2019 Risk Watch News

Judgments and Legislative Developments
1 January 2019 to 31 December 2019

Set out below are some of the more significant judgments and legislative developments during the period 1 January 2019 to 31 December 2019 which may bear upon a South Australian legal practitioner’s potential liability or damages awards generally or which may be of interest to legal practitioners.

Issues have been highlighted rather than explored in detail. The case law and legislation of South Australia, together with the more significant case law in other Australian jurisdictions have been reviewed according to the following headings:-

1. Cases involving claims against (or concerning) legal practitioners
2. Cases involving Insurance Law
3. Other cases of general interest
4. High Court cases of interest
5. South Australian Legislation
6. Commonwealth legislation
7. Policy under review:
   7.1 Policy Review in South Australia
   7.2 Current Royal Commission and Inquiries by the Australian Law Reform Commission

Generally, cases involving Criminal Law, Family Law and other specialised areas have not been included.
Judgments and Legislative Developments

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   1.2 Lemongrove Services Pty Ltd v Rilroll Pty Ltd [2019] NSWCA 174
   1.3 Sgherza v Sgherza [2019] SADC
   1.4 Drivas v Jakopovic [2019] NSWCA 218
   1.5 Bird v Stonham [2019] NSWDC 419
   1.6 Curless v Shell International Limited [2019] EWCA Civ 1710
   1.7 Ploubidis v Carling [2019] SADC 151
   1.8 Bell Lawyers v Pentelow [2019] HCA 29
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1. **Cases involving claims against (or concerning) legal practitioners**

1.1 **McLennan v Clapham [2019] ACTSC1**

In June 2009 the plaintiffs purchased a property in Canberra for $1,375,000. The property had previously been insulated with loose-fill asbestos material by Canberra business Mr Fluffy. That asbestos had (purportedly) been removed as part of the ACT Government’s response to the Mr Fluffy controversy in 1993. The defendants, a Canberra law firm, acted for the plaintiffs when the plaintiffs bought the property.

The 2009 Contract for Sale had attached to it a Certificate of Completion of Asbestos Removal Work dated 25 August 1993. That Certificate however contained a statement suggesting that residual fibres may still be present in the wall cavities of the building.

There were other documents attached to the Contract which also referred to asbestos, including a copy of a scope of work document for removing loose asbestos fibres from the ceiling, wall cavities and sub-floor of the house.

In 2013 the plaintiffs became suspicious that there was still loose-fill asbestos present in the property. In February 2014 the plaintiffs received a letter from the ACT Government advising them to get the property tested by a licenced asbestos assessor. They engaged such an assessor and in June 2014 received a report from that assessor which indicated that loose asbestos fibres had been found on the top of a cupboard in the hallway. The assessor rated this a “high risk”. In October 2014 the plaintiffs moved out of the property into a rental property.

Around the same time the ACT Government announced a buy-back scheme for Mr Fluffy houses and in January 2015 the plaintiffs received an offer from the ACT Government for the Government to buy the property for $1,876,000. The plaintiffs accepted the offer and settled on the transfer on 30 June 2015. The house was then demolished. The plaintiffs then re-purchased the land for $1,210,000 and then spent $1,386,000 building a new house on the site. As at 30 August 2017 the property, with the new house, was valued at $2,450,000.

The plaintiff sued the defendants, alleging that they were not properly advised in 2009 about the risks in purchasing such a property and, had they been so advised, they would not have purchased it. They claimed $1,830,000 in damages, including substantial amounts for “disappointment and distress” and for lost income.

The conveyancing clerk employed by the defendants at the time gave evidence that she, as an experienced conveyancing clerk essentially “ran” the conveyancing part of the defendant’s practice with little or no supervision. She said that she generally did not provide contracts for sale to a solicitor in her office for review unless she thought there was something unusual about them. It was clear that there was no such referral to a solicitor in this case.

The defendants accepted that they owed the plaintiffs, as their clients, a duty of care to advise them in relation to the contract of sale as the defendants were expressly engaged to act on the purchase. As to the content of this duty the Judge said:

“A solicitor owes a general duty to explain legal documents to the client, or at least to ensure that the client understands the material parts. In particular, a solicitor should explain any unusual
provisions or any provisions of particular relevance to the client’s proposed activities, or which might influence the client in deciding to enter the contract: Sykes v Midland Bank Executor & Trustee Co Ltd [1971] QB 113, applied in Australia in Fox v Everingham (1983) 76 FLR 170 at 174.

In the case of property transactions, a solicitor should explain both the relevant risks attending the purchase of the property and the consequences of that risk to the client: Capebay Holdings Pty Ltd v Sands [2002] WASC 287 (Capebay) at [97]-[100] per Pullen J.

Earlier at [89] in Capebay, Pullen J had referred to two further propositions which are relevant to the present case, namely that a solicitor acting for the buyer of property is paid not only for what the solicitor, in fact, does, but also for the responsibility he or she assumes in trying to protect clients from financial loss if things for wrong: Fox v Everingham at 175. A solicitor has a duty to warn a client of a material risk inherent in the proposed purchase: Rogers v Whitaker (1992) 175 CLR 479; Heydon v NRMA at [146].” [paras 50-52]

The Judge found that the defendants were in breach of their duty to the plaintiffs in that the requisite advice that should have been given was not provided. Her Honour noted that no person with any qualification to give legal advice either met or corresponded with the plaintiffs; the plaintiffs were simply shown the Contract and the pages of the document were turned over, allowing the plaintiffs the opportunity to only skim read each page. Her Honour concluded (on this point) that:

“That does not amount to the provision of competent legal advice. The plaintiffs could have sat in their lounge room and read the contract for sale document for themselves. Reading a document and appreciating its consequences are two different things. What they were paying the defendants for was a professional legal opinion on the risks and consequences arising from the contents of that particular contract for sale. The asbestos information in the contract required someone to properly explain to the plaintiffs exactly what the risks and consequences were, so as to allow them to make an informed decision about whether to make further enquiries and ultimately whether to purchase the property....” [para 73].

The plaintiffs were awarded only the sum of $37,638.34 for asbestos investigation costs, rent, relocation and holding costs up to the time of ACT Government buy-back of the property. Her Honour accepted the ACT Government buy-back – which provided the plaintiff with full market value of the property (valued on the basis it was uncontaminated by asbestos) - fully restored the plaintiffs to the position they were in before buying the property. The buy-back was, in effect, a novus actus interveniens which broke the chain of causation with the defendant’s breach of duty. Her Honour held that the evidence put forward by the plaintiffs about their loss of income was weak and speculative and did not establish any such loss.

1.2 Lemongrove Services Pty Ltd v Rilroll Pty Ltd [2019] NSWCA 174

Anthony Brischetto, a solicitor in a NSW firm, acted for Mr & Mrs Hanshaw in relation to the purchase of land at Huntleys Cove on the Parramatta River and a café business conducted on that land. The Hanshaws wished to purchase the land and business, however wanted to have included in the Contract for Sale, which Mr Brischetto was negotiating on their behalf, a “subject to finance” clause.

Mr Brischetto wrote to the Vendors seeking that such a clause be included. The solicitors for the Vendors wrote back to Mr Brischetto saying that their clients would not agree to making the contract “subject to finance” and would not insert the requested clause into the contract.
Mr Brischetto met with the Hanshaws on 27 November 2014 and the contracts were later exchanged without the inclusion of any “subject to finance” clause.

Mr & Mrs Hanshaw were unable to obtain the necessary finance and were unable to complete the purchase. They were sued by the Vendors and agreed to pay the Vendors’ damages which were ultimately agreed at some $272,000. The Hanshaws cross-claimed against their solicitors alleging that Mr Brischetto was in breach of retainer and duty in that he had not told them that the Vendors had not agreed to include the “subject to finance” clause in the contract. They alleged that, had they known that, they would not have exchanged contracts. Mr Brischetto denied that there had been a breach and said that he had told the Hanshaws at their meeting on 27 November 2015 that the Vendors had not agreed to include the relevant clause.

Mr Brischetto’s case was that his oral evidence that he had told the Hanshaws about the Vendors’ position on 27 November 2014 was corroborated by his detailed handwritten notes. It was said that these notes confirmed that he went through the Contract in detail with his clients.

The Trial Judge and the Court of Appeal examined in detail the evidence given by Mr Brischetto, Mr & Mrs Hanshaw and Mr Brischetto’s file note as to what occurred on the 27 November 2014. The evidence of the Hanshaws was, in effect, that they had no recollection of ever being told that the “subject to finance” clause had not been agreed and that, given the obvious importance of that clause to them, this was something that they would have remembered. They also said that in the absence of being explicitly told that the clause had not been agreed they assumed that it had been agreed.

Mr Brischetto’s notes (made shortly after the meeting) record that:

“Loan with NAB – Val wouldn’t be done until after exchange – will lend 70% of Val – John [Mr Hanshaw] is okay with this – can put in more if Val is short”

His submission was that this note confirmed that he had raised the absence of the “subject to finance” clause with the Hanshaws before they signed the contract because it was implicit in the statement that the Hanshaws could make up a shortfall that they knew the contracts were not “subject to finance”. Both the Trial Judge and the Court of Appeal rejected Mr Brischetto’s defence because nowhere in Mr Brischetto’s file (either in correspondence or in file notes) was there an unequivocal statement advising the Hanshaws that the “subject to finance” clause was not included in the Contract. Critically the Court of Appeal (Payne JA, with whom Bell P and Simpson AJA agreed) held as follows:

“[38] The primary judge was entitled to conclude that a competent solicitor would formally communicate such a rejection promptly to his or her clients. Sometimes powerful proof or evidentiary support for a proposition is provided by the absence of something that would reasonably be expected to be present.

[39] The absence of a letter or email communicating the rejection of the clause by the vendors is consistent with it having been overlooked by Mr Brischetto. A solicitor, in circumstances where there had been an explicit request for the inclusion of a detailed clause, which had been immediately rejected the following day, would be expected to communicate that rejection to his or her clients in writing. Were the rejection to be communicated orally, a careful file note of that conversation would be expected to be made. There was neither here.”
The problem in this case was not that there were no notes, it was that the notes did not deal adequately with the critical issue. The lesson from this case is that not only do file notes need to be made, they need to properly deal with all matters of importance.

1.3 Sgherza v Sgherza [2019] SADC

This case involved an action by a mother (Anna) against her son (Sam) as well as a number of other defendants including a solicitor, in respect of an undocumented family arrangement.

Anna and Onofrio (Sam’s father) had owned their family home for approximately 30 years. This was a large property and exceeded the space required by an elderly couple. The arrangement (reached in 2014 and 2015) was that land would be purchased and two dwellings would be built (by Sam, who ran a building company), one to be occupied by Anna and Onofrio, and one to be rented out, providing a source of income for them. The new house, plus a $100,000 cash payment to Anna and Onofrio, would be funded by the sale of the family home. It was expected, however, that the new property would carry a mortgage of around $200,000.

On 28 May 2015 a number of documents were executed. These documents included a Loan Contract, a Memorandum of Mortgage and Settlement Instruction in relation to a (second) Mortgage over the family home, securing the sum of $350,000. It was Sam’s case that this loan and the (second) Mortgage were necessary steps in the implementation of the family arrangement i.e. so that the land for the new house could be purchased and for construction to commence. According to the 28 May 2015 Loan and Mortgage documents, the signatures of Onofrio and Anna on those documents were witnessed by a solicitor.

Onofrio died in September 2015. The property was then sold, with settlement occurring on 11 January 2016. Two dwellings on land purchased for that purpose were constructed by entities associated with Sam, with Anna occupying a house owned by one of Sam’s daughters (Deanna) during that period. The portion of the new property which was to be available to be rented out has been rented out. Anna, however, refused to move into the other portion of the property. Significantly, the property now carried a mortgage of approximately $500,000.

Anna alleged that the documents executed on 28 May 2015 were forgeries and that she and Onofrio never signed them. Anna also alleged that her son must have acted fraudulently somehow in forging these documents and by misappropriating the proceeds of sale of the family home. Anna sued the solicitor (as the third defendant) for being part of Sam’s fraud and for fraudulently representing that he witnessed Onofrio and Anna’s signatures because, on her case, this never occurred.

His Honour found against Anna on her case that the signatures on the Loan Document/Mortgage Document were forgeries. He found that a meeting on 28 May 2015 did occur at which the documents were signed by Anna, Onofrio and Betty (Sam’s sister) and witnessed by the solicitor. Expert evidence to that effect that Anna’s signatures were not forgeries was also accepted by the Judge as supporting the version of events that the meeting occurred.

