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FEBRUARY 2020

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The truth about generational change

Proactive planning to meet *all* member needs



Today's early career lawyers (ECLs) are the future of the legal profession. Perhaps that statement is both plainly obvious and an observation that might apply to any profession.

For Queensland Law Society, however, it is a significant concept that has underpinned recent planning by QLS Council. It is the 2020-21 Council's aim to better engage with, and serve, all of the Society's member segments.

Early career lawyers (0-5 years) are the largest single cohort in our membership profile (2947) followed by career builders (6-12 years, 2713), secure achievers (13-20 years, 2266) and pinnacle practitioners (21+ years, 2660). Just as momentous is the fact that 62% of our early career lawyers are female. This is a decisive change in the profession's demographics.

In our planning for this segment of membership, we have included 'young' practitioners (those under 36). Overall, the group consists of more than 4000 lawyers. We are referring to this group as 'future lawyers and future leaders'.

Last year we undertook research to lay the foundations for our planning. Part of that research involved consulting with the QLS Early Career Lawyer Committee and many of their colleagues. We learnt that ECLs wanted opportunities to advocate for the future of our profession.

They told us that they wanted a stronger voice in advocacy. Council elevated the former ECL membership committee to a policy committee. This committee has already contributed to the Law Council of Australia's consideration of the underpayment of junior solicitors.

As education is our biggest asset during times of transformation and change, we also want to equip our practitioners for generational change by ensuring members from every membership cohort are educated on what those changes are, how it affects them, and what products and services we provide to help them thrive.

Our flagship event, Symposium, now features an 'essentials' pathway to help practitioners

of all practice areas and levels equip for the dynamic changes in legal practice.

To make this event more accessible, we have offered discounted registration for community legal centres, early career lawyers and regional members. The ECL Committee expressed concerns with pricing of events, so we have also introduced a new ECL rate, which is 40% off select events.

We have also moved to enhance support and resourcing by establishing the role of Relationship Manager – Future Lawyers, Future Leaders, whose focus is dealing with our future lawyers and future leaders in their initiatives, and assisting the transition from law school to lawyer.

Changes will continue for our future lawyers and future leaders in 2020-21. Council is considering a proposal to establish an elected 'Future Leaders Council'. Eligibility for this council would extend to members who have either 0-5 years post-admission experience or are under 36 years of age.

We have made our strongest-ever commitment to fostering diversity and inclusion in the profession. We will launch a QLS Ability Network as a platform for building accessibility within and into the profession, and we'll continue our support of like-minded legal organisations such as Pride in Law, Asian Australia Lawyers Association (AALA), The Legal Forecast (TLF) and TLF Creative and Queensland Young Lawyers (QYL).

Council remains committed to improving engagement with our regional practitioners. We value highly our close relationships with Queensland district law associations and we'll continue to provide a platform for our regional practitioners, including the introduction of a new Regional Practitioner of the Year award to recognise excellence.

As of 1 January, we relaunched QLS Student Membership – featuring a fully online sign-up process – and have committed to playing a much greater role in the critical transition from law school to the profession. QLS will also continue to work with law schools, student associations, firms and other employers to

communicate the many career pathways in law and open minds to the rich opportunities on the horizon. Legal Careers Expo will continue to be the QLS flagship event for future lawyers.

QLS is strengthening technology services through a significant investment program that will refresh critical business systems and create a strong digital backbone for the organisation, including a new website which is responsive and intuitive.

QLS anticipates a digital future that meets emerging solicitors' expectations (including mobile and app-friendly platforms). This will assist engagement with all membership cohorts and demographic.

We will continue working with our QLS Senior Counsellors, leaders in the profession and legal education providers to provide programs and support that improves newly admitted and early career lawyers' practical, analytical and presentation skills.

We are aware of the need for a diverse approach to representing law in Queensland, given all lawyers are not practising solicitors and recognising that futures in the profession aren't limited to the traditional law firm model.

Your 2020-21 Council wants to drive this fuller view of generational change. Responding to generational shifts is not simply about tooling up young lawyers for techy futures. Generational shifts affect all QLS members and requires QLS to develop a fundamental understanding of the needs of members across the lifecycle of their careers. QLS aims to better support all members who are changing gears, including those preparing for retirement and transitioning into the third age of their careers.

I and your 2020-21 Council look forward to working with you this year.

Luke Murphy
Queensland Law Society President

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Notes

¹ Queensland Law Society Annual Report, 2018-19.

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The pleasure of peer praise

Awards program recognises ingenuity and contribution



Having our work recognised and applauded by our peers ranks highly as a source of personal satisfaction in the legal profession.

That is why there are quite a number of award programs run by various organisations, and Queensland Law Society is proud to recognise our members when they are named as award recipients – particularly via our annual Best Lawyers Breakfast – and to maintain and build on the awards program that was developed to recognise and celebrate the achievements of our members.

Last year we added two new awards. The first was the Dame Quentin Bryce Domestic Violence Prevention Advocate Award, which was awarded to Sharell O'Brien at the 2019 Women's Legal Service Legal Profession Breakfast in November last year. Sharell was recognised for her work as the Coordinator of the Domestic Violence Resource Service, Mackay Domestic and Family Violence High Risk Team.

The award encourages those who have a demonstrated commitment to addressing domestic violence and who have advocated for change within workplaces, through fundraising, academia, the legal and/or social systems. Nominations for this year's award will open in mid-to-late 2020.

Then, at the Specialist Accreditation Christmas Breakfast in Brisbane on 12 December, we recognised Anne-Marie Rice, the Principal Mediator at Rice Dispute Resolution, with the inaugural Outstanding Accredited Specialist Award.

This award was open to those accredited specialists whose accreditation aligned with the 2019 accreditation programs, which were family law, succession law, property law and taxation law.

Nominees – and there were a total of 18 for this award – had to demonstrate a personal and professional commitment to their area of accreditation, shown outstanding leadership, high achievement and contributed to the education of the legal profession within their area of accreditation.

This year's award will be open to accredited specialists in business law, commercial litigation, criminal law, immigration law, personal injuries and workplace relations.

Next month there will be eight awards, including four new awards, presented at the QLS Legal Profession Dinner & Awards during QLS Symposium 2020.

The awards which most members would be familiar with are the QLS President's Medal, the QLS Agnes McWhinney Award, First Nations Solicitor of the Year Award and the Workplace Culture and Health Award (previously known as the Diversity and Inclusion Award), which has an individual winner and an organisational winner.

The four new awards are:

- The Access to Justice Award, which will go to one winner from private practice and one winner from the legal assistance, government or not-for-profit sectors
- The QLS Emerging Leader Award, which encourages and supports emerging lawyers and will recognise a high-performing practitioner with outstanding leadership attributes and a thirst for knowledge and improvement
- The Regional Practitioner of the Year Award, which will recognise a regional practitioner (working more than 180km from the Brisbane CBD) for their outstanding commitment to their local profession and community
- The Proctor Best Feature Article Award, which will acknowledge the wide range of topics and excellence of standalone feature articles written and published in Proctor last year (Note that this award is determined internally rather than by nomination.)

While nominations for this year's awards have closed, now is the best time for members to make a conscientious effort to observe their colleagues and note the occasions that they go 'above and beyond' in coming months.

And there are more awards on the way. This year's First Nations Student Award will be announced at the QLS Legal Careers Expo in March, and we are developing an In-house Legal Team of the Year Award to be launched later this year.

I would also like to acknowledge human rights advocate Bill Mitchell of Townsville Community Legal Service Inc., who was awarded the Law Council of Australia's 2019 President's Award in Canberra late last year. This is a significant national award and recognises the substantial contribution Bill has made in providing access to justice to marginalised and vulnerable people in our communities. *See photo, page 12.* Bill's acceptance speech is available at qls.com.au/billmitchell.

As you can see, there are plenty of opportunities to publicly acknowledge the exemplary efforts of Queensland's legal professionals. Our awards provide the opportunity for outstanding solicitors, teams and organisations to showcase their ingenuity and contribution to both the legal profession and the broader community, and the awards highlight our steadfast support of good law, good lawyers, for the public good.

For more information about the QLS awards program, see qls.com.au/awards. Follow the 'online platform' link to our new awards website.

Rolf Moses
Queensland Law Society CEO

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2020-21



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QLS welcomes judicial appointments

Queensland Law Society has welcomed the announcement of two judicial appointments – one each to the District and Magistrates Court – and the elevation of respected Supreme Court judge Debra Mullins to the state's highest court.

2019 QLS President Bill Potts said in December that the appointment of Justice Mullins to the Court of Appeal was welcome and would be universally applauded by the profession.

He said the appointments of Director of Public Prosecutions Michael Byrne QC as a judge of the District Court and barrister Julian Noud as a magistrate were also very good choices.

Law year service

Chief Justice Catherine Holmes has issued an invitation to practitioners to attend the opening of the Law Year Church Service to be held on Monday 10 February at St Paul's Presbyterian Church, 43 St Paul's Terrace, Spring Hill, Brisbane. The procession will begin at 9.25am and the service at 9.30am.



Australian Lawyers go back to back

The Australian Lawyers Cricket team has been crowned world champion once again after a win against Sri Lanka in New Zealand.

The team retained the Lawyers Cricket World Cup last month after a nine-wicket win at Seddon Park, Hamilton.

The team, boasting several Queensland solicitors, and solicitors and barristers

from New South Wales and South Australia, was led by captain and Norton Rose Fulbright solicitor (and Sydney first grade player) Jon Whealing (left, with tournament director Roddie Sim).

The Australian team will be hoping to make it three in a row in 2021 when the tournament will be hosted by the West Indies in Trinidad.

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Obituary: Richard Williams

Richard Williams was born in Chester, in the north of England, studied law at Cambridge University, and was called to the Bar in 1993 as a member of Gray's Inn.

He built a significant reputation in the trustee industry. As a result of that work, he conceived and acted as general editor of the text, *A Practical Guide to the Transfer of Trusteeships*, which set the standards for transfer of trusteeships in 10 jurisdictions and is currently in its third edition.

After years undertaking complicated trust matters in the Cayman Islands, he emigrated to Brisbane, where he was called to the Queensland Bar in 2012. He quickly developed a reputation as a leading succession law barrister in Queensland and throughout Australia. He appeared in many leading cases.

He was the co-author of *Statutory Will Applications: A Practical Guide*, published by LexisNexis. He taught as an adjunct lecturer for the College of Law's LLM

program and as a sessional academic at the Queensland University of Technology.

In addition to his practice at the Bar, Richard freely gave of his time as a lecturer, particularly in the College of Laws LLM program in wills and estates. He also continued his authorship, being a co-author of *Statutory Will Applications: A Practical Guide*, which is the leading text on that topic in Australia, and contributing a number of articles to *Proctor*.

Richard was Chair of both the Queensland Branch of STEP, as well as STEP Australia, during which period both entities developed significantly. For his exceptional long-term contribution to STEP, Richard was awarded a STEP Founder's Award in 2017.

In a few short years in Australia, Richard became universally well regarded as an advocate, educator and author. He will be sadly missed by all who knew him.

Richard died on 25 November 2019 at the age of 49.



Free library services

Full members of Queensland Law Society are entitled to several free services from the Society's member library, Supreme Court Library Queensland (SCLQ).

These include:

- Up to 30 minutes a day of free legal research assistance. And up to 10 documents a day, supplied on request free of charge. (Some charges may apply for urgent requests.)
- Free access to a large number of key legal resources through the popular Virtual Legal Library (VLL) service. (Eligibility conditions apply.)
- For members ineligible for VLL access, a smaller selection of legal resources, such as Hein Online, are available free of charge with an SCLQ website account.
- Free onsite wi-fi, photocopying, and meeting and study rooms.
- After-hours access to the library, on application.

To access these free services, you need to be registered with the library. Contact us for more information:

- see sclqlld.org.au/register
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11 November 2019 · 🌟

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It's been a little quiet on Facebook for our team over the last couple of months, but there were some good reasons why...

1. We welcomed the newest Dream Team member - Aniah in late August (which has seen [Skye](#) begin her maternity leave);

2. Simon presented at a number of conferences for the [Queensland Law Society](#) - including two sessions at their Property Law Conference and their Conveyancing Conference and he also led their 2-day Introduction to Conveyancing Course;

3. Simon... [See more](#)



**Offermans**
16 December 2019 at 12:44 · 🌐

Like as your Page

Huge congratulations to Offermans Principal & Queensland Law Society Councillor Michael Brennan on being made a Life Member of the Townsville District Law Association, along with Purcell Taylor Lawyers Ken Taylor. Two great men who do a lot for their community.



**Bradley and Bray Solicitors**
13 December 2019 at 11:48 · 🌐

Like as your Page

Last Thursday night our Director Jacob Corbett attended the 2019 Queensland Law Society Early Career Lawyers Christmas Party at Bar Pacino in Brisbane.

The QLS does a great job of bringing it's members together with events such as this, which help to form career-long relationships, benefiting both practitioners and their clients.





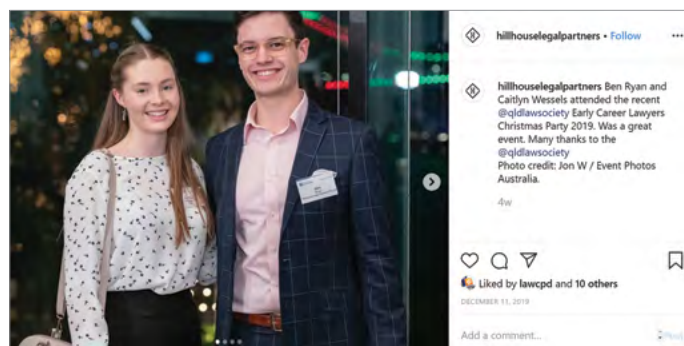
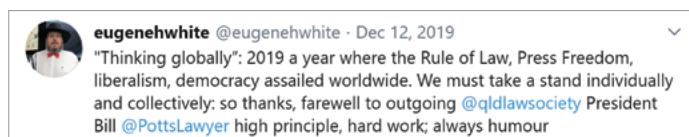
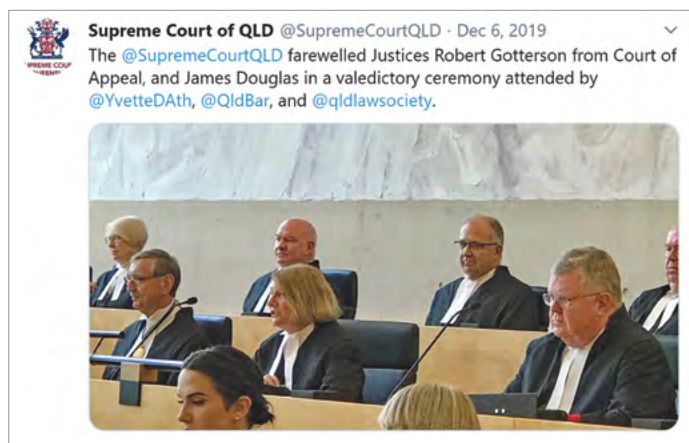
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Ladies and gentlemen, thank you!

In celebration

It was a busy festive season for Queensland lawyers, with several events drawing QLS members and friends to celebrate the end of an active year.

On 4 December, some 160 people gathered at The Grove, Brisbane, for the QLS Appreciation Evening 2019. This event acknowledged and thanked our regular professional development presenters, committee members and other contributors to QLS for their support and participation throughout the year.

The next night, some 13 QLS Presidents past, present and future came together at the Brisbane Club to share recollections over a delicious dinner.

At the same time, a somewhat more boisterous affair was in progress at the QLS Early Career Lawyers Christmas Party held at Bar Pacino, where the last early career lawyer event of 2019 drew some 85 attendees.

Finally, Brisbane City Hall was required on 12 December for the last major QLS event of 2019, with more than 200 guests and friends gathering for the Brisbane Specialist Accreditation Christmas Breakfast.

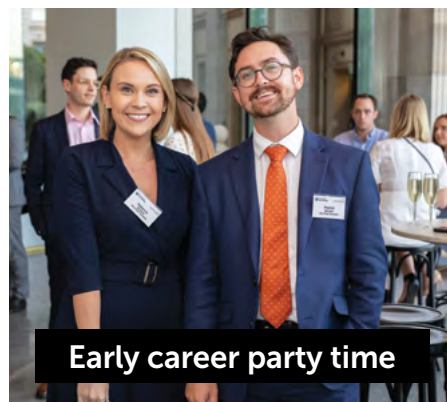
Chief Justice Catherine Holmes was again a very welcome guest speaker at the breakfast, where Anne-Marie Rice of Rice Dispute Resolution received the Outstanding Accredited Specialist Award and family law accredited specialist Julie Bligh of Connolly Suthers led this year's 10 graduates to receive the Highest Achiever Award.







Presidents for the ages



Early career party time



Stepping up for human rights

On 29 November, Townsville human rights advocate Bill Mitchell, (centre), was awarded the Law Council of Australia's 2019 President's Award in Canberra. He is pictured with 2019 QLS President Bill Potts and CEO Rolf Moses.





February

20 Essentials • 3 CPD Core CPD: 3 in 1 workshop

Brisbane • 8.30am-12pm

Gain your three core CPD points in one hit. Designed for practitioners of all experience levels – sessions will cover ethics, trusts, and costs.



21 Essentials • 1 CPD Priced to sell: Finding the right pricing model

Online • 12.30-1.30pm

This livecast will discuss a range of pricing models to ensure you are better placed to decide which model is right for you.



