Law Council
OF AUSTRALIA

Federal Litigation and Dispute Resolution Section

CHAPTER III

WINTER
2015

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WELCOME MESSAGE FROM THE SECTION CHAIR AND DEPUTY CHAIR

Chris Cunningham, Chair

John Emmerig, Deputy Chair

It's been an active few months for the Section. We're pleased that the Australian Government has accepted a majority of the recommendations of the Kendall Report – the Independent Review of the Office of the Migration Agents Registration Authority (OMARA) – and that the dual regulation system for migration lawyers is being dismantled. We look forward to the Migration Act amendments – expected in the Spring sittings. The Migration Law Committee (MLC) and Law Council staff met with and provided information to the Department of Immigration and Border Protection (DIBP) to assist. Brief further information is available under *General News*.

On other migration law matters, the Law Council has written to the Minister for Justice expressing concern about the loss of expertise in the amalgamated Administrative Appeals Tribunal (AAT) following the non-appointment of many members of the former Migration Review Tribunal and Refugee Review Tribunal. The AAT Liaison Committee may assist with advocacy on this issue in coming months. The amalgamation is discussed further in *Selected Tribunal News*.

The Law Council also wrote to MPs expressing concern about aspects of the Migration Amendment (2015 Measure No. 1) Regulation 2015, and the timely filling of judicial vacancies in Federal Courts.

Recent Section achievements include two appearances before Parliamentary Committees.

- Geoffrey Kennett SC, Chair of the Section's Administrative Law Committee, gave evidence on the Law Council's submission to the inquiry by the Parliamentary Joint Committee on Intelligence and Security on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015; and
- Rita Chowdhury, Deputy Chair of the Migration Law Committee, gave evidence on the Law Council's submission to the Senate Education and Employment References Committee Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on temporary work visa holders.

The Section also contributed to several earlier submissions:

- many committees contributed to the Law Council's submission to the Australian Law Reform Commission's 'forgotten freedoms' inquiry;
- the Administrative Law Committee contributed detailed content to a submission on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 in July 2015, much appreciated by Law Council policy staff; and
- positive comment was received on the *Review of the Protection of Movable Cultural Heritage Act 1986* submission.

In relation to Committee liaison meetings, the MLC attended two Migration Advice Industry Liaison (MAIL) meetings with DIBP to discuss issues of mutual interest and concern, and attended a briefing on reforms to the protection visa process for illegal maritime arrivals (IMAs) in Australia, including Temporary Protection visas, Safe Haven Enterprise visas, the Fast Track Assessment Process and plans for managing the 'illegal maritime arrival' legacy caseload.

It's been an unusually active period for Section Committee membership changes, with the establishment of the new Transnational Litigation and Constitutional Law Committees, the appointment of two new members to the Alternative Dispute Resolution Committee, and the appointment of four replacement members to the Industrial Law Committee. John Emmerig, a/g Chair in July and August, also progressed planning for a 22 October Class Actions CPD seminar that his firm is hosting for the Section's Class Actions Committee that he co-chairs with Ben Slade. Ben's feature article later is this issue challenges claims that this type of litigation is entrepreneurial or opportunistic, and analyses their social value.

On behalf of the Section, we congratulate the following Section members on their appointments to Section Committees:

- Dr Andrew Bell SC, Adrian Chai, Beth Cubitt, Shane Doyle QC, Daniel Perry, Professor Richard Garnett, Eugenia Levine, Daisy Mallett and Andrew Stephenson – appointees to the Transnational Litigation Committee, under the co-chairing arrangement shared by Bronwyn Lincoln and John Emmerig;
- Chair Bret Walker SC and members Stephen P Donaghue QC, Geoffrey Kennett SC, Dr Jeremy Kirk SC, Stephen Lloyd SC, Professor Anne Twomey, Laureate Professor Emeritus Cheryl Saunders AO and Neil Young QC, appointees to the Constitutional Law Committee;
- Steven Amendola, Anna Casellas, Andrew Gotting, Shae McCartney, Paul Vane-Tempest appointees to the Industrial Law Committee; and
- Tony Nolan QC and Michael Hollingdale, appointees to the Alternative Dispute Resolution Committee.

We sincerely thank retiring Committee members for their dedicated service to the Section, and congratulate former members who have been elevated to judicial roles. We extend thanks and well wishes to the Hon Robert McClelland (appointed to the Family Court of Australia), Peter Kite SC (appointed to Industrial Relations Commission NSW) and Harry Dixon SC, Richard Bunting and Rob Lilburn.

The expansion of the *Federal Court Case Management Handbook* continues apace with the competition law chapter soon to be published, and chapters on administrative law and industrial law underway. Some of the *Handbook* content will need to be rewritten this year to take account of the Practice Notes National Court Framework.

The Law Council is upgrading its IT systems and we have been working hard to ensure that the Sections' needs are well met. We hope that you have had a smooth transition onto the Law Council's new membership database and that you have been finding your engagement with Section activities stimulating and rewarding. We are currently creating a tag-based search facility for the *CLPWatch* database.

When the Law Council's new website is up and running we plan to reformat *Chapter III* into a more accessible web-linked publication that will enable you to click easily into content that is of interest to you and your practice.

Meanwhile, happy reading!

Office of the Migration Agents Regulation Authority ('OMARA') – Kendall review – issues

This is an abridged note from the Office of the MARA plus added comment.

The findings of the independent review of OMARA, conducted by Dr Christopher N. Kendall, were released on 8 May 2015.

Once the legislation recommended in the Kendal review comes into force:

- immigration lawyers will cease to be governed by the OMARA; and
- practising lawyers will not be permitted to also be registered migration agents (RMAs).

As such, immigration lawyers will look to their key professional body (e.g. the Law Council and Law Society of their relevant jurisdiction) for support thus far provided by the OMARA.

In addition, the Law Societies will likely become the only regulator of immigration lawyers and will receive complaints which are currently received and dealt with by MARA.

The OMARA undertakes a programme of regular monitoring as part of its consumer protection mandate and in its role as regulator of professional standards for RMAs. The monitoring programme aims to provide agents with an opportunity to reflect on business practices and for the OMARA to provide feedback and information. The OMARA recently conducted self-audit surveys and office visits as part of the monitoring programme. During this exercise, agents in Queensland submitted returns to a self-audit checklist and some also participated in monitoring visits. Additionally, agents who operate on a 'No Win No Fee' basis participated in a survey about managing client monies.

As feedback from the agents who used the self-audit checklist has been so positive, OMARA will be making the checklist available on its website.

One of the recommendations is that 'the OMARA's position within the Department (should) be fully consolidated so that it is entirely and unequivocally part of the Department'. This consolidation will be phased in over the coming months. However it is important to note this will not impact the OMARA's functions, authority or jurisdiction.

In line with the consolidation the OMARA's website has had a new look from 1 July 2015, to align with the Department's. This change is not intended to affect website functionality and RMAs and migration lawyers should continue to be able to login, renew registration, perform searches and interact with the website as previously. In addition, products and publications produced by the OMARA, including certificates, the Code of Conduct, the Consumer Guide and translations will be redesigned. Some of these products may be unavailable for a short period during the transition.

The Large Law Firm Group

On 1 July 2015, the Large Law Firm Group, one of the Law Council's Constituent Bodies, became known as Law Firms Australia. Mr Nicholas McBride has been appointed as the CEO and Mr Ross Drinnan as Chair. Nicholas McBride is also the LCA Director having replaced Pat Garcia.

HIGH COURT OF AUSTRALIA NEWS

Judicial appointments and retirements

The Law Council welcomes the appointment of Brigitte Markovic as a judge of the Federal Court of Australia, based in the Sydney registry, and we congratulate her honour on her appointment. The Law Council agrees with the Federal Attorney-General, the Hon Senator Brandis, that Ms Markovic 'will bring exceptional experience as one of Australia's foremost litigation lawyers to the Federal Court bench'. Ms Markovic was sworn in at the Federal Court in Sydney on 24 August 2015.

According to the Attorney-General's media release:

> *Ms Markovic graduated from the University of New South Wales with the degrees of Bachelor of Commerce and Bachelor of Laws in 1987. She has been a legal practitioner of the Supreme Court of New South Wales and High Court of Australia since 1988 and the Supreme Court of the Australian Capital Territory since 1997.*
>
> *Ms Markovic's career has been with the leading commercial law firm Clayton Utz, where she began as a solicitor in 1988. In 1997, at age 32, she became a partner of the firm and was the national managing partner for litigation and dispute resolution for four years.*
>
> *Ms Markovic's areas of practice include administrative law, corporations law, directors' and officers' duties, professional negligence, commission of inquiry, securities enforcement and insolvency. She has been recognised as a leading individual for Dispute Resolution by both the Chambers Asia Pacific and Chambers Global. Ms Markovic was voted by her peers as one of Australia's Best Lawyers in litigation from 2009 to 2015, Public Law from 2014 to 2015, Regulatory Practice from 20143 to 2015 and Alternative Dispute Resolution in 2015.*

Selection of judicial and other speeches:

22 April 2015 – Justice Rares – The Modern Place of Arbitration – Celebration of the Centenary of the Chartered Institute of Arbitrators, accessible here.

13 May 2015 – Professor Paul Brand Paul FBA, Emeritus Fellow, University of Oxford – High Court public lecture on 'Magna Carta and the Development of the Common Law', accessible here.

1 June 2015 – Justice Kiefel – Developments in the law relating to medical negligence in the last 30 years, presented at the Greek/Australian International Legal and Medical Conference 2015, accessible here and to be published in volume XIX of the International Trade and Business Law Review.

15 June *2015* –President of the Australian Human Rights Commission, Professor Gillian Triggs – Alice Tay Lecture to mark the 800th anniversary of the Magna Carta in Canberra, accessible here**.**

16 June 2015 – Justice Barker – Zen and the Art of Native Title Negotiation, presented at the 2015 National Native Title Conference, Australian Institute of Aboriginal and Torres Strait Islander Studies, accessible here.

25 June 2015 – Chief Justice Robert French AC – Lawyers, Causes and Passion, EDO NSW 30th Anniversary Dinner, accessible here.

25 June 2015 – Justice Collier – The Influence of the Magna Carta on Papua New Guinea Law, inaugural lecture in the Sir Salamo Injia Lecture Series at the School of Law, University of Papua New Guinea, accessible here.

26 June 2015 – Justice Rares – Is access to justice a right or a service?, presented at the Access to Justice – Taking the Next Steps Symposium, Monash University, accessible here.

High Court sittings

The High Court (2016 Sittings) Rules 2015 No. 136 (Cth) commenced on 15 August 2015. The Rules appoint the sittings of the Full Court of the High Court (the Court) for 2016.

They provide that

- Sittings of a Full Court of the High Court are to be held at Canberra and other places as required during the following periods in 2016:

  Monday 1 February – Friday 12 February
  Monday 29 February – Friday 11 March
  Monday 4 April – Friday 15 April
  Monday 2 May – Friday 13 May
  Monday 6 June – Friday 17 June
  Monday 18 July – Friday 29 July
  Monday 22 August – Friday 2 September
  Tuesday 4 October – Friday 14 October
  Monday 7 November – Friday 18 November
  Monday 5 December – Friday 16 December

- Sittings of a Full Court of the High Court to hear applications for special leave to appeal to the High Court are to be held on the following days:

  Friday 12 February
  Friday 11 March
  Friday 15 April
  Friday 13 May
  Friday 17 June
  Friday 29 July
  Friday 2 September
  Friday 14 October
  Friday 18 November
  Friday 16 December

- The winter recess begins on Saturday 18 June 2016.
- The summer recess begins on Saturday 17 December 2016.

