LSJ
LAW SOCIETY OF NSW JOURNAL
AUGUST 2014

UNFINISHED BUSINESS
ELIZABETH BRODERICK ON WHY TRUE EQUALITY DEPENDS ON LAWYERS

THE TECH GAP
WHY LAWYERS NEED TO GET WITH THE TIMES

A FAMILY AFFAIR
EMBRACING REGIONAL PRACTICE

THE COSTS EXPERIMENT
WHERE TO NOW?

CAREER SPOTLIGHT
5 WAYS TO WORK BETTER

THE MAGIC OF MINDFULNESS
HOW IT BOOSTS PRODUCTIVITY

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In a move viewed as premature by the legal profession, the Baird Government recently announced a review of the law of bail. Under the reformed system, which came into force on 20 May 2014, the presumptions against bail have been removed with matters now assessed on a risk-to-the-community basis. However, following a handful of high-profile cases in which bail was granted, strong criticism of the new law has come from sections of the community and the media.

Whilst I accept that the new law should be subject to review to establish its efficacy, it concerns me that the current bail arrangements have not yet been given the requisite time to work through the court system. One must remember that our criminal justice system is based on the principle of presumption of innocence until proven guilty. Despite our reservations, the Law Society of NSW will seek to engage with government in the review process to ensure a balance is struck between fundamental legal rights and the protection of the community.

A statutory review of the *Workers Compensation Legislative Amendment Act 2012* was released on 30 June. This included recommendations such as lowering the threshold for compensation for a seriously injured worker and removing the prohibition against payment of lawyers for conducting the work capacity reviews. The Motor Accidents Authority has also recently proposed changes to costs in the motor accidents compensation system. If this happens, it may not be economically viable for lawyers to act in these matters, and injured motorists may be left to fend for themselves against insurers. We continue to raise our concerns in relation to both of these issues with government and, where necessary, work to inform the public through the media.

Finally, as many of you know, my charity for this year is Soldier On. On 18 September there will be a "Battle of the Brains" trivia night with all proceeds going to the charity. This should be a really enjoyable evening, an opportunity to pit your wits against others, and all for a good cause. Further information about this event can be found online.

Ros Everett

LSJ
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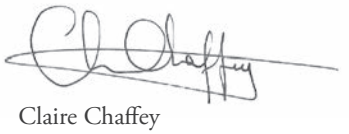
A WORD FROM **THE EDITOR**

It's amazing how the world can change in the space of a month.

As we put the August edition of *LSJ* to press, it feels like humanity is on the brink of disaster. The terror of flight MH17 is fresh in everyone's minds, with tales of bodies falling through rooves and the indignity suffered by the victims, many of them children, horrifying the international community. The Israeli ground offensive in Gaza is raging, with civilians dying violent deaths as a result of a conflict that just won't end. Australian-born teenagers are blowing themselves up in Iraq in the name of jihad, and images of mass executions at the hands of ISIL are being broadcast across the web. These events are tragic on a global scale and bring into focus the very reason why the rule of law is the foundation of society. Without it, chaos reigns. When the rule of law dies, so does peace, respect, dignity, and everything that we, as human beings, hold dear. As depressing as the state of the world is, it makes me proud to be a part of the legal profession, and of the Law Society of NSW which, across all facets of society – both locally and internationally – is working hard to ensure the rule of law, in its many forms, reigns supreme.



Claire Chaffey

Contributors

Hina Jilani is a leading Pakistani lawyer, pro-democracy campaigner and women's rights activist.
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Julie McCrossin is a writer, trainer and lawyer. She meets country lawyer Tacita Murrell in Wagga Wagga.
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Got an idea? We would like to publish articles from a broad pool of expert members and we're eager to hear your ideas regarding topics of interest to the profession. If you have an idea for an article, email a brief outline of your topic and angle to journal@lawsociety.com.au. Our team will consider your idea and pursue it with you further if we would like to publish it in the *LSJ*. We will provide editorial guidelines at this time. Please note that we no longer accept unsolicited articles.

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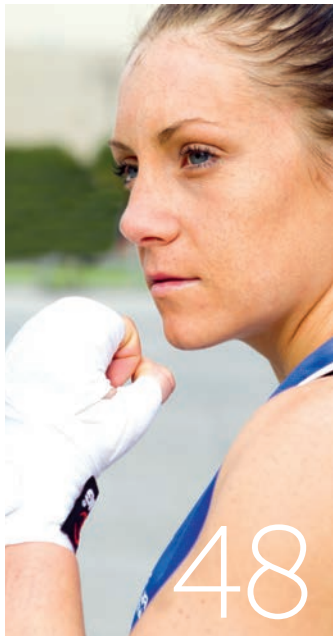

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FEATURES

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SAI GLOBAL
PROPERTY

LETTERS TO THE EDITOR

Money versus morality

In the July edition of *LSJ*, Michael Bradley was shocked to learn that an Indian outsourcing provider forbad its employers from bringing mobile phones to work.

It was, he writes, a denial of the employees' "basic expectations of privacy, trust and dignity" and inconsistent with an important value of his own firm – a value that was "about giving respect".

Mr Bradley was not naïve: "I understand entirely that what was being described to me is not unusual in that kind of work environment ... This is India, so in context [the employees] are some of the unfortunate few". All the same, he made the principled decision not to use the Indian outsourcer, accepting that it would change nothing.

Rudyard Kipling felt the same way: *Take up the White Man's burden, The savage wars of peace, Fill full the mouths of famine, And bid the sickness cease; And when your goal is nearest, The end for others sought, Watch sloth and heathen Folly, Bring all your hopes to nought.*

Richard Travers, Bowral

Written in the stars?

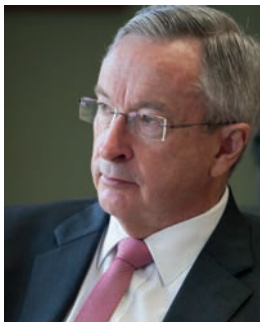
So the *LSJ* now offers its readers health advice, from a naturopath. Why not a homeopath, iridologist, or astrologist? For a profession purportedly dedicated to pursuit of facts via evidence and sober reasoned analysis, this flight away from science is seriously alarming. Shall we simply believe whatever we wish, or does scientific method matter? Lawyers sharing such concerns are warmly invited to visit scienceinmedicine.org.au. Please join us in defence of reason. Plainly we need your help.

Dr Adrian Cachia, Northbridge

WRITE TO US:

Letters to the editor
Email: letters@lawsociety.com.au

JUDGE NEILSON ISSUE NOT FOR PUBLIC DEBATE



The New South Wales Bar Association has said that while comments made by Judge Neilson last month are "plainly inappropriate" and "offensive to members of the community", his fitness to remain in office should not be the subject of public debate.

In a statement released after NSW Attorney-General Brad Hazzard (pictured) referred Judge Neilson to the Judicial Commission last month, the association's junior vice president, Arthur Moses SC, said that "whether those comments caused the judge to fall into error is a matter solely for the NSW Court of Criminal Appeal".

"As for the fitness of any judge to remain in office, that is not a matter that should be the subject of public debate or comment. I am not commenting on this particular judge in making that statement. The fitness of any judge to remain in office is a matter for the NSW Judicial Commission and ultimately the State Parliament."

Moses said NSW is fortunate to have a body such as the Judicial Commission that vigorously investigates complaints it receives about judicial officers in a fair and transparent manner.

"It prepares detailed reports and recommendations for the NSW Parliament, which has the ultimate responsibility to remove a judicial officer," he said.

"Such a power is only exercised in exceptional circumstances of proven misbehaviour or incapacity to remain in office."

Judge Neilson drew heavy criticism following comments made about incest and gay sex in a sexual abuse case over which he presided in April. ■

"As for the fitness of any judge to remain in office, that is not a matter that should be the subject of public debate or comment."

ARTHUR MOSES SC, JUNIOR VICE PRESIDENT, NSW BAR ASSOCIATION

ATHLETES DESERVE WORKERS COMP

The Australian Lawyers Alliance (ALA) has backed a call for professional athletes to be covered by workers compensation legislation.

The Australian Athletes Alliance called for workers compensation for professional sportspeople after Medicare warned that professional athletes should not claim Medicare benefits for injuries for which their employers are liable.

ALA national president Geraldine Collins said professional sportspeople deserved to have the same peace of mind as other employees when injured in the workplace.

"Why should professional athletes fail to be covered by workers compensation? The same workplace risks and responsibilities are present, as is the same need for support following injury or disability," said Collins in a statement.

"In Australia, there is a national move underway to ensure people are appropriately supported when they suffer disability or injury under the National Disability Insurance Scheme. Part of this move must also be to ensure they are covered under workers compensation legislation. The potential for very serious injuries exists in various sports. It is completely inadequate for professional sportspeople to be excluded from benefits when they are in fact performing their job." ■

"Why should professional athletes fail to be covered by workers compensation? The same workplace risks and responsibilities are present, as is the same need for support following injury or disability."

GERALDINE COLLINS , ALA NATIONAL PRESIDENT

KNOWLEDGE MANAGEMENT

The 7th Annual Janders Dean Legal Knowledge & Innovation Conference will be held 18-19 September in Sydney.

More than 130 people including senior management, private practitioners and in-house legal officers have registered for the event. Details of the event (including confirmed faculty list and draft agenda) can be found at:

jandersdean.com/conference

LEGAL MARKET PULSE **STRONGER**

The legal services market has ended the financial year in good shape, despite challenges.

The Commonwealth Bank's June quarter *Legal Market Pulse* report showed the profession ending the year positively, despite "the ongoing highly competitive business environment".

According to Marc Totaro, national manager of professional services at CBA, the short-term outlook for firms is reportedly tight. However, with the non-mining economy gathering momentum, firms are reporting a more positive longer-term outlook and are looking to increase their number of partners, senior associates and lawyers. Revenue expectations reportedly grew in the June quarter across Australia, the UK and Europe, with only Asia "edging lower".

While the taxation and banking practice areas have reportedly lost ground, firms expect revenue to increase in many practice areas, "with construction, engineering and infrastructure practice groups likely to benefit from higher demand". ■

JOHN HENNESSY SCHOLARSHIP AND EXCELLENCE AWARD

CALLING FOR RESEARCH AWARD NOMINATIONS

Nominations are open for the John Hennessy Scholarship and the Excellence Award in government legal service, which will be presented at the Government Solicitors Conference Dinner on 10 September 2014 at Sydney's Hilton Hotel.

Rebecca Barrington (pictured right), a solicitor at the Office of the Director of Public Prosecutions in Newcastle, won the award last year. She used the award, worth up to $10,000, to study the United Kingdom's specialist domestic violence courts. She said she found the UK system "very impressive" in terms of decreasing recidivism and decreasing the number of discontinued prosecutions due to witnesses failing to appear and/or detracting statements.

"The UK system addresses this complex issue with a multi-agency approach," Barrington said. "I have always been interested in this area of the law and it was an honour to investigate it. I studied psychology and law at the University of New England so this complex issue was something that fitted into my areas of study."

John Edmund Hennessy was born in 1940 and commenced work in the Crown Solicitor's Office in 1957. Admitted as a solicitor in 1965, he was appointed Assistant Crown Solicitor, Civil Law Branch, in 1980 where he worked until he was appointed as Acting Magistrate in 1996 and Magistrate in 1997. Hennessy served on the Legal Aid Review Committee as the Attorney-General's nominee for 17 years. He retired on 31 January 1999 and died the same year.

All NSW-based government and local government solicitors holding a current NSW practising certificate who are members of the Law Society of New South Wales are eligible to apply. Applications for this year's John Hennessy Scholarship close on 8 August 2014.

lawsociety.com.au

THE YEAR IN
review
2004

Take a trip down memory lane through the pages of the *Law Society Journal*.

THE NEW CHILDREN'S COURT: SOMETHING TO DREAM ABOUT

In February, the first stage in the NSW Government's children's court building program began with Worimi Court at Broadmeadow, Newcastle, scheduled for demolition. "Out of the rubble will rise a court fit for children of the 21st century," the *LSJ* reported. Architect Peter Broderick said: "We had a workshop early in 2003 to address how we dealt with young people. We wanted to treat them with dignity and respond to their needs. That means creating an ambience that's less intimidating. We won't, for instance, be using the ornate symbolism that in the past emphasised the remoteness and severity of authority. Courts have historically been designed like temples. You climb up to them: they look down on you, They're inaccessible, mysterious, hardly visible from the outside."

A FIRST FOR SYDNEY FAMILY COURT

One in three judges of the Family Court of Australia are women and in November three women make history by making up the Full Court. They are Justice Mary Finn, Chief Justice Diana Bryant and Justice Jennifer Boland.

THE FAMILY LAW RULES 2004, 545 PAGES, CAME INTO EFFECT

"The main purpose of the rules is said to be to ensure that each case is resolved in a just and timely manner at the lowest possible cost to the parties and to the court that is reasonable in the circumstances of the case," the *LSJ* reported.

PRO BONO WINNERS

A partnership between Mission Australia, the Salvation Army and Freehills to redress the special disadvantage experienced by young homeless people wins the first Pro Bono Partnership Award.

From left: Patrick McClure, Mission Australia, Paul Moulds, Salvation Army Captain, Jane Sanders, Shopfront Legal Centre and John Taberner, Freehills.

WHAT'S NEW?

Membership of the Law Society of NSW becomes voluntary. "I find it hard to imagine what my career would have been like without the support and strength of my professional association," writes Law Society president Gordon Salier. *"While my colleagues consider their options, I find myself thinking of that amusing line of Groucho Marx: 'I don't care to belong to any club that will have me as a member'. I like it because is sums up what we expect from a professional association – a sense of exclusivity, prestige and professionalism, a place where standards are set."*

MARRICKVILLE LEGAL CENTRE TURNS 25

Workers on the evening shift at Marrickville Legal Centre (from left) Jeremy Agnew, Anna Day, Janet Loughman, Jesse Booth, Gabrelle McKinnnon and Peter Jones.

MENTORING PROGRAM **KICKS OFF**

The NSW Young Lawyers Mentoring Program, now in its seventh year, launched its 2014 program on 22 July.

The program includes 100 pairs and unites young lawyers seeking guidance and support with more experienced practitioners. It provides an opportunity for those involved to share and reflect on professional life in a confidential, non-judgmental environment.

The program is based on the firm belief that mentoring is a lifelong process that is important for career development and gaining confidence in the workplace.

As part of the program, internationally renowned coaching and mentoring expert Professor David Clutterbuck will be appearing at a special event on 23 October at the Law Society of NSW. Clutterbuck is a strong advocate of the benefits of mentoring and says that an effective mentoring relationship is one where the mentor and mentee have mutual respect, recognise the need for personal develop, and have at least some idea of where they want the relationship to go. ■

LAW COUNCIL WELCOMES **SCRUTINY OF SECURITY LEGISLATION**

The Law Council of Australia has welcomed the government's decision to retain the role of the Independent National Security Legislation Monitor and its referral of proposed new national security laws to the Parliamentary Joint Committee on Intelligence and Scrutiny for review.

The National Security Legislation Amendment Bill (No.1) 2014 (the Bill) introduced into the Senate is the most significant modification to Australia's anti-terrorism laws in nine years.

The Bill is designed to strengthen the legislative framework governing the activities of Australia's law enforcement and security agencies and deals with a range of subjects including the admissibility of evidence gathered in foreign jurisdictions, telecommunications interceptions, the functions of Australia's foreign intelligence agencies, the power to urgently suspend passports, and the creation of new offences applying to unauthorised dealings with an intelligence-related record and new maximum penalties for existing offences involving unauthorised communication of intelligence-related information.

Law Council president Michael Colbran QC said in a statement that while the proposed new laws are designed to counter emerging national security threats, they may also impinge on the rights and freedoms of Australians.

"The Law Council supports the move to evaluate existing legal frameworks, which already contain extensive powers to collect intelligence from domestic and foreign sources and to investigate and prosecute terrorist activity, to determine whether gaps or unjustified handicaps exist in terms of Australia's capacity to respond to these emerging threats," said Colbran.

"If gaps are identified, then the Law Council urges Parliament to carefully consider how any new laws are drafted to ensure they are effective and proportionate responses." ■

PROFESSIONAL NOTICES

The Council of the Law Society of New South Wales, at a meeting on 2 June 2014, resolved to immediately suspend the practising certificate of Tereze Vilhelmina Dzitars, pursuant to section 548 of the Legal Profession Act 2004

On 2 June 2014, by resolution of the Council pursuant to Section 616 of the *Legal Profession Act 2004*, Richard Stephen Savage, solicitor, was appointed as manager of the law practice known as Tereze V Dzitars (Id: 13681), formerly conducted by Tereze Vilhelmina Dzitars .

The Council of the Law Society of New South Wales, at a meeting on 2 June 2014, resolved to immediately suspend the practising certificate of Malcolm Nelson Johns, pursuant to section 548 of the *Legal Profession Act 2004*.

On 23 May 2014, the NSW Civil and Administrative Tribunal, Occupational Division, ordered that the name of Daniel Downie be removed from the Roll of Legal Practitioners.

LIFELINE LAUNCH EVENT

On June 23, the Law Society of NSW launched Lifeline for Lawyers: a free, confidential, 24-hour telephone support service for solicitors experiencing emotional and psychological distress, or other work-related health issues. John Brogden AM (below) was the guest speaker at the event.

Lifeline For Lawyers

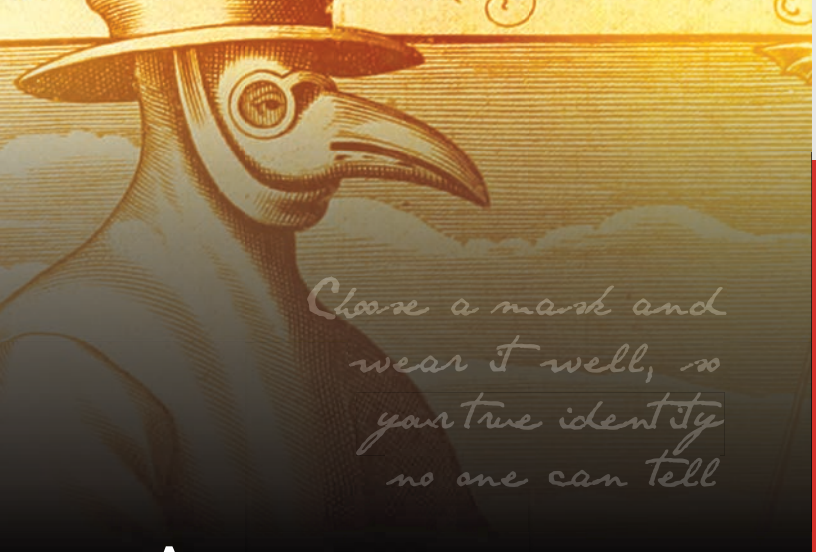
Lifeline for Lawyers Crisis Support
Available 24/7 by phoning 1800 085 062.
Lifeline also provides online crisis support from 8pm-4am which can be accessed at: **lifeline.org.au/crisischat**

MENTORING LAUNCH

THE NSW YOUNG LAWYERS LAUNCHED ITS 2014 MENTORING PROGRAM ON 22 JULY.

The program matches over 50 young lawyers with more experienced practitioners, many of whom descended on the Law Society for the cocktail event.

lawsociety.com.au/ylmentoring



ANONYMITY

YOUNG PROFESSIONALS CHARITY BALL 2014

SATURDAY

13 SEPTEMBER 2014 | 7PM-11PM

IVY BALLROOM

LVL 1, IVY, 320 GEORGE ST, SYDNEY

BLACK TIE

MASQUERADE

TABLE TICKETS* after 31 July (12 per table)	1800.00
SINGLE TICKETS* after 31 July	155.00
ADVANCED RAFFLE TICKETS cash only tickets available on the night	10.00

*3 course meal, beverages and live entertainment
Masks will be available at the entrance from 15.00

LAWSOCIETY.COM.AU/CHARITYBALL

'Soldier On' is the President of The Law Society of NSW's nominated charity for 2014.

BATTLE OF THE BRAINS

All proceeds from the trivia night will go to charity

Thursday 18 September 2014
6.00pm - 9.00pm
The Law Society of NSW
Level 2, 170 Phillip Street Sydney

Tickets
$95 per person*
$760 per table of 8*

* Price of ticket includes a 3 course meal with drinks and entertainment
* Prices include GST

SOLDIER ON
HELPING OUR WOUNDED WARRIORS

To find out more about the charity visit **soldieron.org.au**

Purchase tickets online
lawsociety.com.au/battleofthebrains

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MEMBERS ON THE move

ANNE MARIE DOUEIHY
Promoted to associate solicitor
Freedman & Gopalan Sydney

DUNCAN RAMSAY
Now a senior corporate lawyer
Steadfast Group Limited

FLO MITCHELL
Promoted to partner
Etheringtons Solicitors, North Sydney

MICHELLE SIRASCH
Appointed as partner in the land access and property development team
McCullough Robertson Newcastle

PENELOPE PARSONS
Promoted to associate solicitor
Etheringtons Solicitors, North Sydney

CANDICE LAU
Promoted to associate solicitor
Etheringtons Solicitors, North Sydney

TOM MOXHAM
Appointed as consultant
Etheringtons Solicitors, North Sydney

ALEX HUTCHENS
Appointed as partner in the technology team
McCullough Robertson Sydney

HELEN EDE
Appointed as director
Pigdon Norgate Family Lawyers

CRAIG MUNTER
Appointed partner in the property team
Makinson d'Apice Sydney

PAUL EVANS
Appointed to partner in the private client team
Makinson d'Apice Sydney

KEITH REDENBACH
Appointed as partner in the infrastructure, construction and government practice
Atanaskovic Hartnell Sydney

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Email us the details and a photograph (at least 1MB) at:
journal@lawsociety.com.au

global FOCUS

LEGAL NEWS FROM AROUND THE WORLD

UNITED KINGDOM

PRIVACY VERSUS SECURITY

On July 14, the UK Investigatory Powers Tribunal (IPT) began hearing cases brought against the British secret security and intelligence agency Government Communications Headquarters (GCHQ) in respect of alleged interception activity, or mass spying. The case comes in the wake of the Edward Snowden revelations of widespread spying upon individual private citizens by the GCHQ and the American NSA. The complainants in the current cases before the tribunal are Liberty, Privacy International, Amnesty International and seven overseas human rights groups. The complainants have claimed that through the GCHQ's mass surveillance program, "Tampora", the GCHQ has breached the rights to privacy and freedom of expression, which are enshrined in the European Human Rights Convention. In a separate statement, Privacy International said, "Unrestrained, unregulated government spying of this kind is the antithesis of the rule of law and government must be held accountable for their actions". The GCHQ has neither confirmed nor denied the existence of the "Tempora" spying program, and the case will proceed on the basis of "agreed hypothetical facts". Commentators have described the hearing as unprecedented in terms of its relatively transparent examination of a highly secretive spy agency.

FRANCE

FRENCH BAN ON VEILS DOESN'T VIOLATE RIGHTS

The European Court of Human Rights (the ECHR) has upheld a 2011 French law banning the concealment of one's face in public, finding the law did not violate the European Convention on Human Rights. The ECHR held there had been no violation of Article 8 (right to respect for private and family life), Article 9 (right to respect for freedom of thought, conscience and religion), or Article 14 (prohibition of discrimination) of the Convention. The case concerned the complaint of a French national, a practising Muslim woman who had worn the burka and the niqab. She wished to continue to wear the veil in certain circumstances in accordance with her religious beliefs. The ECHR accepted the French Government's argument that the "face played a significant role in social interaction" and that the veil ban was justified in the interests of "living together" or broader social cohesion. However, the court dismissed the argument of public safety, saying the ban was not "necessary in a democratic society" in order to fulfil that aim. The court said it should be sufficient to create a mere obligation to show one's face in order to identify oneself in situations where risks to personal safety or property or fraud were identified.

MALAYSIA

WHAT'S IN A NAME?

UN special rapporteur on freedom of religion and belief Heiner Bielefeldt has encouraged all groups, including intellectuals and supportive moderate Muslims, "not to give up the fight" and support the right of non-Muslims in Malaysia to continue to use the word "Allah" when referring to their deity. *BBC News* reports that on 23 June, Malaysia's Federal Court (its highest court) refused to hear an appeal from the Catholic Church against a government ban on the use of the word "Allah" to refer to "God" in the Church's weekly Malay language newsletter. Malaysia's Court of Appeal ruled against the Church, finding that one's fundamental right to practise and profess a religion can be curtailed on the basis that it could cause confusion or public disorder, and that Islam must be protected from threats. The appellate court had found the use of the word Allah by the Catholic newspaper would cause confusion for Muslims and may lead them to convert to Christianity. The dominant religion in Malaysia is Islam, but there are large Hindu and Christian populations. In the Malay language, people of all faiths have used the word Allah to refer to their deities. The Church argued the word entered the language from Arabic centuries ago, and they have subsequently used it to refer to their God for centuries. The Church argues that the ruling violates the fundamental human right to freedom of religion and expression.

UNITED KINGDOM

CONTROVERSIAL DATA RETENTION LAWS RUSHED THROUGH BRITISH PARLIAMENT

British Prime Minister David Cameron has received backing from all three major parties to rush through new anti-terrorism data retention laws that will allow government access to all individuals' phone and internet personal usage by requiring telecommunications companies to retain "communications data" on all of their customers' domestic and international communications. The BBC reports that the Data Retention and Investigatory Powers Bill will also require the compliance of internationally based telco companies whose services are used in the UK. The European Court of Justice (ECJ), only months earlier, had struck down the European Union's (including UK's) existing data laws, which it found interfered with the "fundamental rights to respect of private life and to the protection of personal data". UK civil liberties groups and several members of the House of Lords have voiced concern over the laws, and have questioned the way in which laws pertaining to such a complex area were hastily pushed through parliament in a matter of days when most bills are usually passed within weeks or months. The new UK law has several new oversight provisions and a sunset clause, however, which will take effect in December 2016.

UNITED STATES

BITCOIN FOUND TO BE LEGAL TENDER IN "SILK ROAD" CASE

A Manhattan Federal Court has dismissed an application by the mastermind behind the notorious online drug vending website Silk Road to have his indictment dismissed. As reported by the *New York Post*, the government (prosecution) claimed that virtual currency Bitcoin was used to facilitate money laundering in support of a host of crimes, including six failed murder-for-hire plots and the sale of cocaine, heroin and other illicit drugs over the Internet. Lawyers for Ross Ulbricht, the alleged creator and operator of the "deep web" site, had argued that the money laundering charges against their client should be dismissed on account of the fact that American tax authorities (the IRS) had recently "determined that the encrypted, virtual currency is property – and not a 'monetary instrument'." However, as reported by the *New York Post*, Judge Katherine Forrest, in a 51-page opinion, found federal money laundering statutes "encompass use of Bitcoin" and that "any other reading" of the law would be nonsensical. Ulbricht was arrested in October 2013 for allegedly masterminding the mysterious site and is scheduled to go on trial 3 November 2014.

CHINA

CHINESE "TRADEMARK SQUATTERS" STALL REACH INTO THE LUCRATIVE CHINESE WINE MARKET

Treasury Wine Estates is one of the latest international companies to fall prey to so-called "trademark squatting" in China. As reported in *The Australian Financial Review* and *BRW*, Treasury Wine Estates failed to register its Chinese name for the Penfolds wine brand in China and now faces a protracted legal battle. Treasury reportedly won an initial court case, but the defendant's appeal is still pending and could take some time. Chinese law traditionally has followed the "first to file" rule, whereby the first to register a name has the right to use it. If Penfolds seeks to use its Chinese name, Ben Fu, it could be ordered to pay for trademark infringement and be forced to buy back the name for a substantial price. Amendments to trademark laws came into effect on 1 May and introduced a new principle of "good faith". They also include provisions to prevent registering same or similar trademarks in "bad faith". However, the future is still uncertain. Previous judgments have not been favourable for foreign companies. Last August, a Chinese court ordered French wine producing company Castel to pay Yuan33.73 million ($A5.8 million) for trademark infringement after a rival Shanghai wine company was found to have already registered its Chinese name.

