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HARAKSIN v MURRAYS AUSTRALIA LTD

Disability discrimination judgment

PIAC 30th ANNIVERSARY

Stories from the archive

JUSTICE GAGELER:

PIAC's 'extraordinary diaspora'

Three key principles inform PIAC's work

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Working for a fair, just & democratic society

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Cover: Julie Haraksin, Chris Ronalds SC and PIAC senior solicitor Camilla Pandolfini. Photo: Dominic O'Grady.

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CEO REPORT

Edward Santow, PIAC Chief Executive

This year, the Public Interest Advocacy Centre (PIAC) celebrates its 30th birthday. For 30 years, PIAC staff and board, volunteers, students and pro bono supporters have worked together to pioneer public interest advocacy in Australia. PIAC provides a voice for the vulnerable, improving access to justice, and finding effective solutions to social problems and systemic disadvantage.

There are three key principles at the heart of what PIAC has strived to do over the past 30 years.

First, PIAC looks for disadvantage and unmet legal need. The Homeless Persons' Legal Service (HPLS) is a good example. It is a collaborative venture that brings together 10 law firm members of PILCH NSW and a host of welfare agencies.

HPLS provides free legal assistance to people who are homeless. In the past decade, it has helped about 7000 homeless clients.

This year, PIAC is focusing on the link between homelessness and mental illness, as well as ways to remove the revolving door between prison and being homeless.

The second key principle for PIAC is that we try to see our clients' problems in their broader context. We undertake test cases so that people in a similar position are able to benefit.

A good example is PIAC's work to promote fairness and equality for people with disability. This year, our clients, Graeme Innes and Julia Haraksin, were successful in their respective disability discrimination claims against RailCorp and Murrays Australia Ltd (see pages 4 and 5).

But these were just two of a number of cases in which PIAC has represented clients seeking accessible public transport. In recent years, we have had successful cases dealing with aircraft travel and wheelchair accessible taxis.

The third principle at the core of PIAC's work is that we work with our clients, government, the community and business sectors to develop comprehensive, systemic solutions that address social justice problems at their source.

Through the Indigenous Justice Program, made possible through the funding of law firm Allens, PIAC has been a key player in protecting the rights of Aboriginal and Torres Strait Islander people. A long-running project has been to ensure that the many Aboriginal people, whose wages were withheld in trust accounts, could have that money repaid.

PIAC worked with the NSW Government to establish a repayment scheme, and then built a coalition of law firms to help Aboriginal workers and their descendants access their money. This was a complex process involving a mixture of advice on law reform to establish the scheme, education to ensure that eligible claimants were aware of the scheme, and legal advocacy to allow claimants to navigate through the scheme.

As PIAC looks ahead at its next 30 years, we are acutely aware that much remains to be done to promote social justice for disadvantaged people. An immediate challenge is that the current economic situation has put pressure on funding for PIAC, as well as other community legal centres, just as our clients need our help the most.

In this context, the support we receive from the community, and especially the legal community, is very much appreciated and remains crucial to our ongoing success.

Edward Santow,
PIAC Chief Executive Officer.

Photo: Amanda James

Justice Gageler on PIAC's 'extraordinary diaspora'

The High Court's Hon Justice Stephen Gageler and the NSW Attorney General, the Hon Greg Smith, addressed guests at PIAC's 30th anniversary dinner on 28 February 2013.

Noting it was impossible to name every contributor to PIAC over the past three decades, Justice Gageler nevertheless acknowledged 'the extraordinary extent of the PIAC diaspora'.

'I am not talking here about the people like John Basten and Jeremy Kirk (to name just two of those present) who were always happy to do work that was farmed out to them.

'I am not talking about the friends of PIAC, of which there are many.

'I am talking about the hundreds of people who worked in, or for or with PIAC generally for a period of months or years, generally in their youth: people who in many cases have gone on to have very significant careers in law, in public or community service or in academia or in some cases all three,' Justice Gageler said.

'John Basten reminded me that those old enough to remember the Easybeats may have watched the sad story of Stevie Wright, the group's lead singer, on Australian Story recently.

'Apart from his descent into the netherworld of drug and alcohol addition, Stevie also suffered deep sleep therapy for which Chelmsford Hospital became notorious. PIAC was instrumental in the long running litigious saga that led to the exposure of the horrific regime at Chelmsford.

'Liza Carver, who could not be here tonight, reminded me of the HomeFund litigation in the Federal Court, part of which ended up in the High Court in which thousands of former housing commission tenants faced mortgage interest rates of 17 per cent. Others reminded me of the copper seven IUD litigation.

'This was all pioneering stuff. The issues were difficult. The stakes were high. The public interest was unambiguous.

The Hon Justice Stephen Gageler at PIAC's 30th anniversary dinner. Photo: Chris Gleisener

'There is much that has changed in the legal landscape since PIAC first came onto the scene.

'Some of the space once occupied by public interest organisations is now occupied by litigation funders. But issues of access to justice remain.

'There is a concept in the European law of human rights of which I have just become aware because it has featured in some recent decisions of the Supreme Court of the United Kingdom.

