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LAW INSTITUTE JOURNAL

MARCH 2022

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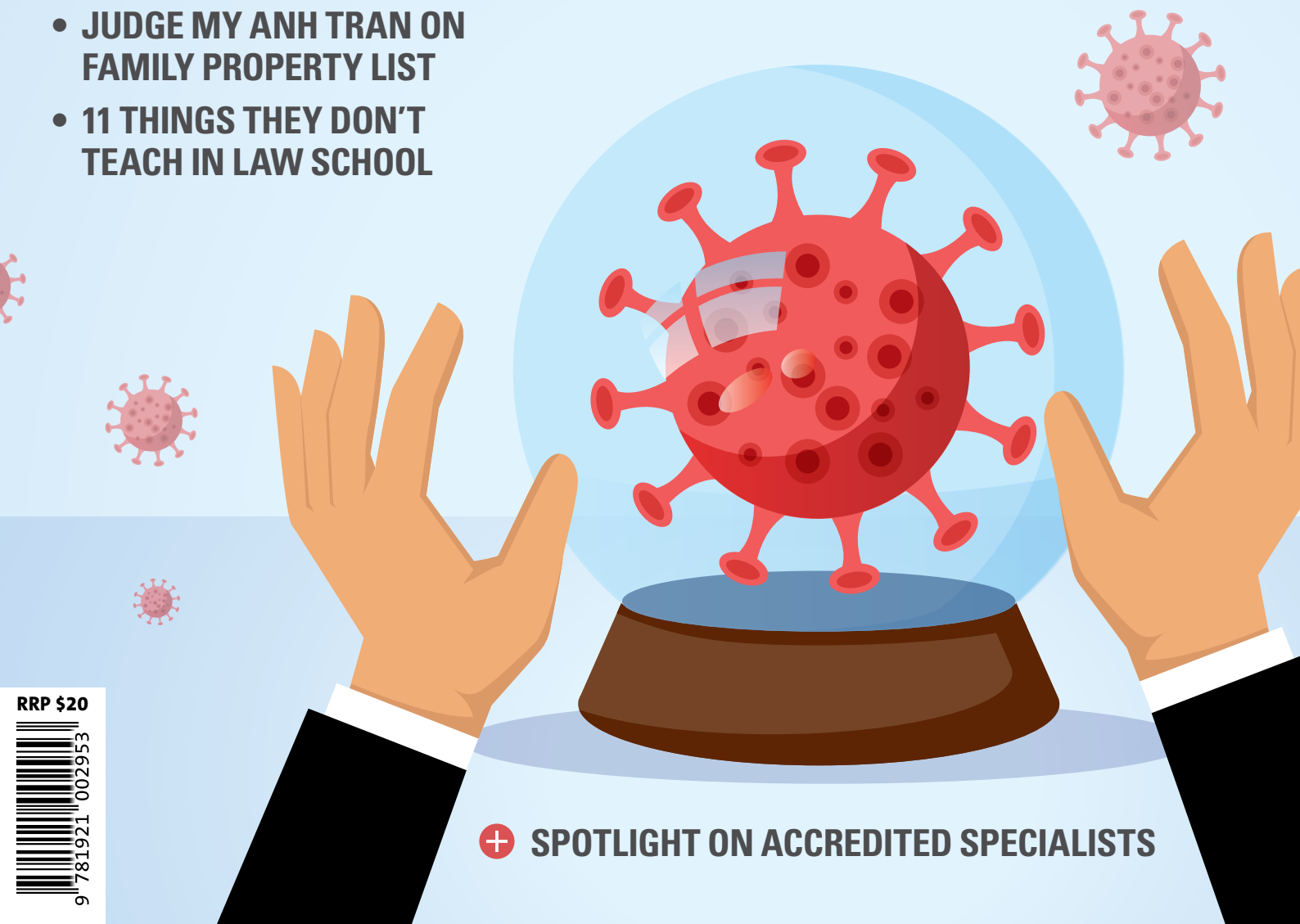

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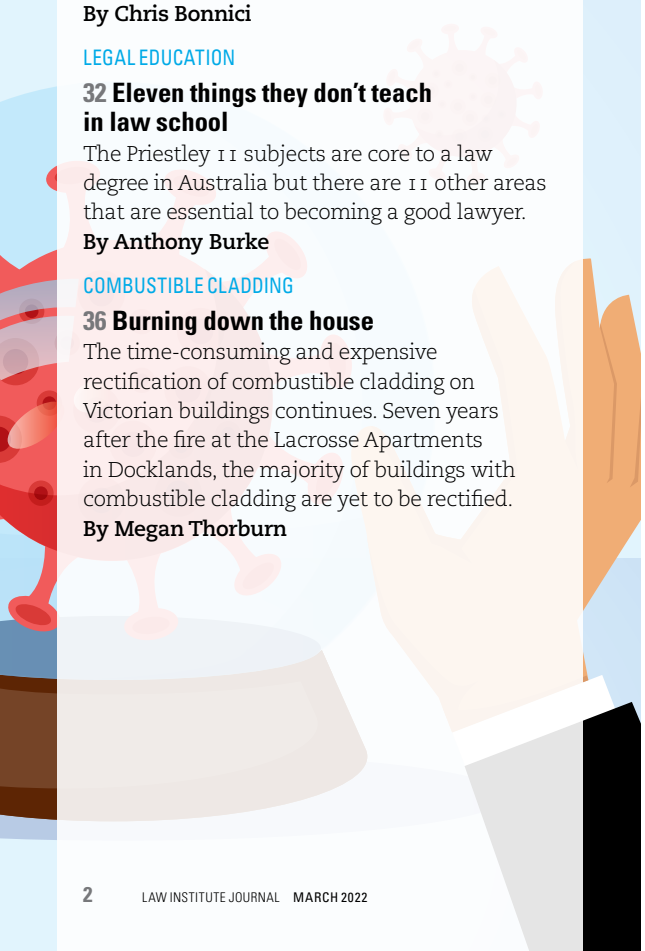

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CHAT TO US TODAY

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Contributors

Blair Ussher

VCAT member.

PAGE 20

Bill Swannie

Lecturer at the College of Law and Justice, Victoria University.

PAGE 24

Chris Bonnici

Deputy Public Interest Monitor for Victoria.

PAGE 28

Anthony Burke

Consultant with Burke & Associates Lawyers.

PAGE 32

Megan Thorburn

Principal of CCP Law.

PAGE 36

LAW INSTITUTE JOURNAL

EDITORIAL

Managing editor
Carolyn Ford
03 9607 9319
cford@liv.asn.au
www.liv.asn.au/lij

Production editor
Mary Kerley

Senior journalist/ online editor
Karin Derkley

Senior legal editor
Libby Brown

Art director
Natalie White

Graphic designer
Jacquie Grabert

SUBMISSIONS

Submissions for legal features, opinion pieces and other articles should go to edassist@liv.asn.au

ADVERTISING INQUIRIES

Advertising sales executive
Greg Pryer
03 9607 9496
advertising@liv.asn.au
www.liv.asn.au/lij

SUBSCRIPTION INQUIRIES

subscriptions@liv.asn.au
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LIJ WORKING GROUP

Gerry Bean
Carolyn Ford
Geoff Gronow
Melissa Macken
Chris Molnar
Cameron Ross
James Turnbull

THANK YOU TO OUR REGULAR CONTRIBUTORS FOR MARCH:

Craig Nicol
Keleigh Robinson
Dr Michelle Sharpe
Dr Michael Taylor

DISTRIBUTION

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LAW INSTITUTE OF VICTORIA

140 William Street
Melbourne 3000
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Up to 3 points accrued from 1 January–31 March can be carried forward into the next CPD year.

Check your unconscious bias

The 2022 International Women's Day campaign theme – #BreakTheBias – can be an enabler of cultural change in the profession.

Historically, International Women's Day has been a day of both action and celebration. As I look at the Victorian legal profession, there is much to celebrate: more than half the profession are women; there are women in legal leadership roles in government, the courts, both arms of the profession, and in large and small firms across the state; and there are women leading legal teams in Australia's most prestigious corporations.

There have been great strides in changing the culture of the legal profession, and we should feel pride that the playing field looks much more level than it did even a decade ago.

But there are endemic challenges across the profession that we need, collectively, to address – and the most difficult to change are those rooted in the culture, institutions and infrastructure of our profession.

As I reflect on how the 2022 International Women's Day campaign theme – #BreakTheBias – can be enlisted as an enabler of cultural change in the profession, it is helpful to call out where we see that bias evidenced and take positive steps to eliminate it. We also need to address that unconscious bias to which we ourselves are blind, since it has a significant impact on the retention and advancement, and affects the satisfaction, of women in the profession.

One step the LIV has taken is to launch the Charter for the Advancement of Women. Organisations can sign the Charter to demonstrate their commitment to promoting and supporting strategies to retain women from all backgrounds in the profession over the course of their careers. The Charter is designed to complement policies that promote equal opportunity and prohibit sexual harassment, while proactively championing the retention and advancement of women within organisations. The key to the Charter is the commitment to support "women from all backgrounds" in the profession.

While women's representation across the profession is strong, Indigenous women, women from culturally diverse backgrounds, women with disabilities, and those identifying as LGBTIQ+ continue to face particular challenges. As part of building an inclusive, diverse and equitable profession, we need to adopt specific strategies to ensure that diversity is reflected at all levels in our profession. The LIV hopes the Charter for Advancement for Women, which has been adopted by nearly 60 organisations in Victoria, will be one of the key mechanisms by which that diversity can be achieved.

As we emerge from the worst of the pandemic (we hope) in 2022, we must also think about how new ways of "agile working" may exacerbate old – and contribute to new – biases and inequities. Organisations will need to re-think their expectations of staff, and their rewards for staff, at a time when attendance at face-to-face work and activities seems destined to change permanently. We will all need to ensure that the results of our new, more flexible, more results-oriented approach to work does not have the unintended effect of limiting the options and advancement of those who are more productive and more engaged when working outside the conventional office structure.

COVID-19 brought into the spotlight many issues and structural inequalities experienced by women in the workforce. Women largely bore the brunt of home-schooling and family responsibilities while trying to manage work expectations. Now that we can begin to dare to look ahead, it's time for purposeful and values driven leadership at all levels to tackle many of the systemic and structural barriers to women's full and equitable participation at all levels, but in particular senior levels of the workforce. In Australia we are fortunate to have one of the most educated population of women in the world. Yet we squander this opportunity by failing to remove the barriers that prevent career progression and leadership for more than half the population. In doing so, we all miss out on the breadth of perspective, skill and wisdom that this contribution could provide. It's time to change and to address the systemic barriers and embrace flexible working arrangements, and that will benefit us all.

A final thought about how we can #BreakTheBias relates to our profession's place in the community, and to our responsibility to promote equal access to justice and uphold the rule of law. Each of us make judgments, often swift and instinctive, about the people we meet – including the clients who engage us, our opponents, witnesses, counsel, the experts we engage, and about each other. In order to #BreakTheBias in the profession, each of us needs to first examine the assumptions we make about others, based on how we think individuals will behave and what opinions they might hold, based on how they look and speak.

That way, we will contribute not only to a more equitable, diverse and inclusive profession, but a more just and cohesive community. ■

Tania Wolff
LIV PRESIDENT *president@liv.asn.au* *@LIVPresident*

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Unsolicited

In support of health information sharing bill

A woman arrives at a public emergency department at 4am with a broken leg. She is drowsy. Should the doctor have immediate access to all her medical records from other public hospitals?

A bill now before the Legislative Council will allow the Department of Health to administer a system enabling public hospitals to share patient health records.

Last month, Bill O'Shea argued ("New bill on disclosure of health information trashes patient autonomy", *LIJ*, 8 February) that the Health Legislation Amendment (Information Sharing) Bill 2021, should be amended so patients could opt out of this system.

Mr O'Shea asked, for example, if a woman presents to hospital with a broken leg, will her past mental health or gynaecological history at other hospitals be disclosed?

It's a great example, and I've added the drowsiness.

Her potentially stigmatising past history may seem irrelevant. Except that the surgeon would like to know about the gynaecological cancer invading and weakening her bone. And the treating team would like to know whether they can safely reduce the dose of the psychiatric medication which made her fall and break her leg.

The patient is drowsily unaware of the relevance of these details, but fortunately they are recorded in her digital medical records at other public hospitals.

The information sharing system authorised by this bill will ensure her current doctor sees all that information at 4am, along with medication allergies, the results of blood tests, painful biopsies and expensive scans. They won't be flying blind until the day shift can phone another busy hospital, and wait for them to email the information.

As Mr O'Shea argues, patient autonomy is a fundamental principle. Whatever the doctors think, this woman should have the right to refuse chemotherapy or surgery for her cancer.

But is there a fundamental principle that a person's health information must stay in the one hospital that operates as part of a statewide system? Is it fair to expect her to have been sufficiently well-informed in the past, to decide?

At 4am in the emergency department this woman has a right to expect that our health system will not withhold vital information from her treating team. At 4am that right competes with her right to privacy.

As a non-government MP and the only medical doctor in state parliament I strongly supported this bill in the Legislative Assembly and I urge the LIV to do the same. ■

Dr Tim Read, Greens MLA for Brunswick

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Email: edassist@liv.asn.au

Mail: *Law Institute Journal* managing editor Carolyn Ford, GPO Box 263, Melbourne 3001; or DX 350 Melbourne.

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LIVEDUCATION

NOVEMBER–MARCH CPD PROGRAM

LAW INSTITUTE VICTORIA

Make your points count with the LIV's March CPD schedule

Focus	Session Title	Date	Time	CPD Units	Skill Area
Administrative Law	Administrative Law Symposium	Thursday 3 March	9am–1pm	4	[SL]
Commercial & Business Law	Commercial Law & Litigation Conference	Thursday 24 March	9am–5pm	6	[SL PS PM EP]
Criminal Law	Criminal Law Fundamentals	Monday 7 March	9am–1.15pm	3.5	[SL]
Family Law	Evidence in Family Law Proceedings	Thursday 10 March	9am–1pm	3.5	[SL PS]
	Family Law Intensive	Friday 18 March	9am–5pm	6	[SL PS PM EP]
In-house	In-house Essentials	Monday 28 March	10am–1.15pm	3	[PS PM EP]
Personal Injury Law	Breakfast with the Experts – Insights into Personal Injury Mediations	Wednesday 2 March	8–9.30am	1.5	[SL]
	Personal Injury Conference	Friday 25 March	9am–5pm	6	[SL PS PM EP]
Practice Management	Succession Planning for Your Law Firm	Wednesday 2 March	9.30am–12.45pm	3	[PM]
Property Law	Property Law Fundamentals (3-part program with on-demand videos)	Tuesday 1 March Tuesday 8 March Tuesday 15 March	10.30am–12pm 10.30am–12pm 10.30am–12.30pm	8	[SL]
	Property Law Intensive	Wednesday 16 March	9am–5pm	6	[SL PS PM EP]
Succession Law	Succession Law Intensive	Thursday 17 March	9am–5pm	6	[SL PS PM EP]
	Retirement Village & Aged Care Contracts	Monday 21 March	9.30–11am	1.5	[SL PS]
	Breakfast with the Experts – All Things Super	Tuesday 29 March	9–10.30am	1.5	[SL]

[SL] Substantive Law [PS] Professional Skills [PM] Practice Management & Business Skills [EP] Ethics & Professional Responsibility

Already fulfilled your CPD requirements?
Up to 3 points accrued from 1 January–31 March may be carried forward into the next CPD year

www.liv.asn.au/CPDProgram

LAW INSTITUTE VICTORIA

Commercial Law & Litigation Conference 2022

Thursday 24 March, 9am–5pm | Digital Conference

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CPD Units: 6 [SL] [PS] [PM] [EP]

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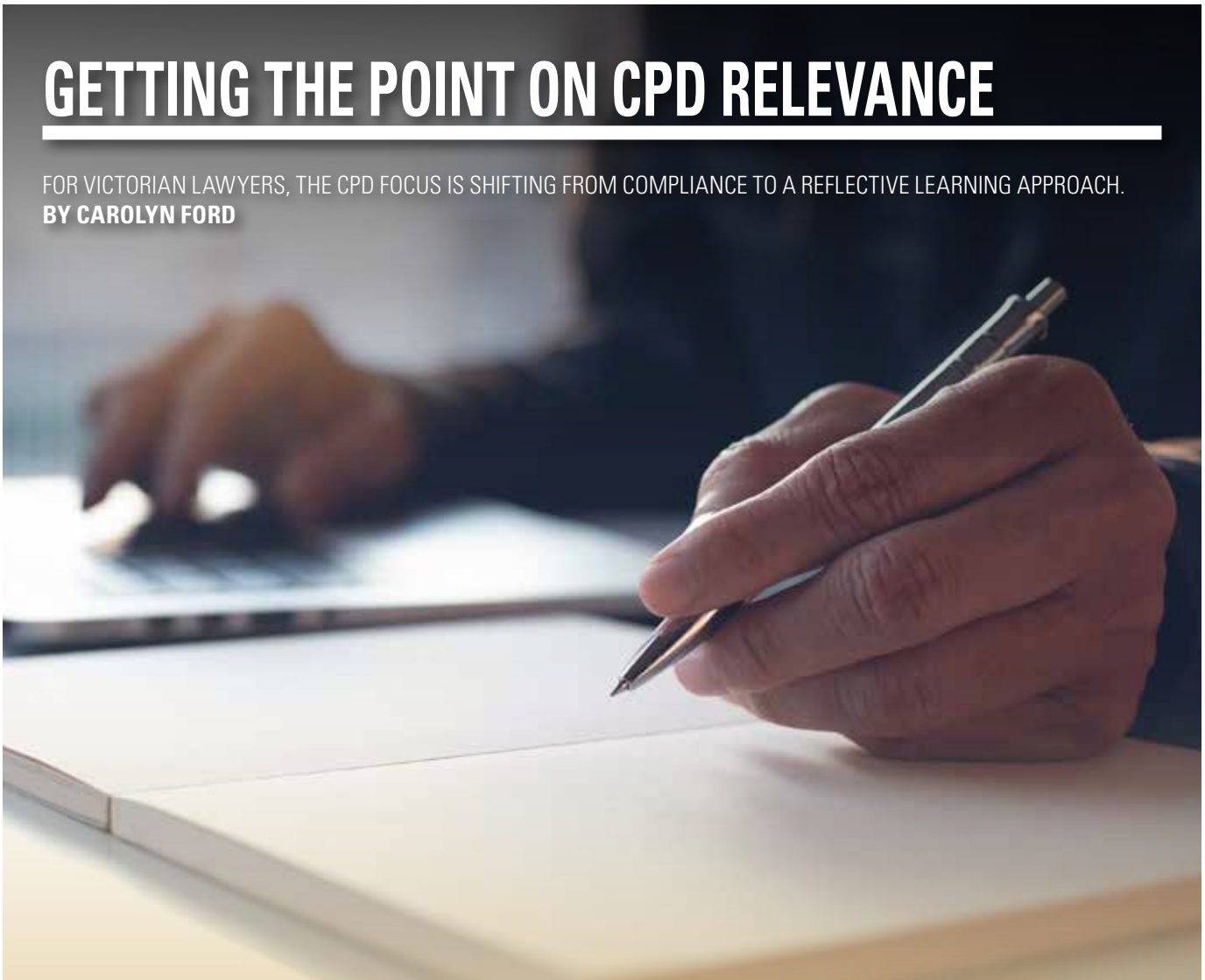
GETTING THE POINT ON CPD RELEVANCE

FOR VICTORIAN LAWYERS, THE CPD FOCUS IS SHIFTING FROM COMPLIANCE TO A REFLECTIVE LEARNING APPROACH.
BY CAROLYN FORD



What's referred to as March madness, when lawyers may tick the box to comply with Uniform Law continuing professional development (CPD) rules by the end of the month deadline, is on the way out; reflective CPD that is relevant and beneficial to practice is coming in.

A broader CPD mindset, where lawyers can claim points beyond formal technical learning, could include joining an LIV committee or section, writing a legal feature for the *LIJ* or completing specialist accreditation.

The new approach to CPD comes after the Victorian Legal Services Board and Commissioner (VLSB+C) conducted an independent review of the mandatory requirement stemming from a growing awareness of the inadequacies of the scheme.

CPD is based on a requirement for solicitors and barristers to complete 10 CPD points annually. That often translates to 10 hours attendance in person/online at seminars and conferences. Critics have said it amounts to a formulaic exercise that generates little in the way of actual learning and development. Compliance has been the focus.

The review into CPD in Victoria (https://lsbc.vic.gov.au/resources/report-cpd-victoria) considered effective learning, learning activities, subject areas, different levels of experience, providers, role of employer/regulator, obstacles (cost, location, relevance, time and employer pressure), compliance and enforcement, and technical provisions.

More than 170 individuals and organisations, including the LIV, contributed to the review. In its submission, the LIV, a leading provider of CPD programs and education for Victorian lawyers, acknowledged the world of work for the five generations of lawyers in the Victorian workforce is complex. Challenges include automation, digital disruption, alternative legal service providers, constant regulatory, legislative and industry changes, better equipped clients with changing expectations, changes to how law is practised, technology, resource management and mental health and wellbeing.

Careers are not linear, Victoria has a disparate legal education marketplace and while LIV surveys show practitioners cite "being better in their current role" as their main aim, they generally allow 1 per cent of time to learning for work.

The current CPD rules, the LIV said in its submission, supported the desire to ensure meaningful, relevant and accessible CPD, however improvements/alternatives could be implemented that would provide greater opportunity for lawyers to use CPD to develop and maintain knowledge, skills and competencies relevant to their work – not just subject matter expertise – as well as compliance.

Opportunities for improvement, the LIV said, included clarification of the four skill areas, broader learning options, self-directed study of audio-visual material/formal mentoring/accredited specialist study (typically 50-75+ hours) /business skills/safe workplace culture training be considered as CPD format, more emphasis on digital literacy and technological competence, increased transparency and awareness of activities, defined documentation, recording, risk-based audit, targeted guidance notes and enforcement, and an overall structural framework.

The review's final report "Getting the Point?", released November 2020, made 28 recommendations, all accepted by the VLSB+C. The report said conventions and structures of legal practice had been greatly challenged over the past 50 years – technology, globalisation, demand for greater accountability and transparency, more lawyers, changing demographics with many more women lawyers, more competition within and outside the profession, alignment with other jurisdictions, growth of ADR, concerns about consumer protection and access to justice, to name some recurring topics driving debate and reform.

The CPD system wasn't immune from the changes, yet had not been scrutinised in recent years. It wasn't broken, but it needed improvement to reflect more contemporary approaches to adult learning and professional development.

At its best, CPD helped lawyers integrate their career with personal aspirations and development. It helped make lifelong learning a reality. It's potential was unrealised if it was just another diversion from the demands of a busy practice, the report said.

The profession had scholastic roots. Its reverence for acquisition of knowledge about the content of the law was insufficient to equip a lawyer with the skills needed to apply the law, conduct a business, advise clients or employers or make difficult ethical choices.

The 10-point system was useful but had a negative impact on how lawyers think about their learning needs and seek out learning and development options. Many seek out seven points in their practice area then spend time "scrabbling around" to find the one point required for the other streams – ethics, professional skills and practice management.

Nor had learning modes evolved far beyond a traditional classroom approach, all of which resulted in frustration for lawyers and providers and a bad name for CPD. The contrast with medical practice, and also accountancy, couldn't be more stark, the review said.

The Victorian legal profession's problem around CPD were a compliance structure that encourages tick-the-box, a legal culture that valued subject matter expertise alone, a fragmented, competitive market and a lack of structure and governance bodies.

To counteract the threshold's influence, the review recommended development of a competency framework that will give greater weight to the "whole basket" of skills needed for contemporary legal practice. The other key recommendation is the establishment of a steering committee led by the VLSB+C, LIV and Victorian Bar to implement the recommendations, develop CPD generally and develop a three-year plan for implementation of the review with regular reporting to the VLSB+C.

Other recommendations, which will shift the focus of activity from compliance to genuine learning and development include: reflective learning approach, adult learning principles, mentoring to count, permit private study, publish guidance, five points for non-substantive law areas, ethics overhaul, wider range of training programs, encourage employers to pay in full or part for employee lawyers' CPD, more assessment of emerging areas of competence risk, maintaining the 10-point plan.

The VLSB+C is working on a plan for implementation, including establishing the CPD steering committee to build and oversee a robust CPD scheme. It is talking with professional associations, CPD providers and other stakeholders about working together to improve the quality, availability, relevance and diversity of CPD activities over the next three to four years. The initial focus will be towards improving the information, guidance and resources available and on supporting increasing availability, relevance and quality of ethics CPD given the significant concerns raised by lawyers during the review and as further highlighted by the Royal Commission into the Management of Police Informants.

Effective immediately, when considering whether lawyers have been compliant with their obligations, the VLSB+C will ask lawyers whether the CPD they have undertaken is:

- of significant intellectual or practical content and related to their practice of law
- conducted by a person suitably qualified with practical or academic experience in the subject matter (not necessarily a lawyer)
- extends the lawyer's knowledge and skills relevant to their practice or career development.

VLSB+C director, Investigations and chair of the CPD steering committee Matt Anstee said the VLSB+C will direct its attention to ensure lawyers are reflective about how the CPD they undertake is relevant and beneficial to their practice.

"We will be focusing on known areas of risk and communicating with the profession about what they can do to educate themselves through their CPD to avoid the common concerns raised with us," Mr Anstee said.

"Our experience is that a focus on professional development is an important part of how lawyers can ensure that they are providing competent, relevant and up to date services to their clients.

"Our intention is that lawyers will look at CPD as more than being compliant with the rules and 'ticking the box' at the end of March. This is consistent with the findings of our independent review.

"We know the majority of lawyers understand and meet their obligations every year. We also know that most lawyers are proactive about seeking CPD that is relevant

to their circumstances but can be unsure what reflective professional development means for them."

LIV Member Knowledge & Learning general manager Kellie Hamilton said learning was a constant for lawyers, "however we often don't consider it learning unless there is a presenter, power point slides and a CPD point attached.

"CPD is a tool to help maintain relevance in modern practice. It is not just about compliance. Yet, as the legal landscape and legal roles evolve and change, a fit for purpose CPD scheme is even more important."

The global pandemic had altered lawyers' ability to access traditional modes of learning, Ms Hamilton said, although the LIV had successfully delivered 125 digital CPD and education activities to 11,300 attendees.

"The professional interaction and reflection that comes from shared experience helps to be a better lawyer. The LIV will continue to drive continuous learning with a focus not on compliance but on skill building and reflection. We look forward to working with the VLSB+C to roll out the review recommendations." ■

CPD resources

For 2021-22 CPD obligations go to https://lsbc.vic.gov.au/lawyers/practising-law/continuing-professional-development-cpd/your-cpd-obligations

Rules for solicitors

In general, each activity must:

- be of significant intellectual or practical content and be related to the practice of law
- be conducted by a person suitably qualified with practical or academic experience in the subject matter (not necessarily a lawyer)
- extend your knowledge and skills relevant to your practice or career development.

You must complete at least one point in each of the following four fields:

- ethics and professional responsibility
- practice management and business skills
- professional (or barristers') skills
- substantive law (which includes practice, procedure and evidence for barristers).

There is a range of options for completing CPD. For a more rewarding experience, lawyers are encouraged to pre-plan some CPD and try different formats and delivery modes. Lawyers must keep a record of all the CPD activities completed for at least three years.

For solicitors, there are some limits to the number of hours you can do for each activity (see table below).

LIV CPD

For information on the LIV CPD programs go to LIV CPD, Education & Networking on the website.

Key resources

- LIV Member CPD Tracker, in My LIV Dashboard. You must be signed in to MY LIV to see your points.
- Record of Engagement in CPD Activities (PDF)
- View examples of CPD activities for each compulsory field here (https://www.liv.asn.au/CPDCompulsoryFields)

For other inquiries about CPD compliance contact the LIV Compliance team, ph 9607 9391 email compliance@liv.asn.au

Specialist accreditation

The LIV Accreditation Specialisation program can also be completed as part of your CPD for a total of 10 points.

Practice management course

For solicitors intending to become a principal of a law practice or commence as a sole practitioner, undertaking a practice management course is mandatory. Early completion is encouraged as it assists the transition to becoming a principal and meets all CPD obligations for the year it's done in.

CPD activity	Points of activity	Limits that apply for solicitors
Participate in a lecture, seminar, workshop or discussion group, in person or online	1 point per hour of activity	No limit
Research, prepare and/or edit a legal article or law report	1 point per 1000 words	No more than 5 CPD points per year
Prepare and/or present a CPD activity	1 point per hour of activity	No more than 5 CPD points per year
Participate in a legal committee, taskforce or practice section	1 point per 2 hours of activity	No more than 3 CPD points per year
Postgraduate studies relevant to the practice of law or practice needs	1 point per hour of activity	No limit
Private study of audio/visual materials	1 point per hour of activity	No more than 5 CPD points per year

Source: VLSB+C

PROMOTING THE PROFESSION

A NEW PUBLIC AWARENESS CAMPAIGN INCLUDES ADVERTISING AND PODCASTS AIMED AT DEMYSTIFYING THE LAW AND PROMOTING THE VALUE OF LAWYERS. **BY CAROLYN FORD**

Count on a lawyer to resolve legal problems – that is the message driving a new public awareness campaign which aims to raise the profile of Victorian lawyers and connect the public with LIV members, as well as improve access to justice.

The LIV and Queensland Law Society are joining the campaign, an initiative of the Law Society of New South Wales.

A series of videos and advertisements saying "stop looking for advice in all the wrong places" is included in the campaign. Alongside images of a fortune cookie, tarot cards and a pick-a-box game, it recommends using a lawyer instead.

There is also a 16-episode podcast "Lawfully Explained" planned. Through interviews with experts from the profession, legal topics commonly grappled with in everyday life will be tackled. The podcast will be made available on the LIV website and other podcast platforms.

Episodes include "Can my landlord evict my fur baby?", "Feeling the strain; can I claim workers comp?" "Starting a business; what can possibly go wrong?", "Where there's a will there's a day in court" and "How much will this cost me?"

LIV president Tania Wolff says the LIV is adopting the campaign to make connections between lawyers, the community and the LIV. "Connected, we can increase access to justice, especially for those who don't qualify for legal aid or have a lawyer on speed dial.

"Lawyers are trusted professionals of great diversity, from all walks of life, and the law, far from being an intimidating mystery, is a useful tool for all."

Connecting with and educating the public about common legal issues would go towards making the law feel more accessible and less intimidating.

"We want to build visibility of lawyers and demystify the legal process," LIV CEO Adam Awty says.

"Rentals and relationships, wills and workplace issues are common areas of dispute but people often don't know where to begin to resolve it.

"Indeed, people often don't know their problem is a legal one and that it can be resolved, possibly in their favour, by law. When thinking about their issue, we would like to see people consider getting a lawyer to assist."

The campaign speaks to the LIV's strategy of promoting the value of members, and also its mission which is to promote justice for all, advancing social and public welfare in the

operation of the courts and legal system as well as advancing education and public confidence in the legal profession and in the processes by which the law is made and administered. Informally, it also speaks to the outcomes of the Royal Commission into the Management of Police Informants, which recommended education to raise public awareness of the ethical duties of lawyers.

The LIV's advocacy is on behalf of legal professionals but also members of the public on community issues. It is the go-to body for media but also individuals seeking guidance on legal issues, including the appropriate assistance required and how to find a lawyer.

The campaign will draw attention to the LIV's customised Find Your Lawyer tool, a popular lawyer referral service on the LIV website. It has about 330,000 visits by members of the public per year. An individual can have up to three referral letters connecting them with LIV members who have agreed to see that person for up to 30 minutes free. People can define their search for a lawyer based on location, legal issue or area of law, law firm, language, pro bono, hours of operation, no win no fee and need for an accredited specialist.

In development, and linking to Find Your Lawyer, is a micro-site which will hold engaging, useful multi-media digital content (videos, podcast) which will educate the public about the law and the legal profession. It will be added to continuously.

