

QLS PROCTOR



APRIL 2020

ON PAROLE

Not just a 'get-out-of-jail-free' card

COVID-19


Pandemic practice

DV LAW

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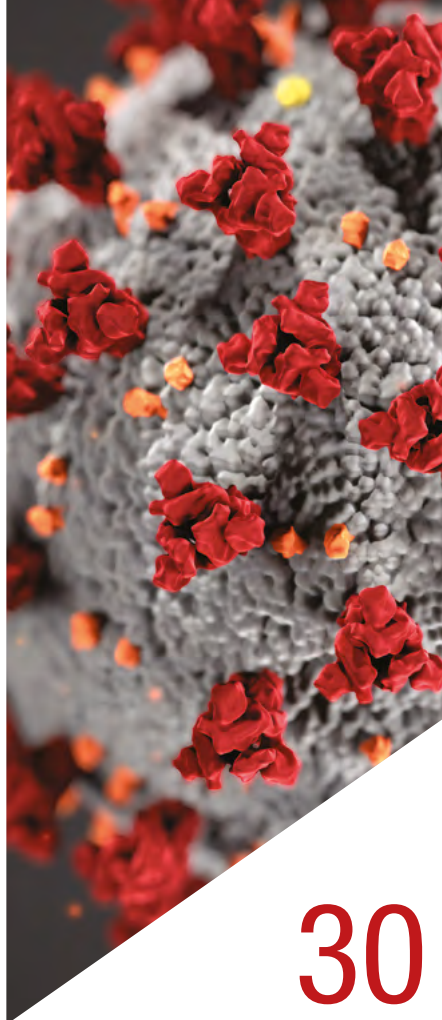
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Symposium shrugs off a shadow

Practitioners celebrate another great event



Notwithstanding the shadow of Coronavirus, Symposium 2020 was held with over 650 members attending.

It was once again a great success with informative presentations, interested and motivated attendees, and enthusiastic sponsors and exhibitors. The cloud of Coronavirus did not dampen everyone's energy.

Although most handshakes were replaced with elbow touching, bows and other inventive greetings, there wasn't a facemask in sight and the entire event proceeded with its typical efficiency. The profession's thanks must go to the QLS Events Team, Professional Development Team and to event partners, sponsors and exhibitors without whom Symposium could not proceed as it does.

There were many highlights, including an opportunity at the Legal Profession Dinner and Awards to present honorary QLS membership to my father and past President Gerry Murphy and to listen to QCAT President Justice Martin Daubney AM, who kindly stepped in to deliver a toast to the profession. I confess to being envious of his Honour's remarkable ability to deliver such an enthralling and inspiring speech without notice.

The conference and drinks with district law association presidents on Symposium eve provided Council with the opportunity to establish stronger lines of communication, which we will no doubt need in responding to the Coronavirus throughout Queensland appropriately. The productive conference gave us an opportunity to meet, support each other and discuss our mutual concerns. We agreed to collectively develop strategies to improve the Society's and district law associations' support for our profession during 2020 and years ahead.



Kiley Hodges received the Workplace Culture & Health Award, while Monica Taylor was the inaugural winner of the *Proctor* Best Feature Article Award for an article which highlighted the impact of climate change on the legal profession.

Awarding the 2020 QLS President's Medal was a great pleasure. The medal recognises and encourages commitment, contribution and outstanding performance amongst Queensland's legal profession, and deciding on the winner – a task undertaken by six QLS past Presidents as judges – is not an easy one.

The winner, Denis McMahon (pictured with his award), is an extremely worthy recipient who, in his own quiet, humble manner, is the personification of all the characteristics the medal honours. Denis is recognised as Queensland's expert for assisting clients with farm debt and farm debt mediation issues. His knowledge of the area is extensive and spans the four decades of his legal career practising and assisting clients in rural and regional Queensland.

Denis appeared at the Financial Services Royal Commission in 2018 to give expert oral evidence on farm debt issues and has been appointed to the Code of Banking Practice Expert Panel on Farm Debt. He has contributed to numerous reviews and policy inquiries with a focus on systemic issues affecting farmers and rural-based businesses.

It was another excellent evening at the Legal Profession Dinner and Awards, and two days of Symposium.

Let's hope that, by 2021, the world has regained a sense of normalcy, and we can do it all again with even more enthusiasm, without any virus shadow!

Luke Murphy

Queensland Law Society President

president@qls.com.au

Twitter: @QLSspresident

LinkedIn: [linkedin.com/in/luke-murphy-5751a012](https://www.linkedin.com/in/luke-murphy-5751a012)

The following night's Legal Profession Dinner and Awards was enjoyed by 300 attendees and the awards recognised the achievements of fellow practitioners.

The Agnes McWhinney Award – the 14th occasion this award has been given – recognises an outstanding professional contribution from a female practitioner in Queensland. It was a pleasure to announce Environmental Defenders Office (EDO) CEO Jo-Anne Bragg as a very deserving winner.

Jo-Anne has overseen the organisational development and transformation of the Environmental Defenders Office from 3.5 staff in 2009 to 13 staff today. She has also driven a successful national merger process, combining disparate legal practices from around the country into one organisation, whilst successfully litigating and advocating on a variety of environmental issues, including for community standing rights to be included in the *Nature Conservation Act 1992* (Qld).

Jo-Anne was a dual award recipient on the night, also being awarded the QLS Access to Justice Award. Our congratulations go to her and the other award winners.

These include First Nations Solicitor of the Year award winner Keryn Ruska and First Nations Student Award winner Kathryn Dorante, Regional Practitioner of the Year winner Kellie Walker and QLS Emerging Leader Award winner Paloma Cole.



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.

[CHECK YOUR DETAILS](#)

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 Queensland
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Digital pandemic solution

How we're meeting the COVID-19 challenges



QLS has communicated to members operational updates and changes as a result of the Coronavirus (COVID-19) outbreak.

And we will be updating the profession weekly on COVID-19 through *QLS Update*.

We've made changes to some of our products and services:

- QLS Council has resolved to extend the annual CPD year to 30 June 2020.
- All QLS face-to-face events and courses from 23 March to 31 May have been cancelled or postponed. This includes our continuing professional development courses. We are however developing additional online CPD and learning content. Members can visit the QLS Shop (see qls.com.au) to access our on-demand resources.
- External access to Law Society House will be restricted to mediation facilities only. Access will be limited to 20 participants on site at any one time. Strict hygiene protocols and social distancing measures will need to be adhered to.
- The Legal Practitioners Admissions Board will still be available to take applications for admission.
- We are taking sensible steps to help protect our QLS team. Many staff are working remotely. We have reduced face-to-face meetings, ceased staff work travel and presenting externally up to and including 31 May.
- Lawcare is still available – but the service has been altered. Face-to-face sessions have been temporarily stopped but phone sessions are still available and we encourage you to keep using this invaluable member-only service.

We've created a dedicated information hub. Advice, from multiple sources is changing daily and to help you access the most critical practitioner-specific information, we have created an online hub dedicated to COVID-19 and the legal profession (qls.com.au/COVID-19). This is where you will find the latest COVID-19 information from the courts, external agencies and QLS.

To help you access the most critical practitioner-specific information, we have created an online hub dedicated to COVID-19 and the legal profession

We will also post information practitioners will need to consider in the management of their practice along with recently asked questions we've answered that we feel might benefit other members.

You will find more information in this edition of *Proctor* covering responses from state and federal courts, as well as practical guidance for firms from practice management expert Graeme McFadyen. There's also an interesting article from QLS member Julie Guilfoyle, who was one of the first to be caught up in the isolation regime.

Attendance to statutory and Council meetings will be available by teleconference. And policy committee and working group meetings will also rely on teleconferencing.

In order to assist our staff, any falling within an 'at-risk' category will be working from home until further notice, and from 23 March we have restricted our on-site staff to those critical to maintaining our business functions.

These protocols will be reviewed and revised as required.

PC and membership renewals reminder

If you are practising law in Queensland, you must renew your practising certificate during May.

Check your details before 1 May by logging on to qls.com.au/myQLS. Errors in your myQLS record may lead to delays in issuing your practising certificate and issues with your fees.

Your online PC and QLS membership renewals should be submitted and all prescribed fees paid by 31 May 2020.

Thanks to all

I would like to pass on QLS's thanks to all those who made our Symposium 2020 and Legal Profession Dinner and Awards such a great success, including attendees, sponsors, presenters and QLS staff.

Unfortunately that may be the last large gathering organised by QLS for the foreseeable future. Our professional development program will certainly continue, with an emphasis on online participation and restrictions as outlined above. Please watch this space for more details!

Rolf Moses
Queensland Law Society CEO

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Letter to the editor

Des Sturgess and the NT Criminal Code



I thought I should write because I recently read a review of a biography of the late Des Sturgess QC.

There was no mention, that I could see, of the leading role Des played in the formulation of the Northern Territory *Criminal Code*.

When I first went to Alice Springs in 1966, to find myself in an amalgamated profession, I was quickly pressed into service at the Bar. Within a few days I was appearing in my first criminal trial on behalf of an offender charged with, of all things, buggery.

Imagine my surprise to hear the associate read out to the court the Indictment which ended with the words:

"You stand charged...with the abominable crime of buggery, not to be mentioned amongst Christians, contrary to Section 71 of the *Criminal Law Consolidation Act and Ordinance of 1867*."

It was apparent to me there and then that the Northern Territory was lagging.

So when we attained self-government 12 years later in 1978, one of our first priorities was to follow the examples of Western Australia, Tasmania and Queensland and reform the criminal law into a code.

Looking for someone to lead our team working on the codification and seeking to be perhaps a little bit ahead of the curve, we agreed probably only one person who could provide the guiding hand and lead our team was the late Des Sturgess, who cheerfully agreed to take on the task. Of course he was supported by staff within the Department of Law, including Graeme Nicholson and others as well as the NT Law Society and the legal profession generally.

On and off Des was probably involved in the project for a couple of years until it finally came to fruition. I should also say that he insisted on charging only his usual modest rate of remuneration despite being urged otherwise.

During the considerable period of time over the years that Des spent toiling and frothing between Brisbane and Darwin, Des made many friends in the Territory with his gentle, unassuming manner. If anyone ever deserved to have an ego it was Des Sturgess, but he never displayed it.

I would suggest that the Northern Territory *Criminal Code* is Des Sturgess' major contribution to Australian law reform and I thought it proper that I bring this to your readers' attention so that it is recognised.

*Paul Everingham,
Everingham Lawyers*

2020 advocacy update

UPDATE PREPARED BY THE QLS LEGAL POLICY TEAM

Queensland Law Society made 39 policy submissions in January and February, and appeared at six public hearings at Queensland Parliament, advocating for good law and the public good.

Following our written submission, QLS appeared at the public hearing on the Justice and Other Legislation Amendment Bill 2019, represented by President Luke Murphy, QLS Criminal Law Committee Deputy Chair Ken Mackenzie and QLS Litigation Rules Committee chair Andrew Shute.

The omnibus Bill aims to amend 33 Acts and four regulations. We advocated for the right to maintain a claim for privilege against self-incrimination at an inquest, in circumstances where the proposed amendment to the *Coroners Act 2003* would also have retrospective application.

QLS also highlighted that:

- broadening the scope of 'Restricted premises orders' in the proposed changes to the *Peace and Good Behaviour Act 1982* may have unintended consequences
- ambiguity in amendments to the *Civil Proceedings Act 2009* would cause delays and increased costs in proceedings, and should be rectified
- the proposal to increase, to \$80,000, the value of property offences which must be determined summarily in the Magistrates Court may impact on the accused's ability to access legal assistance and put further pressure on existing court and other resources.

QLS also attended the public hearing on the Community Services Industry (Portable Long Service Leave) Bill 2019 following our written submission to the inquiry. QLS was represented by President Luke Murphy, Industrial Law Committee member Aaron Santelises and QLS Senior Policy Solicitor Kate Brodnik.

The Bill seeks to establish a portable long service leave (PLSL) scheme for the community services industry in Queensland. QLS generally supported the Bill, but made several recommendations to clarify certain key definitions and also questioned the wide powers of entry introduced by the Bill.

QLS provided a written submission and appeared at the public hearing on the Health Legislation Amendment Bill 2019, represented by President Luke Murphy, QLS Criminal Law Committee Deputy Chair Ken Mackenzie and QLS Occupational Discipline Law Committee Deputy Chair Andrew Forbes.

The Bill seeks to introduce a range of reforms to the health sector, including prohibiting the practice of conversion therapy by health service providers in Queensland.

QLS agrees that conversion therapy is a reprehensible practice and strongly supported the policy intent behind the Bill, but raised concerns with the proposed definition of 'conversion therapy' in the Bill. If interpreted too broadly, the definition may impede legitimate therapeutic and evidence-based practices.

This concern was shared by the Australian Medical Association Queensland and the Royal Australian & New Zealand College of Psychiatrists Queensland Branch. QLS welcomes the committee report which acknowledges these concerns and recommends amendments to the Bill to ensure greater clarity and certainty in the law for health practitioners.

We also made a submission and attended the public hearing on the Associations Incorporation and Other Legislation Amendment Bill 2019, which seeks to clarify the operation of the *Associated Incorporations Act 1981* and improve the internal governance of incorporated associations.

In our submission, and at the public hearing, we welcomed many of the reforms but also called for a longer and more extensive consultation process before the Bill is passed. QLS highlighted the significant impact these reforms will have on the day-to-day operations of community groups, many of which are run by volunteers and called for a two-year transitional period. We also raised concerns with respect to the powers of entry introduced, under which authorised officers may enter and inspect an association's premises without a warrant.

As outlined in the President's column in the March edition of *Proctor*, QLS also appeared at the public hearing on the Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019, represented by President Luke Murphy, QLS Occupational Discipline Law Committee chair Calvin Gnech and Professor Myles McGregor-Lowndes, a member of the QLS Not for Profit Law Committee.

We raised concerns about the impact of the Bill on "third parties", including not-for-profit and charity organisations, and the potential inclusion of strict liability offences which would criminalise administrative oversights.

QLS is pleased that the parliamentary committee report on the Bill has recommended amendments be made to "...address the concerns of small, not-for-profit third party organisations regarding the regulatory burden of the political donation and electoral expenditure cap schemes, such as by increasing the threshold for third party registration".

This would address some of the concerns raised by QLS and other not-for-profit entities. It was also positive that the committee decided not to progress the strict liability offence proposal.

QLS thanks the many dedicated volunteers on the QLS policy committees for their valuable assistance with our submissions and hearings. Copies of QLS submissions are available at qls.com.au.

If you would like to learn more about becoming involved with the legal policy work at QLS, keep an eye out for the weekly *QLS Update*, in which we regularly seek member feedback on our legal policy work.

Courts respond to pandemic

State and federal courts have introduced measures in response to the COVID-19 pandemic.

In Queensland, Chief Justice Catherine Holmes AC and District Court Chief Judge Kerry O'Brien announced on 16 March that all new trials requiring a jury would be suspended as a precautionary measure.

Criminal trials that had already started before a jury in the Supreme Court or District Court would continue until their conclusion.

The statement said that other cases would proceed, but further adjustments to court procedures were being considered, and the courts would continue to monitor advice being provided by government health authorities and act accordingly.

Also, admission ceremonies in Brisbane have been cancelled for the near future, with applications for admission to be dealt with in almost all cases on the papers, so that no representation in court is required.

However, applicants' presence in court will be required in order to comply with the rules and to allow them to take their oaths of allegiance and of office and sign the roll. For that purpose, only applicants will be allowed into the courtroom. Candidates not wishing to proceed on this basis should request an adjournment.

When courts resume normal operations, all practitioners admitted in these circumstances will be offered the opportunity to take part in a welcoming ceremony attended by family and friends.

Meanwhile, the Federal Court has introduced a suite of measures to reduce the risk to staff, litigants and the legal profession. Following developments which led to the closure of the Lionel Bowen building in Sydney, the court has vacated all listings up to 30 June that require in-person attendance, including mediations and listings relying on video link from court premises, apart from those specifically and individually excepted by the court.

The court was looking at its capability to facilitate listings by remote access technology and at the time of writing was expected to provide more details on this as soon as possible.

Court users were advised to closely monitor the daily court lists to check which listings are proposed to proceed. More updates will be posted on the Federal Court's website, fedcourt.gov.au.

The Family Court of Australia and the Federal Circuit Court of Australia have also implemented precautionary measures to minimise the risk to everyone operating within court buildings.

A courts spokesman said that, as of mid-March, all current listings would continue to be heard. However, judges and registrars were being encouraged to hear matters by phone or videoconferencing when appropriate.

The courts were well aware that there were potentially very serious impacts on families if there were extended delays in dealing with family law matters, particularly cases relating to parenting and the living arrangements of children, and cases involving issues of risk and family violence.

Callovers were being staggered in time and distance to ensure that the number of people attending court at any one time was minimised. Future callovers were to be reviewed daily, subject to ongoing medical advice issued by the Commonwealth Chief Medical Officer.

The spokesman said the courts were actively reviewing the caseload for the coming weeks and months, and were developing contingency plans to ensure that cases could be prioritised if the current situation escalated.

Inquiries could be directed to the national enquiry centre, enquiries@familylawcourts.gov.au or phone 1300 352 000.

Updated information would be posted at familycourt.gov.au/wps/wcm/connect/fcoaweb/home and federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/home.

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Networking swansong for young professionals

On 26 February some 125 young professionals descended on City Winery Brisbane for the first (and possibly last) Young Professionals Networking Evening of 2020. The event was very well received by attendees and introduced the Australian Property Institute as an event partner.



QLS SYMPOSIUM 2020







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ON THE INTERWEB

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Townsville District Law Association
13 March at 00:55 · [Like as your Page](#)

Today myself and Michael Murray spent the day engaged in significant and important discussions regarding matters important to our members and the industry in general. Many thanks to the [Queensland Law Society](#) for giving DLA Presidents from across the State the opportunity to interact, share ideas and look to ways to better serve our members into the future

UQ School of Law
6 March at 19:32 · [Like as your Page](#)

Who said the university is just about studying? Last Tuesday, first-year students and UQ staff met in the library for what was a successful night with a cheese and gelato spread that ran for meters, literally! ❤️

After a vibrant address from University of Queensland Law Society - UQLS, Justice and the Law (JATL), UQLS and Queensland Law Society, students were left to network and familiarise themselves with their cohort.

Jump over our Flickr to check out the photos! 📸



The Legal Forecast Creative
13 March at 19:57 · [Like as your Page](#)

We're honoured to be playing tonight at the QLS Legal Profession Dinner & Awards. Thanks to [Queensland Law Society](#) for inviting us along

Far North Queensland Law Association Inc. is with Josh McDiarmid.
14 March at 09:46 · [Like as your Page](#)

Congratulations to Cairns-based practitioner Kellie Walker of Legal Aid Queensland who was crowned winner of the Regional Practitioner of the Year Award at the [Queensland Law Society Awards](#) last night! A well deserved recognition of Kellie's work and the talent in regional Queensland practice. Well done Kellie and all of the winners at last night's awards. 🎉 [#qls](#) [#fnqla](#)

Bradley and Bray Solicitors is at City Winery Brisbane.
27 February at 12:27 · Brisbane · [Like as your Page](#)

Last night our Director Jacob Corbett and our Law Graduate Bridie Edwards attended the Queensland Law Society Young Professionals Networking Evening at the City Winery in Brisbane.

The QLS does a great job of bringing the profession together with events such as this, so that our Lawyers are better connected with their colleagues in the industry.

