THE BULLETIN

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Child safety laws must be strengthened

TONY ROSSI, PRESIDENT

The Government's draft Children and Young People (Safety) Bill 2016 was disappointing in its failure to adopt many of the recommendations set out in the Child Protection Systems Royal Commission Report of the Hon. Margaret Nyland.

The approach of Government to the submissions received, from various stakeholders, has been a concern.

The Royal Commission report both followed and set out numerous failings of the Department of Child Protection in identifying and responding to children at risk .

The Commissioner identified systemic failure on a grand scale. Not surprisingly, the Commissioner recommended a new approach.

Fundamental is the recognition that legislation concerned with the welfare of children must have, as a primary consideration, the best interest of the child. Indeed, this is a requirement under Article 3.1 of the United Nations Convention on the Rights of the Child.

The Bill fails to identify that primary consideration. In clause 7 of the Bill it identifies the safety of the child as being the primary consideration. That difference informs the structural problem with the Bill.

In a radio interview on 24 February, Attorney General John Rau argued that clause 7 is the same as the interest of the child being a primary consideration. Anyone who has had any experience with these concepts would readily appreciate how wrong that is. The best interest of the child is closely aligned with the rights of the child. Instead, the Bill is closely aligned with the welfare state mentality. The Bill increases the rights and powers of the Department, without accountability or even civil liability, and at the detriment of the family unit.

Clause 156(1) of the Bill will remove all civil liability from the Crown, the Minister, the Chief Executive, a child protection officer or indeed any other person in relation to any act or omission relating to the functions or powers under the Act, no matter how grossly negligent, as long as the person did not act in bad faith.

Recommendation 63 of the Nyland Report provides that if the Chief Executive suspects on reasonable grounds that a child is at risk then the Chief Executive *must* act so as to cause an assessment of or investigation into the circumstances of the child be carried out or the Chief Executive *must* act in some other appropriate way.

The Government has rejected the Commissioner's recommendation. The Bill allows the Chief Executive a discretion as to whether to act even where the Department has identified a child at risk. When would you contemplate it being reasonable to do nothing when a child is at risk? We have seen what happens when notifications about at-risk children slip through the cracks.

The Bill also proposes that if a decision is made to remove a child from a family unit and a parent wishes to oppose a formal order for the removal it will be the parent who will bear the onus of satisfying the court that the child should not be removed. This was not recommended by the Commissioner.

There can be no justification for the suggested change in onus. Not only should the Department, as a matter of principle if it wishes to remove a child from a family unit, bear the onus, the Department should be expected be able to gather and present the evidence. The families involved tend to be in the lower socioeconomic section of the community, are typically poorly educated and up to half are Aboriginal.

Studies and expert opinion emphasise the desirability of maintaining connection with the biological family where a child is removed. This does not appear as a desired objective in the Bill.

Where there is representation of a child the Bill proposes that the legal practitioner be required to act in accordance with the instructions of the child. It is important that the primary duty to the court be recognised and that the practitioner be entitled to also make a submission considered to be in the best interest of the child even if it is inconsistent with the express instructions of the child. The Bill provides for the ability to seek review of certain decisions in the South Australian Civil and Administrative Tribunal. However, an unreasonable time limit of two weeks is provided for the filing of the application. This is totally inadequate in order to make an appointment not see a solicitor, obtain advice and make an informed decision. Some documents may need to be sourced. The grounds for an extension of time are also harsh.

The Bill does not incorporate a provision that would allow the youth court that powers to prevent female genital mutilation. Minister Rau gas suggested that the matter is addressed in other laws. Presumably he is referring to the criminal law. By the time the criminal law becomes involved it is too late.

There are many other concerns and the Society's detailed submission can be found on our website.

On 23 February the Society arranged, at its premises, a press conference which included the AMA and SACOSS. News crews from ABC, 7, 10 and SBS attended and reported the matter that night. ABC Radio has reported upon the concerns. FiveAA presenter Leon Byner has made clear his concerns on his radio program.

The Government has remained impervious. The Bill was introduced into the Lower House without forewarning and with the expectation that other members of the Parliament be in a position to nevertheless debate the Bill. The welfare and associated legal rights of children and of the family unit are matters of considerable importance to the Society. It will be providing every member of the Upper House with its formal submission, a summary of that submission and a further explanation for the Society's concern. The Society must continue to speak loudly in support of the interest of the most vulnerable in our community.

Reflecting on the role of lawyers

MICHAEL ESPOSITO

In her article for this edition of The Bulletin, Emily Telfer SC describes the monumental volume of evidence that came before the Royal Commission into Child Protection Services, of which she was counsel assisting the Commissioner Margaret Nyland.

The Commission examined 11,000 documents and 374 submissions, and heard from 250 witnesses. The evidence was heavily scrutinised and assessed against the latest global research in child protection. The result was 260 recommendations to improve the broken child protection system in SA.

The Government has begun implementing some of those recommendations, including introducing the Children and Young People (Safety) Bill which ostensibly adopts a number of the Nyland recommendations.

The Law Society's view, however, was that the Bill failed to reflect the intentions of the recommendations, and has vigorously lobbied the Government to strengthen the Bill.

The Society's position was informed by a large cross-section of practitioners who have vast experience working in child protection related matters. It was pleasing to see so many practitioners exhibit such passion and acumen in the complex and emotive area of child protection.

This collaborative effort demonstrated the importance of the legal profession in standing up for and upholding fundamental legal principles that ought to apply equally to all. This was reflected on at the recent "Happy New Legal Year" event, which the Society hosted at Adelaide Oval on 2 February.

The Hon. Chief Justice Chris Kourakis and Society President Tony Rossi both spoke of the traditional purpose of opening of the legal year ceremonies– to reaffirm allegiance to the rule of law. While this event was far more relaxed than the church services of yesteryear (some states still have a "multi-faith" ceremony) it was still an apt opportunity to reflect on the role lawyers play in society.

The event was extremely well-received, with about 200 people attending the informal evening gathering. It is planned that this will become an annual event on the Law Society calendar.

SOCIETY CYCLISTS RAISE ALMOST $10,000 FOR CANCER RESEARCH

The Law Society once again entered a team in the 2017 Tour Down Under Bupa Challenge on 20 January. The 17-member Ride for a Reason team raised $9,405 for Cancer Council SA, taking the total money raised over the Society's eight-year involvement in the event to $66,000.

Special thanks go to team sponsor Judith Jordan. Judith has strongly supported this cause and team for many years and the Society is very grateful for her support. Not only does she donate to the team each year, she also provides the picnic at the finish line. A special thanks also to Annette Comley for sponsoring the team and supporting Judith with the refreshments at the finish line in Campbelltown.

Sam Dighton (left), Martin Lovell, Andrew Comley, Judith Jordan, Tim Dibden, Marie Stokes

Jeremy Culshaw, Arlette Culshaw, Michael Janus, John White, Geoff Thomas, Judith Jordan, Annette Comley

Team Members:

Michelle Barnes (Len King Chambers); Collie Begg (Wakefield Orthopaedic Clinic); Andrew Comley (Wakefield Orthopaedic Clinic); Arlette Culshaw (Culshaw Miller Divorce & Family Lawyers); Jeremy Culshaw (Culshaw Miller Divorce & Family Lawyers); Jacqueline Dettman (Student – University of Adelaide); Tim Dibden; David Fidler (Angas Lawyers); Magistrate Terry Forrest (Elizabeth Magistrates Court); Michael Janus (Janus Lawyers); Martin Lovell (Laity Morrow Legal Commercial Strategic); Joseph Sanders; Bec Slimming (Student – University of Adelaide); Marie Stokes (Marie Stokes Family Lawyers); Geoff Thomas (Law Society of SA); Jason Vernik (Laity Morrow Legal Commercial Strategic); John White (Mitchell Chambers)

The Law Society's recent advocacy activities

ROSEMARY PRIDMORE, EXECUTIVE OFFICER

18 JANUARY 2017

Children and Young People (Safety) Bill 2016

The Society submitted a comprehensive submission to a consultation draft of the Children and Young People (Safety) Bill 2016. The Society identified a number of concerns with the Bill which were highlighted in a submission to the Attorney-General. The Bill sought to implement a number of recommendations from the Child Protection Systems Royal Commission Report of the Honourable Margaret Nyland ("the Report"). The Society engaged with its Committees, specific Members who work in child protection matters, the Youth Court and other stakeholders and carried out a thorough review and assessment of the draft Bill. A Bill has now been introduced to the parliament. The Society maintains its concerns and is advocating strongly for the Bill to be revised.

18 JANUARY 2017

Meeting with Aboriginal Legal Rights Movement

The President, Tony Rossi and Chief Executive, Stephen Hodder met with Cheryl Axelby, Chris Charles, and Amanda Lambden of the Aboriginal Legal Rights Movement (ALRM) to discuss matters of mutual concern and interest, including the impact of funding cuts which commence on 1 July 2017 on staffing, representation of those living on the APY lands including the impact of changes in service by the Legal Services Commission and the situation of aboriginal children involved in the child protection system. The Society will assist in raising awareness of these issues.

25 JANUARY 2017

Meeting with President Judge McCusker

Tony Rossi and Vice-President Amy Nikolovski met with President Judge McCusker in relation costs and the recovery of costs in the South Australian Employment Tribunal and the Rules of the Tribunal.

1 FEBRUARY 2017

Privatisation of the Land Services Group

Philip Page, Chair of the Property Committee, represented the Society at a meeting of the Stakeholder Reference Group for the Land Services Commercialisation Project. The Department of Treasury and Finance sought to respond to key issues raised by stakeholders, many of which had been raised by the Society. The Society maintains considerable concern at the prospect of the sale of this key State asset and that the key tenets of the proposal are not sound or in the best interest of the State. The Government presently intends to enter into a contract with a private provider in August or September this year.

The Society maintains considerable concern at the prospect of the sale of the Land Services Group and that the key tenets of the proposal are not sound or in the best interest of the State.

3 FEBRUARY 2017

LCA Symposium: Abolition of the Death Penalty

Stephen Hodder represented the Society at a Symposium on the Abolition of the Death Penalty in Melbourne, hosted by the Law Council of Australia. The function marked the 50th anniversary of Ronald Ryan's execution; the last person executed in Australia prior to the abolition of the death penalty. Sessions throughout the day resulted in discussions around more support for advocacy, research and education, development of a coalition of countries who share Australia's views, development of a strategy for global abolition, Australian representation on the UN Human Rights Council, a push for a moratorium of the death penalty in Asia for crimes not involving death of another person and participation in the World Day against the death penalty.

8 FEBRUARY 2017

Meeting with the Chief Justice

Matters discussed at a meeting Tony Rossi and Stephen Hodder held with the Chief Justice included consultation as to the wearing of wigs in Court, a proposal to allow the Courts Administration Authority to introduce tiered lodgement fees and security fees, a proposal by the Magistrates Association for the Magistrates Court to be renamed as the Local Court and for the title of Magistrate to become "Judge"; and a survey of legal practitioners in relation to Mandatory Continuing Professional Development the Society has facilitated on behalf of the Legal Practitioners Education and Admission Council. B

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Royal Commission recommendations & the development of public policy

EMILY TELFER SC, SENIOR PROSECUTOR, SOUTH AUSTRALIAN DIRECTOR OF PUBLIC PROSECUTIONS

Emily Telfer was Counsel Assisting on the Child Protection Systems Royal Commission between October 2014 and August 2016. In this article she outlines how the Royal Commission investigated the complex, systemic issues within SA's child protection to formulate a raft of ambitious recommendations based on the most relevant, up-to-date and reliable evidence.

Royal Commissions are generally established to investigate and make recommendations in relation to complex events which require a public policy response. They are powerful institutions usually associated with a high level of public expectation that resulting recommendations will be accepted and implemented by the Government of the day. Recommendations must therefore be carefully crafted to ensure that they supported by the evidence available, including current research in the relevant field.

Royal Commissions enjoy wide ranging powers to investigate. However, the considerable resources devoted to identifying problems relevant to the terms of reference (looking backwards) can overwhelm an inquiry such that there is a risk that recommendations are developed as an afterthought. This can result in recommendations which reflect good ideas, but are not necessarily based in the best available evidence, or which have not fully considered system-wide implications.

Since 2003 in South Australia, there have been four independent child protection inquiries: The Layton Review,[1] The CISC Inquiry,[2] the APY Lands Inquiry,[3] and the Debelle Inquiry.[4] Major child protection inquiries have also been held in every state of Australia in the same period. The current Federal Royal Commission into Institutional Responses to Child Sexual Abuse has brought the issue to national prominence. These major inquiries, as well as the plethora of other Parliamentary and other inquiries have made many similar recommendations following the identification of similar system deficits. It is clear that the problem of how to protect children at risk of abuse and neglect is not one which is unique to South Australia, and themes which emerge from each jurisdiction highlight common challenges.[5]

High profile public inquiries, including royal commissions, have become the approach of choice in addressing intractable issues that have plagued child protection public policy. In Ireland (where there has been a comparable litany of inquiries) researchers have observed that a "recommendation fatigue" has developed from the number, predictability and repetitiveness of the resulting recommendations.[6] It is likely that a similar recommendation fatigue is being experienced across child protection jurisdictions in Australia.

On 15 August 2014 the Child Protection Systems Royal Commission (CPRC) was established. The Commission was established in the context of a growing public concern about how children at risk of harm were being identified and protected. This simmering level of concern came to a head in June 2014 with the arrest of Shannon McCoole, a residential care worker employed to care for children, including infants, who were living in residential facilities operated by Families SA. It was alleged that McCoole had used his position as a carer of these infants and young children to commit unspeakable sexual crimes against them.

The CPRC's terms of reference were

The Hon Margaret Nyland AM

wide-ranging, anticipating an investigation into all aspects of the system, including the legislative and policy framework, resource allocation, practices and procedures of the statutory agency (then called Families SA) and other agencies, including agencies licensed by the Minister. While there was no specific mandate to investigate the circumstances in which Shannon McCoole's offending occurred, it was clear from the background to the Commission and the terms of reference that such an investigation was required.

At an early stage of the inquiry it was evident that a considerable amount of cynicism existed about the utility of what was perceived to be yet another inquiry about the same recurring problems. Many witnesses expressed frustration about the number of prior recommendations that have been ignored, and wondered about how recommendations made by the CPRC would gain traction against this background. To identify potential barriers to implementation or recommendations, the CPRC commissioned the Australian

Centre for Child Protection (based at the University of South Australia) to research the implementation of recommendations made by each of the four major inquiries conducted in South Australia since 2003.[7] Research available from the Royal Commission into Institutional Responses to Child Sexual Abuse and other research (predominantly in the Irish context) was also considered in approaching the task of making good recommendations.[8]

Fundamentally, the Commission was concerned to ensure that recommendations made were based firmly in the evidence available, and were framed in a way that optimised the chance they would be implemented in a way that was faithful to their intent. In gathering the evidence the Commission adopted a range of strategies, including sworn evidence taken in formal hearings, research reports from experts in the field, and the examination of in excess of 11,000 documents produced in response to 280 summonses to produce. Publicly available data about the performance of the South Australian system against other systems in Australia was also relied upon.

In the early stages of the inquiry, the CPRC invited submissions from individuals and organisations with experience in, or an interest in the issues raised. A total of 374 submissions were received.[9] From these submissions, a general hearing program was established during which sworn evidence was taken from a range of witnesses including staff of Families SA and other relevant agencies, children in care,[10] children who had left care and foster and kinship carers. By the end of this hearing program, the Commission had heard from approximately 250 witnesses.

In the course of considering written submissions and sworn evidence a number of individual cases which warranted closer investigation were identified. Five individual cases were selected for investigation through formal hearings in the hope of elucidating areas of the system's operation in specific cases: [11]

1. 'James': services for children at risk of harm between birth and school age.
2. 'Abby': services and approaches employed in intervening in families where risk to children is identified.
3. 'Hannah': services available to young people who are approaching the leaving care age, and what supports are available to young people who exit the care of the state on reaching adulthood (18).
4. 'Nathan': caring for children and young people in out of home care who have complex needs.
5. Shannon McCoole: keeping children safe from abuse in out of home care.

In the course of the five case studies the CPRC heard from more than 100 witnesses, and received 227 exhibits. Each study exposed system issues which informed the development of recommendations. It became very clear that there was frequently a gap between documented policy and day-to-day practice. While agencies could identify documents that required practice of a certain standard, day-to-day practice frequently fell short.

To ensure that the observations made in the individual case studies were not isolated, and could be extrapolated system-wide, an expert panel engaged for the period of the Commission completed a series of projects which examined (on the basis of documentation) a larger number of cases than was possible through the individual case studies.[12] The observations made by members of the expert panel often confirmed that deficits identified in individual case studies were systemic and required reform.

Statistical data which tracked performance across a number of measures was examined to further check whether the observations made by experts and the individual case studies were valid. There is a large amount of data publicly available through the Australian Institute of Health and Welfare and the Productivity Commission's Report on Government Services (ROGS) data on community services. Other data was sought through the issuing of summonses to both government and non-government organisations. Data analysis enabled the commission to confirm the validity of general or anecdotal observations made by witnesses.

Although in the course of the investigative activities, many witnesses provided suggestions for reform, the Commission was keen to engage with leaders in the field to ensure that recommendations were based on up-to-date research. The expert panel provided ongoing assistance in this regard.

The Commission established a research relationship with the Australian Centre for Child Protection (ACCP). Between members of the expert panel and the ACCP, the Commission had available research reports on best practice in residential care, including secure care for children with high therapeutic needs; income management for child protection purposes; social work training and regulation and other relevant topics.[13]

In each area examined, the CPRC attempted to ensure that the observations and recommendations were based on a review of a variety of sources of evidence. Notwithstanding that those recommendations were based on the best available knowledge about what would work, they were accompanied by the following caveat: child protection is uncertain and complex, and while recommendations are based on the best available evidence, there is no *guarantee* that they will work. The Commission made it clear that those responsible for implementation must be empowered to adjust their approach if the evidence demonstrates that the desired result is not being achieved by the recommendations as originally framed.[14]

The CPRC's final report contains 260 recommendations. It provides an ambitious program of reform, most of which has been accepted by the Government. Importantly, the report acknowledges that there is no quick fix to the complex problem of child protection. The aim of the program of reform is to *improve* the system, and develop structures to facilitate continuous improvement.[15] It is the development of a learning culture and structures which support a system to continually improve itself that is the key to a better management of the complex problems in public policy and child protection.

The recommendations are a starting point for a comprehensive program of reform which will continue for some years. Hopefully the comprehensive evidence base behind the reforms suggested means that they gain traction in this complex area of public policy.

The views expressed in this article are entirely the author's own. **B**

Endnotes page 35

THE DUTIES AND FUNCTIONS OF COUNSEL ASSISTING

CHAD JACOBI, EDMUND BARTON CHAMBERS

The popular conception of Counsel Assisting is framed around the image of a cross-examiner asking – in the common perception combatively – questions to a reluctant witness. That follows from the further conception that major public inquiries are invariably conducted with many of the conventions and forms of a hearing in a court.

What is surprising about this is that the empowering legislation or instrument that establishes a public inquiry usually says nothing at all, or if it does very little, about the form that the inquiry must assume. Indeed, with few exceptions statutes which empower the creation of an inquiry do not make mention of Counsel Assisting, and even fewer helpfully define their duties and functions.

This absence of the express mention of Counsel Assisting does not mean that the duties and functions of Counsel Assisting are not derived from law – or are a product of mere convention. Instead, the duties and functions (which have important implications for how they are performed) are to be derived by implication from the empowering legislation or instrument that establishes the inquiry, and the principles of administrative law that govern the exercise of executive power.

The starting point is the vesting of executive power in a fact-finding authority which presides over an inquiry into a defined subject. This occurs either with the vesting of executive power in a standing body (such as a Coroner or a Corruption Commission) or a special purpose inquiry (such as a Royal Commissioner).

