BALANCE

AUGUST
1992

The Official Publication of the Law Society of the Northern Territory

Legal Aid won't suffer under GST: Tambling

The Coalition's goods and services tax (GST) won't affect legal aid, according to Senator Grant Tambling.

Senator Tambling was responding to letters seeking clarification of the legal aid position in relation to the proposed GST written by the President of the Society, John Stirk.

He said practitioners who accept legal aid briefs will have to charge GST on the completed work.

"It is erroneous to suggest that the Legal Aid Commission's funding would be reduced by 15 per cent with the imposition of GST on lawyers' fees under contract to the [Legal Aid] Commission," Senator Tambling said.

"Lawyers' services to the Commission will attract 15 per cent GST which the commission will have to pay in the first instance.

"However, a full rebate will be available to the Commission for all business inputs and this will include outside legal advice."

Senator Tambling said practitioners, in the normal course of business, will also be eligible for a GST rebate, paid on all business inputs.

He was not specific about what proportion of GST would be rebatable.

Mr Stirk said that even though the Legal Aid Commission would be entitled to GST rebates, the proposed regime would almost certainly create cash-flow problems.

"Cash-flow problems will apply to firms, as well," he said.

"The notion of 'taxable periods,' which vary from one to six months depending upon the dollar value of turnover, means that firms and the Commission will be 15 per cent worse off for the duration of the taxable period as well as for the duration of the time lag involved in the provision of a rebate," he said.

Businesses with a turnover of more than $30,000 per annum will be required to register for GST purposes.

Businesses with a turnover below $24 million and above $250,000 per annum will be required to lodge quarterly GST returns.

Mr Stirk said although he was pleased to hear that Legal Aid would be eligible for a rebate on GST, the system still appeared clumsy, particularly in light of the Coalition's claim that it could trim $10 million from legal aid nationally in administrative savings.

He said the proposed system implied that extra clerical staff would be required to monitor GST payments and apply for rebates.

"Surely it would be far more simple to exempt the legal aid commissions from this tax and save everyone the administrative burden of processing claims and checking rebates," Mr Stirk said.

Annual General Meeting

The 1992 Annual General Meeting of the Law Society will be held at 5.00pm on Friday 28 August 1992 in the Jury Muster Room at the Supreme Court in Darwin.

Nomination and proxy forms on page 8.

Financial members are eligible to vote.

Conveyancing course okay, but s22 a worry

The Course Advisory Committee for the proposed Certificate in Conveyancing has forwarded a draft course outline to the Department of Education Curriculum Management and Accreditation Unit.

But the Society's representative on that Committee, Peter James, said he still has grave reservations about section 22 of the *Land and Business Agents Act*.

That section applies to exemption from educational qualifications on the basis of experience.

It reads: "A person, not being a company or firm, is eligible for the grant of a licence where the Board is satisfied that...

"(c) he holds the prescribed educational qualifications for the class of licence which is the subject of the application or has other prescribed qualifications or experience...

"(2) In subsection (1)(c) 'other prescribed qualification or experience' includes, in the case of an applicant for a conveyancing agent's licence, experience gained in the employ of -

"(a) a person (however described) authorised to act as a legal practitioner under the law of a State or Territory of the Commonwealth and who was during the period of that employment engaged from time to time in the sale and transfer of real property.

"It would be quite improper for someone who has been acting as the secretary to a conveyancing solicitor for six months to claim that they have sufficient expertise in the field to warrant registration as a conveyancing agent under section 22," Mr James said.

The President of the Society, John Stirk, said he would take the matter up with the Attorney-General to ensure standards are set and maintained from the outset.

A Law Society sub-committee, headed by Mr James, has been established to draft a proposed amendment to section 22.

If, as anticipated, the course proposal is accepted, the Certificate in Conveyancing will be offered at TAFE centres in the 1993 academic year.

The course proposed for the Northern Territory is similar to the South Australian land brokers course and the Western Australian settlement agents course.

The curriculum includes four units in settlement procedures and units in legal method, contract law, land contracts, propertly law, torts, bookkeeping, accounting, technical communications, business computing, business law and work environment.

And for light comic relief...

When Justice Alwynne Rowlands was welcomed to the bench of the Family Court and Federal Court, Peter Gandolfo [then President of the Law Institute of Victoria] said the Law Institute had appreciated the way His Honour had instructed its members in parables when he was President of the Victorian Administrative Appeals Tribunal.

Some examples: Inexperience can sometimes work to your advantage, as when a young man was summonsed before a court on an affiliation order. He replied by letter: "I don't know whether or not I am the father of the child. I am only an apprentice."

