Edition: November 2004

# The independence of the judiciary and a fair trail

president's column

# New committees get straight to work

**It has been straight to work for the new Law Society Council. On Saturday 30 October the strategic planning meeting was held to determine the direction of the Law Society for the coming year and to establish Council committees to address various issues and areas of law.**

Since then the new committees have been busy recruiting members from the local profession to contribute their expertise. I would like to thank all those members of the profession who have willingly been seconded to Law Society committees. The new committee structure promises an extremely busy, but very constructive, year for the Society.

Many of the new committees have met already and all of them will meet before the end of this year. The committees are as follows:

**1. Complaints Procedures**

**Chair:** Kate Hughes. **Members:** Glen Dooley, Jodi Mather, Donna Dreier, Barbara Bradshaw and Josephine Stone.

The committee will consider: amendments required to complaints by-laws; the implementation of by-laws; and other issues relating to complaints.

**2. Admissions and CDU**

**Chair:** Matthew Storey. Members: Jo Tomlinson, Lisa O'Donoghue, Barbara Bradshaw, Julie Davis and Meredith Day.

The committee will: consider implementation of pre-admission training requirements; monitor and assist in implementation; liase with the new Vice-Chancellor on issues relating to Charles Darwin University; and seek written curriculum and course guides from the units offered by the law faculty and liaise with them.

**3. Professional Indemnity Insurance**

**Chair:** Merran Short. **Members:** Rhona Millar, Barbara Bradshaw and Julie Davis.

The committee will:

- Recommend PII proposals for 2004;
- Finalise wording of Master Policy with broker and make submission to the Attorney-General;
- Make comment on the national terms and conditions for PII suggested by the Law Council and amendments to policies;
- Monitor model legislation in respect to PII; and
- Consider FSRA implementation.

**4. Alternative Income Sources**

**Chair:** Jacqueline Presbury. **Members:** Merran Short, Allison Robertson, Barbara Bradshaw and Julie Davis.

The committee will consider alternative income sources, including procedure management systems.

**5. Information Brochures**

**Chair:** Jacqueline Presbury. **Members:** Glen Dooley, Melanie Little SM and Julie Davis.

The committee will review the legal practice brochure, review other existing brochures and consider costs agreements for Family Lawyers.

**6. Investment of Funds**

**Chair:** Jacqueline Presbury. **Members:** Paul Maher, Barbara Bradshaw and Julie Davis.

The committee aims to develop and implement policies for investment of funds in line with the Society's constitution and FSRA requirements.

**7. Tort Law Reform**

**Chair:** Jack Lewis. **Members:** Merran Short, Allison Robertson,

*Merran Short, President*

Jacqueline Presbury, Rhona Millar, Tony Whitelum and Barbara Bradshaw.

The committee will continue to monitor developments relating to Tort Law Reform, particularly medical indemnity, and prepare position papers for the Council on relevant issues and develop a strategy for publication and representations.

**8. Costs**

**Chair:** Merran Short. **Members:** Markus Spazzapan, Tony Whitelum, John Neill, Dylan Walters and Barbara Bradshaw.

The committee will develop a revised costs submission for the Chief Justice and review costs rules, procedures and practices generally, with a view to making further recommendations.

**9. Family Law**

**Chair:** Kate Hughes. **Members:** Sam Salmon, Margaret Orwin, Mary Allan, Janet Terry and Barbara Bradshaw.

The committee will consider the development of a Family Law costs agreement; general Family Law Act issues; and the Child and Young Persons Care and Protection Bill (when it becomes available).

**10. Commercial Law**

**Chair:** Barbara Bradshaw. **Members:** Cameron Ford, Alison

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cover story

# The independence of the judiciary and a fair trail

Excerpts from an address given by Her Honour Antionette Kennedy, Chief Justice of the District Court of Western Australia*

**"At Runnymede, at Runnymede,**
**Your rights were won at Runnymede!**
**No freeman shall be fined or bound,**
**Or dispossessed of freehold ground,**
**Except by lawful judgment found**
**And passed upon him by his peers.**
**Forget not, after all these years,**
**The Charter signed at Runnymede."**

*'What Say the Reeds at Runnymede'* – Rudyard Kipling (1865-1936)

The 18th century social commentator Walter Bagehot is reputed to have said something to the effect that: "The British are famous for inventing wonderful institutions which they themselves don't understand." If he did not say it, someone should have because it is correct.

Australians have inherited these institutions and the principles which make them great with no more understanding than the British. There is always a risk that we will lose what we have because we do not understand why it came about, its purpose and benefit.

I am concerned here with parliamentary democracy and the various principles of law which it both sustains and requires such as the separation of powers, judicial independence, and the fundamental principle which underlies our entire system of justice and government, *the rule of law*. For these purposes, that is simply that we are ruled by law and not by people; everyone and every institution is subject to the law.

We have inherited from the British the separation of powers; that is to say, the powers of the executive, the legislature and the judiciary are separate. The power of each operates as a check upon the others; this is what prevents us from ever becoming a totalitarian State and from being ruled by men and not laws.

Frequently, when judges make decisions with which some citizens disagree, there are letters to the editor demanding the executive sack the particular judge or all of us for that matter.

One cannot help thinking that news is slow at getting through – the executive has not been able to sack judges since the *Act of Settlement* in 1700.

It is also the case that politicians, aggrieved by the decision of judges, declare that the judges are not doing what they are paid to do and, in one well known case, stating that from now on all judges should be capital 'C' Conservatives. I thought this was something akin to the Captain of Essendon demanding that all referees be supporters of Essendon.

There are times when judges could be excused for thinking that there is a concerted effort to convince the populace that we are the enemy rather than the power to protect them from the excesses of the executive, the legislature and the self-righteous, ill-formed publicity.

Judges are frequently called upon to decide issues between the citizens and the State and to stand between the citizen and the State, increasingly between the citizen and the lynch mob aroused by sensational or self-righteous pre-trial publicity; a lynch mob who does not want the law applied to an accused about whom they have already decided the guilt, still less to an offender who is guilty. What they want in the latter case is a free for all between the offender and the victim, regardless of the harm this will do to the common good. Anyone who resists is immediately categorised as a person who does not care about victims and must live his or her private life in a crime free bubble.

