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## President's message

On April 25th the nation commemorated ANZAC Day, which reminds us all of the nation's role and sacrifice in defining world events. Most Supreme Courts have Honour Rolls to note for history the lawyers and law students who died in the two World Wars as part of the huge armies that had to be assembled for those conflicts. One sees the careers cut short of so many who died as soldiers, not lawyers, in the Armies in the First World War, and so many in the Air Force as well as the other branches. It is sobering to reflect on the waste of life and promise—there have been wars since, alas, but the scale of

the two World Wars is unthinkable today.

In the past 110 years, 98 Australians have been awarded the Victoria Cross in conflicts from the Boer War to Afghanistan. Two solicitors, Lieutenant Arthur Seaforth Blackburn and Lieutenant Percy Valentine Storky, are counted amongst these bravest of the brave.

We have highly specialised lawyers working in the Defence Force, many of whom have served and are still serving in Australia's military zones. We should spare a thought for our colleagues' risk in our Country's service, and wish them a safe return.

National Law Week celebrations recently took place between 16-22 May under the theme of Justice in Your Community. Events like this are important to all of us who operate in Australia's legal system as a further reminder to the important role the law plays in Australian society. The Law Council's constituent bodies who participated across the country put on a fantastic array of programs for those within and outside the profession and I congratulate them for their efforts.

The annual Federal Budget as always was another big ticket item that took place in May. It was disappointing to see the Commonwealth Government's failure to do more in this year's Budget to improve access to legal services for economically and socially disadvantaged Australians. Despite clear indications a lack of funding for legal aid is having a serious impact on the ability of many Australians to access legal services, the Government has not taken the necessary steps in this year's Budget. Failure to adequately resource legal aid is a false economy. Unrepresented litigants in the courts (just one symptom) will burn resources with extended case times and clog courts that are already under pressure.

While the Law Council and I acknowledge the Commonwealth Attorney-General, the Hon. Robert McClelland MP, for last year reallocating resources within his own portfolio to find additional funds for the legal assistance sector, it is still chronically underfunded.

Commonwealth funding for legal aid commissions is well below the pre-1997 proportional share, when funding generally represented approximately 55 per cent to the States share of 45 per cent, and as a principal revenue raiser, the Commonwealth contribution should be at least 50 per cent.

The Law Council has been actively lobbying the Commonwealth Government to restore per capita funding to legal aid and in its recent budget submission to Treasury, provided a plan to restore funding to 50 per cent through consolidated revenue by 2015.

As the recent natural disasters have proven, the legal assistance sector plays a crucial role for all Australians, particularly in times of need. It's absolutely vital we increase

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## President's Message (cont.)

funding to this sector to improve access to legal advice and services for all Australians.

When I first became Law Council President, I highlighted the recruitment and retention of lawyers in rural, regional and remote (RRR) areas of Australia as a key priority. I, along with Commonwealth Attorney-General The Hon. Robert McClelland, recently launched an important part of the Law Council's strategy to combat this issue: the RRRLaw website ([www.rrrlaw.com.au](http://www.rrrlaw.com.au)) and the RRR promotional DVD.

RRRLaw.com.au is the key resource for the RRR initiative and links people to job opportunities in RRR Australia. It has everything practitioners need to know about legal careers in RRR Australia including interactive case studies, RRR regional profiles, development opportunities available in RRR areas and comprehensive links to RRR-related research and statistics.

The RRRLaw DVD gives legal practitioners an insight into what life is like in RRR Australia by breaking down myths and highlighting the exciting opportunities available to lawyers across Australia.

The Law Council will continue to work with our partners in RRR Australia to ensure we maximise the potential of this project to ensure the citizens of these areas have proper levels of access to justice.

And finally, you may notice a Business Law Section (BLS) theme in this edition of *@theLCA*. The BLS has existed as part of the Law Council for over 30 years and provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia. There are interviews with Chair of the section, Tony O'Malley; as well as interviews with other prominent members of the BLS including Teresa Dyson and Guy Alexander.

— Alexander Ward

## Law Council welcomes reinstatement of legal practitioners to Skilled Occupation List

The Law Council has welcomed an announcement by the Department of Immigration and Citizenship (DIAC) that legal practitioners will be reinstated to the Skilled Occupation List (SOL).

Law Council of Australia President Mr Alexander Ward said the Law Council had lobbied hard over the previous 12 months to have barristers and solicitors reinstated after being removed in 2010.

"The Law Council was disappointed with the lack of consultation relating to the review of the list in 2010 which resulted in legal practitioners being removed from the SOL.

"Since this time the Law Council has worked closely with both Skills Australia and the DIAC to ensure barristers and solicitors were reinstated.

"The Law Council is very pleased lawyers are back on the SOL and this shows the benefit of effective consultation by Skills Australia," Mr Ward said.

The SOL identifies specialised occupations of high value and having barristers and solicitors back on the SOL means foreign lawyers can apply for a work visa under Australia's skilled migration program, without the need to receive sponsorship from a firm or state government.

