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LAW INSTITUTE JOURNAL

MAY 2022

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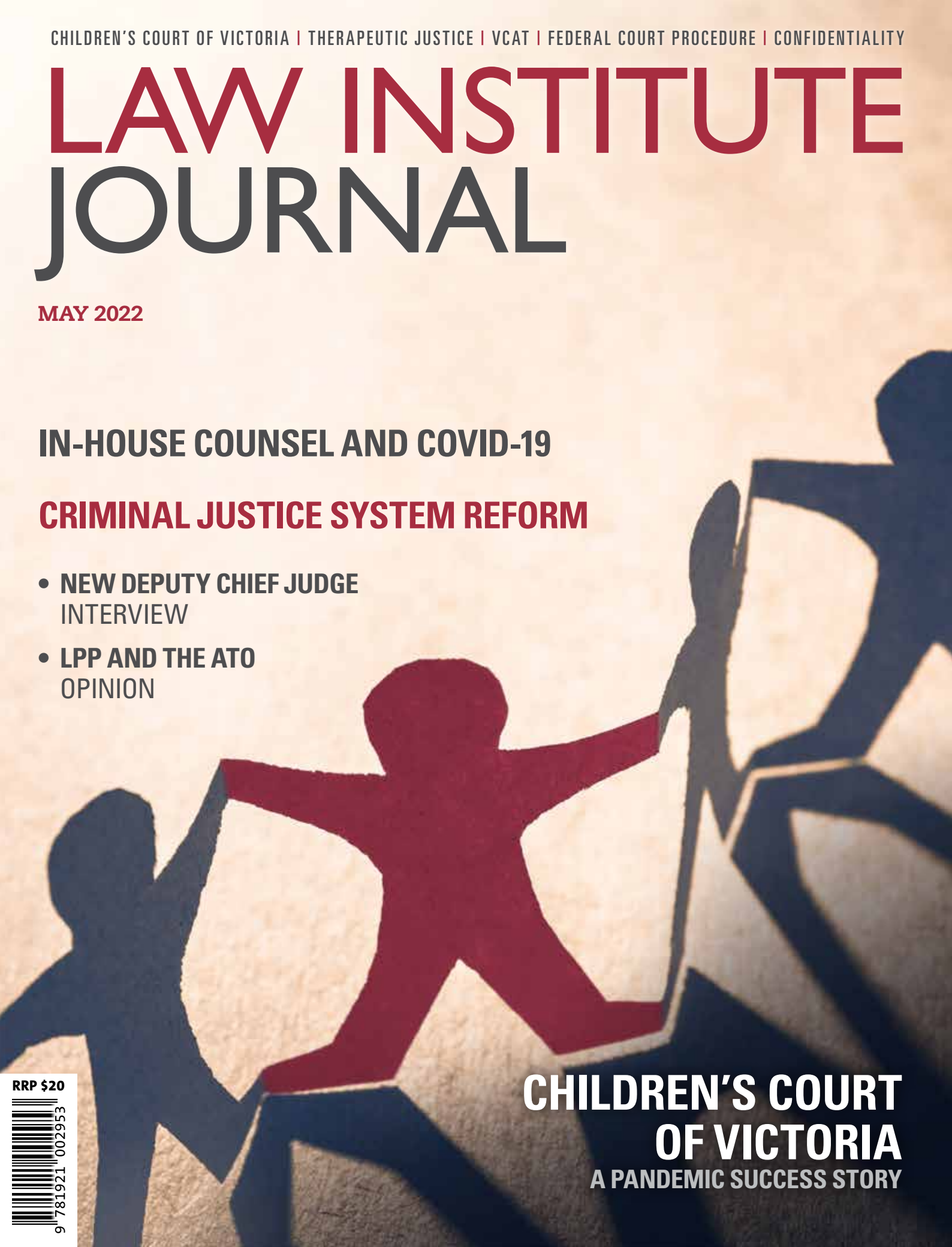

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Contents

CHILDREN'S COURT OF VICTORIA

A pandemic success story.

By Magistrate Francis Zemljak

PAGE 18

In-house counsel and COVID-19

Three corporate counsel interviewed.

By Karin Derkley

PAGE 11

New County Court role

Meet Deputy Chief Judge Meryl Sexton.

By Karin Derkley

PAGE 14

Call for criminal justice reform

Major changes recommended.

By Karin Derkley

PAGE 16

Opinion: LPP and the ATO

By Eu-Jin Teo

PAGE 17

ADOBE STOCK

Contents

May 2022

FEATURES

CHILDREN'S COURT OF VICTORIA

18 Rising to the challenge
A small, focused and passionate legal community worked together to provide professional education during the COVID-19 pandemic.
By Magistrate Francis Zemljak

THERAPEUTIC JUSTICE

22 Every step of the way
The County Court Drug and Alcohol Treatment Court is entering the final months of a 12-month pilot. The therapeutic approach guides the client on a rehabilitation/justice journey, supported by a multidisciplinary team comprising the judge, clinical adviser, case manager, counsellor, OPP lawyer and VLA lawyer.
By Naomi Newbound

VCAT

26 Filling the jurisdictional vacuum
Amendments to the *VCAT Act* give Victorian courts jurisdiction to determine matters VCAT is precluded from hearing because they involve federal subject matter.
By Roland Müller

FEDERAL COURT PROCEDURE

30 Creating efficiencies
It has now been five years since the Federal Court established Concise Statements as an orthodox procedure.
By Matthew Peckham

CONFIDENTIALITY

34 A duty of confidence
There are legal and ethical rules applicable to the use of information barriers to ensure they are effective in protecting confidential information.
By Michael Dolan and Kirin Mathews

NEWS

PRACTICE

11 Lawyers at home in-house
Lawyering outside a law firm has advantages despite the challenges of the past two years.
By Karin Derkley

JUDICIARY

14 New role at County Court
Deputy Chief Judge Meryl Sexton has taken on the Court's administrative and pandemic backlog with gusto.
By Karin Derkley

ADVOCACY

16 Call for criminal justice reform
Major changes to Victoria's criminal justice system have been recommended following a 2021 inquiry.
By Karin Derkley

OPINION

17 Privilege and the majesty of the law
ATO officers who seek to pressure practitioners in relation to claims of legal professional privilege may expose themselves to culpability.
By Eu-Jin Teo

EVERY ISSUE

4 Contributors
6 From the president
8 Unsolicited

COURTS & PARLIAMENT

38 High Court judgments
40 Federal Court judgments
42 Family law judgments
44 Supreme Court judgments
46 Criminal law judgments
48 Legislation update
50 Practice notes

REVIEWS

53 Online
54 Books
56 LIV Library

PRACTICE

58 Ethics Committee rulings
59 Ethics
60 LPLC
61 Victorian law reform
62 Property
63 Technology
64 Technophile
65 Gender
66 Pro bono
67 Diversity
68 Practice management
69 LIV accredited specialists

CAREER

70 Admissions

LIV

73 Council

CLASSIFIEDS

82 Crossword

LIVING LAW

83 Inside stories
85 Food/Wine/Coffee
86 With all due respect
87 Health and wellbeing
88 Beyond the law

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PAGE 34

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PAGE 34

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Reflections on working in-house

Many lawyers find satisfaction and rewarding careers as a part of a company rather than a law firm.

Just over 20 years ago I started work as in-house legal counsel for an Anglo-Norwegian engineering and construction firm, based in Melbourne. With little post-qualification experience and a mere six-months in-house at another company, I had just enough understanding of the industry to be familiar with a handful of acronyms – but not much more.

I had little idea what my new regional in-house role would entail or where it would take me. Nor could I know how much I would enjoy the role and the breadth of experience and perspective it would eventually afford me. As it turned out, less than two years later, I relocated to Singapore, where I lived and worked for three years.

I had no idea of the support networks available to lawyers working in-house and was not, at the time, connected with the LIV. I wish I had been. Although the work was challenging and exciting, it was often lonely. As the sole lawyer in the company, I was usually on my own, making decisions far outside my comfort zone. Though I learned to be self-sufficient, it took me a while to gain the confidence of various groups within the organisation and to overcome the reputation as the legal "killjoy" that stood between commercial success and contract acquisition.

It was exciting and stimulating work. The engineers were smart, hardworking, optimistic, earnest and keen to win and execute projects. Oil and gas tenders were competitive. I was required to assist, while reminding company employees to limit our exposure to liquidated damages; to provide adequately for future variation orders; to ensure overall liability caps; and to insist on robust mediation and arbitration clauses. In balance with the thrill of winning work was the need to conceive of all the things that might go wrong.

And sometimes things went wrong. Early in the job, I was required to fly to Mumbai to assist a project manager in his negotiations with a client. The client was requiring a significant change to our scope of work, while refusing to acknowledge it as a change, exposing us potentially to high additional costs. Negotiations continued for two full days, with barely any breaks, while we tried to reason with five ill-tempered, chain-smoking executives in an airless room in a neon-lit office. But we got there in the end to the satisfaction of both parties.

A few years later, on a project that fell apart in Thailand, I got to see how international arbitration clauses work in practice. I also saw, up-close, the benefit and value of a true and solid partnership with external lawyers, as they strove to understand the business and culture of the affected organisation, as well as the intricacies of the legal dispute and our position.

Many lawyers chart a path for themselves outside the traditional employment in private law firms. Like me, they find satisfaction and rewarding careers as a part of a company, assisting, advising and counselling those directly involved in the fortunes of the business. They advise on risk and strategy, and a range of other issues. And while, from time to time, they may yearn for the structure, support and collegiality of legal practice, they are blissfully free of the billable hours burden.

This month's *LIJ* shines a spotlight on in-house legal practice, from the perspective of three practitioners working in different sectors (see News, p11). Perhaps you wish to join them? I recommend you spend some time building a detailed understanding of the sector or industry you hope to enter – an understanding beyond the strict legal or regulatory environment. Look to gain an appreciation of an organisation's culture, including the values it espouses and the relationships it fosters within and outside its walls. Seek out and invest in networks of support with other in-house lawyers and practitioners and don't be afraid to ask for help.

Expect, as in-house counsel, to operate from time to time outside your comfort zone. Be ready to incorporate a level of commercial risk in the advice that you provide. Remain open to new experiences and perspectives. Expect to forge strong and enduring relationships within your chosen organisation and among the many external parties with whom you will inevitably engage.

But mostly, enjoy it. I did. ■

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

DEVER'S LIST

WELCOME THE FOLLOWING

WE PROUDLY WELCOME G. TONY PAGONE AM QC TO DEVER'S LIST.

Tony was admitted in Victoria as a legal practitioner in 1980, signing the roll of counsel in 1985, being appointed Queen's Counsel for Victoria in 1996.
He was appointed to the Supreme Court in 2001, serving as a Judge of that court until June 2002 when he took up the position of special counsel to the Commissioner of Taxation until December 2003. Tony was appointed to the Supreme Court again in May 2007, and was judge in charge of the Commercial Court. He was then appointed and served as a judge of the Federal Court of Australia from 21 June 2013 until 31 March 2018. Tony was appointed as Commissioner to the Royal Commission into Aged Care Quality and Safety on 13 September 2019.
In 2022 he was appointed as a Member of the Order of Australia (AM) in the 2022 Australia Day Honours for "significant service to the law, to the judiciary, and to professional associations".
Tony returned to the Victorian Bar some years ago where he has a wide practice specialising in taxation law, commercial law, administrative law, constitution law, public and human rights law.

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Preparing graduates for practice

I wanted to congratulate you on the brilliant article "Eleven things they don't teach in law school" by Anthony Burke (March 2022 *LIJ*, p32) that I intend to share with my students. I teach civil procedure, dispute resolution and ethics at the Thomas More Law School at the Australian Catholic University (ACU) and I have recently partnered with ACU's career and employability department to provide some careers advice to students who are either in their penultimate or final year of law school.

The first point about how to get in the door contains sage advice on getting a job which many law students do not appreciate at any time during their studies. The section on how to be a real lawyer, is what I will be speaking about in week 2 of my ethics subject, especially on drafting retainers, and in my dispute resolution elective (also running this semester) I will be quoting you on the lack of decent negotiating skills and, of course, your advice on how to negotiate.

I thought the section on how to say no was brilliant, and again the topic is beyond the comprehension of many law students (notwithstanding that I cover it thoroughly under our duty of competence in my ethics subject). I am also at one with your notion of leaving a legacy which accords with the notion of a profession.

I enjoyed the overtones of the article that the Priestley 11 may have had its day. A former academic colleague, Professor Simon Rice at the University of Sydney, has written about the limitations of the Priestley 11 and there is a concern among some in the profession that the current concept of the required academic areas of knowledge needs to be revisited along with the incorporation of some of the elements of a legal education that prepares graduates for practice that the article raised. While law schools and PLT providers try to equip students with these skills, together with a thorough grounding of the doctrinal rules of law, the curriculum is full simply ensuring that each student's legal education meets the respective accreditation requirements. It is time to think more creatively about what legal practice entails and how we equip our students for a life in the law.

Thank you for an excellent article that speaks a great many truths. ■

David Spencer, solicitor and senior lecturer, ACU

LETTERS TO THE EDITOR

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LAWYERS AT HOME IN-HOUSE

LAWYERING OUTSIDE A LAW FIRM HAS ADVANTAGES DESPITE THE CHALLENGES OF THE PAST TWO YEARS. **BY KARIN DERKLEY**

Corporate counsel work outside the collegiality of a law firm and deal with myriad issues specific to their organisation. COVID-19 ramped up the juggle, with in-house lawyers often working long hours to help deal with surges in demand and repeatedly revising health and safety rules and policies for workforces as public health requirements evolved. Some started new roles without meeting colleagues in-person for many months.

The *LIJ* spoke to three in-house lawyers – in the private sector, not-for-profit, and a government agency – about their experience over the past couple of years. All were already enjoying flexible working arrangements before the pandemic hit, so adapted quickly to working from home full time. But being part of a small legal team around the board table has been uniquely demanding.

Kate Sherburn – head of legal at Who Gives a Crap

At the beginning of the 2020 COVID-19 lockdown, "legal beagle" at toilet paper manufacturer Who Gives a Crap Kate Sherburn remembers seeing images of supermarket shelves empty of toilet rolls. "Someone said, oh that wouldn't happen to us. And then three days later we sold out."

For the next two years, every time a lockdown was announced, orders would come flooding in. "It was crazy," says Ms Sherburn. "Why people thought toilet paper was the must-have item during a pandemic I'm still not entirely sure."

It was a chaotic time for the business, she says. "No one knew what this thing was, and how long it was going to affect us, and what the impact would be. And all the while we're trying to deal with supply chain issues and production."

One of the biggest challenges was making sure staff weren't burnt out in the process. "People were so busy and no one was taking any leave." By September 2020 the company decided to close down the office to half the staff, one week at a time, just to force people to take leave. "The overwhelming response from people when they got back was that they hadn't realised how much they needed that break."

Who Gives a Crap isn't just a toilet paper manufacturer. The company was set up in 2012 by Simon Griffiths, Danny Alexander and Jehan Ratnatunga as a way of funding a long-term project to give everyone in the world access to a toilet and to fresh water. Half the company's profits are donated to charities including WaterAid, WaterSHED, and Shining Hope for Communities, to which the company had donated more than $7.8 million by 2021.

Ms Sherburn came across the company when a friend of a friend working there wanted to pick her brain to put together a job ad for an in-house lawyer. At the time she was working in-house for Chisholm TAFE, after seven years at Deacons (later Norton Rose Fulbright). After getting a company backgrounder from the friend's friend, she was intrigued. "I did not have a great passion for toilet paper in particular. But the passion this person had for the business and goal they were working towards just made me feel I wanted to be part of that too."

It was a big leap going from a big law firm and then a big educational institution to what was essentially a start-up that had just 50 employees at the time (it now has more than 200 employees across the world). "Everything is done differently and there is such a different approach to risk."

When she arrived the lack of processes and protocols and approach to risk took some getting used to. "But everyone was really open to the fact that we did need to have a bit more of a process in place". The more freewheeling work environment empowered her to be proactive with advice about how to improve the business, as well as head off problems before they blew up.

"It's not just about what the risks are or what the problems are, but about having a conversation and looking at other ways things can be done."

With many of its employees already well set up for remote working – one of the co-founders is based in the US, and there is a hub there as well as in the Philippines – the company was well set up for lockdown. "The biggest loss was the social connection." The company had regular "hub hangs" via Zoom, and its Slack channels ran hot on everything from parenting and home-schooling issues to sharing dog pics.

"It meant that when we did get to catch up with colleagues, some of whom we'd never met in person before, you felt you already knew them." One of those was a new member of the legal team, who came on board during one of the lockdowns and has never been into the office. Remote working has meant some members of the Melbourne team have moved to regional Victoria, to NSW and one has moved to Bali. "There's no expectation to go into the office at all."

Sari Baird – general counsel and company secretary at Oxfam Australia

Working from her home office on a sheep farm near Ballarat, Sari Baird is having another busy day as in-house counsel at international aid organisation Oxfam. With her team of two other lawyers, she has been working on papers for two board meetings and preparing for a meeting with the Australian Charities and Not-for-profits Commission to discuss strategic issues facing the sector in the year ahead. There's organising for the upcoming Oxfam Comedy Gala, with special guests Corrs Chambers Westgarth (Corrs) which has done pro bono work for the international aid organisation for 35 years now, and risk management for the Oxfam Trailwalker which was heading off from Melbourne that weekend. Then there's work with Oxfam's international office in Sri Lanka, which is managing a social enterprise there. Something like that is not always black letter law," she says. "A lot of the work we do is about enabling and empowering our colleagues and partners in the international space to meet standards that might not necessarily be obvious to them."

Ms Baird started out at Freehills, and first went in-house with telecommunication company Neighbourhood Cable, which became iiNet. She'd been involved with not-for-profits since university days, but first recognised the value of her legal skills in the sector when she became a board member of the Art Gallery of Ballarat. An opportunity to work at the Australian Conservation Foundation gave her the chance to combine her professional skills with her values in a purposeful way. Seven years ago, after a stint with Justice Connect, she started at Oxfam.

"An exciting part of my work [at Oxfam] is connecting funds with causes," she says. "Because we are stewarding public funds through DFAT-funded aid agreements and from the public who make donations, we have obligations under the requirements of charity and state-based fundraising laws. It's a lot about making sure that systems and processes are in place to meet our Australian integrity standards for international funding."

COVID-19 has thrown several curve balls at Oxfam. Events like the Comedy Festival Gala and the Trailwalker that are so

important to the organisation's fundraising have been subject to constantly changing restrictions over the past two years. There have been questions to consider over who the public health orders and vaccination policies apply to – event participants, suppliers, volunteers.

The difference between being a lawyer in a law firm giving advice, and being in-house "is saying how do I operationalise that advice on a practical level at an event?" she says.

"For a legal team, that means making enough time in our very busy schedule of work to be ready for rebriefing the project teams in the agency and in the operational team. You need to be prepared for the advice that we gave last week to be updated again next month, or even next week."

Those requirements have come on top of what, even before the pandemic, were hundreds of requests for legal advice a year. "It can be overwhelming," she says. "Even though we're not billing in six-minute units, we have to make sure we're dealing with the business critical, the strategic, the time critical and the legal questions that count."

Beyond the in-house lawyers, the team draws on a paralegal service provided by a law student agency, and an intern from the public interest law course at Melbourne Law School, along with the pro bono help from Corrs. Corrs also provides a secondee, and a secondee from Johnson Winter Slattery recently commenced with the team.

"It's important to be able to rely on our external lawyers for advice when we need someone who has a broader view of what's happening elsewhere," Ms Baird says.

Out there on her sheep farm, Ms Baird says the move to remote working has just meant she has been doing less commuting on the train into Melbourne. Conscious of greenhouse emissions, Oxfam was quick to embrace working in the digital environment, even before the pandemic, she says. "The only change I noticed was that I was no longer the one person in the room who needed to be connected remotely."

Emma Gale – solicitor, Transport Accident Commission

It was in the thick of the 2020 lockdown while she was on maternity leave that Emma Gale applied for a job as a solicitor with the Transport Accident Commission (TAC). "I did the interviews, which also involved some written tasks, got the job and was inducted, all online." It wasn't until the end of the year that she finally got to meet her manager and her legal assistant and the rest of her team. "It was so nice meeting people in person."

Ms Gale had already relocated to Geelong, where the TAC is based, and worked with the National Disability Insurance Agency, after five years with Melbourne CBD-based Clarke Legal which specialised in Commonwealth workers compensation.

"The big difference [between working in a private firm and working in-house] was not having to spend all that admin time doing timesheets and billables. That frees up a lot of your day because you can concentrate on the work rather than trying to record what you're doing."

Another benefit was the family friendly policies. "Maternity leave here is really generous, and the work is great in terms of flexibility. People understand if you have to work from home if one of your kids is sick."

She was also impressed at how sophisticated her business clients are within the organisation. "A lot of our common law clients have been at the TAC for 20 or 30 years. They know it back to front, and their instructions are really comprehensive because they've run these matters for so long. They really know what they're doing.

"From a lawyer's perspective, it's great to have a client who understands why you're making recommendations and can talk strategy with you. If you have clients that know the business inside out, that's really helpful. Sometimes they can raise things that you haven't considered."

The legal team at TAC is the size of a medium-sized law firm, Ms Gale says. "And because it's been around so long, all the processes and practices and procedures are there, and they have a really good management system."

Matters vary widely, across dispute matters, VCAT matters, originating motions, and damages proceedings. "They tend to mix it up so that we get experience in all of the different jurisdictions and all the different types of matters. We have mediations for VCAT and disputes, we have conferences with the clients and then also with the other side as well. I'm never bored."

Working as an in-house lawyer requires good communication skills, something Ms Gale says became more of a challenge during lockdown when communicating online. "I had to make sure I was really working to develop a rapport with clients because we weren't in person."

It also helps to be excited about the business, "because ultimately you're a representative of the organisation. With TAC, I feel like it's a fabulous scheme and I'm really passionate about all of the different things it does aside from provide compensation . . . like educating people about road safety."

Although Ms Gale says she fell easily into the personal injury area in the boutique firm she started with, she says it can be worthwhile for younger lawyers to start with a larger more generalist firm to give them experience across a range of areas first. "It can be good to meet different people and work on a lot of different matters and different types of law so you can shop around and see what you like doing."

With the easing of restrictions, Ms Gale says she is planning to go back into the office two to three days a week. "It's starting to be more encouraged now, but they're also very flexible, which is obviously one of the main benefits of working in a government agency." ■

NEW ROLE AT COUNTY COURT

DEPUTY CHIEF JUDGE MERYL SEXTON HAS TAKEN ON THE COURT'S ADMINISTRATIVE AND PANDEMIC BACKLOG WITH GUSTO.

BY KARIN DERKLEY

Deputy Chief Judge Meryl Sexton

New County Court Deputy Chief Judge Meryl Sexton had just 10 days as deputy before she had to step into the shoes of Chief Judge Peter Kidd after he went on a well-deserved period of annual leave. Among her tasks in her acting role has been attending meetings with the Courts Council, the governing body of Court Services Victoria, as well as the Judicial Commission of Victoria and the board of the Judicial College of Victoria.

It is partly the extra workload involved in attending those various bodies that prompted the decision to bring in a new position of deputy. "It became increasingly obvious that the administrative burden on the Chief Judge had been starting to ramp up," Judge Sexton says.

That burden was exacerbated by the pandemic and the effect that had on the Court backlog, particularly in the criminal division. After the Chief Judge requested help to clear that backlog, the government increased the number of judges on the bench by appointing early replacements for retiring judges. Alongside the additional appointments of new judicial registrars, the total number of judicial officers has increased from about 70 to 90 over the past few years. "That's a huge increase in numbers, so the Chief Judge felt having a deputy would help to spread the workload." The government agreed.

Judge Sexton was among several candidates considered for the position. "And I was the lucky one." She was of course extraordinarily experienced, having spent the past 20 years as a judge in the County Court after six years as Crown Prosecutor and 10 years as a barrister before that. In her first couple of years as a County Court judge, she presided over a range of jurisdictions. "Back then, as a new judge you had to be able to do everything that the Court did as a general jurisdiction. I was in the practice court, I did civil, I did a bit of crime, I did workers compensation. So that gave me a good background coming into this role across all divisions, not just the criminal division."

When former Chief Judge Michael Rozenes came in, judges were able to specialise and Judge Sexton moved into the Criminal Division, which in the County Court meant mostly sex offences. In 2005, in response to the Victorian Law Reform Commission (VLRC) report into how sexual offence cases were being handled by the criminal justice system, the then Chief Judge decided to set up a sex offences list and asked her to be its inaugural head. "So that was the beginning of my administrative role in this Court way back in 2005."

Over her eight years "across two patches" in that role, she was involved in a "massive amount of law reform that came out of the VLRC report, in terms of being consulted on policy work and then, once the government decided on policy, on the implementation. And I've continued on with that right through."

That reform role continued under Chief Judge Kidd and under the VLRC's new sexual offences report that came out last year. Among the reforms she has assisted with, Judge Sexton is particularly proud of the intermediary program that provides support for vulnerable witnesses, being children under 18 and people with a cognitive impairment. "It wasn't clearly understood by some on the bench and in the profession that victims and witnesses weren't understanding questions that were being asked of them. They'd just say yes, or I don't know, or I don't remember, which is a real key to the fact they they're not understanding."

The program provides for a qualified intermediary, (a psychologist, social worker, speech pathologist or occupational therapist), to work with counsel to help them understand how to ask questions to elicit more reliable evidence. "It's not good enough anymore to say witnesses are unreliable. It's counsel's job to ask the question in a way that will be understood." In many cases that can be achieved by limiting each question to just one point, she says.

When COVID-19 hit, she became deputy chair of the Court's COVID-19 task force, tasked with helping adapt the Court's processes to deal with the new reality. "The Court had to adapt at the speed of light," she says. With its reputation for innovation, the Court had a good technology base to deal with court matters remotely. "We were in the process of being upgraded before COVID-19. So we were lucky we had a base that we were able to work from and we were able to ramp up those technological upgrades to assist us when we were doing all our work remotely."

She has nothing but praise for the legal profession's ability to adapt during those days. "They came on board, they were really open to the process, they were committed to their clients getting their cases on if they could. Everybody was very flexible, and we just got through a power of work."

When restrictions eased up briefly after a lull in COVID-19 case numbers in November 2020, the Court brought in adaptations to try to make criminal jury trials possible, including redesigning jury boxes to accommodate social distancing requirements. In January, criminal trials resumed after the Christmas break, with the legally supported requirement that all jurors be double-vaccinated, supplemented by the requirement that anyone coming into the Court is now regularly tested with rapid antigen tests (RATs). With those safeguards in place, the feedback from jurors is that they have felt comfortable coming into court.

There have been just 12 instances, out of the approximately 127 empanelments in 2022 to date, when a jury had to be discharged because of a juror or trial participant becoming positive or a close contact.

For solicitors, barristers, prosecutors and other practitioners who regularly engage with the Court, the Court worked with their respective representatives to minimise the disruption that the new testing requirements involved by providing free RATs they can use to test at home before coming into Court. "That has the benefit of convenience for the practitioners," she says. "So that has been, we hope, a win-win."

It is these kinds of seemingly small changes that make the operation of the Court more efficient and more equitable for its users, and her key role in implementing those improvements has helped in her new role. "It's all about assisting the Chief Judge as a team to run the Court efficiently, because the efficient administration of justice is really what we're all about."

Those weeks stepping into the Chief's shoes were a good segue into the role, she says. "It's been a tremendous way to learn what the job's going to involve. And we'll have a really good discussion about how we're going to work in future."

After 20 years on the bench she says she is delighted to be in the position of being able to take on something new. She will still be presiding over some cases, but not on a regular basis. "I was by no means bored on the bench, but what a privilege it is that I can take on this role. I just feel very lucky." ■

On diversity

Judge Sexton was appointed to the Court in 2001 when then-Attorney General Rob Hulls had a policy of appointing women to half the vacancies. "That changed the face of the Court right back then, and we've had incredible diversity ongoing since then." The current proportion of women on the Court is 45.7 per cent, with leadership roles spread evenly across the genders at various times. "It's now almost not an issue," she says.

What the Court is now focused on is increasing other forms of diversity, and has recently launched a diversity and community relations committee. "We recognise that the Court needs to reflect the community that it sits in and that it represents as both a workplace and as a site of justice."

On sexual harassment in the courts

The Szoke Review of Sexual Harassment in Victorian Courts and VCAT has set in train a raft of changes in the courts generally. "We as leaders acknowledge that this [sexual harassment in the courts] is a problem, that it wasn't necessarily well addressed in the past, and that we need to do better," Judge Sexton says. "It's spoken about now. We don't just say, we're not going to worry about until it does come up. It's absolutely out there in the open."

The Courts Council in conjunction with the Judicial College has established policies and induction materials emphasising the importance of a safe and respectful workplace, and is rolling out workshops later this year on what that constitutes, and what options there are for reporting incidents. "We're also aware of the need for different ways of reporting, because some people may not want to make a complaint, but want to make sure it's an issue that's addressed."

Reluctance to speak up at the time of an incident is something Judge Sexton says she is aware of from her work in the sex offences area. "There are all sorts of reasons why people will not necessarily say immediately if something happens to them of that nature. So we need to factor that in."

On wellbeing

"Judicial wellbeing has been a focus of this Court for many, many years," Judge Sexton says. She says she takes advantage where appropriate of professional counselling provided by the Court, and the support of colleagues has been invaluable.

She played hockey with her Monash University team for many years, "until bad knees caught up with me". More recently she has gone back to another youthful passion, taking up ballet lessons with the Australian Ballet. "You won't see me on the stage of the State Theatre anytime soon, but it's such a great outlet. I can go there after a really tough day in Court and I just get completely refreshed."

CALL FOR CRIMINAL JUSTICE REFORM

MAJOR CHANGES TO VICTORIA'S CRIMINAL JUSTICE SYSTEM HAVE BEEN RECOMMENDED FOLLOWING A 2021 INQUIRY.
BY KARIN DERKLEY

Children should not be imprisoned, and the Bail Act should be reviewed, says an inquiry report extensively informed by LIV submissions that was tabled in Parliament in March.

The report cited the LIV, Victoria Legal Aid, Smart Justice for Young People, the Uniting Church of Australia and others who argued that the minimum age of criminal responsibility should be raised from 10 to 14 years, and that affected children should be helped to address these behaviours through a health and welfare response.

LIV president Tania Wolff told public hearings for the Inquiry into Victoria's Criminal Justice System held in 2021 that 10-year-olds who were imprisoned were likely to continue to return to prison as adults, creating damage along the way.

Her concerns were echoed by VLA, which told the inquiry that the younger a child is at their first sentence "the more likely they are to reoffend generally, reoffend more frequently, reoffend violently, continue offending and be sentenced to an adult sentence of imprisonment before their 22nd birthday".

