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Turning the tide of negativity

While Queensland Law Society often speaks out strongly for the profession, the challenge of media negativity we face is of such importance that we must all publically declare our support for the principles we believe in.

The media delights in reporting allegations and suggestions that some lawyers are unethical and prepared to engage in questionable behaviour. To counter this, it is vital that we stand together as a profession and make our voices heard in the community.

I commend those practitioners who speak out – many through social media – about their pride in the profession and the work they do for their clients and their communities, but our campaign to improve the public perception of lawyers must be ongoing.

Last month I wrote about one way in which we might achieve this – consistently and carefully spreading the 'good news' about our pro bono work and other achievements. We know that bad news travels faster than good news, and that the mainstream media is always receptive to negative reports about solicitors.

However, we can't be just reactive. We must take back the initiative on this. We need to convey positive news stories to the community on a very regular basis. Its members need to know the extent to which lawyers play a really positive role and provide positive assistance in the community.

Unfortunately we have some way to go in gaining community respect. A 2012 Reader's Digest survey of Australia's most trusted professions ranked lawyers 29th (along with charity collectors and bankers) out of 40.

Our challenge is to shift community perceptions so that we rank with paramedics, firefighters, doctors and nurses as trusted professionals. We engage in activities and provide assistance that is every bit as important in the lives of our clients and those we assist.

A key task is identifying the enormous amount of pro bono work that our members do, including with community legal centres, shelters and refuges.

We outperform every other profession in providing pro bono service. Consider how community legal centres are staffed mostly by volunteers. Where are the free community financial advice centres staffed by volunteer accountants, or the free car repair shops staffed by volunteer mechanics?

The work undertaken by solicitors is critical in ensuring access to justice for the most disadvantaged and vulnerable in our community. Indeed without the committed contribution of the solicitors' branch of the profession, the legal system simply could not function.

Solicitors annually provide literally millions of hours of valuable services often with no expectation of remuneration, no expectation of reward and no expectation of thanks either. We do it not only because it's our job, it is our obligation as members of the legal profession because we have a strong sense of community and service to the community, and because we have a fundamental commitment to democratic principles and the paramount importance of the rule of law.

We need to reinforce this positive message again and again, for years to come. Only then can we begin to counter the negativity we face and shift that mindset.

The Society will continue to speak on behalf of the profession, but we want to hear your voices and your good news stories. In this year's renewals process, we will ask you to tell us how much pro bono work you do. This will help us to spread that message.

I repeat my request to send me your pro bono stories (president@qls.com.au) so that we can promote them too. In time, the benefits will begin to flow.

As we work at this challenge, be proud to say “I'm a solicitor and a QLS member” – it's a badge that should be worn with pride.

See you at Symposium

Fortunately, there are times when we can put aside such challenges and celebrate being a part of a magnificent profession.

One such occasion was last month's convivial Legal Profession Dinner. Another occurs later this month – Symposium 2014.

Yes, there's plenty of professional development work to be undertaken and practitioners will already be familiar with the fantastic program that has been developed, but I want to remind everyone that Symposium is also the best time to get together with our friends and colleagues to celebrate the collegiality of our profession.

One of the significant things that the QLS can do for its members is to provide this flagship event and an environment in which we can come together.

I invite you to take this opportunity, and I look forward to meeting you there.

Ian Brown
Follow me on Twitter at: @QLSpresident

Note
Numbers that add up

A snapshot of the Queensland legal profession

The size and composition of the Queensland legal profession isn’t clearly understood by many people in the profession.

For example, there is a common belief that most solicitors in Queensland practise as sole practitioners or work in very small firms. That probably was the case many years ago, but it is definitely not the way things are today.

Statistics drawn from last year’s membership and practising certificate renewal process provide an illuminating picture of the profession in Queensland today.

Looking at our 9135 full members in 2012-13, 78% were in practice with a legal firm of some kind (this excludes corporate and government lawyers, among others). Of these:

• 29% were in ‘large’ law firms (50-plus practising certificate holders)
• 10% were in ‘medium’ firms (20 to 49 pc holders)
• 24% were in ‘small’ firms (6 to 19 pc holders)
• 26% were in ‘micro’ firms (2-5 pc holders)
• 11% were sole practitioners.

So almost two-thirds of our full members – 4351 practitioners – are in sizeable firms (six or more pc holders), while 2522 are in firms with up to five pc holders. I think that clearly dispels any suggestion that most Queensland practitioners work in very small firms!

A couple of other statistics are noteworthy.

The profession’s gender shift is also continuing. For example, the largest concentration of QLS members outside the Brisbane CBD is on the Gold Coast, which is home to more than one in 10 (11.3%) of members. Brisbane’s southern suburbs are next (with 6% of members), then the western suburbs (5.5%), Sunshine Coast (3.4%) and Townsville (3.3%).

The profession’s gender shift is also continuing. It has moved by 0.8% toward females (now 46% of full members). The average rate of change since 2005-6 has been 1.1% a year.

While it’s interesting for members to contemplate these changes, they have significant implications for the Society itself. It is an ongoing challenge for us to deliver meaningful products and services to members from such a range of firm sizes and locations, not to mention age and gender differences and diverse practice areas.

Our growing membership (up 6.7%) indicates that we are successful in our stated aims of representing your interests and delivering the products and services you need. However, we can never rest easy in this task and will continue to deliver services based on who you are, where you are and what you need.

Legal Careers Expo

Law students are a growing segment of QLS membership, increasing from 1269 to 1623 in 2012-13.

As many of you would be aware, there has been a huge growth in law graduates over the past eight years and we will be inviting all of the Queensland law school deans to a round-table discussion on the challenges arising from this growth for both the profession and students.

We are keen to help graduates enter the legal profession with their eyes open to the challenges and opportunities that await, so we also actively participate in the university student career fairs, foremost of which is our very own QLS Legal Careers Expo.

The event, to be held this year at the Brisbane Convention & Exhibition Centre on 11 March, continues to grow in size and popularity year on year, bringing students face-to-face with potential employers and education providers, and arming them with the knowledge they need to launch their legal careers.

If your clients or friends have asked you for legal career advice on behalf of their children, you can tell them that the Expo is a very good starting point.

Flexibility in practice

I would encourage all employers, in fact all practitioners, to read the flexibility article on page 42 of this issue. This reader’s story really captures the essence of how we must change our thinking about flexibility, clearly illustrating the differences between unresponsive employers and those who understand and embrace the true meaning of flexible work practices.

I look forward to more such articles from our members – please email them to flexibility@qls.com.au. There are a couple of elements of this issue I’d also like to hear more about.

Firstly, flexible work practices should be just as accessible to male practitioners as females. Are there male practitioners who can tell Proctor readers about how flexibility has been successfully adopted in their roles?

I think we should also dispel misunderstandings that flexibility entails remaining ‘on call’ 24/7. I’d like to know what sort of client arrangements have been drawn around availability in workplaces which have implemented flexible arrangements. Can anyone assist?

Noela L’Estrange

Noela L’Estrange | Queensland Law Society CEO
Updated costs guide to launch at Symposium

A new edition of the Queensland Law Society Costs Guide will be launched this month at Symposium 2014.

The updated guide provides solicitors with a practical handbook on costs and takes into account amendments to the Legal Profession Act 2007 (Qld), the introduction of the Competition and Consumer Law Act 2010 (Cth), the Queensland Civil and Administrative Tribunal (QCAT) and the Australian Solicitors Conduct Rules 2012.

Revised through an initiative instigated by the QLS Litigation Rules Committee and with the assistance of other policy committees, the expanded publication provides practitioners with a voluntary guide to assist in costs matters throughout the various stages of a client file – ‘the cradle to the grave on costs’.

It now includes detailed commentary on:

• the applicable laws and further resources
• starting a client retainer and costs agreement
• information flow to clients, including disclosure and trusts accounts
• information about costs disputes and proceedings, including recovering costs in QCAT and the courts
• post-contractual rights and obligations
• electronic file management from a costs perspective
• process checklists.

Examples from the original 2008 guide have also been updated to reflect the changes in the law and GST, as well as to provide more guidance to clients on fee structures, court proceedings and law practice engagement details.

The 2014 guide now has more than 12 document examples including:

• an example covering letter, disclosure notice and client agreement for a non-sophisticated client
• an example covering letter, disclosure notice and client agreement for a non-sophisticated consumer client (with reference to the definition of ‘consumer’ in the Competition and Consumer Law Act 2010)
• an example covering letter and client agreement for sophisticated clients
• an example pro bono client agreement
• an example non-associated third party costs agreement
• an example litigation disclosure notice
• an example update/ongoing disclosure letter for non-sophisticated clients
• an example bill notification for non-sophisticated, pro bono, consumer and sophisticated clients
• example clauses for family, litigation and uplift fee arrangements.

In association with the launch of the new QLS Costs Guide at Symposium, two representatives of the Litigation Rules Committee will conduct a costs guide workshop for attendees. For Symposium information, see qls.com.au.

President’s Medal to John Sneddon

Brisbane lawyer John Sneddon has been recognised for his tireless pro bono defence of Australian businessman Marcus Lee.

Mr Sneddon, a partner at Shand Taylor Lawyers, was awarded the Queensland Law Society’s 2014 President’s Medal at last month’s Legal Profession Dinner, where president Ian Brown described him as a gifted practitioner who exhibited the finest standards of professionalism and selflessness in duty.

Mr Sneddon, who also received the Australian Lawyers Alliance Queensland Civil Justice Award last month, made several self-funded trips to Dubai and worked across time zones to represent his client. Despite a practice largely founded in commercial law, he compiled Mr Lee’s defence, liaised with his Dubai barristers and succinctly explained the complex case to the Australian media.

Mr Lee attributes much of the reasoning for his acquittal to the “tireless and unselfish devotion of Mr Sneddon to my case and my plight.”
New DLA presidents set for busy year

Three new district law association presidents have been elected for the Fraser Coast, Gympie and Ipswich district.

John Milburn, who moved to Hervey Bay in 1992 after practising in Brisbane for many years, has been elected president of the Fraser Coast Law Association.

John is a principal of local firm Milburns Law and practises primarily in criminal law. He is a member of the Queensland Civil and Administrative Tribunal, a lecturer/course coordinator for Central Queensland University and a co-founder of the local community legal service.

“This year we plan to coordinate two mock trials, the first for younger participants during Law Week and the second for university and year 11/12 students,” he said. “We will be involved in coordinating judges’ dinners, with a special event planned for early next year. I hope to set up a website for the DLA and create a better opportunity for our members to liaise with members of ancillary professions in the area.”

Selena Cartwright, a director of Gympie firm Baldwin Cartwright Lawyers, has been elected as president of the Gympie Law Association.

Selena is a born-and-bred local who did her articles at Baldwin Lawyers. She was admitted to partnership at 23 and by 25 was one of Australia’s youngest female sole practitioners. After five years as a sole practitioner, in the last financial year Selena incorporated her legal practice and brought in two well-known and experienced partners.

“Gympie has a demographic ranging from young lawyers to very experienced and well respected lawyers,” she said. “I look forward to bringing together youth and wisdom, giving Gympie practitioners and their support staff opportunities to network, mentor, be mentored and to ultimately progress their professional development through fun informal networking events and training.”

David Love, who has been in private practice since his admission in 1996, succeeded Richard Zande as president of the Ipswich & District Law Association following the association’s December meeting.

David, a partner at Dale & Fallu Solicitors, has been a keen member of the association’s professional development committee. He said that this year it was planned to offer members the opportunity of earning all of their core CPD points through local seminars. The first, held on 27 February, would be followed by a second in August.

He hoped to also continue providing an academic prize for University of Southern Queensland law students and expanding the association’s social and networking events.

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Vicki celebrates 40 years at South & Geldard

Rockhampton solicitor Vicki Jackson notched up 40 years with local firm South & Geldard on 14 January, celebrating the milestone with a surprise morning tea and celebratory lunch.

Vicki joined the firm in 1974 articled to founder Robert South and was admitted as a solicitor in 1979, becoming a partner the same year. She is a QLS accredited specialist (family law) and was president of the Central Queensland Law Association. Vicki is a QLS senior counsellor and has served on QLS committees including specialist accreditation and ethics.

Vicki Jackson, centre, with personal assistant Nicole Svensen, left, and South & Geldard staff member Grace Elleray, who has also celebrated 40 years at the firm.

New practice directions

New Supreme Court of Queensland practice directions issued on 17 February by Chief Justice Paul de Jersey AC will come into effect on 3 March.

They relate to:
- the criminal jurisdiction of the Supreme Court (PD 4 of 2014)
- listing procedures for criminal matters in Brisbane (PD 5 of 2014)
- applications for interpreters under the Bail Act 1980 or the Dangerous Prisoners (Sexual Offenders) Act 2003 (PD 6 of 2014)
- the digital recording of court proceedings (PD 7 of 2014)
- the use of electronic devices during court proceedings (PD 8 of 2014)
- management of controlled items in court precincts (PD 9 of 2014)

All practitioners are advised to familiarise themselves with these practice directions, which are available at courts.qld.gov.au > For lawyers > Practice directions.
Caxton’s law handbook #12 launched

Caxton Legal Centre has announced the release of the 12th edition of *The Queensland Law Handbook*.

The handy resource for both practitioners and the public was officially launched by federal Attorney-General George Brandis QC on 21 February at the Avid Reader bookshop, West End.

Its 40 chapters include two new additions on health law and immigration, and provide a broad guide to legal rights and responsibilities, including an extensive list of contact points for further assistance at the end of each chapter.

The publication is now also available as an ebook. See caxton.org.au for details.

Receiver appointed for Tay Lawyers, Sunnybank

On 21 January 2014, the executive committee of the Queensland Law Society passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Tay Lawyers.

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.

Inquiries should be directed to Sherry Brown or Glenn Forster, at the Society on 07 3842 5888.

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Beaton Capital adds Brisbane partner

Beaton Capital has announced the appointment of David Goener as a partner in its Brisbane office and Nick Seddon as a partner in Hong Kong.

David will lead the advisory practice in Queensland with a focus on financial management and capital structuring. He has previously worked in senior executive roles with BDO and McCullough Robertson, and had a long career with the Commonwealth Bank.

Nick has joined Beaton Capital to lead specialist professional services in the firm’s advisory practice in Asia, with a focus on law firm corporate and business strategy.

Members greet 2014

More than 100 Queensland Law Society members welcomed in the new year and new president Ian Brown at the Member New Year Drinks on Thursday 6 February.

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The partners of Ferrier Hodgson are delighted to announce the appointment of Matthew Ashby as an executive director in the Forensics practice.

His arrival will help drive the continued growth of the Ferrier Hodgson Forensics practice in Queensland. As a forensics specialist, Matthew provides advice to clients, their legal advisers and the courts to resolve high-stakes disputes and address fraud.

Matthew can be contacted at:
Ferrier Hodgson
Level 7, 145 Eagle Street
Brisbane QLD 4000
Direct: 07 3834 9297
Mobile: 0422 004 026
Email: matthew.ashby@fh.com.au

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In 1996, the (then) Australian Securities Commission (ASC, now ASIC) carried out a major research project and found that the annual loss to Australian businesses due to illegal phoenix activity was between $670 million and $1.3 billion a year.¹

A more recent report, commissioned by the Fair Work Ombudsman and delivered by PricewaterhouseCoopers (the PwC Report), estimated that the annual cost to the Australian economy of this activity had grown to between $1.78 and $3.2 billion (for the 09/10 financial year).²

To put that figure into context, the PwC report suggests that illegal phoenix activity costs:

- Australian employees up to $655 million a year in unpaid wages and other entitlements
- businesses up to $1.93 billion a year in goods and services they have paid for but have not received, or in other outstanding debts, and
- up to $610 million in government revenue a year, mainly as a result of illegal phoenix companies not paying tax debts, but also in payments due to employees under the Fair Entitlement Guarantee.³

It is clear that the cost of this activity to the Australian economy has been on the rise.⁴

What is illegal phoenix activity?

Illegal phoenix activity often involves the winding up of a company and the subsequent continuation of that business in a new company, with a similar company name, structure and staff.

The phoenix company phenomenon is a side-effect of the use of the corporate form and of limited liability, concepts fundamental to the operation of the global commercial system. It is essential to the concept of limited liability that, when a company fails, the directors and the shareholders, as a general rule, are not held personally responsible for the debts of the company.

Phoenix activity is not, therefore, inherently unlawful. Genuine corporate failure when businesses have been responsibly managed and subsequently continue after liquidation using another corporate entity is a legitimate use of the corporate form.

Illegal phoenix activity, on the other hand, generally involves an abuse of the corporate form, by current or previous directors of the original company, for the purpose of intentionally denying creditors access to their entitlements.
There is no current single statutory definition or offence dealing with illegal phoenix activity. Similarly, each regulatory agency has its own focus and many have developed their own criteria for regulating this type of activity. From ASIC’s perspective, ‘illegal phoenix activity’ occurs when a company:

- fails and is unable to pay its debts
- acts in a manner which intentionally denies unsecured creditors equal access to the available assets in order to meet unpaid debts
- soon after the failure of the initial company (usually within 12 months) another business commences, which may use some or all of the assets of the former business, and is controlled by parties related to either the management or directors of the previous company.

This conduct is of particular concern to ASIC as it can give rise to breaches of directors’ duties and other important provisions of the Corporations Act 2001 (Cth) (the Act), for example, under s180 to 184, 588G and/or 590.

Illegal phoenix activity has far reaching and unfair consequences. Employees are robbed of wages and entitlements, and creditors – many of whom are small businesses – are left behind with a pile of unpaid debts. There are also significant unmet tax liabilities which have a detrimental impact on tax revenue.

In some cases, company failures are nothing more than bad luck. But there are some directors who deliberately walk away from a failed company with no intention of meeting liabilities and subsequently establish a new company to conduct the same business. ASIC is committed to identifying and taking action against these individuals.

**Where do lawyers fit into this process?**

In 2012, an ASIC small business survey found that lawyers are often a director’s first choice for advice on running and management of his or her company.

Barristers and solicitors are, therefore, ideally placed to inform, educate and discourage company officers from engaging in illegal phoenix activity. They are equally exposed to the unenviable position of being asked to provide advice to corporate clients who want to engage in illegal phoenix activity.

One example of a solicitor going too far in the provision of legal advice concerning illegal phoenix activity can be found in the Somerville case.

In this case, Timothy Somerville (a solicitor) was held liable for his involvement in breaches of director duties (pursuant to s79 and ss181 to 183 of the Act), committed by eight directors, in circumstances amounting to illegal phoenix activity.

Mr Somerville was a director of an incorporated legal practice in NSW, Somerville & Co Pty Ltd. In his capacity as a solicitor, Mr Somerville provided legal advice and assistance to eight company directors in relation to 15 companies. In each case:

- the original company was in financial difficulty and under threat of insolvency
- the assets of the original company were transferred to a new company for little or no consideration
- the debts remained with the old company
- employees were terminated and then employed by the new company, and
- settlement dates were arranged to ensure that the assets belonging to the original company were transferred prior to the winding up of the old companies.