Having warned that premature admissions can ruin a case, His Honour had explained that not all admissions were against interest. In a transport accident case the evidence was that a man had driven carefully through a green light at an intersection. A woman driving a kombi van with 14 children in it went against the red light, and the two vehicles collided. The man said: "You stupid woman, don't you know when to stop?" "Oh," she replied, "they're not all mine."

On one occasion, His Honour explained, the tribunal hinted to counsel that the tribunal's time was being wasted, and a settlement would be appropriate. Knowing that his client was hard of hearing, the applicant whispered to her in a voice that could be heard all round the room: "He want's to know what you'll take?" "That's very kind of His Honour," she replied. "If it's not too much trouble, I'll have a whisky and soda."

Feelings could run high, His Honour had warned. One persistent applicant, having put the department he enjoyed torturing to a lot of trouble, lost his place, then dropped his papers and exclaimed to the tribunal: "I am my own worst enemy." The man from the departmend interjected: "Not while I'm alive."

*The above extract is but a sample of the content of Columb Brennan's **Pith Without Thubtanth: A Mulch of Legal Trivia**, available from the LIV Bookshop for $15.95 (includes postage and packaging) on telephone (03) 6079315.*

Lawyers meet with TPC chief

A delegation comprising members of Council, practitioners and the President of the NT Bar Association met with Professor Allan Fels, Chairman of the Trade Practices Commission, last month.

Professor Fels wanted to meet members of the profession to discuss the TPC's investigation of trade practices in the legal profession.

The TPC has defined the principal aims of its study as: (a) clarification of the role of trade practices law and competition policy in the legal profession; (b) identification of the nature and extent of public benefits arising from various regulations and restrictions applicable to legal services; (c) examination of the likely effects of current restrictions on cost, quality and availability of legal services; and (d) canvassing options for reform of regulatory arrangements with a view to greater competition and efficiency without jeopardising public benefits.

"However, the TPC recognises that there can be a public benefit in keeping various rules, notwithstanding their apparent anti-competitive effect," Professor Fels said.

He said this was so that "consumers are not disadvantaged by a lack of information or by inadqeuate avenues for complaints; third parties are not damaged by unsatisfactory contracts drawn up by careless or unqualified persons; lawyers can adhere to ethical conduct and avoid conflicts of interest; and the system of justice can operate impartially and fairly."

The Executive Officer of the Society, Jim Campbell, said the meeting was constructive.

"We were able to make a couple of important distinctions between how legal practitioners operate in the Territory by comparison with the larger states," he said.

"For example, practices which are considered restrictive in the other states -- such as the two counsel rule -- simply don't apply here.

"Similarly, the distinction between barrister and solicitor is negligible because practitioners are admitted, and may practice, as either or both," he said.

Mr Campbell said although the Society did not believe the inquiry was necessary given other recent inquiries, a side benefit may be to eliminate some of the mystique surrounding the role of law societies in the legal system and the need for certain rules and regulations which have been implemented to protect the consumer.

During the meeting, the question of duplication of inquiries was raised (for example, the Cost of Justice Inquiry and the Victorian Law Reform Commission's investigation).

Professor Fels said he was conscious of the other inquiries and hoped to avoid duplication, although he found that in some areas the other studies complemented the present TPC inquiry.

The TPC has released a detailed issues paper and, following consultation with the Law Council of Australia, its deadline for submissions has been extended beyond the initial deadline of 30 August.

The Law Council requested the extension of time because of the very broad scope of the inquiry.

A spokesman for the Law Council said that the LCA had sought to limit the scope of the study in discussions with the TPC because the inquiry may go beyond its statutory authority and because it would stretch resources of both the Law Council and the various societies to the limit.

The Deputy Chairman of the Commission, Professor Brian Johns, agreed, but said that was necessary to fully understand the mechanics of the profession.

Harrison gets Law post

Meredith Harrison has been confirmed as Secretary of the Department of Law.

Ms Harrison has been acting in the position since November last year.

The Attorney-General, Daryl Manzie, announced Ms Harrison's appointment late last month, saying he was delighted that she had accepted the position.

"The selection process was lengthy and arduous, and I am pleased to say Ms Harrison was clearly the top choice for the job," Mr Manzie said.

Ms Harrison graduated from the University of Adelaide in 1969.

She practiced in Adelaide from 1970 to 1975 and lectured at the SAIT.