No judge could be expected to carry our judicial tasks with impartiality if one side in the dispute had the power to dismiss that judge, move the judge out of office, or reduce his or her salary or could cause its elected representative to do so. It has been said that:

> *The ultimate test of public confidence in the judiciary is whether people believe that, in a contest between a citizen and government, they can rely upon an Australian court to hold the scales of justice evenly.*[1]

We should never be complacent. We should never assume that, if we allow the independence of the judiciary to be in any way undermined, it will have no effect upon us.

There are many complaints about the judiciary in Singapore. Whether it is biased in favour of the government or whether that is simply the perception, is for others to say. But justice must not only be done, it must be seen to be done. In Singapore, the judicial system has two levels of courts – the Supreme Court, which

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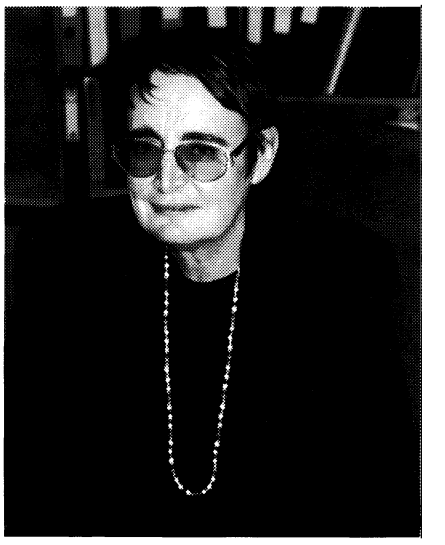
* Her Honour Antionette Kennedy, gave this address for the 12th Annual Sir Ronald Wilson Lecture to the Community during Law Week 2004 in Western Australia. This edited version of the address first appeared in the June 2004 edition of *Brief* and has been reprinted with the kind permission of Chief Justice Kennedy and the Law Society of Western Australia.

**for the record**

# Looking at Pro Bono



*Barbara Bradshaw, Chief Executive Officer*

**PRO BONO ISSUES**

A major project for the Council this year is the development of an effective pro bono regime for the Northern Territory. The Legal Aid and Pro Bono Committee recently met and considered this issue. The Committee consists of practitioners from Legal Aid, government and private practice from across the Territory.

Members of the Committee are aware of the issues involved. It is noted there has been some assistance provided to legal aid services by southern firms. It is also noted that a number of individual practitioners and Territory firms do valuable pro bono work of various clients on an ad hoc basis without necessarily wanting this fact to be made public.

Pro bono services can be provided through various arrangement: a firm may provide a specified staff member to a legal aid service for a particular period; or assistance is provided for library services; or if advice is sought on a particular issue an opinion is provided.

Other states have schemes whereby a member of the public who is not otherwise entitled to legal aid, or who cannot afford to engage a firm approaches the Law Society who acts as a "clearing house' enabling the applicant to get advice.

The NT Legal Aid Commission has proposed, and will shortly be writing to various persons about, a two-day meeting be held in April 2005 involving the various legal aid agencies, the Law Society and other interested persons. On the first day issues relating to the proposed ATSILS tender would be addressed. On the second day pro bono issues would be discussed. Persons from the Pro Bono Centre at the University of NSW and pro bono officers from southern firms would also be invited to attend. The purpose of the meeting would be to develop a coordinated approach and work out how the pro bono resources available could be best used.

Funding will be sought for the costs of the conference from various sources.

It is also proposed the Law Society conducts a survey of individual practitioners and firms about pro bono work undertaken. The purpose of this would be to enable the Committee to get a better picture of what work is currently being undertaken locally.

Once these initiatives have been progressed we would also look at establishing an "individual" based scheme.

The views of practitioners are sought on these initiatives as well as your assistance when a survey form is provided.

**SHORTAGE OF PROFESSIONALS IN THE NT**

The Law Society has been working with the Department of Business Industry and Resource Development (DBIRD) which has been developing a services sector strategy. One issue that has constantly come up in this process and the deliberations of the NT Business Council (a "peak body" of various industry associations) is the shortage of skilled personnel including professionals such as accountants, engineers and lawyers.

I would seek the feedback of members on this matter. I have noticed since coming to work for the Law Society the relatively high turnover of legal personnel. It is also apparently difficult to recruit from interstate, in spite of the lifestyle, opportunities and interesting work available in the NT.

Please call me on 8981-5104 if you would like to discuss these issues or send me and email at bbradshaw@lawsocnt.asn.au.

**THE PRACTITIONER**

**News & views from the LSNT Secretariat**

*The Practitioner* is the Law Society's weekly e-mail newsletter, which provides members with an update on what the Law Society has been doing. There is news, submissions, calls for comments and details of upcoming functions and events.

If you want to stay informed and up-to-date, make sure you are on the mailing list. For more information, or to be added to the list, please email Zoe at publicrelations@lawsocnt.asn.au

# The independence of the

includes the High Court and the Court of Appeal, and then the Subordinate Courts. Subordinate Court judges and magistrates, as well as public prosecutors, are civil servants whose specific assignments are determined by the Legal Service Commission which can decide on job transfers to any of several legal service departments. Judges therefore know what can happen if they make a decision the government does not like and litigants know it too.

Government leaders historically have used court proceedings, in particular defamation suits, against political opponents and critics. Both this practice and consistent awards in favour of government plaintiffs raise questions about the relationship between the government and the judiciary; this has led to a perception that the judiciary reflected the views of the ruling party in politically sensitive cases.[2]

The judges are not the enemy of the people, unless they join the government or the media or give that impression. The judges themselves must be very careful to ensure that justice is not only done but seen to be done and the executive and legislature must not make laws that create the impression that judges have joined the government or laws that seek to remove judicial protectors from citizens. The media should not get itself into a frenzy when judges refuse to do what the media wants.

## A fair trail

I want to move on now to discuss other aspects of a fair trial. This plainly involves a whole range of issues, apart from the independence of the judiciary and, to assist me in confining the issues I will deal with, I have sought help from no lesser a personage than John Mortimer (aka *Rumpole of the Bailey*) who said on one occasion:

> *What some people would like is to repeal Magna Carta, suspend habeas corpus, abolish trial by jury, reverse the onus of proof and replace the whole thing with a summary trial in front of the station sergeant.*

I never took this to be a criticism of the station sergeant. The station sergeant has his role as an aid to the executive but it is not a substitute for the judiciary and all that it can offer in a fair trial.