Anna put forward an alternative case against the solicitor to the effect that he was negligent or in breach of his duty as a solicitor arising from the events associated with signing of the documents. Whilst the alternative case against the solicitor was pleaded with “a degree of vagueness and uncertainty” as to just what the alternative case was there was an allegation that the solicitor made no recommendation to the plaintiff to obtain independent advice.
His Honour said that the real issue raised by the alternative case was the nature and extent of the solicitor’s duty and whether there was a breach of that duty.

The Judge found that the solicitor was engaged by Sam but that the Judge found that the solicitor was providing a service to all of the parties whose signatures he was witnessing, i.e. Anna, Onofrio and Betty, as well as Sam.

His Honour said

“This was a fairly minimal service which did not actually require a solicitor, but on this occasion was being carried out by a solicitor. In addition to that, in relation to the statutory declarations, he was providing a service to each of the parties who signed a statutory declaration. This was a service that did need to be provided by a suitably qualified person, such as a solicitor.

......

That is the limited scope of the services he was retained or engaged to carry out... Those circumstances gave rise to a duty of care to all four of those parties, to carry out his role, as I have just specified it, in a competent and professional manner. It can be seen that it was a fairly minimal duty.”

The Judge found that the solicitor had breached even this minimal duty to the Plaintiff in a number of ways:

1) It was important that he make it clear to the Plaintiff what his limited role was. He did not do this.
2) It was important that he not say and do things which would be apt to confuse the Plaintiff as to what his role was. By entering into even the brief cursory discussion and advice about the documents which his Honour found took place, the solicitor was potentially giving the impression he was in some way providing independent advice on the document. Whatever discussions took place were nowhere near what would be required to provide proper independent advice on the documents.
3) He made no effort to comply with the formal requirements for witnessing a statutory declaration.
4) Had the solicitor carried out his minimal role in a competent and professional manner, there were a number of circumstances which should have amounted to “alarm bells”. The Judge found that “this was a situation that cried out for something to be said to the Plaintiff on the topic of independent legal advice” and that discussion (being the raising of the topic rather than the giving of it) should plainly have occurred in the absence of Sam.
5) Even in carrying out the minimal role outlined above, it must have been patently obvious to the solicitor that some aspects of the documents and statutory declarations were plainly incorrect or misleading, yet nothing was said.

Notwithstanding these comprehensive findings of breach, the Plaintiff was unable to prove that these breaches were causative of her loss and so damages were not ordered against the solicitor. In the circumstances of the family arrangement his Honour was not convinced that had the solicitor advised Anna to seek independent legal advice that she would have done so, or heeded that advice. Damages were awarded against Sam, however for breaching the family arrangement.

Even though damages were not awarded against the solicitor, by reason of the causation issues, these findings as to breach of duty are serious. Practitioners must take their obligations in witnessing documents seriously and be aware of additional duties which might arise.
This case involved a dispute about testamentary capacity. The deceased had made wills in 1998, May 2007 and September 2007.

Evidence relied upon the deceased’s granddaughter (who had a greater entitlement under the 1998 Will than under the other Wills) suggested that the deceased’s capacity was questionable from about April 2007. A CT scan performed in October 2006 showed the deceased suffered from vascular disease consistent with dementia. In about April 2007, the deceased’s general practitioner referred her to a neurologist, Dr Beran, who prescribed the deceased medication used for the treatment of Alzheimer’s. Memory tests conducted on the deceased’s admission into a nursing home in May 2007 were also introduced to evidence. As was the report of Dr Kathy Watson of late May 2007, which summarised the deceased as having "developed cognitive impairment..."

Dr Beran, who saw the deceased in April 2007 and twice in 2009 (for Guardianship Tribunal proceedings), provided a report dated September 2016, answering questions which addressed the test in Banks v Goodfellow and doubted that she had capacity at that time.

Another doctor, Dr Rosenfeld, prepared a retrospective report in June 2017. Dr Rosenfeld concluded the deceased did not have testamentary capacity at the time she made the 2007 Will.

Mr Taylor, the solicitor who drafted and witnessed the September 2007 Will, gave evidence that he had no independent recollection of conferring with the deceased or drafting the documents she signed in 2007 (which included a power of attorney and enduring guardian).

By 2007, Mr Taylor had been in practice for over 30 years. He did not have file notes or letters confirming the advice given to the deceased at the time she signed the various documents. The Will had time stamps which indicated Mr Taylor had spent approximately 1.5 hours with the deceased. Mr Taylor gave evidence as to his normal practice when seeing elderly clients to draw powers of attorney, enduring guardianship appointments and wills.

The Trial Judge relied on Mr Taylor’s evidence of usual practice and the time-stamped document to infer the likelihood of events in relation to the deceased and the signing of the September 2007 Will and held the evidence overall did not support the position that the deceased lacked testamentary capacity when she signed the September 2007 Will.

Justice Parker said:

“Mr Taylor was an experienced solicitor who apparently detected no difficulties with the deceased’s testamentary capacity when he prepared her will. That, in itself, is valuable evidence which favours a finding upholding the will: Re Crooks Estate (Unreported, Supreme Court of New South Wales, Young J, 14 December 1994) at 29; Hamilton v Nelson [2012] SASC 219 at [13].

Given these considerations, I am satisfied that the deceased knew that she was making a will and knew what the effect of doing so would be...”

His Honour found the experts did not properly apply the test for testamentary capacity because their views were too generalised.

The granddaughter appealed, however the appeal was dismissed.
The reasons given by the Court of Appeal are summarised as follows:

- evidence of practice is admissible and can, in the right circumstances, be given considerable weight;
- a general description of the nature of practice does not render the evidence inadmissible;
- Dr Beran's conclusory evidence cannot be regarded as of any significant weight because:
  
  "It was based on facts of which he was insufficiently apprised and, in interpreting the facts as he thought they were, he was not drawing on his expertise in a field of specialised knowledge."

- the judge at first instance was justified in treating Dr Rosenfeld's evidence similarly, because Dr Rosenfeld made assumptions and inferences about matters of fact outside his field of expertise;
- the judge at first instance was correct to infer from Mr Taylor's evidence of practice and the time stamps on the Will the amount of time he spent with the deceased which influenced the conclusion the deceased knew and approved the contents of the Will; and
- the evidence, when considered as a whole, provided ample basis for the Court to be satisfied there were no suspicious circumstances and the deceased knew and approved the contents of the Will.

This decision highlights the inherent difficulties of medical professionals providing retrospective opinions with respect to the legal test of testamentary capacity which requires an application of facts to law. Such evidence be treated with caution however it is probably not a prudent approach for solicitors to rely on their usual practice especially if they have not had a great deal of experience in the area of wills, estate planning and dealing with elderly clients.

1.5 Bird v Stonham [2019] NSWDC 419

The plaintiff was the mother of a boy who was expelled from school in 2007. She commenced a suit in the Supreme Court of New South Wales to overturn the expulsion, and lost (expulsion proceedings). The plaintiff's solicitor (Mr Ford) issued a bill in the amount of $100,000, but the Plaintiff only paid around $36,000 of it. Mr Ford proceeded to have his costs assessed and recovered a judgment certificate against the plaintiff for the sum of $58,940.22.

On 7 June 2010, Mr Ford issued the plaintiff a bankruptcy notice. The plaintiff engaged a new solicitor (the defendant to these proceedings) to act in relation to the notice. On 25 June 2010 an application to set aside a bankruptcy notice and a supporting affidavit from the plaintiff were filed. The supporting affidavit attached a draft statement of claim for filing in the Supreme Court of New South Wales against Mr Ford in relation to his alleged negligent handling of the expulsion proceedings.

On 13 July 2010, the plaintiff commenced a professional negligence suit against Mr Ford in the Supreme Court of New South Wales (the Ford proceedings). On 30 August 2010, orders were made to set aside the bankruptcy notice, with an order that Mr Ford pay the plaintiff’s costs. In the reasons for the orders, the Magistrate indicated, among other things, that he found the professional negligence proceedings against Mr Ford had reasonable prospects of success.

The defendant acted for the plaintiff in the Ford proceedings. By July 2014, the Ford in the Supreme proceedings had failed at first instance and on appeal.
The present litigation comprises a further professional negligence suit in the District Court of New South Wales against the defendant (the plaintiff’s solicitor in the Supreme Court Proceedings) (the Stonham proceedings). In the Stonham proceedings, the plaintiff complained that the defendant acted negligently by failing to advise her:

1. of the risks of the Ford proceedings, namely:
   (a) That the trial judge might prefer Mr Ford’s evidence to her own;
   (b) The consequences for the success of her claim if the defendant did not prepare her case competently in advance; and
2. that if she lost the Ford proceedings, she might be exposed to a significant cost liability to Mr Ford which was disproportionate to the (relatively) modest debt she owed him.

The defendant denied being negligent and also relied upon the doctrine of advocate’s immunity.

The Court confirmed that the rationale for the immunity attaching to the advocate’s conduct was the quelling of controversies by the exercise of judicial power and that test for the application of the immunity requires that the advocate’s work bears upon the Court’s determination of the case.

As regards the negligence claim, the Court found that the alleged pre-litigation failures to warn about the risks, and cost consequences of commencing the Supreme Court Proceedings were not caught by advocates immunity as they merely had an historical connection with the proceedings and did not impact on the quelling of controversies by the exercise of judicial power.

The plaintiff submitted that her separate misrepresentation claim was distinct from her negligence claim and that the advocates’ immunity defence was not applicable to that claim. The court confirmed that was not the case and that advocates’ immunity may, in principle, apply to actions for damages for statutory misleading or deceptive conduct. The Court held that a representation by a lawyer to a client prior to the commencement of a suit, as to the lawyer’s expertise, experience or competence does not move the litigation towards any determination by a court even if it could influence a client to decide to commence litigation. As such, the representations of this nature would not be caught by the immunity.

It was also found that:

1. The preparation of affidavit evidence, and the plaintiff’s evidence generally, is work that is performed out of court which bears upon the Court’s determination of the case;
2. The argument that there was other evidence that was available but which, because of the defendant’s conduct, was not put before the Court amounts to a collateral challenge to the findings of the Court, which would undermine the principle of finality that lies at the heart of the immunity;
3. As such, the matters that the plaintiff needed to establish in order to prove her misleading or deceptive conduct action were such that they would bear upon the Court’s determination of a dispute and would amount to a collateral challenge to the Court’s findings.

In the circumstances, the Court held that the defendant had made out his defence of advocates’ immunity in connection with some portions of the claim.
The Court considered whether the defendant was negligent for failing to warn the plaintiff about the risks and cost consequences of commencing the Supreme Court Proceedings. The defendant did not dispute he did not advise the plaintiff that:

1. if he did not conduct the case competently, she may lose;
2. Mr Ford’s account of events may be preferred to her own;
3. if she lost, she could be exposed to a substantial cost liability to Mr Ford, which would exceed the modest sum of fees she owed Mr Ford.

The defendant said he advised the plaintiff of generic uncertainties of litigation, in the following terms:

’Litigation is difficult because you can win on every point except one and then still lose the case. Even if you establish that the other side did the wrong thing, if you can’t prove that that caused you loss, then you still won’t win. Or you could lose on one factual issue, which may be the undoing of the whole case.’

The Court acknowledged that the sophistication and expertise of a client is a critical factor when assessing the content of a solicitor’s duty to advise. The Court considered that at the time of the Ford Court Proceedings, the plaintiff was an intelligent person with a professional occupation who had already been involved in the expulsion proceedings and the bankruptcy hearing who had an understanding of adverse costs orders and of the process of cross-examining witnesses.

The Court was of the view, however, that it is part of a solicitor’s duty of care, which arises from the filing of a statement of claim to ensure a client is advised of certain material features of litigation, prior to commencing a suit on the client’s behalf. The Court found that such advice was not provided and it was unreasonable for the defendant to have assumed the plaintiff was aware of the above matters because of her previous involvement in litigation or because her previous solicitors or barristers may have brought those matters to her attention.

Particularly, the Court found that reasonable pre-litigation advice should have included:

1. warning the plaintiff that if the Ford Proceedings were contested to trial, they were likely to involve a factual contest; for which credibility findings might be influential, if not decisive; and
2. drawing to the plaintiff’s attention that she could be exposed to a very significant costs liability to the other side.

The Court rejected the plaintiff’s complaint that the defendant had a duty to warn her that if he did not perform his duties as a solicitor competently, she might lose. The Court did not consider it was to be expected that a prospective professional service-provider needed to warn a client of adverse consequences should the professional service-provider not act in a competent fashion.

Despite the finding of negligence, the Court found that there was no causative link between the alleged failure to advise and the plaintiff’s alleged loss because it was not persuaded that reasonable advice would have caused the plaintiff to refrain from commencing the Ford Court Proceedings. In reaching this conclusion, the Court found (amongst other things) that the plaintiff had a bullish approach towards settlement negotiations and a determination to continue the Ford Proceeding despite being advised she had poor prospects of success indicated that any advice regarding the Court preferring the
evidence of Mr Ford, or the likelihood that she would bear a substantial costs liability if she lost would not have deterred her from commencing the Ford Proceedings.