Smart Justice for Young People said the practice risked trapping children within the criminal justice system who would otherwise grow out of their criminal behaviour. "Evidence shows the younger a child is when they have their first contact with the criminal justice system, the higher the chance of future offending and the more likely they are to have long term involvement in crime."

Raising the age of criminal responsibility was one of 100 recommendations in the report that addressed crime prevention and early intervention, overrepresentation in the criminal justice system, policing, victims of crime, the bail and remand system, sentencing, prisons, parole and the judicial system.

Other major recommendations were made around the bail and remand system, including the repeal of the reverse onus provision and the presumption in favour of bail.

LIV Criminal Law Committee co-chair Mel Walker was cited in the report for her comments that changes to bail laws following the Bourke Street attacks in 2017 and 2018 have been the single biggest contributor to the increase in prison population.

Ms Walker acknowledged the importance of protection of the community, but warned that presumption against bail risked exacerbating the rates of reoffending still further. "Pre-trial detention increases the severity of the circumstances which underlie factors which lead to reoffending, such as a person may lose their income, they may lose their home, there is a breakdown of relationships and family support systems, there is a destabilising effect from somebody going into custody," she said in the report.

Diversion programs work effectively as mechanisms for diverting people away from the criminal justice system and connecting them with the social supports necessary to address the factors underpinning their offending, the report acknowledged.

However the decision as to whether diversion should be granted is currently up to the prosecution, which the LIV argued "places Victoria Police in a quasi-judicial position by usurping the role of the court in preventing the magistrate from considering the viability of a diversion".

Along with the Victorian Aboriginal Legal Service, the Human Rights Law Centre, community legal centres and the Office of the Public Advocate, the LIV recommended that such programs should be up to the magistrate's discretion rather than the prosecution.

The LIV provided survey data that demonstrated prosecutorial consent to diversion programs differs across cases and different regions. This data helped inform Recommendation 24 in the report which will consider whether prosecutorial consent should be replaced with a requirement for the magistrate to consider the recommendation.

The value of restorative justice was another major theme in the inquiry. The report cited the LIV's recommendation of a pilot program of restorative justice diversion to "expand non-adversarial pathways to justice pre-plea for summary offences and offences triable summarily". This would address the necessity for the criminal justice system to better respond to the needs of victims involved in criminal proceedings, the LIV noted.

Restorative justice processes are of benefit to victims as much as the accused, major provider of restorative justice programs Jesuit Social Services CEO Julie Edwards told the inquiry. "Victims' experience [of restorative justice] is that it is much more healing and respectful of their experience." For the accused, such a process may be the first time they hear the impact of their crime on another person, she said.

The inquiry committee agreed that "there is a clear need for additional mechanisms to provide non-adversarial opportunities for justice outcomes where parties consent and it is deemed appropriate by a court or restorative justice facilitator". It welcomed the Victorian government's announcement of a new victim-centred restorative justice program to commence in 2022, which will build on previous, more limited programs.

The LIV recommended expanding specialist court services to reduce the risk of re-offending. The authors of the report agreed that Victoria's specialist courts, including the Koori Courts, Assessment and Referral Court and Drug Courts, are providing a therapeutic alternative to traditional sentencing processes, and that their operation and jurisdiction should be widened. ■

PRIVILEGE AND THE MAJESTY OF THE LAW

ATO OFFICERS WHO SEEK TO PRESSURE PRACTITIONERS IN RELATION TO CLAIMS OF LEGAL PROFESSIONAL PRIVILEGE MAY EXPOSE THEMSELVES TO CULPABILITY.

EU-JIN TEO

LIJ readers hardly need be reminded of the importance of legal professional privilege. Indeed, from a review of the cases, a publication no less august than *The Laws of Australia* has observed that: "In the absence of instructions by the client to waive, it is the legal adviser's duty to claim the privilege on behalf of the client".

In recent times, however, the Australian Taxation Office (ATO) has been somewhat bellicose in its opposition to claims of legal professional privilege. The ATO insists that legal practitioners who, in its view, make unfounded privilege claims, leave themselves open to sanction for breaching their obligation to comply with the Federal Commissioner of Taxation's (Commissioner) coercive information-gathering powers in ss353-10 and 353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth) (powers which, the ATO accepts, are subject to legal professional privilege). In this regard, *The Australian Financial Review* has reported that "the ATO 'frequently pushes taxpayers, and their advisers hard, to waive LPP, or push [sic] for disclosure, in circumstances that breach that privilege, or make it difficult for the lawyers to give frank and fearless advice, on privilege issues'".

Interesting then, is s39 of the *Legal Profession Uniform Law*. Headed "Undue influence" (evocative, potentially, of generations of case law on actual undue influence), the section provides as follows:

"A person must not cause or induce or attempt to cause or induce a law practice or a legal practitioner associate of a law practice to contravene this Law, the Uniform Rules or other professional obligations. Penalty: 100 penalty units."

Section 39 (and its equivalent in non-*Uniform Law* jurisdictions) has attracted scant commentary, and is yet to be judicially considered. While the precise contours of the provision are, therefore, still to be determined, the conduct that has been described in the LIV's 12 November 2021 Draft Legal Professional Privilege Protocol public submission to the ATO (which *The Australian Financial Review* then highlighted) should, at the very least, give one pause for thought in relation to s39.

Conduct by the executive vis-à-vis s39 clearly raises broad rule of law concerns, quite apart from the general issue of Crown immunity (the *Legal Profession Uniform Law* does not purport to bind the Crown). The potential application of the section to the Crown in right of the Commonwealth raises further issues in relation to intergovernmental immunity and s109. These matters have been sketched out in a paper delivered at this year's Australasian Tax Teachers Association Conference and, for reasons of space, will not be canvassed in detail here.

Suffice to say for now, however, that it would appear to be an extraordinary anomaly if the "great unwashed" were bound by s39 . . . but a servant, agent or officer of the Crown (or other person acting on the Crown's behalf) was not so constrained, and was, therefore, free to interfere with lawyers' duties generally, and, in this instance, a duty as important as protecting legal professional privilege (which has been held by the High Court to be a fundamental right of a person, in a system that comports with the rule of law). Surely this outcome would be inimical to a stated purpose of s39, namely "to ensure that clients of law practices are adequately protected"?

Further, it could not seriously be contended that ATO officers driving on Victorian roads (even in Commonwealth cars), to compulsorily access physical premises pursuant to their powers under s353-15 of sch 1 to the *Taxation Administration Act 1953* (Cth), would not be subject to the requirements of the *Road Safety Act 1986* (Vic) and the *Road Safety Road Rules 2017* (Vic). By parity of reasoning, *mutatis mutandis*, would it not appear, therefore, that ATO officers likewise would have to abide by s39 of the *Uniform Law* when exercising their information-gathering powers under s353-10?

No necessary inconsistency would appear to exist, for s109 purposes, between s39 and ss353-10 and 353-15, as legal professional privilege already operates as a constraint on ss353-10 and 353-15 independent of the existence of s39.

While pursuing the hardly objectionable objective that the legally "correct" amount of tax be paid, it would seem therefore that well meaning but overzealous ATO officers could potentially expose themselves to criminal culpability if they seek to pressure practitioners in relation to claims of legal professional privilege, contrary to s39 and its equivalents. ■

Eu-Jin Teo is a senior lecturer at the University of Melbourne and is principal examiner for the LIV Administrative Law Accredited Specialisation Scheme.

Rising to the challenge

A SMALL, FOCUSED AND PASSIONATE LEGAL COMMUNITY WORKED TOGETHER TO PROVIDE PROFESSIONAL EDUCATION DURING THE COVID-19 PANDEMIC. BY MAGISTRATE FRANCIS ZEMLJAK

"Children and young people are the 'tomorrow' . . . Let me venture into the order of things: the future of children and young people is in the top order of priorities. The challenge is how to confront it. The priority is very, very high for judges and magistrates", the Hon Marilyn Warren, Chief Justice of Victoria at the Hon Austin Asche QC Oration in Law and Governance, Charles Darwin University, 11 October 2016.

Introduction

Each court had its own particular challenges as it dealt with the pandemic. The Children's Court of Victoria (Children's Court) has not only been successful in managing its ongoing caseload, in 2021 it finalised more outstanding matters than in any previous year. In addition, one unexpected and positive impact of the pandemic has been the flourishing online professional development opportunities for lawyers and other professionals. This article sets out that success, placing it in the context of a specialist jurisdiction with quite specific professional development needs.

An important but little understood jurisdiction

From my experience as a magistrate, with more than a decade in the jurisdiction, the work of the Children's Court is not widely understood among members of the legal profession, possibly due to the highly specialised nature of its work and the various broad ranging prohibitions against publication.

The jurisdiction of the Children's Court is perhaps better understood by regional lawyers with broad based Magistrates' Court appearance practices as they would frequently appear before local magistrates exercising the Children's Court jurisdiction. However, in the metropolitan area where there are three specialist Children's Court locations, it is generally an area of law practised by a small number of solicitor advocates and barristers who devote themselves to appearing exclusively in the jurisdiction.

Broadly speaking, the greatest proportion of the work of the Children's Court involves child protection proceedings, that is, proceedings instituted by the Department of Families Fairness

ADOBESTOCK

and Housing (Department) to secure the safety and wellbeing of children. It is hard to briefly and fairly summarise this important and challenging work but it frequently involves significant, high stakes disputes between the Department, the parents and, in many cases, legally represented children. Children are represented as of right under an instructions based model if they are 10 years of age or older, and the Children's Court, similar to the Family Court, has the ability to appoint an Independent Children's Lawyer or Best Interests Lawyer if it believes exceptional circumstances exist.

The Children's Court's child protection jurisdiction frequently involves urgent interim contests, known as submission hearings, heard as part of protection proceedings brought in response to welfare concerns that demand immediate attention and action. Submissions hearings more typically occur soon after the commencement of a departmental intervention but can occur at later stages of proceedings if placements break down or there are developments which raise questions as to the safety and welfare of children in previously sanctioned care arrangements. These hearings can be listed with little warning or opportunity for substantial preparation, with skilled advocates on both sides having to digest and analyse hundreds of pages of documents, take instructions from often distressed parties and then be in a position to argue where a child can be safely placed pending subsequent litigation. Submissions hearings can also determine the level of contact a parent or other person might have with the child as well as mandate what might be needed to protect a child and promote reunification. Subsequent proceedings, which may take some months to finalise, can be significantly impacted by the outcomes of these challenging, fast paced initial submissions hearings. In my experience, the best practitioners, when faced with a submissions hearing, are able to quickly go to the fundamental issues in dispute, prepare succinct submissions on those issues and resist the temptation to be distracted by minutiae.

As in family law proceedings, few Children's Court matters proceed to a fully contested final hearing, with most matters settling thanks to strong judicial oversight, multiple alternative dispute resolution (ADR) opportunities and the ever-present practical advice provided by lawyers on all sides. Final contested hearings, when they do take place, are frequently of several days duration, and can run for several weeks in complicated matters, with multiple lay and professional witnesses being called – professional witnesses typically being a combination of Department workers, health professionals, parenting experts and experts who have prepared forensic assessments on issues as varied as sexual assault risk assessments, paediatric injury interpretations, neuropsychological testing, alcohol or drug rehabilitation and broad parenting capacity assessments. Unlike family law proceedings, parents do not give evidence as a matter of course in Children's Court proceedings. Legal practitioners appearing in the jurisdiction need to have a solid understanding of issues as varied as parent-child attachment theory, contemporary drug rehabilitation practice and the interpretation of urine screen results.

SNAPSHOT

- A specialist court and the lawyers appearing in that court meet the challenge of providing ongoing professional education during the pandemic.
- There was a successful expansion of a legal professional education program with other professionals' continuing education needs being addressed.
- The various professionals working in the jurisdiction now have ongoing opportunities to further understand each other's roles and to work collaboratively in ensuring the best interests of Victoria's vulnerable children and their families.

The youth crime aspects of the Children's Court jurisdiction are also significant, often including the capability of finalising matters that, were the defendants adults, would be dealt with by the higher courts. There are significant similarities with criminal practice and procedure in other jurisdictions but practitioners need to have a thorough knowledge of the particular legislative provisions and jurisprudence which emphasise rehabilitation.

Finally, the Children's Court has a family violence jurisdiction, dealing with those challenging situations where intervention order proceedings might involve children and young people as applicants, affected family members/protected persons or respondents. Lawyers and other professionals need to be able to sensitively work with young people and families where mental illness, substance abuse and intellectual disability may be contributing factors, and be mindful of capacity issues, appropriate service interventions as well as the specific legislative provisions relating to young people.

Specialisation and a greater need for professional development

The uniquely complex and challenging nature of the work of the Children's Court was recognised by the establishment in 2010 of an additional area of specialisation by the LIV – children's law. For my part, it was an honour to be involved with the LIV in establishing the specialisation and being involved with the specialisation committee for several years.

The establishment of the new area of specialisation created a new need in terms of continuing professional development as existing opportunities were modest in scope and infrequent.

Pre-pandemic legal CPD

In 2018 a group of lawyers led by solicitor and accredited specialist Fleur Ward approached then president of the Children's Court Judge Amanda Chambers to seek the Court's assistance in putting on a series of seminar presentations for lawyers practising in the jurisdiction. Judge Chambers nominated me to work with the lawyers, and the Children's Court also offered speakers, a venue and IT support, given the lack of any budget. Ms Ward and her colleagues suggested topics and sourced and provided expert speakers who always gave of their time without charge. Utilising our largest courtroom, Court 8, and employing relatively unsophisticated pre-pandemic IT, we arranged for the seminars to be relayed live to a number of regional courthouses so that lawyers in regional Victoria could participate.

Topics covered included the analysis of supervised urine screen results, the challenges of subpoenas, and managing multiple matters in youth crime. Perhaps the most successful and memorable seminar involved an instructive mock submissions hearing with one of the jurisdiction's most

experienced lawyers putting on a stellar performance as a troubled yet vocal parent who, mid-hearing sacked her lawyer and asked me, as the presiding magistrate, to recuse myself. Each seminar was oversubscribed, revealing a great appetite for frequent practical, accessible and affordable professional development.

The seminar committee was eager to continue its work in 2020 but the pandemic quickly put an end to our plans.

The pandemic

As one of the first magistrates in our jurisdiction to commence working from home, I was struck by how isolating the experience was. Managing the rapidly developing IT was, personally speaking, a positive experience, but overnight I had lost contact with my colleagues and court staff. I assumed that many members of the legal profession felt similarly isolated, particularly those who were either sole practitioners or in small practices.

In addition, many of the child protection practitioners were working from home, managing their investigations and ongoing cases remotely, with all the stresses and challenges that such arrangements entail. And for all professionals, working from home could involve makeshift offices in bedrooms, poor connectivity and maintaining the need for privacy. Privacy was a particularly relevant consideration for professionals dealing with sensitive and confronting content that always characterises child protection matters. Other household members, particularly children, needed to be shielded from the graphic nature of the work, and the families whose lives are so intimately explored and analysed in child protection proceedings also needed to continue to have their privacy respected.

My ruminations on how to deal with the impact of the pandemic on our jurisdiction's professional community took shape and evolved into an idea that we could and should expand our seminar concept to cover not only lawyers but all other professionals that were working in the various jurisdictions of the Children's Court – child protection workers, workers in agencies that supported families (such as the Victorian Aboriginal Child Care Agency (VACCA) and Anglicare) and police prosecutors. No longer constrained by the size of our largest court, which could work as a lecture theatre accommodating 80 or so attendees, and encouraged by the rapid expansion of IT, there was now the capacity for a potentially unlimited audience. Additionally, there was a need to maintain professional connections and, more than ever, foster a sense of community.

The idea of having professionals other than lawyers involved was at least in part inspired by the work of the Multi-Disciplinary Training Group (MDT) which, for the past 10 years or so, had hosted major annual professional development events for lawyers and child protection practitioners. Some of the most fascinating and enlightening discussions I have had as a magistrate took place at MDT events when I spoke to child protection practitioners. We shared the same concerns, sought the best outcomes for children yet approached issues in quite different ways. Much in my view could continue to be done to demystify the law and its processes for child protection practitioners and to, in turn, inform lawyers about the assessments, investigations and work of the child protection practitioners.

I initially made contact with senior child protection practitioners whom I respected and then began working with senior Department staff within the Office of Professional Practice to develop input into our webinar series.

The original committee, founded by Fleur Ward and which had grown to include lawyers from the private profession, Victoria Legal Aid, the Child Protection Litigation Office, the Children's Court Bar Association and Victoria Police, supported the expansion to include professionals who were not legally qualified. All potential topics were now analysed not only in terms of any potential benefit to lawyers but to other professionals as well.

The webinars

The first webinar on 21 May 2020, most appropriately, dealt with the pandemic and its impact on Children's Court processes, the families and lawyers. This initial webinar was led by then President of the Court Judge Chambers who was in conversation with the then President of the Children's Court Bar Association (and now Magistrate) Melissa Stead. The rapidly implemented Practice Directions were canvassed at length and then questions were invited from the live audience.

The second webinar on 1 June 2020 afforded the Department's most senior practitioners an opportunity to outline the Department's response to perhaps the most vexing of pandemic challenges, managing contact between children and parents from whose care they had been removed. Against a background of transmission risk and with child protection staff working from home, issues such as transport, supervision and venue cleaning had to be considered alongside the need to preserve and promote family connections.

Subsequent webinars explored presenting submissions hearing arguments from both a departmental and family perspective, working with Indigenous families, therapeutic treatment orders, managing subpoenas, ground rules hearings and intermediaries in criminal contests, VOCAT and its relevance to families involved in the Children's Court jurisdiction and, finally, older juvenile offenders who might have matters in both the Children's Court and courts dealing with adult crime.

Judicial officers, lawyers, child protection workers and other experts have all given their time freely and generously. In addition, the previous Children's Court President Judge Chambers and the current Children's Court President Judge Jack Vandersteen have not only ensured that a sitting president was present to welcome attendees to every webinar but have also actively participated in a number of presentations.

In 2022 we have planned an ambitious program of webinar presentations beginning with an ethics presentation that will focus on the Department's role as model litigant followed by two separate sessions that will ask the question "What makes for a good first day?". The aim of these two webinars is to explore how professionals working either with the Department or with families can ensure that the vital first day in court is well prepared, runs smoothly and ensures that subsequent hearings proceed in a way in which the best interests of children are best served.

By early 2021 we had more than 1500 attendees on our invitation/data base, a mixture of barristers, child protection workers, solicitors, police and professionals otherwise working

in the jurisdiction. I would like to think that to a significant extent the sense of potential professional isolation that troubled me when the pandemic began has not eventuated and that, indeed, there is an enhanced sense of professional community. I am also confident that the different professions working in our jurisdiction have a much clearer idea of each other's roles and that they can accordingly work more effectively together to promote the wellbeing of young people and their families.

The people behind the webinars

I am greatly assisted by the current webinar committee members who, each in their own way, ensure that the perspectives of all stakeholders are considered. Magistrate Erica Contini (formerly from Victoria Legal Aid and the Victorian Aboriginal Legal Service), Natalia Gorges, Dr Jenny Anderson, Helen Dale, Joel Orenstein, Jayne Parker, Jordana Cohen and Arna Delle-Vergini have been wonderfully generous with their time, commitment and wisdom. Retired Magistrate Peter Power, in many ways the godfather of professional education at the Children's Court, has also been a reassuring presence.

Finally, none of our webinar work could even have commenced without the Court's IT staff, in particular Ashe Whitaker and Jess Lauder. They were responsible for designing and disseminating invitations, setting up the complex IT on the day and managing the live audience interactions.

Conclusion

Having commenced by quoting the previous Chief Justice it would be appropriate to bookend this article by referencing the current Chief Justice Anne Ferguson who was recently interviewed for the Summer 2021/22 edition of *Victorian Bar News*. Her Honour commented, when asked about the impact of the pandemic:

"There were some teething issues as people familiarised themselves with the technology and a new way of hearing matters. But we asked the profession to change the way they work and they did so with patience and sometimes ingenuity . . . To my mind, that is a strength of the profession. The current environment has enabled us to demonstrate our skill and agility to meet whatever comes our way".

The Chief Justice's comments aptly sum up the work of the Children's Court and the webinar committee lawyers over the past two years. It has been stimulating, challenging and deeply satisfying to work with them on the Children's Court webinar series. ■

Magistrate Francis Zemljak was appointed in 2008. He was admitted to practice in 1982 and has held specialist accreditations in family law and children's law. This article expresses the personal views and observations of the author.

Every step of the way

THE COUNTY COURT DRUG AND ALCOHOL TREATMENT COURT IS ENTERING THE FINAL MONTHS OF A 12-MONTH PILOT. THE THERAPEUTIC APPROACH GUIDES THE CLIENT ON A REHABILITATION/JUSTICE JOURNEY, SUPPORTED BY A MULTIDISCIPLINARY TEAM COMPRISING THE JUDGE, CLINICAL ADVISER, CASE MANAGER, COUNSELLOR, OPP LAWYER AND VLA LAWYER.
BY NAOMI NEWBOUND

ADOBE STOCK

SNAPSHOT

- The CCDATC is a 12-month pilot project extending access to the therapeutic model to clients in the County Court jurisdiction, with a drug or alcohol dependency.
- Clients are given wraparound services but are also subject to a stringent regime of drug testing and case management, closely monitored by the Court. This approach has proved to be highly effective in reducing the rates of recidivism.
- There is value in having Victoria Legal Aid lawyers as part of the multidisciplinary team, as they have specialist skills to support clients to navigate the complexities of their therapeutic journey.

Steven was one of the first clients placed onto the County Court Drug and Alcohol Treatment Court (CCDATC). On his mother's side, he is Djab Wurrung, Gunai and Yuin. On his father's side, Yorta and Djangadi. Steven was placed onto the Drug and Alcohol Treatment Order (DATO) with some reservations, partly because his background indicated a deep distrust of authority. But apart from a brief relapse, five months into the program he is producing consistently clear screens with no police involvement. He spent Christmas with his partner and her family in Lorne with the permission of the Court. It came with very strict conditions, which Steven followed to the letter. Steven recently said this about his VLA lawyers:

"You keep me updated with the stuff that needs to be done on my DATO and give good advice. For eg, what I have to do, in order to progress to Phase 2. Even when I'm not doing my DATO, you check in with me and ask why that is happening. You ask me how I am doing in the outside world and don't always talk about legal stuff. You are there every step of the way. You treat us like normal human beings. That in itself helps young men and anyone going through the system feel worthy and makes us feel like we can do it."

It is clear there is value in having a team of specialised lawyers attached to such a program. Drug Courts are entrenched in the principles of therapeutic jurisprudence, the belief that courts and legal processes can be used as a force to trigger positive change in the individual's personal circumstances. Participants are provided with access to platinum standard treatment for their drug dependency, to promote their rehabilitation and eliminate or reduce offending rates. Where advocating for the client at referral stage or in an application to cancel, the defence lawyer operates within the traditional adversarial matrix. However, during the post-sentence phase, the lawyer functions as one member of the multidisciplinary team, where there is a certain "blurring" of roles.

The CCDATC is a pilot program, based on successes in the Magistrates' Court of Victoria jurisdiction. A 2014 evaluation by KPMG demonstrated a 29 per cent lower reoffending rate within the two-year period after completing the program. The CCDATC is set up in a similar way to the Magistrates' Court model, with some necessary adaptations. Entry into the CCDATC is via either the "fast track" model, if a suitable candidate is identified prior to committal stage, or a matter can be referred to the CCDATC any time prior to arraignment. Once accepted, clients must test immediately, and their first court review takes place a couple of days later. At this first review, they will meet the multidisciplinary team.

Why does it work?

The multidisciplinary team approach provides wraparound supports for the client from the outset. Once placed onto a DATO, participants are subject to a strict regime of weekly Court reviews, thrice weekly urinalysis testing and a schedule of meetings with treatment professionals including their case manager. Each writes a report on the person's progress that week which is provided to the presiding judicial officer and discussed at the case conference meetings that precede the Court reviews.

The strict supervision regime allows for continual fine-tuning and promotes community confidence in the program. Compliance is measured against an incentives and sanctions framework. "Sanction points" are for behaviour the team wants to discourage. Positive behaviour reduces sanction points and when deemed appropriate, results in small prizes or applause.

Client Neville told me he enjoyed the times he got a round of applause: "It's a small thing", he said, "but it makes you feel good."

The DATO is divided into three phases. In phase 1, admitted drug use is met with a therapeutic response, rather than a sanction point, given abstinence is a "distal goal". Phases 2 and 3 have decreased attendance requirements, but drug use attracts higher sanctions. Throughout the DATO, any dishonesty is swiftly met with a punishment. Participants are expected to attend appointments punctually and engage openly. Over time, this model of treatment assists participants to achieve sobriety and a host of associated benefits. Therefore, referral of eligible clients to the CCDATC is a worthwhile consideration.

What is the VLA lawyer's role?

Each member of the multidisciplinary team has a specialised, separate role to play but the team works best when the individual members collaborate. The VLA lawyer's primary role is to protect the rights of their clients at case conference and review, and they develop close relationships with their clients. Sometimes, this takes the form of practical referrals and legal advice that falls comfortably within the lawyer's toolkit. At other times, the role of lawyer blurs, taking on a therapeutic aspect. When speaking to a client whose progress is stalling, the lawyer might address this by speaking to them in a particular way, employing their skills in motivational interviewing. The advantage of having a team of specialist defence lawyers attached to the CCDATC pilot is that we spend time in acquiring and have plenty of opportunity to practise the perspective and skillset of good therapeutic lawyers.

We prioritise calling the new CCDATC participant within 24 hours of their placement, making sure they have our work mobile number saved and encouraging them to contact us with any concerns. Although their case manager will take them through the client code of conduct and incentives and sanctions framework, we encourage our clients to seek our advice. We play a distinct role in this induction process as described by client, Evan:

"I was excited to be out of custody. A lot of information was given to me, but I couldn't always concentrate on what I was told. You guys could explain it to me in a way that I could understand".

On the morning of review days, the multidisciplinary team meets for a case conference. In preparation, the program generates a feedback sheet for each client, regarding their engagement with treatment that review period and the results of their drug screens. Much of the discussion at case conference concerns recommendations for sanctions or rewards. The knowledge that their lawyer is present to protect their interests is crucially important to the participants, as put by Neville:

"It was good to know that if something came up in review, something that the team thought was an issue, but I thought of differently, that there was someone in my corner who would put my point of view. I have a history with the police, but I trust my lawyer. My case manager is my direct fallback in terms of the program and what it is trying to achieve, but my lawyer is there in 'the shadows', should I need assistance".

VLA lawyers here must learn to operate within a legal environment with several unusual features. For instance, the purpose of case conference is to decide sanctions which may result in jail time, yet they are conducted without the client present. Also, the incentives and sanctions framework does not have the force of statute and, therefore, is subject to a broad scope of interpretation. The ordinary rules of evidence do not apply in case conference and review. In the Drug Court, the notion of the client's "best interests" includes the concept of their recovery from drug dependency, not simply the avoidance of a sanction. Robust discussion in case conference took place one week, when Steven was exited early from a residential drug rehabilitation program. The topic of sanctions was raised, but it was ultimately agreed that there were difficulties involved in fitting the particular sanctions sought into the framework. Plus, it was agreed that Steven's motivation was not the issue, rather he was not the "best fit" for that program. Ultimately, it was decided that the most therapeutic response was to support Steven to leave the residential facility and move in with his mother. The multidisciplinary team is discouraged from arguing, in favour of consensus decision making. For all these reasons, it is essential to have a team of specialist lawyers attached to the Court, who have the necessary competence in this complex juggling act.

After case conference, the registrar generates an incentives and sanctions sheet, which calculates the final tally of points. The program allows for a participant to accrue six "community workdays" before the count tips over into "prison days". Once there are seven prison days, the participant is on "7/6", so the judicial officer may order that the participant serve a jail term of at least seven days.

Conferences with clients on review days are an opportunity to give advice and referrals on allied legal matters, most commonly fines and family law. For client Shaun, a tenancy matter in VCAT was "sorted out" during the break between case conference and review one week. Once we have their confidence, we also make suggestions as to ways to bring down their sanction count. We might send a client a link to a walking app and suggest that they use it to accrue voluntary points. This approach worked with one client, who said it gave him back some control in his life.

We also counsel our clients as to the process involved in achieving variations to the DATO, so that they have greater personal freedom, which is granted incrementally and in response to demonstrated positive engagement. There is value in having a dedicated lawyer to provide this advice, as Evan says:

"It can be daunting for us as 'ex crims', looking at the judge and the prosecution through a different lens, in that they are trying to help. It is good to have our own lawyers in the middle. We speak to you first and then you voice our needs in a way that the judge and the prosecution can understand. For example, the curfew amendment, it wouldn't have occurred to me to ask the judge for that. My past dealings with judges and prosecutors have not been positive, so I get nervous speaking up and communicating my needs."

A key task is to take instructions regarding sanction points that they have accrued and potentially to challenge those in Court, or to advocate for a discretionary approach. This is often the true value to our clients: our willingness to stand apart from the rest of the team and to be their advocate in the traditional, adversarial sense when the occasion requires it.

Conclusion

"I . . . understand that the County Court DATO is under a pilot program and to me that means that we as the participants are responsible for the success of the pilot program to ensure that it sticks around for potential future candidates to be given the same opportunity I have. I am very proud to be one of the initial candidates of this program. I truly hope that in the future other candidates can look at my journey, and be confident that they too can live a life of sobriety, simultaneously instilling confidence that the whole DATO team are there to help" – Evan.

So far in the CCDATC, there are many clients like Evan who are doing exceptionally well. They are doing the courageous work involved in addressing deep-seated trauma and reaping the benefits. VLA lawyers are proud to support our clients on this therapeutic journey, while weathering the challenges presented by COVID-19 which meant that the vast majority of hearings and meetings of the multidisciplinary team took place remotely. I look forward to the first round of graduations.

The combined talents of the multidisciplinary team means that it operates effectively, whatever the challenges. It is our goal to provide a "platinum standard" level of service, which means keeping up to date with the most innovative and culturally sensitive thinking. Once we are back to a more "normal" way of working, I hope to see more scope for the multidisciplinary team to meet in person, to increase the fluidity of the collaborative, problem solving process. ■

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ADOBE STOCK

Filling the jurisdictional vacuum

AMENDMENTS TO THE VCAT ACT GIVE VICTORIAN COURTS JURISDICTION TO DETERMINE MATTERS VCAT IS PRECLUDED FROM HEARING BECAUSE THEY INVOLVE FEDERAL SUBJECT MATTER. BY ROLAND MÜLLER

ADOBESTOCK

As a tribunal, the Victorian Civil and Administrative Tribunal (VCAT) has jurisdiction as provided for in the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act) and other Victorian legislation which confers jurisdiction. In various areas, it has long held exclusive original jurisdiction. For such matters, including most domestic building disputes, certain residential[1] and retail tenancy disputes, co-ownership disputes and planning, a prospective litigant is required to apply to VCAT, with no option to commence court proceedings at first instance.