The campaign will start in coming months with details to be announced on the LIV website. ■

ADDING VALUE TO FAMILY LIST

FOR JUDGE MY ANH TRAN, ENGAGEMENT WITH THE PROFESSION WAS IMPORTANT AND CONTRIBUTED TO REFORMS TO THE COUNTY COURT'S FAMILY PROPERTY LIST. **BY KARIN DERKLEY**

In late 2020, not long after she took over the Family Property List at the County Court, Judge My Anh Tran attended a panel session of the LIV Succession Law intensive on issuing proceedings in the Supreme Court versus the County Court. "It is fair to say the panel had some difficulty thinking of a reason why you would initiate in the County Court," Judge Tran says.

The Family Property List deals mostly with testator family maintenance claims, in which someone claims that a deceased estate hasn't provided for them adequately, despite a moral duty to do so. The Supreme Court's Testators Family Maintenance List also deals with these matters, but those dealt with by the County Court tend to be straightforward, "where people just need an answer."

"We don't generally permit things like discovery or interrogatories. We don't want to see a lot of interlocutory arguments, or deal with complicated tax structures or corporate trust vehicles. Just mums and dads and brothers and sisters who have a problem and want to get it resolved cost effectively, equitably and sensitively so they can get on with their lives."

Determined to learn how to better demonstrate the value of her List, Judge Tran met with the LIV Succession Law Committee and the Family Property List users' group. "For me, engagement with the profession is very important and I wanted to make my list a collaborative exercise in terms of providing a dispute resolution service that actually met a need."

On the basis of the consultation, Judge Tran circulated a draft practice note for feedback. The changes suggested were twofold – one was around the process each matter would take, and the other was around a limit to the legal costs that could be charged for matters.

Previously, the Court's procedure was that parties would attempt to settle the matter, and if this failed the parties would be given a trial date. The approach Judge Tran suggested was to give parties a trial date for six months in advance, and provide them with a choice between three different forms of dispute resolution: private mediation, a judicial mediation or settlement conference. "By having a trial date right from the start everybody's attention is focused," she says.

Private mediation is the most common approach to settlement, while judicial mediation is reserved for more difficult matters and is conducted by the judge, generally Judge Tran herself or a judicial registrar. "These are cases where the parties need help from the Court to reach a resolution. One particular party might not be able to accept their legal advice and need to hear it from the Court. Or someone has a story that they really need to have heard by the Court before they're ready to move on, such as one that raises issues of sexual abuse or domestic violence".

Settlement conferences involve cases where the estate is too small to pay for a private mediator. "It's not an intense judicial mediation, but we can facilitate a discussion between the parties and try to reach a resolution."

Since the new process was introduced in May 2021, most of the 213 matters dealt with have settled, with just a handful continuing to trial.

The other reform around legal costs was somewhat more controversial. Judge Tran says too often a disproportionate amount of costs was coming out of modest estates, leaving very little for the parties. The new directions orders stipulate that solicitors must disclose to their clients that the expected legal costs to the end of mediation will range from $10,000 and up to $35,000 for very complicated cases. Lawyers who levy costs above that range must give the Court an explanation of what led to those costs. "And if I'm not satisfied with the explanation, then I can list it for a hearing, send it to taxation, or fix the costs at some lower amount," Judge Tran says.

Despite some initial pushback about this requirement, the number of matters initiated in the Family Property List since the reforms is double that of the previous year. "People are seeing the value of it and bringing appropriate proceedings to the list."

Judge Tran joined the County Court in 2015 as a Judicial Registrar in the Commercial Division where she conducted up to 70 mediations a year. "My speciality in mediations were the really complicated family disputes and self-represented litigants – the really messy disputes."

The shift to the Family Property List has been a satisfying move into an area of law with a more human dimension, she says. "You are dealing with complicated, fraught human disputes, cases that typically involve fractured family relationships.

"It's really important to me that when parties come to Court, they feel respected, they feel heard, and they feel like they've had an opportunity to participate in the process rather than the lawyers controlling everything and the judges deciding everything.

"If you can get a mediation to work and get the parties to reach a point where they're prepared to let go of the dispute and reach an agreement, that's the best outcome for everybody. It is something that I'm passionate about continuing in." ■

Find out more about the County Court's Family Property List (https://www.countycourt.vic.gov.au/going-court/common-law-division/common-law-division-lists/family-property-list).

Judge Tran will give a keynote address at the LIV Succession Law Intensive on 17 March.

WHAT CAN WE DO ABOUT SEXUAL HARASSMENT?

THE LIV'S CHARTER FOR THE ADVANCEMENT OF WOMEN CONTINUES TO ATTRACT NEW SIGNATORIES. **BY KARIN DERKLEY**

The LIV, along with the legal profession and justice system generally, is taking a proactive approach to the issue of sexual harassment and promoting the interests of women in the profession.

The LIV's Charter for the Advancement of Women continues to attract new signatories, with nearly 60 firms and organisations having joined since it was launched in September 2021.

Signatories to the Charter make a commitment to supporting women in the profession and addressing the incidence and drivers of sexual discrimination and harassment in their workplaces.

Among the signatories are firms including Allens, Arnold Bloch Leibler, Gadens and Herbert Smith Freehills. Organisations including Federation of Community Legal Centres Victoria, Victoria Legal Aid, College of Law and the Victoria Law Foundation have also signed up.

Also working to raise awareness of sexual harassment issues is the LIV-led Advocates for Change group made up of more than 50 Victorian legal professionals from public and private organisations and community legal centres. Small group meetings have taken place over the past year to share experiences, encourage mutual learning and good practice, and commit to being advocates for promoting change.

The Advocates for Change group launched its report Sexual Harassment in the Legal Profession: What can we do about it? at a roundtable on 22 February, convened by Victorian Court of Appeal President Justice Chris Maxwell, LIV CEO Adam Awty, Lander & Rogers chief executive partner Genevieve Collins and Slater and Gordon CEO John Somerville (See Opinion p18).

LIV president Tania Wolff says that unless the profession properly addresses the issue of sexual harassment and the other barriers that prevent career progression for women, it will continue to be deprived of the significant contribution of highly skilled and highly educated women who are coming into the legal profession every year.

"It's such a shame when we think of the breadth of perspective, skill and wisdom that this contribution could provide and that we continue to miss out on," she says.

Sexual harassment remains pervasive in the legal sector, despite efforts to address it over the years, the document points out. Some people still lack an understanding of what constitutes sexist and harassing behaviour, and many managers do not know how to respond to reports of incidents, making those affected reluctant to speak out.

The document sets out ways in which organisations can foster cultural change within their workplace, including addressing power imbalances and gender stereotypes that enable sexual harassment, encouraging bystanders to report such behaviour, suggestions for ways to support an affected person, and how to address the barriers to reporting and improve responses to sexist and harassing behaviour.

Sexual harassment needs to be reframed as an issue of workplace safety and respect, and leadership is critical in achieving this change, Mr Awty says. "Leaders have a crucial role in modelling respectful behaviour and calling out and addressing inappropriate conduct." Gender equality in leadership roles is also important for entrenching cultural change, he says.

While the numbers of women in partnership and senior leadership roles in the profession have increased in recent years, it is still disproportionate to the number who enter the profession each year. Last year 67 per cent of those entering the profession were women, and women now outnumber men in the profession in Victoria, making up 53 per cent of lawyers. But less than a third of those in partnership positions are women, and last year just 9 per cent of women held a principal practising certificate, compared with 17 per cent of men.

While lack of support for women needing to balance family responsibilities with their professional career is partly to blame, sexual harassment and sexist behaviour is another major contributor to the high attrition numbers among women in the profession.

Mr Awty says that gender equality needs to be embedded into the culture of an organisation by ensuring it is part of a firm's "operating rhythm". This includes applying a gender lens to policies and practices and to pay equity, he says.

The Charter promotes strategies that are aimed at retaining women from all backgrounds in the profession over the course of their careers, and encourages their progression into senior executive and management positions.

The LIV also urges firms to promote and encourage parental leave and flexibility for caring responsibilities, and focus on equitable briefing practices.

"It's time to address the well documented, systemic barriers and discard the old terminology of 'part time' and 'full time' work and embrace flexible working arrangements that will ultimately benefit us all," Ms Wolff says.

Signatories to the Charter agree to continue working together with the LIV to form a common understanding and collective focus towards addressing attitudes that give rise to gender inequality. ■

Find out more about the Charter for the Advancement of Women and how to sign up for it here. https://www.liv.asn.au/LIVCharterAdvWomen.

ADVOCATES FOR CHANGE UNITE

VICTORIAN COURT OF APPEAL PRESIDENT JUSTICE CHRIS MAXWELL JOINS LEADERS IN THE PROFESSION IN TRYING TO STAMP OUT SEXUAL HARASSMENT.

A remarkable thing happened in 2021. We invited 50 people from across the profession to come together in small groups (on Zoom) to talk about how to prevent sexual harassment – and they all came. Week after week between June and September, in 60-minute sessions from 5-6pm, groups of six to eight engaged in lively, passionate discussion about why harassment occurs and what can be done to stop it.

What was thrilling was the diversity of participation: senior and junior, lawyers and non-lawyers, from public and private organisations. What was exhilarating was the readiness to engage, the unity of purpose and the obvious pleasure in collaboration. Participants commented on the importance of being able to speak openly about troubling matters in an environment of trust.

What was truly unexpected, however, was the freshness of the insights which participants brought, and the vigour of their commitment to bringing about change. This was especially encouraging given how long the profession has been trying to solve the problem of sexual harassment.

Such was the quality of the contributions that we realised, midway through the process, that there needed to be a record which we could distribute to a wider audience. This was important, we thought, so that others could see and act on the ideas for action, and so that the wider profession could be inspired by what had occurred.

That is how the document entitled "What Can We Do About It?" came into being, as a distillation of themes, ideas and comments from the meetings. Importantly, each participant signed the document in their individual professional capacity, while also committing to work as advocates for change in their own organisations. The document was launched on 22 February.

Given the success of the meetings in 2021, participants expressed a wish to meet again in 2022 to assess progress, to discuss specific issues in greater detail, and to continue to exchange ideas about the way forward.

Lander & Rogers chief executive partner Genevieve Collins

"A legal community and workplaces free from sexual harassment are essential to our collective success. With events over the last few years, and multiple reports tracking the prevalence of sexual harassment, there seems now to be a genuine commitment to eradicate this across the industry.

"Our 'Advocates for Change' initiative promotes important dialogue across various levels of the profession. By discussing the causes, experiences and successful responses and practices by firm management, we are both raising awareness and generating information and ideas which might otherwise not be considered.

"Importantly, this creates engagement and a collective sense of accountability to continue to drive real and meaningful change."

Slater and Gordon CEO John Somerville

"Harassment and bullying are a blight on society and diminish all of us. The fact it is prevalent in the legal industry which stands for justice and fairness is an issue that needs urgent attention. That's why I was very pleased to co-convene this important initiative and to see the enthusiasm and energy brought to bear by colleagues across the industry to identify ways to combat this blight."

LIV CEO Adam Awty

"The pervasiveness of sexual harassment in the legal profession was described by Dr Helen Szoke as an open secret in her April 2021 Review into Sexual Harassment in Victorian Courts and VCAT, and the Victorian Legal Services Board + Commissioner Investigation into Sexual Harassment in the Profession reported that one in three respondents had experienced sexual harassment in the workplace. The structural and cultural causes of this have been well articulated – power imbalances, institutional hierarchy, a culture of silence and threat of victimisation, lack of transparency, and a profession whose leadership remains dominated by men.

"We have focused our energy on re-designing reporting regimes to provide an easier path for victims and witnesses to bring perpetrators to account. Part of the momentum for Advocates for Change is to place responsibility onto each of us to change the profession in which we work.

"Sexual harassment is not just a women's issue. Men need to take a leadership role together with women to bring real change to the profession, and individuals must take responsibility to drive effective action within their organisations. That's why the LIV is proud to be an Advocate for Change." ■

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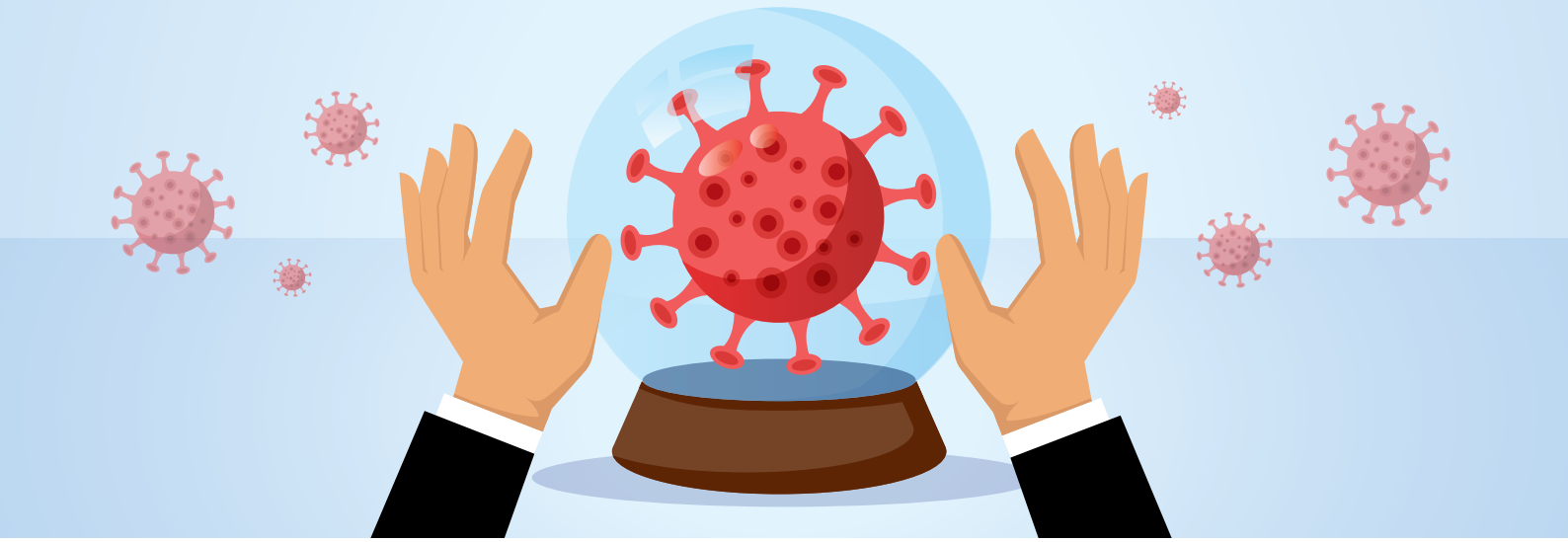
Foreseeability and the COVID-19 pandemic

THE FORESEEABILITY OF FRUSTRATED CONTRACTS HAS PARTICULAR RELEVANCE WITH THE COVID-19 PANDEMIC AS THE PARTY SEEKING TO RELY ON THIS DOCTRINE WILL BE CONFRONTED BY THE FACT THAT, AT LEAST FROM EARLY 2020, THE PANDEMIC'S IMPACT ON COMMERCIAL ACTIVITY WAS FORESEEABLE. BY BLAIR USSHER



Government measures to control the COVID-19 pandemic have had a significant impact on commercial activity, particularly in the fields of tourism, accommodation, hospitality, events and entertainment. Thousands of consumers have not only seen their plans dashed but have also found it difficult to claw back monies paid in advance. Traders, likewise, have been hard hit and, unsurprisingly, have sought to retain their customers' pre-payments by relying on contractual cancellation provisions or by offering credits or re-bookings in lieu of providing refunds.

In some circumstances, consumers have obtained redress under the legal doctrine of frustration. This doctrine operates to "kill" the contract and to discharge the parties from any further obligation under it. Additional remedies are provided under Part 3.2 of the *Australian Consumer Law and Fair Trading Act (Vic) 2012* (ACL&FTA).[1] These provisions add two crucial remedies, namely:

- money paid under a frustrated contract may be recovered by the payer (s36) subject to the qualification that the court "may" allow a payee who incurred expenses before the discharge of the contract "in or for the purpose of the contract" to retain or recover all or part of the amount paid or payable if the court "considers it just to do so in all the circumstances of the case" (s37); and
- partial performance is compensable (s38).

These statutory provisions acknowledge that the doctrine of frustration is a remedy designed, not to allocate loss or liability on the happening of an exceptional event, but to deliver a fair and reasonable outcome for parties caught up in such circumstances.

The test for determining whether a contract has been frustrated is the "radical difference" test. This test was formulated by the House of Lords in *Davis Contractors Ltd v Fareham UDC*[2] where Lord Radcliffe stated:

"Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract".

This formula has withstood the test of time, but some commentators have noticed that it omits one of the usual limitations imposed on the doctrine, namely, that the supervening event must not have been in the contemplation of the parties at the time of the contract's formation.[3] While that is true, the Court did regard the foreseeability of the contingent event as a determinative factor.

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The issue of foreseeability is not without controversy. In Denny, *Mott & Dickson*[4] Lord Wright took the view that a supervening event qualified as a frustrating event where the facts, on which the contract was based, no longer held true, regardless of whether the parties could have foreseen the change of circumstances. This factual determination was not dependent "on the intention of the parties or even on their knowledge as to the event, but on its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure".

Subsequently, in *The Eugenia*[5] Lord Denning MR considered it was not so much the question of foreseeability that mattered, but rather the lack of contractual provision for the supervening event. That, and that alone, in Lord Denning's view, was the essential criterion.

Neither of these approaches has proved satisfactory and the issue of foreseeability continues to trouble the courts. In the context of the COVID-19 pandemic, this issue may have a crucial bearing on the determination of those cases which involve contracts formed at a time when the parties knew, or ought to have known, the type of restrictions that could be mandated under the *Public Health and Wellbeing Act (Vic) 2008*.[6] It is, therefore, appropriate to consider this issue.

For the purposes of the doctrine, foreseeability is usually analysed in two contexts. First, when the supervening event was actually foreseen by the parties and they made contractual provision for its occurrence. Second, when the occurrence of the supervening event was objectively foreseeable, but the parties made no contractual allowance for the contingency.

SNAPSHOT

- Legal commentators contend that, for the doctrine of frustration to apply, the frustrating event must not have been foreseen by the parties when entering the contract.
- If that is so, how is this concept of foreseeability applied? What is the nature and degree of the foreseeability necessary to displace the doctrine?
- How do the courts use this concept when determining whether a contract has been frustrated.

Events actually foreseen

In the first instance, the parties may define the legal consequences of the supervening event in a manner that provides for outcomes different from those attainable under the doctrine. This is done through the insertion of a force majeure or "change in law" clause. The courts have held that such provisions will preclude the application of the doctrine, provided that the subject provision deals with the consequences of the supervening event in a manner that makes "full and complete" provision for the "effects" of the supervening event on the parties' rights and obligations.[7] Whether the clause achieves this result will depend on its content, noting that the courts require these clauses to be "narrowly construed".[8]

The degree of "actual foresight" exercised by the parties also goes to the issue of adequacy. That is, the mere fact that the parties may have foreseen the kind of supervening event, and made some provision for it, is not, in itself, sufficient to exclude the doctrine. The parties are required to have foreseen and, more particularly, to have made adequate provision for, the degree or extent of the supervening event's impact on their contractual obligations. Therefore, in *Tatem Ltd v Gamboa*,[9] while the Court found that the contracting parties had foreseen that a cargo ship might be seized and detained by a belligerent, it did not accept that the parties ought to have foreseen that the ship would have been detained for the length of time in question. For that reason, the doctrine remained applicable.

Similarly, in *The Nema*[10] the frustrating event was a strike. This was a known risk, the happening of which had been made the subject of an express contractual term (strike clause). Despite this, the House of Lords held that the contract had been frustrated because the parties could not have reasonably foreseen the duration and extent of the strike. In the view of their Lordships, the strike clause dealt with the usual form of strike action. It was not the objective intention of the parties that it should deal with the radical alteration of circumstances caused by a strike of the magnitude that in fact occurred.

The degree of foreseeability

The House of Lords decision in *The Nema* confirms that the courts will require a high degree of foreseeability if the doctrine of frustration is to be excluded. It is not sufficient that the supervening event be "reasonably foreseeable"[11] at the time the parties concluded their agreement. The parties must have foreseen the supervening event as a "serious possibility" and of a degree that would radically affect the performance of the contract.[12]

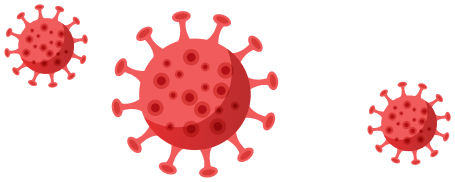
Not foreseen but foreseeable

In circumstances where the event is foreseeable (or indeed actually foreseen) by the parties, but the contract contains no covering provision, it is open to the court to infer that the parties agreed to assume the risk of the occurrence of the event and to refuse to treat the contract as frustrated.[13] This inference is only a prima facie one and can be excluded by the objective analysis of the contract within its matrix of surrounding circumstances.[14] After all, it may be that the parties elected to rely on the equitable remedies available at law to deal with the contingent event. In *The Sea Angel*[15] Rix LJ, whose judgment was endorsed by the Court, stated that, in this context, he was "not much attracted" to any approach based on a prima facie rule.

Therefore, despite judicial statements to the effect that the doctrine of frustration only applies to situations that are "unforeseen" or "not reasonably contemplated", that is not really the case. A contract may be frustrated even though the supervening event was objectively foreseeable and/or actually foreseen by the parties. Even in those situations where the high standard of foreseeability demanded by the courts is met, the application of the doctrine is not necessarily precluded.

The fundamental test remains, namely, whether the change in circumstances has rendered:
a) the contract an impossibility or
b) the continued performance of the contract is something which is radically different from that agreed to by the parties.

Whether the impact of the contingent event was foreseeable or not informs the court when applying this test.



The nature of the analysis

There are two broad lines of authority which deal with the manner in which the courts should approach this test. The first requires the court to objectively construe the contract so as to determine whether:

- the silence of the party seeking to rely on frustration indicates that they had the intention to assume the risk of the frustrating event[16] or
- the contract is, on its true construction, wide enough to apply to the new situation.[17]

The second line of authority holds that the court's task requires, above all, an exercise of judgment as to whether, in the light of all the circumstances, it is just to allocate the risk of the supervening event to one party or the other. Under this approach the court is not limited in its considerations to the mere construction of the contract, within the factual matrix, but may have regard to general, discretionary considerations of what is fair and just.[18]

These lines of authority have now been synthesised by the English Court of Appeal in the case of *The Sea Angel*.[19] In that case, Rix LJ (with whom Wall LJ and Hooper LJ concurred) considered that the resolution of the radical difference test required the Court:

- to put itself in the position of the parties and to view the matter in the role of reasonable and well-informed individuals, and then
- to make an overall assessment of whether those parties would or, properly speaking, should have formed the view that, in all fairness and consistent with the demands of justice, their contract, has become something whose performance in the new circumstances is "radically different" to that agreed and, therefore, has ceased to bind them.

This test was one of fact and degree and Rix LJ cautioned against any approach that isolated a single factor from the other facts and circumstances. Indeed, Rix LJ held that a multi-factorial analysis was required, involving the consideration of the following:[20]

- the terms of the contract, together with its matrix or context
- the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk at the time of contracting, so far as these can be ascribed mutually and objectively
- the nature of the supervening event
- the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances
- a measurement of the consequences of the tribunal's decision against the demands of justice.

On the final point, Rix LJ held that:

"Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind".[21]

Rix LJ accepted that the Court had no "broad absolving power" to grant relief from hardship and that considerations of justice did not supersede the rules governing the operation of the doctrine, "but only as long as it is not sought to apply those rules as though they are expected to lead one automatically, and without an exercise of judgment, to a determined answer without consideration of the demands of justice". Rix LJ explained that these demands were not an additional test but were "a relevant factor", a factor which "underlies all and provides the ultimate rationale of the doctrine".[22]

Under this multi-factorial approach, the foreseeability of the risk may, in the circumstances of the case, "be a special and highly relevant factor against which the issue of frustration needs to be assessed" but "like most factors in most cases it must not be exaggerated into something critical, excluding, [or] preclusive".[23]

A recent COVID-19 case

In the case of *Foster & Seiker v Theodor*[24] all these issues came up for consideration. In that proceeding the respondent ran a holiday accommodation business. The applicants paid a booking tariff of $2950 to the respondent to secure holiday accommodation for July 2020. The booking was made at a time that post-dated the easing of the initial COVID-19 travel and business restrictions. The second COVID-19 wave then struck. Stage 3 travel and business restrictions were imposed. These restrictions precluded the applicants from travelling to take up the accommodation and precluded the respondent from providing the accommodation. Consequently, the applicants agreed to vary the booking to a date in September 2020. As that date approached, there was no indication that the stage 3 restrictions would be eased. In fact, harsher, stage 4 restrictions were subsequently imposed.

The applicants contended that the contract had been frustrated and that they were entitled to recover the booking-tariff. The respondent defended the proceeding on the basis that:

a) at the time the contract was entered into, the prospect of government restrictions being imposed owing to the COVID-19 pandemic was foreseeable, hence the applicants must be taken to have assumed the risk that the accommodation would not be available to them at the time of their planned holiday[25]
b) as the risk was foreseeable, the parties had made contractual provision for the impact of "pandemics, government restrictions on home gatherings, acts of God, force majeure events or other circumstances . . ." (pandemic clause). Therefore, the applicants were bound by this term which precluded the recovery of the deposit.

VCAT found that the pandemic clause probably did not exist at the time the contract was formed. In any event, VCAT found that the clause was inadequate. It was neither a force majeure nor a "change in law" clause. It was, at best, an elaboration of the existing "cancellation or change of booking" clause.

VCAT then considered the defence based on foreseeability. VCAT found that the re-imposition of health directions was foreseeable under the relevant test at the time of formation. VCAT then applied the multi-factorial analysis and determined that the contract had been frustrated. The relevant findings were:

- there was nothing in the contract itself to suggest that the consumers intended to assume the risk of the subject event as neither of the parties evidenced any objective intention to be bound by the contract in a situation where performance was rendered legally impossible. Both parties left the consequences of such an event to be determined by the relevant law (and this would have been the case even if the pandemic clause had been incorporated into the contract)

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- the contract was a standard form contract prepared by the trader. The consumers were given no real opportunity to negotiate any contractual provision. The consumers had no option but to rely on the relevant law
- the trader was better placed than the consumers to assume the risk. The trader must have known the profit margin on each accommodation contract and could have factored into those margins some component to mitigate the foreseeable risk
- further, the trader might have allocated the foreseeable loss by the insertion of an effective force majeure clause, setting out, for example, that, on the occurrence of the contingent event, a certain amount of the accommodation tariff would be allocated to the trader's reasonable costs incurred prior to the discharge, with the remainder being returned to the customer. Of course, any such provision that provided that the whole of the accommodation tariff would be forfeited to the trader on the occurrence of a supervening event, would be open to challenge as an unfair contract term under Chapter 2 of the Australian Consumer Law (Vic)[26] or as a penalty[27]
- as for the "dictates of justice," VCAT found that the retention of the full booking tariff by the trader would result in an unjust enrichment, particularly in circumstances where the trader was excused from providing the accommodation.

Given these findings, the foreseeability of the frustrating event did not preclude the application of the doctrine and the remedies under Part 3.2 of the ACL&FTA were available to the consumers.

The true value of this case, of course, is that, unlike much of the case law, it did not concern a charterparty. The legal issues were considered within the context of a typical consumer transaction, the type of contract that may affect any one of us. ■

Blair Ussher is a VCAT member. He was formerly general counsel for Consumer Affairs Victoria and director of the Royal Australian Navy's Professional Studies Program. He is a Lonsdale Medallist at the Australian Command and Staff College, Australian Defence College. He has authored many articles in the fields of consumer law and maritime trade security.

1. The expression "court" found in Pt 3.2 of the ACL&FTA includes the Victorian Civil & Administrative Tribunal (VCAT) – see *Beresford v A&J Mackenzie Pty Ltd* (Civil Claims) [2021] VCAT 236; *Quinn v Hay Events Pty Ltd* (Civil Claims) [2021] VCAT 172; see also *Gray v Talentmed Pty Ltd* [2018] (Civil Claims) VCAT 1466 and *Chen v Ma* [2018] (Civil Claims) VCAT 2049. Note: Pt 3.2 of the Act applies to nearly all contracts. There are very few exceptions. It is not restricted to "consumer contracts" nor contracts involving "the supply of goods or services", nor to contracts in "trade or commerce".
2. [1956] AC 696 at 728.
3. See Kariyawasam & Palliyaarachi, "Importance of the doctrines of frustration and force majeure in light of COVID-19", 2021, 50 *Australian Bar Review* 370 at 378.
4. *Denny, Mott & Dickson Ltd v James B Fraser & Company, Limited* [1944] AC 265 at 276, per Lord Wright.
5. *Ocean Tramp Tankers Corp. v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226 at 239.
6. See, eg, *Happy Lounge Pty Ltd v Choi & Lee Pty Ltd* [2020] QDC 184 where at [35] the Court found that the doctrine could not apply because the parties were aware of the prospect of COVID-19 restrictions.
7. *Bank Line v Arthur Capel & Co* [1919] AC 435 at 455; *The Florida* [2006] EWHC 1137 per Tomlinson J at [12].
8. *Joseph Constantine SS Line Ltd v Imperial Smelting Corp. Ltd* [1942] AC 154; see also *Chitty on Contracts*, 29th edn, 2004, at [24-057].
9. [1939] 1 KB 132 at 135-6.
10. *Pioneer Shipping Ltd v BTP Tioxide (The Nema)* [1982] AC 724; [1981] 2 All ER 1030; [1981] 2 Lloyd's Rep. 239.
11. *Ooh! Media Roadside Pty Ltd (formerly Power Panels Pty Ltd) v Diamond Wheels Pty Ltd* [2011] VSCA 116 at [72].
12. This test is set out in *Chitty on Contracts*, note 7 above at [24-057/8] and was taken from Trietal, G, *Frustration and Force Majeure*, 2nd edn, 2004, at [13-09] citing the US authority of *Mishara Construction Company Inc. v Transit Mixed Concrete Corp.* 310 NE 2d 363, 367 (1974) at [84].
13. Note 6 above.
14. *Tatem Ltd v Gamboa* [1939] 1 KB 132; *Chandler Bros Ltd v Boswell* [1936] 3 All ER 179.
15. *Edwinton Commercial Corp & Global Tradeways Ltd v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyds Rep. 517; [2007] EWCA Civ 547 at [110].
16. *British Movietone News Ltd v London & District Cinemas Ltd* (1952) AC 166 at 185; *National Carriers Ltd v Panalpine (Northern) Ltd* [1981] AC 675; *The Eugenia* (note 5 above).
17. Note 2 above, per Lord Reid at 721.
18. *Tatem Ltd v Gamboa* [1939] note 14 above; also Bingham LJ in *Lauritzen AS v Wijismuller BV (The Super Servant Two)* [1990] 1 Lloyds Rep 1.
19. *The Sea Angel* (note 15 above).
20. Note 19 above, at [111]; the multi-factorial approach was endorsed by *Bunge SA v Kyla Shipping Co Ltd* [2012] EWHC 3522 (Comm) at [39]-[42]; *ACG Acquisitions XX LC v Olympic Airlines* [2012] EWHC 1070 (Comm) at [178]-[185];and was applied in *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association* [2010] EWHC 2661 (Comm).
21. Note 17 above, at [112].
22. Note 17 above, at [132].
23. Note 17 above, at [128].
24. [2021] VCAT 1025.
25. The respondent contended that the applicants should have taken out travel insurance.
26. Note the grey list example under s25(1)(c) of the ACL.
27. *Andrews v ANZ Banking Group Ltd* [2012] HCA 130; *Fiorelli Properties Pty Ltd v Professional Fencemakers Pty Ltd* [2011] VSC 661.

Free speech and employee misconduct

A RECENT HIGH COURT DECISION HAS SHED NEW LIGHT ON THE RIGHTS OF EMPLOYEES TO FREE SPEECH AND ACADEMIC FREEDOM. BY BILL SWANNIE

ADOBESTOCK

Australian courts have recently made several significant determinations regarding employees and their respective speech rights. In 2019, the High Court held that the employment of a public servant was validly terminated based on critical comments the employee made on social media.[1] Also, former Australia rugby league player Israel Folau brought proceedings against Rugby Australia, alleging that his employment was unlawfully terminated based on controversial comments that he made on social media. However, the recent decision of the High Court in *Ridd v James Cook University (Ridd)*[2] may be more significant than these two high-profile cases.