## The Magna Carta

Most of what I knew about Richard the Lion Heart and his brother King John, I learnt from old episodes of *Robin Hood*. Richard was good and John was bad. In John's eyes, since John was King, there was no law above him, he was not subject to the *rule of law*. The only entity higher than the King was God.

By 1215 the Barons had had enough. They decided that John was so untrustworthy that he must be tied down by a Charter of *Ancient and Accustomed* liberties which they put to him. When John stalled, they captured London and refused to give it back. Eventually, a meeting was arranged at Runnymede field on 15 June 1215. The agreement was sealed.

There were a whole range of matters in the great Charter, including a section on forests which might owe something to Robin Hood, but our interest is in the clauses on justice and on the overall principle that the law existed on the plane above the King, that is the *rule of law*. Thus, even the King, future government and judges were subject to law.

The Magna Carta became associated with those fundamental rights that formed the foundation of parliamentary democracy – trial by jury, habeas corpus, equality before the law, freedom from arbitrary arrest and parliamentary control of taxation.

> *Clause 38: No official shall place a man on trial upon his own unsupported statement without producing credible witnesses to the truth of it.*
>
> *Clause 39: No freeman shall be seized or imprisoned, or stripped of his rights or possessions or outlawed or exiled, or deprived of his standing in any other way nor will we proceed with force against him or send others to do so except by the lawful judgment of his equals and by the law of the land.*
>
> *Clause 40: To no one will we sell, to no one deny or delay right or justice.*

It was said in the 17th century that these clauses embodied the principles of the writ of habeas corpus and trial by jury. Magna Carta certainly meant a great deal to the people and the clauses to which I have referred were put into the Charters of various States of the United States of America and eventually called "due process".

## Trial by jury

Originally, trial was by ordeal, by battle or by compurgation. Over a period of time, people did not want to fight each other and decided that trial by ordeal was a little unsophisticated.

The use of the jury system in legal proceedings began at about the time of Henry II, the father of Richard and John. In arguments over land, 12 local men would be summoned to give their answer as to who was in the right. So, at that time, the jury was part of the proof; it provided the local knowledge. Slowly juries became the independent judges of the facts.

The juries themselves, that is the ordinary people, were largely responsible for the proper development of the jury system and for the recognition of the need for jurors, like any other judges, to be completely independent and not to be at the mercy of the government or whoever happened to be in power at any particular time.

An early and great example of this was in September 1670 when William Penn (who subsequently founded the

**cover story**

# judiciary and a fair trial cont...

colony of Pennsylvania in the United States) and William Meade were tried at the Old Bailey for agreeing to hold, and for holding, an unlawful assembly in London.

The court was presided over by the Recorder and the Mayor who were bullies, but Penn and Meade declined to be pushed around. The evidence against them was transparently inadequate and they were not timid about asserting their rights. The jurors were inspired by their example and convinced by them and refused again and again to hold them guilty. The court threatened, but the jury refused to give in. Finally, the jurors showed their courage by announcing a defiant verdict of "not guilty". For this, the court fined them 40 marks per man and imprisonment until paid. The jurors were taken away to gaol.

Several weeks passed with the fines unpaid and the jury locked up in Newgate Prison. In November, one of them, Edward Bushell, made an application to superior judges for an inquiry into the grounds for imprisoning the jury and a finding was made that the fines and the imprisonment of the jury were contrary to law – the jurors were freed immediately.[3]

This really set juries on the right track and guaranteed that they would be independent and would not be punished for making a decision that the authorities of the day, or the community , or we could say in this day and age, the media and talkback radio, did not like. This guaranteed people would have a fair trial and would have their guilt determined on the basis of the evidence and not on the basis of what was politically expedient or what the media and talkback radio wanted to happen.

There is now of course a recognition by judges and lawyers that the jury system is a bulwark of democracy. In the case of *Duncan V Louisiana*,[4] the United States Supreme Court said:

> *Those who wrote our Constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the Constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.*

This has been approved in Australia's High Court where it was said, in addition:

> *Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgment are comprehensible by both the accused and the general public and have the appearance as well as the substance, of being impartial and just.*
>
> *The presence and function of a jury in a criminal trial and the well known tendency of jurors to identify and side with a fellow citizen who is, in their view, being denied a 'fair go' tend to ensure observance of consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance as well as the substance, of impartial justice in criminal cases.*[5]

## Habeas corpus

I move on now to habeas corpus. Habeas corpus literally means "bring up the body" (to court). It is used to compel a person who is in custody to be brought before the court. This is so that people do not simply remain in custody at the King's (or in today's language, the government's or the police's) pleasure and they can have their grievance about being in custody aired in public.

Today we have legislation that requires that any person who is arrested must be brought before a justice as soon as reasonably possible, which usually means the next day. It was not always so and, even today, a writ of habeas corpus is available in certain circumstances.

In 1627 Charles I imprisoned five Knights in the Tower of London. They sought their release through the issue of a writ of habeas corpus. The King did not release them but sent the writ back saying that they were being held by special command of His Majesty. The court affirmed the King's absolute prerogative and denied the Knights' petition to get out. Parliament responded by forcing the King to sign the *Petition of Right* of 1628 which referred back to Magna Carta and asserted that no person should be subject to arbitrary arrest or imprisonment. The King then accepted the petition and the Knights were released.

Then, during the English Civil War 20 years later, political prisoners were sent to prisons off the mainland beyond the reach of habeas corpus (this sounds ominously like Guantanamo Bay). In 1667, by which time Charles I had had his head cut off, the first Earl of Clarendon was impeached in part for his role in the illegal imprisonment of these political offenders and in 1679 Parliament passed the *Habeas Corpus Act* foreclosing that potential for abuse in England but maybe not in the

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# The independence of the judiciary and a fair trail cont...

USA. In April 1689 William and Mary of Orange were crowned King and Queen after swearing obedience to the laws of parliament and reading the *Bill of Rights* as part of their oaths.

The *Bill of Rights* established strict limits on the Sovereign's legal prerogatives, including a prohibition against arbitrary suspension of parliament's law. It also established the fundamental constitutional principle of parliamentary supremacy and made the executive (in those days the King and Queen and their advisers) fully accountable to parliament and the court – this has often been referred to as the *rule of law*.

