[13] See Kingswell v R (1985) 159 CLR 264
[14] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116
[15] *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254
[16] Former Liberal Prime Minister Sir John Gorton who attacked the High Court and the Senate in a lecture at Old Parliament House on 12 November 1997, the former particularly for its finding in *Mabo; Sydney Morning Herald*, 11 November 1997; see also Howard rejects High Court's lawmaker role in *The Australian*, 25 February 1997
[17] See "Judges now picked for their political bias, says Kirby", *Sydney Morning Herald*, 6 January 1998
[18] *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96
[19] *Kruger v Commonwealth* (1997) 146 ALR 126
[20] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273
[21] See Murray Wilcox, "The North American Experience: A Personal Reflection", in Philip Alston (ed), *Towards an Australian Bill of Rights*, Centre for International and Public Law, Human Rights and Equal Opportunity Commission, Canberra 1994, p 189
[22] The Hon Sir Anthony Mason, "A Bill of Rights for Australia", in *Australian Bar Review*, 1988, p 88
[23] This was a central finding of the Australian Rights Project survey conducted by Brian Galligan and Ian McAllister and which is reported in Citizen and Elite Attitudes Towards an Australian Bill of Rights, in Brian Galligan and Charles Sampford (eds), Rethinking Human Rights, The Federation Press, Sydney, 1997, pp 144-153
[24] Sir Anthony Mason, op cit. p 79
[25] This is often expressed another way by means of an oft quoted statement of Sir Harry Gibbs: *"...if society is tolerant and rational, it does not need a Bill of Rights. If it is not, no Bill of Rights will make it so"*. This statement has been condemned as a neat aphorism by the Constitutional Commission and the Senate Standing Committee on Constitutional and Legal Affairs, who considered it insufficient to deny the desirability of a Bill of Rights: see Brian Burdekin, "The Impact of a Bill of Rights on those who Need it Most" in Alston (ed), op cit. pp 148-149
[26] The pride of United States governments in their Bill of Rights has been one of the primary reasons the United States has long resisted becoming party to United Nations human rights instruments even while urging other nations to comply with those instruments: see Brian Burdekin in Alston (ed), op cit. pp 148-149
[27] This was the experience of His Honour Justice Wilcox of the Federal Court during his time as Visiting Fellow at Harvard Law School in 1991 talking to Americans about the Bill of Rights: see Wilcox, op cit., p 191
[28] See the account given by Philip Alston in Alston, op cit. pp 14-16

Costs orders in the NSW District Court

Zac Gabriel, Sydney

The writer recently encountered a problem concerning the application of Part 39A Rule 31 (4) of the District Court Rules in relation to costs on re-hearing of a District Court Arbitration.

A brief summary is as follows:-

1 The plaintiff commenced proceedings following personal injuries arising out of a motor vehicle accident on 1 December 1995.

2 The matter was referred to arbitration and the Arbitrator made an award in the plaintiff's favour for approximately $23,000 plus costs. The component of the award relating to non-economic loss was in the sum of $16,000 representing 25% of a most extreme case. The Arbitrator awarded this following a deduction from 30% having regard to the plaintiff's age, who was at that time 82 years old.

3 Prior to the arbitration, the defendant had made an offer of approximately $9,000 inclusive of costs and did not offer any sum in relation to non-economic loss.

4 The defendant applied for a re-hearing.

5 The plaintiff filed an offer of compromise of $15,000 plus costs.

6 At the re-hearing, the Judge awarded the sum of $2,500 for non-economic loss based on 15% of a most extreme case, after making an unspecified deduction for the plaintiff's age. The total verdict was in the sum of approximately $11,000. The defendant asked for an order for costs on the basis that as a result of the verdict the defendant had substantially improved its position from the arbitrator's award.

7 The Judge ordered that the defendant pay the plaintiff's costs up to and including the arbitration. However, in relation to costs subsequent to the arbitration each party was to pay its own costs. The Judge's reasoning was that based on Part 39A Rule 31 (4) and practice note 14 the defendant had substantially improved its position from the arbitrator's award.