A series of recent cases considered the jurisdiction of VCAT in relation to matters involving parties who reside interstate, or to which the Commonwealth of Australia is a party. These cases have clarified the, at times overlooked, jurisdictional limits of VCAT, where matters fall within the original jurisdiction of the High Court of Australia, pursuant to ss75 or 76 of the *Commonwealth of Australia Constitution Act (Constitution)*.

SNAPSHOT

- Legislative amendments have finally confirmed that Victorian courts, but not VCAT, have jurisdiction over federal subject matter and maintained access to justice.
- Part 2 of the *Victorian Civil and Administrative Tribunal and Other Acts Amendment (Federal Jurisdiction and Other Matters) Act 2021* (Vic) (Amending Act) commenced on 29 November 2021.
- Practitioners acting in VCAT matters which may involve federal subject matter should continue to advise clients on any jurisdictional considerations prior to commencing proceedings.

Federal subject matter

Chapter III of the Constitution establishes the federal judicature. Section 75 provides for matters in which the High Court of Australia has original jurisdiction. Among other matters, these include all disputes between residents of different states; disputes between a state and a resident of a different state; and matters to which the Commonwealth (directly or by a person on behalf of the Commonwealth) is a party. Section 76 provides that the (Australian) Parliament may legislate to confer original jurisdiction on the High Court in other matters.

Section 77 provides, among other matters, that Parliament may make laws investing any court of a state with federal jurisdiction, in respect of matters in ss75 and 76. Victorian courts are invested with certain federal jurisdiction, including under ss39A and 39B of the *Judiciary Act 1903* (Cth) (*Judiciary Act*). In the case of the Supreme Court of Victoria, the *Jurisdiction of Courts (Cross-vesting) Act 1987* confers jurisdiction similar to that conferred on the Federal Court of Australia. Significantly, federal legislation confers federal jurisdiction on courts of a state, but not on other decision-making bodies of a state.

Jurisdiction of tribunals

VCAT and other tribunals created by state legislation have no inherent jurisdiction; their jurisdiction is as validly conferred by statute. In the case of VCAT, various pieces of state legislation confer jurisdiction on it, however it is not invested with jurisdiction by federal legislation. The Constitution does not empower a state legislature to confer jurisdiction on a state tribunal to determine matters falling within ss75 or 76 of the Constitution. Where a law of state is inconsistent with a law of the Commonwealth, the state law is invalid to the extent of any inconsistency (s109, Constitution).

While such a jurisdictional limitation is readily apparent on basic principles of constitutional law, VCAT and tribunals in other states are not always assisted by practitioners cognisant of such matters. In addition, appointed members in various lists need not be legally qualified and absent such assistance may not have been informed of the potential jurisdiction limitations, such as where a party is a resident of another state. A review of decisions shows that in some cases it was identified that they involved federal subject matter, however, in others this was overlooked. While jurisdictional errors are concerning, they are understandable where tribunals often determine matters between self-represented litigants and are often hearing types of matters in which VCAT has exclusive jurisdiction.

Burns v Corbett

The decision of the High Court in *Burns v Corbett*[2] highlighted such jurisdictional limitations of state tribunals. The High Court held that a state parliament does not have the power to vest jurisdiction in a state tribunal (other than a court of the state) to determine federal subject matter.

In issue in *Burns v Corbett* was the jurisdiction of the NSW Civil and Administrative Tribunal (NCAT) to determine claims between the applicant as a resident of NSW and respondents who were residents of other states. Various tribunal proceedings had been commenced under the *Anti-Discrimination Act 1977* (NSW), which ordinarily fell within the jurisdiction of NCAT. Because parties on "opposite sides" of NCAT proceedings resided in different states, the proceedings became concerned with federal subject matter, by reason of s75(iv) of the Constitution. It was assumed, for the purpose of the appellate proceedings, that NCAT was not a court of a state and it was exercising judicial power (not simply administrative decision-making) in respect of the proceedings commenced by the applicant, Burns.

A detailed analysis of the decision is beyond the scope of this article. In summary, the plurality of Kiefel CJ, Bell and Keane JJ,[3] and in a separate judgment Gageler J,[4] held that as s77 of the Constitution empowered the federal legislature to confer federal jurisdiction on state courts, by implication federal jurisdiction could not otherwise be conferred. Nettle J[5] and Gordon J[6] held that any state legislation purporting to confer jurisdiction on a tribunal other than a state court was inconsistent with s39 of the *Judiciary Act* and rendered invalid by operation of s109 of the Constitution. Edelman J[7] held that the effect of ss38 and 39 of the *Judiciary Act* is to exclude and render inoperative the conferral by state parliaments of jurisdiction on tribunals other than state courts to determine federal subject matter.

The implication-based reasoning adopted by Kiefel CJ, Bell, Keane and Gageler JJ; the inconsistency-based reasoning adopted by Nettle and Gordon JJ; and the exclusion-based reasoning adopted by Edelman J each lead to the conclusion that a state law purporting to invest a tribunal other than a state court with jurisdiction to determine matters within the scope of ss75 and 76 of the Constitution is nugatory. Consequently, VCAT is unable to determine such matters, including all matters in which the Commonwealth is a party, matters where interstate residents are parties and other such federal subject matter.

O'Hehir v Tsaganas

O'Hehir v Tsaganas, Nicholson Wright Pty Ltd (Building and Property)[8] was the first VCAT proceeding in which an objection to jurisdiction in light of *Burns v Corbett* was determined. The proceedings involved an application in which the applicant had intended to name a natural person and a corporation as respondents. The VCAT registry processed the application as relating to the corporate respondent only. The applicant made an application for amendment of her application documents to correct the error and have the proceedings recorded as relating to both intended respondents. The application was opposed on grounds including that it was alleged the prospective respondent was then a resident of NSW and that VCAT did not have jurisdiction to amend the application to add him as a party.

VCAT accepted the writer's submission that as a corporation was a party to the proceeding, it no longer fell within the characterisation of a matter between residents of different states within the meaning of s75(iv) of the Constitution.[9] The effect of *O'Hehir*, which remains good law, was to affirm that VCAT retains jurisdiction to determine matters where parties reside interstate but only where at least one of the parties is a corporation.[10]

Meringnage v Interstate Enterprises

In *Meringnage v Interstate Enterprises Pty Ltd*[11] the Court of Appeal considered a referral of questions of law from VCAT. An applicant to VCAT had named the Commonwealth of Australia (as represented by the Department of Defence) as a party to a discrimination proceeding seeking relief in accordance with s125 of the *Equal Opportunity Act 2010* (Vic). The Commonwealth sought to be removed as a respondent. VCAT referred questions to the Court of Appeal. Ultimately, the Court considered three questions:

1. Is VCAT a "court of a State"?
2. Does the VCAT proceeding involve the exercise of judicial power?
3. Does VCAT nevertheless have the authority to decide a suit against the Commonwealth?

A summary of the decision in *Meringnage* was previously published.[12] The Court held that VCAT is not a "court of a state". It further held that VCAT proceedings would be a "matter" for the purpose of s75 of the Constitution and would involve VCAT exercising judicial power. Finally, the Court held that VCAT did not have authority to decide the application against the Commonwealth.

Abrogation of jurisdiction

It is likely that deciding most VCAT proceedings involves the exercise of judicial power. Certain matters require purely administrative decisions.[13] That noted, the effect of the decisions in *Burns* and *Meringnage* is that VCAT has no jurisdiction to determine any matter falling within the ambit of ss75 or 76 of the Constitution.

While it is likely to be rare for a properly conducted proceeding to seek to name the Commonwealth as a respondent, it may be relatively common for VCAT proceedings to involve parties who reside interstate. Tenancy matters, building disputes, guardianship applications and consumer disputes could readily involve parties resident in different states. For such matters, and in particular where there was no option to commence proceedings in a court due to the jurisdiction of courts being excluded, the practical effect was to preclude or limit access to justice in such matters.

The Amending Act

Part II of the Amending Act is intended to address the absence of an available forum where VCAT has exclusive jurisdiction to hear certain types of matters, but parties are precluded from accessing it due to the dispute involving (for example) interstate parties.[14] It is further intended to address the potential that decisions made by VCAT in matters which involved federal jurisdiction are void, by legislating (retrospectively) that rights in accordance with such orders can continue to be enforced.

The Amending Act inserted Part 3A into the *VCAT Act*, in s57A of which "federal subject matter" is defined as "subject matter of a kind referred to in section 75 (other than section 75(v)) or 76 of the Constitution . . ." Section 57B provides an entitlement for certain litigants and those whose matters had been struck out by VCAT (without hearing) by reason that they involved federal subject matter, to apply to the Magistrates' Court for their matters to be heard. The section empowers the Magistrates' Court to hear such matters involving (or potentially involving) federal subject matter, the determination of which would involve

the exercise of judicial power and which VCAT would otherwise have had jurisdiction to determine.

Section 57F provides for the validity of rights and liabilities of parties to VCAT proceedings in which an invalid decision, order or declaration was made, as if they had been made by the Magistrates' Court in accordance with Part 3A, had it been in operation at the time of the invalid decision. Section 57G provides for the validity of acts or omissions in relation to a right or liability affected by s57F. The balance of the Part prescribes Magistrates' Court process, provides for the extension of certain limitation periods and time frames and other procedural matters. Section 57D allows certain prospective applicants who were unable to commence their proceedings in VCAT and who would have been eligible to do so in the Magistrates' Court had s57B been operative, to apply to bring proceedings notwithstanding limitation periods.

The Amending Act also inserted s100(1)(ca) into the *Magistrates' Court Act 1989* (Vic), extending the Magistrates' Court jurisdiction to hear and determine applications made under s57B of the VCAT Act. At the time of writing, the Magistrates' Court "federal jurisdiction" webpage contained a range of information and forms for various matter types.[15]

Practical considerations

Practitioners should continue to be aware of the potential for proceedings to fall within the scope of federal subject matter, most commonly where a party or prospective party resides interstate. Filing in the incorrect forum may continue to cause delay and risk limitation periods being exceeded. Practitioners should also review any matters previously excluded from VCAT on jurisdictional grounds. Where there is doubt as to whether a case will involve federal subject matter, the Magistrates' Court will have jurisdiction, however, practitioners are advised to be prepared to assist the Court with submissions as to jurisdiction. Applications to proceed following the expiration of limitation periods will also require careful submissions and should be made promptly.

While untested, the present effect of ss57F and 57G of the *VCAT Act* legislates for the validity of decisions and consequential acts where VCAT has determined cases involving federal subject matter. To that extent, there is unlikely to be detriment to a "successful" litigant in such proceedings. There may, however, be a risk of liability for any practitioner who advised or represented a party to such a proceeding who failed to identify and advise on the potential for a jurisdictional objection where the proceedings involved federal subject matter. Subject to the validity of s57F, it is unlikely that an aggrieved litigant could now set aside an order obtained on the basis that VCAT did not have jurisdiction.

Conclusion

The amendments made by the Amending Act appear to remedy the barrier to justice faced by those who were precluded from accessing the exclusive jurisdiction of VCAT because of the decisions in *Burns* and *Meringnage*. It seeks to take a pragmatic approach of legislating the validity of rights and liabilities which may have been obtained beyond VCAT's jurisdiction and preserves causes of action where litigants were unable to access VCAT where their cases concerned federal subject matter. ■

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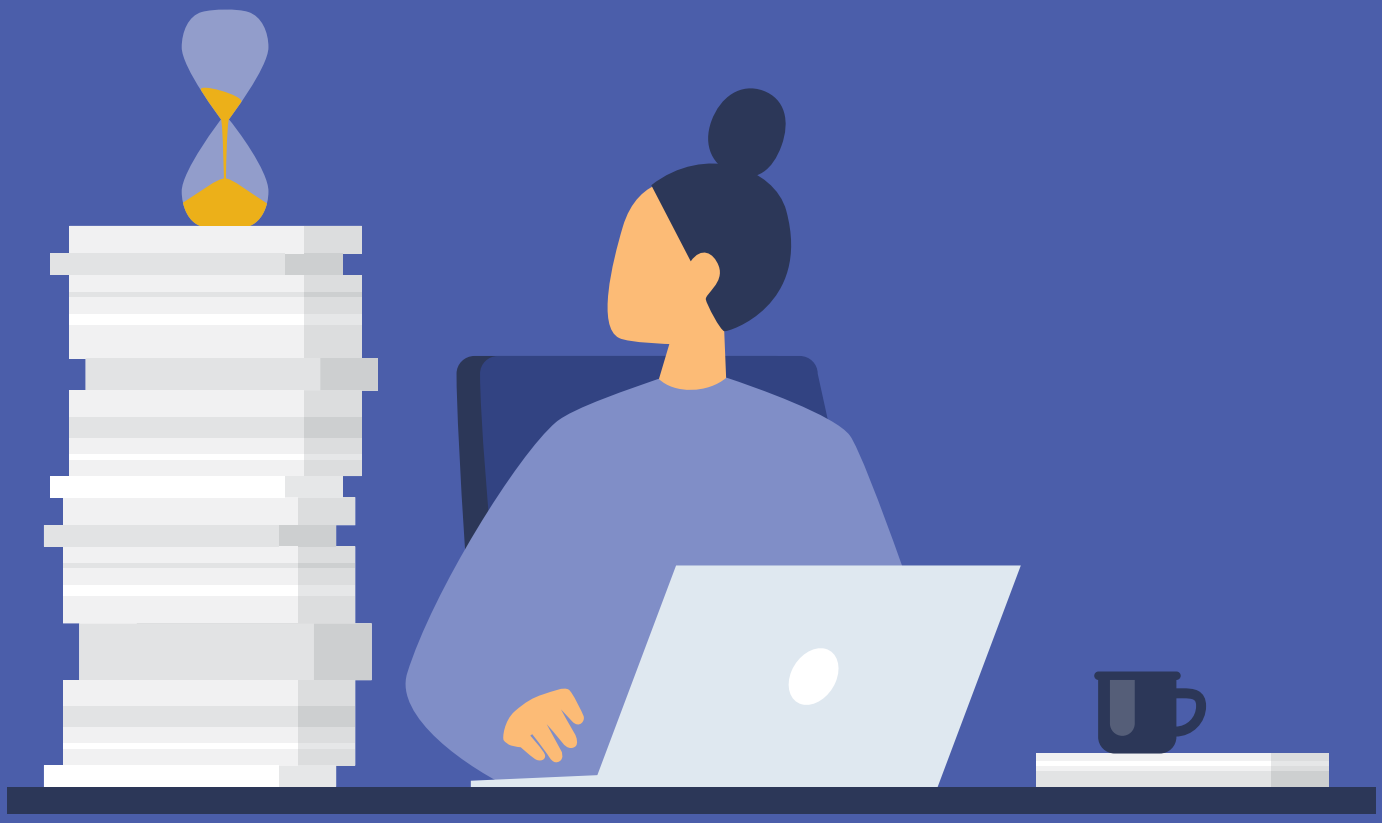
1. Albeit certain matters under the *Residential Tenancies Act 1997* (Vic) are justiciable in the Supreme Court of Victoria: *De Souza v Vavlitis* [2021] VSC 554, unreported 6 September 2021, per Irving AsJ.
2. (2018) 265 CLR 304.
3. Note 2 above, at [43]-[63].
4. Note 2 above, at [94]-[121].
5. Note 2 above, at [145]-[146].
6. Note 2 above, at [189]-[200].
7. Note 2 above, at [252]-[259].
8. [2018] VCAT 1973 per J Hampel VP. The writer appeared for the applicant, O'Hehir.
9. Note 8 above, at [10]-[16]; applying *Rochford v Dayes* (1989) 84 ALR 405 at 406-407, affirmed in *British American Tobacco Ltd v The State of Western Australia and Anor* (2003) 217 CLR 30 at [37] per McHugh, Gummow and Hayne JJ.
10. See also *Boyall & George v Cubbitt Developments Pty Ltd (in liquidation)* [2021] VCAT 257 at [26], fn 18. *O'Hehir* would not operate to preserve jurisdiction of the VCAT to determine a matter involving a type of federal subject matter other than a dispute between residents of different states.
11. (2020) 60 VR 361.
12. Reinhardt G, "Supreme Court Judgments – Whether VCAT can exercise Commonwealth judicial power?", (2020) 94(4) *LIJ* 54.
13. See generally *McCardle v Victorian Legal Services Board (Legal Practice)* [2021] VCAT 743 (9 July 2021).
14. Victorian Parliamentary Debates, Legislative Assembly, 26 May 2021 at 1789.
15. "Federal jurisdiction", Magistrates' Court of Victoria, https://www.mcv.vic.gov.au/civil-matters/federal-jurisdiction.



Creating efficiencies

IT HAS NOW BEEN FIVE YEARS SINCE THE FEDERAL COURT ESTABLISHED CONCISE STATEMENTS AS AN ORTHODOX PROCEDURE.
BY MATTHEW PECKHAM

SNAPSHOT

- The Federal Court's Concise Statement procedure has now been in operation for five years as an orthodox means of commencing proceedings.
- The Concise Statement procedure emphasises case management and relies on cooperation between lawyers to identify the real issues and thereby save money and time.
- In appropriate proceedings, the Concise Statement procedure provides an iterative approach to case management, with a focus on efficiency and flexibility.

ADOBE STOCK

It has now been five years since the Concise Statement procedure was established as an orthodox means of commencing commercial and corporations proceedings in the Federal Court (Court), by the Practice Note C&C-1.[1] Previously, a similar procedure was used in the Federal Court's Fast Track List, first piloted in 2008. In that time, the Concise Statement procedure has been adopted by many, not least by Commonwealth regulators, as a means of efficiently commencing complex proceedings.

What is a Concise Statement?

A Concise Statement is a narrative statement of the case, in five pages or less. It must summarise:

- the important facts
- the relief that is sought from the Court (and against whom)
- the primary legal grounds, or causes of action
- the alleged harm, including wherever possible a conservative and realistic estimate of loss, which may be expressed as a range.[2]

Nature and purpose of Concise Statements

The purpose of a Concise Statement is to enable the applicant to bring to the attention of the respondent and the Court the key issues and key facts at the heart of the dispute and the essential relief sought from the Court.[3] Critically, this avoids the need for lengthy or detailed pleadings prior to commencing proceedings, and their associated costs.[4]

The Practice Note anticipates that the majority of commercial and corporations matters will be assisted by commencing with a Concise Statement, and encourages applicants to use them, unless clearly inappropriate.[5] The procedure is also available in the Court's other practice areas, subject to the guidance in their practice notes.[6]

At the first case management hearing (typically within two to three weeks of filing), the Court will consider whether the matter is better suited to Concise Statements or a more detailed Statement of Claim.[7] The Court may require a Concise Statement in Response from the respondent, either to proceed without pleadings, or to determine which procedure is most appropriate.[8]

Typically, a Concise Statement in Response will also be in narrative form, rather than a line-by-line series of denials and admissions. However, as with a conventional Defence, its purpose is to engage with and identify the key issues.[9]

Technical requirements and approach to case management

The purpose of the Concise Statement procedure is to identify and give notice of the issues. However, they are typically much shorter than a Statement of Claim, raising the potential for confusion or evasion. In several cases, the Court has considered what is technically required to be set out in a Concise Statement and by what means the issues are to be explored in further detail, if necessary.

As a starting point, the Court has emphasised that the Concise Statement procedure is not merely a short form of pleading – rather, it is intended to be a more narrative and tailored approach, requiring the engagement of the parties and the Court.[10]

However, the fundamental purpose remains the same: to give fair notice of the issues and the case that each party must meet.[11] Accordingly, the Concise Statement must set out a well-drafted narrative of the facts and circumstances and of the wrong or grievance that constitutes the real substance of the complaint. It must contain all the facts to be proven, concisely but fully expressed, at the appropriate level of generality or specificity to accomplish that task.[12]

Where the issues are detailed or technical, a high-level explanation may be sufficient, with further detail to be provided by particulars, evidence or other means.[13] Where the case relies on statutory provisions, they should be disclosed in the Concise Statement, so that fair notice is given.[14] Importantly, a Concise Statement is "not an excuse for laziness in analysis or vagueness or imprecision in expression".[15]

Unlike conventional pleadings, however, Concise Statements are not intended to be exhaustive of the issues in dispute. Although they must set out the key facts and claims, they will then form a starting point for the issues to be further articulated through the case management process as a whole, by whatever means are most fitting.[16] This may involve requests for more detailed particulars, targeted interrogatories, disclosure of key documents, joint statements of issues, statements of agreed facts, the oral examination of senior officers or the early provision of an outline of opening submissions.[17]

Accordingly, the Court will have regard to the case management process as a whole.[18] However, this is not to say that the case may substantially change as it progresses, or that additional claims can be added without leave. Rather, the issues will be progressively defined and exposed.[19] If there is a claim at the heart of a party's case that is not disclosed in its Concise Statement, then leave should be sought to amend in the ordinary way.[20] Similarly, if a party should seek to raise matters at trial (particularly in closing submissions) that should fairly have been disclosed at an earlier stage, it may be prevented from doing so.[21]

The Court's expectations

In *ASIC v ANZ Banking Group Ltd*, Allsop CJ explained the nature and purpose of the Concise Statement procedure and the Court's expectations of the parties. The Chief Justice said:

"Modern litigation of this kind must be wrenched from the mindset of staged trench warfare, statement and affidavit drafting and document production that makes access to the legal system, even for large and well-resourced litigants, overly costly and slow".[22]

On receiving a Concise Statement, a defendant should engage with the narrative in an appropriate fashion, identifying the points in contention, and the facts to be advanced in their defence.[23] Where a Concise Statement in Response is filed, the two statements should be viewed as a combined narrative. It should be possible, on reviewing both statements, to determine which fundamental facts are agreed, which are in dispute, and the competing legal analyses.[24]

In *Allianz Australia Insurance Ltd v Delor Vue Apartments*, a Full Court majority linked the Court's expectations with the modern approach to case management and the statutory requirements of the *Federal Court of Australia Act 1976* (Cth):

"The modern approach of courts in Australia emphasises case management and relies upon the performance by lawyers of their duty to work cooperatively to expose the real issues in the case. For some time, the courts have required a cards on the table approach that requires parties to disclose in clear terms the nature of their case and not to insist upon proof of matters not genuinely in issue . . ."[25]

In particular, the majority observed that:[26]

- "The Court must conduct proceedings in the Court on the basis of a practice and procedure that facilitates its overarching purpose: the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible: s37M."
- "[T]he parties themselves must conduct the proceedings in a way that is consistent with that overarching purpose: s37N(1)."
- "Their lawyers must, in the conduct of a civil proceeding, take account of that duty as imposed on their client and assist them to comply with that duty: s37N(2)."
- "In addition, the lawyers have a common law duty to the Court to confine the case to the real issues and present the case as quickly and simply as circumstances permit in a manner that is proportionate to the overall subject matter: *Dyczynski v Gibson*".[27]

Given the greater brevity of Concise Statements and the emphasis on cooperative case management, the parties have a duty to proactively expose the real issues at the earliest stage possible. If a party wishes to complain that the case has been too broadly stated, or that a claim is not properly disclosed, that needs to be done at an early opportunity, and must not be "saved up" for trial.[28]

Suitability for particular cases

Unconscionable conduct, dishonesty and fraud

The Court has observed that the narrative Concise Statement procedure is particularly well-suited to describing unconscionable conduct and other forms of equitable claims.[29]

Conversely, where the case is one of outright dishonesty or fraud, it may become necessary to revert to conventional pleadings. Conventional pleadings are stricter and less dependent on the cooperation of the parties. The conventional requirements for pleading these matters, with appropriate particulars, are stringent.[30] However, this is not to say that such a case should not be commenced by Concise Statement, which may save costs at the outset.

Regulatory and civil penalty proceedings

Regulatory enforcement and civil penalty proceedings are routinely commenced by way of Concise Statement. At least where a corporate defendant is concerned, there is nothing inherent to such proceedings that requires the formality of pleadings.

There is an interesting question about whether a Concise Statement is appropriate in a civil penalty case against a natural person. This has not yet been specifically addressed. However, in *ASIC v Bettles*,[31] a case against a natural person, Greenwood ACJ ordered that ASIC's Concise Statement be set aside and replaced by conventional pleadings. In doing so, Greenwood ACJ noted that the penalty was very serious, and that it was essential for ASIC to set out individually each of the material facts giving rise to the alleged contraventions.[32]

Notably, because of the privilege against self-exposure to a penalty, a natural person defending a proceeding for civil penalties will be partially or wholly excused from the requirements to:

- file a factually informative defence until after the close of the prosecution case[33]
- make discovery or respond to subpoenas[34]
- file evidence until after the close of the prosecution case.[35]

This is obviously at odds with the cooperative and proactive approach that has so far been described as fundamental to proceeding by Concise Statements. Even so, this is not to rule out altogether the use of Concise Statements to bring a civil penalty case against a natural person. Such cases may well be brought efficiently by Concise Statement, and then expanded by conventional pleadings, if liability is sought to be contested.

In some penalty proceedings the contravention itself will be admitted, and the real contest is solely about the quantum of penalty. In that case, a Concise Statement may be analogous to the procedure for a "plea brief", under ss116 and 117 the *Criminal Procedure Act 2009* (Vic). In criminal cases, those provisions allow the service of a condensed version of the prosecution brief, which is served on the accused with their consent, typically as a prelude to a guilty plea.

Similarly, in civil penalty cases where the contravention is admitted, proceedings are regularly commenced by Concise Statement, and then followed by a Statement of Agreed Facts. Together, these will form the basis for the Court to declare that a contravention has occurred, and the starting point for a subsequent penalty hearing. This procedure applies just as well to individuals as it does to a corporate defendant, subject to the commentary above.

Conclusion

In summary:

- In the Federal Court, Concise Statements should be used for all commercial and corporations matters, unless clearly inappropriate, and may also be used in some other practice areas.
- As with conventional pleadings, the purpose remains to identify and give notice of the issues. However, this is done in a more tailored fashion, requiring the engagement of the parties and the Court. Ideally, the benefits include saving costs and time.
- Arguably, the cases where the Concise Statement procedure may not be sufficient, or may need to be fleshed out by conventional pleadings, include those concerning dishonesty or fraud, and those which seek penalties against a natural person.
- However, even in those cases, the procedure may be valuable as a starting point, allowing complex matters to be brought before the Court efficiently and with minimum delay. ■

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1. Commercial and Corporations Practice Note (C&C-1), issued 25 October 2016.
2. Note 1 above, [5.6].
3. Note 1 above, [5.4]; see also *Allianz Australia v Delor Vue Apartments* CTS 39788 (2021) 153 ACSR 522 (*Allianz Australia*), at [140].
4. See eg Note 1 above, at [5.4]; *MLC Ltd v Crickitt (No 2)* [2017] FCA 937, at [4]; *ASIC v ANZ Banking Group* (2019) 139 ACSR 52 (*ASIC v ANZ*), at [8].
5. Note 1 above, [5.8].
6. See eg Intellectual Property Practice Note (IP-1), issued 20 December 2019 [4.2].
7. Note 1 above, [6.7].
8. Note 3 above (*Allianz Australia*), at [143].
9. Note 3 above (*Allianz Australia*), at [144] and [148].
10. See eg Note 1 above, [5.4]; Note 3 above (*Allianz Australia*), at [140] and [148].
11. See eg *ACCC v Jayco Corporation Pty Ltd* [2020] FCA 1672 (*ACCC v Jayco*), at [97]; Note 3 above (*Allianz Australia*), at [140].
12. Note 4 above (*ASIC v ANZ*), at [3].
13. *ACCC v Apple Pty Ltd (No 2)* [2017] FCA 1329, at [8]-[9].
14. Note 11 above (*ACCC v Jayco*), at [97].
15. Note 3 above (*Allianz Australia*), at [153].
16. Note 3 above (*Allianz Australia*), at [143], [150] and [151].
17. See *ASIC v ANZ*, at [9]; *Allianz Australia*, at [144].
18. Note 3 above (*Allianz Australia*), at [150] and [151].
19. Note 3 above (*Allianz Australia*), at [143], [144] and [149].
20. Note 3 above (*Allianz Australia*), at [149].
21. Note 3 above (*Allianz Australia*), at [194] and [197].
22. Note 4 above (*ASIC v ANZ*), at [12].
23. Note 4 above (*ASIC v ANZ*), at [6].
24. Note 4 above (*ASIC v ANZ*), at [6]-[7].
25. Note 3 above (*Allianz Australia*), at [146].
26. Note 3 above (*Allianz Australia*), at [147].
27. *Dyczynski v Gibson* (2020) 280 FCR 583 at [214]-[219].
28. Note 3 above (*Allianz Australia*), at [149].
29. Note 4 above (*ASIC v ANZ*), at [2].
30. See *Federal Court Rules 2011* (Cth), r16.42.
31. *ASIC v Bettles* [2020] FCA 1568.
32. Note 31 above, at [82] and [85].
33. *Anderson v ASIC* [2013] 2 Qd R 401, at [42]-[43].
34. *Rich v ASIC* (2004) 220 CLR 129, at [39].
35. *ACCC v FFE Building Services Ltd* (2003) 130 FCR 37, at [27]-[30].

A duty of confidence

THERE ARE LEGAL AND ETHICAL RULES APPLICABLE TO THE USE OF INFORMATION BARRIERS TO ENSURE THEY ARE EFFECTIVE IN PROTECTING CONFIDENTIAL INFORMATION.

BY MICHAEL DOLAN AND KIRIN MATHEWS

ADOBESTOCK

Introduction

Since Roman times a lawyer has owed a duty of confidence to a client to protect the client's information acquired during the course of an engagement for legal services. The importance of the duty is often described as being needed to allow clients to make full and frank disclosure to their lawyer without fear of the information imparted being disclosed to any other person without client consent or prescribed by law. In Australia the duty is based in the common law and lawyers' professional conduct rules.[1] The purpose of this article is to assist Australian legal practitioners in the implementation of information barriers for the purpose of preventing the slippage of confidential information in a variety of legal transactions.

What is an information barrier?

Formerly known as a "Chinese wall", the term is now referred to as an information barrier. The use of this tool has been historically endorsed in Australian case law and enshrined in regulation in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (ASCR)[2] to prevent potential problems that conflicts of interest can pose for law firms. For the purposes of this article, "firm" will be used to denote solicitors, lawyers and legal practices.

As per Prince *Jefri Bolkiah v KPMG*,[3] an information barrier is an arrangement established by a firm in order to prevent confidential information, which is available to one partner or employee, from becoming available to another partner or employee.

When can I use an information barrier?