[Queensland Law Society](#)






Rukshana Sashankan • 2nd
Executive Manager, Practitioner Services (QLD) at Property Exchange Australia Ltd ...
5d • Edited • 🌐

We had a fantastic program of speakers at Day 1 of **Queensland Law Society's** Symposium. One of my highlights being the session on Creating Cultural Change in the Legal Profession, presented by **Megan Mahon**, Commissioner at Legal Services Commission, Queensland and **Rolf Moses**, CEO Queensland Law Society.

'Keep what's good and adapt what's valuable' - was a focus of discussion.

Personally, I believe we are so fortunate to have such a formidable leader in **Megan Mahon** for our legal industry. She inspires me with her passion for the legal community, and her amazing ability to connect and empower women in leadership roles with such grace and humility ❤️
#Leadership #community #culturalchange



Mark Fenlon • 2nd
Senior Prosecutor at Queensland Police Service and Sessional Lecturer at Jam...
5d • 🌐

Well that's an amazing first day of the **Queensland Law Society's** Symposium done and dusted. Great speakers, amazing networking and frankly it was just a great day. The highlight for me was the lecture on vicarious trauma which is near and dear to me not only because of the nature of my work, but also in my role as a PSO. Also the Awards night was awesome! So many talented, dedicated professionals being recognized for the work they do in the profession and the community. Absolutely awe inspiring. Now to fire up for Day 2

Chris Herral TEP • 2nd
Special Counsel at Mullins
4d • 🌐

Thanks so much to Professor Lindy Willmott, **Michele Sheehan** and **Brian Herd** for sharing their expertise and insights at today's **Queensland Law Society's** Symposium.

It was my pleasure and honour to Chair the session.

📷: **Danielle Little TEP**



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herinnerglow Enjoyed my first legal conference and left feeling inspired and motivated following the @qlsossociety symposium! Highlight was attending the personal injuries stream and getting an informative update on case law presented by @karendening, and @travis.schultz.1656 as well as supporting Dr Andrew Shaw (dad) with his presentation on the objective psychiatric assessment. It was a really enjoyable day made even better by the veggie steam buns 🥰 #queenslandlawsociety #youngprofessional #earlycareerlawyer #personalinjurylawyer #brisbane #motivated

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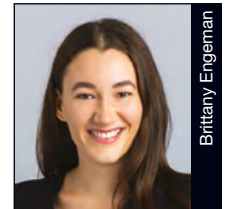
Todd Garsden



Rowan Wilson



Ben Shaw



Brittany Engeman

Career moves

Broadley Rees Hogan

Broadley Rees Hogan has announced the appointment of **Michael Byrom** as head of the firm's property services team. Michael has extensive experience in representing clients in all areas of property and commerce, including body corporate.

The firm has also announced the appointment of **Erin Priest** as an associate in the property services team. Erin has experience in leasing, property and commercial law.

Employment lawyer **Sarah Lock** has also joined the firm as special counsel in the employment and work health and safety team. Sarah has extensive experience and a first-hand appreciation of the needs and issues concerning employers and employees, as both a lawyer and a human resources practitioner.

Cornwalls Law + More

Cornwalls has welcomed **Julian Troy** to the building and construction team as a partner. Julian brings more than 16 years' experience to the team, servicing all levels of the construction industry across Australia, including front-end and litigation experience on major projects.

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.

Cronin Miller Litigation

Jessica Daniels has been appointed as a solicitor at Cronin Miller Litigation. Jessica has practised in corporate insolvency, estate litigation, employment law, dispute resolution and other areas of commercial litigation. She has acted for large corporate clients in the state and federal court jurisdictions, national banks, insolvency practitioners and individuals.

Gilshenan & Luton Legal Practice

Gilshenan & Luton Legal Practice has announced the appointment of **Callan Lloyd** to the position of director. Callan, who joined the firm in 2011, is a QLS Accredited Specialist in criminal law and undertakes a wide variety of criminal law and occupational discipline work, with a particular interest in assisting other legal practitioners in disciplinary proceedings.

James Conomos Lawyers

James Conomos Lawyers has announced that **Jon Patty** has been promoted to senior associate, practising in commercial litigation and insolvency matters.

The firm has also announced the appointment of **Myles Bayliss** as a solicitor. Myles joined as a research clerk in 2018 and was admitted to the profession in 2019.

Adam Saunders, a solicitor with experience in commercial litigation, has also been welcomed to JCL.

Mahoneys

Mahoneys has announced that **Amy O'Donnell** and **Todd Garsden** have joined the firm.

Amy is an experienced property lawyer focusing on management rights, motels, commercial property transactions and leasing.

Todd is an experienced body corporate and management rights lawyer who focuses on body corporate law.

Miller Harris Lawyers

Miller Harris Lawyers has announced the promotion of **Rowan Wilson** to partner. Rowan is a litigator and dispute resolution lawyer with experience in commercial disputes spanning a range of industry areas, particularly banking and finance, property, insurance, construction, and insolvency.

Tucker & Cowen

Tucker & Cowen has announced the appointment of **Ben Shaw** as a special counsel and **Brittany Engeman** as a solicitor.

Ben is a corporate restructuring and disputes lawyer experienced in a range of industry sectors, including financial services, agribusiness and mining.

Brittany, who has joined the litigation team, previously worked as an associate to Judge Long SC at the District Court in Maroochydore.

Winds of change hastening for Queensland's property industry



"Time is of the essence – contracts are required to be settled by a certain date and within certain time parameters. If they don't settle, there can be significant consequences – and that's something we take quite seriously.

But we know that our settlements going through with PEXA will be the ones that likely settle on time and there's going to be the fewest problems with them."

— Jacob Corbett
Director, Bradley & Bray Solicitors

It's a life-changing moment for every Queenslanders when the time comes to buy your first home.

These purchases are significant too for the legal practitioners representing them, given the financial and emotional pressures on their clients, and the responsibility to mitigate potentially significant risks.

A 2018 report published by KPMG found that settling digitally, rather than manually via paper, reduces the number of administrative errors.

Additionally, the study identified that online document verification, made possible thanks to integration between land registries and online settlement platforms such as PEXA, helps provide greater certainty of settlement.

If you'd like to speak with PEXA regarding transacting online, please contact Rukshana.Sashankan@pexa.com.au.

This is of heightened importance in Queensland, with 'time of the essence' incorporated within standard conveyancing contracts. At the 2019 QLS Property Law Conference, it was revealed that there is a requisition rate of 6% in paper compared to 0.2% in PEXA.

Jacob Corbett, Director of Bradley & Bray Solicitors, is part of a growing contingent championing the industry's progression to digital settlements.

And for his firm, the incentives are obvious – an easier process for staff and critically, more guarantee of settlement for clients.

"The first time I ever did a settlement, back in 2015, I knew we shouldn't have been walking around going to physical settlements and handing over bank cheques.

"Time is of the essence – contracts are required to be settled by a certain date and within certain time parameters. If they don't settle, there can be significant consequences – and that's something we take quite seriously.

"But we know that our settlements going through with PEXA will be the ones that likely settle on time and there's going to be the fewest problems with them."

Having welcomed digital settlements into his business, Jacob envisages fundamental change to Queensland's property network – and he's calling on all parties to come together.

"This, in my view, represents wholesale change to an industry that's been working in one, archaic way for so long, that's now undergoing a paradigm shift.

"I believe that industry bodies have a responsibility during this time to ensure they're supporting solicitors as well – they need to recognise that there is huge change coming."





CORRECTIONAL CENTRE ISSUE

REGIONAL

L-R: Parole Board Queensland President Michael Byrne QC, Deputy President Julie Sharpe and Deputy President Peter Shields

ON PAROLE

Not just a 'get-out-of-jail-free' card



Responsible release or revolving door justice?



BY TONY KEIM

The granting of parole or early release to Queensland prisoners has long been a controversial topic which has fuelled many a fiery debate – usually on talkback radio or in media reports – on occasions when hard-core or infamous criminals are released back into the community.

The cloak of secrecy surrounding the parole process and whether, when, why and how a prisoner is to be released and managed or given support as part of their rehabilitation has not helped placate the naysayers or ill-informed members of the community who believe many inmates should never be released, or at least serve the full term of any sentence imposed by the courts.

That perceived absence of transparency and the community's lack of faith in the Queensland Parole Board, as it was then named, was validated in July 2016 with the brutal stabbing murder of 81-year-old Townsville woman Elizabeth 'Beth' Kippen by a paroled prisoner, 32, who was also charged with the attempted murder of a man and woman, aged 28 and 26 while he was on parole.

News reports of the murder and all its gory and horrific details so outraged the public that it prompted Queensland Premier Annastacia Palaszczuk to order a review of the parole system by then eminent Queen's Counsel and former Solicitor-General, now Court of Appeal President, Walter Sofronoff in August 2016.

The result of the extensive Queensland Parole Review was the release of the Sofronoff report on 16 February 2017. The Government embraced the key recommendation of establishing a new, independent and professional parole board with a full-time president, two deputy presidents, professional board members, and part-time community board members who would represent the diversity of Queensland.

The formation of the Parole Board Queensland in mid-2017 resulted in the scrapping of three separate former boards – the Queensland

Parole Board, South Queensland Regional Parole Board and the Central and Northern Queensland Regional Parole Board.

The newly minted board saw the appointment of eminent veteran criminal lawyer and Queen's Counsel Michael Byrne as its president. Mr Byrne's illustrious legal career commenced when he was first called to the Bar in 1977 and took silk in 1993. Apart from acting in numerous high-profile criminal trials – including being defence counsel for Gerard Baden-Clay – his stellar career included Mr Byrne being an acting District Court judge, the Deputy Director of the Office of Public Prosecutions and head of the Queensland Organised Crime Commission of Inquiry.

“The concept of parole is often controversial and its purpose misunderstood.”

Michael Byrne QC

Experienced former police detective and renowned specialist criminal lawyer Peter Shields, who also represented numerous infamous criminals including Baden-Clay, Queensland's first convicted serial killer Leonard John Fraser (in 2003) and former Billabong boss Matthew Perrin, was named as Mr Byrne's deputy.

Barrister Julie Sharp was named as the other deputy. She started her career as a law clerk with Legal Aid more than 20-years ago and progressed through the ranks there, ultimately becoming in-house counsel at Legal Aid. She then went to the private bar where she focused on criminal defence work but also prosecuted, and did work in other areas of the government and in the coronial inquest sphere.

The board in its current form consists of 37 members, which include:

- four full-time professional board members with a legal or health practitioner qualification
- 24 community board members with varied diverse and cultural backgrounds
- three nominated public service officers (from Queensland Corrective Services)
- three nominated police representatives

The workload of the board has increased significantly since its inception, with a 24% increase in the number of applications decided between 2017-18 and 2018-19. And, of the 3129 applications made in the last financial year there has been a 13% increase in the number of applications granted and a reciprocal percentage decrease in those refused. In 2017-18, 1736 of the 2517 requests for release were granted, whereas last year 2565 of the 3129 applications were approved.

And as Board President Michael Byrne QC explains, there is a very good reason for the granting of early release – and it has nothing to do with prison overcrowding.

“The concept of parole is often controversial and its purpose misunderstood,” Mr Byrne said in the board's most recent annual report.

“It is not a ‘get out of jail free card’ and it is not an indication of a ‘soft’ approach to crime and punishment.

“It is a method developed to prevent reoffending. Research tells us paroled prisoners are less likely to reoffend than prisoners released without parole.

“Common sense tells us success on parole and beyond depends on access to adequate support for prisoners to address the root cause of their criminal conduct – for example, poverty, homelessness, substance abuse and mental health issues.

“Along with Community Corrections, and rehabilitation and reintegration resources, proper investment in the Board is an investment in community safety.”

Mr Byrne said prisoner numbers had increased by 4% since the new board was established, while applications for parole release had increased by more than 25%.

Community safety relies on a well-run, efficient parole system

“(Last year) the Board considered 17,413 matters impacting citizen liberty, based on evidence-based risk assessment,” he said.

“Community safety is always the Board’s highest priority.

“The work of the Board has become increasingly voluminous and complex. In one fortnight this year, Board members were required to consider 32,000 pages of material for 449 parole matters over 12 meetings.

“The Board’s commitment to fair, evidence-based decision making and community safety is genuine and resource intensive. Each case is considered on its own merits on the basis of all evidence before the Board. Where the evidence is perceived to be insufficient to make a sound decision, the Board will seek what it needs.

“The Board meets nine times per week (excluding out-of-session meetings for urgent consideration of parole matters). Each meeting is chaired by me or a Deputy President.”

Mr Byrne said that due to the resulting workload, he was hopeful that State Government Budget commitments would result in additional staffing so the Board could deliver “tightened legislative timeframes”.

“It is hoped additional positions approved by government in the latest budget will alleviate the pressure felt by all at the Board (last) year.”

The sweeping reforms and recommendations made by Walter Sofronoff QC – the head of the Queensland Parole System Review – revealed an important insight into why it was essential that prisoners, when released back into the community as most of them inevitably are, need to be responsibly paroled to “ensure the safety of the community”.

Judge Sofronoff, who is the current Queensland Court of Appeal President, said in his 2017 report that a reconstituted parole board needed to play a vital role in Queensland’s criminal justice system to protect the community.

“The only purpose of parole is to reintegrate a prisoner in the community before the end of a prison sentence to decrease the chance that the prisoner will ever reoffend,” he said.

“Its only rationale is to keep the community safe from crime. If it were safer, in terms of likely reoffending, for prisoners to serve the whole sentence in prison, then there would be no parole.

“It must be remembered also that parole is just a matter of timing; except for those who are sentenced to life imprisonment, every prisoner will have to be released eventually.”

Judge Sofronoff said that, at the time he conducted the review, “most research” suggested most parolees were less likely to reoffend than prisoners released after serving their sentence in full and without the assistance and support provided to parolees.

“In truth... (parole) is nothing more than a method that had been developed in an attempt to prevent reoffending,” he said. “It works to achieve that purpose to a degree; like the criminal justice system itself, it will never fully achieve the goal of eradicating offending.

“The only realistic issue is how it can be improved to reduce reoffending by increments and to avoid cases of serious offending on parole.

“The goal is perfection but perfection will always be out of reach.”

To that end, the current Board Deputy President Peter Shields said that positive outcomes that have been achieved are due to the “complete restructure” since July 2017, including the running of the board like a law firm, modernising language, reducing time and ensuring the board always “make(s) evidence based decisions” on whether an inmate is granted or refused bail.

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

No body, no parole

State legislative amendments introduced shortly after the establishment of the revamped Parole Board Queensland included the particularly controversial – albeit universally welcomed outside of the legal profession – new ‘no body, no parole’ laws.

The laws – which came into effect in August 2017 – received bi-partisan support, with Government and Opposition parliamentarians agreeing that no one convicted of murder, manslaughter, striking causing death, interfering with a corpse or accessory after the fact ever be considered eligible for conditional release back into the community unless they revealed the location and satisfactorily assisted investigators to recover the bodies or remains of their victims.

For obvious reasons, the implementation of these newly minted laws fell into the remit of the reconstituted Parole Board Queensland.

Parole Board Queensland President Michael Byrne QC, in an exclusive interview, told *Proctor* that when the laws were introduced he and his two deputies – Julie Sharp and Peter Shields – spent considerable time deciding how to proceed with the unexpected and complicated new law and landed on the “radical” approach of holding “open hearings” for convicted killers to ensure transparency and understanding for the prisoners, the victim’s family and the wider community.

“No body, no parole. That caught us from left-field (when introduced) because it didn’t exist when we came here and it came to us (the board) in rushed legislation,” Mr Byrne said

“When the three of us sat down and said how do we deal with this? We thought it’s all about the victims (and their family and friends) and all about openness – so we took the radical step of holding (hearings) in open court.”

Mr Byrne said the reasoning behind the concept of open, and ultimately transparent, hearings was quite simple.

“This is to further the ideal that justice must not just be done; it must be seen to be done – in particular by the families of the victim and the family of the prisoner,” he said.

“I think that approach has so far been rather successful. Corrective Services, to give them their due, will fly the families of victims from wherever they are – be it Melbourne or wherever – (to the hearing) to sit in the back of the court, with a support person, so they can see what’s going on.

“We will always sit two of us (out of the three executive board members) rather than the usual one on the panel to hear the matter. We also thought it was a good idea to get (legal) counsel assisting us (to cross-examine the prisoner) and the next step (in our plans) is to try and have prisoners legally represented.”

Mr Byrne said that, while the concept of ‘no body, no parole’ laws received widespread media coverage at the time they were enacted, many people did not fully comprehend what they meant or how they were implemented.

“It is laudable legislation to try and give (the families and friends of) victims some closure,” Mr Byrne said. “And the best way to get closure is to get (convicted killers) to talk and to try and say where the body or remains (of a victim) can be found...and if they don’t do that they know the consequences (and will remain in jail indefinitely).”

The laws to be implemented by the Parole Board Queensland – under Section 193A of the *Corrective Services Act 2006* – dictate parole must not be granted to prisoners where the remains have not been located, unless it is satisfied the inmate has cooperated satisfactorily to identify where the victim’s remains are located.

These laws apply to cases where bodies or remains have not been located or recovered in cases of people convicted of:

- murder
- manslaughter
- misconduct with regards to corpses
- accessory after the fact to murder
- conspiracy to murder
- unlawful striking causing death
- accessory after the fact for the offences of misconduct with regards to corpses, manslaughter, conspiracy to murder and unlawful striking causing death
- counselling, procuring or conspiring to commit one of the above offences, and
- for prisoners transferred from interstate who are serving a period of imprisonment in Queensland, an offence against the law of that other state that substantially corresponds with one of the above offences.

Mr Byrne said the approach adopted in the estimated “eight-or-so” cases so far heard under the ‘no body, no parole’ legislation had resulted in the release of about half of the prisoners who had applied for release.

In order to grant parole under the ‘no body, no parole’ provisions – the board must be satisfied that the prisoner has cooperated satisfactorily with police and investigators to locate or identify their victim’s body or remains.

By way of explanation, Mr Byrne said one prisoner secured parole by directing investigators to a location heavily populated with crocodiles where they were able to secure the murder weapon, but no remains, in a stretch of river where the victim’s body was dumped.

“The easy example (of how ‘no body, no parole’ works) is one of the early (applications) we had where a guy and his mate were living in a shanty somewhere north,” he said.

Parole Board Queensland

Parole Board Queensland currently consists of 48 member positions – 14 full time and 34 part time – consisting of:

“As it turned out the (prisoner’s) mate took his washing off the line and (the prisoner) wasn’t happy so he clubbed him (with a length of pipe). He then dragged his mate’s body down to the river and threw it into a section filled with crocs.

“When (police) investigated...it took them three days to make it safe for divers to go in to the (crocodile infested) water (around the nominated dump site). The prisoner said ‘I killed him with a piece of pipe.’ The divers found the piece of pipe but did not – for obvious reasons – find the body. So what more could he do to help? And so he got out.”

However, Mr Byrne referred to another case where parole was denied to a prisoner – who claimed he was not present when his unnamed co-offenders dumped a victim – declined to assist investigators by naming his assailants and thereby increase the chances of locating the deceased person.

“At the other end of the spectrum is (an inmate)...who, I think, expected to get out,” he said.

“He was there (at the time of the murder)... but, he said: ‘I didn’t go, I didn’t dump the body, I don’t know where it is.’

“Well we said, ‘You said organised it.’ Tell us who the other people were and what happened.

“For obvious reasons he wasn’t going to tell us. And for even more obvious reasons we told him he wasn’t going to get out.”

Mr Byrne said these two examples, in essence, showed the aim of the ‘no body, no parole’ legislation to induce prisoners to “talk” and provide answers, solace and ultimately some form of closure for those most affected by the unlawful killings – their victim’s family.