From 1977 to 1982 she practiced as an Attorney in California, then joined the Office of the Crown Solicitor of the NT in 1983.

In 1987 she was appointed Assistant Secretary (Legal Services) and was responsible for conducting litigation on behalf of the Northern Territory.

In 1988 she was appointed Deputy Secretary of the Department.

She became Acting Secretary when Peter Conran left the department to take up a position in the Chief Minister's department.

Ms Harrison is a former Councillor and secretary of the Law Society.

The President of the Society, John Stirk, welcomed Ms Harrison's appointment and said she was the logical choice.

"An incumbant with the experience of Ms Harrison would be extremely difficult to beat," he said.

Mr Stirk said he was delighted that an appointment could be made from within the Northern Territory.

NOTES FROM PARLIAMENT

by GREG ROCHE

The following notes are on legislation set down for debate during the August sittings of Parliament.

Proposed amendments to the Firearms Bill are also listed for debate.

The government also intends the introduction and passage of urgent amendments to the *Local Government Act* concerning minimum rating of multi-unit allotments and the *Work Health Act* in respect of medical review panels.

The McArthur River agreement legislation is expected to be introduced this sitting for debate in the September sittings of parliament, as is the Equal Opportunity legislation.

HOUSING ACT AMENDMENT (Serial 138) -- This bill makes two amendments: (1) Housing Commission tenants have to notify the Commission within 28 days of any change in income; (2) The Commission will have two years in which to charge a person for an offence (eg claiming eligibility for Housing Commission premises when one is not eligible).

MISUSE OF DRUGS AMENDMENT (Serial 146) - This Bill picks up an oversight when the Misuse of Drugs bill was considered in 1990. Section 5 of the Act provides that where a commercial quantity (normally 40 grams plus) of a dangerous drug (heroin, cocaine, LSD, etc) is supplied by an adult, the penalty is life imprisonment. The logical question here is: what if the person who supplied the drug was a child? The effect of the amendment is that the penalty is 14 years maximum where the supplier is a child or the receiver is an adult. The penalty is life where the offender is an adult and the receiver is a child.

STATUTE LAW REVISION BILL (Serial 147) - This Bill amends 15 Acts and four sets of Regulations. Of interest to solicitors are amendments to the *Justice's Act*, allowing for payments made under restitution orders to be normally made to the Clerk of Courts; to the *Small Claims Act*, to allow for Rules concerning rehearing of claims; and to the custody powers of the Sheriff under the *Sheriff Act*, the *Juvenile Justice Act* and the *Prisons (Correctional Services) Act*. Collectors of legal trivia will be saddened to learn that the procedure for making an application to marry your ward will no longer be in the Regulations under the *Justice's Act*.

CRIMINAL CODE AMENDMENT (NO 2) (Serial 149) - In criminal trials in the Territory, the defence is provided with the names and addresses of all potential jurors two days before the start of the trial. This is used to challenge potential jurors if, for example, they come from the same suburb as the victim. Last year, a juror in a drug trial was anonymously threatened. The Bill removes the defendant's right to access to the addresses of potential jurors.

REGISTRATION ACT AMENDMENT (Serial 150) - In order to help pay for the introduction of computer facilities at the Titles Office, there is, as practitioners would know, a $5 surcharge on dealings in the Titles Office. The problem is there is no power in the *Registration Act* to do so. This amendment: (1) inserts the power into the Act; and (2) retrospectively validates the previous collection of the levy.

LIQUOR AMENDMENT (NO 2) (Serial 151) - This Bill tightens up the law on the power of the employees of licensees, or liquor inspectors, to remove intoxicated persons. It also strengthens the licensees' powers to remove so-called "undesirables." Currently, only the licensee has the power to remove intoxicated persons. This amendment will give employees (including bouncers) the power to remove persons who might lead to the licensee being charged with a breach of the *Liquor Act*, or, in his opinion 'disrupt the business of the licensee or unreasonably interfere with with well-being of other persons lawfully on the premises.' They can use "reasonable force" to do so. Liquor inspectors will also have the power of removal.

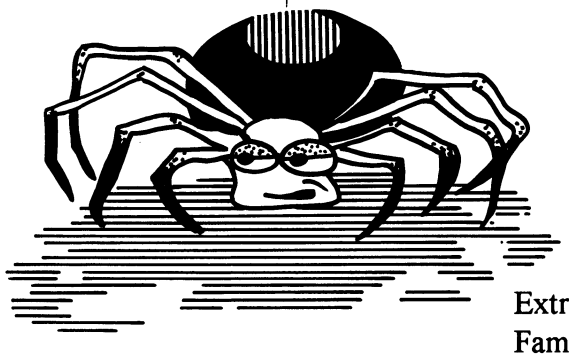
NT LITIGATION LAWYERS GROUP

Anyone interested in joining this group should contact Roger Bennett in Alice Springs or Hugh Bradley, Graham Hiley, Meredith Harrison or Judith Kelly in Darwin.