'The concept is that of "equality of arms". I am not sure exactly what it means. That is probably why I find it interesting. I think it is the litigation equivalent of a level playing field. I think it is symbolised in our court rooms by a common Bar table where the legal representatives of the adversaries sit at the same level to present their cases to a Judge.

'None of us are naïve enough to think that the adversary system of justice is the only way, or even the optimal way, or in some cases even an appropriate way of delivering socially optimal outcomes. But if and to the extent that it is an available way of resolving an issue of significance to the public interest then it is in the public interest that the adversaries have equality of arms.

'That, amongst other things, is what PIAC delivers.'

This is an edited version of Justice Gageler's speech to guests at PIAC's 30th anniversary dinner, 28 February 2013.

Murrays case puts all public transport operators on notice

A direct discrimination finding against Murrays Australia Ltd puts all transport operators on notice.

Disability discrimination decision... Julia Haraksin, Chris Ronalds SC, Camilla Pandolfini and Alexis Goodstone talk to media outside the Federal Court.

Delays, breakdowns and overcrowding have a habit of turning a trip on a public bus into a frustrating experience. But people with disability face a far bigger problem when it comes to public transport: often they can't get on the bus in the first place.

Julia Haraksin tried to book a seat on a Murrays Australia Ltd (Murrays) bus between Sydney and Canberra in August 2009. But when she advised the bus company that she uses a wheelchair, Murrays told her they did not have any wheelchair accessible buses and so could not accept her booking.

In a judgment delivered on 14 March 2013, the Federal Court's Justice Nicholas ruled that Murrays had directly discriminated against Ms Haraksin and had breached national Disability Standards.

Justice Nicholas rejected the unjustifiable hardship defence put forward by Murrays.

"There was no evidence before me to suggest that avoidance of the discrimination by the respondent [Murrays] against the applicant on the grounds of her disability would have imposed an unjustifiable hardship upon the respondent. I am therefore satisfied that the acts of direct discrimination that have been proven were unlawful," Justice Nicholas said.

National Disability Transport Standards were introduced in 2002. The standards apply to ferries, buses, coaches, planes, trains, trams and taxis. They are there to ensure that wheelchair users and other people with disability can board a bus or any other form of public transport safely and with dignity, like everyone else.

Public transport operators were given plenty of time to meet these standards, and a staggered introduction was seen as the best way to minimise the costs and inconvenience to operators.

The deal in relation to buses was this: operators had until 2007 to ensure that at least 25% of their public transport services were accessible, and until the end of 2012 to ensure at least 55%. Any newly purchased vehicles to be used on a public transport service had to be accessible. An operator's entire public service fleet has to be accessible by 2022.

Even with such a generous timeframe, operators could also apply to the Australian Human Rights Commission for a temporary exemption from the laws and seek to rely on a defence of unjustifiable hardship in relation to any legal claims.

With this in mind, the fact that Murrays Australia could not accept Ms Haraksin's booking because it had no wheelchair accessible buses was surprising.

The question now is: what happens next? This case was never about personal gain and Ms Haraksin did not ask for compensation. Instead, PIAC, acting on Ms Haraksin's behalf, asked the Court to order Murrays to comply with the transport standards.

The Federal Court decision in Haraksin v Murrays Australia Ltd effectively puts all public transport providers on notice to comply with the standards or risk a finding of unlawful discrimination. Other applicants may also wish to seek financial compensation.

But while the Federal Court decision sets a precedent in relation to public transport operators, it highlights another, unresolved issue.

There remains no independent umpire to monitor operators' compliance with the transport standards. Instead, individuals who are discriminated against on public transport are expected to argue

the case for equitable treatment by lodging a complaint with the Australian Human Rights Commission, and if not resolved by conciliation, proceeding to a court hearing.

In 2009, over a million Australians with a disability reported difficulty using public transport. Clearly, the issue is not an individual one, nor should it be left to individuals to address. This is particularly important, given the role public transport plays in enabling participation in all forms of public life, from employment, to education, to sport and much more.

The Federal Attorney-General's Department is considering a consolidation of Commonwealth anti-discrimination laws. The Government has produced an exposure draft Bill, but recently indicated that there would be a delay in seeking to have it passed. In any event, that bill maintains the current position in relation to standing (who can sue), so that only a person who is an affected party in relation to a discriminatory act, policy or practice can make an application to the courts. This places a heavy burden on individuals to enforce the transport standards through the courts.

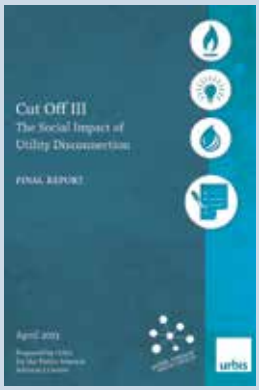
Thankfully, the transport standards are being reviewed by the Department of Infrastructure and Transport. This review, together with the move to consolidate Commonwealth anti-discrimination laws, represents an opportunity for systemic change.

Given that public transport is used by large numbers of people, and the importance of ensuring its accessibility for all, it makes sense that a public body be tasked to monitor and enforce the disability standards, rather than leaving it to courageous individuals like Ms Haraksin.

