

BARRISTERS & SOLICITORS

**Johnston  
Withers**



Client focus and quality service

# THE VERDICT

**Winter Edition 2011**

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## Editor's Note By Emma Wilkinson

### News from Johnston Withers...

#### We welcome the following staff

To our Port Augusta office: Tim Whitelum (Solicitor), Lynn Gee (Solicitor), Georgia Irvine (Receptionist/Secretary, Carly Gilbert (Conveyancer) and Rosa Manno (Receptionist/Secretary)

To our Adelaide office: Maggie Chan (Law Clerk).

#### We farewell the following staff and wish them well with future endeavors:

Wendy Symons (Clare Receptionist/Secretary), Gemma May (Conveyancer) and Helen Steele (Secretary) and Melanie Tilmouth (Clerk).

#### Congratulations to the following staff:

Emma Wilkinson and Ted Gurthrie on their appointment as Senior Associates;

Helen Whittington on her 20 years of service at Johnston Withers.

Brooke Kennedy (Solicitor) and Tanya Beames (Accounts/Payroll Supervisor) on their recent engagements

## JOHNSTON WITHERS' GROWING PRESENCE IN THE COUNTRY

Johnston Withers has recently merged with Whitelum and Associates. We welcome the new staff to our Port Augusta Office. Johnston Withers now has a total of three full time regional offices (Clare, Port Augusta and Whyalla) and a regularly visited office in Roxby Downs. We continue to provide assistance and representation to those in regional areas, as well as the Adelaide Metropolitan area.

BY EMMA WILKINSON



Emma Wilkinson is a Senior Associate of Johnston Withers and a member of the Law Society's Animal Law Committee.

## WORK COVER UPDATE



**BY ANNE SIBREE**

Anne Sibree is a Solicitor at Johnston Withers and a member of the Law Society Human Rights Committee.

June and July have been significant months for WorkCover developments, with the delivery of three appeal decisions affecting the rights of injured workers.

On 24 June 2011 the Industrial Relations Court, overturning the decision of an Industrial Magistrate, concluded that no compensation is payable to an injured worker under section 53 of the *Sentencing Act* following an industrial prosecution of the worker's employer for breach of safety regulations. This is so even where the worker was not entitled to compensation for his injury under s43 of the *Workers Rehabilitation and Compensation Act*, because his impairment was not assessed as being greater than 5% whole person impairment as required by that Act.

On 26 June 2011, the Full Court of the Supreme Court (Gray, Sulan and White JJ) delivered its long-awaited decision in the matter of *Yaghoubi/Campbell v EML*, concerning the validity of Medical Panels. In a split decision, the Full Court ruled that medical panels under the new WorkCover legislation are constitutionally valid. However, the Court further ruled that whilst medical panels "may give an opinion" on issues referred to them, their opinions are not binding on the

Workers Compensation Tribunal. The decision has been described as a win for workers, as Medical Panels no longer have the final say in Workers Compensation issues.

On 20 July 2011, the Full Court of the Supreme Court (Duggan, Gray Sulan JJ) delivered its decision in the matter of *WorkCover Corporation v Davey*. This judgment, overturning a decision of the Workers Compensation Tribunal found that, whilst there is a requirement to provide notice of the intention to discontinue payments, there is no obligation to afford the worker an opportunity to provide submissions on the discontinuance. The Court was satisfied that sufficient procedural fairness provisions existed elsewhere in the Act, and it was not necessary for additional procedural fairness requirements to be inserted into s35B. Similarly, the Court ruled that the Workers Compensation Tribunal had no power to determine issues of procedural fairness under the Act.

## SPENT CONVICTIONS ACT UPDATE

In our Winter 2010 newsletter, I advised that a new law was soon to be passed in South Australia that would allow any minor convictions to be erased from a person's criminal record, provided that ten years of good behaviour had elapsed.

The *Spent Convictions Act* (the Act) was assented to by the Governor of South Australia on 13th February 2011.

The Act purportedly makes it unlawful to disclose convictions that meet the criteria of a "spent conviction" under the Act.

The Act provides that a conviction will become "spent", if at the end of a qualification period, the person has not been convicted of any further offences. The relevant qualification period for a juvenile offence is five consecutive years from the date of conviction, and for adult offences, ten consecutive years.

However, certain convictions, such as sex offences, cannot become spent, despite the passing of the qualification period.

Once a conviction has become spent, a ques-

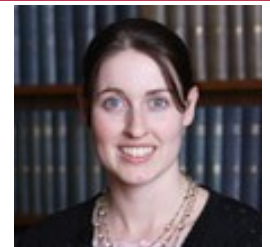
tion about the person's criminal history is taken not to refer to the spent conviction. Further, the Act makes it an offence to unlawfully disclose spent convictions in certain circumstances.

The introduction of this Act gave hope to many individuals, that convictions for offences committed in earlier stages of their lives, would no longer be disclosed on the National Police Certificate, which is a requirement for many forms of employment.

However, this legislation is subject to a number of exclusions set out in Schedule 1 of the Act. As the schedule stands at present, the ability to disregard spent convictions does not apply to employees of Commonwealth or justice agencies, fire fighters, police or correctional services, or persons associated with the care of children or vulnerable people. Further, you may still have regard to spent convictions in connection with any proceedings before a designated judicial authority or parole board, or activities associated with a character test. In addition, the conviction cannot be removed from official records.

