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Your Society: the bigger picture

Community engagement extends beyond advocacy

The relationship between the Queensland Law Society and each of its members is obviously central to the functions of the Society.

Naturally, most of our efforts are directed at maintaining and enhancing this relationship, providing our members with the services and benefits that they need and want.

Sometimes, however, it is necessary to appreciate the broader role of the Society in its relationships with government, business, media, the tertiary sector and the community.

Our research from some years ago indicated that many members were not aware of the extensive work of the Society and its committees in advocacy and law reform.

We addressed this knowledge gap through innovations such as the monthly advocacy pages in Proctor and our Advocacy Annual (the latest edition of which will soon be available), and we now know that most members are up to speed with this activity and the opportunities that they have to contribute to it.

However, there is an even bigger picture which members should be aware of, encompassing our relationships well beyond the legal profession and justice system.

For example, we offer regular comments to the media on legal topics and matters of concern to the profession and the community through media releases and interviews. While these may not always make national headlines, we have a credible success rate in providing information on a wide variety of law-related topics through local, regional, metropolitan and national radio, television and print media. Most months we notch up dozens of ‘media mentions’.

For example, our recent media activity has provided the Society’s views on the Queensland Government’s approach to youth justice, the proposal to scrap court-ordered parole and suspended jail sentences, and some of the risks associated with signing enduring powers of attorney.

Besides working closely with the courts and judiciary, we also work closely with another group of stakeholders, the regulators. These include the Office of State Revenue, the Titles Office, the Legal Services Commission, the Office of Fair Trading, the Australian Securities and Investment Commission, the Queensland Valuer-General and the Australian Competition and Consumer Commission.

These relationships allow us to be responsive to issues such as audits of self-assessors for duties purposes and trade practices issues, and we work with the regulator to produce benefits for both our members and the community.

Our relationships include national and international perspectives through our regular contact with the Law Council of Australia (of which we are a constituent body), other law societies in Australia and abroad, LAWASIA, the South Pacific Lawyers’ Association and others.

For example, in 2012–13 we consulted with the Chamber of Commerce and Industry on proposed reforms to the workers’ compensation system and together with Hong Kong Law Society started coordination of a panel of member firms interested in exploring Australia-Hong Kong commercial opportunities.

Our activities within this sector are designed to build prospective and mutually beneficial relationships, both nationally and internationally, promote the rule of law, internationalise the Queensland legal profession, and build and maintain a positive reputation among international legal and business communities so that we can better advocate for members.

There isn’t sufficient space here to even begin to examine our engagement with other community groups and organisations, not least of which is the Bar Association of Queensland, with which we have a close working relationship based on our mutual interests.

I will save the detail for another column about our work in the tertiary sector through a range of initiatives such as the Lawlink program for Indigenous students and how we interact with the general public on a number of levels.

For now, the message is that our members should understand that they are a key part of a much bigger picture than they might realise through their day-to-day dealings with their Society.

Our advocacy earns praise

Our Society was singled out for particular mention in Queensland Parliament last month in a lengthy debate on the Justice and Other Legislation Amendment Bill, which amends numerous pieces of legislation.

Both the chair of the parliamentary Legal Affairs and Community Safety Committee, Ian Berry, and Opposition Leader Annastacia Palaszczuk praised our contribution, with Ms Palaszczuk saying: “I am reluctant to single out any particular organisation, but as usual the submission by the Queensland Law Society alerted the committee to quite a number of unintended consequences of the legislation and they were, of course, of valuable assistance.”

Annette Bradfield
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Election policy inspection

Parties quizzed on legal issues

As we prepare to vote in this month’s federal election, it is reasonable that we should be well-informed on the major political parties’ policies on key issues of concern to the Australian legal profession.

To facilitate this awareness, the Law Council of Australia has approached the parties with a series of questions to ascertain their policies on a number of major issues.

In the lead-up to last year’s state election, we initiated a similar awareness campaign, providing Proctor readers with the views of then Attorney-General Paul Lucas and then shadow Attorney-General Jarrod Bleijie on 11 key issues, including legal aid funding, access to legal representation in the Queensland Civil and Administrative Tribunal and resourcing for courts and tribunals.

On the federal level, the Law Council identified 10 key legal issues – among them access to justice, Federal Court funding, Indigenous imprisonment rates, anti-terrorism reform, asylum seekers and immigration detention, and same sex marriage. It then formulated relevant questions under each topic.

The parties were invited to respond by 20 August, and the responses will be published on the Law Council website, lawcouncil.asn.au.

And while on the subject of elections, we are now gearing up for our biennial Council election, and you will find all of the details about this process on the next page. I urge all eligible members to ensure that they participate by voting and consider nominating as, or supporting, a candidate.

Given the major role that Council plays in determining the direction of the Queensland profession, your involvement is critical in ensuring that the profession benefits from respected and astute leadership.

New portal for small practices

We are pleased to announce the launch of a new small firm portal that provides significant resources and assistance for sole practitioners and small firms.

The small firm portal promotes the Society’s practice management resources, including: ethics, trust accounting and offerings on other typical practice concerns. By grouping these together, busy practitioners looking after small firms have a one-stop shop for quick access to practical information which is directly relevant to them. See qls.com.au/small-firm-portal.

A feature of the portal is the LegalDatum pricing service, a subscription-based product which provides reliable and confidential pricing information for law firms. It was developed by the London-based legal services pricing consultancy, Validatum, and the corporate advisory firm, Beaton Capital.

Another initiative, also available through the portal, is a practice health check which focuses on a practice’s profitability, business model and strategy. This allows practice managers and principals to self-audit their practice by working through a simple questionnaire, which can be followed by a free, confidential one-on-one consultation to discuss high-level practice management issues.

Based on the answers to the questionnaire, participants will be directed to specific resources to help benchmark their practice against legal profession best practice. See qls.com.au/phc.

While these new offerings are directed at small-scale practices, our aim remains to provide all our members, from sole practitioners to top-tier partners, with the services they need.

Day of learning for DLAs

Another recent activity, aimed at assisting our regional members, was the annual workshop for district law association presidents, held on 2 August.

Sixteen of the 18 DLA presidents were able to attend on the day, which featured addresses from Queensland’s top legal officers, including Attorney-General and Justice Minister Jarrod Bleijie, Chief Justice Paul de Jersey AC and Legal Services Commissioner John Briton.

While senior Society staff provided insights into our activities, the assistant editor of The Courier-Mail, Bob Macdonald, shared his suggestions on ways to work with the media.

Noela L’Estrange
**Elect to influence**

**Influence the future of Queensland’s legal profession.**

Ensure you are a full Queensland Law Society member to take part in the 2013 Council election. Council sets the strategic and policy direction of the profession. By participating in the Council election, you play a critical role in ensuring your profession benefits from respected, astute leadership.

**Who is Council?**

Council is the QLS’s ‘board’ and is comprised of working solicitors who understand the needs of practice. Council guides QLS in:

- setting the strategic objectives of your Society
- protecting the rights and interests of the profession
- reviewing and making submissions on legislation
- maintaining the highest standards of professional development, ethical and professional conduct, and practice and business management.

QLS is an influential body on the state and national stage. Our influence is exercised through development and review of policy submissions on proposed legislative change and helping the profession maintain the highest standards of expertise, ethical conduct, and practice and business management.

**Your involvement**

To be involved in the Council election, you will need to:

- Ensure you are on the Roll of Members by 10 September – contact us on 1300 367 757 or email elections@qls.com.au. If you are not on the roll by this date you cannot nominate for a position on Council or vote.
- Consider nominating for Council – nominations are open from 11 September to 3 October
- Vote in the Council election – voting will be open from 7 to 22 October.

**Why nominate?**

The profession faces major changes in coming years, including:

- advancement in digital technology and associated opportunities and risks
- the commoditisation of areas of practice and outsourcing of services
- the impact of the Asian century and its influence on the Queensland profession.

Council is ideally placed to guide 11,000 members through these changes as councillors understand the issues, pressures and opportunities facing members.

Nomination forms will be available from 11 September on the Council election website – qls.com.au/councilelection. If nominating for Council, you will need three full QLS members to endorse your candidature on the form.

**How to vote**

When voting begins on Monday 7 October, members will use a secure online voting tool accessible by email to cast their ballot.

Vote in two easy steps.

1. Complete and submit the voting form.
2. Respond to the confirmation email.

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**Key dates**

5pm Tuesday 10 September

9am Wednesday 11 September

5pm Thursday 3 October

9am Monday 7 October

5pm Tuesday 22 October

Close of Roll of Members for Council election participation

Nominations open

Nominations close

Voting opens

Voting closes

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Aladin checks out after 30 years

Supreme Court of Queensland Librarian
Aladin Rahemtula, right, retired at the end of last month after 30 years of service.

He began as reference librarian in 1983, an era when library staff spent the first hour of the day filing hundreds of catalogue cards into narrow drawers and when the Australian Legal Monthly Digest and Australian Current Law were the starting point for legal research.

In 1987 Aladin was appointed Supreme Court Librarian and began a stewardship that would inspire law libraries across Australia. He had the foresight to determine which new programs and ideas would enable the library to remain relevant and vibrant. He was careful yet creative. He read widely, observed the success and failures of similar organisations, and forged ahead with a blend of activities that suited the library’s clients and budget, and harnessed the talents and enthusiasm of his staff.

Aladin fostered a string of achievements which distinguish the library from its peers today. These include its comprehensive print collection and the extensive and growing online subscriptions available to patrons via the library website. He also instituted the research assistance service to QLS members, provided after the QLS Library was absorbed into the Supreme Court Library in 2008, and the Queensland Legal Index, which provides a searchable database of Queensland judgments covering more than 20 years. Judgments are now available on the library website within hours of being handed down and the weekly Legal Updater service is available free to all patrons.

In 2000 the library launched the Supreme Court History Program, which led to a cornucopia of exhibitions, lectures and books showcasing Queensland’s legal history. Other innovations included the Rare Books Room and the new Sir Harry Gibbs Legal Heritage Centre in the Queen Elizabeth II Courts of Law.

“We farewell Aladin with enormous gratitude and great respect,” Chief Justice Paul de Jersey AC said. “His stewardship has been both stabilising and innovative.

“As to the former, he has ensured the financial stability of the library notwithstanding many and various governmental regimes and divergent monetary situations – many of them quite unsympathetic to libraries ‘of all things’.

“As to the latter, his contributions are legion – exploiting the internet (unknown at his advent here), developing the Judicial Virtual Library, establishing the Supreme Court History Program, fostering the schools program, encouraging the donation of a wealth of material … the list goes on …

“Aladin is a polymath, and one of extraordinary humility. He will not relish my saying these things, but his contribution to legal learning and history in this state is simply remarkable, and must be acknowledged, as I say, with enormous gratitude.”

Aladin is to be succeeded by Legal Aid Queensland library services manager David Bratchford.
Korean officials visit QLS

Officials from the Republic of Korea’s Ministry of Justice met with senior Queensland Law Society staff on 12 August to gain an understanding of the regulation of lawyers in Queensland and the functions of the Society. They were senior prosecutor Maeng-Kee Cha, prosecutor and vice-director of the Legal Affairs Division Rak-Hyun Kim, prosecutor Kwang-Soo Jung and editorialist Jong-Hwa Kim.

New general manager at Trilby Misso

Trilby Misso has announced the appointment of Michael Broughton as general manager.

Mr Broughton has served as a practice group leader since 2011 and as acting general manager. He will succeed Lisa Rennie, who is resigning from her position to spend more time with her family and will finish with the firm at the end of this year.

Philanthropy almanac launched

Queensland Law Society and the Australian Centre for Philanthropy and Nonprofit Studies at QUT jointly hosted a launch of The Australian Nonprofit Sector Legal and Accounting Almanac 2012 on 22 July.

Supreme Court Justice Debra Mullins congratulated the centre for producing the almanac as a useful resource for the sector. It includes comprehensive summaries of legal cases in Australia and overseas, and changes to relevant legislation in all Australian jurisdictions during 2012. The almanac is available at eprints.qut.edu.au/61386.

Appointment of receiver, Pennella Lawyers

On 10 August 2013, the executive committee of the Queensland Law Society passed resolutions to appoint officers of the Society, jointly & severally, as the receiver for the law practice, Pennella Lawyers, Bridgeman Downs.

The role of the receiver is to arrange for the orderly disposition of client files and safe custody documents to clients and to organise the payment of trust money to clients or entitled beneficiaries.

Appointment of receiver, John C. Potts & Co. t/a Potts & Co.

On 9 August 2013, the executive committee of the Society passed resolutions to appoint officers of the Society, jointly & severally, as the receiver for the limited purpose of winding up the trust account used by the law practice prior to the death of John Cornelius Potts on 25 March 2012.

The role of the receiver is to wind up this trust account and return the trust monies to the persons on whose behalf it is held.

The appointment does not affect the law practice of Potts & Co., Coorparoo, which continues to operate under the control of principal Aaron Cornelius Potts.

Appointment of receiver – clarification

Page 8 of the August 2013 of Proctor reported that, on 19 June 2013, the executive committee of the Society passed resolutions to appoint officers of the Society, jointly & severally, as the receiver for the law practice, Elliott May Pty Ltd, of Paddington.

This firm should not be confused with Elliott May Lawyers Pty Ltd of Paddington, which trades as Elliott May Lawyers, and is not in receivership.

Inquiries on the receiverships above should be directed to Sherry Brown or Glenn Forster, at the Society on 07 3842 5888.
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FWC insights into unfair dismissals

Members of the Queensland Law Society’s Industrial Law Committee recently met with then Commissioner Jones of the Fair Work Commission to discuss procedural aspects of unfair dismissal matters.

In particular, the committee sought clarification on the circumstances under which scheduled conciliations might be adjourned for good reason and when face-to-face conciliation conferences would be agreed to by the commission.

The commissioner provided the Society with several extracts from the Fair Work Commission’s Procedures Manual (April 2012) to assist members.

Requests for adjournment in unfair dismissal conciliations

In terms of when adjournments will generally not be granted, the manual says:

“Representative availability is not generally grounds for granting an adjournment request.

“If an initial adjournment request has been granted, and a further adjournment is sought from the same party for the same reason, then this is not generally grounds for an adjournment request.”

Possible grounds include:

“If there is no one available from the respondent who has the authority to conclude a matter, then this is generally a ground for an adjournment request to be granted.

“Where a party has a medical appointment or emergency, then this is generally a ground for granting an adjournment request. Depending on the length of the delay, the party may be required to provide medical or other evidence to support the request.”

Face-to-face conciliations

Face-to-face conciliations can be convened for a number of reasons:

“Requests for a face-to-face conciliation rather than conciliation by telephone in circumstances that do not require an interpreter must be made in writing citing substantial grounds. Consent must also be sought from the other party by the requesting party. Except in exceptional circumstances, Fair Work Australia will not seek this consent.

“Where a party has made a request without consent, they are to be informed that they must obtain consent and also provide the substantial grounds for making the request. Following this, the parties are to approach Fair Work Australia together. Where consent is not clear, a copy of the request should be sent to the other party seeking their comments.”

There are also grounds to convene a face-to-face conciliation in exceptional circumstances:

“For requests for face-to-face conciliations involving exceptional circumstances, no consent is required from the other side. Instead, when the request is granted, prior to relisting the matter, the other party should be called and invited to attend at Fair Work Australia. Should they refuse the invitation, it should be explained that the other party and the conciliator will be in the same room together.

The Society thanks then Commissioner Jones for clarifying these matters. For more information see fwc.gov.au > Contact us.

This article appears courtesy of the Queensland Law Society Industrial Law Committee. For information about the committee, please email r.dcruz@qls.com.au.

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Cairns young lawyer an outstanding alumnus

Macdonnells Law associate Melissa Sinopoli was named an outstanding early career alumnus at the James Cook University annual Outstanding Alumni Award program breakfast in Townsville on 26 July.

Ms Sinopoli, who completed her Bachelor of Laws and Bachelor of Business at the university’s Cairns campus in 2009, won last year’s Regional Woman Lawyer of the Year Award from the Women Lawyers Association of Queensland, and was a national finalist in the Lawyers Weekly Women in Law Awards.

She enrolled in law in 2005 and undertook additional subjects – up to 13 in a year – to complete her five-year course in four years. She is the second youngest lawyer in Macdonnells’ 128-year history to be promoted to associate. Her areas of expertise include corporate law, liquor and gaming, and the Personal Property Securities Act.

In Brisbane, Queensland Attorney-General and Minister for Justice Jarrod Bleijie was named as the winner of QUT’s Outstanding Alumni Award for the Faculty of Law at a ceremony on 23 July.

Mr Bleijie, who holds a Bachelor of Laws from QUT, was elected MP for Kawana on the Sunshine Coast in 2009 and appointed to the Queensland ministry after the 2012 Queensland election.

The public/private divide

Justice Patrick Keane of the High Court of Australia will deliver an address this month on ‘The public/private divide, and its implications for the extent of judicial intervention in civil disputes’.

It will be held in the Banco Court in the Queen Elizabeth II Courts of Law at 5.15pm on Monday, 16 September.

“Differing perceptions of what is public and what is private affect the development of the law in many fields of legal practice,” his Honour said. “Of particular interest is the extent to which the public/private distinction may serve to explain some of the limits of judicial intervention in disputes between parties to voluntary relationships.”

Registration is required for the free lecture. Please email aal@law.anu.edu.au or call 02 6125 3487 or 6125 2906 to book your seat. Attendees are eligible to claim 1 CPD point.