1.6 Curless v Shell International Limited [2019] EWCA Civ 1710

Mr Curless had been employed as an in-house lawyer at Shell in London since 1990. There had been issues surrounding his work performance since 2011 and he had submitted a claim to the Employment Tribunal in 2015 complaining of discrimination. Shell acquired British Gas in 2016, following which there was a group wide program of redundancy, and Mr Curless’ employment was terminated, ostensibly on the ground of redundancy in January 2017. He then made a second claim in the Employment Tribunal alleging that the real reason behind the termination of his employment was not genuine redundancy but was discriminatory.

At issue in this case was whether Mr Curless could rely on two pieces of information (1) a leaked email, and (2) a conversation overhead in a pub which he said helped prove his case that his redundancy was, in effect, a sham. The email, both dated April 2016, was sent by Shell’s Managing Counsel to a lawyer from the firm Lewis Silkin LLP who was working with Shell on employment related matters and discussed how the redundancy program might be used “across the UK legal population, including [in respect of] the “individual””. It was not in dispute that “the individual” was Mr Curless. At some stage, an anonymous person in the Shell legal department “leaked” this email to Mr Curless.

Further, in late May 2016, Mr Curless was in “The Old Bank of England” a pub in Fleet Street just near Chancery Lane, when a group of “professionally dressed” people came in and sat at a table behind Mr Curless who was in a position to overhead their conversation. One was carrying a Lewis Silkin LLP notepad. One of the women in that group mentioned dealing with a complaint by a senior lawyer at Shell who had brought a discrimination claim which was taking up a lot of time. She also said that “his days were numbered as there was now a good opportunity to manage him out by severance or redundancy in a big re-organisation exercise that was underway” as a result of the British Gas takeover.

Shell claimed that both the leaked email and the pub conversation were covered by legal professional privilege and could not be relied upon by Mr Curless.

The Employment Tribunal held in favour of Shell however, Slade J in the Employment Appeal Tribunal found for Mr Curless holding that the email, properly interpreted, recorded legal advice that the genuine redundancy exercise could be used as a “cloak” to dismiss Mr Curless to avoid his continuing complaints. Her Honour also held that, although it was of significantly lesser importance, legal advice privilege could not be claimed in relation to the pub conversation.

The Court of Appeal overruled Slade J’s decision and held that the email and the pub conversation were privileged and could not be relied upon by Mr Curless. It was found that the advice in the email was the sort of advice which employment lawyers give “day in day out” in cases where an employer wishes to consider for redundancy an employee who, rightly or wrongly is regarded as underperforming. The Court of Appeal did not agree that this was advice to act in an underhand or iniquitous way, and also held that the advice could not be tainted by a conversation (The Old Bank of England conversation) involving gossip from someone else after the event. Given the “leak” of the email, a further interesting question arises as to whether or not this decision would be decided in the same way in Australia following the High Court’s judgment in the Panama Papers case – Glencore v Commissioner of Taxation [2019] HCA 26.
Notwithstanding the fact that legal professional privilege between Shell and Lewis Silkin LLP was ultimately upheld, the whole episode must have been extremely embarrassing to all involved.

1.7 Ploubidis v Carling [2019] SADC 151

The case (which is also of interest for its discussion of the principles applicable to the receipt of evidence under the Listening and Surveillance Devices Act 1972 (SA)) was about caveats and de-facto relationships. It concerned (in part) whether or not a letter from the plaintiff’s lawyers to the defendant was admissible on an application for partial summary judgment by the defendant.

The letter in question (which was said to prove the date upon which the parties separated) was headed “Without Prejudice save as to costs”, however, on the final page of the letter it was said that it was “an open letter and may be relied upon on the issue of costs should [the plaintiff] ... find it necessary to apply to the Family Court for Orders” [emphasis added].

The defendant alleged that the contents of the letter proved that the parties had separated before 2009 (which was relevant to the issue of whether the Family Court had jurisdiction in relation to the de-facto relationship), but the plaintiff objected to its admissibility because it was without prejudice and subject to settlement privilege. Whilst the letter put forward a date of separation, it also contended that the plaintiff was entitled to a settlement of property enforceable by orders of the Family Court and made an offer of settlement.

Judge Durrant said that the language used by the solicitor was “problematic”. This was because, on the one hand, the letter was marked “Without Prejudice” and contained an offer of settlement (and would thereby be a communication made in connection with an attempt to negotiate a settlement of a civil dispute and therefore privileged under s. 67C of the Evidence Act 1929 (SA)), but on the other hand, the letter was said to be “open”. These were two conflicting positions.

His Honour held, in effect, that, read as a whole, the letter was said to be relied upon on the question of costs in future proceedings and that the attempt to negotiate a settlement contained in it meant that it was privileged. It was, therefore, not admissible on the defendant’s application.

Although it was not mentioned specifically in the Judgment, it would appear to have been the case that the plaintiff’s solicitor was trying to engage Calderbank-type principles, that is, “Without Prejudice save as to costs” [emphasis added]. What they may have been trying to say when stating that the letter was “open” was that the plaintiff would seek to rely on the fact of the settlement at some future time in any argument on costs. This was certainly the way the Judge interpreted it; however, had the language used been clear, explicit, and not apparently inconsistent, the argument could have been avoided in the first place.

1.8 Bell Lawyers v Pentelow [2019] HCA 29

The appellant, an incorporated legal practice, retained the first respondent, a barrister, to appear in proceedings in the Supreme Court of New South Wales. At the conclusion of those proceedings, a dispute arose as to the payment of the first respondent’s fees. The first respondent sued the appellant for her unpaid fees in the Local Court of New South Wales. She was unsuccessful in that proceeding, but she appealed successfully to the Supreme Court of New South Wales. Orders for costs were made in the first respondent’s favour in relation to both the Local Court and the Supreme Court proceedings.
The first respondent subsequently forwarded a memorandum of costs to the appellant pursuant to those costs orders, which included sums for costs incurred on her own behalf and the provision of legal services by her in the Local Court and Supreme Court proceedings. Although the first respondent was represented by a solicitor in the Local Court proceeding, and by solicitors and senior counsel in the Supreme Court proceeding, she had undertaken preparatory legal work and had attended court on a number of occasions.

The appellant refused to pay the costs claimed for the work personally undertaken by the first respondent. A costs assessor rejected the first respondent’s claim for the costs of the work she had performed and that decision was affirmed on appeal before the Review Panel and the District Court of New South Wales. The first respondent sought judicial review of the decision of the District Court in the Court of Appeal of the Supreme Court of New South Wales. As a general rule, a self-represented litigant may not obtain any recompense for the value of his or her time spent in litigation. Under an exception to the general rule, commonly referred to as “the Chorley exception”, a self-represented litigant who happens to be a solicitor may recover his or her professional costs of acting in the litigation. The Court of Appeal, by majority, held that the first respondent was entitled to rely upon the Chorley exception notwithstanding that she was a barrister and not a solicitor.

By grant of special leave, the appellant appealed to the High Court. The majority of the Court held that the Chorley exception should not be recognised as part of the common law of Australia because it is an anomaly that represents an affront to the fundamental value of equality of all persons before the law and cannot be justified by the considerations of policy said to support it.

1.9 Monsere Pty Ltd v RDM Nominees Pty Ltd [2019] SASC 126

The defendant (“RDM”) sent a Statutory Demand to the plaintiff (“Monsere”) on 19 March 2019 in relation to a debt RDM claimed was owed by Monsere. Monsere asserted that there was a genuine dispute and an off-setting claim in relation to the debt claimed by RDM. Monsere instructed its solicitors to make an application pursuant to s.459G of the Corporations Act 2001 (Cth) for the Statutory Demand to be set aside. Such an application must be made within 21 days of the service of the Statutory Demand, otherwise the company to which the Demand is directed will be deemed to be insolvent. The Corporations Rules 2003 (SA) provide that an application to set aside a Statutory Demand “must be in accordance with Form 2”. Form 2 is used for a number of different types of applicants and contains a number of parts. One part (Part B) provided for the details of the return date of the application to be filled in and another part (Part C) was a section to be completed if the originating process was seeking an order that the company be wound up in insolvency on the ground that the company had failed to comply with a Statutory Demand.

The Court noted that it was common for the wording under Part C to be deleted if it was not applicable. Part C – which contained spaces for the insertion of the details of the service of the Statutory Demand (i.e. something which had already occurred) – was not applicable in this instance because the relief sought was to set aside a Statutory Demand and not wind-up a company.

Upon filing of a Form 2 the Registrar must fix a time, date and place for hearing and endorse those details on the document at Part B. What occurred in this case is that on 5 April 2019 (4 days before the 21 day period expired) the solicitor for Monsere attended at the Registry himself to file the set-aside application. The Registry Staff filled in the date, time and place of the hearing at Part C of the
Form 2, not at Part B. The solicitor did not notice that the Registry Staff had written the return date ("30 April 2019 at 2:15pm") in the wrong part of the document and did not check that the document was correctly filled out. After attending at the Registry Monsere’s solicitor served the documents himself on RDM’s solicitor.

RDM then disputed that an application to set aside the Statutory Demand had been filed because the application did not comply with Form 2 and s.459G by reason of the fact that it did not bear the return date at Part B. RDM said that because the matter was not one to which Part C applied, the date written in Part C could not be read as the return date for the hearing, and that strict compliance was required.

Monsere submitted that in the circumstances of this matter, where Part C of the Form was not engaged, and where the date at Part C was a future date, it should have been obvious to RDM that the Registry had made a mistake and that the date in Part C was actually the return date. Monsere submitted that there was therefore substantial and sufficient compliance with the requirements of the Act.

Judge Bochner examined a number of the authorities on s.459G, although she acknowledged that none of them specifically related to a situation where the date was on the wrong section of the Form. It was clear from previous cases that it was fatal to the validity of the application if no return date at all appeared on the document, whether or not it was fault of the applicant – see for example Bache Business and Printing Services Pty Ltd v SA Hub Productions [2009] SASC 369 and Cooloola Dairys Pty Ltd v National Foods Milk Ltd [2004] 211 ALR 293.

Judge Bochner concluded that:

“It was not for the defendant [RDM] to attempt to ascertain the true meaning of Part C; the time and date for the hearing must be evident on the face of the document, without requiring the defendant to make any assumptions. In my view, this case cannot be distinguished from Cooloola Dairies, despite the factual differences both cases required the defendant to guess, make an assumption or take some other step to ensure that it was aware of the hearing date for the application”.

Monsere’s application to set aside the Statutory Demand was therefore dismissed thereby exposing Monsere to being wound up.

2. Cases involving Insurance Law

2.1 Bank of Queensland Ltd v AIG Australia Ltd [2019] NSWCA 190

The first instance decision in this matter was dealt with at para 2.2 of the 2018 Riskwatch News.

On appeal, the NSW Court of Appeal allowed the appeal by the Bank of Queensland. It will be recalled that the first instance decision was in favour of AIG Insurance’s contention that the 192 individual matters in one Class Action were to be considered individual claims for the purposes of the Aggregation Clause in the relevant insurance policy. Given the excess under the policy was $2m the result of this finding was that the Bank was effectively uninsured.

The Court of Appeal Judges found that the Class Action constituted multiple claims (White JA dissented on this point) but that as the claims arose out of, or were based upon or attributable to one series of
related wrongful acts, they should be aggregated and the Bank was liable to pay only one excess (or retention) in relation to the claims.

2.2 Globe Church Inc. v Allianz Australia Insurance Ltd [2019] NSWCA 27

The Plaintiff was insured by the Defendants from 31 March 2007 – 31 March 2008. It made a claim under the policy in September 2009 in respect of property damage (flood damage to a church hall and the underground footings of a carpark) alleged to have occurred during that period. The Insurer defendants denied liability in September 2011 and April 2011, respectively.

The Plaintiff commenced proceedings in November 2016.

The defendants argued that the plaintiff’s claims were statute barred by operation of s14(1) of the Limitation Act 1969 (NSW). This issue was referred to the Court of Appeal for determination.

Bathurst CJ, Beazley P and Ward JA (Meagher and Leeming JJA dissenting) held that the claim for damages in relation to the policy accrued at the time of the property damage rather than the date of claim as asserted by the plaintiff. The minority Judgments held that the claim was not statute barred because the plaintiff’s cause of action did not accrue until the insurer made its decision on indemnity. The Plaintiff’s claim was therefore out of time.