24 Specialist Accreditation Information Evening

Brisbane • 5.30-7.30pm

If you are a full member and aspiring to become an accredited specialist, join us for this complimentary session about the 2020 program.

26 Essentials • 3 CPD How to run a profitable practice

Brisbane • 8.30am-12pm

This practical workshop will bring three profitability and organisational experts together to help you boost your bottom line — from multiple angles.



28 Essentials • 3 CPD Trust accounting essentials

Brisbane • 9am-12.30pm

This workshop provides interactive and practical training in the fundamental requirements for your trust records, designed for practitioners and accounting support staff.



March

5 Essentials • 3 CPD Business basics for emerging leaders

Brisbane • 8.30am-12pm

A practical look at business models and structures, financing and administrative systems, and strategic and operational risk protocols behind the most innovative practices.



9 Essentials • 1 CPD International Women's Day 2020

Brisbane • 5.30-7.30pm

Experience an inspirational evening of insight, vision and collegiality as we join together to help promote a gender equal world – and raise funds for charity.



13-14 10 CPD QLS Symposium 2020

Brisbane • 8.30am-5.05pm, 8.30am-3.20pm

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13 QLS Legal Profession Dinner & Awards

Brisbane • 6.30-11pm

The most prestigious night on Queensland's legal calendar. Celebrate the best of the profession, shine a light on the QLS award winners and welcome our 2020 President.

The black holes of goal setting

BY SANDRA PEPPER



It's that time of year when the daily grind of February has taken over the enthusiastic optimism of January.

You may have set yourself some professional goals – perhaps to increase your business development activities, ramp up your online presence, or investigate some new legal tech products. Whatever your goal, when your life gets busy, your goals can be sucked into the black hole where all good intentions go to rest until the next New Year's Day.

Black hole 1: Not precise enough

Simply saying I will do more business development activities is too vague. It gives you lots of wriggle room to avoid doing what you need to do to achieve your goal. Would taking a couple of potential clients out for a coffee every now and then be sufficient? Should you join the local industry association? A goal must be measurable and specific to achieve it – for example, a specific goal could be: "I will find three new major clients in the next 12 months by attending my local Industry

body meetings, and once a month inviting a fellow member I meet there out for a coffee."

Black hole 2: Which has priority?

If you originally set yourself a number of goals and have realised you are spreading yourself too thin to achieve any of them, it's time to reassess your priority and timings for the year. Focus on one or two high priority goals and leave the others for later. For example if you want to rebuild your website, set yourself a specific step-by-step plan and a date to do this by. Once you have achieved that goal you can then move on to the next.

Black hole 3: Getting started

You don't have to do it alone. If you are struggling to even start – let alone reach – your goal, getting expert help can show you the way and motivate you to put your plan into action. This may be as simple as attending one of the many QLS livecasts being offered in February on topics such as Online Marketing and Your Business Plan Healthcheck. Otherwise, trusted and experienced colleagues can be good sounding boards, and if the budget runs to it, a consultant or contractor who will work with

you and become that valuable buddy who keeps you accountable and helps you stay on track. LinkedIn is also a great place to reach out to mentors and like-minded role-models who might have some nuggets of valuable and practical advice.

Black hole 4: I lose motivation

Staying motivated is tricky. Try breaking your goal down into achievable chunks which are easier to progress. For example, if your goal is to improve your online presence, you could start by making a designated number of posts on LinkedIn each month to improve your personal brand. Once this habit is embedded, you may look at marketing content through an on-site blog to attract traffic to your website, and then take it a step further by releasing regular podcasts on a topic that interests you and aligns with your brand. By achieving smaller goals, you will feel like you are hitting your deadlines and this will help keep you motivated to keep taking the next step.

Sandra Pepper is Queensland Law Society Head of Professional Development.

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Georgia Corpe



Sarah Adams



Melanie Husband



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James Rayner



Beata Lezczek



Lucinda Stevenson



Paige O'Flaherty



Chris Herald



Adam Hamrey



Natalie Silvester



Tayla Gorman



Lauren Black



Mark Goldsworthy



Melissa Inglis



Paigen Green

Career moves

Anthony Black Family Law

Anthony Black Family Law has announced that **Amy McBrean** has joined the firm as a senior associate.

Amy has experience in all areas of family law, including property settlement, parenting matters, financial and child support agreements, and divorce. She is an experienced court advocate, but has the strategic skills to guide clients towards a resolution outside of litigation whenever possible.

Cornwalls Law + More

Cornwalls Law + More has announced the promotion of experienced commercial litigation lawyer **Georgia Corpe** to associate. Georgia joined the firm in 2018.

Donaldson Law

Donaldson Law has welcomed **Sarah Adams** to its team as a senior associate.

After many years with another Toowoomba firm, Sarah has moved to Donaldson Law to build the firm's collaborative family law practice. With more than 10 years' experience in family law and alternative dispute resolution (ADR), Sarah will focus on building a family law practice with an emphasis on ADR, particularly collaborative law, mediation and family dispute resolution.

Jensen McConaghy Lawyers

Jensen McConaghy Lawyers has promoted **Melanie Husband** to the partnership. Melanie has played a key role in the management and success of the firm's Cairns office. She has 11 years' post-admission experience in insurance and commercial litigation, debt recovery and insolvency, and handles a portfolio of insurance claims from all areas of North Queensland.

Mahoneys

Mahoneys has announced the appointment of **Amy McKee** as a partner at the firm's Gold Coast office. Amy, a long-standing member of the coast team, has practised for more than 13 years with a focus on management rights and motels.

MBA Lawyers

MBA Lawyers has announced the appointment of **James Rayner** as a partner in the property department.

James has practised for several years in the United Arab Emirates and advised on a number of super-projects. He has practised in top-tier national and international law firms for 15 years, gaining extensive experience in all aspects of real estate transactions, including acquisition, development and disposal, as well as commercial, industrial and retail leasing.

The firm has also appointed **Beata Lezczek** as special counsel with the family law department. Beata is a QLS Accredited Specialist in family law and has nearly 20 years' experience advising clients on all facets of family law, including international matters, pre-nuptial and post-nuptial financial agreements for married and de-facto couples, cross-jurisdictional matters, and complex property matters involving intricate business structures.

Lucinda Stevenson has also been welcomed to the family law department. Appointed as an associate, Lucinda has worked exclusively in family law since her admission in 2013, advising clients in areas such as property, parenting, spousal maintenance, child support, divorce and domestic violence.

Paige O'Flaherty has joined the firm as an associate in the corporate, commercial and property department. Paige has more than six years' experience in commercial and property law, particularly in retail, commercial and industrial leasing, and property acquisitions and disposals.

Mullins

Mullins has announced four 2020 internal promotions – **Chris Herrald** (wills and estates) to special counsel, **Adam Hamrey** (commercial disputes and litigation) and **Natalie Silvester** (wills and estates) to senior associate, and **Tayla Gorman** (retirement villages and aged care) to associate.

Chris has practised in wills and estates for a decade and has served on the STEP Queensland Committee for more than four years, being elected to serve as the committee chair in 2020. Chris has been recognised by Doyle's Guide for four consecutive years.

Natalie has been with Mullins since 2016, recently completing her Masters of Law (wills and estates). She has been elected to the STEP Queensland Committee and became a QLS Accredited Specialist in succession law in December 2019.

Adam handles a wide range of commercial disputes, and also has experience in regulatory compliance in the liquor and gaming industry, as well as sport disciplinary tribunal matters.

Tayla has experience advising clients from single-site facilities through to national multi-site operators and acting on a range of commercial property matters. She is an ambassador for Leading Age Services Australia 'Next Gen', a national network of younger leaders in the age services industry.

Plastiras Lawyers

Plastiras Lawyers has announced the promotion of **Lauren Black** to associate. Lauren focuses on property and commercial law, assisting a range of clients including property investors, health professionals and SMEs.

Results Legal

Results Legal has announced the promotion of **Mark Goldsworthy** to senior associate with the commercial litigation and insolvency team. Mark has broad experience and regularly advises on partnership and shareholder disputes, PPSA, and secured and unsecured legal recovery matters. Mark also has experience in financial services matters acting for bank and non-bank lenders.

Rose Litigation Lawyers

Melissa Inglis has been appointed as a partner with Rose Litigation Lawyers. Melissa has been with the firm since April 2015 and has worked on significant and complex legal matters, including property disputes, corporate, franchising and partnership disputes, building and construction litigation and body corporate and community management disputes.

Slater and Gordon Lawyers

Slater and Gordon Lawyers has welcomed new associate **Paigen Green** to its Southport office.

Paigen, who has worked in the legal profession for more than 12 years, has a diverse background as an experienced plaintiff lawyer and also a stint as an insurance claims manager. She volunteers at Robina Community Legal Centre and Women's Legal Service, and assists clients with motor vehicle accident, worker's compensation and public liability claims.

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

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bytherules uses technology in almost every facet of the conveyancing process as a way to smoothen operations and improve the working environment of its employees. This approach, taken to provide consistency and positive outcomes for its clients, shines through in their recent milestone - surpassing 1,000 online settlements using PEXA.

Work-life balance

The focus to improve its service with technology, and PEXA, not only had flow on, positive effects for bytherules' customers and internal processes but also for the work-life balance of its employees. Chris Collinge, bytherules Managing Director said, "We were the first to create a true work from home model with

fully integrated systems and a central hub for governance. *This gave our team the ability to work within the usual bounds of family obligations and responsibilities.* The work is still demanding however the inherent flexibility with the remote working model gives our people something that brings out the best in them."

Integrated with PEXA

bytherules was an early adopter of PEXA. *"PEXA ensured the golden rod of consistency of outcome and performance. All of the top service providers in our space have taken up PEXA not only for efficiencies but because it gives the client a better experience. We no longer have delays in settlement and for our clients it means no waiting with a removalist truck out the front of the property for a mistake to be rectified and issues*

such as requisitions are mainly things of the past", Chris shares.

The icing on the cake for bytherules was fully integrating its workflow systems with PEXA. Chris said, "Integration with PEXA has been instrumental in giving our clients the smooth experience we strive for, and that they want. Is it any wonder we have already surpassed our 1,000th PEXA settlement? From our point of view that is something worth celebrating."

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New laws put the clamp on claim farming

Changes to the *Motor Accident and Insurance Act 1994*

PREPARED BY MEMBERS OF THE QLS ACCIDENT COMPENSATION AND TORT LAW COMMITTEE



Recent amendments to the *Motor Accident and Insurance Act 1994* (Qld) aim to stamp out the issue of 'claim farming' in the CTP scheme.

This article provides an introduction to some of the key provisions and information about what practitioners need to consider to ensure compliance with their legal and ethical obligations arising from the amendments.

Background

The Motor Accident Insurance and Other Legislation Amendment Bill (2019) was introduced in the Queensland Parliament in June 2019.

The Bill was given Royal Assent on 5 December 2019 and the amendments are now in effect. Most importantly, these provisions apply to the conduct of all claims on and after the commencement date of 5 December 2019 and not just claims for accidents which occur after 5 December (sections 115 and 116 of the *Motor Accident Insurance Act 1994* (MAIA)). For example, the certificate requirements will apply where there has been a change in law practice acting for a claimant since the commencement date.

The obligation to give the certificate under section 41A on the settlement or judgment of any claim after 5 December 2019, importantly, only relates to conduct engaged in on, or after, that date.

Key changes to the MAIA include:

- the creation of two new offences which prohibit claim farming (sections 74 and 75 MAIA)
- the extraterritorial application of the '50/50 rule' (section 79 MAIA)
- the required completion of new certificates; one by the claimant and by a supervising principal of the law practice acting for the claimant at various stages of the claim, including where the solicitor is retained before (section 36A) or after the notice of claim (section 37AB) and on settlement of or judgment on the claim (section 41A)

- the expansion of the Motor Accident Insurance Commission's (the commission's) investigative and prosecution powers with respect to claim farming activities.

The new offences

New Part 5AA of the MAIA provides for two new offence provisions with respect to:

- giving or receiving consideration for claim referrals where 'consideration' is defined in section 74A (Section 74), and
- approaching or contacting by a first person of a second person to *solicit or induce* the second person to make a claim (Section 75), (consistent with the existing anti-touting provisions in the *Personal Injuries Proceedings Act 2002*).

Giving or receiving 'consideration' for a claim referral or potential claim referral

QLS has previously published information for solicitors and law practices about their obligations with respect to the paying or receiving of referral fees in line with rules 12.4.3 and 12.4.4 of the Australian Solicitors Conduct Rules 2012 (ASCR), see in particular Guidance Statements 3 and 4, available on the QLS website.

The new section 74 of the MAIA now clearly stipulates a prohibition on the payment or receipt of consideration by solicitors (save for those exceptions provided for in section 74A), to another person for a claim referral or potential claim referral. Having regard to Rule 2 of the ASCR, where legislation proscribes a higher standard than set out in the framework of the ASCR, then a solicitor is required by those rules, to comply with that higher standard.

This means that unless an exemption or limitation contained within the legislation is applicable, a solicitor who engages in conduct where the conduct is such that they "give, agree to give or allow or cause someone else" the payment of consideration for a claim referral or potential claim referral, then that solicitor will breach the law and potentially be exposed to a civil penalty. Further, they risk disciplinary action with respect to unsatisfactory professional conduct or professional misconduct.

The exceptions

During the parliamentary inquiry, there was some concern and a divergence of views within the profession with respect to the proposed definition of 'consideration'. QLS supported the preservation of longstanding legitimate and beneficial relationships between law practices, solicitors and community organisations.

When the Bill was introduced, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships Jackie Trad stated plainly that the Bill does not prevent lawyers "from advertising or promoting their services, sponsoring local sporting clubs or community groups or making bona fide charitable donations".¹

New section 74A of the legislation states that 'consideration' does not include hospitality or a gift if the hospitality or gift has a value of \$200 or less.

Further, it does not include:

- a payment or other benefit, *not for a claim referral or potential claim referral*, to –
 - a community legal service, or
 - an industrial organisation, or
 - a registered entity within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), or
 - a school association or
 - a sporting association.

It is important to emphasise, however, that even where the legislation *permits* conduct – that is, where the conduct falls within the exceptions outlined above – Rule 12 of the ASCR (Conflict concerning a solicitor's own interests) states that a solicitor cannot give or receive a financial benefit for a referral, *unless* the solicitor satisfies the requirements set out in rules 12.4.3 and 12.4.4. These rules require that the solicitor give consideration to the issues raised by the Guidance Statements 3 and 4 and, in particular, the matter of 'Informed consent', in Guidance Statement 3, paragraph 2.4.

Importantly, the exceptions do not apply when a payment or other benefit is made for a claim referral or potential claim referral.

Practical considerations – completion of certificates

The completion of certificates by the claimant and a supervising principal of a law practice are a crucial process arising from these amendments. New Notice of Accident Claim Forms are now available on the commission's website.

The law practice certificate has a number of important elements of which solicitors should be mindful:

- The certificate is a statutory declaration made pursuant to the *Oaths Act 1867*.
- The certificate requires the supervising principal of a law practice to declare that:
 - There has been no contravention by the supervising principal and each *associate* (as defined under section 7(1) of the *Legal Profession Act 2007*) of the law practice of sections 74 or 75 of the MAIA, and
 - The costs agreement related to the claim complies with section 79 (Maximum amount of legal costs for claims) of the MAIA or section 347 of the *Legal Profession Act 2007* (Maximum payment for conduct of speculative personal injury claim).

New Division 2A sets out the requirements with respect to law practice certificates. Where a law practice is retained by a claimant before a notice of claim, the supervising principal must complete a law practice certificate and give the certificate to the claimant before the claimant gives notice of a claim under section 37 (section 36A). A certificate must also be given within one month after a practice is retained if a claimant has given notice of the claim under section 37 before retaining the law practice (section 37AB).

A supervising principal must also complete the law practice certificate on settlement of or judgment on the claim and give the certificate to the insurer and a copy to the claimant within seven days after the acceptance of an offer or judgment (section 41A). The certificate requirements for a law practice which sells all or part of the law practice's business to another law practice and where the claimant has not given notice of the claim under section 37 are set out in section 36E of the MAIA.

There are significant penalties for not providing a law practice certificate and for the provision of a false or misleading certificate. Further, where a supervising principal fails to give a certificate and because of the principal's failure, the claimant cannot comply with section 37(1) and the claimant terminates in writing the engagement of the law practice to act in relation to the claim, a principal is also required to refund to the claimant all fees and costs (including disbursements) paid by the claimant in relation to the claim (section 37AA).

Supervising principals who are on leave or otherwise unable to complete the law practice certificate should have regard to section 36C and consider the manner in which the certificate can be executed in their absence.

The penalties for providing a false or misleading law practice certificate also extend to a person completing a certificate under section 36. The QLS Ethics and Practice Centre considers that it would be prudent for a lawyer who has been nominated by the supervising principal to sign the law practice certificate in their absence to attach a copy of the supervising principal's written authorisation and nomination to sign the certificate, so as to avoid any potential issues at a later stage.

The certificate also requires law practices to declare compliance with the '50/50' rule and crucially, is applicable within and outside of Queensland. More information about the '50/50' rule can be found at qls.com.au and on the Legal Services Commission website, lsc.qld.gov.au.