"The Law Council has identified that there is a shortage of lawyers in rural, regional and remote (RRR) areas of Australia and has been actively working on recruitment and retention initiatives to try and address this issue.

"Recruitment of foreign lawyers in RRR areas is one way of addressing this skills shortage, which is part of an overall recruitment and retention strategy for the lawyers outside metropolitan areas," Mr Ward said.

This announcement comes after the recent launch of the Law Council's RRRLaw campaign which aims to promote legal careers in country areas and to link law graduates and more experienced lawyers from Australia and overseas with firms in RRR areas.

"Obviously there will still be some complexities around admission requirements but it will help to address skills shortages in RRR areas.

"Overall, this is excellent news for RRR practitioners as we are aware of legal practitioners in international jurisdictions who are interested in meeting these needs," Mr Ward said.

The revised SOL is due to take effect from 1 July 2011.



## Centre of excellence for business law advocacy

Tony O'Malley started his legal career in Australia firmly at the deep end of the pool. Originally from the north-west town of Preston in the UK, he came to Australia on the back of an old-fashioned love story having met his then future wife, an Australian girl travelling through the UK at the time, while working for a large law firm in London.

You would not know talking to O'Malley, however, that he originally hailed from a region known for its very distinctive and thick Lancastrian accents, "My first six months in Australia were spent in Bundaberg up in Queensland so it was a deep immersion into Australian life," he said.

O'Malley came to Australia in 1994 and after working in private practice for about a year, he began work as a deputy-general counsel at Telstra. In 2000, he went back to private practice at law firm Mallesons as a partner in the competition and telecommunications area.

"I had a real interest in the reform of competition and telecommunications law and policy as it was a significant focus of government attention at the time," O'Malley said. It was through his associations and work at Mallesons that O'Malley eventually came to be involved with the Law Council, and more specifically the Business Law Section (BLS). "One of my Partners at Mallesons, Roger Featherston, said to me: 'Don't sit on the side here, get involved with the discussion.'"

And get involved O'Malley did. A vacancy became available on the Executive Committee and O'Malley jumped at the chance to get involved. O'Malley has now been involved with the Law Council in different capacities for over 10 years now and has ascended to the role of Chair of the Business Law Section.

The BLS was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It provides a forum through which lawyers and others

interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills. It is the Law Council's second largest Section, with 13 specialist Committees, all of which are now active in most of the mainland capital cities.

The BLS prepares many of the Law Council's submissions each year, putting the views of the business community and the legal profession directly to the Commonwealth Government and its agencies, and Federal Parliamentary Committees. Recent examples include the *Clawback of Executive Remuneration* submission that is featured in this edition of @theLCA.

The BLS also represents the Law Council on a number of bodies—for example, the National Taxation Liaison Group and its sub-committees, the Customs and Border Protection National Consultative Committee and its sub-committees and the ASX Corporate Governance Council. Through the Taxation Committee, the BLS is also represented on the Resource Tax Implementation Group, which is presently examining how the controversial Mining Resources Rent Tax will operate in Australia.

"The BLS has grown substantially over the last 10-15 years as a Section," O'Malley said. "We see ourselves as an integral part of the broader Law Council family. We now have over 1200 members and the brand of the Section has improved due to the engagement that we have with government and its key agencies. When I look back over the last decade and think of the, literally, hundreds of submissions that the BLS has made in areas such as competition policy, corporations law, insolvency law, tax law and intellectual property, in all of these areas the BLS has made an enormous difference in the quality of legislative outcomes."

The BLS has an annual planning session in February with the chairs



Tony O'Malley



Law Council  
OF AUSTRALIA

*Business Law Section*

and deputy chairs of each BLS specialist committee to plan out the Section's focus and examine what some of the big-ticket items are within the broader public discourse. O'Malley says three of the key priorities for the BLS in 2011 are: trade practices, tax and the National Broadband Network.

In the trade practices area, the BLS will be heavily engaged in the debate on the proposed price signaling and information exchange laws. The proposed laws are primarily focused on the banking sector in response to Government criticism of the way in which the banks responded to rate increases by the Reserve Bank. "The Government was concerned that the banks were signaling to each other where they were going to move their rates," O'Malley explained. "There's specific legislation being designed in relation to that and



## Centre of excellence for business law advocacy (cont.)

the BLS is monitoring its progress carefully.” The BLS maintains the current laws already address the concerns raised by the Government and remains unconvinced the legislation is necessary. O’Malley said the BLS is advising the government to proceed with caution and the section has, and will continue to make, detailed submissions on this issue.

On the tax side, O’Malley says that the proposed tax forum to be held in October will be another focal point on the BLS’s activities. The forum will involve approximately 150 representatives of community groups, businesses, unions, and governments, as well as academics and tax practitioners to discuss ways to build on the Commonwealth Government’s ambitious tax reform agenda. “The Tax Forum will help identify those reforms that have broad agreement across the community, and will also provide valuable insight into the competing priorities that must be weighed against one another in a fiscally-constrained environment,” Federal Treasurer Wayne Swan said in a press release about the forum. O’Malley said the BLS is very keen to contribute to the forum through its Taxation Committee and will release further details as the event draws closer.

