ENVOY

LEGAL EXECUTIVES NEW ZEALAND

WINTER 2020

OUR FRESH NEW LOOK

A rebrand for the institute

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FROM THE PRESIDENT

Tēnā koutou katoa



It is hard to believe that we are now more than half way through 2020 and what a year it has been so far!

We will all have had different experiences over the last few months and it is great to now be getting our lives back to normal, or rather the 'new normal'. I know that some members have experienced an element of uncertainty and worry, but please remember we are all in this together and we are here to support you in any way we can.

Our new look

This issue of *Envoy* officially launches our new brand. The National Council has been working on the rebranding project over the past 12 months and it is a privilege to now present it to members.

Although we are retaining our legal name of 'The New Zealand Institute of Legal Executives Incorporated', we will now be known as 'Legal Executives New Zealand' that we will abbreviate to LENZ.

We hope you all like the new logo and refreshed look as much as we do. There is more on the rebrand story on page 18.

Kaiārahi

Kaiārahi is our mentoring service for all members. Our Kaiārahi service offers support for members who have questions or concerns regarding technical work matters and/or their personal well-being. We have experienced senior members who are willing to act as confidential mentors to other members. I encourage you to use this service as together we can support each other. There is more information about Kaiārahi page 14 and on our website.

Purea Nei – Changing the culture of the legal profession

Following the release at the end of 2019 of a report entitled *Purea-Nei: Changing the culture of the legal profession*, the authors set up a panel discussion in February that was hosted by the Auckland District Law Society. LENZ was invited to have a representative on the panel which we greatly appreciated. My thanks to Ian Jespersen and Carmen Franich, our vice president, for representing the membership at the event. There is more about the report and the panel discussion on page 15.

LENZ Rules review

We have been working on amendments required to our constitution so that we are ready for the proposed changes to the Incorporated Societies Act. The amended constitution will be circulated to all members prior to our AGM.



Necia Parker
PRESIDENT



Nicky Dreadon
Northland Branch President

Northland

I hope that all of you were safe and well during the lockdown period and that working from home was not too stressful. I spent the lockdown and the beginning of Level 3 at home in my bubble of three adults, three cats and a new puppy.

The top of our dining room table was not seen from mid-March as it was covered in files and computer screens. It was an interesting time; I was lucky to have been kept fairly busy catching up on existing work, with a slow but steady stream of new work coming in. I am not the most computer-savvy person, and I am proud to say that I learnt heaps of new skills. The thought of going completely paperless now does not scare me as much as I thought it would. I kind of missed it when it was time to return to the office.

No doubt by the time you receive this Winter edition of *Envoy,* work and home life will have returned to a resemblance of normality and, most importantly, we have all remained safe and well.

Social events
We had planned to hold a midwinter lunch, however when organising this it was clear from the responses that it was just the wrong time for members to attend so this event was postponed. We will plan another event once things warm up a bit and, hopefully, everyone is a little less busy.

We also plan to also restart our monthly Friday night drinks/catch-up in Whangarei as the days get warmer and longer. If you are in the Far North and would like to start a similar regular catch-up with colleagues in your area, we would love to hear about it and offer our support.

Education
By the time *Envoy* is published, we will have held our Kāinga Ora seminar on 10 August in Whangarei and livestreamed to Kerikeri.

This seminar was presented by Jason Lovell, a senior product manager at Kāinga Ora. Jason provided updates and tips on HomeStart grant applications. He also discussed other topics such as KiwiBuild, Kāinga Whenua (assisting people who wish to build on Māori land) and other Kāinga Ora initiatives.

The branch presidents plan to hold a training session at the National offices in Auckland later in the year. I attended this event last year and it was wonderful to have the opportunity to bounce ideas off people from other branches for the benefit of our Northland members. Two members of our branch committee will attend and training will be given to assist in their roles on the committee.

We would love to have more members involved on our branch committee. If you would like to attend a committee meeting to see what we do, with a view to joining the committee at our AGM, please let us know. If you are outside Whangarei and unable to attend in person, we would be happy to arrange for you to attend remotely via Zoom.





Pip Glasson
Auckland Waikato Branch President

Auckland Waikato

Hi from Auckland Waikato

I think it is safe to say that we were not expecting the year to have gone the way it has. I hope that you all stayed safe over the lockdown and you have adjusted to the new 'normal'.

Focusing on the positives, the lockdown showed that doing legal work is possible outside of the office. While this won't suit everybody, working from home could introduce flexibility and options to a sector that can (at times) be described as 'traditional'.

At branch level, the lockdown had us considering options for remote webinars for our members. Make sure you keep an eye on your inboxes!

Now that our city and country have opened up again, demand for our services has been on the rise. I hope you all stay healthy, both physically and mentally, as this has been a testing time for us all.





Ally McEldowney
Bay of Plenty Gisborne Branch President

Bay of Plenty Gisborne

No doubt you all experienced some challenging times during the COVID lockdown, both in your work and home lives.

It is important for us to remember that we were not all in the same waka. We may have been sailing in the same storm, but not in the same waka. Your waka could be shipwrecked and mine might not be, or vice versa.

For some, lockdown was welcomed; it became a time for reflection and of re-connection. For others, however, this has been a desperate time with financial and family crises. Some people who live by themselves may have faced extreme loneliness, while for others lockdown was a time of peace, rest and time with their family.

Some people earned extra money with endless overtime as they worked in essential businesses; others worked longer hours for less money due to a pay cut; and some may no longer have a job, or have job uncertainty.

Some would have been spending two to three hours each day helping their child with online schooling while others were juggling online schooling on top of their workday.

We have all been on different wakas during this storm, experiencing a very different journey, so do not judge others by what has been happening in your waka; we are all just fighting our way through the storm. Continue to be kind to one another.

CPD
There were several free webinars on offer during the lockdown period. I hope you took advantage of these.

I found the webinars helpful and have learnt some new skills to enable me to work effectively from home. There

are so many audio-visual media options out there to be able to consult with clients. I think I used at least five different programs during the lockdown period, using what suited that particular client.

Branch news
Apart from Rotorua's breakfast catch-up, our other regional social events planned in March were cancelled due to the lockdown restrictions.

Now that life is returning to some normality, our branch committee arranged regional social events in July. It was good to support our local cafes and restaurants and, of course, have a good catch-up with each other.

The branch committee hopes to firm up a date shortly for a seminar on house and land packages, and building contracts. The seminar will be held in Tauranga and livestreamed to Whakatāne, Rotorua, Gisborne and Taupō.



Sheryl Thornton
Wellington Central Districts Branch President

Wellington Central Districts

I do hope you managed to survive lockdown and are now enjoying more freedom. It was certainly a challenging time and the experience would have been different for each of us.

For me, team Zoom meetings included a discussion on the latest trend on Netflix or what people had been baking! Of course, we discussed work too...

I commend those colleagues with school-age and smaller children who had to try to work and school/entertain them. You have my utmost admiration – it would not have been an easy job. Wearing different hats throughout the day can certainly be a challenge! Now we are back to 'normal', I hope you have since managed to have an evening out without the kids.

Seminars
Social functions were held before lockdown in Hawke's Bay, Palmerston North and New Plymouth. Thank you to all of you who attended.

Due to lockdown we cancelled the LINZ/OIO compliance seminar scheduled for 22 April in Wellington. I am looking forward to picking this up again.

Social events
No events have yet been scheduled for the near future. During lockdown, we trialled holding our monthly committee meetings via Microsoft Teams and Zoom. We will see if this is something we will want to continue with in the future.

During Level 4 most of you would have taken advantage of the free webinars on offer. These were certainly most valuable.

There are many more online webinars on offer over the coming months to add to your CPD hours. I encourage you to register for webinars that are of interest to your practice.

Most of us have returned to the office (a huge relief for some!) – while some may still be working from home or combining both, either as a gradual return to work over an extended period or on a permanent basis. Whatever work looks like for you now, all the best for the coming months.

Enjoy this time with family and friends as much as you can while staying safe and well.



Robyn Dewson
Nelson Marlborough Branch President

Nelson Marlborough

Nelson Marlborough Branch was very quiet over lockdown period; it was a daunting experience for

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everyone. Thankfully, we are out the other side and now are working toward some semblance of the new normal ... will we ever be the same again?

Planning regular get-togethers
This winter has been cold so far which has given us all a very good excuse to socialise indoors. The branch committee is working on ways to encourage members to gather each month for lunch, coffee or even breakfast. We would love to hear from members on what you would like to see for social gatherings .

Blenheim members: we are looking for a liaison person in your area to coordinate a coffee get-together or lunch. If you are interested, please contact one of the committee members.

Nelson news
Nelson firms are busy and keeping members well-employed with a variety of work.

Sadly, Tamara Millard died in mid-June. Tamara passed away as a result of ongoing medical issues that began late last year. Even though Tamara wasn't a member of the institute (though many attempts were made to secure her membership as a Support member), I want to express my condolences on behalf of Nelson Marlborough Branch. Tamara was well-known in our region and will be sadly missed by local members.

Local seminars
We had planned to hold a seminar in June but could not because of lockdown. If you have a specific topic you would like covered or suggestions for seminar locations, please let the committee know; we welcome any and all suggestions. Now that we have mastered Zoom, Blenheim members will hopefully be able to attend remotely.

I am moving towards the end of my last term as branch president and we are looking for someone to step up. If you are interested in becoming a committee member or taking on the branch president role, please do not hesitate to contact me directly. My contact details are on the back cover.

Warm regards and stay safe.





Jo Langton
Canterbury Southern Districts Branch President

Canterbury Southern Districts

The branch committee and I hope that you are all managing ok post-lockdown. Lockdown, with all that it entailed, was a challenging time and something we will never forget! Working from home for the duration gave us plenty of time to get used to the change. I was, however, very much looking forward to getting back into the office!

