

ENOUGH IS ENOUGH

Like last year, our legal year 2001 has started off with a 'bang' regarding the perennial polemic of the independence of the judiciary. Justice Angel's brave and unequivocal statement was timely and accurate. From a person whom I understand to be of conservative political views his message was clear. Enough is enough.

Over the last few years that independence has been attacked by the politicisation of our legal system. Whether it be in the part removal of sentencing discretion, the appointment of judicial officers or the Attorney General's complete betrayal of his role as First Law Officer of the NT. The shoddy refusal to follow the agreed protocol regarding Silks was a further example of how politics is everything: principles, conventions, agreements all go by the by if the politics of the moment hold sway.

This incremental attack on the independence of the judiciary will no doubt continue, bearing in mind an election looms this year. The incumbent government might not need to play the race card this election: perhaps the lawyer card will suffice. No doubt they will play both.

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Again I remind readers of the 8th Biennial Criminal Lawyers Conference to be held from 24-29 June this year at the Bali Hyatt Sanur. There will be three main speakers. Chief Justice Doyle of the South Australian Supreme Court will deliver a paper on the conference theme: "Criminal Law; Serving the Community or Giving the Community a Serve". Mr Richard Ackland, Editor of *Justinian* and one time host of the ABC Media Watch will present a paper on several aspects of the media's relationship with criminal law. Further, Justice Weinberg of the Australian Federal Court will present a paper on the Independence of the Judiciary. If you are interested in attending the conference please phone the writer on 8981 6833 or Lyn Wild on 8981 2549. The committee urgently requires intended attendees to submit their registration forms at this stage.

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Losing cases is sadly part of every lawyer's lot. Part of the trade is receiving judgments which go against you and your client's case. Many are to be expected and you, if not the client, move on. Others are "kicks in the guts". Those are the cases where you have the merits, the facts, the law and the evidence. Really you should have won but for some reason the order goes against you. You agonise over the questions you forgot to ask and the ones you shouldn't have asked, the submissions you failed to make or the ones that were made in a hopeless way. In the dead of night the "if not for" factor comes to visit you. You're wounded and permanently scarred by cases like this. It's the price you pay for the responsibility you have for the clients you represent. Often in cases of this nature their lives have been severely affected. Of course you can blame everybody and anybody bar yourself but you invariably end up in front of the mirror. Your first reaction is often to blame the court. The judge had a bad day, he got it wrong, he didn't understand. You go through the reasons for decision to find that your best submissions have just been ignored. In the end you, albeit reluctantly, *accept* the decision and trawl through the reasons to see if any error might allow an appeal. The sickening kick in the guts is probably the worst thing that happens in the trade. Methinks there could be a worse thing, however.

When all's said and done about the separation of powers, one of its most important aspects is that it prevents the government appointing judicial officers who are "yes men".

Our system works with criminal lawyers representing the police, defendants and the Crown. The case is heard by a judge pursuant to the legal principles, both substantive and procedural, following which the judge makes his ruling. All that counts is the evidence and the applicable law from which the judge gives his ruling. No other consideration is allowed. That system sounds almost machine like: almost scientific but, of course, it's not. The reason being that the players in it are human beings and as far as the ultimate decision is concerned so is the judge.

Our judges, like elsewhere, are invariably, and in a sense remarkably, persons from similar socioeconomic upbringings and backgrounds. Generally speaking they're



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white, they're male and they're middle class. They are human and so hold views, prejudices, opinions and predilections like everyone else. They're life experience is very similar and, some might argue, limited. Just as lawyers endeavour to present the facts from the evidence and the law that thereby applies in their client's favour they do, as professionals, consider the "mind set" of the presiding judge. Probably too much fretting occurs about this but it does exist.

Criminal lawyers know their arguments based on Z may be less persuasive if heard by judge X than judge Y because of that judge's known attitude towards Z. This is a fact. We don't present arguments to a machine, we present them to a human being. This factor has existed for centuries. To acquit your duties and responsibilities to your client you take that into account and tailor your arguments accordingly. That approach is not exclusive to criminal law. It applies to all advocacy. This "stuff" is trite but of course it's largely unwritten. It's perhaps unwritten because it goes against "The Book", that is, judges are independent and merely rule on the facts and law before them.

It strikes me that there would be something far worse than the kick in the guts as described earlier. The banshees that haunt the lawyer from a kick in the guts will pale into insignificance if the lawyer was to reasonably conclude that the wrong ruling had nothing to do with the way the case was presented but by the fact that it was made on some other agenda — the judge was a "yes man". Such a prospect should not occur thanks to the operation of the separation of powers. Long may it last for the good of all.