This vesting gives rise to a significant part of the role of Counsel Assisting. The conferral and exercise of this executive power require firstly, that the limits on the exercise of that power are observed (*ultra vires*) and secondly, that the power is exercised according to procedural fairness. It is a minimum duty of Counsel Assisting to ensure those limits are observed.

Beyond that minimum requirement lies an equally significant duty. That is to guide the proper and efficient discharge of the function to inquire which is commanded by the conferral of the power.

It is these matters which define the practical tasks Counsel Assisting which must – and must not – undertake. They also inform how that task should be undertaken to ensure public confidence in the process and the outcome.

ENSURING PROCEDURAL FAIRNESS

The participation of Counsel Assisting more readily ensures that the minimum limits of a conferral of executive power are observed. The reasons for this are both legal and practical. Separating the role of the authority from questioning the witnesses helps considerably both in the perception, if not also the actuality, of impartiality. Having Counsel Assisting perform those tasks should assist in resolving any ostensible bias issue because it allows, as far as possible, the fact-finding authority not to descend into the issues of contention (the type of problem that arose in the *Bundaberg Hospital Commission of Inquiry*).

Counsel Assisting's work should ensure that procedural fairness is observed and that those interested or affected have a full opportunity to consider, respond and participate. There are two aspects to the function of Counsel Assisting in this respect. The first is involvement and advice on the design of the process itself which should achieve this end without unnecessary complication. The second is in its administration which is assisted if the process is simple and easy to follow. This means Counsel Assisting must ensure that both issues of procedural fairness do not arise, and are resolved if they do.

As the inquiry calls for an investigation into a defined subject matter a further requirement is to ensure the inquiry remains within the scope of its terms of reference or its statutory limits. While few public inquiries for reasons of efficiency now proceed with a significant separation between decision-maker and Counsel Assisting as to both the direction of the

Counsel Assisting's work should ensure that procedural fairness is observed and that those interested or affected have a full opportunity to consider, respond and participate.

One of the public sessions conducted by the Nuclear Fuel Cycle Royal Commission

inquiry and the evidence to be considered, the greater the chosen separation, the heavier is the burden on Counsel Assisting with respect to these matters. The same is true if the authority is not a lawyer by training.

Failure to properly address these matters during the inquiry can greatly compromise and complicate later fact-finding during the report-writing process. It may prevent the inquiry making findings it can release on the evidence elicited. This can, and has, brought inquiry processes undone (this is the type of issue that arose in the *City of Burnside Inquiry* in South Australia and *Parliamentary Criminal Justice Committee Inquiry* in Queensland which became the subject of the litigation in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

DISCHARGING THE TASK TO INQUIRE AND ASSISTING THE INQUIRY

Not to act beyond power is no particular achievement. There are higher standards to aspire to which require fully discharging the command to inquire. The end goal is to identify a body of robust evidence which establishes the true conclusions to be reached, in contrast to any alternative or competing view. It is those facts which must found recommendations if they are to be made.

At the outset, there is a need to divide up the issue or subject matter of the inquiry into workable pieces. This is straightforward if the subject matter is an event which can be addressed chronologically but most major public inquiries are not that simple.

That is particularly so where the terms of reference of the inquiry are a vast sea. Where the inquiry is about a topic it may require its division into parts which are individually analysed (a topic by topic approach) or taking a cross-section such that there are sufficient examples from which general conclusions can be drawn (the case study approach).

In any case, there is a need for decision-making about what to do, and in what order. It is necessary to isolate what is essential evidence from what may be interesting, and to ensure that the essential evidence will be gathered within the fixed timeframe.

A structure for the process of gathering and organising the essential evidence must be formulated at the start, and constantly adjusted if it is found not to work. Whatever the inquiry, it is necessary to identify a sure factual foundation of propositions from which to work, and then to work outwards in accordance with the plan gathering the evidence that will address the questions asked. It is significant that the findings are authoritative and that as far as possible it is not open to later reach a different conclusion (this is the issue with the report of the Royal Commission into the Hindmarsh Island Bridge in South Australia which came to a different conclusion to the decision of the Federal Court in *Chapman v Luminus (No.5)* [2001] FCA 1106).

ASSISTING THE INQUIRY TO RUN EFFICIENTLY

Discharging the task to inquire requires guidance being given about how the inquiry is to be run efficiently. There is an initial and ongoing need to advise about the form the inquiry should take. This advice is guided by the subject matter of the inquiry, the form of the evidence gathered and from whom the evidence is to be taken.

An executive inquiry is not a court and the authority is not acting as a judicial officer. Thought should be given to what forms the inquiry should take and in particular what forms used in courts might be discarded without real loss – for example, whether lists can replace the tender of exhibits, or it is possible to dispense with the formal proof of expertise of an expert, or the formal proof of a witness statement. Counsel Assisting ought advise on the nature of hearings, such as whether a courtroom ought be used, and not a conference table (for example, the Nuclear Fuel Cycle Royal Commission), a closed room, or a public meeting, or even no hearings at all (see, for example, the *Children in State Care Commission of Inquiry*). Consideration should be given as to whether evidence which is not conveniently taken orally, should be

taken in writing without the time and cost of it being given in person.

In any hearings, Counsel Assisting must assist the inquiry to address probative material fairly and efficiently. As to evidence, unlike in a court, the operative criteria is not only relevance, but whether the evidence would assist the inquiry in its fact finding. If material would not assist it is the duty of Counsel Assisting to raise that concern. As to applications, it is for Counsel Assisting to ensure that they are scheduled and as far as possible confined to issues that are genuinely in dispute.

It is not Counsel Assisting's role to administer the inquiry. Matters of employment and financial control should be managed by someone with those skills. If that administrator can plan work schedules, and has the confidence and support of the team, this will assist the inquiry to address any inclination that the inquiry will take as long as it takes. The tendency of inquiries to grossly exceed their expected timeframes is much discussed. Every effort should be taken to ensure that does not occur in the interests of efficiency and in the interests of the findings and recommendations being relevant.

PROMOTING PUBLIC CONFIDENCE IN THE INQUIRY

An inquiry is established to find the truth about some matter of public controversy or importance. It must instill in the public confidence from both its process and its conclusions – irrespective of the particular result – that it is the best that could have been done. While it is inevitable that in time the report itself will become part of the controversy, the report's robustness in the face of political criticism will be informed by the process that produced it.

Instilling public confidence says a lot about how to be a Counsel Assisting. These are not matters of taste or variations in personal style.

Counsel Assisting must act to find the truth – at no stage ought they adopt a partisan view from one perceived side or the other. They should pursue relevant lines of inquiry that are genuinely open, and only so far as they need to be pursued and no further. They must engage with all the evidence, but work within the evidence and not overreach.

To ensure fairness of process Counsel Assisting must actively assist - by seeking out - everyone involved in the process and explaining how the process is to work, why it is to work that way and how their needs are to be addressed.

Finally, public confidence requires that the report be written so that it can be read and understood by an ordinary member of the public. The report ought be of a length that might reasonably be expected to be read. Just as an executive inquiry is not a court, a report is not a judgment. An inquiry's report is intended to have efficacy, stimulate change or to be decisive. A report cannot be said to have hit its target if only the most ardent enthusiast can learn what it has concluded and how it reached that result.

Chad Jacobi was Counsel Assisting the Nuclear Fuel Cycle Royal Commission (2016) and the Solicitor-Assisting the Kapunda Road Royal Commission (2005). **B**

MEMBERS ON THE MOVE

SAM BURFORD

ANITA FILLETI

RACHEL TEH

Lynch Meyer Lawyers is pleased to welcome specialist construction and engineering lawyer, **Sam Burford**, to the firm's partnership. Sam brings a wealth of knowledge in both commercial and domestic construction law and dispute resolution.

"Sam is a prominent construction lawyer and his appointment will continue to strengthen our position as a leading provider of legal services to South Australia's construction industry" says Chair of Partners, Michael Hutton.

Gilchrist Connell is pleased to announce the promotion of two of its lawyers from Associate to Senior Associate in its Adelaide office.

Anita Filleti and **Rachel Teh** have been appointed to the senior ranks in Gilchrist Connell Adelaide from January 1, 2017. Both Anita and Rachel were admitted in 2009 and have been with the firm since starting out.

They work across a broad range of matters from professional indemnity, casualty and CTP. Additionally, Anita has experience in employment practices liability claims.

Managing Principal Richard Wood said, "It's a great perk of my job to help support the careers of highly talented individuals like Anita and Rachel. Their promotions are fully deserved and I look forward to their continued achievements and success with us - congratulations."

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NT Royal Commission: Procedural difficulties with obtaining evidence from vulnerable children

RALPH BÖNIG, SPECIAL COUNSEL, FINLAYSONS

Following the broadcast on 25 July 2016 of the ABC's Four Corners programme "Australia's Shame", which centred on the treatment of juveniles in detention at the Don Dale Juvenile Detention Centre in Darwin, the Australian Government announced the establishment of a Royal Commission. Letters patent pursuant to the *Royal Commissions Act* 1902 were issued on 28 July 2016. The Northern Territory also commissioned an inquiry in identical terms pursuant to the *NT Inquiries Act*.

One of the early issues that the Commission faced was how to manage the procedural logistics of taking evidence from children who were in protection or detention and from vulnerable or underage witnesses. At the first directions hearing held by the Commission on 6 September 2016 Tony McAvoy SC, one of the two Counsel Assisting the Commission, identified this issue. He said: "It has been possible already to identify some special challenges that will be faced by this Inquiry. They include challenges that attend upon proceedings in which it is sought to hear the evidence of young people."

The procedural process adopted by the Commission has been one of evolution as the Commission embarked on its public hearings.

As a general rule Royal Commissions are not bound by rules of evidence. The *NT Inquiries Act* specifically codifies this (Section 6). In order to provide some structure around its proceedings and in particular the manner and form in which it might receive evidence, the Commission has published a number of practice guidelines.

The Commission's first practice guideline prescribed that "which witnesses are called and in what order, and what documents will be tendered to the Commission and when" will be determined by Counsel Assisting (paragraph 32). Any witness who was to be called would be called by Counsel Assisting (paragraph 33) and would ordinarily be examined first by Counsel Assisting. That witness would then be examined by their own legal representative. The guideline then established a regime for cross-examination of witnesses (Part H). This regime included directions that:

- Cross-examination will usually be limited to matters in dispute (paragraph 37);
- Before cross-examination is authorised "a signed statement of evidence advancing material to the contrary" needs to be provided to Counsel Assisting (paragraph 38);

General principles guiding the grant of leave to cross-examine which were:

> *"a. If there is a disputed issue of fact relevant to a matter which the Commission regards as material to any issue it must determine, cross-examination will ordinarily be allowed in relation to that issue.*
>
> *b. If a person gives evidence of an adverse matter and that evidence is not denied by another person, cross-examination will not be allowed on that comment.*
>
> *c. If the disputing evidence is a matter of comment, as distinct from raising a factual conflict, cross-examination will not be allowed on that comment.*
>
> *d. If a person gives evidence of a fact, and the contestant states that they have no recollection of the alleged fact, cross-examination will ordinarily not be allowed, unless there are surrounding circumstances casting doubt upon the veracity of the evidence.*
>
> *e. If there are grave allegations against a person which may be diminished or eliminated by an attack on the credit of the witness giving the evidence, cross-examination will be allowed."*

Commissioners Mick Gooda and Margaret White AO (seated) with Counsel Assisting Peter Callaghan SC and Tony McAvoy SC (on right). Photo: NT Royal Commission

Commissioners Margaret White AO and Mick Gooda tour the Don Dale facility in Darwin. Photo: NT News/Elise Derwin

At its first directions hearing Counsel Assisting also foreshadowed that a further guideline would be issued "which will deal with the way in which evidence will be given to the Commission by children and young persons". A guideline designed to deal with "arrangements that may be available to vulnerable witnesses while giving evidence before the Commission" was published on 14 September 2016.

Formal sittings of the Commission took place on 11-13 October 2016 and then recommenced on 5 December

2016. During the December sittings it was foreshadowed that evidence would be led from "child witness AD" and "vulnerable witness AE". On 8 December 2016 the Solicitor General for the Northern Territory sought to adjourn the balance of the hearings scheduled for December primarily citing concerns that the Government had as to its ability to be ready to deal adequately with the evidence of these witnesses. Some of the submissions made by the Solicitor General raised concerns as to the ability to comply with and the application of the practice guideline concerning cross-examination.

In refusing the application the Commission made the following observations:

- "it is not the purpose of this Commission to subject children to cross-examination" (transcript page 478, lines 10-12);
- "of considerable, if not overriding concern, is the vulnerability of these witnesses. And everyone present in this Commission would see that this is the case" (transcript page 478, lines 20-22);

The Commission ruled that to proceed to hear AD's evidence was not procedurally unfair to the Northern Territory because it would not be required (or permitted to cross-examine AD) and his evidence was to be received in a closed hearing and his statement would not be published and no issue as to reputational damage would therefore occur. Faced with this ruling the Solicitor General made further submissions as to the status of AD's evidence. The Solicitor General asked that the Commission rule that:

a. it will not, by virtue of the Northern Territory's failure to provide questions to Counsel Assisting as described in paragraph 2, consider the evidence of AD to be "unchallenged" and, on that basis alone, accept the accuracy of the allegations made by AD in his statement and oral evidence; and
b. it will not, in the absence of an indication to the Northern Territory of the findings it proposes to make in relation to the allegations made by AD and an opportunity to be heard, publish AD's statement or the transcript of his oral evidence, or otherwise vary the non-publication order.

The Commission agreed to and issued a ruling in these terms.

Further issues were raised before the Commission at the conclusion of the hearing on 8 December 2016 and on the resumption of the hearing on 9 December 2016 concerning access to the statements provided to the Commission by witnesses AD and AE and submissions were made as to who should be entitled to be present in the hearing room while these witnesses gave their evidence. This led to a series of general directions concerning the nature in which the evidence of vulnerable witnesses would be taken. The Commission directed that:

1. When a vulnerable witness is giving evidence, the evidence will be heard in closed court.
2. The effect of closing the court is to exclude all persons from the court except the Commissioners, Counsel Assisting, Royal Commission staff, transcriber and other technical support staff and the legal representatives of the witness.
3. If the legal representative of a witness chooses they may ask questions after the close of Counsel Assisting's examination.
4. A summary of the statement and the evidence of the witness will be published as soon as possible after the conclusion of the evidence."

One of the children central to the Four Corners programme is Dylan Voller. He is now over 18 years of age. He was scheduled to give evidence on 12 December 2016. This led to another series of exchanges between the Commission and the legal representatives of some of the parties given leave to appear before the Commission. The issue of cross-examination, how, when and by whom it was to be conducted, was again agitated. The Commission made a number of directions in relation to Mr Voller's evidence including the following:

1. The Royal Commission will not, by virtue of the Northern Territory's failure to provide questions to Counsel Assisting, consider the evidence of Dylan Voller to be unchallenged and, on that basis alone, accept the accuracy of the allegations made by Mr Voller in his statement and oral evidence.
2. In relation to allegations made in Mr Voller's oral evidence or witness statement, no information which may identify a current or former employee of the Northern Territory may be published, including that person's name, position title or a specific identifying location (**identifying information**)."

The hearings of the Commission adjourned on 14 December 2016 and are now scheduled to resume in March. The Commission has issued amended guidelines dealing with how evidence will be taken from "vulnerable witnesses" in the future. On 13 January 2017 an amended practice direction defined a "vulnerable witness" as:

a. a child or young person under 21 years of age,
b. a person, regardless of age, who is or was in a juvenile justice detention centre, correctional centre or other secure residential facility,
c. a person, regardless of age, who is or was the subject of child protection arrangements under the *Care and Protection of Children Act* (NT) or any antecedent law,
d. a person with cognitive disability or mental illness, and
e. any other person the Commission determines is a Vulnerable Witness on application in writing by the person or of the Commission's own volition." (paragraph 5).

The guideline then goes on to deal with the topic of cross-examination of vulnerable witnesses and provides:

- that vulnerable witnesses may only be cross-examined with leave.
- cross-examination of anyone under 18 appearing will be by Counsel Assisting and in other cases this will also ordinarily be the case.
- Cross-examination will only be permitted by prior application accompanied by a list of proposed questions.

The above evidentiary procedural matrix is illustrative of the difficulties faced when dealing with vulnerable (and child) witnesses and at the same time seeking to ensure procedural fairness. The latest guidelines are part of what has been an evolving process and will not necessarily put this issue to bed for this Commission. **B**

Deaths in Custody Royal Commission: 26 years on

CHRIS CHARLES, CHAIR, ABORIGINAL ISSUES COMMITTEE

It is 26 years since the release of the National Report of the Royal Commission into Aboriginal Deaths in Custody. The National Report extended to five volumes, with 99 additional individual reports covering the cause and circumstances of the individual whose death had been investigated. The Final Report of the National Report made 339 recommendations. These covered the broader societal issues and were recommendations to improve the socio-economic position of Aboriginal people in Australian society, covering issues such as improving Aboriginal people's access to education, housing, employment and health services and providing mechanisms to deal with racism and discrimination (e.g. through recommending a reconciliation process and other measures). The recommendations also attempted to deal with legislation which results in in the criminalisation of Aboriginal people (e.g. recommending the decriminalisation of minor offences such as offensive language charges, fine default and public intoxication). It also focussed on systemic issues, for example, recommending that the treatment of Aboriginal people within the criminal justice system be more humane and acknowledge cultural and language diversity through an enhanced standard of care; the general duty of care to prisoners being well established at common law.[1] The recommendations also emphasised the significance of the Aboriginal person's ethno-cultural needs and compliance with national and international human rights law standards.

The Royal Commission found that the rate of deaths in custody for Aboriginal people was not significantly higher than for non-Aboriginal people, but that Aboriginal people were massively overrepresented in the criminal justice system. On the broadest level, the Royal Commission intended to induce incremental change to the status Aboriginal people in Australian society. The impetus was clear. Resources and political will were fundamental to improving the socio-economic standing of Aboriginal people and if the changes worked synergistically, then the socio-economic standing of Aboriginal people would increase and Aboriginal people's overrepresentation in the criminal justice system would decline.

Protesters gather to rally against systemic violence against Aboriginal people in response to Wayne "Fella" Morrison's death following an incident at Adelaide's Yatala Labour Prison. Photo: Lynda Coe

The impetus behind recommendations for systemic changes was more urgent. Governments expended funding improving the standards of custody and ensuring that police and correctional officers were trained in techniques of resuscitation. In large regional police complexes, dedicated staff and purpose built cells replaced the multitude of small local police stations which had substandard and rudimentary custodial arrangements. This occurred in metropolitan Adelaide and across the State. Strategies were implemented to identify people who were "at risk" due to their physical or mental health status or pre-existing injuries, and screening processes became standard practice for people entering into police and prison custody. Police and Correctional Agencies implemented Aboriginal cultural awareness training for officers and sought to employ Aboriginal people as officers and in roles such as Police Aides, and Aboriginal Liaison Officers. These functions have become widely accepted, it seems almost unthinkable that the police or correctional services could operate without them.