Some comments

The legislative amendments to the MAIA have significantly strengthened the longstanding established position on referral fees for law practices and solicitors prescribed under both the *Personal Injuries Proceedings Act 2002* (PIPA) and the ASCR. Even when a relevant exception applies, solicitors must still have regard to their ethical obligations and in particular to those matters set out in Rule 12 of the ASCR and the PIPA.

The reforms are a timely reminder of law practice and solicitors' obligations with respect to referral fees, soliciting or inducing the making of a claim, and ensuring ongoing compliance and disclosure with respect to costs in personal injury cases.

More information

The QLS Ethics and Practice Centre provides legal ethics and practice support guidance and education to QLS members. If you are a lawyer or work for a lawyer and a member of the Society, the centre's solicitors are available to discuss and provide confidential ethical guidance and advice. The centre can be contacted by telephone on 07 3842 5843 or by email to ethics@qls.com.au.


General information about the reforms is also available from the Motor Accident Insurance Commission website, maic.qld.gov.au. Any specific queries from law practices should however, be directed to QLS. The QLS Ethics and Practice Centre, in consultation with the QLS Ethics Committee, is reviewing and updating the relevant guidance statements to reflect the changes. Practitioners will be advised of further developments in this regard in due course.

More information about the changes will also be provided within the personal injuries stream at the QLS Symposium 2020 on 13-14 March. See symposium.qls.com.au for program and registration details.

This article appears courtesy of the QLS Accident Compensation and Tort Law Committee. It has been prepared by members of the committee in consultation with the QLS Ethics and Practice Centre. The matters outlined are for general information only. Any specific queries should be directed to the QLS Ethics and Practice Centre.


Notes

¹ parliament.qld.gov.au/documents/tableOffice/BillMaterial/190614/Motor.pdf at p2.



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THE PEOPLE'S COURT –

Queensland's Civil and Administrative Tribunal celebrates its 10th anniversary



BY TONY KEIM

In the late noughties the Queensland Government put in motion its plan to establish a simple but affordable and accessible forum where any member of the community could go to settle their grievances – a so-called 'people's court'.

The aim and working brief for this one-stop judicial shop – or as it is known, the Queensland Civil and Administrative Tribunal – was to increase every Queenslanders' access to justice and to enhance the efficiency and quality of the civil and administrative decision-making process.

The plan was simple. Amalgamate the almost 20 tribunals, panels and committees which covered a myriad minor legal disagreements – from discrimination, the needs of children and the elderly, and neighbourhood disputes, to the supervision and standards of certain professions, such as doctors, nurses and teachers – into one central tribunal.

While Supreme Court judge Peter Dutney was named as the first President of QCAT, his unexpected passing while on a cycling trip in South Australia on 4 September 2009 saw Justice Alan Wilson preside over the opening of the tribunal in December 2009.

"QCAT's jurisdiction reaches across a remarkably diverse range of the ordinary elements of a Queenslanders' life, from childhood to the needs of the elderly, racing, retirement villages, home unit dwellers and real estate agents, minor civil disputes to large building cases, review powers for administrative decisions, and an active role in the supervision of vocational standards for (many professions)," Justice Wilson said in his first president's message in 2010.

"QCAT operates as a tribunal, not a court and the procedures it has developed are focused on statutory requirements that it acts with as little formality and technicality, and with as much speed, as the proper consideration of the substantial merits of its matters permits.

"QCAT sees its work as having the potential to contribute to a harmonious society." As QCAT celebrates its 10th anniversary with a commitment of \$13.1 million in additional State Government funding – announced in last year's State Budget – and a long overdue refurbishment of its Queen Street premises, current QCAT President Justice Martin Daubney says the tribunal's "simple and accessible access to civil justice" also has a tendency to "mask the jurisdictional and organisational complexities of QCAT".

With a decision-making cohort of just over 270 officers – including Deputy President Judge John Allen, 97 Sessional Members, 72 Justices of the Peace, three full-time and four part-time Adjudicators, four Senior Members and nine full-time Members – Justice Daubney says the tribunal still carries a heavy caseload.

"Tens of thousands of Queenslanders come to QCAT each year," Justice Daubney in the tribunal's 2018-19 annual report.

"From the simplest neighbourhood disagreements to the most complex building disputes; from guardianship and administration proceedings in which the rights of the most vulnerable in the community are protected, to professional disciplinary proceedings for the protection of the public; from review of government decisions to resolving claims between consumers and traders. And much more.

"The diversity of jurisdictions, and the competing needs of those who access QCAT's services, call for a unique organisational approach, on both the decision-making and the registry sides."

As QCAT approached its 10th anniversary, Justice Daubney said it became clear it was time to press the 'reset' button on the organisation.

"Not that it was in any way broken, nor that the merger of a diverse range of separate tribunals had not been successful," he said.

"Rather it was to take a deep breath, review the assimilation of QCAT's merged organisation, and identify how a good operation could build on the existing experience and expertise of its decision-makers and staff to provide better and more efficient civil justice services for Queenslanders.

"That explains why this has been a very busy year for QCAT, with two major projects on the go.

"First, we have had the 'QCAT Redux' project... (which) has captured the learnings of the past, and given us a roadmap to allow QCAT to evolve in response to the expanding jurisdictions conferred on QCAT and the ever-increasing number of Queenslanders whose cases are dealt with in QCAT each year.

"Secondly, we have commenced significant renovation of QCAT's premises. When completed (in early 2020), QCAT will have expanded and updated hearing and mediation facilities, and cohesive accommodation for members and registry staff." Over the past decade, QCAT has been led by four very accomplished and highly respected judicial officers – Justices Peter Dutney, Alan Wilson, David Thomas and Martin Daubney.

Justice Daubney – who was appointed to the Supreme Court bench on 13 July 2007 – was given the commission as QCAT President for three years from 16 October 2017.

He said he plans to continue his commitment to making the tribunal to continue improve and evolve in its "mission of providing Queenslanders with simple and accessible access to civil justice" until his time in the post is scheduled to end later this year.

Tony Keim is a newspaper journalist with more than 25 years' experience specialising in court and crime reporting. He is the QLS Media manager and in-house journalist.

THE PEOPLE WHO MAKE UP QCAT

Queensland's Civil and Administration Tribunal (QCAT) comprises a great of variety and diversity of specialist skills from leaders of the legal profession – including serving and retired judges and experts in specific areas of the law. They work together to provide an independent and accessible tribunal that efficiently resolves disputes on a wide range of matters.

QCAT is led by the President and Deputy President and has a decision-making cohort of just over 270 officers – including President Justice Daubney, Deputy President Judge John Allen, 97 Sessional Members, 72 Justices of the Peace, three full-time and four part-time Adjudicators, four Senior Members and nine full-time Members.



President – Justice Martin Daubney

Justice Martin Daubney was appointed as a Supreme Court Judge in 2007 and as QCAT President for three years from 16 October 2017.

The President's roles and responsibilities include:

- the efficient operation of the tribunal
- giving directions about the practices and procedures of the tribunal
- overseeing the selection process for members
- the management of members and adjudicators
- hearing significant matters in the tribunal as a member
- developing a positive and cohesive culture
- advising the Attorney-General about how QCAT could better meet its objectives, and about the ongoing effectiveness of the *Queensland Civil and Administrative Tribunal Act 2009* and the enabling Acts.



Deputy President – Judge John Allen QC

Judge John Allen QC was appointed a judge of the District Court of Queensland on 17 December 2018 and as QCAT Deputy President on 29 January 2019.

The Deputy President's roles and responsibilities include:

- assisting the President in the management of the business of the tribunal
- assisting the President in managing members and adjudicators
- hearing significant matters in the tribunal as a member, including appeals of QCAT decisions.

QCAT Senior Member IAN BROWN

In 2014, I was Queensland Law Society President. When my term ended, I had every intention of returning to private practice. However, when applications for appointment to the Queensland Civil and Administrative Tribunal were sought in 2014, I decided to apply and was greatly honoured to be offered appointment as a Senior Member. I was appointed a Senior Member of QCAT in May 2015 – on my 50th birthday to be more precise.

It is fair to say that my introduction to QCAT was somewhat overwhelming. As the Senior Member responsible for the various civil lists, I found myself responsible for the case management of matters as diverse as building disputes (in which QCAT has an unlimited monetary jurisdictional limit), retail shop lease disputes (in which QCAT has jurisdiction in respect of claims up to \$750,000), body corporate disputes (in which QCAT has an unlimited monetary jurisdictional limit), manufactured homes disputes, retirement village disputes, tree disputes, claims for breach of information privacy and claims against real estate agents, motor dealers and auctioneers.

The active case management of matters is central to the tribunal achieving its statutory objectives, including dealing with matters in a way that is accessible, fair, just, economical, informal and quick. However, case management in theory and case management in practice are two very different things, as I was to quickly learn. Many parties in tribunal proceedings are self-represented. Civil disputes are often legally and factually complex. The combination of these factors can result in proceedings taking an unpredictable path. Without active case management there is often a significant risk that parties will not adequately present their case to the tribunal.

The tribunal also has duties to take all reasonable steps to ensure that each party

to a proceeding understands the practices and procedures of the tribunal and the nature of assertions made in the proceeding and the legal implications of the assertions. In managing the various civil lists, I found myself responsible for case-managing a large number of often complex matters involving self-represented parties, many of whom had a very limited understanding of tribunal practice and procedure and little (or no) understanding of civil litigation and the legal principles relevant to their dispute.

I found that my career as a solicitor over 25 years placed me in good stead for the challenges ahead. Solicitors are required to be adept in undertaking a remarkably broad range of matters, ranging from the day-to-day conduct of matters on behalf of clients, managing the financial aspects of their practice, managing staff and managing the growth of their practice. In addition, solicitors undertake a significant amount of pro bono work on behalf of the profession and the community.

The skills I had acquired as a solicitor in private practice and in the various roles I had played in legal and community organisations were immediately put into practice upon my appointment as a Senior Member. Not the least of these was managing large numbers of matters, under the dual pressures of limited time and limited resources.

QCAT is the forum in which parties may bring disputes in the knowledge that they will not be subject to many of the rigours and requirements they would face in the courts. As I have observed, people come to the tribunal seeking to resolve often complex legal disputes. It goes without saying that the role of the tribunal is not to provide assistance to parties in prosecuting or defending claims. However in my view, self-represented parties generally find the case management of matters enables them to present their case to the best of their abilities, ensuring that (insofar as it is possible) they place before the tribunal the necessary evidence. Case management can be time consuming and, at times, frustrating, however it is essential in ensuring that matters are determined according to the substantial merits of the case.

It is sobering to reflect upon some statistics which illustrate the enormity of the workload undertaken by QCAT. In the civil lists, since my appointment as a Senior Member, the number of building disputes commenced in the tribunal has increased by 33% and retail shop lease lodgements have increased by 49%. These figures illustrate the increase in the work being undertaken by the tribunal, but they pale by comparison when the sheer numbers of lodgements of minor civil disputes and guardianship are considered. Guardianship lodgements in 2018/19 were 12,805 (which is an increase of 23% over

four years). Minor civil dispute lodgements in 2018/19 were 16,246 (excluding lodgements in regional Magistrates Courts outside South-East Queensland).

The management of such huge volumes of matters cannot be undertaken without the support and dedication of the QCAT membership and registry staff. It may come as a surprise to learn that there are only 17 permanent members of the tribunal and 11 permanent adjudicators. With some limited exceptions, the membership sits across all jurisdictions. Despite this, the number of matters to be heard and decided requires the tribunal to rely upon our sessional members to ensure that matters are dealt with expeditiously.

The appointment of Justice Daubney as President in 2017 has seen some significant changes across QCAT, changes that are both welcome and long overdue. From an organisational perspective, it has been both challenging and rewarding to respond to the observations of a 'fresh pair of eyes'.

Justice Daubney has brought to the tribunal not only his experience as a Supreme Court judge, but his experience in leading and managing other organisations. This has resulted in the QCAT Redux – an opportunity to press the reset button – described by the President as an evolution, not a revolution. From my perspective the most significant outcome from QCAT Redux has been the opportunity for us (that is, the membership and the registry) to challenge the status quo and the accepted practices and procedures and to look afresh at how QCAT can continue to ensure the delivery of justice in a way that is accessible, fair, just, economical, informal and quick.

Significant highlights since my appointment as a Senior Member at QCAT have included the opportunity to work with successive QCAT Presidents, Justice Thomas and Justice Daubney and with Deputy Presidents Judge Sheridan and Judge Allen. It has also been a great privilege to work with the incredibly hardworking and dedicated QCAT registry staff – the unsung heroes of the tribunal. I must confess to being in awe of the ability of a relatively small number of people to manage the workloads involved with the huge numbers of matters before the tribunal.

But without a doubt the most significant highlight of my time at QCAT has been working with the membership. I have been involved in many organisations, legal and otherwise, over the years. Nowhere have I worked with a more collegiate and supportive group of people than the QCAT membership, from the President down. A membership dedicated to QCAT's objectives and to supporting each other in so doing is undoubtedly one of the greatest strengths of the tribunal, which in turn results in the very significant contribution QCAT makes to the delivery of justice in Queensland.

Looking back. Moving forward. Reflections on 10 years of QCAT

QCAT has come a long way in 10 years. The fact that it has flourished is a testament to the foresight and fortitude of all involved in its establishment and development. So much is clear from the contributions by others on these pages.

Marking QCAT's tenth anniversary allows us to look back with a sense of satisfaction at what has been able to be achieved at QCAT within the constraints of a very modest budget. Registry staff work hard to assist the many self-represented litigants who come through our door literally and electronically each day, and to keep the tribunal running efficiently. All tribunal members and adjudicators work hard in assisting parties to resolve disputes wherever possible, and, when settlement cannot be reached, to give reasoned decisions.

In short, QCAT strives to provide Queenslanders with champagne quality civil justice on a home brew budget.

As a mature organisation, we can also use this anniversary to look forward and ask: Where to for QCAT in this third decade of the 21st century?

Let me give just one exciting prospect.

QCAT's Minor Civil Dispute jurisdiction is its largest (by annual filings), a significant proportion of which are money claims under \$25,000. For historical reasons, the processes which QCAT inherited for dealing with these money claims are clunky. There are gaps in the jurisdiction. The forms are not particularly user-friendly. It is an area of practice and procedure which is unnecessarily challenging and disproportionately complicated for both the litigants and the tribunal itself.

Queenslanders seeking to recover a relatively modest sum, or defend themselves against such a claim, don't want to be mired in jurisdictional or procedural difficulties. They don't want to be involved in numerous interventions by way of directions hearings or settlement conferences before they even get to a hearing. Many don't even want a physical hearing because the amount in issue does not justify the time, cost and effort involved. They just want the dispute resolved – either by agreement or by a quick and understandable decision.

QCAT's money claims jurisdiction needs an overhaul.

One way of approaching this would be to streamline the current system for resolving such disputes. The processes could be simplified, "plain English" forms developed, and technology utilised to allow the forms to be completed and lodged online. That would certainly be an improvement on the current state of play. But it would ultimately be not much more than what the internationally renowned Professor Richard Susskind describes as "automation" – the grafting of new technology onto an existing method of dispute resolution.

The alternative would be to seize this opportunity for real innovation in our approach to the delivery of civil justice in Queensland by establishing a fully "online tribunal" for the settlement and adjudication of minor money claims.

An online tribunal could be established as an interactive digital platform within which parties are electronically assisted in formulating their claims and defences (and indeed, working out whether they have a claim or a defence), settlement negotiations are facilitated by an Online Dispute Resolution (ODR) tool, and if settlement is not reached the parties interact online with a tribunal member or adjudicator with a view to a reasoned decision being delivered.

All of the interaction under this model can take place online. The need for parties, often at significant personal cost and inconvenience, to attend personally at the tribunal would be removed. Parties would not need to be physically present at the tribunal to lodge forms or participate in alternative dispute resolution. The default position would be for no "hearing" in the traditional sense, with parties having the opportunity to state and present their cases to a decision maker electronically. It would be a less adversarial, more results-driven model. A fall-back to a traditional form of hearing could be allowed in exceptional cases.

This is not a pipe dream. A similar proposal was outlined in 2016 by Sir Ernest Ryder, the Senior President of Tribunals in the United Kingdom, and is comprehensively described in Professor Susskind's latest book "Online Courts and the Future of Justice". The technology exists. This sort of model could be easily adapted to QCAT's money claims jurisdiction.

The benefits of establishing an online tribunal for these sorts of claims, particularly in such a regionally diverse State as Queensland, are obvious.

If the establishment of an online tribunal is considered a step too far, there is a compelling case for at least transforming QCAT's money claims jurisdiction by the implementation of ODR.

ODR is, as its name suggests, an online form of alternative dispute resolution. The use of ODR is well-established in private enterprise, where sophisticated electronic tools such as e-negotiation and e-mediation assist parties to resolve private disputes in areas as diverse as family law and industrial relations. It is publicly estimated that eBay's ODR tool is utilised in more than 60 million customer/trader disputes each year.

ODR technology is available and would be readily adaptable to QCAT's money claims jurisdiction. This technique has been successfully trialled and implemented for similar sorts of claims in other common law jurisdictions, including England, Singapore and Utah.

The prospect of ODR being adopted in QCAT was raised several years ago, but was shelved due to competing priorities.

The current pressing need for overhaul of QCAT's money claims jurisdiction compels serious consideration of these transformative options.

The establishment of an online tribunal, or at least the introduction of ODR, would be consistent with QCAT's statutory objectives.