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Opening of the Law Year, Cairns

Members of the Cairns judiciary, barristers and solicitors came together on 24 July for the opening of the Law Year church service at the Church of St John the Evangelist Anglican Church, Cairns. The clergy, led by Bishop William Ray, entered the church in procession followed by Far Northern judge Justice Jim Henry, local magistrates, and senior and junior counsel. Justice Henry, above, addressed the congregation on historical connections between the church and the law, while Bishop Ray delivered a homily on a portion of Psalm 119 relating to the law.

Students shine at torts moot

A record 15 universities participated in the 11th annual Shine Lawyers Torts Moot held in the Banco Court from 5 to 9 August. The moot featured a round-robin series of ‘mock trials’ judged by a panel of judges, barristers, solicitors and legal professionals. The University of Sydney took out the top spot with the University of New South Wales as runner-up.

1988 – a year to remember

Expo year 1988 also marked the beginning of many legal careers, and 19 of those lawyers celebrated their 25 years of QLS membership when they were presented with 25-year pins by president Annette Bradfield at a Law Society House function on 25 July.

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On 11 June 2013, Gold Coast City Council made Local Law No.17 (Maintenance of Works in Waterway Areas) 2013 (local law) and Subordinate Local Law 17.1 (Works in Non Coastal Waterway Areas) 2013.

Section 15 of the local law requires the seller of a “relevant lot” to ensure the contract includes a clause dealing with “specified prescribed work.” The local law gives a buyer a right to terminate the contract prior to settlement if:

- the seller has not included the relevant clause in the contract, or
- there is an outstanding notice issued by the council in relation to the ‘specified prescribed work’ and the notice has not been detailed in the contract.

This new local law presents a significant risk for sellers of land near waterways in the Gold Coast City Council area. Solicitors acting for sellers, purchasers and financiers must confirm that their clients’ contracts comply with the local law.

What is ‘specified prescribed work’?
Specified prescribed work means a work completely or partly in, on, above or below a waterway area that is:

- a revetment wall
- a training wall
- a jetty, or
- a pontoon.

A “waterway area” refers to all land and waters in the local government area in a tidal or non-tidal waterway, lake, artificial waterway, coastal wetland, and certain drains and channels.

Which land does the obligation apply to?
The requirement under section 15 of the local law applies to a contract for the sale of a “relevant lot”:

- on which a specified prescribed work is completely or partly situated, or
- that is waterfront land and which is connected to a specified prescribed work.
A new Gold Coast local law has significant implications for practitioners involved in the sale of waterfront properties and raises broader concerns should other local authorities follow suit. Report by Sarah Wheatley.

A lot is defined by reference to section 10(1) of the Sustainable Planning Act 2009 (Qld) and includes:
- a lot under Land Title Act 1994 (Qld)
- a separate, distinct parcel of land for which an interest is recorded in a register under the Land Act 1994
- common property for a community title scheme under the Body Corporate and Community Management Act 1997, or the Building Units and Group Titles Act 1990
- a community or precinct thoroughfare under the Mixed Use Development Act 1993, or
- a primary or secondary thoroughfare under the Integrated Resort Development Act 1987 or the Sanctuary Cove Resort Act 1985.

The local law is not entirely clear about whether it is intended to apply to the sale of all lots within a body corporate or resort development, where the common property or thoroughfare is connected to specified prescribed works, even if the lot being sold does not connect to those works. However, given the serious risks arising from a failure to comply with the local law, a conservative approach should be adopted by lawyers acting for sellers of lots in a body corporate adjoining a waterway area.

The obligation applies to all land sales for a relevant lot. It does not matter if the sale is by a developer, a corporation or an individual land owner.

What does the clause need to include?
The clause must state:
- that this is a contract to which section 15 of the local law applies
- the type of specified prescribed work, that is, a revetment wall, training wall, jetty or pontoon
- that the local law requires the responsible person for the specified prescribed work to maintain and keep the specified prescribed work in:
  - a safe condition, and
  - good working order, repair and condition so the prescribed work can continue to perform its intended function, and
- whether or not there is an outstanding notice issued by the local government under the local law in relation to the actual specified work and, if so, the contents of that notice.

Further obligations and notices for works
The purpose of the local law is to provide for the maintenance and repair of works in waterway areas in the council area. Works and structures in tidal waters are already subject to substantial regulation under the Coastal Protection and Management Act 1995 (Qld) (the Coastal Act).

The local law expands on section 124 of the Coastal Act, which requires a person who carries out tidal works to keep the relevant tidal works structures maintained in a safe condition.

Also under the local law, an owner of land is responsible for a range of prescribed works beyond the bounds of their property if their property is waterfront land and receives the benefit of prescribed work. The obligation applies even when the owner is not the person who built the structure. The Public Guide for the Local Law indicates that the council will take a broad view of who is a responsible person for relevant works.

The local law gives the council the power to issue a ‘waterway area required work notice’ which is broadly similar to the tidal works notices that the Department of Environment and Heritage Protection can issue under section 60 of the Coastal Act. The notice can require a responsible person to undertake work that is necessary to secure, protect, support or stabilise a part of land or improvements adjacent to a waterway area. Receipt of a notice could give rise to significant expense for a person.

Implications for practitioners
Property lawyers acting for sellers in the Gold Coast local government area should ensure that their contracts comply with the new local law. This might require a review of your conveyancing package to ensure you check whether your client’s land has any relevant structures, and to ensure your sale contract includes an appropriate clause.

The local law may also have a significant affect on property values and expenses for property owners in the Gold Coast area.

Sarah Wheatley is a planning and environment lawyer at McCullough Robertson.

QLS raises concerns
Queensland Law Society has raised concerns on the new local law with the Gold Coast City Council. We told the council that:
- There could be uncertainty about the effectiveness of the termination right, given the terms of section 57A(1) of the Property Law Act 1974.
- There was a very strong onus on council to take an educative role to ensure that relevant information was generally available.
- Standalone disclosure would increase red tape.
- There were already termination rights for buyers in the standard contract for circumstances in which a council notice had not been disclosed or compiled with.

The council responded that it did not share our concerns.

Practitioners may now need to consider the possibility that other local government authorities could start using similar mechanisms.

Solicitors may also need to consider how they are to be informed of the workings of local laws from other municipalities.

Latest QLS advocacy, page 26
Arrest stress - can it mitigate penalty?

The Court of Appeal judgment in *R v Galeano*
For some time the common law has recognised that the health of an offender, both at the time of offending and at sentence, can be a factor in mitigation of penalty.

There are a number of reasons in principle why this is so.

Firstly, the offender’s health at the time of offending may tend to reduce his or her moral culpability and render the principles of general and personal deterrence less relevant in the particular case. This is especially so in relation to illnesses of the mind falling short of insanity. In R v Huff [2012] QCA 138, Fraser JA (with whom Gotterson JA and Fryberg J agreed) wrote at [20]:

“Certainly general deterrence and punishment are purposes for which sentences may be imposed, as are personal deterrence and denunciation, but the significance of those sentencing purposes in a particular case may be reduced by a mental disorder, including, as in this case, a mental disorder which bears upon the offender’s moral culpability (as distinct from legal responsibility) for the offence.”

Secondly, the offender’s health at the time of sentencing may mean that imprisonment will be more burdensome for the particular offender. In R v Pope; ex-parte Attorney General (Qld) [1996] QCA 318, the court considered the relevance of a serious medical condition, which had deteriorated dramatically since the date of the offence. The court said:

“The existence of serious medical conditions are, of course, not necessarily an answer to the question of imprisonment, and not uncommonly the need for an adequate response calls for a custodial sentence notwithstanding. It is recognised however that the health of an offender is a factor tending to mitigate punishment when it appears that imprisonment will be a greater burden on the offender by reason of his state of health, or where there is serious risk of imprisonment having a gravely adverse effect on his health.”

Against that, it has always been recognised that the nature of the offence itself may be such that principles of denunciation and general deterrence are more important even in the case of an infirm offender.

In R v Islam; ex-parte Attorney General [2002] QCA at 235, the court increased the sentence substantially when the ill health of the elderly offender convicted of rape was given too much weight by a sentencing judge:

“The sentencing discretion miscarried to the point where the sentence is unsustainably lenient. As it stands, it may regrettably be taken to suggest a reprehensible serious offender may escape appropriately salutary punishment because of subsequent serious ill health. Where the correctional facility can accommodate him, he should serve a sufficient term; the community and especially his victim would, fairly expect that.”

In R v Svensson ex-parte Attorney General (Qld) [2002] QCA 472, de Jersey CJ (with whom McMurdo P and Davies JA agreed) said:

“… with the capacity of contemporary prisons, complaints of hardship through incarceration because of particular physical conditions will assume less significance than may previously have been the position.”

The common law has also recognised that, in limited circumstances, injuries suffered by the offender, at or subsequent to the offending, can mitigate punishment on the basis that the defendant has suffered a form of “extra-curial punishment”.

The decision of the Court of Appeal (Davies, Pincus JJA and Williams J, as his Honour then was) in R v Noble and Verheyden [1996] 1 QdR 329 is often quoted in support of this proposition. The offenders attempted to rob an antique shop armed with a knife and a pistol. They threatened the female owner. Her 20-year-old son observed the offenders on a security monitor. He took a shotgun that was on the premises and shot and wounded both offenders, one seriously.

In R v Robertson JCA (1997) 1 QdR 244-246 in which the author, Mr F Rinaldi, referred to a Victorian Court of Criminal Appeal decision in which a robber had suffered serious injury during a robbery when his gun discharged.

The Court of Appeal (in Nobel and Verheyden) wrote (at 331):

“We would not accept, however, that any injury suffered in the course of committing an offence is necessarily a factor in sentencing.

But it is easy to postulate circumstances in which an injury so suffered would be relevant. If an offender has assaulted another without causing significant injury, and the other has defended himself so vigorously as to cause the offender serious injury, it would ordinarily be right to treat the injury the offender has suffered as at least part punishment – whether or not the retaliation was within lawful bounds.”

In fact in that case the court did not reduce the sentences imposed for the attempted armed robbery.

Extra-curial punishment suffered subsequent to the offending is perhaps more obviously a relevant factor in mitigation because not taking it into account attracts the risk that community respect for the administration of the criminal law will be reduced.

In R v Hanaghan [2009] QCA 40, the court analysed a number of relevant authorities. Chesterman JA quoted with approval James J in R v Daetz (2003) 139A Crim R 398 at 410:

“I have concluded that, while it is the function of the courts to punish persons who have committed crimes, a sentencing court, in determining what sentence it should impose on a defendant, can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence. This is so, even where the detriment the offender has suffered has taken the form of extra-curial punishment by private persons exacting retribution or revenge for the commission of the offence. In sentencing the offender the court takes into account what extra-curial punishment the offender has suffered, because the court is required to take into account all material facts and is required to ensure that the punishment … is what in all the circumstances is … appropriate … and not … excessive … How much weight a sentencing judge should give any extra-curial punishment, will, of course, depend on all the circumstances … Indeed there may well be many cases where extra-curial punishment attracts little or no significant weight.”

All of these various concepts coalesce in the recent majority decision of the Court of Appeal in R v Galeano [2013] QCA 51 (Gotterson JA, McMurdo P agreeing; McMeekin J dissenting).
The offender was a major dealer in schedule one drugs. He was a mature offender who had previously been in prison for trafficking in dangerous drugs. He pleaded guilty to trafficking methamphetamine, MDMA and cannabis over a period of more than two years. He was a target of a major police surveillance operation in the last months of the offending period. He had previous summary drug and other convictions, and had been convicted many times of weapons possession.

Because it was suspected that he was armed, his arrest was undertaken by an armed Special Emergency Response Team unit at his north Queensland farm. Later searches located three shotguns, four rifles and boxes of ammunition. The offender attempted to escape. He was tasered and suffered some physical injuries, “the evidence as to the extent (of which) was rather inconclusive”.

On 28 March 2013, North J in the Townsville Supreme Court sentenced the applicant to 10 years’ imprisonment and declared some pre-sentence custody. It followed that he was automatically convicted of a serious violent offence.

He appealed on the grounds that the sentence was manifestly excessive. His argument was essentially based on three grounds. The first two (namely that North J misunderstood the appropriate range, and did not give sufficient weight to the applicant’s subsequent cooperation) were not accepted by Gotterson JA.

The third ground was that North J gave insufficient weight to the injuries suffered by the applicant as a result of his arrest. Gotterson JA found that North J acted correctly in relation to the applicant’s physical injuries. His Honour went on to discuss the effect on sentence of a psychiatric injury suffered by the applicant as a consequence of his arrest.

It is this aspect of the decision that is the subject of this article, as it involves questions (to quote the dissenting Justice McMeekin J); “that have not previously been considered, so far as my research shows, in decisions on sentencing. They include whether psychiatric injury ought to be brought into account in mitigation of sentence . . . .” My experience mirrors that of McMeekin J, hence my interest in the decision.

Psychiatric injury as extra-curial punishment

The appellant was apparently contemplating a civil action against police seeking damages for physical and psychiatric injury said to have been suffered as a consequence of his arrest. It was not submitted before North J that the arrest was unlawful. Indeed it seems to have been conceded that the arrest was appropriate.

For reasons related to the possible civil action, the applicant had been seen by a psychiatrist who provided a report in which the doctor opined that the applicant:

“… is totally incapacitated from working in his pre-injury position as a result of his depressive disorder symptoms of poor sleep with subsequent daytime lethargy, anergia, amotivation, anhedonia, cognitive problems particularly in the areas of poor attention, concentration and short-term memory not to mention the overall zeitgeist surrounding his situation.”

After referring to that opinion, Gotterson JA then referred to R v Noble & Verheyden and quoted some of the passages set out above. He noted that North J had also referred to that authority; and noted that the psychiatrist had described the applicant as “somewhat of a vague historian”, and that his depressive disorder may have been contributed to by other factors. He quoted North J (at [45]) when his Honour said:

“On the limited evidence before me, albeit not vigorously contested by the prosecution, I accept that the circumstances of your arrest has to some extent, contributed to your suffering and that you have suffered from apparently a psychiatric complication that, in part, has been contributed to by the fright or fear that you suffered on the occasion of your arrest. Whether that condition has all its genesis in that event or only partially, is a matter that perhaps one day another court might have to look into, and I say no more about that. It is a matter that I will take into account that is a contribution that, on the evidence before me, has played.”

Gotterson JA went on to note that North J was justified in not making express findings with respect to “the extent or cause of the applicant’s psychiatric condition.” Gotterson JA also noted other factors relevant to any weight to be given to the evidence. At [48] – [49] his Honour wrote:

“It was based largely on information narrated by the applicant itself. There was good reason, which would have been apparent to his Honour, to have been cautious with regard to findings and conclusions based upon the applicant’s account of fact including the symptoms he experienced. For one thing, Dr Likely had described him as somewhat unreliable. For another, he had told Dr Likely adamantly that he was not guilty of trafficking an illicit drug. That was manifestly untrue. The applicant did not give evidence at the sentence hearing.”

“[49] On the state of the evidence before him, it was open to his Honour also to proceed on the rather broad factual basis that the circumstances of the applicant’s arrest had contributed to, but that it was not the sole cause of, a psychiatric disorder from which he was suffering.”

His Honour then wrote (at [51]):

“As a result of his arrest, he suffered physical and psychological injuries. The applicant’s physical injuries were substantial but neither life threatening nor productive of significant long-term physical disability. The learned sentencing judge found that the circumstances of the arrest may have contributed to an enduring psychiatric disorder which requires medication. This is likely to make his time in prison more difficult than for the offender without these health problems. Due allowance needs to be made to reflect these as mitigating circumstances.” [my emphasis]

His Honour later concluded that, for the reasons expressed above, the sentence imposed was manifestly excessive.

A sentence of nine years was substituted. McMurdo P agreed with Gotterson JA without comment.

There was no evidence that the psychiatric disorder was such that it would be likely that the appellant’s time in prison would be more difficult than for an offender without the disorder. That is not surprising, given the high level of serious psychiatric disorders within the prison population, and the sophisticated medical response to such conditions in modern correctional facilities. A similar point is made in relation to other health problems in R v Svensson, referred to above.

McMeekin J dissented. His Honour noted that the psychological injury resulted from the police “doing their job”. His Honour undertook an extensive analysis of the jurisprudence behind decisions such as Noble and Verheyden.
As his Honour notes at ([96]):

“The common thread running through these cases providing the reason for any reduction in sentence seems to be the notion that the criminal will have as a permanent reminder through the remainder of their lives that particular adverse consequence which will be of such nature as to cause them a significant degree of suffering either in their purse, mind or body and so constitute a punishment, over and above that which the community can inflict by way of sentence.”

At [113], his Honour commences a discussion of psychiatric harm, and notes that no case had been presented in which the court had accepted that such harm consequent upon criminal conduct engaged in, or the manner of an arrest, should be taken into account in mitigation of sentence. At [119] his Honour wrote:

“… I suspect that many members of the community would doubt the wisdom of lending too sympathetic an ear to the troubles that follow from the choices that criminals make. In order to avoid having the criminal law fall into disrepute by the setting of sentences that are disproportionately low, given the criminal conduct in question, it seems essential that any claimed adverse consequence, and importantly its severity and permanency, be seen to be established to a reasonable degree of certainty. I doubt that level of certainty can be achieved in cases of this type.”

His Honour then discusses the difficulties of proof in injuries of this nature, noting that expert opinion (as was the case here) is largely based on self report, and should be approached with a degree of scepticism. It is apparent that North J was alive to these very issues.

McMeekin J did not comment on the apparently decisive comment of Gotterson JA to the effect that prison would be more difficult for the appellant because of his psychiatric illness.

Conclusion

The majority judgment does seem to extend the category of extra-curial punishment to psychiatric injury suffered in the course of an arrest. There was no authority put forward to support such an extension. If such a principle has general application, one can imagine it being relied on in many cases.