Let's hope the Government uses these opportunities to improve access for people with disability, so they can get on the bus and experience the normal frustrations of public transport like the rest of us.

New report reveals impact of electricity disconnections

Paid workers are as likely as pensioners and people who are unemployed to be disconnected from electricity or other utilities, new research from PIAC has found.



Forty four per cent (44%) of households disconnected from electricity, gas or water in NSW last year reported their primary source of income as paid employment.

A further forty five per cent (45%) of households cut off from electricity or other utilities cited Centrelink payments as their primary income source.

These findings are included in the PIAC report, *Cut Off III*, available at www.piac.asn.au.

'In 2012, there was a significant increase in respondents who reported that their gas, water or electricity bill was unusually high,' said PIAC senior policy officer, Carolyn Hodge.

'Although most respondents owed between $300 and $1,000 prior to disconnection, almost one in four households owed more than $1,000 when they were disconnected. These debt levels are significantly higher than they were four years ago,' Ms Hodge said.

More than a quarter of disconnected households (26%) were disconnected more than once during the year, and many respondents were unable to pay energy and water bills because they had to meet medical expenses.

'Forty-five per cent (45%) of disconnected households included a person with a health condition, some of whom rely on electrical equipment such as wheelchairs,' Ms Hodge said.

Embarrassment was the largest barrier to people seeking help to pay utility bills.

'Many people are unaware they can ask for energy and water vouchers or payment assistance to help pay their bills,' Ms Hodge said.

Cut Off III is PIAC's third report into the social impact of electricity, gas and water disconnections. Previous reports were issued in 2005 and 2009.

Cut Off III is based on interviews with consumers and a survey of 171 households, conducted during October and November 2012.

Key recommendations include:

- Retailers should train all contact staff on the impacts of financial and social hardship.
- Retailers should train all contact staff on developing payment plans for customers that are genuinely affordable.
- Retailers should remove late payment fees and waive reconnection fees.
- The NSW Government should create and deliver an information campaign to inform all NSW households about assistance programs. The campaign should target consumers with little awareness of assistance, such as those in the workforce and culturally and linguistically diverse communities.
- The NSW Government should increase funding of emergency assistance programs such as the Energy Accounts Payment Assistance (EAPA) Scheme.
- Retailers should investigate using text messaging and other methods to communicate with their customers, as letters often go unopened.
- Retailers should provide a call back service to minimise customer call costs and wait times.
- Retailers should highlight the availability of interpreter services and provide information on payment plans and assistance in languages other than English.
- Emergency assistance should be made available through channels used by culturally and linguistically diverse community members to access assistance.

Asbestos exposure at Baryulgil mine

Asbestos was commonly used in building and insulation until the early 1970s. It is now known to cause lung cancers such as mesothelioma. The most insidious aspect of this condition is that it usually occurs 15 or 20 years after exposure to asbestos. Asbestos-linked diseases are common amongst workers at asbestos mines.

The James Hardie Group operated an asbestos mine at Baryulgil on the north coast of New South Wales from 1944 to 1976. Aside from a few white managers, Aboriginal Australians comprised the Baryulgil workforce.

There were reports that the Baryugil mine had often been suffused in a cloud of asbestos dust from the mining and crushing operations.

Workers said that often they could not see from one side of the mining site to the other and during the bagging of the crushed asbestos the thick clouds of dust made it impossible for the person shovelling to see the person holding the bag. The mine tailings were also piled near the Square and dust blew over the mine workers' houses. Roads in and around the Square were commonly sealed with the asbestos tailings. There were stories of children rolling in the dust as the tailings were being dumped from the trucks.

After media stories on asbestos-related illnesses at Baryugil, the Standing Committee on Aboriginal Affairs in the Federal House of Representatives conducted an inquiry. The Aboriginal Legal Service requested that PIAC assist by preparing a detailed submission. PIAC engaged an Aboriginal law student, Murray Chapman, and Larry Strange, an expert in occupational health issues. The submission formed a major part of the evidence before the Parliamentary Committee and was relied upon in its Report.

The Committee's report, tabled in Parliament in October 1984, was a mixed bag for the workers of Baryugil Square. Disappointingly, the Committee refused to recommend compensation for the mine workers, although it recognised that there were legal difficulties in them bringing common law claims.

However, the Committee did strongly condemn the failure of the company to protect its workers. It found that while the dangers of asbestos were not known to the general public and many doctors until the early 1960s, James Hardie, as a major international asbestos company, was in a position to know of major overseas studies and reports at a much earlier point.

The Committee also found that the company made greater efforts to reduce the risk of exposure to asbestos in its factories and other operations than at the mine, although mining operations were by their nature potentially far more dangerous. The Committee also heavily criticised the state health and mining officials for failure to adequately guard the welfare of the mine workers. The inspectors apparently gave forewarning of visits to the mine manager, who then cleared up the site.

Recommendations were made for changes in the compensation laws to accommodate the special situation of Aboriginal workers. For example, most marriages of mine workers were according to traditional Aboriginal law and therefore considered to be de facto marriages in 'white' law, which meant the spouses of deceased workers were excluded from seeking compensation. Some of these changes have since occurred as a result of general reforms in the law affecting all de facto relationships.

