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EDITORIAL:

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Balance edition 4 content deadline: 3 October 2018

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Magazine design and print: Zip Print, Darwin
Happy New Year, and welcome to 2018! I hope that everyone had a relaxing break over the festive period. Having now resumed work, I find myself more enthused than usual at this time of the year. I suspect this is as a result of the challenges and exciting opportunities ahead in my role as President.

I’d like to pause for a moment to acknowledge and thank the members of the 2016/17 Council and committees for their contribution to the Society. These volunteers are essential to the running of the Society and their service to the members is to be commended by the profession.

As this is my first President’s column for **Balance** I thought I would take this opportunity to tell you a little about myself and outline the Society’s goals for 2018.

I became enthusiastic about studying law after quickly realising in high school that science and maths weren’t really for me. I was lucky enough to have parents who supported my desire to become a lawyer, but in truth, my parents were simply happy that I decided to go to university. Both my parents migrated from Cyprus to Darwin in the 1940s and they worked hard to instil in their children the importance of obtaining an education and the opportunities that come from a tertiary education.

I was born in Darwin and I’m proud to say that I completed my primary, secondary and tertiary studies in Darwin. I’m a graduate of the (then) NT University and I’m lucky to have been taught by the likes of Ned Aughterson, Bill Herd, Chief Justice Grant, Judge Blokland, Judge Oliver, Sue Phillips and a number of other well-respected practitioners in the NT.

I was fortunate to obtain my articles with the then Withnall Maley & Co where I had the privilege of serving my Master solicitor, John Withnall, a brilliant practitioner with one of the sharpest, strategic minds and a genuine passion for the law. John taught me the important lessons: quality over quantity, and be bold when fighting for your clients. I continued with Withnall Maley & Co after my articles and had the pleasure of continuing to work with John Withnall, Peter Maley, Sally Pfitzner and Rob Jobson (and several other brilliant lawyers) and developed a practice in criminal law and civil litigation.

After five years, it was time to _spread my wings_ so to speak, and I moved to De Silva Hebron where I was able to expand my civil litigation practice to encompass and develop a medical negligence practice. I had the pleasure of working with David De Silva, Susan Porter and Merran Short and many other great practitioners. I also had the privilege of working with brilliant barristers who, one by one, accepted appointments to the Bench. It was during my seven years at De Silva Hebron that I developed the knowledge and confidence to move on and establish my own practice in 2009 with my business partners.

I have worked and continue to work with exceptional practitioners and I’m grateful that my partners have supported my continued involvement with the Society.

Being in private practice, it’s easy to forget that being a legal practitioner is more than just running a business. My involvement with the Society over the past six years serves as a reminder that our society cannot function without a legal profession advocating for people’s rights and upholding the rule of law.
That’s probably enough about me. Let’s move forward with the Society’s plans for 2018.

December 2017 proved to be a busy month.

Firstly, I attended the Law Council of Australia quarterly directors meeting in Canberra. The meeting coincided with the Law Council’s Annual General Meeting where I’m delighted to say that our very own local practitioner, and former Society President, Tass Liveris was elected to the Executive. In the context of there being a contest for the three executive positions, with six nominees, Mr Liveris’ achievement should be congratulated.

Secondly, the Council met to reflect on the Strategic Plan which was adopted in 2017. During that meeting we were able to revisit existing goals, review the Society’s progress and develop additional objectives to respond to current challenges facing the local legal profession. This year the Society will focus on:

- Access to justice and advocating for funding for our legal aid bodies
- Advocating on issues of law reform in the Territory
- Educating members about the role of emerging technology and the rise of artificial intelligence
- Supporting and mentoring young practitioners
- Promoting, protecting and defending our legal profession
- Continuing the conversation about judicial conduct

Thirdly, the Society’s Christmas drinks in Darwin and Alice Springs were well-attended by the profession and was a great way to kick off the festive period.

The Society is also busy organising an exciting calendar of events, a notable event being Law Week which will take place between 14 and 20 May 2018. A diverse range of events are planned that will not only interest the legal profession but will engage the community. Watch this space!

This year also marks the 50th anniversary of the Law Society Northern Territory. In anticipation of reaching this milestone, the Society formed a 50th anniversary working group last year to plan and coordinate Gala Dinners in Darwin and Alice Springs which will be held at the end of August/early September 2018. Keep a look out for your ‘save the date’ invitations! In addition to the dinners, historians and authors Peter and Sheila Forrest have been engaged to document the fifty-year history of the Society and the Territory profession to mark the occasion and the book, all things going well, will be launched at the Gala dinner in Darwin.

There will unquestionably be many challenges which the legal profession will have to face in 2018. The Society recognises that it is important to unite the profession and, where possible, support the different needs of our diverse members and assist with challenges facing the profession. With that in mind, I welcome any suggestions from the members as to how the Society can better respond to your needs and the needs of the profession generally.

On a final note, may 2018 be a successful and prosperous year for us all.

I can be contacted through the Society or at MSP Legal.
Happy 50th birthday to the Law Society Northern Territory! The Society is pleased to be hosting a number of activities to mark this special anniversary. A ceremonial sitting will be held at the Supreme Court on 4 May 2018, the closest date to the anniversary of the Society’s inaugural meeting.

We are also looking to acknowledge and remember the important contribution of numerous practitioners to the NT legal profession over many years. The cover of this edition of *Balance* recognises and highlights some of the first Presidents of the Society. A history of the NT legal profession and the Society will be published later this year. Special dinners are being planned to be held in Darwin and Alice Springs later this year – a ‘Save the date’ will be sent out shortly and we ask that you share this with any former NT practitioners you know who might like to travel back for these special events.

Only a month in and the year’s activities are already well-underway. We kicked it off with the annual Start at the Top Family Law Conference on 24 and 25 January 2018. The conference was a great success and well-attended by Northern Territory practitioners from Darwin and Alice Springs, as well as interstate colleagues. The conference delegates had the honour of hearing Chief Judge Alstergren provide the keynote address for the conference—this was his first since appointment to the Federal Circuit Court bench so the Society was delighted to have the opportunity to host him.

We thank the Federal Circuit Court and the numerous Family Court and Federal Circuit Court judges who continue to support the conference by attending and presenting. The significant work and assistance Judge Cole provides in planning for the program content and coordinating the judicial officers who attend is greatly valued and always appreciated. The Society also congratulates Judge Cole and his wife on recently being awarded the Medal of the Order of Australia—a well-deserved honour.

The Society had the pleasure of welcoming the new President of the Law Council of Australia, Morry Bailes, at the Opening of the Legal Year events in Darwin and Alice Springs. Morry is passionate about issues affecting regional and remote practitioners and the impact of technology on the future of the profession. It was wonderful for him to have the opportunity to speak to and meet with members of the profession in Darwin and Alice Springs.

The Law Council of Australia has now published its long awaited discussion paper to facilitate a review of the *Australian Solicitors Conduct Rules* (ASCR). The ASCR were first adopted in 2011 so it is timely to review the rules and consider if any changes are needed, particularly to clarify the operation of any of the rules. Whilst the ASCR have not been adopted in the Northern Territory it is important that we engage with the review process as any proposed changes may impact this jurisdiction if the ASCR are adopted here in the future. The discussion paper is lengthy and quite detailed but the consultation period is open for three months so members are invited to take some time to have a look at any recommended changes to the current rules, or recommendations not to make any changes as proposed by some. The discussion paper is available on the Society’s website and the Law Council of Australia website.

Since my last *Balance* column our Manager Regulatory Services has taken maternity leave—congratulations to Aislinn and her husband on the birth of their beautiful baby girl! The Secretariat welcomes Liza Powderly who has been employed to fill the Manager Regulatory Services role whilst Aislinn is on leave. Efforts to recruit to fill Bella’s very large shoes are ongoing and we hope to introduce the newest member of the Secretariat to the profession soon.
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In November 2017 the CLANT AGM was held in the NAAJA Boardroom. Russell Goldflam, our Human Rights Award winning, gypsy clarinet and limerick enthusiast President stood aside after six tireless years in the role. His contribution to the association has been exceptional. As the newly elected President, I have been left with enormous shoes to fill.

Our new committee spans the jurisdiction with representatives from Darwin, Katherine, Tennant Creek and Alice Springs and comprises members of the Bar, private firms, the DPP, the Commonwealth DPP, the NT Legal Aid Commission and NAAJA.

The CLANT membership has continued to grow and we now are proud to boast in excess of 140 members. At the 16th Biennial Bali Conference in June last year we celebrated the 30th anniversary of CLANT in the gardens of founding President, Colin McDonald’s, beautiful villa in Ubud. It was a time to recognise and reflect on both the growth of the association’s membership and the determined lobbying, advocacy and general ‘boat rocking’ of previous committees.

Hard work lies ahead for this committee. We have the most severe and stringent mandatory sentencing laws in the country. We have a broken youth justice system that now has an apparent path to effective reformation but as yet no concrete commitment from either the Federal or Territory governments to implement the recommendations of the Royal Commission. We require a collaborative approach to dealing with criminal justice issues. Underlying criminogenic factors must be mitigated by way of increased funding and infrastructure in the Health, Education and Housing departments including in remote communities.

The over representation of Aboriginal and Torres Strait Islander men, women and children in custody and the shameful rates of imprisonment in our jurisdiction carry a costly toll on our community in both financial and human terms. The number of persons with mental health issues in custody on supervised orders because we have no appropriate community-based health services and treatment facilities is unacceptable in a first world country. The lack of appropriately qualified persons to provide reports to the Courts creates extreme delays for these vulnerable persons and is something that must be addressed as a matter of urgency.

Holistic and therapeutic strategies that attempt to engage and identify ‘at risk’ persons prior to or at the commencement of criminal offending is crucial to minimising both crime rates and incarceration. Long-term commitment is required to make generational change. We cannot fear controversial policy reform including the de-criminalisation of certain drug offences in favour of educating and voluntary rehabilitation options. Diversion
should be extended as a sentencing option for adults. Mandatory sentencing in all forms must be abolished. Pro-social community engagement and specialised youth officers must be embraced by the NT Police. Police procedures and processes must take on the recommendations of the Royal Commission.

Just prior to Christmas I met with the Attorney-General and raised these issues and more. This committee hopes to continue to have a meaningful and open dialogue with the current government so as to achieve real reform, the success of which will eventually be measured in decades to come; not in quick fixes, chest beating and tough on crime rhetoric.

We continue to share the dream of a true and equitable system of criminal justice.

Hey you.
Do you like reading stuff?

Thanks to Lexus Nexis, Butterworths and The Federation Press, the Law Society NT has a number of printed publications available to our members to keep – free of charge – and in return all you need to do is write a short book review which will be published in Balance.

To register your interest, please email: practitioner@lawsocietynt.asn.au
Happy New Year!

Jessica Holgersson  
Vice-President, Darwin  
NTWLA

Thanks to everyone who came along to our AGM and Christmas Party on 24 November 2017. It was a fabulous night – we had a huge turnout for the AGM, the Hon Natasha Fyles was our guest speaker at the Christmas Party, National Golden Gavel Winner of 2017 Micah Kickett performed what I assume to be the very first NTWLA rap (check out our Facebook page to see the magic for yourself), and our long-term committee member Frieda Evans was awarded a life time membership for her fantastic contribution to our association.

During our AGM, the NTWLA Committee for 2017/18 were elected as follows:

President – Bronwyn Haack  
Vice-President, Alice Springs – Sall Forrest*  
Vice-President, Darwin – Jessica Holgersson  
Treasurer / Public Officer – Frieda Evans  
Secretary – Caitlin Weatherby-Fell

Committee members – Ros Chenoweth, Anna Davis, Traci Keys, Julia Parkin*, Nicki Petrou, Nhi Tran, Kendra Frew, Asta Hill*, Helena Blundell

*Alice-based Committee members & Executive

Stay tuned to our social media pages for updates and pictures from late 2017, as well as upcoming events and information for 2018!
NTWLA in 2018

While we map out 2018 for NTWLA, if there are particular things you’d like to see NTWLA doing, doing more of, or cutting out completely, we would love to hear from you! There are plenty of issues and ideas to address in the space that women lawyers occupy in the Northern Territory and it would help the Committee to know what your interests and priorities are. The more we communicate, the better we’ll be able to work together and confidently generate some action.

Contact NTWLA

You can contact us by email to ntwomenlawyersassoc@gmail.com or drop us a line on Facebook or Twitter.
NTWLA held a drinks event with the Northern Territory Anti-Discrimination Commissioner, Sally Sievers, in Alice Springs on 1 November 2017. The event, held at Monte’s Lounge, was an excellent opportunity for the Commissioner to discuss her role and the function of the Anti-Discrimination Commission with NTWLA members.

The Commissioner was visiting Central Australia to discuss the proposed reforms to the Anti-Discrimination Act (NT) with local organisations, community groups and practitioners. NTWLA was pleased to give its Alice Springs members an opportunity to talk about these reforms directly with Ms Sievers, a number of which were discussed as being particularly relevant women practitioners. These included the addition of domestic violence as an attribute under the Act, and the modernisation of the Act to ensure that gender identity, sexual orientation, and intersex status are also protected attributes.

