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NOVEMBER 2021

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Courts recognise members' efforts

The burdens shouldered by lawyers have not gone unnoticed.

Together, we have dealt with the impact of COVID-19 since March 2020. Nothing about this global pandemic has been easy, but the past few months have felt especially difficult and exhausting. The initial anxiety and fear that characterised our collective response to the pandemic has been replaced by increased rates of burnout and poor mental health.

I receive consistent feedback from LIV members about the struggles they endure to maintain a legal practice during a pandemic. From sole practitioners to suburban practitioners, from partners at large law firms to those working in the community legal sector, the toll of living in a city and state that has endured the world's longest lockdown has been profound.

I hear of ongoing difficulties of remote working – from responding to the demands of increasingly anxious clients to onerous litigation expectations – all while isolated from colleagues and often compelled to juggle simultaneously the responsibilities of childcare and home schooling.

I have been told of the mental ill health experienced across the profession and of lawyers simply resigning – not for better options, but because they were simply unable to cope any longer. Although firms are doing what they can to support their staff, affording where possible maximum flexibility through initiatives including additional leave, challenging workloads and fixed court deadlines persist.

This growing distress across the profession prompted me to reach out recently to our heads of jurisdiction and to articulate the concerns and struggles of our members. The response was heartening. Each of the Chief Justices responded with letters to the profession, expressing gratitude and acknowledging the burdens shouldered by members.

Chief Justice Anne Ferguson of the Supreme Court of Victoria wrote that she was "deeply impressed" with how the profession continued to serve the courts and the community. Specific acknowledgement was given to the challenges of working remotely – while "providing support to families, home schooling and childcare" – placing "significant strain" on lawyers and increasing "levels of fatigue". Her Honour continued: "The judges and I have spoken often about the desirability for flexibility and the need to take into account in all that we do the unusual circumstances that prevail".

Chief Justice James Allsop of the Federal Court wrote: "The judges of the Federal Court appreciate how difficult lockdowns and other like restrictions can be. They bring about personal and professional strains, difficulties and pressures of significant severity".

His Honour acknowledged the unique difficulties experienced by lawyers balancing home schooling and professional responsibilities during lockdowns: "I would like the profession to understand that the Court, and all the judges, is, and are, alive to the kinds of difficulties which the profession is experiencing. Members of the profession should not in any way feel constrained to bring these matters into account in how they express their ability to undertake their work and to fulfil the demands of the Court".

In a similar vein, Chief Justice William Alstergren of the Federal Circuit and Family Court of Australia wrote: "On behalf of the Judges, Registrars, Family Consultants and staff of the Courts, I wish to take this opportunity to thank each member of the profession for their extraordinary work in supporting their clients, their colleagues, and the Courts. The ability of the Courts to maintain necessary levels of access to justice in these challenging times is directly reliant upon the support and cooperation of the profession. That support and cooperation has been unwavering".

Recognising the uniquely challenging circumstances, His Honour continued: "The Courts will endeavour to accommodate any reasonable request made for extensions of time when necessary, and members of the profession should feel comfortable in jointly approaching the chambers of a Judge or Registrar with such requests where appropriate. Practitioners should not feel stressed if they need a brief suspension of an electronic hearing to attend to an unforeseen interruption. We recognise everyone is doing their best to cope with a range of competing demands in these challenging times".

There was something remarkable about the sincerity and generosity of all these responses; several lawyers contacted me to say as much. Practitioners responded warmly to the support and advocacy of the courts on their behalf – to the simple and heartfelt acknowledgement of the difficulties arising from our collective circumstances.

Following on from these conversations, together with the president of the Law Council of Australia and the president of the Law Society of New South Wales, further meetings were arranged with senior representative of ASIC and the ACCC to convey similar sentiments. Hopefully, the care and concern expressed translates to greater flexibility and understanding between all our members, courts and regulators.

Our collective health depends on it. ■

Tania Wolff
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'Worthy of intervention'

I refer to the article "Worthy of intervention" by John Willis, October 2021 *LIJ*. I am writing to provide a response to the first aspect of Mr Willis' article, the statutory provisions that require Victoria Legal Aid (VLA) to provide legal representation for cross-examination of protected persons and respondents.

Sections 71 and 72 of *Family Violence Protection Act 2008* (FVPA) are the statutory mechanisms by which the court can order VLA to offer a self-represented party a limited grant of legal assistance for the purpose of cross-examination of protected witnesses. The circumstances in which the court can make these orders and the extent of legal assistance funding offered by VLA is constrained by these statutory provisions. VLA must allocate court-ordered grants of limited legal assistance in accordance with the legislation.

We note that the intent of Parliament was to ensure that a respondent was not prevented from having a witness' evidence tested, due to the FVPA's special rules for cross-examination of protected witnesses. Assistance is extended to self-represented applicants to minimise the disadvantage experienced where a respondent has court-ordered representation.

We acknowledge that it was not within the scope of Mr Willis' article to consider the cost implications of legislative change providing for broader legal assistance under these orders. However, as the statutory authority responsible for administering these court-ordered grants, we have to consider the financial impact of legislative change.

VLA is responsible for administering legal aid funds in the most effective, economic and efficient manner possible. In 2019-20, this enabled us to help 88,662 clients and to ensure the sustainability of VLA's mixed model of service provision.

Any consideration of legislative change to broaden the scope of legal assistance under sections 71 and 72 of the FVPA would need to include an assessment of and funding for the consequential costs of such a change. In the absence of specific purpose funding, VLA's current resources would not enable us to meet this demand without limiting or reducing the legal assistance available for people with other legal needs. ■

Leanne Sinclair, associate director, Family Violence Response, Victoria Legal Aid

LETTERS TO THE EDITOR

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Children's Law	Children's Law – Year in Review	Monday 22 November	5–6.30pm	1.5	[SL]
Commercial & Business Law	Business Law & Commercial Litigation – Year in Review	Thursday 4 November	9–10.30am	1.5	[SL]
	Competition & Consumer Law – Updates & Insights from 2021	Thursday 2 December	12–2.15pm	2	[SL PS PM]
Criminal Law	Criminal Law – Year in Review	Thursday 9 December	5–6.30pm	1.5	[SL]
Family Law	Children's Law – Year in Review	Monday 22 November	5–6.30pm	1.5	[SL]
	Children's & Family Law – Year in Review Bundle	Monday 22 & Thursday 25 November	5–6.30pm	3	[SL]
	Family Law – Year in Review	Thursday 25 November	5–6.30pm	1.5	[SL]
Immigration Law	Migration Law: Emerging trends from a year in review	Monday 29 November	3–5pm	2	[SL PM]
Litigation	Business Law & Commercial Litigation – Year in Review	Thursday 4 November	9–10.30am	1.5	[SL]
Personal Injury Law	'Hot-tubbing': Exploring expert witness conclaves in personal injury matters	Tuesday 16 November	8–9.30am	1.5	[SL]
Practice Management	Key Hacks for Remote & Collaborative Work	Tuesday 16 November	1–2pm	1	[PS PM]
	Western District Law Association Conference	Friday 26 November	10am–5.30pm	5	[SL PS PM EP]
Property Law	Subdivisions Unpacked (2-part program)	Wednesday 10 & 17 November	9am–12.45pm	6	[SL PS PM]
	Common Conveyancing Mistakes & How to Avoid Them	Wednesday 24 November	1–2pm	1	[SL PS]
Regional & Suburban	Western District Law Association Conference	Friday 26 November	9.30am–5pm	5	[SL PS PM EP]
Succession Law	Will Drafting Masterclass (2-part program)	Tuesday 16 & 23 November	9.30–11.30am	4	[SL PS]
	Wills & Estates – Year in Review	Thursday 2 December	9–10.30am	1.5	[SL]
Workplace Relations & Employment Law	Employment Law Fundamentals (2-part program)	Monday 29 November & 6 December	10am–12pm	4	[SL PS]
	Workplace Investigations – Insights, Tips & Tricks	Tuesday 7 December	1–2pm	1	[SL PS]

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

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'NO JAB, NO OFFICE' POLICY TAKES HOLD

FIRMS ARE URGING THEIR EMPLOYEES TO GET VACCINATED AS MANDATORY VACCINATION DIRECTIONS ARE BEING INTRODUCED BY THE VICTORIAN GOVERNMENT. **BY KARIN DERKLEY**

Law firms have been grappling with the issue of getting their employees vaccinated in order to come back to the office, against a backdrop of rapidly evolving government regulations.

By early November, when the state expects to reach 80 per cent full vaccination rates among those aged 16 and older, lawyers who need to come back to the office will have to be fully vaccinated.

And as of 26 November, all authorised workers, including lawyers who need to have face-to-face contact with clients, will need to be fully vaccinated. Unvaccinated lawyers will be unable to work at the office or meet in-person with clients.

The vaccination mandates have been issued by the Chief Health Officer in the form of Mandatory Vaccination Directions and for now take the issue of vaccine requirements out of the hands of employers. But both mandates will likely have an expiry date, ultimately leaving employers to take on responsibility for issuing vaccine requirements.

In the US and Canada, independent of government mandates, many major law firms require employees to be vaccinated to enter the office, or provide regular negative tests to do so. Here in Victoria, some law firms have also been early adopters of the "no jab, no office" policy.

Gilbert + Tobin is among the first law firms to state that any employees who want to come back into the office after lockdown restrictions ease will need to have received both doses of a COVID-19 vaccine. Chief operating officer Sam Nickless says the dominant consideration behind the decision was the health and safety of the firm's people. "Our approach is based on considering the degree of community transmission and the additional risk if people who are

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not fully vaccinated were to come into the office, to their own health, to the health of others and to the general wellbeing and sense of safety of all staff."

Hall & Wilcox is also planning to require those returning to the office be vaccinated. Managing partner Tony Macvean says that once everyone has had the opportunity to receive the vaccination based on eligibility and availability, the firm will be implementing a "no jab, no office" policy. "Our purpose is to enable our clients, people and communities to thrive. Consistent with our purpose, we have strongly encouraged our people to get vaccinated unless medically contraindicated," he says.

Holding Redlich partner Charles Power says the firm is considering the option of requiring employees to be fully vaccinated in order to be able to return to the office. "The measure obviously raises a number of potential issues, including those arising under health and safety, privacy and anti-discrimination laws. Ultimately, our primary concern is to protect the wellbeing of our employees and clients."

Moores says it is also considering requiring employees to be fully vaccinated in order to be able to return to the office once Victoria reaches the 80 per cent threshold. "As a professional services firm, we need to consider the health and safety of our clients and visitors to the workplace, as well as how the way we work impacts on our client and employee experience," Moores CEO Tessa van Duyn says.

Many other firms are relying on measures other than mandates to encourage their staff to be vaccinated.

Arnold Dallas McPherson managing partner John McPherson says the firm has not had to mandate vaccination, but everyone in the firm's Melbourne and Bendigo offices has been fully vaccinated, or are on the way to being so. "People have been enthusiastic about getting vaccinated and they had support from their employer. We encouraged people to arrange a vaccine appointment and we gave them time off if they had side effects."

DLA Piper says the firm is actively encouraging all staff to get vaccinated, supporting them to do so by offering flexibility and leave to attend appointments during work hours. "Our absolute priority is always the health and wellbeing of our people and their families," managing partner Amber Matthews says.

Herbert Smith Freehills has signed up with the UNICEF Pay It Forward program, in which the firm will donate one full double dose of the COVID-19 vaccine to a Pacific nation when an HSF employee lets it be known they have received their vaccination. Australian executive partner Andrew Pike says, "Not only does this encourage our people to be vaccinated but it assists our Pacific nation neighbours to get access to the vaccine. This has been really well received by our people."

Allens says its focus is on "encouraging our people to get the vaccine when eligible and providing information and access to health professionals to help ease any concerns, including running an information session with our external medical specialist provider. We continue to offer time to staff to get vaccinated as needed."

Rankin Business Lawyers senior associate workplace relations/employment law Francine Hoyne-Clancy says the presumption is that a law firm can require everyone who comes into the office to be fully vaccinated. "Under workplace health and safety laws, it is likely that it would be considered reasonable to make that directive on the basis that the employer is doing what they need to do in order to maintain a safe workplace.

"Requiring people to be vaccinated will likely be lawful in many circumstances, but only if it is also reasonable and necessary."

"My overall recommendation to a law firm would be that they will firstly need to consult the relevant CHO directions. Unless workers can entirely work from home, the direction will cover those needing to attend the office, court or client meetings."

Employment and industrial law barrister Ian Neil SC recently told an LIV webinar on vaccination that employers could be liable if their employees or people who came onto their workplaces were exposed to the virus by unvaccinated staff. "Equally, they would be liable if they don't take reasonably practical steps to ensure that doesn't happen – and vaccination is such a step."

Workplace Wizards director Susanna Ritchie says that, once any mandates cease, requiring people to be vaccinated will likely be lawful in many circumstances, but only if it is also reasonable and necessary. "You need to go through an occupational health and safety hazard assessment as you normally would, and have a think about whether you are going to be coming into contact with anybody likely to have COVID . . . or with anybody that is specifically high risk if COVID passes around the workplace."

Dealing with exemptions

The challenge for employers will be how to deal with employees who are unable or unwilling to be vaccinated. Firms say they will deal with exceptions on a case-by-case basis.

Ms van Duyn says Moores will have individual discussions with those lawyers who do not wish to be vaccinated to explore ways they can continue to have client contact in the coming months. "Having consulted with our people about their safety and wellbeing in a COVID normal environment, including vaccination status, I expect that those team members who prefer not to be vaccinated are in the minority."

Hall & Wilcox says those who prefer not to be vaccinated for whatever reason will continue to perform their roles remotely. "Given the Victorian government direction and our intended 'no jab, no office' policy, we expect that it may not be possible for lawyers who prefer not to be vaccinated to have face to face client contact in the coming months," Mr Macvean says.

Holding Redlich says that while work from home arrangements is one option for employees who are not vaccinated, "the feasibility of that on an ongoing basis would need to be reviewed as circumstances change".

Beyond medical exemptions, there appear to be few likely grounds for exemption. The Victorian Equal Opportunity and Human Rights Commission has pointed out that the law doesn't offer protection for someone who chooses not to get vaccinated unless they have a protected attribute such as a disability that means they cannot get the vaccine for medical reasons.

Mr Neil says that for employees who are not able to back up

their refusal to be vaccinated on medical grounds, the employer may be within their rights to deal with that employee in whatever way is necessary. That could include requiring them to continue to work from home, or even terminating their employment if working from home was not a viable option.

"All employees have an obligation to obey the lawful and reasonable directions of their employer. The ultimate sanction for an employee's disobedience to a lawful and reasonable direction is dismissal," he says.

Looking for clarity

While the government mandate for authorised workers goes some way to clarifying employers' right to require vaccinations for those of their employees who fit the criteria, workplace relations lawyers and law firms say that further legislation would also help.

"It should be in the *Fair Work Act*, it should also be changes to discrimination legislation, and potentially changes to the workplace health and safety laws in each state," says Ms Hoyne-Clancy.

Despite the CHO directions, and whether or not legislation is put in place, it won't necessarily stop employees going to the courts, she points out. "It just provides a better framework for the courts and for lawyers and employers and everybody who needs to use it to start with."

A case challenging the Victorian state government's vaccine mandates was being heard in the Supreme Court in late October, with a casual relief teacher claiming the vaccination requirements for teachers breaches her human rights. More such cases are expected in the light of the much wider suite of authorised workers required to be vaccinated under Victoria government directives.

Unvaccinated clients

There is also the question of how to deal with clients who may or may not be vaccinated. That's something that concerns Mr McPherson, whose firm by its nature sees many clients who by definition tend to have health issues. "There would be a logical inconsistency between our concerns for our staff and our staff's families in close contact, and then being blind to what's going on with clients." Now the Services Victoria check-in app is able to show evidence of a client's vaccination status, the question arises as to what to do with those who are unvaccinated, he says.

"If people are going to have to do that to go to the pub, it's probably not too much to say you might have to do that if you sit in a room indoors with a lawyer for an hour or two." Mr McPherson says the firm is looking at the possibility of seeing such people outdoors, such as in a sidewalk café, or perhaps in the carpark adjoining the office.

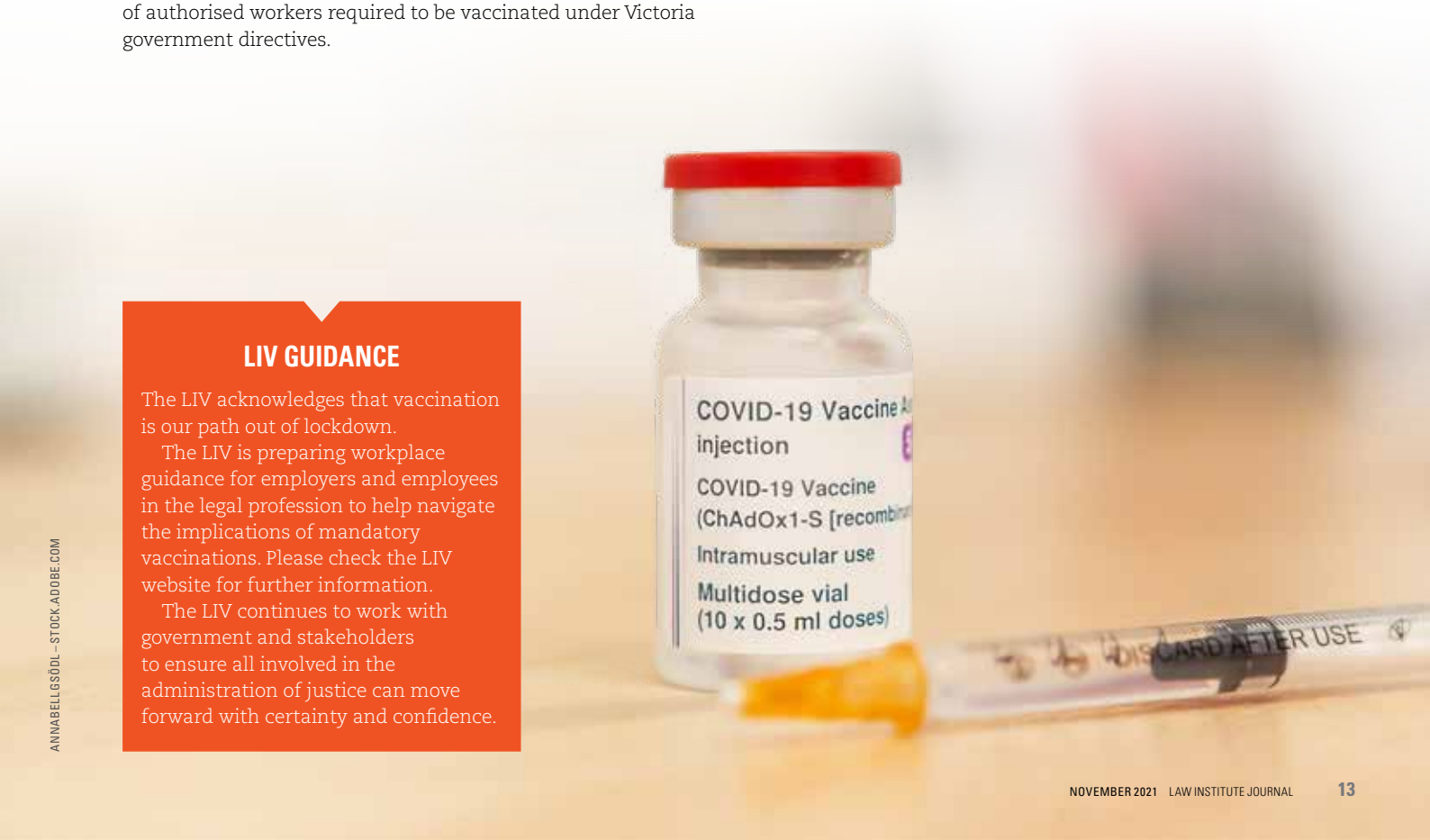
Aside from the issue of vaccination, law firms that allow their staff to go back to the office will still need to employ the kinds of COVID-safe measures that were required prior to the fifth and sixth lockdowns, Ms Ritchie says. "We still have to continue practising safe social distancing and good hygiene and making sure we've got enough space and ventilation in our workplaces." ■

LIV GUIDANCE

The LIV acknowledges that vaccination is our path out of lockdown.

The LIV is preparing workplace guidance for employers and employees in the legal profession to help navigate the implications of mandatory vaccinations. Please check the LIV website for further information.

The LIV continues to work with government and stakeholders to ensure all involved in the administration of justice can move forward with certainty and confidence.



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FIRMS SIGN ON TO CHARTER

THE LIV CHARTER FOR THE ADVANCEMENT OF WOMEN REQUIRES SIGNATORIES TO ESTABLISH FAIR AND TRANSPARENT SEXUAL DISCRIMINATION AND HARASSMENT COMPLAINTS PROCESSES. **BY KARIN DERKLEY**

Legal workplaces signing on to the LIV Charter for the Advancement of Women say the charter represents a confirmation of their values and aspirations to support women in the legal profession.

The charter, which is based on the NSW Law Society's Charter for the Advancement of Women, aims to promote and support strategies to retain women from all backgrounds in the profession over the course of their careers. It also requires signatories to establish procedurally fair and transparent sexual discrimination and harassment complaints processes.

Elit Lawyers principal Danielle Snell says her firm was proud to be among the first signatories to the charter. "The core mission of the charter is distinctly aligned with our own commitments to facilitate change within the industry," she says.

"We are deeply committed to advancing the position of women in our industry, but we believe that adopting the charter is just as important for our clients, stakeholders, lawyers from other firms who we deal with on legal matters, and future women who have not yet entered the legal sector," Ms Snell says.

Argent Law principal Melissa Patterson says the charter has been a rare bright spot in a year filled with challenges. "With all the negativity around at the moment and the terrible things happening to women in Afghanistan it was just so nice to see something so positive for women in this country and in our profession." The charter represents everything the firm already values, she says. "Promoting and supporting women in their careers has always been a natural focus of the firm.

"Now more than ever our people expect to and want to work for organisations with values that reflect their own sense of community and fairness. Signing the charter is part of our firm's fundamental commitment to workplace respect."

City of Melbourne chief legal counsel Kim Wood says he jumped at the chance to sign up to the charter. "What the charter does is put into one document everything our organisation is committed to in regard to promoting and supporting women.

"We were already complying with everything it sets out, but it's given us an ability to actually measure what we are doing and establish that we are well and truly in compliance," Mr Wood says. The charter fits alongside the City of Melbourne legal office's embrace of the Equitable Briefing Initiative and Court of Appeal president Justice Chris Maxwell's Champions of Change coalition, he says.

Curium Legal managing principal Sarah Gee says the charter is "a simple summation of what every law firm should be thinking about, talking about with their leadership teams, measuring and being accountable to."

Ms Gee established her own commercial law firm a little over one year ago after experiencing what she says were "all of the same issues, biases and constraints that women invariably report" as she tried to meet her employer's expectations while also being a mother. Ms Gee's business is staffed by four women based in regional areas who work flexibly and remotely around day care and other family responsibilities.

"I challenge any law firm manager who thinks this is not something that needs to be measured in their firm, to listen to the disruptors, the statistics around women leaving the profession, the lack of diversity, the rates of burnout and depression and tell me that something doesn't need to change."

Gadens CEO Mark Pistilli says the charter aligns to other initiatives and programs that Gadens is already a signatory to, including the Law Council of Australia's Equitable Briefing Policy, their Diversity and Equality Charter, and the NSW Law Society's Charter for the Advancement of Women in the Legal Profession.

"By signing the charter, we are making a visible statement that the advancement of women is important to our firm and the profession more broadly. We hope to share knowledge and ideas within the legal industry to improve the experience for all female practitioners, regardless of where they work."

Lander & Rogers CEO Genevieve Collins says adopting the charter is part of the firm's commitment to its people "that we promote a gender-balanced workplace and will always take action to ensure equality." The firm is already a signatory to the NSW Charter for the Advancement of Women.

Adopting the charter is part of being an employer of choice, Ms Collins says. "Now more than ever our people expect to and want to work for organisations with values that reflect their own sense of community and fairness. Signing the Charter is part of our firm's fundamental commitment to workplace respect."

Allens chief people officer Jane Lewis says the firm's diversity and inclusion framework is aligned with the commitments in the Charter. "Signing the charter is a continuation of our work on inclusion and diversity. We hope it demonstrates our commitment to gender equity and helps to build a culture where everyone is empowered to reach their full potential."

Charter for the Advancement of Women

Atticus director Alexandra Doig says the charter is a great initiative she hopes will encourage firms to stop and think about the decisions they make when offering roles and promoting staff. "I've been a solicitor for 10 years now, and when I started I was struck by the massive contrast between the number of young female lawyers working in junior roles and the number of women working in management and higher roles. Ten years later I can't see a massive difference, which I think is really a shame.

"The reality for women is that we're still living in a society where men have all the power and are the ones who are making the decisions about who gets promoted and who gets the roles and who steps into their shoes."

The charter "is a way of saying we are going to take time at intervals during the year or at those big decision-making moments and say what females do we have in our own ranks that we should be looking to develop to a position that they should be moving up into?" Ms Doig says.

"And if they're not, what are we doing wrong in our organisation that's stopping women from wanting to move up, or what's stopping them from being able to move up?"

Among the measures recommended by the charter is more generous parental leave, flexible working policies and better support for women to return to their role after maternity leave without being penalised. Firms who have signed up to the charter say they have already embraced those measures.

Allens' Jane Lewis says the firm's approach to parental leave does not distinguish between primary and secondary caregivers, provides a temporary break from billable expectations for legal employees when returning to work and pays superannuation on the unpaid component of leave. "This package has been crucial to creating cultural change for working parents and supporting the shifting roles within families," Ms Lewis says.

Gadens has a similar parental leave policy and a flexible work policy that supports its people to balance their personal and professional lives. The firm also conducts regular unconscious bias training and consciously reviews for gender equality in recruitment, promotions and rewarding performance. "In addition, our firm seeks opportunities to support women in the legal profession through university mentoring and networking events," Mr Pistilli says.

At the City of Melbourne Mr Wood says the legal office already offers flexible hours, and ensures that meetings are not conducted early in the morning or late at night. "Those types of practices are so obviously going to affect women more than men."

Mr Wood says it is essential that men sign up for the charter and commit to its recommendations. "Men need to commit to these things instead of saying it's for women to do. Women have done more than enough. We have to do it."

LIV president Tania Wolff says she is delighted that more than 40 firms have already signed up to the charter and hopes more will do so over the coming months. "It is great to see that the legal profession is recognising the need to deal proactively and preventatively with this issue. There are very real obstacles holding women back from progressing in their careers, whether it be a lack of family friendly policies or a failure to provide a safe and inclusive workplace. We need to do what we can to create conditions not only for women to enter the profession, but to remain in it." ■

Argent Law principal Melissa Patterson

Gadens CEO Mark Pistilli

Lander & Rogers CEO Genevieve Collins

COURT DELIVERS ON NEED

THE MAGISTRATES' COURT OF VICTORIA IS TRANSFORMING THE STATE'S JUSTICE RESPONSE TO FAMILY VIOLENCE.
BY CAROLYN FORD

Supervising Magistrate Stella Stuthridge

Lawyers are encouraged to be aware of the support services Victoria's nation-leading Specialist Family Violence Court (SFVC) offers and use them to better assist affected family members and respondents.

They include pre-court engagement to facilitate legal and other support service referrals, highly trained applicant and respondent court practitioners, victim-centred secure court facilities for in-person attendance, a Family Violence Intervention Order (FVIO) online application form, LGBTIQ+ practitioner services, culturally safe services for Aboriginal and Torres Strait Islander court users through Umalek Balit, the Court Mandated Counselling Order Program (CMCOP), and remote hearing options.

"I would ask lawyers to develop a better understanding about what is available for their clients at court," says Magistrate Stella Stuthridge, Supervising Magistrate Family Violence (Civil).

"Lawyers need to become more aware of the wraparound services that are here. They need to think in a more sophisticated way about how they can utilise those opportunities that the courts now provide to get a better outcome for their clients.

"When you think about a respondent coming to court with, potentially, child protection matters on foot, some criminal charges, a bail situation happening, and an intervention order as well, it's important that lawyers don't just think they'll get a CISP [Court Integrated Services Program] worker to help their client.

"Instead, a lawyer could talk a [respondent] client through it, getting consent without admissions, and apply for a counselling order with the Men's Behaviour Change Program [MBCP] before sorting out the criminal matters, and that would help in the child protection matters. A lawyer could ask a court practitioner to help their client, often homeless, getting a referral to housing support services or to a psychologist or other services the court offers.

"The court's business is, 'what do you need?'

"When a court practitioner talks to respondents at the crisis point of the proceedings, which is at the beginning, many, many respondents need urgent mental health supports and as a lawyer that's an opportunity that should not be missed. All they have to do is ask – before, during or after proceedings.

"We want to provide safety, and support services to make that safety solid and ongoing. Engagement in the court process by a respondent leads to better outcomes for the whole family, including fewer breaches of orders."

The SFVC is a "wonderfully inclusive" service, Magistrate Stuthridge says, and lawyers should be more aware that there are specialist programs for Aboriginal and Torres Strait Island and LGBTIQ+ communities attending court. It is developing a suite of offerings for CALD communities such as linking court users to interpreters during pre-court engagement and family violence training for court interpreters.

The SFVC division of the Magistrates' Court of Victoria (MCV) came out of the 2015 Royal Commission into Family Violence.

Family violence matters, summarised as any violent, threatening, coercive or controlling behaviour that occurs in current or past family, domestic or intimate relationships, are heard at an applicant's local court. Those without a local SFVC continue to use existing mainstream courts.

Starting in Shepparton in 2019, the goal of the SFVC, which comes under the therapeutic jurisprudence umbrella, is to ensure victim survivors of family violence feel physically, emotionally and culturally safe during their court journey. Also, to ensure the safety of children, that Victoria's diverse community has equal access to justice and, through the CMCOP, keeping perpetrators in view and addressing barriers to behaviour change.

The MCV is transforming Victoria's justice response to family violence.

Victoria's five SFVCs, the first of their kind in Australia, are at Ballarat, Frankston, Moorabbin, Heidelberg and Shepparton; each has separate entrances and safe waiting spaces. There will be 14 SFVCs in Victoria by 2025. Further, the CMCOP is expanding to

another eight locations – with Ballarat trialling case management support for clients as part of its MBCP – and remote hearing services are to be established at 10 non-court locations across Victoria.

The last follows a successful Geelong remote hearing pilot in 2019-2020. Its aim was to expand options for how victim survivors participate in court hearings. When offered remote hearing, about three out of four victim survivors chose to appear remotely with detailed pre and post court engagement.

Then came COVID-19 and the entire criminal justice system went digital. Lockdowns saw contact with the Family Violence Contact Centre increase. In 2020-2021, it received 214,980 inquiries, an increase of 137 per cent on the previous year.

During COVID-19, all courts, including the SFVC, switched to remote service provision, with parties attending remote hearings via video/audio link, albeit keeping physical courts open for urgent cases.

"COVID-19 showed us it can be done, safely. It provided us with a solution to the infrastructure quandary physical courts present in these matters. Now, if you think it's not safe to attend court, we can offer you a suite of remote alternatives. Service delivery is not tied to a physical court house, and the rest of the family violence ecosystem has developed as well."

It's accurate to say the justice response to family violence, now better understood and driven by the concepts of risk, safety and trauma, has been revolutionised by remote processes and pandemic or not, the SFVC will continue to take a remote approach, offering a suite of options, where possible and preferred, enabling as it does Victoria's statewide focus on family violence resolution.

"The online form and remote hearings have improved access to justice for all Victorians. The development of a statewide model is a first in Australia and it's a massive piece of work."

Family violence is, says Magistrate Stuthridge, one of the most important conversations Australia can have. "It comes down to this – how do we treat women and children in our society? What is needed to have healthy families?

SFVC 2020-21

- 214,980 inquiries received – 137 per cent up on previous year
- 28,267 requests for information from prescribed agencies
- 8164 online applications made for FVIOs
- 84 registry staff completed specialist family violence training.

"You have to understand, a significant portion of cases are families. Even if children are not being physically hurt by a parent, they are seeing what is going on between mum and dad. You help clean up the mess, comfort your mother.

"Throwing food and smashing of plates is terrible for a child to see. They see the food prepared then the anger, violence, destruction, disrespect and fear it engenders in their mother. These are terribly traumatic experiences for a child, four or 14, who is present whether in the room or not. There is inter-generational damage done. As a society, we need to focus on prevention, to teach healthy relationships, and how to leave one in a respectful way.

"Personal experience as a child of family violence makes me acutely aware of the impacts on children, and very dedicated to implementing court processes that make things better for children, and keep families safe."

