

# Macrossan & Amiet Solicitors: news update

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## Where there's a will...

By Darren Sekac



As a lawyer, I am often engaged in trying to solve problems after the event, like one who carefully picks through the wreckage after a car has gone over the cliff. Consequently, I have become passionately interested in estate planning.

Estate planning is about creating structures to prevent the car from going over the cliff. It is about seeing problems in the future and putting in place a plan to avoid them for you and your family.

A will is part of estate planning. It is a part of the plan to provide for people who are important to you. Why we have allowed wills to be degraded in importance is beyond me, but we have.

There are few people who enter the world of purchasing property without relying upon good legal or conveyancing advice. We rely on conveyancers to make sure the property we are purchasing is registered in our name and any problems attached to that property are either resolved or brought to our attention.

A will is not about the purchase or sale of one property. It concerns and governs all of your

assets. It is about the conveyance of your home, your investment property, your beach house, your investments, your shares, your business, your farm and all of your personal property. Yet, we think that a will is simple and have been told "No, that won't cost much."

"Well Bill, what do you want to do?" This is the typical question asked of the client when he or she presents themselves to make their will. This is only the first stage of preparing the will.

There needs to be a thorough investigation of what Bill actually owns and how he owns it. There also needs to be careful consideration of Bill's personal history. You see, Bill was married before and has three children from that marriage. He now lives

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## News



The transition from law student to lawyer can be challenging. On your first day as a law student you're promised by your university that by the time you graduate, you will be prepared for a career as a lawyer. On your first day at a law firm, after five years of law school, you're told that you are completely unprepared to be a lawyer and you are in for a lot more hard work.

By Dane Lang

# Isn't it time you got a real job?

Both of these statements are true to some extent. A legal education can't fill your mind with all the legal knowledge you will ever need in practice. It does however give you the skills you need to access knowledge when you need it. A lot of "the law" that you learn at university doesn't stay with you long. You have to cover so many areas so quickly; you end up retaining only what you need for the next exam and then move on. What you do retain are the skills you need to identify the legal questions and how to find the answers.

For example, when a client has a contractual dispute, you may not be able to recall the case that laid down the legal principle that allows your client the right to enforce or terminate the contract. You will be able to read the contract and identify the important clauses, interpret those clauses and access any cases or State and Federal legislation that may assist in reaching a legal conclusion.

Next, when deciding on the best course of action once reaching a legal conclusion, is where young lawyers often find they have a lot of work ahead of them. This is because the practise of law is not only concerned with answering legal questions, but also with achieving the best outcome for your client. Often this has less to do with whether your client has a strong legal

argument than it does with the practical circumstances of the situation.

In the contractual scenario above, your client may have sub-contractors who are in breach of the terms of their contract. Your client may however rely on the sub-contractors for the finalisation of work. Terminating the contract and suing the sub-contractors for damages may never compensate your client for the loss that will be suffered as a result of failing to complete the work in time.

A lawyer's job then becomes a matter of identifying what the best possible outcome will be for the client, given the practical constraints of the situation. This involves an analysis of the interests of all parties and their relationship. It involves skills of persuasion and negotiation to reach a workable outcome. These skills are not theoretical and cannot be learned at university. They are acquired by dealing with similar situations and finding out what is effective and what is not. In short they are acquired largely through experience.

Even though lawyers spend five years at law school, their education continues throughout their career. This is what makes a legal career both challenging and rewarding.

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## News



I cannot remember who said it, but it has stuck with me throughout my time as a lawyer; to practise as a lawyer is to dedicate oneself to a life of servitude.

I understand this is not in keeping with the traditional view of the lawyer, which is well summed up by Don Corleone in *The Godfather* when he said, “A lawyer with his briefcase can steal more than a hundred men with guns.”

By Greg Smart

## Making a difference

The idea of the lawyer as servant is one worthy of further examination. Its origins lay in the duties that every lawyer is bound by. The first, and highest duty, is as an officer of court. The second duty is to the client. Matters that go solely to the solicitor’s own preferences are secondary to those duties.

It is this concept of the lawyer as a servant that answers the all too common question of how a solicitor could represent a person charged with child molestation. It is our duty to our client that must prevail over our own moral distaste for the allegations laid against our client.

The purpose of this discussion is to provide a framework in which to examine what the practise of law entails. It is to serve our clients as best we can within the boundaries of the law. Put another way, our job is to manufacture the best possible result for our client within a given circumstance. We are to do so without fear or concern for our own interests, reputation or safety. In this vein, I am reminded of the lawyers representing David Hicks and Dr Haneef, whom risked personal censure to ensure their clients obtained a just trial.

