

# Macrossan & Amiet Solicitors

news update

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# Family Provision Applications - Time Limits

By Francesco Maconi

The background and facts to this topic are set out in the article entitled *Contesting a Will - Family Provision Applications*, which was published in Issue 27: August 2007 of our newsletter. In this edition we will discuss an important factor that needs to be kept in mind when bringing a Family Provision Application - the time limits imposed by statute and enforced by the Court.

The *Succession Act 1981* (Qld) outlines two statutory time limits that an applicant must comply with. First, the applicant must give notice of the intended application to the executor of the estate within six months of the deceased's date of death. Second, the applicant is required to file the Family Provision Application within 9 months of the deceased's date of death in Court.

The rationale behind these time limits can be explained by considering the application from the Court's perspective. Once an executor has distributed the



Francesco Maconi

property of an estate, it becomes difficult for the Court to reverse these distributions and to make an order for further and better provision from the property. An application for further and better provision out of the estate must be brought before an executor has distributed the property. If this or the aforementioned time limits aren't complied with, an applicant could lose their chance of obtaining a favorable order.

The case of *Curran & Ors v McGrath* [2010] QSC 172 - in which Macrossan & Amiet successfully acted for the respondent executors - highlights

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# Independent Contractors Beware: The Sham Contract

By Andrea Green



Andrea Green

The purpose of this article is to provide independent contractors and the people who “hire” independent contractors with a warning about the existence and ramifications of “sham agreements”. Sham agreements are those where an employer disguises contracts of employment with independent contracting relationships in order to evade their would-be obligations to employees.

Under the *Fair Work Act 2009* harsh penalties will be imposed on any employer who:

1. Represents to a person that the contract of employment is a contract for the services of an independent contractor;
2. Dismisses or threatens to dismiss an employee in order to engage that person as an independent contractor to perform the same or substantially the same work.
3. Makes a statement that the employer knows is false in order to persuade or influence a person to perform work as an independent contractor rather than an employee.

These laws extend to a broad range of employers, despite whether the employer thinks the *Fair Work Act* does not apply to them. If you are an employer, you could be caught off guard, so think about the terms of the contract of any independent contractors you hire to perform work.

## What difference does it make if you are working as an employee or an employer?

While employees have the benefit of a range of entitlements at the cost of the employer, independent contractors are left to their own devices in terms of paying tax, contributing to superannuation, and keeping money aside for a sick day or holiday pay. This could amount to a large windfall to employers at the detriment of hard working people.

It might seem like a simple question, but how do we identify an employer/employee relationship from a principle/independent contractor relationship? Is it fair for an employer to have complete control over the work performed by an independent contractor without having to provide any employee entitlements required by law?

To determine whether a person is an employee or an independent contractor, the Courts will look at the relationship as a whole. There are certain factors that typify the independent contractor and employee. Some relationships are difficult to ascertain, however, the following are some points that Courts have used in approaching the issue:

- Whether the person has a right of control over what work they perform, and who they perform the work for.
- Whether the person gets paid a wage or salary, or whether they issue an invoice for the work performed.

- Whether the person has control over the hours they work.
- Whether the person uses their own equipment or the equipment owned by the company/business they’re working for.
- What entitlements the person receives or has access to.

Employers must provide employees with superannuation contributions, must arrange income tax payments (PAYG instalments), and workers compensation insurance, and numerous leave entitlements.

Independent contractors do not receive any entitlements (with the exception of superannuation contributions in some circumstances) and must pay for these things themselves. This is the very essence of an independent contractors position, as the independent contractors are effectively running their own business. This means that they are responsible for their financials and books and accounts.

The obligation to pay these entitlements is the main motive for employers choosing to “hire” independent contractors rather than employing employees, as the employer gets the same work done, without having to pay the entitlements.

## As an independent contractor, what can you do about it?

If you are an independent contractor and suspect that you

## Independent Contractors Beware: The Sham Contract

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should be employed as an employee, you can apply to the Fair Work Ombudsman to have your employment situation investigated by a Fair Work Inspector. If required the Fair Work Ombudsman will take legal action against an employer if it finds that the employer has disguised an employment contract as an independent contracting relationship. Alternatively you can commence your own legal action with Fair Work Australia, the Federal Court, or the Federal Magistrates Court. For sham arrangements, a Federal court

may issue a maximum penalty of 60 penalty units per contravention, which equates to \$6,600.