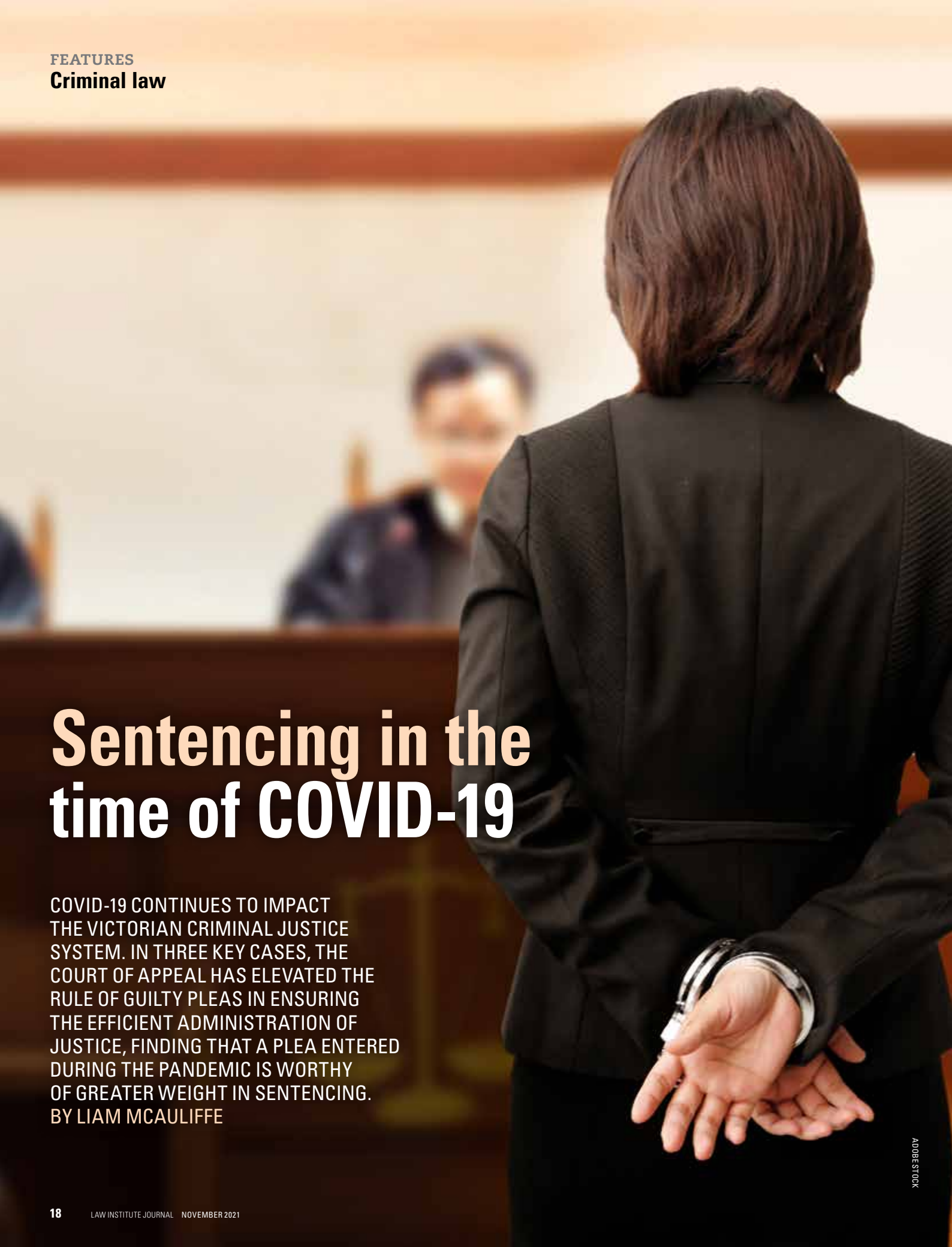
Remote hearing pilot case study

Family violence victim survivor Sarah, mother of a newborn, is extremely frightened. The male perpetrator has called her hundreds of times over three days. Victoria Police is applying for an indefinite extension to a FVIO, which the perpetrator has persistently breached and is on remand for related criminal charges. Sarah is interviewed by phone by the SFVC, then attends a videolink hearing at a remote location. She returns to her baby within the hour, saying she feels far less stressed than previously, when she attended court at the same time as the perpetrator.

SFVC in-person case study

Kay, a victim survivor of domestic violence, attends SFVC with her young child who has additional needs. On arrival via a dedicated entrance, briefed SFVC staff direct them to the safe, child-friendly waiting area. Kay and her child come and go, meeting with court services then returning to rest and snack. Kay says how unexpected the facilities are, how much easier the experience is, how safe she feels. ■

Magistrate Stuthridge will be speaking at a MCV Specialist Courts & Programs CPD event on 30 November. Check LIV website for details, www.liv.asn.au/FamilyViolenceMatters, www.liv.asn.au/MCVHub.



Sentencing in the time of COVID-19

COVID-19 CONTINUES TO IMPACT THE VICTORIAN CRIMINAL JUSTICE SYSTEM. IN THREE KEY CASES, THE COURT OF APPEAL HAS ELEVATED THE RULE OF GUILTY PLEAS IN ENSURING THE EFFICIENT ADMINISTRATION OF JUSTICE, FINDING THAT A PLEA ENTERED DURING THE PANDEMIC IS WORTHY OF GREATER WEIGHT IN SENTENCING.
BY LIAM MCAULIFFE

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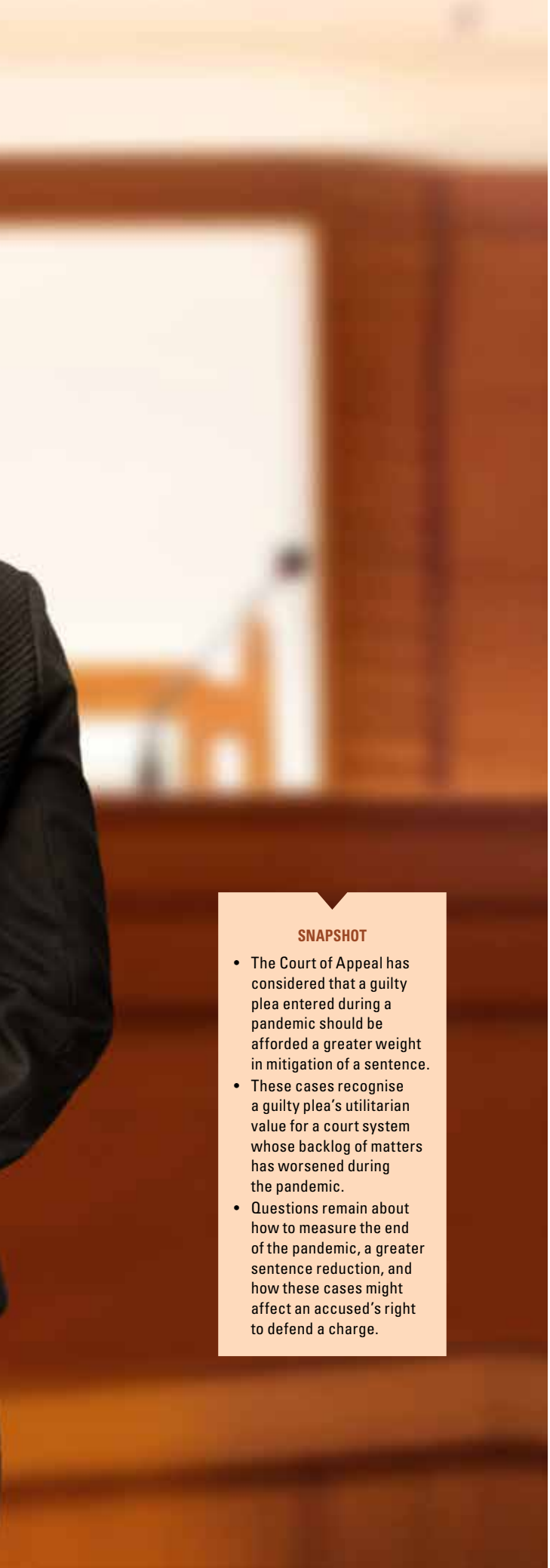

SNAPSHOT

- The Court of Appeal has considered that a guilty plea entered during a pandemic should be afforded a greater weight in mitigation of a sentence.
- These cases recognise a guilty plea's utilitarian value for a court system whose backlog of matters has worsened during the pandemic.
- Questions remain about how to measure the end of the pandemic, a greater sentence reduction, and how these cases might affect an accused's right to defend a charge.

The importance of guilty pleas

In 2019-2020, across all Victorian courts, 88,932 defendants finalised criminal matters, which represented 18 per cent of defendants finalised nationally.[1] From these matters, 88 per cent resulted in a guilty outcome.[2] For the period 2018-2019, the Productivity Commission found around 21 per cent and 25 per cent of criminal cases in Victoria's County and Supreme Courts (respectively) were more than a year old.[3] However, for 2019-2020, the Productivity Commission found in a recently released report that these numbers had increased to 28 per cent and 32 per cent respectively. It is trite to say that the backlog in Victorian criminal courts is getting worse.[4]

It is against this background that the importance of guilty pleas in the Victorian criminal justice system is revealed. In 2015, the Victorian Sentencing Advisory Council (SAC) reviewed the statistics relating to pleas of guilty in the Victorian higher courts. From 2009-10 to 2013-14, the SAC found that "72.4 per cent of proven charges in the Supreme Court and 84.6 per cent of proven charges in the County Court were resolved by a guilty plea".[5] From these discreet statistics, it is apparent that guilty pleas help in ensuring the efficient administration of justice because an increase in the number of matters run to contested hearing or trial would likely burden an already strained system.

Common law development

In Victoria, a state of emergency was declared on 15 March 2020 and, at the time of writing, the latest lockdown extended to 21 October 2021. This period has seen more than seven lockdowns and the suspension of jury trials in March and July 2020. Jury trials are again suspended at the time of writing, but regional trials are due to recommence soon. The common law has responded flexibly during the pandemic with sentencing judges considering the effect of the pandemic in a multitude of ways.[6] Indeed, there was some early consideration about whether the pandemic's effects influenced the utilitarian benefit to be awarded to a guilty plea.[7] However, it was not until 18 June 2021, that the Court of Appeal (COA), constituted in each case by Priest, Kaye and T Forrest JJA, considered the utilitarian value of a plea entered during a pandemic.

Worboyes v the Queen

In *Worboyes v the Queen* [2021] VSCA 169 (*Worboyes*) the appellant was granted leave to appeal against a total effective sentence of two years and five months' imprisonment, with a non-parole period of one year and four months. This sentence was imposed on him by a judge of the County Court on 24 July 2020, following his pleas of guilty to recklessly causing serious injury, reckless conduct endangering serious injury, and failing to render assistance after a motor vehicle accident. The offending occurred at a "skid meet" attended by 200-400 people in Derrimut. Ultimately, the appeal was dismissed.

The appellant argued that the sentencing judge had, inter alia, erred by not giving meaningful attribution to his guilty plea during the pandemic. The COA (at [21]-[24]) set the background of the argument as involving "an undeniable fact" that the pandemic has caused "enormous and intimidating backlogs" in the Victorian criminal court, which will take years to "rein in". The COA particularly emphasised the backlog of jury trials in the County Court and that attempts to conduct trials in novel ways, eg, using two courtrooms, are resource-intensive and slow.

After considering the case law history behind the guilty plea discount (at [25]-[33]), the COA concluded that "the preponderance of authority" contemplates a guilty plea's pure utilitarian benefit should mitigate the punishment imposed (at [34]). This is because appellate courts have long recognised the importance of guilty pleas in conserving court resources, reducing delays and alleviating congestion. Noting that the pandemic has compounded these issues, the COA held that "all other things being equal" a plea entered during the COVID-19 pandemic is worthy of greater weight in mitigation than one entered outside of the pandemic's effects (at [39]). While a sentencing judge need not quantify the extent of this discount, there must be a "perceptible amelioration" of sentence.

However, the COA dismissed the appeal because the sentencing judge had specifically considered the imminent risks to prisoners posed by COVID-19 and the resulting stress and inconvenience it caused (at [18]). The COA also considered that it was quite unrealistic to criticise the sentencing judge for failing to consider a matter not advanced by counsel during the plea (at [21]). The COA found that the sentencing judge had not only considered the appellant's plea as a "valuable plea", but also its "utilitarian effects" on the course of justice and the demonstrated remorse (at [41]). The COA dismissed the other grounds noting that there was a significant measure of general deterrence, curial denunciation and just punishment required for this type of offending (at [50]).

Schaeffer v the Queen

In *Schaeffer v the Queen* [2021] VSCA 171 (*Schaeffer*) the applicant was granted leave to appeal against a total effective sentence of seven years and three months' imprisonment, with a non-parole period of five years. This sentence was imposed on him by a judge of the County Court on 24 September 2020, following his pleas of guilty to charges including home invasion, theft, possessing a firearm and cultivating narcotic plants. The principal home invasion offence occurred in December 2019 when the offender and two others committed the home invasion against a 75-year-old woman alone in bed in her own home. The appeal was dismissed.

During the plea hearing both the applicant and prosecutor submitted that the guilty plea had additional value in the context of the COVID-19 pandemic, which the sentencing judge accepted. The applicant (at [41]-[42]) argued on appeal that the sentencing judge erred in failing to specifically identify the additional utilitarian value of the guilty plea due to COVID-19 in the sentencing remarks. It was also argued that the sentence and s6AAA (a statement by a sentencing court indicating the sentence and the non-parole period, if any, that it would have imposed but for the offender's plea of guilty) declaration weighed against the proposition that the sentencing judge had considered the additional utilitarian value.

The COA (at [46]-[47]) outlined the conclusion in *Worboyes* that a guilty plea in the current pandemic should augment the utilitarian value of the plea and be accorded additional weight as a mitigating circumstance. However, the COA noted that the question was not whether the sentencing judge accorded the guilty plea utilitarian value, but whether the failure to specifically mention the additional value due to the pandemic, gives rise to an inference that adequate mitigating weight was not afforded (at [55]). The COA (at [50]-[54]) considered that the failure to so expressly state did not constitute an error in the exercise of the sentencing discretion. The COA considered that a sentencing judge is not obliged to address every argument advanced on a plea, and that sentencing reasons should not be scrutinised critically with "an eye that is overly zealous for the detection of a specific error". It was salient in this case that the sentencing judge did not express any disagreement to the applicant's submissions about the guilty plea's utilitarian benefit advanced during the plea hearing. The COA dismissed the remaining ground of appeal (at [64]-[76]) because it was not persuaded that the sentence was manifestly excessive.

Chenhall v the Queen

In *Chenhall v the Queen* [2021] VSCA 175 (*Chenhall*) the applicant was granted leave to appeal against a total effective sentence (state and federal) of five years and six months' imprisonment, with a non-parole period of four years. This sentence was imposed on him by a judge of the County Court on 17 December 2020, following his pleas of guilty to numerous charges related to child abuse material, and sending and receiving sexually explicit material with female children.

The applicant had submitted during the plea hearing that his guilty plea's utilitarian benefit was enhanced because of COVID-19, citing both the lockdown of prisons and the state of court lists (at [18]). On appeal, the applicant argued that the sentencing judge erred in rejecting this submission. The COA set out the sentencing judge's remarks that "bearing in mind the history of this prosecution", there was no greater utilitarian benefit flowing from the guilty plea because it took place during the COVID-19 pandemic (at [26]). Indeed, the sentencing judge considered that the applicant's submission during the plea hearing was illogical "in circumstances where that plea was inevitable" (at [18]). In allowing the appeal on this ground, the COA (at [33]-[36]) repeated its reasons in *Worboyes* and noted that in the present case, the sentencing judge erred in declining to accept the greater weight to be given to the guilty plea during the pandemic. The applicant was re-sentenced to five years' imprisonment, with a non-parole period of three years and six months.

It is important to note the prosecution's submission on appeal that while an ordinary discount should be given for the guilty plea, the matter took place during the "early stages" of the pandemic and that there was no prospect of a trial regardless of public health issues because of the strength of the Crown case (at [32]). The COA did not, however, consider the prosecution's submission that any utilitarian benefit should be ameliorated in the face of an overwhelming prosecution case. It remains a matter to be determined in future appeals.

Future issues

The COA's consideration that a guilty plea entered during a pandemic should be afforded a greater weight in mitigation of a sentence is welcome in the current pandemic circumstances. However, there are four obvious difficulties that arise immediately:

- How are legal practitioners and sentencing judges to determine when the pandemic is over? Should we reference the state of emergency orders, or until a certain amount of

the population is vaccinated, or until a certain reduction has been achieved in the backlog? It is likely that there will be successive arguments on appeal about how and when the courts will determine that we no longer labour under the pandemic's effects.

- How is this "perceptible amelioration" on sentence to be judged? The obvious answer is that we should see an immediate reduction in the type and length of sentences imposed – that is, it should become evident in statistics. Optimism aside, as any utilitarian value must be measured objectively (*Chenhall* at [31]), it will likely be difficult to argue on appeal that there was no perceptible amelioration in an individual matter, especially given the COA's comments in *Schaeffer*.
- It is incumbent now on all criminal law practitioners to emphasise with clients that a guilty plea during the pandemic is worth more than one after the pandemic "concludes". However, an accused must balance this apparent inducement carefully against exercising their right to defend a charge and put the prosecution to proof.
- It should be noted that there is some possible conflict in the case law between the COA's findings in *Worboyes* and the prosecution's arguments in *Chenhall*. The Supreme Court of Victoria had previously considered that a guilty plea in an overwhelming case or one tainted by self-interest, ie, one not designed to serve the public interest, may not be worthy of a reduction in punishment (see, *R v Gray* [1977] VR 225, 232). It remains to be seen whether and how the Court will determine this issue in light of the holding in Worboyes that a guilty plea should mitigate punishment (in some way) based solely on the utilitarian benefits. Does this hold true even in the face of an overwhelming prosecution case? ■

Liam McAuliffe is a barrister at the Victorian Bar. He has specific expertise in public and administrative law, quasi-criminal and criminal law. Prior to coming to the Bar, he was a principal solicitor at the Victorian Government Solicitor's Office.

1. Australian Bureau of Statistics, "Criminal Courts, Australia" (25 March 2021), <https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/2019-20>.
2. Note 1 above.
3. Productivity Commission, Report on Government Services 2020: Courts, 2020 (29 January 2020), <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/courts>.
4. Productivity Commission, Report on Government Services 2021: Courts, 2021, (22 January 2021), <https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/justice/courts>.
5. Felicity Stewart and Dennis Byles, "Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts", Sentencing Advisory Council, August 2015, 10 ("Stewart – SAC 2015 Report").
6. This included lockdown restrictions on prisoners, visitation and contact restrictions, religious observance restrictions, additional stress and concern for prisoners and families, and the cancellation of rehabilitation programs.
7. DPP (Vic) v Bourke [2020] VSC 130 at [32] (per Jane Dixon J). See, also, R v Nolan [2020] VSC 416 at [39] (per Taylor J) and R v McNamara [2020] VSC 705 at [170] (per Croucher J)).

Media communication pitfalls

THE PITFALLS OF LAWYERS' MEDIA COMMUNICATIONS INCLUDE BREACHING PROFESSIONAL CONDUCT RULES, BREACHING THE DUTY OF CONFIDENCE AND COMMITTING A CONTEMPT OF COURT. BY JUSTICE EMILIOS KYROU*

Lawyers' media communications have traditionally been limited on the assumption that the administration of justice is better served if lawyers are "seen but not heard" outside the courtroom. Allowing lawyers to use the media as a vehicle to sway public opinion is viewed by some as impinging on the independence of the Bar and risking the integrity of the trial process.[1]

On the other hand, too strict a limitation on lawyers' media communications may discourage public comment on occasions where it is legitimate.

Accordingly, restrictions on lawyers' out-of-court media communications must balance:

- the interest of the public and the media in accessing facts and opinions about litigation
- the interest of litigants in placing a legal dispute before the public or in countering adverse publicity about the matter
- the interest of the public and opposing parties in ensuring that the process of adjudication is not distorted by statements carried in the media, especially in criminal cases.[2]

Breach of professional conduct rules regulating public disclosures

The key professional conduct rules that regulate lawyers' public disclosures are r28 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Solicitors' Conduct Rules) and r176 to 78 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Barristers' Conduct Rules).

Rule 28 of the Solicitors' Conduct Rules addresses the issue of solicitors making public disclosures by simply prohibiting a solicitor from "publish[ing] or tak[ing] steps towards the publication of any material concerning current proceedings which may prejudice a fair trial or the administration of justice".

Rule 76 of the Barristers' Conduct Rules prohibits barristers from publishing material concerning any proceeding which is inaccurate, discloses any confidential information or expresses the barrister's opinion on the merits of the proceeding. Rule 77 provides that public comment concerning current proceedings

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may be made in answer to unsolicited questions, provided that the answers are limited to information as to the identity of the parties or any witnesses already called, the nature of the issues in the case and the nature of the orders made or a judgment given including any reasons given by the court. Rule 78 allows a barrister to advise a client about dealings with the media "if requested . . . but not in a manner which is calculated to interfere with the proper administration of justice".

Ramifications of breaching professional conduct rules

A breach of the professional conduct rules may have serious consequences including embarrassment to the lawyer, damage to the lawyer's reputation and loss of clients. In particular, it may result in disciplinary action against the lawyer. The ultimate sanction for the lawyer is losing the right to practise law.

SNAPSHOT

- The pitfalls of lawyers' media communications extend across diverse areas of law.
- Inappropriate media communications may lead to disciplinary action and can result in loss of the right to practise law.
- Inappropriate media communications may also antagonise the judge hearing the case and undermine the administration of justice.

Case of *R v MG*

In *R v MG*,[3] Margaret Cunneen was the Crown prosecutor in criminal proceedings against MG. In 2005, after a successful appeal against conviction by MG and before a retrial, Ms Cunneen made public comments regarding the proceedings during the Sir Ninian Stephen annual lecture to the Newcastle University Law School. She referred to aspects of MG's case and stated that criminal appeals "result in retrials due to very minor matters which seem most unlikely to have made any difference to the verdict of the jury" (at [46]). She further remarked:

"If justice, in the criminal jurisdiction, means that the innocent are acquitted and the guilty are convicted, the adversarial system may seem routinely to achieve the former but rather often to fail the latter" (at [47]).

Her address was reported in the *Daily Telegraph* and *The Australian*, with Ms Cunneen being identified as the author in an article in the *Weekend Australian*.

MG's solicitor complained about Ms Cunneen's address to the Director of Public Prosecutions (DPP), the New South Wales Bar Association and the Legal Services Commissioner. The DPP noted MG's concerns, but did not propose to withdraw Ms Cunneen's brief as prosecutor in the matter.

MG applied to the District Court of New South Wales for a stay of his retrial until the appointment of a different Crown prosecutor. That application was dismissed by the trial judge, so MG appealed to the Court of Criminal Appeal.

The Court of Criminal Appeal found that Ms Cunneen's comments conveyed that she was of the view that MG was guilty (at [46]-[47] and [50]). The Court held that Ms Cunneen had breached r59 of the then *New South Wales Barristers' Rules*, which was in similar terms to the current r77 of the *Barristers' Conduct Rules* (at [45] and [52]-[54]). In addition, Ms Cunneen was found to have breached guideline 32 of the *New South Wales Prosecution Guidelines of the Office of the Director of Public Prosecutions*, which further regulated prosecutors' media contact (at [42], [45] and [52]-[54])).

The Court acknowledged that Ms Cunneen's address was not to the media directly. However, the Court held that the address concerned high profile criminal cases and was given on a public occasion and, therefore, it was inconceivable that the address would not be brought to the attention of the media (at [50] and [85]).

The Court observed at [87]:

"The difficulty created by a breach of Bar Rule 59 when an advocate publicly speaks of the merit of a client's case before trial may not be so acute in ordinary civil litigation. Even then the Rule prohibits such statements in order to ensure the appearance of detachment and objectivity. The position is significantly different when a prosecutor breaches the Rule".

The Court of Criminal Appeal stated that Ms Cunneen's public expression of her view that MG was guilty displayed partiality and potentially compromised her capacity to fairly prosecute on behalf of the Crown (at [86]). The Court found that, in the circumstances, justice would not be seen to be done if Ms Cunneen were to act as prosecutor in MG's retrial (at [95] and [100]) and granted the stay sought by MG.

Breach of duty of confidence

Lawyers owe a duty of confidence to their clients. That duty is based in contract, equity and professional rules.

The contractual duty of confidence is implied into the retainer between a lawyer and a client in the absence of an appropriate express term. The duty extends to all confidential information supplied by a client to his or her lawyer. It will not extend to information which is in the public domain.

The equitable duty of confidence arises from the fiduciary nature of the relationship between a lawyer and client.[4] It will not cease on the termination of the retainer[5] but will last as long as the information retains its confidential quality.[6]

The key professional conduct rules that are a source of confidentiality obligations are r9.1 of the Solicitors' Conduct Rules and r114 of the Barristers' Conduct Rules.

Rule 9.1 of the Solicitors' Conduct Rules provides that "[a] solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person" unless that person is a solicitor working in the same law practice or a barrister or other person engaged for the purpose of delivering legal services to the client.

Rule 114 of the Barristers' Conduct Rules states that, subject to limited exceptions, "[a] barrister must not disclose . . . or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential".

There are common law and equitable exceptions to the duty of confidentiality. The main exceptions are:

- disclosure authorised by the client
- disclosure compelled by law
- disclosure to enforce the lawyer's entitlement to remuneration
- disclosure to defend disciplinary or legal proceedings against the lawyer
- disclosure for the purpose of obtaining advice in connection with the lawyer's legal or ethical obligations

- disclosure for the purpose of avoiding the probable commission of a serious criminal offence or for the purpose of preventing imminent serious physical harm.

Most of these exceptions are reflected in the Solicitors' Conduct Rules and the Barristers' Conduct Rules. Those rules generally do not impose an obligation on lawyers to disclose confidential information in particular circumstances, but rather give them a discretion to do so if they consider that disclosure is appropriate.[7]

Ramifications of breaching the duty of confidence

A client whose confidential information has been disclosed may seek the intervention of the court. By virtue of the implied term of confidentiality in the retainer, a breach of the duty of confidence may attract damages for breach of contract.[8] A client could also seek an injunction to restrain the lawyer from committing a breach of confidence.[9]

A breach of client confidentiality may also constitute a breach of the professional conduct rules and result in disciplinary action against the lawyer.

Cases of two of Schapelle Corby's lawyers

In October 2004, Australian woman Schapelle Corby was charged with drug smuggling related offences in Indonesia. She was found guilty on 27 May 2005 and was sentenced to 20 years' imprisonment.

On 26 June 2005, her Gold Coast-based solicitor Robin Tampoe, in an interview on the Channel 9 program *Sunday*, publicly disclosed confidential instructions that Schapelle Corby's sister, Mercedes Corby, had communicated to him about past criminal convictions within the Corby family.

In 2009, the Queensland Legal Practice Tribunal found Mr Tampoe guilty of professional misconduct. Atkinson J observed that "[i]t is hard to think of a more egregious breach than to do so on a national television program".[10] The Supreme Court of Queensland subsequently struck off Mr Tampoe from the roll of legal practitioners.

Following Schapelle Corby's conviction, on 6 June 2005 Perth-based barrister Mark Trowell QC was retained to provide pro bono legal assistance in relation to an appeal. Between that day and 22 June 2005, he made a number of statements to Australian journalists concerning the appeal without Ms Corby's consent. The statements criticised the conduct of the appeal by Ms Corby's Indonesian lawyers and asserted that they had considered seeking $500,000 from the Australian government for the purpose of bribing the appellate judges.

In 2009, the State Administrative Tribunal of Western Australia found Mr Trowell guilty of unsatisfactory conduct by way of unprofessional conduct and reprimanded him.[11] The Tribunal said at [449] that the statements were "detrimental to the interests of a person who was in an extraordinarily vulnerable situation". In relation to the bribery allegation, the Tribunal stated that disclosure of such confidential information could only be justified if made to the appropriate authority or otherwise as permitted by the professional conduct rules, and that it was difficult to see how publication to the media would ever be justified (at [384]).

Contempt of court

A lawyer's comments to the media may constitute criminal contempt of court if they interfere, or tend to interfere, with the administration of justice, whether generally or in a particular proceeding.[12] Contempt which generally interferes with the administration of justice includes publications that scandalise the court or a judge.

Comments published in the media amount to scandalising the court where they are calculated to bring a court or a judge into contempt or to lower a judge's authority.[13] This is so even if it is unlikely that the comments would have any actual effect of influencing the outcome of pending proceedings. However, criticising the conduct of a court or a judge in good faith does not constitute contempt.[14]

A publication may constitute a criminal contempt of court in relation to a current court proceeding where, as a matter of practical reality, it has a real and definite tendency to prejudice or embarrass the trial of that proceeding.[15] This is known as sub judice contempt of court.

Bold claims by a lawyer about the strength of his or her client's case, prejudicial comments about the veracity of witness testimony, adversarial pronouncements about facts in issue and polemic assertions about how a case will or ought to be decided may constitute sub judice contempt of court. This is particularly so in jury trials where statements made to the media risk influencing prospective jurors and polluting the jury pool.[16]

Ramifications of contempt of court

Criminal contempt of court is a serious offence which can be punished by imprisonment or a fine. In less serious instances, payment of costs or a censure may be sufficient punishment.

Case of Harry Kopyto

In 1985, a Canadian lawyer, Harry Kopyto, acted for a political activist named Ross Dowson in a proceeding in which Mr Dowson claimed that members of the Royal Canadian Mounted Police had conspired to injure him.

After the claim was dismissed, in response to a journalist's request for comment about the decision, Mr Kopyto gave a long statement which was quoted in a newspaper article. The statement included:

"This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it.

"Mr Dowson and I have lost faith in the judicial system to render justice.

"We're wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the [Royal Canadian Mounted Police] are sticking so close together you'd think they were put together with Krazy Glue".[17]

Mr Kopyto was charged with contempt of court by scandalising the court. He was convicted, but the conviction was reversed on appeal. The Ontario Court of Appeal found that, while Mr Kopyto's statement would constitute a contempt under the common law, the statement represented the expression of a sincerely held belief on a matter of public interest. As such, it was protected under the freedom of expression clause

set out in s2(b) of the Canadian *Charter of Rights and Freedoms*. Mr Kopyto's statement would not be protected in Australia except perhaps in jurisdictions which have legislation similar to the Canadian *Charter of Rights and Freedoms*.[18]

Conclusion

Irrespective of their motives, public comments by lawyers about their clients' affairs carry serious risks, even if the information is already in the public domain. Repetition or confirmation of information by a legal practitioner may give that information a credible status that it might not otherwise have had.[19]

Further, disclosure to the media is fraught with danger not least because the lawyer loses control over the form and breadth of publication of the information as well as the slant that the media might put on it.

As we have seen, disclosure to the media can involve a breach of professional conduct rules or the duty of confidence and may also constitute a contempt of court. Even if these adverse consequences do not arise, there is the risk that the publicity may antagonise the judge hearing the case and he or she might publicly rebuke you. Displeasing the judge cannot be helpful for your client.

Apart from the potential negative impact on you or your client, unwise media commentary can also undermine the administration of justice. ■

Justice Emilios Kyrou is a judge of the Victorian Court of Appeal and the Victorian patron of the Hellenic Australian Lawyers Association.

* This is an edited version of a paper delivered at a Hellenic Australian Lawyers Association webinar on 2 June 2021.

1. GE Dal Pont, Lawyers' *Professional Responsibility* (6th edn), Lawbook, 2017, 583 [17.200].
2. American Law Institute, *Restatement (Third) of the Law Governing Lawyers* (2000) § 109 cmt (b), cited in Note 1 above, 583 [17.200].
3. *R v MG* (2007) 69 NSWLR 20; [2007] NSWCCA 57.
4. *In the Marriage of Griffis* (1991) 105 FLR 441, 442.
5. GE Dal Pont, *Law of Confidentiality*, LexisNexis, 2015, 170 [9.22].
6. Note 1 above, 345 [10.25].
7. Note 1 above, 356 [10.105].
8. Note 5 above, 168 [9.19].
9. See, eg, Note 4 above.
10. *Legal Services Commissioner v Tampoe* [2009] QLPT 14, 5.
11. *Legal Practitioners Complaints Committee v Trowell* [2009] WASAT 42.
12. *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 106; [1986] HCA 46.
13. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31–2; [1992] HCA 46.
14. Note 13 above.
15. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15, 34, 46, 70; [1987] HCA 56.
16. Brian Foster and Jared Craig, "The Lawyer and the Media: What Can a Lawyer Say to the Media?" (2014) 43(1) *Advocates' Quarterly* 59, 72.
17. *R v Kopyto* (1987) 62 OR (2d) 449, 455.
18. *Human Rights Act 2004* (ACT) s16(2); *Human Rights Act 2019* (Qld) s21(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s15(2).
19. *Camp v Legal Practitioners Complaints Committee* [2007] WASC 309, [70].