Baryulgil workers were not able to secure compensation through common law actions. The main problem proved to be the requirement that actions be brought within six years of injury. There is provision in NSW for an extension of one year where a previously unknown material fact comes to light. However, this provision is confused and complex and fails to adequately deal with the problems posed by latent injuries.

Photo: Flickr/beigephotos

HomeFund borrowers left with ballooning debt

HomeFund was a NSW Government sponsored scheme that made home loans to 57,000 low-income borrowers between 1986 and 1993. When the economy slowed and interest rates fell, HomeFund borrowers were left with high fixed-interest loans and ballooning debt.

PIAC worked with financial counsellors, other community legal centres and borrowers to bring the borrowers' plight to public attention. The Government pushed through legislation on Christmas Eve 1993 restructuring HomeFund. This fell short of meeting borrowers' needs and took away borrowers' rights to sue for breaches of consumer protection.

After legal action in the Federal Court and the High Court, a settlement proposal was developed and approved in March 2001. Under the settlement, borrowers who still had loans achieved a reduced interest rate and borrowers who still owed money after the sale of their home had the debt waived.

PIAC's FIRST DIRECTOR Peter Cashman

Prof Peter Cashman (left) with Judge Kevin O'Connor. Photo: Chris Gleisner.

Professor Peter Cashman was PIAC's first director, from 1982 to 1987, and he currently chairs the PIAC board. Peter is also director of the Social Justice Program at the Faculty of Law, University of Sydney.

PIAC's launch on 29 July 1982 was a significant moment in the history of Australian community legal services and public interest advocacy.

The Law Foundation, established a decade earlier, had been concerned for some time about the restricted access to the law, particularly for disadvantaged people.

Similarly, community legal centres found that their capacity to take on test cases and run campaigns was limited by their need to provide desperately needed legal services to local residents in areas such as family law and debt.

The Legal Aid Commission, which was the main source of legal assistance in NSW, also recognised that its focus had been on core legal service delivery rather than on test cases, and that this left a significant gap in legal services.

The director of the Law Foundation, Terry Purcell, and the Law Foundation's senior research officer, Peter Cashman, had seen a range of public interest groups operating very successfully in North America and they suggested that a public interest organisation be established in Australia.

The Hon Justice Stephen Gageler, who was a guest speaker at PIAC's 30th anniversary dinner in February 2013, had this to say about Peter's impact on PIAC:

'Arch-Duke Cosimo de Medici – Cosimo il Vecchio, Cosimo the Elder – founder of the Medici dynasty, ruler of Florence in the Italian Renaissance, lived to a grand old age. It is said that, in his later years, as he paused to look back on his illustrious career, he expressed just one regret. His regret was that he had not been there "in the beginning". If he had been there been there "in the beginning", he could have given the Almighty some tips for the improvement of creation.

'Peter Cashman – Peter il Vecchio, Peter the Elder as he prefers to be called – was there "in the beginning": 30 years ago. He is not yet old. He is not prone to looking back. But if he does ever pause to look back on the organisation he helped to create, there is not much, I suspect, he would want to change.'

The Hon Elizabeth Evatt PIAC board, 2000 - 2008

The Hon Elizabeth Evatt AC joined the PIAC board on 26 October 2000 and served for eight years. Ms Evatt chaired the PIAC board from 2000 to 2004. She retired from the board in October 2008.

Ms Evatt was the first Chief Judge of the Family Court of Australia, the first female judge of an Australian federal court, and the first Australian to be elected to the United Nations Human Rights Committee.

From 1984 to 1992, Ms Evatt was a member of the United Nations Committee on the Elimination of Discrimination Against Women, and she chaired that Committee from 1989 to 1991.

From 1993 to 2000, Ms Evatt was a member of the UN Human Rights Committee, and she was a Judge of the World Bank Administrative Tribunal from 1998 to 2006. In 2003, she became a Commissioner of the International Commission of Jurists.

Ms Evatt was made an Officer of the Order of Australia in 1982, in recognition of services to the law, and was granted the status of Companion of the Order of Australia, Australia's highest civil honour, in 1995. The latter citation was awarded 'in recognition of service to the law, social justice and to the promotion of human rights worldwide, particularly in the areas of equal opportunity and anti-discrimination legislation and practice.'

During her time as PIAC Chair, Ms Evatt led PIAC's call for a Stolen Generations Tribunal to address injustice arising from the forced removal of Aboriginal and Torres Strait Islander children from their parents.

