

# Macrossan & Amiet Solicitors: news update

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## Caught on tape: Recording private conversations



Robert McCloskey once said, "I know you believe you understood what you think I said, but I'm not sure you realise that what you heard is not what I meant."

By Greg Smart

**Communication can be a confusing game at the best of times. Some conversations however, are more important than others. Whilst a chat with the neighbour over the fence may lead to nothing, an interview with the police may change someone's whole life.**

Unfortunately, the human memory is fallible and easily forgets the precise words used in a conversation. Sometimes, perhaps trying to be helpful, the mind will fill in the blanks with words it thinks should have been said. It is also true that no two participants to a conversation will remember it the same way. Lawyers have learnt to deal with this problem by using the cliché "... or words to that effect".

Often, the precise words that were said can be crucial. In the absence of written evidence, the words that a person spoke can determine the nature and extent of a binding contract. The exact words that a salesman used to describe a product may be central to determine whether the salesman made a misrepresentation. It may be that a person needs to prove a threat to obtain a domestic violence order.

Many people assume that it is illegal to record a private conversation. Whilst this is technically correct, in Queensland section 43(2)(a) of the *Invasion of Privacy Act 1971* is an important exception. Relevantly, it provides that the prohibition on recording or listening to private

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## News



If you are in a dispute with a neighbour, involved in a divorce settlement or party to a multi-million dollar commercial contract dispute your solicitor can assist with alternative dispute resolution methods that could save you both time and money.

By Paul Stasuik

# Alternative dispute resolution

Alternative dispute resolution (ADR) as set out by the Queensland Law Society, is a term used to describe the process used by parties to resolve legal issues without necessarily going through the Australian court system.

Dispute resolution processes are now utilised in many areas to resolve legal disputes. The aim of ADR is to provide a cost efficient and speedier outcome for clients by reducing the time, stress and expenses of having to resolve the matter in court.

The different avenues for resolving disputes without going to court include *negotiation, mediation, consolidation, arbitration and case appraisal*.

**Negotiation** is where two parties discuss the dispute to see if they can resolve the issues.

**Mediation** is where a qualified mediator acts as an impartial third party who is independent and objective and does not express any views on how the dispute should be resolved.

**Conciliation** is where a third party assists in the negotiation process. They may advise on the content of the dispute or the outcome of its resolution, but do not make a determination or ruling. The conciliator can make suggestions for terms of settlement, give expert advice on likely settlement terms, and actively encourage the participants to reach an agreement.

**Arbitration** is where parties present arguments and evidence to an arbitrator who then makes a determination, similar to a judge.

**Case appraisal** is where an independent third party is given all relevant information in relation to both parties' cases and they make a recommendation about what would happen if the matter proceeded to court.

Solicitors use varying forms of ADR daily. The primary role of a solicitor,

acting as a dispute mediator, is aiding their client to resolve their dispute in the most time and cost effective way. Your solicitor can advise on whether you should consider ADR in your case and which form of ADR would be appropriate. They can also advise whether you are obliged to go through a particular form of ADR before you can commence proceedings in court or whether a court will refer you to ADR and what is involved in a court mandated ADR referral. Solicitors can help you prepare for specific alternative dispute resolution methods, attend some forms of ADR in order to represent you, speak on your behalf and assist you in protecting your interests.

There are numerous advantages of ADR including:

- Savings in legal costs and time.
- The process is private between parties and is usually conducted on a confidential basis.
- There is flexibility of process.
- Preservation of relationship and lack of animosity.
- More creative solutions where parties can tailor an agreement to suit themselves.

Dispute services in our local area include the Queensland Department of Justice and Legal Aid Queensland.

The Queensland Department of Justice has dispute resolution branches state wide to assist in settling disputes without going to court. Their services are generally provided free to the public, though facilitations and workplace mediations are provided on a fee-for-service basis. For information, contact Mackay Whitsundays Dispute Resolution branch on 07 4967 4404 or 1800 501 5765 (toll free outside Mackay).

For further information on how alternative dispute resolution methods can help you resolve a legal issue contact your solicitor at Macrossan & Amiet.

## News



Benjamin Franklin once said “it is better that 100 guilty persons should escape than that one innocent person should suffer,” is a maxim that has been long and generally approved.