What is the status of those recommendations? There are few authorities on the consequence of failure to comply with RCIADIC recommendations per se, however in South Australia the criminal case of Robinett[2] is authority for the proposition that failure to comply with RCIADIC recommendations on providing medical assistance to an intoxicated prisoner in distress gave rise to a discretion to exclude certain police evidence. At paragraph 67and 68 of the Judgement Bleby J said:

"So much is clear from a brief perusal of the *Report of the Royal Commission Into Aboriginal Deaths in Custody* (1991). Whilst the recommendations of the Royal Commission cannot be binding on this Court as prescribing essential standards of police conduct towards Aboriginal people, recommendations 122-167 of the *Report* provide a wide range of recommendations concerning desirable measures to be implemented in respect of the health and safety of persons in police custody. Whilst they are obviously not prescriptive, they are indicative of changing community standards and expectations of conduct to be exhibited by police custodians, in particular in respect of Aboriginal people. In my opinion, it was inappropriate in the present state of community understanding of and insight into the effect of neglect of possible medical needs and requirements

In 2007, correspondence to the Correctional Services Advisory Council and the the Aboriginal Legal Rights Movement documented at least 20 cases of preventable deaths by hanging in South Australian prisons between 1994 and 2004.

of persons in custody to ignore requests of the type that were made in this case, and in the circumstances in which they were made. I am reinforced in that view by the fact that an ordinary common law duty of care is owed by police to persons in their custody in such circumstances. Breach of such a duty, if it results in loss or damage, will render the authority liable in damages to the person injured."

The Royal Commission investigated some 13 deaths in South Australia, from deaths in remote police stations in the outback to appalling and tragic deaths in suburban police stations. There were deaths by hanging in police and prison cells where the families were highly suspicious of official explanations of the death of their loved ones, there were cases where neglect and lack of proper training had led to deaths which could have been prevented. Cases of overtly racist behaviour by police officers were uncovered. There were cases where preventable death could have been forestalled by prompt and timely medical treatment and correct diagnosis. It would be fair to say that in the investigation of individual deaths few if any stones were left unturned in the Royal Commission's determination to get to the truth of what occurred. That included a thorough investigation of the States coronial system and some 30 recommendations were made to improve it. Most of those recommendations have been implemented in South Australia, including 2003 amendments to the Coroner's Act which require, in the case of inquests into deaths in custody for government departments and ministers to report to the Coroner and the Parliament on the implementation or otherwise of coronial recommendations to prevent the recurrence of such deaths.[3] Practical improvements were also made by ensuring the complete independence of the Coroner, the appointment of permanent counsel assisting, and improvements in the standard of investigations and steps to ensure their independence. This was a concern particularly in cases of deaths in police custody, to ensure that police independent of the officers concerned carried out the investigation. This concern has not always been alleviated and in a 2007 coronial case the State Coroner made a recommendation that interstate police carry out investigations into deaths in police custody.[4] At the time of writing this recommendation has not been acted upon.

A further major cause of concern is that deaths in prison custody continue to occur because of the failure of successive governments to implement coronial recommendations to create safe prison cells. In 2007, correspondence to the Correctional Services Advisory Council and the the Aboriginal Legal Rights Movement documented at least 20 cases of preventable deaths by hanging in South Australian prisons between 1994 and 2004. Further research has disclosed a further 43 deaths, including five of Aboriginal people which have occurred in South Australian prisons up to the present. Many of these deaths were preventable as was pointed out by the State Coroner in the 2001 case of *Varcoe*,[5] where he recommended the adoption of the Victorian government safe cell design principles to be adopted in all cells in all South Australian prisons.

That this recommendation has not been carried out is more than unfortunate, it means that all prisoners are at risk and continue to be at risk in our already overcrowded prisons of dying from causes which are preventable. It is of some comfort that the new Minister for Correctional services. the Hon Mr Malinauskas, has officially repudiated

the former Deputy Premier's position of "racking packing and stacking" prisoners and it is to be hoped that the current Parliamentary Inquiry will provide much-needed impetus toward proper prison reform in the state.

But this leads us to the heart of the dilemma. As noted the hope and expectation of the Royal Commission was that synergistic and enthusiastic implementation of all of its recommendations would lead to a gradual but effective reduction in the rate of overrepresentation of aboriginal people in the criminal justice system. We all know that precisely the contrary is what occurred.

Aboriginal and Torres Strait Islander prisoners now represent 27% of the total full-time adult prison population in Australia, yet constitute 2% of the total Australian population aged 18 years and over. In South Australia in September 2015 the imprisonment rate for Aboriginal people was 2516 per 100,000 people, the third highest rate, in the Commonwealth. Aboriginal people constituted 22.15% of the total prison population in the state in September 2015. Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research and Adjunct Professor with the School of Social Science and Policy at the University of New South Wales, refers to a 102% increase in Aboriginal incarceration rates for 1988 to 2012 in South Australia.[6]

It is beyond the scope of this paper to examine all of the many theories as to why this increase has taken place.[7] What is noteworthy is that many of the reforms recommended by the Royal Commission have only been partially implemented. Examples include greater use of police cautions and other alternatives to arrest[8], decriminalisation of public drunkenness,[9] and the principle that imprisonment should be used as a sanction of last resort.[10] What is clear is that in South Australia the dramatic increase incarceration rates is affecting all classes of prisoners, not just Aboriginal persons. The South Australia Department for Correctional Services has been able to map increases in incarceration rates to the date of commencement of new laws. An example is the 2012 amendments to the Bail Act which provides for a presumption against bail for prescribed applicants.[11] What also seems clear now, and was always clear at the time of the Royal Commission for was that Aboriginal people always were and still are particularly vulnerable to arrest for public order offences, driving offences, and offences involving alcohol and drug abuse.

It is of particular concern that the Royal Commission recommendations numbered 105 to 108 regarding the proper funding, resourcing and functions of Aboriginal Legal Services are now being met by actual funding cuts, due to commence for the Aboriginal Legal Rights Movement in July 2017. That is occurring in the context of general cuts to the resources of legal aid.

It has been said that there are good Royal Commissions and bad Royal Commissions. It would be invidious to make comparisons but the Royal Commission Into Aboriginal Deaths In Custody was a good Royal Commission. It can hardly be said that the government of the day knew what the results would be before it called it. But the results have been enduring and beneficial. I am thinking particularly of the enhanced standard of care toward prisoners in prison in police custody, improved cultural awareness by Police and Correctional staff toward the particular needs and susceptibilities of Aboriginal persons, the gradual implementation of alternatives to imprisonment, Nunga courts, and section 9C sentencing conferences. Most significant is the strenuous effort that has been made by the judiciary of South Australia to implement recommendation 96 regarding cultural awareness training for the judiciary. This has been taken very seriously by the judiciary, culminating in the Chief Justice's Aboriginal Incarceration Rate Conference of 2016.[12]

This is hardly surprising. The Royal Commissioner was after all the late Elliott Johnston QC, a much revered South Australian Judge. It should also be remembered that many other prominent South Australian lawyers worked on the Commission. They included Geoff Eames QC and Ralph Bleechmore who acted as counsel assisting, Kathy Whimp, Greg Fisher SM and the late Digby Wilson who worked in the Royal Commission Adelaide office. Many prominent South Australian lawyers appeared before the Royal Commission including Wayne Chivell, now His Honour Judge Chivell, Claire O'Connor SC Andrew Collett and the late Anthony Parker, formerly of the New South Wales Public Defenders's office. It should also be remembered that many prominent Aboriginal people from South Australia worked on the Royal Commission, most particularly the late Ruby Hammond, who, with her staff, was responsible for their remarkable theatrical production which played at the Festival Theatre during the currency of the Royal Commission itself. **B**

Endnotes

1 Howard v Jarvis(1958) 98CLR 177. See also the Royal Commission Into Aboriginal Deaths In Custody and the duty of care owed to prisoners in South Australia. By Chris Charles.[2011] volume 15 number 1 Australian Indigenous Law Review page 110

2 *Robinett v Police* (2000) 116 A Crim R 492at paragraphs 67-68.

3 The Coroners Act 2003 (S A) and the partial implementation of RCIADIC: consequences for prison reform.(2008) Vol12 Australian Indigenous Law Review,page75 by Christopher Charles

4 Colin Craig Sansbury www.courts.gov.au.coroner/findings / 2007 / Colin Craig Sansbury

5 Alexander Varcoe www.courts.gov.au.coroner/findings / 2007 / AlexanderVarcoe and see footnote3 above.

6 Weatherburn, Arresting Incarceration, Pathways Out Of Indigenous Imprisonment Aboriginal Studies Press 2014 Page26.

7 Weatherburn op. cit. and Penal Culture And Hyper Incarceration, The Revival Of The Prison by Cunneen, Baldry, Brown, Schwartz & Steel Ashgate Publishing 2015.These two books present differing perspectives on the causes of the increased incarceration rate for Aboriginal people. .

8 Implemented the Young Offenders Act, however the rate of uptake by Aboriginal youths less than for non Aboriginal youths..

9 implemented successfully by the Public Intoxication Act 1984 however the implementation of that legislation has not been complete or in all respects satisfactory.www.courts.sa.gov.au coroner/findings/2012 sleeping rough inquests

10 Criminal Law Sentencing Act, s 11. Should also note government's intention to totally rewrite the SentencingAct and recent amendments which have placed more importance on alternatives to imprisonment, one of the very strong impulse behind the Royal Commission.

11 Symposium Calls The National Effort On Aboriginal Incarceration. Law Society bulletin April 2016, page 8 by Christopher Charles

12 'footnote 11 above .

Space law lands in Adelaide

ASSOC PROF MATTHEW STUBBS , ASSOCIATE DEAN (LEARNING AND TEACHING), ADELAIDE LAW SCHOOL

Space law is – literally and metaphorically – a new frontier, offering remarkable potential as a market for legal services as well as involving fascinating issues. And in 2017, Adelaide will be the world's hub for space law activities!

Human activity in space has come a long way since the Apollo 11 Moon landing in 1969. No longer the domain of a select few superpowers or the stuff of science fiction, with the advance of technology such as cubesats (satellites as small as 10x10x10cm) getting into space is within reach of even small and medium-sized enterprises. We don't often stop to think how ubiquitous space is in our daily lives for communication, navigation and information. Humankind is highly dependent on activities in space for navigation (GPS), the internet, weather forecasting, disaster management, agriculture, and security. So, the next time you grab your smartphone before you go out – to check the weather, get directions or maybe see if any last-minute changes of plans have come by text or email – don't forget that all this (and much more) relies on space.

The following is a list of major space law activities taking place in Adelaide this year, with some suggestions for how to get involved.

18–21 APRIL

MANFRED LACHS SPACE LAW MOOT COURT COMPETITION – ASIA-PACIFIC REGIONAL FINALS

Adelaide Law School will be hosting the Asia-Pacific Regional Finals of the Manfred Lachs Space Law Moot Court Competition, the world's most prestigious space moot. This year's problem is the *Case Concerning Lunar Facilities and Withdrawal from the Outer Space Treaty*, which involves a dispute between Perovsk and Titan, historically peaceful neighbors on Earth, who find themselves in an emotionally charged conflict on the Moon involving lunar facilities, liability for damage, and space mining. The grand final will be a public event, volunteers are being sought for judging, and sponsorship opportunities are available. For more information, see http://law.adelaide.edu.au/military-law-ethics/manfredlachs/

5–9 JUNE

STRATEGIC SPACE LAW AT ADELAIDE LAW SCHOOL

The University of Adelaide, in partnership with the McGill University Institute of Air and Space Law (Montreal, Canada), is offering a short postgraduate course on Strategic Space Law as part of its Winter School program. The unique course is designed to provide the knowledge and skills necessary to make a meaningful contribution to global space security, dialogue and policy development. More information is available from the 'Specialist Courses' tab at http://law.adelaide.edu.au/study/our-law-programs/

25–29 SEPTEMBER

68TH INTERNATIONAL AERONAUTICAL CONGRESS

The IAC is the world's largest annual gathering of space professionals. Its parent organisation is the International Astronautical Federation (IAF), based in Paris (http://www.iafastro.org). IAC's have been held every year since 1950: 2017 is only the second time it has been held in Australia (in 1998 the IAC was held in Melbourne). More than 3,000 space professionals, including astronauts, heads of space agencies, engineers, scientists, innovators, legal and policy specialists, interested parliamentarians and students are expected to attend the IAC. Of particular interest to lawyers will be the 60th International Institute of Space Law (IISL) Colloquium on the Law of Outer Space, details of which can be found at https://iafastro.directory/iac/browse/IAC-17/catalog-technical-programme

MILAMOS PLENARY

The first installment of space law in Adelaide this year has occurred in February, when 43 legal experts from around the world converged on the University of Adelaide Law School for the first workshop meeting of the *Manual on International Law Applicable to Military Uses of Outer Space* (MILAMOS) project (https://www.mcgill.ca/milamos/home). Over four days, world thought leaders in space and military law combined with national representatives from key space-going nations to commence work on drafting a new *Manual* that clarifies the law applicable to military activities involving outer space.

GET INVOLVED IN ADELAIDE'S SPACE LAW ACTIVITIES

There are a number of ways practitioners who are interested in learning more about space law and the many opportunities it will offer over coming years and decades can get involved.

- **Volunteer to serve as a judge** (for at least one day) of the Asia-Pacific Regional Finals in Adelaide on 18-19 April (email matthew.stubbs@adelaide.edu.au to express interest).
- **Sponsor a prize** at the Asia-Pacific Regional Finals in Adelaide (email matthew.stubbs@adelaide.edu.au to express interest).

Naming rights are available for sponsorship of the following prizes (e.g. The Your Firm Prize for the Best Oralist in the Asia-Pacific Final) at the Asia-Pacific Regional Finals in Adelaide in April:

  - Winner of the Asia-Pacific Regional Competition
  - Best Oralist in the Asia-Pacific Regional Grand Final
  - Best Oralist in the Asia-Pacific Regional Competition
  - Best Memorial in the Asia-Pacific Regional Competition
  - Spirit of Lachs.
- **Enrol in the award-winning** University of Adelaide (in conjunction with McGill University) **course in Strategic Space Law**, 5-9 June 2017 at Adelaide Law School: under the 'Specialist Courses' tab at http://law.adelaide.edu.au/study/our-law-programs/
- **Attend the IAC** in Adelaide, 25-29 September 2017 http://www.iac2017.org/

A Licence to Lease? The Common Law Status of an airbnb 'Stay'

DAVID KELLY, ASSOCIATE, LEVENTIS LAWYERS

Many readers will have heard of or used *airbnb*, the web-based platform by which "hosts" (persons looking to generate income by allowing others to occupy premises on a short term basis, called a "stay") are connected with "guests" (persons looking to find short term accommodation generally at a comparatively reduced cost) all on a relatively immediate and informal basis using pro forma, click-wrap style agreements.

Some members of the profession might thus consider that the scene is set for extensive disputation, and that this sector of the so-called sharing economy will be fertile ground for regulation.[1] However, apparently a more fundamental legal issue arises, namely, whether sole, temporary occupancy of entire premises allowed by a stay is a licence, as *airbnb* would have it,[2] or a lease.

That question presently remains unanswered in South Australia, however, was recently considered by the Supreme Court of Victoria in *Swan v Uecker* [2016] VSC 313 (*Swan*) which concerned precisely this issue. In essence, Croft J there held that the host granted the guest a lease and not a licence on the ground that in substance such a stay conveyed exclusive possession.[3]

Absent a basis to distinguish *Swan*, Croft J's views would thus appear to provide the best indication of the approach likely to be taken elsewhere. Accordingly, a brief summary of the decision together with some thoughts on its potential consequences for persons offering or accepting an *airbnb* stay and or conventional demise of premises are warranted, and are offered below.

DRAMATIS PERSONAE

The appellant in *Swan* owned a two-bedroom apartment that she leased to the respondents in the usual manner. That lease (the "Head Lease") did not permit the respondents to sublease the apartment without prior consent. Subsequently, however, the appellant discovered that the respondents had made it available for stay via *airbnb*, including an option to occupy the whole apartment in the absence of the respondents for a fixed price per night for between three and five nights.[4]

Unimpressed, the appellant made application to the Victorian Civil and Administrative Tribunal (VCAT) for orders for vacant possession pursuant to s 330 of the *Residential Tenancies Act 1997* (Vic)[5] on the basis that the respondents had breached the Head Lease. Although the respondents conceded that they had allowed other people to stay in the apartment, and that the appellant did not consent to that occurring, VCAT dismissed the application on the basis that such stays were licenses only, and, therefore, no breach of the Head Lease had occurred.[6] Unsurprisingly, the appellant appealed.

Critically, the *airbnb* agreement relevantly provided as follows:[7]

Guest access: You will have use of the entire apartment, its bathroom, kitchen, lounge room, and balcony.

Interaction with guests: [We] will be available by phone for any guidance [we] can give and [we] will not be far away if you need [us] to come with a key, etc.

House rules: Since this is [our] home and [we] [are] leaving to allow you to have it all to yourself, [we] simply ask that you observe the normal courtesies such as being considerate about noise for the neighbours' sake and being careful with [our] TV, stereo, and kitchen amenities. [Underlining added].

THE APPEAL

The appeal proceeded on grounds primarily including that there was no evidence to support VCAT's finding that the respondents were able to access the premises during the stays such that guests did not have exclusive possession so as to render the arrangement a lease.

LEGAL HOLDINGS

Croft J allowed the appeal on each ground and set aside the orders of VCAT,[8] holding that, in view of the classic authorities on point:[9]

- The method of characterisation of an *airbnb* stay as a lease or licence depends upon the proper construction of the agreement – looking to substance and not form – and having regard to relevant surrounding circumstances. [40]
- There is a broad spectrum of residential accommodation available ranging from the usual hotel room licensing arrangements through to long-term serviced apartment agreements, which, on any view, would be taken to be leases. [40]
- The surrounding circumstances and provisions of the *airbnb* agreement indicate that although the occupancy granted by the hosts to the guests was for a very short time, the nature of that occupancy was of the type expected of residential accommodation generally, namely, exclusive possession. [46]

To these ends, Croft J more particularly found:

- The manner of booking and of payment does not affect the character of the occupation granted under an *airbnb* agreement. [47]
- Nothing in the *airbnb* agreement indicated that the respondents had the ability to access the apartment during a stay. [53]
- The reference to a "licence" in an *airbnb* agreement is no more than a label, and is not decisive. [53]

More broadly, Croft J also held that:

- When determining whether a person has exclusive possession of premises, it is not relevant (or at least not decisive) that by agreement that person can be made to leave the premises if that person overstays the period that has been agreed for them to stay. At common law, a lessor has the ability to make an overstaying lessee leave, just as a licensor can evict an overstaying licensee. Hence, a person's ability to make an overstaying occupant leave does not tend in favour or against the finding of exclusive possession prior to that entitlement arising. [67]
- When determining whether a person has exclusive possession of premises, it is not relevant whether that premises is a person's principal place of residence. A person may grant a lease in respect of their principal place of residence (for example, when going away for an overseas holiday) in the same way that a licence might be granted in respect of that premises. Hence, retention by hosts of premises as their principal place of residence during an *airbnb* stay does not tend in favour or against a finding of exclusive possession. It is entirely neutral on the point and consequently not a matter of logical relevance. [72], [73]

DOES ANY OF THIS REALLY MATTER?

The short answer is yes. The finding in *Swan* that the *airbnb* stay was a lease and not a licence meant that the respondents were in breach of the Head Lease, and therefore liable to an order for vacant possession. Leaving aside the good graces of others, there is no real reason to suppose that aggrieved head lessors in later cases will be more accommodating – especially where hosts may ultimately derive more income from stays than head lessors might derive from the rent. In view of that outcome, hosts who are lessees themselves may be well advised to clarify whether permission is needed before they permit guests to occupy entire premises without express authority from head lessors.

Additionally, given the cost and likely undesirability of legal action against an otherwise good head lessee, head lessors may also be well advised to try to anticipate and to deal with the possibility of *airbnb* stays and similar arrangements at the time of entering into a lease, including by negotiating a higher rent, and or agreed percentage of takings.

There is also the consequent possibility that rights and remedies provided for by legislation may come into play. For example, it may be that the law will impose upon a host the usual lessor's covenants, and, likewise, the usual lessee's covenants upon a guest, with all attendant protections and or liabilities, notwithstanding the express terms of the *airbnb* agreement thought to govern the stay in issue.