### **If you are a person who “hires” independent contractors, but you suspect they should be employees, what can you do?**

Employers will not be liable for having entered into sham arrangements if they can prove that at the time of making such representation or dismissing such employee, they did not know or were reckless as to whether the contract with the independent contractor should have been a contract of employment.

Employers should obtain legal advice when conducting business through, and contracting with, independent contractors.

Employers should not dismiss employees in order to contract with that dismissed employee as an independent contractor to perform the same work. It is possible that any employer could be fined up to \$6,600 for entering into sham agreements - which is as much as having to pay entitlements.

For further information, contact Fair Work Australia, or visit their website [www.fwa.gov.au](http://www.fwa.gov.au).

## Changes to Queensland Court Civil Jurisdiction

By Steven Hayles

On the 1st November, 2010 changes to the Civil Jurisdiction of Queensland Courts will be implemented as part of stage one of the Queensland Government's Moynihan Forms.

The changes will involve an increase in the monetary jurisdiction of both the Magistrates Court and the District Court which will increase the number claims which those Courts are able to hear and determine.

It is expected that these changes will result in a significant increase in the case load of the Magistrates Court and District Court whilst ensuring that the Supreme Court

remains able to concentrate on matters involving greater expense and complexity.

With an increase in the case load of the lower courts, the Queensland Government may need to consider appointing more Magistrates and District Court Judges to ensure court proceedings are dealt with expeditiously. There may also be a need for the permanent appointment of a District Court Judge for growing regional areas like Mackay.

While the increases in jurisdiction are important for litigants to be



Steven Hayles

aware of, those parties to claims which have commenced prior to 1st November 2010, will not be required to transfer their proceedings to a lower court for determination.

A table of the significant changes to the Courts Jurisdiction is set out below:

	<b>Civil Jurisdiction on or before 31 October, 2010</b>	<b>On or after 1st November, 2010</b>
<b>QCAT</b>	\$25,000.00 monetary limit	No Change
<b>Magistrates Court</b>	\$50,000.00 monetary limit	\$150,000.00 monetary limit
<b>District Court</b>	\$250,000.00 monetary limit	\$750,000.00 monetary limit
<b>Supreme Court</b>	Claims of \$250,000.00 and over	Claims of \$750,000.00 and over

## Profile

# The Story Behind the Picture on the Wall

By Andrew Telford

I grew up on a cane farm at Strathdickie situated between Proserpine and Airlie Beach. I have always known that my family came to the area in the early 1900's when my great-grandfather and his extended family came here from South Africa. My grandfather, John Telford, died when I was 8 years old in 1973. He spoke with what I now recognise as a slight South African accent. So to did his brother, Eddie Telford. They must have been influenced by the way their parents spoke. In my grandfather's case, he was 3 years old when the family migrated from South Africa to Australia.

Recently I have attended a number of meetings in the boardroom of the Proserpine Canegrowers. Whilst sitting at the table I have looked up at the wall and seen a photo of my great

grandfather, George Telford. Looking at this photo made me think of my family and how it is that we came to live here. (As an aside I also wonder if he gave me what is called the "Telford Temper" of which I and others in my family are said to possess. Of course I deny this!). These thoughts were then reinforced when I was at a recent barbeque at my brother Bob Telford's place where Valda Cantamessa gave me some old photographs which had been saved to a CD rom. Valda's grandmother was Winnie Petersen (nee Telford) who came to Australia with her father, Thomas Telford. The late Winnie Petersen has many descendants in the Proserpine area and was highly regarded as having a great intellect which was with her until she passed away at the age of 94. One of the great benefits of living in a small town is having many



George Telford - (Andrew's great grandfather)

relatives with whom there is a definite bond. I know that Winnie's daughters, Vi McPherson and Jean Forse, have taken great pride and some ownership in my personal success. Likewise I am proud to have a connection to them and their families.

