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MARCH 2020

THE DIVERSITY JOURNEY

The challenge for the profession and those who navigate it

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Advocacy at full throttle

Productive start to efforts to ensure good law

The year is still young, but already our efforts to ensure good law for Queensland are proceeding at full throttle and bearing fruit.

In the first five weeks of 2020 we have made some 24 submissions and appeared at six parliamentary hearings.

We have undertaken advocacy on a variety of issues, including proposed electoral reforms and suggested changes to child sex offences.

In regard to the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019, both our Not for Profit Law and Occupational Discipline Law Committees worked on a submission that was supportive of the stated legislative objective but raised several concerns. These included an apparently unintended consequence of preventing not-for-profit organisations and charities from having a voice during election campaigns.

The Bill proposes that third parties meeting certain criteria be required to register with the Electoral Commission if they have more than $1000 'electoral expenditure' on an activity that might "influence (directly or indirectly) voting at an election". A registered third party is then subject to a significant range of compliance obligations.

Our concern is that the overall effect of this could be to stifle the voices of community and other organisations which would otherwise want their views to be known in the pre-election debate.

We also raised concern with a proposed amendment to the Bill to introduce 'strict liability' provisions for the new offences under the legislation. These proposed new offences would apply to both Ministers and local government councillors. QLS considers the new offences to be unnecessary, and we strongly oppose provisions that mean someone will commit a criminal offence in circumstances where their conduct was, for an example, a one-off administrative oversight.

As always, our advocacy has been about fairness, ensuring that legislation does not have unintended consequences, and that proposed laws do not abrogate any of the cornerstone legal principles on which our justice system is based and which allow it to work efficiently and effectively.

While being completely supportive of the important policy intent behind the proposed reforms to the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill, our concerns covered a number of provisions. These included the broad scope of the new offence for failure to report the belief of a child sexual offence. We consider this provision goes beyond the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse.

We expressed concern about proposed changes to long-established common law jury directions and called for clarity within the Bill to ensure that legal professional privilege is expressly preserved. In this instance, my thanks go to our Criminal Law Committee and QLS policy staff for their contribution to the preparation of a comprehensive submission.

It is opportune in fact to thank all of our policy committee members for the remarkable amount of voluntary work they put into preparing submissions on proposed legislation and other crucial issues.

Our advocacy work regularly bears fruit. In regard to the electoral/integrity reforms above, it appears that we have been influential as the parliamentary committee has recommended that strict liability offences not be introduced, and that further consideration be given to the impact of the Bill on third-party not-for-profit and charity organisations.

New Year Profession Drinks 2020

I'm grateful that we can balance this hard work with social, collegiate activities such as this year's New Year Profession Drinks, where despite heavy rainfall it was a pleasure to welcome more than 140 guests to a convivial evening of celebration and conversation.

I took the opportunity to congratulate special guest Chief Justice Catherine Holmes AC and also former QLS President George Fox AM on the receipt of their respective Australia Day honours. Judge Sarah Bradley AO of the District Court, former Allens partner Kenneth MacDonald and Townsville solicitor Bill Mitchell OAM were among others on the Australia Day honours list. The Society congratulates all four recipients on their respective honours.

The focus of my address on the night related to the shifting demographics of our profession and their implications. I noted that more than 60% of our young lawyers are female and that nearly 40% of QLS members are now under 35.

"The increasing youthfulness of our profession contrasts with the average age of solicitors leaving private practice, which is now 38 for males and 33 for females – this is obviously far too young and means there is an enormous loss of talent," I said.

"These demographic changes present challenges, and it is this Council's and your Society's objective to implement services that respond appropriately."

The next significant event for members is this month's QLS Symposium and the Legal Profession Dinner and Awards. Symposium includes presentations that will touch on some of the Society's responses to the shifting demographics.

The dinner and awards event is an opportunity for the Society itself to honour members of our profession for their significant contributions to our profession's work. I look forward to meeting as many of you as possible at Symposium and welcoming you to the dinner. See you there.

Luke Murphy
Queensland Law Society President

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Delving into diversity

Inclusion builds a better profession

I hope all readers enjoy this month's *Proctor* feature on diversity in the legal profession.

Reading these articles has led me to reflect on the legal industry I first joined 23 years ago, and what diversity meant then.

To be honest I don't recall much talk about diversity in the workplace in the 1990s. I remember that we didn't have social media, nor did we use email or the internet.

Diversity as we now know it was not really on the agenda. Employed in Sydney at the time with a global law firm, I do however recall working with and meeting people from all over the world – it was a real eye-opener and education working with colleagues mainly from throughout Asia, the United Kingdom, United States and Europe.

In fact I can't recall working in a more culturally and faith diverse workplace than that one – and that was more than 20 years ago.

The Diversity Council of Australia, of which QLS is a member, covers 10 diversity dimensions and topics, some of which are featured in this edition.

Our understanding of diversity and inclusion has developed significantly and matured over the last 20 years and I am pleased to have been part of the management of firms that have worked hard to gain acknowledgment, acceptance and a voice, first for gender inclusion, then flexibility and what was at the time called sexual orientation.

This maturation has come to include mental health, culture and ethnicity, First Nations people, disability, age and those impacted by domestic violence. In the past we had to develop the business case for diversity and inclusion in the workplace and eagerly consumed the emerging research that evidenced the benefits to all from employing and developing a diverse workforce and leadership.

We strived to change policies, procedures, beliefs, behaviour and culture. Thankfully, much of that research we now take for granted. But what we still need to remind ourselves of is the need to keep informed, to understand the interests, ideas and challenges that others face, that people don't automatically bring their whole or their true selves to work – and that by encouraging and facilitating diversity and inclusion everyone is better off.

The QLS staff Diversity and Inclusion Committee has made a valuable contribution to our workforce by informing us on topics that include disability and LGBTIQA+. Some of the committee's events have had our highest staff attendance rates.

We are also committed to gender equality and are working hard at QLS to achieve an Employer of Choice for Gender Equality citation from the Workplace Gender and Equality Agency. After two years of solid effort and commitment we hope to submit our nomination later this year. If we are successful, we will be the second law society in Australia to achieve this citation.

So, please enjoy the feature on diversity and inclusion, looking specifically at First Nations, LGBTIQA+ and disabilities. If you are like me, use this as an opportunity to think about what more you can do to make others feel included in the profession.

Preparing for renewals

At this time of year, we issue a reminder to members to ensure that their details are up to date. With the renewals period for practising certificates and QLS membership beginning in May, now is a good time to ensure that your QLS profile reflects any changes in your details, especially if you have changed firms or moved house.

Please log in to **qls.com.au/myqls**, where will you find that your details can be easily updated.

See you at Symposium

The other regular event at this time of year is of course our flagship professional development event, QLS Symposium 2020.

Key features include targeted streams covering personal injuries, property, family, succession, criminal and commercial law, as well as a core stream focusing on the essential learnings for a successful practice.

You will hear from the leaders of the profession, including Attorney-General and Minister for Justice Yvette D'Ath MP, Chief Justice Catherine Holmes AC and Queensland Court of Appeal President Justice Walter Sofronoff.

The Friday night, 13 March, is the legal profession's night of nights for 2020, the QLS Legal Profession Dinner and Awards.

Symposium will be held on 13 and 14 March at the Brisbane Convention & Exhibition Centre. See **qls.com.au/symposium** for full details and registration.

Also coming up this month is our annual QLS Legal Careers Expo, on 23 March at the Brisbane Convention and Exhibition Centre.

This allows Queensland legal students to explore many of the pathways that open to law graduates, meet face to face with potential employers and more. It's a very popular event and I find that many members recommend attendance to family and friends who have begun their legal journey.

Rolf Moses
Queensland Law Society CEO

The 'People's Court' turns 10

The Queensland Civil and Administrative Tribunal (QCAT) celebrated its 10th anniversary and the refurbishment of its Queen Street premises and hearing rooms on 29 January. Attendees included Queensland Governor Paul de Jersey AC, Attorney-General Yvette D'Ath, Chief Justice Catherine Holmes AC, QCAT President Justice Martin Daubney AM, District Court Chief Judge Kerry O'Brien, Chief Magistrate Terry Gardiner, and QCAT inaugural President Justice Alan Wilson. See the February edition of *Proctor* for a special feature marking the anniversary.

Solicitor appointed to Supreme Court

Queensland Law Society has welcomed the first appointment of a solicitor to the Supreme Court of Queensland in more than six years.

Brisbane lawyer Frances Williams last month became the first member of the solicitor's branch of the legal profession to be appointed to the Supreme Court Bench since August 2013.

QLS President Luke Murphy welcomed the appointment and said the Society had consistently advocated for the appointment of solicitors with considerable experience to the higher courts.

"On behalf of QLS's more than 11,000 members I would like to congratulate Justice Williams on her well-deserved appointment," Mr Murphy said. "The Attorney-General's choice is particularly worthy given Justice Williams' extensive experience in managing large-scale litigation and appeals."

The former Corrs Chambers Westgarth partner's career as a litigator includes commercial and construction disputes, competition, anti-trust and consumer protection law, Royal Commissions, regulatory investigations, inquiries and prosecutions.

The last solicitor appointed to the Queensland Supreme Court was Justice David Thomas, who was subsequently appointed a Federal Court of Australia judge in June 2017.

Justice Williams, who at the time of her appointment was the Society's Litigation Rules Committee Deputy Chair, was last year recognised by QLS for more than 25-years of dedicated and distinguished service to the law.

Attorney-General Yvette D'Ath announced Justice Williams as one of two new Supreme Court appointments – the second being eminent silk Peter Callaghan, SC.

Mr Murphy also welcomed the announcement of Justice Callaghan's elevation to the bench, saying: "Both appointments are a positive step forward to ensuring swift and effective justice for all Queenslanders through a well-resourced justice system."

Wellbeing for Tasmanian firms

QLS CEO Rolf Moses visited Tasmania in January to facilitate a workshop titled 'Leading Wellbeing in the Legal Profession', aimed at managers and supervisors and acknowledging the crucial role they play in helping to improve employees' wellbeing at work. Rolf also attended the Law Society of Tasmania's Opening of the Legal Year Dinner, where he is pictured with Law Society of NSW CEO Michael Tidball and Law Council of Australia President-elect Dr Jacoba Brasch QC.


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New *Legal Services Award 2020*

BY MARCELLE WEBSTER

The Full Bench of the Fair Work Commission, as part of the four-yearly review of modern awards, made a number of determinations on 25 November 2019, including a determination that the *Legal Services Award 2010* be replaced with a new version.

This is of importance to practitioners in the private sector as the Legal Services Award covers legal support staff, paralegals (including law clerks) and law graduates (who have not been admitted to practice) employed by private sector legal practices.

Legal Services Award 2020

The new version, the *Legal Services Award 2020*, came into operation on 4 February 2020. Accordingly, any new employment contracts (in respect of persons covered by the Legal Services Award) should refer to the new *Legal Services Award 2020* (and not the outdated *Legal Services Award 2010*).

In summary, aside from minor amendments to the wording of clauses, the most noticeable difference is that the clauses in the new award are in a different order as set out in the table opposite.

Whilst the minimum weekly rates of pay remain unchanged, the new award includes a new Schedule B which summarises, in a table format, the hourly rates of pay for employees in each classification level. Schedule C also includes a summary, in table format, of the monetary allowances payable to employees in accordance with Clause 18 of the award.

You can access a copy of the current *Legal Services Award 2020* on the Fair Work Commission website[1] or directly at fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list.

New 'annualised salaries' clause

The Full Bench of the Fair Work Commission has determined that the annualised salaries clause in the Legal Services Award will also be replaced with a new model clause.[2]

The commission intends to make the new clause effective from the start of the full pay period for employees after 1 March 2020.[3] On 23 December 2019, the commission published a draft determination setting out the wording of the new clause.

In summary, the new clause requires employers to:

1. document the annualised wage payable and the award provisions which are satisfied by the payment of the annualised salary
2. document the method of calculation of the annualised wage, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation
3. document the outer limit number of ordinary hours which would normally attract a penalty rate payment and the outer limit number of overtime hours which the employee may be required to work in a pay period without any extra payment
4. make a separate payment to the employee, in the relevant pay period, in respect of any hours that the employee works in the relevant pay period outside the outer limit hours
5. keep a record of the starting and finishing times or work and any breaks taken by each employee on an annualised wage arrangement

6. conduct a review each year (and at the time of termination) of the difference between the amount actually paid to the employee and the amount of remuneration that would have been payable to the employee under the award, and
7. pay the employee any shortfall within 14 days of conducting the review.

The draft determination can be viewed online at **fwc.gov.au/documents/sites/awardsmodernfouryr/ma000116-draft-det-awa.pdf**.

Practitioners should familiarise themselves with the draft determination as the new obligations will require practitioners (who pay award-covered staff on a salaried basis) to implement new procedures into their practice to ensure that they are able to comply when the new clause takes effect on 1 March 2020.

Practitioners in private practice who wish to be notified when the *Legal Services Award 2020* is amended can create a free account and subscribe to updates to the award using the Fair Work Commission's award update service at **fwc.gov.au/about-us/reports-publications/subscribe-updates**.

This article appears courtesy of the Queensland Law Society Industrial Law Committee. Marcelle Webster is a Special Counsel at Tucker & Cowen and a member of the committee.

Notes

[1] fwc.gov.au.
[2] [2019] FWCFB 4368 at [26].
[3] [2019] FWCFB 4368 at [31].

Description	*Legal Services Award 2020*	*Legal Services Award 2010*
Title and Commencement	1	1, 2
Definitions	2	3
National Employment Standards	3	5, 6
Coverage	4	4
Individual Flexibility Arrangements	5	7
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Annualised salaries	17	30
Allowances	18	19
Superannuation	19	23
Overtime and Penalty Rates	20	34
Shift work	21	31
Annual leave	22	35
Personal/carer's leave	23	36
Parental leave	24	–
Community service leave	25	37
Unpaid family and domestic violence leave	26	40
Public Holidays	27	38
Special conditions of employment	28	39
Consultation provisions	29-31	8-9
Termination of employment	32	11
Redundancy	33	12

WARM WELCOME TO THE NEW YEAR

More than 140 guests gathered at the Banco Court in the Queensland Elizabeth II Courts of Law on 6 February to welcome the new year and 2020 QLS President Luke Murphy. Special guest Chief Justice Catherine Holmes and QLS President Murphy both spoke on the need to recognise the importance of future lawyers and the profession's future leaders.

Photo credit: Jon Wright, Event Photos Australia

ON THE INTERWEB

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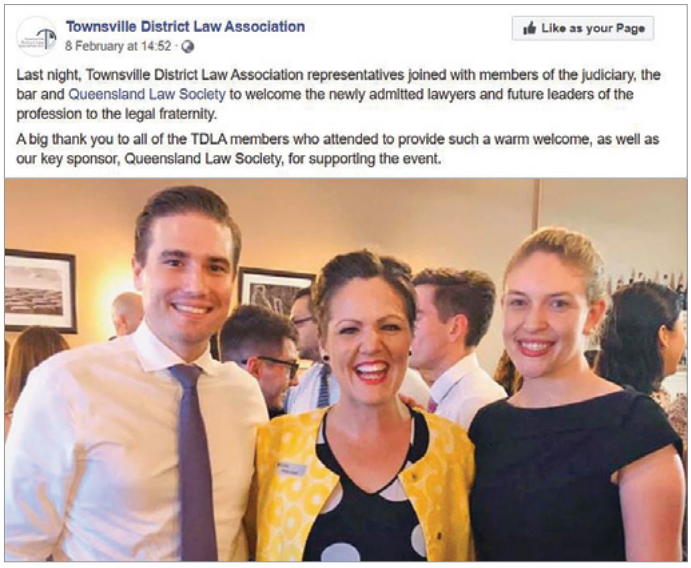

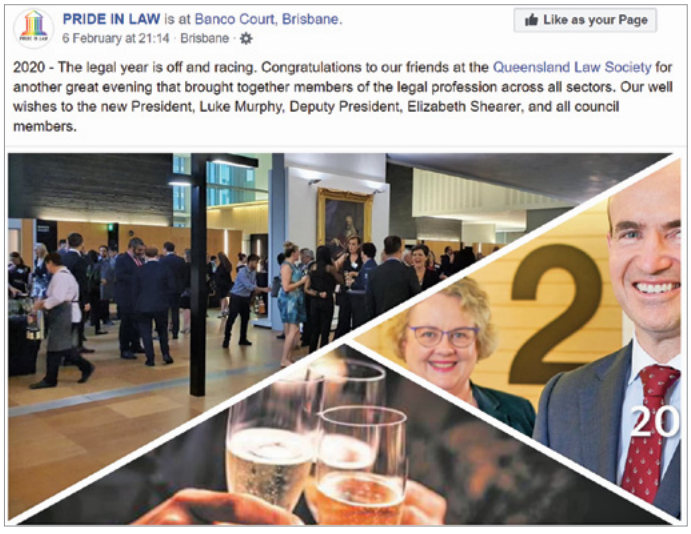

INSTAGRAM

Are your details up to date?

QLS will contact you in April to remind you to update your details ahead of practising certificate and QLS membership renewals for 2020/21. To ensure you don't miss any of these important messages, update your details today via **myQLS** or by contacting **QLS's Records & Member Services** team on 1300 367 757 or records@qls.com.au.

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Career moves

Brooke Winter Solicitors

Brooke Winter Solicitors has welcomed **Avril Cowarn** as a senior associate in family law. Avril has extensive experience in resolving a broad range of family matters, with a strong background in mediation. Avril focuses on early intervention in children and property matters.

Carter Newell

Carter Newell has announced the elevations of **Kyle Trattler** (construction and engineering) and **David Fisher** (insurance) to special counsel, **Liana Isaac** (insurance) and **Kate Martin** (insurance) to senior associate and **Rebecca Reeves** (insurance) to associate.

Kyle focuses on resolving building and construction disputes through litigation, arbitration and adjudication, and is a registered adjudicator under the *Building Industry Fairness (Security of Payment) Act*.

David focuses on commercial disputes on behalf of insurers and their intermediaries, and corporate self-insureds. He regularly provides advice to insurers on the construction, interpretation and application of all facets of directors & officers' management liability and professional indemnity policies.

Liana's experience extends to property and injury liability matters, advising a variety of Australian insurers and corporate insureds on public liability, product liability and workers' compensation claims.