The event was also a great opportunity for young women practitioners to ask questions of a senior colleague and to hear about Ms Sievers career trajectory and some of her experiences practising as a lawyer in the Northern Territory.

Many thanks to the Anti-Discrimination Commissioner for her time and to our NTWLA executive members for their work in organising the event.

We look forward to more opportunities to meet and connect as women lawyers in Alice Springs in 2018.
News and updates

NTYL represents lawyers in the NT who have been admitted to practice for fewer than five years, as well as graduate clerks and GDLP students (even if not yet admitted). Despite being called ‘young lawyers’, there is no age restriction on membership and junior practitioners of any age are most welcome to get involved.

We are a sub-committee of the Law Society NT and have two representatives on the Society’s Council (Sarah Dowd, main representative and Elanor Fenge, alternate representative).

Stay connected

NTYL organises events throughout the year and we will keep you updated via Facebook (www.facebook.com/NTYLpage) or through our monthly newsletter. Please email us at NTYL.Committee@gmail.com if you would like to receive our newsletter or if you would like further information about the committee.

2018 committee members

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NORTHERN TERRITORY YOUNG LAWYERS (NTYL)

Sarah Dowd
President
NTYL
An increased awareness of mental impairment matters would serve practitioners well. This is especially relevant because the law has traditionally identified the mentally impaired as not being criminally responsible for conduct that is beyond their capacity to understand or control. However, this vulnerable group remains saddled with various handicaps that require special consideration under the law that practitioners need to recognise and address.

History of mental impairment

The concept of criminal responsibility or ‘guilt’ only applies if the accused possesses the capacity for rationality. A criminal act made voluntarily and intentionally with an understanding of its significance will attract criminal responsibility, while a person who does not fulfil this criteria or found ‘not guilty on grounds of insanity’ may be excused from criminal culpability. This reflects the principle that the accused should not be unjustly convicted or punished for an act related to or caused by illness over which they had little or no control.

M’Naghten’s Case (1843) established the defence of mental impairment. This defence acknowledges mental impairment by exculpating an accused from criminal responsibility when lack of capacity to understand the nature and quality of the conduct or that the conduct was wrong is proven. This exclusion was further broadened by the High Court in Falconer (1990) which held that non-insane automatism, while not a ‘disease of the mind’, entitled the accused to outright acquittal if proved beyond reasonable doubt.

Mental impairment in the NT

In the NT, ‘mental impairment’ under the Criminal Code s 43A reflects an inclusive and encompassing understanding of mental health matters. This is envisaged by the Code’s broad spectrum of legislative mental impairment inclusions. These inclusions purposefully capture the widest range of health issues affecting criminal responsibility as possible and includes senility, intellectual disability, mental illness, brain damage and involuntary intoxication.

Such range is consistent with growing awareness of mental health issues and its effect on society. It is estimated that at least 690 000 Australians currently live with some form of mental illness, affecting up to four million family or relationship carers. Further, 45 per cent of Australians will experience a personality or eating disorder, psychotic illness or other mental illness in their lifetime with 20 per cent now affected by severe illnesses like anxiety disorder and depression.

Therefore, a change in perspective with regard to the mentally impaired is necessary. Despite a common perception, dangerous psychopaths are only a minute representation of the spectrum. In reality, the poor, minorities and people with a history of offending and...
contact with law-enforcement make up the vast majority of mentally impaired clients. Such clients are more likely to be female and non-violent, highly vulnerable and at risk of homicide, suicide and self-harm.

Indigenous Australians are especially vulnerable to serious mental and behavioural disorders. The Centre for Rural and Remote Mental Health finds that the higher rates of serious mental disorders and problems experienced by remote communities are associated with social disadvantage, affecting children particularly hard, with data indicating that morbidity and mortality rates, including suicide, are double that of non-Indigenous Australians.

**Practical issues**
The legal profession is not immune to this growing epidemic and needs to develop skills and knowledge, although achieving proficiency in mental impairment matters can be challenging. Firstly, the concept of mental impairment is broad ‘with no universally accepted definition.’ Secondly, most practitioners would not possess the specialised training to readily identify manifestations; and thirdly, clients with mental illness are unlikely to disclose their illness or treatment due to self-denial of their illness, embarrassment or fear of discrimination.

Stakeholders have recognised this shortfall and have called for practitioners to have a better understanding and awareness of mental impairment issues. While the Duty Lawyer Handbook calls for awareness in the interest of providing personalised instructions and case management, the NT Law Reform Committee declares the need for additional resourcing, training and materials in the interest of effective communication with the wider community.

Such an attitude is especially appropriate given that pro bono practices and community law centres are seeing and servicing a record number of mentally impaired clients. Various unique circumstances lead a client into contact with the criminal justice system and invariably the already complex lawyer-client relationship is compounded when a client is mentally ill and especially so in combination with alcohol or substance abuse.

With mental illness, the clients often lack objective reasonableness and behaviour can range from aggressive and nasty to vulnerable, attractive and even seductive. In many cases, client behaviour may be irrational, polarising, disorganised, delusional or even paranoid and their ability to understand and give instructions may be affected. For example, by frequently changing or providing conflicting instructions, or even instructing against self-interests. It may even be difficult to assess capacity to give instructions due to communicational and social-skill deficiencies such as rejection or misconstruction of advice.

Ultimately, wherever possible, the defendant should have the benefit of a full trial in the interests of transparency and fairness. In *Eastman* (2000), the High Court proclaimed a duty to raise such issues, where a ‘well-founded belief’ exists, overriding any other professional duty. Although mental illness is a broad concept, practitioners should learn to recognise the potential legal and problem issues, and how to identify resources to deal effectively with these
issues to address the specific needs of their clients through the judicial process.15

Conclusion
Practitioners need to revaluate their attitudes when dealing with mentally impaired clients. Mental impairment covers a spectrum of severity and affects clients who are vulnerable, of minority groups (particularly Indigenous, women and children) and at the lower end of the economic scale who are non-violent and more likely to be at risk of homicide, suicide and self-harm. Practitioners need to overcome potential issues in their clients’ interest by learning to identify and deal effectively with these issues and to address their clients’ specific needs.

1 Daniel M’Naghten’s Case (1843) 8 ER 718, 722.
3 Sane Australia, Mental Health Basics (retrieved 8 December 2017) Health Direct Australia.
5 Allen J Frances, Prison or Treatment for the Mentally Ill (10 March 2010) Psychology Today.
12 Barnett, above n 10, 63.
13 Ibid.
14 Eastman v R (2000) 203 CLR 1 per Miles AO at [284-285].
15 Ibid, 71.

Make Your Decision Count and Register Today

DonateLife NT is urging Territorians to make their decision count in 2018 by registering on the Australian Organ Donor Register today.

According to recent stats from DonateLife NT at least half of Northern Territory residents are willing to donate their organs and tissue to someone in need, however only 12 percent have registered their donation decision online. While most Territorians are confident their partner or family members would uphold their donation decision in the event of their death, registering online provides grieving families with no doubt of their loved ones wishes.

Nine out of 10 families agree to donation when their loved one is a registered donor. There are around 1,400 Australians currently on transplant waiting lists, and a further 12,000 people on dialysis. Territorians are urged to register now to help save more lives.

To find out more and to register your donation decision, please visit donatelife.gov.au.
Meet your Council

Maria Savvas  
President  
MSP Legal

Josine Wynberg  
Vice-President  
Dept. Attorney-General & Justice

Emma Farnell  
Treasurer  
Ward Keller

Andrew Giles  
Secretary  
De Silva Hebron

Leonique Swart  
Councillor  
Dept. Attorney-General & Justice

Lisa O’Donoghue  
Councillor  
First National Real Estate

Peggy Cheong  
Councillor  
Hunt & Hunt

Marty Aust  
Councillor  
North Aust. Aboriginal Justice Agency

Fiona Kepert  
Councillor  
NT Legal Aid Commission

Carly Ingles  
Councillor  
Director of Public Prosecutions

Glen Dooley  
Alice Springs Rep  
Central Aust. Aboriginal Legal Aid Service

David Alderman  
NT Bar Association Rep  
William Forster Chambers

Sarah Dowd  
NT Young Lawyers Ward Keller  
NT Legal Aid Commission

Elanor Fenge  
NT Young Lawyers Alt Rep  
NT Legal Aid Commission
2018: A year of significant changes to privacy law, affecting legal practices and clients

Snapshot

• Two significant reforms to privacy law commence in 2018. Legal practitioners will need to consider the impact on clients, as well as on the operation of their own legal practices.

• The changes will affect all medium-large Australian businesses; some smaller businesses depending on the nature of their business; all Australian government agencies; and to a lesser extent state and territory agencies and small businesses in their capacity as employers.

• The changes include mandatory notification of data breaches, and the extension of European data protection law to Australia.

February – Notifiable data breaches

Who is affected

Commencing 22 February, amendments to Part IIIC of the Privacy Act 1988 (Cth) will affect almost every organisation in Australia in some way:

• All entities already required to comply with the 13 Australian Privacy Principles (APPs), which includes all Australian government agencies, almost all businesses and non-profits with a turnover of more than $3m pa, plus some smaller businesses such as health service providers and contracted service providers to the Commonwealth;

• All organisations which receive Tax File Numbers (TFNs) – which will include bodies not regulated by the APPs, such as state and territory agencies and most small businesses, in their capacity as employers; and

• Credit providers and credit reporting bodies.

The key requirements

The amendments require notification of certain types of data breaches. Notifiable data breaches are incidents which involve the loss of, or unauthorised access to or disclosure of, ‘personal information’ (or a TFN, or credit eligibility/reporting information) and which are likely to result in serious harm to one or more individuals. When a data breach meets this threshold test, notification is required, as soon as practicable, to both the Australian Privacy Commissioner and the affected individuals. The Privacy Commissioner is part of the Office of the Australian Information Commissioner (OAIC).

The legislation sets out the factors which impact on whether or not a data breach is ‘likely to result in serious harm’; the timeframes in which an assessment must be carried out on a suspected breach; what a notification must contain; and how a notification must be made.

A failure to comply with the new notification requirements attracts a civil penalty of up to $2.1m.

The takeaway

There are two objectives driving the move towards mandatory notification of data breaches. The first is to fulfil a duty of care to the affected individuals, by letting them know that their personal information has been put at risk. The second is to create a sufficient financial disincentive, such as to prompt organisations into investing
Anna Johnston
Director of Salinger
Privacy

more in their privacy and security programs, to avoid data breaches in the first place.

**What to focus on**
To prepare for a data breach, every organisation should prepare a Data Breach Response Plan. Having a plan in place can clarify what needs to be done when and by whom, in the first few hours and days after a data breach is discovered.

To avoid data breaches in the first place, the privacy team or legal advisor should be working hand-in-hand with the information security team. Staff need privacy training and constant reminders of privacy messaging; and third-party contractors, vendors and suppliers need to be bound by appropriate terms and subject to additional controls to avoid becoming the weakest link in the security chain.

**Further resources**

**May – The GDPR**

**Who is affected**
Commencing 25 May, the General Data Protection Regulation (GDPR) will regulate not only businesses based in the European Union (EU), but any organisation anywhere in the world which provides goods or services (including free services) to, or monitors the behaviour of, people in the EU.

The GDPR will replace the current set of differing national privacy statutes with one piece of legislation, and will offer a one-stop-shop approach when dealing with privacy regulators across all 28-member states of the EU – including the UK post-Brexit.

**The key requirements**
In addition to harmonising the privacy rules across the EU, the GDPR introduces some new privacy obligations (although using the European term ‘data protection’ rather than ‘privacy’). One is the Accountability principle, which requires organisations to be proactive. This means that if an organisation doesn’t have an effective privacy compliance program, it can be found in breach of its data protection obligations even if it doesn’t suffer a data breach. Although by no means a European invention – APP 1 in the *Australian Privacy Act* has the same objective – the financial penalties attached to the GDPR are intended to kick-start proper privacy governance in even the most recalcitrant organisations.

To help achieve this, the GDPR embeds a proactive requirement to do ‘data protection by design’, or as we tend to know it in Australia, ‘privacy by design’. The technique used to ensure privacy is built-in to project design is known in the GDPR as Data Protection Impact Assessment, or here as Privacy Impact Assessment (PIA).

The GDPR also has a strong focus on getting reactive strategies right. It sets a default timeframe for notifying data breaches of only 72 hours, which adds further complexity for Australian organisations already adjusting to the new Australian notification scheme (above).

The GDPR also updates the scope of privacy law to cover such things as data portability and the ‘right to erasure’, and aims to ensure that algorithmic decision-making is subject to human review.
The takeaway
The objectives of the GDPR are to harmonise privacy law across the EU and streamline its application, and dramatically increase the penalties for non-compliance. Fines for failing to comply with the GDPR will reach up to €20m, or 4 per cent of a company’s annual global turnover, whichever is the greater.