The decision concerns the lawfulness of James Cook University's (JCU) termination of Professor Ridd's employment. JCU argued that Ridd breached the staff code of conduct (Code) by (among other things) publicly criticising research concerning the Great Barrier Reef conducted by other academics at JCU. Ridd argued that his conduct was protected by a clause in the JCU enterprise agreement (EA) regarding intellectual freedom. The High Court ultimately concluded that Ridd's termination was not protected by the intellectual freedom clause, and it was lawful.

Background

Free speech in Australian universities received heightened attention in 2019, with former High Court Chief Justice Robert French handing down his independent review.[3] The review was commissioned following a protest at Sydney University in response to a controversial guest speaker, and publicity regarding alleged practices of "de-platforming" such speakers. The review recommended that all universities adopt a model code regarding free speech, and legislative amendments to define academic freedom.

Also in 2019, marine physicist Professor Ridd commenced proceedings against his employer JCU, alleging that disciplinary action being taken against him contravened provisions in the JCU EA concerning intellectual freedom. The EA sets outs important terms and conditions for all staff employed at JCU, which are negotiated and agreed to by staff and management. Breach of the EA is a contravention of the *Fair Work Act 2009* (Cth) (FWA).

JCU ultimately terminated Ridd's employment, alleging serious misconduct. Various misconduct was alleged, including that Ridd had "denigrated" other JCU academic staff by public comments he made concerning coral bleaching of the Great Barrier Reef – an area in which Ridd had published research. JCU argued that this conduct breached the staff Code, which sets general standards by which staff are expected to conduct themselves in relation to other staff and in their professional duties. JCU also alleged that Ridd had not complied with directions given by JCU to not disclose any details of the disciplinary process.

Trial Court's decision

At trial, Ridd based his arguments on clause 14 of the EA, which is titled "Intellectual Freedom". The clause states that JCU 'is committed" to respect intellectual freedom, and it defines various aspects of this freedom. This includes the ability of academics to comment on issues within their areas of expertise and to comment on decisions of JCU. Similar provisions are contained in the EAs of virtually all Australian universities.

SNAPSHOT

- Employees have raised free speech arguments in several high-profile employment disputes.
- An employee's rights and responsibilities regarding speech are commonly set out in their enterprise agreement and codes of conduct.
- The speech rights of academic staff at Australian universities remain uncertain following the *Ridd* decision.

The trial judge emphasised the importance of intellectual freedom, or academic freedom, stating that it is the "core mission" of all universities.[4] He regarded intellectual freedom as essential to the search for truth, which promotes social progress. Therefore, academics should be able to "express their opinions openly and honestly". Considering the importance of intellectual freedom, when staff honestly exercised this freedom they were immune from disciplinary action based on breach of the Code. This interpretation was supported by clause 13, which provides that the Code "is not intended to detract from clause 14".

In a subsequent decision, the trial judge determined that JCU breached the enterprise agreement by taking disciplinary action against Ridd. The trial judge awarded more than $1 million compensation to Ridd, including an amount for general damages.[5] The judge described JCU's conduct as "an egregious abuse of the power of an employer over an employee".

The Full Court decision

On appeal, the Full Court (Griffith, Derrington and Rangiah JJ) noted that the sole issue was whether the JCU EA provided Ridd with the "untrammelled right . . . to express his opinions in whatever manner he chose, unconstrained by the behavioural standards imposed by the Code".[6] This is because Ridd relied exclusively on clause 14 of the EA and he did not dispute that his behaviour breached the Code or that it constituted misconduct.

The majority (Griffith, Derrington JJ) allowed the appeal and held that JCU did not contravene clause 14 by taking disciplinary action against Ridd. The majority based its decision on three main findings. First, the Court held that clause 14 must be interpreted according to its terms and not in the light of broader conceptions of "academic freedom". Second, the terms of the EA should be read together, rather than emphasising certain parts of clause 14. The Court noted that clause 14 merely "committed" JCU to act consistently with intellectual freedom, rather than obliging it to do so. Likewise, clause 14 committed JCU to act "in accordance with" the Code.

The majority emphasised JCU's duty as employer to ensure that all staff complied with the behavioural standards set by the Code. Clause 14 was interpreted as requiring JCU to ensure that the standards in the Code were maintained, as this was in the interests of all staff. In other words, clause 14 did not place any overriding obligation on JCU to respect the intellectual freedom of staff. Rather, the Code defined the behaviours expected of staff, unconstrained by references to intellectual freedom in clause 14.

Rangiah J dissented, holding that the proceeding should be remitted for a further hearing, rather than being dismissed. He agreed that the primary judge had misinterpreted the EA. However, he proposed an interpretation of the relevant clauses that ensured the primacy of intellectual freedom while also enabling JCU to ensure compliance with the behavioural standards in the Code.

The High Court decision

The High Court unanimously dismissed the appeal, affirming that JCU did not breach the EA by terminating Ridd's employment.[7] Significantly, the Court held that some of Ridd's conduct was protected by the intellectual freedom clause. This included public statements he made criticising the research of other staff at JCU. This conduct was protected as it was within his areas of academic expertise. Further, there was no requirement that Ridd speak "respectfully" when making such comments.

However, some of the conduct on which Ridd's termination was based was not protected by the clause. Specifically, his disclosure of details concerning the disciplinary process conducted by JCU was not protected by the EA, as this was confidential information.

The High Court affirmed that clauses in a university enterprise agreement may protect academics by making certain types of comments immune from disciplinary action by the university. This is particularly so when academics are commenting on matters within their areas of expertise. The Court, therefore, clarified a core aspect of academic freedom.

The Court also confirmed that staff codes of conduct are subject to the protections provided in an enterprise agreement. Therefore, the requirement for staff to be "respectful" was subject to the intellectual freedom clause. There was no overriding requirement for respectfulness in relation to academic debate

and, therefore, staff could not be disciplined for "disrespectful" comments when exercising academic freedom. This overturned the approach of the Full Court majority, which held that the code of conduct – rather than the enterprise agreement – defined the scope of protection. This approach provided little protection to academics.

The High Court's decision affirms the importance of academic (or intellectual) freedom, and the unique nature of universities as places of discovery and dissemination of knowledge. In this context, academic staff have an important role in presenting and challenging claims in areas of technical knowledge. This role is, of course, subject to limits, such as honesty and compliance with appropriate standards regarding research and scholarship.

The future

The High Court's decision in *Ridd* affirms the importance of academic freedom in Australian law. This is significant, because virtually all Australian universities have clauses protecting intellectual (or academic) freedom in their enterprise agreements. However, these clauses are expressed in different terms in each EA, so it is difficult to predict exactly what conduct is protected.

Similarly, the limits on academic freedom are also unclear. In the *Ridd* decision, the High Court held that confidential information relating to disciplinary action by the university is not protected. This is a strange conclusion, as it seems to give the employer the final word regarding whether academic freedom applies.

In his review, Robert French recommended each Australian university adopt a "model code" regarding academic freedom. However, codes do not provide legal protection for academic staff. Therefore, legislative protection may be necessary. Legislation would affirm the importance of academic freedom in promoting the production and dissemination of knowledge. In *Ridd*, the trial judge noted that debates concerning the accuracy of research on important topics such as the effects of climate change should be conducted openly and publicly, rather than prevented by vague codes of conduct that can be applied arbitrarily. ■

Bill Swannie is a lecturer at the College of Law and Justice, Victoria University. He teaches and researches in human rights and media law, with a focus on free speech issues.

1. *Comcare v Banerji* [2019] HCA 23. See Tessa van Duyn, "Overzealous control or reasonable and lawful: workplace law in the digital age" (2020) *LIJ* 45.
2. *Ridd v James Cook University* [2021] HCA 32.
3. Commonwealth, Department of Education, Skills and Employment, *Independent Review of Freedom of Speech in Australian Higher Education Providers* (Report, March 2019).
4. *Ridd v James Cook University* [2019] FCCA 997, [301]-[302].
5. *Ridd v James Cook University (No.2)* [2019] FCCA 2489.
6. *James Cook University v Ridd* [2020] FCAFC 123 (22 July 2020).
7. Note 2 above.

Detecting deception?

ARE WE BEING DECEIVED BY THOSE WHO CLAIM TO BE ABLE TO DETECT DECEIT BY READING BODY LANGUAGE? BY CHRIS BONNICI

ILLUSTRATION BY LOREDANA MINERVINO, DESIGNER, ROME

SNAPSHOT

- "Reading" body language is considered by some to be a reliable way to detect deception in investigative interviews.
- However, body language is an unreliable indicator of deceit. Its claimed reliability is based on spurious reasoning and is contradicted by research in forensic psychology and experience in coercive examinations.
- Using body language to detect deception has little or no place in serious criminal investigations.

In 2020 I attended a seminar during which the presenter, an experienced interviewer, referred to the use of "body language" to detect deception. While not a main feature of the presentation, it was a reminder of how some in law enforcement consider that "reading" body language is a reliable way to detect deception in the course of investigative interviews. This article argues that body language is not a reliable indicator of deceit in these circumstances.

For the purposes of this article, body language is a reference to the observable non-verbal behaviour (behaviour) displayed by interviewees during investigative interviews that may be interpreted as cues/signs/indicators of their deceit. Body language that has been attributed to deception in this way includes gaze aversion, fidgetiness, frequent shifting of position, "self-grooming" and more frequent movements of arms, hands, legs and/or feet.[1] The behaviour of interviewees can be distinguished from their linguistic conduct (tone/speech characteristics) and the verbal content of their interviews.

Deceit/deception/lying is a reference to blatant deception, that is, where interviewees make statements they know or believe to be false at the time they make them. It is not a reference to more subtle forms of deception such as minimisation, exaggeration, evasion, omission and ambiguity[2] (although the significance of these will be covered later in the article).

For more than 20 years as counsel assisting at coercive examinations, other attendees would sometimes say: "Did you see the witness touch their face", "look up to the left or right" or "shake their leg(s)/hand(s)", "when you asked them about . . . they were lying".

I found those comments to be unduly suspicious but they did not surprise me. There is an obvious allure in believing that someone can detect deception by the careful observation and interpretation of an interviewee's body language. It also seems to make intuitive sense as we have all had the experience of reading, or being read by, those close to us including parents, partners, children and intimate friends.

The way it usually works is that deception is inferred from changes in body language. Interviewees are initially asked a series of questions that are non-threatening and where the answers are known or likely to be true. One purpose of this is to establish a "baseline" body language for their truthful answers.

Later changes in their body language, particularly when responding to more controversial topics, may be interpreted ("read") as deception. Those changes are supposedly caused by stress, nervousness and/or discomfort arising from a consciousness of guilt and/or a fear of getting caught. The underlying theory is that lying causes an emotional response which manifests itself in observable changes in body language/behaviour.[3] Body language that has frequently been attributed to deception in this way is described above.[4]

The problem with this process of reasoning should be immediately obvious. There are many reasons why interviewees might change their body language during interviews. They may well be lying but they may equally be truthful and simply reacting to a personally sensitive topic. For example, that change might be prompted by being asked about a family situation; an event they found traumatic; a person with whom they have

an emotional connection; or even an interviewee picking up on a more accusatory tone in their interviewer's questions.

If that alone is not enough, then credible research and my own extensive experience with coercive examinations suggest that reading body language is not a reliable indicator of deceit. Despite its allure, it is too simplistic.

Research in the area of forensic psychology indicates that:

- there are no conclusive behavioural signs of deceit
- behaviours which give the impression of lying (such as those described above) have not been conclusively linked to deception
- the added complication in interviewing people from other cultures is the difficulty of determining if behaviour is indicative of deceit or cultural differences
- law enforcement professionals are over confident in their ability to detect deception despite repeated studies showing they perform marginally better than chance
- it is uncertain whether "clusters" of these unreliable behaviours are any more reliable than their constituent parts.[5]

My interviewing experience is limited to coercive examinations. In that context, body language (including clusters) is not a reliable indicator of deceit. Coercive examinations are a daunting experience for interviewees. They are compelled to attend premises they have never been before. They must then answer questions posed by people they have never met on topics they would probably prefer not to talk about, or face criminal sanctions.

They also tend to be unfamiliar with the procedures and are usually uncertain about their status or where their information may go (and who may find out about it). Interviewees are likely to be uneasy in these circumstances regardless of whether they are truthful.[6]

It is not an answer to say that interviewees might start out that way but they will calm down as the interview progresses (so that any subsequent body language changes may be attributed to deceit). Some will, some will not and some are likely to change their body language during the course of their interviews for any of the reasons outlined above.

I am not suggesting changes in body language should be ignored. The reality is that some interviewees will lie in response to being asked to divulge information they perceive to be against their interests. Changes in body language can legitimately raise suspicions of deceit.

However, more is needed to confirm deceit before interviewers can validly conclude their interviewees are lying.[7] Fortunately, there are a number of more reliable and ethical techniques available for interviewers to do this such as the strategic use of evidence.[8]

Another problem is that interviewees will typically resort to subtle deception (particularly omission) more frequently than blatant deception when they wish to conceal information.

There is some research support for this observation.[9] Many interviewees would not consider this to be deceit because they are not making false statements.

I have also spoken to some Italian anti-mafia magistrates about how they successfully interviewed people during the course of investigations into organised crime and corruption involving Italian mafia organisations.[10] Not one of those magistrates referred to reading body language to detect deception. The same is true of other published accounts concerning investigations by Italian anti-mafia magistrates.[11] They relied on good preparation, building trust, effective questioning techniques, keeping an open mind and sound strategy in order to get a reliable version of events from interviewees. They took into account how interviewees presented (which presumably included an assessment of their body language) but used it to tailor their questioning approach and strategy rather than to detect deception.

Conclusion

I have argued that reading body language is not a reliable indicator of deceit in the course of investigative interviews. Not only is it based on spurious reasoning, but credible research and my own experience also indicate it is unreliable for that purpose.

Human lie detectors are unlikely to really exist. Those who claim to be able to conclusively detect deception by reading body language in these circumstances are deceiving us. Like the Italian magistrates referred to above, interviewers who have successfully obtained reliable information during investigative interviews (including identifying and overcoming deception) have done so by using a holistic approach involving good preparation, building trust with interviewees, effective investigative questioning techniques and sound strategy. They have not done so using simplistic, superficial and dubious techniques that may be alright for entertainment but which have little or no place in serious criminal investigations. ■

Chris Bonnici is a Deputy Public Interest Monitor for Victoria. He has previously conducted more than 1300 counter-terrorism and organised crime coercive examinations as counsel assisting the Australian Criminal Intelligence Commission. He has also been trained in the PEACE model of investigative interviewing in Australia and the United Kingdom to interview adviser level and has taught that model to the staff of a number of government agencies.

1. Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities*, 2016 (2nd end), John Wiley & Sons Ltd, chapters 3 and 4; Charles F Bond, Timothy R Levine and Maria Hartwig, "New Findings in Non-Verbal Lie Detection" in Par Anders Granhag, Aldert Vrij and Bruno Verschuere (eds), *Detecting Deception: Current Challenges and Cognitive Approaches*, 2015, Wiley Blackwell, 37; Maria Hartwig and Par Anders Granhag, "Exploring the Nature and Origin of Beliefs about Deception: Implicit and Explicit Knowledge among Lay People and Presumed Experts" in Par Anders Granhag, Aldert Vrij and Bruno Verschuere (above), p125.
2. In between the two is deceit within a mostly truthful account.
3. An alternative theory is that lying is more cognitively demanding than telling the truth so lying imposes an increased cognitive effort (load) on interviewees. That manifests itself in a reduction in certain behaviours and an increase in verbal and linguistic cues to deceit. The most reliable indicator of deceit (or at least of unreliable information) is to compare interviewee statements (the content of their interviews) with evidence/objective information. However, this is not always possible during investigations because evidence/objective information is usually still being gathered and assessed.
4. A less sophisticated version of this is to simply ascribe deceit to one or more of these behaviours without first establishing a behavioural base line.
5. For points 1 to 5 see Aldert Vrij (note 1 above); Charles F Bond, Timothy R Levine and Maria Hartwig (note 1 above) and Maria Hartwig and Par Anders Granhag (note 1 above). For point 3 see also Paul J Taylor, Samuel Larner, Stacey M Conchie and Sophie van der Zee, "Cross Cultural Deception Detection" in Par Anders Granhag, Aldert Vrij and Bruno Verschuere (note 1 above) p175.
6. Conversely, some interviewees are very good liars. They show no perceptible changes in their body language when they are lying.
7. This often leads to a change in the tone of interviews towards a more confrontational/accusatory approach, which is less conducive to interviewees providing information.
8. Maria Hartwig, Par Anders Granhag and Timothy Luke, "Strategic Use of Evidence during investigative interviews: The State of the Science" in David C Raskin, Charles R Honts, and John C Kircher (eds), *Credibility Assessment: Scientific Research and Applications* (Elsevier Academic Press, 2014) 1. The strategic use of evidence technique is also described in a number of published articles.
9. Note 8 above.
10. See Chris Bonnici, "How do you interview the mafia?: A conversation about investigative interviewing with an anti-mafia magistrate: Judge Antonino Di Matteo" (2018) 40(4) *Bulletin (Law Society of South Australia)* 26 (concerning the Sicilian *Cosa Nostra*); Chris Bonnici, "Come si Intervista la Camorra? (How do you interview the Camorra?)" (Dec 2020) 40 *QLS Proctor* (concerning the Neapolitan *Camorra*); Chris Bonnici, "How do you Interview the New Mafia of Rome" (2021) 48(3) *Brief (Law Society of Western Australia)* 27 (concerning one of the new Mafia organisations).
11. See Giovanni Falcone and Marcelle Padovani, *Men of Honour: The Truth About the Mafia* (Warner 1992). See also Alex Perry, *The Good Mothers: The True Story of the Women Who Took on the World's Most Powerful Mafia* (William Collins, 2018).

Eleven things they don't teach in law school

THE PRIESTLEY 11 SUBJECTS ARE CORE TO A LAW DEGREE IN AUSTRALIA BUT THERE ARE 11 OTHER AREAS THAT ARE ESSENTIAL TO BECOMING A GOOD LAWYER. BY ANTHONY BURKE

Coming to the end of a life in the law I have been ruminating. I have been wondering what I wish I had known at the outset. What may have mitigated my risk, avoided the scenic route to where I am now.

Sure, law school can be an enriching and stimulating experience. We learn to think clearly, to be precise with our language and to be relentlessly relevant. But it's a big subject, an encapsulation of human experience at the pointy end. It is only to be expected that much gets left on the cutting room floor in crafting the law curriculum.

In Australia, our now law faculties have carved in stone the Priestley 11. These are the 11 law subjects to be completed for admission to practice as a lawyer. They have been so since 1992 and are the minimum academic study admission requirements.[1] The world has changed enormously since 1992, but not the Priestley 11.

In my rumination, I have come up with my own 11 separate areas of study that embellish, extend and exemplify a law degree. I am seeing and raising the Priestley 11.

SNAPSHOT

- While a law degree gives you technical expertise, "soft" skills are also essential to a career in the law.
- Knowing how to communicate as a lawyer – listen, talk, write – is vital.
- Here's some advice to make the change from law student to lawyer more successful.

ADOBESTOCK

1. How to get in the door

Let's not dance around, the study of law is vocational training. It is not theology. So, it is curious that there is no training in how to seek work as a lawyer.

When I graduated there was a recession afoot and it was hard to find work. I spent a great deal of time on my resume. My covering letters were just three paragraphs and the culmination of many drafts. Ultimately, it worked and got me in the door to a career that then had a life of its own. But it was a struggle.

In the subsequent decades I have received and reviewed hundreds of job applications and interviewed scores of lawyers. Many readily consign themselves to the "No" pile. With two degrees in the main, and yet:

- their applications are addressed to "Dear Sir or Madam" or, even worse, "To Whom it may Concern"
- there is zero evidence of a customised and thoughtful covering letter
- there are obvious mistakes of grammar or spelling
- there is no pithy summary up front to make you read on
- there is much irrelevant material in the resume. Who cares if you won a swimming medal in Year 11?
- they are not simple and concise.

This is the first exercise in advocacy beyond the hallowed halls of academia and it's directed to getting you hired as an advocate by a firm of advocates. So, best you apply some advocacy skills to get your first gig.

2. How to listen

Effective listening is not taught in law school. Clients typically come in a state of stress and raw emotion. There is often pent up anger that gets in the way of clear thinking and clear listening.

We have an obligation to allow clients to feel that they have been truly heard and understood and that often means allowing space for venting. Until that venting has been given some escape, it is impossible to move to a dispassionate analysis of the legal consequences. It's ok to ask, "How did that make you feel?" And silence can be helpful, respectful and allow voice for what may prove to be significant.

Active listening and careful rephrasing are important listening skills.

3. How to be a real lawyer

When we look at the principal drivers of negligence claims and misconduct complaints against lawyers – the things that keep us awake at night – our insurer and our regulator tell us that in the main they are due to:

- failing to adequately define the retainer
- poor communication skills
- poor negotiation skills.

Not technical legal skills! These risk management skills are not taught in law school. To be frank, much of what we do is transactional and repetitive. It is rare that we cite reported cases in our correspondence.

The skills that are most relevant for our sort of work are not formal lawyer skills, but rather communication skills and business management skills. So, why do a Masters of Law? For my money, additional skills in communication and business management are far more advantageous.

4. How to talk to a client

In essence, your client looks to you to navigate a path through a legal morass as quickly as possible, suffering the least harm possible and at the least cost. In each instance, the client wants to know the bottom line and the risks. I am yet to encounter a client who cares about making the law reports. So, essentially, it is a person management process where there is an imbalance between the skill level of the lawyer and the skill level of the client, all awash in the swirling seas of the law.

Sometimes it is difficult to identify the real client and this is where lawyers get into disciplinary and other strife. Are you acting for the individual, the company of which the individual is a director, the individual's partner, child or spouse?

A lawyer has the upper hand with language, usually, so there should be no ambiguity. For every engagement there should be clarity as to:

- what you will do
- what the client will do
- what you will not do, often very important
- what the client will pay and when.

If all these are not abundantly clear, you have risk.

Don't be hesitant to visit your clients in their homes or business premises. Ask lots of non-legal questions. It is amazing how often you go for one thing and come back with three.

In other words, show empathy and respect and avoid jargon. Rephrase, restate and seek confirmation of your plain English rendering of what you are hearing.

5. How to write a letter

With technology and COVID-19, the number of face-to-face encounters is steadily diminishing. Increasingly, our output is textual and substitutes for:

- personal deportment
- tone of voice
- spoken advocacy.

That is why your text must be your best face to the world. People will judge you, your firm and your client by how your text manifests. So it should be:

- clear and succinct
- have a clear call to action. If there is no call to action, don't write
- something you would be proud to have as an exhibit to an affidavit in court
- be resplendent in firm livery, be it email or letter.

Each item of firm correspondence should be crafted as elegant advocacy, as if you are frocked up and besuited before the court to deliver it.

Years ago, I did a presentation skills course which was one of the best learning experiences I have ever had. I remember that one of the rules for any presentation was "Tell them, tell them, tell them, tell them". Applying that to legal correspondence, which is a form of presentation, means:

- tell them what you want
- tell them the reasons that you want it
- tell them what will happen if you don't get what you want by a date that is certain
- tell them what you have told them.

The recipient should be left in no doubt. There should

be nothing left after your final edit that fails to support that mandate. Good lawyers do not need to hide in flabby verbiage.

6. How to negotiate

Now, it is just about mandatory for all civil disputes to go to mediation before trial, and increasingly solicitors appear at mediation. A prepared lawyer must:

- develop negotiation skills
- learn to listen, as mentioned above
- learn to deal with the passive aggressive, the yellers, the screamers and the jerks
- have up to the minute details of costs
- anticipate and prepare for the best and worst case outcomes
- explore lateral solutions to add value beyond the surface legal issues
- explore the BATNA (best alternative to a negotiated alternative)
- coach the client about mediation conduct, including the right to walk out.

Doing a mediation training course is excellent training, even if you don't plan to be a mediator. You will never approach a mediation or a negotiation the same way after. These skills are also transferable and serve you well in life at large.

7. How to manage a law firm

At law school there is no class on how to get clients, networking or the business end of running a law shop. To do that you need skills in accounting, finance, management, marketing and organisational behaviour. Two or three additional degrees perhaps. Law firm management does not feature in the Priestley 11.

I started out working in a crisis management environment. Everything was done at the last minute. I did not fancy spending my career in a constant state of crisis so I looked for training in law office management.

I did various courses, some post-graduate management study and most recently the AICD Company Director's course. All of this was time and money well spent. I came out of it a businessman who owned a law practice rather than a lawyer fumbling around in business. My practice took off.

8. How to get in and out of ownership of a law firm

Personally, I have had many false starts and misfires in planning my succession. Often it would begin with another practitioner engaging me in discussion and realising that we were each billing gross fees of about equal value. We would then consider how much more we would each earn if we joined together and rationalised premises, subscriptions, staff and a range of other expenses.

But things would then come unstuck for one of these reasons:

- the other lawyer would want some guaranteed income, instead of an equal split
- the other lawyer would insist on his premises
- the other lawyer would be risk averse to the point of paralysis.

I wasted a lot of time and money with accountants and consultants before ultimately giving that approach away.

Instead, I chose to look at internal succession, but that presented another problem – my employee lawyers were flying blind about management of a law firm. So I had to invest substantially in their education before we could even talk:

- I sent several to law firm management training with specialist advisory firm FMRC
- FMRC did a formal valuation that was ultimately adopted and which was embedded in our shareholders agreement
- I created a quasi-board and invited the chosen several on to the board before they were owners
- I had my external accountant take on a role as chair of this quasi-board with clear instructions to routinely hold me to account and be a protector of the firm interest, not just my personal interest
- I opened myself up to the chosen few as to my income from the practice in recent years.

This was all very expensive in dollars and time but it had the consequence of meaningful discussion with informed young lawyers who could then proceed to equity with their eyes wide open. Interestingly, it completely changed the dynamic within the firm, lifted performance and increased profitability. We talked as equals.

I am now an employee of a three owner law firm with about 20 people and several full time equivalents in an outsourcing firm in India. All my bosses are decades younger than me. The firm has nearly tripled in size since I started this process about 10 years ago.

To express the process more colloquially, succession involves standing up naked in front of unsophisticated eyes while all the while investing heavily in the education of your inquisitors. The flipside is that if you want in as an owner and you want to be treated as an owner you need to learn those aspects of law firm management they do not teach you at law school. If your principals fail to see the value in that you may be wasting your time.

As to getting out, I used to fear that as a sad and bedraggled suburban sole practitioner I would end up slinking alone into the night with a truckload of old files bringing up the rear. I had fantasies of burning the old files to destroy the evidence or throwing them into the traffic on the Monash Freeway. I have dodged that bullet.

9. How to say no

Law is big. Acknowledging that early on can save a lot of grief.

Some think that with the Priestley 11 in hand, practice will be a doddle. It isn't. Certainly it is possible to outsource some research to barristers but that assumes you have sufficient knowledge to articulate the problem in the first place and to then engage the right counsel with the specialist expertise.

Learning to say "no" is critical. Too many lawyers try to do all things for all clients on all occasions for any fee they can get paid and thereby they generate a rolling catastrophe.

We define ourselves by what we reject, more than by what we say yes to. And, of course, becoming an accredited specialist carries an implicit nay saying for other work because you must maintain a threshold of work in the field of specialisation. We all want special.

10. How to leave a legacy you will be proud of

My legal career has provided me with a good income and quality of life. My legal proteges are much younger to have attained the

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management goals I set myself and I am very proud of their achievements. I look forward to their successes. But I have to say that most of our key skills were not taught in law school.

Ultimately, it is very satisfying to move from being a sole practitioner in the suburbs to a larger firm headed up by three talented young female lawyers, each of whom is a graduate of the AICD Company Director course and each of whom has brave expectations and aspirations for the future.

11. The downside

Yes, law is stressful. Essentially, we are in the trauma business, be it personal, marital or commercial.

According to a 2019 study by the American Bar Association[2] of some 12,825 attorneys, 20.6 percent of lawyers have difficulties with problem drinking. Levels of depression, anxiety and stress were at 28.5 per cent and suicidal ideation was at 11.5 per cent. There is no reason to think that Australian lawyers are any different.

Coping with stress is not taught in law school and our professional bodies do not mandate the sort of debriefing and counselling that is routine for others in stressful occupations such as psychologists and psychiatrists.

Staying healthy and fit, meditation and developing a life beyond the law all help. You will often hear it said by lawyers that the solution to that tricky problem came to mind on the fourth lap of the pool or the running track or the golf course, out of the ether and when the stress of work has been put aside.

I hope these thoughts mitigate your risk. ■

Anthony Burke is a consultant with Burke & Associates Lawyers and an LIV past president.

1. Administrative Law, Civil Procedure, Company Law, Contracts, Criminal Law and Procedure, Equity (Including Trusts), Ethics and Professional Responsibility, Evidence, Federal And State Constitutional Law, Property, Torts.
2. Study on Lawyer Impairment, American Bar Association, 18 January 2019.

Burning down the house

THE TIME-CONSUMING AND EXPENSIVE RECTIFICATION OF COMBUSTIBLE CLADDING ON VICTORIAN BUILDINGS CONTINUES. SEVEN YEARS AFTER THE FIRE AT THE LACROSSE APARTMENTS IN DOCKLANDS, THE MAJORITY OF BUILDINGS WITH COMBUSTIBLE CLADDING ARE YET TO BE RECTIFIED. BY MEGAN THORBURN

SNAPSHOT

- Victoria's Planning Minister issued a declaration on 1 February 2021 banning the use of ACPs with a core of less than 93 per cent inert mineral filler or EPS on buildings of Type A and Type B construction.
- The Building Amendment (Registration and Other Matters) Bill 2021 has extended the limitation period for cladding building actions to 15 years commencing 20 October 2021.
- A searchable public register of the buildings with combustible cladding ought to be available to enable prospective tenants and purchasers to make informed choices with regard to safety, insurability and potential financial implications, including property values.

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The risks of multi-storeyed buildings still being clad in combustible Aluminium Composite Panelling (ACP) were again highlighted by the fire in a 20-storey building in Milan on 29 August 2021. Victorians first became concerned about combustible cladding products in November 2014 when there was a fire at the Lacrosse Apartments that spread 13 floors via the façade in 11 minutes.[1] This fire alerted Australia to the dangers of combustible cladding on multi-storeyed buildings but it was after the Grenfell Tower tragedy in the UK in June 2017, in which 72 people died, that the Victorian Cladding Taskforce and various other state and territory cladding audit programs were established.

Under these cladding audit programs, more than 3400 buildings across Australia have been identified as having potentially dangerous combustible cladding. These audits have generally covered government owned buildings and privately owned, multi-storey, residential buildings. Rectification has yet to occur on the vast majority of these buildings and it is estimated that their rectification will cost billions of dollars. There are also commercial, retail and office buildings that owners are developing cladding rectification strategies for, incentivised by the insurance industry and risk management responsibilities.

In Victoria, to date, 766 privately owned residential apartment buildings initially assessed as extreme or high risk by the Statewide Cladding Audit, which is administered by the Victorian Building Authority (VBA), have been referred to Cladding Safety Victoria (CSV). CSV conducts due diligence on these buildings to assess their eligibility and priority for funding assistance. CSV has, at the time of writing, inducted 541 buildings into the program for due diligence and has issued funding agreements to 253. As at January 2022 cladding rectification works are complete on 113 buildings, works are underway on a further 82 and 58 are in the pre-construction phase. Another 127 other buildings have been discharged from CSV's residential program because they have been found by CSV to not require any rectification or are out of scope. Owners of buildings assessed as lower risk have been left to fund the rectification work themselves.

CSV's work is funded in part by the Cladding Rectification Levy (CRL) imposed on building permit applications from 1 January 2020. The CRL applies to specified classes of buildings on top of the pre-existing building permit levy.

Owners may commence cladding related rectification works pending applications for funding. Where costs have been incurred, CSV may enter into funding agreements that provide reimbursement as well as funding to complete the rectification process.

Buildings identified as having combustible cladding arguably ought to be disclosed in a searchable public register to enable prospective tenants and purchasers to make informed choices with regard to safety, insurability and potential financial implications, including property values.