As a consequence of his conduct and involvement in providing the advice, drafting the necessary documents and carrying out the work required to give effect to the recommended restructure which gave form to the illegal phoenix company, Mr Somerville was ultimately disqualified from managing corporations for six years (a penalty higher than that imposed on the directors as the principal offenders).

Acting Justice Windeyer found Mr Somerville’s conduct to be “far more serious” than that of the other directors, perhaps because he could not accept that Mr Somerville considered that his actions were proper and in accordance with the law.

The court also rejected Mr Somerville’s argument that he shouldn’t be punished for simply giving legal advice.

On this point, his Honour said:

“I have of course carefully considered the argument … that it would be extraordinary if a solicitor just giving advice became liable under s79 of the Corporations Act (Cth). That of course may be the position in a normal case, but that depends on what advice was given. If advice is given the result of which brings about an action by directors in breach of the relevant sections of the Act, in other words, when advice is given by a solicitor to carry out an improper activity and the solicitor does all the work involved in carrying it out apart from signing documents, it seems to me that there can be no question as to liability.”

This case provides a useful reminder for lawyers of what not to do and indicates that ASIC will not shy away from holding gatekeepers to account.
What is ASIC doing about it?
ASIC continues to focus on understanding and combating this type of activity.
ASIC also continues to engage in a number of campaigns focused on disrupting and deterring illegal phoenix activity, including the Director Disqualification and Liquidator Assistance Programs.
ASIC administers the Assetless Administration Fund (which provides funding in appropriate circumstances to liquidators for the investigation of potential breaches of the Act) and has recently received additional powers, as a result of law reform, enabling it to take administrative action to wind up abandoned companies.12
This power was used for the first time in August 2013 when ASIC appointed liquidators to six abandoned companies which owed 57 employees about $731,000, allowing the employees to gain access to their entitlements under the Fair Entitlements Guarantee.13
Most recently, ASIC launched a national surveillance campaign targeting company directors with a history of failed companies and where there have been allegations of illegal phoenix activity.14
So far, ASIC has identified about 2500 individuals who have been involved with 1400 companies in the building and construction, labour hire, transport, security and cleaning industries as potential targets for the campaign.
Using intelligence from a variety of sources to ascertain which of the current companies are in, or tracking towards, financial distress, ASIC is working to deter directors from engaging in illegal phoenix activity.

What’s next?
ASIC will continue to raise awareness through its assistance and engagement programs and will make compliance easier for company directors by developing enhanced tools.
When illegal conduct is detected, ASIC will consider taking action against all relevant parties, including advisers who may have facilitated or become involved in the activities of their corporate clients.
The task of combating illegal phoenix activity is a difficult one, but it’s not impossible.
With assistance from other government agencies, professional associations and industry bodies, ASIC is determined to proactively disrupt those who are already engaged in illegal phoenix activity and deter others from becoming involved.
More information about illegal phoenix activity can be found under the ‘Information for Small Business’ tab on ASIC’s home page (asic.gov.au) or by contacting ASIC on 1300 300 630.

Notes
2 PwC (commission by the Fair Work Ombudsman), ‘Phoenix activity – Sizing the problem and matching solutions’ (June 2012) 15 (the PWC Report).
3 Ibid ii, iii and 15.
4 For instance, the Australian Tax Office has reported that the impact of fraudulent phoenix activity is likely to have increased since the ASC Report in 1996 as it spreads from the small business community to larger businesses and individuals with significant levels of wealth. See the Department of Finance, ‘Regulation Impact Statement for Taxation Changes to Address Fraudulent Phoenix Activity’ (2011) 2.
5 The ASC Report, n1, 1.
6 Ibid [35].
7 Ibid (2009) 77 NSWCLR 110, 126, [49].
8 See the Corporations Amendment (Phoenixing and Other Measures) Act 2012 (Cth) which amended the Corporations Act 2001 (Cth) providing ASIC with a new administrative power under s489EA of the Act to wind up companies that have been abandoned.
9 See ASIC media release 13-233MR, Workers to gain access to entitlements after ASIC employs new powers, Tuesday 27 August 2013.
10 See ASIC media release 13-253MR, ASIC surveillance targets illegal phoenix activity, Monday 9 September 2013.

Greg Tanzer was appointed an ASIC Commissioner for a four-year term from 5 March 2012. He served as Secretary-General of the International Organization of Securities Commissions (IOSCO) from 2008 until early 2012 and was previously Executive Director (Consumer Protection and International) at ASIC. Before joining ASIC, Greg worked in the Australian Government Attorney-General’s Department. He is a qualified solicitor and barrister.
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When consumer goods turn bad

Mandatory reporting under the Australian Consumer Law

The mandatory reporting obligations for death, serious injury or illness linked to consumer goods require swift, specific responses that many businesses may be unaware of. Justin Oliver suggests that practitioners ensure all of their relevant commercial clients are up to speed.
Since 2011, Australia’s consumer protection laws have been codified in a single Australian Consumer Law (the ACL) that applies under Commonwealth, state and territory legislation to all Australian businesses.

One of the reforms introduced by the ACL is a mandatory reporting regime that requires a supplier of consumer goods to notify the Commonwealth Government within two days if its goods are associated with the death or serious injury or illness of another person.

While there has been a lot of focus on provisions of the ACL relating to unfair terms and consumer guarantees (especially around extended warranties) the mandatory reporting regime has received less attention, despite the fact that the regime applies to any business involved in the supply of consumer goods.

In a speech in 2013, the chair of the Australian Competition and Consumer Commission (ACCC) noted that the regulator receives more than 2500 reports under the regime each year, allowing the ACCC to identify issues for which a recall may be warranted and to look for hidden trends in product safety. The ACCC regards product safety as one of its highest priorities, and over the coming year plans to focus on improving its intelligence around consumer risks. The ACCC has published guidelines to explain the regime in further detail and to assist businesses to comply.

The obligation to report

Sections 131 and 132 of the ACL provide that a person who, in trade or commerce, supplies “consumer goods” or “product related services” must give a prescribed notice to the responsible Commonwealth Minister within two days of becoming aware of the death or serious injury or illness of any person, if the supplier considers, or becomes aware that another person considers, that the harm was caused, or may have been caused, by the use or foreseeable misuse of the consumer goods.

“Consumer goods” are defined in the ACL as goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption. “Product related services” are defined as services for or relating to the installation, maintenance, repair, cleaning, assembly or delivery of consumer goods of a particular kind, or any other service that relates to the supply of consumer goods.

A “serious injury or illness” is defined as an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or nurse, but does not include an ailment, disorder, defect or morbid condition or the recurrence or aggravation thereof. This could include an external physical injury (for example, a serious burn, deep cut, broken bone, choking or serious fracture), an internal injury (such as internal bleeding) or an illness (such as poisoning). It would also include death or serious injury or illness suffered by a person with a pre-existing sensitivity (for example, an anaphylactic reaction suffered by a person with an allergy).

Critically, the reporting obligation applies to any participant in the supply chain for consumer goods. This could be a person who is involved in the manufacture or importation, wholesale or retail supply, or delivery, installation or repair of consumer goods.

The obligation to report arises if the supplier becomes aware of a death or serious injury or illness that may have been caused by the use or foreseeable misuse of the consumer goods. It is not necessary that the supplier believes the consumer goods did in fact cause the harm. Only if it is clear that the harm was not caused by the use or foreseeable misuse of the consumer goods, or it is very unlikely that the consumer goods were the cause, is the supplier exempted from the obligation to report. A report must be made regardless of whether the consumer goods were used before or at the time the death or serious injury or illness occurred.

So, for example, a person who installs an electrical appliance in a home would be required to notify the Minister if the person became aware that the appliance may have caused a death or serious injury or illness. It does not matter that there is no reason to suspect that the installation of the appliance contributed to the harm. The installer has supplied services relating to the consumer goods, and is therefore required to report by section 132 of the ACL on becoming aware of a death or serious injury that may have been caused by that appliance. The obligation would arise even if the installer received, days or even weeks after the event, a complaint from another person who considered that the appliance may have caused the harm.
The obligation to report can be satisfied by sending a notice to the ACCC using the online form that can be found at productsafety.gov.au

> Law and safety > Mandatory reporting. The notice must:

- identify the consumer goods, or the product related services and the goods to which they relate
- state when the goods or services were supplied and, in the case of goods, in what quantities (to the extent known)
- describe the nature of the death or serious injury or illness and the circumstances in which it occurred
- describe any action that the supplier is taking or intends to take.

A failure to comply attracts a civil penalty of up to $16,500 for a body corporate, or $3300 for other suppliers for (for example, a sole trader or partnership). The ACCC also has the power to issue an infringement notice, imposing a penalty of $5100 for a body corporate, or $1020 for other suppliers.

The Queensland Office of Fair Trading also has the power to investigate and enforce a contravention of sections 131 and 132, including the power to issue an infringement notice.

**Exemptions**

There is no obligation to report under the ACL if there is an existing obligation to notify the death or serious injury or illness under another law prescribed by the regulations, or if the death or serious injury or illness has been notified in accordance with an applicable code of practice prescribed in the regulations. These include obligations to report under the:

- *Agricultural and Veterinary Chemicals Act 1994* (Cth)
- *National Health Security Act 2007* (Cth)
- *Therapeutic Goods Act 1989* (Cth)
- *Coroners Act 2003* (Qld)
- *Motor Accident Insurance Act 1984* (Qld)
- *Public Health Act 2005* (Qld)
- *Transport Operations (Road Use Management – Road Rules) Regulation 2009* (Qld).

It should be noted that overlapping reporting obligations can still arise. For example, the *Food Act 2006* (Qld), which requires reporting of contamination in certain cases, is not prescribed under the regulations. This means food businesses would still be required to notify the Commonwealth Minister if they become aware that contaminated food may have caused death or serious injury or illness, even if they are required to report that contamination under the Queensland legislation.

**Use and disclosure of information provided to the ACCC**

The giving of a notice under sections 131 or 132 is not to be taken, for any purpose, as an admission of liability. Information provided to the ACCC in a notice must be kept confidential except to the extent that:

- the provider of the information consents to its disclosure
- the Minister shares the information with the regulator
- the Minister discloses the information in the public interest
- the information is disclosed in the performance of the regulator’s duties or for the purposes of law enforcement, or
- disclosure is required or authorised by law.

**Conclusions**

There are three points to highlight when reviewing the mandatory reporting regime under the ACL:

- It is broad in its application, applying to almost any person involved in the supply of consumer goods, or services related to those goods.
- The threshold for notification is relatively low, and can be met even where the supplier does not believe it was responsible for the harm.
- The supplier has only two days to report once it becomes aware that consumer goods have caused, or may have caused, death or serious injury or illness.

In practical terms, a business may find it difficult to meet this deadline if it only starts the process of learning about its reporting obligations after it becomes aware of a death or serious injury or illness. Businesses involved in the supply of consumer goods will be better prepared if their lawyers ensure they are aware of their reporting obligations and have appropriate procedures in place to ensure compliance.

Justin Oliver is a partner at Minter Ellison Lawyers.
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A life in war crimes

Kate’s journey to the International Criminal Court

While aspiring lawyers may dream of fighting for justice in the world’s highest courts, few attain that lofty ambition. One who has is Brisbane lawyer Kate Gibson. She speaks to John Teerds about her major role in the International Criminal Court.
Brisbane lawyer Kate Gibson is on centre stage in the International Criminal Court in The Hague to defend a former militia leader from the Democratic Republic of Congo (DRC), on crimes against humanity and war crimes.

Kate is co-counsel of the defence team, led by British barrister Peter Haynes QC, in the trial of Jean-Pierre Bembo Gombo, who is charged with two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging) allegedly committed during the conflict in the Central African Republic (CAR).

The trial of The Prosecutor v Jean-Pierre Bemba Gombo, which officially began on 22 November 2010 after pre-trial argument over more than a year, is only the third trial in the International Criminal Court (ICC). It has continued ever since with only short recesses. Kate, who joined the defence team in August 2010, was officially named co-counsel in January this year.

After graduating with an arts/law degree from Bond University, Kate worked at Minter Ellison in Brisbane for three years as a graduate lawyer and was admitted as a solicitor in 2001. In 2003, she was an intern at the Australian Mission to the United Nations in New York and was awarded a Commonwealth Chevening Scholarship to Cambridge University, where she obtained her masters degree in international law.

“Then I was lucky enough to get an internship at the ICC in The Hague in 2004, and I have worked in international criminal courts since then,” Kate said. “My work has predominantly been as part of defence teams, working for accused persons before the UN Rwanda Tribunal (ICTR), the Special Court for Sierra Leone (SCSL), and now the ICC. I have also clerked for a judge of the UN Yugoslavia Tribunal in The Hague (ICTY), and represented victims at the first trial at the Cambodian Courts in Phnom Penh (ECCC).”

While her work mainly involves appearing in court and examining witnesses, criminal trials in these courts are quite different to those in Australia.

“Defence lawyers before the international criminal courts are responsible for conducting investigations,” Kate said. “As such, my work also involves going into the field and finding and locating witnesses and physical evidence to be presented during the trial.

“This means spending a significant amount of time in situ taking witness statements or locating other material evidence which is relevant to the proceedings. This is a hugely interesting and rewarding aspect of defence work.”

Her first real taste of international criminal law was in 2005, when she moved to Tanzania to join the defence team of General Gratien Kabiligi, a former Rwandan general charged with genocide before the UN Tribunal for Rwanda.

“I knew very little about the field, and nothing about the general himself, but quickly formed the opinion that the prosecution case against him was baseless,” Kate said. “I spent three years working as a junior legal assistant on his case, and in 2008 he was acquitted of all charges. He was released after 11 years in prison and saw his family and daughters for the first time in over a decade.

“I will never forget how I felt on that day, watching him walk outside the prison, and I felt honoured to have been part of the team that worked for his release. We are still in regular touch, and he has watched me appear before the UN Rwanda Tribunal on many other occasions, although now from the public gallery and not from the dock.

“This probably remains my most memorable and rewarding experience.”

In 2012-2013 Kate was counsel for former Liberian president Charles Taylor, charged before the Special Court for Sierra Leone.

“The case against Mr Taylor was fascinating from a factual perspective, covering the war in Sierra Leone between 1991 and 2002. We argued his case before the Appeals Chamber of the Special Court in January 2012, and it was another memorable experience to be involved in a case of such importance to Sierra Leone and the region.”

Kate admits that there are some downsides to her work, the chief one being away from Brisbane.

“I spend the vast majority of each year travelling and working overseas, so I miss my family and friends enormously,” she said.

“It is also impossible to ignore the stigma associated with representing people who are charged with some of the worst crimes in history. Many victims or even other lawyers associate defence lawyers with the accused in the dock. However, defence teams play an important role in the international criminal system, by ensuring not only that the rights of the accused are respected, but contributing to the establishment of the truth of the events in question, which are often much more nuanced and complex than presented by the prosecution.”

Kate Gibson Investigating the Rwandan genocide at the site of the Kiziguro Parish massacre, Murambi Commune, Rwanda, in 2011.
"The importance of defence lawyers is often overlooked by those who ascribe a moral complicity to those representing accused 'war criminals' or 'genocidaires,' which is difficult, particularly coming from a tradition where lawyers are afforded the same measure of respect regardless of the role they play in the proceedings."

Kate is often asked whether she finds the process of gathering testimony on war crimes emotionally disturbing.

"I can't pretend that I haven't been upset by things I've heard about," she said. "I spent some time last year in the Congo interviewing women and girls who were victims of sexual violence during the 2002-2003 conflict in the Central African Republic."

"Although I normally am able to switch off at the end of a working day, I remember feeling quite dark for several weeks afterwards. It feels somewhat self-indulgent to say that, because of course we were miles away when any of this happened, and it wasn't me or my family who suffered these absolutely horrendous things. So I don't feel as though I have a basis to assert that it's difficult for me just to hear it second-hand – but there are moments, when it becomes hard to shake."

Kate's travels have taken her well away from common tourist destinations.

"I lived in Tanzania for five years – the base for the Rwanda Tribunal – which I loved. I spent a lot of time investigating in Rwanda and throughout east Africa. I also worked at the courts in Cambodia, so lived in Phnom Pehn for a time."

"Most recently I have been based in The Hague in The Netherlands but spent time investigating in the Congo, and in other countries in the west of Africa interviewing witnesses and searching for physical evidence relevant to the case."

"I feel very fortunate to have been involved in this field, and having had the opportunity not only to live and work in Africa and Cambodia, but also to work alongside so many dedicated defence lawyers fueled by the same goals of contributing to the establishment of the truth of the events in question, and ensuring that the process is fair. I'm also very grateful to have been able to meet so many victims and survivors of genocide and war crimes, many of whom take significant risks to testify for the defence."

"I am often asked if the work we do is risky. Compared to other friends who are working in conflict or in post-conflict zones and face real danger on a daily basis, I can't even start to claim that we are engaging in dangerous work."
“However, there have been some hairy moments investigating, particularly in west Africa, and I’ve been held by armed soldiers at border crossings on more than one occasion for much longer than was comfortable. Most of these incidents are normally just chalked up to experience, and are even worn as a badge of honour in the defence corridors.

“What concerns me more is ensuring the safety of victims and survivors, who often take incredible risks to come forward and testify for the defence. Witnesses who are willing to tell the truth, even when their version of events runs counter to the more politically convenient version put forward by the regime in power, are often exposing themselves and their families to real danger. There are a number of documented and devastating examples of defence witnesses being subjected to violence, or even killed following their testimony.

“In these situations, when even jotting down a name can end up putting someone at risk, defence teams need to be vigilant in doing everything possible to try to protect those people who are willing to come forward. That is the real challenge of investigative work.”

Kate believes that those who aspire to this kind of career need a solid domestic grounding.

“It is certainly possible to try to organise internships with prosecution or defence teams during or immediately after university, but I think paid work at the international tribunals requires some domestic criminal experience,” she said. “It is also worth considering that international criminal trials will inevitably run for several years, so it is a long-term commitment, but certainly one that has significant rewards.”

Of course, another advantage is some language skills, particularly French.

“Rwanda and the Congo, and to some extent Cambodia, are (or were) francophone countries and so the vast majority of clients or witnesses won’t speak English,” Kate said. “As such, even some basic French puts you at a huge advantage. When I met General Kabiligi for the first time, he didn’t yet speak English, and my schoolgirl French was shocking – that was all down to me, not to my schooling! – and so we had to work hard together to come to a place where we could converse easily, and take proper instructions.”

Kate is keen to keep working in this area, possibly returning to chambers to work with judges after the current trial.

“However, I have recently had a baby girl, so my days of being able to spend months investigating in Africa are probably on hold for a while,” she said.

“I feel very fortunate to have been able to do this work, to practise law in an international setting, and I would love to keep working in this area. I feel that the international courts still have a long way to go to ensuring that the accused appearing before them are consistently afforded internationally recognised fair trial rights, and so I believe in the importance of the work that we are doing on our side of the courtroom.