Law firms can consider the use of information barriers to protect client confidential information in the following circumstances:

- when the firm acts for a current client against a former client ("former/current client conflict")
- when the firm acts for two or more current clients, irrespective of whether it is the same legal matter or a separate one ("concurrent client conflict")
- where a new employee to the firm has acted for a client at their previous firm and has obtained confidential information of that client ("migratory lawyer conflict")
- a new employee of the firm has confidential information of a client through their previous employment as an officer of the court or a tribunal (such as a judge's associate)
- in certain (limited) scenarios, for example, when a client requests an information barrier be created due to the particular circumstances of the case.

SNAPSHOT

- An information barrier prevents confidential information, which is available to one partner or employee within a firm, from becoming available to another partner or employee.
- Solicitors' professional conduct rules in Australia provide for the use of effective information barriers by firms to prevent both successive and concurrent conflicts of interest.
- If established in accordance with the relevant Guidelines, information barriers are an effective risk management tool that can assist firms in managing certain potential conflicts of interest.

Former client conflict

ASCR r10 outlines the principles to be applied when a firm is contemplating acting for a current client in circumstances where the firm has provided legal services to a former client. The firm must not act if it holds relevant confidential information of the former client, which, if disclosed, would be detrimental to the interests of the former client.

Exceptions are permitted where:

- the former client has given informed written consent to the firm continuing to act; or
- an effective information barrier has been established to protect the former client's confidential information.[4]

A "former client" is broadly defined and includes a person who has provided confidential information to a solicitor, notwithstanding that the solicitor was not formally retained and did not render an account.[5]

Concurrent client conflict

A firm must avoid conflicts between the ethical duties owed to existing clients, except in accordance with ASCR r11. The core of the ethical standard underpinning the rule is a firm's fiduciary duty of undivided loyalty owed to each client.

Pursuant to ASCR r11.2, a firm must not act for these clients in the "same or related matters where the clients' interests are adverse, and there is a conflict or potential conflict of the duties to act in the best interest of each client". Exceptions would be considered where the client is:

- aware that the firm is also acting for the other client(s) and
- has given informed consent to the firm to do so.[6]

Further, if the firm possesses a client's (first client) confidential and material information which would be detrimental to the first client's interest on disclosure, an information barrier must also be established as per ASCR r11.4.

Importantly, the decision to act in such a circumstance must be considered in light of the firm's overarching obligation to ensure that their client's best interests are considered and protected.

Migratory lawyer and former court officer

Information barriers are also utilised to address potential conflicts created by migratory lawyers' cases. These are lawyers who move between firms and who have had some involvement with the relevant matter at their previous firm. This also applies to non-legal staff (including consultants and personal assistants).[7] The crucial question to be asked is: does the new employee possess relevant confidential information? If so, information barriers should be used.[8]

Information barriers should also be used when former officers of the court, such as judges' associates, are to be employed by a firm if they were involved in the firm's files before the court during their employment as court officials. As per a 2015 LIV Ethics Committee Ruling,[9] it is possible for these lawyers to have obtained confidential information such as being "privy to preliminary views expressed by their respective judges". Further, the ruling points out that as such employment raises an ethical issue regarding the appearance of justice, the relevant judge(s) should be consulted before the lawyer joins the firm.

Before hiring, a candidate must be appropriately screened to ascertain if they possess any relevant confidential information concerning the firm's clients. If they do, information barriers must be established prior to the employee joining the firm.

In many cases, the "relevant confidential information" would be apparent. Of note, the Commentary to the ASCRs[10] elucidates the following classes of information that may be considered confidential:

- a former client's information concerning an issue relating to a current client. For example, information belonging to an insurer relating to a potential claim, in circumstances where the solicitor is asked to accept instructions to act for the claimant
- competitor specific information, including product pricing or business models
- intimate knowledge of a client, its business, personality and strategies.[11]

Making an information barrier effective

In 2015, Riordan J of the Supreme Court of Victoria summarised the position.[12] A court will intervene and may grant an injunction restraining a firm from acting:

1. where there is a real and sensible possibility of the misuse of confidential information
2. under the inherent jurisdiction of the court over its officers and "the appearance of justice"
3. to prevent a breach of a lawyer's fiduciary duty of loyalty (Victoria only)[13].

(Note that conflicts referred to at points 2 and 3 above do not necessarily involve confidential information, so an information barrier may not be an answer to cure the conflict).

A court must be satisfied on the basis of clear and convincing evidence that all effective measures have been taken to prevent the disclosure of confidential information.[14] Such measures include erecting information barriers within the firm to prevent such information from flowing to those who must not see it.

Based on the circumstances of each case, the courts will decide whether the firm's information barrier is effective to be upheld. Both the implementation of, and any challenge to, an information barrier must be undertaken with urgency. An information barrier implemented too late in the matter is unlikely to be accepted by the courts as being effective, due to the possibility of the confidential information's "leakage". Further, a court will decline any applications used by opponents as an abuse of process. A "giveaway" to this could be an application made late in the proceedings as it could cast doubt over whether the applicant believes that the information is confidential or detrimental to the case.[15]

At minimum a firm must adopt the well-regarded Information Barrier Guidelines ("Guidelines")[16] which provide "guidance on the factors typically taken into account in constructing an effective barrier" and "ought to reduce the occurrence of successful challenges in the courts . . .".

The Guidelines were specifically created to deal with the former/current client conflict, and state they are not intended to apply to concurrent retainers. However, the Guidelines were published before the introduction of the ASCR r11, which now allows for information barriers in managing concurrent client conflicts.

The Guidelines recommend that a firm should have:

- established and documented protocols for setting up and maintaining information barriers
- an experienced compliance officer who is knowledgeable about confidentiality-related laws, that is required to oversee each information barrier, including implementation, and documenting all steps taken
- the appropriate informed consent from the client. For example, obtaining the consent of the current client that the former client's confidential information will not be disclosed
- appropriately worded written undertakings from all involved staff
- limited physical contact between staff members who are involved in the information barrier
- security of all confidential information. Traditionally, this included systems for receiving posted mail and designated printers, but in modern times, this would require the relevant securing of electronic document management systems, "hold and print" functions on printers, and various other technological tools to restrict access to the confidential information
- disciplinary sanctions for any breaches by staff
- an ongoing education program on information barriers for all staff, including induction programs. The Guidelines also state that once the information barrier has been established, there should be additional "targeted" education sessions for all staff directly involved in the specific barrier.

An example where a firm implemented an effective information barrier primarily based on the Guidelines was seen in *Zani v Lawfirst Pty Ltd trading as Bennett & Co J* (*Zani*)[17], which involved a migratory lawyer conflict.

In *Zani*:

- all staff members were required to read the information barrier policy and acknowledge the same, with a register of acknowledgment maintained
- the policy implemented by the firm was explained to all practitioners, research clerks, secretaries and support staff at compulsory seminars, and ongoing education seminars were conducted. This education formed part of the new staff members' induction process
- the firm maintained an information barrier register containing information on all active and inactive barriers, completed forms, and the identity of each relevant employee
- the firm's compliance officer undertook steps to avoid the inadvertent breaches of the information barrier, including the restriction of the electronic data and obtaining the appropriate undertakings from the involved staff. They also conducted regular audits of all the firm's information barriers.

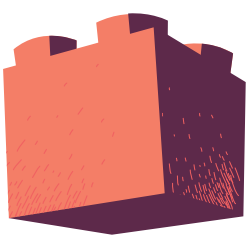
Based on these measures undertaken by the firm, in this case, although the firm ultimately conceded that the migratory lawyer was in possession of confidential information, the court held that the firm had established an effective information barrier to protect any breach.

Conclusion

The effective implementation of information barriers can be an onerous task for firms. A firm must have the resources to build and manage such barriers. A compliance officer independent from staff working with the barrier needs to be appointed. The lawyers and support staff must strictly adhere to defined policies, as well as participate in ongoing training on these policies. Formal written undertakings and the securing of documentation held on a firm's document management system are some of the requirements that will ensure the creation and operation of a successful information barrier.

Courts are unlikely to consider an information barrier established ad hoc to meet a particular issue, rather than being built on established firm arrangements, to be effective. The procedures and practices underpinning information barriers must be part of the firm's culture and organisational structure. Larger law firms are more likely to satisfy the requirements for an effective information barrier, and some courts have noted that it is "almost impossible" for small firms to establish an adequate barrier.[18] Ultimately, the courts examine the effectiveness of a firm's information barrier, as opposed to its reasonableness.[19]

Even if a firm does have the ability to meet an information barrier's prerequisites, the use of such arrangements in conflicts or potential situations must be considered carefully. A barrier that is unsatisfactory can cause a great deal of inconvenience and inflict a heavy cost burden/reputational damage to a



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firm[20]. Further, if a firm is engaged in expensive and contentious ligation regarding the conflict, the client's best interests can be compromised.

The inability to prevent conflicts and a breach of the ASCR can lead to disciplinary proceedings per ASCR r2.3. In addition, some professional indemnity policies will require payment of a double deductible when a firm acts for more than one party to a transaction.

However, if established correctly in accordance with the Guidelines, information barriers are an effective risk management tool that can assist in managing certain potential conflicts of interest. Further, the emerging development and use of purpose-built innovative software which will automate several tasks needed to set up an information barrier will simplify the implementation of information barriers thereby reducing the chances of a court challenge to it being upheld. ■

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1. *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (ASCR) r2.1.
2. The ASCR was enacted on 1 July 2015 under the Legal Profession Uniform Law which commenced in Victoria and New South Wales.
3. [1999] 1 All ER 517, at [529].
4. Note 1 above, r10.2.
5. Note 1 above, Glossary of Terms.
6. Note 1 above, r11.3.
7. GE Dal Pont, *Lawyers' Professional Responsibility*, (7th edn), Thomson Reuters, 2020 [8.255].
8. See, eg, *Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)* [2002] FCA 588; *Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd & Ors* [2015] VSC 453 (*Babcock & Brown*); Ian Dallen (2014) "*The rise of the information barrier: Managing potential legal conflicts within commercial law firms*" which discusses the conflicts lateral hires brings and how information barriers are to be used in these circumstances.
9. LIV Ethics Committee Ruling R4871, April 2015: https://www.liv.asn.au/EthicsCommitteeRulings.
10. Law Council of Australia, Australian Solicitors' Conduct Rules 2011 and Commentary – August 2013.
11. See, for example, the "getting to know you" factors in *Yunghanns v Elfic Ltd* (SC (Vic) Gillard J, 3 July 1998) (unreported).
12. Note 8 above, *Babcock & Brown*.
13. See *Brooking JA in Spincode Pty Ltd Look Software Pty Ltd* [2001] VSCA 248.
14. Note 3 above, at [529].
15. Note 7 above, at [8.265].
16. Law Institute of Victoria and New South Wales Law Society, Information Barrier Guidelines, 20 April 2006: https://liv.asn.au/download.aspx?DocumentVersionKey=7601aa97-abb6-4be6-a7e0-d630d8742b66.
17. [2014] WASC 75.
18. *Pradham v Eastside Day Surgery Pty Ltd* [1999] SASC 256 at [52]
19. Note 3 above, at [237].
20. See, eg, *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550.

HIGH COURT JUDGMENTS

DR MICHELLE SHARPE

Constitutional law

Judicial power of the Commonwealth

In the High Court decision of *Hobart International Airport Pty Ltd v Clarence City Council and Australia Pacific Airports (Launceston) Pty Ltd v Northern Midlands Council Pty Ltd* [2022] HCA 5 (9 March 2022) the issue the High Court was required to determine was whether the dispute sought to be agitated by the respondents (Councils) involved a "matter" for the purposes of Chapter III of the *Constitution*.

The appellants (Lessees) entered into long-term leases with the Commonwealth (Leases) for the Hobart Airport and the Launceston Airport (Airport Sites). The Airport Sites are both on Commonwealth land and in areas administered by the Councils. The Commonwealth granted the Leases pursuant to s22 of the *Airports (Transitional) Act 1996* (Cth) (Transitional Act). The Leases contain materially similar terms; including cl 26 which forms the basis of the dispute between the parties.

The insertion of cl 26 into the Leases is consistent with the principle of "competitive neutrality" embodied in the Competition Principles Agreement between the Commonwealth and the states and territories. Clause 26 provides that if rates are not payable to the local council, because the Airport Site is on Commonwealth land, then the Lessees must use "all reasonable endeavours" to enter into an agreement with the Council to pay an amount equivalent to the amount which would have been payable as rates on those parts of the Airport Sites which are either sub-leased to tenants or on which "trading or financial operations are undertaken".

In 2014, the Valuer-General of Tasmania undertook a re-valuation of the Airport Sites. The outcome was a significant increase in the amount payable by the Lessees to the Councils under cl 26. Subsequently, the Commonwealth engaged an independent valuer to value the Airport Sites. In 2016 the independent valuer provided a valuation report which was later revised in 2017 (Revised Valuation). The Commonwealth told the Lessees that it would consider the Lessees compliant with their obligations under cl 26 if the Lessees paid the Councils on the basis of the Revised Valuation.

The Councils then commenced proceedings in the Federal Court of Australia against both the Commonwealth and the Lessees seeking, among other things, declaratory relief, pursuant to s21 of the *Federal Court of Australia Act 1976* (Cth), as to the proper construction of cl 26. The primary judge dismissed th Councils' applications on the basis that the Councils lacked standing to obtain the declaratory relief sought. The Councils successfully appealed to the Full Court of the Federal Court (Jagot, Kerr and Anderson JJ). By grant of special leave the Lessees appealed to the High Court.

The High Court (Edelman and Steward JJ dissenting) dismissed the appeals. Kiefel CJ, Keane and Gordon JJ observed, at [26], that a "matter" has two elements: the subject matter itself (as defined by reference to the heads of jurisdiction set out in Chapter III of the Constitution) and the nature of the dispute sufficient to give rise to a justiciable controversy. Kiefel CJ et al found that the Councils' dispute satisfied both elements. Kiefel CJ et al considered, at [27], that the first element was satisfied because the Leases owe their existence to a Commonwealth law (the Transitional Act). In determining the second element (the existence of a justiciable controversy), Kiefel CJ et al considered, at [30], that the answer turned on whether the Councils had standing to have the dispute determined and obtain the declarations sought. Referring to the decision of the Full Court of the Federal Court in *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406, Kiefel CJ et al held that the Councils' did have standing to obtain declaration in respect of the proper contruction of cl 26, even though the Councils were not a party to the Leases, because the Councils had a "sufficient" and "real" interest in seeking declaratory relief. Gageler and Gleeson JJ also found both elements of a "matter" to be present. And their Honours, at [74] citing *Aussie Airlines*, found that that the Councils had an interest in declaratory relief that was "distinctive", "substantial", and aligned to the public interest sought to be advanced by cl 26. In dissent, Edelman and Steward JJ agreed with the principles enuniciated by Kiefel CJ et al but, in applying those principles, concluded that there were no exceptional circumstances giving the Council standing to seek declaratory relief.

Contract

Constuction of contract

In *H Lundbeck A/S & Anor v Sandoz Pty Ltd* and *CNS Pharma Pty Ltd v Sandoz Pty Ltd* [2022] HCA 4 (9 March 2022) the High Court considered two appeals arising out of long-running litigation between the parties in respect of a standard patent of a pharmaceutical substance known as escitalopram (Patent). The appeals heard by the High Court raised many complex issues, but the resolution of all of these issues ultimately rested on one key issue: the construction of a clause in an agreement, executed in 2007 (Settlement Agreement), purporting to give the respondent on both appeals (Sandoz) an irrevocable, non-exclusive licence to exploit the Patent.

H Lundbeck A/S (Lundbeck Denmark) is the owner of the Patent. Lundbeck Australia Pty Ltd (Lundbeck Australia) is the Australian subsidary of Lundbeck Denmark and holds the exclusive licence for the Patent. CNS Pharma Pty Ltd (Pharma) is a subsidary of Lundbeck Australia and sells a generic version of a drug, containing escitalopram, which it purchases from Lundbeck Denmark. Lundbeck Denmark and Lundbeck Australia (Lundbeck Entities) agreed to give Sandoz a licence for the Patent if Sandoz discontinued legal proceedings against them for the revocation of the Patent. Clause 3 of the

Settlement Agreement provided for Sandoz's licence to commence two weeks prior to the expiry of the Patent on 13 June 2009 (the Patent being dated 13 June 1989 and having the standard term of 20 years). Unexpectedly, Lundbeck Denmark was granted, on 25 June 2014, an extension of the term of the Patent to 9 December 2012. During the extended term of the Patent, from 15 June 2009 to 9 December 2012, Sandoz sold generic escitalopram products.

The day after the extended term was granted, the Lundbeck Entities commenced proceedings against Sandoz in the Federal Court seeking, among other things, damages and pre-judgment interest on the basis that Sandoz infringed the Patent by selling escitalopram products during the extended term. Pharma also commenced proceedings against Sandoz in the Federal Court seeking, among other things, damages and pre-judgment interest on the basis that Sandoz engaged in misleading or deceptive conduct, within the meaning of s52 of the *Trade Practices Act 1974* and s18 of the Australian Consumer Law, by failing to warn customers that its escitalopram product might infringe the Patent if and when the term of the Patent was extended.

The primary judge found against Sandoz in both proceedings. Sandoz appealed the decisions and the Full Court of the Federal Court allowed both appeals. The Full Court held that the Settlement Agreement gave Sandoz a non-exclusive licence to the Patent from 31 May 2009 to 9 December 2012. The holding of the licence meant that Sandoz did not infringe the Patent and, accordingly, could not have engaged in misleading or deceptive conduct.

The Lundbeck Entities appealed to the High Court (Lundbeck Appeal) as did Pharma (Pharma Appeal). The High Court unanimously allowed the Lundbeck Appeal and dismissed the Pharma Appeal. Kiefel CJ, Gageler, Steward and Gleeson JJ gave a joint judgment and Edelman J gave a judgment on his own.

In the Lundbeck Appeal, Kiefel CJ et al observed, at [40], that s79 of the *Patents Act 1990* (Cth) (Patents Act) had the effect of filling the "temporal gap" between the expiration of the original term of the Patent and the date on which the term of the Patent was extended. Turning to the construction of the Settlement Agreement, their Honours noted, at [51], that parties to a written contract in respect of statutory rights "can ordinarily be taken to use statutory language according to its statutory meaning". Accordingly, the terms "Patent" and "expire", used in the Settlement Agreement, took their content from the Patents Act. Their Honours concluded, at [56], that, by giving effect to the statutory meaning of these terms and being attentive to the "internal logic" of cl 3, the "overall effect" was to grant Sandoz a licence two weeks before the expiry of the original term of the Patent with the licence then coming to an end on the expiry of that original term. Their Honours inferred, at [57], that the "commercial result" which the parties intended to produce by cl 3 was to give Sandoz a commercial advantage over its competitors by giving Sandoz a two week head start on manufacturing, importing, marketing and offering to sell escitalopram products before the expiry of the original term of the Patent. Consequently, Sandoz did hold a licence during the extended term of the Patent and infringed the Patent when it sold escitalopram products during the extended term. Having made this finding, their Honours then determined, at [61], that only Lundbeck Denmark (the holder of the Patent), and not Lundbeck Australia, had rights to bring proceedings against Sandoz for infringing the Patent. And, at [68], their Honours held that Lundbeck Denmark's cause of action against Sandoz only accrued on the date that the extended term was granted and so Lundbeck Denmark could only obtain pre-judgment interest on damages, under s51A(1)(a) of the *Federal Court of Australia Act 1976* (Cth), from that date.

In the Pharma Appeal, their Honours observed, at [69], that the resolution of the appeal required highlighting only two principles relevant to the determination of whether conduct is misleading or deceptive. The first principle being (where the conduct is not directed to an identified individual) the need "to isolate by some criterion" a representative member of the target audience for the conduct. And the second principle being (where the impugned conduct is said to be the non-disclosure of a circumstance) to establish that the representative member of the target audience would "hold a reasonable expectation that the circumstance would be disclosed if the circumstance exists". Their Honours, at [73], considered that it was "not self-evident" that pharmacists purchasing Sandoz's escitalopram products would have held an expectation of being informed by Sandoz of the possibility that they might be exposed to proceedings for infringment of the Patent. ■

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FEDERAL COURT JUDGMENTS

SHANTA MARTIN

Evidence – legal professional privilege at common law – waiver

Whether forensic report attracts legal professional privilege – whether privilege is waived over whole or part of report – whether Court has power to examine document to determine issue of partial waiver

In *TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCA 208 (11 March 2022) the Court upheld a claim by the Applicant (TerraCom) that legal professional privilege attached to a forensic investigation report (PwC report) that had been produced to be given to TerraCom's solicitors so that they could provide legal advice to TerraCom. TerraCom sought a declaration that it was not obliged to produce the PwC report to ASIC and that ASIC was not entitled to inspect it.

Stewart J considered whether TerraCom had waived privilege in part or in full by several disclosures. Some of the disclosures were to a communications advisory firm, Teneo, that TerraCom had appointed and which produced draft media statements that were not released. The PwC report had not been provided to Teneo. The Court found that Teneo was bound by confidentiality and the disclosures to it did not result in waiver of privilege in the PwC report. The other disclosures were by way of ASX announcements and an open letter to shareholders. One of the ASX announcements referred to but did not say what the outcome of the PwC report was, apart from stating that TerraCom believed that the allegations against it were totally unfounded. The Court found that this was a statement of belief, which did not disclose the substance or effect of the advice and therefore did not amount to a waiver. However, both the letter to shareholders and subsequent ASX announcements referred to allegations against TerraCom's CEO and CFO and stated, "an independent forensic investigation was conducted and found no evidence of wrongdoing". The Court found that these disclosures were inconsistent with the maintenance of privilege in the report, and it would be unfair not to grant access to the report to ASIC.

The Court also considered whether privilege had been waived over the whole of the report, determination of which would be difficult without examining the report. ASIC opposed inspection by the Court of the report, submitting that a court should only examine a disputed document at the invitation of the party disputing the privilege. The Court formed the view that it would inspect the report, relying on broad statements of the discretion to inspect documents by the High Court in *Grant v Downs* [1976] HCA 63; 135 CLR 674 and the NSW Court of Appeal in *Rinehart v Rinehart* [2016] NSWCA 58. On inspection, the Court considered that it was not possible to fully comprehend the disclosed parts of the report without disclosure of the whole. Accordingly, the Court found that the partial disclosure by TerraCom had led to waiver of legal professional privilege in respect of the whole report.

Arbitration – freezing orders – practice and procedure

International commercial arbitration – freezing orders in anticipation of enforcement of arbitral award – where enforcement sought in this Court and in foreign courts

In *Viterra BV v Shandong Ruyi Technology Group Co Ltd* [2022] FCA 215 (11 March 2022) the Court considered whether Australian assets can be frozen in aid of enforcement processes of a foreign court and in what circumstances a wholly owned subsidiary of the judgment debtor may be restrained from disposing of, dealing with or otherwise diminishing the value of its assets.

The Applicant (Viterra) is a Dutch-based company that had succeeded in an arbitration against the First Respondent, Ruyi, in a dispute arising from a contract for the sale of cotton. Viterra had received from Ruyi no money towards satisfying the award of approximately $18.7million. Viterra commenced recognition and enforcement proceedings in China and in Singapore. It anticipated judgment in Singapore, following which it intended to execute the judgment against Ruyi's shares in its wholly owned subsidiary, CSST Singapore. CSST Singapore's assets included 80 per cent of the shares in two Australian incorporated entities, the Third and Fourth Respondents. Viterra submitted that once it obtained the shares in CSST Singapore, it would realise that company's assets and obtain payment.

Viterra had been granted ex parte interlocutory freezing orders against CSST Singapore preventing it from dealing with, dissipating or diminishing the value of its assets without notice to Viterra. CSST Singapore sought discharge of the freezing orders, arguing that the case does not come within the meaning of r7.35(5)(b) of the Rules, which allows the Court to make freezing orders against a third party. CSST Singapore submitted that the rule does not apply because there is no process in the Court under which CSST Singapore may be obliged to disgorge assets or contribute towards satisfying any judgment against Viterra.

The Court summarised the applicable cases in Australia, of which Stewart J noted there are remarkably few dealing with freezing orders against third parties that are the wholly-owned subsidiary of the debtor, as well as relevant foreign judgments.

The Court held that the freezing orders should be discharged, finding that Viterra was outside the ambit of rr7.32 and 7.35(5)(b). Those rules refer respectively to the protection of "the Court's powers" and the availability of "a process in the Court". It was held (at [109]) that those are references to the Federal Court of Australia, as opposed to "another court" whether inside or outside Australia. As the freezing order was not sought in aid of a judgment of the Federal Court, the Court should not make such an order. The position was to be distinguished from cases in which a foreign judgment was to be recognised and form the basis of a

judgment in Australia. Further, the proposed process of obtaining shares in CSST Singapore and realising its assets was not a process of enforcing or executing judgment of either the Federal Court or the High Court of Singapore. It was a process available to Viterra as a shareholder, not a process that Stewart J considered should be protected by the power to make freezing orders.

Negligence – duty of care – climate change litigation

Representative proceeding on behalf of Australian children under 18 against the Minister for the Environment – threat of global warming and climate change to the world and mankind – novel duty of care

In *Minister for the Environment v Sharma* [2022] FCAFC 35 (15 March 2022) the Minister appealed a decision in which it was held that she owed a duty to take reasonable care in the execution of her duties, powers and functions under ss130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), to avoid causing personal injury or death to children resident in Australia arising from carbon dioxide emissions. The Minister also appealed the primary judge's finding that human safety was an implied mandatory consideration under the EPBC Act. The threat of climate change and global warming was not in dispute between the parties.

The Full Court allowed the appeal, rejected the primary judge's finding that there was an implied mandatory statutory consideration under the EPBC Act, and rejected the imposition of a duty of care. Each member of the bench provided different reasons for finding no duty of care, though all remarked on the difficulty of assessing the case in circumstances where the cause of action was incomplete because damage had not yet occurred.

Allsop CJ considered that the duty should be rejected for three reasons: (i) the posited duty throws up for consideration at the point of breach matters that are core policy questions unsuitable in their nature and character for judicial determination; (ii) the posited duty is inconsistent and incoherent with the EPBC Act; and (iii) considerations of indeterminacy, lack of special vulnerability and of control, taken together in the context of the EPBC Act and the nature of the governmental policy considerations necessarily arising at the point of assessing breach make the relationship inappropriate for the imposition of the duty. His Honour considered that the proper approach to determine whether a duty of care exists is to begin with the relationship between the parties and consider context, coherence and what is necessarily thrown up at the point of breach, rather than analysing each salient feature on the hypothesis that the government defendant will be amenable to potential liability (at [209]-[212]).

Beach J rejected the imposition of a duty of care based on: (i) insufficient closeness and directness between the Minister's exercise of statutory power and the likely risk of harm – whether temporal, geographic, causal or otherwise; and (ii) the indeterminacy of liability, particularly due to the lack of ascertainability of the relevant class. His Honour expressed no difficulty with the salient features approach to determining whether a duty of care is owed, so long as it is appreciated that it is only a conceptual tool, but considered it should not distract from consideration of broader questions such as whether there is sufficient closeness and directness (at [362]). His Honour accepted there was reasonable foreseeability of harm in the context of duty, and considered the evidence had made out that it was possible to foresee that a particular action may combine with other circumstances to cause harm (at [423]-[428]). It was rejected that incoherency was a strong feature against recognising a duty of care (at [609]), and the case was not in the realm of "core" policy, which label his Honour found unhelpful (at [615]). He concluded that "policy is no answer to denying the duty unless the Act itself makes such policy questions so fundamental to the exercise of statutory power that such a conclusion is compelling" (at [633]), which was not the case here.

Wheelahan J's decision was that no duty of care arose because: (i) the EPBC Act does not create a relationship between the Minister and the children that supports the recognition of a duty of care; (ii) the standard of care cannot be feasibly established, which would lead to incoherence between the duty and discharge of the Minister's statutory functions; and (iii) it was not reasonably foreseeable that the approval of the coal mine extension would be a cause of personal injury to the children. ■

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FAMILY LAW JUDGMENTS

CRAIG NICOL &
KELEIGH ROBINSON

Property

Registrar erred when an application for consent orders was dismissed after husband's death when wife withdrew consent

In *Hullet & Benton* [2022] FedCFamC1A 13 (11 February 2022) the Full Court (Austin, Tree & McEvoy JJ) dismissed an appeal from Macmillan J's decision in *Hullet & Benton* [2021] FamCA 449.

On a review of his decision, a registrar was held by Macmillan J to have erred when an application for consent orders was dismissed following the husband's death and the wife's withdrawal of consent. Macmillan J held that the proceedings could continue where the rules enabled the husband's executor as legal personal representative to apply as to the future conduct of the proceedings.

The wife appealed, arguing that when determining the review application, Macmillan J's power was limited to either granting the application for consent orders or dismissing it; the latter being the only option in the absence of the wife's consent. She argued that an application for consent orders was a "different species of application to an adversarial application . . . and had to be treated differently" (at [10]).

The Full Court said (from [15]-[18]):

". . . The existence of a 'judgment' is the pre-requisite for a competent appeal (s26(1) of the *Federal Circuit and Family Court of Australia Act 2021 (Cth)* ('the FCFCA Act')), for which purpose a 'judgment' is defined to include an order or decree, whether it be final or interlocutory (s7 of the FCFCA Act).

". . . [A] 'judgment' does not include a mere ruling on a question of law which is not decisive of the parties' rights in the justiciable dispute, even if it is expressed in the form of an order . . .

". . . [N]one of the orders amount to a 'judgment' since none is decisive of the parties' rights under Pt VIII of the Act. The orders do no more than achieve the continuity of the proceedings . . .

"Leave to appeal must be refused once it is understood that no appeal validly lies . . ."

Property

Erroneous dismissal of the parties' countervailing applications for sole occupation

In *Sarto & Sarto* [2022] FedCFamC1A 16 (10 February 2022) Austin J, sitting in the appellate jurisdiction of the Federal Circuit and Family Court of Australia, allowed an appeal in a case where the Court heard countervailing applications for sole occupation of the former matrimonial home.

The wife had vacated the home on separation, but sought an exclusive occupation order to move back in, despite being the sole registered owner of the property. The husband had lived in the property since separation and sought a sole occupation order.

The Magistrates Court of Western Australia dismissed both applications. The wife appealed.

Austin J said:

". . . Being the sole legal proprietor of the property, absent an injunction to the contrary, [the wife] . . . is entitled to exclusive possession . . . (at [11]).

"Regardless of whether or not persons are married, property law governs the ascertainment of their property rights and interests (*Wirth v Wirth* [1956] HCA 71 . . . (at [14]).

"The husband . . . seeks to obtain a property settlement order which substitutes him as the exclusive legal proprietor of the property . . . [T]he success of the husband's claim depends upon an eventual exercise of discretion . . . under Pt VIII of the Act adjusting the . . . existing property interests . . . (at [19]).

