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LAW INSTITUTE JOURNAL

JAN/FEB 2024

QANTAS v TWU: UNFAIR DISMISSAL INTO THE FUTURE

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Victoria leads the way in Australia for will execution by video conference, allowing remote execution, with signing and witnessing parties all being in different locations.

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Adjunct Professor at the School of Law, La Trobe University.

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Dr Shuai Wang

Melbourne GP, specialising in cosmetic procedures.

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The Hon Marilyn Warren AC KC

Chief Justice of Victoria 2003-2017, Lieutenant Governor of Victoria 2006-2017 and judge of the Supreme Court of Victoria 1998-2003.

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Strength in diversity

The Victorian community's diversity of opinions and traditions is reflected in the legal profession.

I recently saw a video from the Diversity Council of Australia in which a group of primary school children were asked to draw a picture of a surgeon, a fighter pilot and a fire fighter. Overwhelmingly, the children drew men in these roles. Presumptions about gendered roles run deep, as do perceptions about culture, identity and values.

Our profession unfortunately suffers from this unconscious, and sometimes conscious, bias – it is unfortunately often depicted as a culturally monolithic bastion that is resistant to change, is aloof from our community, absent of deeply internalised values.

Of course, this perception is wrong.

The majority of Victorian practising lawyers are female (54.1 per cent according to the Victorian Legal Services Board and Commissioner's 2023 annual report), nearly one quarter were born overseas and come from 175 different cultural backgrounds.

The rich diversity in our community is reflected in the legal profession. So, too, is the rich diversity of opinions and traditions.

The profession is a big tent, in which individuals cohabit, guided by strong legal responsibilities and ethical duties to the courts, the rule of law and our clients. But we each bring personal values and experiences to the work we do. And that is part of the strong and diverse community that is the legal profession and our Victorian community.

We are entering 2024 with ongoing conflict internationally. I know that many are personally deeply affected by complex events, globally and domestically. Many hold strong views and are propelled to express these publicly and privately. In doing so, let's be mindful of how others may be impacted and show some extra empathy for those holding different views, and compassion for those around us.

My sense is that inclusivity in our community needs a helping hand, so that we can maintain the inclusiveness that is essential to our local cultural richness and harmony across our community.

Within the pages of this first edition for 2024, the diversity, values and tenacity of the profession are celebrated. There is a feature on a speech given by Professor the Hon Marilyn Warren AC KC in honour of Flos Greig, the first woman to study law in Victoria, the first to be admitted to practice (and only the second nationally), and the first female member of the LIV. She was a true ground-breaker and the ancestor of many extraordinary women who have overcome obstacles and unlocked doors to carve pathways for future generations.

There are also features on the impact of Australia's mutual assistance obligations, which put individuals at risk in criminal matters punishable by death in countries that retain capital punishment; the *Qantas v TWU* decision, which also continues to reverberate; and where botox fits, or doesn't, within the current regulatory regime.

I hope readers have had a terrific summer break and have returned fresh for what will be for all of us a big year. There are lots of opportunities over the year at the LIV to reconnect with colleagues, stretch your thinking and learn from experts in your field. There are lots of challenges we as a profession and a community face. Let's face them with courage and understanding.

I wish you all a happy and prosperous 2024 – the lunar year of the dragon. ■

Matthew Hibbins
LIV PRESIDENT *president@liv.asn.au* 𝕏*@LIVPresident*

DEVER'S LIST

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Unsolicited

Open justice in a virtual world

Congratulations on the December 2023 Administrative Law special edition. As Alexandra Lioudvigova observes in "After the storm: Post pandemic review and regulation," COVID-19 was a catalyst for immediate innovation at VCAT and in the justice system as a whole. VCAT's Review and Regulation and Legal Practice Lists were no strangers to this upheaval.

The lists' greatest challenge remains significant delays for compulsory conferences and hearings. Allocating hearing dates for freedom of information matters has been particularly problematic. VCAT is actively working to reduce backlogs, with the recent appointment of 20 new members and a number of other measures discussed below. Most of our new members have begun work in the Residential Tenancies List backlog program, but their arrival will soon see increasing capacity across other lists.

Another important measure is continuing the practice of the first directions hearing setting an administrative mention date by which the parties are to provide a tribunal book and seek a compulsory conference or hearing.

In preparation for a first directions hearing, we encourage parties to "self-manage" evidence collection where possible. Ms Lioudvigova observes that some self-represented parties may struggle with this, but our experience is otherwise. We believe this is primarily because discussions during the first directions hearing and notations in the orders provide guidance for those parties.

Further, the first administrative mention date is tailored to the time it will take parties to prepare a tribunal book. And we take repeated requests for extensions to the administrative mention dates as a sign that more intensive case management (such as a further directions hearing) may be required.

Sometimes, VCAT makes "on the papers" decisions, mostly with the parties' consent. VCAT decides if an on the papers measure will be fair and efficient or if a hearing is better suited to the case.

Most VCAT directions hearings, compulsory conferences and hearings are held by telephone or videoconference. As "After the storm" says, virtual hearings offer significant benefits. However, in-person hearings are increasing, at the request of a party or at VCAT's suggestion. It is clear that in-person hearings also have advantages. As one counsel said at a recent in-person hearing, "let's do this again sometime".

While technology can sometimes go wrong (as can in-person hearings), most virtual hearings proceed without a problem. And VCAT IT staff are available to resolve technical glitches if and when they do arise.

The article correctly identifies VCAT's challenges in providing open justice in a virtual world. However, it is likely that VCAT will continue to offer a range of in-person, hybrid and entirely remote hearings to best meet the diverse needs of our users, while also ensuring that VCAT continues to provide fair, efficient and affordable justice. ■

Judge Ted Woodward, VCAT President

LETTERS TO THE EDITOR

Email: edassist@liv.asn.au

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Meet our New Readers: Scott Smith and Andrew Theodore

Practice Areas

- Common Law
- Personal Injuries
- Transport Accident
- WorkCover
- Public Liability
- Insurance
- Occupational Health and Safety
- Institutional Abuse

Scott Smith

Scott practises in common law with a particular focus on personal injury. He accepts briefs for both plaintiffs and defendants and is available to appear in all metropolitan and regional courts.

Before coming to the Bar, Scott practised as an Associate at Maurice Blackburn Lawyers and also as a solicitor at the Transport Accident Commission (TAC). Prior to this, Scott was Senior Associate to Judge Philip Misso at the County Court of Victoria, providing support to his Honour while Head of the Common Law Division.

Scott holds Bachelor of Laws and Bachelor of Business degrees.

Scott is reading with Dugald McWilliams and his senior mentor is Maria Pilipasidis SC.

Practice Areas

- Common law
- Personal Injuries
- WorkCover
- Public Liability
- Transport Accident
- Medical Negligence
- Coronial Inquests
- Occupational Health and Safety
- Dust Diseases

Andrew Theodore

Andrew practises in personal injury law, representing both plaintiffs and defendants.

Prior to joining the Bar, Andrew practised as a Senior Associate in the Public Liability practice at Slater and Gordon Lawyers. Earlier, he was a solicitor at Lander & Rogers where he advised WorkSafe Victoria, as well as agents and employers in relation to serious injury and common law damages matters.

Andrew accepts briefs in common law and personal injury law including public liability, product liability, workers compensation, motor-vehicle/transport accidents, intentional torts, institutional abuse, inquests, and insurance related matters.

Andrew is reading with Adam Hill and his senior mentor is Fiona Ryan SC.

WHAT'SON

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CONFERENCES

National Costs Law Conference
Wednesday 28 February, 9am–5pm
LIV or online
(6 CPD units)

Personal Injury Conference
Wednesday 6 March, 9am–5pm
LIV or online
(6.5 CPD units)

CPD Intensive (commercial, criminal, family, property, succession and workplace relations law)
Tuesday 26 March, 8.30am–6pm
Grand Hyatt Melbourne
(Up to 12 CPD units – includes on demand content)

CPD Intensive Online (keynote and innovate sessions only)
Tuesday 26 March, 8.30am–6pm
Online
(Up to 12 CPD units – includes on demand content)

COURSES

External Examiners
Friday 15 March, 9am–5pm

LIV Practice Management Course
Wednesday 31 January, 7 & 14 February, 9am–5pm
Wednesday 6,13 & 20 March, 9am–5pm
Wednesday 1, 8 & 15 May, 9am–5pm
Wednesday 5, 12 & 19 June, 9am–5pm

NETWORKING

Accredited Specialisation: Information session
Monday 5 February, 5.30–7pm
LIV

REGIONAL & SUBURBAN FOCUS

Proactive Practice: Wangaratta
Friday 23 February, 9.30am–4.30pm
Quality Hotel Wangaratta
(5 CPD units)

SEMINARS & WORKSHOPS

Adapting for Tomorrow by Rebooting Your Business Strategy
Thursday 15 February, 1–2pm
(1 CPD unit)

Essential Skills
Tuesday 20 February, 9am–12.15pm
Wednesday 13 March, 9am–12.15pm
(3 CPD units)

Charity and Not-for-profit Law
Wednesday 21 February, 9am–12pm
LIV
(3 CPD units)

Bookkeepers Trust Recording Workshop
Thursday 22 February, 9am–12.15pm
Thursday 23 May, 9am–12.15pm
(3 CPD units)

MCV Courts and Programs CPD Series Bail: The 2023 reforms put into practice
Thursday 22 February, 4.30–5.30pm
(1 CPD unit)

Children's Law: Appealing matters to the Supreme Court
Thursday 29 February, 5–6.30pm
(1.5 CPD units)

LIV Library: Getting started with Lexis Red
Friday 1 March, 12.30–1.30pm
(0.5 CPD units)

Commercial Law: Complex matters in contract formation
Tuesday 5 March, 9–10.30am
(1.5 CPD units)

Breakfast with the Experts: Commercial litigation
Thursday 14 March, 9–10.30am
(1.5 CPD units)

Delegation Unveiled: A dynamic panel discussion
Thursday 21 March, 1–2pm
(1 CPD unit)

Practice Management Workshop: Supercharge your business plan
Monday 25 March, 1–5pm
LIV
(3.5 CPD units)

YOUNG LAWYERS

Wellbeing Matters: Adjust your thinking style for success
Thursday 8 February, 6–7.30pm
(1 CPD unit)

Ethics for Young Lawyers
Tuesday 27 February, 1–2pm
(1 CPD unit)

Student Meet 'n Mingle
Tuesday 12 March, 5.30–8pm
LIV

Career Spotlight Series
Wednesday 13 March, 1–2pm
Wednesday 15 May, 1–2pm

Your Future in the Law
Wednesday 20 March, 8–9.30am
LIV

How to Build a Professional Profile
Tuesday 16 April, 1–2pm

Clerkships and More
Tuesday 25 June, 1–2pm

NEW PRESIDENT READY FOR LIV TO SEIZE OPPORTUNITIES

2024 LIV PRESIDENT MATTHEW HIBBINS IS KEEN TO DRAW ON THE BROAD EXPERTISE OF THE LEGAL PROFESSION FOR THE BENEFIT OF THE COMMUNITY.

At university, the LIV's new president and Melbourne managing partner at MinterEllison, Matthew Hibbins had his eyes set on a very different career. He first studied archaeology.

His eyes were opened to a career in the law as he was researching and writing his honours thesis that explored native title and the extent to which the Indigenous relationship with the land was then limited by Australian law, he says.

During his law degree, he contemplated a future as a barrister, but his path was again diverted when, in his final rotation doing articles at Gadens Lawyers, he was required to work in the corporate team.

Through this experience, and subsequently more than 20 years of experience locally and overseas, he says he "ended up finding a love of corporate mergers and acquisitions" and his area of expertise is in domestic and cross-border company transactions.

"I find it to be an incredibly creative part of the law. With some commercial acumen and a practical approach, you help clients meet their commercial objectives, and in doing so you are exposed to a great number of passionate and talented people across a broad range of sectors in the economy. You might be working on a sale or purchase of a transport and logistics business one day, on an investment in wind farms and renewable energy the next, or in the sale of tuna farms off the coast of the Mediterranean on another day."

Within five years of starting at Gadens Mr Hibbins became a partner, and then moved to MinterEllison in Hong Kong. "It was an exciting time. It was just before the GFC [global financial crisis] and the market was booming."

M&A activity fell sharply globally immediately post GFC, but Hong Kong, and Asia generally, turned out to be relatively shielded from the GFC fallout, with investment activity quickly bouncing back in the region from restructuring transactions generated by the crisis and

LIV president Matthew Hibbins

PHOTOS: JESSE SPEZZA – BECKON MEDIA T/A TRANSCEND MEDIA

the increasingly important role of emerging markets like China in the global M&A market.

Mr Hibbins returned to MinterEllison in Australia in 2010, where he continued to advise on cross-border M&A, mostly out of Asia, and domestic M&A, for a broad range of clients.

In 2019 he put up his hand for the Melbourne managing partner role at MinterEllison, and within six months of taking that up he found himself as part of a leadership team navigating his office through two years of lockdowns.

"That was a pretty challenging time," he says. "It was a real learning experience for anyone in leadership to understand how to work with people and maintain their resilience, learn the importance of empathy and being authentic in engaging your teams, and how to adapt to whatever was thrown at you."

He says that during COVID-19 he could see very acutely the value of the LIV as it helped the profession navigate its way through the various lockdown restrictions and requirements. "I saw how the LIV was effectively advocating and engaging with important stakeholders on behalf of the profession and the community.

"I realised I wanted to be more involved in the strategy of the LIV, and in doing so, working as part of a dedicated team to meet the challenges and seize the opportunities necessary to achieve the shared objectives of our community, and to shape its future growth and prosperity."

Immediately after he joined the board, the LIV entered a governance restructure, which would eventually see the council of 19 reduced to nine member directors and three non-member directors.

"The restructure has been really positive. We've brought some really fantastic people onto the board, including some non-lawyer directors who bring great skills and experience and insights from outside the law. That has really assisted in the board's conversations around strategy and oversight."

Mr Hibbins says the board is keen to build on the LIV's education services, including the PLT program launched last year, that have cemented the LIV's historical role of ensuring high standards of education and excellence for the state's solicitors. "I think there is more we can do to build on that learning journey for our members."

Recognising the work that the LIV's sections and committees do, he also sees the necessity for the LIV to continually rethink how it feeds into and positions its public policy ideas in tough economic climates to get the attention and action of governments and decision makers to benefit the Victorian community and economy. "There are currently challenges being faced by the Victorian economy and the community that the LIV is well equipped with its extensive resources of membership and specialists to help solve.

"The LIV is recognised for being a leader, not just in the administration of justice, but also in engaging in really important conversations that we need to have around public policy for the benefit of the community as a whole." He says that the LIV needs to make sure we are always drawing on broad expertise across the profession, and he encourages members to get involved in the LIV's advocacy work "to bear on some of the most pressing problems that our economy and community face, to see how we can work constructively with all stakeholders to improve them.

"We can do that in a constructive way rather than agitating on the side, as part of a coordinated discussion between ourselves, other like-minded organisations and government."

The LIV is also well placed to assist members with what he describes as the "looming spectre" of anti-money laundering legislation (AML), he says. "The LIV needs to be ready to support the profession to work through the introduction of AML if and when it happens."

He is optimistic about the benefits of technology to the profession, including AI (artificial intelligence), which he says is often focused on in terms of how it might be detrimental to the profession. "I personally think there are exciting opportunities that need to be explored through early experimentation and greater knowledge.

"I think there's a responsibility for all members of our profession to learn more so we can fully embrace the benefits of technology in the future of this profession," he says.

With its long history in education and training, Mr Hibbins believes the LIV has a role to play in assisting members to engage with technology to see how it might be usefully employed for the benefit of clients and working experience.

Mental health and wellbeing is an ongoing issue facing the profession, he acknowledges, and he has particular concerns around younger lawyers, many of whom missed out on mentoring and in-person training during the pandemic years.

Echoing Chief Justice Anne Ferguson's reminder to the profession at the LIV's Essential Briefing last year to take an active role in inspiring and engaging new lawyers, he says it is important that the profession ensures younger lawyers are getting the right training and mentoring to gain the skills more senior lawyers take for granted, particularly in our hybrid working environment.

"There are opportunities to assist and work with our members and with the judiciary to see how we can actually improve experiences for our people."

Engaging with the community more broadly is an important aspiration for all lawyers, Mr Hibbins says. "We're very fortunate to occupy the positions we do. But through that position there is a real opportunity for each of us to engage in many more opportunities for the benefit of the community."

Alongside his continuing role as Melbourne managing partner at MinterEllison and on the LIV board, Mr Hibbins is on the board of the Law Council of Australia, the Committee for Melbourne and the Peter and Lyndy White Foundation, a Melbourne philanthropic foundation focused on alleviating homelessness and assisting the lives of the disadvantaged. ■

"There are opportunities to assist and work with our members and with the judiciary to . . . improve experiences for our people."

MEET THE LIV BOARD 2024

Matthew Hibbins

President

A partner at MinterEllison, I am an experienced corporate and mergers & acquisitions lawyer with a successful track record of providing counsel to organisations throughout Australia and Asia over two decades. As LIV president, I am committed to making a meaningful impact and driving positive change. The LIV must play a leading role in advocacy and initiatives to maintain relevance and services to members and member organisations; to support member development and wellbeing; and to encourage greater fairness, inclusion and respect. I will collaborate on how we meet these aims and shape a better future for our members, profession and communities.

Tom Ballantyne

Deputy president

I started at Maurice Blackburn in 2006 and now lead the Victorian medical law practice. In addition to expertise in common law litigation, I have leadership and practice management experience, and significant experience in legal policy and advocacy. I contributed to recent LIV governance reforms as chair of the Governance Working Group.

The next decade will be one of immense change and opportunity for the legal profession, particularly in terms of access to justice, technology and changing demographics, and the LIV must be ready to advocate for our members.

Louisa Gibbs

Deputy president

I am the CEO of the Federation of Community Legal Centres, which is the peak body for Victoria's 47 community legal centres (CLCs) and Aboriginal legal services. For more than 50 years, CLCs have provided free, quality legal advice and representation for those living with disadvantage, and informed law and policy reform. Admitted in 2000, my work experience includes roles in community legal, private and government practice both here and overseas. I serve as one of the deputy presidents of the LIV and chair of the Audit and Risk Committee.

PHOTOS: JESSE SPEZZA – BECKON MEDIA T/A TRANSCEND MEDIA

LIV board

Molina Asthana

Member director

My previous Australian experience was as principal solicitor with the Victorian Government Solicitor's Office and with MinterEllison and Clayton Utz. I also have significant experience of practice in India. I am the national president of the Asian Australian Lawyers Association and serve on various other boards. I will continue to advocate for the interests of sole and small practitioners, for greater cultural diversity in the legal profession, access to justice for vulnerable communities and for addressing the culture of sexism in the profession.

Robin Buckham

Non-member director

I honed my leadership skills as general manager, Oil and Gas Pipelines at Tubemakers. I subsequently worked at the University of Wollongong, then as deputy vice-chancellor (International and Development) at Deakin University, establishing marketing, student services, external relations functions and consolidating market leadership. I am a professional director, with appointments as chair of Gippsland Ports, member of the Southern Metropolitan Cemeteries Trust, and director of Australian Rice Growers and Albert Park South Melbourne Rowing Club. My interests include high quality membership services, especially in innovative education, rowing and travel.

Simon Hann

Non-member director

I have a track record of successfully using technology to transform businesses across sectors including professional services, my edTech start-up, ASX-listed company, university and a professional membership body. I am passionate about the impact of AI, technology and other disruptors on the future of work and how organisations/professions support people to navigate these with capability development and tools to remain relevant, adapt and prosper. I started my career as a solicitor and enjoy working with the LIV, ensuring members have high quality professional development opportunities to remain relevant and succeed.

Lena Hung

Member director

I am an LIV accredited specialist in immigration law and was admitted in 2004. Having chaired the LIV Administrative Law and Human Rights Section, the Migration Law Committee and various LIV working groups, I have extensive experience in setting policies and practices, and advocating for the interests of members and the broader legal profession. I hope to improve educational initiatives offered by the LIV, strengthen advocacy efforts with industry stakeholders and facilitate greater engagement and satisfaction of LIV members through my involvement in steering the LIV's future direction and governance.

Rodd Levy

Member director

I am a mergers and acquisitions partner at Herbert Smith Freehills, with expertise in public company takeovers. A partner at the firm for more than 30 years, I experience first-hand the pressures on Victorian solicitors as the nature of legal practice and the demand for legal services evolves. I aim to ensure that the LIV helps Victorian solicitors develop sustainable careers and provides value to its members. I believe the larger firms should be more involved in the LIV and regard the LIV as a partner. I would love to hear from LIV members.

Michael Liu

Non-member director

I am delighted to continue to serve as a non-member director of the LIV. I have maintained close ties with the legal profession for almost 30 years, starting as a lawyer before joining the investment banking industry. I am interested in business growth strategies and digital enablement and transformation. I believe in the strength and collegiality of member-based organisations, and also serve as a non-executive director on several boards, including member-owned organisations BankVic, Foresters Financial and Defence Health. I look forward to continuing to serve, and advocate for, LIV members.

Juliana Smith

Member director
Regional practitioner

I have practised in regional Victoria since 2007, establishing my own practice in 2012 focusing primarily on the areas of family law, criminal law and family violence. From a rural farming background, I am passionate about regional Victorian law associations. I was Bendigo Law Association president for four years, and represent the LIV on the Supreme Court Library Committee and the Law Council of Australia Regional, Remote and Rural Lawyers Committee. I hold an LLB, GDLP and a Master of Laws from the University of Melbourne along with a Bachelor of Nursing.

Kathy Wilson

Member director
Suburban practitioner

An LIV accredited specialist in wills and estates with extensive experience in CBD and suburban law firms, I have been an active member of LIV committees for many years and appreciate the challenges facing members. I have considerable company director experience, including as chair of board committees in finance, audit and risk, governance and nominations and remuneration, and bring that experience to the LIV board. I am committed to building a strong LIV with good governance which strives to support and advocate for the profession and the rule of law.

Tania Wolff

Member director

My legal experience encompasses commercial law, in-house counsel roles, criminal law and as a member of the Victorian Civil and Administrative Tribunal and a sessional legal member of the Mental Health Tribunal. An LIV accredited specialist in criminal law since 2014, I lead a unique health justice partnership working in health and housing service settings. I am committed to compassionate and trauma-informed legal practice to support marginalised and vulnerable people in our community and advocate for increased focus on mental health and wellbeing, improving access to justice and advancing therapeutic jurisprudence initiatives.

Directors may be contacted through the Company Secretariat by email at secretariat@liv.asn.au or telephone 03 9607 9513. ■

Unfair dismissal: Into the future

IN QANTAS V TWU THE HIGH COURT CONFIRMED THAT IF AN EMPLOYEE IS DISMISSED TO PREVENT THEIR EXERCISE OF A FUTURE WORKPLACE RIGHT, THE EMPLOYER WILL HAVE CONTRAVENED THE GENERAL PROTECTIONS PROVISIONS OF THE FAIR WORK ACT. BY JAMES FRANCIS

Introduction

The minimum employment period under the *Fair Work Act 2009* (Cth) (FW Act) is well understood, at least by employment lawyers. This is the initial jurisdictional hurdle (of a few)[1] that must be cleared by an employee seeking to make an unfair dismissal claim. Unless an employee has been employed for at least the minimum employment period,[2] the employee is not protected from unfair dismissal[3] and will be unable to make an unfair dismissal claim in the Fair Work Commission (FWC). The minimum employment period operates, in effect, as a probationary period during which an employer can assess the performance of the new employee and, if necessary, terminate their employment without the risk of facing unfair dismissal proceedings.

The minimum employment period is a strict jurisdictional bar. In a recent case, an employer terminated an employee a matter of hours before the expiration of the minimum employment period. The FWC determined that the jurisdictional bar meant that the employee was not protected from unfair dismissal at the time of the termination of his employment, and the application was dismissed.[4]

As the end of the minimum employment period approaches, the impending right of an employee to make an unfair dismissal claim can loom large in the mind of employers and, commonly, decisions in relation to underperforming employees are taken swiftly to ensure that termination of employment is effected prior to the emergence of the employee's right to make that unfair dismissal claim. It has generally been considered that this approach is of minimal risk to the employer, provided the dismissal is not for a prohibited reason within the meaning of Pt 3-1 of the Act.

But, as is examined below, such a dismissal may, of itself, be for a prohibited reason in breach of s340(1)(b) of the FW Act, especially having regard to the recent decision of the High Court in *Qantas Airways Limited v Transport Workers' Union of Australia* [2023] HCA 27 (*Qantas*). While this case did not concern an unfair dismissal claim or the question of the minimum employment period, the Court's findings might nevertheless embolden employees to commence general protections proceedings where they find they are terminated prior to the expiration of the minimum employment period and are unable to commence unfair dismissal proceedings.

Transport Workers' Union v Qantas Airways

But first, a brief look at the matter at first instance in the Federal Court – *Transport Workers' Union of Australia v Qantas Airways Limited* [2021] FCA 873. This was a general protections dispute under Pt 3-1 of the FW Act in which the Transport Workers Union (TWU) alleged Qantas Airways Ltd (Qantas) had taken adverse action against its employees to prevent them from exercising a workplace right in contravention of s340(1)(b) of the FW Act. The relevant adverse action taken by Qantas was the termination

SNAPSHOT

- Under the FW Act, an employee must be employed for at least the "minimum employment period" in order to be able to make an unfair dismissal claim, but no such limitation exists for a general protections claim made by an employee alleging dismissal for a prohibited reason, including because of or to prevent the exercise of a workplace right by the employee.
- The High Court has confirmed in *Qantas v TWU* [2023] HCA 27 that even if an employee does not hold a workplace right at the time they are dismissed, if the employee is dismissed to prevent their exercise of that right at a time in the future when the employee will hold it, the employer will have contravened the general protections provisions of the FW Act.
- This means that where an employer terminates an employee prior to the expiration of the minimum employment period to avoid the employee being able to make an unfair dismissal claim, the employer will likely be in breach of the general provisions of the FW Act.

of the employees' employment by reason of redundancy. The relevant workplace right in issue was the employees' ability to take industrial action at a time in the future.

Lee J found that Qantas had breached s340(1)(b) of the FW Act by making employees redundant for reasons including their future ability to take industrial action.[5] This decision was upheld on appeal by Qantas to the Full Court of the Federal Court.[6]

Section 340 provides:

340 Protection

(1) A person must not take adverse action against another person:
  (a) because the other person:
    (i) has a workplace right; or
    (ii) has, or has not, exercised a workplace right; or
    (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
  (b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A person must not take adverse action against another person (the second person) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

The operation of this section is supported by s360, which provides that a person takes action for a particular reason if the reasons for the action include that reason, and by s361, which provides:

361 Reason for action to be presumed unless proved otherwise

(1) If:
  (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
  (b) taking that action for that reason or with that intent would constitute a contravention of this Part;
  (c) it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

The effect of s361 is that the employer bears an onus to prove on the balance of probabilities that it did not take the relevant adverse action for reasons including a prohibited reason. If it does not do so, it will be presumed by a court that the employer took the adverse action for that prohibited reason.

This is the issue that Qantas had before the Federal Court at first instance. While Qantas had sound business reasons for making the relevant employees redundant, it did not satisfy the Federal Court that its reasons for doing so did not include the substantial and operative (and prohibited) reason that it wanted to prevent the employees from taking industrial action (a workplace right) in the future at a time when they would be able to.[7] This meant that Qantas was presumed by the Court to have taken the adverse action for the prohibited reason.

ADOBE STOCK

Qantas Airways v Transport Workers Union of Australia

Qantas' ultimate argument in the High Court was that s340(1)(b) only "bites" (to use the terminology employed by the High Court)[8] when a workplace right is in existence at the time the adverse action was taken. Here, Qantas said that the adverse action (the redundancies) could not have been taken to prevent the exercise of the workplace right (the ability to take industrial action) because the relevant workplace right had not yet accrued to the relevant employees.

The High Court, upholding the findings of the courts below, said this was wrong, and confirmed that a person who takes adverse action against another person for reasons including the substantial and operative reason of preventing the exercise of a workplace right by the other person contravenes s340(1)(b), whether or not the workplace right is held by the person at the time the adverse action is taken.[9]

While this case did not concern unfair dismissal, the Court did advert to the extent to which this finding might bear on unfair dismissal matters. At [55], the plurality of the Court opined (in consideration of arguments raised by Qantas as to s340 and the broader context of the FW Act, including as to unfair dismissal):

"As to the unfair dismissal provisions, it is not self-evident that the balance struck in Part 3-2 is independent of other parts of the Act. Parts 3-1 and 3-2 serve different purposes and are attended by different legal tests. By including dismissal of an employee within the scope of adverse action, Parliament has made a policy choice that forms part of the balance struck by Pt 3.2".[10]

It is difficult to read this as anything other than the Court saying that the balance struck by the unfair dismissal provisions (that is, the balance between the rights of the employee and the employer) is not independent of the legislative position that a dismissal is adverse action.

The minimum employment period, as the first hurdle that must be cleared by an employee when seeking to make an unfair dismissal claim, is at the heart of the balance between the rights of the employer and the employee. It balances the employer's commercial need to be able to assess a new employee against the ability of an employee to bring unfair dismissal proceedings easily and simply. The policy rationale behind it is clear – fairness as between employer and employee.

Application of general protections provisions to dismissals prior to the expiration of the minimum employment period

Section 341 of the FW Act provides (among other things) that a person has a workplace right if the person is entitled to the benefit of a workplace law. Having the protection from unfair dismissal as set out in s382 of the FW Act is an entitlement to the benefit of a workplace law.