In addition, in this *Bill of Rights*, the King, that is the executive, was forbidden from establishing his own courts or acting as judges. That remains the position today, although sometimes you would think that politicians are judges and that judges should do as politicians say. This comes about from a complete failure to understand what our law is, why it is necessary and where it came from.

If we move forward to today and consider the people being held by the United States' government at Guantanamo Bay, we can see how the application of habeas corpus should apply to those people.

These prisoners have no access to the writ of habeas corpus to determine whether their detention is justified. The military will act as interrogators, prosecution, defense counsel, judges and, when the death penalty is imposed, executioners. Every attempt has been made to exclude the United States' courts. The President, that is the United States version of the executive, has already called them all killers.

The United States' Court of Appeal has recently ruled that, despite the fact that the United States has had exclusive control over Guantanamo Bay for 100 years, the courts have no jurisdiction to examine the legality of the detention of prisoners.[6] The Supreme Court of the United States heard an appeal on the question of whether the lower courts were right to conclude that they had no jurisdiction to entertain habeas corpus applications on 20 April 2004; a decision is expected in June or July.[7]

The difficulty is that the further we get away from the historical basis for these rules, the easier it is for citizens to forget why we have the rules and for government to simply go ahead and do as they please without protest.

## The onus of proof

Finally, to the onus of proof. It is customary for judges to tell all juries:

> The State makes the allegation and therefore the State must prove it. The standard of proof the State must reach is proof beyond reasonable doubt.

There is good reason for this. Apart from anything else, it is almost impossible to prove a negative. The standard of proof is proof beyond reasonable doubt so that, before you can be convicted of a criminal offence, the judge or jury must be satisfied beyond reasonable doubt of your guilt. This originally comes from the idea that it is better for 10 guilty people to go free than for one innocent person to be convicted and punished. Just in that regard, I note from the media that, where a jury verdict is not a verdict the media think was the correct verdict, the media query the jury system. However, when the verdict is the verdict that the media expect, then the jury system is lauded as having worked "on this occasion".

To end, can I quote from the legal writer, Justin Fleming, who said, and he was referring to Magna Carta, but it can be said of all the principles about which I have spoken tonight:

> *A careful study [of all of these principles] reveals a required standard of fairness which modem citizens would expect to reflect an essential attitude of any government. Societies would tolerate nothing less than these unequivocal strictures. They are principles that arise in the human heart today as if they were natural. But they are not natural. They were hard fought for and they were hard won. They were bled from a King by uncompromised extraction. They were demanded by a human wall of courage which had no comfortable precedent that favoured success. What astonishes the modern thinker is that any official in the world in the [21st century] can actually abuse one of these principles without feeling the sordid weight of historic pain bearing down upon him or her.*[8]


## Acknowledgements

I acknowledge the valuable aid of my Research Assistant, Donald Ritchie LLB.


## Footnotes

1. Chief Justice Murray Gleeson. *The Rule of Law and the Constitution.* Boyer Lectures, 24 December 2000
2. US State Department. Human Rights Report 2002.
3. *Bushell's* Case 84 Eng. Rep. 1123; 6 State Trials 999 (CP 1670)
4. *Duncan V Louisiana* (1968) 391 US 145, p156
5. *Kingswell V R* (1985) 159 CLR 301.
6. *Khaled AF & Al Odah et al. V United States of America et al.* United States Court of Appeals for the District of Columbia Circuit, (02-5251, 11 March 2003).
7. *Shafiq Rasul et al. V George W Bush et al.* United States of America Supreme Court (03-334, heard 20 April 2004).
8. Justin Felming. *Barbarism to Verdict*, p 42.

**jottings on the bar**

# Mabo (No 2) to Yorta Yorta - turning the full circle

By Raelene Webb QC*

**Having a national native title practice means living out of a suitcase. Since moving into my new home almost three months ago, I have spent no more than ten nights in Darwin, the longest continuous spell being about five days.**

Over the past few years, whilst appearing as counsel for the Commonwealth, State and Northern Territory governments in various native title matters from first instance through to the High Court, I have lived and worked out of hotel rooms or serviced apartments in places like Perth, Adelaide, Canberra, Broome, Kalgoorlie, Gove and Esperance, in a tent at Roper Bar and have shared a cabin with 6 others at Limmen Bight Fishing Camp.

Living out of a suitcase for most of the year is not fun. But a recompense is that you get paid to travel and are often flown to remote places about which most people only dream. More importantly for me, the law of native title is cutting edge law, always giving rise to new issues and new challenges. A short review of the native title law from *Mabo v Queensland (No 2)*[1] through to the High Court decision in *Members of the Yorta Yorta Community v Victoria*[2] will illustrate my point.

*Mabo (No 2)* was a common law native title claim by the Meriam people to the Murray Islands north of the mainland of Australia. The determination of the High Court on 3 June 1992 was that "the Meriam People are entitled as against the whole world to possession, occupation, use and enjoyment of [most of] the lands of the Murray Islands".[3]

In *Mabo (No. 2)* it was held that some "indigenous owners" (now referred to as "native title holders") hold valuable and recognisable rights and interests (now described generally as "native title").

* Raelene Webb QC is a Barrister at William Forster Chambers.

"The term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants."[4]

The holding of native title by the Meriam people was dependent upon the claimants establishing certain connections with the relevant land and with those original inhabitants who held such native title rights and interests at the time when the Imperial Crown acquired sovereignty over that land. In many other cases, such native title as then existed no longer exists. This is because the necessary connections with the land have been lost or abandoned, or because such rights have been extinguished by activities of the Crown.

The relevant question for the consideration of the High Court in *Mabo (No 2)* was whether rights and interests derived from the system of laws of the original inhabitants survived acquisition of sovereignty: it was held that rights and interests consistent with the common law brought to the Australian colonies on acquisition of sovereignty could survive. Tanistry, a system of succession not based upon primogeniture, was given as an example of a custom found not to be consistent with the common law because it was founded on violence and because vesting of title under the custom was uncertain. What was meant by "rights inconsistent with the common law" later became a focus of submissions in the Croker Island case in the High Court[5].