Note also that:

- Sittings of the Court will continue to be held in Adelaide, Brisbane, Hobart and Perth as required;
- Sittings of the Full Court may also be held on other days as required, for example in matters requiring expedition; and
- Sittings are to be appointed by the Chief Justice pursuant to r 6.04.2.

FEDERAL COURT AND FEDERAL CIRCUIT COURT NEWS

As foreshadowed in the Autumn *Chapter III*, the Hon. James Edelman, a judge of the Supreme Court of Western Australia, has been appointed a judge of the Federal Court of Australia, (Brisbane registry). In his welcoming remarks, the Chief Justice noted that Justice Edelman possessed the finest judicial qualities of a practical, fair, patient and efficient judge.

The Attorney-General provided a background to his Honour's achievements in the law, noting that he graduated from the University of Western Australia with the degrees of Bachelor of Economics in 1995 and Bachelor of Laws with first class honours in 1996. He was also the recipient of the University's Frank Parsons prize for the most outstanding graduate of that year. In 1997, he took a Bachelor of Commerce degree from Murdoch University. He later worked as associate to the late Hon. Justice Toohey of the High Court, and was chosen as the Rhodes Scholar for Western Australia in 1998.

In 2001 Justice Edelman was awarded a Doctor of Philosophy in law, with a thesis on gain-based damages, winning the Society of Legal Scholars prize in 2003 for the most outstanding new work of legal scholarship of that year.

At the age of 34, his Honour was appointed Professor of the Law of Obligations at Oxford, and was twice recognised with Oxford's Excellence in Teaching Award. In 20141, at the age of 37 Justice Edelman became the youngest judge appointed to the West Australian Supreme Court. Four years later, the Queensland legal profession has welcomed his move to the Sunshine State.

HIGH COURT & FEDERAL COURTS NEWS

Federal Court – amendments

2 May 2015 saw the commencement of the:

- Federal Court (Bankruptcy) Amendment (Examination Summons and Other Measures) Rules 2015; and
- Federal Court (Corporations) Amendment (Examination Summons) Rules 2015.

Copies of the Amendment Rules are accessible here.

The *Federal Court (Bankruptcy) Amendment (Examination Summons and Other Measures) Rules 2015*:

- amend rule 6.13 to replicate, in an electronic environment, the requirement that an affidavit supporting an application for the issue of a Summons for the examination of an examinable person under s 81 of the Bankruptcy Act to be filed in a sealed envelope; and
- amend paragraph 5 of the form of Creditor's Petition (Form 6) to update the name of the regulator agency under the Bankruptcy Act to 'Australian Financial Security Authority' reflecting a change made in late 20143.

The *Federal Court (Corporations) Amendment (Examination Summons) Rules 2015* amend rule 11.3 to replicate, in an electronic environment, the requirement that an affidavit supporting an application for the issue of a Summons for the examination of officers and provisional liquidators of a corporation which is in administration or has been wound up and others with relevant knowledge of the affairs of such a corporation under sections 596A and 596B of the *Corporations Act* be filed in a sealed envelope.

Changes to filing and other fees in the Federal Court commenced 1 July 2015

As a result of amendments to the Federal Court and Federal Circuit Court Regulation 20142 made by the *Federal Courts Legislation Amendment (Fees) Regulation* 2015 some significant changes to filing and other fees in the Federal Court took effect from 1 July 2015. Almost all fees have increased by 10% but, other than for some bankruptcy fees, fee categories have been restructured to remove the higher fee tier for publicly-listed companies and to reduce fees for public authorities from the corporations rate to that for 'in any other case'.

An additional exemption has been included so that no fee will in future be payable on filing of an application under s 23 of the *International Arbitration Act* 1974 to issue a subpoena requiring attendance before or production of documents to an arbitral tribunal or both. If an order for the issue of such a subpoena is made the normal fee for issue of that subpoena will still be payable. Otherwise no changes have been made to any of the existing exemptions.

Law Council President, Mr Duncan McConnel, has described the fee increases as unwarranted and unfair, because they had been tripled just two years ago and there was scarce evidence of reinvestment back in the judicial system. The Law Council called for the reversal of the fee changes in the interests of access to justice.

Improved access to justice for vulnerable women

Work is underway to strengthen the capacity of Australian courts to ensure access to justice for Indigenous women as well as women from culturally and linguistically diverse backgrounds.

The Minister Assisting the Prime Minister for Women, Senator the Hon Michaelia Cash, has announced that the Coalition Government will provide $120,000 to the Migration Council Australia to fund a project which will focus on breaking down the barriers to accessing justice for the most vulnerable women in our society.

On 24 June 2105, in Parliament House, the Chief Justice of Australia, the Hon. Robert French AC and Minister Cash opened the Judicial Council on Cultural Diversity's (JCCD) first national roundtable. Justice French's speech on Equal Justice and Cultural Diversity is available here. The roundtable consisted of leaders from the community, domestic violence and legal sectors, who will inform a National Framework to improve justice for vulnerable women in Australia.

The JCCD is the first social policymaking body for the courts and includes representation from every level of court and every jurisdiction. Minister Cash said the roundtable will inform a framework to ensure judges and administrators across all levels of the legal system can deal sensitively with cultural matters including child, early and forced marriage, family violence, female genital mutilation and human trafficking.

ADMINISTRATIVE APPEALS TRIBUNAL (AAT) NEWS

Appointments

On 30 April 2015 the Attorney-General announced the reappointment of Ms Elizabeth Anne Shanahan as a part-time Member of the AAT for a period of three years.

Ms Shanahan was first appointed to the AAT as a part-time Member in 1991 and she also serves on the Superannuation Complaints Tribunal and the Victorian Civil and Administrative Tribunal.

Ms Shanahan is cardiothoracic surgeon and a certified mediator.

On 14 May 2105 the Attorney-General announced the appointment of the following Presidential Members to the AAT for a period of five years:

- Justices of the Federal Court of Australia, the Hon. Tony Pagone and the Hon. Richard White, and
- Justices of the Family Court of Australia, the Hon. Janine Stevenson, the Hon. Victoria Bennett, the Hon. Colin Forrest and the Hon. David Berman.

Dr Damien J Cremean was also appointed as a full time Senior Member for five years.

In addition, the Government has reappointed the following members of the Tribunal for a period of three years from 1 June 2015–31 May 2018:

- Egon Fice as a full time Senior Member
- Rodney Dunne and Ms Chelsea Walsh as part time Senior Members
- Brigadier Anthony Warner AM LVO (Rtd) as a part time Member

Brigadier Conrad Ermert (Rtd) has also been appointed as a part time Member for the period 1 June 2015–31 May 2017.

Tribunals Amalgamation Act 2015

From 1 July 2015, the Social Security Appeals Tribunal (SSAT) and the Migration Review Tribunal–Refugee Review Tribunal (MRT–RRT) joined the AAT. The amalgamation represents the biggest reform to the Australian administrative law system since the AAT was established in 1975 as a generalist merits review tribunal with broad jurisdiction.

Bringing the tribunals together provides a single, simple point of contact for users of the tribunal. It is expected to adjudicate over 40,000 applications every year, providing fair, just, economical, informal and quick reviews of administrative decisions. .

Applicants come to the merged tribunal to challenge Government decisions in areas such as: tax matters; visa applications; social security benefits; workers compensation; disability support, freedom of information requests, and veterans' entitlements.

The new AAT has commenced under the leadership of the Hon. Justice Duncan Kerr Chev LH as President.

Applications that were previously made to the MRT-RRT and SSAT are now dealt with in the AAT's Migration and Refugee Division and Social Services and Child Support Division respectively.

People who arrived on or after 13 August 2012 and before 1 January 2014 by boat and who are regarded as 'Illegal Maritime Arrivals" seeking Australia's protection will not have access to the AAT under the Migration and *Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*. They may apply for a Temporary Protection visa or a Safe Haven Enterprise visa. Under the Fast Track Assessment process for protection visa applicants that came into effect on 19 April 2015, applicants will have access to the Immigration Assessment Authority (IAA) if classified an as an 'excluded fast track review applicant'. The Law Council expressed concern about the limited access to merits and judicial review under the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 in a submission, and response to questions taken on notice, accessible here.

The enlarged AAT is issuing new practice directions, guides, guidelines and forms. For example:

- General Practice Direction (30 June 2015)
- Review of Taxation and Commercial Decisions Practice Direction (30 June 2015)

- Migration and Refugee Matters Practice Direction (30 June 2015)
- Taxation of Costs (30 June 2015)

Please check for current versions at: www.aat.gov.au/resources/practice-directions-guides-and-guidelines

Negotiating Outcomes on Time (Noot) Competition 2015

On 30 May 2015, the AAT held the finals for the Negotiating Outcomes on Time (Noot) Competition in Brisbane. Congratulations to all 10 teams of Queensland law students who took part in the competition. The standard of ADR skills displayed throughout the competition was reported as outstanding.

The scoring system for the competition encouraged collaborative negotiation and win-win solutions. Selection of the top performers was based on their cumulative scores across multiple rounds with the final ranking as follows:

First place	Cameron McCormack and Tim Noonan, Bond University.
Second place	Jack Siebert and Hannah McAlister, Queensland University.
Third place	Felicity Young and Kristen Centorame, Bond University.
Best communicator	Felicity Young, Bond University.
Highly commended	Matthew Naylor and Stephanie Centorame, Bond University. Taylor McCaw, Rosemary Kirby and Daniel Posner, Queensland University of Technology. Jonathan Chabowski, Jackson Saunders and Kit Yan Lam, Queensland University of Technology.

Noot 2015 Trophy for First Place being awarded to (from left) Cameron McCormack and Tim Noonan by AAT President, the Hon Justice Duncan Kerr Chev LH

Five universities participated in the 2015 Noot: Bond University, Griffith University, University of Southern Queensland, University of Queensland and the Queensland University of Technology. The AAT will look to open up the competition to universities outside of Queensland in 20146.

The Noot competition complements the AAT's highly successful National Mooting competition which will be held during the second half of the year. Students participating in both competitions will gain a unique insight into both the way in which 80% of matters at the AAT finalise without a hearing as well as the preparation required for the 20% of maters that need a determinative outcome via a hearing.

The Law Council of Australia Federal Litigation Section sponsored the trophies.

CLASS ACTIONS AND SOCIAL VALUE

By Ben Slade[1]

Introduction

Meritorious and successfully concluded class actions can be of great value to society. Not only are the victims of wrongful conduct compensated by the wrongdoer, but those who engage in offensive conduct and who cause others to suffer losses or injury are thereby held accountable. The benefits of these private actions are not limited to class members alone but flow through to society generally. While this proposition is clear to many, it has become increasingly popular among those who market themselves as the 'go to' defendant class action lawyers to disparage those conducting class actions as 'entrepreneurial' or 'opportunistic'.[2]

This concept has been bandied about by big business and its supporters for many years. In *Mobil Australia Pty Ltd v Victoria* [2002] HCA 27 at [172], Justice Callinan, when determining the validity of the Victorian class actions regime, said:

> *The question here is not whether, by their nature, group or class proceedings are oppressive to defendants, give rise to entrepreneurial litigation, in fact proliferate and prolong court proceedings, undesirably substitute private for public law enforcement or are contrary to the public interest, with disadvantages outweighing a public interest in enabling persons who have been damnified but who would not, or could not bring the proceedings themselves, to be compensated for their losses. The question simply is whether the Victorian Act is valid.*

Big business defendant lawyers reinforce their message of doom with statistics that suggest that there is an 'explosion' of investor and consumer class actions driven by an increasingly 'US-style litigation culture', which is 'fuelled by unregulated litigation funders'.[3]

Before one gets too caught up in this rhetoric, it is worth taking stock and considering the facts. In its first 22 years, the federal class actions regime appears to be an effective market-based mechanism by which people who have been wronged can be heard and properly compensated.[4]

The reason for class actions

Parliaments in Australia have, for many years, seen the need to pass legislation that provides protection to the community from the wrongs of others and to give the victims of wrongful conduct the right to be compensated. The common law has developed many protections. Those injured by the negligence of others who owed them a duty of care, those who suffer loss by another's misleading conduct or by conduct in breach of statutory requirements, and those who are injured by defective products, have rights to be compensated and to sue if that compensation is not forthcoming.