TRIAL PRO BONO SCHEME A WIN-WIN

Young lawyers eager to learn are improving access to justice and bolstering the efficiency of court processes while they're at it, writes **CLARE KERLEY**.

In May 2013, the Fair Work Commission announced a pilot pro bono scheme to be undertaken in Victoria to assist with unfair dismissal matters. This was in response to an increasing number of self-represented applicants and respondents appearing before the commission who were unfamiliar with the commission's proceedings and the relevant legislative provisions. The move was part of the commission's "Access to Justice" reforms. The Victorian scheme approached private firms separately to supply pro bono solicitors to the scheme.

Late last year, senior deputy president Lea Drake arranged for a similar scheme to be trialled in New South Wales. However, instead of approaching a range of firms, as was done in Melbourne, the commission in Sydney decided to take a different approach, making use of the diverse membership of the NSW Young Lawyers' Workplace and Safety Law Committee to assist the commission.

The committee put together a roster of practitioners who

now assist the commission every Friday with the jurisdictional hearings for unfair dismissal matters. These hearings generally involve a quite narrow scope of law – essentially whether a matter is "let through the gate" to proceed to the substantive hearing. Jurisdictional objections can be made only on a limited basis such as the application being lodged outside of the prescribed time limits or the applicant not being covered by the unfair dismissal laws or not being eligible to make an application (for example, if they earn above the high income threshold).

Before the establishment of the scheme, the commission almost always spent longer than usual with these self-represented litigants to help them understand the nature of the jurisdiction. The commission identified that during jurisdictional hearings, a number of self-represented applicants and respondents experienced difficulty in understanding the jurisdictional issues required to be heard and often had trouble expressing their positions or arguments in relation to these jurisdictional issues.

In taking this approach, the commission concluded that the provision of simple, straight-forward legal information to these disadvantaged parties by young lawyers was the most effective way of addressing what could be a very stressful and overwhelming experience. Further, assisting these self-represented parties in expressing their position in a clear and concise manner promotes a better understanding of the issues at hand without becoming convoluted with non-consequential information (as can happen if those requiring assistance aren't afforded such).

Acting on behalf of the commission (as opposed to either party), the duty solicitors clarify issues and inform applicants and respondents on the statutory framework so that the hearings are a more efficient use of the commission's time without requiring members to explain simple legal definitions and jurisdictional requirements. The solicitors also assist unrepresented parties in expressing their positions to the commission.

The willingness of the commission to use young lawyers to launch and manage this ongoing scheme is indicative of the confidence it has in younger members of the profession.

Young lawyers are enthusiastic, keen to learn and eager to have a go at the more practical tasks they may not be exposed to on a regular basis in their firms or organisations. Not only is the scheme important in assisting with the smooth running of the court processes, but it is playing a role in allowing young lawyers to develop essential skills, including confidence before the commission and technical skills in this area of law.

However, this scheme isn't solely run on goodwill and youthful drive. We have been fortunate to have a number of senior practitioners volunteer their time. Our roster is currently comprised of a broad range of practitioners – barristers, senior associates, union legal officers, in-house lawyers, junior lawyers – and we are always seeking more.

The feedback we have received from both volunteers and the commission has been resoundingly positive. Indeed, we have not received a single piece of negative feedback. The volunteers are finding the scheme valuable in not only improving their own skills, but as an opportunity to assist people and businesses they otherwise might not deal with in the course of their day-to-day jobs. The commission introduced this scheme to improve access to justice and it appears it is meeting this aim.

The willingness of the commission to use young lawyers to launch and manage this scheme is indicative of the confidence it has in younger members of the profession to perform this work on behalf of the court.

This scheme, while still in its relative infancy, is necessary, innovative and, most importantly, working. **LSJ**

Clare Kerley is a solicitor in the Workplace Solutions team at Matthews Folbigg in Sydney and chair of the Workplace and Safety Law Committee.

PEARLS OF *wisdom*

Lawyer, pro-democracy campaigner, leading activist in the Pakistani women's movement and international champion of human rights **HINA JILANI** speaks about the fundamental importance of protecting human rights defenders on the ground.

When I was considering the best themes to speak about while in Australia for the Human Rights Dinner, a terrible tragedy occurred; a tragedy to me personally and to the human rights community in Pakistan. We lost a very valuable colleague, a lawyer and a human rights defender, Rashid Rehman. And so I decided to focus on the perils of defending human rights.

Human rights cannot be promoted or protected without the valuable work of human rights defenders. If they did not exist, respect for the universal value of human rights would remain a dream to be achieved.

It is human rights defenders who work at the local levels and on the ground, who inform the international community of situations as they develop so that the collective efforts of the international community can prevent disasters.

An example is the genocide in Rwanda. Many years ago, a wonderful man, who was the United Nations special rapporteur on extra judicial killings, went on a mission to Rwanda.

On his return, he warned the international community that genocide was imminent in that country.

Unfortunately, the international community failed to take notice – and you know what happened in Rwanda after that. (More than 500,000 members of the Tutsi minority and moderates from the Hutu majority were slaughtered during the 100-day Rwandan genocide in 1994.) His information came from human rights defenders who were there on the ground. It was human rights defenders who analysed the situation and saw the crisis emerging.

Human rights defenders work in all kinds of situations trying to ensure that human dignity is protected and respected. They are the ones who are on the front line when democracies are at risk and the rule of law is threatened.

Unfortunately, there is a cost they pay for the work that they do. Human rights defenders all over the world are subjected to killings, arbitrary detentions, disappearances, torture and vilification campaigns to discredit them and their work. It is not just those individuals who suffer for taking on this burden of speaking truth to power. It is their families who suffer as well.

As a human rights defender, I, and people who work with me, take a calculated risk. I had an experience many years ago when my family suffered because of what I do. My house was stormed by extremist religious militants because of my work defending a 12-year-old Christian boy who had been accused of blasphemy and was liable for a death sentence. My house was stormed; my family was taken hostage and would certainly have been killed if there was not a timely intervention by the security forces.

Women human rights defenders find it even more difficult to work. They are more vulnerable to social exclusion and repudiation even by their own families because they are challenging social and cultural mores; because they are talking about the rights of women and their inclusion in all public affairs.

You can imagine what happens when we try to change the mindset that allows people to kill women only because they have exercised some form of autonomy, especially their choice in marriage. A recent case reported the killing of a woman outside the High Court in the city that I live in.

To my memory, this is at least the third such killing that has happened right outside the High Court. I am sure that like everybody else in Pakistan, judges were aware that women were at grave risk; none of them bothered to make any protection orders to ensure that women who leave their courtroom are able to leave safely.

Hina Jilani spoke at both the Melbourne Human Rights Dinner (13 June) and the Sydney Human Rights Dinner (20 June). This is an edited transcript from the Melbourne address.

Raising issues of women's rights becomes extremely dangerous: human rights defenders have been killed, tortured and excluded from their social environment. Many have had to flee to save themselves because the state failed to protect them.

It is important that not only should declarations be made – there must also be protection measures on the ground. The Declaration on Human Rights Defenders efficacy has increased by the establishment of a mechanism to oversee the situation: a special rapporteur.

Human rights defenders and lawyers now demand a chapter in the penal code on offences by the state, to protect those who expose state violations.

It has been estimated that almost one third of serious violations of human rights against human rights defenders have been at the hands of non-state actors.

When governments are confronted with their duty to protect human rights defenders against these non-state elements, governments themselves never acknowledge their inability to hold non-state actors accountable, which points towards their complicity and, in a way, condones what the non-state actors do.

The international community must think about the duty to protect and make sure peace initiatives include protection for human rights defenders.

Without human rights defenders, democracy will not survive. Without human rights defenders, human rights, the rule of law and all kinds of civilised behaviour will not find support.

Nor will there be any accountability or any mechanisms for monitoring and reporting the conduct of governments. The international community will find it very difficult to act or react in order to prevent serious crimes like genocide. Think, for example, of what is happening in Central African Republic, in Southern Sudan. These are situations that need the attention of the international community. Let us hope and pray that the people who can bring this to your attention survive. Let us pray that the international community can act in a timely and effective manner to protect those who are really the eyes and ears of the human rights community. **LSJ**

The Optimist

WHAT'S NEXT FOR ELIZABETH BRODERICK?

Gender inequality is still alive in Australian workplaces and law firms are in the perfect place to change things, says Sex Discrimination Commissioner Elizabeth Broderick. By **JANE SOUTHWARD**.

Elizabeth Broderick thanks her law degree and years at Blake Dawson Waldron for what she sees as an opportunity of a lifetime. Training and practice taught her to listen, she says, and it is top-notch listening skills she believes make good lawyers – and they also set her up for her role as Australia's Sex Discrimination Commissioner.

Broderick, 53, was appointed to the role in 2007 for a five-year term. The appointment was extended for two years and she is now in discussion with the Federal Government about the possibility of another extension. There is still a lot to do, she says, from her office in Pitt Street in Sydney's central business district.

In many ways, Broderick landed the role at a dream time, with Australia having its first female Prime Minister during her term plus a female head of state, female NSW governor, and the nation's first paid parental leave scheme. But she is the first to admit she inherited a depressing set of figures.

In 2008, after a national "listening tour", Broderick reported that women earned 80 per cent of what men earned for the same job; just two women were chairing an S&P/ASX 200 company; superannuation payouts for women were about half those of men at retirement; one in three women reported experiencing physical violence in their lifetime; and one in five sexual assault.

Broderick says some progress has been made and points to the national paid parental leave scheme, the doubling of women on boards and breakthroughs in the treatment of women in the Australian Defence Force.

"However, domestic violence continues unabated, as does sexual harassment, and the gender pay gap is pretty much the same," she says flatly.

"There is still a lot to do and I have requested a one-year extension until September 2015. I need time to do more on the military work and the Male Champions of Change (24 male business leaders who have committed to accelerate the advancement of women in their workplaces).

"After this role I will continue with this type of work in the area of human rights, whether that be in a similar role or in a slightly different sector."

Broderick created the Male Champions of Change in 2010 after discussions with key female business leaders led the women to realise a shift in power won't happen without men leading it.

"We decided we have to think about this another way," she says. "We accepted that if we want to shift things, we have to start with men."

Simon Rothery, from Goldman Sachs, Telstra's David Thodey, Mike Smith from ANZ, and Giam Swiegers from Deloitte were among those who came on board.

"These men are men standing up and recognising that without intervention, these issues will not solve themselves," Broderick says.

"Gender equality is everyone's issue – both men and women. While the responsibility sits squarely on the shoulders of women, we won't make significant progress because men hold the levers of power. Taking the message of gender equality to men is what will shift things.

Photography: Laura Friezer

"The model isn't actually about men. It's a strategy about power and how to move to a more shared model of power. None of the Male Champions are from law firms and maybe where we need to go is to bring law firms in. It's something for us to think about."

In late July Broderick launched a new report into pregnancy, parental leave and return to work discrimination for which she travelled to every capital city and many regional areas talking to women and men.

"What I can tell you from the data we have is that one in two women have experienced discrimination either when they tell their boss they are pregnant, they go on maternity leave or they try to come back to work," she says.

"On occasion, it has been deeply sad. I have sat across the table from women who are very disempowered, maybe on a factory floor or a cashier right through to the most senior executives and medical specialists in major corporates. Their stories are not dissimilar.

"Once they told the managers they were pregnant, the response was, 'Your choice, the job or the baby'. Others told me when they pick up the phone to inquire about a job one of the first questions they are asked is, 'Are you a woman of child-bearing age?' This is in 2013/14. It is just not right."

She says, however, that a key part of the report is the figures and stories of men who have taken parental leave.

"We are the only country in the world with data about men and what we know is that 27 per cent of those men who took parental leave – even four weeks or less – have experienced discrimination on their return to work," she says.

"They had their rosters changed, were put on the daddy track, were not given training or promotional opportunities. We are talking about a small number of men but the findings are concerning.

"One thing this enquiry helped me realise is that when you look at the views that individuals hold, it wasn't that all the discriminatory and bigoted views were coming from male managers. Often they were from women. As Australia's Sex Discrimination Commissioner, I found that deeply depressing."

> **"While the responsibility sits squarely on the shoulders of women, we don't make significant progress because men hold the levers of power. Taking the message of gender equality to men is what will shift things."**
>
> ELIZABETH BRODERICK

Broderick says her legal training (a combined degree in computer science and law at the University of New South Wales) and her years at Hunt and Hunt and then Blake Dawson (now Ashurst), set her up for the role.

"I am so glad I studied and practised law," she says. "It's a fabulous degree and can take you anywhere. There's no one course that a law degree takes you on. That's the wonderful opportunity it provides.

"I never imagined when I was a law student that I would be working with NATO, or as an expert on defence culture, or in the Kimberley camping out with Aboriginal women, or in the abattoirs with men on the slaughter line, or in Bangladesh with survivors of acid attack.

"I honestly don't think I would be as influential as an advocate without my law degree and the way of thinking law provides.

"From studying and practising law, I learned the power of the individual's story to create systemic change and, as an extension of that, the importance of listening deeply to people's stories.

"That's been a distinguishing thing I have been able to bring. You are taught at law school that if you are a good lawyer, you have to listen."

Another skill being a partner in a large law firm taught her, says the 2001-02 Telstra NSW Business Women of the Year, is what she calls "influencing skills".

"If you want to create change, particularly social change, you need to have excellent influencing skills," she says.

"To me, influencing is about finding common ground. We often focus on what divides us. What I like to do is focus on the things we have in common, which are often more than you might expect. That gives a strong foundation for change, whether it be in the military, in a pregnancy review, or talking to people about their superannuation."

BRODERICK'S CAREER STARTED at with a summer clerkship in the mid-1980s, then a year's work in the litigation team. She left to travel to Europe with girlfriends and ended up working in London for the Law Society of England and Wales' investigations team, "chasing errant lawyers who borrowed from the trust accounts of their clients".

After two years she came back to Sydney and made a big decision many people tried to talk her out of. Pre-internet, she was appointed as what was advertised as a "computer lawyer" at what was then Dawson Waldron, and from there she built a career.

"They really had no idea what the job was, which is always the best type of job to get because you can make it what you want," she says with trademark optimism.

"For me it was about looking at the integration of technology and law. Technology was really starting to come into law firms and I thought it would present a wave of opportunity."

She went on to set up the first legal technology group in Australia, then championed the value of flexible work arrangements, becoming the first part-time partner and creating a workplace where more than 20 per cent of staff moved to flexible working arrangements.

"Something I have always loved is being involved in change, whether that's disruptive change or orderly change," she says.

Broderick nominates one of the most satisfying aspects of her current appointment as working in the Australian Defence Force as chair of the review into the treatment of women.

"For me, what shifted in that review was when I understood that I needed to connect the head and the heart of the most powerful men in the organisation to the cultural change agenda," she says.

"I travelled to 60 military bases, went 200 metres under the ocean in submarines, went in Black Hawks, frigates, warships and even to Afghanistan.

"I heard things from women that they would never tell their chain of command because they would be

fearful that if they spoke out on any of these issues they would be victimised. Often, it was the first time they had ever disclosed sexual assault or extreme exclusion.

"What was even more important was that the men who had power to create change in the system actually heard directly from these women. I worked with every chief and I flew in courageous woman from all over Australia. I created a safe environment where power was levelled and women could speak, helped by their support person. Many of them brought their mothers, which was a stroke of genius.

"Just to see the reaction and to hear the impact their stories had on the chiefs was incredible. It showed what is possible when you engage the head and the heart. The energy shifted in that week."

More recently, Broderick believes high-profile convictions for indecent assault against entertainer Rolf Harris, sexual assault charges against *Hey Dad!* actor Robert Hughes, and the sexual harassment case by Kristy Fraser-Kirk against David Jones have brought momentum.

"In terms of empowering women to stand up and speak out, they have been very positive," she says. "After the Kristy Fraser-Kirk case we saw an increase in reporting of sexual harassment. It helps people understand they are not alone."

When it comes to law firms and gender equality, Broderick says the evidence isn't positive. The Law Society of NSW 2013 report Advancement of Women in the Profession found that salaries for female solicitors are lower than for men – even from the first year of work when women are paid $5300 less than men annually.

"It's clear that the model has never worked for women and the evidence for that is just in the small number of women who reach senior levels," she says.

"I honestly don't think I would be as influential as an advocate without my law degree and the way of thinking that law provides."

ELIZABETH BRODERICK

"Part of that is unconscious bias. The other part of it is around the deeply held stereotypes we have about the ideal worker who has been deemed to be always available, 24/7, with no visible caring responsibilities and, as a result of that, ideally male.

"You have to ask, if the business model is not one that has ever worked for women and increasingly it works less and less for men, why isn't there more change occurring in the industry? From where I sit, law firms, unlike most other organisations, control their business model. Most law firms are private entities so if they wanted to change they could do so very, very quickly."

What would her advice be for the profession?

"It's not about squeezing women into a male model," she says. "It's not about pouring women in and stirring. The fact is that women are coming through in really significant numbers but they are not retained in the industry, which shows the model isn't working.

"It's not about giving women more mentoring, more training. It's about changing the fundamentals of the model and I think it's about redefining what success looks like. In law firms there is one model of success and that is the 24/7 ideal worker model.

"It's about recognising that gender diversity at the most senior levels delivers optimum outcomes."

Despite the challenges, Broderick remains positive about work and life. She grew up in Sydney's Caringbah with her identical twin, Jane, and a younger sister, Carolyn. Their mother worked as a physiotherapist and their father ran a nuclear medicine practice, which the girls helped out at from when they were four. Her mother died in 2003 and her sisters and father now live within a few blocks of each other in Sydney.

She is married to a former banker, Hunter Southwick, and they have two teenagers, Tom, who is completing his Higher School Certificate this year, and Lucy, who is in Year 11.

It's a busy life and even Australia's Sex Discrimination Commissioner faces challenges juggling work and family. She travels about eight weeks of the year and laughs when she recalls working on new gender equity policies for NATO in Brussels when she received a text from her son.

"I have learned to keep it real," she says. "I have to pinch myself and ask, 'How did I get to this place?' A few months ago I was there in Brussels and I remember my son texting me as I was drafting some recommendations. He was asking what's for dinner." **LSJ**

The verdict has been delivered

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the technology gap

IN A WORLD IN WHICH CONTENT IS KING AND TECHNOLOGY IS EVERYWHERE, LAWYERS NEED TO GET UP TO SPEED OR FACE THE CONSEQUENCES. **CLAIRE CHAFFEY** CHATS TO TECH EXPERT ROBERT SCHUKAI MBE.

Robert "mobile Bob" Schukai doesn't beat around the bush.

When it comes to adopting the latest technology, lawyers are luddites. And, he says, they're doing themselves a disservice.

Schukai, who visited Australia last month, is quite obviously not behind the 8-ball when it comes to technology. His Google Glass – and the fact he was last year named a Member of the British Empire for services to science, technology, engineering and mathematics – indicates he is a tech-head of the highest order.

As the head of Advanced Product Innovation, Technology Operations at Thomson Reuters, the American is at the heart of technological developments for professionals around the world. And what he sees in Australia is a legal profession which, for myriad reasons, is stuck in the mire of its own tradition when it comes to getting the most out of mobile technology.

"People working in the legal space – and a lot of other professional spaces – are real luddites when it comes to adopting technology," says Schukai. "What I remain concerned about is that we are designing products and solutions for the law librarian of 25 years ago instead of the up-and-coming, 25-year-old legal professional."

The legal profession – in Australia and elsewhere – has a general aversion to change and the fast adoption of technology. But this stance, says Schukai, is akin to having your head stuck firmly in the sand.

"The bottom line is that you can't fight the way technology is going. You can carry 800 pounds worth of books or a

one-and-a-half-pound iPad. You can have it annotated and easily referenced and searchable. What do you want to carry all of [those books] into court for?" he asks.

"A lot of what I do now is to be the voice crying out in the wilderness, saying, 'This is coming. Get ready for it, because it's really going to change the way people work'."

Weight of the past

One of the major hindrances to lawyers and legal systems being fast adopters of mobile or cloud-based technologies is the weight of long-standing, paper-heavy systems that are not easily adapted. Jurisdictions such as Australia, Canada, the UK and USA all struggle to implement new, more efficient ways of working.

"A lot of it boils down to how electronic your court systems are to begin with, so you go to a place like Canada, where one of the justices has written a paper calling the Canadian system a fossilised Jurassic Park. There is no better way to describe it," says Schukai. "Everything is still on paper. You can't file anything electronically."

Interestingly, Schukai says legal systems in developing countries are adopting technology much faster than those jurisdictions with well-established court systems.

"Where you see a lot of great adoption [of technology] is in emerging markets where there was no infrastructure to begin with," he says. "They skipped generations of technology and just jumped right in with [mobile technology], which is kind of cool to see."

Not just efficiency

According to Schukai, the benefits of technology lie not just within the possibilities it unlocks for increased efficiency and ease of process, but also in the analytical capabilities. It is the big data locked up in technology that Schukai says could be a real game changer for the way lawyers work.

"Things are going to move from being just about the information to the insight and the analytics – and what it can tell you about that information to help you shortcut the time it takes to make a decision," he says.

"For example, judges have patterns in terms of how they rule on cases. With analytics, you can look at how they rule for the plaintiff versus the defendant, or how certain keywords impact a particular judgment. You're not going to get that from a book. You're not going to be able to look at a book and know what has gone on in a judge's mind or how they've ruled previously in cases. Technology can pull these pieces together and give you that insight to know, 'Should I even go to court? Maybe I should settle out of court and not bother going to a lengthy trial, ruining my reputation and costing my client a zillion dollars when I know the outcome is likely to be X, Y and Z."

Despite such obvious benefits, Schukai says professionals have difficulties embracing new ways of doing things.

"They're dyed in the wool of, 'Well, this is how we've done things. We're on our computer, and we search and we research against a particular case. We pull out the book from 1864 on common law and how something was done way back when, and that's our reference'," he says. "At the end of the day, there's loads of datasets and content and information that, when coupled together, can produce insights to help you make a better decision so you don't do something stupid – and you actually have a better chance of succeeding in your profession."

Catering for the digital native

According to Schukai, another way in which lawyers are letting themselves down is by not catering for younger generations of lawyers who are, in effect, so-called digital natives.

Technology – especially cloud-based technologies – can really benefit the way lawyers work, and the generation gap means law firms that don't adopt technology are, in a sense, working in a way that is foreign to young lawyers coming through the ranks.

"[Young people] have grown up with an ability to instant message, to share content, to push content left, right and centre, and we're not necessarily giving them the environment to do that," he says. "We're saying, 'Here's the box where you must stand'. There's some good reason for it, because you obviously have to adhere to the laws around data protection and privacy, but there are also a lot of commercial-based, cloud-based solutions that are perfectly safe. [IT teams] need to help drive this and not be so afraid of change and what it means."

The leaky law firm

Despite the benefits, Schukai acknowledges there are risks associated with a move to more mobile or cloud-based technologies – especially for a profession in which confidentiality

is paramount. One of the most prominent risks, he says, is the creation of potentially "leaky" offices in which staff members are encouraged to bring their own mobile devices, such as smart phones or tablets, to work.

"Androids are a great example of where some problems can come from. You go to the iTunes store, you download an application and it installs. Life is good and off you go. Apple does a pretty good job of checking applications before they go into the store. In an Android, however, it's kind of the Wild West. Google isn't looking at anything going on there, and when you download an application from the Android store it will say, 'This application wants to access your contacts, internet connection, passport number and bank details'. People just go, 'Yeah, yeah' and ignore it and accept it. "That's a huge problem, because unsecured applications can do some very naughty things. For example, if it has access to your contact list, what would stop it from sending it off to a competitor's site? So we can't be stupid about how we use some of this mobile technology. We have to recognise that not everyone builds [applications] with security in mind. So while there are a lot of really great, brand-new products brought to market, they are also often fraught with security holes where things can be exposed."

"People working in the legal space – and a lot of other professional spaces – are real luddites when it comes to adopting technology"

ROBERT SCHUKAI MBE

You snooze, you lose

The way Schukai looks at it, professionals who fail to embrace technology will

eventually lag behind those who recognise its power. This means lawyers need to be connected or face the potential consequences of operating in an environment increasingly reliant on and responsive to technology.

"We live in a world where the work-life balance has become the work-life blur. We're all hyper connected. We've got information coming at us all the time," he says.

"If I go and ask a room of 100 people, 99 will say that the first thing they did this morning was look at their phone, so accessing information is there. It's going to happen. If you don't want to be aggressive about how you're staying updated and informed, the younger professional down the road [will] eat your lunch."

And with all the talk of digital detox and the dangers of being connected to technology 24/7, Schukai says that even this is an evolving and adaptable state of being. "I run with my Google Glass but I don't carry a phone with me," he says. "The beauty of that is not that I'm trying to scare off Sydneysiders but, as I'm running and the sun is setting, I can get an amazing picture of the harbour bridge without even having to break my stride, just by asking Google Glass to take a picture of it. That's really, really cool." **LSJ**

Schukai spoke on the topic "The future of technology for lawyers" at a Law Society of NSW CPD seminar on 9 July.

6.8 billion
mobile subscriptions worldwide

65%
of all mobile phone sales in Q1 2014 were smartphones

2.3 billion
global mobile broadband subscriptions reached in Q1

Source: *Ericsson Mobility Report: On the Pulse of the Networked Society, June 2014*

"Wagga has a population of 60,000 people, but you don't have to be in town and a family lawyer for very long before you are well known."

TACITA MURRELL

A Country Practice

Working as a family lawyer in regional NSW has almost as many challenges as it does perks, writes **JULIE MCCROSSIN**

Family lawyer Tacita Murrell made two key decisions when she was a new graduate from the University of New England in Armidale. She decided to work in the country and practise in family law.

Sixteen years later, the 40-year-old, happily married mother-of-three is a partner in the Wagga firm Farrell-Lusher in country NSW and an accredited specialist in family law.

"We're a small, general practice firm, where we can pretty much handle any type of legal issue that walks in the door, unless it's highly specialised and then we'd locate a specialised firm for our client," she tells me from her office near the centre of town. "At the moment there are five lawyers in our practice, two partners, and I practise mainly in family law."

Murrell loves working in the country.

"I would recommend rural practice," she says.

"I think it's similar in content to city practice, particularly in terms of family law. You might be dealing with bigger numbers in the city and bigger asset pools, but the practice of family law is the same wherever you are doing it.

"The benefits of doing it in the country are the much-reduced hours, a cheaper lifestyle, you're close to home, and the sense of community."

Yet there are some challenges particular to rural practice."Wagga has a population of 60,000 people, but you don't have to be in town and a family lawyer for very long before you are well known," Murrell notes ruefully.

"Some people don't mind approaching you in a public place and having a go at you. You have to be tough enough to withstand approaches by people that are not necessarily pleasant and maintain your composure and manage it without losing your cool."

The tyranny of distance also brings professional challenges.

"A lot of preliminary events in court proceedings will be conducted by telephone," she says. "You lack the ability to have face-to-face contact with the judge, which means you'll interrupt the judge when you don't mean to because you don't know they're reading something.

"And you can't read their face. You can't read their reactions to what you're saying. That can be a drawback."

Distance can be an issue for court appearances as well. "A lot of my practice is conducted out of Canberra or Albury. For any critical event, such as a final hearing or an interim hearing, you're travelling to make appearances and that comes at a big cost to your client, but also a big cost to your family in terms of your time away from home."

These disadvantages are counter-balanced, she says, by the advantages of living in a relatively small regional city.

Murrell grew up moving around rural NSW with her parents who were both school principals. After university in Armidale, another major regional centre, she went to the College of Law at St Leonards in northern Sydney.

"I realised I really wasn't happy living a city life. I felt quite closed in and I didn't like commuting," she recalls, "It felt congested because I'd lived a country life, my entire life."

The contrast of the lifestyle in Wagga is a source of joy for this mother of young children.

"My daughter, Amelie, is eight and my twin boys, Gilbert and Hugh, are five," she explains.

"I work two blocks from where they go to school. If I need to nip down to Friday's school assembly because the children are performing, I'm able to be there and back to work with ease. I live out of town, but I'm really only 15 minutes drive away from my work. So travelling is just not a big deal at all."

