DownUnderAllOver
Developments around Australia

FEDERAL DEVELOPMENTS

Inquiry into corporate social responsibility

A federal parliamentary committee has announced it is to conduct an inquiry into corporate social responsibility and how it might be enabled and encouraged in Australia.

The inquiry, to be conducted by the Joint Committee on Corporations and Financial Services, was announced on 23 June 2005 and appears to supersede a referral made earlier this year to the Corporations and Market Advisory Committee with similar, but with more restricted terms of reference.

The inquiry follows calls in the business community for amendments to protect directors from the risk of breaching their statutory duties when making socially responsible decisions. As a result, the inquiry appears to be focused on directors' duties under the *Corporations Act 2001*, although there is scope for the Committee to consider the legal framework more generally.

Companies today have an enormous impact on interests external to their profit-making activities, but corporate governance law still casts them solely as vehicles for the generation of wealth. Increasingly, companies are recognising that they owe responsibilities to the communities and the environment in which they operate, and are responding to pressure to take these into account in their decision-making.

Australian law offers little encouragement for companies to make socially responsible decisions. The duty in s 181 of the *Corporations Act 2001* to act 'in the best interests of the corporation' has traditionally been interpreted so as to require directors to take account only of shareholders' financial interests. A decision which favours the interests of stakeholders other than shareholders can only be authorised if directors are satisfied that the decision advances shareholders' long-term interests, for example by enhancing the company's reputation or by attracting or motivating staff.

The United Kingdom government looks set to amend directors' duties to enable what it calls an 'enlightened shareholder value' approach to decision-making. If the Company Law Reform Bill 2005 (UK) is enacted, as is likely, directors' basic goal will still be the success of the company for the benefit of shareholders, but directors will be required to take into account, so far as reasonably practicable, the company's need to consider a range of interests, including the impact of its operations on the community and the environment.

The novelty of the UK Bill is that it goes beyond merely permitting directors to consider the interests of stakeholders other than shareholders, and imposes an active requirement on directors to consider whether the company needs to take defined stakeholder interests into account. A key agenda issue for the Australian inquiry must be whether it recommends merely amending directors' duties to give protection to boards that make socially responsible decisions, or whether it goes further and prescribes interests that boards must consider in their decision-making.

As well as broadening the scope of directors' duties, Australia could expand companies' disclosure obligations, so investors and ratings agencies can assess their social and environmental performance. Already, ASX listed companies are required to post a corporate code of conduct on their website, outlining the company's view of its responsibilities to a range of stakeholders. However, this is only applicable to ASX listed companies, and is not mandatory but subject to a 'comply or explain' reporting regime. A code of conduct by itself is of limited use without an effective requirement for companies to measure or account for their actual performance against social or environmental standards.

In addition to arming potential investors with better information about companies' social and environmental performance, the Joint Committee might consider recommending better participation by existing shareholders. A good start would be to permit shareholders to place before general meetings resolutions relating to the company's code of conduct or its social and environmental performance without having to meet the 100 shareholder or 5% of votes thresholds in s 259D of the *Corporations Act 2001*.

Full and lively engagement with the inquiry by the not-for-profit and community sector will be crucial if the Committee is to be convinced to go beyond endorsing a merely permissive approach to Australian companies engaging in socially and environmentally responsible conduct.

The closing date for submissions to the inquiry is 15 September 2005. For further information, go to <www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/index.htm>.

SAM URE is a solicitor with Allens Arthur Robinson currently on secondment to the Public Interest Law Clearing House (Vic).

Are the detention centres half empty or half full?

The past few months have seen changes to the government's refugee policy that even a year ago, seemed impossible. All children have been released from detention, and the final refugees on Christmas Island have been granted visas. The

government has also agreed to targets for maximum lengths for detention and oversight by the Commonwealth Ombudsman of asylum cases that exceed two years. But the positive changes, though welcome, rely on the goodwill of the Minister and do not reflect a fundamental policy shift.