What to focus on
Organisations of any size and sector in Australia will need to determine whether they fall within the scope of the GDPR, and then prepare accordingly. A comprehensive privacy management program and a culture of conducting PIAs on new projects will be needed to ensure compliance with both European and Australian privacy law.

Further resources
Salinger Privacy has a free Privacy Officer’s Handbook, to explain what should be included in a comprehensive privacy management program; and a range of commercial Privacy Tools to assist compliance, including PIA tools, training modules, template policies and procedures; see www.salingerprivacy.com.au.

The OAIC has guidance material about the GDPR and Australian businesses available at www.oaic.gov.au.

A different version of this article first appeared in the Law Society of NSW Journal, issue 41, February 2018.
The last twelve months has seen significant changes to superannuation. With this in mind, it is well worth taking the time to ensure you are up-to-date with the changes and their implications, especially as the end of the financial year approaches.

**Annual cap on the amount of concessional contributions you can pay**
The annual cap on concessional (before tax) contributions is now $25,000 per annum for all employed people, down from its previous rate of $30,000 for those aged less than 50 years and $35,000 for those aged 50 and over.

Concessional contributions include Superannuation Guarantee paid by your employer, amounts you choose to salary sacrifice and contributions for which you intend to claim a tax deduction.

If your concessional contributions exceed the new cap, contributions in excess of the cap will be taxed at a higher rate. You should periodically check with your super fund whether or not your concessional contributions are nearing the cap.

**Tax deductions for contributions**
One other recent change by the government was to broaden access across more Australians to the concessional contributions cap to include both employees and self-employed persons. All people under 75 years of age may now be able to claim an income tax deduction for personal superannuation contributions to an eligible fund with people aged between 65 and 74 needing to first satisfy a work test.

Personal contributions for which a tax deduction is claimed count towards the concessional contributions cap of $25,000.

**Non-concessional contributions**
The annual cap on non-concessional (after tax) contributions has been reduced to $100,000 per annum down from $180,000 per annum.

However, if you are under 65 years of age, you may be able to make non-concessional contributions of up to three times the annual cap (i.e. $100,000) in a single year to a maximum ‘bring-forward’ amount of $300,000.

Super fund members with a total super balance of $1.6m at 30 June of the previous financial year are reminded that non-concessional contributions are no longer permitted.

**For those earning over $250,000**
People with more than $250,000 of income and superannuation contributions (adjusted for other benefits) now pay an additional 15 per cent tax on their concessional

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Andrew Proebstl
Chief Executive of Legalsuper
Super changes in review

Contributions on those super contributions that exceed the $250 000 threshold.

However, this effective tax rate of 30 per cent continues to be less than the marginal tax rate for those earning greater than $250 000.

**Super balances of lower income spouses**

To help lower income earning spouses increase the superannuation they accumulate, a person can make a contribution on behalf of their spouse and claim a tax offset. To access the offset, the income threshold for the receiving spouse has been increased from $10 800 to $37 000, thereby helping more families to support each other in accumulating superannuation.

A contributing spouse is eligible for an 18 per cent tax offset worth up to a maximum of $540 for contributions made to an eligible spouse’s superannuation account.

The tax offset is reduced for income above $37 000, phasing out at an income above $40 000.

**First home super saver scheme**

From 1 July 2018, eligible super fund members will be able to apply to withdraw contributions made to super after 1 July 2017 to use as a first home deposit.

The Government’s intention in introducing the First Home Super Saver (FHSS) Scheme was to reduce pressure on housing affordability.

Eligibility for the scheme includes the following:

- be 18 years or over,

- have not previously owned property in Australia,

- have not previously released FHSS Scheme funds,

- either live or intend to live in the premises you are buying as soon as practicable, and

- intend to live in the property for at least six months of the first twelve months you own it, after it is practical to move in.

Up to $15 000 of contributions made in a financial year can count towards the amount that can be released. The maximum amount of contributions that can be released is $30 000 plus associated earnings.

Concessional contributions and earnings that are withdrawn will be taxed at marginal rates less a 30 per cent offset.

**Government super co-contributions**

Government super co-contributions have been available since 2003, and remain a helpful way for eligible people to boost their retirement savings.

Lower or middle-income earners who meet the criteria and make concessional contributions to their super fund are eligible for a government co-contribution up to a maximum amount of $500.

The amount that the government co-contributes depends on your income and how much you contribute.

More information on the eligibility criteria can be found on the ATO website.¹

**Super tax concessions remain one of the best ways to boost your retirement savings**

While there have been considerable changes to super over the last twelve months, what remains unchanged is that super is one of the most tax effective ways to save for your retirement.

Super also remains the only way to make financial contributions to your retirement safe in the knowledge that the funds contributed generally cannot be used for other purposes and will be there when you do retire, or begin to transition into retirement.

If you are not sure how recent changes affect you or your family, or you would like to know more about super in general, now is the time to contact your super fund.

Andrew Proebstl is chief executive of legalsuper, Australia’s super fund for the legal community. He can be contacted on telephone (03) 9602 0101 or via aproebstl@legalsuper.com.au

The year that was.

The Bilata Legal Pathways Program aims to increase the number of Aboriginal and Torres Strait Islander (ATSI) people within the legal profession in the NT. Law Society NT’s Balance publication 2/2015 reported that of the 533 practitioners, only 10 identified as ATSI which approximately equates to under 2 per cent. Qualifications in law also opens up a wide range of career pathways outside of legal practice and with more ATSI people gaining qualifications in law there will be increased benefits for our communities.

2017 was a big year for the program with several significant events. A highlight of the year was when Australia’s first Aboriginal Silk, Tony McAvoy SC, officially launched the program. Other events included the Inaugural Mentoring Workshop, a Law Day Dash with six participating schools, the Bilata Road Show down the Stuart Highway, the second Cudgarees and Canapés event and program activities in December.

We want to thank our law firm partners in 2017 for supporting the program:

Mark Munnich
Program Officer, Law & Justice Projects
North Australian Aboriginal Justice Agency
Inaugural Mentoring Workshop: 29 April 2017

The Bilata Legal Pathways Program started as an idea to put in place a mentoring program between senior members of the legal profession and ATSI students studying law at Charles Darwin University (CDU). The program expanded beyond this initial idea to provide a holistic program focusing on young ATSI students in high school, university law students and other adults interested in studying law. The mentoring component commenced from April 2017 where mentors and mentees gathered on a Saturday morning to ‘workshop’ what makes a good mentor relationship in a context specific to the NT. The mentor component will continue to be improved with new mentoring possibilities.

Law Day Dash: 26 May 2017

The Bilata Legal Pathways Program hosted the Law Day Dash where youth participants from high schools and colleges across the greater Darwin area had the opportunity to visit partnering law firms, hear from interesting guest speakers and take part in fun activities.

A big thank you to Clayton Utz, Maurice Blackburn Lawyers, Bowden McCormack Lawyers + Advisors, Ward Keller, the Northern Territory Legal Aid Commission and Halfpennys Lawyers for having us.
Bilata Road Show: 5–12 November 2017

A group of Aboriginal lawyers and law students embarked on the Bilata Road Show. The route was from Darwin through to Alice Springs and then back to Darwin. The aim was to inspire and encourage people in regional areas, particularly high school students, who may have an interest in pursuing law. This was the first road show of its kind.

The visits in Katherine, Tennant Creek and Alice Springs were to:

• connect Aboriginal youth and mature aged students with role models and stories from Aboriginal lawyers and law students about their experiences and pathways to studying law;

• provide information about the program and encourage applications from ATSI high school students, university students and other adult participants interested in studying law; and to

• connect participants with opportunities and supports to assist their aspirations to study law.

In each town we held an evening event where we encouraged Aboriginal youth or adults who may be interested in studying law to attend and talk about the program. This was also an opportunity to encourage Indigenous people from remote and regional areas in the towns we visited to apply for sponsorship to attend the program days and the official launch of the program.

Thank you to the Law Society Public Purposes Trust for sponsoring the event.
Cudgarees Canapés event: 23 November 2017

The Cudgarees and Canapés event aims to encourage and inspire ATSI women to undertake careers in law by connecting motivational guest speakers with attendees and the legal profession. This year we were very fortunate to have Her Honour Justice Jenny Blokland and Leanne Liddle from the Aboriginal Justice Unit of the Department of Attorney-General and Justice speak at the event. The event was emceed by Stephanie Monck. Thank you to the sponsors: Northern Territory Government Office of Women’s Policy, Bowden McCormack Lawyers + Advisors, Halfpennys Lawyers and Maurice Blackburn Lawyers.

Program days and official launch: 14 & 15 December 2017

Applicants who applied for sponsorship from Katherine, Tennant Creek and Alice Springs attended program activities in Darwin and the official launch. The program days included a range of activities where participants heard from guest speakers including Aboriginal lawyers and received an introduction to CDU’s Law School pre-law program.

The official launch of the program was held at the Supreme Court on 14 December 2017 and Australia’s first Aboriginal person appointed as Senior Counsel, Mr Tony McAvoy SC, officially launched the program.

“The Bilata program, this program which helps the spear fly fast and true, is an acknowledgement that the present state of affairs is unacceptable and that the legal profession must transform itself. It will happen, of that I am confident.” (…)

“The Bilata program also importantly focuses on the need for Aboriginal and Torres Strait Islander law students to have two-way education. By this it is meant that the students are encouraged to continue their education in their own law as well as learning the imported British legal system. I cannot stress how important this aspect of the program is.

I say this because I have an unerring belief that our future self-determination will be experienced through the negotiation and performance of treaties. As lawyers, if we are to be of real value to our communities [and] to our first nations, we must be proficient in both legal systems.” (…)

“To the students … If I can impart just three lessons … [the first lesson is to] concentrate on the task at hand. Do not worry too much about promotion or recognition, if you concentrate on the doing the best you can at each step those things will follow.” (…)

“The second lesson is to work in the area of law you are passionate about.” (…)

“The third lesson is do not be ashamed to ask for help and make the most of your mentors.” (…)

We also thank The Honourable Chief Justice Michael Grant QC and North Australian Aboriginal Justice Agency CEO Priscilla Atkins for speaking at the event. Sponsorship for applicants to attend to Darwin from regional areas was made possible with support from the Law Society Public Purposes Trust.

We want to thank the sponsors of this event: Marsh Insurance through the Law Society NT, Ashurst, who also support the North Australian Aboriginal Justice Agency; and law firm partners including Bowden McCormack Lawyers + Advisors, Clayton Utz and Halfpennys Lawyers.
Incorporated legal practices – in the NT and interstate

The Legal Profession Act (LPA) places some extra regulatory responsibilities on incorporated legal practices (ILP). The most notable is that an ILP is required to give notice in the approved form to the Society of its intention to commence providing legal services in the Northern Territory. It is very important for new ILPs or existing law practices that change from another structure, such as a sole practitioner or partnership arrangement, remember to give this notice. Failure to do so leads to a variety of potential offences under the LPA, but perhaps equally if not more importantly for the law practice it can result in legal fees not being recoverable by the law practice and clients having an entitlement to claim back fees already paid as a debt due.1

Similar obligations exist for ILPs in other jurisdictions. If a Northern Territory ILP is considering expanding its operations to engage in legal practice in another State or Territory the legal practitioner director of the ILP should review the relevant legislation regulating the legal profession in that jurisdiction, review the appropriate interstate body or bodies’ website for information and forms for any notification or other obligations and/or contact the interstate regulator to clarify any requirements.

1 Section 123 LPA

24 October 2017
Admission Ceremony
Supreme Court of the Northern Territory

(Left to right) Ainslee Corridon, Michelle Godwin, Rikki Hudson, Amanda Thornycroft, James Leggo, Nicola Leach and Josie Short
The Start at the Top Family Law Conference 2018 was held on 24 and 25 January 2018 at Parliament House. The Law Society NT (the Society) hosted this conference with the generous support of the Federal Circuit Court and Family Court of Australia and in particular, Judge Peter Cole. This conference has grown from the one-day ‘Family Law Refresher’ held in 2011 to an annual and prominent feature of the Society’s CPD calendar. This year is the first time the conference has expanded to a two-day event.

The conference attracted 64 delegates, of which 25 per cent were from interstate.

The conference program covered a diverse range of topics which included: family violence in a family law context, *Thorne & Kennedy – an update*, mental health, legal capacity and family law, accounting and business valuation dilemmas, and a judicial panel session – ‘things we like and things we hate’. The conference allowed delegates to earn twelve CPD points across all competencies.

Like previous years, the delegates were encouraged to dress casually and enjoy the relaxed, tropical Darwin atmosphere. The conference concluded with an informal
dinner at Crustaceans on the Wharf, complete with a stormy setting which the monsoon provided.

The Society looks forward to working with the Federal Circuit Court to ensure the ongoing success of future Start at the Top Family Law Conferences.
Opening of the Legal Year 2018

The NT legal profession joined together once again on February 1 and 2 to recognise and celebrate the Opening of the Legal Year. The event, hosted by the Society and supported by the Public Purposes Trust, was held at Parliament House in Darwin and the Mercure Resort in Alice Springs.