My great grandfather George Telford was born in Scotland in 1878. He joined and served with the Second Dragoons, Scots Greys, and served throughout the Boer War, attaining the rank of Sergeant. George then was transferred to the South African constabulary. George then worked as electrician with a gold mining company and finally with the Victoria Falls Power Company. George Telford and his South African wife, Annie, migrated to Australia in 1913. George's brother Tom (Winnie Petersen's dad) and his family also came. The original plan was to start tobacco farming at Bowen but since there was no such thing, the family settled at Strathdickie and this farm remains in the Telford family. (As a further aside I am certainly grateful for the decision not to settle in Bowen!!!)

George Telford served on the Proserpine Canegrowers Executive, the Mill Suppliers Committee, the local Cane Prices Board and the Proserpine Council.



Back row left to right - George Telford's two sons, Syd Telford and Eddie Telford, Thomas Telford, George Telford, John Telford (Thomas's son).  
Front row left to right - Winnie Petersen holding her son Ron Petersen, Mary Telford (wife of Thomas Telford) Annie Telford (wife of George Telford).  
On ground - John Telford (Andrew's grandfather)

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# The Story Behind the Picture on the Wall

Continued from page 4

For 16 years from 1939 to 1955, George Telford was the Chairman of the Proserpine Canegrowers Executive. As well as serving as a Proserpine Shire Councillor he was the Chairman of the Council (i.e now called the “Mayor”) from 1940 to 1943. In addition, George was on the Bowen Harbour Board when this was position was quite significant given that Proserpine Sugar was at the time shipped through the Bowen Port.

George Telford passed away at the age of 78 in July of 1956. His wife Annie predeceased George

passing away sometime earlier in 1939. My uncle Ron Telford and his wife Lane, continue to farm the property at Strathdickie. My siblings, cousins and I all feel connected to Strathdickie/ Proserpine and the Whitsunday region in general. Many of us have left the area for education or work. If they haven’t yet returned to the area then it seems that is the ultimate goal. To me, there is nothing like being able to see your family on a regular basis especially when it is as convenient as a 10 to 15 minute car drive. Living in a small rural area does

have disadvantages. But from my perspective, there is nothing like being able to walk down the street and having connection with the people of the town and the area itself. Looking at my great grandfather’s photo sitting on the wall at the Canegrower’s office, makes me think of how many interesting stories there must be behind the other faces in photos of people from generations past hanging on walls throughout our region. I am certainly proud to be part of one story behind a picture hanging on a wall.



Andrew Telford with his family including his wife Rachele, children and parents John and Pam Telford

## work experience - Paul Deguara

My work experience has been very valuable for me.

It started off quite well, although I didn’t quite have enough to do for the first half of the day. I was very happy that Francesco showed me around the office straight away. This helped as I got to attend a settlement, and it gave me a break from filing. The second day I filed and attended a settlement. Also

sitting in on Gene was a very insightful experience.

Maybe the Court House was the most exciting. It was great and wasn’t what I expected at all. By the afternoon I did not mind doing more filing as I had just been observing all day.

The last day was interesting in that I was able to look through

some files. I then completed this and could not write any more.

The filing was the down side as it was repetitive, but I did not mind as I knew someone had to do it and it was important to get it right. Otherwise a really good work experience.

Thank you, Paul Deguara  
27 August 2010

## news

# New Swimming Pool Laws

By Andrea Green

New swimming pools laws will come into effect on 1 December 2010. This will be the second stage in the Queensland Government's crackdown on swimming pool laws to reduce the number of fatalities and pool-related incidents, particularly with young children. These new laws have been introduced by the *Building and Other Legislation Amendment Act (No. 2) 2010*.



## Existing Pools

Pool owners will have until 4 May 2011 to ensure that their pool has been put on the Pool Safety Register and until 1 December 2015 to ensure their pool is compliant with the new laws.

For those proposing to sell properties with a pool, they must provide a copy of the Pool Safety Certificate (if one has been issued) to the purchaser on or before settlement. If a Pool Safety Certificate has not been issued, then the Owner must notify the purchaser and the Local Government of this.