Kate, who works in the firm's Sydney office, has a primary focus on professional indemnity and third party claims. Kate's broader commercial litigation expertise includes personal injury insurance matters, class actions, complex contractual disputes, general commercial disputes, and high-profile defamation actions.

Rebecca, who acts on behalf of both Australian and international clients, advises on indemnity, liability, and quantum issues in various types of public liability insurance claims including workplace incidents, 'slip and fall' incidents, product liability, injuries in sports and recreational activities, motor vehicle incidents, and property damage.

Creevey Russell Lawyers

Creevey Russell Lawyers has announced the appointment of defence lawyers **Michael Burrows** and **Craig van der Hoven**.

Michael, who was previously a partner with a Northern Territory criminal law firm, will lead the firm's 'crime and misconduct' division. Both Michael and Craig have extensive experience in criminal law.

NB Lawyers

NB Lawyers has welcomed **Zahra Rashedi** to its commercial law team. Zahra has a particular interest in helping employers with commercial transactions, shareholder arrangements and finance transactions.

Results Legal

Results Legal has welcomed **Tracy Rafferty** as senior associate to bolster its growing commercial litigation and insolvency practice. Tracy has more than 10 years' experience, having advised a wide range of public and private clients, including banks, pharmaceutical and healthcare companies, not-for-profit organisations and mining companies.

Small Myers Hughes

Small Myers Hughes has appointed two new staff and announced a promotion.

Suzie Ferguson, who has been welcomed as a special counsel in the property department, has wide experience in residential conveyancing, commercial and retail leasing, property development and contract negotiation.

Frank Dwyer has been welcomed as a special counsel in the business and commercial department. Frank is a QLS Accredited Specialist in business law with expertise in areas that include business and property contracts and transaction management, finance and securities, structuring and tax, and employment law. Frank also practises in the Japanese language.

Alesha Banner has been promoted to solicitor and is a member of the family law and commercial litigation teams. She has a particular interest in body corporate litigation, debt recovery, enforcement proceedings and alternative dispute resolution.

***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.

Become a leader worth following

BY REBECCA NIEBLER

Are you in a leadership position, or working towards this goal?

If leading others plays a role in your life, the question of what it takes to become a good (or even, better) leader has probably been on your mind. The idea of 'being a leader worth following' sounds appealing, but what does it actually mean?

How do you convince people that they should come along on a journey with you – assuming that you are looking for a sustainable approach that allows you to refrain from using threats of punishment, instilling unfounded fear or other manipulative tactics?

While a quick Google search on leadership will deliver hundreds of hits describing must-have skills and habits that will lead to greatness, admiration and success, the recommendations provided will differ greatly in clarity, feasibility and the quality of the underlying research.

An alternative approach may start with a review of personal experience: has there been a leader figure in your life you have enjoyed working for and who you have readily given your support because they had your full trust and respect?

If you can think of someone who meets this description in your professional or personal life, try to identify their actions and communication style that prompted you to accept them as a leader. How did they make you feel? Which of their qualities did you admire most?

Next, think of the exact opposite, maybe someone managing you in the past who you would rather describe as a manager to run away from. What is it that they did which gave you a 'bad vibe', made you feel fearful, angry, or doubt yourself every time you had an interaction? Why did you never feel safe around them?

Doing this mental analysis of your own past experiences may give you a good idea of what works in leadership, and what doesn't. To ensure you become a great leader, could you not just start to emulate all the good behaviours and get rid of all the bad habits you have?

While this may sound like a straightforward solution, reality is a bit more complex. Also, our blind spots can get in the way. In other words, the way we see ourselves may not match other people's perceptions of us; and on top of it, we may be completely blind to this widening chasm.

For example, we may think that we are demonstrating great leadership qualities because people eagerly nod their heads around us, never seem to have an issue with what we are doing, and we never receive any negative feedback, let alone complaints.

What could possibly be wrong or even alarming about this? While we may think this is because of our convincing arguments, clearly articulated vision and winning personality, it may in reality be a reflection of a fear-driven workplace (people believe there will be negative personal consequence if they speak up), lack of emotional commitment (people don't really care; they have lost interest and just want to get paid), or learned helplessness (people have become resigned to the fact that nothing they will say or do will ever change anything).

Eventually, we may get an idea that something is wrong when performance standards are dropping, workplace behaviours become toxic, or people start to leave. But it's too late by then – we have lost people on the way.

Another common trap many managers fall into is the idea that they should keep doing more of what they have always done, just with a bigger audience.

After all, their impressive legal expertise and strong competitive drive is what got them a promotion and responsibility for other people in the first place. Why not rely on what worked best in the past? And in their new role leading others, they focus on showcasing their impressive technical capabilities and (apparently) unrivalled ability to always come up with the best solution to the trickiest problem and the finest answer to the most difficult question – ideally before anyone else can have a go.

The problem with this approach is that this is not leadership; this is making your team watch you play the lone wolf game, while neglecting their needs and wondering why they don't clap in the end.

If you would like to learn more about transitioning from a great lawyer to a great leader, come to QLS Symposium 2020 and join our core session on 'Becoming a leader worth following'. In this session on day one, leadership expert, lawyer and author Midja Fisher and QLS Organisational Culture and Support Officer Rebecca Niebler (myself) will inspire you to take the next steps to sharpen your leadership skillset.

QLS SYMPOSIUM 2020

will be held at the Brisbane Convention & Exhibition Centre on 13 and 14 March. Register now at **qls.com.au/symposium**.

Rebecca Niebler is a Queensland Law Society Organisational Culture and Support Officer.

Mar-Apr

Here is a sample of what we have on offer.
View all our events at **qls.com.au/events**

March

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.

PS

13 -14

All Levels • 10 CPD

QLS Symposium 2020

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

Featuring our renowned, high-quality and flexible program delivered by over 70 experts. Enjoy the rare opportunity to connect with more than 450 legal professionals in one place.

PLE PM&BS PS SL

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.

18

Essentials • 1 CPD

Grow and nurture your client base

Online • 12.30-1.30pm

Aimed at those in sole and small practices, this session will give you a competitive edge by equipping you with the crucial skill to develop an effective business development plan.

PS

19

Advanced • 1 CPD

Masterclass: Professional independence

Online • 12.30-1.30pm

Join us for a conversation on professional independence, representation, risk and courage.

PLE

26 -28

Advanced • 10 CPD

Practice Management Course: Medium to large practice focus

Brisbane • 9am-5.30pm, 8.30am-5pm, 9am-1.30pm

Develop the essential skills and knowledge required to manage a successful legal practice. Learn the art of attracting and retaining clients, and how to develop a business plan and manage your practice finances in a profitable and financially sustainable way.

PLE PM&BS PS SL

April

1 -2

Foundation • 10 CPD

Introduction to conveyancing

Brisbane • 8.30am-5pm, 8.30am-3pm

Are you a junior lawyer new to this area, or are your support staff in need of training? Secure registration for this popular, practical course covering the fundamentals.

PLE PM&BS PS SL

2

Essentials • 0.5 CPD

Modern Advocate Lecture Series: Lecture one, 2020

Brisbane • 6-7.30pm

Featuring the Honourable Justice Ann Ainslie-Wallace of the Family Court of Australia, who will deliver the first presentation for the year on 'Challenges for the 21st Century advocate in the context of modern litigation'.

PLE

● Practical Legal Ethics ● Practice Management & Business Skills
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THE DIVERSITY JOURNEY

The challenge for the profession
and those who navigate it

BY LOUISE CORRIGAN

The workplace of the 1960s was in a very different era to today's world.

Rows and rows of identical desks dominated vast open spaces while the bosses' offices occupied every corner. Men paced the floors doing the 'real' work, while the under-represented females participated in stereotyped tasks such as secretary, tea lady or typist. This was your typical office environment mid-last century.

Fast forward to the new millennium and workplace culture has had a major facelift. Diversity and inclusion has become the new normal as organisations strive to balance their workforces with a mix of backgrounds and abilities.

But what does striving for diversity and inclusion in the workplace actually mean? It's more than gender quotas or tokenistic morning teas promoting one attribute of diversity or another. It's a holistic focus on encouraging all people to bring their whole selves to work, strengthening their workplace and the profession as a whole with their diverse perspectives and abilities.

The Diversity Council of Australia's Inclusion@Work survey found that inclusion is not only better for team performance but that employees working in an inclusive workplace are:

- five times more likely to be very satisfied
- two times more likely to receive regular career development
- two times more likely to have been given constructive performance feedback
- three times less likely to leave their current employer.[1]

Diversity and inclusion is high on the agenda in most organisations because of the benefits and positive impacts it delivers – greater profitability and productivity, and a happier, more engaged workforce. This means that many organisations and their human resources teams across the world are focusing on diversity and inclusion policies and consciously recruiting and working to retain a diverse mix of people to bring a range of backgrounds, perspectives and abilities.

But what about diversity and inclusion in the Queensland legal profession? We have seen our profession bridge the gender gap. Today, women make up the majority of the Queensland legal workforce. According to the 2018 National Profile of Solicitors, 51% of solicitors in Queensland are women[2] – a great achievement for the legal profession.

However, we know that diversity and inclusion is much broader than that. Gender, ethnicity, sexual preference, religion and age – all of these people with their different and complex backgrounds and abilities have rightly become part of the modern workplace and are a huge consideration in the diversity and inclusion conversation.

So where does the Queensland legal profession sit in the world of diversity and inclusivity culture? First Nations,the rainbow community and persons with a disability – how do they feel they have made their mark in a profession, which like many others, has only recently embraced the change? And what changes are still needed to build a genuinely diverse profession, with the strength and connection to our communities needed to truly serve Queenslanders in the 21st century?

From minority groups to our experienced practitioners to our law firm HR departments, everyone's path to diversity is different and it is this journey where lessons are learned. Listening to those who have already walked the path, and are currently walking the path, will provide much needed information to help us continue to mould the profession's response to diversity in an ever-changing landscape.

This month, *Proctor* brings you three very different and personal viewpoints on diversity and inclusion in the legal profession. What you'll see is that in some instances we've taken great strides - and that in others there's still a long way to go. Over the coming months, *Proctor* will cover more viewpoints from people of all walks of life and abilities and at all stages of their legal career journey as well as hearing from law firms about their own diversity journeys.

"Gender, ethnicity, sexual preference, religion and age – all... have rightly become part of the modern workplace."

Louise Corrigan is a Queensland Law Society Senior Corporate Communications Executive.

Notes

1 Diversity Council Australia (O'Leary, J and D'Almada-Remedios, R) 'DCA-Suncorp Inclusion@Work Index 2019–2020: Mapping the State of Inclusion in the Australian Workforce'. Sydney: Diversity Council Australia, 2019.

2 Urbis (2019) '2018 National Profile of Solicitors'. Sydney: Law Society of NSW, 2019.

My diversity **journey**

Breaking through the rainbow ceiling

Michael Bidwell is a young man with a huge future in front of him.

A talented and respected environment and planning lawyer at Herbert Smith Freehills, Director and Vice President Qld of Pride in Law and a rainbow community advocate, Michael has climbed and conquered many mountains.

The journey to where he is now was fraught with danger of the worst kind – indirect and direct innuendo and slurs – which had him thinking of leaving the legal profession for good. His determination to generate change – not just for him, but for everyone treading a path like him – has seen him stand up for himself and stand strong for his community in the legal profession.

In 2018, *Lawyers Weekly* conducted a survey to determine current perceptions on rainbow community inclusion within Australia's legal profession.

The survey found that 90% of respondents agreed or strongly agreed that employees who identified as part of the rainbow community could comfortably be themselves around colleagues and immediate supervisors, but when thinking about senior management, this number dropped marginally to 85%.

Also, almost half of legal professionals (44%) believed their employers could be making more of an effort in rainbow community inclusion, and two-thirds (66%) wanted the profession as a whole to do more.

Entry into the profession for Michael was a confusing and lonely time.

"I was told by a partner that my sexuality would hold back my career," Michael said. "I had to separate my personal and professional life.

"It is not easy to maintain when you know what your reality is. I couldn't bring my whole self to work. This led to depression, anxiety and a questioning of my ability to do my job."

Unfortunately, this experience is not limited to just Michael. He says 49% of rainbow community millennials are still not out at work.

"Many junior professionals feel it is a barrier to promotion – it does hold back your career," he said.

"There is always something in the media which reminds us every day that there are people against you. The assumptions that our identities are wrong, you're not masculine enough, you're not feminine enough. Because we live in a society that still questions, the barriers will be there."

For Michael professionally, it got to a point where hiding his true self was not working for him anymore. Gradually, he started coming out to some people at work – some were great, some were not.

But it was an internal work best-dressed competition that brought Michael to the crossroads. The contest was judged by loudest applause and appearing in a leopard print suit, Michael was clearly the crowd favourite and winner. However, a very public stance from one of the firm's partners saw the prize given to someone else.

"I felt isolated in a very public way," Michael said. "It wasn't directly linked to sexuality, but there was a clear purpose behind his actions. This was the very first time I saw that someone felt comfortable doing something like this and they just didn't think it was an issue to do it."

Michael thought of leaving the legal profession for good. Luckily for the profession, Michael decided to be part of the change.

"I spoke out about this behaviour to our HR team," he said. "Then a senior partner and I started the firm's rainbow community initiative."

"After we launched the initiative, a partner told me that I had saved lives because of this. Change will come from senior partners and management support of these initiatives. They should be proud allies and visible partners in change."

Michael now works at a firm where he has always been able to bring his whole self to work and which as never questioned his identity.

While Michael's journey has ended well, he is all too aware that there still is a long way to go for the rainbow community to be fully accepted in the legal profession.

"We need to educate and firms need to invest in diversity and inclusion initiatives and training. They need to make sure that everyone goes to this training, not just employees that already support the community.

"My goal is that we get society to a point of compassion and empathy. And in a work environment, we need to communicate what a baseline of equality means and what happens if people step outside those bounds."

Notes

[1] Doraisamy, J (2018) 'Law and LBGTQI rights: Where are we at' *Lawyers Weekly*, 30 May 2018.

[2] Ibid.

“I was told by a partner that my sexuality would hold back my career... I had to separate my personal and professional life.”

My diversity **journey**

Still looking for true acknowledgement

BY LINDA RYLE

In my view, every address whether to a small or large audience, delivered anywhere across the continent of Australia and its adjacent Isles, must always commence with the truthful acknowledgement that, irrespective of where we might be in situ, we accept that we continue to occupy the Stolen Lands of the First Peoples, the longest existing and surviving peoples on this planet today.

I must also pre-empt any comments I offer with the caveat that provides for my words only serving to represent my own experiences and opinions.

What obstacles you have encountered in the legal profession?

Challenges existed from the moment I began to expect and demand more for myself (and my family and the whole Aboriginal community).

The law and the frameworks of policing, justice and public service fail to understand and appropriately accommodate authentic First Nations realities. These frameworks create untold damage every day which remains unaddressed.

First Nations people are attributed roles (by outsiders) that do not align with our cultural obligations. The rules are foreign, the values weighted differently to our culture, the objectives fall short, the actors are most often self-centred (rather than community oriented) and the commentary delivered from the perspective of another (also not First Nations). The outcomes of this approach have been cosmetic, short term and generally ineffective.

In my early working days, it was made abundantly clear we needed to forsake our cultural learnings to make room for the western measures of success. Mid-career, in the public service, I began to fully appreciate that abandoning cultural identity and values created a deficit in our capability, communication and problem-solving perspectives. First Nations people are the original innovators, the first thought leaders and the great sustainers – why would the Australian mainstream not want to be a part of this?

Many of our younger generations are of the belief that to be cultural one must have been through traditional ceremony and hold sacred knowledge, story, song lines and have specific skills (law, healing, etc.) entrusted to you. Unfortunately, detrimental external impacts including stolen land, children, wealth, language and culture have created a different reality. In my view, being cultural includes the way an individual conducts themselves – their way of being, doing, interpreting, valuing.

Western society has limited (or no) understanding of the cultural expectations and the adherence to cultural principles which exist hand in hand with claiming our Indigeneity. Some First Nations people also need reminding of how this can be achieved. Government policy and legislation, corporate infrastructure and institutional mechanisms have not prioritised this inquiry.

What are the obstacles for First Nations people?

Accepting that being First Nations carries with it a heavy cultural responsibility, it is not simply percentage ownership or certified heritage. Success for First Nations is genuinely taking your brothers and sisters with you – not creating competition where it is wholly selfish, unnecessary and destructive to do so. Ensuring your wins are the successes for all your people and taking responsibility for making sure those successes are invited, respectful, actual, measured and sustainable. It is also about caring for our young people and taking responsibility for calling out destructive behaviour (when that is your role).

First Nations people need to continually seek counsel from our Elders, and respect their tenure, experience and real knowledge. Deep listening to both the words and the things they do not explicitly verbalise is required. Elders are most often not self-appointed and Eldership comes with experience and contribution rather than being determined by the western measure of a person's age.

Our people need to reset our values and start by rejecting wasteful, disingenuous, consumerist, cosmetic wealth and status as the baseline of our individual worthiness. We have defined our own measure of success through sustainable existence for over 80,000 years.

How can we support and encourage First Nations people to be part of the legal profession

The legal profession is, on the whole, a very wealthy and powerful network. Legal professionals are entrenched in the upper echelons of western democracies – politics, justice, commerce and tertiary learning. This is where decisions are made, deals are done and large sums are allocated and spent. The resources undeniably exist. It is not that the money is not available to allocate. Simply, decision-makers choose not to allocate it to First Nations self-determined advancement. This is the situation across all sectors at the highest levels.

The courage to consider that there may be a better way to progress our collective futures is in deficit supply. The fear of losing control or often even sharing some of the control is all pervading.

Too many First Nations people continue to believe that we are not as deserving as other humans on this planet. With good reason: we have not been returned country on freehold tenure, our international rights (UNDRIP) are regarded as aspirational, and many accept that a voice to parliament without the power to effect change is enough.

The promises to reset relationships have all been heard before. We have seen the many justice Inquiries, law reform reports,

Royal Commission recommendations, the Government responses which miss (inter alia) *the self-determination point* time and time again. We have a sound judiciary doing a very difficult job, but it lacks any continuing authoritative cultural intelligence support to provide the full depth of understanding . It is a given that are too few First Nations judges across this continent.

We have held our young people out to career-supporting initiatives (founded on another culture's traditional mores); we have a range of Indigenous sector practices and First Nations internships managed by non-First Nations professionals).