2.3 Dalby Bio-Refinery Ltd v Allianz Australia Insurance Ltd [2019] FCAFC 85

Dalby carried on business as a manufacturer and distributor of ethanol and claimed on its insurance policy for damage that occurred to stockpiles of dry distillers’ grain after smoke was detected in bays in which the grain was stored. No fire actually occurred but the grain was damaged. At first instance, Allianz successfully relied on an exclusion clause, which excluded liability for, inter alia,

‘spontaneous combustion... spontaneous fermentation or heating or any process involving the direct application of heat’.

The Trial Judge held that the term “heating” was not qualified by the work “spontaneous” and, in the alternative, that “spontaneous” should be given its natural meaning, namely something without external cause, rather than something that occurs rapidly. As a referee report indicated that the fire was caused by “self-heating”, the primary judge found that liability was excluded by the perils clause. Dalby appealed.

The Full Federal Court disagreed with the primary judge’s qualification that the word “heating” with the adjective “spontaneous” noting that the proper meaning to be given to the clause is a “businesslike construction, by reference to what a reasonable business person would have understood the words in their commercial context to mean”.

The alternative reasoning of the primary judge, that the phrase “spontaneous heating” should be interpreted to mean self-generating, rather than the requiring some suddenness (as asserted by Dalby) did find favour with the Judges on Appeal. Their Honours dismissed the appeal with costs.
2.4 Tokio Marine & Nichido Fire Insurance Co Ltd v Holgersson [2019] WASCA 114

The fifth respondent, Mosman Bay, was a builder insured by the appellant, Tokio. The first respondent, Holgersson, was engaged as a subcontractor to do painting works on the second respondents’ home. The home was substantially damaged by a fire.

The primary judge determined, as a preliminary question, that Holgersson was an insured under the policy between Tokio and Mosman Bay. His Honour considered the definition of ‘You, Your, Insured’ to mean ‘the Person(s) or legal entity named in the Schedule’, which stated ‘Mosman Bay Construction Pty Ltd and all Principals, Contractors, and Sub-Contractors’. Tokio appealed, arguing that the policy should only apply to parties whose names were explicitly included in the Schedule.

The WA Court of Appeal dismissed the appeal, finding that the term ‘named’ in the Policy should be given its ordinary and natural meaning and may include persons and legal entities if they are specified, mentioned, designated or described by class, without the use of proper names. Holgersson was therefore covered, as a sub-contractor of Mosman Bay.

2.5 Hanson v Goomboorian Transport Pty Ltd [2019] QCA 041

A deceased employee (the deceased) of a Transport Company was found to have stolen $2.5m from their employer. The deceased had a life insurance policy and had paid four of the 95 premiums paid (including the last premium paid) in respect of that policy from stolen funds.

The employer claimed a declaration that the proceeds of the policy were received by the deceased’s parents as trustees for the Employer.

The Trial Judge characterised the insurance policy as providing cover on a month by month basis and noted that the deceased had insurance cover for the month she died because of the money held on trust for the Employer. His Honour ordered that the Employer was entitled to a declaration that the proceeds were received as trustees for the Employer and related entities.

The parents of the deceased appealed. They submitted that the proceeds were not held on trust for the Employer but rather that the proceeds should form part of the deceased’s estate.

The Queensland Court of Appeal allowed the appeal. Their Honours found that the cover ought to be characterised as singular in nature, rather than a series of sequential covers and that therefore the cover should be attributed to all premiums paid rather just than the last premium paid.

2.6 MetLife Insurance Ltd v MX [2019] NSWCA 228

MX a former police officer who had suffered injury, claimed an insured benefit for total and permanent disability under an insurance policy issued by MetLife. MetLife declined the claim on the basis that it was not satisfied that MX’s incapacity would render him unlikely to ever engaged in any gainful profession, trade or occupation for which he was reasonably qualified by reason of education, training or experience. MetLife relied on evidence of the respondent’s overseas travel, volunteering behind the bar at a community club and taking part in a charity sporting event. MX’s case was that these had been “safe” places for him and relied on several psychological reports in support on his claim of total and permanent disability.
The Trial Judge found that MetLife had breached its obligations of utmost good faith and of acting reasonably in forming its opinion as such their decisions were void and of no effect.

The NSW Court of Appeal granted MetLife leave to appeal but dismissed the appeal with costs. Their Honours held that there was no error in the primary judge’s finding that MetLife breached its contractual duties to MX to act fairly and reasonably in considering his claims.

2.7 XL Insurance Co SE v BNY Trust Company of Australia Ltd [2019] NSWCA 215

BNY Trust Company of Australia Limited made a claim against valuers in respect of property valuations made by the valuers.

XL insurance, as the insurer of the valuers, declined to indemnify them or fund their defence, relying on an exclusion clause for valuations undertaken for lenders who were not an Authorised Deposit-Taking Institution (ADI) supervised by the Australian Prudential Regulatory Authority, unless the valuation included a particular clause known as a “Prudent Lender Clause”.

The parties agreed that BNY was not an ADI, that the valuations did not include a “Prudent Lender Clause”, and that the loss was not caused by the failure to incorporate a “Prudent Lender Clause” in the valuations.

The question of indemnity was determined separately.

The Trial Judge found in favour of the valuers, and against the Insurer, noting that the exclusion only operated where there was a causal connection established between the plaintiff's loss and the absence of a prudent lender clause in the valuations.

The NSW Court of Appeal allowed the appeal, finding that the preferred construction of the exclusion clause was that it applied to exclude loss where the valuation is undertaken by or on behalf of the Insured for a non-ADI lender and the valuation does not include a “Prudent Lender Clause”. The Insurer was therefore successful.

2.8 Allianz Australia Insurance Ltd v Certain Underwriters at Lloyds [2019] NSWCA 271

A worker employed by Baulderstone was seriously injured at work and sought compensation. The worker obtained a consent judgment against Baulderstone for over $1m.

Baulderstone was insured under two different liability insurance policies being a Construction Risks Policy issued by Allianz to the Roads and Traffic Authority of New South Wales (the Allianz Policy) and a Public and Products/Contract Works Liability Policy issued by Underwriters at Lloyd’s of London to the parent company of Baulderstone (the Lloyd’s Policy).

Allianz indemnified Baulderstone against the judgment. Allianz then sought a declaration that Lloyd’s were also liable to indemnify Baulderstone and sought equitable contribution. The Judge at first instance found that the Lloyd’s Policy did not respond and dismissed Allianz’s claim.

The Allianz Policy contained a provision (clause 8.17) which provided, in effect, for that Policy to only respond where any underlying insurance did not respond.
It also contained an “Other Insurance” clause (clause 8.20) to the effect that “this Policy is excess over and above any other valid and collectible insurance and shall not respond to any loss until such time as the limit of liability under such other primary and valid insurance has been totally exhausted”.

The Allianz Policy also contained a definition of “Underlying Insurance” as follows:

“Underlying Insurance means a policy of insurance arranged by or on behalf of an Insured either voluntarily or pursuant to a Contract (which may include a policy(ies) arranged by joint venture partners, principals, contractors etc) that provides cover to the Insured for a risk, which save for the Underlying Insurance, would be covered by this Policy.”

The Lloyd’s Policy contained a clause (clause 10.5) excluding liability which forms the subject of insurance by any other policy and it also stated that “this Policy shall not be drawn into contribution with such other insurance”.

The Trial Judge held, in effect, in favour of Lloyd’s, finding that there was no double insurance because the Lloyd’s Policy did not respond in the first place. Allianz’s appeal to the NSW Court of Appeal was allowed (by a majority). The majority focused on the definition of “Underlying Insurance”. They held that if the Lloyd’s Policy was not “Underlying Insurance” then cl 8.17 had no application and cl 10.5 and cl 8.20 would cancel each other out, entitling Allianz to contribution from Lloyd’s.

Meagher JA confirmed that the Lloyd’s Policy satisfied the first part of the definition of “Underlying Insurance” as it had been arranged by Baulderstone’s parent company but it did not satisfy the second element of the definition. This was because to be “Underlying Insurance” it must convert, by operation of cl 8.20 of the Allianz Policy to excess insurance. The Lloyd’s Policy did not convert the Allianz Policy to excess cover because the effect of cl 10.5 of the Lloyd’s Policy was that there was no primary cover for Baulderstone’s liability under the Lloyd’s Policy. Accordingly, each “other insurance” clause cancelled each other out.

2.9 AIG Australia Limited v Kaboko Mining Limited [2019] FCAFC 96

AIG issued a Directors and Office Liability Policy to cover directors and officers of Kaboko. Kaboko became the subject to a Deed of Company Arrangement and sued four of its former directors and officers (the Directors) alleging breaches of the Directors’ duties to act with due care and diligence and in good faith in the best interests of the company. The Directors made a claim for indemnity under the Policy. The Policy contained an exclusion as follows:

“The Insurer shall not be liable... for any loss in connection with any Claim arising out of, based on or attributable to the actual or alleged insolvency of the Company...” (the Insolvency Exclusion).

The business of Kaboko was to develop manganese mines in Zambia. Substantial advances (totalling US $10 million) on the purchase of manganese ore were made by Noble Resources Limited. The funds advanced were to be used by Kaboko to develop the mines so that manganese ore could be produced. Noble and Kaboko fell into dispute and Noble sought repayment of certain sums advanced on the basis that Kaboko was in breach of their arrangements as it was alleged that Kaboko had sold manganese to unauthorised third parties. A statutory demand was issued by Noble and litigation ensued and the Demand was ultimately set aside. Subsequently, part of the advances fell to be repaid (quite apart from any allegation of breaches result from unauthorised sales) but were not repaid.
Kaboko then sued the Directors alleging, in effect, that the Directors had breached their duties by not using the Noble advances for mining (in breach of the agreements) and not keeping proper financial records. In broad terms the claim against the Directors was that their alleged breaches of duty caused the loss of the opportunity to profitably exploit the Zambian mines.

AIG submitted that the bringing of the proceedings arose out of, was based upon or was attributable to the insolvency of Kaboko and therefore the claim against the Directors was excluded by the Insolvency exclusion. Kaboko submitted that the exclusion only applied if insolvency was one of the underlying facts that, if established, would justify the claims or the loss suffered and that the pleading against the Directors was not of this nature. It was said that each of the claims made could be advanced irrespective of whether Kaboko was in administration and that the claims were not based upon insolvent trading.

The judges, both, at first instance and in the Full Federal Court, found in favour of Kaboko’s contentions and held that the Insolvency exclusion did not apply.

3. Other cases of general interest

3.1 Caffrey v AA Limited [2019] QSC 7

The plaintiff was a police officer who developed Post Traumatic Stress Disorder (PTSD) after attending the scene of a single vehicle motor vehicle accident. The driver had suffered eventually fatal injuries but was still alive when the plaintiff attended. The plaintiff took steps to maximise the driver’s chances of survival by:

- placing his hand under the driver’s chin and supporting his head to clear his airway;
- reassuring the driver’s parents and telling the driver that he shouldn’t give up because his parents had arrived; and
- instructing the fire brigade to wait for the paramedics prior to cutting the driver from the vehicle as the driver could suffer a heart attack or go into shock.

After the paramedics arrived, the plaintiff was informed that the driver was going to pass away. He informed the driver’s parents and took the driver’s parents to say goodbye.

The Civil Liability Act 2003 (Qld) did not apply. The incident occurred in the course of the plaintiff’s employment; therefore, Common law principles were applied to determine all issues including if the driver owed the plaintiff a duty of care.

The Court applied the principles from the leading High Court case of Wicks v State Rail Authority (NSW) where several police officers attended the scene of a deadly train derailment near Waterfall Station and suffered from psychiatric injuries. In that case, the High Court found that depending on the sights a police officer might see, sounds they might hear, tasks they might have to undertake, in combination, cause them to develop a psychiatric illness, a duty may be owed.

The Court found:

- it was reasonably foreseeable if someone were to discover a motor vehicle accident, emergency services and police officers would be called to attend the scene;
- whilst it was uncommon for a police officer to arrive at the scene before other emergency services, this would be no impediment to a successful claim if it was reasonably foreseeable that this would occur; and
the presence of the driver's parents at the scene was not unexpected and therefore, the extent that his parents contributed to the plaintiff's trauma "should not be viewed as outside the contemplation" of the driver.

The defendant made submissions to distinguish this case from and earlier case *(Jaunskis v Nominal Defendant (No 5))* which held that a defendant driver who hit another vehicle and caused casualties should have foreseen a police officer attending the scene might suffer a psychiatric injury as a result. However, the Court rejected these submissions and found:

The Court found the driver owed the plaintiff a duty of care because

- the plaintiff met the requirement for "direct perception" as what he saw at the scene would be part of the “aftermath” of the incident.
- even though the driver was the defendant and the sole victim, it did not bar the plaintiff's claim.
- the plaintiff was part of the “rescuer” class, but even if he was a “mere bystander” this would not bar him from bringing a claim.