Statutory and common law rights are of little value if not enforceable. Class actions facilitate the enforcement of rights when it would otherwise be impractical; the cost of individual pursuit is often greatly outweighed by the value to the individual claimant, yet the right to be compensated is no less important. The class action allows individual victims to pool the effort with other victims so that the claim for compensation is cost-effective.

As recently noted:

> *Many people with legal grievances would face serious financial hurdles in seeking legal redress through the courts without class actions. For the most disadvantaged members of our society, those hurdles are near insurmountable.*[5]

The benefit of class actions is not restricted to individuals who are otherwise unable to pursue their rights. Class actions are often a sensible and cost-effective means by which investors can obtain redress from corporations that mislead them.

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1 Principal, NSW Maurice Blackburn Pty Limited. This article has also been submitted for publication in *Precedent*

2 See: "*Crackdown on opportunistic class actions*", The Australian, 23 May 2014, 31.

3 See, for example, J Emmerig and M Legg, "*Securities class actions escalate in Australia*" www.jonesday.com/securities-class-actions-escalate-in-australia-05-14-2014/.

4 Part IVA of the *Federal Court of Australia Act* 1976 (Cth). See also Part 4A *Supreme Court Act* 1986 (VIC) and Part 10 *Civil Procedure Act* 2005 (NSW). The Victorian and NSW regimes are similar but have had a shorter life, so the Federal Court statistics are used in this article.

5 V Morabito and J Ekstein, *Class actions filed for the benefit of vulnerable persons – An Australian Study* (2015) 34 *Civil Justice Quarterly* (forthcoming).

When the federal class actions regime was introduced, Parliament recognised that it had a dual purpose:

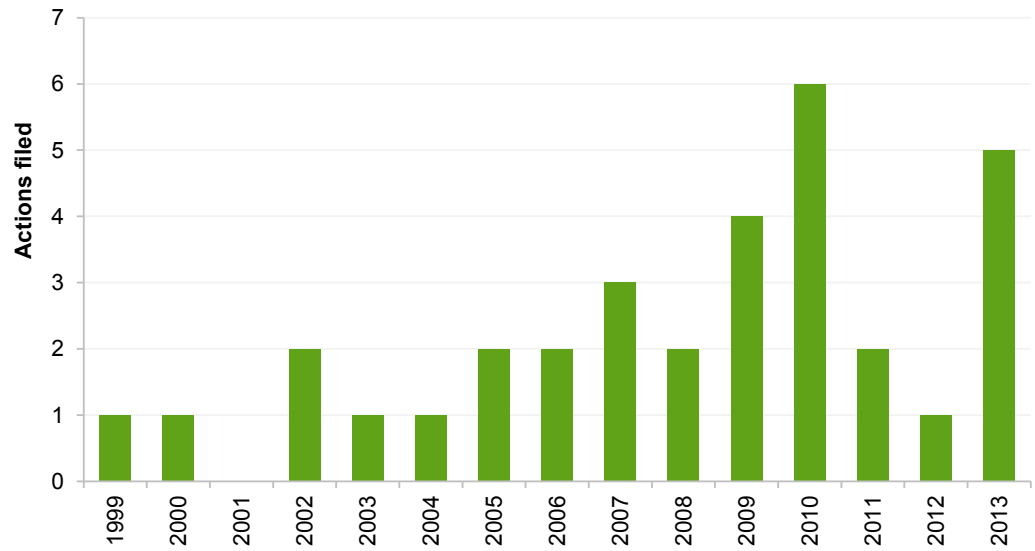
> *The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action. The second purpose of the bill is to deal efficiently with the situation where the damages sought by each claim are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.*[6]

The statistics

Professor Vince Morabito's most recent empirical study on the numbers of class actions in Australia reveals that there have been 15 class actions filed in the Federal Court every year since the regime began in 1992. If related actions are counted as one, the number falls to 10 per year.[7] In total, about 5,000 cases are filed in the Federal Court every year. Class actions, comprising only 0.3 per cent of all actions filed, cannot be accused of dominating the scene, although the claim values in class actions are certainly often significant.

The suggestion that the number of class actions is increasing at alarming rates also does not withstand scrutiny. The annual number of class action filings in the Federal Court has been steady since the regime commenced and while the nature of the claims has changed over time, the numbers have not. Professor Morabito's study found that for the first 11 years, product liability, industrial and migration class actions dominated the landscape, whereas in the second 11 years, after litigation funding commenced, investor and consumer claims were more prevalent.[8] Shareholder class actions, the sort that appears to worry big business the most, have not increased significantly over the past 11 years, as can be seen in the graph below:

Shareholder class actions filed



Sourced from Allens Linklaters, *Class Actions in Australia Report*, 2014. displayed as it appears in the Productivity Commission's report, 2014, figure 18.3, 620.

Comparisons have been made with US class action filings.[9] The suggestion that the number and type of Australian class actions are similar to that in the US is misleading.

6 Second Reading Speech for the *Federal Court of Australia Amendment Act* 1991 (Cth), House of Representatives, Parliamentary Debates, *Hansard,* 14 November 1991 at 3174 (and noted by the High Court in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 when interpreting Part IVA of the *Federal Court of Australia Act* 1976 (Cth)).

7 Professor Vince Morabito, Empirical study of Australia's class action regimes (Third report), *Class Action Facts and Figures – Five Years Later*, Monash University, November 2014.

8 *Ibid* at 8.

9 J Emmerig and M Legg, above note 3.

The Productivity Commission's 2014 report, *Access to Justice Arrangements*, compared Australian and American shareholder class action statistics for 20143 and concluded as follows:

2013	Shareholder class actions	Population (approx.)	Actions per million people	Listed companies	Actions per company
Australia	5	23 mil	0.2	2195	0.002
US	166	319 mil	0.5	4972	0.03

Based on the table, when compared by:

- *population – actions were 2.4 times more likely in the US;*
- *listed company – actions were almost 15 times more likely in the US.*

The economic impacts of these actions also differ. The largest securities class actions in the US settle for over 35 times the values of the largest in Australia. To 20143, the top ten settlements in the US range from around $17 billion, while the top ten settlements in Australia range from $35200 million. This is partially explained by greater use of punitive damages in America, with the anticipated judgments impacting settlement amounts.

Therefore, the suggestion that Australia is becoming as litigious as the US is unwarranted. Such an outcome is also unlikely because the loser pays rule will continue to provide a strong deterrent to bringing unmeritorious claims and the comparatively limited use of punitive damages reduces the expected return from litigation.[10]

According to a King & Wood Mallesons report, as of July 2014 there were 27 class actions on foot in the Federal Court, New South Wales and Victorian Supreme Courts. Of these, seven related to allegations of breach of continuous disclosure obligations and a further seven related to financial products. The report stated that the total value of significant securities class actions settled since 2003 was, at the time, around $1.113 billion.[11]

As at May 2015, the number of class actions on foot in Australia has fallen slightly, with settlements and dismissals being greater than the number of new filings.

The lack of available data makes it difficult to identify the total value of class action settlements since the commencement of the regime in Australia, but it appears that it is well over $2 billion.

This suggests that a significant number of class actions settled to date had substantial merit.

Litigation funding

Litigation funders are often blamed for the alleged explosion of class actions. The Business Law Section of the Law Council of Australia made a submission to the Productivity Commission that claimed that 'unregulated litigation funding allows unmeritorious claims that would not otherwise be litigated'.[12]

This extraordinary claim must be challenged. It is in the nature of litigation that unmeritorious claims are inevitable, but examples of third-party funded shareholder class actions lacking in merit are difficult to find.

A few class claims can be identified that were commenced without sufficient merit but each one, when carefully considered, can be explained. The reasons include:

- it was conducted by those unfamiliar with the complexities of class actions;
- the enormity of the plaintiff's task was underestimated by the lawyers;
- the class representative struggled to prove individual causation; or
- the complex web of facts ultimately failed to convince a judge.

Very few claims can be criticised as being opportunistic. The few filings that appear to be a

10 Productivity Commission's Access to Justice Arrangements report, 2014, Box 18.3, 618.

11 Moira Saville and Peta Stevenson, *The Review, Class Actions in Australia* 2013/2014 (www.kwm.com/en/au/knowledge/downloads/the-review-class-actions-in-australia-2013-2014-20140701).

12 Annexure B to the Law Council of Australia's Submission to the Productivity Commission's Access to Justice Inquiry, June 2014 (see: www.pc.gov.au/__data/assets/pdf_file/0019/137530/subdr266-access-justice.pdf); Maurice Blackburn's response dated 7 August 2014 can be seen at www.pc.gov.au/__data/assets/pdf_file/0005/139172/subdr320-access-justice.pdf.

'try on', an abuse of process or mere folly should carry no weight in this debate because they are so few in number and because, in all likelihood, they will be struck out or fail if they have not done so already.[13]

There are also very few unmeritorious class actions, if any, that one could sensibly argue have settled for significant sums purely because, as is sometimes alleged, the defendant considers it simpler to pay for the case to go away rather than to defend it.[14] There are no known examples of shareholder class actions that have settled, even though they were arguably lacking in merit, that were funded by litigation funders.

It has been suggested that the existence of a litigation funder behind an action distorts the principle that damages are awarded to compensate loss.[15] This is not the case. Litigation funders contract with those claiming compensation to carry the risk of litigation in return for payment that is set by reference to a proportion of the compensation. The payment and the amount thereof is a decision for the claimant. It does not distort the compensatory principle.

Furthermore, the suggestion that litigation funders are more likely to risk less meritorious claims than an individual plaintiff is also flawed.[16] The history of litigation funding in Australia suggests that the wrongful conduct targeted by funded class actions is more likely to be egregious than borderline because litigation funders are concerned about the adverse costs risk. Litigation funders also indemnify a representative plaintiff if ordered to pay the defendant's costs. In class actions, the Federal Court practice note requires a representative plaintiff to reveal the existence of litigation funding and recent decisions have reinforced the fact that a defendant can demand sizeable security for costs.[17]

The skill of litigation funders, whose business depends on positive outcomes, means that even greater care is taken to identify strong claims than might be the case for those commenced by emotionally involved plaintiffs.

In Australia, defendants can move to strike out class action proceedings or have them 'decertified' under ss 33C, 33M or 33N of the *Federal Court of Australia Act* (and the equivalent sections in Victoria and NSW). This regime gives defendants greater protection than the US certification requirement, a conclusion supported by another of Professor Morabito's empirical studies,[18] which found that there is:

> *... no evidence of claimants taking advantage of the absence of a compulsory certification device by regularly filing class actions with respect to claims that could not possibly be advanced fairly or efficiently through the class action device.*[19]

Class actions that have been commenced without sufficient merit are generally struck out or otherwise dismissed. The dismissal of a claim with costs suggests that the system is working.