Less obviously, the distinction between a lease and licence may also affect the ability of a "guest" to bring an action and seek relief against those interfering with their quiet enjoyment of the land in tort for nuisance.[10] This is important because legal standing to bring such an action is afforded generally to lessees, but the position has been doubted with respect to licensees.[11]

Taxation obligations may also require attention, in particular, whether income generated from a stay is personal or business-related, especially if the dwelling offered to the guest is not occupied by the host.

There may also be ramifications for insurance in the event of damage, especially in relation to occupier's liability,[12] not further considered here.

CONCLUSIONS

If followed in other jurisdictions, the holding in *Swan* is likely to have implications for parties to *airbnb* agreements, or persons concerned or potentially concerned by those legal relationships, including (head) lessors and (head) lessees. Without legislation and or specific judicial consideration of the issue that gives rise to a different treatment of the matter, would-be hosts and guests may be wise to invest in legal advice before entering into such agreements.

Or stay at a hotel.[13] **B**

Endnotes

1 But see announcement dated 7 June 2016 indicating that an *airbnb* "stay" would not amount to 'change in use' to land under the *Development Act 1993* (SA): www.premier.sa.gov.au/index.php/john-rau-news-releases/664-airbnb-boost-to-sa-tourism.

2 www.airbnb.com.au/terms, [13]: *'Overstaying without the "host's" consent'.*

3 *Swan*, [75]. *Swan* also considered agreements for temporary occupancy of less than entire premises (e.g., a portion of a dwelling, or a dwelling at which a "host" remains present with a "guest"). It is tolerably clear that these kinds of "stays" are not leases because exclusive possession is not granted.

4 *Swan*, [19].

5 An analogous power exists in s 93, *Residential Tenancies Act 1995* (SA).

6 *Swan*, [27].

7 *Swan*, [20].

8 *Swan*, [81].

9 *Swan*, [30]-[48].

10 See e.g., *Hargrave v Goldman* (1963) 110 CLR 40, 60 (Windeyer J); *Hunter v Canary Wharf Ltd* [1997] AC 655; *Stockwell v Victoria* [2001] VSC 497, [241] (Gillard J). Relevantly, loss of a single night's sleep has been held to be actionable in nuisance: *Munro v Southern Dairies Ltd* [1955] VLR 332, 334 (Scholl J).

11 See e.g., *Oldham v Lawson (No 1)* [1976] VR 654, 657 (Harris J).

12 See ss 19-22, *Civil Liability Act 1936* (SA).

13 Namely, 'an establishment held out by a hotelkeeper as providing, without special contract, sleeping accommodation, and to some extent provisions and refreshment to a person who appears able and willing to pay a reasonable sum for the services and facilities offered and is in a fit state to be received': see e.g., *Smith v Scott* (1832) 1 LJ CP 143; *Gibson v King* (1842) 12 LJ Ex 9; *Railway Assessment Authority v Great Western Railway* [1948] LJR 244.

How royal commissions have shaped SA: a history

LAWRENCE BEN, UNION OFFICIAL, SHOP, DISTRIBUTIVE & ALLIED EMPLOYEES' ASSOCIATION

There have been more than 180 royal commissions in South Australian history. Many have been at the centre of the State's economic and social development.

Royal commissions have been regarded as "the highest court in the land."[1] However, it is important to recognise that they are simply one form of public inquiry. Other forms of inquiry, such as parliamentary select committees, have been held in South Australia since 1851.

The first South Australian royal commission was appointed in 1859 to investigate the shipwreck of passenger vessel, *SS Admella*. Resulting in 83 fatalities, it was regarded as the "most disastrous ship wreck to occur on the Australian coast."[2]

The President of the Legislative Council, James Hurtle Fisher, an ancestor of South Australia's first Federal Court judge Bob Fisher, lost two sons in the accident. Parliament was adjourned for a number of days out of respect and a royal commission was appointed in response to the tragedy.

Governor Richard MacDonnell provided four commissioners with "full power and authority diligently to examine into the circumstances of the late lamentable wreck..."[3]

After examining 20 witnesses over 22 days, the ship's Captain was exonerated from any wrongdoing. The commission's Chairman, Captain William Douglas, left the chair during one sitting to be examined as a witness.

Controversy struck the second royal commission when former Premier, Richard Hanson, was as appointed as one of the five commissioners.

The commission, tasked with investigating real property law, was given a budget of £500, with a limit of £300 reserved for remunerating commissioners. As was common practice, a number of parliamentarians presided as commissioners.

However, Hanson was the only one who accepted fees for his services. In a lively parliamentary debate, William Townsend argued that Hanson had disqualified himself from holding his seat in Parliament by accepting an office of profit from the Crown.

Hanson was able to successfully deflect the criticism and he continued as a commissioner. Six months later he was appointed as the State's second Chief Justice.

Throughout the 19th century South Australia experienced a period of rapid economic development. From 1859 to 1889 the population increased from 122,000 to 318,308. In response to the economic growth, Parliament appointed numerous royal commissions to investigate the growing need for new public services and amenities.[4]

The construction of railways was a regular topic for these inquiries. By 1888 over 300 miles of railway had been opened and following a royal commission in 1887, sights had been set on a transcontinental railway to Port Darwin.

It was said that South Australians at this time were "a people of railway builders" and the number of royal commissions appointed to investigate the subject certainly reflected this.[5] A permanent parliamentary standing committee on railways was eventually established in 1913 to deal with the constant flow of work.

In 1879, Parliament took the unusual step of holding a ballot to determine the appointment of Commissioners.[6] By 1926, the year that saw the appointment of 14 royal commissions, parliamentary representatives were being paid £1 a day for their work as commissioners.

The appointment of parliamentary representatives became less common as governments sought greater levels of expertise and independence. The last parliamentary representatives were appointed in 1936.

Following a number of controversial witness testimonies, the powers of South Australian royal commissions were legislated.

The *Witnesses on Commissions Oaths Act* was introduced in 1873 to provide powers that could compel witnesses to appear before a commission and to give evidence under oath. Refusal to take the oath would result in a £10 penalty – the equivalent of approximately a quarter of the average annual working salary.

Former Attorneys-General Randolf Stow and James Boucaut strongly opposed the Bill and argued that government would use the powers to "summon their political opponents before it to give sworn evidence."[7]

By the turn of the 20th century the efficacy and cost of holding a royal commission received greater scrutiny.

From 1859 to 1901 there were 71 royal commissions appointed in South Australia. In the decade commencing in 1890, 31 commissions were appointed at a cost of £19,875. This was not an insignificant amount of money in the 1890s, when the South Australian economy endured a severe depression and expenditure on public works almost halved.

Future Attorney-General, William Denny, argued that "the majority of [royal commissions] had little or no practical result to show for all their labours." Others said that they had become "very expensive luxuries" for which "the state had not got value for money spent."[8]

In 1924, the *Register* published an accusation that a certain royal commission in the 1890s (with paid commissioners) "used to meet in the evening, make a pretence of doing something for half an hour or so – and sit down to whist."[9]

The newspapers' editorial pages provide a comprehensive record of prolonged public criticism. Many sceptics shared the same sentiments that royal commissions simply

Royal commissions have been crucial to determining the fate of governments. In 1991, the collapse of the State Bank of South Australia instigated one of the State's biggest financial crises and it ultimately resulted in the demise of the Bannon Government.

"bring headlines into newspapers, fees to many Adelaide solicitors, and grief to the less elated taxpayer."[10]

Organised labour began to emerge from the economic upheaval of the 19th century. In 1876, South Australia became the first territory outside of Britain to legalise trade unions.

The second female commissioner (the first was Catherine Helen Spence in 1894), Elizabeth Hanretty, was appointed to the 1911 Royal Commission on the Shortage of Labor in the Clothing and Boot Trades.

Hanretty, who went on to become the South Australian Labor Party's Assistant Secretary, was appointed to the commission as one of the three Trades and Labor Council representatives. Aged just 30, she served as a royal commissioner seven years before the first woman stood for Parliament in South Australia and 48 years before the first woman was elected to the South Australian Parliament.

In 1902 the Commonwealth introduced the *Royal Commissions Act*, providing powers that compel witnesses to give evidence or produce documents at a royal commission.

These powers were famously challenged in *Colonial Sugar Refining Co Ltd v Attorney-General (Cth),*[11] the only case that the High Court issued a certificate under section 74 of the Constitution to permit an appeal to the Privy Council on a constitutional question.

Josiah Symon KC, the first leader of the opposition in the Senate, was an outspoken critic of the *Commonwealth Act*. In 1917, he appeared as *amicus curiae* before the South Australian Royal Commission on Government Land Purchases. The inquiry was brought to a standstill as he questioned the legitimacy of the Commission to administer oaths and enforce penalties.

Acting almost single-handedly in response to Symon, the South Australian government passed the *Royal Commissions Act* in 1917, which was largely modelled on the *Commonwealth Act*.[12]

During the 20th century new technology and social attitudes brought new issues to the forefront.

In 1928, a Royal Commission on Traffic Control reported on "the advent of the swift and mobile motor vehicle [that had] revolutionised existing ideas of traffic control."[13]

In 1932, the Royal Commission on Betting reported that "there is nothing immoral or sinful in making a bet that is within one's means."[14] Six years earlier, a separate royal commission had found that police bribery was rife amongst South Australian bookmakers.

Matters of state development continued to be topics of investigation. None was more prominent than the viability of electricity supply and the 1945 Royal Commission on the Adelaide Electric Supply Company (AESC). Premier Thomas Playford confronted his own side of politics to advocate they adopt the commission's findings and nationalise AESC. He said:

"It is not a pleasant task for me to have to come before Parliament and advocate the acquisition of a company which has done so much to develop the State… In some cases members have to give way on their likes or prejudices and accept things as they really find them."[15]

The Leader of the Opposition, Robert Richards, described the political climate as "somewhat electrified." He offered bipartisan support to Playford's proposal, stating that "it has been invariably held to be improper for Governments to ignore the findings or recommendations of a royal commission."[16] The Bill was guaranteed passage through Parliament, with the only dissenters (six in total) on Playford's side of the House.

Former Surveyor General G.W. Goyder, who chaired the railways construction Royal Commission in 1875.

Throughout his record 26 years as Premier, Playford only appointed four royal commissions. Comparatively, in the first 26 years of the 20th century there were a total of 58 royal commissions.

Perhaps the most controversial and renowned South Australian royal commission was the 1958 inquiry into the conviction of Rupert Max Stuart, an Aboriginal man found guilty of murdering a nine-year-old girl. Stuart was initially sentenced to death and a long appeal process followed.

To some, the mishandling of the case was representative of the Playford Government's growing "insensitivity to currents of public opinion."[17] Petitions were received from interstate and 15,000 copies of a pamphlet *Why not hang Rupert Stuart?* were distributed.

In response to public pressure Playford appointed a royal commission. Controversy arose when Chief Justice Mellis Napier (a presiding judge in Stuart's appeal) and Justice Geoffrey Reed (the trial judge) were

appointed commissioners. The case made international headlines when former British Prime Minister, Clement Attlee, mused, "I should have thought you would need fresh minds on it."[18]

The Stuart case also provided a 32-year-old backbencher and future Premier, Don Dunstan, with a platform to advocate against capital punishment. His strong performances in Parliament were instrumental in his rise to the front bench.

In 1978, Dunstan, as Premier, dismissed the Commissioner of Police, Harold Salisbury, for allegedly misleading the Government about the existence of files accumulated by the police special branch.

Following an initial inquiry and growing public pressure, Dunstan appointed a royal commission, chaired by Justice Roma Mitchell.

The commission sat for 19 days and heard 23 witnesses, including three Premiers, six Cabinet Ministers and top-ranking police officials. It was one of the shortest royal commissions in decades but it had powerful implications for the Dunstan Government.

Eight-thousand people attended a public rally calling for a "fair go" for Salisbury. Similar to the changing attitudes encountered by Playford 20 years earlier, "the protests appeared to become a rallying point for those who had been uneasy with Dunstan's policies."[19] The Salisbury Royal Commission would directly contribute to Dunstan's downfall as Premier.

Royal commissions have been crucial to determining the fate of governments. In 1991, the collapse of the State Bank of South Australia instigated one of the State's biggest financial crises and it ultimately resulted in the demise of the Bannon Government. A royal commission was called to investigate.

Following 31 months of hearings, three reports of the commission's findings were published, the first two delivered by Samuel Jacobs QC and the third by John Mansfield QC. The cost of the State Bank inquiries totalled $34.81 million and the *Advertiser* editorialised:

> *"A phalanx of lawyers has been enriched, not much light has been shed… The Royal Commission ends with a whimper. In a sense that is appropriate as it was the wrong vehicle for the inquiry."*[20]

The editorial reflects a frustration at the inability of the royal commission to deliver "political justice." Whilst this is not their purpose, the royal commission certainly delivered a "passport to an electoral landslide", giving the Liberal Party the largest majority Government in South Australian history.[21]

Royal commissions have been at the centre of South Australia's major crises, controversies and policy debates. The inquiries themselves have not escaped public criticism. They have evolved such that their composition is less political; however, they have not ceased to investigate matters central to the State's economic, social and political development. **B**

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Reboot your mental hard drive

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REBOOT YOUR MENTAL HARD DRIVE

You know that little circle that you get when your computer's not working properly? It slows down and it can't perform to its optimum?

It's exactly the same for our mental capacity as well. Just your computer folders get full and you've got outdated software on your computers, we get outdated mindsets as well and obsolete information that takes up mental storage space.

When our brains are over-taxed and cluttered we become:

- Anxious
- Unclear
- Torn between old ideas and new ones
- Tired mentally and physically
- Slow to respond

Think about your own mental hard drive being like a computer drive. We need to reboot every so often.

When we regularly take time out to re-boot our mental hard drive we pave the way for:

- More creativity
- Space to think and process challenges and solutions
- Less stress and anxiety
- The ability to assess with a fresh perspective
- Have updated mindset and view points

PAUSE AND REBOOT REGULARLY

Don't just wait for the end of the year. I like to sit down each week and take a little nano-break to really cleanse from the week. To think about the ideas, the experiences, the intellectual data and things that I need to really write down and keep, and what I can just let go of.

You need to "turn your brain off" in order to keep restarting it in its best capacity, which means de-cluttering from old mindsets. Stop having stories about things, people, or places that just aren't relevant anymore. They're taking up valuable space that'd allow you to be more creative, make better commercial and personal decisions, as well as have a healthy mind, a healthy body, a healthy spirit.

VISUALISE A VIRTUAL CLEAR OUT

Regularly make time to optimise your mental and emotional brain space.

- Declutter – wind down before you start up
- Refocus – what is truly important now
- Update your "software" – disconnect to reconnect. Don't just wander around on "sleep mode".

What folders do you really need to keep in your brain?

What files, what ideas, what stories, which templates, what software's are really going to help you moving forward? Let go of all the things that are outdated. All the ideas, the bits of information that you just don't need anymore, and follow your intuition more than the stories in your head.

The way I do this is by creating some quiet, no devices and no music and mentally tap into my thoughts, ideas, concerns and old content I just don't need. Then I visualise deleting them. It's a powerful tool. The best place for me is by the ocean or in nature. I also can create mini areas of space and time out even when travelling. Find your own mojo for this – as long as you are uninterrupted. I also like to create a space at home as well.

MAKE THE REBOOT A DISCIPLINE

Like all things that work well they need to be done consistently. Practise the art of planning, of pausing and of being in charge of what information and ideas/mindsets you choose to store in your own mind. This is a very valuable asset of yours – so be selective.

Our capacity for learning and growth is quite unbelievable. We just need to allow the space and time to pursue knowledge, insights and hold on to experiences that truly allow us to be our personal best.

Costs recovery proceedings by lawyers

GREG MAY, LEGAL PROFESSION CONDUCT COMMISSIONER

Many lawyers issue recovery proceedings in the Magistrates Court against their clients in order to recover their fees. In many cases the client will defend the proceedings, often on the basis that they have been "overcharged", and usually also on the basis that their lawyer did not provide an adequate service (for whatever reason).

The service of the proceedings will often be the trigger for the client to complain to me about overcharging. Sometimes, the client will have already complained to me before the proceedings are issued – indeed, the complaint may be the trigger for the lawyer to issue the proceedings. The complaint will usually mirror the client's defence to the proceedings.

When all of that happens, there is clearly an overlap between my role in relation to the complaint and the Magistrates Court's role in relation to the recovery proceedings.

A Magistrate no longer has any power to refer these type of proceedings to the Supreme Court – so, quite simply, once proceedings are commenced in the Magistrates Court, that Court has to deal with the proceedings one way or another. Similarly, once an overcharging complaint is made to me, I have to deal with it one way or another.

What then can lawyers and firms expect when they issue recovery proceedings in the Magistrates Court and the client also complains (or has already complained) to me about overcharging? In discussions I have had with the Chief Magistrate, we have come to a "common understanding" as to how we will usually deal with the potential overlap between us.

THE COMMISSIONER'S POWERS

My powers in relation to overcharging complaints are set out in section 77N of the Legal Practitioners Act (Act). In very general terms:

- when I receive an overcharging complaint, I first consider whether it can be resolved through conciliation conducted by my office;
- if conciliation is either inappropriate or unsuccessful, it may be appropriate that I then have a costs assessment undertaken by a suitably qualified practitioner;
- if the amount I determine to be appropriate for the work done is less than the amount that the practitioner has charged, then I can make a (non-binding) recommendation that the bill be reduced (or, if already paid, that there be a refund);
- if my recommendation isn't accepted (by either or both the practitioner and the complainant), then:
  - if the amount in dispute is more than $10,000, I am unlikely to be able to do much else (although I could take adjudication proceedings in the Supreme Court under clause 42 of Schedule 3 of the Act); or
  - if the amount in dispute is $10,000 or less, I can make a binding determination as to whether or not there has been overcharging and, if so, the amount that has been overcharged;
- a binding determination can only be set aside by the relevant bill being adjudicated in the Supreme Court.

Because of the expense involved in obtaining a costs assessment, I will usually only do so when the amount in dispute is $10,000 or less (such that I can make a binding determination). And, even where the amount in dispute is $10,000 or less but the overall costs exceed $10,000, I will often not obtain a costs assessment because the whole of the fees on the matter need to be assessed, which can be a significant exercise. I need to weigh up the cost to my office of having that assessment undertaken as against the use to which I will be able to put it.

Under section 77C(1)(e) of the Act, I can close an overcharging complaint without further consideration of its merits if the bill complained of is the subject of civil proceedings between the complainant and the practitioner.

I have no power to make decisions in relation to the issues which the Magistrates Court can determine (which are described below). So, I have to consider any overcharging complaint that comes before me on the basis of the retainer agreement (if there is one) as it is presented. While I can proceed to assess an overcharging complaint on the basis that I consider that the Supreme Court would set it aside under clause 30 of Schedule 3 of the Act, I can't actually set it aside. Nor can I make any binding decision in relation to contractual issues, whether there has been negligence etc.

MAGISTRATES COURT'S POSITION

While the Magistrates Court has jurisdiction to determine issues of liability in relation to a lawyer's and firm's fees, it has no jurisdiction to adjudicate the question of costs. Judge Lunn said this in *Cavallaro v FNE Lawyers* [2012] SASC 189:

> "*By virtue of the relevant legislation, recovery of lawyers' costs from clients can require separate proceedings in two different courts. It is for the Magistrates Court to determine the retainer and the contractual liability of the client to the lawyer and it is for this Court to determine the proper quantum of the costs which are payable.*"

That is, the Magistrates Court determines:

- whether or not there is a retainer between the parties; and
- any other contractual issues, such as:
  - whether the practitioner is seeking to recover from the correct party; and
  - whether (and if so when) the retainer was terminated.