An employee still serving their minimum employment period does not, however, have the benefit of s382 – that protection is contingent on the completion of the minimum employment period. It is a future workplace right.

In *Qantas*, the High Court has clearly found that a person is prohibited from taking adverse action against another person if a substantial and operative reason for the action is to prevent the other person from exercising a presently held or future workplace right.

This means that if an employer terminates an employee during the minimum employment period for reasons including the substantial and operative reason of preventing the employee from exercising the future workplace right to make an unfair dismissal claim, the employer will likely have contravened s340(1)(b).

The rationale for this can be explained if the minimum employment period is seen truly as a period in which the employer is assessing the employee's suitability for the role. Employment and human resources professionals are aware that an employee who is dismissed before they acquire unfair dismissal rights still has access to general protections or anti-discrimination laws. Mid-probation performance reviews are therefore common, to not only assist in performance improvement, but also to document any performance issues which can help to justify a termination prior to the expiry of the minimum employment period. A termination purely due to the employee being unsuitable for the role will not fall foul of s340(1)(b). While such a termination would be adverse action, it would not offend s340(1) if it was taken with "mere awareness" of its effect on the employee's workplace rights.[11] However, if an employee's employment is terminated where one of the substantial and operative reasons for doing so is to avoid an unfair dismissal claim (as opposed to a situation where the employer is merely aware that this will be a practical outcome of the termination), then there is some risk that a general protections claim alleging breach of s340(1)(b) would be successful.

Practical consequences

The High Court's decision in *Qantas* is a timely reminder that employers – and their advisers (while not covered in this article, the accessorial liability provisions of the FW Act can apply to advisers too)[12] – must be mindful that any decision to terminate an employee during the minimum employment period must be made for lawful reasons.

It may be prudent to consider the following matters when weighing up termination of employment:

- The risks of waiting until the last minute to terminate. Consider the optics from a court's perspective if it might appear that the termination process has been rushed to take advantage of a rapidly expiring minimum employment period.
- Engaging in regular monitoring of the new employee's performance during the minimum employment period, with feedback where necessary. Not only is it good practice and may lead to improved performance (and ultimately no need for dismissal), but if termination is ultimately necessary, evidence of feedback and monitoring will provide a defensible paper trail which forms the basis of the reasoning for a valid and lawful termination in the event an employee brings a claim alleging their dismissal was in breach of s340(1)(b). Where performance issues during probation are documented (for example, during a mid-probation review) it will be much easier for an employer to prove that a decision to terminate at the

conclusion of the minimum employment period was because the employee was unsuitable for ongoing employment.
- Ensuring that any discussions or communications with human resources advisers (including in-house) regarding any potential termination of employment are made by reference to the employee's performance and why it has been unsatisfactory, rather than by reference to seeking to avoid an unfair dismissal claim.

Conclusion

Qantas clearly establishes that employers must be mindful of the future exercise of workplace rights by employees, even where those rights do not yet exist. During the minimum employment period, the ability of an employee to make an unfair dismissal claim is, while not yet a right in existence, a future workplace right, protected under s340(1)(b) of the FW Act. It is, therefore, essential that the substantial and operative reasons for termination are valid, defensible and lawful – the minimum employment period is not the "get out of jail (FWC) free" card, as it may previously have been viewed. ■

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1. *FW Act*, s382
2. For employers that employ 15 or more employees the minimum employment period is six months, and for employers with fewer than 15 employees (small business employers), the minimum employment period is 12 months
3. Note 1 above
4. *Mr Lee Sherman v NYK Forklift Services* [2021] FWC 4148 (14 July 2021)
5. *Transport Workers' Union of Australia v Qantas Airways Ltd* [2021] FCA 873 (30 July 2021). The employees were, at the time of the adverse action, not legally entitled to take the industrial action due to, for one group of employees, an enterprise agreement not yet having passed its nominal expiry date, and for another group of employees, not yet having participated in a protected action ballot
6. *Qantas Airways Ltd v Transport Workers' Union of Australia* [2022] FCAFC 71 (4 May 2022)
7. Note 5 above, at [288]
8. *Qantas Airways Limited v Transport Workers' Union of Australia* [2023] HCA 27 (13 September 2023), at [5]
9. Note 8 above, at [6]
10. Note 8 above, at [55]. Part 3-1 of the Act concerns general protections claims, and Part 3-2 concerns unfair dismissal
11. Note 8 above, at [41]
12. FW Act, s550. See also *Ezy Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134

Mutual assistance: A threat to life?

DESPITE THE WHOLE OF GOVERNMENT COMMITMENT TO OPPOSE THE DEATH PENALTY FOR ALL, AUSTRALIA'S MUTUAL ASSISTANCE OBLIGATIONS PUT INDIVIDUALS AT RISK IN CRIMINAL MATTERS PUNISHABLE BY DEATH IN RETENTIONIST COUNTRIES. BY SAMIRA LINDSEY AND SIMONE ABEL

ADOBE STOCK

Government-to-government or formal assistance is administered under the *Mutual Assistance Criminal Matters Act 1987* (Cth) (Mutual Assistance Act). Police-to-police or informal assistance may be given in accordance with the *National Guideline on International Police-to-Police Assistance in Death Penalty Situations 2009* (Guideline) of the Australian Federal Police (AFP). The information provided may assist in the apprehension, prosecution and conviction of individuals who are detained in countries that retain the death penalty,[1] even if this leads to their execution. Statistics indicate that by 2015 the AFP had routinely offered such assistance, placing 1800 individuals at risk of the death penalty.[2] This is despite the "whole of government commitment" to actively oppose the death penalty, Australia's continued support of abolition, its proximity to retentionist states,[3] and the history of Australians on death row (some of whom have been executed) across Southeast Asia.[4] We contend that this is not an intended result, rather, that lives are made vulnerable because Australia's information sharing framework lacks prescriptiveness and adequate safeguards. The regulatory task is made more difficult with the proliferation of legislation enabling an individual's telecommunications data to be shared.

Australia's mutual assistance obligations

In Australia, information sharing in criminal matters is regulated in two ways. First, formal requests for assistance by governments of other countries are administered by the Australian Attorney-General's Department under the Mutual Assistance Act. This can be understood as government-to-government assistance. Second, informal assistance in the absence of such a request is provided under the AFP's Guideline. This is known generally as police-to-police assistance.

Both mechanisms undermine Australia's whole of government strategy, devised in 2018 by the Department of Foreign Affairs & Trade (Strategy), whereby the Executive committed to "oppos[ing] the death penalty in all circumstances for all people".[5] Under the Strategy, the government must demonstrate an absolute, not a selective, commitment to opposing capital punishment,[6] consistent with its commitments to prohibitions on executions and torture under international law.[7]

The introduction of the Strategy demonstrates Australia's continued commitment to opposing human rights abuses, including capital punishment. In 1972, Australia signed the *International Covenant on Civil and Political Rights* (ICCPR) which expressly recognises the right to life.[8] The death penalty was abolished in Australia one year later. In 1990, it ratified the Second Optional Protocol to the ICCPR which seeks to impose an "international commitment to abolish the death penalty" on its members.[9]

Formal assistance

Under s8(1A) of the Mutual Assistance Act, a request for assistance *must* be refused if it pertains to individuals charged, convicted or arrested overseas in connection with offences punishable by death.[10] However, the Attorney-General may exercise discretion to allow assistance in "special circumstances".[11] This phrase is not defined by the Mutual Assistance Act and there is limited guidance to assist the Attorney-General in determining whether "special circumstances" have arisen in any given case. The explanatory memorandum to the Mutual Assistance Act suggests that the discretion should be limited to the provision of information comprising exculpatory evidence, or where assurances have been given that the death penalty will *not* be sought or imposed.[12] These limitations are not, however, imposed by the statute itself.

Under s8(1B), it is *not* mandatory to refuse assistance where the request relates to individuals who have not been charged or convicted. This is concerning as assistance given this early in the criminal process can be detrimental, particularly in countries where fair trial rights are not guaranteed.[13] The request may only be refused if the Attorney-General is satisfied that the death penalty may be imposed and is of the opinion that, in the circumstances of the case and having considered the interests of international criminal cooperation, the request should not be granted. Short of the mandatory death penalty, one can readily foresee the possibility of compliance with a request where a subsequent conviction may result in a death sentence.

SNAPSHOT

- States may face competing obligations under international law that cannot be fulfilled simultaneously.
- While the Australian government has committed to actively opposing the death penalty for all persons, its mutual assistance obligations in criminal matters may place individuals at risk.
- Currently, information may be given lawfully by Australian law enforcement agencies to their foreign counterparts, furthering international cooperation.

Informal assistance

Greater concern lies with the Guideline, a non-binding and aspirational policy document that applies where a request is made outside the parameters of the Mutual Assistance Act or where information is otherwise volunteered.[14] In 1979, legislation was enacted which permitted the AFP to share information with foreign counterparts.[15] In 1993, the AFP published a "practical guide" regarding police-to-police assistance in "death penalty situations". This was replaced in 2009 with the Guideline, which continues to apply. Unlike its predecessor, the Guideline requires the AFP to exercise caution when providing assistance in cases involving death eligible offences.[16] Even so, the protections for those at risk of being subjected to capital punishment are few.

On 17 April 2005, nine Australians were arrested in Indonesia in connection with narcotics offences. The arrests were prompted by the AFP who had "tipped off" the Indonesian police about an impending scheme to smuggle 8kg of heroin from Australia to Bali.[17] Under Indonesian law, drug-trafficking is punishable by death.[18] In 2015, two of the so-called "Bali Nine", Myuran Sukumaran and Andrew Chan, were executed. The information given by the AFP was shared in circumstances where the Australians had not yet been charged and prior to their arrival in the country. It is not clear that Indonesia gave any assurances that the death penalty would not be sought or imposed.

Several members of the Bali Nine later sought judicial review of the AFP's decision to provide mutual assistance. In *Rush v Commissioner of Police*[19] the Federal Court of Australia dismissed the claim finding that the AFP's decision was lawful.[20] The Court

also rejected the submission that Australians have a substantive legitimate expectation that the Executive will not expose them to the death penalty,[21] particularly given that the provisions of international instruments such as the ICCPR and the Second Optional Protocol do not operate to confer rights or impose duties on members of the Australian community.

Three years after the judgment, the AFP introduced the Guideline. The Guideline requires the AFP to consider the extent to which providing mutual assistance to an agency of a retentionist country will directly result in a death sentence.[22] However, mere consideration is all that is required. The AFP may still provide assistance, even though the risk of capital punishment may be high and/or there are no assurances that the death penalty will not be sought. The AFP is not required to seek external expert guidance despite the complexity of the foreign legal systems which they are navigating.

The Bali Nine case demonstrates that it remains possible for police-to-police cooperation to continue unregulated, notwithstanding the protections purportedly contained in the Guideline (or its precursor), Australia's international obligations and its abolitionist position. That is a risk that is not ameliorated by the introduction of the Guideline. Indeed, a failure to absolutely prohibit mutual assistance in instances where the death penalty may eventuate exposes individuals to an avoidable risk of execution, particularly if the assistance is incriminating rather than exculpatory. In this respect, it must be queried why information would be given to enable the apprehension of a citizen of the assisting country, in circumstances where there is a prospect of that individual's right to life being violated. Between 2009 and 2010, the AFP refused to provide mutual assistance in response to just three of 58 informal requests for assistance made by foreign law enforcement agencies in death penalty cases. However, in 2011, the AFP granted all 40 requests.[23] This data does not include situations where the AFP volunteered information in the absence of any request. The AFP's annual reports for the previous four financial years have not contained data about the number of requests for mutual assistance received by it. However, it is clear that the AFP continues to provide international police-to-police assistance,[24] with the only safeguard being the Guideline's requirement for "consideration".

Abolition, but is it absolute?

The Strategy calls for absolute prohibition of the death penalty for three reasons. First, the death penalty is irrevocable and may be implemented in circumstances where there has been a denial of due process. Second, there is no evidence that the death penalty is more effective than long-term imprisonment. Third, the death penalty affects disadvantaged groups disproportionately.

The resoluteness of the Strategy is, however, complicated by Australia's position which has wavered over time.[25] One need only chart the developments since abolition in 1973 to gauge the confusion and oscillation of Australia's commitment to abolition.[26] Some abolitionist momentum was lost with the failure to act on the recommendations of the Australian Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade, following its inquiry into Australia's advocacy for the abolition of the death penalty.

On tabling its report in 2016, the Committee made three recommendations. First, the government should review the Mutual Assistance Act to ensure greater consistency with Australia's commitment to the ICCPR and the Second Optional Protocol. The Attorney-General conducted this review but found that no changes were required.[27] Second, where information sharing involves death-eligible offences, the AFP should obtain guarantees from prosecutors that capital punishment will not be sought. This was rejected by the government. Third, the Guideline must be reviewed to better address the risk of death sentences being imposed following international cooperation.

In response, the Commissioner of the AFP released an amended Guideline, which stated that it had been updated to reflect the Committee's recommendations.[28] The primary amendment was the introduction of a "death penalty request" process by which individual members of the AFP would conduct an assessment, taking into account prescribed factors of the risk that provision of the assistance sought would place on a person at risk of facing, or being subjected to, the death penalty.[29] Relevantly, the factors are not limited to the risk of execution for the individual. They include, for example, the nature of the AFP's relationship with the requesting agency and "Australia's interest in promoting and securing cooperation". Where a request falls in the "high risk category", it is not mandatory for the AFP to refuse the assistance. Even where the provision of assistance is approved, there is no requirement that the AFP obtain any assurances from the requesting agency that the death penalty will not be sought or imposed.

These developments reflect some unwillingness to implement reform that would appropriately limit Australia's mutual legal assistance obligations, in turn undermining the Strategy.

Telecommunications legislation: a new threat?

The Strategy faces a new challenge with the *Telecommunications Legislation Amendment (International Production Orders) Act 2021* (Cth) (IPO Act) which commenced on 24 July 2021.[30]

The IPO Act amended existing legislation by introducing a framework enabling Australian government agencies to obtain access to a person's telecommunications data via an "international production order" issued to service providers overseas.[31] These service providers include mobile networks, data storage providers and message and call applications (eg, Zoom and WhatsApp). Foreign authorities have a similar power in respect of Australian-based providers. The IPO Act allows for exemptions from Australian laws which would otherwise prevent the release of this information.

One can scarcely deny that the IPO Act intends to be compatible with human rights,[32] or that regulating international criminal investigations is complex. However, two issues remain.

First, as advocates have noted, the IPO Act furthers the goal of cooperation through mutual assistance without due regard to the risks faced by individuals.[33] Parliament intended that the amendments implemented via the IPO Act would "not derogate from the mutual legal assistance processes" which continue to apply.[34] However, it is foreseeable that otherwise protected telecommunications data may be obtained under this framework by foreign authorities and used to facilitate the prosecution of

criminal offences abroad including those punishable by death. Moreover, the IPO Act broadens the categories of information that can be shared.

Second, the amendments cannot be easily reconciled with the Australian Privacy Principles (APP), a set of principles guiding the lawful use of personal information of individuals by the Australian government or its agencies.[35]

Principle 6.1 of the APP requires an individual's consent to the sharing of their information for a particular use. It is not likely that an individual would consent to their information being shared to enable a conviction against them, particularly where the sentence may carry the death penalty. Principle 8.1 requires the entity providing the information to take reasonable steps to ensure the "overseas recipient" adheres to the APP. This seems impractical given that an Australian agency could not reasonably dictate the exercise of power by a foreign agency, particularly if it operates within a "weak governance zone" lacking substantive rule of law.[36] In any case, there will be no need to comply with the APP if the information sharing is permitted by the Mutual Assistance Act or the IPO Act. This is because the APP will not apply to disclosures of information otherwise permitted or required by an Australian law or an international agreement.[37] Information sharing will not be subject to the APP provided the AFP satisfies itself that the disclosure is "reasonably necessary" for an "enforcement related activity" and the requesting agency has law enforcement functions and powers.[38] Critically, the terms "reasonable" and "reasonably" are not defined by the APP. According to the Office of the Australian Information Commissioner, it is the responsibility of the party seeking to share information to justify that its conduct was reasonable, which is to be assessed objectively.[39] At a minimum, "it would not be sufficient if the collection, use or disclosure is merely helpful, desirable or convenient". In the absence of any other guidance, it is apparent that the decision-maker has a wide discretion under the APP in determining whether to give assistance for a law enforcement purpose. While it may be in the public interest to pursue a citizen offshore, it is difficult to see how this could outweigh that person's right to life where the country receiving the assistance retains the death penalty.

Under the IPO Act, an international production order may only be issued to a service provider located in a country with which Australia has a "designated international agreement". Currently, there are no such agreements. However, the *Australia-US CLOUD Act Agreement* (Agreement)[40] was entered into on 15 December 2021. It is anticipated that this will be the first agreement designated under the IPO Act, although we note that the Agreement has not yet been formalised as domestic law (albeit this was expected to occur in late 2022).[41] The imminent adoption of the Agreement is concerning as the risk of avoidable executions is unduly significant given that the US still retains the death penalty in 27 of its 50 states[42] and has executed foreign nationals despite their governments' efforts to prevent their deaths.

Under the Agreement, an Australian agency that receives a request from an American counterpart must review the international production order to ensure compliance with the Agreement.[43] There is no equivalent provision in the Mutual Assistance Act or the Guideline. Article 9(4) of the Agreement purports to introduce safeguards "relating to the use of Australian-sourced data in prosecutions that could result in the death penalty". The same safeguards are also applied where there are concerns that "the use of American-sourced data . . . could raise freedom of speech concerns for the US". Effectively, this provision equates the right to life with the right to freedom of speech. Moreover, article 9(4) is somewhat artificial given that the IPO Act lacks any adequate safeguard itself.

The risks posed by the IPO Act and, in turn, the Agreement are real. Recent litigation in the UK highlights the need to ensure that information sharing legislation does not unduly expose individuals to capital punishment. In the UK, mutual legal assistance in criminal matters may be given by authorities in accordance with guidelines issued by the British Home Office in 2011.[44] Part 1 of the guidelines defines mutual legal assistance as "a method of cooperation between States for obtaining assistance in the investigation or prosecution of criminal offences". The guidelines contemplate police-to-police cooperation and the provision of communications data (eg, call records) and content (eg, social media messages) to foreign law enforcement agencies.

Under the guidelines, British authorities retain discretion in determining whether to grant or refuse a request for assistance. The guidelines contemplate the circumstances in which it may be appropriate to refuse the request. These include where the request relates to an investigation that is politically motivated or where the assistance would disclose personal data otherwise protected under British data protection laws. Additionally, the request may be refused if there is a risk that the death penalty will be imposed for the crime being investigated. In none of these cases is it mandatory to refuse the request. At most, all that is required is that human rights risks be considered.

Guidance issued by the Foreign & Commonwealth Office (now the Foreign, Commonwealth & Development Office) in 2011 imposes an obligation on British agencies to seek written assurances that if the assistance sought is given, this will not result in the imposition of the death penalty.[45] If the assurances are not forthcoming or there are strong reasons not to seek assurances, the case should be deemed high risk and ministerial advice should be sought to determine whether the assistance should nonetheless be given in the particular case.

In 2011, Ali Babitu Kololo was sentenced to death having been convicted of murder, as a result of assistance provided by British law enforcement to Kenyan authorities where no assurances were given that the death sentence would not be sought or imposed.[46] In *Kololo v Commissioner of Police of the Metropolis*[47] Kololo sought to compel the production of information relating to the decision to provide mutual assistance.[48] The High Court refused to make an order for production, finding that such an order could not be made in order to circumvent the criminal process.[49] Effectively, Kololo had no recourse.

Elgizouli v Secretary of State for the Home Department also concerned the provision of mutual assistance in circumstances where no assurances were given by the requesting party, the United States of America.[50] The Supreme Court found that the mutual assistance was lawfully given under applicable legislation. However, it unanimously found that the English authorities had not satisfied the statutory conditions precedent for sharing Elgizouli's personal data[51] and knew that no safeguards were in place.

Mutual assistance frameworks can, therefore, be incompatible with data-sharing legislation. The latter may enable retentionist states to obtain information that would otherwise be difficult to access under, for example, the Mutual Assistance Act or the Guideline. There is a question as to whether the Executive must do more than simply abolish the death penalty itself.[52] The provision of assistance to a retentionist state in circumstances where an individual is or may be at risk of facing the death penalty should be limited to circumstances where assurances are given that the death penalty will not be sought or imposed if the assistance is given. Where those assurances are not forthcoming and the information is given, the assisting state may be complicit in "exporting the death penalty" overseas.[53] In such cases, abolitionist states ought to exercise caution so as to avoid facilitating the use of the death penalty.[54] The reality is that this obligation is generally not included in the text of information sharing frameworks. Indeed, there is often no provision which permits authorities to refuse a request for assistance from a retentionist state in the absence of these assurances. Certainly, there is no binding obligation or long-term practice to seek those assurances at the domestic level. Such an obligation exists at least in international law in the context of extradition, but it is not clear that it extends to information sharing.[55] This is despite the fact that both exercises constitute a form of mutual legal assistance.[56]

Conclusion

Australia's mutual legal assistance obligations cannot be easily reconciled with its commitment to the abolition of the death penalty. The legacies of *Rush*, *Kololo* and *Elgizouli* are timely reminders of the inadequacies of information sharing frameworks in jurisdictions where capital punishment has been abolished, including that they may enable governments to inadvertently defer the implementation of capital punishment to retentionist countries. However, change is inhibited by an apparent reluctance to support litigation against law enforcement where there is questionable decision-making. There is also a lacuna in the implementation of the Strategy insofar as no expert support or assurances that the death penalty will not be imposed are contemplated at the point at which law enforcement is expected to make a very complex assessment, often without an understanding of death penalty law and practice of the country receiving assistance. Although the options for reform exceed the scope of this article, our hope is that the principled commitment of the Australian government to furthering abolition abroad will result in improvements to the existing information sharing framework in aid of the Strategy. ■

Annexure A	
1972	Australia signed the ICCPR
1973	Australia abolished the death penalty.[57] This was made permanent in 2010.[58]
1979	Legislation was enacted permitting the AFP to share information lawfully with other states and/or their enforcement agencies.
1987	The Mutual Assistance Act was enacted
1990	Australia ratified the Second Optional Protocol to the ICCPR
2005	Prime Minister John Howard announced that the government would oppose the death penalty for two members of the Bali Nine[59]
2007	Prime Minister John Howard called for the death penalty for foreigners involved in the Bali bombing, which caused Australian deaths[60]
2009	The Guideline was introduced by the AFP
2013	Prime Minister John Howard again called for the death penalty for the Bali bombers, while maintaining that his government would oppose capital punishment for Australian citizens[61]
2013	The Minister for Foreign Affairs restated Australia's commitment to absolute abolition.
2015	The Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015 (Cth) was introduced to create an offence for the provision of information sharing which directly results in a person being tried or investigated on death-eligible charges. The Bill failed.[62]
2015	The Australian Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade was commissioned to inquire into Australia's role in abolishing the death penalty,[63] led by former Attorney-General Philip Ruddock AO.
2016	The Committee tabled its report.
2017	The Australian government published its response to the Committee's report.[64]

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Regulating botox

THE USE OF BOTOX AND SIMILAR PRODUCTS IN NON-SURGICAL COSMETIC PROCEDURES DOES NOT FIT NEATLY INTO CURRENT VICTORIAN LAWS REGULATING DRUGS AND POISONS AS IT HAS NO DIRECT THERAPEUTIC OR CLINICAL BENEFIT FOR CONSUMERS.

BY DR CHRIS CORNS AND DR SHUAI WANG

Introduction

The provision of cosmetic procedures is a burgeoning industry in Australia. According to the Australian Health Practitioner Regulation Agency (AHPRA), Australians spend more than $1 billion annually on non-surgical procedures including anti-wrinkle injections, fillers and botox injections.[1] Significant concerns exist regarding the safety and appropriateness of such procedures, with AHPRA recently announcing further reforms to improve safety and quality standards in this sector.[2] Considerable uncertainty also exists as to how such procedures are currently regulated by the law.

This article explains how the law in Victoria regulates the prescribing of Schedule 4 (Sch4) substances, such as *botulinum toxin type A* for human use (botox) and dermal fillers, for use in non-surgical cosmetic procedures. It argues that the use of scheduled substances in non-surgical cosmetic procedures does not neatly "fit" within current laws because those laws are based on an historical and restricted concept of "therapeutic need". Conventional concepts of therapeutic need do not take into account the fundamental nature of cosmetic procedures as "non-therapeutic" in a medical sense. Some reforms are suggested.

While the *Health Practitioner Regulation National Law* contains some relevant provisions, the primary form of legal regulation in Victoria is the Victorian legislation governing drugs and poisons – the *Drugs Poisons and Controlled Substances Act 1981* (Vic) (DPCSA) and the *Drugs Poisons and Controlled Substances Regulations 2017* (Vic) (DPCS Regulations). Botox and similar products are classified as "poisons" under the legislation.

The applicable laws in other Australian jurisdictions differ significantly.[3]

For the purposes of this article, a "prescription" in respect to a scheduled substance means a written instruction authorising the supply or administration of a specified substance to a person.

Commonly used substances in cosmetic procedures

The most commonly used substance in non-surgical cosmetic procedures is botox (the most common brand is "Botox"). Injecting botox appears to be the most common cosmetic medical procedure in Australia, and probably in the Western world.[4] Other commonly used substances include hyaluronic acid and its polymers, deoxycholic acid, calcium hydroxlapatite, collagen, polyacrylamide and polycaprolactone.

All these substances are listed in Sch4 of the Commonwealth Poisons Standard as "prescription-only". Sch4 substances must be registered with the Therapeutic Goods Administration (TGA) and, therefore, it would be unlawful to use any of the Sch4 substances without a prescription, or other authorisation, or to use an imported substance which is not on the TGA register.[5]

However, it is left to state and territory legislators to determine who can lawfully obtain, possess, prescribe, dispense and administer Sch4 substances. A useful starting point is to consider who can lawfully "administer" (ie, inject) Sch4 substances.

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Who can administer Sch4 substances in Victoria

In Victoria 11 categories of health practitioners can, in prescribed circumstances, administer Sch4 substances.[6] Of these, the most likely to be engaged in the administration of Sch4 drugs for cosmetic procedures are registered medical practitioners, nurse practitioners and nurses.

The major safeguards in place to regulate who can administer Sch4 substances are applicable guidelines of regulatory agencies and requirements under the *Therapeutic Goods Act 1989* (Cth).[7]

Prescribing Sch4 substances

Under Victorian laws there are three ways that a drug or poison can be "prescribed".[8] First, a conventional prescription can be written out by an authorised prescriber and given to the patient to be dispensed by a pharmacist (DPCS Reg 17). Second, an authorised practitioner can issue a chart instruction (for use in a hospital setting)[9] and third, an authorised practitioner can provide a written "administration order" for the substance to be administered by an authorised practitioner (DPCS Reg 77(1), 80).

SNAPSHOT

- How the law in Victoria regulates the use of products such as botox in cosmetic procedures is summarised here.
- The "non-therapeutic" feature of such procedures creates a tension with legal requirements that a "therapeutic need" must exist for the use of scheduled drugs and poisons.
- One possible reform is to insert a new definition of "therapeutic need" into the relevant legislation to include the unique benefits that cosmetic procedures can provide. This is not to deny the concerns relating to such procedures.

Authorising administration of botox

The usual procedure in non-surgical cosmetic procedures in Victoria is that the authorised prescriber issues a written administration order which authorises the substance to be administered to the patient by an authorised person (Victorian Department of Health, Medicines and Poisons Regulation, communication with the author dated 11 September 2023).

Under reg 77(1) of the DPCS Regulations, a number of persons can authorise the administration of a Sch4 poison. These include a doctor and a nurse practitioner. It is an offence for a person other than the specified practitioners to authorise the administration of a Sch4 poison; the penalty for a breach of this rule is 100 penalty units (DPCS Reg cl 77(1)).

However, a doctor or nurse practitioner must not authorise the administration of a Sch4 poison unless the following conditions are satisfied:

a) the administration is for the *medical treatment* of a person other than the practitioner
b) the person is under the *practitioner's care*
c) "The practitioner has taken all reasonable steps to ensure a *therapeutic need* exists for the poison" (DPCS Reg cl 78).

(The requirements of "under the practitioner's care" and "taking all reasonable steps to ensure a therapeutic need exists" is also found in the laws concerning the use of conventional prescriptions (DPCS Regs 17) and the administration of scheduled drugs and poisons (DPCS Regs 88 (doctors), 91(3) (nurse practitioners) and 92(3) (registered nurses)).

Other conditions for a lawful administration order apply which are not relevant here.[10]

A breach of these rules will make the administration authorisation (and, therefore, the administration itself) unlawful and carries a maximum penalty of 100 penalty units (DPCS Reg cl 78(1)). The italicised terms above require some discussion.

Medical treatment

The term "medical treatment" is not defined in the DPCSA or DPCS Regulations but, by definition, refers to the treatment of a recognisable medical disorder, disease or ailment. According to the Medical Board of Australia *Guidelines for doctors who perform cosmetic surgery and procedures* (effective 1 July 2023) (Cosmetic Guidelines), non-surgical cosmetic procedures do not constitute "medical treatment", discussed below. This by itself "problematises" the use of Sch4 poisons for cosmetic procedures.