By Greg Smart

# 11 angry men: Conviction by majority verdict

The state-sanctioned deprivation of a person’s liberty, more commonly called imprisonment, is considered the most grave and serious penalty which may be imposed upon a person. It is for this reason that the onus of the state in proving a crime, is that the matters relied on must be proved beyond a reasonable doubt.

It has been the case for some hundreds of years in most common law countries that those accused of crimes are entitled to be tried by a jury of their peers. In order to obtain a conviction, the prosecution is required to obtain a unanimous guilty verdict from each of the members of the jury. In the event that a unanimous verdict of guilty or not guilty cannot be reached, the jury will be declared hung. We can only hope that this is not a historical reference to some barbaric practice of executing jurors who couldn’t agree.

If a trial results in a hung jury then the prosecution may elect to run the trial again. If a second hung jury occurs, the trial may be run a third time and so on, until a unanimous verdict is reached.

Recently, the Queensland State Government has proposed legislation that will allow people accused of a crime to be convicted on a majority verdict where, after eight hours of deliberations, there remains one dissident juror.

The debate that has ensued might be described as the classic struggle between civil rights and budgetary concerns. But who is right?

Clearly, hung juries cost the tax payer considerable amounts of money. The cost associated with a trial is large, with both the judge and the prosecutors drawing on the public purse for their salaries. Often the

accused will be represented by state funded legal aid. The prosecution must pay witness expenses and there are the associated costs of administration in managing the justice system behind the scenes. If a jury is hung, these costs might be said to be wasted. The same might be said if a verdict of not guilty is handed down.

Another consideration in the corner of majority verdicts is that in some instances, the prosecution will have access to evidence that for some reason or another, is not admissible before the jury. It may be the inadmissible evidence that prompts the Crown to re-try a matter after obtaining a hung jury - sound in the knowledge that there is strong evidence of guilt that cannot be produced.

On the other side of the fence is the protection of our civil rights. Those against majority verdicts argue that if one juror considers the accused is innocent that in itself is a reasonable doubt. They argue that eight hours is not a long time to consider the fate of a person accused of a crime, who could well face life in prison. They point to the fact that no evidence has been produced to support the argument that hung juries are causing excessive expense.

Whilst there are many arguments about the rights of individuals versus the budget requirements of government, about the need to ensure criminals go to jail as against the need to protect the innocent, in the writer’s view whether majority verdicts are acceptable can be resolved by considering the impact on oneself. If you were accused of a crime you did not commit, would you want the court to disregard the vote of the one person that believed you?

## Feature

Mike Brunker and I were both born in 1965. He was born in Collinsville, the son of a coal miner. I was born in Proserpine, the son of a cane farmer. Our paths first crossed playing Under 9 football in 1973. I remember Mike as one of the Collinsville props (i.e. the big kid who was hard to tackle - every team has one!). But most of all I remember the long boring drive to get to Collinsville to then have to play on a dry hard field. I recall playing one game on a field that had been levelled with a grader a few days before. There were rocks all over the field. The thought of this happening in today's litigious environment is certainly unthinkable.

By Andrew Telford

# Mayor Mike Brunker

As I recall, there was at least one Brunker in every age level playing football in Collinsville. Mike tells me that one of his great uncles arrived in Collinsville in 1920 and was the first manager of the coal mine. Mike's Dad was one of 13 children and many of his family have worked as coalminers and continue to live in Bowen and throughout the Collinsville district. Mike has two older brothers. His younger brother, Adrian, played State of Origin football and club football for the Newcastle Knights.

Mike remembers coming to stay with Charlie Law in Proserpine for a week for a football carnival. He recalls sitting in a class with Les Stagg as his teacher. For those from outside of Proserpine, Les Stagg was a primary school teacher, former footballer and was heavily involved in the Proserpine Brahmans football team for many years. (Les was a parochial supporter of the Proserpine football team and, dare I say it, had more than a passing dislike for footballers from Collinsville). Mike says that Mr Stagg asked if anyone could answer a particular question. When Mike and a couple of his mates from Collinsville stood up to answer the question, Mr Stagg responded "You boys from Collinsville just sit down! You're just here to play football!" When asked about his education, Mike says that he went to school in Collinsville and moved from class to class progressively as he became too big for the chairs.