CONGRATULATIONS

To John Lowndes SM, who not only completed a Master of Laws at but was also awarded the Sydney University Medal.

THE SPIDER'S WEB



TPC ON PGA

One wit at the meeting with Professor Fels of the Trade Practices Commission suggested the TPC turn its attention to the PGA: his view was that their rules were restrictive on the basis that his handicap is not good enough for him to be admitted to the circuit.

QUI?

Name the unemployed french actor who attended a certain person's 35th birthday party before falling ill and failing to appear before Martin J at 10.00am next day.

AMBER FLUIDS

Practitioner with a Royal Doulton tea set took on a slightly different role at the Darwin Show: pulling beers at the Rotary booth.

COINCIDENTALLY

And, that same weekend, who just HAD to attend a meeting in Canberra on the day of the third and final rugby test in Sydney (at which a friend had a box)? One wonders whether he'd planned a meeting in Madrid which HAPPENED to coincide with the closing ceremony of the games in Barcelona...

GOOD TIMING

Remember a reference to "bloody women" in the last *Spider's Web*? It concerned a practitioner being grounded (so he couldn't attend Wimbledon) because of the "problem" of ordination of women; he had to attend Synod when he ought to have been ingesting strawbs courtside. Well, guess where he was when he opened his issue of *Balance*? Yep, at Synod. Apparently *Redback* didn't go down too well. Some of them appear not to have extremely well developed senses of humour...

ON THE TRAIL

And Brownie points for good old Auntie. The Society issued a media release on a holiday with a contact number for Neville Henwood (Secretary) at home. Nev wasn't there and, after trying several times, the journalist had him paged at the Darwin Cup. Got 'im, too.

OUCH!

New Zealand is dealing with a major defalcation which has resulted in an annual per capita contribution of $12,000 to the Fidelity Fund...

DARK-AGE THINKING

Extraordinary developments in Family Law: novel rules such as solicitors may not be in court if their matter has not been called on; they need the permission of the clerk to be in court; they must give the other party a copy of their bill of costs and non-legally qualified people may appear for parties in consent matters. This, of course, is in addition to the rule that a party residing within a 400km radius of the court MUST appear on each occasion the matter comes before the court (even for mention) and, in the event that a party isn't present, the solicitor may be held PERSONALLY liable for the other party's costs. And you thought you were in the 20th century, didn't you?

SEXIST LUNCH

Mutterings of reverse sexism by male practitioners who insist they'd be accused of sexist behaviour if they convened a luncheon for male practitioners to welcome a male judge...

Anyone for Uganda?

Uganda needs some help with its legal system and has asked the Australian Government for it.

The Attorney-General of Uganda, Mr Manyanja, wrote to the Australian Attorney-General, Michael Duffy, requesting assistance in the placement of judges in the High Court and Supreme Court, retraining and reorientation of existing judges, legal experts to revise and update the law, and provision of facilities for the production and printing of laws.

Mr Manyanja said senior Law Reform Commission personnel are also required.

He said the British Government was sponsoring three judges, two of whom were already in Uganda.

Expressions of interest should be forwarded to Mr Alan Rose, Secretary, Attorney-General's Department, Robert Garran Offices, Barton, ACT 2600 by mid-September.

Update

The outgoing Chief Stipendiary Magistrate, Sally Thomas, has agreed that there is a need for a rule for interest on Local Court judgments.

Ms Thomas informed the Society that a new rule in the same terms as Section 84 of the *Supreme Court Act* has been drafted and should be gazetted this month.

The President of the Society, John Stirk, has written back to Ms Thomas asking that matters which were commenced prior to the new rule, but which have not come before the Court yet, be entitled to interest in the same way that new matters would.

Commonwealth drafting inquiry next on the agenda

The House of Representatives Standing Committee on Legal and Constitutional Affairs has turned its mind to Commonwealth legislative and legal drafting.

Michael Lavarch, who chairs the Committee, said the inquiry has arisen from concerns that many of the Commownealth's laws are unnecessarily complex and that because of their complexity they are difficult to understand, unclear in their operation and result in higher costs to users seeking to comply with their requirements, and to regulators in seeking to enforce their provisions.