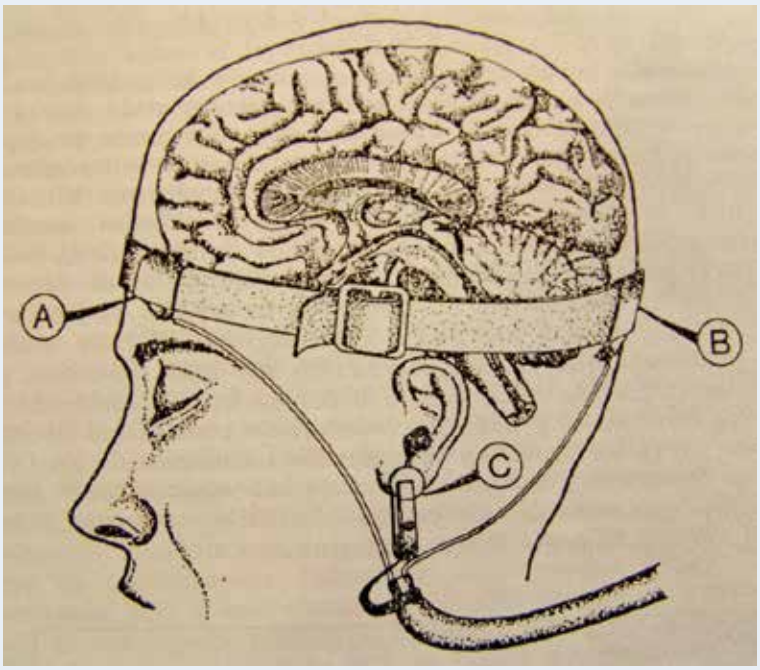
The proposal for a Stolen Generations Tribunal was a joint project initiated by PIAC, the National Sorry Day Committee, the then Aboriginal and Torres Strait Islander Commission (ATSIC) and stolen generations groups.

Chelmsford's deep sleep tragedy

During the 1960s and 1970s, patients at a small Sydney private hospital called Chelmsford were subjected to a treatment known as deep-sleep therapy.

Patients at Chelmsford Hospital were kept in a comatose state for days or weeks by massive doses of barbiturates. They lay naked on beds and were fed through tubes and were sometimes administered convulsive electrical shock treatment while in a coma.

The treatment's major proponent, Dr Harry Bailey, claimed deep-sleep therapy cured depressive illnesses and compulsive behavior such as drug and alcohol addiction.



Other psychiatrists doubted the value of the treatment and were concerned about its risks. Dr Bailey and his small group of colleagues were the only psychiatrists to use deep-sleep therapy with any frequency.

Over a dozen of the patients given deep-sleep therapy at Chelmsford died while in a coma or shortly after their release from the hospital. Other patients at Chelmsford claimed they were inflicted with brain damage and paralysis as a result of the treatment.

That the tragedy of deep-sleep therapy was finally exposed to the public owes much to the persistence of two people who subsequently became clients of PIAC: Barry Hart, a former patient, and Jan Eastgate, president of the Citizens Committee on Human Rights (CCHR), backed by the Church of Scientology.

Mr Hart underwent treatment at Chelmsford in 1973 and was administered shock therapy against his will. In 1974, he spoke to the media of his ordeal. In 1976, he commenced civil proceedings against Dr Bailey and the hospital for assault and false imprisonment, which resulted in a damages award to him of $60,000 in 1980.

In 1980, the CCHR forwarded documents it had obtained from Chelmsford to the television program, 60 Minutes. The story 60 Minutes aired as a result of those documents was a powerful indictment of Dr Bailey and his colleagues and of government inactivity. The authorities were finally stirred to some action, but what followed was a lamentable series of bungles by different parts of the bureaucracy, which ultimately led to the striking out, 11 years later, of misconduct proceedings against the Chelmsford doctors because of this delay.

PIAC represented Mr Hart and Ms Eastgate in these disciplinary proceedings.

Mr Hart and Ms Eastgate had laid misconduct complaints against the Chelmsford doctors under the Medical Practitioners Act in 1980 and 1982.

About that time, several inquests were held into the deaths of patients and a criminal charge of manslaughter was pending against Dr Bailey. The Investigating Committee, which is responsible for dealing with complaints against doctors, decided to stay its hand until the criminal proceedings and inquests were completed.

In 1983, Ms Eastgate and Mr Hart came to PIAC for assistance in getting the Committee to start investigating the complaints.

PIAC wrote to the Committee arguing that it had an immediate duty to protect the public from unfit practitioners and that this task was entirely different from the criminal proceedings and should not await their outcome. The Committee was unmoved and in 1984 PIAC brought mandamus proceedings in the Supreme Court.

After further courtroom skirmishes, the Investigating Committee referred the complaints to the Disciplinary Tribunal, the body which de-registers doctors. After further delays, the de-registration hearing finally came on in June 1986. Dr Bailey had committed suicide in the intervening period.

PIAC solicitor, Mark Buscombe, and counsel, John Basten (now a Justice of the NSW Court of Appeal), represented Mr Hart and Ms Eastgate at the Disciplinary Tribunal hearings.

The Health Department, which had by then laid its own charges, was separately represented. At the opening of the inquiry, counsel for the other doctors involved in the treatment at Chelmsford argued that the disciplinary proceedings had

Illustration: Flickr/laimagendelmundo

taken so long to come on that they were an abuse of process and should be stopped.

The Disciplinary Tribunal rejected the argument that Mr Hart and Ms Eastgate had not diligently pursued their complaints and held that in any event the principle of abuse of process was overridden in disciplinary proceedings by the public interest in protecting further patients from unfit doctors.