It is not an easy task to define what the best possible result is. Sometimes the legal result is not practical or is otherwise undesirable. The simplest example of the legal course not necessarily being the best possible outcome is when the legal fees associated with running

a trial are likely to exceed any award of damages. In these circumstances, our duty is to advise our client to make a commercial settlement to avoid the costs of litigation, notwithstanding that it is in our commercial interest to have the matter run to trial.

The delicate task of identifying the best possible result is best obtained by the application of experience and a consideration not of what the client’s rights are, but what it is the client wishes to achieve. In this regard, the role of the lawyer might be defined as a problem solver.

The idea of lawyer as servant also manifests in the working life of a solicitor. A dedication to our clients above our own interests will often mean working long and unpleasant hours to ensure that the job is done to the best of our ability within the necessary timeframes. It requires that we stay sharp and focused during our work and not be distracted by peripheral issues.

The thought of the lawyer as a servant is, whether we acknowledge it or not, the reason we keep on in the practise of the law. Daily, we help our clients solve their problems, large or small. There may not be much glory in a simple residential conveyance or a work licence application, but to that client it matters. For that client, we have made a difference. And if we make a difference for each of our clients, day in day out, then that makes for a rewarding career.

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## Feature

What is the name of the player who kicked the first ever goal for the Sydney Swans?

Sounds like a Trivial Pursuit question doesn't it? The answer is in fact Airlie Beach builder, Colin Hounsell.

Col hails from Wagga Wagga in New South Wales which has produced many famous sportsmen including the Mortimer brothers, Mark Taylor, Geoff Lawson, Paul Kelly and Peter Sterling.

# Colin Hounsell: Under development

Since moving to Airlie Beach in 1995, Col has become one of the real characters of the town.

If you happen to meet him placing a bet at the Airlie Beach Hotel you would never guess that he is the largest builder in the Whitsundays, having completed projects such as Shorelines on Hamilton Island or the 51 units comprising Marina Shores at Airlie Beach's Abel Point Marina.

Also, if you have the bank balance to be able to holiday at *qualia* on Hamilton Island, then you might be interested to know that Col also built this resort for the Oatley family.

Col is able to recount many

anecdotes about his time with the Sydney Swans and the heady days of living with characters such as Dr Geoffrey Edelsten, Warwick Capper and all of the hype that surrounded the introduction of the Sydney Swans into the AFL competition. He was a ruck rover and he played 130 AFL games for both South Melbourne and the Sydney Swans, retiring from football in 1985.

Col is married to Jenny and they have two children Jade and Todd. Todd has followed in his father's footsteps by working as a carpenter for Col's company and also plays AFL for the Whitsunday Sea Eagles.



Shore Lines on Hamilton Island



### Marina Shores at Able Point Marina

Col's career as a builder has had its ups and downs much the same as a football career. Building in the Whitsundays used to be much more risky than it is now. Col had some close calls when developers had financial troubles and were unable to pay him. 2000 was difficult however Col battled his way through those tough times. He has benefited greatly from the building boom that has been experienced in Airlie Beach and on Hamilton Island for the last five years.

Col said he is lucky to have the support of Macrossan & Amiet and appreciates the expertise and availability of the staff.

"I like dealing with local people who have who are available for my "after hours" queries," he said.

Col is quite philosophical

about development and states, "if it was easy everyone would be doing it". Having had the benefit of good and bad experiences in the industry Col will soon be hanging up the tools and retiring to live in his new house that he plans to build at the Port of Airlie development which is currently under construction. Col, Jenny and their family are really looking forward to a new phase in their lives when they can put their feet up and relax a bit. Not that he has much difficulty in relaxing but he does admit that the pressure of undertaking such large projects can take its toll. Even with the best of intentions things can go wrong and like the great footballer that he was, Col the builder would like to quit while he is on top.



Colin Hounsell –  
footballer, builder  
and family man

## Feature



If it has ever crossed your mind to refuse to provide a breath specimen for random breath testing, you may like to reconsider.

By Kylie Davies

# Take a deep breath

If you are pulled over by police for a road side breath test and fail to give a breath specimen, or are unable to give a breath specimen when transported to the police station, you are automatically deemed to be over 0.150% and are looking at a 6 month licence disqualification for a charge of drink driving. That's even before you face the penalty for failing to give the specimen in the first place.

The rules relating to drink driving and the requirement to provide a specimen of breath for analysis are contained in the *Transport Operations (Road Use Management) Act 1995*. This complicated piece of legislation provides that where a person is directed to provide a specimen of breath for analysis and fails to do so without having a valid medical reason (supported by a doctor's certificate produced at the time), a person is automatically presumed to be under the influence of alcohol.