"These concerns have been expressed most recently in some of the public debate surrounding corporate regulation," Mr Lavarch said.

"The Committee is looking at the principles which presently guide the drafting of laws and legal documents and examining the claim made by some commentators that there are ways not presently pursued of drafting legislation and legal documents in a more simple but no less precise manner."

He said the terms of reference will have regard to the need for the Government to ensure that its policies are clear and capable of being simply expressed in writing, the need for Government agencies to convey the Government's policies clearly in their instructions to drafters, the need for drafting agencies to be trained in simple drafting, consequences of inadequate drafting, the need for adquate time to scrutinise bills and draft legislation, the effectiveness of recent innovations in Commonwealth drafting and the potential of alternative proposals for simple legislation which costs less to administer and comply with.

Submissions have been called, and the deadline is 4 September.

Information and terms of reference are available from Grant Harrison, telephone (06) 2772358.

The Secretary-General of the Law Council, Peter Levy, said that although the LCA needs another inquiry like a 'hole in the head,' it has been pushing for simplification of legislation for some time.

POSITION VACANT

A vacancy exists at the Law Society for a mature Bookkeeper/Clerk. Initially, the position will be offered on a 12 months limited tenure basis but may become permanent. The successful applicant will have a thorough knowledge of Word Perfect 5.1 and Attache 5, will be able to maintain manual and computerised records, will be able to work with minimum or no supervision and will be able to work flexible hours during the Society's busy periods. The successful applicant will be responsible for maintaining financial records to trial balance, will have a minimum typing speed of 50wpm, a pleasant telephone manner and the ability to work effectively with a small team. Applications should be addressed to the Executive Officer, Law Society of the Northern Territory, GPO Box 2388, Darwin NT 0801 no later than close of business on 20 August.

Darwin Community Legal Service

The DCLS operates three drop-in legal advice sessions each week (Darwin, Casuarina & Palmerston). We advise about 100 clients each month. The advice sessions are staffed by volunteer lawyers and others who are rostered on a monthly or fortnightly basis. DCLS currently has places for a number of additional volunteers. We are keen to hear from any solicitor who wishes to assist in the provision of this much-needed community service. If you can help or would like further information, please phone Margaret Wearing or Gordon Renouf on 413394.

LIV will withdraw

The Law Institute of Victoria has formally notified the Law Council of Australia of its intention to withdraw.

The Institute had previously notified the LCA of its intention to withdraw, but agreed to defer the action so a task force, which was made up of representatives of constituent bodies, could try to reconcile the parties.

That, obviously, has failed.

In a media release issued by the LIV last month, the President, Gordon Hughes, said: "The decision was made because of concerns over the cost effectiveness of the Law Council.

"Fees paid to the Law Council by constitutent bodies are presently levied at a rate of $65 per member each year.

"The Institute has more than 7000 members and last year paid $461,760 in fees to the Law Council, yet we have the same voting power as, for example, the ACT Bar Association, which has 45 members," Dr Hughes said.

"The Law Council constitution allows each member body one vote notwithstanding the vast differences between them in membership size and financial contribution.

"Another factor which influenced our decision is the inherent difficulty of the Law Council accommodating the often-conflicting views of both law societies and bar associations, for example in relation to the cost of justice issues such as contingency fees," Dr Hughes said.

He said the Institute had rejected the findings and recommendations of the task force because they did not go far enough.

The Law Institute of Victoria has been under considerable financial pressure as a result of the Victorian economy.

Legal aid in that state is in crisis and it is understood that monies paid to the Law Council would be used to service what the LIV considers to be greater financial priorities.

Parliamentary question on the cost of expert witnesses

The Member for Macdonnell and Shadow Attorney-General, Neil Bell, has put a question on notice to the Attorney-General in relation to expert witnesses.

Mr Bell was speaking during an adjournment debate in the May sittings.

His question was: In how many cases in Darwin or Alice Springs, and possibly in other courts, have litigants' costs been increased by the postponement of hearings because already substantial costs have been incurred - for example, in paying travel costs from interstate by expert witnesses?

Mr Bell said his attention was drawn to the problem by a claimant in a complicated workers compensation case who needed an interstate expert medical witness.

He said that witness flew to Alice Springs, only to find the case adjourned.

"For them [expert witnesses] to fly to and from Alice Springs for a case that is subsequently postponed, only to be returned at some future date, compounds the already high costs of litigation," he said.