Similarly, if a land owner proposes to lease a property with a pool, the owner must, provide the tenant with a copy of the Pool Safety Certificate before the commencement of the lease. If a Pool Safety Certificate has not been issued, then the Owner must notify the tenant and the Local Government that there is not one.

If you're unfortunate to purchase a property that does not have a Pool Safety Certificate issued before settlement, you have 90 days (from the date of settlement) to

1. have the pool inspected;
2. get the pool placed on the Pool Safety Register; and
3. get a Pool Safety Certificate issued.

Pool Safety Certificates are valid for 2 years (unless it is a shared pool in which case the Pool Safety Certificate is valid for 1 year).

## Warning Signs

A pool owner or builder must, place a warning sign on the land, before constructing a new pool. The warning sign must be displayed on the land until a Pool Safety Certifier has issued a Pool Safety Certificate.

## Empty Pools

If your pool is empty, you must not fill it with more than 30cm of water unless you have a Pool Safety Certificate.

## Pool Fencing and Barriers

Not much has changed in respect of pool fencing except as the new laws now relate to pool *barriers*\* as well as pool fences. Despite this, the new laws state that:

1. If you make an application to construct a pool, you must also apply to construct a barrier or fence for the pool;



Andrea Green

2. Any person entering or exiting a pool area must ensure that the door or gate is securely closed while the door or gate is not in use; and,
3. Also, the property owner has an obligation to ensure that doors or gates leading to a pool are securely closed while not in use.

\* Where pool barriers include exterior walls of a dwelling which form part of the pool enclosure.

## Notifying Queensland Health of Pool Immersion Incident

If a young child is involved in a pool-immersion incident, there is a new obligation of health professionals to notify Queensland Health. Health professionals will be obliged to give any information that is relevant and cannot be held liable for doing so, particularly in breaching their duty of doctor/patient confidentiality.

## A 'how to' guide...

The Pool Safety Council ('PSC') will be responsible for certifying pool certifiers. Pool Safety Certifiers will be individuals or building certifiers who hold a certificate from an approved training course and who have been approved by the PSC.

The Pool Safety Register will contain a list of Pool Safety Certifiers, which you can browse on the Department of Infrastructure and Planning website at [www.dip.qld.gov.au](http://www.dip.qld.gov.au). This will be available to the public from mid-November 2010.

# Family Provision Applications - Time Limits

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the importance of these factors. In that case the applicants brought a Family Provision Application against the estate of Cecil McGrath, who met an untimely death on 28 November 2006. Mr McGrath conducted a grazing business in a partnership with his sons and their spouses and also held property in a second partnership with his wife Mary Ann McGrath. On 24 April 2007, the solicitors acting on behalf of the applicants and the deceased's widow gave a notice by letter of their intention to make a Family Provision Application out of the estate. On 15 June 2007 Mary Ann McGrath brought a separate action against the solicitors for the executors, seeking disclosure of the executors' file. By the time this action was resolved between the parties, the time limit for bringing a Family Provision Application had expired. Mary Ann McGrath then brought a second action against the executors, which

sought to challenge some property severances that had been made before Cecil McGrath had died. The widow and the executors made two attempts at mediation and eventually settled their claim. On 21 November 2008 the executors assigned Mary Ann McGrath \$7,500,000.00 as part of their agreement.

Meanwhile, the applicants had watched these events unfold, without formally commencing the Family Provision Application. On the same day that Mary Ann McGrath and the executors had settled their claim, the applicants lodged their Family Provision Application in Court. By the time these documents were served on the executors in March 2009, almost 16 months had passed from the deceased's date of death.

Unfortunately for the applicants, they were well beyond the allowable time limit and most of the property had been distributed

out of the estate. When the application was heard in the Supreme Court, Justice McMeekin dismissed the application and found in favour of the executors. In his judgment, Justice McMeekin discussed the need for bringing an application within the statutory time limits. He said that the Respondent's failure to bring the application on time was "the crucial thing." Also, his honor said that once an asset passes to a beneficiary, there is no power to make an order for further provision out of that asset.

