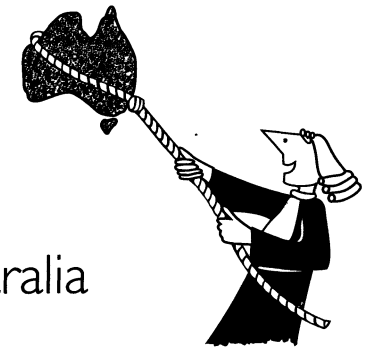

DownUnderAllOver
Developments around Australia

NEW SOUTH WALES

Why should that be so?

A wonderful little case recently bubbled its way through to quick and just judgment in the NSW Court of Appeal, *The Ombudsman v Laughton* [2005] NSWCA 339 (30 September 2005).

Spigelman CJ and Handley and Basten JJA gave separate incisive *ex tempore* decisions dismissing the Ombudsman's appeal with costs, without even hearing from the respondent's barristers.

The conduct in question and the court case concerned such matters as procedural fairness, exclusion of rights to appeal a government decision, unreasonable and incorrect interpretation and application of the law, unfair discrimination and, something fast disappearing, the rights of workers, although the Court of Appeal decision rested on straightforward statutory interpretation.

NSW public servants are entitled to appeal to a body called the Government and Related Employees Appeals Tribunal (GREAT), if they wish to dispute a promotion decision. Selection on merit has applied in NSW for about 30 years, although other 'relevant' factors are undeniably taken into account in deciding who might be the best person for a job.

Our tale begins with a citizen, Robert Laughton, a public servant in one NSW agency applying for a job advertised in the Office of the Ombudsman, as did seven others. A selection committee was convened but rather than take the next step and interview eligible applicants the committee merely decided on the papers who was best for the job and recommended appointment of one of the applicants.

The recommendation was accepted by the Department Head (as defined in the *Public Sector Employment and Management Act 2002*), who happened to be the Ombudsman. Definitions are very important in this case, coming down as it did to statutory interpretation. The recommended applicant was already employed in the Office of the Ombudsman.

Our public servant appealed to GREAT seeking a review of the promotion decision and pointed out, among other things, that even the Ombudsman's own web site showed a right to appeal to GREAT. The Office of the Ombudsman challenged GREAT's jurisdiction. GREAT issued a decision upholding its jurisdiction. The Department Head wanted another go in GREAT but eventually, wisely, lodged an appeal in the Court of Appeal.

Laughton was initially unrepresented. The Ombudsman not only sought to quash the decision by GREAT about jurisdiction, but also sought an order for costs against our intrepid citizen. Laughton also had to lodge his own FOI request on the Office of the Ombudsman to find out who was on the selection committee and to obtain a copy of its report, as well as other records. In a letter to GREAT, an Assistant Ombudsman pointed out it was not competent to hear the appeal and had advice confirming this from 'senior counsel'.

According to the Ombudsman's own *Guidelines to Good Conduct and Administrative Practice* there are some circumstances in which copies of legal advice should be released to the other party. Laughton wrote to the Ombudsman seeking a copy of the advice. The Ombudsman refused.

The Ombudsman's argument was twofold: before lodging an appeal to GREAT Laughton had to seek leave from the Supreme Court to do so, as long as he could show bad faith. Even if Laughton was successful in obtaining leave, the Ombudsman was prevented by the secrecy provisions applying to him from giving any evidence in GREAT or producing any documents to it.

The reader might be wondering by now why the Ombudsman would fight with so much determination against having his own actions open to examination in the interests of transparency and accountability. In his message on page 3 of his 2004 Annual Report, the Ombudsman states 'Accountability is one of the cornerstones of an effective democracy.' I agree.

The Public Service Association (PSA) recognised the implications for its members if the Ombudsman's argument prevailed and wrote to the Director General of the Premier's Department asking it to intervene in the case. Laughton similarly wrote to the Public Employment Office (PEO), as the employer of NSW public servants, including those in the Office of the Ombudsman.