Mr Bell asked for a statement from the Attorney-General including the views of the legal profession so that "court administration is as expeditious as possible and so that the further burden of unnecessary costs be kept to a minimum."

1992 ANNUAL GENERAL MEETING
NOMINATION FORM

I nominate _____ for the following position on the Council of the
(name of member)
Law Society of the Northern Territory for the 1992-93 year:

- ☐ President
- ☐ Vice-President
- ☐ Secretary
- ☐ Treasurer
- ☐ Councillor (6 positions)
- ☐ Alice Springs Representative

Nominated by_____
(signature of proposer)

Seconded by _____
(signature of seconder)

I accept the nomination _____
(signature of nominee)

1992 ANNUAL GENERAL MEETING
FORM OF PROXY

I _____, of _____, being a financial
(name) (firm)
member of the Law Society of the Northern Territory hereby appoint _____
(name of member)
of _____, also a financial member of the Society, to vote on my
(firm)
behalf at the Annual General Meeting of the Society on Friday 28 August 1992 and any adjournment thereof.
DATED the _____ day of _____ 1992.

Signed: _____

Media confusion follows Martin J's decision

There was considerable media hype and more than a little confusion following the decision of Justice Martin in the matter of Stone.

Headlines claiming all sorts of extraordinary action purporting to be taken by the Law Society fuelled rumour and counter-rumour.

Following persistent media enquiries for comment, the Society issued the following release:

The Council of the Law Society of the Northern Territory will further consider a complaint against Shane Stone in light of a recent decision of the Supreme Court.

The decision of Mr Justice Martin, handed down last Thursday, quashed a Law Society finding of professional misconduct against Mr Stone.

The Law Society President, John Stirk, said there appeared to be some confusion in the media about the effect of Justice Martin's decision.

"What the decision means is that the finding of professional misconduct for the purposes of section 47 of the *Legal Practitioners Act* is invalid," Mr Stirk said.

"His Honour specifically did not interfere with the finding that Mr Stone's conduct was unprofessional.

"However, because the Law Society's Professional Conduct Rules -- which have been in force since 1985 -- were not approved by the Chief Justice following an amendment to the *Legal Practitioners Act* some years ago, a breach of the rules of itself cannot amount to professional misconduct.

"The definition of professional misconduct which refers to the professional conduct rules and imposes the requirement of approval by the Chief Justice was introduced in 1987. The rules remain valid and binding on legal practitioners.

"But because they were not approved by the Chief Justice at the time, a breach of the rules is not necessarily professional misconduct," he said.

Mr Stirk said that Justice Martin's decision means that the Law Society's finding of unprofessional conduct against Mr Stone stands.

But, he said, the Society needs to consider whether the conduct amounts to professional misconduct as a matter of general law and not only by virtue of being a breach of the professional conduct rfules.

In his judgment, Justice Martin said: *Whether the conduct complained of amounted to professional misconduct without reference to the rules is not the point. A finding of professional misconduct in these circumstances may well require other evidence and consideration of issues going beyond that which might suffice in relation to a particular rule or rules said to have been infringed. Whether the result would have been any different if the complaint had been made by reference to general standards of professional conduct as opposed to the formulated standards is not for me to decide.*

Mr Stirk said what the Society now has to do is determine whether or not the allegation of professional misconduct is proved.

"The Society has to consider three things," Mr Stirk said.

"First, whether it will proceed on the basis of the finding of unprofessional conduct to impose a penalty on Mr Stone or not.

"Second, it needs to decide whether it is satisfied that the unprofessional conduct amounts to professional misconduct under the Act.

"Third, if it considers that Mr Stone's conduct amounts to professional misconduct it will need to decide whether to refer the matter to the statutory Legal Practitioners Complaints Committee, or to impose a penalty within the limits of its own powers," he said.

Mr Stirk said that the Society must afford Mr Stone the opportunity to be heard, irrespective of which option it selected.

He said this was the crux of the judgment in Mr Stone's favour.

"The Court has appropriately referred the matter back to the Law Society for further consideration," Mr Stirk said.

"In circumstances where a legal practitioner's client has made a complaint of this nature, it is incumbent on the Society to perform its obligations under the Act.

"The Society will be doing to so in the very near future," Mr Stirk said.

Ethnic Assistance Wanted

McKean & Park, Solicitors, of Melbourne would like to hear from practitioners who speak any of the following languages: Croatian, Danish, French, German, Italian, Norwegian, Serbian, Slovenian, Swedish. This is for a register of firms for their own use in matters of ethnic assistance. The firm has partners and/or solicitors who speak all of those languages. Contact Richard Park, GPO Box 38A, Melbourne or telephone (03) 6708821.