It would facilitate effective access to civil justice for people all across the State. It would provide a convenient, efficient and proportionate civil justice service to thousands of Queenslanders every year. It would be a smart use of Queensland's technological, administrative and judicial capabilities. And over time it could be appropriately extended into QCAT's other jurisdictions.

Such a transformative overhaul would require the support of the Government and all relevant stakeholders. Whether such support is given will be for others to decide.

But let it be noted that QCAT would certainly be up to this transformative challenge as it moves into its second decade.

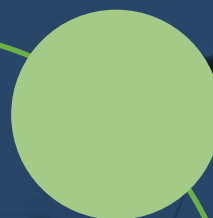
The Honourable Justice Martin Daubney AM
President, Queensland Civil and Administrative Tribunal

WITH JUSTICE MARTIN DAUBNEY AM

Since the introduction of QCAT in late 2009, it has taken responsibility for decisions which, until 10 years ago, were considered by Queensland's:

- Supreme Court
- District Court
- Magistrates Court
- Other statutory bodies including the Gaming Commission and Information Commissioner.

259
Queen





2020 VISION

WELCOME TO QLS PRESIDENT LUKE MURPHY

Luke Murphy's 2020 vision is for a cohesive Queensland Law Society Council leading the state's legal profession into a new decade of change.

"My goal is for the Council, as a cohesive unit, to be an example of considered decision making, clear planning and acceptance of diversity and diverse views, all to the betterment of the profession," he said.

"I want to ensure the broader profession feels they have a connection to the Council and that its members are seen as being approachable. I would like to think the profession feels there is benefit in making contact with Council members and being heard.

Luke said that several of the priorities for the year ahead were developed during a very successful 2019 Council planning day held in August last year. These include the continuing modernisation of the Society's communications with the profession, and a major re-evaluation of the role of *Proctor* in the digital age.

"There is also an emphasis on greater involvement for early career lawyers and we are taking significant steps in that regard," he said. "With the state election in October, a priority for



BY
JOHN
TEERDS

Council will be to ensure open and full dialogue with all political parties. A lot of work has been put in over recent years to ensure that we engage with the parties in a respectful and educated discussion around policy decisions."

In Luke's particular areas of practice – personal injuries and succession law – he believes there is a need to ensure proper cost disclosure to clients and to maintain access to common law rights.

"Clients need to be fully aware and fully informed of all costs that are incurred and that may be charged, and how or why those costs are incurred," he said. "As a profession we need to keep trying to improve this area, and ensure the profession's duties are adhered to and that the public's interests are protected."

Wellness and mental health would, of course, remain a significant issue, with positive action

continuing, while another key concern was the many and varied forms of cyber risk.

"Some great work has been done by the Society and by Lexon in that respect, and that has to be maintained," Luke said. "The pressures those risks can put practitioners under are significant."

Luke also mentioned the need to maintain the collegiate nature of the profession, and ensure respectful interaction between members.

"As the profession continues to grow, it is more difficult to maintain the collegiality our predecessors enjoyed," he said.

"Another issue is the maintenance of proper professional standards and recognition of the fact that we must maintain our objectivity to ensure our client's interests are protected.

"There has also been concern expressed by members of the judiciary regarding the experience of some practitioners and their preparation for court/tribunal appearances. There is a need for the profession to ensure that younger members, those early career members, are properly mentored and properly educated in the conduct of files, dealing with clients and the obligations they take on – the duty to the court, duty to other practitioners, and duty to their client."



I WANT TO ENSURE THE BROADER PROFESSION FEELS THEY HAVE A CONNECTION TO THE COUNCIL



Family links

Luke admits that he never thought he would be a solicitor.

"I always enjoyed accounting at school – business principles and accounting – and I did relatively well at it. I can't tell you why I decided to study law."

He believes it was probably the influence of his father – Gerry Murphy, who was QLS President in 1978-80 – and the closeness of the relationships with Gerry's partners at MG Lyons & Co., which were "so much part and parcel of my upbringing".

While Luke is believed to be part of the first father-son QLS Presidency, there is a precedent. The 1970-72 President, JR Nosworthy, was the father of 1986-87 President Elizabeth Nosworthy.¹

Asked who he most admired, Luke said he had been very fortunate to have his father as a mentor.

Also, through his upbringing and his involvement in the law, there was exposure to other senior practitioners – Judge Rinaudo, Judge Buckley, Ken Rose, Kev O'Hanlon – four of his father's former MC Lyons & Co. partners who have been role models not just for him but for his siblings as well.

"I have the utmost admiration for my father and my mother. My father would not have been able to make the contribution he did if it wasn't for Mum. I also have remarkable admiration for Dad's mother.

"She had nothing to do with the law, but she raised five children on her own, the eldest being 12 when my grandfather was killed. She was an incredibly independent and strong woman."

Luke, too, is one of five children – with two brothers and two sisters. Only one is a lawyer; his younger brother, Dominic, who has been at the Bar for around 14 years.

At university, Luke at first thought he would practise as an accountant, but then believed he might become an insolvency practitioner. In due course he became a construction lawyer – "but I just didn't like drawing the contracts, and I wasn't good at it" – before finding his forte in personal injuries law, and then in succession law.

"What I enjoy about those areas is what I refer to as the 'humanity', the dealing with people," he said. "I am a very strong believer that, particularly in personal injuries, if you are going to present a claim properly for a client, you really have to understand them.

"You have to understand what their life was like beforehand, how it's changed and how

they have coped. I also enjoy getting to earn the trust of those clients over the life of the claim; and it takes years to earn that, it's not a given, you have to earn that respect."

Outside of law, Luke admits to being a rugby tragic. "I was brought up with rugby, I played rugby through uni and in my early years of practice – not very well, but consistently, or consistently poorly some would say, but I enjoyed it and rugby was very kind to me."

Today, you are more likely to find Luke and wife Tracy on the road cycling, including distance events.

"We generally cycle two to three times a week and I also try to swim a little bit," Luke said. "We try to maintain a good physical exercise regime."

"Tracy and I have been blessed with three children, two at university – including one law student – and one recent university graduate. The children have kept us occupied and taught us a lot."

| John Teerds is the editor of Proctor.

Note

¹ *The Queensland Law Society Inc. 1928-1988: A History*, by Helen Gregory, p151.

A DEDICATED DEPUTY

BY QLS DEPUTY PRESIDENT ELIZABETH SHEARER

Our 2020-21 Queensland Law Society Council is a group of solicitors who practise law in very different contexts, and I am excited about harnessing this diverse experience to enhance the professional lives of all QLS members.

There are important initiatives begun by previous Councils to improve services for QLS members and to support collegiality and professionalism. I expect that the new Council will build on the work of our predecessors, as well as look for new ways to deliver value to our members.

I began life in the law as an articled clerk in 1983 and have worked in large and small practices, and in private practice, government, universities, legal aid and community legal centres. I have represented clients ranging from large companies to the most impoverished and vulnerable in our community.

A common feature, across all the years, has been observing the value that clients place on the solicitor's role as trusted advisor and problem solver. In a crowded services market, the idea that we, as fiduciaries, are ethically bound to put our clients' interests first gives us a powerful point of differentiation.

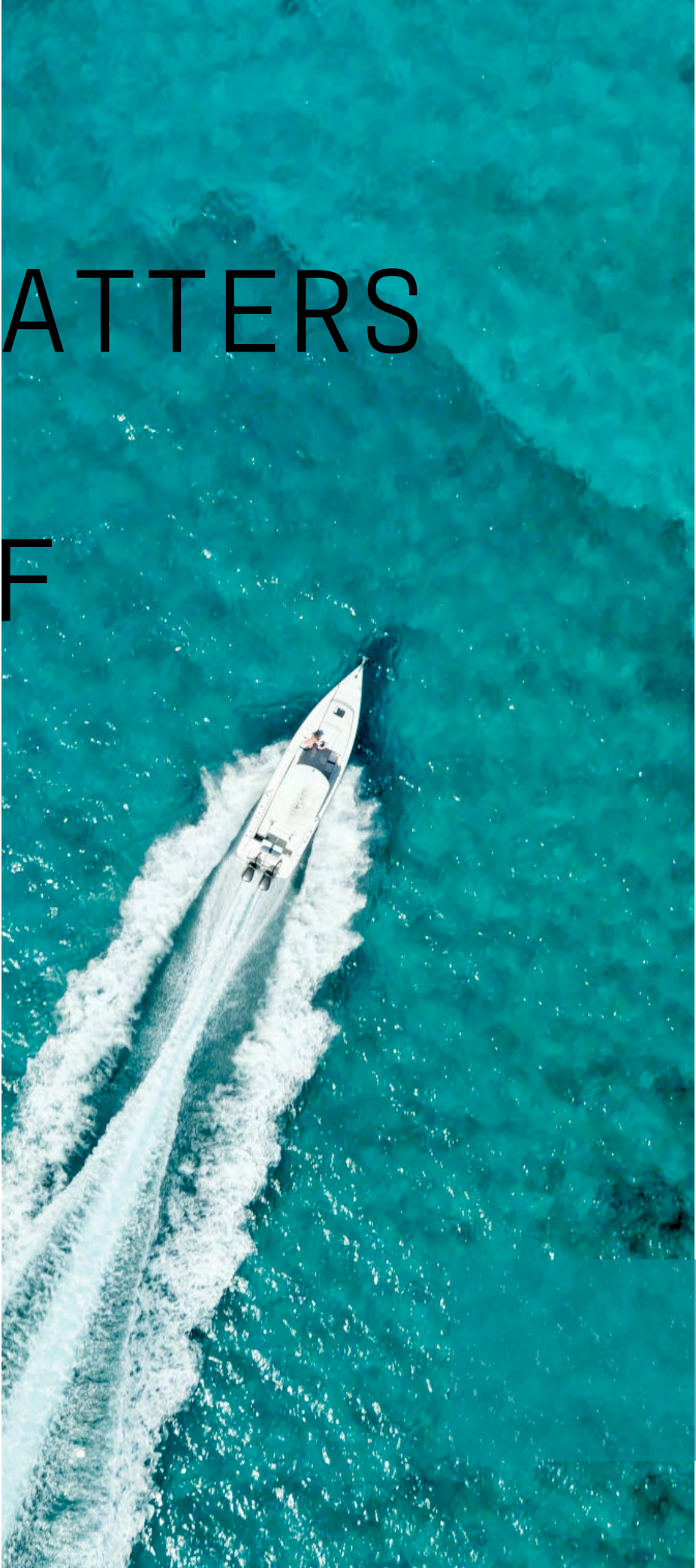
Some of what we have traditionally done can be commoditised, and maybe even improved by algorithms. However, our ability to bring professional judgement, and even wisdom, to complex situations, is needed now more than ever.

So where does QLS fit with this vision of professional practice and why am I involved? QLS is integral to our life as professionals. It regulates us all through the issuing of practising certificates, it speaks on behalf of us all on important policy and legislation, and it provides services to us all including professional development and education, and ethics and practice support.

I see my role as helping to ensure that these core functions of QLS are delivered effectively and efficiently. In addition, I want to do what I can to name, celebrate and promote the value that we as solicitors bring to our clients and the community.

INFLUENCE

MATTERS
OF





NEW LEGAL CHALLENGES IN MARKETING BY ONLINE INFLUENCERS

The dramatic rise of the social media 'influencer' has spawned a multi-billion-dollar industry, and no doubt new legal challenges for Australian lawyers will soon follow. Report by **Tegan Boorman**.

You may have seen one of the documentaries on the Fyre Festival – *Fyre Fraud* streamed on Hulu while *Fyre: The Greatest Party That Never Happened* was on Netflix last year.

Essentially, the Fyre Festival was intended to be a luxury music festival promoted to take place on the Bahamian island of Great Exuma in April 2017. It was heavily promoted by high-profile social media Influencers (many without initially disclosing the sponsored nature of the post).

Despite the high cost of the tickets to attend the 'luxury' festival, attendees were said to have been faced with pre-packaged sandwiches and accommodation in tents from the United States Federal Emergency Management Agency, instead of the promoted gourmet meals and luxury villas. It was reported that, due to problems relating to security, food, accommodation, medical services and artist relations, the event ended up being postponed indefinitely after many attendees had already arrived.

A number of large lawsuits were filed against the organisers and the social media influencers based in the US, where it is unlawful to post sponsored content on social media without expressly disclosing that the influencer is being paid to post it. Many of these lawsuits continue today.

Such a situation poses the question of how influencer marketing is regulated in Australia, how Australian consumers are protected from a 'Fyre Festival' situation, and how brands, influencers and agencies can minimise their risk when it comes to engaging in influencer marketing campaigns targeting Australian consumers.

INFLUENCER MARKETING INDUSTRY

According to a benchmark report by Influencer Marketing Hub, influencer marketing was predicted to become a \$6.5 billion industry in 2019, up from \$1.7 billion in 2016. The same report found that 92% of the 800 marketing agencies, brands and other professionals surveyed believe that influencer marketing is an effective form of marketing. If you believe the statistics, then a lot of products and services are being sold through influencer marketing campaigns.

REGULATION OF INFLUENCER MARKETING CAMPAIGNS IN AUSTRALIA

Despite the apparent impact that influencer marketing can have on the sale of goods and services, Australia has adopted a model of self-regulation of advertising and marketing communications. The Australian Association of National Advertisers (AANA) oversees a self-regulated program and is the first point of contact for advice on marketing and communication queries.

The code of ethics (code) adopted by the AANA is platform and media neutral, and applies to all advertisers and marketers who promote brands, products or services to Australian audiences. Of particular relevance to influencer marketing campaigns is section 2.7 of the code, which requires advertising and marketing communication to be clearly distinguishable as such to the relevant audience.

This provision was inserted into the code with effect from 1 March 2017. If a complaint is made to the Ad Standards Community Panel (previously known as the Advertising Standards Board), and it is upheld, then, amongst other things, the case can be referred to the Australian Competition and

Consumer Commission (ACCC), which can require that any claims on social media pages be substantiated and commence proceedings if a breach of the law has been identified. Such a claim would also expose the influencer, the brand promoting its product or service through the influencer, and any agency involved in the campaign, to possible claims by third parties for damages.

We are yet to have a high-profile case similar to the Fyre Festival in Australia, where Australian consumers or the ACCC commence proceedings against a social media influencer, an agency and/or a brand as a result of false, misleading or deceptive conduct by an influencer on their social media account.



When such a case does arise in Australia, which most likely will be only a matter of time, sections 18 (misleading or deceptive conduct) and 29 (false or misleading representations about goods or services) of the Australian Consumer Law (ACL) will need to be considered in the context of an influencer marketing campaign.

In what can only be a move in the right direction, in September last year the Audited Media Association of Australia (AMAA) announced that it had established an Australian Influencer Marketing Council to develop an Influencer Marketing Code of Practice. The AMAA has announced that the code will span influencer vetting, advertising disclosure, contractual considerations including content rights usage, and metrics reporting. It has also been confirmed that there will be a separate guide created for buyers. This code will be likely to increase awareness of disclosure requirements and contractual rights between the influencer and the brand engaging them, particularly in the absence of any written agreement between them.

RISKS

Parties engaging in influencer marketing campaigns may be exposed to a number of legal, financial and reputational risks which, in the absence of any written agreement between the brand and the influencer, may be outside of their control. Some of the larger risks include:

- For the brand engaging the influencer:
 - the influencer making false or misleading representations about the brand, its involvement with the brand and/or the brand's goods or services
 - the influencer failing to disclose the sponsored nature of a post
 - potential damage to the brand's reputation due to the influencer's actions
 - the influencer failing to have the authentic and engaged followers advised to the brand, which is likely to result in a lower than expected return on investment for the brand.
- For the influencer:
 - not being paid by the brand
 - the brand using the content created by the influencer outside of the original intended scope (such as in outdoor advertising or a Facebook advertisement)
 - the brand misusing confidential information provided to the brand by the influencer about the influencer's audience.

A breach of the ACL provisions can result in damages, injunctions, publication orders and other remedial orders. Pecuniary penalties, fines and infringement notices can also apply

in the case of a breach of section 29 (but not the wider section 18) of the ACL.

Many of the risks for the brand are also risks for any agency involved in creating the campaign. If found to be liable as an accessory to a breach of section 18 of the ACL, an agency may be ordered to pay damages. If found to be liable as an accessory to a breach of section 29 of the ACL, it may also be fined.

The maximum pecuniary penalty for a breach of section 29 of the ACL was increased on 1 September 2018 from \$220,000 to \$500,000 for an individual (often an influencer) and for a corporation (often a brand engaging an influencer) from \$1.1 million to the greater of:

- \$10 million
- three times the value of the benefit obtained from the contravention or offence (where the value can be calculated), or
- if the value of the benefit cannot be determined, 10% of the corporation's annual turnover in the preceding 12 months.

The ACCC has advised that it is more likely to pursue cases of false, misleading or deceptive conduct in relation to social media sites if:

- there is the potential for widespread public detriment if the statement is relied on
- the conduct is particularly blatant
- it is by a business that has come to their attention previously.

PROTECTION FOR AUSTRALIAN CONSUMERS

In short, laws already exist to protect Australian consumers, but are yet to be considered in the context of a high-profile influencer marketing campaign. The AANA code of ethics and the coming AMAA Influencer Marketing Code of Practice provide some further assistance in that they provide an avenue for complaints to be made and subsequently investigated as well as useful guidelines on requirements for campaigns.

