BAR BULLETIN

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The *Prasad* Direction - When should a Jury be told?

In Australia, when seeking a Prasad Direction, it is customary to refer to the decision of King CJ in *The Queen v Prasad* (1979) 23 SASR 161 at 163 wherein the learned Chief Justice said -

> *"It is, of course, open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard, is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more".*

It is within the discretion of the trial judge to inform the jury of their right, and if he decides to do so, he usually tells them at the close of the case for the prosecution that they may do so at any later stage of the proceedings. Archbold, "Criminal Pleading and Practice" 39th edition (1976) page 332.

However when one goes to Archbold at page 332 para 577 under the heading *'R v Young'*, one sees subtle but important differences in what Archbold actually says and what has become 'the law' in Australia. Archbold says as follows:

> *"577. It is open to the jury, at any time after the close of the case for the prosecution, to inform the court that they are unanimously of opinion that the evidence which they have already heard is insufficient to justify a conviction. It is within the discretion of the judge to inform the jury of this right, and if he decides to do so he usually tells them at the close of the case of the prosecution that it is open to them to stop the case either immediately or at any later stage in the proceedings. However, in R. v Young [1964] a W.L.R. 717; 48 Cr App R 292, C.C.A., the court expressed the view that maybe the time had come, though the court did not desire to rule on it, when this practice should be only rarely, if ever, used, and that judges should more often take the responsibility themselves of saying to the jury that there is no satisfactory evidence upon which they could convict, and accordingly direct an acquittal. When a submission is made that a case should not be left to the jury it is a judge's duty not only to consider whether there is some scintilla of evidence which in law could go to the jury but also whether it would be safe for a jury to convict on the evidence as it stands".*

In *Young* (1964) 1. W.L.R. 717 per Lord Parker CJ, Phillimore and Winn JJ, it was observed that after all the evidence had been heard the jury were told

> *"...when you have reached the stage in a criminal trial at the end of the evidence and you all, as a jury, are of the view that you could not find the defendant guilty upon that evidence, you are perfectly entitled to give your verdict there and then of 'Not guilty' without waiting to listen to the speeches of counsel and my summing-up..."*

What happened however in *Young* was that the Foreman told the court that they found the accused *"Guilty"* - before hearing a summing up or defence counsel. The verdict was set aside [obviously]. That led the Court of Appeal through Lord Parker CJ to make the following comments at page 720 -

> *"...Before leaving the case, the court would like to say that this appears to be yet another case where difficulties have arisen through a practice whereby judges invite juries to stop a case if they feel the prosecution case has not been proved....It may be that the time has come - the court does not desire to rule on it - when this practice should be only rarely if ever used, and that judges should more often take the responsibility themselves of saying to the jury that it is not satisfactory evidence upon which they could convict, and accordingly direct an acquittal".*

In Australia, a Prasad Direction is not sought for no case/ insufficient evidence scenario. The Direction is usually sought when the evidence is in reality such a state that a con-

viction would be unsafe and unsatisfactory - i.e. a *M v The Queen* (1994) 181 CLR 487 situation.

In the Court of Criminal Appeal in South Australia in the case of *Pahuja* (1987) 32 A Crim R 118 King CJ said at page 128 -

> *"...The undoubted right of a trial judge to inform the jury of its power to bring in a verdict of not guilty at any time after the conclusion of the case for the prosecution, should be used sparingly and only when the judge is of opinion that the evidence for the prosecution, although capable in law of supporting conviction, is insufficiently cogent to justify a verdict of guilty. Even in such a case, the judge should bear in mind that the evidence called by the defence might strengthen the prosecution's case. The decision as to whether to inform the jury of its power must be made by the trial judge in light of the assessment of the case and it would not be helpful to offer general advice as to the circumstances in which it would be proper to adopt that course.*
>
> *...There should be nothing in the nature of a pretrial summing up. If the jury cannot properly reach a decision at that stage on the law as explained in the opening, perhaps clarified by a concise correction or explanation if necessary, it is better not to embark upon the course of action at all. A partial summing up at that stage of the trial is a serious departure from the due course of trial and so is to be avoided."*

In the Court of Criminal Appeal in *Seymour v The Queen* (2006) 162 A Crim R 576 Hunt AJA adopts what Cox J said in *Pahuja* namely:

> *"...any Prasad direction should be put to the jury quite simply and shortly. It is not the occasion for any more than a passing glance at the law and a brief reference to whatever feature of the evidence it is that has led the trial judge to give the direction - usually some weakness in the Crown case that has emerged during his presentation...typical occasion for it in sexual case will be the discrediting of the complainant in the witness box - admitted lies...or plain contradictions or vacillations or important contradictions with other crown witnesses."*

In the Court of Criminal Appeal in *Reardon* (2002) NSW CCA 203 Hodjson JA gave the judgment in which Simpson and Barr JJ agreed and said:

> *"153 In my experience, it has long been recognised in NSW that a judge may, in a suitable case, and in the exercise of his or her discretion, take the course outlined by King CJ. There is no rule that in any particular set of circumstances a judge is obliged to take that course or ought to take that course. The decision to do so or not to do so lies entirely within the discretion of the judge. I can think of no circumstances in which a refusal to give such direction could result in a miscarriage of justice. True it is, that at the end of the Crown case an accused has to make certain elections, for example about giving evidence or not giving evidence, and about calling witnesses or not calling witnesses. The fact that an accused person is obliged to make certain tactical decision, some of which may, conceivably operate in practice to his or her disadvantage, does not mean that there is an entitlement to a direction in accordance with Prasad."*

There are then at least three questions of interest in relation to a *Prasad* direction.

a) Why is the jury not told about this 'right' to acquit after the Crown closes its case, in the opening by the Judge to the jury, in that the jury should be told by the Trial Judge at the start about the elements of the charge(s), jury function, presumption of innocence and burden and standard of proof etc. There can be no injustice to the accused as the only verdict can be "not guilty".

b) It is a 'right' which if exercised would certainly save court time and so should be restricted to a weak Crown case which may, or should provide an unsafe/ unsatisfactory appeal. Which if exercised by the jury saves time at first instance.

c) If there are more than one accused and multiple charges - can a *Prasad* be given in relation to certain accused and in relation to certain charges? i.e. Can the indictment be split or severed? I can see no good reason why not, nor am I aware of any cases that deal with this save for the recent case in front of Refshauge J of *R v Harmouche No 2 of 2010*, wherein His Honour declined to sever the indictment but told the jury that the *Prasad* Direction only related to the first five counts and not the whole indictment. The jury in that case acquitted on the first five counts, after the *Prasad* Direction. So was Refshauge J correct? At this stage the obvious answer is "Yes".

FJ Purnell SC
Blackburn Chambers

FROM THE PRESIDENT

We are all aware of the delays in the ACT Supreme Court. There are two kinds. Matters are now being listed into the middle of 2013. Some judgments have been reserved for over two years.