Under the care

The term "under the care" is also not defined but implies that the doctor or nurse practitioner (and not some other staff member) has ultimate responsibility for the care and management of the patient. In other words, the conventional doctor-patient or nurse practitioner-patient relationship applies.[11] This requires that the practitioner has sufficient knowledge about the specific patient to be able to make informed judgments about what is in the best interests of the patient. While a patient has the ultimate decision as to what procedures they wish to undergo, the treating medical practitioner has an overriding obligation to always act in the best interests of the patient. This requires, for example, a full consultation with the patient prior to the conduct of any procedures.

This could not be satisfied if the doctor/nurse practitioner has not, at the least, spoken to the patient, and has a full understanding of the medical problem the patient presents with.

Therapeutic need

The term "therapeutic need" is also not defined in the DPCSA or the DPCS Regulations. The general approach to statutory interpretation is to look at the statutory context.[12] In *Project Blue Sky v ABA* [1998] HCA 28; (1998) 194 CLR 355 at [69] the High Court stated, "The primary object of statutory construction is to construe the relevant provisions so that it is consistent with the language and purpose of all the provisions of the statute".

For this reason, some guidance as to the meaning of "therapeutic need" can be gleaned from the definition of "therapeutic use" in s4 of the DPCSA. "Therapeutic use" is defined as:

"use in or in connection with –
(a) the preventing, diagnosing, curing or alleviating of a disease, ailment, defect or injury in human beings or animals;
(b) influencing, inhibiting, or modifying of a physiological process in human beings or animals; or
(c) the testing of the susceptibility of human beings or animals to a disease or ailment".

(The Victorian definition of therapeutic use appears to be based on the definition of "therapeutic use" in s3 of the *Therapeutic Goods Act 1989* (Cth) (TGA Act) except the TGA Act definition includes prevention of conception, testing for pregnancy and "the replacement or modification of parts of the anatomy in persons").

The above definition of "therapeutic use" refers to the different ways that a drug or poison can be used by doctors and other practitioners. Part (a) of the definition (in s4 of the DPCSA) refers to the use of Sch4 drugs to prevent or cure physical diseases, ailments and injuries in humans. This could not apply to cosmetic procedures.

The second way that a poison could be lawfully used is through influencing, inhibiting or modifying a "physiological process" in human beings. It is unclear what a "physiological process" refers to. However, "physiological" refers to physical conditions. An argument could be made that botox and related substances are used to inhibit or modify (change) physiological processes such as natural aging or premature aging. The TGA guidelines for botox state that botox is used "to improve the look of vertical frown lines that appear between the eyebrows, lines around the eyes and on the forehead in adults".[13]

It is doubtful that the Victorian parliamentary draftsperson intended this type of meaning to be "therapeutic need" in cl 78 of the DPCS Regulations. It will be left to a Victorian court to determine this question if the issue is ever raised.

The third meaning of "therapeutic use" does not apply to the administration of botox and similar products because there is no testing of human susceptibility to disease or ailment.

The conclusion is that the use of botox and the like for cosmetic purposes does not neatly fit any of the above meanings of "therapeutic use". The closest meaning is part (b) of the definition (in s4 of the DPCSA).

In any event, the term "therapeutic need" is different to the term "therapeutic use". A therapeutic "need" implies that the patient requires the particular treatment (in the form of a specified poison) and the administration of the particular poison to the patient can be justified on medical grounds. In comparison, a therapeutic "use" refers to how the particular poison can be lawfully applied to benefit a patient.

A second source of guidance as to the meaning of "therapeutic need" are guidelines issued by the Victorian Department of Health. The Department of Health advises that the following factors should be taken into account by a health practitioner in determining if a "therapeutic need" exists (in terms of the patient) for the authorising, prescribing or administration of a Sch4 poison:

- the medical history of the patient
- the prescribing history of the patient
- the presenting symptoms or described condition
- any signs of misuse of drugs.

Equally important, in terms of the substance being prescribed, the Department of Health Guidelines state the following factors should be taken into account:

- the suitability of the poison "for the treatment of the presenting symptoms or described condition"
- the potential for misuse or abuse
- the quantity to be prescribed.[14]

It is suggested that, having regard to the definition of "therapeutic use" and the Department of Health guidelines, it is conceptually difficult (if not impossible) to fit the use of Sch4 substances for cosmetic procedures into the requirement of "therapeutic need".

It is clear that "therapeutic need" refers to traditional concepts of medical needs and the treatment of recognised medical disorders, diseases and conditions.

The Cosmetic Guidelines define non-surgical cosmetic procedures and, referring to cosmetic procedures, state (at p2):

"Surgery or a procedure may be medically justified if it involves the restoration, correction or improvement in the shape and appearance of body structures that are defective or damaged at birth or by injury, disease, growth or development for either functional or psychological reasons. Surgery and procedures that have a medical justification and which may also lead to improvement in appearance are excluded from the definition".

A cosmetic procedure that does not fit this definition would, therefore, not be medically justified and, from a medical perspective, has no therapeutic need.

This "lack of fit" between strict legal definitions and the burgeoning cosmetic market is directly attributable to the simple fact that (purely) cosmetic procedures and cosmetic surgery have no therapeutic or clinical benefit. The explanation as to why Reg 78 does not appear to cover substances used in cosmetic procedures is that the drafters of Reg 78 did not have cosmetic procedures in mind. Cosmetic procedures are a relatively new development in Australia and it can take some time before relevant laws catch up with medico-scientific developments.

The key legal terms "medical treatment" and "therapeutic need" are based on conventional concepts of medicine and the medical treatment of physical disorders, diseases and the like.

Although some products such as botox are TGA recognised, practitioners still need to satisfy their jurisdiction's laws to lawfully use any substances in cosmetic procedures.

The effect of this "lack of fit" is that considerable confusion and uncertainty exists as to the legality of non-surgical cosmetic procedures.

Legislative reform is required to take account of the unique characteristics of such procedures and to remove any legal uncertainty regarding the use of products such as Botox.

Reform

Space does not permit a discussion of the "big picture" issues, but it is clear that cosmetic procedures have become a permanent part of Australian society. Cosmetic procedures offer significant benefits for many consumers but, at the same time, are problematic in terms of known risks and exploitation by unscrupulous providers. The issue is how to best regulate this sector rather than to ban such procedures. One possible solution to the specific problem identified in this article is to insert a definition of "therapeutic need" into the DPCSA or DPCS Regulations to include not just conventional concepts of medical or clinical needs of the patient but also the type of psychological or social benefits that cosmetic procedures can provide. This still leaves practitioners with the important discretion to refuse cosmetic procedures to patients considered unsuitable or where the cosmetic procedure is not in the best interests of the patient.[15] By clarifying the concept of "therapeutic need", most of the current interpretive uncertainties will be removed. ■

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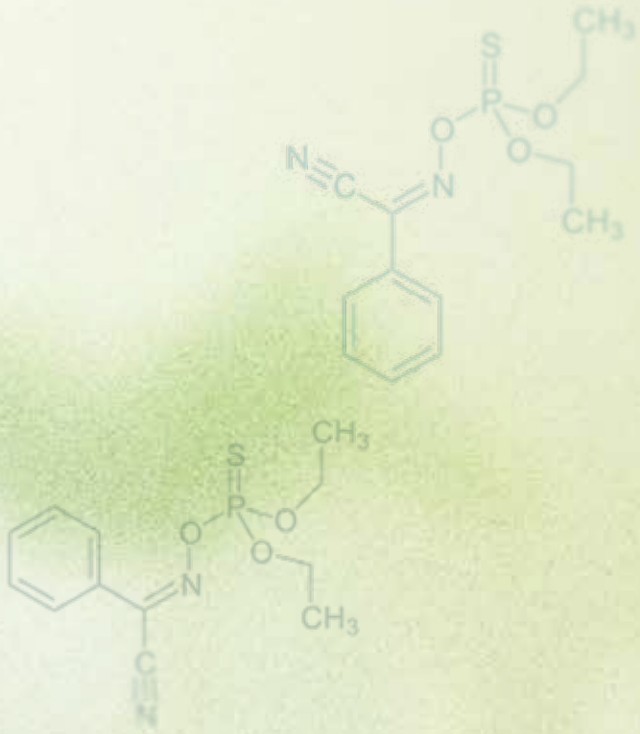
1. AHPRA, *Cosmetic procedures in the spotlight one year from surgery review*, 5 September 2023. This does not include the amount spent on cosmetic surgical procedures
2. Note 1 above. This AHPRA posting gives examples of the sort of concerns raised
3. For the regulation of drugs in Australia see Chris Corns, *Regulation of Doctors in Australia: General and Cosmetic Procedures* (Sydney, LexisNexis, 2023) ch 6. Also see *Medicines, Poisons and Therapeutic Goods Act* 2012 (NT) ss81, 82 and 92; *Poisons and Therapeutic Goods Act 1966* (NSW) s18B and *Poisons and Therapeutic Goods Regulation 2008* (NSW) cls 32(1) and 33 ("medical treatment" only and "therapeutic standard"); *Medicines and Poisons Act 2019* (Qld) and *Medicines and Poisons (Medicines) Regulation Act 2021* (Qld) cl 81 ("therapeutic treatment" only); *Poisons Act 1971* (Tas) s45(1) and *Poisons Regulations 2018* (Tas) cl 45(1); *Controlled Substances Act 1984* (SA) s18(1) and *Controlled Substances (Poisons) Regulations 2011* (SA); *Medicines, Poisons and Therapeutic Goods Act 2008* (ACT) s7(1) ("therapeutic standard") and *Medicines, Poisons and Therapeutic Goods Regulation 2008* (ACT) sch 1 part 1.3; and *Medicines and Poisons Act 2014* (WA) and *Medicines and Poisons (Medicines) Regulations 2016* (WA) cl 15
4. International Society for Aesthetic Plastic Surgery (ISAPS), Aesthetic Cosmetic Procedures performed in 2020, 2021 (ISAPS Report) p6 and M Latham and J McHale, *The Regulation of Cosmetic Procedures: Legal, Ethical and Practical Challenges* (Routledge, London, 2020) p1
5. Botox is registered with the TGA and some cosmetic procedures are recognised by the TGA as Specific Indications (ie, uses)
6. Registered medical practitioner (Reg 88), veterinary practitioner (Reg 90), nurse practitioner (Reg 91), authorised registered nurse (Reg 92), approved registered nurse (Reg 92A), authorised registered midwife (Reg 93A), approved registered midwife (Reg 93A), authorised optometrist (reg 94), authorised podiatrist (Reg 95), nurse (Reg 96), and pharmacist (Reg 99)
7. See Medical Board of Australia, Good medical practice: a code of conduct for doctors in Australia (October 2020); Medical Board of Australia, Guidelines for registered medical practitioners who perform cosmetic surgery and procedures (effective from 1 July 2023) ("Cosmetic Guidelines"); Nursing and Midwifery Board of Australia, Position Statement: Nurses and cosmetic medical procedures
8. Victoria Department of Health, Prescribing (undated)
9. A medical instruction is not included in the definition of a "prescription"
10. The authorisation must be in writing, signed, name the patient and be dated. The authorisation is kept on the patient's file (DPCS Reg 84)
11. For the nature of the doctor-patient relationship see *Rogers v Whitaker* (1992) 175 CLR 479; *Cheema v Medical Board of Australia* [2020] SACAT 40 at [56]; Medical Board of Australia, Good medical practice: A code of conduct for doctors in Australia (October 2020) at 2.1, 3.1.1 and 10.12.2; and Medical Board of Australia, Guidelines for doctors who perform cosmetic surgery and procedures (issued 3 April 2023 and effective from 1 July 2023) at 2.1 and 3.1
12. *Project Blue Sky v ABA* [1998] HCA 28; (1998) 194 CLR 355 at [21]
13. TGA, Consumer Medicine Information-Botox 2023 p2
14. Victoria Department of Health, "All reasonable steps" (and other key terms) (undated)
15. If screening indicates the patient may have an underlying psychological condition which makes them unsuitable for cosmetic surgery, the treating doctor must have the patient independently assessed. The doctor must also discuss with the patient other options: see Cosmetic Guidelines at 2.5. Pursuant to cl 2.7 of the Cosmetic Guidelines, "A medical practitioner must decline to perform the surgery if they believe it is not in the best interests of the patient"



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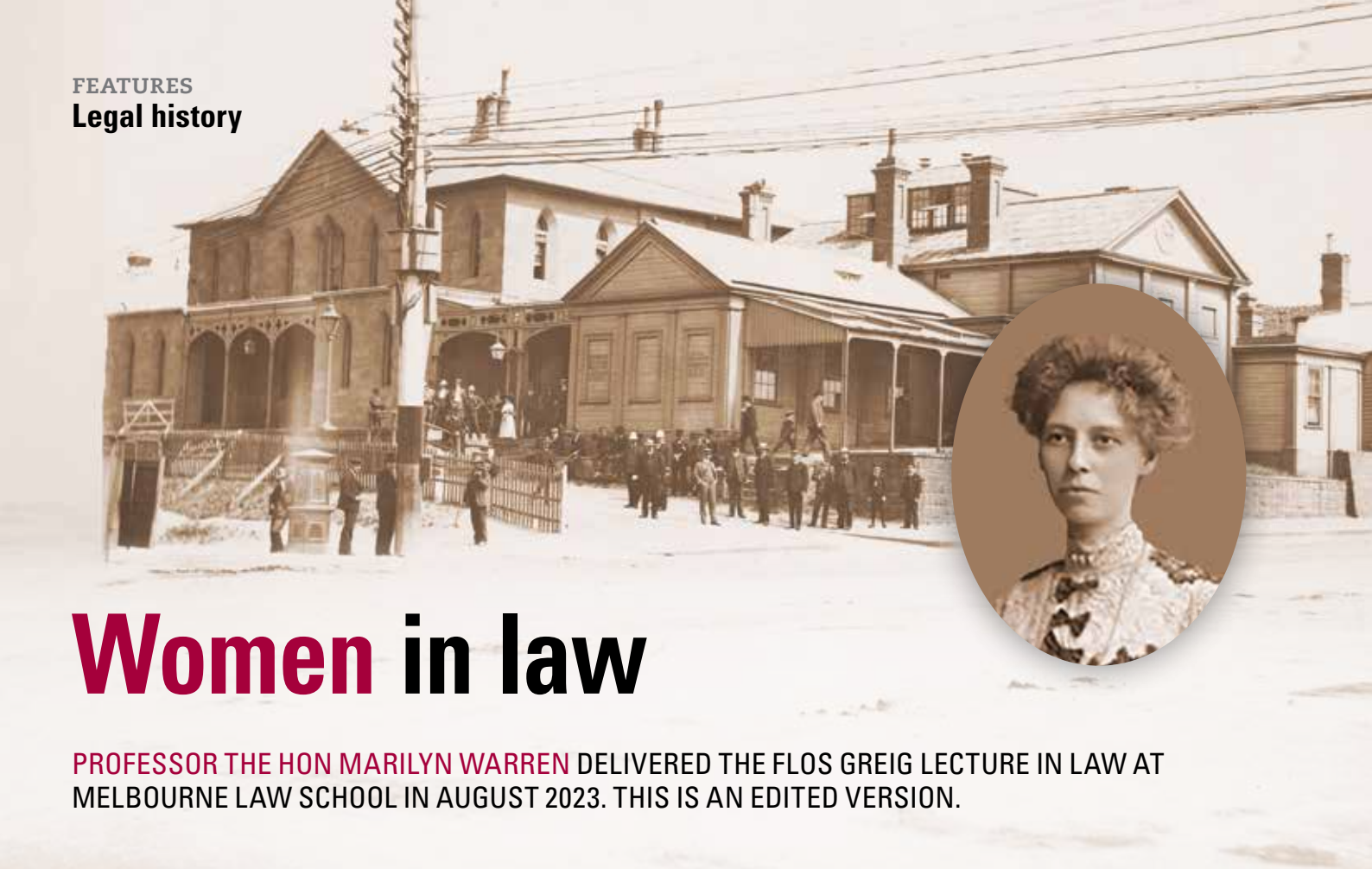

Women in law

PROFESSOR THE HON MARILYN WARREN DELIVERED THE FLOS GREIG LECTURE IN LAW AT MELBOURNE LAW SCHOOL IN AUGUST 2023. THIS IS AN EDITED VERSION.

Flos Greig was a true groundbreaker and the ancestor of extraordinary women – women who later forged remarkable careers in the law for the benefit of the legal profession itself and for the rule of law. Despite the efforts of these women, the pathways for women in the legal profession have been littered with obstacles and locked doors.

Academic research has been done on the influence of a female judiciary in focusing on judgments and the extracurricular statements and publications of women judges. I have in mind the work, for example, of Professor Rosemary Hunter of Kent then Queen Mary Universities, and Justice Catherine L'Heureux-Dubé, a former judge of the Canadian Supreme Court. I will consider how women have managed legal practice to achieve a higher standard, which, in turn, impacts on the cases heard and the judgments written by the judiciary, and indeed the quality of those judgments.

But let's wind back the clock. In the early 1900s (Flos Greig's time), the population of Melbourne, including its suburbs, was about 500,000. The architecture was mostly new. The Exhibition Buildings, the Victorian Parliament and the Supreme Court building in William Street, were all, give or take, about 20 years old. Flinders Street Station had not been built.

The city basked in its post-gold-rush aura as marvellous Melbourne. Despite the economic crash and depression of the 1890s with the crippling drought, Melbourne firmly held its mantle as the liberal city of the south. Sir Alfred Deakin was a leader of the new Federation of Australia, and all Victorians were very proud of him. The colony of Victoria enjoyed its new status as a statehood with its five constitutional counterparts.

Women of the middle and upper classes wore a bustle, a corset, and long, sweeping skirts, usually topped off by a bonnet. Looking at the Tom Roberts painting of the first sitting of the High Court of Australia in 1902, we see an excellent depiction of Australian society in the Banco Court of the Supreme Court of Victoria. In the painting, the women are all upstairs in the gallery wearing their bonnets. Downstairs, the men are everywhere – on the bench, at the Bar table, in the professions' seats and in the downstairs gallery. The population there is universally male.

The Roberts painting encapsulated the legal profession into which a young woman from a farming area near Bendigo in Victoria would seek entry. That Banco Court was and remains where most Victorian law graduates progressed to be admitted as an Australian lawyer and as an officer of the Court.

Before Flos Greig could be admitted, she needed to obtain a degree in law. It had long been thought that women should be educated, the philosophy being educate a man and you educate an individual, educate a woman and you educate a family. Women, ostensibly, were breeders. Sir Alfred Deakin was educated in his early years at his sister's all-girls school. Later, as a father, he would ensure his daughters were properly educated, but not to university level.

When Flos Greig stepped up and through the emotional barriers of doing something no one had done before, she did so when woman were speaking up and pressing for equality. The women in Victoria did not have the right to vote. They were able to vote, if they chose to, in the federal elections. Greig was an activist and an effective and articulate advocate for the admission of women. As if gaining university entry was not enough, she had to prove herself as a scholar, achieving honours in her subjects. We might reflect on the intimidating environment she faced in that building of men, more men, and only men.

ADOBESTOCK

Indeed, if we cast back to 1871, women were not allowed to sit the matriculation exam for fear they may become entitled to university entry. As Chancellor of the University of Melbourne, Supreme Court Judge Sir Redmond Barry permitted the ongoing exclusion of women for some time. He said, "With respect to business, especially if it be law business, I seek the intervention of a man trained to do the work".

It remained the position that under Victorian law only men could be admitted to practice. Greig's admission required passage of legislation. Earlier attempts failed. The all-male parliamentarians would not accept the admission of women. Greig's eventual admission required the passage of the *Legal Profession Practice Act 1903* (Act), colloquially known as the *Flos Greig Act*. The historical act of her admission passed without comment in the minutes of the Board of Examiners, which simply certified her readiness for admission.

Interestingly, s2 of the Act provided that: "No person shall by reason of sex be deemed to be under any disability for admission to practice as a barrister and solicitor of the Supreme Court of Victoria, any law or usage to the contrary notwithstanding".

If we reflect where we are now, the Act, more than 120 years ago, was an early codification of human rights and sex discrimination laws. On Greig's admission, my predecessor, Chief Justice John Madden, said, "Miss Greig. Allow me to express my gratification at the graceful incoming of a revolution and to express a hope that success which has attended you as a student may indeed attend you also in your career as a barrister and solicitor".

Then came the warning: "I also trust the profession, the noble profession, of which you are the first female member in this country, will be well-preserved and sustained in your hands as it has heretofore been in the hands of the other sex". To which I interpolate, "no pressure". However, Chief Justice Madden made public statements to the contrary in the main Melbourne newspaper expressing reservation and caution about letting women into the legal profession.

After her graduation and admission, there was no flood of women to follow Flos Greig. In the 20 years after her admission, only 34 women were admitted, compared with more than a thousand men. It was not until 1939 that yearly admissions of women hit double figures, when 12 women were admitted. It took until 1997, almost a century, for the admission of women to exceed those of men for the first time, when the split in Victoria was 388 women to 334 men.

One of my roles when I was Chief Justice was to preside usually over the admission ceremonies of new lawyers in the Banco Court. In my time, we calculated I presided over the admission of around 15,000 lawyers. Over that time, it was a very plain phenomenon that women were in numbers of 60 per cent or more. We will talk about that more in a moment.

Between 1903 and the end of the 20th century, progress for women in the law was slow, but there were some lights on the hill. In 1916, more than a decade after Greig, Lesbia Harford graduated in law and later became the first woman to sign the Bar Roll. However, her extracurricular interests worked against her, with her public bisexuality, political campaigning against social injustices and publishing of poetry. She was doubtlessly seen as an aberration and probably evidence of what happens when you let women in.

Later, in 1919 Joan Rosanove was admitted. She was a powerful presence as a prominent barrister in the criminal and matrimonial practices. When not robed, she wore a full-length mink coat, a fascinator and smoked through a long cigarette holder. She wore that outfit around her chambers.

But Rosanove was not taken seriously in important quarters. Another of my predecessors, Chief Justice Edmund Herring, refused for 11 years to appoint Rosanove as silk. Fortunately, one of the early acts of another of my predecessors, Sir Henry Winneke, was to appoint Rosanove silk in 1965, the first Victorian woman silk. Bar chambers in Melbourne proudly bear the name Rosanove.

SNAPSHOT

- Flos Greig's groundbreaking achievements have cemented her place in history.
- This article gives a brief historical overview of women in law and explains how women worked collectively to change the legal profession.
- We need to understand where we've come from to know where we are going, how women have influenced the very practice of law.

Little progress was made in the law until the 1960s and 1970s, when women were starting to be seen in the profession, but they were mostly sent to practise conveyancing and family law. Yet the feminist movement of the 1960s and 1970s slowly permeated Australian and Victorian society, and, in time, inevitably, the legal profession.

In the early 1970s, a woman could be denied a legal job because she was a woman, as happened to me. It took a later decade of equal opportunity and sex discrimination laws to prohibit that behaviour. In that era, there were female presences occurring. Marcia Neave featured in the daily Melbourne press because she won the Supreme Court Prize at the University of Melbourne, notable because Neave became engaged to marry her fiancé on the same day.

Neave would proceed to forge extraordinary pathways in the law as a scholar, law professor, law dean, law reformer, jurist and royal commissioner. As an academic, she co-authored the primary law text on property, *Sackville and Neave Australian Property Law*. As adviser to government, Neave achieved the decriminalisation of prostitution in Victoria. As a law reform commissioner, she effected change in a range of areas from the law of evidence in sexual assault trials to the practice and rules of civil procedure in litigation. Later, after a decade on the bench, Neave chaired two state royal commissions into family violence.

In the academic world, women moved beyond a sprinkle of presence in the law to the first woman law professor at the University of Melbourne, Cheryl Saunders. Now Laureate Professor Emeritus at Melbourne University Law School, she became heavily involved in the teaching and development of constitutional law nationally and internationally. In the 1980s and 1990s, whenever an event occurred in constitutional development of law reform, state, federal or international, Saunders was present as an academic leader and government adviser.

There were numbers of other leading women, including those who gave up their successful legal practices to accept judicial appointment or high office. The drivers for such change came

from Attorneys-General who embraced the changing, more feminised era, and understood the essence of the vision of a woman on the bench.

The first female Victorian Attorney-General, Jan Wade, appointed three women to the Supreme Court of Victoria between 1996 and 1998, including the first woman, Rosemary Balmford, in 1996. As a first-hand witness, I can say it was breathtaking to see a woman sitting on the bench in the Banco Court. Balmford, incidentally, had also won the Supreme Court Prize at the University of Melbourne. Sir Daryl Dawson, later a Justice of the High Court of Australia, was second. And Balmford did that after being told when she was a student, "Law? That's a funny course for a woman".

Each of the women I have described were also mothers. They juggled their pregnancies, child raising and childcare arrangements with their extraordinary careers. Each of these women excelled in the law as jurists, scholars and law reformers by virtue of their individual intellect, intelligence, cleverness, performance and work ethic. Individually, their achievements changed the development and application of constitutional law, women's human rights, family violence laws and more. They were exemplars. They were the lights on the hill for surrounding women and the next generation. Women lawyers and law students could look to those women and see themselves.

However, despite those exemplars, and there were many more, by the 1990s and early 2000s, the legal profession had in fact changed very little. Despite the majority of law graduates being women, men remained in the driving seat.

Sitting as the judge in charge of the Commercial List of the Supreme Court of Victoria in about the year 2000, I would enter the courtroom on direction days and see a sea of men in suits. On most trial sitting days, the only women in the courtroom were my associate and me. So rare was the appearance of a female barrister that I started to keep a list of when one appeared, noting usually the appearance was in a junior, non-speaking role.

Reverting back to the expansion of equal opportunity and sex discrimination laws, women lawyers were struck by the prevailing inequity of legal practice. Plainly, the individual achievements of outstanding women did not have much reformative effect on the profession itself. Individual achievement, no matter how glorious, did not penetrate. In my opinion, there was a prevailing attitude of, "Well, she's exceptional", or "Well, she's preoccupied with motherhood now".

The realisation occurred that, no matter how brilliant, individual achievement was not enough. Collective action was a necessary strategy to move the unmovable.

In the mid 1990s, there was movement in Australia to establish a national representative body of women lawyers. Victorian women tapped into that movement. A seminar chaired by my immediate predecessor, Chief Justice John Phillips, was attended by hundreds of women lawyers. The concern was that, notwithstanding the numbers of female law graduates, there was a disproportionately high attrition rate of women from the profession.

On 19 August 1996, Victorian Women Lawyers (VWL) was launched by then Victorian Attorney-General Jan Wade, and Eve Mahlab, founder of Mahlab and Associates and co-leader of the Women's Electoral Lobby who delivered the keynote address. VWL was incorporated under the *Associations Incorporations Act*. Its objectives included to provide a common meeting ground for women lawyers, to foster the continuing education and development of women into the legal profession and their advancement within the legal profession and to promote the understanding and support of women's legal and human rights.

In 2001, VWL published a watershed document "Flexible Partnership – Making it Work in Law Firms". The document was co-sponsored by Victoria Law Foundation, the LIV and law firms Mallesons Stephen Jacques, Freehills, Deacons, Blake Dawson Waldron, Maddocks, Minter Ellison, Allens Arthur Robinson and Middletons. Most of those firms continue to exist following mergers and various iterations.

The VWL document was steered by a work practices committee made up of VWL women. The authors, Sue Kaufmann and Georgina Frost, were VWL women. The crux of the problem addressed was the need for flexible work practices in the legal profession. Kaufmann noted, "It is clear that the stress and attrition observed at staff level in private law firms are part of a long-term and profession-wide trend. Secondly, women lawyers are clustered at the entry and associate levels and are generally leaving law firms without becoming partners".

The VWL report listed the perceived inhibitors including, disgruntled clients that perceived lower service levels from absentee women lawyers, perceived lack of commitment by the woman lawyer to the firm, resentment at female partners sharing in firm capital on an equal distribution, disgruntled colleagues at the female absence, alleged under-utilisation of resources, reluctance to provide part-time arrangements and lack of female role models.

The VWL recommended the establishment of guidelines and policies to establish an equitable open process for setting up of flexible work arrangements, including balancing the interests of the firm partnership and the female partner, transparency with clients and colleagues, proper management and assessment of arrangements, part-time partnership to be treated as permanent, and an improvement of female role models by increasing the number of female partners.

Following the report's publication, the VWL convener informed me that there had been a vigorous debate with the 13 managing partners of medium-sized firms, and support was given in principle. VWL marched onwards and, indeed, it was a watershed document, producing a set of guidelines based on sound evidence that had never existed in Victoria.

The LIV, as the primary and largest professional representative body, sponsored discussions. In my mind, there were three imperatives that came into play – first, the determined collective action of VWL as an association representing women lawyers; second, the support of the main professional representative body of Victorian lawyers, the LIV; and third, a significantly committed male champion of change at the time, then LIV executive director John Cain.

Relevantly, at this time, VWL accrued modest income through membership subscriptions and sponsorship. It sought charitable status, which was rejected by the Commissioner for Taxation. The decision was challenged by VWL. The Commissioner argued that, if the main objects of an institution were the protection and advancement of persons practising in a particular profession, the institution would not be regarded as charitable because the element of direct public benefit was lacking.

VWL was determined. It challenged the Commission's ruling in the Federal Court. Justice French, as he then was, allowed the appeal, stating, "VWL was established to overcome a well-known social deficit, namely the substantial under-representation of women in the legal profession in its upper reaches and the judiciary". Having regard to the social norms reflected in the *Sex Discrimination Act*, cognate state legislation and Australia's membership of the Convention for the Elimination of All Forms of Discrimination Against Women, that objective was a purpose beneficial to the community. It was within the spirit and intendment of the Statute of Elizabeth. VWL won.

Looking back at the Commissioner's rejection, it is puzzling that supporting and promoting women was not viewed from the beginning as beneficial to the community.

