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LAW INSTITUTE JOURNAL

MAY 2019

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Cover photo of Attorney-General Jill Hennessy by David Johns

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Kristina Kothrakis
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Governing for the times

Your responses to an LIV member survey have given us valuable feedback that we have incorporated into our strategic planning.

The LIV celebrated its 160th anniversary in March. As detailed in Simon Smith's article in March *LIJ*, 26 men came together to form a society to set standards for the local profession and established relevant practice areas for solicitors in Victoria. Originally Melbourne based, the LIV became Victoria-wide as travel and communication became more accessible. It took almost 50 years for the first woman to be admitted to practice in Victoria and join the LIV, yet now more women are in practice as lawyers than men. A welcome change. Now the LIV must continue to grow and reflect the diverse community that makes up our legal profession.

The LIV has evolved over in its 160 years. It has developed as an ethical adviser, educator, regulator, advocate and change agent. We have had different homes, now residing in a purpose led fit-out on level 13 of 140 William Street – please come and visit us when you have the chance to look around. We are continually seeking to ensure we remain relevant to the membership, giving you what you want from your professional membership association. We value your feedback. Late last year we were privileged to have about 1000 members respond to a survey we conducted, which gave us feedback that we have incorporated into our strategic planning.

The LIV Council has approved a new strategic plan, vision and purpose for the LIV (see p20). Approving the strategy is one of the key tasks for LIV Council, it will guide the LIV in its decision and priority setting for the future. Relevance and value for members is at the heart of the strategic plan. It was developed by listening to your opinion about your membership organisation.

The Council has worked to ensure that the vision and purpose of the LIV match the bold promise of our new home, premises that we want you to use and feel a part of. As CEO Adam Awty says, the engine under the bonnet needs to complement the shiny new chassis. That is what this strategic plan aims to do.

In reviewing the LIV, it would be remiss not to look at our own governance structure. The onus on boards and directors to remain relevant, future focused and ready for the opportunities and threats that arise is more pronounced than ever. We are ultimately responsible for the successful running of the LIV, overseeing management as it implements operational plans that have been agreed. We must make sure that the culture of the LIV, for staff and members, is respectful, inclusive and conducive to achieving the goals we have set.

The corporate governance lessons from the Banking and Finance Royal Commission are relevant for not-for-profit organisations like the LIV. Are we fit for purpose to deal with the challenges that contemporary boards face? The Council has established a taskforce to investigate and review our current practices, and make recommendations on whether reform is required. We have given the taskforce a broad remit, with the clear guidance that consultation with the membership is essential for the success of any recommendations that arise from its work.

The Council Is expecting a preliminary report to be provided in December 2019, with further work to continue in 2020. We want to get this right so have given it time to consider all the options. Member input can be provided in various ways, including using the board email address of secretariat@liv.asn.au for suggestions and comments.

2019 is an exciting time. I will be travelling around Melbourne and Victoria meeting with members, discussing the strategy, and encouraging suburban and regional law associations to develop their own strategic plans informed by the LIV's activities.

I look forward to hearing from you all about the exciting activities here at the LIV. ■

Stuart Webb
LIV PRESIDENT *president@liv.asn.au* *@livpresident*
BLOG *www.liv.asn.au/Staying-Informed/Presidents-Blog*

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tweets

Our CEO Joanna Fletcher tells @theLIJ that the paltry funding allocated to legal aid in #Budget2019 means our org "will have to continue to turn away vulnerable women who need legal assistance, especially in areas such as family law."

@WwomensLegalVic

Assoc Prof @JasonBosland and Prof @jeremy_gans discuss suppression orders in the latest edition of the @theLIJ.

@MelbLawSchool

Last year the Court of Appeal allowed evidence to be admitted despite being obtained from a mobile phone that was unlawfully seized and searched: McElroy & Wallace v The Queen [2018] VSCA 126. For an overview, read my [November] piece in the @theLIJ

@paulmcgorrery

Kellehers Australia Director @LeonieKelleher expands on her 40-year career with an article in @theLIJ Environment Special Edition [March] concerning the future of environmental law and the critical role lawyers can play into the future.

@Kellehers_Aus

This is an excellent initiative and new approach by our Courts. Educating the public is essential: Going public in Court's defence - Law Institute of Victoria.

@timfreemanlaw

Justice Ferguson is championing the power of the spoken word in a new @SCVSupremeCourt podcast called Gertie's Law via @theLIJ

@SACvic

Our Adjunct Professor Dr Simon Smith AM shared a snapshot of the LIV's history in this month's @theLIJ. It starts on page 13 of the [March] issue and is also available to members.

@CowenCentre

I hate the way the tabloid media is always calling for the key to be thrown away.

@JamesE357

@theLIJ have you read the voices of Aboriginal and Torres Strait Islander children in Vic's youth justice system in @Ngaga_dji report? We'd love to see it featured in LIJ.

@Ngaga_dji

LETTERS TO THE EDITOR

Email: letters@liv.asn.au
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Court on camera

PHOTO: HAYLEY COATES

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1 The Ballarat and District Law Association celebrated its 160th anniversary at Craig's Royal Hotel.

LIV CPD Intensive

2 The LIV held its CPD intensive at the Sofitel Hotel on 22 March.

3 LPLC risk manager Phillip Nolan, LMI Group managing director Professor Allan Manning, Bedelis Lawyers consultant David Hart and MinterEllison partner Cameron Oxley discussed cyber security, insurance and risk management at the Property Law CPD intensive.

LIV Council honours

4 Former LIV president Reynah Tang wears his Order of Australia (AM) medal received at Government House on April 5.

5 Receiving his Order of Australia (AM) medal from Victorian Governor Linda Dessau was LIV Council member Tom May.

6 Tom Callender, with his wife Ann, celebrated 50 years of service with Rigby Cooke Lawyers.

Court on camera

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LIV office opening

1. LIV president Stuart Webb and Victorian Attorney-General Jill Hennessy cut the ribbon to celebrate the official opening of the LIV's new premises at 140 William Street, as well as its 160th anniversary.
2. LIV president Stuart Webb with LIV past president Rowland Ball and Court of Appeal president Justice Chris Maxwell.
3. Attorney-General Jill Hennessy with former Victorian premier John Cain and LIV past president the Hon David Jones.
4. Chief Magistrate Peter Lauritsen, Minister for Corrections Ben Carroll, LIV Council members Brendan Lacota and Molina Asthana, and Solicitor for Public Prosecutions John Cain.
5. Law Council of Australia CEO Jonathan Smithers, LIV past president Steve Stevens, LIV president Stuart Webb, LIV past presidents Steven Sapountsis and Peter Gandolfo.
6. Victorian Legal Services Commissioner Fiona McLeay and Victoria Legal Aid's criminal law executive director Dan Nicholson.
7. LIV events coordinator Penny Mure (right) with members at the interactive screen.

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Victoria's second only female Attorney-General: Jill Hennessy

ATTORNEY-GENERAL CALLS FOR TRANSPARENCY

THE ATTORNEY-GENERAL JILL HENNESSY WANTS TRANSPARENCY IN THE JUSTICE SYSTEM – A BELIEF HONED DURING HER TIME AS A LAWYER. **BY CAROLYN FORD**

Eight weeks into her role as health minister in 2014, data around the preventable deaths of 11 babies years earlier at Djerriwarrh Health Services in Bacchus Marsh landed on Jill Hennessy's desk.

Risking re-traumatising the parents and further fallout, she resolved to tell the truth about what happened – a course of action she credits to ethical legal training at her former firm.

"It was a great dilemma," Ms Hennessy recalls. "Do you go back to someone who lost a baby 10 years ago and say, you thought this just happened or that it was an accident, but in fact it was preventable because of poor-quality care? You think of the grief you will cause.

"I had a very ethical partner when I was a young lawyer and I often reflect on the value of that. If you think living your ethics and integrity in law is hard, you should try it in politics.

"Having that professional socialisation of not covering things up, to not be dishonest or err on the side of spinning deceitfully, were really important lessons for me as a politician.

"As a minister, being able to say to bureaucracies and your staff, if you tell the truth and try to do the right thing, you might be criticised for a while but that is a better option than covering things up.

AG'S TOP PRIORITIES

- Royal Commission into Management of Police Informants
- Transparency in the justice system
- OH&S law reform – workplace manslaughter, wage theft and sexual harassment
- Diversion programs
- Victim-sensitive justice system

"It was controversial and hard to live through. I had some very difficult conversations. But that drove a fundamental change in our quality and safety structure. One mother wrote to me saying, 'for the last 10 years I thought it was something I did, that I ate something or didn't do what the doctor said'.

"These are all the decisions you have to make as a politician. I think of that partner I worked for. He was honourable in every sense of the word and I am grateful for those lessons."

Ms Hennessy had another early, explosive ministerial start, this time to her term as Attorney-General, in late 2018. And again, although in starkly different circumstances, it went to ethics.

She had only been in the job 72 hours in early December when the call for a Royal Commission came around management of police informants.

After an all-consuming election campaign, the mother of two had planned a summer holiday of swimming and fish and chips on the beach with her family but without the work phone.

"That all went out the window when I was called in to develop and announce the Royal Commission. I put everybody in the car and said have a good time.

"Any sense I was going to have a slow and peaceful transition into the role quickly imploded. [The Royal Commission] has been the focus of my time and energy in the first few months, but it has calmed down a bit."

She describes today's legal landscape as "issues-rich" or, as she wryly observed recently, more a seven-course degustation menu than a so-called lawyers' picnic, which may be her way of facing down what she has on her plate.

Victoria has seen a proliferation of issues in the legal profession and the justice system.

Royal commissions, suppression orders in the digital age and Open Courts era, contempt laws, committals, judge-alone trials, mental health of judges and lawyers, the workplace, training of lawyers, technology challenges, legal aid funding, spent convictions, the list goes on.

It's all a long way from health. Four years there, she admits to missing the giving people – and the budget of $26 billion, one-third of state resources – "but it feels like another part of my brain is being exercised in this role", which she welcomes.

Ms Hennessy is Victoria's second only female Attorney-General – out of 54 attorneys general – and a first for the state Labor Party in a gender balanced cabinet. She is a graduate of Monash University and completed a Masters of Public and International Law at the University of Melbourne. She practised at Holding Redlich in personal injury and employment law before working as a political adviser to then Premier Steve Bracks then going on to win the seat of Altona in 2010 in a by-election.

In March, the state's first law officer sat down with the *LIJ* and in a wide-ranging interview talked about her ambitious legislative agenda – "I'm up for it, I'm not afraid of difficult issues or debates" – gave her view of challenges for the profession – "those slow to modernise do so at their peril" and shared thoughts on being a working parent – "I think of it more as work-life collision".

Reputation of lawyers

Top priority for the Attorney-General is the Royal Commission into Management of Police Informants.

"There are a range of serious and challenging issues that are going to be canvassed, but I'm confident we have processes in place to establish the facts, look at how we came to be in these circumstances and get assurances we will never be here again," Ms Hennessy says.

"Lawyers still deserve to have a strong reputation as people that take their ethical obligations very, very seriously. One of the great challenges of the Royal Commission [is] that it has put a strong focus on the behaviour of a very small group of people, as I understand it.

"It always feels unfair when a potentially bad apple defines and taints the rest of a profession. I think that lawyers still have a very strong basis to rightly and proudly have a sense that their integrity and ethics are not sullied as a profession."

She said it was important for the opportunity it brought to assure people there were responsive structures in place, educate the community about lawyers' obligations and share the "incredible contribution" many lawyers make.

"This is the exception and not the rule, but I understand that when your profession is on the front page of the morning newspaper, day after day, it can have a cultural effect around how you feel the community might perceive you. I'm confident that most people understand most lawyers do the right thing and often make an enormous contribution to the general economic and social wellbeing of our community."

The LIV had, she said, played a critical role in the development of the informants Royal Commission. It will also be making submissions.

"The role the LIV and others have played in the development of the Royal Commission has been critical around confidence, having people who are able to bring expertise and insight.

"It's very easy for government to believe it can see all angles of an argument, but often it doesn't. Having the public service supplemented with the voices of others is critical.

"Professional associations making a contribution to policy development leads to better public policy and law, but it also helps us learn about other pressing professional issues. All of those things benefit from having the view of a professional association.

"The LIV is a credible and respected organisation and institution and their contribution to public policy counts. That doesn't mean that we will always agree, but I will meet with the LIV regularly and always ensure its view is given probative weight. It's never a view I would dismiss.

"I am accessible and not one to avoid disconfirming evidence. I'm not afraid of difficult issues or debates."

Suppression orders

Ms Hennessy "desperately" wants Open Courts reform. "We want to be publicly transparent, to have an open, modern justice system. I want the community to have great confidence in it, and I want to be a great advocate for it."

The hot-button issue of suppression orders is a piece of the puzzle, but on that particular tension, Ms Hennessy anticipates "living with imperfections".

Their "enthusiastic, regular" use by Victorian courts prompted the 2017 *Open Courts Act 2013* review by the Hon Frank Vincent. The issue flared up around the George Pell matter and dozens of journalists, editors and publishers face sanctions after alleged breaches. The Law Council of Australia (LCA) has called for national uniformity around their use and a review.

"Suppression orders make people suspicious and think that something is being covered up, hidden. People tend to give greater weight to that emotion than to the abstract concept of the importance of a fair trial.

"The competing interests of open justice and fair trials are even more challenging in the digital world we live in. People are consuming their news and information from digital platforms in international jurisdictions beyond our regulatory reach.

"We are not going to defeat the international digital environment. How do we protect fair trials? How do we not have a culture in the law that says, oh well, we will just let suppression be our automatic response?

"We need to have cultural and legal change, but we don't want to do that at the expense of the right to a fair trial. And ultimately, we need a sensible national approach. Seeing something published in NSW but not Victoria is not very effective.

"I don't think we're going to get a perfect solution.

"At some point we may have to live with some imperfections, that people can access information internationally, that people are forced to just trust juries."

The government has accepted most recommendations made in the Vincent Review. It will assess their impact on numbers of suppression orders before deciding on the recommendation of appointment of a Public Interest Monitor.

Also, the VLRC is considering contempt laws and committals and departmental work is underway on judge-alone trials.

Everything is on the table

"I don't dismiss anything. We have suppression orders, judge-alone trials, the potential abolition of committal hearings to come. They are matters that inter-relate and they are all on the table.

"A dilemma around judge-only trials is that we want people to have confidence and trust in juries. I don't support a patronising view that the lawyer knows best. But at the same time, a judge-only trial might be a way we can achieve a fair trial but have greater openness of that trial.

"The risk in public perception, that perhaps only famous people get access to judge-only trials, is a concern. We are looking at models interstate. That is a potential panacea against having suppression orders used with great enthusiasm and regularity, which is the perception in Victoria, fairly or unfairly."

Work on suppression orders is due by the end of the year, when cabinet will consider recommendations and legislative reform.

"My ambition is to have the suppression orders and judge-alone matters dealt with concurrently in the next two years.

"It's a fascinating topic. It takes in the right to know, the right to a fair trial. The other important aspect is the rights of victims of sex offences. They are prohibited from talking about their experiences until the end of a trial, so an important part of the Open Courts reform is enabling victims to talk about their experiences without offending a suppression order."

Under the *Judicial Proceedings Reports Act*, it is potentially an offence to name a victim of sexual assault – even if they give their permission. Legislation before parliament provides a clear process that would allow victims of a sexual offence to share their experience after conviction of the perpetrator.

Committals and spent convictions are also on the radar of the Attorney-General, who puts victims' rights high on her list of priorities. "My starting position is that there is a baseline compelling case for us to look at the abolition of committals, or a significant reduction in their use. The challenge is, how do you test the evidence?

"It's not just around efficiency and how quickly a person – accused or victim – gets access to justice, it also goes to the trauma a victim is exposed to, having their evidence tested at different times, sometimes without right of reply.

"We can look to the experience of other states, not perfect, but we are looking at other options. That report is due in 2020."

She said there was more work to be done on spent convictions. The LIV advocates a spent convictions scheme. "The debate is about what convictions, when and who decides. Do I have a cabinet decision in support of that? No, but there is an appetite from the Parliament to look at that issue."

George Pell live to air

More generally, the justice system needed to be transparent, Ms Hennessy said, and applauded Chief Judge Peter Kidd for his live sentencing of George Pell.

"Chief Judge Kidd's broadcast was a moment in time where people really started to understand the complexity [of court decisions]. You are on the train and

you hear people discussing it. That was a great moment in time for our justice system in terms of building insight and awareness. It was a unique set of circumstances, but the more we are able to demonstrate to the community that no one is trying to hide from public scrutiny on these issues and that actually making decisions in many of these trials is difficult and complex, giving insight and awareness of that, the better.

"As well, the Supreme Court has just released a podcast [Gertie's Law]. I think the Chief Justice has shown some important leadership.

"I am supportive of any initiative for the courts to be open and transparent. I know this is an issue that the heads of jurisdiction are very committed to. It's not a simple and easy task but there is strong acceptance that the greater insight we give the community on sentencing decisions the more informed it will be and the less we will have fact-free debate and outrage."

Best in show

The legal workplace is also in Ms Hennessy's sights. She wants to see a modern update that attends to health and wellbeing, is free from discrimination and harassment, gives people fulfilling, lifelong careers recognising parenthood, ageing parents, professional development and graduated retirement.

"Modern management needs to do that. I believe you can do that at the same time as you make a buck. Competition for the best and brightest means that those slow to the party do so at their peril. They will lose them to the public sector or consulting firms whose model is more flexible than traditional law firms.

"I've got the VGSO targeting people across the sector, saying come and work for us. We'll give you balanced hours and access to interesting work.

"The hard stick around it is Worksafe prosecuting law firms that do not manage workload. We had an example of that in the financial services Royal Commission. We will see a rise in the expectation around those issues as the mental health Royal Commission unfolds.

"I think it's really important that the legal fraternity get involved in the mental health Royal Commission."

Ms Hennessy also wants to strengthen OH&S laws around workplace sexual harassment, and otherwise drive gender diversity. "The government's legal services panel looks at the OH&S record of law firms, female promotion, the number of female briefs given and the value of those briefs. When government spends the enormous amount of money we do on private sector legal services, we are looking for best in show. Smart law firms are getting ahead of the game. This is not a fad."

Work-life collision

"I call it work-life collision, that's what it feels like to me," says Ms Hennessy of her experience as a working parent. In her own marriage, she expects shared parenting. "There is a great price to be paid if you are the partner of a politician and my husband pays that price and then some. I don't demand much more than that except equal parenting when you've both got really busy lives.

"We want men stepping up to their parenting responsibilities. Until we get people taking equal responsibility for parenting and domestic obligations, the collision between work and life for women will continue to feel impossible."

Imposter syndrome

Working as a lawyer had been terrific and demanding. "It's incredibly competitive when you are doing your articles about who gets kept on. And women often feel like an imposter. Am I meant to be here? Am I smart enough? Am I good enough?" Ms Hennessy says.

"I didn't [feel that way], eventually."

With an interest in law and politics [also Western Bulldogs and the Rolling Stones], the young Jill Hennessy hightailed it to Monash University. "I just wanted the opportunity to go to university. I had the expectation that this would be the great escape from suburbia. I got there and I was pretty lonely in my first year.

"There were not a lot of people from my 'hood."

At Holding Redlich "I remember walking in and thinking everybody looked so well dressed and proper.

"I think success in a workplace is when you find your people, those you can be authentic with.

"I was lucky to work with an irreverent, smart group of people and we used humour to cope. We didn't take ourselves too seriously. I thought they'll either like me or they won't.

"I mainly worked 8-6 which was reasonable. I have very fond memories, it was a terrific experience."

Man buns and barbers

The western suburbs girl married a western district boy (Dimboola). He works in financial services. The couple, their two children and dog and cat live in the western suburbs where, Ms Hennessy says, the gentrification can be measured in man buns and barbers.

"It's an area of great Vietnamese migration. I've always lived in great, culturally diverse communities, as have my kids. When I walk into a room that looks and feels very white I notice it.

"I have been struck by the lack of cultural diversity around senior levels of the legal profession. There has not been a pipeline of people from different cultural backgrounds going into law so I'm interested in fixing that. How do we build a pipeline of people who are diverse and can contribute not just as judicial officers but as crown counsel or other roles. We have got a way to go with structure and culture.

"I bring a great interest in people with different life journeys. I think the era of the legal profession being dominated by a few elite schools is over and that's not a bad thing."

First female Vic Labor AG

Ms Hennessy brings change just by being in the role. She is proud to be state Labor's first female Attorney-General. "I'm proud of the achievement. I wasn't one to get out of bed every day to climb the greasy pole and get to the top. I'm humbled and honoured and grateful we live in a community where you can come from an economically challenged background, get the value of education and assume positions of responsibility and trust that have great reform potential. I feel a responsibility around that." ■

GROUP EFFORT SAVES LIVES

MORE THAN 100 LAWYERS HAVE BEEN PREPARED TO DROP EVERYTHING OVER THE PAST YEAR TO HELP BRING DESPERATELY ILL ASYLUM SEEKERS TO AUSTRALIA FOR TREATMENT. **BY KARIN DERKLEY**

Pro bono lawyers involved in saving lives on Nauru and Manus Island: (from left, front row) Russell Kennedy special counsel Emma Dunlevie, Phi Finney McDonald lawyer Olivia McMillan, Russell Kennedy pro bono senior associate Arti Chetty, Holding Redlich pro bono coordinator Guy Donovan, Maurice Blackburn social justice senior associate Nicki Lees, and barrister Matthew Albert

PHOTO: DAVID JOHNS

Medevac


HRLC's David Burke

The call came late in the afternoon on 3 September 2018 as Phi Finney McDonald lawyer Olivia McMillan was working on a class action matter. It was David Burke from the Human Rights Law Centre (HRLC).

A 10-year-old Rohingya boy in detention in Nauru was experiencing severe symptoms of resignation syndrome, he said. Resignation syndrome is a life threatening psychiatric condition in which sufferers go into a profound withdrawal.

"The boy was catatonic, not speaking, not eating" says Ms McMillan, an associate with the law firm. "David said, he's really sick – can you help?"

Putting aside her other files, Ms McMillan spent the next few hours reviewing the boy's medical records and talking to his father through an interpreter on Skype about his son's symptoms. "He was pretty distressed but he was also very grateful that something was being done for his son."

Over the next couple of days she worked with a medical expert to compile the court documents that showed the boy needed urgent inpatient psychiatric treatment.

On 5 September, the case went before the Federal Court, which issued an interlocutory injunction to ensure the boy would be moved to Australia to receive the medical treatment he needed.

"It all happened incredibly quickly," Ms McMillan says. "At this point people are very unwell and every hour counts."

It wasn't the first time Ms McMillan had been asked to help with a medical emergency being experienced by an asylum seeker being held on Nauru. Her first case was when she was at Russell Kennedy and worked to help a mother and son with physical and psychiatric illness get airlifted to safety in Australia where they continue to get specialist medical care.

"You get a call asking if you have got capacity, which essentially means: can you put everything aside for at least the next week? Sometimes there's an imminent risk of suicide, so you don't have a long time," she says.

Ms McMillan is just one of more than 100 lawyers around Australia who have volunteered their time and expertise over the past year to help transfer people off Nauru or Manus Island to get proper medical help.

At a call from the HRLC,they have dropped everything, often working through the weekends to pull together the evidence that shows people are at imminent risk of their lives or long term damage unless they are removed to proper medical facilities not available on the islands.

At Russell Kennedy the pro bono team have been working on medical transfer matters since early 2018, helping to bring 11 refugees and their family members to Australia for urgent medical treatment.

Emma Dunlevie is special counsel in commercial leasing and dispute resolution at Russell Kennedy but has spent the past 10 years also volunteering on refugee matters. "It's an area I've always wanted to have as part of my legal work.

"It's one of the areas of greatest unmet legal need. You're working with people in really dire circumstances and it's where the rule of law is most tested because of the shifting goalposts. That's where lawyers are really needed to step up, usually on an urgent basis, to challenge these laws in an administrative law forum and a human rights forum."

Mustering the evidence to prove a client's medical emergency involves mobilising legal teams and medical experts to pull together the hundreds of pages of court documents required by the courts. "It's a big burst of work that happens in a short time," says Russell Kennedy's pro bono senior associate Arti Chetty. "These are really resource intensive acute matters that need a bit of a team to run them."

Clients or their family members are often highly distressed, demanding all a lawyer's listening skills to elicit the required information, she says. "We might have a suicidal client on the phone and we need their instructions and we need to manage their expectations and their health. You have to be very empathetic in order to build rapport and trust."

"The lawyer is sometimes the only person they can talk to on a day to day basis," Ms Dunlevie says. "Often the lawyer has to step in and play the role of family member or psychologist – often they're very isolated."

"You're not quite a counsellor," Ms Chetty says. "But we're talking about some pretty dire circumstances, so to do this work you have to be very empathetic and patient and acknowledge what is happening for that person."

The social justice team at Maurice Blackburn took on its first case in May 2018, that of a 2-year-old girl with a brain inflammation who was being transferred to Papua New Guinea even though it lacked the medical facilities to deal with this condition.

"It highlighted just how inadequate the healthcare system was on Nauru to provide treatment for sick children," says social justice senior associate Nicki Lees. Ms Lees and her team worked for days to obtain an interlocutory order from the Federal Court that required the 2-year-old, and both parents, be brought to Australia for medical care.

Along with the four full-time lawyers in Maurice Blackburn's social justice team, another dozen or so from across the practice have worked on the 10 matters the firm has dealt with in the past year.

"We have lawyers from employment law, class actions, medical negligence getting involved," Ms Lees says. "They're emotionally and physically demanding matters, but people are happy to help out because they realise they are really making a difference to people's lives."

One matter came in on a Friday night when the team was at a work function. "The evidence we got from doctors was that we had a 48-hour window to get this critically ill person proper medical treatment. We worked around the clock and were in the Federal Court by Sunday evening and got orders, and our client was on the next flight from Nauru."

Medical emergency cases in Australia's offshore detention centres are initially referred to the Asylum Seeker Resource Centre (ASRC). It has its own in-house lawyers, but passes on to the HRLC those it lacks capacity to deal with. The HRLC has

had a long relationship with firms such as Maurice Blackburn and Russell Kennedy, but a flood of cases last year prompted the HRLC to scale up its referrals to other law firms, including Holding Redlich, Robinson Gill, Allens Linklaters, and Carina Ford Immigration Lawyers.

Holding Redlich took on its first case in August last year, helping a family whose mother had attempted to take her own life and whose 2-year-old son was experiencing trauma as a result.

Pro bono coordinator Guy Donovan says the firm had become aware of the explosion in medical emergencies. "We knew the need had become overwhelming and this was a critical situation, and we were only too happy to help."

The firm has since taken on six matters, all but one of which have resulted in the minister consenting to the injunction order. The other went to court.

Out of the 150 matters that have been taken on by lawyers in Australia, around two-thirds have been quietly negotiated and settled with the government. Where the government either rejected or failed to respond to the request for medical transfer, a court appearance was the next step.

One of around 30 barristers acting pro bono as counsel for medical transfer matters, barrister Matthew Albert has taken on around 15 of the 50 cases that have gone to court. His efforts won him the John Gibson award for human rights and refugee advocacy earlier this year.

Given the constraints on time and resources, the bar for taking on a case is high, Mr Albert says: severe risk of death or permanent disability. "The only time we have been to court has been when there was a genuine and severe medical need for evacuation."

That conservative approach has been vindicated by the fact that every one of the cases taken to court was successful in achieving the injunction sought, he points out. "We have to stand up before the Federal Court judge and say this is urgent – and you don't do that unless it's true." He said expert medical evidence made it clear in every case that there was a genuine need that was dire.

Mr Albert says one of the impressive aspects of the medical transfer cases has been the willingness of the Federal Court to sit at extremely short notice, often over the weekend, to hear applications for medical evacuations.

"How lucky are we as a legal community and also as a broader community to have courts willing to sit in response to genuine medical need at literally all hours of the day or night and when required?"

But it's the efforts of ordinary lawyers, prepared to drop everything at extremely short notice, that has particularly made Mr Albert and others involved in the effort "immensely proud".

"We've had people from across the profession, from the very junior to partners of commercial firms and silks who have signed up to give up multiple weekends and evenings to do these cases at virtually no notice and with no funding at all," he says.

HRLC's senior lawyer with the refugeee rights team David Burke says the support of the legal community has been remarkable.

You're helping people who would otherwise die. People are really sick and we have the skills . . .

"It's been so inspiring to see the legal community come together at all hours of the day and night to respond urgently to seriously sick and vulnerable people," he says. "It has really reinforced for me the legal profession's commitment to access to justice. On multiple occasions when there was an emergency, we called firms on a Friday night and were in court that weekend fighting to have men, women and children brought to Australia for desperately needed medical care."

For Ms Chetty, the motivation for being involved in medical transfers and asylum seeker matters is straightforward. This area of law is really interesting, she says. "It's complex and it's rapidly changing. You get a lot of client contact and a lot of collaborative contact with VicBar because it's often litigious. If you have a social justice bent it's pretty satisfying if you get a good outcome for these clients."

Holding Redlich's Mr Donovan says that while the work is intense and gruelling, it is also incredibly satisfying for everyone involved. "People are motivated by being able to help people who otherwise wouldn't have access to justice and who, without access to a pro bono lawyer, would literally die. It's one of those few areas of law where you are actually involved in saving lives."

For Ms McMillan, work on medical transfer matters has been both professionally and personally satisfying. "You're helping people who would otherwise die. People are really sick and we have the skills to help them."

The boy, now 11, who was not long ago refusing to eat or speak, recently rang her to thank her for her help and tell her he is now at school and playing soccer.