Many black men and women are fulfilling professional roles, forgoing adherence to their cultural principles because these principles are not valued in those environments. Despite often being the lowest paid, and with fewer years tenure, First Nations professionals (including lawyers) contribute our perspectives and our knowledge in huge volumes via forums such as volunteer committees. However, the costs of professional memberships and development are often a barrier. This means decisions that matter are frequently made in our absence. Change, therefore, is glacial.

What we need is acknowledgement that we have not achieved the outcomes we truly deserve, including real, measurable self-determined action. The profession must accept that their historical perspectives and business-as-usual modus operandi does not equate to genuine access to the legal profession and thwarts equitable access to justice for First Nations people.

This is a situation that will not alter without the courageous commitment of the profession. Many First Nations lawyers have been waiting for society to reach this point of enlightenment for some time now. Let us in, listen to our story and work equitably with us so we can fix this together…please…

"A good head and a good heart are always a formidable combination" Nelson Mandela

Linda Ryle is Executive Director at CALM (Cultural Advocacy and Legal Mediation) and is a member of Queensland Law Society's Equity and Diversity Committee. She is a proud Aboriginal woman of Birrigubba (Bowen, Queensland) and Kamilaroi (Monaro, New South Wales).

"Let us in, listen to our story and work equitably with us so we can fix this together… please…"

My diversity **journey**

Achieving ability equality in the legal profession

Dr Paul Harpur is an associate professor at the University of Queensland Law School and an accomplished lawyer, researcher and author, renowned internationally for his expertise in disability rights, equality and human rights laws, and employment, work health and safety laws.

His book, *Ableism at work: Disablement and Hierarchies of Impairments*, while not solely focusing on law, strikes at the heart of the challenges disabled people face when looking to secure employment in any endeavour. His research found:

- There is a reluctance to hire people with disabilities.
- Businesses often embrace negative attitudinal perceptions when making hiring decisions.
- When a person with a disability secures work, work processes and prejudices reduce their prospects of receiving equal opportunities.[1]

This is backed up by the Diversity Council Australia's Inclusion@Work Index 2019-2020, which found that the unemployment rate for people with disability in Australia has been almost twice that of people without disability (9% versus 5%). Moreover, Australian workers with disability consistently reported lower levels of inclusion and higher levels of exclusion that their able bodied colleagues.[2]

But what about the legal profession? Statistics around the number of people with a disability employed in the Queensland legal profession are hard to come by. But it would be fair to say that the employment rate of persons with a disability in the legal profession would mirror the Inclusion@Work Index findings.

Perhaps this is why then Australian Human Rights Commission disability discrimination commissioner Alastair McEwin told *Lawyers Weekly* in 2018 that the legal profession could do better in regards to ability equality.

"I think (law firms) are heading in the right direction, they certainly understand the law and some firms are doing very well – there's one firm with a partner who's blind," he said. "There's also a number of firms who have people who use wheelchairs or have other physical impairments.

"But while firms are very good at talking about the law, translating that into reality is not quite there."[3]

Dr Harpur also maintains that people with disabilities still confront a raft of barriers when trying to establish a career in law.

According to Dr Harpur, achieving ability equality in the legal profession centres around three areas: transition from student to professional, fitness to practice, and the strategic direction of individual law firms.

"A barrier which remains a challenge in Queensland, and indeed across Australia and internationally, is clarifying the entry requirements of the profession to people when they are deciding to study law," Dr Harpur said.

His co-authored paper with Michael Stein from Harvard Law School, 'Universities as Disability Rights Change Agents', calls for a closer working relationship between universities and professional bodies to help alleviate the barriers to entry faced by people with disabilities.

New graduates may have obtained their law degree and be ready and eager to enter the workforce, but find they are faced with physical barriers, digital barriers and negative stereotypes that hinder their transition.

In fact, students with disabilities who receive inadequate support in transitioning from education to work will have their career prospects reduced.[4]

Dr Harpur also firmly believes another barrier to entry for those with disabilities is lack of access to technology. Many persons with disabilities have assistive technology that may not work well with a firm's current or future technological systems.

"The earlier the legal profession can work with universities and students to establish fitness to practise the better all around," Dr Harpur said.

He believes law firms could be more engaged strategically with disability issues.

"A very simple and very public means of advancing ability equality in the legal profession would be for law firms to work with the Australian Human Rights Commission to adopt disability action plans."

Notes

1 Harpur, P (2019), *Ableism at work Disablement and Heirarchies of Impairment*. New York: Cambridge University Press, p10.

2 Diversity Council Australia (O'Leary, J and D'Almada-Remedios, R) 'DCA-Suncorp Inclusion@Work Index 2019–2020: Mapping the State of Inclusion in the Australian Workforce. Sydney: Diversity Council Australia, 2019.

3 Doraisamy, J (2018) 'More opportunities needed for lawyers with disabilities' *Lawyers Weekly*, 16 May 2018.

4 Harpur, P and Stein, MA, 'Universities as Disability Rights Change Agents', *Northeastern University Law Review*, vol.10, no.2, p571.

“A barrier which remains a challenge... is clarifying the entry requirements of the profession to people when they are deciding to study law.”

Lexon
INSURANCE

Cyberfraud – A serious ongoing risk

Lawyers are regularly involved in large transactions for clients and often control substantial sums of their money.

This makes them an attractive target for fraudsters, who are now using sophisticated methods to gain access to funds or property.

Practitioners who receive our risk alerts will know that cyber claims have been significantly impacting practices and their clients. Of the claim events that occurred in the last three years, cyber related claims have been valued at almost $3 million.

The emergence of cyber claims and the significant proportion of our portfolio (by value) that they now comprise means we must continue to take steps to keep the profession's claims experience as low as possible.

As well as our ongoing commitment to cyber education, Lexon is considering what other steps need to be taken to manage this risk and further announcements in this important area will be made in the near future. In the interim, we encourage practices to remain cyber vigilant.

Easy (and free) steps to take include ensuring all staff have completed the Lexon online training course, signing your practice up for one of our free cyber workshops, and downloading our law practice-specific cyber tools (available on our website).

Online services – are you covered?

The manner in which professional services are provided continues to evolve. We are seeing more and more instances of practices assessing the value and risk of online portals to deliver forms or other products to clients.

If you are considering such mechanisms, it is important to give thought to whether your interaction is more in the nature of providing a DIY solution or the sale of a pro forma document rather than the application of a practitioner's mind to a client's particular needs/expectations/capacity etc. If it is one of the former examples, then if a claim was to arise from that interaction, it may not be covered by the Lexon policy. Whilst each case will turn on its own facts, the absence of:

- a clear retainer, and/or
- the application of a solicitor's skill and knowledge to the client's specific needs and circumstances in the matter,

can give rise to a question as to whether the policy will respond.

This is because it is possible no 'legal services' (being 'work done or business transacted in the ordinary course of legal practice') have been provided. Moreover, even if 'legal services' have been provided, any embedded error in the portal leading to multiple claims of a similar nature may be subject to a single aggregated limit under the policy terms. Practitioners should carefully consider these issues when assessing any proposed online portal, automated or DIY solution.

2020/21 renewals and rates

Thank you to all practices that completed their QLS Insurance Renewal Questionnaire. The online process has been very successful and provided useful insights into the current state of the profession, which I will report on in a later edition of Proctor.

QLS and Lexon are working hard to deliver the best rates possible for 2020/21 consistent with the long-term requirements of the scheme. These rates will be announced by QLS President Luke Murphy shortly.

Top-up insurance

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

This option is available at very competitive rates and practitioners have the choice of increasing cover under the Lexon policy to either $5 million or $10 million per claim.

This offering comes with the full backing of Lexon and ensures access to its class-leading claims and risk teams in the event that you require their assistance. Further details will be provided during the renewals process.

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

Michael Young
CEO

Getting ready for the end of year

Getting ready for the end of year – practice changes (mergers, acquisitions, splits and dissolutions)

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

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

There are potentially significant financial consequences (in terms of future insurance levies and payment of excesses) which should be borne in mind when considering such changes. Because of these consequences, law practices are strongly encouraged to:

- Be familiar with the policy wording and Indemnity Rule (including Rule 10(6)) and the implications they may have.
- Contact Lexon to discuss your particular circumstances.
- Take independent legal advice where required.
- Consider contractual terms for adjustments/indemnities to provide some recourse in the future.
- Obtain a written authority and direction for Lexon to disclose the claims history and insurance history of any practice which you may be acquiring etc. Note – this will only reveal existing matters.

Lexon offers law practices what is known as an 'acquisition endorsement', which enables a practice acquiring another practice to limit the impact of new claims that arise out of closed matters previously handled by the acquired practice. The acquisition endorsement provides the following benefits:

- Such claims are excluded from any future claims loading calculations.
- The applicable excess for such claims will be that of the acquired practice (which will often be lower than would otherwise be the case).
- No deterrent excess will apply irrespective of the circumstances.

More information on the PLP concept and the acquisition endorsement can be found in detailed information sheets available on the Lexon website.

Did you know?

- The foreign law exclusion has been updated in the 2019/20 policy with coverage no longer predicated upon obtaining prior written consent from Lexon. However, practitioners must still be able to establish the work was of a type that the practice was "appropriately qualified and authorised to provide in the relevant Foreign Country". For practices that require specific confirmation ahead of transactions, the capacity to obtain a written authorisation from Lexon remains. If you would like to seek pre-approval, please complete the application form available on our website.
- During 2019 Lexon was a finalist in the insurance in-house team of the year category of the Australasian Law Awards and also the small and medium enterprise category of the RM Advancer awards. These nominations are a reflection of Lexon's ongoing commitment to providing class-leading services to the profession.
- After almost seven years of service, Paul Tully has retired as a Lexon director. Paul's pragmatic commercial insights and commitment to Lexon will be missed. In February we welcomed to the board Michael Brennan, QLS Councillor and a principal of Offermans based in Townsville. Michael practised in commercial law before becoming an insolvency practitioner and will ensure we maintain our commitment to regional Queensland.

HONOURING QUEENSLAND'S LEGAL HEROES

On 26 January 2020, the Governor-General and Chancellor of the Order of Australia, General David Hurley AC DSC (Retd), announced some 1099 awards in the 2020 Australia Day Honours List.[1]

These included some 837 recipients of awards in the General Division of the Order of Australia (five AC, 59 AO, 224 AM and 549 OAM), 26 recipients of awards in the Military Division of the Order of Australia (one AO, 13 AM and 12 OAM), and 236 meritorious awards.

Some 41.6% of recipients in the General Division of the Order of Australia are women, the highest percentage since the Australian honours system was established in 1975.

Five of the recipients are well known in the Queensland legal profession. Queensland Law Society congratulates the following people on their awards:

Chief Justice Catherine Holmes AC

Chief Justice of the Supreme Court of Queensland[2]

Chief Justice Holmes was appointed a Companion in the General Division of the Order of Australia for "eminent service to the judiciary, notably to criminal, administrative, and mental health law, and to the community of Queensland".

Her Honour was admitted as a solicitor of the Supreme Court of Queensland in 1982, and as a barrister in 1984. From 1984 to 1986 she worked as a Commonwealth Crown Prosecutor before commencing private practice as a barrister and being appointed Senior Counsel in 1999.

Her Honour was a founding member of the Women's Legal Service (1984), a member of the Anti-Discrimination Tribunal (1994–2000) and Deputy President of the Queensland Community Corrections Board (1997). Chief Justice Holmes was Counsel assisting the Forde Commission of Inquiry into Child Abuse (1998–99) and was the Commissioner of the Commission of Inquiry into the 2010–11 Queensland Floods (2011–12).

She was appointed Chief Justice in 2015, having served as a judge of the Queensland Court of Appeal from 2006. Chief Justice Holmes previously served as judge of the Queensland Supreme Court (2000–06), judge of the Queensland Mental Health Court (2000–04) and acting judge of the District Court (1999).

Sarah Bradley AO

Judge of the District Court of Queensland (retired)[3]

Ms Bradley was appointed an Officer of the Order of Australia for "distinguished service to the law, and to the judiciary, to women in the legal profession, and to the community".

Sarah Bradley AO was admitted as a solicitor of the Supreme Court of Queensland in 1978 and worked as a legal officer with the Solicitor-General's office. From 1979 to 1981 she practised as a solicitor, before commencing work with O'Dwyer and Murphy Solicitors where she was a solicitor (1982–84) and later partner (1984–1990).

Ms Bradley was a mediator with Legal Aid Queensland (1991–93), before being appointed a magistrate of the Magistrates Court of Queensland in 1993. In 1999 she was appointed a judge of the District Court of Queensland, becoming the first magistrate in Queensland to be appointed as a judge of the District Court.

She served as president of the Australian Association of Women Judges (2006–2014), member (2000–09) and chair (2009–2012) of the District Court Judges Aboriginal and Torres Strait Islander Committee, part-time member of misconduct tribunals, Criminal Justice Commission of Queensland (1990–93), and chair of the Management Committee of South Brisbane Immigration and Community Legal Service (1984–88).

Judge Bradley retired from the District Court on 30 June 2016.

John Teerds is the editor of *Proctor*.

Notes

1 See gg.gov.au/australian-honours-and-awardsaustralian-honours-lists/australia-day-2020-honours-list.

2 See sclqld.org.au/judicial-papers/judicial-profiles/profiles/cholmes.

3 See sclqld.org.au/judicial-papers/judicial-profiles/profiles/sbradley.

4 See foxbradfield.com/partners.html.

5 See linkedin.com/in/bill-mitchell-oam-949966116.

BY JOHN TEERDS

George Fox AM

Partner, Fox Bradfield Lawyers[4]

George Fox was appointed a Member in the General Division of the Order of Australia for "significant service to the law, to professional legal organisations, and to the community".

Mr Fox was admitted as a solicitor in Queensland in 1976 and completed his legal training at Feez Ruthning (now Allens). He has been a solicitor in private practice for more 30 years.

He was a member of the Queensland Law Society's disciplinary tribunal for many years, is a QLS Senior Counsellor and served as a Law Reform Commissioner in Fiji. He is a qualified mediator and arbitrator and continues to work in these areas. He has taught and presented papers on mediation and ethics at tertiary level in Australia and overseas, and is an adjunct Professor of Law at the University of Southern Queensland and Murdoch University.

His community and public administration positions include member of the Australian Tax Practitioners Board, Chair of the University of Southern Queensland Council Governance Committee and Treasurer of the Royal Agricultural Society of Queensland. Mr Fox was a board member of Lifeline for 17 years and President of the Queensland Law Society in 1992–93.

He practises in the areas of succession and estate planning, commercial and corporate services, and governance and structure advice.

Kenneth MacDonald AM

Partner, Allens Brisbane (retired)

Ken MacDonald was appointed a Member in the General Division of the Order of Australia for "significant service to the law, and to the legal profession".

Mr MacDonald was a partner in the Allens Brisbane office for more than 30 years, retiring as a partner in 2007, but remaining as a consultant until December 2016.

He led the firm's energy, resources and infrastructure practice for many years, was Queensland Practice Director from 1998 to 2007, a board member, and Chairman of the firm in 1991.

Mr MacDonald has also had a distinguished career as a director. He is Chairman of the Queensland Business Leaders Hall of Fame Governing Committee and was chairman of Highlands Pacific, Deputy Chancellor of Bond University, Deputy Chairman of the Queensland Investment Corporation and a director of companies including RiverCity Motorway group and MIM Holdings.

William (Bill) Mitchell OAM

Principal Solicitor, Townsville Community Law[5]

Bill Mitchell received a Medal (OAM) of the Order of Australia in the General Division for "service to the law in Queensland".

Mr Mitchell has written for a number of law publishers and many community legal education publications. He is currently responsible for the Human Rights chapters in the *Queensland Law Handbook* and the *Lawyers Practice Manual Queensland*.

He was Convenor of the Queensland Association of Independent Legal Services Inc. (QAILS) from 2001 to 2006 and was a member of the QAILS committee for 15 years. Bill has also worked on a number of national community legal centre policy issues and recently assisted the National Association of Community Legal Centres to write a comprehensive national Risk Management and CLC Practice Guide for the 200 centres across Australia.

He has served on several QLS committees and is panel member with the Australian Financial Complaints Authority in the Investments, Life Insurance and Superannuation division.

Mr Mitchell was awarded the Australian Human Rights Commission Law Award in 2008 for his work in promoting and advancing human rights in Australia through the practice of law. He has represented the National Association of Community Legal Centres seven times before the United Nations in New York in debates around a new Convention on the Rights of Older Persons.

He received the QLS Community Legal Centre Member of the year award for 2018–19 and the Law Council of Australia's President's Award in 2019.

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In conversation with Erin Mitchell

BY SHEETAL DEO

This month *Proctor* introduces a regular profile of members who are humanising law while shaping the next generation of the legal profession.

Erin Mitchell started her career in criminal defence with Potts Lawyers in 2011 and quickly rose to the ranks of senior criminal lawyers.

In 2017 she was recognised by *Doyle's Guide* as an Australian Leading Criminal Law Rising Star. In 2018, Erin was named a finalist for the 'Best Senior Associate' category by the *Lawyers Weekly* Women in Law Awards. Earlier this year, Erin was appointed a director of the practice.

Formal accolades aside, Erin actively engages with her professional community through various initiatives including events with the Gold Coast District Law Association, her involvement with Griffith and Bond universities, the Gold Coast Lawyers Achieving Development (GLAD) mentoring program and the Griffith University Innocence Project, which works to overturn wrongful convictions in Australia. She also has a social media following on @lady.crim.lawyers (shared alongside Potts colleagues Danielle Hanson and Shelby Smith). Erin is also happily married and fur mum to a beautiful cavoodle pup, Banjo.

How does she do it all? We sat down with Erin to learn more about her life in law and what she'd like to share with the next generation of lawyers.

SD: Thank you so much for your time today, Erin. We're grateful to have you as the first subject for our 'Lawyers of Queensland' column!

EM: Thank you so much for thinking of me, I'm so touched that you would consider me to take part.

SD: Let's get into it – you do a lot. Notwithstanding that, criminal law is an area rife with vicarious trauma, how do you 'switch off' from work, and why do you think it's important?

EM: It really helps to have friends or teammates you can talk to, rather than bottling it all up. One of the key factors is my fellow criminal lawyer/'work wife', Dani. Debriefing with her, or another colleague, is such a massive help. We carpool so by the time we're home we're switched off.