VWL continues to this day. It is extraordinary in its reach, power, influence and representation. It has committees on publications, justice, law reform, women in the public sector, networking, outreach, diversity and inclusion, work practices and mentoring. VWL mentors law students as well as practising lawyers to make women lawyers more competent, confident and articulate through substantial mooting competitions.

Finally, VWL publishes a legal feminist publication annually entitled appropriately, *Portia*. I encourage its reading.

Parallel with VWL, Victorian women barristers faced a different struggle. In the 1990s, the Victorian Bar sponsored a survey and report into the treatment of women barristers entitled "Equality of Opportunity for Women at the Victorian Bar" co-authored by Professor Rosemary Hunter and leadership consultant, Helen McKelvie. In summary, it disclosed rampant discrimination against women barristers by male barristers, judges, magistrates and clients. My experience as a barrister had been that I could have a brief taken away from me because I was a woman. The report was promoted by the Women Barristers' Association (WBA), led then by Rachelle Lewitan.

In 2002, a woman barrister, Fiona McLeod, led the Victorian Bar to implement the model briefing policy to conduct a further work, "The Equality of Opportunity for Women at the Victorian Bar: The Victorian Bar Council's Response" report. The recommendations with respect to barristers were that senior barristers ensure a balanced gender mix in Chambers allocation. It could not be all men anymore. Bar social events were to be held in a welcoming atmosphere and never at male-only clubs.

The report recommended the Bar organise education on sexual harassment and representation of women on the Bar Council and committees. Again, it could not be all men. There was a recommendation of recognition that the WBA has a valuable role, not just for women but for all barristers. It recommended that sexist behaviour be combatted. There was encouragement for government agencies and private firms to utilise gender balance in briefing practices and to pursue it as a key performance indicator.

It recommended that change be initiated in the attitude towards pregnant barristers and those who were mothers, and the accommodation of childcare arrangements with sympathy and understanding.

Finally, there was a recommendation of gender awareness education for judges. I am pleased to say that, in my role as Chief Justice and Chair of the Judicial College of Victoria, that was one recommendation taken to heart.

By 2013, the Law Council of Australia (LCA) had been brought into the picture because reports of discrimination were presenting nationally. The LCA commissioned the "National Attrition and Re-Engagement Study". Importantly, it was the Victorian report which was the genesis of the national report. Not waiting for the national movement, the Victorian Bar introduced its discussion paper, making the quantum leap in 2014. Again, one of the leaders of the paper was Fiona McLeod, by then Fiona McLeod SC.

The paper acted as a barometer of the Victorian Bar with the following aims:

- recording data and providing basic metrics to develop and progress women barristers
- improving the income and experience of women juniors by encouraging the briefing of women in significant cases
- eliminating unconscious bias by exposing briefing authorities to the skills of women barristers
- responding adequately to the discrimination and harassment of women barristers
- addressing the gap in earnings between male and female barristers
- engaging with women during a career break to encourage return to practice
- conducting exit surveys of departing barristers to resolve female attrition rates.

And there was more.

The Victorian Bar's senior counsel were asked to give what was known as Silks' Undertaking. The signed Undertaking included this statement: "At a minimum, I commit at least one new woman barrister working in my area of practice on a research task and, if suitable, recommending them for a junior brief".

And more. There were unconscious bias continuing professional development sessions. The Victorian Bar's Conduct Rules were amended to expressly prohibit discrimination and sexual harassment as defined under state and federal legislation and workplace bullying.

These reforms were gradually implemented, supported often by the presence of women on the bench. As more women judges and barristers were appointed, they in turn supported and encouraged women barristers. Women judges did, and still do, like to see female barristers appearing in court.

The Bar's work led to consultation with the judiciary. Many heads of jurisdiction, including the superior courts, led and spoke at seminars involving the large law firms and the briefing authorities of the state and federal government and regulatory agencies.

For example, at seminars co-hosted by Justice Michelle Gordon of the High Court of Australia and Kate Jenkins, then Federal Sex Discrimination Commissioner, the question was asked at small roundtable working discussions, "When did you last brief a woman barrister and in what type of matter?" Alarmingly, there was a too regular response of "I cannot recall". That is a difficult response to give to Justice Gordon and heads such as myself. At the follow-up seminar, when the question was asked again, there was a commendable change.

It seemed the walls of the Victorian legal profession were cracking. VWL was effecting change to give women flexible working practices. A feminine presence in law firm partnerships slowly appeared. Women even became managing partners, including at a national level. Commensurately, major

corporations had powerful women chairs and CEOs who applied equal opportunity policies and expected that the best lawyers and barristers would include women.

State and federal governments applied equality principles for their lucrative and expanding legal work. The female presence on the court benches and in significant seats was expanding. There were women as heads of jurisdiction, as Solicitors-General, as Crown Counsel, as lead counsel assisting royal commissions and inquiries. Indeed, the Victorian government has had a public policy since 2014 that 50 per cent of all judicial appointments be female.

As an aside, one of the best promoters of women as lawyers has come from technology. The streaming of royal commissions, from the Black Saturday royal commission to that for banking and Robodebt, has encouraged a broader public curiosity in how hearings work, accompanied by a revelation that women lawyers are clever, competent, articulate, assertive and controlling.

The legal landscape has changed because all lawyers and their clients, current and potential, have seen that, when it comes to business, especially if it be law business, often the best man for the case is a woman.

In my firm view, female members operating individually were not enough to change the legal profession. It took the collective action of women to progress equality as pursued and achieved so far by the VWL and the WBA together with their interstate and national counterparts.

Whenever there was a first female appointment, albeit as a partner, Chief Justice or Solicitor-General, there was always such a fuss. These days, I venture to suggest the novelty has mostly evaporated.

But to complete the picture of women's influence on the legal profession, I need to turn to what I will call the dark side. Over the decades, as the reviews and reforms were developed and implemented, female dissatisfaction and attrition in the legal profession continued. In 2012, the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), in its report "Changing the Rules – the experiences of female lawyers in Victoria", looked at the experiences of female lawyers in Victoria.

VEOHRC made these findings from its surveyed respondents: 40 per cent had personally experienced discrimination while working as a lawyer or trainee. The discrimination encompassed hostile work environments, workplace bullying, unfair work allocation and unequal remuneration. Seventy per cent of those discriminated against were working in private firms at the time. Six out of 10 women who experienced discrimination did not make a complaint. Twenty-three per cent experienced sexual harassment, with 63 per cent of those incidents occurring within the first 12 months of being in a workplace, in other words, a new or junior lawyer. In three-quarters of those harassment cases, the harasser was in a senior or supervising position, and two-thirds of those harassed did not make a complaint.

The VEOHRC report made recommendations to stem the problems. However, the report did not receive the prominence it deserved. Its findings were truly alarming. Yet that was not the last of it. While VWL, with the LIV and the WBA, worked through their reforms and policies, the nation was not shocked by the discrimination revealed. There seemed to be a social acceptance, including in the legal profession, "Oh well, it happens".

Sexual discrimination laws had been in place for decades. The Commonwealth *Sex Discrimination Act* commenced in 1984. So, to reiterate, sexual harassment in the workplace had been unlawful for decades.

Despite the revelations of the WBA and VEOHRC, society believed, and I have to confess, including myself, that women were safe with judges. Yet, in the highest court in both the state and the country, women lawyers working as a judge's associate, in multiple instances we at least know of, were sexually harassed. The revelations were shocking and shameful. In my own case, I thought I presided over a collegial and safe workplace where associates flourished and progressed their legal careers. The multiple cases in the High Court of Australia and the Supreme Court of Victoria possibly came to light because of the MeToo# movement.

However the evidence came to light, it remains that the women affected suffered the impact privately for a long time. They courageously came forward and made their complaints. The cases warn all women that there has been a dark side to the legal profession, even in the courts, where women lawyers can be the victim. These cases revolve around power and consent. I encourage all women lawyers to read the pamphlet publication *Power and Consent* by Rachel Doyle SC. Indeed, I would like to see the publication as mandatory reading for all lawyers at all levels.

Suffice to say, when Flos Greig was admitted to the legal profession, sexual harassment may, in all likelihood, not have troubled her. I truly hope so. But in the century since, sexual harassment and discrimination has been a burden women lawyers have faced. I fear it has not gone yet.

I am certain women will continue to be a forceful and persuasive presence within the legal profession. Notwithstanding the challenges, there are ways to convert those challenges into opportunities.

First let me suggest the working-from-home phenomenon. Some time away from the workplace with flexibility is productive and constructive. For many women, especially with family responsibilities, it is a pressure relief valve. Yet, women lawyers must be alert to the risk of being sidelined or their advocacy diluted. If they are missing from the meeting or trying to engage with a meeting through Zoom presence, it may be quite counterproductive for what women need to achieve. In my view, the physical presence is essential to most legal institutions. We must remember, too, on a more humorous note, the American lawyer who appeared in court remotely but as a cat, his daughter having earlier been communicating in character with friends.

Second, an opportunity may arise with artificial intelligence. It is a boon to the busy lawyer, yet it brings risks of human minimisation, redundancy and irrelevance. My instincts tell me that women lawyers could be the first to be dispensable. We should be mindful of Justice Mary Gaudron's judgment in the *Banovic* case, where the women were the most recent to join the workforce and, when retrenchments occurred, the union applied the policy of last on, first off. However, as women had only recently joined the workforce under equality of opportunity policies, they were discriminated against by virtue of their gender.

Third, sexual harassment will continue as long as society has opposite sexes. It is a serious issue that society faces. Women lawyers must be ever vigilant and protective, not only of themselves but of each other. If sexual harassment occurs, I urge

women lawyers to disclose it. As lawyers, I urge them to prosecute tortious actions under occupational health and safety laws. An order of damages has a sobering effect on the predatory offender, together with the deterrent effect of public disclosure and shame.

Fourth, I urge consideration of the policy framework which can support and enable women. It is worthy of close examination and deep reflection. Taking the equality of opportunity and sex discrimination statutes as a base, women are supported through the United Nations Sustainable Development Goals (SDG). Gender equality is one of those goals. I suggest, therefore, it is a legitimate inquiry to ask any employer as to what the environmental, social and governance (ESG) compliance and SDG application arrangements are of the employment place. Corporate and institutional clients are bound, or at least encouraged, to demonstrate their performance under social governance arrangements.

As an extension of ESG, employers should have gender equality action plans which cover recruitment, career progression, promotion and development, gender composition at all levels of the institution, appropriate gendered work segregation, workplace support, leave and work flexibility, workplace culture, leadership and diversity and gender pay equity. The risk is, unless there is a gender equity policy, it is easy for things to slip back. In other words, the risk will be, "we had a woman here, we used to have a female partner, but she left, not sure why", or "she's off having babies".

A trap can occur such that the modern, hard-fought new norm of women being prominent in the law dissipates, even disappears. Twenty years ago, I urged women lawyers to keep gender on the agenda. I have said it repeatedly. Sometimes in the busy public discourse, gender can be forgotten and sidelined. As one-half of the Australian population and as a majority gender of Australian lawyers, it is essential that women occupy at least half of the seats at the table.

A last set of observations. The Australian taxpayer subsidises, to an extent, our universities. Surely, as women form the majority in law graduates, taxpayers should be able to yield a dividend. Society itself is constituted around 50 per cent by women. When only part of that half of society goes to court or engages with the law, that female half should be able to see itself reflected in the practice of the law. Why? Because it cannot be that the best intellectual ability lies exclusively within the other half of society.

The rule of law underpins our democratic society. The rule of law must ensure equity and justice – a fundamental tenet. It is the legal profession that underpins the rule of law. It behoves the profession to demonstrate gender equity and justice within itself so that those tenets flourish under the rule of law. ■

The Hon Marilyn Warren AC KC, Chief Justice of Victoria 2003-2017, Lieutenant Governor of Victoria 2006-2017 and judge of the Supreme Court of Victoria 1998-2003. She is Patron of Victorian Women Lawyers.

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HIGH COURT JUDGMENTS

DR MICHELLE SHARPE

Constitutional law

Judicial power of the Commonwealth – indefinite detention

In the much publicised, landmark High Court decision of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (28 November 2023) the High Court was required to determine the lawfulness of indefinite detention under ss189(1) and 196(1) of the *Migration Act 1958* (Cth) (Migration Act).

Section 189(1) of the Migration Act imposes an obligation on an officer (as defined in the Act) to detain a person who the officer knows, or reasonably expects, is an "unlawful non-citizen". Section 196(1) of the Migration Act provides that an unlawful non-citizen is to be kept in immigration detention until, among other things, that person is granted a visa or removed from Australia under s198 of the Migration Act. An officer must remove "as soon as reasonably practicable" an unlawful non-citizen when an application for a visa has been rejected or when the unlawful non-citizen asks to be removed: ss198(6) and 198(1) of the Migration Act respectively.

The plaintiff is a Rohingya Muslim born in Myanmar. The plaintiff was taken into immigration detention in 2012 after arriving in Australia by boat. In 2016 the plaintiff pleaded guilty to a sexual offence against a child and was sentenced to a term of imprisonment. After having served his sentence, the plaintiff was returned to immigration detention. While still in criminal custody, the plaintiff applied for a protection visa. In 2020 a delegate of the Minister found the plaintiff was a refugee but also that there were reasonable grounds to consider the plaintiff a danger to the Australian community. Accordingly, the delegate refused the plaintiff's request. The plaintiff, after having exhausted all avenues of appeal, wrote to the Minister asking for his removal but the plaintiff could not be removed to another country: he did not have any right to enter Myanmar and no other country would receive him. The plaintiff then commenced proceedings against the Minister in the original jurisdiction of the High Court. The plaintiff claimed that, properly construed, ss189(1) and 196(1) of the Migration Act did not authorise his continuing detention. In the alternative, the plaintiff claimed that those provisions contravened Ch III of the Constitution. An obstacle to both claims was the High Court's decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*). By a majority, the High Court held in *Al-Kateb* that the proper construction of ss189(1) and 196(1) applied to require the continuing detention of a person such as the plaintiff and that these provisions did not contravene Ch III of the Constitution. The plaintiff applied to have *Al-Kateb* reopened and overruled.

In respect of the plaintiff's first claim, the High Court (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) unanimously found that ss189(1) and 196(1) of the Migration Act did authorise his continuing detention. The High Court, at [19], could not find any error in the majority's reasoning in *Al-Kateb* in respect of their statutory construction of ss189(1) and 196(1). Further, the High Court considered, at [20]-[22], that Parliament's amendments to the Migration Act, after *Al-Kateb*, appeared to support the correctness of the majority's decision.

In respect of the plaintiff's second claim, the High Court did find that ss189(1) and 196(1) contravened Ch III of the Constitution. More than a decade before *Al-Kateb* was decided the High Court was required to consider the constitutional valdity of provisions under the Migration Act authorising detention in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (*Lim*). The High Court, at [30], noted that the majority in *Lim* formulated a constitutional principle which provided the criterion to determine the constitutionality of the detention provisions in the Migration Act. At [41], the High Court observed that the *Lim* principle entails that "a Commonwealth statute which authorises executive detention must limit the duration of that detention to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved". The High Court, at [43], unanimously held that the majority in *Al-Kateb* did not properly apply the *Lim* principle. The High Court concluded, at [71], that the plaintiff was entitled to his common law liberty as at the date of the High Court's decision.

Consumer protection

Extraterritorial application of s23 of the ACL

In the High Court decision of *Karpik v Carnival plc* [2023] HCA 39 (6 December 2023) (*Karpik*) the High Court was required to determine the extraterritorial application of s23 of the Australian Consumer Law (ACL), contained in schedule 2 to the to the *Competition and Consumer Act 2010* (Cth) (CC Act) which deems unfair contract terms void.

The facts which give rise to the dispute in *Karpik* are notorious. On 8 March 2020, shortly after the first case of COVID-19 was found in Australia, the cruise ship, *Ruby Princess*, departed Sydney with 2600 holiday makers on board. On 19 March 2022 the *Ruby Princess* was compelled to return to Sydney after a number of passengers were found to have contracted COVID-19 (some fatally). Ms Karpik, a passenger on the *Ruby Princess*, brought representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA Act). Ms Karpik asserts claims in tort and under the ACL against the respondents (collectively "Princess") for loss or damage allegedly suffered by passengers or their relatives.

This High Court decision only concerned the interlocutory application brought by Princess for a stay of the claims in the representative proceedings as they related to Mr Ho. Mr Ho is the representative of the United States (US) subgroup in the representative proceeding. The US

subgroup, numbering 696 passengers, purchased their passage outside Australia subject to certain terms and conditions (US Terms and Conditions). By the time this matter reached the High Court it was accepted that the US Terms and Conditions were incorporated into Mr Ho's contract. The US Terms and Conditions included a choice of law clause applying the general maritime law of the US, an exclusive jurisdiction clause in favour of the US District Courts for the Central District of California in Los Angeles and a class action waiver clause. Princess sought to have determined, as a separate question, whether Mr Ho's claims should be stayed by reason of the exclusive jurisdiction clause and, in support of its application, also relied on the class action waiver clause. Ms Karpik argued that s23 of the ACL applied to Mr Ho's contract and the class action waiver clause was void for unfairness.

At first instance, the primary judge refused the stay application. The primary judge held that s23 of the ACL applied to Mr Ho's contract by reason of s5(1)(g) of the CC Act. The primary judge went on to find that the class action waiver clause was an unfair term and void under s23 of the ACL. The primary judge did not consider that the class action waiver clause was unenforceable by reason of being contrary to Pt IVA of the FCA Act. The primary judge concluded that there were strong reasons not to enforce the exclusive jurisdiction clause. Princess appealed and a majority of the Full Court of the Federal Court (Allsop CJ and Derrington J, Rares J dissenting) allowed the appeal. The majority held (without considering the extraterritoriality of s23) that the class action waiver clause was not an unfair term or otherwise unenforceable by reason of Pt IVA of the FCA Act. The majority enforced the exclusive jurisdiction clause and stayed Mr Ho's claims.

The High Court (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ) unanimously overturned the Full Court and set out the reasons for their decision in a single joint judgment spanning 71 paragraphs. On the extraterritorial application of s23 of the ACL, the High Court observed, at [18] and [24], that this was primarily a question of statutory construction. The High Court, at [35] and [36], noted that the relevant provisions extending the application of the ACL are ss131(1) and 5(1) of the CC Act. Section 131(1) of the CC Act provides that the ACL applies as a law of the Commonwealth to the conduct of corporations in contravention of Chapter 2, 3 or 4 of the ACL. Sections 5(1)(c) and 5(1)(g) of the CC Act extend the application of the ACL to conduct outside Australia by corporations carrying on business inside Australia. At [38], the High Court observed: "If a corporation carries on business in Australia, then a price of doing so, is that the corporation is subject to and complies with statutes intended to provide protection for consumers". This construction, the High Court considered at [39] to [41], is consistent with the object and purpose of s23 of the ACL, the CC Act being beneficial consumer legislation and the legislative history of the CC Act. The High Court noted, at [42], that there was no dispute that Princess, in marketing and selling cruises, was carrying on business in Australia. After undertaking an assessment of the class action waiver clause, at [52]-[58], as at the date of the contract against the mandatory matters specified in s23, the High Court concluded, at [59], that the clause was an unfair term. The class action waiver clause added to the imbalance between the rights of Princess and Mr Ho under the contract and, if relied on, would cause Mr Ho detriment by denying him the benefits of Part IVA of the FCA Act. The High Court considered that any interest Princess had in shutting Mr Ho out of these benefits was not legitimate. An important thread in the High Court's analysis was the lack of transparency of the class action waiver clause. Mr Ho did not have access to the US Terms and Conditions prior to booking the voyage. Mr Ho was only able to view the clause after he had received a booking confirmation email, clicked the link provided and worked his way through the website until he was presented with the US Terms and Conditions. The High Court otherwise did not consider, at [63], that the class action waiver clause was unenforceable by reason of anything in Part IVA of the FCA Act given that Part IVA itself allows for a person to remove themselves from a group proceeding. The High Court, at [68]-[70], declined to enforce the exclusive jurisdiction clause for two reasons: first, because the class action waiver clause was an unfair term and, second, because it would otherwise fracture the litigation. ■

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FEDERAL COURT JUDGMENTS

NADIA STOJANOVA

Industrial law

Earlier proceedings between same parties in Federal Circuit and Family Court of Australia settled by Deed of Release – fresh proceedings instituted in Federal Court seeking damages and compensation for personal injuries – Fair Work Act proceedings barred by Deed of Release – Federal Court proceedings an abuse of process – Federal Court did not have jurisdiction to hear common law claim for damages because Fair Work Act claims were made for improper purpose of fabricating jurisdiction – meaning of "claims under workers' compensation . . . law" – costs issued against s570 of Fair Work Act

In *Scott v Steritech Pty Ltd* [2023] FCA 1401 (14 November 2023) the Federal Court (Collier J) held that proceedings instituted in the Federal Court were precluded by the terms of a Deed of Release and were an abuse of process (at [36]).

The Respondent was successful in their interlocutory application that the statement of claim filed by the Applicant be struck out and the proceeding dismissed with costs (at [55]-[56]).

In the Federal Circuit Court (now Family Court and Federal Circuit Court of Australia Division 2), the Applicant made a claim under the *Fair Work Act 2009* (Cth) (FW Act) alleging his dismissal contravened the general protection provisions under the FW Act and he sought compensation and pecuniary penalty (at [5]).

The Federal Circuit Court proceedings were settled by a Deed of Release signed by the Applicant and the Respondent. Among other things, the Deed of Release provided a wide release by the Applicant of "all actions, suits, claims, demands, rights, costs, complaints and other liabilities of any nature" which the Applicant may have against the Respondent. There were limited carve outs to the release, namely "any claims made under workers' compensation . . . law". The Deed of Release also provided a "bar to all actions, causes of actions, proceedings, claims, accounts, demands, costs and expenses (including legal costs and expenses) threatened or brought or attempted to be brought" by the Applicant against the Respondent (at [12]).

Following the execution of the Deed of Release, the Applicant commenced the present proceedings in the Federal Court (at [13]). The Federal Court proceedings sought damages and compensation for personal injuries (at [13]-[14]).

The facts pleaded in the Federal Circuit Court proceedings and the Federal Court proceedings were almost identical and focused on the Applicant's dismissal from his employment by redundancy. There were differences between the two proceedings. For example, the Applicant pleaded in the Federal Court proceedings that the Respondent had contravened the Respondent's duty of care to the Applicant (at [19]).

The Court indicated that the Deed of Release was to be interpreted in the same manner as a written agreement. The Court found that the release and bar in the Deed of Release contained "very broad and comprehensive language" (at [22]).

The Court found that the Deed of Release applied to bar the Federal Court proceedings (at [24]).

The Court further held that the Federal Court proceedings were an abuse of process (at [55]), despite the difficult test associated with finding that an abuse of process has occurred (at [26]).

The Court emphasised that the re-litigation of proceedings that had finalised will generally be regarded as an abuse of process (at [27]).

The Court was also required to make findings about the words "claim made under workers' compensation . . . law" in order to determine the scope of the Deed of Release in relation to the Federal Court proceedings (at [37]).

The Court held that these words could "only" be a reference to a potential claim for damages pursuant to the *Workers' Compensation and Rehabilitation Act 2003* (Qld) where the Applicant was employed by the Respondent in Queensland (at [38]).

The Court considered that there were multiple significant problems to the extent that the Applicant's claim for damages pursuant to "a workers' compensation . . . law" were on foot (at [44]).

In particular, the Court rejected the Applicant's argument that even if the FW Act component of his claim was dismissed, the Federal Court's jurisdiction to determine the Applicant's claim for damages already existed and would therefore remain (at [47]). The Court relied on *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 (*Burgundy*) and emphasised the Full Court's reference in that matter to a claim that was "'colourable' in the sense that [it was] made for the improper purpose of 'fabricating' jurisdiction". The Court then found that the Applicant's claim for damages under "workers' compensation . . . law" was "colourable" as per the reasoning in *Burgundy* and therefore the Court did not have jurisdiction to hear it when the Federal Court would not otherwise have had the jurisdiction (at [51]-[52]).

The Court was satisfied that the Applicant had instituted the Federal Court proceeding without reasonable cause within the meaning of s570(2)(a) of the FW Act and issued costs against him in favour of the Respondent accordingly (at [55]).

Criminal law

The term "suicide" in the *Criminal Code Act 1995* (Cth) does apply to conduct undertaken in accordance with and authorised by Victorian legislation

In *Carr v Attorney-General (Cth)* [2023] FCA 1500 (30 November 2023)the Federal Court (Abraham J) held that "suicide", as used in ss474.29A and 474.29B of the *Criminal Code Act 1995* (Cth), does apply to the ending of a person's life in accordance with, and by the means authorised by, the *Voluntary Assisted Dying Act 2017* (Vic) (VAD Act) and *Voluntary Assisted Dying Regulations 2018* (Vic).

Sections 474.29A and 474.29B of the *Criminal Code Act 1995* (Cth) (Commonwealth Offence Provisions) respectively make it an offence to use a carriage service for suicide related material and to possess, control, produce, supply or obtain suicide related material for use through a carriage service (at [10]).

The applicant was a doctor authorised to operate as a "co-ordinating medical practitioner" and a "consulting medical practitioner" under the VAD Act (at [1]). The VAD Act provides a scheme for Victorians to voluntarily end their life in certain circumstances, such as if the individual is suffering terminal illness and is expected to have less than six months to live (at [12]). The VAD Act provides that actions taken in accordance with the VAD Act do not constitute a criminal offence (at [15]).

The applicant uses a carriage service (such as by telehealth, telephone or email) to perform their functions under the VAD Act. The applicant's interest in the matter therefore concerned the question of whether the Commonwealth Offence Provisions may apply to criminalise those communications (at [8]).

The Court found that there was a direct inconsistency between State and Commonwealth laws. This is because to the extent that the VAD Act purports to authorise medical practitioners to provide information about methods of committing suicide via a carriage service, the VAD Act purports to authorise conduct criminalised by the Criminal Code (at [76]).

Section 109 of the Australian Constitution resolves this direct inconsistency by rendering the VAD Act invalid to the extent of the inconsistency (at [77]).

It would not be an offence under the Commonwealth Offence Provisions for a medical practitioner to provide information about methods of committing suicide by using a mode of communication that is not a carriage service (at [76]). ■

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FAMILY LAW JUDGMENTS

CRAIG NICOL & KELEIGH ROBINSON

Children

Trial judge unnecessarily interrupted and curtailed cross examination via a "five minute warning" to counsel – unfounded and unfair findings as to family violence

In *Edinger & Duy* [2023] FedCFamC1A 194 (10 November 2023) the Full Court (Aldridge, Schonell & Carter JJ) heard a father's appeal from parenting orders for a child (born in 2015) to spend no time with him (at [2]).

The mother alleged that the child witnessed sexual activity in the father's house and was subject to sexual abuse by the father's girlfriend and neglect by the father and paternal grandfather (at [13]).

The trial judge found that the least detrimental outcome for the child was to remain in the mother's care and spend no time with the father (at [19]). The father appealed, arguing he was denied procedural fairness (at [5]).

The Full Court said:

". . . [I]n this hearing there was a significant departure from that permitted for proper trial management such as to give rise to a miscarriage of justice. The interventions were excessive, including needlessly interrupting the flow of the evidence and cross-examination . . . (at [27]).

"Section 69ZX(2)(d) of the Act sets out that the court's general duties and powers relating to evidence [and] includes permitting the court to give directions limiting the time for the giving of evidence. That must . . . be tempered by the primary duty of a judge, namely to ensure a fair hearing . . . (at [49]).

". . . [I]t was procedurally unfair and unreasonable for [the father's] counsel to be given . . . a five minute warning when a significant part of the evidence regarding family violence had not yet been put to the [mother]. That is particularly problematic . . . where it is readily apparent from the reasons that the mother's experiences of family violence were central to the Court's determination (at [50]).

". . . [T]he primary judge identified the lack of cross-examination on many aspects of the mother's allegations regarding family violence as relevant to her fact-finding process . . . Yet she permitted only about 20 minutes in total for counsel for the father to complete his cross-examination on the topic – during which time the primary judge continued to interrupt counsel (at [51])".

The appeal was allowed, the orders set aside and the proceedings were remitted for rehearing. Costs certificates were granted.

Property

Court lacked jurisdiction to hear non-federal aspects of justiciable dispute between husband and his former business associate – no common substratum of facts between matrimonial cause and husband's civil suits

In *Akbar & Gandega* [2023] FedCFamC1A 174 (12 October 2023) the Full Court (McClelland DCJ, Austin & Wilson JJ) heard an appeal from a decision of Riethmuller J. The appellant was the husband's former business partner.

The husband and the appellant agreed to the husband's withdrawal from their business in exchange for payment, but the appellant did not pay. The wife joined the appellant as a party, "purporting to sue him on behalf of the husband for damages to compensate him for the appellant's alleged breach of the contract" (at [10]).

Austin J (with whom McClelland DCJ and Wilson J agreed) said:

"The existence of the husband's chose in action was not contentious as between the spouses . . . Only its value was liable to be controversial between them. But placing a value on that property interest for the purpose of resolving the spouses' matrimonial dispute did not demand the determination of the causes of action brought against the appellant . . . (at [25]).

"Claims grounded solely in contract, tort, equity, or some other form of non-matrimonial relationship (such as partnership or corporation shareholdings) are not likely to attract jurisdiction as a matrimonial cause when the spouses' marriage is purely coincidental to the dispute . . . (at [28]).

". . . [T]he relationship between the husband and appellant arose exclusively out of their mutual business activities . . . The husband's legal grievance with the appellant could easily have been litigated independently . . . There was no common substratum of facts between the spouses' matrimonial cause and the husband's civil suits . . . (at [33]).