Seminars
Our first seminar since the lift of lockdown was held in July. This mindfulness seminar was free for branch members. We had 70 people attend in person and 27 attend via livestreaming. Wellbeing, both in and out of the workplace, is very important and there are many tools on the Allright website (www.allright.org.nz) for those who may find them useful.

Social events
A wine and nibbles evening was held for Christchurch members on 23 July, with 21 attendees. It was great to socialise again with local members.

Also in Christchurch, a midwinter dinner is booked for Thursday, 20 August at The Dish; we look forward to seeing as many Canterbury members as possible. The event is being subsidised by the branch committee.

Your branch
We have a position available on the branch committee. Serving on the committee is a great way to build relationships with colleagues — both in your region and nationally. Please contact me if you are interested. My contact details are on the back cover of this issue. ■



Working from home may become the new normal after pandemic

Like millions of other New Zealanders, legal executives abruptly became home-based workers when the Level 4 COVID lockdown was announced.

The speed of the government's action meant that arrangements had to be made almost overnight for staff to move out of offices and set up work stations at home.

Although the Level 4 lockdown lasted only five weeks, it is likely to have changed the face of work forever. The disruption of the pandemic is far from over and New Zealand does not yet know what the future will look like. But it seems certain more people will permanently work from home — at least on a part-time basis.

Air quality increased during lockdown

The benefits of not commuting to an office were speedily clear during lockdown. Working remotely meant that lives were saved because the roads were almost empty so there were far fewer traffic accidents.

The slashing of the number of vehicles on the roads meant a corresponding drop in pollution. At the end of the first week of lockdown, NIWA recorded huge plunges in traffic pollution and emissions in New Zealand's largest cities. In Christchurch, there was a 79% drop in nitrogen oxide pollutants at the Riccarton Road monitoring station. Wellington's central business district saw a 75% decline in pollutant levels, while in Auckland nitrogen oxides measured in Queen Street were down by 51%.

Overseas the picture was similar, with images circulating on social media showing dramatic

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improvements in visibility as pollution cleared in Delhi, Hong Kong, Bangkok, Beijing and São Paulo. Obviously, the reduction in pollution was not simply due to fewer cars on the road but also because of the shuttering of much economic activity.

More family time

Working remotely also meant that workers had far more time to spend with their families. People who normally spent an hour each day commuting had five extra hours a week for family, exercise and other activities. Those whose commute normally took two hours a day had 10 additional hours.

Less public infrastructure in future?

A future with fewer workers on roads and public transport would mean that less money would have to be spent on building and maintaining more motorways, and on providing buses, trains and other forms of public transport.

Remote working also raises other issues for law firms. Online and document security are clearly key concerns, as are the signing and witnessing of documents.

A permanent move to working from home would also offer major cost savings for businesses. Rents make up a significant proportion of the cost of running a business. That is highlighted by the difficulty closed businesses faced during Level 4 in seeking to make rental payments when they had no income. With staff working from home, businesses would either no longer need offices, or could make do with much smaller and less expensive premises.

Shift to working from home – at least part of the time?

In the United States, it is suggested that COVID could collapse office rentals by accelerating the trend towards Americans working from home, in the same way that the advent of online shopping slashed mall returns.

Global Workplace Analytics calculates that 56% of Americans have jobs involving at least some tasks which could be done remotely, but in 2018 only five million employees – 3.6% of the United States workforce – worked remotely half-time or more. However, regular remote working has increased by 173% since 2005 and Global Workplace Analytics forecasts that 25% to 30% of the American workforce will be working remotely multiple days a week by the end of 2021.

The firm estimates that American employees save between US$2,500 and US$4,000 per year by working remotely half-time, with the savings consisting mainly of travel, parking and food costs. On top of that, half-time telecommuters save the equivalent of 11 work days a year in time that would otherwise be spent commuting.

For businesses, a typical employer would save an average of US$11,000 per half-time telecommuter each year, with the primary savings resulting from increased productivity, lower real estate costs, and reduced absenteeism and turnover.

In New York, after COVID forced them to trial remote working, investment banks and professional and financial services firms are considering whether they can get by with less office space in future.

Of course, working from home is not feasible for many people. The essential workers who kept New Zealand and other nations going during the lockdown generally carried out tasks which required them to be in a workplace. In addition, people living in crowded homes lack the space needed to work from home.

Further, although many people enjoyed working from home, others longed to return to their offices as speedily as possible, craving interaction with their colleagues and a clear separation between work and family life.

Employers are still responsible even if working from home

Some remote workers did not have comfortable chairs or proper desks for their computers, meaning that they spent lockdown hunched over their devices in ergonomically-unsatisfactory positions. Employers' health and safety obligations continue, however, to apply even if staff are working from home. Similarly, employees' employment agreements remain in force, and their terms and conditions continue to apply. Employment agreements cannot unilaterally be altered because of the pandemic and employees cannot be forced to agree to variations on a 'take it or leave it' basis. If employers plan to make staff redundant, the correct redundancy processes must still be followed.

Specific issues for law firms

Remote working also raises other issues for law firms. Online and document security are clearly key concerns, as are the signing and witnessing of documents. It is also not yet clear how many clients will be satisfied to conduct interviews on an ongoing basis via Zoom – a non-secure platform – rather than in person.

Post-lockdown

Some New Zealand businesses began easing out of lockdown by dividing their workers into two groups, and alternating time spent working in the office and time continuing to work from home. For example, this involved one group working three days in the office and two days from home in the first week, and two days in the office and three days from home in the second week. The second group of employees had the opposite schedule.

This country's closed borders and travel restrictions relating to other countries mean that there will be little or no international business travel for the foreseeable future. Domestic business travel is also likely to decline permanently, as the lockdown demonstrated that much work travel is simply unnecessary. The work can be done remotely without losing efficiency.

Working from home may also reduce the discrimination faced by women who juggle jobs and having children. A 2019 American survey found that 31% of women who left the workforce after having children did not want to do so, but felt forced to step away from paid work as their employers did not provide the flexibility necessary for parents to combing work and child-raising.

Career breaks cost women thousands of dollars in lost remuneration, as well as seniority and future job opportunities.

Perpetual Guardian founder, Andrew Barnes, champions a four-day working week. He said that COVID had forced employers to trust staff to work from home, and businesses should now retain aspects of remote and flexible work as part of their normal operating patterns. New Zealand telecommunications companies are also considering how working from home for at least part of the week can be made a permanent fixture for staff.

The coming months will reveal how much the lockdown has permanently altered our work patterns. ■

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CHANGING THE CULTURE OF A PROFESSION



Developer loses deposits over cancelled Queenstown development

The importance of clear drafting of property sale and purchase agreements and full understanding of all the terms of contracts is illustrated by a Court of Appeal decision in which a developer lost deposits after trying to cancel a contract for financial viability reasons.

The developer claimed that the parties' agreements should be interpreted to be given meanings other than those provided by the plain words of the contracts. However, both the High Court and the Court of Appeal rejected that submission in *Long Capital Holdings NZ Ltd v Jacks Point Village Holdings No 2 Ltd* [2020] NZCA 102.

Long Capital Holdings NZ Ltd was an experienced property development company that entered into two agreements for the purchase of blocks of land in Queenstown from Jacks Point Village Holdings No 2 Ltd on 2 June 2017. The total land area was five hectares and was to be used for a residential subdivision. The prices under the agreements were $14.2 million for Area 1 and $11.9 million for Area 2.

The agreements were conditional on Long Capital Holdings providing a development plan to Jacks Point for its approval by a certain date. Effectively, Jacks Point was selling the opportunity to Long Capital to carry out the developments of the two areas in the Jacks Point Village development, subject to various obligations designed to ensure compliance with requirements applicable to the overall village development. Jacks Point had residual obligations to ensure that the two properties were developed within those parameters.

Standard form had 19 pages of additional terms

The agreements were on the standard form approved by REINZ and ADLS, but a number of general terms had been deleted and 19 pages of bespoke further terms had been added. Clause 10.8(2) of the general terms required that the party or parties for whose benefit a condition had been included 'do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment.'

Clause 10.8(5) stated that, if a condition was not fulfilled by the specified date, either party could at any time before the condition was fulfilled or waived avoid the agreement by giving notice to the other party. Upon avoidance of the agreement, the purchaser would be entitled to the immediate return of the deposit and any other money paid and neither party would have any right or claim against the other arising from the agreement or its termination.

Long Capital did not provide the development plan by the required date, despite the time limit being extended several times. The company then purported to cancel the agreements due to its non-satisfaction of the condition, and sought a return of the substantial deposits paid.

Jacks Point did not accept the purported cancellation, arguing that Long Capital could not cancel for non-fulfilment of the development plan condition through its own default. Jacks Point said that Long Capital was obliged to do all things reasonable and necessary to fulfil the condition, but had provided no evidence that it had complied with that obligation.

Jacks Point treated the purported cancellation as a repudiation or as a breach of an essential term and cancelled the agreements, requesting release of the deposits.

Summary judgment sought

Jacks Point then sought summary judgment against Long Capital for forfeiture of the deposits. Long Capital argued that it was not in default as it was not obliged to submit a development plan to Jacks Point if it had formed the view that no feasible development of the land was possible. In particular, the company said that it had realised that the proposed development would not be economically viable.

Summary judgment was granted by the High Court, which concluded that Long Capital had not fulfilled its obligations and Jacks Point was entitled to the deposits. Associate Judge Johnson held that Long Capital had not met its obligation to take reasonably necessary steps to submit the development plan to Jacks Point for approval.

Long Capital was therefore in breach of the agreements and had repudiated them and Jacks Point was entitled to cancel in response to the repudiation. Associate Judge Johnson drew a distinction between a development plan that was 'technically' not feasible and which would have enabled Long Capital to cancel, and a development plan that was economically unviable and which did not permit cancellation.

An example of the former situation would have been an adverse geotechnical report about the property.