In a theoretical sense, one can imagine rare cases in which a psychiatric injury suffered in the course of committing an offence or even (in rarer cases) in the course of arrest amounting to a factor in mitigation. An offender may witness the slaying of a co-offender who is, for example, his partner in the course of an armed robbery, or in the course of an arrest and suffer a severe psychiatric injury as a consequence.

Psychiatric illness suffered as a consequence of remorse is a different subject and not the subject of this paper.

It is unlikely, I think, that this decision will have a floodgate effect with reports being tendered suggesting post-traumatic stress disorder as a result of offending and/or arrest.

The critical factor appears to be the conclusion that the appellant would find prison more difficult because of his condition. As I have noted, there was no evidence to support this conclusion placed before North J, or indeed before the Court of Appeal. It is unlikely that such a conclusion will ever be open given the level of psychiatric and psychological health care now available in correctional facilities.

It is suggested that, like the Aurukun case of R v KU; ex-parte Attorney General (Qld) [2008] QCA 154, this case will be confined to its facts by subsequent decisions of the Court of Appeal.

Judge JM Robertson of the District Court of Queensland is the author of the Queensland Sentencing Manual.
An express trust need not have a trust deed to act as its “charter of future rights and obligations”, but the vast majority certainly do, and updating or varying such a deed is not necessarily as simple as it appears.

This article focuses on ‘private’ trusts in the form of discretionary trusts or unit trusts carried on for business or investment. It may be that such a trust is a partner in a larger partnership of unrelated entities, or (in the case of a unit trust) has unit-holders representing a number of different family groups. Nonetheless, these fall under the category of private, rather than public entities on the basis that they are not charitable trusts, a managed investment trust, or a listed entity.

Obviously, first read the trust deed in full and check if there are any deeds of variation already existing in respect of the trust deed, or whether there have been any changes of trustee, and how that change was documented. You will also need to read all of those deeds of variation and changes of trustee. While you can often use the format of a prior variation document for your own deed of variation, do not assume that this was correctly done (which may mean it has to be redone in the variation you are preparing).

When reading the deed, note the definitions clause, the income and capital distribution provisions, the general powers of the trustee, and, of course, the variation clause.

The most important thing to look for is the clause which provides the trustee with power to vary the trust deed. If there is no variation clause in the trust deed, the only way in which changes can be made to the terms of the trust involves retaining counsel and making an application to a Supreme Court with relevant jurisdiction to enable the deed to be varied. Court variation will not be brief or inexpensive, however the good news is that almost all trust deeds have a variation clause.

Follow the process in the internal variation clause exactly. Generally, it is preferable for evidentiary purposes to undertake the variation by way of a deed, even if the clause in question is expressed to permit a variation to be made in writing or by some other means. You will also have to check that the consent of another party to the proposed variation is not required. It is reasonably common for prior consent of an ‘Appointor’ or ‘Guardian’ to be needed in the case of a family discretionary trust, and unit-holder consent or approval may be required for a unit trust.
Consent can often best be evidenced by having the party also execute the deed of variation, together with a recital setting out that, by their execution of the deed, they consent to the proposed change. This can be problematic in unit trust cases if the variation clause requires (for example) a resolution of unit-holders. It may be necessary to separately hold a meeting of unit-holders, again following the processes set out in the trust deed, which can take some time to complete.

A failure to follow the correct variation processes under the deed, and relying on a Saunders v Vautier type of ‘consent’ by all unit-holders, will instead probably have the effect of terminating the existing trust and transferring the assets to a new trust with the same unit-holders, with the likely consequence of significant tax and stamp duty.

Once the parties required to execute the deed of variation have been identified, the deed of variation should be drafted, clearly identifying the trust deed to be varied by reference to its name, settlor and date of creation, preferably together with reciting any variations to the deed or changes of trustee which have occurred between the original trustee and the new trustee who now proposes to use its powers to vary the deed.

The variation power should be identified and the relevant term recited exactly as it appears in the deed – the whole clause need not be set out, but the actual power to vary such as the phrase ‘alter or vary or absolutely revoke any of the trusts powers or provisions’ is usefully repeated, as well as the trustee’s desire to vary the deed.

Once all that has been recited, you can turn to making the changes to the deed desired by the client. Common changes include the addition or deletion of a beneficiary or class of beneficiaries, expansion of the powers of the trustee, and amendments to the definitions of income.

Variations directed to income and capital distributions are the most common variations, following the 2011 changes to the Income Tax Assessment Act 1936 (Cth) and the fact that the proposed rewrite of the taxation of trusts more generally appears to have stalled, at least for now.

In short (while not purporting to be a guide to amend a trust deed to make it compliant post Bamford) the definition of income of the trust will commonly need to be amended to fully accommodate the current tax law and practice. In such a case the definition should also deal with ‘notional amounts’ such as deemed capital gains and franking credits, as well as various other matters beyond the scope of this article. The trustee should also be given (either in the general powers clause or within the income distribution clause itself) the power to identify income having different characteristics and to stream that income – a so-called ‘attribution clause’. Finally, there should also be a power to make distributions of trust capital prior to the vesting date if it is not there already.

The process for adding or deleting a beneficiary is not necessarily as simple as amending the definition of beneficiary; it may be necessary to make corresponding changes to the income or capital distribution clauses. Some caution is required from a stamp duty perspective.

Provided that a variation of a trust deed is effected using the internal power given by the variation clause, not only will the variation be valid (if correctly done) but also it is extremely unlikely that such a variation will constitute a resettlement of the trust itself or create a new trust. Following the decision in FCT v Clark, the Full Federal Court has held that in such cases the trust estate will continue and will not become a new trust estate.
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The High Court accepted the formulation articulated by the Full Federal Court in its refusal to grant special leave and as a result deleterious taxation consequences are unlikely, although stamp duty issues may still be relevant in cases involving changes of the interests of beneficiaries under the trust.13

Lastly, while it is one thing to vary a trust deed the form of which is familiar to you (for instance as it was prepared by your own firm, or one that you are otherwise quite familiar with) sooner or later there is sure to be a trust deed which by virtue of its age or some other factor is near-incomprehensible, or badly drafted to an almost terminal degree (or both).

Nonetheless, the same process must be followed as you would in varying a trust deed – that is, identify the variation power and then follow it exactly. In some cases it may be wise to consider whether to vary14 or update a particularly onerous requirement of the variation power (such that it is no longer necessary to track down a nonagenarian appointor who no longer has any clear recall of his or her role under the trust deed), but bearing in mind that it is often the oldest and most primitive deeds which have had the longest time to build up substantial assets, more care, not less, must be taken in such cases.

Once executed, whether or not a deed of variation requires stamping varies from state to state, and indeed on the content of the variation itself. In Queensland, a variation of a discretionary trust which does not affect the beneficiaries who are takers in default under the deed is not dutiable.15

Much of the above may seem relatively straightforward, but in dealing with trusts the consequences in case of error or misunderstanding can be dire, and cannot be easily fixed by merely lodging an Australian Securities and Investments Commission form. Indeed, often such error cannot be fixed at all. Accordingly, it is better to be prepared for the potential pitfalls and take good care to avoid them.

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**Notes**

1. Davidson v Chrimsde (1908) 7 CLR 324 at 340 is the classic statement of the relevant Australian law.

2. Of course, strictly speaking it is the trustee who is the partner.

3. A charitable trust cannot be varied to change its nature into something other than a charitable trust and consents of regulators such as the Commissioner of Taxation or the Australian Charities and Not-For-Profits Commission (ACNC) may also be required by the deed or by the terms of endorsement with a tax-preferred status.

4. Or even prepared by a legal practitioner at all, in some cases.

5. For instance, s59-96 of the Trusts Act 1973 (Qld) authorise this course of action, and similar provisions exist in most other states (NSW being a notable exception in having a more limited right). There is also a degree of inherent jurisdiction – in Queensland this jurisdiction apparently flows from the Constitution Act 2007, although there is likely extra-statutory jurisdiction also.

6. There is a degree of doubt as to whether or not a deed is required to vary a deed. Absent a compelling reason not to prepare a variation on deed format (which does not spring easily to mind), a variation by way of deed should be used irrespective of any less formal method in which a variation may be made.

7. Which are usually based on company meeting procedures, and may have timeframes which cannot be shortened.

8. In which case care should be taken in some jurisdictions that changes are not made to the takers in default such that a stamp duty liability might arise – in Queensland, refer to the Duties Act ss58-63.


10. Commissioner of Taxation v Bamford [2010] HCA 10. Subsequent legislative change to the decision was at least arguably an overreaction.

11. Other tax matters such as the existence of a family trust election or interposed entity election will also need to checked and considered.

12. Of course, strictly speaking it is the trustee who is the partner.

13. For an example of a change which was the creation of a new trust estate (but was not made under a deed of variation) refer the recent decision of FCT v Oswal [2010] FCA 745.

14. This is in itself a nice question – if it is at all possible to vary a variation power per se. If it is preferable to work within the framework of the deed to obtain the desired outcome if possible, for instance by having named individuals retire and appoint a replacement rather than attempt to amend the terms of the variation power itself. Such a course of action should only be undertaken in extremis.

15. But cf (for example) the Northern Territory which imposes a flat $20 duty on deeds of variation.
Brisbane

CPD Core Workshop: Client Conflicts, Objectives and Attraction

Law Society House, Brisbane | 8.30 – 11.55am
Tailored to the needs of mid-career solicitors, this workshop includes three presentations around the theme of taking greater responsibility in client management. It offers delegates the opportunity to gain points in each of the three core CPD areas – practical legal ethics, professional skills, and practice management and business skills.

Sessions include:
• identifying and handling conflicts – scenario-based activity and discussion
• managing complex legal matters – an introduction to legal project management
• not just a job for partners – your role in business development.

3 CPD POINTS

Core CPD Workshop: Managing and Avoiding Complaints

Law Society House, Brisbane | 1.30 – 4.50pm
This workshop includes three presentations around the theme of managing and avoiding complaints. Delegates can gain points in each of the three core CPD areas – practical legal ethics, professional skills and practice management/business skills.

Sessions include:
• an introduction to complaints
• handling Legal Services Commission complaint investigations
• implementing management systems to avoid complaints.

3 CPD POINTS

Annual Insolvency Intensive

Law Society House, Brisbane | 8.25am –12pm
This year’s Annual Insolvency Intensive will enable lawyers in insolvency, liquidators and other insolvency practitioners to enhance their knowledge on the latest developments in this practice area and gain three CPD points. Industry experts will present on an array of topics, including pleadings in insolvency matters, the role of the Australian Taxation Office in insolvency claims, and recent issues and cases.

FRI 20 SEP

3 CPD POINTS

Early Career Lawyer Movie Night: Jobs

Palace Barracks Cinema, Brisbane | 5.30 – 9pm
Jobs is the powerful and true story of the visionary who set out to change the world, and did. The film chronicles Steve Jobs’ transformation of character from the enthusiasm and self-discovery of his youth, to the personal demons that clouded his vision and, finally, to the ultimate triumphs of his later life. This relaxed social networking evening is only open to early career lawyers.

FRI 20 SEP

14th Annual Property Law Conference 2013

Pullman Brisbane King George Square
8.50am–6pm, 8.50am–2.45pm
The 14th Annual Property Law Conference is designed for property law practitioners and accredited specialists, providing an ideal opportunity to gain knowledge on the latest developments and current issues in property law and to network with peers and acknowledged experts. This year’s event covers topical issues such as leasing, body corporate matters, mortgagee re-possessions and termination of residential and commercial property contracts. Experts will provide practical tips, discuss ethical issues in contract formation, and review recent legislative changes and cases. The conference will include an update on econveyancing and a lively debate on ‘The delivery truck dilemma – should time be of the essence?’

THU-FRI 26 & 27 SEP

10 CPD POINTS

Earlybird prices and registration available at

>> qls.com.au/events
Your courtroom debut
Essential tips for the first hearing

A lawyer’s first trip to court is, traditionally, a bit of a harrowing experience. As a general principle the conversation in the lead up to your first appearance will go something like this:

‘Jane, I am going to be stuck in a meeting and you need to duck up to the Supreme Court on the matter for Joe Bloggs and arrange an adjournment this morning. There shouldn’t be any problems; just tell the court we need a couple more weeks to secure counsel and get them briefed and up to speed before the matter can be heard. I am pretty sure the other side is going to consent, but just confirm that before the hearing …’

Even to the unwary, this seems like a trap.

I have set out below some tips for surviving your first court appearance. Some are more obvious than others, but putting them together should provide you with a good grounding for your hearing.

1. What’s going to happen?

Before we get to any specific ‘tips’, here is a rough summary of how the process will go (I’ve used a fairly normal Supreme Court of Queensland Applications List process as a guide):

• You will get the file and review it (if you’re lucky).
• You will print out the relevant law list so you know where you need to be and when, and take it with you to the court.
• You will arrive at the courtroom around 10 minutes before the hearing time and complete an ‘appearance slip’, which is usually available outside the courtroom. You will need to complete an appearance slip for each matter that you are there for.
• The judge will usually call first for any matters that are to be adjourned or have consent orders (that is, the shortest matters) and deal with them on the spot.
• The remaining matters will be ‘called over’ in the order in which they appear in the law list. During this call-over, each matter is very briefly summarised and an estimate of time given to the judge – for example, ‘Your Honour, this is a contested application for summary judgment. We estimate two hours.’
• At the end of the call-over, the judge will announce the order in which the matters will be heard.
• You should be aware that it is still an occasional practice of some judges to call the matters to be heard in the order of seniority of the appearing practitioners. In that case, if you are a junior solicitor and you do not have a more senior counterpart acting for the other party, then you may have the pleasure of waiting until the end of the list in order to have your matter heard.
• You will pay attention to which matters are proceeding, and go into court at the appropriate time for your matter.
• Different courts have slightly different procedures, but they are mostly variations on the above theme.

2. Addressing the court

Nothing is quite as embarrassing as calling the individual presiding over your hearing by the wrong title. Although it is poor form to refer to a registrar as ‘your Honour’, it is even worse to fail to use the term when required. In Queensland, all judges and magistrates are referred to as ‘your Honour’.

If you are appearing at a winding-up or a bankruptcy application in the Federal Court, Federal Circuit Court or the Supreme Court, it is likely you will be appearing before a registrar, in which case you refer to them as ‘Registrar’.

In a tribunal (including the Queensland Civil and Administrative Tribunal and the Administrative Appeal Tribunal), you may refer to the presiding individual as ‘Member’, ‘Sir’ or ‘Madam’ as appropriate.

In all but the most informal settings, you should stand when addressing or being addressed by the court or tribunal.

It used to be common practice to say ‘Good morning your Honour’ prior to announcing your appearance. Although a largely perfunctory greeting, this practice has attracted some controversy. It was perceived by some that the normal civilities between practitioners and the court indicated a kind of undue familiarity. As a result, some judges now frown on the practice and you should therefore be cautious in how you greet the court.

3. Seating and bags

Although the rule is not routinely enforced these days, it used to be the case that the more senior practitioner sat on the right-hand side of the courtroom (facing the judge). A barrister is always considered more ‘senior’ than a solicitor, irrespective of who was admitted when. Similarly, if you are acting against the Crown in a matter, the practitioners for the Crown are always considered ‘senior’ for the purposes of this procedure.

When the time comes to actually appear on your matter, do not put your bag on the bar table. Put your bag next to you, remove whatever you need from it and then put those items on the table in front of you.

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Early career lawyers

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4. Referring to your opposition

Your opponent is referred to as ‘my learned friend’ if counsel, and ‘my friend’ if a solicitor. If there are multiple parties, you refer to them as ‘my learned friend for the [party title]’.

Alternatively, it is permissible to refer to your opponent as ‘the applicant’, ‘the respondent’, etc.

5. Conversations outside court

It is still common for practitioners to engage in discussion outside court.

Although these may appear, from time to time, to be casual conversations, do not assume that they are ‘off the record’.

If you intend to engage in any discussion that needs to be on a ‘without prejudice’ basis, then you must ensure that you state this explicitly and get the other participants’ acceptance before proceeding.

Otherwise, err on the side of saying nothing rather than saying something. Always remember, it is not incumbent on you in such conversations to answer a question just because it is asked.

Don’t forget to make file notes of the discussion as soon as possible afterwards.

6. Check the rules

Wherever you are appearing, the court will have rules about what you must hand up, the format it must be in and the number of copies required.

Even on a straightforward matter, it may be appropriate for you to hand up a draft order, a list of material, some brief submissions, case authorities in the appropriate format and, in almost every jurisdiction, an appearance slip will be required. When your matter is heard, it is common for a bailiff or court attendant to take the appearance slip from you.

Before you get to court, make sure you are clear about what you need to have with you.

Conclusion

Hopefully the above tips will give you a good starting point for attending a court hearing. Remember to adopt a cautious, respectful and honest attitude at all times in your dealings with the court and other parties.

Whether the matter is a simple adjournment or a longer contest, there is nothing that can substitute for preparation. Sometimes you will not have much time to prepare, but use your time productively to learn as much about the matter as you can, so that you are not caught unaware.
The voice of your profession

Recent Queensland Law Society advocacy includes the voicing of concern on proposed reforms to the Crime and Misconduct Commission and the provision of feedback on the Queensland Government’s Safer Streets Crime Action Plan – Youth Justice. Details of this and other recent advocacy are available here and at qls.com.au/submissions. A member log-in is required to view some of the submissions listed.

Nature Conservation (Productive Plants) and Other Legislation Amendment Bill 2013

S89 exemptions should stay in Act

On 21 May 2013, the Nature Conservation (Productive Plants) and Other Legislation Amendment Bill 2013 was introduced into Parliament and referred to the Agriculture, Resources and Environment Committee for review.