". . . The *convenience* of first determining whether or not the husband should have judgment for a certain sum of money entered in his favour against the appellant . . . is not the same as the *essentiality* of determining those causes for the purpose of then determining the matrimonial cause . . . (at [34])."

The appeal was allowed and the causes of action at common law and in equity pleaded by the respondents against the applicants in the original proceedings were dismissed for want of jurisdiction. Costs certificates were ordered.

Procedure

Duty of formality before the court – Inappropriate for non-legal staff to make substantive representations or seek orders in written communication with the court

In *Amirbeaggi (Trustee), in the matter Billiau (Bankrupt) v Billiau* [2023] FedCFamC2G 949 (23 October 2023) Given J heard a bankruptcy application in Division 2 of the Federal Circuit and Family Court of Australia.

The judgment related to procedural orders "necessary to address an apparent deterioration in the standard of conduct before the Court, which should not be allowed to endure" (at [1]).

In September 2023, the Court directed the respondents to file a Notice of Opposition and listed a directions hearing. No Notice was filed. Rather, in October 2023, an email was sent from a law clerk to the Court with further directions as agreed between the parties. The e-mail read "Please have the Directions hearing relisted in accordance with the Orders" (at [1]-[3]).

The Court said:

"Legal practitioners in Australia . . . have a duty of formality before the Court . . . (at [12]).

"There is arguably nothing so informal, or possibly arrogant, as to approach a Court with [proposed] orders . . . and simply presume, or in the instant case direct, that they will be made . . . (at [14]).

"Where a party is represented, submissions should not be made to the Court by anyone other than a legal representative . . . [N]on-legal staff . . . should not write to the Court to make substantive representations and/or seek orders . . . (at [15]).

"The underlying origin/s of this spate of informal and presumptuous correspondence is unknown, although it does seem heightened since . . . [the increase of] hearings [via] using online technologies . . . Lest there be any doubt, parties and practitioners should not interpret the use by Courts of a medium which can also be used for meetings and entertainment, as somehow informalising the solemnity of Court proceedings (at [16]).

". . . The proposal of consent orders should be undertaken in terms which properly acknowledge that the Court retains a full discretion as to whether they will be made . . . No correspondence to the Court should be in terms to the effect that the parties have reached agreement and are simply informing the Court of a change to the orders . . . (at [19])". ■

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SUPREME COURT JUDGMENTS

DR MICHAEL TAYLOR

Torts

Personal injury – vicarious liability – whether principles of vicarious liability may apply to relationship between volunteer and sporting club

Kneale v Footscray Football Club Ltd [2023] VSC 679 (23 November 2023) concerns rulings on matters to be put to a jury in a sexual abuse claim. The plaintiff claimed damages from the Footscray Football Club Ltd (Club) for injuries, loss and damage suffered because of being sexually abused by Graeme Hobbs (and other perpetrators) (at [1]). From the age of 11 years, the plaintiff was a spectator at the Western Oval, where Hobbs was a volunteer for the Club (at [1]). Between 1984 and 1989, Hobbs sexually abused the plaintiff during home games at the Western Oval in the Club's administration offices in the EJ Whitten Stand, and trafficked the plaintiff for abuse by others (at [1]).

The trial commenced on 17 October 2023 before a jury of six, who retired to consider their verdict on 8 November 2023 (at [2]). On 9 November 2023 the jury returned their verdict, finding that there was negligence on the part of the Club that was the cause of the plaintiff's injuries, and awarded damages of $5.9 million, consisting of $3.25 million for pain, suffering and loss of enjoyment of life, $2.6 million for past and future economic loss and $87,573 for future medical expenses (at [2] and [3]).

As originally pleaded, the plaintiff's case was that the Club was liable in negligence and that it was also vicariously liable for Hobbs; in addition, the plaintiff also claimed aggravated and exemplary damages (at [4]). During the trial, the Club foreshadowed an application under s62 of the *Civil Procedure Act 2010* (Vic) (CPA) for summary judgment, and on 1 November 2023 arguments were heard in respect of the claims for vicarious liability and aggravated and exemplary damages (at [5] and [6]). This case note is concerned with the ruling on vicarious liability; for completeness, the rulings on aggravated and exemplary damages were that these claims would not be put to the jury as there was no evidence on which the jury could reasonably have awarded aggravated damages (at [39]–[48]) or exemplary damages (at [49]–[52]).

Section 62 of the CPA permits a defendant to apply for summary judgment if the plaintiff's claim (or part of the claim) has no real prospect of success (at [9]). The power to grant summary judgment is "exercised with caution and only in a clear case, where the plaintiff's prospects of success are no more than fanciful" (at [9]). In this case the application was heard and determined after both the plaintiff and the Club had called all their witnesses, but before closing addresses to the jury (at [10]). As such, the test applied was that for determining whether a question should be put to a jury, which required the Court to take the view of the evidence most favourable to the plaintiff (at [10]).

The plaintiff's case was that Hobbs was a "well-known and special volunteer" at the Club who performed various fundraising and other roles and was under the supervision, direction and control of the Club (at [11] and [12]). It was pleaded that throughout the relevant period, Hobbs was "in a relationship akin to employment with the Club" and able to achieve a high degree of power over (and intimacy with) the plaintiff by virtue of his role with the Club (at [12]). The plaintiff relied on the Court of Appeal's decision in *Bird v DP* to support his case that vicarious liability could apply to the relationship between the Club and Hobbs even though it was not an employment relationship (at [13] and [14]).[1]

In *Bird*, the extent to which the tortfeasor presented as "an emanation of the principal was a central factor in determining whether the relationship was one in which the principal was vicariously liable for the actions of the tortfeasor" and will give rise to vicarious liability notwithstanding that absence of an employment relationship (at [15] and [16]). Two further indicia were identified in *Bird*: the principal's power to control the performance of work of the tortfeasor, and the tortfeasors inability to delegate their work to a third person (at [17]).

Bird was a case involving the relationship between an assistant priest and the diocese and held that the relationship could give rise to vicarious liability (at [18]). Several important features of that relationship led to that conclusion, including that the relationship was governed by a "strict set of normative rules" that "enabled the assistant priest to embody the Diocese in his pastoral role" (at [18(b)]).

Applied to the plaintiff's case, if vicarious liability attached to the relationship between the Club and Hobbs, then there would be a separate question whether the Club was vicariously liable for Hobbs' abuse of the plaintiff (at [19]). To find that there was, the jury "would have to be satisfied that the Club provided the opportunity and the occasion for Hobbs' wrongdoing, because of some special role that the Club assigned to Hobbs vis-à-vis [the plaintiff]" (at [19]).

As was the plaintiff's evidence, he had come to know Hobbs through a child at school called Jason, who told him about how to get "some money, easy money" from Hobbs (at [22]). The first incident of abuse occurred in about June 1984, when Hobbs took the plaintiff into a conference room and bathroom inside the stand (at [23]). The plaintiff knew little about Hobbs' role with the Club, but his impression was that Hobbs was "a well-known worker at the Club" because everyone would greet him by his nickname, "Chops" (at [26]). Other evidence indicated that Hobbs had both a fundraising role and a role in assisting the Under 19s team (at [27] to [32]). In the 1980s, volunteers were the "arms and legs" of the Club and "absolutely critical" to its operations, however, the Club did not have a list of volunteers nor any written policies about volunteers (or anything else) (at [33]).

In viewing the evidence in the way most favourable to the plaintiff, the Court noted that the Club disputed certain evidence; for example, how Hobbs was able to access the offices within the stand, as the door

described by the plaintiff would have been locked at the relevant time (at [34]). It was not necessary for the Court to resolve such factual disputes because the question was "whether there was any evidence on which the jury could reasonably find the Club vicariously liable for Hobbs' wrongdoing" and, for three reasons, the Court concluded that there was not (at [34]).

First, the Court did not view *Bird* as a "general invitation to identify other non-employment relationships with indicia of vicarious liability" and as a matter of law did not consider that the relationship between a sporting club and a volunteer was one to which vicarious liability could attach (at [35]).

Second, the relationship between the Club and Hobbs "did not remotely resemble that between the Diocese and the assistant priest in *Bird*" for several reasons, including that Hobbs' roles with the Club were "informal, undocumented, and uncertain" and there were no written policies as to recruitment, supervision or control of volunteers (at [36]). Such informality was contrasted by the strict set of normative rules that enabled the assistant priest to embody the Diocese in *Bird* (at [36]). For this (and other) reasons, the Court did not consider there was evidence on which the jury could reasonably have found there was a relationship between the Club and Hobbs giving rise to vicarious liability (at [37]).

Third, there was no evidence that the Club assigned any role to Hobbs in relation to the plaintiff, "let alone a special role involving authority, power, trust, control, or the ability to achieve intimacy with [the plaintiff]" (at [38]). The Club was not aware of the plaintiff, as he was not an Under 19s player, nor a member or volunteer with the Club (at [38]). The plaintiff was "merely a spectator at the Western Oval when, at the suggestion of a school mate, he first found Hobbs" and there was no basis for the jury to have reasonably found that Hobbs' voluntary roles provided the opportunity for his abuse of the plaintiff (at [38]).

Accordingly, vicarious liability was not put to the jury (at [6]). ■

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

1. (2023) 69 VR 408 (*Bird*).

CRIMINAL LAW JUDGMENTS

LIAM MCAULIFFE

Case stated

Open justice and ground rules hearings (take 2)

The November 2023 column examined the case of *Alec (a pseudonym) v The King* [2023] VSCA 208 (5 September 2023) (*Alec*) in which the Court of Appeal set aside the applicant's convictions and ordered a new trial. In *DPP v Smith* [2023] VSCA 293 (30 November 2023) the Court of Appeal (Emerton P, Priest and Macaulay JJA) dealt with four reserved questions of law from the County Court following the Court's judgment in *Alec*.

The special hearing

Special hearings are conducted pursuant to Parts 8.2 and 8.2A of the *Criminal Procedure Act 2009* (Vic) (Act) which provides for the appointment of intermediaries for, and the conduct of ground rules hearings with respect to, complainants (and other witnesses) in sexual offence cases who are under the age of 18 years. The Act provides that a complainant's video and audio recorded evidence interview with police stands at trial as evidence-in-chief, together with any cross-examination or further evidence given at a special hearing pursuant to s372 of the Act.

In *Alec*, the Court determined that a substantial miscarriage of justice occurred because the judge presiding over the special hearing met with the complainant privately in advance of the special hearing. This private meeting was incompatible with the fundamental tenets of the criminal justice system, notwithstanding that no objection was taken.

Background

David John Smith faced trial in the County Court on an indictment that charged him with sexual assault and sexual penetration of the complainant, currently under 16 years old, when the complainant was aged between 11 and 13 years (at [11]). On 15 March 2023, the complainant gave evidence at a special hearing conducted pursuant to s370 of Act. On 14 March 2023, the judge who presided over the hearing met with the complainant, in the presence of both the prosecutor and defence counsel, at the offices of the Child Witness Service. The meeting occurred as a result of the intermediary appointed for the complainant reporting that the complainant had indicated that her confidence would be assisted if she could meet with counsel and the judge prior to giving evidence at the special hearing (at [12]).

Questions reserved

The Court was called on to answer whether, first, the meeting infringed the principles of open justice as identified in *Alec*. Second, whether the meeting did bring the impartiality of the presiding judge into question. Third, whether the meeting represented a fundamental irregularity in the trial process such as to constitute a serious departure from accepted trial processes. Fourth, if an answer to any question was in the affirmative, whether the only remedy was for the evidence of the complainant to be taken at a further special hearing conducted before a different judge (at [14]). The Court answered the first, third and fourth questions in the affirmative, and found it unnecessary to answer the second question.

Director's challenge

In oral submissions, the Director accepted that there were some similarities with *Alec* in that the meeting with the witness did not occur in the courtroom, was not recorded, and the accused was not present at the meeting. However, it differs from *Alec* in that both the prosecutor and defence counsel were present at the meeting (which occurred with their acquiescence) and no issue was raised by counsel or the judge about anything that was said or done at the meeting (at [17]-[19]).

The Director took issue with the judgment in *Alec* and submitted that the answer to the questions turned on principles referable to apprehended bias, and not principles of open justice (at [16]). The Director submitted that the meeting that occurred between the complainant, the judge and counsel, could not give rise to an apprehension of bias. The meeting's purpose was to introduce the judge and counsel to the complainant. There was no suggestion that anything was said by the complainant or the judge which might cause the judge to decide the issues at the special hearing or trial other than on their merits. Further, there was no logical connection between the fact of the meeting and a fear that the judge might not have conducted the special hearing on its merits (at [20]).

In response to *Alec*, the Director submitted that the principle of open justice is not absolute and there was a power to impose limits when necessary to secure the proper administration of justice. There were sound reasons for an introductory meeting between a judge and a vulnerable witness, in the presence of the parties' legal representatives, with as little formality as possible (at [22]).

Consideration

The Court emphasised that the principle of open justice, which requires criminal proceedings to take place in public, is an essential characteristic of criminal justice in this State (at [33]). Open justice is "ingrained" in the Act, which must be interpreted in a way that is compatible with human rights. Section 24(1) of the Charter relevantly provides that a person charged with a criminal offence has the right to have the charge decided by a competent, independent and impartial court or tribunal after a fair and public hearing (at [32] and [34]).

Not only is an accused person entitled to be present at their trial and any related pre-trial hearings, but the provisions of the Act make it plain that an accused is obliged to be present unless excused by the court (at [36]). Nothing within the Act, including the provisions dealing with ground rules hearings and special hearings, authorises either directly or by necessary implication a private meeting between a trial judge (whether or not accompanied by counsel) and a witness outside the courtroom (at [40]).

The Court was emphatic that it was "anathema to the principle of open justice that a judge could have a non-public communication with a witness in the course of a criminal proceeding, particularly a witness whose evidence is central to the prosecution case" (at [54]). The Court did not doubt that the meeting was well-intentioned and in accordance with the intermediary's report. However, such a meeting was inconsistent with the principle of open justice, being an essential element of the administration of criminal justice in this State. It was a fundamental irregularity that could not be waived (at [55]).

The Court concluded that the principle of open justice must be upheld for its own sake. This is because it is of critical importance in maintaining public confidence in criminal courts, which requires every aspect of the criminal process be open to scrutiny (save where there are recognised exceptions), so that criminal justice may at all times be seen to be administered by courts that are unmistakably impartial and indisputably independent (at [57]).

The Court also considered that there may be a reasonable apprehension of bias where the trial judge had an unrecorded meeting with, and talked to, the central prosecution witness outside a court setting (at [59]. Given these answers, the only remedy was for a further special hearing to be conducted before a different judge (at [61]).

Sentence appeal

Section 5(2H) and combination sentences

In *Wright v The King* [2023] VSCA 243 (12 October 2023) the Court of Appeal (Walker and Macaulay JJA) granted leave to appeal but dismissed the appeal.

Background

On 17 March 2023, Brendan Wright (applicant) was convicted and sentenced to 30 months' imprisonment with a non-parole period of 15 months in relation to four indictable offences and two related summary offences. This included one charge of "home invasion" which is a category 2 offence under the *Sentencing Act 1991* (Vic) (Act). However, on 1 March 2023, the sentencing judge announced that he would impose a sentence on the applicant of 15 months' imprisonment on the home invasion charge, and an 18-month community correction order (CCO) on the three other indictable charges to commence on the applicant's release from prison. The judge was ultimately dissuaded from this sentence on submissions from both parties (at [1]-[6]).

Mandatory and presumptive sentencing

Generally, a CCO must begin within three months of the making of the order unless s44(3) of the Act applies to the sentence. Section 44(3) applies if an order for a CCO is made together with an order for imprisonment pursuant to s44(1) of the Act. Subject to any specific provision relating to an offence, a court may make a combined order of a term of imprisonment and a CCO in respect of one, or more than one, offence only if the sum of all the terms of imprisonment to be served (after deducting any period of pre-sentence detention) is 12 months or less. If the court makes such a combined order, the CCO commences on the release of the offender from imprisonment (at [43]-[52]).

Section 5(2H) of the Act requires a court to impose a "straight" term of imprisonment, that is *not* in combination with CCO in relation to a category 2 offence unless one of the exceptions in that section is found to apply. As the applicant did not seek to invoke any of the exceptions to the operation of s5(2H), the judge was obliged to impose a head sentence and a non-parole period in relation to the home invasion charge (at [53]).

Consideration

The Court considered that s5(2H) applied to the category 2 home invasion charge (in circumstances where none of the exceptions were invoked) to preclude a CCO or a combined term of imprisonment and a CCO for that charge. However, s5(2H) did not apply to the other non-category 2 charges and therefore did not preclude the imposition of a CCO in respect of those charges, so long as the sum of all of the terms of imprisonment being imposed in the total sentencing disposition did not exceed 12 months (at [64]). This conclusion was driven by the statutory language of s5(2H) which used the singular word of "offence", and the broad power of s44(1) to impose a combination sentence.

The Court cautioned that any statutory limitations must be observed, and the sum of all of the terms of imprisonment imposed when sentencing for multiple offences, for example including in respect of any category 2 offence, does not exceed 12 months. Where these requirements are met, a court may make a CCO for one offence in relation to which there is no specific provision, in addition to imposing a sentence of imprisonment in respect of another offence or offences for which a specific provision provides that a CCO may not be imposed (at [65]).

Accordingly, when the applicant fell to be sentenced on 17 March 2023, the available pre-sentence detention would have overcome the 12-month limitation and the judge had the power to comply with the strictures of s5(2H) referable to the category 2 home invasion offence and also impose a combination sentence for the other charges – that is, to impose the original sentence the judge intended to pronounce (at [66]).

Author's note

It is necessary to emphasise the importance of carefully analysing and reading this case for those practitioners dealing with statutory provisions governing mandatory and presumptive sentencing and minimum terms. ■

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LEGISLATION UPDATE

New Victorian 2023 Assents

As at 24/11/2023

2023 No. 28 Bail Amendment Act 2023
2023 No. 29 Education and Training Reform Amendment (Land Powers) Act 2023
2023 No. 30 Gambling Legislation Amendment Act 2023
2023 No. 31 Special Investigator Repeal Act 2023
2023 No. 32 Triple Zero Victoria Act 2023
2023 No. 33 Early Childhood Legislation Amendment (Premises Approval in Principle) Act 2023
2023 No. 34 Transport Legislation Amendment Act 2023

New Victorian 2023 Regulations

As at 24/11/2023

2023 No. 107 Circular Economy (Waste Reduction and Recycling) (Container Deposit Scheme) Amendment (Miscellaneous) Regulations 2023
2023 No. 108 Trans-Tasman Mutual Recognition (Victoria) (Temporary Exemption) (Container Deposit Scheme) Regulations 2023
2023 No. 109 Mutual Recognition (Victoria) (Temporary Exemption) (Container Deposit Scheme) Regulations 2023
2023 No. 110 Water (Resource Management) Amendment (Fees) Regulations 2023
2023 No. 111 Water (Place of Take) Regulations 2023
2023 No. 112 Electricity Safety (General) Amendment (Certificate of Electrical Safety) Regulations 2023
2023 No. 113 Social Services Regulations 2023
2023 No. 114 Social Services Regulation Transitional Regulations 2023
2023 No. 115 Environment Protection Amendment Regulations 2023
2023 No. 116 Associations Incorporation Reform Regulations 2023
2023 No. 117 Public Records Regulations 2023
2023 No. 118 Heavy Vehicle National Law Application (Infringements) Regulations 2023
2023 No. 119 Casino Control Regulations 2023
2023 No. 120 County Court (Chapters I, II and III Miscellaneous Amendments) Rules 2023

New Victorian 2023 Bills

As at 24/11/2023

Biosecurity Legislation Amendment (Incident Response) Bill 2023
Charter of Human Rights and Responsibilities Amendment (Protection from Torture and Slavery) Bill 2023
Constitution Amendment (SEC) Bill 2023
Corrections Amendment (Parole Reform) Bill 2023
Crimes Amendment (Non-fatal Strangulation) Bill 2023
Drugs, Poisons and Controlled Substances Amendment (Regulation of Personal Adult Use of Cannabis) Bill 2023
Justice Legislation Amendment (Police and Other Matters) Bill 2023
Land (Revocation of Reservations) Bill 2023
State Electricity Commission Amendment Bill 2023
Workplace Injury Rehabilitation and Compensation Amendment (WorkCover Scheme Modernisation) Bill 2023

New Commonwealth 2023 Assents

As at 24/11/2023

2023 No. 85 Migration (Visa Pre-application Process) Charge Act 2023
2023 No. 86 Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Act 2023
2023 No. 87 Family Law Amendment Act 2023
2023 No. 88 Family Law Amendment (Information Sharing) Act 2023
2023 No. 89 Higher Education Support Amendment (Response to the Australian Universities Accord Interim Report) Act 2023
2023 No. 90 National Occupational Respiratory Disease Registry (Consequential Amendments) Act 2023
2023 No. 91 Intellectual Property Laws Amendment (Regulator Performance) Act 2023
2023 No. 92 Statutory Declarations Amendment Act 2023
2023 No. 93 Migration Amendment (Bridging Visa Conditions) Act 2023

New Commonwealth 2023 Regulations

As at 24/11/2023

A New Tax System (Australian Business Number) Amendment (Display of Trading Names) Regulations 2023
Airspace Amendment (Danger Areas) Regulations 2023
Australian Citizenship Amendment (Refund of Fees) Regulations 2023
Communications and the Arts Measures No. 4) Regulations 2023
Criminal Code (Terrorist Organisation – Islamic State Khorasan Province) Regulations 2023
Criminal Code (Terrorist Organisation – Jama'at Nusrat al Islam wal Muslimin) Regulations 2023
Financial Framework (Supplementary Powers) Amendment (Attorney General's Portfolio Measures No. 1) Regulations 2023
Financial Framework (Supplementary Powers) Amendment (Climate Change, Energy, the Environment and Water Measures No. 4) Regulations 2023
Financial Framework (Supplementary Powers) Amendment (Employment and Workplace Relations Measures No. 2) Regulations 2023
Financial Framework (Supplementary Powers) Amendment (Health and Aged Care Measures No. 5) Regulations 2023
Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 6) Regulations 2023
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Financial Communications and the Arts Measures No. 4) Regulations 2023
Framework (Supplementary Powers) Amendment (Social Services Measures No. 5) Regulations 2023
High Court (2024 Sittings) Rules 2023
High Court Amendment (2023 Measures No. 1) Rules 2023
High Court Amendment (Fees) Rules 2023
Migration Amendment (Biosecurity Contravention) Regulations 2023
Nuclear Non-Proliferation (Safeguards) Amendment Regulations 2023
Privacy Amendment (NT Home Ownership) Regulations 2023
Superannuation Legislation Amendment (CSS) Regulations 2023
Telecommunications (Consumer Protection and Service Standards) (Accessible Standard Telephone Services) Regulations 2023
Treasury Laws Amendment (ALRC Financial Services Interim Report) Regulations 2023
Treasury Laws Amendment (Modernising Business Communications) Regulations 2023 ■

This summary is prepared by the LIV Library to help practitioners keep informed of recent changes in legislation. For Commonwealth Bills, please go to www.liv.asn.au/LegislationUpdate_JanFeb24.

PRACTICE NOTES

Supreme Court of Victoria

Scale of Costs

On 30 November 2023, the Supreme Court's Council of Judges endorsed in principle a new Scale is to be incorporated within Appendix A of the *Supreme Court (General Civil Procedure) Rules 2015* to replace the current Scale.

The new scale will commence on 1 January 2025. For more information, go to https://www.supremecourt.vic.gov.au/areas/legal-resources/practice-notes/notice-to-the-profession-new-scale-of-costs.

Vivienne Mahy, Executive Associate to the Chief Justice, 1 December 2023

County Court of Victoria

Practice Note: Institutional Liability List

This Practice Note (PNCLD 19–2023) deals with the operation of the Institutional Liability List and provides practitioners and parties with guidance when initiating certain proceedings in the List in respect of damages for personal injury arising out of alleged physical or sexual abuse. For full details, go to www.countycourt.vic.gov.au/practice-notes.

4 December 2023

County Court of Victoria

Common Law Division Standard Orders Booklet

The Common Law Division Standard Orders Booklet is to be consulted by parties whenever they draft consent orders to be submitted to the Court. It should be read in conjunction with the relevant practice note. The booklet can be downloaded at www.countycourt.vic.gov.au/practice-notes. ■

4 December 2023

CASH RATE TARGET

From 6 December 2007 law practices whose matters are governed by the *Legal Profession Act 2004* cannot use the penalty interest rate for their accounts. The maximum rate is the cash rate target plus 2 per cent. The cash rate target is currently 4.35 per cent (from 8 November 2023). To monitor changes between editions of the *LIJ*, practitioners should check www.rba.gov.au/statistics/cash-rate.

PENALTY AND FEE UNITS

For the financial year commencing 1 July 2023, the value of a penalty unit is $192.31. The value of a fee unit is $15.90 (*Victorian Government Gazette* No S256, 23 May 2023).

PENALTY INTEREST RATE

The penalty interest rate is 10 per cent per annum (from 1 February 2017). To monitor changes to this rate between editions of the *LIJ*, practitioners should check the Magistrates' Court of Victoria website.

LAW INSTITUTE VICTORIA

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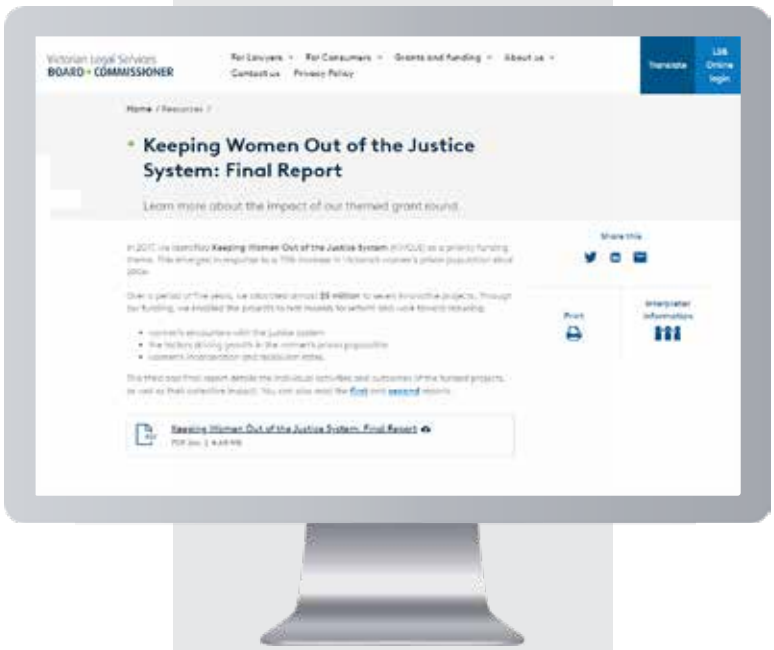


VLSB+C report

https://lsbc.vic.gov.au/resources/keeping-women-out-justice-system-final-report

From 2017, the Victorian Legal Services Board and Commissioner has allocated almost $5 million to seven projects for Keeping Women Out of the Justice System. The projects looked at reducing women's encounters with the justice system, the factors driving growth in the women's prison population and women's incarceration and recidivism rates. The final report, released in August 2023, provides priority themed grants funding. The 32-page report, including project outcomes, can be downloaded in pdf. The first and second reports are also available.

The University of Melbourne Library Guides

https://library.unimelb.edu.au/library-guides#filters

The University Library Guides are a great resource in assisting with research over a wide range of subjects. The University of Melbourne Library has 34 subject guides for law covering various aspects of Australian and international law. For example, the Competition and Consumer Law guide covers Australia and its states/territories, China, the EU and the US. For Australia, it lists several resources including commentary, legislation, websites, selected book titles and government agencies.

Australian Legal Technology Australia blog

https://alta.law/blog/

Australian Legal Technology Australia (ALTA) is a community of Australian legal technology professionals sharing information and collaborating to build an international presence for Australian legal technology. The ALTA Blog posts range from general topics including 10 Tips to Reduce Cyber Risk for Law Firms and How to Build the Ultimate LLM Stack to the ALTA "Hour of Power" members' events – a series of four-minute presentations showcasing Australian legal technology.

Macpherson Kelley insights

https://mk.com.au/news-insights/?searchWords=&sentence=1&categories%5B%5D=insights&industries%5B%5D=&expertises%5B%5D=&locations%5B%5D=

Written by Macpherson Kelley lawyers, these concise insights are a good way for practitioners to remain up to date with the legal world. The papers are three to five minutes reading time and provide an overview and commentary on the topic, as well as takeaways and tips. Recent topics include Payroll Tax: Common mistakes and the grouping net; Australia and Tuvalu announce new pathway for permanent residency; Big Mac vs Big Jack – a trade mark burger war; Major changes to employer sponsored migration; and Thinking of implementing generative AI? Think policy and training.

Lexis Nexis Legal Talk Series

https://www.lexisnexis.com.au/en/insights-and-analysis/legal-talk

Legal publisher LexisNexis has produced a series of podcasts, LexisNexis Legal Talk Series, on topics relevant to the legal profession. The series is free to access, and each episode runs approximately 15 to 30 minutes. The latest topics include Dispute Resolution – tips and traps when preparing evidence in civil litigation; Responsible AI and Ethics – what it means in practice; The future of Australian merger law; and The Growing Influence of Generative AI on the Legal Industry – what lawyers need to know.