"He'd never been to school before," she says. "He was so happy. That's a reward in itself – and for a little boy to understand what you've done for him is pretty incredible."

Postscript: The passing of the Migration Amendment (Urgent Medical Treatment) Bill 2018 means that people held in offshore detention centres who have been assessed by two doctors as requiring medical or psychiatric treatment that is not available on the islands will be transferred to Australia, unless the Minister for Home Affairs determines that they represent a security risk.

A Medevac Group has been established by the ASRC in conjunction with other legal and refugee organisations to create a referral process that allows people on Nauru and Manus Island to be triaged by medical professionals and supported by caseworkers. At the time of publishing, just one asylum seeker had been transferred to Australia under the new law. ■

LIV launches new strategic plan

THE LIV IS DEDICATED TO PROVIDING MEMBERS WITH HIGH QUALITY RESOURCES AND SERVICES AT EVERY CAREER STAGE.

A dynamic organisation with members' needs front and centre is the new direction for the LIV, which has launched its strategic plan for 2019-2022.

Approved by the board on 20 March, the new strategic plan comes after a major year-long review which considered feedback from stakeholders, members, staff and directors.

One key input was an extensive member engagement survey which provided qualitative and quantitative feedback on what was important to members in driving engagement and value. Other major inputs were management workshops, the Conference of Council where section chairs, suburban and regional law association presidents and others were consulted, and a staff culture survey.

"We sought your feedback, we listened and we have acted on it," says LIV CEO Adam Awty.

The LIV is dedicated to providing members with high quality resources and services at every career stage and to stay true to this, it asked members what they needed, their perceptions of the LIV and if they valued what was provided.

"Late last year we asked you for feedback via an extensive survey," Mr Awty says. "You told us you want personalised and relevant support and advice on ethics and compliance. You need competitively priced learning opportunities to enhance skills. You want us to advocate on your behalf, to promote your value to the community. And you want to connect with your peers.

"Sharing this valuable information helped us identify what is most important to you for your LIV to deliver on now and in the future. The feedback has formed the basis of the five strategic goals that the LIV will focus on over the next three years."

Resources and support, learning and education, influence and advocacy, promoting the value of members and providing a collegiate community are at the heart of the five goals spearheading the LIV's new strategic plan which has three components; vision, purpose, goals.

THE NEW LIV STRATEGY

2019-2022

Our vision

Partnering with members throughout their careers so they are best placed to deliver outcomes for and on behalf of their clients and the community.

Our purpose

To be the trusted voice of members, respected for delivering value to members, while driving excellence in the profession and steadfast in safeguarding the rule of law on behalf of the community.

Our goals

1. Provide members with personalised, relevant and engaging support, advice and services in areas of practice and management by:
- being a one-stop shop of high-quality tools, resources and insights to enable members to stay up to date with issues relevant to their practice
- delivering integrated practice support services to assist members meet and exceed their regulatory and compliance obligations, build their practice and develop appropriate succession plans
- providing members with a safe and secure environment to access support regarding ethics, wellbeing and issues of practice management

2. Provide relevant and value-based learning and education opportunities to enhance members' skills, knowledge and capability in running their practice by:
- providing access to relevant, flexible, valued professional development
- delivering market relevant accreditation and practice management
- producing enhanced e-learning opportunities.

3. Influence and advocate for impact within government, regulators and stakeholders on behalf of members, the profession and the community by:
- being an authoritative voice of members, the profession and community on issues related to upholding the rule of law
- developing informed member-driven policy positions and advocating for evidence-based policies and law reform
- influencing the legislative and regulatory environment in the public interest

4. Promote the value of members in the community and advocating the importance of the profession when sourcing legal advice by:
- actively promoting the value of LIV members, accredited specialists and practices to the community, to businesses and relevant stakeholders.

5. Provide a collegiate community of peers for members to connect and support each other throughout their careers by:
- welcoming, engaging and supporting members at all stages in their career
- attracting, developing and mentoring the next generation of members
- being a key conduit for informed consultations with government, regulators and other stakeholders
- supporting suburban and regional law associations.

Mr Awty says the five strategic goals will be enabled by a focus on:

- promoting an innovation driven culture underpinned by strong values
- enhancing staff and member facing technologies
- delivering contemporary and accountable governance
- ensuring sound financial stewardship.

"Together with our staff and board, we have already begun aligning our primary activities with your expressed needs," Mr Awty says. "You can expect to see continued improvements to resources and member support, learning and education opportunities and enhanced law reform and legal practice advocacy. We have a plan to more actively promote the value of our members and the legal profession, as well as provide a collegiate community for members."

2019 LIV president Stuart Webb says the strategic plan puts members' interests at the heart of the LIV's work. "We want you to value your membership of the LIV, to get out of it what you need to assist you pursuing your interests in the law and engaging career opportunities. Our vision sets this out, identifying that we want to partner with you throughout your career progression.

"We recognise that a career in the law is no longer a linear progression, that those who are entering it now will work in a different way and in a different environment to what has occurred in the past. We want to assist you as you develop and move in and out of roles and responsibilities. When you explore new opportunities, we will be there to give you advice and assistance.

You can expect to see continued improvements to resources and member support . . .

"We think this will set you up to be the best that you can be, for your own benefit, for that of your clients and our community."

Mr Webb says the new purpose provides a bold affirmation of the reason for coming together as a professional association. "We speak out on behalf of our members on issues that are relevant to our practice of law. We ensure that those who govern and administer our laws have the opportunity to hear directly from those most experienced with the practical application of the law, where it works and where it needs to be amended.

"We will ensure that those who practise the law do it with the highest ethical and professional standards. And we will do this on behalf of the Victorian community who look to us as valued contributors to a cohesive and inclusive society where opportunity arises for all. I look forward to working with you to make your LIV the best that it can be." ■

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Time to rethink conveyancing

USING THE PROFESSION'S EXPERIENCE TO BETTER UNDERSTAND THE KEY DRIVERS OF CONVEYANCING CLAIMS CAN PROVIDE IMPORTANT LEARNING AND HELP IDENTIFY AREAS FOR IMPROVEMENT IN A FIRM'S SYSTEMS AND RESOURCING. BY JUSTIN TOOHEY

If there is one thing that could reduce professional indemnity insurance premiums over time it would be to reduce the incidence and severity of conveyancing claims. LPLC is very focused on developing strategies to achieve this.

That is not to say that other practice areas don't carry claims risks, but rather to highlight the fact that mistakes in conveyancing transactions are becoming more expensive, having grown in recent years from an average of less than 20 per cent of total claims costs to more than 25 per cent and in some years more than 35 per cent (see contributing factors, p24).

In this month's *LIJ*, LPLC looks at the drivers of conveyancing claims across the profession with reference to a selection of themes. We go back to basics and look at:

- what is needed when preparing a section 32 statement
- why you cannot successfully practise in conveyancing without a good understanding of tax and stamp duty laws
- the perils of giving informal pre-contract advice
- why you need to spend time with your client understanding what matters to them and the context in which they are coming to you with instructions for a sale or purchase
- some specific traps in acting in off-the-plan transactions
- recognising when you are holding money as a stakeholder and the potential conflicts that can arise
- and some tips on how to transform an awkward discussion about fees with a client into a discussion about the value of your services in what for many of them will be the most important financial transaction of their lifetime.

Sell your clients peace of mind. When unexpected complications emerge in a matter, show them you care and do what good lawyers have always done and find a solution for them. It may be negotiating an extension of time for finance or for settlement, seeking expert advice from counsel in response to an untimely rescission notice, or it may simply be a telephone call to the furniture removalist to communicate a settlement delay. This is what can differentiate you from your competitors, and develop your reputation as a professional problem solver.

Finally, remember to immediately notify LPLC's claims solicitors when you have a problem with a conveyancing transaction that might lead to a claim against you. It costs nothing to speak to us and we have a team of experienced risk managers and claims solicitors here to help you.

We hope you find this special edition a valuable resource and an impetus to re-examine the way your firm manages conveyancing transactions for clients. The LPLC has a wide range of resources designed to inform and assist you at lplc.com.au. As always, we are very keen to receive feedback on ways we can improve our risk and insurance services for you.

SNAPSHOT

- Conveyancing is the highest risk practice area for negligence claims. They are becoming more expensive and consuming a larger proportion of LPLC's premium pool.
- The falling property market and tighter lending conditions imposed by banks create external pressures which historically give rise to more conveyancing claims against practitioners.
- Be vigilant to the most common themes and causes of conveyancing claims, and implement risk management strategies to prevent them in your own practice.

Factors contributing to high representation of conveyancing in claims

The complexity of property law ought not be underestimated, but that of itself doesn't explain why conveyancing is consistently the highest risk practice area for professional negligence claims. Other factors are at play and include:

- the mismatch between client expectations of conveyancing practitioners, the high standard of care which the law demands, and the fees clients seem willing to accept
- competition from licensed conveyancers, leading to the commoditisation of conveyancing, bringing with it less professional time from senior practitioners with deep subject matter expertise supervising transactions at critical moments – such as when taking a vendor's instructions for preparation of the contract and section 32 statement; or when advising about aspects of the transaction before a purchaser's contract execution; or upon receipt of certificates and search information analysing and appreciating the importance of information contained within them
- a misapprehension that conveyancing is low-skill process-work that anyone can do.

The recent move to mandatory electronic conveyancing has not contributed to conveyancing claims. Overwhelmingly, claims arise from defective documentation or inadequate advice about aspects of a transaction.

Property prices in Melbourne have fallen by 10-20 per cent in the past two years. Building approvals are also falling. The Hayne banking royal commission has put a spotlight on bank lending practices, with APRA-regulated banks having tightened lending controls and placed greater emphasis on responsible lending. Lower valuations are affecting the supply of credit for investors, homeowners and small business. We are hearing from practitioners with clients whose previous finance approvals are being reassessed and, in many cases, refused.

These external conditions affect the risk profile of conveyancing, and property claims historically rise at this stage of the economic cycle. Your risk antennae should be on high alert as property transactions in this environment carry increased risk of becoming contentious. The time is now for refocusing attention within your conveyancing practice on the finer details of matters being undertaken by your firm. ■

Justin Toohey is CEO of LPLC and has more than 30 years as a practising solicitor. He has managed hundreds of conveyancing claims against solicitors insured by LPLC.

Section 32 statements: the basics

IT TAKES PRACTICE, UNDERPINNED BY SOUND RISK MANAGEMENT, TO COMPLETE A SATISFACTORY SECTION 32 STATEMENT. WHAT PRACTITIONERS OFTEN GET WRONG – AND HOW TO AVOID IT – IS DETAILED BY HEATHER HIBBERD AND PHILLIP NOLAN

Providing satisfactory disclosure to meet the standards set by the *Sale of Land Act 1962* (Vic) (SLA) for every property transaction that crosses your desk requires significant legal knowledge and training backed up by good systems, processes and precedents.

This article contains details of some of the important aspects of the disclosure requirements to assist those preparing s32 statements.

The law

Section 32 of the SLA requires a vendor of real estate to provide certain written information to the purchaser before the purchaser enters into the sale contract. This is colloquially called a "section 32 statement" or a "vendor statement".

In practice, this usually means the vendor's legal representative prepares the s32 statement and provides it to the selling agent who ensures the signed statement is given to the purchaser before the contract is signed.

This summary of the delivery process may give the impression that the preparation of a s32 statement is straightforward. Given LPLC regularly receives claims each year about defective s32 statements, the data says this couldn't be further from the truth.

The content requirements of the s32 statement are prescribed in ss32A to 32J of the SLA, which will be discussed in detail in this article.

The consequences of not complying with these requirements are set out in ss32K and 32L. Most importantly, non-compliance may allow a purchaser to rescind the contract at any time up until settlement. It may also constitute an offence under the SLA and result in 60 penalty units for individuals and 300 penalty units for body corporates.

Appreciating the importance of a s32 statement, combined with good risk management when preparing one, will give practitioners the best chance of avoiding a claim.

Preliminary steps

The following three foundational steps are essential for those preparing their first s32 statement.

- Read the disclosure obligations in the SLA.
- Familiarise yourself with the form of statement. This might be the Law Institute of Victoria (LIV) form, one you have drafted, or one used as a precedent by the firm.
- Develop and use a checklist to collect information from the client about the property to be sold. LPLC has a Key risk checklist: sale of land questions for the vendor[1] which can be

SNAPSHOT:

- Preparing s32 statements well requires good online resources or current books on conveyancing in Victoria, keeping up to date with the case law and doing regular training on current property issues.
- Develop and use a checklist to collect information from the client about the property to be sold. Regularly review the checklist.
- The big hot spots are owner builder requirements in s137B of the *Building Act,* providing descriptions of drainage easements and covenants, attaching land information, planning and water encumbrance certificates, clarifying with clients what services are connected and whether they have a septic tank.

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used or adapted.

To step up your efforts to deliver a first-rate s32 statement consider:

- collecting and reviewing s32 statements prepared by other firms and note anything from them that you can use to improve your own s32 statements.
- tag teaming with a colleague and agreeing to critically review each other's s32 statements to find the items which need improving.

Deeper dive

Invest in some good resources or current books on conveyancing in Victoria[2] and consult them regularly.

Take some time to read cases about vendor disclosure obligations.

When reading the cases think about whether you need to amend your practice to ensure you avoid the issues raised in the cases.

Disclosure obligations

The following is a list of ss32A–32I of the SLA which contain the key disclosure obligations for a vendor. They have been married up with the items in the standard s32 statement issued by the LIV to help those doing a s32 statement for the first time to identify the sections of the SLA as they relate to the items in the LIV form.

Section 32A – item 1

Disclosure of financial matters including rates, taxes, charges or other similar outgoings affecting the land such as council and water rates, land tax and owners corporation fees.

It is usual for this financial information to be contained in certificates attached to the s32 statement. See s32J about attaching certificates, notices or other documents.

Tip: Don't forget to check for and include details of charges over the land, especially land tax charges and details of the fire services levy pursuant to the *Fire Services Property Levy Act* 2012 (Vic).

Section 32B – item 2

Disclosure of the vendor's "damage to or destruction of the land", including building insurance where the property is at the risk of the purchaser from the day of sale; and owner builder insurance.

Tip: The owner builder insurance requirements stem from s137B of the *Building Act* 1993 (Vic). When these provisions apply can often be difficult to determine but LPLC's July 2011 LIJ article,[3] "Owner-building danger zone", helps clarify this.

This section specifies that an owner builder must not enter into a contract to sell unless they are covered by any required insurance and have given the intending purchaser particulars of the insurance.

Section 32C – item 3

Disclosure of matters relating to land use. These are more specifically described as any easements, covenants or other similar restrictions affecting the land. This would include both registered and unregistered easements. The section requires a description of the restriction and any particulars of existing failure to comply. There is also a requirement to disclose certain information about the land if it is in a bushfire prone area as described in s192A of the *Building Act* 1993.

The most common restrictions are drainage easements or covenants that are referred to on the title, such as a single dwelling covenant. These are also the ones that are most often missed in s32 statements.

The other mistake practitioners make is attaching a copy of a plan or certificate that contains only the word "covenant" or "easement", but no "description" as required by the section. The description or diagram showing the easement is often in another document or plan that is not attached. Providing a document that refers to the easement or covenant but nothing else does not satisfy the requirement for a description.

A description of a covenant might be: A single dwelling covenant registered number xxxxxxx.

A description of an easement might be: One metre wide drainage easement at rear of property.

There is no requirement to provide a copy of the covenant. Section 32I(a) states that a vendor needs to attach a Register Search Statement, ie, a title search, but this does not include the "instrument" containing the covenant. The vendor "may" provide certain certificates, notices and other documents pursuant to s32J.

Tips: Sometimes clients are not aware of all the easements which may affect the property, some of which may be unregistered easements and will be disclosed in a water encumbrance certificate or plan of subdivision. You should always obtain a water encumbrance certificate.

Best practice is to give a description of the easement or covenant and attach the relevant certificate, document creating the easement or covenant, or plan of subdivision.

If using your own precedent, ensure the wording about bushfire prone areas is up to date.

The wording in s32C(d) was amended by s78 of the *Building Amendment (Registration of Building Trades and Other Matters)* Act 2018 (Vic). The amendment took effect on 30 October 2018.

The new wording is "if the land is in an area that is designated as a bushfire prone area under s192A of the *Building Act* 1993, a statement that the land is in such an area".

Item 3.3 in the LIV September 2018 vendor statement form has been updated to include the new wording.

Section 32D – item 4

This is arguably the most complicated section dealing with disclosure given the long list of things which must be disclosed. The vendor must give "particulars of any notice, order, declaration, report or recommendation of a public authority or government department or approved proposal directly and currently affecting the land … which the vendor might reasonably be expected to have knowledge".

A similar disclosure is required for anything relevant to livestock disease or chemical contamination as well as an intention to compulsorily acquire the land.

There is some debate about what "directly and currently

affecting the land" means. Commentary on this can be found in *Sale of Land in Victoria*.[4] What "public authority" means is discussed in a recent LPLC blog.[5]

Tip: Always attach a land information certificate in the s32 statement as this certificate may contain details of notices, orders, declarations, reports, recommendations or approved proposals caught by s32D of the SLA.

Section 32E – item 5

A vendor must disclose particulars of any building permits issued in the previous seven years where there is a dwelling on the land.

Tip: Ask the vendor whether they have done any works in addition to whether they have obtained any building permits. The works may be classified as owner builder works even where no building permit is required or obtained.

Remember how important it is that the vendor complies with the owner builder requirements, given a purchaser may avoid the contract for the failure to comply.[6]

Section 32F – item 6

A vendor has several options when dealing with the owners corporation disclosure obligations. They can either attach a current owners corporation certificate or provide the information required in an owners corporation certificate as set out in s151(4)(a) of the *Owners Corporation Act* 2006 (Vic) (OC Act). They must also attach the owners corporation rules, the prescribed information for purchasers, copies of any resolutions made at the last annual general meeting and any other documents prescribed as set out in s151(4)(b). Make sure the client's instructions about owners' corporation information are confirmed in writing.

Where an owners corporation is inactive and the s32 statement states this, the vendor does not need to include the information above. An inactive owners corporation is described in s32F(2) to include an owners corporation that has not held an annual general meeting, fixed any fees and has not held any insurance in the previous 15 months.

Warning: Only two lot subdivisions are exempt from the insurance requirements pursuant to s7 of the OC Act. Any other owners corporation is required to have:

- public liability insurance for any common property. See s60 of the OC Act.
- reinstatement and replacement insurance where ss59 and 61 of the OC Act apply.

Where insurance is obtained the result will be that the owners corporation no longer qualifies as "inactive" for the purposes of s32F.

Section 11 of the SLA says the failure to obtain any necessary owners corporation insurance gives a purchaser the right to avoid the contract.

Section 32G – item 7

Specific disclosure is required where the land is in a "contribution area" as described in s201RC of the *Planning and Environment Act 1987* (Vic). This is generally growth area land zoned for urban use and development. The land in this area will often be affected by a growth areas infrastructure contribution (GAIC) requirement and it is these details that must be disclosed, including attaching any relevant GAIC certificate(s).

The standard LIV form lists the relevant GAIC information which must be included in the s32 statement.

Details about the contribution area and GAIC certificates can be found on the State Revenue Office website[7] and apply to land within the municipalities of Cardinia, Casey, Hume, Melton, Mitchell, Whittlesea and Wyndham.

Section 32H – item 8

Only electricity, gas, water, sewerage or telephone services that are not connected need to be disclosed.

Claims arise every year where a vendor misleads a purchaser as to what services are connected. Most commonly they get the sewerage connection wrong. Many vendors think that if they have a flushing toilet, they have sewerage connected, even if they have a septic tank. You need to clarify that a septic tank does not constitute connection to sewerage and should be disclosed.

Tip: A number of these claims could have been avoided had the practitioner asked the vendor client whether they had a septic tank. The issue can also be picked up by looking at the client's water bill which will not contain any charge for sewerage, or the water certificate, where the plan attached to the encumbrance certificate shows no sewer pipes running to the property.

Section 32I – items 9 and 10

Disclosure of certain title documents by attaching them to the s32 statement. The documents include:

- a Register Search Statement (title search)
- diagram location in the Register Search Statement that identifies the land and its location
- certain plans of subdivision
- evidence of right to sell where the vendor is not registered on the title.

Tip: The common scenarios where the vendor is not registered on title are where a purchaser is looking to on-sell before settlement, a mortgagee sale and a deceased estate sale.

The evidence of right to sell is commonly a copy of the head contract with the price redacted; a copy of the notice of default served on the mortgagor; and the grant of probate.

Section 32J – item 13

This section clarifies that if any information is required by the sections referred to above it can be provided by attaching a certificate, notice or other document that contains the information.

Tip: Common documents attached for this purpose are planning certificates, land information certificates and water encumbrance certificates. In many of the claims made against conveyancing practitioners, if these certificates had been attached the relevant information would have been disclosed and avoided the claim. Make a practice to obtain these certificates for all sales.

As mentioned above, just attaching certificates may not satisfy the requirement of s32C to provide a description of easements,

covenants or other similar restrictions.

Attention to detail

Recognise that preparing a s32 statement requires attention to detail. Information provided by a vendor must be compared for consistency and accuracy against the searches and certificates obtained as part of the due diligence when preparing a s32 statement.

Send the vendor a draft of the s32 statement together with a copy of all searches and certificates and direct the vendor to read the documents and give written confirmation about their accuracy or otherwise.

Case study – combined drain easement

An executor instructed his practitioner about the sale of the deceased's former principal place of residence.

The property was serviced by a combined sewerage drain but this was not disclosed in item 3 of the s32 statement, in breach of s32C.

The purchaser discovered the easement and rescinded the contract pursuant to s32K(2). The vendor refused to return the deposit, so the purchaser issued proceedings. The vendor subsequently joined his practitioner to the proceeding, alleging he had failed to prepare an adequate s32 statement.

The practitioner had not obtained a water encumbrance certificate, which would have disclosed the combined sewer, and had not thought to look for the easement on the plan of subdivision.

The proceeding was settled with the deposit released to the purchaser. The practitioner was required to make a substantial payment to the vendor to cover the lost deposit and the extra selling expenses.

Conclusion

While on the surface complying with the requirements of ss32 to 32J of the SLA may seem a simple, almost administrative task, there is in fact a lot of legal complexity that this article has only just touched on. A "charge over the land", an unregistered easement, a notice directly and currently affecting the land, are just a few issues to beware of. The significant body of case law and commentary about these disclosure requirements is evidence enough of the complexity.

Anyone who practises in conveyancing needs to have good reference material, regularly updated precedents and a good knowledge of the case law and legislation in this area. This should be maintained with regular training. Well thought through questionnaires for vendors to answer, and extensive checklists for practitioners to make sure everything is done, are essential tools.

Every s32 statement needs to be prepared after asking the right questions and exercising due diligence. Treat each one as if it is unique, which in most cases it will be. ■

Heather Hibberd is the chief risk manager at LPLC. She is a regular contributor to the *LIJ* and writes LPLC's newsletter *In Check*. **Phillip Nolan** is a risk manager at LPLC and a Senior Fellow at the University of Melbourne where he lectures in property law.

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Taxing times in conveyancing

ALL CONVEYANCING PRACTITIONERS NEED TO HAVE A BASIC UNDERSTANDING OF TAX ISSUES TO AT LEAST ALERT CLIENTS THERE MAY BE A PROBLEM AND SEND THEM OFF FOR MORE EXPERT ADVICE. BY HEATHER HIBBERD AND PHILLIP NOLAN

All practitioners practising in conveyancing need to understand the tax implications of buying and selling property. Excluding tax advice from your retainer may not be sufficient to avoid all liability as a court may find that the practitioner should have drawn any relevant tax issues to the client's attention.[1] Some understanding of the tax issues is needed if only to refer clients to other tax experts.

LPLC's tax checklist[2] identifies many issues that need to be considered in conveyancing transactions to help practitioners and clients to agree on who will deal with those issues.

Land tax

The most frequent land tax issues practitioners need to remember and build into their checklists and systems are set out below.

Is the client buying as trustee of a trust?

Land owned by a trustee on behalf of a trust, subject to certain exclusions,[3] is subject to land tax,once the aggregate Victorian land holding reaches $25,000 instead of the general threshold of $250,000. The tax payable is at a higher surcharge land tax rate than the general land tax rate.[4]

Claims 1

Claims have arisen where practitioners didn't realise that the client was buying the property as trustee on behalf of a trust. The practitioners did not submit the land tax trust form 8, resulting in the wrong land tax being paid. The mistakes were usually discovered during a State Revenue Office audit and penalties and interest were incurred.

Risk management 1

Ask the client at the start of the transaction if they are buying on behalf of a trust and tell them that higher land tax will be incurred unless an exclusion applies.[5] Confirm the client's instructions in writing.

Are there land tax implications if buying more than one property from the same vendor?

Land tax is usually adjusted at settlement based on the value of the property, that is, on a single holding basis, as though the land described in the particulars of sale is the only land owned by the vendor. It may be advantageous for some purchasers to buy multiple properties from one vendor under separate contracts rather than in one contract.

Similarly, it may be advantageous for a vendor with multiple land holdings to do adjustments on a proportionate basis.

While practitioners are not necessarily required to do the various calculations, they should understand the issue and raise it with clients in appropriate circumstances.

You should:

- Add land tax certificates to the checklist of certificates you obtain for purchasers.
- Know what land is exempt from land tax. The most common exemptions are principal place of residence property, primary production land, land owned or used by charities and rooming houses. A range of other land tax exemptions is set out on the SRO website.[6]
- Have a basic understanding of these exemptions.

Why is it important to obtain a land tax certificate?

Practitioners acting for purchasers should always obtain a land tax certificate, first, to check the amounts payable and second, because the purchaser can rely on the amounts in the certificate if liabilities arise in the future from tax default by the vendor, or errors in the SRO records. This protection is set out in s 96 of the *Land Tax Act 2005* (Vic) and

SNAPSHOT

- There are often tax consequences when buying or selling real estate and conveyancing practitioners need to understand what those tax issues may be.
- Land tax, duty and GST consequences of a conveyancing transaction can affect the way the client decides to structure their purchase or sale.
- Practitioners need to make appropriate inquiries and give timely advice about potential tax issues to help clients make the right decisions.

only applies if the bona fide purchaser for value obtains the certificate. The protection does not apply if the purchaser relies on a certificate provided by the vendor.

Duty

Claims involving duty have increased significantly in the past few years. The most common mistakes involve not understanding when nominations will result in a sub-sale and incur a second amount of duty. The other major issue is failing to advise foreign residents about increased duty they have to pay.

When do nominations incur double duty?

Section 32J of the *Duties Act* 2000 (Vic) sets out the basis on which duty will be payable on transfers. While somewhat difficult to follow, it essentially says that double duty will be payable when a vendor agrees to transfer land to an original purchaser and then to a subsequent purchaser, often through nomination, in two circumstances:

- The original purchaser "undertook or participated in land development" before the new purchaser was nominated.
- The subsequent purchaser pays or is liable to pay more consideration than the original purchaser.

"Land development" is defined broadly and includes:

- preparing a plan of subdivision or taking steps to have it registered
- applying for or obtaining a planning permit
- applying for or obtaining a building permit or approval
- doing anything on the land for which a building permit or approval would be required
- requesting an amendment to a planning scheme that would affect the land
- developing or changing the land in any way which would increase its value.

Claims 2

Claims commonly arise when the law firm knows its purchaser client is about to, or has, lodged a planning application before a related company or entity is nominated as purchaser, but fails to warn the client of the double duty exposure.

Risk management 2

Include advice in your precedent letter to purchaser clients about the risks of double duty when nominating if any land development, including lodging planning applications, has occurred.

When do foreign purchasers pay additional duty?

There is additional duty payable for foreign natural persons, foreign corporations and trustees of a foreign trust. Foreign entities are defined on the SRO website.[7] The definitions practitioners sometimes don't know are: a foreign corporation is any corporation incorporated outside Australia or if incorporated in Australia the controlling interest is held by a foreign natural person, foreign corporation or foreign trust. A foreign trust is a trust where a substantial interest is held by foreign natural person, foreign corporation or another foreign trust.

There are various exemptions that may apply but in general the extra duty payable by a foreign purchaser of residential property is 7 per cent. Giving residential property to a foreign party also incurs the extra duty.

While not strictly duty, foreign buyers may also be caught by the vacant residential land tax.[8]

Claims 3

Clients often allege after the transaction that they were not advised there would be extra duty, and had they been advised they would have restructured the purchase so that it was not made by a foreign party. This can happen where the purchasers are a husband and wife, but only one is a foreign person or the purchaser is a family trust and one of the beneficiaries is a foreign person, which creates a foreign trust.

Often the firm is unaware the party is a foreign purchaser, so the advice is not given.

Risk management 3

Become familiar with the definition of foreign purchaser. Ask clients at the start of the matter, particularly if you are giving precontractual advice, if they are foreign purchasers and advise them of the extra duty.

When are transfers of property between beneficiaries and trusts not exempt?

There are exemptions from duty for transfers to and from a trustee. These exemptions are set out in Chapter 2 Part 5 of the *Duties Act*.[9] They relate to specific types of trusts and beneficiaries and all criteria in the sections must be complied with for the exemption to apply. This is not an area where a general understanding of principle is enough. If you are going to advise on these transactions, you need to read the legislation and any reliable commentary, including the SRO website,[10] as well as the terms of any trust deeds carefully.