There is some relief on the way! The Government has provided $670,000 funding to provide two temporary acting judges for the Supreme Court and additional funding for legal aid and the DPP.

Under the chairmanship of Penfold J members of the Bar, the Law Society, Justice and Community Services and the DPP have been undertaking a review of court listing practices to try and minimise wasted court time cases being listed and then falling over. In the case of crime this can run as high as 50% of listed cases. This will see the introduction of a "docket" system into the court and more active case management.

The change which is most likely to have the most immediate impact on litigants and the profession has been termed the "blitz". Nothing quite so focuses the mind on whether to plead or settle as an imminent hearing date. The "blitz" is predicated upon heavier than usual overlisting of cases.

The precise details of the "blitz" are not yet confirmed. It is likely that there will be two simultaneous, fortnight long civil lists in which around 20 cases of selected size will be listed. Three such fortnight blocks will occur in six weeks. Cases which are not reached in that period will be given priority in a later sitting.

There will also be a two week criminal list. Two criminal trials are likely to be fixed for a Monday and a further two on Wednesday of the first week then two and one in the second week.

While the "blitz" is welcome we can only hope that it is for a temporary period. Heavier overlisting increases the cost and inconvenience to litigants. It may therefore not be an ultimate answer to the perennial issue of the appointment of another judge to the court. However, the delays now involved in obtaining a hearing date simply must be reduced. It is therefore essential to accept any temporary inconvenience associated with the "blitz" to achieve the greater good of reducing the listing delay.

The blitz is unlikely to do anything to reduce the delay in obtaining reserved judgments. (It is even possible that it may exacerbate it.) There must be ongoing attention to whether adequate time is being provided to the judges and the master when matters are ultimately heard.

With 2011 behind us and a "blitz" in front of us, I wish every the very best for Christmas and a most reinvigorating holiday period.

Philip Walker

From Chief Justice Terence Higgins AO

CASE MANAGEMENT IN THE ACT

In the previous edition of the *Bar Bulletin*, I remarked upon the publication of a Discussion Paper pertaining to case management within the ACT Supreme Court. The goals of the Paper include the promotion of early and fair settlement of civil cases, and early pleas of guilty in criminal cases where appropriate. Pursuant to these objectives, one proposal now under further consideration is that of a 'blitz' on current listings in both civil and criminal matters. What this essentially involves is having selected matters (for example, certain personal injury matters) heard before a Judge and/or Master during an allotted period (for example , two weeks twice a year) with the expectation that many of them would settle or be heard to finality during this time. Where this does not occur, the parties would have the option of maintaining their original listing date or taking an earlier listing vacated by the hearing or settlement of other 'blitz' matters. If successful, the ultimate outcome of this process would be the expedited resolution of matters which might otherwise take up a disproportionate amount of the Court's time and resources.

This backlog reduction technique has been employed in a number of jurisdictions. For example, it contributed to a significant decrease in delays within the New South Wales Supreme Court. Such results are undoubtedly encouraging. Certainly, measures which provide incentive for practitioners to settle cases and enable judges to dispose of a large number of matters in a short period of time are to be welcomed. It is not, however, itself a panacea . Improved case management in New South Wales has only been achieved through a multiplicity of measures, including an increase in the jurisdiction of the District Court and the appointment of additional judges, both full time and acting.

Indeed, in light of the Report on Government Services which indicates that delays in court proceedings are the result of an increased workload rather than the inefficiency of judicial officers, it remains the considered opinion of this Court that the appointment of a fifth resident judge or, at least, an acting judge until the lists improve, is a necessary step along the road to permanently clearing the backlog of cases. Clearly, such a measure does not come without a financial cost. It is well understood and appreciated that budgetary constraints are part and parcel of the modern administrative state. Nevertheless, all branches of government within the Territory recognise that the efficient and effective administration of justice is of the utmost importance. That objective will continue to drive productive consultation between the various stakeholders, all of whom understand that the true, and indeed unacceptable, cost of the current delays is borne by those who seek the timely resolution of their matters before our courts. It is, in a real sense, false economy not to expend the relatively small sums needed to reduce delays in dispensing of cases. I am sure all stakeholders realise this and will use their best endeavours to resolve this important issue.

The Director of Public Prosecutions
Jon White

SUSPENDED SENTENCES

The ACT Law Reform Advisory Council reported to the Attorney General in late 2010 on this topic. The Government has now published its response to the report, and has invited comment on a number of matters. One such matter is: what should be the consequences of breach of a suspended sentence?

In every State and Territory of Australia, with the sole exception of this Territory, there is a statutory presumption that the originally imposed suspended sentence will be activated on a breach of the conditions of the order associated with the suspended sentence.

The NSW provision in section 98(3) of the *Crimes (Sentencing Procedure) Act 1999* NSW is a good example of such a provision. It provides that on the breach of a good behaviour bond embodying a suspended sentence, the court must revoke the bond unless it is satisfied that that the offender's failure to comply with the conditions of the bond was trivial in nature, or there are good reasons for excusing the offender's failure to comply with the conditions of the bond.

The reasons for such a provision are obvious. In legal theory, suspended sentences are high on the hierarchy of sentencing options, ranking just below sentences of actual imprisonment. This is because before a suspended sentence can be imposed the court must be satisfied that it is appropriate that the offender receive a custodial sentence.

As Howie JA stated in *DPP v Cooke* [2007] NSWCA 2 at 23:

> *"There is nothing more likely to bring suspended sentences into disrepute than the failure of courts to act where there has been a clear breach of the conditions of the bond by which the offender avoided being sent to prison. Notwithstanding what has been stated about the reality of the punishment involved in a suspended sentence, if offenders do not treat the obligations imposed upon them by the bond seriously and if courts are not rigorous in revoking the bond upon breach in the usual case, both offenders and the public in general will treat them as being nothing more than a legal fiction designed to allow an offender to escape the punishment that he or she rightly deserved."*

As the LRAC Report revealed, there is widespread controversy about suspended sentences. Essentially this is because there is a wide spread perception that they are imposed for the wrong reasons. Specifically, there is a perception that they imposed to give the impression that the sentence is tougher than in fact it is – in other words, they are really just good behaviour orders with the outward appearance of being associated with imprisonment.

Suspended sentences imposed for the wrong reasons have unfortunate consequences. First there is a "truth in sentencing" aspect – the sentence can appear on its face to be more severe than in fact it is. Secondly there is the "net widening" aspect – a suspended sentence imposed for the wrong reasons can lead to inappropriate imprisonment.

The best way to test this is to see what happens when an offender breaches a suspended sentence order. In the ACT, persons who breach suspended sentences are not usually sentenced to a term of imprisonment, even when they have been given the benefit of a suspended sentence on previous occasions. Given that before a suspended sentence can be imposed, the court has to be satisfied that it is appropriate that the offender receive a custodial sentence, then if an offender who breaches a suspended sentence order is not sent to prison, it is reasonable to ask: why was that person sentenced to imprisonment in the first place?