Types of class actions

The table below lists the class actions currently being conducted by one Australian law firm as at May 2015. It illustrates that the causes of actions and the nature of claims are varied and are not, as some suggest, dominated by shareholder claims or litigation funders.[20]

MAURICE BLACKBURN'S CLASS ACTIONS AS AT JUNE 2015				
Name of action	Short title	Type of action	Estimated number of group members[21]	Third-party funded (Y or N)
Matthews v AusNet Electricity Services Pty Ltd and Others	2009 Kinglake Bushfires	Compensation for negligent management of power lines	5,000	N

13 See, for example, *Treasury Wine Estates Limited v Melbourne City Investments Pty Ltd* [2014] VSCA 351.

14 One example may be *Taylor v Telstra Corporation Limited* [2007] FCA 2008.

15 Annexure B to the Law Council of Australia's Submission, above note 12.

16 *Ibid.*

17 CM17, *Kelly v Willmott Forests Ltd* (in liquidation) (No. 3) [2014] FCA 78.

18 Vince Morabito & Jane Caruana, *Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia, in The American Journal of Comparative Law* Vol 61 2013, 580.

19 Ibid at 614.

20 Some of these cases have settled but are yet to be finally concluded. The information in the table is descriptive and the allegations are, in the main, not conceded by the defendants.

MAURICE BLACKBURN'S CLASS ACTIONS AS AT JUNE 2015				
Name of action	Short title	Type of action	Estimated number of group members[21]	Third-party funded (Y or N)
Rowe v AusNet Electricity Services Pty Ltd	2009 Murrindindi Bushfires	Compensation for negligent management of power lines	1,000	N
Erin Downie v Spiral Foods Pty Ltd and Others	Bonsoy Milk	Compensation for negligent manufacture of soy milk	500	N
Stanford v DePuy International and Johnson & Johnson Medical Pty Ltd[22]	Defective hip implants	Compensation for injuries caused by defective hip implants	4,000	N
Inabu Pty Ltd v Leighton Holdings Limited	Leighton	Shareholder class action that settled for $69.5m	3,000	Y
Gray v Cash Converters International Limited & Ors	Cash Converters	Two consumer class actions seeking a refund of excessive interest charges on payday loans	40,000	N
McAlister v State of NSW & Ors	Grand Western Lodge	Compensation for disabled residents of a home for injuries caused by the State's negligence and the licensee's alleged intentional torts	70	N
Amom v State of NSW	Children in detention	Claim for false imprisonment against NSW Police	50	N
Clasul Pty Ltd and Others v Commonwealth of Australia	Equine influenza	Claim by businesses for losses caused by the negligent management of the Commonwealth's quarantine station	570	N
Hopkins v AECOM and Ors	RiverCity	Compensation for investment in the failed CLEM7 tunnel in Brisbane	1,000	Y
Blairgowrie Trading Ltd and Others v Allco Finance Group Ltd and Others	Allco Finance	Shareholder class action	1,000	Y
De Brett Seafood Pty Ltd & Anor v Qantas Airways Limited & Ors	Air Cargo Cartel	Compensation for businesses over-charged by price fixing cartelists	200	Y
Paciocco v ANZ Banking Group & Ors and similar claims against another 12 financial institutions	Bank fees	Claim by consumers for refund of exorbitant bank fees	>200,000	Y
AS v Minister for Immigration & Border Protection & Commonwealth of Australia	Asylum seekers	Compensation for asylum seekers detained in Christmas Island and injured by negligent management	1,000	N

MAURICE BLACKBURN'S CLASS ACTIONS AS AT JUNE 2015				
Name of action	Short title	Type of action	Estimated number of group members[21]	Third-party funded (Y or N)
Casey v Casey DePuy International Ltd and Johnson & Johnson Medical Pty Ltd	Defective knee implants	Compensation for injuries caused by defective knee implants	400	N
Jones v Treasury Wine Estates Ltd	TWE	Shareholder class action	600	Y
Tyson Duval-Comrie v Commonwealth of Australia	Workers with intellectual disabilities	Claim by workers with intellectual disabilities to be compensated for wage discrimination	10,500	N
Rodriguez & Sons Pty Ltd v Queensland Bulk Water	Queensland floods	Claim for compensation for damage caused by the negligent management of the Wivenhoe Dam in January 20141	5,000	Y
State of Victoria & Anor v Regent Holdings Pty Ltd	Abalone	Compensation for losses suffered by abalone fishers caused by the negligent release of a virus	90	Y

The social value of class actions

The gradual increase in the number and frequency of representative proceedings over the past 22 years is a positive development. Successfully concluded or settled class actions suggest that those wronged achieved some redress. This is what our justice system is meant to provide.

The class actions regime and the pursuit of such claims can be a very good thing, not only for the victims of the wrongful conduct, but also for the wider community through improved accountability. Those who might think they can get away with wrongful conduct need to be aware that they may be taken to task not only by market regulators but by the victims in a private class action.

There are many examples of Australian class actions that have wide community support and which have undoubtedly added social value. A number of these are portrayed in Professor Morabito and Jarrah Ekstein's soon to be published paper, '*Class Actions filed for the benefit of vulnerable persons – an Australian Study*'. [23]

The two recently settled class actions for survivors of the 2009 Black Saturday bushfires are good examples of socially valuable claims.[24] The $800 million paid to settle these claims suggests that the class actions were well considered and well conducted. These actions will provide real and meaningful compensation to survivors and greatly assist in rebuilding devastated communities.

The bank fees cases[25] and the Cash Converters claims[26] play a very important role in calling financiers to account for conduct that offends many Australians. Charging a $35 fee every time a computer detects late payment on a credit card or tricking a pensioner into paying

21 These estimates are just that, estimates, as some classes are ongoing.

22 Maurice Blackburn is on the record with Shine, Lawyers.

23 V Morabito and J Ekstein, *Class actions filed for the benefit of vulnerable persons - An Australian Study* (2015) 34 Civil Justice Quarterly (forthcoming).

24 *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663 (23 December 2014); *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 8.

25 *Paciocco v Australian and New Zealand Banking Group Limited* [2015] FCAFC 50.

26 *Gray v Cash Converters International Ltd* [2014] FCA 420.

633 per cent interest on a payday loan is considered offensive by many. It is conduct that should not go unchecked.

Class actions have made price-fixing cartelists refund their victims.[27] As well, several class actions that have been commenced have forced, or will force, governments to confront claims of negligence and neglect.[28]

Does anyone seriously suggest that these claims are bad? That society is poorer for them? Can one honestly suggest that intellectually disabled persons should not be able to challenge their miserly pay or complain that the state stood by and did nothing while they were abused for a decade?[29] Should people whose homes were destroyed by the apparently negligent management of a dam cross their fingers and hope that the government will see fit to compensate them?[30] Should children who have been falsely imprisoned due to the NSW Police Force's blind reliance on a flawed database just suck it up?[31] Does society expect seriously injured victims of defective medical devices to live crippled lives without redress?[32]

The much-maligned shareholder class action may irritate those companies that wish to ignore their obligations to the market but the reality is that such actions, or the threat of such actions, have a direct and positive impact on corporate governance standards. Companies that have been subject to securities class actions have been shown to have weaker levels of corporate governance than other firms.[33]

Contrary to the view expressed by Callinan J, as quoted in the introduction, both the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission have supported the role of class actions as private enforcement complements to their own regulatory role.[34]

Of the actions mentioned in this article, not one class member would have been compensated adequately or at all without the class action facility. The evidence is that class actions add value to our society by forcing wrongdoers to account for their actions. The only people honestly irritated by such claims are the wrongdoers themselves.

27 *Jarrah Creek Central Packing Shed Pty Ltd v Amcor Limited* [2001] FCA 671; *De Brett Seafood Pty Ltd v Qantas Airways Limited* (No. 6) [2013] FCA 591.

28 *Giles v Commonwealth of Australia* [2011] NSWSC 582; *McAlister v State of NSW* Federal Court NSD 1968/2013; *Tyson Duval-Comrie v Commonwealth of Australia* Federal Court VID 1367/2013; *Clasul Pty Ltd v Commonwealth of Australia* [2014] FCA 1133; *Konneh v State of NSW* (No. 3) [2013] NSWSC 1424; *AS (by her litigation guardian Marie Theresa Arthur) v Minister for Immigration and Border Protection & anor* – Supreme Court of Vic No. S CI 2014 04423.

29 *As is alleged in Tyson Duval-Comrie v Commonwealth of Australia and McAlister v State of NSW* (see note 27 above).

30 *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater* Supreme Court of NSW No. 2014/200854.

31 *Konneh v State of NSW* (now *Amom v State of NSW*) (see note 28 above).

32 *Courtney v Medtel Pty Ltd* [2002] FCA 957 (pacemakers); *Casey v DePuy International Ltd* (No. 2) [2012] FCA 1370 (knees); *Stanford v DePuy International Ltd* (No. 5) [2015] FCA 340.

33 See, for example, Chapple, Clout and Tan, Corporate governance and securities class actions, Australian Journal of Management, November 2014.

34 See, for example, *ASIC backs private litigation*, Money Management, 25 June 2014.

CASE NOTES

Selig v Wealthsure Pty Ltd [2015] HCA 18

by Andrew Sharpe[1]

High Court restricts proportionate liability for statutory breaches

On 13 May 2015, the High Court of Australia handed down its decision in the appeal *Ronald Selig & Anor v Wealthsure Pty Ltd & Ors* [2015] HCA 18.

The Court's unanimous decision will have a significant impact on the application of proportionate liability legislation to claims brought against professionals and directors in circumstances where plaintiffs' claims can be brought based on contraventions of Commonwealth statutory provisions *other than* those based upon misleading or deceptive conduct.

Background

Mr and Mrs Selig relied on financial advice provided by Mr Bertram, an authorised representative of Wealthsure Pty Ltd (Wealthsure) to invest $450,000 in Neovest Ltd (Neovest). When Neovest failed, the Seligs lost the entirety of their investment.

The Seligs brought proceedings against Wealthsure and Bertram together with other parties responsible for their loss, being Neovest, Norton Capital Pty Ltd (which had promoted the investment) and two of the directors of Neovest. The Seligs claimed damages for the loss of their investment and consequential losses.

The Seligs' claim alleged a number of breaches of the *Corporations Act* 2001 (Cth) (**Corporations Act**), the *Australian Securities and Investments Commission Act* 2001 (Cth) (**ASIC Act**), breach of contract and negligence.

The statutory claims included the allegation that Wealthsure engaged in misleading or deceptive conduct in relation to a financial product or a financial service in contravention of s 1041H of the Corporations Act. That claim was accompanied by allegations that Wealthsure had breached other sections of the Corporations Act including s 1041E which applies in respect of false or misleading statements to induce a person to apply for, acquire or dispose of financial products.

Similarly, it was alleged that Wealthsure's conduct contravened s 12DA of the ASIC Act which is the misleading or deceptive provision in that Act. That claim was accompanied by allegations that Wealthsure had breached other sections of the ASIC Act including s 12DB of the ASIC Act for false representations in relation to the standard of financial services.