As a firm we also get together on a Friday afternoon and have a chat before we head off, which I think is really important. Also having a puppy at home to play with is a great de-stressor!

I think it's really important in all types of law, but especially so in criminal law, which is quite emotive; you have to switch off so that you can be the best version of yourself when you start the next day. Otherwise if you don't have time to clear your head, it's hard to maintain the high standard of care we aim to provide our clients.

SD: On being the best version of yourself, what advice would you give your younger self? What's something you wish you'd known or implemented earlier?

EM: I probably would've told law student Erin the case studies that we were being told to read were really important! On a more personal note, I would say have more confidence in your abilities and decisions. Since turning 30 and becoming a director, my goal has been to trust my instincts and back myself more; something you then realise that you should have tried earlier.

SD: And what advice would you give aspiring young lawyers?

EM: Find a job in a firm that makes you happy. It's so important to find that cultural fit. If you're wanting to do things slightly differently, find a firm that is open to that. For the longevity of your career, if you can find a workplace where you can enjoy even the tough days, or at the very least have someone to help you through the tough days, it will make it a lot easier.

SD: What is your approach to 'lawyering' and being a good lawyer?

EM: My approach to criminal law is not traditional in the sense that I don't adopt a default mode of being aggressive. I've learned through practice that by being true to myself and my instincts, I can support my clients as well as be an advocate for them. Whether it's dealing with clients or the other side, I think you can get a long way with real conversations and a calm, firm, professional approach, rather than aggression. The clients I've assisted appreciate that and it's given me confidence that I'm doing things the right way for me, even if it's a deviation from the stereotypical model.

Erin is a reminder that you don't have to hide, or leave part of yourself, when you start a career in law. In fact, her compassion has been key to her success both in and outside the courtroom. She has established meaningful relationships with clients and colleagues, and has learned what she needs to do to ensure she brings her best, whole self not just to work but to every day.

To find out more about Erin, follow her and the lady crim lawyers team on Instagram @lady.crim.lawyers.

Sheetal Deo is Queensland Law Society Relationship Manager – Future Lawyers, Future Leaders.

What is a rejoinder?

And when do you need one?

BY KYLIE DOWNES QC AND JANE MENZIES

The word 'rejoinder' does not appear in the *Uniform Civil Procedure Rules 1999* Qld (UCPR) or the *Federal Court Rules 2011* (Cth), but the rules accommodate the filing of a rejoinder when appropriate.

This article explains where rejoinders fit into the pleading regime in the Queensland state courts and the Federal Court, and discusses when you might need to file one on your client's behalf.

What is a rejoinder?

A rejoinder is a reply to a reply. Common law pleadings historically continued until all issues were exhaustively defined. Subsequent to a reply, a defendant would use a rejoinder to deny facts that had been first alleged in the reply or to make allegations that would deprive facts in the reply of their alleged effect.

The exchange continued until there was an issue: one side alleged a fact, the other side denied it and there was an issue of fact for the jury's determination. Pleadings beyond a rejoinder were a surrejoinder, a rebutter and a surrebutter.[1]

Australian courts no longer require issues to be so refined. Under the UCPR, allegations of fact in the last pleading before the pleadings close are deemed to be not admitted.[2] In the Federal Court, if no response is made to allegations in a defence, they are taken to be denied.[3]

Those deeming provisions have done away with the drawn out pleadings regime of old. Nonetheless, rejoinders are still seen today, usually when allegations are made for the first time in a reply.

In some states, pleadings after a reply cannot be filed without the court's leave.[4] There is no such limitation in the UCPR or the *Federal Court Rules*.

So when might you need a rejoinder? A recap of pleadings in the Queensland state courts and the Federal Court is necessary to answer this question.

Pleadings in Queensland state courts

Proceedings that involve factual disputes are commenced by a claim and a statement of claim.[5] The statement of claim sets out the facts relied on to establish the right to relief. To defend the claim, a notice of intention to defend and a defence must be filed within 28 days.[6] While a reply is not mandatory, if one is to be relied upon, it must be filed within 14 days of service of the defence unless the court orders otherwise.[7]

If a counterclaim is made, it must be included in the same document as the defence.[8] The defence to the counterclaim is called the answer and it must be filed and served within 14 days (or 28 days if the defendant to the counterclaim is a new party).[9] The party serving the counterclaim can then file and serve a reply to the answer if it wishes to do so.

In responding to a pleading, a party can plead an admission, a denial, a non-admission or another matter.[10] A denial or non-admission must be accompanied by a direct explanation of why the party believes the allegation to be untrue or cannot admit it.[11] If the explanation does not suffice, the allegation is deemed to be admitted.[12] If a fact is not admitted, that party cannot lead evidence about it at trial unless the evidence relates to another part of the pleading.[13]

The pleadings close either 14 days after service of the defence or on service of a pleading after the defence or counterclaim.[14]

Pleadings in the Federal Court

The requisite content of pleadings in the Federal Court is similar. In answering another party's pleading, every material fact pleaded by that other party must be admitted, denied or not admitted. However, two key differences between the jurisdictions are that the Federal Court does not require denials and non-admissions to be explained, and a fact that is the subject of a non-admission is taken to be denied.[15]

When damages are sought, a proceeding is started by filing an originating application[16] and a statement of claim.[17] A defence must be filed and served within 28 days after service of the statement of claim,[18] and a reply within 14 days of service of the defence.[19] Pleadings close at the end of the latest time fixed for filing a defence or reply, or other pleading between the parties.[20] A respondent may bring a cross-claim[21] which must be filed at the same time as filing the defence.[22] The cross-claim is then required to be conducted in the same way as the principal proceeding.[23]

When might a rejoinder be needed?

While silent on the matter, the UCPR and *Federal Court Rules* are cast in broad enough terms to accommodate a rejoinder.

In a pleading "subsequent to a statement of claim" (*Federal Court Rules*) or "after a defence" (UCPR), a party must plead matters that:

a. raise a new fact or issue
b. might take another party by surprise if not pleaded, or
c. mean the other party's claim (or defence) cannot be maintained.[24]

If allegations of fact in a reply give rise to any of these situations, a rejoinder may be required. That is because new facts have been alleged for the first time in the reply and the defendant has not had an opportunity to respond to those new facts.

An example of when that might happen is where a plaintiff has abided by the principle not to anticipate the defence.

By that principle, a statement of claim should only plead the facts necessary to give the plaintiff a right to claim relief. The statement of claim should not include facts that would rebut a defence that the defendant might rely on. If the defendant did not adopt the anticipated approach, the statement of claim would be left cluttered with irrelevant facts.

For this reason, the reply is the place to plead the rebutting facts. For example, it might be left to the reply to allege facts showing part performance of a contract (in response to a statute of frauds defence), removing a claim from a limitation statute, or supporting an estoppel and waiver argument.[25]

To take one of those examples, if conduct showing part performance was first pleaded in a reply in proceedings in the Queensland Supreme Court, rule 168 UCPR would deem those allegations not admitted. The practical problem presented by rule 165(2) is that the defendant might then be prevented from leading evidence at trial to disprove that conduct. Pleading a denial in a rejoinder, which would include the plea of an explanation for the denial, provides a practical solution to that problem.[26]

Form and timing

If it is necessary to prepare a rejoinder, the rules for pleadings subsequent to a statement of claim must be complied with.

There is no time limit for filing and serving a rejoinder. However, it is suggested that a rejoinder should be served as soon as possible and within 14 days of service of a reply.

Kylie Downes QC is a member of Northbank Chambers and the editorial committee of Proctor. Jane Menzies is a Brisbane barrister and reader at Northbank Chambers.

Notes

1 The Hon. John P Bryson QC, 'Common Law Pleadings in New South Wales and How They Got Here' (speech, sponsored by the New South Wales Bar Association, the Francis Forbes Society and the Selden Society, 30 August 2011) at [38]-[39].
2 UCPR, r168(1).
3 Federal Court Rules, r16.11.
4 See, for example, *Uniform Civil Procedure Rules 2005* (NSW), r14.5 and *Supreme Court (General Civil Procedure) Rules 2015* (Vic.), r14.06.
5 UCPR, rr9 and 11(a), although see rr11(b) and (c) when there is no opposing party or in urgent circumstances.
6 UCPR, rr137(1) and 139.
7 UCPR, r164(2).
8 UCPR, r179.
9 UCPR, r164(1).
10 UCPR, r165(1).
11 UCPR, r166(4).
12 UCPR, r166(5).
13 UCPR, r165(2).
14 UCPR, r169.
15 See *Federal Court Rules*, r16.07.
16 *Federal Court Rules*, r8.01.
17 *Federal Court Rules*, r8.05(1)(a).
18 *Federal Court Rules*, r16.32.
19 *Federal Court Rules*, r16.33.
20 *Federal Court Rules*, r16.12(1).
21 *Federal Court Rules*, r15.01(1).
22 *Federal Court Rules*, r15.04.
23 *Federal Court Rules*, r15.10.
24 UCPR, r150(4); *Federal Court Rules*, r16.08.
25 BC Cairns, 'A review of some innovations in Queensland civil procedure' (2005) 26 Aust. Bar Rev. 158 at 172.
26 Ibid at 172-173.

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Supporting Indigenous perspectives

QLS helps Giselle on her legal journey

BY JOSHUA APANUI

Queensland Law Society welcomes young Indigenous students who come through its doors to begin a career in law.

For Giselle Kilner-Parmenter, a proud Gumbaynggirr woman (mid-north coast of New South Wales) now based in Queensland, her experience with QLS has been very rewarding, giving her insights into the legal profession and providing pathways to gain the necessary knowledge.

"I have learnt a lot of practical skills and knowledge which I otherwise would not have obtained simply through my studies," Giselle said. "QLS has also provided me with a unique insight into different aspects of the legal profession through the LawLink program."

Giselle was inspired by all the possibilities within the legal profession, which was what led her into undertaking a law degree. A passion to help others is at the forefront of Giselle's aspirations, in particular encouraging other Indigenous people to become active in the legal profession.

"I am interested in the breadth and complexity of the law and would love to use my position to encourage other Indigenous people to study law or join the profession in some aspect," she said.

QLS is engaged in advancing reconciliation and is advocating for just and positive solutions and outcomes for First Nations people throughout Queensland. Its supportive and flexible working environment has made a significant difference with Giselle's experience, allowing her to bring her own perspectives.

"I think the landscape is changing significantly, and in particular for First Nations people," Giselle said. "There are increasingly greater opportunities for us to have our voices and perspectives heard and respected."

Where are you from?

I live on the Gold Coast, however, I am a proud Gumbaynggirr woman (from the mid-north coast of New South Wales).

What made you study law?

I have always been passionate about being in a position to help other people, and studying law is a fantastic opportunity to make a significant change. Throughout high school I participated in the AIME Mentoring program, where I visited Bond University and was mentored by current university students.

I was inspired by hearing from students about the work and subjects they had been studying and I thought it sounded like a fantastic degree in the sense that it would open up numerous pathways.

Giselle Kilner-Parmenter was named Queensland First Nations Legal Student of the Year in 2019, and received her award from then QLS President Bill Potts.

How was your experience at QLS?

I have thoroughly enjoyed my time at QLS. I am fortunate to work in an environment which has been supportive of my studies and I have found it manageable to finish my degree whilst working at QLS. It is interesting to see how the work here compliments what I have learnt though my studies.

From the day I started at QLS, I have felt accepted. I enjoy coming to work each day to be greeted by many friendly faces. The environment here is very welcoming and encourages you to involve yourself as much as possible. I have developed and honed my skills and I will be able to carry this knowledge and experience with me throughout the rest of my career.

What does the future hold for you post-graduation?

I graduated in February and am moving to Perth for a 12-month graduate program.

Has QLS provided a good insight for you of the law and legal profession?

Working at QLS has provided me with a unique insight into different aspects of the legal profession. I have appreciated the opportunity to engage with people at all levels of seniority within the profession and also from multiple disciplines.

QLS has also provided me with a unique insight into different aspects of the legal profession through the LawLink program. LawLink was one of my first introductions to QLS and I enjoyed the opportunity to meet and engage with other Indigenous law students, legal professionals and QLS members.

Joshua Apanui works at Queensland Law Society under a First Nations Cadetship and is a Reconciliation Action Plan Coordinator.

Contact decisions for children in care

The roles of Child Safety, the Childrens Court and QCAT

BY TOBY DAVIDSON

When a child is taken into the custody of the Department of Child Safety, Youth and Women (Child Safety), there is an obligation to ensure that the child has 'contact' with their parent and appropriate members of the child's family as often as is appropriate in the circumstances.[1]

This obligation is tempered in that, "the chief executive may refuse to allow, or restrict or impose conditions on, contact between the child and the child's parents or members of the child's family, if the chief executive is satisfied it is in the child's best interests to do so or it is not reasonably practicable in the circumstances for the parents or family members to have the contact."[2]

Child Safety may also restrict persons who are not the child's parents or family from having contact with the child. While the *Child Protection Act 1999* (CPA) is silent on an express power for the state to make decisions as they relate to people who are not the child's parents or family, contact with such people is treated as a day-to-day decision.

Therefore when Child Safety has custody or guardianship of a child, they have the rights and responsibilities to decide who a child spends time with.

To guide them in making contact decisions, Child Safety has produced resources that include: 'Practice Guide – Family contact for children in care'[3] and 'Family contact decisions' in the *Child Safety Practice Manual* (CSPM).[4] Interestingly, the CSPM does not make reference to the practice guide mentioned above but instead refers the Child Safety Officer to 'Practice Guide – Assessing harm and risk of harm', a document only available to Child Safety staff.

The 'Practice Guide – Family contact for children in care' is child-focused in its approach, saying that well-planned and positive family contact benefits children and young people in the following ways:

- Maintaining/building attachment and connection with family and other significant people supports a child and young person's emotional need for love, a sense of belonging, stability and continuity, and relational permanency whether or not reunification is possible.
- There is an established connection between parental contact and child well-being, self-esteem and positive identity development.[5]

The two practice guides highlight some of the many considerations taken into account by Child Safety when making contact decisions. How to determine in this context the appropriate level of contact for a child is a matter of balancing the benefits to the child of family contact against any risks associated with that contact.

What if the client disagrees with Child Safety's contact decision?

If a parent or member of the child's family, including the child, does not agree with a decision made by Child Safety in relation to the child's contact with a parent or family member, they can apply to have the decision reviewed.

The CPA creates review rights of contact decisions for a person affected by the decision to the Queensland Civil and Administrative Tribunal (QCAT).[6] QCAT has the power to, "confirm or amend the decision; set aside the decision and substitute its own decision or set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions the tribunal considers appropriate".[7]

Child Safety will be notified of the application for review by QCAT and then Child Safety will prepare a statement of reasons. Generally, QCAT will list contact review matters for a compulsory conference,[8] the purposes of which include identifying and clarifying the issues in dispute, and promoting the settlement of the dispute.

When parties are applying for a review of a contact decision, they may also apply for a stay of the contact decision.[9] In the case where a party applies for a stay of the decision, QCAT will generally list the matter for a stay hearing followed by a compulsory conference.

For a parent seeking review of a contact decision, the review right is enlivened once the decision has been made. However, if Child Safety makes a decision to restrict a person who is not a child's parent or family from having contact with the child, and issues a contact restriction letter under CPA s87, then a right to review has been found by QCAT to be enlivened by the issuing of that letter.[10]

Where court proceedings are on foot, how are QCAT's powers circumscribed?

If an application for review of a contact decision is lodged with QCAT and there is currently a child protection proceeding on foot in the Childrens Court, then in some circumstances the QCAT Member presiding over the review must suspend the QCAT review. This will occur where the Member considers "the court's decision about the matter would effectively decide the same issues being decided by the tribunal and the matters will be dealt with quickly by the court".[11]

If QCAT suspends the review, the Member must dismiss the review application after the court makes its decision, effectively deciding the matter. However if the Member is not satisfied that the matters have been dealt with by the court, then the Member can cancel the suspension and QCAT may continue to deal with the review application.[12]

If an application is to be made to the court for contact, where Child Safety's position is that the contact must be supervised, it may be useful to prepare submissions to the court on the basis that the court has the power to order unsupervised contact, or to order that contact be supervised by a person outside of Child Safety.

If those arguments are not accepted, it may then be appropriate to make submissions to the QCAT Member to cancel the suspension and continue to deal with the review application.

How the Childrens Court determines contact decisions

When an application for a child protection order is before the Childrens Court, the court is able to make an interim order about the child's contact with the child's family during the adjournment.

This power is limited in that "the court must not make an order under subsection (1)(c) requiring the chief executive to supervise family contact with the child unless the chief executive agrees to supervise the contact".[13] The power of the court to order contact that is not required to be supervised by Child Safety can extend to contact that occurs 24 hours a day, seven days a week.[14] However, there is currently another appeal on foot which may affect this precedent in the future.

The term 'family' is not defined in the CPA or the *Acts Interpretation Act 1954*. There is some assistance in the definition of 'family group', which includes: members of the child's extended family; members of the child's clan, tribe or similar group or persons recognised by the extended family or clan or tribe as part of the child's family.[15] The scope of the term 'family' will continue to be a topic for judicial interpretation.

When the Childrens Court is hearing an application for a court assessment order (CAO), the court is able to "make provisions about the child's contact with the child's family during the chief executive's custody of the child".[16] There is no legislative limit on this power as applies when the court is making interim contact orders about a child protection order (CPO).[17]

When hearing a CAO, the court does not require Child Safety's agreement to supervise any contact arrangements the court orders to occur during the CAO, although the court must consider Child Safety's views before making the order. The reason for this is that a CAO is an investigation into *whether* the child is a child in need of protection, where no prima facie findings have been made about the result of this investigation.

In comparison, for a CPO Child Safety has formed a view that the child *is* in need of protection and the Director of Child Protection Litigation has successfully argued to the court that custody to Child Safety is warranted to keep the child safe. Therefore the legislative requirement for Child Safety to agree to supervise the contact under an interim contact order should also reflect that, while there are prima facie concerns, they remain untested and so the court should be prioritising the child's safety, over the parents' desire to have unsupervised contact. Where contact is in dispute, practitioners should investigate Child Safety's reasons for resisting interim orders increasing the frequency of supervision of family contact under a CPO, which may be operational.