If the ACT were to follow the lead of other Australian jurisdictions and legislate for a presumption of activation on breach, this would act to emphasise that a suspended

sentence should only be imposed as a last resort and that if the opportunity afforded by the sentence is not availed of, then jail will almost certainly follow.

Indeed it might be appropriate to require pre-sentence reports to be obtained before a suspended sentence was imposed, at least in circumstances where such a report would be obtained if the sentence were not to be suspended.

Hopefully any such reforms would moderate the inappropriate use of suspended sentences.

If there were a legislated change, it would be reasonable to apply the change to sentences imposed only **after** the commencement of the new legislation.

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

PRACTICE DIRECTION NO 2 OF 2011

INTRODUCTION OF A DOCKET SYSTEM and "BLITZ" ON CURRENT LISTINGS

Following the review of case management and listing practices commissioned by the Acting Chief Justice and the Attorney-General late last year, the Supreme Court has resolved to change aspects of its case management and listing practices with a view to reducing the time taken to finalise matters lodged in or committed to the Court.

The main changes will be the adoption of a docket system, covering both civil and criminal matters, under which matters of a kind likely to require listing for trial, and certain other matters, will be assigned to a docket judge (for matters within the Master's jurisdiction, the Master may be the docket judge) shortly after coming to the Court and will then be managed by that docket judge until finalisation. Docket judges will engage in active case management of matters on their docket. Criminal matters will generally not be allocated to a docket judge until the parties complete the initial exchange of material, and the existing requirements for the exchange of material will be expanded; this will facilitate efficient case management, and may also result in earlier resolution of some matters.

The Court has also worked with the Bar Association, the Law Society, the Director of Public Prosecutions and the Legal Aid Office to develop a proposal for using short-term additional judicial resources for a "blitz" on current trial listings, civil and criminal, to enable most trials listed for the second half of 2012 and beyond to be given earlier hearing dates and thereby to facilitate the introduction of the docket system. The docket system will commence following this "blitz". Matters not addressed by the "blitz" will become part of the judges' dockets. Further Practice Directions will be issued as the details of the various changes are developed.

By Direction of the Judges

ANNIE GLOVER
Registrar
ACT Supreme Court

16 December 2011

Momcilovic v The Queen [2011] HCA 34

Case Review - Dr Christopher Ward,
Henry Parkes Chambers, Canberra

Momcilovic v The Queen is a significant decision of the High Court dealing with the operation and validity of the provisions of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter"). The constitutional validity of the Act was upheld by the majority, but the status of the interpretative principles and of international and foreign decisions was read down. The case has important implications for the *Human Rights Act 2004* (ACT) ("the Human Rights Act") because of the identity of the central provisions.

Momcilovic was an appeal from a conviction for trafficking a drug of dependence under s71AC of the *Drugs Poisons and Controlled substances Act 1981* (Vic) ("the Drugs Act"). The appellant was convicted by reference to s5 of the Drugs Act which placed an onus of proof upon a person who owned or occupied premises in which controlled drugs were found. The High Court was asked to consider whether this raised a s109 inconsistency with offences under the *Commonwealth Criminal Code 1995* (Cth). In the course of that process challenges were made to the constitutionality of provisions of the Charter and its provisions of interpretation.

The majority of the Court upheld the constitutionality of the Charter, but clearly preferred a limited construction of the central principles of interpretation in the Charter.

Section 32(2) of the Charter provides that:

> International law and the judgments of domestic foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

This wording is relevantly identical with that of s31(1) of the Human Rights Act (ACT) save that s31(1) of the Human Rights Act refers to "interpreting a human right".

French CJ held that s32(2) 'does not authorise a court to do anything which it cannot already do'. French CJ noted that '[C]ourts may, without express statutory authority, refer to judgements of international and foreign domestic courts which have logical or analogical relevance to the interpretation of a statutory provision'.

His Honour added:
'[I]nternational and foreign domestic judgements should be consulted with discrimination and care'.

That view was echoed by Gummow J (with whom Hayne J relevantly agreed). Gummow J noted that human rights systems elsewhere were of limited assistance.

It follows that there may be little independent work for s31 (1) of the Human Rights Act to do following *Momcilovic.*

Section 32(1) of the Charter provides that:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights

Section 32(1) is effectively the same as s30 of the Human Rights Act (ACT).

French CJ said:
"Section 32(1)**…**requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law."

One key question was the extent to which s7(2) of the Charter informed the interpretative process under s32. S7(2) is relevantly identical to s28 of the Human Rights Act (ACT) mirrors that of s7(2).

French CJ considered that s7(2) could not inform the interpretive process of s 32(1). His Honour held that considerations under s7(2) could only be undertaken after the s32(1) interpretation had first concluded that the statutory provision in question did impose a limitation on a relevant right. Crennan & Kiefel JJ held that s7(2) did not inform the s32 process of interpretation, but was rather an exercise in proportionality as understood by European Courts (at [555] – [574]). Gummow J (with whom Hayne J agreed) took a different approach (at [165]-[168]), modelled on the interpretation given by New Zealand Courts to ss5 & 6 of the New Zealand Bill of Rights Act 1990, by which there is a more holistic process of interpretation. Bell J held that 's7(2) is part of, and inseparable from, the process of determining whether a possible interpretation of a statutory provision is compatible with human rights'.

Perhaps the most attention was given to the constitutional validity of s36(2). Under s36(2) of the Charter, the Supreme Court may make a 'Declaration of Inconsistent Interpretation' if it 'is of the opinion that a statutory provision cannot be interpreted consistently with a human right'. A similar power is granted under s32 of the Human Rights Act (ACT).

The majority of the Court found that the act of making such a declaration was not a judicial function, nor was it incidental to a judicial function. Key to this finding was that the Declaration had no affect upon the legal rights of the parties to the proceeding, but was instead directed to the Executive. The majority found that this non-judicial function was not fatal to the constitutional validity of s36(2) because the function was vested in a State Court. Gummow J, with whom Hayne J agreed, found 36(2) and associated provisions to be invalid either because it offended the principle of *Kable's case* or alternatively because the Victorian Supreme Court was in the circumstances exercising federal diversity jurisdiction. Heydon J, in a strong dissent, found the whole Charter to be invalid, primarily because in his Honour's view, s7(2) and s32(1) invoked reasoning which was impermissibly vague and ambiguous and thus inconsistent with judicial power (at [408]-[429]).

Finally, French CJ, Crennan and Keifel JJ and Gummow and Hayne JJ each criticised the dialogue model. Crennan and Kiefel JJ said:

"A "dialogue" is an inappropriate description of the relations between the Parliament and the courts and it is inaccurate to describe the process suggested by s36(2) as involving a dialogue, just as the reference to the making of a "declaration" in that sub-section is inaccurate."

1 *Momcilovic v The Queen* [2011] HCA 34, at [18] per French J; see also [565] per Crennan and Kiefel JJ.
2 Ibid.
3 At [19].
4 At [146], [152]-[153].
5 [36].
6 [683].
7 e.g. [89]-[90] per French CJ.
8 At [531].