First instance

At first instance, Justice Lander of the Federal Court of Australia found against Wealthsure, Mr Bertram and two other respondents, ordering that they pay a sum of $1,760,512 to the Seligs.

His Honour held that the proportionate liability provisions only applied to the cause of action based on s 1041H. Wealthsure brought an appeal before the Full Court of the Federal Court of Australia.

Appeal to Full Federal Court

The Full Court allowed the appeal holding that, even though Wealthsure and Betram committed various contraventions in addition to the apportionable misleading and deceptive conduct provisions of the Corporations Act and ASIC Act, each of those causes of action, together with the cause of action under s1041H, constituted a single apportionable claim.

Justice Mansfield stated:

> *Provided that there is a separate cause or other causes of action against the person or persons who have contravened section 1041H [of the Corporations Act 2001] if that other or those other causes of action have caused the same damage, the claim maintains its character as an apportionable claim.*

Shortly after the Full Court's judgment, a differently constituted Full Court of Federal Court handed down a decision dealing with the same issues in *ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65. In that decision, the Court unanimously held that the proportionate liability provisions in the *Corporations Act* only apply to contraventions of s 1041H of the Corporations Act and not to losses flowing from the other statutory causes of action pleaded.

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1 Principal, McCabes Lawyers, Sydney

High Court decision

The Seligs appealed to the High Court.

The High Court unanimously allowed the Seligs' appeal, holding that:

- the text of s 1041L(1) of the Corporations Act restricts an 'apportionable claim' to a claim under s 1041I for damages caused by conduct done in contravention of s 1041H;
- the effect of s 1041L(2) is not to expand the definition of 'apportionable claim' under s 1041L(1) but to explain that, regardless of the number of ways in which a plaintiff seeks to substantiate a claim for damages based on a contravention of s 1041H, as long as the loss or damage claimed is the same, apportionment is to be made on the basis that there is a single claim;
- as such, the proportionate liability regime under Div 2A, Part 7.10 of the Corporations Act does not extend to causes of action arising from conduct of a different nature, such as conduct of the type giving rise to other statutory causes of action.

The Court held that this reasoning applied equally to the analogue provisions of the ASIC Act. While not directly considered by the Court, the reasoning would also apply to the analogue provisions of the Australian Consumer Law.

The Court acknowledged the policy considerations, observed by the Full Court in the *ABN Amro* decision, that the contraventions of provisions referred to in *s* 1041I which were not chosen as being capable of being the subjects of an apportionable claim, involve a higher level of moral culpability than the conduct referred to in *s* 1041H. Unlike *s* 1041H, contravention of any of sections 1041E–1041G constitutes an offence, an element of which is knowledge of recklessness. However, the Court based its decision on the clear language of Div 2A and did not consider it necessary to resort to legislative purpose to arrive at its decision.

Costs award against professional indemnity insurer

The High Court, in exercise of it discretionary powers in respect of costs, ordered that the costs of the appeals to each of the Federal Court and the High Court be paid by Wealthsure and Bertram's professional indemnity insurer, which was not a party to the proceedings.

This issue turned upon the impecuniosity of Wealthsure and Bertram, the likely insufficiency of the costs inclusive limit of indemnity available under the insurance policy to meet an adverse costs order and the fact that the insurer's decision to appeal the judgment of the primary judge was taken in an attempt by the insurer to seek to better its own position.

Implications

The High Court's judgment brings resolution to an issue which has caused significant debate and uncertainty in the legal profession and the Courts.

For many defendants (including particularly professionals, directors and trustees as well as corporations involved in capital raisings and the issue of financial products) it means that the advantages of the proportionate liability regime will not be available in a range of circumstances where plaintiffs are able to frame their claims as contraventions of Commonwealth statutory provisions other than the generic 'misleading and deceptive conduct' provisions.

CLIENT LEGAL PRIVILEGE CASE NOTES

DPP (Cth) v Galloway (a pseudonym) & Ors [2014] VSCA 272

Case note by Alexandra Rose[2]

*Criminal proceedings – Evidence sought to be elicited by accused in cross-examination – Whether witness can refuse to answer on ground of legal professional privilege (**LPP**) – Whether statutory provision abrogated common law right – Principle of legality*

Background

The respondents had been indicted on serious criminal offences. They had applied for a permanent stay of proceedings on the basis that the evidence had been gathered unlawfully and that the conduct of the Australian Federal Police (**AFP**) and lawyers acting for the Commonwealth Department of Public Prosecutions (**CDPP**) had been such as to destroy their right to a fair trial.

When the first CDPP lawyer was called to give evidence, counsel representing the accused gave notice that he proposed to ask each of the CDPP lawyers about their knowledge of the contents of any legal advice given by the CDPP to the AFP concerning

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(potential) charges against the accused. It was submitted that this course was authorised by s. 123 of the *Evidence Act 2008* (Vic). Counsel for the CDPP submitted that the circumstances fell within the ambit of s. 131A of the Act to preserve LPP where information is required to be provided pursuant to a 'disclosure requirement'.

Her Honour ruled that the solicitor was obliged to answer the question notwithstanding the privilege claim on the basis that by eliciting the answer in cross-examination, counsel for the accused would be '*adducing evidence…in a criminal proceeding*' within the meaning of s. 123 and hence ss. 118 and 119 did not prevent the adducing of the evidence. Her Honour held that s. 131A had no application.

The CDPP appealed the decision to the Court of Appeal to consider the following five questions, reserved by her Honour, regarding the interplay between ss. 123, 118, 119 and 131A of the Evidence Act:

Question 1

Is each of the accused's applications to stay the current prosecutions ('the stay applications') *in a criminal proceeding* within the meaning of s. 123 of the *Evidence Act 2008* (Vic) ('the Act')?

Question 2

In the stay applications, in asking questions of the CDPP and AFP witnesses (**the witnesses**), the answer to which may disclose a confidential communication or the contents of a confidential document (within the meaning of ss. 118 and 119 of the Act) (**privileged matters**), is the accused *adducing evidence* from the witnesses within the meaning of s. 123 of the Act?

Question 3

If the answer to questions 1 and 2 are in the affirmative, does s. 123 of the Act require the witnesses to answer, if to do so would require the disclosure of privileged matters to the accused?

Question 4

If, by operation of s. 123, Division 1 of Part 3. 10 of the Act does not prevent an accused from adducing evidence of privileged matters from the witnesses, does common law LPP provide a valid ground of objection to answering a question the answer to which may disclose privileged matters?

Question 5

In the stay applications, when being asked questions by the accused in the circumstances set out in paragraphs 7 to 27 inclusive annexure B, are the witnesses being *required by a disclosure requirement to give information* which would result in the disclosure of privileged matters, within the meaning of s. 131A of the Act?

Consideration

The Court of Appeal held that s. 131A had no application in this instance as it was introduced into the Victorian Act in 2008 to achieve consistency with the NSW and Commonwealth Acts to apply the same law of privilege to adducing evidence in court proceedings as during the preliminary stages of litigation. As such, the eliciting of evidence about the content of legal advice is prohibited by ss. 118 and 119 unless s. 123 applies.

Further, neither a direction to a witness to attend for cross-examination, nor a direction to answer a question in cross-examination over objection, falls within the scope of 'disclosure requirement' within the meaning of s. 131A(2). The question being whether the eliciting of evidence in cross-examination on behalf of an accused falls within the scope of the phrase 'adducing evidence' as used in s. 123.

The respondents submitted that s. 123 was intended to abolish LPP in connection with the adducing of evidence by an accused by any means, including eliciting answers in cross-examination. Secondly, that although s. 123 created a significant exception to LPP, it did not take away common law rights.

In response, the Court held that the phrase 'adducing evidence' had no fixed meaning in the Act and that because it removes privilege, the provision should be read narrowly. It also decided against the respondents' second submission on the basis that if their construction of s. 123 was correct, disclosure of legal advice in answer to a subpoena could be resisted on the grounds of LPP but disclosure of the content of the same advice, in answer to a question in cross-examination, could not.

It concluded that Parliament would not have been so precise in s. 131A to preserve a right to object on grounds of LPP in response to a compulsory process such as a subpoena if the same privilege, in respect of the same communication, would inevitably

be lost once relevant witnesses were cross-examined. It also said that it has never been part of the common law of Australia to establish a 'principle' that LPP in criminal trials was overridden whenever the accused could show that access to the privileged information was required for his or her defence.[3]

Decision

The Court of Appeal provided the following answers to her Honour's reserved questions:

Question 1 – Yes

Question 2 – No

Question 3 – Does not arise

Question 4 – Unnecessary to answer

Question 5 – No

Implication

The reference to 'adducing evidence' in s. 123 only refers to the adducing by an accused of evidence already in the accused's possession or knowledge. That is, the section preserves the common law exception to LPP in criminal trials to allow an accused to use what would otherwise be privileged information if in possession of it, but it does not provide a vehicle for enforced production of the material.[4]

Australian Competition & Consumer Commission v Yazaki Corp [2014] FCA 1316

Case note by Stephen Tully[5]

Litigation privilege – test for determining when litigation reasonably anticipated – whether documents created for dominant purpose of use in litigation

Background

Yazaki Corporation and Australian Arrow Pty Ltd (the **respondents**) applied for the production of documents discovered by the Australian Competition and Consumer Commission (the **applicant**). These documents included file notes of confidential communications with potential witnesses and/or their legal advisers, correspondence between industry participants and the applicant about potential evidence, witness statements and English translations of Japanese documents.

The applicant asserted litigation privilege. It had sought legal advice about certain matters in this proceeding during October 2010. In November 2010 the applicant received legal advice on the question of jurisdiction under competition law in any proceedings brought against the respondents. At issue was first whether proceedings were reasonably anticipated on or before 2011 and secondly whether the documents were prepared for the dominant purpose of those proceedings.

Relevant law

This case was decided by reference to common law principles (eg *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA 67). The dominant purpose for preparing documents must be litigation. A claim for privilege requires 'focused and specific' evidence rather than assertions, conclusions or generalised comments: *Barnes and Another v Commissioner of Taxation (Cth)* [2007] FCAFC 88.

Two tests have been suggested in the caselaw for determining when proceedings are reasonably anticipated: whether litigation is 'more likely than not' or when there are 'real prospects' (as distinct from a mere possibility) of proceedings commencing. But where an institution has both investigatory and enforcement functions, there is no neat and tidy distinction between the end of an investigation and the reasonable anticipation of litigation: *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd and Others (No 2)* [2011] FCA 1057 (*Australian Lending Centre*).

Judgment

Besanko J dismissed the application for production. The applicant had established that a privileged purpose was the dominant purpose for which the documents were created (at [51]).

The 'real prospects' test was applied for the reason that *Ensham Resources Pty Ltd v AIOI Insurance Company Ltd and Others* [2012] FCAFC 191 was considered binding. Whether litigation was reasonably anticipated is an objective test requiring consideration

3 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121

4 *R v Wilkie* [2008] NSWCA 885 at [4]

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of all facts and circumstances. Relevant factors include any dealings with witnesses. Besanko J concluded that the question was determined when a document was produced, and statements by persons claiming privilege were not conclusive (at [34]-[35]). Besanko J was moreover satisfied that proceedings would more likely that not be commenced in November 2010 (at [44]).

This case was considered to be similar to *Australian Lending Centre*. All the documents were prepared after the date on which litigation became reasonably anticipated. A sworn statement as to their dominant purpose was supported by a description of those documents (at [50]).