"In the face of the wife's withdrawal of consent, the only way . . . the husband could evade ejection from the property was by securing an injunction to restrain the wife from exercising the rights which attend her legal title . . . (at [20]).

". . . Evidently, the magistrate concluded it was not proper to do so, because the injunction sought by the husband was refused (at [21]).

". . . [T]he magistrate also refused to make the orders sought by the wife . . . The magistrate decided no order was necessary, but that conclusion was reached on the false premise that making no order at all would then permit the husband to continue residing in the property . . . (at [22]).

". . . The husband . . . has not demonstrated it would be 'proper' to grant an injunction depriving the wife of her legal entitlement to possession of the property. An order should be made requiring the husband to immediately vacate the property . . ." (at [30]).

Children

Order for vaccination of child against COVID-19 – Evidence of public health researcher preferred

In *Palange & Kalhoun* [2022] FedCFamC2F 149 (16 February 2022) Judge B Smith heard an application for a 10 year old child to be vaccinated against COVID-19.

The Court directed each parent to file any expert evidence that they sought to rely on. The mother filed an affidavit of "Dr E", a public health researcher in the area of vaccination, who had a PhD in public health among other qualifications. There was no other expert evidence.

The mother also sought to rely on publications by the World Health Organisation and the Center for Disease Control Prevention.

The Court said:

". . . [E]ach party has given evidence of what various bodies have said, and what is contained in the pamphlets provided, to seek to prove the truth of those statements . . . (at [68]).

"Dr E . . . has a PhD on the topic on which she has given her opinion. She currently works in the field in which she has given her opinion and her role is to study the area on which she gave an opinion. There was no challenge to Dr E's expertise . . . (at [81]).

". . . I am satisfied that Dr E's opinion evidence sufficiently satisfies the criteria for admissibility pursuant to s79 *Evidence Act* . . . (at [83]).

". . . I do not consider it appropriate to give any weight to either of [the parties'] opinions on the medical and public health issues associated with COVID-19 infection or vaccination (at [109]).

". . . I also give no weight to the pamphlets tendered by the mother (at [111]).

". . . I give substantial weight to the unchallenged and uncontested evidence of Dr E who is a highly qualified expert . . . (at [112]).

"My role is to consider and weigh the relative risks . . . taking into account the evidence before me, and . . . to make a decision as to what course of action I believe is in his best interests . . . (at [154]).

". . . I am satisfied that it is in the child's best interests to be vaccinated against COVID-19 . . ." (at [155]). ■

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

Statutes – constitutional law

Whether erecting election candidate signs prior to an election being called is valid – statutory interpretation – implied freedom of political communication

Badger v Bayside City Council [2022] VSC 140 (23 March 2022) concerns a proceeding in which the right of an occupier of land to display a yard sign concerning the federal election on their land is regulated by the law (here, the Bayside Planning Scheme) (at [1]-[3]). While the date of the federal election was not yet known at the time of the Court's judgment, it was nevertheless "notorious that there will be a Federal Election in 2022" (at [1]).

Keith Badger is the campaign director for Zoe Daniel, an independent candidate for the seat of Goldstein, and a resident of the Bayside local government area (situated within the Goldstein electorate) (at [2]). Consistent with the practice of candidates for election at federal, state or local levels, Ms Daniel's campaign sought to use yard signs "displayed by supportive individuals on their properties within the electorate" (at [1]-[2]). Prior to doing so, inquiries were made of Bayside City Council (Bayside) where the response was that election signage is exempt from the requirement for a planning permit (at [4]).

After Bayside received complaints regarding the signage, their position changed. For the election signage exemption to apply, an election must first be called, and the date known so as to constitute the political "event" contemplated in clause 52.05-10 of the Bayside Planning Scheme (Scheme) (at [4]-[6]). Bayside sent letters to Mr Badger (and other residents of Bayside displaying the signage) requiring removal of the signage or that it be completely covered up (at [8]-[9]).

Mr Badger's challenge was directed towards Bayside's application (and interpretation) of clause 52.05-10 of the Scheme to the sign, and whether it restricted the constitutionally implied freedom of political communication of the occupier of the land (at [7]). Mr Badger sought relief by way of various declarations (as to the display of signs by occupiers of the land) and injunctions restraining Bayside from taking further steps to enforce the Scheme. Bayside had given the Court an undertaking that it would not take any enforcement steps against Mr Badger (or other Bayside residents) in respect of signage until such time that the Court delivered its judgment in this proceeding (at [10]).

In its judgment, the Court separated the issue of whether clause 52.05 regulated Mr Badger's yard sign from the issue of whether the sign was exempt from the requirement for a permit and the time period in which the exemption applied (at [22]).

For the purposes of this case note, Mr Badger's contentions that clause 52.05 of the Scheme did not apply to the signage were not accepted by the Court (at [23]-[30]). Clause 52.05 regulates development of land, the statutory definition of which includes "the construction or putting up for display of signs or hoardings,"[1] which clearly contemplated putting up for display a temporary "corflute" (corrugated polypropylene) sign affixed to a fence by cable ties (at [11] and [31]-[36]). Clause 52.05 was, in part, intended to regulate development of land for signage and ensure signs are compatible with the amenity of an area, where both signs that are constructed and signs "that are merely 'put up' and made of less permanent materials [can be] to the detriment of amenity" (at [37]). Clause 52.05 applied to prohibit all signs of any description, unless the subject of a permit or an express exemption from the requirement for a permit (at [38]).

Clause 52.05-10 of the Scheme is an exemption from the requirement for a permit to display signs of particular types; these include signs "publicising a local educational, cultural, political, religious, social or recreational event not held for commercial purposes" (at [44]). Further conditions apply to the exemption, such as a limit of one sign being displayed on the land and that it is not displayed "longer than 14 days after the event is held or [three] months, whichever is sooner" (at [44]). Bayside's submissions were that an "event" is something that occurs at a known time and place (because it must also be "held") and must finish on a particular date so that the requirement for any sign to be removed 14 days after the event could operate (at [47]). Bayside contended that while the federal election will be a local political event in the seat of Goldstein, it was not yet an "event" that engaged the exemption in clause 52.05-10 of the Scheme (at [47]-[48]). Further, Bayside also contended that for clause 52.05-10 to apply, the event must be three months (or less) into the future (at [50]).

The Court considered that the primary message of the yard signs was not that there will be an election (yet to be called) for the seat of Goldstein; rather, the signs communicated that Ms Daniel will nominate as a candidate for election as the federal member for Goldstein (at [56]-[57]). This nomination would occur after the writs issue, a forthcoming event, and that the election "is plainly an anticipated event being publicised by the sign" (at [57]). Ms Daniel's candidacy in the election for the federal member for Goldstein pertains to the politics of the local electorate and so was about a local political event (at [58]).

Clause 52.05-10 was not confined to an "event" occurring at a known time or place, and the Court did not accept Bayside's characterisation of an "event" for the purposes of the clause's time limits went "beyond what the text, context and purpose of the clause requires" (at [59]-[60]). Clause 52.05-10's time limits – not to be displayed longer than 14 days after the event is held or three months, whichever is sooner – governs the period of display of signs, and does not require the event to be held on a certain date (at [60]). Further, "three months" related

only to the maximum period for display of a sign, and was not the three-month period preceding the event – if that were the case, then the text of clause 52.05-10 would prohibit display "earlier than three months prior to the happening of the event, or 14 days afterwards" (at [61]).

As to the implied freedom of political communication, Bayside submitted that the constitutional question cannot be reached in the proceedings (at [78]-[80]). In its submission, Mr Badger was still within the three-month period for displaying his sign as per the Scheme's exemption, and since the sign was currently displayed there was no constitutional question in the factual controversy before the Court (at [71]). The Court was not persuaded that it was "necessary or desirable to determine whether clause 52.05 impermissibly burdens the implied freedom of political communication" (at [82]). However, the Court did express at [85]:

- the view that "signs identifying and promoting the candidates for an election appear central to the implied freedom of political communication" to communicate to the electorate the available candidates for public office and thus contribute to the system of representative government
- the tentative view that it is likely an alternative measure to clause 52.05 might be more practicable and less restrictive on the freedom, where such a measure may exempt political signs separately from "the grab bag" of educational, cultural, religious, social or recreational events held for non-commercial purposes.

In light of the Court's findings, declarations were made as to the display of the Zoe Daniel signs not contravening the Scheme if displayed for a period not exceeding three months (or removed less than 14 days after the federal election, if that occurs before the end of the three-month period) (at [88]). It was also declared that the forthcoming federal election is an event for the purposes of clause 52.05-10 of the Scheme (regardless of whether a writ for general elections of the House of Representatives has been issued by the Governor-General), and Bayside was restrained from taking steps to enforce the Scheme in relation to signs displayed in accordance with the exemption (at [88]). ■

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1. *Planning and Environment Act 1987* (Vic) s3, definition of development (paragraph (f)).

CRIMINAL LAW JUDGMENTS

LIAM MCAULIFFE

Conviction appeal

Prosecutor's fallacy

In *Ali v The Queen* [2022] VSCA 31 (10 March 2022) the Court of Appeal (T Forrest, Emerton and Walker JJA) considered whether the prosecutor and trial judge had committed the "prosecutor's fallacy" in relation to DNA evidence. A further issue arose in relation to whether the Crown should have been permitted to lead general evidence about the formation of memories and the role of unconscious transference during traumatic events.

The appeal

Mark Ali (applicant) was found guilty by a jury of aggravated burglary and indecent assault. He was sentenced to a total effective sentence of six years and four months imprisonment with a non-parole period of four years and two months. The applicant sought leave to raise two grounds of appeal: a substantial miscarriage of justice occurred because the trial judge and prosecutor made a probabilistic reasoning error known as "the prosecutor's fallacy"; and the trial judge erred in admitting the evidence of Professor Thompson (at [5]).

Background

Shortly after midnight, on 29 April 2009, the complainant heard what she thought was a knock at the front door. She got out of bed and opened her bedroom door and was confronted by an intruder. He was naked from the waist down. He indecently assaulted her. The complainant ran screaming from her house. A neighbour called out to help her, but she ran past him (at [1]).

At trial, the applicant disputed that he was the offender in question. He relied on the complainant's description which he said did not match his appearance. This description was said to match the neighbour who tried to help the complainant. The Crown relied on DNA recovered from the scene, several samples of which were 100 billion times more likely if the applicant was the source than if he were not the source (at [2]). The DNA evidence included a sample found on a windowsill at a house close to the complainant's home that had both a "sperm fraction" and a "non-sperm fraction" (at [33]-[34]). The DNA evidence and the DNA expert's testimony (and expertise) was not challenged at trial (at [43]).

The Crown also adduced evidence from another expert, Professor Thompson, about how memories are formed, stored and retrieved and how such processes can be disrupted by the experience of a traumatic event. Professor Thompson gave evidence about "unconscious transference", which is when a person may see somebody and mistakenly attribute that sighting to a different person, who had been seen earlier. His evidence was general in nature (at [3]).

The prosecutor's fallacy

The Court explained the prosecutor's fallacy as involving the "transposition of the conditional", that is, it takes a statement about the probability of one thing (X) relative to another (Y) and inverts it to a statement about the probability of Y relative to X. In relation to DNA evidence, it takes the random match probability, that is the probability of a DNA match if the accused was the (or a) source of the DNA and inverts it to a probability that the accused is the (or a) source, given the DNA match (at [25]).

The risk is that the jury will reason that the evidence about the DNA ratio or match probability expresses the probability that the incriminating DNA was the accused's DNA (at [26]).

The Court accepted that both the prosecutor during a single question to the DNA expert, and the trial judge in several statements while summing up the case to the jury, committed the prosecutor's fallacy (at [42]).

Ultimately, the Court considered that the prosecutor's fallacy was not a "*relevant* error" (emphasis in original) because it was not a fact in issue at the trial as to whether the DNA found at the scene (or the DNA from the sperm fraction found on the windowsill of the nearby house) included the applicant's DNA (at [45]). Further, the Court considered that, despite the trial judge's unfortunate reformulation, the DNA expert's testimony was unimpeachable. While there was an irregularity, it was not one that led to a substantial miscarriage of justice (at [46]-[47]).

Memory evidence

The Court explained that the Crown sought to use Professor Thompson's evidence to rebut the defence case that the complainant was entirely reliable and credible (therefore her description of the attacker being her neighbour should be accepted) and to explain why the complainant might have made a mistake in her description. The Crown's use of the evidence was not made clear until after submissions about its admissibility had commenced (at [50]).

During the trial, the applicant accepted that the evidence was admissible under s79 of the *Evidence Act 2008* (Vic). Arguments under ss137 and 135 and the common law were abandoned. Agreement was reached with the Crown to limit the Professor's evidence (at [52]). On appeal, the applicant submitted that Professor Thompson's evidence caused him unfairness. This was because the Crown had not put to the complainant that she might be identifying her neighbour (rather than the applicant) or was otherwise mistaken about her description. The applicant did not have an opportunity to ask the complainant whether she disavowed that she might be identifying her neighbour (at [57]-[58]).

The Court found that Professor Thompson's evidence should not have been admitted in the absence of the complainant being recalled because the Crown had not laid any evidentiary foundation for such evidence. Forensically, the applicant was entitled to object to the evidence while also agreeing that the complainant should not be recalled. The unfairness caused by the Crown's approach outweighed the

evidence's probative value and it should have been excluded under s137 (at [61]-[65]).

Despite this irregularity, the Court did not consider that it resulted in a substantial miscarriage of justice. This was because the applicant ultimately abandoned his objection at trial and did not argue that the evidence was not relevant on appeal merely that it caused unfairness (at [66]-[68]). Further, the Court considered that the applicant's conviction was inevitable in light of the strength of the DNA evidence (at [69]-[70]).

Occupational health and safety

Prescribed compliance regulations

In *Seascape Constructions Pty Ltd v The Queen* [2022] VSCA 29 (10 March 2022) the Court of Appeal (Maxwell P, T Forrest and Sifris JJA) granted leave to appeal and allowed the appeal. The applicant's conviction was quashed, and a new trial was ordered.

Background

Seascape Constructions Pty Ltd (Seascape) was charged with breaching s23(1) of the *Occupational Health and Safety Act 2004* (Vic) (Act). This was a deemed breach based on reg 327(1) of the *Occupational Health and Safety Regulations 2017* (Vic) (Regulations). Generally, it was alleged that Seascape had failed to prepare and ensure that work, being the laying of flooring sheets, was conducted in accordance with a safe work method statement. The work being high risk construction work within the meaning of reg 322(a) of the Regulations (at [11]-[14]).

The relationship between general duties and regulations

The Court explained how the regulation of occupational health and safety in Victoria comprises three interlocking parts. The first part comprises the safety duties or so-called general duties imposed on employers and others by the Act (also referred to by the Court as a "parent provision"). The second part comprises the Regulations made under s158(1) of the Act. The third part comprises the compliance codes approved by the relevant Minister under s149 of the Act (at [1]).

This proceeding concerned the relationship between the general duties and the Regulations. First, s152 of the Act provides for a mechanism of deemed compliance where the Regulations make provision for or with respect to a duty or obligation imposed by the Act (at [3]). There are also regulations which set out the way in which one or more of the general duties is to be performed with respect to a particular activity (at [4]). The Court described this type of regulation as a mechanism of prescribed compliance, which requires that a person to whom such a regulation applies must ensure that the relevant activity is carried out in the prescribed manner (at [5]). With more than 200 such regulations, the mechanism of prescribed compliance is of great importance to the Victorian regulatory scheme (at [5]). Accordingly, non-compliance with any such prescribed compliance regulation is a deemed breach and is, by definition, a breach of the general duty (at [6]).

The question for the Court concerned how the prosecution is required to prove a deemed breach of a prescribed compliance regulation.

The decision

The Court considered that where a dutyholder under the Act is alleged to have breached its duty by failing to comply with a prescribed compliance regulation, it is both necessary and sufficient for the prosecution to prove that there was non-compliance with the requirements of that regulation. If that non-compliance is proved, the charge of breach of duty is made out. No reference to the parent provision in the Act is necessary (at [9]).

This is because a breach of the regulation is a breach of the general duty and so the words of the regulation effectively stand in place of the words of the parent provision (at [23]).

Where an employer, like Seascape, is charged with a deemed breach of s23(1) on the basis of non-compliance with a prescribed compliance regulation, no question arises about the nature or scope of the employer's "undertaking" or about what was "reasonably practicable" in the circumstances. The only question is whether there has been non-compliance with the requirements of the relevant regulation (at [24]). Accordingly, the trial judge's ruling on the elements of the offence and the conviction that followed was not correct (at [27]).

The Court considered that it is unnecessary and undesirable for a charge of deemed breach to recite the terms of the parent provision. This is because the prosecution is not required to prove breach of any requirements of the parent provision and inclusion of such words may be misleading (at [33]). The Court offered a suggestion about how a charge might be drafted (at [35]). ■

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LEGISLATION UPDATE

New Victorian 2022 Assents

As at 22/03/2022

2022 No. 3 Domestic Animals Amendment (Reuniting Pets and Other Matters) Act 2022
2022 No. 4 Health Legislation Amendment (Quality and Safety) Act 2022
2022 No. 5 Major Events Legislation Amendment (Unauthorised Ticket Packages and Other Matters) Act 2022
2022 No. 6 Service Victoria Amendment Act 2022
2022 No. 7 Sex Work Decriminalisation Act 2022
2022 No. 8 Victoria Police Amendment Act 2022
2022 No. 9 Alpine Resorts Legislation Amendment Act 2022
2022 No. 10 Workplace Safety Legislation and Other Matters Amendment Act 2022

New Victorian 2022 Regulations

As at 22/03/2022

2022 No. 15 Guardianship and Administration (Fees) Regulations 2022
2022 No. 16 Drugs, Poisons and Controlled Substances Amendment (Registered Aboriginal and Torres Strait Islander Health Practitioners) Regulations 2022
2022 No. 17 Bus Safety Amendment Regulations 2022
2022 No. 18 Transport (Safety Schemes Compliance and Enforcement) (Infringements) Amendment Regulations 2022
2022 No. 19 Road Safety (Drivers) and (General) Amendment Regulations 2022

New Victorian 2022 Bills

As at 22/03/2022

Conservation, Forests and Lands Amendment Bill 2022
Drugs, Poisons and Controlled Substances Amendment (Decriminalisation of Possession and Use of Drugs of Dependence) Bill 2022
Gambling and Liquor Legislation Amendment Bill 2022
Human Rights and Housing Legislation Amendment (Ending Homelessness) Bill 2022
Justice Legislation Amendment (Fines Reform and Other Matters) Bill 2022
Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Bill 2022
Puffing Billy Railway Bill 2022
Road Safety Amendment (Hoon Events) Bill 2021

New Commonwealth 2022 Assents

As at 22/03/2022

2022 No. 1 Appropriation (Coronavirus Response) Act (No. 1) 2021-2022
2022 No. 2 Appropriation (Coronavirus Response) Act (No. 2) 2021-2022
2022 No. 3 Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Act 2022
2022 No. 4 Electoral Legislation Amendment (Authorisations) Act 2022
2022 No. 5 Electoral Legislation Amendment (COVID Enfranchisement) Act 2022
2022 No. 6 Electoral Legislation Amendment (Foreign Influences and Offences) Act 2022
2022 No. 7 Parliamentary Workplace Reform (Set the Standard Measures No. 1) Act 2022
2022 No. 8 Corporate Collective Investment Vehicle Framework and Other Measures Act 2022
2022 No. 9 Corporations Amendment (Meetings and Documents) Act 2022
2022 No. 10 Treasury Laws Amendment (Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest) Act 2022

New Commonwealth 2022 Regulations

As at 22/03/2022

Autonomous Sanctions Amendment (Myanmar) Regulations 2022
Autonomous Sanctions Amendment (Russia) Regulations 2022
Autonomous Sanctions Amendment (Ukraine Regions) Regulations 2022
Business Names Registration (Fees) Regulations 2022
Civil Aviation Safety Amendment (Parts 47 and 101) Regulations 2022
Competition and Consumer (Industry Codes – Franchising) Amendment (Penalties and Other Matters) Regulations 2022
Criminal Code (Terrorist Organisation – Abu Sayyaf Group) Regulations 2022
Criminal Code (Terrorist Organisation – Al-Qa'ida in the Lands of the Islamic Maghreb) Regulations 2022
Criminal Code (Terrorist Organisation – Al-Qa'ida) Regulations 2022
Criminal Code (Terrorist Organisation – Hamas) Regulations 2022
Criminal Code (Terrorist Organisation – Hay'at Tahrir al-Sham) Regulations 2022
Criminal Code (Terrorist Organisation – Hurras al-Din) Regulations 2022
Criminal Code (Terrorist Organisation – Jemaah Islamiyah) Regulations 2022
Criminal Code (Terrorist Organisation – National Socialist Order) Regulations 2022
Family Law (Superannuation) Amendment (2022 Measures No. 1) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Agriculture, Water and the Environment Measures No. 2) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 2) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 3) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 2) Regulations 2022
Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 1) Regulations 2022
Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 2) Regulations 2022
High Court Amendment (Fees and Other Matters) Rules 2022
Industry Research and Development Regulations 2022
Legislation (Exemptions and Other Matters) Amendment (Autonomous Sanctions) Regulations 2022
Migration Amendment (2022 Measures No. 1) Regulations 2022
Migration Amendment (Extension of Temporary Graduate and Skilled Regional Provisional Visas) Regulations 2022
Migration Amendment (Pacific Australia Labour Mobility) Regulations 2022
Migration Amendment (Subclass 417 and 462 Visas) Regulations 2022
Migration Amendment (Ukraine) Regulations 2022
National Land Transport Regulations 2022

Seafarers Rehabilitation and Compensation Levy Amendment Regulations 2022
Superannuation (CSS) Salary Amendment (Housing Allowance and Rent-free Housing) Regulations 2022
Superannuation (Government Co-contribution for Low Income Earners) Regulations 2022
Tax Agent Services Regulations 2022
Telecommunications Amendment (Local Access Lines – Class Exemptions) Regulations 2022
Therapeutic Goods Legislation Amendment (2022 Measures No. 1) Regulations 2022
Transport Security Legislation Amendment (Issuing Body Reform) Regulations 2022
Treasury Laws Amendment (Enhancing Superannuation Outcomes) Regulations 2022
Treasury Laws Amendment (Professional Standards Schemes) Regulations 2022

New Commonwealth 2022 Bills

As at 22/03/2022

Crimes Legislation Amendment (Ransomware Action Plan) Bill 2022
Education Legislation Amendment (2022 Measures No. 1) Bill 2022
Higher Education Support Amendment (Australia's Economic Accelerator) Bill 2022
Public Sector Superannuation Legislation Amendment Bill 2022
Telecommunications (Interception and Access) Amendment (Corrective Services Authorities) Bill 2022
Transport Security Amendment (Critical Infrastructure) Bill 2022
Treasury Laws Amendment (Modernising Business Communications) Bill 2022
Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022 ■

This summary is prepared by the LIV Library to help practitioners keep informed of recent changes in legislation.

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

Supreme Court of Victoria

Notice to the profession – Criminal trials by judge alone pursuant to Chapter 9 of the Criminal Procedure Act 2009

The *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022* re-inserts Chapter 9 into the *Criminal Procedure Act 2009* (CPA) to temporarily provide for criminal trials by judge alone.

Pursuant to s420E of the CPA, a Court may order that there be a trial by judge alone while a pandemic declaration is in force. The provisions apply to proceedings involving charges for an offence under Victorian law on an indictment. An application for trial by judge alone cannot be made for any trial on indictment which includes a Commonwealth charge.

This notice applies to criminal proceedings listed in the Supreme Court sitting at Melbourne and at regional locations, but does not apply to proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

This notice remains in force until Chapter 9 of the CPA is repealed, on the first anniversary of its commencement.

The Court may dispense with some or all of the requirements set out in this notice, or may give additional directions, in respect of any application for an order for trial by judge alone, as required.

For the full notice, go to https://www.supremecourt.vic.gov.au/law-and-practice/practice-notes/notice-to-the-profession-criminal-trials-by-judge-alone.

For all inquiries relating to trials by judge alone, please contact the Criminal Division case management lawyers on criminal.casemgmt@supcourt.vic.gov.au.

Viv Mahy, Executive Associate to the Chief Justice, 30 March 2022

Supreme Court of Victoria

Practice Note SC CR 11 – Applications for sentence indications pursuant to part 5.6 of the Criminal Procedure Act 2009

The purpose of this Practice Note is to set out the procedure for applications for a sentence indication.

This Practice Note commenced on 28 March 2022 and applies to any application made after that date.

At any time after the indictment is filed, but before the trial commences, an application may be made to the Court for a sentence indication, provided the proposed charge(s) for the sentence indication have been agreed between the parties. If the parties are unable to agree on the facts for the purpose of the sentence indication, any sentence indication would be based on the facts as asserted by the prosecution.

To apply for a sentence indication, the defence must file via RedCrest and serve on the prosecution an application using Form 6-1D of the *Supreme Court (Criminal Procedure) Rules 2017*.

If the sentence indication application is granted, the sentence indication hearing may proceed immediately thereafter.

For the full practice note go to https://www.supremecourt.vic.gov.au/law-and-practice/practice-notes/sc-cr-11-applications-for-sentence-indications.

For inquiries relating to sentence indications, please contact the chambers of the allocated judge (if known) or the Criminal Division case management lawyers via email (criminal.casemgmt@supcourt.vic.gov.au). ■

Viv Mahy, Executive Associate to the Chief Justice, 28 March 2022

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.

LAW INSTITUTE VICTORIA

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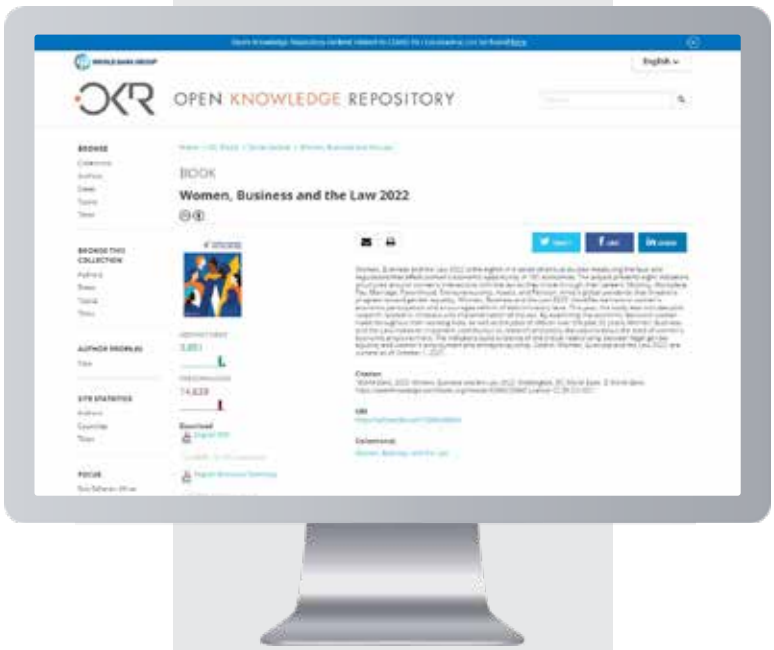
IN_SITES



World Bank Group – Women, Business and the Law 2022

https://openknowledge.worldbank.org/handle/10986/36945

Published by the World Bank Group, Women, Business and the Law 2022 is the eighth instalment in an annual series that measures women's economic inclusion by reviewing laws and regulations that affect women in 190 economies. The book discusses eight indicators (mobility, workplace, entrepreneurship, pay, assets, marriage, parenthood and pension) and their relationship to laws that affect women throughout their working lives. The resource highlights barriers to economic participation and can be used for policy and law reform discussions.

Sentencing Advisory Council – Sentencing Breaches of Personal Safety Intervention Orders in Victoria

https://www.sentencingcouncil.vic.gov.au/publications/sentencing-breaches-of-personal-safety-intervention-orders-in-victoria

In February 2022, the Sentencing Advisory Council published a report to assist the Victorian Law Reform Commission (VLRC) to develop recommendations in response to stalking and breaches of intervention orders. The report discusses data collected from 2011-2020 regarding sentencing practices in Victoria, the relationship between breaches of personal safety intervention orders (PSIOs) and family violence, and subsequent offending. The report also covers PSIOs in rural and regional Victoria as well the impact of COVID-19 on the Magistrates' Court and Children's Court.

International Criminal Court – Legal Tools Database

https://www.legal-tools.org/

The International Criminal Court (ICC) has produced the Legal Tools Database; a virtual library specialising in international criminal law. The online collection provides open access to numerous legal documents including legal digests, court documents, legal instruments, fact-finding mandates, human rights judgments and publications. Legal Tools also provides access to the ICC Case Law Database where cases can be searched by keyword, document number, type of decision and date. Simple and advanced search options are available, and results can be filtered as required.

ABC Radio – Law Report with Damien Carrick

https://www.abc.net.au/radionational/programs/lawreport/

The Law Report is a weekly radio program/podcast hosted by former lawyer turned journalist Damien Carrick. It covers legal issues including law reform, legal education, miscarriages of justice and legal culture. Recent episodes include: Gathering evidence of possible war crimes in Ukraine, predatory lending, supporting Indigenous people in NT watch houses and the legal needs of flood victims. Each episode runs for approximately 30 minutes.

LIV Sexual Harassment Resources

https://www.liv.asn.au/SexualHarassmentResources

To assist with the elimination of sexual harassment in the profession, the LIV has compiled a list of resources to assist members in dealing with sexual harassment. Information is listed for targeted access under the following topics: Victims of sexual misconduct in the workplace, Bystanders, Managers/Supervisors; Alleged perpetrators of Sexual harassment; Mental health and wellbeing; and Education and prevention training.

Australian Institute of Family Studies – The power in understanding patterns of coercive control

https://aifs.gov.au/cfca/webinars/power-understanding-patterns-coercive-control

This webinar is about understanding coercive behaviour, its prevalence (particularly during COVID-19), how to identify and manage it, how it affects children and other family members, and how services can assist women in responding to a partner's coercive behaviour. Presented by ANROWS CEO Dr Heather Nancarrow, the webinar hears from experts in associated fields as well as the personal experience of those affected by coercive behaviour in the home. The webinar runs for approximately 70 minutes. ■

IN_PRINT

This month's books cover refugees and people smugglers, criminal law, succession law and forensic medicine.