“I am well aware that it’s not a career for everyone, yet I am still surprised by how often I am asked how I could possibly defend people accused of such horrendous crimes. But, being married to a prosecutor, I actually feel that we are both doing the same work and engaged in the same exercise – contributing to the establishment of the most accurate version of events of some of the most difficult periods in our collective history.”

John Teerds is the editor of Proctor.
A flood of claims?

Procedural and ethical issues in collective actions¹

The 2012 Queensland floods had a significant impact on many people. Given the numbers affected, one of the obvious legal avenues of redress is a collective action.²

With a collective action pending over flooding in south-east Queensland, it’s a good time to examine the workings of this form of lawsuit in our courts. Report by Francesca Bartlett and Jennifer Corrin.

The 2012 Queensland floods had a significant impact on many people. Given the numbers affected, one of the obvious legal avenues of redress is a collective action.²

This article considers the type of collective action available in Queensland courts, the extent to which solicitors are allowed to engage in advertising for potential claimants, the extent to which commercial funding is allowed, and some questions on related professional ethics.

Class actions, representative actions and group proceedings – what’s the difference?

Damage as a result of the floods may constitute grounds for claims by victims in negligence, breach of contract, breach of statutory duty and/or actions for misleading or deceptive conduct. Allegations of misleading or deceptive conduct would allow application to the Federal Court, while the other grounds would confer jurisdiction on the Supreme Court of Queensland.

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Class actions, representative actions and group proceedings – what’s the difference?

Damage as a result of the floods may constitute grounds for claims by victims in negligence, breach of contract, breach of statutory duty and/or actions for misleading or deceptive conduct. Allegations of misleading or deceptive conduct would allow application to the Federal Court, while the other grounds would confer jurisdiction on the Supreme Court of Queensland.

The court in which action is commenced has implications for a collective action,³ as Queensland has never introduced ‘class action’ legislation as in the federal and some state jurisdictions. The closest equivalent is a ‘representative action’ which is substantively different in terms of its procedural requirements. However, they arguably share similar challenges in relation to professional ethics for lawyers involved in them.

Representative actions differ from class actions in that they may only be commenced by persons representing others who have the same interest and could have been parties in the proceeding.⁴ Despite a broad interpretation of ‘same interest’ by the High Court in *Carrie v Esanda Finance Corp Ltd* (1995) 182 CLR 398, this requirement is still interpreted restrictively by some courts⁵ and may raise problems for flood victims whose interests are unlikely to be exactly the same.

This may be the reason why few collective cases have been brought in Queensland state courts. In contrast, in Victoria a number of large ‘group proceedings’⁶ are being conducted following the findings from the Royal Commission into the Victorian bushfires in February 2009. In these actions, like the federal regime, seven or more complainants may have claims arising out of “the same, similar or related circumstances” which “give rise to a substantial common issue of law or fact”.⁷ There is no need to have a common interest.⁸ Federal (and a number of other states’) class action legislation also provides detailed procedural rules, which are lacking in Queensland representative actions.⁹ For example, federal class action legislation does not require naming all the parties or their consent, making actions an ‘open class’ and its members ‘passive’.¹⁰ However, there are a range of provisions which empower the court to act to protect the interests of those in the class.

In most cases, courts will require those running the claim to release a public notice of the action in the form of a newspaper advertisement.¹¹ There is provision for substitution of a new representative if the existing representative is unable to represent adequately the interests of the group.¹² There are no legislative requirements that representation in Queensland representative actions be adequate or for advertising the claim.

The federal regime also requires the court’s sanction prior to settlement.¹³ This assists in ensuring that any settlement on behalf of represented victims is “fair and reasonable and adequate” and “in the interests of the group members as a whole”.¹⁴ This is clearly important in a system where the lawyers represent potential class members with whom they do not have contractual relationships, and may not even know.¹⁵

An ‘opt-out’ procedure allows members of the group defined in the proceedings to file a formal opt-out notice if they do not want to be included in the proceedings,¹⁶ as occurred in a number of cases concerning the Victorian bushfires.¹⁷ In one case, the Victorian Supreme Court made orders to ‘close’ the class to those registered with solicitors conducting the action.¹⁸ This is permitted under the legislative provisions and has a number of precedents in recent Victorian and Federal Court proceedings.¹⁹
In practice, such class actions arguably become more like the Queensland approach, where the size and composition of the action is determined by the lawyers (and perhaps their funders). Nevertheless, there remain significant differences. The Queensland regime suffers from lack of procedural detail, requires registration of class members with a lawyer and applies a more restrictive test for class membership.

**Lawyers promoting collective claims**

Given the scale of claims under both regimes, and the potential numbers of members in a class, lawyers must find ways to reach people who would otherwise be unaware of their legal rights. In Queensland, there is no procedural requirement to do this in order to commence an action. However, recent cases indicate that lawyers similarly advertise to find potential claimants.

However, there is scant regulation of lawyers’ activities in this area and there have been no cases specifically on point. The Australian Solicitors Conduct Rules 2012 (ASCR), which are intended to apply to all solicitors within Australia, including Australian-registered foreign lawyers (r1.1), impose a number of specific restrictions on practitioners in Queensland promoting their legal services, as well as general duties as officers of the court.

The restriction on advertising is principally set out in ASCR r36, which prohibits false, offensive or misleading or deceptive practices. The ASCR is broader than previous rules to also cover ‘marketing or promotion’, and therefore covers the use of internet, media and direct contact with potential clients. There are also general duties for practitioners to act honestly and reputably (r5); and in the interests of the administration of justice (r3).

In addition, r34.2 prohibits activities to promote legal services which are “likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the instructions are sought.”

Use of community meetings, letter drops to homes or videos with emotive music are just some of the ways in which lawyers have sought to reach potential clients. The limitations on these actions are that they must not oppress or harass people, or be offensive or misleading.

As yet there is little guidance on which activities would be in breach of these rules. The New South Wales Office of the Legal Services Commissioner has recently been considering the use of technologies such as social networking to advertise, which may raise professional ethical issues. The commissioner has not provided any specific guidance on the many new ways to advertise services, including encouraging people to register for membership of a class action.

**Litigation funding given the green light**

Litigation in Australia can be funded by any person or body, except for a lawyer. Historically, under common law, the torts of maintenance and champertys prohibited a third party from funding a suit in which he or she had no interest. As observed in the minority decision in *Campbell’s Cash and Carry Pty Ltd v Fostif* (Fostif),

> “The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties…”

However, the arguments against litigation funding have been outweighed by “the siren call of access to justice.” The majority of the High Court in *Fostif* came down strongly in favour of litigation funders, dismissing the minority’s views as follows:

> “As for fears that ‘the funder’s intervention will be inimical to the due administration of justice’… Why is that fear not sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court’s processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that present rules regulating lawyers’ duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise.”

In *International Litigation Partners Pte Ltd v Chameleon Mining NL*, the High Court overturned the Federal Court’s decision that litigation funders required an Australian Financial Services Licence. Accordingly, a funder may now operate without being subject to any background checks as to status or competency.

However, a new ASIC regulatory guide does emphasise that the funder must establish and observe conflict procedures.

The NSW Legal Services Commissioner has gone further, calling for ethical regulation of lawyers to apply to their funders. It is likely that there will be changes to how funders are regulated, which will have the potential to impact on the conduct and frequency of class actions.
Some ethical questions about lawyers and their funders

Despite internal conflict management systems within law firms and funding organisations, there remains a potential range of ethical pitfalls. The very close alignment of law firms and litigation funders is a relatively new phenomenon. In the proposed flood litigation in Queensland, as in other multi-party actions under the federal and Victorian regimes, commercial funding may limit claimant group members to those who have retained the legal firm conducting the action and/or entered into an agreement with the litigation funder. There are many potential conflicts of interest arising after constituting the class, from negotiating the fee arrangements to settling the claim. We point to a few here. The degree of control exercised by the funder in dealing with clients and conducting the claim raises potential ethical dangers for solicitors acting for the same clients. The lawyers owe contractual and fiduciary duties, duties to avoid conflicts, as well as duties to be (and be seen to be) ‘independent’. Even when the lawyers do not owe direct duties of care to non-clients, there is a larger policy question about facilitating access to justice by which funding is justified.

A related question arises when a funder takes a ‘cut’ of the settlement. Legal practitioners are prohibited from charging ‘contingency fees,’ being a percentage of damages or settlement monies under the Legal Profession Act 2007 (Qld). Lawyers have a duty to be clear about their legal fees and costs, including indicating to the client the right to obtain ‘independent legal advice’ about the arrangement with the funder and to enter any arrangement with ‘informed consent.’ Funders, however, are not covered by these provisions.

The difficulty arises when there is a close relationship between the funders and the lawyers. Indeed, these issues were before the Federal Court in 2013, when it was

Notes
1. Part of this paper is based on a longer article by the same authors which appears in (2013) 87/4 ALJ 250.
3. There are other implications such as the difficulty of when a claim as to a similar matter is brought in different jurisdictions governed by differing regimes. For a comprehensive study of this see: V Morabito ‘Clashing classes down under – Evaluating Australia’s competing class actions through empirical and comparative perspectives’ (2012) 27 Connecticut Journal of International Law 245.
4. Uniform Civil Procedure Rules (Qld), r75.
6. This is the terminology of the Victorian Supreme Court Act 1986 Part 4A, which adopts the federal provisions almost in full. The term ‘class actions’ is used in this paper.
7. Supreme Court Act 1986 (Vic), s33C; Federal Court of Australia Act 1976 (Cth), s33C.
8. Although it is conceded that there have been many challenges to actions brought under this regime as to the basis of the claim and its membership, such as in Wong v Silkfield Pty Ltd (1999) CLR 255.
9. Uniform Civil Procedure Rules (Qld), s75.
11. Federal Court of Australia Act 1976 (Cth), s33X.
12. Federal Court of Australia Act 1976 (Cth), s33T(1).
15. Federal Court of Australia Act 1976 (Cth), s33V and Supreme Court Act 1986 (Vic) s33V. See for instance the decisions as to applications for approval of settlement agreements in relation to Victorian bushfire claims in Merckx v SPI Electricity Pty Ltd [2012] VSC 204, Perry v Powercor Australia Ltd (2012) VSC 113.
16. Federal Court of Australia Act 1976 (Cth), s33L.
17. These are available on the Supreme Court website, which has usefully established a page dedicated to current class actions: supremecourt.vic.gov.au/home/class-actions/.
20. There have been a number of decisions, an Australian Law Reform Report – Grouped Proceedings in the Federal Court Report No.46 – in 1988, and much commentary on this phenomenon and the tension it carries. The public policy of facilitating access to justice appears to be thwarted by this approach. On the other hand, the opt out system allows ‘free riders’ and it is understandable that lawyers and funders wish to minimise risks. Some have proposed the use of a common fund approach which has precedents in North America, and see Pathway Investments Pty Ltd v National Australia Bank Ltd (No.3) [2012] VSC 625, see also Multiplex Funds Management Ltd v P Davidson Nominees Pty Ltd (2007) 164 FCR 275; compare Dongjooy Pty Ltd v Antoecol Leisure Ltd (2005) 147 FCR 394. For a discussion, see Jamah Hoffman-Ekstein ‘Funding Open Classes Through Common Fund Applications (2013) 87 ALJ 331.
21. The ASCR was introduced as law governing Queensland solicitors in July 2013.
asked to make a declaration on whether a funder, Claims Funding Australia, could underwrite an action run by a law firm (Maurice Blackburn Cashman) when a number of the law firm partners were shareholders or directors, and beneficiaries, of the trust.60 Chief Justice Allsop is reported to have said to the parties at a hearing on 22 July: “A fundamental issue is whether [the arrangement places the solicitors] in either an intractable position to the court has been withdrawn.” The application to the court has been withdrawn.

Conclusion

Procedural rules in Queensland have yet to embrace class actions in terms of constitution of classes or setting down specific procedures. Perhaps it is time for this to be reconsidered. However, collective actions of each kind bring with them professional ethical concerns which must also be part of the considerations in adopting a particular approach. The need for clients to exercise ‘informed consent’ in representative litigation must be a central consideration, as must the requirement for lawyers to remain ‘independent’ from their funding partners, at least in respect of professional duties. As the Law Council of Australia concedes, this approach to justice is still a “work in progress.”61

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22 There are further restrictions on lawyers offering personal injury services under Personal Injuries Proceedings Act 2002 s67-68.
23 This is similar to the old Solicitors' Rule r37 1-2. See also provisions of the Australian Consumer Law (Schedule 2 Consumer and Competition Act 2010 (Cth) s118, 29 and 24) which apply to legal services.
24 Direct-Marketing Guidelines issued by the Law Institute of Victoria provide useful best practice for what is described as direct marketing’ lv.asn.au/ PDF/Practising/Ethics/DirectMarketingGuidelines. It should be noted that when advertising for personal injury litigation services, Personal Injuries Proceedings Act 2002 s65 prohibits distribution of flyers at hospitals and related treatments facilities. For other issues related to personal injury matters see the disciplinary prosecution in Legal Practitioners’ Complaints Committee v JLR [2006] WASAT 201 which related to inducing someone to bring a personal injury claim.
28 Clares Keeley v Tracey [2004] 29 WAR 479 [125].
29 [2012] HCA 45.
30 See also Corporations Amendment Regulation 2012 (No.6).
31 ASC ‘Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest’ provides a discussion of conflict searches, but maintains the relatively light touch to regulation of litigation funders. In Victoria, certain conduct standards also catch funders involved in actions in the court under the Civil Procedure Act 2010 (Vic.).
33 For instance, there is an Australian Government Productivity Commission review, Access to Justice Arrangements, which raises this topic.
34 Giannarelli v Wraith (1988) 165 CLR 543; ASCR r17.
35 Lawyers do not owe general duties to the public in terms of assisting access to justice, as was discussed by the Queensland Supreme Court in LSC v Winning [2008] LPT 13. However, lawyers may owe duties of care beyond the terms of a retainer: Hawkins v Clayton (1988) 164 CLR 539.
36 Legal Profession Act 2007 (Qld), s325(1). There have been some calls to lift this ban as in the United Kingdom in 2013.
37 Powell v Powell [1900] 1 Ch 243; Legal Profession Act 2007 (Qld), s328. Legal Practitioners Complaints Committee v Browne [2006] WASAT 201.
38 See Legal Services Commissioner v Dempsey [2009], LPT 20 at [116].
39 This is the general protection offered by regulation for consumers of legal services. In O’Reilly v Law Society of New South Wales (1988) 24 NSWJR 204, 208, Kirby J described this as meaning “full candour and appropriately complete disclosure to the client” by the lawyer.
40 Alex Boscx, “Full Federal Court invoked on law firm’s class action funding”, Australian Financial Review (17 May 2013). It is unclear whether the Federal Court has jurisdiction to hear this matter under a state Act. Justice Cowdry at first instance referred the matter to the Full Court for a date to be decided.
42 Law Council of Australia Position Paper: Regulation of third party litigation funding in Australia; June 2011, 4, 5 citing Stuart Clark and Christina Harris, ‘Class actions in Australia: (Still) a work in progress’ (2008) 31 Australian Bar Review 63.

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A recent decision of the Western Australian Court of Appeal provides a warning to company directors that ignorance of workplace health and safety obligations is no excuse for a failure to meet legislative standards, and that any ignorance may lead to personal liability.

The facts

In Fry v Keating [2013] WASCA 109, an employee of D&G Hoists and Cranes Pty Ltd (the Company) was killed on 9 October 2007 when a pack of crane components, known as an L68 pack, slipped in the course of being lifted and moved at his place of work and hit him in the head.

It was found that there were two methods for lifting the L68 packs – method one which “properly encapsulated all components” and was “the appropriate method to lift L68 packs”; and method two, which “involved securing only the bottom two of the 16 components of the pack [and] was incorrect and dangerous and created the risk of injury or death”.

Despite the yard supervisor being told in October 2004 that method one was the only method to be used to move the L68 packs, method two was used to move the L68 packs on 9 October 2007, which resulted in the fatality.

“The Company was prosecuted for breach of s19 of the Occupational Safety and Health Act 1984 (WA) for allegedly failing to provide and maintain a working environment in which its employees were not exposed to the risk of being injured or killed as a result of being crushed or hit by L68 Pack crane components when they were being lifted, and that that failure caused the death of the deceased”.

Further, her Honour found that “the offence was attributable to neglect on the part of the directors [of the Company] pursuant to s55(1) of the Act”.

The Company was fined $90,000 and the directors were fined $45,000 each. Costs orders were also made.

Subsequently:

1. The Company did not appeal the conviction but appealed the quantum of the fine on the basis of manifest excess.
2. The directors of the Company appealed their convictions and sentences.
3. The prosecutor (Mr Fry) appealed against some of the costs orders.

Decision of Supreme Court

The Supreme Court of Western Australia:

1. dismissed the Company’s appeal in relation to manifest excess although the total fine for the Company and the directors was reduced by apportionment as follows:
   a. the Company to pay a fine of $70,000, and
   b. the directors to pay fines of $10,000 each.
2. dismissed the directors’ appeal in relation to conviction
3. upheld the directors’ appeal in relation to sentencing (see paragraph 1b above), and
4. upheld the prosecutor’s appeals relating to costs.

The directors of the Company and the prosecutor appealed this decision to the Court of Appeal.

Decision of Court of Appeal – directors’ appeal

The directors appealed to the Court of Appeal on the following grounds:

1. “McKechnie J erred in law in finding the directors guilty of neglect attributable to the commission of the Company’s offence when there were no facts or evidence capable of supporting a finding or an inference that they knew or ought to have known of unsafe methods being used on 9 October 2007, the date of the fatality;”
2. “McKechnie J erred in law in failing to require the prosecution to particularise the specific act of neglect of the directors, which was said to be attributable to the commission of the offence by the Company; and
3. “In the absence of the proper application of s55 of the Sentencing Act 1995 (WA), McKechnie J should have found that the sentences imposed on the directors by the magistrate were excessive, having regard to current sentencing practices and the level of culpability attributable to the commission of the offence by the Company.”

In relation to the ground 1 of the directors’ appeal, the court found that the steps taken by the directors (including the oral direction to the yard supervisor in 2004 and the directors’ belief that the yard supervisor would enforce method one), were “inadequate to enable the Company to discharge its statutory obligations with respect to employees in relation to the movement of L68 Pack crane components.” Therefore, in dismissing ground 1 of the directors’ appeal, the court held that the “Company’s failure was attributable to neglect on the part of its directors.”

The court dismissed ground 2 because, in the court’s view, the particulars of neglect were provided.

The court dismissed ground 3 because the directors were each guilty of an offence in their own right and did not deserve a reduction in penalty because the Company committed the offence and each director committed a like offence.
Company directors can be personally liable for safety breaches, in Queensland as in Western Australia, where a workplace death led to substantial fines. Report by Ben Schefe.

Decision of Court of Appeal – prosecutor’s appeal

The prosecutor appealed to the Court of Appeal on the following grounds.