The present case was a 'far cry' from one where privilege was asserted over a document obtained for the purposes of seeking legal advice where its topic had not been identified and there was nothing about its description which suggested that it was prepared on a privileged occasion (at [49]).

Implications

This case illustrates that, for the purposes of establishing litigation privilege, litigation is reasonably anticipated when there are 'real prospects' for it. The 'more likely than not' test was not preferred. However, like Weinberg J in *Visy Industries Holdings Pty Ltd and Others v Australian Competition and Consumer Commission* [2007] FCAFC 147, Besanko J observed (at [33]) that the different tests generally produced the same result. More straightforward is the proposition that the available evidence will indicate whether documents have been created for the dominant purpose of proceedings. The outcome is particularly fact sensitive (at [38]).

Donoghue v Commissioner of Taxation [2015] FCA 235

Case note by Stephen Tully[6]

Third party provided privileged material without privilege holder's permission – conscious misuse of privileged material – tax assessments invalid

Background

The Commissioner of Taxation (the **respondent**) issued income tax assessments to Garry Donoghue (the **applicant**) after an audit. The applicant sought orders declaring these assessments invalid and that the respondent be restrained from using certain information. The assessments were based on material about the applicant and asserted to be subject to legal professional privilege which had been supplied to the respondent without permission by Simeon Moore.

Simeon Moore was a law student who advised the applicant on existing and pending litigation. Simeon rendered accounts as managing director of 'Scientes' but arranged the retention of Moore & Associates, his father's legal practice. Simeon asserted that documents would be protected by privilege. The applicant believed that, by giving instructions to Moore & Associates, Simeon was either its agent or employee who described himself on business cards and emails as that firm's Lay Associate or Consultant. Communications involved the provision of legal services; for example, Simeon sent analysis to his father who forwarded it to the applicant's counsel.

Simeon ultimately held a set of documents about the applicant's financial affairs at the time a solicitor-client relationship existed between the applicant and Moore & Associates. Simeon gave these to the Australian Taxation Office (ATO) when the applicant refused to pay an invoice (described as a 'fantasy document' at [72]). The ATO made no inquiries to quell an apprehension it held at the outset that this material might be protected by privilege, preferring to maintain the confidentiality of its sources when conducting its audit.

Judgment

Logan J accepted much of the applicant's evidence. The communications made and documents entrusted to Simeon by the applicant were for the dominant purpose of obtaining legal advice or for use in existing or anticipated litigation. Simeon was working to or for Moore & Associates, providing legal advice about litigation to the applicant via the firm.

Even if he was not so working, the applicant could assert privilege because the evidence also indicated that Simeon was the applicant's agent for the purpose of dealing with the law firm (at [60], [62]).

This privilege had not been lost, including when communications were exhibited in an affidavit used in interlocutory proceedings (at [140]). The test for waiver was not met by the mere availability for inspection, or the acquisition of knowledge of, a privileged communication: *Australian Competition and Consumer Commission v Cathay Pacific*

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Airways Limited [2012] FCA 1101. There was no waiver having regard to the quality of the conduct (an interlocutory application) and the practical significance and purpose of disclosure (to identify the subject of the claim).

Logan J moreover concluded that the ATO acted in reckless disregard of the applicant's right to claim privilege (at [145]). Income tax assessments drew upon documents Simeon had provided which were subject to privilege and not waived by the applicant. Sections 166 and 263, *Income Tax Assessment Act 1936* (Cth) did not authorise using or accessing material subject to privilege. This legislation was not to be construed as overthrowing fundamental principles such as privilege without irresistible clarity (the principle of legality). The deliberate failure to comply with the requirements of tax legislation amounted to 'conscious maladministration' which, following *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, rendered the assessments invalid.

Implications

This judgment is noteworthy for its factual finding that communications were protected by legal professional privilege in circumstances where the principal player was not a lawyer. An individual was found to have worked to or for a law firm which the privilege holder had retained or alternatively had acted as the holder's agent. The evidence was incontrovertible that these communications were made for the dominant purpose of obtaining legal advice or for use in litigation.

Also of interest is judicial consideration of the extent to which the tax regime protects material in the ATO's possession which might be privileged after having been furnished by third parties without the consent of the privilege holder. The *Income Tax Assessment Act 1936* (Cth) did not give a right to the ATO to use this material. The case illustrates the significant consequences which otherwise flow: here, a reckless failure to inquire whether the material was privileged amounted to conscious maladministration such that tax assessments were quashed.

National Australia Bank Ltd v C & O Voukidis Pty Ltd (No. 2) [2015] NSWSC 258

Case note by Stephen Tully[7]

Implied waiver – affidavit concerning legal advice – whether privileged material used to party's advantage – whether privileged material relevant to issues in proceedings

Background

Olga Voukidis (the **fourth defendant**) served an affidavit in support of Notices of Motion to amend pleadings. Her affidavit contained a claim to have not received advice from a former solicitor about certain issues. Reliance on this affidavit was abandoned at the interlocutory stage on the basis of erroneous content. The Notices of Motion were then addressed with the effect that the fourth defendant could not litigate about those issues on which the advice had been given. The National Australia Bank Ltd (the **plaintiff**) sought access to documents and the fourth defendant asserted client legal privilege.

The plaintiff argued that privilege had been waived when the affidavit was served and it would be unfair to withhold production. The fourth defendant replied that there was no disclosure of the required kind and no unfairness. None of the matters about which disclosure was made remained as an issue for the final hearing.

Relevant law

Implied waiver of privilege occurs when a party's conduct is inconsistent with maintaining the confidentiality which privilege seeks to protect. The context and circumstances are assessed as well as any considerations of fairness: *Osland v Secretary, Department of Justice* [2008] HCA 37, per Gleeson CJ, Gummow, Heydon and Kiefel JJ at [45]. Section 122(2) of the *Evidence Act 1995* (NSW) provides that evidence may be abduced if a party acts in a way that is inconsistent with objecting to that course because it would result in a disclosure of the required kind.

In *Banksia Mortgages Ltd v Croker* [2010] NSWSC 535, a solicitor swore an affidavit to resist summary judgment and referred to privileged emails. The plaintiff sought access at a later stage of proceedings. Schmidt J reasoned (at [39]-[40], [42]) that disclosure was made by way of affidavit on which the defendants had relied to their advantage. This disclosure was made to achieve the benefit of resisting summary judgment. The emails were relevant to what remained in issue between the parties. The plaintiff might wish to rely on that material at a further hearing of the case, even if the defendants did not. Privilege had been waived.

7 Barrister, Sixth Floor, St James' Hall Chambers

An identical conclusion was made in *Weston (as special purpose liquidator of One.Tel Ltd) v News Ltd* [2010] NSWSC 1288.

Judgment

Davies J was satisfied that a disclosure of privileged material had occurred. However, it was disclosed for a limited purpose in a particular context: to be allowed to amend a pleading to include causes of action on which the fourth defendant said she had received no advice. The fourth defendant had been denied the opportunity to pursue those grounds for other reasons (at [37]).

For Davies J, the relevant inquiry was between the issues remaining to be determined in the proceedings and the inconsistency of maintaining the privilege. There was no overriding principle of fairness operating at large (using the language of the joint judgment in *Mann v Carnell* [1999] HCA 66 at [29]).

Davies J considered it difficult to see how privilege had been waived (at [38]). Although the present case was contrasted with *Banksia Mortgages*, the statement of principle from it was applied. Had the privileged material been used to the party's advantage in proceedings? Here the material had not been so used. Furthermore, the material was not relevant to any remaining issues in the proceedings. Thus any disclosure effected by service of the affidavit did not bring about any relevant inconsistency (at [43]).

Implications

This case adds to a line of authorities which illustrate when client legal privilege can be waived through conduct when a party relies on privileged material in an affidavit prepared for use in an interlocutory application. A court will likely consider:

- whether disclosure was made in order to obtain an advantage or benefit in proceedings, and
- the relevance of the privileged material to the issues in dispute between the parties.

The precise interaction between these elements, including where they do not coincide, requires clarification.

Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Ltd [2015] FCA 282

Case note by Alexandra Rose[8]

Claim of legal professional privilege – consideration of claims

Background

In separate proceedings the applicants brought a claim against the respondents with regards to the termination of an employee for his involvement with the union and engagement in industrial activity and for failing to avoid the forced redundancies of other workers.

Port Kembla Coal Terminal submitted that in 2014 it undertook an organisational review which proposed the elimination of three positions and that it commenced consultation with the workforce about those matters and the compulsory redundancy of three named employees.

The applicants served the first respondent with notices to produce documents in relation to the organisational review, restructure and decision to make the relevant positions redundant.

The first respondent objected to producing a number of the documents identified in the notices on the basis of a claim of privilege, namely that they were '*for the purposes of seeking legal advice*.' It also submitted that its claims of privilege were '*clear from the contents of the documents*.'

The claims were brought before her Honour Justice Yates for urgent determination.

Analysing the material

Her Honour inspected the documents for advice privilege applying the dominant purpose test from *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia.*[9]

She also assessed the sufficiency of the first respondent's evidence to support a claim of legal professional privilege per *Barnes v Commissioner of Taxation (Cth).*[10]

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8 Barrister, 6 St James' Hall Chambers

9 (1999) 201 CLR 49

10 [2007] FCAFC 88; (2007) 242 ALR 601 at [18]

On this point, she stated that she gained little assistance from the affidavit of the first respondent's solicitor which contained '*verbal formulae and bare conclusory assertions*' [at [20]].

Neither party objected to the primary judge seeing the documents over which privilege was claimed.

Decision

Her Honour was satisfied on the balance of probabilities that several of the first respondent's claims of privilege had been established but found that a number failed to meet the dominant purpose test. She also stated that she was generally cautious of documents with headers and footers containing statements such as '*private and confidential*' and '*created for the purpose of gaining legal advice*' as in some instances they were created by the author for his own planning purposes and were otherwise not created for the purpose of obtaining legal advice.

She rejected the first respondent's claims of privilege for numerous documents including, amongst others:

- document 2 which appeared to be reporting on a meeting and communicating a particular costs analysis undertaken on the author's own initiative;
- document 4 which was an email between lawyers at Ashurst but there was noting on the face of it to show that it was created or communicated for the dominant purpose of obtaining legal advice or assistance; and
- document 8 which was a draft plan endorsed 'PRIVATE AND CONFIDENTIAL' and '*This document was created for the purpose of gaining legal advice.' Her Honour was not satisfied it was created for the dominant purpose of obtaining legal advice or assistance.*

Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd [2015] NSWSC 342

Case note by Alexandra Rose[11]

Application to set aside notice to produce – legal professional privilege – waiver – implied waiver – whether conduct inconsistent with maintenance of privilege

Background

In the primary proceedings before his Honour Justice Sackar, the plaintiff (**ASIC**) alleged that the defendant (**PTPG**) contravened s. 911A of the *Corporations Act* by operating a business, which partly consists of the provision of financial services, without an Australian Financial Services Licence (**AFSL**). The conduct was said to include promoting and recommending to members of the public the use of Self-Managed Superannuation Funds as a means of investing in real property.

In the conduct of ASIC's investigations into PTPG, it obtained from PTPG a Compliance Manual prepared by a partner at HWL Ebsworth who was engaged by PTPG for his expertise in financial services regulatory issues.

Prior to the final hearing, the parties asked that his Honour make a preliminary determination as to whether privilege had been waived with regards to material sought to be obtained by notices issued by ASIC to PTPG pursuant to the *Australian Securities and Investments Commission Act 2001* (Cth). The documents sought included communications, recommendations or advice provided between PTPG and HWL Ebsworth Lawyers in connection with compliance reviews referred to in affidavits of a Mr Robert McGregor.