The Bill amended, inter alia, the Nature Conservation Act 1992 (the Act). Of particular concern to Queensland Law Society was the proposal to remove the exemptions to the s89 offence, an offence punishable by up to two years’ imprisonment, from the Act to the regulations.

The explanatory memorandum for the Bill said the change would be a “reasonable and appropriate way of handling this policy framework” as the regulations would be subject to parliamentary scrutiny required under the Statutory Instruments Act 1992. While the Society accepted this point, it noted the review processes for subordinate legislation may not be as stringent as those for authorising law.

Moreover, if moved to the regulations, the exemptions could simply be amended by executive action, to potentially take effect before being tabled in Parliament. Therefore, the Society noted it would be possible that accused persons could be denied the benefit of the exemptions even if relevant amendments to the subordinate legislation are subsequently disallowed.

The explanatory memorandum also said that moving the exemptions to the regulations was consistent with how other exemptions were established. The Society respectfully disagreed, citing examples of other legislation in Queensland, such as the Sustainable Planning Act 2007 (Qld), which provide defences in the authorising law.

It was also argued in the explanatory memorandum that the amendment would make “it easier for the public to navigate”, which the Society noted, with respect, to be without foundation and contrary to experience and common sense. Accordingly, we suggested that all recognised exemptions which amount to defences should be retained in the Act.

The committee held a public briefing on the Bill on Wednesday 7 August and was due to table its report on Monday 19 August 2013.

Patrese McVeigh is a member of the QLS policy team.

Safer Streets Crime Action Plan

Youth justice legislative plans ‘misguided’

Queensland Law Society responded to the Queensland Government’s Safer Streets Crime Action Plan – Youth Justice, a community consultation designed to broadly review the youth justice system.

The review sought feedback about the types of reform Queenslanders would like to see to address youth crime. We said the government’s focus on legislative change was a misguided approach to addressing youth justice issues, noting that Childrens Court figures show the number of young people committing crime is declining. We pointed to data which showed there are a small number of persistent offenders who are charged with multiple offences. We suggested there be a focus on targeted intervention for this small group of young people.

We opposed the proposal to remove the principle that detention should be used as a last resort, and pointed to research which has found that imprisonment is the most significant factor that can lead to recidivism. We also noted the substantial costs likely to be associated with an increase in the number of children in youth detention. We highlighted the importance of ongoing support for young people within their own community, as a means of addressing underlying causes of offending behaviour.

In response to the proposal for naming and shaming young offenders, we noted that research does not suggest this will be an effective deterrent for committing further crimes. We referred to Northern Territory and New South Wales studies and noted our concern with the proposal, given it may significantly affect the ability of children to find employment and become productive members of their community, and can adversely affect victims of crime.

We also noted concern over the proposal to introduce criminal histories in adult sentencing as we consider sentencing should be founded in judicial discretion and precedent. We opposed making breach of bail an offence, given the likely impact it would have on remand and detention rates, and the subsequent cost in relation to detention.

Members can obtain copies of our submissions on the action plan at qls.com.au > Knowledge Centre > Submissions.

Jennifer Roan is a QLS policy solicitor.
CMC reform proposals ‘reduce jurisdiction’


We reiterated support for the functions and role that organisations such as the Crime and Misconduct Commission (CMC) play in the community, acknowledging the intent of the Fitzgerald Inquiry Report in ensuring that accountability and transparency are central features in carrying out government responsibilities.

We voiced concern that the overall composite effect of the recommendations will be to reduce the jurisdiction of the CMC, a reduction which is not justified. Particular concern was raised on recommendations such as:

• changing definitions which would, in effect, raise the threshold of what is misconduct, in addition to raising the threshold for what is official misconduct. Certain misconduct complaints not falling within these new thresholds will not be able to be addressed by the CMC.
• the requirement for a person to verify by statutory declaration that they have read and understood the relevant sections of the Crime and Misconduct Act, which appears to be an extraordinary and entirely unsatisfactory basis for commencing a prosecution.
• changes to the Ombudsman Act which could have unforeseen consequences in terms of removing the Ombudsman’s general responsibility for administrative practices and procedures.
• the requirement that the complainant must keep the matters confidential for all purposes until a decision is made which results in a criminal prosecution or proceedings in respect of it in QCAT. In the absence of this, none of the matters can otherwise be ventilated.
• there could be prosecutions for failure on the part of a complainant to refer to the relevant legislation, which appears to be an extraordinary and entirely unsatisfactory basis for commencing a prosecution.
• reducing ethical standards units without an effective replacement to carry out all the functions currently undertaken by the units.
• significantly weakening the Right to Information legislation, which would impact on any number of requests for information which do not relate at all to complaints will be captured.

We asked to be included in consultation going forward, noting that the government has responded to the report, supporting and noting various recommendations.

Raylene D’Cruz is a QLS policy solicitor.
Interlocutory applications in the Federal Court

The Federal Court has power to make interlocutory orders. The Federal Court Rules 2011 (Cth) has application in most proceedings in the court where a party seeks interlocutory orders.

Practitioners should also consult the court’s various practice directions and administrative notes when making an application in a proceeding because the process for bringing an application in a proceeding in the Federal Court will vary depending on the matter.

For example, if the Federal Court (Corporations) Rules 2000 (Cth) apply to the matter, Practice Note CORP 1 – Interlocutory process and pleadings in corporations matters is relevant. If the matter is urgent, a party in Queensland must have regard to Administrative Note QLD 1 – Corporations Matters.

Interlocutory applications generally

Part 17 of the rules provides for interlocutory applications to the court. The rules have dispensed with motions and notices of motion.

A party who wants to obtain an interlocutory order must now make an application in accordance with r17.01. An interlocutory application is defined as "an application, other than a cross-claim, in a proceeding already started".

Additionally, an interlocutory application can be made orally at a hearing. A party may also seek interlocutory orders when filing its originating process or a cross-claim.

Preparing the interlocutory application

If filing an interlocutory application which is not part of the originating process or cross-claim, the party must draft the application in accordance with Form 35. The Form 35 interlocutory application requires, among other things, that the applicant:

- State briefly, but specifically, each interlocutory order that is sought by the party. However, an order for costs does not necessarily need to be sought as costs follow the event if an order is made in favour of any party.

Documents, the authenticity of which is not in dispute. This reduces costs and the need for an unnecessary affidavit. If so, the first party must comply with rule 17.02(2).

If the first party decides not to file an affidavit, rule 17.02(2)(a) requires that the first party provides a list of the correspondence or other documents to each other party. Pursuant to rule 17.02(2)(b), each other party is provided the opportunity to notify the first party of any further documents that should be added to the list. If another party notifies the first party of additional documents, the first party must file the documents it originally intended to file together with those documents another party notifies should be added to the list.

If the documents mentioned in 17.02(2)(a) and (b) number more than six, the documents must be indexed and paginated.

Lodging the interlocutory application and accompanying affidavit for filing

The interlocutory application and accompanying affidavit can be lodged by:

- being presented to the registry
- being posted to the registry with a written request for the action required in relation to the document
- being faxed to the registry provided each document is less than 20 pages
- being sent by electronic communication (that is, elodgment) to the registry

If presenting or posting the documents to a registry, the original and sufficient number of service copies should be filed. Affidavits will be stamped as filed but are not sealed. The interlocutory application will not usually be endorsed.

Information sheet

At the time of filing, the court’s registry will require parties filing an interlocutory application or originating application seeking interlocutory relief to complete an information sheet.

If an interlocutory application or originating application is filed by elodgment, the court will expect to receive, by email to the Queensland Registry Federal Court email address, the information sheet at the same time as when the party files an interlocutory application. A similar process is followed when filing by fax.

Affidavit accompanying the interlocutory application

If appropriate, when filing the interlocutory application, it must also be accompanied by an affidavit.

Rule 17.01(2) states the party filing the interlocutory application must serve the interlocutory application and any accompanying affidavit on any other party at least three days before the date fixed for the hearing.

To avoid any potential issues at the return of an interlocutory application with an abridged time for service, practitioners may also consider seeking an order in the interlocutory application abridging the time for service of accompanying affidavit material. A registrar is able to make an order dispensing with compliance with the rules for serving an affidavit or make a direction about service of affidavit material, if necessary.

Reliance on correspondence or other documents

In the Federal Court, an interlocutory application need not be accompanied by an affidavit if a party (described as the first party) wants to rely on correspondence or other
Kylie Downes QC and Scott Richardson review the necessary procedures under the Federal Court Rules 2011.

The information sheet seeks:
- the material to be relied on at the hearing, including material already filed and any further material proposed to be filed prior to, or by leave, at the hearing
- counsel appearing at the hearing, if any
- counsel’s estimate of the duration of the hearing
- allowance of time for the judge to read the material
- the preferred dates for hearing
- the latest date by which the orders must be obtained if the matter is urgent
- when notice was given to the affected parties or when it will be given and if it is intended that the matter be heard without notice and the reasons why
- the name of the lawyer providing the information and their contact details.

After filing of the interlocutory application and receipt of information requested in the information sheet, the registry will refer the matter to the docket judge. The judge may elect to make straightforward directions, including directing the parties to file submissions in advance of the hearing. If the matter is complicated, the judge may also list the interlocutory application for a directions hearing.

Urgent interlocutory application
Where an urgent hearing is sought, the party filing the documents must provide a letter setting out the urgency of the matter with the information sheet. Additionally, the applicant’s solicitor should telephone the registry and advise that documents have recently been filed or lodged with the court for filing. The registry may request that a party summarise the matter, explain its urgency and state the anticipated time for hearing. In this way, the judge can be alerted to the application and consideration given to appointing a return date and time.

Collection of endorsed interlocutory application
If the interlocutory application is presented to a registry for filing, a party will be given a receipt and contacted by telephone when the service copies are endorsed and ready for collection. If filing by fax, the interlocutory application will be dealt with in a similar way.

If the interlocutory application is filed using eLodgment, the interlocutory application will appear as ‘pending’ in eLodgment until a date is determined for hearing. Once a date is determined by the court, the interlocutory application will be processed in eLodgment and returned. An email link will be sent to the party to access the documents. It will be returned with the date for hearing endorsed on the front coversheet. Affidavits filed in eLodgment will also be processed in eLodgment and returned.

Serving the interlocutory application
The party filing the interlocutory application must serve the interlocutory application and accompanying affidavit, if any, on any other party at least three days before the date fixed for hearing, unless the time for serving the interlocutory application and affidavit, if necessary, has been abridged.

Pursuant to rule 17.03, a party may apply to the court for an order that an interlocutory application be served on a party who has not filed a notice of address for service and on a person who is not then a party. Such orders can be made by a registrar and should be sought in the interlocutory application.

Hearing of the interlocutory application
The listed matters will be called and heard in the order of the law list. Unlike in the state courts, you must wait for the matter to be called by the judge’s associate even if the parties have reached consent.

Bring to court a spare copy of submissions, list of materials, cases, legislation and draft order. Hand up an additional copy of the submissions and list of materials for the court file when reading material. The judge’s associate will stamp and file documents as leave is granted by the judge.

When announcing your appearance, there is no need to spell your surname as an attendant from the court’s transcription service will likely be present, unless the matter is urgent. That attendant will have a copy of the written appearance slip which you have completed.

Kylies Downes QC is a Brisbane barrister and member of the Proctor editorial committee. Scott Richardson is a solicitor at Bartley Cohen Litigation Lawyers and a former associate to Justice J.A. Logan RFD in the Federal Court of Australia.

Notes
2. Rule 5.07.
4. Rule 17.01(3).
5. Rule 8.03.
6. Rule 15.07.
7. Practitioners should exercise care when filing documents or complying with orders of the court requiring the filing of documents. The rules define ‘file’ as ‘file and serve’.
8. Rule 17.01.
9. Rule 17.01(1)(a).
10. Rule 40.04(a).
11. Note 3, Rule 17.01.
13. Rule 17.01(1)(b).
14. The three-day rule for serving affidavits is a feature of the 2011 rules (see Rule 29.08). See Buffalo v Official Trustee in Bankruptcy [2011] FCAFC 111 at [28] per Mansfield, Besanko and Flick JJ discussing the requirement under the rules for three days’ service before the occasion for using the affidavit arises. This departs from service of an affidavit within a “reasonable time” in the superseded court rules.
15. Item 93, Schedule 2, Federal Court Rules 2011 (Cth).
16. Rules 17.01 and 29.08.
17. Item 198, Schedule 2, Federal Court Rules 2011 (Cth).
18. Rule 17.02(1).
19. Rule 17.02(2)(c).
20. Rule 17.02(2)(d).
22. See Rule 2.22 for the particular requirements for lodging and filing documents by fax.
23. See Rules 2.23 and 2.24 for the particular requirements for lodging and filing documents by eLodgment.
24. Rule 2.21(4).
25. See Rule 2.25 as to when a document is filed and Rule 2.27 for when documents will not be accepted.
27. Rule 17.01(2).
28. Rule 17.03(a).
29. Rule 17.03(b).
30. Item 158, Schedule 2, Federal Court Rules 2011 (Cth).
ADR in QCAT

New ‘hybrid hearings’ join resolution tools

Alternative dispute resolution provides practical and economical tools for the Queensland Civil and Administrative Tribunal (QCAT) to meet its obligations. Report by Penny Feil.

QCAT has come of age in fulfilling the objects of the Queensland Civil and Administrative Tribunal Act 2009 (Qld) (QCAT Act) in dealing with matters in a way that is accessible, fair, just, economical, informal and quick.¹

This article reviews how QCAT members meet these objects by engaging in alternative dispute resolution processes.

Mediation

Mediations are undertaken for disputes in areas that include domestic building, retirement villages and retail shop leases, as well as prior to the hearing of minor civil disputes (mediated by the Department of Justice and Attorney-General’s dispute resolution branch on behalf of QCAT).² Registry members who are also nationally accredited mediators conduct mediations in minor civil disputes. QCAT reported a 45% mediation settlement rate for these in 2011-2012.

Compulsory conferences

Compulsory conferences are the most common form of ADR used in QCAT.³ Their purpose is to identify and clarify issues in dispute, determine questions of fact and law to be decided, to promote settlement of the dispute and make orders, and give directions if the dispute is not resolved.

Compulsory conferences differ from other forms of dispute resolution in that the member can make further directions at the conclusion of the conference if the matter isn’t settled. As at 30 June 2012, QCAT reported a 54% success rate for compulsory conferences. Compulsory conferences are confidential. This allows parties to engage in full and frank discussions which won’t be referred to at a hearing if the matter isn’t resolved. Compulsory conferences differ from other forms of dispute resolution in that the member can make further directions at the conclusion of the conference if the matter isn’t settled. As at 30 June 2012, QCAT reported a 54% success rate for compulsory conferences.

Hybrid hearings

Hybrid hearings are a relatively new ADR process applied in QCAT matters.¹ At the conclusion of these hearings, the member records his or her decision in writing with brief reasons and, in the presence of the parties, the decision is placed in a sealed envelope. Mediation with the parties is then undertaken by the same member on the same day without the parties knowing the member’s decision.

This encourages the parties to reach an agreement without a tribunal determination being imposed and a greater prospect of compliance with the terms of any agreement reached. Any communication between the parties at the subsequent mediation cannot affect the member’s decision, as it has already been made.

Hybrid hearings also allow the parties to consider their positions, including all evidence heard at the hearing. This increases the prospect of the parties reaching a negotiated settlement through direct discussions, on a without prejudice basis.

While the evidence presented at the hearing is recorded, statements made during the mediation are confidential. This allows the parties to fully explore outcomes, while being assured that mediation discussions will not be considered by the tribunal member, as the decision has already been made.

If a settlement is reached, the member prepares the terms of agreement and destroys the sealed envelope containing the member’s decision. If no agreement is reached at the mediation, the decision will be taken from the sealed envelope and read to the parties. The member may then make orders necessary to give effect to the decision.

This form of alternative dispute resolution is utilised in animal management cases such as when local government authorities declare dogs to be dangerous. QCAT has jurisdiction against decisions in a review notice.⁶ This model has also been utilised successfully in tree disputes.⁷

These various alternative dispute resolution processes help QCAT meet its obligations under the QCAT Act in a practical and economical manner for the benefit of the parties, with a positive degree of success.

Penny Feil is a solicitor and a sessional member of QCAT. She is the principal of Accord Mediation, a nationally accredited mediator and a registered family dispute resolution practitioner. Penny is a member of the Queensland Law Society Alternative Dispute Resolution Committee.

Notes

¹ Section 3(b) Queensland Civil and Administrative Tribunal Act 2009 (Qld) (QCAT Act).
² Practice Direction 6 of 2009 (replaced by QCAT Practice Direction No.4 of 2011).
³ Chapter 2, Part 6, Division 2 QCAT Act.
⁴ Section 43(2) QCAT Act.
⁵ QCAT Practice Direction No.1 of 2012.
⁶ Chapter 8, Part 2 Animal Management (Cats and Dogs) Act 2008 (Qld).
⁷ Neighbourhood Disputes Resolution Act 2011 (Qld).
The further use of discovered documents

What can you and your client do with documents obtained through discovery or other compulsory processes such as a subpoena?

This issue has been before the Legal Practice Tribunal in Cochrane [2008] LPT 18. He had been personally involved in litigation in the Family Court, including issuing subpoenas for the medical records of his ex-wife’s father. He obtained copies of the documents and used them in an application for an examination order pursuant to Division 2 of Part 3 of Chapter 2 of the Mental Health Act 2000. This was a contempt of the Family Court and was also unsatisfactory professional conduct. Mr Cochrane professed ignorance of this principle, which the tribunal characterised as by no means obscure (see paragraph 15 of the judgment).