1. McKechnie J erred in law in holding that Mr Keating, Mr Decesare and the Company were joint offenders within the meaning of s55 of the Sentencing Act and could therefore have the fine of one offender apportioned amongst them, and
2. in the alternative, McKechnie J erred in the exercise of his discretion by apportioning the fine.

In upholding ground 1 of the prosecutor’s appeal, the court held that it was the ‘additional act of consent, connivance or neglect that results in the director’s liability; not merely the fact of the director’s legal relationship with the company’.

Since ground 1 was upheld, the court did not consider ground 2.

Conclusion

This case demonstrates that employers need to ensure that their safety systems and risk management procedures are strictly followed, audited and kept up to date in a systematic way. Otherwise, directors and officers risk the imposition of significant fines and penalties against them if their actions or actions by other persons in a company result in an injury to a person or lead to prosecution.

It is important to note that, to date, Western Australia has not adopted the model laws in relation to workplace health and safety. However, statements by the Western Australian government indicate that it is committed to the harmonisation process and intends to adopt the majority of the model laws. In the event that the model laws are adopted, outcomes may be different.

Ben Schefe is an associate at Michael Sing Lawyers.

Notes

1 Fry v Keating [2013] WASCA 109 [18].
2 Ibid.
3 Ibid.
4 Ibid at [3].
5 Ibid at [4].
6 Ibid.
7 Ibid at [8].
8 Ibid at [36].
9 Ibid at [37].
10 Ibid at [49].
### Core CPD Workshop: Building Business Through Referrals

**Law Society House, Brisbane | 8.30–11.55am**

For legal practices, referrals are typically the most common source of new work and offer many advantages in terms of easier conversion and reduced price sensitivity. Few practices, however, can claim to have a clear plan of action for maximising the quality and quantity of their referrals. In this workshop, specifically targeted at sole practitioners and small practice principals, three presenters discuss the steps necessary for ethically and systematically building your practice through referrals.

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The most common issues faced by junior legal practitioners are explored in this workshop, including:

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- ethical considerations especially relevant for early career lawyers.

**3 CPD POINTS**

### Introduction to Wills and Estates

**Law Society House, Brisbane | 8.30am–5pm**

Aimed at legal support staff with less than three years’ experience, this introductory course develops delegates’ knowledge and skills, offering:

- an overview of succession law
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The course is based on the nationally accredited diploma level unit, BSBLEG515A Apply legal principles in wills and probate matters, offered by QLS as self-paced study.

**6 CPD POINTS**

### Webinar: Queensland’s ‘Anti-Bikie’ Laws

**Online | 7.45–8.45am**

Between October and November 2013, the Queensland Parliament passed a ‘package’ of legislative reforms commonly referred to as the ‘anti-bikie’ laws. Presented by criminal law accredited specialist Peter Shields, this session provides an overview of these reforms as well as an insight into the practical application of ‘anti-bikie’ legislation.

**1 CPD POINT**

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**10 CPD POINTS**

### Legal Careers Expo

**Brisbane Convention & Exhibition Centre, South Bank | 12–4pm**

Queensland’s premier legal careers expo puts law students face-to-face with future employers and equips them with all they need to know to launch their legal career.

### Annual Trust Accounts Refresher

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This seminar provides delegates with an overview of common issues in the management of trust accounts, as identified by the QLS trust account investigations team. Delegates are encouraged to bring along their questions on receipting, cheques, cashbook ledger and reconciliation for guidance on correct procedures.

**3 CPD POINTS**
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This core CPD webinar explores the concepts of value and costs consciousness, providing practitioners with a set of tools and techniques to discuss costs more confidently and profitably. Specifically, the session will discuss how to reduce client price sensitivity while reducing the risk of client costs complaints.

Essentials: Introduction to PPSA

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Designed for lawyers with less than five years’ professional experience, this practical session provides you with clarification on the interpretation and application of the Personal Property Securities Act 2009.

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- what property is caught under the PPSA
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- the order of priorities
- how the PPS register works.

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Masterclass: Driving Practice Productivity

Law Society House, Brisbane | 1.15–4.30pm

Increasing practice productivity is one of the quickest ways to improve profitability. Recording an extra 15 minutes of billable time each day can increase typical fee-earner revenue by 5% and profitability by 15% or more. For practices that record time, increasing productivity requires more than just setting increased billable hour targets; it requires sustained practice and principal support.

At the end of this workshop you will be able to:
- better manage client engagement, estimating and costs communication to support higher practice productivity
- maintain personal productivity while still managing the practice
- apply alternative approaches for improving team productivity.

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*Dr John Hewson appears via arrangement with Saxton Speakers Bureau
With an aging population and around one in five Australians impacted by disability, there are significant issues all lawyers must consider, particularly in terms of mental disorders and capacity. Report by William Johns.

Political preferences aside, Julia Gillard and her government put forward one of the most important debates which we never had on the table – the rise and rise of the number of people with a disability.

While the National Disability Insurance Scheme won’t cover everyone with a disability, it will cover a significant number of people. In Queensland alone, it is forecast to cover around 97,000 when fully operational and 410,000 nationwide.1,2 But does this number really reflect the number of people with a disability? The short answer is no. Brace yourself for astounding facts and figures…

A snapshot

Nationwide, we live amongst 4,026,200 people with a disability. That is around 19% of the population or one in five people.3 Granted, this figure also includes disability due to ageing, but this only means one thing: as people grow older, so will the number of people with a disability.4 In fact, this is why the NDIS excludes people over 65.1,2 Queensland has an average rate of disability (around 17%), while Tasmania leads the nation with disability prevalent in more than 21%, mainly due to the average age of residents being around 40.5

The main conditions reported are back problems (15.6%), arthritis (14.8%) and hearing loss (6%). Autism and related disorders also affect 3.2% of the population, followed closely by depression and stroke (3.1%).5

Disability and capacity

Symposium session highlights planning for the disabled
A recent study by the Australian Bureau of Statistics found that 288,348 of our children have a diagnosed disability (7%), with the vast majority having a serious and profound disability.6

A major issue with figures and facts is that they dehumanise the toll disability has on people and their quality of life. We also tend to forget about the carers who are often overlooked but work and fight daily for their loved ones.

### The dignity of risk

The ‘dignity of risk’ refers to the right of individuals to self-govern, even if there is an inherent risk. In a case I was involved in a couple of years ago, a client who suffered from multiple mental illnesses decided to make a will naming her pen-pal in a Californian jail as her sole beneficiary. Her lawyer was reserved, but could do little to stop her.

But why is she any different from one celebrity singer who refused to sign a prenuptial agreement and ended up at the mercy of his partner, eventually paying millions?

### Technical challenges

There is no doubt that when it comes to legal matters, the issue of capacity is probably one of the principal challenges facing a person with an intellectual disorder or mental illness.

---

**William Johns and Sharon Winn**

will present ‘Estate planning for the disabled’ in the succession stream at QLS Symposium 2014 this month.

Sharon is a special counsel at Paxton-Hall Lawyers and William is a certified financial planner (CFP®) and founder of Health & Finance Integrated.

He is recognised as an industry leader in the areas of disability, chronic illness and ageing, and has received numerous awards, including a Financial Planning Association of Australia Best Practice Award (CFP Professional Category) NSW.

William, who holds a business degree in applied finance and financial planning, is completing a masters degree in disability studies. He works with and consults to law firms, health professionals and carers to provide superior outcomes to clients and families with complex and special needs.

He is a director of a number of not-for-profit organisations specialising in health care provision and intellectual disability, and is passionate about helping people at risk of being devalued.

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However, at the end of the day, people are people and we still need to take instructions, albeit a higher duty of care is required.

In Ryan v Public Trustee [2000] 1 NZLR 700, the Public Trustee was sued successfully for failing to prepare a will for an elderly testatrix when her capacity was in doubt. The court found there was a duty to investigate testamentary capacity by consulting the testatrix’s doctors if necessary and relying on medical evidence to establish her capacity. Otherwise, the client is deprived of the opportunity of making a possibly valid will.7

In another case, Public Trustee v Till [2002],8 the judge confirmed the obligation of a solicitor to take instructions and only decline in exceptional circumstances “where the client is so obviously lacking in mental capacity that the instructions are not truly instructions at all [26].”

Dependence and fraud

By the time you and I are 90, research suggests we have an 88% chance of being classified as disabled and dependent on others (higher for women).3

This will also mean we will be at a higher risk of being defrauded by people we rely on. It is not always our carers or family, but it could be retailers, bankers, sales people, or the nice neighbour who keeps the spare key in case we get locked out. The bottom line is that there is a strong relationship between disability, dependency and fraud.

According to the Australian Institute of Criminology, financial abuse is an area of particular concern, especially changing wills to benefit specific individuals.9 While we usually associate such abuse as being within the family, the report warns that health care providers and medical practitioners may have strong influence over a person. As a person in charge of my client’s financial affairs, I do my best to familiarise myself with my client’s spending patterns and environment to try to work out where the potential risks are, and report to estate planning lawyers and others (such as social workers) accordingly.

One fifth is not ‘niche’

We need to accept that serving a large community of four million people is not working within a ‘niche’; we are simply serving people who require a higher level of understanding and perhaps technical ability, but mainly compassion. I encourage professionals to look at the issues seriously, and contribute positively. Understanding and familiarity does start with educating one another. To me, the principle worry is not the ‘dignity of risk’, it is the ‘risk to our dignity.’

Notes

1 PricewaterhouseCoopers, Disability Expectations: Investing in a better life, a stronger Australia, Sydney, PWC, 2011.
6 Australian Social Trends: Children with Disability, Canberra, Australian Bureau of Statistics podcast, June 2012 (4102.0).
8 Public Trustee v Till, 2 NZLR 508, 2000.
Review of the Births, Deaths and Marriages Act 2003

‘De facto’ definition needed

In early December 2013 the Attorney-General invited Queensland Law Society to participate in the public consultation review of the Births, Deaths and Marriages Act 2003 (Qld) (the Act).

The public consultation was led by the Department of Justice and Attorney General and aimed to determine the key issues that should inform the consultation paper.

In our submissions, we highlighted a number of issues that should be considered in the review, including:

- revising the definition of ‘relative’ to include de facto partnerships and registered relations
- reviewing the broad legal definition of ‘de facto’, including a definition in the Act and setting out how one may establish a ‘de facto’ status
- defining ‘registered relationships’ and setting out how they may be established and recognised throughout the corresponding states and territories
- considering the difficulties and legal implications encountered for children whose births have not been registered
- reviewing the Births Deaths and Marriages register searches
- investigating a facility for interstate searches and cross-referencing
- updating and reviewing births, deaths and marriages forms.

The consultation paper is due for release this year.

Penalties and Sentences (Indexation) Amendment Bill 2013

‘Penalty unit indexation ‘not the answer’

On 19 November 2013, the Attorney General introduced the Penalties and Sentences (Indexation) Amendment Bill 2013, which will create a yearly increase in the value of the penalty unit.

The Bill was referred to the parliamentary Legal Affairs and Community Safety Committee, which then called for submissions on the Bill.

We said that we considered the current existing ad hoc method for the increase in the penalty unit value should remain, noting that this is comparable to the legislation for the Commonwealth, New South Wales and ACT. We also suggested that an alternative solution would be to ensure that the value of the penalty unit was reviewed at regular intervals, without necessarily prescribing an automatic annual increase.

We noted that, in practice, the proposed method would have a substantial impact on the penalty for offences which have a high prescribed maximum penalty unit. For example, the offence of ‘carrying out particular development without resource allocation authority’ in the Fisheries Act 1994 has a maximum of 3000 penalty units. With a 3.5% increase over 10 years, this would raise the value of the penalty from $330,000 to about $449,550. This type of substantial increase may not be in line with the expectation of the maximum penalty when the Act was drafted.

We also noted concern with the lack of criteria for determining the percentage change each year. This may be inconsistent with the stated goal for the legislation to provide “a level of certainty in relation to potential changes”.

Also, we noted there could be confusion, given that different penalty units may be prescribed with each rate potentially changing on an annual basis.

Finally, we suggested there were other costs linked to the criminal justice system which could be subject to indexation or regular review (such as the scale of costs in the Justices Regulation 2004).

The committee was due to report on the Bill by 3 February.
Electoral Reform Amendment Bill 2013

Electoral identity check ‘disproportionate’

The Electoral Reform Amendment Bill 2013 was introduced into Parliament on 21 November 2013 and referred to the Legal Affairs and Community Safety Committee for review.

The Bill seeks to “amend the Electoral Act 1992 to ensure the opportunity for full participation in Queensland’s electoral process and to enhance voter integrity and voting convenience.” To this end, the Bill proposes, among other things, to introduce a proof of identity requirement to vote in a state election.

In any event, we believe the proposed amendments to be contrary to the government’s commitment to reduce red-tape in that the proposed overhaul of regulation of this fundamental aspect of civic duty would require a substantial education campaign, creation of new procedures and training for Electoral Commission Queensland.

We wrote to the committee and asked for clarification on the types of documents that may be used as proof of identity by voters. We noted that a number of individuals will not have the ability to obtain proof-of-identity documents, photographic or not, and will therefore face direct discrimination and exclusion from services and opportunities through no fault of their own.

We said that consideration had to be given to ensuring that any identity documents were easily accessible and widely available to reduce the risk of disfranchisement. We also noted that the practical difficulties associated with some forms of identification had to be recognised, for example, a person without photographic identification could prove who he or she was merely by showing a Medicare card.

In any event, we believe the proposed amendments to be contrary to the government’s commitment to reduce red-tape in that the proposed overhaul of regulation of this fundamental aspect of civic duty would require a substantial education campaign, creation of new procedures and training for Electoral Commission Queensland. It could also be foreseen that waiting times to vote will increase to ‘check’ the forms of identification. Given that “there is no specific evidence of electoral fraud in this area”, we agreed with the discussion paper on electoral reform issued by the Department of Justice and Attorney General that “introduction of proof of identity requirements could be considered a disproportionate response to the risk.”

Instead, we consider that “issues surrounding a person’s entitlement to vote should be resolved at the enrolment stage”, as suggested in the discussion paper.

Patrise McVeigh is a member of the QLS advocacy team.

Notes
1 Stated on page 1 of the Explanatory Notes under ‘Policy objectives and the reasons for them.’
4 Ibid.
Terminating a retainer

Make your reasons crystal clear

by Stafford Shepherd

In *The Trust Company (PTAL) Pty Ltd v Romeo (No.4)*, Schmidt J had to consider a solicitor’s application for leave to file a notice of ceasing to act and to withdraw from the proceedings.

The cost agreement entitled the solicitor to file a notice of ceasing to act if the client:

- unreasonably refused to act in accordance with the solicitor’s advice, or
- an amount in excess of $1000 in respect of any account was outstanding for more than 30 days, or
- the client didn’t, within seven days, comply with a request to pay a disbursement or a prepayment.

At the time the solicitor made the application, he was owed more than $100,000 in legal costs and disbursements in the proceedings.

In accordance with the cost agreement, the solicitor filed and served a notice of intention to file a notice of ceasing to act on number of occasions.

After these notices were served, the solicitor and client agreed that he would continue to act for the client provided that $105,000 ($80,000 for counsel and $25,000 for the firm to conduct the hearing of the proceedings) was deposited into the firm’s trust account (to cover disbursements)

The client opposed the application. He contended that he should not be left unrepresented when he had been paying the solicitor $3000 a week, money which ought not to have been taken if the solicitor intended to withdraw. The solicitor’s position was that these amounts were paid to off what was owing in respect of other matters in which he had acted for the client.

Justice Schmidt noted “that a client’s failure to provide money for costs and disbursements can be an appropriate basis upon which the leave which is sought may be granted”.

In *Super 1000 Pty Ltd v Pacific General Services Ltd* (Super 1000), Gzell J held that:

“… a failure by a client to provide funds to cover disbursements is good cause for termination of a retainer ([Wadsworth v Marshall (1832) 2 Cr&J 665 (149 ER 2 79) (Wadsworth), Robins v Goldingham (1872) LR 13 Eq 440, Warmington v McMurray (1937) 2 All ER 562 .].”

In *Wadsworth*, Bayley B said:

“[a solicitor] has a right to call upon the client from time to time, on reasonable notice to make advances, and, for the purposes of taking the cause to trial, to supply him with adequate funding [to pay] the expense out of pocket.”

In *Super 1000*, Gzell J also noted that Ritchie’s Uniform Civil Procedure New South Wales stated that: “[W]here a solicitor is prevented by the client from properly carrying out the duties required by the retainer good cause for termination is established (Underwood, Son & Piper v Lewis (1894) 2 QB 306 at 314) (Underwood).

“In Underwood”Al Smith LJ said: “… it is clear that the solicitor may be placed in such a position by the client as to absolve him from further performance … the client may put the solicitor in such a position as to entitle him to decline to proceed; for instance, if the solicitor asks for necessary funds for disbursements, and such funds are refused by the client, the solicitor is not bound to go on … the solicitor is not bound to go on acting for the client if the client insists on some step being taken which the solicitor knows to be dishonourable … [or] when a solicitor is in a position to show that the client has hindered and prevented him from continuing to act as a solicitor should act, then upon notice he should decline to act further .”

Schmidt J held that the solicitor was justified in ceasing to act. The evidence established ongoing attempts to secure necessary funds and that he was not dilatory.

Matters to consider include:

1. Review cost agreements to expressly provide for a right to terminate where:
   - The client has, within a specified time, failed to comply with a request to pay a disbursement or provide adequate advances for disbursements and out-of-pocket expenses.
   - A client insists on some step being taken which in the solicitor’s opinion is dishonourable.
   - The client hinders and prevents the solicitor from continuing to act as he or she should act, or unreasonably refuses to act in accordance with your advice.

2. Do not be dilatory in your pursuit of the client putting you in funds to cover future costs and disbursements.

3. Act promptly on breaches and give clear notice (remember, a reasonable time is required to be given).

4. Do not delay in seeking to extract the necessary funds as dilatory behaviour may lead the court to conclude that reasonable notice has not been given.

Stafford Shepherd is Queensland Law Society senior ethics solicitor.

Notes
2. At [8].
4. (1832) 2 Cr&J 665 (149 ER 279).
5. Words inserted.
6. Super 1000 at [14].
7. Underwood at p 314.
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I am a senior associate in a defendant insurance practice. I have two children under three and work four days a week.

My current flexible arrangements work because of the attitude that the partners of my firm and the other employees take to my flexibility. Nothing is too difficult; there is open communication and the partners are very understanding of my need to balance the needs of my family (and my desire to be with them) with my desire and willingness to be a contributing member of the firm.

My manager is happy to call me on the days I am not in the office to discuss any urgent work or anything happening on my files. The solicitors and administrative staff that I work with also feel comfortable contacting me. I have a good support person who manages my diary, and our clients are aware of my flexibility and happy to schedule meetings on the days I am working.

I have never had any negative feedback from clients or from those with whom I work. I am available to deal with urgent issues on the days that I am not working, but this rarely happens.