The Commonwealth Government’s proposed carbon tax will no doubt be a major discussion point at the taxation forum and although O’Malley said the politics of the situation is best left to those in Parliament House, he notes the BLS has made approaches to become involved in any future development. “Once the carbon tax proposal is released, the BLS will be examining the functional aspects: will it be a fair regime? Will it work? It is a tax that will be manageable for business?” he said. “Details are fairly scant at the moment on how the carbon tax will work, but the BLS, through its Taxation Committee and Climate Change Working Group, is in the process of making contact with Greg Combet

Federal Minister for Climate Change and Energy Efficiency to get involved with the debate early so we can help with the formulation of the tax—if there is to be one of course.”

The third priority for the BLS, the National Broadband Network, is one O’Malley is particularly interested in given his background as former in-house counsel at telecommunications giant Telstra. “This year, one of the big-ticket items for the Government will be putting in place the access framework for a national broadband network, setting out the terms upon which retail telecommunications companies will access the network,” O’Malley pointed out. “The laws that relate to that will be very important because they’ll set the competition framework for the next 10-20 years in the telecommunications industry. What was viewed by some as the old Telstra monopoly, which was formed by the copper access network they own, will be replaced by a broadband network the Government owns, so it’s important from a competition policy perspective there be workable access arrangements.” The BLS’s Media and Communications Committee are heavily involved with a review of this legislation and are working on submissions, with a focus on the fairness of the new broadband regime to make sure it promotes, and not hinders, competition.

O’Malley is now into his second year as Chair of the BLS—Chair appointments on the BLS are held on a bi-yearly basis—and will step down from the position effective 31 December 2011. He plans to stay involved with the BLS through its Executive Committee and the Competition and Consumer Committee, which he has been a member of since he got involved with the Law Council in 2000. He is proud of the achievements of the BLS and said since humble beginnings in 1980, it has developed into one of the preeminent bodies for business law advice and advocacy in Australia. “When I look at

where the BLS is now and when I look at the future direction of the section, I think continuing to strengthen our relationship and brand with government and key agencies is important as it gives us a credible and respected voice,” O’Malley said. “The BLS is becoming more sophisticated and becoming better at prioritising the work we do, which helps us better influence debate and reform over a number of areas.”

In terms of the legacy he leaves once he departs as Chair of the BLS, O’Malley is keen to better highlight the BLS’s commitment to small business in Australia. He said there is a perception that the BLS is only advocating for the interests on big business, “We never set ourselves up to be like that,” he said. “We set up a Small Business Committee last year and from humble beginnings it has now started to get some real traction. The Committee has met with the Federal Minister for Small Business, Nick Sherry; they’ve participated in the National Small Business Summit; and they’re now starting to make submissions and really build their membership base. I’d like to think that by the end of this year, it will be a fully functioning committee and that the perceived gap in advocacy within the BLS will be filled.”

O’Malley sees the Section as an integral part of the Law Council family and said it will continue to play an important role in the current and future direction of the organisation, “What the section has done is contribute enormously to the Law Council’s brand and reputation in Canberra,” he said. “In the area of business law, the BLS has really created a centre of excellence under the Law Council banner where there’s now a well-recognised forum to debate and discuss laws affecting to business and also in contributing to law reform.”

## Q&A with Teresa Dyson

Teresa Dyson is a taxation law specialist at Blake Dawson and Chair of the Business Law Section's Taxation Committee. She has been acknowledged as a leading individual in tax by Chambers Global, 2011 and *Best Lawyers Australia*, 2011.

Teresa acts for a wide range of clients in the corporate, government and not-for-profit sectors, providing taxation advice on a wide range of matters. Her passion for tax law stems from evolving nature of the area and the exposure it has offered her to a gamut of different legal disciplines.

Teresa is actively involved in consultation about new tax legislation and administrative interpretation, and as Chair of the Taxation Committee she is pursuing an active agenda in areas including mining, anti-avoidance and trust account taxation reform.

Teresa kindly donated her time to talk with @theLCA about the Taxation Committee, as well as some pressing tax-related issues to the legal profession and broader Australian community.

### **What is the Taxation Committee and what function does it serve within the BLS?**

The Taxation committee comprises about 110 representatives across Sydney, Melbourne, Brisbane, Adelaide and Perth.

The Committee engages in high level discussions and consultation with a number of the development bodies, particularly the Australian Taxation Office (ATO), the Treasury, the Board of Taxation and the Office of the Inspector General of Taxation.

The Committee is represented on a number of specific liaison groups that are run by the ATO, particularly the National Tax Liaison Group (NTLG), as well a series of sub-groups that encourage very high level consultation and participation on particular issues affecting taxation in general, but also in more specialised areas too, such as trust law, property, finance and general commercial and corporate law.