Court of Appeal

Long Capital appealed to the Court of Appeal. Justice Gendall delivered the court's decision. He said it was common ground that the development plan condition was a condition subsequent. A failure to fulfil a condition subsequent could either bring the contract to an end at that point, or could give one or both parties the option to do so.

In the present case, clauses 20.5 and 20.4 in the agreements permitted either party to cancel if any of the conditions in clause 20 (including provision of the development plan) were not met. The only exception to that express ability to cancel for non-satisfaction of a condition was where a party had brought about the failure to meet the condition by its own default.

Clauses 20.4 and 20.3(d) expressly identified certain conditions that were inserted for the sole benefit of the purchaser and could be waived only by the purchaser. There was no provision for waiver of any conditions by the vendor.

Justice Gendall said this meant that Jacks Point could not waive compliance with the development plan condition. Long Capital argued in the Court of Appeal that the High Court had not properly addressed the implications of those clauses. Counsel for Long Capital submitted that the company had carried out much of the preparation for the development plan and, indeed, appeared to have a completed plan. However, it was not just the cost of the development that was an issue, it was also the fact that the proposed development plan did not align with the local council's Outline Development Plan, which would need to be varied.

Justice Gendall said that, as this was an appeal against summary judgment, the question was whether Jacks Point had met the onus on it of showing that Long Capital had no arguable defence to the claim against it. Clauses 10.8(2) and 42.1 required Long Capital to do all things reasonably necessary to provide a development plan to Jacks Point for approval. Long Capital elected not to provide the development plan it had prepared to Jacks Point. It made that choice for commercial reasons — namely, that, given the risks of the development, the return would be insufficient.

The court said that it was plainly within the reasonable ability of Long Capital to send the development plan to Jacks Point. There was no practical difficulty or material cost in just providing it. On the face of it, Long Capital simply failed to take a simple but essential step required by the agreements, with the result that it was in default and was not entitled to rely on the failure to satisfy the development plan condition which resulted from that default.

Justice Gendall said that the agreements expressly provided that Long Capital was to do all things reasonably necessary to enable the development plan condition to be fulfilled. The focus should be on interpreting that requirement, having regard to the scheme of the agreements and other relevant provisions. The ability of the court to imply terms was constrained by the express provisions of the parties' contract.

As the agreements made separate provision for Long Capital's obligation to provide the development plan to Jacks Point and the company's obligation to implement the development plan,

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any anticipated difficulties in implementing the plan were not relevant in assessing whether reasonable steps had been taken in relation to the initial requirement of providing the development plan to Jacks Point. The issues raised by Long Capital about the costs and risks of implementing the development plan were simply irrelevant and did not excuse the failure to provide the plan to Jacks Point.

The court concluded that Long Capital's approach to what would constitute a justification for failure to deliver the development plan was inconsistent with the scheme of the agreements. Long Capital's argument that it could unilaterally decide that proceeding with the development was not commercially attractive, for reasons of cost or other risks, would effectively convert the condition in clause 20.3 into a form of due diligence clause. This would give Long Capital the option to investigate the development and choose not to proceed with it if it was not satisfied with the outcome of that investigation. Justice Gendall said it was not arguable that clause 20.3 had that effect.

Developer had breached its obligations

The court held that Long Capital had breached its obligation to provide a development plan. The company could not cancel for non-fulfilment of the development plan condition, as that was the result of its own default. Long Capital's purported cancellation was a repudiation of the agreements. Jacks Point was entitled to cancel, as the cancellation was the result of a default by Long Capital. Jacks Point was accordingly entitled to the deposits.

The appeal was dismissed. ■

COVID shakes up every aspect of the law

New Zealand legal system responds well

New Zealand's legal system moved swiftly to accommodate the many changes required to enable transactions to proceed, and to maintain order and the rule of law as the global pandemic upended normal life.

The coming months and years will reveal whether some of these new procedures will become permanent parts of the legal landscape, or whether they will be discarded in the rush to return to pre-pandemic life.

Property sales

In relation to property sales, a common sense approach was adopted to prevent chaos during Level 4, when moving was not an essential activity. Most settlements were delayed until the highest level of lockdown ended.

The move back to Level 2 in May saw the return of open homes for marketing property, but with safety measures in place. These included physical distancing, the use of hand sanitiser, a register to sign for future contact tracing if needed, and banning potential buyers from touching things inside the property. Instead, viewers were requested to ask real estate agents to open cupboards or demonstrate water pressure.

In the courts

In the courts, jury trials were deferred during lockdown in the expectation that they would resume when restrictions were lifted.

Judgments, however, continued to be released during lockdown, including *Savill v AMFL Ltd* [2020] NZHC 655. That case involved an urgent application made in late March to the High Court for an interim injunction to stop a mortgagee sale in the Marlborough Sounds from going ahead. The property was being marketed by a real estate agency as the country was about to enter the Level 4 lockdown.

Justice Dunningham said in her judgment that time pressures meant that she could not outline the details of the application. However, the applicant argued that AMFL Ltd could not exercise any power to sell the property as no valid notice had been given under sections 118, 119 or 120 of the Property Law Act 2007; AMFL Ltd had breached its statutory

duty of reasonable care to obtain the best price possible under section 176; and it was continuing to market the property despite the imminent move to Level 4 meaning that prospective bidders would not be able to attend the auction.

Her Honour said it was clear that some of the claims were strongly disputed, but she considered one point to be unquestionably live. This was that AMFL's lawyers had sought keys to enable viewings to take place, but those could not occur and it was impossible to see how a mortgagee sale could be held that would obtain the best price reasonably possible when parties could neither view the property, nor attend the auction.

The court accordingly granted an interim injunction.

Document witnessing

With most people confined to their homes during Level 4, the issue of how documents could be witnessed also arose. Regulations were passed to permit documents to be signed via audio-visual meetings until such time as the Epidemic Preparedness (COVID-19) Notice 2020 expired or was revoked.

Don Thomas, the director of Thomas & Co Lawyers, argues that the ability to witness and sign documents remotely should be retained permanently. In an article for the New Zealand Law Society, he said that modern technology meant that lawyers and legal executives could meet with signatories, verify their identities and understanding of documents, and complete witnessing just as effectively by remote means as in person.

Mr Thomas said that being physically present did not mean that practitioners and banks were able to detect fraudulent passports in a mortgage fraud some years ago, nor had it prevented lawyers and clients from being involved in undue influence cases.

He said that LINZ e-Dealing regulations and the epidemic response regulations translated the requirements for physical presence into the audio-visual world.

"To those, I would add my own practice as having the document(s), if not prepared by me, and ID-scanned and emailed to me in advance. This gives me time to consider the document and its effect, provides me with a benchmark to check against with the document(s) being signed and ID-presented, and to then match to the signed document(s) when I receive them."

Mr Thomas said that, in his other role as a Notary Public, there was an issue with a lack of geographical coverage for services, while enduring powers of attorney required multiple parties and witnesses. It would be far more convenient if the parties could sign and witness from different locations.

The COVID-19 Response (Further Management Measures) Legislation Bill provided for using audio links to conduct hearings in Corrections disciplinary and criminal court proceedings. In its submission on the bill, the New Zealand Law Society said that there were significant concerns about the precedent of permitting audio-only hearings, even in a time of crisis.

English experience

In England, the first online trial was held between 26 March and 1 April. The case involved a commercial dispute which had been set down for a seven-day hearing in London from 23 March. Parties and witnesses were due to travel to London for the trial, but an adjournment was sought by the defendants when lockdown was announced to begin on 23 March.

The Lord Chief Justice directed that hearings should take place remotely if possible. Zoom was selected as the platform to enable the hearing to proceed online and the case was heard over four days. It may be the start of a new method of conducting court hearings. In particular, remote hearings would mean that parties would not need to travel internationally to give evidence.

New Zealand government responses to COVID

In April, the New Zealand government announced that legislation would be speedily passed to deal with the debt and insolvency issues caused by the pandemic. The COVID-19 Response (Further Management Measures) Legislation Bill provided for a business debt hibernation scheme and 'safe harbour' in respect of directors' duties.

Lawyers were also warned that the pandemic had heightened the risks of crimes such as fraud, cybercrime, and misdirection or exploitation of government funds or international financial assistance. In May, the Financial Action Task Force released a paper titled *COVID-19-related Money Laundering and Terrorist Financing – Risks and Policy Responses.* The document said that measures to contain the pandemic had impacted on the criminal economy and changed criminal behaviour, so that criminals might move to other forms of illegal conduct.

At the same time, COVID had hampered the ability of government and the private sector to maintain stringent anti-money laundering and counter-terrorist financing measures, thereby exposing both clients and advisers to heightened risks. These could include criminals

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finding ways to bypass customer due diligence measures, increased misuse of online financial services and virtual assets to move and conceal illicit funds, and the exploitation of economic stimulus measures and insolvency schemes to conceal and launder illicit proceeds.

The Task Force said that ways of counteracting these risks included using electronic and digital payment options; a full, risk-based approach to customer due diligence; and strengthened communication between governments and the private sector.

In response to the large numbers of employees working from home during lockdown, Inland Revenue issued *Determination EE001 – Telecommunication tools* and *Determination EE002 – Working from home costs.* Inland Revenue said that, if employers decided to pay essential workers additional amounts to recognise their increased risk during the pandemic, those extra sums would be subject to tax. Payments would be deductible for the employer.

Inland Revenue also said that any allowances paid to employees to recognise the inconvenience of working from home for an extended period were taxable. That would apply to payments made for the period between 17 March and 17 September 2020. ■



Legal Executives New Zealand

Kaiārahi service

The term *kaiārahi* means 'someone who guides; leader, mentor, counsellor'.

The institute (now LENZ) has long-acknowledged the importance of providing a support network for its members in both professional and personal capacities. We are pleased to have established our national Kaiārahi service to supplement the ongoing informal support offered through our branches via their networking events and seminars.

Whilst our members can access the professional counselling service provided by the New Zealand Law Society, we also saw a need for LENZ to provide members with direct and personal support on every level.

