RECENT DEVELOPMENTS

Alice Mantel*

Grant guarantees free access to the law

Left to right: Philip Chung, Executive Director, AustLII; the Honourable Rob Hulls, Victorian Deputy Premier and Attorney-General; Prof Graham Greenleaf, Co-Director, AustLII; Prof Andrew Mowbray, Co-Director, AustLII; Victoria Marles, Legal Services Commissioner and CEO, Legal Services Board

Free access to the law on-line will be expanded through a major grant to the Australasian Legal Information Institute (AustLII). The Honourable Rob Hulls, Victorian Deputy Premier and Attorney-General, announced the grant of $838,927 to be provided over a three-year period from the Legal Services Board of Victoria to help make Victoria a model jurisdiction for free access to law.

Operated jointly by the University of Technology, Sydney (UTS) and the University of New South Wales (UNSW), AustLII provides free online access to Australian legal materials through more than 270 databases. The service relies on external contributions to fund its operations.

AustLII Co-Director and UNSW academic Professor Graham Greenleaf said the grant would enable AustLII to develop comprehensive and up-to-date databases of Victorian legal materials, including legislation, case law, law reform reports, law journals, and community legal materials. It is hoped the funding will have spillover effects into other Australian and international jurisdictions. 'Victoria is the first Australian jurisdiction to provide a major grant to AustLII to bring its free access legal materials to the highest possible international standards,' Professor Greenleaf said.

AustLII experienced some financial distress in 2007 because for the first time in eight years, AustLII did not obtain major funding from the Australian Research Council. ARC research infrastructure funding (LIEF) supports development of new facilities and enhancements to existing facilities and cannot be expected to be available every year. Although AustLII had considerable funding from non-ARC sources, AustLII embarked on a vigorous and public campaign to obtain funding contributions from the many different sectors that make substantial use of its services, or otherwise benefit from those services, but who had not

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previously been asked to contribute. By the end of the year, over 210 organisations and individuals contributed nearly one million dollars in funding to support AustLII's Australian services.

HREOC to be known as the Australian Human Rights Commission

The Human Rights and Equal Opportunity Commission (HREOC) has changed its name and is now known as the Australian Human Rights Commission.

Its new corporate identity is reproduced below:

The design represents an evolution from the long-standing HREOC logo and includes the positioning statement, 'everyone, everywhere, everyday', which is drawn from the Australian Human Rights Commission's new vision statement, 'Human rights: everyone, everywhere, everyday'.

The new corporate image for the Australian Human Rights Commission is the first step towards ensuring that all Australians are aware that the Commission is an independent national institution with the responsibility to protect and promote human rights in Australia.

The Commission's goals are outlined in its new vision and mission statements which can be found at www.humanrights.gov.au/about/index.html.

The Commission's legal name will remain the Human Rights and Equal Opportunity Commission.

17 September 2008

AUSTRAC releases interpretation of reporting obligations legislation

A new public legal interpretation of certain reporting obligations under anti-money laundering legislation is now available on the AUSTRAC website. The Public Legal Interpretation (PLI) series explains the provisions and obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and the *Financial Transaction Reports Act 1988* (FTR Act).

This latest PLI focuses on the requirements to report suspect transactions and suspicious matters as part of Australia's effort to combat money laundering, the financing of terrorism and other major crime. Reports of suspect transactions are currently required from cash dealers under the FTR Act. Under the AML/CTF Act, all reporting entities will be required to submit suspicious matter reports to AUSTRAC from 12 December 2008.

AUSTRAC's Chief Executive Officer Neil Jensen said 'The PLI series is an important channel through which AUSTRAC provides guidance about some of the more complex legal issues affecting cash dealers and reporting entities. This latest topic is significant as it touches on the current FTR Act reporting requirements, as well as the reporting requirements soon coming into effect under the AML/CTF Act.'