Due to the growing nature of the influencer marketing industry, it is likely that we will see a case arise in Australia resulting from non-disclosure of a sponsored post and/or an influencer making a false or misleading representation on a social media site during an influencer marketing campaign.

PROTECTION OF BRANDS AND INFLUENCERS THROUGH INFLUENCER AGREEMENTS

One of the best ways that parties to an influencer marketing campaign can mitigate their risk is by entering into a suitable influencer agreement.



FYRE FAIL

An important point to note on influencer agreements is that these campaigns are frequently arranged on short notice and the parties often have little to no appetite to negotiate the terms of lengthy legal agreements prior to commencement of the campaign. This is particularly the case with smaller campaigns.

A typical influencer agreement is similar to a services agreement, but it is specifically tailored to address some of the key risks identified above. Some of the key considerations (depending on the specifics of the campaign) include:

- **Term and termination** – Some campaigns are one-off posts and some will be ongoing campaigns with multiple posts during a determined period or until otherwise terminated.
- **Services** – The services will often involve creating certain forms of content (such as a video or a photograph) in a certain style and featuring certain products in certain ways and/or posting the content on the influencer's own social media channels using certain hashtags.
- **Deliverables** – Sometimes the arrangement might include providing the brand with an edited photograph or a video to use themselves for a permitted purpose.
- **Deliverable dates, times and locations** – The number of posts to be made by the influencer, the specific social media accounts to which they are to post, and the dates and times on which the content should be uploaded should all be agreed. These details can have a significant impact on the return on investment for the brand. In cases where video or photographic material is to be provided to the brand, the format, due date and method of delivery should also be agreed.
- **Permitted use of content and intellectual property rights** – Ownership of the intellectual property rights in any content created should be addressed in the agreement. Any assignments and licences of intellectual property rights and the permitted use for the content should also be negotiated and set out in the agreement.
- **Moral rights** – Depending on what the parties intend to do with the content created, it may be necessary to include certain consents and approvals in relation to use of the content which is inconsistent with the creator's moral rights.
- **Brand obligations** – This might include for example, to provide the influencer with style guides, products or services by a certain date, respond to requests for approval of content within certain time frames and to pay the influencer the agreed fees.



- **Fees and payment terms** – Payments can be required on fixed dates or sometimes linked to the completion of certain services or deliverables.
- **Legal obligations** – Due to the nature of influencer marketing campaigns, and the fact that the influencer often has significant creative control over the content as well as control over the social media site on which it is posted, the agreement should require each party to take steps necessary to enable both parties to comply with their legal obligations. By way of example, the agreement should require the influencer to disclose the commercial arrangement when they post the content on their own social media accounts. It should also require the influencer to delete any user-generated comments on their social media account which may be found to be false or misleading. An obligation to delete user-generated comments on the post should be one of the obligations that survive termination of the agreement, as the posts may remain on the influencer's social media accounts for some time after the agreement ends. The legal obligations should be considered on a case-by-case basis and relevant provisions included in the agreement to cover the likely risks for that particular campaign.
- **Creative approvals** – If the brand wishes to approve any of the content prior to the influencer posting it on their social media accounts, then the process for such approval should be set out in the agreement. Care should be taken in this regard as the post should fit within the style of the influencer's other posts and it should not require the influencer to make a statement which may be false or misleading (for example that the influencer has used and obtained certain results from the product if they have not).
- **Influencer's rights** – Sometimes the influencer may wish to exercise certain rights in relation to posts on their own social media accounts, for example archiving a post after a certain period of time. To avoid disputes at a later date, this should be set out as an influencer's



right in the influencer agreement. This may affect the price that a brand is willing to pay to an influencer for the campaign and therefore should be made clear from the outset. The recent Victorian case of *Roberts v Con Katsogiannis Legacy (Civil Claims)* [2019] VCAT 645 considered this very issue, – determining the payment due to the influencer after she had archived the sponsored posts. It resulted in the brand being liable to the influencer for only two-thirds of the invoiced amount.

- **Reporting metrics** – If the brand expects the influencer to provide them with reporting metrics (which is commonly the case), such as extracts from the influencer's insight analytics (reporting metrics available to the influencer in their own social media account), either before, during or after the campaign, then this obligation should be set out in the agreement.
- **Jurisdiction** – Influencers from all over the world may be engaged by a brand to participate in an influencer marketing campaign. It is therefore prudent to agree the jurisdiction which will apply to govern the commercial arrangement.

- **Confidentiality** – It is common practice in an influencer marketing campaign for the brand and the influencer to exchange some confidential information. This may include, for example, insight analytics and style guides. The agreement should therefore contain a suitable mutual confidentiality clause.
- **Liability** – It may be appropriate to include an indemnity in the agreement whereby the influencer agrees to indemnify the brand for any loss suffered by the brand as a result of the influencer breaching the terms of the agreement, particularly in relation to copyright infringement and misleading or deceptive conduct by the influencer.
- **Warranties** – Ideally the influencer should warrant in favour of the brand that it has not made any misrepresentations to the brand about the influencer's audience. This is important to protect the brand in cases where influencers have purchased followers or are part of a social media pod (being a group of people who all agree to engage with each other's posts, leading to mutually beneficial growth for each of the members of the pod). Warranties should also be given in relation to the rights to assign or licence any intellectual property as contemplated by the agreement, as influencers may engage third parties such as photographers or videographers to assist them in creating the content.



Tegan Boorman is the head of corporate/commercial law at Boorman Lawyers and Social Law Co., where her areas of expertise include providing guidance on the creation of influencer agreements and advice on influencer marketing campaigns.

Notes

- ¹ influencermarketinghub.com/influencer-marketing-2019-benchmark-report.



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Building resilience

A key skill for early career lawyers

BY LAURA GRASSO



Being an early career lawyer can be hard.

It is a great juggling act of putting on a cool and confident facade while carefully stumbling through the unknown, simultaneously bearing the stress and concerns of our clients.

The practice of law as an early career lawyer often sees us second-guessing our decisions and our own capabilities as we strive to achieve perfection in our work.

There is no question that working as a lawyer can be a satisfying and fulfilling career as we help clients through difficult times or provide them with advice to assist in decision making. However, as young professionals in the field, it can be easy to not ask for help and allow the workload and stress to consume us and our practice.

For this reason, it is important to work on our resilience and to seek out assistance and guidance from peers, colleagues and mentors to share the mental load. It is vital that we have these people to turn to, whether they work in the same firm or office, the same area of the law, or are simply willing to listen to our issues and provide valuable input. They may come in handy when we're doing unfamiliar work, need to run something past them, or if we're looking for direction in our careers.

As well as having mentors in the practice of law, we should look for inspiration from those who have achieved great success in life.

For me, Dr Kirstin Ferguson is one of those people.

Coming from a background in law and commerce, Dr Ferguson formerly held CEO and executive director positions in ASX-listed and private companies and served in the Australian Defence Force. She now works as the Deputy Chair of the ABC.

She recently wrote a reflective article – a letter to her 21-year-old self – that hit home for me in more ways than one and gave me the reminder I needed at this stage of my career.¹

I consider her article to be relevant not only to early career individuals but also to those hiring and working with early career professionals.

Embedded throughout the article is her advice to work with others in achieving our own goals and to support them in theirs. She refers to our responsibility to empower each other and provide opportunities to those around us when we are able to do so.

I found the main takeaway points by Dr Ferguson to be:

- Stop trying to predict what might be around the corner or what could go wrong – you have no reason to think you will fail, so seize every experience and go for it 100%.
- Continue to be yourself and trust that you will be successful as you are, rather than the person anyone else thinks you should be.
- Say yes – while you may not think you are ready, or that you don't have the precise experience required, trust that it will come; you will be successful. You will become a better leader for being willing to learn, and even if you don't see your own potential, others do. Believe them.

It is also worth mentioning that early career lawyers are not alone in experiencing difficulty in building resilience while working under high pressure and stress. A recent wellness survey of Australia and New Zealand by Meritas found:²

- 63% of practitioners have in their career, or have had someone close to them in the workplace, experience depression
- 85% of practitioners have in their career, or have had someone close to them in the workplace, experience anxiety.

The survey also found that the leading reasons that practitioners were prevented from seeking help was due to a preference to manage their mental health on their own and concern about asking for help, and in turn what others might think of them.

Ultimately, resilience is key to all practitioners. Building our resilience gives us the ability to manage the stress associated with the practice of law and it is something that we should all endeavour to improve throughout our careers, and encourage others to do.

Below are some practical ways to build resilience:

- You are not alone – lighten your mental load by speaking with colleagues about complex or stressful matters.
- Use the making of mistakes as a tool to learn from for next time, rather than beating yourself up.
- Say yes to opportunities offered to you to tackle challenging work that takes you outside of your comfort zone.
- Maintain perspective by volunteering in the local community, whether it be with a not-for-profit organisation or a law-related committee.
- Prioritise self-care. This can include simple activities such as going for a walk, exercising, listening to mindfulness meditation, or spending meaningful time with family and friends.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Adam Moschella (amoschella@pottslawyers.com.au). Laura Grasso is a lawyer at O'Connor Law, Cairns.

Notes

¹ Kirstin Ferguson, A letter to her 21-year-old self by Dr Kirstin Ferguson (11 September 2019), Women's Agenda, womensagenda.com.au/latest/a-letter-to-her-21-year-old-self-by-dr-kirstin-ferguson.

² Meritas Law Firms Worldwide, Meritas Australia & New Zealand Wellness Survey 2019.

Words with the other solicitor's client?



BY STAFFORD SHEPHERD



What if the other solicitor's client contacts me to discuss the matter?

It makes no difference to the application of the 'no-contact rule' referred to in the article, *What is the rule about communicating with the client of another solicitor?* So unless one of the exceptions applies, you must avoid speaking to them about the matter or even listening to what they have to say.

The consent exception requires the consent of the other solicitor rather than their client, so you cannot assume from the other party contacting you that you have permission to speak to them, or that they are waiving the benefit of the rule – they cannot do so.

If contact is unavoidable, for instance if a phone call is put through to you or they approach you in person, then as soon as you realise who they are, you should immediately tell them that you cannot speak to them about the matter or listen to anything they have to say, and that any communication has to be through their own solicitor, and you should immediately terminate the conversation.

You should immediately advise the other solicitor of the attempted communication and ask them to advise their client accordingly.

Stafford Shepherd is the Director of the Queensland Law Society Ethics and Practice Centre.

Notes

¹ See qls.com.au/Knowledge_centre/Ethics/Resources.

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Law Foundation Queensland

William (Bill) Rainsford Loughnan

22 December 1952 – 7 October 2019

BY ARI MCCAMLEY AND ALEX RAMSEY

Bill Loughnan, a champion of rural Queenslanders, was a pre-eminent agribusiness lawyer for more than 40 years and Chairman of Thynne + Macartney from 2012 until his resignation in 2017.

His passing on 7 October 2019 is a huge loss to his clients, colleagues and the many people he generously helped and mentored throughout his career.

After studying law at the University of Queensland, Bill joined Cannan & Petersen and quickly became a key member of the agricultural law team. It was there he met Peter Kenny and began a successful business partnership and friendship that was based on the principles of the bush.

"When you've been in business with someone for 40 years and have remained friends for all that time, I think that says something," Peter said.

Bill became a partner in 1979 at the age of 27. In 2002, he and Peter moved to Thynne + Macartney with their entire team, where they felt they could better serve their rural client base.

During his career, Bill advised on some of the largest cattle property deals in Australian history.

"Bill looked after the big corporates and the big families, as well as working with a great many mum-and-dad operations, which were very close to his heart," Peter said. "He will be remembered as the mover and shaker on the big issues, just as he will for training many of the up-and-coming young rural lawyers."

For most of his legal career, Bill, his wife Stephanie and their family ran sheep and cattle on their properties, 'Arlington' and 'Wongamere'.

Bill gave his time generously to those who sought his guidance or advice. His contribution to the legal sector included his role as a Queensland Law Society Senior Counsellor and as a mentor to the many lawyers who worked with him during his career, including the two of us. With Peter Kenny, we now lead the agribusiness practice at Thynne + Macartney.



He authored documents that are now commonly used as precedents by many lawyers involved in the sale or purchase of agribusiness assets, and negotiated access arrangements with mining and gas companies, and Indigenous land use agreements between native title claimants and landholders.

At the instigation of QLS, Bill was instrumental in publishing the *Legal Guide for Primary Producers*, which is currently in its 4th edition.

Bill proposed and supported the firm's visited office program to meet with clients face-to-face in their home towns of Longreach, Charleville and Roma, and later expanded the program to include Emerald and Rockhampton. His client base stretched the breadth of Queensland and spanned three and four generations of some families; it stands testament to Bill's dedication to the success of the practice.

It is in the agricultural sector where Bill's immense legacy will continue for many years. For more than 20 years he served as the principal lawyer of the United Graziers Association (UGA) and was the lead lawyer in the amalgamation of the Cattlemen's Union of Australia, the Queensland Grain Growers Association and the UGA, which formed AgForce and provided the Queensland agricultural sector the ability to speak with a united voice. He was instrumental in important policy and legislative developments in the history of Queensland agriculture.

In a December 2016 interview, Bill reflected on his career, articulating his deep love for the bush and its people:

"It's the people that make it special," he said. "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. 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."

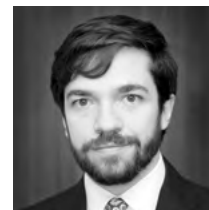
Bill was involved in the establishment of The Wetlands and Grasslands Foundation in 2000 and was one of its inaugural honorary directors. His generosity, both personally and as a key member of the leadership team at Thynne + Macartney, extended to many philanthropic ventures, including the Royal Flying Doctor Service and the Gallipoli Medical Research Foundation.

Bill is sadly missed. Our thoughts are with his family, friends and all who knew him.

Ari McCamley and Alex Ramsey are partners with the Thynne + Macartney agribusiness team

Proof of effective service

BY KYLIE DOWNES QC AND ALEXANDER PSALTIS



Proof of service is just as essential as service itself.

In many applications in the Queensland courts and the Federal Court, an applicant cannot succeed unless they have proved that relevant documents were served.

For example, if a person is applying to wind-up a company in insolvency, to bankrupt someone on a creditor's petition, or to obtain default judgment for a failure by a defendant to defend a claim, success is contingent on first proving service.

It is therefore critical that those undertaking service *firstly* identify the correct rules of service to apply, *secondly* effect service strictly in accordance with those rules and, *thirdly* be able to prove, by admissible evidence, that service has been effected correctly.

In this article, we discuss these three steps.

The rules of service

When effecting and proving service, the first step is to identify the appropriate rules governing service. Those rules will typically define how service is to be effected (that is, the means of service) and the time period in which service must be effected. Which rules apply will vary depending on the jurisdiction, the type of proceeding, the type of document and the person being served.

In Queensland, the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) provide for two formal means of service with their own rules for how service is to be effected, namely:

1. **Personal service** – which requires the document to be brought to the attention of the person to be served, usually by giving the document directly to the person to be served, and
2. **Ordinary service** – which requires that the document be delivered to an address connected with the person to be served, for example by posting the document to the person's address.

Personal service is typically required for documents which commence court proceedings (for example, claims and originating applications) as well as notices of non-party disclosure and applications for contempt, whereas ordinary service is acceptable for most other documents (for example, affidavits, interlocutory applications, subpoenas, subsequent and amended pleadings).

In the Federal Court, the *Federal Court Rules 2011* (Cth) (FCR) provide for similar formal means of service which are applied in similar circumstances to the UCPR and have similar formal requirements.

If a company is to be served, whether by personal or ordinary service and whether in Queensland or the Federal Court, service may be effected in accordance with the requirements of section 109X of the *Corporations Act 2001* (Cth) (CA). That section permits the documents to be, among other things, left at or posted to the company's registered office.

There are also special requirements in the UCPR and the FCR when serving, among others, disabled persons, minors and prisoners.

In addition to the formal means of service, there are two further ways, contemplated by both the UCPR and the FCR, by which service may be effected. These are:

1. **Substituted service** – which can be used (on application to the court) where it is impractical to serve the person in accordance with the formal means of service (whether personal or ordinary service), and
2. **Informal service** – where service has not been effected in accordance with the formal means of service but the document has otherwise come to the attention of the person to be served.

It is not merely sufficient to effect service in accordance with the mechanisms provided for by the rules; it is also critical to identify the applicable time by which service must be effected. The timing rules also differ, depending on the jurisdiction, type of proceeding and the document which is being served.

Proving that a document was served within the required time period is just as important as proving that the correct means of service was used. For example, a claim and statement of claim must be served, in Queensland, within one year of it having been filed, whereas an originating application must be served at least three business days before the date fixed for hearing. Different requirements for the time for service of documents apply in the Federal Court.

There are also different time periods provided for in proceedings under the CA (which are governed by special Corporations Rules). If a proceeding involves a CA issue, it is necessary to confirm whether these apply and then identify the correct time period for service as required by those rules, which will depend on the document.

Effecting service

Once the correct means of service and time period for service are identified, the next step is to effect service in accordance with those requirements.

It goes without saying that service must be effected strictly in accordance with the relevant rules for the jurisdiction, document and person being served to ensure service is correctly effected and avoid any disputes about service.

