

Death of a protected species

by Pat McIntyre, *Alternative Dispute Sub-Committee of the NT Law Reform Committee.*

Listen to this:- "Stupid Galahs! If you shoot one, the others gather around to have a look, with deafening shrieks and cackles! Then you can shoot five of them with one blast of the shotgun!"

Now listen to this:- "Galahs take one mate, and live together as a couple for life. They live about three score years and ten. If their mate dies, the survivor remains single for the rest its life. Imagine the shock and overwhelming loss that befalls them, when one of their number mysteriously falls bleeding to the ground! And the widowed and the clan join in the unmistakable wail of grief! Me driving, just like a bullet, but at least I can't hear it from the car. I don't stop now. I just let the tragedy recede, glimpsed in my mirror and my shudder.'

Now briefly reflect on your experience of exposure to these stories.

What happened? Did you recognise a contrast or contrasts? Was there an urge to value one story?, or one use of language?, or one style of telling?, or one imagined speaker?, or one imagined 'world view'?, above the other? Did you dismiss any contrast, preferring to treat the stories as taken out of context? Was there information that was new to you? Did you not only see a contrast in the valuing of galahs, but also experience a change in your own? Did one imagined speaker seem more 'real'; or one more informed; or one too 'feely/touchy'; or one more intelligent; or one a simple fool?

Just how much of your own values and perspectives did you bring to this listening? Did something 'strike a chord', appeal to your sense of humour, or touch your heart? If you pause and reflect on your experience of this contrast, does it reveal some bias or prejudice? Have you seen some hitherto invisible assumption operating in you? Or is your analytical mind still wondering what in the hell any of this has got to do with lawyering!

The point is that each of us has an **experience** of the contrast of stories that is beyond our mere **awareness** of the fact of the contrast. We do not respond to such contrast simply with reasoned analysis. Of course we endeavour to bring reasoned analysis to our response. When our clients' own lives are enmeshed in the contrasting stories; it is our job to assist them to bring a reasoned analysis to their other human response. Our clients ask us to help them to make sensible choices; to find solutions that are at the same time reasoned, creative and founded in our client's contextual reality.

Listening to our client's human experience is not a traditionally valued legal talent. We tend to be so much more concerned for the words or even 'or words to that effect'! We are focused on preparation, not for settlement; but rather for the grand battle in Court!

Disputants engage lawyers for wise counsel. To help them find wisdom in their choices; that is why they engage us!

Do you see 'a becalming', and 'an insightful listening'; and 'an animating yet gentle guidance' when you imagine yourself in the presence of wisdom's counsellor? In such a place do you imagine yourself received/heard/welcome from a depth, certainly beyond your first mere words?

That is what our clients want! First and always they want us to listen!

So what do we do? We 'brief' Counsel!

The Oracle we may not be, but at the least we lawyers should endeavour to be better skilled in the art of listening.

One attribute of wisdom is that it is concerned not only with the content of the question, but also its context in human reality.

Wisdom seeks choices of action that are deeply contextual. Choices of action that are contextually 'most global' and at the same time 'most critical'.

We would do well to remind ourselves then, that our clients **experience** their dispute. Our clients do not simply 'own' or 'hold' it, as if it were the subject of an essay or the topic for a moot! Their very experience of the contrast, between themselves/their story; and their perception/analysis of

the story/person of the protagonist; informs their decision-making.

One of our tasks as instruments for wise counsel; is to listen not only to our client's story; but also and especially to our client! And to help our client to rise above the experience of the dispute, so that their emotional/psychological response is also joined by rational analysis. Joined! Not overborne or dismissed!

Another of our tasks is to bring that same trained listening to the receipt of the story from the personal reality of our client's protagonist and/or their advisor. That is simply because it is the breadth and depth of our perception of a dispute that contains, limits and restricts our analysis.

Foolishness is in the eye and the ear and the heart of the beholder! Foolishness is the fruit, rather of arrogance, than naivete. The fool tells all, and listens to none. More fool us then, when we have no care for the art of listening!