The best interests of the child

WHEN THE DEPARTMENT OF FAMILIES, FAIRNESS AND HOUSING CAN UNILATERALLY OVERRIDE DECISIONS OF THE VICTORIAN CHILDREN'S COURT REGARDING CHILD SAFETY AND WELFARE HAS BEEN THE SUBJECT OF SUPREME COURT PROCEEDINGS.

BY SALLY NICHOLES, MICHAEL OSRIN AND ALASTAIR NOAKES

SNAPSHOT

- Child protection is empowered to make numerous decisions regarding the safety and welfare of children, including the suitability of a parent to care for a child.
- *AA v Secretary to the Department of Health and Human Services & Ors* [2020] explored when the Secretary can unilaterally override decisions of the Victorian Children's Court regarding the placement of children.
- Decision-making by Child Protection remains bound by the requirements of procedural fairness and adherence to the best interest and decision-making principles under the *Children, Youth & Families Act 2005*.

ADOBESTOCK

Decisions about the safety and welfare of Victoria's most at risk children typically occur under the oversight of the Victorian Children's Court. There are, however, provisions in the *Children, Youth and Families Act 2005* which provide for the Secretary of the Department of Families, Fairness and Housing (formerly the Department of Health and Human Services) (Department) and her delegates to unilaterally alter the Children's Court Orders which these children are subject to without any oversight of the Court or any clear assessment process.

Best interests of the child and protection orders

Under the *Children, Youth & Families Act 2005* (Act), the legislation which grants parens patriae jurisdiction to the Victorian Children's Court (Court), the best interests of the child must always be paramount.[1] The Act provides what matters the Court and the Secretary of the Department (Secretary) should take into consideration when determining whether an action is in the best interests of a child including:

- the need to give the widest possible protection to a child while limiting intervention to only that which is necessary
- the child's wishes
- placement options for the child if removed from parental care contact arrangements for the child and parent.[2]

In *Secretary, Department of Human Services v Sanding* [2011] VSC 42 Bell J emphasised that the best interests of the child is the underlying principle of the Act as well as being a longstanding consideration of the parens patriae jurisdiction of the Children's Court. In this case the best interests principle was treated as the "cardinal consideration" in protection proceedings, particularly with regard to the making and revoking of Custody to Secretary Orders, now known as Care by Secretary Orders (CBSO).[3]

The debate about which of the best interest principles is relevant, or the most relevant, makes up a substantial amount of the argument before Children's Court magistrates; with parents, child protection practitioners, independent children's lawyers and other interested parties rarely in unanimous agreement. Once it has been determined what is in the best interests of the children by the Court, the children, if appropriate, will be placed on one of the various protection orders which the Court is empowered to make.

These protection orders vary in the level of intervention they permit in a child's life, and in the intended outcome of the order. Some of the relevant protection orders are:

Family Preservation Order[4]	This order provides for the child to be placed in the day-to-day care of one or both parents and bestows on the Secretary responsibility for the supervision of the child. It does not affect a person's parental responsibility for the child, and support and assistance will be provided to the family while the child's safety within the family is monitored by the Secretary.
Family Reunification Order[5]	This order may be made when it has been found that a child is in need of protection and cannot safely remain in parental care. The purpose is to promote the reunification of the child with a parent. It confers parental responsibility of the child on the Secretary in addition to the child's parents.
Care by Secretary Order[6]	This order is appropriate when a child has been in out of home care for a period of 24 months, or earlier if it has otherwise been determined that a child will not be able to safely return to the care of a parent, and the appropriate permanency objective is adoption, permanent care or long-term out-of-home care. It confers parental responsibility for the child on the Secretary to the exclusion of all others.
Permanent Care Order[7]	This order grants parental responsibility for a child to a person other than the child's parent or the Department. It is, in effect, very similar to an Adoption Order, however, it will remain in force until the child turns 18 or marries (whichever occurs first).
Long Term Care Order[8]	This order confers parental responsibility for the child on the Secretary to the exclusion of all others until the child turns 18 or marries (whichever occurs first). Generally, under this order an identified carer will be able to care for the child until they reach the age of 18, while parental responsibility vests with the Secretary. This Order cannot be made if a child aged 10 or over opposes it.

In the matter of *Cardell (A Pseudonym) v Secretary, Department of Health and Human Services* [2019] VSC 781 a submission, on appeal, that the Magistrate had erred in granting a CBSO was rejected by Maxwell P. This case concerned arrangements for the care of a two-year-old boy referred to as Oliver. Given Oliver's likelihood of suffering emotional or psychological harm due to his mother's drug and alcohol dependency, a Family Reunification Order (FRO) was made under s275(1)(c) of the Act in early 2018 conferring responsibility for his care to the Secretary. After a review of the situation in May 2019 the Department felt that reunification was no longer an appropriate objective and applied for a CBSO. In the Children's Court proceedings, the Magistrate found it was in Oliver's best interests to grant the CBSO.

The submission of the appellant was that the Magistrate erred in giving no separate consideration to Oliver's best interests before granting the CBSO that the Department applied for. This submission was rejected by Maxwell P as he found that the appropriate test – the "best interests" test – was applied by the Magistrate in determining the application.

Unilateral change to final orders by the Secretary

While the Court has sole jurisdiction to make the above orders, there are provisions enclosed in the Act which allow for the Secretary to unilaterally change the nature of these orders. Notably, under the Act, such an action does not require consultation with the Court or any other interested party.

Sections 288A and 289A of the Act were introduced as part of the amendments to the Act in 2016, and were included as part of the new format for the Orders which the Children's Court was able to make. Respectively, these sections allow for the conversion of FROs and CBSOs to Family Preservation Orders, placing the child back in the care of a parent.

This is not an insignificant step, as the CBSO can only be in existence by order of the Children's Court which would have assessed the removal of parental responsibility to be appropriate. Under the Act, parental responsibility in relation to a child means all the duties, powers, responsibilities and authority that, by law or custom, parents have in relation to children.

The exercise of ss288A and 289A can be wholly appropriate in special circumstances, for example if a parent was previously incarcerated but has now been released, or if due to circumstances such as a wait time for services, the protective concerns were unable to be addressed in a timely manner. Notably, during COVID-19, this has not been an uncommon occurrence. That being said, the sections do not pose any restrictions on their own operation in terms of time restraints,

consent of the parties, prior consultation or permissions of the Court. Therefore, a scenario may exist whereby a Court, on hearing the evidence of all parties, determines that a CBSO is appropriate, and this Order is unilaterally overturned by the Department without advising the Court prior, within a short period of time.

It should also be noted that pursuant to the COVID-19 *Omnibus (Emergency Measures) and Other Acts Amendment Act 2020* (Vic) the usual 24 month duration of FROs could be extended by six months if it could be demonstrated that reunification with the parents had been impeded by COVID-19 and such an extension is in the best interests of the child.

Possible restrictions

While there are no clear restrictions on the Department's exercise of such power under ss288A and 289A, these can be construed when read in conjunction with other sections of the Act.[9] Section 11 of the Act relevantly provides that in making a decision or taking an action in relation to a child, the Secretary or a community service must also give consideration to principles which include:

- where a child is placed in out of home care, the child's caregiver should be consulted as part of the decision-making process and given an opportunity to contribute to the process
- the decision-making process should be fair and transparent
- the views of all persons who are directly involved in the decision should be taken into account
- decisions are to be reached by collaboration and consensus, wherever practicable
- the child and all relevant family members (except if their participation would be detrimental to the safety or wellbeing of the child) should be encouraged and given adequate opportunity to participate fully in the decision-making process
- the decision-making process should be conducted in such a way that the persons involved are able to participate in and understand the process, including any meetings that are held and decisions that are made.

A failure to adhere to these considerations does not, however, prevent the operation of ss288A and 289A, but rather may open the door for a party to make a case that the Department's action was unlawful as a result of a failure to provide procedural justice. A decision in breach of procedural fairness is an error that goes to jurisdiction which renders the decision null and void[10] and is determined not to have effect from the moment the decision was made.[11]

It has been well established that where a statute confers a power on a public official to affect a person's rights or interests, the rules of procedural fairness (or natural justice) regulate the exercise of that power unless they are excluded by plain words of necessary intendment within that statute.[12] The requirements of procedural fairness vary according to the circumstances, and the underlying premise of the rule is fairness.[13]

Jurisdictional error

Jurisdictional error is an administrative law concept that refers to an error of law resulting from an overstepping of legislative authority in decision-making.[14] Any decision infected by jurisdictional error can be quashed by judicial review.

This concept was recently revisited by the High Court in the case of *Hossain v Minister for Immigration and Border Protection*.[15] The case concerned a refusal by the Minister for Immigration and Border Protection to grant a visa. The AAT, in a merits review, affirmed the decision of the Minister on two separate bases.

When the matter finally reached the High Court, the Court took the opportunity to expand on the doctrine of jurisdictional error in relation to the principle of materiality. It was held that jurisdictional error will only arise where the error of law meets the relevant threshold of materiality. In this case the error of law was not *material* to the AAT's ultimate decision given the existence of the independent finding which obliged them to affirm the previous decision.

The matter of *DHX17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* also touches on the issue of materiality in relation to jurisdictional error.[16]

When errors occur

The question of how to appropriately address the issue of the Secretary or her delegates inappropriately exercising their power subject to ss288A and 289A was the subject of recent Supreme Court proceedings in the matter of *AA v Secretary to the Department of Health and Human Services & Ors*.[17] In this matter, the Secretary issued a s289A Direction converting the CBSO to which the children were subject into Family Preservation Orders (FPOs). The maternal grandparents of the children, with whom the children had resided for over two and a half years, were advised of this proposed conversion on a Friday morning, with the children proposed to be placed in the care of the father on the Monday morning. Notably the father had never had care of the children prior to this. The maternal grandparents immediately sought an internal review of the decision to convert the Orders, stating that there was significant information the Secretary had failed to consider. While this request does not automatically result in a stay of the decision, given the significant impact on the children, a stay was requested until the review had occurred. Nonetheless, the Secretary proceeded with the conversion prior to the review being conducted.

Once the review was conducted, and the outcome received almost four months later, the Secretary determined that not only was the decision to convert the Orders fundamentally flawed from a failure to consider the children's best interests, but further that there had been a denial of procedural fairness to the mother and maternal grandparents from the exercise of this power. Noting this failure to provide procedural fairness, the Secretary unilaterally determined that the s289A conversion was unlawful, and determined that the children remained subject to the CBSO. Child protection workers then attended the home of the father without notice and removed the children, returning them to the care of the maternal grandparents.

The father, maintaining that the children remained subject to FPOs and, therefore, such a removal was unlawful, issued proceedings in the Supreme Court seeking declarations to this effect. The maternal grandparents then issued further proceedings which they sought be joined to the father's proceedings, seeking an order in the nature of certiorari

quashing the direction purportedly made under s289A for a failure to provide procedural fairness, and a declaration that the CBSO remained in force.

In making her determination on this matter Incerti J noted the position in *Mann v Medical Practitioners Board of Victoria*[18] that if statute confers a discretionary power on a public official to "destroy, defeat or prejudice a person's rights, interests, or legitimate expectations", procedural fairness will apply to the exercise of that power unless they are plainly excluded by the statute. In these circumstances, the maternal grandparents' rights were deemed to have been clearly affected by the Secretary's decisions, and they submitted that nothing in the Act explicitly displaces the presumption that they would be afforded procedural fairness in relation to a decision under s289A.

Incerti J further noted the High Court decision in *Re Refugee Review Tribunal; Ex parte Aala*[19] that a failure to afford procedural fairness will constitute jurisdictional error if affording procedural fairness could have resulted in the decision-maker making a different decision. Notably, in this matter the Secretary, on review of the earlier decision, had come to a different decision, further strengthening the maternal grandparents' argument that the decision was contaminated by jurisdictional error. Further, Incerti J found that the Secretary's conduct was in breach of several aspects of s11 of the Act, which she viewed as "mandatory considerations underpinning any decisions and actions by the Secretary".[20] As such, Incerti J determined that the decisions made by the Secretary were unlawful and invalid and, therefore, the CBSO remained as the prevailing Order.

In this matter it also fell to Incerti J to determine whether the Secretary, on becoming aware of the contaminated decision, had the power to treat such a decision as invalid and reconsider the decision. Her Honour was validly critical of a delegate of the Secretary being given such a power, and pointed to the decision-making in this proceeding as evidence against the Secretary's position.[21] Incerti J confirmed that it followed that the Secretary did not have the power to reconsider her decision, therefore the FPO remained in place unless and until it was set aside by the Court and, therefore, the subsequent decision and action to remove the children from the father's care was not authorised by the Act and was beyond power.[22]

Conclusion

While not expressly provided for in the legislation, the recent decision of *AA v Secretary to the Department of Health and Human Services & Ors* has helped to clarify the limitations on the Secretary's decision-making under ss288A and 289A of the Act. It has been confirmed that any such decision-making remains bound by the requirements of procedural fairness and adherence to the best interest and decision-making principles under the Act, and that the Secretary does not possess the power to unilaterally review her own decisions. ■

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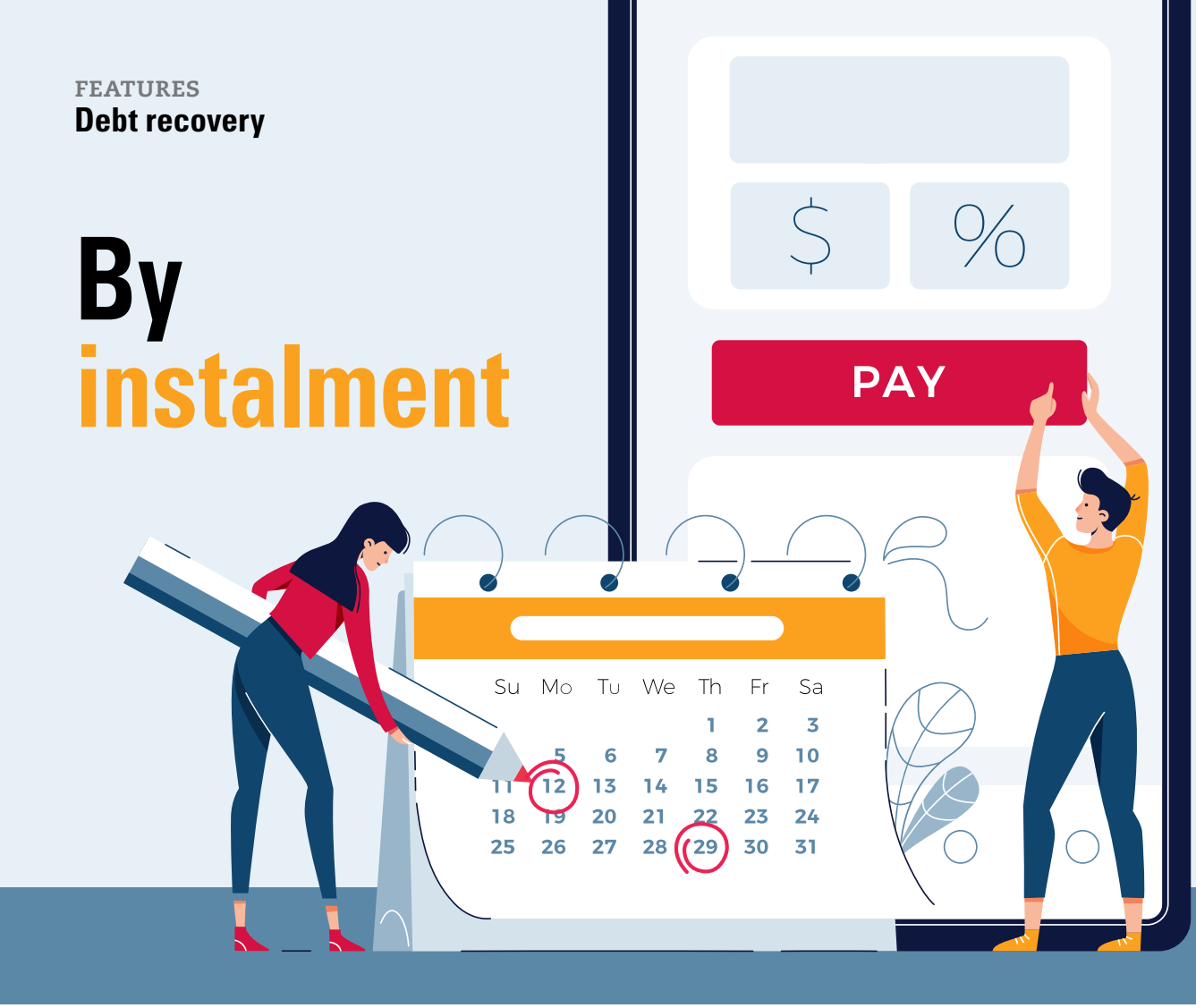
1. *Children, Youth and Families Act 2005* (Vic), s10(1).
2. Note 1 above, see s10(3) for a full list of factors to be considered.
3. *Secretary, Department of Human Services v Sanding* [2011] VSC 42, at [11].
4. Note 1 above, s280.
5. Note 1 above, s287.
6. Note 1 above, s289.
7. Note 1 above, s321.
8. Note 1 above, s290.
9. For the specific factors to be considered with regard to the placement of Aboriginal children in out of home care see note 1 above, s13.
10. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 WLR 163, Lord Reid at 171, Lord Morris at 181, Lord Pearce at 195, Lord Wilberforce at 207.
11. *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, at [51] (Gaudron, Gummow JJ, McHugh J and Hayne J concurring).
12. *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh).
13. *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, at [85] (Allsop CJ, Middleton and Foster JJ).
14. *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.
15. [2018] HCA 34.
16. [2020] FCAFC 127.
17. [2020] VSC 400.
18. [2004] VSCA 148.
19. [2000] HCA 57.
20. Note 19 above, at [180].
21. Note 19 above, at [232-233].
22. Note 19 above, at [236].

By instalment



THE JUDGMENT DEBT RECOVERY ACT 1984 INTRODUCED A MECHANISM FOR COURTS TO ORDER THE REPAYMENT OF JUDGMENT DEBTS BY INSTALMENTS BUT PROVIDES LITTLE GUIDANCE TO DETERMINE WHEN SUCH ORDERS ARE APPROPRIATE. IN THE INTERVENING YEARS THE COURTS HAVE DEVELOPED THEIR OWN CRITERIA. BY MICHELLE BENNETT

Instalment orders are court orders that authorise payment of judgment debts by instalment. Instalment orders are available in all Victorian courts via the *Judgment Debt Recovery Act 1984* (Vic) (Act)[1] and may be made at the time judgment is given (pursuant to s5) or later (s6). The Act provides for both judgment debtors and judgment creditors to apply for instalment orders. The purpose of the provisions is to provide a further mechanism for the judgment creditor to obtain satisfaction of a judgment, not to curtail or delay the rights of the creditor to recoup the whole judgment sum.

In *C Tina Pty Ltd v Barham-Floreani* [2019] VSC 819 Riordan J observed that:

"The Act does not prescribe any relevant factors to be taken into account and provides 'little guidance . . . as to the cases or circumstances in which Parliament considers that it is appropriate for an instalment order to be made'".[2]

This article provides an overview of the features of instalment orders; the process for applying for instalment orders; and the relevant factors and circumstances that the Court considers in determining whether an instalment order will be made.

Interest continues to accrue

The "judgment debt" on which an instalment order is made under the Act means not just the amount of the judgment debt but also the interest that comes to accrue on that debt (*Cahill v Howe* [1986] VR 630).[3] Therefore, the judgment debt is ever increasing and any instalment order should provide for accrual of interest.

Other enforcement mechanisms are stayed

An application for an instalment order stays enforcement of the judgment debt from the date the application is served until the application is determined (s6(8)). Where an instalment order is made, it operates as a stay of enforcement or execution of the judgment debt for so long as the instalment order is being complied with (s9).

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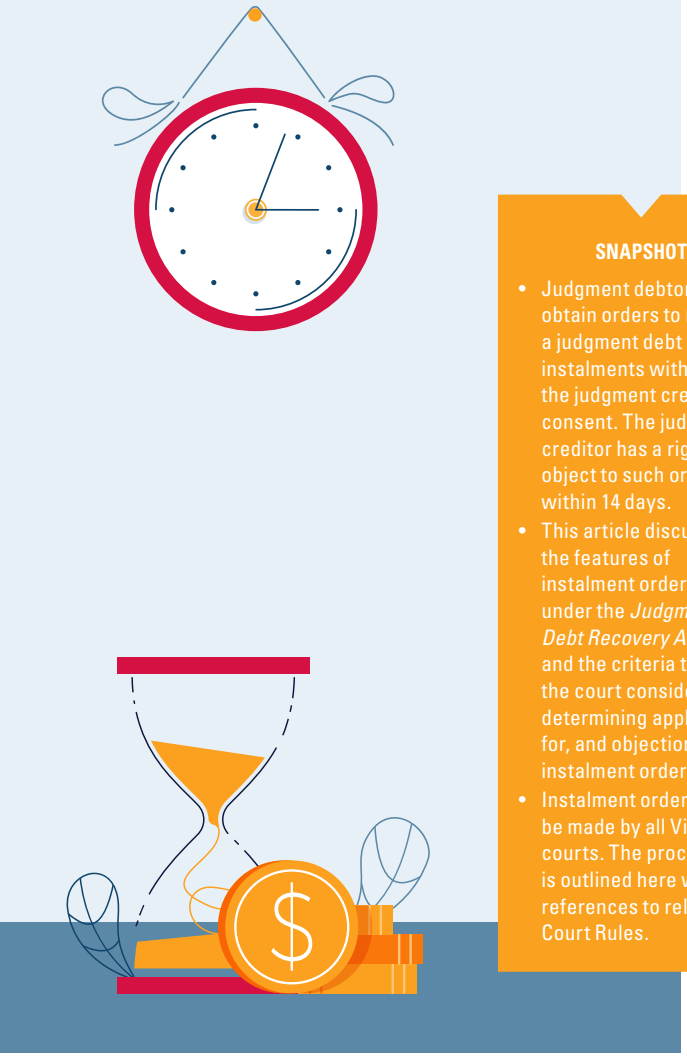

SNAPSHOT

- Judgment debtors may obtain orders to repay a judgment debt by instalments without the judgment creditor's consent. The judgment creditor has a right to object to such orders within 14 days.
- This article discusses the features of instalment orders under the *Judgment Debt Recovery Act 1984* and the criteria that the court considers in determining applications for, and objections to, instalment orders.
- Instalment orders can be made by all Victorian courts. The process is outlined here with references to relevant Court Rules.

Instalment orders by agreement

Where the parties have reached an agreement for the payment of the judgment debt by instalment, the Act provides a mechanism for parties to formalise their instalment agreement and for the court to make orders in terms of the agreement (s7). For the parties' instalment agreement to be recognised in a formal court order, the agreement must be in the prescribed form and accompanied by a statement of affairs in the Magistrates' Court, or an affidavit regarding execution in the County Court and Supreme Court. The form is found in the rules of the relevant court.[4] The formalisation of the parties' agreement has benefits for both the judgment debtor and the judgment creditor – for the judgment debtor the order, while in force, operates as a stay of enforcement; for the judgment creditor it means that the methods of enforcement which can follow a default in payment will be available.

Instalment orders without consent

It is common for a judgment debtor to apply for, and be granted, an instalment order without the judgment creditor's consent.

A judgment creditor may apply for an instalment order without the judgment debtor's consent, however, an instalment order will not be made without the consent of the judgment debtor where the judgment debtor's sole source of income is a pension or other regular social security payment. Where the judgment creditor applies for an instalment order without the judgment debtor's consent, it may not have the necessary evidence to satisfy the court of the judgment debtor's capacity to pay the debt by the proposed instalment. To address this issue, the judgment debtor is ordinarily required to be examined under oath by the court (ss13 and 14). The Act sets out the process of summoning the judgment debtor and conducting the oral examination. Where a judgment debtor has been summonsed for oral examination, they may also be required to produce documents (s16).

Irrespective of the party making the application, the process for applying for an instalment order is governed by the rules of the relevant court (Order 61 *Supreme Court (General Civil Procedure) Rules 2015 (Vic); County Court Civil Procedure Rules 2018 (Vic); Magistrates' Court General Civil Procedure Rules 2010* (Vic)). There are subtle differences in the procedures between courts, the key one being that the Supreme and County Courts require the debtor applicant to file their financial situation[5] as an affidavit or, where the applicant is the creditor, the applicant is required to file an affidavit of the facts forming the basis of the application. The applicant is required to serve a copy of the application and affidavit of support (or statement of affairs in the Magistrates' Court) on the other party and file an affidavit of service (or declaration of service in the Magistrates' Court). Instalment order applications are usually dealt with on the papers and the proper officer of the court may make, or decline to make, the orders sought without notice to either party (s6(3)).

Factors relevant to whether an instalment order will be made

The Act does not prescribe the factors a court may take into account when considering an instalment order, and each case will turn on its particular facts. In *Wilson v Richards* [2018] VCC 1755, Ryan J listed the criteria which the courts have identified as relevant to assessing applications for instalment orders:

a) "whether the judgment debtor is employed;
b) the means the judgment debtor has to satisfy the judgment;
c) whether the instalments will see the judgment paid within a reasonable time. Instalment orders that go for too long should not be made. The question of whether the time period is unreasonable or not depends on the facts in each case (In *Hellier Capital Pty Ltd v Richard Albarran* [2009] NSWSC 403, McDougall J held that four years was a reasonable time);
d) the necessary living expenses of the judgment debtor and dependants;
e) other liabilities of the judgment debtor;
f) whether, having regard to other enforcement means, an instalment order would be consistent with the public interest in enforcing money orders efficiently and expeditiously;
g) a proposed instalment order that only chips away at the interest obligation of a debt will be ineffectual and should not be made;
h) whether the order will impose unreasonable hardship on the creditor – an applicant for an instalment order is required to establish more than just the financial hardship flowing from having his property and assets sold and called in and collected by the sheriff;
i) an instalment order should not be made if it is obvious it would be futile because the judgment debtor could not meet his or her obligations under it".[6]

Riordan J was more succinct in *C Tina Pty Ltd v Barham-Floreani*, noting:

"In my opinion, an application by a judgment debtor to pay by instalments will usually be granted unless:
a) the judgment debtor has the means to pay the debt immediately or in a significantly shorter time than proposed;
b) it is unlikely that the judgment debtor will be able to comply with the instalment order; or
c) the proposed instalment plan will not result in the repayment of the debt and interest in a reasonable period of time".[7]

In applying for an instalment order a judgment creditor should address each of the criteria identified by Ryan J above. Where the judgment debtor is a company, the means the judgment debtor has to satisfy the judgment includes not only its own internal resources but also external sources, particularly related companies on which it might reasonably be expected to draw and which might reasonably be expected to provide financial assistance to it.

The judgment debtor must provide evidence to demonstrate that it is unable to pay the debt immediately but has the means to pay the debt by regular instalments, and that the debt, inclusive of interest, will be paid off in a reasonable period. A balance must be struck between demonstrating an ability to pay the debt by the instalment plan proposed but not so many means as to suggest that the debt could be repaid in a shorter time than proposed.

The information provided in support of an application for an instalment order must be accurate otherwise the judgment debtor may successfully apply for the order to be varied or cancelled (s8(2)(b)). If there is insufficient evidence to support the financial position asserted, the court may decline to make the order sought. It is not sufficient for the judgment debtor to seek an instalment order on an aspiration that they will be able to pay it. As observed by Mukhtar AsJ in *Davidson v Greedy* [2012] VSC 202: "The Act does not contemplate 'see-how-we-go' interim orders".

In considering what is a reasonable period the court will consider the magnitude of the debt and the proposed instalment payments. Two years may be considered a good rule of thumb,[8] however, each case will turn on its own facts: in *Lewis and Anor v Leslie* [2001] VSC 110, McDonald J considered that 29 months to repay $3019.88 was too long, while in *Laro-Bashford v Mihos* [2015] VCC 1540, where the judgment debt was $100,453, Anderson J observed that "If the Court were otherwise confident that the judgment debtor had limited means, payment over a period of five years, or even longer, may not be inappropriate".

Objecting to an instalment order

It is frequently at the point where a party receives a notice that an instalment order has been made, or declined, that they seek the assistance of a lawyer. Time is of the essence. The parties have 14 days from receiving notice of the Court's order to object to the Court's determination to make or refuse to make an instalment order (s6(5) the Act and r61.02(7(b)) *Supreme Court (General Civil Procedure) Rules 2015 and County Court Civil Procedure Rules 2018; r61.03 Magistrates' Court General Civil Procedure Rules 2010*).

The factors relevant to objecting to an instalment order are the same factors as those that are relevant to whether an instalment order will be made.

In formulating an objection to an instalment order, it is relevant to return to the purpose of instalment orders: to provide a further mechanism for the judgment creditor to obtain satisfaction of a judgment, not to curtail or delay the rights of the creditor to recoup the whole judgment sum.[9] In other words:

"The principal concern . . . is to discover whether an instalment arrangement will be more conducive to the judgment creditor's achieving payment in full in a reasonable time. The issue is thus not one of indulgence to the judgment debtor because the judgment debtor somehow deserves an indulgence. The issue is whether indulgence to the judgment debtor will enhance the prospects of full recovery by the judgment creditor".[10]

Practically, the practitioner should consider closely the financial circumstances of the judgment debtor disclosed in the affidavit in support/statement of financial affairs. Particular matters to consider include:

- are all relevant financial circumstances disclosed?
- is there documentation to support the debtor's claimed income, expenses, assets and liabilities?
- do the financial affairs evidence an ability to pay the judgment debt immediately?
- do the instalment orders provide for the payment of interest on the judgment debt?
- do the financial affairs evidence an ability to pay the judgment debt sooner than provided for under the orders?
- is the instalment plan realistic given the debtor's income, expenses, assets and liabilities?
- do the instalment orders provide for the repayment of the debt and interest in a reasonable time?

Where a notice of objection is filed with the court within time, the court will order a hearing of the matter. In preparation for the hearing the objector should file affidavit material in support of its grounds for objection.

Future applications and variation

Where an application for an instalment order has been refused, the judgment debtor may not make another application for three months (s6(9)).

The circumstances of the judgment debtor may change after an instalment order has been made. In these circumstances the judgment creditor or judgment debtor may apply to vary or cancel an instalment order (s8 the Act). A judgment creditor may only apply to vary or cancel an instalment order on the ground that there has been a substantial increase in the property or means of the judgment debtor or on the ground that information given in support of the application for the instalment order was inaccurate (s8(2)).

Further instalment orders may be made in respect of the same judgment and will supersede earlier orders (s10).

Default in paying instalments

Part IV of the Act provides the process for the court to deal with recalcitrant judgment debtors who default on their instalment payments. The process is instigated by an application by the judgment creditor for the judgment debtor to be brought before the court for oral examination. The court will examine the debtor and consider the circumstances of the default and may confirm,

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vary or cancel the instalment order (s18). If the instalment order is cancelled, the judgment creditor can proceed to enforce the judgment by alternate means.

In rare instances the court will make an order for the imprisonment of the judgment debtor where the court is satisfied that the judgment debtor has the means to make the payments but has persistently and wilfully defaulted in payment "without an honest and reasonable excuse" (s19). An imprisonment order cannot be made unless the judgment debtor is before the court (s19(2)). A judgment debtor who is imprisoned under such an order must be discharged if they pay the instalments of which default was made (s19(3)). ■

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1. Section numbers in the body of the article refer to the *Judgment Debt Recovery Act 1984* (Vic) unless otherwise specified.
2. *C Tina Pty Ltd v Barham-Floreani* [2019] VSC 819, at [19], quoting Young CJ in *Cahill v Howe* [1986] VR 630, 632.
3. Judgment debts carry interest at the rate for the time being fixed under s2 of the *Penalty Interest Rates Act 1983*; s101 of the *Supreme Court Act 1986*; s73(4) of the *County Court Act 1958*; s100(7) of the *Magistrates' Court Act 1989*.
4. See r61.03 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) and *County Court Civil Procedure Rules 2018* (Vic) and r61.04 of the *Magistrates' Court General Civil Procedure Rules 2010* (Vic).
5. Called a Statement of Affairs in the Magistrates' Court.
6. *Wilson v Richards* [2018] VCC 1755, at [23], citations omitted.
7. Note 2 above, at [22], citations omitted, drawing from criteria identified by Barrett AJA in *Australian Institute of Fitness* [2016] NSWSC 1143, at [8].
8. See, eg, *Bendigo and Adelaide Bank Ltd v Young* [2012] VCC 55.
9. Identified by Mukhtar AsJ in *Davidson v Greedy* [2012] VSC 202.
10. In the matter of *Australian Institute of Fitness (VIC & TAS)* [2016] NSWSC 1143, at [11] in respect of equivalent provisions in NSW legislation.