The defendant also submitted that the claim should be denied on policy considerations. As to this submission, the Court found:

- there would be no deterrent effect if civilians can be liable for psychiatric injuries suffered by police officers because they can already be liable for physical injuries;
- a finding of duty being owed to the plaintiff would not unacceptably expand the categories of potential defendants and claimants as claimants still need to reach the threshold of suffering a “recognisable psychiatric illness” and courts are equipped to control any increase in claims;
- although, police officers are better equipped to “handle” distressing scenes, the incident “exposed the plaintiff to deeply distressing and personalised circumstances”;
- members of the public are not entitled to drive in any manner without regard to police officers who may attend accident scenes; and
- the fact police officers are legally obliged to respond to emergencies places them in a situation of “elevated risk” with respect to psychiatric injuries.

### 3.2 Zeng v Leeda Projects Pty Ltd [2019] VSC 106

Yun Zeng *(Zeng)* purchased a whole floor apartment at Eureka Tower in Melbourne for $5,838,000.00. The apartment was a shell and required fit out works before it could be occupied.

Zeng entered into a building contract with the defendant to carry out internal fit out works which included a private art gallery and a residence. The contract price was $1,168,558.24.

The contracted works should have been completed by 3 December 2014, however were not completed for a further 130 weeks.

The case was heard in VCAT who held that damages were not applicable because Zeng wasn’t intending to rent out the property. The case was appealed to the Supreme Court.

The Supreme Court held that there was an implied term that the works must be completed within a reasonable amount of time and that even though the intention was for Zeng to live in the apartment, it was reasonable to provide compensation by way of the rental equivalent of the apartment for the delayed time (130 weeks).
This was despite the fact that there was no loss of residential income because Zeng never intended to lease the apartment and that Zeng did not incur the expense of having to rent other accommodation during the delay period because at all relevant times she had access to a number of her own residential properties in Melbourne.

The Court held that despite this, Zeng still suffered a loss. She was therefore entitled to be compensated. This was because had the defendant completed the fit out within a reasonable period, Zeng would have been able to exercise her right of occupancy of the apartment for the 130 weeks.

The Court held that damages for breach of contract are intended to restore the plaintiff to the same situation as if the contract had been performed. If the contract had been performed in accordance with its terms, Zeng would have been able to use the property during the delayed period of 130 weeks. The property would have been available for use both as accommodation and an art gallery for Zeng's extensive art collection.

The defendant knew when it entered into the fit out contract it was undertaking to fit out the apartment for use both as a residence and an art gallery. As reasonable person in the defendant's position would have realised that Zeng's loss of use of the apartment would flow from the breach of the defendant of the implied terms that the works would be completed in a reasonable time. The Court held that damages be awarded in favour of Zeng at the rental rate for the apartment.

3.3 Marisha Nominees Pty Ltd v Daw [2019] SASC 77

This case involved a dispute regarding a contract for home renovations. The appellant company, a builder, entered into an oral agreement with the respondent to carry out certain renovations to the respondent’s premises. The parties fell into a dispute about the works and the appellant sued for breach of contract or, in the alternative, a quantum merit for the work performed.

The appellant company did not have the appropriate builder’s licence. A director of the appellant company did hold the appropriate licence but it was found that the contract was entered into by the company rather than the director. This meant that, by reason of s.6 (2) of the Building Work Contractors Act 1995 (SA), the appellant company could not sue under the agreement.

As far as the claim for a quantum merit was concerned, it was found that time runs when the defendant (in this case the respondent) received the benefit that gave rise to the obligation to make restitution. In this case, that date was 30 July 2006, yet the quantum merit claim was not added to the proceedings until 28 March 2017.

A Magistrate held that the relevant limitation period for the quantum merit claim was 6 years, being s.35(a) of the Limitation of Actions Act 1936 (SA) (for actions on a simple contract, express or implied), and that it was therefore out of time. Section 38 of the Limitations of Actions Act (for actions for recovery of monies based on restitutionary grounds) was also relevant.

On appeal to a single Judge of the Supreme Court, it was argued on behalf of the appellant that the defence of laches (on the part of the respondent) was relevant. For this argument to be successful, however, a claim for a quantum merit needs to be a claim in equity. It was held (applying the High Court in Pavey & Matthews Pty Ltd v Paul (1987) 62 CLR 221) that a quantum merit was a claim based on restitution or unjust enrichment and was not a claim based in equity.

The appeal was dismissed.
In 2016, the ABC's Four Corners programme presented its investigation into the treatment of youths at Northern Territory detention centres, including the Don Dale Youth Detention Centre. The programme showed some of the treatment received by Dylan Voller at Don Dale.

The investigation and a subsequent Royal Commission received significant media attention in Australia, with various news outlets and sites covering the stories around it in detail. In 2016 and 2017, Nationwide News, Fairfax Media and Australian New Channel (the News Companies), posted various news stories on their public Facebook pages regarding the investigation and Royal Commission. Comments left by members of the public on the Facebook stories and pages were allegedly defamatory of Mr Voller. Mr Voller commenced defamation proceedings in the NSW Supreme Court against the news companies as operators of the public Facebook pages.

The Court considered the issues of publication as a preliminary question, that is, were the News Companies liable as publishers for the comments left by members of the public on their Facebook pages.

The Court considered substantial expert evidence about how Facebook operates generally, how its algorithm may influence the visibility of posts and any tools available to moderators of any particular page to monitor comments left by the public. The Court considered the volume of visitors to the main news website of each News Company and the percentage of those visitors who were prompted or channelled there by the public Facebook page. The purpose or function of the public Facebook page for each Company, which was ultimately to channel users to its main news website to optimise readership and advertising revenue, was thought by the Court to be important.

The expert evidence received about the mechanisms in place to monitor and moderate unsavoury behaviour on the public Facebook page was that it was possible to:

1. completely block all comments from being made on the page;
2. hide comments on the page, either for the purpose of ensuring that only friends of the commentator can read the comments; or
3. arrange all comments to be sent to the administrator for review and release, if appropriate.

The elements of publication were set out by the Court as follows:

- when a third party comments on a public Facebook page, that is the first time the comment is a comprehensible form to the vast bulk of readers;
- it is from that publication that the comment is downloaded onto the computer of the person who is gaining access to the public Facebook page;
- the comment's presence on the public Facebook page allows third party users to gain access, that is, the operation of the Facebook algorithm promoting stories or content to like-minded people perpetuates the publication of the comments as the more comments a story gets, the higher it is "bumped" in the Facebook algorithm and therefore shown to more users; and
- it is the capacity to exercise the final right of approval that renders the distributor or page operator liable for defamation because of publication.

The Court found that the News Companies were each publishers because the administrator of a public Facebook page effectively authorises publication of the comments on each post or story if he/she/it
does not monitor or moderate appropriately the publication of comments. The extent of publication of a comment is wholly within the hands of a company that operates a public Facebook page because of the ability to moderate the comments.

3.5 Douglas v Morgan [2019] SASCFC 76

The decision of Judge Bochner was dealt with at paragraph 1.4 of the 2018 Riskwatch News. The Insurer appealed from Judge Bochner’s decision that the report in question was not prepared for the dominant purpose of contemplated litigation and was therefore not privileged from production.

The Full Court dismissed the Insurer’s appeal, thereby upholding the finding that the report was not privileged from production.

3.6 Bendigo and Adelaide Bank Limited v Pickard [2019] SASC 123

This case concerned the enforceability of personal guarantees given by the directors of a company to the Bank in respect of loans provided by a financier to the company. The company failed and the financier sought to recover the amounts advanced to the company from the directors. The loan documents and guarantees were in fact executed under power of attorney by the financier on behalf of the directors.

The issues in the case involved whether the defendant directors had signed the application for the loans only in the name of the company or in their personal capacity as well, whether the financier was authorised to enter into the loan documents as their attorney, whether the guarantees were within the limited scope of the power of attorney, whether the guarantees in the loan documents were validly executed by the attorney, whether, if the loan documents were not valid deeds, they nonetheless took effect as a contract and whether or not the conduct of the directors had ratified the deeds.

In a complex judgment, Stanley J. found in favour of the financier on all except one critical point relating to the execution of the loan documents. In relation to the execution point, the directors submitted that the loan deed (which contained the guarantees) was not enforceable because it had been improperly “signed” by the financier by the affixing of electronic signatures of two of its officers to an electronic version of the document. In the circumstances of this case Stanley J. found that the manner in which the signatures were affixed did not comply with s.127 (1) of the Corporations Act 2001 (Cth), which provides that a company may execute a document without using a common seal if the document is signed by two directors of the company.

Although it is possible for a director to “sign” a document electronically, in this case the evidence was that the signatures of the directors of the financier were affixed electronically by a company officer without the directors of the financier reviewing the particular document in question. This meant that there was no personal authentication by the individual signing, as required.

3.7 Fitzpatrick v Lifetime Support Authority [2019] SASCFC 97

The Motor Vehicle Accidents Lifetime Support Scheme Act 2013 (SA) came into operation on 1 July 2014 and provides for the participation of persons suffering catastrophic injury in a motor vehicle accident in SA in the Lifetime Support Scheme (LSS), being a scheme for the future care of such persons. The
LSS is administered by the Lifetime Support Authority (LSA). The Act provides that a person can become a participant in the LSS against their will.

The plaintiff was significantly injured in a motor vehicle accident on 16 November 2014. At the time, the plaintiff was not eligible to become an LSS participant. On 13 July 2015 the plaintiff commenced proceedings against the driver of the other vehicle, seeking compensation. Up until the rules of the LSS changed in 2017, the plaintiff was not eligible to become an LSS participant, but thereafter she was. On 20 March 2018, the LSS decided to accept the plaintiff as a member.

The plaintiff commenced judicial review proceedings, seeking to quash the LSS decision on the basis that the 2017 Rules did not apply to her because she had accrued rights under the law applicable at the time of the accident and the time she issued proceedings.

The Full Court decided that at the time the 2017 Rules were promulgated the plaintiff had not accrued any right to an award of damages at common law for her future needs as those damages had not yet been assessed. The Court also found that any accrued right that the plaintiff may have had had been displaced by a contrary intention in the 2017 Rules of the LSS Act and s. 58A of the Civil Liability Act 1936 (SA). The action for judicial review was dismissed.

3.8 Giameos v Return to Work Corporation [2019] SASCFC 161

The applicant suffered an injury to his left foot at work in 2014 for which he underwent surgery. In 2017 further surgery was recommended and approved by the respondent. The respondent also approved a post-operative rehabilitation program, but only for a limited period (i.e. up until 27 June 2018). The Return to Work Act 2014 (SA) limits a worker’s entitlement to compensation for medical expenses to expenses incurred in the period ending 12 months from the date on which the worker’s entitlements to weekly payments came to an end. In this case, this date was 27 June 2017. The respondent therefore said it was justified in stopping paying for the rehabilitation program on 27 June 2018.

The appellant argued that the time limitation for payment of medical expenses could, in effect, be extended by the making, and acceptance, of an application to the respondent in advance, for the respondent to be liable to pay the expenses.

The Full Court held that the pre-approval is only available within the period specified.

3.9 Cowie v O’Brien [2019] SASC 203

In a medical negligence matter, the solicitors for the defendants received an email from a medical expert. At issue in this case was whether this email was an Expert Report, which had to be disclosed pursuant to R. 160.

The defendant’s position was that the email was a communication with the expert (rather than a Report) and that it did not have to be disclosed.

Kelly J held that the Court should not adopt a technical and narrow approach to the definition of “Expert Report” in the Rules and held that the email did constitute such a Report and should have been disclosed.
This is a rare case which deals (along with many other issues) with the unusual, but interesting, concept of gross negligence.

Babcock & Brown was approached by Deutsche Bank concerning the possibility of acquiring the shares in Coinmach Services Corporation, a publicly listed Delaware corporation. Deutsche Bank was one of the financial advisors to Coinmach. The Coinmach share acquisition proceeded but resulted in major losses for the investors in the fund managed by the Manager. It was alleged that the Manager breached a duty of care and was liable in damages to the investors.

The manager had obligations to:

“(a) invest and manager the Portfolio for and on behalf of the Partnership in accordance with this Agreement;

(b) exercise all due diligence and vigilance in carrying out its functions, powers and duties under this Agreement.”

The agreement also contained the following clause:

“5.1 (a) Neither the Manager nor any of its related bodies corporate, directors, officers, employees, shareholders and other agents (each, an Indemnified Party), shall be liable to the Partnership or to the Limited Partners for any Loss arising from any act performed or omitted by such parties arising out of or in connection with the performance by the Managers (and/or its related bodies corporate) of its services under this Agreement or arising out of the Partnership’s business or affairs, except to the extent that any such Losses are primarily attributable to the gross negligence or wilful misconduct of such Indemnified Party.” (emphasis added).