If it is not practical to effect service in accordance with the rules, then (as noted above) an order for substituted service may be sought. It is beyond the scope of this article to explain when and how to obtain such an order. However, even where substituted service is involved, in order to correctly effect service, the terms of the substituted service order must be complied with strictly and the affidavit of service must prove that compliance.

To similar effect, when informal service is sought to be relied upon (for example, when a document which was required to be served personally was emailed to a defendant who responded by acknowledging receipt of the document), it is important that sufficient information is kept to prove that the document was brought to the relevant person's attention.

The affidavit of service

Once service has been effected, the final step is to prepare the affidavit of service to prove that service was effected correctly. It is essential that the requirements for the affidavit of service be kept in mind throughout the entire service process so that not only is service effected correctly but also that the information necessary to prove service can be identified and inserted into an admissible affidavit of service.

It is important to keep accurate file notes and copies of documents/envelopes used for service to assist in preparing an affidavit of service.

An affidavit of service, like any affidavit, is subject to the rules of evidence. Failure to comply with the rules of evidence can have the consequence of:

- rejection of part or all of the evidence by the court
- costs penalties under the rules
- less weight being afforded to the evidence.

When preparing an affidavit of service, the following ought to be borne in mind to ensure that the affidavit is relevant, admissible and persuasive to the court for proving effective service:

1. Avoid hearsay evidence. This means that evidence which is not direct evidence by the person effecting service should, wherever possible, not be used. Therefore, the person who effected service should as a matter of course swear or affirm the affidavit of service.

2. If multiple people were involved in the process of effecting service, separate affidavits should be prepared by each person so that they give direct evidence as to the parts of the process which they completed. For example, if A prepared the envelope and inserted the documents to be served into it and then handed the envelope to B who placed it into a post box, an affidavit should be given by both A and B deposing to the steps that they each took.
3. Comply with the formal requirements for an admissible affidavit, which will vary depending on whether the proceeding is governed by the UCPR, the FCR or the Corporations Rules.
4. Comply with any formal requirements in the UCPR and FCR concerning the form and content of the affidavit of service. For example, rule 120 of the UCPR requires an affidavit proving personal service to include:
 - the full name of the person who effected service
 - the time, day and date the document was served
 - the place of service
 - the name of the person served and how the person was identified.
5. Ensure that the affidavit proves each fact required by the applicable rules to demonstrate effective service. For example, to prove service under section 109X CA, the evidence required to prove that service was effected on a corporation by post includes being able to prove that the envelope:
 - was properly addressed
 - contained the relevant documents to be served
 - bore the correct cost of postage
 - was placed in the post.
6. Ensure that (if required) documents proving service are exhibited or annexed to the affidavit. For example, when service by post is involved, a copy of the envelope in which the documents were placed ought to be exhibited or annexed to the affidavit.
7. Avoid using precedent affidavits or affidavits prepared by process servers. These are usually generic or targeted at a particular jurisdiction's rules and may not provide the necessary information to prove effective service in accordance with the relevant rules.

Notes

¹ Section 465A(1)(b) of the *Corporations Act 2001* (Cth).

² Section 52(1)(b) of the *Bankruptcy Act 1966* (Cth).

³ Rule 282 of the UCPR.

⁴ Rule 106 of the UCPR.

⁵ Rule 112 of the UCPR.

⁶ Rule 106 of the UCPR.

⁷ As to personal service, see rule 10.01 of the FCR; as to ordinary service, see rule 10.31 of the FCR.

⁸ However, note that section 109X is not a code and it does not displace the ordinary rules such that service on a company by other means allowed for by the rules is permitted, for example, UCPR, rule 117; see for example *Polstar Pty Ltd v Agnew* (2007) 208 FLR 226 at [15] (Barrett J).

⁹ See, for example, rules 108-110 of the UCPR and rules 10.09-10.10 of the FCR.

¹⁰ Rule 116 of the UCPR and rule 10.24 of the FCR.

¹¹ See rule 117 of the UCPR. In the Federal Court the power is found in rules 1.34 and 10.23 of the FCR.

¹² Rule 24 of the UCPR.

¹³ Rule 27(1) of the UCPR.

¹⁴ See for example Rule 8.06 of the FCR which requires originating documents to be served at least five days before the return date.

¹⁵ In Queensland, Schedule 1A to the UCPR contains the Corporations Rules, for the Federal Court they are contained in the *Federal Court (Corporations) Rules 2000* (Cth) (referred to in this article collectively as the Corporations Rules, though there are some differences between the UCPR and Federal Court versions of the Corporations Rules).

¹⁶ By rule 1.3 of the Corporations Rules, those rules generally apply to proceedings under the CA or the *Australian Securities and Investments Commission Act 2001* (Cth). However, they also incorporate, when relevant and not inconsistent, the UCPR and the FCR (depending on which jurisdiction the proceeding is in).

¹⁷ For example, an originating process must be served at least five business days before the hearing, whereas an interlocutory process only needs to be served at least three business days before the hearing; see rule 2.7 of the Corporations Rules.

¹⁸ While hearsay evidence is permissible when proving service other than personal service in Queensland (rule 120(1) of the UCPR), it is good practice to have the affidavit of service prepared wherever possible by the person who effected service as this is the best evidence of service and could be the difference between succeeding or failing to prove service if a dispute arises.

¹⁹ Chapter 11, Part 7 of the UCPR.

²⁰ Division 29.1 of the FCR.

²¹ Rule 2.6 of the Corporations Rules (noting the differences between the Federal Court and the UCPR versions of these rules).

²² A similar requirement as to proving personal service arises at common law: see *Warringah Shire Council v Magnusson* (1932) 49 WN (NSW) 187.

²³ See for example *Grant Thornton Pty Ltd v Green Global Technologies Ltd* [2009] QSC 262 (Daubney J), citing *Pearlbust Pty Ltd v Summers Resort Group Pty Ltd* [2007] NSWSC 1126 at [22]-[24] (Barrett J), c.f. *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd* (2010) 190 FCR 1 at [23]-[34] (Logan J).

²⁴ Unless the rules dispense with the need to exhibit the documents served, such as rule 120(2)(b) of the UCPR, which permits filed documents to be sufficiently identified in the affidavit.

'Disgraceful and dishonourable'¹

Powers of attorney and elder abuse

WITH CHRISTINE SMYTH



Staunchly, I defend Queensland solicitors, and proudly I celebrate the good we achieve in our community. Sadly, this article is not about one of those occasions.

In the past few years, our profession has done much to support our community as it suffers the insidious increase of elder abuse. Our community looks to us, the legal profession, to support and protect our vulnerable from such abuse. Equally as important, newer practitioners look to more experienced practitioners for guidance and support in this complex legal framework. What then, when it is one of our own, a lawyer 75 years of age with 53 years of legal experience, who engages in elder abuse?

In the matter of *Legal Services Commissioner v Poole* [2019] QCAT 381 the tribunal found Ivan Poole, a practising solicitor since 1966,² guilty of four charges brought under the *Legal Profession Act 2007* arising from his conduct involving the making of wills, powers of attorney and property transactions. The sustained charges were:

Charge 1 – Dishonest and disreputable conduct in breach of rule 5 of the Australian Solicitors Conduct Rules 2012 (ASCR)

Charge 2 – Duties concerning current clients in breach of rule 11 of the ASCR³

Charge 3 – Communication with another solicitor's client in breach of rule 33 of the ASCR⁴

Charge 4 – Unfounded allegations in breach of rule 32 of the ASCR.⁵

In finding Mr Poole guilty of each charge, QCAT ordered that Mr Poole be publicly reprimanded, suspended his practising certificate, prohibited him from applying for a practising certificate for five years, and ordered him to pay costs.⁶

So, what did Mr Poole do?

ABC⁷ was an 87-year-old⁸ man with significant property interests, whose estate was estimated to be in the region of \$50 million. In 2007, ABC appointed his longstanding solicitor, Sean McMahon, as his personal and financial power of attorney.⁹ Later, and at the relevant time, a property deal was in train involving MDG who were seeking to be appointed managers of a property involved

in the deal. Simultaneously, the relationship between ABC and Mr McMahon was under strain. Mr Ivan Poole represented MDG.

In 2013, ABC suffered a heart attack, was admitted to hospital by his attorney, Mr McMahon, at which time ABC was diagnosed as having also suffered a stroke and diagnosed with dementia.¹⁰

Despite Mr McMahon writing to Mr Poole "on 16 April 2013 advising him of ABC's medical condition including capacity issues" and advising that "ABC was his client and direct[ing] him to cease dealing with ABC directly",¹¹ on 17 April 2013 Mr Poole and MDG removed ABC from the hospital without the knowledge or permission of the hospital staff and his attorney, Mr McMahon.¹²

That same day, Mr Poole had ABC sign a costs agreement in favour of Mr Poole. Mr Poole then shepherded ABC into the offices of "Mr Field of Aylward Game Lawyers seeking to revoke the Power of Attorney",¹³ Mr Poole was unsuccessful in that attempt. However, the next day Mr Poole "arranged for ABC to attend at the offices of Mr Hughes of Small Meyer Hughes where ABC revoked the Power of Attorney and made certain changes to his will including appointing [Mr Poole] as an executor".¹⁴

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Mr McMahon filed an application and obtained orders that the revocation of attorney was invalid and that ABC lacked capacity.¹⁵ Immediately thereafter, the Legal Services Commission (LSC) corresponded on at least two occasions with Mr Poole confirming the court's order as to ABC's lack of capacity.¹⁶

In the meantime, Mr Poole became aware that ABC's will did not leave him a bequest. Undeterred by the court's finding as to lack of capacity, the correspondence from the LSC and correspondence from Mr McMahon, Mr Poole arranged for another solicitor, this time one known to him, to consult with ABC over the phone while ABC was in hospital.

Mr Poole, did not disclose any of the history of the matter to the solicitor, and directed the solicitor not to ask ABC any questions. A will was ultimately made in which Mr Poole, MDG and a certain doctor were to each receive a 16% share of the \$50 million dollar estate – about \$24 million.¹⁷ During this time, Mr Poole wrote to ABC and made certain allegations against Mr McMahon.

In paragraphs 64 to 84 the tribunal discusses the law and its application to the agreed facts. Justice Daubney properly found “these were serious incidents of misconduct. The public interest and the interests of the profession require that it be clearly understood that practitioners who engage in disgraceful and dishonourable conduct, as occurred here, will be subject to serious sanctions.”¹⁸

In his 2014 paper, ‘Current Issues In Probate Law Administration: Life, Death, Form, Function And History’, Justice Geoff Lindsay forecast that “[c]ulturally, death has become more of a process, and less of an event, than it once was”.¹⁹ He observed that, while the “expression ‘elder law’ genuflects in the direction necessary”,²⁰ there is a greater “need to redefine the whole subject area”,²¹ and that “[a]s a process, with different dimensions for ‘person’ and ‘property’, death requires different but interrelated approaches to management before and after the event of ‘physical death’.”²²

“The legal process of passing property from one generation (or, more broadly, from one person) to the next may commence during a period of incapacity before the arrival of physical death.”²³ “[W]ithin the limits of the protective jurisdiction, the interests of an incapable person's family might be taken into account in the deployment of an enduring power of attorney or during the course of protected estate management,”²⁴ fundamentally changing the character of probate litigation.²⁵

Practitioners in the field of succession law may increasingly find themselves thrust unwittingly into the process of the abuse, or indeed aid in the abuse. Poole's decision amplifies the importance of proper enquiry and fulsome understanding of our responsibilities.

Amendments to the *Powers of Attorney Act* are expected to commence later this year, and with that there will be new capacity guidelines made under the *Guardianship and Administration Act 2000*. Once published, practitioners will be well served in making them a familiar and staple resource.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, QLS Senior Counsellor and Consultant at Robbins Watson Solicitors. She is an executive committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, and member of the QLS Specialist Accreditation Board, *Proctor* Editorial Committee, QLS Succession Law Committee and STEP.

Notes

¹ *Legal Services Commissioner v Poole* [2019] QCAT 381 per Daubney J at [90].

² At [8].

³ At [41].

⁴ At [50].

⁵ At [57].

⁶ At [94].

⁷ “The narrative has, however, been anonymised to prevent identification of certain affected parties, there having previously been a non-publication order made in this proceeding and a further non-publication order made in the course of the present hearing.” Per Daubney J at [4].

⁸ At [28].

⁹ At [11].

¹⁰ At [16].

¹¹ At [50].

¹² At [16]–[18].

¹³ At [30].

¹⁴ At [19].

¹⁵ At [19]–[22].

¹⁶ At [33]–[34].

¹⁷ At [35]–[40].

¹⁸ At [90].

¹⁹ At [49].

²⁰ At [45].

²¹ At [46].

²² At [50].

²³ At [51].

²⁴ *Ibid.*

²⁵ At [53].

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Partner's contributions continued during separations

WITH ROBERT GLADE-WRIGHT



Property – contributions can continue during separations – rise in value of property resumed by government

In *Whiton & Dagne* [2019] FamCAFC 192 (31 October 2019) the Full Court (Aldridge, Kent & Tree JJ) allowed Ms Whiton's appeal against a property division of 75:25 in favour of her de facto partner. An 18-year relationship with 20 separations meant a 12-year cohabitation in total. At first instance a judge of the Federal Circuit Court found proved the wife's allegation that the separations were due to domestic violence by the respondent.

It was also found that the appellant "bore the major share of responsibility as a homemaker and parent for the parties' children throughout the relationship" ([12]) and that the respondent should be credited with an initial contribution of a property at 'Suburb B'. Its proceeds of sale of \$160,000 five years later were used towards the purchase of a property at 'Suburb C' for \$258,000 which was resumed by the State Government 11 years later for \$2,336,288.

On appeal by the wife, the Full Court said (from [13]):

"(...) [I]t appears the trial judge equated each separation with the de facto relationship having then ended, for the purpose of assessing contributions. (...)

[18] ...[C]ommencing in mid-1999 with the birth of the parties' first child and continuing...with the birth of [their] second child in late 2000 the wife maintained her contribution as the primary homemaker and parent...irrespective of any... separation...

[19] ...[T]he wife maintained external employment for much of the...relationship and provided financial support to the family and to the children (...)

[25] The approach adopted by the trial judge was wrong in law..."

The Full Court said ([30]):

"The Suburb B property...were...contributed to by the wife in both a financial sense, given her employment, and the payments towards the...mortgage, and by her non-financial contributions... Thus, the trial judge was clearly wrong to treat the \$160,000 as solely the husband's contribution and ...to find that the wife made no contribution to the acquisition of the Suburb C property."

The Full Court added ([34]), citing *Zappacosta* [1976] FamCA 56, that "it is well settled...that a...rise in property value brought about by a rezoning or resumption is properly treated as a windfall gain for which neither party can take sole credit".

Property – interim dollar-for-dollar order granted to wife was ineffectual as husband's solicitors carried their costs

In *Shelbourne* [2019] FamCAFC 196 (4 November 2019) Loughnan J had made a dollar-for-dollar order three months before the trial by which the husband was to pay to the wife's solicitor a sum equal to any amount he paid to his solicitor. The husband did not pay his lawyers any amount, so the amount paid to the wife's lawyers was also nil. In the absence of payment the parties' unpaid legal fees ballooned by the time of trial to \$152,000 (the husband) and \$264,000 (the wife).

At the final hearing Gill J granted the wife's application for a continuation of the dollar-for-dollar order so as to secure payment of costs paid by the husband post-trial. The Full Court (Ainslie-Wallace, Ryan & Tree JJ) allowed the husband's appeal, saying (from [17]):

"(...) The source of power to make a litigation funding order includes s74...(by way of interim spouse maintenance), s79 and s80...(interim property division) and s117...(interim costs order)...Different considerations will apply depending upon which head of power is sought to be engaged (...)

[21] Plainly in making order 18 the primary judge was exercising discretion under s117... That discretion must be exercised by reference to...s117(2A)...There is no advertence to those considerations in the primary judge's reasons, and indeed the path of reasoning by which his Honour proceeded cannot be adequately discerned...save that his Honour was of the stated view that not extending the operation of the dollar-for-dollar order 'would defeat' it... It therefore follows that either his Honour did not have regard to the matters in s117(2A)... or...did not sufficiently expose his reasoning as to how he...weighed the matters referred to in the provision. (...)

[25] ...The appellant correctly identifies that the effect of [the final dollar-for-dollar order] was to create an additional liability of the husband in the sum of \$152,000, together with a corresponding asset...for the wife. That asset and liability were not extant at the time of trial, but only arose in consequence of order 18. The authorities are clear that any litigation funding order needs to be taken into account in determining the final property adjustment...The impact of order 18 ought therefore to have been taken into account...in the division of...property."

Property – add-back of post-separation livestock sale proceeds in error where husband habitually relied on them

In *Cabadas* [2019] FamCAFC 179 (11 October 2019) Kent J, sitting in the appellate jurisdiction of the Family Court of Australia, heard the husband's appeal against an equal division made by a judge of the Federal Circuit Court of a \$901,078 asset pool which included a notional \$130,176 received by the husband from the sale of livestock over the previous five years.

Kent J said (at [17]):

...[There is a] fundamental...error of notionally adding back sums of money that may have been available to a party post-separation, as a notional asset, without any necessary finding to support that approach. Here, it can be seen that the trial judge took no account of the husband's longstanding dependence upon income from livestock sales for his livelihood which continued in the post-separation period; nor did his Honour have any regard to likely business expenses or expenditure offsetting the gross livestock sales income over a five-year period between the first recorded sale in August 2013 and trial in August 2018. In short, his Honour gave no consideration to the fact that reasonably incurred expenditure by the husband, either for his own living expenses and support or for business expenses to maintain the livestock/business operation, had to be taken into account as an offset to the gross amount of livestock sales income produced over a period of some five years."