The doctors appealed to the Court of Appeal and won. The judges gave predominant weight to the perceived hardship caused to the individual doctors by the long-running investigations and strongly criticised the authorities for the slowness and ineptitude of their inquiries. They also said that Mr Hart's and Ms Eastgate's reliance on the government to act over Chelmsford was no excuse for their own delay in prosecuting their own complaints.

An application for special leave to appeal to the High Court was lost. All disciplinary proceedings in relation to the Chelmsford tragedy were stymied.

The Chelmsford case was the first time a higher court in Australia considered the principle of 'abuse of process' on the ground of delay by the prosecution.

Not surprisingly, the judgment generated controversy amongst lawyers.

The Court of Appeal judgment throws a heavy burden on private citizens to bring complaints. A citizen cannot rely on the fact that a government agency will perform its duty, even though that agency must take individual action at the earliest possible point after the matter of complaint occurs.

If a government agency is dragging its feet, the citizen must force the agency to quicken its pace or prosecute the matter without the agency's help. But it is difficult to think what more Ms Eastgate and Mr Hart could have done to expose Chelmsford.

Arthur Chaskalson: 'lawyers must act fearlessly'

Arthur Chaskalson (pictured with Nelson Mandela), was South Africa's most senior judge for a decade after apartheid's demise. He was President of the Constitutional Court of South Africa and Chief Justice of South Africa. He also represented Nelson Mandela in the infamous Rivonia Trial.

'Chaskalson was a tenacious, creative and hugely effective legal combatant in the anti-apartheid struggle in South Africa,' recalls PIAC chief executive, Ed Santow.

'I've always thought that it's important to have heroes, and Arthur Chaskalson was certainly a real hero of mine. He was also a truly lovely person, interested in young lawyers and contemporary issues, and also very humble.

In June 2000, Justice Chaskalson was the guest of honour at a dinner organised by PIAC's Andrea Durbach and then partner at Freehills, Julian Block. Mr Chaskalson reminded his audience that night of the lessons to be learnt from South Africa's experience of apartheid.

'We are here to demonstrate our support of PIAC and to affirm the importance of its work,' Mr Chaskalson said.

'Lawyers must act fearlessly in the interests of their clients, uphold the cause of justice and be willing to protect fundamental freedoms and human rights. The independence of the profession is tied to these important duties, which can only be performed properly if that independence is protected against interference from government or any other quarter.

'Everywhere the best talents of the legal profession are sought to be drawn into the service of the rich and powerful.

'In most countries it is left to small groups of lawyers such as PIAC, and individuals within the profession, to provide the counterweight by devoting themselves to the problems of poor or marginalised communities. In doing so they serve not only those communities, but the legal profession as a whole. They are the conscience of the profession, they give effect to its ideals and they deserve the active support and encouragement of us all.'

Photo: Getty Images/Robert Botha

The Dalkon Shield: close to 6,000 Australian claims

The Dalkon Shield was a faulty contraceptive, a stingray-shaped intra-uterine device (IUD) sold by the A H Robins Corporation of Virginia.

Robins began marketing the Shield in the early 1970s and sold over two million units worldwide. Over 100,000 Australian women were fitted with the device.

The Shield's greatest problem was that its knotted string tail often resulted in infection. The plastic head of the device also cracked within a few years of insertion, making for more ready penetration of bacteria. The shield was linked to a condition called Pelvic Inflammatory Disease (PID), which is a passing and painful infection often resulting in infertility or requiring a hysterectomy.

Infections generated by the Shield were held responsible for spontaneous abortions and associated septicaemia. The spiky edges of the Shield could also perforate the uterine wall and there were reports of the device migrating to the intestinal and abdominal cavities and causing horrific damage. Some women fitted with Dalkon Shields died of these conditions.

Reports of these injuries began emerging in 1972, not long after the device was first placed on the market.

Documents obtained from Robins show that the company was aware of these problems, but it continued to publicly defend the Shield as a safe contraceptive device.

In 1973, the US Food and Drug Administration began investigating the device and Robins agreed to temporarily suspend its sale in the US.

The FDA Committee reported that there was no conclusive proof of any fault in the device. However, five members of the Committee strongly dissented and called for its removal from the market. The FDA did recommend that the Shield's tail be changed and that a patient register be maintained to allow monitoring

Unknown artist. Recall the Dalkon Shield c.1980. National Gallery of Australia, Canberra. Gift of the Canberra Contemporary Art Space 1993.

of the Shield's performance. Robins saw the decision as a vindication, but elected not to re-market the device in the US because of continuing adverse publicity.

The Dalkon Shield continued to be sold in Australia after its withdrawal from the US market and there were reports of doctors fitting the device as late as 1980, contrary to the advice that even Robins was then giving. The Australian Department of Health knew of the problems reported in the US but it took no action. Family Planning agencies were also aware of the serious doubts about the device's safety but elected to continue fitting it.

Over 15,000 personal injury claims were filed in the US. After some initial wins by complainants, including a judgment in 1975 for $6.5 million, Robins successfully defended actions for a number of years, mainly because the complainants had difficulty proving causation.