A Bill was recently introduced into Parliament which provides for affected entities which currently report to AUSTRAC as cash dealers under the FTR Act to continue to report in the same way during their transition to the new reporting format. When enacted, the Bill will apply to suspicious matter reports (as well as the upcoming threshold transaction and international funds transfer instruction reports) made after 12 December 2008, until such time as entities are compliant with the AML/CTF reporting requirements, but not later than 11 March 2010. This would assist entities with the transition from their FTR Act reporting obligations to their AML/CTF Act reporting obligations. PLI No. 6 sets out AUSTRAC's views on:

- the obligation to report suspect transactions within the meaning of s 16 of the FTR Act;
- the obligation to report suspicious matters within the meaning of s 41 of the AML/CTF Act; and
- the general prohibition on use of these reports as evidence.

The six PLI publications and an updated list of topics for the 2008 series are available on the AUSTRAC website -www.austrac.gov.au/pli.

1 October 2008

NSW developers now must disclose political donations

The *Local Government and Planning Legislation Amendment (Political Donations) Act* 2008 (NSW) which commenced on 15 September 2008 introduced obligations on local councils to receive and make publicly available the disclosed information and must record how councillors vote on applications.

The new law requires DAs and rezoning applications to be accompanied by a declaration disclosing political donations and certain gifts over $1000. The declaration will need to cover donations made by the applicant, landowners, and any person with a financial interest in the development. The disclosure requirements also apply to individuals or entities lodging submissions in objection or support to DAs and rezoning applications. The disclosure requirements apply to donations made in the two years before the application is made and ends when the application is determined.

The new legislation will require the disclosure by applicants or persons making submissions in respect of relevant planning applications of:

- political donations to a party, elected member, group or candidate of $1000 or more (or smaller donations totalling $1000 or more);
- gifts as defined by the *Election Funding and Disclosures Act 1981*.

If the application or submission made is only to a local council, the disclosure need only be for political donations or gifts made to any local councillor or council employee – not to State government politicians.

Mandatory mediation likely to extend

An inquiry into Alternative Dispute Resolution (ADR) could result in mandatory mediation for an extended number of cases, as the Federal Government moves to curb the rising costs of litigation.

Attorney-General Robert McClelland used the National Mediation Conference to announce that the Government had charged the National Alternate Dispute Resolution Advisory Council (NADRAC) with the task of determining what incentives could be offered to encourage greater use of ADR, as well as what barriers needed to be removed and whether ADR processes should be made mandatory in some cases.

Justice Murray Kellam, chair of NADRAC, said that the inquiry, known as the Civil Procedures Reference will see NADRAC identify strategies for litigants, legal professionals, tribunals and courts, to remove barriers and provide incentives to ensure greater use of appropriate ADR processes.

Although most courts in Australia do have the power to refer matters to mediation, the outcome of NADRAC's inquiry may see such mandatory circumstances extended further. Justice Kellam said NADRAC would also investigate where incentives and changed cost structures could be introduced to encourage greater use of ADR. NADRAC will also be investigating the potential for a greater use of private and community-based services, and how such services can meet appropriate standards.

ADR, and more specifically mediation, is fast garnering attention in Australia as mediators work to establish a national accreditation system, the ethics surrounding the position, and the role of associated professions such as lawyers and psychologists.

23 September 2008

New report into whistleblowing

A third of public servants have observed wrongdoings in their agencies they consider 'very' or 'extremely' serious, but have failed to act upon the situation by reporting it.

The news comes from a report by academics at Griffith University calling for legislative reform around public whistleblowing, as well as a revamp of the operations systems at public agencies used to manage whistleblowers, and the associated support programs.

Launching the study, Special Minister of State John Faulkner said that legislation would be the preferred model for protecting whistleblowers in the future and that the research by Griffith University would provide the framework. Based on interviews with 7500 public servants over three years, the report, *Whistleblowing in the Australian Public Sector,* is the largest study of its kind undertaken in Australia.

Mr Faulkner said that transparency was essential for accountability and that the government was committed to broadening and strengthening public interest disclosure measures through a pro-disclosure system across the Australian Government sector so that proper reporting and investigation systems were put in place.

Such reform could see the removal of criminal penalties for whistleblowers in the public sector – protecting whistleblowers from liability and offering them the ability to claim financial compensation if they suffer reprisals as a result of their disclosure.

About a fifth of those same employees have formally reported a wrongdoing in their organisation with the most likely candidate to do so being female and, surprisingly, not disgruntled by their working situation or driven to report wrongdoings due to perverse personal reasons. Of those who do make a report, 37 per cent don't believe their disclosure was investigated.