But the Magistrates Court cannot determine whether a practitioner's retainer agreement should be set aside, or the

proper amount that the client should pay. Both of these things are for the Supreme Court to decide (as per Judge Lunn above, and in particular clause 30 and Part 7 of Schedule 3 of the Act). As it will be relevant to any decision about the proper amount that the client should pay, it is also for the Supreme Court to decide:

- whether the practitioner has been negligent, and if so the impact of that negligence on the fees (on the basis of *Cavallaro*); and
- whether the practitioner has a claim for fees based on quantum meruit (see clause 21(c) of Schedule 3 of the Act).

COMMON UNDERSTANDING

I will use the following terms in describing my common understanding with the Chief Magistrate as to how we will usually deal with the potential overlap between the Magistrates Court and my office:

Small Recovery Proceedings means recovery proceedings in the Magistrates Court where:

- the amount in dispute is $10,000 or less;
- the relevant bill is not part of a much larger matter (ie the expense associated with a costs assessment would not be prohibitive);

Large Recovery Proceedings means recovery proceedings in the Magistrates Court where the amount in dispute:

- is more than $10,000; or
- is $10,000 or less but the relevant bill is part of a much larger matter (ie the expense associated with a costs assessment would probably be prohibitive).

In relation to Small Recovery Proceedings:

1. if these proceedings are on foot, I will suspend my investigation until a Magistrate has dealt with the matter;
2. the Magistrate will then make a decision in relation to any of the matters about which he or she has jurisdiction (as above);
3. the Magistrate will then adjourn the proceedings for a period not exceeding 6 months (with liberty to apply), and suggest to the parties that, in order to determine quantum, they can do one of the following 3 things:
   a. they could reach agreement as to quantum between themselves;
   b. one of them could commence adjudication proceedings in the Supreme Court; or
   c. they could ask my office to again be involved;
4. if either party asks my office to again be involved:
   a. I will most likely start by attempting to achieve a conciliated outcome;
   b. if conciliation is either inappropriate or unsuccessful, then I will consider whether or not I can make a binding determination;
   c. we will so advise the Magistrates Court if:
      i. either a conciliated outcome is achieved or I make a binding determination; or
      ii. a conciliated outcome is not achieved and I decide it isn't appropriate for me to make a binding determination.

In relation to Large Recovery Proceedings:

1. if these proceedings are on foot, then I will most likely simply close the complaint (at least that part of it that relates to overcharging) under section 77C(1)(e);
2. I will advise the Court of the overcharging complaint and that I have closed it, simply so that the relevant Magistrate is aware that I have done so;
3. the Magistrate will then make a decision in relation to any of the matters about which he or she has jurisdiction (as set out above);
4. having made that decision, the Magistrate will then adjourn the proceedings for a period not exceeding 6 months (with liberty to apply), and suggest to the parties that, in relation to quantum, they can do one of the following 2 things:
   a. they could reach agreement as to quantum between themselves; or
   b. one of them could commence adjudication proceedings in the Supreme Court.

Therefore, in any costs recovery proceedings, ultimately the quantum of the costs will be determined:

- by the parties reaching agreement as to quantum between themselves – either on their own or (in the case of Small Recovery Proceedings) with the assistance of conciliation through my office;
- by the Supreme Court, as a result of adjudication proceedings before it; or
- (in the case of Small Recovery Proceedings) by me making a binding determination.

Once the question of quantum has been finalised, the lawyer can simply discontinue the proceedings in the Magistrates Court. **B**

By virtue of the relevant legislation, recovery of lawyers' costs from clients can require separate proceedings in two different courts. It is for the Magistrates Court to determine the retainer and the contractual liability of the client to the lawyer and it is for this Court to determine the proper quantum of the costs which are payable.

Lawyer of many talents reflects on a life well travelled

After spending her early years assisting European migrants to resettle in Australia, Jo Mercer made a sea change. She went back to university to study law, eventually becoming one of the South Australian profession's go-to people for specialist advice on costings.

Studying law was never high on Jo Mercer's list of preferred careers when she graduated from the Brigidine convent school in Randwick, NSW. Having studied French and Latin, she instead chose to undertake an Arts degree, majoring in Italian and Education at Sydney University.

Her language skills enabled her to secure her first job as a personnel officer at a nearby cotton mill, where she found herself helping migrants who were entering the workforce and also getting involved with social justice and industrial issues.

Her compassion for migrants intensified when she was offered a scholarship by the Italian Department at the university and spent time living in Rome, Italy.

"It was at that stage that I became more and more interested in migration, and migration from Italy to Australia. And that's where I could see a connection between personnel issues and the language," she explained.

With Italy behind her, Jo took a job with the Immigration Department and began escorting migrants from Europe, resulting in many trips around the world.

"I would get on the ship in Australia and have a great time going north with all the Australians going north to holiday. On the way back I would organise language training for the migrants, information about Australia, help them with the entry into Australia, sometimes escort groups to the Riverland, for example. So I was involved in the introduction of the migrants to Australia."

An overseas posting to Greece followed and when she eventually settled back in Australia she began working for the Committee on Overseas Professional Qualification, which was tasked with the recognition of professional qualifications.

"The late Sam Jacobs was on the committee at that time and so was the Chancellor of La Trobe – it was a very interesting group. I was given certain professions to look at, and they were medicine, law, dentistry.

"I found I needed to understand statutory interpretation to be able to work out who should be registered, and what the conditions were in order to try and get them changed to make it more feasible for overseas migrants to be recognised… so that's when I started to study law at ANU. That's where the interest in law came in."

In 1970, at age 36, she graduated and moved to Adelaide with her husband David, who had been lured from Queensland to become Chairman of the Public Service Board.

After undertaking Articles with Riley Ahern and Kerin, Jo was employed by the firm and again became involved with migrants, particularly relating to industrial matters.

"I loved the law. I loved studying it. I loved being a part of it," she said.

After several years doing predominantly chamber work for Riley's, she fell in love with another aspect of the legal profession – costings.

"I remember one very complex Estate matter that went on and on through to the High Court. I went as a junior – I didn't argue, but thank goodness the senior didn't collapse. I did the costing on it through the three levels. And the firm sent me off to Bob Lunn, who at the time was in

Jo Mercer

Chambers – this is before he had gone onto the Bench – to have some special lessons with him on good costing, and I just gradually got interested in costing, and found it was the sort of work I could do from home.

"The more I got into it, the more interested I got. And the more I realised how important it is for the profession. First, for the solicitors themselves, because it's the basis of their business in one sense, but from the client point of view my real concern were party-party costs, because the "loser pays" principle only works if those party-party costs are properly detailed and assessed.

"That's how things got really much harder with proliferation of time costing. And that's what I've been sad about, and sort of trying to counter for all these years.

"I still think the majority of the profession once they get involved in a matter, they do it with their whole hearts, get into it and are not counting the dollars as they go.

"But there is pressure now, and it's becoming stronger on the younger members of the profession, that at the end

of the day you have a billing slip record that fits into the expectations of the firm. And that's sad, but still it's reality."

With her interest and adeptness in this niche field it seemed a logical step to join the Law Society's Costs Committee, where she served for many years, several as chair.

Even in her twilight years, she remains passionate about certain issues, such as getting rid of the short-form bill. This bill is the first claim that the solicitor makes on behalf of the client, who in most cases has won a matter, to get their costs back from the other side.

"It has become so complex it is frightening," Jo said. "The whole exercise of getting your costs back from the other side is ridiculously complicated and expensive, and at the end the clients are losing out because matters are settling to the disadvantage of clients, quite often, because they can't risk the cost of going on."

> "I still think the majority of the profession once they get involved in a matter, they do it with their whole hearts, get into it and are not counting the dollars as they go."

Pleasingly, the profession has had some joy in this area when last year the Society's Costs Committee convinced the Supreme and District Courts to abolish the short-form bill and replace it with an improved format on which costs claims are based.

"Going back to a more abbreviated form of the old system… we think it will lead to much more settlement, and less unnecessary argument.

Despite seeing some solicitors abuse the costings system, Jo has no regrets about changing careers.

"I have great respect for the profession and I think that most of the people in it are really providing a service to the community.

"I think there are some… who just regard it as a business and that upsets me because I think, like medicine, the law is a community service, it's a service profession.

"You should be entitled to make your living out of it, but I think it's basically a vocation."

Original interview conducted by Lindy McNamara. **B**

Young lawyers on why they specialise

Evelyn Johns (Rossi Legal), Christopher Woodard (Richards Commercial Lawyers), and Danielle Macolino (Commercial & Legal) talk to young lawyers who have specialised early on in their careers.

ADRIAN CARTLAND, CARTLAND LAW

When did you decide to specialise?

From before I started University I knew that I wanted to work in a business oriented area of law. My other degree was Economics, which is not particularly practical, but is instead a degree done out of interest. I was therefore always headed towards a commercial field. I selected electives at University accordingly. I enjoyed the electives that I selected, and in particular where I could use lateral thinking to get around laws and regulations to achieve a particular objective. In my final year I did tax law at winter school and was enamoured by the complexity of the law and therefore the opportunity for creative thinking that complexity enabled. I was fascinated by how people found creative ways of getting around tax obligations, and how tax planning had shaped so much of the law. From the use of discretionary trusts (which had seemed an enigma when I learnt about them in Equity law), to leases and finance structuring, to employment relationships, to almost every area of business life, tax law shaped how transactions were done and how people acted. One day on my holidays I found myself reading the Master Tax Guide out of interest, and from then I decided that I was going to be a tax lawyer. I sought out jobs in tax law only, and found that my focus on that area was a benefit in employment considerations.

Why did you decide on that area?

As a career I have found specialising immensely rewarding because I can delve deeply into understanding that one area. Because I am not a generalist, this means that I can easily work well with other lawyers, accountants and professionals who recognise the skill set and who can feel comfortable that I will not attempt to encroach on their work. I also get lots of time to think deeply about complex matters and law, which is an enjoyable way of working. Finally, I have found that the skills developed from deep and creative thinking have transposed well into new areas, such as technology and the law, and have been crucial to the development of my artificial intelligence Ailira, and implementing new technology in my firm Cartland Law.

TOM CROMPTON, BOTTEN LEVINSON LAWYERS

When did you decide to specialise?

I decided to specialise in the environment and planning practice area whilst I was at university. I started working in the area as a law clerk whilst completing my university studies. I have practised in the area for some six years since then.

Why did you decide on that area?

I enjoyed studying environmental law at university because of the diverse and interesting legal and practical issues, so the environment and planning practice area seemed like a suitable fit for me. The area has since provided me with great opportunities to work with and learn from professionals from many different areas of expertise including engineers, architects, ecologists, environmental scientists and town planners. I have found fulfilment in finding efficient, practical legal solutions to a range of legal problems for our clients, which predominantly range from individuals to larger private sector entities.

DANIELLA DI GIROLAMO, MURRAY CHAMBERS

When did you decide to specialise?

I had been interested in pursuing a career at the Independent Bar since I commenced working as a solicitor in 2007. I made the decision to go to the bar in early 2015, and applied and was accepted for the Step Up to the Bar Program. My 12 months spent working within the Courts and with various Supreme Court Justices really cemented my decision. I started the bar readers course the Monday after I finished up with the Courts, in mid 2016.

Why did you decide on that area?

I started my career at a boutique firm where I was able to do a lot of appearance work across a variety of matters, briefing great counsel. I really enjoyed that time in my career. I was drawn to the bar initially

because of the ability to work across different areas and to appear in Court, but being your own boss is a pretty good perk too.

JOSEPH HENDERSON, SHAW & HENDERSON

When did you decide to specialise?

I had known since Law School that I wanted to practice predominantly in criminal law.

Why did you decide on that area?

The decision to direct my career toward the criminal law was not made until I had spent a number of years being exposed to other areas of law. It was, to some degree, a leap of faith. However, the satisfaction and enjoyment that I immediately experienced from practising criminal law, when contrasted with my previous areas of practice, confirmed that it was the correct decision to make.

ERICA PANAGAKOS, BELPERIO CLARK

When did you decide to specialise?

I spent the first five years of my career working in general practice, initially as a law clerk and following my Admission to legal practice, as a solicitor. I have practised predominantly in Family Law since 2015.

Why did you decide on that area?

I enjoy working with people and supporting them through what can be an incredibly traumatic time in their lives. With the number of blended families and de facto relationships increasing, family law is never boring. Every family is different and I enjoy the creativity involved in assisting people to find solutions that are suitable for their family. I am fortunate enough to work at a firm that is resolution focused and encourages mediation and collaborative law. It is refreshing to see families resolve their disputes respectfully using these avenues.

Conducting a Royal Commission: From establishing the terms of reference to delivering the final report

THE HON. JUSTICE JOHN MANSFIELD

There is an aura about a Royal Commission. It is the form of public inquiry with the greatest prestige, no doubt because of its statutory foundations,[1] which include coercive powers of investigation. The Royal Commissioner is also generally a significant and respected public figure, such as a sitting or retired judge.[2]

Commonly, too, the aura of a Royal Commission is enhanced by the major social or political issues to be addressed. A major Royal Commission of continuing significance is the Royal Commission into Aboriginal Deaths in Custody, conducted by the Hon Elliott Johnston QC between 1987 and 1991. I have been careful not to refer to any ongoing or contemporary inquiry.

My experience arises principally from the Royal Commission into the Collapse of the State Bank of South Australia in 1991. That is now a matter of relatively ancient history, but my ongoing interest in such inquiries including many detailed discussions with those directly involved in more recent times does give me some comfort in contributing my thoughts on this topic.

In that inquiry, the Commissioner was the Hon Sam Jacobs AO QC, a retired end very experienced Supreme Court judge. We worked very well together and I learned a lot from him. For the Final Report, following his illness, I was the Commissioner myself. That gives an indication of the closeness with which the counsel assisting and the Commissioner do work together.

My final preliminary comment is to point out that there are numerous other public inquiries conducted at the request of the Executive arms of government, the Commonwealth, the States and the Territories. Many are also of great significance. They too have counsel assisting, and offer challenges and complexity equal to, and sometimes greater than, a Royal Commission.[3] Do not spurn the opportunity to become involved in such an inquiry.

SETTING UP A ROYAL COMMISION

The starting point is the Terms of Reference. There will generally by an opportunity for the proposed Commissioner and the counsel assisting to comment on them. Do not pass up that opportunity. It is desirable to view them from your legal perspective, to ensure they are clear and comprehensive. It is not desirable to be interrupted in the course of an investigation with challenges to the scope of the inquiry, or to seek variation in them. That causes delay, and can lead to some loss of confidence in the inquiry's integrity. Perception only of course, but it matters. On the other hand, keep an eye on the issue and the time in which it is proposed to report on the issue. Loosely expressed, or too widely expressed terms may make a delay inevitable. They, too, may give scope for unwanted judicial challenges to the progress of the inquiry.

It is important to bear in mind that the strategy of some potentially affected by the inquiry may be to take what opportunities there may be seen to be to challenge the scope of the inquiry, or to challenge the procedures of the inquiry. The role of counsel assisting is to support the set-up of the Commission, and to conduct it, so as to avoid such challenges if possible.

The next step is the physical establishment of the Commission - staff, offices, IT facilities, hearing room, storage, and so on. This can be quite time consuming. Usually the initiating government will provide a manager and some staff, and manage the budget. That is a matter for each Commission.

Then the real work begins. In consultation with the legal team, counsel assisting has the consultative role with the Commissioner of identifying and discussing the detailed issues, their investigation, the potential witnesses, the proposed hearing structure and sequence. That is an ongoing and evolving process. It involves setting an investigative timetable with the Commissioner, although that work is done under the supervision of counsel assisting. It should not be unrealistic.

It is easy to underestimate the time required to identify the sources of documentary information, the processes to assemble them, where necessary with subpoenas, their analysis, the identification of potential witnesses, where they are available the proofing of those witnesses meaningfully (that is after the documentary material is understood), and where additional expert or other research is required. But those things must be done. They are common to much litigation, but they must be done in a structure that can be imposed and withstand challenge.

Counsel assisting needs to keep the Royal Commissioner informed. Of course, that does not mean that the Commissioner should know in detail every piece of anticipated evidence. But the Commissioner should be aware of the direction of the investigation, broadly where it is pointing, and what is planned for the hearing. It is not a good look for the Commissioner to be critical of the counsel assisting during a hearing, or to be taken too much by surprise.

Where there are clear legal issues, that it not to say that the Commissioner must always rule in favour of the contentions of counsel assisting. That will commonly be the case in the nature of things, but some issues are capable of being meaningfully debated without a clear answer, and counsel assisting has sometimes the role of putting the contradictory contention so that a clear ruling can be made.

Part of the process of informing the Commissioner of the course of the evidence is to enable the Commissioner to decide on contentious issues. If there is to be a judicial challenge to a ruling, or

to the fairness of the procedures, it is the Commissioner who will be the nominal responding party, so it is important that any such ruling or procedure should be "owned by" the Commissioner. Both counsel assisting and the Commissioner have the same objective of lawfully conducting the inquiry, and fairly reaching a resolution of the issues. Not all participating parties will see the rulings or the processes in the same light. It is ultimately the decision of the Commissioner about where to draw the line.

There is not too much more to say about the process of the evidence at the hearing. It is a routine process, common to litigation, and subject to the discretion of the Commissioner. It will not deviate from those processes.

The role of counsel assisting at the hearing will vary somewhat with the nature of the issues and the parties represented. Where there are natural contradictors, counsel may suggest to the Commissioner the sequence of cross examination be varied. It is largely a matter of common sense. Where there is no contradictor, counsel assisting may have to take an aggressive role in relation to a particular witness or witnesses.

At this point, the overall responsibility of counsel assisting for securing the best evidence, and presenting it fairly (and forcefully if necessary), cannot be overemphasised. The continuing consultation at a moderately high level with the Commissioner will enable counsel to use the wisdom of the Commissioner and will ensure that counsel assisting does not take the process in directions the Commissioner does not want to do so. That does not, and should not, inhibit counsel assisting from expressing, vehemently if necessary, viewpoints different from the Commissioner. But ultimately the inquiry is that of the Commissioner, and counsel's role is to assist.

Over the course of the hearing, there will be a more or less continual review of the evidentiary processes and the timetable. Times for witnesses, and for written and oral submissions, will evolve in consultation with the Commissioner. The Commissioner will then give appropriate orders from time to time. Almost inevitably, the Commissioner will want to move forward at a quicker rate than counsel assisting and the legal team.

The final step is the written submissions and the Report. It is the Commissioner's Report. It is the role of counsel assisting to submit, in public, what is said to be the appropriate content and findings in the Report. That is done through written submissions, appropriately indexed and set out. Other submissions may present a series of different views. So be it.

The Commissioner will then, after the hearing, probably discuss with counsel assisting what assistance is required for completing the Report. It varies with each inquiry how much counsel assisting contributes to that document. Generally, it involves at least the first draft, in considerable detail. It often involves some rewriting by counsel assisting at the direction of the Commissioner. It almost invariably involves writing, as a draft, much of the largely uncontentious background and processes, and summaries of the relevant evidence. Every Commissioner will put the Report in its final form to reflect the writing style and findings and recommendations of the Commissioner in the words of the Commissioner.

Then the public release of the Report. Counsel assisting will be thanked by the Commissioner, but has no further role. Counsel assisting gets neither the credit for the Report, or the criticism if it is not well received.

But it is a professional task of immense satisfaction if you have done it well, and generally speaking counsel will have done just that. B

Endnotes

1 *Royal Commisions Act 1902 (Cth); Royal Commissions Act 1917 (SA)*

2 Former Governor of SA The Hon Kevin Scarce was appointed Royal Commissioner in the Nuclear Fuel Cycle Royal Commission.