We have many senior members who are approachable and empathetic, and members who have specific technical knowledge that they are prepared to share. We are grateful to the members who have volunteered to be kaiārahi and are willing to provide caring, listening ears to members who would like some guidance.

Our members work for a wide range of employers—from sole practitioners to large corporate firms, government departments and commercial entities. We hope that our kaiārahi will stimulate greater engagement and collegiality between members new and old.

We now have a list of kaiārahi who are happy to be contacted. Not only do they have a range of experience and technical knowledge, but they are also easy to talk with and have a kindly manner.

If you would like to talk with a kaiārahi, please look at the contact list in the members' section of our website or contact the National Office.

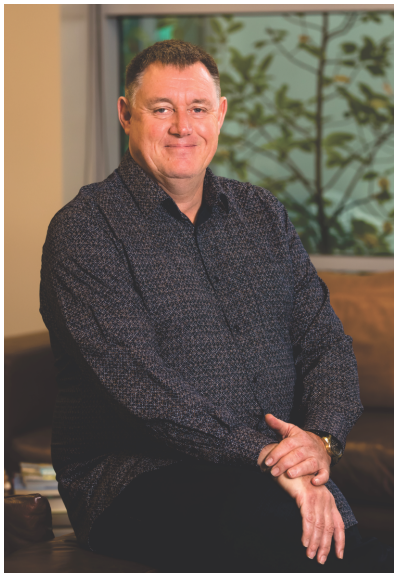
We need to be kind, and together we can support each other. These words have never been more relevant: *Me mahi tahi tātou mo te oranga o te katoa.* We must work together for the wellbeing of all.

Carmen Franich

Purea Nei: Cleanse and renew

Changing the culture of the legal profession

Panel discussion



Ian Jespersen

It was over two years ago when the news of harassment and bullying in New Zealand's legal profession hit the headlines. In particular, it featured the experiences of five summer clerks at Russell McVeagh. Since then a number of reports and blogs have been published, and actions taken on the issues including:

- Zoë Lawton's #metoo blog
- NZLS 2018 Workplace Environment Survey compiled by Colmar Brunton
- Formation of the 'Culture Change Task Force' by the NZLS
- International Bar Association's 2019 bullying and harassment report, and
- Employment Information Survey released in late 2019 by the Aotearoa Legal Workers' Union.

Purea Nei — the report

In December 2019, three legal professionals — Allanah Colley, Ana Lenard and Bridget McLay — published their report — *Purea Nei*: *Changing the Culture of the Legal Profession. Purea Nei* seeks to continue the conversation about culture change in the legal profession by asking some very direct and difficult questions about how that culture change can be achieved.

The authors determined that the people best positioned to answer these questions were those within the legal community. *Purea Nei* brings together a collection of ideas from people within, and associated with, the legal profession to help provide a springboard towards making the profession happier and healthier.

The resulting report is a culmination of feedback from people attending workshops held in Auckland, Wellington, Christchurch and Dunedin; open-ended discussions online and via email; and an online survey which attracted almost 650 responses. In total, more than 700 people engaged in the project. This high participation is encouraging; it is evident that many people within the profession still had more to say beyond the immediate issues and ideas that had already been collected and discussed.

In the workshops, *Purea Nei's* authors asked questions on two themes:

1. What needs to occur in order to make a meaningful difference to workplace culture?

2. How can we translate the concerns about what has happened before into significant improvements to the everyday employment experiences of the people in the legal profession in the future?

The authors readily acknowledged the work of the Culture Change Task Force and that the original Russell McVeagh incidents had very quickly expanded to questions about the culture of the legal profession generally. What had become clear that was that the issues were not new, nor were they unique to Russell McVeagh. They continue to be present in different forms and to varying degrees in many, if not all, legal employment environments. These issues affect lawyers, non-legal staff, academics, students and even former members of the profession.

For Registered Legal Executives, it was encouraging that our members and The New Zealand Institute of Legal Executives (as it then was) were approached to participate in the report research. The authors

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acknowledged that it was important that the legal profession and anyone associated with it — non-legal staff, legal executives, law students, legal academics and former members of the profession — should all be surveyed, with the emphasis on seeking solutions that could enhance change. A concerted attempt was made by the authors to spread the net wide by including as many interested parties as possible.

In this article there is not sufficient space to discuss *Purea Nei* at length but I encourage you all to read the report available here or go to the New Zealand Law Foundation's website under 'News'.



Ideas for change

Purea Nei seeks to capture conversations with the participants, supported by the collected quantitative data. The report outlines ideas for change across a range of issues:

- Workplace expectations and culture
- Diversity and inclusion
- Work format
- Training and education
- Leadership and management
- Remuneration
- Human resources and procedures for managing workplace issues
- Holding the profession to account, and
- The role of clients in shaping the experiences of people associated with the profession.

There was clear support from participants for the NZLS to have a more significant role in the wellbeing of its members and others employed in the legal profession. Participants wanted the NZLS to audit workplaces along various safety, wellbeing and diversity factors and to strengthen its complaints and disciplinary systems. It was suggested that a specialist unit be established for responding to bullying and harassment claims. (Since *Purea Nei* was published, the NZLS has taken steps to start implementing the findings of the Cartwright Report[1] which focused on its complaints, discipline and education systems.)

Purea Nei is a useful resource for many within the legal profession. It can be referred to when decisions are being made as to how best to tackle the difficult and entrenched issues that have been identified through the various surveys and enquiries to date. In essence the report:

- Recognises that each workplace is unique and that not all of the ideas outlined would be suitable for every place of work or for every employee
- Does not purport to offer all of the answers or to be a final handbook for dealing with issues in the legal profession
- Is a significant base for encouraging further discussion and greater consideration of the issues that have to be faced, and
- Seeks to contribute to and encourage the ongoing discussion that the legal profession must face in the future.

I congratulate the *Purea Nei* authors for their work, and for the panel discussion and additional debate that followed.

The panel discussion

Following the release of *Purea Nei*, the authors arranged a panel discussion, hosted by ADLS. The institute was invited to have a representative on the panel.

Vice president, Carmen Franich, and I were nominated to attend the event, with me representing the institute on the panel.

While the appointment caused me some trepidation, having a white middle-class man representing the institute was a carefully considered decision. As you will be more than aware, the institute's membership comprises mainly women and selecting one of its few men, and an ageing white male to boot, may have been perceived as 'odd' to say the least. The institute wanted to send a message — *we are one and our members' views*

[1] Report of the New Zealand Law Society Working Group chaired by Dame Silvia Cartwright, 2018

are all valued and considered — and also, I have many years' experience as a legal executive.

Questions were circulated before the panel met. Carmen and I considered them carefully, and spent time formulating what we hoped would be appropriate and useful responses.

The panel was chaired by Jenny Cooper QC, a member of the NZLS Culture Change Task Force. The panel membership[2] had a wide range of experience, culture and views; the debate was lively, frank and positive. There were, of course, divergent views but all opinions were respected and it was clear that the issues were being openly dealt with. With the robustness of the debate, there was not sufficient time to respond to all of the authors' questions. The upside is that there is room for further positive and effective discussion.

As time ran out in the panel discussion, we gave our written comments to the *Purea Nei* authors and to the institute; these are available on the website here, in the members' section. (Do note that although I was representing the institute on the panel and putting across views on issues from the perspective of a Registered Legal Executive, many opinions expressed are clearly personal and should only be seen as such.)

The inclusion of LENZ and its members in the surveys and questionnaires, and the invitation to sit on the panel are positive steps for LENZ and the legal profession. This bodes well for the future and we look forward to a continuing close working relationship.

The culture of the legal profession continues to evolve positively. In some areas, however, the message has clearly not got through to everyone. We need to see faster change, more positive education and stronger guidance on professional conduct.

The NZLS is leading the way with changes to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 currently under consideration.

LENZ is being proactive by amending its CPD policy to help ensure there is more education on professional conduct and well-being. In addition, LENZ intends to amend its constitution at this year's AGM in order to promote higher standards of conduct.

LENZ has also established its Kaiārahi service that provides more assistance to members on a wider range of issues including professional conduct and wellness.

Hopefully the future will be brighter and happier for all participants in the legal profession.

Ian Jespersen

Acknowledgements. I wish to thank Allanah Colley, Ana Lenard and Bridget McLay for allowing me to use excerpts from Purea Nei *in this article (albeit in greatly abridged form) and for their review of my writing. I would have hated to get the timeline wrong. Acknowledgement also to ADLS for providing the venue and the platform for the panel discussion.*

Purea Nei *was funded by The New Zealand Law Foundation, the Michael and Suzanne Borrin Foundation and the* New Zealand Women's Law Journal – Te Aho Kawe Kaupapa Ture a ngā Wāhine.

[2] Membership of the panel comprised: Jenny Cooper QC (chair); Glenn Tootill, Consultant at McCaw Lewis and Tumuaki Tāne of Te Hunga Rōia Māori o Aotearoa; Hayley Cassidy, Chief General Counsel at the Bank of New Zealand; Ian Jespersen, Senior Associate at Burton Partners and Council Member of the New Zealand Institute of Legal Executives (now Legal Executives New Zealand); Karen Chang, Head of Enforcement at the Financial Markets Authority; and Litia Tuiburelevu – Professional Teaching Fellow at the University of Auckland Faculty of Law.

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Our fresh new look

A rebrand for the institute

When design studio Tangerine was engaged to design and project manage the institute's rebrand, its team took a very considered approach.

"We could clearly see that the brand needed a redesign, but wanted to keep some of the elements that made it unique. We knew, however, that the image of the institute, its website and collateral had become dated. It needed to look and feel more contemporary," says Tangerine's designer Stephen Tunley.

Executive officer Jo Buckton adds that after Council reviewed the institute's activities in 2018-19, it wanted the organisation to have a more effective and professional feel that better reflected the professionalism of the membership and the strands that weave the organisation together. "Council felt that Tangerine could do a great job in presenting the institute with a much fresher image about which our 1,300-plus members would feel proud."