In dealing with the meaning of “gross negligence” Ball J noted:

“The effect of that clause is that the Manager will not be liable unless it has at least been grossly negligent. “Gross negligence” is not a term with a precise meaning; and its meaning is to be ascertained from the context in which it is used. In some cases, it has been held to encompass more than mere negligence... However, any distinction between gross negligence and mere negligence is one of degree and not of kind: Armitage v Nurse [1998] Ch 241 at 254 per Millett LJ. In other cases, the word “gross” has been found to add no additional meaning in the circumstances: see Sucden Financial v Fluxo-Cane Overseas Ltd [2010] EWHC 2133 (Comm) at [54] per Blair J.”

In deciding that the manager had acted with gross negligence, his Honour continued:

“In the present case, in my opinion the phrase “gross negligence” encompasses more than mere negligence, but it would at least include a deliberate decision not to undertake enquiries or investigations required by the contract.”

His Honour’s key conclusion was as follows:

“... in my opinion, the Manager’s conceded breach amounts to more than mere negligence. It must have reflected a deliberate decision on the part of the manager to rely on the work of the Coinmach Deal Team rather than to undertake any substantive enquiries of its own in relation to the
investment. In taking that deliberate decision in breach of its contractual obligations, it was at least grossly negligent, with the result that the exclusion in cl. 5.1 (a) did not apply." (emphasis added)

Whilst Ball J included within the concept of “gross negligence” a deliberate decision not to do something, it should not be thought that his Honour was requiring there to be deliberateness in the sense of conscious wrongdoing but rather the making of a decision which not only involved a breach of a duty of care and a serious disregard or indifference to obvious risk. This is because negligence as a tort is concerned with inadvertent conduct and not intentional wrongdoing.

4. High Court cases of interest

4.1 Onley v Catlin Syndicate Ltd as the Underwriting member of Lloyd’s Syndicate 2003 [2019] HCA Trans 18

The Full Court of the Federal Court’s decision in this matter was dealt with at paragraph 2.1 of the 2018 Risk Watch News.

On 15 February 2019 the High Court dismissed Mr Olney’s application for special leave to appeal, holding that the decision of the Full Court of the Federal Court was not attended by sufficient doubt to warrant the grant of special leave to appeal.

4.2 Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13

Proceedings were brought in the Federal Court by Ms Bianca Rinehart (“Bianca”) and Mr John Hancock (“John”) in which they made a number of claims concerning the conduct of Mrs Gina Rinehart (“Gina”) Hancock Prospecting Pty Ltd (“HPPL”) and others, which is said to have diminished the assets of trusts of which the appellants are beneficiaries (“the substantive claims”). The three deeds the subject of the appeals (“the Deeds”) came into existence against the background of and were addressed to claims and threats of litigation made publicly by John in relation to the substantive claims. Each Deed contained an arbitral clause providing that in the event of a dispute “under the deed” (or, in one of the Deeds, “hereunder”) there is to be a confidential arbitration. The appellants claimed that the Deeds are void as against them because their assent was procured by misconduct on the part of Gina, HPPL and other (“the validity claims”).

Gina sought an order pursuant to s 8(1) of the NSW Commercial Arbitration Act 2010 that the matters the subject or the proceedings be referred to arbitration. The sub-section relevantly provides that a court before which an action is brought in a matter which is the subject of an arbitration agreement must in certain circumstances refer the parties to arbitration. Gina, HPPL and other related companies also sought orders including that the proceedings be dismissed or permanently stayed.

The primary judge held that the validity claims were not subject to the arbitral clauses, based on a limitation on the scope of the clause resulting from the words “under this [deed]”. The Full Court of the Federal Court disagreed, holding that the arbitral clauses should be given a liberal interpretation, such that the arbitrator could deal with all issues, including the validity claims.

The High Court unanimously held that it was clear that the arbitral clauses, construed in context, included as their subjects the validity claims. It could not have been understood by the parties to the Deeds that any challenge to the efficacy of the Deeds was to be determined in the public spotlight.
4.3 Parkes Shire Council v South West Helicopters Pty Limited [2019] HCA 14

The Parker Shire Council engaged the respondent to assist it to carry out by helicopter a low level aerial noxious weed survey. On 2 February 2006, a helicopter operated for that purpose by the respondent was carrying two of the appellant’s officers, Mr Buerckner and Mr Stephenson. The helicopter struck power lines and crashed, killing all three occupants. Amongst a number of other claims made as a result of the accident, Mr Stephenson’s widow, daughter and son (“the Stephensons”) brought claims against both the appellant and respondent for damages for negligently inflicted psychiatric harm resulting from the death of Mr Stephenson.

The issue in this appeal was whether a claim under the general law of tort for damages for negligently inflicted psychiatric harm consequent upon the death of a passenger during air carriage to which Pt IV of the Civil Aviation (Carriers’ Liability) Act 1959 (Cth) (“the Act”) applies was precluded by the Act.

Section 28 of the Act relevantly provides that, where Pt IV of the Act applies to the carriage of a passenger, the carrier is “liable for damage sustained by reason of the death of the passenger… resulting from an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking”. Section 35(2) provides that the liability is “in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger or in respect of the injury that has resulted in the death of the passenger”. Section 34 imposes a time limit on the availability of the right of action created by s 28 being 2 years after the date of the arrival of the aircraft at its destination or when the aircraft ought to have arrived at its destination.

The claims brought by the Stephensons were commenced outside the time fixed by s 34 of the Act. The Supreme Court of New South Wales held that the Stephensons’ claim did not fall within the ambit of s 35(2), with the result that they were not extinguished by the operation of s 34. Each of the Stephensons was successful in his or her claim against the Council. In turn, the Council obtained judgment for contribution against the respondent as co-tortfeasor under the Act. The respondent appealed to the Court of Appeal, which allowed the appeal by majority. The majority held that the Stephensons’ claims were excluded by s 35(2), and should have been dismissed.

By grant of special leave, the Council appealed to the High Court. The Court unanimously held that the Stephensons were entitled to claim against the respondent for damages for loss suffered by them by reason of Mr Stephenson’s death pursuant to s 28 of the Act but held that s 35(2) substituted that entitlement of any claim that might otherwise have been brought under the general law of tort. As the Stephensons’ entitlement to claim under s 28 was extinguished by s 34 before their proceedings were commenced, the Court of Appeal rightly held that their claims should have been dismissed.

4.4 ASIC v Kobelt [2019] HCA 18

Mr Kobelt operated a general store in Mintabie, South Australia. He sold goods including food, groceries, fuel and second-hand cars. Almost all of the respondent’s customers were Anangu persons who resided predominantly in two remote communities. The Anangu customers were said to be vulnerable due to the remoteness of their communities, their impoverishment and the limitations on their education and financial literacy. Mr Kobelt supplied credit to his Anangu customers using a system of credit known as “book-up”, under which payment for goods was deferred in whole or in part subject to the respondent retaining the customer’s debit card and person identification number (“PIN”) linked to the customer’s account into which wages or Centrelink payments were credited. Mr Kobelt would then use the debit card and PIN to withdraw the whole or nearly the whole of the wages
or Centrelink payments shortly after they were credited, so as to prevent the customer having any practical opportunity to access the monies in other ways. At least 50 per cent of the withdrawn funds were applied to reduce the customer’s indebtedness to the general store, and the remainder was held in the respondent’s account and informally made available to the customer for the provision of future goods and services. The evidence established that the withdrawal of funds was authorised by the customers, who understood the basic elements of the book-up system.

Further, anthropological evidence suggested that Anangu customers trusted Mr Kobelt with their debit cards to enable them to exercise choice about what was in their own interests. Several customers reported that they were supportive of the book-up system and Mr Kobelt’s business. For many, book-up was the only means by which they could purchase a vehicle or access credit. Further, Mr Kobelt’s retention of the whole of the monies credited to the customers’ accounts could protect them from the cultural practice of “humbugging” or “demand sharing”, which required them to share resources with certain categories of kin. Book-up credit also ameliorated the “boom and bust” cycle of expenditure and allowed the Anangu customers to buy food between pay days. With two exceptions, the Anangu witnesses considered that Mr Kobelt had treated them well.

Section 12CB(1) of the Australian Securities and Investments Commission Act 2001 (Cth) relevantly provided that a person must not, in trade or commerce and in connection with the supply of financial services, engage in conduct that is, in all the circumstances, unconscionable. It was accepted that, at all relevant times, s 12BC(1) was capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual was identified as having been disadvantaged by the conduct or behaviour. The sole issues was whether Mr Kobelt’s provision of book-up credit was, in all the circumstances, unconscionable.

The Trial Judge found that Mr Kobelt’s conduct was unconscionable as he had chosen to maintain a system that, while it provided some benefits to Anangu customers, took advantage of their vulnerability to “tie” them to his store. On appeal, the Full Court of the Federal Court concluded that Mr Kobelt’s conduct was not unconscionable.

By grant of special leave, ASIC appealed to the High Court. A majority of the Court held that Mr Kobelt’s conduct was not unconscionable. It was held that, although the book-up system rendered the customers more vulnerable to exploitation, no feature of Mr Kobelt’s conduct exploited or otherwise took advantage of the Anangu customers’ vulnerability. The basic elements of the book-up system were also understood and voluntarily accepted by the Anangu customers. The Anangu customers’ acceptance of the terms on which book-up credit was supplied was not the product of their lack of financial literacy, but rather reflected aspects of Anangu culture not found in mainstream Australian society.

4.5 Carter Holt Harvey Wood Products Australia Pty Ltd v Commonwealth of Australia [2019] HCA 20

Amerind Pty Ltd ("Amerind") carried on a business solely in its capacity as trustee of a trading trust and, to that end, maintained credit facilities with Bendigo and Adelaide Bank Ltd ("the Bank"). After terminating those facilities and demanding repayment, the Bank appointed the second respondents ("the receivers") as receivers and managers of Amerind pursuant to a general security deed. Amerind’s creditors then resolved that the company be wound up in insolvency.

The receivers realised Amerind’s assets and satisfied its obligations to the Bank out of the proceeds. After provision for what the receivers considered to be a just estimate of their remuneration, the
surplus remaining for distribution was some $1,619,108, being the proceeds of realisation of inventory. The first respondent ("the Commonwealth"), had advanced accrued wages and entitlements totalling $3.8 million to Amerind's former employees pursuant to the Fair Entitlement Guarantee Scheme and claimed to be entitled to payment out of that surplus in priority to other creditors, including the appellant ("Carter Holt"), pursuant to s 433(3), 556(1)(e) and 560 of the Corporations Act 2001 (Cth).

The primary judge held that s 433 of the Corporations Act did not apply because Amerind had no assets of its own, only a right of indemnity in respect of trust liabilities, which right was neither "property of the company" nor "comprised in or subject to a circulating security interest" within the meaning of that section and rejected the Commonwealth’s claim. The Court of Appeal allowed the Commonwealth’s appeal, holding that Amerind’s right to be indemnified out of the assets of the trust was "property of the company" and that s 433, 555 and 556 therefore necessarily applied to the distribution of the surplus. The Court of Appeal further held that, because the proceeds of realisation of the inventory were property of Amerind subject to a circulating security interest and of which the receivers had taken possession or assumed control, s 433(3) required the receivers to pay the claims in s 556(1)(e) in priority out of those proceeds. By grant of special leave, Carter Holt appealed to the High Court.

Kiefel CJ, Keane and Edelman JJ summarised the issue as follows:

“In 1988, the Australian Law Reform Commission observed that although the trading trust had been used extensively for more than a decade, the “the companies legislation make little or not provision for corporate trustees which become insolvent”. That observation remain true today. The issue that arises on this appeal, which was foreseen nearly four decades ago, essentially concerns whether creditors who would be priority creditors for an insolvent company are priority creditors when that company trades as the trustee of a trading trust (footnotes omitted)” para [1].

The High Court dismissed the appeal unanimously held that, in the winding up of a corporate trustee, the "property of the company" available for payment of creditors includes so much of the trust assets as the company is entitled, in exercise of its right of indemnity, to apply in satisfaction of the claims of creditors, but that proceeds from an exercise of the right of exoneration may be applied only in satisfaction of trust liabilities to which the right relates. The Court also held that s 433(3) required the receivers to pay the debts in accordance with the statutory priorities in a winding up. A majority reasoned that Amerind’s right of indemnity was not "property [of the company] comprised in or subject to a circulating security interest", but the inventory itself was such "property of the company" and the receivers were, as Amerind would have been, entitled to apply the proceeds of its realisation in satisfaction of the claims of trust creditors.

4.6 Masson v Parsons [2019] HCA 21

In 2006, the appellant provided semen to the first respondent for her to conceive a child by way of artificial insemination. At the time of conception, he believed that he was fathering the child and would thus support and care for her. His name was entered on the child's birth certificate as her father. Although the child lived with the first respondent and later also her de facto partner, the appellant continued to have an ongoing role in the child's financial support, health, education and general welfare. He was described by the trial judge as enjoying an extremely close and secure attachment relationship with the child.