BALANCE
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ROKA Graphics

Supreme Court Notes

by Cameron Ford, Barrister at Law

EXECUTORS AND ADMINISTRATORS - who has the right to bury the body.

Calma v Sesar & Anor (Martin J) 27/3/92

A young man died in Darwin and the estranged father and mother each sought to make their own arrangements for the burial, the father in Port Hedland, WA, and the mother in Darwin. The mother sought and was granted an interim injunction restraining the father from removing the remains from Darwin, and then sought a permanent injunction to like effect. When she discovered the competing plans of the father, the mother applied for letters of administration, but the father lodged a caveat, and that application had not been determined at the time of these proceedings.

Held: (1) There is no property in a human corpse held for burial; (2) The rightful executor has the power and duty to bury the deceased in a manner befitting his estate: *Williams v Williams* (1882) 20 Ch D 659, referred to; (3) A person entitled to possession of a dead body may enforce that right in the courts, and an injunction will be granted since damages would not be an adequate remedy: *R v Fox* (1841) 2 QB 246, referred to; (4) The mother and father were here on an equal footing as regards the right to disposal, and the court had to resolve the argument in a practical way paying due regard to the need to have the body disposed of without unreasonable delay, but with all proper respect and decency; (5) Since the body was in Darwin and proper arrangements had been made for its burial, there was no good reason in law to remove it to Western Australia.

B Cassells instructed by Noonans for the plaintiff/mother; D Crowe instructed by Crowe Hardy for the defendant/father and the undertakers.

APPEAL - jury verdict unsafe and unsatisfactory - whether Judge's summing up unbalanced - whether incompetence of counsel a ground of appeal - duties of Crown counsel

Fitzgerald v The Queen, CCA (Martin, Angel & Mildren JJ) 20/3/92

The appellant was convicted by a jury of armed robbery. He appealed on the grounds that his counsel failed to take certain points at trial; that the Crown addressed so briefly that the Judge had to put the Crown case in unbalanced detail; and that the Judge left the jury overnight after addressing on the Crown case, thus rendering it unbalanced.

Held, per curiam, dismissing the appeal: (1) When the conduct of defence counsel is a ground of appeal, an appellate court will only intervene where there has been "flagrant incompetence" of counsel involving or causing a miscarriage of justice: *R v Birks* (1990) 19 NSWLR 677 and *Ella v R* (unreported, Court of Appeal 11/1/91), applied; (2) The Court has a power to set aside a guilty verdict where, at a very late stage of trial, an important new issue is raised for the first time by the trial judge in summing up: *King* (1985) 17 A Crim R 184, referred to; (3) In determining whether the verdict is unsafe and unsatisfactory, an appellate court asks whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused: *Chidiac v R* (1991) 171 CLR 432, applied; (4) It is the duty of the appellate court to make an independent assessment of the evidence both as to its sufficiency and quality: *Chidiac, supra*, at 443 and 462; (5) However, the appellate court is not entitled to substitute its view of the quality of the evidence for the view which the jury was entitled to take: *Chidiac, supra*, at 452-3 and 458; *per Martin J* (6) It is the duty of Crown counsel to lay before the jury the whole facts of his case and to make them perfectly intelligible, and to see that the jury is instructed on the law and can apply the law to the facts: *Finn* (1988) 34 A Crim R 425, applied, *Vella* (1990) 47 A Crim R 119, referred to.

The appellant in person; J Karczewski instructed by Director of Public Prosecutions, for the respondent.

COSTS - orders for taxation in interlocutory applications - pleading - whether necessary to plead that plaintiff has sued the wrong party

Markorp Pty Ltd v Geoffrey King as Liquidator of Murray Constructions Pty Ltd & Ors (Mildren J) 20/3/92

At trial the plaintiff applied for and was granted leave to join a party, which resulted in the trial being adjourned. On the subsequent application by the parties for costs:

Held: (1) It is not usually necessary for a defendant to plead that the plaintiff has sued the wrong party -- this is not a "fact or matter" within the rules; (2) To have costs of interlocutory applications taxed immediately, it is not necessary to show particular circumstances or considerations: *TTE Pty Ltd v Ken Day Pty Ltd* (unreported, Martin J, 29/5/90), not followed; (3) The rule against immediate taxation is directed to reducing the administrative burden of taxing small amounts, or amounts which might be offset in later orders for costs. Here the amount was neither small nor likely to be offset.