Legislative provisions

Practically, practitioners should be mindful of the following provision, "on the adjournment of a proceeding for a court assessment order or child protection order, the Childrens Court may make… an interim order directing a parent of the child not to have contact (direct or indirect) with the child or with the child other than when a stated person or person of a stated category is present".[18]

Practitioners should be considering this provision every time they have a CAO or CPO mention before the court, as even where interim orders are simply extended, the court is nevertheless making a decision about custody and/or contact. Advocates should turn their minds to whether interim orders remain necessary at each mention, and make submissions about them as appropriate:

- When making decisions about the child, the court must consider the safety, wellbeing and best interests of the child, both through childhood and for the rest of the child's life. [19] While considering these matters, the court must also balance them with the child's right to be protected from harm or risk of harm.[20]
- A child should be able to maintain relationships with the child's parents and kin, if it is appropriate for the child.[21]
- Additional principles for Aboriginal and Torres Strait Islander (ATSI) children that must be taken into account by the Childrens Court in making contact decisions include:
  - The long-term effect of a decision on the child's identity and connection with the child's family and community.[22] The provision of regular contact with family will often affect a child's sense of self and connection to community.
  - The child's right to 'connection' – being supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly when the child is in the care of a person who is not an Aboriginal or Torres Strait Islander person.[23]

In addition to the above principles of the Act, which guide decision making, the court is required to consider the views of the child when making any decisions about them, and in particular for this article, decisions about contact arrangements on adjournment.

The means by which a child's views are provided to the Childrens Court may vary with each proceeding, but could include the following sources: separate representative, direct representative, child advocate, social assessment report, child safety officer affidavit material, respondent parent affidavit material or discussions by the child with the Childrens Court magistrate directly in chambers or in open court.

Crafting submissions

A paper by then Federal Magistrate Slack, 'The Forensic Investigation of Child Abuse', was drafted for the Family Law Residential in 2010.This paper refers practitioners to relevant case law regarding the unacceptable risk test.

While unacceptable risk is a very important concept in child protection proceedings, in cases where the client is seeking contact with their child, the court has already determined that there is sufficient evidence on a prima facie basis for the child to be in the care of Child Safety.

The value of this paper in the context of interim contact decisions is that it sets out the issues that the court should consider when determining these matters. Practitioners should consider the following aspects of the paper in crafting submissions about interim contact orders:

"In assessing the magnitude of risk [of the proposed contact arrangements], the Court should take into account…a number of factors which include but should not be limited to:

(a) The nature and extent of the proposed contact.

(b) The other options for contact including supervised contact.

(c) The nature and quality of the safeguards, if any, proposed including the quality of the proposed supervisors.

(d) The quality of the relationship between the child and parent.

(e) The age and maturity of the child."[24]

There are more resources practitioners may wish to consider in framing submissions, for example, 'The Children's Court of New South Wales Contact Guidelines',[25] which is referred to in the 'Childrens Court Child Protection Proceedings Bench Book'.[26] The NSW guidelines involve a series of questions which may be very useful to the advocate in determining submissions regarding contact arrangements on an interim basis.

Conclusion

The legislation enshrines the right of children to maintain a relationship with their families. In determining contact arrangements, decision makers must balance the principles of the Act and assess the relevant risks.

Practitioners should turn their minds to the relevant legislation, including the principles, when considering the most appropriate submissions to be made about the safety and wellbeing of children in this jurisdiction.

This article appears courtesy of the Queensland Law Society Children's Law Committee. Toby Davidson is an Ipswich lawyer and member of the committee.

Notes

1 *Child Protection Act 1999* s87(1).
2 *Child Protection Act 1999* s87(2).
3 Accessed at cspm.csyw.qld.gov.au/resources/resource/Family-contact-for-children-in-care/00346d76-c7cb-4d92-87e0-3739e0e58ec5 on 2 January 2020.
4 Accessed at cspm.csyw.qld.gov.au/procedures/support-a-child-in-care/decision-making-for-a-child#Family_contact_decisions on 2 January 2020.
5 'Family contact for children in care, Practice Guide', Department of Communities, Child Safety and Disability Service, page 2.
6 *Child Protection Act 1999* s247.
7 *Queensland Civil and Administrative Tribunal Act 2009* s24(1).
8 *Queensland Civil and Administrative Tribunal Act 2009* s67.
9 *Queensland Civil and Administrative Tribunal Act 2009* s22(3).
10 *PJC v Department of Communities, Child Safety and Disability Services* [2017] QCAT 350.
11 *Child Protection Act 1999* s99M(2).
12 *Child Protection Act 1999* s99M(3)-(5).
13 *Child Protection Act* 1999 s68(1)(c)
14 *The Department of Communities, Child Safety v M and S* [2013] QChC 27; This kind of order means that, while Child Safety retains custody, the child may effectively live with their parent or another person.
15 *Child Protection Act* 1999 Schedule 3, Dictionary, family group.
16 *Child Protection Act* 1999 s45(1)(d)
17 Section 68(1)(c) and s68(5) combine to provide that an interim adjournment order about a CPO may only be made for Child Safety to supervise family contact if Child Safety agrees to do so.
18 *Child Protection Act 1999* s67(b).
19 *Child Protection Act 1999* s67(b).
20 *Child Protection Act* 1999 s5B(a).
21 *Child Protection Act* 1999 s5B(k).
22 *Child Protection Act* 1999 s5C(1)(b).
23 *Child Protection Act* 1999 s5C(2)(e).
24 'The Forensic Investigation of Child Abuse', Federal Magistrate Slack, Family Law Residential 2010 at paragraph 33
25 Accessed at childrenscourt.justice.nsw.gov.au/Documents/contact_guidelines.pdf on 14 March 2019.
26 Accessed at courts.qld.gov.au/__data/assets/pdf_file/0003/485274/cc-bb-childrens-court-child-protection-proceedings-benchbook.pdf on 14 March 2019.

A decade for justice

We start with four key facts

BY ELIZABETH SHEARER

At the beginning of a new decade, it's useful to review what we know about the state of access to justice in Australia.

Key fact #1 – Not enough government funding

The legal assistance sector (legal aid, community legal centres and legal services for Aboriginal and Torres Strait Islander peoples) remains chronically underfunded.

The Justice Project of the Law Council of Australia,[1] finalised in 2018, found:

- Decades of inadequate government funding have led to a situation in which 14% of the population live under the poverty line, yet legal aid representation is only available for 8% of Australians.
- Most people charged with crimes, or requiring representation in family law matters, do not qualify for legal aid grants, due to stringent means and assets tests.
- Aboriginal and Torres Strait Islander peoples experience extremely high levels of unmet legal need for criminal matters, contributing to their over-incarceration. There are also serious gaps in Aboriginal and Torres Strait Islander family and civil law services, which if unaddressed, can often escalate to criminal matters.

The costs of not funding adequate legal services have a devastating impact on individuals not able to access the legal help they need for serious legal problems, and also create pressure on courts with increasing numbers of self-representing litigants. There is also a societal cost. The Productivity Commission has found[2] that "not providing legal assistance…can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection. Numerous Australian and overseas studies show that there are net public benefits from legal assistance expenditure."

Key fact #2 – Our advocacy for more funding is constant, but success is limited

Queensland Law Society, the Law Council of Australia, and many of our members have been tireless advocates for increased funding by government for legal assistance services.

Over the past decade we have seen some success at the margins, but the chronic underfunding of the system overall remains. The Law Council has quantified this in its 2019-20 pre-Budget submission[3] as at least an additional $310 million a year comprising:

- $120 million a year for civil legal assistance services, and
- $190 million a year for other services provided by Legal Aid Commissions, raising the share of Commonwealth funding of such services to 50%.

The new decade is a time to reflect on what we need to do differently to gain more traction with our funding advocacy. This will be an ongoing discussion in the QLS Access to Justice Pro Bono Committee.

Key fact #3 – As a profession we are filling some of the gap

In this context the legal profession does a lot to fill the gap.

Many lawyers undertake legal aid work at very low rates (currently $140 per hour in family law, and less in criminal law)[4] and frequently work many more hours than they are paid for.

There is a huge amount of pro bono work done, both formally through pro bono programs in larger firms, and informally in smaller firms.

Key fact #4 – The missing middle remains a challenge

Even if we succeed in our advocacy for government funding, the problem of the 'missing middle' remains. This term is used to refer to the bulk of the population who are not eligible for legal aid but cannot afford to pay the legal costs to resolve their legal problem.

The problem is perhaps larger than it could be because people perceive that they will not be able to afford a lawyer, and so don't seek help. The Productivity Commission[5] summarised the problem as:

- People lack knowledge about whether to take action and what action to take.
- They find it hard to shop around for legal services.
- They find it hard to judge quality of legal services, and whether the service makes them better off.

Last year's Queensland Law Society campaign, 'Some things shouldn't be left to chance',[6] which informed the community about when to consult a lawyer, was a good start to overcoming these barriers.

Meeting the needs of the missing middle is a challenge for our profession in the decade ahead. It will be a focus of the work of the QLS Access to Justice Pro Bono Committee but is no doubt of broader interest to many of our members who provide services to individuals and small businesses to address everyday legal need.

The annual Access to Justice Scorecard, which seeks members' views on the state of access to justice in Queensland, will return this year, but we also welcome the views of members outside that process. If you are interested in the issues around access to justice and the work of the committee feel free to email committee chair Elizabeth Shearer at e.shearer@qls.com.au.

This article appears courtesy of the Queensland Law Society Access to Justice and Pro Bono Committee. Elizabeth Shearer is Deputy President of QLS, chair of the committee and Legal Practitioner Director at Shearer Doyle Law.

Notes

1 lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/JP%20Overarching_Themes.pdf at page 10.
2 pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf at page 30.
3 lawcouncil.asn.au/resources/submissions/2019-20-pre-budget-submission.
4 legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/Fees-and-payments/Scale-of-fees.
5 pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf at pages 8-10.
6 qls.com.au/For_the_community/Find_a_solicitor/Advice.

Could AI breach branding and competition law?

Law lags behind rapid change

BY MARIAM JABER, THE LEGAL FORECAST

Over the last few years, artificial intelligence (AI) has taken centre stage in the way we function and operate.

From interface to synthetic biology, AI has been delicately shaped and reworked to eventually embody human intelligence. From a narrow perspective, we've begun to see its emergence in driverless cars, in data analytics and medical prognosis.

At a higher level, AI has become increasingly more sophisticated, surpassing human intelligence to perform infinite tasks across multiple domains of activity. The problem therefore becomes the speed at which these technologies are surfacing.

The rapid development of AI has resulted in a global predicted investment of US$97.7bn by 2023.[1] With its increased use and prevalence, a critical question is whether existing laws provide appropriate mechanisms and statutory safeguards to redress and compensate individuals for AI-powered decisions.

What has become apparent is that, over time, and as AI becomes more complex, it will begin to test the boundaries of founded legal frameworks, which necessitates better-pronounced policy development and established guidelines that ascertain acceptable parameters for the use of AI.

What is an AI-powered decision?

Algorithms, when chained together, build AI systems like the neural networks in human brains, where data is pieced together to find an answer or perform a task. Algorithms not only save organisations and individuals time by sifting through copious material in a blink of an eye, but also build shortcuts to get computers to do whatever is required.

For example, when you open up Facebook, and you scroll through your feed, you stop for a second when you see an ad pop up for an item that you've contemplated purchasing over the last few days. That's because Facebook's nifty extension monitors (algorithms) track your interactions for patterns to provide insight into your personality and habits – what you look at, what you click on and what you type.

This process of analysing data sets when targeting consumers has become a valuable asset for companies like Facebook, Google and Amazon when it comes to determining what to show you first and how to keep engaging you with relevant content. As time passes, the algorithms behind your screen become more advanced, and the number of voices you pay attention to begins to shrink. Where the web was once a sea of search terms, the algorithmic iterations you see now are the ones you seem most comfortable with.

Branding

By this year, it is predicted that 85% of customer service interactions in retail will be powered or influenced by some form of AI technology.[2] With a large portion of product selection being removed from consumers and placed in the hands of AI, the question arises as to whether branding is considered or influenced by AI, or if AI simply focuses on price, speed of delivery and availability.[3]

When examining branding in the context of trade mark law, current and existing laws that cover an average consumer's conception of brand identity are inherently human.[4] AI does not have a memory like humans, instead a better capability and perfect recollection. With AI becoming the new average consumer, the parameters of the law will need to change in order to reflect the new retail reality.

Redefining 'competition'

A problem facing competition law under the increasing use of AI systems is collusion. Businesses are increasingly relying on AI to develop and improve their ability to innovate, respond to market conditions, and set pricing using AI systems. With the increased ability to establish pricing systems comes the risk of facilitating discrete and complex price fixing arrangements and price discrimination between buyers. AI systems are being used to develop algorithms that are set to match competitor's price changes allowing competitors to operate with a high degree of certainty. Over time, this means that pricing algorithms will develop learning capabilities to assimilate, test and understand market responses.

The algorithms may find that, in order to maintain profits, colluding with a competing algorithm may be the best solution to price setting. Despite this type of conduct mimicking what the law defines as 'collusion', the algorithms in question are not designed to elicit this conduct, nor communicate this with other algorithms.[5]

What this form of behaviour creates over time is patterns of predictability, machine-learned 'conscious parallels' that can result in higher prices and less competition. Competition regulators need to consider whether AI's potential ability to facilitate exploitation of market power means a new benchmark for illegality will need to be established under anti-trust and competition law.

Conclusion

This article has explored some potential implications for AI-powered decisions with branding and competition law. At its root, the speed at which AI has been deployed begs the question of whether current regulatory frameworks are in place to mitigate the risks that these technologies introduce to society. Are we advancing AI faster than culture and institutions, creating more complexity than certainty?

Technology, AI and robotics have developed rapidly over the last few years, bringing profound changes to all aspects of human life. Hence, it is now prudent that regulatory systems and legislative change underpin the rapid development of new technologies.

Mariam Jaber is a New South Wales member of The Legal Forecast (TLF). Thank you to Michael Bidwell for his technical and editing assistance. TLF (thelegalforecast.com) aims to advance legal practice through technology and innovation. It is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

Notes

1 IDC report on *worldwide spending on AI systems,* 4 September 2019, dc.com/getdoc.jsp?containerId=prUS45481219.

2 Lee Curtis and Rachel Patts, 'AI is coming and it will change trade mark law', *Trademark Artificial Intelligence*, hgf.com/media/1173564/09-13-AI.PDF.

3 Ibid.

4 Ibid.

5 Hennemann M (2020), 'Artificial Intelligence and Competition Law', in *Regulating Artificial Intelligence* (Wischmeyer T, Rademacher T (eds)). Springer, Cham.

Paternalism v capacity to choose

WITH CHRISTINE SMYTH

Patriarchy…is a word in modern context that often forms part of a certain expletive phrase.

It is a word that can stir emotions, as was demonstrated by the reactions to journalist Mona Eltahawy when she appeared on the ABC's *Q&A* last year. It is certainly not a word we encounter all that often in judgments. Yet a derivative of it – paternalism[1] – was a central aspect to a recent ACT guardianship decision involving a capacity assessment: *In the Matter of Pari*[2] (*Pari*).

Pari emphasises that our right to make our own decisions includes our right to make choices that others would not make. It affirms that a capacity assessment is not merely evidenced by poor choices with which better educated, psychologically sound, well-meaning and better resourced people do not agree,[3] and that the capacity assessment ought not be conflated with a best interests assessment.[4]

In *Pari*, the ACT Civil & Administrative Tribunal (the tribunal) carefully considered the importance of a vulnerable older woman's right to autonomy, the critical role of close family relationships, and the intersection with the well-meaning objectives of a number of professionals who sought to protect her from herself, utilising the ACT guardianship legislation.

Pari[5] is a 73-year-old "non-English speaking woman who needed to communicate through an interpreter".[6] Born in Afghanistan, she moved to Iran 30 years ago. Then, in "2014 Pari and her daughters, Roya aged 52 and Tela aged 48, came to Australia as refugees (Women at Risk Status)".[7] They have a highly traumatic history[8] and their experience of life in Australia included "sleeping rough" over a number of years.[9]

Pari and her daughters were close and "extremely dependent upon each other".[10] Leading a peripatetic life, at the time of the matter they were living on the streets of Canberra and were well known to local police.[11]

An incident occurred which resulted in Pari being admitted to hospital. Two social workers, concerned for Pari's welfare, "brought an application for the appointment of the Public Trustee and Guardian (PTG) as guardian and manager for Pari". At the time of the application, Pari was living in the hospital, it seems "because no one ha[d] found a suitable place to which she can be discharged".[12]

The social workers were of the view that Pari was a great risk because of her advanced age and her unwillingness to engage with support and service providers, including housing. A report provided by a Dr Choudhry found Pari was "severely malnourished, very hungry", had "poor dentition" and had "a lot of skin damage"...so that she required "full assistance with all her ADLs including showering, dressing, meal set-up and toileting".

Dr Choudhry stated that "this all points towards advanced cognitive impairment".

However, Dr Choudhry caveated his assessment as being "potentially incomplete" as a result of the "language barriers"[13].

In reaching its determination to dismiss the application, the tribunal had regard to the criteria of the *Guardianship and Management of Property Act 1991* (ACT),[14] giving careful consideration to Dr Choudhry's evidence.[15] The tribunal expressed doubt as to the conclusion to be drawn by his evidence and others that Pari probably had "advanced cognitive impairment".[16]

The tribunal expressed real doubt that Pari's "lifestyle and circumstances are a product of impaired decision-making ability",[17] concluding "that how she lives is primarily a function of her lifestyle and 'situation' in life, rather than impaired decision making-ability".[18]

The tribunal affirmed:

"There is a need for caution about…treating a poor decision as demonstrating lack of insight and poor reasoning and as supporting an inference of a cognitive impairment."[19]

The tribunal emphasised that "when making decisions about a person, the views and wishes of the person should receive paramount consideration unless doing so is likely to significantly adversely affect their interests".