Claims 4

The common claim scenario involves trust property that is subdivided and developed and then one or more titles transferred to various beneficiaries. The beneficiaries are often also trustees of the trusts. The exemptions do not apply for various reasons, including the way the trust deeds are written; the amount transferred does not match the unit holders' interest; the transfer is made in satisfaction of a debt owed to the beneficiary; or the beneficiary pays out or takes over the existing mortgage. The clients allege, had they been properly advised, they would have restructured their arrangements. The practitioner usually makes the mistake of generalising about the arrangements instead of looking closely at the detail of the transaction.

Risk management 4

The law in this area is complex and if you do not have a detailed knowledge of the legislation and its application you should refer clients to a suitably qualified tax barrister, solicitor or accountant. You should make it clear in your retainer that you are not advising on this aspect and the importance of obtaining advice.

GST

The application of GST legislation and rules is not always simple. LPLC's GST checklist[11] is a useful tool for everyone practising in conveyancing. It is designed to take practitioners through the main issues to consider and provide them with links to the relevant reference material. We cannot deal with all GST issues in this article, but below are some that appear regularly in the claims or via the LPLC GST Hotline.

Who fills in the 'plus GST' box?

Filling in the "plus GST" box might seem like a simple administrative task, but it underpins whether practitioners are dealing with GST with their vendor clients. In some

claims the practitioner or clerk does not even turn their mind to whether GST is payable, often because they don't realise the property is commercial or new residential property. In other cases, the client hasn't decided whether to make the contract plus GST and it is left blank and not revisited.

GST needs to be on the checklist and be considered each and every time.

What are residential premises?

Residential premises in most cases will be obvious, but there will always be those properties that occupy the fringe of the definition. The definition can be found in s195-1 of the GST Act[12] as land or a building that is occupied, or capable of being occupied, as a residence. For land to meet the definition it must have a building on it that has the physical characteristics of a residence.[13]

If the building is no longer habitable because, for example, the bathrooms are damaged or not working or the kitchen is non-existent, then it will not meet the requirements of being a residence, even if it is in a residential zone. The property needs to be treated as vacant residential land.

Similarly, if the building had previously been a residence but has been turned into an office so that it no longer has the characteristics associated with residential accommodation and is leased for use as an office, it cannot be treated as residential property.

What are new residential premises?

The sale of new residential premises is a taxable sale if the vendor is registered or required to be registered for GST, and the supply is made in the course or furtherance of an enterprise that the vendor carries out.

The supply by a natural person of their own home is not a taxable supply since it would not be made in the course or furtherance of an enterprise.

The definition of new residential premises appears in s40-75 of the GST Act. The premises will be new if:

- a new residence has been built in place of an old residence or
- a residence has been substantially renovated
- the property had not been sold as residential property before, such as when a previously commercial property has been converted to a residence.

New residential premises cease to be new if they have been previously sold or rented out for a continuous period of five years.

When will an isolated transaction for the sale of a property trigger the need for GST registration?

Where a vendor of commercial property or new residential premises is not registered for GST it may appear that GST is not payable. However, there is a further question that needs to be asked. Was the supply done in the course or furtherance of an enterprise? GST ruling GSTR 2001/7[14] at paragraphs 46-47 sets out that where an entity buys a property, such as a suburban shop, and refurbishes it with a view to then selling it for a profit, it is an isolated transaction that constitutes an enterprise. The sale of the property is treated as trading stock rather than the disposal of a capital asset. The sale price is part of the enterprise turnover for the purposes of assessing projected GST turnover and usually will be more than $75,000, so the vendor will be required to be registered.

The key issue here is what was the vendor's purpose in buying the property in the first place when assessing whether this was an isolated transaction that triggers the requirement to be registered for GST.

When can the margin scheme be used?

The margin scheme can be applied if the parties agree in writing before settlement to apply it. Where a nomination occurs, the new purchaser should confirm in writing to the vendor the use of the margin scheme. Agreements after settlement must be done with the Commissioner of Taxation's approval (s75-5(1A)).

The margin scheme can be applied to property that was previously bought on the margin scheme. It can also be applied where the previous purchase was input taxed, non-taxable or GST-free, for example, existing residential property. There are some less common restrictions on the use of the margin scheme that can be found at s75-5 of the GST Act. If GST was paid on the full sale price when buying the property, the margin scheme cannot be applied on the sale.

Developers who buy existing residential premises and then develop them into new residential premises will usually want to sell on the margin scheme and can do so if the sale contract specifies the margin scheme be used. Developers who buy residential vacant land will want to buy on the margin scheme so they can sell the developed property on the margin scheme. This should be discussed if giving pre-contract advice for the purchase, and the subsequent sale.

Practical examples

LPLC's GST FAQs[15] has a lot of practical examples on GST issues and further information about GST withholding can be found in LPLC's bulletin, *GST practical examples.*[16] All LPLC checklists can be found at lplc.com.au.

Conclusion

Tax issues in conveyancing transactions are often not simple. Practitioners doing conveyancing need to have a general grasp of the issues, so they can at least warn clients of the potential pitfalls and when they need to get further tax and or financial advice. It is not enough to just say you don't advise on tax. You need to be at least consciously incompetent in this area. That is, know what you don't know. ■

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The authors acknowledge the assistance of Derry Davine in the preparation of this article.

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3. See s46A of the Land Tax Act for a list of exclusions such as a superannuation trust.
4. State Revenue Office website https://www.sro.vic.gov.au/node/1506
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6. https://www.sro.vic.gov.au/node/1460
7. https://www.sro.vic.gov.au/node/1658
8. The vacant residential land tax applied from 1 January 2018 to homes that were vacant for more than six months in the preceding calendar year in inner and middle Melbourne. Land owners of vacant residential property are required to notify the State Revenue Office by 15 January every year. Failing to notify is a notification default and penalties may apply.
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13. GSTR 2003/3 para 26, https://www.ato.gov.au/law/view/document?DocID=GST/GSTR20033/NAT/ATO/00001&PiT=99991231235958
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The perils of pre-contract advice

CLAIMS ARE OFTEN MADE AGAINST SOLICITORS FOR INADEQUATE PRE-PURCHASE ADVICE. SOME COMMON CAUSES OF THESE CLAIMS AND THE DECISION OF THE SUPREME COURT OF THE ACT IN *McLENNAN* ARE CONSIDERED.

BY STEPHEN BUBB

Solicitors are often asked to provide pre-purchase advice to a client buying residential property. The instructions often come just before an auction or when the client is due to meet the agent to sign a contract, leaving the solicitor with long documents to review and a short time to properly advise the client. Given these circumstances, it's not surprising that pre-contractual advice features commonly in conveyancing claims against solicitors.

If you accept the instructions, regardless of the time involved or fee, you owe the client a duty of care. If you don't discharge your duty to the client and they suffer loss, they may bring a professional negligence claim against you.

Solicitors need to be cautious in these situations. Don't accept instructions to act unless you have the time, knowledge and experience required to do the work properly. It must be within your direct area of expertise. A quick contract review or failure to give full advice may not discharge your duty of care if something goes wrong.

Your duty of care

A recent decision of the Supreme Court of the ACT in *McLennan v Clapham and others*[1] (*McLennan*) is a timely reminder to solicitors about their duty of care.

In that matter in 2009, the clients were proposing to buy a residential property to live in and engaged a firm to act. They provided a copy of the unsigned contract to the firm and then met the firm's conveyancing clerk to go through the contract. Before this purchase, the house had been insulated with loose-fill asbestos and had purportedly undergone a removal process. There were documents attached to the contract in relation to asbestos including an asbestos advice fact sheet and a certificate of completion of asbestos, removal work.

In 2014, after receiving a letter from the ACT Government, the clients had the property tested. It was at this point, years after purchase, that the clients learnt about the dangers of loose-fill asbestos. The clients took part in the government buy-back scheme and pursued litigation against the firm which provided pre-contract advice, alleging they were not adequately advised about the risks and consequences associated with buying this property. They said that with proper advice they would not have proceeded to purchase.

The pre-purchase advice was given by an experienced conveyancing clerk in the solicitor's office, but there was no file note to record the details or what advice was given. The clerk could not recall acting for the clients in 2009, and her evidence was based on her "usual practice" when advising on an asbestos affected property.

The clients' evidence was that the only discussion about asbestos was when the clerk pointed to an asbestos advice fact sheet attached to the contract and asked them to read it, before pointing to the asbestos removal certificate which they skim read.

In the judgment the Court made these points about a solicitor's duty to exercise reasonable care and skill:

"A solicitor owes a general duty to explain legal documents to the client, or at least to ensure that the client understands the material parts. In particular, a solicitor should explain any unusual provisions or any provisions of particular relevance to

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the clients' proposed activities, or which might influence the client in deciding to enter the contract.[2]

"In the case of property transactions, a solicitor should explain both the relevant risks attending the purchase of property and the consequences of that risk to the client.[3]

"A solicitor acting for the buyer of property is paid not only for what the solicitor, in fact, does, but also for the responsibility he or she assumes in trying to protect clients from financial loss if things go wrong.[4]

"A solicitor has a duty to warn a client of a material risk inherent in the proposed purchase."[5]

The Court accepted the clients' evidence that they were only given a chance to skim read the contract documents and no advice was given about the asbestos[6] and said:

"That does not amount to the provision of competent legal advice. The plaintiffs could have sat in their own lounge room and read the contract for sale document for themselves. Reading a document and appreciating its consequences are two different things. What they were paying the defendants for was a professional legal opinion on the risks and consequences arising from the contents of that particular contract for sale. The asbestos information in the contract required someone to properly explain to the plaintiffs exactly what the risks and consequences were, so as to allow them to make an informed decision about whether to make further enquiries and ultimately whether to purchase the property. That finding is consistent with the evidence of both expert witnesses."[7]

Claims experience

Our claims experience shows a broad range of allegations about inadequate pre-contractual advice. Some of the recurrent issues we see in claims are set out below.

- Failure to identify or fully advise the client about restrictions recorded on the land title such as restrictive covenants, easements and s173 agreements. Clients need to be made aware of these restrictions, including the material effect and consequences.
- Not advising the client about the terms of a lease, particularly about options for further terms and rental reviews or other unusual clauses such as provision for rent-free periods.
- Inadequate advice about planning permits, zoning and planning scheme regulations that affect the clients' use or intended use of the property. Planning matters can be complex, so refer the client for specialist advice when required.
- Not identifying and advising about title boundaries, common property, car park or storage titles, particularly on complex plans with air space or height restrictions. The client should always be given a title plan and directed to do a physical inspection or engage a surveyor to do it before purchase. A proper physical check can identify missing titles, areas of adverse possession, structures over title boundaries and incorrect boundary fencing.
- Not clarifying the services connected or directing the client to do a physical check. Specific advice should be given about properties that are not connected to the electricity network, sewerage or water supply and clients directed to get specialist advice about operation requirements, future connection, capital and operational costs.
- Not explaining land transfer duties and taxes such as GST and CGT that may result from the transaction, particularly in family or trust transfers. Refer the client for specialist advice if required.
- Failure to identify and explain ongoing charges such as GAIC, land tax, owners corporation levies or a flammable cladding special charge.
- Not explaining the concept of *caveat emptor* and that in general a purchaser takes the property in its condition at purchase, including issues of illegal structures, termites, flammable cladding, asbestos and safety. A report from an authorised building inspector or other specialist is an important part of the clients' due diligence but you must identify and make them aware of the issues.
- Not explaining the risk and consequences of default, and that preliminary finance approval is usually subject to valuation and other requirements from the lender. Consider a subject to finance condition.

What you should do

To give pre-contract advice under time pressure you should use a checklist and a good precedent letter that covers all the issues. You need the time to establish the client's intentions, properly review the documents and provide advice.

If you don't have the time to do these things, then to manage your risk of a claim you should either decline to act or clearly limit your retainer, making sure the client understands the risks of the limited retainer. This must all be confirmed in writing.

A record of instructions received and advice given is critical in all legal work and is even more important for pre-contract advice on property transactions in a declining property market.

Summary

McLennan is a good reminder to solicitors about their duty of care when giving pre-purchase contractual advice to clients. There are a multitude of things to cover and you need the time, knowledge and systems to do this work safely. Sometimes it's better just to say no.

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1. [2019] ACTSC 1.
2. Note 1 above at [50].
3. Note 1 above [51].
4. Note 1 above [52].
5. As above.
6. Note 1 above at [72].
7. Note 1 above at [73].

SNAPSHOT

- A failure to give adequate pre-purchase advice to property purchasing clients is a common cause of claims against solicitors.
- *McLennans* case is a reminder to practitioners about their duty of care and what they must do to discharge that duty.
- Solicitors need the time, knowledge and experience to do this work safely and sometimes it's better to decline to act.

How to avoid the traps

PRACTITIONERS PLAY A CRUCIAL ROLE WHEN ACTING FOR THE BUYERS OF LAND. NO TRANSACTION IS THE SAME, AND PRACTITIONERS NEED TO BE AWARE OF WHERE THINGS CAN GO WRONG. BY CAROLINE DEW

Acting on behalf of purchasers of land is a common occurrence for many practitioners. Most of the time the transaction runs smoothly with the client becoming the new owner of exactly what was intended. However, not every transaction is the same and practitioners need to be wary of what can go wrong. The practitioner's role when acting for a purchaser of property is to obtain clear title to what the client intended to purchase. Checklists and precedents are helpful tools but it is important that practitioners view each transaction and each parcel of land as unique.

I do not act in conveyancing matters, but often act on behalf of practitioners who have been sued as a result of an unhappy conveyancing outcome. This article aims to highlight some of the ways in which errors are made and how they could have been avoided. While conveyancing is largely process-driven it is important for the practitioner to step back, look at the transaction, and ask questions.

What does the client want?

Practitioners are often instructed to act for purchasers simply by being provided with a copy of the contract of sale. However, it is important to ascertain from the client what they intended to buy (ie, the location, boundaries, dimensions, accessory units) and ensure that their intention is reflected in the contract.

It is equally important to ascertain what the client intends to do with the property. Do they intend to develop the property? Or use it for a particular purpose?

Put simply, ask the client:

- what they think they have bought
- in what capacity they are intending to buy it (eg trustee, tenants in common)
- what they intend to do with the property.

The client's intentions need to be kept in mind throughout the transaction and should inform what particular searches and inquiries need to be undertaken and what advice should be given beyond the usual.

The land: review the contract and s32

Obviously any successful transaction will start with a careful reading of the contract documents. Even if the documents are in standard form practitioners must be familiar with the terms and carefully review any special conditions.

It is certainly advisable for practitioners who act in conveyancing to have a precedent "first letter of advice" to purchasers. It is a cost-effective way of providing advice and an important risk management tool.

However, as with all precedents, care must be taken to ensure the precedent is adapted to the specific matter.

While not an exhaustive list, a purchaser client should be advised:

- what the contract provides they are buying. It might be different from what they think they are buying
- what the vendor's statement and attached searches show
- what further searches should be undertaken in terms of title, encumbrances (registered and unregistered), appurtenant and restrictive easements, zoning (and what it means), recent construction
- to measure the property and its distance from a reference point such as the nearest intersection to fix its location. While many clients may ignore this advice a future claim against the practitioner may be avoided by this simple recommendation
- If any cooling off period is still applicable
- Whether the contract is conditional or unconditional and any critical dates
- Whether the client has any right to rescind the contract due to any defect in the s32 statement;
- any GST issues.

An example of a failure to advise about the land is set out here.

The practitioner had acted for a client who had bought several residential properties as investments, all of which had been rented out to tenants. On this occasion the practitioner was instructed to advise the client in relation to the purchase of a residential property next door to one of the client's existing properties. The practitioner failed to inform the client of the existence of a single dwelling covenant on the assumption that the client again intended to simply rent out the premises to tenants. However, the client claimed it intended to demolish both premises and undertake a multi-dwelling development, which it was prevented from doing by the restrictive covenant. The client was successful in applying for the restrictive covenant to be removed but sued the practitioner for loss of profits for the years it took for that to occur.

Searches

Claims against practitioners arise because the practitioner fails to undertake searches or inquiries which the client later alleges would have revealed information which would have given the client a right to rescind.

Practitioners routinely undertake the "usual" searches, but the type of searches you carry out should depend on the type of land being bought and the client's intended use.

From a risk management perspective it is advisable for practitioners to apply for a full set of certificates, particularly if the certificates attached to the vendor's statement are incomplete or "old". There is no standard definition of what makes a certificate "old" but three months is sometimes used as a rule of thumb.

It is advisable for practitioners to carry out their own searches, even if a certificate is attached to the vendor's statement. For example, when acting for a purchaser you should always obtain a land tax certificate. If the land tax later increases, under s96(4) of the *Land Tax Act 2005* (Vic) a bona fide purchaser is only liable for the amount shown in the certificate, but only if the purchaser obtained the certificate.

Claims are made against practitioners for failing to carry out searches such as building certificates and information statements, which can reveal an encumbrance, such as an easement or drainage, not shown on the certificate of title – or even the likelihood of an encumbrance the clue for which was that there was a water utility asset nearby but in line with the property being purchased.

Sometimes searches are not undertaken because the client does not want to pay for them. In that scenario, practitioners should provide advice in writing to the client recommending the searches be undertaken and explaining the potential consequences of not doing so. A prepared letter, which can be adjusted to the circumstances, is a good risk management tool. The client's instructions not to proceed should be confirmed in writing.

SNAPSHOT:

- The solicitor acting for a purchaser of land is carrying out a crucial role.
- Be sure to understand the client's intentions and keep them in mind throughout the transaction.
- Every piece of land is unique. Be curious about the property and ask questions.

Of course, searches could reveal information which might prevent the client from carrying out their desired objectives with the property, but does not necessarily give the client a right to rescind the contract. While the client might not suffer any loss that can be claimed against the practitioner, it is obviously preferable to the client that they find out about any issue affecting their intention with the property sooner rather than later and the practitioner will be, or at least should be, thanked for it.

Examples of errors practitioners have made in acting for purchasers include:

- failing to provide advice on matters such as zoning, planning or restrictive covenants which prevent the client from using the property as they intended
- failing to detect or advise the client of easements (registered or unregistered) or covenants which prevent the client from

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developing or renovating a property as they intended
- failing to identify issues with the vendor's statement, particularly as to whether services are connected
- obtaining searches but failing to properly review and advise the client as to the results of those – the job is not complete by having ticked off that all searches have been received and filed
- Failing to advise the client of any discrepancies with the searches attached to the vendor's statement which could provide the client with a right to rescind, which they later claim they would have exercised if properly advised.

Some examples:

1. The client bought a residential property with a large extension on the rear of the house. The vendor's statement stated that there were no building approvals in the past seven years. The client knew from inspecting the property that the extension appeared quite recent but did not appreciate the issue. The practitioner did not obtain any instructions in relation to the property, did not apply for a building approval certificate and did not advise the client of the reasons for not doing so. After settlement, the client discovered the council had issued a notice requiring the demolition of the extension and the client sued the practitioner.
2. The client bought a property with the intention of demolishing the single dwelling and constructing several townhouses. A search revealed an easement not shown on an old plan attached to the vendor's statement, but the practitioner failed to bring this to the attention of the client so that the client lost its right to rescind. The easement prevented the client from carrying out its intended plans to develop the property, which had to be revised to a less profitable development.

Contract becomes unconditional

The most common reason a contract of sale is conditional is usually a "subject to finance" clause. While this is reasonably common, clients and practitioners can be caught out by these provisions.

The first advice provided to the client should note the date on which the contract becomes conditional and what is required to be done if, for example, finance is not obtained before the due date. It should also clearly explain the consequence of not complying with the provision, that is, that the contract becomes unconditional if notice to terminate the contract is not given to the vendor within time.

If a client instructs that it has obtained finance, if possible obtain a copy of the finance approval before the contract becomes unconditional to ensure the finance approval is final, not conditional and for a sufficient amount. If the finance approval is not final, consider obtaining an extension so that the contract remains conditional. Any extension should be agreed in writing.

Common mistakes made by practitioners include:

- failing to notice, or check, that an approval letter for finance is subject to valuation, which when received is too low for the purchaser's requirements, by which time the contract is unconditional
- failing to realise that the amount approved is less than what will be required at settlement
- failing to advise the client of the need to give notice to the vendor in writing by a specified time if finance cannot be obtained
- failing to advise the client of the consequence of the contract becoming unconditional
- failing to follow up any request for an extension of the subject to finance clause within the time in which the clause expires to ensure the extension is granted
- ensuring that proper notice is given in accordance with the contract to bring it to an end if finance is not obtained or an extension in writing provided.

Some examples of failing to properly advise as to the practical effect of a subject to finance clause:

1. Upon being instructed, the practitioner wrote to the client advising of the date by which finance needed to be approved and requested that the client notify the practitioner of the position before the due date. The practitioner did not advise the client of the consequence of not providing those instructions within time and the need to give notice to bring the contract to an end. The finance approval received by the client was too low to complete the contract but he delayed in instructing the practitioner on the mistaken assumption that the contract simply came to an end on the due date if finance was not obtained. The client said had he been aware of the consequences, he would have notified the practitioner immediately.
2. A purchaser client instructed the practitioner that he had negotiated an extension of a "subject to finance" clause directly with the vendor. The practitioner did not confirm that with the vendor's solicitor. The client was unable to obtain finance but when he sought to end the contract, the vendor claimed there were certain conditions to the extension which had not been met and the contract had become unconditional.

Conclusion

Unfortunately there are many traps in conveyancing. However, most can be avoided by a few simple steps:

- Take full instructions from your client and approach the transaction as unique and with their intentions in mind
- Adopt an attitude of being curious about the property and undertake searches and inquiries as are necessary in the circumstances. ■

Caroline Dew is a partner at Obst Legal practising in commercial litigation and professional indemnity claims.

Off the plan: managing the risks

CLAIMS AGAINST CONVEYANCING PRACTITIONERS HIGHLIGHT PARTICULAR RISKS WHEN ACTING FOR VENDORS OR PURCHASERS IN OFF-THE-PLAN TRANSACTIONS. CLEAR INSTRUCTIONS ABOUT WHAT CLIENTS THINK THEY ARE BUYING ARE NEEDED BEFORE GIVING ADVICE. BY MATTHEW ROSE

Off-the-plan purchases are risky. They involve buying a property based on plans and artistic images without the benefit of a physical inspection.

The risks for purchasers include:

- delays in completion of construction
- insolvency of the developer during construction
- changes to the plan or advertised features
- the property losing value after the contract is signed, which often results in the purchaser being unable to obtain finance. This risk is amplified in a market of falling property prices.

The *Sale of Land Act 1962* (Vic) (SLA) contains specific protections for purchasers buying off the plan, including a right of rescission for certain breaches by the vendor. Therefore, a major risk for vendors is failing to comply with those SLA provisions.

When acting for purchasers or vendors, you need to remain alert to the particular risks of off-the-plan transactions and how a mistake could lead to serious consequences for your client and result in a negligence claim against you.

Acting for purchasers

There are specific issues that need to be dealt with in off-the-plan transactions and you need to have a comprehensive precedent letter of advice that explains them and a system to check that the letter is always tailored to the transaction at hand and sent.

Take detailed instructions from your client about what they think they are buying (eg, location, dimensions, finishes, car parks) and check whether the contract and plan of subdivision accord with these instructions. Check that the plans attached to the contract are legible. Advise your client about changes the vendor can make to the property before settlement and what your client's rights are under both the contract and SLA.

Advise your client on the meaning and effect of any sunset clause. Also advise them to seek an amendment to the sunset clause requiring the purchaser's consent before the vendor can terminate the contract. If there is no sunset clause tell the client about their rights under s9AE(2) to rescind if the plan of subdivision is not registered within 18 months of entry into the contract.

Be aware of foreshadowed legislative reforms by government[1] to better regulate sunset clauses in residential off-the-plan sales – requiring notices by vendors and consents by purchasers before rescissions based on a sunset clause.

Check the sunset date in the contract, put it in your diary and advise your client if the plan of subdivision is not registered in time. If a dispute about a sunset clause arises, seek the advice of experienced counsel early in the piece, as such disputes are usually complex and getting it wrong can be expensive.

Check that only a 10 per cent deposit has been taken and that it was paid to the vendor's lawyer, conveyancer or real estate agent. Tell your client that any breaches of the s9AA requirements will allow them to rescind under s9AE(1) any time before registration of the plan of subdivision.

SNAPSHOT

- Knowledge of the pitfalls and good systems including checklists are essential when acting in off-the-plan transactions.
- Advise vendors on their obligations under the SLA, especially regarding sunset clauses and deposit money, and the consequences of non-compliance.
- Take instructions from purchasers about what they think they are buying and advise on changes to the property and vendor's non-compliance with the SLA.

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Look for any material differences between the proposed plan of subdivision in the contract of sale and the plan finally registered. Examples include reduction in the lot size, change of boundary, removal of a car park and addition of an easement. Warn your client to also check the plan and inspect the property before settlement. Be alert to the possibility the vendor may have failed to notify your client about any amendments as required by s9AC(1). Advise your client on any potential right of rescission if the amendments materially affect the lot.

Warn your client that finance approval is often limited and/or conditional. It might be withdrawn months or even years later if property values fall in the intervening period before settlement, resulting in the proposed loan exceeding the lender's loan to value ratio. Also advise your client of the need to obtain finance by the stipulated time. Otherwise they may be unable to settle, entitling the vendor to rescind the contract, keep the deposit and resell the property – this risk is heightened in a rising market.

Warn your client not to pay money to the lender on the promise of a rebate of part of the purchase price at settlement or as a mezzanine loan to help finance the development. Advise your client if any such arrangement potentially breaches s9AA and explain the risks of advancing money to a vendor without adequate security.

Promptly tell your client when the occupancy permit is issued or plan of subdivision is registered. Failure to do so can leave your client insufficient time to procure finance or arrange a pre-settlement inspection.

Claims example – amendment to plan

In one claim, a purchaser of an off-the-plan apartment was given marketing material indicating the property had certain dimensions. After settlement, the purchaser discovered the developer had amended the plan of subdivision and the apartment's dimensions "as built" were significantly smaller. The purchaser then claimed the practitioner failed to warn them the plan could be amended, to check the measurements before settlement and engage a surveyor, and failed to take proactive steps to detect any revisions.

The matter was handled by a busy inexperienced clerk working with little supervision. There was no evidence the purchaser had been given advice on any substantive matters, particularly their right of rescission under s9AC(2).

Acting for vendors

When acting for vendors, it is often the simple things that go wrong. Deficient systems, including the lack of a good checklist, can result in basic mistakes with major consequences. For example, sunset date errors have resulted from a failure to obtain instructions or a simple typographical error with no system in place to check the date was entered correctly.

It is also important to give adequate advice and not make assumptions about your client's level of knowledge, even when they are experienced in off-the-plan transactions.

To manage your risk you need to do the following things:

Because multiple consultants are usually involved in any development, scope your role in writing and specify what advice you will not be providing. Recommend that your client obtains expert advice from other professionals such as surveyors, town planners, engineers and accountants as required.

Reiterate the expiry date for any planning permit and the consequences for failing to meet the deadline. Unless there is a contrary provision, a planning permit for the subdivision of land expires five years after certification of the plan of subdivision (see s68(1)(b) of the *Planning and Environment Act 1987* (Vic)). Once the period expires, the plan of subdivision will need to be recertified by the council. In some instances it may also be necessary to apply for a new planning permit to subdivide the land.

Ensure your precedent contract complies with the obligations imposed by the SLA, particularly s9AA, discussed below, and keep up to date with legislative changes.

Warn your client of the consequences of a breach of the SLA, including that the purchaser may rescind. Give specific advice about sections:

- 9AA and 9AE(1) regarding a 10 per cent deposit and how it is to be held, and that failure to comply with s9AA gives the purchaser the right to rescind[2]
- 9AB requiring disclosure of certain works
- 9AC requiring that the purchaser be advised of proposed amendments to the plan of subdivision and the right to rescind if the changes are material
- 9AE(2) regarding the purchaser's right to rescind if the plan of subdivision is not registered within the sunset clause time frame or the statutory 18 months if there is no sunset clause.[3]

Check that the sunset date recorded in the contract is correct. Where the incorrect date is sooner than the vendor wanted, it may be difficult to have the plan of subdivision registered within that time.

Check with your client whether GST is to be payable on the purchase price and specify in the contract if GST is to be applied on the margin scheme.

Check whether the planning permit requires your client to enter into an agreement under s173 of the *Planning and Environment Act 1987* (Vic). If so, ensure the contract contains details of the restrictions required by the s173 agreement and advise the vendor on what they are required to do under the agreement before settlement.

Check to ensure you are transferring the correct lot on the plan of subdivision.

Conclusion

Off-the-plan transactions are higher risk than standard domestic conveyancing matters and need special treatment and focus. It is essential to be aware of the risks highlighted in this article, use well-drafted off-the-plan-specific documents and give clear advice that focuses on those risks. ■

Matthew Rose is a risk manager with LPLC. He presents on a range of risk topics and writes many of LPLC's risk management publications including LPLC's monthly *LIJ* column.

1. See Sale of Land Amendment Bill 2019 (Vic).
2. See *Everest Project Developments Pty Ltd v Mendoza & Ors* [2008] VSC 366 and LPLC bulletin Recent decisions affecting "off the plan" sales, https://lplc.com.au/bulletins/recent-decisions-affecting-plan-sales/
3. See *Clifford & Anor v Solid Investments Australia Pty Ltd* [2009] VSC 223, *Harofam Pty Ltd v Allen & Ors* [2013] VSCA 105 and *Harofam Pty Ltd v Scherman* [2013] VSCA 104.

E-conveyancing can be e-fficient

FOUR PRACTITIONERS FROM DIFFERENT SIZED AND STRUCTURED FIRMS TELL HOW THEY HAVE ADAPTED TO THE ELECTRONIC CONVEYANCING SYSTEM. THE FIRMS ALL JOINED THE FIRST AND, AT THE TIME, ONLY ELECTRONIC LODGEMENT NETWORK OPERATOR, PEXA, AT DIFFERENT TIMES IN THE PAST FIVE YEARS.