The Premier's Department and the PEO were last seen heading off at great speed in the opposite direction to the Court of Appeal. Why? A decision in favour of the Ombudsman would effectively exclude his Office from any external supervision in employment matters (see paras 10 and 43 of the decision).

The PSA also gave our citizen legal assistance, although most of the legal footwork had already been done by Laughton: first, in GREAT, and then in the preliminary rounds in the Court of Appeal. The final submission prepared by his new solicitors and barristers relied on much of his work, albeit with some additional material about the 'generalia specialibus' rule (when interpreting legislation, a general provision should not derogate from a specific provision addressing the same matter) among other things.

The case came down to recognition of a simple position: the Ombudsman wears two hats — one as Ombudsman, where the provisions of the *Ombudsman Act 1974* apply to him acting

as Ombudsman, and the other as Departmental Head, where different rules apply.

In the Court of Appeal, Spigelman CJ honed in on the essential point of the case and confirmed with the Ombudsman's counsel that matters such as awards, disciplinary action, indeed all employment rights, might be excluded if the Ombudsman's view prevailed.

As alluded to by the title of this item, the Chief Justice pointed out during the hearing that if there was no appeal allowed to GREAT, appointment to positions in the Office of the Ombudsman would, uniquely in the public service, not be subject to challenge, and asked 'why should that be so?' It would also make the Ombudsman different from other Department Heads. No answer could stand up to scrutiny.

How to best sum it up: the old '*Quis custodiet* etc', 'do as I say not as I do' or 'what are they trying to hide' saws do not seem enough. On another front one must wonder why there was such a waste of public money, especially as the Ombudsman in his 2004 Annual Report lamented a 3% budget cut he was to face in 2004–2005.

Meanwhile, this matter is probably still not over. GREAT is now able to hear the substantive promotion decision (ie whether the recommended applicant was the most meritorious appointee), and the NSW Parliamentary Committee on the Office of the Ombudsman may decide to visit some aspects of the Ombudsman's conduct, as might other regulatory agencies.

But what message might other NSW agencies take from this case? Next time someone from the Ombudsman knocks on their door to pursue some matter of public interest is the agency going to be tempted to say 'well we have taken our lead from you', and then cite various legal rules to delay, deter, distract or discomfort the Ombudsman? One hopes not.

PETER WILMSHURST is a law teacher.

NORTHERN TERRITORY

Sentencing, underage sex and Aboriginal traditional law

This issue, commented on in the Journal in DUAO, June 2003 [vol 28, no 3], raised its head yet again recently in *R v GJ* (NTSCC 20418849, 11 August 2005 <http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2005/08/gj_20050811.html>). A 55 year-old Aboriginal man came up for sentencing by the Chief Justice after pleading guilty to two counts of assault on, and unlawful sexual intercourse with, a 14/15 year-old girl who he claimed had been promised to him as a wife when she was four.

Briefly, the facts revealed that the accused and the girl's grandmother, suspecting that the girl had a sexual relationship with a boy, went to the house where the girl and boy had stayed. The grandmother took the girl from the house and the accused struck the girl with some force over her shoulders and back with a boomerang. The girl was taken to the grandmother's house where the accused struck her in the area of her shoulders and arms. The girl did not really know the accused except as 'the old man'. The accused, with the complicity of the girl's grandmother, then forcibly took the girl, who was crying and shaking, from her home to an outstation where he lived. At his house he took the girl by her leg and dragged her to a bedroom and tried to have intercourse with her but desisted after she kicked out and screamed. The next night he went into the bedroom again and asked for sex. At the time he threatened her with a boomerang. He had anal intercourse with the girl who was crying. She was in pain and sustained a deep laceration at the edge of her anus. The child reported the matter to the police and said, 'I told that old man I'm too young for sex, but he didn't listen.'