1

who has equivalent standing of a Supreme Court judge

2

Deputy Presidents – who have equivalent standing as a District Court judge

1

Health Professional Board Member

3

Legal Professional Board Members

34

Community Board Members (part-time)

3

Queensland Police Service representatives

4

Queensland Public Service representatives

NORTHERN PENINSULA AREA COMMUNITY JUSTICE CENTRE



First Nations solutions address a shameful crisis

It is one of the most heartbreaking and shocking statistics for any Australian state or territory, but the over-representation of First Nations people in our jails is both a tragedy and ongoing human rights crisis.

People who identify as being of Aboriginal and/or Torres Strait Islander origin in Queensland account for 4% of the state's population, according to the latest Australian Bureau of Statistics figures. However, the state's prisons are home to 10 times more First Nations people than any other race or culture.

A Queensland Productivity Commission report on 'Imprisonment and Recidivism', released on January 31 this year, found Indigenous imprisonment rates had exploded over the years, with a staggering increase of 45% in the prison population during the 10 years to 2018.

"This growth was around 50% faster than for non-Indigenous people," the report says. "Indigenous imprisonment rates are around 10 times the non-Indigenous rate... (and) for Indigenous men, the rate of imprisonment is over 3000 (people) per 100,000 population."

The Queensland Parole System Review headed by Walter Sofronoff QC found that, at 30 September 2016, of the almost 20,000 prisoners under supervision by the now defunct Queensland Parole Board (since replaced by Parole Board Queensland) – 24% of those identified as Aboriginal and/or Torres Strait Islander.

As the state's inaugural Parole Board Queensland (PBQ) President, Michael Byrne QC recently told *Proctor* that up to 98% of all the state's prisoners will eventually be released back into the community and there needs to be robust and effective systems and social support networks in place to ensure public safety and also support inmates as they return to the community and to significantly reduce risks of reoffending.

To that end, PBQ Deputy President Julie Sharp has been the driving force behind addressing the over-representation of First

Nations people in jail and implementing strategies and programs uniquely tailored to recognise particular cultural differences and needs required to assist in their rehabilitation.

"We (at PBQ) currently have about eight of our 37 board members that are First Nations community board members to date... and the director (of the board) and I have interviewed and aim to add 10 more First Nations community board members in the very near future," Ms Sharp said.

"That is very exciting, I think, and will bring the total numbers to close to 50% membership of Aboriginal and Torres Strait Islander representation of community board members.

"What is really significant about that is that we will be able to achieve meetings that are all comprised of Aboriginal and Torres Strait Islander (parole) applicants with a community member who is also Aboriginal or Torres Strait Islander.

"We think this will be really beneficial in considering not only what has gone on before (a person is incarcerated) but what can happen afterwards (when they are released).

"That became evident to us through the input of a sterling community board member who has been involved in many video links (to prisons) with Indigenous applicants in that she can communicate and speak (to them) in 'the language'. You can see the difference in

(applicants') demeanour almost immediately when the (First Nations elder) board member starts talking.

"You know, you have me or (fellow executive board members) Peter (Shields) or Michael (Byrne) there at the hearing as the 'authority figure' and they (the Indigenous inmate) just cannot relate to us on any level. But as soon as (the First Nations) community board member starts to talk to them in a way they can understand, you can see (the applicants') shoulders drop immediately; they are relaxed and talk openly and honestly about what's going on and what we can do (to help them return to society). It is really effective."

Ms Sharp said the board had also spent considerable time visiting and engaging with numerous First Nations community justice groups – as widespread as Doomadgee, Mt Isa, Mornington Island, Boigu, Moa and Thursday Island – who are "passionate about improving outcomes for their communities in respect of safety and reintegration of offenders".

"All of these visits opened our eyes to the fact we needed to be and do better here (in Brisbane) in relation to what's going on up there. We ultimately hope these new (First Nations) community board members will bring these qualities to all future discussions for every new (Indigenous) applicant for parole, which will be great."



Doing time beyond the crime

Under Section 192 of Queensland's Corrective Services Act (2006), Parole Board Queensland is not bound by the sentencing court's recommendations or parole eligibility date.

Queensland taxpayers are slugged an average \$293 a day to house, feed, clothe and care for each and every person held in detention.

This is in excess of \$107,000 a year for every person in detention, according to the most recent Productivity Commission figures.

Since the formation of the Parole Board Queensland, one of its priorities has been to reduce this extraordinary cost to taxpayers by slashing delays to the release of prisoners granted immediate parole by judges and magistrates at the time of their sentencing.

Parole Board Queensland Deputy President Peter Shields said a review of estimated times for release of prisoners serving actual custodial jail sentences past their parole eligibility date had found that the average was 69 days.

A prisoner who may have been left languishing in jail – sometimes for several years – on remand awaiting sentencing can expect to spend almost twice as long behind bars past their “immediate release date” (132 days on average) despite being granted immediate parole by a court on the day they were sentenced.

“When you look at a lot of the legislation the Board is still working under a parole system that is a ‘one size fits all’ model,” he said.

“For example, when making an application for parole a prisoner must make it in the approved form and you must make it to the Board.

“The reality of that of course is that if you’re sentenced for drug trafficking you are going to receive a lengthy sentence of imprisonment. The legislation allows an inmate to make their application for parole up to six months before their eligibility date. So in those circumstances a prisoner may have served two years in prison, and six months before their eligibility they can make an application to the Board and, if everything is as it should be, they will be granted parole and notified of that many months before their release.”

Mr Shields said that, while that process would appear fair to inmates, the same system was not available to prisoners who had served lengthy periods of time in pre-sentence custody

– which meant being held in jail until such time as they were tried or sentenced – and were granted immediate release orders by the courts at the time sentences were imposed.

“The opposite applies to someone who is remanded in custody and has done significant time while awaiting sentence,” Mr Shields said. “When they arrive at court and are sentenced that day, they may be sentenced to prison but with immediate parole eligibility because of the amount of time they’ve spent on remand.

“In these cases, the prisoner has to go back to the (correctional) centre, they have to fill out the approved form and have to provide that form to the Board.

“...The Board is still working under... a ‘one size fits all’ model.”

Peter Shields

“What we have found is that there has been an inequity for those prisoners who are sentenced to immediate parole eligibility because the Board wasn’t able to assess their applications for a period of approximately three months. That is inconsistent with the order of the court.”

To remedy that inequity, the board – in an initiative instigated by Mr Shields – created the Court Ordered Immediate Parole Eligibility Project (COIPE).

“The COIPE Project is designed to prove the case that if we have the resources available the Board can deal with those prisoners sentenced to immediate eligibility in a timely fashion. And by doing it in a timely fashion we can prove the incredible saving that flows from not having to keep them in jail.

“The COIPE Project has been running (as a trial) in Ipswich since September (2019). The project to date has been successful. What we can show... is that so far we are saving on average \$12,000-\$15,000 per prisoner, just on (prison) accommodation.

“We can also show (from the data collected) those prisoners are being released consistently with the order of the court. That is how it should be because how can we have a Supreme Court judge order that a prisoner is eligible for parole today and have a system where the Parole Board doesn’t get to look at the application for 3½ months?”

“That’s not fair to the prisoner and it’s certainly not fair to the order of the court.”

Data held by the board shows that in 2018-19, 897 prisoners were sentenced to COIPE. During that same year, Parole Board Queensland granted 82% of prisoner applications.

Mr Shields said that, if the 735 inmates who were granted parole within two weeks of court orders (which is the COIPE Project’s objective) – as opposed to the average 132 days they ordinarily spend awaiting parole hearings – the total cost saving to taxpayers each year would be about \$25.41 million, or \$34,500 per prisoner.

Figures provided exclusively to *Proctor* show that, since the introduction of the Ipswich COIPE trial, 80% of the 34 prisoners eligible for immediate parole via the Ipswich courts were released by the board within a third of the time of other immediate release parolees across Queensland.

Mr Shields said prisoners dealt with under COIPE has seen the average post-immediate release prison stay slashed from 132 days in prison to just 47 days.

He said the average savings to the government, and ultimately taxpayers, as a result of the small study sample was almost \$400,000, or the equivalent of 1365 “prison bed days”.

“You can only imagine the cost savings if COIPE is successfully implemented state wide.”

He said the project had been so successful that the trial was set to be extended to orders made in the Beenleigh District and Magistrates Courts.

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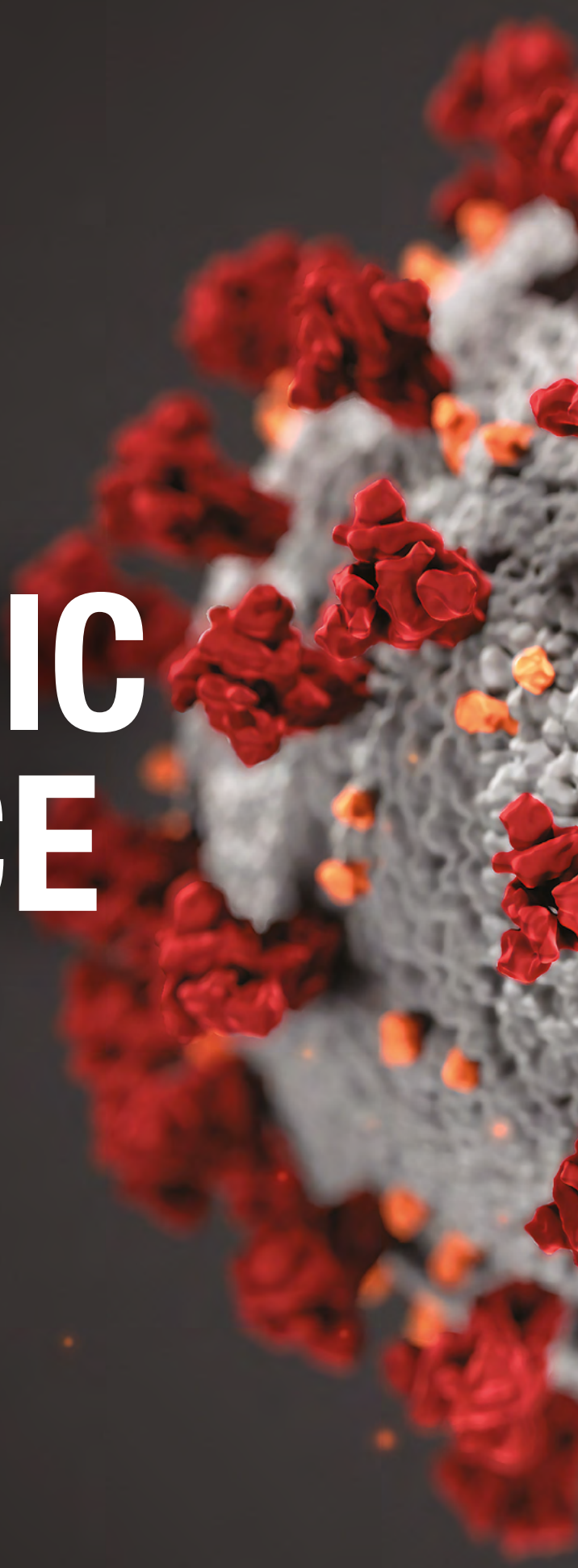
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PANDEMIC PRACTICE

Strategic tips for your firm





BY GRAEME MCFADYEN

The Coronavirus presents a significant challenge to all businesses. Professional services are no different.

For the most part, legal staff need not mix with clients to any great extent – emails, telephones and electronic signatures have largely done away with the need to physically meet with clients.

Rather, the threat is more likely to come from a member of your own staff contracting the virus. So what measures have you adopted to keep your staff well and your practice operating?

Here's some simple steps to keep the lights on.

1. Check your insurance. Your business interruption cover is likely to exclude the virus once a pandemic has been declared, but check anyway.
2. You have to ensure that everyone understands that personal hygiene is the big issue. So there needs to be hand sanitiser everywhere! If anyone leaves the office, they should apply the sanitiser upon their return. Ask your reception to remind everyone upon their return. The Health Department has emphasised the importance of good hand and respiratory hygiene including:
 - cleaning hands with soap and water for 30 seconds or using alcohol-based hand rubs
 - covering nose and mouth with a tissue or flexed elbow when coughing or sneezing
 - avoiding contact with anyone who has symptoms such as fever, a cough, sore throat, fatigue, and shortness of breath
 - staying home if you are feeling unwell.
3. Increase the frequency of office cleaning especially 'touchpoints' such as door handles and handrails, and photocopiers. If anyone exhibits some of the above symptoms, ensure they go home and that their desks are thoroughly cleaned with disinfectant.
4. Advise everyone to avoid crowded venues as best they can. Public transport is a health risk and all staff using public transport need to be especially vigilant. Query the need to attend external seminars.
5. Ensure as many people as possible are able to work from home. With more people using home internet, it can get really slow. Get backup internet via mobile data with extra downloads.
6. Many staff just need their notepads and mobile devices. Advise your staff to carry their devices with them always, just in case tomorrow is their first remote day.
7. Cyber criminals are still looking to create havoc. Remind staff to be vigilant while working from home.
8. With more remote working, your IT infrastructure for remote volumes will be under pressure. Check with your telcos and obtain some additional capacity, and do the same for core infrastructure.
9. Speak to your IT about installing firewalls on staff devices to ensure working from home on their own devices does not diminish office IT security.
10. It will be necessary to keep in touch with people working from home so consider a daily telephone hook-up just to touch base and remind people at home that they are still part of the team and they still need to record their chargeable time.
11. Wherever possible, substitute online video conferencing for physical meetings both internal and external.
12. Encourage staff to get their flu vaccination. It may not defeat the current virus, but if anyone catches the normal flu their immune system will be weakened. Consider having a nurse attend the office to immunise as many people as possible. Herd immunity works in offices too.
13. This virus is a once-in-a-generation event, so businesses are going to adopt a wait-and-see approach which regrettably but inevitably will mean less work for legal practices. In this context, you should put any thoughts of employing new staff on hold.

Graeme McFadyen has been a senior law firm manager for more than 20 years. He is Chief Operating Officer of Misso Legal Consulting.

SOLE PRACTITIONER IN QUARANTINE

Unwell and interstate, Corona control steps in

BY JULIE GILFOYLE



Saturday 7 March – phone ringing from private number. OK, I will answer it as it's probably the husband not changing his phone onto caller ID mode.

"Hello, is that Julie Gilfoyle?"

"Well, you should know as you called me" was what I wanted to say, but I said "yes".

"It's Dr Louise Flood, Director of the Centre for Communicable Diseases (CCD) here, and were you a passenger on Virgin Flight VA159 Brisbane to Adelaide on Tuesday 3 March?"

Heart dropping now. "Yes," I reply.

"Where are you now?" So I answer. "Have you any symptoms, such as a sore throat..."

The answer is yes, and I'm sitting under a tree because I just wanted to lie down, and I'm trying to drink coffee as I have a sore throat and neck, and a fever.

"I am telling you that you are now detained. A passenger sitting next to you on this flight has tested for Coronavirus. What we need you to do is stay there and we will send an ambulance..." And there it began.

How easy it is to go from reading, hearing and discussing COVID-19 Coronavirus like it was not real but some media hype, the only reality up to now being the lack of toilet paper on the supermarket shelves.

I was in Adelaide for commencement of uni and then to stay with a friend for the WOMAdelaide festival. I had hubby and kids in Brissy, I am a sole practitioner, I am in the middle of an urgent child recovery and have court and end-of-month rollover to do. I have two clients to do bail applications for in three days.

I am then met by police with masks on, in front of the crowd who were supposed to be watching a Korean drum band (so was I); escorted to an ambulance with officers straight of a chemical hazard drug raid outfit, transported to the Adelaide testing facility (only opened two days before).

"Stand behind the yellow line. No, don't hand over your Medicare card – we can't touch that. What? You are not from Adelaide; where is home?"

The questions are endless, the swab test easy, results in 48 hours. I have so many questions but they don't have the answers. I explain to them that keeping patients (clients) informed and educated may benefit them in obtaining co-operation from patients. I start being treated as a person then. Apparently, I am the first one that they had that was detained by the CCD; all their other tests had been with people volunteering to come and be tested.

My friend? She is employed with the Public Services Commission. She is asymptomatic (no symptoms) and I find out she was told to go to the hotel room and stay there until further notice. I am returned to the hotel room too and we are there together feeling lost and uninformed.

We are fortunate that we are both literate and mostly intelligent. We start reaching out for information and sources of help. No more laughing at the toilet roll and Corona bottle memes and jokes, seriously trying to work out what will be required of us and if I am positive, then the consequences of this.

We are into now Day 4 and still in our hotel room. What has occurred between that first day and now is unique to our circumstances. All individuals affected will have needs and face the unique consequences of having COVID-19 in their lives.

My friend's supervisors have been extremely supportive – she is working remotely and attending meetings where possible. Her children are still at home but young men, and she is a single mother. They were both more anxious about having no toilet paper than their mother's wellbeing. She has no symptoms. However, she was not tested either.

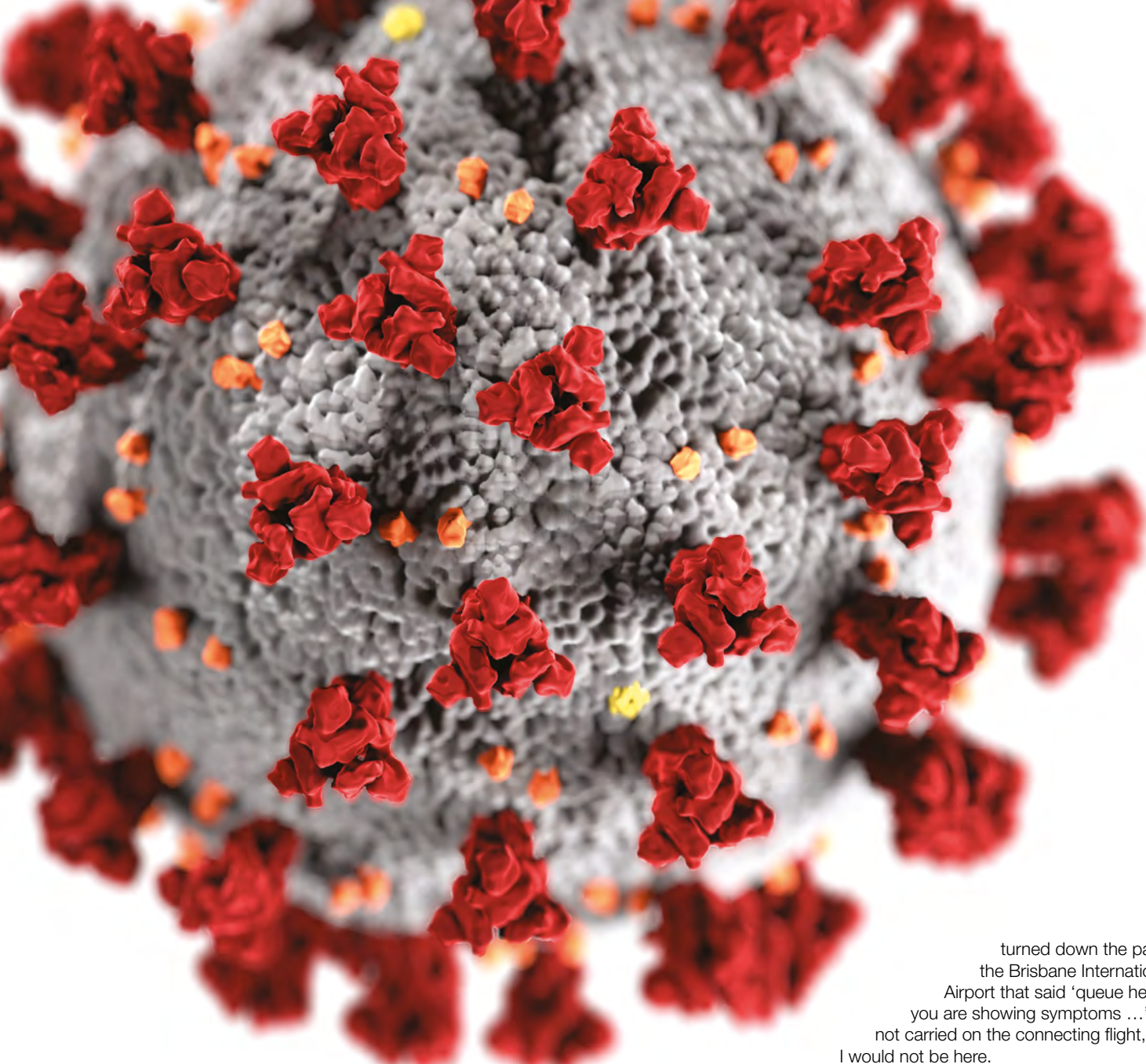
Myself as a sole practitioner – I am my own boss and she is not very happy with me. Regardless, positivity and optimism is vital. Instead of 'what can't be done?', change

it to 'what can I do?' or 'what must I do?'.