Citing the binding ACT Supreme Court decision in *A v Guardianship and Management of Property Tribunal*,[20] the tribunal affirmed the court's statement about "the importance of ensuring that the proviso does not override the general rule, and to guard against paternalism or protection overriding individual autonomy".[21]

Relying on the decision of Justice Baker of the Court of Protection (England and Wales) in *KK v STCC*, the tribunal affirmed this statement:

"There is, I perceive, a danger that professionals, including judges, may objectively conflate a capacity assessment with a best interests analysis. …I remind myself again of the danger of the 'protection imperative' identified by Ryder J in Oldham *MBC v GW and PW* ([2007] EWHC136 (Fam) [2007] 2 FLR 597). These considerations underpin the cardinal rule, enshrined in statute, that a person is not to be treated as unable to make a decision merely because she makes what is perceived as being an unwise one."[22]

In Queensland, the *Guardianship and Administration Act 2000* underscores this statement, by requiring such an assessment to be approached from this perspective:

"(a) an adult's right to make decisions is fundamental to the adult's inherent dignity;

(b) the right to make decisions includes the right to make decisions with which others may not agree."[23]

On 1 January this year the *Human Rights Act 2019* (Qld) became operative.[24] Its objects are set out in section 3. Succinctly, these are to protect and promote human rights, to help build a culture in the Queensland public sector that respects and promotes human rights, and to help promote a dialogue about the nature, meaning and scope of human rights.

The Act ties in its operation with provisions of the *Guardianship and Administration and Other Legislation Amendment Act 2019* (GAOLA),[25] which are yet to commence.

GAOLA introduces two different definitions of capacity. The tests are set out in section 41 (1) to define general capacity and a specific definition of capacity to make an enduring document. Section 42(2) contains a list of factors the person must be able to understand.

GAOLA also removes the General Principles and replaces them with new principles which are more closely aligned with the United Nations Convention on the Rights of Persons with Disabilities. Relevantly, the *Human Rights Act* binds public entities such as hospitals.

Accordingly, a person or entity performing a function will be required to comply not just with this new GAOLA regime[26] but also

the newly operative *Human Rights Act*.

Neuroscience is a relatively new discipline[27] from which our understanding of cognition and the factors that impact it and the extent to which they impact it is yet to mature. It is therefore understandable that it is difficult for us all, including professionals, to distinguish between impaired decision making and the right to make choices with which others do not agree, regardless of how illogical.

It is made all the more difficult in an environment in which we are just beginning to understand the extent of elder abuse and the influence of others in taking advantage of vulnerable elderly people.

Dr Jane Lonie, in her paper 'The Cognitive Mechanics of Elder Abuse', explains that "[a]n understanding of the relationship between cognitive impairment and elder abuse is required to differentiate undue influence from supported decision making and to facilitate the selection of appropriate forms of decision-making support in cognitively impaired elderly clients".

Pari stands as a timely reminder of the necessary balance to be struck between a caring and supportive society and the risk of overreach by our institutions in a quest for neat, efficient solutions to complex problems.

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Notes

1 "The term paternalism first appeared in the late 19th Century as an implied critique predicated on the inherent value of personal liberty and autonomy, positions elegantly outlined by Immanuel Kant in 1785 and John Stuart Mill in 1859." Paternalism by Lindsay J. Thompson. britannica.com/topic/paternalism.
"Paternalism is the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm. ...At the theoretical level it raises questions of how persons should be treated when they are less than fully rational." Paternalism – *Stanford Encyclopedia of Philosophy*, first published 6 Nov 2002; substantive revision 12 Feb 2017.

2 *In the Matter of Pari (Guardianship and Management of Property)* [2019] ACAT 120.

3 *J v Guardianship and Administration Board* [2019] TASSC.

4 At [21] citing Justice Baker of the Court of Protection (England and Wales) in *KK v STCC*.

5 A pseudonym given by the tribunal at [1].

6 At [9].

7 At [3].

8 Ibid.

9 Ibid.

10 Ibid.

11 At [4]-[5].

12 At [5].

13 At [7].

14 At [17]; the provisions are similar to the *Guardianship and Administration Act 2000* (Qld).

15 At [17]-[22].

16 At [21].

17 At [22].

18 Ibid.

19 Citing and approving *J v Guardianship and Administration Board* [2019] TASSC 15.

20 At [25].

21 Ibid.

22 At [26].

23 The *Guardianship and Administration Act 2000* (Qld) Chapter 2 section 5.

24 See legislation.qld.gov.au/view/html/inforce/current/act-2019-005.

25 With relevant provisions to commence on 30 March 2020. See legislation.qld.gov.au/view/html/asmade/act-2019-009#sec.66.

26 For a broader analysis of the GAOLA, refer to Mehera Saunders' paper, 'Guardianship and Administration and Other Legislation Amendment Act 2019', changes to powers of attorney/guardianship legislation' presented at a Sunshine Coast DLA seminar on 28 January.

27 'The Emergence of Modern Neuroscience: Some Implications for Neurology and Psychiatry' – *Annual Review of Neuroscience*, Vol. 23:343-391 (Volume publication date March 2000) W. Maxwell Cowan, Donald H. Harter and Eric R. Kandel.

High Court and Federal Court casenotes

WITH ANDREW YUILE AND DAN STAR QC

High Court

Criminal law – murder – case based on circumstantial evidence – unreasonable verdict

In *Fennell v The Queen* [2019] HCA 37 (Orders 11 September 2019; reasons 6 November 2019) the High Court quashed the appellant's conviction on the basis that it was not open to the jury to be satisfied of his guilt. Mr Fennell was convicted of the murder of Ms Liselotte Watson in her home in a small community on Macleay Island. The Crown case was entirely circumstantial, relying on a window of opportunity and Mr Fennell's access to Ms Watsons' house; motive (he knew Ms Watson had cash in her house, he had been stealing from her to service gambling debts, and he didn't want her to find this out); and other matters said to be inculpatory. The most significant "other matter" was evidence from a Mr and Mrs Matheson purporting to identify a hammer that was the likely murder weapon as one they had given the appellant many years before. The jury convicted and the Court of Appeal dismissed an appeal, finding that the motive and opportunity evidence were sufficient and the evidence of the Mathesons could be taken as convincing proof of his link to the murder. The High Court held that the Crown case on motive and opportunity was extremely weak. The relevant window for the alleged murder was very small and required assumptions contradicted by other evidence. On motive, the appellant was in no different position to other residents of Macleay Island. Further, Mr Fennell's gambling habits had not changed, but he was not in debt and ahead on mortgage repayments. A search of the appellant's home found nothing to link him to the murder. None of his DNA or fingerprints were at the crime scene and he was excluded as a DNA contributor to a bag found with the hammer. Finally, the evidence of the Mathesons was glaringly improbable and should have been given such little weight that it was barely admissible. In light of all of these matters, it was not open on the evidence for the jury to be satisfied of Mr Fennell's guilt. Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from Court of Appeal (Qld) allowed.

Constitutional law – Ch.III – principles from *Kable* and *Kirk* – preventative control orders

In *Vella v Commissioner of Police (NSW)* [2019] HCA 38 (6 November 2019) a majority of the High Court upheld the validity of s5(1) of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) (SCPO Act). Sections 5 and 6 of the SCPO Act empower the District Court or the Supreme Court of NSW to make "civil preventative orders" that can restrain the liberty of an individual, including without proof of the commission of an offence by that individual. The plaintiffs were the object of orders sought in the Supreme Court, seeking to restrain and prohibit them from associating with persons involved in outlaw motorcycle gangs, attending the premises of such gangs, travelling in a vehicle in certain periods except in case of emergency, and possessing more than one mobile phone. Section 5 was challenged on the basis of the principles developed from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 – incompatibility with the institutional integrity of the relevant courts. The majority identified six steps to be satisfied before power to make a preventative order was enlivened. The majority noted previous decisions of the court holding that other preventative order regimes dealing with possible terrorist acts, sexual offenders and criminal acts do not infringe the *Kable* principles. The majority held that the SCPO Act gives courts substantial judicial discretion in respect of making orders and their content. The courts were not enlisted by the executive. The challenge based on judicial power was contrary to history and prior authority. And there was nothing antithetical to the judicial process in open-textured legislation establishing broad principles to be developed and applied by courts. To the contrary, if such powers are to exist, it is desirable that they be exercised by courts with broad discretions. Bell, Keane, Nettle and Edelman JJ jointly; Kiefel CJ separately concurring; Gageler J and Gordon J each separately dissenting. Answers to Questions in Special Case given.

Proceeds of crime – forfeiture of tainted property – proceeds or instruments of offending – third party acquisition

Lordianto v Commissioner of the Australian Federal Police; Kalimuthu v Commissioner of the Australian Federal Police [2019] HCA 39 (13 November 2019) both concerned whether money held in bank accounts had ceased to be the proceeds of crime or the instrument of an offence under s330(4)(a) of the *Proceeds of Crime Act 2002* (Cth) (POCA). The appellants were involved in a money laundering scheme known as 'cuckoo smurfing', in which a person offshore asks a remitter to transfer funds to Australia. The remitter withholds the money, while in Australia associates deposit money into the transferee's account, in amounts beneath a reporting threshold of $10,000. In both cases, the commissioner obtained orders under s19 of the POCA restraining the funds in bank accounts of the appellants, on the basis that they were the proceeds of crime or instruments of offending. The relevant offences were structuring offences contrary to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). The appellants later sought to have excluded from the restraining order choses in action in respect of the bank accounts (being the entitlement to require the banks to pay out the money to the appellants' credit in the accounts). The appellants in both cases conceded that the "property" had been the proceeds of crime or an instrument of offending, but argued that it had ceased to have that character. They argued that the property had been acquired by a third party for sufficient consideration, without the third party knowing that the property was the proceeds or instrument of an offence, pursuant to s330(4)(a) of the POCA. The High Court considered the proper interpretation of s330(4)(a), holding that the section must be read as a whole and not as a series of isolated elements. Section 330(4)(a) provides a limited exclusion, in many cases similar to the inquiry about bona fide purchaser for value without notice. After considering the matters to be satisfied in s330(4)(b), the court held – unanimously in respect of the appellant in the *Lordianto* appeal and the first appellant in the *Kalimuthu* appeal; and by majority in respect of the second appellant in the *Kalimuthu* appeal – that the appellants had failed to discharge the onus to meet the section's requirements. Kiefel CJ, Bell, Keane and Gordon JJ jointly; Edelman J separately concurring in respect of *Lordianto* and the first appellant in *Kalimuthu*, and dissenting in respect of the second appellant in *Kalimuthu*. Appeals from the Court of Appeal (NSW) and Court of Appeal (WA) dismissed.

Criminal law – Crown appeal against sentence – procedural fairness – public interest immunity

HT v The Queen [2019] HCA 40 (13 November 2019) concerned procedural fairness to an accused in circumstances where a confidential

summary of assistance was provided to the court but not to the accused on grounds of public interest immunity (PII). The accused pleaded guilty to 11 counts of fraud each with maximum penalties of five or 10 years' imprisonment. The offending was found to be very serious with a high level of moral culpability. By s23(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), one matter the sentencing judge had to take into account was assistance given to law enforcement. The accused was a registered informant and had provided significant assistance. Before the sentencing judge, the Crown gave the accused's counsel a choice between producing a much shorter (inferentially less beneficial) document outlining the accused's assistance that the accused could see, and a longer (inferentially more beneficial) statement that would be provided only to the court. Counsel chose the latter. A confidential exhibit was given to the judge setting out the assistance. The judge gave the accused a discount of 35% of which 15% was identified as for her guilty plea. She was sentenced to three years and six months' imprisonment, with a non-parole period of 18 months. The Crown appealed the sentence. On appeal, counsel for the accused sought access to the confidential exhibit. The Court of Appeal took the document into account but upheld a claim of PII over the exhibit made by the police (supported by the Crown) to prevent access for the accused. The court increased the discount for assistance to 40%, but re-sentenced the accused to six years and six months' imprisonment, with a non-parole period of three years and six months. The High Court held unanimously that the accused had been denied procedural fairness in the Court of Appeal. By being denied access to the exhibit, she was denied a reasonable opportunity to be heard. PII did not justify the denial of procedural fairness. That doctrine, where it applies, excludes material from being admissible. Where necessary, orders can be tailored to meet the demands of sensitive evidence. However, PII does not allow for material to be admitted into evidence but kept confidential from an accused. No other sources of power sought to be relied on justified that position. Further, the Crown had an obligation to place all relevant material before the court. Where sensitivities arose, tailored orders might be made. In the circumstances, the court set aside the orders of the Court of Appeal and reinstated the orders of the trial judge. Kiefel CJ, Bell and Keane JJ jointly; Nettle and Edelman JJ jointly concurring; Gordon J separately concurring. Appeal from the Court of Criminal Appeal (NSW) allowed.

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Federal Court

Corporations law – false, misleading or deceptive conduct – contraventions of s1041H of the *Corporations Act 2001* (Cth) and ss12DA(1) and 12DB(1)(i) of the *Australian Securities and Investments Commission Act 2001* (Cth)

In *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* [2019] FCA 1932 (22 November 2019) the court found for the regulator (ASIC) in its case against a financial services advice business (Dover) alleging that its "Client Protection Policy" was "misleading or deceptive" or "likely to mislead or deceive" within the meaning of s1041H of the *Corporations Act 2001* (Cth) (Corporations Act) and s12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and a "false or misleading representation" within the meaning of s12DB(1)(i) of the ASIC Act (at [115]). Central to the case was the introductory clause to the Client Protection Policy which stated: "Dover's Client Protection Policy sets out a number of important consumer protections designed to ensure every Dover client gets the best possible advice and the maximum protection available under the law..."

O'Bryan J summarised his decision at [3]: "... the title of that document was highly misleading and an exercise in Orwellian doublespeak. The document did not protect clients. To the contrary, it purported to strip clients of rights and consumer protections they enjoyed under the law. Some 19,402 clients of Dover's authorised representatives were provided with the Client Protection Policy in conjunction with a statement of advice."

The judgment contains a convenient recent summary of the applicable principles concerning the statutory prohibition of misleading or deceptive conduct (and closely related prohibitions) in the Australian Consumer Law, the Corporations Act and the ASIC Act (at [98]-[101]).

Practice and procedure – requirements in preliminary discovery application

In *Gold Coast Marine Aquaculture Pty Ltd v HTC Trading Pty Ltd* [2019] FCA 1995 (27 November 2019) the court granted the applicant's application for preliminary discovery pursuant to Rule 7.23 of the *Federal Court Rules 2011*, which concerns discovery from a prospective respondent, against the respondent and a Commonwealth department.

There are three elements to rule 7.23, namely: (1) a reasonable belief that it may have the right to obtain relief from the prospective respondent (7.23(1)(a)) (2) after making reasonable inquiries, it does not have sufficient information to decide whether to start a proceeding (7.23(1)(b)) and (3) a belief that the prospective respondent has relevant documents that would assist (7.23(1)

(c)). The court relied on the scope and operation of Rule 7.23 as explained in *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193; 257 FCR 62 (*Pfizer*). At [30], Anastassiou J adopted what Allsop CJ stated in *Pfizer* at [121], namely: "In practice, to defeat a claim for preliminary discovery it will be necessary either to show that the subjectively held belief does not exist or, if it does, that there is no reasonable basis for thinking that there may be (not is) such a case. Showing that some aspect of the material on which the belief is based is contestable, or even arguably wrong, will rarely come close to making good such a contention. Many views may be held with which one disagrees, perhaps even strongly, but this does not make such a view one which is necessarily unreasonably held..."

Costs – costs in preliminary discovery application

In *Autosports Castle Hill Pty Ltd v Altitude Brighton Pty Ltd* [2019] FCA 2065 (9 December 2019), one day before the hearing of an application for preliminary discovery pursuant to Rule 7.23 of the *Federal Court Rules 2011*, the respondent agreed to provide the discovery sought. Yates J noted that the court's jurisdiction to order preliminary discovery is an extraordinary one and that a successful prospective applicant has no automatic entitlement to an award of costs in its favour (at [21]). However, in the circumstances, the court concluded that a costs orders should be made in favour of the applicant against the respondent (at [22]).

Evidence – privileges against self-incrimination and against exposure to penalties in relation to discovery by a one-person company

In *Meneses v Directed Electronics OE Pty Ltd* [2019] FCAFC 190 (1 November 2019) the Full Court considered a claim by the sole director and shareholder of a company that he is entitled to invoke the privilege against self-incrimination and the privilege against self-exposure to penalties (the penalty privilege) to resist an order for production of documents.

The underlying proceeding was brought by Directed Electronics OE Pty Ltd (Directed OE) against a number of respondents. Directed OE is an Australian automotive electronics developer and supplier. In summary, Directed OE alleged that Mr Meneses dishonestly arranged for his own company, OE Solutions Pty Ltd (OE Solutions), to be an intermediary in the supply of goods by another party to Directed OE, and dishonestly charged marked-up prices to Directed OE. There are many causes of action alleged against OE Solutions and Mr Meneses (the Meneses parties). The claims include breaches by Mr Meneses of duties under ss182 and 183 of the *Corporations Act 2001* (Cth), which are civil penalty provisions: s1317E.

On the ex parte application of Directed OE, the docket judge made a search order as authorised by Division 7.5 of the *Federal Court Rules 2011* (Cth) directed to various persons, including Mr Meneses and OE Solutions. The order made specific provision for the preservation of claims to privilege against self-incrimination and the penalty privilege. In accordance with the process that followed execution of the search order, the Meneses parties made discovery by filing a joint list of documents verified by an affidavit of Mr Meneses in which the Meneses parties objected to production of numerous documents on the grounds of privilege against self-incrimination and the penalty privilege. Directed OE challenged those claims for privilege. A separate judge heard that dispute and held that the Meneses parties' claims to privilege should be refused. This was the subject of the application for leave to appeal.

The court explained the commonalities and differences between the privilege against self-incrimination and the penalty privilege (at [84]-[90]). By operation of s187 of the *Evidence Act 1995* (Cth), which reflects the Australian common law, both privileges are not available to corporations that are called on to produce documents in proceedings in the court (at [91]). The Full Court discussed at length cases addressing the complexities that arise in relation to one-person companies (at [92]-[120]), including the United States authorities, some of which have been referred to by the High Court (at [121]-[148]).

The court granted leave to appeal and held that the appeal should be allowed. The errors of the primary judge included ordering an individual who is himself or herself at risk of prosecution or the institution of proceedings for a civil penalty to produce the relevant documents on behalf of a company. Insofar as the US cases suggested that an act of production by a director of a company is merely an act as agent for the company, the Full Court said those cases did not reflect Australian law (at [152]).