Research first

Tangerine started the ball rolling with a survey sent to 29 randomly selected members asking their views on the look and feel of the current brand, how they felt it represented Registered Legal Executives and the style and tone for the new brand.

The survey results were decisive. The logo needed a revamp, fresh clear colours were vital, new fonts should be introduced and the professionalism of the institute could be communicated better through the rebrand.

Rebranding

With the research results under their belts and ratification from Council to go ahead, Tangerine's team rolled up their sleeves to rebrand NZILE. Not only did Tangerine need to redesign the logo, colours and font but they also needed to produce designs for stationery, certificates, develop a new website and redesign *Envoy* – all within the new colour palette of dark blue and light blue, and a gradient blue.

Respondents were happy to have the elements of the Māori weave/harakeke symbolism of the current logo retained with the intertwining of the strands reflecting both the institute's byline of *Share, Support, Grow* and the interconnectedness of our members, their employers and the New Zealand Law Society, and the strong bond we share.

One more thing . . .

The project was then delivered a slightly curved ball. Jo Buckton takes up the story . . . "For some years, we had felt that the name of our organisation was a bit too long and complicated. And the name of the profession came at the *end of* the title, not at the *beginning*.

"My light bulb moment came at a presentation by the chief executive of what used to be the Institution of



Proposed landing pages for new website.

Professional Engineers New Zealand — another long title — which has now rebranded as Engineering New Zealand. If an organisation full of engineers could agree to a new name, so could we!

"After some deliberation and a vote by National Council, the institute is now known as Legal Executives New Zealand, although we retain our legal name of The New Zealand Institute of Legal Executives Incorporated."

And what did this mean for the NZILE rebrand? Stephen says it was relatively straightforward to alter the organisation's name on the draft designs. "In fact it became easier because LENZ in full is much shorter than NZILE so it's easier to fit into spaces. The name change also allowed us to tweak the logo with a highly-stylised lower case 'L' and 'E'. The more simplified name better matched the new branding so it looked modern and much fresher."

Brand roll out

The LENZ rebrand will be rolled out in stages. *Envoy* kicks it off with this Winter edition in the new colours and design. "We are so pleased with the new look and feel of *Envoy*. It looks fresh and modern, and we all very much like the contemporary imagery that we will use in each edition of the magazine," says Jo.

"The collateral such as the stationery, certificates and other items are now being introduced as we use up old stocks. The website is taking a bit longer as it's not an off-the-shelf site because of the members' only section and all that goes on at the back end. We're looking forward to this being live in the Spring."

Stephen says he and his Tangerine team of Kirsten Payne and Luke Kelly have very much enjoyed this rebrand process, and there is of course a way to go in getting the website up and running. "It's been very smooth sailing for us, even with the name change! We've very much enjoyed working with Jo and the team." ■



Jo Buckton

The history of the logo

Mid-1990s
Stylisation of Lady Justice is introduced.

1998
Introduction of the parallel lines (inside a diamond shape) symbolising the interweaving of the 'three arms' of the law: NZILE members, their employers and the district law societies (at that time). This new logo was part of a major review of the institute led by the president at the time, Sally Mountfort. It introduced a higher qualification, registration of members, review of membership levels, review of the constitution and a proposal to employ an executive officer.

2008
Refresh of the 1998 logo where it was freed from the confines of the diamond shape.

2019-20
Major overhaul of the NZILE constitution, introduction of the Kaiārahi service and other initiatives, and consideration of the name in te reo Māori.

CASES UPDATE



Property

Law firm and barrister restrained from acting

The first nine defendants in these proceedings were the registered proprietors of 18 retail, office and residential units in a unit title development at Landmark House in Auckland's CBD. The 10th defendant was the development's body corporate.

The development in *Landmark Property Holdings Ltd v Shen Empire Ltd* [2020] NZHC 893 included a positive covenant by which unit holders were liable to contribute to the body corporate's outgoings as assessed and levied 'by reference to rentable areas in lieu of . . . unit entitlements.' That was a divergence from the statutory liability to contribute in terms of unit entitlement.

In June 2017, the body corporate obtained legal advice from Minter Ellison Rudd Watts that, while it was beyond the body corporate's statutory power to levy outgoings in accordance with it, the divergent covenant was nonetheless enforceable as between unit holders. In May 2019, the body corporate's AGM resolved to require unit holders to contribute to a contingency fund in terms of utility interests.

The plaintiffs were the ground floor retail holders of 34.5% of the development's utility interests. They brought proceedings seeking a declaration that the covenant was enforceable against the first to ninth defendants or, alternatively, declarations and orders that particular outgoings be recovered by the body corporate under section 126 of the Unit Titles Act 2010.

Rainey Law and barrister Tim Rainey acted for all but the sixth and ninth defendants in the proceedings, and for the body corporate in related proceedings in which the body corporate pleaded that the covenant was unenforceable.

Landmark Property Holdings Ltd alleged that the body corporate had taken a partisan position on the covenant and had spent funds in the interests of the defendants, but not its interests. The body corporate, through its lawyers, denied any disqualifying conflict of interest and filed defences for the body corporate and the defendants. Landmark then applied for Rainey Law and barrister Tim Rainey to be restrained from acting either for all the defendants, or for the first to ninth defendants or for the 10th defendant.

Justice Jagose said that the core issue was that the body corporate could not have a community of interest with the represented defendant unit holders in resisting claims raised by the plaintiff unit holders, when it had a fiduciary duty not to prefer some unit holders over others and was required to treat all of them even-handedly. His Honour said that he could not identify anything authorising the body corporate to discriminate between unit holders.

As there was no community of interest and the lawyers acted for the body corporate, they required leave to act for any other party in the proceedings. However, leave had not been sought. The court accordingly ordered that Rainey Law and Tim Rainey were restrained from acting for any of the defendants.

Order settling unit title scheme of repair declined

Westthorn Properties Ltd v Body Corporate 177519 [2020] NZHC 593 involved an application by Westthorn Properties Ltd, the owners of the four commercial units in an Auckland complex, for an order under section 74 of the Unit Titles Act 2010 settling a scheme of repair.

There was no dispute that the commercial block of the building was in need of repair and that the appropriate means of raising the repair costs was by utility interest. However, the applicants claimed there was delay by the Body Corporate. They were also concerned that the Body Corporate might trigger section 126 of the Act to recover the repair costs from the commercial owners.

The respondent, Body Corporate, submitted that it was acting to carry out the repairs and would not use section 126 to recover the costs, and that the scheme of repair was not appropriate and simply replicated the provisions of the legislation.

Justice Edwards noted that defects in the commercial block had first been noticed in 2008 or 2009. In 2019, the Body Corporate engaged an engineering firm to carry out geotechnical and structural surveys. The preliminary estimate of the repair costs was between $250,000 and $500,000 plus GST, depending on how the work was done. The Body Corporate decided that levies would be raised from all of the unit owners on the basis of their utility interests.

Justice Edwards said that section 138 of the Act placed repair obligations on the Body Corporate, while section 74 permitted parties to apply to the court for an order settling a scheme of repair where a building was damaged or destroyed. In an earlier case, the Court of Appeal had set out a three-step approach:

1. The court must be satisfied that the building had been damaged or destroyed
2. It must then decide whether to settle a scheme, and
3. It must determine the terms of the scheme.

Schemes with broad support were preferred, they should be appropriately detailed, and they should not depart from the legislation and body corporate rules more than was reasonably necessary.

Her Honour said there was no dispute that the building was damaged and in need of repair. The key issue in the case was whether the scheme was appropriate in the circumstances. The management structures for unit title developments were based on democratic principles and the other 97 unit owners had not yet had a chance to consider and vote on the scheme.

In addition, it was not clear that the proposed scheme was an appropriate response to the delays in investigating and undertaking repairs. A scheme should be a remedy of last resort and the section 74 application would accordingly be declined.

Property sale order made by High Court

In *Styler v James* [2020] NZHC 713, Anthony Styler was married to Ms Styler for 20 years and they lived at a property in Christchurch. Ms Styler died before 19 November 2008. Mr Styler, Susan James and Barry Deanes on that date entered into a property sharing agreement recording their rights in the property in Ms Styler's estate. The defendant and Mr Deans were Ms Styler's children and the step-children of the plaintiff.

Mr Styler was to be registered as a tenant in common of the property with a 50% share, while Mr Deanes was to hold a 20% share and Ms James a 30% share. If Mr Styler decided to no longer occupy the property, Ms James and Mr Deanes were to have an option to purchase. If that right was not exercised, then Mr Styler would enjoy an option to purchase.

Mr Styler later discussed with the defendant and Mr Deanes his decision to no longer live in the property and it was agreed that it would be placed on the market. For an extended period, however, Mr Styler was unable to obtain Ms James' signature on the listing agreement.

Mr Styler accordingly applied to the court for an order that the property be sold and the proceeds be divided among the co-owners. Justice Osborne said that sections 339(1) and 341 of the Property Law Act 2007 provided for orders for the sale and division of property. With both Mr Styler and Mr Deanes being in favour of a sale, His Honour noted that those supporting a sale represented 70% of the ownership interests. Nothing about the nature or location of the property suggested that any option other than a sale was available.

Mr Styler gave evidence that, when he notified his intention to vacate the property, there was a further agreement that the parties wished the property to be sold.

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Subsequently, Ms James, who lived in Auckland, had without explanation taken no steps to give effect to an agreement that was undoubtedly binding on her. The situation could not continue as the house was vacant and creating costs for the parties.

Justice Osborne made an order for sale.

Trusts

High Court clarifies meaning of trust deed

In *Public Trust v Cancer Society of New Zealand Inc* [2020] NZHC 615, Public Trust sought directions from the court either to confirm the meaning of a trust deed or to rectify it. The application related to the Burns Family Charitable Trust that was settled by sisters Helen and Mary Burns. Both of the sisters had passed away.