We gathered our food supplies (two bottles of wine, chocolate and other gifts to take back) we liaised with one member of staff at the hotel and they agreed to have us remain there and gave us a set rate which included breakfast and dinner. We organised the wi-fi and then I started my keyboard warrior journey.

I was fortunate to have a friend who was seconded to the Queensland Response to COVID-19 Task Force and who guided me in who to approach. I cannot imagine how this would negatively affect those without people to assist them. Here is the outcome:

1. There is national funding to assist with those in quarantine whilst away from their homes and your state/territory health department have these details.
2. You are entitled to a case worker within the health department. If you have been tested, then you have this case worker talk with you on the phone and assist you in obtaining medications and other life needs specifically to you.
3. Should you have no symptoms and no need for testing (my friend) then you get a text daily to ask you if you are showing any symptoms – this is a yes or no reply function via mobile phone.
4. It is a 14-day quarantine period from last exposure. Therefore, should I have tested positive, then my detention period would be served at the hospital, however, my friend's 14-day period starts all over again.
5. My test came back negative for Coronavirus but positive for Influenza A. Influenza A has killed more people than Coronavirus – fact.
6. The test for Coronavirus is for 'that time only' – meaning that we could develop the virus any time up to and including the end of the 14 days. Therefore, this rejected my submissions for early release as I had no Coronavirus.



7. After making inquiries about how we were exposed, we were advised that a person returning from overseas was unwell and did not comply with the testing opportunity at Brisbane International Airport. The person headed straight to the domestic terminal and boarded our flight.
8. Insurance – yes we were insured for travel – even domestic travel I get insured. I have been liaising with them. I have ascertained that the relevant state/territory have funding to cover accommodation costs for visitors to a certain amount (this varies between states/territories). Therefore, you could be moved to different accommodation. Unfortunately, the Hilton was booked out when we were booking our trip so we were staying in lesser quality location and

as they quite liked us, they negotiated with SA Government and we are staying here. This is important to know because we were both stressing about the extra accommodation and food costs. There is no insurance policy that I am aware of that will cover you for epidemic, pandemic or outbreak of diseases. At the time of writing this, I am waiting for a response from our insurer on whether they will pay for the flight home and I have made submissions that it falls under the definition of 'unexpected event'. We have not booked flights as we may have to change yet again.

9. Masks – only good for half an hour and then they lose their protective aspects. Your future travel – this is a decision for you. Should the person I sat next to on the plane (who was coughing and spluttering) have

turned down the path at the Brisbane International Airport that said 'queue here if you are showing symptoms ...' and not carried on the connecting flight, then I would not be here.

Adhere to the warnings, comply with requests, think of others and not yourself. I am due to travel to Sydney at the end of the month and will I cancel that? The answer is no.

As a sole practitioner, I have to work. I have financial commitments and people rely on me. I have emailed clients, I have an out-of-office message on, I am taking limited calls, I have made applications to appear by telephone before court, and accepted offers from colleagues for assistance. I am in touch with my family and friends and I am keeping people informed and educated on what's happening and I am following my own suggestion – keeping others informed – that I gave to the nurse all those long days ago.

Julie Gilfoyle is a Brisbane-based solicitor, mediator and conflict coach.

DV breaches and related criminal charges

Can two punishments follow one incident?

SCENARIO

John is the subject of a current domestic violence order in respect of his partner, Jane.

John subsequently assaults Jane, resulting in him being charged both with breaching his domestic violence order and with a separate count of assault.

In such circumstances, can John be punished for both offences?



BY RACHEL TIERNEY

Criminal law practitioners will be familiar with this scenario. One of the fundamental principles of our criminal justice system is that a person cannot be twice punished for the same act or omission. There are exceptions to this rule though, including when an Act otherwise *expressly provides* that it is permitted.

The *Domestic and Family Violence Protection Act 2012* (Qld) (DFVPA) contains provisions which, on their face, appear to allow matters under the DFVPA and related criminal proceedings to both proceed.

This article examines whether those provisions of the DFVPA constitute an exception to section 16 of the *Criminal Code Act 1899* (Qld) (Criminal Code), such that offenders can be punished for both a domestic violence order (DVO) breach and a related criminal offence.

The legislation

Section 16 of the Criminal Code provides that a person cannot be twice punished for the same offence:

“A person can not be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof the person causes the death of another person, in which case the person

may be convicted of the offence of which the person is guilty by reason of causing such death, notwithstanding that the person has already been convicted of some other offence constituted by the act or omission.”

Section 45 of the *Acts Interpretation Act 1954* (Qld) (Acts Interpretation Act) also states that an offence is punishable only once:

“(1) If an act or omission is an offence under each of 2 or more laws, the offender may be prosecuted and punished under any of the laws, but the offender may not be punished more than once for the same offence.

(2) Subsection (1) applies to a law unless an Act otherwise expressly provides...”Section 138 of the DFVPA deals with a concurrent criminal proceeding:

“(1) *An application under this Act may be made, and a court may deal with the application, even if a person concerned in the application has been charged with an offence arising out of conduct on which the application is based.*

...

(3) *To remove any doubt, it is declared that, subject to this section, an application, proceeding or order under this Act in relation to the conduct of a person does not affect—*

- (a) any proceeding for an offence against the person arising out of the same conduct; or
- (b) any civil liability of the person.

(4) The person may be punished for the offence mentioned in subsection (3)(a) despite any order made against the person under this Act.”

The cases

Two Queensland cases have considered the interplay between these provisions, expressing different views on the matter. In both cases it was accepted that the same act was relied on for the breach of DVO offence and the substantive criminal charges, and that this would normally constitute a breach of section 16 and meet the test espoused in *R v Dibble ex-parte Attorney-General of Queensland* [2014] QCA 8. The point of distinction in the reasoning of the two decisions hinged on the interpretation of section 138 of the *DFVPA*.

R v MKW [2014] QDC 300 (*MKW*)

In *MKW* the defendant pleaded guilty to breaching a DVO and was sentenced. At a later time, after a medical report was furnished, police then charged the defendant with an offence of grievous bodily harm arising from the same act that constituted the breach of the DVO.

His Honour Chief Judge O'Brien concluded that the breach of DVO proceedings were “proceedings” under the *DFVPA* for the purposes of section 138(3). His Honour relied particularly on section 181 of the Act, which provides that “proceedings for an offence against the Act” must be taken summarily. His Honour saw that provision as making plain that breach proceedings were contemplated as proceedings under the Act for the purposes of section 138(3), and therefore the related criminal offence proceedings could continue. The application for a permanent stay of the indictment was therefore dismissed.

His Honour went on to note that if his “tentative view” of section 138(4) was correct, then in the event of a conviction in the related criminal proceedings, section 16 of the Code would still need to be considered for sentencing purposes, and at the very least, regard should be had to the penalty already imposed for the breach offence.

QPS v DLA [2015] QMC 6 (*DLA*)

DLA dealt with a defendant who was charged with using a carriage service to menace or harass and breaching a DVO at the same time; the facts of each charge were identical.

In considering the matter, Magistrate Bucknall had regard to section 45 of the Acts Interpretation Act, and the High Court decision of *Pearce v R*, which considered a similar legislative provision to section 138 of the *DFVPA*. His Honour concluded section 138 did not expressly provide for an offender to be punished more than once for different criminal offences comprised of the same act

or omission. He declined to follow the District Court’s reasoning in *MKW*, noting the views expressed there were tentative ones.

Magistrate Bucknall ultimately ordered a permanent stay of the breach proceedings. Importantly, he commented that this issue is not resolved by simply convicting and not further punishing a defendant for a breach offence in these circumstances, given that previous convictions for breach offences may automatically increase the applicable penalty for subsequent breach offences.

Discussion

The crucial issue is the meaning of “application, proceeding or order under this Act” as that phrase is used in section 138(3) of the *DFVPA*. If that phrase encompasses criminal proceedings under the Act (that is, breach proceedings), then the section serves as an express exception to the protection of section 16 of the Criminal Code.

Unfortunately the cases decided to date are not consistent. The law therefore remains uncertain and further judicial consideration would seem likely, given the increase in DVO breach proceedings commenced in conjunction with related criminal charges.

It is the writer’s view that there is a strong argument available to resist breach offences and related criminal offences both proceeding in these circumstances, as being contrary to section 16 of the Criminal Code. While the provisions of the *DFVPA* expressly contemplate mutual *DFVPA* proceedings and other (related) criminal proceedings, they do not expressly refer to mutual criminal proceedings (that is, breach proceedings under the *DFVPA* and related proceedings).

It is suggested that there is also a reasonable argument open that, despite section 181 *DFVPA*, breach proceedings are not proceedings under the *DFVPA* (as required by section 138(3)), but proceedings under the *Justices Act 1889* (Qld) or the *Penalties and Sentences Act 1992* (Qld) in respect of an offence against the *DFVPA*.

It follows that if the *DFVPA* does not specifically allow for both types of criminal matters – breach proceedings and related criminal proceedings – then the operation of section 16 of the Criminal Code is not displaced, and the offender cannot be punished for both.

Recent decisions of the higher courts suggest that this issue is not always being agitated by practitioners. In circumstances where it is ventilated, it seems courts are commonly convicting and not further punishing for the breach offence.

Conclusion

Considering the increased penalties for breach offences under the most recent *DFVPA* amendments, stakes are high for clients. As practitioners, we must carefully consider if the factual basis of breach offences and criminal offences are the same. If so, the appropriate course seems to be to enter into negotiations with the prosecutor to withdraw the breach offence. Failing this, an application to stay proceedings might then be made to the court on the basis that section 138 does not allow the breach proceedings to run in tandem with the criminal offence proceedings.

Rachel Tierney is a lawyer at Gilshenan & Luton Legal Practice.

Notes

¹ S16 *Criminal Code 1899* (Qld).

² S45(2) *Acts Interpretation Act 1954* (Qld).

³ S138 *Domestic and Family Violence Protection Act 2012* (Qld).

⁴ In *Dibble* the primary judge determined that there would be a contravention of s16 of the Code and as such, an abuse of process, in circumstances where the basis of an indictable offence charged was the same “basic act” as that which had constituted a summary offence of which the defendant had previously been convicted.

⁵ (1998) 194 CLR 610.

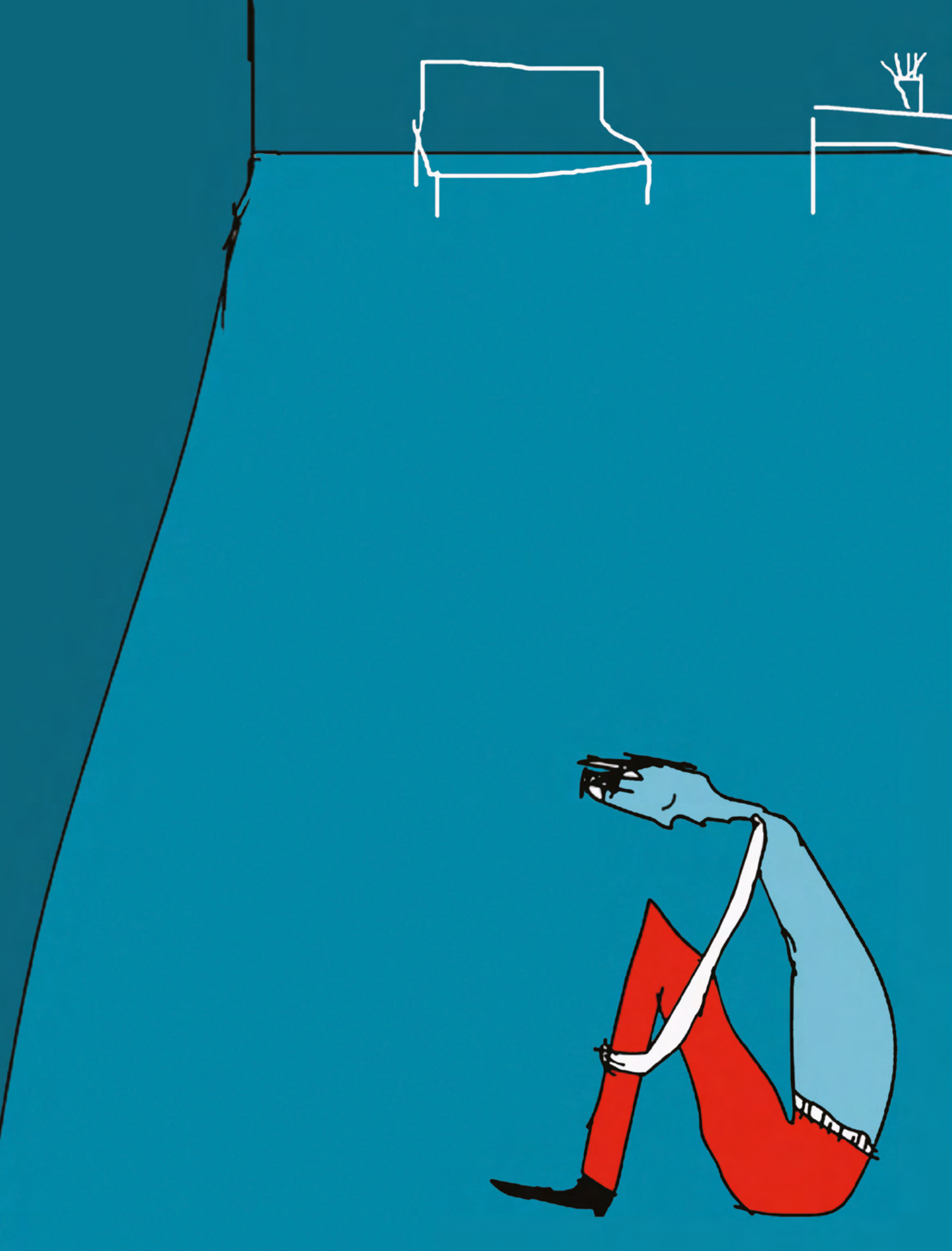
⁶ At paragraph 40: “To the extent to which two offences of which an offender stands convicted contain common elements it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt the general principle may yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just desserts.”

⁷ S77 *DFVPA*

⁸ It is noteworthy that a discussion of this issue, including *MKW* and *DLA*, is found in the *DFVPA* Magistrates Court of Queensland Benchbook, although no conclusion is reached on the matter and no guidance is given as to how magistrates and practitioners should address this issue.

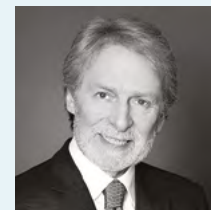
⁹ For example: *R v MCW* [2018] QCA 241; *R v Webb*, Mt Isa District Court, 4 May 2016. However, it is not always the case that this issue legitimately arises. Careful attention must be paid to the specific actions alleged to form the basis of the breach DVO charge and criminal offence/s before considering whether to agitate this issue, for example, *R v WKT* [2018] QDCPR 25.

¹⁰ For example: *JWD v The Commissioner of Police* [2019] QDC 29; *DAY v Commissioner of Police* [2018] QDC 3.



The parent trap

Denis's disaster is an object lesson for all of us



BY BRIAN HERD

Remember the hoary old mantra, 'a lawyer who acts for themselves has a fool for a client'?

Longevity has created another version of it: 'A lawyer who acts for their ageing parents has two fools for a client.'

Sure, we all do it for our parents. It's almost a duty – their conveyancing, their wills and other garden or run-of-the-mill services. We'll even act for them under an enduring power of attorney (EPOA). We're the family legal aid office.

And, as our parents age and their needs and reliance on us increase, we feel a heightened filial duty to help. After all, 'helping' is a form of reciprocity or reimbursement for your parents' earlier sacrifices and investment in you. Without that, you probably wouldn't be in the position of being the 'in-house' lawyer. Perish the thought should you ever suggest an 'out-house' solution to their legal issues.

Not only that, in your parents' later lives the pressure can build from other sources – your siblings. There is a general expectation that each one will volunteer their expertise for the benefit of the common cause – your parents. God forbid if, amongst you and your siblings, there is an accountant, a nurse, a doctor, a physiotherapist and you, the lawyer. You've got the field covered! But with such a breadth of expertise, you would expect that you could, individually and collectively, address and solve every nuance in your parents' ageing lives.

Well think again. The family committee of experts can be very good at giving credence to another old saying, 'a camel is a horse designed by a committee'.

Here is a story which needs to be recounted as a warning:

Denis was a mature-age lawyer.

He had three siblings, none of whom had any formal qualifications, but plenty of life experience.

Denis was a filial son to his ageing parents, aged 93 and 89 respectively.

Given the relatively limited achievements of his siblings, who were generally a disappointment to the parents, Denis was the family star – he was the go-to person.

For many years, he had also carried a weight on his shoulders – an emotional debt to his parents. Being the only one who showed any early promise in the achievement stakes, he was often bestowed with preferential treatment by his parents to 'give him a leg up', as they put it.

As luck would have it, his parents were now at that familiar tipping point in their later lives. Mum and Dad needed residential aged care.

His parents were full age pensioners and not particularly well off, having, at least in part, expended a lot of their parental largesse on subsidising Denis' path to the top of his profession (and his big law firm).

Denis had a high opinion of his talent in his chosen speciality of cross-border transactions. To be fair, it was an opinion shared by others. His view of his capabilities extended to a belief that, after a bit of web browsing and self-education, it wouldn't be that hard to navigate our aged-care system and steer his parents through the choppy seas.

Denis made an initial reconnaissance in the area and then, in a secret conversation with himself, lamented about what a maze he had entered, but he didn't think it necessary to seek appropriate specialised advice, at the very least from a financial adviser and lawyer.

Besides, that would all cost money his parents didn't have. It wasn't helped either when he mentioned to his spouse that perhaps they might chip in themselves to help out. His spouse went slightly apoplectic mumbling along the lines of, "And what about my parents?"

All family eyes were on Denis. Some readers may remember one of the very first American sitcoms from the 1950s called *Leave it to Beaver*. Denis's family was very much in the same mould, 'Leave it to Denis'.

As expected, he took control of the process wearing his three hats – son, lawyer and EPOA. Word limits prevent me from detailing the quasi-disaster he managed to create for his parents' later lives. In summary:

- He created, inadvertently, a Centrelink investigation of his parents, financial affairs owing to a failure to complete the paperwork accurately and his financial dealings with them, below.