3 See a list of such Inquiries up to 2004 in Appendices 2 - 10, Frasser, Royal Commissions and Public Inquiries in Australia, Butterworths, 2006 at 267 - 341

Recollections of the State Bank Royal Commission

In a 2009 interview conducted by the Law Society, The Hon. Samuel Jacobs AO QC spoke about his time as Royal Commissioner into the State Bank Collapse. These were some of his recollections:

"I had good Counsel. Not only was John Mansfield assisting me but Michael Abbott was appearing for the Directors of the bank, and the State government was represented. The State Bank and the Treasurer ultimately had to take responsibility and, indeed, (Premier) John Bannon did. He knew as soon as the bank collapsed that his political career was at an end.

I think the government were a bit disappointed, I think they thought that a Royal Commissioner was going to come down on the Government's side but they chose the wrong man. I wrote it as I saw it. Bannon had complete trust in (State Bank Chief Executive) Marcus Clarke and that was one of the problems. If the Treasurer, who knew what position was developing and how the Bank was going bust, if he'd thumped the table and been more emphatic, Bannon might have listened to him but he gave up advising Bannon because Bannon took no notice of him.

The Reserve Bank knew how unwise some of its activities and procedures were, but it never alerted the Treasurer because it said it had nothing to do with the State. I think that was very wrong of the Reserve Bank." B

S.J. Jacobs, Q.C.

Conveyancing Conundrum: Who should sign a Form 1?

GRANT FEARY, DEPUTY DIRECTOR, LAW CLAIMS

Sections 7 and 9 of the Land and Business (Sale and Conveyancing) Act 1994 (SA) (LBSC Act) contain the well-known requirements for verified vendor's statements, containing particulars in relation to land, to be provided to a purchaser of land. An issue has recently been considered by the Society's Property Committee and Law Claims as to who can sign the requisite form – Form 1.

The obligation to provide information to a purchaser as set out in section 7 is placed upon "a vendor of land" and involves the completion by that vendor of a form as set out in Form 1 of the *Land and Business Regulations (Sale and Conveyancing) Regulations 2010 (SA)* (LBSC Regulations). The required "sign-off" for this part of Form 1 is as follows:-

> *'***Part C – Statement with respect to prescribed particulars**
> **(section 7 (1))**
> **To the purchaser:**
> **I/We,*
> *of…..*
> *being the *vendor(s)/person authorised to act on behalf of the vendor(s) in relation to the transaction state that the Schedule contains all particulars required to be given to you pursuant to section 7 (1) of the Land and Business (Sale and Conveyancing) Act 1994."*

In the view of the Property Committee, a solicitor should not sign Part C of Form 1, unless the solicitor is the vendor or, possibly, the attorney of the vendor. In the view of the Committee the words "person authorised to act on behalf of the vendor" should be limited to authorised officers of corporate vendors or attorneys acting on behalf of vendors. It is simply too risky for any solicitor (however authorised) to make representations about land on behalf of the vendor when some of the required information may be known only to the vendor. Further, it may be, a solicitor signing "on behalf of the vendor" would be acting as "vendor" and not as a legal practitioner and issues as to indemnity under the Law Claims policy might arise.

The section 9 requirement applies where an agent acts on behalf of the vendor. In particular, section 9 requires the agent to ensure that the prescribed enquiries are made into the matters as to which particulars are required in the statement and, the agent must sign a certificate in the form required by regulation.

The required "sign-off" for this part of Form 1 is as follows:

> *'***Part D – Certificate with respect to prescribed inquiries by registered agent**
> **(section 9)**
> **To the purchaser**
> *I,…*
> *certify * that the responses/that, subject to the exceptions stated below, the responses to the inquiries made pursuant to section 9 of the Land and Business (Sale and Conveyancing) Act 1994 confirm the completeness and accuracy of the particulars set out in the Schedule.*
> *Exceptions:*
> *Date:*
> **Vendors/Purchaser's agent*
> **Person authorised to act on behalf of*
> **Vendor's/Purchaser's agent"*

The definition of "agent" contained in section 3 of the LBSC Act is that "agent" has the same meaning as in the *Land Agents Act 1994 (SA)*. This definition is that a person is an "*agent*" if the person carries on a business that consists of or involves:

a. selling or purchasing or otherwise dealing with land or business on behalf of others or conducting negotiations for that purpose: or
b. selling land or business on his or her own behalf, or conducting negotiations for that purpose.

Crucially, sub-section (2) of the definition provides:

> *"However, a person does* ***not*** *act as an agent in so far as –*
> a. *the person sells or purchases or otherwise deals with land or business on behalf of others, or conducts negotiations for that purpose,* ***in the course of practice as a legal practitioner…..****" (emphasis added)*

The combination of section 9 of the LBSC Act and the definition of "agent" – especially sub-section (2) of the definition – means that legal practitioners should not be executing the Certificate contained at Part D of Form 1, even if they do so as persons authorised to act on behalf of the agent. This is because the statutory definition of "agent" does not extend to legal practitioners carrying on legal practice. This in turn means that if a legal practitioner signed a Part D certificate as an agent "the agent" he or she would not be indemnified under the Law Claim policy which defines "legal practice" as "the provision of such legal services as are usually provided by a legal practitioner in private practice in Australia". The fact that there may be some legal practitioners who "usually" sign Part D Certificates would not be likely to overcome the specific statutory definition that acting as an agent does not apply to persons acting in the course of legal practice.

According to the Property Committee legal practitioners and registered conveyancers who sign Part D certificates will likely do so, not as "agent", but as a "person authorised to act on behalf of" the agent. The Committee's view is that this is also too risky and should not be done. The whole intent of Section 9 (1)(b) of the Act is to put the obligation on the agent to

ensure the completeness and accuracy of the information in the form, after all, that is what they receive commission for and they have direct contact with the property and the vendor. Increasingly, however, agents are seeking to avoid this responsibility by contracting out the preparation of Form 1 to other providers who then sign Part D as persons "authorised to act on behalf of" the agent. The agent still receives commission and also claims the Form 1 preparation fee as a disbursement. In the view of the Property Committee, the LBSC Act and Regs should be amended to make it clearer that only agents and their employees can sign Part D and that they cannot delegate their responsibility under Section 9.

The preparation of the information contained in Form 1 by a solicitor, on proper instructions would, however, be considered to be legal work, and any claim arising from negligence / breach of retainer in compiling the contents of the Form 1, should, in the normal course, be indemnifiable under the Law Claims policy.

This position may be seen as anomalous, however, it is a direct result of the terms of the statutory regime. Law Claims and the Property Committee invite comments from practitioners as to these issues.

The assistance of Philip Page, Chair of the Property Committee in the preparation of this article is gratefully acknowledged

4 January 2017 – 3 February 2017

A MONTHLY REVIEW OF ACTS, APPOINTMENTS, REGULATIONS AND RULES COMPILED BY MELLOR OLSSON'S ELIZABETH OLSSON.

Acts Proclaimed

Statutes Amendment (Budget 2016) Act 2016 (No 57 of 2016)
Commencement Parts 5 and 13: 1 February 2017
Gazetted: 27 January 2017, No 5 of 2017

REGULATIONS PROMULGATED (4 OCTOBER 2017 - 3 JANUARY 2017)

REGULATION NAME	REGULATIONS NO.	DATE GAZETTED
Local Nuisance and Litter Control Act 2016	1 of 2017	19 January 2017, Gazette No. 3 of 2017
Local Nuisance and Litter Control Act 2016	2 of 2017	19 January 2017, Gazette No. 3 of 2017
Development Act 1993	3 of 2017	27 January 2017, Gazette No. 5 of 2017
Return to Work Act 2014	4 of 2017	27 January 2017, Gazette No. 5 of 2017
Development Act 1993	5 of 2017	27 January 2017, Gazette No. 5 of 2017
Green Industries SA Act 2004	6 of 2017	27 January 2017, Gazette No. 5 of 2017
Animal Welfare Act 1985	7 of 2017	2 February 2017, Gazette No. 6 of 2017

Continued from page 9

Endnotes

1 RA Layton, *Our Best Investment: A state plan to protect and advance the interests of children*, Report of the Review of Child Protection in South Australia, 2003.
2 EP Mullighan, *Children in State Care Commission of Inquiry: Allegations of sexual abuse and death from criminal conduct*, Children in State Care Commission of Inquiry, Adelaide 2008.
3 EP Mullighan, *Children on Anangu Pitjantjara Yankunytjatjara (APY) Lands Commission of Inquiry: A report into sexual abuse,* Children on APY Lands Commission of Inquiry, Adelaide 2008.
4 BM Debelle, *Royal Commission 2012-2013: Report of Independent Education Inquiry*, Independent Education Inquiry, 2013.
5 Child Protection Systems Royal Commission, The Life they deserve: Child Protection Systems Royal Commission Report, Volume 1: Summary and Report, Government of South Australia, 2016 at p 13, Table 2.2.
6 Ibid at 4.
7 The full research report can be accessed at http://www.agd.sa.gov.au/child-protection-systems-royal-commission.
8 These issues are discussed in Child Protection Systems Royal Commission, The Life they deserve: Child Protection Systems Royal Commission Report, Volume 1: Summary and Report, Government of South Australia, 2016 at p 14-17.
9 Child Protection Systems Royal Commission, The Life they deserve: Child Protection Systems Royal Commission Report, Volume 1: Summary and Report, Government of South Australia, 2016 at p 618.
10 A less formal consultation was held with children currently in care, facilitated by staff from the Office of the Guardian for Children and Young People and CREATE Foundation.
11 More detail about each case study can be found in Child Protection Systems Royal Commission, The Life they deserve: Child Protection Systems Royal Commission Report, Volume 2: Case Studies, Government of South Australia, 2016.
12 Section 7 of the Royal Commissions Act provides for 'technical matters' to be referred to experts, and reports provided to be accepted as evidence. Further detail about the membership and professional qualifications of the expert panel can be found at Child Protection Systems Royal Commission, The Life they deserve: Child Protection Systems Royal Commission Report, Volume 1: Summary and Report, Government of South Australia, 2016 at p 620-621. Further detail about the methodology of the expert panels studies can be found at p 634-645 of the same volume.
13 The full list and access to the research papers is available at http://www.agd.sa.gov.au/child-protection-systems-royal-commission.
14 Child Protection Systems Royal Commission, The Life they deserve: Child Protection Systems Royal Commission Report, Volume 1: Summary and Report, Government of South Australia, 2016 at p 17.
15 Child Protection Systems Royal Commission, The Life they deserve: Child Protection Systems Royal Commission Report, Volume 1: Summary and Report, Government of South Australia, 2016 at xiv (Summary).

History of Royal Commissions in SA

A full list of Royal Commissions in South Australia, compiled by Lawrence Ben.

1859

Royal Commission appointed by the Governor-in-Chief to inquire into the loss of the "SS Admella"

- Captain B Douglas (Chairman), William Scott, Richard Tapley, Handasyde Duncan, Henry Strangways

1861

Royal commission on real property law

- Charles Cooper (Chairman), Richard Hanson, George Waterhouse, Robert Torrens, John Henry Barrow

1864

Royal Commission on the Customs House

- John Hart, C.H. Goode, John Formby, GEO Young

1864

Royal Commission appointed to inquire into and report on the management, etc. of the Lunatic Asylum and Hospital

- William Wyatt (Chairman), George Mayo, Thomas Elder, Neville Blyth, A. Sidney Clark

1865

Royal Commission appointed by the Governor-in-Chief to report on colonial defences

- John Hart (Chairman), Henry Strangways, Peter Egerton-Warburton, James Hesketh Biggs, George Frederick Dashwood

1865

Royal Commission appointed by the Governor-in-Chief to inquire into the state of the northern runs

- CHAS. Bonney, W. Cavenagh, C.J. Valentine

1865-66

Royal Commission on the Port Harbour

- John Hart (Chairman), Henry Strangways, Peter Egerton-Warburton, James Hesketh Biggs, George Frederick Dashwood

1866

Royal Commission appointed by the Governor-in-Chief to inquire into the working of the Lands Titles Registration Office

- John T. Bagot (Chairman), William Kay, W.M. Letchford

1866

Royal Commission appointed by the Governor-in-Chief to inquire into the management of the Northern Territory expedition

- W.L. O'Halloran (Chairman), C.H. Goode, H.E. Bright

1866

Commission of Inquiry into management of Police Force

1867

Royal Commission appointed by the Governor-in-Chief to inquire into the state of runs suffering from drought

- John T. Bagot (Chairman), John Hodgkis, William Townsend, Neville Blyth, Henry E. Bright

1867

Royal Commission appointed by the Governor-in-Chief to inquire charges against Waterworks Engineer

- T. Reynolds (Chairman), William Milne, John Colton, David Bower, John Carr, Henry E. Bright, Philip Santo

1867-68

Royal Commission appointed by the Governor-in-Chief to inquire and report upon the diseases in cereals

- John H. Barrow (Chairman), THOS. Hogarth, WM. Everard, W Cavenagh

1869

Royal Commission to inquire into and report upon the public accounts

1872-73

Royal Commission appointed to inquire into the Intestacy, Real Property, and Testamentary Causes Acts

- Rupert Ingleby (Chairman), W. C. Belt, Leonard W. Thrupp, WM. JNO. Brind, F. E. Krichauff

1873

Commission of Inquiry appointed to inquire into matters in dispute in connection with the Hope Valley aqueduct contract

- Philip Santo (Chairman), WM. Rogers, James Pearce, John Crozier, Robert Cottrell

1873-74

Royal Commission appointed to consider the whole matter of remuneration and classification of the Civil Service

- E. W. Hitchin (Chairman), J. Boothby, Fred J. Sanderson, James N. Blackmore, Sam Deering, W.T. Sheppard

1873-74

Royal Commission appointed to inquire into the whole question of the new Institute and Museum

- Richard Hanson (Chairman), WM. Everard, William Milne, William Gosse, Rowland Rees

1874

Royal Commission appointed to inquire into the alcoholic strength of South Australian wines

- William Milne, John William Lewis, Richard Schomburgk, Samuel Davenport, Robert Dalrymple Ross

1874

Royal Commission appointed to inquire into and report upon the plans submitted in competition for the new Parliament houses and the new Institute and Museum, and the sites best suited for their erection

- H.E. Bright (Chairman), William Milne, G.S. Kingston, J. Fisher, JAS. Pearce, George C. Hawker, G.T. Light, W.D. Allott

1874

Royal Commission appointed to inquire into the organisation and working of the Post Office Department

- William R. Boothby (Chairman), Fred J. Sanderson, WM. G. Cuthbertson, WM, Longbottom, Caleb Peacock, H.E. Bright

1874-75

Royal Commission appointed to inquire into the subject of railway construction

- G. W. Goyder (Chairman), W. Barber, SAM. Davenport, Alfred Hallett, WM. R. Boothby, H. C. Mais, W. L. Beare

1875

Royal Commission appointed to inquire into the best means of providing agricultural and technical education

- Henry Ayers (Chairman), Ebenezer Ward, JNO. Ingleby, SAML. Davenport, R. Schomburgk

1875-76

Royal Commission appointed to inquire into the whole question of sanitation for the Province

- R. Rees MP (Chairman), J. Crozier MLC, P. Santo MLC, T. Johnson MP, W.Kay MP, J. Richards MP, R.R. Ross MP, B. Taylor MP, W. Gosse, A. Campbell, J. Sinclair

1876

Royal Commission appointed to consider and report upon the whole question of the defences of the Province

- Colonel Warburton, Frederick Howard, Boyle Travers Finniss, William Barber, Benjamin D'Urban Musgrave, James Hesketh Briggs

Sir Samuel Way

1877-78

Royal Commission appointed to report on the principles and working of tribunals of commerce, etc., etc.

- Samuel Way (Chairman), Neville Blyth, Philip Santo, Henry Scott, Rupert Ingleby, Samuel Tomkinson

1878

Royal Commission appointed to report on the Parliament buildings site

- Henry Scott (Chairman), William Milne, Alexander Hay, Philip Santo, G.S. Kingston, John Darling, WM. Townsend

1879

Royal Commission appointed to report on the liquor laws

- Samuel Tomkinson (Chairman), Joseph Fisher, Henry Scott, John Carr, Hugh Fraser, W. J. Magarey, David Nock

1879-82

Royal Commission appointed to report on public finance

- Ebenezer Cooke (Chairman), J. C. Bray, WM. B. Rounsevell, David Murray, S. Tomkinson, W. J. Magarey, R. D. Ross, H. E. Bright

1879

Royal Commission appointed to inquire into the Parliament buildings site

- G. S. Kingston (Chairman), Allan Campbell, Henry Scott, William Sandover, W. Townsend, E. T. Smith, W. C. Buik, L. Scammell

1879-82

Royal Commission appointed to report on the public works

- R. D. Ross (Chairman), George C. Hawker, Lavingdon Glyde, David Bower, Hugh Fraser, Luke L. Furner, Caleb Peacock

1879

Royal Commission on sewage farm site

- T. Hinginbotham (Chairman), R. Schomburgk, R. Tate, G. Chamier, L. Scammell

1880-81

Royal Commission appointed to report on wharves and jetties

- W. H. Bean (Chairman), J. G. Ramsay,Henry Scott, Ebenezer Ward, R. H. Ferguson, H. C. E. Muecke, William Kay

1881

Royal Commission appointed to report on the alleged injuries by sparrows

- Samuel Davenport (Chairman), John F. Pascoe, John Robertson, George F. Ind, George L. Barnard, William Rhodes, Thomas Atkinson

1881-82

Royal Commission on the working of the Education Acts

- J. Langdon Parsons (Chairman), JNO. W. Downer, John Colton, Samuel Tomkinson, Robert Dixon, F. Basedow, Ebenezer Cooke, Jenkin Coles

1882

Royal Commission appointed to report on electoral districts

- J. W. Downer (Chairman), J. Colton, W. Gilbert, W. R. Mortlock, J. H. Howe, H. E. Downer, W. B. Roundsevell, L. L. Furner

1883-85

Royal Commission appointed to report on the Destitute Act, 1881

- Samuel James Way (Chairman), M. Salom, W. Haines, C. H. Goode, Dr O'Connell, H. W. Thompson

1883-84

Royal Commission appointed to report upon the Adelaide and Parkside Lunatic Asylums

- John Colton (Chairman), Allan Campbell, J. H. Bagster, Thomas Johnson, Jenkin Coles, Arthur JNO. Baker, SAM. D. Glyde

1883-84

Royal Commission on railways

- W. E. Matttinson (Chairman), T. Playford, Thomas Burgoyne, J. J. Duncan, J. H. Howe, H. E. Bright

1886-87

Royal Commission on Government Stores

- SAM. D, Glyde (Chairman), Luke L. Furner, David Bower, JNO. Darling Jr, James Duncan, WM. Gilbert, Arthur Lucas Harrold, James Martin, ALF. W. Meeks

1887

Royal Commission on Transcontinental railway

- S. Newland (Chairman), R. C. Baker, Allan Campbell, Thomas Burgoyne, F. Basedow, David Murray, John A. Cockburn

1887

Royal Commission on the utilisation of River Murray waters

F.W. Holder

1888

Royal Commission on the land laws of South Australia

- Clement Giles (Chairman), F. E. H. W. Krichauff, F. W. Holder, John Moule, Jenkin Coles, Thomas Burgoyne, William Copley

1888-91

Civil Service Commission

- SAM. D. Glyde (Chairman), H. E. Bright, D. Bews, WM. Longbottom, David Bower, Lawrence Grayson, J. Langdon Parsons, John Moule

1888-89

Royal Commission appointed to consider the desirability of establishing a State Bank and Royal Mint

- Robert Caldwell (Chairman), S. Solomon, William Copley, F. Krichauff, J. W. Castine, P. McM. Glynn, T. Playford, Samuel Tomkinson, Henry Scott

1889

Barossa water commission

- Alfred Catt (Chairman), Alexander Hay, R. Homburg, A. McDonald, Lawrence Grayson, J. V. O'Loghlin, J. H. Bagster, John Warren