While any new layer of scrutiny on the Department is welcome, none of the Ombudsman's recommendations will be binding on the Minister or the Department; if the maximum lengths for detention are overshot, there has to be a report on why, but the problem doesn't have to be remedied and no one has to be freed.

The Federal Court, in *QAAH of 2004 v Minister for Immigration and Multicultural Affairs* (2005) FCAFC 136, recently ruled that instead of a refugee having to continually prove their case when their temporary protection visa expires, the onus is now on the government to prove it is safe for the refugee to return to the country they fled. But with control of the Senate, the Coalition can introduce and pass legislation to overturn this ruling at any time, assuming they do not appeal the decision.

Thankfully, the children are out of detention. But the system that put them there is largely untouched. When the Palmer Report denounced the culture within DIMIA, it overlooked the fact that DIMIA is only as sick as the law it has been charged with enforcing. It is up to the legal community, including volunteer lawyers working through community legal centres and public interest law clearing houses, to help refugees on temporary protection visas try and bridge that gap between law and justice.

The Senate Legal and Constitutional References Committee inquiry into the administration and operation of the Migration Act is due to report on 8 November 2005 (see <www.aph.gov.au/senate/committee/legcon_ctte/Migration/index.htm>. What the Coalition does with that report, which will be brought down after the heat of the Rau and Solon cases has faded, will be the first real test of their change of heart.

DON SINNAMON is a member of the Queensland Democrats.

NICOLE RANDALL is a member of the Refugee Action Collective (Queensland).

NEW SOUTH WALES

Community Legal Centres tell Senate about the crisis in mental health

A Senate Select Committee on Mental Health is currently inquiring in relation to the provision of mental health services in Australia. On 3 August 2005, the Combined Community Legal Centres Group, Welfare Rights Centre, the Public Interest Advocacy Centre and the Homeless Persons' Legal Service NSW gave evidence to the Committee concerning the frequent contact people experiencing mental illness often have with the law, and the punitive nature of many of these interactions.

The evidence given also drew attention to the current lack of access to affordable and supported housing for people experiencing mental illness and to the fact that a combination of lack of housing and specialist mental health services places many people at risk of homelessness or incarceration.

Welfare Rights Centre outlined the specific need that people experiencing mental illness have for stable income support as a way of ensuring they obtain and maintain housing. Welfare Rights Centre submitted that proposed changes to the disability support pension will exclude many people with psychiatric disabilities. They will instead be placed on Newstart allowance and required to meet onerous activity tests.

The Committee also heard evidence that the current under-funding of supported accommodation and public housing leaves people with few housing options, and that boarding houses are often unaffordable and unstable options for people with psychiatric disabilities. The Committee heard that without appropriate support from health services, people with mental illnesses often face difficulties living independently within the community and frequently come into contact with the law in this context. Situations often became legal problems due to a lack of services to support people, leading to the police being called when a person's behaviour causes concern. The Combined Community Legal Centres Group submitted that it cruel for people experiencing the agony of mental illness to be forced into the legal system due to a lack of appropriate support services.

The Committee is scheduled to report 6 October 2005; for further information see <www.aph.gov.au/senate/committee/mentalhealth_ctte/index.htm>.

EMMA GOLLEDGE is Co-ordinator of the Homeless Persons' Legal Service, operated by the Public Interest Advocacy Centre and Public Interest Law Clearing House in Sydney.