The first issue that arose was as to the identity of one of the beneficiaries of the trust: whether it should be the New Zealand SPCA, or its British counterpart. Prior to her death, the surviving settlor, Helen Burns, executed a statutory declaration in which she stated that the inclusion of the British organisation in the deed was a clerical error. The intention of the sisters had been to benefit the Tauranga branch of the New Zealand organisation.

The United Kingdom organisation had provided written consent to rectification occurring. Justice Churchman said that the court's task in dealing with an application for rectification was to ascertain the natural and ordinary meaning of the words in question. In the present case, at the time the trust deed was created, both of the settlors had lived in Tauranga for 30 years and had a history of community involvement and support for local charities.



Having considered the statutory declaration and the wording of the trust deed, His Honour said he was satisfied that the settlors intended the New Zealand SPCA to be the beneficiary, rather than the United Kingdom organisation, and a declaration to that effect would be made.

The second issue was that the trust deed contained an accumulation of capital clause directing that, after payment of 80% of the net income to the beneficiaries, the remainder of the net income was to be transferred to the capital of the fund. Justice Churchman said that, historically, capitalisation of the income of a charitable trust had been prohibited by that part of the rule against perpetuities known as the rule against accumulations.

However, His Honour noted that the Trusts Act 2019, which would take effect on 30 January 2021, permitted accumulations. Justice Churchman said that he would rely on the court's inherent jurisdiction to declare the accumulation clause invalid. After the new legislation came into force, the trustee could have regard to the settlors' intentions in acting, but would not be obliged to follow the accumulation clause. ■

High Court rules on disputes over administration and distribution of large estates

The High Court has ruled on three cases involving disputes between family members over large estates. The judgments illustrate the importance of seeking to prevent disagreements, which are not only time-consuming but also eat up estate property in legal fees.

Successful claim for companion

Hill v Waddingham [2019] NZHC 3505 involved a claim under the Law Reform (Testamentary Promises) Act 1949 against the estate of Neville Morton. Mr Morton had farmed a property at Titiroa in Southland for most of his working life. He and his wife had three children, before his wife and younger son, Kerry, left the farm when Kerry was 12.

Mr Morton met Emily Hill in 1980 and the pair developed a friendship that continued for 36 years until Mr Morton's death. A feature of their long relationship was that Emily would travel from her home in Invercargill and work with Mr Morton on the farm. Three years before his death, Mr Morton told Emily that there would be something in his will for her.

He left her $100,000 from his estate of between $5.7 and $6.4 million. Ms Hill brought proceedings, claiming that the $100,000 did not reasonably recompense or remunerate her for the work and services she provided to Mr Morton. She sought an additional $400,000 on the basis that this would be a reasonable amount to satisfy Mr Morton's testamentary promise that would otherwise remain unmet. Kerry Morton was the sole other beneficiary of the estate.

Kerry Morton had had very little contact with his father after he and his mother left the family farm. They were effectively estranged until shortly before Mr Morton's death. Kerry Morton initially took his son to the farm to meet Mr Morton (his son's grandfather), but the meeting did not go well. Mr Morton would subsequently see Kerry about once a year but was not very communicative and even privately questioned whether he was Kerry's father.

However, after Mr Morton moved to a rest home in 2015, Kerry visited him two to three times a week and Mr Morton said he planned to leave his estate to Kerry.

Ms Hill enjoyed farm work but was no longer able to work on the land after her family's farm was sold. She began travelling 49 kilometres to Titiroa to work on Mr Morton's farm and continued to do so until his death. Ms Hill said that she drove out to the farm almost every day and was involved in all aspects of Mr Morton's life. She said that she fed out bales of hay and balage to the cattle, assisted with drenching and dipping, sprayed and cut gorse,

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did drainage work, repaired fences and fed the pigs.

She said she purchased his groceries, provided him with meals, did his washing and assisted him when he became unwell. Kerry disputed the extent and value of the work done by Ms Hill and said she had been amply rewarded by the $100,000.

Justice Mander ruled that Ms Hill was to receive an additional $350,000 from Mr Morton's estate. He said that, without her, Mr Morton would have had no-one to assist him when he was unwell or incapacitated. Ms Hill had worked on the farm and provided a range of qualifying services and work that benefited Mr Morton and went beyond that which would be accepted of a simple friend or companion.

High Court orders trust to be wound up in light of continuing litigation

In a second case, siblings spent $300,000 in legal fees battling over their sister's estate. In *Pauline Janice Harrison v Adrienne Harrison* [2019] NZHC 3474, Valerie Geard settled a family trust in October 2005, at a time when she was terminally ill. She appointed her brother Graeme Harrison and her sister-in-law Adrienne Harrison as trustees.

The final beneficiaries of the trust were Mrs Geard's siblings – Graeme, Brian, Malcolm and Pauline. The discretionary beneficiaries included Mrs Geard, her husband David, the final beneficiaries and Child Fund New Zealand Ltd.

At the time of settlement of the trust, Mrs Geard signed a memorandum indicating that she wished Malcolm to be the primary beneficiary of the trust. Mrs Geard also executed a will on the same date in October 2005, appointing Graeme and Adrienne as executors and making bequests in favour of her husband and Pauline, with the residue of the estate to be bequeathed to the trustees of the trust. Mrs Geard died on 3 March 2006 and Malcolm on 2 November 2007.

Pauline believed that Graeme and Adrienne had breached their obligations as trustees by keeping and using the trust property for their own benefit and to the exclusion of herself and Brian. She brought court proceedings seeking redress.

Justice Brewer said that his primary difficulty was identifying the legal issues in contest between the parties. He described Pauline's attitude as aggressive and obsessive, and noted that she was self-represented. Pauline had produced a 23-page affidavit with 22 exhibits attached to it.

Justice Brewer said that her case appeared to be that Graeme and Adrienne were fraudsters. However, His Honour ruled that Pauline's claim could not succeed. There had been no fraud by Graeme and Adrienne in the exercise of their duties as trustees of the trust. They had acted properly and carefully and in conditions of great difficulty resulting from Pauline's hostility.

Graeme and Adrienne had also filed proceedings, seeking directions as to the final distribution of the trust property. Justice Brewer said that the primary grounds on which the orders were sought were that Pauline's continuing litigation made it impossible for them to continue to exercise their responsibilities as trustees, and the assets of the trust were being depleted by the litigation costs.

Graeme and Adrienne's affidavit said that they had faced litigation relating to the trust from Pauline for more than 10 years, causing stress and costing the trust estate hundreds of thousands of dollars.

Justice Brewer said he was satisfied the trust should be wound up. Mrs Geard's wish had been that the trust should be maintained after her death for the benefit of her siblings, particularly Malcolm. However, that wish was being frustrated and the assets were being depleted.

His Honour said he had no doubt that litigation would otherwise continue as, between the date of setting the current proceeding down for hearing and the judgment date, Pauline had filed two further sets of proceedings.

Justice Brewer ordered that the trust be wound up and its assets be distributed in three equal parts to Graeme, Pauline, and Brian's children.

Appointment of independent trustee divides warring family

A third case involved a dispute between a widow and a niece over administration of an estate valued at between $15 million and $40 million. In *Georgina Miranda Mary Hall v Dorothy June Radich-Chaytor* [2020] NZHC 409, Dorothy Radich-Chaytor married Anthony Chaytor in 2014, when he was 80 and she was 68. Mr Chaytor had never been married before and his closest blood relatives were his seven nieces.

Mr Chaytor died in 2018, leaving a will under which his wife and John Chantery-Harris were appointed as executors. After personal bequests and a life interest in Mr Chaytor's residence to Mrs Radich-Chaytor, the will directed that the residue of the estate was to be divided into 14 shares. Seven shares were to be held on trust for Mrs Radich-Chaytor if she survived Mr Chaytor, five shares were to be divided among

the nieces and nephews living at the date of Mr Chaytor's death, and two shares were to be distributed to charities.

Mr Chaytor's niece, Georgina Hall, had filed proceedings in the District Court prior to Mr Chaytor's death. A mediation was held and Ms Hall and Mrs Radich-Chaytor agreed on how Mr Chaytor's property would be divided after he died. That settlement would have varied the terms of the will, but was never signed.

An application was made to the High Court for the appointment of an executor/trustee, as it was agreed that the estate should be administered by a professional independent executor because of the disharmony between Mrs Radich-Chaytor and the nieces. Each party proposed a different independent trustee.

Justice Grice said that the sole issue was which of the two executors should be appointed. Her Honour said that both trustee corporations were experienced in managing competing and adversarial beneficiaries. The responsible manager would need to speedily get to grips with the management, with the position being complicated by the fact that there were other proceedings relating to the estate.

Justice Grice said that either trustee corporation could do the required work competently. However, the fact that Mrs Radich-Chaytor was suspicious of Perpetual Trust weighed against it being appointed. While Ms Hall said the suspicions were baseless and they might seem trivial, the concerns were nevertheless real for Mrs Radich-Chaytor.

Accordingly, following the renouncing of probate by the executors named in the will, Trustee Executors Ltd was appointed as sole executor of the will. ■

Changes to CPD requirements

Continuing professional development (CPD) has been mandatory for Registered Legal Executives since 2014, with criteria and requirements very similar to those for lawyers.

The National Council recently reviewed LENZ's CPD policy and has made some key changes, effective from 1 July 2020, that you need to be aware of.

Wellness and professional conduct CPD now compulsory

CPD that covers elements of wellness and professional conduct is now a mandatory component of your annual CPD plan.

In addition to ensuring that you remain up-to-date with developments in law and practice, it is important that you take care of yourself and those around you.

Up to 20% of your annual CPD should focus on wellness and professional conduct. At least 80% of eligible CPD activities should continue to address your areas of legal practice.

CPD hours increased for Affiliates and Associates

The number of annual hours that Affiliates and Associates are required to complete has been increased.