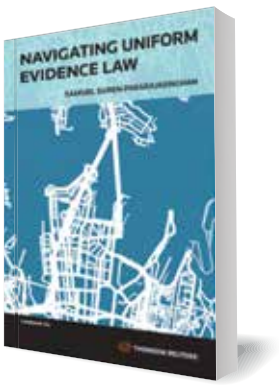
Public Record Office Victoria – Wills and Probates

https://prov.vic.gov.au/explore-collection/explore-topic/wills-and-probates

Public Record Office Victoria (PROV) holds copies of wills and probates from 1841 to January 2020 (probates after this are held by the Supreme Court of Victoria). Searching is conducted using a basic search interface with more options for refinement at the results page. Records from 1841 to 1925 have been digitised along with any requested copies from 1926 onwards and records processed so far in the 1926 to 1950 digitisation project. Copies can be in person or ordered online via the PROV Copy Service at its standard rates. Certification is also available if required for formal legal proceedings. ■

IN_PRINT

This month's books cover uniform evidence law, mergers and acquisitions, competition and consumer law and family law.



Navigating Uniform Evidence Law

Samuel Suren Pararajasingham, Thomson Reuters, 2023, pb $139

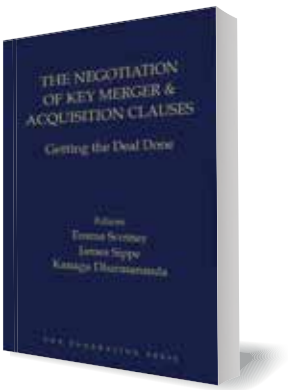
Samuel Suren Pararajasingham is an experienced criminal defence barrister in Forbes Chambers at the Sydney Bar and a lecturer in evidence. His aim in *Navigating Uniform Evidence Law* is to provide a straightforward, easy-to-use guide to Australia's uniform evidence legislation (UEL) that applies under Commonwealth, ACT, NSW, NT, Tasmanian and Victorian law as a result of the 1987 ALRC report.

The author follows the structure of the UEL and divides the book into five parts – preliminaries (ss1-11); adducing of evidence (ss12-54); admissibility of evidence (ss55-139); proof (ss140 -181); and miscellaneous matters. He divides each part into discrete topics found in the UEL, extracting the relevant statutory provisions; referring to differences between jurisdictions where they exist; analysing the effect of the provisions, including identifying the relationship between different provisions; providing a brief summary of key relevant case law; and giving examples of the practical application of the provisions.

The book does not purport to be a competitor to Odgers' *Uniform Evidence Law*. It is less comprehensive and not as referenced to case law. This is not a criticism – it cites fewer cases and relatively little secondary literature because it has different objectives. However, the cases to which it does refer are generally the leading authorities and well explained.

The strengths of this book are in its accessibility and its pertinent examples from practice which are consistently to the point and provide clarity for the context in which admissibility objections can be taken. It is well written, lucidly organised and clearly presented. It constitutes a useful first port of call for those needing to think through whether evidence can be admitted or should be the subject of objection. Its accessibility makes it a valuable contribution to litigation lawyers' bookshelves and an excellent adjunct to major texts on evidence law.

Dr Ian Freckelton AO KC, barrister, Castan Chambers, Melbourne



The Negotiation of Key Merger & Acquisition Clauses: Getting the Deal Done

Scotney, Emma, Sippe, James, Dharmananda, Kanaga (eds), The Federation Press 2023

This book of essays provides an insightful and highly practical examination of key clauses which are standard or commonplace within merger and acquisition (M&A) contracts.

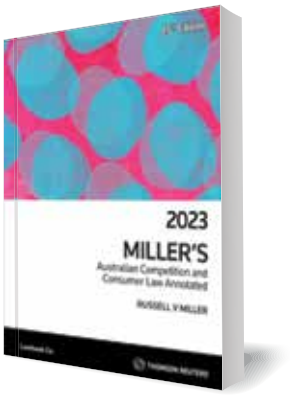
It takes the reader methodically and logically through the process of advising and negotiating on M&A clauses, from the start of an M&A transaction through to its conclusion.

The book is divided into 11 concise chapters which have been authored by experts who are leaders in their field, most of them with outstanding legal qualifications and experience, but all with extensive experience in the M&A world, whether as senior members of boards, management or advisers.

Each chapter begins with an introductory summary of what is covered in the chapter and concludes with a summary of the "key points" or take aways and a checklist on how to deal with the relevant issues logically and sequentially. Various examples of clauses are provided throughout the book. There are also numerous insights from the contributors, which they have gathered from experience, such as the cautionary observation that, in M&A, synergies are often overstated and that the remuneration practices of an organisation provide a telling cultural marker.

The book is a unique accomplishment – it achieves the fine balance between the theoretical and the highly practical. Accordingly, it provides a conceptual roadmap for the reader in negotiating and navigating the issues. The ability of the authors to present the material in a clear and straightforward manner ensures that students, legal and financial advisers, bankers and corporate principals will find it a valuable source of information and guidance.

David Kim, barrister



Miller's Australian Competition and Consumer law Annotated

Russell V Miller, (45th edn), Thomson Reuters, 2023, pb $185

Miller's annotated legislation has been an invaluable practical reference for commercial lawyers in Australia for decades. The latest edition is a testament to the author's commitment to providing lawyers with the most current and relevant information. It includes a further three legislative changes and 75 new court and tribunal decisions. With more than 300 updated annotations and 70 new annotations, this book is a treasure trove of insights into the ever-evolving landscape of competition and consumer law in Australia.

One standout feature is its coverage of the unfair contract terms amendments, commencing in 2023, which involve new penalties. The annotations are a useful reference on this critical legal development, empowering lawyers to navigate the complexities of unfair contract terms with confidence. Another addition is commentary incorporating penalties imposed in 2022 for consumer law breaches. These decisions have far reaching implications for businesses, making it crucial for lawyers to be familiar with them. Miller's insights enable lawyers to advise their clients on compliance measures and mitigating risks associated with consumer law breaches.

The user-friendly layout allows for easy navigation through a wealth of information. Lawyers will find the annotations invaluable, saving time and enhancing research efficiency. It is an indispensable reference for lawyers practising in Australian competition and consumer law and a must-have in any legal library.

Andrew Westcott, expertise counsel, Ashurst

Australian Family Law in Context

Patrick Parkinson, (8th edn), Thomson Reuters, 2023, pb $190

This edition is to be final version authored by one of its originators, Professor Patrick Parkinson. Intended to be a teaching text, the premise is that a thorough understanding of family law is not achieved through the study of legislation and case law alone. By putting the law in context, with an in-depth exploration of the historical factors and social values affecting its development and application, the book is an invaluable resource for law students also practitioners.

While referencing empirical and statistical evidence, together with some international literature, Parkinson principally draws on Australian research. In the notes and questions that follow extracts, the reader is called to reflect on how and why the legislation has evolved and to consider the rationale behind various court decisions. Providing a range of views and perspectives helps to shed light on the way family law shapes and responds to societal changes.

The book is not intended to be an exhaustive exposition. Rather, it is framed to present "a useful starting point" for the consideration of the issues it considers. The removal of footnotes and references from extracted material makes the text easier to read and more accessible.

The book also develops a number of interesting themes, including how the form and structure of the legislation (including the associated Rules) have progressed to provide a guide and framework for the private resolution of disputes,as much as for court adjudication. It will be of great assistance to those negotiating and litigating family law matters. ■

Adrian Stone, principal, Gold Stone Family Lawyers

IN_REFERENCE

HARDCOPY COLLECTION

Sale of Land Act Victoria

Lloyd, David and Rimmer, William, (2nd edn), Thomson Reuters (Professional) Australia, 2023

https://www.liv.asn.au/Web/Library/index.aspx#record/100390

Sale of Land Act Victoria provides a comprehensive analysis of, and commentary on, all aspects of the legislation. This second edition provides updates to the Act made by the *Sale of Land (Amendment) Act 2019*, expands the commentary across many aspects of the book, and includes decisions on the legislation handed down since publication of the first edition.

The Law of Civil Penalties

Kayis, Deniz, Gluer, Eloise and Walpole, Samuel (eds), Federation Press, 2023

https://www.liv.asn.au/Web/Library/index.aspx#record/100134

This collection of essays considers the purpose of civil penalties and their operation in different areas of the law as important tools of regulation and enforcement. It examines the doctrine of the law of civil penalties and reflects on potential further developments in the area. The collection features a variety of different perspectives including from judges, solicitors, academics and policymakers.

Uniform Evidence Law

Odgers, Stephen, (18th edn), LawBook Co, 2023

https://www.liv.asn.au/Web/Library/index.aspx#record/100135

Authored by Stephen Odgers, this latest edition continues to be an authoritative and comprehensive commentary on evidence law in Victoria and other jurisdictions. It is updated with case law and legislative judgments reviewed by the High Court of Australia, appellate courts and lower courts. With accessible annotated legislation and comprehensive commentary, this is a leading guide for barristers, courts, litigators and students.

REMOTE ACCESS COLLECTION

Australian Practical Tax Examples

Chapman, Mark, (6th edn), CCH Australia, 2023

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

This is a helpful resource for anyone working in tax law, and is a good companion to the CCH Australian Master Tax Guide. This eBook, updated to the 2022-23 tax year, contains practical and current information regarding the operation of tax law. The text has more than 275 case studies set out in an "issue" and "solution" format.

MULTIMEDIA

Estate planning – drafting – insolvency – franchises

https://www.liv.asn.au/Web/Library/index.aspx#record/100219

Clemente, Robert, Evans, Paul, Sapienza, Amanda et al, Sound education in Victorian law, Audio CD, October 2023, Television Education Network, 2023 (ACD KB 105 C 46)

Family law – family violence – proof – legal drafting – legal language

https://www.liv.asn.au/Web/Library/index.aspx#record/100220

Clemente, Robert, Blizzard, Monica, Wheeler, Robyn et al, Sound education in family law, Audio CD, October 2023, Television Education Network, 2023 (ACD KN 170 C 58)

SEMINAR PAPERS

Family law – parent and child – family arrangements

https://www.liv.asn.au/Web/Library/index.aspx#record/100506

Cooper, Adam, Escape to the Country: Negotiating Relocation Arrangements, seminar paper, November 2023, Television Education Network, 2023 (F KN 173.8 C 3)

Succession

https://www.liv.asn.au/Web/Library/index.aspx#record/100360

Wilson, Kathy, Bartfeld, Anita, Moore, Steven et al, Succession law conference [2023], seminar papers, 12 October 2023, Law Institute of Victoria, Continuing Professional Development, 2023 (F KN 120 W 9)

Wills – estates – communication – barristers

https://www.liv.asn.au/Web/Library/index.aspx#record/100363

Wilson, Kathy, Stanisich, Ursula, Gehrig, Louise et al, Regional & suburban series: Barrister and Solicitor Communications in Wills and Estate Matters, seminar papers, 25 September 2023, Law Institute of Victoria, LIV Education, 2023 (F KN 125 W 7) ■

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

Eligible LIV members may borrow library material for 21 days. Items can be posted free of charge. Material including the location REF is unable to be borrowed.

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EBOOKS AT THE LIV LIBRARY

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

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PERSONAL INFORMATION OF A NON-CLIENT

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

Wills and estates

FILE DESTRUCTION (R5018 – MAY 2023)

Firm A is seeking guidance from the Ethics Committee regarding the course it should adopt in relation to the holding of confidential personal information of a non-client. Firm A acts for the executor of an estate. In order to properly administer the estate, Firm A has been provided with confidential personal information from one of the beneficiaries. The beneficiary is not an executor. The beneficiary has requested that the information that has been provided and is being held by Firm A should be redacted (beyond name and address) and destroyed, such that it no longer holds the information on the estate file, either electronically or physically. Firm A is subject to the *Privacy Act 1988* (Cth) due to its annual turnover.

Ruling

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

1. The documents are still required for the purposes of complying with fiduciary obligations, statutory record keeping obligations, and the defence of any future claim against the solicitor. Accordingly, the documents are not required to be destroyed under the *Privacy Act 1988* (Cth). ■

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

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

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

INADVERTENT DISCLOSURE

Australian Solicitors' Conduct Rule 31 gives rise to an ethical obligation where material is 'reasonably expected' to be confidential.

When we think of inadvertent disclosure, it is usually the classic situation where a confidential email is sent to the other side by mistake. In that case, the ethics advice is straightforward; where it is known or reasonably suspected that the email is confidential, and the disclosure was inadvertent, it is the duty of the solicitor to not read the material and notify the other side about the disclosure.

Additionally, the solicitor must provide notification to the other side of the steps taken to prevent the inappropriate misuse of the confidential information. In practice, this means that once a solicitor is notified that a document is confidential and inadvertently disclosed, the solicitor must destroy any physical copy and delete any electronic copy[1] The solicitor must inform the client that the material has come into his or her possession but must not disclose the confidential information to the client.

The leading authority is *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46. In this case, the High Court of Australia said:

"[ASCR 31] should not be necessary. In the not too distant past it was understood that acting in this way obviates unnecessary and costly interlocutory applications. It permits a prompt return to the status quo and thereby avoids complications which may arise in the making of orders for the rectification of the mistake and the return of the documents. This approach is important in a number of respects. One effect is that it promot es conduct which will assist the court to facilitate the overriding purposes of the CPA. It is an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice."[2]

The LIV Ethics Advice Line receives calls relating to inadvertent disclosure in the context of family law disputes. It is no secret that family law disputes can become incredibly acrimonious and it can be easy to fall into the trap that disclosure by one spouse to the other of privileged information amounts to privilege having been waived. Solicitors need to exercise caution if they find themselves in this position, as failure to do so could result in having to cease acting..

In the case of *Crittenden v Collins* [2017] FamCA 716, Carew J was clear about the solicitors' obligations:

"In the case before me there is no issue that the documents are on their face privileged. There is also no doubt that the husband knew the documents were confidential and that he had provided them [to his solicitors] for the purpose of perceived forensic advantage in his case . . .

"It is most unfortunate (to say the least) that [the husband's solicitors] delayed in taking appropriate steps immediately upon receipt of the privileged documents. While Rule 31 of the *Australian Solicitor Conduct Rules* may not strictly apply the intended mischief to be addressed is absolutely clear in my view".[3]

The key takeaway from this case and the expected conduct by solicitors who find themselves in this situation is that, if you have a suspicion that any material provided to you by a client is confidential and has been obtained in error, it should prompt you to urgently seek further instructions. ASCR 31 gives rise to an ethical obligation where the material is "reasonably expected" to be confidential. Even if your client refuses to instruct you to do so, you must immediately pick up the phone to the other side's solicitor, provide them with the material that has been obtained and confirm the position. You must refuse to read anything that is confidential, even if instructed to do so. The client in possession of the material should be advised to destroy it.

The purpose of ASCR Rule 31 is to advance ethical obligations for the proper administration of justice as required by ASCR Rule 3, and that duty is paramount where it conflicts with another duty owed to our client. The LIV Ethics Hub has a useful guideline on this issue.

How can we help you?

Visit the Ethics & Professional Practice Department's website at http://www.liv.asn.au/ProfessionalPractice/Ethics

To discuss concerns about inadvertent disclosure, please contact the Ethics & Professional Practice Department on 9607 9336. ■

Jo Hall is a lawyer, LIV Ethics and Practice Support.

1. LIV Ethics Committee Ruling R5010, February 2022
2. [66]-[67]
3. [50] and [54]

ARE YOU DOING ENOUGH TO SUPERVISE STAFF?

Effective supervision embeds ethical behaviour and sets the standard and culture of a law firm.

While an important aspect of supervision is monitoring and maintaining the quality of work undertaken for clients, it has a much wider role in law firms and should also be viewed as an opportunity to provide on-the-job training, development and support of legal practitioners at all levels.

Effective supervision not only imparts technical knowledge but also passes on good practice management and work habits, communication skills, embeds ethical behaviour and sets the standard and culture of a law firm. If done well it creates a supportive environment to improve the performance, engagement, wellbeing and retention of staff.

There is no one-size-fits-all approach for effective supervision, and what is required will vary in each case depending on the size of the law firm, the type of work and experience and competence of the supervisee. A key ingredient is that the supervisor properly understands the importance of their role and genuinely cares about, and is committed to, the development and support of their firm's people.

There are many important foundational skills and practices that good supervision helps develop.

Ethics: Legal practitioners have professional responsibility and ethical obligations under general law, legislation and professional rules, and are trained in ethical theory, but ethical behaviours, including what to do and how to handle an ethical dilemma are often learned and developed in real practice situations. It is not just staying within the technical rules and law but also identifying and taking action to avoid potential problems and "doing the right thing". This is often best learned from the guidance and direction of supervisors and colleagues as new and different situations arise. Supervisors and leaders of the firm must set, live and pass on the ethical standards that everyone lives by.

Knowledge: Supervisors typically have a wealth of knowledge that they can pass on to less experienced practitioners. This is not just technical knowledge of the law, but imparting strategy and lessons learned over many years of practice to develop and mentor practitioners to do good quality work.

Effective communication: Practitioners can learn enormously from observing a more senior lawyer interact with clients and other parties and should be given this opportunity. Good supervision should also include supervisors sitting in with supervisees in client meetings and calls and providing feedback. Analyse whether the supervisee is obtaining and testing the client's instructions with active listening and asking probing questions, effectively communicating advice, and checking and adequately testing whether the client understands the advice. Constructive feedback and support is important to help hone these essential communication skills.

Record keeping: A critical aspect of running a file is the discipline of recording in writing all communications with clients (and other parties) and the instructions received. Supervisors should teach practitioners to always, without exception, make a contemporaneous file note of the client's circumstances, advice given and instructions received. The file note should also record the date, start and end time, how the meeting or interview was conducted (eg, in person or online) and who was present. Supervisors should check files and follow up to ensure this has been done and help instil this basic but critical practice management habit.

Confirming key risks and advice in writing: A good supervisor should stress the importance of always confirming legal advice and key risks to clients in writing and require it to be done until it becomes the norm – a habit that the practitioner always does. Like file notes, it is a crucial step which is often overlooked.

Dealing with difficult clients and work: Another key skill practitioners must develop is how to manage difficult clients and unusual or complex work. We all have a "too hard" basket, and from time to time need guidance on how to action these matters before they become a problem such as a complaint or claim. Supervisors have an important role to help file handlers move forward when there is a block to doing the work. Often discussing a file with a supervisor will give the supervisee the confidence to action the matter or identify another strategy, such as briefing counsel or initiating a client conference (often with the supervisor present) to discuss the difficulties. It may be hard to identify a way forward until you talk about it with another practitioner who with fresh eyes can see a clear path forward.

A culture of support: Providing a structured and proactive program of supervision within the firm that includes regular discussions and meetings, feedback and proactive follow up, shows a commitment to support, train and mentor staff to be better practitioners. It will not only improve performance and risk management within the firm, but facilitate the engagement, wellbeing and long-term retention of staff.

Experience tells us that good supervisory skills do not come naturally to all lawyers, and some will require training and support from the firm. Another way to help improve supervision practices within the firm is to identify and recognise who are good supervisors. Think about the qualities that make them a good supervisor and ask them to share their experiences, techniques and tips. At the same time, law firms should also identify supervisors who are not supervising well, and give them feedback and support to help them improve or change their role away from supervision. ■

TIPS

- Supervision has a wider role in law firms than checking work quality. It involves on-the-job training, development and support of practitioners.
- Regular discussions or meetings, feedback and follow-up are essential.
- Done well, supervision passes on good practice management habits, communication skills, embeds ethical behaviour and improves the wellbeing and retention of staff.

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

BEWARE THE ENFORCEABILITY OF LEASE INCENTIVE CLAWBACKS

The case of Alamdo Holdings Pty Ltd v Croc's Franchising Pty Ltd reaffirms the potential unenforceability of incentive clawbacks as penalties.

Commercial landlords frequently offer incentives to tenants to enter a lease. When a landlord pays an incentive upfront (usually by way of a rent-free period or contribution to tenant fitout costs), an incentive repayment obligation is often included. These provisions (or "clawbacks") allow a proportion of the incentive to be refunded to the landlord if the lease is terminated early, on the basis that the landlord has not received the benefit of the full lease term.

However, the recent case of *Alamdo Holdings Pty Ltd v Croc's Franchising Pty Ltd (No 2)* [2023] NSWSC 60 reiterates that clawbacks will be unenforceable as a penalty, where the provision goes beyond protecting the landlord's legitimate interests.

Alamdo Holdings Pty Ltd v Croc's Franchising Pty Ltd

The NSW Supreme Court considered whether a clawback was a penalty. In this case, Alamdo Holdings Pty Ltd (Alamdo) as landlord paid an incentive of $250,000 to Croc's Franchising Pty Ltd (Croc's). The incentive was taken upfront as a contribution to fitout costs, with Alamdo retaining ownership of the fitout. The documents contained a clawback, whereby a proportion of the incentive would be repayable on early termination of the lease, calculated on a pro rata basis by reference to the initial lease term. The lease was then terminated early due to non-payment of rent. Alamdo sought recovery of rental arrears, loss of bargain damages for the remaining lease term and a partial refund of the incentive under the clawback. Croc's argued the clawback was unenforceable as a penalty.

In determining whether the clawback would operate as a penalty, the Court considered:

- whether the clawback could be characterised as a threat against Croc's failing to comply with its lease obligations or as a punishment
- conversely, whether the clawback served to safeguard the legitimate interest of Alamdo, was proportional to that interest and reflected a genuine pre-estimate of damage.

The Court held the clawback went further than necessary to protect Alamdo's legitimate interest and was unenforceable as a penalty. Alamdo was entitled to recover rental arrears and loss of bargain damages, but if Alamdo were able to additionally recover a proportion of the incentive, it would be in a better position than had the lease run its course. The Court adopted the reasoning of Dalton J in *GWC Property Group Pty Ltd v Higginson* [2014] QSC 264, which held that a similar clawback operated as a penalty, as the repayment was extravagant and unconscionable in comparison with the maximum loss suffered by the breach of the lease. Difficulties in re-letting the premises were to be reflected in contractual damages but did not justify incentive repayment.

Victorian position

The Court's findings in *Alamdo Holdings* are indicative of the likely position of the Victorian Courts. *Alamdo Holdings* is consistent with the recent position of the Victorian Civil and Administrative Tribunal (VCAT) in *Finetea Pty Ltd v Block Arcade Melbourne Pty Ltd (Building and Property)* [2019] VCAT 1529 (*Finetea*), which also applied the reasoning of Dalton J in *GWC Property Group*. In *Finetea*, VCAT held a clawback was a penalty on the basis that if the landlord was refunded the incentive in addition to contractual damages, it would be out of proportion with the damage suffered. With clawbacks a common feature of commercial leasing, there is a risk that similar clawbacks may be unenforceable in Victorian courts.

Practical implications

Practitioners should consider the enforceability of clawbacks when advising on incentive structuring. Alternative options may include:

- utilising rent abatement incentives, which reduce the rent proportionately throughout the lease term. Clawbacks are not required as the incentive is applied in-line with rent received. However, this may not be suitable for tenants with significant upfront capital requirements
- minimising landlord risk by having caps on the total incentive to be applied upfront
- securing incentive repayment through financial agreements, provided appropriate security can be agreed (as landlords may already own the fitout paid for by the incentive)
- as a fallback, strengthening other contractual provisions to ensure easier recovery under contractual damages principles and indemnities. ■

SNAPSHOT

- *Alamdo Holdings Pty Ltd v Croc's Franchising Pty Ltd* provides important insight as to when lease incentive clawbacks may be unenforceable.
- Clawbacks will be construed as a penalty and unenforceable where they go further than necessary to protect the landlord's interest.
- Practitioners need to consider enforceability of clawbacks when advising on incentive structuring.

Danielle Jansse is a senior legal counsel in-house (real estate).

ADOBESTOCK

STEPS TO IMPROVE SAFETY AT WORK

Survey finds three in five employers are not taking internal complaints of workplace sexual harassment and discrimination seriously.

A new research report by employment rights legal centre JobWatch, RMIT and the University of Wollongong has revealed that more than three in five employers are not taking internal complaints of workplace sexual harassment and discrimination seriously and are failing to protect their employees from discrimination in the workplace.

In the report, "Overwhelmed and Frustrated: Experiences of workplace sexual harassment and discrimination; the barriers faced with the legal system",[1] callers to the JobWatch free telephone information service also revealed that:

- 95 per cent of respondents experienced discrimination either multiple times or by multiple perpetrators
- nearly three in four respondents reported multiple adverse outcomes including loss of job opportunities, financial reward, position and work, as well as harassment and bullying.

The research also found that the reported experiences were exacerbated by negative and unsatisfactory interactions with a complex legal system that favoured the employer, and the short time limit for claims. Fear, stress and lack of resources were also cited as barriers to reporting or disclosing.

Survey respondents noted:

"Every legal option exposed me financially and the workplace made it known they would fight. I felt there were really no guarantees and therefore no recourse. Everything I looked at just seemed fruitless".

"I was told by the workplace that I had left it too long to make a complaint and that I needed to make a complaint shortly after leaving that workplace".

The research was conducted to address the notable gap in justice system data about the non-legal and legal actions that are taken by workers. This has been noted in landmark reports such as the Respect@Work report of 2020 which noted: "There is currently little consistency in the collection, monitoring and reporting of data on workplace sexual harassment by anti-discrimination and other regulatory agencies".[2]

As a result of this research, JobWatch is making 10 recommendations for improving workplace cultures and safety and increasing access to justice for vulnerable workers. Here are the top five recommendations:

- standardise time limits across all jurisdictions to 24 months for initiating all forms of discrimination claims
- create a Discrimination Information Statement to be provided to all employees on the commencement of a new job, similar to the Fair Work Information Statement
- increase funding to community legal centres to deliver dedicated workplace sexual harassment and discrimination legal services
- fund duty lawyers for conciliations and mediations through both anti-discrimination and industrial relations claims
- reduce and regulate the use of confidentiality clauses in settlement agreements, to be used only on request by the applicant in proceedings.

Victorian employment and anti-discrimination lawyers are encouraged to read the full report on the JobWatch website[3] and consider how they support clients to navigate the legal system and achieve settlement arrangements that both meet the applicant's needs and promote improvements in employer practices. ■

Zana Bytheway is the executive director of JobWatch employment rights community legal centre. She is a former co-chair and current member of the LIV Workplace Relations Committee.

1. A Chan, Z Bytheway, J Oldfield, R Loney-Howes and G Heydon, 2023. "Overwhelmed and Frustrated: Experiences of workplace sexual harassment and discrimination; the barriers faced with the legal system", JobWatch and RMIT survey and data analysis report. Melbourne, Australia
2. Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces, 2020, Australian Human Rights Commission
3. https://jobwatch.org.au/what-we-do/law-reform/

SNAPSHOT

- A new research report into the actions taken by workers after experiencing workplace sexual harassment and discrimination has been released by JobWatch employment rights community legal centre, RMIT and University of Wollongong.
- Survey respondents reported overwhelmingly poor responses from employers, with three in five employers not taking complaints of harassment and discrimination seriously and failing to protect their employees. Respondents also reported frustration with trying to navigate the legal system on their own.
- Report authors have provided 10 recommendations for improving access to justice for workers, including the standardisation of time limits for discrimination claims to 24 months across all jurisdictions.

ADOBE STOCK

SIDELINE

This technology is relevant to all practice areas.

JUDITH BENNETT

Which practitioners would find this useful?

Sideline is useful for all lawyers who use emails to write messages, draft client advice and edit other lawyers' work.

This legal tech is relevant to all practice areas, especially in more complex areas requiring tailored drafting when teams of lawyers work together.

Founder

Sideline was developed by Daniel Lim and launched mid 2023. With more than 10 years as a finance lawyer and internal legal innovation adviser, Mr Lim is now a legal "techpreneur". (He also trained for more than 20 years as a classical pianist and repetiteur.) Building on more than a dozen prototypes, iterations and user feedback, he honed in on lawyers' frustration with the need to manually redline their emails to show edits. He built Sideline as a one-click solution to this niche problem.

Enabling junior lawyers to see changes to their emails made by more experienced lawyers, Sideline also links to Daniel Lim's wider philosophy that the best training for lawyers is on-the-job training.

What is it?

Why doesn't Outlook have a track changes feature like Word? Now it does. Sideline tracks changes in Outlook emails.

Sideline is a simple add-on that enables users to track changes to emails as they are made or to show edits in clean copies. It uses the well-known protocol of red for deletions and blue for inserts.

Sideline operates across various work flows:

- colleagues or supervisors can edit your emails and Sideline automatically converts the edits from clean text into redlined text. No more manual formatting
- colleagues or supervisor can make edits in clean text to your email and then send it out or back to you. No more wondering what changed as Sideline shows you the changes with a single click
- you received your email back with edits shown in redline from your colleague or supervisor? Sideline lets you accept or reject each change

It is easy to install, taking five to 10 minutes. There is assistance with on-boarding supported by a help knowledge base.

Benefits

Key benefits include:

- no more tedious formatting of edits to look like track changes
- no more wondering what changes have been made when edits are in clean text
- clear view of all changes made
- easy to accept or reject changes
- all done within Outlook.

Integration

Sideline works with Outlook in MS365 or Office LTSC2021 and with Exchange Online. It works on Windows, Mac and Office on the web.

Risks

Sideline does not store any data or metadata processed through it. Security includes hosting on Microsoft Azure with SSL-encryption. Sideline has been built on Microsoft's platform and complies with all Microsoft requirements. It has passed third party audits. As with any cloud offering, cybersecurity is present for confidential data moving beyond a firm's internal systems.