Crown Immunity

The April 2005 issue of the *Alternative Law Journal* (pp 93–4) reported on a case involving a claim for Crown immunity by the NSW Governor. The NSW Administrative Decisions Tribunal (ADT) decided the NSW Governor was immune from being summonsed before the ADT regarding her conduct prior to wearing the crown. See *O'Sullivan v Central Sydney Area Health Service (No 2)* [2005] NSWADT 136 at <www.lawlink.nsw.gov.au/adt>. Roll it on to the High Court please. **[PW]**

QUEENSLAND

Re-shuffles and re-starts

Premier Peter Beattie, under pressure on a range of fronts, has recently re-shaped his Cabinet. Among the changes are a shift for Rod Welford from Attorney General and Justice to Education, and the promotion into Cabinet of Linda Lavarch, taking Welford's former portfolio. The new Queensland Attorney General will be able to turn to husband Michael, a former Commonwealth Attorney-General (and current Dean of QUT Law School), for advice on the nature of the portfolio.

In Volume 30(2) April 2005, this column reported on the aftermath of the death in custody of Mulrunji Doomadgee in November 2004. The coronal inquest into his death, referred to in the column, was abandoned in April due to accusations of bias on the part of the coroner. A second inquest before a new coroner commenced on 1 August 2005.

STEVEN WHITE teaches law at Griffith University, Brisbane.

Legal lifeline for people with mental health or intellectual disabilities

The Disability Law Project represents long awaited progress in providing legal help to people with mental illness and people with intellectual disabilities in Queensland's criminal justice system.

Based in Toowoomba, the project started in March 2005 and is coordinated by Dan Toombs. It is a pilot project involving the cooperation of a range of stakeholders from Queensland Police to Queensland Health, Disability Services Queensland, and a number of disability support services in and around Toowoomba.

The project offers a range of services to adults and children with a mental disability or intellectual disabilities, including:

- duty lawyer representation in all pleas of guilty and some summary trials in the Toowoomba Magistrates Court
- representation for children in the Toowoomba Children's Court
- advice and support to people who are victims of crime
- representation of patients currently on a forensic order before the Mental Health Review Tribunal and/or Mental Health Court
- representation and advice to patients at the Toowoomba Acute Mental Health Unit and the Baillie Henderson Hospital.

A high proportion of people charged with a criminal offence have a mental illness or an intellectual disability, and Queensland's legal system is often unable to adequately deal with their needs. The volume of matters before the lower courts each day, and the limited time to hear them, create challenges for lawyers dealing with clients who have disabilities of this nature. It can be difficult to dedicate enough time and resources to clients who are confused, slow to give instructions, and require medical evidence to be placed before the court.

The project, which is due to finish in October 2005, is currently seeking further funding. It is hoped the project will become more than just a one-off service and will develop into a driving force that reforms the way legal help is provided to Queenslanders with mental illness and intellectual disabilities.

For further information Dan Toombs can be contacted by mail:
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SOUTH AUSTRALIA

Keep the bastards honest or let the rat get away?

In South Australia, the Democrats are still trying to 'keep the bastards honest'. In June and July, they joined forces with the Liberal opposition and independent MPs of the Legislative Council and hounded the government over the terms of reference of the promised inquiry into the Ashbourne Clarke affair.

In June, a District Court jury acquitted former government adviser, Mr Randall Ashbourne, of offering the inducement of a board position to maverick Labor MP, Ralph Clarke, in return for his dropping a defamation case against the Attorney General, Michael Atkinson. Mr Ashbourne's defence focused on the lack of substantial evidence against him. Mr Clark himself refused to give evidence at the trial, and the jury took less than an hour to reach a verdict of not guilty.

Prior to the beginning of the trial, the Deputy Premier, Kevin Foley, had promised Parliament an extensive inquiry with the participation of the opposition. The inquiry was supposed to include an examination of the processes leading up to the corruption charges against Randall Ashbourne. Mr Foley promised that the inquiry would have the same powers as given to the Motorola inquiry in 2001. That inquiry led to the resignation of Premier John Olsen after a finding that he had given preferential treatment to telecommunications company Motorola when the then Liberal government had sought to establish a radio network.