A major shake-up

THE FEDERAL GOVERNMENT IMPLEMENTED THE 15 RECOMMENDATIONS MADE BY THE ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY TO REFORM THE INSURANCE SECTOR, HERALDING A MAJOR SHAKE-UP OF THE INDUSTRY. BY AMANDA STOREY

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SNAPSHOT

- Unfair contract terms contained in contracts of insurance can be declared void.
- New laws around the selling of insurance now apply. Unsolicited selling of insurance products is banned. Add-on insurance must be sold via a deferred sales model.
- An insured has a new duty to take reasonable care not to make a misrepresentation when entering into a contract of insurance.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Commission) was a watershed moment. The Australian public heard shocking testimony of unscrupulous behaviour by financial service providers. The Final Report boldly stated that the root cause for misconduct was personal greed[1] and putting economic convenience ahead of compliance with the law. The government committed to implementing all 76 recommendations made by the Commission to reform the financial services sector.

How are insurance contracts regulated?

The Commission focused on the life insurance and general insurance industries. Those contracts of insurance are "financial products" for the purposes of Chapter 7 of the *Corporations Act 2001* (Cth). Contracts of insurance are therefore subject to regulation under the *Corporations Act and the Australian Securities and Investment Commission Act 2001* (Cth) (ASIC Act). The *Insurance Contracts Act 1984* (Cth) governs contracts of insurance and aims to strike a fair balance between the interests of insurers, the insured and other members of the public.

Two key bills passed[2] in 2020 in response to the Commission's recommendations. This article discusses the reforms in relation to unfair contract terms, anti-hawking, add-on insurance and the duty of disclosure.[3]

Unfair contract terms

Under the *Australian Consumer Law* and the ASIC Act, a court can declare an unfair term void within standard form contracts for consumer goods and services or financial products or services. Insurance contracts were exempt from the unfair contract term regime. The logic was that insurance contracts were distinguishable from other products and services because of the nature of risk involved.[4]

In accordance with recommendation 4.7 of the Final Report, from 5 April 2021 the unfair contract terms provisions set out in the ASIC Act now apply to insurance contracts. An unfair term is one that:

- causes a significant imbalance to the parties' rights and obligations
- causes detriment to a party if relied on
- is not reasonably necessary to protect the legitimate interests of the party advantaged by the term.

There are three important carve outs (ASIC Act, s12BI). First, a term will not be unfair if it defines the main subject matter of a contract. For insurance contracts, the main subject matter encompasses a term that describes what is being insured (eg, a person, a house or a car). Second, a term will not be unfair if it sets the upfront price payable under a contract. Third, a term in an insurance contract regulated by the *Insurance Contracts Act* will not be unfair if it is a transparent term that is disclosed at or before the time the contract was entered into, and sets an amount of excess or deductible under the contract.

To complement this reform, s15 of the *Insurance Contracts Act* has been amended. The duty of utmost good faith contained in s13 of the *Insurance Contracts Act*, which applies to both insurers and the insured, will operate independently of the unfair contract term regime.

Since the Final Report, Treasury has consulted on enhancing the unfair contract term protections[5] which, if passed, will make unfair contract terms unlawful and give courts the power to impose a civil penalty. These foreshadowed reforms go beyond the Commission's recommendations and will apply to all contracts subject to the unfair contract term regime.

Prohibition of unsolicited selling of insurance

Section 992A of the *Corporations Act* regulates the unsolicited selling of financial products. The Commission found that this regulation was ineffective because individuals were being offered complex financial products – sometimes forcefully – without having sufficient understanding of whether the product offered value to them.

Consistent with recommendation 4.1, from 5 October 2021 the hawking of financial products to retail clients is now banned with limited exceptions.[6] The ban captures unsolicited sales by telephone calls, face-to-face meetings and "any other real-time interaction in the nature of a discussion or conversation", such as a chat bot, where the consumer did not consent to the contact (*Corporations Act*, s992A(4)). Where a person contravenes the new anti-hawking laws, the consumer has a right to a refund (*Corporations Act*, s992AA). ASIC's *Regulatory Guide 38: the hawking prohibition* provides guidance on the new provisions. The ban of unsolicited selling operates in addition to the prohibition on unconscionable conduct and misleading or deceptive conduct contained in the ASIC Act and the *Corporations Act*.

Deferred sales model for add-on insurance

Add-on insurance, sometimes known as "junk insurance",[7] refers to a contract of insurance that has been offered or sold to a consumer in connection with that person acquiring another product or service (ASIC Act, s12DO). One example is consumer credit insurance which is sold with consumer credit products like personal loans and promises to cover the consumer's loan repayments if the consumer loses their job, becomes sick or injured, or dies. The Commission found that add-on insurance products are poor value for consumers and were often forcibly sold.[8]

In accordance with recommendation 4.3, from 5 October 2021, a deferred sales model will apply which mandates a four-day pause between the sale of a principal product or service and the sale of add-on insurance. The four-day pause aims to reduce pressure-selling of insurance, and to help consumers make informed decisions about insurance products. Where add-on insurance is sold in contravention of the deferred-sales model, a consumer is entitled to a refund (ASIC Act, s12DT). ASIC has released *Regulatory Guide 275* and *ASIC (Information under the Deferred Sales Model for Add-On Insurance) Instrument 2021/632* to provide guidance to industry.

The deferred sales model does not apply to comprehensive motor vehicle insurance and the government has announced that it will exempt several classes of add-on insurance products (ASIC Act, ss12DW-12DX).[9] Where an add-on insurance product is exempt from the deferred sales model regime, the anti-hawking regime will generally apply to it.[10]

In keeping with recommendation 4.4, s12DMC of the ASIC Act now empowers ASIC to determine a cap on the value of commissions for add-on risk products supplied in connection with motor vehicles sold to consumers. The Commission found that sales of add-on insurance were driven by commissions which led to poor consumer outcomes.[11] While the value of the cap is unknown, its objective should be to correct these problems.

Insured's duty to take reasonable care not to make a misrepresentation

The *Insurance Contracts* Act replaced an insured's common law duty of disclosure with a statutory code. The Commission found that consumers struggled to discharge their duty of disclosure, resulting in claims on their policy being denied, even when they did their best to answer an insurer's questions truthfully.[12]

In accordance with recommendation 4.5, from 5 October 2021 the duty of disclosure has been replaced with a new duty to take reasonable care not to make a misrepresentation when entering into, varying, extending or renewing a consumer insurance contract (*Insurance Contracts Act*, s20B). The new duty applies to contracts of insurance obtained for the insured's personal, household or domestic purposes, including general and life insurance contracts (*Insurance Contracts Act*, ss11AB and 20A).[13] If an insurer rejects a claim or voids a policy because an insured failed to take reasonable care not to make a misrepresentation, an insurer will need to consider all the relevant circumstances set out in s20B of the *Insurance Contracts Act*. It is no longer sufficient that an insured's representation was inaccurate.

Is the insurance sector fairer?

The implementation of the Commission's 15 recommendations should make the insurance sector fairer. The extension of the unfair contract term regime to contracts of insurance was well overdue. These protections will be bolstered by the draft bill proposed by Treasury. The new duty not to misrepresent information should safeguard consumers against having their claims declined because insurers have failed to ask the right questions. The focus of the new duty will shift away from the consumer to the insurer. However, one area of criticism is the deferred sales model for add-on insurance because the breadth of the exemptions granted are not in the spirit of the Commission's recommendations. However, on the whole, the implementation of the Commission's recommendations with respect to insurance will result in fairer selling of products to consumers, drafting of contractual terms and claims handling.

At a glance: commencement dates of insurance law reforms

1 January 2021

- ASIC empowered to identify enforceable code provisions when approving industry codes of conduct like the *General Insurance Code of Practice and the Life Insurance Code of Practice*
- ASIC empowered to set caps on commissions for add-on risk products supplied in connection with motor vehicles
- The *Corporations Act* is amended to include a requirement for "claims handling and settling services" to hold an Australian Financial Services Licence[14]

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5 April 2021

- Unfair contract terms apply to contracts of insurance

5 October 2021

- Deferred sales model for add-on insurance commences
- Ban of hawking of financial products to retail clients commences
- An insured's duty to take reasonable care not to make a misrepresentation replaces an insured's duty of disclosure for consumer insurance contracts[15]
- The Product Design and Distribution Obligations commence under the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth). ■

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1. Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, (2019), 138.
2. Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (Cth); *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020* (Cth).
3. Other recommendations include empowering ASIC to identify enforceable code provisions when approving industry codes of conduct, amending s29(3) of the *Insurance Contracts Act* with respect to voiding life insurance contracts, and the removal of the claims handling exemption from the definition of "financial service". See note 1 above, 267-318.
4. Note 1 above, 304.
5. Exposure Draft, Treasury Laws Amendment (Measures for a later sitting) Bill 2021: Unfair contract terms reforms.
6. Reg 7.8.21A of the *Corporation Regulations 2001*. The hawking rules do not apply to financial advisers who are required to act in the client's best interests by operation of s992A(2) of the *Corporations Act 2001* (Cth).
7. See Consumer Action Law Centre, Demand A Refund, https://demandarefund.consumeraction.org.au.
8. Note 1 above, 289.
9. The Treasurer of the Commonwealth of Australia, Outcome of consultation on deferred sales model for add on insurance products, (Media Release, 8 July 2021).
10. Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 Corporations (Fees) Amendment (Hayne Royal Commission Response) Bill 2020, 3.120.
11. Note 1 above, 289.
12. Note 1 above, 297-299.
13. The duty of disclosure remains for contracts of insurance that are not consumer insurance contracts, s21 *Insurance Contracts Act*.
14. Applications for an Australian Financial Services License were due by 30 June 2021. ASIC will make a decision on those applications by 31 December 2021.
15. Legislation effective from 1 January 2021 but the duty not in force until 5 October 2021.

HIGH COURT JUDGMENTS

DR MICHELLE SHARPE

Criminal law

Recklessness

In the High Court decision of *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26 (1 September 2021) the High Court was required to determine the standard of recklessness required to establish the indictable offence of recklessly causing serious injury under s17 of the *Crimes Act 1958* (Vic) (*Crimes Act*).

Section 17 of the *Crimes Act* (which came into force in 1986) simply provides: "A person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence". The *Crimes Act* does not define "recklessly". The Victorian Court of Appeal in *R v Campbell* [1997] 2 VR 585 (*Campbell*) held that the standard of recklessness required, under s17 of the *Crimes Act*, foresight of the probability of harm. In doing so, the Court of Appeal in *Campbell* overturned a long line of Victorian authorities in which it has been held that the test for recklessness merely required foresight of the possibility of harm. In reaching its conclusion, the Court of Appeal in *Campbell*, applied the decisions in *R v Crabbe* (1985) 156 CLR 464 and *R v Nuri* [1990] VR 641. In both cases the Court adopted a standard requiring the foresight of the probability of harm. Neither case concerned s17 of the *Crimes Act*. But the Court of Appeal considered that the same principles applied in *Crabbe* (which was concerned with murder) were relevant to an offence under s17. And the Court of Appeal held that all the relevant sections in this group of the *Crimes Act* should apply the same test of recklessness applied in *Nuri* (which was concerned with s22 of the *Crimes Act*). Decades later, the High Court in *Aubrey v The Queen* (2017) 260 CLR 305 confirmed that the degree of recklessness required for the statutory offence of maliciously inflicting grievous bodily harm in New South Wales was the foresight of the possibility, and not probability, of harm.

The Director of Public Prosecutions for Victoria (DPP) subsequently referred the correctness of *Campbell* as a point of law for the opinion of the Victorian Court of Appeal. In a joint judgment, the Court of Appeal (Maxwell P, McLeish and Emerton JJA), applying the "re-enactment presumption", held that, irrespective of the correctness of the decision in *Campbell*, the legislature had plainly approved of the decision by subsequently making a number of amendments that directly concerned s17 of the *Crimes Act*. These amendments were made by the *Sentencing and Other Acts (Amendment) Act 1997* (Vic) (1997 Amendments) and the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) (2013 Amendments). The Court of Appeal concluded that, until such time as the legislature amended s17 of the *Crimes Act*, the meaning of "recklessly" is as set out in *Campbell*.

The DPP appealed to the High Court. By a narrow margin of 4:3 the High Court dismissed the appeal. Gageler, Gordon and Steward JJ, in a joint judgment, observed, at [51], that: "Where Parliament repeats words which have been judicially construed, it can be taken to have intended the words to bear the meaning already judicially attributed to them". This is the "re-enactment presumption" which their Honours note, at [51], has a long history. Their Honours also note that the presumption is not based on a fiction. The presumption may be applicable because the legislative history reveals an awareness by Parliament of a particular judicial interpretation. To this end, the timing between a decision and an enactment will also be relevant. Here, their Honours agreed with the Court of Appeal, at [43]-[50], that the 1997 Amendments and the 2013 Amendments could only be understood on the basis that the legislature was aware of, and accepted, the *Campbell* definition of "recklessly". These amendments, their Honours observed, at [57], were "based on the nature and extent of the criminality and culpability of a contravention of s17 as stated in Campbell". And the 1997 Amendments, their Honours noted at [54], were made just two years after *Campbell*. Their Honours also referred, at [59], to the fact that *Campbell* was decided some 25 years ago as reinforcing their conclusion not to disturb the decision adding "This Court is reluctant to depart from long-standing decisions of State courts upon the construction of State statutes, particularly where those decisions have been acted on in such a way as to affect rights".

In a separate judgment Edelman J, while expressing "'considerable hesitation" at [65], also dismissed the appeal. The "three significant constraining factors" Edelman J identifies, at [66], as leading him to this conclusion include: that the decision in *Campbell* cannot be thought to be plainly wrong, the decision in *Campbell* formed part of the background to the 1997 Amendments and the 2013 Amendments and the definition of recklessness enunciated in *Campbell* has been adopted in Victorian courts for 26 years "without any obvious inconvenience".

In dissent, Kiefel CJ, Keane and Gleeson JJ, considered, at [7], that there could be no doubt that the decision in *Campbell* is wrong. Noting the re-enactment presumption, their Honours also observed, at [11] and citing *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (19520 85 CLR 159 at 174), that the presumption cannot be used to perpetuate an erroneous construction of a statutory provision. In any event, their Honours considered, at [23], that there are no secondary materials that support the assumption that the legislature was aware of *Campbell* at the time of the 1997 Amendments. And their Honours also considered, at [27]-[28], that the secondary materials for the 2013 Amendments did not provide a reliable basis for an enactment presumption. Their Honours, in dissent, conclude that the error in *Campbell* should be corrected and did not consider, at [34], the "'mere passage of time" to be an impediment. Their Honours could not see that anyone, tried after *Campbell*,

would have suffered any injustice since those people would have been tried under a higher standard.

Defamation

Publication

In the High Court decision of *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 25 (8 September 2021) the High Court had to wrestle with a very 21st century problem: unkind Facebook posts. Here the High Court was required to determine whether news organisations, each maintaining a Facebook page, were publishers of defamatory comments posted by third parties on their Facebook page.

The respondent (Voller) had been incarcerated in a juvenile justice detention centre in the Northern Territory. The appellants had posted hyperlinks to news stories referring to Voller on their Facebook pages. Clicking the hyperlink takes the reader to the full story on the appellants' news website. Readers are invited, by options which appear under the post, to "'Like", "Comment" on or "Share" the post. These options were standard features of the Facebook page and features which could be seen or read by other Facebook readers. Facebook users responded to the appellants' news posts about Voller with comments that were defamatory to him. Voller brought proceedings in the Supreme Court of New South Wales alleging that the appellants were liable as publishers of the users comments (FB Comments). The parties agreed to have the issue of publication decided separately from the balance of the proceedings.

At first instance, the primary judge (Rothman J) held that the appellants were publishers of the FB Comments. The trial judge's decision was upheld on appeal (Simpson A-JA, Meagher and Basten JJA). The appellants subsequently appealed, unsuccessfully, to the High Court. The plurality consisting of Kiefel CJ, Keane and Gleeson JJ (in a joint judgment) and Gordon and Gageler JJ (in their own joint judgment) dismissed the appeal. The tort of defamation is committed in Australia on "the publication of defamatory matter of any kind": *Defamation Act 2005* (NSW) (*Defamation Act*), s7(2). The *Defamation Act* does not define what is meant by "publication" of defamatory matter. As Kiefel et al observed, at [10], resort must be had to the general law to determine the meaning of "publication". The plurality, citing *Webb v Bloch* (1928) 41 CLR 331 and *Trkulja v Google LLC* (2018) 263 CLR 149, held that any act of voluntary participation in the communication of defamatory matter to a third party is sufficient to make the defendant a publisher: Kiefel CJ et al at [3] and Gordon and Gageler JJ at [96]. The plurality noted the availability of the "defence" of innocent dissemination under s32 of the Defamation Act, but observed that the defence was only available to those publishers ignorant of the existence of the defamatory comment: Kiefel CJ et al at [48] and Gordon and Gageler JJ at [62]. But, as Gordon and Gageler JJ observed at [102], "the appellants' attempt to portray themselves as passive and unwitting victims of Facebook's functionality has an air of unreality. Having taken action to secure the commercial benefit of the Facebook functionality, the appellants bear the legal consequences". And their Honours also considered that, here, the case of *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (2012) 16 HKCFAR 366 (an internet discussion forum on which users posted defamatory matter) was apposite.

In dissent Edelman J and Steward J allowed the appeal in part in separate judgments that, as Edelman J noted at [143], substantially overlapped. Their Honours held that the appellants were only liable for FB Comments that had a connection to the subject matter posted by the appellants that is more than remote or tenuous. Edelman J argued, at [142], that there was no basis, on any of the evidence before the primary judge, to conclude that the appellants intended to publish "anything and everything" unrelated to the posted news story. ■

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FEDERAL COURT JUDGMENTS

ANTHONY LO SURDO SC
& DR DAVID J TOWNSEND

Bankruptcy

Appeals from decision finding whole or part of interests in properties held on resulting trust for bankrupt – where properties registered in names of parties associated with bankrupt – whether bankrupt provided all or part of purchase price for properties – whether presumption of resulting trust rebutted by evidence of intention of bankrupt to contrary – available inferences

El-Debel v Micheletto (Trustee) [2021] FCAFC 117 (30 June 2021) (Markovic, Derrington and Colvin JJ).

Background

The trustees of the bankrupt estate of Mr Bachar El-Debel (Current Trustees) alleged that all or part of the purchase price for four parcels of land registered in the names of parties associated with the bankrupt had been provided by him and therefore that the whole or part of the interests of those associated parties in the properties were held on resulting trust for the bankrupt and was property divisible among the creditors of the bankrupt.

Two appeals were brought against the decision by the primary judge who upheld the claims of the Current Trustees. The first appeal, brought by the bankrupt, his wife and his mother, was confined to discrete points of law while the second appeal, by a company associated with the bankrupt, challenged the inferential reasoning process used by the primary judge in upholding the claims by the Current Trustees.

The decision provides a timely and helpful reminder of the principles concerning resulting trusts including the circumstances in which a presumption of a resulting trust will be rebutted, the proper approach to factual findings on appeal and guidance as to the process of inferential reasoning.

Principles concerning resulting trusts

The legal reasoning by the primary judge as to the principles to be applied in determining whether property is held on resulting trust was accepted as being correct by all parties to the appeals. This reasoning was:

- a presumption of a resulting trust arises where one person provides the purchase price of property which is conveyed into the name of another person
- in deciding whether a presumption of a resulting trust has been rebutted the Court must reach a conclusion on the whole of the evidence
- the presumption of a resulting trust may be rebutted by evidence which manifests an intention to the contrary, but should not give way to slight circumstances
- the extent of the beneficial interest of the parties arising by reason of a resulting trust must be determined when the property was purchased
- it is the intention of the person who provides part of the purchase price that is relevant when considering whether the presumption may be displaced by contrary evidence
- if part of the purchase price is provided by being borrowed on a mortgage, the presumption of a resulting trust is applied by treating the moneys raised by the mortgage as a contribution by the person who is liable to repay that money.

Proper approach to factual findings on appeal

To succeed an appellant must demonstrate an error of law or an error infecting a finding of fact (see *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 at [20]-[30] and *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 at [45] [53]).

Where factual error is alleged, an appellate court must show restraint with respect to interference with such primary or secondary factual findings by the trial judge as were likely to have been affected by the trial judge's impressions as to witness credibility or reliability; an appellate court should only interfere with factual findings of this kind where the factual findings were "glaringly improbable" or "contrary to compelling inferences". Subject to this, an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge (*Lee v Lee* [201] HCA 28; (2019) 266 CLR 129 at [55]).

The process of inferential reasoning

Although permissible inference and mere conjecture exist on a continuum, there is a distinction between them (*Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29; (2000) 49 NSWLR 262 at [84]).

An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. It is a process that requires the application of general human experience to determine whether the hypothesis that is sought to be proved is a conclusion that can be drawn given the alternatives that reasonably may be suggested and the standard of proof required. In a civil case, a permissible inference is one which is more probable on the evidence. However, where two or more competing inferences are equally probable on the evidence, the choice between them is mere conjecture, and is not permissible reasoning (*Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163 at 173; *G v H* (1994) 181 CLR 387 at 390).

The result

As to the first appeal, the Court found:

a. the primary judge was in error in failing to bring to account a finding that the bankrupt had not been shown to have provided a one-fifth interest in one of the properties
b. whether one of the properties was held on resulting trust for the trustees of the bankrupt's earlier bankruptcy was a procedural issue only, as an exchange of correspondence between the Current Trustees and the earlier trustees in bankruptcy disclosed that the earlier trustees were content for the Current Trustees to make any claim to a resulting trust for the relevant property on the basis that it was property of one or other of the bankrupt estates. It could

be accommodated by upholding the appeal to a limited extent and amending the relief to reflect the nature of the informal procedure that had been adopted between the two sets of trustees.

The first appeal was otherwise dismissed.

As to the second appeal, the Court rejected the contention that the reasoning of the primary judge went beyond the evidence and was based on inferences that were not open. It was upheld to a limited extent as there was insufficient evidence to support a conclusion that moneys in the nature of a deposit were provided by the bankrupt and an associate. Accordingly, the calculation of the percentage interest of the resulting trust in relation to that property required some minor adjustment.

Private international law – competition law

Exclusive jurisdiction clause in agreement nominated foreign jurisdiction – proceedings commenced in Australia – stay application – forum for determination of disputes under Part IV of *Competition and Consumer Act 2010* (Cth)

In *Epic Games, Inc v Apple Inc* [2021] FCAFC 122 (July 2021) the Full Court of the Federal Court of Australia (Middleton, Jagot and Moshinsky JJ) considered whether Australian proceedings should be stayed on the basis of an exclusive jurisdiction clause nominating a foreign jurisdiction, which clause appeared in an agreement between some (but not all) of the parties. Their Honours also considered the role of the Federal Court of Australia (FCA) as the preferable forum for certain disputes under the *Competition and Consumer Act 2010* (Cth) (CCA).

Background

Epic Games, Inc (Epic Games) is the developer of the game Fortnite, which may be played on smartphones produced by Apple, Inc (Apple), in addition to other platforms. There are approximately three million players of Fortnite on Apple devices in Australia alone. Pursuant to an agreement between Epic Games and Apple, apps (such as Fortnite) for use on Apple devices may only be sold through the App Store, and likewise in-app purchases may only be made through the App Store, from which purchases Apple takes a 30 per cent commission. Further, the agreement contained an exclusive jurisdiction clause, limiting litigation arising out of or relating to the agreement, Apple software or Epic Games' relationship with Apple to the State and Federal courts of the Northern District of California (where Apple is headquartered).

On 13 August 2020, Epic Games introduced its own system for in-app purchases in Fortnite, outside the App Store, whereupon Apple immediately exercised its power under the agreement to cease to distribute Fortnite. Epic Games commenced proceedings in California alleging breaches of various US and Californian competition statutes (Californian proceedings).

On 16 November 2020, Epic Games also initiated proceedings against Apple in the FCA for alleged contraventions of Part IV of the CCA and of the Australian Consumer Law (ACL) (Australian proceedings). The provisions of the CCA and ACL are similar, but not identical, to the statutes which were at issue in the Californian proceedings. On 9 April 2021, the primary judge in the FCA granted Apple a stay of the Australian proceedings, pending Epic Games' initiating proceedings for the alleged contraventions of the CCA and ACL in California. On 16 April 2021, Epic Games appealed to the Full Federal Court. In the meantime, the Californian proceedings were heard and judgment was reserved on 24 May 2021.

Decision

The Full Federal Court allowed the appeal and set aside the stay of the Australian proceedings. Their Honours confirmed that the onus of proof lay on Epic Games, as the party resisting a stay application based on an exclusive jurisdiction clause, but went on to find that, in determining whether to stay the Australian proceedings, the primary judge had made three significant errors in his reasoning.

First, in applying the High Court's judgment in *Akai Pty Ltd v People's Insurance Co Ltd* [1996] HCA 39; (1996) 188 CLR 418, the primary judge had failed to assess whether or not there was a strong reason for refusing the stay having regard to the various considerations on a cumulative basis, and had incorrectly taken each consideration separately.

Second, the primary judge had failed to properly assess the disadvantage of litigation of provisions of high Australian public policy being conducted in the United States. The disadvantage was significant, as the findings of a US court would not be able to be relied on in subsequent Australian proceedings as readily, the Australian Competition and Consumer Commission could not intervene in US proceedings, and the full range of remedies under the CCA would not be available (remedies being part of the law of the forum: *Stevens v Head* [1993] HCA 19; (1993) 176 CLR 433). Further, the far-reaching impact which the Australian proceedings would have on Australian consumers diminished the significance of the fact that Epic Games, as an individual company, had agreed to the exclusive jurisdiction clause in its agreement with Apple.

Third, the primary judge had failed to properly evaluate the significance of the Second Defendant, Apple Pty Ltd (an Australian subsidiary of Apple), not itself being party to the agreement which contained the exclusive jurisdiction clause. Epic Games' claims against Apple Pty Ltd were substantive, and not merely "parasitic" on the claims against the parent company Apple, and this weighed against a stay being granted.

Their Honours also held that an analysis of the provisions of the CCA and other relevant legislation revealed that there was a legislative policy that claims under Part IV of the CCA should be determined in an Australian court and preferably in the Federal Court (at [99]-[122]). Notwithstanding the desire to avoid clashing outcomes in the Australian proceedings and the Californian proceedings, there were strong reasons not to grant the stay of the Australian proceedings.

Aftermath

Apple has applied to the High Court of Australia for special leave to appeal. At the time of writing, the special leave application has not yet been decided

Judgment was delivered in the Californian proceedings on 10 September 2021, largely in favour of Apple, although with one ground in favour of Epic Games. Both Apple and Epic Games have appealed to the US Court of Appeals (9th Circuit) in respect of the grounds on which each party was unsuccessful, and Apple has applied for a stay of the injunction issued against it in the decision below pending outcome of its appeal. Apple has reportedly declined to re-admit Fortnite to the App Store until the conclusion of all legal proceedings in the United States. ■

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FAMILY LAW JUDGMENTS

CRAIG NICOL &
KELEIGH ROBINSON

Children

Court did not reconcile relocation order with expert recommendation that relocation not occur until child was nine

In *Denham & Newsham* [2021] FamCAFC 141 (6 August 2021) the Full Court (Ainslie-Wallace, Ryan & Aldridge JJ) allowed a father's appeal from a decision of Carew J to permit a mother to relocate with a three-year-old child from Australia to Belgium from March 2022.

The hearing occurred in February 2020. The orders included provision for the father to travel to Belgium at least three times a year and that the child return to Australia each year.

The Full Court said:

"[The single expert psychiatrist] . . . gave evidence that the child was too young to sustain significant separations from his father . . . (at [28]).

". . . [T]he single expert . . . did not give evidence that the child would develop the . . . capacity to sustain significant gaps of contact if there was an additional two years of regular contact . . . Her evidence was . . . relocation should not be considered before the child was eight or nine years of age. This evidence . . . was of signal importance to the central question and had to be considered . . . [I]f the . . . judge determined that . . . this evidence should not be accepted, it was necessary to explain why not . . . This did not occur and the challenges . . . have been established (at [35]).

" . . . [T]he documents issued by the Australian Department of Home Affairs . . . record that the availability of regular air travel should not be assumed and . . . that flights have reduced (at [51]).

"Had this evidence been placed before the . . . judge, it compelled a finding that the mother's proposals for the child's time with the father could not be assured and that any prediction for face-to-face contact between the child and the father . . . would be no more than mere speculation . . . This . . . undermined the findings to the effect that the child and the father would maintain a meaningful relationship if the child moved to Belgium in 2022 (at [52])."

Property

Creditor of discharged bankrupt has standing to bring s79A application

In *Valder & Saklani* [2021] FamCAFC 142 (6 August 2021) the Full Court (Ryan, Aldridge & Watts JJ) allowed an appeal from a decision of Rees J dismissing an application by a creditor to set aside consent orders.

The history included proceedings before the High Court, and the husband owing the creditor $594,028.25, plus costs of more than $250,000.

The husband and wife entered into consent orders, pursuant to which the husband transferred his interest in a real property to the wife. The husband then declared himself bankrupt. The creditor obtained leave from the Federal Court of Australia (pursuant to s58(3)(b) of the *Bankruptcy Act*) to issue a s79A application in the Family Court.

The Full Court said:

"A discharge from bankruptcy operates to release the bankrupt 'from all debts . . . provable in the bankruptcy' as per s153(1) of the *Bankruptcy Act* (at [19]).

". . . [T]he *Bankruptcy Act* continues to refer to the person who . . . has a right to prove as a creditor. The *Bankruptcy Act* goes on to provide such creditors . . . with various rights . . . which continue after any discharge of the bankrupt . . . (at [20]).

". . . [T]he bankrupt being discharged from . . . bankruptcy, does not mean that . . . creditors cease to be 'creditor' for all purposes . . . (at [21]).

". . . [When] the appellant commenced . . . proceedings . . . she was entitled to do so . . . As well as being 'a person affected by an order' for the purposes of s79A(1), [she] is also a 'party', a 'creditor' and a 'person whose interests would be affected by the making of the instrument or disposition' for the purposes of s106B(4AA)(a), (b) and (c) of the Act (at [29]).

". . . If it was found that the consent orders had been entered into with the intention of defeating creditors, we do not see why an appropriate variation . . . could not see the provision for the payment of those creditors . . . The court would be astute to make orders to overcome fraud on it . . . (at [47])."

Property

Where a valuer has provided a range of values, the court is free to make its own findings as to value

In *Samper & Samper* [2021] FamCAFC 140 (5 August 2021) the Full Court (Ainslie-Wallace, Watts & Austin JJ) dismissed with costs a husband's appeal from a decision of Smith J where each party owned a business.

The husband's business operated from rented premises. A single expert valuer opined that the business would have goodwill of $100,000 to $150,000 if the husband obtained a lease with a minimum term of five years (at [18]) and that the plant and equipment of the business was worth $45,624.

The Court found the business was worth a total of $162,093 being: i) the plant and equipment of $45,624; plus ii) $125,000 for goodwill (being the average between the $100,000 and $150,000 range); with a 5 per cent discount to reflect there being no signed lease. The husband appealed.

The Full Court said:

"It was within the 'specialised knowledge' of the . . . valuer to provide his opinion . . . by way of a range of the value of the business if a new lease was entered into, or . . . available . . . (at [22]).

". . . Given the . . . judge found the opportunity . . . to obtain a new lease was 'very likely', it was open to his Honour to adopt a range of values that assumed that . . . (at [23]).

". . . [W]here a valuer has provided a range . . . the court is free to form its own

view as to the proper value . . . It is usually inappropriate to . . . select the mean of two valuations (. . . *Commonwealth v Milledge* [1953] HCA 6 . . .). However . . . both parties submitted that the . . . judge pick the mid-point, albeit of different ranges . . ." (at [24]).

"The husband argues that . . . it was not within the . . . judge's expertise to make an allowance for a lease being available or unavailable . . . when there was no evidence from the landlord as to his intention to continue the lease . . . (at [25]).

"Given the . . . judge concluded that there was a high probability that there could be a new lease, it was open . . . to select the discount . . . (at [29])."

Children

Criticisms of independent children's lawyer's chronology insufficient to justify their removal

In *Lim & Zong* [2021] FamCAFC 165 (27 August 2021) Tree J, sitting in the appellate division of the Family Court of Australia, dismissed an appeal from Judge Coates' dismissal of a father's application to discharge an independent children's lawyer (ICL).

The father's complaints related to a chronology document filed by the ICL and its content.