### **How did you come to be involved with the Taxation Committee?**

I became involved with the Melbourne Committee a number of years ago. Throughout my career I have taken a very active role in tax reform and contributing to the development of legislation, and also how the profession works with the administration side of the ATO to ensure the rules work in a clear and intended way.

When I moved to Brisbane a couple of years ago I accepted an invitation to be the Deputy-Chair of the Brisbane Committee; and then as Chair of the National Committee this year.

### **What is the primary function of the Taxation Committee?**

The Committee has many functions. We act as the interface between the legal profession and the tax administration functions of the ATO, which is an important role in relation to the ongoing administration of tax and taxation law in Australia.

When there is consultation or change or review of tax laws then there's often submissions or consultation that is required. The volume of changes and submissions being announced has been unprecedented, so the committee has worked on upwards of 25 submissions this calendar year alone. The submissions range across a variety of issues that are important to the interpretation of taxation law including the taxation of trusts, GST issues and anti-avoidance provisions.

### **What are some of the big-ticket items on the Taxation Committee's current agenda?**

The Committee is becoming far more engaged and involved in the ongoing discussions regarding taxation law: we're currently represented on Resource Tax Implementation Group and the National Tax Liaison Group (NTLG) Resource Tax sub-group. These two groups are intrinsically involved in the development of the Federal Government's Mining Resource Rent Tax



Teresa Dyson

(MRRT) and we're playing an important role in helping shape these new rules.

The Committee is also heavily involved in the current interim approach to the taxation of trusts and we'll be involved in the broader review of this area as it progresses through the year.

There are also some interesting developments in the area of tax administration that the Committee will be involved with, particularly in relation to corporate tax, which is very cutting-edge on the administration front.

We are also putting the final touches on our annual Workshop, which will feature high level discussion between senior practitioners, Treasury, the ATO and the judiciary and we are pleased to have the Chief Justice of the High Court, the Honourable Justice French, as our keynote speaker. And we are looking towards the Federal Government's Tax Forum, scheduled for October and the opportunity to engage in the debate about the future tax system.

### **The MRRT has been particularly controversial from its original form to what it is now. How is the Taxation Committee involved in its ongoing development?**

The Committee is involved in two groups related to the MRRT. The first group is the Resource Tax

## Q&amp;A with Teresa Dyson (cont.)

Implementation Group, which includes representatives of the mining industry, Treasury and ATO. The second group is the NTLG, which the ATO has started preemptively to work on administrative guidance on the tax.

The Committee has been making positive contributions to both groups, and ultimately the new taxing regime and the way it will be administered.

### What do you view as some of the other major pressing issues relating to taxation law in Australia?

The two biggest general issues at the moment would be the taxation of trusts and anti-avoidance provisions. People are always interested in new regimes, so the resources rent tax is obviously one of them. Australia has also just passed 10 years of GST and there are a range of issues still emerging in that area; as well as some of the other long-standing regimes including consolidation and debt equity.

There are issues across the whole breadth of the tax system such as the small-medium enterprise (SME) market; and also in the international market including Australia's treatment of offshore income. Again, the impact of the Tax Forum on changes to Australia's taxing system will be important.

### Can you expand on the anti-avoidance and trust account taxation issues? Why are they pressing issues within the taxation sphere?

Anti-avoidance is a perennial issue to do with the interpretation of tax law. Because it's a particularly sensitive area, there's always a lot of attention paid to the way in which the rules are interpreted; the courts take their own interpretation and they're not always easily predictable, which is the nature of the anti-avoidance rule we have in Australia.

There was a Treasury discussion paper from last year that looked at whether any enhancements or improvement could be made to the legislation. That's in Treasury's court at the moment and the ATO is also actively investigating with practitioners the way in which the regime is currently administered.

In terms of trusts: the rules relating to the taxation of trusts have been around a long time. Whether or not the laws are sophisticated enough, or able to be interpreted in a way that is sophisticated enough to cope with the current commercial use of trusts, remains a question.

There are issues of interpretation around some of the core elements of the taxation of trusts, particularly in relation to income derived from them. It's an area where there have been a few recent cases that have highlighted some of the complexities in the area. There

have been calls at the judiciary level right down for a review to ensure that the rules are being interpreted correctly and are sufficient to cover the modern structures.

Legislation providing some interim measures to assist the interpretation of the taxation of trusts rules has been introduced into Parliament on 2 June 2011. This is the first step in what is anticipated to be a broader review of the taxation of trusts that will hopefully provide more clarity.

### Do you feel there is greater scope for the legal profession to be involved with the development of taxation law in the future?

Certainly. There is already a good working relationship between the legal profession and the ATO and Treasury, but like all things there is always scope for improvement. Ensuring the Law Council is represented, on behalf of our members, at all of the forums and working groups the ATO offers is important and is something the Taxation Committee will continue to actively pursue. Similarly, continued involvement in the development of new policy and legislation at the Treasury and Government levels will benefit the development of new law, given the very high quality input our members are able to provide.