Photography: Kylie Blatch

Murrell transferred to law from an arts degree. She was attracted to family law right from the start when she chose it as an elective.

"I liked the fact that it was dealing with real people and their day-to-day needs when they were at a low point and they desperately needed help," she recalls. "I've always been reasonably community-focused and I thought, 'This is something I can do'."

Her attraction to family law has continued since her student days, although now it is tempered by the challenges inevitably associated with dealing with entrenched conflicts over children and property.

On the day we speak, one of the darker potential challenges of family law is front and centre.

"Today I found out that the husband of a client of mine took his own life last night," Tacita explains sadly.

"They'd only separated four months ago and were only at the start of their pathways in terms of the resolution of their family dispute. So that's pretty heart-wrenching that someone felt so desperate. It possibly wasn't just his family law situation.

"He was probably suffering from depression and not taking medication. But the fall of his family was part of that unfortunately. This sort of thing makes you ask yourself, 'Why am I doing this?' And the answer is, in part, to stop other people feeling so desperate."

This distressing, but relatively rare event, is balanced by the much more common experience of being able to help clients – the factor that attracted Murrell to family law in the first place.

"I like helping people and I like people, generally," Murrell says. "I find people really interesting. I like knowing their story. I find the things that people do to each other, how they behave and their personalities really intriguing."

She cites a recent experience with a client. "I saw a client for the first time the other day. This woman was coming to the end of a 34-year marriage and had been unhappy for many years. She was very teary. I explained how the family law process works. At the end of our time, she wanted to give me a hug and say, 'Thanks very much'. That's nice. She was teary and devastated but I'd helped her. That's quite satisfying."

Over the past decade there have been significant reforms in family law and a deep engagement with social science research through expert reports and witnesses, with a particular focus on trying to improve the results for children.

Have the reforms led to improvements? There is a long pause and a deep sigh before Murrell gives a considered response.

"What I would say is that, yes, there have been some changes in language and the legislative pathways, but my experience over 16 years says to me that the way the court manages entrenched parties in dispute hasn't changed a terrible lot," she says. I ask for an example and she discusses the "shared care" provisions of the *Family Law Act* that have been debated and generally misunderstood in the public domain.

"In 2006 there were changes to the legislation that provided for it to be mandatory to consider whether shared care was appropriate for families having a dispute about their children," she explains. "The reality is that the court orders it very infrequently. And that always was the case. This is not a criticism. You can change the legislation whatever way you want, but it's always the best interests of the children that are the paramount consideration."

Have the reforms led to better results for children? Murrell sighs deeply again.

"That's a really hard question to answer because the social scientists argue about one set of research findings versus another set of research findings," she says.

"Post the 2006 amendments, research conducted by Jennifer McIntosh and former Judge Chisholm of the Family Court basically found that shared care wasn't working particularly well for under-school-aged children.

"And what was recommended, particularly for pre-school-aged children, was short, frequent periods with the non-residential parent, but not overnight necessarily. There's been some research taking a counter view to this. [See McIntosh, J & Chisholm, R "*Shared care and children's best interests in conflicted separation: A cautionary tale from current research.*" (2008). Australian Family Lawyer, 20(1), 3-16]."

When I press Murrell for a view on whether results have improved for children, her response is equivocal.

"I think so. Yes I do," she says. "Because I think that there are a lot of judges that take notice of social science and would follow the recommendations

of the report writers. But I must say that even before the 2006 amendments that required shared care to be a consideration of the court, I think judges were taking into account those sorts of things in any event."

There is no ambiguity in Murrell's reply to my inquiry about whether her husband, Lee, is a hands-on dad. She laughs with affection and says quickly and repeatedly, "Very much so".

"I'm fortunate that Lee is also a lawyer," she continues warmly, "He works at Charles Sturt University as the in-house counsel. He understands the time that things take and he really is a huge support in terms of how I manage my work environment and our family.

"If we ever get divorced, we would definitely be the family where shared care would work because the kids have experienced him being as much of a primary care giver as I have been."

My final question about how Murrell handles stress brings another deep laugh and a forthright answer from this refreshingly, plain-speaking country woman: "Oh, I don't handle it very well. I get mouth ulcers. My husband says, 'You need to take some time off, you're being really cranky.' School holidays are a really good excuse. I have to take time off." **LSJ**

HOW GRAVITAS **CAN GIVE YOU THE EDGE**

Cultivating your gravitas may just give you the edge within a competitve law firm, writes **EMILY MORROW**.

Consider the following: the partners in a firm are considering inviting one of the younger lawyers to become a partner. This lawyer is known to be technically highly skilled and capable. However, when the partners are discussing the possible advancement, one remarks, "He lacks gravitas. I'm not sure he has what it takes". What exactly does this mean? What does this individual need to do to address that concern?

Gravitas is sometimes defined as "dignity, gravity, solemnity of manner, substance, weightiness". Defined this way, gravitas has a heavy, sombre and dark aspect.

However, when professionals think of gravitas, they often mean something different. They are referring to an elusive quality that enables some people to instill confidence in others quickly, reliably and appropriately. It goes beyond technical competency, charm, charisma and intelligence. People with gravitas speak crisply and directly, make eye contact, have excellent workplace relationships, successfully lead teams, and can be funny or serious when appropriate. They have "the whole package". It's second nature and it's genuine. One cannot be both disingenuous and have gravitas.

A winning edge

That said, I don't think gravitas and solemnity always go hand-in-hand. For example, a lawyer with whom I consult is cheerful, energetic, warm and emotionally intelligent. She laughs frequently, can be silly and interacts easily. Everyone enjoys working with her. Nevertheless, she is the most highly respected and influential lawyer in the firm and has a powerful "slipstream" into which others are pulled. She's a real leader and no one questions her importance to the firm. She has gravitas in spades.

Consider the issue of gender and gravitas. Men are often assumed to have gravitas, whereas women may be assumed to lack it. Such assumptions can undermine women in the workplace. However, gravitas is a human characteristic and it goes beyond gender. It may present somewhat differently in men and women, but it's equally important and real for both.

So, how does one have gravitas? I think it has to do with consistently knowing and being yourself, while tailoring appropriately the way you present.

Tailoring yourself to situations requires being internally consistent but also highly attuned to the reactions of others. You need to be firmly personally grounded, but also able to stand outside yourself so you can observe a situation critically, objectively and accurately. It's a subtle dance that requires some skill.

Gravitas matters because it differentiates adequate performers from real stars. It becomes more important the older one gets, particularly in a tough economy. Age can work against you in the workplace, except when it's coupled with gravitas. Then it's a winning combination.

So, how do you know if you have this elusive quality? It's not the sort of thing people typically tell you.

There can be subtle clues if you watch the reactions of others. When working in a group, do people stop and listen when you speak? Are your ideas commented upon and used by the group? Are you offered leadership roles? Do people seek out your advice about thorny issues in the workplace and even sometimes heed it? Do you feel "comfortable within your own skin"? These are all good indicators that a person has gravitas.

Cultivating gravitas

Some people naturally have gravitas. Others successfully cultivate it. Doing so requires consistent attention and focus.

The first step is to understand what gravitas means to you and to create an intention to manage yourself accordingly. Reflect on what works for you and what doesn't. Stick with the former and jettison the latter. When you begin to notice positive changes in the ways others respond to you, you'll know you're on to something. After a while, consider asking other professionals whose judgment you trust for some feedback. Practice makes perfect. Don't doubt it for a minute.

Emily Morrow was a senior partner with a large firm in Vermont, USA, where she built a premier trusts, estates and tax practice. She now lives in Auckland and provides tailored consulting services for lawyers in New Zealand and Australia focussing on the non-technical skills such as presentation, leadership and team building/management.

emilymorrow.com

CAREER 101

PETER BUTLER shares the ups and downs of his career.

Peter Butler is a disputes partner at Herbert Smith Freehills (HSF). He started his career in Melbourne at Allens, became a partner at Freehills at just 29 and, after a stint in a senior management role in Reuters in London, returned to Sydney as head of the national disputes group of Freehills, where he became managing partner. Butler returned to full-time practice three years ago and acts for some of Australia's leading companies such as Lend Lease, Johnson and Johnson, Tabcorp and Telstra. He is passionate about pro bono and the charity sector. He is chair of the national board of Starlight Children's Foundation and the HSF Pro Bono and Community Committee, and sits on the boards of several not-for-profits, including the Cure Brain Cancer Foundation, the Tristan Jepson Memorial Foundation and the Australia Israel Chamber of Commerce.

What did you learn from your first job and where was it?

Selling men's shoes as a 15-year-old at Myer over the summer school holidays. I learned a bit about selling (and shoes!) and, over successive summers at that job, a surprising amount about human nature.

What made you study law?

My father was a doctor. He hoped I would follow him, but (luckily for future patients) a family friend took me under his wing. That friend was Sir Eugene Gorman QC, an eminent Melbourne silk. Like a lot of old barristers, he was persuasive and enticed me with wonderful tales of the law.

First break?

Becoming a litigator in a firm that took the trouble to nurture and develop whatever skills I had gave me a great start to a happy career. Being invited to join the board of a children's charity as a graduate also started a lifelong passion for the charity sector.

Biggest lesson week one in that job?

If you want to be a good lawyer, then you will never stop learning. It is true – even today, after more than 30 years in the profession.

Best advice so far?

Give back. I have been lucky and have had a few breaks, so I try to give others some breaks too.

Career turning point?

Maybe not so much of a turning point, but I have had several opportunities to work in management – in a global public company based in London and at my firm here. I think my experience in management has made me a better lawyer.

When you are 70, where will you be?

Life is an adventure and time is very precious. I hope with more time my involvement in the charity sector will increase. There is so much to do.

IT SHOULDN'T BE *legal*

Career strategies to put you ahead of the pack, with **FIONA CRAIG**.

Now that the annual performance review period is out of the way, it's tempting to slip back into old habits. You get busy, deadlines loom, priorities shift. But it's important to keep focused on professional development and growth – no matter what stage of your career you are at. There is always something new to learn and new ways of doing things.

Try these five ways to be consistently better at work.

1. Collaborate

There is a multitude of leadership material on the importance and benefits of collaboration. There is no doubt that we solve problems more effectively and efficiently as a team. The legal industry places huge importance on the ability to work together, but there is a big difference between being part of a team and true collaboration. To get the real benefits of collaboration, you can't just throw any old team together and expect it to work. Here are some key strategies to make collaboration an everyday occurrence in your workplace:

- Choose a team that works to each others' strengths (not just who is available)
- Make each role in the team clear
- Have a team leader or facilitator who is skilled in managing people as well as projects
- Make sure everyone understands their role within the bigger picture, to make them feel valued in the team
- Resolve conflict quickly and without blame

2. Innovate

"I know". Possibly the two most dangerous words you can use. There are always new and better ways of doing things. Make it your job to find them. Don't be afraid of coming up with new ideas and sharing them. Even if you are junior, you may have technology or other experience that is extremely valuable and could bring a fresh approach to a problem.

Nothing improves or is solved on its own. Every solution to a past problem was at one point innovated. If your employer says, "That's just the way it's always been done around here", maybe it's time to find an employer who is willing to embrace change and new ways of doing things.

3. Communicate

Learning your own communication style and preferences, and those of others, is one of the best investments you can make in your career. Most unhappy relationships stem from poor (or no) communication and, in many cases, the issues could be solved if only the parties understood each other better.

Behavioural profiling will help you see why you do what you do, in the way you do it – and the same for those around you. It's not mumbo-jumbo – it's a valuable insight into you and others that will have an eternal positive impact on your performance at, and outside of, work.

4. Delegate

This is an oldie but a goodie. And once you have nailed point three, above, delegation becomes much easier. Yes, you are clever. Yes, you have great skills. Yes, you might know how to do something quicker than you teach someone else, but ultimately, attempting to do everything and be all things to all people is the quickest way to slow you down, stress you out and hamper your own (and others') progress.

5. Celebrate

In our constant strive to be, do and have more, we often forget to celebrate the milestones of achievement. Think how much more you know now than the day you started your very first job as a lawyer. Recognise how your skills have improved and how much more confident you are.

Celebrate the big wins – the cases, the deals and the new clients brought on board. But don't forget to celebrate the smaller wins, too – a relationship developed, a colleague nurtured, and a problem solved. Achieving great things is easier when you take time to recognise everything that has come before.

Fiona Craig is a lawyer with 20 years' experience working within the legal industry. Through workplace and personal coaching and training programs, she ensures her clients have the vision, confidence and positioning they need to excel.

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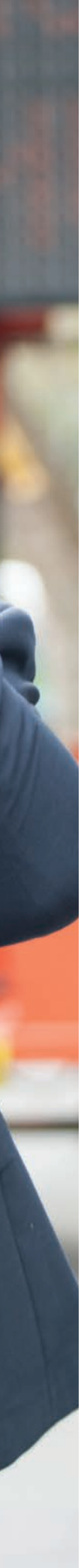
A day in the life of ...

Jack Tyler-Stott

JUNIOR BARRISTER

Jack Tyler-Stott's thighs are getting a workout a personal trainer would be proud of. Up, down, up, down – every time the magistrate speaks to him. It's an average day for the barrister, 34, who is in the Downing Centre Local Court representing a mother-of-two facing jail for fraud. Tyler-Stott is one of 2259 barristers in NSW, half of whom have been practising for more than 15 years. He is one of 60 lawyers – 24 women and 36 men – admitted to the Bar in the past year, according to statistics from the NSW Bar Association. As a junior, Tyler-Stott charges up to $2000 a day for his services (or about $1000 for cases assigned to him by Legal Aid NSW). Tyler-Stott studied law then went to the Bar in 2013 after 12 years in the NSW police force. Armidale-born and the only son of parents who work at the University of New England, he is married to a teacher and has a young son. He invites **JANE SOUTHWARD** to spend the day with him.

Photography: Laura Friezer



My grandfather was a police officer for 35 years, so it made sense when I decided to stop studying engineering at the University of New England in Armidale and join the police.

My first posting as a police officer was to Redfern and I did five years there in general duties. I then worked as a detective and in youth liaison before moving to prosecutions. I ended up working at the Downing Centre overseeing 40 police prosecutors.

About 93 per cent of legal work in the courts is done by police prosecutors. I did a lot of work in the Children's Court at Parramatta and Bidura Children's Court in Glebe. It was tragic at times and so sad to have worked with some kids as a youth liaison officer, taking them on day trips, trying to help them make better choices, then end up prosecuting them for crimes in court.

I love being in court and this is the main reason I decided to study law. I did it by correspondence, and studying and working was hard at times. There was constant pressure to be doing assessments, listening to lectures via podcast. Persistence was the key.

It took four and a half years to get my law degree and I was admitted as a solicitor in 2013 and went on to study for the Bar.

For the Bar, I completed three exams to qualify for the month-long course – studying evidence, civil procedure and ethics.

As a barrister, you are a sole trader and independent. One of the most painful parts of my job is the administration that comes with running a small business, such as doing my tax.

Basically, being a barrister is about being an advocate. I'm looking for the holes in the brief and how to get the best outcome for my clients. Although sometimes morally vexing, it doesn't matter if a person is guilty. Our job is to advise what's in the best interest of the clients to the best of our ability, without fear or favour. What matters is whether the prosecution can prove their case.

As a reader I spent 10 days with a criminal barrister and 10 days with a civil barrister. Three people who really helped me were Peter Gow, Iain Todd and Grant Brady.

At the Bar it can be lucrative, but there is a big risk because you rely on solicitors and clients to engage you. Many days involve 12 hours of work and it's rare that I am not thinking of work and the cases and people they involve. There's hours of reading. I spent five days last week reading for a case that I had to opt out of for ethical reasons. It was a drug case and I had blocked out three weeks of time for it, knocking back other work.

Many barristers donate their time in a free roster at the Downing Centre and this fraud case came to me when I met the woman there. She is an accountant from Sydney's north who pleaded guilty to stealing $50,000 from two workplaces.

Her husband had left her and she was in a bad way, working 47 hours a week in two jobs to raise the money for her $450,000 mortgage and to look after her two children aged five and one. She had no familial support and she didn't want to lose her kids if she went to jail.

This was a crime of need not greed. It was a win that she received a suspended sentence, with the judge urging her to complete community service, continue receiving treatment for her anxiety and depression, and never reoffend. I consider dialogue between a judge or magistrate and a client as sacrosanct. It can be such a chance for your client to decide to change their life.

One of the reasons I joined the police prosecutors was because I had a fear of public speaking. I thought it would help me get over it. You can get nervous. You don't want to make a mistake in court.

One of the best pieces of encouragement I was given came from a barrister with 15 years experience. He said if you are not nervous it shows you don't care, and that means you shouldn't be in the profession. **LSJ**

"One of the best pieces of advice I was given came from a barrister with 15 years experience. He said if you are not nervous it shows you don't care, and that means you shouldn't be in the profession."

PAPERLESS LITIGATION

Practitioners need to embrace and get ready for an increase in electronic options in future litigations, writes **ELIZABETH MILLER**.

The amount of potential evidence required for trials has reached immense proportions. Federal Court Practice Note CM6 recommends using technology within litigation when matters have more than 500 documents.

The courts have invested in the provision of state-of-the-art courtrooms and provide facilities to the legal professional to enable electronic evidence presentation. In such instances, presenting evidence electronically during trial or an e-trial can be the most efficient and cost-effective means for all parties.

WHY GO ELECTRONIC?

There are many factors to consider when deciding if an e-court is right for your matter. For instance, the limitations of a paper submission make it difficult to present non-traditional forms of evidence such as filmed depositions. Here are some points to think about when deciding on an e-court:

Type of Evidence: is the evidence in electronic format already? Are there non-traditional forms of evidence?

Amount of Potential Evidence: how much evidence will be presented at trial?

Remote Witnesses: will all witnesses be present at court?

Savings: what kinds of savings will be incurred by increasing technology use and eliminating traditional methods?

The court will consider all these factors, however the decision will be based on fairness to all parties and not solely cost savings. The legal parties apply to the court and if the judge agrees, the legal parties agree among themselves on the level of e-court and pay the costs.

The use of technology is encouraged in civil litigation, a growing area of the law. The 2012-2013 Federal Court of Australia Annual Report reported a 50 per cent increase in total court filings since 2008.

The report also outlines an eServices Strategy that *"aims to utilise technology to maximise the efficient management of cases".*

"The court has been progressively implementing a series of electronic initiatives to make use of technological opportunities to improve our services to court users. The primary objective of the court's eServices strategy is to create an environment where actions are commenced, case managed and heard by filing documents electronically. The result will be that the court's official record will be an electronic court file."

WHAT ARE THE ADVANTAGES?

There are advantages to a fully integrated electronic trial versus a traditional approach. Evidence can be displayed simply and clearly from an ipad or other electronic device with ease. Not to mention that most documentation (Word, Excel, PDF, HTML or other) can be indexed (linked to evidence), including all eCourtbook Management documentation.

Perhaps the most obvious advantage is that hyperlinks present information instantaneously and in the manner that professionals are accustomed to receiving information. In a hyperlinked format, every supplemental document and point of law can be accessed immediately by the reader, without any delay in looking up the relevant material in a case book or digging though a box of exhibits.

Questions of interpretation can be addressed while the question is still fresh in someone's mind. Adding hyperlinks to citations and exhibits enables the judge to access the material quickly without becoming distracted from the argument while looking for the reference in a hard copy format. This can be useful especially when the record is voluminous. Hyperlinks can focus the judge's attention where you want it, on your argument, eliminating external distractions.

e-TRIAL CHALLENGES

As with any new process, there are challenges. Very few counsel use electronic devices to present evidence and usually when they do bring them to court it is for note-taking or for access to the litigation support program.

In some cases, junior counsel or legal clerks can convince senior counsel of the advantages of using technology in the courtroom.

When configuring a courtroom to display electronic documents, consider the effect the monitors will have on sight lines. Will the monitor in the witness box interfere with counsel's or the judge's view of the witness? Will the monitors interfere with the court reporter's view of the witness, which may impair his or her ability to comprehend the evidence of the witness?

Australia is still a fair way away from paperless litigation. However, the momentum is picking up and we are learning more about technology and how we can use it in today's courtroom.

Elizabeth Miller is head of eCourts at Law In Order. She wrote this article with Leola Foon, marketing specialist at Law In Order.

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INDIVIDUAL RIGHTS IN A DIGITAL AGE

CYBER BULLYING

As technology advances and more Australians speak out about bullying, the legal landscape has begun to change.

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HOW TO VALUE YOUR SUPPORT TEAM

You pay your support staff for seven and a half hours a day, but do your business processes allow them to work to their full potential? Find out how to maximise the time your support staff spend on work that brings real value to your firm.

There are better ways to increase the value and productivity of your support staff than by simply cracking the whip. A significant amount of the time your support staff should be spending on valuable work is potentially wasted on inefficient work procedures, duplicated tasks or as a result of insufficient knowledge or communication. Working your support staff smarter, not harder, will prevent burnout, promote job satisfaction, and ensure you get value for money.

1. Streamline your work processes

If you've never reviewed your administrative work processes, chances are they're in pretty bad shape, leaving your support staff to improvise. Make time to sit down with your whole support team and identify which procedures are giving them the most grief – the ones causing bottlenecks, affecting the quality of services, wasting resources and increasing costs. Invite suggestions for ways to eliminate duplicate tasks and inefficiencies, reduce data entry and minimise manual processing. You should end up with a well-tested set of steps for everyone to follow to complete each key administrative task.

2. Embrace technology

Why pay someone to do what a computer can do for free – and faster? With the availability of practice management software such as Infinitylaw, there's no need for your support staff to be shackled to traditionally laborious and time-consuming tasks. For example, the ability to automatically merge pre-stored data into document templates enables documents to be created with greater accuracy and in a fraction of the time. Having access to a centralised interface that manages all your administrative, accounting and legal needs will empower your support staff to do more in less time and eliminate duplication.

3. Educate and train your staff

Don't pay your staff to reinvent the wheel – make sure they have the specific resources they need and are trained in the most efficient work processes to fulfil their roles. Take advantage of employee inductions, training and regular team meetings to ensure all support staff are on the same page and following the same procedures. A new practice management system can bring efficiencies but is useless if your staff don't know how to fully exploit its time-saving features for maximum benefits. Root out any dinosaurs who are still trying to perform old procedures on the new software and ensure all staff can correctly and confidently use system features relevant to their roles. Be sure to provide refresher training every year to build on staff skills.

4. Capitalise on your workers' strengths

Everyone likes to do what they are good at – it raises morale and promotes confidence. In fact, research shows that cultivating an employee's strengths is significantly more effective in improving performance than attempting to address their weaknesses. Employees who know and use their strengths at work are more engaged, productive and likely to stay in their roles. Make regular opportunities to talk to each of your support staff individually to find out what aspects of work they like and dislike. Help them to identify their strengths, and focus on how these can be used and cultivated within the firm. Make it part of your team culture to know and talk about each other's strengths.

5. Communicate and be easy to communicate with

Regular communication enables instructions to be conveyed accurately and understood clearly and provides the lubrication to ensure the individual components of your team function with minimal friction. *HR Magazine* recently reported that 48 per cent of employees polled regularly received confusing directions that led to an average of 40 minutes of lost productivity per day. Support staff are not mind readers, so it's important that professional staff take the time to provide thorough and specific instructions. Developing an open-door culture will ensure that support staff feel comfortable to ask questions and clarify instructions when necessary, so that work can be done correctly the first time.

5 WAYS TO INCREASE THE VALUE OF YOUR SUPPORT TEAM

1. **Streamline your administrative work processes to ensure efficiency.**
2. **Embrace practice management software solutions to replace laborious administrative tasks with automated processes.**
3. **Educate and train your staff on work processes and how to use practice software for maximum benefit.**
4. **Capitalise and focus on your workers' strengths.**
5. **Communicate clearly and be easy to communicate with.**

James Boocock is general manager of Legal Solutions and a future market trend specialist at Thomson Reuters. Members of the Law Society of NSW save up to 20 per cent off Thomson Reuters' books, ebooks and research solutions. Visit lawsociety.com.au/thomsonreuters for more information.

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BOXING HISTORY

Four years ago a knee injury broke her heart. Now law student **SHELLEY WATTS** is making history.

NSW law student Shelley Watts is making history in the first women's boxing team competing at the Commonwealth Games in Glasgow.

Watts, 26, is fighting in the 60-kilo division in the team of eight men and three women representing Australia in boxing. The Glasgow Games are the first to include women's boxing.

Watts, from Laurieton on the NSW mid-north coast, is in the final year of her law degree at Southern Cross University in Lismore. She took up boxing just four years ago after injuring her knee playing soccer. A friend was preparing for her first fight and needed a female sparring partner, so Watts stepped into the ring to give her some practice.

"I have always been sporty and always pretty good at the majority of sports such as soccer and touch footy," says Watts, who has two brothers keen on rugby league.

"When I stepped through the ropes for the first time, I realised that no matter how fit you are or how much training you have done or how ready you are, it's tough."

Still, Watts was hooked. "I think boxing suits my personality a lot," she says. "I like to think that I am ambitious and very strong. There's no sport that compares to boxing because there is nothing that pushes you both mentally and physically as much as boxing."

In 49 amateur fights and with two national titles, she has been knocked down but not knocked out.

"I was lucky with my first fight," she recalls. "I fought against a girl who probably wasn't ready. The fight lasted one minute and 20 seconds before the ref stopped the contest.

"It shocks a lot of people who think they are ready. They think to themselves that they are ready to be in there, but ... they don't realise that the first thing in a fight is to try to take [your opponent's] head off.

"Then, mentally, a lot of people get in there without really going through some serious and intense sparring. If you haven't been in a ring and haven't been getting punched in the face quite a lot, you both physically and mentally are not going to be able to deal with it."

Watts, who nominates hurdler Sally Pearson as an inspiration, says she wants to be a criminal lawyer and apply to the bar after completing her degree. Boxing and the law, she says, have similarities.

"Boxing is a chess game," she says. "You have to put your opponent into certain situations and that's exactly what happens in the court room.

"You have an argument you have to beat and you have to use your brain to be able to achieve your aim. Boxing is a mental game, a sweet science.

"I don't want to look back on life and think I could have done this a little bit better or I should have given this a crack. I just want to be able to say I have lived my life to the fullest and enjoyed every moment of it."

"I will definitely finish off my law degree. I have wanted to be a lawyer since I was 11, so my mum tells me.

"I can't wait for the day that I stand up there, speak to the judge and actually get to be part of the process.

"But I have to take advantage of what's on offer for me. I want to push myself as far as I can go in both boxing and the law. I'm not sure what it is about criminal law that appeals to me, but every single time I step into a courtroom, it gives me goosebumps."

Watts concedes that the community is divided when it comes to boxing.

"A lot of people don't want to see women beating each other up," she says. "But I believe women do deserve to be in there. We are definitely just as good as the boys. I think it's a bit of a challenge.

"Competing at the highest amateur level is exciting and it's going to be a rollercoaster ride of emotions. I cannot wait, especially as there will be 10,000 people in the stadium.

"My passion for boxing is growing. With every win it just gets stronger and stronger. The beauty of boxing is there is always going to be a flaw to fix and something you can do better. It is such a demanding sport. You need to be physically and mentally at your peak to succeed.

"I don't want to look back on life and think I could have done this a little bit better, or I should have given this a crack. I just want to be able to say I have lived my life to the fullest and enjoyed every moment of it." **LSJ**

Photography: Laura Friezer

DON'T **THINK** ABOUT IT

Savouring the moments at work can help you focus, be more productive and feel less stressed, writes **JANE SOUTHWARD**.

Ros McCulloch was doing the juggling act so many parents face these days – a busy practice in local government and planning law, two teenagers, a recent divorce, and weekly yoga classes. The yoga helped her feel calm but at night she went to sleep too late and often woke up early to start her to-do list for the day.

"I noticed a change in my mental attitude after yoga," recalls McCulloch, 52, Special Counsel at Pikes & Verekers. "It gives you a peacefulness. People suggested I try mindfulness as a way to get more of this feeling. What I didn't expect was how much it would improve how I was working."