The move towards electronic conveyancing started as early as 2014, but it was in the lead-up to 1 October 2018 when the majority of transactions were required to be done electronically that many firms entered the electronic workspace. How are firms adapting? To put the answers in context we also tell you the size and structure of the four practices.

Tom White at Coulter Roache: Tom is one of four principals, 19 lawyers and a range of paralegals.

Michael Benjamin at Michael Benjamin & Associates and Dingley Conveyancing Services. Michael is the only principal. He employs two lawyers and runs a conveyancing company that employs a licensed conveyancer and three conveyancing staff.

Zelma Rudstein at RKL Lawyers & Consultants. Zelma is the only principal. She employs one lawyer in the commercial area, one graduate lawyer and three conveyancing clerks.

Kristy Burrows at Yarra Ranges Lawyers. Kristy is the only principal and employs three lawyers, one of whom does conveyancing with her, and three conveyancing clerks.

When did you start using PEXA?

Tom White: Coulter Roache was part of the early adoption program with our first transaction performed in 2014.

Michael Benjamin: Our firm started using it on 24 November 2015.

Zelma Rudstein: Our firm started using it in January 2017.

Kristy Burrows: In early 2018 we started using PEXA regularly. Before that we had completed only a small number of settlements via PEXA, largely due to the fact that other firms had not yet registered as PEXA users and were unable to complete transactions via PEXA

How do you manage digital certificates in your office? Who has them, do you have a policy, what if someone is on leave?

Tom White: Lawyers required to use the PEXA platform have access to their own digital certificate which is their responsibility to manage and store securely in accordance with firm policy. There are several lawyers within the family law and wills and estates as well as conveyancing department with digital certificates as well as all four principals of the firm, so we are covered when lawyers are on leave or absent.

Michael Benjamin: Three of our lawyers have a digital certificate. The one licensed conveyancer and the three conveyancing staff in our conveyancing company each have digital certificates. The conveyancing company does not have a trust account, so no trust money is managed through it.

One employee solicitor has trust authorisation on PEXA to a set limit. If the transaction involves more than that I authorise it. If I am not in the office when authorisation is required, I can access the system remotely and sign using my digital certificate. I have not yet been required to do it remotely.

Zelma Rudstein: At the moment I am the only one who has a digital certificate. I can access the system remotely if I am away from the office or on leave.

Kristy Burrows: Each solicitor has a digital certificate. As the director of the firm, I am the only solicitor authorised to sign off on the trust account.

If I am not in the office I can sign off via remote access to our system.

SNAPSHOT

- Four perspectives on how firms are adapting to electronic conveyancing.
- While the firms are doing some things differently, they are generally finding they have systems in place now and they are working well.
- Electronically transferring money in the era of email fraud is a challenge for everyone, but these firms are aware and checking instructions and using new technology to help them.

How do you manage the certification process? VOI, client authority, right to deal?

Tom White: Most of our clients attend one of our offices to undertake the VOI process and the signing of client authority. We use the ZipID app for this process. For those clients unable to attend our office we direct them to Australia Post.

Michael Benjamin: The client authority is sent with our first letter. We do the VOI at our office via the TIMG app for the same fee as doing it at the post office or clients can elect to use the post office. The VOI number is recorded on the file. The right to deal is managed by the file operator.

Zelma Rudstein: We complete the VOI and the client authority check internally or through ZipID.

Kristy Burrows: In our initial letter to clients, we provide the client with:

- VOI form (Australia Post) or the option to verify their identification online via a link which is available through InfoTrack
- client authorisation form
- general power of attorney limited to conveyancing transactions only.

Once the client has completed the above, this is noted in an office register which is accessible by all staff. The person responsible for the file checks the register to ensure everything has been attended to before any documentation is signed off for the client.

Who approves and locks the PEXA workspace?

Tom White: Once the figures are balanced and all parties have signed the PEXA workspace, this goes to a ready state. I have a designated time each day that I sign and lock any matters that involve movement of trust money and are in a ready state. I manage to do 85 to 90 per cent of matters at this time, with some being signed later in the day. If any figures change the workspace is no longer in a ready state. The settlement statement is altered accordingly, rechecked and signed again by me. This can be inconvenient, but these changes are happening less and less with about one to two every two weeks. It is a much better rate than it was 12 months ago. I think everyone is more accustomed to using the system. If I am unavailable, one of the other principals is able to approve and lock the system using their digital certificate.

Michael Benjamin: The relevant file operator or user on the file. Where trust money is involved that person is me or one of my lawyers who has trust authorisation.

Zelma Rudstein: Our conveyancing clerks make any further changes necessary and then I check them and lock the workspace. I try to time the signing at the start of the day, but last-minute changes do happen, and it can be very intrusive to have to attend to when busy with other things.

Kristy Burrows: The person responsible for the file approves any last-minute changes and checks the information is correct. I then sign off and lock the PEXA system.

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E-conveyancing Q&A

How does training of staff to use PEXA work in your office?

Tom White: We have been able to build a good relationship with PEXA and our relationship manager, who assists us with training of new staff. In addition, PEXA provides help cards.

Zelma Rudstein: On-the-job training and our PEXA representative visits regularly or when we need them.

Kristy Burrows: Initially we had staff training by the PEXA direct specialist and all conveyancing staff (including support staff) attended the PEXA day seminar run by AIC.

All our conveyancing staff (including support staff) have completed online tutorials and webinars as required and we have had in-house training of staff from time to time.

What has been the biggest change you have made to the way you run conveyancing since e-conveyancing started?

Tom White: The most significant change has been managing online security with the increase in fraud efforts. Coulter Roache manage this through the use of password management tools, multifactor authentication, internal policies and the verification of bank and trust details.

PEXA has supported Coulter Roache's focus on a paper-lite office and streamlining the conveyancing process. No longer using settlement agents is another big change.

Michael Benjamin: The biggest changes have been the greater need for identification, where all parties have to attend somewhere for face-to-face identification. The elimination of settlement agents. A far more efficient settlement process apart from some banks which usually complete their component only on the day of settlement.

Zelma Rudstein: We insisted on electronic conveyancing for all matters as soon as it started. We found the process much quicker, easier for last minute changes and streamlining the settlement process. We start workspaces as soon as practicable and keep track of upcoming settlements through PEXA. We have found contacting lenders a lot easier through PEXA workspaces. Communicating with different departments of some lenders has sometimes proved challenging, but lenders seem to be getting more efficient and streamlined in their processes.

Kristy Burrows: We still take the same steps we did in the paper-based system. It is just done in a different way with online forms and systems. Our conveyancing staff have been open to the change and have made the most of all the training available and are really enjoying the new system which they think is more seamless.

We have much less physical banking to do as we no longer have to take bank cheques to the bank after each settlement. This is both cost and time saving.

Verification of the bank account details provided by third parties is more involved (including written and telephone verification procedures).

In the past 12 months there has been a noticeable increase in email fraud resulting in funds being sent to the wrong accounts. How is your firm managing this risk now most money in conveyancing is electronically transferred?

Tom White: Coulter Roache has implemented the firm policy that when bank details are received via email they are verified over the phone. When our trust account details are provided to clients via email a phone call is made immediately to make the client aware of the email and highlight that no follow up emails with changes to trust account details will be made.

This is a work in progress and we are hopeful new systems such as PEXA Key or Infotrack's Secure Exchange will provide better security for clients to provide bank details and for us to provide trust account details.

Michael Benjamin: We manage the risk by phone confirmation of account numbers and we now send the PEXA deposit form encrypted by Adobe which allows a code to be used to open it up, hopefully preventing cyber frauds modifying it as they would not know the code.

Zelma Rudstein: We are test driving PEXA Key, an app developed by PEXA. We were the first firm in Australia to have used it. The client logs in and provides the account details which populates directly to the workspace. Before that, we called the clients to confirm the account details they would email.

Kristy Burrows: We take several steps to address the increase in email fraud.

We advise all clients in writing that with cyber fraud on the rise, we must all be suspicious of email instructions relating to payments into bank accounts.

If we receive emails from our clients containing bank account details, we telephone the client personally to check the authenticity of the email and confirm their bank account details are the same as set out in the email. A record is kept of this on our file.

We also write to the client asking that they not act on any email payment directions from us without first calling our office to confirm the email is genuine.

When entering bank account details into PEXA, this is double checked by us prior to signing off and locking the PEXA workspace. ■

Heather Hibberd is chief risk manager at LPLC. The author acknowledges assistance in compiling this article from Phillip Nolan, a risk manager at LPLC, and practitioners Tom White, Michael Benjamin, Zelma Rudstein and Kristy Burrows.

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Common questions for PEXA

When can you hand over the keys?

You don't need to wait for funds to clear to consider the settlement finalised.

The LIV electronic conveyancing special condition says "settlement occurs when the workspace records that the exchange of funds or value between financial institutions in accordance with the instructions of the parties has occurred".

The exchange of funds between financial institutions happens at the RBA and the PEXA workspace status will change to "settled" when this has occurred.

This is equivalent to a paper settlement when a cheque is handed over and is later deposited into the vendor's account. The depositing occurs after settlement. In both paper and electronic settlements, keys can be released to a purchaser after confirmation of settlement.

The process is described well in Financial Settlement Overview on the PEXA website (https://community.pexa.com.au/t5/Help-Centre/Financial-Settlement-Overview/ba-p/56)

Who can sign off on PEXA?

There are four types of signing off on PEXA that require the use of a digital signature. There is some restriction on who is entitled to sign each stage or document.

1. Land Registry documents such as transfers – in a law practice – can only be signed by lawyers. This is based on direction from ARNECC to Subscribers and ELNOs based on advice provided by practitioner regulators including the Legal Services Board and Commissioner in Victoria.
2. Financial settlement schedule – anyone can sign these. It is dependent on the practices and policies of the individual law firm.
3. Trust account authorisation – only people with trust authorisation should sign these – in most cases this will be the principal of the firm or an employee lawyer who has been authorised to handle trust money.
4. New user activation – a subscriber manager or subscriber administrator with a digital certificate. See a recent release note at https://community.pexa.com.au/t5/PEXA-Product-Releases/PEXA-Release-9-1-1-4-March-2019/ba-p/14305.

It is not necessarily the principal who need always sign each of these stages on PEXA. Indeed, it is often better to have multiple signers within your firm. ■

Lisa Dowie is chief customer officer, PEXA.

The value of conveyancing

MANY CONVEYANCING CLAIMS AGAINST SOLICITORS ARE ROOTED IN THE BUSINESS STRATEGY OF THE LAW FIRM. THIS IS OFTEN LED BY THE PERCEPTION THAT CLIENTS WILL NOT PAY FOR MORE ROBUST SERVICE. BY HEATHER HIBBERD

Most conveyancing practices are busy places with multiple sale and purchase files being managed every week. Yet many firms are not making much money and conveyancing mistakes continue to be a major hotspot for professional indemnity claims. The mistakes have been described in other articles in this special edition and other material published elsewhere by LPLC. Many claims are often caused by simple oversights that time, systems, training or a combination of these risk management measures could have prevented. The question is why haven't these measures been implemented?

The problem

The feedback from many practitioners is that they are under such costing and time pressure that putting safeguards in place is burdensome and "one more thing to do". The root cause of the pressure is client understanding about what they are buying and its value to them.

Generally, most clients do not understand the extent of what is required to complete a conveyance successfully – the legal knowledge, experience, troubleshooting and steps that need to be taken. From the outside looking in it is a simple paper shuffling process. It is not surprising then that clients are reluctant to pay for the expertise they are unaware they are receiving.

To make conveyancing a safe and financially sustainable practice area, you need to be able to charge a fee that reflects the work, time and expertise needed to do the job well. This is not a revolutionary concept, but one that many firms fail to fully grasp.

There are at least two components to achieving this goal:

- making your firm's systems as efficient and effective as possible and
- educating clients about the value of the service and the corresponding fee reflecting that value.

When clients truly understand that you are offering the value they want or need, price becomes less of an issue.

The remainder of this article will focus on the latter point of articulating the value of the conveyancing service.

Consumer behaviour

Before we look at the value of your role, it is worth looking at the change in consumer behaviour when buying products or services today.

Consumers value peer review more than any other source of information about an unknown product, service or supplier. Online reviews, even if they are from strangers, will hold more weight than anything you can say in traditional promotional material.

Even if most of your clients come from a traditional referral source like other clients, real estate agents or financial advisors, the first thing most people will do is google your firm to see what is said about it.[1]

The other change in consumer behaviour is that many consumers want to be informed, not just about the provider of a service but what is involved in the service. They want to understand why. They don't want to be sold to, they want to be informed and educated.[2]

Communicating value

With these consumer expectations in mind, let's consider how you can communicate the value of what you do as a conveyancing practitioner to a potential client.

Answer the tricky questions

The best way to articulate value is to educate your clients and potential clients about the tricky issues involved in conveyancing. Put that information either as an article, frequently asked question or blog on your website or in social media so that when they google you or the topic they will find it. Answering the client's potential or real pain points helps dispel the myth that conveyancing is routine paper shuffling. It gives you credibility and visibility. It demonstrates you think about this stuff.

What are the common things that your clients ask you or complain about or get caught out with? Are they things like: Why do I need to lodge a purchaser's caveat? Can I have early access to a property? What happens if the property is damaged before settlement? Why do I need to pay for those searches? How long will

SNAPSHOT:

- Many conveyancing claims involve simple mistakes that occur because of time and cost pressures.
- Changing clients' perception of conveyancing work as simple administrative work is essential to improving the way the work is done.
- Consumer behaviour means educating clients on what is important in conveyancing.

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it take to do contract and disclosure documents? What could cause settlement to be delayed?

You will be able to come up with a long list of questions you could answer online for potential clients. Try googling the first two questions above and you will see there are firms that do this very well.

It is also easier to communicate some of these issues to clients, either before or when they arise, if you have already done the work to articulate them.

Focus on the value

How do you articulate what you do for clients? It should not be about the price you charge. That only leads to a race to the bottom which benefits nobody. Focus on the value. Liz Fox, agency development manager from Google, at a seminar in February this year told this story.

When a friend was trying to negotiate a group discount, the bungy jumping company representative said our business is to provide excellent bungy jumping experience but also to provide a safe experience. We don't discount on safety.

What is the value you are providing? For some lawyers this will take a mindset shift. You aren't just preparing a contract and lodging a transfer. You are providing peace of mind by ensuring that the biggest sale or purchase of the client's life goes ahead without a problem. You may even see it as making dreams come true because you will ensure the place they dream of raising their family, running their business from or increasing their investment wealth becomes a reality. A good analogy used by Liz Harris in her blog[3] is that people don't buy drill bits, they buy holes, or the capacity to make holes. What are your clients buying from you?

TIPS

- Change your mindset on what value you offer.
- Avoid making conveyancing a race to the bottom on price.
- Articulate your value through answering clients' pain points in articles and online content.
- Look at value through the client's eyes and understand it can relate to how they feel they are treated.
- Make the time to improve systems and procedures to be more efficient and effective and client friendly.

Client experience

Value, like beauty, is in the eye of the beholder. Often lawyers think their value is obvious to the client if the transaction goes ahead as expected and perhaps, in many instances, that is true. What lawyers can often underestimate in assessing the client's measure of value is how the client feels about the way they were treated, because achieving the legal outcome is a given.[4]

Is going to a lawyer a bit like going to a dentist? As lay people we would expect every dentist to be able to do their job competently. What stands out for us is our experience of dealing with the dentist personally as well as the booking process. Can we do it independently online when we want to? Do they send us a text message reminder before the appointment? Does the dentist give us enough information to help us understand what is happening? Does the dentist put us at ease and make us feel welcome and safe?

What is the conveyancing equivalent? Is the conveyancing client's contact, especially the initial contact, handled personally and professionally by a lawyer? Can they ask questions of the lawyer if they need to? Is it easy to make an appointment? Do they get follow up reminders?

If you put yourself in your client's shoes and ask what would make your client's experience of working with you easier and more fulfilling, then you will be closer to understanding how to provide your clients with an assurance of the value they are looking for.

Conclusion

Where value is understood price becomes less of an issue. As conveyancing practitioners, you need to better balance this equation in favour of your value to free yourselves up to better service your clients, and ultimately the legal system. The balancing starts with a change in attitude as to what you are doing and taking time to work on your business, not just in it.

Heather Hibberd is chief risk manager at LPLC. The author acknowledges assistance in writing this article from David Hart of Bedelis Lawyers.

1. Liz Harris, Director, Ovid Consulting, *Thriving in a world of change*, LPLC Risk Management Intensive 20172.
2. State of the connected customer report, https://www.salesforce.com/au/form/pdf/state-of-the-connected-customer.jsp
3. https://www.lifehacks4lawyers.com/l4l/2017/4/25/buying-the-hole, https://ovidconsulting.com.au/new-blog
4. https://www.cxinlaw.com/reports/; State of the connected customer report, https://www.salesforce.com/au/form/pdf/state-of-the-connected-customer.jsp

When the stake is at stake

GOOD SYSTEMS AND CHECKLISTS TO ENSURE COMPLIANCE WITH THE PROCEDURAL ASPECTS OF CONVEYANCING ARE IMPORTANT PREVENTATIVE ASPECTS OF RISK MANAGEMENT. STAKEHOLDING IS A GOOD EXAMPLE OF WHEN DIFFICULT SITUATIONS MAY ARISE. BY HILARY STOKES

Stakeholding is an area which leads to claims when practitioners are caught up in a dispute as to whom and when the money (ie, the stake) should be paid out. Broadly speaking there are two types of stakeholding. The first is when there is no wider retainer and the whole role of the solicitor is to act as stakeholder; the second is where the solicitor holds the stake as part of a broader retainer, most commonly the deposit held in a conveyancing transaction. In either case, the solicitor ought never become the arbiter of a dispute between the parties as to whom and when the stake should be paid.

As a matter of risk management and because there is often no benefit for the practitioner, it is generally recommended that practitioners avoid acting as stakeholder when that is the sole role. However, if in that position and to avoid dispute, the solicitor ought to clearly communicate to the parties in writing at the outset in particular, the terms upon which:

(a) the stake will be held. A term to the effect that the solicitor holds no interest in the stake may be prudent so the solicitor may make application to the Court by way of stakeholder interpleader if necessary. The interpleader applicant must be neutral in having no claim on the stake, except for charges or costs: r12.10(1) *Supreme Court (General Civil Procedure)* Rules 2015
(b) the funds will be released, being either mutual written consent by the parties or court order.

If the conditions are not met solicitors are commonly subject to, and ought to resist, pressure from one of the parties to release the stake. Instead, and subject to the terms already agreed, a solicitor may enter into a new stake as to the sum disputed on terms expressed in (b) above, or file a stakeholder interpleader summons with the Court. The stakeholder interpleader application provides for the parties to the dispute to argue the issues, not the solicitor, and the Court determines which party is entitled to the stake.

In conveyancing transactions, stakeholding disputes can arise when the contract of sale is not completed and both purchaser and vendor claim entitlement to the deposit. For example, the vendor alleges the purchaser defaulted by failing to pay the contract price, entitling the vendor to forfeit the deposit held, and the purchaser alleges the vendor produced an inadequate or wrong vendor's statement, entitling the purchaser to rescind the contract and recover the deposit paid.

To the extent the deposit is being held by the vendor's solicitor, a conflict arises between duties to the vendor as the client and duties to vendor and purchaser as contingent beneficiaries of the stake. It is a dangerous position for the solicitor to determine entitlement to the stake – if the solicitor pays the deposit out to one claimant without resolution of the dispute, the solicitor is inevitably joined as a party to a future proceeding brought by the other party claiming entitlement to the deposit. Payment by the solicitor of the deposit to the party ultimately found not to be entitled to the funds is the foundation for a claim against the solicitor in negligence. The deposit monies may disappear, for example when the recipient is insolvent, and the solicitor's conduct is the cause of the loss.

If a dispute as to the deposit arises, a prudent course of action for a solicitor is:

- if appropriate, seek agreement between vendor and purchaser that the deposit be held pending ventilation of their dispute and that it be released only in accordance with an agreed (in writing) outcome or court order
- if no such agreement is reached, the solicitor should immediately make application to the court for an order that the money be paid into court while the vendor and purchaser litigate their dispute. The solicitor is saved the costs of participating in any future proceeding, and is entitled to seek an indemnity in respect of the costs of the interpleader application, and
- to preserve neutrality, the solicitor ought not make any claim on the deposit for costs or otherwise. A conservative approach avoids the risk the stakeholder interpleader application may fail, creating a three-way dispute. ■

Hilary Stokes has worked at Obst Legal for 10 years and is a senior associate practising exclusively in litigation, principally in professional indemnity defences for solicitors.

SNAPSHOT

- A solicitor ought never become the arbiter of a dispute between parties as to whom and when the stake should be paid.
- Do not release the stake without written consent from both parties or a court order.
- If agreement cannot be reached, use the stakeholder interpleader summons r 12.02 *Supreme Court (General Civil Procedure) Rules* 2015.

ADOBE STOCK

Road blocks on the path to settlement

CONVEYANCING CAN BE AN ONEROUS TASK. SINCE 2016 IT HAS BECOME MORE SO WITH THE MOVE TO PEXA. BY SIMON LIBBIS AND DAN PRIOR

SNAPSHOT

- Watch for the requirements of the incoming mortgagee.
- Examine the plan to check what is being sold.
- Stratum and company share titles can pose a threat to the unwary.

Conveyancing practitioners are now required to change their data collection requirements, change their identity requirements, upgrade their hardware to prevent hackers trying to steal PEXA monies, train clients in how to not send money to the wrong account and report on and collect capital gains tax and GST.

These are in addition to the usual trials and tribulations that occur during a conveyancing transaction.

The main aim of conveyancing is to get to settlement. The purpose of this article is to identify some of the issues that can prevent that happening. They are not everyday issues. If they are identified at an early stage, they can be dealt with, minimising disruption to the process and unpleasant surprises for the client.

Requirements of the incoming mortgagee

The most common way in which a title issue threatens to derail a settlement is the requirements of the incoming mortgagee. When the purchaser asks to borrow money on the strength of the security that they will offer at settlement, the incoming mortgagee looks at the title and sends back to the purchaser's banker/broker/solicitor a list of things that they will need to certify their file for settlement.

Noting that the incoming mortgagee would like the best security possible, the mortgagee will invariably and perhaps quite reasonably ask for any irregularities or unusual aspects on title to be rectified.

The problem arises when the vendor is not able or willing to attend to the title issue and presses the purchaser for settlement. The purchaser is then in the invidious position of choosing between:

- seeking to have their current proposed mortgagee change their mind with respect to their requirements; or
- obtaining finance from a different mortgagee (usually at short notice); or
- finding a cash buyer who doesn't consider the title issue to be material and then nominate that buyer; or
- negotiating an exit with the vendor; or
- a combination of some or all of the above.

Each of the aforementioned scenarios is undesirable and goes well beyond the scope of the initial conveyance. In each of these situations timeframes become tight and purchasers can experience considerable stress. The question will then be asked: could this have been identified earlier? A purchaser's representative must inform themselves as to existing title issues and advise the purchaser early in the engagement whether a title issue presents a risk to the purchaser and whether there are steps required of the purchaser to ameliorate some of the risk.

General Law Land

The amount of General Law Land is continuing to diminish rapidly as the conversion regime set out in the *Transfer of Land (Single Register) Act 1998* takes effect. One of the important provisions of that legislation was to allow the registrar to create provisional folios pursuant to s23 of the *Transfer of Land Act 1958* (TLA) This process was one of the steps deemed necessary as a result of the slow uptake for the conversion process. The registrar, pursuant to s26S(b)(ii), can create the provisional folio on their own application. When such a folio is created, it is issued to the Registrar of Titles and should the registrar consider it appropriate, notice will be provided to the proprietor of the provisional folio of the creation of the folio, pursuant to s26U. A provisional folio can also be created by an "entitled person"[1] pursuant to s22 on a lodging of a specified dealing, or under s23.

The provisional folio will contain warnings, most commonly warnings as to subsisting interests and as to dimensions. The subsisting interests warning will expire 15 years from the provisional folio being created, pursuant to s26Y. The dimensions warning will not expire until a survey application is completed (such as a s26P application). The warnings are to be treated as encumbrances (s17).

The issue for practitioners is that when a provisional folio is created, the title appears to some clients to be a perfectly good title. This is especially so in an environment where many clients are able to conduct their own title searches. A vendor client may advise

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that they wish to sell their property, instruct for the preparation of a Section 32 and one may be prepared without consideration of whether the title is in fact able to be provided at settlement or how a purchaser will fund the purchase if security is a provisional folio.

It is not uncommon for a vendor to sell land that has a provisional folio. In accordance with s23(1) of the TLA it has been brought under the operation of the TLA by the creation of the provisional folio. This means that General Condition 9 (General Law Land) of the prescribed contract will not apply.

Under the contract, unless some other provision gives the purchaser relief, the purchaser could not refuse to settle on the basis that the vendor had only a provisional folio. There is no prohibition on sale of land contained in a provisional folio. Section 26L does, however, prohibit subdivision and consolidation of provisional folios with subsisting interest warnings.

In reality, a vendor's representative should be conscious of the need to assist and will usually do so by agreeing to apply for a s14 conversion before settlement. If such agreement is not reached, the purchaser is left in the position of trying to complete a contract in which there are slim prospects of a financier providing the funds if the security is a provisional folio. In those circumstances, relief of the Court should be sought well before settlement, seeking orders that the vendor make the necessary application.

Practitioners should also note that while PEXA appears to allow registration on a provisional folio in that it will advise that the title is available for electronic lodgment, the title would have to be nominated by the registrar. This is unlikely and a request for paper lodgment would be necessary.

Accessory, restricted and other lots

Strata and cluster subdivisions, or sales which should deal with more than one lot, continue to confuse vendors and purchasers. Often a practitioner will be presented with the volume and folio by their client of the land that they are proposing to sell, or a practitioner will rely on the automated assessment by their search provider of the parcels relevant to a particular unit that is being transacted.

The difficulty with this approach is that in relying on the client or a search provider, additional lots that need to be part of the transaction may be overlooked. Perhaps, for example, the unit on the plan has two accessory lot carparks, however only one accessory lot has returned in the searches.

The issue eventually presents itself after signing of the contracts and before settlement. A rush ensues to try to have the contracts amended to include the accessory lot if possible – but what if the omission of a lot from a contract of sale has been perpetuated over time, resulting in a chain of owners that have not transacted at all on a carpark that was originally designated to the unit? Land Victoria's Customer Information Bulletin Edition 132 in December 2011 noted that this remained an issue and specified that the provisions of s47 TLA (completed purchase) were not available to the purchaser unless it could be established that normal conveyancing practice cannot occur.

Practitioners should consider seeking instructions to conduct historical searches of the title and then instrument searches of earlier transfers to rule out any missing accessory lots where instructions, the plan or the nature of the property suggest that there may be an accessory lot that has been orphaned on the plan. These instructions should be obtained early so that the resolution of the matter can be attempted before settlement.

Restricted titles are treated slightly differently as they will not be able to be dealt with unless the restricted lot is accompanied on the transfer by a carpark lot.[2] This means in practice that it is less likely for a carpark to be forgotten, but if there are two carparks the same issues as mentioned for accessory lots could apply.

The problems are not limited to forgetting lots on RP, SP, CP or PS plans. Old laneways claimed or bought from council and lots created by adverse possession are often forgotten from sales documentation. It is not unheard of for adverse possessions to be claimed again by the successor in title years after they were first claimed by a predecessor in title, but forgotten. There should be less of this issue in future as the Titles Office has, several years ago now, changed its process so that it marks the parcel claimed as a lot on the plan with the existing fee simple parcel owned by the possessor. This has meant that when a search is done of the plan, all parties to the transaction ask the question of the additional parcel on the plan and the parcel becomes part of the transaction. However, the previous practice of the Titles Office was to simply issue the parcel without reference to the primary lot, and to make matters worse, many of these small adverse possession parcels did not find their way to the mapbase so do not appear on planning searches etc.

Practitioners should always go beyond the title plan returned to them by their search provider and look at the lot in the context of the lots around it. When acting for the vendor or purchaser before contract, or the purchaser post contract, the mapbase through LASSI[3] should be examined to establish whether there is an old laneway that abuts the lot or there exists other plan references that indicate a further examination is required. If there are plan references, copies of those plans should be obtained.

Examination of the titles to the property at this level of inquiry will ensure that the practitioner has done all they can to prevent a parcel being forgotten.

Separate interest titles

In some cases, where two or more proprietors own a property, they are able to create separate interest folios pursuant to s32 TLA.[4] Upon registration of the application, the existing folio of the register will be cancelled and titles issued to each of the tenants in common as to their respective interests in the property. Search providers occasionally miss an interest folio and practitioners must make sure that they check the proprietorship so that each share is accounted for. The task is made easier by the additional information at the end of the register search statement which provides the details of other folios with interests affecting the land.

If a practitioner is acting in relation to a sale of land where there is a life tenant and an estate in remainder, great care must be taken to ensure that the appropriate documentation is available before preparation of the contract. If the life tenant is still alive, both the life tenant title and the estate in remainder title must be provided at settlement to the purchaser. If the life tenant has died, an application must be made for certificate absolute.[5] The title would then cease to be an interest title.

PEXA will not allow an electronic transfer of an interest, so any transaction dealing in interest titles must be conducted in paper

and time allowed to arrange the same.