## CLPwatch update

The latest updates have been posted to the *CLPwatch* website.

The *CLPwatch* site was established by the Law Council's Federal Litigation Section to provide regular updates and case notes on cases affecting client legal privilege for practitioners.

Case notes added this month are:

- ◆ *Brennan & Shaw* [2011] FamCAFC 11 (2 February 2011)
- ◆ *Krok v Szaintop Homes Pty Ltd (No 1)* [2011] VSC 16 (8 February 2011)
- ◆ *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2 (9 February 2011)
- ◆ *Wingecarribee Shire Council v Lehman Brothers Australia Limited (in liq) (No 5)* [2011] FCA 245 (18 March 2011)
- ◆ *TransGrid v Members of Lloyds Syndicate 3210* [2011] NSWSC 301 (13 April 2011)

Visit the [CLPwatch website](#) for these case notes and more.



## Executives feeling the pinch of clawback

History will remember the Global Financial Crisis (GFC) as an event that nearly crippled the world's economy beyond repair. The effects of the GFC are still evident throughout the world today, most notably in Europe and North America.

In the wake of such a catastrophic event in world history, corporations across the globe continue to be under intense scrutiny for their role in the GFC. Of particular concern is executive remuneration. Questions were raised about the levels of executive remuneration given the perilous state of economies worldwide.

In March 2009, the then Assistant Treasurer, the Hon. Chris Bowen, instructed the Productivity Commission to undertake an extensive review of Australia's director and executive remuneration framework. The Commission's final report, released in January 2010, listed a number of recommendations aimed at further strengthening Australia's remuneration framework.

In the Government's response to the Commission's report, it indicated its intention to implement most of the recommendations. But the Government also announced that it would undertake further consultation on an additional proposal to clawback bonuses paid to directors and executives in the event of a material misstatement in the company's financial statements.

The *Clawback of Executive Remuneration Where Financial Statements are Materially Misstated Discussion Paper* may have raised a few eyebrows in corporate Australia and rightly so.

"The Government put out for discussion whether there should be an amendment to corporations law or the listing rules to insert a provision that would give companies the ability to recover executive bonuses that have been proven to be based on false or misleading financial statements," says Chair of the Law Council of Australia's Corporations Committee, Guy Alexander.

Alexander says there are many similarities in the development of the

Clawback proposal to that of the Dodd-Frank Wall Street Reform and Consumer Protection Act that has been legislated in the US. The Dodd-Frank Bill is described as the most comprehensive changes in the US financial sector since the Great Depression and a key change contained within Act allows for a company to recover bonuses paid to current or former executives based on incorrect financial statements.

"The Australian Government is trying to be tough on executive remuneration and thinks Clawback is an issue that could be relevant in the Australian context—particularly given the legislation of the Frank-Dodd Act in the US," Alexander says.

In its submission to the Treasury on the issue, the Corporations Committee put forward the view that clawback of bonuses based on incorrect financial statements was not needed within Australia. "The Committee is strongly of the view that legislative change is not required to enable a company to clawback executive remuneration paid on the basis of financial statements which have been overstated. Given the wide range of performance measure upon which remuneration is based, any clawback needs to be dealt with in the employment contract under which it is paid. There is no need for a statutory clawback mechanism in Australia," says the submission.

According to Alexander there little evidence that clawback provisions are relevant to corporate Australia, "The Government has not pointed to any evidence that shows there is a problem in Australia," says Alexander. "Nobody, in fact, has been able to point to a situation where someone's bonus has been calculated by reference to the misstated financials and when that's been found out, the company hasn't been able to take action to recover that amount."

In fact, as the submission states, companies can include the right to recover overpaid amounts in their service agreements with executives. If the company has such a contractual right, it is not

clear what is added by a statutory provision requiring the executive to pay back that amount. If the company failed to pursue its contractual rights, the shareholders will have remedies against the directors for breach of duty, and are likely to have a right to bring a statutory derivative action in the name of the company in any event. Shareholders should not be able to recover directly against the executives as the right to recover the overpaid amount is a right of the company, not the shareholders.

Perhaps one of the biggest issues with clawback is the method with which the bonuses are actually determined. Performance conditions attached to executive remuneration are seldom based solely on net profit or some other metric set out in the company's statutory accounts. Usually, performance based pay is tied to other factors, such as a strongly performing share price; and as the stock market has shown through its peaks and troughs, there are many factors (sometimes outside the control of a business) that can influence prices.

If performance is measured by movement in the share price, there are significant difficulties in establishing causal links between misstated information in a company's statutory accounts and those movements. There will be many factors which impact on a company's share price other than historical numbers in a company's statutory accounts.

"A lot of bonuses are calculated based on TSR—Total Shareholder Return," Alexander says. "Because executive remuneration is in many cases tied to things like TSR, if there is an overstatement of profit in the financial statements that might have impacted the share price, but it's still almost impossible to work out what the share price would have been without the misstatements. There are too many additional factors that influence a share price on a daily basis."