However, an order for production can still be made against a one-person company. Moshinsky, Wheelahan and Abraham JJ explained at [153]: "This is not to say that an order for production cannot be made against OE Solutions (assuming that there are relevant documents in its control). The privilege against self-incrimination and the penalty privilege are available only to natural persons and not to corporations. Thus, OE Solutions cannot rely on the privileges to resist production of documents that are in its control. As the privileges are against self-incrimination and self-exposure to penalties (see [90] above), OE Solutions cannot resist production on the basis that production of documents by the company would expose Mr Meneses to a real and appreciable risk of prosecution or institution of proceedings for a civil penalty. Nor can Mr Meneses complain about the production of documents by OE Solutions on the ground that the production of documents by the company might incriminate him or expose him to a penalty. However, in circumstances where OE Solutions is essentially a one-person company and that person (Mr Meneses) is entitled to rely on the privileges to resist production of the documents, it is necessary to consider mechanisms by which OE Solutions could produce the documents (other than by Mr Meneses doing so on its behalf). These mechanisms include the appointment of a receiver of the company for the purposes of producing the relevant documents on behalf of the company: see *Ronen* at [79] per Spigelman CJ; *Re Australian Property Custodian Holdings* at [159] per Robson J. We consider that a receiver could be appointed by the Court in circumstances such as this pursuant to the power conferred by s57 of the *Federal Court of Australia Act 1976* (Cth): see also s23 of the *Federal Court of Australia Act* and see, generally, *The University of Western Australia v Gray (No.6)* [2006] FCA 1825 at [64]-[66], [71]-[74] per French J (as his Honour then was). It is important and necessary that such a mechanism exist; otherwise, a one-person company such as OE Solutions would be effectively immune from producing documents in its control notwithstanding that it is not entitled to claim the privilege against self-incrimination or the penalty privilege".

The trial in the underlying proceeding commenced on 9 December 2019.

Dan Star QC is a Senior Counsel at the Victorian Bar, ph 03 9225 8757 or email danstar@vicbar.com.au.
The full version of these judgments can be found at austlii.edu.au.

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Mother wins appeal on relocation order

WITH ROBERT GLADE-WRIGHT

Children – unilateral relocation by mother (which did not prevent her from adhering to interim order for father's contact) allowed on appeal

In *Franklyn* [2019] FamCAFC 256 (23 December 2019) the Full Court (Watts, Austin & Rees JJ) allowed the mother's appeal against an interim order of the Federal Circuit Court that the appellant, who had unilaterally relocated with the parties' four-year-old child from central west New South Wales to south-eastern Queensland, return with the child, enabling the child to spend five hours each Saturday with the father.

Upon separation the child had little or no contact with the father for seven months due to the mother's concealment of her address and a family violence order obtained by her. That order was ultimately discharged ([9]). On the father's application, an interim order was made with his consent to his having two hours a fortnight with the child at a contact centre. Four months later the father filed an application for variation of that interim order, at the hearing of which the mother disclosed that she had already relocated with the child ([11]).

After a two-month adjournment the father (and independent children's lawyer) sought an order that the mother return to NSW, he to have unsupervised time, and that if the mother failed to relocate, the child live with him.

The Full Court said ([28]-[29]):

"While the children's interests are paramount, their interests are not the sole determinant of parenting orders under Part VII of the Act (*AMS v AIF…U v U…*). Parents enjoy as much freedom to live where they please as is compatible with their obligations pertaining to the children…Only when the children's welfare would be adversely affected must a parent's right to freedom of mobility defer to the paramount consideration of the children's best interests…

When the mother relocated with the children from central west NSW to south-eastern Queensland, she did so in the knowledge she would still need to adhere to the interim parenting orders made in May 2018 requiring her to present the children to the father at a contact centre in Town H, NSW once every fortnight. (…)"

Property – court's failure to comply with guidelines for litigants in person does not necessarily establish error

In *Laremore & Speidell* [2019] FamCAFC 215 (19 November 2019) the Full Court (Ainslie-Wallace, Ryan & Tree JJ) dismissed with costs fixed at $16,426 Mr Laremore's appeal against a property and maintenance order made by the Federal Circuit Court on the ground that he was not given a fair trial.

Represented until the eve of trial, the appellant appeared at the trial in person but appealed, contending that the court had not followed *Re F: Litigants in Person Guidelines* [2001] FamCA 348. He complained that the court had not explained that, if not challenged by cross-examination, a single expert's testimony might be more readily accepted than if he had challenged it; and that in the context of the…case for…maintenance, the judge failed to explain sections 90SE and 90SF…to him.

The Full Court said (from [11]):

"A failure to comply with the *Re F* guidelines does not automatically establish error. …[T]he guidelines are only informative of the overarching obligation upon a…judge to conduct the hearing in a way which affords each party a fair trial, and…to provide a self-represented litigant with the opportunity to fairly present their case. …[T]hat opportunity may require such a litigant to be apprised of information…for them to make informed choices…whether to call evidence, cross-examine…or make submissions…Error will only be established if the failure to provide such information…meant that, in the…circumstances of the case, a fair trial did not ensue. However a new trial will not be ordered if it can be shown that the…judge's decision was inevitable despite the procedural irregularity, in that it could have had no bearing on the outcome. (…)

[19] We cannot see how [expert] Ms B's evidence could have been materially undermined even if the appropriate explanation about cross-examination…had been given. (…)

[22] …[T]he appellant was…represented until the…eve of trial. It is…inconceivable that his solicitors had not explained the law relating to…maintenance…prior to…termination of their retainer (…)"

Children – granting of overseas relocation set aside on appeal

In *Soulos & Sorbo* [2019] FamCAFC 231 (3 December 2019) the Full Court (Strickland, Aldridge & Austin JJ) allowed the father's appeal of an order permitting the mother to relocate the parties' eight-year-old child from Australia to 'Country N' in Europe where the mother was raised. At the hearing the ICL opposed relocation, proposing that the child continue to live with the mother and spend time with the father. The father sought an order that the child live with him.

Hannam J found that the father had been violent towards the mother…although…[not]…since separation. The father appealed the court's finding that there was a risk of harm to the child in his care, arguing that that finding was in error and resulted in the court's failure to consider the inevitable loss of the paternal relationship due to relocation overseas.

The Full Court agreed, saying ([35]):

"…[W]hilst the father had been violent when the parties were…together, there had been no violent conduct in the six years since the parties had separated. There was no suggestion that the father was violent in his new relationship and the evidence was to the contrary. Whilst it was relevant to future interactions between them, it is too far a stretch to suggest that because of the earlier violence, there was an existing risk of harm to the child. The mother did not suggest that there was.

The Full Court concluded ([63]):

"In short, we accept the father's submission that nowhere in the reasons did the primary judge adequately consider and weigh in the balance the effect of the changes of the child relocating to Country N, other than the loss of his relationship with his father. This was then weighed against the erroneously found risk of harm that the father presented to the child. In doing so, her Honour omitted to take into account a relevant factor and took into account a mistaken factor. (…)"

Property – no property order for husband who had effectively been supported by wife and her parents during six-year cohabitation

In *Babray* [2019] FCCA 3514 (9 December 2019) Judge Kelly dismissed the husband's application for property settlement in respect of a marriage where the parties lived together for 5.75 years and had a six-year-old child. At commencement of cohabitation in 2009 or 2010, the husband effected a property settlement with his former de facto partner, borrowing $90,000 from the wife's parents so as to achieve that settlement. The parties married in 2011.

When the husband's Suburb D property was sold in that year he received net sale proceeds of $47,750. He put those proceeds towards buying a motor vehicle for $70,000, but he could not afford it so he borrowed more money from the wife's parents to make up the shortfall. At cohabitation the wife owned an unencumbered property which remained in the asset pool.

The husband worked for three years as a labourer before being made redundant. He was then unemployed for three years, retraining in occupational health and safety and re-joining the workforce before separating. The husband sought 30% of the wife's property, which the wife opposed. The parties had kept their finances separate, save for a joint bank account established for living expenses.

The court said (from [48]):

"…Although the parties had established a joint account, the applicant's contributions were sporadic…[When] the applicant made contributions they barely covered his personal expenditure and…when he did not, he was effectively supported by the respondent. (…)

[51] In terms of contributions…[the wife] worked throughout…cohabitation, applying the whole of her income to the support of the relationship and the maintenance or improvement of her property. (…)

[53] …[W]hen challenged…[the applicant] agreed that…his [$8000] redundancy… had been…applied…in…reduction of his indebtedness to the respondent's parents. (…)

[128] …[T]he respondent's…property was kept strictly separate in the parties' dealings, …[she] meeting all costs and discharging all liabilities…The property was brought into the relationship by the respondent (…)

[129] …[H]is work around the property came nowhere near to supporting a conclusion that he had equity… (…)

[132] Additionally, the respondent met the parties' living expenses…[while] the applicant was unemployed. …[T]he respondent effectively bore the whole of the parties' living expenses for at least half of…the relationship."

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).

Legal Services Award 2010 – award coverage

BY ROB STEVENSON

Employment law is an amalgam of overlapping statutory and common law requirements.

However, meeting statutory employment requirements is of prime importance and the penalties for failing to do so, particularly when it comes to payment of wages, are significant.

Recent publicity about historical underpayments by major companies underscores the potential practical consequences of not getting it right. It also involves potential conduct issues.

It is important to understand the hierarchy of basic employment law instruments. In previous articles, I have dealt with the basic entitlements of every private sector and federal public sector employee under the National Employment Standards (NES) contained in the *Fair Work Act 2009* (Cth) (the Act). These are largely replicated in state legislation which applies to state public servants.

There are other relevant obligations on employers under the Act. However, in considering employee entitlements, it is next necessary to consider whether there is an applicable industrial award that applies to an employee.

Industrial awards have long been a feature of the Australian employment law system. Industrial awards are given force by legislation and are made by the relevant industrial tribunal. For most private sector employees, this will be the Fair Work Commission (FWC).

Industrial awards contain more detailed provisions relating to particular industries or occupations. It is not generally possible to simply opt in or out of an industrial award. In particular, industrial awards contain provisions about hours of work, minimum wages and overtime and penalty rates which must be complied with.

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

In the area of private legal services, the *Legal Services Award 2010* (Legal Services Award) applies to most support staff and graduates who have not been admitted as solicitors. This award has been recently reviewed and updated by the FWC with effect from 4 February 2020 (with a new annualised salary provision taking effect from 1 March 2020). *See page 8*.

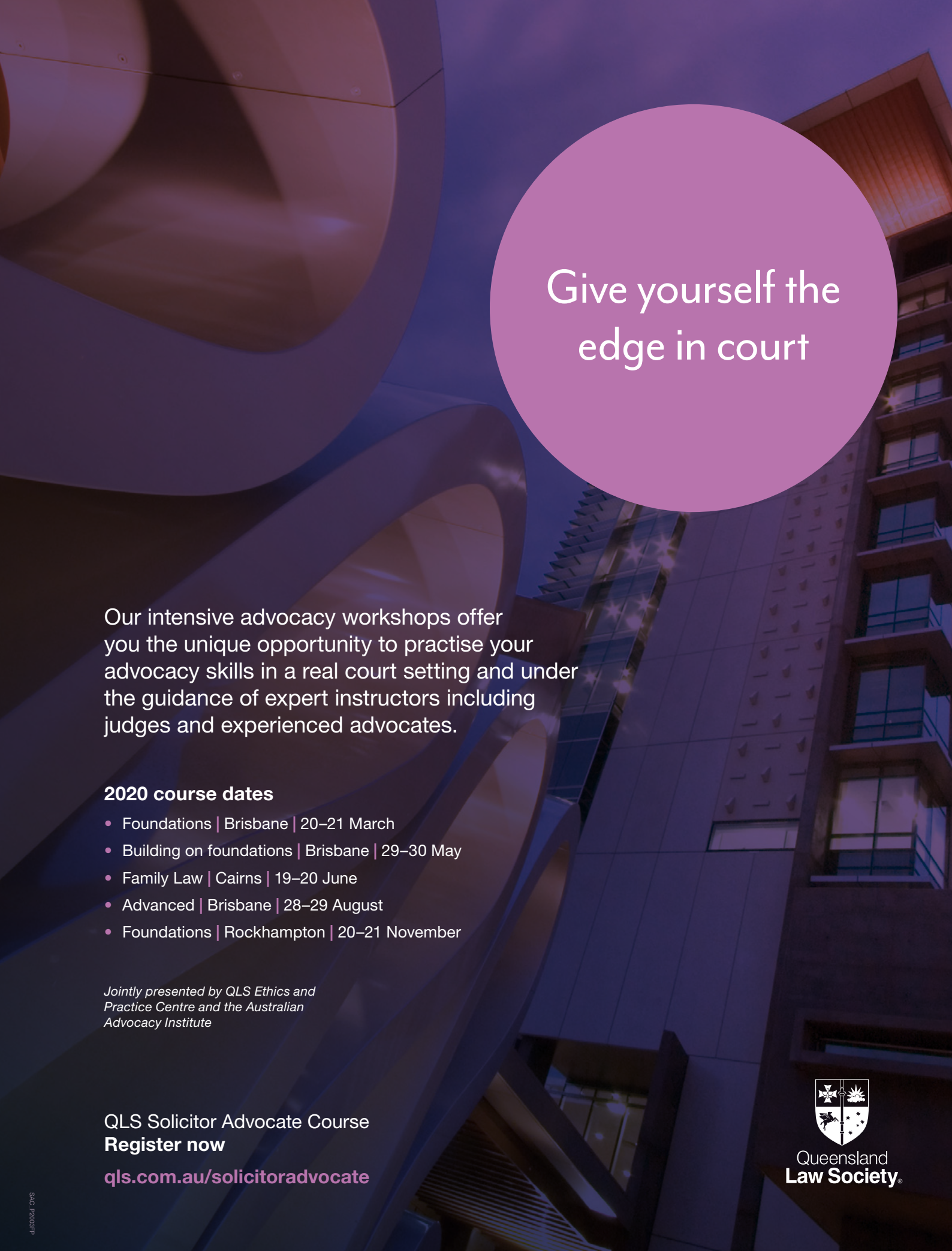
When examining an award, the starting point is to review the coverage clause to see which industries or occupations are covered by the award, followed by a review of the position classifications subject to the award. This will also mean checking the definition provisions. The coverage clause and definitions are always found at the start of any award whilst the classification descriptions are usually found in a schedule at the end of the award.

In the case of the Legal Services Award, the foundation clause is clause 4.1, which provides that the award covers employers throughout Australia in the legal services industry and their employees in the classifications listed in Schedule A – Classifications to the exclusion of any other modern award.

The term 'legal services industry' is defined broadly to mean employers engaged in the business of providing legal and legal support services. Accordingly, it will cover most private legal practices. However, the award specifically states it does not cover employees of community legal centres, Aboriginal legal services or employers whose primary activity is not within the legal services industry. The award also covers labour hire employees and group training service employers providing trainees in the legal services industry.

An employee can agree not to be subject to award requirements if an employer provides a high-income guarantee in writing which guarantees the employee will be paid over the high income threshold (currently $148,700pa excluding superannuation – this is indexed from 1 July each year). Otherwise, award provisions must be complied with for the positions covered by the award.

Rob Stevenson is the Principal of Australian Workplace Lawyers and a QLS Senior Counsellor, rob.stevenson@workplace-lawyers.com.au.



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Would any person or firm holding or knowing the whereabouts of a Will or any other testamentary document of **HAILLIE ANNE ROSENGREEN** late of 47 Paddington Drive, Carrara QLD 4211 who died on 13 January, 2020 please contact Montana Arnold at MacGregor O'Reilly Nash Solicitors of PO Box 949, SURFERS PARADISE QLD 4217, Ph: (07) 5570 6766, Email: montana@macgregor-oreilly.com.au.

Would any person or firm holding or knowing the whereabouts of a Will of the late **Michael Timothy Cranfield** of 122 Alice Street, Goodna, Queensland (deceased 15/12/19), please contact Patrick Ellwood from Clover Law on 0400 503 111 or patrick@cloverlaw.com.au

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Missing wills continued

ESTATE OF THELMA JOYCE GILES

Would any person or firm holding or knowing the whereabouts of a will or other document purporting to embody the testamentary intentions of **THELMA JOYCE GILES** late of OzCarePalm Lodge Nursing Home, New Farm QLD formerly of 24 Lenore Crescent, Springwood QLD and of Flat 1, Umbiram Lodge, 82 Sarawak Avenue, Palm Beach QLD, who died on 15 October 2019. Please contact Denise Maxwell Solicitor, PO Box 3156 Yeronga QLD 4104. Telephone: 07 3892 4329 or email denise@denisemaxwell.com.au.

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How to work from home (the toddler edition)

Step one: Don't

BY SARAH-ELKE KRAAL

Whilst the following is based on actual events, in the interests of protecting the anonymity (and dignity) of the toddler in question, I have used a respectable pseudonym.

4.25am: Spud starts screaming. Check time. Groan.

4.26am: Screaming stops. Hold breath; blink in the dark a few times. Tentatively place head back on pillow. Close eyes.

4.27am: Screaming continues. Heavy sigh, begrudgingly get up. Expertly navigate house without turning any lights on; consider becoming cat burglar.

4.28am: Trip over senile dog in hallway. Curse. Reconsider becoming cat burglar.

4.28am: Arrive at Spud's room; scream volume now upgraded to ambulance driven by screeching pterodactyl. Room temperature ok; approach cot. Spud radiating heat, generating copious amounts of goober. Sense of foreboding commences.

4.29am: Pick up baked Spud, check limbs for anything obvious. No big 'on/off' switch apparent. Fumble for thermometer under change table. Switch on; blinded by screen light. Squint in the dark to find Spud's ear, accidentally poke her in the eye. Have great idea to use screen light to illuminate ear.

4.30am: Find ear! Lose as soon as screen light moved. Attempt to summon superhuman reflex that trumps the speed of light, fail several times. Realise you have very few good ideas. Resolve to just turn on lamp.

4.34am: Finally get thermometer into ear. Wait for reading. Sense of foreboding builds. Thermometer beeps, remove, read screen.

4.35am: No temp. Sceptical. Try again in other ear.

4.36am: Low grade temp. Sense of foreboding transitions to routine process of elimination, commencing with protracted walk'n'bounce until Spud asleep.

5.05am: Spud asleep. Attempt to lower into cot with precision of bomb squad. Fail. Bomb goes off.

5.06am: Maybe some Nurofen will fix it.

5.36am: Nurofen doesn't fix it. Maybe a bottle will fix it!

5.59am: Bottle doesn't fix it. *MAYBE JUST ONE MORE CUDDLE WILL FIX IT!*

6am: Cuddle doesn't fix it. Realise Spud can't go to childcare today.

6.03am: Curse. Realise you won't be going into the office today.