Suspended Sentences – The Sword of Damocles should not drop without thought

Following on from the Law Reform Advisory Council report in late 2010 regarding Suspended Sentences the government has now sought to address issues including the consequences of breach.

Consequences of Breach - The current legislative regime in respect of breach of a good behaviour order with a suspended sentence contained within s110 *Crimes (Sentence Administration) Act 2005* is appropriate. It sets up a process that requires the original sentence to be cancelled before either imposing the term of imprisonment that was suspended or resentencing. Any resentence proceeds as a new sentence; requiring reference to the full range of sentencing factors and considerations. There is therefore a broad judicial discretion that allows reference to all the circumstances of the breach.

Prevalence of Suspended Sentences - To some extent Suspended Sentences within the ACT have become harsh good behaviour Orders rather than a lenient form of imprisonment. This becomes most confronting when the prospect of imposition is raised via a breach. In respect of the imposition of a suspended sentence there ought to be a requirement for a pre-sentence report prior to the imposition of a suspended term of imprisonment. This would ensure that offenders who have underlying issues (drug addiction and the like) are not given sentences that they are in fact foredoomed to fail to comply with. There is no advantage to the offender, or the community, in setting offenders up to fail because the sentencing judge or magistrate does not have adequate information before them to determine suitability for a suspended sentence. The use of pre sentence reports in this way would also give pause for thought in respect of whether a Good behaviour Order with or without community service may in fact be more appropriate.

Maintain the status quo - In his piece (in this same issue) the DPP has advocated for a system with a presumption of imposition of sentence as in NSW. However, the DPP appears to advocate this without any significant consequential changes to the current regime in the ACT. This is a terrible proposition and would result in the ACT have a far harsher sentencing regime than prevails in NSW.

There is at least one crucial difference between suspended sentences in the ACT and NSW. Within NSW the good behaviour bond that is attached to a suspended sentence cannot be longer than the term of the sentence of imprisonment that is suspended (see s12(1)(b) *Crimes (Sentencing Procedure) act 1999 (NSW*)). Thus, in NSW, if the term of imprisonment that is suspended is 2 months that is how long the good behaviour order is. Therefore in NSW an offence committed 2 months and one day later would be of no relevance to the suspended sentence. In this example the good behaviour obligations would have been complied with notwithstanding the reoffending. In NSW the sword of Damocles only hangs over a person for as long as the court felt they should spend in prison in respect of the offence.

The situation within the ACT is very different. The good behaviour obligations imposed within the ACT may exceed the term of the sentence and usually do so. This difference alone necessitates a much broader discretion be retained to deal with breaches to avoid arbitrary results. Any change to introduce a presumption of imposition (which should be opposed) must be accompanied by a change to limit the term of the associated good behaviour order to the term of the imprisonment that is suspended; otherwise the overall sentence is draconian.

There is a need for a great deal of discretion in dealing with breaches of suspended sentences. Good behaviour orders that attach to suspended sentences within the ACT are usually imposed for periods of 12, 18 or 24 months. It is usually the case that the term of imprisonment that is suspended is considerably shorter, often being less than 6 months. If the sentence is imposed without a resentence then the whole period of imprisonment will be served:

- without any credit for clean street time;
- without any credit for the progress that might have been made in the form of drug rehabilitation, counselling or the like;
- without reference to the nature of the fresh offence or when within the period of the good behaviour order the breach occurred.

Although there are cases when such an imposition is justified it would be unacceptable for these consequences to be made arbitrary by the inclusion of a statutory presumption of activation. If there is a non-discretionary imposition of the suspended sentence then there will be cases where an offender sentenced to 1 or 2 months of imprisonment for an

assault or property crime ends up being gaoled, despite completing all counselling and supervision, because they happen to commit an unrelated traffic offence 700+ days into a two year good behaviour Order. This would be both too harsh and a very perverse result!

For these reasons the government should maintain faith in the Judiciary and continue to arm our Judges and Magistrates with appropriate discretion to see justice is done.

Michael Kukulies-Smith
Partner, Kamy Saeedi Lawyers &
Chair, Criminal Law Committee of the ACT Law Society

In Sickness and in Wealth Till an Application do us Part

By George Brzostowski SC

As our society is ageing, and as the number of blended families is on the increase, we are likely to see some actions of ambiguous merit commenced under the Family Law Act (FLA).

Many readers will be surprised to learn that proceedings for property adjustment can be commenced under the FLA, even though neither party has repudiated the marriage. How and when can this happen?

A recent case serves as an illustration. In *Stanford v Stanford* (not real names) [2011] FamCAFC 208 the Full Court allowed an appeal by an 87 year old husband against orders that he pay his 89 year old wife, the sum of over $600,000 which would have required the sale of the family home. The asset pool was a total of over $1,500,000.

Both parties had loss of health through strokes or falls. The wife was in a care facility. The husband was still living at the family home with one of his sons who was caring for him. The parties had been together for about 40 years, and each had children from previous marriages. The husband visited the wife about 3 times a week.

The husband owned the home since early 1960s during his first marriage. They had both retired in 1989. They were each receiving a Veterans Affairs pension. As the wife intended to leave her estate to her daughters, excluding the husband, he made a will leaving his estate to his remaining sons. The wife was unaware of his will. He was unaware that she had given a power of attorney to one of her daughters. In 2009 he granted a power of attorney to his sons and the wife of a deceased son. The husband provided for the wife's care by establishing a trust fund of $40,000 for her use.

The case had been commenced by the wife's case guardian (a daughter) seeking funds to secure the wife's financial future, and allegedly to afford a higher level of care.

The WA Magistrate determined that the proceedings arose out of the marital relationship and fell within the terms of sec 4(1)(ca)(i) of the FLA. Therefore she ruled that she had jurisdiction, and secondly, that she should exercise that jurisdiction to make orders for the division of property. It was the decision to exercise her jurisdiction and to make an order which, for a number of reasons, was appealable. A strong factor was the finality of actual "separation", which was not a matter of choice, but something that was imposed upon the parties.

In para 13 of the original judgment we see –

> 13 I accept that the parties did not intend to separate and that they live apart only because [the wife] suffered a stroke and required hospital treatment followed by permanent residential care. The unchallenged evidence of [the husband] is that he visits [the wife] up to three times a week. He said he loves her and would do anything and everything for her. She knows who he is and he said she looks forward to his visit.

The husband was not able to recall a number of things, including the payment of the wife's accommodation fees and the question of a $300,000 bond for future accommodation.

At para 16 we see –

> 16 It was submitted on behalf of [the wife] that [the husband] abrogated his financial responsibilities to her by failing or refusing to pay the money sought for payment of the bond for a low care residential facility and the fees for her care, and that this abrogation goes to the heart of the consortium vitae, which, as a consequence, has broken down.