So if clawback of bonuses paid on the basis of false or misleading financial statements would be of limited utility

## Executives feeling the pinch of claw-back (cont.)

due to the method with which many bonuses are calculated, what's the harm in putting a claw provision into the Corporations Act?

"Other than the limited utility and lack of evidence that it is needed, a further question is: how much do you clawback?" Alexander says. "The Treasury paper suggests as one alternative a 'bright line' test where, the percentage of the bonus to be clawed back is, say, 10 times the percentage of the misstatement in the accounts. So if the financial statements were out by say eight per cent, then you would clawback 80 per cent of the bonus—the issue with this is that it's an arbitrary figure that ignores the fact the misstated figures might have been an innocent mistake. If it was, however, deliberate and you really want to get people for cooking the books, just increase the penalties for doing that rather than just taking an arbitrary figure of a bonus."

Rather than impose clawback provisions that could prove difficult to substantiate, the submission also proposes a potentially useful reform would be to impose on listed companies a requirement to disclose whether contracts with senior executives include provisions allowing the company to claw-back amounts paid if bonuses have been triggered when they were not properly earned. This could be in the form of disclosure in the remuneration report prepared under section 300A, or as an additional disclosure in the annual report on Principle 8 (Remunerate fairly and responsibly) of the ASX Corporate Governance Council's Principles and Recommendations.

"What the government is floating is particular amendments to the Corporations Act that are being put forward to fix a problem that isn't particularly relevant to the Australian jurisdiction, and actually may be done in an arbitrary and capricious manner," Alexander says.

## Anti-money laundering regulation

Anti-money laundering (AML) regulation and its current and potential impact on the legal profession is a policy issue of significant interest to the Law Council and to the Australian legal profession. There are several different aspects to the Law Council's work in this area, for example:

Lobbying government to ensure that any AML regulation of the profession is:

- ◇ Based on real evidence about the money laundering risks faced by practitioners and is precisely targeted at addressing that risk.
- ◇ Consistent with the existing regulatory obligations of the profession and, if possible, is integrated into that regulatory framework.
- ◇ Does not involve legal practitioners being asked to covertly collect and provide information about their clients to regulators.

Monitoring relevant developments overseas particularly with regard to:

- ◇ Revisions and commentary on the Financial Action Task Force's (FATF) 40+9 Recommendations.
- ◇ Liaison and discussion between the International Bar Association and FATF.
- ◇ The disparate approaches adopted by other jurisdictions to implementing the FATF recommendations, particularly as they apply to legal practitioners.

Providing information to the profession about:

- ◇ Their current obligations under existing AML legislation.
- ◇ The likely content and impact of further proposed AML regulation.
- ◇ Best practice policies and procedures practitioners can employ in their businesses to ensure that, regardless of what their regulatory obligations are or might be, they protect their business and their reputation from being misused by money launderers.

Earlier this year, the Law Council Secretary-General met with the CEO of AUSTRAC to discuss a number of these matters. AUSTRAC is the agency tasked with overseeing the implementation and enforcement of Australia's AML regulation. At the meeting, AUSTRAC undertook to provide two articles for distribution by the Law Council and its Constituent Bodies, as follows:

- ◇ A 'refresher' article on existing anti-money laundering obligations which may be of relevance to members of the profession.
- ◇ An article on money laundering red flags which may assist the profession in identifying and mitigating the risk that their practice might be used to launder money.

The first of these [articles](#) has now been provided and is available on the Law Council website. Other relevant [AML information](#) for the profession is also available on the Law Council website.





## New initiative helping revitalise legal services in country Australia

Australia is one of the most urbanised nations on the planet. Just over three-quarters of Australia's population live in its 17 major cities and it's a trend that is only increasing. Urban sprawl is one of Australia's most pressing issues as the population continues to rise and infrastructure fails to keep pace with the ever-increasing growth.

And as our cities grow, there's a rising social disaster that is threatening the ongoing existence of many communities in country Australia. Like a drought slowly evaporating life from the land, the population of many rural, regional and remote (RRR) communities in Australia is dwindling.

In the period 2008-2009, population losses mainly occurred in inland rural Australia. The population of Australia is projected to be 35 million by mid-century and the vast majority of this growth will be concentrated in major cities. Australia's cities are set to get even bigger, whereas many RRR communities will continue to dwindle.

As RRR communities' populations decrease in size, a drain on professional services inevitably follows. Doctors, nurses, dentists, teachers and lawyers are all in great demand in many RRR areas, but instead of going up, their ranks are steadily thinning out.

In 2009, the Law Council undertook a survey of RRR practitioners to establish a concrete foundation for a problem that had only ever existed anecdotally. The results of the survey were alarming: RRR Australia is having difficulty in attracting and retaining legal professionals.