Mindfulness Based Stress Reduction (MBSR) was developed in 1979 at the University of Massachusetts by Dr Jon Kabat-Zinn who is convinced mindfulness practice can help patients deal with stress, pain and illness. Eight-week MBSR courses are now run worldwide by 1000 certified instructors including in Australia.

Sydneysider Elizabeth Granger gave up 14 years of working as a lawyer to practice psychotherapy seven years ago and, like several Australian MBSR instructors, has trained hundreds of people in mindfulness, including lawyers in NSW.

"Our mindfulness programs focus on three elements – attention, awareness and action," Granger explains. "It's not just about training your attention so as to increase focus and presence but it also cultivates increased self-awareness of how you think and act in the world, including your patterns of reactivity. Once we have a strong stable attention and increased awareness of our patterns, we are then in a position to take action to change our behaviours so as to live and work more effectively with higher levels of engagement, clarity and creativity."

McCulloch, who completed an eight-week course through Open Ground in 2007, giving up two hours from an already jam-packed weekend, says the impact was immediate.

"I was sleeping longer hours within a couple of weeks but the biggest change was in my attitude," she says. "I learned not to sweat the little things and to accept that not everything goes to plan. I have also learned to be a bit less hard on myself.

"It has given me a more mature attitude to what's important and what is not. I can set my priorities better. I don't get upset about how long my to-do lists get. They used to overwhelm me."

After the MBSR course, McCulloch decided to stop being annoyed that she wasn't sleeping longer and to use that time at 5.30am for her daily mindfulness practice. She often now begins the day with 35 minutes of breathing, meditation and yoga moves.

Granger says medical evidence supporting mindfulness and proving that the brain can rewire itself through a phenomenon known as neuroplasticity were key to the growth in support for mindfulness. *Time* magazine published a cover story on mindfulness earlier this year, saying that Americans spent US$4 billion on mindfulness-related alternative medicine in 2007 and that the National Institute of Health in the US was funding 50 clinical trials into the effects of mindfulness on health.

"Mindfulness had been written off as pop psychology but now that it is grounded in research and science it is becoming more accepted," she says, adding that she is convinced that training your mind to focus your attention – rather than doing a zillion things at once – is a must for getting good work done.

Despite the benefits of mindfulness, McCulloch says maintaining mindfulness practice can be challenging – especially for the time-poor. Earlier this year she did a refresher course aimed at corporate workers.

"It takes commitment and time and when your time is limited, such as for most lawyers, this can be hard," she says.

"But it really is worth it. I am more efficient now, so much happier and much less stressed."

Photography: Laura Friezer

Pikes & Verekers Special Counsel Ros McCulloch says mindfulness practice improves her wellbeing – and her productivity.

"There is no doubt that in law if you don't know how to manage your stress, you won't go very far."

ELIZABETH GRANGER

Granger says managing stress so you can work better is a common bonus of mindfulness.

"There is no doubt that in law if you don't know how to manage your stress, you won't go very far," she says. "All lawyers feel at times a sense of rising panic. In these times it is harder to think rationally, calmly and creatively, tempers can flare and you can overreact. Once you have awareness, you can create skillful habits.

"Practising law is stressful, so it's time we train our minds to deal with the stress. I think mindfulness is something all law students and young lawyers should be trained in as a proactive thing. Mindfulness is all about giving people the skills to take care of their minds.

"It starts with a breath but it's much more than that. It increases our ability to be present, to regulate our emotions more skilfully, and increases our cognitive capacity so that we can respond more effectively to all the challenges of work and life. When I was a lawyer my most creative moments came while I was swimming or in the shower, times when I gave myself space. Mindfulness gives us this space.

"We can't control what's going to come our way but what we can control is how we respond to it." You can find out more about mindfulness programs by emailing elizabeth@openground.com.au **LSJ**

health MATTERS

Indispensable wisdom for your mind, body and spirit, with nutritionist **Joanna McMillan**.

Metabolism is often blamed for problems in controlling our weight. People claim to have "slow" or "fast" metabolisms and the internet is rife with methods to boost it, ranging from foods to expensive supplements. So is there any truth to all this metabolic talk?

The first thing is to understand exactly what your metabolism is. The dictionary definition is: *"The chemical processes that occur within a living organism in order to maintain life."* In other words, metabolism is the complex chemical processes that go on inside our bodies to allow us to move, think, breathe, exercise, grow new cells (including muscle), make repairs, digest food, and turn food into fuel.

When we talk about metabolism affecting our weight control, really what we mean is our metabolic rate. This is simply the rate at which we use energy, which means your metabolic rate is how many kilojoules you burn every minute.

Now think about it – do you reckon your metabolic rate is always the same? Of course not. Your rate of energy use will be very different from when you are seated at your desk working, compared with when you are sweating in the gym.

So your metabolic rate is not a static thing. It can change dramatically depending on what you are doing.

BE MORE ACTIVE

So herein lies the first problem. Spending more than eight hours a day sitting down is a very real problem. Thinking of ways to move more during your working day can make a big difference to your metabolic rate. Try integrating small changes to address this. For example, stand while taking phone calls, invest in a standing work station, walk to meetings, take a walk at lunchtime, climb the stairs rather than take the lift. These little bursts of activity throughout the day really do add up to make a long-term difference.

But do some of us have "slow" metabolic rates? The truth is most of the differences can be explained by weight and how much muscle people have. A heavier person will use more energy to walk across the room than a lighter person. That's why you'll see far more small, light people running marathons and competing in other endurance events.

So how can we ramp up our metabolic rate to burn more energy from day to day? The most efficient way is to increase your muscle mass. Muscle is far more active tissue than fat and it's using energy all of the time – even while you are sitting at rest. So if I have two people in front of me who weigh the same, but one has more muscle and less fat, the other vice versa, the more muscular person will have a higher metabolic rate.

BUILD AND MAINTAIN MUSCLE

Can food boost your metabolic rate? Well, yes. The effects are much, much smaller than the influence of exercise, but the way you eat can also help build muscle and have the energy to move more often.

Protein takes slightly more energy to metabolise than either carbohydrate or fat, therefore a higher protein diet does have a small effect on raising your metabolic rate. But that doesn't give you a licence to eat massive amounts of protein.

The distribution of protein across the day is just as important as the overall amount. By eating in this way, you help your body preserve muscle and, when accompanied by a strength/resistance training program, it also helps you to build muscle. A simple glass of milk after a strength workout can significantly boost muscle synthesis.

Individual foods can also have an impact. Much was made a few years ago about chillies. They contain a natural chemical called capsaicin, which is also what gives it the bite. Other spices also contain this chemical, so when you feel hot after eating a spicy curry, that is your body producing more heat. That uses energy. The trouble is the effect is pretty tiny, so over time you'd have to eat an enormous amount of chillies to have any effect. But there are other benefits to spices, including their phenomenal antioxidant power, so I do recommend you tuck in.

Green tea has also attracted attention for its influence on metabolism. The mechanisms are not completely understood but drinking four cups of green tea a day does seem to have a significant effect on boosting fat burning.

The bottom line is you can boost your metabolic rate most powerfully by getting off your bum more often, moving as much as possible, building a couple of strength or resistance training sessions into your week, and including a good source of protein in each meal. The cherry on the top may come from adding green tea and a bit of spice to your meals.

Joanna McMillan is a nutritionist, dietitian and author. Visit drjoanna.com.au for more health advice and look out for Joanna's new seminar through the Law Society of NSW's continuing professional development program.

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WHEN PERFECT **ISN'T GOOD**

Worshipping the false god of perfectionism will extract its price, warns psychotherapist **GUY VICARS**.

Lawyers don't have it easy. The business of law requires rigour and self-discipline. It requires consistent attention to detail yet the ability to think about the big picture. It means being available at all hours to deal with client concerns. And, despite regular interruptions, lawyers are expected to remain focused and account for their time often in six-minute blocks.

On top of this, commercial pressures, especially since the global financial crisis, are enormous as are the ramifications if you get it wrong in a world that is more and more litigious when it comes to solving problems. Then there are the internal pressures and expectations that drive you to think you can get everything done, do it perfectly and perform at peak level all the time.

But you get paid well. You work in a good firm. You have a career trajectory in mind. These things justify the endless intrusions, the pressure to perform day-in, day-out and to be on your game 24/7. You know you need a holiday but you'll take it next year, right?

Add to this the very structure of the adversarial system which means that you have to win. You don't necessarily want to eat the other guy but you don't want to lose either. How will you retain and attract clients if you don't win all the time?

The dangers of combat

A combative playing field has an inverse correlation with good mental health. The incidents of post-traumatic stress disorder in returning soldiers who have lived under constant stress in combat environments for extended periods attest to this.

Sure, lawyers don't usually risk their personal safety but they are under great pressure to be the problem-solvers and to be solving numerous problems for numerous clients at once.

Despite the urban myth that multi-tasking is a good thing, the science and anecdotal evidence shows that this actually works against us. It causes us to become scattered and unproductive but, worse, our minds show a reduced capacity for concentration and a lower sense of wellbeing.

For example, depression is not like a cold. You don't catch it when someone sneezes. It has little to do with "luck" but it is contagious, according to clinical psychologist Michael Yapko (see his book *Depression is Contagious*, Simon & Shuster, 2009).

Yapko argues that depression happens due to a multitude of factors including the way we behave when coping with pressures, the way we think and respond in different situations, our personality types and the environments in which we work.

What makes depression worse is that the places where we cut corners to "find time" often are the very things that inoculate us against life's stressors, such as the important relationships, social outings, and just doing nothing.

Doing more of what you know

People often avoid stressors by continuing to do more of what they know and less of what they need. In other words, when they are stressed people work harder not less.

Setting higher standards to deal with work demands only exacerbates the problem. It's the shovel you hold while standing in the hole. Unrealistic expectations are the engine of perfectionism and pushing yourself to work harder when you are already stressed is a big sign that you are chasing perfectionism.

The paradox is that it's when we recognise our limits and allow ourselves to say "enough" – or even to ask for help – that we are closer to our best.

If you recognise the symptoms, try these ways to beat perfectionism:

- Set limits (in the therapy world we call them boundaries);
- Reality-test frequently; and
- Ensure there is room for the things that juice you – even if that's doing nothing. Without these external breaks, especially time with family and close relationships, we can't perform at our best. We burnout.

You are human and this means recognising that getting it perfect every time is just not possible. In fact, it's unrealistic. Ignore being human at your peril. **LSJ**

Guy Vicars is a Sydney psychotherapist, counsellor and trainer in private practice (guysdomain.com.au). He lectures in under-graduate and post-graduate programs and is the president of the Australian Association of Relationship Counsellors (aarc.org.au).

SURVIVING THE RUNNING SEASON

Running events have never been more popular and the City2Surf and Blackmores running festival are just weeks away. But can you join in and be pain-free for work the next day? **ADRIAN HOLDSWORTH** says yes.

They say running is 90 per cent mental. There may be some truth to that but eventually pain and dysfunction caused by poor training or technique can outweigh any level of mental toughness.

So when is pain good and when is pain bad? This is a question that will confront many runners as they accumulate kilometres in the August and September running season.

Former Olympian Rob de Castella tells it like it is when it comes to marathons: "If you feel bad at 10 miles, you're in trouble. If you feel bad at 20 miles, you're normal. If you don't feel bad at 26 miles, you're abnormal."

He is right. The human body is simply not designed to run the 42.195km required in a marathon easily. It takes enormous dedication just to complete the journey, and pain during a marathon is just inevitable. Depending on your fitness level, shorter distances can still result in pain and discomfort.

Previous evidence would have said that stretching before you train can help relieve or reduce some pain. However, recent studies have called this conventional thinking into question. There is now strong evidence that stretching directly prior to running will not reduce the chance of injury, will not reduce post exercise soreness and may in fact result in negative performance outcomes.

It is important to note that this evidence doesn't mean you should never stretch. Most research still supports regular stretching to prepare your body for the rigors of running and improve performance. It is the timing of the stretch sessions that is important. Regular flexibility and mobility sessions should be programmed into your week at any time *other* than before your running sessions.

Pain comes for numerous reasons. Lactic acid builds up when you don't have enough oxygen to generate energy aerobically (exceeding your anaerobic threshold). Your lungs burn as they struggle to cope with the volume of oxygen you need to extract from each breath. You may start to cramp as hydration and salt levels decrease.

As much as running may hurt, this pain can be constructive and useful. Learning to feel these changes in your body means you can adapt and improve. You can use the pain to your advantage by listening to what your body is telling you and by making changes such as moderating your tempo or taking on more fluids.

However, there are other types of pain that indicate destruction to your body. Pain levels can increase as you incur "micro-tears" in your muscles as a result of repeated contractions. Without time to rest and repair, these may exacerbate leaving you pre-disposed to major tears.

Inflammatory conditions associated with running, such as achilles tendonitis or plantar fasciitis, are often characterised by pain before and after activity, but less pain while you are running. As a result, many athletes continue to run when they should be applying basic RICE (rest, ice, compression and elevation) recovery principles.

Stress fractures, joint pain and cartilage damage are often the result of high-impact without the necessary rest to repair the bony matrix and connective tissues of the body. In these cases, working through the pain when your body is telling you to stop can be a fast track to a doctor or physiotherapist.

Ignoring the warning signs of these pains may hold you back from a successful running season. But if you understand your body and monitor your training and the intensity (preferably with an experienced coach or trainer) pain can be your friend.

CITY2SURF, Sunday, 10 August.
BLACKMORES SYDNEY RUNNING FESTIVAL
Sunday, 21 September.

Not sure where to start?

Get professional advice from a Fitness First personal trainer to find out your best way to give your workouts some muscle. Members of the Law Society of NSW receive a 10 per cent discount off membership fees when joining Fitness First. Visit lawsociety.com.au/fitnessfirst for details. **Adrian Holdsworth** is National Fitness Product Manager at Fitness First Australia.

It's three years since Christchurch was rocked by two large earthquakes, including the February 2011 quake that killed 185 people. But the city is fighting back, buoyed by awards from *The New York Times,* which named it the second must-visit place in 2014 (after Cape Town in South Africa) and *Lonely Planet,* which called Christchurch THE city to visit in its latest round-up.

CHRIST CHURCH

While there is still much destruction in the city centre – and many buildings still waiting to be pulled down – the good news is that much of what is new is exciting and the dining options are quality all the way. **JANE SOUTHWARD** reports.

MUST TRY

After 3pm, the sliders (NZ$20 for three mini burgers and chips) at C1 are delivered to your table by air-locked pneumatic tube at 100 km/hr. That's interesting enough, but if you get the chance to meet the owner, Sam Crofskey, he has a tale to tell about losing his house and business in the February quake just two months before his first baby was born. He and wife Fleur have rebuilt their café/restaurant in an old bank building that also serves coffee grown on a farm they help fund in Samoa. The décor in the eatery is eclectic, with Batman/James Bond elements that include a sliding bookshelf as a door to the toilets, Batman drawings on the wall, water served from a Singer sewing machine or dental basin and readings from Star Wars in the toilet area. The food is solid – all-day breakfast, including corn cakes with bacon and guacamole (NZ$17.80), terrific eggs and oversized muffins (NZ$4.50) all of which are baked in-house. There are also plans for a six-room hotel above the café. It's open seven days 7am-10pm, on the corner of High and Tuam streets.

c1espresso.co.nz

DINE

Christchurch may be quake-damaged but some of the oldest dining spots are thriving. In the Botanic Gardens, try Curators House in the 150-year-old gardens' former curator's house (mains about NZ$38). On Salisbury Street, there's Harlequin Public House in a restored 1899 Victorian home (mains about NZ$28) and for a good steak such as a 200g Angus eye fillet with cauliflower cheese and fries (NZ$39), head to Fiddlesticks on Worsester Street.

fiddlesticksbar.com.nz

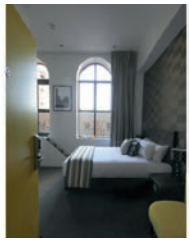
INDULGE

If you have time for some pampering, travel five minutes by taxi from the city centre to Beauty at the Tannery, an opulent new spa that uses Italian Comfort Zone products. Enjoy the antique décor, sample the relaxation room with its stunning purple sofa then head to the hydrocapsule for a vichy shower, light treatment or a cleansing ritual with Monticelli mud (although I'm not sure why they wouldn't source a NZ product for this). Two hours of indulgence costs NZ$210 and a one-hour massage NZ$110. For indulgence of a different kind, take a 30-minute punt on the Avon River next to the botanic gardens. It sounds touristy but it really is relaxing on a sunny day. The trip on a gondola-style boat is guided by a punter dressed in striped blazer, braces and straw hat and costs $25.

beautyatthetannery.co.nz
punting.co.nz

STAY

If you like funky, head to Hotel 115 on Worcester Street in the city centre, right near the main tram station. The chic hotel (see photos below) with its colourful interiors, plush décor and mezzanine sitting areas on each floor opened a year ago and while the rooms are on the small side and there is no restaurant, the location is central and the interiors chic and really interesting (rooms from NZ$170). If you like larger rooms, try The Heritage, a 1913 building on the Historic Places Trust Register (rooms from NZ$239).



hotel115.co.nz
heritagehotels.co.nz

DRINK

For an after-work treat, Bloody Mary's at the Rydges Hotel is hard to beat for its Cloudy Bay and Bluff oysters deal (two glasses of bubbles and half a dozen oysters topped with a bloody mary for NZ$40) but if you want to make a night of it, head to the city's eat street – Victoria Street. There's Tequila Mockingbird, Revival Bar and The Dirty Land, a new cosy bar in red and black (check out the black lacquered pressed metal ceilings) and try the cocktails from NZ$15. Next door is Mexicano's which serves a mean margarita (shaken or slushy) as well as tapas-style plates such as sautéed cauliflower with toasted nuts and seeds (NZ$8), ceviche of local fish (NZ$16), tacos (NZ$8) and braised NZ beef with mushrooms with coleslaw (NZ$26). And just up the road is King of Snake, a solid Thai eatery.

kingofsnake.com.nz

SHOP

Unless you trawl the suburbs, you're unlikely to find a large shopping centre. Instead, shop at the Tannery, modelled on Sydney's Strand Arcade, if you are into high-end crafts, deli items, gifts and fashion. Head to Toi Toi Design Store to hunt for jewellery, children's gifts and homewares and go to Teepee for handmade chocolates and a first-class deli, bakery and butchery. There's also The Apothecary, "a herbal pharmacy" that has been doing business in Christchurch for 33 years. In the city centre, visit Re:START in the Cashel Mall and its colourful collection of refitted shipping containers housing cafes, gift shops and fashion stores (Trelise Cooper, Kathmandu, LuLu Lemon, Mimco, Simply New Zealand and Johnson's Grocery Store plus others) for a huge range of local and imported foodstuffs.

thetannery.co.nz
restart.org.nz

Photography: Visit Britain Media Centre, iStock Images

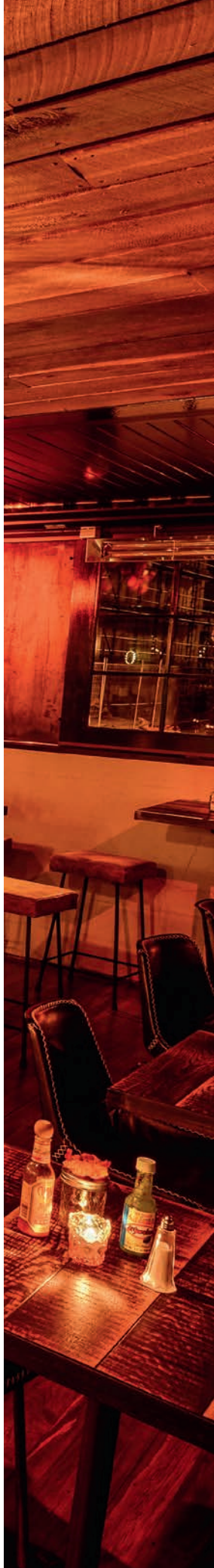
INSIDER TIP

Scott Fairclough, a partner at Cavell Leitch in Christchurch, has this advice for getting the most out of his hometown: "A great day trip from Christchurch is to the harbour resort of Akaroa. This delightful town still retains much of the influence of the French settlers, who arrived there in 1840 hoping to establish a French colony in the South Pacific (see below for more details). For a dinner out in Christchurch, consider the new CBD that has developed in Victoria Street with restaurants such as Saggio di Vino, Harlequin Public House, King of Snake and the cleverly named Tequila Mockingbird to tempt the palate."

DAY TRIP

There are so many options within two hours' drive of Christchurch – think *Lord of the Rings*, spas and hiking – and one of the best is Akaroa. The road to this French-style village is windy in parts but the 90-minute ride offers a glimpse of stunning farming country and the turquoise Akaroa waterway is simply stunning. The streets boast French flags and street names, but the heroes are the Hector's dolphins, which the World Wildlife Fund reports as endangered and numbering just 7400 – all of which live in waters around New Zealand. The cute little Hector's dolphins are the smallest species in the world at just over one metre. You can take a two-hour cruise to watch them (NZ$74) or, if you are game, swim with them. While in Akaroa, head up the hill from the wharf to the Giant's House, an incredible mosaic fantasy by artist Josie Martin. Entry is $20 and it's worth it.

akaroadolphins.co.nz
thegiantshouse.co.nz



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Clockwise from top left: the *Madmen*-inspired Soirée bar and restaurant on the ground floor; the hotel's unique horseshoe-shaped exterior and formal garden; a Luxury Club Room with view to the garden and Chifley Plaza; chandeliers and flowers in the foyer; high tea indulgence French-style; Club Sofitel offers privacy, all-day food and drinks, and other extra services aimed at the business traveller.

A TASTE OF France

It's 10 years since the Sofitel Hotel Group took over the Wentworth Hotel in Sydney's centre. **JANE SOUTHWARD** checks in to see how the French treat their hotel guests.

You know the Sofitel is French from the moment staff greet you with an upbeat "bonjour". Then there are the baguettes and pastries flown in from France for their authentic taste, the tiny macarons, the 10-layer opera cakes with gold leaf for afternoon tea and the Lanvin French toiletries in the rooms to wash off the day's muck from dealing with the peasants.

It's a bit odd because the Sofitel is on land that has played an important part in Australia's history. The Wentworth name is taken from the explorer William Wentworth as the hotel is built on the site where he lived in the 1920s, which was a decade after he crossed the Blue Mountains with Gregory Blaxland and William Lawson in 1813 to find land west of Sydney for farming.

It became Sydney's first five-star hotel when it opened in 1966 as the Wentworth Hotel with its unique horseshoe shape. To add to its historic credentials, the bathrooms have marble mined in Orange, NSW, that is heritage-listed and the ballroom is the place where Princess Diana in 1983 had her much-photographed final dance with Prince Charles (before the divorce) and former Premier Neville Wran.

But the hotel is now French. Downstairs is Soirée, a restaurant and bar inspired by *Madmen* (think 1960s retro décor such as mustard yellow seats and copper domed lamps). Much of the menu is French thanks to executive chef Boris Cuzon, who grew up in Brittany. There's steak frites and croque monsieur but order the pork sliders and keep room for the macarons and crepes suzette.

The more formal restaurant, The Garden Court, looks like a chic European conservatory with its white walls, black and white banquettes and views to a stunning formal garden with curved hedges lit up by fairy lights at night. You can have breakfast and dinner here.

However, if you are after special service and enjoy buffet-style meals, Club Sofitel on the fifth floor makes it easy for you. Some room rates (including the special corporate rate for members of the Law Society – see box below) give you access to a business centre with 100MB internet, hot and cold breakfast, afternoon tea the same as the one served in Soiree for $49 a person – except it's buffet-style, all day refreshments, hors d'oeuvres and pre-dinner drinks including French sparkling Veuve Ambal from 5.30pm to 7pm, access to the Elixir health club in the hotel, as well as one shirt pressed. If your room rate doesn't include access to Club Sofitel, that will cost an extra $150.

While the rooms aren't huge, the beds have 200-400 thread count linen, the stunning marble bathrooms and most have views to the formal garden below. If you want a larger room, opt for the Prestige Club Suite, which has a sitting room and larger bathroom.

If you want to go all out, take the Wentworth Suite where Princess Diana stayed in 1983. It has a dining room for 10, full kitchen, large bathroom and HUGE dressing room plus separate entrance. For the record, Princess Diana stayed there and young Prince William and his nanny slept in a room next door, accessed by an interconnecting door.

Breakfast at the Sofitel is a triumph, thanks to the buttery croissants and baguettes, eggs cooked to order, berry smoothies in tiny glasses, full-fat and low-fat yoghurts in stylish glass jars, and the kind of buffet offerings (bacon, sausages, grilled vegetables etc) you'd expect from a hotel breakfast. **LSJ**

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IN Wilpena's EMBRACE

New luxury tent accommodation is yet another reason to travel to the Flinders Ranges, writes **JANE SOUTHWARD**.

Two wedge-tailed eagles soar above the gum trees layered against the bluest of blue winter sky. They are the only living things we see all day, apart from the dozen or so other bushwalkers wandering along the red dirt track that leads into Wilpena Pound.

Harsh is too soft a word for the climate here, five hours drive north of Adelaide. Last January, the temperature stayed above 40 degrees for almost two weeks. The last big rains in June 2013 cut off the caravan park for three days. This morning the temperature started at close to zero and rose to just 10 degrees, with the wind making it feel like minus-something at midday.

Still, Wilpena Pound and the Flinders Ranges, sighted by Matthew Flinders in 1802, are wonders worth exploring. The pound itself is staggering in size – large enough to hold eight Ulurus. The high points aren't spectacularly tall, with St Mary's Peak rising to just 1188 metres, however the pound is 17 kilometres long and eight kilometres wide, making it larger than New York's Manhattan Island. Wilpena Pound is said to have been named after the fact that when you are in the natural amphitheatre, it feels like you have been impounded. Wilpena is reported to be an Aboriginal word meaning "bent fingers", possibly referring to the shape of the outcrops.

There are walks of varying lengths and difficulty, but it is a three-kilometre stroll on red, flat dirt to a clearing near the centre of the pound that is most impressive. We come upon it after a 90-minute hike to Wangara Lookout and an old homestead. The walk is easy except for some rock hopping to reach the peak at 711 metres from where we see the eagles. It's so silent and fresh here that we want more, and that's when we decide to head to the middle of the pound to really experience the beauty of Wilpena.

Grant Hunt knows a lot about Australian beauty – his company, Anthology, has run lodges in Tassie's Cradle Mountain and Bay of Fires and before that he worked for Voyages resorts for a decade. But Hunt, whose company now runs Wildman Wilderness Lodge near Kakadu, and Ikara, says Wilpena Pound is a little-known gem. Earlier this year, his company started managing Ikara, a set of 15 luxury tents that give travellers to the Flinders another option.

Ikara means "meeting place" in the Adnyamathanha Aboriginal language and, over a porterhouse steak and an open fire at Captain Starlight's Restaurant at Wilpena Pound Resort, Terrence, one of Wilpena's traditional owners, says he hopes one day the whole area will be renamed Ikara.

If you want luxury on a trip to the Flinders, there's Arkaba Station just south of Wilpena Pound where you can stay for $800 per person per night. Closer to the pound, Wilpena Pound Resort has motel-style units and a camping ground. Hunt says what had been missing was a back-to-nature accommodation option with a few luxuries. Ikara was born.

There are 15 air-conditioned tents and they are generous in size at six by four metres. Each has a tiled bathroom, verandah, chairs and table, a bar fridge and tea and coffee making facilities. The beds are king size and comfy. There is no TV and little phone or internet reception, which adds to the experience.

Meals ($29 for mains and $15 for burgers at lunch – and it's quality food with an impressive range of wine and beer to wash it down) are served at the main resort, but from next month you'll be able to eat near the tents as a dining area is being built near a large open-fire pit.

In winter it's the tent's verandah you'll most appreciate, with its director's chairs from which you can take in a view of the red rock that towers nearby. The colours are intense and it's easy to see why artist Hans Heysen was so inspired here.