PTPG objected to producing the documents on the basis that they were privileged because they were primarily communications between PTPG and their legal advisors.

Submissions

ASIC accepted that the material subject of the notice to produce was privileged but submitted that PTPG waived that privilege for two reasons:

- PTPG received legal advice and acted in compliance with that legal advice in order to resist relief being granted in the proceedings pursuant to s. 122(2) of the *Uniform Evidence Act 1995 (NSW); and*
- PTPG had lost privilege pursuant to s. 126 of the *Evidence Act by voluntarily disclosing the substance of part of the advice received, namely the Compliance Manual.*

11 Barrister, 6 St James' Hall Chambers

His Honour determined a number of preliminary issues:

- He proceeded on the basis that the parties accepted that the substance of the material over which it was said privilege had been waived had not been disclosed.
- In *obiter dicta he held that the remarks of Dawson J in Attorney-General (NT) v Maurice*[12] *did not foreclose the possibility of questions of waiver arising at a preliminary or interlocutory stage and that privilege could be waived by the production of a document during discovery.*
- He upheld PTPG's submission that the decision in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[13] *demonstrated that a 'clear showing' of waiver was necessary in the circumstances.*

ASIC relied on the decision in *Commission of Taxation v Rio Tinto Ltd*[14] to state that privilege will be waived where a party expressly or impliedly makes an assertion about the contents of a privileged document, or puts the contents in issue and therefore lays the privileged document open to scrutiny. ASIC submitted that by filing and serving Mr McGregor's affidavits PTPG '*sought to deploy*' the fact that it had sought and obtained legal advice and had implemented that advice in order to resist the interlocutory relief sought by ASIC. The affidavits set out the circumstance leading to the production of the Compliance Manual in some detail.

ASIC conceded that the affidavits made no reference to receipt of legal advice but said that it was obvious that the steps referred to in the affidavits were a result of legal advice. It submitted that privilege must have been waived because it was only by examining the advice PTPG received that it could be determined whether or not PTPG had changed its practices in order to comply with its legal obligations and what PTPG's state of mind was when deciding to adopt the course of conduct.

PTPG submitted that until Mr McGregor's affidavits were read and their submissions relied upon, it was entitled to resile from reliance on those documents: *State of Victoria v Davies.*[15] It also relied on *Cross on Evidence* (10th ed. 2015, LexisNexis Butterworths) at [25010] to submit that a party who, in interlocutory proceedings, refers to the fact legal advice has been obtained, does not thereby waive privilege at the final hearing.

ASIC maintained it was the service of the material that affected the waiver of privilege per *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd.*[16]

Decision

His Honour accepted ASIC's submission and agreed with Vinelott J in *Derby & Co Ltd v Weldon (No 10)*[17] that the issue of whether privilege has been waived will turn on the facts of each case and the extent to which the relevant material has been deployed.

Further, he held that it was clear that the Compliance Manual and the reviews were going to play a part in the final hearing and as such maintained their relevance from the interlocutory proceedings. He felt that for PTPG to disclose the effect of the legal advice but not the advice itself in relation to the Compliance Manual and reviews amounted to an inconsistency.

His Honour found that PTPG's disclosure of the Compliance Manual was voluntary and constituted a disclosure of part of the substance of the advice received because PTPG's legal advisers did not take issue with privilege at the time. Further, ss. 126 and 131A of the *Evidence Act* combined so that when privilege has been waived in respect of particular documents, other documents which are 'reasonably necessary to enable a prior understanding of the communication or document' will be subject to a similar waiver of privilege.

He concluded that PTPG had waived privilege and was obliged to divulge the documents sought in the notice to produce.

Implication

This case demonstrates that privilege can be waived when parties disclose the effect of legal advice even when the legal advice is not disclosed or when a party has not explicitly stated that it had obtained legal advice.

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12 (1986) 161 CLR 475
13 (2002) 213 CLR 543
14 (2006) 151 FCR 341
15 (2003) 6 VR 245
16 (2009) 74 NSWLR 469
17 [1991] 2 All ER 908 at 917–918

TECHNOLOGY AND SOCIAL MEDIA TIPS AND OBSERVATIONS

by Cameron Cooper[1]

On the radar – 9 social media issues to watch

Law firms have typically been slower to embrace social media than other service-based industries. That is changing, however, and smart firms and lawyers realise that it can be a valuable platform to connect with networks and clients while showcasing their strengths and thought-leadership credentials.

A strategic approach to social media is essential for law firms, in particular, as they balance requirements around client confidentiality with any desire to embrace the latest technology and promote their competitive advantages.

Here are nine issues that should be on your firm's social media checklist.

Ignore ethics at your peril

Before considering any means to more effectively use social media, it is crucial for all law firms to outline policies that ensure ethical standards are not breached. Fears around client confidentiality, information storage, data security and a host of other issues explain why some law firms shun social media, but if all staff members understand and follow the firm's policies there is no doubt that it is an important form of marketing and business development. For example, posting a message on Twitter or Facebook about a court victory could well be a professional breach, but you need not discuss current or past cases. Instead, use such forums to explain new legal rulings or other information that is of value to clients and lawyers. Sharing expertise and insights is a subtle way to demonstrate a firm's credentials and connect with the legal and business communities.

Focus on quality content

Blogs have become an important facet of marketing for many law firms, but the truth is that most of the articles fail to pass the quality test. Social media content, including blogs, are a window into your firm, so make sure you create a positive impression on the back of well-produced, interesting material.

Smart legal marketers are concentrating on producing superb content such as insightful blogs and commentaries, informative infographics and educational online tutorials. Aligned with a well-considered search-engine optimization strategy, this content can enhance referral traffic from websites and social media platforms and ramp up the firm's thought-leadership reputation.

The emphasis on quality includes writing catchy headlines that woo readers. This is especially true on Twitter, where you have to quickly attract people's attention, or lose their interest. The *National Law Review* in the United States recently listed some suggestions for better headings, including:

- Use words that break from the normal clichés and create an element of surprise.
- Frame headings as questions because they stimulate people to find out the answer.
- Consider 'How to …' in the heading because it makes the promise of improving the reader's knowledge.
- Use facts or numbers because people dislike uncertainty.

Understand your privacy settings

Most social media platforms give you choices to manage information – such as posts, photos, profiles and location details – and who can access it. The Law Institute of Victoria has shown a strong commitment to educating members on social media strategies and on its website offers some smart tips on this issue.

- Know where to go on a site to change your privacy settings. The 'settings' button is usually a good start and there will generally also be privacy options each time you post material.
- Find out what privacy tools the platform offers (some have more than others). Common ones include 'timeline review' on Facebook, 'protecting tweets' on Twitter and 'anonymous profile browsing' on LinkedIn. Some of these tools can only be accessed on desktop computers, but once they are set up they also apply to posts made from mobile devices.

1 Journalist, Brisbane

- Use lists. Platforms sometimes allow users to post information to only part of a network.
- Search your own social media profile on the web to check how you appear to the public. It is important to do this regularly as social media platforms may change their privacy rules.

Choose platforms wisely

Have you heard of mooting? British barrister Mr Bill Braithwaite has created a website called Mootis, which he describes as 'Twitter for lawyers' and which aims to offer a dedicated space for legal discussions and debate. It reportedly gained about 500 users within 30 minutes of its launch in January. Unlike tweets, which can only be 140 characters, 'moots' can be up to 500 words in length. This means weighty legal issues can be covered without the writers becoming too verbose.

The arrival of Mootis is a reminder that, while LinkedIn, Twitter, Facebook and YouTube are phenomenally successful, there are a range of platforms in the social media space that may be appropriate for lawyers and law firms. The big three continue to dominate, in the United States at least, based on research findings in the American Bar Association's 2014 Legal Technology Survey Report, which indicates LinkedIn is by far the most popular social media destination for lawyers – with 99 per cent of large firms, 97 per cent of mid-size firms, 94 per cent of small firms and 93 per cent of sole practitioners having a LinkedIn profile. Sole practitioners dominate Facebook, with 45 per cent reporting participation compared with 38 per cent of small firms and just 21 per cent of large firms. Larger firms seem to prefer Twitter, with 36 per cent saying their firms maintain a Twitter presence compared with 16 per cent of mid-size firms, 13 per cent of sole practitioners and 12 per cent of small firms.

It is important to note that firms should take a considered approach to the social media platforms in which they are going to invest. Rather than engaging poorly across many platforms, many smaller firms, in particular, have found it more useful to concentrate on one or two platforms that meet their needs. In that regard, some technology analysts believe platforms such as Instagram and Snapchat are not the ideal audience for law firms as they are dominated by a younger demographic that may not be in the market for legal services.

Take advantage of LinkedIn publisher

Given the popularity of LinkedIn in legal and professional circles, it is important to consider whether to maximise the potential of this tool. Users can really ramp up their social media presence by using the site's dedicated publishing platform. To access it, go to the LinkedIn homepage and click on the pen logo where it says '*Share an update*'. Then fill in your post title and copy-and-paste a blog in the '*Write your thoughts*' field. Add images by clicking on the camera icon, while you can also embed videos and Slideshare presentations.

Clever users see this publishing feature on LinkedIn as a way of syndicating blogs and maximising their impact. For instance, they may take an earlier blog from their firm's website and create a new audience for it on LinkedIn.

Consider buying social ads

Paid social advertising is on the rise and is a way to draw attention to content without having to pump money into Google AdWords or other advertising outlets. These social advertisements come in many forms, including promoted tweets on Twitter, sponsored updates on LinkedIn and Facebook advertisements. The beauty of them is that they can be sent to highly targeted audience segments based on categories such as location, gender, the technology device they are using and other very specific interest categories. This compares with the scattergun approach of traditional newspaper or television ads, which target a large, generic audience.

Social media consultancy Hootsuite advises a number of strategies to try to achieve higher success rates with social ads. It recommends rotating the advertisements regularly so they do not alienate audience members who get tired of being bombarded with the same sell message over and over again. Designing the advertisements with smartphones in mind also makes sense because the majority of social media activity occurs on handhelds, not computers or laptops. The other advantage of social advertisements, according to Hootsuite, is that you can get instant feedback on their effectiveness using analytics reports that track results and let you know if people are clicking on your advertisement.

Create a YouTube channel

DLA Piper is but one example of a growing list of firms that has created its own YouTube channel, covering the gamut of topics from IPO market updates and capital market reports to a day-in-the-life of a law firm trainee. The real beauty of having such a bespoke channel is that it allows a firm to address key legal or social issues while still controlling the message. That cannot be said of media appearances in mainstream outlets such as newspapers, radio and television.

Given privacy and confidentiality issues all firms face, such an ability to deliver an unedited message cannot be underestimated. The other advantage is that a YouTube channel can be set up for free. The key with such a channel – and any other social media platform for that matter – is to make sure the content is relevant and up to date. After all, if you cannot be bothered uploading new material, it is unlikely that your target audience will keep coming back.

Recruit through social media

If you want the brightest young talent in your law firm, social media is an important tool. The next generation of law firm recruits live in the social media space, so promoting clerkships and new appointments on sites such as Facebook makes sense. LinkedIn also makes it easy for job-seekers to research positions, check out a firm and learn about its strengths and culture.

Although sites such as Google+ and Instagram are not seen as a logical domain for law firms because of their younger demographic, they may be a valid target for firms seeking to connect with graduates and younger lawyers.

