stronger connection among them than that they each had, on the day at least, a view about how the legal system assists or obstructs the pursuit of the public interest.

Peter Cashman, a solicitor in private practice, acts for plaintiffs in 'public interest' matters, particularly product liability claims. Having noted that mass production will necessarily lead to high levels of consumer litigation, his principal point was that the legal system is not geared to deal with this consequence. Defendants have the capacity to litigate endlessly, and have economic advantages, such as tax deductibility of legal costs, not enjoyed by plaintiffs.

Moving up or along or to another place on the spectrum of lawyers, **Caroline Simpson** is a Sydney Queen's Counsel who challenged us with the thorny question of competing interests. She offered the familiar dilemma of employment of women in lead-based industries, a major issue in the United States recently; the competing interests, each of which alone are in the public interest, are those of equal opportunity in employment, and the right to a safe environment. Caroline Simpson's point was not so much that interests compete, but that it is not always easy (and presumably this is a warning to vociferous advocates for a cause) to identify *the* public interest.

On a different note, but again challenging some implicit assumptions among public interest advocates, Caroline Simpson suggested that despite its advantages, alternative dispute resolution (ADR) can counter the advancement of the public interest. ADR is a private system, with no opportunity for public interest advocates to intervene or to follow the progress and resolution of matters. In my own experience this has been reflected in part in the private nature of conciliating discrimination complaints.

Among Peter Cashman's foes are the lawyers who advise companies. **Don Robertson** is a partner at the Sydney firm of Freehill Hollingdale and Page. He was not, however, on the panel to counter Peter's rage against commercial litigators. Rather, he gave an academic and researched account of how he could see the legal system becoming more accessible. He presumably spoke with some authority when he proceeded on the basis that high litigation costs will not be sufficient to deter companies from using the adversarial system and push them to ADR. His solution is to make the system 'truly user pays', so that the full, real costs of the adversarial process would confront a party. It struck me that this was not a relevant tactic as far as non-commercial litigants at least are concerned, but there does seem to be in it some tacit support for the abolition of the tax-deductibility of legal costs. Don Robertson's further points extended to the need for heightened judicial activism and the need for lawyers to generate a professional commitment to *pro bono* (free?) legal service.

On the heels of the suggested judicial activism came the final speaker, Justice **Margaret Beazley** of the Federal Court. Her contribution focused on the nature of public interest litigation and the capacity of its advocates. I wondered whether Her Honour knew her audience much better than the ex-judge who had spoken at dinner the night before. In presenting the uncontroversial thesis that a public interest issue needs to be acceptable in courts and the broader arena, she strongly intimated that public interest advocates lack professionalism, knowledge of the legal process and knowledge of the law. If true, then her exhortation to PIAC to be more professional might have been an apt conclusion to the conference. I agreed with many who thought it an odd note to go out on.

In all, it was a full, busy and thought-provoking day. It has renewed the need to characterise so much of the work of legal centres and other non-government organisations as being in the public interest, and has maintained the challenging and never-ending quest for the public interest. The papers will be available from the Public Interest Advocacy Centre, P.O. Box C185, Clarence St., Sydney, tel. (02) 299 7833.

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A tax by any other name . . .

LEO TSAKNIS asks whether governments can charge for the provision of services without legislation.

Scant consideration has been given to the ability of governments and statutory authorities, which include government business enterprises established by statute, to charge for services which they provide. Lest it be thought that the reason for this is that the law has long been well settled, the recent decision of the House of Lords in *McCarthy and Stone (Developments) Ltd v London Borough Of Richmond Upon Thames* [1991] 3 WLR 941, which reversed a decision of the Court of Appeal, shows this not to be the case. The reason for the paucity of judicial consideration probably owes more to the fact that, in the past, government services were provided at little or only nominal cost. However, in recent times there has been a trend towards the provision of government services on a 'user-pays' basis with the result that the costs for an increasing number of services are now being passed on to the consumer, and at full cost.

The leading case for over half a century is the English decision of *Attorney-General v Wilts United Dairies, Limited.*[1] Shortly stated, the facts of that case were that following regulations made under the *Defence of the Realm Consolidation Act* 1914, the Food Controller was empowered to make orders regulating, or giving directions with respect to, the production, manufacture, treatment, use, consumption, transport, distribution, supply, sale or purchase of, or other dealing in, or measures to be taken in relation to, any article (including orders providing for the fixing of maximum and minimum prices) where it appeared to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country. On 17 April 1919, the Food Controller issued a press notice stating that he had decided that the maximum price of milk produced in the South-Western counties of Cornwall, Devon, Dorset and Somerset should be 2d. per gallon less than the general prices in England and Wales, and in the industrial area of the West Riding of Yorkshire they should be 2d. per gallon higher, and that these differential prices necessitated special administrative arrangements to ensure that buyers were placed on an equitable footing. To give effect to this, licensed wholesale

dealers would be prohibited from purchasing on and after 1 May 1919, milk exported from the South-Western area except under a special licence to be issued by the Food Controller. In April and May 1919, licences to import milk produced in the four above-mentioned counties into the rest of England and to manufacture milk products within the four counties were granted to the respondents. Each licence was expressed to be subject to the condition that the licensee pay to the Food Controller in the prescribed manner 2d. per imperial gallon of milk purchased by him under the licence. The licensees contended that the Controller had no power under the regulations to levy this charge.