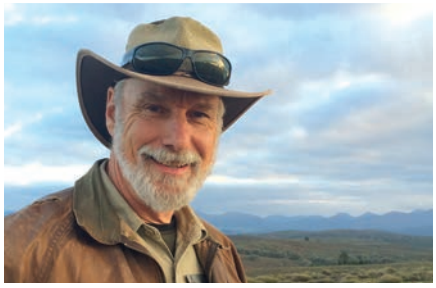
Michael, a tour guide who runs a variety of four-wheel drive activities in the area, claims Heysen was so awestruck

on his first visit to the Flinders that he was unable to paint anything at all. On a two-hour sunset tour to Stokes Hill one evening it's easy to see why. The view of the eastern range of the pound as well as the Heysen mountain range to the north is incredible.

Another big drawcard for the Flinders are fossils, including those at nearby Nilpena Station (where *Wolf Creek* was filmed), which contain evidence of creatures from 635 million years ago. The South Australian Government is pushing for the property to be World Heritage-listed.

If you want to appreciate the size of the Flinders and, in particular, Wilpena Pound, you can take a 20-minute flight for $170. Longer flights take you over Lake Eyre and even to Coober Pedy.

But I think strolling towards the centre of Wilpena Pound, with the wind ripping across the ground, is a magical way to appreciate a real Australian gem. **LSJ**



DETAILS

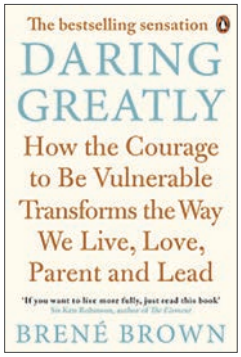
Wilpena Pound is 430 kilometres north of Adelaide in the Flinders Ranges.

Accommodation at Ikara Safari Camp in luxury tents costs from $180 for two, excluding meals.

ikarasafaricamp.com.au

Photographs from top: Wilpena Pound, large enough to hold eight Ulurus; the Ikara luxury tents with private bathrooms, air-conditioning and incredibly comfortabe king-size beds; and Wilpena tour guide Michael who came to the area for a few months and has stayed for years because of its beauty.

books



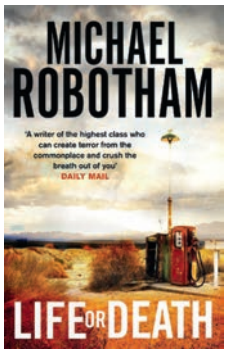
DARING GREATLY

BY BRENÉ BROWN
REVIEW BY CRAIG SISTERSON

How is it that in such a technologically connected world, it seems more and more of us feel increasingly disconnected? For world-renowned researcher Dr Brené Brown, the answer lies in our unwillingness to be vulnerable, our shared need to control, to appear strong, certain and accomplished. It lies in our very misunderstanding of the term "vulnerability": it is not weakness, but strength, for it allows us to discover, harness and share our true selves with the world.

Brown shot to prominence after a decade of research into shame, worthiness, and wholeheartedness after she delivered a heartfelt TED Talk on vulnerability that went viral and saw her appear on Oprah. In *Daring Greatly*, she delves deeper into her research and insights to chart a path towards wholehearted living. "Connection is why we're here … it's what gives purpose and meaning to our lives, and without it there is suffering," says Brown. The trouble is we can become easily socialised to eschew rather than embrace vulnerability, thereby numbing not only potential pain, but the very emotions and experiences that make life truly worthwhile.

Daring Greatly is packed with insights, stories, and practices that clearly evidence Brown's assertion that by embracing vulnerability, anyone can feel more engaged, gain courage and purpose, and create meaningful connections. Live life in the arena, not on the sidelines. ■



LIFE OR DEATH

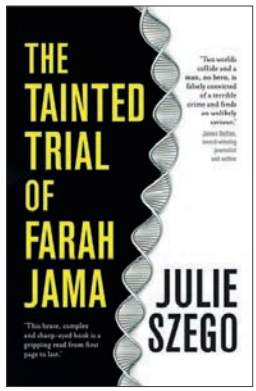
BY MICHAEL ROBOTHAM (SPHERE)
REVIEW BY CRAIG SISTERSON

A decade of torture: beatings, stabbings and all manner of assaults. Audie Palmer has endured the threat of death on a daily basis, from inmates, guards, and prison gangs – all wanting to know what he did with the missing $7 million. A day before his long sentence for the deadly armed robbery expires, Audie escapes. Why?

Because after a decade of protecting his own life, he needs to save another's.

A decade of crime writing: awards, acclaim, and international bestseller lists. Michael Robotham has honed his storytelling skills over the course of nine novels, psychological and geopolitical thrillers, following on from a career as a London-based journalist and celebrity "autobiography" ghost writer. Now the man from the Northern Sydney beaches has turned from his usual heroes, Parkinson's-afflicted psychologist Joe O'Loughlin and tough investigator Vincent Ruiz, and his usual setting, the United Kingdom. Instead, a standalone story about a stoic and courageous convict on the run in Texas, a tale that may very well be Robotham's masterpiece.

With its examination of prison life and murky mix of eclectic characters, crooked and kind, there is something Shawshank-esque about *Life or Death*. However, Robotham elevates his novel far beyond derivative thanks to his tight and twisting plotting, exquisite settings and, most importantly, the emotional oomph of Audie's tale. *Life of Death* is like fine bourbon: smooth, layered and lingering long after the final sip. ■



THE TAINTED TRIAL OF FARAH JAMA

BY JULIE SZEGO
REVIEW BY
JEMMA STILL

The case: a young Somali man is accused of raping a 48-year-old woman in a Melbourne nightclub in 2008. The evidence: swabs taken from the woman prove positive for sperm. The result: DNA matches a sample provided by the man just 24 hours earlier after an unrelated incident.

Julie Szego explores exactly how Farah Jama, a 19-year-old Somalian refugee, came to be found guilty of a crime despite no other circumstantial evidence. He was sentenced to six years behind bars for the rape of a middle-aged woman as she lay unconscious in a Doncaster nightclub.

It's an incredulous scenario. Not one person at the over-28s club claimed they saw a young black man there and the CCTV of the night backed this up. The victim cannot remember a thing. There are no fingerprints or other evidence putting him at the scene. And Jama himself says he is a virgin, doesn't drink, has never been to Doncaster and had been at home with his family and friends with his ill father the night of the rape.

Despite the inconsistencies, the jury backs the science and Jama is sentenced to jail.

In an intriguing and thought-provoking read, Szego, who began her career as a lawyer before working at *The Age* for 12 years, takes us through every step of the case, the injustice of the result, and how the conviction came to be overturned after Jama had spent 18 months in jail.

It's a cautionary tale of what can go wrong – and what does go wrong – when DNA evidence overrules common sense. ■

THE GRIM LIFE OF TENANTS
LIVING IN THE WILLMOTT FOREST

By Jonathan Nathan

Jonathan Nathan is a solicitor at Aitken Lawyers Pty Ltd

Tenants beware: a liquidator appointed to a landlord company can now disclaim your registered lease, so says the High Court's decision in *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)* [2013] HCA 51. This is despite the tenants investing significant amounts of money in developing the land and/or paying rent in advance, even for the entire term of the lease.

The decision in *Willmott* gives liquidators the right to disclaim even registered leases entered into by landlord companies, which could result in tenants being treated unfairly and precludes tenants from protecting themselves sufficiently against the risks of a landlord becoming insolvent.

Section 568 of the *Corporations Act 2001 (Cth)* (Act) grants power to liquidators to relieve a company from onerous financial obligations and to thereby enable a prompt, orderly and beneficial administration of the liquidation of the company. Given the commercial reality discussed below, it is even arguable that the decision in *Willmott* would give powers to a liquidator beyond those envisaged at the time s568 was enacted.

The decision in *Willmott* also seems to contravene the principle that in disclaiming property, any effect on another person's rights or liabilities should go no further than what is necessary to release the company or its property from liability.

The facts

The Willmott Group consisted of a number of companies that were the responsible entities (similar to trustees of a trust) of registered and unregistered managed investment schemes that purchased rural lands in New South Wales, Victoria and Queensland.

The lands were leased to investors for a period of 25 years, with some tenants paying rent annually and others paying rent in advance for the entire 25-year term of the particular lease. This was done in order that the companies could plant and harvest trees on the land and, by selling these trees, make and distribute a profit to the investors after deduction of a management fee.

In March 2011, the Willmot Group of Companies was placed into liquidation and the liquidators made an application under s511 of the Act to disclaim the leases granted by one of the companies (the Company) over a land in Bombala in New South Wales.

This was the only land owned by the companies that had not been recovered by receivers and managers. The question on whether the leases could be disclaimed was taken on special leave to the High Court.

The effect of a valid disclaimer of the leases would be that the value in the trees as fixtures would run with the land, so the liquidator would have the benefit of the forest created though the planting of the trees as well as the benefit of any rent paid in advance without the tenant having any rights as to occupancy.

Snapshot

- Liquidators appointed to a landlord company can now disclaim a registered lease
- This could result in tenants being treated unfairly, and precludes tenants from protecting themselves sufficiently against the risks of a landlord becoming insolvent
- Tenants may be able to protect themselves by including a clause in their lease that states title in any property, fixtures or fittings brought onto the land by the tenant are property of the landlord but will not pass until the landlord company has paid the market value for those properties, fixtures or fittings

The High Court's decision

The High Court examined s568 of the Act and the relevant case law, which, in summary, allowed a liquidator to disclaim property owned by companies in liquidation and contracts entered into by companies in liquidation (which included leases) in order to relieve the company in liquidation of liabilities and to allow for the due and proper administration of the liquidation.

The High Court found the liquidator was entitled to disclaim the Bombala lease as there existed, by virtue of the relevant lease, a liability requiring the Company to provide the investors/tenants with quiet use and enjoyment of the land.

Accordingly, the lease was disclaimed and the tenants were left to prove (i.e. claim) in the insolvency for any loss or damage they incurred as a result of the disclaimer. This process usually would result in the investors receiving a very substantial reduction of their interest in the assets.

Double recovery

The first and most obvious consequence of this decision is that through disclaiming a lease where rent has been paid in advance, the liquidators and/or the creditors of the company in liquidation will be able to realise a portion of the equity in a property twice over without compensating tenants for the rent paid.

This is because by some of the investors paying rent in advance for the entire term of the 25-year lease, the investors have purchased a right to occupy the subject land for 25 years and, by the liquidators disclaiming the leases, the liquidators are able to sell the land to a prospective purchaser unencumbered by leases.

Thereby, they can receive monies from the purchaser and the tenants twice over for the same right, being the right to occupy the land for the 25-year term of the lease.

This double recovery ordinarily would not be allowed in equity and some rules already exist to preclude similar behaviour. An example of this is the rule

against "double proofs". This rule states that a creditor cannot prove twice for the same debt in an insolvency, and thereby receive more than the amount of the respective debt. This rule has been held to operate despite legislation seemingly allowing a party to prove twice for the same debt and thereby recover more than the debt as in the case of *Re-application of Solomons and Tayeh* [2012/NSWSC923] where Justice White comments that although the ATO may prove a number of times for the same debt as a result of certain GST legislation, the ATO could not recover more than the debt owed to it.

Further, the consequences of the decision of *Willmott* even appear to be offensive to the rule in *Cherry v Boultbee* [1839] 41 ER 171, which states that a party cannot seek distribution from a fund without making its due contribution. In *Willmott*, the disclaimer of the lease in effect allowed the company in liquidation to receive the funds paid by the investors as rent for the entire term of the lease without making the contribution that they owe to the investors under the lease to provide them with the quiet enjoyment and use of the subject lands for the unexpired term of the lease.

Lack of protection against risk of disclaimer

It is now apparent that unless and until section 568 of the Act is amended, tenants of long-term registered commercial leases will be exposed to risk of disclaimer by liquidators of landlord companies. What is most concerning is the likely inability of current tenants to protect themselves.

Although rarely sought and most likely refused, one way in which tenants might protect themselves is by obtaining personal guarantees from the director/s of the lessor landlord company. Directors of superannuation funds and large companies that own office buildings or industrial estates are not likely to agree to provide personal guarantees. Where tenants are already in the term of a long-term commercial lease, they will not have an opportunity to even request the landlord company to provide directors' personal guarantees. Fortunately for most landlord companies, having a rent-paying tenant is a benefit the liquidator is unlikely to want to upset, unless the lease is in terms unfavourable to the landlord company, or if the liquidator could do better on the open market by selling the property without a lease, as was the case in *Willmott*.

Balancing prejudice to creditors of the company against that of the lessees

The solution for tenants may be to resist the disclaimer of the lease or the liquidator's application to disclaim the lease in view of s568B(3) of the Act, which empowers a court to set aside the disclaimer of a lease before it takes effect, if it is satisfied that the prejudice caused to the tenant is grossly out of proportion to the prejudice caused to the creditors of the company in liquidation by the lease being disclaimed.

However, the test of "grossly out of proportion to" is a very high test to meet, as it has been held by the courts that in satisfying this test a tenant will need to show that the prejudice suffered by it not only outweighs the prejudice suffered by the company and the creditors, but that it far exceeds the prejudice suffered by the company and the creditors.

This is a particularly strenuous test to meet in circumstances where the tenant would likely not even know, on an urgent application, what specific prejudice may be suffered by the company and the creditors, and may be blindsided if it chooses to take the risk and make the urgent application by evidence coming in only at the "steps of the court" as to the creditors'/company's prejudice.

Further, the notice of the proposed disclaimer issued under section 568B gives the tenant only 14 days to make an application to the court to set aside the proposed disclaimer.

Possible solution under the PPSA

Section 568(1AA)(2) of the Act provides that a s568 disclaimer does not apply to PPSA retention of title property that is taken to form part of the property of the company.

Tenants may be able to protect themselves to some extent by including in their lease a clause that states title in any property, fixtures or fittings brought onto the land by the tenant, such as tenants fixtures, is to be the property of the landlord but will not pass until the landlord company has paid the tenant the market value for those properties, fixtures or fittings. **LSJ**

SUPERCHARGING BATTLES OVER SUPERANNUATION DEATH BENEFITS

By Caroline Harley

Caroline Harley is an associate at Townsends Business & Corporate Lawyers

Death, super benefits and blended families are a perfect recipe for litigation fatigue, the depletion of funds, and increased animosity among the surviving family members. As legal practitioners we should be able to assist clients in avoiding the first two of those issues.

The way it works

When there is uncertainty as to how super death benefits should be paid, dispute resolution or litigation generally follows. With the meteoric rise of self-managed super funds (SMSF), the rules relating to the payment of death benefits can vary significantly to the rules of industry or retail super funds.

When a member of a super fund makes a valid binding death benefit nomination (BDBN), the super fund trustee must pay the benefits to the person/s on that notice, provided they are a dependant under superannuation law. Wait, hold it: how many people who actually completed this form knew there was a legal definition behind the word and didn't just give the word "dependant" a general usage meaning?

There are other requirements that also need to be satisfied, such as witnessing. Like wills, some super funds require two independent witnesses to sign in order for a BDBN to be valid.

The form of the BDBN is important because the trustee cannot use their discretion to pay super death benefits to anyone else if a valid BDBN is in place at the time of a member's death. It is the question of validity that opens up the argument that the trustee's decision was wrong in terms of who got the cash.

What's the issue?

First, it is optional for super fund members to make a nomination. Second, even when validly made, the super fund may not allow it to be a binding nomination. Third, if it is binding it can still expire (or lapse) after three years. If it is a non-binding nomination or it lapses, this restores the discretion of the trustee to decide who to pay.

Snapshot

- When there is uncertainty as to how super death benefits should be paid, dispute resolution or litigation generally follows
- Some people are including directions in their will in relation to the payment of super death benefits as if the will controls the allocation of the death benefit
- Including superannuation considerations as part of estate planning is critical

Another problem is that case law shows that some people are including directions in their will in relation to the payment of super death benefits as if the will controls the allocation of the death benefit.

As super does not form part of a person's estate, the will can control only the allocation of the death benefit if the will satisfies the requirements under the trust deed, which apply to a valid BDBN. Super fund trust deeds can be very prescriptive about the form, manner of execution, and delivery for a BDBN to be valid.

The substance of what a valid BDBN is and how directions contained within wills should be treated has been addressed recently by both the court and the Superannuation Complaints Tribunal (SCT).

An application may be made to the SCT to review a decision by a super fund trustee, unless it is an SMSF, in which caste the trustee's decision can only be contested in court.

Death benefit nominations made in wills

SCT determination D13-14/056 asked the question whether a direction in a will could serve as a valid BDBN. Here, there was no valid BDBN in place from the deceased, who left super benefits of $166,048.95. When the trustee exercised discretion, its decision to pay the death benefit to the de facto was referred to the tribunal by the deceased's adult son. Both the de facto and son claimed to meet the definition of a "dependant" as required by the *Superannuation Industry (Supervision) Act 1993 (Cth)* to enable a trustee to pay directly from the fund to them.

In the will, the deceased bequeathed to his adult son "any car or cars, tools, superannuation and bank accounts". It was claimed by the son that the will satisfied the requirements of a BDBN and, accordingly, the trustee was bound to pay the super death benefit to him. The son argued that the will had been executed in the presence of two witnesses and signed within the required three-year period and was therefore a valid BDBN.

The tribunal stated that, "a valid binding death benefit notice had not been given to the trustee". It focused on the requirement to provide the notice to the trustee and the requirement under the *Superannuation Industry (Supervision) Regulations* for the trustee of a fund to check that the information provided on the BDBN is sufficient and seek written clarification from the member if required.

The tribunal's view was that proper operation of the regulations requires that the member be alive when a BDBN is given to the trustee to allow this to occur. As the BDBN had not been given to the trustee, and no checking had occurred, it was not valid and did not bind the trustee.

The tribunal did not consider as to whether the will, if given to the trustee, would have met all requirements of the trust deed for a valid BDBN. Accordingly, this does not indicate that a direction in a will, which was given to the trustee while the testator was alive, would be considered a valid and binding nomination.

When wills and death benefit nominations collide

Ioppolo & Hesford v Conti [2013] WASC 389 considered what happens when there is a direction in a will and lapsed BDBNs that contain inconsistent directions executed in close proximity.

Mr and Mrs Conti operated their own SMSF. Mrs Conti died on 5 August 2010, leaving a valid will and death benefits of $648,586.

The will, signed on 13 January 2005, contained a direction that her super death benefit be paid to her children and specifically stated that Mr Conti was not to receive those super death benefits.

There were two nominations made by Mrs Conti on 29 July 2002 and 10 April 2006. These had lapsed after three years. Curiously, both nominations were in favour of Mr Conti and the first was still in effect on the date Mrs Conti executed her will, which contradicted the BDBN.

Mr Conti, as the sole director of the corporate trustee, exercised trustee discretion to pay the entire death benefit to himself. Mrs Conti's four children claimed that the super death benefits should be paid in accordance with the intentions outlined in Mrs Conti's will (that is, to them). The court confirmed that Mr Conti was "entitled to ignore the direction in the will".

Had the nominations been valid, the trustee would have been bound to pay Mr Conti and no question could be raised as to the use of trustee discretion or the consideration of intentions by the testator regarding super benefits contained in the will.

This matter confirms that, as super does not form part of the estate, it is dealt with in accordance with the super trust deed, the superannuation legislation and regulations.

It is of concern that Mrs Conti signed two formal documents containing contradictory statements about the payment of her superannuation benefits. If superannuation is not considered when preparing other estate planning documents, the family members inevitably will end up in conflict.

SMSF trustees beware the payment of death benefits

Wooster v Morris [2013] VSC 594 dealt with what appeared to be a valid BDBN. Mr Morris died leaving two daughters from a previous marriage and just over $900,000. Mrs Morris (the second one) jointly operated an SMSF with Mr Morris before he died.

In March 2008, Mr Morris signed a BDBN in favour of his two daughters for the whole of his SMSF interest. Mr Morris died in February 2010.

Mrs Morris later became sole director of a corporate trustee for the SMSF following his death.

As trustee, Mrs Morris sought legal advice as to whether the BDBN was valid. Mrs Morris instructed the practitioner that the BDBN had never been "delivered" to her as co-trustee as required under the trust deed (despite the fact she was able to provide this to them at the time of instruction).

The advice given (unsurprisingly) was that as the BDBN was not valid. While Regulation 6.17B was not mentioned it would have further supported this argument of invalidity.

Mrs Morris began paying the death benefits to herself as a pension. Just over two years after the death of Mr Morris his children commenced proceedings. The Court asked a "special referee" to determine whether the BDBN was valid. They found that it was.

The lesson here is that a validly executed BDBN is not enough. Where the fund is an SMSF, a sole director of a corporate trustee holds all the power and is able to exercise discretion and pay themself "the lot"; unless an effective estate plan is in place that has considered how there will be checks and balances in place in the event of death.

Including super as part of the whole estate plan

While the issue is magnified in an SMSF when a trustee stands to personally gain from their decision, the same type of conflict arises irrespective of the type of super fund. When someone feels the wrong decision is made, lengthy disputes follow.

Including superannuation considerations as part of estate planning is critical. By putting the relevant steps in place, conflict between the "survivors" and perhaps even the potential claims of negligence may be avoided.

Having a valid BDBN and ensuring all requirements have been met at that time is critical. Additionally, it is important in the case of an SMSF (particularly where there are blended families) to plan the distribution of power following the death of a trustee/member.

Many people are not even aware of where their super is invested, so knowing the rules for payment of death benefits when preparing an estate plan is near impossible unless you work with your client and ask the right questions. **LSJ**

CONSEQUENTIAL LOSS: IT'S ALL IN THE DEFINITION

By Scott Alden

Scott Alden
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Recent developments in NSW reinforce the importance of not only expressly defining the term "consequential loss" in contracts, but also carefully considering what categories of losses the exclusion is intended to cover in order to avoid unintended consequences.

Recent historical context

Until recently, it was generally accepted by parties to contracts, and the courts in Australia, that the term "consequential loss" meant those losses falling under the second limb of losses described in *Hadley v Baxendale* and which Lord Alderson B categorised as "indirect loss" (or subjectively foreseeable loss).

These indirect losses were held to be losses not a direct consequence of the breach, and were therefore not fairly and reasonably considered as "arising naturally" or "in the usual course of things", from the breach itself. As such, "consequential loss" was not found to encompass damages for loss of profits or expenses incurred to remedy a breach of contract, as these were considered outside of that definition.

In *Peerless*, the Victorian Court of Appeal departed from previous English authorities and, in so doing, narrowed the ability of parties to recover certain types of damages under a contract excluding liability for "consequential loss".

Thec provided a judicial definition of the concept of "consequential loss" based on a distinction between:

- "normal loss, which is loss that every plaintiff in a like situation will suffer"; and
- "consequential loss, which is anything beyond the normal measure, such as profits lost and expenses incurred through breach".

The *Peerless* decision has been followed in NSW in *Allianz Australia Insurance Ltd v Waterbrook at Yowie Bay Pty Ltd* ("Allianz") and in SA in *Alstom Ltd v Yokogawa Australia Pty Ltd and Anor (No 7)* ("Alstom").

Snapshot

- Best practice has always been to ensure a considered definition of "consequential loss" is included in contracts where the parties are seeking to exclude or deal with consequential loss in some way
- Careful attention must also be paid to what types of loss the definition of "consequential loss" is intended to cover in order to avoid the court interpreting the commercial intention of the parties in a way that leads to unintended consequences for one, or both, parties

However, while the *Peerless* decision signalled a shift in some Australian courts' approach to the interpretation of the term "consequential loss", the Western Australian decision of *Pacific Hydro* demonstrates that the law in this area is far from settled.

In *Pacific Hydro*, Justice Martin did not follow *Hadley v Baxendale* or *Peerless* in attempting to define consequential loss, preferring to construe the clause according to its natural and ordinary meaning, read in light of the contract as a whole, and so as to ascertain the parties' commercial intention at the time of striking their agreement.

Accordingly, it is clear that at the moment the approach to the interpretation of "consequential loss" in exclusion clauses in Australian contract law is far from settled. This uncertainty has prompted contracting parties, and their advisors, to re-emphasise the importance of incorporating into their contracts an extensive definition of consequential loss. The most recent case on "consequential loss", however, suggests that even closer attention must be paid to the breadth of the definition itself to avoid potentially unintended outcomes.

Breadth of definition and the Macmahon case

In the *Macmahon* case, Cobar contracted with Macmahon to design and construct certain works for the development of Cobar's copper mine in NSW. Approximately two years into the contract term, Cobar wrote to Macmahon giving notice of termination for breaches that it said were material and incapable of remedy, and for which the contract granted Cobar termination rights. Macmahon asserted that the termination was invalid and that the letter of termination constituted a repudiation of the contract.

Macmahon sued for damages for what it said was Cobar's repudiation of the contract. One of the heads of damage claimed was described as "loss of opportunity to earn profit". Macmahon argued that, had the contract continued to completion, it would have made substantial profits, and that the wrongful termination of the contract had denied it the opportunity to earn those profits.

The parties agreed that the contract had been brought to an end by one party's acceptance of the other's repudiation. A preliminary question for the judge was, assuming that Macmahon's claim regarding the repudiation was made out, what damages were payable as a result of that termination, in light of an exclusion clause that contained an agreed definition for "consequential loss", which, among other things, included "loss of contract".

What was not clear was whether the term "loss of contract" in the definition of "consequential loss" was intended to refer to simply other contracts, such as subcontracts or other contracts that could be current or effective with third parties in place of the existing contract, or whether this extended to the contract the subject of the dispute. Cobar asserted the latter in an attempt to defeat Macmahon's claim for "loss of opportunity to earn profit" under the terminated contract.

In determining the commercial intention of the parties, Justice McDougall held that it was common ground that the words "loss of contract" were intended to catch loss of the benefit both of the particular contract in which the provision excluding liability for consequential loss appeared, and other, or third party, contracts, the benefit of which might be lost to one party as a result of some breach by the other of the parties' own contract. His Honour found this to be the case despite the fact the word "contract" was not capitalised in the expression "loss of contract" (in circumstances where the word "Contract" itself was defined and used in the contract in question) .

As loss of the benefit of the contract in question ordinarily would be a consequence of accepted repudiation, Cobar was held not liable for repudiation of contract damages, as such damages were excluded by virtue of the exclusion of consequential loss. In deciding this point, his Honour accepted that this construction would give either party the ability to act in a way that might deprive the other of the future benefit of the contract, without having any liability for loss of that benefit.

Summary

Irrespective of what the cases have decided from *Hadley v Baxendale*, through *Peerless, Allianz, Alstom* and then to *Pacific Hydro*, the message remains the same: best practice has always been to ensure a considered definition of "consequential loss" is included in contracts where the parties are seeking to exclude or deal with consequential loss in some way.

Given the decision of *Macmahon*, being the most recent case on consequential loss, it is clear that this advice still stands. However, careful attention must also be paid to what types of loss the definition of "consequential loss" is intended to cover, in order to avoid the court interpreting the commercial intention of the parties in a way that leads to unintended consequences for one, or both, parties. **LSJ**

It is clear that at the moment the approach to the interpretation of "consequential loss" in exclusion clauses in Australian contract law is far from settled. This uncertainty has prompted contracting parties, and their advisors, to re-emphasise the importance of incorporating into their contracts an extensive definition of consequential loss.

PATENT TROLLS: WHAT YOU NEED TO KNOW

By Paula Natasha Chavez

Paula Natasha Chavez is a principal consultant at Keypoint Law

Making money from patents is not a sure bet, but nothing ventured, nothing gained. The risks in patenting are the costs, the prior art and market conditions. The risks of not patenting are the missed opportunities.

An Australian company, Kambrook, missed a big opportunity, as explained in one of IP Australia's recent case studies: Frank Bannigan, managing director of Kambrook, developed the electrical power board in 1972. The product was hugely successful and was the basis for Kambrook's growth to become a major producer of electrical appliances. However, the power board was not patented and Kambrook ended up sharing the market with many other manufacturers. According to Bannigan, "I've probably lost millions of dollars in royalties alone. Whenever I go into a department store and see the wide range of power boards on offer, it always comes back to haunt me."

Australia also has other success stories. For example, the CSIRO earned $430 million licensing its WIFI patent to 23 companies. Australia's Kia Silverbrook is the world's most prolific patentee.