We have considered the Act on behalf of a number of clients seeking a National Police Certificate in respect of their employment. Our general observation is that the majority of persons required to obtain a police clearance in respect of their employment, tend to work in an area that is covered by the exclusion.

Therefore in our view, this Act may prove to have little practical effect.



**BY ADRIA DOHERTY**

Adria Doherty is a Solicitor of Johnston Withers and a member of the Australian Lawyers Alliance..

## MINOR CIVIL CLAIMS—WHAT DO I DO?

A Minor Civil Claim can be brought as an application before the Magistrates Court for amounts of no more than \$6,000.00. Claims can be made for a number of reasons such as for a debt, breach of contract, negligence and so on. The person who initiates the action is named the plaintiff and they will bear the burden of proving their case on the balance of probabilities.

To initiate a Minor Civil Claim the Plaintiff is required to file their claim at Magistrates Court along with a filing fee which (as at the 1<sup>st</sup> July 2011) is \$123.00. Whilst a Plaintiff can instruct a solicitor to obtain advice and assistance with drafting the claim, they must represent themselves during the Court action (unless one of a few exceptions apply). A Plaintiff is able to add to their claim the cost of instructing lawyers in the sum of \$20.00 plus 11% of the amount claimed however this is capped at \$264.00. The filing fee and service fees may also be claimed.

Once the claim has been filed with the Court, the Defendant is then permitted 21 days to file a response. If no response is received and no payment made in satisfaction of the claim, a Plaintiff is then entitled to ask the Court to make orders as per their claim.



**BY MICHELLE  
ALLEMAN**

Michelle Alleman is a Solicitor at the Port Augusta Office of Johnston Withers.

## Shared Care — Is it appropriate for you?

In 2006 the *Family Law Amendment (Shared Parental Responsibility) Act* (“the Act”) was enacted by the Federal Government. The Act brought with it a substantial change in the way parenting cases were determined. It provided a structured approach to determine a regime that focuses on the best interests of the child and paved the way to a more inclusive regime for both parents.

The 2006 amendments have had the effect of allowing non-primary care parents to increase the involvement in their children’s lives. However, there is a common misconception that having shared parental responsibility of a child means sharing equal time with the child between the parents.

In fact, there are primary and secondary considerations outlined by the Act to consider, when determining the best interests of a child, and therefore how much time the child should spend with each party. These include considerations regarding the benefit to a child of having a meaningful relationship with both parties as well as practical considerations such as the proximity of each party to the other.

There has been much debate about whether a child spending equal time with each parent is in the child’s best interest, particularly in cases where there is ongoing conflict between the parents.

Some research indicates that an equal time regime is only viable for a small select group of the community. Factors that support a shared care regime include, but are not limited to the following:

- The age of the child
- Good communication between the parents
- Geographical proximity
- Some financial freedom or family focused employment
- Shared confidence in each party’s parenting skills

The social and legal issues surrounding parenting agreements are complex. Legal advice is recommended to determine whether an equal time regime is likely to be achieved in individual circumstances.



**BY BROOKE  
KENNEDY**

Brooke Kennedy is a Solicitor of Johnston Withers as well as a member of the Legal Practitioners Conduct Board and Family Law Section of the Law Council of Australia.

## STUDENT “OFFENDERS” IN CLARE PUT THROUGH PACES

It was a fun day in Court in Clare on Thursday, 26<sup>th</sup> May 2011, when I and Senior Constable Frick from the Clare Police escorted a local Year 6 class to the Clare Magistrates Court for a lesson on persuasive language.

The students were divided into three groups comprising the accused, the prosecutor and the defence lawyer. Each accused had been charged with a significant breach of school rules dealt with before the Court. The accused were transported to the Courthouse in the back of the police cage car, much to their great excitement!

The prosecutor had to try to persuade the Court to suspend the guilty student as a result of their behaviour, whilst the defence lawyer had to try and convince the Court to keep the student at school.



The students considered the problems with excluding people from society by way of the prison system, and also the effects on individuals and families when excluding students from school by way of suspension.

Only one child was suspended (as a result of an aggravated planking offence), but overall, the defence lawyers did a great job persuading the Court to be lenient when considering penalty.



**BY KATHERINE VINCENT**

Katherine Vincent is a Senior Associate at the Clare office of Johnston Withers.



**STATEWIDE/MSI/Johnston Withers have been providing legal services to the South Australian community for over 60 years. We are a member of the MSI Global Alliance of legal and accounting firms as well as a member of the State-wide Legal Group. This also includes Mason Westover Homburg (Murray Bridge), Catherine Leis (Port Lincoln) O'Briens (Berri), Voumard Lawyers (Port Pirie/Jamestown/Clare) and Ryans Lawyers (Mount Gambier), and delivers legal services to regional areas.**

**PLEASE NOTE:** You should not act only on the basis of the material contained in this newsletter because the articles are general and may be liable to misinterpretation in particular circumstances. Also changes to legislation occur quickly and we recommend our advice should be sought before deciding how to proceed in a legal matter. The Lawyers at **JOHNSTON WITHERS** are always happy to assist with any enquiries. For further information on the material contained in this newsletter please contact **Tony Kerin** of our Adelaide office on **(08) 8231 1110**

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