The Magistrate referred to the leading cases on what constitutes, or is enough to prove, "separation", namely, *Todd and Todd (No 2)* (1976) FLC 90-008 at 75,079 and *Pavey v Pavey* (1976) FLC 90-051 at 75,211 to 75,213. One should now also note the more recent decision by the Full Court in *Price v Underwoood* [2009] FamCAFC 127 and [2008] FamCAFC 46 to which there was no reference in

Stanford.

The Full Court observed at para 39 –

> 39. The Magistrate correctly found that the husband did not knowingly abrogate his financial responsibilities to the wife. Consequently, her Honour was not "satisfied that the consortium vitae has broken down for this reason or indeed any other reason, given that neither party intended to sever the marital relationship or to act as if it had been severed".

Therefore the Magistrate was faced with a situation where there was no "separation" within the context of marital breakdown, but rather a separateness that was imposed by the health needs of one of the parties, and a case guardian's perception of how those health needs could best be advanced. In order to decide what is "appropriate" within sec 79(1) of the FLA and "just and equitable" for the purposes of sec 79(2), it is not enough to give weight predominantly to the claimed needs of the party living in a care facility. It is vital to examine the sufficiency or otherwise of evidence that an order would advance the level and quality of care. A Court must also look at the impact of the order on the other party in the context of what order is "appropriate', {sec 79(1)} and whether any order is "just and equitable" within the context of sec 79(2) and the factors in section 75 FLA.

Dowding SC for the Appellant husband submitted –

> "… parties to a marriage should not be forced into a situation where there is a division of property imposed upon them and they are placed in a contested situation where there is a continuing close and loving relationship. Similarly, the [husband] submits that the Family Court should not make orders pursuant to s.79 in the exercise of a jurisdiction which has as its primary obligation to end the financial relationship of the parties to that marriage pursuant to s.81, when s.43 makes it clear that the Court must recognise and enhance marriage as a voluntary relationship entered into for life and, protect the institution.

Dowding SC relied, *inter alia*, upon the dissenting judgment of Justice Kay in *Sterling & Sterling* [2000] FamCA 1150 where his Honour said -

> "Marriage is not seen to be an institution that is entered into during such time as the health of the parties enables them to live together. The existence of the necessity for the parties to live in separate premises, brought about by the deterioration in the health of one or both of the parties, ought not be seen, as an appropriate trigger for the persons managing the affairs of one or other of the parties to successfully apply to have an order made under s 79."

This led to the following further passages in the Full Court's reasons -

> 56. In that case as in this, reference was made to *Jennings (by his next friend State Trustees Limited) v Jennings* (1997) FLC 92-773 where the Dessau J declined the application for property settlement concluding in those circumstances that a maintenance application was the more appropriate remedy.
>
> 57. The husband's case is that the wife's guardians have acted improperly in reaching the decision that the parties' marriage has ended. The wife did not initiate the proceedings or seek to determine the financial relationship prior to her stroke. Mr Dowding SC relied on the reasons of Dessau J in *Jennings* at 84-535:

> "… perverse proposition that an administrator, appointed to represent a person who through disability is unable to organise his own affairs, could simply "reach a decision" that the person's marriage has ended…"

Further at 84-538:

> "… It seems to me that there is nothing to be gained by embarking upon a full property application in the circumstances of parties who have formed no intent to separate; where one is suffering illness and is hospitalised and where the other continues to visit and partake in his care to the extent that she is able. Orders finally determining the property issues between them could not be appropriate, fair or just in that context."

A moment of reflection may serve to highlight severe problems with the commencement of the proceedings by a case guardian. Instead of the perspective of people in their later

years, who may or may not appreciate what is happening around them, take the case of someone who, while still in the prime of life, is rendered comatose in a sport, car or industrial accident, or by a disease. It would be atrocious for the "in-laws" to apply for the sale of the home so that one party could derive benefits from the family's exertions while displacing the other. And where should the children live? It is the act of filing the application which causes a far more destructive effect on the respondent, and on the residual relationship, than any order could possibly have. Well, at least where there is an appellate Court.

It would take a highly forgiving person to keep on loving a spouse on whose behalf an application is made for a sale of the family home, thereby dispossessing the respondent. Fortunately, as a warning to other individuals contemplating such proceedings, we now have the benefit of this Full Court's unanimous decision.

The Full Court held that once the jurisdictional facts are proved, the Court cannot decline to exercise that jurisdiction, but in the exercise of that jurisdiction, it may in its discretion decline to make the order(s) sought.

At [68] the Full Court went on to say -

> 68. In our view once it is accepted that the Court has jurisdiction to make an order it must proceed to consider the relevant matters under s 79 including the matters under s 79(4) and s 75(2) when determining whether or not to make a particular order or to dismiss an application, making no order at all. It is obvious that one of the matters relevant to the exercise of discretion under s 75(2)(o) is the fact that the parties marriage has not come to an end and a consideration of the overall justice and equity of making an order in favour of one of the parties. Section 79 gives the Court power to make "such order as it considers appropriate – altering the interests of the parties to the marriage in the property". The Court's consideration of what is just and equitable having regard to the matters in s 79(4) and s 75(2) may include for example the fact that the parties have not separated other than in a physical sense. Those facts may be important in a particular case; we would expect them to be so, but under the wide rubric of what is "just and equitable".
>
> 69. Conversely, especially when the parties have not separated, it would be equally wrong to apply some kind of standard that, once there is a physical separation some order under s 79 is inevitable.

(Continued on page 11)

The Full Court went on to say at [71] -

> 71. Kay J dissented in the orders that he would make, supporting the decision of Dessau J in *Jennings'* case. We think there is much sense in what his Honour said although we do not agree that it is open to the trial judge to decline to exercise jurisdiction. To decline to exercise jurisdiction when the Court has jurisdiction appears to be adding an extra step in the proceedings which is not countenanced by s 79. The question of alteration of property interests and how that may be done is contained in the provisions of s 79 and the opening words of s 79(1) "[i]n property settlement proceedings, the court may make such **order** as it considers appropriate" define the Court's powers. It may be that the Court does not have power to decline to exercise jurisdiction but it does have power to decline to make an order. Kay J said:
>
> 26. It is widely known that as the life expectancy of our community becomes greater, so does the incidence of dementia. The problem which presents itself in this case and in Jennings' case is likely to become more prevalent. When coupled with an increase in the incidence of remarriage and "blended families", the pressures to ensure that each party to the marriage has an estate available to pass on to their descendants grows. The real protagonists in this type of litigation may often not be the parties to the marriage but their heirs and successors. An issue clearly arises as whether it is appropriate that the Family Law Act be utilised as the means by which the competing claims of the next generation should be aired.

Quite clearly Kay J was not excluding younger persons in the example given, who happen to be hospitalized through accident or disease.

There was no evidence in *Stanford* that the wife needed the sum of money to provide for her future, or that the level of care would be improved by making the order.

By comparison, the orders would be oppressive to the husband.