IP is big business. Last year, two million patents were filed worldwide. Your mobile phone includes 50,000 patented technologies. Motorola amassed 17,000 patents and Google paid $10 billion for the portfolio. Smartphone patent wars cost $20 billion in two years. US tech companies defending against patent trolls spent $29 billion in litigation costs for 5842 lawsuits in 2011.

Dr Francis Gurry, the Australian director general of the World Intellectual Property Organisation, described the worldwide shift to a knowledge-based economy in a series of lectures delivered around Australia last year. Dr Gurry pointed out that the value of S&P 500 companies' assets has flipped since 1978 from being mostly tangible to being mostly intangible in 2010.

Snapshot

- In 2013, 2 million patents were filed worldwide
- US tech companies defending against patent trolls spent $29 billion in litigation costs for 5842 lawsuits in 2011
- Each type of IP has unique requirements to procure and maintain rights
- Always enforce your rights, or your trademark will be diluted
- Most companies want international patent protection. This is a can of worms. The laws, country to country, are quite different
- Each country's laws need to be considered in international filings

The centre of wealth creation has shifted dramatically to what the OECD calls knowledge-based capital. For example, 5 per cent of Google's assets are tangible, while 95 per cent are intangible. Therefore, as Dr Gurry pointed out, "Competition is increasingly targeted at the competitive advantage that is given by knowledge-based capital" and "that knowledge-based capital is expressed as innovation, of course".

Patents are a barometer of innovation – an indicator being the ratio of resident to non-resident patent filings. Australia's ratio is very low compared with those of our trading partners. Of the 26,358 patents filed in Australia in 2012, only 2627 were filed by Australian residents, whereas 23,731 were filed by non-residents; the ratio being 10 per cent to 90 per cent. In the US and the European Patent Office, for each office the ratio is 50: 50 (wipo.int/ipstats/en/wipi/). These statistics suggest Australia is only a small player in the knowledge-based economy.

Demystifying IP to build knowledge-based capital

Each type of IP carries a distinct bundle of rights and benefits:

- Patents promote a perception of innovation to investors and increase a company's valuation
- Patents can be a sword and a shield
- A patent portfolio strategically obtained provides competitive positioning
- Patents are glorified in marketing campaigns
- Branding with trademarks, trade dress and copyrighted content promotes the company and its products to the public
- Copyrighted software code, the development of which is often outsourced, forms IT-based products
- Trade secrets can protect inventions (and other intangibles) for indefinite periods of time

Avoid losing IP rights

Each type of IP has unique requirements to procure and maintain rights. Patent rights (and design rights) will be lost in all international jurisdictions (with certain exceptions), if:

- The invention is disclosed publicly, orally or in writing
- The invention is publicly displayed

In Australia and the US, a right to patent protection is lost by offering for sale a product embodying the invention. Trademark rights will be compromised or non-existent, if:

- The trademark is descriptive of the product or laudatory
- Someone else has a similar trademark on similar goods. In Australia and the US, an unregistered trademark has priority over a later registered trademark; or
- The trademark is not actually used in the marketplace. For example, use of a business name does not create any trademark rights.

Copyrights will not be vested in the commissioner of a work without a written assignment of the work. Trade secrets must be guarded indefinitely.

Solutions to avoid losing rights

For inventions, file at least a provisional patent application before making any disclosure without a written non-disclosure agreement (NDA) in place to comply with the laws of all of the international jurisdictions. It is prudent for all jurisdictions to file before offering the invention for sale. For patent protection in Australia and the US, do not offer the invention for sale, even if the invention is hidden in the product and cannot be reverse engineered.

For trademarks, choose a fanciful trademark. Apple computers and Adobe software are fanciful and therefore strong trademarks. Before you adopt a trademark, make sure it is available. Check the registers at IP Australia, the United States Patent and Trademark Office and the EU's Office for Harmonization in the Internal Market for similar trademarks used with similar products. Use a search engine to find similar unregistered trademarks. Ordering a professional clearance opinion is prudent. (In the US, treble damages may be imposed for wilful infringement by searching inadequately.)

Use your trademark on your product in the marketplace to establish your rights. Your trademark is your badge of origin on your product. Advertisements do not establish trademark rights. Always enforce your rights or your trademark will be diluted. Hire a trademark watch service and oppose registration on similar marks which sometimes slip through the Trademark Office. Self-filers should file in a person's name unless incorporated.

Copyrights belong to the work's creator. Therefore, if you commission work, you must receive a written assignment from the creator or you will not own the work. This is critical in outsourcing software development. In employment/contractor agreements, explicitly state that inventions and/or copyrightable works developed as a result of the engagement automatically vest to the employer/contractee. Furthermore, all trade secrets must be carefully guarded indefinitely (see NDA above).

More on patents

In case the reader is unfamiliar with patents, claims (the numbered paragraphs at the end of the document) define the metes and bounds of the patented invention. The rest of the document explains the claims. An easy to read patent is US6285999, the famous PageRank patent, owned by Stanford University and licensed to Google. Stanford received 1.8 million shares of Google as a licensing fee, which were sold for $336 million in 2005.

Strategically obtained patent portfolios can be valuable. To save money in building a patent portfolio, arm yourself with knowledge. Do not solely rely on your patent attorney, as their clock never stops. Learn to write patent specifications to eliminate front-end patent attorney work. Your patent attorney should be willing to put your patent applications into condition for filing. Realise, however, that you should defer to those with specialists skills. Never self-file a patent specification.

Suggestions:

- File at least a provisional patent application before any disclosure (without an NDA) or offers for sale
- Patent what your competition must do to compete
- Patent what is easy to see when looking for infringement
- Search free databases such as Google Patents and Espacenet for prior art
- Write the claims before writing the description; and
- Strategically build a portfolio

Most companies want international patent protection. This is a can of worms. First, the laws, country to country, are quite different. Second, by subjecting the patent application to examination by different patent offices, the likelihood increases that pertinent prior art will be found against it. Third, it is expensive.

Each country's laws need to be considered in international filings. In June this year, the US Supreme Court reasserted the US law against patenting purely algorithmic software inventions *(Alice Corporation Pty. Ltd. v. CLS Bank International,* Supreme Court Docket No 13-298 (2014)). In the EU, software is patentable only if it provides a technical solution to a technical problem. New Zealand recently enacted similar legislation. Australia is yet to follow. On the biotech side, last year the US Supreme Court declared isolated human genes unpatentable *(Association for Molecular Pathology v. Myriad Genetics*, 569 U.S. 12-398 (2013)) while in the same year, an Australian Federal Court ruled that human genes are patentable *(Cancer Voices Australia v Myriad Genetics Inc* (2013) 99 IPR 567; [2013] FCA 65). The Full Federal Court is still deciding the issue. The claims should be crafted to pass muster wherever filed. **LSJ**

FORENSIC PROCEDURE APPLICATIONS: **AN OVERVIEW**

By Dr Anton Hughes

Dr Anton Hughes is a barrister at Maurice Byers Chambers

The *Crimes (Forensic Procedures) Act 2000* (the Act) gives police broad powers to obtain forensic material from a person, both with and without their consent. The Act authorises the taking of forensic material by both non-intimate and intimate procedures, as defined in s3(1).

The ability to obtain forensic material, which may be used in a case against them, runs contrary to both the traditional right against self-incrimination and, where obtained without consent, the right to silence.

In those circumstances, and consistent with the principle of legality, it has been held that "[a]uthorisation under the Act can only be granted strictly in accordance with its provisions": *Walker v Bugden* (2005) 155 A Crim R 416 at [53]. Any doubt should be resolved in favour of the person from whom the forensic material is sought.

Where a person does not consent to a forensic procedure, a magistrate may order a procedure be carried out (s24 of the Act). However, in respect of both intimate and non-intimate procedures, before making such an order, a magistrate must be satisfied of the following:

1. That the person from whom the material is sought is a "suspect" as defined in s3(1) of the Act;
2. That there are reasonable grounds to believe the suspect has committed an offence. If an intimate procedure is sought, that must be a "prescribed offence": s24(2)(a) and s24(3)(b);
3. That there are reasonable grounds for believing the procedure might produce evidence tending to confirm or disprove that the suspect has committed that offence: s24(2)(b) and s24(3)(b); and
4. The procedure was justified in all the circumstances: s24(1)(b).

Snapshot

- The ability to obtain forensic material, which may be used in a case against them, runs contrary to both the traditional right against self-incrimination and, where obtained without consent, the right to silence
- Where a person does not consent to a forensic procedure, a magistrate may order a procedure be carried out
- In respect of ordering both intimate and non-intimate procedures, a magistrate must be satisfied of certain criteria

It has been held that these requirements are "rigid, demanding and very specific": *JW v Blackley* [2007] NSWSC 799 at [31]. It is for the applicant to satisfy the magistrate of these requirements on the balance of probabilities: s24(1)(a). Arguably, given the underlying allegations of criminal conduct, Briginshaw principles might apply.

The applicant should be supported by evidence directed to these criteria. The *Evidence Act* applies, and the proceedings are civil in nature: see *L v Lyons* [2002] NSWSC 1199.

A suspect is defined in s3(1) as either:

(a) a person whom a police officer suspects on reasonable grounds has committed an offence

(b) a person charged with an offence

(c) a person who has been summoned to appear before a court in relation to an offence alleged to have been committed by the person

There is considerable overlap between the first and second requirements, as one of the definitions of a suspect in (a) is in similar terms to ss24(2)(a) and 24(3)(a). There is, however, an important difference, as the first requirement is that a police officer holds the relevant suspicion; while the second requirement requires a magistrate to be satisfied that there are reasonable grounds to believe that the suspect has committed an offence.

In both cases, it is necessary to first consider the grounds upon which either the suspicion/belief is said to be based, and then to move on to consideration of whether those grounds are reasonable.

As such, a bare assertion by a police officer that they "believe on reasonable grounds" that a person may have committed an offence is insufficient. To that end, it is useful to look at the use to which the sample is to be put.

By way of example, I appeared in a matter where a person's DNA was matched to a crime scene sample.

Police subsequently learned that the person had a twin, although hospital records did not show whether the twin was identical or fraternal.

An application was brought in respect of the second twin. The only evidence offered in support of the application was that the second twin was in Australia at the time. It was asserted that the second twin was a suspect, on the basis that if they were an identical twin, their DNA would match the sample, linking them to the crime. That argument was not accepted.

Similarly, it will be difficult to establish reasonable grounds where there is no evidence to establish the availability of crime scene DNA, or other grounds for believing that DNA comparison might be of use, such as evidence of a suspect's presence at the scene of a crime; or contact with items involved in the commission of an offence.

Finally, the discretion to decline to make an order remains. The onus remains on the applicant to satisfy the magistrate that the order is justified in all the circumstances, having regard to the matters enumerated in s24(4) of the Act. In short, this requires a balancing of the invasiveness of the requested procedure against the utility of the anticipated evidence: *LK v Police* [2011] NSWSC 458. **LSJ**

ETHICAL DILEMMAS: SOME FAQS

By Penny Waters

Penny Waters is a principal at Penny Waters Armstrong Legal in Armidale and chair of the Law Society of NSW Ethics Committee.

The Ethics Committee and Department of the Law Society provides guidance on ethical issues to all practitioners. Often, it notices particular ethical issues that arise more frequently than others. The following scenarios have been drafted to highlight some current and frequently arising ethical issues. The scenarios also highlight a couple of the changes that came with the new Conduct Rules introduced on 1 January this year.

Q: I am acting for a person who was injured in an accident. Can I write a letter directly to the person at fault or should I contact their insurer?

A: There are two relevant rules here. First is rule 22.4, which says, "A solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course". Therefore, you should contact the insurer. This rule was introduced with the new Conduct Rules and is a little different to the old rule 18. However, it does follow the same broad principles required by professional courtesy, and not contacting a person who is represented by another practitioner. This brings us to the second rule of relevance, which is rule 33 – the no-contact rule. You must be particularly careful of this rule when you are dealing with a corporate entity, which is more likely than not to have in-house counsel or a law firm on permanent retainer.

Q: My client is pursuing their claim "as a matter of principle", although there are limited prospects of success. They want to engage a particularly expensive SC. Who should be liable for paying the SC?

A: The first point to remember is that rule 35 says, "If a solicitor instructs a third party on behalf of the client, and the solicitor is not intending to accept personal liability for payment of the third party's fees, the solicitor must advise the third party in advance". So that means the default is you are professionally responsible for the SC's fees if it is not clear to the contrary. The old rules were not quite so overtly prescriptive on that point. The rule does not change, even if you think it is a waste of money and advise your client to that effect. The second point is that it will be up to the individual SC as to what they are willing to accept in terms of liability. Rule 35 does not prescribe that they must accept the client being liable.

Q: In the middle of litigation, the solicitors for the other side become very difficult to contact. They do not respond to letters, emails or telephone messages. My client needs a particular matter dealt with urgently. They are insistent that I write to the judge and explain what is happening.

A: Two rules are clear here. First is rule 22.5, which states, "A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless: the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor".

This then brings into play rule 8: "A solicitor must follow a client's lawful, proper and competent instructions." You definitely do not follow a client's instructions, which would cause you to breach the Conduct Rules. If the client insists, you would need to terminate your retainer.

Q: My client has disappeared. I have tried to find them, even looking at their social media activity, but there is just no trace of them. Their trial date is imminent and there will probably be a warrant for their arrest if they don't turn up. Can I go along to court and try to represent them anyway?

A: This is the opposite to the overly insistent client, but it does still come back to Rule 8. You must follow a client's instructions. If you do not have your client's instructions, then you cannot do anything. You cannot make assumptions. For instance, your client may actually wish to go to gaol. Even worse, they may be dead. You could end up misleading the court. **LSJ**

You must follow a client's instructions. If you do not have your client's instructions, then you cannot do anything. You cannot make assumptions. For instance, your client may actually wish to go to gaol. Even worse, they may be dead. You could end up misleading the court

THE NEW SOUTH WALES EXPERIMENT: THE REGULATION AND ASSESSMENT OF LEGAL COSTS

By Mark Brabazon SC

Mark Brabazon SC is a tax, equity and commercial barrister at Seven Wentworth. He is also the chair of the costs committee of the NSW Bar Association. This article has been adapted from an address to Blackstone Legal Consulting.

In 1993, New South Wales enacted a new system for quantifying disputed legal costs. Boldness is not usually associated with the law of legal costs, but this was a bold and new experiment.

The Chief Justice's Review of the Costs Assessment Scheme and proposed Legal Profession Uniform Law provide an occasion to reflect on the future of the NSW experiment. The review has been a welcome development, but it will make a difference only if the executive and parliament take action.

The New South Wales experiment

The quantification of legal costs involves two aspects: basis and process. There must be a body of rules to prescribe the basis on which costs are to be quantified and the regulatory conditions that govern entitlement to costs or to a particular basis of quantification. There also must be a process by which costs are quantified. The basis necessarily affects the process.

By way of basis, the 1993 legislation deregulated practitioner/client costs did away with most scales of professional fees, and in their place created a single new "fair and reasonable" benchmark to judge what amount would be allowed to a lawyer or to a receiving party under a costs order, supported by a set of disclosure-based consumer protection rules. Freedom of contract trumped the general rule, subject to the power of a costs assessor to rewrite a contract if found to be unjust. As a matter of policy, parliament placed its faith in an informed free market to achieve justice between lawyer and client.

Concerning process, the legislation did away with taxation of costs by court officers and erected a new system of outsourced quantification by private lawyers, appointed and paid by the State but ultimately funded by the disputing parties. This was the costs assessment system proper. Its key features are striking. The process is universal, extra-judicial, outsourced, informal, authoritative and funded on a user-pays model.

The system we have today reflects the legislative vision of 1993 with an additional regulatory overlay from 2004. It has generated something of an industry. The costs assessors devote part of their working life to making assessments. The paper-driven nature of the process requires detailed written submissions, mostly drafted by costs consultants. And it seems clear that costs generally have become more contentious and litigious than before deregulation.

Snapshot

- The assessment process has drawn well-founded criticism, but we should not pronounce it a failure without giving the experiment its best chance of success
- Lawyers should not just be told to give estimates but should be trained in legal budgeting
- We need to make the costs assessment system more centralised and to bring it under direct judicial supervision. We need to improve the consistency of decision making. And we need to pay our costs assessors properly

Other states and territories have looked at the NSW experiment and found it to be like the curate's egg – good in parts. Some elements of the basis rules – deregulation, the general "fair and reasonable"' criterion, disclosure and consumer protection provisions – have been widely copied. Some of those aspects are set to be replicated, with genuine improvements in policy and drafting, in Part 4.3 of the new Legal Profession Uniform Law. The Uniform Law leaves most aspects of the assessment process to be determined by local legislation.

But what the other jurisdictions have really balked at is the process of outsourced and extra-judicial decision making. Those features remain peculiar to NSW.

The Chief Justice's review

Nearly two decades after its inception, Chief Justice Tom Bathurst commissioned a review of the costs assessment system. The legal status of the review was unusual. It was not commissioned by parliament or the executive but was simply an initiative of the Chief Justice. The court published terms of reference and invited public submissions The review was conducted by a judge of the court, Justice Brereton, and assisted by an advisory panel drawn from the judiciary, government agencies and professional bodies. The resulting report was published last year with an invitation for further public comment. The Chief Justice recently published a response agreeing with most of the report's recommendations and indicating that he would draw them to the attention of the Attorney-General.

The particular constitution of the review had some significant consequences. First, its terms of reference focused on the process of assessment, not on the general regulation of legal costs or the disclosure rules. Second, the review was conducted within the parameters of the present legislative policy settings on the basis that "the deregulation of practitioner costs, the 'fair and reasonable' criteria for party/party costs, and the 'user pays' funding model are not open to general reconsideration". Third, the review had only the personal and official resources of its immediate participants. There was no funding for research, such as an in-depth comparison of models in different jurisdictions or statistical research into the market cost of legal services.

The review was concerned mainly with the process and mechanism of assessment. The report's 56 recommendations focus on process with a view to efficiency. An implicit conclusion of the report is that process will be improved by imposing structure and a degree of procedural control. Formlessness tends to chaos, which is inefficient. That has been a hallmark of the assessment scheme to date. Formality serves a purpose. Mindfully targeted, it orders human activity and enhances efficiency.

Implications of a market-based model

Although the review focused on process, the deregulated market-based model for the charging and recovery of legal costs has implications for both the assessment process and regulation of the legal profession.

Any market-based assessment needs a scientific foundation. Science assumes a body of organised knowledge based on objectively verifiable data. The closest thing we have at present is the aggregated anecdotal experience of a relatively small number of specialist costs consultants whose personal experience may serve as a useful proxy for a more objective data set. The courts have recognised expert evidence of that kind in the context of lump sum party/party costs orders and relied on it to quantify costs.

Second, if information is the client's panacea as the legislation assumes, it must be reliable. The present model assumes lawyers know how to identify a monetary range within which the total cost of performing a retainer should fall, subject to contingencies. It assumes expertise in budgeting for litigation, or whatever the subject matter may be, both at the outset and as the matter progresses. It is reasonable to think that lawyers would receive relevant training to acquire the assumed skills. They do not. They develop their budgeting skills ad hoc, in the course of legal practice. Some of them get good at it. To require lawyers to give estimates without training seems perverse. Legal budgeting should be taught as a cross-disciplinary skill.

Third, regulation should serve the real needs of clients. What clients really need is a meaningful, reliable and continuing conversation about legal budgeting. What they get at present, if the lawyer is professionally competent and compliant with the legislation, is a pile of information that protects the lawyer's back. The two things are not the same. The present heavy-handed regulatory requirements are not the solution; they are part of the problem.

The Uniform Law is a move in the right direction. It retreats from some of the excesses of the 2004 Act. The next step should address the practice and culture of lawyers by giving them the training and the confidence to have a useful budgeting conversation with the client.

Implications of the outsourcing model

The deregulation and disclosure regime was an act of faith in the mechanisms of an informed market, but the design of the assessment process was an act of faith in the privatisation of public services and a combination of "informality" and a nominally inquisitorial process as a means to reduce cost and increase efficiency.

It assumed that experienced practitioners already had the skill, knowledge and ability to make global assessments of the reasonable price of legal work by reference to its high-level characteristics without detailed itemisation. The assumption has not been tested. If the recommendations of the report are adopted, it may be – and the outcome remains to be seen. It also assumes that they can make reliable global assessments with nothing more than written information from the lawyers concerned, written submissions from each side, and access to the relevant lawyer's file. Taken as a general proposition, that has been exposed as naïve. This is not to say that outsourcing is proven to have failed, but that the experiment has not been given its best chance to succeed. The big question is, can the outsourcing model survive?

The first and most obvious necessity is a tectonic improvement in consistency of decision making. Practitioners in the area have long identified inconsistency between individual assessors as a major problem. One experienced costs consultant no longer gives her clients predictions of outcome: she finds the assessors too unpredictable. The probable causes of inconsistency are not difficult to find. The assessors are numerous and scattered. They are not members of an institution that could provide an institutional culture. There is little institutional supervision beyond the exercise of review and appeal rights by dissatisfied parties to assessment. Their mandatory professional development is relatively limited. There is no scientific or other organised body of knowledge by reference to which they exercise their functions. Their assessment work is part time. The criteria for appointment are generic and there is no specialist qualification required. And the remuneration of assessors is poor by professional standards.

A cure for inconsistency must involve a range of strategies, as the report recognises. A reduction in the number of assessors, at least in the short term, would also be useful. It is also possible to draw a larger and less obvious conclusion. It is essential to bring costs assessment under direct and centralised judicial supervision at an institutional level. That is not to say that the assessors should sit in a building in Sydney. The point is that consistency requires a degree of cohesion, which can only be achieved by leadership that can only realistically come from the judiciary. Centralisation under judicial supervision is also necessary if the procedural recommendations arising from the review are to be successfully implemented. The report recommends reconstituting the manager, costs assessment as a registrar of the Supreme Court and instituting judicial leadership of the Costs Assessors Rules Committee. Such steps are a necessary minimum.

Remuneration of costs assessors deserves special mention. The outsourcing model assumes that assessors will be "practitioners well versed in the running of a legal practice".The hourly fee of $175 was modest but respectable in 1994, but the only increase since has been a 10 per cent uplift for GST, and assessors must still meet all their own professional overheads. You get what you pay for. No wonder there is criticism of the quality and consistency of decision making. The wonder is that a good number of assessors still produce decisions of professional quality. We need to keep the best, not the worst; and we need to attract new talent year by year. Justice Brereton's report recommends that the remuneration for assessors be reviewed and increased to at least $250 per hour.

Not dead yet

So is the experiment a failure? Not yet. But if we want it to succeed, we need to make some changes.

Deregulated costs assessment should be given a genuinely scientific foundation. Lawyers should not just be told to give estimates, but should be trained in legal budgeting. Clients need a reliable conversation about legal budgeting instead of the present heavy-handed disclosure. Hopefully, we can make some progress down that path when the Legal Profession Uniform Law is enacted here.

The assessment process under the present outsourcing model has drawn well-founded criticism, but we should not pronounce it a failure without giving the experiment its best chance of success. To do that, we need to make the system more centralised and bring it under direct judicial supervision. We need to improve the consistency of decision making. And we need to pay our costs assessors properly. **LSJ**

PRE-JUDGMENT INTEREST IN **TORT**

By Christopher Barry QC

Christopher Barry QC is a generalist silk and head of chambers at 5 Selborne. He appeared for the successful appellant in the case discussed in this article.

The principles relating to the discretion to award and the quantification of pre-judgment interest in tort have been vexed questions for lawyers for many years.

The relevant statutory basis for the discretion of any award of pre-judgment interest is section 100 of the *Civil Procedure Act 2005*. Its manner of exercise is governed by UCPR Rule 6.12, which relevantly provides in subsections (7) and (8) as follows:

"(7) In the case of a liquidated claim, a claim for an order for interest up to judgment:

(a) must specify the period or periods for which interest is claimed and

(b) must specify the rate or rates at which interest is claimed.

(8) If no rate of interest is specified under subrule (7)(b), the rate at which interest is claimed is taken to be:

(a) in respect of the period from 1 January to 30 June in any year, the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced, and

(b) in respect of the period from 1 July to 31 December in any year, the rate that is 4% above the cash rate last published by the Reserve Bank of Australia before that period commenced."

The recent decision by the Court of Appeal in *Maestrale v. Aspite* [2014] NSWCA 182 has provided further guidance in relation to the discretion to award interest.

The facts in that case were relatively straightforward. The appellant had ceased work to look after his father who was dying of cancer. To compensate him for so doing, his father sought to change his earlier 1982 will to further benefit the appellant. His father gave instructions to the respondent, his solicitor, to do so but died before the will was executed.

Snapshot

- The trial judge approached the question of interest by examining the amount of interest the appellant had paid on a loan used to enable him to pay out his siblings' legacies and retain ownership of the family home
- The Court of Appeal held it was erroneous to reject the claim by the appellant that interest should be awarded at the statutory rate and in accordance with the relevant Reserve Bank rate plus 4 per cent
- To obtain interest in a case where the court has power to award it, an order for interest up to judgment must be specifically claimed

The trial judge held that it was negligent of the solicitor not to get the will executed before the appellant's father died.

The appeal was brought on three bases. The first was that there were erroneous findings on credit, which resulted in an adverse costs order. The adverse costs order was set aside on appeal. The second was an error in taking into account a private arrangement between the appellant and his brother, which reduced the damages awarded. The third was an erroneous method of quantifying the pre-judgment interest. The third ground of appeal is the only one that is relevant to this article.

The trial judge had approached the question of interest by examining the amount of interest the appellant had in fact paid on a loan used to enable him to pay out his siblings' legacies and retain ownership of the family home. The Court of Appeal held that it was an error for her Honour to have rejected the claim by the appellant that interest should be awarded at the statutory rate and in accordance with the relevant Reserve Bank rate plus 4 per cent. The Court of Appeal (Beazley P, Macfarlan and Barrett JJA agreeing) held that that approach to the discretion to award interest was erroneous.

Her Honour said this: "The award of pre-judgment statutory interest is discretionary and there is no prescribed rate of interest that may be awarded. This is to be contrasted with the position in respect of post-judgment interest payable pursuant to s 101: see UCPR, r 36.7, which prescribes the rate at which interest is to be calculated on the judgment debt. Nonetheless, it is desirable for there to be some uniformity in the interest rate adopted, provided that the rate bears sufficient relation to commercial reality; (see *RW Miller & Co Pty Ltd v. The Ship Patris* [1975] 1 NSWLR 704. In *Heydon v. NRMA Ltd (No. 2)* [2001] NSWCA 445; 53 NSWLR 600, Mason P said, at [30]: 'It would be intolerably burdensome if a court required evidence and argument in every case as to what rate or rates of interest would do justice to the principles which I have endeavoured to summarise. The interests of the parties and of the court, including the interest of consistency as a component of justice, are served by taking a broad, standard approach whereby interest is calculated according to predetermined rates that the parties can take into account in their dealings during the litigation and in their endeavour to avoid wasteful disputation concerning its outcome'."

Her Honour held that, "in circumstances where the appellant sought interest pursuant to section 100, he should have an award of statutory interest".

The result of this case is that to obtain interest in a case where the court has power to award it, an order for interest up to judgment must be specifically claimed. If no rate of interest is specified, then it is to be expected that the court will ordinarily award interest at a rate that is 4 per cent above the cash rate last published by the Reserve Bank of Australia during the relevant period. **LSJ**

INFORMAL WILLS: THE DUTY OF A LAWYER TO CONSIDER, DISCUSS AND MAKE AN INFORMAL WILL FOR A CLIENT

By Greg Couston and Daniel St George

Greg Couston is a Partner at K&L Gates and is a member of Lawcover's Panel. **Daniel St George** is a Senior Associate at K&L Gates.

The preparation and drafting of wills is a conventional part of legal practice. The legal issues concerning wills and estates have always engaged elements of formality and technicality.

However, in the 1989 amendments to the *Wills, Probate and Administration Act*, (now adopted in the *Succession Act 2006*), legislative reform took place which, at least in one aspect, allowed for less formality, rather than more.