Inconsistency with rights and interests granted by the Crown post sovereignty forms the basis for extinguishment of native title, either wholly or in part. Two significant decisions of the High Court in the context of the Northern Territory were *Fejo v Northern Territory*[6], which held that a grant of a freehold estate extinguishes native title totally, and *Ward v Western Australia*[7] which held that the grant of Northern Territory pastoral leases extinguishes native title partially.

In *Mabo (No 2)* [8], Brennan J made his seminal "tide of history" statement as to "connection":

> "Of course since European settlement of Australia, many clans or groups of indigenous peoples have been physically separated from their traditional land and have lost their connexion with it. But that is not the universal position. It is clearly not the position with the Meriam people. Where a clan of group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence...
>
> However, when the tide of history has washed away any real acknowledgement of traditional laws and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition."

Justice Brennan went on to consider the gradual dispossession of

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# Mabo (No 2) to Yorta Yorta

Aboriginal peoples to make way for colonial expansion and the possibility of survival of native title on the mainland of Australia[9], concluding in that respect:

> "And there may be other areas of Australia where native title has not been extinguished and where an Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title. Even if there be no such areas, it is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land."[10] (empahsis added)

## *Native Title Act* 1993[11]

*Mabo (No 2)* opened up the possibility of the invalidity of certain acts done after the commencement of the RDA on 31 October 1975. The *NTA* was enacted, in part, to recognise and protect native title by setting up procedures for native title holders to obtain a declaration of their rights[12] for claims for compensation by people whose native title rights have been extinguished. It was also enacted to validate past grants of third party interests, and in certain circumstances their renewal[13] and to set up mechanisms for validly performing activities in the future where such activities might interfere with or extinguish native title[14].

## Wik[15]

In *Wik*, the High Court held, by a 4:3 majority[16], that the grant by the Crown of a pastoral lease under Queensland legislation did not necessarily extinguish all incidents of native title. Whether some incidents of native title are extinguished is to be resolved by a test of inconsistency. Considered strictly on its facts, *Wik* applies only to pastoral leases granted under the *Land Act* 1910 (Qld) and the *Land Act* 1962 (Qld).

Kirby J[17] warned against attempting to express a general rule concerning the legal consequences of the grant of pastoral leases in jurisdictions with different colonial histories, legislation, regulation and practices, particularly where there are express provisions in the grant of the leasehold interest to protect the rights of Aboriginal people.

"Exclusive possession" was the key issue identified for determination by the High Court in *Wik*. In determining the effect of the Crown grants on any native title, the question asked was whether the leases there in question conferred a right of exclusive possession on the lessees sufficient to exclude all others, including any native title holders, from the land.

In *Wik* the majority held that there was no such right of exclusive possession in the circumstances of that case. In doing so, reliance was placed on historical documentation indicating that there was no intention to exclude Aboriginal inhabitants from the land upon the grant of a pastoral lease. The "debate" as to the interpretation of history in *Wik* was discussed in the Appendix to the judgment of Beaumont J in *Anderson v Wilson*[18].

## Post Wik - amendment to the *NTA*

Prior to *Wik*, governments had largely proceeded on basis that native title had been extinguished where a lease had, at any time, been granted, and consequently acts may have been done or grants made in relation to leasehold land which did not comply with the future act regime in the *NTA*.

After *Wik* made clear that native title can co-exist on pastoral lease land, it was realised that such acts and grants, if they affected native title, may have been invalid because of the *NTA*.

The 1998 amendments to the *NTA* provided, amongst other things, for the validation of "intermediate period acts" (1 January 1994 to 23 December 1996) and also confirmed the extinguishing effect of certain other Commonwealth acts on native title. States and Territories were enabled to similarly confirm the extinguishing effect of their acts if they chose to so do.

## Applications for determinations of native title

Since the *NTA* commenced in 1994, there have been relatively few determinations of native title by the Federal Court in cases heard on their merit: that is to say where the respective parties have had to present their complete case, both factual and legal, and had it adjudicated upon. Most those cases have been subject to appeal, and three cases have been considered by the High Court[19]. Certain principles of native title law have been expounded in those cases.

## Croker Island case (*Yarmirr*)

The first decision in relation to any application for a determination of native title was handed down on 6 July 1998 by Justice Olney[20]. This was a native title claim to the seas off Croker Island. Whilst *Mabo (No 2)* was concerned with native title to land, the Croker Island case was about native title to the sea. Issues arose as to whether there could be native title over the sea and if so, of what kind.

Justice Olney J held that there could be native title in respect of the sea but that it did not include exclusive rights. These conclusions have now been upheld by the Full Federal Court[21] and by the High Court of Australia in its decision of 11 October 2001[22]. The majority held that the common law would not recognise exclusive rights and interests of the kind claimed because a fundamental inconsistency between them and the common law public rights of fishing and navigation and the international right of innocent passage.[23] The

# - turning the full circle

Court also declined to interfere with Olney J's findings of fact which were to the effect that the evidence did not support the claimants' contentions that they were entitled under traditional law and custom to exclude anyone and everyone from the claim area.[24]

Some aspects of the decision in *Yarmirr HC* are being revisited in another Northern Territory claim to an area of land and seas in the vicinity of Blue Mud Bay off the coast of Arnhem Land[25]. Here it is being argued by the applicants that traditional rights to close off "djalkiri" areas, either permanently or for specified periods, is capable of recognition at common law.

It was not necessary for the High Court in *Yarmirr* to resolve the difference of approach in the Full Federal Court between the majority[26] on the one hand and Merkel J[27] on the other as to the meaning of "native title" as defined in section 223(1) of the *NTA* and consequently the proper approach to be taken at trial. Whilst these differences were not relevant to the ultimate outcome of the High Court appeal in *Yarmirr* they were relevant to the High Court appeal in the *Yorta Yorta* matter[28].

## Miriuwung Gajerrong case (*Ward*)

The claim here was made by the Miriuwung Gajerrong people. It concerned a large area of land in the East Kimberley region of Western Australia and extended into the Northern Territory. The land included the township of Kununurra, surrounding pastoral stations, as well as the area the subject of the Ord River Irrigation Scheme. The claim area also included the land subject of an Aboriginal owned pastoral lease and the Keep River National Park in the Northern Territory.