Smuggled: An illegal history of journeys to Australia

Ruth Balint and Julie Kalman, 2021, Newsouth Books, pb $35

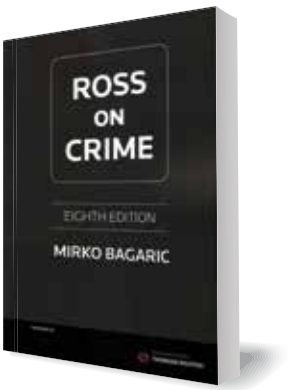
In the opening pages the authors make the compelling claim that this book is "a new way of telling Australia's migrant history," and indeed it is. The authors, with astute analysis and through the deeply personal lived experience of those fleeing persecution, traverse the historical and political landscape of Australia's migrant history. From the Second World War through to the present, the authors reclaim the narrative that for decades has demonised, not only those seeking refuge, but also those who have "helped" – the smugglers.

With passion and readability, each page takes the reader on a thought-provoking journey, to deepen our understanding of the smuggler, the medium that connects the two ends of the migration process. Branding smugglers as villainous and unscrupulous has become a political convenience, deflecting from this nation's obligation to ensure the fundamental right to claim protection from persecution. Demystifying the various connotations, identities and emotions behind the label "smuggler", from a perspective not often told, further adds to our understanding.

Each chapter interweaves the personal, lived experiences of those seeking asylum. With sensitivity and candour, these accounts bring to life the dangerous and desperate journeys of those seeking refuge by a method that has been deemed "illegal". The voices that have long been muted are brought to life through the lived reality of people who decide to use smugglers to make the perilous journey over open waters.

The past decade has seen us lose sight of our humanity when dealing with those who seek to exercise their basic fundamental right to seek asylum, to find a safe haven. *Smuggled*, is a timely and riveting read. A book for all interested in the human stories of people smugglers and those that seek them out.

Linda Telai, College of Law & Justice (Victoria University)



Ross on Crime

David Ross and Mirko Bagaric, (9th edn), Thomson Reuters (Professional) Australia, 2021, pb $295

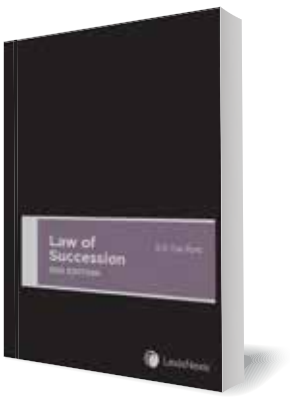
This is a unique and important resource for criminal law practitioners. The latest update to this classic text comes from Professor Mirko Bagaric who also authored the previous three editions.

The book spans all Australian jurisdictions and considers all aspects of the criminal law – including substantive matters, criminal procedure, evidence and sentencing. It is structured in an A-Z format covering more than 350 terms, topics and legal principles. This latest edition includes legislative and case law updates relating to human rights charters, the application of privilege in criminal cases, prosecutorial duties, the judge's role in summing up to a jury, the defence of honest and reasonable mistake in driving cases, the doctrine of severance in criminal cases, and inclusion of more than 20 new High Court cases.

For busy practitioners it can be a difficult decision about where to focus one's energy and resources. The beauty of this work is that it allows you to find and understand complex principles to make that decision easier. While it is not intended to be a complete repository of all criminal law knowledge (though it comes close to that goal), one of its key strengths is that it points a practitioner to other places, such as in statute or case law, for further explanation.

This book should be the first and last resource for criminal law practitioners. Its importance to our profession is exemplified when, on my return after the summer break, I sighted a copy in nearly every pigeon-hole in chambers. If you don't have it, get it (and use it).

Liam McAuliffe, barrister, Victorian Bar



Law of Succession

GE Dal Pont (3rd edn) LexisNexis, 2021, pb $285

An update from the second edition published in 2017, this new text (current to 10 October 2020) addresses in particular the case law within Australia that has shaped this topic generally during the past four years.

From a legislative perspective as referenced in the preface, statutory change between the two editions has been in a relative hiatus. The text does though touch briefly on the COVID-19 legislation concerning the execution and witnessing of wills.

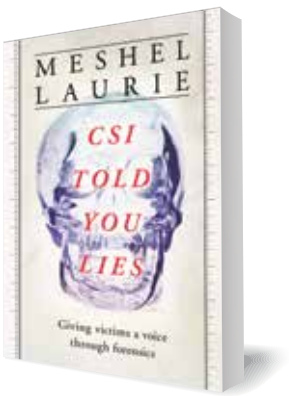
There is an extensive chapter on family provisions dealing in detail with the practical issues of various classes of applicants. The author assesses closely relevant considerations in making orders under the family provisions including character and conduct of the applicant, estrangement, conduct of the deceased and the impact of orders on social security payments.

Addressing the scenario of where assets of a deceased may involve multiple jurisdictions, both within and outside Australia, there is a practical discussion in Chapter 22 of the pertinent issues in this area including the doctrine of scission and the impact of private international law on the family provisions.

The author is well known for his texts including on the topic of lawyers' professional responsibilities (See Ethics, p59). In Chapter 24 he addresses the issue of the specific responsibility and liability of succession lawyers including the duties of care in tort owed to third parties.

This is a valuable and well-structured text for both experienced lawyers and new entrants practising in this area.

Peter Flanagan, lawyer, Melbourne



CSI Told You Lies: Giving Victims a Voice through Forensics

Meshel Laurie, Penguin Random House, 2021 pb$35

This offering from podcaster, author, comedian and radio and television personality Meshel Laurie offers a rare glimpse into the work performed by the Victorian Institute of Forensic Medicine (VIFM).

The book covers a varied cross-section of high profile cases handled by VIFM experts and, in so doing, pulls together a range of interviews with those involved. It is populated by the scientists and technicians of the VIFM, Homicide Squad detectives and the families of the deceased, all of whom gave Laurie insightful, candid and often personal accounts.

The fact that Laurie is not a lawyer or someone involved with the forensic sciences means that *CSI Told You Lies* is an accessible book which rips along at the pace of a detective novel. Where the literature in this area tends either towards the technical and turgid or the trashy and sensational, Laurie's book sits comfortably somewhere between the two poles. She writes well and the stories contained within are compelling. Once the reader accepts that she is not going to deal with the shortcomings of forensic pathology and its associated fields or the failings of the VIFM over the years, it is an enjoyable read. ■

AV Chernok, barrister

IN_REFERENCE

HARDCOPY COLLECTION

Restitution Law in Australia

Keith Mason, JW Carter and Gregory J Tolhurst, LexisNexis Butterworths, 2021

https://www.liv.asn.au/Web/Library/index.aspx#record/91342

Considered essential reading for solicitors, barristers and judiciary, the latest edition has been revised, updated and select chapters rewritten. Topics covered are the structure of restitution law, gain-based remedies, reasoning of the justices and doctrines that respond to different policies. The fourth edition extensively discusses *Mann v Paterson Constructions Pty Ltd* (2019) due to its outcome and the reversal of decisions that were critiqued in previous editions.

Law of Costs

GE Dal Pont, LexisNexis Butterworths, 2021

https://www.liv.asn.au/Web/Library/index.aspx#record/91339

Current as at 1 March 2021, Gino Dal Pont's fifth edition discusses legislation, court rules and case law relevant to all Australian jurisdictions. The book consists of 29 chapters that are divided into the following seven sections: Costs between lawyer and own client – Costs between party and party – Quantification of party and party costs – Costs in appeals – Non-party costs orders – Costs in criminal cases – Securing costs.

REMOTE ACCESS COLLECTION

Australian Fair Work Act 2009 with Regulations and Rules

(11th edn), CCH Australia, 2021

https://www.liv.asn.au/Web/Library/index.aspx#record/65804

Current as at 11 September 2021, the 11th edition covers federal workplace laws such as the *Fair Work Act 2009* (Cth), related rules and regulations as well as other relevant legislation. This eBook covers operative amendments to the *Fair Work Act 2009* (Cth) such as sexual harassment, casual employment, Jobkeeper disputes, the Federal Circuit and Family Court (Division 2), and compassionate and unpaid parental leave. Other legislation with operative amendments discussed include: *Fair Work Regulations 2009* (Cth), *Fair Work (Registered Organisations) Act 2009* (Cth) and regulations, *Fair Work Commission Rules 2013* (Cth), and *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) and regulations.

Summit Leadership: Strategies for building high performing teams

Nick Humphrey, CCH Australia, 2019

https://www.liv.asn.au/Web/Library/index.aspx#record/90924

Nick Humphrey is a managing partner at corporate law firm Hamilton Locke. Written as a practical guide for current and aspiring leaders, this eBook discusses performance cultures, value-based leadership, mindfulness, positive management techniques and improving employee experiences. Divided into four parts, the eBook provides strategies for building high performing teams and workplace cultures, staff recruitment and retention, leadership styles to avoid, and ways to motivate employees.

SEMINAR PAPERS

Family law – superannuation funds – property settlements

https://www.liv.asn.au/Web/Library/index.aspx#record/91242

Campbell, Jacqueline, The role of superannuation in family law property settlements, Seminar paper, Television Education Network, 2022 (F KN 173 C 5)

Costs

https://www.liv.asn.au/Web/Library/index.aspx#record/91135

Dealehr, Cate, Cherry, Sarah, Fulford Megan et al, National Costs Law Conference [2022], Seminar paper, Law Institute of Victoria, LIV Education, 2022 (F KN 397 D 5)

JOURNAL ARTICLES

Sports law – drugs in sport – athletes

Allman, Kate, "Catch me if you can: is anti-doping in sport a law unto itself?" in *LSJ* (NSW) no 86, March 2022, pp36-41 (ID 91380)

Employment – workplace – hours of work

Murphy, Ryan, "The Icelandic '4 day work week study and other', recent international trials" in *Employment Law Bulletin*, vol 27 no 1, February 2022, pp2-6 (ID 91377) ■

NB: To view more newly acquired resources please visit the library's New Material page www.liv.asn.au/NewMaterial

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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www.liv.asn.au/Library
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EBOOKS AT THE LIV LIBRARY

The LIV library now has remote access to selected eBooks. Loans are available to LIV members (excluding student members) for two days. For more information and a list of titles visit the LIV website www.liv.asn.au/LibraryDatabases or contact the library on 9607 9360.

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POTENTIAL CONFLICT OF INTEREST

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

Wills and estates

SOLICITOR AS A MATERIAL WITNESS/
POTENTIAL CONFLICT OF INTEREST
(R5011 – MARCH 2022)

In accordance with ASCR Rule 27, in a case which it is known, or becomes apparent, that a solicitor of a law firm will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the law firm's client in the hearing. Further, in a case in which it is known, or becomes apparent, that a law firm's solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or the law firm of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.

A law firm acted for the Defendant (Defendant's law firm) in a Supreme Court proceeding regarding the will-making capacity of a testator. The Defendant was the sole surviving natural child of the deceased, and the executor and sole beneficiary of the deceased's last will.

Another law firm acted for the Plaintiff (Plaintiff's law firm) who was one of the beneficiaries of the penultimate will. The Plaintiff alleged that the deceased lacked capacity to make the will and that the deceased did not know of or approve of the last Will.

The Defendant's law firm sought a ruling of the LIV Ethics Committee as to whether it could continue to act for the Defendant, where a solicitor of the firm was going to be a material witness as to the testator's testamentary capacity.

Ruling

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

1. The Defendant's law firm should cease acting in the Supreme Court proceedings forthwith because it has become apparent that a solicitor in the firm will be required to give evidence material to the determination of contested issues before the court as a material witness.

Related reading

Legal Profession Uniform Law Australian Solicitors' Conduct Rules, Rule 27. ■

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.

THE LAWYER UNDERTAKER

Compliance with undertakings is a matter of professional conduct.

This column is not targeted at lawyers who conduct business as funeral directors discretely from, or as an adjunct to, their legal practice. (As an aside, a cursory search of the internet reveals examples of this within the Australian context). Instead, "lawyer-undertaker" refers to a much more frequent reflection of legal practice, namely the giving of undertakings by lawyers.

The seriousness with which the profession and the law view lawyer undertakings can be seen as a reflection of the "my word is my bond" motto (although the latter can trace its genesis to the 16th century to facilitate traders making legally binding agreements sans a written pledge). Adherence to (and enforceability of) lawyers' undertakings goes to the core of the trust and confidence that can be placed in lawyers – by their clients, by other lawyers and by the court. As a disciplinary tribunal has observed:[1]

"Undertakings are given by legal practitioners for the specific purpose of enabling legal activities to be carried out. Other persons rely on those undertakings. The undertakings are personal to the legal practitioner and bind that practitioner . . . as a matter of professional conduct and comity, and will be enforced by the Courts because legal practitioners are officers of the Court and because without enforcement undertakings would be worthless, persons and Courts would be unable to rely on the word of the legal practitioner and this aspect of legal practice, that demands compliance for legal efficiency, would collapse".

As compliance with undertakings is, as noted above, "a matter of professional conduct", it is hardly surprising to find manifold examples of lawyers being disciplined for failing to comply with undertakings.[2]

The very nature of an undertaking, moreover, means that it not infrequently overlaps with contract. If so, independent of any disciplinary response, the person(s) to whom a lawyer's undertaking is given can sue thereon – under the general law of contract – should the lawyer not fulfil its terms. A lawyer may escape liability here if the undertaking was given in an agency capacity (typically for a client). But this can prove so only for undertakings clearly given on behalf of a client (any ambiguity here usually prejudicing the lawyer)[3] within the lawyer's authority.

What is unique, though, to the legal practice environment is the court's longstanding summary jurisdiction to enforce lawyers' undertakings, based on its inherent right to require its officers to observe a high standard of conduct. While the jurisdiction has a traditionally "disciplinary" slant (though not equating to professional discipline noted above), it can be utilised to require a defaulting lawyer to compensate a person who has suffered from that default. Importantly, such an order is not dependent on an existing enforceable contractual (or other civil) right in the victim.[4] Procedural benefits, in addition, arise out of a summary proceeding: it does not automatically or usually involve pleadings, discovery or oral evidence, thereby depriving the lawyer of certain advantages that ordinarily avail a defendant on trial.

While the disciplinary slant of this jurisdiction confines its exercise, it is said, to cases of behaviour meriting reproof[5] (as distinct from that punctuated by bona fides), it should not be assumed that the informality of the occasion or setting at which an undertaking is proffered will serve to excuse non-compliance.[6] And while the supervisory jurisdiction targets only undertakings given in the capacity as a lawyer, the breadth of what can fall within legal practice for this purpose may not prove an undue constraint thereon.[7]

It stands to reason that, from an inherent, disciplinary or contractual jurisdiction, lawyer undertakings are viewed with jealousy. The seriousness of failing to strictly adhere to undertakings accordingly cannot be downplayed. ■

SNAPSHOT

- Faithfulness to lawyer undertakings goes to the core of legal process.
- It is unsurprising, therefore, that breaches of undertakings should attract potential adverse consequences.
- Lawyers should, to this end, be scrupulous in adhering to undertakings.

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1. *Copini* [1994] NSWLST 25.
2. See, for example, *Law Society of New South Wales v Martin* [2002] NSWADT 27; *Law Society of New South Wales v Waterhouse* [2002] NSWADT 204.
3. See, for example, *Gorman v Norton* (1887) 8 LR (NSW) L 479.
4. *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] 3 WLR 598 at [149] per Lords Briggs, Hamblen and Burrows (referring to "the courts [being] concerned to uphold particularly high standards of conduct irrespective of some of the rules imposed in contract law").
5. See, for example, *Bentley v Gaisford* [1997] QB 627.
6. See, for example, *Hartnell v Birketu Pty Ltd* (2021) 392 ALR 154 at [140] per Gleeson JA, with whom Basten and McCallum JJA concurred (where a lawyer's undertaking was enforced despite being given at a "non-working lunch").
7. Cf *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] 3 WLR 598, to be discussed in the ensuing column.

ADOBE STOCK

BUT COUNSEL SAID SO . . .

Involving counsel is not a shield to a professional negligence claim.

Solicitors typically brief counsel for their specialist skills and expertise in particular areas of law and advocacy. While solicitors may rely on counsel's advice, they have independent duties to the court and to the client requiring them to bring independent judgment to that advice and the matter in which they are retained.

LPLC regularly sees solicitors trying their hand at unfamiliar or highly specialised areas of the law, hoping that counsel's guidance will see them through. The more specialised the area of law, the heavier the reliance likely to be placed on counsel's guidance. When things go wrong and the solicitor is sued in negligence or is subject to a claim for wasted costs, they are often heard to say "but I relied on counsel" or "I am unsure why we did it that way. You'll have to ask the barrister".

Solicitors have a responsibility for having a basic understanding of the law involved in any case they handle and for making a judgment about any advice they receive. However, solicitors are not bound to know all the law. Their duty is to exercise the reasonable degree of care and skill to be expected of competent and reasonably experienced solicitors.[1] In the words of the Hon Michael Kirby, it is "responsible conduct"[2] for a solicitor to seek advice from the specialised bar. Since the 13th century, there has been a division of function between barristers and solicitors reflecting the different skills each of these branches of legal practice will bring to bear: a ". . . solicitor will not usually have the experience or the skills possessed by the barrister. That is why the barrister is briefed".[3]

Seeking advice

A solicitor who seeks the advice of counsel is normally justified in relying on that advice and is not negligent by doing so: the ordinary rule is that ". . . save in exceptional circumstances a solicitor cannot be criticised where he acts on the advice of properly instructed counsel".[4]

This ordinary rule is, however, subject to significant qualifications. And despite the ordinary rule, it is rare that a solicitor would avoid liability in negligence because they have relied on counsel.

Duty to conduct proceeding

Unthinking reliance on counsel is not sufficient to discharge the solicitor's duty to the court to ensure the proceeding is conducted responsibly.[5] A solicitor who goes on the record as solicitor for a party is representing to the court that he or she has the necessary level of competence to act as solicitor in the proceeding: "[g]oing on the record is not a mere formality".[6]

While it is sometimes difficult, particularly for a junior solicitor, to gainsay counsel, the court still expects that from the time a person has signed the roll of practitioners, "they will exercise the independence of mind and commitment to the rule of law that is necessary for all lawyers".[7]

Not a post box

The solicitor is not merely a post box, conveying counsel's recommendations to the client without consideration as to whether they will advance the client's interests. The solicitor retains a separate and independent duty to the client in tort and contract. Accordingly, "[t]he solicitor must exercise independent judgment to the extent that it is reasonable . . . having regard to the solicitor's reputed knowledge and experience, the complexity of the case and the skill and experience of the barrister who has been retained".[8]

Recent English authority suggests that a solicitor's relative inexperience compared to the barrister's, does not make the solicitor any less liable.[9] The solicitor is required to ensure that counsel's advice is properly reasoned and must be satisfied that the advice is tenable.[10] If the solicitor reasonably considers the advice is obviously wrong, the solicitor must reject the advice and advise the client accordingly. The solicitor may be required to advise about retaining a new barrister.[11] Where advice is right, the solicitor should also be able to explain why to the client, and to the court if required.

While briefing a barrister to provide expertise and advice is good practice, it does not absolve a solicitor from applying independent judgment and expertise and is not a solution to dabbling. ■

Baron Alder is a partner, Moray & Agnew. This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

1. *Regent Leisuretime Limited v Skerrett* [2006] EWCA 1184.
2. *Boland v Yates Property Corp Pty Limited* [1999] HCA 64.
3. *Harley v McDonald* [1999] 3 NZLR 545 (CA).
4. *Davy-Chiesman v Davy-Chiesman* [1984] Fam 48 per May LJ.
5. *Patel v Tailor* [2021] NZHC 3164.
6. Note 3 above.
7. *Re Albert (a barrister) and McLean (a solicitor)* [2021] VSC 297.
8. Note 2 above. See also *Bolitho v Banksia Securities Limited* [2021] VSC 666.
9. *Richard Terrence Percy v. Merriman White* [2021] EWHC 22 (Ch).
10. Note 3 above.
11. *Boland v Yates Property Corp Pty Limited.*

TIPS

- It is not an acceptable response to a negligence claim or a claim for wasted costs that you thought counsel knew what they were doing.
- Ensure you understand counsel's advice and the reasons for it. If appropriate, ask counsel to explain and justify their advice. Document relevant discussions about this.
- If you think counsel's advice is incorrect, advise the client. Consider alternative counsel.
- Ensure you can explain to the client, and to the court if required, the effect of counsel's advice and why that advice is justifiable.

EARLY INTERVENTION CRITICAL IN RESPONSE TO GROWING PROBLEM

The VLRC interim report on stalking focuses on improving the response of police.

In February last year, Attorney-General Jaclyn Symes asked the Victorian Law Reform Commission (VLRC) to review the laws relating to stalking. The inquiry was prompted by the killing of Celeste Manno, allegedly by the man who had been stalking her. The VLRC's interim report has now been tabled in Parliament. The interim report focuses on improving the response of police to reports of stalking.

Stalking is a growing problem affecting at least one in six women and around one in 15 men. It is a set of behaviours that can cause great harm to victims' mental and physical health and can also escalate to include other types of serious offending, including serious violence, homicide and suicide. In Victoria, stalking is a criminal offence with a maximum penalty of 10 years imprisonment. It can be grounds for an intervention order under the *Personal Safety Intervention Orders Act 2010* (Vic).

Section 21A of the *Crimes Act 1958* (Vic) contains a list of behaviours defining stalking. Stalking is a course of conduct which can include following the victim, contacting them by any means, publishing material about them, loitering near their home or place of work, making threats or behaving offensively. Technology has facilitated some forms of abuse, enabling people to keep others under surveillance, track their internet use and email, send repeated unwanted messages via social media, and other forms of behaviour that cause physical or mental harm or arouse fear and apprehension.

There is widespread interest in the inquiry, which is the first Australian review of the justice system response to stalking in a non-family violence context. The VLRC received 115 submissions, as well as 254 responses to an online form asking about people's experiences of stalking. It heard many accounts from victims of such experiences, often lasting for years and causing serious distress. The VLRC held 31 consultations, including with members of Victoria Police and the courts; academics and forensic psychologists; victim survivors, community and victim advocacy and support organisations, and disability services among others.

A repeated message from submissions and consultations was that, because the crime of stalking is not well understood, it is often unreported. Stalking is frequently not recognised by police and even by those who experience it. Even when people do report stalking, it is often only after the behaviour has escalated. One study found that 77 per cent of victims do not report stalking until the 100th incident. Even then, it is often minimised or trivialised, and victim survivors are often expected to manage the situation on their own.

Many victim survivors told the VLRC, in consultations or via an online form, that they had difficulty when they tried to report stalking, because police are not adequately trained in how to recognise and respond to it. Victims often have to make multiple reports to different officers and may not have their reports taken seriously. According to one respondent, "I was told point blank that there was not enough evidence, despite me having witnesses, including a lecturer, and having social media messages. I tried more than once to report it but was shut down every time, despite living in fear".

Currently, Victoria Police has only minimal guidance for identifying and responding to stalking. The VLRC recommends that there should be a four-step process to assist police to identify stalking; get the whole story from the victim survivor; decide on the appropriate response; and make appropriate referrals. Specifically, the VLRC recommends that the police should:

- have training in how to respond when someone reports a stalking matter
- improve the ways they interview people who report stalking
- have better systems for gathering and saving reports about stalking cases, so information is not lost
- request intervention orders on behalf of victims rather than victims doing it themselves
- get the whole story when interviewing victims to ensure that they understand the full picture.

Early intervention is critical in the response to stalking. Ultimately, the aim of the proposed reforms is to assist the police to recognise stalking, to take victims seriously, support them and intervene quickly to stop the stalking.

The current report is an interim report, which can be found on the VLRC website. The VLRC is now working on its final report, which will address other ways that the justice system responds to stalking, including intervention orders. That report will be delivered to the Attorney-General by 30 June 2022. ■

SNAPSHOT

- The VLRC has published its interim report on the justice system response to stalking.
- Stalking, though a serious crime, is little understood and often unreported.
- The police need better guidance and training in responding to stalking.

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

ADOBE STOCK

SECURITY OF PAYMENTS

Recent decisions shed light on the Building and Construction Industry Security of Payments Act.

There have been some important decisions in the *Building and Construction Industry Security of Payments Act* (Vic) 2002 (SOPA) area in the past year.

Lal Lal Wind Farms Nom Co v Vestas [2021] VSC 807

This recent Victorian case shed light on s7(2)(c) of the SOPA:

- Lal Lal Wind Farms (Lal Lal) engaged Vestas for the operation and maintenance of a wind turbine facility
- Vestas served Lal Lal a payment claim of $6,313,734,49
- Lal Lal, responded with a payment schedule assessing the amount payable as $0
- The ensuing adjudication was decided in favour of Vestas
- Lal Lal filed an appeal in the Victorian Supreme Court.

Section 7(2)(c) of the SOPA excludes the application of this Act when the construction contract has consideration for the construction work, "that is calculated other than by reference to the value of the work carried out".[1] Section 11 of the SOPA details how to calculate construction work.

As part of this contract, Vestas was being paid primarily for the level of electricity output produced, which would vary every month.

Lal Lal contended that because Vestas was being paid according to their level of output, s7(2)(c) was operational and excluded the contract, as "value"can only include non-variable outcomes.

Vestas, however, countered that, relying on a decision from *Edelbrand v HM Australia Holdings*, stating s7 would only apply if it was impossible to evaluate the construction work under s11 of SOPA.

The adjudicator was correct in his finding as s7(2)(c) was not operational in this case. "Value of the work" under s7, was intended to have a broad definition and include contracts based on output.

Landmark Building Services Qld Pty Ltd v D & M Carakitsos [2002] VCC 41 (31 January 2022)

The County Court considered the meaning of "principal" in s31 of the SOPA and whether an owner would fall within that definition:[2]

- The defendants, the registered proprietors of a property in Victoria, appointed DM Belo Developments (Belo) to engage a builder for construction on their property
- Belo engaged Landmark Construction (Landmark)
- An adjudicator determined that Belo owed Landmark $329,898
- Belo failed to pay, and the Court entered a judgment against Belo for $348,481.
- Landmark commenced proceedings against the registered proprietors to recover the money owed to them, under s31 of the SOPA.

Section 31 of the SOPA is intended when an adjudicator determines that a certain amount is owed to the claimant, payable by the respondent and the respondent has failed to pay. If the claimant has obtained judgment for the adjudicated amount, the claimant can obtain payment from the "principal".

The owners argued that "principal" could not be referring to an owner. They claimed that a "principal" is someone who owes money to a respondent of construction work. The most common application would, therefore, be that the claimant is a sub-contractor, the respondent the head contractor and the "principal" is someone who owes the respondent money for construction work.[3] Therefore, the owners could not be considered as a "principal" and were not liable to pay Landmark.

Landmark argued that the term principal refers to the person who is highest in the hierarchy of the contract. Therefore, "principal" could certainly refer to the owners, as they are higher up in the hierarchy of the contract.

The Court held that "principal" in s31 could include an owner and Landmark was entitled to recover money from the owners.

Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd [2021] VSCA 44 (5 March 2021)

This 2021 case in the Court of Appeal dealt with the issue of payment claims that included an amount that is excluded under SOPA:

- Yuanda Vic Pty Ltd (Yuanda) engaged Façade Designs International (Façade) to complete construction work in Melbourne
- Façade sent a payment claim to Yuanda for the work, totalling $4.5 million
- Yuanda did not respond to this claim with a payment schedule and instead paid $1.1m but still failed to pay the requisite amount within the specified time
- The amount included in the payment claim included interest, which is excluded under s10 of the SOPA
- Pursuant to s15(4) of the SOPA, Yuanda was liable to pay the remaining money.

Pursuant to s18(b) of the SOPA, if a respondent fails to respond to or pay a payment claim, the claimant may apply for adjudication. Section 16(2)(a)(i) allows for the recovery of an unpaid payment claim "in any court of competent jurisdiction". Section 16(4)(a)(ii) prohibits a court from issuing a judgment when the payment claim includes an excluded amount.

In the original proceeding the judge held that if the excluded amount was less than the principal amount, the Court could still make a judgment. Yuanda appealed this and claimed that the simple reading of s16(4)(a)(ii) made it impossible for a court to make a judgment when the payment claim included any excluded amount.

Façade, however, contended that any excluded amount could be severed from the amount listed in the payment claim and be valid.

The Court took a strict approach to interpreting s16(4)(a)(ii), concluding in favour of Yuanda. The correct approach is to go to an adjudicator if the payment claim includes excluded amounts. The Court will be unable to give a judgment in such a case. ■

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1. *Building And Construction Industry Security of Payment Act* (Vic) 2002 s 7(2)(c).
2. Note 1 above.
3. *Landmark Building Services Qld Pty Ltd v D & M Carakitsos [2022]* VCC 41 (31 January 2022) 41.

ADOBESTOCK

CHECKLIST FOR CHOOSING A PMS

Do you need a practice management system? Here are some important considerations.

One of the key decisions when starting or growing your own SME legal services organisation is whether you – and your employees and clients – need a practice management system (PMS) and, if so, how to choose one. The LIV Technology and Innovation Section includes experienced lawyers, tech savvy geeks, consumer-focused regulators and expert consultants – we offer some guidance before you spend any money.

Remember there is no one magic system. A PMS will not do everything for you. However, it can increase your productivity and help manage risks as well as assist with customer service and in meeting client expectations of you as a modern lawyer. Rather than any one PMS being the best, you will need to choose the one that suits you and the way you work much better than others. Take your time.

When choosing a PMS, think like a business person, not a lawyer. Remember to take your lawyer hat off and put on your manager hat. Develop a clear vision of why you want a PMS. Analyse the PMS by prioritising your user needs and not vendor–led claims. Know yourself and your strengths and weaknesses, such as attention to detail or client focus and how a PMS can complement these. Know why other people in your business want a PMS. Discuss with your staff what they need and like. Talk to your clients about what they need and like. Ask other lawyers about their experiences and opinions.

What do you aim to get out of the PMS for your law firm? This links to what are the most important things in your business that you want to get right, for example:

- Do you want to understand the financial drivers of your legal business?
- Do you wish to become more efficient by streamlining your work flows and processes?
- Do you need to assist your staff to work flexibly?
- Do you want to better meet your clients' expectations?
- How tech savvy are you and do you want to be?

Consider upfront if you really need a PMS or is there something better. For some firms, accounting software or an online app may meet their needs.

How ready is your firm to move to a PMS? Understand what you do now and where your processes can be streamlined and improved now. The more organised you are in real life the easier it is to move these to a PMS. Do you have an office handbook? Are your processes clear and streamlined? For example, does everyone know how your organisation takes on a new client, how to calculate and issue an invoice or how to track and meet deadlines for a matter?

Research the elements of a PMS that fit your most important needs first. Choose a system that will do what you want in the easiest and most direct way possible. A PMS can be where you keep matter and client information, store research and precedents, track time and expenses, book meetings and interviews, issue invoices, keep trust account records, track productivity, produce management reports and approve workflows.

Does it integrate with online payment services? While tools for each of these functions can be used separately, using one platform saves time and reduces duplication (and risk of errors).