23 September 2008

Lessons learned from Cyber Storm II

A detailed report outlining Australia's involvement in the recent international cyber security exercise, Cyber Storm II, has been released by Attorney-General Robert McClelland.

The exercise, led by the United States Department of Homeland Security, allowed the governments and business sectors of Australia, Canada, New Zealand, the United Kingdom and the United States to put their e-security arrangements to the test.

'Cyber Storm II was designed to simulate a significant global incident caused by attacks on critical infrastructure systems via the Internet,' Mr McClelland said. 'The exercise proved Australia's response arrangements to cyber-attack are sound, but just as importantly, demonstrated areas where improvements can be made.'

'The world's increasing dependence on electronic communications creates new opportunities for criminals and terrorists. The lessons learned from exercises such as Cyber Storm II help ensure Australia is well placed to combat these threats."

Australia's involvement in Cyber Storm II included government agencies, state and territory governments and the largest contingent of private sector organisations ever involved in such an exercise.

The Cyber Storm II national cyber security exercise final report can be obtained at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_CyberStormII-September2008.

18 September 2008

Changes ensure same sex parental support for children

Same-sex discrimination will be removed from child support, under proposed amendments to s 60H Family Law Act and implementing a bipartisan recommendation by Labor and Liberal Senators on the Senate Legal and Constitutional Affairs Committee in August.

The amendments form part of the 58 areas of discrimination recommended for removal by HREOC in its landmark *Same-sex: Same Entitlements* report and continue the Rudd Government's implementation of its election commitment to remove same-sex discrimination from a wide range of Commonwealth laws.

'Children who are raised by a same-sex couple currently face financial disadvantage if the couple separates because they cannot access child support," said Mr McClelland. 'The amendments will ensure these children can have their parents recognised and have access to child support in the same way as children of opposite-sex couples who separate. This will help ensure children are protected and are not discriminated against simply because of the structure of their family.'

18 September 2008

Greater consultation on legal harmonisation

The first Standing Committee of Attorneys-General (SCAG) harmonisation conference, t was attended by 40 delegates from a range of fields including the legal profession, law reform bodies, industry, business and academia to consider issues currently before SCAG.

Attending the conference were Commonwealth Attorney-General Robert McClelland and NSW Attorney General John Hatzistergos. 'To be truly competitive on the international stage, Australian Governments need to ensure we have national solutions for national issues.' Mr McClelland said. 'It makes sense that we consult as broadly as possible in developing national solutions to issues that cut across State and Territory borders.'

'This level of direct involvement in the law reform process provides insight into practical realities, allowing us to better direct the process of legal harmonisation,' Mr Hatzistergos said.

The conference is modelled on international approaches to the harmonisation of laws, such as the Uniform Law Conference of Canada. The outcomes of the conference will be reported to SCAG Ministers at their meeting in November.

10 September 2008

Two mothers can be listed on a birth certificate

Birth certificates that carry the names of two mothers will be available for lesbian parents under new NSW laws which came into force as part of a broad package of reforms which give the children of female de facto couples equal rights.

Announcing the changes, NSW Attorney General John Hatzistergos said that the new birth certificates recognised the rights of children of female de facto couples in official documentation.

The new laws only apply to children who are conceived through artificial fertilisation and who are living in domestic situations where their parents are in a lesbian de facto relationship. The laws will be retrospective allowing lesbian mothers to be listed on birth certificates for existing children. Under current law, sperm donors do not have parental presumptions and are not listed on birth certificates. This will not change.

Previously, under the *Status of Children Act 1996*, parental presumptions for artificial fertilisation only applied to heterosexual couples. The new law also brings NSW into line with Western Australia, the ACT and the Northern Territory. New Zealand and Canada also have similar laws. The NSW Government has reformed almost 50 other laws that extend equal rights and obligations to de-facto couples, including updating anti-discrimination laws to address possible discrimination based on a person's domestic status.