Two further groups of Applicants for native title were later joined - one being a group comprising the members of three Miriuwung "estate groups" located in the Keep River area in the Northern Territory; the other, the Balangarra People who claimed native title over Lacrosse Island in the Cambridge Gulf. The Respondents included the Commonwealth, Western Australia and the Northern Territory, and over 100 other parties including mining, pastoral, local government, agricultural and business interests.

The decision of Lee J at first instance in favour of the Miriuwung Gajerrong People was appealed by the State and the Northern Territory (and by the second applicants who claimed native title in the NT part of the claim). The Full Court of the Federal Court by majority (Beaumont and von Doussa JJ) by and large dismissed the appeals of the State and the Northern Territory in relation to native title, but upheld many of their appeals in relation to extinguishment.

The High Court heard four appeals[29] from the decision of the Full Federal Court with some overlapping in the grounds of appeal. Numerous issues were involved, relating to both native title and extinguishment. In general terms *Ward HC* dealt with issues of:

(a) the nature of native title rights and interests, how they should be proven and how they should be described in determinations of native title;

(b) the application and effect of the *NTA* to determinations and the interaction between the *NTA* and the *Racial Discrimination Act 1975* ("*RDA*"); and

(c) the criteria for extinguishment of native title by various acts of the Crown[30].

The High Court delivered its reasons for decision on 8 August 2002. The Court allowed each of the appeals, set aside the main orders originally made by the Full Court, and the whole of the orders and determination made by it on 11 May 2000. The Court remitted the matter to the Full Court for further hearing and determination[31].

The guiding Principles from Ward HC are too numerous to be conveniently summarized here. However the dicta of the High Court on the nature of "connection"[32] is of interest as that issue remains to be argued before the High Court in an appropriate case[33].

The High Court referred to "connection" in the following terms:

(a) Whilst the connection which Aboriginal people have with country is recognised as spiritual, the NTA requires that relationship to be expressed in terms of rights and interests in land and waters[34].

(b) There are two inquiries required by the statutory definition of native title in section 223(1) of the *NTA*[35]:

  (i) in the one case for the rights and interests possessed under traditional laws and customs, requiring the identification of both the traditional laws and customs and the rights and interests possessed under those laws and customs[36]; and

  (ii) in the other, for a connection with land or waters by those laws and customs[37].

(c) Both inquiries require the content of traditional laws and customs to be identified. To that extent the same evidence may well be relied upon when identifying "rights and interests" and "connection"[38]. Nonetheless the distinction between the two inquiries is important, when considering what rights and interests are recognised and protected by the *NTA*.

(d) It is only the rights and interests possessed under the laws and customs which connect people with the land that fall within the statutory definition of native title. Traditional laws and customs are not themselves recognised and protected by the *NTA*; nor are rights and interests possessed under laws and customs not connecting people with land[39].

(e) The indefinite character of an order

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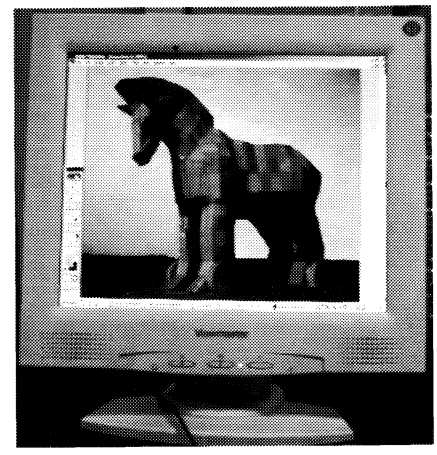
feature

# Unknownuser and the SubSeven Trojan

## *A tale of computer crime.*

By Mark Hunter*



**This story is about a shy computer hacker who lived in Istanbul. He claimed that he could speak English fluently or afford to make overseas telephone calls. In 2000 this man came to be known by the FBI and the Alabama Police Department as "Unknownuser."**

Unknownuser was also a vigilante, determined to identify purveyors of child pornography and provide their details to law enforcement agencies.

On 16 July 2000, officer Kevin Murphy was at the Police Department in Montgomery, Alabama. He found on his office computer an unsolicited e-mail and pornographic image, sent from Turkey by Unknownuser. The message contained the following text:

> I found a child molester on the net. I'm not sure if he is abusing his own child or a child he kidnapped. He is from Montgomery, Alabama. As you can see he is torturing the kid...I know his name, internet account, home address and I can see when he is online. What should I do? Can I send all the pics and info I have...Regards P.S. He is a doctor or paramedic.

How had Unknownuser hacked into the suspect's computer? He uploaded to a child porn newsgroup a pornographic image/file which contained the SubSeven (or "backdoor") program. SubSeven is in computer speak called a Trojan horse ("Trojan"). Trojans are malicious (and often destructive) programs which masquerade as benign applications. For example, during 2001 a hacker focused on some people's morbid curiosity and attached SubSeven to a file which posed as a video of the execution of Timothy McVeigh, the Oklahoma Bomber.[1]

When the user attempted to download the video, SubSeven automatically came in the "back door", silently executing itself. Once installed on a hard drive, trojans such as SubSeven permit unauthorized people like Unknownuser to secretly upload or download images and other files to the infected (and other networked) computers, and collect sensitive information such as passwords. Unlike viruses, Trojans do not replicate themselves but they can be just as destructive.[2]

Officer Murphy realized that the police could be in a bit of a bind, because computer hacking is a crime, and the Fourth Amendment (U.S. Constitution) protects against unreasonable searches and seizures by government officials and private individuals acting as instruments or agents of the government.

When Unknownuser refused Murphy's request for a telephone conversation, the two men continued to exchange e-mails. Murphy requested the suspect's e-mail address, and Unknownuser promptly also provided the suspect's name, address and facsimile number. The FBI then executed a search warrant on the residence of Dr. Bradley Steiger. When they found that his computer was password-encrypted, Murphy asked Unknownuser for the password. Steiger was arrested and charged with child exploitation and possessing child pornography.

By mid-2001 Steiger had been convicted and sentenced to 17 years imprisonment. The FBI had by this time managed to speak with Unknownuser by telephone, but he insisted upon maintaining his anonymity. The FBI thanked him for his assistance, and Unknownuser then divulged that he had used SubSeven to access Steiger's computer. Police reminded Unknownuser that the FBI would be "available" if he wanted to bring "other information" forward.