Do you need a cloud-based PMS to store and find documents online, work together online, and search databases online.

Do you need to add on a client management system for new client intake, email and communications, follow-up and management through to finalisation, as well as supporting your business development? Some PMS offer secure client portals that let you give (secure) access to your clients to share communications, information and see how their matter is going.

Get independent expert advice as to the technology. As well as your business needs, there are technical basics. A fundamental is that the software is secure and encrypted. You must be able to grant different levels of access protected by the design as well as secure passwords. You need powerful, sturdy computers and reliable, fast internet connection for the software to run on. Best practice is to keep legal work separate from personal use so have a work computer for each team member.

Check what technical support is offered by the PMS vendor and where that is based. Also consider how the PMS software integrates with other tools that you use or that your clients use. Depending on your area of legal practice, does it interface with online property conveyancing or government websites? Do you need other software such as legal research tools or precedents?

Once the PMS is chosen and installed, nurture your organisational culture to support people using the PMS and clients using the portal.

Encourage regular feedback and carry out changes and improvements.

Regularly revisit your vision for why you wanted the PMS. Remember this is the beginning of a journey. As one section member advises, "It is like painting the Sydney Harbour Bridge, there is always more to do". ■

Judith Bennett is co-chair of the LIV Technology and Innovation Section and principal of www.business4group.com, business consulting and coaching for lawyers.

ADOBE STOCK

CONTRACT.ONE

This platform would be useful to legal teams involved in collaborative contract management.

PETER MORAN

Which practitioners would find this technology useful?

Lawyers and legal teams involved in drafting, negotiating and managing execution of contracts and other legal documents.

How does it work?

Contract.one creates a safe collaborative environment for the discussion, drafting, negotiation and execution of contracts and other legal documents.

Internal and external teams are first created, although additional people can be added from time to time. Every user has their own profile which enables clear tracking of input, changes and comments by team members. Team members can also be given different roles which can place some control over who has full access to edit documents as contrasted to who can only comment or view.

Existing documents are uploaded to the Contract.one platform or else a document can be created within the platform from scratch or from an existing template. Parties can then comment on the agreements and make amendments. It can be kept as confidential to the internal team until such time as the draft is ready to be released to the counterparty/external team.

When the version is approved, it is circulated to the counterparty and the final changes are visible as well as external comments. Versioning is automatic: there is no need to work on a master version etc. All previous versions are always available to view and revert to.

Finally, when the contract has been finalised, Contract.one integrates into Docusign and enables electronic execution by the parties within the Contract.one platform.

Benefits

A priority for Contract.one is ensuring the export process does not impact on any of the existing formatting in documents. All styles, cross-references, tables etc are brought across exactly as per Microsoft Word.

Much of the audit trail and version control functionality of Contract.one exists with good quality practice and document management systems. However, such functionality ends as soon as the document leaves that system (such as by being emailed to another practitioner). So, unless the system also has a remote portal that allows access to the document by non-users of the system, only half of the drafting process takes place with the benefit of the audit trail and version control.

Other benefits include:

Contract Time Machine: Users can scroll through the evolution of clauses in the agreement and see precisely what changes were made to the clause and when. This can greatly speed up the review process and reduces the need to rely on mark-ups and track change to monitor contract evolution.

There is no risk of amendments being missed through not being included in the track-changes as every change to the agreement will always be shown and the history of what changes have been agreed, declined or changed will always be shown.

Contract.one has a neat cross-referencing function whereby hovering the mouse over the cross-reference creates a pop-up showing the referenced clause (which solves the problem of having to click on the cross-reference to see the relevant clause but then ending up somewhere else in the agreement).

Contract.one tracks all the data on interactions with users and presents document statistics at a simple glance. Time spent on documents is broken down by user and separated into time spent reading, commenting and editing.

Contract.one has an open API to allow integration with other systems.

Costs

Contract.one charges on a per user per month basis, currently $49, which reduces as more users are taken up. There is no charge for external users.

Risks

Cyberisk, as with any cloud offering, is present as regards confidential and sensitive data moving beyond a firm's internal systems. Currently, Australian client Contract.one data is held in the United States.

Downsides

Contract.one is a fairly new platform and currently only caters to one internal team and one external team. This means a distinction cannot be made between the law firm team and the broader counterparty team including clients and advisers. Likewise, multiple counterparties could not yet use Contract.one as it only caters to bi-partite contracts. However, such functionality is in development. Data being held outside of Australian servers may be problematic for many firms from a Privacy Act perspective. ■

SNAPSHOT

What is Contract.one?
Contract.one is a contract management platform that assists with managing the full contract drafting and execution life cycle.

What type of technology?
Cloud based SaaS platform

Vendor
Contract.one, Inc

Country of origin
US

Similar tech products
Concord, PandaDoc, Juro
CobbleStone for contract drafting
Agiloft for contract drafting
Google Docs for sharing documents
Drop Box for sharing documents
Practice and document management systems for audit trail and version control

Non-tech alternatives
Mail, handwritten mark-ups, wet ink signings of hard copy documents

More information
https://www.contract.one/future

Peter Moran is a principal at Peer Legal and founder of the Steward Guide, an online technology guide for lawyers (www.stewardguide.com.au).

THE MISSING CONNECTION

If lawyers are directed by law and ethics not to behave unlawfully, what is happening to create perpetrators and victims in legal workplaces?

From early 2019, the Australian legal profession has been rocked by disclosures of sexual harassment and bullying in the superior courts. Allegations of rape, bullying and sexual assaults were reported in our parliaments.

These are the places of our lawmakers, so how do they miss the disconnection between upholding the law and harming others?

This event cluster has contributed to the drive to change the environments and cultures we each occupy. But will harassment stop?

The regulatory response to these events is diverse:

- further investigation
- reporting[1]
- new regulatory statements[2]
- new codes of conduct[3]
- online victim complaint services[4]
- webpages with links to existing dispute resolution bodies.[5]

The LIV has been a leader regarding sexual harassment, safety and equality in the workplace. In the October 2020 *LIJ* ("Don't call me Sir") I was one of several practitioners interviewed on the profession's use of "Dear Sir" and its variants. It sharpened my focus, leading me to consider why some of the highly educated and legally trained cannot obey the law despite being bathed in it.

Common features of predatory behaviour

Is there a common personality trait or a circumstance that produces a sexual harasser, discriminator or bully in a workplace?

Lawyers' everyday work involves taxing and rigorous application of concepts to fact situations (ie, client instructions).

Yet, when it comes to unlawful workplace behaviour, the disconnect between law and conduct is so stark it has allowed some senior legal leaders to slip a hand, an arm, a poem to a junior colleague, register an employee's phone number as a prostitution service and place their lips on an opponent's head.

The Dear Sir(s) Project

The Dear Sir(s) Project (DSP) is the child of these times, borne also from 25 years of observation and diverse industry experience by its founder and chair. In September 2021, The DSP found its legs through the generous volunteer support of a cohort of Monash University's law students who are tasked with researching the why behind the profession's unlawful conduct.

To support the legal profession, on 8 March 2022, The DSP released its first public work: "The Ethics of Equality" (see http://bit.ly/EthicsofEquality).

The lessons are simple. It emphasises the mandatory knowledge for graduate lawyers to attain admission and for admitted lawyers to work in everyday practice. The law is one thing our professional conduct rules require us to obey. Lawyers must obey the law generally, and expressly not sexually harass, bully or discriminate.

The general law includes rules prohibiting personal, physical and verbal contact with another unless it is consensual.

The criminal law punishes serious breaches of touching without consent through methods that lead to imprisonment.

The civil law provides compensation schemes to manage the expenses connected with recovering from unlawful touching and tortious actions remain available for civil assault. Intervention orders and personal safety orders direct control on the behaviour of those who cannot respect another's wishes.

Lawyers are ethically and legally bound not to misconduct themselves, including in their personal lives.

While people are fallible, our clear duty is to facilitate the administration of justice and not bring the profession into disrepute.

So, what's been missing? If lawyers are directed by law and ethics not to behave unlawfully at any time, what's happening to create perpetrators and victims in workplaces and related spaces?

The LIV Charter for the Advancement of Women correctly identifies that respect is the missing ingredient from our profession.

The DSP sees the LIV Charter as encouraging but it remains to be seen if it will manifest lasting change. Since its announcement, more than 67 firms and individuals have signed it. This is why The DSP's many research influences, including sociology and applied psychology, contribute an understanding towards effecting permanent change.

In a patriarchal society, we disempower hatred of otherness by recognising that 53 per cent of any population is not "other". Highlighting the privilege of the (now minority) male lawyers – who are more reflective of a bygone cultural era – will also encourage respect and generate the necessary cellular level work in the profession.

Respect requires recognition

Pursuing permanent change, The DSP encourages regulators to enforce ethical and legal standards to produce kindness and respect across all strata of the profession. Punishment deters, so let the perpetrators be deterred by putting at risk their privilege.

You cannot be what you cannot see. Or rephrased for equity's sake, you cannot see what women can be without giving them space. At 53 per cent of the lawyer population, industry statistics show "women" are not "diverse". In fact, in 2022, Anglo-Saxon males who traditionally benefit from this practice of "othering" are the minority.

There's much work to be done. ■

Carol Grimshaw is founder and chair of The Dear Sirs Project, principal of Grimshaw Legal and Aide Lawyers, and chair of the Electronic Wills and Online Witnessing Committee. This column was written with the assistance of The DSP's editor and sociology researcher **Alessia Di Paolo**.

1. Helen Szoke, Review of Sexual Harassment in Victorian Courts, https://www.shreview.courts.vic.gov.au/.
2. Fiona Bennett and Fiona McLeay, Sexual Harassment Statement to the Profession, February 2019.
3. LIV, Charter for the Advancement of Women.
4. Victorian Legal Services Commissioner, Sexual Harassment https://lsbc.vic.gov.au/lawyers/practising-law/sexual-harassment.
5. LIV Sexual Harassment Resources https://www.liv.asn.au/Web/Content/Resource_Knowledge_Centre/Practice_Support_Resources/Sexual_Harassment_Resources/Sexual_Harassment_Resources.aspx

For a full list of references please contact dearsirsproject@gmail.com

ONLINE LEGAL CLINIC CLOSING A GAP

Justice Connect Answers is a valuable platform for pro bono lawyers who want to do more for the community.

In March 2020, in response to increasing need for legal help, Justice Connect launched a pilot of our online legal clinic Justice Connect Answers. At Justice Connect Answers, eligible help-seekers can post simple legal questions covering a wide range of issues on the platform – including employment rights, housing and homelessness – and receive tailored and confidential legal advice from lawyers in our pro bono network.

Not all legal matters require ongoing legal assistance. Many people are capable of self-advocacy when provided with the right legal information, advice and resources. One client, John*, wanted to know his rights as a consumer after purchasing a faulty item online and was denied a refund or any option for exchange from the seller.

As someone relying on the disability support pension, he could not afford advice from a private lawyer. John posted his question on Justice Connect Answers. Soon after he received detailed and accessible advice from a pro bono lawyer on his rights and what he could do next. He has since gained the confidence to assert his rights to resolve the dispute fairly.

John is just one of a growing number of people we have seen from our user data looking for legal information and advice online. In the two years since we launched Justice Connect Answers, we have responded to more than 911 questions from 833 help-seekers across Australia.

Justice Connect Answers has proven to be a valuable platform for both the growing number of people seeking legal help and pro bono lawyers who want to do more for the community. In developing a free online platform where people can get information and advice from lawyers free of charge, we aim to close a critical justice gap for people experiencing financial, geographical and other barriers to legal assistance – all of which have worsened due to compounding crises.

And, unlike traditional legal clinics, Justice Connect Answers provides pro bono lawyers the flexibility to answer questions in their own time, wherever they are, and in areas of law in which they have expertise.

Justice Connect Answers allows us to extend our reach by assisting more people to get the legal help they need, when they need it, while simultaneously leveraging the strong interest in the private legal profession to undertake more pro bono work.

To find out more about Justice Connect Answers, visit answers.justiceconnect.org.au.

*Client's name has been withheld to protect their identity. ■

Amy Schwebel is head of Access Program at 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.

CONSIDERING INTERSECTIONALITY

There is still significant discrimination faced by women whose diverse backgrounds, abilities or cultures intersect with their gender.

Addressing discrimination in the legal profession requires listening, acceptance, positive action and courage.

Recent media attention has illuminated the need for better leadership pathways for women lawyers. Although women now make up 53 per cent of the legal profession, this is not reflected in senior positions. Gender is, however, only one part of the issue of equality; for ethnic minorities and other "diverse" persons in the legal profession, inequality is further entrenched, particularly when it intersects with gender.

The need for (useful) data

Data collection is failing to adequately address diversity. The National Profile of Solicitors reports are often cited, however, they do not consider intersectionality and how discrimination is experienced in the legal profession.

The Victorian Legal Services Board and Commissioner (VLSB+C) recently released legal profession diversity information that was obtained through voluntary participation.[1] However, the nature of the data collected limits the utility of the analysis that can be conducted. For example, "languages spoken" does not provide cultural information, but may instead reflect those who have had the privilege to be educated in more than one language and would be captured in "Australian ancestry".

Representation

Luke Pearson for IndigenousX writes about the invisibility of whiteness, reflecting that "whiteness [is] unmade but ever present". The National Profile confirms that Aboriginal and/or Torres Strait Islanders (ATSI) currently make up 0.8 per cent of the legal profession. Comparatively, the 2016 Census indicates Australians who identify as ATSI make up 3.3 per cent of the total Australian population. This lack of representation in the legal profession has a profound impact. There are always concerns that without adequate representation, we cannot have diverse judges such as ATSI identifying judges. Although the system of the Koori Court allows for culturally appropriate legal settings, we hope that through ongoing support, ATSI lawyers will continue to inform a judge on the cultural issues and rise to judicial appointments. It is well known that ATSI Australians are disproportionately likely to be charged with a crime and are incarcerated at much higher rates than non-ATSI Australians, constituting 27 per cent of the national prison population.[2] However, it is unlikely their magistrate or judge will be Indigenous. ATSI lawyers and judges who understand traditional practices are better equipped to appropriately address legal issues pertaining to Aboriginal communities. Their First Nations experience, knowledge and cultural understanding results in more appropriate sentencing and ultimately leads to better reform. We must do more to make the legal profession more accessible for ATSI Australians to increase diversity on the bench.

An active question in this space is whether a lack of diversity leads to racial discrimination in the workplace. As a culturally and linguistically diverse lawyer, I have experienced both micro-aggressions and racism within the profession. Classic examples often arise, such as being told "you don't look like a lawyer" or having an Anglo-colleague comment that my grammar was impressive given my ethnicity. These micro-aggressions are experienced regularly by ethnic minority lawyers and other under-represented groups.

Similarly, members of the legal profession with disabilities can also experience discrimination before they are even employed, as a job applicant may be required to answer questions about the presence of a disability. These questions may be asked in an effort to promote inclusivity, however, lack of transparency on how the information is used by those reviewing the applications means advocating for your needs as a disabled person may lead to missing out on job where your needs are seen as too cumbersome for the organisation.

Positive actions

Progress has been made to the gender balance in the profession, but there is still significant discrimination faced by women whose diverse backgrounds, abilities or cultures intersect with their gender to amplify their experiences of discrimination.

It is not enough for the profession to claim to be not discriminatory – organisations must take proactive steps to diversifying the sector and to create meaningful change, for example by:

- developing and implementing a diversity framework. Organisations should actively seek to hire diverse lawyers. This may or may not include formal targets but should be informed by knowledge, lived experience and evidence
- participating in mentoring and peer support programs where diverse lawyers can support, guide and mentor younger lawyers/law students and peers to progress in their careers and navigate the legal profession
- creating a safe space and formal protocols for calling out micro-aggressions and all forms of discrimination. There are growing examples of approaches that provide protection, safety and confidentiality so as to limit the negative consequences experienced by those who report such behaviour.

There is no place for discrimination in the legal sector. Diversity is the reality of our society; inclusion is a choice our profession must make. ■

Stephanie Vejar is a co-chair of the Victorian Women Lawyers Diversity and Inclusion Committee. The committee was established to focus on issues of intersectionality facing women in the legal profession.

1. https://www.lsbc.vic.gov.au/about-us/board-and-commissioner/legal-profession-demographics.
2. www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/executive-summary-15/disproportionate-incarceration-rate/.

ADOBE STOCK

SAY NO TO DEFAULT DECISION MAKING

LEADERS in Practice

Achieving benchmark practice is all about making strategic decisions by design.

What do leading practices have in common? They are clear on what their ideal practice looks like; envisaging such detail as ideal client profiles, and the type of cases they say yes and even no to. They know what their ideal internal values system and work-life balance structure looks like, all to help them curate their desired culture for their team.

Can you start to imagine how clarity and detail of this kind (across all areas of your practice), can translate to alignment in decision-making and better focus of your resources? I call it business by design. Not only can this strategic approach help you achieve your goals for your practice, but it will also enable you to build a brighter lifestyle as a business owner.

Principal and founder of Rankin Business Lawyers Rob Roy Rankin has deliberately chosen to go down this path. He was a partner in a traditional law firm before he started his own practice seven years ago. I spoke with him and his general manager Tracy Dutt about how they've built their practice by design and the benefits they're reaping as a result.

Rob decided to start his own practice when he realised his professional and personal interests were not aligned with what his partners wanted to achieve. He looked at what was in store for him over the next 10 to 20 years and took the leap to venture out on his own.

So, what next? Rob knew what he was passionate about – spending time getting to know his clients and their businesses. He envisaged a practice with a "no-office model" and was excited by the prospect of building a progressive firm with no premises and common overheads, such as rent. Embracing cloud software, his ideal practice would give him the opportunity to be out on the road. Acknowledging his ideal day is at ". . . a factory floor with his client, rather than in a conventional beige partitioned office".

Rob now has a team of eight and he's proved the no-office model can be successful. As he says, his business had been "COVID-ready for six years".

Here are seven tips which outline how Rob has designed and built his benchmark practice.

Don't let money lead you astray

All practices want to be profitable, but letting budgetary concerns become the main driver of decisions is a trap. As Tracy Dutt says, "stress around income and money can lead you to say yes to the wrong kind of work" and clients.

Understand what work motivates you

Have the conversation with yourself and your team to define what kind of work gives you energy and what drains you. Doing so will make it easier to recognise what to start saying no to.

Be clear on the types of clients you want to help

"A couple of times a year we sit down and look at the clients we like working with," Rob says. This has led them to achieve B Corp certification. "When we were identifying the characteristics of the clients we wanted to work with, we found that not only were they passionate about their business, but they also had an extra dimension of community contribution. We wanted to walk that walk with our clients."

Define your point of difference and how to leverage it

To not only attract your ideal clients but also your ideal staff members. For example, Rob and Tracy proactively promote the flexibility benefits of working remotely (over the traditional legal office set up) when recruiting.

Design your ideal role based on your strengths

Being clear on your strengths (and shortfalls), as well as the strengths of the people you work with, can empower you to propel your practice's progress rather than stagnate your growth. Rob, for instance, has hired Tracy to lead their team and run the practice.

Collaborate with your staff to design their ideal role

Rob and Tracy are keen to nurture their team's personal passions, even during traditional working hours. Tracy says, "when people have broader experiences that feeds into wellbeing". Incorporating passions aside from professional aspirations absolutely benefit staff's motivation and quality of workplace contribution

Proactively design a network of quality people around you

Tracy praises Rob's relationship building skills and how he intertwines networking into his day, finding lots of different ways to connect with people. Be it a simple "hello" call, to catching up for a walk with a referral partner, visiting a client's business, or sending chocolates for Valentine's Day with a note "we love doing business with you".

Join our next Leaders in Practice webinar on 19 May so you can hear how Rob Roy Rankin has built his leading practice by design. ■

Brent Szalay is SEIVA managing director.

ADOBESTOCK

FOCUS ON COMMERCIAL

Matthew Kinross-Smith outlines the broad nature of his specialist area of law.

The future for commercial lawyers in Australia is almost certainly very bright. With COVID-19 and recent events in Europe having focused minds on supply chain security, diversification of production locations with benefits to Australian businesses is likely. With the impacts of climate change coming into sharper focus, and the greater likelihood of carbon trading and other emissions reductions measures affecting business being imposed, new elements may need to be incorporated in agreements in industries where emissions reductions on a significant scale can be expected.

There's a great deal of interesting work one can take on with the greater knowledge that comes with having completed a commercial law specialisation and keeping up with the law and the many changes to it – duty law, employment law, leasing law, implications of COVID-19 legal changes, and for insolvency matters, ongoing changes to unfair contract law, to name a few.

As a commercial specialist, clients bring you interesting and challenging work, but other practitioners refer work on too. It's uniquely broad work – at any one time I would usually have files covering such diverse areas as property law, contract law, employment law, business sales, trust law, intellectual property, leases and partnership agreements or shareholder agreements. Any transaction that comes under the commercial umbrella, particularly if complicated, can come across my desk. In turn, especially if the matter becomes litigious, it can lead to good interactions with senior members of the Bar and interesting negotiation or hearing preparation work.

Being effective includes providing clear, written communication to clients and keeping good notes of what has transpired, what decisions were taken, and what information was conveyed as part of the decision-making process. You also need to have a solid foundation of knowledge in most areas of commercial law and a network to go to for those areas where your own knowledge is not as strong.

The key is not to miss issues entirely and to take the time to reflect on each matter individually. With expert knowledge, you are more likely to pick up on more obscure arguments to advance a client's case. Checklists are very good and plentiful these days, but they are not the be all and end all when considering a matter.

Pursuing specialist accreditation forced me to get a greater understanding of other areas of commercial law I wasn't across, and in so doing, it reduced the stress of having a broad practice and operating under considerable time pressure. It also reduces exposure to risk. You are able to see the big picture. You can identify the implications of what you are trying to achieve for a client on other related legal aspects. For example, re-organising a client's commercial structure might create an unintended transfer of lease. In large firms, where practitioners are often highly specialised, there can be a real benefit from undertaking specialist accreditation. I have seen examples of issues missed altogether because the practitioner is so narrowly focused that they don't see the wider implications of their advice.

Commercial clients tend to be repeat clients as issues invariably arise for businesses on a regular basis – employment issues, changes to legislation, lease renewals and the like bring one into regular contact with clients and their issues.

The work is, and will continue to be interesting, particularly for those practising across a broad range of areas of law covered by the commercial law specialisation. There will always be challenges, particularly as many of the areas of law (competition, consumer, insolvency, superannuation, tax and employment to name a few) seem to attract regular inquiries or reviews and amendment of government regulation. For those who enjoy learning new things and keeping up with developments, the future is bright. ■

Matthew Kinross-Smith is director of Kinross-Smith & Co Lawyers Pty Ltd, Geelong, and has been an LIV accredited specialist in commercial law since 2008.

NEW ADMISSIONS

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on **28 February 2022**. The *LIJ* welcomes them to the legal profession.

ADEBAYO, Esther
AHMADI, Tahmina
AKBULUT, Berrin
AL ASSADI, Yasser
ALEXANDER, Luc
ANEVSKA, Marija
ANGELONE, Arianna
ARUN, Krithika
AYOUBI, Ahmad
BALLARD, Zackary
BARANYAY, Margit
BERTE, Gabrielle
BETHUNE, Jordyn
BINTI AZARAE, Nurul Azalea
BRADY, Sasha
BRODIE, Hayden
BROOKS, Anthony
BROWN, Jessica
BROWN, Kate
BURGOYNE, Paul
BUTLAND, Joshua
CABRAL, Kristoff James
CALLAHAN, Amy-Rose
CARTER, Neane
CHALMERS, Alexandra
CHATTERTON, Asher
CHENG, Wilfred Wing Fai
CHESHIRE, Tanya
CHONG, Tsz Fung Boris
CLARIDGE, Jeannie
CLARK, Joshua
CLARKE, Sarah
CLEVELAND, Jack
CONOLLY, Wade
COOK, Lucinda
COSTER, Katie
DALES, Alice
DE SILVA, Muthuwahandi
DEAN, Jessica
DIMASI, Adam
DODD, Jonathan
DOGAN, Bilgesu
DUONG, Clara
DUONG, Si-Qi
EVANS, Hugh
FARFALLA, Anthony
FARR, Emily
FAUCHER, Veronique
FOSTER, Laurence
FRASER, Sarah
GADD, Liberty
GARDINER, Jaimie
GAUR, Shikha
GOLDSWORTHY, Nellie
GORMAN, Katie
GOUNDER, Rajesh
GREENHILL, Connor
GRIFFIN, William
GROWDEN, Alice
GUELI, Maximilian
HALL, Samuel
HAMIDI, Yasmine
HORGAN, Anna
HSU, Yvonne I-Chen
HUYNH, Emily
INGRAM, Phoebe
ISHAQUE, Aaliya
ISKANDAR, Rio
JACOBS, Christopher
JOHNSTONE, Allison
JOHNSTONE, Genevieve
JONES, Frazer
JONES, Gregory
KANDHARI, Adesh
KARAM, Kaylee
KARVOUNIS, Alexia
KASNER, Sarah
KHURANA, Vanessa
KIMBERLEY, John
KLEPO, Alma
KLEPPER, Thomas
KOK, Hannah
KUOCH, Andy
KUSANGAYA, Zvinodaishe
LACY, Ebony
LAM, Brenda
LAND, Alice
LEITH, Joshua
LI, Joyce
LUDOWYKE, Meliza
LY, Jason
MAGRI, Cylene
MAKO'OCHIENG, Bernard
MASIH, Deborah
MATTEA, Gemma
McGRATH, Jacqueline
McKENZIE, Caitlin
McLAREN, James
McMURRAY, Zakariya
McPHERSON, Lucinda
MENDOZA, Elaine
MIDGLEY, Lauren
MILES, Jeffrey
MILLEN, Eliza
MONAHAN, Harris
MORLEY, Stephanie
MOSAVI, Sayna
MUCCIO, Isabella
MURPHY, Shay
NAGAR, Amishaa
NGUYEN, Nhu-Y
NIVAL, Frances Guinevere
O'CONNOR, Emily
O'ROURKE, Cordelia
PARKHOMENKO, Natalia
PARRY, Meghan
PASCOE, Jessica
PELHAM, Adele
PETHER, Forida
PINCH, Zoe
POVEY, Alison
RAHMAN, Zamira
RAMADAN, Billel
ROGERS, Lachlan
ROHANI, Mohammad
ROTIROTI, Sam
RUSSO, Tamara
RYAN, Meg
SAFDAR, Subhat
SAHHAR, Micaela
SAKKAL, Alexa
SALZANO, Thomas
SANDHU, Simran
SANGU, Sowmyaa
SANTANA-BESWICK, Rex
SFENDOURAKIS, Helena
SIGAMONEY, Alyssa
SIMS, Ronald
SMITH, Hannah
SMITS, Yasmin
SOLAK, Samuel
STASINOPOULOS, John
STEVENSON, Meg
STEVENSON, Olivia
SURIC, David
SURYA PUTRI, Stella
SUTHERLAND, Clayton
TAGGART, Matilda
TAO, Norman
TASHI, Gonpo
TAYLOR, Morgan
THOMAS, Natalie
THOMAS-WEBB, Rufus
TOBIN-WHITE, Phoebe
TRAM, Nicole
TRAN, Kim Thao Nguyen
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TULI, Samiksha
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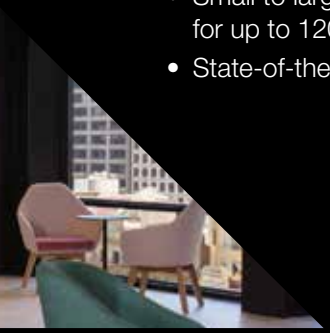
- LIV member's lounge



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LIV UPDATE

LIV Council member Marlene Ebejer gave her introductory speech at the February Council meeting. This is an edited extract.

Thank you to all who supported me by giving me your vote. I start my role on the LIV Council enthusiastic and ready to go.

The COVID-19 pandemic and the changing way in which we offer legal solutions to our clients is challenging for all. The challenges should be embraced as long as the profession continues to provide both ethical quality services and maintain our reputations.

In 2021 I watched the LIV step up to support the profession through very concerning times and I want to be a part of the lead into the next phase in growing the services and support the LIV can offer members.

My background

I was born and raised in Broadmeadows to parents who had arrived in Australia from Malta looking for a better life. My father always instilled in me that we were visitors to this land that had been nurtured for millions of years by our First Nations people and, therefore, we should respect both our first people and the land we are privileged to live on.

When I finally got to university at the age of 21 to do a diploma in welfare studies, I realised for the first time that I was from a disadvantaged area. It was news to me. From there I completed a Bachelor of Arts (Multicultural Studies), a graduate diploma in vocational education and then my Bachelor of Laws – 17 years of study while working full time and raising my son Jake. Clearly, I was addicted to learning. I spent 14 years working as a community development worker in public housing and education and then moved into managing and delivering adult education programs. Prior to completing my law degree, I began lecturing in the Bachelor of Laws. Over the years I have followed the many and varied careers of my past students and feel proud that I played a small role in their legal careers.

My first stint in law was as a community lawyer at what was then the Brimbank Melton Community Legal Centre followed by what was then the Wyndham Legal Service. I became a principal lawyer after one year and then opened my own practice. Although I had many years experience of managing community centres and a private training company, I had no idea how to run a firm. It took several years and lots of professional development to get to where I am now. Continuous learning, as you can see, is a bit of a hobby of mine. I am now an accredited family law specialist, family dispute resolution practitioner and, most recently, a Notary Public.

I am the author of two books *Focus: Family Law and Legal Practice* and *Ethics*.

My focus areas for 2022

Being a lawyer has by far been the most difficult and challenging of all the careers I have held. I know from speaking to other lawyers that the demands of clients, courts and other lawyers can be demeaning and make you second guess your knowledge, skills and how you practise law. So, for me, the importance of being on the LIV Council is to ensure that lawyers' concerns are heard and that the LIV advocates on their behalf.

Promoting and offering support services to ensure all lawyers maintain ethical standards is imperative – one hour of ethics CPD a year is simply not enough. Ethical practice needs to be at the forefront of our daily practice.

Maintaining a lawyer's reputation is seen as paramount. Lawyers must remember they are first and foremost officers of the court. Sadly, I read so many cases and often have to deal with unethical lawyers. They may be in the minority but they make our work so much more difficult and jeopardise the profession I am so passionate about. As a Council member, I hope to not only raise the reputation of the profession but to also call out behaviours that are unacceptable and push for those that cannot meet the standard of a competent ethical lawyer to leave the profession.

As I stated earlier, education has played a major role in my life and I want to see a push for more practical training for law students so that they are prepared for life in legal practice. As a university lecturer, my focus was on providing real-life, practical learning opportunities for my students that were transferable – skills they could take with them into practice.