Given those powers, the inquiry would have been able to compel both public and parliamentary witnesses to give evidence. However, since the acquittal of Mr Ashbourne, something seems to have gone awry. The government, the opposition and the Democrats have been unable to agree on the terms of reference. The Rann government wants to restrict the terms to an examination of the initial McCann report on the allegations against Mr Ashbourne; essentially this would limit the inquiry to considering the appropriateness of the McCann report. The Liberals, Democrats and independent MPs want the terms expanded to include the issues that led to the initial report, and for the inquiry to be public; this would subject the government to greater scrutiny. The government has reneged on its promised inquiry.

Perhaps still believing it can smell a rat worth pursuing, the Legislative Council has established its own Select Committee Inquiry without the support of the government. The Democrats and independents, however, should perhaps reconsider if this is an issue worth pursuing. Unlike a parliamentary inquiry, a select committee inquiry will not have the power to compel politicians to give evidence — it can only invite them to participate. With its populist stance on a number of judicial decisions, its get tough-on-crime rhetoric, a successful bid for the $6 billion warfare destroyer contract, and the Liberal Party's PR ability looking like a bad sideshow, the government is heading towards the next election with oodles of popularity. The public is more likely to interpret the inquiry as a case of political sour grapes than as an attempt to uncover less than virtuous behaviour by some members of the government.

Is the government trying to keep some of the details of the Ashbourne Clark incident out of the political spotlight? Probably. Does a sufficient number of the electorate really care? Probably not. Whatever the Liberal opposition does with its time between now and the next State election on 18 March 2006, the minor parties should not get bogged down in a time-consuming exercise which, even if successful, is unlikely to make a scrap of difference to the Rann government's popularity. On this occasion, it might be expedient to let the rat get away.

Keeping the bastards honest is important. However, the Democrats are fighting for their political lives and it would be a shame to see them or some of the other independent MPs disappear. Let us hope that they can spend some of their remaining time and effort between now and the March 2006 State election on more fruitful issues than the findings of a Committee that will prove little, and will be cared about even less.

GREGOR DAWSON teaches law at Flinders University.

VICTORIA

Human rights advocate appointed President of Victorian Court of Appeal

Chris Maxwell QC has been appointed to the position of President of the Victorian Court of Appeal following the retirement of Justice Winneke.

Prior to his appointment, Justice Maxwell was a prominent and outspoken human rights advocate. He was President of Liberty Victoria in 2003 and, more recently, had led efforts to establish a specialist statewide human rights legal centre. During 2004, he conducted the wide-ranging review of Victoria's *Occupational Health and Safety Act 1985* (the Maxwell Report), resulting in the *OHS Act 2004* which commenced on 1 July this year.

As a barrister, Justice Maxwell demonstrated a strong commitment to access to justice for marginalised and disadvantaged individuals and groups. He was a Legal Aid Commissioner and his extensive pro bono casework included appearing as Counsel in both the Federal Court and Full Federal Court for 433 asylum-seekers detained on board *MV Tampa*. As an advocate, he argued strongly for the use of international human rights law in the interpretation and application of legislation and the development of the common law. One hopes that this commitment continues on the Bench!

The *Alternative Law Journal* extends its heartiest congratulations to President Maxwell.

PHILIP LYNCH is Coordinator of the PILCH Homeless Persons' Legal Clinic.

Latest on the Gunns SLAPP suit

On 18 July 2005, Justice Bongiorno of the Victorian Supreme Court threw out Gunns' entire 360-page statement of claim against all 20 'greenie' defendants. The amended statement of claim had replaced the original 216-page document.

Gunns' counsel, Stephen Howells (who led the CFMEU defence in the Otways case, where loggers were sued by conservationists for false imprisonment and assault during a protest) and Mark Irving were given leave by the judge to lodge a 'radically altered' version of its claim if the case were to proceed. Justice Bongiorno said Gunns had failed to provide the court with a 'proper, coherent and intelligible statement of its case'. The judge, throughout the 20-page judgment, repeatedly referred to the pleadings in the statement of claim as 'embarrassing' in the legal sense as set out in Supreme Court rule 23.02 and in cases such as *Meckiff v Simpson* [1968] VR 62 at 70, that is '... where the pleading is unintelligible, ambiguous, vague or too general, so as to embarrass the opposite party who does not know what is alleged against him [or her]'.