The Court said:

"A number of authorities have considered the removal of an [ICL], and . . . the circumstances which may justify such a course. From those, the following points may be discerned:

- It is not inconsistent with the independent . . . discharge of an [ICL]'s obligations . . . to advocate that a particular course of action adverse to, or inconsistent with, the position of a party, ought be taken by . . .
- . . . [T]he [ICL] owes the same professional obligations to the Court as does any licenced legal practitioner . . .
- On occasion, the [ICL] will be in an invidious position, but nonetheless they should be no less courageous, no less firm and no less cogent, in advocating for results or findings
- Inevitably the role of the [ICL] involves an exercise of professional judgment which may, on occasion, be precarious and difficult
- It is not appropriate for a litigant to endeavour to micro-manage the [ICL], or critique every step that they take
- . . . [E]ven if an [ICL] does make a mistake, the Court will [not] necessarily accede to an application to have them discharged . . .
- It is inevitable that the high standards of competence which the Court expects of [ICL] are not always met . . .
- A court should be slow to discharge an [ICL] on the basis of largely unsubstantiated complaints of one of the parties (at [21]).

". . . [E]ven if it be that the [ICL] was mistaken . . . and acting upon that mistaken belief, misinformed the Court via her . . . chronology, that is not conduct which would justify her discharge, unless it could also be shown that it was done either deliberately, or recklessly . . . (at [34]).

". . . [A] chronology is simply an aide, and is not evidence. It is simply too long a bow to draw to say that . . . the [ICL] thereby misconducted herself in a way which justifies her removal . . . (at [63])." ■

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

SUPREME COURT JUDGMENTS

DR MICHAEL TAYLOR

Criminal law – interlocutory appeal – evidence – admissibility

Thomas (a pseudonym) v DPP [2021] VSCA 269 (23 September 2021), No S EAPCR 2021 0091

This case concerns an application, made under s296 of the *Criminal Procedure Act 2009* (CPA), for leave to appeal a trial judge's refusal to certify an interlocutory decision on the admissibility of hearsay evidence. The applicant (the accused) was charged with one count of murder and one count of possession of a drug of dependence (at [1]).

At trial, the Director of Public Prosecutions (DPP) gave notice of her intention to adduce hearsay evidence;[1] namely, previous representations made by the victim regarding the offender and the offence (at [1]). The DPP contended that the evidence was admissible under s65 of the *Evidence Act 2008* (EA) on the basis that previous representations were made by the victim: (i) when, or shortly after, the asserted fact occurred in circumstances where it is unlikely the representation was a fabrication (EA s65(2)(b)); or, alternatively, (ii) in circumstances that make it highly probable that the representation was reliable (EA s65(2)(c)) (at [2]).

The applicant had opposed this at trial, submitting that the representations were not admissible on either of the s65(2) exceptions and, even if they were admissible, should be excluded pursuant to s137 of the EA (exclusion of prejudicial evidence) (at [2]). The trial judge held that the representations were admissible under s65(2)(b), or alternatively under s65(2)(c), and should not be excluded under s137 (at [2] and [16]).

Further, the trial judge refused to certify that ruling for the purposes of s295(3) of the CPA (at [3]). While accepting that s295(3)(a) of the CPA was satisfied – that is, that the interlocutory decision concerned evidence that, if ruled inadmissible, would eliminate or substantially weaken the prosecution case – the trial judge's decision to admit the evidence "was not attended by sufficient doubt" to warrant certification (at [6]). As a result, the applicant sought review of that refusal under s296 of the CPA, with the task of the Court being to consider the refusal and whether the applicant should be granted leave to appeal against the interlocutory decision (at [3]-[5] and [16]).

On the question of the refusal, it was noted by the Court that the trial judge's refusal was consistent with authority at the time. The Court had (quite recently) held that s295 of the CPA neither permits nor requires separate consideration regarding sufficient doubt, and so the refusal to certify was wrong (at [4] and [6]-[7]).[2] Having disposed of the refusal issue, the Court then turned to whether leave to appeal should be granted in respect of the decision to admit the hearsay evidence.

The applicant was alleged to have struck the deceased (Mr W) with an intention to cause "really serious harm". There were no eyewitnesses, but Mr W gave an account of what had happened to his wife (Mrs W), to the police and ambulance officers in attendance, and to a medical practitioner who treated Mr W in hospital shortly after he was injured (at [1] and [11]). In total, 11 separate representations made by Mr W were at issue; these included descriptions of the offence itself (being hit on the head, being hit on the head four times) as well as descriptions of the offender and identification of certain items left behind by the offender (at [11], [14] and [17]).

At trial, and in the written case to the Court of Appeal, the applicant challenged the admissibility of all 11 representations. However, at the hearing, the applicant narrowed his challenge to those representations in which Mr W stated that he had been hit in the head four times (at [17]).[3] It was submitted that:

- while these impugned representations were made by Mr W shortly after the events in question, they were not made in circumstances where the representation was unlikely to be a fabrication, and so not within s65(2)(b) (at [18] and [24]). In large part, this was argued on the basis that Mr W was not under an obligation to tell the truth at the time of making the statements, and that he was suffering physical and emotional trauma (at [36])
- even if the impugned representations were admissible pursuant to s65 of the EA, they should be excluded under s137 on the basis that evidence of the number of blows, coupled with Mr W's repetition of the statement, led to a high risk that the jury might misuse the evidence to rebut a defence of self-defence (at [19] and [63]).

It was also contended by the applicant that the medical evidence regarding the number of injuries to the head was that there were two (possibly three) injuries, and this was inconsistent with Mr W's statements that he had been hit four times (at [38]). This contention was not accepted by the Court as it was not the case that each blow to the head would necessarily have caused injury (at [38]).

Insofar as admissibility under s65(2)(b) was concerned, Beach, Niall and Walker JJA repeated the High Court's observation on s65 in *Sio v The Queen* that it is "no light thing to admit a hearsay statement inculpating an accused" because there is no opportunity to cross-examine the maker of the statement (at [20]).[4] The Court also had regard to the various authorities on whether the "circumstances" in which a representation is made can be said to include representations made by a person on different occasions and/or to different people (at [26]-[34]).

Ultimately, the Court did not have regard to the repetition of Mr W's statements (ie, being made to different persons at different times) when considering whether the circumstances in which a particular representation was made were such that the representation was unlikely to be a fabrication (at [35]). Further, by reason of the narrowing of the appeal to the impugned

representations, the Court was focused "on whether the circumstances were such that Mr W's statement as to the number of times he was hit was unlikely to be a deliberate fabrication" (at [39]).

In each case, the Court determined that the impugned representations were admissible under s65(2)(b), and that leave to appeal should be refused (at [34], [46], [52], [55], [59] and [70]). In terms of circumstances and any likelihood of fabrication:

- Mr W's representation to his wife about being hit in the head four times was made immediately after the altercation, where Mrs W had heard some parts of the exchange between Mr W and the offender and saw Mr W's injuries (at [40]). At the time of making this representation, there was no reason for Mr W to fabricate a story for his wife and the Court agreed with the trial judge that the representation was a simple, uncomplicated narrative of events to Mrs W (at [40]-[46])
- both representations made to the police officers were made very soon after the altercation, and the Court did not accept the applicant's further submission that s65(2)(b) was not satisfied because Mr W could be assumed to have known that police would investigate the altercation (at [47]-[49]). Mr W's statements were found to be consistent with the observable injury to his head, and there was no suggestion that Mr W had committed any crime (at [49]). Further, it was noted that statements made to police shortly after events to which they relate commonly fall within s65(2)(b), as was the case here (at [51]-[52])
- Mr W's later representations to the ambulance officer and hospital doctor were consistent with the injuries observed by each medical professional (at [53]-[54], [56] and [58]). Further, both representations were statements made to a medical professional as part of a history given to obtain medical assistance, being circumstances that would motivate a person to tell the truth to receive suitable medical treatment (at [54] and [58]).

Having found that it was correct for the trial judge to admit the evidence pursuant to s65(2)(b), the Court did not find it necessary to express any conclusion on whether the evidence might also have been admissible under s65(2)(c) (at [4]).

Finally, the Court did not accept the submission that the representations ought to have been excluded under s137 of the EA (at [60]). The Court noted that the representations were highly probative of a fact in issue – that Mr W's injuries were inflicted by a male person punching him in the head four times – so the question was whether the highly probative nature of this evidence was outweighed by unfair prejudice to the applicant (at [64]). In answering this question, the Court:

- observed that while the representations were admissible under s65 of the EA, the inability to cross-examine Mr W was "not irrelevant to the analysis" (at [65])
- noted that the evidence would undermine a defence of self-defence (assuming that such a defence were to be raised); however, that was "a consequence of its admission. It does not render admission of the evidence unfair," and that jury directions could be given to highlight that the evidence cannot be tested by cross-examination (at [66])
- further noted that if evidence of five consistent accounts was admitted, the jury may use that repetition to conclude that the account was true, but it did not follow that this would cause unfair prejudice to the applicant (at [67]). Even if there were some danger of the jury using the evidence improperly in this regard, the matter could be dealt with by directions from the trial judge (at [69]). ■

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. Where the hearsay notice was given pursuant to s67 of the *Evidence Act 2008*.
2. *Lindsey (a pseudonym) v The Queen* [2021] VSCA 230.
3. Based on the original numbering used in the appeal, the previous representations at issue in the appeal were those made by Mr W to his wife (representation 2), to each of the two police officers that attended (representations 5 and 8), to an ambulance officer who attended the scene (representation 10) and a medical practitioner treating him in hospital (representation 11) (at [14] and [17]).
4. *Sio v The Queen* (2016) 259 CLR 47, 65 [60].

LEGISLATION UPDATE

New Victorian 2021 Assents

As at 16/09/2021

2021 No. 32 Education and Training Reform Amendment (Victorian Academy of Teaching and Leadership) Act 2021
2021 No. 33 Energy Legislation Amendment Act 2021
2021 No. 34 Police Informants Royal Commission Implementation Monitor Act 2021

New Victorian 2021 Regulations

As at 16/09/2021

2021 No. 99 Personal Safety Intervention Orders Regulations 2021
2021 No. 100 Planning and Environment (Fees) Amendment Regulations 2021
2021 No. 101 Magistrates' Court (Personal Safety Intervention Orders) Rules 2021
2021 No. 102 Magistrates' Court Criminal Procedure Amendment Rules 2021
2021 No. 103 Commercial Tenancy Relief Scheme Regulations 2021
2021 No. 104 Supreme Court Library Fund Investment Rules 2021
2021 No. 105 Supreme Court (Chapter I (Inspection and Affidavits) Amendment) Rules 2021
2021 No. 106 Professional Engineers Registration (General, Exemption and Assessment Scheme Fees) Amendment Regulations 2021
2021 No. 107 Land Amendment Regulations 2021
2021 No. 108 Forests (Recreation) (Temporary) Amendment Regulations 2021
2021 No. 109 Land (Regulated Watercourse Land) Regulations 2021
2021 No. 110 Conservation, Forests and Lands (Infringement Notice) Amendment (Flora and Fauna Guarantee) Regulations 2021
2021 No. 111 Road Safety Road Rules Further Amendment Rules 2021
2021 No. 112 Occupational Health and Safety Amendment (Major Hazard Facilities) Regulations 2021
2021 No. 113 Children's Court (Personal Safety Intervention Orders) Rules 2021
2021 No. 114 Victorian Civil and Administrative Tribunal (Residential Tenancies and Other Acts Amendment) Rules 2021
2021 No. 115 Courts (Case Transfer) Rules 2021
2021 No. 116 Road Safety (Vehicles) Regulations 2021

New Victorian 2021 Bills

As at 16/09/2021

Assisted Reproductive Treatment Amendment Bill 2021
Bail Amendment (Reducing Pre-trial Imprisonment of Women, Aboriginal, and Vulnerable Persons) Bill 2021
Education and Training Reform Amendment (Senior Secondary Pathways Reforms and Other Matters) Bill 2021
Essential Services Commission (Compliance and Enforcement Powers) Amendment Bill 2021
Firearms and Other Acts Amendment Bill 2021
Forests Amendment (Forest Firefighters Presumptive Rights Compensation) Bill 2021
Great Ocean Road and Environs Protection Amendment Bill 2021
Suburban Rail Loop Bill 2021
Terrorism (Community Protection) Amendment Bill 2021
Transport Legislation Amendment (Transport Plan) Bill 2021

New Commonwealth 2021 Assents

As at 16/09/2021

2021 No. 80 Tertiary Education Quality and Standards Agency Amendment (Cost Recovery) Act 2021
2021 No. 81 Tertiary Education Quality and Standards Agency (Charges) Act 2021
2021 No. 82 Treasury Laws Amendment (2021 Measures No. 1) Act 2021
2021 No. 83 Education Services for Overseas Students Amendment (Cost Recovery and Other Measures) Act 2021
2021 No. 84 Education Services for Overseas Students (Registration Charges) Amendment Act 2021
2021 No. 85 Education Services for Overseas Students (TPS Levies) Amendment Act 2021
2021 No. 86 Family Assistance Legislation Amendment (Child Care Subsidy) Act 2021
2021 No. 87 Tertiary Education Quality and Standards Agency (Charges) Amendment Act 2021
2021 No. 88 Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Act 2021
2021 No. 89 Australian Organ and Tissue Donation and Transplantation Authority Amendment (Governance and Other Measures) Act 2021
2021 No. 90 Customs Amendment (2022 Harmonized System Changes) Act 2021
2021 No. 91 Customs Tariff Amendment (2022 Harmonized System Changes) Act 2021
2021 No. 92 Electoral Legislation Amendment (Counting, Scrutiny and Operational Efficiencies) Act 2021
2021 No. 93 Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Act 2021
2021 No. 94 Electoral Legislation Amendment (Party Registration Integrity) Act 2021
2021 No. 95 Foreign Intelligence Legislation Amendment Act 2021
2021 No. 96 Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Act 2021
2021 No. 97 Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment Act 2021
2021 No. 98 Surveillance Legislation Amendment (Identify and Disrupt) Act 2021
2021 No. 99 Paid Parental Leave Amendment (COVID-19 Work Test) Act 2021

New Commonwealth 2021 Regulations

As at 16/09/2021

Charter of the United Nations Legislation Amendment (2021 Measures No. 1) Regulations 2021
Family Law (State and Territory Courts) Rules 2021
Family Law Amendment (Western Australia Family Court Rules) Rules 2021
Family Law Repeal Rules 2021
Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Rules 2021
Federal Circuit and Family Court of Australia (Division 2) (Bankruptcy) Rules 2021
Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021
Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021
Federal Circuit and Family Court of Australia (Family Law) Rules 2021
Federal Circuit and Family Court of Australia Legislation (Consequential Amendments and Other Measures) Regulations 2021
Financial Framework (Supplementary Powers) Amendment (Agriculture, Water and the Environment Measures No. 4) Regulations 2021
Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 2) Regulations 2021
Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2021

Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 3) Regulations 2021
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 4) Regulations 2021
Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 4) Regulations 2021
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 3) Regulations 2021
Financial Framework (Supplementary Powers) Amendment (Treasury Measures No. 2) Regulations 2021
Great Barrier Reef Marine Park Amendment (Queensland Fisheries Legislation) Regulations 2021
High Court (2022 Sittings) Rules 2021
Liquid Fuel Emergency Regulations 2021
Sydney Harbour Federation Trust Regulations 2021
Transport Safety Investigation Regulations 2021
Transport Security Legislation Amendment (Serious Crime) Regulations 2021
Treasury Laws Amendment (Professional Standards Schemes No. 2) Regulations 2021

New Commonwealth 2021 Bills

As at 16/09/2021

Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021
Aged Care Amendment (Registered Nurses Ensuring Quality Care) Bill 2021
Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021
COAG Legislation Amendment Bill 2021
Commonwealth Electoral Amendment (Integrity of Elections) Bill 2021
Corporations (Aboriginal and Torres Strait Islander) Amendment Bill 2021
Crimes Amendment (Remissions of Sentences) Bill 2021
Customs Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Bill 2021
Customs Legislation Amendment (Commercial Greyhound Export and Import Prohibition) Bill 2021
Customs Tariff Amendment (Regional Comprehensive Economic Partnership Agreement Implementation) Bill 2021
Federal Environment Watchdog Bill 2021
Foreign Intelligence Legislation Amendment Bill 2021
Health Insurance Amendment (Enhancing the Bonded Medical Program and Other Measures) Bill 2021
Investment Funds Legislation Amendment Bill 2021
Live Performance Federal Insurance Guarantee Fund Bill 2021
National Health Amendment (COVID-19) Bill 2021
National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2021
No Requirement for Medical Treatment (Including Experimental Injections) Without Consent (Implementing Article 6 of the Universal Declaration on Bioethics and Human Rights) Bill 2021
Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021
Offshore Electricity Infrastructure Bill 2021
Paid Parental Leave Amendment (COVID-19 Work Test) Bill 2021
Social Security Legislation Amendment (Remote Engagement Program) Bill 2021
Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021
Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021
Treasury Laws Amendment (2021 Measures No. 7) Bill 2021 ■

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

PRACTICE NOTES

Law Institute of Victoria

COVID-19 Hub – www.liv.asn.au/COVID19

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

LIV FAQs

Information and advice from the courts

- General Announcements: Victorian Courts and VCAT
- Administrative Appeals Tribunal
- Children's Court
- County Court
- Court Services Victoria
- Family Court of Australia
- Federal Circuit Court of Australia
- Federal Court of Australia
- Magistrates' Court
- Supreme Court
- VCAT

Information for the profession

- COVID-19 State of Disaster - Key information for the profession
- Australian Registrars National Electronic Conveyancing Council (ARNECC)
- Corrections Victoria
- Department of Justice and Community Safety Victoria
- Fair Work Australia
- Fair Work Commission
- JobWatch
- Judicial College of Victoria
- Law Institute Victoria
- Legal Practitioners' Liability Committee (LPLC)
- Safe Work Australia
- Victoria Legal Aid
- Victorian Bar
- Victorian DHHS
- Victorian Small Business Commission
- VLSB+C

LIV services and support

- Quick Contacts
- Your Wellbeing
- Communications and LIV's response
- Access to Member Facilities
- LIV Activities and CPD
- Member Services & Support
- Legal Referral Service

Government stimulus and support

- Commonwealth Support for Business
- Victorian Government Response ■

CASH RATE TARGET

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

PENALTY AND FEE UNITS

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

PENALTY INTEREST RATE

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

EQA

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[1]Corporate programme is available to approved corporations who meet the eligibility criteria and is available on selected new passenger cars only. The programme requires a minimum commitment over 24 months. [2]Purchase of a Compact vehicle will attract a discount of $1500.00 off the Manufacturer's List Price. Purchase of a Non-Compact Vehicle will attract a discount of $2000.00 off the Manufacturer's List Price. Refer to the Terms and Conditions of the Mercedes-Benz Corporate Programme and Fleet Support for further details regarding which vehicles are considered to be 'Compact Vehicles' and 'Non-Compact Vehicles.' [3]Available to customers who purchase a vehicle under the Corporate Programme on or after 1 January 2020. Access (including ongoing access) to Corporate Rewards is contingent on the customer holding a valid membership with the Mercedes-Benz Corporate Programme. Member Benefits is not a representative or agent of Mercedes-Benz and Mercedes-Benz accepts no legal responsibility for the Member Benefits website, any information supplied, or any goods or services provided by Member Benefits.
[4]Not applicable to all models.

LAW INSTITUTE VICTORIA

2022 LIV Legal Directory & Diary

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- Accredited specialists, mediators, migration lawyers and arbitrators
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- Courts and tribunals contacts, fees and sitting dates
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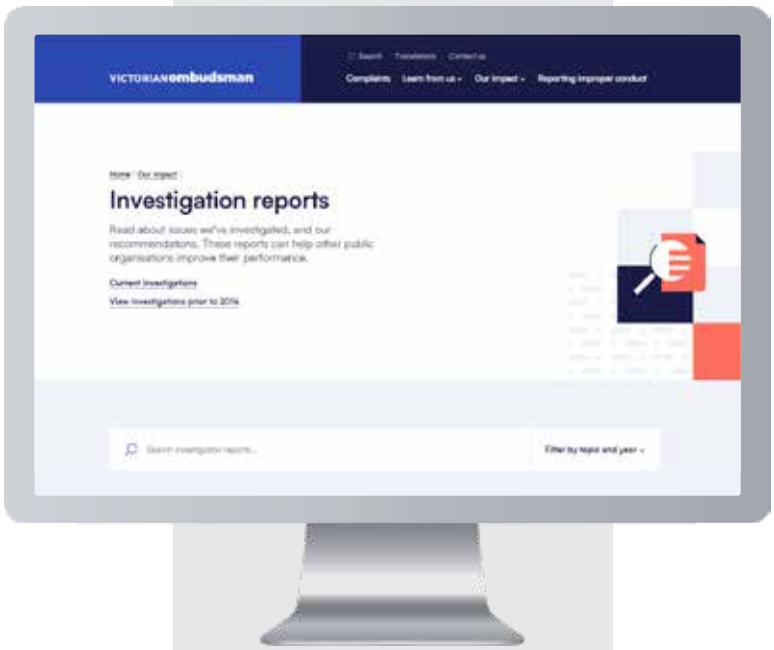
IN_SITES



Victorian Ombudsman – Investigation reports

https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/

The Victorian Ombudsman aims to protect the human rights of Victorians by investigating issues that lead to the improved performance of public sector organisations. Investigations conducted from 2014 are published on its website and titles include "The Ombudsman for Human Rights: A Casebook" and "Investigation into good practice when conducting prison disciplinary hearings". Current investigations and those before 2014 are listed on separate pages and Ombudsman reports 1998-2013 are made accessible through a hyperlink to AustLII.

VEOHRC – Guideline: Preventing and responding to workplace sexual harassment – Complying with the Equal Opportunity Act 2010

https://www.humanrights.vic.gov.au/resources/sexual-harassment-guideline/

The Victorian Equal Opportunity and Human Rights Commission has updated the guideline for "Preventing and responding to workplace sexual harassment" to include new standards for compliance. The guideline contains information applicable to all organisational sizes as well as numerous industries and sectors. This comprehensive resource was produced in consultation with regulators, industry bodies, advocacy groups and employers and can be considered in judicial proceedings. Employers wanting to get an overview of their obligations can refer to the "Preventing and responding to workplace sexual harassment: A quick guide for employers" listed on the webpage.

CPA Australia Podcast

https://content.cpaaustralia.com.au/podcast/

CPA Australia is producing and publishing podcasts that are accessible through its website. The listed episodes vary in length (from 10 to 60 minutes) and cover topics such as "COVID chat: Business support around Australia", "Why small business needs to understand cyber security risks" and "Understanding your digital body language at work". Most episodes are accompanied by a transcript and all episodes include guest speakers who have differing backgrounds, experience and expertise.

Federal Circuit and Family Court of Australia

https://www.fcfcoa.gov.au/

The Federal Circuit and Family Court of Australia commenced on 1 September 2021, bringing together the Family Court of Australia and the Federal Circuit Court of Australia. The Court is divided into three sections covering Family Law, Migration Law and General federal law (bankruptcy, fair work, human rights, consumer, admiralty, administrative and IP). The website has information on topics including Court etiquette, attending Court either in person or online, and current Forms and Practice Directions. There are short videos to assist the public and practitioners, and a news and media centre.

Intellectual Property Australia – Tools and Resources

https://www.ipaustralia.gov.au/tools-resources

The federal government has created an intellectual property resources and downloads hub to assist with all intellectual property needs. The sections include patents, trade marks, designs, plant breeder's rights and understanding IP. Each tab covers the basics – from whether you need a patent or trademark, how to apply, the cost and managing the process. There is also a tab with useful tools and resources including a search option which can be used before applying for intellectual property rights to see that it isn't already registered. There are guides and tutorials to help with the process.

Law and Justice Foundation NSW

http://www.lawfoundation.net.au/

The Law and Justice Foundation of New South Wales is an independent statutory body established to contribute to a fair and equitable justice system and improve access to justice for the socially and economically disadvantaged. Of particular interest to Victorian readers are two reports. The first, published in April 2021, is on Aboriginal and Torres Strait Islander Families in Australian Coroners Courts – A review of the research literature on improving court experiences. The second, in conjunction with Victoria Legal Aid, is on the value of telephone legal information services to clients. ■

IN_PRINT

This month's books cover immigration law, banking law, memory and a guide for young lawyers.

Australian Immigration Companion

Rodger Fernandez, Murray Gerkens, Janelle Kenny, Sherene Ozyurek and Dominic Yau, (9th edn), LexisNexis 2021, pb $71.50

Immigration law has always been a difficult area of law. It is constantly changing and is extremely complex in nature. It is also codified and rule based, with emphasis on policy (PAM guidelines).

Australia has a long complex history of immigration programs and controls which are deeply connected with the political climate and shape of Australian society today. This dynamic and complex legislative scheme makes it difficult for most migration practitioners to navigate without help.

This book is a unique resource of expert guidance written for most practitioners in the form of anticipated issues. It consists of an introduction to migration law and visa application procedures with practical problems and worked solutions. It is written in a simple to understand style using a Q&A format that makes it an easy read for solving complex immigration issues.

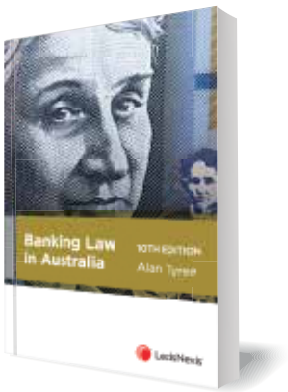
Every chapter highlights the statutory intent of the law and how to navigate "loopholes" within the framework of the law. Because of the Q&A format it provides an excellent resource for problem solving in migration law.

The authors have done a great job in giving simple strategies for solutions to complex immigration issues.

With the passage of the deregulation bill, it is an essential guide for lawyers considering dipping their toes into this complex area of law.

I highly recommend this book to experienced immigration legal practitioners and other legal practitioners who would like to enter the field to use as a "go to" for answers to difficult cases.

Valerie Dagama Pereira, Dagama Pereira and Associates



Banking Law in Australia

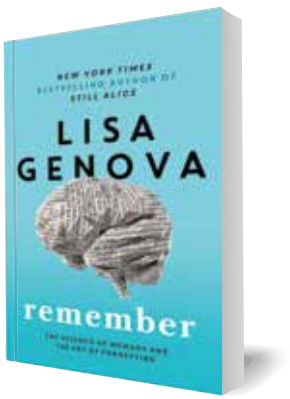
Alan Tyree, (10th edn), LexisNexis, 2021, pb $172

Now in its 10th edition, *Banking Law in Australia* responds to hot topics in banking law such as the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry which have been somewhat overshadowed by the COVID-19 pandemic and resulting economic crisis. As the opening line of the preface declares, we live in interesting times. The book spans 18 chapters and traverses all the key areas of banking law.

About half the book covers the essentials: the banker and customer relationship, accounts, cheques, payment systems and duties of the customer versus duties of the banker. The author has an approachable style so even if you are a banking law novice, you will be able to pick up the basics from these chapters.

The other chapters of the book focus on general principles and other areas of law which intersect with banking law. The chapters on consumer protection, secured lending and guarantees collectively create an inventory of the core issues to consider when advising a client about a banking law matter. The chapter dedicated to the new and, dare I say, sexy law around bitcoin and blockchain currencies is a thought-provoking read. It deftly describes the structure and distribution of blockchains and how Bitcoin operates as a payment system. This book is a great resource for lawyers or barristers advising clients about banking law matters from either the banker or customer perspective.

Amanda Storey, barrister, Victorian Bar



Remember

Lisa Genova, Simon & Schuster, 2021, pb $33

Dr Genova is a neuroscientist with a Harvard PhD who lives on Cape Cod. She has written several books including *Still Alice* – the powerful contemplation of Alzheimer's – which she self-published and it went on to become a hit film with Julianne Moore.

This is a non-fiction popular book about memory. And you will find it has a direct impact on you. People who read long sentences will forget them before the end of the sentence, unless you use commas.

I remember after a long, nasty and protracted trial, including months of expert evidence, asking the late barrister Glenn Holden about the pressures of remembering everything from the trial and he replied, "you go home and forget about it, you've got to have a good forgettery".

There are simple explanations for where information is stored in the brain and broadly how it is received. Some of these are very important, after all we as barristers make our living from being able to test memory. But we also need to consume and process vast amounts of information in the best possible way. There are some really interesting case studies as well.

This is an easy read and makes you feel a bit smart as well by the end of it. Perfect reading on a post lockdown holiday.

Tasman Ash Fleming, barrister and mediator

A New Lawyer's Guide to Getting it Right the First Time

Susan Marie Hill, LexisNexis 2020, pb $100

The book is an excellent resource to new and junior lawyers. The legal profession is largely centred around getting the law right. This transcends not just into the application of the law or providing legal advice, but also into the practice of law. Inadvertently, this, combined with the challenging task of understanding various laws and rules, has resulted in new lawyers facing the uphill task of having to appreciate, understand and distil the practice of law all by themselves. This book fills that void in that it provides useful guidance on the practical elements of legal practice here in Australia.

The book is a refreshing change to the plethora of guidebooks and resources which solely focus on the "black letter law" aspects of legal practice. It will be appreciated that this book provides guidance on the more "hidden" aspects of legal practice which often are not readily apparent to a new lawyer and might be missed. Ironically, these "hidden" aspects of legal practice are as important, or even more important, to the more salient aspects of legal practice.

Highly recommended to new lawyers and even junior lawyers who want to fast-track their understanding of the practical elements of legal practice here in Australia. In fact, a book I wish was available to me when I started out in legal practice. ■

Thomas Abraham, senior associate, Sladen Legal

IN_REFERENCE

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

Seminar papers

Family law – court orders
Spender, John, Family court orders – breaches and enforcement, seminar paper, Television Education Network, 2021 (F KN 170 S 15)

Family law – property settlements
Blizzard, Monica, Understanding contributions in family property settlements – a short and long term perspective, seminar paper, Television Education Network, 2021 (F KN 170 B 17)

Magistrates' Courts – Koori Court
Wolff, Tania, Falla, Rose, Wanganeen, Corey et al, MCV specialist courts & programs CPD series: Koori Court, seminar paper, Law Institute of Victoria, LIV Education, 2021 (F KN 350 3)

Articles

Articles may be requested online and will be emailed to members.

Climate change – corporate social responsibility – lawyers
Schwarz, Kirrily, "Greenwashing: a new climate change risk for lawyers" in *LSJ* (NSW) no 80, August 2021, pp42-45 (ID 89094)

Copyright infringement – trade marks – environmental advertising
John, Lauren, Moloney, Alexandra, "AGL v Greenpeace: Federal Court green-lights copyright infringement for the purpose of parody or satire" in *Internet Law Bulletin*, vol 24 no 2, July 2021, pp19-22 (ID 89062)

Human rights – business ethics – modern slavery
Piccolo, Raffaele, "A decade on from the guiding principles on business and human rights (UNGPs): Is consensus still lacking?" in *Bulletin*, Law Society of South Australia, vol 43 no 7, August 2021, pp14-17 (ID 89139)

Law reform – health care – public disclosure
Cockburn, Tina, "Statutory duty of candour to mandate open disclosure proposed for Victoria" in *Australian Health Law Bulletin*, vol 29 no 5-6, July 2021, pp97-102 (ID 89058)

Legal ethics – conflict of interest
Pritchard, David, Castle, Michelle, "When should I not act for a client?" in *LSJ* (NSW) no 79, July 2021, pp76-78 (ID 88807)

Pandemics – commercial leases – force majeure clauses
Duncan, Bill, Christensen, Sharon, "Spotlight: force majeure in leases and COVID-19 lockdowns: is a reallocation of commercial risk a potential outcome?" in *Australian Property Law Bulletin*, vol 36 no 6, August 2021, pp75-79 (ID 89231)

Privacy – medical records – pandemics
Waters, Peter, Belgiorno-Nettis, Anna, Goodlad, Lucy, "Tackling the government's greatest COVID-19 privacy challenge: Health data" in *Privacy Law Bulletin*, vol 18 no 3, June 2021, pp49-52 (ID 88865) ■

LIBRARY CONTACT DETAILS

During the COVID-19 period, please check the library homepage for updated details: www.liv.asn.au/Library

Hours: 9am-5pm Monday-Friday
Ph: 9607 9360
Fax: 9607 9359
Email: library@liv.asn.au

LIV LIBRARY – NEW MATERIAL

To browse recent additions to the LIV Library, go to www.liv.asn.au/NewMaterial

EBOOKS AT THE LIV LIBRARY

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

LIV LIBRARY

FEATURED EBOOKS OF THE MONTH (ELENDING)

Labour and employment law manual

Joydeep Hor, (3rd edn), 2020, CCH Australia

This practical manual for dealing with Australian HR legal issues includes comprehensive legal commentary as well as mentions of relevant case law and legislation, flowcharts and checklists. Areas of interest from the manual include: recruitment and selection – employment entitlements – performance management – conduct issues – complaints and grievances – ill and injured employees – termination of employment – dealing with third parties – work, health and safety issues – post-employment issues – information collection and management. This edition is updated to deal with issues relating to COVID-19.

Mergers and acquisitions

Nick Humphrey, (2nd edn) 2018, CCH Australia

A guide for mergers and acquisitions and buyouts with step-by-step advice on the key legal, tax and structuring issues when implementing transactions. Chapters include: term sheets – shareholder arrangements – debt financing – due diligence. The book includes useful checklists, definitions, case citations and legislation and a glossary of terms. It has links to key documents including ASIC and ASX documents. A short list of sources is included at the end of each chapter.