The Opening of the Legal Year is an opportunity to reflect upon the role of the Courts and the Rule of Law—past, present and future.

Newly appointed Society President, Ms Maria Savvas, opened the event followed by a speech from the Honourable Chief Justice Michael Grant QC. His Honour spoke of the importance of the independence of judiciary as well as the need for a judicial commission.

Upon conclusion of His Honour’s speech, the profession welcomed an address from the Honourable Natasha Fyles Attorney-General (at the Darwin luncheon).

This year’s keynote speaker was Law Council President, Mr Morry Bailes. Mr Bailes spoke of the value of accessible justice, particularly in rural and remote settings, and increased funding and resources in order to facilitate access. Other topics included the future of the legal profession from a technological standpoint and the key priorities of the Law Council of Australia in the coming year/s.

The Society thanks all those that attended and spoke this year’s event and we look forward to another successful (and busy) year ahead.


L – R: Maria Savvas, Morry Bailes, Kellie Grainger
CHRISTMAS DRINKS

Tess Kelly
Alex O’Donnell
Carly Ingles
Sally Bolton
Lachlan Peattie
Summary of the Society’s recent advocacy activities

- Attended National Young Lawyers Golden Gavel – Sydney
- Attended Indigenous Lawyers and Practitioners Networking Think Tank
- Attended Admissions Ceremony
- Attended Conference of Regulatory Officers – Adelaide
- Attended National Ethics Solicitors teleconference
- Attended NT Law Reform Meeting
- Attended Indigenous Lawyers and Practitioners Networking Think Tank
- Submission to AGD – Contracts (Security of Payments) Act
- Attended Consultation teleconference for Review of WA CPD Program
- Attended Making Justice Work Planning workshop
- Attended CLANT AGM
- Attended NPA Jurisdictional Forum
- Hosted and attended AGD and ADC information Anti-Discrimination Act review session
- Attended Making Justice Work committee meeting
- Held Law Society AGM and SGM
- Attended National PII schemes Roundtables – Hobart
- Attended Criminal Justice Forum
- Attended Territory Families Legal Services Forum
- Attended Electoral Reform information session
- Attended Bilata Cudgerees and Canapes event
- Attended Memorial ceremonial sitting for John Foster Gallop
- Hosted and attended the NTWLA AGM
- Attended Chief Ministers Christmas Reception
- Media Release – NT Young Australian of the Year winner Kevin Kardirgamar
- Attended Conference of Law Society’s – Canberra
- Attended LCA AGM and Directors meeting – Canberra
- Media Release – 2017 Fitzgerald Justice Award winner Russell Goldflam
- Media Release – 2017 Australian Human Rights Award winner David Woodroffe
- Hosted Law Society NT Members Christmas function – Darwin
- Hosted Law Society NT Members Christmas function – Alice Springs
- Hosted and attended Start at the Top Family Law Conference – Darwin
- Attended the Opening of Parliament
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Cameron Ford’s Supreme Court case notes

Detailed notes of all Supreme Court decisions are published on www.ntclr.org and in the Northern Territory Law Journal.

NEGLIGENCE OF ROAD AUTHORITIES

In Kent v City of Darwin [2018] NTSC 3, Barr J found the City negligent in failing to prune vines protruding through a fence 40cm from a cycle path. A cyclist had fallen and been badly injured when the handle bars of his bicycle became entangled in the vine. His Honour applied the test in Brodie v Singleton Shire Council (2001) 206 CLR 512 and found that the City was generally aware of the identified risk and that the risk could have been eliminated easily with no additional resources or cost. The City had a maintenance program which should have revealed the protruding vines but was inadequate in that it did not require the pruning of vine vegetation to the side of the cycle path. His Honour reduced damages by 30 per cent for the cyclist’s contributory negligence in not slowing from 20 km/h in the face of unsteady oncoming cyclists. His Honour awarded at total of $395,880 for pecuniary loss, non-pecuniary loss, Wilson v McLeay damages, gratuitous services, commercial services, special damages and interest.

SENTENCING AFTER ELECTRONIC MONITORING OR REHAB PROGRAMS

In R v Lovegrove [2018] NTSC 2 at [58], Southwood J held that the court does not have power to backdate the commencement of a sentence of imprisonment for either the time an offender spends in the community on electronic monitoring under the provisions of s 27A(1) (ia), (iab) or (ia) of the Bail Act (NT), or on bail on stringent conditions at a residential rehabilitation facility. However, a sentencing court may consider such matters and may because of them reduce a sentence of imprisonment which might otherwise have been imposed on an offender. A point of error will only occur if the accused’s bail conditions demonstrate that in substance the offender has already suffered a penalty of significance and the sentencing court fails to take this fact into account and reduce the sentence of imprisonment accordingly. His Honour said that those conditions did not amount to ‘custody’ within the meaning of s 63(5) of the Sentencing Act (NT) giving the power to backdate sentences. Further, a sentencing court should very carefully consider whether an accused person should be granted bail to undertake a rehabilitation program before pleading guilty. Bail is not a sentencing option, nor should it be an alternative to sentence or treated as a deferred sentence. A sentencing court should be careful to avoid this kind of conflation which has the potential to result in disproportionally lenient sentences.
SENTENCING – POOR PROSPECTS OF REHABILITATION FINDING

In Witham v The Queen [2018] NTCCA 1, the Court of Criminal Appeal held that the sentencing judge was not in error to find that the appellant had very poor prospects of rehabilitation. The appellant had supplied cannabis to an Aboriginal community while on bail for possession of a trafficable quantity of cannabis. The Court of Appeal found at [27] that this more serious offending while on bail provided material on which the judge could properly base his finding. The re-offending in a more serious manner while on bail sets this matter apart from the majority of broadly comparable cases referred to us. Although the appellant’s previous convictions for cannabis-related offences were comparatively minor, he had been dealt with many times before the courts, indicative of a need for some emphasis to be placed on specific deterrence.

SENTENCING – MANIFESTLY EXCESSIVE AND COMPARABLE SENTENCES

In Witham v The Queen [2018] NTCCA 1, the Court of Criminal Appeal held that an unusual non-parole period of 68 per cent of the head sentence was not necessarily indicative of manifest error. There were particular features calling for a strong sentence such as supplying cannabis to an Aboriginal community while on bail for in possession of a trafficable quantity of cannabis. DPP v Dalgliesh (a pseudonym) [2017] HCA 41 at [10] emphasises the importance of the maximum penalty as the yardstick and that the principle of ‘reasonable consistency’ as between sentences requires consistent application of relevant legal principles. Although comparable cases can illustrate the possible range of sentences, they do not define the range. Appellate intervention on the grounds of manifest excess is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude there must have been some misapplication of principle.

SETTING ASIDE CONVICTION ON GUILTY PLEA

In Henwood v Duggan [2018] NTSC 1, Kelly J refused to set aside convictions based on guilty pleas where the appellant said she had been induced to plead to allow her partner to go free. Her Honour applied the principles in Maxwell v The Queen (1996) 184 CLR 501 at 522 and Singh v The Queen [2014] NTCCA 16 that there must be a miscarriage of justice arising from, for example, a failure to understand the nature of the charge, a lack of intention to admit guilt, a legal impediment to being guilty, or an improper inducement, fraud or intimidation. The appellant was legally represented at the time she entered the pleas and at no time has she made any specific comment about being unwilling to plead.
In Cuan & Kostelac [2017] FamCAFC 188 (12 September 2017) the Full Court (Strickland, Aldridge & Loughnan JJ) dismissed with costs Ms Cuan’s appeal against Judge Baumann’s declaration that she and Mr Kostelac had lived together in a de facto relationship. She argued that the parties were never de facto partners, that while she lived at the respondent’s home in ‘Town L’ she was a fly in fly out worker who travelled to live with her children in ‘City N’ for two weeks after each six-week block of work in Town L. She said that in Town L she lived in the respondent’s flat rent-free in exchange for her looking after him, doing his housekeeping and helping him manage his money ([4]). She said that they travelled overseas together between 2010 and 2014 as friends.

Judge Baumann found that the parties lived together in a de facto relationship between April 2007 and late 2010, also granting the respondent leave to issue his property proceedings pursuant to s 44(6). The Full Court said (at [7]) that Judge Baumann in the context of the matters set out in s 4AA(2) of the Family Law Act had found:

- A common (though not exclusive) residence in Town L
- A sexual relationship (in Town L only)
- Significant intermingling of funds (Ms C had authority to operate Mr K’s bank accounts. $93 000 had passed from his accounts to hers and been used to reduce mortgages over two properties of hers in City N)
- Overseas travel but not as a mutual commitment to a shared life (separate rooms or beds)
- Others in Town L saw them as a couple (although little evidence)
- Evidence of Ms C’s children that the relationship was not intimate

The Full Court said (at [15]) that “if the finding of a de facto relationship is open on the evidence then no error will be identified, even if other judges may have come to a different conclusion.”
**CHILD SUPPORT**

Mother wins appeal against setting aside of binding agreement despite father’s inadequate disclosure

In *Telama & Telama (No. 2) [2017] FamCAFC 194* (15 September 2017) the Full Court (Ryan, Kent & Cleary JJ) allowed the payee mother’s appeal against Judge Henderson’s decision to set aside a binding child support agreement. The payer father successfully argued at first instance that the agreement should be set aside as his income had decreased from $710,000 per annum (when the agreement was made) to $220,000 per annum and he had no other financial resources from which to pay child support. The Full Court said (from [15]):

“The central issues in this case were whether the respondent’s changed financial circumstances constituted an exceptional circumstance for the purpose of s 136(2)(d) [of the Child Support (Assessment) Act] and amounted to hardship within the meaning of the provision. (…)”

[19] The respondent conceded on appeal that he did not comply with his obligations as to disclosure … that he had been served with a Notice to Produce … but failed to provide … his tax … returns for the three most recent financial years … [which] was particularly significant as … his case for the 2013 agreement to be set aside was based on:

- A material reduction in his income …
- That he had since become liable for ‘significant and unmanageable debts’ including … to the Australian Taxation Office; and
- That he had since become liable for a significant claim to the liquidator of a company in which he had an interest.

[20] Further, it was [his] contention that he would suffer hardship because he could not meet [his] obligations … and had negligible other assets and financial resources on which to call. (…)”

[22] The trial transcript records her Honour’s disquiet at the respondent’s inadequate disclosure and her recognition that full and frank disclosure was central to the Court’s ability to determine the application. (…)”

[29] However, in this case the primary judge did indeed make findings as to exceptional circumstances and hardship to the respondent, notwithstanding his inadequate disclosure. In our view, where the fact of non-disclosure was so obvious and material it was necessary for the primary judge to explain how and why the respondent’s oral evidence and unsworn explanations were sufficient to meet that deficiency and resolve the confusion created by his failure, for example, to produce necessary and requested documents. Her Honour’s reasons do not address that conundrum and in circumstances where the legal onus sat with the respondent the findings as to ‘exceptional circumstances’ and ‘hardship’ were not available.”

**PROCEDURE**

Adjournment of property trial sought by wife three days after her discharge from a mental health facility

In *Rusken & Jenner [2017] FamCAFC 187* (6 September 2017) Murphy J (sitting in the appellate division of the Family Court of Australia) allowed Ms Rusken’s appeal against Judge Lapthorn’s dismissal of her application to adjourn a property trial and summary dismissal of her initiating application for property settlement. Murphy J said (from [8]):

“The evidence here relates to significant mental health issues suffered by the wife. … a limited capacity on [her] part … to … conduct those proceedings … [S] ubsequent to trial directions being made by his Honour on 6 February 2017 the wife was admitted to hospital and between then and the date of the proposed trial on 15 May 2017 the wife was subject to an involuntary treatment order pursuant to the Mental Health Act 2016 (Qld) and was hospitalised pursuant to that order apart from periods of day release. She was released on 12 May; noting that the mooted trial was to take place some three days later. It is on that later date that the wife made her application for an adjournment. (…)”

[35] … [I]t is not insignificant … that although the wife failed to appear before the court on two occasions in June 2015, and despite her being self-represented … she adduced medical evidence, through her brother, which prima facie suggested an appropriate reason for her failure to appear. … [I]t is also significant of itself … that the wife’s brother, either on her request or on his own volition, appeared for her, rather than her simply failing to appear.

[36] On 15 May 2017 the wife appeared self-represented and tendered a medical certificate which
again sought to explain why she was unable to prepare her case. That certificate indicated that she had been admitted to a mental health facility … between February and May 2017. (…)

[39] In my view, there can be no doubt that the wife was very significantly mentally unwell during, at the very least, the period when she was hospitalised between 9 February 2017 and 12 May 2017.

[40] In my view, justice demands that the orders made … be set aside so as to afford the wife an opportunity to make and prosecute her case for settlement of property.”