Gunns' solicitors, EMA Legal, were given until 15 August 2005 to lodge a new statement of claim, which they have duly done. According to Gunns boss John Gay, who was quoted on the ABC, the judgment merely addressed 'procedural matters' and the case would continue. Meanwhile the psychological torment will also continue for the defendants. The costs ruling on this matter is unlikely to make much of an impact on this logging giant — for the 2003–04 financial year Gunns made an after-tax profit of $105 million.

BARRY WHITE is a Melbourne lawyer.

WESTERN AUSTRALIA

The limits of negligence — to whom do marriage counsellors owe a duty of care?

The Western Australian Supreme Court was recently asked to decide whether a medical practitioner, who was retained by a female patient to provide marriage counselling, also owed a duty of care to the patient's husband (*AAA v BBB* [2005] WASC 139 (29 June 2005)). The issue arose when the patient's husband discovered that the practitioner had commenced a sexual relationship with the patient, thereby sealing the breakdown of the couple's marriage. The husband sued the practitioner for financial loss which he allegedly suffered as a result of these events distracting him from his role as managing director of a group of companies, and for emotional distress.

To establish negligence the plaintiff relied on precedents, such as *BT v Oei* [1999] NSWSC 1082, in which medical practitioners were held to owe a duty of care towards third parties who could foreseeably be affected by a patient's condition. But those cases concerned claims by plaintiffs who contracted a communicable disease from a patient, arguing that the practitioner failed to take appropriate steps to protect the plaintiff from the risk of infection. In *AAA v BBB*, Hasluck J struck out the plaintiff's claim, relying on *Sullivan v Moody* (2001) 207 CLR 562. In that case, the High Court regarded it as inconsistent for the law to require people who are in charge of investigating allegations of child sexual abuse to also take reasonable care in protecting the interests of parties that are suspects of this abuse. Following *Sullivan's* principle that a duty of care does not ordinarily arise where it would expose the defendant to irreconcilable obligations, Hasluck J found that the medical practitioner's primary duty to provide his patient with professional advice regarding her marriage may likewise run counter to the interests of her husband, the plaintiff, for example, where the advice required the practitioner to identify the husband as the cause of his patient's problems.

To most torts lawyers, this action may appear to have been doomed and to have rightly failed, even bearing in mind Lord Macmillan's adage in *Donoghue v Stevenson* that 'the categories of negligence are never closed'. To others, this case may confirm that the law has limits in dealing with some of the most challenging affronts people face in their lives, and that the stated facts of a case often only offer but a glimpse into the psyche and motivation of people seeking redress from the courts.

NORMANN WITZLEB teaches law at the University of Western Australia.

At last, maybe, a Commissioner for Children and Young People

On 1 June 2005, the Commissioner for Children and Young People Bill 2005 (WA) was introduced into the Western Australian Parliament. The introduction of the Bill comes in the aftermath of the Gordon Inquiry into the Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities and the State government's subsequent attempts to reform services provided for children.

The Bill provides for the establishment of a statutory office of the Commissioner for Children and Young People. The Commissioner will be appointed by the Governor and will act

independently of the provisions of the *Public Sector Management Act 1994* (WA). However, the Minister responsible may still give general policy directions to the Commissioner. While similar offices have been established in New South Wales and Queensland, the proposed system for Western Australia will allow the Commissioner greater powers, including the power to conduct special inquiries outside the control of the Minister, although it is proposed that there must be some consultation with the Minister prior to the inquiry.