Michael Tooma on Mental health

Michael Tooma, 2020, CCH Australia

Chapters of interest include: legal obligation – mental health in engagement – systematically promoting mental health – mental health change management and worker engagement – mental health early intervention and organisational performance assessment – enforcement of mental health obligations. The ebook has links to other works, flowcharts, and citations for legislation and case law. Chapters begin with a discussion on a case study, and practical strategies and recommendations are discussed. An explanation of safety recommendations as well as guidance from relevant Codes of Practice are included. Bibliography is at pages 72-74. This book was written before the COVID-19 pandemic.

Workplace investigations

Jodie Fox, Jason Clark, Rose Bryant-Smith, Grevis Beard, (3rd edn) 2020, CCH Australia

The current edition includes lists of key points, citations and written examples of cases and legislation as well as practical exercises. Footnotes include bibliographical references as well as links to external resources. Sections in the book include: – Section 1: A to Z of workplace investigations – Section 2: The roles, rights and responsibilities of the participants in workplace investigations – Section 3: Getting started – Section 4: Gathering the evidence – Section 5: Analysis, decision-making and report-writing – Section 6: Personal and organisational wellbeing. Sections are divided into 21 chapters with new material on whistleblower protection, digital evidence, sexual misconduct, interview techniques and trauma informed practice.

QUESTION OF CONFLICT

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

Family law

POTENTIAL CONFLICT OF INTEREST
(R4998 – JULY 2021)

There is no conflict of interest in a law firm acting against a former client in an unrelated matter in circumstances where there is no real and sensible possibility of the misuse of confidential information and the former client files had been archived or destroyed.

A law firm (Firm A) acted for the de facto wife in family law and intervention order matters in the Magistrates' Court. The other parties were the former de facto husband and his mother who were represented by another firm (Firm B). Firm A previously acted for the former de facto husband and his mother in unrelated personal injury matters. All of the client files in relation to those matters had been archived and destroyed. Firm B asserted that Firm A was conflicted in continuing to act for the de facto wife in the family law and intervention order matters.

Ruling

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

1. Firm A is not conflicted in continuing to act for the de facto wife in her family law and intervention order matters on the basis that there is no real and sensible possibility of the misuse of confidential information of its previous clients the former de facto husband and his mother in unrelated matters, there is no breach of the equitable duty of loyalty owed by the law firm to those former clients, and the administration of justice does not require the law firm to cease acting.

Related reading

Alice Carter and Caroline Paterson, "Conflict of Interest – when to stay in and when to get out" (Conference Paper, Holmes List, 22 February 2016) (https://www.holmeslist.com.au/content/upload/Conflict%20of%20Interest.pdf).
Osferatu & Osferatu [2015] FamCAFC 177 [33]. ■

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/Professional-Practice/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.

OFF THE RECORD

A court may exercise its inherent jurisdiction to restrain a solicitor from acting or assisting in a matter before it, where the solicitor is not on the court record.

As an officer of the court, a solicitor has a paramount duty to the court and the administration of justice.[1] The recent decision of Justice Melanie Sloss in *Lee & Anor v MK Trading Co Aust Pty Ltd & Anor* [2021] VSC 343 demonstrates an exercise of the court's inherent jurisdiction to restrain a solicitor from acting in litigation, where doing so is in the interests of the administration of justice. As summarised by barrister Stephen Warne, the decision "takes the law relating to the restraint of lawyers for acting in a party in litigation a step further in that [Justice Sloss] restrained a solicitor who had already gone off the record from providing legal assistance behind the scenes".[2]

Background to the decision

This case concerned a dispute regarding a bubble tea franchise, where the plaintiffs were represented by a law firm. The principal solicitor at the law firm had a personal financial interest in the bubble tea franchise. The defendants had requested that the law firm cease to act for the plaintiffs on the basis that:

- the principal had a financial interest in the proceeding
- the principal had made threats of harm to the defendants
- the principal would be a material witness in this proceeding
- the law firm acting would prejudice the administration of justice.[3]

The law firm denied the alleged threats and continued to act for the plaintiffs, although the plaintiffs did subsequently engage a new law firm – where the instructing solicitor was formerly employed by the law firm.

Despite the law firm no longer being on the court record, the defendants were concerned about the principal of the law firm continuing to be involved in the action, and sought an order restraining the law firm "from acting for, working for, aiding or otherwise assisting any of the plaintiffs in relation to, or otherwise in connection with, this proceeding".[4] The defendants additionally contended that acting in a matter included assisting in a matter, regardless as to whether a solicitor was or was not on the record.

The decision

In exercising the court's inherent jurisdiction, the principles of *Grimwade v Meagher*[5] were considered applicable, and it was noted that:

". . . [I]t is clear that the Court's inherent jurisdiction is enlivened if a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a solicitor be prevented from acting in the interests of the protection of the integrity of the judicial process and appearance of justice".[6]

Consequently, Justice Sloss held that a fair-minded reasonably informed member of the public would not allow for the law firm to continue to provide legal advice or advice on legal strategy to the plaintiffs when no longer being on the court record. Accordingly, it was held that the law firm and the principal "should be restrained from acting as a solicitor and providing professional services of the kind ordinarily performed by a solicitor for a client in a proceeding".[7] This decision reaffirms that the exercise of the court's inherent jurisdiction extends to restraining solicitors who are officers of the court providing legal services in a matter where they are not on the record.

The LIV Ethics Committee recently noted the decision in ruling R4996.[8] This matter was comparable to the aforementioned case in that it involved a solicitor purporting to act as an agent or "off the record".

In essence, the solicitor in question had acted for a former client and the client's deceased partner in matters related to the creation of wills and testamentary trusts. After the deceased's passing, proceedings were instituted by the estate and the client was represented by another firm – not the former solicitor. However, the former solicitor conveyed communications between the client and their current legal representation – and purported to be doing so as an agent, not as a solicitor.

While this matter is distinguishable from the decision on the basis that a ruling was sought due to concerns that the solicitor as agent may have obtained confidential information through acting in previous matters, the matter did involve a solicitor purporting to act off the record as an agent.

The LIV Ethics Advice Line regularly assists solicitors with queries regarding their ethical obligations – 9607 9336 or email ethics@liv.asn.au ■

SNAPSHOT

- The court has an inherent jurisdiction to restrain a solicitor from acting or assisting in a matter in the interests of the administration of justice.
- This inherent jurisdiction may be exercised where a solicitor is providing legal services in a matter off the court record.
- The LIV Ethics Committee recently noted the decision in a ruling where a solicitor purported to act for a former client only as an agent, not in their capacity as a solicitor.

Carly Erwin is a lawyer, LIV Ethics.

1. *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, r3.1.
2. Stephen Warne, "Solicitor who went off the record for party restrained from giving assistance to former client"', The Australian Professional Liability Blog (Blog Post, 20 June 2021) <https://lawyerslawyer.net/2021/06/20/solicitor-who-went-off-the-record-for-party-restrained-from-giving-assistance-to-former-client/>.
3. *Lee & Anor v MK Trading Co Aust Pty Ltd & Anor* [2021] VSC 343, at [23].
4. Note 3 above, at [1].
5. [1995] 1 VR 446.
6. Note 3 above, at [59].
7. Note 5 above, at [64].
8. LIV Ethics Committee Ruling R4996, July 2021 (*LIJ*, October 2021)

NEW TRAPS IN DEFAMATION REFORMS

Wide-ranging changes to defamation laws require close attention by practitioners to avoid the risk of claims.

Practitioners should be alert to changes to defamation law in the *Model Defamation Amendment Provisions* which apply to publications made on and from 1 July 2021. Victoria, New South Wales, South Australia, Queensland and the ACT have adopted the model provisions.

This column flags some key changes and areas of risk for defamation practitioners.

Single publication rule

The new single publication rule tightens the 12-month limitation period for defamation actions, particularly those concerning electronic/online publications.

The rule provides that:

- the date of the first publication will be treated as the "start date" for the 12-month limitation period
- critically, for electronic/online publications, the publication now occurs when it is "first uploaded for access or sent electronically to a recipient". Before the amendments, and at general law, a fresh publication occurred each time online content was downloaded by a reader, recommencing the limitation period.

Missed time limits remain a continuous source of claims at LPLC across all areas of law and the introduction of the single publication rule requires those practising in defamation to be more vigilant than ever.

Out of time? If the court is satisfied that it is "just and reasonable" to do so, the limitation period may be extended to a period of up to three years.

Concerns Notice

It is now mandatory for plaintiffs to issue a Concerns Notice before commencing proceedings, unless a court grants the plaintiff leave otherwise. Coupled with that, only the defamatory imputations listed in the Concerns Notice can then be referred to in any litigation. This means practitioners need to carefully formulate their client's claim from the outset and seek specialist advice preparing Concerns Notices as appropriate.

Almost out of time? The 12-month limitation period will be extended if a Concerns Notice is served within 56 days of that period otherwise expiring. For example, if the notice is served seven days before the limitation period expires, then the limitation period will be extended by 50 days (ie, 56 days minus six days).

Serious harm threshold

Individual plaintiffs must now establish that a publication has caused or is likely to cause "serious harm" to their reputation. For corporations entitled to sue in defamation, they must demonstrate "serious financial loss".

The threshold in some respects replaces the now abolished "triviality" defence and is intended to prevent the litigation of trivial or frivolous defamation claims, but arguably is more onerous a test. Key considerations in determining whether the applicable threshold is met will include the scale and extent of the publication(s) in issue and the gravity of the statements made.

The threshold can be considered as a preliminary hearing on application of the defendant.

Therefore, close consideration needs to be given to the threshold when advising clients on the merits of the claim at the outset of any defamation matter.

New and amended defences

Practitioners dealing with mass media organisations in particular, should also be aware of the new "public interest" defence.

The defence has two limbs, namely:

- the matter concerns an issue of public interest
- they reasonably believed that publishing the material was in the public interest.

The reforms also introduce a defence applying to matters published in peer-reviewed academic and scientific journals.

Amendments have also been made to the existing statutory defences of contextual truth, honest opinion and qualified privilege.

Corporations

The reforms have also further narrowed the capability for corporations to sue in defamation – contractors are now considered employees under these reforms.

Risk management

Practitioners should familiarise themselves with the key defamation law changes and update their firm's systems, precedents and processes. Particular vigilance is required with managing shorter time limits, and allowing sufficient time to consider and advise on serious harm thresholds and prepare comprehensive Concern Notices which can be relied on in court. ■

Christien Corns is a partner and **Sam Rappensberg** is a senior associate at K&L Gates.

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

TIPS

- The reforms apply to publications made on and from 1 July 2021 in five states and territories in Australia.
- A 12-month limitation period applies from the date of first publication, which for online publications is the date it is first uploaded.
- A Concerns Notice must set out *all* imputations to be relied on in court.
- The threshold for any defamation claim is "serious harm" to reputation for an individual and "serious financial loss" for a corporation.
- Defamation law is complex. Don't dabble if this is not an area you act in regularly.

CHANGES TO RETAIL LEASING

What the Retail Leases Amendment Act 2020 will mean for landlords and tenants.

On 22 September 2020 the *Retail Leases Amendment Act 2020* (Amending Act) became law. Some of the changes the Amending Act made to the *Retail Leases Act 2003* (the Act) are outlined here.

Disclosure obligations

Before the Amending Act, a retail landlord was required to give a tenant a disclosure statement and copy of proposed lease at least seven days prior to the lease commencing, but the consequences of non-compliance with the seven-day requirement were largely non-existent.

The Act now requires that a disclosure statement and draft lease be given to a tenant at least 14 days before the commencement of a lease. Section 17(1C) now deems the commencement date of the lease to be no earlier than 14 days after disclosure and a copy of the lease is provided to the tenant. The tenant cannot agree to waive the 14-day disclosure period (and so allow earlier commencement).

The Act now also requires that the proposed lease include particulars including the rent, the term and the tenant's details. This means that an agent cannot be armed with a pro-forma document during negotiations as was common practice.

Further, if a proposed lease is given to a tenant that includes any change to a previous proposed lease, the landlord must "notify" the tenant of the change. As explored by the Court in *Xiao v Perpetual Trustee Company Ltd* (*Xiao*) [2008] VSC 412, the obligation to notify sets a high bar.

The legislation is somewhat ambiguous but it would seem that the 14-day period will commence from the date the final copy of the proposed lease is given to the tenant (even if amendments have been borne out of negotiations and requests by the tenant).

Security deposits

Section 24(1)(d) of the Act, now requires landlords to return security deposits within 30 days of the end of lease provided that the tenant has performed all of its obligations under the lease. This replaces the previous requirement, that any security deposit be returned "as soon as practicable". The amendment provides greater certainty to tenants but removes any argument that a deposit must be returned earlier than the 30 days.

Essential safety measures

Following VCAT President Greg Garde's 2015 advisory opinion, the generally accepted position has been that the costs of essential safety measures (ESM) cannot be passed on by a landlord to a tenant under a retail lease. The prohibition underpinning that opinion was contained within the *Building Act* and so extended to all leases.

The Amending Act:

- amends the definition of outgoings for the purposes of the Act to include "the cost, or part of the cost, of repairs or maintenance work in respect of an essential safety measure"
- amends the *Building Act* to remove a tenant's right to withhold rent in respect of expenses incurred by the tenant in complying with ESM obligations.

The cumulative effect of these changes is to reverse the position in relation to passing on the cost of ESMs in the retail leasing context. Somewhat perversely, the change has entrenched the position that a landlord under a non-retail lease cannot pass on such costs.

The ESM amendments are retrospective and apply to existing retail leases. This means that any clause in a retail lease entered into before the commencement date of the Amending Act that allows ESMs to be passed on to tenants will be effective. The costs themselves may only be sought from a tenant from 23 September 2020 (recovery will remain subject to the landlord having provided an estimate of the outgoing in advance).

A retail landlord who entered into a lease prior to the Amending Act which did not allow the landlord to recover ESMs loses out. A retail landlord who included a clause contemplating recovery of ESMs from the tenant (even though that was prohibited by the Act and the *Building Act* at the time) is rewarded.

By the date of publication the Building Amendment (Registration and Other Matters) Bill 2021 (Vic) should have commenced (at the date of writing it awaits passage through Legislative Council). The effect of that legislation will (among other things not relevant to this column) be to amend the *Building Act* to enable shopping centre landlords to recover ESM costs from non-retail tenants – leaving non-retail, non-shopping centre tenants the only tenants protected from obligations to pay for ESMs. ■

Paul Nunan is a member of the LIV Property Law Committee.

ADOBESTOCK

THOUGHTRIVER

This platform uses AI to review contracts and summarise issues lawyers need to address.


PETER MORAN

Which practitioners would find this technology useful?

Commercial solicitors, in-house counsel.

How does it work?

ThoughtRiver Artificial Intelligence (AI) reviews contracts against both the law firm and ThoughtRiver's playbooks, previous contracts and other similar precedents.

There is an issue tracker that monitors the number of issues which need to be resolved. The AI determines these issues by asking and answering hundreds of questions regarding the contract, for example, the contract jurisdiction and various other questions lawyers would ordinarily ask when reviewing a contract.

ThoughtRiver allows users to have multiple playbooks for different contract types. ThoughtRiver also has generic playbooks for different commercial contracts which can be utilised. The user and AI then collaborate to modify and enhance playbooks and allow for greater and greater customisation.

ThoughtRiver performs supervised machine learning in its review where it is shown hundreds and thousands of similar and dissimilar clauses of the type being reviewed. The AI will evaluate the familiarity of clauses from those that have never been seen before with those that are part of templates and very common. The AI will flag unfamiliar clauses in particular and other irregularities and issues with the contract.

The analysis and high level review conducted by ThoughtRiver AI also determines corresponding levels of risk. The risk levels and the issues determined to be risky are also informed by previous contracts reviewed. Therefore, if an issue that the AI would flag as risky has been accepted by the user in the past, the AI will take this into account when assigning risk in future.

As well as learning from previous contracts signed, the user can teach the AI and give it more questions to consider.

Benefits

A clausebank can be created where standard firm clauses can be uploaded for easy insertion into the contract via the platform.

A Microsoft Word plugin means that ThoughtRiver's AI insights can be accessed side by side with reviewing the contract in Microsoft Word which allows for easy remediation of the contract through using the clausebank.

ThoughtRiver identifies missing clauses as well as risks and, over time, becomes more and more sophisticated in the identification of both as the AI accumulates more data.

All contract data is stored within the platform so users can look back at contract reviews at a later time, including a record of analysis. This enables the user to look at a summary point and pull out all previous clauses to draft from.

A contract review can also be conducted without leaving one's email inbox.

Costs

ThoughtRiver's pricing model is per user, with different tiers of users and different prices. For example, Power Users can review as many contracts and playbooks as they like.

Risks

Cyber risk, as with any cloud offering, is present as regards confidential and sensitive data moving beyond a firm's internal systems.

Downsides

ThoughtRiver is not tailored to Australian jurisdictions, instead users in different jurisdictions customise ThoughtRiver to accommodate for differences. However, many contract law principles are similar across jurisdictions and the international flavour of the review and AI may be a benefit to practitioners.

ThoughtRiver AI pulls from contracts globally and does not enable a user to compare contractual treatment in different jurisdictions, which would be useful in cross-border negotiations. Such functionality might be introduced in future.

ThoughtRiver data is currently not held in an Australian server but that may change in future. ■

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

SNAPSHOT

ThoughtRiver is an AI powered contract review and negotiation platform

What is ThoughtRiver?
ThoughtRiver uses AI to review contracts and summarise all issues lawyers need to address.

What type of technology?
Cloud platform

Vendor
ThoughtRiver Limited

Country of origin
England

Similar tech products
ContractProbe, BlackBoiler, LegalSifter

Non-tech alternatives
Lawyer, junior lawyer, paralegal

More information
thoughtriver.com

E-SIGNING REFORM FOR CORPORATIONS

Frequent and varied reforms mean electronic signing remains an area for practitioners to keep their eye on during the pandemic and beyond.

The *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (TLA Act) came into effect on 14 August. It modifies s127 of the *Corporations Act 2001* (Cth) (*Corporations Act*) to facilitate the electronic execution of documents.

Here are four key take aways from the TLA Act.

1. Copies or counterparts are fine – on one condition

New s127(3A) of the *Corporations Act* clarifies that a document is taken to have been signed by a person if:

- the person signs a copy or counterpart of the document that is in a physical form
- the copy or counterpart includes the entire contents of the document.

It is commonplace for parties to a transaction to exchange documents in "counterpart". New s127(3A) suggests a counterparts clause is of lesser importance where parties are signing under s127, and clarifies that counterparts can exist in different forms, eg, one party's counterpart could be physical, and another party's counterpart could be electronic – provided that they all include the entire contents of the document.

2. Electronic execution is (again) expressly permitted

New s127(3B) of the *Corporations Act* clarifies that a document is taken to have been signed by a person if three criteria are met, and largely replicates sub-ss6(3) and (4) of the *Corporations (Coronavirus Economic Response) Determination (No 3) 2020* (Determination) which expired on 21 March 2021.

While s127 was already technology-neutral and would not prohibit the electronic execution of documents, new s127(3B) (once again) puts the matter beyond doubt – provided that the three criteria are met.

To avoid any arguments about:

- the veracity of the "method" that was used to identify a person
- whether that "method" adequately indicated that person's intention
- whether the method was "as reliable as appropriate"

it would be prudent for practitioners to use a digital signing platform (such as DocuSign or AdobeSign) when arranging for clients or counterparties to electronically sign documents.

3. Split execution is (again) expressly permitted

New s127(3C) of the *Corporations Act* clarifies that, for the purposes of s127(3A)(b) and s127(3B)(b), a copy or counterpart of a document need not include:

- the signature of another person signing the document
- any material included in the document to identify another person signing the document or to indicate another person's intention in respect of the contents of the document
- the seal, if a common seal is fixed to the document.

This provision largely replicates sub-s6(3) of the Determination, and again resolves the uncertainty arising from *Pickard* which cast serious doubt about whether the (commonly adopted practice) of "split execution" was acceptable, ie, having two directors or secretaries of one corporate entity themselves signing different counterparts.[1]

It is once again expressly clear that directors and secretaries of a corporation can sign different counterparts of the same document.

4. Expiry on 31 March 2022?

On 1 April 2022, the new provisions (s127(3A), (3B) and (3C)) will effectively be made redundant, and corporations could well be back to square one if more permanent reform hasn't been implemented by then.[2]

However, a well-hidden section in the *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Use of technology for meetings and related amendments* (MFC Bill) provides that the Sunset Section, which bakes in the future redundancy of the TLA Bill's e-signing provisions, will itself be repealed when the MFC Bill is passed.[3]

While the MFC Bill is only at the exposure draft stage, it is hoped the MFC Bill is passed long before 31 March 2022.

SNAPSHOT

- The TLA Act makes it clear corporations can electronically sign documents under s127 of the *Corporations Act*.
- Once again, "split execution" is expressly permitted, resolving the uncertainty arising from *Pickard*.
- A recent exposure draft of a Bill indicates more permanent reform is on the way.

A new regime?

The most recent exposure draft of the MFC Bill foreshadows further updates to the e-signing provisions contained in the *Corporations Act*, which are based on the concept of "technology neutrality".[4]

Proposed s110A, if the MFC Bill is passed in its current form, will clarify that a person may physically or electronically sign a document provided the method of signing:

a. identifies the person and indicates the person's intention in respect of the information recorded in the document
b. the method was either:
   - as reliable as appropriate for the purpose for which the information was recorded, in light of all the circumstances, including any relevant agreement
   - proven in fact to have fulfilled the functions above, by itself or together with further evidence.

While proposed sub-ss110A(3) and (4) clarify what is not required to comply with the new regime, given s110A applies to physical documents as well as electronically executed documents, it could be argued that to gain the benefit of the deeming provision requires compliance with a more prescriptive regime than was in place previously. While the technology neutrality goals are commendable, it is hoped the new provisions don't create more doubt than they're seeking to avoid. ■

Mark Burrows is a senior associate in the real estate and projects team at Lander & Rogers and a co-chair of the Executive Committee of the LIV's Technology and Innovation Section.

1. *Bendigo and Adelaide Bank Ltd & Ors v Kenneth Ross Pickard & Anor* [2019] SASC 123, at [70].
2. See s1679F(1) of the *Corporations Act* (Sunset Section).
3. MFC Bill, clause 48.
4. *Using technology to hold meetings and sign and send documents – August 2021* <https://treasury.gov.au/consultation/c2021-203516>.

CLCs ON THE PORTAL

CLCs have provided positive feedback on the opportunity to build new relationships with firms.

Justice Connect's Pro Bono Portal was an integral part of the organisation's contribution to disaster legal response in Victoria and New South Wales. The portal enabled us to respond to rising unmet legal need by connecting people with specialised legal help. Through this work, we saw an opportunity to expand the portal's impact and reach by running a pilot project developed to provide community legal centres (CLCs) direct access to the platform.

We designed our award-winning Pro Bono Portal to help accurately and efficiently connect people who need legal help with our member law firms providing pro bono assistance. It provides a seamless approach to referrals, and enables firms to track their pro bono contributions and impact.

While we have always provided an intake and triage service in support of our CLC partners, we were able to facilitate CLCs' direct use of the platform through our CLCs on the Portal project. We collaborated with 12 law firms and 14 CLCs with a focus on CLCs assisting people with legal problems arising from natural disasters or COVID-19, and paying particular attention to unmet legal need in rural and regional areas.

With several years of disaster response work behind us, we came to understand that people felt more comfortable reaching out for legal assistance locally – via CLCs, local councils or disaster response centres. Our CLCs on the Portal project gave us an opportunity to link up the legal services network efficiently, while supporting local frontline services to refer complex or unique matters directly to law firms. The pilot presented an opportunity for regional and rural CLCs to build relationships with large city-based firms and firms with expertise in areas of law common to communities impacted by natural disasters.

The timing also coincided with the introduction of COVID-19 lockdown measures and restrictions which built greater impetus for legal services organisations to use digital tools to deliver services, of which the portal could be one.

We developed new features to enable CLCs to use the portal and engaged with, onboarded and trained a group of CLCs on how to use the platform. CLCs have provided positive feedback on the use of the portal and the opportunity to build new relationships with firms providing pro bono assistance.

The pilot confirmed that the portal is adaptable and scalable. It helped us to identify opportunities to improve our approach including how to effectively support CLCs to adapt to new technology and embed the portal into their processes, to build their understanding of the types of legal problems that can be assisted pro bono, and the importance of building and deepening relationships with pro bono partners to support effective use of the platform. ■

Roj Amedi leads engagement at Justice Connect.

LOOKING TO HELP?

To find pro bono opportunities for your firm visit www.justiceconnect.org.au/work-with-us, which also manages the LIV's pro bono Legal Assistance Service.
For solicitors: talk to your pro bono coordinator or the person responsible for pro bono work at your firm or visit www.fclc.org.au/cb_pages/careers_and_getting_involved.php.
For barristers: visit www.vicbar.com.au/public/community/pro-bono-scheme.

SCHOLARSHIP FOR THE LEGAL COMMUNITY

Judicial officers and academics have developed a new resource for legal professionals.

Launched in September 2021, Scholarship for the Legal Community aims to foster greater engagement between the legal profession, the judiciary and legal academia by enabling a shared experience of the latest pieces of doctrinal research in significant and emerging areas of the law. This resource provides short summaries of salient articles from local and international journals across a range of legal fields to support judicial decision-making and to promote the coherent development of the law. It is hoped the resource will assist busy legal professionals to stay across the latest academic research, to incorporate relevant academic work into submissions and to promote synergies across the legal community.

The genesis of the project sprang from a suggestion by Professor Jason Varuhas, Melbourne Law School, that finding a way to bridge the divide between the work of the courts and the output of legal academics would benefit both the courts and the profession.

In May 2019, Victorian Court of Appeal president Justice Chris Maxwell, along with professors Matthew Harding, Jason Varuhas and Katy Barnett of Melbourne Law School met with 22 judges, academics and practitioners from Victoria, NSW and Tasmania to discuss ways of enhancing the contribution of legal academics to the development of Australian law. A consensus emerged that too little academic writing reaches the judicial audience, that academic writing is rarely cited in judgments and even more rarely relied on in counsels' arguments. Judicial officers agreed that legal scholarship is indispensable to an understanding of the informing principles in an area of law, and most judges are receptive to having academic work cited to them. Some members of counsel spoke about their reluctance to wade into discussions about the conceptual framework of law, preferring to keep a tight focus on key authorities in the hope of persuading a judge that each case was simple and should plainly be decided in their client's favour.

Among the many proposed solutions was a novel idea to create a digital resource showcasing a curated selection of recently published academic work in an easy and accessible way for judges and legal practitioners to be informed. A working group comprising Justice Maxwell and the three academics searched for an appropriate home for the resource, and had almost given up hope when, in late 2020, the Judicial College of Victoria (JCV) stepped in to host the resource on its website and I came on board as the managing editor. The project aligns with the JCV's key goals of informing the Victorian judiciary, maximising the value of judicial time and connecting the judiciary with the perspectives of critical thinkers beyond the courts.

In the first half of 2021, seven more board members joined the project, including Justice Melanie Sloss, Judge Douglas Trapnell, Law Library Victoria director Laurie Atkinson, UNSW Law School dean Professor Andrew Lynch, Dr Natalia Antolak-Saper of Monash Law School, as well as Michael Rush QC and Sarah Zeleznikow of the Victorian Bar.

A collaborative effort began in earnest to identify the key categories, journal sources and criteria for selecting the most salient pieces of writing. This has led to a curated selection of academic articles hosted on the JCV website which provides direct access to articles from freely available journals, while subscription journals are accessible through the Law Library of Victoria website.

Given the novel nature of this resource, it is experimental, and its boundaries continue to evolve. Articles are selected for their likely utility in assisting advocacy and adjudication, and perhaps the most critical selection criterion is that the writing has immediate doctrinal application. Articles are selected from within the last two calendar years. All articles have a Victorian focus, given the JCV's remit, but articles that have cross-jurisdictional application are included and it remains to be seen how the project focus evolves in future.

Justice Maxwell said: "The output of the legal academy is a rich but underutilised resource. Promoting greater awareness of legal scholarship amongst judges and practitioners can only enhance the quality of what we do. By making new scholarship readily accessible, the Judicial College is doing the legal community a great service."

You can access Scholarship for the Legal Community at www.judicialcollege.vic.edu.au/resources/scholarship-legal-community. Feedback is welcomed, email info@judicialcollege.vic.edu.au. ■

Kerryn Cockroft is a senior research manager at the Judicial College of Victoria. She has a background in research and writing for Thomson Reuters and research for courts in Victoria, NZ and the UK.

ADVOCACY GROUP RAISES ALARM

The legal community has an important role to play in enforcing the rights of aged care residents in Australia.

Aged-care Legal Advocacy and Reform Matter (ALARM) is a not-for-profit organisation established in October 2020 to promote the welfare of aged care residents in Australia.

ALARM has three key objectives:

- to ensure residents of aged care facilities and their families and friends have access to legal support and services
- to ensure law reform occurs in the aged care sector
- to provide legal education to the aged care community and legal practitioners.

ALARM chair Dr Bryan Keon-Cohen QC (Victorian Bar, retired), says: "Aged care residents, their families and loved ones, need to be informed that residents have a voice, have legal rights. ALARM is here to do that".

Dr Keon-Cohen is no stranger to advocating for the legal rights of community groups in Australia, including seeking law reform through test cases in the High Court. He appeared in, among others, the Dams Case, representing the Tasmanian Wilderness Society (1983) and Mabo (1992) and Wik (1996) representing the Indigenous plaintiffs.

ALARM aims to work with legal, community and government agencies.

Residents of aged care facilities often feel vulnerable and need support to determine their legal rights. Many residents are unlikely or unable to complain about abusive practices due to a range of factors, including fear of retribution from their provider and diminished capacity.

ALARM provides a website (https://www.alarm.org.au/) and telephone referral services to residents and families who seek legal redress due to financial, emotional or physical damage suffered in an aged care facility. Complainants are supported by ALARM's allied law firms that specialise in aged care matters.

Residents in aged care facilities in Australia need clarification of their rights. ALARM is developing a series of plain-English, focused educational materials on a range of topics (for example, what constitutes restraint, medical negligence, breach of contract, assaults) plus more technical material to ensure practitioners have the expertise to deal with and understand the issues relevant to aged cared residents.

Reform of the *Aged Care Act 1997* (Cth) consistent with the recommendations of the Royal Commission into Aged Care Quality and Safety is essential to enable the delivery of comprehensive, sustainable and measurable services to older Australians. ALARM has the depth of experience and expertise to actively participate in drafting necessary reforms and is seeking representation in government law reform processes now underway.

ALARM is seeking to drive the legal community, governments, the aged care sector and concerned community groups to work together to eliminate the unacceptable levels of neglect and improve accountability and governance in aged care. An immediate concern is to ensure commonsense reforms related to unacceptable staff training and remuneration and residents' nutrition are implemented urgently.

ALARM is supported by volunteers, including law students, legal practitioners and academics experienced in aged-care administration and elder law, and allied community organisations around Australia. ALARM's services are much needed, given that the recent Royal Commission into Aged Care Quality and Safety found that many facilities have, over many years, repeatedly failed to deliver acceptable standards of care.

The legal community has an important role to play in enforcing the legal rights of residents in aged care in Australia.

ALARM would welcome the active involvement of volunteer practitioners and academics with experience in the aged care sector to provide input, especially in relation to ALARM's law reform and legal education activities. Contact Dr Bryan Keon-Cohen by email bkeoncohen@gmail.com. We also welcome law firms interested in providing legal services support as an allied law firm to contact ALARM. ■

This column was provided by Aged-care Legal Advocacy and Reform Matter (ALARM).

SURVEY FINDINGS AID LIV STRATEGY

In response to the Royal Commission into the Management of Police Informants the LIV conducted a member survey addressing wellbeing and ethics.

Recommendation 89 of the Royal Commission into the Management of Police Informants required the LIV to assess the awareness level, use and views of ethical, health and wellbeing support services and resources offered to members. The LIV conducted the survey to acquit recommendation 89, and to enable a review of LIV wellbeing and ethics offerings more generally. It sought members' views about areas of focus for the development of our wellbeing strategy, what the LIV was doing well and where we could improve. We asked members which wellbeing challenges most impacted them. Key findings about the wellbeing services are outlined here. Information about ethics services will be reported separately.

Who completed the survey?

The LIV sent the survey to approximately 15,500 LIV members and received 600 responses. Of these, 80 per cent were practising full members with a relatively even distribution between male (46 per cent) and female (52 per cent) respondents. Almost half the respondents were aged over 50, and just under half were from practices in the CBD (47.5 per cent). Around a quarter (26.7 per cent) of respondents were in suburban practices and 11.2 per cent were regional practitioners.