A bit of insight into Mike Brunker the person, might be obtained by reference to an Australian Unity Wellbeing Index Survey of 23,000 Australians, which found that the country's happiest people live in

regional towns. The survey found that eight of the top nine happiest electorates in Australia were isolated rural communities. "The people in country towns seem to have a high level of connection with one another, they have good relationships, the neighbours know their kids and look out for them," said survey author Bob Cummins from Deakin University. "All of this tends to make the well being of people in those areas quite high." Research has also shown that playing team sports can help teach children life skills such as how to communicate, commit and collaborate. Consider Mike's background. The major influences in his life are family, mining, football, mates and small rural towns. Then you might conclude that growing up in Collinsville and playing rugby league has had a huge influence on his life and the person he is. Having grown up in a small regional town myself I certainly think there is some truth in the theory that growing up in such a place is a good thing and can have a positive effect in many ways. Mike says that he has a strong sense of family and mateship and passionately believes in our area. He acknowledges the obvious. That is that each of the four main townships of Collinsville, Bowen, Proserpine and Airlie Beach are very much different. Each comprises different industries and people from different backgrounds. Mayor Brunker has the belief that whilst he cannot be all things to all people, he will make every effort to ensure that each of the four regional areas are looked after to the best of his ability. According to Mike, the transition to Mayor is relatively simple. He has gone from negotiating for Union members with the mining company

to negotiating on behalf of rate payers with developers and other levels of Government.

Mike was destined to become a coal miner which he did. He was the youngest ever president of the Collinsville Rugby League Club which then translated to him becoming president of the local Mining Union. Mike remembers that the league players would use the miners' showers and, shall we say, that some of the miners weren't too happy on a Monday when after a hard day of dirty work they wanted to clean up and have a shower but there was no soap left. Mike's foray into politics started in 1994 when the Bowen Council decided that it would close the Collinsville Council Depot. The Union decided that someone had to get on the Council to stop this from happening. Mike was the obvious choice despite his relative young age. He ran as an independent and was successful in being elected to the Bowen Council. Once on the Council Mike was instrumental in lobbying for the re-opening of the Collinsville Power Station. He then ran for Mayor in 1997 which shortly thereafter became a full time position.

Many stories about Mike have become folklore within the region such as his nickname "Moscow Mike". When he was 19 Mike went to the 13th Annual World Youth Festival in Moscow. He was a Union rep at the time but says that the conferences were more about issues such as the environment but that did not stop him being tagged as "Moscow Mike" and the name has stuck ever since. Mike remembers that whilst living in Collinsville he raised a potty calf called "Norman". The calf's escapades caused him

more than a few problems with his neighbours. He and wife Kylie now call Bowen their home.

In the late 1990's I happened to act for a well known (now deceased) character who owned an equally well known, if not infamous, establishment situated on the Bruce Highway between Proserpine and Bowen which was famous for many things including crab sandwiches. One day I was contacted by this client in a very distressed state. He was claiming that the Bowen Shire Council had unjustly closed the kitchen for health reasons. As I understand it, the "health reasons" had something to do with the 100 or so cats that were "alleged" (I am a lawyer!) to be living on site and which had ready access to the area where food was prepared. I immediately arranged for an on-site meeting between myself, my client, the newly elected Mayor and the head of the Health Department. I remember standing in the kitchen of these premises giving Mr Brunker a stern lecture about the effects of the closure on my client's financial well being. I was just about to point out that the area where food was prepared was secure and that cats were not allowed nor could they enter this area. Right at this time, a cat ran through the window, urinated on the kitchen bench and ran out. I tried to hold back the laughter but when Mike broke into hysterics I simply had to laugh. Needless to say my client did manage to do some rectification works and the Council allowed him to re-open and continue to sell what were (apparently?) world famous crab sandwiches.



Mayor, Mike Brunker

The Whitsunday region was fortunate enough to have two strong Mayoral candidates in the recent elections being Mario Demartini from the Whitsunday area and Mike Brunker from Bowen. Unfortunately there had to be a loser, and Mike was successful in winning the election. In doing so he brings what is a very down to earth and direct approach to Local Government. He doesn't suffer from the same disability which most politicians have. That is to be able to get direct to the point. Whether you agree with him or not, he certainly brings an interesting background to the role which, at least, makes for entertaining viewing from the sidelines - where most of us sit. I think that point needs to be remembered, that is whilst it is easy to pass judgement and "coach" the team from the sidelines, most of us aren't necessarily willing to participate and actually play the "game." Whilst it might be a bit of a cliché, at least he is having a go. Not unlike the times when Mike was playing for Collinsville when the Proserpine Brahmins were giving him and his team a flogging. Notwithstanding, he always had a go and held no grudges after the final whistle had blown. Some might say that he is still that big kid from Collinsville who is hard to tackle!