Many law firms, community legal centres and public assistance services are unable to find suitable lawyers to fill vacancies when they arise and are being impeded by the drain of corporate knowledge caused by a constant turnover of staff. There is also evidence to suggest this situation will deteriorate further in the next five to 10 years as a large number of experienced principals retire.

In response to the issue, the Commonwealth Attorney-General, Robert McClelland, and the President of the

Law Council of Australia, Alexander Ward, recently launched a new initiative, RRRLaw, which is aimed at attracting more lawyers to work in rural, regional and remote areas.

The two key resources that constitute the initiative are a promotional DVD and website.

The RRRLaw DVD offers an insight into what life is like in RRR Australia through a series of interviews with practitioners from RRR Australia. It profiles the diverse range of work these practitioners do on a daily basis as well as highlighting other career, social and family reasons for living and working in RRR Australia. As Devonport sole practitioner Matthew Verney said in the DVD: "Life's bigger than work. Sure I'm a lawyer, but here [in Devonport] I have the opportunity to be so much more."

"The DVD shows real lawyers practising in a diverse range of locations across RRR Australia including Broome, Darwin, Townsville, Dubbo, Shepparton, Burnie and Devonport," Ward said. "The website also highlights the development opportunities available in RRR areas, including a range of training programs and incentives available to RRR practitioners."

The website is the key ongoing feature of the initiative designed to give a comprehensive overview about the RRR initiative, as well as offer tangible options for people wanting to make the move away from the cities. "rrrlaw.com.au is the key resource for the RRR initiative—the website links people to job opportunities in RRR Australia and has everything practitioners need to know about legal careers in RRR Australia including interactive case studies from people working in RRR destinations," Mr Ward said.

Lying at the heart of the RRR initiative is a fundamental access to justice issue. While access to legal services in Australia's cities is relatively strong, for many living in RRR areas, accessing legal services is no easy task. In fact, studies have shown there are only three lawyers per 10,000 residents aged 18 years and

older in remote Australia when compared to about 11 lawyers per 10,000 in the capital cities of Australia.

"The Government recognises that geography and isolation can present challenges when it comes to providing access to justice," the Attorney-General said at the launch. "Australia has legal system based on the rule of law and the principles of equality and access to justice for each and every Australian—no matter where they live. The RRRLaw project is an excellent initiative that will go a long way to attracting lawyers to remote and regional areas to improve legal services."

Ward echoed the Attorney-General sentiments about the initiative and said it was about telling the story of how lawyers can make a difference outside the big cities, how they can live an adventure that can last a lifetime and how they can advance their careers to places they never thought possible. "There really are some excellent opportunities, for lawyers of any disposition, out in RRR Australia—I encourage all lawyers to explore the website and DVD," he said. "It might just be the best career move they will ever make."

*RRRLaw is an initiative of the Law Council of Australia funded by the Commonwealth Government as part of a broader project on Recruitment and Retention of Lawyers in Rural, Regional and Remote (RRR) Areas undertaken by the National Association of Community Legal Centres Inc.*

Further information on the Law Council's RRRLaw initiative is available at [www.rrrlaw.com.au](http://www.rrrlaw.com.au)



Rewarding legal careers  
in rural, regional and  
remote Australia

## Living and working in RRR Australia



Julia Barber

*The following is an interview with a RRR practitioner from Broome, which is also available in the Case Studies section of the RRRLaw website ([www.rrrlaw.com.au](http://www.rrrlaw.com.au)).*

Julia Barber is a sole practitioner in the Top End town of Broome, Western Australia. Julia deals with clients across a multitude of different areas of law and has clients spread throughout Australia. She loves the outback lifestyle of Broome and is particularly fond of local camping hot spots and the internationally famous Cable Beach.

### How did you come to be practising law in Broome?

I was a solicitor in Melbourne and my husband had previously been a road train driver throughout remote parts of northern Australia, and he decided he wanted to get back to doing what he loved which involved living and working at cattle stations. We had two small children, who were two and four, and ended up giving the new lifestyle a go. I had another child whilst living up there and we eventually moved to Broome to give them access to other children and for us to enjoy a bit of a beach life style. We intended to stay for

a month or two! We stayed and after two years of doing other things, I took up practising law again.

### Why do you enjoy practising law in Broome?

I enjoy practising law in Broome because the law is so varied. You are able to practise in different areas and, at times, jurisdictions, which means you're learning each and every day and it also keeps you really fresh in your job—you don't get bored or complacent.

I have clients throughout Australia and practise in many areas of law including family law, criminal law, civil litigation, personal injuries, estate planning, probate, conveyancing and commercial law.

### Having experienced work in both a metropolitan city and remote area of Australia, what aspects of your lifestyle did you find required adjusting?

Everything! Professionally, it's very challenging. You're thinking on your feet all the time and you're constantly hopping in and out of different areas of law. Sometimes I might see eight clients, with each of them requiring advice in a different area of law, whereas in the

larger cities like Melbourne you're generally practising in just one area.

Personally, there is a really strong sense of community in Broome. The area affords you to be flexible, so, for example, if you have children, it's much easier to work around them.