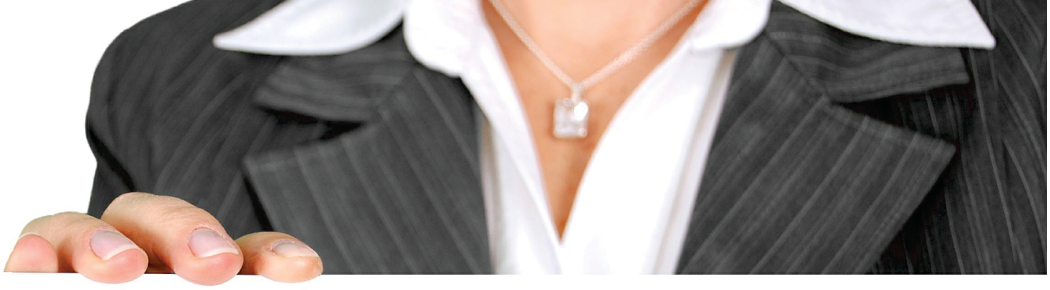
Affiliates are now required to complete at least six hours of relevant and verifiable CPD between 1 July and 30 June of the following year, an increase of one hour per year.

Associates are now required to complete at least eight hours of relevant and verifiable CPD between 1 July and 30 June of the following year, up from 7.5 hours per year.

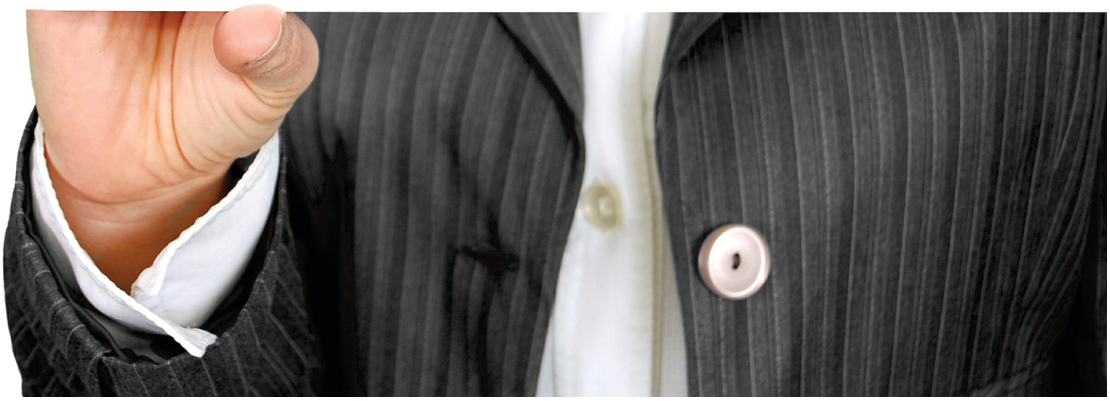
Fellows will continue to complete at least 10 hours of relevant and verifiable CPD, the same number of hours as lawyers, between 1 July and 30 June of the following year.

Legal Executives New Zealand

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Idea → Plan → Action



Reminder of CPD annual requirements

Annual completion of Continuing Professional Development (CPD) is one of the prerequisites for registration renewal each year.

Your CPD activities should address your individual learning needs.

What do I need to do?

Prepare and maintain an annual CPD Plan and Record (CPDPR). To do this, you need to:

1. Identify your areas of practice.
   Have you started working in a new area of law?
   Your areas of practice may include, for example:
   - Residential conveyancing
   - Estate administration
   - Wills
   - Retirement villages
   - Subdivisions.
2. Reflect on what you do well and what could be improved, in terms of:
   - Your knowledge, eg: the areas of law that you work in
   - Your skills, eg: drafting documents, letter writing
   - Professionalism, eg: awareness of changes to legislation and the rules and regulations relating to legal practice
   - 'Practice management', eg: time recording, file management and/or
   - Professional conduct and personal wellness, eg: awareness of issues of conduct and professional responsibilities, self-care, etc.
3. Review your needs against the needs of the firm, in consultation with your supervising lawyer.
4. Identify your two or three most important learning needs for the coming year, ensuring that they are aligned with the firm's strategic plan.
5. Identify learning outcomes that will meet the specific needs you have identified.
   These outcomes will be actions, for example:
   - "To understand and be able to apply new legislation relating to . . . ",
   - "To implement a system and develop habits that will improve my time recording."
6. Choose just three or four learning outcomes to focus on for the coming year.
7. Identify CPD activities that will help to achieve those learning outcomes, for example:
   - "Attend webinar on changes to the XY Act",
   - "Attend in-house seminar on effective use of time-recording software."

What should my CPDPR look like?

We recommend that you use the same format for your CPD plan as the lawyers and any other Registered Legal Executives in your firm.

Your plan should include space to reflect on each CPD activity:

- Did the activity expand your knowledge and/or skills?
- What did you learn, and what will you do differently from here?
- How can you implement the new knowledge or skills in your work?
- Did the activity help you meet your learning outcomes? How did it do that?
- Has the activity identified further learning needs?

What CPD activities can I include in my CPDPR?

Your CPD activities need to:

- Be planned and structured, with a stated purpose and outcomes
- Be related to the learning needs that you have identified for the year
- Be verifiable, with supporting documentation
- Provide for interaction and feedback, and
- Not be part of your daily work.

Essentially, if an activity is something that a lawyer can count towards their CPD, then so can you.

Seminars (both in-house and external), conferences, study groups, webinars and interactive 'on demand' CPD such as that offered online by NZLS CLE Ltd and ADLS may all be eligible activities.

At least 80% of the CPD activities that you include in your CPDPR should address your areas of legal practice. Up to 20% of your annual CPD must focus on wellness and professional conduct.

Please note that verification of your attendance at an event or successful completion of an on demand CPD activity must be attached to your CPDPR if you wish to include it in your CPDPR.

Are CPD hours prorated for Registered Legal Executives who work part-time?

There is no provision for this. Working part-time does not lower one's responsibility or obligation to educate oneself — fewer hours of work should not mean less educated. The number of CPD hours is not onerous over the course of a year.

Even if you are unable to attend webinars and seminars on a regular basis, attending just one in-house seminar per month will more than meet the requirement.

What if I do more than the required number of hours?

CPD hours completed in excess of the minimum annual requirement may be carried forward into the following membership year as follows:

- Affiliates: up to three hours
- Associates: up to four hours
- Fellows: up to five hours

Any further CPD hours completed in the current membership year *cannot* be carried forward into subsequent membership years.

How will Legal Executives New Zealand know that I have done the required number of hours?

When you renew your registration before 30 June each year you are required to submit a declaration stating that you have met CPD requirements for the preceding 12 months.

In any year you may be randomly selected for a CPD audit to check compliance with the requirements. You only need to send us your CPDPR and verifications if you are randomly selected for a CPD audit.

What if I work in only one area of law?

It is important for you to have at least a basic understanding of all areas of law, even if you specialise in just one field. A broad understanding of the wider work undertaken in your firm provides context for the work that you do and also helps to reduce risk for clients and the firm.

Why do Registered Legal Executives and lawyers have different CPD years?

The CPD year for lawyers starts on 1 April and finishes on 31 March, although their practising year is the same as our membership / registration year (1 July to 30 June of the following year). The 31 March date allows plenty of time for lawyers' CPD declarations to be filed with the NZLS before the expiration of their practising year.

Our CPD year is aligned to our membership/registration year in an effort to keep the process simple. Because Registered Legal Executives are not subject to regulation in the way that lawyers are, it is more efficient to get your CPD declaration from you when you return your registration payment and qualifying employment certificate, on or before 30 June.

The Policy on Mandatory Continuing Professional Development can be found in the members' only section of our website: www.nzile.org.nz

If you have any queries about your CPD plan and/or the new CPD requirements, please email enquiries@nzile.org.nz ■

FOREIGN NEWS



Legal executive news from around the world

Like their colleagues in New Zealand, legal executives and law firms around the globe had to make major changes to continue operating during the COVID pandemic. Some observers believe that these forced short-notice adaptations will hasten long-term changes in the way law firms operate.

Legal recruitment firm Major Lindsey & Africa surveyed 1,335 law firm associates in the United Kingdom, the United States and Asia and found that a majority of them expected the pandemic would lead to permanent changes for the legal profession. More than half of the respondents were concerned about job security, while 20% feared the impact of cost-cutting measures.

The survey found that the practice areas which had experienced the biggest downturn in work were real estate (58%) and intellectual property (43%). Almost 95% of those who completed the survey predicted that COVID would change remote-working practices at their firms for good, while 57% expected it would result in permanent change to the need for physical office space.

Perhaps unexpectedly, some associates said that the coronavirus had resulted in greater socialising between international colleagues. One example was international law firm, Simmons & Simmons, which hosted virtual quiz nights and involved family members, flatmates and pets. The firm also had weekly mindfulness sessions and virtual yoga. Milan employees held a call at the end of each day and were encouraged to bring a drink, Parma ham and a non-work-related story about something that had happened during the day.

United Kingdom

Lockdown restrictions implemented in the United Kingdom in March meant that 450,000 people were prevented from completing property settlements. The Health Protection (Coronavirus, Restrictions) Regulations 2020 restricted purchases, sales and rentals of properties.

From 13 May, relaxation of the regulations allowed buyers and renters to complete purchases and view properties in person. Estate agents, conveyancers and removal firms could recommence work under strict social distancing guidelines.

National law firm, Slater and Gordon, had 90% of its staff working from home by late March, and encouraged people to share pictures of their home workplaces to build a team atmosphere. Cardiff and London firm, Hugh James, organised a virtual prosecco evening to replace in-person drinks. Pennington Manches held virtual coffee breaks and drinks with contacts. Whatsapp was also used by many firms to keep in touch and promote a positive atmosphere.