In December 2001, Murphy received from Unknownuser a series of e-mails attaching 45 files of child pornography "evidence" against William Jarrett, who Unknownuser said lived in Richmond, Virginia. Jarrett was soon arrested and charged.

The FBI again thanked Unknownuser for his continuing assistance, and by e-mail assured him that:

> ...you are not a citizen of the United States and are not bound by our laws...you have not hacked into any computer at the request of the FBI...*you have not acted as an agent for the FBI or other law enforcement agency.* (emphasis added)

Senior District Court judge Richard Williams upheld a challenge by Jarrett to this last contention, and suppressed the files provided by Unknownuser. His Honour's decision, however, was overturned on appeal. In July 2003, the US 4th Circuit Court of Appeals[3] determined

*continued next page...*

* Mark Hunter is a barrister at Darwin Chambers.

feature

# Unknownuser and the SubSeven trojan cont...

that the accused's Fourth Amendment rights had not been infringed by the police, because any agency relationship with Unknownuser did not come into existence until *"...after the fruits of Unknownuser's hacking had been made available to the FBI."*

## Trojan Issues

Computer science is complex. Investigating, prosecuting, defending and trying computer crimes will often be a very challenging task.

Ted Coombs is a computer scientist and forensic software analyst based in California, with 25 years experience in the computer industry. Coombs believes that computer operating systems, and in particular the Windows operating system, are so insecure that it can be impossible to say that one individual has had control of their computer. Coombs explains:

> The number of viruses, worms, spyware, key loggers and other types of computer vulnerabilities is endless. The abilities of these 'malware' programs range from destroying the actual computer hardware to merely making copies of themselves and sending themselves onto the next desktop. Making changes to programs, capturing information such as passwords, or leaving behind files, like child pornography, falls into a mid-range capability.[4]

It is in this scientific context that the Northern Territory Government has seen fit to introduce legislation which shifts the burden of proof for the offence of possessing child pornography. The *Criminal Code Amendment (Child Abuse Material) Bill 2004* was passed by parliament on 14 October 2004. The bill introduces s125B into the Code. Under s125B, "child abuse material" is deemed to be in the possession of a person if at the material time it was in or on premises or a place occupied, managed or controlled by that person. In court, s125B shifts the burden of proof to the defendant, who must prove that he neither knew nor had reason to suspect that, in the case of illegal images, there was such material on his computer.

Section 125B is modeled upon a similar provision in the *Misuse of Drugs Act* (NT). The new section will have a major impact upon child pornography prosecutions in the Territory.

Child pornography legislation is also being hurriedly reformed in other Australian jurisdiction, in conjunction with Operation Auxin – a national police operation targeting child pornography.

The *Crimes Amendment (Child Pornography) Bill 2004* (NSW) does not shift the burden of proof by introducing the concept of deemed possession of child pornography. Furthermore, cl 91H(5) of that bill provides an important defence which is absent from the Territory legislation. The proposed New South Wales legislation provides a defence in respect of the possession of unsolicited child pornography which the defendant has taken reasonable steps "to get rid of" once he or she became aware of its pornographic nature.

The presence of certain Trojan infections, on a networked or isolated computer containing illegal images, may make it impossible to prove that the defendant had knowledge of the illegal images. Opening a file which has been downloaded onto a hard drive will activate Windows "last access" date stamp. But this date stamp may also be updated when a file is moved, scanned for viruses, or even if the computer mouse briefly hovers over a file name.

In 2003, the Crown Prosecution Service (Eng.) discontinued child pornography prosecutions against two men, after the defence conducted forensic software analysis which established the presence of Trojans, including SubSeven, on the hard drives which contained the illegal images.[5]

The type of forensic software analysis undertaken by the defence in the two English cases is expensive. Without such expert analysis, and testimony, an innocent defendant who has been the victim of a Trojan will be unlikely to prove his or her innocence – unless Unknownuser or one of his fellow computer hackers comes forward and admits his guilt. ①

### Endnotes

1 See www.sophos.com/virusinfo/articles/mcveigh.html viewed 22 October 2004.

2 Security and Private Research Center. See glossary at www.cio.com/research/security/edit/glossary.html viewed 22 October 2004.

3 *United States v Jarrett* 2003 WL 21744122 (4th Circuit 2003). Go to http://pacer.ca4.uscourts.gov/opinion.pdf/024953.P.pdf viewed 22 October 2004.

4 See www.science.org/tedc/ (click "Child Pornography"), viewed 22 October 2004.

5 The cases of Julian Green and Karl Schofield received widespread publicity in Europe. For example, see article from Le Monde (24/10/03, English translation) at www.anargratos.com/Privacy/Virusmakesyouguilty.htm viewed 22 October 2004.

## Correction

In the October edition of *Balance* an article, "Tort law regression", by Tony Young was published on page 9.

The article included examples of potential damages under the new personal injuries laws. Two of the examples stated that the potential damages were $1050. These figures should have both been $10,500. ①

# A busy social schedule for the NTWLA

*NTWLA President, Gabrielle Martin*

**I am pleased to report that the dinner at the Hanuman Restaurant was a great success. The Chief Justice spoke revealingly about his life and times growing up in Adelaide and graciously withstood the good-natured heckling from some senior members of the profession.**

The Chief Justice was presented with a print by Jimmy Pike as a gift for giving up his Friday night. The print came from Framed Art Gallery. There were two prizes given on the night. The door prize, a dinner for two at E'voo Restaurant kindly donated by SkyCity, was won by Katherine Oldfield. Kate Hughes won the raffle prize which was a generous $200 travel voucher from Travellers' World. Thanks to both SkyCity and Travellers' World for their kind donations.