Bailhache J at first instance decided in favour of the Crown, being of the opinion that the payments complained of were a necessary part of the scheme prepared by the Food Controller and were therefore not such a tax as required the authority of Parliament. The Court of Appeal overturned the decision of the trial judge, holding that the imposition of the charge constituted a levying of money for the use of the Crown without grant of Parliament within the meaning of the Bill of Rights of 1688 and that the agreements were consequently invalid. The *ratio decidendi* of *Wilts* was enunciated by Atkin LJ in the following terms:

> In these circumstances if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorised the particular charge. The intention of the legislature is to be inferred from the language used, and a grant of powers may, though not expressed, have to be implied as necessarily arising from the words of the statute; but in view of the historic struggle of the legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, the circumstances would be remarkable indeed which would induce the court to believe that the legislature had sacrificed all the well known checks and precautions, and, not in express words, but merely by implication, had entrusted a minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department.

Atkin LJ further observed:

> It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sum paid, as money had and received to his use.

The House of Lords agreed with the Court of Appeal. It held that notwithstanding the drastic powers given to the Food Controller for the regulation and control of the food supply people were called upon to pay money to the Controller for the exercise of certain privileges. That imposition could only be properly described as a tax, which could not be levied except by direct statutory means. ([1922] 38 TLR 781 at 782).

The decision in *Wilts* was followed by the Supreme Court of Victoria in *Schilling v City of Melbourne* [1928] VLR 302, and by the High Court in *The Commonwealth v The Colonial Combing, Spinning and Weaving Company Limited* (1922) 31 CLR 421. The latter case held that the executive government of the Commonwealth had no power to ratify an agreement between the Commonwealth and the Company whereby the Commonwealth gave consent to a sale of wool tops by the Company in return for a share of the profits of the transaction, nor could it ratify an agreement that the business of manufacturing wool tops should be carried on by the company as agent for the Commonwealth in consideration of the company receiving an annual sum from the Commonwealth or a combination of both these agreements.

Despite Atkin LJ expressing the principle as being that the executive must show that the 'power to levy' or impose a 'charge' arises from the express or implied terms of the legislation, in the *Colonial Combing* case Isaacs J expressed the principle in *Wilts* as being that the imposition of the burden of 'taxation' must be apparent from the legislation (at 462-4). The distinction is not without significance. The proscription on the imposition of a 'charge' without Parliamentary approval may be wider than the proscription on the imposition of a tax. In *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, the High Court recognised that in certain cases a charge may not amount to a tax. The example the court gave was the imposition of a charge for the acquisition or use of property which was unlikely to be properly categorised as a tax notwithstanding that it otherwise exhibited the attributes of a tax.

In *McCarthy and Stone (Developments) Limited v London Borough Of Richmond Upon Thames* the applicant developers challenged a decision by the respondent local planning authority to levy a charge on developers for inquiries relating to speculative development or redevelopment proposals, on the ground that the local authority had no power to do so. The trial judge at first instance held that the local authority had the power to levy a charge in respect of pre-planning meetings and discussions by virtue of s.111(1) of the *Local Government Act* 1972, and he dismissed the application. The Court of Appeal dismissed an appeal by the developers. Section 111(1) of the *Local Government Act* 1972 read as follows:

> (1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal or any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

The House of Lords also cited with apparent approval the observations of Atkin LJ in *Wilts* quoted above, and the following observations of Scrutton LJ in the same case:

> It is conceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the executive, but in my view the clearest words should be required before the courts that such unusual delegation has taken place. As Wilde CJ said in Gosling v Veley 12 QB at p.407: 'The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except under clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it.' [[1991] 3 WLR 941 at 944]

The quoted passage makes it clear that the proscription on the imposition of a pecuniary burden in the absence of legislation is not restricted to the imposition of taxation but applies to the imposition of any fiscal burden, however expressed. As in *Wilts*, the House of Lords held that the power to impose a charge may be given by express words or may arise by neces-

sary implication. Significantly, it went on to say that the words 'by necessary implication' proposed a vigorous test going far beyond the proposition that it would be reasonable or even conducive or incidental to charge for the provision of a service.