The Commission's primary function will be to monitor and promote the wellbeing of children and to investigate and make recommendations in relation to systemic issues. Involvement in individual complaints will not be part of the Commission's mandate; however the Commission will be in a position to refer individuals to the appropriate agencies. The Commission's role will be to liaise with any government or non-government organisation that provides a service to children, and the Commission will have the power to review any of the policies and procedures of such services.

Debate on the Bill will continue after Parliament reconvenes on 16 August 2005.

JANINE ABBOTT is a Perth lawyer.

'Divorcing Marital Status from Social Security Payments' continued from page 193

or actively engaged in care giving. A person being genuinely supported by a spouse and with no intention of entering the workforce (the current Prime Minister's wife for example) would not meet the Activity Test for a Newstart Allowance.

In addition, the cost of removing the distinction between single and couple rates could be partially offset by cancelling the tax deductible 'dependent spouse rebate'.[54]

Undoubtedly, in some circumstances, people who are generously supported by another will receive a payment under the new scheme.[55] However, not only does the current scheme allow this for gay and lesbian couples and for adult children living with their parents, but it is a small price to pay for introducing a genuinely equal, non-discriminatory and individually assessed system of social security payments; a system where personal poverty can no longer remain hidden.

Finally, taking the antiquated 'member of a couple' provisions out of the *SSA* will make Australia an international leader,[56] and bring our law into step with the 2001 ILO resolutions.

It is beyond the scope of this article to cost this reform, but there is a significant possibility that the net effect will be to reduce government expenditure. Even if the cost is greater there are good policy reasons for moving in this direction.

Before concluding, I note that these issues have considerable implications for people making the decision to parent. The current system places care-givers in the unrealistic, frequently demeaning and conflict generating position of financial dependence on another person. Ultimately, if society wishes to encourage the decision to parent, we must not leave care-givers vulnerable in this way and must provide adequate financial support. A parenting wage needs serious contemplation in addition to the reforms I advocate.[57]

There is no social (or potentially financial) benefit to society in retaining differential rates of social security payment based on marital status. In contrast, the benefits of shifting to an individual assessment are considerable. To return to Alice and Jeremy: under an individual assessment system Alice would continue to receive the higher rate of payment regardless of whether or not she invites Jeremy to live with her. As a result, she is less likely to jeopardise her tenancy. Nor will she be forced into the demeaning position of having to ask Jeremy to financially contribute to herself or her children and, in doing so, reduce his spending on his motorbike or his support to his own children. Removing these pressures may well have a beneficial effect on their relationship.

TAMAR HOPKINS has worked as a solicitor at both the Welfare Rights and Legal Centre (ACT) and the Welfare Rights Unit (Victoria).*

54. Peter Sutherland also suggests that amendments to the tax-free threshold and taper rates in our income tax regime should accompany the proposed SSA reform.

55. The assets test and income received from tax-splitting arrangements may prevent or reduce payments in some of these cases.

56. Welfare systems in the UK, US, Canada and New Zealand currently assess heterosexual couples as a financial unit. For a New Zealand-based perspective see Jessica Wiseman, 'Determining Relationship in the Nature of Marriage: The Impact of Ruka on the Department of Work and Income's Conjugal Status Policy', (2001) 36 *Victoria University of Wellington Law Review* 48.

57. Reform to rid assumptions of financial dependence should also be seriously contemplated in the areas of public and private tenancy law, family law and fatal accident compensation law: see *Grazyna Zurkowska v Llona Matica & Ors* [1986] ACTSC 25; *Compensation to Relatives Act 1897* (NSW) s 4; *Wrongs Act 1958* (Vic) s 19.

*This article is inspired by the clients and staff of these organisations. Its views do not necessarily reflect the policies of these organisations or the National Welfare Rights Network through which they are partially resourced. This article would not have been possible without the assistance of Andrew Hopkins. I would also like to thank Anthony Hopkins, Peter Sutherland, Elizabeth Keogh, Cameron Horn, Peter Horbury, Karen Twigg and my five fantastic, inspiring housemates.