Mr Hatzistergos said that the changes will give children greater protections and would also mean that female de facto parents would have a responsibility to protect and provide for their children. In addition children of lesbian couples will now have equal rights to children of heterosexual couples with regard to:

- workers compensation and victim compensation payments where one or both parents are killed or injured;
- inheritance of both of the parents' assets;
- recognition of both parents by school authorities;
- improving access to guardianship orders for elderly parents.

The new laws were recommended by the Law Reform Commission which consulted widely with stakeholders.
17 September 2008

Commonwealth reforms to procurement of legal services

The first wave of reforms to the Commonwealth's procurement of legal services. were implemented on 1 July 2008 by amendments to the Legal Services Directions 2005 (LSDs) by the Attorney-General under s 55ZF of the *Judiciary Act* (Cth)1903.

The reforms seek to further the efficient resolution of disputes as well as greater transparency and competition in the Commonwealth legal services market.

Additional expenditure reporting requirements

In addition to existing obligations in respect to recording, monitoring and publication of expenditure, each FMA agency (Commonwealth departments and prescribed agencies) must now report to the Office of Legal Services Coordination (OLSC) about the agency's legal services expenditure and legal work using a template approved by the OLSC within 60 days after the end of each financial year. This obligation extends to CAC Act bodies (Commonwealth companies and statutory authorities). The template includes a break down of expenditure on internal versus external legal services as well as counsel fees and external professional charges and disbursements. It also requires each agency to provide information on the number and value of briefs to male and female counsel.

Other amendments include an increased focus on:

- making an early assessment of the Commonwealth's prospects of success in legal proceedings and potential liability;
- even in cases where litigation is unavoidable at the outset, monitoring its progress and using appropriate methods to resolve the litigation, including settlement offers, payments into court or ADR;
- clarification where a legal service provider has carried out pro bono work against the Commonwealth;
- ensuring that persons participating in settlement negotiations have the authority to enter into settlement agreements, and
- the appointment of external legal service providers as being able to receive service in proceedings to which the Commonwealth is a party.

NSW introduces it own Model Litigant Policy

On 8 July 2008, the NSW Government introduced its own model litigant policy which applies to all NSW government agencies and largely reflects the Commonwealth equivalent prior to the recent amendments.

The NSW policy operates alongside other existing litigation policies which relate, amongst other things, to inter-agency litigation and the use of ADR. The Premier's *Memorandum 94-25* reaffirms a commitment to use ADR techniques such as conciliation, mediation or arbitration rather than resorting to litigation to reduce the time and expense of resolving disputes. Unlike the federal approach, the NSW policy permits the CEO of each agency to issue guidelines relating to its interpretation and implementation which has the potential to result in differing approaches to litigation management among NSW agencies.

25 August 2008

Like oil and water? - Religion and human rights in Australia

The Race Discrimination Commissioner, Tom Calma, called for as many Australians as possible to become involved in a discussion about the current state of freedom of religion and belief in Australia when he launched the Australian Human Rights Commission's *Freedom of religion and belief in the 21st century* Discussion Paper in Canberra .

'The fundamental human right of freedom of religion and belief is protected by a number of international treaties and declarations,' said Commissioner Calma. 'It encompasses freedom of thought on all matters and the freedom to demonstrate and express our religion and belief individually, with others, in private or in public. The intent of this discussion paper is to examine and report upon the extent to which this right can be enjoyed in Australia today by drawing from practical everyday experiences and observations,' said Mr Calma. 'This is easy for some, while others feel religion and human rights don't mix, like oil and water.'

In calling for submissions from the public, the Commissioner pointed out that the intersection of religion and belief with human rights is illustrated daily in our news headlines.

'The involvement of religious institutions in school curriculums and practices, religious and ethical concerns about scientific research, the status of Muslim communities in society since the events of September 11 2001, the involvement of religion in debates about homosexuality or abortion, and our politicians declaring their faith on the campaign trail – these are just some of the stories that involve us every day at the intersection of religion and belief with human rights,' said Commissioner Calma.

Submissions close on 31 January 2009.

Ombudsman looks at Centrelink's arrangements for banning face-to-face contact with customers

Guidelines on banning customers from entering Centrelink offices because of inappropriate behaviour are the subject of the Commonwealth Ombudsman's investigation recently released report.

Commonwealth Ombudsman, Prof John McMillan said his office had received complaints over a number of years from customers whose face-to-face contact with Centrelink staff had been withdrawn because of their behaviour.