Key wellbeing results

The results indicated just over half the survey respondents were aware of the *LIJ* and the EAP (52.8 per cent, 52.4 per cent respectively). Webinars (online and in person) were less known. Wellbeing articles in the *LIJ* were the most accessed (35.5 per cent) wellbeing resource. More than 90 per cent of respondents rated *LIJ* articles and webinars/seminars "good" or better, indicating those members who have used these wellbeing services report they are of good to excellent quality.

The LIV was particularly interested in understanding members' views and use of our counselling service. When we asked if members had a significant upheaval in their lives how likely they would be to use the LIV employee assistance program, 60 per cent of respondents said they would prefer to find their own or have an in-house service they would prefer to use. Some members reported they were not aware the LIV counselling service was free for all LIV members. The survey also revealed that of those who had used the EAP service, 74 per cent of respondents rated it as good, very good or excellent. When asked what aspects of an EAP were important to members, confidentiality was the most important (84.9 per cent) followed by the experience of the counsellor (68.3 per cent) and time to be seen (65.3 per cent).

It is evident work volume and demands are substantial, with around 50 per cent of respondents indicating problems with work-life balance and managing pressures and demands of work. Mental health issues are also significant (eg, feeling anxious and overwhelmed) as are challenges with managing physical health and wellbeing (eg, exercise, weight and sleep).

Areas considered important in the LIV wellbeing strategy included working with law firms to provide education and change in the workplace (53 per cent) and improving knowledge of, and responses to, organisational wellbeing (46 per cent). A focus on education, using preventative and positive psychology and access to assistance were also nominated by more than a third of respondents. Other suggestions included that the LIV advocate for change in the legal profession regarding commonly experienced stressors, that there should be a focus on defining wellbeing and promoting this within the profession and that the LIV should consider developing peer support programs to provide different levels of support to members.

What is the LIV's response?

The survey results will enable the LIV to tailor wellbeing services to members' needs.

Specific initiatives include:

- The LIV appointed a wellbeing manager in February 2021 to develop a wellbeing strategic plan and promote initiatives to support legal practitioners. These results will help the wellbeing manager to tailor resources to specific needs of members.
- In 2020 the LIV ran wellbeing webinars to support members during the pandemic, with 100 per cent of respondents who had attended rating the webinar quality as good or better.
- In July 2021, the LIV engaged a new EAP provider (AccessEAP), a "profit for purpose" organisation, which donates profits to disadvantaged families. The EAP has been extended to LIV members and their immediate employees. In line with members' feedback, the member counselling service offers confidential counselling by degree qualified counsellors with an average of 12.5 years post-graduate experience, appointments are made for the nearest possible day and help is available all hours.
- The LIV has filmed videos on wellbeing for lawyers. They are in post-production and once finalised will be released to LIV members. The *LIJ* addresses health and wellbeing in a monthly column and LawNews links to wellbeing articles fortnightly. The LIV Member Outreach Program, started in November 2020, contacts members one-on-one to ensure awareness of support available as part of LIV membership.
- In March 2021, the LIV developed a draft wellbeing strategy, aligned with the broader LIV strategy to ensure wellbeing becomes an integral part of the LIV's strategic direction. ■

Megan Fulford is LIV wellbeing manager.

ADOBESTOCK

THE UPSIDE OF A DOWNSIDE

Comparing the way the legal profession is evolving in Australia and New York shows similar trends towards a borderless future.

COVID-19 has an upside. It has taught many lawyers to embrace and become adept at new technology, to work remotely and more efficiently, to service a broader range of clients, to think more globally and to discover foreign jurisdictions.

With online platforms, clients, colleagues, courts and tribunals are just a click away and jurisdictional walls are slowly crumbling, with younger lawyers leading the march towards a borderless future.

Similar trends can be seen in overseas jurisdictions.

A comparison between the way the profession is evolving in New York and Australia is a good example of this change.

Since 1 July 2015, NSW and Victoria have embraced harmonisation of the regulation of the legal profession, thereby cutting red tape and creating a single system of legal practice governance with the Legal Profession Uniform Law (Uniform Law). At inception it was hoped other states and territories would follow the adoption of Uniform Law and it is on the horizon.

One of the drivers for uniformity was the surprising realisation there were 46 separate regulatory regimes in Australia for a profession then numbering about 50,000 practitioners. Now, the majority of Australian lawyers (in Victoria and NSW) are subject to a single regime of professional regulation.

There are compelling reasons – economic, efficiency, access to justice – for the regulatory apparatus to aim for:

- consistency between states and territories in the law applying to the Australian legal profession
- ensuring legal practitioners are competent and maintain high ethical and professional standards
- enhancing the protection of clients and the public
- empowering clients to make informed choices about their legal options
- efficient, effective, targeted and proportionate regulation
- a co-regulatory framework with appropriate independence for the legal profession.

The Uniform Law is applied in NSW and Victoria by local Acts and can be predicted to achieve a broader remit over time. With it, comes a greater acceptance of practice across borders, real and virtual.

By contrast, the position in the United States is more parochial as it is primarily state based.

Throughout the US, Rule 5.5 of the American Bar Association Model Rules of Professional Conduct and its state variants prohibit lawyers from practising in jurisdictions in which they are not admitted. Sanctions apply for the unauthorised practice of law. That is but one instance of a hidebound legal bailiwick.

That rule has some exceptions, including the authorisation to appear in a sister state through pro hac vice admission.

This allows lawyers to appear on a temporary basis in matters that are reasonably related to their work in the home jurisdiction or on behalf of clients domiciled in that state. This generally requires the lawyer to retain local counsel, especially in litigation. But the US being a much more litigious jurisdiction, there are numerous cases of lawyers "playing the man", as our vernacular has it. In this sense, for lawyers who find that their clients are in one state, their licence in another, and themselves in a third, knowing what each state permits and requires is critical to avoiding claims based on the unauthorised practice of law.

The admission process can also be a labyrinth to navigate: In some states, such as New Jersey, no lawyer can be admitted who does not hold a US Juris Doctor or US law degree. Florida requires 10 years' practice in another state before being eligible to sit for the Florida Bar. This is different from the acceptance in Australia of lawyers admitted in a different state.

New York, California and Washington DC allow non-US qualified lawyers to sit the Bar exam if they come from a common law system, or from a civil or other legal system, after completing the equivalent of a one-year degree (generally an LLM) or where they hold a law degree from a recognised university.

However, being admitted is not necessarily enough. There have been additional hurdles foreign lawyers have faced, particularly in New York.

After a long process, in May 2021 the New York Senate passed legislation (Senate Bill S700) to repeal s470 of New York State's Judiciary Law, a 112-year-old statute that required New York lawyers to maintain an office in New York. The Court of Appeals, New York's highest court, previously interpreted the statute such that it required non-resident attorneys practising in New York to have a physical office in the state.

When the law was challenged in Federal Court, the US Court of Appeals for the Second Circuit held that s470 was constitutional. In other words, although a New York lawyer who resides in the state is permitted to practise law from his or her kitchen or living room or even from a residence in another county, a "non-resident" New York lawyer who lives in an adjoining state or overseas had to incur the expense and inconvenience of establishing a bricks and mortar office. The rapid shift to remote practice during the pandemic had amplified criticisms of s470, including that the law was antiquated.

ADOBE STOCK

Uniform law

The welcome new legislation will abrogate s470 of New York State's Judiciary Law which requires non-resident attorneys to maintain a physical office in New York.

So what? Increasingly, Australian lawyers are dabbling in foreign fields and the lowering of such parochial constraints is further evidence of the world opening up to legal adventurers.

COVID-19 here is a factor. As Mark Cohen observes in his pull no punches but prescient piece ("COVID-19 and the Reformation of Legal Culture", *Forbes*, 12 June 2021):

"The danger is inertia of entrenched stakeholders – law firm equity partners, general counsel, tenured law school faculty, regulators, Bar associations, and the judicial system. Their stasis is rooted in legal culture, anachronistic structural, economic, and delivery paradigms, fiefdoms, self-regulation, and hubris.

"COVID-19 is different. It has cast a harsh light on the outdated way justice is dispensed, law is taught, and legal services are delivered. In a matter of weeks, law schools have transitioned to online learning, cracks in the partnership model of law firms have become fissures, and technology is an operational lifeline. The coronavirus has harnessed the potential of underutilised tools and alternative work paradigms long resisted by the legal establishment. Entrenched ways of doing things have been altered with astonishing speed, ease, and acceptance."

Having been admitted in New York since May 2019 as well as Australia since February 2007, I saw that the process (but not the exam) was, relatively, an easier one for an Australian lawyer to be admitted in New York than a New York lawyer to be admitted in Australia. The bricks and mortar constraint is concerning and limiting, particularly given the severe consequences for a legal professional if engaging in unauthorised legal practice.

It varies vastly from state to state with the consequence that when acting for Australian clients in US-related matters, it is important to be conscious of the need to engage with local counsel in the interests of the client and achieving a successful outcome. I have engaged with partners in New York, Chicago, Oregon, Michigan and Utah for this purpose. Soon, I may be able to appear "in the flesh" and remotely before New York courts. Of course, the cost of doing business in Melbourne is cheaper than in New York. It could all change throughout common law countries in order to become more uniform.

Indeed, it is already changing with boundaries breaking down. I have advised on US drafted contracts for Australian commercial parties, drafted and negotiated agreements subject to varying US state and federal laws, advised parties in US party/location based disputes including litigation and engaged local US partners where needed.

With the changing legislation in New York, my ability to broaden the scope of advice and draw further on my New York qualification from my Australian base is expanding. When the Australian profession becomes borderless, we will be better placed in the global market. Compared to other jurisdictions we are relatively nimble. That positions us well for the future. ■

Meghan Warren is principal, Burke & Associates Lawyers. This article was written with **Anthony Burke,** consultant, Burke & Associates Lawyers and LIV past-president.

IS YOUR PRICE RIGHT?

LEADERS *in* Practice

The final in a series on leading practitioners asks lawyer and pricing expert Liz Harris for her insights.

The lack of transparency in time-based billing can make your clients apprehensive about engaging your advice, with little certainty of your final bill. They may be anxious and fearful they will be over charged. Is that the way to start a quality relationship? Surely there's a better way for clients and your practice to achieve a great experience and outcome. I asked pricing expert Liz Harris (lawyer and director at Ovid Consulting).

Working as a litigator on disputes between lawyers and their clients Ms Harris discovered that time billing was often a key culprit of damaged relationships. The problem-solver in her sensed an opportunity to specialise in alternative and value-based pricing strategies – to help lawyers avoid disputes by changing their management style to foster trusted relationships. That's where her consulting business Ovid began.

Before rolling up your sleeves, Ms Harris suggests shifting your inherited focus away from "inputs" to work closely with your clients to try and unearth their ultimate desired outcome. Forget how many six-minute units your team has recorded. "It's about sitting down together (with your client) and unveiling: What are you trying to achieve? How are you trying to achieve it? Then providing options for how your service can be delivered to meet those objectives."

Only then can you truly visualise where both the tangible and emotional value lies in the service experience you provide. This knowledge can then influence how you proceed with pricing. It's similar to a doctor's approach – slow down the diagnosis process to ensure that the treatment (work) is effective.

What represents 'value' for a client?

It depends, says Ms Harris. Each client is unique, and in some cases, clients can be unaware of what they want to achieve and the value they'll gain from your work. They need your expertise to help ascertain it.

Value pricing is ideally suited to align your advice with their outcome goals, which can include:

Receiving support: "Some clients can simply be looking for someone in their corner. Particularly in family law, clients want their lawyer to walk the journey with them and provide peace of mind through the process."

Realising goals: "Consider conveyancing. For many people, purchasing their home is the biggest financial decision they're going to make. Helping someone achieve their dream is a significant milestone."

Navigating emotions: "When it comes to wills and estates, clients want to know that after they've passed, their family will be looked after, that their loved ones will be guided with compassion and care."

Avoiding resource drain: "Businesses want to minimise the impact on their people and productivity. Experienced litigators will ask: What's the value of your employees avoiding cross-examination? Every time you see an email from us, what's the stress value there?"

One of Ms Harris' key pricing rules is to slow down and invest time to scope the work and your client's expectations. Another rule is to ensure that you and your client are a "match," ie, share the same values so you can meet their expectations and they respect your professionalism. Not every client is the right fit for the way you work. And that's OK.

From there, look to establish internal processes that incorporate questionnaires and pre-interviews, to help your client clarify their wants, needs and expectations. Not only will this overhauled approach set upfront expectations for what they can expect as an outcome, but the more personalised experience will also boost the chances of them returning or referring work your way. ■

Join the SEIVA/LIV pricing strategy webinar on 18 November. Alternative and value-based pricing models, as well as how to adopt your preferred method as a key revamp to your strategy will be discussed. Visit LIV website for details.

Brent Szalay is SEIVA managing director.

TIPS

Liz Harris shares her top tips on how to get your pricing strategy right.

- Don't undervalue yourself because of a belief that what you're doing is easy. You think it's easy because you're an expert. Remember clients are paying for your expertise.
- When you price too low it can create concern in your client's mind. Are you capable of doing a quality job? Do you have enough experience?
- Value is subjective. Be mindful that no two clients are going to see the same price with the same lens. One might perceive it to be expensive but worth it for the peace of mind it will deliver. Another might consider it nominal. This is simply encouraging you to approach your price on a case-by-case basis.

ADOBE STOCK

TIPS FOR CORPORATE LAWYERS

In-house work often involves a balancing act with the business (the client) and legal considerations or risks.

In-house lawyers are commercial practitioners who undertake legal and non-legal tasks and roles. An in-house role requires a different set of skills from private practice and different challenges arise in day-to-day business. Among others, three central considerations for an in-house lawyer are privilege, prioritising and probity. How should these areas be managed?

Privilege

The application of legal professional privilege (LPP) for in-house lawyers can be vastly different to those of private practice colleagues. In-house lawyers are often required to provide legal advice from a commercial perspective, which can at times cause the lines of advice to become more blurred. Although LPP in this environment can be difficult to maintain, practitioners must remember that LPP only applies if they are acting independently of their client, and the dominant purpose of the communication is legal advice, or for actual or anticipated litigation.

Tips for maintaining LPP

- Keep different types of communications separated – attempt to avoid bundling commercial advice into legal advice, and only label legal advice with "confidential and privileged" in the header of communications (while labels won't prove LPP, they can be helpful in demonstrating a considered intention).
- Educate the business on LPP to ensure they are also aware of its purpose and protections – this can include providing best practice tips such as not forwarding legal advice emails to other colleagues or external third parties.
- Use the phone – this may be a better preliminary option before email to ensure potentially contentious issues are not solidified into writing too quickly and the in-house lawyer has time to advise on the best way to document the topic to protect LPP.

Prioritising

In-house lawyers are often faced with instructions and tasks from different business units. This means tasks can have competing time frames and deadlines. Time management and organisation becomes essential in handling such a diverse workload for an in-house lawyer to ensure they are able to effectively manage all requests. In addition, transparent and continuous communication is imperative to assist with managing client expectations.

Tips for prioritising

- Clarify the hard deadline and the business' priorities – by identifying the strategic motivations of the business and the urgency of tasks, an in-house lawyer can better determine whether it is a realistic time frame for the work and, accordingly, manage the delivery expectations.
- Use your calendar – along with meetings and events, the calendar can be a useful tool for setting personal reminders for key deadlines, and setting up a task list.
- Don't be afraid to push back – all business units will prioritise their own work, but it is part of an in-house lawyer's role to ensure tasks are completed based on true urgency, so it's worth checking with the business whether a task can be postponed.

Probity

As an officer of the court first and foremost, honesty and ethics play an essential role in-house. While managing the interests of the business, lawyers still need to exercise their own moral judgments when it comes to risk and compliance. They play a significant role in helping the business to understand the ethical and legal considerations and ramifications of actions or decisions. However, they importantly do not make the final decisions. Although there may be times where ethics and integrity are tested, when the business may prefer more commercial approaches, it is important for in-house lawyers to continue to operate with probity to ensure they do not jeopardise their moral obligations as a legal practitioner.

Tips for maintaining probity

- Consider all the facts – in-house lawyers are able to better establish the merits for their advice when they have assessed all relevant information and are not making decisions solely based on the business' opinion or objectives.
- Manage issues in an impartial manner – helping the business to understand its ethical obligations in this manner will prevent the lawyer becoming too closely invested in a strategic direction and avoid potential conflicts of interest.
- Document decisions – in the event the business wants to proceed in a different direction to the advice provided by an in-house lawyer, it is better to document the positions in a clear and concise email or file note. ■

Shaniya Vilash is co-chair of the LIV Young Lawyers Editorial Committee and a junior corporate counsel at Daimler Truck and Bus Australia Pacific Pty Ltd.

ADOBESTOCK

EMPLOYERS AND VACCINATIONS

What is lawful and reasonable in the workplace?

The crucial question for employers in Victoria now is should they mandate vaccinations. In the current climate of lockdowns and restrictions, it seems beneficial for employers to introduce a mandatory vaccination policy, however, employers must weigh up the benefits of doing so for themselves.

An employer's obligations

Employers have certain obligations under the Victorian *Occupational Health and Safety Act 2004* (OHS Act) and the common law, including but not limited to:

- an obligation to ensure the workplace is free from risks to health and safety, as far as reasonably practicable (s21 of the OHS Act)
- a duty of care to workers (ie, employees and contractors) and visitors to the workplace, and in areas that it may manage or control (eg, offsite locations).

Substantial financial penalties (among other consequences) may apply for employers that fail to observe these obligations.

Options for employers

Employers carry a high level of responsibility to manage the risks around COVID-19 in the workplace. In doing so, employers might consider:

- directing all/some of their employees to get vaccinated under a policy
- encouraging vaccination but leaving the choice up to employees
- introducing a vaccination incentive for fully vaccinated employees in line with the Therapeutic Goods Administration's regulations (https://www.tga.gov.au/communicating-about-covid-19-vaccines).

Lawful and reasonable directions

If employers proceed with a policy, before doing so they will need to assess whether such a direction is lawful and reasonable in light of their activities and their employees' duties. This assessment should consider several factors including risk of transmission and interaction with the community.

The Fair Work Ombudsman has also published guidance (https://coronavirus.fairwork.gov.au/coronavirus-and-australian-workplace-laws/covid-19-vaccinations-and-the-workplace/covid-19-vaccinations-workplace-rights-and-obligations) to assist businesses in assessing their risk level and, therefore, the reasonableness of a policy in their circumstances. These are:

- tier 1 – employees required to interact with people with an increased risk of infection (ie, hotel quarantine or border control)
- tier 2 – employees required to have close contact with those vulnerable to health impacts of COVID-19 (ie, health care or aged care workers)
- tier 3 – employees likely to interact with other people such as customers or the public (ie, retail workers)
- tier 4 – employees that have minimum face-to-face interaction as part of their employment duties (ie, working from home).

Where the business' activities/employee's duties fall into tiers 1 or 2, it is more reasonable objectively to implement a policy, and likely to be less reasonable for tiers 3 and 4.

Potential risks and liabilities

If an employer fails to consider the above in implementing a policy, the potential risks may include:

- an unfair dismissal claim claiming termination was harsh, unjust or unfair
- a general protections claim claiming the employer took adverse action against them on the basis of a protected attribute
- a discrimination complaint in the federal jurisdiction (the Australian Human Rights Commission)
- a discrimination complaint in the state or territory jurisdiction (at the Victorian Equal Opportunity and Human Rights Commission in Victoria)
- significant financial penalties.

Recent cases

At the time of writing, no judicial decisions have directly addressed mandatory COVID-19 vaccinations in the workplace. Despite this, the Fair Work Commission has recently addressed the issue of mandatory flu vaccinations in the workplace, providing helpful insight:

- In *Jennifer Kimber v Sapphire Coast Community Aged Care Ltd*[1] Ms Kimber's termination was found to be lawful, after her employment was terminated by Sapphire Coast, an aged care provider, for failing to follow a direction to be vaccinated in line with the NSW government's health directives and advice, and failing to adduce reasonable medical evidence
- In *Bou-Jamie Barber v Goodstart Early Leaning*[2] Ms Barber's termination was found to be lawful after her employment was terminated by Goodstart, an early learning centre, for reason that she could not perform the inherent requirements of her role (contact with children) and failing to provide reasonable medical evidence to prove otherwise.

Given the many factors employers need to consider, employers need to seek specific and tailored legal advice before implementing a policy for their workplace. ■

SNAPSHOT

- There are several factors employers must consider – including their obligations under the *Occupational Health and Safety Act 2004* (Vic) and whether a direction to be vaccinated would be lawful and reasonable in the circumstances – before taking steps to mandate COVID-19 vaccinations in the workplace.
- The courts are yet to tackle COVID-19 vaccinations specifically, but cases surrounding mandatory flu vaccinations from 2021 show promise for employers looking to implement such a policy.
- Significant risks and liabilities (reputational, financial and legal) exist for employers who get this wrong, so tailored legal advice is key.

Madeleine Hearn is a lawyer at Tisher Liner FC Law and **Grace Cue** is an employment and workplace relations lawyer at Law Squared.

1. [2021] FWC 1818.
2. [2021] FWC 2156.

NEW ADMISSIONS

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on **2 September 2021**. The *LIJ* welcomes them to the legal profession.

ABDALLA, Ibrahim
ADAM, Bahar
AKTEPE, Abdurrahman
ALI, Alina
AMES, Jonathan
ANDERSON, Oliver
ANSARI, Ariz
APOSTOLIDIS, Victoria
ASI, Adam
BALMACEDA, Tamara
BARRY, Hugo
BEATRICE, Megan
BENZ, Madeline
BERGH, Maxine
BEVINETTO, Anthony
BILLINGS, Bradly
BRADLEY, Paristue
BREHENY, Jake
BROOKES, Levi
BUI, Thu
BULBUL, Saarah
CADMAN, Jasmyne
CAMPBELL, Megan
CASQUEJO, Ivy Anne
CAVASINNI, Julia
CERONE, Amiela Danila
CHAN, Enoch
CHAN, Nicole
CHEE, Nicole Kayee
CHEN, Jingnan
CHEN, Pearl
CHEW, Chloe
CHIODO, Marie
CLAYTON, Madeleine
COLLINS, Mitchell
COPLEY, Alexia
COULSON, Joshua
COUSINERY, Leanne
COX, Brianna
DI PALMA, Leah
DILLON, Amy
DORMAN, Nathan
DU, Miaoli
DUNN-VAUGHAN, Michelle
EALES, Sally
ENSOR, Meghan
ERDEM, Ceren
GALEA, Siobhain
GIARRUSSO, Laura
GITIN, Carina
GLENTON, Alan
GORICANE, Alicia
GUGASYAN, Alyce
GUIRAND, Jessica
HABA, Todd
HADLEY, Shannon
HAN, Oscar
HARRISON, Adam
HARRISON, Tayla
HEAH, Rachel
HENRY, Nicholas
HILL, Stephanie
HILL, Timothy
HOPKINS, Alexander
HUANG, Derek
HUANG, Tak Wan Oswald
HUMPHREYS, Joel
IBRAHIM, Henna
IFHAM RAJI, Fathima
JABER, Bataul
JACKSON, Riley
Jean Jacob
JAMES, Carly
JAMES, Teo
JAYAMAHA, Anne
JOHNSON, Grace
JOHNSON, William
JOHNSTONE, Camille
JOYCE, Suzanne
KAZAMI, Marwah
KEATING, Michaela
KEEFE, Courtney
KERR, Chantelle
KHAROUD, Tanveer
KHAZANCHI, Smriti
KHEDHER, Sandra
KO, Andrea
KOKKOLIS, Melissa
KOLAITIS, Chantelle
KOTEVSKI, Monique
KUMARANAYAKA, Sajini
KYANI, Meher
LAI, Anthony
LAIRD, Kayla
LAKKOTRIPIS, Androulla
LAU, Michelle
LEE, Cheuk Yan
LEE, Han Yuan
LEE, Patrick
LEES, Maddison
LI, Luyun
LIM, Jin Hong
LIM, Ken Zen
LIYANAGE, Yuran
LLOYD, Gabriella
LUCAS, Stephanie
LUI, Victor
MA, Edward
MACALI, Brittany
MAHANAMA, Muditha
MAHER, Oliver
MAK, Ka Ki
MALVASO, Adriana
MASON, Jacob
McKINLAY, Patrick
MENAHEM, Monique
MEURS, Jasmine
MILBURN, Cassie
MILTHORPE, Breanna
MIRANKOT, Gagandeep Singh
MITCHELL, Tessa
MORADI, Kobra
MORGAN, Emma
MUNRO, Matthew
MURRAY, David
NAHAR, Nahar
NASTASI, Rosa
NDALA, Webster
NEWLAN, Emily
NG, Mavis
NGUYEN, Alicia
NGUYEN, Amanda
NYE, Thea
OBEID, Layal
OCAL, Edanur
OGETII, Richard
OZTURK, Cezmi
PALAZZOLO, Adrian
PANAYIOTOU, Anna
PAVLIS, Nicholas
PERCONTE, Emma
PERERA, Seveni
POCI-KOCSIS, Domenica
PYLE, William
QUINN, Thomas
RAFFOUL, Nazih
ROSENBLUM, Paul
RYAN, Tim
SAHOTA, Amandeep
SAKAMA, Samuel
SCHEIDLINGER, Alon
SEINDANIS, Erini
SENADHEERA, Tharani
SHAMOON, Yusif
SHEN, Yujie
SHEPHERDLY, Tristan
SHEPPARD, Jessica
SINGH, Sean
SKOK, Luke
SMARRELLI, Danielle
SPILIOPOULOS, Rebecca
STARR, Mariel
TAJAMMUL, Khadeeja
TALTY, Brendan
TELFER, Brittany
THOMPSON, Cherie
TRIPODI, Natalie
TUCKER, James
VAISEY, Montana
VO, Thi Minh Thu
VU, Lisa
VUONG, Devonne
WALKER, Nicholas
WALSHE, Jonathan
WARD, Bryson
WEBB, Michael
WEI, Ping
WELIAMUNA, Jayasuriya
WHELAN, Jessica
WILLIAMS, Imogen
WONGTRAKUN, Jourdain
WU, Yuwei
XIA, Tianzhen
YAO, Jingye
YAZICI, Kubra
YE, Junjie
YOUNG, Jack
ZAHRA, Emily
ZHANG, Fengchi
ZHANG, Qiaochu
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Foley's List

EDUCATION LEGACY FROM MORTGAGE PRACTITIONERS

A fund originally set up to insure solicitors mortgage practices will continue to provide funding for educational programs for LIV members. By Frank Lynch* with Karin Derkley

The LIV has been gifted money from a fund established 20 years ago to self-insure solicitors mortgage practices to provide a funding source for the education of LIV members.

The Solicitors Mortgage Fidelity Fund (SMFF) was set up in the mid-1990s to provide an alternative to insurance in the case of defalcations by solicitors' mortgage practices. The fund is in the process of being wound up, with the Trustee resolving to donate the trust funds to the LIV for the sole purpose of applying the $3.6 million to the education of solicitors.

LIV CEO Adam Awty says the money from the fund is a welcome gift that will continue to support the education of solicitors and LIV members in Victoria.

Lending money for mortgages was a common practice for solicitors until around 20 years ago. A client with money to invest would entrust it to their legal practitioner to lend it to a client usually of another legal practice, who needed finance, on the security of a registered first mortgage. The loan would be managed by the legal practice and if there was default by the borrower, recovery proceedings would be immediately implemented.

Some firms developed very sophisticated systems, and in some of Victoria's larger provincial towns, it was not uncommon for the mortgage practice to be transacting more mortgage finance deals than the banks – in some cases of all the banks in a town combined.

Former LIV president and SMFF director Mark Woods says solicitors' mortgage practices evolved out of necessity. "They were predominantly found in smaller firms, although some of Melbourne's biggest firms had huge and highly lucrative practices as well.

"Apart from a few glitches they were very secure investments and proceeded pretty well," he says.

To enable solicitors to qualify for an exemption from the fundraising provisions of Corporations Law, a Guarantee Fund was established in 1948 to cover the possibility of defalcations. The Fund was financed from the interest derived from the trust accounts of legal practices.

However, following a substantial defalcation in the late 1980s, the state Attorney-General withdrew the Guarantee Fund for one class of mortgage investments, and legal practitioners had to find an alternative if they were to stay in practice.

This led to the formation of the Mortgage Practice Section at the LIV which met throughout the 1990s to guide the future of solicitors' mortgage practices.

The first chair of the Mortgage Practice Section, Alan Roberts, says his involvement arose after the LIV agreed to be service provider for those firms that wanted to continue to operate mortgage practices without having to set up as a finance company and take on independently the onerous insurance requirements attached to that.

"Our essential role was to set the levies that were necessary to be paid by the members of the section to finance the fidelity insurance premiums from time to time. And the institute undertook all the administration for the collection of the levies and to negotiate the premiums with an insurer and pay the insurance premium from the levies."

Former LIV president and SMFF director Steven Stevens says the fund was a "wonderful initiative that provided confidence to clients of law firms who invested their money in mortgage schemes".

In 1998, the newly formed ASIC completed an Australian-wide investigation into the non-bank lending sector and determined that solicitors mortgage practices must be regulated, with ASIC as the regulator, not the LIV.

Consequently, by the turn of the century, mortgage practitioners had the choice to either wind-down their practices or convert them to corporations with the requisite AFS Licence and regulation from ASIC rather than the LIV.

When the last mortgage was discharged under the pre-ASIC regime, and no further claims on the Fund were possible, the SMFF was capped. Under the second purpose of the Trust Deed which established the Fund, the asset was able to be used to provide for education purposes of legal practitioners.

The LIV put up a proposal for using the funds to provide ethics training and other education for members, Mr Roberts says. "And, ultimately, that's what we resolved – that the fund would be handed to the LIV for the basic purposes of legal education in Victoria."

For the past 20 years, Mortgage Fidelity Fund Pty Ltd as trustee has administered the SMFF and overseen the investment of the funds. During this time, the SMFF has provided substantial donations to the LIV for education purposes.

Money from the fund has supported the development of education programs such as the LIV's highly successful Practice Management Course, aimed at lawyers who want to make a career transition to engage in legal practice as a principal of a law practice, and the Ethics Education program.

The LIV's Practice Management Course has run since December 2017 and is conducted seven times a year, since May 2020 online. More than 650 members have completed the course.

The LIV Ethics department has regularly produced ethics videos free of charge to eligible LIV members since 2015. The videos demonstrate best practice solutions to common ethical dilemmas using real-life scenarios, and count for 1 CPD point.

At the end of the last financial year, the directors of the trustee had the final meeting of Mortgage Fidelity Fund. At that meeting, the directors considered which charitable entity was best placed to carry out the education of solicitors with the trust funds and considered this to be the LIV on the basis that the LIV already undertakes significant education activities, and that the trustee resolved that these activities met the requirements of the secondary purposes in the SMFF trust deed.

"Providing educational resources for members of the Law Institute is a most constructive use of the funds," Mr Roberts says, "and one that's in the interests of the profession and maintenance and improvement of the standards under which we all work."

Mr Awty says the LIV is in the process of developing a new strategic plan with a heavy focus on education. "This generous donation gives the LIV a greater capacity to really invest in the future of education in a strategic way."

More information on the strategic plan will be available in coming months. ■

*Frank Lynch was the chair of the Mortgage Practice Section and subsequently a director of the Trustee of Solicitors Mortgage Fidelity Fund from its inception to its conclusion.

NOTICE OF LIV AGM

The LIV is monitoring the ongoing risks from COVID-19. In the interests of the health and safety of members, staff and other attendees, and given the changing nature of rules around in-person gatherings, this year's Annual General Meeting will be online. Members may not be able to attend in person. The 2021 Annual General Meeting of the Law Institute of Victoria Limited (LIV) [ABN 32075475731] will be held on Wednesday 17 November 2021, at 6pm live via webcast. Arrangements to attend the webcast will be published in the Notice of Annual General Meeting and on the LIV website (www.liv.asn.au) on Monday 25 October 2021.