The PLT program may be a student's first introduction to tasks or duties they will undertake as a "real" lawyer. I think more could be done in this space to ensure the profession continues to be filled with high-quality graduates ready to hit the ground running and bolster the profession. This could be achieved with increased mentoring and training opportunities (lawyers giving their time and expertise to penultimate or final year graduates) or university syllabuses designed around practical tasks (more of an apprenticeship rather than a degree). Again, the emphasis on ethics and the privileged role a lawyer undertakes should begin from the start of a person's legal education and continue throughout their career.

I look forward to my time as an LIV Council member. ■

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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.

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VALUATIONS

WILLS & ESTATES

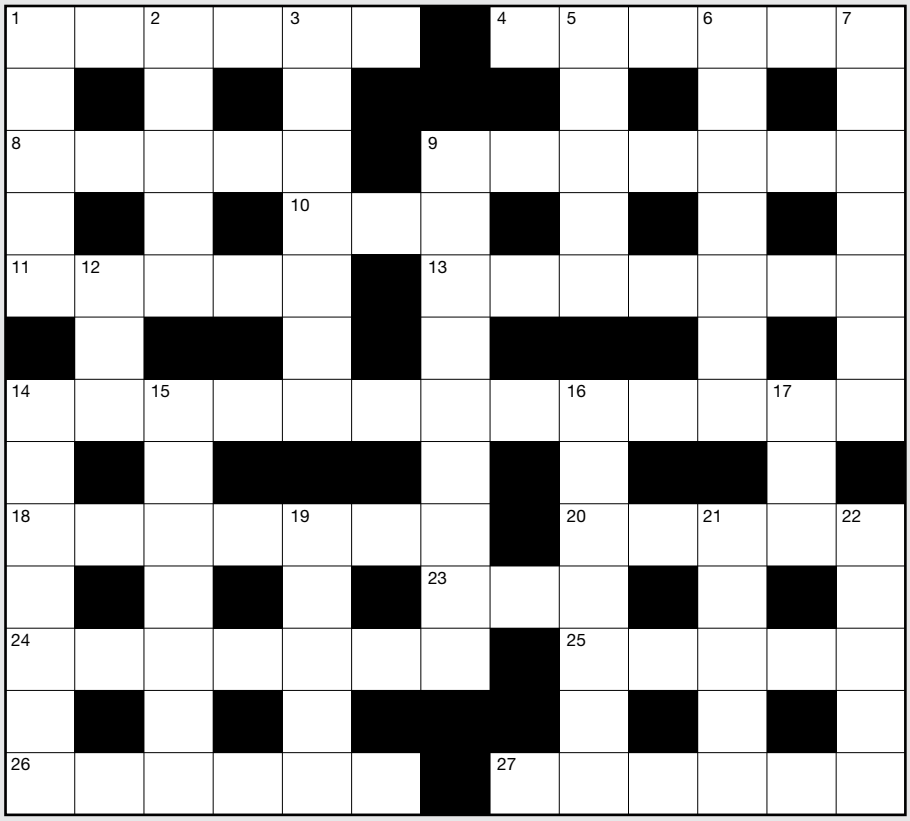
IRENE LEHEL (17 March 1956 to 5 November 2021) Would any solicitor, firm or person holding or knowing the whereabouts of a Will, or other testamentary document of Irene Lehel, late of Unit 4, 303-305 Church Street, Richmond, Victoria, 3121 who died on 5 November 2021, please contact John F Natoli of AB Natoli Solicitors, 24 Cotham Road, Kew, Vic, 3101, Telephone (03) 9853 3222 or email john.natoli@abnatoli.com.au

Would any solicitor, firm or person be holding or knowing the whereabouts of a will, or other testamentary document, written by **Ruru Arana Hona**, last known address was 3 Fontana Avenue, Pt Cook, Victoria 3030. Ruru Arana Hona born 12 May 1992 and died on 8 January 2022. If you have any information please email jacqui.beilby@publictrust.co.nz or phone Jacqui Beilby at Public Trust New Zealand on +64 9 985 6803.

MARGARET DOROTHY LEITCH (25 January 1938 to 29 October 2020). Would any solicitor, firm or person holding or knowing the whereabouts of a Will or other testamentary document of Margaret Dorothy Leitch late of 2/22 Cypress Avenue, Boronia, Victoria, who died on 29 October 2020 please contact Melanie Heffernan of South East Lawyers (Croydon), Suite 1, 1 Railway Crescent, Croydon, Victoria 3136. Telephone: 9723 5300 or email: Melanie@selawyers.com.au

PATRICIA IDA HUNT late of Kerrisdale Gardens, 35 Norwood Parade, Beaconsfield, Queensland, deceased who died on 4 October 2021. Would anyone holding or knowing of the whereabouts of the Will of the deceased please contact Kim Nguyen at Australian Unity Trustees Legal Services of Level 15, 271 Spring Street, Melbourne, Victoria, 3000. Telephone: 03 8682 5339 Email: knguyen1@australianunity.com.au

LETTERS OF THE LAW NO. 247



Solution next edition
Compiled by Aver

ACROSS

1 * Week in bed (6)

4 * Fair outside of Rhode Island (6)

8 Plot fling with Anita, initially for fourth of April (5)

9 German beer contains mostly zest: it's more salty (7)

10 Positive, lying about, contained thus? (3)

11 Man in pub returns for alcoholism treatment? (5)

13 Positive news at first: Ozone regenerating around central Antarctic (7)

14 Criminal to face popular judgment here? (5,2,6)

18 Born rude, leaderless, agitated and like Rumpole when he's not in court? (7)

20 Revolution's endlessly morbid tenor (5)

23 To begin with, Edward the Confessor's ... (3)

24 Marks in glass smashed (7)

25 Making regular sacrifices, terminally suffering (5)

26 Sex appeal in Los Angeles and New York catalogue (6)

27 Artful boat seen before Fourth of July (6)

DOWN

1 Outcast crosses multiple personalities (5)

2 Sibyl and Rowan, perhaps (5)

3 Greeting young woman accompanying former partner to show (7)

5 Coalition's all together ignoring society (5)

6 Iris's family oddly in reindeer area (7)

7 Work around rum, dizzy in confusion (7)

9 Based on friend's opening, I negotiated in good faith (4,5)

12 The governess has self-confidence (3)

14 * Clues on suspect (7)

15 Reputable piano? (7)

16 * In favour of Conservative throwing up drivel (7)

17 Family embraces friend from Rouen (3)

19 Tanned Australian in place of old muscle (5)

21 * Spun fibre (5)

22 Inform on Sydney's last set (5)

Clues marked with an asterisk share a common definition and are clued by wordplay only.

Solution to Letters of the Law No.246

R	E	L	A	P	S	E	■	E	■	A	■	■
E	■	I	■	L	■	N	O	M	I	N	E	E
S	U	B	V	E	R	T	■	P	■	T	■	N
E	■	E	■	A	■	A	I	L	M	E	N	T
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T	■	O	■	B	E	L	L	Y	A	C	H	E
L	■	U	■	E	■	■	■	E	■	O	■	P
E	L	S	E	W	H	E	R	E	■	D	■	R
M	■	■	■	I	■	G	■	■	C	I	T	E
E	N	A	B	L	E	R	■	J	■	F	■	N
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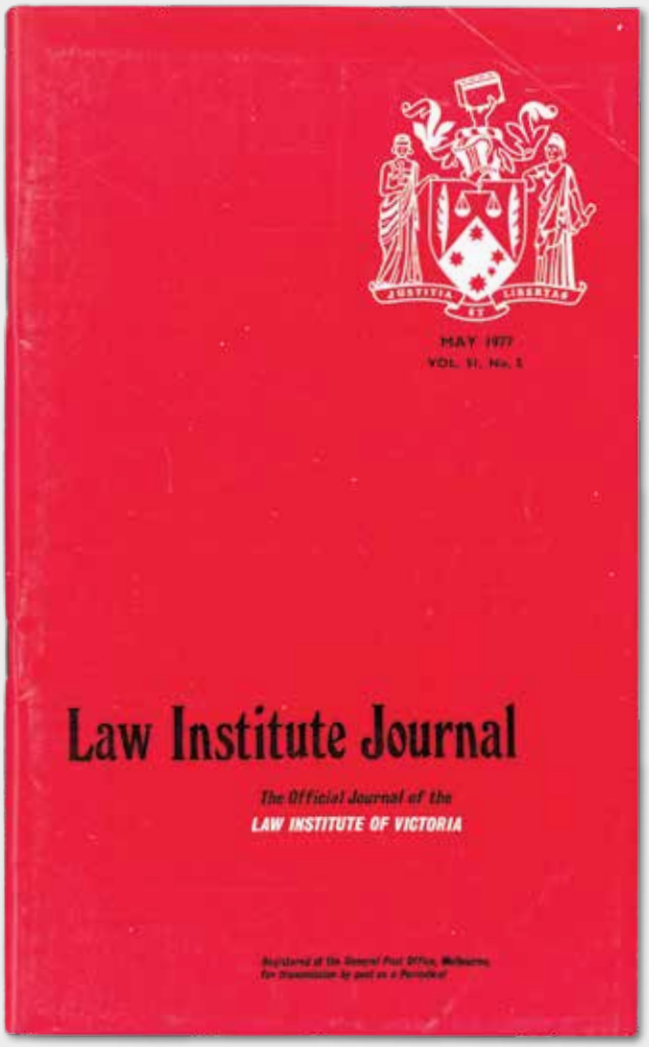


WWII COMMANDO SURVIVED BRUTALITY OF CAPTIVITY

FORMER LIJ EDITOR (1966-1977) JIM ELLWOOD'S WAR SERVICE INCLUDED TWO YEARS AS A PRISONER OF WAR. IN 2021, HE DIED AGED 99, ONE OF THE LAST OF HIS SPECIAL UNIT. THIS OBITUARY WAS FIRST PUBLISHED IN THE AUSTRALIAN.
BY IAN MCPHEDRAN

Captain Jim Ellwood
World War II veteran
Born Casterton, Victoria, 16 December, 1921
died Melbourne, 27 November, 2021, aged 99

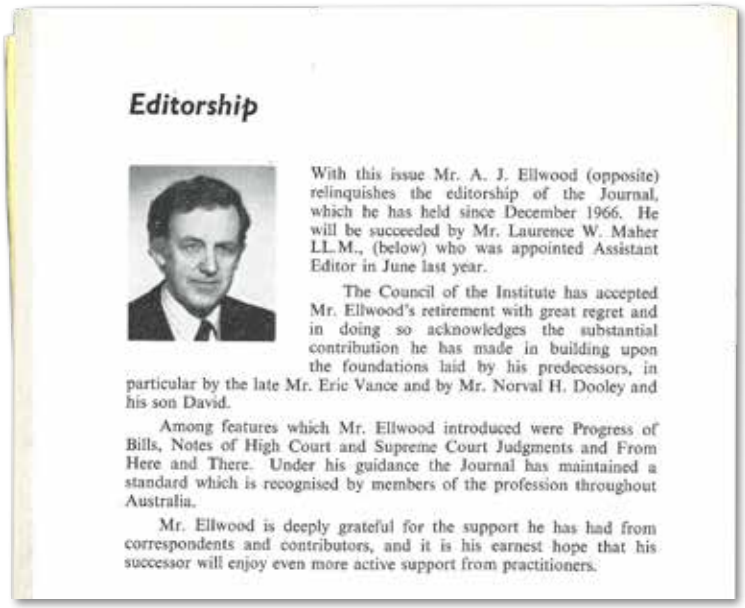
Australia has lost one of its last surviving World War II special forces operators with the death of Captain Alfred James (Jim) Ellwood, just a fortnight before his 100th birthday.

Ellwood, who also survived two years as a prisoner of war of the Japanese in East Timor, was born in Casterton, Victoria on 16 December 1921, the eldest of five children of World War I Flanders veteran Alf Ellwood and his wife Alma.

The family lived on a soldier-settler block at the tiny settlement of Paschendale, east of Casterton, named after the infamous Western Front battlefield.

After attending the local bush primary school Ellwood enrolled at Hamilton High School in western Victoria, where he completed the leaving certificate. He was awarded a Commonwealth Scholarship before he took up a job with the Army Finance Department in Melbourne, where he met his future wife, Mollie.

After enlisting in December 1941, just five days before his 20th birthday, he was posted to Darwin where he trained as a signaller/cipher operator.



Editorship

With this issue Mr. A. J. Ellwood (opposite) relinquishes the editorship of the Journal, which he has held since December 1966. He will be succeeded by Mr. Laurence W. Maher LL.M., (below) who was appointed Assistant Editor in June last year.

The Council of the Institute has accepted Mr. Ellwood's retirement with great regret and in doing so acknowledges the substantial contribution he has made in building upon the foundations laid by his predecessors, in particular by the late Mr. Eric Vance and by Mr. Norval H. Dooley and his son David.

Among features which Mr. Ellwood introduced were Progress of Bills, Notes of High Court and Supreme Court Judgments and From Here and There. Under his guidance the Journal has maintained a standard which is recognised by members of the profession throughout Australia.

Mr. Ellwood is deeply grateful for the support he has had from correspondents and contributors, and it is his earnest hope that his successor will enjoy even more active support from practitioners.

Extract from May 1977 LIJ

"I was bound up like a turkey, handcuffs on the wrists . . ."

He then joined the Commandos and was deployed to East Timor with the 2/4th Independent Company, attached to the legendary Sparrow Force headquarters.

After the evacuation of Sparrow Force, he stayed behind as an operator with the 2/4th, which became known as Lancer Force. Lancer operated behind enemy lines between September 1942 and January 1943, and when the force was evacuated on 9 January Ellwood volunteered to remain with the "stay behind party", known as S Force.

After he returned to Australia on board the US submarine USS Gudgeon in February 1943, exhausted and sick with malaria, Ellwood was recruited to the top-secret Z Special Unit to train for a covert mission back to Timor.

Aged 21, he was redeployed to East Timor alone in July 1943, and after three months operating alongside Timorese and Portuguese guerrilla fighters in the rugged mountains he was taken prisoner on 29 September, 1943.

Transferred to Dili jail, he suffered the brutal interrogation methods of the feared Japanese Kempeitai (military police). He spent months shackled, starved and in solitary confinement with only maggots for company as the interrogators bashed and tortured him while leaving his malaria, wet beri-beri and dysentery untreated.

He survived in captivity for two years before he was recovered to Singapore via Bali in October 1945, six weeks after Japan had surrendered.

Ellwood didn't carry a grudge against the Japanese people but he was blunt in his views about the Japanese military. During a Japanese government-sponsored visit by five Australian ex-prisoners of war to Japan in 2011, the then 90-year-old Ellwood described how he and other POWs were treated.

"I was bound up like a turkey, handcuffs on the wrists, wires on the upper arms, and hobbles and ropes in front and back," he said.

"I was blindfolded most of the time. The only toilet facility was a wooden barrel. That soon became filled, overflowed, flyblown, maggoty, and the maggots were crawling all over the floor and all over my body when I was resting."

Ellwood praised the modern-day Japanese people for renouncing war, which he described as "a failure of intelligence, a failure of diplomacy, a failure of politics and a failure of leadership".

He said: "Of course, it's the old people who run it who are the leaders, the politicians and the diplomats who send the young people to war and destroy a lot of lives."

After the war, Ellwood graduated in law from the University of Melbourne and launched a long and distinguished legal career in Warrnambool and Melbourne, where he joined the State Bank before becoming chairman of the Land Valuations Board and a royal commissioner.

He and Mollie reared five sons: Damian*, Simon, Stephen, Nicholas and Christopher. Ellwood lost his beloved Mollie in 1997 before marrying Loretta in 2015. The couple had known each other at the State Bank and Loretta had lost her first husband to cancer.

Ellwood was an avid reader and jazz music fan, and a proud and dedicated member of many ex-service organisations including the RSL and Legacy.

He was the last of the 2/4th Independent Company veterans and the second last Z Special Unit operative to have served on combat operations during World War II. Only Allan Russell remains. ■

*Damian Ellwood is a Melbourne barrister.

FOOD

13/20

Ten Square
120 Hardware Street
Open daily 8am-3pm

Touting itself as a modern café serving quality seasonal produce, Ten Square occupies a bright and airy space that once housed Hardware Societe at the northern end of Hardware Lane, near the Little Latrobe Street intersection (HS has since relocated to the opposite side of the road). The dining area is illuminated by light that comes through the floor to ceiling glass front, outside of which are tables for al fresco dining.

The café is open for breakfast and lunch and its menu is a combination of early and brunchy mains with a few daily specials. Fried chicken and cornbread waffle ($24) is a generously sized and tasty ensemble: large pieces of crumbed chicken breast are stacked on an oversized waffle, scattered with fried cauliflower pieces, and saved from being a little dry by a pot of caramelized onion and a separate pot of maple syrup that is cleverly infused with rosemary. That I must try at home. Sweet potato vegan stack ($23) is less successful: the centrepiece rosti is a little, er, overcooked on the bottom and, to my taste, over-seasoned. The accompanying beetroot hummus and pesto-coated mushrooms somewhat rescue the dish. We accompany these with one of the lunch specials, arancini balls ($18). These are nice enough croquettes of risotto, mushroom and parmesan. Unfortunately, they are accompanied by aoli that has a glue-like consistency and is redolent with either truffle oil or black garlic, none of which is foreshadowed on the specials menu. These disappointments aside, I am reliably informed that the braised mushrooms on polenta ($21.50) is very good, although I did not get a chance to try it.

There is a good drink selection, with or without alcohol. The Paloma ($14) is a wonderful grapefruit margarita, and the Baxter IPA ($8.50) is an excellent beer.

Dessert choices are limited. An oblong piece of pistachio love cake ($6) is disappointingly lacking in amour, overcooked (in my opinion) and insufficiently sweetened or fragranced with rosewater. A chocolate muffin ($6) is well-sized, but dried out inside. Coffee, supplied by Duke roasters, is above average.

COVID-19 no doubt continues to prove a challenge to emerging eateries, confronting them with staff shortages and inconsistent patronage. Hopefully, Ten Square can find a little more consistency over the coming months. ■

Shaun Ginsbourg is a hungry barrister.

HOW WE RATE IT

18 to 20: Would take my best client here

15 to 17: A safe bet for client entertainment

12 to 14: Best for a lunch with colleagues

<12: Life's too short, try somewhere else

COFFEE

Mr Ashcroft
435 Little Collins Street

The high, wide picture window at Mr Ashcroft café gives a bird's eye view of Melbourne's legal and other locals going about their business. There's plenty of room for a laptop at the marble benchtop, although the passing parade is distracting – as is Sojourn, the interesting blue cube café opposite.

Coffee here is by Single O Coffee (abbreviated from Single Origin Roasters). It's ethically sourced, locally made. But there's myriad hot drinks to choose from – Magic coffee, Affogato, Calmer Sutra Wet Chai, milkshakes, craft beer.

To eat, there's a range of good looking pastries and sandwiches, and smashed avocado on sourdough, of course.

Breakfast is served 7am-1pm, lunch from 12 midday-3pm. **CF**

WINE *By Jeni Port*

Taylors Chardonnay Padthaway-Clare Valley 2021
RRP $22

Chardonnay has had its ups (high alcohol, high levels of oak) and downs (low ripeness and alcohol) in recent memory, but it's back big time. Love this blend of Padthaway and Clare Valley fruit which fits in well with this month's $25 and under top buys. Plenty of juicy fruit to enjoy from lemon and grapefruit through to nectarine and melon, all kept nicely in place by zesty, bright acidity.

Open with whitebait fritters.

Stockist: www.taylorswines.com.au

Mr Mick Clare Valley Sangiovese 2021
RRP $17

The Mr Mick brand offers some of the best value wines in Australia, hands down. Winemaker Tim Adams worked with the legendary Mick Knappstein at Leasingham and this is his homage to the great man. Expect plenty of drink-now appeal with the '21 sangiovese which is bursting with bright, fresh summer berries led by cherry and raspberry with a coating of anise, spice and dried herbs. So much flavour for so little a price.

Enjoy with duck croquettes.

Stockist: www.timadamswines.com.au

Andrew Peace Masterpeace Shiraz 2021
RRP $15

Andrew Peace is a well known name on the Victorian wine scene, a long-time winemaker of the Murray Darling region, based at Piangil. He is also a strong environmentalist embracing works that will bring his property a more sustainable future. It's good to support his important work, not to mention his well-made, price conscious wines under the Masterpeace label. The 2021 shiraz is all about the quality of fruit, its plums, black fruits, attractive depth of spice and chocolate notes, delivered with supple tannins and easy-going drinkability. Don't overthink it, just enjoy.

Open with meat pie.

Stockist: www.apwines.com.au ■

Jeni Port is a Melbourne wine writer, author and judge.

ACTING LIKE THE PARTY OF THE FIRST PART

CONTRACTS EXAM A LESSON IN THE POWER OF BLUFF.

Some professions like to keep things in the family. Think of all the actors surnamed Redgrave, Fonda or Fairbanks. Doctors? Practically incestuous. The *New York Times* reports that doctors have medical parents at a rate 25 times higher than the rest of the population. Lawyers aren't far behind: 18 times more likely to have at least one parent in the legal profession.

Apples often don't fall far from the tree. But sometimes they just crumble. Which explains why I, with both parents doctors, never studied medicine (too squeamish). I did, however, start a law course at university where I was enrolled in legal subjects for two years – although any study ceased midway through Year II.

I knew from the start, slumbering through a Welcome to Law School class, that I'd made a terrible mistake. I'd let myself be persuaded by teachers and parents that arts on its own was wishy-washy. As for what I actually wanted to do – get into an acting school like NIDA – well, that was both risky and ridiculous. Had I forgotten I wasn't a Fonda? Maybe. But I remembered the fun I'd had in school plays. I'd played a judge in one, sitting high above everyone else on stage. That was good. Subsequently realising I couldn't go straight from law school to the bench? Not so good.

Still, I soldiered on through the quicksand of legal process, criminal law and torts. It was contracts that did me in – surprising, in some ways, as I'd thought it might be useful in everyday life. Even Redgraves probably signed contracts regarding major roles. But no. It was just dull, dull, dull. My contracts tutor, however, was a bit of a character. He was sitting cross-legged on his office floor, strumming a guitar, when I broke it to him that law school and I were separating – news that seemed neither to surprise nor dismay him.

He sensibly suggested, however, that I might as well sit the final exam later in the year, especially as I'd conjured pass marks in assignments already done. And so – having thrown myself into the student newspaper (journalism now shaping as an alternative career to the High Court) and done no study whatsoever for many months – I fronted for the contracts exam. Some things, I thought, would surely look familiar. No. I contemplated raising a hand. Surely there'd been a mistake: it seemed I'd been given a paper for a different subject.

Then, pondering a question about Mars contracting with Venus to sell goods to Saturn (etc etc) I remembered someone saying something about how examiners liked to see processes of thought. And diagrams. So that's what they got. The words "Mars" and "Venus" and "Saturn" with little boxes around them and inter-connecting arrows going every which way. Meant nothing, but looked great. Especially when labelled Fig.1.

I passed. Which says plenty about the power of bluff and bulldust. Pile it on thick enough and it tastes like jam. Or perhaps, just briefly, I'd married my two possible careers. Sitting in that exam room I'd acted like a lawyer. ■

Alan Attwood

DO YOU EVER COME ACROSS AMUSING INCIDENTS RELATED TO THE LAW?

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ADOBESTOCK

HOW LAWYERS CAN RESPOND TO ANGER

PROBLEMATIC ANGER IS COMMON AFTER EXPERIENCING TRAUMA, AND THE STRESS OF LEGAL PROCEEDINGS MAY TRIGGER IT.

Typically, anger serves as an adaptive and appropriate expression of emotion, and an understandable reaction to certain situations and circumstances. It can be characterised as an "approach" emotion, employed to address threat or overcome barriers to goal attainment (Carver & Harmon-Jones, 2009). In countering barriers to goal attainment, anger becomes a motivator or mobiliser of productive action. In contrast, fear and anxiety, which tend to be triggered by threatening stimuli, lead to avoidant behaviour.

While anger is an adaptive emotion, for some it can become an all-encompassing experience, seriously affecting their health and wellbeing, and sometimes even their safety or that of others. Anger is considered problematic when it occurs with a level of frequency, intensity or duration that causes significant distress, actively interferes with the person's interpersonal relationships and their functioning, and is associated with aggressive behaviour towards others.

There is mounting evidence for the prominence of problematic anger in trauma survivors. When faced with high levels of threat to life or severe harm, the anger people can respond with is related to a natural survival instinct. Anger is also a common response to events perceived as unfair, or in cases of trauma that involve exploitation or violence. Unsurprisingly, problematic anger is common across a range of trauma survivors, including survivors of large-scale disasters and sexual and physical assault, adult survivors of childhood trauma, and veterans and emergency service personnel exposed to trauma.

For people who have experienced trauma, the response to threat can become "stuck". Any stress is responded to as if in survival mode, which can include aggressive behaviours at an intensity suggesting that person's life is threatened. Less explosive aggressive behaviours include complaining, being late, self-blame or self-harm. The more a person perceives their anger as helpful in coping with stress or facilitating solutions to problems, the greater the potential for it to become an ongoing problem-solving tool.

Lawyers represent and serve people during some of the most vulnerable times of their life. Family law, bankruptcy, criminal law, child protection, immigration, community legal centres, legal aid and personal injury are examples of areas where clients are likely experiencing the impacts of recent or current trauma. As 75 per cent of the Australian population has experienced a potentially traumatic event at some stage in their lives, no area of the law is exempt from contact with clients who have experienced trauma – including incidents entirely unrelated to the legal issue at hand. It follows that a large proportion are likely to experience problematic anger.

Problematic anger can be managed using strategies to de-escalate an individual's aggressive behaviour, and at the organisational level by employing a trauma-informed model. Individual strategies include staying calm and keeping your own emotions in check, adopting passive and non-threatening body posture, not crowding the client, acknowledging the client's feelings, being flexible to the extent feasible, and structuring your work environment to ensure safety and ensuring other clients are out of harm's way. Depending on the behaviour exhibited it may also be appropriate to follow your organisation's occupational violence and aggression processes.

Australian health service delivery organisations commonly adopt a model of trauma-informed care, and its applicability to the practice of law is increasingly recognised. Trauma-informed care is an evidence-informed approach to working with people who have experienced trauma. Training in trauma-informed care helps lawyers understand more about trauma, its effects, and common responses such as problematic anger. It also reduces the potential for unintended triggering of anger and other trauma related responses. Trauma-informed practice also emphasises good self-care strategies to protect you when working directly with traumatised clients and offers a framework for organisations to support legal staff. ■

SNAPSHOT

- While anger is an adaptive emotion, for some it can become problematic.
- Problematic anger is often associated with aggressive behaviour
- It is common after experiencing trauma.
- A significant proportion of your clients will have experienced trauma, and the stress of legal proceedings may trigger problematic anger.
- There are strategies to manage aggressive behaviour at the individual level, while at the organisational level a model of trauma-informed care can provide a more supportive environment for you and your client.

Professor David Forbes is director and **Dr Ros Lethbridge** a senior clinical specialist at Phoenix Australia – Centre for Posttraumatic Mental Health, University of Melbourne.

References

CS Carver and E Harmon-Jones (2009). Anger is an approach-related affect: Evidence and implications, *Psychological Bulletin*, 135(2), 183-204.

For further information, https://training.phoenixaustralia.org/offerings/tic-2022.

ADOBE STOCK

In demand: Illustrator and former lawyer Natalie Rompotis

RUNWAY TO THE TOP OF FASHION ILLUSTRATION

FORMER LAWYER NATALIE ROMPOTIS HAD NO IDEA HOW FAR HER SKETCHING HOBBY WOULD TAKE HER. **BY KARIN DERKLEY**

As a child Natalie Rompotis always had a pencil in hand. "I was forever sketching," she says. She had a particular interest in drawing glamorous frocks and fashion illustration. "But it was always a hobby for me. I didn't take it too seriously." At school she focused on academic subjects, with a special passion for languages.

But she kept on sketching, during her arts/law degree at Monash, as a junior lawyer at Ebsworth & Ebsworth, specialising in insurance and commercial litigation at Turks Legal, through her couple of years in-house at transport company Viking Group, and back into private practice and commercial insurance litigation.

"As a junior lawyer instructing, I'd be sketching portraits of counsel in the background. At the end of the hearing I'd hand them the sketch and they'd always be amused by it."

It wasn't until Ms Rompotis moved to Sydney and went on maternity leave that the almost obsessive sketching turned into something more. She did some sketches of runway dresses at Australian Fashion Week and put them up on her Instagram page. The sponsors spotted them and contacted her to tell her she had won an illustration competition.

"I had no idea there was even a competition," she says. "They wanted me to do a series of illustrations for the 20 year anniversary of Fashion Week. I said I'm not really an artist – I'm just a lawyer who is taking a break and doing this for fun. They said, you'd better get cracking."

One thing led to another, and eight years later Ms Rompotis is in high demand as a full-time illustrator with a global portfolio of clients, including Max Mara, Faber-Castell, Myer, L'Oréal Professionel, Australian Turf Club, Victoria Racing Club, Dermalogica, Westfield and Crown Resorts. Her work has featured in the *New York Times*, *Vogue Australia*, *Harper's BAZAAR* (Australia, Mexico and Latin America) and *ELLE* (US). She has been named by *Harper's BAZAAR* Australia and *Huffington Post* as one of the top 12 Australian Fashion Illustrators.

Ms Rompotis says she could not have imagined becoming a professional artist in days gone by. "I didn't come from a family that had the connections. The art world years ago was quite tightly held, and you really needed to know people." But social media has been an important equaliser for people like her, she says, allowing her to propagate her work through a virtual word of mouth. Interest by Hollywood actor Reese Witherspoon in Ms Rompotis' illustrations of her gown at a film awards night, for instance, led to her work being picked up by magazines and other celebrities such as Beyonce.

"Social media has meant I could dip my toe in the water and put myself out there without fear of over-capitalising."

Back in Melbourne, her new career has meant she has been able to build a flexible career around the needs of her family. "I used to draft affidavits at 2 or 3am for next day's hearing. Now I do some work at night after my children have gone to bed, but the flexibility allows me to set my own time and set my own schedule."

Her legal skills have stood her in good stead for running a business, especially when it comes to contracts and intellectual property issues, she says. "In my early years I had people blatantly rip off my work. There are certain things you can do about it, and a lot that you can't do, especially when you're dealing with international jurisdictions and the cost benefit analysis of pursuing something is sometimes just not worth it."

There are certain aspects of the law she misses, she says, "probably the problem-solving aspects. Which is why I tend to gravitate towards the harder jobs, so I still get to use that part of my brain."

It's unlikely she'll ever stop sketching, but if she ever returned to the law, it would be in IP, she says. "I'd quite like to use the knowledge I've amassed over the years. I have that knowledge . . . I know what to look out for." ■

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