From the outset the accused claimed that he had acted within his rights under his traditional Aboriginal law in striking the child and having sexual intercourse with her since she was his promised wife. The Crown conceded that the accused believed intercourse with the child was acceptable because she had been promised to him and turned 14 and that, based on his understanding and upbringing in his traditional law, notwithstanding the child's objections, he believed that she was consenting to sexual intercourse. The Chief Justice commented that:

> In these circumstances, while I might have misgivings about your state of mind, I do not have before me proof that the objections by the child made you realise that she was not consenting. At the least, it is a reasonable possibility that your fundamental beliefs, based on your traditional laws, prevailed in your thinking and prevented you from realising that the child was not consenting. In these circumstances I have no choice but to sentence you on that basis. I must sentence you for unlawful sexual intercourse. I am not sentencing you for the crime of rape.

Taking into account the accused's beliefs, his pleas of guilty and his personal circumstances and background, the Chief Justice sentenced him to five months imprisonment for the assault and 19 months consecutive for the unlawful sexual intercourse, a total of two years. However the Chief Justice went on to say:

> Mr GJ, I have a great deal of sympathy for you and the difficulties attached to transition from traditional Aboriginal culture and laws as you understood them to be, to obeying the Northern Territory Law. Under the circumstances, however, I have reached the conclusion that a sentence to the rising of the court would be inadequate. The shortest period I can see fit to impose is that you serve one month.

The maximum penalty for unlawful sexual intercourse with an under age girl is 16 years imprisonment. In this case the aggravating factors, such as the large disparity of age, the premeditation, the anal intercourse, the injury inflicted and the violence and threats arguably put the matter towards the higher end of the scale for this type of offence. In view of this even the base sentence of 19 months seems unduly lenient but had there been no suspension of the major part of the sentence it might not have generated much controversy. The decision prompted a public expression of concern from the Federal Minister of Justice, and a group of prominent Territory women sent an outraged letter of protest to the local press pointing out that the interests and rights of young women seemed to be secondary to those of senior men claiming to act in accordance with their traditional ways. One key question the Chief Justice failed to consider is this: does Aboriginal traditional law really endorse and excuse the perpetration of violent anal intercourse by a 55 year-old man on a 14/15 year-old girl, whether or not she is a promised wife?

There is some justification for the criticism that the courts are attaching more weight to traditional law factors than they are to modern human rights norms designed to protect young girls, norms that are enshrined in UN Conventions to which Australia is a state party. Furthermore the 'slap-on-the-wrist' sentences imposed in this and the 2003 *Pascoe* case (*Pascoe*

v Hales NTSC JA 49 of 2002) hardly send out a message of reassurance to young girls that the law will protect them, nor will they serve to encourage young girls to report this sort of sexual abuse.

It is understood that a prosecution appeal claiming that the overall sentence was inadequate will shortly be heard by the Northern Territory Court of Criminal Appeal.

KEN BROWN is a retired lawyer.

QUEENSLAND

Assessment of Virgin 'flair' not fair

Eight ex-Ansett flight attendants recently had their complaints of age discrimination against Virgin Blue upheld by the Queensland Anti-Discrimination Tribunal (*Hopper & Others v Virgin Blue Airlines Pty Ltd* [2005] QADT 28, 10 October 2005).

The women ranged in age from 36 to 56 at the time their applications for 'cabin crew' positions with Virgin Blue were rejected.

Virgin Blue's recruitment process involved assessment of large groups of applicants, alleged to be like a 'cattle yard'. The assessors looked for behavioural competencies including 'Virgin Flair', defined as 'a desire to create a memorable, positive experience for customers. The ability to have fun, making it fun for the customer'.

Statistics showed that over the relevant period only one person (aged 36) was employed, out of 750 people aged 36 or over who applied.