*Leigh Martin presents Kate Hughes with first prize in the raffle.*

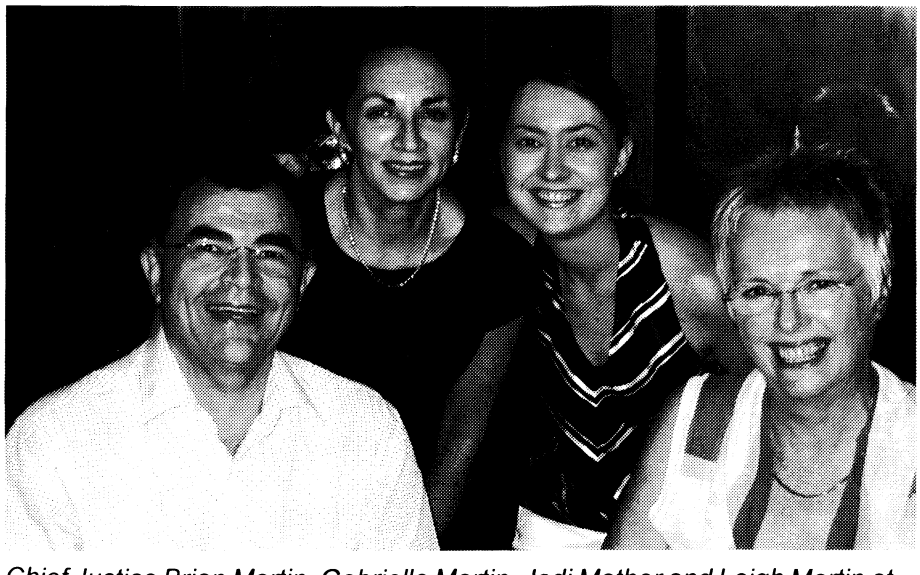
The women lawyers of Alice Springs enjoyed the company of the Hon Justice Murray at dinner at The Lane in Alice Springs on 26 October 2004. Sally Gearin (Barrister from Darwin) and Meredith Dixon (Barrister from Adelaide) also attended. Justice Murray was the second female Judge to be appointed after the late Dame Roma Mitchell.

The next event for the Alice Springs women lawyers is a dinner on Wednesday 1 December, with Magistrate Melanie Little as a guest speaker. Please call Helen Nicholls (Povey Stirk) on 8952 6400 to book your place. More events are planned for next year are planned.

I attended the Australian Women Lawyers (AWL) face-to-face meeting on 6 November 2004. It was an all day meeting and the AGM was held at the end of the day. The new AWL President is Noor Blumer (ACT), Vice President is Jane Knowler (SA), the Treasurer is Marilyn Bartole (NSW) and I am the new Secretary.

The priorities for AWL for the next year were decided by the Board. Priorities which were identified include: a National Equal Opportunity Briefing Policy; child care issues; a national internet directory for Barristers; nationwide gender-based statistics on appearances of barristers study; the issue of an Australian version of "Empowerment and Leadership"; part-time Practising Certificates; Mentoring; Reciprocal Rights; and the AWL Employer of Choice Award. The next AWL face-to-face meeting is planned for May next year in Darwin.

The next NTWLA event is the Christmas party on Tuesday 21 December 2004. Please RSVP Danielle on 8999 6083.



*Chief Justice Brian Martin, Gabrielle Martin, Jodi Mather and Leigh Martin at the NTWLA dinner at the Hanuman in Darwin.*

*Sally Gearin, Justice K A Murray AO and Meredith Dixon at the NTWLA dinner held in Alice Springs.*

# New committees get straight to work cont...

Maynard, Lyn Bennett, Carolyn Walter, Brett Midena, Alistair Shields or Karen Christopher and Barbara Bradshaw.

The committee will consider the Building Licensing Bill, the Construction Contracts Bill and other commercial law initiatives as they arise.

**11. Legal Aid/Pro Bono**

**Chair:** Kate Hughes. **Members:** Tony Whitelum, Sam Salmon, Peter O'Brien, Sally Sievers, Marian Wilson, Caitlin Perry, Kate Halliday and Barbara Bradshaw.

This committee aims to promote and support increased funding for Legal Aid, establish a pro bono system in the Territory and consider ATSILS issues.

**12. Criminal Law**

**Chair:** Glen Dooley. **Members:** Jack Lewis, Jodi Mather, David Lewis and Barbara Bradshaw.

This committee will consider criminal law issues and proposed amendments to the Criminal Code as they arise.

**13. Continuing Legal Education**

**Chair:** Matthew Storey. **Members:** Jo Tomlinson, Allison Robertson, Jodi Mather, Jacqueline Presbury, Meredith Day, Jason Schoolmeester and Barbara Bradshaw.

The committee will:

- Implement formal co-operation with the Young Lawyers and their program;
- Review the current methods of dissemination of information about CLE with a view to increased attendance;
- Assess the long-term provision of a CLE program to Darwin, Katherine and Alice Springs following the outcome of the Society's second application to the Public Purposes Trust;
- Develop a targeted CLE program;
- Implement installation of new equipment; and
- Consider issues relating to mandatory CLE.

The Christmas party season is already upon us, it seems to start earlier and get busier every year. The Law Society is hosting Christmas drinks in Darwin on Thursday 9 December at the Novotel Atrium. So come along and share some Christmas cheer.

In late November Allison Robertson, Barbara Bradshaw and I travelled to Canberra for the last Law Council of Australia meeting for this year. The National Model Laws Project was prominent on the agenda. This meeting was also used to set the strategic plan and direction of the Law Council for the coming year. ①

# Legal teams support Relay for Life

**Congratulations to the teams from the Magistrate's Court, the Department of Justice and Desilva Hebron who participated in the Relay for Life.**

*Desilva Hebron's corporate team in the 2004 Relay for Life.*

The Relay for Life is an 18-hour fun-run/walk which raises money for the Cancer Council NT. This year's Relay was held on 24-25 September at Mindil Beach.

The Cancer Council NT hoped to raise $100,000 from the 52 teams that entered this year's event. The teams exceeded expectations by raising over $124,000.

NT's Relay for Life co-ordinator, Sharon Watson, said: "this year's event has astounded our Relay Committee and the addition of large corporate teams has certainly added to the overall [fundraising] prospective".

The involvement of corporate teams helps to boost the funding capacity of events like the Relay for Life.

The Desilva Hebron team won the award for the Best Tent Site (with an impressive effort which included a spa and water feature) and the Most Fundraising, having contributed over $11,000 towards this year's total.

Congratulations to all those involved in the Relay and all those who donated money to the event.

Desilva Hebron would like to issue a challenge for other legal teams to enter next year.

The Desilva Hebron team are rightly proud of their efforts in this year's Relay and are not-so quietly confident that they will have next year's sewn up as well, so I guess you'll have to be in it to prove them wrong. ①