P Gabrynowicz and S Southwood instructed by Ward Keller and Crowe Hardy, for the applicants; J Waters instructed by Waters James McCormack, for the respondent.

APPEAL - Justices' Appeal - raising matter for first time on appeal - failing to provide sufficient sample for breath analysis - evidence required

Nguyen v Thompson (Mildren J) 19/2/92

The appellant was convicted of failing to provide a sample for breath analysis sufficient for the completion of an analysis contrary to s20(1)(b) of the *Traffic Act*. His solicitor failed to object to the reception into evidence of a Form 8 under the *Traffic Regulations* nor were questions asked or submissions made as to a number of prerequisites which were said, on appeal, to be essential to the proof of the charge.

Held, dismissing the appeal: (1) A failure to take objections at trial is not necessarily fatal to an appeal: *Stirling v DPP* [1944] AC 315, applied; (2) There is a distinction between a mere failure to object, and a conscious decision whether or not to object. The latter will prevent an appeal against the admission of inadmissible evidence: *R v Gay* [1976], applied; (3) This rule applies to any legal practitioner, whether experienced or not, although the inexperience of an advocate may lead to such a miscarriage of justice that an appeal court will interfere: *Ella v R* (unreported, Court of Appeal 11/1/91), referred to; (4) Evidence of a refusal to submit to a breath analysis may also amount to evidence of refusing or failing to provide a sufficient sample, if there is also evidence that the accused had been given directions by the analyst as to how to provide the sample: *Hammond v Lavender* (1976) 11 ALR 371 referred to; (5) "Shortly before" in the Act is different from "immediately before" in the *Traffic Ordinance*, repealed.

P Smith instructed by Noonans for the appellant, K Channells instructed by Director of Public Prosecutions for the respondent.

CORPORATIONS - *locus standi* of shareholder to bring action against company

Australian Agricultural Company & Ors v Oatmont Pty Ltd & Ors* CA (Asche CJ, Martin & Mildren JJ) 19/3/92

The *Crown Lands Act* (NT), s38A, makes it an offence for a person to own or have an interest in pastoral land which exceeds 12,590 sq km, subject to the Minister consenting to a holding of up to 20,000 sq km. The appellant acquired an interest in land which the respondents said exceeded the maximum allowed. O then purchased shared in the appellant and, together with D, brought an application by originating motion for a declaration that the appellant was in breach of the Act. The appellant brough an application to strike out the proceedings for, *inter alia*, lack of standing ont he part of the respondents. O said its standing to bring the action was (a) as a shareholder, and (b) by virtue of a special interest as a competitor for the lands acquired. D said its standing was by virtue of a special interest as a competitor with the appellant for access to and use of the lands. The trial judge held that O, but not D, had established a sufficiently arguable case to found standing on the basis of the shareholding, but that neither had established a special interest as competitors of the appellant. From this the appellant appealed and the respondents cross-appealed.

Held, per curiam: (1) One of the requirements for a plaintiff seeking declaratory relief is that it must have a real interest to raise the question to be decided: *Foster v Jododex Pty Ltd* (1972) 127 CLR 421, applied. This is another way of asking whether the plaintiff has *locus standi*; (2) A shareholder may have standing to seek a declaration that the proposed activity is unlawful where the directors are acting in abuse of their powers by knowingly or recklessly acting contrary to the general law, as a result of which the company sustains loss. This would be a derivative action in the name of the company; (3) Where a derivative action would lie, an individual shareholder may have a sufficient interest to bring an action for a declaration; (4) No derivative action lies where there is mere negligence by the directors: *Pavlides v Jenson* [1956] Ch 565, referred to; (5) No personal action lies for diminution in O's share value: *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204, followed; (6) It would be oppressive to allow an individual shareholder to, where personal rights were not affected except a possible dimunition in share value, and who cannot bring derivative action, to seek a declaration where the lawfulness of the conduct complained of is neither deliberate nor reckless nor negligent; (7) It is not possible to acquire standing by buying some shares in the full knowledge of alleged unlawful conduct; (8) Neither O nor D have a special interest by reason of their competition with the appellant because the best they could hope for here was an opportunity, together with the rest of the public, to negotiate to purchase the disputed lands.

D Russell QC and DWE Trigg instructed by Philip and Mitaros for the appellants; R Conti QC and NJ Henwood instructed by Cridlands for the respondents/cross-appellants; T Riley QC and J Waters instructed by the Solicitor for the NT for the cross-respondent Minister for Lands and Housing.

** Note: An application for special leave to appeal to the High Court has been lodged.*

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