Professor McMillan stated that after discussions with his office and consultation with peak community organisations, Centrelink implemented national guidelines for working with customers with difficult or aggressive behaviour in February 2007.

Under Centrelink's 'alternative servicing arrangements' model, staff can decide to withdraw face-to-face contact with customers where their behaviour poses a threat to the safety of Centrelink staff or other customers. In these circumstances arrangements need to be made for the customer to contact Centrelink in another way. The Ombudsman's report examines the way in which Centrelink has applied this policy.
The Ombudsman made five recommendations to Centrelink for improvement:

- reviewing letter templates to ensure customers are properly notified of their review rights and the review process
- implementing strategies to ensure relevant staff are aware of the review processes required by the guidelines, and providing further training where appropriate

- introducing an appropriate internal monitoring/review mechanism to ensure quality and consistency in the application of alternative service arrangements
- encouraging decision makers to explore the most appropriate alternative servicing arrangement for future contact before deciding to withdraw face-to-face contact
- amending the guidelines to ensure staff record an appropriate level of detail to justify their actions and decisions following an instance of aggressive behaviour.

The two agencies involved—Centrelink and the Department of Human Services—responded positively to the report and agreed with the Ombudsman's recommendations. Details of the actions Centrelink plans to take or already has in progress for each of the recommendations are set out in the report.

Constitutional challenge to NT intervention underway

Lawyers for the Federal Government have told the High Court that the Northern Territory intervention does not breach the Constitution.

The legal challenge has been launched by community elders from Maningrida, which is one of more than 70 towns that have been temporarily taken-over by the Federal Government. Their lawyers argued the takeover was unconstitutional, because the Federal Government had acquired land without offering compensation on 'fair terms'.

But the Federal Government's counsel Henry Burmeister told the court the compulsory five-year leases did not amount to an acquisition, because indigenous landowners retain the right to access the land and conduct ceremonies. He also said the plaintiffs' claims that the intervention could cut off income to traditional owners or allow Aboriginal corporation assets to be seized were nothing more than 'wild assertions'.

Chief counsel Ron Merkel QC told the Court that the abolition of the permit system opened up sacred sites, it undermined native title rights, the takeover was not done on just terms and could threaten the revenue of local Aboriginal corporations.

A successful challenge could impact more than 70 Aboriginal communities.

Indigenous law and justice advisory body to be established

As part of its commitment to Closing the Gap on Indigenous disadvantage, a new national indigenous law and justice advisory body is being established to provide high level indigenous law and justice policy advice to the Australian Government. It is anticipated the advisory body will include representation from non government service providers such as indigenous legal services and family violence support services, key justice sectors, such as police, corrections and the courts, as well as specialists in areas such as law reform, human rights and juvenile justice.

The Government is proposing that the body be appointed from nominations received after a national consultation process. The Government will invite Aboriginal people and Torres Strait Islanders with the relevant expertise and experience to nominate and to participate in consultation sessions, as well inviting written submissions from stakeholders before developing an issues paper for further discussion.

Justice Michael Kirby receives honorary degree

Justice Michael Kirby receiving his Hon Doc from UNSW Chancellor David Gonski

High Court Judge Michael Kirby has urged graduating UNSW law students to work for change in the legal system and think globally in their approach.

Justice Kirby, Australia's longest-serving judge, made the comments during the occasional address at the Law Faculty's graduation ceremony, during which he received the University's highest honour, an honorary Doctorate of Laws (*honoris causa*) for his service to the community.

Justice Kirby urged the graduates to 'scrupulously' maintain, strengthen and safeguard the tradition of the integrity of the legal system, adding that in his entire time on the High Court he had 'never been offered a bribe or an inducement or advantage to decide a case or do some official act in a way contrary to law and justice'.

'That is still true in Australia. It is not true in most countries,' he said.

Attending the ceremony were Justice Kirby's partner of 40 years Johan van Vloten, his 92-year-old father Donald Kirby, Chancellor David Gonski, Vice-Chancellor Fred Hilmer, Dean of the Faculty of Law David Dixon, and the faculty's Foundation Dean Professor Hal Wooten.