In summary it is important to remember that Family Provision Applications need to be brought within the statutory time limits and before the executors have distributed the estate property. The Court's power to overlook statutory time limits will only be done sparingly and should not be relied on. For more information on Family Provision Applications please speak to one of our solicitors.

## Our November chuckle: *We like to have a laugh at ourselves...*

One day in Contract Law class, the professor asked one of his better students, "Now if you were to give someone an orange, how would you go about it?"

The student replied, "Here's an orange."

The professor was livid. "No! No! Think like a lawyer!"

The student then recited, "Okay, I'd tell him, 'I hereby give and convey to you all and singular, my estate and interests, rights, claim, title, claim and advantages of and in, said orange, together with all its rind, juice, pulp, and seeds, and all rights and advantages with full power to bite, cut, freeze and otherwise eat, the same, or give the same away with and without the pulp, juice, rind and seeds, anything herein before or hereinafter or in any deed, or deeds, instruments of whatever nature or kind whatsoever to the contrary in anywise notwithstanding...'"

news

# Amendments to the *Holiday Act*

By Steven Hayles

Employees who work on Christmas Day and New Year's Day this summer will be entitled to penalty rates as a result an amendment to the *Holiday Act* recently passed by the State Parliament.

The need for the amendment has come about as a result of the 25th December 2010 and the 1st of January 2011 each falling on a Saturday and the Minister substituting the observance of the Public Holidays for these dates to the 28th December 2010 and the 3rd January 2011.

In previous years where Christmas Day and New Year's Day occurred on a Saturday and the Public Holiday was allocated for a later date, workers were only entitled to penalty rates for working on the date of the Public Holiday and not for working on Christmas and New Year's Day.

As a result of the Amendment, employees in a range of services and industries, including health, emergency services, hospitality and retail will be adequately remunerated for the work they



Steven Hayles

perform on Christmas Day and New Year's Day through the application of Public Holiday penalty rates.

More information on the allocation of Queensland's Public Holidays and those dates proposed for 2011, 2012 and 2013, is available on the Department of Justice and Attorney General website at [www.justice.qld.gov.au](http://www.justice.qld.gov.au).



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## Real people, real smiles, real service!



Find us on the ground floor of the Macrossan & Amiet Building - 55 Gordon Street, Mackay.

The partners and staff of MACROSSAN & AMIET SOLICITORS are proud to be associated with Wide Bay Australia Ltd.

In fact, for those of you who don't know, Wide Bay Australia has a full service Agency in Amiet House at 55 Gordon Street, Mackay.

Wide Bay Australia is your easy local alternative when it comes to finance & banking and our Agency Staff are fully equipped to assist you.

From Finance (home loans, investment loans, equity loans & lines-of-credit) to Personal and Business Banking (everyday accounts, savings accounts, term deposits, cash management accounts) and from Insurance (home & contents, landlords, car, boat, caravan & trailer, Life) to Travel Money & Foreign Exchange (Travellers Cheques, Cash Passport Debit Card, Telegraphic Transfers) - you'll get personal attention and fast service!

In particular, if you are looking at buying a residential property and need to arrange finance - come and speak with Jenny without obligation. She will be pleased to assist you to make it happen!

In fact, come into the Gordon Street Agency and speak with Jenny about a loan before 30 April, 2010 and you will also go into the draw to WIN A \$2,000 HOME HARDWARE VOUCHER!



Jenny Moohin is our Loans Consultant based at Gordon Street Agency.

Jenny has been involved with lending for 8 years and has a Diploma in Financial Services from the Institute of Financial Services together with an FSRA Tier 2 Training Certificate. Prior to working as a Loans Consultant, Jenny had 15 years as an experienced legal secretary/conveyancer.

Jenny can assist with Wide Bay Australia's range of home loans for owner-occupiers, investors, vacant residential land and acreage.



Nicole Klages is our Senior Customer Service Consultant.

Nicole has an FSRA Tier 2 Training Certificate from the Institute of Financial Services and has 4 years experience in Customer Service within the finance industry.

Nicole can assist with everyday and savings accounts, term deposits, insurance, credit cards, foreign exchange and the full range of Wide Bay Australia's banking services.