PIAC's involvement with the Shield dates from 1983. The Leichhardt Women's Health Service, then fighting an uphill battle to publicise the ill effects of the device, requested PIAC's assistance in giving legal advice.

PIAC staff helped publicise the US litigation and put individual women in contact with US lawyers. In late 1984, the TV program 60 Minutes aired a story about the Shield, and included an interview with Angela Nanson, who had just started work at PIAC.

PIAC was deluged with inquiries from women who had suffered injury and again assisted these women to contact US lawyers.

PIAC also saw its role as publicising the general issues of contraceptive safety.

In January 1985, PIAC organised a seminar on these issues in Sydney, which was attended by over 300 people. Amongst the speakers were US attorneys handling Dalkon Shield litigation and Emmilina Quintillan, a Philippines lawyer who spoke of the third world dumping of unsafe products. The general conclusion of the conference was that the pre-market testing of contraceptives should be much more stringent, and that any potential for risk was unacceptable in products administered to otherwise healthy people.

PIAC's casework took off after Robins filed for bankruptcy under Chapter 11 of the US Bankruptcy Code in 1985, saying that the outstanding Shield litigation could financially swamp the company. Under these provisions, the continued existence of the company was assured by consolidating all present liabilities, including future actions arising out of past conduct of the company, and paying them out of a fund set aside by the company.

Robins' profits were still topping $100 million per year when it filed for bankruptcy. Many victims and their lawyers were outraged by the company's actions and argued that the bankruptcy proceedings were a device to avoid paying as much in damages as the victims deserved.

The US Court set a deadline of 30 April 1986 for foreigners to lodge claims and directed that the company spend $1 million worldwide on advertising that deadline. Both the time and the money were patently inadequate.

PIAC, and in particular Angela Nanson, undertook a heavy schedule of media appearances in an

Robin Banks, chief executive, 2004 - 2010

In June 2004, a former co-ordinator of the NSW Disability Discrimination Legal Centre, Robin Banks, became PIAC chief executive officer and director of the Public Interest Law Clearing House.

Robin led PIAC for the next six years before she was appointed Tasmania's Anti-Discrimination Commissioner.

Homelessness, unlawful detention of young people, human rights, Indigenous justice, disability access, homosexual vilification, mental health, and the impact of rising electricity costs were among the key issues PIAC addressed during these years.

In May 2005, the then NSW Attorney General, the Hon Bob Debus, launched the newest Homeless Persons' Legal Service (HPLS) clinic with PILCH member firm, Baker & McKenzie, and the Salvation Army Streetlevel Mission.

In March 2006, PIAC released *Not Such a Fine Thing*, a report into the impact of fines on homeless and disadvantaged members of the community; and in June that year PIAC secured a three-year funding grant for HPLS from the NSW Public Purpose Fund.

Work with the NSW Government on implementing recommendations made in *Not Such a Fine Thing* resulted in the 2008 announcement by the NSW Government of a pilot program to reform the way in which fines could be paid. This was a very welcome development. The then NSW Attorney General, the Hon John Hatzistergos, announced that people would have a number of options, other than up-front cash payment, to deal with fines. These options included a Work and Development Order (WDO), which would enable a person to work off a fine through voluntary work, undertaking training or participating in treatment.

At the time, Robin commented: 'These reforms will make a very real difference to the experience of homeless people and many others who face disadvantage. For the first time, they can be proactive in responding to a fine, through giving back to the community in the form of voluntary work in the community. We know, through HPLS, that there are homeless people and community organisations who have wanted this option for some time. I expect the Government's reforms to be a very successful change in its approach to fines.'

In 2011, the current Attorney General, the Hon Greg Smith, decided to make the WDO reform permanent.

The unlawful and unnecessary detention of young people in NSW was another issued PIAC tackled during this time.

In 2005, PIAC published Protecting Human Rights in Australia in three community languages: Chinese, Arabic and Vietnamese. Also that year, PIAC conducted Protecting Human Rights train-the-trainer workshops in Perth, Brisbane, Adelaide, Melbourne, and Sydney. These workshops trained hundreds of people, who would in turn train others on human rights.

A decision in *Appleton v State of NSW* was delivered in mid-2005, with PIAC establishing that the NSW Department of Corrections had failed in its duty of care to the mother of a young Aboriginal man who died in custody. The Stolen Wages scheme was also established at this time, and in November 2005, some of PIAC's Stolen Wages applicants received their first payments from the scheme.

PIAC joined with the Australian Centre for Disability Law in mid-2006 to initiate national advocacy on accessible airlines. PIAC client Maurice Corcoran was ultimately successful in his campaign to have airline Virgin Blue (now known as Virgin Australia) change its 'Independent Travel Criteria' so that people with disability were no longer disadvantaged.

The airline access work resulted in the publication, *Flight Closed*, reporting on the experience of people with disability in airline travel. That report was submitted to the review of the Disability Standards for Public Transport and made clear that the light touch regulation in the standards in respect of airlines was insufficient.

endeavour to inform women of the need to file claims before this 'once-and-for-all' deadline. PIAC undertook to file claims on their behalf.

