

Smmmoooking!

It was inevitable. The NT government's new smoking law has forced those committed puffers to take "drastic" action.

For some, the new law means a change of brekkie habits and Muster Room is reliably informed that there has been a "move" from other eateries to The Cavanagh for the early morning feed.

Those outdoor venues seem well placed to make a killing!

Ouch

That's gotta hurt. Which well-known barrister came off his beloved motorbike before Christmas? He suffered a few nasty cuts and bruises and was seen sporting some heavy duty bandaging but otherwise he was fine. Still, not a nice way to start the festive season.

Movers and Shakers

Forgive us if these are a tad old but better late than never!

Jacqueline Presbury has moved from Withnalls to Hunt & Hunt.

Melissa Dunn has moved to Priestley Walsh.

Donna Dreier is due to start at the Department of Justice.

Chris Rowe has also moved from Cridlands to the Department of Justice.

Richard Crane has ceased practising.

Sinclair Whitborne is leaving Ward Keller and Darwin to go to the ACT.

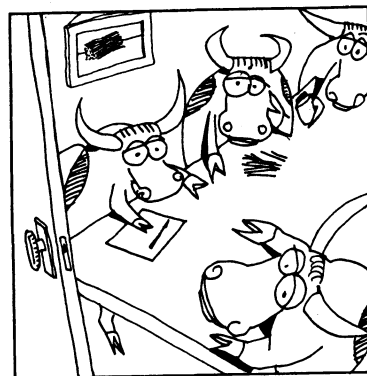
Brett Davies is leaving Ward Keller to consult for Anindilyakwa Air.

David Elix has left De Silva Hebron.

Jim Moore has left Hunt & Hunt for the Sunshine Coast.

His new contact details are ph: 07 54295624, email: amorejb@hotmail.com

The Muster Room



Sydney merger

Cridlands Lawyers have recently merged with Sydney's Dickson Fisher Macansh. Cridlands have had an office in Sydney for two years and the merger means the firm will be now known in the Emerald City as *Cridlands, incorporating Dickson Fisher Macansh*.

An uneasy tension

David Dalrymple draws upon a recent Northern Territory case to explore the difficult task of reconciling Victim Impact Statements with jury acquittals.

On 26 June 2001 Isador Munar, a 19-year-old from Port Keats, was in the Millner/Jingili area of Darwin and came across a 43-year-old woman from Victoria who was in Darwin visiting her sister.

The woman was jogging on a cycle track adjacent to Rapid Creek, about 200 metres from Kimmorley Bridge on McMillan's Road.

A savage and unprovoked attack ensued in which Munar struck his victim many times in an attempt to force her to submit to having sexual intercourse with him. The victim has identified herself in the media, but out of an abundance of caution I will refer to her only as "the victim".

The victim suffered injuries which included fractures, scratches, bruising, and a life-threatening pneumothorax.

Munar was arrested the next day and charged with offences arising from the attack.

The charges which were set out on indictment in the Supreme Court were:

1. unlawfully causing grievous harm (s.181 of the *Criminal Code*);
2. deprivation of liberty (s.196 of the *Criminal Code*);
3. having sexual intercourse (digital penetration) without consent (s.192 of the *Criminal Code*);
4. assault with intent to commit an offence, namely having sexual intercourse without consent (s.183 of the *Criminal Code*).

Munar entered pleas of guilty to counts 1, 2, and 4 and pleaded not guilty to count 3. After a highly publicised trial ending on 17 September 2002, he was found not guilty of

count 3, but guilty of the alternative charge available on the evidence of attempting to have sexual intercourse without consent.

The trial judge (Justice Thomas) noted in her sentencing remarks that the jury must have been satisfied beyond reasonable doubt that Munar attempted digital penetration of the victim's vagina.

Sentencing proceedings in relation to this matter were spread over a number of dates, culminating on 17 December 2002 with the imposing of the actual sentence on Munar and the statement of reasons for the sentencing decision.

sentenced

Munar was sentenced to seven years for count 1, two years (the first of which was concurrent) for count 2, three years (the first of which was concurrent) for the alternative charge to count 3 of which Munar was found guilty by the jury, and one year concurrent for count 4.