> 105. In the husband's written submissions it was said:
>
> "There was no evidence that the husband would

(Continued from page 10)

need to leave the house, or intended to voluntarily do so. Given that the consequences of the orders made by the learned Magistrate would be to uproot an elderly man from his home. With no appreciable benefit to the wife, [the husband] submits that this would on the face of it call for some explanation.

106. It was asserted that her Honour's decision to divide the parties' property is "oppressive" given the matter could have been resolved by a maintenance order.

107. An important submission on behalf of the husband was that the Magistrate failed to consider the s 75(2) factors in favour of the husband which would have been against the sale of the house.

…..

112. ….. It is difficult to ascertain the reason why the Magistrate came to her conclusion given the wife did not have a need for a property settlement as such and that her reasonable needs could be met in other ways particularly by maintenance. In considering what was just and equitable under s 79 and s 75(2) the Magistrate was required to consider the effect of these orders on the husband and the fact that this was an intact marriage. Other than the forced separation of the parties by virtue of the wife being in a nursing home, the husband wished to remain in the home which had been the parties' home for in excess of 35 years, until such time as he could not reasonably remain there. Again her Honour seems to have been of the view that having determined jurisdiction should be exercised she felt obliged to exercise it. In our view there are many aspects of this application which do not require an immediate order finally altering the interests of the parties in their property and particularly so where it would require the husband to leave his home of 48 years in which he is still residing.

A maintenance order could solve some parties' problems if there is a capacity to pay it. However the precipitation of hurt and a sense of betrayal, the kindling of suspicion, and imposition of sheer disruption and anxiety in situations where a party is vulnerable, is a cruel consequence, no matter how noble the original objective may be said to have been. In many cases, that is something one will never know. In lending its skills in such cases, the profession should proceed with care and sensitivity.

George Brzostowski SC
Adjunct Professor
UC Faculty of Law, Blackburn Chambers

Harrex v Fraser [2011] ACTSC 172

21 October 2011 Refshauge J

1. This was an appeal from the Magistrates Court for recording convictions of $750.00 on 11 charges of failing to lodge returns by a certain date and not exercising his discretion under s19(b) of the *Commonwealth Crimes Act* in the circumstances. [Although the learned Magistrate had erroneously referred to s17 of the *Crimes (Sentencing) Act 2005*.
2. The learned Magistrate stated that the Supreme Court pronouncement that in this area non-conviction bonds are not appropriate.

Refshauge J stated that:

a) "His Honour clearly had not recalled or had his attention drawn to *Cummins v Duck* (2009) ACTSC20 where I had substituted non-conviction orders for fines imposed in the Magistrates Court."

b) In a letter to Jean-Baptiste Leroy written in 1789, Benjamin Franklin wrote "Things as certain as death and taxes, can be more firmly believed", though similar sentiments had earlier been expressed by Christopher Bullock in *The Cobbler of Preston* (1710), Edward Ward in *The Dancing Devils* (1724) and Daniel Defoe in *The Political History of the Devil* (1726).

c) The rationale for the certainty of taxation in a modern society is, however, well expressed by Oliver Wendall Holmes Jnr, when as an Associate Justice of the Supreme Court of the United States of America, he said in *Compania General de Tabacos de Filipinas v Collector of Internal Revenue* 275 US 87, 100 (1927) "Taxes are what we pay for civilized society."

d) Despite that substantial justification for taxation, most people find the payment of taxation, and the associated preparation of tax returns, as uncongenial. Thus, legislation provides for sanctions for those who fail to comply with their obligations. Nevertheless, some refuse, some procrastinate."

3. Everyone has to balance various demands on their time and needs to prioritise commitments so that the important as well as or even instead of, the urgent can be performed.

4. His Honour stated on appeal he could;
   a) only interfere and substitute a different sentence if under the principles of *Cooper v Corvesey (No 2)*

(Continued from page 11)

(2010) 5 ACTLR 151 he was satisfied that the exercise of the sentencing discretion in the Magistrates Court was effected by a specific error and that the re-exercising of the sentencing discretion involves a different sentence that is appropriate and not merely *'tinkering'* with the sentence appealed from.

b) Regard specific errors as those that may be errors of law, errors of fact, taking account of irrelevant or extraneous considerations or failing to take account of relevant or material considerations. If I find specific error but the original sentence, nevertheless, appears to be appropriate, I should dismiss the appeal rather than allow the appeal and reimpose the same sentence. Even if I cannot identify a specific error I may uphold the appeal and substitute another sentence for the original sentence if I find the sentence to be manifestly excessive, unreasonable, plainly unjust or plainly wrong.

5. Refshauge J then decided:

a) "In this case, however, clear error has been shown and I should re-sentence unless I am satisfied that the sentences of the Learned Magistrate were appropriate.

b) The first question is whether a non-conviction order should be imposed. As set out in *Baffsky* (at 572; [10]), this requires me to proceed through two stages. In the first place, I should identify a factor or factors of the kind set out in subparagraphs 19B(1)(b)(i), (ii) or (iii) of the *Commonwealth Crimes Act*. Such factors must, of course, be relevant to the discretion (*Commissioner of Taxation v Doudle* (at 80; [13])) or "operative" (*R v Hooper* [2008] QCA 308 (at [18])).

c) the matters, especially in subparagraph 19B(1)(b)(i), are very general (i.e. everyone is of some age and so on), as King CJ pointed out in *Jones v Morley* (1981) 29 SASR 57 (at 63), there must be some mitigating aspect arising from one or more of the matters which would "provide a sufficient ground for a reasonable man to hold that it would be expedient to extend the leniency which the statute permits" (*Cobiac v Liddy* (1969) 119 CLR 257 (at 276) per Windeyer J).

d) In this case, the character and antecedents (as interpreted widely in accordance with *Jones v Morley* and *Baffsky*) of Dr Harrex and his mental condition would clearly fall into this category.

e) I note that it is very widely held that offences of this character cannot be considered trivial: *Kelton v Uren* (at 93), *Federal Commissioner of Taxation v Wormald International Australia Pty Ltd* (1985) 81 FLR 330 (at 332).

f) In my view, these matters do predominate and overwhelm the matters that, it was urged by Mr Blank, justify a non-conviction order. I do not consider that it is appropriate to exercise my discretion to proceed under s 19B of the *Commonwealth Crimes Act.*

g) Nevertheless, it seems to me that the fines imposed by the Learned Sentencing Magistrate were not appropriately set, at least initially. Even allowing for inflation, moderated by the legislature's view of an appropriate inflation for the maximum penalties, the penalties seem to me not to take into account the good character and mental disorder of Dr Harrex and the absence of aggravating factors, such as would be relevant were the returns still outstanding, or the tax due had not been paid.

h) In that sense, the offences would not properly be characterised as "run-of-the-mill" offences, though not sufficiently different to such offences to justify non-conviction orders.

i) In my view, taking into account Dr Harrex's plea of guilty and the other matters relevant to the assessment of the culpability and criminality, I consider that for the first offence a fine of $200 should be imposed with court costs of $111. For the second offence, the fine should be $450. For each of the other nine offences, the fine should be $550."