Before the introduction of this legislation, the execution requirements for a valid will (generally speaking) required that the document be signed by the testator(trix) in front of two witnesses, who also needed to sign the will. Practitioners will be aware that the amending legislation permitted recognition of an "informal will", which did not comply with the otherwise mandated execution requirements.

While these changes were seen as alleviating formal requirements in favour of testators, in one sense they have added additional complications, and burdens, for practitioners. In particular, one of the "risk management" issues for lawyers is the question of when a lawyer is obliged to make an informal will for his or her client.

This issue has been before the New South Wales Supreme Court on a number of occasions – with varying outcomes.

In May, the New South Wales Court of Appeal heard an appeal in the case of *Fischer v Howe* (first instance reference [2013] NSWSC 462). Hopefully, the Court of Appeal will clarify the issue of when a solicitor is obliged to discuss with a client the making of an informal will, and proceed to make such an informal will.

There are two recent Supreme Court first instance decisions on this issue, which appear to be in conflict.

Fischer's case

The basic facts in *Fischer* were:

- Mrs Fischer was the testatrix. She was 94 and physically frail with some mobility problems. She had a home carer but was of relatively good health and had full mental capacity

Snapshot

- Practitioners should be aware of the provisions of the *Succession Act*, which allow a testator(trix) to make an "informal will"
- There is presently a lack of clarity as to the circumstances in which a solicitor has an obligation to advise on, and procure, an informal will from his/her client
- Hopefully, the anticipated judgment of the Court of Appeal in *Fischer v Howe* will bring some clarity to the issue. In the interim, practitioners should err on the side of caution

- The lawyer was contacted by Mrs Fischer's doctor who said that Mrs Fischer "had all her marbles" and was in "relatively good health"
- Mrs Fischer had previously made numerous wills
- The lawyer met Mrs Fischer at her home in late March 2010 (just before Easter)
- She gave instructions to the lawyer (who had considerable experience in wills and estates) about the changes she wanted to make in her will
- The solicitor did not believe there was any urgency in Mrs Fischer arranging a new will. At the end of the conference he told Mrs Fischer he would be away over the Easter break, he would prepare a new will, and would return to see her in the week after Easter. Mrs Fischer agreed and said she wanted her son to be present when the solicitor returned
- On the Tuesday after Easter, Mrs Fischer died without having signed her proposed new will

The testatrix' son – who was to get a substantial and increased benefit under the proposed will – sued the lawyer and succeeded at first instance. The trial judge concluded that, "The solicitor's failure to (procure an informal will) was a breach of his duty to exercise reasonable care.

Although the deceased may not have been at risk of imminent death ... she was, by reason of her age, lack of mobility, need for care and infirmity, susceptible to a not insignificant risk of losing her testamentary capacity in the period of about a fortnight between the initial conference and the proposed conference. There was no reason for her, or her intended beneficiaries, to be subjected to that risk in the light of her settled testamentary intentions ..."

The trial judge also said, "The only thing that would have relieved the (solicitor) of the obligation to procure an informal will would have been the deceased's express instructions that she did not wish to take that course."

The findings in this first instance decision potentially may oblige lawyers to consider (and procure) an informal will in a wide range of circumstances.

This judgment is to be contrasted with the decision of Justice Fullerton in Maestrale v Aspite [2012] NSWSC 1420.

Maestrale's case

In *Maestrale's* case, the lawyer was aware, at the time of the initial conference, that his client was in hospital with terminal cancer and that the doctors believed he had "a few months to live".

Fullerton J found that, at the time of the initial conference, the solicitor did not breach his duty of care by failing to immediately procure an informal will.

Summary

These two first instance decisions are not easy to reconcile. The point at which the law will oblige solicitors to consider, and discuss with clients, the making of an informal will is clearly a circumstantial matter. The Court of Appeal's decision in *Fischer* is likely to provide some clarity and greater definition for will-makers. In the interim, it would be sensible for practitioners – to avoid potentially risky territory – to be particularly conscious of the ability of a testator(trix) to make an informal will; and for lawyers to raise this issue with their clients in situations of concern or doubt. **LSJ**

CLIMATE CHANGE: TURNING REFUGEE LAW UPSIDE DOWN

By Stephen Tully

Stephen Tully is a barrister at Sixth Floor, St James' Hall Chambers in Sydney

Kiribati is a society in crisis. The Kiribati atolls, just three to four metres above sea level, experience coastal inundation, residential flooding, salt water intrusion onto arable land, declining fresh water, sewerage contamination, deteriorating health, overcrowding, social tension, violence and conflict. Life is insecure.

Article 1A(2) of the Refugee Convention 189 UNTS 137 defines refugees as persons who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside their country of nationality and unable or unwilling to avail themselves of its protection.

In *AF (Kiribati)* [2013] NZIPT 800413, Mr Ioane Teitiota claimed that he would experience serious harm from climate change. Kiribati was unable to protect him. A New Zealand refugee and protection officer decided he was not a refugee. The Immigration and Protection Tribunal (the tribunal) affirmed, and applications for leave to appeal were dismissed by the High Court of New Zealand and the Court of Appeal. This note considers why – and some implications for Australian refugee law.

The decision and judgments

In *AF (Kiribati),* the tribunal found Mr Teitiota's account to be credible. Kiribati's capacity to carry its population was compromised by slow-onset environmental processes including sea level rise. However, he could not establish a real chance of a sustained or systemic violation of a core human right demonstrating a failure of state protection having a Convention nexus because:

- he was unaffected by serious harm linked to land disputes
- property available elsewhere could sustain him to an adequate living standard
- environmental conditions would not jeopardise his life; and
- his subsistence life could be resumed and prior family support continued.

Snapshot

- Climate change, although causing individuals to flee their country of nationality, does not by itself establish refugee status
- Individuals adversely affected by climate change can be brought within the Refugee Convention if they establish persecution for one of the five stipulated grounds

Mr Teitiota could not obtain refugee status because the effects of environmental degradation were felt indiscriminately; were not for any Convention reason; and were faced by the population generally. Mr Teitiota would not be arbitrarily deprived of his life because Kiribati was actively protecting inhabitants from sea level rise, including building sea walls; there was no 'imminent' risk to his life; and drowning did not occur with regularity such as to raise the prospect of death beyond conjecture or surmise. Mr Teitiota was not in danger of cruel treatment. The tribunal declined to follow human rights jurisprudence about removing persons to known situations of serious harm. The High Court of New Zealand in T*eitiota v Chief Executive, Ministry of Business Innovation and Employment* [2013] NZHC 3125 (at [41], [51], [54], [55] and [63]) considered his appeal "misguided", his submissions "novel and optimistic" and his attempt to dramatically expand the scope of the Refugee Convention "impermissible". Were he successful, millions of people facing hardships caused by climate change would be entitled to protection. That result was for the legislature, not the court.

The Convention did not apply to persons seeking to improve their lives by escaping climate change ("sociological" refugees). To suggest that the international community was the persecutor completely reversed the refugee paradigm. Priestley J cited 0907346 [2009] RRTA 1168 (at [51]) to conclude that greenhouse gas emitting States did not intend to impact on low lying countries for a Convention reason.

In *Teitiota v Chief Executive, Ministry of Business, Innovation and Employment* [2014] NZCA 173 (at [21], [40]-[41]), the Court of Appeal concluded that climate change effects did not assist Mr Teitiota 'even if the most sympathetic, ambulatory approach permissible to interpreting the Convention is taken'. The Convention did not solve Kiribati's problems. Mr Teitiota's refugee claims were 'fundamentally misconceived' by attempting to stand the Convention 'on its head'.

Implications for Australian law

These authorities considered whether the refugee definition includes individuals adversely affected by climate change. The outcome is unsurprising. Indeed, Tuvaluan applicants with similar claims were rejected by New Zealand in 2000 for similar reasons.

Persons fleeing natural disaster cannot generally obtain Convention-based protection. Persecution requires human agency. Nevertheless, environmental degradation can create pathways into the Refugee Convention. Applicants must establish that their country of nationality failed to protect them from serious harm for a Convention reason by, for example, using environmental degradation to oppress a section of the population; politicising post-disaster humanitarian relief; or discriminating against marginalised groups.

Environmental claims under the Refugee Convention are rarely considered by Australian courts and tribunals. The same conclusions are likely (compare 1004726 [2010] RRTA 845; *Ali v MILGEA* [1994] FCA 887). Legislative solutions such as the Migration (Climate Refugees) Amendment Bill 2007 (Cth) may be warranted. Environmental degradation can raise human rights issues which may offer better prospects for applicants. Some dicta is available: see *SZSFX v MIBP* [2013] FCCA 1309, [32]. Thus consideration in New Zealand of human rights jurisprudence, as well as international law and complementary soft law instruments, is timely and welcome. **LSJ**

"RENT TO BUY" CONTRACT FOUND UNJUST BY THE SUPREME COURT

By Justine Ringbauer

Justine Ringbauer is a solicitor at Baldock Stacy & Niven Solicitors and Attorneys in Orange. She was the the instructing solicitor employed by the solicitors for the plaintiffs.

On 24 October 2003, J and D entered into a "rent to buy" contract with Twin Vision Properties Pty Ltd, the vendor (*Andrews v Twin Properties Pty Ltd (In Liquidation)*). The contract was for the purchase of a house in Cumnock, a small town between Orange and Dubbo. The purchase price was $61,499 of which $49,499 was borrowed by way of vendor finance.

The term of the contract was 30 years. During the term the purchasers were obliged to make weekly payments to the vendors, including amounts for rates and insurance. The contract provided that the purchasers were not entitled to a transfer of the property until they had paid the last instalment. If they failed to make an instalment payment, the vendor could serve a default notice and, if that was not complied with, the vendor became entitled to terminate the contract. Upon termination all money paid under the contract was forfeited to the vendor.

On 3 January 2010, the house was destroyed by fire. Up until then, the purchasers had occupied the property and had reduced the money owed under the contract to $37,517.

Twin Vision claimed on the insurance and in July 2010 received $155,668. In August 2010, Twin Vision told J and D that it held funds and intended to rebuild. J and D asked that the insurance money be applied to the balance owing under the contract and that the rest be paid to them. Twin Vision did not agree and never built a replacement house on the land.

On 7 August 2013, J and D served on Twin Vision a statement of claim seeking orders under the Contracts Review Act 1980. On 13 August 2013, a liquidator was appointed to Twin Vision.

Snapshot

- The contract for the purchase of land was unjust because the plaintiffs, as purchasers, had no equity in the property and were at risk of losing payments made if the contract was terminated
- "Rent to buy" agreements make home acquisition possible for people who could not otherwise afford it, but the terms must be carefully considered to ensure the purchaser's investment in the transaction is properly protected

The proceedings

On 6 March 2014, the matter was heard in the Supreme Court of New South Wales before Justice Nicholas. The liquidator did not appear and the hearing was undefended.

Justice Nicholas found the contract for the purchase of land was unjust in its operation because "at the end of the day, the plaintiffs, as purchasers, are provided with no equity in the property, and are at risk of losing the payments made during the term if the contract is terminated". He was satisfied that, having regard to the matters to be considered under section 9 (1) of the Act, "it cannot be said that a contract of this kind is one which could be maintained with regard to the public interest. This is a contract by which a purchaser, as already indicated, is left with no interest in the property until 30 years after the first payment has been made. On the other hand, the vendor is left in complete control, the payments vesting in the vendor until completion with the risks being left to the purchasers to bear". He went on to state, "Furthermore, in my opinion, the vendor's entitlement ... to retain the insurance proceeds and to appropriate them to its benefit is another stark illustration of a provision which exceeds what is reasonably necessary to protect its interests".

The orders

Justice Nicholas declared the contract unjust under the *Contracts Review Act* and ordered that the insurance money be applied to the balance of the purchase price of the land and the balance paid to J and D. He ordered that the defendant transfer the unencumbered title to the land to J and D.

This is the first time, so far as the writer is aware, that a "rent to buy" contract has been considered by the NSW Supreme Court. The disadvantages of this agreement to J and D were obvious:

- Under the contract, the purchaser acquired no equity in the property for a term of 30 years, but remained liable for weekly payments of principal and interest, and for payment of outgoings on the property.
- Under the contract, the vendor was able to mortgage the property. By the time judgment was entered in this case the mortgage had fortunately been paid out.
- If the vendor failed, there was little the purchaser could do. Although the purchasers acquired the land in this case, they were left without a house.

"Rent to buy" agreements may make home acquisition possible for people who could not otherwise afford it, but their terms need to be carefully considered to ensure that the purchaser's investment in the transaction is properly protected. **LSJ**

This is the first time, so far as the writer is aware, that a "rent to buy" contract has been considered by the NSW Supreme Court. The disadvantages of this agreement ... were obvious.

ICAC: BEAUTY OR BEAST?

Monica Kelly is a principal at Prevention Partners NSW

By Monica Kelly

"I would probably give it 1 per cent", answered Eddie Obeid when asked about the chances of the DPP taking action against him, having been found to have acted corruptly by the Independent Commission Against Corruption (ICAC).

The ICAC was formed on noble intentions on 2 May 1988. In his second reading speech, Nick Greiner (then NSW Premier and father of the ICAC), said: "It would be ...crass and naive to measure the success of the independent commission by how many convictions it gets or how much corruption it uncovers. The simple fact is that the measure of its success will be the enhancement of integrity and, most importantly, of community confidence in public administration in this state". That was 26 years ago. Can we look at the ICAC and say it has enhanced integrity and built community confidence in public administration of NSW?

ICAC's survey

The ICAC gauges public perception of it through periodic studies. The most recent of these studies, *Community Attitudes to Corruption and to the ICAC; Report of the 2013 Survey*, looked at perceptions of the extent of corruption, awareness of the role of the ICAC, perceptions of the ICAC's effectiveness, and understanding of and willingness to report corruption. Unfortunately, the survey had a low respondent rate. Out of 3548 people approached, only 506 provided responses. The respondents were both public servants and members of the public.

Awareness of the ICAC has steadily reduced over the past 20 years, decreasing from about 97 per cent in 1992 to 80 per cent in 2012. Importantly, the perceptions of those respondents who were not public officials of whether the ICAC has been successful at exposing corruption over time has also decreased over the same period, from 80 per cent in 1992 to about 68 per cent in 2012.

While 95 per cent of respondents thought the ICAC was a "good thing" for NSW, only 10 per cent of those respondents who indicated they were aware of the ICAC understood it was supposed to prevent corruption.

The survey showed that while a large proportion of respondents indicated they would likely or very likely report corruption (83 per cent), less than half (49 per cent) believed something useful would be done if serious corruption was reported over time.

Community confidence in the ICAC is diminished partly because it is rare that convictions are secured against those found to have acted corruptly, and when these convictions are recorded and reported upon, many months, and even years, have passed.

Snapshot

- A recent study, *Community Attitudes to Corruption and to the ICAC*; Report of the 2013 Survey, looked at perceptions of ICAC
- The survey showed that while a large proportion of respondents indicated they would likely report corruption, less than half believed something would be done if serious corruption was reported
- If the penalty matches or exceeds the motivation, the probability of corruption would dramatically decrease because the perceived benefit becomes outweighed

ICAC's structure

So why is the ICAC perceived as ineffective in assisting to secure convictions? The answer lies in its structure. The ICAC is an investigative body, not a judicial one. It would rest more comfortably within the French inquisitorial legal system rather than our own adversarial legal system, yet it needs to work alongside the adversarial system in order to achieve convictions.

The structure of the ICAC, including its broad powers, is what binds and restricts the DPP from securing convictions.

The ICAC is not bound by the rules of evidence and has very broad powers, including:

- seeking the issue of a warrant under the *Surveillance Devices Act* 2007 [s19(2)]
- requiring a public authority or official to produce a statement of information [s21]
- power to obtain documents [s22] and enter premises [s23]
- power to override rights of privilege or duties of secrecy [ss24 and 25]
- seeking injunctions from the Supreme Court restraining conduct of a person [s27]
- requiring a person to attend a compulsory, private examination [s30] or a public inquiry [ss31(6) and 31A]
- permitting a person appearing before it to be legally represented (presumably to also deny being legally represented) [s33]
- summoning a person to give evidence or produce documents or other things [s35]
- issuing arrest warrants for those people required to appear but failing to do so [s36]
- authorising the attendance of a prisoner at an inquiry [s39]
- issuing search warrants, entering premises and seizing documents or other things [s 40] including the power to use force [s43]; and
- "all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of its functions, and any specific powers conferred on the Commission by [the ICAC] Act shall not be taken to limit by implication the generality of this section" [s19(1)].

Proponents of the ICAC may state that these powers are absolutely necessary

in order for the ICAC to undertake an inquiry. However, civil libertarians may consider these powers extreme and potentially unacceptable in a society that respects and understands its legal rights. It is this divergence of views that was a concern at the ICAC's inception and it is these same concerns that require us to investigate the utility of the ICAC now, for the public benefit must outweigh the civil imposition.

When entities are created with unusual powers the average person is likely to misunderstand their rights and methods of dealing with the entity. While the ICAC has peers, such as the Police Integrity Commission, the *Community Attitudes to Corruption and the ICAC: Report on the 2009 Survey* provided that only 7 per cent of respondents would be likely to report corruption to the ICAC, whereas 53 per cent said they would report corruption to the police. This question is not addressed in the most recent survey.

The ICAC is empowered to make findings, form opinions and formulate recommendations after conducting investigations [s13(3)]. However, it cannot make findings of guilt [s13(4)].

ICAC's problem

Crucially – and this is the rub – the quid pro quo for relinquishing one's civil rights of self-incrimination is protection from prosecution. Witnesses before the ICAC are entitled to make a s37(3) declaration whereby any evidence the person provides to the ICAC cannot be used against her or him in civil or criminal proceedings, except for an offence against the ICAC Act or for certain disciplinary proceedings.

Making such a declaration and telling everything there is to tell is the wisest choice of anyone who has something to hide. First, it gives the evidence a chance to be tested but, perhaps more importantly, as they hang all their dirty washing on the line for everyone to see (if anyone is interested) they are protected by their section 37(3) declaration. This means the DPP has very limited evidence to use towards prosecution.

Further, the ICAC considers evidence on the civil standard of proof (the balance of probabilities), whereas the DPP must consider whether evidence will meet the higher criminal standard of proof (beyond reasonable doubt) after it has been tested and having had large portions of it quarantined.

Many actions of corruption are also crimes, such as bribery, fraud, blackmail and theft, which the DPP could prosecute independently of the ICAC. Uncovering corruption that is cleverly and secretly crafted is difficult, though, particularly without the ICAC's powers. Yet the interplay between the inquisitorial system and the adversarial system acts to prevent the ICAC and the DPP from conjointly securing convictions.

On 20 June 2014, the ICAC Commissioner, Megan Latham, took the unusual step of publishing a press release outlining the prosecutions that have been successful following ICAC inquiries. She wrote, "In the last 30 months, in addition to the three specific cases referred to above, 32 people have pleaded guilty or been found guilty of charges arising from ICAC investigations. Of those 32 people, four people have been sentenced to full-time imprisonment, five people have been sentenced to imprisonment to be served by way of home detention, and eight people have been sentenced to imprisonment but had the execution of that sentence suspended on condition they enter into a good behaviour bond." Unfortunately, Commissioner Latham failed to detail the charges that were successful. One may presume that the common charge was lying to the ICAC, as this has been the most successful, historically. However, this charge fails to penalise the person for the corrupt act, therefore it does not act as a deterrent to corrupt future conduct.

ICAC's solution

When asked to define corruption, the respondents to the survey mostly answered "self-interest at the expense of government, one's employer or the public" (33 per cent), which points to greed as the predominate reason for corruption. Where the perceived risk of penalty is low and the incentive or the perceived benefit is high, the probability of corruption is elevated.

If the penalty matches or exceeds the motivation, the probability of corruption would dramatically decrease because the perceived benefit becomes outweighed.

Hopefully the Committee will look at the fraught interaction between the ICAC and the DPP and consider that it may be possible to avoid these difficulties by permitting the ICAC to impose penalties. By amending the ICAC's structure and making it a form of tribunal, the ICAC could impose severe and harsh financial penalties, rather than imprisonment, thereby adjusting the punishment so it acts as a deterrent. **LSJ**

THE LATEST FROM THE **HIGH AND FEDERAL COURTS**

By Thomas Hurley, barrister, Victoria

HIGH COURT

CONSTITUTIONAL LAW

Executive power of the Commonwealth – power to fund school chaplains – whether chaplain scheme provides "benefits to students"

In Williams v Commonwealth of Australia (No 2) [2014] HCA 23 (19 June 2014), the High Court considered the consequence of *Williams v Commonwealth of Australia* (No1) [2012] HCA 23, where the Court held payments made by the Commonwealth to fund chaplains in schools were not supported by the executive power in s61 of the Constitution. Shortly after, the Commonwealth Parliament passed legislation to amend the Financial Management and Accountability Act 1997 (Cth) to validate past payments and authorise future payments for the chaplaincy and other programs. This purported to authorise payments specified in regulations where the Commonwealth did not otherwise have power.

In *Williams v Commonwealth of Australia* (No2), the High Court observed that the appropriation of money in the budget under ss81 and 83 of the Constitution did not confer the power to spend the money. The court concluded that the new provisions must be read to be within constitutional power (S15A of Acts Interpretation Act 1901 (Cth)) and did not, standing alone, provide a constitutional basis for expenditure: French CJ, Hayne, Kiefel, Bell, Keane JJ jointly; sim Crennan J. The court concluded the payments were not authorised as "benefits to students" (Constitution S51 (xxiiiA)) as the payments were made to a scheme or program which some, all or no students may use, and not to any individual students directed to the consequence of being a student. The court also considered the extent the executive power of the Commonwealth may authorise contracts. Questions in case stated answered accordingly.

CORPORATIONS

Managed investment schemes – withdrawal or redemption of units

In *MacarthurCook Fund Management Limited v TFML Limited* [2014] HCA 17 (14 May 2014) the High Court concluded that for the purposes of Part 5C.6 of the *Corporations Act* 2001 (Cth) a member of a managed scheme withdraws from it if the member so acts that the entity returns some or all of the member's contribution. The Court concluded a member does not withdraw merely by the entity exercising a power to acquire or redeem the interest: French CJ, Crennan, Kiefel, Bell and Gageler J jointly. Appeal from NSW Court of Appeal allowed.

CRIMINAL LAW

Sexual offences – mental element – recklessness

In *Gillard v The Queen* [2014] HCA 16 (14 May 2014) G was convicted of a number of charges of committing acts of indecency and non-consensual intercourse contrary to s92D of the Crimes Act 1900 (ACT). The charges related to females who intermittently resided with G (who was a family friend of their parents), at times when some were aged under 16. Section 67(1)(h) of the Crimes Act negated consent to an act of indecency where the consent was caused by the abuse of a position of trust in relation to the complainant. G's appeal to the Court of Appeal ACT was dismissed. His appeal to the High Court was allowed: French CJ, Crennan, Bell, Gageler and Keane JJ jointly. The High Court reviewed the mental element in the offences of rape and indecency in circumstances where the apparent consent of the victim was given to a person in "authority" over her. The High Court noted that the judge's charge to the jury accepted a path to find guilt (on the charges where consent was an issue) upon satisfaction G was reckless as to whether consent given was obtained by his abuse of a position of authority. A material misdirection had been given. Appeal allowed. New trial ordered.

CRIMINAL LAW

Miscarriage of justice – transcripts of evidence obtained under coercive powers published to DPP to anticipate examinees defence

In *Lee v The Queen; Lee v The Queen* [2014] HCA 20 (21 May 2014) L and his son were examined by the Independent Commission Against Corruption (NSW) (ICAC) in 2009 in relation to possession of cash, chemicals and firearms before either were charged. ICAC directed under s13(9) of the NSW Crime Commission Act 1985 (NSW) that the record of their evidence not be published. The appellants were charged with drug trafficking offences. The transcripts were later provided to the DPP (NSW) by ICAC at the request of the DPP to anticipate any defences and negate any innocent explanation. While at trial the appellants knew the prosecution had the transcripts they did not know the reason for which they had been provided. The appellants were convicted in 2011 of various offences and appealed to the NSW Court of Criminal Appeal at which point they became aware why the transcripts had been provided. The Court of Criminal Appeal dismissed the appeals finding no miscarriage of justice had occurred. This was reversed by the High Court in a joint judgment: French CJ, Crennan, Kiefel, Bell, Keane JJ jointly. The High Court observed that possession by the prosecution of evidence obtained under coercive powers in the face of an order preventing publication was a miscarriage of justice and did not require practical unfairness be established. Appeal allowed and new trial ordered.

EQUITABLE CHARGES AND LIENS

Entitlement of liquidator to equitable lien over proceeds of litigation – litigation at expense of secured creditor

In *Stewart v Atco Controls Pty Ltd (in liquidation)* [2014] HCA 15 (7 May 2014) the High Court reviewed the circumstances in which a liquidator's charge over property recovered in litigation will be displaced by the rights of a secured creditor. The High

Court in a joint judgment concluded the circumstances did not warrant departure from the rule established in *In Re Universal Distributing* [1933] HCA 2: Crennan, Kiefel, Bell, Gageler, Keane JJ jointly.

EQUITABLE COMPENSATION

Whether director received equitable damages on trust for company

In *Howard v Commissioner of Taxation* [2014] HCA 21 (11 June 2014) H was involved in a joint venture to develop a golf course. He proposed that a company that he was a director of be involved in a business opportunity arising from the joint venture. Because of breaches of fiduciary duty by the other joint venturers the opportunity was lost. H sued his co-venturers and was awarded equitable damages. The commissioner rejected H's contention that H held the funds on trust for the company (because otherwise H would be conflicted) and assessed the damages as part of H's income. The High Court considered the nature of breach of equitable duties and the nature of compensation for such breach.

EQUITY

Equitable estoppel – acting in reliance on promise – proof of detriment – whether presumption of reliance

In *Sidhu v Van Dyke* [2014] HCA 19 (16 May 2014) the respondent (a married female) claimed she acted to her detriment on promises of benefits made to her by the appellant (a married male) in their extra-marital affair and she claimed damages in equity. The primary judge found the respondent had not established she relied on the promises and dismissed the claim. The respondent successfully appealed to the Court of Appeal (NSW). The appellant's appeal to the High Court was dismissed: French CJ, Kiefel, Bell, Keane JJ jointly; sim Gageler J. The Court concluded that the burden on the plaintiff to establish reliance did not "shift" and the decision of Lord Denning in Greasley v Cooke [1980] 3 All ER 710 should not be followed in Australia. The Court considered there was no error in calculating the damages. Appeal dismissed.

EQUITY

Restitution – payments made under mistake of fact – change of position by innocent recipient – whether restitution inequitable

In *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* [2014] HCA14 (7 May 2014) the High Court considered when a party that had received money paid to it by the mistake of the payer (induced by fraud of a third party) could resist a claim for repayment or restitution by proving it had changed position as a result of the payment by abandoning claims against the third party. The appellant (a finance company) paid money to each of the respondents (equipment suppliers) to enable a third party company (controlled by a fraudster) to "lease" or "hire" non-existent equipment. As a result of the payments the respondents abandoned claims against the third party. The appellant failed against one of the respondents at trial and failed against both before the Court of Appeal NSW. Its appeal against both to the High Court was dismissed: French CJ; Hayne, Crennan, Kiefel, Bell, Keane JJ; Gageler J. Consideration as to whether the actions of the recipients/respondents made it inequitable for the claim by the appellant to succeed. Appeal dismissed.

MIGRATION

Visas – determination of maximum number of visas in a class of visas to be granted in a year – whether determination of maximum number of refugee visas invalid

In *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25 (20 Jun 2014) s85 of the Migration Act 1958 (Cth) authorised the Minister to determine the maximum number of visas to be granted in a year in a class of visas. By s65 the Minister was required to either grant or refuse a protection visa within 90 days. The plaintiff's application for a protection visa was not decided before the maximum number of visas for the year was reached. In a case stated, the High Court determined that the power in s85 did not apply to protection visas: French CJ; Hayne with Kiefel JJ; Crennan, Bell, Gageler and Keane JJ jointly. The Court rejected the submission that once the maximum was reached the Minister may neither grant nor refuse any further visas (as this would amount to a decision) as this prevented the operation of s65 that required the applications for protection visas be decided. Questions answered accordingly.