Insurance

In response to cladding issues and risks in the construction sector globally there has been a significant increase in premiums and the introduction of cladding exclusions into professional indemnity policies. In order to provide insurance coverage for the CSV program, the Victorian government purchased a suite of insurance policies at a cost of approximately $7 million. The policies provide cover for 10 years for building consultants and surveyors involved in CSV rectification. A professional indemnity insurance policy, a general and products liability policy and a construction risks material damage policy each provide coverage for cladding rectification works funded by CSV. The professional indemnity policy includes a limit of $10 million for each project with a $50,000 excess.

Recovery and subrogation

Owners and owners corporations that pursue recovery of rectification costs must repay any recovered costs to CSV if rectification has been funded by CSV. Alternatively, CSV can pursue a subrogated recovery claim. The Cladding Safety Victoria Bill 2020 amended section 137F of the *Building Act 1993* (Vic) (*Building Act*) so that from 1 July 2021 when CSV provides financial assistance to owners for cladding rectification work, the state's subrogation rights are triggered. This empowers the Crown to commence proceedings against building practitioners responsible for the installation of non-compliant combustible cladding or other building work that required the cladding rectification work to be undertaken.

On the expectation that many of the builders and consultants involved in the construction of building with combustible cladding have been wound up or restructured in anticipation of claims, the government has provided for directors to be personally liable. Section 137F(3) of the *Building Act* provides that if a right or remedy to which the Crown is subrogated under this section is exercisable against an entity that is not an individual it is enforceable jointly and severally against the entity and the people who were its officers at the time the act or omission that gave rise to the right or remedy occurred.

Through cladding audits many buildings with combustible cladding have been found to have other defects but CSV will only fund cladding replacement. It remains to be seen how recovery actions will proceed for losses incurred by the owners that are not funded by CSV. Common defects include poor weather proofing which has led to rotted structural timbers and mould, unprotected openings for service penetrations in fire rated walls, internal lining of walls that are not fire rated and water issues related to balconies and poorly constructed waterproof membranes in bathrooms. Some of these defects may be obvious, others are being discovered as cladding replacement works are undertaken leaving the owners with significant additional rectification costs.

Other costs borne by the owners and owners corporations can include higher owners corporation fees to pay for increased work by strata managers, special levies for legal fees, increased insurance premiums, costs relating to the loss of apartment rent or use, consultant's reports, fees charged by fire services where there are false alarms triggered by enhanced detection systems installed as a short-term measure to mitigate risks, fines for non-compliance as well as the potential loss of property value.

With cladding rectification matters it is important to consider, at an early stage, whether there are any other potential claims parties might ultimately wish to pursue. If claims aren't pursued together in the course of existing proceedings, there is a risk that parties may lose the right to pursue them at all. This requirement comes from *Port of Melbourne Authority v Anshun Pty Ltd* [1981]

HCA 45, where the High Court laid down the principles known as "Anshun estoppel". A party cannot assert a claim or raise an issue of fact or law in subsequent proceedings if that claim or issue is so connected with the subject matter of the first proceeding that it is unreasonable for them not to have raised them in the first proceedings.[2] If found to be unreasonable, then that party may be "estopped" from raising the issues, losing the right to make that claim altogether. With res judicata and "issue estoppel", a party is unable to re-litigate a matter that has already been decided. However, with Anshun estoppel, a party can lose the right to litigate a matter that has never been raised before.

Some proceedings have commenced in the courts for the recovery of cladding rectification costs, but many cladding matters are being dealt with in-house by insurers, with proceedings yet to commence.

In *Burbank Australia Pty Ltd v Owners Corp* [2015] VSC 160 it was confirmed that consumer protection provisions in the *Domestic Building Contracts Act 1995* (Vic) (DBCA) extend to high rise apartments. Apartment owners can, therefore, bring claims under the DBCA against builders for failing to carry out work in a proper and workmanlike manner, for using materials not suitable for the purpose which they were used and for failing to complete work in accordance with relevant building standards.

Owners may also have claims against the builder for negligence for failing to take reasonable care to ensure that the materials used on the building complied with the relevant building standards. However, in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2013] HCA 36 the High Court held that a builder will not owe a duty of care to a subsequent purchaser (including owners corporations) of a commercial building, which may include buildings used for short term residential accommodation.

Claims may be available under contract law, under Australian Consumer Law and for professional negligence against the builder, manufacturer, supplier, certifier, design consultant, fire engineer or architect. Liability will be determined in cladding matters on a case by case basis and liability can be apportioned between the parties. Apportionment of liability in the Lacrosse decision[3] is discussed in articles published in July 2019 and July 2021 of the *LIJ*.[4]

Limitation period extended to 15 years

The Building Amendment (Registration and Other Matters) Bill 2021 received Royal Assent on 19 October 2021. Clause 49A(1) commenced 20 October 2021 substituting the limitation period in s134(2) of the *Building Act* to increase the time that a person is able to commence a building action for compensation relating to cladding from 12 years to 15 years.

The 15 year period runs from the date of issue of an occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied), or where an occupancy permit is not issued, from the date of issue of a certificate of final inspection.

The extension is for cladding building actions only. Section 134(3) of the *Building Act* defines a "cladding building action" as "a building action in connection with, or otherwise related to, a product or material that is, or could be, a non-compliant or non-conforming external wall cladding product".

The amendment is retrospective. Although all current professional indemnity policies contain cladding exclusions, if a building professional provided a notification of a potential claim on specified buildings to their professional indemnity insurers before the introduction of cladding exclusions they may still be able to make a claim in relation to that notified building. Where notice to the insurer was not given, the cladding exclusions will mean claims relating to cladding defects will not be accepted by insurers, exposing building consultants to uninsured claims.

The time extensions may come as a relief to owners and owners corporations who were previously time-barred (or soon to be time-barred), allowing those groups extra time to formulate and bring claims against builders and consultants in respect of combustible cladding affected buildings, assuming those entitles still exist. They will also allow the state additional time to exercise its rights of subrogation in an effort to claw back some of the cladding rectification funding.

Minister's Declaration

Victoria's Planning Minister issued a Declaration on 1 February 2021 under s192B of the *Building Act* banning the use of aluminium composite panels (ACPs) with a core of less than 93 per cent inert mineral filler by mass (ie, greater than 7 per cent polyethylene) by mass or rendered expanded polystyrene products (EPS) on buildings of Type A and Type B construction. The ban does not apply retrospectively and does not apply to any buildings for which a building permit was issued before 1 February 2021. Minister's Guideline 14 (MG-14), which previously allowed building permits to be issued allowing the use of ACP (with less than 30 per cent polyethylene core) or EPS if the BAB determined their use was compliant, is revoked.

The VBA will enforce the ban and penalties for non-compliance which include fines of up to $80,000 for individuals and $400,000 for companies.

Class actions

Two class action proceedings are currently on foot in the Federal Court of Australia against one manufacturer and two Australian distributors (deemed manufacturers) of ACP cladding products Alucobond and Vitrabond. The litigation is funded by litigation funder Omni Bridgeway, formerly IMF Bentham, who are also covering any exposure to pay the respondents' legal costs. The claims were initially brought under Australian Consumer Law for breach of consumer guarantees that the ACPs would be of acceptable and merchantable quality. The class actions are open to building owners including commercial building owners, owners corporations and public bodies in Australia who have suffered or who will suffer financial loss due to the need to remove and replace the cladding together with other consequential losses suffered.

The Alucobond Class Action is a product liability claim and also a claim for false or misleading representations as well as misleading conduct against 3A Composites GmbH and Halifax Vogel Group Pty Limited. The Alucobond claim was amended in February 2020 to add claims for misleading and deceptive conduct in relation to the advertising and promotion of the ACPs. Justice Michael Wigney found that potential claimants

exist in every state and territory in Australia in the interlocutory judgment where 3A Composites sought to limit the number of members in the open-ended class.

The Vitrabond Class Action is a product liability claim and a claim for false or misleading representations and misleading conduct against Fairview Architectural Pty Limited (Fairview), the Australian supplier which was placed into voluntary administration in July 2020. On 6 November 2020, Fairview entered into a Deed of Company Arrangement (DOCA), which provided for the sale of Fairview's business to a related entity. Under the DOCA, claims of trade creditors were to be paid in full and the owners' claim in the class action was to be preserved to the extent that Fairview was insured for the potential liability.

Leave to proceed was granted for the owners to proceed against Fairview while it is subject to the DOCA. Wigney J found that the owners had an arguable case that Fairview's potential liability in the proceeding was covered under their product liability insurance policies. He also considered that it was arguable that Fairview's conduct in supplying the cladding caused property damage to the building to which the cladding was affixed. The damage arose from the need for owners to remove the cladding and remediate the building citing *Austral Plywoods Pty Limited v FAI General Insurance Co Limited* [1992] QCA 4. It may be prudent for building practitioners defending combustible cladding claims to seek to claim under public liability insurance policies in addition to any professional indemnity insurance policies they may hold.

The state of Victoria filed a notice of consent in November 2020 to become a group member in the proceedings however withdrew from the class actions in April 2021. Willoughby Council has joined the claimants in relation to its nine-storey Concourse performing arts hub in Chatswood, NSW. The state of Queensland has filed a notice of consent to become a group member, as has the state of South Australia. ■

Megan Thorburn is principal of CCP Law and an LIV accredited specialist in property law. She is a member of the LIV Property Law Committee and the LIV Building and Construction Working Group. She is also an adjunct lecturer with the College of Law.

1. Beds are Burning, July 2019 93 (7) *LIJ*; Property: Combustible Cladding Update, July 2021 95 (7) *LIJ*.
2. *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28, at [22].
3. *Tanah Merah Vic Pty Ltd & Ors v Owners Corporation No 1 of PS613436T & Or* [2021] VSCA 72
4. Note 1 above.

HIGH COURT JUDGMENTS

DR MICHELLE SHARPE

Trade practices

Competition

In the High Court decision of *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39 (8 December 2021) the High Court was required to determine two issues under the *Competition and Consumer Act 2010* (Cth) (CCA); first, whether the respondent (Glencore) had a right to negotiate the charge levied by the appellant (PNO) for access to the Port of Newcastle (Navigation Service Charge) and, second, the amount of the Navigation Service Charge.

PNO leases the Port from the state of New South Wales and is the "operator" of the Port of Newcastle (Port) under the *Ports and Maritime Administration Act 1995* (NSW) (PMA Act). The Port is the only commercially viable means of exporting coal from coal mines operating in the Hunter Valley. Glencore is the largest producer of coal in the Hunter Valley. Most of the coal produced by Glencore is sold to overseas buyers on a "free on board" (FOB) contract. Under the FOB contract, Glencore is typically required to deliver the coal onto a vessel nominated by the buyer docked in the Port. Glencore arranges transport of the coal from the Hunter Valley to the Port but the buyer charters the vessel that will convey the coal out of the country.

But, PNO controls the use of the Port for coal export in two ways. First, PNO controls the loading berths located at the Port terminals at which coal is loaded onto vessels. Second, PNO controls the shipping channels (first constructed by the state years ago) through which vessels must pass on entering or leaving the Port. In respect of the latter, PNO levies the Navigation Service Charge for passage. The PMA Act entitles the PNO to levy a charge for the use of navigation channels. The PMA Act provides that the charge is payable by the "owner" of the vessel which is defined to include a person who exercises any of the functions of the owner of the vessel (or holds him/herself out as exercising any of those functions). After increases in charges levied by PNO, Glencore sought to trigger the regulatory process provided for in Part IIIA of the CCA for access to essential facilities. This involved two stages: having the service "declared" (s44F, CCA) and a third party gaining "access" to the declared service by way of a right to negotiate enforceable by the Australian Competition & Consumer Commission (ACCC) (s44S(1), CCA). Glencore asked the National Competition Council (NCC) to recommend to the designated Minister that he declare the service provided by PNO by means of the shipping channels. The NCC declined to make the recommendation sought by Glencore and the Minister decided not to make the declaration. Glencore appealed the Minister's decision to the Australian Competition Tribunal (Tribunal). The Tribunal set aside the Minister's decision (finding the Port to be a necessary input to effective competition) and declared the service. The Tribunal described the service as being the "provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct" (Service). In the meantime Glencore had notified the ACCC of a dispute with PNO over access to the Service. The ACCC made a final determination of the access dispute, as required by the CCA, and Glencore appealed the ACCC's decision to the Tribunal. In its final determination the Tribunal decided (among other things) that Glencore was excluded from the right to negotiate the Navigation Service Charge when it sold its coal under a FOB contract. As to the price of the Navigation Service Charge, the Tribunal set aside the ACCC's decision to reduce the price by taking into account the state's investment in constructing the shipping channels. The Tribunal was of the view that these contributions did not justify a deduction in price under the CCA on the limited material presented to the Tribunal. The Full Court of the Federal Court overturned the Tribunal's decision. The Full Court considered that the Tribunal had taken an unduly physical view of access to the Service. The Full Court held that access and use can be economic. Alternatively, the Navigation Service Charge was indivisible from the Service (which included loading coal onto a vessel docked in the Port). The Full Court also held that the Tribunal misapplied the CCA in determining the amount of the Navigation Service Charge.

PNO appealed to the High Court with mixed success. In an unanimous decision, and a single joint judgment, the High Court held at [123] that the Full Court was correct to conclude that the Tribunal erred in its approach to access to the Service but the Full Court was wrong in finding that the Tribunal erred in fixing the amount of the Navigation Service Charge. In respect of access, the High Court considered the meaning of the term "access" in the context of Part IIIA of the CCA and concluded at [97] that the meaning that appeared to best achieve the objects of Part IIIA is "the right or opportunity to benefit from or use a system or service". The High Court observed at [98] that: "To a supplier or buyer who is a competitor in that upstream or downstream market who wants to ensure that the use of the bottleneck facility [like the Port] is on fair and reasonable terms, it cannot matter which person in the supply chain actually uses that facility". In respect of the amount of the Navigation Service Charge, the High Court observed at [113] that s44X(1) required the Tribunal to take certain, specified, matters into account in making the final determination. The High Court held that: "Provided the Tribunal so took each of the specified matters into account, how the Tribunal factored each of them into its decision-making process was a matter for it". Similarly, s44X(1)(h) of the

CCA obliged the Tribunal to take the pricing principles specified in s44ZZCA in making the final determination. And the High Court at [121] found that the Tribunal did, in fact, take into account these principles. So, PNO having lost the access fight and Glencore having lost the price fight, the High Court concluded at [123] that each of the parties was to bear their own cost.

Criminal practice

Miscarriage of justice

In *Orreal v The Queen* [2021] HCA 44 (16 December 2021) the High Court was required to determine whether the failure of the trial judge to direct the jury to disregard certain evidence amounted to a miscarriage of justice and the appellant's conviction should be set aside under s668E(1A) of the Criminal Code contained in Schedule 1 to the *Criminal Code 1899* (Cth) (Criminal Code).

The appellant was convicted of three counts of indecent dealing with a child under 16 years and two counts of rape. In the course of the trial, evidence that both the appellant and the complainant had tested positive for herpes simplex virus type 1 (HSV-1) was admitted (Impugned Evidence). The trial judge did not direct the jury that the Impugned Evidence was to be disregarded. The appellant later appealed the conviction on two grounds: His defence counsel should have objected to the admission of the Impugned Evidence and the judge should have directed the jury to disregard the Impugned Evidence. A majority of the Court of Appeal of the Supreme Court of Queensland (Mullins JA and Bond J, McMurdo JA dissenting) held that a miscarriage of justice had occurred but that no substantial miscarriage of justice had actually occurred for the purposes of s668E(1A) of the Criminal Code and dismissed the appeal. The majority considered that it was obvious that the Impugned Evidence could not have assisted the prosecution case when almost 80 per cent of the adult population would have tested positive for HSV-1 and concluded that there was no risk that the jury would use the evidence in a way that was adverse to the appellant. But, McMurdo J, in dissent, found that there was a significant possibility that the Impugned Evidence assisted the prosecution to persuade the jury to accept the complainant's evidence. As for the decision by the defence counsel not to object to the admission of the Impugned Evidence, the Court of Appeal observed that the defence counsel made a forensic decision to not object to the Impugned Evidence because it allowed evidence of the complainant's previous sexual encounter to be admitted into evidence also.

The appellant successfully appealed to the High Court. In an unanimous decision, the High Court held that the trial judge's failure to direct the jury to disregard the Impugned Evidence amounted to a substantial miscarriage of justice for the purposes of s668E(1A) of the Criminal Code. The High Court observed that s668E(1A) of the Criminal Code requires an appellate court to be persuaded that evidence properly admitted at trial establishes guilt to the requisite standard before it can conclude that no substantial miscarriage of justice actually occurred: Kiefel CJ and Keane J at [20], Gordon, Steward and Gleeson JJ at [41]. And the High Court recognised that proof of the appellant's guilt was wholly dependent on the complainant's evidence. Kiefel CJ and Keane J observed at [23]: "It may be accepted that, logically, the evidence could not assist the jury, but often the nature of prejudicial evidence means that it may not be rationally applied. Uninstructed by the trial judge, the jury may well have reasoned that the test results were no coincidence and pointed to the complainant having contracted the virus from the appellant". And Gordon, Steward and Gleeson JJ observed at [45] that: "In effect, the jury were invited to employ the impugned evidence as they saw fit. In those circumstances, it was not possible for the Court of Appeal to assess whether guilt was proved beyond reasonable doubt". ■

Dr Michelle Sharpe is a Victorian barrister practising in general commercial, disciplinary and regulatory law, ph 9225 8722, email msharpe@vicbar.com.au. The full version of these judgments can be found at www.austlii.edu.au.

FEDERAL COURT JUDGMENTS

DR DAVID J TOWNSEND

Liquidation

Statutory set-off of debts under Corporations Act – nature of debt owed by company to creditor v creditor's obligation to repay unfair preference pursuant to court order – mutuality of debts

In *Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufacturers Pty Ltd* [2021] FCAFC 228 the question reserved for the Full Court of the Federal Court of Australia (Allsop CJ, Middleton and Derrington JJ) was whether a defendant who had a claim in debt against a company in liquidation could avail itself of the statutory right of set-off of debts under *Corporations Act 2001* (Cth) (Act) s553C(1) in respect of the liquidator's claim against the defendant for recovery of an unfair preference paid out to the defendant. The Full Court unanimously answered that it was not available: the unfair preference must first be repaid, then debts may be proven against the company in liquidation in the normal way. In the course of so deciding, Allsop CJ delivered a lengthy lead judgment tracing the history and operation of the right of statutory set-off, and in particular the necessity for "mutuality" of debts if they are to be set off against one another under the Act.

Facts

The agreed facts were the subject a special case (or case stated). The company in liquidation owed two debts to the defendant for the supply of goods, one of which debts amounted to $194,727.23. The defendant had received payments during the relation back period amounting to $190,000 in respect of the other debt owed by the company. (The defendant acknowledged that it could not set-off an unfair preference against the very debt in respect of which the unfair preference was paid – that would defeat the purpose of the unfair preference provisions in the first place!)

The liquidator sought repayment of the $190,000 as an unfair preference under s588FA of the Act. The defendant sought to avail itself of the right of set-off of debts under s553C(1). The liquidator acceded that if the defendant was correct, the proceedings should be dismissed.

Decision

The Full Court held that set-off was not available to the defendant as s553C explicitly required that sums to be set off against one another be "mutual credits, mutual debts or other mutual dealings". This necessary quality of "mutuality" requires that the sums be owed to and by the company in the same interest. In the present case, the $194,727.23 debt owed by the company to the defendant was owed in one capacity (the company as debtor), whereas the receipt of money by the company on repayment of an unfair preference by the defendant occurred in another capacity (the company as payee pursuant to a court order under s588FF, in the context of the liquidator gathering in the insolvent estate). Unlike the pre-existing obligation on the company to pay its trade creditor, the obligation on the defendant to repay an unfair preference to the company is a new right created by the Court, in exercise of a statutory power, on the making of the relevant order. Such repayment is not received by the company in the same interest as its obligation to pay the defendant creditor, but rather for the benefit of the creditors in insolvency generally and under the control of the liquidator (at [7]-[8] and [153]-[154]).

Further, at the relevant date of the winding up resolution/order there was no right or equity (vested or contingent) in the company to recover the unfair preference, nor any corresponding right or equity (vested or contingent) in the defendant to repay the preference, to be set off. The obligation to repay the unfair preference only arises later, after the liquidator is appointed and successfully applies to the Court for a repayment order under s588FF (at [7]-[8]).

Statutory text and legislative history: Allsop CJ traced the statutory history of the text of s553C back through Australian and English insolvency and bankruptcy law. He observed that, under the similarly-phrased provisions which had preceded the current text, it had never been the case that an unfair preference paid to a creditor could be set off against a debt owed to that creditor by the company, and that there was no basis for concluding that the present enactment had intended to alter that position.

As to whether an eventual obligation to repay an unfair preference constituted a contingent debt for the purposes of s533C, His Honour held that it did not, and drew a distinction between a transaction which is "contingent at [the relevant date] and [is] of a kind which will ultimately mature into pecuniary demands susceptible of set-off" (*Gye v MacIntyre* [1991] HCA 60; 171 CLR 609) and a court order for repayment of an unfair preference under s588FF (at [56]-[58] and [157]).

Purpose: Considering the consequences of a debt and a repayment of an unfair preference being able to be set off, Allsop CJ observed that if this were permitted, it would have the effect of distributing the company's assets not by reference to the overall position of the insolvent company and the claims of all creditors, but rather by reference only to the size of an unfair preference payment compared to a given creditor's other debt(s) owed. In effect, this would render such a creditor a super-priority creditor, able to be satisfied before even the costs of administration and the repayment of priority creditors, including vulnerable priority creditors such as employees (at [31] and [65]). This would dislocate the working of the Act and disturb the proper order of the administration of an insolvent estate, and any interpretation of s553C which allowed an unfair preference to be set off against a debt would ill conform to the policy of the Act in protecting priority creditors (at [155]). Such a seemingly arbitrary dislocation and failure to remediate an unfair preference would require "[t]he clearest statutory text", and there is no such clear text present in the Act (at [156]).

As a result, with no set-off being available, the defendant would be required to first repay the unfair preference (thereby making good the insolvent estate) and then prove its two debts against the company in the normal way, and, if successful, join with other unsecured creditors in pari passu distribution of the company's remaining assets. ■

Dr David J Townsend is a barrister at 3rd Floor Wentworth Chambers, Sydney.

FAMILY LAW JUDGMENTS

CRAIG NICOL &
KELEIGH ROBINSON

Spousal maintenance

Consent order (made as part of property orders) that husband pay wife's mortgage could only be a maintenance order

In *Thorpe & Stirling* [2021] FedCFamC1A 86 (15 December 2021) the Full Court (Aldridge, McEvoy & Altobelli JJ) allowed an appeal from a decision of Kemp J where a final consent order required the wife to sell a property and provided that she receive $430,000 of the sale proceeds on the basis that the husband would be guarantor and pay mortgage payments on a future loan of up to $500,000.

The order provided that the husband would continue to pay the mortgage until its loan balance was discharged. The husband refused to pay after the wife re-married, contending that the order was a spousal maintenance order that had no effect on re-marriage per s82(4) of the Act.

Considering the order (Order 36), the Full Court said:

". . . [T]he husband's liability under the mortgage remains until it is paid out . . . [T]hat liability could . . . exceed what the husband otherwise received under the . . . orders . . . (at [20]).

". . . [P]roperty, as defined, is limited to existing property, whatever it may be (*Stanford v Stanford* [2012] HCA 52 . . .), and does not extend to property that might be received in the future . . . [Section 79] does not empower the Court to make an order against property which does not presently exist but could be brought into existence by the exercise of borrowing capacity . . . (at [26]).

". . . [H]is Honour found . . . the husband's obligations under Order 36 'were likely to be paid out of the husband's future income stream including his receipt of any . . . bonus payments' . . . (at [36]).

"Order 36 does not work an alteration of the interests of the parties in their property but rather creates an obligation which is separate to the division of that property (at [37]).

". . . [T]herefore, that Order 36 could not be an order made under s79 of the Act . . . (at [38]).

". . . Order 36 can be seen as being made as a spousal maintenance order . . ." (at [45]).

Property

Full Court holds that non-commutable disability income insurance payment is not "property" but a financial resource

In *Tomaras & Tomaras* [2021] FedCFamC1A 82 (13 December 2021) the Full Court (Ainslie-Wallace, Aldridge & Watts JJ) dismissed an appeal from Judge Purdon-Sully's decision in *Tomaras & Tomaras & Anor (No. 2)* [2019] FCCA 2830.

At first instance, the Court dismissed the wife's application for a property adjustment where there was no property other than the husband's total and permanent disability insurance policy (TPD policy), which the Court held was not property, where the husband's monthly payment under the policy was contingent on his establishing an entitlement to payment each month.

Ainslie-Wallace & Aldridge JJ cited *Crapp* [1979] FamCA 17, *Mullane v Mullane* [1983] HCA 4, *Marchant* [2012] FamCAFC 181 and *Pates* [2018] FamCAFC 171 and said:

". . . [T]he capitalised value of the pension is not property capable of division because no such property exists in that sum . . . The pension can only be regarded as a financial resource or income . . . [T]here is no more than a right to receive the next payment provided the relevant disability continues . . . (at [80]).

"A . . . difficulty arises in this case because there was no other property to be divided. If there was such property, then . . . the expected receipt of the payments could properly be taken into account as a financial resource in any property division under s79 of the Act so as to allow the other party to receive more of that other property (at [82]).

"The appellant submitted that as the TPD policy could be commuted and the respondent's entitlements assigned, this case could be distinguished from those just discussed (at [83]).

". . . [S]uch a course would require the respondent and the insurer to agree . . . The evidence indicated that the insurer was amenable to such a course . . . However, as the respondent's position was that he would never agree to such a course, there is no possibility of commutation (at [84]).

". . . [W]e think that the husband's insurance payments, when considered in light of the meaning of 'property' under the Act, should best be categorised as income" (at [93]).

Children

Error in treating parents' joint opposition to grandmother spending time with the children as an incident of parental responsibility

In *Bonner & Chandler* [2021] FedCFamC1A 81 (8 December 2021) Austin J, sitting in the appellate jurisdiction of the Federal Circuit and Family Court of Australia, allowed an appeal from a decision of the Magistrates Court of Western Australia, which dismissed a maternal grandmother's interim application for time with her grandchildren.

The parents (whose marriage was intact) jointly sought the dismissal of the grandmother's application.

The Court at first instance made findings that "the respondents have made a parental decision . . . [s]uch decision falls under the umbrella of parental responsibility"; that "[where] the parents [are] in an intact family making a parental decision which they have the authority . . . to make . . . this Court should be cautious in peering over the shoulder of functional parents . . ." (at [20]).

Austin J said:

"The Full Court has repeatedly affirmed that, in child-related proceedings, the parents of the subject children do not enjoy superiority over any other person who is keenly interested in the children's welfare . . . (at [23]).

". . . [T]he magistrate's reasons reveal the appellant's application was dismissed essentially because the respondents jointly opposed the children spending any time with the appellant. The magistrate considered the respondents were entitled

to make that decision as an incident of their parental responsibility for the children and strongly implied the legitimacy of their decision need not be scrutinised, much less countermanded . . . The appellant . . . had standing under the Act to bring the proceedings . . . and so her application ought have been considered on merit; not dismissed just because the respondents opposed it (at [25]).

"It seems apparent from the evidence . . . that other factors affecting the children's best interests were pertinent and ought to have been considered . . . (at [27]).

"It could be that, even if the Act is applied correctly, the same result would ensue, but it cannot be said with certainty that the magistrate's error of law had no influence upon the result. Accordingly, the error cannot be disregarded . . ." (at [28]).

Property

Bankrupt appellant lacked sufficient interest to prosecute appeal

In *Glover & Webster* [2021] FedCFamC1A 69 (19 November 2021) the Full Court (Strickland, Ainslie-Wallace and Aldridge JJ) heard an appeal from a decision of Baumann J relating to a binding financial agreement (BFA).

The Court declared the BFA as binding and that it covered all assets of the parties. The de facto wife appealed, but was then made bankrupt.

The trustee in bankruptcy advised that pursuant to s60(2) of the *Bankruptcy Act 1966* he would not prosecute the appeal but that he did not oppose or consent to the appellant continuing the action.

The Court said:

"Fundamental to the bankrupt being relieved of both his property for the benefit of his creditors is that the bankrupt has no financial interest in an appeal such that he may continue it in his own name after being made bankrupt (at [30]).

"This concept has been applied in the family law context. Whilst a bankrupt party can commence property settlement proceedings, in *Guirguis & Guirguis* [1997] FamCA 6 . . . the Full Court accepted that a bankrupt party cannot appeal property orders where the subject of the orders vests or will vest in the trustee in bankruptcy, because the bankrupt lacks sufficient interest (at [33]).

"If the appeal from the declaration in this matter was successful, and the declaration set aside, then there would either be the re-exercise of the discretion, or a rehearing of the question of whether there was property not covered by the BFA, and if there was, then the . . . appellant could pursue an application pursuant to s90SM of the Act seeking an entitlement to some or all of that property. However, as an undischarged bankrupt, any property that she thereby became entitled to would then vest in her trustee in bankruptcy as after-acquired property pursuant to s58(1)(b) of the *Bankruptcy Act* (at [38]).

"It follows . . . that the appellant does not have sufficient interest in the order the subject of the appeal to give her standing to prosecute the appeal. As the trustee does not wish to pursue it, the appeal must be dismissed" (at [39]). ■

Craig Nicol is an accredited family law specialist and editor of *The Family Law Book*, a looseleaf and online service: see www.thefamilylawbook.com.au. He is assisted by accredited family law specialist **Keleigh Robinson**. References to sections of an Act in the text refer to the *Family Law Act 1975* (Cth) unless otherwise specified. The full text of these judgments can be found at www.austlii.edu.au. The numbers in square brackets in the text refer to the paragraph numbers in the judgment.

SUPREME COURT JUDGMENTS

DR MICHAEL TAYLOR

Different accounts of events – failure to take account of particular evidence – denial of procedural fairness – reliability – forensic risks taken by Board

Nursing and Midwifery Board of Australia v Robinson [2021] VSC 823 (14 December 2021), No S CI 2021 01350

This case concerns an appeal of a professional disciplinary matter from the Victorian Civil and Administrative Tribunal (VCAT) by the Nursing and Midwifery Board of Australia (Board) against Mr Mark Robinson (Respondent), a registered nurse since 1986 with no prior disciplinary history (at [1]).

The disciplinary proceeding in VCAT concerned the Respondent's interaction with a 70-year-old female patient (W1) who he first encountered in 2015 (at [1]-[2] and [4]). At that time, the Respondent was employed in a clinic where W1's general practitioner (W3) practised, and the Respondent's duties involved conducting certain assessments (at [2]). The Respondent performed assessments on W1 in 2015 and again in 2016 (at [2]-[3]). On 17 January 2017, the Respondent conducted another assessment and (as was common ground between W1 and the Respondent) during that assessment they discussed a YouTube video concerning Donald Trump (at [4]). It was the Respondent's contention (denied by W1) that he also discussed with W1 that he was looking for a property in the local area and W1 mentioned a property near her own home (at [5]).

Later that same day, the Respondent attended W1's home, having sent a text message to arrange the visit (at [6]). It was W1's contention that the Respondent obtained her address and phone number from clinic records; the Respondent contended W1 had given him her number on an earlier occasion when they ran into each other at a local shopping centre at which time W1 invited him for a meal (at [7]). Notably, the Respondent said that while he had saved W1's phone number in his phone, he did not save it under her name (at [7]). W1 denied that this earlier encounter had taken place; however, it was common ground that the Respondent's visit on 17 January 2017 related to the YouTube video shown during the assessment at the clinic (at [7]-[8]).

W1 said that while the Respondent was in her home he had "made moves upon her sexually", whereas the Respondent's account was that W1 "made a 'pass' at him and was acutely embarrassed when he had not reciprocated" and the Respondent then left (at [9]).

On 19 January 2017, there was an exchange of text messages initiated by W1 and including an invitation from her to "catch up" which the Respondent accepted for the following day (at [10]). The Respondent admitted that texts he sent during this exchange were sexual in nature, but he thought he was messaging another person and did not realise W1 was the recipient until the following day (at [10]-[11]). On 20 January 2017, the Respondent says that he attended W1's home to clarify and apologise; W1 contended that sexual intercourse took place during this visit (at [11]). Further texts were exchanged between W1 and the Respondent over the following days (at [12]).