FJ Purnell SC
Blackburn Chambers

Law and (dis)order in the wilds, wiles, and (Irish) eyes.

A giant amongst pastoral kings, Pat Durack, at aged 18 years became head of his large family (mother and 7 siblings) when his father was killed in a work accident (witnessed by Pat) after only 2 months in Australia (ex Ireland as free settlers).

In 1853 he left the family in the Goulburn district and headed for the mining district of Victoria to sell goods hauled from Gouburn, and to try his luck at digging. The Government fee (3 pounds/mth), the need to produce the licence instanta, and the chained defaulters, caused burning resentment. Civil disobedience was rife, culminating in the 1854 Eureka stockade. A lessen for any government.

The miners enthusiastically voted in a pompous preener as member for Ovens. When disillusionment set in with his underperformance, a riot erupted between supporters and

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detractors. Enter one (soon to be famous, even unto this date) Superintendent Robert O"Hara Burke, and 20 mounted police. Pat Durack was proud to have known Burke, a fellow Irishman with a shared love of horses, with a manner that enabled him to maintain reasonably good relations with the miners. Modest, neither officious nor class conscious, informal in manner, in dress, and even in his bathing (would take his bath outdoors, his modesty and that of the housekeeper protected by a ply screen).

He was given to a noisy and late arrival for church service (remember the scene from Shannendoah", with James Stewart), and hit upon the hapless fellow worshipper for a share of his service book. A love of literature and romantic discourse topped him off; he spoke of his longing to open up the interior mysteries of the continent. "Would lose himself in a paddock" was the opinion of the experienced local bushman. An obvious choice to lead the 860 Victoria south to north of Australia expedition. More on Burke infra.

After 18 mths and 1000 pounds (a fortune), it was back to Goulburn to purchase 2 Crown land blocks in the area (late 1855).

By mid 1863 it was off to the fabled land of huge open pasture grazing in south west Queensland. A few months of travel (c700 miles of droving), the party was helpless and at the mercy of the crows and natives. One among the latter had a few words of English from contact with Wills (the last survivor of the Burke expedition). Go (back). Advice ignored. Pressed on. Pack saddle found (detritus from Burke's dash). Last horse shot for the blood to drink. Turned for home. Go (back). Led to a secret sacred water hole for precious precious water. After the life minimal sustaining ration was allocated to the whites, one white dipped his water bag for more. Raised spears, "for the blacks were masters of this timeless country where life was sustained by stern discipline of mind and body uncomprehended by the white. These little reservoirs were a sacred tribal trust contents never to be carried away." Water tipped back, pebbles placed in mouth (to activate saliver).

"Escorted" from the land of "the blacks (who) have no thought for tomorrow" (as some white men were saying).

Back in Goulburn, broke and in debt. Younger sisters in the first Catholic girls school in Goulburn (no State aid); feeling the pressure from heavier settler numbers under the Free Selection Act; missing his sister and brother in law (who had again struck out north. By mid 67, with wife and 2 sons, back north. The youngest died of disease and dehydration (inadequate water available). The surviving son (father of Mary Durack) would later wonder "how they had dared bring women and children into such a situation?". Today the parents would be prosecuted. The son was buried and the first home built beside a water hole. They had arrived in the region of Cooper Creek (of Burke fame).

Pat Durack enlisted the local aboriginals for labour in return for truck - meat, flour, tobacco, clothes (for the stock workers). He respected their culture and beliefs. By '68 they were secure. First cattle sold in Kapunda after astonishing droving.

By the mid 1870's the extended Durack family had taken up leases in size greater than Ireland, and tens of thousands of cattle and horses roamed. The Duracks came upon the equivalent of "The Italian Job". A huge cattle rustle (a thousand head, and a fabulously valuable white breeder bull. Driven to and sold in Sth Australia. Head rustler extradited to the town nearest the crime – Roma. "Acquittal by a sympathetic local jury in the face of overwhelming evidence" (incl the breeder bull). Juries have been ever thus. Readers of "Robbery Under Arms" will recognize the real life story.

The Duracks maintained good relations with the Aboriginals, but one senior Durack overstepped the mark. He granted permission for a young Aboriginal woman (promised to an old man with wives already) to marry her true love. The elders pleas fell on deaf ears. How could it be right for the woman to marry such a man when her heart was with another? (the Durack rejoindered).

He officiated at the marriage himself (probably without any authority). The honey moon was arranged - a station outhouse. A real honour from the white to the black. The most loyal Aboriginal servant was posted. Decapitated holding the enraged native attack party at bay long enough for the couple to escape. One Durack and another loyal native out next morning to demand answers. Durack attacked and off his horse. Rescued by said loyal native. White women were "trained" in use of firearms, and holes made in the homestead walls. No general attack. Point had been brutally made. Keep to your ways and out of ours.

With long drought came shortages of tobacco tea sugar and flour. A war painted party invaded the kitchen demanding the "truck" which was the basis of the deal – we help and leave you alone in return for "truck". A loyal house native thrusts a rifle into the hands of the mistress. Rifle raised. Nothing. Loyal servant cocks weapon. Accidental discharge in her hands. Kitchen cleared. No casualties.

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Good relations restored over time. But generally, relations with the wider white settler community deteriorated with the larger numbers and realization by aboriginals that their precious water and land were under serious threat. Cattle were maimed and killed. A white stockman idly killed a native dog. He was kidnapped.

The native Police found his body, and numbers of Aborigines were randomly shot. Pat Costello chased down the Police party in a towering rage. Remonstrations achieved nothing. Another white (a good friend of Pat) was murdered. Setting himself against his own white race, he urged all natives to seek protection at his homestead. A few took the offer. Most did not, and many were killed in subsequent Police raids on the camps. Pat Durack's scorn for the random killings even brought him into conflict with his wider family. He knew of the need to coexist in the margins of the world that was south east Qld. He continued to rely on native labour. He was later saved (when thrown from his horse and left dying) by his loyal tracker who located him, dug him out, and carried him back.

It was hard times and hard work. Pat Durack set a high standard of long days filled with work. He expected it from white and native alike. A hot branding iron on a too slow moving native's rump. A stirrup iron on the head of a foolish white stockman. OH &S was as yet at nought. Yet, "(s)ervants he always regarded and treated as members of the family...he kept in touch with them…worried about them…and remembered their childrens birthdays. This human attitude he had to all men may explain his wonderful tact and unusual success in dealing with the aborigines."

In 1874 he was appointed JP, settling local civil disputes with homely sense and ritual (one even involving pain by fire). When in dispute himself with a neighbour, Pat engaged the station tutor to decide (in favour of Pat). Bias?!. The disgruntled neighbour demanded a trial by fire, won by Pat. One of his civil decisions (ruling fencing as substandard) was challenged in Court. Being overturned, he proceeded to remonstrate long and loud at the Bench. Mrs Durack pulling at his coat tails to extract him. Mr Durack – "What sort of a JP is it that can't be condemning a miserable fence ?"