By 2015, the first and second respondents (the female de facto partner of the first respondent) had resolved to move to New Zealand and take the child with them. The appellant responded by instituting proceedings in the Family Court of Australia for orders under the Act, among other things, conferring shared parental responsibility between himself and the first and second respondents.
Section 60H of the *Family Law Act 1975* (Cth) provides rules in respect of the parentage of children born of artificial conception procedures. The trial judge accepted that the appellant did not qualify as parent under s 60H but held that, because that provision expanded rather than restricted the categories of people who could be parents, and because the appellant was a parent within the ordinary meaning of the word, the appellant was a parent of the child for the purposes of the Act.

On appeal, the Full Court of the Family Court agreed that s 60H was not exhaustive, but held that, because the matter was within federal jurisdiction, s 79(1) of the *Judiciary Act 1903* (Cth) picked up and applied s 14 of the *Status of Children Act 1996* (NSW), under which the appellant was irrebuttably presumed not to be the child's parent. By grant of special leave, the appellant appealed to the High Court.

A majority of the High Court held that s 79(1) of the *Judiciary Act* did not pick up and apply ss 14(2) and 14(4) of the *Status of Children Act* because the presumption in ss 14(2) and 14(4) operated as a rule of law, determinative of parental status, independently of anything done by a court or other tribunal, in contrast to provisions regulating the exercise of jurisdiction.

The majority also held that, even if ss 14(2) and 14(4) were provisions regulating the exercise of State jurisdiction, they could not be picked up by s 79(1) of the *Judiciary Act*, because the Act had "otherwise provided" within the meaning of s 79(1). The majority also held that no reason had been shown to doubt the primary judge's conclusion that the appellant was a parent of the child.

4.7 *Comcare v Banerji [2019] HCA 23*

While an employee in the Department of Immigration and Citizenship, Ms Banerji used the Twitter handle "@LaLegale" to broadcast more than 9,000 tweets, many of which were critical of that Department, its other employees, policies and administration, and Government and Opposition immigration policies and members of Parliament. Following an investigation, a delegate of the relevant Agency Head determined that Ms Banerji had breached the Code and proposed a sanction of termination of employment. After providing her with opportunities to respond to the proposed sanction, the delegate decided to impose that sanction under s 15(1) of the *Public Service Act*, and a notice of termination was provided to her.

As set out in the *Public Service Act*, the Australian Public Service ("APS") Code of Conduct ("the Code") included a requirement that APS employees "at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS" (s 13(11)); the APS Values included that "the APS is apolitical, performing its functions in an impartial and professional manner" (s 10(1)); and an Agency Head could impose sanctions on an APS employee found to have breached the Code, including termination of employment (s 15(1)). Departmental and APS guidelines cautioned against unofficial public comment and recorded a "rule of thumb" that anyone posting material online should assume that their identity and employment would be revealed.

Ms Banerji claimed compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) for injury resulting from the termination of her employment. In that Act, "injury" was defined to exclude injury suffered as a result of "reasonable administrative action taken in a reasonable manner in respect of the employee's employment" (s 5A(1)). A delegate of Comcare rejected the claim, and another delegate affirmed that determination, on the basis that Ms Banerji's injury was suffered as a result of such action. That decision was set aside by the Tribunal, on the basis that the use of the Code impermissibly trespassed upon implied freedom of political communication.

The High Court held that ss 10(1), 13(11) and 15(1) of the *Public Service Act 1999* (Cth) did not impose an unjustified burden on the implied freedom of political communication, with the result that the termination of Ms Banerji's employment with the Commonwealth was not unlawful.
The High Court unanimously held that the impugned provisions of the Act and the Code had a purpose consistent with the constitutionally prescribed system of representative and responsible government, namely the maintenance of an apolitical public service. The Court also held that the provisions were reasonably appropriate and adapted or proportionate to their purpose and accordingly did not impose an unjustified burden on the implied freedom.

4.8 Northern Territory of Australia v Sangare [2019] HCA 25

Mr Sangare was a citizen of Guinea who arrived in Australia under a Belgian passport belonging to his brother. Upon arrival he unsuccessfully applied for a protection visa. The Northern Territory Department of Infrastructure ("the Department") employed Mr Sangare on a temporary basis as a civil engineer, and agreed to sponsor him under a skilled migration scheme run by the Commonwealth Government. As part of that scheme, Mr Sangare was required to apply for and obtain the appropriate visa. He applied for a temporary work visa but was advised that his application was invalid because he had previously been refused a protection visa. He sought expressions of support for his application from the Minister of the Department. The Minister requested that officers of the Department brief him on the request. The Minister was provided with a briefing note which, according to Mr Sangare, contained material fabricated to make it appear that he had provided false and misleading information regarding his immigration status and to make it appear that he was a dishonest person of bad character.

Mr Sangare commenced proceedings against the Northern Territory for defamation in the Local Court of the Northern Territory. The proceedings were transferred to the Supreme Court of the Northern Territory as damages in the sum of $5 million were sought. The claim was unsuccessful at first instance and the Court of Appeal dismissed Mr Sangare’s appeal.

The Northern Territory, which had been wholly successful on appeal and at trial, sought an order that Mr Sangare pay its costs of the trial and the appeal. The Court of Appeal acknowledged that customarily, in such circumstances, an order for costs would be made on the basis that costs should follow the event, but declined to make an order for costs on the basis that such an award would likely be futile because of Mr Sangare's impecuniosity.

By grant of special leave, the Northern Territory appealed to the High Court. The High Court observed that a guiding principle by reference to which the discretion to award costs should be exercised is that the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party. In the present case, there had been no conduct on the part of the Northern Territory that might have weighed against the exercise of the discretion in its favour. The Court, noting that the impecuniosity of a defendant wrongdoer is not a reason for declining to order the payment of damages found to be due to an injured plaintiff, held that it was likewise erroneous to decline to make an order for costs because it was perceived that the debt might not be paid.

4.9 Glencore International AG v Commissioner of Taxation [2019] HCA 26

The plaintiffs were four companies in the global Glencore group. In around October 2014, the plaintiffs' Australian lawyers engaged an incorporated law practice in Bermuda, Appleby (Bermuda) Limited (“Appleby”), to provide legal advice on a corporate restructure of Australian entities within the Glencore group. The resulting legally privileged documents were then stolen (“Glencore documents”) from the electronic file management system of Appleby amongst the documents colloquially known as the “Paradise Papers” that were subsequently disseminated and given global media coverage.
By November 2017, the ATO had obtained copies of the Paradise Papers. After becoming aware that the Glencore documents were in the possession of the ATO, the plaintiffs asserted that those documents were created for the sole or dominant purpose of Appleby providing legal advice to the plaintiffs and subject to legal professional privilege. The plaintiffs requested that the Commissioner, the Second Commissioner and the Deputy Commissioner of Taxation return the Glencore documents and provide an undertaking that they would not be referred to or relied upon. Those requests were declined.

The plaintiffs brought proceedings in the original jurisdiction of the High Court, seeking:

- an injunction in equity’s auxiliary jurisdiction restraining the ATO’s use of the Glencore documents; and
- an order for the delivery up of the Glencore documents.

The plaintiffs’ claim required that they have an actionable legal right arising out of the legally privileged nature of the Glencore documents. In response, the Commissioner submitted that no cause of action had been disclosed by which the plaintiffs were entitled to the relief sought.

The High Court ruled unanimously in favour of the Commissioner in dismissing the relief sought. The Court reiterated that legal professional privilege operates as a means of defensively resisting the compulsory production of information, but does not provide a positive right entitling the holder of the privilege to a remedy, such as an injunction restraining the use of legally privileged material.

The Court did say, however, that a person may be able to rely on the confidential nature of legally privileged material to found an injunction to restrain a breach of an obligation of confidentiality and protect the confidentiality of material. This avenue was not open in this case because the documents were already in the public domain.

The Court explained that the history of legal professional privilege ‘was a response to the exercise of powers by the State to compel disclosure of confidential communications between lawyer and client’, and that the doctrine ‘permitted a witness not to answer questions in court; it provided a lawyer or client with an excuse not to comply with court processes and protected them from liability for contempt’.

4.10 Brisbane City Council v Amos [2019] HCA 27

In this case the High Court held that, where limitation periods overlap, a longer limitation period does not extend or exclude the operation of a shorter time period contained in the same Statute.

The Brisbane City Council (“BCC”) took proceedings against Mr Amos in respect of unpaid and overdue rates pursuant to the Queensland Local Government Act, relating to periods going back to 1999. Unpaid and overdue rates are a charge on the land. The limitation period for debts created by statute and secured by charge was 12 years but the limitation period for actions to recover a sum recoverable by virtue of any enactment (e.g. the Local Government Act) was 6 years.

In Barnes v Glenton [1899] 1QB 885 the Court of Appeal of England and Wales held that where there were overlapping limitation periods for a personal claim to recover a sum secured by a mortgage or other charge, a longer limitation period applicable to debts created by statute and secured by a charge did not extend or enlarge the shorter limitation period.
The High Court held that when Parliament re-enacts provisions with a well-understood meaning, such as those in the 1974 Queensland *Limitation of Action Act* (and the Court held that the rule in *Barnes v Glenston* was well understood) it will generally be assumed that Parliament intended the words to have that meaning.

In the *Brisbane City Council* case, therefore, the shorter time period (6 years) for actions to recover a sum recoverable under an enactment, and not the longer time period (12 years) for debts created by statute and secured by a charge, was the applicable period. Much of the BCC’s action against Mr Amos was therefore time-barred.

### 4.11 Lee v Lee [2019] HCA 28

The appeal concerned a serious motor vehicle accident in which the first appellant appeal, Lien-Yang Lee (“Lee”) then 17 years old was rendered an incomplete tetraplegic. He commenced proceedings against his parents and RACQ Insurance, the compulsory third-party insurer. Lee alleged that his father was driving, stating that he (Lee) was found in the back seat in a paralysed state when found approximately 2 minutes after the accident.

The RACQ argued that Lee had driven the car, noting that Lee’s DNA was found on the driver’s airbag. The RACQ counterclaimed in deceit against Lee, his mother and his father for the recovery of payments made to each upon the allegedly false representation that the father was the driver.

The Trial Judge found that Lee was the driver of the vehicle at the time of the collision, dismissing his claim and ordering Lee and his parents pay substantial sums back to the RACQ. An appeal to the Queensland Court of Appeal was dismissed. Notwithstanding this dismissal, the Court of Appeal identified critical errors in the trial judge’s findings and concluded that, save for the inference to be drawn from the blood on the airbag (“the DNA evidence”), it was “much more likely” that the appellant was not the driver. The Court of Appeal considered that although the DNA evidence substantially weakened Lee’s case the Trial Judge’s decision was not “glaringly improbably” or “contrary to compelling inferences”. The appeals were dismissed.

By grant of special leave, Lee and his parents appealed to the High Court. The High Court unanimously allowed the appeals.

The High Court held that, having rejected essential planks of the Trial Judge’s reasoning, it was the duty of the Court of Appeal to weigh the conflicting evidence, draw its own inferences, and decide for itself which of the two hypotheses presented at trial was the more probable. The Court of Appeal’s acceptance of the Trial judge’s assessment that the DNA evidence was persuasive overlooked that the assessment was based upon a finding that the appellant was unrestrained by the seatbelt at the time of collision. The Court of Appeal overturned that finding, but did not return to consider the significance of unchallenged expert evidence concerning the operation of the driver’s seatbelt pre-tensioners and the rates of inflation and deflation of the airbag.

Given that it was largely a circumstantial case, the High Court held it was not appropriate to order a new trial. The High Court agreed with the Court of Appeal’s tentative conclusion that it was much more likely that the father was the driver and, in light of the expert evidence of the operation of the seatbelt and the airbag, the High Court did not find that conclusion was weakened by the DNA evidence.
Mr and Mrs Mann ("the Manns") engaged Paterson Constructions Pty Ltd ("Paterson") to build two townhouses on their land under a domestic building contract. A dispute as to the work arose and the Manns purported to terminate the contract for repudiation as Paterson had allegedly refused to return to site until a bill for additional work was paid. The Manns also claimed that the work was defective. Paterson alleged that the Manns had repudiated the contract by purporting to terminate and refusing to allow it entry onto the site, and that as a result Paterson had accepted the repudiation and terminated the contract.