Member Savage SC concluded that the assessors unconsciously discriminated on the basis of age when selecting employees. He considered that:

> inevitably a danger of employing the behavioural competencies system, especially as it required an assessment of 'Virgin Flair' was to identify with persons of the same age and experience as the assessors, or what the assessors regarded as, if not of the same age, a 'fun' person. That person was I think likely to be a person of the same age, social class and life experience as the assessor. (at para 48(f))

The complainants were awarded costs, and $5,000 was awarded to one complainant for hurt and humiliation. The other complainants' awards, involving an assessment of economic loss, are to be determined.

YASMIN GUNN is a solicitor at Legal Aid Queensland.

SOUTH AUSTRALIA

Equality before the law

South Australia's Premier, Mike Rann, recently called for the State's first Royal Commission in a decade to investigate and report on the pre-trial processes and outcome of the controversial McGee case. The case had aroused public discontent due to the perception that certain members of South Australia's elite were receiving preferential treatment when they broke the law.

In November 2003, well-known Adelaide lawyer, and former police officer, Eugene McGee was the driver of a vehicle involved in a fatal hit and run accident. Initially, McGee was charged with causing death by dangerous driving. However, evidence produced at the trial was insufficient to convict him. Instead, McGee was convicted of a lesser charge, fined $3100 and had his driver's licence suspended.

Outside of the courtroom, suggestions that the police failed to breath-test McGee shortly after the accident aroused public fears that McGee's privileged status allowed him to circumvent the law. Members of the public believed that McGee had an unfair advantage compared with other South Australians, due to his connections with the South Australian police.

This public discontent prompted Mike Rann to call for a Royal Commission, which found that the police had failed to carry out their investigations in an 'appropriate, efficient and expeditious' manner. However, the Commission did not find that the police acted improperly. Nevertheless, due to some matters which came before the Commission, McGee has now been charged with conspiracy to pervert the course of justice.

The Premier's interference attracted criticism from some members of the legal fraternity. The Director of Public Prosecutions accused the Premier of undermining the independence of the legal system and using the case to his own advantage. He suggested the Premier is motivated by increasing his 'political popularity' rather than by the idea that all South Australians, even the very rich and well educated, are equal before the law.

The problem is that, before the Premier's intervention, members of the public felt McGee was being treated differently. It might be thought that most South Australians in similar circumstances would face a more rigorous police investigation. However, according to the DPP, the Premier's attempt to address this issue undermines the system.

The DPP's criticism misses the point that it is important that it be perceived that all South Australians are treated equally before the law regardless of their circumstances. The notion that the Premier will benefit politically because of the role he played in the McGee case is less important than the integrity of the investigation process itself. Isn't protecting the public's faith in the legal system more important than political sparring about popularity?

While it is true that executive interference is unusual and potentially dangerous, the outcome of the McGee case reveals some shoddy work. The Premier has shown that he is willing to respond to the concerns of the public when they arise, and this should be encouraged, especially when the integrity of our legal system is at stake. After all, faith in the justice system will never be secured while the public believes some people receive preferential treatment when they break the law.

HAYLEY JORDAN is an honours student in Legal Studies at Flinders University.

VICTORIA

Review of Code of Forest Practices for Timber Production

The Department of Sustainability and Environment (DSE) has recently advised that it intends to commence a review of the current Code of Forest Practices for Timber Production. The Code covers all aspects of timber production on public and

private land in Victoria, and was recently considered in the Victorian Supreme Court case of *Hastings v Brennan & Anor* [2005] VSC 269 (22 July 2005). That case was run almost single-handedly by Melbourne's own Dave Morris (*McLibel* case defendant), Tony Hastings, who along with other protesters, had been arrested by DSE officers as he attempted to stop clear fell logging in a Dingo Creek coupe bordering the Errinundra National Park. The Dingo Creek area is a National Site of Significance for Rainforest and is habitat for the endangered Powerful and Sooty owls.