- Because shared rooms in aged care are as scarce as hen's teeth, when the opportunity to get one arose, he was unprepared and had to, secretly (that is, not tell his spouse), contribute some of his own money to pay the necessary refundable accommodation deposit to the aged-care facility.
- He didn't document his financial assistance to his parents, which was also a potential further problem due to the spectre of conflicts of interest for him as EPOA.
- He failed to consider the implications of the financial rearrangements on his parents' wills, including the sale of their home which had been subject to a life interest to a disabled adult child.
- He never read the residential care agreement, being satisfied that it was a 'standard industry document' and didn't appreciate certain issues as a result. For example, when one of his parents died, the other parent would have to move out of the room into another room or, alternatively, share the room with a stranger.
- He was constantly on the back foot with his siblings in response to their incessant inquiries and their pleas of 'what's happening?'

But for fellow travellers like you and me, there was another killer punch. Not having realised the extraordinary and incessant demands on his time that this process entailed, his work started to suffer and, in particular, his billable hours. The managing partner was quick to notice and was want to have some regular chats with Denis. The last one was ominous – 'Buck up or shift out!'

When he was in my office, he was a very sad sight – 'DIY Denis' was reduced to 'WIM (woe is me) Denis'.

He was forced to leave his firm, his spouse discovered the financial sneakiness and he promptly had to move out. His siblings don't talk to him anymore. But his parents are happy, apparently.

Some stories have a moral, as this one does. Hopefully, it is obvious. If not, call me and I will explain.

This article appears courtesy of the QLS Elder Law Committee. Brian Herd is a partner at CRH Law and a member of the committee.

Are you a GP 'specialist'?

How a client-centric approach could diminish the access to justice gap

BY ELIZABETH SHEARER



Doctors recognise general practice as a specialisation in its own right. If lawyers did too, would it help close the access to justice gap?

As solicitors, we define our practice by reference to an area of law, and there are accreditation pathways for us to specialise in our chosen areas.

This works well for solicitors who can demonstrate and promote their accredited specialist expertise, and for clients who have complex legal problems needing the expertise of a specialist in their field.

Missing from this picture are those of us who specialise, not in an area of law, but in a client group – general practitioners who focus on the everyday legal needs of individuals and small businesses in our communities.

We may not have the depth of expertise of our specialist colleagues, but we have a special expertise.

We may not know the scientific name of every tree, but we do know the shape of the woods. We know the pathways through the woods, how to avoid the perils that lurk beyond the path, and who to call for help if our client needs to move off the path into the thicket. This skill set is an important foundation for access to justice.

The first barrier to access to justice is that people don't recognise when an everyday life problem has a legal dimension and a legal solution. The second is that, even when they do recognise that they have a legal problem, they ask almost everyone in their life except a lawyer.

Things are different for clients of general practitioner solicitors who have a personal connection to 'their' lawyer. When they think that a problem might have a legal dimension, they give us a call. They tell their family and friends to call us when they might have a legal problem. Unfortunately, relatively few people seem to have this connection to 'their' lawyer as trusted advisor and first port of call.

Some would argue that this is an outdated model of legal service delivery and its rarity is no cause for concern, but that's at odds with life in the commercial sphere where this role is named and valued as 'general counsel'.

What if our profession, like the medical profession, recognised general practice as a specialisation in its own right?

Perhaps more people in the community would:

- know who to turn to for the legal problems of everyday life
- see a solicitor sooner for help with legal problems, and
- establish and benefit from a relationship with their solicitor as trusted advisor at many life stages.

Perhaps what seems like an old-fashioned way of being a lawyer is more future-proof than we realise.

Technology is disrupting many aspects of our role, but this trusted advisor role is one that is not easily displaced. After all the Google searches, people still want to know:

- What does all this information mean for me?
- There are lots of things I can do, but what should I do next?

General practice solicitors can offer real value to clients based on our knowledge of our clients and their needs.

Technology in the 2020s enables general practice in a way that was difficult when specialisation began in the 1990s.

- The challenge of keeping up to date with knowing the law has been largely solved by technology.
- Small practices can operate efficiently and nimbly with access to resources and systems that would once have been the preserve of only very large businesses.

Having specialist general practitioners would mean defining the skills and knowledge needed to achieve excellence. This challenges us to think differently about excellence in professional practice – excellence is not so much about deep knowledge of complex concepts, but about broad knowledge of a complex system as it impacts on our clients.

This is a client-centric rather than content-centric approach. And this client-centric approach is likely to result in new ways of general practice lawyering.

This article appears courtesy of the Queensland Law Society Access to Justice and Pro Bono Committee. The views are those of the author. If you have an interest in this topic, or other access to justice topics, and want to share your views, please email the author at e.shearer@qls.com.au. Elizabeth Shearer is Deputy President of QLS, chair of the committee and Legal Practitioner Director at Shearer Doyle Law.

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Preparing an affidavit (part 1)

BY KYLIE DOWNES QC



If you are acting in a case in which there are no pleadings, the affidavit material is the only opportunity to present your client's version of the facts to the court.

In an application for interlocutory relief, or a trial at which evidence is to be given by affidavit, the affidavits, rather than the pleadings, will receive significant focus. Again, the affidavit material is to be prepared with the understanding that this is a real opportunity to provide clarity to the court about the key features of your client's case.

With that in mind, it is important to minimise the distractions to the court caused by, for example, the inclusion of inadmissible evidence (especially irrelevant evidence); lengthy, dense, rambling paragraphs in no particular order of importance; or the expression of opinions about the law, the other side's case or the defects in the personality of a witness on the other side.

When drafting an affidavit, you need to consider the following:

1. The purpose of the affidavit

The starting point before drafting any affidavit is to ask the question – why is this affidavit required? If you cannot provide a sensible answer, the affidavit is likely to be unnecessary.

A sensible answer is found by considering the nature of the hearing at which the affidavit will be relied on. If it is to be used at a trial, then the witness is most likely giving evidence of facts which are needed to be proved by your client to establish their case (if a positive case is alleged by them) or to rebut facts alleged by the other side.

Before preparing the affidavit, you need to identify the facts in issue in the case (being the facts which are in dispute). This will in turn assist you to gather the evidence needed to prove or disprove the existence of the facts in issue.

If you are preparing an affidavit of a factual witness for a trial, subject to limited exceptions, the witness will only be giving evidence relating to a fact in issue. Any other evidence is irrelevant and likely to be inadmissible.

Another type of affidavit you might prepare for a trial is the affidavit of an expert witness. It is usual for an expert to be required to provide their evidence in the form of a report. This means that the affidavit prepared by you would be a formal affidavit which attaches the report prepared by the expert. If however an affidavit of an expert needs to be prepared (because, for example, there was no time to prepare a formal report), it is always preferable for the expert to either draft the content of the affidavit or to dictate the content of the affidavit for transcription. An obvious means of attack on an expert witness relates to whether he, or someone partisan to a party (such as you), prepared their evidence.

If the affidavit is to be used for an interlocutory hearing then, again, the witness is likely to be a witness of fact. Before starting to draft, you need to consider the facts which your side needs to establish by way of evidence in order to achieve the desired result at the hearing. Work out these facts before you start drafting. This will ensure that the evidence is as tight and brief as possible, and is relevant.

2. The time available to prepare the affidavit

There is a difference between preparing an affidavit for an urgent application for an interlocutory injunction as opposed to an affidavit of the primary witness in a six-week trial. If you have little time, focus on the main facts you need to establish. Do not try to prepare an affidavit which contains excessive detail about less important issues and which fails to address the critical facts.

If the matter is very urgent, it may be that you will be better served by calling witnesses to give oral evidence rather than attempting to prepare affidavits on the run. These may later be revealed to be not quite correct, which can cause lasting damage to your client's case and the credibility of witnesses called by your side.

3. The availability of the proposed deponent

Once you have identified the facts needed to be established by your client, this tends to help you identify the witnesses who will prove those facts. As a practical matter, do not start drafting the affidavit until you have ensured that the proposed witness is happy to assist; is available to discuss the content of the proposed affidavit (including by telephone); is available and able to swear or affirm the affidavit within the required time; and can, if needed, be available for cross-examination on that affidavit.

4. Proposed exhibits

The identification of facts needed to be established will help to identify documentary evidence which can be adduced to establish the facts. As a practical matter, obtaining the physical documents and copying them in preparation for the finalisation of the affidavit should begin as soon as you decide that certain documents will be required.

5. The forum in which the affidavit will be relied on

The court, tribunal or other body hearing the matter will have its own procedural rules supplemented by any applicable rules of evidence and procedure (whether founded in legislation or the common law). These rules will dictate what can be induced in the affidavit as well as the form in which the evidence is presented.

6. The ability to have the affidavit prepared, sworn and ready in time

You will usually have limited time to interview a witness, draft their affidavit, show the affidavit to the witness for their feedback and then amend in accordance with their feedback, locate and identify exhibits to the affidavit, ensure the affidavit contains admissible evidence only and is in the correct form, have the witness swear or affirm the affidavit, prepare multiple copies and then file and serve it. The identity of the deponent, the content of the affidavit, its level of detail and the number of exhibits will all be affected directly by how much time you have before the affidavit must be filed and served.

In practical terms, if you aim too high in terms of the affidavit evidence which you seek to adduce for your client and you are unrealistic about the time it will take you to carry out the tasks referred to above, then you may miss a deadline or face appearing without an affidavit on a critical issue.

7. Potential cross-examination on the affidavit

When identifying a potential deponent, always give consideration to their likely ability to be able to withstand cross-examination on the affidavit. Are they connected with one of the parties and, if so, is there another witness who could be used who is independent? Does the proposed deponent have an independent recollection of the events in question to the level of detail contained in the draft affidavit? Or are they hesitant, self-contradictory or desirous of knowing what you 'want them to say'?

When drafting an affidavit, you need to avoid the following:

1. Irrelevant evidence

Do not include anything in the affidavit which does not tend to prove or disprove a fact in issue, or at least is not part of the necessary background needed to prove or disprove a fact in issue. Unless you can justify the inclusion of each sentence in an affidavit by reference to the facts in dispute, or the facts which need to be shown as a matter of law depending on the case you are in, do not include the evidence.

2. Evidence which tends to demonstrate partiality

A deponent who is critical of the other side, especially through the use of personal remarks or commentary on their legal position, is unlikely to be regarded as a cogent witness.

3. Legal submissions

Some deponents, especially solicitors, seek to make legal submissions in an affidavit. This is unhelpful, usually inadmissible and may cause harm to your client's case if you brief a barrister to appear and they wish to take a different approach.

4. Inadmissible opinion

There are only very limited circumstances in which a lay witness can express an opinion about something. Before drafting such evidence, check that the opinion is admissible.

If you are proposing to rely on an affidavit from an expert witness, then, depending on the time allowed, attempt to adhere to the rules relating to the admission of expert evidence in the court in which you are appearing. At the very least, establish the qualifications of the expert, whether in the affidavit itself or by exhibiting a curriculum vitae.

5. Poor presentation

The affidavit should comply with all formal matters relating to form. Further, there should be only one idea per paragraph. Ideally, there should only be one sentence per paragraph.

You should present the evidence in a logical manner, which is usually chronological, and use sub-headings. The starting paragraphs should establish who the deponent is and their qualifications and position, if relevant. There may be a section establishing the basis on which the deponent is able to swear to the matters contained in the affidavit. The balance of the affidavit will set out the facts which are the subject of the deponent's evidence.

6. Lack of precision

The reader of the affidavit should never have to ask – how does this person know this? The basis on which the deponent can swear to something should be apparent. The reader of the affidavit should also never have to ask 'which time period is he referring to?', or 'which contract does he mean?' or 'what does she mean when she is referring to the information set out above?'.

Do not use a defined term in an affidavit, such as 'Head Lease', without having included a definition of the term in the affidavit.

7. Overstating the evidence

Do not write the script of evidence for the witness (being the evidence you hope they will give) and then seek to have them adopt it. The words you use and the version of events you describe should come from the witness. If you overstate the evidence in an affidavit, this will inevitably be exposed when the witness is cross-examined.



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

In conversation with Oliver Collins



BY SHEETAL DEO

Earlier this year, Queensland Law Society hosted a meeting of members who share diverse abilities.

This meeting was a culmination of months of discussion between individual members who were seeking mentorship, support and understanding within the legal community.

QLS is proud and privileged to be able to provide its members – advocates in their own right – with a platform to better advocate on behalf of our diverse abled colleagues in law and lead us into a more inclusive future. After all, true inclusivity means there is a place for every (diverse) ability in law.

One of the members of what will be known as the QLS Diverse Abilities Network¹ is Oliver Collins. Oliver reached out to QLS in response to a staff member's LinkedIn post recognising the International Day of People with Disability.

We spoke with Oliver about his journey and interests in forming the QLS Diverse Abilities Network.

SD: Oliver, thank you for agreeing to be this month's feature. I'm excited for you to share your story in light of all the work and attention around lawyers with diverse abilities. Would you mind telling our readers about yourself and your journey?

OC: Thanks Sheetal, happy to. I studied a Bachelor of Laws/Commerce at the University of Queensland and graduated in 2016. I started working at King Wood Mallesons not long after in the dispute resolution team, at first as a law clerk and then as a solicitor once I was admitted in October 2017.

Insofar as my personal journey, at 18 months of age, I was diagnosed with a rare neuromuscular condition called *Fibrodysplasia Ossificans Progressiva*,

or FOP for short. This condition causes my muscles, tendons and ligaments to turn to bone, and for bone to grow through and across joints – essentially encasing the body in a second skeleton.



There are only about 17 people in Australia with this condition, and less than 1000 known cases worldwide. As a result of excess bone growth, I now walk very slowly over short distances with a pronounced limp and a walking stick, and I require a manual

or electric wheelchair for any distance. If I am attending any meetings or seminars at work, I cannot flex my hips to sit in a normal office chair and so use a stool.

SD: How has your diverse ability affected your, pardon the pun, ability to work as solicitor?

OC: Working in law is actually pretty good in terms of accessibility for my particular needs. Much of my job is centred around working on a computer or telephone, both of which are easy to use.

Also, my boss, Justin McDonnell, and King & Wood Mallesons, have been very open to the idea of allowing me flexibility when it comes to working from home. This allows me to be in a more comfortable position at home and also to rest, as it can be quite physically exhausting for me spending a day in the office.

This does not hinder my ability to fulfil my obligations though, as I am fully accessible to my colleagues during the days I work from home, via phone, IM or email.

SD: Where would you like to see the legal profession in five years' or 10 years' time, in relation to diversity and inclusion (of diverse abilities)?

OC: Personally, I view disability, or in fact any quality which is viewed as 'diverse', to be a strength in many respects. The way I see it is that my disability has given me a very unique perspective when it comes to problem solving, as problem solving is part of my normal everyday life. I often find that, given the progression of my disability further limiting my movement, I suddenly have to come up with a new way of doing some of my everyday tasks.

Evidently, as a lawyer whose job it is to solve clients' problems, this comes in handy. To further assist me in my career, as a result of my physical situation, my attitude has always been that no problem is insurmountable and so I always try to

“In an ideal world, things like disability would be a non-issue, and everybody would instead be accepted and celebrated for the unique contribution they can give.”

Oliver Collins

maintain a determined mindset when it comes to overcoming obstacles. These skills have proven very useful, particularly as a young and early career lawyer.

I appreciate that there is some way to go when it comes to how others view disability. It is still largely viewed as 'less than' and as a burden, which is a mindset that needs to be shifted. In an ideal world, things like disability would be a non-issue, and everybody would instead be accepted and celebrated for the unique contribution they can give. It will take time, but I truly think we can get there and the QLS Diverse Abilities Network is a great initiative to facilitate this.

SD: What would be your advice to someone who is struggling with their diverse ability in the legal profession?

OC: My advice would be to stick with it. I know life with a disability, and work in particular, can be tough, with pain, exhaustion, and physical discomfort sometimes proving very challenging. But it is possible. Also, I would recommend finding people to talk to. It doesn't necessarily have to be even a lawyer, or someone with a disability, but it is always good to have some people who can help you talk through your problems.

That being said, it is very helpful to talk to someone who can understand what you're going through. For this very reason, I look forward to working with the QLS to get the committee for lawyers with diverse abilities up and running so that there is a resource for those in the legal profession dealing with these unique challenges, which we can add a personal perspective to, given our direct knowledge of the challenges faced by disabled lawyers.

In Oliver we find yet another reminder that deeply entrenched stereotypes about lawyers and the legal profession is no longer the status quo. The legal profession is diverse and through stories like Oliver's we can learn how to be more inclusive and actively work towards the future Oliver believes we can achieve.

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

Note

¹ Theresa Jennings, Legal Advisor at Cancer Council Queensland, is another founding member of the QLS Diverse Abilities Network.

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A crash course in space law

And why on Earth it matters

BY SARAH CAHILL AND SAMANTHA BYRNE



Have you ever wondered what law applies on the Moon?

Perhaps not. Outer space = out of mind, right? Well strap yourself in and shuttle up; you're about to find out. Let's launch right in.

A crash course in space law

'Space law', the body of law that governs space-related activities, is comprised of a constellation of international treaties overlaid with the domestic law of the relevant state.

Whether a state's domestic law applies will depend on the reach of that law. For example, Australia's domestic law has extraterritorial application; not only does it regulate space activities and launches carried on in Australia, but also space activities carried on outside Australia by Australian nationals. It's not rocket science, but it does get a little murky.

International space treaties

In the 1960s and 1970s, the United Nations General Assembly adopted five treaties (space treaties) in recognition of the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes. The space treaties emphasise equality of access and international cooperation in space, along with the prohibition of hostility and weapons of mass destruction.

They also deal with the preservation of the space and Earth environment, the rescuing of astronauts, liability for damages caused by space objects, and claims of national appropriation by sovereignty.

There are concerns that the space treaties are not equipped to deal with the modern uses of space.¹ Since the treaties were introduced, the industry has experienced a seismic shift. While once upon a time space was almost exclusively the domain of governments, in recent decades it has seen an astronomical surge in private participation.²

Under the space treaties, states are fully and directly responsible for 'national activities', whether carried on by government or non-government entities.³ States are also liable

for any damage caused by space objects launched from their territory or facility.⁴

The risk to governments grows with the increase in private involvement. Australia (along with other countries) reallocates that risk through domestic law that regulates such involvement.

Australian law

The Australian Government has ratified all five of the space treaties and introduced domestic legislation that, among other things, implements certain of its obligations under the space treaties. The previous legislative scheme was overhauled in 2018 in an attempt to ensure that it meets technological advances and does not unnecessarily inhibit innovation in the industry.

On 31 August 2019, the *Space (Launches and Returns) Act 2018* (Cth) (the Act) commenced. The Act seeks to balance the removal of barriers to participation and the encouragement of innovation in the industry with the safety of space activities and the risk of damage to persons or property.

Under the Act, approval is required to undertake certain space activities, including launching a space object from Australia, returning a space object to Australia and operating a launch facility in Australia. The Act also reallocates the Government's responsibility for damage under the space treaties by imposing liability on operators and requiring minimum amounts of insurance.

On 1 July 2018, the Department of Industry, Innovation and Science launched the Australian Space Agency, which is tasked with transforming Australia's space industry.⁵ No pressure. The agency was designed with an industry focus, to address the move towards private enterprise.⁶

Why on Earth it matters

We can all thank our lucky stars for space (think the technology and infrastructure that allows us to access Google Maps, weather forecasts and the internet in general). Big business is also increasingly looking to space for commercial purposes, including mining.