You're also able to form some really strong friendships living in a tight-knit community like Broome. The people here are very good to each other: if people are sick you often find others dropping around a casserole, for example, and I suspect that's not so much the norm in cities these days. You get to meet some really interesting people and have a great social life.

### What have you found to be the most rewarding part of working in Broome?

Working for myself; while it's extremely challenging, it's yours—and you really do make a difference in your local community.

You're also learning every day. I've been involved in the law since I was 16 and now, at nearly 50, I can genuinely say that I continue to love what I do and a lot of what I love about my work is linked to Broome.

### What advantages have you discovered to living and working in Broome?

I don't think you'd get the same flexibility working in a metropolitan city as you do in Broome. For people who are younger and wanting to start out in the legal profession, or even older lawyers who want a lifestyle change, you can do that in RRR areas. People here understand about other commitments because they have the same issues.

The reality is that you're so close to where you work, there are no traffic lights so it's easy to get around and you're never stuck in traffic, the weather is great—I run along Cable Beach every day and it's easy to make time for things like that.

**I**n moving from Melbourne to Broome, what preconceived notions, or myths, about life in a RRR area have you found to be untrue?

The common myths about life in Broome are that there's nothing to do, it's boring, lonely, the weather's too hot and you can't expand yourself professionally. The reality is it's nothing like that.

Professionally, you're as busy as you want to be. If you work hard, the work will keep coming in. People are often worried about work prospects when they ask me about Broome, but there is so much work here—you can earn a really good living.

**A**s someone who has lived and raised a family in Broome for a number of years now, what advice would you give to someone who may be in a similar situation and was contemplating a move to a RRR area of Australia to practise law?

My advice would be: just do it. Too many people get bogged down in the detail with things like money, kids and work when it really isn't a big concern. In my experience, kids love the lifestyle here and as a parent you will actually have more time to spend with them. You're able to have more interaction with your children: you're able to attend their assemblies and sports days and be more involved in their lives. You tend to spend what you earn, so if you are earning less whilst travelling you live on less—it is amazing what you can do without when you have to and equally incredible as to how easily you can slip back into town life when you stop for a while and start to accumulate all over again.

I would never hesitate to recommend a place like Broome to anybody. Australia is an amazing place and not enough Australians actually see it—the experiences here can't be bought. There are wonderful opportunities for all sorts of people to work remotely and your sense of achievement when you see the difference you make in peoples' lives is huge.

## Australasian Law Management Journal

The May 2011 edition of the Australasian Law Management Journal has recently been issued, and includes articles on:

- ♦ Office layouts are no open and shut case.
- ♦ Emission possible: how law firms can cut their carbon footprint.
- ♦ Top employers share their cultural secrets.
- ♦ Q&A: Robert Milliner—'You just can't execute without communication, communication communication.'
- ♦ Future firm: Voice coaching can give you a winning edge.
- ♦ Technology: Can you bank on BYO computers?
- ♦ Finance: Giving partners their fair share.

To access the articles or to subscribe to have the journal delivered directly to your inbox visit [www.lawcouncil.asn.au/almj](http://www.lawcouncil.asn.au/almj)



## Upcoming Events

### June 2011

- » **The future of international arbitration in Australia**  
6 June, LIV Lecture Theatre, Melbourne  
[www.liv.asn.au](http://www.liv.asn.au)
- » **The Eighth Gerard Brennan Lecture**  
24 June, Bond University, Gold Coast  
[www.bond.edu.au/law-events](http://www.bond.edu.au/law-events)

### July 2011

- » **Official Launch of the South Pacific Lawyers' Association**  
10 July, Sydney  
[www.southpacificbars.org](http://www.southpacificbars.org)
- » **Commonwealth Law Ministers' Meeting**  
11-14 July, Sydney  
[www.clmm2011.org](http://www.clmm2011.org)

### August 2011

- » **Adelaide Family Law Intensive**  
13 August, Adelaide  
Email [kristie.fitzgerald@lawcouncil.asn.au](mailto:kristie.fitzgerald@lawcouncil.asn.au)

### September 2011

- » **LAWASIA Law Management Conference: From 'Good' to 'Outstanding' – it's all about your people**  
9-10 September, Hong Kong  
[http://lawasia.asn.au/Law\\_Management\\_Conference\\_Home.htm](http://lawasia.asn.au/Law_Management_Conference_Home.htm)

### October 2011

- » **24th LAWASIA Conference**  
9-12 October, Grand InterContinental, Seoul, Korea  
[www.lawasia2011seoul.org](http://www.lawasia2011seoul.org)
- » **Essentials of Family Law Practice**  
20-22 October, Hilton Hotel, Adelaide  
<http://www.familylawsection.org.au/>
- » **Annual Conference of the International Institute of Law Association Chief Executives**  
19-23 October, Adelaide  
Email [Jan.Martin@lawsocietysa.asn.au](mailto:Jan.Martin@lawsocietysa.asn.au)