CHILDREN
‘Non-urgent’ application for recovery order need not have been urgently listed

In Quong & Rush [2017] FCCA 1765 (2 August 2017) upon the separation of the parties in January 2017 the father moved 680 kilometres away with the parties’ twelve-year-old son. On 19 July 2017 the mother applied for a recovery order; an order that the registrar urgently list the application and leave to serve at short notice. The registrar dismissed the application, listing it for hearing on 23 October 2017. The mother filed an Application for Review of that decision. Judge Terry said (from [16]):

“… I decided to … list the Application for Review in open court and conduct an [ex parte] oral hearing which took the form of inviting the applicant to make submissions. (…) ”

[29] The mother visited X in … March 2017. She said that he told her that he liked (omitted) but she said that she believed that this was because he did not want to go against his father.

[30] The mother has frequent telephone contact with X and the father brought the child to (omitted) to spend time with the mother at Easter 2017 … and in the mid-year school holidays. (…)

[33] The mother said that she did not file her application earlier because she was from China and English was her second language and she did not understand that she could have come to court in or about January 2017 to get X back. She said that she also thought (wrongly as it turned out) that she would be able to negotiate with the father to have X returned to her.

[34] In oral submissions the mother emphasised that the reason she wanted an earlier listing … was that the longer her son was in (omitted) the more things he would lose. She said that there were only seventeen students at his school and the facilities in the small town were very limited.

[35] She said that she was afraid that her ex-partner would not look after X as carefully as she would and that he would have a miserable life in (omitted).

[36] … I am not satisfied that [her application] should be listed any earlier than the date given to it by the registrar.

[37] There is no evidence that X is at any risk of harm. He is attending school regularly, the mother is able to speak to him regularly and she has been able to spend time with him during school holidays. The father relocated the child in January 2017 and this is not a case in which at first glance it is likely that a recovery order would be made.”

FINANCIAL AGREEMENTS
Fiancée (and as wife) wins appeal to the High Court

In Thorne & Kennedy [2017] HCA 49 (8 November 2017) the High Court allowed with costs Ms Thorne’s appeal against a decision of the Full Court of the Family Court of Australia. In a joint judgment Kiefel CJ, Bell, Gageler, Keane and Edelman JJ (Nettle and Gordon JJ giving separate reasons) said (at [1]-[2]):

“This appeal concerns … a pre-nuptial agreement and a post-nuptial agreement which replaced it … between a wealthy property developer … and his fiancée … The parties met online on a website for potential brides and they were soon engaged. In the words of the primary judge, Ms Thorne came to Australia leaving behind ‘her life and minimal possessions … If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community’ … The pre-nuptial agreement was signed, at the insistence of Mr Kennedy, very shortly before the wedding … [where] Ms Thorne was given emphatic independent legal advice that the agreement was ‘entirely inappropriate’ and that Ms Thorne should not sign it.

One of the issues before the primary judge, Judge Demack, was whether the agreements were voidable for duress, undue influence or unconscionable conduct. The primary judge found that Ms Thorne’s circumstances led her to believe that she had no choice, and was powerless, to act
in any way other than to sign the pre-nuptial agreement. Her Honour held that the post-nuptial agreement was signed while the same circumstances continued, with the exception of the time pressure. The agreements were both set aside for duress, although the primary judge used that label interchangeably with undue influence, which is a better characterisation of her findings. The Full Court of the Family Court of Australia ... allowed an appeal ... concluding that the agreements had not been vitiated by duress, undue influence, or unconscionable conduct [saying at [167] that the wife’s ‘real difficulty’ was that she had received independent legal advice] … [T]he findings and conclusion of the primary judge should not have been disturbed. The agreements were voidable due to both undue influence and unconscionable conduct.”

After a discussion of case law as to duress ([26]-[29]), undue influence ([30]-[36]) and unconscionable conduct ([37]-[40]), the majority said at [60]:

“… [S]ome of the factors which may have prominence include … (i) whether the agreement was offered on a basis that it was not subject to negotiation; (ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement … (iii) whether there was any time for careful reflection; (iv) the nature of the parties’ relationship; (v) the relative financial positions of the parties; and (vi) the independent advice that was received and whether there was time to reflect on that advice.”

CHILDREN

Court’s approval no longer required for Stage 2 treatment of Gender Dysphoria if child can give informed consent or the parentally responsible authorise it

In Re: Kelvin [2017] FamCAFC 258 (30 November 2017) a full bench of the Full Court (Thackray, Strickland, Ainslie-Wallace, Ryan & Murphy JJ) heard a case stated by Watts J as to an application by the father concerning the administration of ‘Stage 2’ medical treatment for Gender Dysphoria for his then sixteen-year-old child (‘Kelvin’) who was born female but “transitioned socially as a transgender person” from Year 8 ([27]). The Court said at [6] that Gender Dysphoria was “the distress experienced by a person due to incongruence between their gender identity and their sex assigned at birth.”

The child’s father sought the Court’s sanction for the commencement of Stage 2 treatment in accordance with Re: Jamie [2013] FamCAFC 110. The Full Court held in that case that the court’s approval under s 67ZC FLA was not required in respect of ‘Stage 1’ treatment (puberty blocking treatment) but that Stage 2 treatment (gender affirming hormone treatment) involving the use of oestrogen or testosterone with irreversible effects would require the court’s approval.

Thackray, Strickland & Murphy JJ at [35]-[41] described Kelvin’s experience of Gender Dysphoria since he was nine; his anxiety and self-harming; his distress from experiencing female puberty due to not undergoing Stage 1 treatment; the improvement in his mental health since “taking steps towards a medical transition”; his parents support; the necessity of Stage 2 treatment for his future wellbeing and his wish (at seventeen) to commence such treatment.

Their Honours at [51]) observed that between 2013 and 2017 the Family Court had “dealt with sixty-three cases involving applications for Stage 2 or Stage 3 treatment for Gender Dysphoria” and that “[i]n sixty-two of those cases the outcome ha[d] allowed treatment.”

The majority said from [147]:

“… [T]he Full Court [in Re: Jamie held that] Stage 1 treatment is therapeutic in nature, and is fully reversible. Further, that it is not attended by grave risk if a wrong decision is made, and it is for the treatment of a malfunction or disease, being a psychological rather than a physiological disease. Thus, absent a controversy, it fell within the wide ambit of parental responsibility reposing in parents when a child is not yet able to make his or her own decisions about treatment. (…)

[149] As to Stage 2 treatment … the Full Court agreed … that although Stage 2 treatment is therapeutic in nature, it was also irreversible in nature (at least not without surgery). (…)

[162] The consensus of the applicant, the ICL and all but one of the intervenors is that the development in the treatment of and the understanding of Gender Dysphoria allows this Court to depart from the decision of Re Jamie. In other words, the risks involved and the consequences which arise out of the treatment being at least in some respects irreversible, can no longer be said to outweigh the therapeutic benefits of the treatment, and court authorisation is not required. (…)

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[164] The treatment can no longer be considered a medical procedure for which consent lies outside the bounds of parental authority and requires the imprimatur of the Court. (…)

[167] We note though that … we are not saying anything about the need for court authorisation where the child in question is under the care of a State Government Department. Nor, are we saying anything about the need for court authorisation where there is a genuine dispute or controversy as to whether the treatment should be administered; e.g. if the parents, or the medical professionals are unable to agree. There is no doubt that the Court has the jurisdiction and the power to address issues such as those.”

Ainslie-Wallace & Ryan JJ (at [187]-[188]) agreed upon different reasoning.

**FINANCIAL AGREEMENTS**

No provision for husband who murdered wife after she began property proceedings

In *Neubert (Deceased) & Neubert and Anor (No. 2)* [2017] FamCA 829 (18 October 2017) the wife was murdered by the husband in 2015 after the ending of the parties’ eighteen-year marriage in 2014 when the wife began property proceedings in the Federal Circuit Court, later transferred to the Family Court of Australia. The proceedings were continued by the wife’s estate. When the husband shot the wife dead he also shot a friend of hers with whom the wife was travelling, permanently injuring her.

The friend, who intervened in the case, brought civil proceedings in which she was awarded damages of $2.3m which with taxed costs and interest amounted to a judgment debt of $2.5m. The husband was found guilty of murder and sentenced to twenty-five years imprisonment and a cumulative three-year sentence for the grievous bodily harm of the intervenor. The husband was seventy-five years old and ineligible for parole until he was ‘almost 90’.

Benjamin J accepted (at [94]) that at the date of the wife’s death the Court would have made an order in her favour for the purpose of s 79(8) of the *Family Law Act*, saying ([100]) that “there should be an adjustment … in the light of the findings as to the parties’ respective contributions, including the husband’s significant initial contributions [land sold during the marriage for $590 000, savings $100 000 and shares $300 000]. … [having] regard to the size of the pool [$2 168 153 excluding the damages]”. His Honour ([173]) assessed contributions as to 35 per cent to the late wife and 65 per cent to the husband, ordering that the husband’s share be paid to the intervenor and set off against the judgment debt.”

The Court then (at [182]) reiterated the statement of Coleman J in *Homsy & Yassa and Yassa; the Public Trustee* (1994) FLC 92-442 that “the husband, having murdered the late wife, cannot have the benefit of the s 75(2) factors” and that “[t]o do so would be offensive to justice and equity.”
Andrew Yuile’s High Court Judgments

NOVEMBER

CONSTITUTIONAL LAW
Legislative power – s75(v) of the Constitution – Migration decisions

Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection [2017] HCA 33 (6 September 2017) concerned s 503A of the Migration Act 1954 (Cth), which allowed the Minister not to disclose information to a court on judicial review of certain migration decisions. The visas of Graham and Te Puia were cancelled under s 501(3) of the Act. In making his decision in each case, the Minister considered information that was purportedly protected from disclosure by s 503A. Section 503A(2)(c) prevents the Minister from being required to divulge or communicate certain information to a court when the court is reviewing a purported exercise of power by the Minister under ss 501, 501A, 501B or 501C of the Act, to which the information is relevant. Graham and Te Puia argued that s 503A(2) is constitutionally invalid because it requires the relevant court to exercise judicial power inconsistently with the essential characteristics of a court; or because it is inconsistent with the right of individuals to seek judicial review pursuant to s 75(v) of the Constitution. A majority of the Court upheld the second point. The majority held that Parliament cannot enact a law that denies the High Court (or another court when exercising jurisdiction conferred under s 77(i) or (iii) of the Constitution) the ability to enforce the limits of a Commonwealth officer’s power when exercising jurisdiction under s 75(v). In practical terms, s 503A prevented access to material relevant to the exercise of power under review and relevant to determination of whether the power had been exercised lawfully. It amounted to a substantial curtailment of the capacity of the court exercising jurisdiction. To the extent that it operated on the High Court in its exercise of jurisdiction under s 75(v), or on the Federal Court in the exercise of jurisdiction under ss 476A(1) and (2) of the Act, it was invalid. Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ jointly; Edelman J dissenting. Answers to Special Case given.
**MIGRATION LAW**

**Complementary protection – Meaning of ‘significant harm’ – Intention**

In *SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection* [2017] HCA 34 (6 September 2017) the Court considered the requirements of intention for the purposes of assessing an applicant’s case against the complementary protection provisions in s 36 of the *Migration Act 1954* (Cth). Those provisions allow for a protection visa to be granted to a person at real risk of suffering significant harm if returned to their home country. Significant harm includes being subject to cruel or inhuman treatment or punishment, or degrading treatment or punishment. The appellants had both claimed to be at risk of harm if they returned to Sri Lanka. The Refugee Review Tribunal (RRT) found that, if they were returned, they would likely be held in prison for a short time. It also accepted that prison conditions in Sri Lanka were such that the appellants might be subjected to pain, suffering or humiliation. However, the RRT found that there would be no intention in Sri Lankan authorities to inflict the pain or suffering. The question on appeal was whether ‘intention’ in this context requires subjective intention or whether it was sufficient that a person doing an act knew the act would, in the ordinary course of events, inflict pain or suffering or cause extreme humiliation recklessness sufficed. A majority of the Court held that actual subjective intention to bring about pain or suffering or humiliation was required. Kiefel CJ, Nettle and Gordon JJ jointly; Edelman J separately concurring; Gageler J dissenting. Appeal from the Full Federal Court dismissed.