The remainder of this article focuses on mining on the Moon (and other celestial bodies). Interest in this topic has skyrocketed since resources such as water and helium-3 (a potential source of energy) were discovered on the Moon.⁷ Perhaps unsurprisingly, the current state of the law creates legal ambiguities regarding the use of and ownership rights over these resources.

From an international perspective, two competing approaches are currently in orbit. The first is that, since outer space belongs to all mankind, all natural resources that can be mined belong to all mankind collectively.⁸ The second is that, since 'space is a commons', all states (and their private entities) are equally entitled to use mined resources for their own benefit.⁹

The latter approach is in line with the (roughly analogous) law of the high seas; while the high seas themselves are not subject to appropriation, fish caught therein legitimately belong to the catcher provided they comply with applicable international laws.¹⁰

Application of the space treaties to extra-terrestrial resources

As a starting point, Article I of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies 1967 (outer space treaty) provides that the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development.

Article II of the outer space treaty provides (*our emphasis*):

"Outer space, including the moon and other celestial bodies, is *not subject to national appropriation* by claim of sovereignty, by means of use or occupation, or by any other means."

The limitations of the prohibition on appropriation in Article II are unclear. For example, whether the prohibition is intended to extend to private appropriation (as well as appropriation by state signatories) or to resources contained within or extracted from celestial bodies (as opposed to the celestial bodies themselves) is subject to debate.¹¹

The Agreement Governing the Activities of States on the Moon and other Celestial Bodies 1984 (Moon treaty) deals with resources more directly. Article 11 provides (*our emphasis*):

“1. The moon and its natural resources are the common heritage of mankind...

(...)

3. Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources *in place*, shall become the property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person.”

While the above might seem to preclude ownership rights over resources on the Moon, it has been suggested that the inclusion of the words ‘in place’ might allow the person extracting the resource to take ownership once it is extracted.¹²

Article 11 of the Moon treaty also provides for the establishment of an international regime to govern the exploitation of natural resources of the Moon. The main purposes of the regime include an equitable sharing by all states of the benefits derived from those resources. Special consideration is to be given to the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the Moon.

Approach of spacefaring nations

Of course, the space treaties are only binding on the countries that adopt them. Adoption hasn’t been universal; while Australia has ratified the Moon treaty along with 17 other countries, it has not been ratified by the perceived ‘spacefaring’ countries such as the United States, China or Russia. The outer space treaty has more widespread application, having been ratified by 109 countries (the United States, China and Russia among them).

For private entities, unless the extraction of resources is dealt with by applicable domestic law, activities can occur in a legal black hole.

The United States and Luxembourg have introduced domestic laws recognising ownership rights over space resources, subject to (among other things) compliance with the international obligations of those countries.¹³

Australian domestic law is silent on the issue of ownership of space resources, but it is likely that it will need to address this issue in the near future as companies look to commercialise the cosmos. For example, in a January 2019 report, Rio Tinto stated that it is currently collaborating with the space industry to see how autonomous drilling and other technology could be used in space, such as on the Moon or on Mars.¹⁴ It will be up to the law to keep pace with space or risk being left light years in the past.

More to come. Watch this ‘space’.

Notes

- ¹ Melissa de Zwart and Dale Stephens, ‘The Space (Innovation) Race: The Inevitable Relationship between Military Technology and Innovation’ (2019) 20(1) *Melbourne Journal of International Law* 1, 11-18.
- ² Australian Space Agency, *Advancing Space: Australian Civil Space Strategy 2019-2028*, (Report, April 2019) 6, publications.industry.gov.au/publications/advancing-space-australian-civil-space-strategy-2019-2028.pdf.
- ³ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, Article VI.
- ⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, Article VII, as elaborated on in the Convention on International Liability for Damage Caused by Space Objects.
- ⁵ Australian Government, Department of Industry, Innovation and Science, Australian Space Agency (web page) industry.gov.au/strategies-for-the-future/australian-space-agency.
- ⁶ *Ibid*.
- ⁷ Paul K Byrne, ‘Mining on the Moon’, *The Conversation* (online, 5 March 2019), theconversation.com/mining-the-moon-110744.
- ⁸ Frans von der Dunk, ‘Who Owns the Moon? A Space Lawyer Answers’, *The Conversation* (online, 20 July 2018), theconversation.com/who-owns-the-moon-a-space-lawyer-answers-99974; Frans G. von der Dunk, ‘Asteroid Mining: International and National Legal Aspects’ (2018) 26(1), *Michigan State International Law Review*, 85-99.
- ⁹ *Ibid*.
- ¹⁰ *Ibid* 93.
- ¹¹ Ricky J. Lee, ‘Article II of the Outer Space Treaty: Prohibition of State Sovereignty, Private Property Rights, or Both?’ (2004) 11, *Australian Journal of International Law*, 129-133; Frans G von der Dunk (n8) 97.
- ¹² Frans G von der Dunk (n8) 91.
- ¹³ *Ibid* 94-96.
- ¹⁴ Rio Tinto, ‘Humans and Travel: Can We Go Further, Faster with Less Impact?’ (Report, January 2019) 18, riotinto.com/documents/RT_Humans_and_travel.pdf.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Adam Moschella (amoschella@pottslawyers.com.au). Sarah Cahill is an associate and Samantha Byrne is a solicitor at MinterEllison.

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Dying to help others

Organ and tissue donation in Australia



WITH CHRISTINE SMYTH

Recently I was in Washington DC listening to a discussion on longevity.

The debate was about how we view ageing and the probability that with advances in technology we could comfortably live beyond 100, with some suggesting that living up to 200 years was readily achievable.

To those commentators it was simply a matter of treating ageing as an illness, not an inevitability. That discussion had my mind turning to the practice of organ donation.

At any one time, in Australia, there are about 1400 people on a transplant waiting list. One donor has the potential to prolong up to 10 lives that might otherwise be shortened through illness or disease.¹

Typically, clients approach estate planning from the perspective of leaving a lasting financial legacy. But what if there was another form of legacy we could leave? The gift of enhancing, if not prolonging, another's life through organ/tissue donation?

In Australia, human tissue (which includes organs) donation is governed by a two-tiered legislative process at federal and state level. Federally, the Organ and Tissue Authority (OTA) is established under the *Australian Organ And Tissue Donation And Transplantation Authority Act 2008* (Cth). The object of the authority is the formulation of policy and protocol for tissue donation. It also creates standards designed to "support and encourage" their implementation. The National Organ Donor Register was created under this legislation.

However, the Commonwealth does not have the power to regulate the donation and extraction process. That is entirely within the purview of the states and territories, with each having enacted a legislative scheme governing the process.² Each is similar in effect, but some significant differences are discussed below.

So what parts of the human body can be donated? Any part that fits within the definition³ of tissue.

In Queensland, under the *Transplantation and Anatomy Act 1979* (Qld) (TAA), tissue is defined as "an organ, blood or part of a human body or a human fetus; or a substance extracted from an organ, blood or part of a human body or a human fetus".

"That it will never come again is what makes life so sweet."

Emily Dickinson

Note, that while the definition of tissue includes blood, blood transfusions are dealt with separately to other tissue under part 2, division 4 of the TAA.⁴

Further, "regenerative" and "non-regenerative" tissue are distinguished from each other. The former is the tissue that, after injury or removal, is replaced in the body of a living person by natural processes of growth or repair. This article is concerned with the transplantation of non-regenerative tissue on death.

The tissue removed from a deceased person can only be used for:

- transplanting to the body of a living person
- for other therapeutic purposes, or
- for other medical or scientific purposes.

Before any donation can be undertaken, there must first be a deceased body from which the extraction can take place.

So how do we legally define death? How is a person who appears to be alive, but is 'brain dead' classified? When can organs be harvested from a brain-dead person?

A person is considered to be legally dead when there is an irreversible cessation of circulation of blood in the body of the person or irreversible cessation of all functions of the brain of the person. The determination of brain death must be certified by more than two medical practitioners, one of whom must be a specialist neurologist or neurosurgeon. Each of the medical practitioners must carry out an examination of the donor body prior to such a declaration. Further the declaring medical doctors cannot be the deceased's attending medical doctor or the designated officer who gives authority for removal or the medical doctor who is proposing to remove an organ from the deceased donor.

Once death is established, who can provide the requisite consent to extract the organ/tissue?

In Queensland, the TAA expressly provides that where a deceased person has executed written consent to the removal, after their death, of tissue from their body for any of the abovementioned purposes and that consent has not been revoked by them, the removal of tissue from their deceased body in accordance with their consent is authorised. However, if the deceased's death is a reportable death, the coroner's consent must be obtained before the hospital can proceed.

Note, that in all other jurisdictions, when a person has died in a hospital or whose dead body has been brought into the hospital, a designated officer of the hospital can authorise the removal of organ/tissue from the body if the designated officer can conclude that the potential donor has provided consent in writing to the removal of tissue from that person's body and that consent has not been revoked. The designated officer can only make such authorisation after making "reasonable inquiries in the circumstances".

So what happens if the deceased has not provided any signed written consent and there is no known standing objection by the deceased to donation?

Then who can give the consent? In Queensland it is the "senior available next of kin", who is defined as follows:

- a. In relation to a deceased child, the first of the following persons who in the following order of priority, is reasonably available:
 - i. the spouse of the child
 - ii. a parent of the child
 - iii. a sibling, who has attained the age of 18 years, of the child
 - iv. a guardian of the child; and
- b. in relation to any other person, the first of the following persons who, in the following order of priority, is reasonably available:
 - i. the spouse of the person
 - ii. a child, who has attained the age of 18 years, of the person
 - iii. a parent of the person
 - iv. a sibling, who has attained the age of 18 years, of the person.

In Queensland, 'sibling' includes biological siblings, adopted siblings, a sibling by surrogacy, stepbrothers and sisters, and anyone who is regarded as sibling under Aboriginal tradition or Island custom or any cultural custom.

In Queensland, 'spouse' includes de facto spouse.⁵

In New South Wales, Queensland, Tasmania, Victoria and Western Australia, the consent is effectively an 'opt-out' system. The designated officer of the hospital can authorise retrieval if the senior available next of kin gives consent in writing. In Queensland, if it is impractical for the consent to be given in writing by the senior available next of kin, they may consent orally. The designated officer must record the fact of the giving of consent, noting it in the deceased's hospital records as soon as practical after oral consent is given. The designated officer must also make reasonable efforts to have the consent confirmed in writing by the senior available next of kin.

In Queensland, if there are more than one senior available next of kin with the same seniority, an objection from any one of them will be sufficient to constitute an objection to removal, despite the intentions of others.

However, in Victoria, when there are more than one senior available next of kin, the consent of the any of them is sufficient, notwithstanding the contrary views of other kin.

In the ACT, Northern Territory and South Australia, it is an opt-in system. There, the designated officer can, in writing, authorise the removal of tissue if after reasonable enquiries neither the deceased nor the senior available next of kin object to the removal of tissue.

If a person who dies within the jurisdiction of Queensland has recorded in their will their intention/consent to tissue removal for transplanting or for therapeutic, medical or scientific purposes, hospitals are automatically authorised to remove tissues from that person for that purpose. In all other jurisdictions, a designated officer of the hospital must make reasonable inquiries and authorise the removal.

If a person is a registered donor on the Australian Organ Donor Register, the medical practitioner must inform the deceased's family members of the registration. If the deceased's body is in a hospital, the designated officer will consult the senior available next of kin as to whether the deceased has changed their mind since registering and if there is any change of circumstance that would have caused the deceased to change their mind. If not, then removal of tissue is authorised.

In Queensland, where the deceased does not pass away in a hospital or their body was not taken to a hospital, a senior available next of kin may, in writing, authorise the removal of tissue, but only if there is no known objection either by the deceased or a more senior next of kin. If the deceased has consented by signed writing, removal is automatically authorised, but if the deceased's death is a reportable death, the coroner's consent must be obtained.

Under the TAA, it is an offence to provide false or misleading information in relation to the donation of tissue. The maximum penalty is 200 penalty units or two years' imprisonment. It is also an offence to remove tissue from a deceased person without sufficient authority.

Any unauthorised buying or selling of tissue is prohibited under section 40 and section 42 of the TAA. Any contract to sell human tissue is deemed void. Furthermore, any advertisement related to buying human tissue is prohibited. However, a person who owns a tissue bank is allowed to be reimbursed for their costs in relation to removing, evaluating, processing, storing or distributing donated tissue. Such a person is also allowed to advertise, sell or buy tissue at a cost-recovery amount.

Finally, while consent may be provided, the hospital is not under any *duty* to collect a person's tissue. The scheme is designed to be sensitive to all concerned. Identifying or obtaining consent in time can be difficult. If tissue is to be successfully transplanted, harvesting must be conducted within very short time frames after death. Family members dealing with a sudden and traumatic death of a loved one, understandably, are often slow to make decisions about tissue harvesting.

The National Health and Medical Research Council 'Ethical practice guidelines' recommend that the request for donation should be abandoned if family members object and that objection is not likely to be resolved quickly, and donation will cause distress to the family members.

In our estate planning practices it is easy to focus on the financial aspects of a person's estate. Yet I have found that, when asked, many clients have thought about (and often have strong views about) organ donation. Most, though, are unsure how to go about it. Having arranged their estate plan to assure the welfare of their loved ones, it is uplifting to help them make a gift to society generally – the gift of life.

Notes

¹ transplant.org.au/the-facts/#.

² They are as follows:

Transplantation and Anatomy Act 1979 (Qld) (TAA).

Transplantation and Anatomy Act 1978 (ACT).

Human Tissue Act 1983 (NSW).

Human Tissue Act 1982 (Vic.).

Human Tissue Act 1985 (Tas.).

Transplantation and Anatomy Act 1979 (NT).

Transplantation and Anatomy Act 1983 (SA).

Human Tissue and Transplant Act 1982 (WA).

³ Definitions provided here are from Queensland legislation unless otherwise specified.

⁴ Other state and territory legislation excludes blood from the definition of tissue.

⁵ Section 32DA *Acts Interpretation Act*.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, QLS Senior Counsellor and Consultant at Robbins Watson Solicitors. She is an executive committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, and member of the QLS Specialist Accreditation Board, *Proctor* Editorial Committee, QLS Succession Law Committee and STEP. The author thanks Andrew Smyth and Billy Duane for their research assistance in the preparation of this article.

Michael Findlay Marshall

30 November 1968 – 29 February 2020

On 29 February Michael Marshall of Thomson Geer Lawyers passed away after an illness of several months.

Michael completed degrees in arts/law in 1990 at the University of Queensland and commenced articles of clerkship at Cannan & Petersen in 1991, being initially articulated to then senior partner Neil Dutney.

Michael was admitted in 1993 and worked in a small Brisbane CBD firm, gaining exposure to the small but growing field of planning and environment law. Left largely to his own devices (although assisted by skilled counsel), Michael conducted several significant Planning and Environment Court appeals in relation to tourist projects on the Noosa North Shore.

These actions included the first successful legal challenge in Queensland under the recently commenced *Judicial Review Act 1991*, which overturned a council's attempts to amend its planning scheme whilst the appeals were on foot.

In 1994 Michael commenced employment with Primrose Couper Cronin Rudkin at Southport with a view to further developing his interest and skills in the planning and environment field. He worked under senior partner Brian Cronin on a series of development projects of all descriptions over the next few years, including the Helensvale Town Centre, Coomera Town Centre, Nifsan, as well as numerous smaller commercial and residential uses.

Michael also conducted a well-publicised but ultimately fruitless attempt to protect the Gold Coast's premier live music venue, The Playroom at Currumbin, from closure by the State Government, which had conceived of its imaginative re-use as a car park.

In 1996, Brian Cronin was called to the Bar, leaving Michael to continue to run the planning and environment team at Primrose Couper. This was a positive move for Michael as it taught him to be self-reliant

at an early stage in his career. It also taught him that, in order to have a successful career in the law, he needed to develop the skills and self-confidence to successfully promote his skills and abilities and to develop his own client base.

In 1997 Michael was made a partner at Primrose Couper. He enjoyed his years on the Gold Coast and explored its many charms in company with his friends, including a group of doctors from the Southport Hospital, with much surfing and good times had by all.

However, Michael was hungry to grow his practice to a greater level, which meant a move back to Brisbane, to gain a broader foothold in South-East Queensland. The Gold Coast legal profession had yet to shed its not entirely undeserved reputation as a repository of unorthodox and eccentric practitioners. Furthermore, the social opportunities available on the Gold Coast at this time ran the spectrum from arid and depressing at one end, to downright dangerous at the other. It was time to return to Brisbane.

In 1999, Michael commenced work as an employed solicitor at what was then Phillips Fox. It might seem strange to some that Michael, being a partner at a large regional firm, would take a significant backward step to the role of solicitor. However, Michael was pleased to simply have the opportunity presented by the platform of a larger firm in a larger environment to develop his practice at an accelerated rate, and was confident in his ability to do so.

The early years at Phillips Fox were busy indeed. In addition to undertaking continuous business development activities on the Gold Coast, Sunshine Coast and Brisbane, Michael also became involved in the Urban Development Institute of Australia (Environment Committee) and completed a master's degree in environmental law. Michael became a partner at Phillips Fox in 2004.

In the following years, Michael built a large and successful planning and environment team which represented many successful property developers as well as a large number of local authorities. He was strongly supported in this regard by long-time lieutenant and friend Rayne Nelms (now a partner at Thomson Geer).

In 2011, Michael and his team left DLA Phillips Fox to form part of the new Brisbane office for Thomsons Lawyers (now Thomson Geer).

Michael is remembered as a lawyer of great ability with outstanding negotiation skills. His ebullient personality, combined with his well-known sense of humour, made many a working day more enjoyable for not only his team members but also the fellow practitioners he dealt with.

Michael's greatest contribution to the profession is undoubtedly the fact that, over a period of 20 years, he gave a start to and trained many of today's current planning and environment lawyers, a number of whom have gone on to form their own successful practices. He is remembered warmly as an inspirational and empathetic leader by the many who worked with him over the years.

In November 2019, Thomson Geer renamed its main meeting room 'The Michael Marshall Room' in recognition of Michael's service to the firm.

Michael is survived by his wife, Cathy, and three children.





Left: Michael Marshall. Above images: Michael unveils the plaque for the meeting room named in his honour, assisted by Thomson Geer partner Chris O'Shea.

Regulating the innovators

Google, Facebook and the ACCC

BY DANIEL OWEN, THE LEGAL FORECAST



Google and Facebook have become ubiquitous in contemporary society.

However, concerns have arisen regarding the potentially harmful effects they may have on traditional Australian media.¹

This highlights the need for competition law to balance competitive tension in the markets in which Google and Facebook operate with free-market principles that encourage innovation.

Inquiry

On 4 December 2017, pursuant to subsection 95H(1) of the *Competition and Consumer Act 2010* (the Act), then Treasurer Scott Morrison issued a ministerial direction to the Australian Competition and Consumer Commission (ACCC) requesting a public inquiry into the impact of digital search engines, social media platforms and other digital content aggregation platforms on the state of competition in media and advertising services markets.²

On 26 July 2019, the ACCC released its final report in response to the inquiry, which particularly focused on the impact of Google and Facebook.³

Terms of reference

The Act does not prohibit a corporation from *possessing* a substantial degree of market power.

Rather, section 46(1) of the Act states that a corporation that *has* a substantial degree of power in a market:

“...must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition.”

Significantly, the ACCC stated in the final report that:

“...the Terms of Reference...do not require the ACCC to focus on whether digital platforms have misused their market power.”⁴

Accordingly, the ACCC’s analysis in the final report considered whether Google and Facebook have market power within the meaning of the Act, but did not determine whether Google or Facebook had contravened section 46(1) of the Act.