Notices of Action

The Registrar of Titles is able to take any other step necessary to protect the operation, effectiveness and integrity of the register, including, but not limited to, the making of a notation on a folio of the register (s106(1)(f) TLA). The notation will appear at the bottom of a register search statement under "Activity in the last 125 days", even in circumstances where the Notice of Action has been "noted" on the title well past that timeframe.

Land Use Victoria's Customer Information Bulletin (CIB) in April 2018 noted that the registrar will place a Notice of Action over a folio of the register when exercising the power. That power is typically exercised when the registrar is aware of proceedings affecting land which may result in an amendment to the register.

It goes on to explain that a Notice of Action will not prevent the lodgment or registration of dealings with land. It simply allows the registrar to monitor dealings affecting a folio. This may be necessary to ensure, for example, that dealings which may frustrate the proceeding are not registered. A Notice of Action will be removed from a folio when it is no longer necessary. For example, when the registrar is informed that a proceeding has concluded.

The bulletin's release followed earlier commentary in this journal.[6] Notably, the bulletin does not specify how long the registration of a dealing may be delayed and so incoming proprietors and their mortgagees (incoming parties) must assess the risk of proceeding to settlement. If the incoming parties can be satisfied that they have knowledge of all proceedings that may affect the folio, then they may proceed to settlement. However, the chances of this occurring in reality are slim. In those circumstances, if the vendor presses for settlement, the purchaser must carefully consider their next steps. Counsel's advice is a prudent start.

Problems will recur until either the prescribed form contract of sale is updated to specify that Notices of Action are to be considered an encumbrance requiring removal (GC2.3(e)), or the registrar provides a process that can be relied on by purchasers that establishes what is required for the removal of the Notice of Action.

Registrar's Caveats

Section 106(a) of the TLA gives the registrar the power to lodge a caveat on behalf of the Crown where the registered proprietor is a minor or of unsound mind. Formerly Queen's Caveats, now known Registrar's Caveats, they are commonly seen as a result of the registrar acting on the representation orders of the Guardianship List at VCAT.

Conveyancing practitioners often come into contact with these caveats. They should now pose no issue to settlement provided the mortgagee understands how they work and when they will be removed. The February 2019 CIB provided helpful explanation by the registrar as to when a Registrar's Caveat will be removed:

- If the transferor in a transfer of land is the represented person and the transfer is signed under certification on behalf of the transferor, the Registrar's Caveat will be removed upon registration of the transfer
- No further evidence will be required in support
- The mortgagee can be forwarded the CIB if they are anxious about settling with these caveats in place. The PEXA workspace will settle notwithstanding that the caveat is in place.

Stratum and company share titles

There are still quite a lot of these around and they can pose a threat to the unwary. It is important to ascertain at the outset of a conveyancing transaction if the title for the property comes under one of these categories and, if so, which one. The processes are quite different.

The sale of a company share title is in fact a sale of shares in a company. The shares carry with them the right to exclusive occupation of an area of the building. There is usually a service agreement between the shareholders.

The *Sale of Land Act 1962* does not apply to company shares and there is no transfer of land involved. The standard contract of sale of real estate cannot be used for the sale of them.

The sale usually has to be approved by the company that owns the land. This approval needs to be sought immediately upon signing of the contract. The seller of the shares must have the share certificates to provide to the purchaser and the transfer of shares must be lodged with the company and the company's register on ASIC updated accordingly. Normally the manager of the company share building would undertake this task, but the practitioner needs to make sure that this step is taken as the *Corporations Act 2001* requires that ASIC be informed of the share transfer within 28 days of the date of settlement of the transfer.

Stratum titles also have company shares and a service agreement. They also have a title which will usually be encumbered by a charge in favour of the service company. This can be of concern to lenders as it will take priority over their mortgage. Like company share titles, the service agreement for stratum titles often requires that the company consent to the transfer of the shares. Share certificates are not required in circumstances where they are already shown to be included in the relevant folio of the register,[7] but will be required where this is not the case.[8] The title must be examined closely to establish the shares are included in the relevant folio, not just copies attached to the vendor's statement.

It is important at the outset of a conveyancing transaction to identify stratum and company share titles. Failure to do so and to follow the appropriate processes will result in significant problems as settlement approaches.

Conclusion

As with many aspects of life, things are not always as they seem in conveyancing transactions. Time spent before contract identifying potential roadblocks before you get to them is well rewarded. Failure to identify the roadblocks before the contract or early in transaction can result in unhappy clients and headaches for the practitioner.

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1. See s10 *Transfer of Land Act* 1958.
2. Clause 6, Schedule 2, *Subdivision Act* 1988.
3. Land and Survey Spatial Information, accessible at https://maps.land.vic.gov.au/lassi/
4. Form 11, Application for a New Folio of the Register, *Transfer of Land (General) Regulations* 2004.
5. As above.
6. Russell Cocks "Notice of Action" *LIJ* April 2018, p63.
7. Regulation 7(2) *Transfer of Land (General) Regulations* 2004.
8. Regulation 7(1), as above.

HIGH COURT JUDGMENTS

ANDREW YUILE

Native title

Compensation for impairment of native title rights and interests

In *Northern Territory v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 (13 March 2019) the High Court considered the proper amount payable in compensation for the extinguishment of certain native title rights. The Ngaliwurru and Nungali People (the "Claim Group") held non-exclusive native title rights over land in the Northern Territory that had been extinguished by acts done by the Northern Territory. That gave rise to an entitlement to compensation under s51 of the *Native Title Act 1993* (Cth).

The question in this case was the proper method of determining the compensation payable. At trial, the Claim Group was awarded compensation assessed at 80 per cent of the unencumbered freehold value of the land, plus simple interest, plus compensation for non-economic (cultural) loss of $1.3 million. On appeal, the Full Court varied the trial judge's assessment to award the Claim Group 65 per cent of the unencumbered freehold value of the land but otherwise affirmed the trial judge's decision.

The High Court held that the first step is to determine the value of the particular native title rights held and to deduct from the full exclusive native title rights a percentage that represented the comparative limitations of the Claim Group's interests, then to apply that reduction in percentage value to the full freehold value of the land as a proxy for full exclusive native title. In this case, that percentage equated to no more than 50 per cent of the freehold value. The Court also upheld the award of simple as opposed to compound interest, and upheld the award for cultural loss, also commenting on the factors to be considered in determining that award. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J separately concurring except as to the method for determining the economic value of the Claim Group's interests; Edelman J separately concurring except as to the method of valuation of cultural loss. Appeals from the Full Federal Court allowed in part.

Criminal law

Statutory interpretation – meaning of "destroys or damages"

In *Grajewski v Director of Public Prosecutions (NSW)* [2019] HCA 8 (13 March 2019) the High Court held that alteration to the physical integrity of a thing is required to show that the thing was damaged. The appellant was a protestor who climbed into a ship loader at a coal terminal and locked himself in. The appellant put the ship loader in a position where he was at risk of harm. The ship loader was shut down because of safety concerns and remained inoperable until he was removed. The appellant was convicted of intentionally or recklessly destroying or damaging property belonging to another, contrary to s195(1)(a) of the *Crimes Act 1900* (NSW). The offence was particularised as doing damage to property causing the temporary impairment of the working machinery of the ship loader.

The appellant appealed his conviction to the District Court of New South Wales, which stated a case to the Court of Criminal Appeal asking whether the facts could support a finding of guilt under s195(1)(a). The Court said that they could.

In the High Court, a majority held that "damage to property within the meaning of s195(1) of the *Crimes Act* requires proof that the defendant's act or omission has occasioned some alteration to the physical integrity of the property, even if only temporarily". The question stated in this case had to be answered no and the appellant's conviction quashed. Kiefel CJ, Bell, Keane and Gordon JJ jointly; Nettle J dissenting. Appeal from the Court of Criminal Appeal (NSW) allowed.

Criminal law

Jury directions – *Prasad* directions

In *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9 (20 March 2019) the High Court held that jury directions commonly known as *Prasad* directions are contrary to law and should not be administered. The case concerned an accused who was arraigned on an indictment of murder. A plea of not guilty was entered and a jury empanelled. At the end of the Crown case, the defence sought a *Prasad* direction, which allows for the jury to be informed that they are allowed at any time after the close of the prosecution case to return a verdict of not guilty without hearing more. Over the Crown's objection, a lengthy *Prasad* direction was given. The jury considered the direction but asked to hear more. After the close of the defence case, but before final addresses, the jury was reminded of the direction. After considering again, the jury returned a verdict of not guilty without hearing more.

The Director of Public Prosecutions referred a point of law to the Court of Appeal, asking whether *Prasad* directions are contrary to law and should not be administered. A majority of the Court of Appeal held that there was no reason in principle to hold that such directions should not be given.

The High Court unanimously upheld the appeal. The Court held that a jury does not have a common law right to return a verdict of not guilty any time after the close of the Crown case. To give a *Prasad* direction was inconsistent with the division of functions between the judge and the jury (for example, because it might suggest to the jury that the judge considers acquittal to be appropriate, or because it leaves the jury without the benefit of

the prosecution's final address and the judge's summing up). It is a matter for the jury to decide if guilt beyond reasonable doubt has been established, assuming that the evidence at its highest is capable of sustaining a conviction. A jury cannot make that decision until the end of the case. The Court therefore held that *Prasad* directions are contrary to law and should not be administered. Appeal from the Court of Appeal (Vic) allowed.

Criminal law

Jury directions – lies in complainant's evidence – application of the proviso

In *OKS v Western Australia* [2019] HCA 10 (20 March 2019) the appellant had been charged with four counts of indecently dealing with a child under 13. The trial took place nearly 20 years after the alleged offending. The central issue at trial was the credibility and reliability of the complainant's evidence. The complainant admitted to telling lies to police in her earlier accounts of events, and further lies were asserted by the defence. In the course of summing up, the trial judge directed the jury that they should not reason that just because the complainant had been shown to have lied, all of her evidence was dishonest and could not be relied on. The jury returned verdicts of guilty on one count and not guilty on the other (two counts were withdrawn).

On appeal the Court of Appeal held that the direction given was a wrong decision on a question of law but held that the conviction should stand because there had not been a substantial miscarriage of justice (the proviso).

The High Court unanimously upheld the appeal. The Court held that it was open to the jury, if it accepted that the complainant had lied, not to accept the balance of her evidence as making out the offences. The direction effectively prevented the jury from reasoning in that way or was apt to lessen the weight that the jury might properly give to a finding about the complainant's lies. The jury's assessment of her credibility was wrongly circumscribed. On the proviso, the High Court said that the only gauge of sufficiency of the evidence for the Court of Appeal was the verdict. But it could not be assumed that the misdirection had no effect on that verdict, in circumstances where the misdirection precluded the jury from adopting a process of reasoning, favourable to the appellant, that was open to it.

The conviction had to be quashed and a new trial ordered. Bell, Keane, Nettle and Gordon JJ jointly; Edelman J separately concurring. Appeal from the Supreme Court (WA) allowed. ■

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FEDERAL COURT JUDGMENTS

DAN STAR QC

Administrative and migration law

Legal unreasonableness by failure to exercise statutory discretion – s473DC of the *Migration Act 1958* (Cth)

In *DP117 v Minister for Home Affairs* [2019] FCAFC 43 (15 March 2019) the Full Court allowed an appeal and set aside the decision of the Federal Circuit Court which had dismissed the appellant's application for judicial review of a decision of the Immigration Assessment Authority (IAA). The IAA affirmed a decision by the Minister's delegate to refuse the appellant a Safe Haven Enterprise Visa (SHEV).

The issue in the appeal was whether the primary judge erred in not accepting the appellant's contention that the IAA had acted unreasonably by failing to consider whether to exercise its discretion under s473DC of the *Migration Act 1958* (Cth) to obtain information from the appellant, whether by way of an interview or in writing, for the purposes of its review of the decision made by the Minister's delegate to refuse the appellant an SHEV.

Relevantly, although the delegate refused to grant the appellant an SHEV, the delegate accepted that the appellant had been tortured and sexually assaulted by Sri Lankan officials on at least two occasions. The IAA took a different view on the issue of the sexual assaults and inconsistencies in the appellant's claims apart from those referred to by the delegate. The IAA did not accept that the appellant was a victim of sexual assault as claimed by him.

To the Federal Circuit Court the appellant submitted that the IAA acted unreasonably in not exercising its discretion under s473DC, in circumstances where the IAA made adverse findings against him based on material which was before the delegate, but which the delegate herself had not relied on. In particular, the appellant complained that he should have been interviewed by the IAA and given an opportunity to comment on or explain supposed inconsistencies and this was relevant to the issue whether or not the sexual assaults had occurred as claimed by him.

Griffiths and Steward JJ noted an "important concession" by the Minister that the IAA had in fact failed to consider the exercise of the power under s473DC in relation to the issue whether or not the sexual assaults had in fact occurred or in relation to the relevant inconsistencies (at [44]). The joint judgment held that the IAA's failure to consider whether or not to exercise its power under s473DC in respect of either the issue of the sexual assaults or the relevant inconsistencies was legally unreasonable (at [45]-[47]). They stated at [48]: "It is necessary to now determine whether or not the IAA's error in not considering the possible exercise of its power under s473DC in respect of the two relevant matters is material and involves jurisdictional error (see *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 92 ALJR 780 (*Hossain*) and *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 (*SZMTA*))". Griffiths and Steward JJ held there was jurisdictional error which was material.

Mortimer J agreed in the result but gave separate reasons for judgment. Her Honour's approach differed on the following points of principle: (1) legal unreasonableness and procedural fairness (at [78]-[95]); (2) procedural fairness and materiality (at [96]-[107]); and (3) how to express the test for legal unreasonableness (at [108]-[112]).

In relation to the second of those issues, in contrast to the approach of the joint judgment at [48] set out above, Mortimer J said at [106]: "However, as the law currently stands, I do not understand that the *ratio* of the decisions in *Hossain* and *SZMTA* require that where an exercise of power has been found to be legally unreasonable (a ground not addressed in either of those decisions), the supervising court must conduct a separate assessment of 'materiality', before being able to characterise the error as jurisdictional in character".

Legal professional privilege

Holder of legal professional privilege of government advice – whether waiver of privilege by evidence given during hearing

In *Australian Workers' Union v Registered Organisations Commissioner* [2019] FCA 309 (7 March 2019) Wheelahan J refused leave to the Australian Workers' Union (AWU) to uplift and inspect documents produced in answer to a subpoena that were the subject of a claim for legal professional privilege (LPP) at common law. The documents were produced by the Secretary of the Department of Jobs and Small Business (Department) in answer to a subpoena issued by the AWU.

Wheelahan J determined this dispute while the main proceeding was part-heard before another judge (Bromberg J). The main proceeding is the AWU's claim for relief on grounds including that the decision of the Registered Organisations Commissioner (Commissioner) to conduct an investigation under s331(2) of the *Fair Work (Registered Organisations) Act 2009* into certain donations alleged to have been made by the AWU was affected by jurisdictional error, because the decision was made for an improper political purpose.

The documents in dispute were communications for the purpose of legal advice relating to the two letters from Senator the Hon Michaelia Cash to the Commissioner that were sought to be relied on by the AWU to support its claims in the main proceeding.

The issues before the Court were: (1) who was the holder of LPP in the disputed documents? (at [13]-[35]); and (2) did Senator Cash or her chief of staff (Mr Davies) effect a waiver of that privilege? (at [36]-[62]).

The first issue involved an analysis of who was the holder of privilege in documents that were emails from government lawyers to a Minister's office. That was relevant in order to determine whether (if she did) Senator Cash waived LPP. Possible holders of the privilege were Senator Cash (who was the relevant Minister at the time that legal advice was sought and obtained), Ms Kelly O'Dwyer (who was the relevant current Minister), the office of the Minister or the Commonwealth

of Australia. Wheelahan J stated that the identification of the holder of the privilege requires that a natural person, or an entity with a legal personality such as the Crown, be identified (at [34]). The Court held that the Crown was the holder of the privilege because at the time the letters were prepared and sent, Senator Cash was exercising a function of one of the Queen's Ministers of State for the Commonwealth (at [35]).

The second issue concerned which servants or agents of the Commonwealth had authority to waive privilege. The question of implied waiver also arose in circumstances where the Commonwealth was not a party to the proceeding, and nor were Ms O'Dwyer, Senator Cash or Mr Davies, with the latter two having attended court and given evidence as a result of the coercive process of a subpoena (at [54]). Wheelahan J held that the evidence of each of Mr Davies and Senator Cash did not give rise to an implied waiver of LPP (at [56] and [66] respectively).

Further, Wheelahan J explained at [61] that Senator Cash did not have authority to waive privilege: ". . . On the evidence such as it is, I would infer that the current Minister is entitled to exercise control over the privileged content of the six documents as an incident of her authority as Minister responsible for administering the *Fair Work Act*, and the *Fair Work (Registered Organisations) Act*. It follows that with that authority, she might waive or authorise the waiver of privilege in the documents. There may be others within the Commonwealth who have authority to waive the privilege. However, on the state of the evidence I am not satisfied that Senator Cash, who no longer holds a portfolio with responsibility for the relevant legislation, had authority in fact to waive privilege in the six documents. Senator Cash did not give evidence on behalf of the Commonwealth: she gave evidence as to events to which she was a witness, and as to her own state of mind. In that respect, she was not in the same position as a party witness. The mere fact that Senator Cash is a Minister of the Crown does not permit me to draw a reasonable and definite inference that Senator Cash had any authority to waive privilege in the six documents . . ."

Bankruptcy and corporations law

Application by trustee in bankruptcy – obligation on trustee to present full picture to the Court

In *Carrafa v Chaplin, in the matter of the bankrupt estate of Michael Chaplin* [2019] FCA 415 (22 March 2019) Colvin J dismissed the application by the trustee in bankruptcy for vacant possession of a property relying on ss30, 77 and 129 of the *Bankruptcy Act 1966* (Cth).

Colvin J stated at [8]: "So it is that more than 12 years after the commencement of his bankruptcy, during which time Mr Chaplin and his children have lived in the Broomehill property as their home, the trustee now seeks orders requiring Mr Chaplin to relinquish vacant possession. In support of the application the trustee condescends to no detail about the circumstances in which Mr Chaplin came to be allowed to remain in the property all this time, the nature and extent of any work undertaken by Mr Chaplin on the property, the circumstances in which the insurance was unable to be obtained, and why there has been such a delay in arranging the sale of the property during which, for a period of many years, Mr Chaplin has maintained the property while living in it as his home. The trustee simply claims that, by reason that he is now the registered proprietor of the Broomehill property in his capacity as trustee of the bankrupt estate, he is entitled to unconditional orders for vacant possession".

The application was refused for two reasons: (1) the residential tenancy of Mr Chaplin had not been terminated (at [24]-[32]); and (2) the trustee had not disclosed to the Court all the relevant circumstances (at [33]-[38]).

On the second reason, Colvin J said at [33]: "A trustee in bankruptcy has all the fiduciary duties of a trustee under the general law (as modified by the Act): *Re Fuller* [1996] FCA 523. Further, the trustee is an officer of the court when exercising powers and discretions: *Re Condon; Ex parte James* [1874-80] All ER Rep 388 at 390. So the decision to bring the present application and the manner in which it is to be brought are both matters to which these obligations apply". ■

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The full version of these judgments can be found at www.austlii.edu.au. Numbers in square brackets refer to paragraph numbers in the judgment.

FAMILY LAW JUDGMENTS

ROBERT GLADE-WRIGHT

Property

Wife's SMS held admissible against her case that $145,000 advance from father-in-law was husband's debt

In *Phe & Leng* [2019] FamCAFC 17 (8 February 2019) the Full Court (Alstergren CJ, Strickland & Watts JJ) dismissed the wife's appeal against a property order where Le Poer Trench J found that the husband's father was owed $145,000. The wife alleged that that sum was the husband's debt alone, having been deposited into an account the husband controlled. It was found that it was the parties' debt as the wife in a text message to the husband's sister said that she would "return" the money to the husband's parents if her child "M can come back to Sydney".

On appeal, the wife argued that her text message was inadmissible, being a settlement negotiation within the meaning of s131 of the *Evidence Act 1995* (Cth). The Full Court disagreed:

"His Honour put to the wife that the message represented an acknowledgment by her that the loan (in Taiwanese dollars) existed . . . [T]he wife said the message was . . . an attempt to . . . get the husband and his family to return the parties' eldest child to Australia … (at [28]).

". . . [T]he wife contended . . . that his Honour should not have allowed the message to have been adduced . . . because it was a communication made in connection with an attempt to negotiate the settlement of a dispute . . . (at [30]).

"The broader view . . . is that [the exception in] s131(2)(g) . . . applies where the existence or the contents of otherwise privileged communication contradicts or qualifies existing evidence or an inference from that evidence and the court is otherwise likely to be misled unless the communication is adduced . . . (at [36]).

". . . [W]e conclude it was likely that the primary judge would have been misled into accepting the wife's evidence had the message been excluded (at [49]).

"Thus s131(1) of the *Evidence Act* does not apply to exclude the message because s131(2)(g) was enlivened and the wife was not entitled to claim privilege" (at [50]).

Children

Interim coercive order for mother to return and stay in a place where she had not been living was in error

In *Mareet & Colbrooke* [2019] FamCAFC 15 (7 February 2019) the mother left the father after a four month relationship. She was pregnant with the parties' child when moving from the Northern Territory (where the father worked) to Queensland via "Town F" in NSW where her family lived. She alleged stalking and harassment by the father. The child was born in Queensland. The mother signed a lease and moved her possessions there, also enrolling her 4-year-old child from a former relationship in kindergarten. A judge of the Federal Circuit Court on the father's application ordered the mother to return with the child to the "H Region" in NSW to spend time with the father at a contact centre. The mother appealed.

Ainslie-Wallace J (with whom Ryan and Aldridge JJ agreed) allowed the mother's appeal, saying at [14]-[18]:

"While it is undisputed that the *Family Law Act* . . . provides the power to enjoin a party to relocate (or not relocate), such an injunction should rarely be made . . . [S]uch an injunction can be avoided if the court gives adequate consideration to alternate forms of access . . .

"Her Honour regarded the issue . . . as a 'relocation case' . . . Clearly however, the child's residence was never in the H Region in [NSW] . . . Her Honour's characterisation . . . led her to make significant errors of law.

"In particular, her Honour gave no consideration to making orders that the father travel to the D Region in Queensland to see the child. Nor did she turn her mind to the interests of the mother's older child who had been enrolled at pre-school [there] . . . Instead, her Honour took the view that the mother should be compelled to return.

"This order . . . one directly affect[ing] the mother's right of freedom of movement, in the circumstances of this case was wrong at law. Secondly, her Honour's . . . order which bound the mother to the H Region of [NSW] from which she could not leave is patently erroneous.

"[H]er Honour's order . . . [also] took no account of the financial and other burden on the mother consequent on the move . . ."

Financial agreements

Section 90B agreement was no bar to a spousal maintenance application by wife as it did not comply with s90E

In *Barre & Barre & Anor* [2018] FCCA 97 (19 January 2018) the wife applied (inter alia) for interim periodic spousal maintenance in proceedings filed by her under s90K(1)(d) of the *Family Law Act* (material change in circumstances relating to a child) for the setting aside of a financial agreement made by the parties in 2005 under s90B before their marriage. Subsequent to their agreement the parties had two children, aged 11 and 5 at the time of the hearing. The husband opposed the application.

Judge Kemp said at [37]-[39]:

". . . [T]he Court does not accept that the . . . agreement excludes either party's right to make an application for spousal maintenance.

"The husband says that, while the actual words 'spousal maintenance' are not referred to as excluded, inferentially they were, as they were not specifically included within the terms of the . . . agreement as being an excluded item . . .

"The husband, further, says that such an outcome, being no ability to apply for spousal maintenance, would be consistent with the fact that the . . . agreement was

entered into . . . where both parties were in employment, apparently able to adequately support themselves . . . and intended to continue to do so in the future. The Court does not accept that submission. While the . . . agreement contemplated the parties having children, it was silent as to the impact of having children on each of their earning capacities."

Judge Kemp continued:

". . . [I]n *Boyd* [2012] FMCAfam 439 Brown FM . . . considered . . . s90E and stated:

'Essentially, the legislature requires that any . . . financial agreement specify which portions of any lump sum or property order conferred thereunder are for either spousal or child maintenance, so that the social security implications of such an order or agreement is apparent' (at [44]).

"The wife referred to that decision and submitted that as the . . . agreement did not comply with s90E . . . that was 'the end of the matter' and the wife's spousal maintenance rights were, clearly, preserved" (at [45]).

Judge Kemp agreed.

Property

De facto partners reconciled six years after separation, then married but separated again

In *Borg & Bosco* [2019] FCCA 66 (18 January 2019) Judge Burchardt heard a property case for parties who were de facto partners from 1999 to 2005. In 2007 they made and implemented a financial agreement to divide their assets. They reconciled in 2011, married in 2013 and in 2017 separated. Their children (aged 18 and 15) lived with the wife. The father spent no time with them. Each party made initial contributions (the husband "Property A" worth $80,000 and the wife two properties, sold during cohabitation for $87,500).

Under the agreement the husband retained Property A and paid the wife $61,500. The wife applied her settlement towards real estate but sold it and lost all but $6000 on a business venture. The husband worked as a tradesman on $50,000 per annum while the wife earned $400 per week and provided full-time care for the children since 2000.

The non-superannuation pool at trial was $524,400 – primarily the husband's Property A worth $680,000, subject to a mortgage, and his super to which he had not contributed since 2008.

Citing *Kowalski* [1992] FamCA 54, the Court said:

". . . The Full Court held as the headnote indicates:

'Once a marriage has been celebrated between the parties the entire relationship between them, whether arising out of contributions before, during or after . . . marriage is entered into or dissolved, falls within the ambit of Part VIII of the *Family Law Act* . . .' (at [58]).

". . . [T]he weight to be given to discrete periods of the relationship and . . . to any period of separation must necessarily . . . involve the length of the two periods of cohabitation and the length of the separation . . . (at [61]).

" . . . [T]he financial agreement . . . represented an equal distribution of the parties' then assets . . . (at [66]).

"Counsel for the husband conceded that bearing in mind the primary responsibilities for the two children . . . an equal division . . . was probably somewhat light . . . It is not . . . however . . . appropriate to give a retrospective readjustment in percentage terms . . . (at [67]).

"[From 2005] the parties were wholly separate in their dealings until 2011. They re-partnered for another five . . . years . . . (at [68]).

"During the second . . . relationship . . . both parties did their best. The husband has worked throughout and … he brought into the second . . . relationship a substantially increased equity in the property . . . [from] his own payments between 2005 and 2011 (at [71]).

". . . Between 2011 and 2017 the wife was seeing [the parties'] children into and . . . through adolescence as the primary home carer . . ." (at [72]).

Contributions were assessed as 70:30 for the husband, adjusted by 10 per cent for the wife under s75(2) due to her impaired earning capacity, her carpal tunnel syndrome and her care of the children. The husband's super was split 25 per cent for the wife, it having accrued between 1989 and 2008, a year after the agreement (at [78]). ■

Robert Glade-Wright, a former barrister and accredited family law specialist, is the founder of *The Family Law Book*, a looseleaf and online service: see www.thefamilylawbook.com.au. He is assisted by accredited family law specialist **Craig Nicol**. References to sections of an Act in the text are 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

PROFESSOR GREG REINHARDT

Whether costs incurred by liquidators on appeal recoverable against company in liquidation by way of indemnity

McDermott and Potts in their capacities as joint and several liquidators of Lonnex Pty Ltd (in liq) [No 2] [2019] VSCA 62 (unreported, 20 March 2019, no S APCI 2018 0018, Whelan, McLeish and Hargrave JJA).

In the April 2019 *LIJ* (pp 54-55), I wrote of the decision of the Court of Appeal in *McDermott and Potts in their capacity as joint and several liquidators of Lonnex Pty Ltd (in liquidation)* [2019] VSCA 23 (unreported 19 February 2019, no S APCI 2018 0018, Whelan AP, McLeish and Hargrave JJA). The Court of Appeal there dealt with an appeal by the applicant liquidators against a decision of an associate judge of the Court who had refused to approve a compromise between the liquidators in proceedings against Lonnex & Millennium Management Holdings Pty Ltd (LMMH) regarding a release of debt. The Court of Appeal had granted leave to appeal but dismissed the appeal.

How should costs be awarded? The question was complicated by reason of the fact that the Deputy Commissioner of Taxation had funded the original proceeding resulting in the compromise. The Commissioner had appeared as a contradictor both at first instance and on appeal.

At first instance:

In relation to the costs incurred by a liquidator at first instance, provided that a liquidator acts reasonably and honestly, the liquidator is generally entitled to costs from the company by way of indemnity (at [11]). That is so even in the context of a summons for directions (at [12]). If a liquidator defends proceedings resulting from carrying out his or her functions, then the liquidator should not be subject to a personal order for costs. If, however, the liquidator institutes proceedings in the liquidation or otherwise, the liquidator should be personally liable for costs incurred by the defendant, if so ordered by the court, subject to a right of recoupment if the liquidator has acted reasonably (at [14]).

It was not disputed that the Commissioner's costs at first instance should be paid out of the costs of the company in liquidation (at [15]).

On appeal:

Reference was made at [17] to the judgment of Nettle JA in *Australian Incentive Plan Pty Ltd v Attorney-General [No 2]* (2012) 44 VR 661, 692-3 in relation to applications for directions.