**CRIMINAL LAW**

**Criminal procedure – Jury directions – Standard of proof**

The *Queen v Dookheea* [2017] HCA 36 (13 September 2017) concerned directions to the jury as to the standard of proof required to convict in a criminal case. The accused admitted that he had killed the deceased, but argued that he did not have the requisite intent. In the course of summing up to the jury, the trial judge stated that they needed to be satisfied of the accused’s guilt “not beyond any doubt, but beyond reasonable doubt.” On a number of occasions, the trial judge also used only the phrase “beyond reasonable doubt.” The Court of Appeal held that by referring to “not beyond any doubt” the trial judge had erred in summing up. The High Court unanimously allowed the appeal. The Court held that what is a “reasonable doubt” is a question for the jury. It is generally undesirable to contrast “any doubt” with “reasonable doubt”, but as a matter of principle it is not wrong to notice the distinction. Whether such a reference gives rise to error depends on all of the context. In this case, having regard to the circumstances, including the whole summing up and addresses, it could not “realistically be supposed that the jury might have been left in any uncertainty as to the true meaning of the need for proof beyond reasonable doubt.” Kiefel CJ, Bell, Gageler, Keane, Nettle, and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

In *The Queen v Holliday* [2017] HCA 35 (6 September 2017) the accused was serving a sentence for sex offences and was alleged to have offered another inmate, Powell, a reward in return for the inmate organising third parties outside the prison to kidnap two witnesses, procure statements exculpating the accused, then kill the witnesses. Powell reported this and did not go through with the plan. Counts 4 and 5 charged that Holliday “committed the offence of incitement in that he urged [Mr Powell] to kidnap” each witness. The jury convicted on those counts. The conviction was overturned on appeal; the prosecution appealed to the High Court. The issue was whether Holliday could be guilty of the offence of inciting another (Powell) to commit an offence given that the plan was for Powell to procure a third party to carry out the kidnapping. The High Court held that, at least where there had been no kidnapping, Holliday could not be convicted of urging Powell to commit that offence. A majority of the Court held that incitement requires the accused to urge a person to commit a discrete, substantive offence. However, there is no discrete offence of incitement to procure. Holliday could not, in the circumstances, be convicted of incitement. Kiefel CJ, Bell and Gordon JJ; Gageler J and Nettle J separately concurring in the orders of the majority. Appeal from the Supreme Court (ACT) dismissed.
CRIMINAL LAW

Offence of persistent sexual exploitation – Where jury required to identify acts of exploitation

In *Chiro v The Queen* [2017] HCA 37 (13 September 2017) the accused was charged with persistent sexual exploitation of a child. That offence requires the commission of at least two acts of sexual exploitation (each of which could be the subject of a sexual offence charge) over less than three days. The jury was directed that it would be sufficient if the accused had kissed the complainant in circumstances of indecency (which was a particular of the offending), or had committed any of the other, more serious, acts particularised on more than one occasion within three days. The jury returned a verdict of guilty. No further questions were asked of them. A majority of the High Court held that the trial judge should have asked further, more specific questions of the jury, designed to understand which of the alleged acts of exploitation they had found proved. It would also have been open to give directions to the jury that they would, if a guilty verdict was returned, be asked those questions. However, the conviction of the accused in this case was not uncertain because that had not happened. The appeal on conviction was dismissed. However, in this case, because the trial judge did not know which acts of exploitation the jury had found proved, the accused should have been sentenced on the basis that the least serious alleged acts had been proved. Because the trial judge sentenced the accused on another basis, the appeal against sentence was allowed. The matter was remitted for the accused to be resentenced. Kiefel CJ, Keane and Nettle JJ jointly; Bell J separately concurring; Edelman J dissenting. Appeal from the Supreme Court (SA) dismissed.

DECEMBER

CONSTITUTIONAL LAW

Appropriations – Statutory construction

In *Wilkie v the Commonwealth; Australian Marriage Equality v Cormann* [2017] HCA 40 (28 September 2017) the High Court upheld the validity of the appropriation made to allow the Marriage Equality postal plebiscite to be carried out. On 9 August 2017, the Finance Minister Matthias Cormann announced that the government would proceed with a postal plebiscite to ask electors whether the law should be changed to allow for same-sex marriage. The Minister also announced that he had made a determination, under s 10 of the *Appropriation Act (No 1) 2017-2018* (Cth), providing for an advance of $122m to go to the Australian Bureau of Statistics to conduct the plebiscite. On the same day, the Treasurer gave a direction to the Australian Statistician, to collect the data from the plebiscite. The plaintiffs argued that the appropriation under s 10 was constitutionally invalid; that s 10 should not be construed to allow for the actions taken; that the Finance Minister’s Determination and the Direction to the Australian Statistician were invalid; and that the Australian Electoral Commission (AEC) had no authority to assist in the plebiscite. In relation to validity of the appropriation, the Court held that it was actually s 12 of the Act that made the appropriation. The Determination under s 10 is an allocation of funds already appropriated under s 12. The degree of specificity of purpose for the appropriation is a matter for the parliament. In this case, the appropriation was for an amount for a purpose that the parliament had lawfully decided could be carried out.

CRIMINAL LAW

Offence of persistent sexual exploitation – Legality of actions relating to regional processing in PNG

*Hamra v The Queen* [2017] HCA 38 (13 September 2017) concerned the same persistent sexual exploitation of a child offence as *Chiro v The Queen* (above). This case was heard by judge alone. At the end of the prosecution case, the defence made a no case submission that was accepted. The judge held that it was not possible to identify two or more proved sexual acts or offences as required, given the general nature of the complainant’s evidence. The Court of Appeal allowed an appeal, holding that it was not necessary for each act of sexual exploitation to be identified so as to be distinguishable from the others. The evidence, if accepted, was capable of proving the offence. The High Court agreed that, so long as two or more distinct acts committed in a three-day period could be identified, the acts do not need to be particularised beyond the period of the acts and the conduct constituting the acts. It would be sufficient, for example, if evidence was accepted that an act was committed every day over a two week period without further differentiation, allowing for a deduction that the acts occurred over not less than three days. The appeal on that point had to be dismissed. The High Court also held that the Court of Appeal had considered and decided whether to grant permission to appeal, though no reasons had been given. The Court also had not erred by failing to refer to double jeopardy as a factor weighing against a grant of permission to appeal. Kiefel CJ, Bell, Keane, Nettle, and Edelman JJ jointly. Appeal from the Supreme Court (SA) dismissed.
In respect of the preconditions of s 10, it was required that the Minister be satisfied the expenditure was urgent, not provided for and unforeseen. The Court held that it was not necessary for the need giving rise to the expenditure to arise from a source external to government. Further, whether expenditure was urgent and unforeseen was a matter for the Minister’s satisfaction. The Minister had formed the necessary satisfaction in this case. Urgency and whether the expenditure was unforeseen had been dealt with separately and sufficiently. There was no error of law in the Minister’s reasons or conclusion. The Court further held that the direction to the Australian Statistician was valid, as the information to be collected was ‘statistical information’, collected in relation to matters prescribed in the Census and Statistics Regulation 2016 (Cth). There was nothing in the Act to prevent the Treasurer specifying from whom information was to be collected. Lastly, the Court held that the AEC was authorised to assist in the plebiscite. The Court did not address arguments on standing as it was unnecessary and inappropriate given that the substance of the matter had been fully argued and the Court had decided the grounds had no substance. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Answers to Special Case given.

**CONSTITUTIONAL LAW**

**Implied freedom of political communication**

In *Brown v State of Tasmania* [2017] HCA 43 (18 October 2017) the High Court held invalid sections of the Workplaces (Protection from Protesters) Act 2014 (Tas). The Act prohibited ‘protesters’ from engaging in conduct on ‘business premises’. Those premises relevantly included ‘forestry land’, including land on which ‘forestry operations’ were being carried out. The conduct was also prohibited in ‘business access areas’, being areas reasonably necessary to enter or exit business premises. Under the Act, police officers had power to direct people away from business premises or business access areas. It was an offence to return to the land after being directed away or not to comply with a direction to leave, in certain circumstances. Police had power to arrest or impose criminal penalties on persons who refused to leave such areas or who returned to such areas after being directed away. Former Senator Bob Brown and others were protesting in the Lapoinya Forest in North West Tasmania when forestry operations were underway. They were arrested and charged under the Act, but charges were later dropped. They argued that provisions of the Act impermissibly burdened the freedom of political communication implied by the Constitution. A majority of the High Court upheld that argument. Kiefel CJ, Bell and Keane JJ jointly held that the Act burdened the freedom. It also pursued a legitimate purpose. But the provisions were not reasonably appropriate and adapted, or proportionate, to the pursuit of that purpose in a manner compatible with the maintenance of the system of representative and responsible government. They were therefore invalid. Gageler J, writing separately, took a different view of the test to be applied, but ultimately agreed in the orders of the majority. Nettle J, also writing separately, also agreed in the orders of the majority, but for separate reasons. Gordon J held that one of the impugned sections was invalid, but dissented in respect of the others found to be invalid by the majority. Edelman J dissented in respect of all the impugned sections. Questions to special case answered. Kiefel CJ, Bell, Gageler, Keane, Nettle, and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

**CRIMINAL LAW**

**Sentencing – Current sentencing practices**

In *Director of Public Prosecutions v Charlie Dalgliesh (a pseudonym)* [2017] HCA 41 (11 October 2017) the respondent was charged with incest and sexual penetration of a child under sixteen against complainant A, and incest and indecent assault against complainant B. The respondent’s act of incest against A also caused her to fall pregnant, which pregnancy was later terminated. In respect of the charge of incest against complainant A, the respondent was sentenced to three and a half years imprisonment. The Director appealed, arguing that the sentence was manifestly inadequate. In the Court of Appeal, at the Court’s request, the parties made submissions on the adequacy of sentencing practices, to which the Court is required to have regard under the Sentencing Act 1991 (Vic). The Court reviewed the sentencing information and concluded that current sentencing practice did not reflect the gravity of the offence or moral culpability of the offender. However, the Court held that the sentence in this case, although very lenient, was not outside the permissible range as demonstrated by the current sentencing practices. The High Court held that the Court of Appeal was correct to find that the current sentencing practices were manifestly out of step with the gravity of offending and moral culpability. But having done so, the Court should have corrected the effect of the error of principle it recognised. Further, current sentencing practices are just one of the matters for the Court to take into consideration—it is not the controlling factor. Kiefel CJ, Bell and Keane JJ jointly; Gageler and Gordon JJ jointly agreeing. Appeal from the Court of Appeal (Vic) allowed.
In Koani v The Queen [2017] HCA 42 (18 October 2017) the deceased was killed by a single shot from a shotgun that had been loaded by the appellant, given to the deceased and almost fully cocked. The gun was modified such that it could go off when not fully cocked. The trial judge did not leave murder to the jury because he considered that the “act” causing death in a firearm case must be a deliberate act. The judge left the alternative case to the jury, that the accused would be guilty of murder if the accused failed to use reasonable care in the management of the gun at a time when he intended to kill or inflict grievous bodily harm. The appellant was found guilty. The High Court held that it was an error to leave the alternative case to the jury, because the act causing death and the required intention must coincide. On the alternative case, the intention occurred at a different time to the omission (the failure to use reasonable care) that caused the deceased’s death. The Court also held that it would be open to a jury to conclude that the loading of the gun, presenting it and pulling back the hammer were all connected, willed acts that caused the deceased’s death. The primary case could have been left to the jury. Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from the Court of Appeal (Qld) allowed.

In BRF038 v The Republic of Nauru [2017] HCA 44 (18 October 2017) the High Court held that the Supreme Court of Nauru failed to accord the appellant procedural fairness. The appellant applied for refugee status in Nauru. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. An appeal to the Refugee Status Review Tribunal (RSRT) was dismissed. An appeal to the Supreme Court was also dismissed. The appellant argued that the RSRT had erred by applying the wrong test for persecution, by requiring a total deprivation of human rights; and by failing to accord procedural fairness, by failing to put to him country information about the tribal make-up of the police force in his home country. Procedurally, the High Court held that the Supreme Court was exercising original jurisdiction, meaning that an appeal to the High Court lay as of right. The Court rejected the wrong test argument, holding that the RSRT was not articulating an exhaustive test. However, the information about the police was integral to the reasons for refusing the application, and a failure to bring it to the appellant’s attention was a breach of procedural fairness. The decision was quashed and sent back to the RSRT for reconsideration. Keane, Nettle and Edelman JJ jointly. Appeal from the Supreme Court (Nauru) allowed.

In Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon [2017] HCA 45 (27 October 2017) the High Court considered the proper interpretation of s 44(i) of the Constitution and whether persons referred to the Court were incapable of being chosen or sitting as a Senator or Member of Parliament. The ultimate question was whether any of the referred persons were “under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power” as at the time of their nomination to the Parliament. Four different constructions of s 44(i) were argued. Three of those impliedly included a mental element informing the acquisition or maintenance of foreign citizenship, but varied with respect to the degree of knowledge required and whether a voluntary act of acquiring or retaining foreign citizenship was necessary. The Court rejected those approaches, holding that knowledge of foreign citizenship was not required for a person to come within s 44(i). The Court also held that the reasonableness of steps taken by candidates to inquire as to whether their personal circumstances gave rise to disqualification under s 44(i) was immaterial to the operation of s 44(i). The only question was whether a person had the status of foreign subject or citizen, as determined by the law of the foreign power in question. If a person had that status when they nominated, they would be disqualified unless the foreign law in question is contrary to the ‘constitutional imperative’ that an Australian citizen not be irremediably prevented from participation in representative government. That exception is engaged where a person can show that they took all steps within their power and that are reasonably required by the foreign law to renounce his or her citizenship. The Court went on to apply these principles to the facts of the references. The Court held that Mr Ludlam, Ms Waters, Senator Roberts, Mr Joyce MP and Senator Nash were disqualified; Senator Canavan and Senator Xenophon were not disqualified. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Answers to Questions Referred given.
CONSTITUTIONAL LAW

Section 44(iv) – Qualification to be elected – Holding an office of profit under the Crown

In *Re Nash [No 2] [2017] HCA 52* (orders 15 November 2017, reasons 6 December 2017) the High Court held that Hollie Hughes was disqualified from being elected as a Senator for New South Wales to fill the vacancy left by the disqualification of Senator Fiona Nash. Ms Hughes failed to win a seat in the Senate after contesting the 2016 election. On 1 July 2017, she was appointed as a part-time member of the Administrative Appeals Tribunal (AAT). On 27 October 2017, the High Court declared Ms Nash to be disqualified from being elected as a Senator, with the vacancy to be filled by a special count of the ballots. That same day, Ms Hughes resigned her position in the AAT. Ms Hughes was ascertained to be the candidate that should fill the vacancy left by Ms Nash. The Attorney-General for the Commonwealth sought an order that Ms Hughes be declared duly elected as a Senator. The issue before the Court was whether Ms Hughes was ‘incapable of being chosen’ pursuant to s 44(iv) of the Constitution because she held an office of profit under the Crown. There was no dispute that her position with the AAT was an office of profit; the issue was whether the ‘incapability’ imposed by s 44(iv) extended past the original day of polling to the time Ms Nash was disqualified. The Court held that the processes by which electors choose Members of Parliament and Senators do not end with polling, but continue until a candidate is determined. That would normally end with the declaration of the result. In this case, however, because of the disqualification of Ms Nash, the process of choice had not been completed. In the intervening time, Ms Hughes accepted an office that disqualified her from being chosen as a Senator. Accordingly, the Court refused to make the order sought. Kiefel CJ, Bell, Gageler, Keane, and Edelman JJ jointly. Answers to Questions Referred given.

CRIMINAL LAW

Appeal against conviction – Fresh and compelling evidence

In *Van Beelen v The Queen [2017] HCA 48* (8 November 2017) the High Court considered s 353A of the *Criminal Law Consolidation Act 1935* (SA), which allows the Full Court of the South Australian Supreme Court to determine a second or subsequent appeal against conviction where there is fresh and compelling evidence that should, in the interests of justice, be considered. The appellant was convicted of the murder of a schoolgirl in 1973. Appeals against conviction were dismissed. After a petition for mercy, the case was referred to be heard as if on appeal. That appeal was also dismissed. The new appeal concerned evidence relied on by the Crown at trial, which specified the time of death based on gastric emptying (the speed at which food is processed by the body). That evidence had been relevant in putting the appellant at the scene of the victim’s death. It was argued that scientific research since the 1970s showed the inaccuracy of the gastric emptying technique, undermining the evidence placing the appellant at the scene. The Full Court accepted that the evidence was fresh, but held it was not ‘compelling’ because it only confirmed evidence given at the trial by an opposing defence expert. The High Court unanimously held that the evidence was compelling and should have been considered in the interests of justice. It went on to review the evidence, finding that there was a window of about twenty minutes after the appellant left the scene, during which it could not be excluded that the deceased had died. However, the Court held that this did not significantly reduce the improbability of a person other than the appellant being the killer. There was not a significant possibility that a properly instructed jury, acting reasonably, would have acquitted the appellant even absent the Crown’s original evidence about the time of death. Bell, Gageler, Keane, Nettle and Edelman JJ jointly. Appeal from the Supreme Court (SA) dismissed.
**FAMILY LAW**

Pre and post-nuptial agreements – Undue influence and unconscionable conduct

In *Thorne v Kennedy* [2017] HCA 49 (8 November 2017) the High Court held that pre and post-nuptial agreements in substantially identical terms should be set aside. The appellant was an Eastern European woman with almost no assets. The respondent was an Australian property developer with assets of between $18 and 24m. The couple met online and the appellant came to Australia to be with the respondent. The respondent told the appellant that he would marry her if he liked her, but she ‘would have to sign paper’. The appellant did not see the content of the pre-nuptial agreement until about ten days before the wedding. She obtained independent advice to the effect that the agreement should not be signed and protected only the interests of the respondent. By this time, the wedding arrangements were made, including guests having flown in from overseas. There was also evidence that the appellant believed she had no choice but to sign the agreement, which she did four days before the wedding.

The post-nuptial agreement in the same terms was signed shortly after the wedding. The couple separated approximately four years later. The respondent sought to have the agreements set aside as void for duress, undue influence or unconscionable conduct. The Federal Circuit Court at first instance set the agreements aside; those orders were overturned by the Full Family Court. The High Court reinstated the original orders. The Court upheld the factual findings of the primary judge and overturned a ruling of the Full Court that there was a fair and reasonable outcome available. The Court said that the vitiating factors were better described as undue influence than duress, so there was no need to assess the extent to which the pressure came from the respondent, nor whether the pressure exerted was improper or illegitimate. It was open to the judge to find that the appellant considered that she had no choice or was powerless other than to enter the agreements. Kiefel CJ, Bell, Gageler, Keane and Edelman JJ held that the agreements were void for undue influence and unconscionable conduct. Nettle J concurred. Gordon J held that the agreements were vitiates by unconscionable conduct only. Appeal from the Full Family Court allowed.

**ADMINISTRATIVE LAW**

Appeal from Supreme Court of Nauru – Migration

In *HMF045 v The Republic of Nauru* [2017] HCA 50 (15 November 2017) the High Court held that the Nauru Review Status Review Tribunal (Tribunal) failed to accord the appellant procedural fairness. The appellant is a Nepalese citizen who sought refugee status in Nauru after being transferred there under regional processing arrangements. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. An appeal to the Tribunal was dismissed. An appeal to the Supreme Court was also dismissed. In coming to its conclusion, the Tribunal referred to a report published on the website of the Nepalese army. The appellant argued that he had been denied procedural fairness because the report had not been put to him. He also argued that the Tribunal had applied the wrong test in determining his complementary protection claim. The Court held that the Tribunal had erred by not putting the appellant on notice of the significance that it proposed to attach to aspects of the report and giving him the opportunity to address the issue. The Court rejected the argument that the wrong test had been applied. There was no reason to decline relief. The decision was quashed and sent back to the Tribunal for reconsideration. Bell, Keane and Nettle JJ jointly. Appeal from the Supreme Court (Nauru) allowed.

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In *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* [2017] FCAFC 152 (23 September 2017) the Full Federal Court dismissed the ACCC’s appeal from the primary judge’s dismissal of the proceeding (see [2016] FCA 69).

The ACCC’s case was that the respondents attempted to induce egg producers to contravene s 44ZZR of the *Competition and Consumer Act 2010* (Cth) by making an arrangement or arriving at an understanding which contained a cartel provision. The ACCC alleged that the respondents engaged in conduct which involved encouraging egg producers to act in a coordinated and consolidated fashion and, thereby, to enter into an arrangement or arrive at an understanding containing a provision to limit the production for supply of eggs in Australia.

There was no challenge to facts found by the trial judge and the appeal largely related to inferences which the trial judge drew or did not draw from those primary facts. The Full Court (Besanko, Foster and Yates JJ) discussed the key authorities on the scope of the Full Court’s review in an appeal in such a case (at [126]-[131]).

The Full Court rejected all of the ACCC’s arguments on the appeal.

In *Thomas v Commissioner of Taxation (No 2)* [2017] FCAFC 144 (18 September 2017) the Court rejected a taxpayer’s application to vary costs orders made after the judgment was given in four separate appeals.

The taxpayer was successful in two of the appeals and, when giving judgment, the Court ordered that the Commissioner pay the taxpayer’s costs in those appeals. The taxpayer later sought to vary that order with an indemnity costs orders based on previous offers of compromise. At the hearing of the appeals, no separate
debate was flagged by the taxpayers that any further submissions would need to be made about costs.

The Full Court (Dowsett, Perram and Pagone JJ) referred to clear statements and authorities supporting the principle that if a departure from the usual approach to costs is to be urged this should be flagged with the Court before judgment is reserved (at [4]-[5]).

Upon considering the specific basis on which indemnity costs was sought, the Full Court held there was no basis for interfering with the costs order already made (at [26]).

**COSTS**

Costs under s 570 of the Fair Work Act 2009 (Cth)

In *Australian Building and Construction Commissioner v ADCO Constructions Pty Ltd (No 3)* [2017] FCA 1090 (15 September 2017) the respondent sought a costs order in its favour against the Commissioner.

In an earlier judgment, the Court (Collier J) dismissed the Commissioner’s case seeking orders that the respondent contravened s 354(1) of the *Fair Work Act 2009* (Cth) (FW Act) by discriminating against a particular subcontractor, Surf City Cranes Pty Ltd (SCC), because alleged employees of SCC were not covered by an enterprise agreement which also covered the Construction, Forestry, Mining and Energy Union. Relevantly, the Court found that SCC was not the employer of the employees for the purposes of s 354(1) of the FW Act.

Proceedings under the FW Act are generally a ‘no costs’ jurisdiction. The respondent sought costs under s 570(2)(a) and (b) of the FW Act. Section 570(2)(a) and (b) of the FW Act provides that a party may be ordered to pay costs only if: “(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or (b) the court is satisfied that the party’s unreasonable act or omission caused the other party to incur the costs …”

Collier J referred at [11] to and applied the principles summarised by the *Full Court in Australian Workers’ Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23; (2013) 232 FCR 428 at [7]-[8]. Justice Collier made no orders for costs on the basis that the respondents had not substantiated its claims for costs under s 570(2)(a) or (b) of the FW Act.

**EVIDENCE**

Whether privilege against exposure to penalty waived by lawyer acting with ostensible authority

In *Fair Work Ombudsman v Hu* [2017] FCA 1081 (14 September 2017) the Court determined an interlocutory application seeking orders by a natural person respondent and his company (the respondents) vacating orders requiring them to file and serve affidavits and submissions prior to trial and an order excusing them from filing affidavits and any amended defence until the close of the applicant’s case.

The proceeding was a penalty proceeding in which the Ombudsman alleged the respondents contravened s 45 of the *Fair Work Act 2009* (Cth) which provides that a person must not contravene a modern award. The Ombudsman alleged that the respondents were accessories to under-payments of workers who picked mushrooms.

The respondents consented to orders that they file and serve affidavits and submissions by certain dates prior to the commencement of the trial. The interlocutory application sought to vacate these orders based on the ‘penalty privilege’. The Ombudsman submitted the natural person had waived that privilege based on certain admissions in a defence that had been filed and the consenting to orders for the filing and service of affidavits prior to trial. The respondents argued that the privilege could not be waived by a solicitor without instructions to do so and no such instructions were given.

The Court (Rangiah J) accepted that penalty privilege, like other forms of privilege such as the legal professional privilege and privilege against self-incrimination, can be waived expressly or impliedly (at [18]). The question before the Court was whether the natural person respondent waived privilege by doing acts inconsistent with the maintenance of the privilege.

Justice Rangiah held at [22] that the individual had waived penalty privilege in respect of the limited admissions and positive assertions of fact made in his filed defence. However, there was no indication of any intention to waive privilege in respect of any other facts or matters. The waiver went no further than the facts and matters admitted and asserted in the defence.

Further, the Court rejected the Ombudsman’s submission that the natural person had more generally waived his penalty privilege by consenting, through his solicitor, to
orders that he provide affidavits prior to trial. Privilege may be waived by the actions of a lawyer with the ostensive authority of the person entitled to claim privilege (at [27]). However, here the natural person had not yet filed and served any affidavits. On the face of it, the consent orders were merely an indication of his intention to waive privilege in the future (at [28]).

The Ombudsman contended that the natural person waived privilege by his entry into a binding agreement to provide affidavits prior to the trial, relying upon Birrell v Australian National Airlines Commission (1984) 1 FCR 526 at 531-532 per Gray J. Doubt about whether self-incrimination privilege can be waived by contract was expressed by Finkelstein J in ASIC v Mining Projects Pty Ltd (2007) 164 FCR 32; [2007] FCA 1620 at [18]-[21]. Distinguishing the position in Birrell, Rangiah J held at [33] that the Ombudsman provided no consideration for the natural person respondent’s consent to provide his affidavits prior to trial. Therefore, the agreement to do so was not binding on the natural person respondent and the penalty privilege was not waived by entering into a contract binding him to provide his affidavits prior to trial. The Court made the orders sought by the respondents.

PRACTICE AND PROCEDURE
Application to reopen a case after judgment reserved but not delivered

In FYD Investments Pty Ltd v Promptair Pty Ltd [2017] FCA 1097 (15 September 2017) the Court (White J) considered an application to reopen a hearing after judgment had been reserved but before it had been delivered.

The proceeding concerned contractual claims and misleading or deceptive conduct. The trial took place for five days concluding on 30 March 2017, at which time judgment was reserved. On 27 June 2017, the applicants filed an interlocutory application seeking leave to reopen their case in order to adduce further limited evidence. The need to advance additional evidence and to advance certain claims were attributed to oversights by the applicants’ legal representatives at the trial (at [10] and [19]).

Justice White referred to the settled principles on which the Court acts in deciding whether to grant leave to reopen a case (at [30]-[31]). The overriding principle is the interests of the administration of justice having regard to all the circumstances of the case.