The principle was concisely expressed by the High Court in Hearne v Street [2008] HCA 36 at paragraph 96:

“Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits.”

Complaints about the breach of this principle are perennial and received at least twice a year. The key is that, unless the document compulsorily obtained was admitted into evidence, then it may not be used for an extraneous purpose without the leave of the court.

If you have a client who insists on using documents in breach of the principle, you should rely on the always-useful rule in Myers v Elman [1940] AC 282 at 293:

“However guilty they (clients) may be, an honourable solicitor is perfectly justified in acting and doing his best in their interests, with, however, this important qualification, that he is not entitled to assist them in any way in dishonourable conduct in the course of proceedings. The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise the client as to the latter’s bounden duty in that matter; and if the client should persist in omitting relevant documents from his affidavit the solicitor should decline to act for him.”

Rule 20 of the Australian Solicitors Conduct Rules 2012 is also of guidance in such a situation. It is based on this rule: If the client insists in wrongful use of the documents then the solicitor must withdraw.

This practice note has been prepared by the Queensland Law Society’s professional standards department. For more information call 07 3842 5928 or email c.smiley@qls.com.au.
The redundancy strategy

**Employer obligations and employee entitlements**

*by Matthew Smith and Dominique Mayo*

Most sectors of the Australian economy, including the legal sector, are in a period of significant business uncertainty.

Certainly, the main challenge for many firms is maintaining business momentum in difficult circumstances.

A reduction in workforce numbers when there is excess capacity is one strategy available to employers if the economic climate has made the existing workforce size unsustainable.

While many businesses are loath to take these steps, it is often an important though regrettable consideration in ensuring the ongoing viability and competitiveness of the business. When it is done in a respectful and considered way, taking into account both individual rights and the obligations of the business, the workforce disruption can be greatly minimised on a number of levels.

This article looks at some key considerations for any business facing workforce reduction – whether it be for clients of your firm or for the firm itself.

An employer may seek to implement voluntary or forced redundancies, however, before making any such decision, a review of its workforce against current and projected needs of the business should be undertaken.

Employers can take a number of factors into consideration, including where employees work compared to business demand, employee qualifications/accreditations/certificates, experience, training undertaken, as well as relevant previous and current employment history. Undertaking this process enables an employer to identify the skills and expertise it requires to manage its business in the future.

If an employer seeks expressions of interest from its workforce to determine which employees would be interested in accepting a voluntary redundancy, the employer must ensure that employees understand that the discretion to offer voluntary redundancy lies solely with the employer. This is necessary to ensure that the employer maintains the necessary skill base required to conduct its business.

In circumstances of redundancy, it is critical that the “genuine redundancy criteria” under the Fair Work Act 2009 (Cth) (FW Act) are met.

Section 389(1) of the FW Act provides that a person’s dismissal is a genuine redundancy if all of the following conditions are met:

• The employer no longer requires the person’s job to be done by anyone because of changes in the operational requirements of the employer’s enterprise.
• The employer complies with any obligations in an applicable workplace instrument (for example, award or agreement) to consult about the redundancy.
• There is no reasonable opportunity for the person to be redeployed within the employer’s enterprise or the enterprise of an associated entity of the employer.

An employee’s dismissal, however, would not be considered a genuine redundancy in circumstances where it would have been reasonable for the person to be redeployed within the employer’s business or the business of an entity associated with the employer under section 389(2) of the Act.

It is important to always remember that it is the job or role that is redundant, not the individual. If you bring someone in to do the same job, it is not a genuine redundancy.

In circumstances where an employee has been made genuinely redundant, employee entitlements, including redundancy or severance pay, arise where:

• a workplace instrument (an award or agreement) that applies to the employee exists and contains redundancy pay entitlements, or
• the employee works for an employer that has 15 or more employees and has more than 12 months’ continuous service (although some exceptions apply).

An employer may also be liable to make a redundancy payment under certain preserved redundancy provisions.

Employers should be aware that redundancy pay is generally not payable under the National Employment Standards (NES) to any of the following:

• an employee whose period of continuous service with the employer is less than 12 months
• an employee of a small business
• an employee who was employed for a specified period of time, for a specified task, or for the duration of a specified season

• an employee whose employment is terminated because of serious misconduct
• a casual employee
• an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement
• an apprentice
• an employee to whom an industry-specific redundancy scheme in a modern award applies, and

• an employee to whom a redundancy scheme in an enterprise agreement applies if both:
  • the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation, and
  • the employee is covered by the industry-specific redundancy scheme in the modern award.

Employers should also be aware that the NES allows the Fair Work Commission to reduce an employee’s redundancy pay, on application by the employer if they cannot pay the full redundancy pay entitlement or, alternatively, if the employer finds other acceptable employment for the employee. While this might have little applicability to the legal sector, it may be of use in the client context.

Before any redundancies are made, employers should check the applicable modern award, enterprise agreement, policy or common law contract to ensure that they do not fall foul of the provisions in these instruments (take, for example, the requirement of an employer to consult employees about a redundancy).

While an employer may want to implement urgent decisions when faced with stressful financial conditions, it is important to act cautiously to ensure compliance with the relevant instruments, which, in turn, will guard against any possible future associated claims that might otherwise flow from non-compliance.

Fact sheets on redundancies and what payments may, or may not, be required are available on the Fair Work Ombudsman’s website at fairwork.gov.au.

Matthew Smith is a partner and Dominique Mayo is a lawyer at Sparke Helmore Lawyers, where Matthew leads the national workplace group.
What’s new in succession law

Clarity on ‘charity’

On 29 June 2013 the Charities Act 2013 (Cth) and the Charities (Consequential Amendments and Transitional Provisions) Act 2013 (Cth) were assented to.

These Acts introduce a definition of ‘charity’ and ‘charitable purpose’ for all Commonwealth legislation.

The statutory definitions generally preserve the common law principles, but they incorporate modifications to modernise and provide greater clarity and certainty about the meaning of charity and charitable purpose.

The definitions apply from 1 January 2014.

Name change – ‘accommodation bond’ to ‘accommodation payment’

On 28 June 2013 the Aged Care (Bond Security) Amendment Act 2013 (Cth) was assented to.

It is one of five Bills associated with the Living Longer, Living Better aged care package and brings about mechanistic as well as name changes to the Aged Care (Bond Security) Levy Act 2006 (Cth).

Aged care bonds will change from being referred to as ‘accommodation bonds’ to ‘accommodation payments’. The current Aged Care (Bond Security) Levy Amendment Act 2006 (Cth) contains provisions for the possible imposition of a levy on accommodation payment holders in specific circumstances. Broadly, this occurs where there is a loss of accommodation payments held by residential aged care providers, for example as a result of insolvency.

NSW probate procedures

As of 1 July 2013 any non-New South Wales lawyer seeking to publish the online probate notice with the NSW Probate Registry must now register with the registry. This involves providing them a copy of your practising certificate.

Trusts Act review


International wills

The Justice and Other Legislation Amendment Bill 2013 was introduced in Queensland Parliament on 5 June.


The object of the legislation is to give effect to the UNIDROIT Convention, providing a Uniform Law on the Form of an International Will 1973, signed in Washington on 26 October 1973. Australia is not yet a signatory to the convention, but is expected to sign once all states and territories have individually implemented the legislation, after which the various legislative schemes will commence. The current status of the corresponding state legislation is shown in the table below.

International wills are unique, with two significant features:

- An international will must have three witnesses, one of whom must be an authorised witness being a solicitor or a notary public.

- It must have an authorised witness certificate attached to the will confirming certain requirements have been met.

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<th>Date of assent</th>
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<td>27 June 2012</td>
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Christine Smyth is a Queensland Law Society accredited specialist – succession law and partner at Robbins Watson Solicitors. She is a member of the QLS Succession Law Committee, STEP (Qld) committee and the Proctor editorial committee.
Plain facts about pleading

How to work with rule 166

Pleadings – denials and non-admissions under the UCPR – allegations involving conclusions of law – allegations of mixed fact and law – application of philosophy of UCPR in r5

The decision of Durward SC DCJ in OSM Group Pty Ltd v Holden [2013] QDC 151 involves a useful consideration of the requirements relating to the pleading of denials and non-admissions under the Uniform Civil Procedure Rules 1999 (Qld) (UCPR).

In particular, the decision examines the extent of the obligations when pleading in response to allegations of law, or of mixed fact and law.

Facts

The proceeding arose from an agreement between the plaintiff and the defendant in relation to the operations of OSM Innovative Training Solutions (ITS). The plaintiff asserted that there was an express agreement between it and the defendant relating to the defendant’s responsibility for the day-to-day operations of ITS and the way he would be remunerated. The plaintiff also relied on implied terms of the agreement and fiduciary duties alleged to have arisen because of the relationship between the parties.

The plaintiff pleaded that by specific conduct the defendant demonstrated an intention not to be bound by the agreement and in that way repudiated the agreement. The plaintiff also pleaded that it accepted the repudiation and terminated the agreement. It was further asserted that the defendant, in breach of a number of both express and implied terms and fiduciary duties, had caused the plaintiff loss and damage.

In his defence to the statement of claim, the defendant made various express admissions. The plaintiff alleged that the defence also contained denials and non-admissions that amounted to deemed admissions under r166 of the UCPR. The plaintiff adopted the express admissions in its reply. It also pleaded the basis on which it characterised the various denials and non-admissions as amounting to deemed admissions, and adopted the alleged deemed admissions.

The plaintiff applied for summary judgment under r190 of the UCPR on the basis of deemed admissions in the defence. In the alternative it sought judgment under r292 of the UCPR on the grounds that the defence did not establish a real prospect of success at trial.

Denials and non-admissions under the UCPR

Rule 166 UCPR provides:

166 Denials and non-admissions

(1) an allegation of fact made by a party in a pleading is taken to be admitted by an opposite party required to plead to the pleading unless –
(a) the allegation is denied or stated to be not admitted by the opposite party in a pleading; or
(b) rule 168 applies.

(3) a party may plead a non-admission only if –
(a) the party has made enquiries for an allegation to find out whether the allegation is true or untrue; and
(b) the inquiries for an allegation are reasonable having regard to the time limited for filing and serving the defence or other pleading in which the denial or non-admission of the allegation is contained; and
(c) the party remains uncertain as to the truth or falsity of the allegation.

(4) a party’s denial or non-admission of an allegation of fact must be accompanied by direct explanation for the party’s belief that the allegation is untrue or cannot be admitted.

(5) If a party’s denial or non-admission of an allegation does not comply with sub-rule (4), the party is taken to have admitted the allegation.

Submissions on disputed pleadings

The plaintiff submitted various paragraphs of the amended statement of claim were properly characterised as allegations of material facts. Accordingly, deemed admissions resulted under r166(5) where the defendant had made denials with the only explanation being that the allegations were untrue, without any direct explanation for that belief, and also where the defendant’s non-admissions were not accompanied by an explanation for the defendant’s uncertainty as to the fact’s truth or falsity.

The defendant submitted that the issue of deemed admissions could not arise with respect to allegations of law, or of mixed fact and law. It was further submitted that the explanation for the denial depends on the nature of the allegation: some disputed allegations were pleaded as particulars and were not ‘material facts’. Accordingly there was no requirement to plead to them.

Specific examples of the circumstances which the plaintiff alleged involved a failure by the defendant to comply with the requirements of r166 of the UCPR included:

In response to the allegation in the amended statement of claim that the agreement contained a number of implied terms relating to the defendant’s financial obligations and management, or alternatively fiduciary duties owed by him, the defence asserted those pleadings were legal conclusions (implied terms) and were “wrong”.

The defendant submitted that the allegations about financial obligations and management were conclusions of law, being implied terms and recitations of principle without facts from which implications could be drawn. There were matters for the court to determine and not matters for pleading. Similarly it was submitted that the allegation that the defendant owed a fiduciary duty was a conclusion of law, unsupported by factual allegations other than the vague phrase “in the premises above”, and not a matter for pleading.

The amended statement of claim referred to an oral request (paragraph 10) and to correspondence (paragraphs 15 and 16). The defence asserted that paragraph 10 was untrue, that paragraph 15 was wrong, and that the repudiation in paragraph 16 was denied.

The defendant submitted that its pleading in response to paragraph 10 was compliant; that the allegation in paragraph 15 of conduct amounting to a repudiation of the agreement was an allegation of law and no deemed admission was made; and that the sending of the letter referred to in paragraph 16 was
an allegation of fact and was admitted, but that
the meaning of the terms of the letter – breach
of express or implied terms – was a matter of
law and no deemed admission was made.
In addition to the specific submissions
characterising the disputed parts of the
pleadings as deemed admissions, the plaintiff
relief, in a holistic sense, on the philosophy
of the UCPR, as expressed in r15 (Philosophy –
overriding obligations of parties and court).

Analysis
Durward SC DCJ referred to several
authorities which have expressly considered
the implications involved in pleading to
allegations of mixed fact and law. In that
context his Honour noted that Dixon J in
Thomas v The King (1937) 59 CLR 279, at
306, wrote that “a statement of a conclusion
expressed as fact is ordinarily treated as a
statement of fact”.

In Dovuro Pty Ltd v Wilkins [2003] 215 CLR 317,
however, Gummow J said (at [69]-[70]) that
“a party may admit the facts from which a
conclusion of law may then be drawn”, but that:
“Different questions arise where, as here, the
suggested admission includes a conclusion
which depends upon the application of a legal
standard”. His Honour regarded it as unsettled
whether admissions may be made of matters
of mixed law and fact, as distinct from it being
open for the court to draw a legal conclusion
from statements. His Honour had referred to
a statement in Grey v Australian Motorists &
General Insurance Co Pty Ltd (1976) 1 NSWLR
669, at 684, that “A party to litigation may make
an admission, not only of a fact, but also a
conclusion from facts, a mixture of fact and
law, or even of law”.

Reference was also made to Arnold Electrical
and Data Installations P/L v Logan Area Group
Apprenticeship/Traineeship Scheme Ltd [2008]
QCA 100. In that case there was an issue about
whether the ‘construction rate’ or the lower
‘service rate’ was the applicable hire rate under
a labour supply contract. It was submitted for
the defendant that it was entitled to rely on
a deemed admission under r166 of the UCPR
that the service rate was the correct rate, on the
basis that the plaintiff’s pleaded explanation
for its denial of the defendant’s allegation in
the counterclaim that it overpaid the plaintiff
(that it was not true) was insufficient. That
submission was rejected. Fraser JA, with whom
the president and Lyons J agreed, emphasised
that r166 is concerned with allegations
of facts in pleadings. His Honour said that
the allegation of an overpayment asserted a
conclusion based on various matters that were
not pleaded, and that r166 could not be called
in aid of a claimant who fails to plead or prove
the material facts required to support the claim.

Durward SC DCJ concluded that the approach
of Fraser JA in Arnold as to conclusions of law
pleaded by the plaintiff should be preferred,
even though his Honour was considering
pleadings in a different context. Durward SC
DCJ explained the applicable principles in
these terms (at [35]):

“Where allegations of law or conclusions of
law are pleaded by the plaintiff, the requirement
is to plead only to such part of a pleaded
paragraph as contains an allegation of material
fact that is the source of the conclusion. Where
there is an allegation of mixed fact and law
the requirement is the same. Where material
facts are pleaded as particulars, there is no
requirement to plead to them: Ballisteros v
Chidlow (No.2) [2005] QSC 285 at [21]. However,
particulars do not stand alone and customarily
are pleaded by way of elucidation or description
and follow a specific allegation of a material
fact. Hence a pleading in response may, but
not necessarily, need to be accompanied by
further factual allegations in a Defence. Finally,
I consider that the issue of whether a term
should be implied in an agreement is an issue
of law. Hence, where implied terms are pleaded
there is no requirement to plead specifically
to them in the Defence.”

His Honour then turned to the specific
paragraphs that were in dispute to determine
whether any of them were deemed
admissions. Although he did identify some
limited aspects in which the defence was
deficient, he found in each case that there
was no deemed admission. In some cases
this was because a direct explanation had
been provided. In others it was because the
allegations being responded to were not
material facts, but were implied terms, or to
conclusions of law, or were particular, and
it was not necessary to plead to them.

Durward SC DCJ also addressed the plaintiff’s
submission in reliance on r5 of the UCPR. His
Honour acknowledged that the overriding
philosophy as expressed in that rule applies
equally to the pleading process as it does
to other aspects of a proceeding. He noted,
however, that relevant authorities made it clear
that the pleading rules are designed to ensure
“early comprehensive disclosure of the case to
be mounted by the plaintiff, and the response
of the defence” (Robinson v Laws [2003] 1 Qd
R 81 at [52]) and also that the rules are meant
to limit disputes to issues that are genuinely
in contest, but not to prevent the trial of issues
that are genuinely in dispute (Hanson Construction

In light of his conclusions about the specific
paragraphs of the pleadings in dispute, his
Honour was satisfied that the defence was
substantively responsive and that there was
plainly a genuine dispute that required a trial.

Conclusion
Durward SC DCJ concluded that the
plaintiff had not established an entitlement
to judgment under r190 of the UCPR
(Admissions) on the basis of deemed
admissions. His Honour also declined to order
summary judgment under r292 of the UCPR
(Summary judgment for plaintiff) on the
basis that he was satisfied that the defendant
had a real prospect of success.

The application was dismissed, but leave was
granted to the defendant to file and serve
and amended defence within 14 days of the
date of delivery of the judgment, addressing
the aspects in the defence had been found
deficient. Costs were reserved for trial.

Comment
Rule 166 of the UCPR serves a valuable role
in assisting to ensure that a party pleads in
a way that is responsive and narrows the
issues in dispute between the parties.