W1 later reported her version of events to a friend (W2), and then to W3 during a consultation on 31 January 2017 where she gave W3 a written account entitled "My most embarrassing experience" (at [13]-14]). W3 then stood the Respondent down from his position at the clinic and notified the Board about the allegations (at [15]). In February 2017 the Board took "Immediate Action" against the Respondent, suspending his registration under s156 of the National Law (at [17]). In March 2018, the Board referred two allegations to the Tribunal, being that the Respondent had: (i) inappropriately accessed W1's clinical records to obtain her residential address and phone number, and then used these for purposes unrelated to W1's clinical management; and (ii) failed to maintain professional boundaries with W1 (at [18]-[19]).

In VCAT proceedings in 2019, the Respondent was (at hearing) unrepresented and appeared in person, where this "created difficulties which are very evident in the transcript" and culminated in his view that he was "railroaded" during cross-examination by counsel for the Board (at [23]). At the hearing, W1 gave oral evidence in addition to three written documents detailing events: the "My most embarrassing experience" account given to her GP in January 2017, followed by a statement to the Board's investigator in August 2017 and a further witness statement in March 2018 (at [20]-[21]).

In April 2020 VCAT gave its "Liability Reasons"[1] that made findings of fact regarding the two allegations (at [26]-[27]). Noting that the onus on the Board to make its case and the applicable civil standard of proof, VCAT considered that the evidence in respect of allegation 1 was inconclusive as to how the Respondent obtained W1's address and phone number (at [27]-[28]). In respect of allegation 2, VCAT did not consider W1 to be a reliable witness and formed the view that the Respondent had given "frank evidence" in part but then rejected other parts of his evidence (at [30]). VCAT ". . . observed, more than once, [that] neither the Board nor the respondent could put the critical text messages before it" and noted the Respondent's admissions against interest in respect of attending W1's home without clinical reason on two occasions, and the sending of text messages of a sexual nature (at [31]).

In the "Penalty Reasons"[2] delivered in March 2021, VCAT determined that the Respondent engaged in professional misconduct. As a result, he was reprimanded, and conditions were placed on his registration (at [36]).

In April 2021, the Board sought leave to appeal VCAT's orders under s148(1) of the *Victorian Civil and Administrative Tribunal*

Act 1998 (Vic) (at [35]-[37]). Five grounds of appeal were advanced by the Board, where ground 3 is the focus of this case note: that VCAT did not afford the Board procedural fairness in that it did not accept W1's evidence and/or characterised it as unreliable due to inconsistences, where "the Board was given no notice of these matters, and the so-called inconsistences were not put to [W1] when she gave evidence" (at [38]-[41]).

In considering this ground of appeal, the Court noted that the "no notice" ground concerned VCAT's treatment of several aspects of W1's evidence and the Board's contention that it was deprived of the opportunity to elicit further evidence, while observing that the Board "tended to drift into the territory of suggesting that VCAT had been 'unfair' to W1 (in particular) and W2" (at [84]-[86]). The Court set out the principles relating to procedural fairness and the Tribunal's obligation to raise critical issues, being an obligation that will depend on the circumstances of the case and is not one that should be unreasonable or impractical (at [88]-[91]).

In this instance, the Board had drawn the allegations against the Respondent based on the evidence it obtained, where the Court viewed it as "obvious" that W1's version of events "had evolved over time and via three different documents" and the accounts therein were clearly not consistent (at [92]-[94]). Further, the Court was of the view that:

- these inconsistencies "were there for the Board to take account of (or not) prior to and at the hearing before the Tribunal" (at [96])
- the Respondent's admissions and denials of events (particularly his denial regarding the allegation of sexual intercourse) were "made plain well prior to the hearings" (at [97])
- it was also plain that W1's account was "hotly contested" and as such "it would very likely be necessary to consider the reliability if not credibility of [W1] and the respondent. As always, that risk had the potential to cut both ways" (at [99])
- the Board was represented at the hearing by counsel, where that was a significant advantage given that the Respondent appeared in person (at [100]).

As a result, the Court did not accept the Board's contention that the Tribunal, in emphasising certain inconsistencies in the evidence before it, amounted to unfairness to the Board and that the reliability issues with the evidence "should have been well within the contemplation of the Board prior to and at the hearing before the Tribunal" (at [101]).

The Court then addressed specific criticisms made by the Board regarding VCAT's reasoning; for example, that it unfairly criticised W1 for failing to raise the detail of the sexualised text messages until her third document, where this was not raised with W1 by VCAT in the hearing (at [103]-[110]). A particular point was made that W1's third document included an explanation why the text messages were not referred to in earlier versions and VCAT"overlooked" this; this contention was rejected given that VCAT directly quoted W1's explanation in its reasons (at [103] and [111]). Having asked W1 for an explanation to be included in the third document, the Board "had plainly been alive" to the "infirmities" of W1's evidence (at [115]-[117]).

Other grounds of appeal advanced by the Board concerned VCAT failing to find that the sexualised text messages were deliberately sent by the Respondent (ground 1, at [42]-[72]), failing to have regard to certain matters when assessing W1's allegations (ground 2, at [73]-[83]), erring because its findings were irrational and/or legally unreasonable (ground 4, [157]-[159]) and failing to give adequate reasons (at [160]-[163]). While leave to appeal was granted, all grounds were rejected and the appeal was dismissed (at [164]). ■

Dr Michael Taylor is a barrister at the Victorian Bar (email: michael.taylor@vicbar.com.au). The numbers in square brackets in the text refer to the paragraph numbers in the judgment. The full version of this judgment can be found at www.austlii.edu.au.

1. *Nursing and Midwifery Board of Australia v Robinson* [2020] VCAT 522.
2. *Nursing and Midwifery Board of Australia v Robinson* [2021] VCAT 326.

LEGISLATION UPDATE

New Victorian 2021 Assents

As at 20/01/2022

2021 No. 50 Special Investigator Act 2021
2021 No. 51 Victorian Collaborative Centre for Mental Health and Wellbeing Act 2021
2021 No. 52 Windfall Gains Tax and State Taxation and Other Acts Further Amendment Act 2021
2021 No. 53 Public Health and Wellbeing Amendment (Pandemic Management) Act 2021
2021 No. 54 Casino and Gambling Legislation Amendment Act 2021
2021 No. 55 Circular Economy (Waste Reduction and Recycling) Act 2021
2021 No. 56 Equal Opportunity (Religious Exceptions) Amendment Act 2021

New Victorian 2021/2022 Regulations

As at 20/01/2022

2021 No. 141 Victorian Civil and Administrative Tribunal (Federal Jurisdiction Matters) Regulations
2021 No. 142 Child Wellbeing and Safety (Child Link) Amendment Regulations 2021
2021 No. 143 Magistrates' Court Chapter II and Judicial Registrars Amendment (Federal Jurisdiction Matters) Rules 2021
2021 No. 144 Supreme Court (Chapter I Appendices A and B) Amendment Rules 2021
2021 No. 145 Essential Services Commission Regulations 2021
2021 No. 146 Spent Convictions Regulations 2021
2021 No. 147 Owners Corporations Amendment Regulations 2021
2021 No. 148 Non-Emergency Patient Transport Amendment Regulations 2021
2021 No. 149 Non-Emergency Patient Transport and First Aid Services (First Aid Services) Regulations 2021
2021 No. 150 Major Transport Projects Facilitation (Notification) Revocation Regulations 2021
2021 No. 151 Victims of Crime Assistance (Special Financial Assistance) Regulations 2021
2021 No. 152 Crown Proceedings Regulations 2021
2021 No. 153 Victorian Energy Efficiency Target Amendment (Targets) Regulations 2021
2021 No. 154 Service Victoria (Transfer of Births, Deaths and Marriages Identity Verification Functions) Further Amendment Regulations 2021
2021 No. 155 Offshore Petroleum and Greenhouse Gas Storage Regulations 2021
2021 No. 156 Public Health and Wellbeing Amendment (Pandemic Infringement Offences) Regulations 2021
2021 No. 157 Health Practitioner Regulation National Law Amendment (Professional Indemnity Insurance) Regulation 2021
2021 No. 158 County Court (Chapter I Miscellaneous Amendments) Rules 2021
2021 No. 159 Livestock Management Regulations 2021
2021 No. 160 Education and Training Reform (School Safety) Regulations 2021
2021 No. 161 Fisheries Amendment Regulations 2021
2021 No. 162 Conservation, Forests and Lands (Fisheries Infringement Notices) Amendment Regulations 2021
2021 No. 163 Fisheries (Fees, Royalties and Levies) Amendment Regulations 2021
2021 No. 164 Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards (Prescribed Public Entities) Regulations 2021
2021 No. 165 Public Health and Wellbeing (Quarantine Fees) Further Amendment Regulations 2021
2021 No. 166 Transport Accident (Administration of Charges) Amendment Regulations 2021
2021 No. 167 Magistrates' Court Miscellaneous Civil Proceedings and General Civil Procedure (Costs) Amendment Rules 2021
2021 No. 168 Magistrates' Court (Judicial Registrars) Further Amendment Rules 2021
2021 No. 169 Surveillance Devices Amendment (Body-worn Cameras) Regulations 2021
2021 No. 170 Sentencing Regulations 2021
2021 No. 171 Victorian Energy Efficiency Target Amendment (Commercial and Industrial Air Source Heat Pump Water Heater) Regulations 2021
2021 No. 172 Wildlife Amendment (Noisy Pitta) Regulations 2021
2021 No. 173 Subordinate Legislation Amendment Regulations 2021
2021 No. 174 Drugs, Poisons and Controlled Substances Amendment (Non-Emergency Patient Transport and First Aid Services) Regulations 2021
2021 No. 175 Public Health and Wellbeing Amendment (Service Victoria) Regulations 2021
2021 No. 176 First Home Owner Grant and Home Buyer Schemes Regulations 2021
2021 No. 177 Gender Equality Amendment Regulations 2021
2022 No. 1 Occupational Health and Safety (COVID-19 Incident Notification) Revocation Regulations 2022

New Victorian 2021 Bills

As at 20/01/2022

Health Legislation Amendment (Quality and Safety) Bill 2021
Livestock Management Amendment (Animal Activism) Bill 2021
Regulatory Legislation Amendment (Reform) Bill 2021
Workplace Safety Legislation and Other Matters Amendment Bill 2021

New Commonwealth 2021 Assents

As at 20/01/2022

No. 118 2021 Dental Benefits Amendment Act 2021
No. 119 2021 National Redress Scheme for Institutional Child Sexual Abuse Amendment (Funders of Last Resort and Other Measures) Act 2021
No. 120 2021 Offshore Electricity Infrastructure Act 2021
No. 121 2021 Offshore Electricity Infrastructure (Consequential Amendments) Act 2021
No. 122 2021 Offshore Electricity Infrastructure (Regulatory Levies) Act 2021
No. 123 2021 Social Security Legislation Amendment (Remote Engagement Program) Act 2021
No. 124 2021 Security Legislation Amendment (Critical Infrastructure) Act 2021
No. 125 2021 Agricultural and Veterinary Chemicals Legislation Amendment (Australian Pesticides and Veterinary Medicines Authority Board and Other Improvements) Act 2021
No. 126 2021 Territories Stolen Generations Redress Scheme (Facilitation) Act 2021
No. 127 2021 Treasury Laws Amendment (2021 Measures No. 5) Act 2021
No. 128 2021 Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021
No. 129 2021 Crimes Amendment (Remissions of Sentences) Act 2021
No. 130 2021 Independent National Security Legislation Monitor Amendment Act 2021
No. 131 2021 Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021
No. 132 2021 Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Act 2021
No. 133 2021 Defence Legislation Amendment (Discipline Reform) Act 2021
No. 134 2021 Electoral Legislation Amendment (Annual Disclosure Equality) Act 2021
No. 135 2021 Electoral Legislation Amendment (Assurance of Senate Counting) Act 2021
No. 136 2021 Electoral Legislation Amendment (Contingency Measures) Act 2021
No. 137 2021 Electoral Legislation Amendment (Political Campaigners) Act 2021
No. 138 2021 Health Insurance Amendment (Enhancing the Bonded Medical Program and Other Measures) Act 2021
No. 139 2021 National Health Amendment (Enhancing the Pharmaceutical Benefits Scheme) Act 2021
No. 140 2021 Telstra Corporation and Other Legislation Amendment Act 2021

No. 141 2021 Territories Stolen Generations Redress Scheme (Consequential Amendments) Act 2021

No. 142 2021 Veterans' Affairs Legislation Amendment (Exempting Disability Payments from Income Testing and Other Measures) Act 2021

New Commonwealth 2021/2022 Regulations

As at 20/01/2022

Agricultural and Veterinary Chemicals Code Amendment (Miscellaneous Measures) Regulations 2021

Agricultural and Veterinary Chemicals Legislation Amendment (Improvements) Regulations 2021

Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021

Air Navigation (Essendon Fields Airport) Amendment (2021 Measures No. 1) Regulations 2021

Australian Capital Territory (Planning and Land Management) Regulations 2021

Australian Education Amendment (Capped CTC Score Methodology) Regulations 2021

Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment (No. 2) Regulations 2021

Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021

Biosecurity Amendment (Biofouling Management) Regulations 2021

Civil Dispute Resolution Amendment Regulations 2021

Clean Energy Regulator Amendment (Disclosure of Protected Information) Regulations 2021

Competition and Consumer Amendment (Consumer Data Right) Regulations 2021

Corporations (Fees) Amendment (Relevant Providers) Regulations 2021

Corporations Amendment (Litigation Funding) Regulations 2021

Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Regulations 2021

Criminal Code (Terrorist Organisation – Hizballah) Regulations 2021

Criminal Code (Terrorist Organisation – The Base) Regulations 2021

Customs (Prohibited Imports) Amendment (Commercial Importation of Kava as Food) Regulations 2021

Customs (Prohibited Imports) Amendment (Firearms and Weapons) Regulations 2021

Customs Amendment (2022 Harmonized System Changes and Other Measures) Regulations 2021

Customs Tariff Amendment (2022 Harmonized System Changes and Other Measures) Regulations 2021

Education Services for Overseas Students (Registration Charges) Regulations 2021

Electoral and Referendum Amendment (Australian Consortium for Social and Political Research Incorporated) Regulations 2021

Electronic Transactions Amendment Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Agriculture, Water and the Environment Measures No. 5) Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 5) Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 8) Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 6) Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 1) Regulations 2022

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 10) Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 5) Regulations 2021

Financial Sector Reform Amendment (Hayne Royal Commission Response—Better Advice) Regulations 2021

Fisheries Levy (Torres Strait Prawn Fishery) Amendment (Levy Amount) Regulations 2021

Fisheries Management (Fishing Levy Collection) Amendment (2021-2022 Instalment Dates) Regulations 2021

Fishing Levy Amendment (2021-2022 Levy Amounts) Regulations 2021

Hazardous Waste (Regulation of Exports and Imports) Legislation Amendment Regulations 2021

Health Insurance (Diagnostic Imaging Services Table) Amendment (Equipment Capital Sensitivity) Regulations 2021

Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 1) Regulations 2022

Health Insurance (Professional Services Review Scheme) Amendment (Prescribed Pattern of Services) Regulations 2021

Health Insurance Legislation Amendment (2021 Measures No. 3) Regulations 2021

Health Insurance Legislation Amendment (2021 Measures No. 4) Regulations 2021

Health Insurance Legislation Amendment (Rural Bulk-billing Incentive) Regulations 2021

Home Affairs Legislation Amendment (Digital Passenger Declaration) Regulations 2021

Illegal Logging Prohibition Amendment (2021 Measures No. 1) Regulations 2021

Intelligence Services Regulations 2021

Law Enforcement Integrity Commissioner Amendment (Office of the Special Investigator and Other Measures) Regulations 2021

Migration (Migration Agents Code of Conduct) Consequential Amendments Regulations 2021

Migration (Migration Agents Code of Conduct) Regulations 2021

Narcotic Drugs (Licence Charges) Amendment (Medicinal Cannabis Licences) Regulations 2021

Narcotic Drugs Amendment (Medicinal Cannabis) Regulations 2021

National Health (Pharmaceutical Benefits) Amendment (2021 Measures No. 1) Regulations 2021

Norfolk Island Regulations 2021

Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Titles Administration) Regulations 2021

Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Titles Administration) Regulations 2021

Privacy Amendment (South Australia My Health Records Access) Regulations 2021

Product Emissions Standards (Customs) Charges Amendment Regulations 2021

Product Emissions Standards (Excise) Charges Amendment Regulations 2021

Protection of Movable Cultural Heritage Amendment (2021 Measures No. 1) Regulations 2021

Renewable Energy (Electricity) Amendment (Small-Scale Renewable Energy Scheme Reforms and Other Measures) Regulations 2021

Superannuation Legislation Amendment (Western Australia De Facto Superannuation Splitting) Regulations 2021

Telecommunications (Interception and Access) Amendment (2021 Measures No. 1) Regulations 2021

Therapeutic Goods Legislation Amendment (2021 Measures No. 4) Regulations 2021

Treasury Laws Amendment (Corporate Insolvency Reforms Consequential Amendments) Regulations 2021

Treasury Laws Amendment (KiwiSaver Scheme) Regulations 2021

Treasury Laws Amendment (Miscellaneous and Technical Amendments No. 2) Regulations 2021 ■

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For Commonwealth and Commonwealth Bills, please go to www.liv.asn.au/LegislationUpdate-LIJ-Mar22.

PRACTICE NOTES

Law Institute of Victoria

COVID-19 Hub – www.liv.asn.au/COVID19

The LIV has established a "one-stop shop" for the profession to ensure support for members and the legal profession during the COVID-19 pandemic. The LIV COVID-19 Hub contains all the actions the LIV is taking to deliver continuity of services, tools and guides for members including practice contingency planning, working from home advice, current information from the courts, the regulator and the broader legal sector, as well as other useful information and advice.

- LIV & Government FAQs for the profession
- Information for the Profession
- Information & Advice from the Courts ■

CASH RATE TARGET

From 6 December 2007 law practices whose matters are governed by the *Legal Profession Act 2004* cannot use the penalty interest rate for their accounts. The maximum rate is the cash rate target plus 2 per cent. The cash rate target is currently 0.10 per cent (from 4 November 2020). To monitor changes between editions of the *LIJ*, practitioners should check www.rba.gov.au/statistics/cash-rate.

PENALTY AND FEE UNITS

For the financial year commencing 1 July 2021, the value of a penalty unit is $181.74. The value of a fee unit is $15.03 (*Victorian Government Gazette* S233, 20 May 2021).

PENALTY INTEREST RATE

The penalty interest rate is 10 per cent per annum (from1 February 2017). To monitor changes to this rate between editions of the *LIJ*, practitioners should check the Magistrates' Court of Victoria website.

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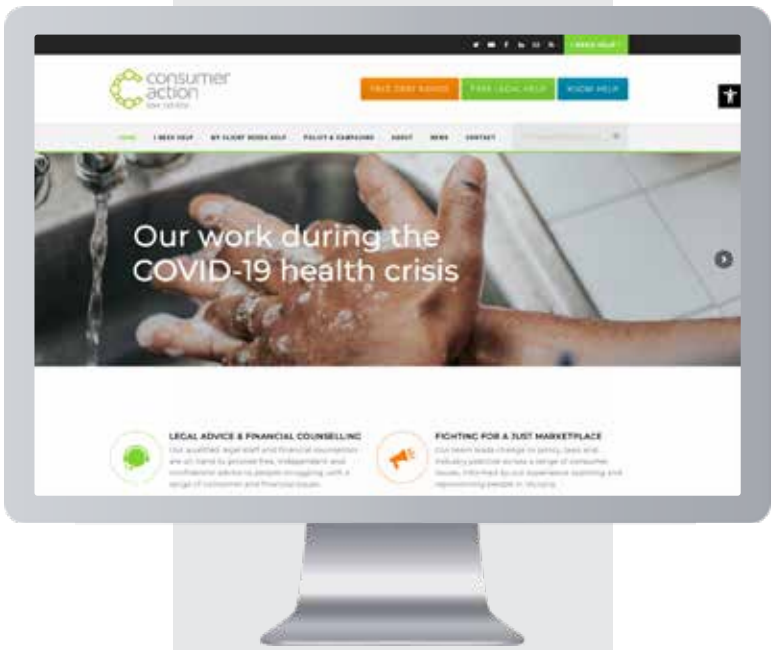
IN_SITES



Consumer Action Law Centre

https://consumeraction.org.au/

Based in Melbourne, Consumer Action Law Centre is a community legal centre funded by the Victorian and federal governments. Consumer Action Law Centre provides free legal advice and financial counselling to disadvantaged and vulnerable consumers as well as litigation assistance. To support legal practitioners with vulnerable clients, it also provides electronic access to the following resources: letter templates, guides, toolkits, referral pathways and notes for identifying issues relating to domestic violence or debt.

Australian Pro Bono Centre

https://www.probonocentre.org.au/

The Australian Pro Bono Centre provides nationwide support to both members of the public and legal profession. Individuals seeking pro bono services are directed to organisations within their respective states or territories that can offer legal assistance and advice. Law firms and legal practitioners wishing to offer pro bono services are given access to numerous online publications such as "Pro Bono Legal Work: A Guide for Government Lawyers", "Pro Bono Guide for Individual Lawyers" and "Pro Bono Partnerships & Models: A Practical Guide to What Works".

Cardiff University – Cardiff Index to Legal Abbreviations

http://www.legalabbrevs.cardiff.ac.uk/site/index

Cardiff University in Wales provides an online index to legal publications from around the world. The database predominately consists of law report and periodical titles sourced from more than 290 jurisdictions. The Cardiff Index can be searched by abbreviation or title, where the results are displayed in a tabular format listing the title, preferred and alternate abbreviations and jurisdiction if known. Some of the notable jurisdictions include the Commonwealth, British Isles and United States.

The Orange Door

https://orangedoor.vic.gov.au/

The Orange Door provides free support to adults, young people and children who are experiencing, have experienced or have been affected by family violence. It was established as part of the Victorian government's response to the Royal Commission into Family Violence. Support can be accessed by phone and face-to-face, currently in 13 locations across the state. Services include specialist family violence services, family services, Aboriginal services and services for men who use violence. The Orange Door can also connect clients with other related services including financial, legal and housing.

LPLC – More Than Knowing the Law podcast

https://lplc.com.au/risk-advice/find-resources?types=273691

More than Knowing the Law is a series of podcasts produced by The Legal Practitioners' Liability Committee (LPLC). LPLC's chief risk manager Heather Hibberd discusses topics with expert guests to provide insights into minimising risk and building good business culture. Recent topics covered include: Reframing supervision as the greatest compliment; Systems for success: Driving a culture of good work habits; Small firms, big changes and the impact of COVID; and Cyber security – not just a technology risk. Episodes run for approximately 30 minutes.

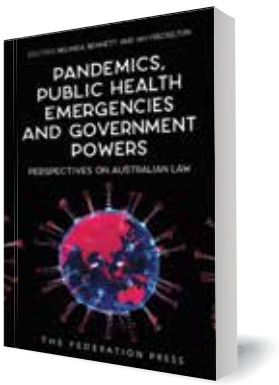
Disaster Legal Help

https://www.disasterlegalhelp.org.au/

Disaster Legal Help provides free legal information and referrals to Victorians who have been affected by a natural disaster. It is coordinated by the Federation of Community Legal Centres, Justice Connect, LIV, Victorian Bar and Victorian Legal Aid. Help is available by phone or webchat on issues including accommodation, compensation, disaster checklist, early access to superannuation, insurance, parenting, property, debt and personal hardship cards. ■

IN_PRINT

This month's books cover public health emergencies, managing COVID-19 in the workplace, mediation and true crime.



Pandemics, Public Health Emergencies and Government Powers: Perspectives on Australian law

Belinda Bennett and Ian Freckelton (eds), The Federation Press, 2021

This edited work examines the issue of our time – the COVID-19 pandemic – and the legal and regulatory responses to it. As one writer in this work notes, there is hardly any area of society that is untouched by it.

Over 21 chapters the contributors consider, from various legal and medical perspectives, the adequacy of the responses so far and the effects they have had. The editors have gathered together a collection of papers that is wide and representative in outlook. The work is evidence-based and well-balanced in its assessments. The authors show a deep knowledge of the subject areas considered. The perspectives discussed include constitutional law, human rights, delegated law-making, government inquiries, privacy, workers' health, contracts, post-separation parenting, administration of justice, patient rights and practitioner responsibilities, women, Indigenous people and residential aged care. Some topics are well known – such as face masks (but are still enlightening). Others, such as the effect of free trade agreements and the role of self-determination in Indigenous communities, are less well known. Comparisons are made with other countries about the effects of regulation. Of interest to a legal audience is how law has been central in our responses to the public health emergency. While law has always been the framework of ordinary life, it has been severely tested and changed as a result of the pandemic.

An obvious limitation of the work is the fact that the pandemic is not over and already significant developments have occurred since the editors' sign-off date (July 2021). The editors frankly acknowledge the work is an "early contribution". But we should welcome this book as it will not only assist the responses to a future pandemic – it will help us deal with the current one.

Dr Jeffrey Barnes, La Trobe University

Managing COVID-19 Risks in the Workplace: A practical guide

Michael Tooma and Mary-Louise McLaws, LexisNexis, 2021, pb $100

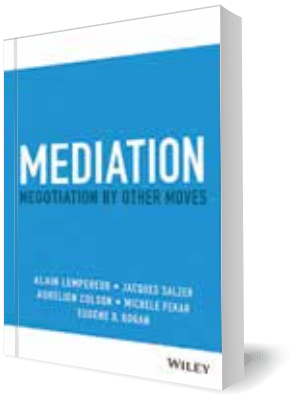
With both federal and state governments eager to avoid policing COVID-19 risks in private workplaces, and consequently placing the onus of providing a COVID-safe workplace onto business owners, this extensive pamphlet from lawyer Michael Tooma and epidemiologist Mary-Louise McLaws serves as a valuable resource for HR professionals, in-house counsel and OHS committee members.

The emphasis of the text is on practicality over an academic treatise on OHS laws and infection control. To this end, the text has concrete and useful advice on protecting workers and customers from COVID-19 infection, engaging and consulting with workers, responding to an infection outbreak and the reporting obligations that apply to businesses.

Each chapter is easy to read while firmly bedded in the statutory obligations that businesses owe under OHS laws. For example, the chapter "Working from home" offers a range of practical matters that should be addressed in a working-from-home policy, such as ergonomic assessments, electrical and fire safety and slip and trip hazards. These practical matters are discussed alongside the employer's continuing obligation to remain vigilant to risks such as burnout from employee's being constantly on-call, domestic violence and mental health.

With new strains of COVID-19 appearing it would seem that workplaces will be required to manage its associated risks well into the foreseeable future. That will make this text a worthwhile investment for any business that wants to ensure that they are taking well considered steps to properly prevent and respond to COVID-19 risks.

Joseph Kelly, Kelly Workplace Lawyers



Mediation: Negotiation by other moves

Alain Lempereur et al, Wiley, 2021, hb $62

There are few books that one anticipates. In terms of the mediation or negotiation world this is pretty much it, written by authors who are leaders in their field. It is both intellectually engaging and practical. It is for everybody interested in mediation – you can learn to mediate or learn to be better.

Fisher and Ury began the conversation 41 years ago. This book is the next phase, working through a mediation step by step with lessons and strategies from all around the world nestled between case studies and tipsheets.

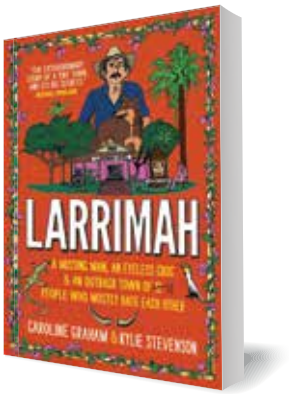
The skill of the mediator is to be listening and intervening at the right moment. One chapter entitled "The past toward the present" focuses in part on the importance of listening to whom and to what. This includes transcripts from various real life disputes, an owners corporation dispute, an HR dispute and a breach of contract where the mediator has an opportunity to listen and engage or not with the different thoughts of the subjects. It italicises the words of transition and asks the reader to consider their position.

I was fortunate to have one of the authors, Michelle Pekar, as a lecturer in the University of Oxford program on negotiation. Her precision and depth of thinking is inspiring.

There are a number of features in this book which lend them to reading and rereading. My copy now has so many bookmarks in it they have almost lost their meaning.

Mediators will all read this.

Tasman Ash Fleming, barrister and mediator



Larrimah

Caroline Graham and Kylie Stevenson, Allen & Unwin, 2021, pb $33

"To tell a tale in the Territory is to tell a tall tale; the further inland you go, the harder it is to pick apart fact from fiction."

The fate of Paddy Moriarty is just that. A whodunnit that even the greatest writers of fiction couldn't have done justice to. This tale was a job for journalists, and the authors have done it superbly.

Paddy and his dog, Kellie, vanished three years ago in Larrimah, a town 500km from Darwin. A town of 12 people, suddenly 11. Theories were rife, from the completely innocent to the truly sinister. A spectrum of explanations ranging from a sink-hole accident, to the old Irish bushie becoming the mince in Fran's famous Larrimah pies.

Larrimah is primarily the story of a missing man and his dog. But it's also the story of a town, struggling for its existence. It is the story of a town on the edge of nowhere, the edge of extinction. The place is evidently under the skin of the authors, as they weave between history and rumour with the lightest of touch and genuine intrigue. In return, they are given extraordinary access to the town's residents. Residents very willing to divulge the rich tapestry of neighbourly disputes that underpin this mystery. Who killed the buffalo? Who stole the Mars Bars? Who killed Paddy Moriarty?

The book is funny, intriguing, bizarre and, above all, a wonderful journey into life in the bush. You won't put it down. ■

Conor O'Bryan, barrister

IN_REFERENCE

HARDCOPY COLLECTION

Contract Administration for Construction Professionals

Jeremy Coggins et al, LexisNexis Butterworths, 2021

https://www.liv.asn.au/Web/Library/index.aspx#record/90591

This practical book is written by construction law experts for professionals working in construction management and contract administrative areas. The resource reviews relevant legislation, clauses from standard forms and case law to provide readers with an understanding of the different issues. Chapters include: An introduction to forms of construction contract – Subcontracting – People, property and the works – Time – Variations – Security of payment legislation – Termination of contract – Insolvency – Claims and dispute resolution.

Sport and Entertainment Law

Chris Davies, Thomson Reuters (Professional) Australia, 2021

https://www.liv.asn.au/Web/Library/index.aspx#record/90647

This book explains what sport and entertainment law is and discusses governance, tribunals and other areas of law such as competition, torts and contract law and how they relate to entertainment and sport. The resource discusses legislation from multiple Australian jurisdictions and relevant decisions from Australia and abroad. Chapters include: What is sport and entertainment? – The governance of sport and entertainment – Sporting tribunals – Contract law – The business of sport: competition, trade and taxation law – Tortious liability: specific torts – Criminal law, gambling and corruption – Discrimination – Contracts and club constitutions.

REMOTE ACCESS COLLECTION

Australian Master Family Law Guide

(11th edn), CCH Australia, 2021

https://www.liv.asn.au/Web/Library/index.aspx#record/65766

Written by family law experts, the 11th edition aims to provide practical guidance and answers through updated commentary, legislation and decisions. Notable topics include financial agreements, superannuation and property as well as commentary caused by the introduction of the Federal Circuit and Family Court of Australia and relating legislation. The eBook is divided into seven key sections: Family law legal system and practice – Children – Property – Financial agreements – Financial support for children – De facto relationships – Court process, evidence and costs.

Australian Practical Tax Examples

Mark Chapman, (4th edn), CCH Australia, 2021

https://www.liv.asn.au/Web/Library/index.aspx#record/89909

This is a good companion to the CCH Australian Master Tax Guide. The text has 240 detailed examples presented in an "issue" and "solution" format. It includes links to Australian Tax Office content, as well as a case table, legislation finding lists and index. Chapters include: Assessable income – Capital gains tax – Fringe benefits tax – Deductions – Trading stock – Depreciation – Individuals – Partnerships – Trusts – Companies and distributions – Administration and assessment – Goods and services tax and other indirect taxes.