Paterson commenced proceedings against the Manns in the Victorian Civil and Administrative Tribunal (VCAT) seeking relief on a quantum meruit basis, or alternatively, contractual damages for the unpaid work performed. The relief claimed by Paterson included amounts for oral variations to the contract works. The Manns responded with a counterclaim for contractual damages on the basis Paterson had repudiated the contract. Further, section 38 of the Domestic Building Contracts Act 1995 (Vic) prevents a builder from recovering any money for oral variations asked for by an owner unless formal requirements are met under section 38, or if there are exceptional circumstances and it would be unfair to the owner for the builder to recover the money.

The VCAT found that the Manns had repudiated the contract and that Paterson was entitled to recover on a quantum meruit basis for work performed prior to the termination including the oral variations.

The Manns appealed to the Supreme Court of Victoria and then the Court of Appeal, both of which upheld Paterson's entitlement to sue on a quantum meruit for work performed prior to termination.

The Manns subsequently appealed to the High Court of Australia.

In three separate judgments, although allowing the appeal with costs, the members of the Court were divided in relation to the availability of a quantum meruit.

Nettle, Gordon and Edelman JJ found the accrual of progress payments meant that there was no total failure of consideration. Kiefel CJ, Bell, and Keane JJ noted an amount due under the contract is a matter of debt and therefore leaves no room for restitution. Gageler J, similarly held that the existence of an accrued contractual right excludes a restitutionary claim.

The High Court rejected the Court of Appeal's finding that the Builder was entitled to a claim on quantum meruit holding that it was based upon a "rescission fallacy". The "rescission fallacy" contemplates that the repudiation of a contract has the effect of rescinding the contract ab initio (or from the beginning), therefore allowing for a claim in quantum meruit as an alternative to a claim for damages. This was originally derived from the decision in Lodder v Slowey [1904] AC 442 and is subsequently applied in Sopov v Kane Constructions Pty Ltd [No 2] (2009) 24 VR 510.

Their Honours held that the concept of a contract becoming completely irrelevant upon rescission is fallacious. It was a legal fiction which had been dispelled in McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457. The High Court reaffirmed Mason CJ's finding in Baltic Shipping Co v Dillon (1993) 176 CLR 344 at 356 in that a discharge only operates prospectively and is not equivalent to rescission ab initio.

The High Court confirmed that the "rescission fallacy" is no longer applicable.

The High Court considered that the "rescission fallacy" could give rise to serious mischief as some builders set prices on the expectation that they will be able to take advantage of an opportunity to elect a to receive a remuneration exceeding the contract price. Their Honours held that a quantum meruit claim should not exceed the contract price. The possibility of exceptional circumstances where there is unconscionable conduct was, however, left open.
The High Court referred to the long-standing decision of *Pavey v Matthews (1987) 162 CLR 221*, noting that where is a valid enforceable contract governing a party's right to compensation, there is neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration. Their Honours concluded that to allow a resitutionary claim in these circumstances would be to subvert the contractual allocation of risk, that is, to allow a resitutionary claim for *quantum meruit* to displace compensation measured by contractual expectations would contradict the "gap-filling and auxiliary role of restitutionary remedies".

As to the subsidiary issue of section 38 of the *Domestic Building Contracts Act 1995 (Vic)*, their Honours unanimously overturned the Court of Appeal's decision and held that the Builder did not satisfy the conditions in section 38 in recovering an amount in restitution for variations to works orally implemented.

4.13 **BMW Australia Ltd v Brewster / Westpac Banking Corporation v Lenthall [2019] HCA 45**

In the Westpac matter (No S154 of 2019), representative proceedings were commenced in the Federal Court of Australia alleging that Westpac’s financial advisers breached their obligations to clients in relation to advice given regarding insurance policies. In the BMW matter (No S152 of 2019), representative proceedings were commenced in the Supreme Court of New South Wales against BMW Australia Ltd relating to the national recall of BMW vehicles fitted with defective airbags. Both proceedings were funded by litigation funders. In each proceeding, the litigation funder had entered into a litigation funding agreement with a small number of group members.

The representative parties applied to the court in each representative proceeding for a “**Common Fund Order**” or “**CFO**”. A CFO is an order sometimes made at an early stage in representative proceedings that provides for the quantum of a litigation funder’s remuneration to be fixed as a proportion of any moneys ultimately recovered in the proceedings, for all group members to bear a proportionate share of that liability, and for that liability to be discharged as a first priority from any moneys so recovered.

Section 33ZF of the *Federal Court of Australia Act 1976 (Cth)* (**FCA**) and s 183 of the *Civil Procedure Act 2005 (NSW)* (**CPA**) each provide that in a representative proceeding, the court may make any order that the court thinks appropriate or necessary to ensure that justice is done in the proceeding. The Full Court of the Federal Court of Australia and the Court of Appeal of the Supreme Court of New South Wales held that s 33ZF of the FCA and s 183 of the CPA, respectively, empowered the court to make a CFO.

By grants of special leave, BMW and Westpac (being the respondents/defendants to the representative proceedings) appealed to the High Court. A majority of the Court allowed the appeals, holding that, properly construed, neither s 33ZF of the FCA nor s 183 of the CPA empowers a court to make a CFO. Considerations of text, context and purpose all point to the conclusion that it is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding by the making of a CFO.

4.14 **Boensch v Pascoe [2019] HAC 49**

Mr Boensch (a former bankrupt) set up a trust (“**the Trust**”) of which he was the trustee. Real property located at Rydalmere NSW (“**Rydalmere property**”) was identified as trust property, held beneficially on behalf of his children.

Following the making of a sequestration order against Mr Boensch by the Federal Magistrate Court, Mr Pascoe was appointed as his trustee in bankruptcy. Mr Pascoe immediately lodged a caveat on the
Rydalmere property, claiming a “Legal Interest pursuant to the Bankruptcy Act”. In the course of administering the bankruptcy, Mr Pascoe came to the view that the Trust was a sham to defeat creditors and that he had a right to be indemnified by the Trust for certain expenses he had incurred on behalf of the Trust as its trustee, although the value of that right of indemnity was uncertain.

Mr Pascoe’s view that the Trust was a sham was based on legal advice, however, in subsequent litigation in the Federal Magistrates Court, on appeal or in special leave application to the High Court, no findings as to the Trust being a sham were made. Mr Pascoe then allowed the caveat to lapse.

Following his later discharge from bankruptcy, Mr Boensch commenced Supreme Court of NSW proceedings against Mr Pascoe seeking statutory compensation pursuant to section 74P of the Real Property Act 1900 (NSW) (RPA), on grounds that Mr Pascoe had lodged the caveat without reasonable cause.

The proceedings were listed for hearing for the separate determination of that question. The Trial Judge found in favour of Mr Pascoe. Mr Boensch appealed, initially to the NSW Court of Appeal, which dismissed the appeal on the basis that it did not have jurisdiction to deal with the bankruptcy issues. Mr Boensch then appealed to the Full Court of the Federal Court, which dismissed the appeal.

The High Court granted Mr Boensch special leave to appeal.

The High Court held that:

- If a trustee in bankruptcy has reasonable grounds to conclude that a bankrupt trustee has an extant beneficial interest in property held on trust for another, the trustee will be justified in lodging a caveat, provided that he/she does so with an honest belief on reasonable grounds;
- A technical deficiency in the description of the interest claimed in the caveat will not, on its own mean that the caveat was lodged without a “reasonable cause”; and
- A caveat can only be lodged if the caveator had legal or equitable interest. A statutory right, such as those conferred by sections 120 and 121 of the Bankruptcy Act 1966 (Cth) (“BA”) to set aside a transfer of land, does not constitute either a legal or equitable interest in land.

The Court confirmed that property held on trust by a bankrupt trustee can vest in a trustee in bankruptcy in accordance with section 58(1) of the BA, provided that the bankrupt has some beneficial interest in it, either vested or contingent.

The High Court accepted the existence of Mr Boensch’s right to be identified by the Trust for various payments he had made in his capacity as trustee, such as rates, mortgage payments and utilities. It did not matter that Mr Pascoe did not have actual knowledge of this right of indemnity at the time he lodged the caveat. Nor did it matter that the right of indemnity may have been of little value. It was the existence of this beneficial interest, rather than its value, that triggered the exception to the exclusion found in s 116(2). Property held on trust by a bankrupt can vest in a trustee in bankruptcy, provided that the bankrupt has some interest in the property, either vested or contingent and no matter how remote. As Mr Boensch had a beneficial interest in the trust property, Mr Pascoe had reasonable cause to lodge the caveat.

5. South Australian Legislation
5.1 Surrogacy Act 2019

This Act received assent on 7 November 2019 and is currently waiting commencement.

This Act repeals part 2B of the Family Relationships Act 1975 and creates standalone legislation to recognise and regulate certain forms of surrogacy in South Australia.

The Act updates outdated language regarding surrogacy; raises the required age of parties to surrogacy agreements to 25 or older; allows surrogacy agreements in which neither intending parents provides genetic material; makes clearer provision for the payment of reasonable surrogacy costs, including compensating surrogates for loss of income, and provides less complex fertility requirements that include same-sex couples and single intending parents.

This Act also accommodates cross-jurisdictional service provision by removing the requirement for fertility treatment to take place in South Australia and allowing interstate lawyers and counsellors to fulfil advisory functions. The Surrogacy Act also requires the surrogate mother to provide intended parents with a criminal history report, and to require for the provision of the identity of any donors used in a lawful surrogacy agreement, resulting in the birth of a child.

5.2 Supreme Court (Court of Appeal) Amendment Act 2019

This Act received assent on 19 December 2019 and is currently waiting commencement.

This Act establishes a permanent court of appeal in South Australia, as a Division of the Supreme Court, to support a more effective and efficient means of disposing the appellate work of the Supreme Court.

5.3 Legal Practitioners (Foreign Lawyers and Other Matters) Amendment Act 2019

This Act received assent on 19 December 2019.

This Act regulates the practice of foreign law by foreign lawyers in South Australia and provides for their local registration and regulation and removes trustee companies from the ambit of the Legal Practitioners Act 1981.

6. Commonwealth Legislation

6.1 Foreign Influence Transparency Scheme Act 2018

This Act commenced on 10 December 2018 and contains the Foreign Influence Transparency Scheme (the “Scheme”). The Scheme establishes registration obligations for individuals and entities that undertake certain activities on behalf of a “foreign principal”. The term “foreign principal” is defined to include: a foreign government; a foreign political organisation; a foreign government-related individual; and foreign government-related entities.

The activities that are registrable are: parliamentary lobbying; general political lobbying; communications activity on behalf of a foreign principal for the purpose of political or government influence; and disbursement of money or things of value on behalf of a foreign principal.
6.2 Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019

This Act received assent on 12 March 2019.


7. Policy Under Review

7.1 Policy Review in South Australia

7.1.1 Abortion: A review of South Australian Law and Practice

On 5 December 2019 the Attorney General released a report from the South Australian Law Reform Institute recommending major changes to South Australian abortion laws.

The report recommends that abortion is decriminalised by making it a regulated medical procedure under health law as opposed to a criminal law issue.

7.2 Current Royal Commissions and inquiries by the Australian Law Reform Commission (ALRC)

7.2.1 Royal Commission into misconduct in the Banking, Superannuation and Financial Services Industry

The final report was tabled in Federal Parliament on 4 February 2019.

The Commissioner makes a number of critical recommendations aimed at stamping out conflicts of interest in the Financial Services Industry.

In respect to mortgage brokers, the Commissioner recommended that the law be amended to impose a civil penalty obligation upon mortgage brokers in connection with home lending so as to place a “best interests” obligation.

In respect to financial advisers the Commissioner observed that “sales-driven, commission-based culture” of advisers had endured that had resulted, at times, in clients’ best interests being given insufficient consideration.

The Royal Commission put in focus the existence of conflicts, their propensity to cause harm and provided recommendations to avoid or eliminate conflicts.
7.2.2 Review of the Family Law Act

The ALRC report was tabled in Federal Parliament on 9 April 2019 and made 60 recommendations for reform.

The report recommends that the resolution of family law disputes be returned to the States and Territories and that the federal family courts eventually be abolished. The report found that under the current system, children fall through the gaps between the family law courts, the child protection systems and the state and territory responses to family violence and recommended this could be remedied only by having a single court focused on the best interests of the child that is able to resolve all family law, child protection and family violence issues together.

The Federal government re-introduced bills into parliament on 5 December 2019 to merge the Family Court with the Federal Circuit Court. The bills have been referred to the Senate committee and are not due to report back until November 2020.

7.2.3 Review into the framework of religious exemptions in Anti-discrimination Legislation

There are a number of anti-discrimination laws in Australia at the federal, state and territory level. Many of these laws include some kind of exemption for religious institutions, to enable those institutions to give effect to beliefs and practices of the particular religion.

On 29 August 2019 the Attorney-General issued terms of reference requesting the ALRC to conduct an inquiry into the framework of religious exemptions in Anti-discrimination legislation and to report its findings in December 2020.