I joined my current firm after a disappointing and difficult return to work at my last law firm following my first period of maternity leave. Some examples about the way my work changed as a result of my maternity leave and return to work are:

1. On my first day back in the office after my maternity leave (I was working three days a week in the office initially, increasing to four days a week when my child turned one):
   a. My manager was informed of my return to work date but did not inform anyone in my team.
   b. I went to my office and discovered that all of my belongings had been moved and someone else was using it.
   c. I was allocated a spare office with no computer, phone, chair, stationery or files.
   d. I was not allocated any files for the first week, which caused me considerable anxiety about how I would meet my budget and satisfy targets for billable hours.

2. I was given less work to do and therefore on the days that I was working I was not gainfully occupied.
3. Regular team meetings were scheduled on the days that I was not at work.
4. The space provided to express breastmilk was unsuitable because other employees used it to store their lunch and I would be interrupted while trying to express. I then began to express by sitting on the floor in the shower room.

I raised concerns about the space provided for expressing and although other staff were directed not to use the fridge, in practice they continued to do so. At my performance review I complained to my supervisor and human resources manager about the way that my return to work had been managed.

My supervisor acknowledged that my return to work had not been well organised, and apologised for what he described as a breakdown in communication. By that time, however, I felt that the relationship could not be repaired. I resigned my position shortly thereafter.
This lawyer’s return from maternity leave was a nightmare. However, because of a new employer who showed understanding and flexibility, her story has a happy ending.

When I interviewed with my current firm, I was upfront and advised that I intended to have another child. The response during interview was positive. My supervisor said that he was happy to accommodate a period of maternity leave and that there would be ample work for me up to any period of leave and when I wanted to return.

I started working three days a week and within five months I had fallen pregnant. I then began working four days a week and continued to do so until my second child was born. Originally I intended to have five months of maternity leave, but while I was on maternity leave our firm became quite busy and my partner contacted me to ask if I would be interested in coming back to work earlier than I had otherwise anticipated. He made me completely at ease and impressed on me that I should feel no pressure to come back early, but if I wanted to, he would like to facilitate an early return to work for me.

I told him I would be happy to return to work earlier than I had anticipated but that, in order to make the arrangement work, I would need the following things:

a. A dedicated support staff person. The firm operates on a typing pool arrangement so there is no dedicated assistant or secretary for each lawyer. In order to make the flexibility work, I needed somebody in the firm every day that I could trust to take messages for me, manage my mail and manage my diary.

b. A place to be able to express or breast feed privately.

c. If I was to work in the office, my daughter would need to accompany me.

d. I would need remote access to our systems.

My employer agreed quickly to all of these requirements, modifying my office with shelving along a window for privacy and providing appropriate administrative and IT support. I returned to work in the office two days a week when my daughter was eight weeks old. My daughter accompanied me to work until she started daycare at five months old. At the same time I increased my workload to four days a week.

Now that my children are in daycare, I share pick-up and drop-off duties with my husband. On the days that I pick them up, I finish work at 4.30pm.

Because I practise in litigation, there are times when I will have to be available on days I would not normally be working, for example, on court hearing dates and if trials are set down for a week or more. At those times I will either swap my usual working day for the court hearing day or, if I have to work a full week, I do so and then am paid on an hourly rate. Otherwise I am paid a pro-rata of my salary.

Previously I travelled regularly to Cairns, Mackay, Townsville and Rockhampton for trials and other work. Now (where possible) my partner allocates me Brisbane-based work, which will hopefully reduce the number of nights that I am away from home this year.

I feel very connected and loyal to my firm because of the consideration and support they have given me. With their help I have been able to strike a good balance between work and family. I have been able to keep my skills up to date, make a meaningful contribution to the firm and progress my career while caring for two small children. I could not imagine working anywhere else.

The Queensland Law Society flexibility working group needs your story. Please contact flexibility@qls.com.au and share your experiences with flexibility in the legal profession.
Setting aside default judgment

If a plaintiff obtains default judgment in the state courts, then pursuant to rule 290 Uniform Civil Procedure Rules (UCPR), the defendant to the proceeding may apply to the court for orders setting aside or amending that judgment.

The judgment, and any enforcement of it, may be set aside or amended on terms including terms about costs and the giving of security, as the court considers appropriate.

It is first important to determine whether the default judgment is regular or irregular.

In the event judgment was irregularly entered, the defendant is entitled to have it set aside as of right.1 However, if regularly entered, the court has a wide discretion whether or not to set the judgment aside.2

Judgment regularly entered

A judgment is regularly entered if the plaintiff has complied with the UCPR and, on the face of the pleadings, has an entitlement to the relief sought.

Under rule 290, the court has a wide discretion as to whether or not to set the judgment aside.3 However, in the exercise of that discretion, the courts have identified a number of relevant considerations, namely:

1. whether there is a satisfactory explanation for the defendant's failure to appear
2. whether there was delay in making the application to set aside the judgment, and
3. whether the defendant has a prima facie defence on the merits.4

It is not necessary that the applicant satisfy each of the three considerations before the court's discretion can be exercised, as the discretion is unconditional and the considerations merely operate to guide the court.5

Notably however, of the guiding considerations, whether the defendant has a prima facie defence on the merits is the most cogent.6 Indeed, the Supreme Court has noted that “it is not often that a defendant who has an apparently good ground of defence would be refused the opportunity of defending, even though a lengthy interval of time had elapsed provided that no irreparable prejudice is thereby done to the plaintiff”.7

Explanation for failure to appear

The defendant ought to be able to “demonstrate a very compelling reason for the failure to appear”.8 That is, there must be material before the court indicating how the defendant came to be bound by the judgment and the court will usually take note of the conduct of the defendant and, if relevant, the defendant’s legal advisors. An explanation for the failure to appear will typically be accepted unless there has been a "contumelious disregard of the process of the court".9

By way of example, that the managing director of the defendant was very busy dealing with the business of other companies was not considered a satisfactory explanation for the failure to appear.10 However, the defendant’s mistaken belief that the plaintiff had accepted a repayment proposal;11 that the defendant attempted to file documents in response to the claim, but the documents were rejected by the registry;12 or that the defendant was suffering from a critical illness13 may, in the circumstances of the particular case, prove a satisfactory explanation for the failure to appear.

Delay in making the application

As with an explanation for failure to appear, there is no definitive test as to what will constitute a satisfactory explanation for the defendant’s delay in the circumstances. It will depend on the circumstances of each case.

By way of illustration, a delay of nearly 14 months did not prove sufficient delay to justify dismissal of the defendant’s application in circumstances in which the defendant was found to have a defence on the merits.

Importantly, however, the real focus is on the prejudice, if any, caused by the delay, and whether that prejudice can be adequately compensated by a suitable award of costs.14

The court will consider the prejudice suffered by the plaintiff by reason of the delay compared to the prejudice suffered by the defendant if the judgment is not set aside.15

It may also be relevant if the delay has prejudiced the rights of a third party who may wish to intervene.

The Court of Appeal has noted that, if there is a finding the defendant has a defence on the merits, the courts will be reluctant to dismiss the application for delay by reason that it is “an unusually heavy sanction”.

Prima facie defence on the merits

It is necessary that the defendant, when applying under rule 290 to have a regularly entered default judgment set aside, demonstrates there are real and substantial issues or questions in dispute, or a serious point of law which ought to be tried.17 That is, the defendant must show that it has an arguable defence on the merits.18

The alleged defence must be more than a bare allegation; rather, it “must be supported by some reference to evidence to suggest that the defence is plausible and not just
Last year, Kylie Downes QC and Kirsty Gothard examined the process for obtaining a default judgment under the Uniform Civil Procedure Rules (Proctor June 2013, page 40). This article explains how that judgment may be set aside.

Terms including costs and the giving of security

If the judgment was regularly entered and set aside, the defendant will usually be required to pay the plaintiff’s costs of both obtaining the judgment and the application to set the judgment aside.\(^{10}\)

If the judgment was irregularly entered, the plaintiff will usually be required to pay the defendant’s costs of the application.

The court may also order as a condition for setting aside the judgment that the defendant be required to provide security in respect of the judgment amount.

Notes

1. Embrey v Smart & Anor [2013] QSC 241 at [41] and [54].
2. Cook v D A Manufacturing Co Pty Ltd [2004] QCA 52 at [18] and [22].
4. Rule 38B UCPR.
5. Business National Pty Ltd v Matherson & Anor [2013] QDC 4 at [7].
16. Yankee Doodles Pty Ltd v Blemvale Pty Ltd [1999] QSC 134 at [22].
17. Yankee Doodles Pty Ltd v Blemvale Pty Ltd [1999] QSC 134 at [18].
18. Treneski v The Irish Bar and Restaurant Company Pty Ltd [2006] QDC 007 at [39].
24. Yankee Doodles Pty Ltd v Blemvale Pty Ltd [1999] QSC 134 at [22].
28. Yankee Doodles Pty Ltd v Blemvale Pty Ltd [1999] QSC 134 at [14].
Exercise book notes = informal will

Estate of Laura Angius; Angius v Angius [2013] NSWSC 1895

With a fact matrix worthy of a Hollywood script, this decision spectacularly demonstrates the importance of advising clients to bring to the court’s attention any document that may contain testamentary expressions.

The facts include a $17 million estate, estranged siblings, family law property proceedings, dismissal of the legal team mid-trial, allegations of family violence, a suspicious death, a coronial enquiry with an open finding, proceedings, dismissal of the legal team mid-trial, allegations of family violence, a suspicious death, a coronial enquiry with an open finding, a homicide investigation and an exercise book with notes written by the deceased in Italian.

It is a decision of his Honour Hallen J traversing some 293 paragraphs, which very much turned on the evidence.

The deceased was an Italian woman, Laura Angius, who “was found dead at the bottom of the stairs of her home on 4 January 2012.”

The deceased then consulted another solicitor at the firm, Mr Vlahakis, on 15 December 2011, at which time she gave instructions for a new will. It was agreed the deceased had the exercise book with her when she saw Mr Vlahakis, who noted the deceased’s instructions. The file note indicated clear instructions as to the terms of the proposed will. After the appointment Mr Vlahakis sent an internal email to another solicitor within the firm setting out in greater detail the terms of the proposed will, but those instructions were never finalised.

The court was critical of the solicitors’ lack of co-operation and said that it had added to the time and cost in the proceedings. Ultimately Mr Vlahakis gave evidence. He recalled the deceased having the exercise book with her at the appointment and that she dictated to him from the notebook, translating her Italian notations to English. Of import was Mr Vlahakis’s evidence that the deceased was adamant she would not make a will until her matrimonial matter was resolved, and with that her statements to third parties that she had made a will.

The court was critical of the solicitors’ lack of co-operation and said that it had added to the time and cost in the proceedings. Ultimately Mr Vlahakis gave evidence. He recalled the deceased having the exercise book with her at the appointment and that she dictated to him from the notebook, translating her Italian notations to English. Of import was Mr Vlahakis’s evidence that the deceased was adamant she would not make a will until her matrimonial matter was resolved, and with that her statements to third parties that she had made a will.

Having considered the admissibility of hearsay evidence of statements made by the deceased and weighing the evidence of witnesses, Hallen J’s interpretation of that evidence was that the deceased did not intend to make a formal will – in the meantime she had prepared an informal will in Italian written in the exercise book.

Hallen J analysed the applicable legislation with extensive regard to case law, emphasising that he did not intend the reference to statements in the various cases to be “elevated to into rules of law, … merely as providing useful assistance in considering the statutory provisions, the terms of which must remain firmly in mind.” He ultimately found the undated document contained in the exercise book was the deceased’s will.

Approval of newspapers for publication of notices of intention to apply for a grant

A new Supreme Court of Queensland practice direction extends the list of newspapers approved by the Chief Justice for the publication of a notice of intention to apply for a grant.

Practice Direction 2 of 2014 repeals practice Directions 25 of 1999 and 32 of 1999. There are now 33 newspapers in which the advertisement may be published. Notably, the list includes both paid and free newspapers.

Will making & contesting study

The Australian Research Council is undertaking a study on will making and contestation by developing a national database on who does and does not make a will and why wills are challenged in the legal system.

The database will be based on survey results from solicitors and others with experience in drafting wills. For more information and a link to the survey, see liv.asn.au/PDF/ENews/Friday-Facts/2013-Australian-Research-Council-study.

Christine Smyth is a Queensland Law Society accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council, QLS Succession Law Committee, STEP (Qld) committee and the Proctor editorial committee.

Notes
1 At [19].
2 At [108]-[119].
3 At [235]-[279].
4 At [278].
5 Thank you to Jeneve Frizzo for bringing this to my attention.
New sites enhance content and services

sclqld.org.au
legalheritage.sclqld.org.au

After much anticipation, the Supreme Court Library has launched its new website, with an associated site dedicated to the Sir Harry Gibbs Legal Heritage Centre.

For our regular users, this means enhanced access to library services and content, with clear navigation and a streamlined layout. In particular, you will notice changes to the library’s judgments services pages, which have now been consolidated under the ‘Caselaw’ menu heading on the primary navigation bar on the home page.

You can find decisions using a keyword search function or browse a list of decisions by court or tribunal. Our related services – including the Queensland Sentencing Information Service, Queensland legal indices, UCPR Bulletin and Criminal Codes appellate decisions – can all be found under the ‘Caselaw Plus’ tab.

‘Information for: Legal Profession’ on the homepage will connect you to essential services and products, including our document delivery and research service, the latest editions of the Queensland Legal Updater email bulletin and upcoming training events.

The more visible ‘Judicial Papers’ link is another useful service, offering a searchable database of articles and speeches delivered by members of the judiciary. Users can also link from this service to biographical information on each of our judges – past and present – as well as serving magistrates.

Regular users may also notice that some of our content has moved to the new Sir Harry Gibbs Legal Heritage Centre site. Here you will find:

- information on our exhibitions
- a timeline of Queensland legal history
- Information on significant items in the library’s legal heritage collection
- details of Supreme Court Library publications
- the schools and community visit booking calendar.

As with all our products and services, we greatly value feedback and suggestions from users on the new websites and their content. If you need any assistance locating information, please contact us via the phone number or email below.

For those who have not yet registered as library users, please do so to enjoy the full range of benefits that your QLS member library has to offer.

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New book

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“‘This unique work from the Library of the Supreme Court of Queensland consists of a number of essays by prominent lawyers (judges, academics and practitioners) with each essay considering one of the five volumes of Finnis’ collected works. The essays are not mere summaries of the Finnis’ arguments. They are insightful analyses of his writings and theories by persons who were and are well acquainted with Finnis. It is possible to consider the work as an ‘Introduction to the works of John Finnis,’ but only in the same way that Peter Birks’ work was misstated by its title, ‘Introduction to the Law of Restitution’.”

The book can be ordered from the Supreme Court Library on 07 3247 9102 or via sclqld.org.au.
When two wrongs don’t make it proportionate

Pleading – defence of proportionate liability under the *Civil Liability Act 2003* (Qld) – loss-causing acts and omissions of wrongdoers the same – whether concurrent wrongdoers – whether defence disclosed no reasonable ground of defence

In *Hobbs Haulage Pty Ltd v Zupps Southside Pty Ltd* [2013] QSC 319 Jackson J considered the application of the concurrent wrongdoer provisions of the *Civil Liability Act 2003* (Qld) (CLA).

Facts

The plaintiff, Hobbs Haulage Pty Ltd, purchased a new truck from the defendant, Zupps Southside Pty Ltd. The contract required that certain modification work be undertaken to the specifications for the truck. The defendant subcontracted the modification work to the third party, Trakka Pty Ltd.

The plaintiff alleged breaches of conditions as to fitness for purpose or merchantable quality implied by the *Sale of Goods Act 1896* (Qld) and by the *Trade Practices Act 1974* (Cth). To the extent that the contract was one for the supply of services, there was also an allegation of breaches of the warranty implied under the *Trade Practices Act 1974* (Cth) that services would be rendered with due care and skill.

The defendant joined the third party, seeking damages for breach of contract in the sum of the defendant’s liability, and also claiming damages for negligence. The defendant pleaded by way of defence to the plaintiff’s claim that its liability, if any, to the plaintiff, should be reduced to nil because of the proportionate liability defence under s31 of the CLA.

The defendant alleged, in particular, that its liability, if any, to the plaintiff for breach of contract, was an “apportionable claim” within the meaning of s28(1)(a) of the CLA. Further, it was alleged that the third party owed an independent duty of care to the plaintiff to perform the modification work with due care and skill; that the third party had negligently performed the modification work and thereby caused the plaintiff loss and damage, and that the third party was a concurrent wrongdoer within the meaning of s30(1) of the CLA.

The plaintiff applied under rule 171 of the *Uniform Civil Procedure Rules 1999* (Qld) for an order striking out those paragraphs of the defence relating to the proportionate liability defence on the ground that they disclosed no reasonable ground of defence.

Legislation

Section 28(1)(a) of the CLA provides:

1. This part applies to either or both of the following claims (apportionable claim)—
   a. a claim for economic loss or damage to property in an action for damages arising from a breach of a duty of care;
   b. a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or
   c. another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b).

   duty means—
   a. a duty of care in tort; or
   b. a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or
   c. another duty under statute or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b).

   duty of care means a duty to take reasonable care or to exercise reasonable skill (or both duties).

Section 30(1) of the CLA provides:

30 Who is a concurrent wrongdoer

A concurrent wrongdoer, in relation to a claim, is a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim.

Section 31(1)(a) of the CLA provides:

31 Proportionate liability for apportionable claims

1. In any proceeding involving an apportionable claim—
   a. the liability of a defendant who is a concurrent wrongdoer in relation to the claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just and equitable having regard to the extent of the defendant’s responsibility for the loss or damage;

Analysis

Jackson J found that none of the plaintiff’s claims for damages for breach of any implied condition as to fitness for purpose or merchantable quality was an “apportionable claim” within the meaning of s28(1)(a) of the CLA, because none of them was a claim arising from a duty to take reasonable care or to exercise reasonable care or exercise reasonable skill.

Jackson J questioned whether the plaintiff’s claim for damages for breach of the implied warranty that services be rendered with due care and skill was an “apportionable claim” within the meaning of section 28(1)(a). His Honour accepted that a promisor’s contractual obligation to render services with due skill and could be a “duty of care” within the definition in schedule 2 and s28(1)(a) of the CLA, provided that the obligation was a duty within the meaning of the definition of “duty” in schedule 2 and s28(1)(a).

This required that the duty be coextensive with a duty of care in tort. His Honour expressed some reservation about whether this was the case here, but it was not necessary to decide the issue because the plaintiff did not lead arguments in the negative.

The plaintiff accepted for the purposes of the application that it was reasonably arguable that the third party owed a duty of care to the plaintiff for the tort of negligence. However, the plaintiff submitted that the third party was not a “concurrent wrongdoer” within the meaning of s30 of the CLA in relation to a single apportionable claim because it was not a person whose acts or omissions caused the loss or damage that was the subject of the claim, independently of acts or omissions on the part of the defendant.