LIV GOVERNANCE

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EXECUTIVE MEMBER
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Gippsland Law Association
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Goulburn Valley Law Association
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North East Law Association
Amanda Toner 5752 1493

North West Suburbs Lawyers' Association
David Gonzalez 9379 7306

North West Victorian Law Association
Tyler Wolff 5021 6200

Northern Suburbs Law Association
Antonella Terranova 9432 0266

Southern Solicitors Law Association
Celina Roth 9592 7744

Western District Law Association Inc
Jessica Dowdy 5572 1600

Western Suburbs Law Association
Rebecca Ballard 8622 0600

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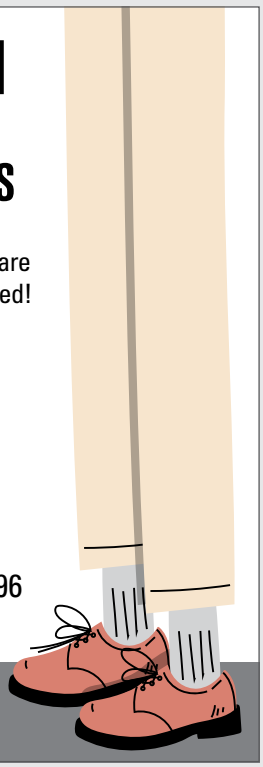

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WILLS & ESTATES

Would any solicitor, firm, or person be holding or knowing the whereabouts of a will, or other testamentary document, written by **Rex Jonathan Willox**, last known address was unit 20/36 Grange road, Toorak, Victoria 3142. Rex Jonathan Willox born 17th January, 1977 and deceased on 27th February, 2021. If you have any information please either email keys.penelope@gmail.com or phone Penelope Keys on 0411 485 174.

Estate of Ermioni Mandalozis, deceased ('the Deceased'). A request is made to the profession, particularly those in the northern suburbs of Coburg, Coburg North, Brunswick and Brunswick East, Essendon, Moonee Ponds, Fitzroy North, Pascoe Vale, Preston and Thornbury, as to whether they hold any documents for the abovenamed Deceased, including, but not limited to, Wills or certificates of title. The Deceased's last known residential address is 22 Murdoch Street, Brunswick, Victoria 3056. Should you have any documents, please contact Paul Traianedes, Anne Pantelidis or Jessica Daley at Wisewould Mahony on 03 9612 7355.

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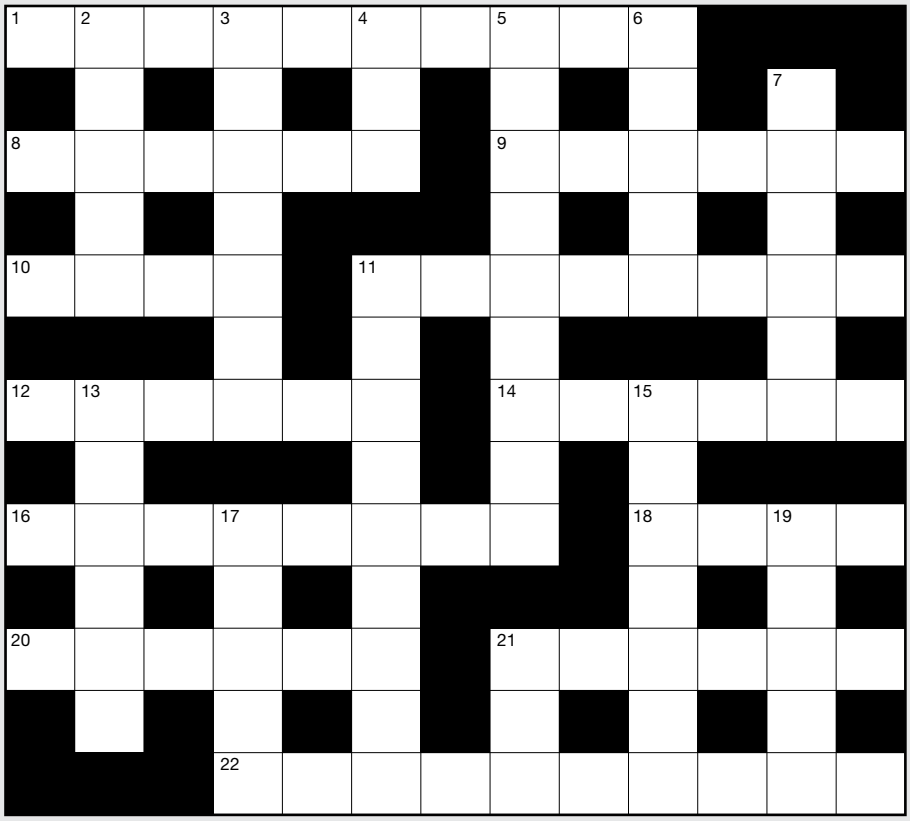

Solution next edition
Compiled by Aver

ACROSS

1 I tendered material at first, negotiated and settled (10)

8 Amid odd characters in drum circle (6)

9 Armed criminal injured Nan and 4dn (3-3)

10 Festival of ill-fortune, it's said (4)

11 Prayer regularly being terse, tartly (8)

12 Amended Deed, it changed (6)

14 Reconcile account or add-up, essentially (6)

16 One who gets donkey, headless pig and endless need (8)

18 Fancy goop stick? (4)

20 One who holds trouble in second letter (6)

21 Represent part of play to the audience (3,3)

22 Tireless, we struggled for these winds (10)

DOWN

2 Avoid part of schedule on return (5)

3 Demanding attention of former partner with a male (7)

4 The face of an idiot (3)

5 Manage toe, eating bananas (9)

6 One who gets over drug (5)

7 One who takes orders: a water, perhaps? (6)

11 Risks of daft dental surgeon firing deranged lout (9)

13 Strike off corrupt bad sir (6)

15 Money invested in Melbourne? (7)

17 A relative acquired during outspoken learning (2-3)

19 Saw that may be found in the garden? (5)

21 Copy a priest with energy (3)

Solution to Letters of the Law No.241

L	A	M	B	A	S	T	■	A	■	U	■	■
E	■	A	■	J	■	H	O	M	O	N	Y	M
A	C	R	E	A	G	E	■	P	■	D	■	U
D	■	A	■	R	■	L	O	O	K	O	U	T
I	O	T	A	■	■	A	■	U	■	■	■	I
N	■	H	■	O	R	W	E	L	L	I	A	N
G	■	O	■	N	■	I	■	E	■	M	■	O
C	O	N	V	E	R	S	E	S	■	P	■	U
A	■	■	■	S	■	A	■	■	L	O	S	S
S	E	S	S	I	O	N	■	B	■	L	■	N
E	■	E	■	D	■	A	V	A	R	I	C	E
S	E	A	L	E	G	S	■	I	■	T	■	S
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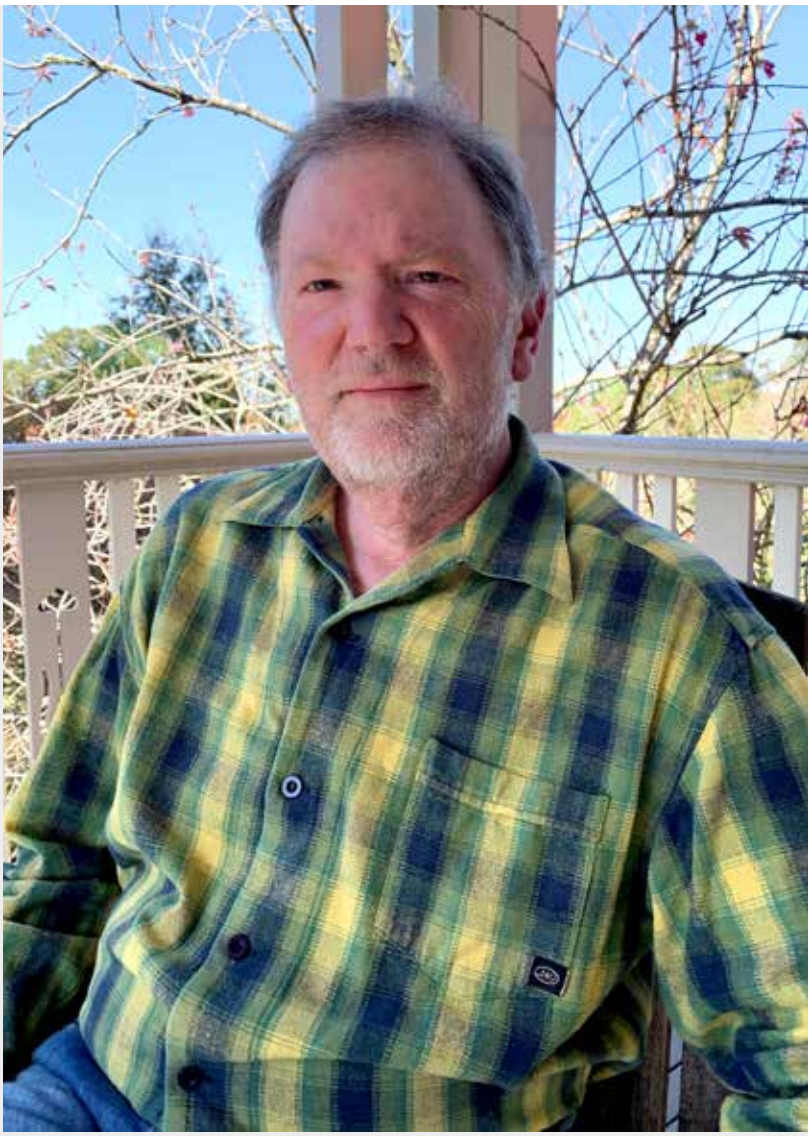
INSIDER'S LIFE IN CRIME TAKES A NEW TURN



CRIMINAL LAWYER ROB STARY HAS DEFENDED GANGSTERS, TERRORISTS AND JULIAN ASSANGE. NOW RETIRED FROM HIS FIRM, HIS ADVOCACY CONTINUES.

BY KARIN DERKLEY

Rob Stary might be famous in the wider world as the go-to-lawyer for terrorists and gangsters, but that's not how he hopes to be remembered long term. After retiring from Stary Norton Halphen, the firm he set up in 1995, he's more interested in addressing the factors that are contributing to filling Victoria's prisons.

"I've been practising for 40 years in criminal defence work," he says. "What I've observed over those years is that those in the criminal justice system are overwhelmingly from dysfunctional family backgrounds, with poor education and work opportunities, who have slipped into substance abuse and end up in jail."

Some of those are the kinds of people Mr Stary grew up with in the housing commission area of Braybrook where his Hungarian migrant father and fifth-generation Australian mother raised their family. While his family were economically poor in a socially disadvantaged area, he acknowledges he was more privileged than many of those around him. His grandfather was a crown prosecutor in inter-war Hungary, and his father studied law before he was caught up in the fighting in World War II. There was no question he would go to university and he benefited from free tertiary education at Melbourne University Law School.

While still studying, he co-founded the Western Suburbs Legal Service with his friend Peter Gordon in 1978 before going to work with Victoria Legal Aid after he graduated. He then moved with Gordon to Slater and Gordon, where he worked for 11 years and became a partner, before setting up his own criminal defence law firm Robert Stary Lawyers in 1995. The firm, now Stary Norton Halphen, has five offices across Melbourne and Geelong.

Over the years the firm has defended a rogues' gallery of gangsters such as Tony Mokbel and Carl Williams, terrorists

"I don't believe in unfettered freedoms. We live in a society and I believe in the collective good for which people might have to forego some of their liberties."

such as "Jihad Jack" Thomas, political activists such as Julian Assange and wife killer Borce Ristevski. He is philosophical about his role in defending people often regarded with little sympathy by the wider community. "I don't moralise about their behaviour . . . as long as the state is made accountable and there's transparency in the process and the law is applied. I'm a strict adherent to the rule of law."

But defending terrorist suspects has made him highly critical of the way such cases are prosecuted, where suspects are monitored for up to two years before being arrested, which he says is often counter-productive to the objective of de-radicalisation, especially where young people are involved. "If you believe in de-radicalisation, you'd be going to the parents and the leaders of that community, religious and otherwise, and you'd be saying this child is being radicalised, look at the company they're keeping and at their social media and what they're accessing. And you should do something. But they don't."

His impartiality has its limits though. He is not confident he could defend participants in the recent anti-vaxxer protests. "I watch those protests and the chaos they've caused and as Robert Stary private citizen I challenge myself, could I bring a fair and impartial and non-judgmental approach to it?

"I don't believe in unfettered freedoms. We live in a society and I believe in the collective good for which people might have to forego some of their liberties, including, for instance on vaccination."

What has long concerned him is the exponential increase in the prison population, "in circumstances where the serious crime rate's been falling," a trend that has been exacerbated by changes to the bail laws following the Bourke Street massacre. "You've got drug affected offenders who have got to show exceptional circumstances before they're bailed. They're the unintended recipients of that harsher application. The target was not them, it was people charged with serious crime, particularly violent crime."

Mandatory sentencing is another practice he decries for its role in filling prisons. "Mandatory sentencing is anathema to what we stand for as lawyers. Every case has to be determined on its individual merit. You can't say an 18-year-old from an impoverished background with mental illness should be dealt with the same way as a hardened criminal who is 40 and has had every opportunity."

Helping reverse the rising incarceration trend is one of his aims now he's retired from his firm. "I think to myself, have I done enough to try to prevent that? That issue of who we are jailing and why are we jailing people has troubled me the whole time. It's the most expensive form of punishment and it's the least effective. It has the highest recidivism rate."

Despite the concerning trends, he is optimistic the tide is starting to turn, especially with the growth in specialist courts taking a more therapeutic approach to offenders, including the drug court, the Neighbourhood Justice Centre, and the Assessment and Referral List for people with mental ill health.

One of his post "retirement" aspirations is to set up a homelessness court with the Salvation Army's Major Brendan Nottle to help address the situation where many homeless people end up in prison simply because they fail to pay their fines and won't attend a police station or a court. A homelessness court would allow such people to access court where they won't feel threatened or intimidated and where support services are provided. "So you're not allowing those people to slip into the prison system."

Education is another area he wants to expand into now he has the time. Mr Stary has been an adjunct professor at Victoria University for three years and says the diversity of the law students there fills him with optimism. That is helping to fuel what he says is a steady change he's observed over the past 40 years in the make-up of the legal profession, with a "massive increase" in the number of women and people from culturally diverse backgrounds going into the law and being appointed to the courts. "It was a very 'waspish' bench when I started."

A heart attack a couple of years ago was a "blessing in disguise" that convinced him it was time to retire from the high intensity role as a criminal defence lawyer, Mr Stary says. His health had suffered from the long hours and the stress, he admits now. He wants to spend more time with his children and his grandchildren. Working in his three acres of garden at his property on Mount Macedon has also been very therapeutic, he says. He's looking forward to going back to the football next year to watch his beloved Bulldogs play, and is happy to have seen one premiership in his lifetime, and one runner-up.

But while he is adamant he is not retiring as a criminal lawyer, he says he won't have any involvement in the running of the firm that will continue to include his name. "They've got excellent lawyers there. It's time [for me] to draw a line in the sand and say it's now for someone else." ■

FOOD

Taxi Kitchen on Providoor
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As the pandemic lockdown grinds on, home delivery remains one of the few ways to enjoy Melbourne CBD hospitality. This is particularly unfortunate for Taxi Kitchen, which counts as a main drawcard its panoramic views of the river, city and arts precinct, from a modern Fed Square dining space. I'm nonetheless grateful that its Providoor pivot still enables a limited sample of the Kitchen's modern Australian food that has now been on offer, since 2014.

The Spring Lamb Banquet ($150) is a six-dish spread for two. It starts with a light and creamy silken tofu and sour cream dip that is scooped up with commendably non-greasy prawn crackers, dusted with a little chili and nori powder. Six Hervey Bay scallops, in the shell, come out of a hot grill, oozing with a lip-smacking miso chili butter. These are well paired with a salad of pickled shreds of radish, carrot and Asian herbs. The butter leads me to rifle the house for fresh bread to mop up the excess.

Duck and lemongrass buns, steamed and pan-fried, pot-sticker style, are a nice idea. Unfortunately, they are mealy and dry inside, due to excessive processing and insufficient fat. The fermented chili jam dipping sauce has a nicely funky aroma, but overpowers the mild flavour of the dumplings. Luckily, we have upsized with a side order of turnip cakes ($13), which we deep fry to give a crisp shell to their gooey interior. These are moreish with a vinegar dipping sauce.

The promised climax of the meal is a shoulder of Flinders Island lamb. As a few restaurants appear to have discovered, this cut remains delectably moist and gelatinously tender, even after it has been pre-cooked prior to delivery and then reheated afterwards. Taxi's lamb is no exception. It is served with the mostly well-conceived accompaniment of soft mandarin pancakes, a pickled fennel salad, "caramelized yoghurt" and a garden salad with some Japanese twists. But alas, it lacks seasoning, and there is no sufficiently strong acidy pungency or spice provided by the side dishes to suitably accent the meat. What should be the star of the meal is left somewhat bland.

Dessert billed as "chocolate and raspberry delight with orange crumb" conveys understatement that is characteristic of a great dessert. This is like a weeknight pantry-raid produced chocolate custard (which is neither rich in flavor nor light in texture), topped with raspberry jam, and sprinkled with crumbled shortbread. In my opinion, it does not belong on a $150 banquet menu.

As I have previously acknowledged, lockdown has been brutally tough for Melbourne's CBD restaurants. Taxi's Providoor offering shows signs of fatigue. Hopefully its longevity and uplifting views will help it find fresh inspiration when it reopens in the near future. ■

Shaun Ginsbourg is a hungry barrister.

COFFEE

Islamic Museum café
15A Anderson Road
Thornbury
www.islamicmuseum.org.au/cafe

During lockdown, the path along the Merri Creek in the inner north has been as busy as Bourke Street with workers and families escaping their desks at home. Alongside the Thornbury section of the path, the Islamic Museum café has been doing a brisk trade catering to passersby with its Antico coffee "slow roasted" in nearby Brunswick, as well as house-made wet chai with whole roasted spices, and a range of snacks and wraps ideal for in-hand dining, such as the Middle Eastern breakfast wrap with fried eggs, spinach, sujuk (spicy sausage) and haloumi. Once restrictions ease, outdoor seating will resume in the museum's pleasant courtyard. **KD**

WINE *By Jeni Port*

Pizzini Il Soffio Prosecco 2019
RRP $28

Like a soft summer breeze, Il Soffio delivers a refreshing – and different – look to the usual prosecco. One that is more delicate, fine-edged and complex in taste, that comes from a single vintage rather than the usual non-vintage. Apple blossom, jasmine scents with preserved lemon hints at a slight savouriness ahead. The palate explores apple, brioche, pear and delivers a soft and lasting effervescence.

Enjoy with chips and olives.

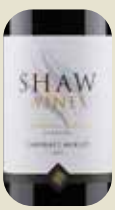
Stockist: www.pizzini.com.au, Dan Murphy's Prahran and Brighton.

Miles From Nowhere Best Blocks Chardonnay 2020
RRP $25

A Margaret River chardonnay for $25? Got to be kidding, right? And did I mention it's one smart wine, well made, that fills the mouth with plenty of Marg's luscious summer stone fruits? Nectarine, white peach, melon and citrus are the wine's fresh and lively signature. Fruit is ripe, the palate is bright aided in large part by brisk acidity and oak is settled in the background providing a warm, textural quality.

Open with barbecue prawns.

Stockist: www.cloudwine.com.au



Shaw Wines Winemakers Selection Cabernet Sauvignon Merlot 2019
RRP $20

Canberra is best known for its shiraz, but here cabernet sauvignon (57 per cent) and merlot (43 per cent) join forces to put forward a strong case for Bordeaux varieties in the district. They also hit the right price spot. The immediate impression is one of balance with fruit, oak and tannin in harmony. Delivers black berries, spice and some merlot aromatics that are immediately engaging. Follows through on the palate with one soft, easy-going red that is so more-ish.

Enjoy with Italian meatballs.

Stockist: www.shawwines.com.au ■

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

PASSING THE TIME

HOBBIES CAN BE DIVERTING DURING A BAD SPELL.

Human beings have over the centuries found many different ways to pass their free time. WADR won't go into some of the more unsavoury ones but things that readily spring to mind include sport, hobbies and shopping for stuff we don't need.

The law is one of those professions that often doesn't allow a lot of down time, in our 24-hour "always on call" world, but lawyers like many people are enthusiastic hobbyists.

The dictionary definition of a hobby is "an activity done for pleasure or relaxation during one's leisure time" and it should not be confused with an interest.

A hobby requires continuous engagement which is where it differs from an interest, an activity that you can dip in and out of depending on your mood.

For instance the law could be an interest for a person who is not a lawyer but is unlikely to become a hobby unless you are a member of Melbourne's underworld, where continuous engagement is a necessary part of the job.

A person might not practise witchcraft as a hobby but find the subject fascinating. In fact your correspondent did try witchcraft once but unfortunately flew off the handle during a bad spell.

One of the results of the COVID-19 pandemic has been that many of those stuck at home have taken up a new hobby or perhaps revived something they gave up years ago.

If you are at a loose end you might choose sailing as a hobby since that is where the term originates but there are many others. Sewing, baking, knitting, learning a new language, painting, photography, restoring old furniture, scrapbooking, jigsaws, collecting clocks or autographs. The list is endless.

As a child your correspondent went through numerous hobbies. Stamp collecting was a passion for a while until I realised philately will get you nowhere. There was also football card collecting and fishing, a hobby that didn't catch on because I liked eating fish but didn't like killing them.

It is claimed that you can tell a lot about a person from the hobbies they choose. Your correspondent is friends with the most mild mannered of couples who are horror movie fanatics, leaving me to wonder if I should leave cutlery lying about when they visit.

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.

If you can indeed tell a person from their hobby what does that say about some well-known faces? Model railways seem to be an obsession with musicians and actors, including Rod Stewart, Elton John, Tom Hanks and Frank Sinatra who had a massive train system that was a miniature copy of his home town of Hoboken. Hanks also collects vintage typewriters.

And who would believe Ryan Gosling is passionate about knitting? Angelina Jolie not only looks daggers at ex Brad Pitt but collects them as well. Brad by way of contrast makes pottery, Taylor Swift makes snow globes and Paris Hilton restores vintage radios.

Some people claim that drinking red wine is a hobby and who am I to argue? And if you plan to take up the trumpet or the bagpipes perhaps you should check with your neighbours first. ■

ADOBESTOCK

PRACTISE SELF-COMPASSION

NOURISHING YOUR PERSONAL RESOURCES IS NOT ONLY GOING TO HELP YOU ENJOY LIFE MORE BUT CAN ALSO HELP SUSTAIN YOU AT WORK.

In the era of COVID-19, we often talk about just getting through it and what we need to do to survive the mental health challenges of lockdowns and social isolation. Putting our bodies and our minds into this constant survival mode can lead to high stress and poor wellbeing for individuals and communities. No one individual can solve a society's problems, but by focusing on improving our individual wellbeing, we can help to benefit our community, our friends and our families.

Improving our wellbeing is inevitably more complicated than simply putting on a relaxing song and hoping for a zen state to wash over us. Seeking counselling or coaching support when stressed can be a helpful step, but it is often akin to clearing out the gutters when the house is already aflame. Figuring out how to resolve potential issues in your life system, whether that's work or personal, before they threaten your sense of wellbeing is key.

Your life away from work can be a place to draw energy from but all too often it can be the place where the cost is most deeply felt. Often the weight of holding things together in the day is let go at home and can manifest in unhelpful lifestyle practices, damaged relationships, withdrawal from partner, family or friends and a lack of engagement in hobbies and interests that can sustain us. Focusing your effort on fostering your personal life to be the strongest it can be is not only going to help you enjoy life more but can also help sustain you at work.

Treating yourself with the same level of importance as you would a big contract, project or client engagement is a great way to promote your wellbeing. Treat your relationships with your partner, family and friends as the precious resources they are and focus on how you nourish them, not just draw from them.

At work, consider what costs you energy and what supports you to feel energised. For each person that might look different. Bakker and Demerouti's Job Demands-Resource model is a great place to draw inspiration. It suggests that stress and strain is a response to an imbalance in the resources and demands an individual faces in their work.

If you can alleviate some of the demands in your role – whether that be your workload, inefficient processes, or the emotional demands of having a caseload of exacting clients – this is a proactive and preventative approach to reducing stress. Eliminating demands is probably not a workable solution for most of us so making sure you have the right balance between demands and resources and crafting enhanced resources into your role is time well spent.

Trying to maximise your resources, which can include the support between yourself and your manager, your co-worker relationships, the freedom you have to do your job and role-clarity, all help improve your wellbeing.

Practically, this might mean seeking mentoring in an area where you lack knowledge or skill so you can get through your work more efficiently. It could even be as simple as having a walking meeting so you can talk while getting the physical activity you need to feel energised. More complex imbalances like unequal workloads or under-resourcing may be something you will need to involve others in your work system to solve.

When you are in the thick of feeling stressed, and feel inadequate to the challenge or doubt yourself, try talking to yourself with the kindness you would show to a loved one. Practising self-compassion by being understanding towards ourselves when we suffer is far more effective than avoiding our pain, criticising ourselves further or getting stuck in the suffering. First, be aware of when you are not self-compassionate and are instead basing your perception of a situation on a self-critical thought or feeling. For instance, if you feel nervous that you are not going to meet that work deadline reassure yourself it is OK to be nervous when you have an important deliverable, which in turn can help lower your worry.

Not sure where to start and what to tackle first? Think through what is most important to you, how you want to be known, and pursue those goals and values. The greater the alignment between your values and your behaviours, the more likely you will live well. Seeking the support of a counsellor, coach or psychologist can help you figure out what's important to you and support you in achieving your life goals. ■

TIPS

- Treat yourself and your wellbeing with the same level of importance you would a big contract, project or client engagement.
- Consider what energises you and what depletes your energy at work to try to craft the right balance between job demands and resources.
- Identify what matters to you so you can strive for this and practise self-compassion when you are struggling to do this.

Rachel Joustra is a clinical and organisational psychologist working across government, private practice and consultancy. She was assisted in final editing by Stephanie O'Halloran and Cathryn Kamizay who are master of organisational psychology students from Deakin University.

ADOBE STOCK

Bonnie Logan

CAMPAIGNER ASKS WHY 'HE' STILL DOMINATES

DURING LOCKDOWN, LAW STUDENT BONNIE LOGAN DECIDED TO DO SOMETHING ABOUT MAKING VICTORIAN LEGISLATION GENDER NEUTRAL.

BY KARIN DERKLEY

The fact that masculine pronouns still pepper much of Victoria's legislation has troubled final year student Bonnie Logan through her time at Monash Law School. "It's so frustrating reading it all the time. Even lecturers apologise that the wording is so outdated," she says.

Reading or hearing gendered language in class just confirms the notion that men are the norm and that "anyone who is not a man has to work around that", Ms Logan says. "Gendered language is a massive contributor to sexist attitudes, which is then a contributor to all sorts of gender issues. It's particularly important when it's in the text of our law."

A drafting direction issued in 2016 requires new legislation passed by the Victorian Parliament, as well as any amendments to existing legislation, to be written using gender neutral language. But Ms Logan says masculine pronouns are often left unchanged in amendments. "And what about all the legislation that is not likely to be amended for a long time, like the *Crimes Act*?"

Ms Logan says she and her fellow students regularly change the language in their own notes to more inclusive terms such as "they" or "a person". But stuck at home during lockdown, she decided she had had enough.

"During lockdown I had more time to act on the social justice issues I've always been dedicated to, and I thought: why can't we do something to change this? In lots of ways we have progressed so much as a society. We've got so many progressive laws. And I think the text of the law should be given the same amount of attention."

In June this year, Ms Logan set up a petition on Change.org calling for all existing legislation to be revised to employ gender neutral language. The petition garnered more than 700 signatures, with many responses expressing surprise this was not yet the situation in Victoria. That led to an article in *The Age*, and then to a meeting in July with representatives from the Attorney-General's office, the Department of Justice and Community Safety and the Minister for Women's office.

"I went in with a high bar, with the idea that if we got something under that, at least I've tried," she says of the meeting. "I wanted them to implement some sort of reform to change all of the pre-existing provisions that haven't been touched and that probably won't be for a long time. I said, perhaps you could amend just one act a year."

Even if they weren't prepared to legislate, they could at least tighten the existing policy which requires provisions to be made gender neutral when they are amended, she suggested. "Because the policy that is in place right now is not working."

The meeting was "interesting", she says, if not yet conclusive. She has been told the Department of Justice is in discussion with the Office of the Chief Parliamentary Counsel about a possible solution.

A Victorian government spokesperson told the *LIJ*: "We know how important it is to use inclusive language in all aspects of work and life. We will continue to look at ways to modernise our legislation and justice system to ensure it is inclusive for all Victorians regardless of their gender".

Ms Logan's campaign has had a number of high profile supporters, LIV president Tania Wolff among them. Ms Wolff said the LIV supports reform that results in gender equality in the legal profession and the community. "Our laws are a reflection of our community and our values. If amendments to legislation such as the use of non-gendered language can be made to reflect a fairer, more inclusive community, then that is a good thing and we wholeheartedly support it."

Other supporters include the Public Sector Gender Equality Commissioner Dr Niki Vincent, the dean of La Trobe Law School Professor Fiona Kelly and Human Rights Law Centre senior lawyer Kieran Pender. "It's been great to have that support," Ms Logan says.

But in terms of the day-to-day effort involved in running the campaign, the research, the emailing, the meetings and the follow-ups, "that has just been me," she says.

While she will be delighted if one day her campaign leads to change, this is not the beginning of a career in feminist law reform, she insists. Her dream is to be a barrister and an academic specialising in wrongful convictions. "That's been my passion since I can remember. I want to practise, and then get my PhD researching miscarriages of justice."

But fighting for equality, and in this case gender equality, is something she says she intends to do throughout her career. "Just by being a woman in the law, you are doing something for gender equality," she says. ■

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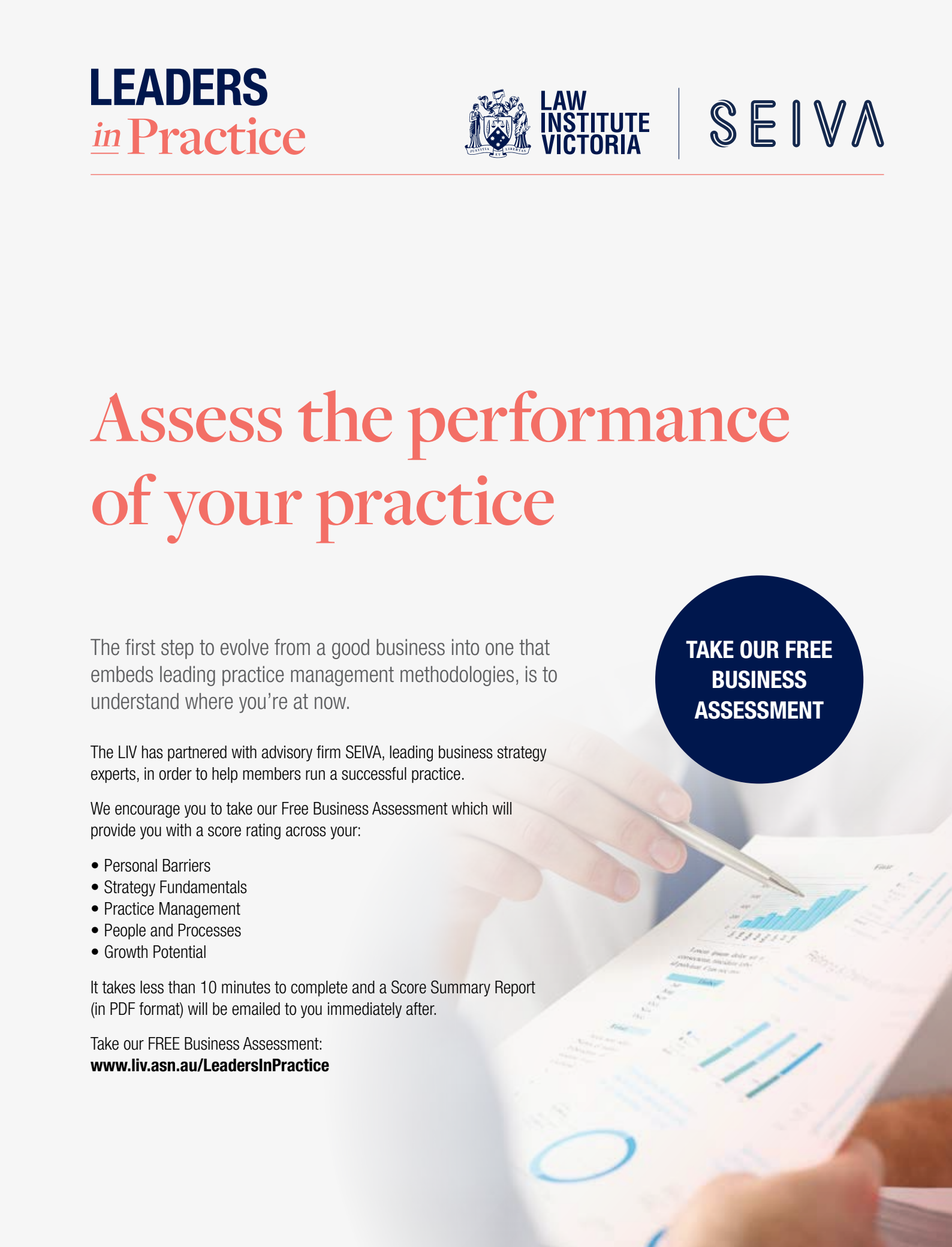

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