Cost

Sideline offers a 14 day free trial. Pricing is $5 per user per month (excl GST) on a flexible month by month contract. ■

SNAPSHOT

What is this legal tech?
Sideline is an add-in that lets you track changes in your Outlook emails

What type of technology?
Copy Add-in to Outlook

Vendor
Sideline Technology Pty Ltd

Country of origin
Australia

Similar tech products
Google docs

Non-tech alternatives
Lawyers

More information
www.trysideline.co

Judith Bennett works with lawyers to better manage their business as director of www.business4group.com. She is also an executive member and past chair of the LIV Technology & Innovation Section.

ADOBESTOCK

ON MERIT

Pernicious or profound? The anonymity paradox.

In my year as Victorian Women Lawyers (VWL) president I have reflected on the history of our organisation, the legacy I am a part of and the impact women have had on the practice of law in Victoria.

VWL has a long history of contributing to the *LIJ*, including to this column which readers may not be aware once had another name. Under the title "According to Merit" it was originally penned by an anonymous author using the pseudonym "Merit". Written with an almost acerbic tone in the third person as a gossip column, the first "According to Merit" appeared in May 2000;[1] it reads very differently from this modern iteration.

In that first column Merit shares with readers the news that, with new judicial appointments, the number of women magistrates has increased to 24 (compared to 71 men). Good news you would think, but in that same column Merit is compelled to address and rebuff concerns and complaints about these appointments. Merit shares quotes from a former Chief Justice of the High Court that "diversity and merit may not necessarily go hand in hand, and that a focus on the former may somehow mysteriously result in the latter being diminished". Merit feigns confusion using humour to point out the absurdity of assumptions that women lack merit declaring that the profession is lucky to have access to a "largely untapped pool of extremely qualified and experienced contenders who are not necessarily of the same background or gender! What new perspectives they can bring to the Bench on top of their training in an Anglo-Celtic heterosexual male legal framework! What a bonus!"

Unveiling Merit

When I started this column I envisaged an investigation into Merit's identity and (if she was indeed one person) an interview. I wondered if views on the progress toward equity changed after two years penning the column.[2] I wanted to understand why Merit wrote under a cloak of secrecy. Did anonymity give power, pushing forward the cause for women's rights? Did Merit fear pushback or reprimand if printing those views with their name attached? After more than 20 years, are the concerns of Merit a thing of the past?

Reading more of Merit, I couldn't help but notice the issues covered are the same for many of VWL's contributors today: parental leave, equitable briefing, intersectional representation in the profession and equal pay, among others. It seems we've not progressed all that far. As a legal professional and public servant I am always cautious about public statements; before writing this column I spoke to my employers to ensure they had no concerns with it. I found myself envying Merit's freedom to speak candidly. Shielded by anonymity Merit could openly call out those in the profession acting against equality. What a tempting proposition.

Realities of anonymity

Over the course of 2023, the romance of anonymity was shattered for many when a certain flyer was posted in the elevators of Owen Dixon Chambers. Without wanting to repeat the details, the intent of the flyer was to diminish programs and events aimed at uplifting and celebrating women in law. In the process it also derided the LGBTIQ+ community, respect of non-binary persons and pronouns and recognition of Aboriginal and Torres Strait Islander people's connection to Country. This was all framed as a joke to mock those who are "woke".

The allure of an alias ended for me when I felt the sting of its use. I was not that upset or even surprised by the words on the flyer. I was, however, disheartened by the silence of many people I had assumed to be allies. I was left wondering whenever I enter a room of men, "how many of you agree with the flyer's author? How many of you don't believe women like me have earned professional success?"

Finding the courage for your convictions

I am an advocate for gender equality in the legal profession and I have assumed a public position as VWL president to further that cause. I am willing to share my views not to participate in an echo chamber but to agitate for progress to make the lives of women working in and impacted by the law better. In publicly sharing my views I am open to good faith discussion and debate, but I'm not sure if there is good faith or genuine discussion if you are addressing a nameless and faceless antagonist. I'm proud to openly participate in the discourse in the hopes of creating change for the better and having a lasting impact.

I thank Merit for the contributions. However, on balance, I think anonymity is best left in the past. If putting my name to my opinions means I take the time to ensure they are accurate and authentic reflections of my values that I am willing to defend, that can only be a good thing. ■

Sophie Lefebvre was 2023 president of VWL and is a principal solicitor at the Victorian Government Solicitor's Office. Her opinions are her own and she is proud to state them.

1. Merit, "According to Merit" (2000) 74(4), *LIJ*, 39 (now available on AustLII)
2. In July 2002 the column's first person writing style changed and there was a named author (Michaela Ryan) from 2002. Until now there have been various different authors, most with connection to VWL

ADOBE STOCK

LIKES, SHARES AND LEGAL LIABILITY

Navigating the complex world of social media where an emoji can be considered defamatory.

In a world where lawsuits are just a click away, online competence is a necessity and lawyers need to be mindful of their digital footprint.

Maintaining an online presence has become an indispensable element of professional life. The use of digital platforms by legal professionals has transformed client interactions and career management, presenting both opportunities and challenges.

In this profession, where trust and credibility are essential, maintaining a strong online presence has become a way to display expertise and establish a reputation. A well-maintained website, professional profiles, and the sharing of insightful legal content across various platforms can reinforce a lawyer's image and standing in their field as a competent and experienced professional, offering peers and clients a better understanding of the person behind your brand. A client's decision to approach you can be directly impacted by their initial perception of your digital authenticity. Those who dismiss the impact of social media and technology could find themselves vulnerable to competitive setbacks. There is power in being able to see the value in change, rather than actively rejecting it.

Social media a double-edged sword

Platforms like X (formerly Twitter), LinkedIn and Instagram offer avenues for lawyers to advocate, share legal insights, and even attract potential clients. However, this accessibility is not without risk. The immediacy of social media can lead to oversharing information, inadvertently compromising client confidentiality or disclosing sensitive details of ongoing cases. Social media platforms facilitate informal and virtual interactions placing lawyers at risk of invasion of privacy, defamation and even self-incrimination.

In *Marburg v Aldred & Anor*[1] Dr Pieter Mourik had to publicly apologise and pay $180,000 after he supported and allegedly edited a defamatory page that made a post targeting Dr Roland von Marburg. The plaintiff found that the post was unethical and a breach of privacy for himself and his clients, but further defamed him and his practice, demonstrating how the simplicity of a Facebook post, comment or even "like" can lead to defamatory liability.

The way we conduct ourselves online is a reflection of who we are and can have severe repercussions if not handled with care. From posts to even private texts and conversations containing defamatory matter, we can observe the extent to which a level of caution is required in how we discuss others in public forums as demonstrated in *Armstrong v McIntosh*[2] where Paul Armstrong received $6500 in damages for defamatory remarks made against him via texts that were exchanged privately between his ex-brother-in-law and a friend.

Further, the first emoji defamation case has been reported in Australia. A precedent was established in *Burrows v Houda*[3] which held that courts have the authority to find defamatory content even when more indirect means of communication, like emojis, are used. The Court found emojis in comments left on a post by a lawyer about a judge that were liked and shared across platforms could be considered defamatory.

All actions on social media platforms, direct or indirect, should be handled with care. Defamation, being a tort of strict liability, does not require proof of malice intent, but rather, that the defamatory content affected the reputation of the plaintiff in the eyes of an "ordinary and reasonable person".

Access to justice

On a positive note, social media has proven to be a potent tool for legal advocacy and promoting access to justice. Lawyers can leverage platforms to raise awareness about critical legal issues, providing valuable information to a broader audience and endorsing causes that matter. Further, these platforms enable communication with individuals who might have lacked access to legal services, thereby fostering a more inclusive legal environment.

Free advertising and networking

Social media's establishment of online communities can facilitate free advertising for legal professionals, particularly those starting their careers. Lawyers can reach a vast audience without the need for expensive traditional marketing strategies. Compelling content, such as leadership posts and client testimonials, can bolster a lawyer's digital reputation, drawing in clients who align with their values and expertise. This provides an opportunity to cultivate a more specific audience, as legal professionals construct personalised communities tailored to their specific practice areas.

Innovation meets responsibility

While acknowledging the potential benefits of social media, lawyers should exercise caution regarding the information they disclose, the platforms they participate in, and the repercussions of their online interactions. Cybersecurity and data privacy are pressing concerns, necessitating vigilance to protect sensitive client information.

An informed and strategic digital strategy can elevate a lawyer's reputation, broaden their advocacy and foster a more inclusive legal system. However, the power of social media comes with a responsibility to exercise prudence and maintain ethical standards.

Legal professionals who master the nuances of online presence are poised to thrive in a legal landscape that is increasingly interconnected and competitive. It is imperative for us, whether legal personnel, students or professors, to set an example by using social media in a positive and legally sound manner as technology propels the legal profession forward. ■

Bailey Barbour is a current law student studying a Bachelor of Law / International Relations at Deakin University and a member of the Young Lawyers Editorial and Law Reform committees.

1. *Marburg v Aldred & Anor* [2015] VSC 467
2. *Armstrong v McIntosh* [No 4] [2020] WASC 31
3. *Burrows v Houda* [2020] NSWDC 43

ADOBESTOCK

THE BUSINESS REBOOT

LEADERS in Practice

It's time to think about sustainable goals for the year ahead.

BRENT SZALAY

Reading before bed instead of doomscrolling. Learning to play the guitar. Only buying one coffee a day. We often start the new year with the best of intentions, but giving effect to those New Year resolutions can be daunting, with the success of the entire 12 months seemingly resting on those first few weeks of January.

When it comes to your business, the same pressures apply. While you may feel invigorated to hit the ground running after a break, your professional success in 2024 will likely follow from taking a moment to reflect, plan and execute sustainable goals across the entire year.

So – where do you start? It's time to revisit, review and reboot.

2023 at a glance

2023 was the year we came to terms with generative AI, rising interest rates, increased inflation and talent shortages. While 2024 will most likely inherit these issues, the upshot is that businesses are heading into the new year with eyes wide open and can plan for the challenges ahead. The question to define their success will be – are their minds open, too?

The top issues for businesses in 2024

The Australian Institute of Company Directors asked business leaders to reflect on the governance challenges of the past 12 months and identified the following key areas to consider in 2024:

- elevated input costs, including wage increases
- adapting to and embracing generative AI
- increased psychosocial responsibility risks
- labour shortages
- cost of living
- productivity.

While these areas may seem overwhelming, they can be tackled by breaking down your plan of attack into manageable steps, allowing your business to rise to the occasion and thrive in 2024.

Four steps to reboot your business

Review

Before you charge forward, take a moment to look back at the year in review. Start by revisiting your business goals and consider whether they should still be your goals for the year ahead.

What worked for your staff, business and bottom line the previous year, and what will you leave behind as a relic of 2023?

By clearly articulating what worked and what didn't, you're setting your business up with clear intentions of where to head without continuing practices that no longer serve you.

Consider consulting your staff with an engagement survey to gauge the temperature of your workforce and their views on what you achieved as a business, where you excelled and what you could improve on.

Speaking with your clients is another invaluable touchpoint. Just as you have with your staff, a client feedback survey is a great way to understand what they value from your business and anything you could adapt or develop to offer a better service.

Reframe

Once you understand your workforce and clients' attitudes, it's time to pan out and look at the broader context in which your business operates.

Has the market changed or are there big shifts coming?

Embracing and moving with change instead of losing time resisting it is the best way to seize on opportunities and keep ahead of the game. This might include a marketing refresh, adopting AI for efficiencies, considering your employee value proposition to keep staff engaged or re-thinking the way you connect with clients.

Re-plan

Now that you've reviewed your business goals for 2024, it's time to update your strategic action plan to plot out how and when to achieve them.

Breaking goals down into three, six and 12-month objectives helps keep you on course throughout the year and avoids sobering realisations in December that you should have made adjustments in March.

With the RBA indicating that interest rates have hit the top of their rising cycle, or close to it, business owners can step into 2024 with a stronger level of confidence and certainty about the year ahead of them and plan accordingly.

Reignite

It's time to harness the energy of the new year and kick into action mode.

With a renewed drive and confidence, re-engage with your staff and clients and remind them of your business' vision and purpose (which should now be clearly defined).

Let them know what you can offer in 2024, how the cornerstones of your business might remain the same but that you're adapting with the times. Share your mission and invite them along for the journey.

Apathy is the silent killer of commerce. By actively turning your mind to the lessons of 2023 and critically evaluating what to carry forward to 2024, you're giving your business the best chance of a successful year ahead – one step at a time. ■

Brent Szalay is SEIVA managing director.

GREATER RECOGNITION FOR SPECIALISTS

This year the LIV is offering accreditation in five areas of law – children's law, costs law, criminal law, immigration law and wills and estates law.

Since 1989 the LIV's Accredited Specialisation Scheme has had great success for members with benefits gained from accreditation. Last year, 51 new specialists joined their peers in holding accreditation across five areas of practice. Support from the profession includes LIV committee volunteers and VCAT without whom this peer-based certification would not be possible. The start of a new cycle is a good opportunity to reflect on the scheme with an introduction from the new chair of the Accredited Specialisation Board Caroline Counsel AccS(Fam).

Caroline Counsel

It has been a privilege to have been a board member of the Accredited Specialisation Scheme since 2015 and an even bigger privilege to have been appointed chair. I am mindful of the incredible service that immediate past chair and fellow LIV past president Katie Miller AccS(Adm) has performed in the role over many years. I have big shoes to fill, and I am grateful to the other members of the board and the indefatigable team at the LIV who will ensure Katie's legacy lives on.

Among the many achievements of the Accredited Specialisation Board have been a reconsideration of the changing nature of the working life of lawyers, the pre-requisites to attaining accreditation, and the introduction of post-nominals to ensure specialists are differentiated from those who have not yet attained specialisation. We intend to continue to promote and elevate our specialists in the minds of both the public and the regulator. That is one of our biggest challenges – to ensure the legacy of the specialisation brand and its prominence in the minds of users of legal services.

As a family law accredited specialist, holder of the Family Violence Portfolio at the LIV and co-chair of the LIV Family Violence Working Group, I have had a particular interest in ensuring that, where appropriate, there is assessment of specialisation candidates in relation to family violence and how it impacts on their given area of law. To this end, and together with past members of the Accredited Specialisation Board Mark Woods and Rose Lockie, we have ensured that family violence issues be addressed in assessment of specialists, particularly in family law.

As the LIV continues to partner with its members to support lifelong learning, the accreditation scheme has an increasingly important role to play in that partnership. We want our specialists to excel, to stand out and be confident in the mastery of their chosen area of expertise.

The Accredited Specialisation Board must have an eye on the present, the future and the changing nature of legal practice to ensure accreditation remains not only relevant but highly desired. This work is ongoing, and the Accredited Specialisation Board and LIV staff will work together to ensure the strength of the brand into the future. We will continue to refine the rules to encapsulate the changing nature of employment in the legal profession and ensure the scheme continues to reflect contemporary practice through assessment and ongoing specialists' requirements.

With the LIV/ACAP PLT program, we have new opportunities to position accreditation as a goal for lawyers post admission, and to develop pathways for specialist accreditation. We will build the skills expected of an accredited specialist through the LIV CPD programs, mentoring and professional engagement opportunities, to truly position the LIV as a partner in our members' careers.

The importance of referees

The provision of three referees is part of the eligibility criteria for accredited specialisation and considered to be an important and intrinsic part of the peer-based program. Yet, finding three suitable referees that also meet the eligibility criteria who can support your application can sometimes be tricky or leave applicants wondering what is the purpose.

References, similar to job applications are an essential part of the application process as it provides the Accredited Specialisation Board a signal by peers as to an applicant's practice, suitability and confidence to undertake the program. The disclosure of an applicant's intention to apply for specialist accreditation provides the opportunity for an applicant to reflect on their readiness for the assessment program and to invite feedback from peers as to the suitability and breadth of their practical experience. It also demonstrates that an applicant's network can provide support through the assessment program, as well as possible referrals and legal community support that is intrinsic and a key benefit of joining more than 1100 LIV accredited specialists.

Be recognised using post-nominals

Becoming an accredited specialist is a significant achievement, providing practitioners with the opportunity to set themselves apart and promote themselves as accredited specialists publicly. In 2023, to increase recognition of specialists in the legal profession and with consumers of legal services, the LIV introduced post-nominals for its accredited specialists. The aim is to provide an objective way for the profession and the public to identify and recognise legal practitioners with certified expertise who can best assist them with their particular legal issue.

To build awareness of the post-nominals and the accredited specialisation brand, it is important current accredited specialists use their post-nominals, as we continue to educate the community on their significance.

New applicants' questions answered

If you are considering applying for accredited specialisation, here are some common questions and general information to assist.

What is the Accredited Specialisation Scheme?

The Accredited Specialisation Scheme is a peer founded, sector led certification in an area of specialist practice. It requires individuals to demonstrate ongoing excellence in all areas of practice and maintain the higher levels of competence expected of a specialist which includes an ability to manage complexity and showcase contemporary lawyer skills to deliver client service excellence.

The scheme is governed by both the LIV Accredited Specialisation Board and the LIV board.

LIV specialist accreditation is nationally recognised and helps improve professional standing and career opportunities while setting lawyers apart as experts in their field. It is a definitive and recognisable mark of excellence to peers and clients. The scheme has operated for more than 30 years and accredited more than 1100 specialists across 16 areas of law.

How do I become an accredited specialist?

The accredited specialisation assessment program is how candidates who believe their experience, knowledge and expertise is that of a specialist nature can choose to gain formal recognition. The assessment program seeks to verify professional experience through various assessment formats and is not a curriculum-based education or training program. It seeks to test and identify the breadth and depth of legal knowledge and skills, based on lived experience as a legal professional, and ensures the quality of these skills is aligned with future peers. It is a robust process and candidates are encouraged to consult with mentors and managers as to their readiness for undertaking the assessments.

The assessment guidelines determine the expected level of understanding required against recommended topics and provide recommended legislation and other resources to assist with assessment preparation. These guidelines seek to build on an existing foundation of knowledge to enhance and grow the practical application and skills in an area.

Areas of specialisation on offer in 2024

We will be offering the assessment program in the following areas:

- children's law
- costs law
- criminal law
- immigration law
- wills and estates law.

You can check when we are next offering assessments in other areas via the website as below.

What are the eligibility criteria?

Practitioners applying for specialisation must satisfy the following criteria:

- be a current member of the LIV (or the interstate equivalent)
- hold a current practising certificate
- have at least five years' full-time equivalent experience in practice (by 31 December in the year of application)
- have substantial involvement in your area of specialisation over the past three years
- provide three eligible references in support of the application.

I work as a prosecutor, can I still apply?

Absolutely. In fact, a signal of being a specialist is the ability to understand a matter and potential arguments to best represent your client, irrespective of whether your client is the defendant, the accused or the respondent.

What types of assessments should I expect?

Each practice area has a three and a half hour written examination. Depending on the area of specialisation there are also oral assessments that include mock court submissions, simulated client interviews or case presentations. There are also take-home assessments that include things like a letter of advice or a mock file.

What format do the assessments take?

We continue to take a digital-first approach to maintain equity for all practitioners, regardless of location. However, to ensure the assessment program remains contemporary, we have consulted with committees to design assessments to reflect current practice and the skills required of a specialist practising in 2024.

Skills such as digital literacy, conducting remote interviews and remote court craft have all been identified as important. Written exams are remotely monitored and use specific examination software. This supports global access at your preferred location yet limits any use of other applications while completing the exam. In 2024, we will continue to support digital simulated client interviews, and return to in-person delivery of some advocacy-based assessments in court. Further details for specific areas of law can be found in the area-specific assessment guidelines.

Key dates and fees for 2024 assessment program

Applications open	December 2023
Early bird* applications close	9 February 2024 (*$1350 inc GST)
Applications close	2 April 2024 ($1500 inc GST)
Candidate outcomes announced	First week of May
Assessments	Late July to late August

Early bird applicants will find out the outcomes of their applications in March. Standard application fees payable after 9 February are $1500 (inc GST) and the special consideration fee of $300. The full fee breakdown and dates for specific areas for 2024 can be found in the application and assessment guidelines respectively.

To apply, submit an expression of interest or find out more about the accredited specialisation assessment program, visit www.liv.asn.au/AccreditedSpecialisation

Save the date

There are a number of upcoming Accredited Specialisation Breakfast with the Experts sessions that are open to current specialists and anyone considering undertaking the assessment program as part of their preparations for assessment. As a current specialist you will receive a 25 per cent discount on the sessions: Further details can be found online.

Children's Law - Thursday 29 February 2024, 5-6.30 pm
Commercial Law - Tuesday 5 March 2024 – 9-10.30 am
Commercial Litigation - Thursday 14 March 2024, 9-10.30 am. ■

Sarah Munzenberger is program manager, LIV Accredited Specialisation.

Admissions

NEW ADMISSIONS

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on **21 November 2023**. The *LIJ* welcomes them to the legal profession.

ABBAS, Kirsten
ADAIR, Georgina
ADIHETTY, Dilini
ALAG, Raj Aalishna
ALYSANDRATOS, Leah
AMIRY, Sadiqa
ARMITAGE, Claire
ATKINS, Shanice
AWAD, Benjamin
BEATTIE, Rachael
BOND, Maxwell
BUI, Quang-Minh Jonathan
CAPUTO, Gemma
CARRUTHERS, Joel
CARTER, Paige
CAWOOD, Tamara
CHALABI, Yasmin
CHINYIMBA, Aaron
CHOL, Samuel
CRANLEY, Benjamin
CROWTHER, Joshua
CURRAN, Jack
DECKKER, Teisha
DESPOTELLIS, Natalie
DIMITROPOULOS, Elena
DINGLE, Georgia
DOAN, Quynhi
DON MANUELGE DONA SRI JAYAWARDENA, Kaushalya
DOUVEAS, Harrison
DRAPER, Brandon
DRYEN, Jasper
EL-KHOURY, Faris
ELLIOT, Rachel
EMANUEL, Isabella
FASTUCA, Bianca
FEDER, Imogen
FERNANDO, Jeneesha
FINCHER, Ali
FITZGIBBON, Anna
FRANCO, Andrea
GHALY, Jason
GHOSH ROY, Arnab
GOODLAD, Richard
HALPIN, Meg
HALSTEAD, Benjamin
HAMED, Redwan
HERRYGERS, Maryanne
HOBBS, Amy
HUANG, Wei
IBRAHIM, Sama
INGLEBY, Max
JEFFERIS, Daniel
JOYCE, Jasmine
KAN, Liyon
KAUR, Mandeep
KELLY, Monica
KEMPTON, Arabella
KENNEWELL, Harry
KEOGH, Darcy
KING, Alexandra
KMITA, Krystian
KNIGHT, Alysha
KORMAN, Samuel
KOZAKIS, Natasha
LAL, Rajat
LAVENDER, Ciara
LAW, Ho Ching Nathaniel
LE, Anne
LE, Josephine
LEFEVRE, Emma
LENG, Arlysa
LI, Ziting
LIEW, Ren Jay
LIND, Hannah
LOIZOU, Stacey
LOVICH, Lisa
LUMAPAS, Bernard
MACDONALD, Annabel
MACHAR MADUOT, Bol
MACLACHLAN, Lucy
MADAFFERI, Grace
MALANIN, Kaleb
MASON, Georgia
MAXWELL-LEONE, Galen
McATEER, Tessa
McCOMBE, Lachlan
McKENNA, Hannah
McMASTER, Kennedy
McNAUGHTON, Nicholas
MELVILLE, Brianna
MILLER, Lloyd
MISHRA, Shimpy
MOKE, Man Thng
MONTALTI, Sienna
MORGAN, Connor
NADANAKUMAR, Mathura
NAIK, Sita
NAVARRO, Christopher
NELSON, Eric
NENH, Kavin
NGUYEN, Linhthuy
O'SHANNASSY, Dee Dee
OWUSU, Nana
PAGLIARO, Catherine
PERERA, Kasadoruge Dakshika
PERKINS, Blaine
PHAM, Kim
PITCHFORD, Art
PORZ, Sam
PUZON, Cameron
QIAO, Yueyue
RAUX, Stephanie
REBBECHI, Chloe
RESIC, Angela
RETTORE, Monique
RIAZATI, Arman
RIGGALL, Isobel
SALAMY, Mark
SALMON, Thomas
SANDHU, Navpreet Singh
SAROPOULOU, Ariadni-Maria
SAVAGE, Rebecca
SHEEDY, Jack
SIMMONS, Louisa
SMITH, Cooper
SONG, Isaac
STIJACIC, Sasha
STRATMANN, Patrick
SZABO, Abigail
TAM, Chui Wah
TAM, Ingrid
TATE, Harrison
TERREY, Caitlin
TUMENCI, Fatma
VARMAN, Anita
VICK, Cassidy
VINCI, Cristian
VON SCHOENBERG, Nicholas
WAITE, Jeremy
WALTON, Thea
WARD, Alexandra
WEDDING, Trent
WETHERILL, Hugh
WHEELDON, Brielle
WHITTON, Madeline
XIAN, Cecilia
XU, Jasmine
YANG, Weifeng
YU, Amy

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on **16 November 2023**. The *LIJ* welcomes them to the legal profession.

AKULA, Kieran
ANDREWS, Madeleine
ASOTHAN, Arjun
AU, Jonas
BELL, Ashleigh
BONNE, Walinda
BRUSNAHAN, Wade
CHAN, Kylie
CHEN, Ava
CHESTON, Edward
DEMPSEY, Rory
GOLDMAN, Rona
GOVENDER, Divashna
HA, Uyen
HABIB, Siddiqa
KELLY MARLOW, Jack
LEE, Ruby
LI, Lok Ting
LIM LO SUY, George
MA, Shun Ying
MANDERS, Brooke
McGUCKIAN, Gabrielle
McKEE, Jeanette
MERLO, Jack
MIRRANAY, Waffa
NAIDU, Kaushal
NEALE, Caitlyn
PHILLIPS, Jessica
POPA, Julia
QUINTANA, Leticia
RABAHI, Edwina
RAO, Priyanka
RWABUTOZI, Cedrick
SHAH, Rajaneesh
SHAO, Carrie
SIM, Simson Zhan Yao
SMITH, David
SUDARSAN, Shruti
SULLIVAN, Kate
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LIV UPDATE

2023 LIV president Tania Wolff addressed the 15 November 2023 LIV annual general meeting. This is an edited version of her speech.

I would like to begin by saying what a great honour it has been to serve as president of the Law Institute of Victoria for a third consecutive year.

Representing our diverse membership is a tremendous responsibility and I am privileged to have had the opportunity to represent you and advocate for your interests and those of our community.

Last year, being an election year, the LIV's Call to Parties served as the blueprint for our legislative advocacy efforts. We were delighted that two long-standing policy positions concerning raising the age of criminal responsibility and bail reform gained traction in Spring Street. We will continue to advocate strongly on these issues.

We also invested significant advocacy efforts concerning the Health Information Sharing Bill and the Human Source Management Bill. Although not all our advocacy objectives were achieved, there were gains, and we strengthened our reputation and extended our influence among members of parliament, the media and other legal stakeholders.

I express my heartfelt gratitude to everyone involved in our policy and advocacy work, including more than 2500 members of our sections and committees. Their efforts, expertise and dedication to informing our policy positions have been invaluable – through 98 formal submissions in the financial year.

The year 2022/23 was a turning point. It marked the first year without lockdowns, mandates or audience caps. The LIV's milestone and flagship events returned in person, allowing us to welcome new members, accredited specialists, young, established and senior lawyers to various events, conferences and networking opportunities.

In 2022/23, the LIV received invitations to speak at 21 judicial welcomes and farewells, including those of distinguished leaders in our profession like the farewell to former Chief Justice of the Federal Court the Hon James Allsop AO and the welcome to the Hon Chief Justice Debra Mortimer. It is with immense pride that I represent the solicitors of Victoria in these important ceremonial occasions. I was also honoured to attend the farewell in Canberra for our first female Chief Justice of the High Court Susan Kiefel AC KC a month ago.

In July 2023, the LIV launched a new four-year strategic plan.

The plan enables the organisation to achieve our vision – a community served by an ethical and trusted legal profession, that defends the rule of law, safeguards the administration of justice and strives for access to justice for all. It also reinforces our purpose – to promote the highest standards of ethical and legal practice, education and service excellence in the practice and administration of law to ensure the community benefits from strong legal representation, effective advocacy and a fair and equitable legal and justice system.

The strategic plan is designed around three member and community focused themes:

- to influence and lead to uphold the rule of law for the benefit of the community
- to support and grow a connected and engaged community of members
- to transform, evolve and enhance the performance and capability of the legal profession through lifelong learning.

The strategic plan also outlines the strategic enablers we need to reach our goals to ensure our people and culture, our technology and our governance underpin our work and our financial sustainability.

The strategic plan is implemented by our staff and members in accordance with our values:

- acting with respect and integrity
- commitment to collaboration and teamwork
- fostering curiosity and innovation
- dedication to service excellence
- accountability to each other.

In developing the four-year strategic plan for the LIV, we were responding to fundamental shifts in the community, its expectations of legal professionals, the operation of the justice sector, and how legal practices are managed.

The strategic plan also responds to changing aspirations within the profession – a focus on diversity and inclusion, health and wellbeing, as well as a continual emphasis on promoting the highest standards of ethics and professional practice for the benefit of consumers of legal advice. We are newly cognisant of the need to design for the unexpected, to plan for uncertainty, and enhance the flexibility of the LIV's operations to seize new opportunities as they arise.

The LIV is committed to ensuring that we deliver the value and service that every member expects. The September 2022 member engagement survey demonstrated that satisfaction across the membership remained solid, and had risen markedly from 2018.

The survey also provided insights about changes in the profession since COVID-19 and highlighted the ongoing need for practitioners to develop new skills and knowledge to maintain practice and personal competitiveness. These insights continue to inform how we execute our strategic plan.