The total sentence was 10 years with a non-parole period of seven years. Justice Thomas' sentencing remarks are available from the Supreme Court website.

After the trial and prior to the finalisation of the sentencing process, the victim let it be known through the media that she disagreed with the jury verdict.

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In particular there was an ABC Stateline program which was broadcast on the evening of 25 October 2002 and in which the reporter stated:

(the victim's name) believes crucial evidence to back her claim was not allowed and that the Territory Supreme Court Judge directed the jury to deliver a not guilty verdict to the rape charge.

As I understand it, the suggestion that there was an acquittal by direction was incorrect. There was apparently no attempt by the reporter to seek any comment from Munar's legal representative as to the obviously contentious issues which were the subject of the victim's complaints.

The victim gave an oral victim impact statement in court on 18 September 2002. Earlier that morning the prosecutor had faxed to Munar's counsel a document which was described as a summary of the victim's "intended statement".

Subsection 106B(8) of the *Sentencing Act* requires that such a summary be provided in advance if the victim's impact statement is to be presented orally.

The summary itemised 20 matters under the heading "Physical injuries" and a further 23 matters under the heading "Short term and long term consequences". The last two items under this second heading were:

- Feel that the police, judicial and medical systems dealt with the matter inadequately
- The trial listing caused significant inconvenience, anxiety and financial loss.

The victim's evidence on 18 September 2002 essentially followed the sequence of dot points set out in the summary document.

When she reached the final two items she expanded considerably on what was summarised in a manner which clearly reflected her view that the jury verdict (i.e. the acquittal on count 3) was a miscarriage of justice.

The last part of her testimony before Munar's counsel felt compelled to object was as follows:

When I took the witness stand, I took an oath on God's holy word to tell the truth and nothing but the truth. I had complete faith in the justice system. I had no understanding that I would be prevented from telling the truth, and that the witnesses and evidence that supported and corroborated my story would be deemed inadmissible in order that the accused be given a fair trial. The jury was unable to make a valid decision because they were not allowed to hear this evidence. The defence misrepresented the facts many, many times, and the jury was not always corrected. It is ironic that the defence is now requesting a ...

Prior to the introduction into the sentencing system of a statutory requirement for the presentation of victim impact statements, the presentation to criminal sentencing courts of detailed information regarding the injuries and other impacts of offences was already a feature of the sentencing

process in all Australian jurisdictions. However, the presentation of such information was required to be undertaken in a balanced and independent fashion. In the case of *P*, (1992) 64 A Crim R 381, the Full Court of the Federal Court made the following comments (at 386):

In the absence of statutory provisions for victim impact statements in the Australian Capital Territory, we do not see any impropriety in the Director of Public Prosecutions, or the representatives of the Director, whether acting as counsel or as solicitor, ensuring that the court has before it sufficient material of a proper kind to enable it to proceed to sentence upon a realistic assessment of the injury to or loss suffered by a victim. It is essential however, that the material be presented in such a way that the prosecuting authority will not only not be seen to be promoting the interests of the victim at the expense of the interests of justice, but also the reality will be quite otherwise. Vengeance is not to be equated with justice. And the understandable feeling of a victim or a relative of a victim must not be allowed to move the court beyond the way of justice. For that reason it may be appropriate for the material to be presented other than in the form of direct statements by the victim or persons closely connected with the victim.

Similar comments were made by Justice Angel in the case of *Eley v Walter* (Supreme Court proceedings No.94 of 1993, unreported Reasons For Decision delivered 20/8/93):

Nevertheless it is appropriate that I say how inappropriate it was for the learned Magistrate to invite comment from Mr. Aloessi as to how the appellant should be dealt with and to speculate aloud as to whether Mr. Aloessi would consider the learned Magistrate had done 'the right thing' or the 'wrong thing'.

Sentencing courts seek neither to please nor displease. A transgressor, a victim, or a crowd may be pleased or displeased with a sentencing result but this is of no concern to a court. Courts seek to do justice according to law, not sentiment.