The Duracks came up against canon and holy law. In the early 1870's a local parish priest was finally placed @ Roma. He traveled thousands of miles to the predominently Irish flock. He was granted title to the 100000 acre "Dunham" by the very grateful Durack clan. The PP wisely put in a manager. Some readers will remember school days terms such as "holy grass" (keep off), "holy water" (don't drink/sully/wash in), "holy orders" (given any thought to taking?). Well, "Dunham" had its "holy herd", which increased in size. Miraculously??!!. Much to the annoyance of the neighbours whose cattle were seen running with calves carrying Dunham brand. Replying to protests, the (PP? and) manager was/were only protecting the interests of "Holy Church".

The Archbishop intervened and suggested that land ownership was incompatible with pastoral duty. Duracks resumed title, sold; cheque to PP. No grudges. Said PP required to call a close horse race finish (the Cooper Cup, not the 2011 Melbourne Cup). The loser (a hot headed Durack "in law") challenged PP to a fight. Laid out by the versatile PP. In resignation, accepting his punishment – "And what sort of a man is it atall would be hitting a praist?"

The first christening of Durack and other children (c. 1 doz.) was the basis for Banjo Patersons "The Bush Christening". From beautiful poetry to tragic art ("Lost Child", McCubbin). A 3 year old Durack girl disappears from a large congregation. Found dead, clutching flowers. The terrors of "the bush".

1880, a civil suit naming Pat Durack as Defendant. Alleged misrepresentation by Durack to purchasers of land (as to the boundary). Defence – Plaintiffs had own knowledge of boundary from own inspections. Rejoinder – only that part inspected was not misrepresented by Defendant. Defendant offers refund of purchase price (800 pounds) for retransfer of the land. Settled – 900 pounds (incl costs) for Plaintiffs. Defendant paid own solicitors 300 pounds. So it would seem that the Defendant was persuaded that perhaps there had been some vagueness in his description of the boundary (in part). The benefits of actually court filing are a continuing lesson.

Christopher Ryan Silk Chambers
Extracted from "Kings in Grass Castles", Mary Durack, 1959.

High Court Escapades

By David Mossop

The first court to sit in Canberra was not the High Court exercising territorial jurisdiction. *Pritcher v Federal Capital Commission* (1928) 41 CLR 385 was a Canberra

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case but was heard by the High Court in Sydney. Instead the Valuation Court established in 1929 under the Rates Ordinance 1926 was the first court to actually sit in Canberra. The Court was established to hear objections to land valuations and rates determinations by the Federal Capital Commission. It was president over Justice Pike, a judge of the NSW Land and Valuation Court and sat for the first time on 24 September 1929 at the new court house in Acton. There were some 400 appeals lodged with the Court and its first sittings involved a series of test cases. The proceedings and the evidence given were reported in detail in the Canberra Times including the evidence given by each of the witnesses including a Mr J C Brackenreg, an official of the Federal Capital Commission. Justice Pike delivered his decision on 2 October 1929 the day after he completed hearing the evidence. Several points can be noted:

1. Lessees were complaining about the valuation of their block for the purposes of rating;

2. The Canberra Times reported the proceedings in a detailed and unsensational manner;

3. Judgment in the cases was delivered the day after the cases were concluded;

Some things have changed. Some things have stayed the same.

ANNOUNCEMENTS

President Donohoe SC - has just been elected President of the ACT Womens' Lawyers. We congratulate her on her appointment and wish her well in her presidency. She will bring much wisdom and experience to her new role and the Bar Bulletin hopes that she will make a contribution every now and then about women lawyers .

NEW Supreme Court Building - We have been advised that the ACT Government has provided funding for work in for the forward design for a proposed new Supreme Court Building. As a key Stakeholder, the Bar Association will be asked to input into what we would like a future court building to provide in terms of amenity, security, technology and accessibility.

With this in mind, your consideration and input is requested by the CEO, Svetlana Todoroski by 16 December 2011. Please forward your ideas to ceo@actbar.com.au.

Delays in the hearing of matters before the Administrative Appeals Tribunal - The Presidents of the Bar Association and the Law Society met with members of the Administrative Appeals Tribunal (AAT) who are concerned that lack of availability of counsel is resulting in significant delays in the hearing of matters before the AAT.

They would like it to be brought to the attention of the profession appearing in the AAT that if availability of either counsel is precluding an early hearing in the matter, then it is likely that they will list the matter earlier rather than later and expect that the solicitor will brief available counsel.

There is a listing and adjournment practice direction from 2005 to that effect which will be firmly followed and it is available at www.aat.gov.au/LawAndPractice/PracticeDirectionsAndGuides/PracticeDirections/ListingAndAdjournmentPracticeDirection.htm

Key points:

- "Matters are fixed for hearing on the basis that the hearing will proceed on the day fixed;
- An application for an adjournment will not be granted unless there are good reasons to justify the adjournment;
- Unavailability of counsel is not generally a sufficient reason for an adjournment to be granted.

Australian Crime Commission v Stoddart & Anor [2011] HCA Trans 44

MR GAGELER:...The thesis goes something like this - it is that there is and has always been a specific and concrete common law right, privilege or immunity for one spouse not to incriminate another spouse that has, partly it seems because of a wrong turn taken by Lord Coke in 1628 - - -

HEYDON J: His name is not Lord Coke.

MR GAGELER: I am sorry, your Honour.

HEYDON J: In what year was that lawyer given a peerage?

MR GAGELER: I do not have the answer to that question, your Honour.

GUMMOW J: He never was. He was just a knight.

MR GAGELER: I am sorry.

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GUMMOW J: He was the last person James I was going to make a peer.

MR GAGELER: I will drop the Lord, your Honour.

GUMMOW J: It is causing an endless trouble in the Kings Bench.

MEAGHER'S CORNER

Master Harper and Easter—The Master put a matter into the Thursday Application List before Easter 2012. Russell Bayliss of the ACT Government Solicitors Office reminded the Master that Pontinus Pilate had a matter in that list as well.

Mossop on Delay Compulsory Xmas presents for barristers - 2014 Diaries.

Parker in France - Parker went to the world cup in New Zealand and was hosted by a passionate French supporter prior to the final which France lost, although the better team. Parker must have had a premonition because after a (couple) of drinks - sang loudly and correctly 2 verses of the La Marseillaise.

Steven Hausfeld - *Found in mass of dry & repetitive expert reports* - "As you know this man had a left ilio popliteal bypass graft for his claudication. This was a complicated procedure which involved end to side anastomosis of the profunda femoris artery. From a functional point of view Mr Bloggs is delighted with the outcomes of his surgery. He is now back playing golf. Unfortunately this surgery has not particularly helped his handicap but at least he is making the fairway distances walking, if not by hitting the ball".

DATES FOR YOUR DIARY

30 January 2012 - Commencement of Law Year Church Service, 9am—St John the Baptist, Reid.