Parties must, however, comply with the
fundamental obligation under r49 of the
UCPR (Statements in pleadings) to plead
all the material facts on which the party relies.
As this case highlights, r166 will not assist
a party who has not adequately pleaded
facts to support conclusions of law or
other allegations in a statement of claim
or counterclaim.

Sheryl Jackson is an associate professor at the QUT
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Rules Committee welcomes contributions from
members. Email details or a copy of decisions of general
importance to s.jackson@qut.edu.au. The committee is
interested in decisions from all jurisdictions, especially
the District Court and Supreme Court.
Parenthood v parenting

**Children – mother v non-parent – parenthood v parenting**

In *Withall, Richardson and Powles v Powles* [2013] FCAW 54 (21 May 2013) Walters J determined a parenting dispute between the mother of three children and the father’s former de facto partner (Ms Powles) by finding that the children should live with Ms Powles. The judgment at paras 181-189 contains a review of case law relevant to the mother’s submission that weight should be given to the fact that she was the children’s mother.

**Subpoenas for production – objections of third parties upheld – discovery by wife had not been pursued first**

In *Cahill* [2013] FamCA 176 (26 March 2013) Cronin J at paras 14 and 17 upheld the objections of the wife’s mother and brother to the husband’s subpoena for production of documents as he had not pursued discovery by the wife first.

**Property – unvested share units in employee share fund – not ‘property’ but a ‘financial resource’**

In *Beklar* [2013] FamCA 327 (10 May 2013) Ryan J held at para 119 that the husband’s unvested share units were a “financial resource” not “property” as (1) “he [could not] sell, assign or deal with them until they vest[ed]”; (2) “until the shares vest[ed] he [was] entitled to receive dividends on the underlying shares and nothing more” and (3) “the probability [was] that he will [still be employed when the shares vest].”

**Property – foreign divorce – leave to proceed out of time not required**

In *McIntosh & Anderson v McIntosh & Anderson* [2013] FamCA 164 (20 March 2013) the parties had married in Australia but divorced overseas. On the wife later applying for property orders under the Family Law Act, the parties agreed that the divorce should be recognised under s104 but the husband argued that the wife required leave to proceed. Murphy J concluded at para 69 “that the words of s44(3) construed in their proper context evidence an intention that the expression ‘divorce order’ … is confined to orders for divorce obtained in Australia pursuant to an application under the Act.”

**Children – overseas surrogacy – no federal power to declare parenthood**

In *Mason and Anor* [2013] Fam CA 424 (7 June 2013) the applicant and his male partner sought parenting orders and a declaration of parenthood in relation to twins conceived and born in India by surrogacy. Conception occurred by placing an anonymous donor’s egg inseminated by the applicant’s sperm into the uterus of the birth mother by IVF. Ryan J held that the applicant as the children’s biological father was entitled to a parenting order but not a declaration of parenthood, saying at paras 33-34:

“(…) for the purposes of the Act [FLA], the 2008 amendments [introducing ss60H and 60HB] evince an intention by Parliament that the parenthood of children born as a result of artificial conception … [to which the Status of Children Act 1996 (NSW) applies] or under surrogacy arrangements [under the Surrogacy Act 2010 (NSW)] will be determined by reference to those provisions and not the general parenthood provisions. This interpretation achieves, on a state by state (and territory) basis, a uniform system for the determination of parenthood. The effect of this is that, unless an order is made in favour of the applicant pursuant to the Surrogacy Act, the provisions of the Act do not permit this Court to make a declaration of parenthood in his favour.”

**Children – artificial conception – sperm donor with intention to father a child may be a ‘parent’ under Family Law Act**

In *Groth & Banks* [2013] FamCA 430 (11 June 2013) a child was born to the mother, conceived by assisted reproductive technology using the applicant’s genetic material. The mother submitted (para 4) that under s15 of the Status of Children Act 1974 (Vic) a man who produces that material for an IVF procedure is not the father of a resulting child and that she undertook the procedure “in expectation that she would be a single mother and that the applicant would only have an avuncular role in the child’s life [being allowed to see the child but without any share of parental responsibility].” Cronin J disagreed, saying at para 6, 12 and 16:

“The definition [of parent] in s4(1) is unhelpful where the child has not been adopted. The lack of a comprehensive definition means that the word ‘parent’ should be given its ordinary dictionary meaning. (… ) [The applicant’s] argument is that [the case] is … distinguishable from a donor who does not wish to have an involvement in the child’s life. (…) The applicant fits [the two-parent] presumption in the Act of who is a parent. He is the biological progenitor and one of two people who set about a course of conduct with the intention of fathering a child … a logical conclusion would be that the applicant is the parent of the child.”

**Property – de facto relationship – evidence inconsistent with prior statements not excluded – Elias principle not applied**

In *Benedict & Peake* [2013] FCCA 332 (23 May 2013) the existence of a de facto relationship was in issue, the respondent’s case being that any such relationship ended in 2006 and was out of time. The respondent sought to exclude “substantial portions of the Applicant’s evidence [under] the ‘Elias principle’ as being inconsistent with prior statements to Centrelink and the ATO (para 10). Judge Harman at para 43 declined to apply that principle as it was alleged “that each party … had knowledge of the statements and had[ed] each benefited from the statements (at least to the extent of income thus derived).”

**Children – substituted service by email – ex parte orders – father’s consent to application for children’s passports dispensed with**

In *Kozar* [2013] FCCA 339 (20 May 2013) the mother was granted *ex parte* parenting orders, substituted service on the overseas, elusive father by email and an order dispensing with his consent to the mother’s application for the issue of passports to the children. Judge Scarlett’s considerations are set out at paras 22-28 of the judgment.
Court of Appeal judgments
1 – 31 July 2013

Civil appeals

NK Collins Industries Pty Ltd v The President of the Industrial Court of Queensland & Anor [2013] QCA 179, 12 July 2013

Application for Extension of Time/General Civil Appeal – where a worker referred to in the complaint as Mr Guo was employed with another Chinese worker, Mr Xu, to fell trees in a harvesting operation in western Queensland – where it was admitted that Mr Guo died as the result of being crushed by a tree – where in the Industrial Magistrates Court the prosecution tendered as exhibits, inter alia, the Forest Harvesting Code of Practice and the Risk Management Advisory Standard Code of Practice – where the applicant was convicted in the Industrial Magistrates Court on the second respondent's complaint that it had failed to discharge its obligation under s24 of the Workplace Health and Safety Act 1995 to ensure the workplace health and safety of its workers – where the Industrial Magistrate declined to order that the second respondent give further and better particulars of the act or omission alleged to have constituted the offence – where the applicant appealed to the first respondent, who ruled that the particulars were not required and dismissed the appeal – where the primary judge dismissed an application for review of the first respondent's decision, holding that it involved no jurisdictional error – whether the Act required that an act or omission be identified as constituting the offence – whether the High Court's decision in Kirk v Industrial Court (NSW) [2010] 239 CLR 531 was properly distinguished – whether the structure of the Act required that the measure a defendant employer should have taken to ensure its workers' safety from risk be identified in order to permit an effective defence under s37 – where the contravention in this case was identified as the failure to discharge the obligation to ensure that the workplace health and safety of the applicant's workers was not affected by the conduct of its business or undertaking – where that allegation, which merely repeats the words of s28(1), could hardly be more general; it gives no guidance at all as to what the contravention actually consists of – where for s37 to have any sensible application, the same approach must be taken to a contravention of s24 as was taken in Kirk to contravention of s15 and s16 of the New South Wales Act, so that the relevant breach "is the measure not taken, the act or omission of the employer" – where it was incumbent on the prosecution to identify the measure or measures which should have been taken to ensure workers' safety from the risk; which would, presumably, have been a means stated in the Forest Harvesting Code of Practice – where the Industrial Magistrate misconstrued s24, in consequence of which he convicted the applicant of an offence under the section where he had no jurisdiction to do so, because no relevant act or omission had been identified as constituting the offence.

Application for extension granted. Appeal allowed. Set aside the orders below. Matter remitted to the first defendant for hearing and determination according to law. Costs (Brief)

Tep v ATS Australasian Technical Services Pty Ltd [2013] QCA 180, 12 July 2013

General Civil Appeal – where the appellant brought an action for damages for personal injuries sustained in a workplace accident which, he pleaded, was the result of his employer's breach of contractual, common law and statutory duties – where in essence, his claim was that he had been standing on a mobile scaffold using an angle grinder to cut asbestos pipes suspended from the ceiling above him when he leant on a guard-rail for support; it gave way and he fell backwards to the concrete floor below – where on his estimate, the platform of the scaffold was between 1.5 and 1.7 metres above the floor – where it became necessary, while judgment was reserved, to seek further submissions from the parties – where the fact that, as emerged in a review of the appeal record and (in consequence) the primary court file, the judgment had not been filed – where r66(1)(b) of the Uniform Civil Procedure Rules 1999 provides that no appeal may be brought against an order which has not been filed without the leave of the court to which the appeal would be made – where no such application was made for leave on the hearing of the appeal, but the parties concur that leave should now be granted nunc pro tunc – where that order is appropriate: the oversight of the appellant's representatives should not disadvantage him in his appeal – where as was observed in Suvaal v Cessnock City Council (2003) 77 ALJR 1449, it was not the trial judge's task to find an alternative explanation of how the accident could have occurred – where the finding that the platform was set at half a metre above the ground was critical to making the respondent's version of the accident feasible – where it was not open on the evidence, and its making without notice to the appellant was a denial of natural justice.

Grant leave nunc pro tunc for the bringing of the appeal. Appeal allowed. Set aside the judgment given below. Proceeding remitted to the trial division for determination of the issues of liability and quantum.

Dempsey v Legal Practitioners Admissions Board [2013] QCA 193, 19 July 2013

Application for Admission – where the applicant's name was removed from the roll of legal practitioners after the Legal Practice Tribunal found him guilty of two charges of unsatisfactory professional conduct, and four charges of professional misconduct – where the applicant's offending conduct included dishonestly transferring funds from his trust account to his general account and charging excessive fees – where the applicant's conduct was deliberate, and involved the sustained deception of clients and, in one case, the Legal Practice Tribunal – where the applicant had initially failed to admit any wrongdoing and rejected the findings of the Legal Practice Tribunal but now deposed that he accepted responsibility for his wrong-doing and had sought professional help – where at least one of the applicant's former clients is still owed money under the Legal Practice Tribunal's orders – where the burden of establishing that he should be re-admitted is on the applicant – where there has been nothing placed before this court which could satisfy it that the applicant would no longer exhibit the kind of disregard of his clients' interests in favour of his own, with whatever accompanying dishonesty he thought necessary to achieve his ends, which led to the tribunal's recommendation that he be removed from the roll – where this court would be reckless, indeed, to hold him out to the public as a fit and proper person to practise on the current state of evidence.

Application for re-admission dismissed.

Verhagen & Anor v Millard [2013] QCA 202, 26 July 2013

Application for Leave s118 DCA (Civil) – Further Order – where the applicants' application for leave to appeal judgment under s118 District Court of Queensland Act 1967 (Qld) was refused
with costs – where both parties were granted leave to make submissions as to the respondent’s proposed application for a different costs order – where the respondent subsequently applied for indemnity costs – where the respondent had not sought such an order in his written submissions or orally in court and had not sought leave to apply for an indemnity costs order after the hearing, as required by Practice Direction 3 of 2013 – where the respondent contends that the applicants rejected a reasonable offer to settle, had no real prospect of a successful appeal, abandoned a fundamental part of their argument before the primary judge, sought to argue a point not litigated at trial and would not have brought the application had they been properly advised – where the primary judge had found in favour of the respondent – where the applicants’ application involved a small monetary amount – where there were a number of unusual features of this case which support Mr Millard’s application – where he had the benefit of a favourable judgment from Judge Andrews and, very reasonably, he encouraged the Verhagens to abandon their unpromising appeal process by offering not to seek his costs up until 27 November 2012 – where the Verhagens rejected that offer – where the compromise agreement they relied on was an attempt to circumvent Judge Tutt’s order of 3 October 2008, after they made a forensic decision not to appeal from that order – where this offended the public policy interest in the finality and authority of court orders – where the Verhagens, in pursuing their appeal rights from Judge Andrews’ orders, have unreasonably put Mr Millard to further expense concerning, first, a 2008 and then a 2012 final court order in his favour – whether the remarkable combination of circumstances of this case support an application for costs on the indemnity basis.

Hwang v Lawrie & Anor [2013] QCA 204, 30 July 2013

General Civil Appeal – where the appellant appealed against a judgment requiring her to repay funds obtained through fraud and undue influence – where the respondents contended that the court should not hear the appellant because of her prima facie contempt of orders of the court below – where those orders included four made in an earlier ancillary proceeding between the parties and the judgment orders in the proceeding the subject of this appeal – whether there is an absolute bar on a party in contempt being heard or whether the court has a discretion to hear the contemnor – whether contempt of orders in a different but related proceeding should attract the application of the rule or discretion – whether the interests of justice militate in favour of permitting an appellant to challenge the correctness of the orders of which he or she is prima facie in contempt – where counsel for the appellant submitted that the appellant wished to take steps to purge her contempt – whether the court should exercise its discretion to hear the appellant and deal with the appeal on its merits – whether this court should treat the question of whether a party in contempt will be heard as one of discretion, which, in general terms, depends on where the interests of justice lie – where the appellant was found to have acted unconscionably and defrauded and exercised undue influence over her husband, the first respondent, in obtaining control of large sums of money from his bank accounts and those of his company; the second respondent – where the appellant did not give evidence at the trial – where the appellant submitted that the trial judge overlooked matters raised in her “Defence”, placed too much weight on the evidence of the respondents, and failed to take “language and cultural barriers” into account – where the “Defence” document filed by the appellant in no way conformed with the Uniform Civil Procedure Rules 1999 and was unsupported by any affidavit material – where the appellant submitted that a “contractual issue” had been overlooked – where for evidence of this, counsel pointed to the newspaper articles which accompanied the “Defence”, which he described as Mr Lawrie’s “advertisements” for a wife – where the newspaper articles were by no stretch of the imagination admissible, nor were they even tendered as evidence; had they been, they showed nothing more than that a Korean match-making agency was touting an unnamed Australian millionaire as a lucrative marital prospect – where there was no evidence of anything remotely approaching a contract before the primary judge – where no evidence of language or cultural barriers was placed before the trial judge – where the appellant was represented at the trial; she had been represented previously – whether in all the circumstances the trial judge ered in entering judgment for the respondents.

Appeal dismissed with costs.
Criminal appeals

Townsville City Council v McIntyre [2013] QCA 173, 9 July 2013
Application for leave s118 DCA (Criminal) – where the respondent’s wife drove the respondent in his vehicle and dropped him off at the front of the Townsville Courthouse – where the respondent’s car was parked in a metered parking space beyond the length of time for which a ticket was purchased – where the respondent was convicted in the Magistrates Court of breaching s106 of the Transport Operations (Road Use Management) Act 1995 (Qld) – where respondent appealed his conviction to the District Court – where the appeal was allowed and the complaint dismissed – where applicant seeks leave to appeal the decision of the District Court judge – whether primary judge correctly construed provisions of the Transport Operations (Road Use Management) Act – whether primary judge erred in failing to dismiss the appeal or remit the matter to the Magistrates Court for determination – whether leave to appeal should be granted – where under the pay and display system users were apparently required to pay money for a period of parking into a nearby ticket machine and display the ticket issued by the machine in their vehicle – where the display ticket, endorsed as a tax invoice, contained details including the amount paid, the time of payment and the “expiry time” – where there was no evidence that any signage about the system explained what amount of money ought be paid – where it may well be that signage on the ticket machine specified what parking fee was to be paid and that it did so by reference to periods of time but there was no evidence led of any such sign – where his Honour’s reasons involved mixed conclusions of law and fact and the errors of law were not determinative of the eventual conclusion that the evidence did not prove a failure to comply with the requirements of the authorised system. Application for leave to appeal refused with costs.

R v Cannon [2013] QCA 191, 6 and 7 March 2013
Reference under s672A Criminal Code – where the appellant was convicted of one count of trafficking in a dangerous drug and one count of possessing a dangerous drug in excess of two grams – where the applicant alleges the prosecution failed to disclose material including an audio recording of an interview with a central witness and the history of that witness being a registered informant – where the obligation for disclosure extends to all things in the possession of the prosecution – whether the obligation of disclosure was breached – where fresh evidence given in later court proceedings raises issues relevant to the credibility of key witnesses at the appellant’s trial – where reliability and credit of the witnesses was in issue at the trial – where the jury was directed to have regard to reliability when considering the guilt or innocence of the appellant – whether there has been a miscarriage of justice – where the obligation on the prosecution to disclose relevant material in its possession to an accused person is fundamental – where the multiple changes in the appellant’s legal representatives, in circumstances where no clear records were being kept as to what was being forwarded from previous legal representatives to new legal representatives, renders it entirely plausible that audio recordings were misplaced despite having been disclosed by the prosecution – where the additional matters identified by the appellant do no more than call into further question the reliability and credibility of B – where that reliability was squarely in issue at the trial – where a jury was carefully directed to have regard to those matters in considering the guilt or innocence of the appellant – where it cannot be said that the additional material, even allowing for the fact that a jury may therefore have considered minor inconsistencies in a different light, deprived the appellant of a material forensic advantage – where the new or fresh evidence does not call into question the “central plank” of the prosecution case – where the new or fresh evidence, at best, raises further examples of inconsistencies in the witnesses’ versions, or further bases to question the reliability of their evidence in circumstances where the jury had before it multiple examples of inconsistencies in the accounts given by the witnesses together with specific issues said to adversely affect their reliability and credibility – where it was a matter directly considered by the jury at the appellant’s trial – where the appellant has not established that the additional material relied on by him, either as fresh or new evidence, is of such a nature that its unavailability at trial led to the loss of a substantial possibility of a finding of not guilty or to procedural unfairness in his trial – where there is no basis to find any miscarriage of justice in the appellant’s conviction. Appeal dismissed.