The adoption of statutory victim impact statements in the various Australian jurisdictions in the 1990s reflected similar reforms that were implemented in the United States in the 1980s, following what amounted to a political movement demanding that victims have the right to be heard.

The position in the Territory after the enactment of our own victim impact statement regime is outlined in the case of *Staats*, (1998) 101 A Crim R 461, in which the Chief Justice noted:

Generally speaking, the VIS provisions serve the primary purpose of giving victims of crime, or their relatives in the case of death, an opportunity to place before the courts their own statements either personally or through another as to the impact of the crime upon the victim of the crime.

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His Honour went on to express the opinion that while the VIS provisions were not primarily intended to fulfil the function of providing the information to which the court is to have regard the purposes of s5(2)(b) of the *Sentencing Act*, a victim impact statement, or parts of it, may be admissible for that purpose.

The problem that has been fairly and squarely raised in the case of Munar is how a sentencing court can moderate and if necessary restrict the right bestowed to a victim when the subject matter of his or her victim impact statement moves from the impact of offences of which which the person sitting in the dock has been found guilty to an attack on a verdict of acquittal in respect of the same person and a recitation of the impacts arising from the trial leading to that acquittal.

Given the current overwhelming popular support for the rights and entitlements of victims and the identified statutory intent of the victim impact statement provisions in section 106B of the *Sentencing Act* of allowing a victim to have his or her own moment in court, any sentencing judge would presumably feel most reluctant to curtail or cut short an oral victim impact statement in full flow.

I do not claim to have thought of a solution to the problem, but it is one which may in at least some cases involve both an unfairness to an acquitted person and an undermining (by means of the court's own processes) of a particular jury verdict, and indeed jury verdicts in general. ①

Child Support Agency guide

The Child Support Agency (CSA) has amalgamated former legal and technical products into one product called *The Guide*.

The Guide is an easy to use source of technical information for legal practitioners, clients and CSA staff. In contrast to the former legal and technical products, *The Guide* is organised into Parts, Chapters and Topics.

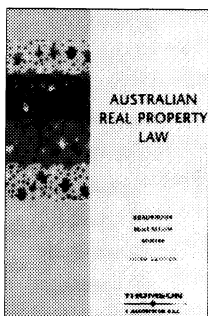
The Parts, Chapters and Topics in *The Guide* make up a collapsible menu located on the left-hand side of each page. Users can locate information using the menu or the extensive A-Z index.

Once in a topic other related topics can be reached by clicking on underlined text.

You can view *The Guide* from CSA's home page: www.csa.gov.au. It supersedes all former legal and technical products. It includes information that was not covered in earlier material such as a discussion of overseas child support, details of legislative history and CSA's policy about enforcement of debts through court action.

On the bottom of each page is a feedback link. CSA hopes that you will use *The Guide* to answer any questions about child support and welcomes your feedback.

readers forum - book reviews



**Australian
Real Property
Law 3rd
edition by
Bradbrooks,
MacCallum
and Moore
The Lawbook
Company, RRP
\$115**

From a general law point of view, this is a very comprehensive text and easily compared to my old favourite "Butt on Land Law".

Apart from covering the usual areas such as:

- history of tenure from the year dot,
 - various forms of ownership of property; and
 - current and future interests;
- the book covers more contemporary

topics such as native title, management of property, trade practices, credit legislation and the legislative changes to perpetuities law. The section on perpetuities looks at the particular statutory position in each state and territory.

The book also has a very comprehensive section on the contemporary relationship between landlord and tenant including, interestingly, a section on the legislation governing Retirement Village schemes and its various requirements across the States and Territories.

Another addition to the landlord/tenant bow is the section on recent changes to residential tenancies law and the advent of the retail tenancies legislation.

Add to the above some broad text on the nature of property rights under strata schemes and again a good basic spiel on the nature of various security interests and how they operate and you have a text which could be a Bible for a junior property lawyer and a good point of first reference for someone more senior.

The book is very readable despite covering a lot of quite distinct topics, the authors have obviously made an effort to keep the language relatively simple and split the topics into easy to find categories.

A good comprehensive text covering the breadth of property law issues.

- **Karen Christopher, partner,
Cridlands Lawyers**