The appeal was allowed, discretion re-exercised and the adjusted pool (absent any notional add back) divided equally.

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

High Court and Federal Court casenotes

WITH ANDREW YUILE AND DAN STAR QC



High Court

Restitution – unjust enrichment – breach of contract – building contracts

In *Mann v Paterson Constructions* [2019] HCA 32 (9 October 2019) the High Court considered the application and interaction of principles of breach of contract and restitution in respect of a building contract. The appellants entered into a “major domestic building contract”, as defined by the *Domestic Building Contracts Act 1995* (Vic.) (the Act), with the respondent builder. The contract provided for progress payments to be made on completion of stages of work. As work was being done, the appellants sought 42 variations without giving written notice as required by s38 of the Act. The builder carried out the variations, also without giving written notice as required by s38. Section 38 provides that a builder is not entitled to recover for work done in respect of a variation unless notice has been given (s38(6)(a)) or the Victorian Civil and Administrative Tribunal (VCAT) is satisfied that there are exceptional circumstances or that the builder would suffer significant or exceptional hardship; and that it would not be unfair to the building owner for the builder to recover the money (s38(6)(b)). After being issued with an invoice for the variations, the appellants repudiated the contract, which was accepted, thus terminating the contract. The respondent began proceedings in VCAT seeking damages or, alternatively, moneys for work done and materials provided. VCAT found that the appellants had wrongfully repudiated the contract and that the respondent was entitled to recover for the value of the benefit conferred on the owners, being the fair and reasonable value of the work. That amount was considerably greater than if the claim had been confined to the contract. VCAT also decided that s38 did not apply to a claim for restitution and it did not need to decide whether s38 applied in this case. Appeals to the Supreme Court and to the Court of Appeal were dismissed. The High Court unanimously held that s38 did operate to limit the amount that might be recovered by way of restitution. It excluded the availability of restitutionary relief for variations other than in accordance with s38. The court also held that, for amounts not in respect of the variations, the builder could claim for amounts due for stages completed by the time of termination or for breach of contract for any uncompleted stage of the contract. A majority of the court also held that the builder was entitled to recovery by

way of restitution, in the alternative to breach of contract. However, the claimant should not be able to recover more by restitution than would have been available under the contract. Any amount recoverable in restitution should therefore be limited in accordance with the rates or overall price in the contract. Kiefel CJ, Bell and Keane JJ jointly; Nettle, Gordon and Edelman JJ jointly; Gageler J separately concurring with Nettle, Gordon and Edelman JJ. Appeal from Court of Appeal (Vic.) allowed.

Corporations law – financial assistance of company to acquire shares in the company

Connective Services Pty Ltd v Sleat Pty Ltd [2019] HCA 33 (9 October 2019) concerned the scope of s260A of the *Corporations Act 2001* (Cth). The appellant companies (Connective Companies) were incorporated in 2001. The shareholders have relevantly been the first respondent (Sleat Pty Ltd, (Sleat)), the third respondent (Millsave Holdings Pty Ltd (Millsave)) and the fourth respondent (Mr Haron). The constitution of each Connective Company contained a pre-emption clause, requiring that before a shareholder could transfer shares of a particular class, those shares had to be offered to existing shareholders. In 2009, the sole director and shareholder of Sleat, Mr Tsialtas, entered into an agreement with the second respondent (Minerva Financial Group Pty Ltd (Minerva)) for the sale of Mr Tsialtas's shares in Sleat. A second agreement was made in 2010 between Mr Tsialtas, Sleat and Minerva. In 2016, the Connective Companies began proceedings against Sleat and Minerva (also joining Millsave and Mr Haron), alleging that Sleat intended to transfer its shares in the Connective Companies to Minerva without complying with the pre-emption provision. Sleat and Minerva applied to have the proceedings dismissed or stayed. One form of relief sought was an injunction under s1324 of the Act, restraining the Connective Companies from prosecuting the pre-emption proceedings on the basis that the proceedings constituted a contravention of s260A of the Act. That provision prevents a company from providing financial assistance to a person to acquire shares in the company except if the assistance does not materially prejudice the interests of the company or its shareholders, or the company's ability to pay its shareholders. The High Court held that “Any action by the company can be financial assistance if it eases the financial burden that would be involved in the process of acquisition or if it improves the person's ‘net balance of financial advantage’”.

It extends beyond direct contributions to share price. In this case, bringing legal proceedings against Sleat was a necessary step for the vindication of the pre-emption rights of Millsave and Mr Haron. The proceedings could have been brought by Millsave or Mr Haron. If that had been done, the provision of any financial assistance by the Connective Companies would have contravened s260A. Instead, the Connective Companies, in which Millsave and Mr Haron held 66.67% of the shares, themselves commenced the proceedings, at the companies' expense. That commencement was financial assistance to Millsave and Mr Haron. And the Connective Companies had not shown that there was no material prejudice to the Connective Companies or their shareholders. Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) dismissed.

Migration – Fast Track – procedural fairness – certificates under s473GB

In *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34 (9 October 2019) the High Court held that procedural fairness did not require the Immigration Assessment Authority (IAA) to inform the applicant of a notification under s473GB(2)(b) of the *Migration Act 1958* (Cth). The appellant made an application for a protection visa that was refused by a delegate of the Minister. The application was referred to the IAA for consideration under the Fast Track regime in Part 7AA of the Act. Section 473GB applies to documents given to the Minister or the Department in confidence. Where it applies, s473GB(2)(a) obliges the Secretary to notify the IAA in writing that s473GB applies in relation to a document or information. The IAA may then have regard to any matter in the document or information and may, in certain circumstances, disclose the document or material to the applicant. In relation to reviews by the IAA, s473DA(1) provides that Div 3 of Part 7AA, with ss473GA and 473GB, “is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the [IAA]”. In this case, a s473GB notification was issued to the IAA. The IAA did not disclose to the applicant any of the documents or information in the file and did not disclose the fact of the notification. The applicant argued, relying on the decision in *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599 (SZMTA), that the failure to tell the applicant about the fact of the notification from the Secretary was a breach of procedural fairness. SZMTA concerned review

under Part 7 of the Act by the Administrative Appeals Tribunal. The High Court held that s473DA provides for a different procedural fairness obligation to that imposed under Part 7 of the Act. Section 473DA precludes an obligation equivalent to that in *SZMTA*. Further, in this case, there was insufficient evidence to infer that the IAA failed to consider exercising the discretion conferred by s473GB(3)(b) of the Act. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ jointly; Edelman J dissenting. Appeal from the Full Federal Court dismissed.

Tax law – income tax – capital expenditure – gaming machine entitlements

Commissioner of Taxation v Sharpcan Pty Ltd [2019] HCA 36 (16 October 2019) concerned whether gaming machine entitlements (GMEs) acquired by the respondent were deductible under s8-1 of the *Income Tax Assessment Act 1997* (Cth). The respondent was the sole beneficiary of the Daylesford Royal Hotel Trust. Spazor Pty Ltd, the trustee of the trust, purchased the Royal Hotel in Daylesford. The trustee did not purchase 18 gaming machines in the hotel, but received a percentage of income derived from them. In 2008, under new legislation, the trustee bid for and was allocated 18 GMEs allowing it to operate the gaming machines itself. The GMEs were paid for by instalment, with forfeiture in default. The trustee claimed the purchase price as a deduction under s8-1 of the Act, or one-fifth of the price under s40-880 of the Act. The claims were disallowed by the Commissioner. That decision was set aside by the Administrative Appeals Tribunal (AAT), which decided that the purchases were not of a capital nature and deductible. The Full Federal Court by majority dismissed an appeal from the AAT's decision. The High Court unanimously upheld an appeal. The court held it was not to the point that the price was to be recouped out of daily trading; that the purchase price may have reflected the economic value of the income stream expected to be derived; that the business was integrated and would have been prejudiced if the GMEs had not been purchased; or that a change in the law allowed the trustee to purchase the GMEs. The purpose in paying the purchase price was to acquire, hold and deploy the GMEs as enduring assets of the business for the purpose of generating income. The GMEs were also necessary for the structure of the business. Although by instalment, the purchase was in the nature of a once-and-for-all outgoing for the purchase of an enduring asset, not a regular and recurrent payment for the use of an asset. Further, the High Court held that evidence did not establish that the purpose of purchasing the GMEs was to preserve but not enhance the goodwill of the business. The value of the GMEs to the trustee was also not solely attributable to the effect that the GMEs had on goodwill. Section 40-880 of the Act did not apply. Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from the Full Federal Court allowed.

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Federal Court

Corporations law – consumer law – regulatory law – what is ‘financial product advice’, when is it ‘personal advice’ or ‘general advice’ and the duties that arise depending on which type of advice it is

Australian Securities and Investment Commission v Westpac Securities Administration Ltd [2019] FCAFC 187 (28 October 2019) is an important decision on the interpretation and application of the provisions addressing financial services and markets provided for by Chapter 7 of the *Corporations Act 2001* (Cth) (the Act). Relevantly, Division 4 in Part 7.1 concerns when a person provides a financial service. The legislation contains a significant distinction between “personal advice” or “general advice” (as defined in s766B). If only general advice is given, the primary obligations on the provider of the advice are fewer (see Pt 7.6 Div 3 and Pt 7.7 Divs 2 and 4). In contrast, where personal advice is given, there are many additional obligations in order to provide protection to the client (see Pt 7.7 Div 3 and Pt 7.7A, Div 2). This Full Court decision explores the contours of “financial product advice”, “personal advice” and “general advice”.

Facts

The appeal and cross-appeal was in respect of campaigns in 2014 and 2015 by the respondents/cross-appellants to encourage their customers to roll over external superannuation accounts into existing accounts (the BT accounts) that they held with the first respondent/cross-appellant, Westpac Securities Administration Limited (Westpac), and the second respondent/cross-appellant, BT Funds Management. The campaign comprised sending letters and making telephone calls to the customers. By the campaign, Westpac successfully increased its funds under management in the BT accounts by almost \$650 million. The heart of the appeal concerned whether Westpac's campaign (in particular by the telephone calls) involved the provision of financial product advice and, if so, whether that financial product advice should properly be characterised as personal advice or general advice. The campaign involved calls to more than 95,000 customers but ASIC's case at trial was determined on the basis of sample calls to 15 customers (although on appeal the call to one of the customers was no longer relied on).

Trial judge and main issues on appeal

In summary, the trial judge found:

Westpac's telephone communications involved the provision of “financial product advice” within the meaning of s766B(1) of the Act. Westpac's cross-appeal included this threshold issue.

This “financial product advice” in the telephone calls was “general advice” (s766B(4)), and not “personal advice” within the meaning of s766B(3) of the Act. This conclusion was the subject of ASIC's appeal.

If there was personal advice, there were contraventions of provisions such as to provide

services efficiently, honestly and fairly (s912A(1)(a)) and the duty to act in the best interests of the customers (s912B(1)). This also formed part of the cross-appeal.

In three separate judgments, the Full Court (comprising Allsop CJ, Jagot J and O'Bryan J) allowed ASIC's appeal and dismissed the cross-appeal.

Issue 1 – ‘financial product advice’

On the threshold issue, having regard to components of the definition of “financial product advice” in s766B(1) of the Act, what had to be established was that Westpac, by the telephone calls, made a “recommendation or a statement of opinion” that was intended, or could reasonably be regarded as having been intended, to influence the customer in making a decision in relation to his or her BT account.

Each of the judges held that the telephone communications amounted to financial product advice as defined in s766B(1) on the basis of there being both a “recommendation” and a “statement of opinion” as to the required matters. See Allsop CJ at [67], Jagot J at [234]-[240] and O'Bryan J at [340]-[349]. This was despite the callers not expressly making any recommendation or statement of opinion and there were marketing elements to the calls. The Full Court rejected the distinction that Westpac sought to draw between advertising/marketing, on the one hand, and advice on the other hand (Allsop CJ at [22] and [67] and Jagot J at [218]; see also O'Bryan J at [338]-[339]). Communications could involve both elements.

Issue 2 – ‘personal advice’ or ‘general advice’

Relevantly, under s766B(2), “personal advice” is financial product advice given or directed to a person where “the provider of the advice has considered one or more of the person's objectives, financial situation and needs” or “a reasonable person might expect the provider to have considered one or more of those matters”. Under s766B(4), “general advice” is financial product advice that is not personal advice.

ASIC succeeded in its appeal grounds that Westpac's campaign involved the provision of “personal advice” within the meaning of s766B(2) of the Act. See Allsop CJ at [75]-[146], Jagot J at [241]-[280] and O'Bryan J at [381]-[398]. This was despite the fact that, in each call, the caller said (following the call script) words to the effect that everything being discussed would be general in nature and wouldn't take into account the customer's personal needs.

On this key issue in the appeal, the Chief Justice summarised his conclusion at [5]: “... Westpac's attempts to have customers transfer funds from their external accounts with other superannuation funds into their BT accounts were carefully calculated to bring about this desired result by giving no more than general advice. It was marketing by telephone selling. The difficulty is that the decision to consolidate superannuation funds into one chosen fund is not a decision suitable for marketing or general advice. It is a decision that requires attention to the personal circumstances of a customer and

the features of the multiple funds held by the customer. Westpac attempted, assiduously, to get the customer to make a decision to move funds to BT without giving personal financial product advice as defined in the legislation. It failed. It gave personal advice, because when the telephone exchanges are considered as a whole and in their context, including importantly the 'closing' on the telephone by getting the decision made during the call, there was an implied recommendation in each call that the customer should accept the service to move accounts funds into his or her BT account carrying with it an implied statement of opinion that this step would meet and fulfil the concerns and objectives the customer had enunciated on the call in answer to deliberate questions by the callers about paying too much in fees and enhancing manageability..."

Each of the judges considered that there were errors in aspects of the primary's construction of elements of the statutory definition of "personal advice" in s766B of the Act. The various issues of construction were addressed by Allsop CJ at [13]-[30], Jagot J at [241]-[260] and O'Bryan J at [360]-[380].

Issue 3 – contraventions

The Full Court held that Westpac contravened a number of provisions that applied where there is personal advice. Most attention was given to the duty to act in the best interests of customers (s961B(1)) and to do all things necessary to

provide services efficiently, honestly and fairly (s912A(1)). See Allsop CJ at [147]-[176], Jagot J at [286]-[302] and O'Bryan J at [404]-[428].

The court made strong statements about Westpac's conduct. For instance, O'Bryan J said at [427]: "...Westpac took unfair advantage of that asymmetry [of knowledge] by implementing a carefully crafted telephone campaign, reinforcing in the minds of its customers an erroneous assumption that the decision to consolidate their superannuation into a Westpac fund was straightforward and was likely to generate benefits for the customer by saving fees and by reducing the burden of managing superannuation. The telephone campaign was directed to persons with whom Westpac had an existing relationship and in a real sense occupied a position of trust with respect to the customer's superannuation fund. Despite knowing that the decision was not straightforward, Westpac did not advise its customers about the matters that they should consider before deciding to consolidate their superannuation. Nor did Westpac even suggest to its customers that they reflect on the decision or seek advice about the decision. Through the campaign, Westpac pursued its own self-interest and disregarded the best interests of its customers. That conduct can rightly be described as unfair and involved a contravention of s912A(1)(a) of the Act."

The other two judges referred to calculated or systemic sharpness in the campaign's practices (at [174] per Allsop CJ and [290] per Jagot JJ).

Next steps

At the time of writing this summary, the court had not made the declarations and other orders consequential on allowing ASIC's appeal and dismissing the cross-appeal. It is apparent that the matter will need to be remitted to the trial judge for the fixing of pecuniary penalties and other matters. It will be interesting to see if Westpac and BT Funds Management seek special leave to appeal to the High Court from the Full Court's decision.

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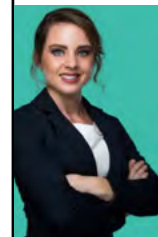
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Have a baby, they said

Amid life, law and *Groundhog Day*

BY SARAH-ELKE KRAAL

Allow myself to introduce...myself.

I'm Sarah. I'm 26 (no, wait, 37), and I enjoy complaining about my lower-back pain, quoting *The Simpsons* and *Seinfeld* at professionally inappropriate times, and eating potatoes (I just think they're neat).

I'm a lawyer – currently recovering from private practice – and I'm fairly sure I'm the world's first former-Marilyn-Monroe-impersonator-turned-solicitor. My predecessor, Sophie Monk, may have parlayed her time in the white dress and wig into millions of dollars, a season of *The Bachelorette*, and a lucrative radio gig; but I have a self-inking stamp with my name, 'Solicitor' and 'Brisbane' on it. So really, who's the bigger success here?

Anyway.

Aside from carefully cultivating my bitterness and regret, I spend my time working, taking photos of my dog sleeping, using my legal training as leverage in as many petty arguments as possible; and a little over 18 months ago, I had a baby.

Now, you're probably thinking this is going to be one of those columns that shares advice on how to have it all: the baby, the career, and the great hair that does that effortlessly cool flicky thing. And you'd be wrong. So, if you are even slightly affronted by the sight of someone barely managing their personal and professional life amidst the chaos that is wrangling a wee bairn, feel free to stop reading here.