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

**Regular features**

**High Court**

**Tort – false imprisonment – person detained under Act later declared invalid**

In *NSW v Kable* (No 2) [2013] HCA 26 (5 June 2013) K was detained for six months from February 1995 by an order made by a judge of the Supreme Court (NSW) under the *Community Protection Act 1994* (NSW). This Act was passed solely to provide for the preventative detention of K. The order expired in August 1996 and K was released. In September 1996 the High Court declared the Act invalid as it was incompatible with Chapter III of the Constitution for bestowing executive functions on a state court: *Kable v NSW* [1996] HCA 24. K sued for false imprisonment, abuse of process and malicious prosecution. The primary judge determined preliminary points adversely to K, in particular rejecting K’s contention that the initial order of February 1995 was a nullity: the NSW Court of Appeal allowed K’s appeal in part, holding the order of February 2005 was invalid. The state appealed. The High Court concluded that K’s detention was not unlawful as the order of the Supreme Court of February 2005 was valid and effective and authorised the detention until set aside: French CJ, Hayne, Kiefel, Bell, Keane JJ; sim Gageler J. Appeal by sate allowed.

**Corporations law – financial services – market manipulation – what is an ‘artificial price’**

**Procedure – whether case stated raised hypothetical issues**

In *DPP (Cth) v JM* [2013] HCA 30 (27 June 13), s1041A of the *Corporations Act 2001* (Cth) creates the offence of engaging in transactions in a financial market that have the effect of creating an “artificial price” for financial products (including shares) in the market. JM was charged of conspiring with his daughter in 2006 to cause her to purchase on the ASX, through one company she controlled, shares in X Ltd at the close of the day’s trading in order to leave the closing price of the shares above the price at which JMs lenders could make a margin call on his assets. The trial judge in the Victorian Supreme Court stated a case for the Court of Appeal under s30(2) of the *Criminal Procedure Act 2009* (Vic). The original case contained questions as to the meaning of the term ‘artificial price’ in the circumstances of the case that were set out referring essentially to what the prosecution contended. The Court of Appeal (Vic) directed the trial judge to reformulate the question to be whether the phrase ‘artificial price’ was used as a legal term or not, and if as a legal term whether it referred to the learning of American courts on ‘cornering’ and ‘squeezing’ markets. The Court of Appeal (Vic) answered the question as reformulated as importing the American jurisprudence. The DPP was granted special leave to appeal. In a joint judgment the High Court concluded that questions can be stated before a trial on the basis of the what is alleged and, while the process may be contingent on findings of fact, it was not hypothetical. The High Court found the original questions were proper and the reformulated one was inappropriate and did not raise an issue that would arise in the trial. The court referred to the difference between a question of law and a question of fact, and how the meaning of everyday words used in a statute is ascertained. The court reviewed the history of the provisions and concluded the American jurisprudence (*Cargill Inc v Harding* [1971] USC 443) arose in limited circumstances in trading in finite quantities of physical goods on futures markets and was not applicable to trading of listed securities on the Australian Stock Exchange. The court concluded that, where the price of a security was set by a transaction that had the sole or dominant purpose of creating a particular price for that security, the price revealed was an ‘artificial price’. Question as posed by trial judge answered accordingly.

**Criminal law – sentencing – existence of alternative charge with lesser penalty**

In *Elia v Q; Issa v Q* [2013] HCA 31 (27 June 13), M failed to answer bail in March 2006 at his trial in the Supreme Court of Victoria for drug trafficking contrary to s233B(1)(b) of the *Customs Act 1901* (Cth). M went into hiding and then fled to Greece where he was arrested in June 2007. M was sentenced to imprisonment in absentia. E and I gave M support while he was a fugitive in Australia. They were charged with the common law offence of attempting to pervert the course of justice which by virtue of s320 of the *Crimes Act 1958* (Vic) carries a penalty of a maximum of 25 years’ imprisonment. The Commonwealth offence of attempting to pervert the course of justice in s43 of the *Crimes Act 1914* (Cth) carries a maximum penalty of five years’ imprisonment. E and I were each sentenced to imprisonment for eight years. Their appeal to the Victorian Court of Appeal (where five justices sat) was dismissed. In the appeal they argued that the decision of the Court of Appeal in *R v Liang* (1995) 124 FLR 350 required the sentencing judge to take into account the lesser penalty provided for the Commonwealth offence they could have been charged with. The Victorian Court of Appeal concluded this sentence was inadequate for their offending. Their appeal to the High Court was dismissed; French CJ, Hayne, Kiefel, Bell and Keane JJ jointly. The High Court concluded there was no principle of sentencing that required the fact that an alternative offence with a different penalty that could have been brought be taken into account. The court observed that the time to dispute the exercise of the prosecutorial discretion as to which charge to proceed with was before the plea was entered. Appeal dismissed.

**Criminal law – whether manslaughter open – decision of High Court in favour of co-accused – whether material difference**

In *Nguyen v Q* [2013] HCA 32 (27 June 2013), N and another (also named Nguyen) and a third person were charged with a murder. All were convicted. N and Nguyen both appealed to the Court of Appeal (Vic) contending the trial judge should have directed the jury that a verdict of manslaughter was open. The Court of Appeal allowed Nguyen’s appeal but dismissed that of N. The prosecution was granted special leave to appeal against Nguyen’s success and Nguyen cross appealed, again contending the jury should have been directed that a verdict of manslaughter was open. This argument was accepted by the High Court: *R v Nguyen* [2010] HCA 38. The appeal by N was allowed on the basis that there was no material difference in his circumstances and those of Nguyen and the like direction should have been given: French CJ, Kiefel, Bell, Gageler, Keane JJ jointly. Appeal allowed. New trial ordered.

**Federal Court**

**Extradition – disputed identity**

In *Marku v Republic of Albania* [2013] FCAFC 51 (3 June 2013) a Full Court concluded a magistrate exercising power under s19 of the *Extradition Act 1988* (Cth) and determining...
whether the person remanded under s15 is eligible for surrender was not authorised or required to determine the person’s identity where the person claimed to be other than the person whose extradition was sought.

**Native title – res judicata**

In WA v Fazeldean (No.2) [2013] FCAFC 58 (6 June 2013) a Full Court considered whether the doctrine of *res judicata* was an appropriate vehicle to consider a native title claim made in 2010 in respect of land that had been the subject of a consent determination of native title in 2008. The court concluded it was not appropriate to summarily dismiss the second claim.

**Patents – revocation of patent orders**

In Novozymes A/S v Danisco A/S (No 2) [2013] FCAFC 55 (31 May 2013) a Full Court considered the orders needed to give effect to a decision to revoke some but not all claims in a patent.

**Trade practices – delay**

In Knott Investments Pty Ltd v Winnebago Industries Inc [2013] FCAFC 59 (7 June 2013) a Full Court allowed an appeal against orders preventing an Australian company from using the respondent American company’s name where the respondent had known from 1985 its name was being used in Australia but did not commence proceedings until 2010. Consideration given to doctrines of acquiescence, laches and delay.

**Discrimination – services – police actions – association**

In Robinson v Commissioner of NSW Police [2013] FCAFC 64 (20 June 2013), a Full Court concluded that a police officer conducting an investigation did not provide the persons subject to it with a ‘service’ for the purposes of the *Disability Discrimination Act 1992* (Cth). The court also considered when a person can claim discrimination by reason of being an ‘associate’ of a person who has a disability.

**Freedom of Information – when information on a computer ‘ordinarily available’**

In Collection Point Pty Ltd v C of T [2013] FCAFC 67 (3 July 2013), a Full Court concluded that, where an agency was required to create a computer program to access documents on its computers to grant access under the *Freedom of Information Act 1982* (Cth), the information was not ‘ordinarily available’ for the purposes of ss17(1) and 17(2) of that Act.

**Procedure – class actions – security for costs**

In Madgwick v Kelley [2013] FCAFC 61 (14 June 2013), a Full Court concluded the trial judge had erred in refusing to consider whether to order under s33ZG and s43(1A) of the *Federal Court of Australia Act 1976* (Cth) that the applicants (a group of investors in a forestry investment scheme) give the respondent financiers security for costs.

**Taxation – charities – rescue of wildlife**

In Sea Shepherd Australia Ltd v C of T [2013] FCAFC 68 (3 July 2013), a Full Court concluded (by majority) that the AAT had not erred in finding the Sea Shepherd organisation (devoted to the cessation of whale hunting) was not a charitable institution involved in providing “short-term care to animals ... that have been mistreated or are without owners” or “the rehabilitation of orphaned sick or injured animals” for item 4.1.6 of the table to s30-45 of the *ITAA 1997* (Cth). Consideration of whether the provisions should be given a beneficial interpretation.

**Taxation – when shares are acquired**

In Fowler v C of T [2013] FCAFC 69 (3 July 2013), a Full Court considered when an employee acquired shares under an employee share scheme and the operation of administrative penalties under the *Taxation Administration Act 1953* (Cth).

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The brainstorm bonus

Using ideas to formulate strategic change for your business

A considered approach to brainstorming and a follow-up ‘ideas workshop’ will provide the material you need to take your business forward. Report by Louise Corica.

More than ever before, businesses are working harder and need to be more innovative in making changes to survive and prosper.

It’s important to be prepared with a new strategic move on the back of the current change. However, the need for constant positioning and re-positioning of change ideas in business, regardless of size or type, can be exhausting for all involved.

One way to remain positive, stimulated and creative is to undertake regular brainstorming sessions. The founder and CEO of Apple Inc., the late Steve Jobs, consistently conducted perpetual brainstorming sessions with his teams during his stewardship. He said: “Creativity is connecting things.”

So how connected are you with yourself, your skills, your team members and stakeholders? 1

When your business activities are extremely quiet, take the time to initiate a brainstorming session with good advisers. Brainstorming is an effective way to keep on top of your business, your skillset, and products and services.

The top five aims of this are to:

1. Brainstorm new business activities regularly.
2. Review your business resources regularly.
3. Refresh your approach to your products and services.
4. Consider other avenues of work that you and your team members are skilled at.
5. Come up with a ‘free’ gift idea for your dedicated customers.

Brainstorming

Brainstorming requires you and your participants to write down all of your ideas to bring about change. A brainstorming session is also a valuable opportunity to uncover creative changes and solutions to problems. With all participants contributing on an equal basis and where no opinions are allowed on the ideas put forward, you will soon discover that there may be more ideas to choose from than you think.

Regular reviews

Strategic planning has evolved and business plans have gone from a 10 to 15-year strategic plan for growth down to two or three-year plans. While it is important to consider overall long-term goals, these still rely on the efficiency of your short-term strategic plans. Also, as a part of your strategic planning, consider changes as planned events rather than as responses to crises.

Refresh your approach to product and services

What is one brand-new thing you can bring to the business that will improve its visibility, viability and value, and ultimately bring in more money?

The ideas that flow from answering just that question in a brainstorming session will give you a start in the right direction. You and your quorum2 will be able to look at each new idea in detail later when you undertake an ‘ideas workshop’. By looking at how you can refresh the presentation of your products and services, you will show your stakeholders what you can do. It is important to try rather than never knowing what could be possible.

What are your skills?

We all have an abundance of skills, and if you and your team have other skills and talents, consider how you can blend these to benefit the business. Most businesses evolve and change, and are influenced by those within the business, and therefore during the ‘ideas workshop’ phase you can develop the best brainstorming ideas even further. Business guru Brian Tracy said: “Develop an attitude of gratitude, and give thanks for everything that happens to you, knowing that every step forward is a step toward achieving something bigger and better than your current situation.”

Benefits for stakeholders

Connecting with the right people is always a bonus, as you will be primed to make change and deliver effective outcomes. Asking customers what they want and need, and meeting those needs is essential, but this is only part of the overall change process.

So how do you get started? The basic brainstorming rules are:

1. Put your quorum of people together (a minimum of three).
2. Spend 30 minutes downloading any ideas you may have (without opinions or comments on the ideas put forward).
3. Focus on quality of ideas at this stage.
4. Be positive and don’t forget to be as outrageous as possible with your ideas.
5. Observe linkages for all the ideas.

When your 30-minute brainstorming session is up, take a break so that you and the participants can consider all the ideas. You can revisit each one when you conduct the ‘ideas workshop’. All participants will contribute again by selecting the best ideas and can seeking the best solutions to any problems you may have.

At that time, you can expand on the ideas that came out of the brainstorming session, and look for linkages between all the ideas. It is these linkages which, bundled together, will enable you to take action and roll out a change plan for your business.

By playing the creative card you can bring about powerful changes for your business. Brainstorming starts the ball rolling and ultimately creates and defines a new direction for your business on a regular basis.

Louise Corica is the director of time2manage – business management solutions and services. See www.time2manage.com.

Notes

1 Stakeholders are customers, new or old, suppliers, service providers, shareholders of the company, etc.
2 Quorum – minimum of three supportive advocates you are comfortable with and who will be honest with you about your ideas.
3 Stakeholders are customers, new or existing, suppliers etc.
Keep it simple…

The first of four practice tips providing handy suggestions on solicitor performance and review.

Understand what matters

Many smaller firms manage performance and review in a vacuum.

Usually this is because principals are very busy with matters and business building, and anything in the way of structured review is about “when I can get to it”.

To supervise and assess performance, the starting point is to appreciate what the influences are. The simple model at right (Adrian Morgan, 1995) shows what matters.

Performance (or lack thereof) can be caused by any number of valid factors. Does the person know what is expected? Have they received timely and constructive feedback? Do they have the right core skills? Are they supported within the firm? Do their tools work when they need to? And what things might be motivating/demotivating them? (Work and personal life are both relevant.)

Just declaring “you were $15,000 under budget last month – now do something about it” really doesn’t get you anywhere.

You need to work through all the issues in the model and discover the relevant weak link(s) – and then look for a solution. Getting improved performance out of people is mainly about knowing the right questions to ask.

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Career moves

Carter Newell Lawyers

Carter Newell announced the promotion of Jason Savage to senior associate in its litigation and dispute resolution team and Christopher Collins to associate in its construction and engineering team. Jason has practised for almost 10 years in commercial litigation and professional indemnity insurance. He has particular experience in complex multi-party contractual disputes, franchising disputes, defamation claims, defending claims against office bearers and intellectual property disputes.

Christopher is experienced in advising on policy indemnity issues and acting in contentious litigated and non-litigated claims arising from the specific policies used within the building and construction industry. He focuses on legal issues of interpretation of construction and contract works, professional indemnity, property, ISR and public and product liability insurance policies.

Gadens

Gadens announced several promotions, including the promotion of Andrew Frieberg to partner in the employment and safety team and that of Rhys Lloyd Morgan and Barbara-Ann Sim to directors in the property team and financial services recovery (FSR) team, respectively:

Andrew has extensive experience in occupational health and safety, workplace relations and statutory prosecutions. His previous experience as a police officer and prosecutor has been invaluable in workplace investigations, including workplace health and safety incidents, or defending clients in statutory prosecutions instigated by government agencies.

Rhys been a member of the property group for almost four years and specialises in real property, with particular expertise in major projects and infrastructure-related land matters. Barbara-Ann has practised as a solicitor for seven years and previously spent several years working for the Australian Taxation Office.

Following Gadens' merger with MacGillivray's, a new category of associate has been created to recognise the efforts of up-and-coming solicitors. Promoted to associate were:

Victor Asoyo, a member of the firm’s banking and finance group focusing on commercial lending for property developments and pharmacies, mezzanine finance and factoring transactions.

Lucy Lindbergh-Ostling, an employment and safety group member who advises on discrimination, disciplinary and performance management matters, and termination and redundancy claims.

Tegen Tvede, also in the employment and safety group, who works in employment and WHS litigation, and provides advice on related issues including employer statutory obligations, restraints of trade and confidential information, and drafting of employment contracts.

Terri Reynolds, who focuses on public liability, professional indemnity, property damage and workers’ compensation.

Madeleine O’Connor, who has been practising for five years and works in the insurance group where she focuses on public liability claims.

Angela Ormiston, who recently returned to Gadens after two years in London at a boutique city firm. Angela’s area of expertise is insurance litigation, including personal injury, property damage and professional indemnity claims.

Jacqueline Kemp, who focuses on insolvency, banking and finance litigation, and commercial litigation.

Sara Forgione, who is experienced in commercial litigation and insolvency. Before joining the firm more than three years ago, Sara worked in financial services regulation at an international hedge fund trade association headquartered in London.
Amy Griffin, who advises and acts for financial institutions in secured and unsecured debt recovery actions, including the enforcement of mortgages. She also advises and acts for lessors in commercial and retail shop leasing disputes.

Ang Li, a member of the property group whose areas of interest are the Foreign Investment Review Board and Chinese businesses. He recently attended a Chinese Government ambassadorship program aimed at attracting foreign investment.

Rebecca Donohoe, a property group member experienced in reviewing off-the-plan contracts for major lenders funding developers, including major banks. She also advises on body corporate law and residential and commercial acquisitions and disposals.

Rose Mackay, a property group member who also sits in the retirement villages and aged care sub-group. Her expertise covers commercial, residential and rural acquisitions and disposals, commercial and retail leasing, and retirement villages.

Bryn Hannan, who primarily acts for local government and provides advice and representation, including appearing in planning appeals in the Planning and Environment Court and prosecutions for development offences in the Magistrates Court. He also advises on the operation of planning and other statutory instruments.