Final report

The final report concluded that:

- a. Google and Facebook both have substantial market power in their dealings with news media businesses in Australia,⁵ and
- b. digital platforms are both rivals to, and essential business partners of, news media businesses in the supply of digital advertising opportunities.⁶

The ACCC expressed concern in the final report that there was significant *potential* for Google and Facebook to substantially lessen competition because they each:

- a. have incentive to favour their own related businesses, or those with which they have an existing relationship (and through which additional revenue may be generated)
- b. have the capability to advantage their own related businesses, due to operating as gateways to their respective platforms, and
- c. operate utilising key algorithms, the workings of which are not transparent to third parties.⁷

Voluntary code

On 12 December 2019, the Federal Government responded to the final report by tasking the ACCC with developing a voluntary code of conduct to which Google and Facebook will be bound in their dealings with Australian media businesses.⁸

The code is to address revenue sharing between Google, Facebook and Australian media businesses, as well as create transparency regarding online algorithms.⁹

The ACCC must now finalise the voluntary code in consultation with Google, Facebook and Australian media stakeholders by no later than November 2020, failing which, the Australian Federal Government has threatened to impose a mandatory code.¹⁰

Microsoft

The approach of the Australian Federal Government can be contrasted with that adopted by the United States Government in *United States v Microsoft Corporation*, 253 F.3d 34 (DCCir. 2001).

In that case, Microsoft Corporation was accused of illegally maintaining its monopoly in the personal computers market through restrictions it placed on manufacturers from uninstalling Microsoft programs (primarily Internet Explorer) in favour of third-party software (such as Netscape and Java).¹¹

At trial, the US District Court determined that Microsoft’s conduct breached section 2 of the *Sherman Antitrust Act of 1890*¹² and that, as a remedy, Microsoft had to be divided into two separate business units.¹³

On appeal, a settlement was reached whereby Microsoft would continue as one entity, subject to sharing its application programming interfaces with third-party companies and appointing a panel with oversight of Microsoft’s systems, records and source code for five years.¹⁴

Critics of the decision have concluded that the outcome was not sufficient to discourage Microsoft from continuing to exploit its monopoly position and that Microsoft continues to stifle competitors.¹⁵

Conclusion

The circumstances in *United States v Microsoft* are not wholly analogous to the position of Google and Facebook in Australia. However, it demonstrates the inherent difficulty in regulating prominent technology-based platforms using conventional anti-trust and competition laws.

In what the Federal Government has touted as a world-first approach,¹⁶ it has attempted to circumvent this difficulty by:

- a. re-domiciling the misuse of market power assessment of Google and Facebook to a function of the executive (the ACCC), rather than before the Federal Court of Australia, and
- b. presupposing that the incentive and means to misuse market power is sufficient basis to impose the voluntary code.

This approach:

- a. erodes the separation between judicial and executive functions, and
- b. adopts a per se liability approach which disregards the “substantially lessening of competition” test which must be applied to make out a contravention of section 46(1) of the Act.

Nonetheless, should the approach prove successful, it may set a precedent approach which could carry weight internationally and be implemented in other jurisdictions.

Daniel Owen is a Queensland Executive Member of The Legal Forecast (TLF). Thanks to Michael Bidwell and Lauren Michael for their technical and editing assistance. TLF (thelegalforecast.com) aims to advance legal practice through technology and innovation. TLF is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

Notes

- ¹ Australian Competition and Consumer Commission, Department of Treasury, ‘Digital Platforms Inquiry’ (Final report, June 2019), p1.
- ² Treasurer (Cth), ‘Inquiry into Digital Platforms’ (4 December 2017).
- ³ Above n1, p4.
- ⁴ Ibid, p10.
- ⁵ Ibid, pp8 and 9.
- ⁶ Ibid, p15.
- ⁷ Ibid, p12.
- ⁸ Australian Government, ‘Regulating in the digital age’ (12 December 2019), p7.
- ⁹ Eryk Bagshaw, Fergus Bagshaw and Jennifer Duke, ‘We are not going to put up with this’: Tech giants warned on tax, (12 December 2019) *Sydney Morning Herald* (online), smh.com.au/politics/federal/we-are-not-going-to-put-up-with-this-tech-giants-warned-on-tax-20191212-p53jh1.html (accessed 27 January 2020).
- ¹⁰ Above n1, p8.
- ¹¹ *United States v Microsoft Corporation*, at [84].
- ¹² *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (DDC 2000), at [61].
- ¹³ Ibid, at [64].
- ¹⁴ *United States v Microsoft Corp.*, 98-CV-1232 (DDC Nov. 12, 2002), pp9, 13, 15.
- ¹⁵ Gregory T Jenkins, Robert W Bing, ‘Microsoft’s Monopoly: Anti-Competitive Behavior, Predatory Tactics, And The Failure Of Governmental Will’ (2007) *Journal of Business & Economic Research* (JBER) 5. 10.19030/jber.v5i1.2508.
- ¹⁶ Fergus Hunter and Jennifer Duke, ‘Not messing around’: Government unveils ‘world-leading’ regulation of tech giants (December 12, 2019) *Sydney Morning Herald* (online), smh.com.au/politics/federal/morrison-government-unveils-world-leading-privacy-competition-regulation-of-tech-giants-20191212-p53j8r.html (accessed 27 January 2020).

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WITH DAVID KELSEY-SUGG AND DAN STAR QC



High Court

Criminal practice – Crown appeal against sentence – procedural fairness

HT v The Queen [2019] HCA 40 (13 November 2019) concerned whether the appellant had been denied procedural fairness in the Court of Criminal Appeal and, if so, whether that denial was justified. The appellant had been convicted and sentenced in the District Court of New South Wales. She was a registered police informer who had provided assistance to law enforcement authorities. The sentencing judge was required, by statute, to take that assistance into account as a mitigating factor. Confidential evidence of the appellant's assistance was given to the sentencing judge and was seen by the Crown prosecutor. It was not, however, given to the appellant's counsel.

The Commissioner of Police had opposed making the confidential information available to the appellant or her legal representatives even with the imposition of conditions. The basis given for this was public interest immunity. The Crown supported that stance. The Court of Criminal Appeal upheld the commissioner's objection on the ground that the confidential information was subject to public interest immunity.

The High Court said the appellant, having been denied access to the confidential evidence, and therefore an opportunity to test and respond to it, was denied procedural fairness. The doctrine of public interest immunity did not provide a basis for keeping the confidential evidence from the appellant. The Court of Criminal Appeal was wrong to exercise its residual discretion.

Kiefel CJ, Bell and Keane JJ jointly. Nettle and Edelman JJ jointly concurring. Gordon J separately concurring. Appeal from the Supreme Court of New South Wales allowed.

Immigration – administrative law – judicial review – jurisdictional error

In *EBT16 v Minister for Home Affairs* [2019] HCA 44 (13 November 2019) the plaintiff applied for a constitutional or other writ in the original jurisdiction of the High Court under s75(v) of the Constitution. The plaintiff sought a writ of certiorari quashing two orders of the Federal Circuit Court. By the first order, the Federal Circuit Court refused an application by the plaintiff for an extension of time under s477(1) of the *Migration Act 1958* (Cth) for the filing of an application for judicial review of a decision of the Administrative Appeals Tribunal. The second order dismissed the application for

judicial review in respect of which the extension of time was sought. The plaintiff also sought a writ of mandamus requiring the Federal Circuit Court to determine his application for an extension of time according to law.

The High Court did not consider that the plaintiff's application raised an arguable basis for the relief sought by the plaintiff.

Gageler J. Application dismissed under r25.09.1 of the *High Court Rules 2004* (Cth).

Income tax – appeal against objection decision

In *Bosanac v Commissioner of Taxation* [2019] HCA 41 (22 November 2019) the plaintiff sought a writ of certiorari to quash a judgment and orders of the Full Court of the Federal Court, a writ of certiorari to quash the primary judge's judgment, and other orders including a writ of mandamus to compel the Commissioner of Taxation to excise \$600,000 from the plaintiff's assessable income for the year ended 30 June 2009.

In March 2014, the commissioner commenced an audit into the plaintiff's tax affairs. Before the completion of the audit, the plaintiff lodged tax returns for the years ended 30 June 2006 to 30 June 2013 for the first time. On completion of the audit, the commissioner issued notices of amended assessments that substantially increased the plaintiff's taxable income. The plaintiff objected. The commissioner then issued notices of further amended assessments. The plaintiff commenced an appeal in the Federal Court against those assessments pursuant to s14ZZ of the *Taxation Administration Act 1953* (Cth).

The onus was on the plaintiff to prove on the balance of probabilities the extent to which the impugned assessments were excessive. The plaintiff failed to do so before the primary judge. He then appealed to the Full Court, which dismissed the appeal. The High Court said there was no error in the reasoning of the Full Court and no basis for compelling the commissioner to reduce the further amended assessment in respect of the 2009 year of income by the amount of \$600,000.

Nettle J. Application dismissed.

Representative proceedings – power to make common fund orders

BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45 (4 December 2019) concerned whether, in representative proceedings, s33ZF of the *Federal Court of Australia Act 1976* (Cth) (FCA) and s183

of the *Civil Procedure Act 2005* (NSW) (CPA) empower the Federal Court and the Supreme Court of New South Wales to make a "common fund order". Such an order is usually made early in representative proceedings and provides for the quantum of a litigation funder's remuneration to be fixed as a proportion of any money ultimately recovered in the proceedings, for all group members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any money so recovered.

The issue was resolved in the affirmative against the appellants – in the *Westpac* appeal by the Full Court of the Federal Court of Australia, and in the *BMW* appeal by the Court of Appeal of the Supreme Court of New South Wales.

By majority, the High Court said that properly construed, neither s33ZF of the FCA nor s183 of the CPA empowers a court to make a common fund order. Those sections provide that, in a representative proceeding, the court may make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding. While the power conferred is wide, it does not extend to the making of a common fund order. The sections empower the making of orders as to how an action should proceed in order to do justice. They are not concerned with the different question of whether an action can proceed at all.

It was not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court. The making of an order at the outset of a representative proceeding, in order to assure a potential funder of the litigation of a sufficient level of return on its investment to secure its support for the proceeding, was beyond the purpose of the legislation.

Kiefel CJ, Bell and Keane JJ jointly. Nettle and Gordon JJ each separately concurring. Gageler and Edelman JJ each separately dissenting. Appeal from the Court of Appeal of the Supreme Court of New South Wales allowed in the *BMW* appeal. Appeal from the Full Court of the Federal Court of Australia allowed in the *Westpac* appeal.

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Federal Court

Consumer law – whether misleading or deceptive conduct by online search and price comparison platform for travel accommodation

In *Australian Competition and Consumer Commission v Trivago NV* [2020] FCA 16 (20 January 2020) the court held that Trivago contravened ss18, 29 and 34 of the Australian Consumer Law (ACL) by various representations that it made when Trivago conducted an online search and price comparison platform for travel accommodation.

Trivago's website presented prices from a number of different online booking sites for a particular hotel. One price was presented in green, in a large font with space around it (the Top Position Offer).

The ACCC's case was that at various times in the period from 1 December 2016 to 13 September 2019, Trivago made the following representations in breach of the ACL:

- a. that the Trivago website would quickly and easily identify the cheapest rates available for a hotel room responding to a consumer's search (the Cheapest Price Representation)
- b. that the Top Position Offers were the cheapest available offers for an identified hotel, or had some other characteristic which made them more attractive than any other offer for that hotel (the Top Position Representation)
- c. that the red strike through text on the website (the Strike-Through Price) was a comparison between prices offered for the same room category in the same hotel (the Strike-Through Representation)
- d. that the red text without strike-through (the Red Price) was a comparison between prices offered for the same room category in the same hotel (the Red Price Representation).

The ACCC also alleged that Trivago engaged in conduct that led consumers to believe that the Trivago website provided an impartial, objective and transparent price comparison which would enable them to quickly and easily identify the cheapest available offer for a particular (or the exact same) room at a particular hotel (the additional conduct allegations).

Trivago admitted parts of the ACCC's case but disputed others (at [11] and [34]). The court substantially found for the ACCC on the contested parts of the case, although not necessarily for all the time periods argued by the ACCC (at [15] and from [190]).

The court received and analysed complex computer science expert evidence from both parties (at [91]-[145]), particularly on the algorithm used by Trivago to select the Top Position Offer. The experts agreed that in approximately 66% of listings, higher priced hotel offers were selected as the Top Position Offer over alternative lower priced offers (at [13] and [125]). This was of particular relevance to why the Cheapest Price Representation was misleading and deceptive. Moshinsky J explained at [204]: "...the expert evidence establishes that the offer that was given most prominence on the website (that is,

the Top Position Offer) was in many cases not the cheapest offer for the hotel room. Based on the data they examined, the computer science experts agreed that higher priced offers were selected as the Top Position Offer over alternative lower priced offers in 66.8% of listings. Conversely, 33.2% of listings had a Top Position Offer that was the cheapest offer. ...The explanation for the fact that in many cases the Top Position Offer was *not* the cheapest offer relates to the role of the CPC in the Top Position algorithm..."

The CPC is the Cost Per Click, which is Trivago's principal source of revenue. Trivago's contractual terms required online booking sites to pay Trivago the CPC if a consumer clicks on the online booking site's offer on the Trivago website whether or not the consumer makes a booking on the online booking site's website (at [12]).

The judgment includes findings on consumer behaviour evidence based on expert evidence called by both parties (at [146]-[177]).

There will be a subsequent hearing on relief, including the quantum of pecuniary penalties to be paid by Trivago.

Representative proceedings – application of cy-près doctrine to the distribution of monies from the settlement of a class action

In *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No.5)* [2019] FCA 2196 (20 December 2019) the court approved the settlement of a proceeding instituted under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA) pursuant to s33V of the FCA. The allegations in the class action concerned the obtaining of financial products for personal, domestic or household purposes and whether the provider engaged in conduct which was misleading or deceptive, involved the imposition of contract terms that were unfair, and engaged in unconscionable conduct contrary to various statutory norms.

Of interest is the court's consideration of a clause in the settlement distribution scheme which provided that, if there was an outstanding balance remaining in the settlement fund as at the date of final distribution to group members who were participating, the administrator:

"...may exercise its discretion based on a consideration of what is materially proportionate to distribute the additional amount to some or all Participating Group Members or make a donation to the Financial Rights Legal Centre...or such other community legal centre as approved by the Court" (at [16]).

Lee J considered the source of power to allow an administrator to pay the residuum of a settlement distribution pool to charities and not-for-profit organisations and when such a power, if it exists, should be exercised (at [17]-[27]). The origins of the cy-près doctrine were summarised.

In general terms, the doctrine allows a court to continue to apply charitable trusts where the intent of the settlor can no longer be effectuated, such that an alternative plan can be designed which will serve to carry out the donor's intent as nearly as possible (at [19]). The court discussed

the adaption of the cy-près doctrine to the class action context in the United States (at [20]-[22]).

After turning to the principles relevant for a court to order a cy-près scheme in Australia (at [22]), Lee J held at [24]: "I consider that the Court presently possesses sufficient power to fashion a remedy to allow a distribution of a settlement sum pursuant to a form of cy-près scheme if it is *impracticable or impossible* to distribute all or some of the settlement sum to group members individually (being circumstances directly analogous to there being a trust which has exhausted its original purpose and a surplus remains)." Lee J further held at [25] that, even if he was wrong about the position in equity, s33V(2) of the FCA Act was wide enough to provide this court with such power.

On the clause before it, the court was not satisfied on the present evidence that it was *impracticable or impossible* to distribute all of the settlement sum to group members or to some of them (at [28]). Instead of approving the proposed clause, the court reserved liberty for the claims administrator to apply to the court, in the event there was a residual sum, to present proposals which facilitated the most efficient distribution of this residual sum to those of the group members who were most in need of it (at [29]).

Court backs custody rights for 'left-behind' parent

WITH ROBERT GLADE-WRIGHT



Children – child abduction – mother repudiated agreement for family's temporary stay in Australia

In *Handbury & State Central Authority and Anor* [2020] FamCAFC 5 (21 January 2020) the Full Court (Alstergren CJ, Strickland and Williams JJ) dismissed the mother's appeal of Bennett J's order sought by the State Central Authority (SCA) that the parties' six-year-old child be returned from Melbourne pursuant to Regulation 16(1) of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) to the United Kingdom, being the child's place of habitual residence, accompanied by the father.

The mother was born in Australia but began living with the father in the UK in 2005. Their child was born there in 2013. When the mother was offered temporary work in Australia the family came here in 2017. Bennett J found that the child was a habitual resident of the UK; that the parties had agreed to live temporarily here for two years; and that the mother repudiated that agreement in 2018 when telling the father that she did not want to return to the UK with the child.

The Full Court ([47]-[48]) adopted the following statement of principle by the UK Supreme Court as applying to the present case:

"When the left-behind parent agrees to the child travelling abroad, he is exercising, not abandoning, his rights of custody. ... It is not accurate to say that he gives up a right to veto the child's movements abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed. It amounts to a... unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent, and becomes wrongful."

Children – interim order that father spend no time with child set aside on appeal

In *Lim & Zong* [2020] FamCAFC 20 (31 January 2020) Kent J (sitting in the appellate jurisdiction of the Family Court of Australia) allowed the father's appeal against Judge Tonkin's interim

order that the father spend no time and not communicate with the child (an order not sought either by the mother or the independent children's lawyer (ICL)) and that he consult a clinical psychologist for preparation of a report as to "whether there was a risk to the mother and child being exposed to further family violence by the father" ([3]).

The mother alleged violence by the father, which he denied, saying that the mother had historically alleged violence to disrupt his relationship with the child. A report from a family consultant who accepted the mother's allegations opined that the father was likely to continue to perpetrate family violence towards the mother ([31]). The father complained that he had not had an opportunity to cross-examine the report writer.

After (at [33] and [50]) citing *Salah* [2016] FamCA 100 (a judge at an interim hearing must for the purpose of s60CG consider "the risk of family violence") and *SS & AH* [2010] FamCAFC 13 ("findings made at an interim hearing should be couched with great circumspection"), Kent J said ([52]-[53]):

"...[H]ere the inescapable conclusion is that the primary judge's decision rested upon... concluded findings of fact... So much is clear from the... order for no time or communication despite... not being sought by either parent or, importantly, by the ICL..."

(...) [T]he... judge was in error in failing to... articulate to the parties... the father in particular, and afford him the opportunity to be heard on, the prospect of... an interim order for no time or communication. Moreover, review of the transcript does not reveal the... judge having foreshadowed to the father, or calling for his submissions upon, questions about his attendance upon a clinical psychologist for the purpose of further reports. Importantly, in the manner in which those orders are framed, the determinations made by the... judge about family violence were to be taken as a given by the... psychologist... [T]he... orders speak of "further" family violence being perpetrated by the father and the orders make provision for the expert to be provided with the... judge's reasons for judgment and the family reports, all of which express... unequivocal conclusions about the disputed issues... concerning family violence."

Property – wife enforces money orders against bankrupt spouse via a splitting order

In *Wilkinson & Kemp* [2020] FCCA 69 (16 January 2020) Judge B Smith heard the

wife's enforcement application in respect of \$47,912 owed to her under a property order and a costs order made in 2015. The husband declared himself bankrupt before the time for payment; and after being discharged from bankruptcy in August 2018 he declared bankruptcy again before the enforcement hearing in January 2019. The wife sought a variation of the order via a superannuation split in her favour for the amount outstanding. She relied on an email from the husband stating that he had moved assets offshore ([69]).