SEMINAR PAPERS

Wills – legal drafting – testamentary trusts

https://www.liv.asn.au/Web/Library/index.aspx#record/90665

Swan, Allan, Will drafting masterclass [2021], seminar papers, Law Institute of Victoria, LIV Education, 2021 (F KN 125 S 10)

Landlord and tenant – commercial leases – residential tenancies

https://www.liv.asn.au/Web/Library/index.aspx#record/90688

Stark, William, Landlord and tenant reform in Victoria – a pandemic perspective, Television Education Network, 2021 (F KN 92.6) ■

NB: To view more newly acquired resources please visit the library homepage www.liv.asn.au/Library

Eligible LIV members may borrow library material for 21 days. Items can be posted or sent via DX free of charge. Material including the location REF is unable to be borrowed. Please check the library homepage at www.liv.asn.au/library for library service updates during the COVID-19 period.

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During the COVID period, please check the library homepage for updated details:
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Hours: 9am-5pm Monday-Friday
Ph: 9607 9360
Email: library@liv.asn.au

EBOOKS AT THE LIV LIBRARY

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LAW INSTITUTE VICTORIA

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POTENTIAL CONFLICT

Ethical dilemmas are part of everyday practice for solicitors. The Ethics Committee is available to help.

VCAT

POTENTIAL CONFLICT OF INTEREST – EXPERT REPORT
(R5008 – NOVEMBER 2021)

Where an expert is a past and current client of a law firm, and the expert has been asked by a different law firm to provide an expert report in an unrelated matter in which the expert's law firm acts for another party, the law firm will not be conflicted from continuing to act in the unrelated matter provided that the expert provides informed consent. This will address any duty of loyalty or confidentiality the law firm may owe to the expert.

A law firm acted for one of the respondents in a VCAT proceeding involving a building dispute. Another respondent to the proceeding was granted leave to provide a report from an expert (Expert). The Expert was a client of the law firm in an unrelated matter and the law firm had previously acted for the Expert in other unrelated matters. Both the law firm and the Expert stated that the law firm was not in possession of confidential information of the Expert. The Expert was prepared to give consent for the law firm to act in the VCAT proceeding. The law firm sought guidance from the Ethics Committee as to whether or not it was conflicted and, if so, whether it should cease to act in the proceeding.

Ruling

In the opinion of the Ethics Committee and on the information presented:

1. Provided that the Expert gives informed consent to the law firm continuing to act in the VCAT proceeding for one of the respondents, thus addressing any duty of loyalty or confidentiality, the administration of justice does not require that the law firm withdraw from the case.
2. The law firm should disclose to VCAT that the Expert is a past and current client of the firm.

Related reading

Queensland Law Society Ethics Centre, *Can I cross examine a former client?*: https://www.qls.com.au/Practising-law-in-Qld/Ethics-Centre/Rules-Resources/Can-I-cross-examine-a-former-client.

MEDIATION; COMMUNICATION WITH OPPONENTS
(R4973 – JANUARY 2020)

A law firm does not have to disclose to their opponent that a witness may not give evidence in accordance with a statutory declaration which has been made by the witness.

A law firm received information from a key witness (witness) about critical discussions in their client's matter that strongly supported the case. A statutory declaration was prepared and completed by the witness in respect of this evidence. The statutory declaration was part of the client's discovery and was subsequently relied on by both Counsel and the solicitor during and following an unsuccessful mediation.

The witness then appeared to be under pressure from other parties in the matter and indicated in a telephone conversation with the law firm that the witness' recollection of the circumstances may not be correct. It then became unclear to the law firm whether the witness would provide evidence that accorded with the contents of the statutory declaration.

The law firm then sought an Ethics Committee ruling to determine whether the law firm would need to disclose to their opponent that the witness might not give evidence in accordance with the statutory declaration.

Ruling

In the opinion of the Ethics Committee and on the information presented:

1. In the circumstances as they currently stand, the law firm does not have an ethical obligation to communicate with the other side regarding the witness.

Related reading

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r22.2. ■

The **ETHICS COMMITTEE** is drawn from experienced past and present LIV Council members, who serve in an honorary capacity. Ethics Committee rulings are non-binding. However, as the considered view of a respected group of experienced practitioners, the rulings carry substantial weight. It is considered prudent to follow them.

The LIV Ethics website, www.liv.asn.au/Ethics, is regularly updated and, among other services, offers a searchable database of the rulings, a "common ethical dilemmas" section and information about the Ethics Committee.

For further information, contact the Head of Ethics on 9607 9336.

FREEDOM TO SPEAK

Lawyers who make unfounded allegations against third parties can be exposed to professional discipline.

Humans have freedom to think as they wish. And while some regimes have over history sought to control freedom of thought – typically through various means of (political or other) indoctrination – "success" in this endeavour has proven elusive. One upshot of freedom of thought is the freedom to express and disseminate the subject matter of that thought. In our Western society, we describe this in terms of freedom of speech; in some cultures, conversely, this freedom appears severely compromised.

Of course, the notion of an absolute freedom, even in Western society, is a myth. The vaunted freedom of speech is no exception. There are occasions where its exercise has negative legal consequences. It cannot, for instance, legitimately sustain imputations that are defamatory. Nor can it overcome statutory proscriptions on vilification. It can also be constrained legal obligations of confidentiality, wherever sourced.

Like others in society, lawyers enjoy freedom of thought and, subject to constraints such as those mentioned above, freedom of speech. In many instances, moreover, there is good reason why members of society should hear from lawyers, at least within their field(s) of expertise. For the legal profession to be mute in the face of ostensible abuses of legally defensible freedoms, or to stand silent in the face of apparent injustice, misaligns with the privileges its members enjoy. Lawyers are also well positioned – some would say best positioned – to assess the adequacy and appropriateness of the law and its processes. After all, lawyers confront these on a daily basis.

It follows that to constrain lawyer freedom of speech in these endeavours could serve to compromise some of the greatest utility that lawyers can bring to society. But with this freedom comes responsibility, and consequent restraint, sometimes exceeding what may apply to laypersons. For instance, the strictures of lawyer-client confidentiality are likely to constrain lawyer freedom of speech more so than communications arising in many other relationships. Lawyers must also take greater care in making adverse allegations against others, not only by reason of the privilege applying to statements during court proceedings and to eschew being a party to abuses of process, but because many in society might attach to such allegations the imprimatur of truth by reason of having been made by a member of the profession. This explains why lawyers who, whether in a legal or personal capacity, make unfounded allegations against third parties can be exposed to professional discipline.[1]

As inferred above, lawyers are ideally positioned to contribute to law reform. But even in this context, freedom comes with responsibility and restraint. There is nothing amiss in lawyers alerting lawmakers to deficiencies in the law and proffering suggestions for its improvement. Indeed, this is entirely apt, and many lawyers make submissions to reform and regulatory bodies with this object. The value of these is not to be underplayed, assuming that any criticism is designed to be constructive rather than being understood as some indictment or aspersion vis-à-vis individuals with alternative viewpoints. There is a danger, in this latter respect, in a lawyer's exercise of freedom of speech being hijacked by interest groups who see the lawyer's status as an asset.

The foregoing is not to say that lawyers should suppress their own personal views when it comes to contentious matters of law or procedure. Nor should it outright preclude them speaking as part of a campaign for reform, even should this be associated with an interest group while opposed to another. At the forefront of lawyers' minds, though, is that bringing an independent mind to an issue is valuable not only when acting in a representative capacity. This can in turn be prejudiced by becoming too closely aligned with a broader cause, with the risk of being swept up by the broader movement, and the attendant risk of constructive legal criticism being construed as having a much broader purview. This sweeping has the potential further danger of being perceived as advocating breach of the law, to which no lawyer should be a party, whether in a personal or professional capacity.

At a time of unheralded assaults on long-enjoyed individual freedoms – to associate, to travel and even to work – there is clearly scope for lawyers to analyse and test the relevant laws. Silence is hardly the only option. But freedom of speech here, arguably more so than in other contexts, comes with an appreciation of professional responsibility. ■

Gino Dal Pont is Professor, Faculty of Law, University of Tasmania.

1. See, for example, *Hewson v Bar Standards Board* [2021] EWHC 28 (Admin) (involving grossly offensive tweets against another practitioner); *Ibrahim v Nasr* [2021] NSWSC 1321 (Facebook posts vilifying the opponent).

SNAPSHOT

- Freedom of thought translates in large measure to freedom of speech.
- Lawyers accordingly enjoy freedom of speech but must nonetheless take care in its exercise.
- There is a danger of lawyer freedom of speech being abused.

ADOBE STOCK

CALL FOR INDEPENDENT ADVOCATE MODEL

Victim survivors of sexual assault need continuous support throughout their experience of the justice system.

Towards the end of last year, the VLRC's report on Improving the Response of the Justice System to Sexual Offences was published, including 91 recommendations. In formulating these recommendations, we consulted with victim survivors of sexual assault who gave us valuable guidance.

Two related areas where reform is needed, which came through loud and clear in our consultations with victim survivors, are:

- victim survivors need continuous support throughout their experience of the justice system
- victim survivors need separate legal representation.

SNAPSHOT

- Victim survivors often have to deal with the justice system alone.
- The VLRC recommends victim advocates to "walk alongside" victims.
- It is time for victim survivors of sexual violence to have their own legal representation.

'A little bit of light' – independent advocates

Almost one in five (18 per cent) women in Australia have experienced sexual violence. In many cases, they are left to deal with it alone.

We were told in consultations that victim survivors usually have to navigate the justice system unsupported. Often a victim is alone when she reports her story to police, answers their questions, participates in the court system, and if there is a trial, deals with the verdict and its aftermath. As one victim survivor said: "I needed a support team, an advocate, a lawyer. The offender had all of this, a whole team of people looking after him. I felt stripped of everything, like I had no one. I felt so alone".

In order to make their experience of the justice system less traumatic, we must make sure victim survivors get the support they need. Practical and emotional support of various kinds makes it more likely that people participate in the system.

Victoria already has the foundations of a strong support system. Centres against sexual assault (CASAs) are the main form of specialist support for people who have experienced sexual assault, and the VLRC heard consistent praise for the work of their counsellor advocates. Other programs to support all victims of crime include the Victims Support Agency, the Child Witness Service, the Victims and Witness Assistance Service and the Court Network.

The first and most crucial task of reform is to invest in these existing sexual assault support services.[1] We heard, for example, that "CASA is [extremely] underfunded, and it took four months for me to be allocated a counsellor". This was a recurring theme. We heard of long waiting lists for counselling, and people having to pay for their own psychologists. Sexual Assault Services Victoria told us that in court it could only support "the most high-risk and vulnerable witnesses while they are actually giving evidence".

Another issue is that people's experience of these services is that they can be "quite disjointed". We heard that "the whole system is overwhelming . . . there hasn't been one centralised support from the start". Others told us that support needs to continue after the criminal process ends: "The system in general basically wants to hear about an incident and then very quickly turns its back on the person who has gone through the gruelling effort of reporting such horrific experiences".

We need to move to a system in which a support person "walks with" people who have experienced sexual violence, before, during and beyond their time in the criminal justice system. We have, therefore, recommended introducing the independent advocate model. A similar model already exists in England and Wales and is effective and affordable.

Advocates are usually social workers or counsellors who provide practical and emotional support to people who have experienced sexual violence. The role is broad and involves assisting the victim survivor with whatever kind of support they need – including accurate and impartial advice on what to do, ensuring they know their rights, being there for them before and during a court hearing, and liaising with other agencies and police. Independent advocates have been described as "a little bit of light in a very dark place". Besides the benefits for victims' wellbeing, research into the program in England has found a strong link between specialist support and criminal justice outcomes in terms of charges and successful prosecutions.

Legal representation for victims

Our inquiry also identified a gap in legal assistance for people who have experienced sexual violence. Victims of crime have rights; however, they often do not know what these rights are and how to exercise them. For example, rights include being able to object to requests to produce confidential communications (such as counselling records), or to object to their previous sexual history being discussed.

During this inquiry we heard support for the concept of separate legal representation for victim survivors of sexual violence. Pilot schemes have already taken place in parts of England and Northern Ireland. We consider it is time to pilot a scheme of separate lawyers for complainants in sexual offence cases. This would go a long way to ensure that their rights and entitlements are realised in practice.

Our recommendation follows the approach adopted by the Gillen review and recommends legal advice and representation up to the point of trial and in related hearings. We do not recommend that the legal representative should have a role at trial. The Victorian government should fund legal advice and representation to ensure victim survivors can exercise their rights in relation to evidence, privacy, compensation and restorative justice.

Both these recommendations, if implemented, would be steps forward in assisting victim survivors to deal with the challenges of involvement in the justice system.

The full report can be downloaded from lawreform.vic.gov.au. ■

This column was provided by the **VLRC**. For further information ph 8608 7800 or see lawreform.vic.gov.au.

1. A review of support services for victims was published in November 2020 by the Centre for Innovative Justice, RMIT University, recommending major increases in investment. See Strengthening Victoria's Victim Support System: Victim Services Review (Final Report).

MANAGING THE RISKS OF STAFF TURNOVER

Losing staff is a perennial headache for law firms. Don't compound the problem with professional negligence claims on their way out the door.

Many law firms are operating at close to full capacity with the result that when lawyers leave, there are limited remaining employees with the bandwidth or expertise to take on the work. In 2022 this issue is likely to be amplified as staff turnover – aka "the great resignation" – is predicted to gather pace with COVID-19 pandemic interruptions stretching into the third year and lawyer's reviewing their existing work arrangements.

Staff turnover – particularly when a team is stretched – presents a real risk for costly mistakes to be made. The most common mistake LPLC sees following the departure of a lawyer on a matter is missed critical dates because there were inadequate file handover processes and procedures. Contributing factors typically include:

- failure to supervise or review the files of the departing lawyer(s) leading up to departure
- no or inadequate handover notes and failure to record critical dates in the principal and/or incoming lawyer's diary
- heavy file loads of lawyers taking over that prioritise existing and familiar files over newly inherited files with inadequate handover instructions
- principals mistakenly assuming the replacement lawyer on a file has the same skills and expertise as the departing lawyer and failing to provide the level of supervision required.

Eight ways to minimise the risk

If a lawyer gives notice that they are leaving your firm, principals should immediately start planning to prioritise the safe transition of work. This can be difficult when you already have a full workload, but properly managing a changeover is critical to avoiding claims and unhappy clients. Every situation will be different but here are eight key things to consider.

1. As a first step, principals need to review a list of the departing lawyer's matters to assess the type, complexity and volume of work and determine who the files should be allocated to. Without a good understanding of the work, you won't be able to make decisions on how to manage the files.
2. The departing lawyer should prepare internal file handover notes for each file which should be reviewed and signed by a principal prior to their departure. The memo should clearly detail:
   - upcoming and other critical dates
   - factual background and key issues
   - current status and next steps
   - client contact details
   - links to all key documents and advice.

   Dates should be diarised in the principal/incoming lawyer's calendar so they aren't overlooked.
3. Both the departing and incoming lawyers should meet to discuss each file. The earlier this occurs, the better to maximise the opportunity for asking questions and clarifying issues before the departing lawyer leaves.
4. Clients need to be informed about staff changes as soon as possible. Some clients may want to transfer their work to another firm or follow the departing lawyer. Be open and honest about what you can and can't do for the client going forward. Don't overstretch. If you can't provide them with high-quality service, it is likely to be in their interests and yours for them to go to another firm.
5. When replacing staff, it's rare that you can find a "like for like" replacement. New staff will have different knowledge, skills and personalities. It will take time and effort to induct them and assess what they can and can't do. We have seen claims when principals assume that the new person can do what the departing person did, simply because they have replaced them. Ongoing supervision is essential.
6. You may need to wait months to find the right replacement and lots of things can go wrong during that time if existing staff can't reasonably take up the extra work. Consider the availability and suitability of short-term options such as temporary staff, barristers and locums to get the firm through a difficult spot, noting that these contractual arrangements also create substantial supervision and oversight obligations.
7. With the disruption of someone leaving it may be necessary to reduce new work intake until the firm has employed new staff. Don't assume you will get an immediate replacement and that there will be little or no disruption.
8. Principals have the responsibility to take proactive steps to manage the situation. It is not realistic to direct or expect departing lawyers to materially advance and/or close all their files before they go. Sometimes they will have mentally moved on and lack the commitment to do the work, or it just won't be possible to bring all their matters to a conclusion in the remaining time available. Don't leave it to the departing person to manage.

For more assistance in managing the transition when practitioners leave see:

- LPLC's checklist : File transition - practitioner is leaving the firm
- LPLC's template: File handover list. ■

TIPS

- Now is a timely opportunity to review and update your firm's file handover processes and procedures for managing the risk of staff turnover.
- Principals should proactively manage and supervise the safe transition of the departing lawyer's files.
- File handover notes are essential and should highlight upcoming and critical dates, key issues and required next steps.
- Departing and incoming lawyers and/or principals should meet to discuss the file and clarify any issues or questions.
- Critical dates should be diarised in the principal/incoming lawyer's calendars before the departing lawyer leaves the firm.

This column is provided by the **Legal Practitioners' Liability Committee**.
For further information ph 9672 3800 or visit www.lplc.com.au.

LOCUS STANDI – 2021 IN REVIEW

What follows is a brief overview of last year's Victorian Supreme Court decisions on standing, as it applies to environmental interest groups.

Overall, 2021 was a mixed bag. The group with a track record of putting its objects into action, fared well. The two groups with no track record, fared badly.

Kinglake Friends of the Forest Inc (KFoF)[1] fared well. Its litigation took place in the Supreme Court and the Supreme Court, Court of Appeal.

VicForests challenged KFoF's standing to maintain proceedings restraining VicForests from engaging in certain logging operations in Victoria's Central Highlands and Kinglake native forests.

KFoF produced material as proof of its special interest in the protection of the forests, to give it standing to apply for the relief it sought. The material showed that, since its formation, KFoF had an extensive and impressive track record of putting its objects into action, for the wellbeing of the Central Highlands and Kinglake native forests and their flora and fauna.

Reviewing the evidence and case law, Richards J determined KFoF had the special interest it claimed, an interest beyond "a mere intellectual or emotional concern or a strongly felt belief the law should be observed".[2] The Supreme Court, Court of Appeal unanimously upheld Richards J's decision.[3]

Binginwarri Friends of the Jack and Albert River Catchment Area Inc (Bwarri)[4] fared badly. Initially, Forbes J determined in August it had an arguable case of possessing a special interest to give it standing to bring its proceedings against VicForests in relation to an alleged breach of the *Sustainable Forests (Timber) Act 2004*.

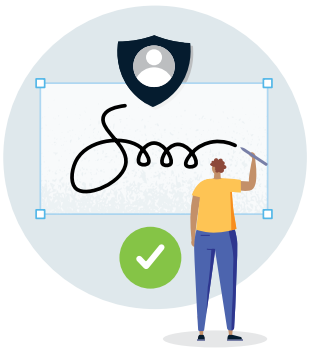
In November, when Niall J came to consider whether Bwarri had a special interest, he determined it did not.[5] Bwarri faced insurmountable obstacles. It did not exist in unincorporated form, let alone possess a track record before its incorporation, occurring a short time before commencing its proceedings. Further, it could not be treated as possessing the attributes of its members, environmentalists of long-standing, in determining its connection with the litigation. And, tellingly, after incorporation Bwarri had no track record of pursuing its objects. And, aside from issuing its proceedings, it had not undertaken any other activities to represent its members' interests. Bwarri failed because it could not convince Niall J its interest in its proceedings was anything more than "a strongly felt belief the law should be observed".

The People of the Small Town of Hawkesdale Incorporated (TPSTH)[6] also fared badly. It was incorporated to challenge the Minister for Planning's decision to extend a permit for the development of a wind farm in Victoria's Western District. When TPSTH's assertion of a special interest was challenged, Richards J determined it had no special interest, and therefore no standing to bring its proceedings.

TPSTH had no legal, proprietary or financial interest in the extension decision and, although some of its members did, it was a separate legal entity and it could not acquire a special interest through them. As with Bwarri, TPSTH had not undertaken activities to represent its members' interests or to pursue its objects, apart from its proceedings. Nor had it held public meetings or interacted with the relevant government department, the Minister or wind farm proponents. It was merely a litigation vehicle with no special interest in the subject matter of its proceedings. Richards J commented "I conclude . . . the Association does not have standing to seek review of the Extension Decision. The objects of the Association and the interests of at least some of its members in opposing the construction of the wind farm do not amount to a special interest on the part of the Association . . ." ■

Peter Lowenstern is a member of the LIV Property and Environmental Law Section Property Committee.

1. *Kinglake Friends of the Forest Inc. v VicForests* (No 4) [2021] VSC 70.
2. *Australian Conservation Foundation v Commonwealth* [1980] HCA 53 (per Gibbs J).
3. *VicForests v Kinglake Friends of the Forest* [2021] VSCA 195.
4. *Binginwarri Friends of the Jack and Albert River Catchment Area Inc v VicForests* [2021] VSC 507.
5. *Binginwarri Friends of the Jack and Albert River Catchment Area Inc v VicForests* [2021] VSC 824.
6. *The People of the Small Town of Hawkesdale Incorporated v Minister for Planning* [2021] VSC 510.



E-SIGNATURES BECOME THE NORM

Government amendments to the Corporations Act will fuel further growth in digital documents.

Digitisation of documents can help accelerate digital transformation, increase security and boost overall productivity. While regulatory support has been a barrier for adoption in the past, recent updates to legislation mean businesses can continue to operate through the use of digital documents, even after social distancing restrictions start to lift.

The role of e-signatures today

The reality is e-signatures are not new. The legislation for electronic signatures dates back more than two decades with the introduction of the *Electronic Transactions (ET) Act 1999* (Cth) (ET Act).

Electronically signed documents meet the statutory criteria in the ET Act if they meet three requirements:

- identification of the person who is signing
- reliability of signature method, for example an electronic signature solution
- consent between both parties to sign the document electronically.

As a result of recent reforms, there are only a few categories of documents which may require a wet-ink signature in some jurisdictions, such as powers of attorney, legal proceedings or some forms of documents which need to be physically witnessed "in person".

In Victoria specifically, there are a few exemptions to the ET Act that mean a traditional "wet-ink" signature may be required. Transactions that must be effected by personal service and documents that must be served personally are not subject to Victoria's ET Act. Also, transactions, requirements or permissions in relation to the creation, execution or revocation of a will, codicil or other testamentary instrument are not subject to Victoria's ET Act.

How COVID-19 impacted the use of e-signatures

As a result of social distancing rules, temporary measures were put in place by the Australian government in 2020 to facilitate digital signing of all types of documents, but some have since expired. For example, under emergency legislation, Victoria introduced temporary regulations that allowed for electronic execution of deeds and mortgages; remote witnessing of documents; and electronic execution and remote witnessing of powers of attorney, wills and statutory declarations. These changes have since been made permanent by the passing of the *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021*, which introduced permanent changes to Victoria's ET Act, the *Oaths and Affirmations Act 2018* (Vic), the *Wills Act 1997* (Vic) and the *Powers of Attorney Act 2014* (Vic).

Recently, the Australian Senate voted to accept the government's amendments to the *Corporations Act 2001* (Cth) (Corporations Act) which now expressly allows companies to use electronic signatures and hold virtual annual general meetings until 31 March 2022.

Previously, the Corporations Act was exempt in its entirety from the provisions of the Commonwealth ET Act. The exemption meant a person was not able to confidently rely on the statutory presumption in s129(5) of the Corporations Act if a document had been electronically signed. These latest amendments mean corporations can continue to sign documents electronically with confidence.

The need for continued digital transformation:

The amendments are a step in the right direction, as further regulatory support is key to overcoming the barriers of digitisation and driving the use of digital documents among Australian organisations. In the past, a perceived lack of regulatory support was a major hurdle for adoption. Recent research from Forrester explored the trends of digital document processes with legal professionals, finding that before the pandemic almost half (47 per cent) of respondents admitted the lack of regulatory for support for electronic approvals was a barrier for digitisation (Forrester, 2021).

However, this fell significantly following the pandemic as many organisations were able to benefit from digital documents and continue business operations despite social distancing restrictions. As a result, only 11 per cent of respondents still perceive the lack of regulatory support as a barrier for adoption today (Forrester, 2021).

The results align with Adobe's research showing rapid growth of e-signatures throughout 2020. Almost half (48 per cent) of Australians signed documents electronically in the past two years, with adoption rates highest among millennials (61 per cent) (Adobe, 2021).

Now is the time for businesses to reconsider digital documents

E-signatures are becoming the norm, therefore businesses have to adapt. Digital documents can increase trust and provide additional security that paper-based documents cannot. Forrester revealed that security and compliance were critical factors in using digital documents and e-signatures, with almost half (44 per cent) of respondents across APAC reporting difficulty securing paper-based environments (Forrester, 2021).

Paper-based documents can also be easily misplaced, damaged, or easily accessed for malicious purposes. Digital documents can be password protected, require multi-factor authentication, and be hosted on highly secure cloud infrastructure.

As the government continues to evaluate laws and make amendments to legislation, the use of e-signatures and adoption of digital documents will only continue to grow and become a business norm. The pandemic revealed that not only can we trust the security of digital documents, but we benefit from the productivity gains from less reliance on paper-based documents. Ultimately, digital document processes enable a virtual work environment, support flexibility of hybrid working and improve collaboration. ■

Chandra Sinnathamby is head of Adobe Document Cloud, Asia Pacific.

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Forrester. (2021). *Build A Strong Foundation For Security And Compliance With Digital Document Processes*. Forrester Consulting. https://on24static.akamaized.net/event/33/16/96/5/rt/1/documents/resourceList1628600132368/forresteradobedoccloudspotlightbuildastrongfoundationforsecurityandcompliance1628600129550.pdf.

ADOBE STOCK

INCREASING ACCESS TO JUSTICE GLOBALLY

Justice Connect's Pro Bono Portal's adaptability means it is configurable to suit different legal systems.

Every year more than 5 billion people globally have a legal problem, with the majority missing out on any legal assistance. From three years of research and product development, we know that clearinghouses and firms have been using time- and resource-inefficient systems that limit their ability to scale their support targeting improved access to justice. A lack of coordination, visibility into legal need and capacity, and under-utilised resources in the pro bono ecosystem constrain the impact of pro bono contributions in assisting those who need it most.

In response, in 2019, we launched our in-house developed Pro Bono Portal to connect lawyers more efficiently, transparently and effectively with unmet legal need using innovative technology. In keeping with our human-centred design approach, to ensure the portal meets the needs of its users, stakeholders have been involved at every step of the design and development process.

Already used by more than 175 firms across Australia, the portal is being adapted to meet various place-based requirements in jurisdictions around the world. The platform's adaptability means it is completely configurable to suit different legal systems, and can be installed and run independently by local legal service organisations.

In July 2020, we successfully launched the platform in the UK, through local partner LawWorks. Since then, we have also deployed the portal to Ireland's Public Interest Law Alliance (PILA) and Te Ara Ture in New Zealand. Insights from these deployments have informed the continual development of new features including better privacy and security, as well as comprehensive and insightful reporting.

We are proud to share that the Pro Bono Portal is also now available in Hong Kong – the first of its kind in the jurisdiction – through our partners, international NGO PILnet and local charity Equal Justice.

The portal is fast becoming a sector-wide all-purpose platform. We are planning to launch in more countries, develop language adaptability for non-English jurisdictions, and provide access to more legal assistance organisations in Australia. The scalability and adaptability of the portal presents a huge opportunity to support the global pro bono ecosystem, frontline organisations, and most importantly, those experiencing legal problems.

To find out more about our multi award-winning Pro Bono Portal, visit probonoportal.org. ■

This column was provided by Justice Connect.

LOOKING TO HELP?

To find pro bono opportunities for your firm visit www.justiceconnect.org.au/work-with-us, which also manages the LIV's pro bono Legal Assistance Service.

For solicitors: talk to your pro bono coordinator or the person responsible for pro bono work at your firm or visit www.fclc.org.au/cb_pages/careers_and_getting_involved.php.

For barristers: visit www.vicbar.com.au/public/community/pro-bono-scheme.

ADOBESTOCK

LANGUAGE STILL MATTERS

The public sector, private law firms and the Victorian Bar have implemented policies to ensure inclusive language is adopted.

It is acknowledged among the legal profession that women now account for the majority of law graduates and lawyers in Australia, with 53 percent of lawyers in Australia being women. However, the representation of women in law should not be reduced to an equal numbers game in the workplace.

Women in the legal profession also have overlapping and intersecting identities. For example, they may be members of Aboriginal and Torres Strait Islander communities, multicultural communities, and LGBTIQA+ communities. They may also be neurologically diverse or have lived with or are living with disability and/or mental illness. Our society is diverse and the legal profession should reflect this diversity. It is important that our language also acknowledges and welcomes this diversity.

Inclusion begins with the words we speak. From the correct pronunciation of culturally diverse names to respecting pronouns for trans and gender diverse individuals, the language we use day to day affirms visibility and belonging. Inclusive language is a vital way of acknowledging and respecting diversity and differences. It ensures individuals are not excluded from conversations, which many of those in diverse communities experience.

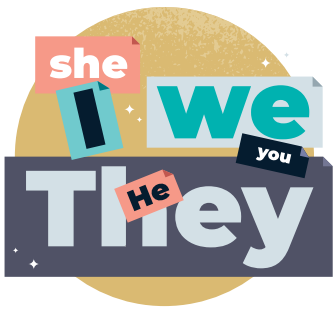
Inclusive language matters everywhere. At university, women will recall the gender-specific language used in studied case law and legislation, noting references to individuals as 'he' instead of 'he/she/they'. Last year, a law student campaigned for all existing Victorian legislation to be updated by an Act of Parliament to be written in gender-neutral terms. In the workplace, it is commonly recognised that heteronormative language can be harmful and exclusive. For example, it can be exclusionary to assume the gender of someone's partner or assume a person's pronouns. The public sector, private law firms and the Victorian Bar have implemented policies to eliminate discrimination and ensure inclusive language is adopted.[1] Inclusive language is not just important for creating inclusive workplaces for all identifying women, but it signifies to clients the culture that the legal profession embraces.

In 2021, Victorian Women Lawyers' Diversity and Inclusion Committee, in collaboration with the Disabled Australian Lawyers Association (DALA), hosted a panel discussion with women lawyers living and working with disabilities. DALA is a national association advocating for greater representation and inclusion of people with a disability in the legal profession. The panel discussion shed light on the value of flexibility in the workplace, the prejudices and discrimination faced by lawyers with disabilities, and the importance of normalising disability in the legal profession. One item discussed at this event was the use of communication and language to demonstrate inclusivity. For example, DALA notes that they have chosen to use identity-first language (ie, disabled person) in naming their organisation, but also acknowledge others in the disabled community may prefer to use person-first language (ie, person with a disability).[2]

In order to keep advancing the diversity and inclusion of women in law, it is important that our conversation around inclusive language continues. As individuals, we must remember the language we use sends a clear message to all women that they belong. ■

Maria Korakas is a member of Victorian Women Lawyers' Diversity & Inclusion Committee.

1. https://www.vicbar.com.au/members/community/equality-diversity/eliminating-lgbtiq-discrimination.
2. https://www.linkedin.com/company/disabled-australian-lawyers-association/about/..



WHEN A CHILD IS ABDUCTED BY A PARENT

Practitioners working in family law or family dispute resolution need to have a general awareness of international parental child abduction and the available remedies.

International parental child abduction (IPCA) is an often overlooked but crucial aspect of family law with long-lasting consequences for separated families. The distress of losing a child to IPCA is made worse by the lack of community awareness of IPCA and its international law processes.

IPCA occurs when one parent takes a child overseas without the other parent's knowledge or consent or refuses to return the child to their country of habitual residence after an agreed period overseas.[1] In Australia, there is a presumption of equal shared parental responsibility meaning parents are jointly responsible for making decisions regarding the care and welfare of a child.[2] Parental responsibility can only be varied or removed by a court order, therefore, one parent cannot change a child's place of residence without the consent of the other parent or a court order.

Approximately two to three children are taken out of or brought into Australia through IPCA each week with most abducted children aged between two and seven years.[3]

IPCA is not a crime in Australia. However, if a parent abducts a child in breach of a court order, or pending parenting proceedings, it may constitute a criminal offence punishable by up to three years' imprisonment.