Applying those principles, while conscious that the Court ought not readily grant an application to reopen following the reservation of judgment, White J exercised his discretion to permit the applicants to reopen their case (at [45]).

DECEMBER

REGULATORY LAW – CIVIL PENALTIES

Pecuniary penalties for contraventions of statutory provisions are commonplace in Commonwealth (and state) legislation. Within the Federal Court’s jurisdiction there is substantial enforcement litigation resulting in pecuniary penalties under the Competition and Consumer Act 2010 (Cth) [CCA], the Corporations Act 2001 (Cth), the Fair Work Act 2009 (Cth) (FWA) and other legislation (such as the Environment Protection and Biodiversity Conservation Act 1999 (Cth)). The applicable principles for the imposition of civil penalties are well-established (in particular, the oft-cited ‘French factors’ to be applied to determining an appropriate penalty listed by French J as a Federal Court judge in Trade Practices Commission v CSR Ltd [1991] ATPR 41-076 at 52,152-52,153). However, the High Court has had some important things to say in recent years in this area of the law, such as about agreed penalties (Commonwealth v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482) and the importance of deterrence as the purpose of civil penalties (Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640 at [65]-[66]). The High Court is currently reserved on the question of whether the Federal Court has power to order a party not to indemnify another party in respect of a pecuniary penalty order made under s 546 of the FWA (Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Anor, M65/2017, reserved 17/10/2017).

Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2017] FCAFC 59 (5 October 2017) is a recent Full Court judgment (Middleton, Beach and Moshinsky JJ) that is likely to be often cited on some discrete principles relevant to imposition of pecuniary penalties under s 76 of the CCA. It may also have relevance to other statutes providing for pecuniary penalties (allowing for any bespoke differences in the other legislative regimes compared to the CCA).

The Full Court upheld the ACCC’s appeal, and dismissed a cross-appeal, against the penalties that the trial judge imposed on Cement Australia Pty Ltd (Cement Australia) and its related companies for making and giving effect to anti-competitive agreements.
The facts were complex and detailed and, given the focus of this case note is on penalties, it will suffice to give a basic summary. The respondents were related corporate entities involved in the manufacture and distribution of cement and concrete materials in Queensland. The proceedings concerned decisions to enter into or amend contracts with power station operators to acquire their supply of flyash. Flyash, a by-product of the burning of fossil fuels, was produced by the power stations. If it was of sufficient quality, it could be used as a partial substitute for cement in the production of concrete. The trial judge held that the relevant contracts with the power stations contained provisions that had the purpose, or had or were likely to have had the effect, of substantially lessening competition in the relevant markets. It was held that, by making each of those contracts, Pozzolanic Industries Pty Ltd (PIPL), a company related to Cement Australia, had committed separate contraventions of s 45(2)(a)(ii) of the then Trade Practices Act 1974 (Cth) (TPA) and that, by giving effect to those provisions in certain instances, PIPL and other respondents had contravened s 45(2)(b)(ii) of the TPA. Some respondents were also found to have been knowingly concerned in the contraventions. The trial judge ultimately imposed penalties totalling $17.1m against Cement Australia and companies in its group. Some of the penalties were imposed separately and some were imposed jointly and severally on the companies in the Cement Australia group.

The specific issues in the appeal were at [10]:

A. “whether the primary judge erred in law in assessing and imposing a single joint and several penalty on two respondents;

B. whether the making of and giving effect to the provisions of each of the contravening contracts ought to be separately penalised or treated as a single course of conduct;

C. whether the primary judge erred in his treatment of issues of market harm and financial benefits; and

D. whether the penalties imposed by the primary judge were manifestly inadequate as they were not of appropriate deterrent value.”

On the ‘joint and several issue’, the Full Court held that s 76(1) of the CCA does not allow for the imposition of a single joint and several penalty against multiple respondents (at [376]). This conclusion was reached through “an orthodox application of statutory construction” (at [377]). The Full Court also said at [385] that the general principles governing the assessment and imposition of penalties also supported their interpretation. “The deterrent effect of a penalty at a personal level is potentially lessened if one party is able to avoid paying any portion of that penalty at all. This is not necessarily ameliorated by the respondents’ suggestion that deterrence would be sufficiently achieved at the level of the corporate group.” Accordingly, the Full Court held that the trial judge erred because he was not empowered under s 76(1) of the CCA to fix a joint and several penalty (at [391]).

The next issue in the appeal concerned the course of conduct principle, which seeks to ensure that an offender or contravener is not punished or penalised twice for what is essentially the same conduct (at [393]; see also [421]). In the appeal there was not a dispute about the nature of the course of conduct principle. It was a dispute about whether the facts of the case supported the application (or non-application) of the principle in relation to certain contracts. Relevantly, the trial judge regarded the making of and giving effect to one particular contract as one course of conduct, however, he did not treat the making of and giving effect to the other contracts as single courses of conduct. The Full Court at [425]) was “mindful that the application of the course of conduct principle requires an evaluative judgment in respect of the relevant circumstances.” (Their Honours held that the trial judge erred where he regarded the making of, and giving effect to, a particular contract as constituting a single course of conduct stating at [431]: “We consider that the course of conduct principle must be informed by the particular legislative provisions relevant to these proceedings. In particular, we consider that weight must be given to the fact that the legislature has deliberately and explicitly created separate contraventions for each of the making of, and giving effect to, a contract, arrangement or understanding that restricts dealings or affects competition: ss 45(2)(a) and 45(2)(b).”

The question of market harm and the expected and actual benefits said to be causally connected to the contravening conduct was the next issue considered by the Full Court (at [443]-[565]). The ACCC’s grounds of appeal on these issues were fully rejected.

The final issue in the appeal was the quantum of penalties to be imposed (in light of the ACCC’s success on certain grounds) and whether the penalties imposed by the trial judge were manifestly inadequate. At trial and on appeal, there was a ‘canyon’ between the parties. At trial the ACCC contended for total penalties of $97m while the respondents submitted appropriate penalties were in the order of $4m (at [316]). This gulf between the parties hardly narrowed in the appeal (at [575]-[577]). The Full
Court decided for itself the penalties to be imposed and ordered total penalties of $20.6m (that is, an increase compared to the trial judge’s total penalties of $17.1m).

**JANUARY/FEBRUARY**

**CONSTITUTIONAL LAW/DEFAMATION PRACTICE AND PROCEDURE**

**Trial by jury in the Federal Court?**

Section 39 of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) provides that civil trials are to be without a jury “unless the Court or a judge otherwise orders.” Section 40 of the Federal Court Act is a broad discretionary power of the Court in civil proceedings to direct trial of issues with a jury.

In *Wing v Fairfax Media Publications Pty Ltd* [2017] FCAFC 191 (27 November 2017), the Full Court determined an interlocutory application seeking an order pursuant to s 40 of the *Federal Court Act* that, to the extent permitted by law, the proceeding be heard by a jury. This was in relation to the applicant’s claim for damages for defamation under the *Defamation Act 2005* (NSW) (the NSW Defamation Act). The Court had jurisdiction because the applicant alleges that the matter complained of was published in (among other places) the *Australian Capital Territory: Crosby and Another v Kelly* (2012) 203 FCR 451.

There was a constitutional law issue before the Full Court by reason of an alleged inconsistency between ss 21 and 22 of the the *NSW Defamation Act* and ss 39 and 40 of the *Federal Court Act* for the purposes of s 109 of the Constitution (Cth). The parties agreed (as did the Court) that ss 21 and 22 of the *NSW Defamation Act* were inconsistent with ss 39 and 40 of the *Federal Court Act* within s 109 of the Constitution (at [21] and [23], Allsop CJ and Besanko J). The point on which the parties disagreed was whether the Court in exercising the discretion under s 40 of the *Federal Court Act* may have regard to ss 21 and 22 of the NSW Defamation Act. The Full Court held ss 21 and 22 of the *NSW Defamation Act* did not apply to the proceeding and the sections were not relevant to the exercise of the discretion in s 40 of the *Federal Court Act* (at [30]-[34], Allsop CJ and Besanko J, and [49], Rares J).

The Full Court also dismissed the respondents’ interlocutory application under s 40 of the *Federal Court Act* seeking an order that the proceeding be heard by a jury (at [46], Allsop CJ and Besanko J, and [66], Rares J). In doing so, the Full Court considered the authorities and principles relevant to exercising the discretion to order a trial by jury in the Federal Court (at [36]-[44], Allsop CJ and Besanko J, and [51]-[60], Rares J).

Justice Rares noted at [59] that “in the forty years of the existence of ss 39 and 40 in the *Federal Court Act*, Ra 183 FCR 148 is the only occasion on which a judge has ordered a jury trial” … *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148 was in fact a decision of Rares J. In *Wing*, Rares J agreed Allsop CJ and Besanko J with that his view of the certain factors in *Ra* was erroneous (at [40]-[42], Allsop CJ and Besanko J, and [49]-[50] Rares J).

**EQUITY/NATIVE TITLE**

**Fiduciary duties of persons constituting an applicant for bringing a native title determination application**

In *Gebadi v Woosup* (No 2) [2017] FCA 1467 (7 December 2017) the Court considered fiduciary obligations that arise in equity in the context of statutory arrangements under the *Native Title Act 1993* (Cth) (the Act).

The applicants were persons who brought proceedings in a representative capacity on behalf of the Ankamuthi People. The respondents (Mr Woosup and Ms Tamwoy) were formerly two of thirteen persons authorised by the Ankamuthi native title claim group to prosecute the native title determination application under s 61 of the Act.

The main issues in the case were summarised by Greenwood J at [52]: “… the central contention in these proceedings is that Mr Woosup and Ms Tamwoy owed fiduciary obligations to the Ankamuthi native title claim group when acting as applicant and that they failed to discharge those obligations. In the case of Mr Woosup, it is said that he has taken for his own benefit, benefits payable under the Gulf agreement for and on behalf of the *Ankamuthi* native title claim group. The first question is whether Mr Woosup and/or Ms Tamwoy owe fiduciary obligations to the *Ankamuthi* native title claim group, that is to say, are they in a fiduciary relationship with that group? The second question is, if fiduciary obligations are owed by either of them to the claim group, what are the obligations so owed? The third question is, have either of them failed to discharge those obligations? … ”

As to whether and how fiduciary obligations arose, Greenwood J held at [96] that the applicable principles “ … are the essential principles which determine whether a person has accepted or assumed fiduciary obligations to another. The context in the case of Mr Woosup and Ms Tamwoy, in accepting and undertaking to act as persons constituting the applicant, is the relevant context but the principles to be applied in determining whether they owed fiduciary obligations to the native title claim group are the same principles determined in our jurisprudence for deciding whether a person has, in all the circumstances, assumed particular fiduciary obligations to another.” At
[97]-[98], Greenwood J relied on the extensive discussion of principles on whether particular parties owed fiduciary obligations to another from his judgment in the Full Court (with whom White J agreed) in Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd [2017] FCAFC 141 at [236]-[269].

The Court held that Mr Woosup and Ms Tamwoy owed fiduciary obligations to members of the Ankamuthi native title claim group (at [101]-[104]) and that they had breached those obligations (at [154]). The Court granted declaratory relief and also made orders for the respondents to pay monies into court of the financial benefits they derived in breach of their fiduciary obligations (at [163]-[169]).

**INDUSTRIAL LAW**

**Freedom of association – Contraventions of ss 346, 348 and 349 of the Fair Work Act 2009 (Cth)**

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case)* [2017] FCA 1398 (30 November 2017) the Court found contraventions of ss 349, 346 and 348 of the *Fair Work Act 2009* (Cth) (FW Act) by the respondent union and Mr Farrugia, the union’s representative and a shop steward. The contraventions arose from threats made and action taken by Mr Farrugia to prevent a worker from working on a construction site because he did not pay membership fees to the CFMEU.

Following a contested trial, the Court found that the contraventions on 17 March 2014 by the shop steward were:

A. a contravention of s 349 of the FW Act by knowingly making a false representation to two workers that each was obliged to engage in industrial activity by paying fees to the CFMEU in order to work on the site (at [53] and [58])

B. a contravention of s 348 of the FW Act by threatening to take action against a worker, by threatening to prevent him from working on the site if he did not pay fees to the CFMEU, with intent to coerce him to engage in industrial activity by paying the fees to the CFMEU (at [72])

C. a contravention of s 346(b) of the FW Act by taking adverse action against a worker, that is, prejudicing him in his employment or in relation to his performance of a contract or services, by threatening to prevent him from working on the site, because he had engaged in industrial activity by not paying the fees to the CFMEU (at [87] and [89]-[90]).

There were also contraventions of s 348 (at [74]-[75]) and s 346(b) (at [87]-[90]) of the FW Act by the shop steward on 31 March 2014. The contravening conduct on 31 March 2014 was constituted by the shop steward taking action against the worker. The union was found to be liable for each of the contraventions by the shop steward pursuant to ss 363 and 793 of the FW Act (at [92]-[93]). The Court will have a further hearing on 5 February 2018 on final relief (specifically declarations and penalties).

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