# Caught on tape: Recording private conversations

Continued from page 1

conversations does not apply where the person using the listening device is a party to the private conversation.

There is a further prohibition on publishing a private conversation that has been recorded lawfully in accordance with section 43(2)(a). A party may only publish the conversation to parties to the conversation with the actual or implied consent of all parties, or in legal proceedings. The definition of *legal proceedings* includes civil and criminal matters as well as any inquiry, examination or arbitration in which evidence is given.

It should be noted that serious penalties apply for breaching the *Invasion of Privacy Act 1971*, including imprisonment of up to two years. Accordingly, it is strongly recommended that you obtain specific legal advice prior to recording any conversation.

Different considerations apply when recording a telephone conversation. Telecommunications fall within the jurisdiction of the federal government, and the *Telecommunications (Interception and Access) Act 1979* (“TIA”) applies.

TIA prohibits the listening to or recording of a communication

passing over the telecommunications system without the knowledge of the person making the communication. A communication has passed over the telecommunication system when it becomes accessible to its intended recipient. As federal legislation takes priority over inconsistent state legislation, the Queensland exceptions do not apply whilst the communication is passing over the telecommunications system but do apply once the communication has finished passing over.

In the case of a telephone conversation, it appears a communication will have passed over the telecommunications system when it becomes audible in the handset. The result is that you must not attach a device to your telephone set or telephone line in order to listen to the conversation, but the use of a separate device to record a phone conversation held, for example, on speaker phone would be subject to the Queensland law, and the relevant exceptions.

Therefore, it would not be acceptable to record a private conversation over the telephone to which you were a party by placing

a hand-held recorder to the earpiece. It would however, be acceptable to use an in-line answering machine to record a conversation, as the communication would pass through the answering machine before it reached its intended recipient. The use of an answering machine to record a message is generally considered to be acceptable because the message leaver will be assumed to have knowledge that the recording is being made.

Again, substantial breach penalties apply under the TIA, including imprisonment for up to two years.

It is important to bear in mind that different states have different laws regarding the recording and publication of private conversations. What is legal in Queensland is illegal in other states.

If you believe that you need to record a private conversation for some purpose, it is strongly recommended that you obtain legal advice beforehand to ensure you are permitted to record the conversation and that the method you intend to use does not infringe the relevant legislation.

## Last word



# The year in review

When Christmas and the end of year approaches as rapidly as they do, I can't help but reflect over the previous year's events. Looking back on this year it seems there were a number of trying times sent to test us.

By Kylie Davies

We all know someone who was affected by the January and February floods and this has been a learning experience for a lot of people, particularly where their insurance companies are concerned. The floods affected many people but what was pleasing to see was the amount of community support that was given to those that were most affected.

Another very trying time was in March with the Council amalgamations. A number of issues are still being ironed out, especially in the new Whitsunday Regional Council. However, as Andrew alluded to in his article on Mayor Brunner, the area has a bright future ahead and Mackay and the Whitsundays are lucky to have such a diverse range of sustainable economies to support local business and industry.

Perhaps the most significant issue at present, and one that is evolving every day, is the global

financial crisis and the market downturn. At a grass roots level this affects everyone on a daily basis from having influence on the cost of fuel, groceries, job security and the all important interest rate.

While on reflection it has been a difficult year on a number of fronts, I know that myself personally and our firm as a whole, are looking to the future to support our clients in their personal and business endeavours. I wish all of our clients, both past and present a very safe and happy new year and all the best for the coming 12 months. I really enjoyed collating and bringing this newsletter to fruition and I hope that you look forward to reading it as much as I look forward to presenting it to you.

Until next year,  
Kylie Davies

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**Wishing you and your family a  
very Merry Christmas.**

**The Macrossan & Amiet Team**

Holiday office hours

**Whitsundays and Mackay**

closed 25 and 26 December and 1 and 2 January

**Proserpine**

closed 21 December to 6 January

**Local people. Local expertise. Industry leaders.**