Upon the writer's reading of practice note 14, **the intention of the rule appears to be to impose a burden on the party who makes unnecessary applications for re-hearing.**

The writer has since discussed this problem with other personal injury practitioners and has learned of other judicial interpretations of this rule which have adversely affected plaintiffs by ordering the plaintiff to pay all or some of the defendant's costs from the arbitration or that the plaintiff is not to recover party/party costs in circumstances similar to the facts set out above.

The impact of this is that the plaintiffs are being penalised by what may or may ▶

not be a fair decision made by an arbitrator. Sub-rule 4 appears to only penalise the party who makes an application for a re-hearing. It seems, therefore, that the sub-rule or practice note 14 needs revision or clarification in order to prevent a great injustice.

Surely the rule should only apply to those parties who make applications for re-hearing and who do not do substantially better. A cost burden should not be imposed on a party who has not done substantially better through no fault of their own, for example, where the arbitrator has got it wrong or even when a different interpretation of the evidence is applied by one judicial officer compared with another. ■

Zac Gabriel is a solicitor with Heazlewoods in Sydney. APLA members who have encountered similar problems with the application of the Rules are encouraged to contact Zac on **phone** 02 9869 2222, or **email** heazlew@heazlewoods.com.au

Republicans push for a bill of rights

By ADRIAN ROLLINS, Canberra

A broad cross-section of republicans will work together to urge week's Constitutional Convention to consider a declaration of rights.

And the Prime Minister, Mr John Howard, yesterday increased the chances of Australia having a directly elected head of state when he allowed Liberal MPs attending the convention to vote according to their conscience.

The Australian Republican Movement will join Victoria's Real Republic delegates in arguing for more conventions to be organised to consider "constitutional renovations".

The strategy was revealed as 300 women gathered in Canberra for a two-day Women's Constitutional Convention beginning today.

A Real Republic delegate, the Reverend Tim Costello, said agreement had been reached with the Australian Republican Movement on broadening the deliberations of the 10-day convention to include a working group to discuss the preamble to the Constitution.

Mr Costello said his group had also discussed with other republicans — including Ms Pat O'Shane, of A Just Republic, and a New South Wales delegate, Mr Ted Mack — the possibility of discussing a charter of freedom and responsibility.

A draft Order of Proceedings, issued on 8 January, essentially limited discussion at the convention to a consideration of a head of state and the question of whether and how Australia would become a republic.

But the convention's chairman, Mr Ian Sinclair, yesterday adopted an open position on proceedings, saying it was up to delegates to decide what form the meeting would take and what should be discussed.

"The convention itself will decide its own proceedings. What we have tried to do is to set down a suggested form to give debates on key issues time," Mr Sinclair said.

The Australian Republican Movement's New South Wales convenor, Mr Peter Grogan, confirmed discussions had been held with other republican groups about changing the Constitution's preamble and future non-Parliamentary forums to discuss constitutional change. An ARM official said it was "unlikely we would not support these things".

Mr Grogan said, though such matters could be discussed, his group did not want the convention to be taken "off the rails".

The convention must agree on a model for a republican government, which is to be put to the Australian people in a referendum by the end of 2000.

Mr Howard has attacked the proposal that an Australian president be directly elected, but yesterday he declared that coalition MPs attending the convention would be given the freedom to vote as they saw fit.

The National Party has directed its representatives to argue in support of the monarchy and the retention of the current Constitution.

Opening the Women's Constitutional Convention today, the Minister for the Status of Women, Ms Judi Moylan, an avowed republican, is expected to urge changes to the Constitution.

In her speech to be delivered today Ms Moylan says that, along with many of her colleagues, she believes the time has come for an Australian to be head of state.

The convention organiser, Ms Christina Ryan, said Australian women had concerns with the Constitution and wanted to see an amended preamble or the attachment of a bill of rights, as well as reforms to the electoral system.

— with AAP

www.theage.com.au

The Age will cover the Constitutional Convention live on the Internet from Monday at **www.theage.com.au** Users will be able to e-mail comments to **What the People Say** and vote for a new flag design of their choice.