It was contended in that context that the defendant had not pleaded any acts or omissions on its part which were independent of the acts or omissions pleaded against the third party. This was because the defendant’s liability, to the extent that it was liable for failure to render any services with due skill and care under the contract, was for the same acts or omissions which caused the loss or damage for which the third party was alleged to be liable to the defendant. The plaintiff relied in support of its submission on *Hunt & Hunt v Mitchell Morgan Nominees* (2013) 87 ALJR 505 and *Seiris v Bengston* [2013] QSC 240.
Jackson J considered in particular the decision in Seirlis v Bengston [2013] QCA 240 and that in Tomasetti v Brailey [2012] NSWCA 399 which it followed. In each of these cases it was determined that the loss-causing omissions of each wrongdoer were the same. Accordingly the provisions in question, which relevantly correspond with sections 30 and 31 of the CLA, did not apply. His Honour agreed with the plaintiff’s contention, and concluded that where putative “concurrent wrongdoers” are each liable to a plaintiff for the same acts or omissions, because one is vicariously liable to the plaintiff for the wrong of the other, they are not “concurrent wrongdoers” within the meaning of section 30(1).

The defendant sought to raise an alternative argument that, for the purposes of considering a defence of proportionate liability, the relevant “apportionable claim” was one which had not been made by the plaintiff against the third party. Jackson J rejected this. His Honour found it to be clear from the structure of sections 28-31 of the CLA that the potentially apportionable claim must be examined in the context of the allegations made by the plaintiff against the defendant.

Order
The plaintiff’s application succeeded, and the paragraphs of the defence which raised the defence of proportionate liability were struck out.

Comment
It is clear as a result of this decision that a defence of proportionate liability may not be raised by pleading that a third party contractor is a concurrent wrongdoer. This will be the position whenever putative “concurrent wrongdoers” are each liable to a plaintiff for the same acts or omissions because one is vicariously liable to the plaintiff for the wrong of the other. In any such case there is no separate cause of the loss or damage as between the acts or omissions of one and the acts or omissions of the other.

It is worthy of note that Jackson J remarked in the course of his judgment that the same conclusion may or may not apply to defendants who are each liable to a plaintiff as joint tortfeasors for other reasons, such as comprising a joint enterprise. His Honour also recognised, though without identifying particular examples, that there may be other circumstances in which two or more persons are not “concurrent wrongdoers” because their acts or omissions do not, independently of each other, cause the loss or damage that is the subject of the claim.

Sheryl Jackson is an associate professor at the QUT School of Law. The Queensland Law Society Litigation Rules Committee welcomes contributions from members. Email details or a copy of decisions of general importance to s.jackson@qut.edu.au.
In the emerging area of animal law in Australia it is always exciting to welcome a new resource that promises to assist lawyers, investigators and others dealing on a daily basis with animal abuse. It is even more exciting when that publication has a distinctly local flavour.

Catherine Tiplady has managed to deliver just such a resource in *Animal Abuse – Helping Animals and People*. With an introduction by respected animal welfare researcher Professor Clive Phillips and contributions from a wide array of brilliant minds including animal lawyers Allie Phillips and Tracy-Lynne Geysen, veterinary forensic scientist Dr David Bailey, animal behaviourist Dr Cam Day, special animal crimes investigator Jenny Edwards and veterinarian forensic scientist Dr Michael Byrne QC, this book is one that certainly keeps its promise.

After several years working as a veterinarian in an animal welfare organisation and volunteering in the RSPCA Queensland call centre on her days off, the author became disillusioned and emotionally fatigued by the instances of animal abuse she was exposed to on an almost daily basis. She pinpointed as one of the underlying problems the lack of support and guidance for veterinarians dealing with this issue and the failure of universities to educate veterinary students in this area and acknowledge the valuable role vets could play given the undeniable connection between animal abuse and human interpersonal violence. Tiplady resolved to produce a book that would assist others facing the same despair and support them to continue fighting the ‘good fight’ for animals.

Published in 2013 by CAB International, this book is the product of the author’s resolve to fill a gaping void for those who work closely with animals and encounter animal abuse as part of their paid or voluntary work. However, in the process she has produced a very convenient resource to assist investigators and lawyers to deal with animal abuse from a legal and social perspective.

Tiplady approaches the difficult subject matter from various and unique perspectives, providing readers with a refreshing real world overview of the emerging trends in animal welfare and some valuable insights into the social context of animal abuse and the mindset of both the abuser and those who act and care for the victims.

The opening chapters address definitions, histories and reasons why people either abuse or care for animals. But the book moves quickly to more provocative discussions of contentious topics including cultural, religious and feminist links to animal abuse and the correlation between interpersonal violence (including domestic violence and child abuse) and animal abuse.

Lawyers will appreciate contributions on recognising, reporting and investigating animal abuse, including a chapter on prosecuting matters written by Michael Byrne QC and Tracy-Lynne Geysen, a partner at Couper Geyser – Family and Animal Law.

An abundance of case studies and useful practical tools, together with chapters exploring the personal perspectives of people performing different roles in animal welfare, complete the rounded and easy reading experience for readers.

Reviewed by Tracey Jackson, a former police officer and Assistant Chief Inspector for the RSPCA Qld. She is a paralegal at Couper Geyser – Family and Animal Law.
Title: Exploring Civil Pre-Action Requirements – Resolving Disputes Outside Courts
Author: Professor Tania Sourdin
Publisher: The Australasian Institute of Judicial Administration Incorporated, 2012
ISBN: 9780646589879
Format: paperback, 241pp
RRP: $55

The way forward with ADR

With the growing presence of alternative dispute resolution (ADR) and pre-action practices in civil disputes, the consideration of issues in this Australasian Institute of Judicial Administration (AIJA) report should be of great interest to practitioners.

Professor Tania Sourdin and her research team at the Australian Centre for Justice Innovation (ACJI) comprehensively explore the use and effectiveness of civil pre-action requirements in Australia to encourage the resolution of disputes without recourse to a court or tribunal. Incorporating the input of numerous leading academics, members of the judiciary and practitioners, the report presents a balanced perspective of the benefits and challenges of civil pre-action requirements. It follows a meticulous research methodology that synthesises academic literature, case law, statistics from civil litigation files and information from focus groups, allowing insightful conclusions to be drawn.

The author investigates the key pre-action areas of process efficiency, both nationally and internationally; perceptions including fairness and justice; the effect of costs in terms of finance, time and other impacts; the timing of dispute resolution interventions and the interrelationship to case complexity and behavioural obligations; systematic impacts and recent international approaches and issues relating to disadvantaged and self-represented disputants. It is written in a clear and uncomplicated style with a useful incorporation of figures and tables to aid in the presentation of data.

Throughout, the report makes recommendations on potential improvements to ADR practices in key pre-action areas which serve the mutual interest of the lawyer, disputants and the courts. Practitioners will find the exploration of the Civil Dispute Resolution Act 2011 (Cth), including commentary on the requirement to take ‘genuine steps’ to be extremely useful.

As the report itself notes, the recommendations made will be significant for all courts and tribunals adopting pre-action requirements. With an increasing prominence of ADR processes in civil disputes, it is definitely worthy of a read.

Reviewed by James Semit, an intern with the Institute of Arbitrators & Mediators Australia and a law/science student at the University of Queensland.

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In March last year, the Chief Justice of Queensland raised eyebrows when he questioned the received wisdom as to the benefits of mediation of civil disputes which would otherwise be tried in the Supreme Court.1

But his Honour is not alone. In 2010, Master of the Rolls Lord Neuberger urged caution in the expansion of the role of mediation and alternative dispute resolution in the English civil justice system. His Lordship said:

"Requiring all individuals to mediate before gaining access to the court door will necessarily have a greater impact on some classes of litigants than others. Some litigants will have the resources to afford both mediation and litigation. Others will not. Those who do not will then be faced with a choice. Accept a mediated solution, which may well not reflect their legal rights, because they cannot afford to first mediate and then litigate, or accept no solution at all. Financial pressure on some litigants may well mean that a mediated solution becomes a substitute for justice because the requirement to mediate is a fetter on access to justice. Such financially based letters run the risk of depriving some citizens of their right of access to justice; they run the risk of depriving all citizens of an equal right of participation in government. We must be careful to ensure that this does not occur."2

Similarly, in 2008, Justice Hayne urged that we must not simply assume that the diminution in the number of civil cases being disposed of at trial marks the success of managerial judging and ADR.3

Anecdotally, there is increasing dissatisfaction with mediation as a means of resolving commercial disputes, at least as mediation occurs after the parties have incurred very significant costs and is conducted as a de facto case appraisal or arbitration on limited material under the guise of robust 'reality testing'.

While it may be producing resolutions, mediation may not be producing satisfactory resolutions. It would be a mistake to dismiss what is, in my experience, a growing disquiet as "some rare complaints from the private sector" of "pressuring", "over-bearance", "misunderstanding" and "general regret at terms of settlement"4

Mediation is by its very nature private. It is impossible to know whether or not in Queensland it is producing satisfactory resolution of disputes, or even to know whether it is in fact responsible for the measurable reduction in the number of civil proceedings being resolved by trial. The uncritical assumption has been that mediation has produced increased resolution of civil disputes, satisfactory resolution of those disputes and for less cost to litigants and to the state. However, there is evidence from other jurisdictions which should cause us to question those assumptions.

In his 1999 Hamlyn Lectures, Professor Michael Zander of the London School of Economics and Political Science said:

"ADR is not some form of magic potion. The five-year Rand Corporation study of civil justice reforms [in America], based on 10,000 cases in federal courts in 16 States, looked also at ADR (mediation and early mutual evaluation) schemes. The report found no statistical evidence that these forms of ADR 'significantly affected time to disposition or litigation costs'.5

Similarly, a study in England in 2007 by Professor Dame Hazel Genn of the University College London Judicial Institute showed that mediation did not result in speedier resolution of cases nor any reduction in costs to the litigants or to the state.6

The evidence, such as it is, and experience otherwise, suggests that we should question the fundamental assumptions about the 'success' of mediation in Queensland, particularly as it occurs in practice in commercial disputes in the superior courts. Mediation (and other forms of ADR) emerged as a response to the costs to the parties and the state of and the delay involved in, litigating civil disputes to trial in the 1980s and 1990s. Mediation and ADR, with judicial case management, were unashamedly directed to reducing the cost to the state of the court system by reducing the number of cases to be resolved by trial and, therefore, it was thought, the judicial and other resources required to deal with them.

Mediation, as it has developed in Queensland, does not appear to be achieving those aims. In commercial disputes, it occurs almost invariably after the court process has been engaged and the court and the parties have spent considerable time and resources in the interlocutory process. It occurs as the last, and practically mandatory, step before the courts will permit a proceeding to be listed for trial.

Nor does mediation, in practice, adhere to its conceptual definition as:

"[T]he process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs."7

In that context, I prefer the words of then Hong Kong Secretary for Justice Wong Yan Lung in a speech given at the Hong Kong Mediation Council annual dinner in March 2006 and entitled ‘The Benefits of Mediation’ in which he said:

"Many people still think that mediation is, in effect, an informal arbitration. Nothing could be further from the truth. Mediation does not seek to establish liability. It is not a weapon for use in the ‘blame culture’ that we see in so many parts of the world. Mediation is a process that seeks to help the parties find a solution to their problems that they can live with. Mediation is not tied to traditional judicial remedies. It can be, and often is, highly imaginative and can have the effect of bringing the parties back into a good relationship."

In practice, however, mediation of commercial disputes more closely resembles informal arbitration.

I suggest that it is time for us to re-evaluate and to ask some questions. Lord Neuberger posed some of the relevant ones as follows:

"Those questions would be: first, to what extent does mediation and other forms of ADR increase settlement rates? Second, what cost and time savings are there through the increased use of these methods both to
Are there valid reasons to doubt the success of mediation, particularly in Queensland, and for commercial disputes in the state’s superior courts? Report by Ben Cohen.

The parties and the state? If the answers to these questions are positive, are the results significant? If so, how significant, and are they significant only in some types of case, and only after or before a certain state of litigation? Are they significant enough to support an expansion of the use of mediation and ADR generally? If so, how much of an expansion and what time of expansion?8

I would pose some others:

• Is a mediation necessary or appropriate in this case?
• Is there another way in which a satisfactory (to the parties and not just the state) resolution of this dispute might be achieved sooner and cheaper?
• If mediation is appropriate, when should it occur? Who should be the mediator? What format should the mediation follow? Who should be present? Where should it take place? For how long?

It should no longer be thought that what has become the ‘standard’ mediation in Queensland is appropriate for all – or perhaps even any – commercial disputes. If the question is how is this commercial dispute best resolved in the interests of and to the satisfaction of the parties to it, mediation as it is usually conducted in Queensland may not be the answer:

“In the context of commercial disputes, the basic premise of ADR is that commercial disputes are essentially business problems capable of resolution by businessmen rather than lawyers, and that businessmen are capable of negotiating commercially satisfactory solutions to most problems, provided that they are fully briefed with the relevant facts.8 One unfortunate aspect of commercial litigation is that often the senior executives with the clearest idea of their company’s best interests, and with the authority to settle a particular dispute, do not know and do not investigate the facts of the dispute until it has been in the hands of outside lawyers for considerable periods, until substantial costs have been incurred, and until final hearing of the matter is imminent. Meanwhile, any business relationship with the other party has often been irreparably damaged, and avenues for solutions other than the judgment of the Court are effectively foreclosed.9

Notes
1 Chief Justice Paul de Jersey AC, ‘Contemporary Lawyers: Some Contemporary Challenges’ (address to the Australian Corporate Lawyers Association Queensland Corporate Counsel Day, 7 March 2013).
2 Lord Neuberger of Abbotsbury MR, ‘Has Mediation Had its Day?’ (Gordon Slynn Memorial Lecture, 10 November 2010).
8 Lord Neuberger of Abbotsbury MR, above n2.
High cost of sexual harassment

A recent Federal Court case, Ewin v Vergara (No.3) [2013] FCA 1311, illustrates the costly consequences of sexual harassment in the workplace, with the perpetrator ordered to pay more than $475,000 in total damages.

Ms Ewin, an accountant employed by Living and Leisure Australia Limited (LLA), alleged that Mr Vergara, an employee of a recruitment and labour hire firm who was contracted to work at LLA, contravened s28B(6) of the Sex Discrimination Act 1984 (Cth) (the SD Act). This subsection makes it unlawful for a contract worker such as Mr Vergara to sexually harass an employee at their workplace.

Under the SD Act, “workplace” means a place at which a workplace participant (such as a contract worker or employer) works or otherwise carries out functions in connection with being a workplace participant.1

For conduct to meet the definition of “sexual harassment,”2 the conduct must be a sexual advance, request for sexual favour or conduct of a sexual nature.3 Ms Ewin, as the complainant, bore the onus of proof.4 The conduct complained of must be “unwelcome” and “made in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated”.5 Importantly, “what the person, who perpetrated the conduct, anticipated or otherwise perceived would be the reaction of the person harassed, is not relevant”.6

Ms Ewin claimed Mr Vergara had both verbally harassed and physically harassed her, which triggered post-traumatic stress disorder and other psychiatric illness on her part. She claimed she was unable to work as a result of Mr Vergara’s conduct and sought, amongst other things, to recover loss of earning capacity.

The hearing lasted 12 days, which could be attributed in part to the fact that Mr Vergara was self-represented. He directly cross-examined Ms Ewin over more than four days and Justice Bromberg said this contributed to the difficulty attaching to the court’s determination,7 particularly in view of the sensitivity of the matters under consideration.

At the time of the alleged sexual harassment, Ms Ewin went to the police with her allegations of physical harassment. The police recorded conversations between Ms Ewin and Mr Vergara, which formed part of the police investigation and body of evidence at the hearing. A transcript of the conversations was tendered in court and corroborated the judge’s perception of Mr Vergara as having “little or no regard for the truth”.8 His Honour said that the “evidence in the pretext conversations verified the evidence given by Ms Ewin of the vulgar and obscene way in which she was sexually propositioned by Mr Vergara”.9

During the hearing, his Honour accused Mr Vergara of having misconstrued events to further his position that Ms Ewin had sexually pursued him. Usefully for the court, a large body of prior statements provided a point of comparison with oral evidence given during the course of the hearing. This enabled his Honour to discount Mr Vergara’s evidence where he sought to portray Ms Ewin as a sexual predator, rather than the victim of sexual harassment.

Interestingly, both Ms Ewin and Mr Vergara were criticised by the judge for providing novel information during their respective evidence at the hearing, when it was compared with their prior statements in evidence. Though, the whole of Mr Vergara’s evidence was treated “with suspicion”10 by his Honour and Ms Ewin’s evidence was preferred where inconsistencies arose between the two accounts.
Justic Bromberg was satisfied that Ms Ewin had been both verbally and physically harassed by Mr Vergara. An award of $476,163, with interest, was made against Mr Vergara comprising:

- $293,000 for loss of past earnings
- $63,000 for loss of future earnings
- $110,000 in general damages
- $10,000 for past and future medical expenses.

His Honour formed the view that the proposed compensatory damages were not "inadequate to punish Mr Vergara for the entirety of his unlawful conduct and to deter him and others from engaging in similar conduct."  

**Lessons to be learned**

This decision highlights the possible ramifications that law firms and their clients face from a serious sexual harassment complaint, particularly the significant financial penalties that may be awarded against a perpetrator. An award that is similar to the one in this decision, which is the largest award to date, could bankrupt an individual.

Lawyers and their clients should take note that:

- While Mr Vergara was a "contractor" and not a "fellow employee," the subsection uses a "commonality of workplace as the nexus in relation to harassment that takes place at the workplace."  

- The workplace is "not confined to the place of work of the participants but extends to a place at which the participants work or otherwise carry out functions in connection with being a workplace participant."  

- The wide approach of s.28B(7) of the SD Act "recognises that work or work-based functions are commonly undertaken in a wide range of places … beyond the principal or ordinary place or places of work of workplace participants from a common workplace."  

- There will be a contravention of the SD Act "irrespective of whether the sexual harassment occurred during working hours and irrespective of the purpose for their attendance at [the place where the sexual harassment occurred]. The requisite nexus will have been provided by the fact that the LLA office was a place where both Mr Vergara and Ms Ewin worked."  

- Should you encounter litigation of this nature and the alleged perpetrator is self-represented, it would be prudent to make an application for your client that the perpetrator be precluded from personally cross-examining the complainant.

- When allegations of sexual harassment are made, they must be fully investigated and, where appropriate, the parties should seek to resolve the matters by way of mediation or conciliation.