1889-90

Royal Commission on an Angaston railway

- J. H. Howe, A. R. Addison, J. Martin, J. Downer, R. Caldwell, W. Gilbert, C. H. Hussey

1889-90

Mining Commission

- J. H. Gordon (Chairman), Allan Campbell, A. D. Handyside, J. C. F. Johnson, John Moule, HY. Allerdale Grainger

1890

Royal Commission on the utilisation of River Murray waters

- J. H. Howe, P. McM. Glynn, F. Krichauff, A. H. Landseer, Alfred Catt, T. Playford, James Rankine, C. J. F. Johnson, James W. Jones, A. D. Handyside, Thomas Burgoyne, C. H. Hussey, Allan Campbell, James Martin, J. C. Bray, G. W. Goyder

1890

Queensland border railway commission

- D. Bews (Chairman), Charles Kimber, J. V. O'Loughlin, J. G. Jenkins, Luke L. Furner, Thomas Burgoyne, Allan Campbell

1890

Royal Commission on the Water Conservation Department

- W.A. Horn, T. Playford, Alfred Catt
- Lawrence Grayson, J. H. Howe, P. McM. Glynn, J. Lancelot Stirling

1890

Royal Commission on intercolonial free trade

- F.W. Holder (Chairman), David Murray, John Darling, WM. Gilbert, J. Hancock, B. Gould, J. G. Jenkins, John Moule, HY. Allerdale Grainger, Theo. Hack
- A. McDonald

1890-91

Royal Commission on landing and embarking European mails

- T. Playford, A. R. Addison, Allan Campbell, J. W. Castine, Lawrence Grayson, F. W. Holder, J. W. White

1890-91

Royal Commission on the Port Augusta and Cockburn railway
- J Hancock (Chairman), Alfred Catt, B. Gould, Laurence O'Loughlin, John Miller, Ebenezer Ward, John J. Osman

1891

Queensland border railway commission
- J. Hancock (Chairman), Thomas Burgoyne, Peter P. Gillen
- Allan Campbell, A. McDonald, J. Langdon Parsons, J. W. White, J. G. Jenkins

1891

Royal Commission on the question of the best route for the Blyth railway extension
- John Miller (Chairman), A. R. Addison, J. V. O'Loghlin, Ebenezer Ward, WM B. Rounsevell, Thomas H Brooker, A. McDonald, WM. Gilbert

1891

Pastoral lands commission
- Robert Caldwell (Chairman), John Warren, F. W. Holder, J. R. Kelly, William Copley, Robert Kelly

1891-92

Royal Commission on the valuations of pastoral improvements
- JAS. Cock, Thomas Burgoyne, James Hague, John Miller, Robert Caldwell, J. Lancelot Stirling, William Copley

1892

Royal Commission on the south-east drainage system
- A.D. Handyside (Chairman), W. Copley, R. Caldwell, John J. Osman, A.A. Kirkpatrick, H. Bartlett, William Haslam, Peter P. Gillen, Laurence O'Loughlin

1892

Orroroo and Port Germein railway commission
- L. Grayson (Chairman), J. Warren, H. Lamshed, R. Kelly, F. W. Holder

1892

Royal Commission appointed to inquire into the question of the expediency of constructing a graving dock in South Australia at the public expense
- G. Feltham Hopkins (Chairman), Thomas Burgoyne, A. R. Addison, John Darling, J. W. Castine, A. McDonald, J. G. Jenkins

1892

Shops and factories commission
- C. C. Kingston (Chairman), J. A. Cockburn, G. Ash, Thomas H. Brooker, R. S. Guthrie, J. Hague, J. A. McPherson

1892

Royal Commission on main roads
- A.D. Handyside (Chairman), G. W. Cotton, J.V. O'Loghlin, B. Gould, T. Hack, R. Kelly, J. R. Kelly, G. H. Lake, H. Lamshed

1893

Royal Commission on stores
- T. Playford (Chairman), Thomas H. Brooker, J. W. Castine, D, Morley Charleston, WM. Gilbert, Theo. Hack, William Haslam, F. W. Holder

1893

Vermin-proof fencing commission
- F. W. Holder (Chairman), J. H. Howe, A. A. Kirkpatrick, Ebenezer Ward, T. Playford, John Moule, John J. Osman, J. W. White

1894

Royal Commission on the utilisation of River Murray waters
- Alfred Catt (Chairman), E. W. Hawker, James Rankine, G. W. Goyder, P. McM. Glynn, A. D. Handyside, Thomas Burgoyne, A. H. Landseer, T. Playford, J. C. F. Johnson, F. Krichauff, Allan Campbell, J. H. Howe, James W. Jones

1895

Royal Commission on the Northern Territory
- William Haslam (Chairman), Frederick Holder, James O'Loghlin, John Warren, William Archibald, William Gilbert, Vaiben Louis Solomon

1895

Royal Commission on the Adelaide Hospital
- F.W. Holder, A.R. Addison, Thomas H. Brooker, R. S. Guthrie, R. Homburg, Alex S. Paterson, Catherine Helen Spence

1896

Royal Commission on the Beetaloo waterworks
- H. Allerdale Grainger, J. G, Jenkins, A.R. Addison, John G. Brice, G. McGregor, John Warren, Thomas H. Brooker, Charles R Goode, J. A. McPherson

1896-97

Royal Commission on the Government wharves
- Ebenezer Ward (Chairman), J.V. O'Loughlin, R.S. Guthrie, J. Lancelot Stirling, WIlliam Russell, A. McDonald, J.W. Shannon

1897

Royal Commission on the Bundaleer waterworks
- R.W. Foster (Chairman), John Miller, A. McDonald, I. MacGillivray, J.G. Jenkins, E.A. Roberts, William Russell, W.A. Robinson, CH. Willcox

1897-98

Pastoral lands commission
- Laurence O'Loughlin (Chairman), John G. Brice, Thomas Burgoyne, J. Lancelot Stirling, E, L. Batchelor, J. H. Howe, W. Copley, Alex Poynton, Andrew Tennant, A. G. Downer

1897-98

Royal Commission on the aged poor
- WM. H. Carpenter (Chairman), Richard Butler, H. Adams, P. McM. Glynn, J. H. Howe, WM. Gilbert

J.W. Castine

1898-99

South-eastern drainage commission
- A.H. Peake, J. Lewis, John G. Brice, G. McGregor, J.T. Morris, A. McDonald, R. W. Foseter, R. Hooper

1899-1901

Public service commission
- J. V. O'Loghlin (Chairman), W. A. Robinson, Alfred Catt, T. Burgoyne, William Copley, James Hutchinson, J. G. Jenkins

1899-1900

Royal Commission on Renmark and Murray River settlements
- F. W. Holder (Chairman), H. Adams, S. Tomkinson, T. Playford, F. W. Coneybeer, C. M. R. Dumas, J. W. Shannon, J. W. Castine

1900

Royal Commission on main roads
- T. Playford (Chairman), L. O'Loughlin, W. O. Archibald, W. Copley, D. McKenzie, W. H. Carpenter

1900

Royal Commission on the Taxation Acts
- William Russell (Chairman), CHAS. Tucker, C.M.R. Dumas
- John Warren, A. McDonald, F.W. Holder, F. J. Hourigan

STATE OF SOUTH AUSTRALIA

1901

Royal Commission on the Wine and Produce Depot
- J. W. Castine (Chairman), W. O. Archibald, Richard Butler, A. McDonald, E. L. Batchelor, John Miller, William Copley

1902

Wine and produce commission in London
- HY. Allerdale Grainger (Chairman), David Murray, John H. Cockburn

1902

Royal Commission on the question of the construction of a railway to Pinnaroo
- John Lewis (Chairman), A. D. Handyside, John Miller, R. Homburg, R. W. Foster, GEO. Riddoch, R. Wood, Thomas Pascoe, A. A. Kirkpatrick, John G. Brice

1902

Interstate Royal Commission on the River Murray representing the States of New South Wales, Victoria, and South Australia
- Joseph Davis (President), Stuart Murray, Frederick N. Burchell

1903

Royal Commission on waterworks

- John Warren (Chairman), R. W. Foster, John G. Brice, Thomas Pascoe, Henry W. Thompson, W. P. Cummins, A. D. Handyside

1903–04

Royal commission on railways

- R. W. Foster (Chairman), A. Von Doussa, John G. Bice, E. H. Coombe, F. W. Coneybeer, THOS. H. Brooker, F. W. Peach, Andrew S. Neill

1905–06

Royal Commission on the necessity for improved facilities for the trade of the south-east

- WM. Senior (Chairman), A.H. Peake, John G. Brice
- A. von Doussa, W. O. Archibald
- T. Burgoyne, Alfred Catt, A. McDonald, F. J. T. Pflaum

1906

Royal Commission upon the question of the treatment of inebriates

- Thomas H. Smeaton (Chairman), J. M. Holder, Elizabeth W. Nicholls, T. Pascoe, Theodore Bruce, W. J. P. Giddings, Thomas Leahy

1907

Royal Commission upon the charges against produce merchants

- Laurence O'Loughlin (Chairman), P. Allen, W. Jamieson, E. A, Roberts, John Travers

1907–08

Royal Commission on main roads

- Laurence O'Loughlin (Chairman), John G. Brice, A. von Doussa, W. O. Archibald, W. J. Blacker, T. Burgoyne, W. Miller, WM. Senior

1908–09

Royal Commission on the question of the marketing of wheat

- E. H. Coombe[4] (Chairman), Richard Butler, A. McDonald, Laurence O'Loughlin, John Newland, Crawford Vaughan, C. Goode

1908–09

Royal Commission on the Land Titles Office and General Registry of Deeds Office

- R. Homburg (Chairman), J. G. Russel, W. Strawbridge, J Gordon

1908–09

Royal Commission on the conviction of Myles Flynn

- JNO. W. Downer (Chairman), Eustace B. Grundy, G. J. R. Murray

1909–12

Royal Commission on Eyre's Peninsula railways

- Laurence O'Loughlin (Chairman), A. von Doussa, T. Pascoe, P. Allen, C.H. Goode, H. Chesson, J. Miller

1909

Royal Commission upon the necessity of a railway to Willunga

- A. H. Peake (Chairman), J. H. Howe, A. R. Addison, Harry Jackson, David James, F. J. T. Pflaum, John Verran

1909–12

Royal commission on the Murray lands railway

- Laurence O'Loughlin (Chairman), H. Chesson MP, A. von Doussa, T. Pascoe, J. Miller, C.H. Goode, P. Allen

1909–11

Royal Commission upon the necessity for a railway through Kangaroo Island

- A. H. Peake (Chairman), J. H. Howe, A. R. Addison, Harry Jackson, David James, F. J. T. Pflaum, John Verran

1909

Royal Commission on the management of the Parkside Lunatic Asylum and treatment of criminal lunatics

- James Gordon (Chairman), W. Ramsey Smith, R. H. Edmunds

1909–10

Royal Commission on the suggested railway deviation at Goolwa

- Laurence O'Loughlin (Chairman), P. Allen, A. von Doussa, H. Chesson, T. Pascoe, J. Miller, C.H. Goode

1910–12

Royal Commission on northern railways

- E.H. Coombe (Chair), Messrs Lucas MLC, Anstey MP, Jamieson MP, Blacker MP, Blundell MP, Ritchie MP, Pflaum MP

1910–11

Royal Commission on the proposed railway from Eudunda to Robertstown

- Laurence O'Loughlin (Chairman), J.H. Howe, John Lewis, Peter Allen, Thomas Burgoyne, F.W. Coneybeer, George Dankel, K. W. Duncan, J. Travers

1910–12

Royal Commission on narrow-gauge extension and break of gauge

- John Verran, Theodore Bruce, Alfred von Doussa, Edward Anstey, Percy Heggaton, William Jamieson[5]

1910–14

Royal Commission on the Sedan railway

- Laurence O'Loughlin (Chairman), P. Allen, F.W. Coneybeer
- G. Dankel, T. Burgoyne, J. Travers, K.W. Duncan

Laurence O'Loughlin

1910–12

Royal Commission on water supply

- David James (Chairman), John G. Brice, John Warren, J. Newland, L. O'Loughlin, T. H. Smeaton

1910–12

Inter-state Royal Commission on border railways

- John George Bice (Chairman), A.H. Peake, T. Burgoyne, W. Miller, G. Ritchie, J.H. Howe

1911–13

Royal Commission on the Adelaide University and higher education

- T Ryan MP (Chair), Messrs Coneybeer Cowan, Styles, Green

1911

Royal Commission on wharves and water frontages

- John George Bice (Chair), Messrs JG Moseley, J Verran, E Klauer, WJC Cole, I MacGilliway, BA Moulden

1911–12

Royal Commission on the shortage of labour in the clothing and boot trades

- H. Coombe, Messrs F Condon, WW Forwood, J Gunn, E Henretty, A Hill, E Vardon, A Wallace and H Winterbottom

1912

Royal Commission on electoral registration

- William Isbister (Chairman), Walter Dalton, Harry Gell

1912–16

Royal Commission on the Aborigines

- William Angus (chair),[6]
- J Jelley, J Lewis, G Ritcher, John Verran

1914–15

Royal Commission on the metropolitan abattoirs

- JG Mosely (Chair)
- J Cowan MLC, FS Wallis MLC, EA Anstey MP, RP Blundell MP, HS Hudd MP, OH Duhst MP

1913–15

Royal Commission on main roads

- Frederick William Young (Commissioner of Crown Lands and Immigration) (Chair), W Hannaford MLC, WJC Cole MP, W Miller MP, J Travers MP, J Jelly MLC, G Bodey MP, Frederick Coneybeer

1913–17

Royal Commission on the municipalisation of gas and electric services

- Herbert Angas Parsons (Chair)
- E Lucas MLC, JH Vaughan, C Vaughan, Robert Homburg

1915–16

Royal Commission on electoral matters

- John Albert Southwood (Chair),
- Messrs E Klauer, E Lucas, A McDonald, P Rielly

1916–18

Royal Commission on water supply

- John Frederick Herbert (Chair), Messrs D James, I MacGillvary, JG Bice, FS Wallis, P Allen, T Butterfield

1916-19

Royal Commission on North Terrace reserves and railway centres
- Thomas Hyland Smeaton (Chair), Messrs J Carr, JH Cooke, T Green, J Gunn, GR Laffer, RA O'Connor

1916

Royal Commission on Port Adelaide road contracts
- Thomas Colbatch, Peter Whitington

1917-18

Royal Commission on government land purchases
- Noel Webb

1917-18

Royal Commission on Hannaford's quarry
- W.L. Stuart

1917-21

Royal Commission on the wheat scheme and rural industries
- William Angus (Chairman)

1918

Royal Commission on the acquisition and disposal of wheat and material in connection with the South Australian wheat scheme
- Noel Webb

1918

Railway inquiry commission
- PA Anthony

1918-20

Second Royal Commission on the acquisition and disposal of wheat and material in connection with the South Australian wheat scheme
- Noel Webb

1919

Royal Commission on the Yatala Mental Hospital site
- Walter Hannaford (Chair), Alfred Blackwell, John Albert Southwood

1919-20

Royal Commission on Loxton
- Thomas Hewitson

1919-20

Royal Commission on the Port Adelaide coal wharf
- Henry Crosby (Chair),
- Messrs JG Bice, T Pascoe, HR Buxton, VG Petherick, RS Richards, JA Southwood

1921-22

Royal Commission on the Public Service of South Australia
- Peter Whitington, Thomas Gill

1923-27

Royal Commission on law reform
- FW Birrell (Chairman), J Carr, H Tassie, T Butterfield, P Reidy, AW Robinson, HD Young

1923-25

Royal Commission on south-eastern drainage
- George Kermode, Walter Colebatch, Daniel Findlater

1923-25

Irrigation Royal Commission under section 22 of Irrigation Act, 1922
- Edgar Field, Richard Horsfield, Howard Jolley

1923-25

Royal Commission on Eyre Peninsula transport charges and facilities
- J Carr, H Tassie,Herbert Hudd,
- Stanley Whitford, Henry Crosby

1925

Royal Commission on plumbism
- Keith R. Moore, J. L. Pearson, Herbert W. Gepp, W. Robinette

1925-26

Royal Commission on rural settlement
- Walter Colebatch (Chairman), Walter Spafford, John Fraser

1925

Royal Commission on Port Pirie Police
- John Halcombe

1925

Royal Commission on the thousand homes contract
- Samuel James Mitchell

1925

Second Royal Commission on Port Pirie Police
- Reginald Nesbit (Chair), Duncan Fraser, James Geddes

1926-27

Royal Commission on manufacturing and secondary industries
- FJ Condon (Chairman), T Gluyas, W Morrow, EC Vardon, E Anthoney, W Harvey, SR Whitford

1926-28

Royal Commission on traffic control
- AJ Blackwell (Chairman), T Gluyas, H Tassie, PF Heggaton, LA Hopkins, JAS McLauchlan, J Stanley Verran

1926

Royal Commission on release of prisoners
- Sir Herbert Kingsley Paine

1926-27

Royal Commission on the pastoral industry

1926-27

Second Royal Commission on allegations of bribery against police officers

1927

Royal Commission on electoral districts

1928

Royal Commission on electoral districts
- Theo E Day (Chair), O.H. Stephens, C.L. Matthews

1930-33

Local government commission appointed under the Local Government Areas Re-arrangement Act, 1929
- Sir Edgar Bean, Walter Rogers, Richard Gibbins, Samuel Reeves, Frederick Wilson

Sir Edgar Bean

1932-33

Royal Commission on betting
- Walter Ray, Walter Hannaford, George Laffer, John Critchley, Arthur McArthur

1933

Royal Commission on dairy industry prices
- WJ Dawkins (Chair), Arthur J Perkins, JW Wainwright

1934-35

Royal Commission on the fishing industry
- Reginald Rudall, Herbet Hale, Ernest Sheridan

1935

Royal Commission on matters concerning the promotion and operations of certain companies in South Australia
- Alexander Briskham

1936

Royal Commission on afforestation
- FT Perry, VG Petherick, RC Mowbray, EA Oates, H Tasie, J McInnes

1936

Royal Commission on lotteries
- Harold Piper (Chairman), Horace Hogben, Collier Cudmore, Frank Condon, Frederick Beerworth

1936-37

Inquiry commission by the South Australian Government into the system of management of libraries maintained or assisted by the State
- Grenfell Price

1937-38

Royal Commission on transport
- Geoffrey Reed, John Wainwright, William Fowler

1937-38

Royal Commission on betting laws and practice
- Harold Piper, Kenneth Sanderson, Sidney Powell

1945

Royal Commission on the Adelaide Electric Supply Company
- Geoffrey Reed, Prof Arthur Lang Campbell, John William Wainwright

1947-51

Royal Commission on state transport services
- Herbert Paine (Local court judge and special magistrate), William Bishop, Edmund Daly, Albert Thompson, Kenneth Wills (replaced by) Samuel Fisk

1956-57

Royal Commission on local government; Report on creation of an additional district council district in the Upper South-East and adjustment of existing district council districts together with maps
- Lawrence Johnston

1959

Royal Commission in regard to Rupert Max Stuart
- Sir J. Mellis Napier, Geoffrey Reed, Bruce Ross

1965-66

Royal Commission into the grape growing industry
- G. H. P. Jeffery

1966-67

Royal Commission into the law relating to the sale, supply and consumption of intoxicating liquors and other matters
- Keith Sangster

1967

Royal Commission into State Transport Services
- Joseph Nelligan, Thomas Shanahan,, George Jeffery

1967

Royal Commission into John Douglas Murrie, Headmaster of Larrakeyah Primary School
- George Walters

1971-72

Royal Commission into September Moratorium Demonstrations
- Charles Bright

1973-75

Royal Commission into Local Government Areas
- Gerald Ward (Chairman), Donald Pitt, Keith Hockrdige

1974-75

Royal Commission into Monarto land transactions
- Gerald Ward

1974-75

Royal Commission into suspension of a high school student
- Gordan Combe

1975

Royal Commission into allegations made by prisoners at Yatala Labour Prison
- Laurence Johnston

1977

Royal Commission into Juvenile Courts Act and other associated matters
- R. F. Mohr

1977

Royal Commission into law relating to shop trading hours and ancillary matters
- William Lean

1978

Royal Commission into law relating to the sale by retail of petroleum products
- William Lean

1978

Royal Commission into dismissal of Harold Hubert Salisbury
- Roma Mitchell

1979

Royal Commission into the non-medical use of drugs
- Ronald Sackville, Earle Hackett, Richard Nies

1979

Royal Commission into the floodlighting of Football Park at West Lakes
- Peter Allan

1981-82

Royal Commission on allegations in relation to prisons under the charge, care and direction of the Director of the Department of Correctional Services and certain related matters
- Gresley Clarkson

1983-84

Splatt Royal Commission
- Carl Shannon

Justice Ted Mullighan

1991-93

Royal Commission into the State Bank of South Australia
- Samuel Jacobs (replaced by) John Mansfield

1995

Hindmarsh Island Royal Commission
- Iris Stevens

2004-08

Commission of Inquiry into Children in State Care
- Ted Mullighan

2004-08

Commission of Inquiry into Children on the APY Lands
- Ted Mullighan

2005

Kapunda Road Royal Commission
- Greg James

2012-13

Royal Commission - Report of Independent Education
- Bruce Debelle

2014-16

Child Protection Systems Royal Commission[19]
- Margaret Nyland

2015-16

Nuclear Fuel Cycle Royal Commission[21]
- Rear Admiral Kevin Scarce

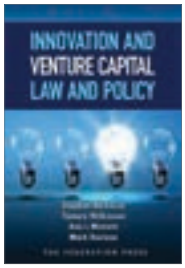
By G Bates
9th ed LexisNexis Butterworths 2016
PB $149.00

ENVIRONMENTAL LAW IN AUSTRALIA

Abstract from LexisNexis

This leading text examines environmental law across all Australian jurisdictions. Written in a clear and accessible style, it explains the fundamental principles underpinning all environmental initiatives. The ninth edition covers all relevant developments in policy, case law and legislation.