In the courts below the Council successfully argued that a distinction should be drawn between functions such as planning, which a council has a duty to provide, with those such as providing a museum, a library or a public park, which it has power to provide. According to this distinction, the Council could not charge for the provision of a function which it had a duty to provide, whereas it could charge for a function which it had merely a power to provide at its discretion. In the course of overturning the decision of the Court of Appeal, this distinction was rejected by the House of Lords. The decision also makes it clear that it is for the person or body seeking to impose the charge to show that it has the right to do so.

The effect of the decision in *McCarthy* is that in the absence of express statutory authority or authority which arises by necessary implication from the statute, a charge cannot be imposed in respect of both a statutory duty or power. The test for drawing such an inference is a 'rigourous test going far beyond the proposition that it would be reasonable or even conducive or incidental to charge for the provision of a service'. Moreover, any moneys paid to the government or a statutory authority in the absence of statutory authority would be recoverable as moneys had and received to its use.

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Reference

1. Bailhache J at first instance [1921] 37 TLR 296; Court of Appeal [1921] 37 TLR 884; House of Lords [1922] 38 TLR 781.

POLICE SHOOTINGS

Charges laid

Victoria's DPP has laid charges against 11 former and serving police officers over the shootings of Graeme Jensen and Gary Abdallah. JUDE McCULLOCH reports.

The charging of eight serving and two former police officers with murder and one other police officer with being an accessory to murder has caused a sensation. The charges and the police officers' appearance in the Supreme Court made front page headlines in Victoria's newspapers three days in succession following the issuing of a media release by Bernard Bongiorno, QC, Victoria's Director Of Public Prosecutions. On the day the officers appeared in court, passers-by at the Supreme Court were in danger of being run down by hordes of camera crews who stampeded up and down the streets bordering the court trying to anticipate the arrival of the charged officers. When the court doors opened at 10.30 a.m., members of the legal profession, friends and family of the men shot by police, police officers, the media and the public competed for seats. Dozens of people were locked out as the public gallery filled to overflowing. As in the Chamberlain inquest lack of space meant that the media sat in the seats usually reserved for a jury. John Winneke, QC, who acted for Lindy Chamberlain, has been retained by the Crown to prosecute the Abdallah case. In a manner similar to the Lindy Chamberlain and Tim Anderson cases, the police shootings and the charging of the officers have provoked a great deal of public discussion and like the Anderson and Chamberlain cases the charging and trial of the officers will go down in legal history. It is likely that, in the wake of the trial, books will be published and films produced.

Unlike the Chamberlain and Anderson cases, where the media had a field day speculating about the guilt of the accused before their trials, it has been made clear by the Director of Public Prosecutions that any breach of the *sub judice* rule that prohibits any comment or publication that has a tendency to prejudice the fair trial of the accused will be prosecuted. The media release that announced the charges also warned media outlets about contempt prosecutions for any breach of the rule. A follow-up media release a few days later directed all media outlets to keep copies of all coverage of the charges and related matters. The Victorian Director of Public Prosecutions has a reputation for being vigilant in relation to *sub judice* and currently has five contempt proceedings pending in relation to breach of the *sub judice* rule in other matters.

Graeme Jensen was shot and killed by the Armed Robbery Squad at a Narre Warren shopping centre on 11 October 1988. Jensen had travelled to the shopping centre to buy a spark plug for a lawn mower. At the shopping centre eight Armed Robbery Squad members confronted Jensen who they claimed they wanted to question over an armed robbery and murder. The coroner heard that two members of the Armed Robbery Squad shot at Jensen seven times and that he was hit three times and died of a bullet wound to the back of the head. The Armed Robbery Squad members claim to have shot Graeme Jensen in self-defence after he produced a firearm and pointed it at them. All eight police officers at the scene of the shooting have been charged with murder. Five of the officers have also been charged with impeding the investigation into Jensen's death. In addition, the Homicide Squad detective whose responsibility it was to investigate the shooting has been charged with being an accessory after the fact to the murder for allegedly conducting the investigation in such a way as to impede the punishment of those responsible.

Thirteen hours after Graeme Jensen's fatal shooting, two Victorian police officers were shot and killed at Walsh Street, South Yarra. Four associates of Graeme Jensen were eventually charged with the murders but found not guilty by a Supreme Court jury.

Gary Abdallah was shot and fatally wounded at his Carlton flat by City West Detective Clifford Lockwood on 9 April 1989. Also present at the scene of the shooting was Lockwood's partner, Dermot Avon. Both officers have been charged with murder. The coroner heard that Abdallah was shot at seven times and hit by up to six bullets. Police claim to have shot Abdallah after he allegedly produced an imitation