However, the lockdown experience was stressful for almost everyone and some people were impacted more than others. *The Law Society Gazette* reported in May that half of the mothers working in the legal field were bearing the brunt of childcare responsibilities, taking on more work looking after their children than fathers did.

A survey of 900 women by The Next 100 Years found that 90% of them

had taken on additional childcare and home schooling responsibilities, with a third of respondents forced to reduce their working hours to juggle all of their tasks. Seventy three per cent said their situations were difficult to manage.

One lawyer said that she was the only female lawyer in a team of five. The other lawyers' partners managed home schooling of their children, whereas she could only manage her workload by working early in the morning and late in the evening. A female partner said that she had worked from home while caring for a four-year-old and a sick husband, and was exhausted.

United States

In the United States, Mark A Cohen predicted that COVID would 'turbocharge' legal industry transformation, propelling the law into the digital age and reshaping its landscape. He said that the entire legal ecosystem would be affected — consumers, providers, regulators and the judicial system.

In an article in *Forbes,* Mr Cohen said that digital transformation of the legal profession had been on the cards for years, but law firms had paid little attention to it and were unprepared for the changes it would bring. COVID had altered that and would produce a 'swift, comprehensive, top-to-bottom re-imagination of the legal sector.'

Specifically, Mr Cohen suggested that remote working and distance learning would finally be adopted on a large scale, after 150 American law schools speedily moved to online teaching after the coronavirus took hold in the United States.

Competition for clients would increase and legal services would be provided by law firms, corporate departments and others working together seamlessly. The courts would finally begin operating digitally, after the pandemic led to the Supreme Court postponing oral arguments for the first time since 1918.

Australia

Some large Australian law firms strengthened their ties during COVID. *Law.com International* reported that the chief operating officers at Australian and global firms in the country began routinely emailing each other to advise of their latest responses to the pandemic and to ask questions about the best future steps.

An informal group of representatives from firms including Clayton Utz, MinterEllison, Allens and Gilbert + Tobin shared details about remote working, managing staff who continued to work on-site and IT issues.

The Law Institute Victoria held a series of webinars for practitioners, covering different COVID topics such as emergency measures for the electronic signing and witnessing of documents, representing clients in online mediations and the impact of the pandemic on parties' legal obligations in property transactions.

A Government Lawyers Conference was held online in June, with the theme of collaborating for a future-proofed public sector. The conference examined the long-term impacts on the legal professional of the Australian bushfires and the COVID pandemic. ■





Wills – not always on paper

Andrew Johnstone of APEARS, Sydney, Australia



In the Autumn edition of *Envoy,* I discussed a particularly interesting will from Australia and promised more similar stories.

iPhone will in Queensland

The Queensland Supreme Court in *Re: Yu [2013] QSC 32* found that a document on an iPhone was a valid will.

Karter Yu took his own life on 2 September 2011. Shortly before he died, Mr Yu created various documents on his iPhone, mostly some final farewells.

One document was expressed to be Mr Yu's last will. In Queensland, section 10 of the Succession Act 1981 identifies the various formal requirements for the execution of a valid will. Section 18 of the same legislation provides that if the court is satisfied that a person intended a document to be their last will, the document then forms a will if it purports to include the testamentary intentions of the deceased.

Further investigation of the Acts Interpretation Act 1954 (Qld) was required to ascertain the meaning of a document. That legislation defines a document to include a disc, tape or other article, or any material from which writings are capable of being produced or reproduced with or without the aid of another article or device.

It was agreed by the judge in this case that the condition of the existence of a document was met. A further condition was that it purported to state the testamentary intentions of Mr Yu. Further examination of the document in question showed that it did set out the testamentary intentions of the deceased.

It was concluded that the document was intended to be the will of the deceased. For section 18 of the Succession Act to be satisfied, it must be concluded that the document intended to be legally operative so as to dispose of the property of the deceased upon their death.

Justice Peter Lyons said in his judgment, '*The document for which probate is sought, in my view, plainly satisfies that requirement. The document commenced with the words, "This is the last Will and Testament . . ." of the deceased, who was then formally identified, together with a reference to his address. The appointment of an executor, again, reflects an intention that the document be operative. The deceased typed his name at the end of the document in a place where on a paper document a signature would appear, followed by the date, and a repetition of his address. All of that, it seems to me, demonstrated an intention that the document be*

operative. Again, the instructions contained in the document, as well as the dispositions which appear in it, all evidence an intention that it be operative on the deceased's death. In particular, the circumstance that the document was created shortly after a number of final farewell notes, and in contemplation of the deceased's imminent death, and the fact that it gave instructions about the distribution of his property, all confirm an intention that the document be operative on his death. I am therefore satisfied that the deceased intended the document which he created on his iPhone to form his Will. I am prepared to make the orders sought.'

Word document still on laptop is a valid will

The *Yu* case is similar to a case in New South Wales. In *Alan Yazbek v Ghosn Yazbek & Anor* [2012] NSWSC 594, a Microsoft Word document (Will.doc) completed by the deceased and found on his laptop after his death, was admitted to probate as the last will of the deceased. In this case the deceased had typed up a will on his laptop before going on holiday. It was contended that the will was only a stopgap measure whilst he was away and, since he had returned from holiday, it was not needed.

The judge, however, ruled that notwithstanding the will being made just before going on holiday, it had in fact been opened again since the deceased's return and it had not been amended or even deleted.

Again, with the laws of New South Wales and Queensland being similar, the judge went through the requirements for a valid will including the need to confirm the intentions of the deceased for the Word document to be the deceased's last will.

Meanwhile, in the USA

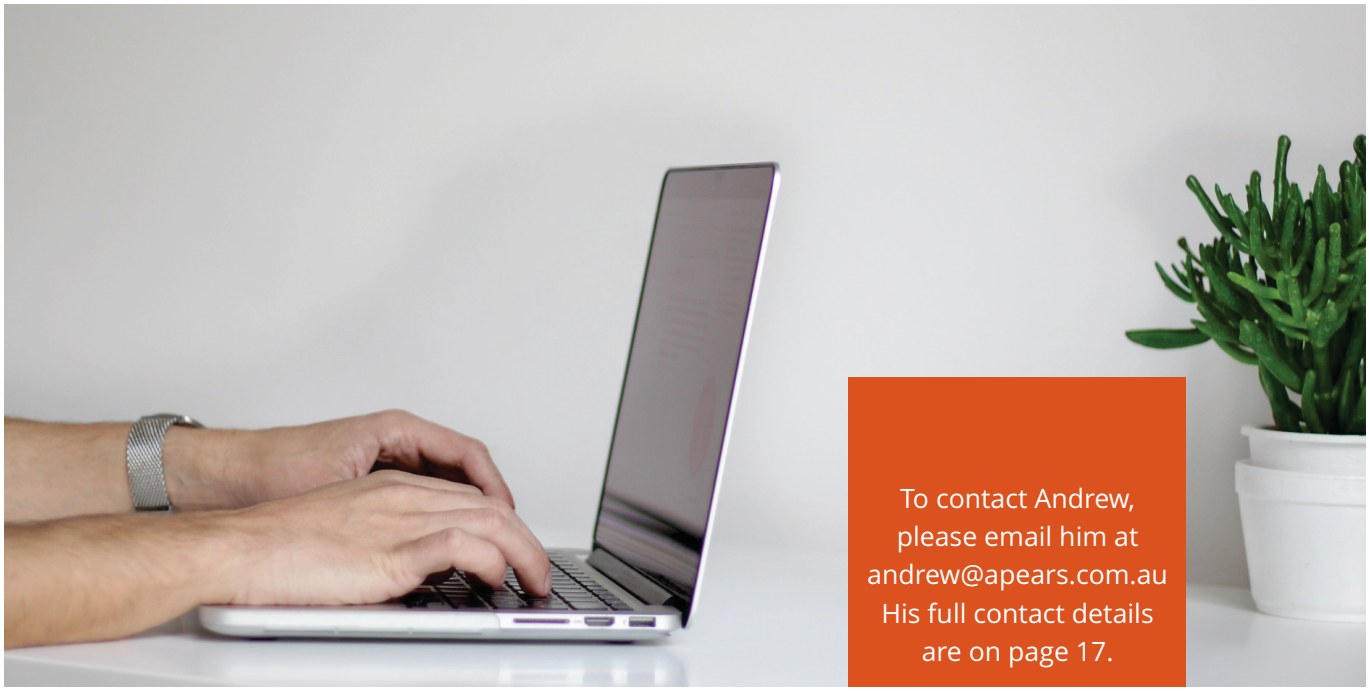
Marilyn S. Rhodeback's last will and testament submitted to the Licking County Probate Court in 2010 by New Albany lawyer Larry Shafer, was written in her own hand on a piece of 12-by-12-inch scrap wood. Mr Shafer had worked with Mrs Rhodeback on other issues before being handed the half-inch-thick wooden will by her daughter. The previous issues had always been dealt with on paper. At her mother's request, Mrs Rhodeback's daughter went looking for a 'board' that she was told had the will written on it, Mr Shafer said. Expecting to find a dry erase board, she was surprised to find the scribbled-on wood, signed by Mrs Rhodeback's two sisters as witnesses.

Mr Shafer said that after Mrs Rhodeback's husband died in the 1990s, she realised that she ought to put down her own last wishes. Mrs Rhodeback's will was filed in court on 20 August 2010 and admitted after a hearing on 21 September, said Licking County Chief Deputy Clerk, Bill Fisher. Despite its unusual material, there was no problem with its legality. A witness testified to its authenticity and another filed an affidavit. The 'will' was admitted to probate!

And back to NSW

I wonder if the story in the 1888 novel by H. Rider Haggard, *Mr Meeson's Will*, in which a marooned man's will was tattooed on the back of a woman, will happen on a more regular basis given the proliferation of inked skin these days?! ■

Regards from Australia,
Andrew Johnstone
APEARS



To contact Andrew, please email him at andrew@apears.com.au His full contact details are on page 17.

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