Environmental Law in Australia provides a clear and authoritative discussion of the fundamental principles underpinning all environmental initiatives. The author explains how the involvement of the law adds value to the design and implementation of environmental policy, providing an impartial process for resolving conflicts about breaches of the law and environmental decision-making.



By S Barkoczy, T Wilkinson, Ann Monotti, M Davison
The Federation Press 2016
PB $135.00

INNOVATION AND VENTURE CAPITAL LAW AND POLICY

Abstract from Federation Press

Innovation and Venture Capital Law and Policy examines the Australian innovation system, focusing on the broad range of government programs that have been introduced over the years to foster innovation and encourage venture capital investment in entrepreneurial start-up and early stage companies. It discusses the importance of innovation to a country's economic growth and the critical role that venture capital plays in financing new businesses. The book also looks at the innovation systems in the United States and Israel. Both countries have been selected for comparative purposes as they have highly developed innovation systems and are widely respected as world leaders in venture capital investment.

J Stubbs & S Tomsen (editors)
Federation Press 2016
PB $59.95

AUSTRALIAN VIOLENCE: CRIME, CRIMINAL JUSTICE AND BEYOND

Abstract from Federation Press

Australian Violence reflects shifts in our understanding of violence and debates issues surrounding it. It offers contemporary analyses of violence in the lives of women and girls, male drinking violence, prison violence, gun debates and gun-owning culture, and more recent concerns with hate crime, rural crime, harm directed at animals, risky and 'dangerous' offenders, and borders and detention, as well as new forms of community prevention and alternative criminal justice. It acknowledges state violence in Australia's history and present, in the dispossession of Indigenous people and the denial of Indigenous knowledge, and the treatment of refugees and asylum seekers.

By J A Watson
Federation Press 2016
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THE DUTY TO ACCOUNT: DEVELOPMENTS AND PRINCIPLES

Abstract from Federation Press

This book investigates the history of the modern doctrine of account, and by that history, seeks to identify some of the principles and premises which help explain the application of, and which underlie, the action today. The common law account, and its successor in equity, is over 800 years old. There does not appear to have been any work devoted to an examination of that history published in that time. The focus on the book is on the question 'who is an accountable party'? The area of law focused on is common law and equitable remedies, namely, the account (including the subsidiary principle, the 'account of profits').

Capital Gains Tax – Death, Disagreement and Devolution

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Tax Files is contributed on behalf of the South Australian based members of the Taxation Committee of the Business Law Section of the Law Council of Australia.

Section 128-10 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97) provides that a capital gain or loss from a capital gains tax (CGT) event that results for a CGT asset owned by a taxpayer just before dying is disregarded, subject to some exceptions.[1] This reflects the view at the time of the introduction of CGT, that the CGT provisions were not intended to involve a form of death duty. The memory of the abolition of death duties was current when CGT was introduced.

Section 128-15 then sets out what happens if a CGT asset owned by a deceased taxpayer[2] passes to the legal personal representative or a beneficiary of the estate. That section deems the legal personal representative or beneficiary to have acquired the CGT asset on the date of death of the taxpayer.[3] It also provides that any capital gain or loss that the legal personal representative suffers on an asset passing to a beneficiary is disregarded.

Further, section 128-15(4) provides for the cost base to be attributed to the asset passing to either the legal personal representative or a beneficiary. In most cases,[4] where the CGT asset was acquired prior to 20 September 1985 the cost base is set at the market value of the CGT asset at the date of the death of the taxpayer or where the CGT asset was acquired by the taxpayer on or after 20 September 1985 the legal personal representative and the beneficiary inherit the cost base of the deceased.

The question that these provisions raise is when does an asset pass to the legal personal representative or a beneficiary for the operation of these provisions. In most situations, the answer is relatively straight forward, it passes when the CGT asset passes pursuant to the terms of the will or on intestacy of the deceased taxpayer. It may also pass where the will or the operation of the law of intestacy are varied by a court or where a CGT asset is appropriated by the legal personal representative in satisfaction of a pecuniary legacy or some other interest or share in the estate of the deceased.[5] An asset will not pass if the legal personal representative transfers it to a person under a power of sale.

The final situation where an asset may pass to a beneficiary for the purposes of these provisions is where there is a deed of arrangement to settle a claim to share in the distribution of the estate of the deceased and the only consideration given is the variation or waiver of a claim to one or more other CGT assets that formed part of the estate of the deceased. It is this provision that is the focus of this article.[6]

For this provision to apply, as indicated, there are a number of criteria that must be satisfied, they are:

- the arrangement must be by deed;
- the arrangement must be with a beneficiary;
- it must be to settle the right to participate in the distribution of the estate; and
- any consideration given by the beneficiary;
  - for the asset;
  - must consist only of a variation or waiver to claim one or more of the other CGT assets of the estate of the deceased.[7]

Each of these requirements are considered briefly, in turn, for unless satisfied, the relief provided by Division 128 will not be available where, in a disputed estate, the matter is settled informally by the interested parties.[8] The first of those requirements is that the arrangement must be effected by a deed. There appears to be no choice, it cannot be a simple agreement inter parties, it must be a deed.[9]

Further, whilst the legislation gives no indication as to the timing of the arrangement, in Taxation Ruling TR 2006/14 *Income tax: capital gains tax: consequences of creating life and remainder interests in property and of later events affecting those interests* (TR 2006/14) the Federal Commissioner indicates that the deed needs to be entered into during the period of the administration of the estate.[10] That commentary continues that if the period is outside that of the administration of the estate being completed then it must be demonstrated that a court would have entertained such an application for family provision or an extension of time to make such an application.[11]

The ruling also appears to suggest that the Commissioner's view is that the arrangement must be to settle a claim under the family provision legislation.[12] There is nothing in the provision itself to suggest that it is limited to persons entitled to make a claim under family provision legislation to share in the distribution of an estate. Division 128 simply requires that the person (beneficiary) entered into the deed to share in the distribution of the estate of a deceased. One must question whether the view of the Commissioner involves an unduly narrow interpretation of the provision.

As described, the arrangement must be with a beneficiary to settle a dispute in connection with the estate. ITAA97 does not contain either a general definition of beneficiary nor a specific definition in this context. The word beneficiary usually means a person who has an interest in the property the subject of a trust, not a mere *spes* or right to due administration.[13] Occasionally, the word beneficiary has been construed more broadly, in the context of the particular legislation, to include a mere object of a power.[14] Until there is due administration of the estate the interests at law of the persons entitled to take under a will is merely a right to due administration,[15] though there appears generally little doubt such persons may still be appropriately called a beneficiary.

However, section 128-20 contemplates that the deed describes how the person entering into the deed will participate in the estate of the deceased as a beneficiary and that any consideration given by such person consists only of a waiver or variation of a right to a CGT asset. The requirements of the provision are therefore twofold, one that the person settles a claim as a beneficiary and the consideration (if any) is limited to a

variation or waiver of a claim to one or more other[16] CGT assets of the estate.

Whilst there may be an inference from the use of the word beneficiary that the person must be a beneficiary in the classical sense at the time of the execution of the deed, this appears to be an unduly narrow interpretation. The narrow view also appears to find support in the use of the word beneficiary in the preceding paragraph (c) of section 128-20(1) when referring to property appropriated to a beneficiary in satisfaction of an interest in the estate.

A broader interpretation can be supported by interpreting the first limb[17] as simply referring to the person entering into the deed as being a beneficiary of the estate by reason of the execution of the deed. That is also the beneficiary referred to in the second limb.[18] On this basis, the person entering the deed need not be a beneficiary under the will or the laws of intestacy prior to the execution of the deed.

Unfortunately, the second limb may have a further limiting effect, if the person gives any consideration. It requires that the consideration given by the person entering the deed is limited to a variation or waiver of a claim to one or more other CGT assets. A claim need not be an actual right to an asset but may include an assertion of a right to a CGT asset.[19] But it must be an assertion of a right to a CGT asset. It is likely that in many family provision claims there is no claim to a CGT asset of the estate. Usually, there is a general claim for proper provision out of the estate, and that is what is compromised by the arrangement. In some cases, there may be a claim to a particular CGT asset, such as farming land.[20]

Further issues may arise if the person entering the deed does not attain a fixed right to any asset of the estate. Once again this raises the meaning of the word beneficiary. If, the view is taken that the word beneficiary is not limited to a person that satisfies the usual meaning of that word but extends to any person who may benefit under the estate of the deceased, no matter how, then it is likely that the relief may be available to a much wider class. This approach finds some recent support in *Yazbek v Commissioner of Taxation*[21] though that decision was considering objects of a discretionary trust in a very different provision in the *Income Tax Assessment Act 1936* (Cth), it recognised that the expression extends to persons who may benefit rather than those who have an interest in the property of the trust estate.

As already highlighted, under the arrangement any consideration given by the beneficiary for the CGT asset to pass under the deed must consist only of a variation or waiver to claim one or more of the other CGT assets of the estate of the deceased.[22] This prevents the introduction of external consideration. As already mentioned, it may preclude a simple compromise of a claim for proper provision under the family provision legislation where a CGT asset is to pass to the claimant. Notwithstanding that, if the claimant is to simply receive the payment of a sum of money, then that is unlikely to involve the passing of a CGT asset, so Division 128 may have no relevance to that arrangement.

The requirement that there be no other consideration may also create problems where there is a dispute involving multiple estates and it is desired to settle all disputes. It can raise some esoteric questions when the interests given up are a right to receive a legacy, as the right to a legacy may not constitute a right to claim one or more of the CGT assets of the estate of the deceased. So far I have found no adequate discussion of this requirement in any public ruling of the Commissioner.

Finally, the provision does not expressly contemplate the legal personal representative being a party to the deed. Whilst it may be possible not to include the legal personal representative as a party to the deed, in my view, it would be unusual not to do so. **B**

Endnotes

1 The exceptions include assets of the deceased passing to an exempt entity, the trustee of a complying superannuation fund and a foreign resident, see section 104-215 and note 1 to section 128-10.

2 The asset must be a CGT asset of the deceased for the provisions to apply.

3 Section 128-15(2).

4 There are special rules for trading stock, a dwelling that was a main residence of the deceased, foreign residents and assets that pass to the trustee of a special disability trust.

5 There appears to be no statutory power of appropriation in South Australia though there is a limited common law right available with the consent of the affected legatee (see G Dal Pont and K Mackie *Law of Sucession* [13.15]-[13.20]). Ideally in South Australia wills should include an express to power to make such appropriations.

6 This article does not consider whether entering into such a deed can give rise to any other CGT event such as CGT event C2 (that event applies to the ownership of an intangible CGT asset being, inter alia, released, discharged, satisfied or surrendered) and what if any consequences may arise where that event is triggered.

7 There is a discussion in G Cooper and C Evans *Australian CGT Handbook 2015-16* [20 090] to the effect that gifts of cash under a will are not subject to Division 128 as cash is not a CGT asset. This discussion raises the question whether the foregoing of a right to a legacy will satisfy this requirement.

8 Whilst the rules apply automatically where the criteria are satisfied, there may be situations where it is preferable to trigger the loss or gain and therefore not satisfy the rules in Division 128.

9 The provisions of section 41 of the *Law of Property Act 1936* (SA) should assist and may in some situations allow an informal document to be found to be a deed where the circumstances or the nature of the instrument indicate that it is intended to be a deed.

10 TR 2006/14 [36].

11 Ibid [36] and [209]-[223].

12 The Explanatory Memorandum that lead to the amendment to the *Income Tax Assessment Act 1936* (Cth) that inserted a similar provision in that Act, as described in [211] of TR 2006/14, also could be interpreted in a like manner.

13 *Frish v Barclays Bank* [1955] 2 QB 541; *Gartside v IRC* (1968) AC 553; *Secretary, Department of Families, Housing, Community Services & Indigenous Affairs v Elliott* [2009] FCAFC 37.

14 *Leedale v Lewis* (1982) 1 WLR 1319; *Trennery v* West [2005] WL 62250; *Yazbek v FCT* [2013] FCA 39.

15 See *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12; [1965] AC 694; also, see discussion in *Dawson v Fitch* [2002] SASC 12 as to when an executor becomes a trustee. I also say usually have an equitable interest on the basis that the property is held for them. In some situations, the terms of the trusts under which the property is held may not mean that anybody has an interest in such property (*Glenn v Federal Commissioner of Land Tax* [1915] HCA 57; (1915) 20 CLR 490; *Custodian Pty Ltd v Commissioner of State Revenue (Vic)* [2005] HCA 53, (2005) 224 CLR 98; *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12; [1965] AC 694).

16 The implications of the requirement that the only consideration be a variation or waiver to claim one or more of the "other" CGT assets of the estate of the deceased is not considered in this article.

17 Section 128(1)(d)(i).

18 Section 128(1)(d)(ii).

19 *LexisNexis Australian Legal Dictionary* (2nd ed) 262.

20 In the case of some estoppel claims it may be important to distinguish whether the property was to be the subject of a testamentary disposition or is held on a constructive trust for the claimant. In the constructive trust situation, the property is unlikely to be an asset of the estate of the deceased.

21 [2013] FCA 39.

22 The provision also highlights that all of the assets of the estate of the deceased may not constitute CGT assets, this can also raise some questions as to application of the provision.

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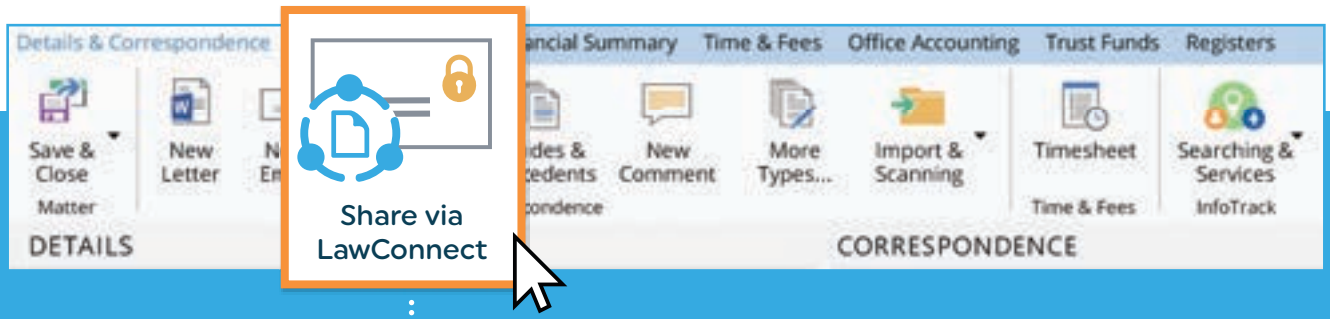

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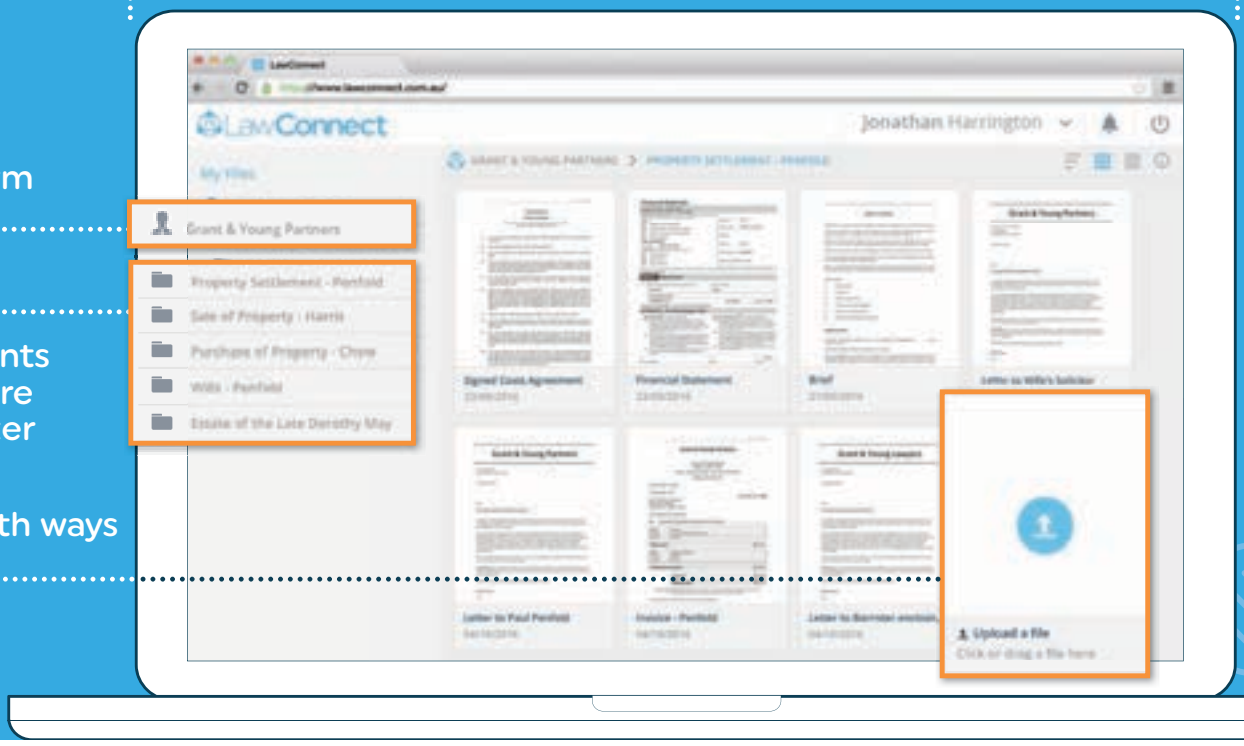

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