We suggest that if you suffer from a medical condition that could affect your ability to undergo a breath test, visit your general practitioner to provide a medical certificate and carry it in your glove box at all times. You should be aware however that having a medical certificate will not get you off the hook completely, as the police can require you to provide a blood or urine sample instead.

There are some circumstances that may exempt a person from having to comply with the requirement to provide a breath specimen but these are very limited and we would not recommend that anyone attempt to avoid the requirement to provide a specimen without obtaining legal advice.

The best advice is to avoid driving under the influence at all and avoid unnecessary consequences by providing a breath specimen upon request.

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in a de facto relationship with Mary who also has two children from her previous marriage.

“What’s that got to do with my will? Nobody has ever asked me about this before.”

Actually planning Bill’s way ahead is difficult. I’ve only scratched the surface.

“But surely you only ask these

questions if the person is extremely wealthy.” It is often more important that these questions are asked in modest estates than they are for people who have considerable wealth. The impact of a mistake resulting in a large liability to the Australian Taxation Office or resulting in a protracted court case, will have more affect on a small estate than on a large one.

Estate planning is important for the people who are important to you. Unless you know where you are going, it is highly likely that you and your family will not get there. You need to seek the assistance of a lawyer who is really interested in estate planning and is able to ask the right questions to guide you, assist you and plan with you.

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## Feature



It is common for Criminal Law Practitioners to prepare and present bail applications for clients appearing before the Courts while in custody throughout their hearing.

By Steven Hayles

## Making bail

As a junior solicitor, with an interest in developing a practice in the area of criminal law, I looked forward to cutting my teeth in this area. Naturally enough, given my lack of experience, the chances that a defendant in custody would engage me to act on their behalf for such a matter would be limited.

One of the first opportunities to appear in a bail application was through my participation in the Duty Lawyer Program. A duty lawyer is a practising solicitor engaged by Legal Aid to attend a Magistrates Court to provide free legal advice to individuals appearing before the court on criminal matters. This work involves dealing with clients unfamiliar with the court process, who seem far removed from Macrossan & Amiet's usual client base.

Taking instructions from a defendant in custody has its difficulties. The defendant may have been recently apprehended by police and may appear in a somewhat dishevelled state. In some circumstances the defendant, upset by their present situation, may go into a diatribe of reasons why they should not have been arrested and why they had not done anything wrong.

After reading out the charges they face and the facts the police rely on, it is important to direct the defendant's attention

to answering how they wish to plead; guilty or not guilty to the charges.

Where a defendant wishes to plead not guilty and the police object to the granting of bail, it is important to ascertain from the defendant the following information which will assist the Magistrate in determining the question of bail:

- Whether the defendant is likely to commit the same or similar offence if released;
- Whether the defendant will interfere with any witnesses;
- Whether the defendant is likely to reappear at the next court date;
- Where the defendant will reside if granted bail;
- Whether the defendant has employment to return to;
- Whether the defendant has children or other dependants.

Provided the defendant poses no risk to members of the community and does not represent an unacceptable risk of failing to reappear before the court, bail will be granted in most circumstances. In circumstances where the bail application is unsuccessful, the defendant will have to face the next several weeks in a correctional facility as the next date that their matter could be mentioned in court may be several weeks later.

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## Last word



Kylie Davies

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# The greatest gift

As I've just recently purchased my first home, I thought it would be prudent to make myself a will. Having said that, it's like living with a plumber and wanting a leaky tap fixed, it happens eventually....

As I was thinking about my will, I thought about my organs. While I'm still (relatively) young and (relatively) healthy, they could surely be put to good use. After making a few enquiries on the internet about how I can make sure that my organs are utilised if at all possible, I discovered the following astonishing facts:

- In Queensland, only 21 percent of Queenslanders who are legally able to register their consent to donate do so.
- There are almost 2,000 Australians on the organ donor list at any given time.
- The Donor Register is the only national database for recording decisions about becoming an organ and tissue donor for transplantation after death.
- In most cases, a person is only able to donate organs when they are declared brain dead. Less than 1% of all people who die in hospital each year dies in this way and therefore cannot donate their organs.

- A far greater number of people have the opportunity to donate tissue for transplantation.
- Unlike organs, tissue may be stored for a period of time and does not require the donor's death for transplantation to be successful.

So which organs and tissue can be donated?

Organs: heart, lungs, liver, kidneys, pancreas.

Tissue: heart valves, bone tissue, skin tissue, eye tissue, pancreas tissue.

I've concluded that being on the Organ Donor Register is important; that's why I've registered my details. If you haven't yet or are considering donating, please visit <https://www2.medicareaustralia.gov.au/pext/aodr/Pages/DonorRegistration.jsp> or call 1800 777 203.

Until next month,

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