- Legal advice should be provided at an early stage in an attempt to resolve any complaint that is made about an alleged contravention of the SD Act.
High Court and Federal Court notes

Competition law – misleading and deceptive conduct

In Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54 (12 December 2013) the primary judge in the Federal Court found that certain of the respondents' advertisements in 2010 on using the consumer's telephone landline to achieve internet connection were misleading and deceptive contrary to ss52 and 53C(1)(c) of the Trade Practices Act 1974 (Cth) because of the disparity between a prominent headline showing an attractive price and the fine print that qualified the offer. The primary judge in the Federal Court accepted the advertisements failed to disclose a single price for the service and imposed a penalty of $2 million. These conclusions were set aside on appeal and the fine reduced. The appeal by the ACCC was allowed by the High Court by majority; French CJ, Crennan, Bell, Keane JJ jointly; contra Gageler J. Corporations law – winding up – insolvency – disclaimer of property – lease – whether lease granted by corporation is ‘property’

In Willmott Growers Group Inc v Willmott Forests Ltd (receivers and managers appointed) (in liquidation) [2013] HCA 51 (4 December 2013) the High Court concluded that s568(1) of the Corporations Act 2001 (Cth) was to be construed as giving a liquidator of a company power to disclose a lease granted by the company to a tenant and such a lease was “property” for s568(1)(f). The court concluded the provision was not restricted to leases where the company was the tenant: French CJ, Hayne, Kiefel JJ jointly; sim Gageler J; contra Keane J. Appeal against decision of Court of Appeal (vic) dismissed.

Criminal law – whether jury verdict supported by the evidence – reasons of Court of Appeal

In BCM v The Queen [2013] HCA 48 (27 November 2013) B was convicted by a jury of unlawfully dealing with a child. His appeal to the Court of Criminal Appeal (Qld) contending there was insufficient evidence to support the conviction was dismissed by that court. His further appeal to the High Court was also dismissed: Hayne, Crennan, Kiefel, Bell, Keane JJ jointly. The court concluded that whatever criticisms were made of the reasons of the Court of Appeal in explaining its decision, there was evidence on which the jury could reach its conclusion. Appeal dismissed.

Criminal law – malicious infliction of grievous bodily harm – unauthorised surgical procedure – when miscarriage of justice

In Reeves v The Queen [2013] HCA 57 (18 December 2013) R was a surgeon. In 2002 a patient CDW was referred to him for excision of a lesion in CDW’s left labia minora. In the operation R performed a simple vulvectomy and removed CDW’s genitals. R was convicted of a charge of malicious infliction of grievous bodily harm by performing a procedure without consent and benefit to the patient. The trial judge sentenced R on the basis that the jury had found he had operated without consent rather than that the surgery was unwarranted. R’s appeal to the Court of Criminal Appeal (NSW) was dismissed: this court found that R’s guilt had been established beyond reasonable doubt on the “consent” basis regardless of the error of the trial judge in referring to the concept of “informed consent”. As this court found there was no miscarriage of justice it dismissed appeals against conviction and sentence. R’s appeal to the High Court failed: French CJ, Crennan, Bell and Keane JJ jointly; sim Gageler J. The High Court concluded the Court of Criminal Appeal had not erred in the result it reached and that misdirection on a critical element of liability did not actually occasion a miscarriage of justice. R’s appeal against sentence was allowed as the prosecution accepted material had been overlooked: Appeal allowed in part.

Damages – breach of contract

In Clark v Macourt [2013] HCA 56 (18 December 2013) in 2002 a medical practice involved in assisted reproduction (Dr C) entered an agreement to purchase assets from another practice (St George) for a total of $386,954. M guaranteed the performance of the vendor. The assets included 3513 ‘straws’ of frozen sperm. Due to breach of warranty by the vendor, only 1996 were usable. By 2005 the appellant purchaser had run out of usable straws. At this time the amount still outstanding and payable by the purchaser (Dr C) was $219,000. The vendor sued for this. The purchaser counter-claimed for the cost of acquiring usable straws. The primary judge assessed the purchaser’s loss at $1.2 million, being the hypothetical cost of obtaining 1996 warranty-compliant straws at the date of the completion of the contract in 2002. On appeal the Court of Appeal (NSW) viewed the agreement as a sale of business rather than a sale of goods. It concluded the loss was calculated as the cost of acquiring replacement stock less what had been recouped from patients but noted the purchaser had not sought this. It reduced the damages on the counter-claim to nothing. The purchaser’s appeal to the High Court was allowed by a majority: Hayne J, Crennan with Bell JJ; Keane J; contra Gageler J. The majority agreed with the primary judge that the loss was the value of what was not received at the date of completion. Appeal allowed.

Extradition – whether extradition ‘unjust or oppressive’

In Commonwealth Minister for Justice v Adams [2013] HCA 59 (18 December 2013) the effect of ss22(3) of the Extradition Act 1987 (Cth) and article 92(b) of the Treaty annexed to the Extradition (Republic of Indonesia) Regulations 1994 (Cth) was that Australia could refuse to order extradition to Indonesia if in the circumstances extradition would operate in a way that was ‘unjust, oppressive or incompatible

Due to space limitations, this is an truncated listing of recent decisions from the High Court and Federal Court. See the online edition of this month’s Proctor for a comprehensive list – qfs.com.au/proctor.
with humanitarian considerations”. A was an Indonesian banker. In 2002 he was convicted in Indonesia in absentia of corruption crimes; his appeal against this was dismissed in 2003; a warrant for his arrest was issued in Indonesia; following a request for extradition he was arrested in Australia in 2009; in 2010 the appellant Minister determined A be surrendered to Indonesia. The primary judge and the majority of the Full Court of the Federal Court considered the Minister had erred by not analysing the question of oppression etc by reference to “Australian standards”. The High Court in a joint judgment concluded these courts were in error and that while Australian standards were relevant they were not determinative: French CJ; Hayne; Crennan; Kiefel; Bell; Gageler; Keane JJ jointly. Appeal by Minister allowed.

Federal Court

Administrative Appeals Tribunal – whether AAT made a ‘decision’

In Commissioner of Taxation v Cancer and Bowel Research Association Inc (includes Corrigenda dated 10 and 13 December 2013) [2013] FCAFC 140 (25 November 2013) a Full Court concluded that the orders made by the AAT to remit back to the commissioner a decision (revoking the charity status of the respondent) under s42D of the Administrative Appeals Tribunal Act 1975 (Cth) because the AAT was unable to reach a conclusion on the material before it, was not a decision that could be appealed under s44. The court concluded a constitutional writ would not be issued to quash the decision under s42D as the AAT had not erred. However the court reviewed the construction of law adopted by the AAT on the substantive question (under s426-55 of Taxation Administration Act 1953 (Cth)) to determine the controversy and concluded the AAT had not erred.

Bankruptcy – slip rule

In Flint v Richard Busuttil & Co Pty Ltd [2013] FCAFC 131 (19 November 2013) a Full Court concluded the slip rule cannot be relied on to extend a creditor’s petition after it has lapsed.

Federal Court – orders supressing identity of athlete

In Anti-Doping Rule Violation Panel v XZTT (No.2) [2013] FCAFC 135 (20 November 2013) a Full Court concluded it was in the interests of open justice that interlocutory orders made under s37AF of the Federal Court Act 1976 (Cth) be discharged.

Industrial law – dismissal – multiple reasons for dismissal

In BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union (2013) FCAFC 132 (13 December 2013) an employee was dismissed for holding up a sign condemning ‘scabs’ during industrial action. A Full Court concluded by majority that the primary judge had erred in finding the employee was dismissed for involvement in industrial action contrary to ss346 and 347 of the Fair Work Act 2009 (Cth). Consideration of when acts are done for more than one reason.

Industrial law – uniform allowance

In Australian Nursing and Midwifery Federation v Eastern Health [2013] FCAFC 137 (22 November 2013) a Full Court concluded cl46.1(b) of the relevant enterprise agreement did not entitle nurses to a uniform allowance where there was no uniform to be provided.

Industrial law – whether state industrial court made a decision

In Maughan Thiem Auto Sales Pty Ltd v Cooper [2013] FCAFC 145 (29 November 2013) a Full Court concluded findings by a magistrate in the Industrial Relations Court of SA as to which Act applied were not “decisions” that could be appealed under s565(1) of the Fair Work Act 2009 (Cth).

Industrial law – public holidays falling on weekends

In Woolworths Ltd v Shop, Distributive and Allied Employees’ Association [2013] FCAFC 151 (5 December 2013) a Full Court considered the operation of the provisions of the Fair Work Act 2009 (Cth), the Public and Bank Holidays Act 1972 (WA) and the Woolworths National Supermarket Agreement 2009 where public holidays fell on weekends.

Thomas Hurley is a Victorian barrister, 03 9225 7034, email tvhurley@vicbar.com.au. The full version of these judgments can be found at australie.edu.au.
FLA backs stepmother in contest with aunt

Children – parenting contest between child’s aunt and stepmother – Section 60CC(2)(a) Family Law Act does not apply to non-parents

In Burton & Churchin & Anor [2013] FamCAFC 180 (15 November 2013) the Full Court (Finn, Strickland and Loughman JJ) allowed a stepmother’s appeal against Johnston J’s order that a child live with the aunt in France. The child’s primary carer (the father) had died, the mother had failed to participate in the proceedings and the child’s stepmother sought orders for the child to remain living with her in Australia.

The Full Court said at para 51:

“We accept that his Honour did in fact make an error of law when he expressed the view in [325] that the primary considerations in s60CC(2) extend also to both the stepmother and the aunt for the reason that clearly the child has a close relationship with each of them. There can be no question that the words of s60CC(2), or more accurately s60CC(2)(a), refer only to the benefit to the child of having a relationship with both the child’s parents.”

Property – death of a party – legal personal representative would not act – appointment of lawyer null and void – Section 38(2) FLA does not apply to FCWA

In Laue & Laue (Deceased) [2013] FCWA 87 (29 August 2013) a husband died during proceedings but his legal personal representative (the executor of the deceased’s estate) swore an affidavit deposing that he did not want to be appointed the husband’s legal personal representative. Another court appointed a legal practitioner (B) as legal personal representative.

The parties’ son (who had applied for letters of administration of the estate) “sought to be heard as amicus curiae and submitted that that appointment was contrary to law, B not being the executor of the deceased’s estate. B’s counsel relied on s38(2) FLA (the High Court Rules apply where the Family Law Rules are insufficient) and Rule 21.06 of the High Court Rules (upon the death of a party “the court … may, by order, appoint a person to represent the estate of the deceased for the purpose of the proceeding”). Crisford J referred to s79(8) (upon the death of a spouse “proceedings may be continued … against … the legal personal representative of the deceased”) and Rule 6.15(3) of the Family Law Rules 2004 (the “court may order that the legal personal representative of the deceased … be substituted for the deceased … as a party”) but held that that s38(2) applies only to the Family Court of Australia, not to the Family Court of WA so that, as B was not the personal representative of the husband, his appointment was null and void.

Property – business debtors treated as an asset – party found to ‘under-exercise her capacity for gainful employment’

In Crawford & Ruskin [2013] FamCA 493 (26 June 2013) Stevenson J said at para 30:

“The applicant sought to include as an asset a sum of $75,000 on account of debtors of the respondent’s business. The respondent alleged, reasonably in my view, that these outstanding payments should be treated as an income stream rather than an asset. There can be no guarantee that the respondent will ever receive the entirety of this sum, even though he has a right to sue for recovery. As well, the gross amount will be reduced by income tax payable in the year when this money comes into his hands. In my view, however, the Full Court authority of In The Marriage of Mitchell ([1995] FLC 92-601) compels me to include the sum of $75,000 as an asset in the balance sheet.”

The court adjusted its contributions assessment by 3% (of a $1.39m pool) in favour of the de facto wife, saying at para 56:

“The applicant has a current weekly income from all sources of $935 and the respondent a gross amount of approximately $1,100. It seems to me that there was some force in the submission on behalf of the respondent that, to some extent, the applicant under-exercises her capacity for gainful employment. She works making handicrafts, a calling which she obviously enjoys, but it may well be that she could earn a higher income if she chose to work in another field.”

Property – long marriage, small pool – contributions adjusted due to husband’s gambling and other waste – Section 75(2)

In James [2013] FCCA 1188 (23 August 2013) Judge Phipps considered a 20-year marriage involving traditional roles which produced two children and an asset pool of about $400,000. The court adjusted the parties’ equality of contributions by 5% in favour of the wife due to waste by the husband due to his “gambling and associated expenditure on alcohol and food” (para 52). Judge Phipps (paras 61-62) made a further adjustment of 20% under s75(2) given the small pool, the husband’s construction of a house while the wife and children were renting, the wife’s cost of the children over and above the husband’s child support payments, and disparity of income and earning potential.

Property – Section 79A application – wife alleged husband hid £250,000 overseas – husband sought summary dismissal – admission of evidence

In Paget & Dubois [2013] FCCA 1746 (8 November 2013) the husband applied for summary dismissal of the wife’s application to set aside property orders made in 2010. The wife alleged that it had come to her attention that during those proceedings the husband had hidden an overseas bank account containing £250,000. The husband denied that. The wife said that her informant could not obtain documentary proof, that the bank refused to answer a subpoena and would only provide information if the husband authorised it to do so (para 17). Judge Burchardt disagreed with the wife’s submission that the husband could not rely on any affidavits at the hearing of his summary dismissal application, citing Priestly v Godwin [2008] FCA 1529. The husband conceded through his counsel that the court had power to order him to give the applicant the authorisation she sought to conduct her investigations (para 40). The court directed the husband to do so, reserving its ruling under s17A of the Federal Circuit Court of Australia Act until after those inquiries were conducted.
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How can lawyers generate work from LinkedIn?

LinkedIn is a powerful tool you can use to:
• position yourself in your area(s) of expertise
• stay top of mind with existing clients, referrers and other contacts
• find and build relationships with more of your ideal prospects.

It’s not a silver bullet, but it is changing the way we find work and do business. With more than five million Australians on LinkedIn, 46 million members throughout the Asia-Pacific region and 259 million worldwide, it’s a platform you should consider using. But it can be hard to know where to start.

How to leverage LinkedIn to grow your practice

Before you start, you need to be really clear about why you’re on LinkedIn and how you want to use it. Once you know that, you can use the following five-phase process to:
• give you a focus
• give you an understanding about how to build relationships online to generate more work opportunities
• ensure you don’t waste time online.

A five-phase process to leveraging LinkedIn

1. Set up your profile
This is the first thing you’ll need to do after you set up your LinkedIn account. In order to ensure your profile clearly positions you, make sure it answers the following:
• Who do you help?
• What do you help them with?
• What results have you achieved for your clients (if public)?
• How would you describe your working style?
Include a call to action at the end. Upload or add links to any relevant videos, whitepapers and articles you’ve written.

LinkedIn ranks highly in Google searches, so it will be one of the first things a prospective client comes across when they search for you. If they click on LinkedIn and there’s a skeletal profile, it doesn’t reflect well on you.

2. Connect
The more people you connect with, the more people see your updates and the more useful your LinkedIn search results will become. A free LinkedIn account limits you to seeing complete information about your connections, your second-degree connections (that is, contacts of your connections) and fellow group members. You can see a wider audience by upgrading to a paid account or by using Google to search LinkedIn.

If you’re using LinkedIn for business development, connect to your colleagues. It’s a good way to help you position yourself with them and it also lets you see their connections. This may help when you’re targeting a particular company or industry sector for new work.

When you invite people to connect, you have the chance to start a conversation. Personalise your message (although this isn’t possible on all LinkedIn apps). If you’re accepting an invitation to connect, always send them a LinkedIn email afterwards thanking them for connecting. I routinely do this and it has generated a number of new clients.

3. Engage
Look for opportunities to converse with your connections and other group members. This will help to position you in your field and, over time, will help people make the connection between you and the content you share.
• Post status updates sharing information your connections will find valuable and that helps to position you. When sharing someone else’s content, make sure you write an introduction setting out a key finding or saying who should read it. Make it easy for people to decide whether they want to open the link.
• Find and join relevant groups and then comment on, and start, discussions. A good tactic is to ask questions that will get a discussion going. You can then stay involved in the thread. When commenting, build on others’ comments.
• Share some of your clients’ content where relevant, or at least comment on or like it (if appropriate).
• Use LinkedIn email to send one of your contacts an article, video or blog post that is going to help or be of interest to them. Let them know why you’re sharing it with them.
• Thank each person who endorses you.
LinkedIn presents more than social networking opportunities for lawyers. At Symposium 2014, the principal of Kaleidoscope and author of LinkedIn for Lawyers, Kirsten Hodgson, will present on ‘Grow your practice with LinkedIn: practical tips and how-tos’. Here’s a preview:

4. Take relationships offline
While LinkedIn’s a great relationship starter and a good way to stay top-of-mind with your existing connections, you’ll eventually have to move relationships beyond LinkedIn. Some ways you might transition from online to in-person include:

- Follow up a discussion via LinkedIn email and suggest a meeting or phone conversation.
- If someone has looked at your LinkedIn profile and you’d like to connect with them, send an email introducing yourself and asking if they can help.
- Send specific people in your groups a tailored invite to an event you’re running.
- Send someone material related to a topic you’ve been discussing, and ask for their opinion, advice or feedback.
- Ask a subject matter expert to write an article for your newsletter, blog or website.
- Arrange a coffee with one of your LinkedIn connections each week or fortnight.

5. Measure what matters
What you should measure depends on why you’re using LinkedIn. Measuring things that have little bearing on your objectives is pointless. Instead pick a few key things to focus on. Look at trends over time rather than trying to measure everything.

LinkedIn is the means to an end rather than the end itself, so measure the success of specific activities in conjunction with offline activities. For example, if you organise an event and invite people via LinkedIn, track which of these people attend.

LinkedIn could be the catalyst for new work, but it can take many months (and many steps such as the event, a follow-up coffee, a proposal, other meetings etc.) before someone actually becomes a client. At that stage, you may have forgotten that this contact originated from LinkedIn. Without tracking this you’ll never know the extent to which LinkedIn has helped you generate more work.

To realise the benefits of LinkedIn you need to be active – consistently so.

Whether you use LinkedIn to reconnect with dormant clients or former colleagues and to rebuild the relationship from there, or you harness its power to strengthen existing client relationships and to find and help prospective clients, the principles are the same: Focus on the other person and their needs, be yourself and build relationships one at a time. If you do this you’ll reap the rewards.
NewLaw
New Rules
A conversation about the future of the legal services industry by Giles Watson

George Beaton’s new book isn’t just about business models – it provides valuable insights on the range of challenges facing law practices of every size and model.

Published in December 2013, it discusses how the business model of larger law firms is being tested by the emergence of a range of NewLaw models and provides valuable insights for all law firms on how to adapt and thrive in the face of the numerous challenges, disruptions and innovations changing the legal services industry.

Curated by Dr George Beaton, it gathers contributions from 35 contributors in six countries, including Andrew Grech (Slater & Gordon), Peter Kalis (chair and global managing partner of K&L Gates), Richard Susskind OBE (author of Tomorrow’s Lawyers), Ken Jagger (CEO of AdventBalance), Trish Hyde (CEO of Australian Corporate Lawyers Association), Karl Chapman (Riverview Law) and Ken Grady (CEO of SeyfarthLean).