Social media consultancy Good2BSocial advises using social media to spread the word about positions that are available and provide valuable content – such as video testimonials from associates at your firm – that give candidates a sense of the values and practices of the firm. That engages job seekers far better than simply posting a vacancy online.

Get up to speed on social media evidence

Finally, aside from all the practice management opportunities available through social media, it is crucial for firms and lawyers to understand the day-to-day implications of social media in the courtroom.

For example, admissibility of social media evidence is an issue of great conjecture. Courts are justifiably cautious about whether information posted on sites such as Facebook or in blogs is authentic. The Law Institute of Victoria offers valuable advice in this area, noting that care must always be taken when a party introduces or opposes the introduction of social media evidence. It notes that with the admission of social media evidence in court, a party must show that the evidence is relevant and authentic. This typically involves consideration of the *Evidence Act 2008 (Vic)* or the *Evidence Act 1995 (Cth)*. The LIV's quick tip list on this issue includes:

- Planning for the introduction of social media evidence; for example, check a witness or the other party's Facebook or LinkedIn pages.
- Asking a witness with personal knowledge of the social media evidence or a computer forensic expert to authenticate the material.
- Making a list of the circumstances that apply to the social media evidence to explain why it is authentic; for example, by reference to identifying characteristics.
- Serving a Notice to Admit the authenticity of the social media evidence.
- Being prepared to provide the court with information to understand the technology issues and whether there are case management tools that could assist the court.

This list on the issues to consider relating to social media is far from exhaustive – and it is such a dynamic area that the challenges and opportunities are sure to evolve over the next 12 months and beyond.

Apart from recruiting strong technology teams to oversee the rollout of IT and social media programs, firms are well advised to create social media champions within a firm who can help to guide the firm's strategies in this evermore important area of legal services.

CONFERENCE NEWS

The conference proceedings from the joint **Law Council/Federal Court of Australia Administrative Law conference** last year are now available from Federation Press.

Members may recall that the former Chair of the Administrative Law Committee, Michael Will, and Graeme Johnson, helped to organise the conference with the Hon. Justice Debbie Mortimer and other justices of the Court.

Copies of *Administrative Justice and its Availability* are available via www.federationpress.com.au for $145, or contact Jason Monaghan, Publisher on (02) 9552 2200.

AMTAC Annual Address 2015: A view from the crow's nest: maritime arbitrations, maritime cases and the common law

Speaker: Dr Kate Lewins, Associate Professor, School of Law, Murdoch University

Date: Wednesday 16 September 2015

Time: 4.45 pm for 5pm, concluding by 6.00pm AWST

Venue: Federal Court of Australia, Courtroom No.1, Level 7, Peter Durack Commonwealth Law Courts Building, 1 Victoria Avenue, Perth

The Address will be Video Webcast Live. The Webcast will also be available to view for a period of time following the event from the AMTAC website at www.amtac.org.au.

RSVP by 2 September 2015 to AMTAC Secretariat, Level 16, 1 Castlereagh Street, Sydney NSW 2000

P: 02 9223 1099

E: secretariat@amtac.org.au

To register for the Live Webcast, please follow this link (you will need to return to the same link at the time of the Webcast in order to view).

2nd South Pacific Lawyers' Conference and AGM

Date: 17 September 2015 (All day)–18 September 2015 (All day)

Venue: Rydges, Brisbane

Registrations are open here. Download the Conference Program here.

The Section's Alternative Dispute Resolution Committee chaired by Mary Walker will be running two workshops at this conference – on negotiation and mediation skills.

Drug Testing in the Workplace – A Storm in a Pee-Cup

Date: Tuesday 13 October 2015

Time: 5.15 pm – 6.45 pm

Venue: The Law Society of New South Wales, Level 3 Training Room, 170 Phillip Street, Sydney NSW

Cost: Member: $138 (incl GST) Non-member: $180 RSVP: Wednesday 2 September 2015 CPD Units: 1.5

You can register for this Law Council / NSW Law Society event online here:

Increasingly employers are introducing random drug testing using on-site testing devices. There is general agreement amongst unions, employees and employers that in many industries it is appropriate, if not necessary, to implement a random drug-testing regime to identify workers who may create a risk to health and safety because of drug use. Where there is a dispute it is not usually about whether to have a testing regime, but over what modality of testing to adopt - testing a urine sample or testing a saliva (oral fluid) sample.

Ingmar Taylor SC and Bilal Rauf of State Chambers have both appeared in major cases on the subject. They will speak about drug testing in the workplace, including:

- The nature of the dispute and the different approaches available;
- Case studies which have considered the introduction of drug testing in the work-place; and
- Unfair dismissal in the context of a failed drug test.

The presentation will be followed by a panel discussion involving the speakers and Vice President Catanzariti of the Fair Work Commission.

Presenters

Joseph Catanzariti was appointed to the Fair Work Commission as a Vice President in June 20143. Prior to this he held the position of lead Partner for the National Clayton Utz Workplace Relations, Employment and Safety Practice Group for 25 years. Mr Catanzariti is the Chair of the College of Law. He is an Adjunct Professor, Work and Organisational Studies, at Sydney University's Business School and a Visiting Professorial Fellow, School of Law, Faculty of Law at the University of New South Wales. He was also the President of the Law Council of Australia and President of the Law Society of New South Wales.

Bilal Rauf has a broad practice with a particular focus in employment law and industrial relations and workplace health and safety law. Bilal has worked with many of Australia's largest corporations, employer associations and government entities. Prior to coming to the Bar, Bilal was a Special Counsel at Ashurst (formerly Blake Dawson) and worked in its Sydney and Brisbane offices over 11 years. Bilal appeared as counsel in the recent Port Kembla Coal Terminal litigation, including the appeal of the first instance decision.

Ingmar Taylor SC is an expert advocate in the areas of industrial and employment law and workplace health and safety law. He was called to the bar in 1997 and appointed Senior Counsel in 20142. He chairs the Law Council of Australia's Industrial Law Committee and is the editor of the Industrial Reports. He was lead counsel for the unions in the Endeavour Energy litigation concerning the introduction of new random drug testing.

Class actions and the National Court Framework

Hear from our panel of experts as they share their experiences and discuss key issues, trends and developments in the class actions arena. Speakers include: the Hon Peter Jacobson QC; the Hon Justice Bernard Murphy; Professor Peter Cashman and Professor Vince Morabito.

Time 4.30 pm – 7.00 pm with drinks and canapés

Date: Thursday 22 October 2015

Venue: Jones Day Offices, 88 Phillip Street Sydney

Enquiries: events@lawcouncil.asn.au

Australian Lawyers Alliance National Conference 2015

The Australian Lawyers Alliance (ALA) has announced that it will hold its *National Conference 2015* on 22–23 October 2015 in Hobart. According to the ALA, the conference will cover various topics in relation to personal injuries law, social justice and discrimination litigation. Registrations for the conference should be made using the online form. Further information from the ALA

The 28th Annual LAWASIA Conference - Sydney

Date: 6-9 November 2015

The theme of the conference is Cross-Border Law and Practice in the Asia-Pacific

Some of the anticipated topic areas include:

Cross-border issues in international commerce: The rapid growth of Asian economies puts up a range of issues in the commercial arena that challenge national legal frameworks and require legal practitioners to develop a regional perspective in their thinking. This session seeks to combine examination of current topics in competition and consumer protection, corporate securities, FDI, insolvency and others.

Cross border issues in banking and finance: Laws that underpin the operation, regulation and flow of international banking and finance lie at the heart of the global economy. An understanding of current issues, regimes, theories and practices across the region is of considerable importance to the legal profession. In this session, expert speakers have been asked to highlight contemporary topics of importance, including socially responsible and ethical financing, whether the inherently lopsided nature of current financing structures should be revamped and how the ASEAN trading block will change the landscape of banking in the region.

WELCOME
SECTION NEWS
HIGH COURT & FEDERAL COURTS NEWS
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CONTACTS

Environment and resources: The role played by legislation, the profession and the courts in finding a balance between the pivotal need to protect the region's environment, the requirements of resourcing growing economies in the 21st century and the aspirations of investors in the energy sector is of ultimate importance now and into the future. How does the Asia Pacific legal community respond to this challenge?

Intellectual property: Enhancing IP protection to address 21st century issues, including cross-border protection and enforcement in the Asia-Pacific region.

Taxation law: Harmonisation of ASEAN tax treaties and practices: issues and solutions, including those relevant to international profit shifting.

Employment law: Countries and territories in our region have a diverse range of employment laws reflecting their varying stages of development, and their differing economic and societal settings. While our employment laws share a number of similarities, there are inevitably different issues for different nations and groups of nations. This session focuses on some of the employment law development issues encountered particularly by Pacific nations.

Business and human rights: The legal profession is uniquely placed to deliver advice to clients which addresses the risk of adverse impacts on human rights linked to business activity. Has the profession been effective in meeting the global standards set out in the United Nations Protect, Respect and Remedy: A Framework for Business and Human Rights?

Real estate and transactions law: This session proposes to visit and brings to the fore the current get up and set up of real estate and related transactional issues in Asia and the Pacific involving land, property, titles, rights, costs, damages, and predicaments.

Family law: In line with the conference theme, these sessions see an emphasis on international ADR and cross-border disputes as families deal with break up and related structural changes.

Migration and refugees: The Asia Pacific region has, over centuries, wrestled with issues that emerge as populations are displaced due to conflict, preference, disaster, economic conditions and a range of other considerations These are issues which affect business migrants and refugees alike. Do legislative reactions in the 21st century reflect effective solutions to the challenges?

International ADR – ISDS, a universal panacea or a ticking time bomb? While some states have long advocated ISDS as an effective form of international recourse for investors in a globalised economy, others view it as threat to parliamentary sovereignty and the supremacy of national courts. Where do Asia and Pacific countries and their lawyers sit in this debate?

The internationalisation of legal practice: Mobility of the profession within the Asia Pacific region is becoming a vexed issue as the desire of lawyers to follow their clients across jurisdictional boundaries potentially conflicts with the desire of courts and regulators to maintain control over local professional standards and admission rules. What are the challenges that emerge for the courts, regulators, the profession and for clients?

Equal opportunity in the legal workplace: What are the experiences and challenges in the variation of cultures of the region in avoiding discrimination on grounds of race, gender, age, family circumstances and other factors that should not, in a perfect world, affect the ability to be a successful member of the working legal community in all its facets.

Hot Topics In Commonwealth Compensation

Date: 20 November 2015

Time: 8.30am – 1.00pm

Venue: Sparke Hellmore Lawyers, Level 16, 321 Kent Street, Sydney

A must attend event for all compensation lawyers. Topics for discussion include:

- The Tribunal is not bound by the rules of evidence but…!
- Reasonable administrative actions: how to evaluate the reasonableness of action and/or its manner
- Case preparation for conciliation conferences and hearings

Please register your interest by emailing: events@lawcouncil.asn.au and we will forward you a registration form as soon as it has been finalised.

CONTACTS

Practitioners with an interest in contributing material to this newsletter may contact the editor Mr Ian Bloemendal by email at ibloemendal@claytonutz.com or by phone on 07 3292 7217.

Membership renewal

If you haven't yet renewed your membership of the Federal Litigation and Dispute Resolution Section would you please do so at your earliest convenience by completing and returning the membership form accessible here.

Law Council OF AUSTRALIA

Federal Litigation and Dispute Resolution Section

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