The Court of Appeal said at [19]-[20]:

"In our opinion, the principles explained by Nettle JA in relation to an appeal by a trustee against a court's determination of an application for advice apply also to an appeal by a liquidator against a court's determination on an application for directions under s511 and like provisions. The principle in *Silvia v Brodyn* as set out above and explained by Oliver J in *Re Wilson Lovatt* derives from the close analogy between the position of trustees, with respect to the trust property under their control, and that of liquidators with respect to the property of the company. In both cases, the risk to which Nettle JA adverted, namely that the assets will be frittered away in costs, is the same. Moreover, as Higgins J put it in *Rosenthal v Rosenthal*, a trustee's right to come to court is based on the principle that they ought not be expected to take a risk as to the law, and the advice of the court will, ordinarily, give the trustee 'unimpeachable protection'. The same may be said of

the liquidator seeking directions. This consideration lies at the heart of the different treatment of appeals of this kind.

"In general, therefore, a liquidator who appeals unsuccessfully from a determination of a court upon an application for directions ought to pay both the liquidator's own costs and those of the successful party personally" (citations and endnotes omitted).

There was no reason in the case before the Court to depart from this approach (at [21]).

Applicants'/appellants' indemnity:

Reference was made to several authorities. The Court then said at [32]:

"The authorities to which we have referred do not make it altogether clear which party bears the onus on the question of indemnity, once it has been found to be appropriate to order a trustee (or liquidator) to pay personally the costs of an appeal they have brought following an unsuccessful request for advice or directions. However, in principle it would be strange if the onus lay on the successful respondent to the appeal. Both Higgins J and Nettle JA justify the general rule that the trustee (or liquidator) ordinarily pays the costs of an unsuccessful appeal in a directions proceeding on the basis that there would otherwise be a risk that the estate (or the assets of the company) would be 'frittered away in costs'. If the trustee (or liquidator) could none the less ordinarily have recourse to that estate or those assets to discharge that obligation, the general rule would be substantially undermined" (endnote omitted).

The Court concluded at [37]-[38]:

"What is striking about this case is that all the creditors of the company opposed the course adopted by the appellants. Notwithstanding the appellants' view that the compromise was in the best interests of the creditors, it cannot be avoided that, as a matter of objective fact, the entry into the compromise would also have been of benefit to the appellants as it would have secured payment to them of outstanding liabilities and averted the risk of future adverse costs orders. The fact that such a benefit was sought, even if only collaterally, over the objections of the creditors, by way of an appeal that was wholly unsuccessful, means in our opinion that the incurring of the costs liabilities in respect of the appeal cannot be regarded as reasonable.

"Since the appellants have not satisfied us that the costs were properly incurred, there should be an order that they not be entitled to indemnity from the assets of the company in respect of those costs." ■

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LEGISLATION UPDATE

New Victorian 2019 Assents

As at 19/03/2019

2019 No. 1 Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Amendment Act
2019 No. 2 Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Act
2019 No. 3 Justice Legislation Amendment (Police and Other Matters) Act
2019 No. 4 Parliamentary Committees Amendment Act

New Victorian 2019 Regulations

As at 19/03/2019

2019 No. 8 Adoption Regulations
2019 No. 9 Coroners Amendment Regulations
2019 No. 10 Major Crime (Investigative Powers) Amendment Regulations
2019 No. 11 Fisheries and Fisheries (Fees, Royalties and Levies) Amendment Regulations
2019 No. 12 Health Complaints Regulations
2019 No. 13 Subordinate Legislation Amendment (Prescribed Bookshop) Regulations
2019 No. 14 Residential Tenancies Regulations
2019 No. 15 Safe Patient Care (Nurse to Patient and Midwife to Patient Ratios) Amendment Regulations

New Victorian 2019 Bills

As at 19/03/2019

Energy Legislation Amendment (Victorian Default Offer) Bill 2019
Essential Services Commission Amendment (Governance, Procedural and Administrative Improvements) Bill 2019
Major Transport Projects Facilitation Amendment Bill 2019
Open Courts and Other Acts Amendment Bill 2019
Primary Industries Legislation Amendment Bill 2019
Professional Engineers Registration Bill 2019
Statute Law Revision Bill 2018
West Gate Tunnel (Truck Bans and Traffic Management) Bill 2019

New Commonwealth 2019 Assents

As at 19/03/2019

2019 No. 1 Defence Legislation Amendment Act
2019 No. 2 Electoral Legislation Amendment (Modernisation and Other Measures) Act
2019 No. 3 Home Affairs Legislation Amendment (Miscellaneous Measures) Act
2019 No. 4 Parliamentary Service Amendment (Post-election Report) Act
2019 No. 5 Social Services and Other Legislation Amendment (Supporting Retirement Incomes) Act
2019 No. 6 Telecommunications Legislation Amendment Act
2019 No. 7 Treasury Laws Amendment (2017 Enterprise Incentives No. 1) Act
2019 No. 8 Treasury Laws Amendment (2018 Measures No. 4) Act
2019 No. 9 Aboriginal Land Rights (Northern Territory) Amendment Act
2019 No. 10 Treasury Laws Amendment (Enhancing Whistleblower Protections) Act
2019 No. 11 Wine Australia Amendment (Trade with United Kingdom) Act
2019 No. 12 Industrial Chemicals Act
2019 No. 13 Industrial Chemicals (Consequential Amendments and Transitional Provisions) Act
2019 No. 14 Industrial Chemicals (Notification and Assessment) Amendment Act
2019 No. 15 Treasury Laws Amendment (2018 Measures No. 5) Act
2019 No. 16 Treasury Laws Amendment (Protecting Your Superannuation Package) Act
2019 No. 17 Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act

New Commonwealth 2019 Principal Regulations

As at 19/03/2019

Acts Interpretation (Registered Relationships) Regulations 2019
Administrative Appeals Tribunal Amendment (Small Business Taxation Division) Regulations 2019
Air Navigation (Aircraft Noise) Amendment (Delegations) Regulations 2019
Archives (Records of the Parliament) Regulations 2019
Australian Citizenship Amendment (Concession Codes and Payment of Fees) Regulations 2019
Civil Aviation Safety Amendment (Part 139) Regulations 2019
Corporations Amendment (Name Exemption) Regulations 2019
Crimes (Overseas) (Declared Foreign Countries) Regulations 2019
Electoral and Referendum Amendment (Modernisation) Regulations 2019
Family Law Amendment (Family Violence Measures) Regulations 2019
Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 1) Regulations 2019
Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2019
Financial Framework (Supplementary Powers) Amendment (Education and Training Measures No. 1) Regulations 2019
Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2019
Financial Framework (Supplementary Powers) Amendment (Jobs and Small Business Measures No. 1) Regulations 2019
Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 1) Regulations 2019
Fisheries Research and Development Corporation Amendment (Fishing Levy) Regulations 2019
Great Barrier Reef Marine Park Regulations 2019
Health and Other Services (Compensation) (Repeal) Regulations 2019
Health Insurance (Professional Services Review Scheme) Regulations 2019
Health Insurance Legislation Amendment (Services for Patients in Residential Aged Care Facilities) Regulations 2019
Migration Amendment (Chest X-ray Requirements) Regulations 2019
Migration Amendment (Working Holiday Maker) Regulations 2019
National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019
Parliamentary Business Resources Amendment (2019 Measures No. 1) Regulations 2019
Public Order (Protection of Persons and Property) Regulations 2019
Renewable Energy (Electricity) Amendment (Percentages) Regulations 2019
Renewable Energy (Electricity) Amendment (Small-scale Solar Eligibility and Other Measures) Regulations 2019
Shipping Registration (Repeal and Consequential Amendments) Regulations 2019
Shipping Registration Regulations 2019
Telecommunications (Interception and Access) Amendment (Form of Warrants) Regulations 2019

Telecommunications (Interception and Access) Amendment Regulations 2019

New Commonwealth 2019 Bills

As at 19/03/2019

Civil Aviation Amendment Bill 2019
Counter-Terrorism (Temporary Exclusion Orders) Bill 2019
Counter-Terrorism Legislation Amendment Bill 2019
Foreign Influence Transparency Scheme Amendment Bill 2019
Native Title Legislation Amendment Bill 2019
Treasury Laws Amendment (Putting Members' Interests First) Bill 2019
Water Amendment (Indigenous Authority Member) Bill 2019. ■

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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 1.50 per cent (from 3 August 2016). 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 2018, the value of a penalty unit is $161.19. The value of a fee unit is $14.45 *(Special Gazette* S145, 29 March 2018).

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.

PRACTICE NOTES

Supreme Court of Victoria New Contacts List 2019

COURT OF APPEAL

Court of Appeal: 03 8600 2000
Court of Appeal Registry: 8600 2001
coaregistry@supcourt.vic.gov.au

TRIAL DIVISIONS

PRACTICE COURT
Practice Court: 8600 2036
Practice Court After Hours Only:
0419 303 981 or 0412 251 757
practice.court@supcourt.vic.gov.au

COMMERCIAL COURT URGENT APPLICATIONS
Commercial Court Registry: 8600 2002
Commercial Court Urgent Applications:
8600 2002
Commercial Court Duty Judge After Hours:
0439 153 522
commercialcourt@supcourt.vic.gov.au

PROBATE OFFICE
8600 2006
probate@supcourt.vic.gov.au
Costs Court 8600 2007
costs.court@supcourt.vic.gov.au
Common Law 8600 2008

PRINCIPAL REGISTRY
Principal Registry: 8600 2004
Principal Registry Filing: 8600 2004
Subpoenas: 8600 2038
subpoenas@supcourt.vic.gov.au
Admissions: 8600 2050
admissions@supcourt.vic.gov.au
Videolinks: 8600 2061
videolink@supcourt.vic.gov.au
Bail Applications: 8600 2061

REDCREST SUPPORT
Redcrest Common Law, Costs Court (PR):
8600 2004 – OPTION 4-1
Redcrest Commercial Court: 8600 2002
Redcrest Criminal Division: 8600 2004
OPTION 2 redcrest@supcourt.vic.gov.au

FOR SELF-REPRESENTED LITIGANTS
Self-Represented Litigants Coordinator:
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MEDIA
Media: 8600 2088
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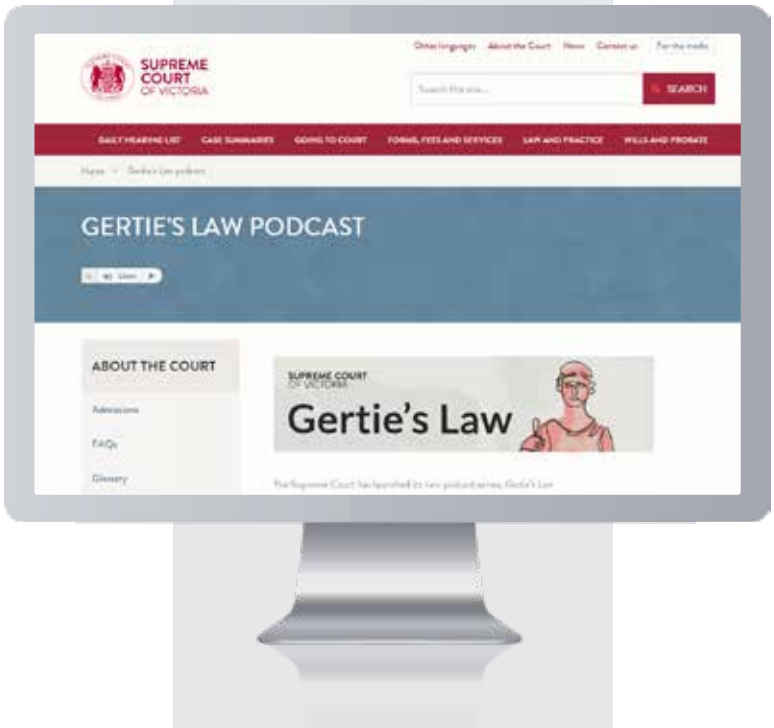


Supreme Court of Victoria – Gertie's Law

www.supremecourt.vic.gov.au/podcast

The Supreme Court of Victoria has released a new podcast series entitled Gertie's Law. It aims to help the community better understand and engage with the Court. The series takes a closer look at aspects of the Court such as sentencing, mental health, juries and the criminal trial process. It also looks at some historic cases. The first episode, approximately 46 minutes long, is currently available, with a new episode being released on a fortnightly basis. Transcripts in both word and pdf format are also available.

Family Violence Law Help

https://familyviolencelaw.gov.au/

Funded by the Commonwealth Attorney-General's Department, National Legal Aid has developed this website to assist those affected by domestic and family violence. With states and territories having different laws, this is an important resource for both lawyers and victims. Tabs include Family Advocacy and Support Services, Domestic Violence Orders, Family Law and Child Protection Law.

Domestic Violence Resource Centre Victoria – DVRCV Knowledge Centre

www.dvrcv.org.au/dvrcv-knowledge-centre

The Domestic Violence Resource Centre Victoria, which focuses on preventing and responding to family violence, particularly in intimate relationships, has developed the Knowledge Centre website for survivors of family violence and workers in the field. The website publishes research and presents resources including a magazine for family violence service providers, discussion papers and booklets, as well as links to other relevant websites. DVRCV is Victoria's only family violence registered training organisation.

Sentencing Advisory Council – Publications

www.sentencingcouncil.vic.gov.au/publications

The Sentencing Advisory Council is an independent statutory body. Under the Publications tab on its website you can find all its publications, freely downloadable, which you can browse alphabetically, by publication topic or date. Of particular interest are the Sentencing Snapshots where you can access the sentencing trends by offence and by court.

Judicial College of Victoria – Bail Materials

www.judicialcollege.vic.edu.au/publications/bail-materials-0

The Bail Materials page on the Judicial College of Victoria website now includes a new guide to key bail cases following last year's reforms to the *Bail Act 1977* (Vic). The cases handed down in the Victorian Supreme Court identify key legal principles regarding the compelling reason test, the exceptional circumstances test as well as what constitutes an unacceptable risk. Also, take a look at other material on this page including the Overview of changes commencing 21 May 2018.

Judicial College of Law – Victorian Criminal Charge Book

www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm

There have been updates to the Victorian Criminal Charge Book on the Judicial College of Victoria website. Each topic starts with commentary on a specific area of law and then groups the charge and its corresponding checklist together. There are several updates to this publication including prosecution failure to call or question witnesses, cultivation of narcotic plants and criminally concerned witnesses. More changes to publications will be released on this website in coming months. ■

IN_PRINT

This month's books cover Blockchain, petroleum resource management, habeas corpus and family mediation.

Blockchain: Transforming Your Business and Our World

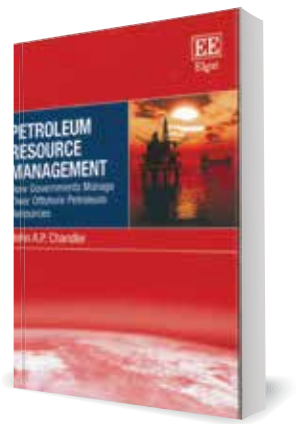
Mark Van Rijmenam and Philippa Ryan, 2019, Routledge, pb

The rise of interest in Blockchain is not surprising. As a digital revolution it has made its mark as a true transformative technology. Notwithstanding the tumultuous ride of Bitcoin over the last year, Blockchain still holds great potential. And it is on this basis that this book seeks to engage you.

As expected the book starts by reviewing the underlying technical aspects of Blockchain (also known as distributed ledger technology). The explanations are not overly technical and the case studies are informative. The section relating to smart contracts will be of particular interest to lawyers. From there the book goes on to describe how Blockchain can assist in solving some of the world's most "wicked problems". These include the usual suspects of currency and identity, through to more surprising applications relating to government administration and voting. And, as if to show the extraordinary power of Blockchain, there are also discussions on how it can tackle problems such as poverty and climate change.

For lawyers, what this book does particularly well is situate Blockchain in the techno-legal paradigm. It does this in a way that it can be understood by those who don't have an in-depth understanding of the relationship between technology, the law and society. For those lawyers who do have such an understanding, this book will reveal some of the lesser-known potential of Blockchain that may, sooner or later, prove to be the equivalent of the hype afforded to it.

Fabian Horton, lecturer, College of Law



Petroleum Resource Management

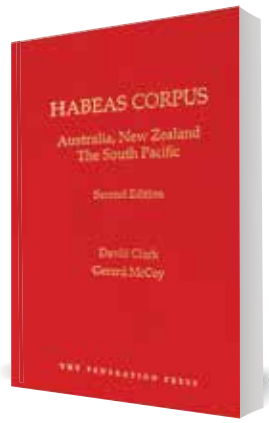
John AP Chandler, 2018, Edward Elgar Publishing, 2018, hb

If you are on the lookout for a densely footnoted legal text on petroleum law, this is not it. However, this book is a valuable addition to a resources law practitioner's library in that it explains and discusses context – understanding the multitude of interconnected issues that affect the business of a client in the petroleum sector (commercial, legal, regulatory and environmental, to name a few).

A major aim of the book, which the author achieves with admirable brevity and precision, is to identify the common features of systems of government and policy frameworks applicable to offshore petroleum resource management in Australia, Norway and the United Kingdom against the backdrop of the most significant commercial, environmental, social and regulatory challenges faced by stakeholders in the petroleum industry. The three countries covered in this book share essential common features that drive the author's comparative analysis – an established track record of attracting and managing private sector investment in the petroleum industry, major offshore producing basins reaching maturity, comparable licensing systems, dealing with environmental, sustainability and climate change considerations and resource management policy.

Chapters of the book which may be of particular interest to lawyers are Regulators and Regulatory Structures (Chapter 3), Resource Rent, Value and Stewardship (Chapter 5), Resource Management Policy (Chapter 7) and Production Sharing Contracts (Chapter 8).

Rudi Cohrssen, barrister



Habeas Corpus: Australia, New Zealand and the South Pacific

David Clark and Gerard McCoy, 2nd edn, 2018, Federation Press, hb $150

Habeas corpus is a term that most of the population, including lawyers, believe they understand prompting the writers of this book to remark in their opening line that it is like a classic that "everyone has heard of but no one has actually read". This book provides a definitive outline and explanation of common law and statute as it applies to the use of habeas corpus in the jurisdictions of Australia, New Zealand and the South Pacific, which relevantly for Australia includes jurisdictions such as Nauru, Fiji, Solomon Islands and other places of interest in Australia's relationships.

Consider then that there are obvious high profile cases dealing with detention of criminals, illegal immigrants or people wanted by overseas authorities. On a more mundane level even a suburban solicitor might have to give advice regarding a disgruntled aged parent forced into a nursing home or hospital, ill patients in care for mental issues, or a child forced to stay with a guardian. Interestingly, with the development of statute in the area of family law and bailment, a writ of habeas corpus may not be appropriate.

This is a text designed as the ultimate resource on habeas corpus. The meticulous research and collation of case law and statute is evident in the bibliography and extensive footnoting throughout the book commends itself to any serious practitioner seeking some guidance on the applicability of habeas corpus in Australia and its near neighbours.

David Parker, lecturer and tutor in law

Mediating with Families

Mieke Brandon and Linda Fisher, 4th edn, 2018, Thomson Reuters, pb $140

It is interesting reading a book that is now in its fourth edition, not only for seeing the developments both in law and research but also the people involved in endorsing the book (the preface to the first edition was by Laurence Boulle).

My view is that a thorough and properly conducted intake process can really set a mediation on the right path.

The practice of family law can be beset by emotion. Where children and money are involved, power imbalances can lead to a rights based approach which can lead to a protracted process with an unworkable outcome.

Perhaps one of the most exciting areas of developing practice in family law is collaborative practice.

A practice of mediation which negotiating parenting must include is how to listen to the child. What is the importance of the voice of a child in relation to parenting matters? What about developing a parenting plan? There is a chapter on Child Inclusive Practice.

I take the view that any practitioner must keep up to date with current thinking via case studies and examples. There are numerous case studies and good examples which are useful to both experienced lawyers and the novice.

It is a feature of the law that this book is so specialised. It will appeal to those students, lawyers and mediators involved in family law practice mediations with a primary focus on family dispute resolution and alternative dispute resolution in the Family Court. ■

Tasman Ash Fleming, barrister and mediator

IN_REFERENCE

Books and multimedia

LIV members may borrow library material for 14 days, with a one week renewal available unless reserved by a member. Items can be collected from the library, posted or sent via DX free of charge. Material including the location REF is unable to be borrowed.

Civil procedure – practice and procedure – forms and precedents – pleadings

Zillmann, Hugh J, *A Civil Litigation Practice Manual*, Thomson Reuters (Professional) Australia, 2019 (KN 350 Z 2)

Civil rights – Charter of Human Rights and Responsibilities (Vic)

Pound, Alistair, Evans, Kylie, *Annotated Victorian Charter of Rights* (2nd edn), LawBook Co, 2019 (KM 201.2 P 1 2)

Construction law

Bailey, Ian, Bell, Matthew, *Construction Law in Australia* (4th edn), Thomson Reuters (Professional) Australia, 2018 (KN 83.8 B 3 4)

Family law – bias – communication – evidence – disputes – family settlements

Vohra, Minal, Without prejudice correspondence in family law matters, seminar paper, November 2018, Television Education Network (F KN 170 V 1)

Family law – case law – evidence – video recordings – bias – correspondence

Clemente, Robert, Wilson, Geoff et al, Sound Education in Family Law, Audio CD, November 2018, Television Education Network (ACD KN 170 C 9)

CD 1: 1. Introduction 2. Family law report 3. Caught on camera: The admissibility of audio & video recordings in family law matters 4. Family law case watch CD 2: 1. Without prejudice correspondence in family law matters.

Family law – evidence – video recordings – electronic surveillance – privacy

Woods, Justine, Caught on camera: The admissibility of audio & video recordings in family law matters, seminar paper, November 2018, Television Education Network (F KN 170 J 1)

Articles

Articles may be requested online and will be emailed, faxed or mailed to members.

Breach of confidence – social media – privacy – aggravated damages

Carr, Claudia, "Breaches of confidence via social media: should exemplary and aggravated damages be available?" in *Privacy Law Bulletin*, vol 15 no 9, November 2018, pp144-150 (ID 78055)

Casual employment

Sivaraman, Giri, Cole, Paloma, "Casual by name or nature?" in *Proctor*, vol 38 no 11, December 2018, pp14-17 (ID 78056)

Cybercrime – risk assessment – law firms – data protection – fraud

Herbert-Lowe, Simone, "How cyber resilient is your law practice?" in *LSJ* (NSW) no 51, December 2018, pp86-87 (ID 78062)

Elder law – legal capacity – law reform

Castles, Margaret, "Supported decision-making: a new approach for older clients with cognitive impairment" in *Bulletin*, Law Society of South Australia, vol 40 no 11, December 2018, pp26-27 (ID 78229)

Fair work – working conditions – franchising

Robertson, Courtney, "A snapshot of Australia's new vulnerable workers legislation" in *Employment Law Bulletin*, vol 24 no 8, November 2018, pp102-105 (ID 78212)

Human rights

Stubbs, Matthew, "The Universal Declaration of Human Rights at 70" in *Bulletin*, Law Society of South Australia, vol 40 no 11, December 2018, pp6-7 (ID 78227)

Long service leave – employee entitlements

Jackson, Rob, "Long service leave provisions in Victoria: evolution of an old entitlement!" in *Employment Law Bulletin*, vol 24 no 8, November 2018, pp106-111 (ID 78213)

Medical treatment – blood transfusions – children – religion

Anderson, Justine, "Gillick competence, parens patriae and Jehovah's witness" in *Australian Health Law Bulletin*, vol 26 no 10, November 2018, pp170-177 (ID 78072)

Online gaming – video games – regulation

Scott, Brendan, "Loot boxes drawing regulatory attention" in *Internet Law Bulletin*, vol 21 no 7, November 2018, pp124-126 (ID 78123)

Sexual harassment – legal profession – women lawyers – working conditions

Allman, Kate, "Timesup for the legal profession" in *LSJ* (NSW) no 51, December 2018, pp30-35 (ID 78059)

Trade – international law – free trade – agreements

Alvarez-Jimenez, Alberto, "The international law gaze: protection of labour rights in free trade agreements: mission impossible" in *New Zealand Law Journal*, October 2018, pp287-291, 297 (ID 78064)

Whistleblowing – risk assessment – corporate disclosure

Hansen, Grant, "Whistleblowing: is it worth the risk under Australian law?" in *LSJ* (NSW) no 51, December 2018, pp70-71 (ID 78060) ■

LIBRARY FACILITIES

- Wide range of online legal databases
- PCs with free internet access and commonly used software
- Wireless internet access
- Photocopiers
- Members' lounge
- Experienced staff offering assistance and advice on the use of resources
- Monday to Friday, 8.30am-5.30pm
- Request, reserve and renew books, order copies of articles, request research assistance and access legal resources via the LIV website

LIBRARY CONTACT DETAILS

Ph: 9607 9360/1
Fax: 9607 9359
Email: library@liv.asn.au
Web: http://library.liv.asn.au

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/Learning-and-Networking/Library/Research-Services or contact the library on 9607 9360.

LEGACY OF COMPASSION

The Hon Philip Cummins' tireless contribution to modernising Victorian law will have a lasting impact.

The Hon Philip Cummins, who died in February, will be remembered for many contributions to the law as QC, judge, and after leaving the bench. His work in the area of law reform will be a lasting part of his legacy. As chair of the Victorian Law Reform Commission (VLRC) from 2012 to 2019, he led it through 14 inquiries covering a wide range of criminal and civil matters. A further three inquiries were in progress at the time of his death. To all of these he provided intellectual leadership with a strong sense of compassion.

Important reforms

Throughout his career as a judge and afterwards, Philip maintained a profound concern for the wellbeing of victims in our legal system. In his address on retiring from the bench in 2010, he said: "The even hand of justice requires that victims properly be acknowledged and properly be respected". This came through in the recommendations made by the VLRC in its major 2016 report The Role of Victims of Crime in the Criminal Trial Process. After listening to the views of many victims, Philip concluded: "the overwhelming – not universal – response of victims to the VLRC's inquiry was dismay at how poorly they were treated in the trial process; how they were not acknowledged or respected; how they were demeaned; how they were retraumatised; and how they were not participants."

The VLRC's key recommendations were that victims should be regarded as participants in the criminal trial process, with an inherent interest in the proceedings, and should be treated with respect at all times. The report described in detail how this could be achieved while not compromising the accused's right to a fair trial – a principle that Philip regarded as sacrosanct. It was a source of satisfaction to him that these recommendations made their way into legislation in 2018, when the Victims and Other Legislation Amendment Bill 2018 received royal assent.

Another major review undertaken by the VLRC during Philip's term as chair concerned the legalisation of medicinal cannabis in exceptional circumstances. Philip was moved by the many powerful stories of personal suffering that the VLRC heard during consultations, and the report balanced personal compassion with medical responsibility. The government accepted all the VLRC's recommendations, making Victoria the first Australian state to legalise medicinal cannabis.

Reforms based on the VLRC's inquiries into jury empanelment and succession laws were also passed by Parliament during this period. The VLRC's reports on crime and mental impairment, adoption, and litigation funding, among others led by Philip during his time as chair, may result in future legislative change.

Community law reform

Philip was a strong supporter of the VLRC's community law reform program. Section 5(b) of the *Victorian Law Reform Commission Act 2000* empowers the VLRC to initiate its own inquiries based on suggestions from the community about legal matters of general community concern, provided they are limited in size and scope. During Philip's leadership of the VLRC, three community projects were completed, while a fourth (Neighbourhood Tree Disputes) was well advanced.

A community project of particular interest to Philip was funeral and burial instructions. While it began with a simple question – who should have the right to decide what happens to a person's body when they die? – it led to intriguing questions about identity, culture, and changing social mores. Philip noted that the current law on funeral and burial instructions had emerged in 19th century England, when it was assumed that everybody wished to have a Christian burial. As he stated in his preface to that report, "21st century Australia is a vastly different society . . . There are diverse cultural and religious practices and complex family arrangements . . . people may reasonably expect funeral and burial arrangements to reflect their personal values and choices".

The VLRC made the bold but straightforward recommendation that a law should be passed affording Victorians the opportunity to leave legally binding funeral and burial instructions. This reform, which would be an Australian first if implemented, overturning hundreds of years of common law, would modernise the law and bring it closer to contemporary values in our diverse society.

Education

Philip was passionate about educating the community, and nowhere was this more evident than his enthusiasm for the VLRC's education program. He thought nothing of driving many miles to talk to students about law reform and the Australian legal system, and was an unfailing contributor to the Victoria Law Foundation's Law Talks program in metropolitan and regional Victoria. His videos on the legal system, aimed at school students, are frequently downloaded from the VLRC's website – another part of his legacy.

Philip often referred to his belief that retired judicial officers should consider taking on roles in which they can continue to give the community the benefit of their experience and expertise. He demonstrated the value of this personally through his tireless contributions to modernising Victorian law. ■

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

ADOBE STOCK

NOMINATION AND THE ACL

Is the Australian Consumer Law (ACL) relevant to the contractual right to nominate?

RUSSELL COCKS

This column has in the past considered the purchaser's right to nominate an additional or substitute transferee and has also considered the impact of the ACL on residential conveyancing, which is essentially a consumer transaction. This month's column specifically considers the application of the ACL to the purchaser's right to nominate.

Nomination

Conventionally, contracts for the sale of land in Victoria include a condition giving the purchaser the right to nominate. General condition 18 of the LIV contract expresses that right in very general terms, without limitation in relation to the form of nomination or time for nomination. Parties are free to negotiate the terms of their agreement and so they may, by special condition, agree to a more limited right to nominate, including limitations as to the nominee, time for nomination and form of nomination.