Emily Hughes-Johnson, a property group member who focuses on acquisitions and disposals (including for receivers and managers) of commercial property and leasing.

Ivan Poole Lawyers

Ivan Poole Lawyers announced the promotion of Peter Thelwell to associate and the appointment of Samuel Rees as a solicitor. Peter joined the franchising and intellectual property firm in 2009 and has gained extensive experience in franchising, international trade mark registration and commercial law. Samuel recently completed his law degree at Bond University.

MacDonnells Law

MacDonnells Law announced the promotion of Eleanor Scott and Miranda Foster to senior associate, and Kate Black to associate. Eleanor, a Cairns-based local government advisory lawyer, has wide experience in areas that include native title and cultural heritage, land tenure, and energy and resources. Miranda, an experienced commercial and property lawyer, practises primarily in property, leasing and commercial law. She has advised and acted on behalf of developers, government authorities and major private and public companies. Family lawyer Kate, who practised in Townsville for five years before coming to Brisbane two years ago, focuses on arrangements for property division, children, adoption, de facto relationships, and separation and divorce.

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Marino Law

Gold Coast firm Marino Law appointed family law and commercial litigation lawyer Clare Quinn as an associate. Clare, who is also trained in collaborative law, has a particular interest in property matters involving complex investment structures and children’s matters involving relocation and child support.

McMahon Clarke

McMahon Clarke announced five promotions, including three new partners.

New partner Kristy Dorney works across the construction, and litigation and risk management teams. Her expertise includes construction contract drafting and advice, contractual disputes and interpretation, corporate and individual insolvency, acting for landlords in relation to tenant disputes and rent recovery, and property-related litigation.

Matt Allen, also appointed as a partner, has experience in property matters, including large commercial property transactions, strata title law and commercial, retail and industrial leasing.

Another new partner, Brendan Ivers, assists clients with the establishment, operation and restructuring of managed funds as well as advising on the financial services regime, including banking and finance transactions. Brendan is widely published and a member of several national committees through involvement with the Property Council of Australia and the Property Funds Association of Australia.

Emma Stapleton was appointed as an associate in the funds management team. Her practice areas include preparation and advice on applications for Australian financial services licences, preparation of documents for the establishment of managed investment schemes and advising on the operation of managed investment schemes, drafting and reviewing banking and finance documentation, and advising on the Personal Properties Securities Act.

Allana Agnew, who was appointed an associate in the litigation and risk management team, works in insolvency, construction law and contractual disputes. Her expertise includes advising liquidators and trustees on recovery actions for preferential payments and entitlement to funds received during liquidation, and advising on and representing clients in dispute resolution procedures and legal proceedings under the Building and Construction Industry Payments Act 2004.

Preston Law

Preston Law welcomed Mal Skipworth as a partner.

Mal has more than 30 years’ experience in Cairns practising in local government and infrastructure, concentrating on advisory, property and commercial issues affecting local governments, and transport and electricity infrastructure operators. He advises councils on issues ranging from rating and roads to tendering, procurement, leasing and implementation of property-related development approval conditions.

The firm also announced the appointment of Rose Davies as a senior associate, and Helen Oliver and Penny Laws as associates.

Rose is senior family lawyer at Preston Law and has experience in all aspects of this discipline, including child support agreements, negotiating property settlements, children’s orders and also wills and estates.

Helen, another member of the family law team, has also represented clients in estate planning and deceased estate administration, criminal matters and personal injury claims.

Penny is experienced in residential conveyancing, commercial law and planning and environmental law. She works closely with the firm’s native title and local government department.
Trent Waller –
Carne Reidy Herd Lawyers

Current position
I am the family law partner at Carne Reidy Herd Lawyers, Brisbane, and manage the family law section.

Career path
After completing five years of articles to a good master, I was fortunate enough to work for accomplished partners before managing my own section.

Why did you decide to practise law?
I have always been interested in the law and I was encouraged to pursue a career in the law by family and teachers at school.

Most memorable moment in the law?
Meeting my wife.

Most useful piece of advice you’ve received?
Respect is something you earn. The most valued asset that you have is your reputation and integrity.

How has being a family law accredited specialist benefited your career?
The confidence gained in obtaining the recognition that you have reached an advanced skill set in family law that accreditation mandates. I wish the candidates currently sitting the accreditation in family law success, and hope they will treat it with the respect it deserves.

What would you like to be doing in 10 years’ time?
Remain practising family law with an expanded mediation practice.

How do you manage your work/life balance?
I remain trying to find a solution to that equation.

Trent Waller joined Judge Kevin Lapthorn of the Federal Circuit Court of Australia, Martin Bartfield QC, barrister Dr Jacoba Brasch and Queensland Law Society senior ethics solicitor Stafford Shepherd at the recent QLS Family Law Residential to examine ethical issues specific to family law.

Proctor career spotlight: If you are a lawyer with a story to tell and would like to be featured in Career spotlight, send an email to proctor@qls.com.au.

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Fine wine or passable plonk?

Can anyone really tell the difference? with Matthew Dunn

“Experiments have shown that people can’t tell plonk from grand cru. Now one US winemaker claims that even experts can’t judge wine accurately.”¹

A senior practitioner suggested this comment in The Observer might make an interesting topic for a wine column, as it raises several questions about the basis on which many wine marketing budgets are formulated.

For wine sales, it is true to say that the more medals, the more sales, and the bigger the show medal stickers on the bottle, the better. But perhaps this success is built on little more than the toss of dice.

The Observer article relates the experiments of US winemaker Robert Hodgson, who convinced California State Fair wine controllers to permit him to alter the way in which judges taste wines. Essentially, Hodgson would anonymously repeat some wines three times in the course of judging a class and compare the different ratings for each glass.

Logically the judges should treat each occurrence of the same wine the same, even if it reappears more than once. However, what Hodgson found was that only about 10% of judges were consistent and a typical judge would vary plus or minus four points (out of 100) on each tasting. In other words, a wine costing more than $25; the other two were ‘bargain selections’ at less than $10.

Next, a small group of tasters were drafted in (not professional drinkers, but perhaps drinking professionals) to judge the wines on the 20-point American Wine Society (AWS) scale and to select whether each blind sample was the bargain or the finer wine. The AWS scale allot:

• up to three points for appearance
• up to six points for aroma and bouquet
• up to six points for the taste and texture
• up to three points for the aftertaste
• up to two points for the overall impression of the wine.

In what could be described as significantly less fair competition, ‘C’ was the now rare and delectable Penfolds Bin 28 Kalimna Shiraz 2004 from one of the greatest vintages of the last decade in South Australia. In comparison, ‘D’ was the more affordable and more commercial Houghton’s Western Australia Shiraz 2011.

The panel picked the difference in the reds with comparative ease, returning the correct result 86% of the time.

While great fun on a Sunday afternoon, the experiment eerily demonstrated with the white wines that two wines in close style, but from different ends of the spectrum, could be so easily mistaken for each other. Perhaps that is a great compliment to the makers of New Zealand gooseberry and grass white. Perhaps the more understated style of the Adelaide Hills wine struggled against the tour-de-force of the world’s favourite white?

Or perhaps it might be all so subjective that drinkers really are better off flipping a coin and buying whatever comes up heads, ignoring all those pretty wine show medal stickers and learned reviews.

Oh, the shame …

Matthew Dunn is QLS principal policy lawyer.

The experiment

For this month’s tasting, we opted for an adventure in blind tasting.

Four wines were selected (two red and two white of the same varieties) and disguised cunningly as bottles ‘A’, ‘B’, ‘C’ and ‘D’. One red and one white were good examples of style, costing more than $25; the other two were ‘bargain selections’ at less than $10.

It was no secret that ‘A’ and ‘B’ were white wines. After discarding the highest and lowest scores (as is usual wine judging practice), the hard-marking panel returned a close call:

• ‘A’ – 12.5 out of 20
• ‘B’ – 12.6 out of 20

This was a surprising result as ‘A’ was the much praised Shaw & Smith Adelaide Hills Sauvignon Blanc 2012 and ‘B’ was the much more affordable Brancott Estate Marlborough Sauvignon Blanc 2012.

The panel also struggled to pick the more expensive wine, returning the correct result only 43% of the time.

Obviously, ‘C’ and ‘D’ were the reds and, after discarding the highest and lowest scores, the panel returned a more decisive result (but still not into medal territory) of:

• ‘C’ – 15.7 out of 20
• ‘D’ – 7 out of 20

Mould’s maze #13

Across
2 Tortious act committed by the crew or master of a ship against its owner. (8)
5 Islamic law, ...... Law. (6)
8 Contract between legal practitioner and client. (8)
10 Queensland legislation that permits post-sentence incarceration for sexual offenders (abbr.). (5)
13 Number of persons in a Queensland civil jury trial multiplied by three. (6)
14 Section 22(1) of the Criminal Code enshrines the doctrine ‘ignorantia juris non ......’. (Lat.) (7)
15 Queensland legislation which regulates a Terry stop (abbr.). (4)
18 Section 67 of this Queensland Act prohibits touting at the scene of an accident or hospital (abbr.). (4)
19 Medieval chair for the restraint of an offender, c..... stool. (7)
20 General damages in personal injury claims are awarded for ..... and suffering. (4)
23 Admissibility hearing within a trial, voir ..... (4)
24 Jurisdiction of a bailiff (9)
28 Dissolution of a company. (11)
30 Gaol. (12)
32 An important tenet of restitutionary law is total ...... of consideration. (7)
34 Excessive or illegal interest. (5)
36 A purpose of criminal sentencing, which can be general or specific. (10)
37 Former name for the action of conversion. (6)

Down
1 Queensland rules which regulate the setting aside of a summons to witness (abbr.). (3)
2 Inadequate pleading will usually attract an application for further and ..... particulars. (6)
3 Lessee. (6)
4 Civil defence justifying possession by virtue of the entitlement of a third person, ... tertii (Lat.). (3)
6 Colour of Supreme Court robes worn on formal occasions. (3)
7 Ancient crime involving repudiation of the Christian faith (not heresy). (8)
9 Under the Family Law Act there is now a presumption of equal shared parental .......... (14)
10 Tortfeasor, wrong..... (4)
11 Years required post-separation before a divorce can be applied for. (3)
12 I am guilty; mea ..... (Lat.). (5)
13 Brisbane civil barrister, runner and author of Tennyson Breach, David ..... (4)
16 Document removal from the court file or from its reliance by the court, struck ..... (3)
17 Civil culpability. (9)
18 Fraudulent investment scheme that pays investors by payment of subsequent investors instead of by the company running the operation. (5)
21 Police inducement of a person to commit a crime for which they are later prosecuted. (10)
22 Group of prospective jurors. (6)
25 Legal reference. (8)
26 Toowoomba solicitor employed by Groom and Lavers, Byron ...... (6)
27 Recently appointed Queensland Deputy Chief Magistrate, Ray ...... (7)
29 Essential condition or literally ‘without which it could not be’, sine ... non (Lat.). (3)
31 Additional clause, amendment or stipulation in a legal document. (5)
32 2011 appointment to the District Court and Children’s Court of Queensland, Judge Brad ..... SC. (4)
33 Therefore (Lat.); a rowing machine. (4)
35 To lease; permit. (3)
A simple guide to marketing

Have you got a number for Bruce Willis?

As regular readers will attest – in those brief periods of lucidity allowed them by their medications – this column has often made the point (on the rare occasion that it makes any point) that the legal world today is very different from the one I knew as an articled clerk, back in Mesopotamia (that is a real name, look it up).

Law was easier back then, because there was only the one piece of legislation, albeit that toting around the stone column on which it was carved proved problematic. Many top legal historians – by which I mean me – now believe that the position of articled clerk was created so that lawyers had access to someone who could drag stone law texts around and be paid less than a slave.

Things did change a bit, of course – eventually the pay got lower and the tasks more menial – and now articled clerks have gone the way of the dodo; appropriate really, with extinction not being the only thing articled clerks had in common with the intellectually unremarkable bird, at least according to the lawyers who had to rely on them (the articled clerks, not the bird).

With the evolution of takeaway coffee and pizza delivery, most of the useful functions articled clerks historically performed became unnecessary, and so the legal profession decided to abandon the concept and upgrade articled clerks to lawyers – a move which suggests that the articled clerks weren’t the only dodos in the room, if you get my drift.

In any event, the explosion of newly-minted lawyers began to create a glut, which was exacerbated (stop giggling, that is a real word and not rude at all) by the changes in legal education. When I studied law, there were only two places – UQ and QIT – which offered law in Queensland, and most people didn’t know about the QIT course (which explains how I managed to get in); this limited the number of people who could potentially become lawyers.

Now, however, law degrees are offered by pretty much anything that even remotely resembles an educational institution, like Mac’s College of Refrigerator Repair and Pest Control. This means that people no longer regard law as something they do in preparation for being a lawyer – it is more a course they do if they fail to get in to an Associate Diploma of Intermediate Feng Shui (which, incidentally, is not a real thing, though many people believe in it anyway so you could still look it up). They then complete the course and get admitted, becoming lawyers almost by accident and practising that way as well.

Unfortunately, this means that there are a heap of lawyers out there and not enough clients to go around. If you are in personal injuries law, for example, cases are harder to come by as there are only so many people in the world who will do stupid things like trying to watch a DVD in the shower, and understandably those sorts of people are being removed from the client pool by natural selection.

Plus, by virtue of having been sued within an inch of their lives for the injuries idiots regularly sustain, deep-pocketed defendants like local governments and multinational companies have taken steps to stay out of court. For example, whereas once upon a time a council with a scenic cliff in its area might erect a warning sign telling people not to get to close to the cliff, now they erect the sort of barrier that could deflect asteroids large enough to make Bruce Willis wet his pants; granted, tourists can no longer see the view from the cliff, but even the most determinedly stupid of them can’t fall off and subsequently engage you to sue the council.

That means that in order to get clients, you will need to do something called marketing. This used to be easy: you rounded up potential clients for a function at a venue well-suited to marketing – that is, a venue with a liquor licence – and gave them free drinks until they passed out, allowing you to staple your business card to their forehead and head off for a night out.

Nowadays, things have become very sophisticated, as you may have noticed if you ever watch television. Some firms now have ads on TV with production values that make the Lord of the Rings films look like Neighbours.

These ads convey the idea that the law firm in question is a bit like Batman, just sitting around looking for people to help out of trouble, and that they would be offended to the point of violence if you were to suggest that they were involved in a money-making venture (not that I would ever suggest that, because I firmly believe these law firms are so altruistic as to make Buddhist monks seem like Paul Keating).

The point is, you will definitely want a great TV ad as part of your marketing strategy, preferably endorsed by a celebrity (for example, “Nine out of 10 NRL players would rather be bailed out of the watch-house by Reasonable Doubt Lawyers, Queensland’s leading firm for urine-related offences.”).

If you can’t get a live celebrity to endorse your firm, there is no law against getting a dead one to do it, at least as far as I know based on no research whatsoever. If your ad happens to mention that you are Jesus’ preferred law firm, it is hard to imagine him bringing forward the second coming just to sue you – and if he did come back, as lawyers we will all have a lot more to worry about than a passing-off lawsuit.

So good luck with the marketing, and I look forward to seeing an ad for Jesus’ Choice lawyers, endorsed by Elvis and Kurt Cobain. If that prompts someone to sue you, I would advise – based on the fact that you have foolishly mistaken my column as outlining a credible business strategy – that your best chance is to call Batman, or if he is busy, Bruce Willis.

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Shane Budden is manager of legal services for the Queensland Building Services Authority.
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contact directory

Queensland Law Society – 1300 FOR QLS (1300 367 757)
Ethics support – 07 3842 5843
LawCare – 1800 177 743
Lexon – 07 3007 1266
Room bookings – 07 3842 5962

Solution from page 54

Interest rates

For up-to-date information and more historical rates see the QLS website >> qls.com.au under ‘For the Profession’ and ‘Resources for Practitioners’

<table>
<thead>
<tr>
<th>Rate</th>
<th>Effective</th>
<th>Rate %</th>
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<tbody>
<tr>
<td>Standard default contract rate</td>
<td>from Jul 1, 2013</td>
<td>10.20</td>
</tr>
<tr>
<td>Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year</td>
<td>to Dec 31, 2013</td>
<td>8.75</td>
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<tr>
<td>Federal Court – Interest on judgment debt for half year</td>
<td>to Dec 31, 2013</td>
<td>8.75</td>
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<tr>
<td>Supreme, District and Magistrates Courts – Interest on default judgments before a registrar</td>
<td>to Dec 31, 2013</td>
<td>6.75</td>
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<tr>
<td>Supreme, District and Magistrates Courts – Interest on money order (non-local priority judgment at the court’s discretion)</td>
<td>to Dec 31, 2013</td>
<td>8.75</td>
</tr>
<tr>
<td>Court suitor rate for quarter year</td>
<td>to Sep 30, 2013</td>
<td>1.8075%</td>
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Cash rate target

from Aug 7, 2013 | 2.50%

Historical standard default contract rate %

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NB: A law practice must ensure it is entitled to charge interest on outstanding legal costs and if such interest is to be calculated by reference to the Cash Rate Target, must ensure it ascertains the relevant Cash Rate Target applicable to the particular case in question. See qls.com.au for more historical rates.

Senior counsellors

Senior counsellors are available to provide confidential advice to Queensland Law Society members on any professional or ethical problem. They may act for a solicitor in any subsequent proceedings and are available to give career advice to junior practitioners.

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M O Klug 07 3292 7000
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Nambour 4560

W M Potts 07 5532 3133

M D Bray 07 5441 1400

G W Ferguson 07 5443 6600

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O R R P P R A L A

N D I R E B A I L I W I C H

A I R I U T A T

P E N I T E N T I A R Y T E

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P O O L P I P A S

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