6.04am: Deposit disgruntled potato back into cot. Anticipate lack of neighbour Christmas cards this year.

6.05am: Hear husband trip over senile dog in hallway, curse. Flip on kettle.

6.06am: Lecture husband on patriarchal unfairness of women being the assumed primary carer in a society where career achievement matters equally to both genders. Simultaneously refuse his offer to stay home and look after Spud by emphatically responding "no, *I want* to do it!".

6.08am: Confuse husband, self.

6.09am: Pick up phone, check emails. Remember multiple deadlines. Curse.

6.10am: Send text to boss apprising of situation, apologetically proposing to work from home. Boss immediately responds with "Ok, thanks", sans usual emoji.

6.12am: Obsess over underlying meaning behind response sans usual emoji.

6.30am: Resent husband as he skips off to work; again refuse his follow-up offer to stay home. Thoroughly assume role of martyr.

6.45am: Make doctor's appointment, Weet-Bix for Spud. Senile dog upgrades from trip hazard to Black Diamond Obstacle Course by commencing Operation *MustBeInContactWithYourLegAtAllTimes*. Chooses right leg.

7.15am: Mop-up Weet-Bix from Spud, floor, senile dog.

7.17am: Answer emails at kitchen table whilst Spud entertains herself goobering on light switches, door handles, and generally incubating viral plague.

7.59am: Await inevitable onset of contracted plague symptoms.

8am: Spud indicates fatigue, respond at speed. Water, nappy, teddy, cot. Close door to very little protest. Feel like baby whisperer.

8.18am: Notification of upcoming teleconference at 8.30am. Check calendar, curse. Manically search emails for enough material to appear at least somewhat prepared.

8.29am: Sit at kitchen table, ready documents on laptop, position phone. Await call.

8.29:57am: Spud screams.

8.29:58am: Sprint to room, collect Spud. Senile dog follows. Phone starts ringing. Sprint back to kitchen table, balance Spud on hip, dog resumes position astride leg, answer phone.

8.30-8.59am: Toggle between 'mute' and 'unmute' with awkward timing; phone develops off-putting echo that throws timing off even more. Eventually get so distracted by own voice that you forget to unmute and at least two people have to ask "Hello? Are you there?" before you realise the problem. Feel stupid.

9am: Baby babbles into phone. Nervously laugh, apologise. Make ill-considered joke about never letting your husband near you again. No one on other end responds.

9.01am: Yep, still on mute.

9.02am: Unmute, wrap up conference; Spud and senile dog start grizzling, hacking respectively. Hang up.

9.03am: Dog throws up on your foot.

9.04am: Send boss text saying on second thought perhaps you will just take today as carer's leave.

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

Wine disaster in a blackened land

WITH MATTHEW DUNN

Core of my heart, my country!
Land of the Rainbow Gold
For flood and fire and famine,
She pays us back threefold –[1]

'Shocked and devastated' was the way Prue and Stephen Henschke described their feelings to the *Barossa Leader*[2] in January after losing 30 hectares of their prized Lenswood vineyard to the savage Cudlee Creek bushfire of late December.

The Henschkes purchased an old apple orchard in 1981 in Lenswood in the Adelaide Hills to take the Henschke range into cooler climate wines. As a terrible portent of what was to happen later, the apple orchard was razed in the Ash Wednesday bushfires of 1983.

Despite being re-established and set over to vines by 1989, this vineyard was to be destroyed again some 37 years after the initial terrible fire. With the loss of the Lenswood vineyard, the Henschkes lost their riesling, chardonnay, pinot and merlot vines. The recovery will be long and slow. New vines on the site will take around seven years before they are producing commercial quality grapes.

Sadly, the Hensckes were not alone. About 30% of the Adelaide Hills wine region was within the fire grounds and 60 grape growers and producers were affected.

Tillbrook Estate lost its winery entirely, including all stock held in bottle and barrel, and a portion of the vineyard. Other Adelaide Hills producers affected included Golding Wines, Tomich Wines, Barristers Block Wines, Bird in Hand Wine, Geoff Weaver and Riposte Wines.

Apart from the destruction of vineyards themselves, the bushfires also brought a smoke taint, which is an insidious foe for winemakers. Grapes at their peak ripening time are very susceptible to soaking up smoke flavours from the air and repeated or prolonged smoky periods increase the risk of 'infection'.

Volatile smoke taint particles can either attach themselves to the skins or can bind themselves to the sugars in the grape – only to become apparent following fermentation and aging as the chemical composition of the wine changes over time. Both forms are disastrous for sale to consumers.

In New South Wales' Hunter Valley the impact of fire smoke has been disastrous. Severe bushfires started in late October and the mountain behind the historic Mount Pleasant winery caught alight. Mount Pleasant Chief Winemaker Adrian Sparks told *The Guardian*[3] that the heavy smoke persisted throughout November and December, causing stinging eyes, coughing and forcing everyone to stay indoors.

Despite ordinarily producing 30,000 cases of wine a year, on account of the smoke taint damage to the grapes, the entire 2020 production has had to be written off. Similarly, at other high-profile local producers such as Tyrrells and Brokenwood, the 2020 season will not be harvested. The loss of a year's production will be sharply felt, but at least the vineyards will recover for next year.

On the Granite Belt in Queensland, horrific bushfires raged at The Summit in September 2019 in the tinder-dry country which had been drought declared since May 2018. The town of Stanthorpe had its 'day zero' when the municipal dam ran dry in mid-January and many winemakers had to buy water to keep their vines alive.

Despite the troubles, the Granite Belt Wine Country website urges people to support the troubled region by buying local wine and visiting the region. Responding to the conditions, local winemakers even banded together to raise funds for drought assistance under the moniker Wine4Water.

Amid the disasters of the last few months for wine regions across the country, there will be many producers hoping for Dorothea Mackellar's promised optimism of repayment three-fold.

Notes

1 Dorothea Mackellar, *My Country*.
2 barossaleader.com/henschke-lose-lenswood-vineyard-to-fire.
3 theguardian.com/australia-news/2020/feb/07/no-vintage-australian-vineyards-dump-grape-harvest-as-bushfire-smoke-takes-its-toll.

The tasting Three wines from disaster regions were sampled.

The first was the **Henschke Greens Hill 2019 Riesling** from last season at the destroyed Lenswood vineyard. The colour was palest yellow to white with a nose of gooseberry, lime and granite. The palate was front facing bracing lime citrus zest, with delicate floral notes. Sadly we will not see the 2020.

The second was the **Mount Pleasant Blue Label Hunter Semillon 2010**, with a colour of hot summer straw and a nose of butter and oak and developed lanolin of an aging wine hitting its straps. The palate had plenty of grapefruit and citrus zing left despite the age and a crisp tone which promised a long further life.

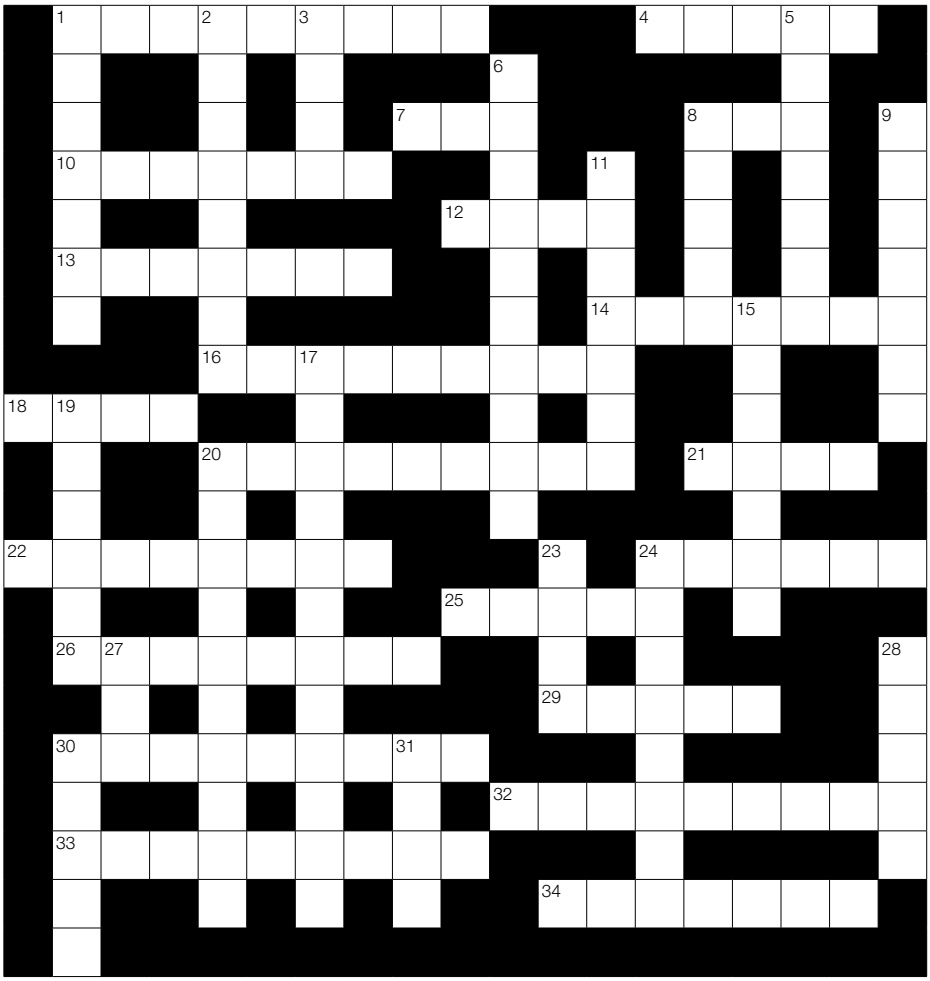
The third was the **Golden Grove 2016 Granite Belt Mourvedre**, with the colour of deep crimson red and a nose of floral Belgian chocolate. The palate was forceful with blackcurrant, oak and cherry, along with damson plum and a firm tannin backbone pointing to great longevity.

Verdict: The three wines were each excellent representations of their place and style. The sentimental favourite was the Henschke. Let's hope they recover quickly.

Matthew Dunn is Queensland Law Society policy, public affairs and governance general manager.

Mould's maze

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



Across

1 The principle that a company or organisation continues even if one or more of its members dies, ... succession. (9)

4 Dr .... invented the word 'nerd' in his 1950 story, 'If I Ran the Zoo'. (5)

7 Bachelor of Laws degree. (Abbr.) (3)

8 First female Family Court judge appointed in Queensland, Michelle .... (3)

10 Defamation. (7)

12 Apprentice. (4)

13 Theft with threats of, or actual, violence. (7)

14 '..... Protections' are intended to provide employees relief against discrimination, victimisation or unfair treatment. (7)

16 ..... is often said to be the father of natural law. (9)

18 A .... jury is prevented from reaching a verdict through disagreement. (4)

20 Pertaining to an Act of Parliament. (9)

21 In a .... trust the trustee holds property without any beneficial interest therein and without any further duty to perform, except to convey the trust property on demand to beneficiaries or deal with it as directed by beneficiaries. (4)

22 The process of naming and classifying things into groups within a larger system according to their similarities and differences. (8)

24 Territorial waters extend ..... nautical miles (22.2km) from a nation's coastline. (6)

25 Non-binding comment in a judgment not directly bearing on the case. (5)

26 Recent High Court case which ruled that police cannot arrest people solely for the purpose of questioning them, *R v* ..... . (8)

29 Eligibility for parole is generally set at a ..... of the head custodial sentence imposed. (5)

30 'On behalf of', abbreviated to *ex rel., ex* ..... . (Latin) (9)

32 John Grisham novel about a law school graduate who is the antithesis of a celebrated lawyer. (9)

33 A breath-test gadget connected to the ignition of a car to stop it from starting if a motorist has been consuming alcohol. (9)

34 Impermissible request for disclosure of documents, ... expedition. (7)

Down

1 Encourage or influence a person to commit an offence. (7)

2 A group of rights implied from others explicitly protected in the Bill of Rights. (US) (8)

3 Section 60CC of the *Family Law Act* enshrines the '.... pillars' underpinning its parenting regime. (4)

5 A person, especially a lawyer, who uses unscrupulous, fraudulent or deceptive methods in business. (7)

6 Duty. (10)

8 Medical term for an adult with an IQ of 51-70, being superior in one degree to 'imbecile' and superior in two degrees to 'idiot'. (Arch.) (5)

9 An offence that can be classified as either a misdemeanour or a felony. (US) (7)

11 Illegal imitation or counterfeiting of documents, signatures or works of art. (7)

15 Construct or select a jury. (6)

17 Not permitted to be used as evidence in a court hearing. (12)

19 Reinstatement applications relate to ..... terminations. (6)

20 Financing offered by a group of lenders, a ..... loan. (10)

23 Justice Daubney is its President. (4)

24 'Eye for an eye', *lex* ..... . (Latin) (8)

27 Number of minutes of the world's shortest jury deliberation, resulting in acquittal. (3)

28 Depraved-..... Murder involves acts or omissions committed with a 'depraved indifference' to human life without any explicit intention to kill. (U.S.) (5)

30 In the movie *Primal Fear*, Richard Gere playing a lawyer says: "First thing that I ask a new client is 'Have you been saving up for a ..... day?'." (5)

31 Arrest, steal or gaol. (4)

Solution on page 60

Holidays with the appliance ninja

The joys of perseverance and hyperbole

BY SHANE BUDDEN

One should always save hyperbole until it is truly necessary, and not just because it is really hard to say.

For example, remember when Kevin Rudd referred to climate change as the "greatest moral challenge of our generation"? That lasted from when he said it right up until when it started costing him votes, at which point he dropped climate change, moral-challenge wise, down to about the same threat level as dandruff.

Of course, dandruff is probably a much greater challenge for the younger generations, who spend most of their time walking around with their heads bent over smartphones, making dandruff far more obvious (at least to those not bent over a smartphone). It isn't clear which generation Rudd was addressing, however, because generations are arbitrarily determined groups with no particular basis in science.

In fact, the only scientific way to distinguish generations in my view is quite simple: there are two generations, and if you wear a baseball cap backwards you are from the wrong one. I would be quite happy if voting eligibility were determined in the same way, but I digress.

Anyway, I was speaking about hyperbole, which was brought to my mind by recent events, specifically the fact that my wife and I – because old age apparently has started to rot our brains – took our kids up the coast for a holiday. We did this so that our children could have new experiences, such as feeling that beautiful sense of oneness with nature that comes with watching the sun set, slowly and serenely, behind an upraised iPad.

On seeing the pool at our units, my son happily declared that this was the best holiday ever, because the pool had a spa. Later that same day, he proclaimed it the worst holiday ever, because I made him get off his iPad; this routine would play out many times over seven days. Clearly, my son should have withheld judgment on the holiday up to the point where I threw his iPad from our 7th floor unit into said spa.

(Note to all those who have stopped reading to write a venomous email to the *Proctor* editor, calm down; I didn't really do that, but only because my son has such a strong grip).

Lest you think that I am a terrible parent, I note that my son does not play games or watch inappropriate videos on his iPad (or at least not all the time); he writes songs. In fact – this is a true thing here, which is why I used the word 'fact' – he has recorded and released some of them, and you can listen to them on various things like Spotify, iTunes, Apple Music and the Play Store, whatever they are. Note that I have too much class to spruik my son's songs in my column, and you should not feel that I am pressuring you to buy them; you can just send me some money in a box, if that is more convenient.

Actually, the holiday was quite good, although I had to go through the usual issue of deducing how to work the various appliances in the unit, all of which have instruction sheets translated (from the original Martian) by the same people who used to create the English subtitles for the samurai films we used to watch back in the old days.

People of my generation – remember, those who know how to navigate the complexities of baseball-cap operation – will recall these subtitles, and note that the translators had a less-than-perfect understanding of the Japanese language. By 'less-than-perfect' I mean that they had the same overall fluidity in Japanese as that possessed by your average German Shepherd, although I'd give the dog the edge on pronunciation.

This lead to some difficulty understanding these films, as four minutes of spoken dialogue would be reduced to, "Yes, Shintaro!". Or, the main characters would be laughing heartily, and the subtitle, "A dragon ate my grandfather!", would flash up on the screen; good thing we were only watching to see Shintaro kick butt, ninja-style, which he always did.

Unfortunately, when it came to deciphering the instructions to the appliances (remember them? Three paragraphs back?) I could not simply wait for an outbreak of swordplay, as your modern dishwashers rarely engage in martial arts displays. With indecipherable instructions, I had to fall back on my own technical abilities to get the appliances working. Those abilities are limited to telephone operation, so I called reception and asked them.

This brought the helpful hotel reception guy up to our unit, who entered with the sort of wary expression he understandably reserves for people who apparently can't work a stove. He spoke to us in that understanding, calm voice you use when trying to teach a two-year-old how to tie shoelaces, and the only reason he didn't get whapped over the head with a frying pan is that he was too tall.

Also, he did get the stove to work, albeit that he eschewed the instructions in favour of the rapid, random pressing of buttons method, which I should have worked out earlier because I use a similar method when turning off the electronic devices of my children. I suppose I could learn the correct way to turn them off (the devices, not the children) but the random-button method means that my kids are so scared of me touching their devices – and in the process wiping out an entire week's worth of progress on Minecraft – that they actually turn the devices off when I tell them (you parents out there might want to write that down).

I eventually got the dishwasher going, too, by pressing random buttons while crossing my fingers behind my back and hopping in a counter-clockwise direction (at least that's how I recall it). We ended up having a great holiday through perseverance with the appliances and – here is a free tip for anyone considering a holiday in the future – the fact that Caloundra has a great many lovely and affordable restaurants.

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Crossword solution

From page 58

Across: 1 Perpetual, **4** Seuss, **7** Llb, **8** May, **10** Calumny, **12** Tiro, **13** Robbery, **14** General, **16** Aristotle, **18** Hung, **20** Statutory, **21** Bare, **22** Taxonomy, **24** Twelve, **25** Dicta, **26** Robinson, **29** Third, **30** Relatione, **32** Rainmaker, **33** Interlock, 34 Fishing.

Down: 1 Procure, **2** Penumbra, **3** Twin, **5** Shyster, **6** Obligation, **8** Moron, **9** Wobbler, **11** Forgery, **15** Empire, **17** Inadmissible, **19** Unfair, **20** Syndicated, **23** Qcat, **24** Talionis, **27** One, **28** Heart, **30** Rainy, **31** Nick.

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