MIGRATION

Visas – protection visas – refusal of protection visa where "serious reasons for considering" applicant had committed serious non-political crimes

In *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26 (27 June 2014) Article 1F(b) of the Refugees Convention excluded from the grant of refugee status a person of whom there were "serious reasons for considering" had committed serious non-political crimes. In reviewing a decision to refuse a visa the AAT referred to various factors that combined to satisfy it that there were serious reasons for considering the applicant had committed a crime in China. An appeal to the Full Federal Court was dismissed but the appeal to the High Court allowed: French CJ with Gageler J; Hayne J; Crennan with Bell JJ. The members generally concluded that most of the factors referred to were actions in Australia and had been referred to by the AAT as showing "consciousness of guilt" but were not logically probative to what had happened in China.

MIGRATION

Whether designation of overseas processing centre "proportional"

In *Plaintiff S156-2013 v Minister for Immigration and Border Protection* [2014] HCA 22 (18 June 2014) the High Court held s198AB of the Migration Act 1958 (Cth) (that authorised the Minister to designate another country as a regional processing centre for unauthorised maritime arrivals) was supported under the aliens power (Constitution s51(xix)). The Court rejected a submission that legislation needed to satisfy a "proportionality test" to be supported by a power and be valid: French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ jointly. The Court observed it was not necessary to consider any other head of power. Questions in case stated answered accordingly.

WORKER'S COMPENSATION (NSW)

Transitional provisions in regulations

In *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 (26 May 2014) G suffered an injury at work and made a claim in 2010 that included a claim for compensation for permanent impairment. Amendments in June 2012 to the Worker's Compensation Act 1987 (NSW) introduced a threshold requiring workers establish a 10 per cent permanent impairment before being entitled to lump sum compensation. The transitional provisions of the amending Act protected claims made before 19 June 2012. The Act permitted regulations that gave the Act different operation at different times. G lodged a specific claim for the impairment on 20 June 2012. His impairment was

assessed at 6 per cent. The Court of Appeal (NSW) concluded that the transitional regulations Court did not apply the new provisions to G's claims. The High Court allowed the appeal on behalf of the insurer: French CJ, Crennan, Kiefel, Keane JJ jointly; sim Gageler J. The High Court concluded the effect of the transitional regulations was to apply the new amendments to G's claim. Appeal allowed on the basis on which special leave was granted: that the insurer paid costs.

FEDERAL COURT

CONSTITUTIONAL LAW

Freedom of association - ban on protesters camping in Martin Place

In *O'Flaherty v City of Sydney Council* [2014] FCAFC 56 (8 May 2014) a Full Court dismissed an appeal that asserted a Sydney City Council notice that prohibited camping in Martin Place was unconstitutional by infringing on the rights of association of a group of persons camping there by way of protest.

CORPORATIONS

Oppression

In *Catalano v Managing Australia Destinations Pty Ltd* [2014] FCAFC 55 (8 May 2014) a Full Court, faced with conflicting claims that both parties were engaged in oppressive conduct within a corporation, decide to wind it up.

FEDERAL COURT

Appeal – leave to appeal out of time

In *Vaysman v Deckers Outdoor Corporation Inc* [2014] FCAFC 60 (22 May 2014) a Full Court considered when an extension of time to appeal would be granted under FCR Ord 52 r 15. It allowed an extension of three years to appeal against orders for contempt that involved imprisonment but made in complex and lengthy proceedings that had been both settled and discontinued.

INCOME TAX

Charities – fundraising charity

In *Commissioner of Taxation v Hunger Project Australia* [2014] FCAFC 69 (13 Jun 2014) a Full Court upheld the conclusion of the primary judge that a non-for-profit company that raised funds as part of an international network of entities whose principle object was the relief of hunger was a "public benevolent institution" for the Fringe Benefits Tax Assessment Act 1986 (Cth).

INDUSTRIAL LAW

Civil penalty provision – when multiple contraventions treated as one

In *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62 (27 May 2014) a Full Court considered when multiple civil contraventions of the civil penalty provisions were by reason of s557 of the *Fair Work Act 2009* (Cth) to be treated as one.

SUPERANNUATION

Appeal

In *Kristoffersen v Superannuation Complaints Tribunal* [2014] FCAFC 63 (28 May 2014) a Full Court dismissed an appeal from the decision of the primary judge dismissing an appeal from the respondent. The Full Court concluded it would not allow the appellant to amend the appeal against the trustee and insurer of his superannuation fund for placing false material before the SCT.

TAXATION

Cross-border insolvency - international arrangements

In *De Akers as a joint foreign representative of Saad Investments Company Limited (in official liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57 (14 May 2014) a Full Court concluded the primary judge had not erred in granting the Commissioner of Taxation permission under the Cross-Border Insolvency Act 2008 (Cth) (and the UNICTRAL model law on "Cross-Border Insolvency") to claim an interest in funds in Australia held by a company from the Cayman Islands and being liquidated there.

TRADE AND COMMERCE

Financial services – structured finances for local government bodies

In *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 (6 June 2014) a Full Court determined by generally dismissing appeals from findings of the trial judge that the appellant bank and other financiers were liable for the loss caused to local government agencies in NSW who entered into sophisticated financial arrangements. The Full Court considered the findings of the trial judge that assessments by ratings agencies were flawed. **LSJ**

The full version of these judgments can be found at austlii.edu.au

FAMILY LAW

By Robert Glade-Wright, founder and senior editor, *The Family Law Book*

Property – Leave to proceed out of time – 'Hardship' – Stanford argued

In *McCoy & Chancellor* [2014] FamCAFC 62 (11 April 2014) the Full Court (May, Strickland & Kent JJ) dismissed Ms McCoy's appeal from Judge Turner's granting of leave to Ms Chancellor under s 44(6) FLA to apply for property orders three months out of time. The parties had been in a de facto relationship for 27 years. The appellant argued (para 33) that before considering hardship under s 44(6)(a) the judge was required to make findings that altering the property interests under s 90SM was necessary to do justice and equity between the parties and that a mere intermingling of property and financial resources was insufficient to demonstrate hardship. The Full Court said (para 37): " ... the voluntary severance of the de facto relationship rendered the just and equitable requirement 'readily satisfied' in the language of the High Court. As is made clear by *Stanford* [[2012] HCA 52] it is not necessary to find that an order adjusting property interests will be made, for the just and equitable requirement to be satisfied. Indeed [*Stanford*] allows for cases where the just and equitable requirement is fulfilled, but application of s 79(4) may result in no order being made adjusting the parties' existing property interests."

Property – Superannuation disability pension commutable to a lump sum – One pool approach – DFRDB cases distinguishable (such pensions in payment phase being not commutable)

In *Balzano* [2014] FCCA 615 (3 April 2014) Judge Bender considered a 39 year marriage where each party had retired and the husband sought to "retain the total benefit of his [E] Superannuation indexed disability pension from which he currently receive[d] $42,384 per annum" (para 2). He argued that the pension should be "dealt with differently to the parties' realisable assets", the wife to receive "a greater portion of the parties' realisable assets" (para 3). The rules of the pension (para 14) made *"no provision to create a separate interest for the non member spouse and/or for the non member spouse to receive on-going pension payments"* (Court's emphasis) and a splitting order would mean "the non member spouse will be entitled to be paid as a lump sum". The superannuation benefit had been valued in accordance with the *Family Law (Superannuation) Regulations 2001* at $455,761 (para 15). Judge Bender said at paras 28-29: "Counsel for the husband referred the Court to a number of 'superannuation pension' cases in which it was submitted the principle expounded by the Full Court in *C v C* [*C & C* [2005] FamCA 429 also known as Coghlan] that the preferred approach by the Court when determining a property matter where there was an entitlement to a superannuation pension was to deal with that entitlement separately to the parties other assets was upheld (*T & T* [2006] FamCA 207).

The cases to which the husband's counsel referred the Court were all dealing with a Defence Force Retirement and Death Benefits Scheme (DFRDB) pension in its payment phase. A DFRDB pension in its payment phase cannot be commuted to a capital sum."

Judge Bender concluded (at paras 34-39) that "[b]y contrast to the DFRDB entitlement at the centre of the cases to which reference ha[d] been made, the husband's [E] pension can, and must, be commuted to a lump sum in the event a splitting order is made" and that therefore the preferable approach was to include the lump sum of $455,761 payable upon commutation in a single pool of assets.

Financial agreements – Pre-nuptial agreement made two days before wedding set aside for unconscionable conduct

In *Parkes* [2014] FCCA 102 (24 January 2014) Judge Phipps set aside a s 90B financial agreement made two days before the parties' wedding. The parties

FAMILY LAW

CONTINUED

had been de facto partners for 6 years and engaged to be married for 11 months. The husband had raised the question of a prenuptial agreement three days before their wedding, handing her a copy of a proposed agreement signed by him and saying that "if she did not sign it ... the wedding was off". The wife signed it the next day, her evidence being that she "had no choice". Wedding arrangements were in place, guests had been invited and her parents had paid $40,000 for the reception (paras 53-55). Judge Phipps at para 65 discussed relevant authority including *Louth v Diprose* [1992] HCA 61 in which the High Court said in the context of a gift procured unconscionably: "The jurisdiction of equity to set aside gifts procured by unconscionable conduct ordinarily arises from ... a relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis-à-vis the donee; the donee's unconscientious exploitation of the donor's disadvantage; and the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what is in his or her best interest ... "

Judge Phipps concluded at para 68: "The wife says she considered that she had no choice. She was clearly in a position of special disadvantage and the husband knew so. The prenuptial agreement was not to the wife's advantage. It gave her no rights at all in the future to any of the husband's property. She knew that it was to her disadvantage because Mr C told her so. Nevertheless, she signed it because she considered she had no choice."

Children – Grandmother's parenting application opposed by parents – Summary dismissal

In *Penn & Haughton & Anor* [2013] FCCA 1941 (1 November 2013, published May 2014) Judge Lapthorn summarily dismissed a paternal grandmother's parenting application where the children's parents were "implacably opposed to the children spending time with [her]" (para 2). The parents, who had had no relationship with the applicant since June 2010 (para 29), argued that the grandmother's application should be summarily dismissed as it had no reasonable prospect of success (para 15). His Honour cited relevant authority, saying (para 25) that "any determination of the best interests of [children] should be informed by the family dynamics between the children's parents and grandparents" and that (para 43) "[w]here parents jointly or ... a sole parent solely have a strong view in relation to the parenting of their children courts should be cautious about interfering with that exercise of parental responsibility". **LSJ**

WILLS AND ESTATES

By Pam Suttor, partner, L Rundle & Co

Executors access to documents

When an executor seeks documents such as a Certificate of Title after death from a solicitor's strongroom, the whole of the probate document, including the inventory, should be forwarded to the solicitor with the executor's authority. The requirement to do this is based on the concept that it is included in the inventory, which gives the executor and third parties the ability to deal with the listed assets and therefore for a solicitor to release security documents

Duty to file accounts

Practitioners continue to be unsure of their obligations. I adopt the following practices:

1. There is no positive obligation to file accounts unless the executor is seeking commission
2. Commission can be agreed with beneficiaries
3. Any beneficiary can call on the executor to file accounts
4. There is no entitlement to commission without an order of the court or agreement

Intestacy

The primary rule is that it is only persons sharing on intestacy who can make application for the grant. Where those persons reside outside the jurisdiction, the proper procedure is to apply for an attorney grant. Where entitled persons lack capacity, there are special forms of grant for those circumstances.

Private international law and wills and estates

As Australian society becomes more complex with assets in several jurisdictions, including overseas, the task of obtaining a grant of probate becomes more difficult. From recent practitioner enquiries, I remind readers of the significance of ascertaining the domicile of the deceased which can impact the validity of wills including whether they meet the formalities of a third party country and the existence of death duty on world-wide estates, for example where the deceased is domiciled in Great Britain. Expert assistance is usually required in dealing with some of these issues.

Gifts to unincorporated associations

The recent judgment of Darke J in *June Shirley Overall v Family Voice Australia Incorporated* [2014] NSWSC 736 highlights the difficulties in making charitable gifts to unincorporated associations. They are fluid by nature and liable to cease existence. Usually there is a charitable intent expressed in the will. The difficulty is in deciding the ultimate destination of the gift. Where amounts are small, the cost of resolving the issue may be out of all proportion to the amount of the gift. **LSJ**

LAW SOCIETY ADVOCACY

Managing concurrent electronic and paper conveyancing processes

The Property Law Committee reviewed a Consultation Paper issued by Land and Property Information, *Conveyancing Reform – Concurrent Electronic and Paper*.

The committee broadly supports the proposal to align paper and electronic conveyancing requirements on the basis that this will assist solicitors in moving to electronic conveyancing and provide a single efficient approach to client engagement. Additionally, during the start-up phase for electronic conveyancing, solicitors are likely to operate in both paper and electronic environments.

The consultation paper acknowledges that a proportion of transactions will continue in the paper environment for some time and that implementation of the reforms outlined in the consultation paper is likely to be staged. The committee noted that the timeframe for implementation, together with appropriate communication and education, will be critical to a smooth transition for solicitors. The committee has significant concerns in relation to several options being considered in relation to the removal of the requirement for mortgagees to consent before the registration of subsequent dealings. The current process for mortgagee consent is being reviewed in light of the gradual phasing out of paper certificates of title.

The committee favoured replacing the current practice of producing the certificate of title with a mortgagee being obliged to provide an electronic control of the right to deal (CoRD) consent. Other options that allowed registration of dealings during the life of the mortgage without the mortgagee's prior consent unduly focused on ease of process rather than protection of the mortgagee's interest and the paramountcy of the register. In the committee's view, simplicity of process at the point of registration appears to be very much outweighed by the resultant complexity and uncertainty.

Review of Property Stock and Business Agents Regulation 2014

The Property Law Committee made a submission to NSW Fair Trading in relation to the statutory remake of the Regulation. Apart from some minor drafting considerations, the committee supported most of the minor reforms set out in the draft regulation. The committee suggested two further areas for consideration:

- An amendment to the regulation to require a mandatory warning to be inserted into agency agreements where commission may be payable even if the sale does not complete. Such a warning could follow the approach adopted in items 1 and 2 of schedule 8, and could similarly be added to schedules 10 and 11 of the regulation.
- The provision of further guidance as to what constitutes "material fact" as referred to in s 52 of the *Property, Stock and Business Agents Act 2002*, and what steps must a real estate agent take to discharge his or her obligation, particularly in the context of a violent crime having occurred in the property whilst owned by the vendor.

Parliamentary Inquiry into the Child Support Program

The Family Issues Committee provided a written submission and appeared at a public hearing and gave evidence to the House of Representatives Inquiry into the Child Support Program. The committee expressed the view that the public policy reasons for the establishment of the scheme are sound, but suggested "the best interests of the child" should be included in the principles driving any future reform and new legislation. In addressing the terms of reference of the inquiry, the committee stressed the fundamental need to align legal and policy frameworks and strengthen the collaboration between child support and family assistance agencies. The committee submitted that there is scope for increased use of programs within Family Relationship Centres. Expansion of the programs available through these centres could occur through coordinated legally assisted

family dispute resolution (in a wider range of cases; not simply cases involving a legally aided client), agency referred or party initiated family dispute resolution (in matters involving disputed parenting issues and child support issues) and interdisciplinary collaborative practice (in matters involving property settlement and/or child support and parenting issues).

Joint Costs Advisory Committee – Legal Practitioners' Scale of Costs

The Family Issues Committee and Costs Committee provided a submission to the Joint Costs Advisory Committee. The High Court, Federal Court, Family Court and Federal Circuit Court established the JCAC to inquire into and make recommendations on any variations in the quantum of costs allowable to legal practitioners contained in the scale of costs in the court rules. The Family Issues Committee expressed the view that over the past 14 years, changes to the quantum of costs provided in the Federal Circuit Court Rules have not kept pace with the substantial increase in the range and complexity of matters filed in the court. The committee is of the view that costs awarded to a successful party in family law proceedings should provide that party with sufficient indemnity. In relation to the scale of costs in the Federal Circuit Court Rules, the committee suggested: the inclusion of a range of amounts for each item or event; the inclusion of additional items or court events; that the amounts provided in the scale are inadequate; and that the distinction between family law and general law items in the scale should be removed.

Crown Lands Legislation White Paper

The Property Law Committee, Indigenous Issues Committee, Rural Issues Committee and the Environmental, Planning and Development Committee made a joint submission to the NSW Department of Trade and Investment. All Committees supported the proposal to consolidate current legislation applying to Crown Lands. The Committees stressed that Crown lands should be held and used "for the benefit of the people of NSW". The Committees also noted that Crown lands can be subject to other legislative rights and interests such as those arising under the *Native Title Act 1993* (Cth), the *Aboriginal Land Rights Act 1983* (NSW) or the *Environmental Planning and Assessment Act 1979* (NSW). Any proposal to rationalise and consolidate Crown land legislation must take account of these wider interests. While it does not necessarily support this option, the Property Law Committee suggested that if it is intended that local councils are to manage Crown land under local government legislation rather than under the *Crown Lands Act 1989* ("CLA"), sufficient safeguards must be put in place to ensure that a robust scheme of Crown land management continues. In particular, the fact that the land will be locally managed should not affect the wider objects and nature of management. The Rural Issues Committee supported the greater involvement of the local community in the use and enjoyment of Crown reserves and also supported any measures that provide the local community with simplicity, certainty and predictability in the management of Crown reserves.

Inquiry into the Manus Island Detention Centre incident 16-18 February 2014

The Human Rights Committee made a submission to this Senate inquiry, querying the legality of the PNG offshore arrangements and noting that the Australian government is likely to continue to have ultimate responsibility for the safety of asylum seekers held in offshore places. The society was invited to give evidence at a public hearing, and members of the committee appeared on behalf of the Law Society. At this hearing, the society was invited to make a further submission on an appropriate amendment to the Migration Act 1958 to ensure that offshore processing complies with human rights laws and obligations. The committee has since made that further submission, suggesting that the relevant provisions in the Act be amended to reflect the Act before the High Court decision of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 in which the High Court decided that the Minister could not validly declare a country for offshore processing unless the country was legally bound by international law or domestic law to:

- Provide access for asylum seekers to effective procedures for assessing their need for protection
- Provide protection for asylum seekers pending determination of their refugee status
- Provide protection for persons given refugee status pending their voluntary return to their country of origin or their resettlement in another country
- Meet relevant human rights standards in providing that protection. **LSJ**

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MISSING WILLS

MARY PATRICIA BYRNE
Deceased 1st July 2014. Late of Bexley, Kingsgrove and Bexley North. Seeking Will lodged with Sydney firm after 1979. Contact daughter Elizabeth. 0409782194.

GRAHAM RONALD CAWTHORN
Would any person or firm knowing the whereabouts of a Will or other document purporting to embody the testamentary intentions of Graham Ronald Cawthorn late of 53 Isis Street, Wahroonga in the State of New South Wales who died on 31 December 2013 please contact Mark O'Brien of Messrs Harrington Maguire & O'Brien, PO Box 598, Edgecliff NSW 2026, phone: 9363 0484.

THAI CHO
Would any person holding or knowing the whereabouts of a Will or other document purporting to embody the testamentary intentions of Thai Cho late of Campsie NSW who died on 30 April 2014 please contact Strathfield Law, PO Box 557, Strathfield NSW 2135. Telephone (02) 9745 6111 or Facsimile (02) 9745 6244. (Ref: HK:JM:C324).

WALLACE CLIVE CLARK AND MARGARET SYBIL HELEN CLARK
Would any person or firm holding or knowing the whereabouts of a Will or other document purporting to embody the testamentary intentions of Wallace Clive Clark late, who died on 14 September 2013 and Margaret Sybil Helen Clark late, who died on 9 September 2011, both of 65 Carinya Road, Picnic Point, NSW 2213, please contact Matthew King of Dibbs Barker, L 8, 123 Pitt St, Sydney, NSW, 2000 Ph: 8233 9655, E: matthew.king@dibbsbarker.com.

ROBERT GEORGE DALTON
Would any firm knowing the whereabouts of a Will of the late Robert George Dalton who died on 29 July 2010 please contact David Griffiths Lawyers of 16a Bass Street, Eden NSW 2551 telephone No 02 6496 2543 Fax no 02 6496 1755 Email address: eden@dglegal.com.au.

DAVID LYNTON HALE
Seeking any Will for David Lynton Hale (dec) formerly of 53 Orion St, Yass NSW. 0428447076. arnecam@gmail.com.

NASIM WAHIB INDARAWIS HANNA
Would any firm knowing the whereabouts of a Will of the late Nasim Wahib Indarawis Hanna late of 31/60 Harriet Street, Waratah West who died on 31 August 2010 please contact O'Sullivan Saddington of Level 4, 23 Watt Street, Newcastle NSW 2300 Tel: 02 4929 5166 Fax: 02 4929 3021 Email address: reception@ossad.com.au.

GARRY JOHN HENLEY
Would any person or firm knowing the whereabouts of a Will or document purporting to embody the testamentary intentions of Garry John Henley, late of Sydney who died on 23 December 2013 please contact Colleen Burgoyne Lawyer of 90 Gondola Road, North Narrabeen NSW 2101, Ph: 02 9446 3251, Fax: 02 9475 1351, Email: colleen@cblawyer.com.au.

JOSEPH MARIA HILGERDENAAR (ALSO KNOWN AS JOSEPH HILGER)
Would any person holding or knowing the location of a Will or other document purporting to embody the testamentary intentions of Joseph Maria Hilgerdenaar (known as Joseph Hilger) late of Glebe, who died on 17 May 2014 please contact The Rocks Practice of Suite 803 Quay West, 98 Gloucester Street, Sydney 2000, Phone 9240 6112, Email: carol@therockspractice.com.

MORRIS ARCHIBALD KEEVERS
(Date of Birth: 13/4/1938) spent most of his last 13 years living in Asia and died in Thailand on 05/06/2013. Mr Keevers was born in Kyogle, New South Wales and is known to have lived in the Waratah and Kyogle areas in New South Wales and at 60 Belmont Park Drive, Mudgeeraba and 8 Mark Way, Mudgeeraba, Queensland. Anyone who may have acted for Mr Keevers or who is holding or has knowledge of any Will made by Mr Keevers is asked to contact Donald Portbury & Co, Solicitors, Suite 23, Cooloola Centre, 97 Poinciana Avenue, Tewantin Qld 4565 Ph: (07) 5449 7963 or Fax: (07) 5449 7112.

DAVID JAMES KIDNEY
Would any person or firm knowing the whereabouts of a Will of the late David James Kidney, late of 505 The Scenic Road, Macmasters Beach 2251 please contact Michael Grogan Solicitor, PO Box 1625 Hornsby Westfield NSW 1635, T: 99874577 F: 94766674.

MOHAMMAD MASOUD LODIN
Would any practitioner, person or firm holding or knowing the whereabouts of a Will or other document purporting to embody the testamentary intentions of Mohammad Masoud Lodin late of Bangor who died on 12 June 2014 please contact Craddock Murray Neumann Lawyers, PO Box 533 Queen Victoria Building NSW 1230, Ph: 02 8268 4000.

BERYL MAY SAUL
Would any firm holding or knowing the whereabouts of a Will or other document re testamentary intentions of the late Beryl May Saul of Moss Vale who died 23 February 2014 please contact Crimmins Legal 3 Wyatt St Moss Vale 2577. E: tclegal@bigpond.net.au or Ph 02 4869 1525.

CHERYL ANN SCOTT
Would any person knowing the whereabouts of a Will or other document purporting to embody the testamentary intentions of Cheryl Ann Scott late of 18 Clare Crescent Five Dock NSW 2046 who died on 1 May 2014 please contact Lynne Hughes of Hughes & Taylor Solicitors P O Box 537 Drummoyne NSW 1047 phone 02 9819 7270.

STUART STOLZENBACH
Would any solicitor who holds a Will for Stuart Stolzenbach late of 81/142 Moore Street, Liverpool 2170 please contact Neil Lyon Solicitors, PO Box 99, Helensburgh 2508 or nlyonsolicitors@bigpond.com.

FRANCISCUS JOHANNES VAN GEFFEN
Would any person holding or knowing the whereabouts of a Will or other documents purporting to embody the testamentary intentions of Franciscus Johannes Van Geffen late of Marulan, who died on 28 May 2008, please contact Warren & Warren, PO Box 749, Riverwood NSW 2210 T:02 9533 3966 F: 02 9534 3887.

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VALUATIONS
Stamp duty, Family law & Probate valuations etc Ken Wolf JP MRE(unsw)FAPI. Lic Real Estate Agent. 0418675611.

EXPERT witless

BECAUSE IF WE CAN'T LAUGH AT OURSELVES ...

Cartel responsible for wurst-ever sausage prices

Did you celebrate Germany's World Cup victory with a cheap and cheerful bratwurst washed down with a nice German ale or two? Sounds *sehr gut*, but spare a thought for your friends in Germany who have recently learned they may have been victims of inflated sausage prices for decades. While one might associate the word cartel with drugs, last month the German authorities busted a sausage cartel. According to reports from the BBC and Deutsche Welle, the sausage cartel comprised some 21 sausage manufacturers and other individuals, and was collectively known as "Atlantic Circle" – named after the Hotel Atlantic in Hamburg where the parties first met. The BBC reported that the groups had been meeting for decades to discuss market developments and pricing, but the meetings had come to evolve into "concrete agreements [and a] collective raising of prices". The German Federal Cartel Office has imposed a 338 million euro ($A488m) fine on the cartel. Eleven of the companies involved reportedly admitted wrongdoing and co-operated with the authorities. The case comes after five large German beer manufacturers were fined 145 million euros by the German Cartel Office in January this year for price fixing and colluding to raise prices for draft and bottled beer from 2006 to 2008. ■

A STINK OVER INK

Paper jammed? Run out of toner? Thought you'd leave it to the next guy to fix? A recent case from the French courts may give you cause to think again ...

According to a recent report from telegraph.co.uk, a court in Bobigny, France, has left the family of a murdered part-time DJ shocked and outraged after the prime suspect in the case was released because the court fax machine "ran out of ink". *Oh merde ...*

The suspect, who was in custody awaiting trial, faxed an application for bail to the court. According to French law, the court was required to respond within 20 days. Although the fax was reportedly received and stored on the machine, the court did not see it, as the machine had run out of toner and was "so old, the staff didn't know where to find any more" – meaning they had no way of printing out messages.

The court's attempt to blame the failure on a "technical error" was unsuccessful, resulting in the immediate release of the suspect. *Quelle horreur!* ■

HAPPY WIFE, HAPPY LIFE?

The saying, "A happy wife makes for a happy life" has taken on new significance in Kenya with the passing of a new Marriage Act by the Kenyan parliament.

The new law has caused a furore among Kenyan women and, dare we venture, perhaps any woman reading this story. President Kenyatta's *Marriage Act 2014* now officially allows men to marry as many women as they please, with no requirement or obligation to inform or consult their first (or second) wife in advance. The law does not give the same rights to women wishing to marry more than one husband, and removes women's existing right to veto their husband's latest choice. While polygamy was a traditional part of the culture of a number of African nations prior to European colonisation, its popularity has gradually declined, particularly, and unsurprisingly, among women.

Kenyan newspaper *The Daily Nation* reported that female MP Soipan Tuya protested in parliament: "We know that men are afraid of women's tongues more than anything else ... But, at the end of the day, if you are the man of the house, and you choose to bring on another party – and they may be two or three – I think it behoves you to be man enough to agree that your wife and family should know". Sounds reasonable to us! The few female parliamentarians of the Kenyan parliament staged a walk out in protest against the vote, and the Kenyan Federation of Female Lawyers said it will mount a legal challenge against the laws. ■

"We know that men are afraid of women's tongues more than anything else ... But at the end of the day, if you are the man of the house, and you choose to bring on another [wife] – and they may be two or three – I think it behoves you to be man enough to agree that your wife and family should know".

SOIPAN TUYA, KENYAN FEMALE MP

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