The value of our reputation is reinforced to me when I speak with members – individually, at regional and suburban law association meetings, at LIV events – and when I speak to those across the sector, in government and in the courts.

Our members are at the heart of everything we do, and we've continued to deliver high-quality, accessible services and resources that best meet your needs:

- our ethics and support lines resolved 3376 inquires from practitioners asking for support
- our library completed more than 2300 requests for information
- of the 144 events we hosted, the majority were free to members
- our daily LawNews emails and monthly *LIJ* kept more than 11,000 members up to date with the latest sector news and opinions.

We also continue to be committed to maintaining the diversity of our membership and wellbeing of the profession. The profession is demographically changing, with the majority of lawyers now female. The needs and aspirations of young lawyers are changing – which is why the LIV partnered with the Australian College of Applied Professions to launch a new Practical Legal Training course into the

Victorian market. Our commitment to developing the next generation of young lawyers is as unwavering as our support to existing members of the profession.

The LIV's community role is also one of which I'm proud:

- our referrals service provided valuable support to individuals in 2022/23 and generated more than 63,000 client leads for law firms who participate in the service
- our continued sponsorship of Law Week, our support for the VLSB+C's Your Right to Ask campaign and every media interview that we give demonstrates our commitment to expanding the understanding of the law, legal process, individual rights and access to justice for everyone in the community
- the work that we are doing in developing a cultural capability framework to support Victorian legal practitioners in meeting their responsibilities to First Nations clients is a long-overdue milestone in better providing for legal representation that is culturally informed, is culturally safe, and achieves the best outcomes for First Nations clients.

I thank the LIV CEO Adam Awty for the work that he and the LIV staff have done to achieve these results. Adam not only leads the dedicated and talented staff of the LIV but is also a respected leader of our profession. His tireless efforts in representing the LIV within the intricate legal and justice sector are commendable, and I am grateful to him and his team for their hard work, expertise and commitment in serving the LIV, its members and our community.

I would like to extend my appreciation to my fellow directors on the LIV board for their hard work, support and collegiality throughout the year.

Ultimately, the LIV is nothing without its members, and I extend my heartfelt thanks to every one of you for your unwavering support and encouragement over the past year and indeed the past three years. Your commitment to your clients and dedication to serving our communities is truly inspiring. The board and I are well aware that many of our members diligently work behind the scenes, engaging and leading in their communities without seeking public recognition.

Leading an organisation with members of such depth of dedication, talent and generosity fills me with pride. It has been an extraordinary privilege to have been at the helm of this remarkable organisation for the last three years. Thank you for your support and for your remarkable contributions to protecting and advancing the rule of law, promoting access to justice and striving for a more just Victoria. ■

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

ABOUT THE LIV: The LIV represents about 18,300 lawyers and people working in the law in Victoria, interstate and overseas. Our members offer their commitment, diversity and expertise to help shape the laws of Victoria and to ensure a strong legal profession for the future. The LIV promotes justice for all advancing social and public welfare in the operation of the courts and legal system as well as advancing education and public confidence both in the legal profession and in the processes by which the law is made and administered. As the peak body for the Victorian legal profession, the LIV initiates programs to support the needs of a changing profession, promotes an active law reform advocacy agenda, responds publicly to issues affecting the profession and broader community, delivers continuing legal education programs, and continues to provide expert services and resources to support our members.

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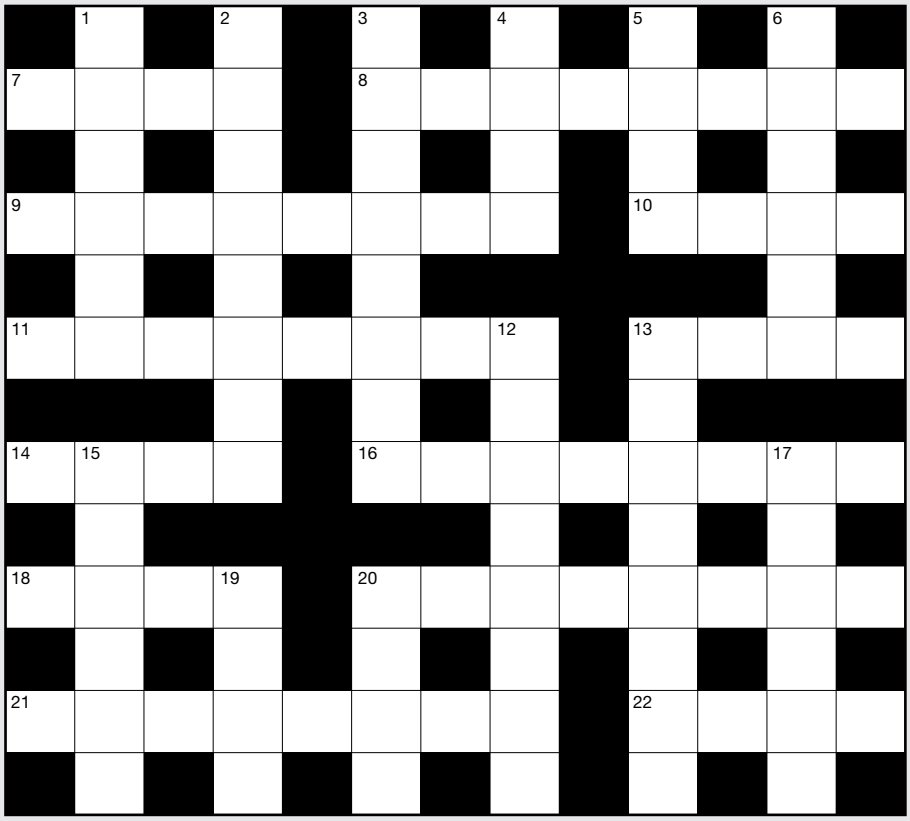
WILLS & ESTATES

FRANK PETER LYON - died on 26 June 2023, late of 9/1a Davidson Street, South Yarra, Victoria. Would anyone holding or knowing the whereabouts of any Will of the Deceased please contact Kathryn Gray, Hartwell Legal of Suite 8, 1 Milton Parade, Malvern, Victoria, 3144. Phone: 0402 828 231 Email: kathryn@hartwell-legal.com.au

Would any solicitor, firm or person holding or knowing the whereabouts of a will or other testamentary document of **STEVEN BRETT BURLEY** late of 381 Dryburgh Street, North Melbourne, in the State of Victoria, who died on 20 October 2022 please contact Michelle Zwieger of Saunders Family & Estate Lawyers, Level 6, 451 Little Bourke Street, Melbourne VIC 3000 Phone: 03 8672 7510 Email: michellez@saunderslaw.com.au; info@saunderslaw.com.au

LETTERS OF THE LAW NO. 266



Solution next edition
Compiled by Aver

ACROSS

7 Little Natalie gets nothing for alliance (4)

8 Sequence of events car noise started (8)

9 I'm obscuring the central field of eye specialist who has rose-coloured glasses (8)

10 Dismissed team leader leaves worried (4)

11 Was liked criminal used by footmen? (8)

13 Indian royal seen in region of Iran/Iraq (4)

14 Wise man cycles for a long time (4)

16 Travel, improbably, in tube near Osaka? (8)

18 Bridge player's point (4)

20 They don't believe in haste and sit around (8)

21 Southern stick-up artist steals litre from rum-runner (8)

22 Bank Holiday's crossword? (4)

DOWN

1 Tether salary to auditor's capital (6)

2 Grace's dancing shoes clipping most of lino (8)

3 Wannabe partisan must be agitated (8)

4 Settle in treeborne structure (4)

5 Narcotic made from roots of kumquat and volcanic ash (4)

6 Surrender to US soldier with attitude (4,2)

12 SA desert regularly features in UK daily as heat ruin (8)

13 Lip readers forget of French revolutionary's revenge (8)

15 We all have two, but Beyonce has thirty-two (6)

17 Abstractionist's extract of broth konfyt (6)

19 They'd be than a few sheets to the wind if this party was held outdoors (4)

20 Celebrate left dropping old Scot (4)

Solution to Letters of the Law No.265

1 E	A	2 S	E	3 S	U	4 P	■	5 T	U	6 P	A	7 C
R	■	T	■	A	■	U	■	E	■	R	■	A
8 R	A	I	L	S	P	L	I	T	T	E	R	S
O	■	C	■	H	■	L	■	T	■	L	■	E
9 R	A	K	E	■	10 J	U	D	I	C	I	A	L
■	■	E	■	11 S	■	P	■	X	■	M	■	A
12 M	E	R	I	T	S	■	13 R	E	V	I	E	W
U	■	L	■	R	■	14 F	■	S	■	N	■	■
15 T	R	I	B	U	N	A	L	■	16 D	A	R	17 T
A	■	C	■	M	■	T	■	18 S	■	R	■	R
19 T	A	K	E	M	E	W	I	T	H	Y	O	U
E	■	E	■	E	■	A	■	U	■	T	■	S
20 S	U	R	E	R	■	21 H	I	D	E	O	U	S

A VOICE FOR CHANGE IN RECOGNISING DISABILITY

CENTRE FOR INNOVATIVE JUSTICE ADVISER DOROTHY ARMSTRONG SHARES HER LIVED EXPERIENCE WITH JUDGES, MAGISTRATES AND OTHERS WORKING IN THE CRIMINAL JUSTICE SYSTEM. **BY KARIN DERKLEY**

The first person in the justice system to ever address Dorothy Armstrong with respect was her sentencing judge.

"She looked at me in the eye all the way at the back (of the courtroom) and said something that still makes me emotional. She said, 'I don't want to imprison you. But the law requires that I must.'

"[She] showed me respect by addressing me by my name. She showed me kindness and compassion when no one else had spoken to me, including my own lawyer. And that meant the absolute world to me."

Fifteen years later, Ms Armstrong now works with the Centre for Innovative Justice (CIJ) as a lived experience expert and peer mentor, providing advice on a range of issues relating to people with acquired brain injury (ABI) involved in the criminal justice system.

Dorothy Armstrong

Now in her early 50s, Ms Armstrong had been in and out of the justice system since she was a child, mostly as a victim of crime. "I experienced violence from partners and also from others, including from police."

In all those years, up until she was sentenced, she says nobody asked her what was going on in her life. "Nobody asked, why do you keep presenting?"

Unbeknown to Ms Armstrong, she had acquired a brain injury as a result of the violence she had experienced over the years. "It was only once I got to prison that I learned I had a brain injury."

Ms Armstrong is not alone in being a prisoner with an ABI. A study by Corrections Victoria found that 42 per cent of male prisoners and 33 per cent of female prisoners have an ABI.

But it was not until she had left prison that the impact of that disability on Ms Armstrong was finally acknowledged. Living in specialist accommodation, she was approached by researchers from the Enabling Justice project, a collaboration between the CIJ and Jesuit Social Services (JSS), after she was recommended as someone who had been to prison and had an ABI.

"These women asked me questions about things that had happened to me and my experience in the justice system. I'd never been asked that before. They really wanted to hear what I had to say. It was so overwhelming. I literally could do nothing but cry."

Having shared her own experiences with the researchers, Ms Armstrong wanted to help others like herself who had never had anyone in the criminal justice system understand what they were going through.

She became a member of the CIJ's Justice User Group, joining others like

herself who had an ABI and experience with the criminal justice system. Their experiences fed into the joint CIJ and JSS Recognition, Respect and Support report that aimed to determine why there were so many people with ABIs in prison, and to recommend better ways to accommodate their needs.

In 2020, Ms Armstrong gave evidence about her experience to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, describing the fear and frustration of being unable to communicate or understand what was being said to her in court.

"Whenever I've appeared before a court I'm just a number on a docket," she says now, "but decisions are being made about me that will affect the rest of my life. So not being able to understand what's going on is really awful."

Impressed by the depth of her contribution, the CIJ invited Ms Armstrong to come on board as a casual adviser and peer support worker. She contributed to the CIJ's Supporting Justice project, which provides practical resources for court and legal professionals to better respond to people with disability in the criminal justice system.

She now works for the CIJ on a permanent part-time basis, regularly giving presentations sharing her lived experience with judges and magistrates and others working in the criminal justice system. She also trains people to be self-advocates at the Self Advocacy Resource Unit (SARU), forming a group called Voices for Change.

CIJ associate director Stan Winford says people with an ABI or some other cognitive impairment are often reluctant to disclose that fact, even if they are aware of it.

"Sometimes it's because the process happens so quickly and they're so stressed and there isn't enough time." But sometimes it's because people have only ever had a negative response to others realising they have a disability.

He says that rather than expecting people with ABIs to disclose their disability, the criminal justice system could assume a disability is more likely than not, and take appropriate steps to uncover what that is and what response is needed.

"Disability is so prevalent that it shouldn't be up to people like Dorothy to put their hand up and say there's an issue here for me. Why not make the system more accessible generally? Because if it works with people with brain injury or cognitive impairment, it's going to work for everyone."

He points out that it is not necessary to be a clinician to respond to a person with a disability. "It's not about looking for the exceptional case of cognitive impairment. It's more about how we can accommodate the people in our justice system, many or most of whom have some form of disability, without requiring them to self-disclose."

Ms Armstrong agrees that taking more care with communication would help everyone who appears before the courts. "There's a lot of evidence to show that most people who come before the courts haven't finished school. They've been involved in youth justice, they've had experience of child protection and poverty. There's all kinds of abuse happening."

She would like lawyers and other court officers to adjust their language so those before the court can better understand what is happening about them. "Just slow down your speech, speak clearly, and use plain simple English."

Mr Winford says part of the problem is that "as lawyers we talk about concepts and use language that is hard for people to understand. Some of that is necessary, but a lot is not. There's no reason why, when communicating with a client or communicating with a court, you can't explain things in language that's understood and accessible to everyone.

"If a sentence is supposed to address the underlying need to change behaviour in that person, or to understand the impact of what they've done on the victim, and learn from that and try to change for the future, that's not going to be very effective if that person's not understanding or comprehending what's happening."

In the 10 years she has been giving presentations to people working in the justice system or talking with others like herself who have experienced it, Ms Armstrong says she feels things are gradually changing for the better.

"I have seen incredible change in the willingness of people in different areas of the justice system for showing up and reaching out to find out more information."

There's still more to be done, Mr Winford says. He points to mental health services as a possible model, where frameworks, principles and standards guide engagement with people with lived experience, and draw on their perspectives to improve programs and services.

"The value of their input and advice is recognised. They are described as 'consumers' and the mental health system provides them with a seat at the table."

But Ms Armstrong says the judge who spoke with kindness and respect to her would no longer be an exception. "I do feel that people are listening better these days." ■

FOOD

18/20

MoVida Aqui
500 Bourke Street
www.movida.com.au/aqui/

Recently refreshed by an interior makeover, MoVida Aqui has been one of the best-loved destinations in the legal precinct since it opened in 2009, seven years after Frank Camorra's Spanish cuisine empire commenced taking hold in Melbourne with the establishment of its flagship Hosier Lane premises.

Aqui's basic layout is mostly unchanged, with a row of high tables opposite the bar opening to a small room of lower tables and booths at the William Street end near the Little Bourke Street intersection. The mood has been softened accentuating the quiet intensity that marks a more serious dining venue.

We commence with heuvas ($16), a snow-white mound of whipped cod roe that is indented to accommodate a pool of green herb oil, and surrounded with picked vegetables. It is a lovely mild, salty dip for malty, wholewheat bread that is served simultaneously. We also have green olives ($16), lightly warmed and flavoured with thyme and olive oil.

Next come tapas. The iconic and explosively flavoured anchoa ($7 ea) is a full anchovy fillet, stretched across a rye crispbread, and topped with a spoonful of smoked tomato sorbet and capers. Alongside is another favourite, calamari sandwiches ($10 ea), in which a soft, pillowy bun encloses fried calamari and a peppery alioli. Finally we have skewers of smoky and moist chargrilled chicken thigh ($13 ea), simply garnished with pickled onion.

For main course, pulpo ($36.50) is a triumphant assembly of perfectly textured, chargrilled octopus leg, draped with a gently sweet-sour sauce with currants or barberries, seeds and nuts. Cordero ($55) is a rich and comforting braise of morcilla – a rice-filled blood sausage – and broad beans, which nest slices of soft, pink Flinders Island lamb loin.

For dessert, we share the highly successful gazpacho dulce ($17), which is a tangy and refreshing glass filled with layers of watermelon and strawberry soup, compressed melon peel, and white chocolate crumb.

It is wonderful to find that Aqui has not messed with excellence. ■

Shaun Ginsbourg is a hungry barrister.

HOW WE RATE IT

18 to 20: Would take my best client here

15 to 17: A safe bet for client entertainment

12 to 14: Best for a lunch with colleagues

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

COFFEE

Spin Coffee
607 Bourke Street
Monday-Friday 7am-3.30pm

Spin Coffee last year moved from St James Place to the lobby of 607 Bourke Street and its forecourt overlooking King Street. With its lush garden, it's a pleasant place to enjoy brunch or lunch under the trees on a warm sunny day. Inside there are plenty of tables with banquette seating, including private nooks, scattered around the tastefully revamped lobby. For breakfast there are bagels, toasties, croissants and the café's signature egg and bacon roti, and for lunch a range of filled Turkish rolls and ciabatte alongside some more substantial menu items. Coffee by Brunswick-based roastery Code Black has a delicate nutty sweetness. **KD**

WINE *By Lisa Cardelli*

2022 Munda Walgalu Country (Tumbarumba) Chardonnay
RRP $45

If you love chablis and want to stay local, this wine will work wonders. Intensely mineral, refreshing, elegant and persistent with notes of salted pink grapefruit, lemon zest, mandarin and delicate white flowers, this is easily the best Australian white wine I've had recently. Despite being the first release for First Nations leader Paul Vandenbergh and partner Damien Smith, it has already collected many accolades. So damn good and true to Country (Munda).

Enjoy with freshly shucked oysters with a drip of lemon juice, grilled abalone with butter.

Stockists: Dan Murphy's, www.thewinecollective.com.au.

2022 Collector Ledger Grüner Veltliner
RRP $34

Another Tumbarumba hit, proof that this cool climate wine region is capable of delivering some outstanding wines. It's all about mild spices, citrus fruits, herbal notes, and jasmine flowers. Alex McKay has a fine touch across all his wines, allowing the fruit to shine. A solid effort with a grape variety that is still on the rise in Australia.

Enjoy with octopus ceviche, Thai green curry.

Stockists: Dan Murphy's, collectorwines.com.au.

2023 Bondar Rosé Grenache/Cinsault/ Counoise
RRP $28

For this vintage Selina and Andre' Bondar have added some counoise, which gives a gentle peppery note.

Poised red cherries, cherry blossoms, feels like spring in the glass. Vibrant and so fine, with red currants and a persistent, delicate length. Drink now (yes please) or wait (if you can).

Enjoy with cured salmon gravlax, turmeric chicken and rice casserole.

Stockists: CV wine merchants, Cloudwine cellars. ■

Lisa Cardelli is a sommelier, WSET educator, wine writer and judge.

HOW DID WE DO?
RATING THE WRONGS

WE'VE ALL GOT USED TO REQUESTS FOR STAR RATINGS OUT OF FIVE.

I booked a tradie the other day. Hopped online, filled out a form requesting help, and was pleasantly surprised when a real person phoned soon afterwards. He asked for some details and booked someone in to see me the following morning. Smooth sailing – and all this on a Sunday, too.

I got an email soon after the call. Subject: How Did We Do? It asked how I'd found my booking experience with Justin (his name, apparently), wondered if I could give a star-rating out of five, and if I would recommend the service to anyone else. Hang on, I thought. Let's see how things go tomorrow.

As it happened, things went fine. A pleasant chap turned up within the specified time and got the job done. Money well spent, I decided. Then another email arrived. How would I rate Simon, my new best friend? Would I recommend him, etc etc. Because my problem had been fixed (at least for now) I banged out some positive responses – largely to stave off what I would knew would happen otherwise: more emails telling me I still had time to compose my responses.

We've all got used to this sort of thing. I've even had a message from Australia Post asking me to rate how a package had been delivered. And as much as we often treat such requests as spam and hit Delete, I sometimes worry if Justin (let's say) could be out of a job if people like me can't be bothered confirming that our brief encounter was pleasant.

Does it also happen in the legal world? Don't know. I can't imagine judges getting into it. Nobody would welcome an email headed: "You Were Recently Sentenced to 10 Years . . . How Did We Do?" But the genie is out of the bottle. We're going to get more, not fewer, requests. Deal with it. My suggestion is that we broaden the horizons. Make ratings retrospective. Which would enable me to thank a traffic policeman for his assistance many years ago.

Long story short: I ran a red light in a VW Beetle in my early driving days. I was heading home late, made a blue and collected a taxi on my way through a city intersection. A policeman visited me in a hospital Emergency room, where I was having some minor cuts stitched up, and told me that because there were witnesses there was no point denying anything. I would be charged. I nodded and denied nothing.

A while later I got my day in court. I'd been advised to look smart and turn up. I did. The policeman recognised me and asked if I had legal representation. No. Then he told me I should ask him a question about the traffic lights at the intersection. Which I did, during a brief and straightforward hearing. To my astonishment, the policeman staged an Academy Award performance, telling the magistrate those particular lights were poorly placed and potentially confusing. Result: a slap on the wrist rather than transportation to the colonies.

I can only imagine that this policeman was grateful I hadn't caused him any problems. Hadn't contested anything; didn't even have a lawyer to toss him curly questions.

Decades down the road, I thank him. How Did He Do? Brilliantly. Happy New Year. ■

Alan Attwood

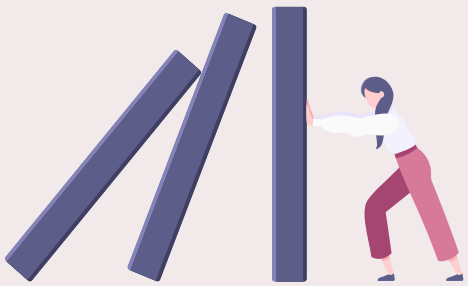
DO YOU EVER COME ACROSS AMUSING INCIDENTS RELATED TO THE LAW?

Then why not contribute to WADR? Send your submission to edassist@liv.asn.au.

ADOBESTOCK

GET THE MONKEY OFF YOUR BACK

HOW CAN LAWYERS CULTIVATE THE ESSENTIAL SKILL OF RESILIENCE?



ADOBE STOCK

The legal profession is no stranger to stress, pressure and demanding workloads. Lawyers often find themselves grappling with a heavy load of responsibilities, tight deadlines and high stakes. In this high-pressure environment, the metaphorical "monkeys on your back" can be all too real – the burdens, stressors, limiting beliefs, distractions and obstacles that hold individuals back and inhibit peak performance and positive wellbeing.

Resilience is the catalyst that empowers individuals to face the monkeys on their back and is intrinsically linked with wellbeing. Research consistently demonstrates that resilient individuals tend to experience lower stress levels, enjoy better mental health and report higher life satisfaction.

So how can lawyers cultivate this essential skill of resilience?

The starting point is self-awareness. Research has found that individuals who possess a high level of emotional intelligence (EQ), which comprises self-awareness, self-regulation, motivation, empathy and social skills, tend to demonstrate remarkable levels of resilience and self-efficacy. This is because self-awareness, the cornerstone of EQ, equips individuals with the ability to recognise and understand their own emotions and reactions, ultimately empowering them to effectively deal with the "monkeys" that weigh them down.

It also necessitates a high degree of self-reflection and a commitment to brutal honesty with oneself. In a profession that often demands unwavering confidence, acknowledging one's weaknesses, limitations and areas for improvement can be challenging but is essential for personal and professional growth. This level of honesty enables lawyers to identify and address the things holding them back with greater precision and effectiveness. Self-awareness empowers us to make informed decisions, harness our strengths and address our weaknesses proactively.

Our ability to lead ourselves and effectively respond to setbacks is deeply influenced by our beliefs, which in turn, shape our subsequent actions and vice versa. Do you embrace challenges, seeing setbacks as stepping stones for growth? Are you willing to take on new responsibilities that push you beyond your comfort zone? By cultivating a growth mindset – one rooted in resilience, adaptability and a thirst for learning from experiences – you can nurture personal leadership qualities that propel your professional growth and uncover new aspects of yourself.

SNAPSHOT

- The "monkeys on your back" symbolise challenges hindering performance and wellbeing in lawyers. Self-awareness uncovers these monkeys.
- Fostering a growth mindset, prioritising self-care, setting boundaries along with seeking help is transformative and leads to satisfaction, fulfilment, and personal growth.
- Taking small actions yields big results, and keeps the monkeys away.

To combat the burden of work overload and lack of work-life balance, prioritising self care is not a luxury but a necessity. Have you considered strategic breaks during your workday for mental recharge? Like going for a short walk, stretching exercises or mindfulness meditation. How might regular exercise fortify you against stress, even if it is small pockets of 10 minutes throughout the day? Do you set clear boundaries between work and personal life, such as designating specific "offline" hours and creating a dedicated workspace at home. Are you kind to yourself? Self-care is the foundation on which sustained high performance is built, ensuring you have the mental, emotional and physical vitality needed to excel consistently.

Often underestimated on the resilience building journey is the transformative power of seeking help. In the demanding world of law, lawyers can sometimes find themselves playing superhero in an effort to achieve optimal outcomes for clients, and their own personal wellbeing can take a backseat. How frequently do you lean on your support network to share the weight of your challenges? Are you open to seeking professional help when necessary? These questions hold the key to staying strong amid adversity because, as experience shows, getting trapped in our own thoughts rarely leads to positive outcomes.

Remember, the path to professional excellence is paved not only with legal expertise but also with a profound commitment to resilience, self-awareness and self-care. This enables us to be the leaders of our life.

So, if you are currently feeling the weight of the monkeys on your back, focus on taking action – no matter how small. It's the little things that make the biggest difference in any given day or moment, and over time, the powerful antidote you've been looking for to get the monkeys off your back and experience greater satisfaction, fulfilment and personal growth. ■

Daniel Merza is a wellbeing and leadership specialist, international speaker and author. For more information, www.danielmerza.com

Lawyer Ben Sasse

READY TO FACE THE HEAT

LAWYER BEN SASSE LIVES AND WORKS IN METROPOLITAN MELBOURNE BUT IN SUMMER IS ALERT TO HIGH FIRE DANGER DAYS WHEN HE HEADS NORTH TO JOIN CFA VOLUNTEERS. **BY KARIN DERKLEY**

This summer, cyber law and critical infrastructure expert Ben Sasse will have one ear constantly tuned to his radio, listening for a signal that he needs to jump in his car and drive from his home in Carlton to the CFA fire station in Bulla.

Mr Sasse is one of an increasing number of people from metropolitan areas who have volunteered to fight fires in regional areas.

On hot blustery days he'll work from home to make sure he's only ever 20 minutes drive away from the Bulla area. When there's a total fire ban he'll work from the Bulla fire station so he can be ready to act immediately if necessary.

"It's important to get fires under control because a wind change or gust can cause the fire to get away quickly."

It was the 2019-2020 bushfire season that prompted Mr Sasse to volunteer as a firefighter. He had been interested in the idea of volunteering for a while. But while overseas during the fires, the reaction of friends and family there made him want to be one of the people "that were actually making a difference, helping respond to the crisis instead of just watching it on the television".

In his day job, Mr Sasse works as a security of critical infrastructure (SOCI) operations manager at renewable energy operator Goldwind Australia, managing threats such as cyber attacks, IT failure and supply chain failures, and implementing risk management programs to comply with the SOCI Act.

His first love was nanotechnology, which prompted him to do a double degree in materials engineering and law. He worked at CSIRO for a couple of years, including on a research project in its manufacturing division, and then moved to EY to work in cyber security. "Having that combination of law and engineering meant I could grasp technical concepts quite quickly and also think programmatically as lawyers do, and it turns out that's the basis for risk management in technology."

Moving to KPMG Law, he picked up an interest in SOCI, new legislation for which came out in 2019. "It's about managing the continuity of critical infrastructure assets such as the energy grid, telecommunications networks, gas and oil pipelines, which if they went down could have a serious impact on people."

His new role at Goldwind draws on his experience in cybersecurity, legislative frameworks, risk management, as well as his background in engineering.

The fascination with what he calls "machines that matter" was part of his motivation to join the CFA. "It also has purpose and direction in terms of organisational goals and objectives. Plus, you get to learn new skills, and you get outside."

But when COVID-19 hit his plans were put on ice. It wasn't until late 2022 that he revived his dream, ringing around CFAs to see who would be open to a city worker joining their brigade.

"Most CFAs are not used to out of area workers," he says. "Because when the siren goes off, they've got six minutes to get a truck out the door. So fire house members are local."

But with many Bulla locals commuting into the CBD, the brigade there has struggled for some years with membership, making them open to out of area firefighters. The fire station has a number of members from the inner northern suburbs, many of them young and an almost equal balance of genders.

During three months of twice-a-week training Mr Sasse learned how to work on the fire trucks, how to pull water from hydrants and lakes and spray it on various types of fires, and how to avoid tree hazards, one of the biggest risks on a fireground.

Not long after he joined, Mr Sasse also took on the role of CFA treasurer. "My legal experience helps me with working through the applications, grants and financial audits that our brigade has to submit on a regular basis."

As well as setting up his work at the station on high fire danger days, Mr Sasse spends every second weekend keeping the fire stations clean and in order. "I like that it's really active. It gets me out of the office and outdoors on a weekend, or if I'm not up to anything on a public holiday."

But it's the firefighting that is truly satisfying he says. "Recently we back burned along a road north of Melton. And you could see what would have happened if there was a grass fire. That back-burned strip will protect half the suburb of Melton." ■

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