IPCA is governed by the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Convention). The Convention is a multilateral treaty in force between Australia and 83 countries and provides a legal process for parents to seek the return of their child to Australia when the child has been removed or retained overseas.[4]

The hearing for return applications takes place in the overseas country, which is obliged to apply the custody laws of the child's country of habitual residence.[5]

International Social Service Australia prepared a matter where Michelle, left-behind parent of two children Charlotte and Jackson, was in the midst of Family Court proceedings. While waiting for the hearing, the children's father Tim abducted Jackson and took him to New Zealand. After 10 months with multiple affidavits filed on both sides, the New Zealand court ordered Jackson's return and he and Michelle were reunited in Australia (names have been changed).

For a left-behind parent to pursue a return application, the following criteria must be met:

- the child must have been removed to or retained in a signatory country to the Convention. A list of signatory countries recognised by Australia is available from the Attorney-General Department's website
- the child must be under the age of 16 at the time court proceedings take place
- the parent must have been exercising their rights of custody over the child prior to their abduction
- the child must have been habitually resident in Australia at the time of abduction
- the proceedings must begin within 12 months of the date of abduction.

There are five defences a taking parent can raise in response to a return application. If any apply, the Court will then have discretion as to whether to order the child's return. Defences are:

1. the child has settled in the new jurisdiction (has been overseas for 12 months or more)
2. the left-behind parent consented or acquiesced to the child's relocation
3. there is a grave risk of physical or psychological harm if the child were to return to the left-behind parent
4. the child objects to returning to the left-behind parent
5. returning the child to the left-behind parent would be a breach of their fundamental rights.

If a return application fails, the left-behind parent can apply for an access application to seek orders with specific contact requirements. Access orders ensure the left-behind parent can maintain a relationship with the child, despite living in different jurisdictions.

It is important that practitioners working in the family law or family dispute resolution sectors have a general awareness of IPCA and the available remedies. This will avoid delays in parents receiving accurate legal advice and assistance in pursuing available legal avenues.

For more information or to receive legal advice regarding IPCA, International Social Service Australia is a free legal service to assist clients and professionals with IPCA matters. ■

SNAPSHOT

- IPCA is an important area of family law that all family law practitioners should be aware of due to the grave impact it has on separated families.
- IPCA occurs when a parent removes or retains a child in a country other than the child's country of habitual residence without the other parent's consent.
- A parent can make an application under the 1980 Hague Convention to have their child returned to Australia. Where this fails, a parent can make an access application to maintain a relationship with the child while they live overseas.

Monique Amy Angeleri is a third year Juris Doctor student at the University of Melbourne, and a paralegal in the International Parental Child Abduction team at International Social Service Australia.

1. International Parental Child Abduction, Attorney-General's Department www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/international-parental-child-abduction.
2. *Family Law Act 1975*, ss61C & 111B(4)(a).
3. Parental Child Abduction, Child Recovery Chapman www.childrecoverychapman.com.
4. Hague Convention on the Civil Aspects of International Child Abduction', Attorney-General's Department www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/hague-convention-civil-aspects-international-child-abduction.
5. 1980 Hague Convention on the Civil Aspects of International Child Abduction Article 1(b).

ADOBESTOCK

CRANKING UP THE MACHINE

LEADERS *in* Practice

Unshackle yourself from your practice with better systems.

March usually resembles getting down to business; work is flowing in and the renewed busy-ness makes it all too easy to slip into old habits and forget about practice improvement. Right now is the time to elevate your downward gaze and start thinking of your practice as a machine, and picturing how it can operate in a systematic way, regardless of you being in action or on annual leave.

Setting up your machine, so to speak, by documenting a collection of your simple day-to-day processes and embracing technology to enhance the flow and efficiency, is the secret to removing the current dependence and burden on you – finally freeing you up to drive key strategic activity towards your goals.

Imagine:

- if your pre-meeting admin tasks could be streamlined (ditching the clipboards and paper) and replaced with an automated questionnaire that asks the right questions so you can easily determine who your best suited lawyer is for the new client
- the same questionnaire responses gave you visibility to the goals of the new client, the complexity of their circumstance and even the potential value they represent for your practice
- if the new client had access to education (via your website) to explain how, for example, family law works, to better understand their options ahead of them and prepare more specific questions for you to respond to.

You could now walk into that first meeting already well-briefed on the job and the complexities around both the emotional and practical solution the client is seeking. All empowering you to skip the repetitive administrative questions and get down to providing valuable legal advice.

That's exactly what lawyer and entrepreneur Max Paterson did when he took a simple, repetitive process and turned it into the award-winning tech business Settify.

Working within a family law practice, Max noticed first-hand the manual nature and repetition of initial client meetings; being both time-consuming for the lawyer and costly for the client. Rather than making a great first impression with valuable, trust building advice, he saw the first encounter as being too consumed with cross-checking addresses and reeling off the same spiel about how family law works. That's how he set his sights on the idea for Settify.

Many of us don't have an abundance of hours to think about how we can simplify a repetitive task or make the steps for a first home conveyance (for example) more efficient, profitable and way more enjoyable from the client perspective. We're so focused on doing the work as the professional lawyer that we're blinded to our business lens.

Yet, I believe it's very possible to be both a brilliant lawyer and run a successful practice that is not dependent on you. You don't have to create the next tech software like Max, you just have to be open to looking for and understanding the benefits behind the tools that are already at your disposal.

I recommend you start building your "machine" by visually mapping out your overall "workflow process", ie, how the work comes in; how it gets processed; how it gets reviewed, completed, packaged and sent to the client. By breaking it down into progressive steps, you can unearth where the bottlenecks exist and what improvements and simplifications can be made.

Perhaps the greatest benefit of mapping this workflow process, is that once you document how you (as the lawyer) want each step to be delivered and experienced by your clients, you can then teach your team to follow suit. That's how you unshackle yourself and replace your long hours with more repeatable processes that can flow even when you're not there. That's what makes a quality machine, and successful practice.

Having grown my business (SEIVA), from a handful to now teams of people, at times it has felt impossible to find space to develop better processes. However, I knew that if we could make it our key priority short-term, it would pay off for us later in capacity and control, and allow me space to grow the business. But I had to commit to finding and investing time, even during the busy-ness.

At our March Leaders in Practice webinar, with Max Paterson, we'll discuss the importance of documenting processes and embracing technology and how to practically go about doing that. ■

Brent Szalay is SEIVA managing director.

A DAY IN THE LIFE OF AN ACCREDITED SPECIALIST

Eight lawyers explain the value of specialising – for their practice and their clients.

Criminal law

Advice, guidance and mentoring dominate my day. I assist with analysing briefs of evidence, making forensic decisions, advocacy tips, appearing in courts (including Koori Court) across the state in everything from bail applications to sentencing indications. As an accredited specialist (AS) I have carriage of the most complex and serious criminal matters, including homicide. As well as managing the Victorian Aboriginal Legal Service (VALS) legal practice, I participate in law reform projects, provide evidence to parliamentary inquiries and advocate for the Aboriginal and Torres Strait Islander community across the legal sector.

Criminal law practice, particularly defence, is at the sharp end of human rights lawyering. To stand between the defendant and the state and be the voice for someone whose acts may be among the most serious offences against the community, is an intellectual, and often emotional and ideological, challenge.

I am passionate about the importance of a robust and constantly checked criminal justice system as it contributes to a fair and just society under the rule of law. Specialisation better equips me for performing my role in this, while also expanding the knowledge, expertise and service I bring to clients and the community.

Specialisation presented several career opportunities for me. I built a network of contemporaries and friends – a brain trust I rely on. I gained membership of the VLA Indictable Crime Panel and my career has advanced at VALS. I now run the statewide practice and have taken on the role of acting director of Legal Services at VALS.

Kin Leong, principal managing lawyer, VALS, member LIV Accredited Specialisation Committee (criminal law)

Workplace relations

COVID-19 has generated new and challenging legal issues for workplace relations ASs. Employers need assistance with workplace flexibility, stand-downs and enterprise bargaining.

Controversies over mandatory vaccinations, compulsory mask wearing and employee privacy are being played out in courts and tribunals.

Organisations and companies have been humbled by the pandemic, with empathy and compassion demanded from business leaders. A successful workplace relations lawyer will also have empathy and appreciation of the personal needs of workers, even if their practice is predominantly representing employers.

The law is changing, too. Key judgments (Rossato, Jamsek, Personnel Contracting) will have implications for the common law of employment. Amendments to modern awards, the *Fair Work Act* and the *Sex Discrimination Act* have introduced new rights and remedies for employers and employees.

ASs in workplace relations receive referrals from other lawyers, including specialists. They have access to a collegiate network of successful and competent practitioners in the field, and build their brand through external presentations, media comment and being published. Their standing as a competent lawyer in the field is endorsed by the profession, giving confidence to build skills, practice and career success.

A workplace relations AS will also know how to make the law accessible to industry clients and thereby improve their circumstances. The AS will give the disadvantaged worker power and leverage to improve their professional and personal wellbeing and assist employers to navigate legal frameworks that govern the activity and place of work. An AS makes sense of the law for the client in areas fundamental to the social and economic fabric of Victoria.

Charles Power, partner, Holding Redlich, member LIV Accredited Specialisation Committee (workplace relations)

Wills and estates

Wills and estates is a diverse and constantly evolving area of law, encompassing general estate and succession planning, estate administration, and estate, equity and trust litigation.

It requires a working knowledge of multiple pieces of legislation (family, superannuation, trust, taxation, stamp duty) and numerous seminal cases. It involves many common law and equitable principles and legal concepts, as well as many principles derived from and modified by statute including the freedom of testation, the law of special and general powers of appointment, will construction and equitable relief.

Specialists are in demand for their knowledge and skill, and can attract more complex, and consequently more interesting, legal issues and cases.

It's a varied day-to-day working life, which may include client conferences and meetings with colleagues to provide instructions or guidance on matters; settling or signing off on advice and legal documents, attendances offsite to prepare urgent documents, appearances to represent clients (directly or to instruct counsel) at mediation or court.

You are dealing with death on a daily basis and need to work within the environment of mortality in a compassionate and objective manner. Achieving settlements is often challenging but ultimately satisfying. You deal with clients from all walks of life.

AS is a significant achievement, enabling clients and peers to recognise a solicitor's expertise. I did it to advance my knowledge and skill and to take control of my career direction. I was able to identify and close the gaps in my knowledge and believe I am a better practitioner having gone through the process. It has also enabled me to build new relationships with peers, join AS committees, present at seminars, publish in the *LIJ* and assist other practitioners generally.

With an aging population, growing wealth of individuals, more blended families, more complex tax laws and an increasingly litigious society, there is a greater demand for legal practitioners in wills and estates law than ever before.

Greg Russo, solicitor, Featherby's Lawyers, member LIV Accredited Specialisation Committee (wills and estates)

Commercial law

There is always something interesting and challenging going on in commercial law as a specialist. That comes from clients but also practitioners referring work on.

On any one day I can deal with a variety of complicated matters – a real estate purchase with mixed supply residential/commercial, finalising a draft pleading in a lease dispute, helping finalise dissolution of a partnership, aspects of a matter involving a construction easement for property development by a neighbour, an intellectual property issue involving branding, obtaining a duty exemption on a land transfer from a trust to a beneficiary and reviewing a mistakenly drafted renewal of a shopping centre lease.

Commercial law is broad and it's difficult if not impossible to compartmentalise what one does, at least without exposing oneself to risk. Even large firm practitioners can benefit from specialisation. I have seen issues missed because the practitioner is so narrowly focused they don't see implications of what they are doing on other legal aspects.

There's a great deal of interesting work for specialists who keep up with the law, the many changes to the law and current issues, such as the legal implications of COVID-19.

I specialised to get a greater understanding in some areas and reduce the stress of having a broad practice and operating under considerable time pressure.

More interesting work can come your way as a specialist because specialists are more likely to pick up on more obscure arguments to advance a client's case.

In turn, particularly if matters become litigious, that can lead to good interactions with senior members of the Bar, interesting negotiations or hearing preparation work.

Matthew Kinross-Smith, Kinross-Smith & Co Lawyers Pty Ltd, member LIV Accredited Specialisation Committee (commercial law)

Immigration law

Specialisation gives you the cutting edge you need to be a good lawyer. It gives you the knowledge to navigate the complicated maze that is immigration law, and provides professional opportunities such as giving advice on complicated migration law issues and expert opinion for court matters. ASs manage applications that are more complex and difficult to understand.

Migration laws change daily so ASs need to monitor changes to legislation but also policy, regulation and ministerial instruments. ASs also need to be across the intersection between immigration, employment and criminal law – and deadlines. A typical day involves reviewing deadlines for visa expiry, visa lodgement, court application, AAT applications and conducting client interviews.

COVID-19 changed the migration landscape, with the introduction of COVID-19 visas. Closed borders caused havoc with clients in countries with visa deadlines. I joined the advocacy effort by the LIV and LCA to effect several changes implemented by the federal government, eg, the new Global Talent Visa which encourages highly talented people to migrate to Australia under a fast-track system to accelerate economic growth, which has been a challenge as it is complex and difficult to understand. Our firm has successfully managed several of these applications.

Deregulation of migration advice has opened the doors for lawyers and ASs. We need to ensure the community knows the true value of an immigration lawyer with their thorough understanding of the law and ability to identify the issues. This gives clients the best options and enables managing client expectations.

Valerie Dagama Pereira, Da Gama Pereira and Associates Pty Ltd, member LIV Accredited Specialist Committee (immigration law)

Commercial litigation

I pursued specialisation as it was a good opportunity to benchmark my knowledge and meet lawyers with similar interests. It gave me the confidence to set up an online caveat removal business. It addresses wrongful caveats lodged in the context of disputes about debts, joint ventures, property interests and insolvency.

Specialisation also assists with referrals from lawyers in other areas who know what it takes to gain accreditation.

Commercial litigation as an AS involves diverse disputes in different contexts that are resolved in different ways across all state and federal jurisdictions. A typical day involves a lot of court work and attendances, and high client exposure.

Solicitors in the commercial litigation space need to have a highly developed understanding of the rules and procedures of all courts and tribunals. There is no single point of entry as there is for other areas such as family law.

The Supreme Court of Victoria is currently conducting a review of the scale of litigious costs.

To be an effective AS in this area the skills you need to develop and build are communication and understanding of business imperatives.

Alexander Sheed-Finck, director, SMR Legal, member LIV Accredited Specialisation Committee (commercial litigation)

Planning and environment

A typical day includes a range of planning and environment law: drafting and settling advices, s173 agreements, calls from clients asking for strategic advice on difficult issues, selecting and briefing witnesses, submissions/appearances to VCAT and planning panels/advisory committees, mentoring juniors, assisting team members to tease out complex issues. The mix of advice and appearance work,and range of issues from strategic policy issues to black letter legal advice make this area of practice unique. The key challenge is understanding the breadth of policy and the interaction between policy interpretation and case law.

The planning system is becoming more complex. Recent key issues include the restructure of policy in all planning schemes, shifting attitudes of agencies towards native vegetation removal within growth areas, and slow approval and decision times at many councils and referral agencies.

I did specialisation to test my knowledge of this area of practice, to brush up on aspects I wasn't familiar with and to demonstrate leadership in this area. I started in local government as a planner and worked in government, so I understand how councils and other bodies work.

Becoming an AS can result in accelerated progression at your firm, leadership roles in the profession and recognition leading to referrals from other lawyers.

Being an AS in this area of practice provides exposure to interesting areas of public policy and complex aspects of administrative law. Also, bushfire controls, native vegetation frameworks, growth area planning, infrastructure contributions, and the new general environment duty and how that will be recognised by VCAT and the courts.

Specialist accreditation

New policy and legislative change is happening all the time. This means keeping abreast of changes to legislation, planning schemes and other guidelines and regulations.

To be an effective AS in this area, you need an interest in fields such as geography, environmental science, planning or architecture and urban design.

Mark Bartley, partner, HWL Ebsworth Lawyers, member LIV Accredited Specialisation Committee (planning and environment)

Children's law

Specialists in children's law are in a privileged and unique position of helping people in complex personal situations who are really suffering. A lot of time is spent in court advocating to keep families together where possible.

A typical day can include assisting parents and/or children to navigate the child protection system and understand the role of the Department of Families, Fairness and Housing (DFFH), negotiations and early intervention advice with the DFFH on behalf of parents and/or children being investigated, legal advice and representation for parents and/or children who are the subject of protection applications in the Children's Court, and legal advice and representation to carers such as grandparents and permanent carers who have an interest in the proceeding and have questions or concerns about their obligations.

It is a fast paced and reactive area of practice. Most cases that come before the Children's Court are emergency protection applications. There is often little time to prepare. So you must think on your feet and respond quickly to clients with complexities including exposure to family violence, limited financial stability, addictions, mental health, homelessness and trauma.

I specialised because I enjoy child protection law, I like the fast pace of the work and there is always something to learn. I wanted to know more about the social sciences behind why some families end up embroiled in the child protection system and also have a more trauma-informed practice experience. More knowledge of trauma, causes of family violence and addiction assists with improved representation and outcomes.

Managing complex clients, you also need to be patient, compassionate, resilient and show empathy. I am committed to access to justice for vulnerable members of the community and representing those who have DFFH in their life. As a specialist I have developed good relationships across the sector – DFFH, VLA, CLCs, the bench, barristers and private firms. I'm part of a network of legal professionals who are committed to children's law and assist me in doing the best job for clients.

Cleona Feuerring, legal director, WEstjustice member, LIV Accredited Specialisation Committee (children's law)

Why pursue specialist accreditation?

LIV specialist accreditation is a nationally recognised certification that sets a lawyer apart as an expert in their field, improves professional standing and career opportunities. It is a definitive and recognisable mark of excellence for peers and clients.

The LIV has accredited more than 1100 lawyers since 1989 and offers advanced professional development programs for its accredited specialists to help maintain their high standards.

The program is independent and peer-led, nationally recognised, supported with study materials and activities (past assessment materials, related legislation and regulations, *LIJ* articles, discussion groups and mentoring), provides free access to the CCH Pinpoint platform and a listing in the LIV's Accredited Specialists directory.

In 2022, the LIV is offering specialist accreditation in children's law, criminal law, commercial law, commercial litigation, wills and estates, workplace relations, immigration law and environment and planning law. In 2023, the LIV is offering specialist accreditation in administrative law, commercial tenancy law, costs law, family law, personal injury law, property law, taxation law and mediation.

New specialists welcomed

At the most recent conferral ceremony, in November 2021, LIV president Tania Wolff congratulated 53 new accredited specialists in property, family, tax and personal injury law. She said the occasion marked the culmination of years of study and career effort. "It's the product of, countless hours, not just preparing for these assessments, but all the time spent in the years before accumulating knowledge, skill and expertise," said Ms Wolff, an AS in criminal law.

"The high bar required to become an AS is a testament to the calibre of individuals. Beyond the minimum five years practising in your area of law you have participated in a program that is designed to prove your knowledge as rigorously as possible.

"You've been challenged to become experts in your field, excelling in difficult assessments marked by independent examiners."

In preparing, many spent more than 100 hours studying. Seventy per cent had been in practice five to 10 years, 27 per cent were over 40 years, 67 per cent were female, 68 per cent practised outside the CBD. There was a 100 per cent success rate in tax law.

Chair of the AS board Katie Miller said at the conferral ceremony that specialisation was a mark, a way of giving clients and other solicitors a way of identifying lawyers with the skills, knowledge and experience of an expert.

"Our scheme is peer-based. It's based on the principle that the people best able to assess skills, knowledge and experience to be an expert in a field are those experts currently practising in that area of law.

"From my way of thinking, there is no better mark of approval and achievement than to have the endorsement of your peers. Indeed, I'd say it's the ultimate cure for imposter syndrome."

Ms Miller encouraged lawyers to undertake the scheme to back themselves and demonstrate to themselves the depth and extent of their knowledge.

"When you are accredited by your peers, it gives you confidence in your own ability that becomes part of your professional identity. I suspect we wouldn't get there alone because we are our own harshest critics."

Ms Miller said all the new specialists demonstrated their skills, knowledge and experience during "one of the strangest, most challenging and hopefully never to be repeated times in our community's history.

"In addition to the increased confidence in your ability as a legal practitioner, I hope you take from this experience a greater confidence in your own resilience and ability to adapt and overcome difficult challenges and circumstances." ■

For extended coverage go to liv.asn.au/PracticeAS.

Anoushka Jeronimus
Legal Director, Youth Law Program, WEstjustice
Accredited Specialist, Criminal Law & Children's Law

LAW INSTITUTE VICTORIA

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LAW INSTITUTE OF VICTORIA ACCREDITED SPECIALIST

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- Children's Law
- Commercial Law
- Commercial Litigation Law
- Criminal Law
- Environmental & Planning Law*
- Immigration Law
- Wills & Estates Law
- Workplace Relations Law

*Subject to sufficient interest in applications.

Applications for the 2022 program close Friday 25 March, 4pm.

For further details and to apply online, visit: **www.liv.asn.au/AccreditedSpecialisation**
T 03 9607 9311 **E** specialisation@liv.asn.au

LAW INSTITUTE VICTORIA

Personal Injury Conference 2022

Friday 25 March, 9am–5pm | Digital Conference

Keep your finger on the pulse of recent developments and what they mean for your practice in 2022 and beyond.

The LIV Personal Injury Conference takes you through topical issues, such as the new *Workplace Injury Rehabilitation and Compensation Amendment (Arbitration) Bill 2021* and the proposed statutory duty of candour reform.

This is your best opportunity to obtain expert insights and crucial updates from eminent authorities, equipping yourself with the knowledge and skills to confidently navigate the evolving personal injury landscape.

Keynote speaker

Her Honour Judge Tsalamandris, County Court of Victoria

CPD Units: 6 [SL] [PS] [PM] [EP]

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Register online to secure your spot
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NEW ADMISSIONS

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on **24 November 2021.** The *LIJ* welcomes them to the legal profession.

ABORETE G MESSKEL, Rediete
ACHESON, Amelia
ADAMS, Rachel
ALGIE, Cameron
ALLMAN, Katherine
AMINIAN, Setareh
ARNFIELD, Beau
ARPACI, Bahar
ARUNDEL, Max
BARING, Sophie
BELL, Giacomo
BERRY, Amelia
BOAG, Robert
BUDIMIR, Fedja
BUTLER, Sarah
BUTTIGIEG, Megan
CAMPBELL, Ashley
CARROLL, Darcy
CLEEVE, Samuel
COLANTUONO, Rosalie
COUSINS, Nicholas
DALTON, Chloe
DERKS-CONVERY, Milou
DING, Phoebe
DOUPE-WATT, Oscar
DOUVOS, Stephanie
EKBOTE, Pranjal
FARRUGIA, Mikaela
FERGUSON, Francis
FUNG, Cherie
FYFFE, Emily
GAL, Rachel
GHASEMI, Saemeh
GILLIES, Nicholas
GLEISNER, Alice
GOOK, Lyla
GRIFFITHS, Rebecca
GRIMALDI, Amelia
GYA, Rajiv
HAMER, Alexander
HARLEY, Alexandra
HATFIELD, Amy
HETHERINGTON, Amy
HILL, Lachlan
HO, Melissa Chi Yan
HOLST, Michael
HOSSACK, Joyce
HOSSEINI, Nosrat
HOWARD, Edward
JACOBS, Luke
JAMES, Andrew
JAQUIERY, Sofia
JENKINS, Thomas
JIANG, Alice
JOHN, Elizabeth
KANE, Hannah
KARAILIS, Andrea
KEERAN, Peter
KELAART, Rebecca
KENNEDY, Edmund
KIM, Charles
KING, Annebelle
KISS, Isabelle
KOAY, Tzeyi
KORMAN, Raphael
LAW, Chloe
LAWRY, Madison
LE, Thien Huong
LEONARD, Ruby
LI, Chun Lei
LIM, Avy
LIM, Beatrice
LINSCHOTEN, Laura
LITRAS, Andreas
LLEWELLYN, Brittany
LOCHAM, Priya
LU, Chengwen
MANTEGAZZA, Madeleine
MASEROW, Rami
MASHO, Luwam
MASINO, Mario
MASON, Nora-Louise
MAYBURY, Amanda
MAYLINDA, Ayu
McCOMBE, Edward
McKENZIE, Samuel
MELSOM, Elizabeth
MERRETT, Lucinda
MESCHER, Benjamin
MESSINA, Kellie
MICALIZZI, Olivia
MOULDAY, Brayden
MOURNEY, Jessica
NAJEEBULLAH, Zuhra
NASHED, Jessica
NAYLOR, Phoebe
NG, Andrew
NGUYEN, Johnson
NICHOLAS, Jorge
NICHOLSON, Nitaya
OWEN, Timothy
OWENS, Taylor
PANTELIDIS, Kate
PARKER, Siobhan
PEREIRA, Kate
PHELAN, Kathleen
PONARI, Edison
PRELEVIC, Stefan
RAHIMI, Nadia
RANAMUKHAARACHCHI, Kithmin
RICHARDSON, Elsie
ROBERTS, Benjamin
ROPER, Isabella
ROY, Ayrton
SAGGIO, Thomas
SCHAFFER, Charles
SCHWARCZ, Alexander
SENSERRICK, Jane
SHAABAN, Raianne
SHER, Jordana
SIMA, Yan
STAFFIERI, Dino
SUTHERLAND, Philippa
TAN, Wilson
THEODOSI, Andrew
TIONG, Vera
TOTHAM, Alyssia
TOWNSEND, Zulema
TROTTER, Ashleigh
UDALL, John
VAN EYK, Janine
VAN NOOTEN, Sally
VASSALLO, Natasha
VATS, Neeraj
VOLARIS, Marissa
WAGNER, Kiara
WARD, Sophie
WATLING, Sarah
WELLS, Michael
WINTLE, Jennifer
WITTNER, Kimberley
WOO, John
WORTH, Samantha
WRIGHT, Aidan
XU, Debby
XU, Mingyu
YAKO, Maryana
YANEVA, Daniela
YOUNG, Hayley
ZAJAC, Danita
ZHANG, Tao

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on **9 December 2021.** The *LIJ* welcomes them to the legal profession.

ALDAY, Michael
ALPHANSO, Clarisa
ANDREWS, Niketa
ANGELERI, Harland
APTED, Kimberly
ARGYROPOULOU, Evangelia
ASARI, Shiva
ATKINSON, Jacob
AUSTIN, Chantelle
BALLESTRIN, Jasmine
BANHIDI, Zoltan
BARR, Madeleine
BARWICK, Samantha
BEARDS, Ashli
BEASLEY, Alexandra
BEHAN, Matthew
BENNETT, Adam
BESLEE, Nicola
BEVILACQUA, Eleanor
BORLAND, Thomas
BRADY, Amy
BRAUDE, Raphael
BRIMACOMBE, Patrick
BULOS, Christine
BURKE, Tristan
CAIRNS, Grace
CHAKRABORTY, Ira
CHEUNG, Sylvia
CHIKWE, Nella
COMERFORD, Annabelle
CORBETT, Zoe
COSGRIFF, Lachlan
COSTANZO, Aldian
CULSHAW, Alexandra
CURNOW, Jack
CURRIE, Liam
CUTLER, Clara
DARMANIN, Nancy
DE MAN, Cameron
DETERING, Lucinda
DRES, Georgia
DUKE, George
DUNN, Owain
EALES, Daisy-Anne
EASTWELL, Taylah
EL ASSAAD, Samir
ELDER, Rebecca
ELZANATY, Akram
FLEGELTAUB, Luke
FORD, Alice

Admissions

FREE, Nathan
GHABRIAL, Naomi
GIBSON, Jackson
GOUGH, Matthew
GREY, Hannah
GUNAWARDANA, Charles
HADAWAY, Reid
HALABI, Radwan
HALE, Alana
HARDING, Isabelle
HATELY, William
HENKES-YOUNGER, Sarah
HEWITT, Joanna
HIGGINS, Lisa
HO, Henry
HOBBS, Tamara
HOGARTY, Stephanie
HONG, Ji Hyun
HOWARD, Justin
HUSON, Cameron
HUSSEY, James
JAMES, Kristen
JENNER, Anna-Lena
JOB, Jack
JOHNSTON, Natalie
JONES, Andrea
JOSHI, Bibhusan
KALUARACHCHI, Anjalee
KERWIN, Zoe
KOH, Huimin Grace
KOSTUR, Paloma
KUMARALINGAM, Ani
LAMANNA, Nicholas
LEE, Ho Ching
LEE, Rex
LI, Jiaxin
LIM, De Sheng
LIM, Seow Gek Grace
LINCOLN, Ashleigh
LIU, Liuqian
LONI, Maria
MAHAR, Patrick
MANGION, Alexandra
MARCHESE, Alex
MARDONES, Brianna
MAROUN, Frederick
MARTYSZUS, Naomi
MAY, Zachary
MICHELSON, Remy
MORRIS, Julia
MOSHINSKY, Danita
MURPHY, Caitlin
NAGENDRA, Seema
NAKHLA, Cathryn
NAMMOUR, Christine
NGUYEN, Hoang My
O'BRYAN, Amy
O'DONNELL, Matthew
ONG, Ying Kuan
ORESKOVIC, Ana Maria
PANNA, Eve
PANNA, Madelane
PEART, Thomas
PEDERICK, Daniel
PENHALL, Ashleigh
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PHAN, Duong
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RASCH, Sophia
REZAEE, Samantha
RICHARDS, Ella
RIZZUTO, Jon
RODDA, Courtney
ROSART, Jazmine
ROZARIO, Stephanie
RUDDY, Isabella
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SARGEANT, Isaac
SCALLY, Monika
SFENDOURAKIS, Artemis
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SIGERA, Polgahawattage
SIOTOS, Katherine
SKILBECK, Shehara
SOLOVYOVA, Tatyana
SWAMY, Muni
TATE, Stefanie
TO, Catherine
TOMA, Laura
TONG, Lok Hei
TORCASIO, Antonio
TRAN, Michelle
TREVASKIS, Mitchell
TSIALTAS, Elyse
TULIAKIONO, Sasha
URBANS, Daniel
WAL, Gatwech
WALL, Madison
WALSH, Lucy
WATKINS, Laura
WEAVER, Amy
WHITE, Jessica
WOOTTON, Hannah
YAP, Ian
YU, Hing Bong

SUBMISSIONS

Access to voluntary assisted dying by telehealth

The LIV has called on the Victorian government to introduce legislation to permit the remote witnessing of advanced care directives (ACDs) and appointments of medical treatment decision makers.

Appointed medical treatment decision makers and ACDs play a critical role in ensuring that the medical preferences of a person are known and respected in the event of a loss of capacity. The COVID-19 pandemic prompted the introduction of legislation to permit remote witnessing of formal legal requirements across multiple areas of law.

The LIV notes the benefits of remote witnessing, including ease of access for Victorians living in the regions or who are too unwell to travel, and calls for similar remote witnessing legislation for the appointment of medical treatment decision makers and ACDs.

Criminalisation of elder abuse

The LIV has written to the Attorney-General of Victoria presenting arguments for and against why the VLRC should review the potential criminalisation of elder abuse. The LIV acknowledges that there are divergent views as to whether the current Victorian framework adequately protects against elder abuse in cases of neglect.

The LIV's paper draws on the expertise of the LIV Elder Law Committee and comments made from other prominent elder law advocacy groups and experts in the Seniors Rights Victoria's Elder Law Roundtable discussion. ■

To read submissions go to the LIV website – www.liv.asn.au/Submissions

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To find out more about LIV governance and representation or to contact LIV Council members see www.liv.asn.au or phone the secretary to the Council on 9607 9513 or email secretariat@liv.asn.au.

ABOUT THE LIV: The LIV represents about 19,000 lawyers and people working in the law in Victoria, interstate and overseas. Our members offer their commitment, diversity and expertise to help shape the laws of Victoria and to ensure a strong legal profession for the future. The LIV promotes justice for all advancing social and public welfare in the operation of the courts and legal system as well as advancing education and public confidence both in the legal profession and in the processes by which the law is made and administered. As the peak body for the Victorian legal profession, the LIV initiates programs to support the needs of a changing profession, promotes an active law reform advocacy agenda, responds publicly to issues affecting the profession and broader community, delivers continuing legal education programs, and continues to provide expert services and resources to support our members.