Tony unsuccessfully defended himself against the DSE charges in both the Magistrates and County Courts. He then appealed again to the Supreme Court. Justice Harper handed down a landmark ruling that a breach of the Code was a breach of the law, setting a precedent that establishes, once and for all, that the Code has legal status for the conduct of forest operations in Victoria — a fact that the DSE disputed, claiming the document was merely guidance for the carrying out of logging in the state, and thereby justifying its reluctance to impose significant penalties on those logging contractors who transgress the Code. For example, few sanctions have been dished out following the successive EPA audits that have found a multitude of Code breaches by logging contractors all around the state.

DSE has advised that individuals or organisations interested in the Code review can register to provide input into the review at <forestry.code@dse.vic.gov.au>.

ROGER RAMJET is a Melbourne lawyer.

WESTERN AUSTRALIA

The Unrepresented Criminal Appellants Program — a phoenix rising out of the ashes?

In this column in August 2002 [vol 27, no 4], we lamented the demise of the Unrepresented Criminal Appellants Scheme (UCAS) and queried what, if anything, would take its place.

A new program — the Unrepresented Criminal Appellants Program (UCAP) — has recently been initiated to assist the Court of Appeal. UCAP will operate under its own Management Committee as a joint effort of the Court of Appeal Office, the Legal Aid Commission, West Australian law schools and pro bono lawyers in private practice. Under the previous scheme, student participants worked mainly under the guidance of university staff and, effectively, 'briefed' a private lawyer to appear as counsel. UCAP will differ from that scheme by handing conduct of the matter largely to the pro bono lawyer, with students assisting in research and preparation.

Until recently, the number of criminal appellants who had to represent themselves because they had been refused legal aid was significant and increasing. This often resulted in lengthy delays and waste of judicial time. UCAP is intended to operate in conjunction with a greater availability of legal aid. Legal Aid guidelines have now been widened so that:

- if a lawyer certifies the appellant has a reasonable prospect of being granted leave to appeal, aid will be granted for the application for leave;
- if leave is granted by a single judge, aid will be granted for the appeal and the matter assigned in the ordinary way.

The increased availability of legal aid for appeals will hopefully also act as a 'carrot' for pro bono lawyers, who, if successful in presenting a UCAP appellant's application for leave, could reasonably expect a grant of aid to follow for the appeal.

The program is seeking expressions of interest from lawyers in private practice and experienced in criminal law who are willing to undertake at least one pro bono brief per year in the Court of Appeal. The Outline of Program, containing full details of how UCAP is to operate, is available on the Supreme Court website at <www.supremecourt.wa.gov.au>. General enquiries about the program may be directed to the Court of Appeal Office via <courtofappeal.office@justice.wa.gov.au>.

CATIE PARSONS is a Judge's Associate in Perth.

'Rugby and race in New Zealand' continued from page 244

heavy ground: many injured in stirring contest': this could have been lifted straight from either Cowan or the colonial press in 1864. The encounter was described as a battle, but Pakeha victory was inevitable. The Maori, on the other hand, gained admirers by the way they contributed to the contest. Similarly, when the all-conquering 1924-25 All Black 'Invincibles' returned from Britain, the Native Minister, Gordon Coates, heralded the success of the three Maori members of the team in 'assisting' their 'Pakeha brothers to win imperishable fame in far off lands'. In other words, Maori had excelled in partnership with the Pakeha in the highest levels of (Pakeha) achievement, and proudly, together, the two races made the nation stronger.

It must be stressed that the Maori role was seen as a supporting one. An apposite image in a souvenir programme issued for the Battle of Rangiriri centenary in 1963 neatly encapsulated the quintessential myth of New Zealand race relations and rugby's part therein. The cover portrayed a warrior and a soldier fighting each other, juxtaposed by a Pakeha and a Maori playing rugby against one another. Underneath these images a dominant white hand is shaking a brown hand above the words 'Tua kana tanga', which can be translated as 'elder brothership'. The message is clear: the mutual respect gained on the battlefield has led to playing the national sport together, with Pakeha taking the Maori in hand and guiding them as would an elder brother.

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