A nomination by the purchaser creates a second contract, between the purchaser and nominee. However, this is not a contract for the sale of land, rather it is an assignment of the purchaser's rights under the contract of sale of land to the nominee. Traditionally, this is a doc-lite contract in that the rights and obligations of the parties are succinctly recorded with no written agreement as to what is to happen if either party does not wish to proceed with the nomination. It is essentially an assignment of the purchaser's rights to the nominee, a legal relationship recognised by s134 *Property Law Act*. Consideration for this contract may be found in the release of the purchaser from obligations under the contract of sale of land and the assumption by the nominee of rights under that contract. Importantly, the vendor is not a party to such a nomination or assignment and remains entitled to enforce the contract against the named purchaser. The nomination acts as the purchaser's authority to the vendor to transfer the property to the nominee in fulfilment of the vendor's duties under the contract.

The contractual right to nominate is an important escape hatch for a purchaser who finds that, due to changed circumstances, they are not able to complete the contract. This is particularly so in an off-the-plan environment where the contract contemplates an extended contract period during which time the purchaser is exposed to changing circumstances.

The ACL

The ACL is designed to protect consumers. A purchaser in a residential contract of sale of land is a consumer for this purpose.

Section 20 proscribes "unconscionable conduct", which is an equitable concept developed by the courts in cases commencing with *Amadio* in 1983 and which continues to adapt to changing circumstances. Conduct will be unconscionable if one party to a contract is at a "special disadvantage" and the other party "takes advantage" of that situation. Some purchasers in residential contracts may satisfy this test but inequality of bargaining power alone may not be sufficient to establish unconscionable conduct.

Section 23 proscribes "unfair contract terms" in standard form consumer contracts. Factors to be considered in determining whether terms are unfair are:

- inequality of bargaining power;
- whether the contract is prepared in anticipation of the transaction, rather than in response to the transaction; and
- whether the other party had a real ability to negotiate the terms.

Contracts for the sale of land are created as "standard form contracts". Certainly, the parties are free to negotiate amendment to the terms of such contracts but in practice this does not happen. The vendor or vendor's agent presents the standard form contract to the consumer and it is signed, without negotiation. Various factors such as trust, lack of knowledge and unequal bargaining power contribute to this outcome but the result is a standard form contract in the vast majority of cases. The removal of the right to nominate, or the imposition of onerous conditions in relation to nomination, are likely to be unfair terms in these circumstances and liable to be unenforceable against the purchaser. ■

Russell Cocks is author of *1001 Conveyancing Answers*. For more information go to www.russellcocks.com.au. The author acknowledges the assistance of Roger Gamble of Monash University in the preparation of this column.

SNAPSHOT

- Nomination rights are important to the purchaser
- The ACL protects the rights of the purchaser
- Removal or constraint of nomination rights may be an unfair term.

ADOBE STOCK

ADDRESSING SEXUAL HARASSMENT

The regulator is surveying the profession to gather data about where sexual harassment is occurring, who the perpetrators are and whether such conduct is being reported within firms.

FIONA MCLEAY

When I was first appointed Victorian Legal Services Board CEO and Commissioner, I was approached by men and women, all of whom had the same message: that sexual harassment is prevalent in Victoria's legal profession, that it's a pressing issue, and that it is time the problem was addressed.

Sadly, this message was not a surprise to me. Sexual harassment is a pervasive problem across Australian workplaces. The latest Australian Human Rights Commission (AHRC) research[1] indicates up to a third of all employees across the nation have experienced sexual harassment in their workplace. It also resonated with my personal experience of working within the legal profession.

Addressing this issue is a key imperative of mine. In February I announced that the LSB and Commissioner are embarking on a program of work focused on sexual harassment within the Victorian legal profession.

We are committed to taking a leadership role on this issue. Taking action to understand the prevalence of sexual harassment within legal workplaces and working with the profession to develop appropriate responses has broader implications for the productivity, agency and wellbeing of legal professionals in Victoria. It is also the right thing to do.

Quantifying the problem – surveying the profession

In Australia and internationally, research suggests the rate of harassment in professional settings is relatively high. In 2016, the UK Bar Standards Board conducted a survey of women at the Bar which found that over 40 per cent of respondents had faced some form of harassment (including sexual harassment) during their careers. In New Zealand, a 2018 workplace environment survey quantified the prevalence of sexual harassment in a legal environment in the last five years at 27 per cent (40 per cent of women and 14 per cent of men). In Australia, the latest AHRC survey found 39 per cent of women and 26 per cent of men had been sexually harassed at work in the last five years. In Victoria, the Victorian Bar's Wellbeing of the Victorian Bar report notes that one in six female barristers and 2 per cent of male barristers reported sexual harassment in the last year.

This research provides a strong evidence base for action. However, we believe it is critical to gather our own data to fully understand the situation facing the profession in Victoria. We are surveying the profession to gather data about where sexual harassment is occurring, who the perpetrators are, whether such conduct is being reported within firms, and the measures being taken to deal with reported conduct and to prevent harassment.

We are also surveying law firms to better understand what policies and procedures they have in place to deal with sexual harassment and how they respond to complaints.

This data is critical to guide and shape our response and I urge all recipients to complete the survey.

Against the Rules – existing legislative framework

Over the past three decades, the federal and Victorian governments have passed legislation aimed at preventing sexual harassment in the workplace. Legislative and compensation requirements under the federal *Sex Discrimination Act 1984* and the Victorian *Equal Opportunity Act 2010* have driven organisational responses to sexual harassment. Under these laws, organisations are required to show they have taken reasonable precautions to prevent sexual harassment in the workplace and have developed and implemented appropriate policy, training and complaint processes.

In our profession, sexual harassment is behaviour that is capable of constituting professional misconduct. Rule 42 of the *Legal Profession*

Uniform Law Australian Solicitors' Conduct Rules 2015 and r123 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* make it clear that solicitors and barristers must not in the course of practice engage in conduct which constitutes discrimination, sexual harassment or workplace bullying.

Employers, too, have a responsibility to ensure their workplaces are free of sexual harassment. Principals who fail to address this behaviour within their workplace may also be guilty of unsatisfactory professional conduct or professional misconduct.

Why the rules aren't enough – changing cultural attitudes

Despite the longstanding presence of laws to deter this behaviour, it is clear that laws are not always sufficient. There are broader cultural and societal norms that often manifest outside the workplace and from which arise the attitudes and behaviours that ultimately generate incidences of sexual harassment.

While the law does not explicitly prohibit a sexist culture, an unhealthy workplace culture can produce specific conduct that constitutes sexual harassment. A 2017 report from the International Bar Association explored the reasons why women lawyers in commercial legal practices experience barriers in attaining the most senior positions. This report identified corporate culture and leadership as key factors in whether or not inappropriate conduct is tolerated.

Behavioural norms and culture were also identified as key elements in perpetuating everyday sexism in a paper by the Male Champions of Change. This sought to identify how less intense incidences of sexism can impact on employees over time. The paper notes that the most frequently encountered form of everyday sexism experienced by women and men consists of sexist remarks or jokes, and insulting terms based on gender.

Role for the regulator

The 2018 United Kingdom Parliamentary Inquiry into Sexual Harassment in the Workplace considered the role of regulators. It found that they are uniquely placed to oversee employer action to protect workers from sexual harassment and that they could undertake activities to mitigate future instances of sexual harassment. Such activities could include issuing guidance on the actions that employers could take, undertaking specific risk assessments, and investigating reports of particularly poor practice. Since releasing our statement, I have been buoyed by the support from all quarters of the profession, in particular the LIV and the Victorian Bar. There is huge potential for the LSB and Commissioner to work proactively with these professional bodies to raise standards, and create healthier workplaces that foster wellbeing, including workplaces that are free from harassment.

We want to hear from you

Our objective in this work is not only to put a stop to inappropriate conduct, but to contribute to broader discussions throughout the profession about appropriate behaviour in the workplace, and to encourage all practitioners to work together to raise the standards of behaviour in legal workplaces.

If you wish to discuss a matter confidentially, or make a complaint, please contact harassmentcomplaints@lsbc.vic.gov.au or ph: 9679 8001. ■

Fiona McLeay is Victorian Legal Services Board CEO and Commissioner.

1 Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces (2018).

TAKING THE ELDERLY INTO ACCOUNT

How to ensure older, lonely people age according to their wishes.

The new Guardianship and Administration Bill follows the recent trend of supported and substituted decision-making laws in Victoria that place at their centre the individual's values and preferences (eg, power of attorney and end of life planning laws).

The direction of reform is progressive, thoughtful and supported by many working with older people. That is, so long as we have a trusted family member or friend. If we're isolated, lonely or just don't have someone in our life we trust, the new laws can leave us out.

With 10 per cent of Victorians over 60 experiencing chronic loneliness, this is a problem.

We might end up in the public guardianship and administration system, through which a professional is appointed. Bringing in a trained, impartial person can be a useful, even essential, safeguard, as long as they can understand what's important to us. Without a centralised place to record our values and preferences, even the most experienced guardian or administrator may find it difficult to understand our history and long-standing values, especially if we have diminishing capacity.

Maya's (not her real name) daughter left her on the bench at the front of an aged care facility in NSW. After hours of her sitting there alone, the staff brought Maya inside. Her mental state meant she couldn't explain who her family was. She entered the guardianship system and was taken into care. She remained at the NSW aged care facility for months, until her sister managed to contact her and have her transported to Victoria. Maya remained under the care of the public guardian in NSW, who refused to release her savings to buy essentials. She was also fed meals against her religious beliefs – she was Hindu, requiring a vegetarian diet.

With hundreds of hours of complex pro bono support from our partner firm, we helped Maya overturn the guardianship order. She is lucky to now have her sister supporting her.

Had she been able to record her wishes and family, Maya might have avoided the guardianship system altogether, and age according to her wishes.

The Royal Commission into Aged Care is uncovering stories about vulnerable older Australians being let down by our aged care system. Justice Connect will make a submission later this year calling for a central, digitised system for holding critical documents such as powers of attorney and statements outlining values and preferences in later life.

We should all have confidence that our values and preferences will be taken into account as we grow older, especially as supported and substituted decision making is often required when deeply personal decisions need to be made. ■

Faith Hawthorne is manager and principal lawyer, seniors law, Justice Connect, and **Stephanie Tonkin** is head of community programs, Justice Connect.

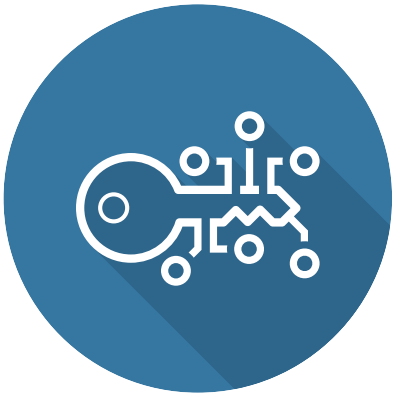
LOOKING TO HELP?

To find pro bono opportunities for your firm see www.justiceconnect.org.au/get-involved, 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 see www.fclc.org.au/cb_pages/careers_and_getting_involved.php.

For barristers: see www.vicbar.com.au/social-justice/pro-bono.

ADOBE STOCK



CONTRACT PROBE

Solicitors needing the first review of individual commercial contracts turn to AI.

Which practitioners would find this technology useful?

Solicitors and in-house lawyers needing the first review of individual commercial contracts.

How does it work?

The practitioner logs into Contract Probe via the web portal and then uploads the relevant contract (which is encrypted on upload). The type of contract, such as supply agreement or non-disclosure agreement (NDA), is selected from a drop-down menu. If the document type is not available, a more generic review can still be conducted but with less accuracy. A tailored review is also available – the agreement can be compared with the firm's standard template for the same type of document.

Contract Probe then runs its analysis which takes 30 seconds to a minute. Once complete, the following information is provided:

1. A score out of 10 in terms of how favourable the contract is to the client.
2. Important issues covered by the agreement, ie a summary of core terms.
3. Any problems with the agreement broken down into three categories: critical, important and minor.

For all problems, mark-up suggestions and comments are provided. A useful function is an analysis of how common such problems are in comparison with similar types of agreements already analysed by the system. This can provide useful leverage for a practitioner in negotiating a change to the clause with the other side. Another useful function of Contract Probe is identifying problem defined terms, in terms of defined terms not actually used in the agreement or capitalised terms used in the agreement but not actually defined.

Practitioners can choose to include the mark-ups in the document and continue drafting and editing.

Benefits

Contract Probe could either replace an initial review by a junior lawyer or be used as a tool by a junior lawyer in conducting their first review. The system could also be a quick safety net for a senior lawyer's review in ensuring all relevant problems are identified. Contract Probe is a potential training tool for junior lawyers' contract reviews. Data for the Australian product is hosted by AWS in Sydney and does not leave Australia. It is encrypted on upload and download. Contract Probe does not retain a copy of the contract once analysed.

Risks

The system is not foolproof and may not identify all legal issues. It does not constitute legal advice and does not have the protection of professional indemnity insurance for errors. It is dependent on the vendor remaining up to date with relevant legislative and case law changes. It is also designed to deal with generic issues relating to a particular contract type: it is not provided with any context and is unlikely to be able to identify issues with bespoke clauses that are specific to the context of a particular transaction. It does not assess the agreement as a whole or at a commercial level, nor is it likely to be able to assess the impact of one particular clause on others elsewhere in the agreement. If it could do so, the lawyer could well become redundant to the task.

Cyber risk, as with any cloud offering, is present as regards confidential and sensitive data moving beyond a firm's internal systems. However, with encryption in both directions, the security is substantially better than when emailing the same data and a third party vendor is also liable to the law firm for the security of the data.

Costs

A per contract price is $50 for an NDA and $100 for other contracts. Subscription plans are also available.

Downsides

Over time, a practitioner may become reliant on Contract Probe and less able to exercise independent judgment and the ability to navigate the contract separately. Practitioners need to be careful when adding mark-ups not to accidentally include a Contract Probe comment in the version for the other side. The mark-ups, while designed to imitate the formatting of the previous clause, may create new formatting problems. ■

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

What is Contract Probe?

AI contract reviewing system

What type of technology?

Web portal/cloud service with encrypted upload and download

Vendor

Contract Probe

Country of origin

Australia

Similar tech products

Kira: Canadian product but marketed in Australia (for use more in mass reviews of contracts and due diligence than individual contracts)

Lawgeex: Israeli product but marketed in Australia

Thought River: UK based but marketed in Australia

Non-tech alternatives

A well trained junior lawyer with an eye for detail

More information

https://contractprobe.com.au

https://youtu.be/4E90XhNxJXU

ADOBE STOCK

BE WILLING TO GIVE ADVICE

How lawyers raise the charitable question can have an impact on legacy giving.

Australia is a generous nation. In 2016, the Giving Australia report found that 14.9 million people (80.8 per cent of the adult population) donated $12.5 billion to charity.

But while most Australians donate to charity in their lifetime, only 7.4 per cent include a charitable gift in their will. That's because often they never thought they could leave a legacy for a cause they cared about. It's also possible their lawyer hasn't mentioned it.

Research by the Include a Charity social change campaign has found that three times as many Australians would be willing to leave a charitable gift if it was more top-of-mind when making their will.

According to Include a Charity campaign director Helen Merrick the US and UK are further ahead in using charitable gifts in wills.

"In Australia, we need to rethink what a philanthropist is. It doesn't just mean a wealthy person or a celebrity. Lots of ordinary, hardworking Australians can leave gifts in their will. To move that 7.4 per cent figure, we need to encourage more Australians to think about their legacy," she says.

That's where lawyers can help. The way a lawyer talks to a client about including a charitable gift is a vital influencer because they are usually the first port of call for will-making. But according to Include a Charity only 21 per cent of solicitors ask the question.

Why not? Paul Evans, a partner at Makinson D'Apice, says lawyers might not want to mention charitable gifts because they may feel they are intruding in a client's decision-making process.

He believes lawyers shouldn't avoid the subject. "It's a part of a solicitor's duty when drafting a client's will to assist, advise and provide them with options, which involves asking them if they support a charity and whether they wish to include a charitable gift to that cause."

Jennifer Maher, an estates and wills specialist at KCL Law, agrees and adds that some lawyers don't ask their clients about charitable gifts because they don't know how to implement them, or they worry about offending the client. "There's also the historical factor: lawyers traditionally took instruction from clients rather than giving advice. Many lawyers still perceive receiving instruction as their primary role. But lawyers are becoming advisers to clients, in areas like asset protection, tax benefits and certainly philanthropy," she says.

Starting the charity chat

Both lawyers believe there's no downside to asking the question: "Now that you've provided for your loved ones, are there any charitable causes you might consider for a gift in your will?" They believe that while most clients appreciate the question, those who aren't interested in discussing it will quickly let you know.

Mr Evans suggests starting by asking a client to list all the groups/people they want to be included in their will. "It's a useful approach to exploring whether the client has considered leaving a gift to a charity," he says.

Ms Maher finds many clients don't know charitable gifts in wills are an option. They also worry about familial reactions. "Often they are worried their family may be upset about it. However, after walking the client through obligations to family and if the estate is a significant size, it becomes clear that a charitable gift shouldn't cause issues because there's sufficient and adequate provision for all," she says.

A UK study found that people's likelihood of including a charity in their will is affected by the language lawyers use and concluded that how they raise the charitable question can play a significant role in legacy giving. The study revealed that framing (eg, are there any charities you particularly care about or have helped you and your family?) may be helpful in encouraging the client to consider gifts in wills.

Mr Evans also suggests using the term gift in your will or charitable gift when speaking to clients rather than bequest or legacy which some people feel are the domain of the wealthy. Using a phrase like leaving a gift in your will to charity could alleviate that perception.

Don't suggest charities

Sometimes clients will ask what charity they should give to. It's not a good idea to offer suggestions as it might be perceived as a conflict of interest. Ms Maher and Mr Evans believe it's better to bring the conversation back to the client and ask what causes are important to them. Invariably they will mention a cause that has had an impact on their lives.

Ms Maher says if a client isn't sure which charity to support, she steers them to the ACNC's Charity Register or the Include a Charity website as they are reputable sources of information. ■

Kim Carter is with the Fundraising Institute of Australia.

TIPS

- Ensure the client has the correct name of the charity.
- A will should specify the charity's ABN number.
- A will should also have some provision for flexibility in case a charity amalgamates or, if it closes, the gift can be offered by the executor to a similar entity.

ADOBE STOCK

MODERN SLAVERY: AN UNCOMFORTABLE TRUTH

Slavery continues to be a human rights issue for the modern world and particularly vulnerable women.

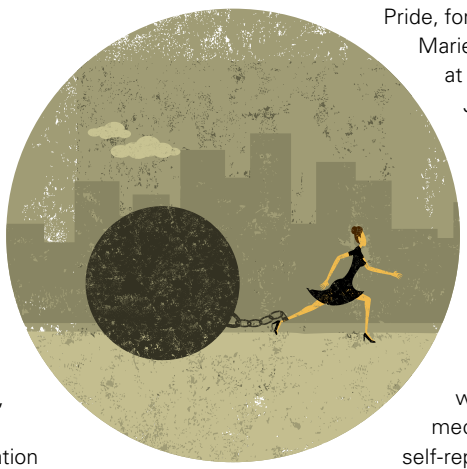
Slavery has a modern face, reaching into our everyday patterns of consumption – and it should raise alarm bells. Driven by a multitude of factors, including new waves of middle class wealth, globalisation and regional instability, modern slavery is the hidden face behind consumer must-haves that are increasingly presented as affordable, everyday parts of life. These are the uncomfortable truths for the affluent consumer.

There is no globally agreed definition of modern slavery: the term is used to cover a range of exploitative practices including human trafficking, slavery, forced labour, domestic servitude, child labour, removal of organs and slavery-like practices.[1] It is widely recognised that there are significant challenges in collecting global data on the prevalence of modern slavery, due to the hidden nature of these crimes.

Modern slavery in Australia

What is clear is that slavery is not a problem that happens "over there". We are in the heart of it and need to address the issue.

According to the International Labour Organisation, over half of the world's 40.3 million victims of slavery are exploited in the Asia-Pacific region, where the supply chains of a significant number of large businesses operating in Australia are based. Of this number, women and girls are vastly over-represented, making up 71 per cent of victims.



Australia has been recognised as a destination country for human trafficking and slavery. The majority of trafficked people identified by the Australian authorities to date are women from Asia, exploited in the sex work industry.

However, numbers outside this industry are increasing, with reported cases rising in domestic work, hospitality, agriculture and construction industries, or within intimate or family relationships. To a limited extent, Australia is also a source country for people who are forced to marry.[2]

What steps can be taken to prevent this? The difficulty is that modern slavery in its various forms is often hidden in plain sight and many cases go undetected and unreported.

Domestic servitude, for example, is one of the most hidden – yet most prevalent – types of modern slavery. Servitude is defined as the condition of a person who does not consider themself to be free to stop working or to leave work, because of threats, coercion or deception, and the person is significantly deprived of their personal freedom in areas of their life outside of work.[3] It is one of the reasons why it is so difficult to measure with certainty the hard data on slavery in the world today.

Victorian Women Lawyers (VWL) strongly supported the introduction of the *Modern Slavery Act 2018* (Cth) (MSA), which took effect on 1 January this year. As a step in the right direction, the MSA provides a valuable model for behaviour change, implementing transparency laws that force businesses with a turnover of $100 million or more to report annually on the slavery risks within their supply chains. This will include the Australian government.

In March, VWL held a panel discussion examining the MSA. While the MSA is a welcome addition to the Australian legislative landscape, it has been criticised by some advocacy, academic and legal groups for falling short in its scope, enforcement and reach.

Panellists Professor Felicity Gerry QC, an international QC with vast expertise in human trafficking and modern slavery; Jo Pride, former lawyer and current CEO of Hagar Australia; Marie Segrave, criminologist and associate professor at Monash University, and panel moderator Jacinta Lewin, senior associate in the social justice practice of Maurice Blackburn Lawyers, applauded the introduction of anti-slavery legislation in Australia. However, they commented it is concerning that the MSA only captures corporate supply chains occurring offshore, and further that the Act is silent on penalties for non-compliance. In short, was the MSA a missed opportunity?

VWL believes well-drafted legislation is weakened without adequate enforcement mechanisms, particularly when it relies on corporate self-reporting in the way the MSA does. In addition, the MSA does not require the appointment of an Independent Slavery Commissioner, unlike the Modern Slavery Act in the UK.

There is an argument that enforcement with real teeth is required to adequately address misconduct or wilful blindness on the part of Australian companies.

However, the MSA does establish mandatory reporting criteria (unlike the UK Act). Additionally, the federal government has committed funding to provide non-binding guidance to businesses on slavery risks and reporting, in addition to establishing a free Online Modern Slavery Statements Register for public use to monitor performance under the Act. The MSA will be subject to a legislated three-year review. ■

Naomi Hickey-Humble is co-chair of the VWL cultural diversity committee and **Vanessa Shambrook** is an executive committee member of VWL.

1. *Hidden in Plain Sight* (December 2017), Joint Standing Committee on Foreign Affairs, Defence and Trade, Commonwealth of Australia, [3.4]).
2. Australian Government, Submission 89, Inquiry into Establishing a Modern Slavery Act in Australia, p2.
3. *Criminal Code Act 1995* (Cth), s270.4.

ADOBE STOCK

NEW ADMISSIONS

The following people were admitted to practice as Australian lawyers and as officers of the Supreme Court of Victoria on **19 March 2019**. The *LIJ* welcomes them to the legal profession.

ABRAHAM, Rebecca
ALUR, Ruth
BAINBRIDGE, Griffyn
BARNDEN, Jade
BENNET, Emily
BENTLEY, Laura
BRAVERMAN, Joseph
BURNS, Cameron
CAIN, Emily
CHRISTOFOROU, Danielle
CLARK, Daniel
COSTANZO, Domenico
DAVIES, Laura
DEIGHTON, Molly
DENG, Beau
DENSHAM, Jessica
DI CARLO, Jordan
EDIS, Bayan
FAINE, Jack
FAMULARI, Isabella
HERMITAGE, Louisa
ITO, Sara
IVOSEVIC, Jacqueline
KARAPALIDIS, Kathie
KEATH, Amelia
KEATING, Lydia
KENNEY, Jarrod
LA MATTINA, Nicholas
LAM, Eugene
LARKIN, Codey
LAVERS, Sebastian
MACPHERSON, Daniel
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MOORE, Bethany
MORROW, Kristen
MUNZEL, Renee
NALPANTIDIS, Anna
NAUER, Victoria
NGUYEN, Lauraine
ORMEROD, Emily
RAITT, Stewart
RANCHHOD, Sajel
RATHNAYAKE, Rathnayake
REGESTER, Rachel-Anne
SHAMI, Karl
SMART, Nina
STARVAGGI, Francesco
SU, Jiapeng
TRAN, Tuan
TYLER, Jake
VANDERLEEST, Joshua
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VEITH, Rodney
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ZEGLINAS, Evelyn
ZHU, Beibei
BARTON, Arlena
BASSILI, Claire
BEATTIE, Connor
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BOLOG, Kristdel
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CAO, Runlai
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DEERING, Sally-ann
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FOO, Wee Yang
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HANLON, Micaela
HARAWA-FREEMAN, Simba
HEALY, Tiffany
HUTCHESSON, Lachlan
JACOBS, Poppy
KANAGAVIJAYAN, Nirmal
KEMELMAN, Paloma
KIERNAN, Emma
KRIEGER, Amity
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LEISHMAN-CRERAR, Emily
LESKIE, Kirsty
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LI, Yung
LOVEL, Isabelle
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NG, Teng Hui
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TRICARICO, Madeleine
VERMA, Hemant
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ZHOU, Yuming
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To find out more about LIV governance and representation or to contact LIV Council members see www.liv.asn.au or phone the secretary to the Council on 9607 9513 or email secretariat@liv.asn.au.

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

LIV UPDATE

The opening of its William Street home signals a new era for the LIV, which celebrates its 160th anniversary this year.

State Attorney-General Jill Hennessy officially opened the new home of the LIV at 140 William Street on 4 April. The opening signals a new era for the LIV, which celebrates its 160th anniversary this year. Ms Hennessy said she was greatly honoured to be part of the celebration and congratulated the LIV on its "incredibly beautiful" premises in the heart of the legal precinct.

"To Stuart [Webb, LIV president] and your team, I want to congratulate you on this new building, it is incredibly beautiful. The LIV has obviously worked hard in making the decision around what their future will look like and get that match between the infrastructure and purpose and vision," Ms Hennessy said.

"The only thing I would have quibbled about is having the beautiful view down to Spring Street. Be careful what you wish for. The view is not always a pretty one," Ms Hennessy joked. "My advice is to look at the non-Spring Street view and keep your eye firmly on the legal precinct as well.

"I take off my hat to your staff and team for what has no doubt been an incredibly demanding process to build this beautiful space.

"I do just want to acknowledge the genius of starting a Bread and Cheese Club as the genesis of the LIV and I think that reflects finely upon the profession," she said, noting that at a quarterly meeting of the fledgling organisation in 1868, only three people turned up and it was shortly thereafter adjourned.

"As you contemplate the culture you want here, both as an organisation but also for your members, don't forget the importance of bread and cheese and short meetings."

The ribbon-cutting ceremony was attended by 20 past presidents of the LIV, regional and suburban law association representatives, LIV section chairs as well as legal and political VIPs. Guests had an opportunity to tour the office – members on 12, staff on 13 – which, Mr Webb said, was all about connecting with members.

"Our goal is to provide a comfortable space for our members to conduct business, learn and relax, as well as modern facilities for our staff.

"We want members to drop in next time they are in the neighbourhood and treat the place like a home away from home" Mr Webb said, adding the coffee was complimentary and good. The new historical timeline (below, with Attorney-General Jill Hennessy, LIV president Stuart Webb and CEO Adam Awty), interactive screen and life members honour board were also on display. The installation showcases significant moments in the Victorian legal profession and that of the LIV. ■

WHAT'SON

LAW INSTITUTE VICTORIA

For more information and to register, go online at www.liv.asn.au/CPD-Networking, call 9607 9473 or email register@liv.asn.au
All events held at the LIV, Level 13, 140 William Street, Melbourne, unless otherwise stated.