FEDERAL ELECTION IN FOCUS

The LCA believes federal courts and tribunals have been chronically under-funded and under-resourced and will advocate on behalf of the legal profession.

TASS LIVERIS

While the world seems to hold much uncertainty, one thing we can be sure of is that Australians will go to the polls this year, providing an opportunity to assess the policies of all those standing for election and for the Law Council of Australia (LCA) to advocate on behalf of our profession and our community.

The commitments we will be seeking from all major parties during this election campaign have been developed in consultation with our constituent bodies. The LIV has influenced our priorities by proactively telling us what issues are most important to you, its members.

By the time you read this column, the LCA will have already begun communicating its main recommendations to those striving to represent us. We will also be publicly reporting on the adequacy and acceptability of the policies parties espouse in the lead up to polling day. The overarching goal is to ensure whoever forms government has pledged to implement changes and measures we believe will make the greatest difference for all Australians.

Some of the key issues on which the LCA is seeking action following the 2022 federal election fall under the following themes – access to justice; federal courts and tribunals; ensuring the safety of women, children and families; Aboriginal and Torres Strait Islander peoples; ensuring equality before the law; integrity measures; climate change and environmental laws; criminal law and national security; human rights; asylum seekers, detention and offshore processing policies; privacy and data; anti-money laundering; workplaces and employment; Medicare; and modernising business practices.

One of the things I most value about our profession is its dedication to serving the needs of the most vulnerable members of our community. Throughout history, the critical role of lawyers in defending rights and amplifying the voices of those who must be clearly heard has been significant.

The feedback we received as we were determining the issues to focus on during the election campaign show our profession remains devoted to law and policy reform that advances the public good.

People experiencing disadvantage are often more vulnerable to legal problems and frequently have greater and more complex legal needs than the general population. However, despite having disproportionate interactions with the justice system, Australians experiencing disadvantage are often the least able to respond effectively.

The Final Report of the LCA's Justice Project highlighted the costs (personal, community, social and economic) that arise and/or grow when people cannot access justice. These include, for example, unresolved problems escalating from civil, to family, to criminal matters; an inability to resolve mounting debts, fines or payments, resulting in poverty and/or eviction and homelessness; and women and children remaining at risk of harm, violence and exploitation. These scenarios have broader cost implications across government – such as to health, housing, social services and welfare, child protection, families, corrections, policing and justice portfolios.

Despite the clear economic and social benefits of investment in the legal assistance sector, it remains critically underfunded. The LCA is calling for increased federal funding for Legal Aid Commissions across criminal, civil and family law matters, restoring the Commonwealth share of funding to 50 per cent. We estimate this translates to more than $300 million in additional funding each year.

We are also seeking commitment from the newly elected government to work with state and territory governments to undertake a review of the resourcing needs of the judicial system and address those needs. The LCA believes our federal courts and tribunals have been chronically underfunded and under-resourced for a substantial period of time. The capacity of courts and tribunals to resolve matters both swiftly and fairly is hampered by insufficient resources in the face of increasing demand for services.

SNAPSHOT

- The LCA will be advocating on behalf of the profession and the community in the lead up to this year's federal election.
- Priorities have been developed in consultation with constituent bodies, expert sections, committees and working groups to ensure they reflect the views of the profession.
- Key issues on which the LCA is seeking action include access to justice, equality before the law, human rights, and Aboriginal and Torres Strait Islander peoples.

A commitment to the principle of self-determination and evidence-based, culturally safe solutions is critical to addressing the inequality faced by Aboriginal and Torres Strait Islander peoples across Australia, including within the justice system.

The LCA is challenging parties to implement the recommendations of the Referendum Council and establish a timetable for a referendum on enshrining a First Nations Voice to Parliament in the Constitution. We also want a commitment to implementing the recommendations of the Australian Law Reform Commission's Pathways to Justice Report, informed by Aboriginal and Torres Strait Islander communities and their representatives, to meet or exceed the justice targets in the National Agreement on Closing the Gap. This must be complemented by commitments to raise the minimum age of responsibility to 14 years, and to meet or exceed other Closing the Gap targets, particularly those on care and protection, and family violence.

While we don't yet know who will lead Australia post-election, I can guarantee the LCA will do everything in its power to make sure they are aware of the initiatives and measures our profession believes are vital for Australia's future. ■

Tass Liveris is president of the Law Council of Australia.

LEADERS *in* Practice

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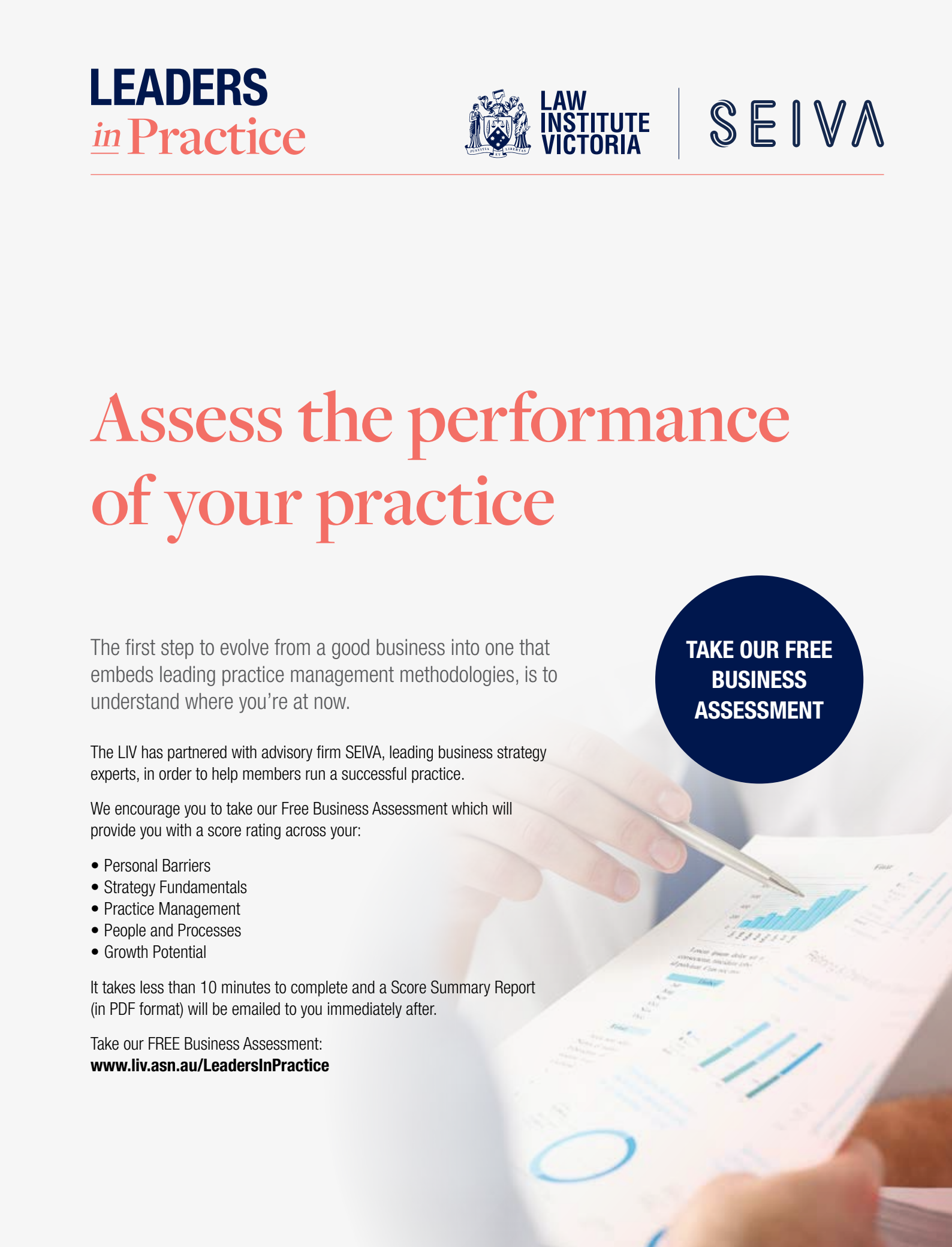

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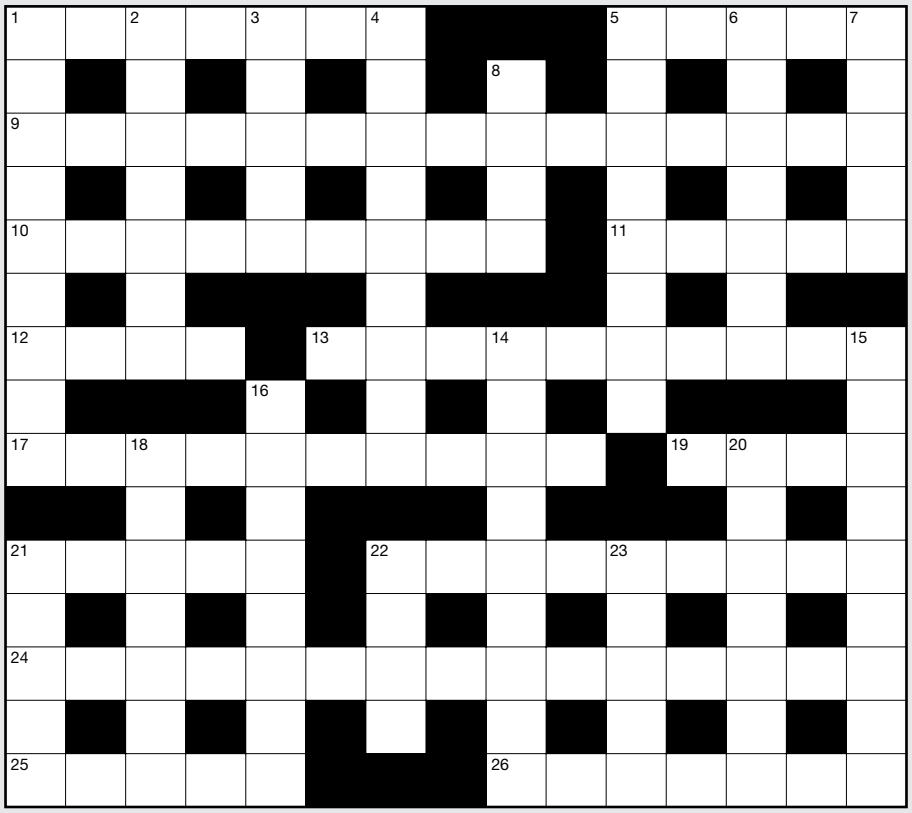
CHRISTOPHER JAMES NUTTALL who died on 12 September 2021. Would anyone holding or knowing the whereabouts of any will of the deceased please contact Will Monotti of Sladen Legal, Tower Two Collins Square Level 22, 727 Collins Street, Melbourne Victoria 3008. Phone (03) 9611 0127 or wmonotti@sladen.com.au as soon as practicable.

LETTERS OF THE LAW NO. 245



Solution next edition
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ACROSS

1, 5, 25, 26 According to someone disguised as a lawyer, the 1a of 5a is 25a 26a

5 See 1a

9 In France, the men organised around society's liberation (15)

10 Anguished and upsetting end to term (9)

11 Sluggish person cycles for tacks (5)

12 Kick out characters from Houston (4)

13 Accentuated space before dimension and shape is reconfigured (10)

17 Suspect sitting on a posting (10)

19 Does what's held back in most cases (4)

21 Type of architecture from Rhode Island embraced by dwarf (5)

22 Supply a small yew? Why not? (3,2,4)

24 Principle used in sentencing pilot prior to any broadcast (15)

25 See 1a

26 See 1a

DOWN

1 They may be loaded or leading (9)

2 Admiral of the Fleet reinforces and stands by statement (7)

3 It's foolish and crazy skipping seconds (5)

4 He may chant lead to shanties at sea (9)

5 Submission made by keen criminal in difficulty (8)

6 It's after northbound deer goes over again (7)

7 Snowmen seen regularly up in Saint-Remy (5)

8 Friendly type (4)

14 It's built by workers in Hungary, initially busy after economy reorganised (9)

15 Sid turned up, competed and showed off (9)

16 Reveal record drop (8)

18 Half of Apricots around Rio not observed (1,6)

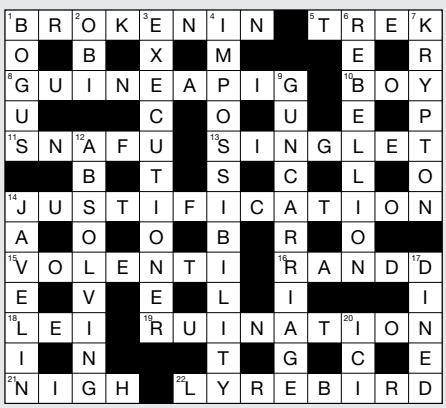
20 Clergymen's strange circles (7)

21 Tyrant abandons son in store (5)

22 What may follow checking tea (4)

23 Scramble for graduation (5)

Solution to Letters of the Law No.244



YRIPP volunteer David Grigg

PHOTO: DAVID JOHNS

VOLUNTEERS SUPPORT YOUTH IN CUSTODY

THE YOUTH REFERRAL AND INDEPENDENT PERSON PROGRAM AIMS TO MAKE SURE A YOUNG PERSON WHO HAS BEEN ARRESTED UNDERSTANDS WHAT'S GOING ON AND WHAT THEIR LEGAL RIGHTS ARE. **BY KARIN DERKLEY**

Around once a week David Grigg's sleep will be interrupted by a call to come into a police station. He is a volunteer with the Youth Referral and Independent Person Program (YRIPP) and invariably the request to sit with a young person who has been arrested comes in the wee hours of the morning.

"You wake up, stumble out of bed and get in there. If you get woken up at midnight and you've only been asleep an hour, that's hard. But once you're there it's fine."

Mr Grigg is one of around 400 YRIPP volunteers who agree to being called up any time of the day or night to sit with a young person who has no parent or guardian available to accompany them in the police interview.

He's been doing it for around three years, and says it's a way he can help young people who have no other support. "I believe that if we give our kids as much support as we can at the start of their life, that will hopefully help them later in their life."

Under the s464e of the *Crimes Act 1958* (Vic), a person under the age of 18 is required to be accompanied by an adult in a police interview. If a parent or guardian is not available, that has in the past been an untrained volunteer member of the local community or a justice of the peace. (That is still the case in other states and territories.)

Without specific training, such individuals were not always impartial, says YRIPP program manager Lawrence Ussher.

"It is about being able to take a young person as you find them . . ."

"Police might have a list of people in the tearoom they would call on when they had a young person in custody. They weren't really clear what their role was, and had no training in the legal rights applicable to the young person who was being processed in custody."

Sometimes these well-meaning members of the community would remonstrate with the young person and encourage them to acquiesce or comply with a line of police questioning, Mr Ussher says.

Concerns about the lack of training and lack of clarity surrounding the role of an independent person were canvassed by the 2010 Victorian Law Reform Commission report Supporting Young People in Police Interviews. The report noted there was a risk that the independent person, or the police, viewed the role as one of an "independent witness" rather than as a support for the young person. It found that young people often viewed the independent person as another authority figure rather than someone to support them.

The report commended the YRIPP pilot program that was set up in 2003 under then Attorney-General Rob Hulls as a joint venture between the Centre for Multicultural Youth (CMY), the Youth Affairs Council of Victoria, the Federation of Community Legal Centres, the then Department of Immigration and Multicultural and Indigenous Affairs, Victorian Aboriginal Legal Service and Victoria Police.

It recommended the program be rolled out as a statewide scheme, and YRIPP has been run by the CMY ever since. After years of relying on annual budget handouts, the program was last year given the security of four-year funding in the most recent Victorian state budget.

Mr Grigg has a background in business, and says he sees the role as a way to give back that also keeps him connected to the wider community. "You get to meet some really interesting young people and chat with them about their life and aspirations. I find that really interesting and rewarding."

With a long experience in volunteering, he says the YRIPP program offers the best training and support he's come across. "As part of the initial process there is some pretty intensive training, and a day of role-playing and various interviews."

Once training is complete, volunteers are by necessity on their own with the young person and police officer. "But the support is good. Any time of the night we can place a call through to the organisation and get support if we're not too sure about something."

Volunteers need to be able to quickly build a rapport with a young person, and make sure they are treated fairly and equitably, Mr Ussher says. But while they play an important role in supporting the young person, they are not there to advocate on their behalf, he points out.

"They're not there to be caseworkers or to be invested in the young person's journey or the outcome of their criminal proceedings. They're there to be impartial, be objective, support them as they find them and that's it. They're there as a safeguard. It's a checks and balances role that they play within the system."

It is also important that volunteers withhold any judgment in their role as the support person, he says. "It is about being able to take a young person as you find them, and to make sure you don't let any of your biases get in the way of completely objective and impartial support and advice to the young person."

Mr Grigg sees his role as making sure the young person understands what's going on, what their rights are and the various options. "We emphasise that we're volunteers, that we're not part of the police or the government. We're not judgmental, it's all confidential."

"Mostly it's about being there and making sure they understand that if they don't understand what's going on or feel uncomfortable, they can look at me and say they've got a problem and we can stop and set that right."

YRIPP volunteers also assist the young person in getting legal representation, and refer them to various programs that can help them get their life back on track. "You get the chance to chat to them and ask them what's going on in their life and see if there's a way to provide more support," Mr Grigg says. "We can send a referral off that night and the professionals in the organisation will take it forward."

Mr Ussher says he has nothing but admiration for YRIPP volunteers. "They really are the unsung heroes in our community." Those in regional areas can drive for hundreds of kilometres through the night on a country road from one country town to the next. In metro areas, volunteers often drive from station to station because there isn't capacity for young person to be processed at a particular metro station, or because a bail justice isn't available.

The role has been especially demanding during the pandemic, Mr Ussher says. Under the legislation, volunteers are required to attend police interviews in-person. "It's just completely overwhelming to think we've got people willing to go into a small confined custodial setting with young people who can often be impulsive and non-compliant."

Mr Grigg says he didn't think twice about taking on that risk. "We take precautions and it's something that just has to be done." ■

FOOD

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Melbourne's lawyers will know as well as almost anyone how profoundly COVID-19 lockdowns have impacted its legal precinct. Its dining scene has been decimated by many forced restaurant closures, both temporary and permanent. Other eateries have re-opened well short of full-stride as they have had to deal with reduced foot traffic and continuing staff shortages.

There are hopeful signs that, as the 2022 legal year opens, the precinct is slowly coming to life. From the last week of January, queues out the door of a few lunch spots have reappeared. Some smaller establishments are leading the way out of lockdown, and worthy of special mention. Bear in mind that menus and opening hours are constantly changing.

Queensmith is a breezy wine bar between Lonsdale and Bourke. At the time of my visits it serves a small but delicious range of open, fresh and toasted sandwiches and a salad bowl ($10-13) on excellent Noisette sourdough. The flagship ham and cheese sandwich is delectably crusted with parmesan on one side, with a moist and flavourful filling that is possibly tweaked by ketchup or mustard.

There is an excellent Reuben, with nicely chewy brisket and oozing with mayo, mustard and sauerkraut. These may be washed down with a very well-chosen range of wines available by the glass or bottle ($12–15/$34-71), beers ($9-12) and cocktails ($15-20).

Kings and Knaves Espresso is a purveyor of fine coffee that has burgeoned into a great breakfast and lunch hangout. It has a selection of light breakfasts, a daily salad or two ($10), a changing selection of modestly priced bagels – cheese and cauliflower being a personal favourite – and pides, which make a great portable snack to eat as you queue for your daily RAT to gain admission to the County Court.

Schmucks bagelry is a notable lockdown stayer, serving generous and tasty bagels, coffee, and grab and go breakfasts from morning to afternoon, seven days a week. Even with a roaring delivery trade, bagels are quickly made to order. My favourites are vegemite and cheese on a seedy bagel (special order), Nutty Monkey combining Nutella, banana and almond on a blueberry bagel, and the Reuben and cauliflower ("hippie–slicker") selections are both winners.

Less casual options are emerging with the returning legal set, and I look forward to tasting and reviewing them in coming months. ■

Shaun Ginsbourg is a hungry barrister.

COFFEE

Maker Coffee
387 Little Bourke Street

Hardware Lane is quickly coming back to life as a place for returning city workers to gather for coffee and lunch in its al fresco eateries. On its south-east corner with Little Bourke Street, Maker Coffee is doing a brisk trade serving up a selection of filter, cold drip, and batch brewed coffees from its Richmond roastery. Along with outdoor seating, the whitewashed Scandi-style interior has sunny window-side benches perfect for setting up the laptop, plus a few communal tables and a cosy private nook. Artfully presented treats include a pistachio and yuzu cake and porchetta calzone. There are also tempting baguettes, vegetarian and otherwise. **KD**

WINE *By Jeni Port*

Howard Park Jeté Brut Non Vintage
RRP $38

Howard Park has put Western Australia on the national sparkling wine map with Jeté. It is consistently top ranked with its alluring charm and purity of citrus and apple with white flowers on the bouquet and persistent, energised mousse. Autolysis complexity from ageing on yeast lees comes into the picture on the palate in almond, fresh-baked pastry sitting across subtle red berry pinot noir fruits. Great Southern chardonnay and pinot noir are blended to produce one long, crisp, brisk finish. Works as either an aperitif or with food.

Enjoy with bacon and cheese croquettes.
Stockist: Armadale Cellars, Atlas Vinifera Richmond, Cellarbrations at Elsternwick, www.howardparkwines.com.au

Cat Out Of The Bag Chardonnay 2020
RRP $25

Under the Bellarine Peninsula's Leura Park Estate, the Cat Out Of The Bag label offers outstanding value for your dollar. The 2020 chardonnay tops the value list with its energy and clean, brisk fruit in peach, nectarine and citrus. Fermentation in barrel has contributed a warm textural quality and accompanying almond meal flavours.

Drink with chicken with apricots and pistachios.
Stockist: www.leuraparkestate.com.au

Catlin Wines The Gellert Adelaide Hills Gamay 2021
RRP $32

One look and you are hooked. Brilliant purple-cherry colour attracts the eye and makes for a welcoming start to this delightful, playful gamay, fresh and lively in cherry, raspberry fruits, plummy and soft. Generous in fruit, lifted in spice with a light tannin structure which makes for easy drinking. Catlin Wines is a relatively newish addition to the Adelaide Hills wine scene with some exciting wines.

Enjoy with salmon frittata.
Stockist: www.catlinwines.com.au ■

Jeni Port is a Melbourne wine writer, author and judge.

STRANGERS ON A TRAIN

CIVIL PROCEDURE STUDENTS GO THE EXTRA MILE WHEN IT COMES TO REMOTE LEARNING.

COVID-19 has caused major changes to our work practices. For academics, the most notable has been to adapt to teaching online. As academics have adapted so too have our students, yet it never ceases to amaze me how law students go the extra mile when it comes to engaging in their learning.

In my civil procedure class in second semester last year I had a class participation component to the assessment which, like most such assessments, requires students to prepare answers to a set of questions and legal problems and then be prepared to discuss them in class with their peers. I usually ask specific students each week to start each answer and then let the natural flow of the intellectual tide take over. It works a treat and gives students a little bit of control over their learning.

During the COVID-19 initiated lockdowns, classes were online and unless a student had a technical reason, I required all students to be sitting or standing upright (as opposed to being in bed or doing yoga) with their cameras turned on so I could see their "learned faces".

This past semester, I had a student who worked during the day and therefore, enrolled in a 6pm tutorial class which ran for two hours. She must have finished work just before 6pm each day and because of her dedication to her learning and her desire to earn good marks across all the assessments she came online at 6pm via her mobile phone with her camera on.

For the first 30 minutes of each tutorial the whole class joined her journey from Parliament station in the city, three stops out of the city then a five-minute walk to her home. Upon arrival at her home, a hot drink appeared from nowhere as did an eager labrador retriever puppy who just as enthusiastically ran away once the mandatory pat had been rendered and it had left its nose print on the camera. I always avoided asking her to answer a specific question or problem until she arrived at her home and settled in.

But here's the thing . . . she participated, and she did it well. She had prepared and even while navigating her route home she jumped in and answered questions particularly when other students were struggling.

One evening while on the homeward-bound train, as she was answering a question about the use and inappropriate use of discovered documents in civil litigation, I noticed a well-dressed young man sitting next to her and listening in on the class, although he was pretending not to. When the student answered, citing the correct Supreme Court Rules and relevant case law, I noticed him nodding with approval and smiling.

In the twilight of the evening, after the class had finished, I concluded that the young chap must have been a lawyer on his way home too (although a little too early for your average city-based lawyer, I mused). But I also wondered if they ever met up and had a chat about the law and in particular civil procedure. Or was it a missed opportunity to make a new friend? I wonder. ■

David Spencer

DO YOU EVER COME ACROSS AMUSING OR NOTEWORTHY INCIDENTS RELATED TO THE LAW?

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ADOBESTOCK

NEUROPLASTICITY: TRAIN YOUR BRAIN FOR CALMNESS

IT CAN TAKE UP TO SIX WEEKS TO FORM NEW BRAIN HABITS AND BUILD STRONGER NEURAL PATHWAYS.

The arrival of COVID-19 in our lives, complete with lockdowns, working from home and home-schooling has made it harder than ever to find calmness in our lives. This year will no doubt bring more changes including balancing office-based work with working from home, frequent changes to COVID-19 rules and the need to manage ourselves and our families during variant outbreaks.

Some people are better at seeking calm moments in their lives. Factors that influence this include personality style, upbringing, stage of life and previous experiences. A major factor in achieving calm that is often ignored is neuroplasticity, the notion that our brains are flexible and change throughout our lives. Recent studies using neuroimaging have indicated that our brains may be far more "plastic" than previously thought. The good news is that we can consciously control this process to train ourselves in achieving greater calmness.

A helpful analogy is to compare the way your brain works to a power station, where neural pathways light up when you react to stimuli in the environment. The more you use a particular pathway, the thicker and stronger it becomes. It also becomes easier for electrochemical signals to travel on these well-worn paths. When we make a conscious effort to respond to the environment in a different way, new pathways are formed and our brain changes in response to these new habits. Eventually the new way of responding becomes second nature. This process is like exercising a new muscle.

We can think of our brains as having three different functioning modes. In green mode we feel comfortable and safe, and stress hormones are low. We feel calm and in control and can experience non-judgmental thinking. Red mode is the opposite. Here we feel threatened and stressed. The fight or flight response is triggered, and we often adopt narrow viewpoints and feel disconnected from others. Orange mode involves a state of striving for goals. Here you plan and think about your goals and set about achieving them. These modes are on a continuum and we can move quickly from one to the other. There is nothing wrong with any of the modes and it is human nature to experience all three over the course of a day. The point of understanding this is not to block or eradicate any of the modes, it is to have more control over the state our brains are in.

Most us spend our day going back and forth between orange (achieving) and red (stress) modes. Being aware and present (green mode) is often reserved for when we take time out after work or when we are on holidays. However, research suggests that this is not the optimal way to live our lives. When doing green mode activities such as being present in the moment, our brains are working in the background to process and store information and engage in high level thinking, including creative problem solving. An example is going to sleep with a problem and realising on waking that you have found a solution. Another is taking a break if you are stuck on a problem. When you return you can often see the problem from a different perspective and find a solution. This is utilising green mode to solve problems and work effectively from a neuropsychological perspective. We are likely to report feeling more contented, be more productive and experience improved relationships in green mode.

So how can we train ourselves to activate our brains in green mode, rather than vacillating between red and orange mode? The first step is to identify what situations activate safe mode. Examples could be exercising, connecting with others, gardening or playing music. List these activities and consciously schedule them into your day. This creates brain breaks from being in red or orange mode and strengthens these positive neural pathways, making it easier to switch to safe mode.

Next make a list of the things that activate red mode. Examples include conflicts about household tasks, rushing to complete work assignments or arguing. Consider reducing these activities so that you are spending less time in stress mode.

This is not about eliminating all stress from our lives. The aim is to have more control over your mind and responses. Mindfulness practices including formal meditation, breathing exercises and activities that encourage us to pay attention to the present moment without judgment also help train our brains to be in green (safe) mode. Connecting with others, spending time in nature and exercising are other examples. Training your mind to strengthen neural pathways for a calm mind is the path to optimal functioning both psychologically and physically. While it can take up to six weeks to form new brain habits, the investment will be worth the effort. ■

SNAPSHOT

- COVID-19 has brought many challenges requiring us to be more flexible and to seek calm where we can.
- While some people find it easy to seek calmness in their lives, many of us spend much of our day in stress mode or "achieving" mode.
- Training our brains to be calmer involves identifying and consciously practising activities that build stronger neural pathways to a calmer mind.

Adapted from *Renew your mind: How to rewire your brain for a happier, healthier life*, Chantal Hofstee, Exisle Publishing (2018).

Megan Fulford is LIV wellbeing manager.

ADOBE STOCK

LAWYER'S THIRST FOR EXPERIENCE PAYS OFF

Lawyer and brewer Jacob Uljans, right, with his brother Josh and Karl van Buuren

MOON DOG BREWING STARTED AS AN AFTER-HOURS PROJECT WHEN JACOB ULJANS WAS A TRAINEE LAWYER.
BY KARIN DERKLEY

Jacob Uljans has been a brewer longer than he has been a lawyer. The Hall & Wilcox partner, along with his brother Josh and their friend Karl van Buuren, had been home brewing for some years before setting up Moon Dog Brewery not long after he joined the firm as a trainee lawyer in 2009.

"We'd been interested in brewing for a while and we'd noticed a growing trend overseas for experimental beer styles, with big flavours, barrel ageing of beers and sour beers," Mr Uljans says. "There were great beers being brewed here, but they tended to be more traditional styles. We thought we could bring some of that excitement and variety into the Australian market."

With no professional brewing experience, let alone experience in running a business, the three set up their first brewery, cobbled together from decommissioned farming equipment, in a small warehouse in Abbotsford.

"I'd finish up in the office, head out to Abbotsford at 7pm and then spend the night bottling beer until three o'clock in the morning," Mr Uljans says. "Then after a week at work I'd head off to the brewery at 6am on Saturday, planning to be finished by 2pm but it'd be more like 10pm, because invariably things would go wrong and there would be delays."

"It was very hands on for the three of us. We were basically handling every aspect of the business – procuring supplies, getting permits to operate the business, setting up the equipment, putting together the brewhouse, ordering tanks from overseas, handling sales, doing the deliveries, doing the financials, marketing."

The initial approach was to do smallish one-off brews of 1500 to 1800 litres, which were then put into a barrel to age, or added with different yeast or bacteria strains to develop sour flavours. The beers were labelled with quirky names like Breaker of Chains, Black Lung, and Drew Berrymore. "And then we'd move on to the next beer. It was constant experimentation. We were always looking at the next beer and coming up with new styles and crazy names."

The gamble paid off, and within a couple of years the three opened a bar at the Abbotsford premises, expanded into the premises next door, and then into another site next door to that. Last year the brewery expanded yet again into a mega-site in Preston, the 700-seat Moon Dog World venue, and now employs more than 200 staff across the brewery operation. The brewery was also one of the first in Australia to introduce seltzer, which it now sells more of than any one particular beer.

Mr Uljans says his legal experience has stood him in good stead in the business, making him effectively its in-house lawyer. "I'm a dispute practitioner by trade. So I'm pretty comfortable looking over contracts and dealing with disputes when they come up. I've handled some of the regulatory side of things as well."

But the flipside is what the experience of running a brewery has added to his practice as a lawyer, he says. "That has really benefited from the experience of starting and going through that journey with Moon Dog. I've got a lot of empathy for people who start up and run businesses and I know what it's like dealing with professional services providers and I think I've learnt a lot about the way I can improve my practice and my dealings with my clients, as a result of having been on the other side of the fence."

These days his brother Josh and Karl van Buuren are running the business full-time, while he has pulled back to focus on its strategic operations in his capacity as a director. "I still take a very active interest in the business, but I'm looking at new opportunities from a high level rather than the day-to-day. That balance works well for me in that I'm still able to get the enjoyment of having some involvement in the brewery business, and fit that into running a busy legal practice as well."

Part of that has been finessing the original approach of never brewing the same beer twice. "That can get quite difficult after 10 years. And we also found that people want to be able to come back and drink the same beers, because they've come to love them. But we're still keeping that spirit of experimenting and keeping the weird and wonderful beers coming out that we've been known for from where we started." ■

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