The key theme – how and why the ‘BigLaw’ business model is under threat from disruptions and innovations – is handled convincingly with authoritative insights and discussions in relation to the economic cycle, client power, legal careers and technology.

Following a discussion of how BigLaw may respond, the hallmarks of NewLaw – disruptive technologies, flexi-work practices, fixed fees, corporate ownership and corporate brand – are discussed with the clarification that the term ‘NewLaw’ doesn’t refer to a single new business model, but instead a range of new legal services providers including virtual legal service providers, LPOs (legal services outsourcing), online legal marketplaces, client captives, legal document suppliers and, indeed, traditional law firms which successfully adopt and adapt.

While the book’s main focus is therefore on business models, some of the most valuable insights have much broader relevance, such as:

- Ron Friedmann’s comments on improving value, changing the way lawyers practice and making better risk-adjusted decisions about how much to invest in legal services
- Ken Grady’s comments on the continuing role of lawyers as trusted advisors
- Richard Moorhead’s comments on emerging ethical challenges.

NewLaw New Rules is available from online providers including Amazon and Smashwords for around $20.

George Beaton will lead the opening plenary at QLS Symposium 2014 on ‘Riding the storm – how to take a legal practice through tough times’. See qls.com.au for more details.

Giles Watson is QLS practice support manager.
Career moves

Brooke Winter Solicitors
Brooke Winter Solicitors has announced the appointment of Nicole Thiel as a solicitor and the promotion of Antonious Abdelshahied to senior associate.

Nicole, who worked with the firm as a clerk until her admission in July last year, practises in criminal and family law. She regularly volunteers her time and legal skills with a local community advice clinic.

Antonious has practised as a family lawyer in regional and metropolitan Queensland since 2006, and has worked as an associate with the firm in criminal and family law since August 2012. He appears regularly in courts in Queensland and New South Wales in criminal matters, and also in the Federal Circuit Court and Family Court of Australia.

Clayton Utz
Fiona Austin has joined Clayton Utz as a special counsel in the national workplace relations and safety team in Brisbane. She is an accredited workplace relations specialist with expertise in health and safety management, and litigation.

Fiona has worked as an in-house corporate counsel in the energy sector and has experience in several industries, including government, gas, electricity, resources, manufacturing, education, agriculture and transport.

Couper Geysen – Family and Animal Law
Kathryn Smith has joined Couper Geysen – Family and Animal Law as the firm’s senior solicitor.

Kathryn has practised exclusively in child protection and family law for more than six years, including four years for a Brisbane firm and two years in the United Kingdom, working for local government in child protection and in international children’s law matters. She has experience in all aspects of family law, including parenting and property matters, domestic violence applications, financial and relationship agreements, spousal maintenance and child support issues.

DibbsBarker
DibbsBarker has welcomed medico-legal expert Chris West as a special counsel in its insurance practice.

Chris, who has practised for more than 13 years, holds degrees in science and law as well as postgraduate qualifications in nursing, midwifery and neonatal intensive care.

With areas of expertise that include medical, nursing and allied health disciplinary matters, litigated and non-litigated claims against medical and health practitioners and health care facilities, and coronial investigations, Chris will be based in Brisbane and play an instrumental role in building the firm’s medical malpractice offering in Queensland.

Holding Redlich
Holding Redlich Brisbane has welcomed new partner Ron Eames, who has joined the firm from Thomson’s Lawyers, where he was also a partner.

Ron has extensive experience in major projects, infrastructure and project financing, property development and M&A.

The firm also welcomed senior associate Katie Miller to its property and projects team. Katie has extensive expertise in the leasing of shopping centres, commercial office towers, bulky goods centres and mixed-use resort developments, and the acquisition and sale of shopping centres, industrial estates and commercial estates.

HopgoodGanim
HopgoodGanim has welcomed resources and energy partner Simon Panegyres to its Perth team, bringing its national number of partners to 34.

Simon specialises in corporate and resources and energy work, with particular expertise in resources project development and operations, acquisitions and disposals, joint ventures, fund raisings and corporate governance. He joins three other partners and a team of 16 lawyers offering general corporate, M&A, capital markets, resources and energy, litigation, insolvency, employment and property advice in Western Australia.
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Would any person or Firm holding or knowing the whereabouts of an original Will dated on or about the 8th April, 2011 of OTTO ALEXANDER BALOGH late of Forest Lake Lodge, 12 Tewantin Way, Forest Lake, Queensland but formerly of Unit 15/12-14 Yeates Crescent, Meadowbrook Queensland, who died on 20 September, 2013, please contact Mr Jeff Peace of the Public Trustee of Queensland, PO Box 140, Ipswich 4305, Tel: 3432 6607, E-mail: Jeffrey.peace@pt.qld.gov.au within 30 days of this notice.

K. RETSCHLAG
REGIONAL MANAGER
Public Trust Office
Ipswich

MISSING WILL

Would any person or Firm holding or knowing the whereabouts of any will or other document purporting to embody the testamentary intentions of PATRICIA AILEEN BRYSON late of 17 Idriess Street, Oxley, Queensland; who died on 7 September 2013, please contact Williams Lawyers PO Box 340 Coorparoo, Qld 4151, Tel (07) 3397 5010 Fax (07) 3397 0644.

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She’ll be apples

… and grapes and oysters and cheese with Matthew Dunn

Every summer in Hobart, the bounty of southern Tasmanian food and wine bursts into life at the Summer Festival.

Set against the sound of Sydney-to-Hobart yacht rigging tinkling in the afternoon sea breeze which blusters through Constitution Dock, the festival features the annual Taste of Tasmania, a mighty food and wine exposition held in a converted waterfront warehouse. It is a week-long blowout of the latest wines, craft beers, ciders and best local produce. All the big, hip and emergent local wineries come to spruik their wares by tasting, glass or bottle to an appreciative audience of locals and ‘mainlanders’.

Often, winemakers and owners man their stalls late into the evening, sometimes needing to retaste often to ensure the consistent quality of their product.

Chatting to the patron of the much respected Cape Bernier Vineyard after the dust had settled at this marathon event, he admitted that he wasn’t sure whether he had turned a profit from the week-long expo, but said he had a marvellous time with industry colleagues and interested consumers.

Away from the festivals, the food and wine scene in southern Tasmania has burst into full bloom, ably assisted by foodie immigrants such as Gourmet Farmer host Matthew Evans, Rodney Dunn of the Agrarian Kitchen or Nick Haddow from the Bruny Island Cheese Company. These and a cast of many new quality-conscious producers have raised the bar for a place originally thought best to be a potato factory. Even far-flung locations such as Bruny Island, possibly the edge of the known world, are now bastions of artisan producers of cheese, smoked products, cherries, chocolates, wine and a very cheeky fresh oyster farm called Get Shucked.

The latest and hippest thing on the Apple Isle is the return of cider making. However, this time the rise of craft beer has led inevitably to craft cider. The rising star is Pagan Cider, which cleverly approaches cider with the sophistication and artistry of winemaking. The apple and black cherry cider is a revelation, made only from fresh fruit, completely dry and very adult and complex.

The Coal River valley, near Hobart, is establishing itself as the pre-eminent home of full-bodied pinot noir and life is returning to the heritage village of Richmond, the valley’s main town. Although why this village doesn’t have a proper wine centre escapes me – imagine Beaune or Bordeaux with no wine shops.

Southern Tasmania has become a haven in recent years for the well-healed and disaffected artisans of Sydney and Melbourne looking to reconnect with themselves. Despite this, the wine, craft beer and now cider scenes have thrived as a part of a glorious gastro-adventure waiting to beguile the unsuspecting tourist.

The tasting

**Abel’s Tempest 2010 Pinot Chardonnay**

from Heemskerk was golden with a medium bead. The nose was yeasty and the initial sensation was kin to refined Vegemite toast; this was supported by citrus fruit cut and refined length. A toasty rare bird of a sparkling with some sophistication.

**The Two Metre Tall Derwent Aromatic Spelt Ale** was cloudy golden with a floral and citrus aroma. The palate was uniquely heavy with citrus cut and floral notes on a mildly rich bodied ale. The end product was superb farmhouse ale, but so radically different to mass market beer that it was like entering a new but very pleasant world – hello beer!

**The 42 degrees South Premier Cuvee NV** was almost golden-pink and had an exuberant bead that kept going and going. The palate was cut dry with a fusion of citrus and toasty yeasty notes. The persistent flavour mix lingers on the tongue as a hint of richness rises and cuts back with the acid. Rich and sophisticated fizz.

**The Stefano Lubiana Riesling 2010** was textbook cool, with aged limey citrus and floral notes on the nose supported by a minerally tone. The palate showed the perfect balance of the sugar with acid cut supported by the symphony of floral lime.

**Pagan Cider’s ‘Cerise’ Apple Cherry Cider** (40% cherry, 60% apple) was seductively drinkable and an uncommon treat, given the rarity of craft cider created from black cherries and apples. The colour was ruby pinot red and the nose was a wild mix of the two fruits. The palate was fruity, but with no hint of cloyed sweetness, and was again quite sophisticated and complex with some yeasty complexity to carry through this surprising but excellent drink.

**The Bruny Island Premium Wines 2012 Chardonnay** was pale at present, with a nose of restrained mineral and peachy fruit underscored by some oak. The palate showed real finesse and approximated a good young chablis, with more acid cut and mineral backbone than oak or stewed fruit, which is synonymous with warm-climate chardonnay. The estate is remotely located on the island of fine foods and is producing offerings of style and impending renown.

Matthew Dunn is QLS principal policy lawyer.
**Mould’s maze**

Across

1. Former High Court of Australia (HCA) justice who published a book on Mahatma Ghandi. (5)

2. 1992 HCA case mandating judicial warning for a jury of the dangers of convicting on identification evidence where its reliability is disputed. (7)

3. Legal work performed but not billed. (abbr.) (3)

4. Generalia specialibus non............ (Latin) (8)

5. 1991 HCA case mandating judicial warning to jurors where a confession made in police custody lacks reliable corroboration. (8)

6. 1999 HCA case heralding the demise of proximity as a criterion for civil liability. (5)

7. Moving of electoral boundaries for political advantage. (11)

8. Surname of Queensland Justices Margaret and Alan, and Queensland barristers Elizabeth, Nerida and Christopher. (6)

9. An employer has a non-......... duty of care. (9)

10. 1997 HCA case concerning the constitutionally implied right of political speech. (5)

11. The ‘wait and see’ principle in s210 of the Property Law Act 1974 (Qld) prevents options to purchase from offending the rule against ........... . (12)

12. President of the Sunshine Coast Law Association, John...... . (6)

13. Next court event, ..... date. (6)


15. Adoption of guilt. (10)


17. Time limit for complaints under the Anti-Discrimination Act 1991 (Qld), .... year/s. (3)

18. Legislation authorising registration of same sex unions, .......... Act 2011 (Qld). (13)

19. Appellate judgments containing substantial obiter on the area of law concerned, .......... judgments. (9)

20. Royal approval of legislation, parliamentary ...... . (6)

21. Two HCA cases involving one defendant regarding the constitutionality of legislation permitting preventative detention. (5)

22. Informal assumption of parental responsibility, in loco ...... . (Latin) (8)

23. Amongst others, inter ..... (Latin) (4)

24. Senior associate at Hopgood Ganim in Brisbane, ..... King. (5)

25. Appellate judgments containing substantial obiter on the area of law concerned, .......... judgments. (9)

26. Sankey v Whitlam raised the issue of ...... interest immunity. (6)

27. Silk who represented Jayant Patel, .. Fleming QC. (3)

28. 1984 HCA case concerning the circumstances in which a criminal trial judge can call a person to give evidence when the prosecution have failed to do so. (11)

29. 1995 HCA case concerning similar fact evidence. (7)

30. Admission of guilt. (10)

31. 1983 HCA case concerning the presumption of strict statutory construction in favour of a defendant when the statute is penal in nature. (6)

32. 1976 HCA case concerning the manner in which an appeal from a discretionary judgment should be determined, .... v The King. (5)

33. When counsel .... for and inspects a document held by the other party, he/she is bound to tender it if requested. (5)

**Solution on page 72**

Down

1. Superman; Noosa solicitor Chris ...... (5)

2. In the Full Court, in ...... . (Latin) (5)

3. Amongst others, inter ...... . (Latin) (4)

4. Amongst others, inter ...... . (Latin) (4)

5. 1936 HCA case concerning the manner in which an appeal from a discretionary judgment should be determined, .... v The King. (5)

6. 1980 HCA case in which Justice Mason (as he then was) listed the criteria relevant to establishing a breach of duty of care, ...... Shire Council v Shirt. (5)

7. The sale of a ...... concern is GST exempt. (5)

8. Time limit for complaints under the Anti-Discrimination Act 1991 (Qld), .... year/s. (3)

9. Royal approval of legislation, parliamentary ...... . (6)

10. Two HCA cases involving one defendant regarding the constitutionality of legislation permitting preventative detention. (5)

11. Informal assumption of parental responsibility, in loco ...... . (Latin) (8)

12. Senior associate at Hopgood Ganim in Brisbane, ..... King. (5)

13. Legislation authorising registration of same sex unions, .......... Act 2011 (Qld). (13)


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16. Time limit for complaints under the Anti-Discrimination Act 1991 (Qld), .... year/s. (3)

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18. Legislation authorising registration of same sex unions, .......... Act 2011 (Qld). (13)
If it ain’t broke, fix it

Why HR wants to make things better

One of the curious things about working in the corporate sector, which – since the majority of law firms now employ the equivalent of the population of Thailand – includes the legal profession, is that no matter how well things are going, bosses always believe they could be better.

For example, imagine you are a car-maker, and you have a great car, in fact you have the best car ever made – let’s call it the Porsche 911 Targa. The car is cool and sporty, and – because it has a roof you can take off, a spoiler the size of a tennis court and says to everyone “I have more money than sense and will spend it on pretty things”, it helps unattractive men date beautiful women and sells like hotcakes amongst the legal profession.

A normal person might think that such a good product would be left alone to make the car-maker rich, but that isn’t how bosses work. The bosses decided that the car could be better, so they gave it a normal roof, took away the spoiler and turned the Targa into something that looks like every other car but costs four times as much. If Porsche hadn’t managed to convince people to buy turbo-charged SUVs for soccer mums, they’d probably be broke.

The point is that changing the design was, idea-wise, up there with low-alcohol wine, Super League and Han shooting first.

‘Live and don’t learn’ is the mantra of executive management everywhere, and things that aren’t broken continue to be fixed all the time (see Rudd, Kevin and the Industrial Relations System; Rudd, Kevin, and Border Protection; Rudd, Kevin, and the tax system; Rudd, Kevin … you get the idea). The point is that no matter how well your work is going and how much you are billing, someone – probably from your human resources department – will tell your boss that things could be better and that something should be done.

HR people do this because the HR field is one of those professions that arose in response to no particular need whatsoever, like real estate agents and the Senate – and if you are in a job which is basically the answer to a question no one has asked, you had better come up with a reason for your existence, and quickly.

Bosses listen to HR people because experience tells them that if they sign off on whatever the HR person wants, the HR person will stop talking to them. They also know that whatever HR is suggesting, as a boss they won’t have to take part in it.

Of course, when things are going well it is probably because everyone is doing their job quite well, and as it is hard for HR people to come up with solutions to real problems (since there aren’t any) they will come up with imaginary problems. These are problems that have a big advantage over real problems, because if the solutions suggested don’t work, nobody will know. Such problems always have vague and meaningless names and never bothered anybody until they were thought of in the ‘80s. Examples include ‘poor communication’, ‘lack of teamwork’ and ‘leadership’.

Why a team is brought together by encouraging it to fight with itself is beyond me…

I have yet to meet a consultant who could come up with a definition of any of these terms, despite the fact that I have also never met a consultant who didn’t believe that every problem anywhere – up to and including global warming – was the result of one (or all) of the above. Unfortunately, imaginary problems are invulnerable to logic and need no definitions; they will still require a solution that will result in you (although not your boss) being involved in an activity that is less fun than root canal surgery at the Rusty Implements School of Dentistry and DVD Repair.

Such activities are usually related to team-building, which bosses always opt for as it is the only thing in the above list that cannot be directly related to any failure on their part. The curious thing about team-building exercises is that they inevitably involve splitting the team up and pitting them against one another in some pointless, inane and desperately boring contest (historians now believe that Australian Rules football started as a team-building day for the Rum Corps).

Why a team is brought together by encouraging it to fight with itself is beyond me, which is why team-building exercises organised by me tend to involve alcohol and karaoke, but I digress.

I recall one team-building event where my team was split in to two groups and sent – along with a HR person to supervise, of course – to Dreamworld. Each group had a list of items to find and count, or draw, or steal or something like that; apparently this would get us to engage our teamwork skills in order to help us defeat our evil opponents (who were of course also our team-mates the rest of the year).

At least, I assume that was the plan, because when we got there we did what any two groups of people would do when only one person has been sent to supervise – we bolted. Every now and then we would glimpse the raging, breathless form of the HR supervisor fighting through the crowds towards us and screaming for us to for God’s sake stop so we could tell him how many penguins we counted in Koala Town or something like that, but he never caught us. I suspect he is still there, wandering the grounds looking for us, surviving on dropped ice-cream cones and any chips the seagulls couldn’t eat.

I don’t think my team and I came out of that experience with any increase in motivation, except possibly that we were all motivated to never, ever work in HR. It did fulfil all of the requirements of a team-building exercise, however, in that it made absolutely no difference to our work output at all and gave our HR department something to do.

Also, since the goals of such events are always something like, ‘participants will be seen to utilise synergies and holistic methodologies to enhance cross-team envisioneering to eliminate institutionalised thinking and repurpose silos to achieve outcomes’, no one can ever claim that the goal had not been met.

In closing, I should point out that this column is in no way an attempt to offend Dreamworld, its owners, staff or – God forbid – its no doubt massive and well-resourced legal team, and as far as I am concerned it is a great place to go, especially if work is paying.

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

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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'

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<th>Rate</th>
<th>Effective</th>
<th>Rate %</th>
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<td>Standard default contract rate</td>
<td>from Oct 1, 2013</td>
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<td>Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year</td>
<td>to Jun 30, 2014</td>
<td>8.50</td>
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<tr>
<td>Federal Court – Interest on judgment debt for half year</td>
<td>to Jun 30, 2014</td>
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<tr>
<td>Supreme, District and Magistrates Courts – Interest on default judgments before a registrar</td>
<td>to Jun 30, 2014</td>
<td>6.50</td>
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<tr>
<td>Supreme, District and Magistrates Courts – Interest on money ordered (rate for debts prior to judgment at the court’s discretion)</td>
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<td>Cash rate target</td>
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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 > Knowledge centre > Practising resources > Interest rates any changes in rates since publication. See the Reserve Bank website – www.rba.gov.au – for historical rates.

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District Law Associations (DLAs) are essential to regional development of the legal profession. Please contact your relevant DLA President with any queries you have or for information on local activities and how you can help raise the profile of the profession and build your business.

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