Noting ([40]) that the wife's application which concerned unvested property (superannuation) did not affect the position of the Official Trustee, the court ([46]) cited *Molier & Van Wyk* [1980] FamCA 85 which held that a court exercising jurisdiction under the Act has power to amend its orders "to remedy a lacuna or gap... to give effect to the... orders" by means of a "machinery provision... without affecting the substantive rights of the parties".

The court concluded ([75]-[77]):

"The intention of the original orders was that the wife should receive a certain percentage of the total pool including superannuation. The orders made were ineffective because the husband had unilaterally removed the... majority of the non-superannuation assets from Australia prior to the primary hearing and then voluntarily entered bankruptcy.

"If no order is made the wife will suffer a substantial injustice. I am satisfied that it is both just and equitable and also necessary to make a superannuation splitting order by way of a machinery provision amendment.

"To ensure that there is no interference in the substantive rights of the parties the superannuation sums must be, as the wife seeks, in the sums originally ordered, and taking effect as at the date for payment of the original orders... to give effect to the substance and intention of the primary order."

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).

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The psychology of the 'mum chop'

A thoroughly researched analysis

BY SARAH-ELKE KRAAL



Ladies of the law, I see you.

You (we?) have worked long, hard and tirelessly to be taken seriously in the workplace.

In fact – if my late night Wikipedia research is anything to go by – we have been working since at least the French Revolution to be taken seriously in the profession.

This means that, since the late 1700s, we've toiled against calamitous odds to embrace our inner Rosie the Riveter¹ and tenaciously face the patriarchy of what has historically been quite an inhospitable environment for a pretty, little head.

And we did it because despite those calamitous odds and inhospitable conditions – plus sharks with frickin' laser beams attached to their heads² – there was something in us that whispered, and called, and hollered, and SCREAMED that we were more than 'just' a woman.

Yes! We were more than just a pretty, little head with fluttering eyelashes and cheeks ever-so delicately blushed by broken capillaries (ladies pinch; harlots use rouge).³

That's right! We were brave. Ambitious. Passionate, patriotic, and pioneering. We challenged the judiciary, governments, and other esteemed members of the profession to accept us as their colleagues, peers and equals. We never gave up no matter how hard the fight; and we did it all whilst raising a family, keeping the house from burning down, and pinching the absolute bejeebus out of our cheeks because you never know when the ball and chain might get a wandering eye for another bit of exposed ankle.⁴

Make no mistake: it is the shoulders of these remarkable foremothers that we stand on today. We owe them our gratitude, our respect; and our commitment to continue their legacy as unforgettable, unstoppable, unchallengeable forces of nature in our own rights, so that our daughters and granddaughters may one day fearlessly tread the trails we have only started to blaze; and never again have to prove that they are more than just a pretty, little head.

So, yeah.

clears throat

Anyway, I got a haircut.

It's nothing too exciting – it's just a bob – but I'm going to go ahead and call it what it really is: the mum chop. Because it's basically the same haircut almost every new mum seems compelled to get at some point.

Yep, the 'chop' is the haircut we get following a relentless campaign of internal, overpowering, random (or are they?)⁵ urges to cut off our hair, and DAMN IT, CHARLIE! We fight those urges as valiantly – and for as long – as we can. Sure, we get a Pinterest board cracking, throw a few pins on there, maybe even screenshot that pixie that treads dangerously close to the 'I want to speak to the manager' haircut; but the motivation to leave the house and actually do the thing after six months seclusion on your own personal *Survivor: Baby Island*, remains relatively low.

And even though we complain about them being frumpy, and lumpy, and nowhere near as cute as they used to be, we actually really do *love* our messy mum-buns!⁶

But eventually the lure of all the exciting, dynamic, unrealised potential locked away within one, epic, new haircut becomes too much and one day out of nowhere (or is it?),⁷ we make the damn appointment, throwback that complimentary glass of champagne, squeeze our eyes shut, and somehow involuntarily command the hairdresser to "just do it!"

And in the aftermath of the highs and lows of my own 'chop' journey, I can't help but wonder,⁸ what makes so many of us do the 'do?

(Stay with me, I'm going somewhere with this.)⁹

Maybe we're craving some kind of drastic change after a couple of years of feeling our frumpy oats, and it's either this or a bedazzled eyepatch?¹⁰

Maybe it's because we're hot and frazzled and exhausted and the baby keeps grabbing at our dishevelled, dangling strands and we keep going to yelp but we don't want to frighten the baby so we end up squawking for a split second before clumsily trying to cover that up with a smile that disturbingly resembles Jack Nicholson?¹¹

Or maybe – just maybe – it's a small, benign, and entirely superficial way to start reclaiming a precious sense of control. And after all, whilst I'm not technically a psychologist,¹² I reckon feeling a bit more in control amidst the swirling chaos that is new motherhood is a very good thing.

Even if we do it by going and getting a pretty, little head.

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

Notes

¹ Some lady at the Revolution probably. Ref: Wikipedia. Accessed: after one too many wines.

² Wikipedia, et al.

³ That's ok, all the more ½ price Priceline bronzer for me!

⁴ Not shaming. #freetheankle.

⁵ That's ruddy mysterious.

⁶ The hairdo, that is.

⁷ Ibid, at 5.

⁸ I was going to make the Carrie Bradshaw reference eventually.

⁹ The writer does not undertake to actually go anywhere with this.

¹⁰ Wear an eyepatch Brett. Wear a funky, funky eyepatch.

¹¹ For me, it's Jack Nicholson as the Joker in *Batman* – because my makeup routine basically now consists of stiff-arming the toddler whilst I shove my face in whatever hasn't been thrown, smooched or cracked already by the toddler in question.

¹² Not in the western sense anyway.

Granite Belt miracle: Wine into water



WITH MATTHEW DUNN

Last year the winemakers of the Granite Belt clubbed together to do something miraculous – turn wine into water.

In 2018 the area covered by the Southern Downs Regional Council, including the Granite Belt, was suffering a prolonged dry spell. It was a mark of the desperation of its rural and pastoral producers that Mayor Tracy Dobie welcomed a drought declaration in May 2018, saying it “will bring much needed relief to local producers suffering from dry conditions”.

In the year after the declaration, the rains didn’t come like they used to. In Stanthorpe, the town water supply, coming from the Storm King Dam, drew ever closer to running dry or ‘Day Zero’. The Government made plans to truck in water at public expense from Connolly Dam near Warwick.

In September 2019, the tinder-dry Granite Belt was hit by savage bushfires north of the town around the hamlet of Applethorpe. One resident described them as “like an atomic bomb going off”. While few vineyards were affected, it was yet another blow to the tight-knit community.

In October 2019, Golden Grove founder Sam Costanzo spoke to *ABC Landline* after the

vineyard ran dry for the first time ever. “We’ve never run out of water here on Golden Grove,” he said “But you can never say never, can you?” The Costanzos took to buying water to keep their vines alive, rather than to produce a crop. At \$20,000 a megalitre, trucked water was a costly way to run a business, but the Costanzos felt they needed to protect their investment in the vineyard.

By 13 January 2020 Stanthorpe reached its Day Zero. The town stopped using the Storm King Dam and became completely reliant on the megalitre of water trucked in from Warwick each day.

Into this bleak setting, Golden Grove winemaker Ray Costanzo and 15 other Granite Belt wineries stepped in with a project called Wine4Water. The initiative was “a not-for-profit alliance to raise much-needed funds for another non-for-profit organisation, Granite Belt Drought Assist”.

The idea was simple; each winery would contribute bottles in stock for mixed six-packs of wine to be sold at \$150 each, with the profit of \$45 per box going to drought assistance. Each winery sold the packs through their online shops and cellar doors. Delivery was provided for free by a local courier company. The alliance

formed a Facebook page and went to work packing boxes, selling and sending wines all over Queensland. Ray Costanzo told the *Stanthorpe Border Post*: “The support, from not only our community, but out to Brisbane and all over the country has been fantastic.”

The Wine4Water project came to an end only five days before Day Zero for Stanthorpe, when Ray Costanzo handed over the final cheque, making a grand sum of \$21,726, or nearly 500 mixed wine packs sold for drought relief. Granite Belt wineries had done their bit to ease the burden on their local communities and turn their wine into water.

But, the story does not end there. Rain started falling on 6 February 2020 in Stanthorpe and while locals were cautious, it was welcome relief. In fact so much rain started to fall that Accommodation Creek (where Golden Grove sources water for its vineyards) started to flow again and the Costanzos could post videos of their irrigation equipment being turned on for the first time in months. At the time of writing, Storm King Dam sat at 19.3% full with 398 megalitres – from empty to one-fifth full in a little over a month.

The Granite Belt is not out of the woods yet, but just perhaps, wine did help to turn on the water.

The tasting Three examples from a Wine4Water pack were examined.



The first was the **RidgeMill 2019 Granite Belt White Blend**, which was almost palest yellow and had a nose of fresh candy melon. The zesty palate was lime, candied orange zest with some acid body and a lively fresh spring in its step. Fresh and young.



The second was **La Petite Mort Rose 2019** with a burnished orange rose colour and a nose of light delicate elderberry. The palate was dry with a body of fruit and a slight floral spritz. Honeysuckle developed on the palate as it moved into the mid palate most pleasantly. A joy to tipple.



The third was the **2017 Ballandean Estate Shiraz/Viognier** which was crimson brick red and had a nose of nutmeg and red berry. This was a medium-bodied red wine with a floral tone and an underlying character of leathery age following the velvety fruit of the front palate. A class act.

Verdict: The three wines were great examples of what the Granite Belt can produce, but the preferred wine was the La Petite Mort Rose as a great and very moreish wine.

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

Mould's maze



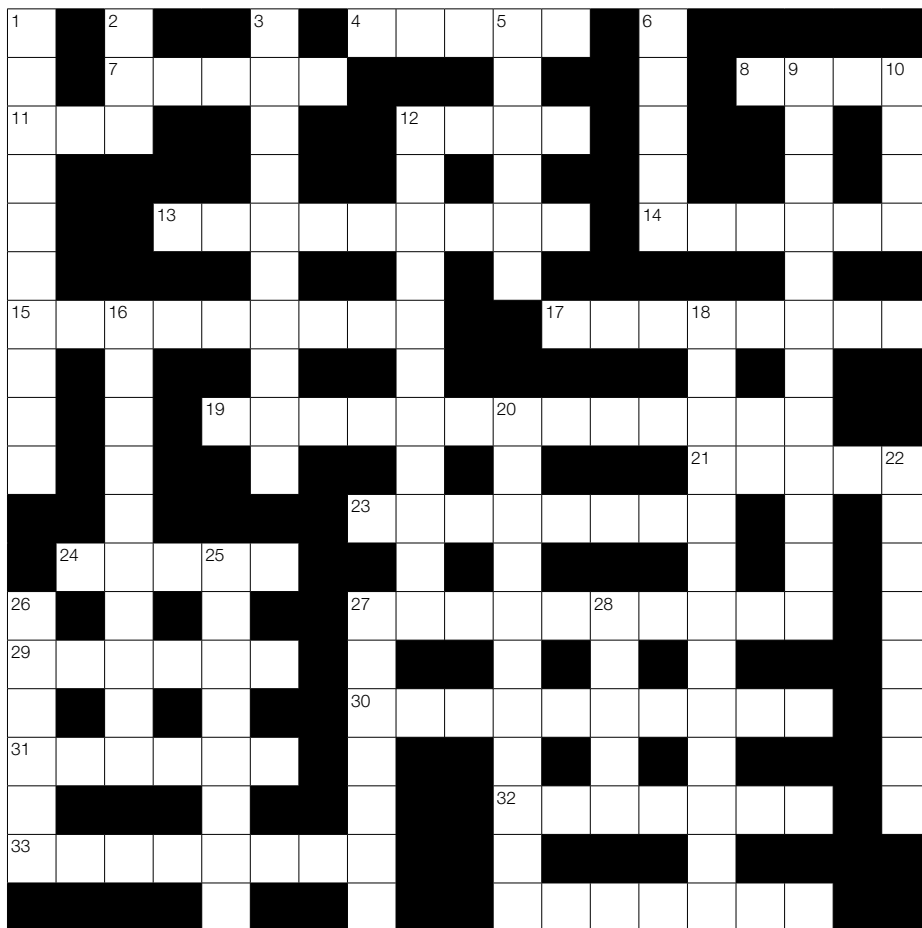
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Across

- 4 Metonym used to describe members of the judiciary collectively. (5)
- 7 Athenian lawmaker, renown for freeing all debtors from bondage. (Archaic) (5)
- 8 Enforcement hearing, examination. (4)
- 11 Commence civil proceedings. (3)
- 12 Duty central to the tort of negligence. (4)
- 13 Truthful. (9)
- 14 Period of a person's youth. (6)
- 15 To bind someone as an apprentice or labourer. (Archaic) (9)
- 17 One who disposes or grants, or transfers property. (8)
- 19 Precedent document. (11)
- 21 Likelihood of success. (5)
- 23 The right to operate sea, air or other transport services within a country. (8)
- 24 To prepare the writing of a legal document. (5)
- 27 Assertion of wrongdoing. (10)
- 29 The manner in which a party holds or occupies a parcel of land. (6)
- 30 Declare judicially. (8)
- 31 Ancient Greek Titaness whose statue appeared outside the former Queensland Supreme and District Courts. (6)
- 32 Real-time reporting of judicial proceedings debuted in this Queensland District Court. (7)
- 33 The right to vote in political elections. (8)
- 34 Statutory body that compensates people who are injured as a result of the negligent driving of unidentified or uninsured motor vehicles, Defendant. (7)

Down

- 1 The *Salmon Act 1986* (UK) makes it illegal to handle salmon in circumstances. (10)
- 2 The right of a person to take the profits of land belonging to another. (Archaic, England) (3)
- 3 Remorse or penitence. (10)
- 5 Public opprobrium is an example of extra-..... punishment. (6)
- 6 A person who comes into equity must come with hands. (5)
- 9 A person who inherits property upon the termination of the estate of its former owner. (12)



- 10 Recent High Court case which held that Aboriginal Australians are not within the reach of the power to make laws with respect to aliens. (4)
- 12 A notional barrier within a firm erected to prevent communications that could lead to conflicts of interest. (Two words, 7,4)
- 16 A purpose of criminal sentencing. (10)
- 18 Forethought. (13)
- 20 The institution and conducting of criminal proceedings. (11)
- 22 Registrar managing the Discrete Property List in the Federal Circuit Court of Brisbane. (8)
- 25 Denoting a conclusion for which there is stronger evidence than for a previously accepted conclusion, 'a'. (Latin) (8)

- 26 The primary subjects of international law that possess the greatest range of rights and obligations. (6)
- 27 Judicially ordered payment of compensation. (7)
- 28 Assumed identity. (5)

Solution on page 64

No longer a dog's life

Dog days succumb to Rover-regulation

BY SHANE BUDDEN



As I may have mentioned before, when struggling for content, we have a dog (my family and I do, I mean; not you and me).

Funnily enough, given the hard time I generally give him in this column, I feel sorry for him – and it isn't easy to feel sorry for someone whose life consists largely of sitting around eating and sleeping, or if he feels like changing things up, sleeping and eating. There isn't much difference, in terms of impacting on the world, between our dog and your average gamer, although the dog is statistically less likely to pee on the floor.

I feel sorry for him (the dog, not the gamer) because a whole bunch of dog rules got passed by the pet authorities in between the last time I had a dog and now. For example, when I was a kid everyone had a dog, nobody had totally fenced-off yards, and dogs pretty well went (in every sense of the word) wherever they felt like.

Everyone knew everyone else's dog and things were quite pleasant, aside from the occasional dog fight which didn't bother anybody (or, to be more accurate, didn't bother me, because my dog never lost).

Now, there are many rules about dogs, including about leads which – as I have mentioned before – nobody but me observes. Back in the '70s and '80s (never mind which '70s and '80s) we had our dog for 13.5 years, and he never once had a lead. It would have been utterly superfluous anyway, since no force on Earth could make that dog go in any direction he didn't want to go.

When he was due for a bath (this is a true anecdote here) we would place his food bowl next to a tree, and when he was distracted eating his food, we'd tie a rope to the tree and his collar. He was a big, strong dog, and we were not bothered by salesmen in those days (or if we were, he did something non-discoverable with the bodies).

I do support some of the new rules, especially the one about cleaning up after your dog. I have had many running shoes ruined by dog doo which, as any runner knows, is the most toxic and fragrant substance on Earth.

If the UN was serious about containing North Korea (or if it ever actually did, you know, anything really) they would simply surround the place with a 10-foot-wide band of dog doo; Kim Jong Un would thereafter sit in the exact middle of the country with a peg on his nose. I believe a similar tactic would work in the Middle East, and in response to other existential threats such as the expansion of China and Gwyneth Paltrow.

The weirdest rules about dogs, however, are in relation to what they cannot eat, because previously dogs could eat anything. For example, these days we know that dogs are not allowed to eat onions because they (the dogs) would die; back in the day we did not know that, but thankfully neither did the dogs, and they happily ate many foods that had onions in them (and many things that were not technically food) with no ill effects apart from occasionally vomiting up, say, the wrapper of a Hava Heart.

I can relate to my dog on this, because humans have also become subject to a number of weird food rules that did not have any application back in the day. For example, back then the height of healthy beverages was orange juice, but these days many highly-respected fruit loops have websites dedicated to the concept that orange juice is too high in sugar and is, thus, unhealthy.

I have to laugh at that, because in those days my friends and I occasionally consumed a soft drink called creaming soda, which had a sugar content so high it would eat through the can if you did not consume it quickly enough. If that stuff didn't kill us, there is no need to worry about orange juice (or nuclear waste, for that matter).

We also considered meat and three veg a good dinner, and bacon and eggs a hearty breakfast. These days, vegans will lecture you for hours on the evils of such diets, or would if they didn't keep passing out halfway through their opening sentences. I suspect whatever messages vegans are trying to get across would have more impact if vegans did not look like people who had been adrift on a liferaft for months, surviving on toothpaste.

Not that I am suggesting that there is anything wrong with veganism, because following a deep analysis of all the scientific literature and informed commentary available on the subject, I have concluded that I do not wish to be sued. I am happy for people to choose for themselves whatever diet they wish, be it veganism, vegetarianism, pescetarianism or breatharianism, although I point out – again, in the interests of not being sued – that breatharianism has some minor drawbacks, in that it is a load of old cobblers and you will die if you take it up.

I do object to people putting their dogs on weird diets though. I saw an article recently about a woman who had placed her husky on a vegan diet with no ill effects that she could see. The husky was right there in the photo, looking as healthy and fit as you would expect it to look, presuming it had been lying dead in the desert for a week.

So I think that we need to let the dogs go back to eating pretty much what they want, as long as it isn't something valuable such as money or the TV remote control. Oh, and don't let them anywhere near the orange juice...

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Crossword solution

From page 62

Across: 4 Bench, 7 Solon, 8 Oral, 11 Sue, 12 Care, 13 Veridical, 14 Nonage, 15 Indenture, 17 Disponor, 19 Boilerplate, 21 Merit, 23 Cabotage, 24 Draft, 27 Allegation, 29 Tenure, 30 Adjudicate, 31 Themis, 32 Ipswich, 33 Suffrage, 34 Nominal.

Down: 1 Suspicious, 2 Use, 3 Contrition,

10 Love, 12 Chinesewall, 16 Deterrence, 18 Premeditation, 20 Prosecution, 22 Turnbull, 25 Fortiori, 26 States, 27 Awarded, 28 Alias.

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