CONFERENCES & MASTERCLASSES

Government Lawyers Conference
Friday 14 June, 9am–5pm
(6 CPD Hours)

ACCREDITED SPECIALISTS BREAKFAST WITH THE EXPERTS

Personal Injury Law
Wednesday 22 May, 7.30–9am
(1.5 CPD Hours)

Wills & Estates
Thursday 30 May, 7:.**Business Law & Commercial Litigation**
Tuesday 4 June, 7.30–9am
(1.5 CPD Hours)

WORKSHOPS & SEMINARS

Bookkeepers Trust Recording Workshop
Monday 20 May, 9am–12.15pm
(3 CPD Hours)

Acting for Ageing Clients
Tuesday 28 May, 9am–5pm
(7 CPD Hours)

The Voluntary Assisted Dying Act: Victoria at the vanguard
Tuesday 4 June, 12.30–2.30pm
(2 CPD Hours)

LEGAL RESEARCH TRAINING

Making the Most of Free Resources
Friday 24 May, 2–4pm
(2 CPD Hours)

COURSES

LIV Practice Management Course
15, 16 & 17 May, 9am–5pm, OR
19, 20 & 21 June, 9am–5pm
(21 CPD Hours)

ACADEMY SERIES

Family Law Sessions – Parenting
Friday 10 May, 1–4.15pm
(3 CPD Hours)

Succession Law Sessions – Estate administration
Friday 24 May, 9am–12.15pm
(3 CPD Hours)

Drafting Skills Sessions – Drafting for settlement
Wednesday 29 May , 1–4.15pm
(3 CPD Hours)

Business Law Sessions – Franchising
Tuesday 4 June, 1–4.15pm
(3 CPD Hours)

Family Law Sessions – Analysing complex scenarios in family law
Friday 7 June, 1–4.15pm
(3 CPD Hours)

Property Law Sessions – Retail leasing
Friday 14 June, 9am–12.15pm
(3 CPD Hours)

Succession Law Sessions – Litigation
Wednesday 26 June, 9am–12.15pm
(3 CPD Hours)

Drafting Skills Sessions – Drafting evidence
Wednesday 24 July, 1–4.15pm
(3 CPD Hours)

WELLBEING PROGRAM

Emotional Wellbeing for Lawyers: How to succeed with peace, purpose and happiness

Series of five evening workshops
Begins Monday 6 May, 5.30–7.30pm
FREE for LIV members

NETWORKING & SOCIAL EVENTS

Worksafe Victoria and LIV Regional Lawyers Networking Evening
Wednesday 8 May, 5.30–8pm
WorkSafe Victoria, 1 Malop Street, Geelong

15th Victorian Legal Awards
Friday 17 May, 7pm–12am
Peninsula, Shed 14, Central Pier, 161 Harbour Esplanade, Docklands

Women in Leadership Luncheon
Thursday 13 June, 12.30–2.30pm
Palladium at Crown, Level 1 Crown Towers, Southbank

Your Future in the Law
Wednesday 19 June, 5.30–7.30pm

LAW WEEK – LIV PUBLIC EVENTS

Domestic Violence and Your Workplace: Impacts and solutions
Monday 13 May, 1–2pm

Planning for your Future: Let's explore your choices!
Tuesday 14 May, 10–11.30pm

The Importance of Family Report Writing
Wednesday 15 May, 1–2pm

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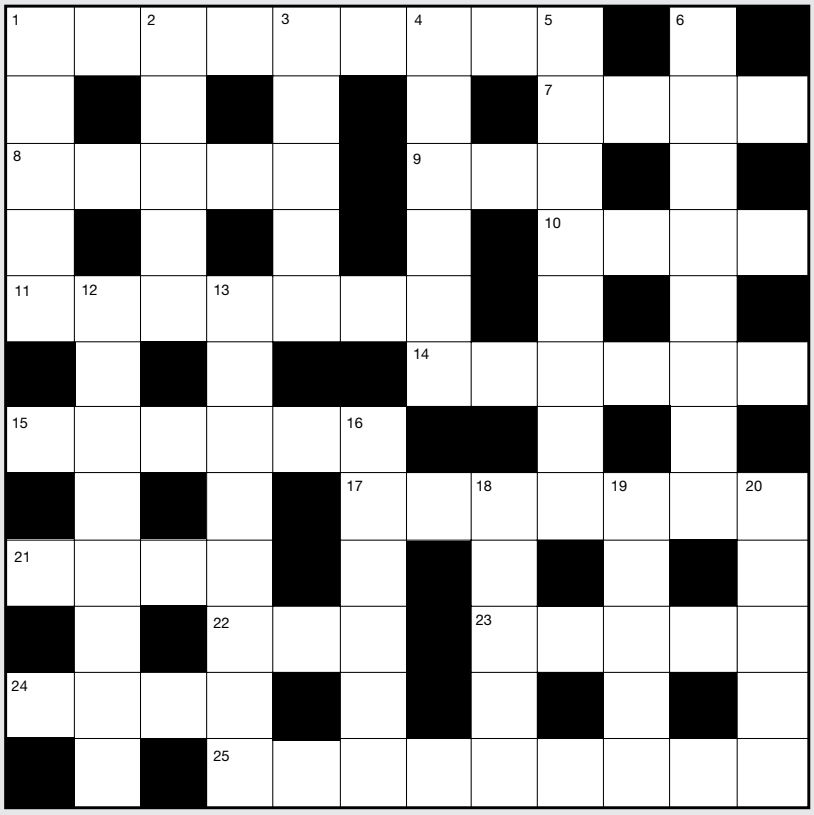

Solution next edition
Compiled by Stroz

ACROSS

1 Fieldsman can be a straw man! (9)
7 Ended across (4)
8 Shaw gets a movement flooded (5)
9 Rower implement (3)
10 Maintained horrible strike pay leaving Syria (4)
11 Style with Peter a rebel (7)
14 Let again rough rehearing nag away (6)
15 More work in seventh heaven! (6)
17 Run riot with sheep attendant (7)
21 Therefore not sure with green light (4)
22 Fire residue is old flame! (3)
23 Nuclear weapon for bombardiers losing riders (1-4)
24 Axis for endless snooker (4)
25 Ice set with rain (4,5)

DOWN

1 Take away distress (5)
2 Repeating a profit (5)
3 Pam lacks empathic for moral principle (5)
4 Craftsman gets top job! (6)
5 Discussion group on firm's dance (8)
6 Sally jumper advancement (8)
12 In spite of expectations, the end (5,3)
13 Coming close at hand (8)
16 Sagittarius is a bowman (6)
18 Slap happy, I mow a cat-like sound (5)
19 Nearly a fight (5)
20 Old flame from coal (5)

Solution to Letters of the Law No.214

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

Fall from grace: Cardinal George Pell drawn by Paul Tyquin

QUICK ON THE DRAW

In a packed court a pencil sketch of Cardinal George Pell's expression at his sentencing was caught for the record by an illustrator. **By Carolyn Ford**

In October 1880, when Ned Kelly learned he would hang for the murder of police constable Thomas Lonigan, in court before Justice Redmond Barry, it was a sketch artist who captured the outlaw's reaction with pen and paper for the *Illustrated Australian News*.

The 25-year-old's execution the following month at Melbourne Gaol was sketched, too. There's the condemned man, the prison guards, the churchmen . . . and the rope.

When Lindy Chamberlain received a life sentence for the murder of her 9-week-old daughter Azaria in a Darwin court in October 1982, it was illustrators who recorded her devastation.

And when George Pell was sentenced in March for historic child sex crimes, the ageing Cardinal's expression as he officially fell from grace was caught for the record – and global transmission – by an illustrator.

That man was Paul Tyquin. His portrayal of George Pell was commissioned by Channel Nine and ricocheted around the world via AAP for publication everywhere from *The Age* in Melbourne to *The Times* in London.

"The court was packed. Pell was led in with security guards around him. I was on the side of the courtroom, with a three-quarter view of Pell, who sat up the back," Mr Tyquin recalls. "He looked very sad. He is a big, broad man, but stooped more these days.

"Sometimes you only get a few minutes, but I had about 45 minutes to get a good likeness of him. I think I did, it's for others to judge. He did look glum, that was his expression."

A pencil sketch of facial features and expression done, Mr Tyquin rushed back to Channel Nine, filled in skin tone and hair colour from a palette of more than 100 coloured markers and the now infamous face was ready for the 6pm nightly news bulletin.

James Gargasoulas, who murdered six people and injured others with his speeding car in Bourke Street in 2017, was another of Mr Tyquin's assignments for the TV network.

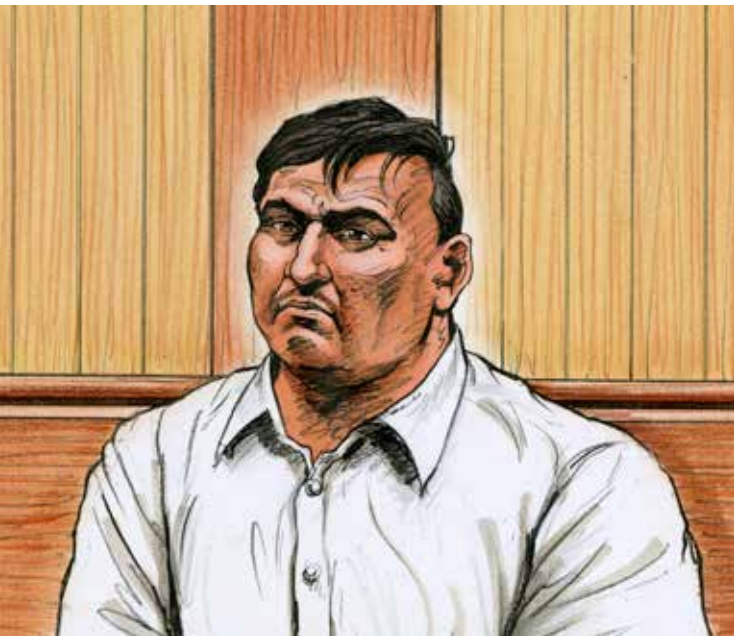
"The first hearing went for about an hour because there were so many charges against him.

"He just sat there . . . he seemed unconcerned, which was odd. He seemed quite relaxed considering the seriousness of the case. That's what struck me."

For George Pell and James Gargasoulas, Mr Tyquin was filling in for Jeff Hayes who is Channel Nine's main illustrator and has been covering the courts for the TV network since the late 1960s. His first assignment was a police conspiracy trial.

In the 1980s, he would take a jar of water and a palette of watercolours to court. "It was messy and difficult." Nowadays, he takes A3 paper, some grey leads and finishes the work later with ink and coloured pencils.

Mr Hayes has done 800-plus



Bourke Street killer sentenced: James Gargasoulas

drawings of people in court for Nine, including Borce Ristevski and Carl Williams.

"It's all about meeting deadlines, getting it down on paper and back to the TV station quickly. It's sometimes difficult to get it done in the time you have, often as little as a few minutes. They are in and out. In initial hearings, you get five minutes if you are lucky. You have to use your visual memory," Mr Hayes says.

"As soon as they come in you look at them three-dimensionally. You look for an emotion or expression. Often there's none. If that's what their expression is, you concentrate on that. I try not to think of their criminality, I just think of the art side.

"I draw what I see. When Carl Williams was in the Court of Appeal he saw his mother and smiled at her. I saw that. It was the most worthwhile image for me the whole day."

The conditions are often difficult, too.

"You might be jostled by family members. I've had my seat kicked and heard obscene comments.

"The media box is often very cramped. Sometimes I work standing up peering around someone's shoulder. It can be quite difficult. But I like it. You go in with a blank sheet of paper and come out with something on it."

The third member of Nine's trio of freelance illustrators is now retired Robert McDougall, another veteran of the business whose sketches show a who's who of the law. He covered the trial of Lionel Murphy, the Costigan Inquiry and the Chamberlain trial. He vividly recalls the two-month NT court hearing, including the day the verdict was delivered. "She looked sad and shocked. He was so downcast. They were both shattered," Mr McDougall recalls, adding it was a "gruelling" assignment.

"Every day I would race out of court and finish the drawings in the open air with the light. It would go by cable to Mt Isa, then Brisbane, Sydney and Melbourne and then overseas."

Photography is prohibited in Australian courts during criminal trials. This is to protect the privacy of parties involved, the identities of jurors, and to prevent distractions.

Sketch artists have a long tradition in the courts. Generally allowed, provided they are unobtrusive, illustrators go where cameras cannot. With fidelity to the moment, they bring the theatre of court to life, giving glimpses into trials most of the community would never otherwise see. It is access to justice via pen and ink. Their renderings capture a moment in time, conveying emotion and atmosphere, humanising the demonised.

The arcane craft would seem at odds with the digital age. Mr Hayes is often asked where he gets the drawing software he must be using. But Supreme Court archives and records manager Joanne Boyd thinks it's unlikely the court custom will change any time soon.

"Here we are in the 21st century still drawing pictures of people. It's to protect those involved, particularly the defendants but also witnesses. I doubt that will ever change. People need to be comfortable to be jurors and witnesses, so it is important they are anonymous.

"The Pell illustration was interesting. We were relying on a third person to show us [Pell's] reaction to the sentence. How they look is important to know. Journalists' word pictures are really added to with illustrations. Otherwise, you are relying on photos of them getting out of prison vans."

Change has come to Victorian courts, however, in the interests of open justice. Australia's first televised criminal court sentencing – of self-confessed child murderer Nathan Avent – was by the Hon Bernie Teague in May 1995 in the Supreme Court.

Some criminal, civil and Appeal Court judges allow broadcasting – recorded and live, audio and video – of their sentences and judgments. It is not unusual in Victoria to hear a brief recording on the nightly news. The Supreme Court live streamed [with a 15-second delay] video of the Rebel Wilson verdict in September 2017 and of the Court of Appeal's judgment in the matter in June 2018. Also recently, the sentencings of Tony John Smith in a domestic violence manslaughter case and Flinders Street driver Saeed Noori.

In the Pell sentencing, it was the first time the County Court allowed a criminal sentence to be broadcast live. It went out across all networks and it stopped Australia. Millions around the world watched the ground-breaking live video of the Cardinal's sentencing, with the camera only on Chief Judge Peter Kidd as he read out his 16-page judgment for the hour it took. "People were so interested in Chief Judge Kidd broadcasting the whole sentence," Ms Boyd says.

Similarly, much of Melbourne listened when, in 2011, Justice Paul Coghlan read out his sentencing remarks in the matter of Arthur Freeman who murdered his daughter Darcey. The broadcast was live on radio.

Decades earlier, such was the level of public interest, the findings of the initial coroner's inquest into the death of Azaria Chamberlain were broadcast live on television, but the trial of the Chamberlains was not. Sketch artists like Robert McDougall took the sequence of events to the community in his drawings.

"The court was a solemn theatre. It was a mystery to people, most didn't go to court, but there are these images and I drew drawings that would stand the test of time." ■

FOOD

17/20

Pentolina
2/377 Little Collins Street

Tucked away in Collins Way, like one of the many eateries hidden in the labyrinthine streets of Rome, Pentolina makes pasta its focus. Opened just last year by ex-Pellegrini chef Matt Picone, the Italian bistro is sleekly fitted out with a curved bar that extends along the length of the restaurant and allows diners to peer into its open kitchen.

Arriving at a mostly empty restaurant on a Monday lunchtime, we dive straight into the Fat Chef's Choice degustation ($65pp). This begins with a Coffin Bay oyster, served au natural but at its finest, flavourful arancini filled with eggplant and oozing fior di latte, and zucchini flowers that are steamed rather than deep fried – a pleasant change – stuffed with creamy buffalo ricotta and balanced nicely with the acidity of a tomato emulsion and dots of vincotto. Finally, there is a small plate of beef carpaccio: thin, pale slices of eye fillet, garnished with capers, parmesan, aioli, and a restrained drizzle of truffle oil.

Then comes the pasta. Spaghetti vongole is an understated but simply outstanding plate of al dente pasta, spanking fresh Tasmanian clams, zucchini ribbons, tossed in a little butter, and seasoned with shaved burrata. Next comes an earthy chestnut flour casarecce – finger length, twisted ribbons of firm pasta – served with a wonderful umami braise of porcini mushrooms, asparagus, and topped with shaved pecorino.

The third plate in the progression is an all-beef Bolognese layered on pappardelle and parmesan cream. The beef is perhaps a little finely minced and the pasta soft for my taste, but hey, I am nitpicking here about a dish that is packed with meaty creamy flavour.

The highly attentive staff choose a 2015 Langhorne Creek Lake Breeze Grenache, which is an excellent, light but peppery accompaniment to our pasta.

Dessert is a delicious semifreddo flavoured with limoncello and mascarpone, dotted with meringue, a yummy basil "curd", and fresh strawberries. It is a perfect way to follow the procession of pasta.

I was recently fortunate enough to spend two weeks in Italy, where I had the best pasta I had ever eaten. Pentolina replicated this experience for me, with perfectly crafted and cooked pasta, carefully matched with simple but harmonious combinations of ingredients and textures. Given the universal appeal of pasta, it is hard to imagine anyone leaving here feeling hungry or disappointed. ■

Shaun Ginsbourg is a hungry barrister.

HOW WE RATE IT

18 to 20: Would take my best client here

15 to 17: A safe bet for client entertainment

12 to 14: Best for a lunch with colleagues

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

COFFEE

Cocoa Bean
140 William Street

Conveniently located on the ground floor of 140 William Street, Cocoa Bean is an unassuming café with a big heart. Bright, airy and spacious, this café has a spacious outdoor garden area and plenty of indoor seating, perfect for large catch-ups. Cocoa Bean uses local roaster St Ali's Orthodox blend, a classic Italian espresso with notes of dark chocolate, butterscotch and hazelnut – and if you bring your keep cup they provide a discount. There is a lot to like about this café, but the stand-out feature is the service. A friend recently sat down for coffee with her mother, who upon taking her first sip accidentally spilt the whole cup. The friendly staff not only replaced the coffee free of charge but kindly threw in a delicious cookie on the house. This café provides a solid range of lunch options including a variety of salads, sandwiches and baked treats – including cookies – to accompany your coffee. **SS**

WINE *By Jeni Port*

Taylor's Estate Clare Valley Riesling 2018
RRP $20

Classically stylish, Clare Valley Riesling is immediately identifiable by the tell-tale, and oh so delicious, lime cordial intensity on the bouquet. It's the scent of summer: lime leaf, high floral aromatics and concentrated citrus.

On the palate it's pure riesling all the way with apple, nougat and lantana with a slightly elevated acidity, this is 2018 youthfulness, after all. Refreshing and a fitting ambassador for the regional flagship from an experienced maker.

Open with Thai prawn curry.

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Yalumba Samuel's Collection Barossa Shiraz Cabernet Sauvignon 2017
RRP $28

The archetypal Aussie red blend that combines the down-to-earth generosity of shiraz with the poise and structure of cabernet sauvignon is enjoying a moment. Long may it continue. Yalumba has been a long-time promoter of the blend and the recent launch of its new Samuel's Collection wines saw a fab shiraz cabernet sauvignon included. It's a star turn for a wine priced under $30. Sweet black cherry, raspberry, nutmeg and cinnamon spices with gentle oak produce a wine blessed with a super friendly personality.

Enjoy with lamb casserole.

Stockists: www.yalumba.com

Morris Wines Cellar Reserve Muscat
RRP $40

Rutherglen winemaker David Morris is one of the most awarded winemakers in Australia. His understated personality belies his ability as a master fortified blender. Rutherglen muscat becomes a world-beater in his hands. The Cellar Reserve is a cellar door exclusive release imbued with classic Rutherglen muscat character from the voluptuous aromas of sweet, dried fruits, roasted nuts with fruitcake, honey and orange peel. The flavour is deeply concentrated and luscious with a toffee, nutty, rancio edge. Serve with florentines.

Stockists: www.morriswines.com. ■

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

WHO KNEW?

DISCOVER A WORLD OF TRAVEL MYTHS.

Travel is one of those subjects that prompts torrents of discussion and advice, not all of it welcome and much of it inaccurate. An illustration of the massive interest in travelling is the number of quotations you can find on the subject.

Better to see something once than hear about it a thousand times. Adventure may hurt but monotony will kill you. Collect moments not things.

They also say travel broadens the mind and your correspondent would add that it also lightens the wallet, especially in countries where our Aussie dollar appears to have the value of Monopoly money. But hey.

We're advised to "quit your job, buy a ticket, get a tan, fall in love, never return". Divorce lawyers love that one.

Hans Christian Andersen said that to travel is to live. Oscar Wilde advised to live life with no excuses and travel with no regret and the Dalai Lama said "once a year go someplace you've never been before".

In my case that could be Fawkner, which is a few kilometres from my house.

WADR would add that travel, and particularly foreign travel, smashes misconceptions. Many people have fairly strong opinions of other countries, and perversely, it seems especially if they've never visited them.

This is confirmed in one of my favourite sayings from Aldous Huxley. He said: "To travel is to discover that everyone is wrong about other countries".

You know those tired old chestnuts. The French are unfriendly, Italians disorganised, Scandinavians cold, British food inedible and so on.

It's as ridiculous as visitors to our shores stepping off the plane and expecting to see mobs of kangaroos hanging around the suburbs of Melbourne. Hold on, Skippy just bounded past my lounge room window.

I accept that occasionally a generalisation appears to be confirmed. Once in Paris my daughter, then around 14, told a waiter in her rehearsed French "je suis vegetarien" to which he replied in perfect English "that is not my problem" before walking off. But you don't judge a country by one rude waiter in the French capital. Okay, I accept there are a lot of rude waiters there.

My family has a number of French friends and without exception they are the nicest people you could imagine.

After several years of negative publicity about poisonous politics, gun massacres and a country riven by discord, your correspondent travelled to the US earlier this year with some trepidation. In the Trump era we hear so many negative things about America and Americans that it's easy to fall for the generalisations.

What your correspondent found was a country bursting with energy, friendly and helpful locals, wonderful cities and surprisingly good weather for the middle of winter. And in over a month there wasn't a single moment when it felt unsafe.

As Mark Twain wrote: "Travel is fatal to prejudice, bigotry and narrow-mindedness". ■

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.

ADOBE STOCK

BREAK OUT OF THE LOOP

WHAT TO DO WHEN YOUR EMOTIONS HAVE HIJACKED YOU.

Every emotion you've ever felt started with a thought. While some thoughts are intelligent and well-crafted, others persist as a complete distraction to our otherwise focused minds. But then there are the ones that present as unpleasant public emotional displays, when you least expect it.

Picture being on the receiving end of a less than flattering remark uttered by Opposing Counsel. You feel a heat rush as it swiftly morphs into full blown anger. Instead of remaining cucumber cool, you rebut with words of an unprofessional nature sending the incident swiftly south from there.

Let's break down what just happened. The incident created within you an angry thought, which sent neurochemicals into your body, transmitting messages on how prickly you now *feel*. Your body obliges by sending a message back to your brain saying "I'm feeling prickly, I must be angry". Your intelligent brain acknowledges that you do feel anger and sends more messages to anchor those prickly feelings firmly in place. You have now created a thought/feeling loop.

You continue to unravel as you surreptitiously curse OC for "causing" the incident and in the process lose your train of legal thought. OC and the incident now hold your undivided attention. Do you realise that you have just given your personal power away? And that certainly was not part of your brief.

For some immediate liberation from the dreaded thought/feeling merry-go-round:

1. Begin by retrieving your personal power, or you'll remain scattered and depleted of energy. Regaining power can only occur in the present moment. Focusing on your breath is an instant way to achieve this. It's not hard to do and no one needs to know you're doing it. Draw in a slow and deep breath through your nose and into your belly to activate your parasympathetic nervous system for some instant calm.
2. Then acknowledge your anger. Ask yourself why you think it reached that level. Know that it has a real purpose in the instance before you. It is there for a reason. Most people try to push it away, which is counterproductive. Be with your anger, feel where it is in your body, but only give it 90 seconds of your valuable time. If your anger hasn't dissipated by then, there are other factors at play.
3. Now consciously choose a better thought. Your subconscious just removed the power of thought choice from you, now you are taking it back. Your unravelled moment was a product of your subconscious thinking. Conjure up thoughts of anything that helps you feel better – perhaps your dog's smiling face might help?
4. Finally, mentally thank the incident for showing you that something within you needs a tune-up. In this setting, the world is your mirror.

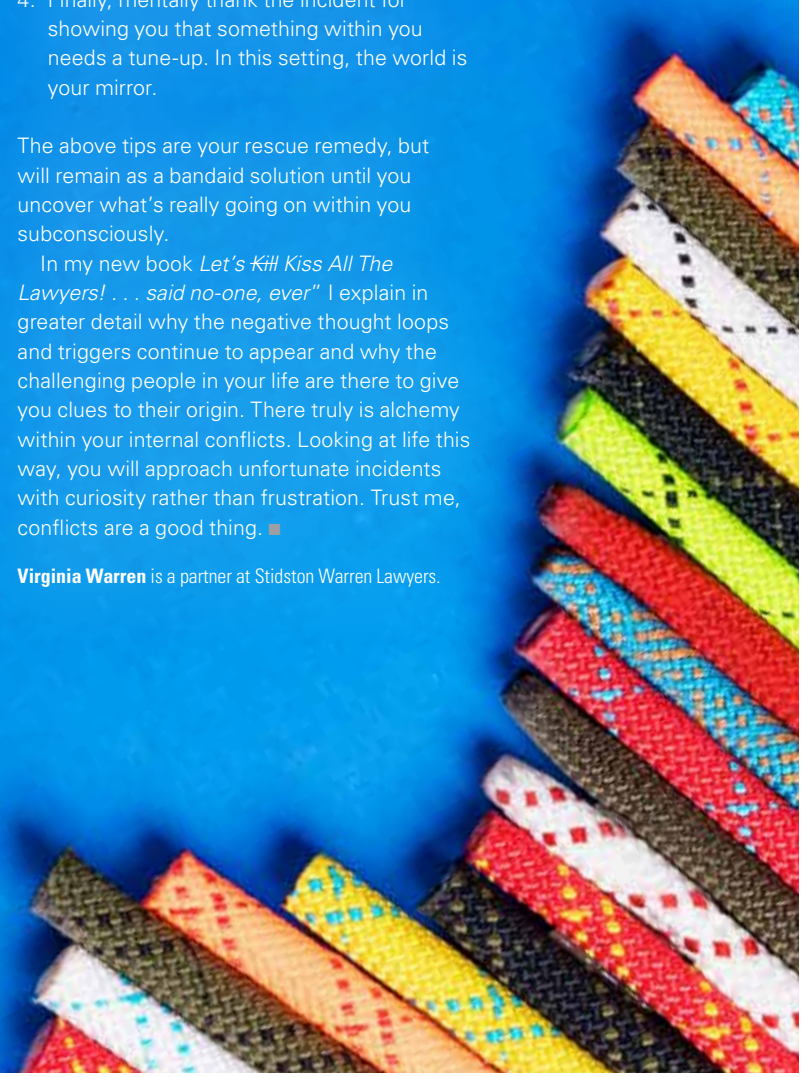
The above tips are your rescue remedy, but will remain as a bandaid solution until you uncover what's really going on within you subconsciously.

In my new book *Let's ~~Kill~~ Kiss All The Lawyers! . . . said no-one, ever*" I explain in greater detail why the negative thought loops and triggers continue to appear and why the challenging people in your life are there to give you clues to their origin. There truly is alchemy within your internal conflicts. Looking at life this way, you will approach unfortunate incidents with curiosity rather than frustration. Trust me, conflicts are a good thing. ■

Virginia Warren is a partner at Stidston Warren Lawyers.

TIPS

- When angry and unravelling, focus on your breath and regain your power.
- Acknowledge your anger and only give it 90 seconds.
- Think of something that makes you feel better – your dog?



ADOBE STOCK


Real life drama: Playwright and law student Verity Norbury

THE DRAMA OF LAW

LAW STUDENT VERITY NORBURY'S SECOND PLAY REFLECTS HER PASSIONS FOR THE ARTS AND LAW. **BY KARIN DERKLEY**

Like one of the characters in her play, *Mocha is Not Coffee!*, Verity Norbury was initially torn between following her passion for the performing arts and doing the "sensible thing" by studying law. "All I really wanted to do was be an actor and write plays, but then the reality hit that I might need another profession if I didn't want to work in the service industry for the rest of my life."

So far, Ms Norbury has managed to straddle both worlds, and has almost finished a double degree at Monash University in performing arts and law. Like one of her characters, she has also spent more time than she cares to think about working in menial jobs to support herself during her studies – barista, supermarket deli assistant, waitress and as a department store salesperson.

Her first play *Global Citizen* drew on those experiences in the service industry. "It was a comedy, but it was also a comment on the exploitation of retail workers, based on my own experiences."

Her second play, which is being performed as part of Law Week, is also partially based on her work experiences. One of her characters is a barista who finds her friends' choices of beverage – soy lattes, mocha, dirty chai – infuriating. "I'm a big coffee fan," she says.

The four young female law students banter about their studies, their boyfriends, and their adventures on Twitter, in a script initially reminiscent of *Sex and the City*. "I wanted to write a contemporary play with strong roles for young women – people who have lived in Melbourne all their lives, the kind of role I would like to play myself," Ms Norbury says.

But what starts as a seemingly light-hearted tale soon descends into a deeper, darker story that reveals the young women's struggles with the stresses of life: juggling studies with working menial jobs, grappling with the pressure to land a position in a top tier firm, dealing with the vicarious trauma that emerges when textbook cases shockingly turn into real life. And all the while, the burden of maintaining a façade of effortless perfection.

Ms Norbury says she is all too aware of the sobering statistics showing lawyers experience disproportionately high rates of depression, anxiety and suicide. "Each of the girls in the play is impacted in some way by mental health issues. The play shows the different ways people approach those issues for themselves and for others.

"Ultimately the play is saying it is okay to be stressed and anxious, and to talk about it. But it's also about the difference between those who offer support and those who push away someone who is struggling."

The play was performed at the Fringe Festival, with an audience response component feeding into Ms Norbury's honours thesis for her performing arts degree. "People really engaged with the issues brought up by the play. Other people can relate because they've had those experiences."

With two successful plays under her belt, Ms Norbury is tossing up her next move after she completes the last two units of her law degree. She has set up her own production company, Norbury Productions, but says that despite her initial misgivings about the law, a string of placements with Springvale Monash Legal Service, two sexual assault clinics, and JobWatch has kindled her enthusiasm for a career in the law. She now works casually as a victim support officer at the Department of Justice and Community Safety.

"Doing placements was when I got a better perspective on what it means to be a lawyer and what you can do with the law. That's when I realised the practical skills were very different from the lecture environment to working with real people."

She realises now the value of a career in the law, not just financially but also for giving her all important material to use in her parallel career as a playwright. "The thing about the law is that it's very dramatic. So many ideas have come from people I've met or worked with, people at law school, cases I've read at law school, and from my legal placements. "It's good to do something else because you always need inspiration with playwriting."

Mocha is not Coffee! is playing at Studio Theatre, at Gasworks Arts Park, 15 -18 May. For tickets go to www.gasworks.org.au/event/mocha-is-not-coffee/ ph 6606 4200. Law Week (13-19 May) has more than 200 mainly free events on offer all over Victoria. For more information, go to lawweek.net.au. ■

LAW INSTITUTE VICTORIA

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Northern Community Legal Centre
St Kilda Legal Service – LGBTIQ Legal Service

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Natasha Maugeuret, Victorian Government Solicitor's Office
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