How often has it been said that the best thing for your client is that the other side get a good lawyer! A lawyer that can listen as well as reason. So much more likely, then, is a settlement acceptable to all parties. That is because when we hear our client feels strongly about something, and what and why they feel strongly about it; and do the same of the protagonist, then we are better able to help our client pursue their real interests. There is less din! There are less smokescreens! There is wood and trees! There is less focus on destroying the opponent or his argument. There is more admission of the weaknesses in our own. We permit a creative dialectic. We are, collaboratively, able to broaden and refine our perception of both the problem and possible solutions.

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HIGH COURT NOTES: Validity of Cross-Vesting

Constitutional law - Powers of Parliament - Power of Parliament to bestow on Federal Court non-Commonwealth judicial power

In *re Wakim; Ex parte McNally* ([1999] HCA 27; 17 June 1999) by s.77(i) the Constitution provides that Parliament may make laws defining the jurisdiction of any Federal Court. By s.9(2)(a) the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) provided the Federal Court could exercise jurisdiction conferred on it by that Act or a State law relating to cross-vesting of jurisdiction. By ss.51 and 56 the *Corporations Act 1989* (Cth) provided the Federal Court may exercise the jurisdiction conferred on it by a State cross-vesting law. By s.42(3) each State *Corporations Act* provided the jurisdiction was conferred on the Federal Court with respect to civil matters arising under the Corporations law of that State. The High Court concluded that these provisions were not Constitutionally effective to give the Federal Court under the State Corporations law: Gleeson CJ [3]; Gaudron J [26]; McHugh J [33] [59]; Gummow with Hayne JJ [127]; Callinan J [265]. The High Court rejected the submission that the Commonwealth *Cross-vesting Act* represented a form of "consent" [61] or that the "incidental" power (Constitution s.51(xxxix)) could extend the ambit of the judicial power of the Commonwealth [118]. The High Court observed that this did not affect the accrued jurisdiction of the Federal Court [71], [135]. Three proceedings had been removed to the High Court. In *Wakim* the Court held a claim by W that the Official Trustee of a debtor had acted in breach of his duty under s.176 of the *Bankruptcy Act* then, in separate proceedings in the Federal Court, various solicitors had been negligent, constituted a single justiciable controversy which the Federal Court had jurisdiction to entertain [145] [147]. In *Brown* the High Court concluded that an order under s.569A of *Corporations Law* requiring

a person connected with a corporation be examined about its affairs was invalid [168]. In this matter the Court considered the extent to which res judicata in issue estoppel arose in constitutional litigation [160]. In *Spinks* the High Court

Constitutional law - Family law - Guardianship and custody of children - Power of Court to order custodial parent not change residence of child

In *AMS v AIF and AIF v AMS* ([1999] HCA 26; 17 June 1999) the child of AMS (the father) and AIF (the mother) was born in the Northern Territory in March 1990. The parties then moved to WA. In April 1996 the Primary Judge of the Family Court of WA ordered the parties have joint guardianship, the mother sole custody and the mother be restrained from changing the child's principal place of residence from Perth. On appeal the Full Court ordered the mother have sole guardianship and custody but affirmed the order restraining her from changing the child's principal place of residence. The High Court allowed appeals brought by each of the father and the mother. The High Court allowed the father's appeal on the basis that s.35 of the *Family Court Act 1975* (WA) (which gave the mother of an ex-nuptial child custody and guardianship of that child) was invalid as being inconsistent with s.63F(1) of the *Family Law Act 1975* (Cth) as in force

in Darwin when the child was born (which gave both parents joint custody): Gleeson CJ, McHugh, Gummow JJ [20]; Gaudron J [65]; Kirby J [183]; Hayne J [201]. The mother's appeal was allowed on the basis that the Court had erroneously exercised its jurisdiction to make the order on the basis of requiring the mother provide compelling reasons as to why the welfare of the child would not be promoted by residence in Perth: [47], [92], [195], [220]. Callinan J dissented. Both appeals allowed.



held that orders under s.597(9) of *Corporations Law* (ACT) requiring persons connected with a corporation attend for examination and produce documents were valid by reference to the Territories Power (Constitution s.122) and because the orders were reasonably incidental [176]. In dissent Kirby J concluded the cross-vesting scheme was valid. Orders accordingly.