I get it. Not everyone sees the magic in the incessant whining, whinging, and wailing (and you probably wouldn't enjoy what the baby does, either). So, long story short, I won't be offended if you stop reading. In fact, I'm going to go out on a limb and insist. Just stop. *It's not for you, Jen.*

This column may also be triggering to anyone who finds the idea behind the movie *Groundhog Day* at all distressing. Because when you think about it, parenting is basically one or more Bill Murrays forced to relive a time-loop of bottles, nappies,

Weetbix, running/tripping/pots boiling over, thwarting triple-axels off the sofa, baths, more nappies, and bed. If I'd been the one to make it to Hollywood (instead of old what's-her-name) I would have pitched it as a sequel to my mate Bill with the totally hilarious title, *I'm Flogged Day*, and become a big-shot producer. But I digress.



The moral of the story is that anyone enjoying clean clothes right now should probably go ahead and hop off the bus. Your crisp, white linen and well-rested perkiness are not welcome here.

To everyone else – top of the muffin, to you!

There's something particularly gratifying about being among others who *get it*; a special sort of solidarity that you can only sense on 3.75 hours of 'sleep' and feigning enthusiasm at light switches, a twig from the driveway, and those same two Matchbox cars all day. It's

being at work and having colleagues high-five you when that call from childcare was just about a plain old minor head injury (and not a fever, thank gawd!).

It's being at an overly upmarket shopping emporium and making the fatal mistake of letting the baby out of her pram for a few minutes to stretch her legs; of course, she'll throw a complete chazwazzer when you dare to reinsert her into the baby-torture-device-that-stops-her-from-living-her-best-life. And to say the whole process will be like squeezing ten pounds of screaming sausage into a five-pound bag would be to downplay the mortification of it all. But you know what? There will be solidarity, even there, when a perfectly groomed, middle-aged woman hears you mumble "have a baby, they said" before looking at you, looking at your combustible toddler, and commiseratively retorting "it'll be fun, they said" (#truestory).

So here I am, sacrificially offering myself up to make you feel just a little bit better about it all, too. Just a girl, standing in front of a profession, asking them to join me in my pained, sometimes victorious, but mostly embarrassing attempts at balancing all the things. We'll laugh, we'll cry, we'll binge-eat a tub of something once everyone has finally gone to bed at 7.30pm...and we'll pass out around 8.05pm adrift a harmonious white-noise symphony of bad reality TV, and the rhythmic wheezes of our senile, old dog with the unfortunate gas problem (come to think of it, those sounds are all pretty much interchangeable).

Yes, in the words of Liz Lemon: we can have it all! Especially our night cheese.

And, in the end, isn't that what it's all about?

See you next month!

Sarah-Elke Kraal is a Queensland Law Society Senior Legal Professional Development Executive.

False logic by the glass

WITH MATTHEW DUNN



“‘All wood burns,’ states Sir Bedevere. ‘Therefore,’ he concludes, ‘all that burns is wood.’ This is, of course, pure bull****. Universal affirmatives can only be partially converted: all of Alma Cogan is dead, but only some of the class of dead people are Alma Cogan.” *The Logician*, Monty Python.

There are few who would disagree with this famous Monty Python line, yet when it comes to choosing wine we have all been trained to commit similar crimes of logic without thinking by slick marketing and tricky concepts like terroir.¹

Consider the following. The Barossa makes some of Australia’s best red wines, therefore all red wines from the Barossa are good. I know, from painful experience, this is not true. The error is even more easily made in the negative: The Languedoc makes a great deal of cheap wine, therefore all wine from the Languedoc is low grade. That probably sums up the view of most informed wine drinkers, but it hides a deeper truth.

Quality is more than just an expression of place, despite the marketing spin. Quality in wine come from a wild combination of a good site, good practices in the vineyard, careful harvest, good prompt transportation of ripe fruit and thoughtful, deft winemaking followed by appropriate storage, distribution, sale and consumption. It is a far longer and more complex chain than thinking all burgundies will be great, or all Queensland wines will not.

Enter the Languedoc, a region of south-west France, sitting in the western end of the French Mediterranean. It is the largest wine-producing region in the world, with just over 245,000 hectares of vines (in Australia, the total is around 170,000 hectares).

The history of this region is an interesting one, with a tradition of high quality, destroyed by the onset of phylloxera, an inability to get immune American rootstocks to thrive, and a focus on creating bulk wine to quench the thirst of the growing working classes of the Industrial Revolution. Having said that, this expansive region is still the origin of sparkling wine in the abbeys of Limoux and home to fine Rhone varieties alongside inferior bulk red grape vines.

In the wines of this place, the falsity of logic marches strongly. Despite a focus on upgrading the quality of their product, many of the entry-level French wines available in Australia come from here.

Brands such as Arrogant Frog, JP Chenet, Paul Mas or Fat Bastard in the United Kingdom bring accessible wine to the public. But, this is not the whole story.

The Languedoc also has 33% of France’s organic vineyards and 7% of the world’s organic vineyard footprint. There are also young, passionate winemakers like Mylene Bru working a small biodynamic, five-hectare vineyard in the mountains making stunningly evocative wines. Here all the elements come together to express the best of the local varieties and give a proper sense of place.²

In many ways the view of the Languedoc is not dissimilar to that of Queensland wine, the perception is not always the truth. In both places there are passionate winemakers using their natural advantages and challenges to turn out gems. Not all that glitters is gold.

Matthew Dunn is Queensland Law Society Policy, Public Affairs and Governance General Manager.

Notes

¹ According to dictionary.com, ‘terroir’ is the environmental conditions, especially soil and climate, in which grapes are grown and that give a wine its unique flavour and aroma.

² See livingwines.com.au/wines/mylene-bru.

The tasting

The 2015 Far Ouest Appellation Coteaux du Mangedoc Controlee by Mylene Bru was the colour of violets with a complex nose of black pepper, plums and local hillside herbs. The palate was red currant leather, lively red summer fruits and a hint of Rhone chalk. The wine is a mix of the red varieties in the vineyard, mainly grenache, syrah, carignan and cinsault. The wine was alive in the glass and held a vigour that is not always apparent in French wines. It was akin to a fine Cote du Rhone with a lust for life that Iggy Pop would be proud of. A stunning example of fine wine from a place worth exploring further.



Mould's maze



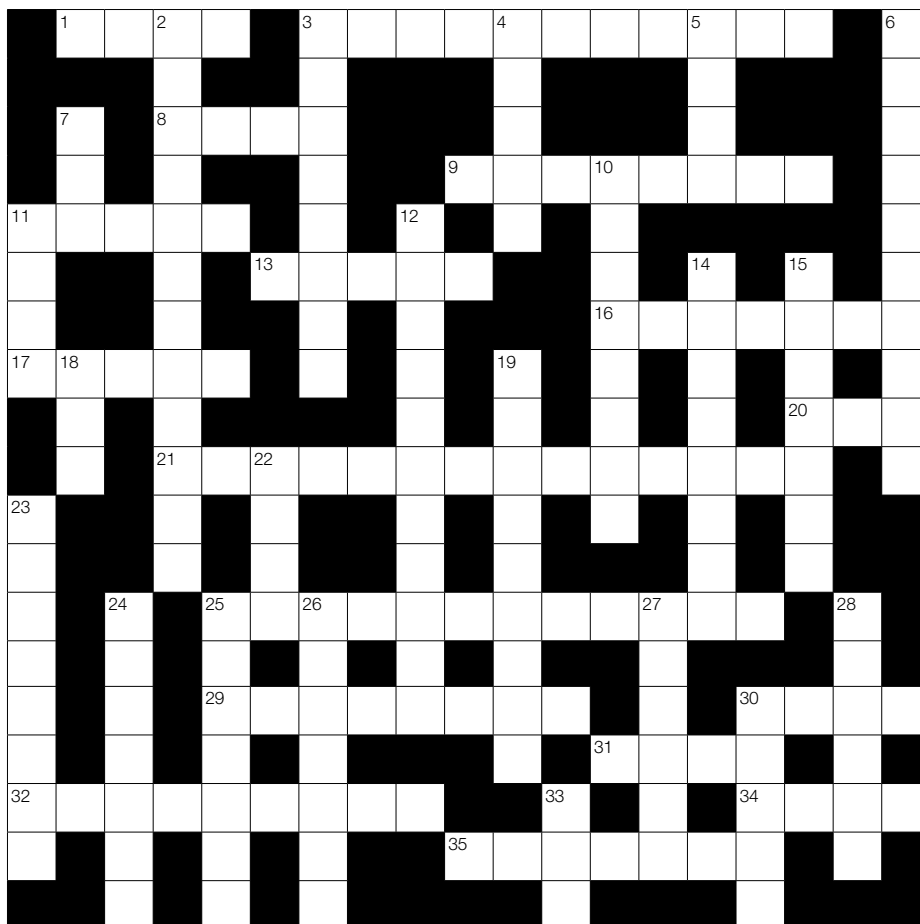
BY JOHN-PAUL MOULD, BARRISTER AND CIVIL MARRIAGE CELEBRANT | JPMOULD.COM.AU

Across

- 1 Treat the rights or duties of a company as the right or liabilities of its shareholders, pierce the corporate (4)
- 3 John Austin and Jeremy Bentham were early legal (11)
- 8 White law firms refer to old, well-established and prestigious firms. (4)
- 9 courts ignore recognised standards of law or justice. (8)
- 11 "The first thing we do, let's kill all the lawyers" is a line from Shakespeare's play VI, Part 2. (5)
- 13 Condition or proviso added to an agreement. (5)
- 16 Essential elements of a crime, *corpus* (Latin) (7)
- 17 What Colonel Jessep considers Lt Kaffee cannot handle in *A Few Good Men*. (5)
- 20 A person who deposits on a road an item. (3)
- 21 Navel-gazing. (14)
- 25 Ticket issued on the spot for regulatory offences, notice. (12)
- 29 Coheir. (8)
- 30 Figurative reference to the position of police in society as the force which holds back chaos, thin line. (4)
- 31 Draft statute. (4)
- 32 Probation and graffiti removal orders are examples of-based sentencing orders. (9)
- 34 Call given, typically three times, by a court officer to command silence and attention before an announcement. (4)
- 35 Common tactical abuse of process in cross-border disputes to defeat a jurisdiction agreement, the 'Italian'. (7)

Down

- 2 Information given by clients to their lawyers. (12)
- 3 Claims, defences and replies are examples. (8)
- 4 A Muslim man can divorce his wife by simply uttering '.....' three times. (Islam) (5)
- 5 English court established to ensure the fair enforcement of laws against prominent people that became synonymous with arbitrary abuse of power, Chamber. (Archaic) (4)
- 6 Gave official permission or approval. (10)
- 7 Loud call for the pursuit and capture of a criminal, ... and cry. (3)
- 10 Queensland's Chief Magistrate and District Court judge, Terry (8)



- 11 Author of *The Concept of Law*, H.L.A. (4)
- 12 The executive, judicial and branches are the three heads of government under the doctrine of separation of powers. (11)
- 14 Collision between a moving vessel and a stationary object. (8)
- 15 Criminal defendant. (6)
- 18 Criminal history, ... sheet. (Jargon) (3)
- 19 District Court judge who worked for a magazine in New York before appointment, Jennifer (9)
- 22 Provide a chattel as security for repayment of a loan. (4)
- 23 New York state judge Sol Wachtler famously said that district attorney had so much influence on grand juries that they could get them to indict a ham (8)
- 24 Israeli king who adjudged that a baby be cut in half to determine its true mother. (7)
- 25 Seize goods because of illegal activity. (7)
- 26 Cold calls made to encourage people to make a compensation claim. (7)
- 27 Ronald Dworkin's theory of legal interpretivism is found in his book, *Law's* (6)
- 28 Person who lends money at unreasonably high rates of interest. (6)
- 30 Payment made to compensate and appease the family of an individual who has been killed, money. (5)
- 33 Subject an accused to a final hearing. (3)

Solution on page 60

Scary wardrobes and creepy shirts

One man's view of fashion

BY SHANE BUDDEN



Neow nana neow nana neow nana neow nana neow...neow...

Those of you who can read music will of course recognise the above as the opening riff of the classic David Bowie song, *Fashion*, from his brilliant album, *Scary Monsters (and Super Creeps)*, which has been shown by scientific testing at the Smithsonian to be one of the greatest albums of all time. That same testing of course revealed that Bowie himself is the greatest artist of all time, including the future.

I realise that some people out there may not care for David Bowie, and to them I say that everyone is entitled to an opinion, and yours is wrong.

In any event, the topic of today's column is fashion (as in the trend, not the song) because I thought I would continue my decades-long streak of writing about topics about which I know nothing. Why change a winning formula?

I got to thinking about fashion because I realised that some of the clothes in my current wardrobe are somewhat out of date, in the same sense that Donald Trump's skin colour is somewhat inconsistent with any skin colour sported by any member of the human race, ever.

How out of date? Well, I have a couple of shirts in there that are older than my children, and I note one – which I admittedly have not worn for a while – that pre-dates my relationship with my wife. I am not talking about sentimental shirts here such as my t-shirt from the David Bowie concert in 1983, or my old Gerbils jersey (yes, I played rugby league for a team called the Gerbils; probably best you don't ask).

I am talking old business shirts, some of which are examples of the sorts of colours that were popular in the 1980s, possibly due to the fact that my generation grew up watching television from about a foot away, and we cannot identify colours unless they are bright enough to set off Geiger counters at 30 feet.

This is actually pretty standard male behaviour, of the kind that can often annoy non-males, such as women. Men who

can happily date a woman for six years without ever being 'ready to commit' to the relationship can nevertheless form a pretty much permanent bond to the shirt they were wearing the day Brew won the Melbourne Cup, despite the fact that due to the resulting celebration said shirt smells like the carpet of a pub TAB.

This is why, in general, men don't have much to do with fashion. For example, there is a segment in one of the Saturday papers in which a reporter stops people, photographs them and asks them what they are wearing (quick tip: don't try to replicate that activity via telephone, because it takes on a whole different angle which could have you explaining things in a more formal setting).

Mostly the reporter stops and interviews women, who respond straight away with something like: "The clutch is from Pretentious & Fatuous, the shoes are from Bianco Martimni Rubio Alexio Scipio, and the dress is from Virtue Signalio Hypocria and is made entirely of recycled wheat."

If you stopped and asked most men the same question, they would say: "...emm... I think the jeans belong to my brother, and ... umm...the shirt I found at my mate's place; the shoes are Dunlop Volleys, but the laces broke so I tied them up with wire."

I realise I am generalising here, and that many men probably do know a lot about fashion, but as is often the case when I generalise, I don't care. For most guys, fashion is important only insofar as it might improve their level of attractiveness as a potential partner.

I experienced this first-hand at my cousin's 16th birthday party, when she introduced me to her friends, who had in fact all met me before and immediately forgotten me. At the party, however, I was wearing a Crystal Cylinders t-shirt, which magically made me much more attractive for about five minutes, after which some guys in Golden Breed shirts walked in; the results were even more dramatic with Jag jeans.

Of course, the reason I can get away with having business shirts that are older than dirt is that, keenly appreciating that men don't really care, fashion designers don't bother changing men's fashion much. Almost all

men's clothing looks the same every year, and the last big shake-up in the world of fashion for men was the invention of buttons. Frankly I am surprised we aren't still walking around in mammoth skins.

This is why it is unfair that we get the rap for promoting unhealthy and impossible body weights and figures, when in reality it is the fashion industry that does this. It isn't us who watch those fashion shows in which models so thin they disappear when they turn sideways stalk sulkily up and down wearing expressions which suggest either intense contempt or gastrointestinal parasites.

Those shows are not often watched by average Aussie men. They are usually watched by the designers who designed the outfits on parade in the show, and unsurprisingly those designers applaud their own stuff and bask in the feigned approval of their peers.

Fashion designers manage to do this despite the fact that it is unclear what they actually bring to the process. It seems to those of us standing on the outside looking in, and being bored by what we see, that fashion designers don't do much. It seems they produce a 'concept', which usually looks vaguely like one of the dark spots on the surface of the moon, and hand it to a seamstress who somehow takes the vague blob and turns it in to a dress.

So we can see that the fashion industry is responsible for many bad things, and I haven't even mentioned the movie *Zoolander*, which is the most damaging thing to come out of Hollywood since actors promoted smoking as a diet initiative.

I am not going to sit idly by while the fashion industry spreads damaging stereotypes, takes credit for the work of others and creates opportunities for Ben Stiller to inflict himself on the public; I am going to make a stand; I am going to take action.

I am going to listen to *Scary Monsters* again.

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Crossword solution

From page 58

Across: 1 Veil, 3 Positivists, 8 Shoe, 9 Kangaroo, 11 Henry, 13 Rider, 16 Delicti, 17 Truth, 20 Use, 21 Omphaloskepsis, 25 Infringement, 29 Parcener, 30 Blue, 31 Bill, 32 Community, 34 Oyez, 35 Torpedo.

Down: 1 Instructions, 3 Pleading, 4 Talaq, 5 Star, 6 Authorised, 7 Hue, 10 Gardiner, 11 Hart, 12 Legislative, 14 Allision, 15 Accuse, 18 Rap, 19 Rosengren, 22 Pawn, 23 Sandwich, 24 Solomon, 25 Impound, 26 Farming, 27 Empire, 28 Usurer, 30 Blood, 33 Try.

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