July 1999 High Court Notes prepared for the Law Council of Australia and its Constituents by Thomas Hurley, Barrister, Vic., NSW, ACT (Editor, Victorian Administrative Reports).

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Perception requires more than an eye; listening more than an ear; and wisdom is as much an act of the heart as of the mind.

In an age of general literacy, it is nothing grand to be able to read and understand the arguments and reasoning of the judiciary. To be able to say what will happen if a Judge determines the solution is one thing; to have the skills to assist the parties to say what will happen, is another thing entirely. And that, quite frankly, is what a literate and democratic society requires of its legal profession. The times when a 'man of words' was an important instrument in the honing of a modern democratic state are passed. Not because such instruments are no longer needed; but because more is needed from those would inspire and nurture a modern state.

To acquire the skills and modern understandings of the dynamics of negotiation and collaborative decision making; is to acquire a **cultural literacy**. In the minutiae of party/party disputes, we lawyers are invited to develop the processes, to articulate the understandings and to lay the foundations for collaborative decision making in society at large. Already these processes are used in some multinational corporations; international social justice organisations and national political movements.

Do we experience a contrast between how the public values lawyers and how lawyers value lawyers? What might the contrast have to tell us if we listen with our ears, our eyes and our hearts?

For those of us who may be interested in developing our cultural literacy skills, LEADR will be offering its internationally acclaimed 4 day **MEDIATION** training workshop in Darwin from the 1st- 4th September 1999. It will be offering its two day skills workshop for **Skills for Representatives of Parties in Mediation** on 30th -31st August 1999. It will deliver a one-day **Refresher Course** and also a **Mediator Accreditation Course** on 5th

September 1999.

Please contact Pat Kirkland at LEADR Tel. 02 9233 2255 for enrolment and other details.

The following are some comments about this training from some of our colleagues in the law (all of whom are accredited mediators):-

'These LEADR courses provide an opportunity for lawyers to break out of the confines of legal dispute analysis. Legal analysis is just one form of analysis of a dispute. The more ways of analysis, the more ways of looking at a dispute that you have at your disposal; the better your understanding of it will be. Mediation training stimulates your imagination in the analysis of disputes'.

Michael Spargo, Barrister, Darwin Tel. 8981 1830

'I would say that anyone involved in any kind of dispute resolution should do the 2 day Party Representative workshop. Most lawyers don't have any real training in negotiation or dispute resolution. Such training is invaluable. Lawyers need to get it. To step up from that and do the actual mediator training is even more useful and it enables you to appreciate what is going on also from the mediators perspective.'

Danny Masters, Cridlands, Darwin Tel. 8943 0400

'The LEADR mediation training offers a new, different and effective way of analysing, articulating and resolving problems surrounding disputes. You get a new, different and utterly refreshing perspective on human problem issues. You get a new clarification of your own thought processes. It offers an attractive way of looking at things. It re-orientates the usual legal thought processes; lifting the adversarial blinkers; removing the mote from ones legal eyes. It allows you to see more clearly real world considerations and solutions, which we need to do because the real world is not a Courtroom.'

Ian Gray, Barrister, Melbourne Tel. 03 9608 7888

'It has helped me in my job. Mediation training reinforces the skills that lawyers have in relation to settlement negotiations and can improve them. It shows you how to help the parties to negotiate.'

Tanya Fong Lim, Judicial Registrar, Local Court, Darwin Tel. 8999 6264

'I think that the LEADR workshop is a great thing to do. Every lawyer should do a mediation course. It's the way of the future. It helps you to consider both sides of a dispute carefully; to listen more. It greatly improves your interviewing skills. I listen more. When I have a new litigation client my first thought is now about negotiation and mediation and how the matter might be settled. I think about and discuss with the client whether mediation might be useful.'

Nardine Collier, Bowden Turner & Deane, Alice Springs Tel. 8952 6566

'I think the mediation training is excellent. I found it most helpful in the context of highly emotional Family Court negotiations to be able to move people along from their fixed positions'

Jo Sivyler, Sivyler & Associates, Darwin Tel. 8941 3899

The Law Society Annual General Meeting

will be held on

**September 9,
1999**

**Please pencil this date
into your diaries.**