The Legal Aid Commission of NSW provided considerable assistance to PIAC. This enabled PIAC to engage four lawyers and two support staff and to open a sub-office, known affectionately as 'Dalkon House'.

PIAC also decided that its clients needed representation in the US. Peter Cashman and Angela Nanson travelled to the US on two occasions during 1986 to follow up these matters. The trips proved very useful. Mr Cashman and Ms Nanson met with the counsel assisting the bankruptcy court and the presiding judge to express concern about the treatment of foreign claimants. As a result, a lawyer in the counsel's office was assigned to deal with foreign claims.

The trips also confirmed that the continued representation of the claimants would require a huge input of resources. PIAC decided that the interests of its clients would be best met by placing the files with a firm of private solicitors who had the financial resources to carry the litigation during the years until the payout of claims. Slater and Gordon, a large Melbourne personal injury firm, was recommended to PIAC's clients, most of whom agreed to transfer.

Over 1,700 claims were filed before the due date by PIAC, with the Australia-wide figure being close to 6,000, the largest of any foreign country. Much of this can be attributed to PIAC's efforts and the work of Angela Nanson.

NUDE SUNBATHING GIVES CAUSE FOR ALARM

Some of the more amusing moments in our legal system occur when it is called upon to make judgments about community standards and morality. These decisions often owe much to the social background of the particular judge, magistrate or police officer and can appear quaint and out-dated to the community at large.

In 1983, PIAC brought a case that tested the outer limits of the criminal law of offensive behaviour.

PIAC's client, a young woman, had been nude sunbathing at a small, secluded beach in Sydney's eastern suburbs, when she was apprehended by a police officer who was attired in swimming trunks.

The young woman was charged under the *Offences in Public Places Act* with behaving 'in a manner likely to cause reasonable persons justifiably to be seriously alarmed or seriously affronted'. To reach her, or even see her, it was necessary for this intrepid sleuth to clamber over large rocks. The only other people in the area were also nude, and included children, men and women.

Photo: Flickr/stml

A case was stated to the Supreme Court and heard by Justice Yeldham. In a wonderfully understated judgment, his Honour said:

'I do not believe that it was open to find that a female, behaving in a manner which was held not to be indecent, and lying quietly naked in the area in question, there being other naked people in the vicinity, could cause serious alarm to others.'

The decision had significance beyond nude sunbathing in the general treatment of the so-called 'victimless' crimes: where a person has broken a standard of behaviour set down in the law but which causes no other person any harm.

The Labor Opposition, led by Neville Wran, promised to abolish many victimless crimes and specifically to repeal the *Summary Offences Act*. It did so on election in 1976, but in the face of a campaign of scare mongering suggesting that the police would lose control of the streets, the Government reintroduced many of the provisions of the *Summary Offences Act* in the *Offences in Public Places Act*.

Justice Yeldham's decision reinforced the stricter requirements of the new offence and also held that the defendant's views of what is or is not offensive may be relevant to a 'defence' of reasonable mistake.

The police continued to wage their war against the *Offences in Public Places Act* and in February 1984 the Wran Government amended it to replace 'serious alarm' with 'offensive behaviour'. The amendment meant the legislation had almost reverted to the situation that prevailed before Labor's 1976 election.

Romzi Ali: defamed by *The Australian*

A PIAC client, Romzi Ali, was awarded $125,000 in damages after the Supreme Court found that he had been defamed by the publishers of *The Australian* newspaper in 2003.

The Australian newspaper had printed a front-page story and several other news items claiming that Mr Ali had raised money for the terrorist organization, Laskar Jihad. The articles referring to Mr Ali were published less than a year after the Bali bombings in 2002, in which 88 Australians were killed.

In the defamation case against the newspaper in 2005, a jury found the articles suggested Mr Ali was a supporter of terrorism and 'that he has raised money for the operations of Laskar Jihad, an organisation which does not worry about doing killing in pursuit of its political objections'.

In fact, Mr Ali was an upstanding citizen who had worked tirelessly within his community to ease tensions after the Bali bombing in 2002.

Mr Ali had earned considerable respect within his local community. The unsubstantiated allegations in *The Australian* had a profound impact on his life, as many who had previously trusted and respected him now had cause to doubt his motivations.

Mr Ali was the secretary of the Dee Why mosque in Sydney at the time the allegations were printed. He had a strong local media profile as an advocate for peace. He had often been quoted or photographed along with colleagues from other religious organisations including the Anglican Church, advocating for tolerance and understanding.

Not surprisingly, the allegations printed in *The Australian* undermined his standing in the community.

In 2007, Justice Bruce James awarded Mr Ali $125,000 in damages when he found that articles in *The Australian* had damaged Mr Ali's reputation and had left him angry and humiliated. Handing down his judgment in the NSW Supreme Court, Justice James said reading the articles had affected Mr Ali's health and that he was 'frightened, alarmed, shaken and broken'.

Amicus curiae: *Lange v the ABA*

PIAC makes *amicus curiae* submissions in cases that feature a strong public interest issue.

Amicus curiae literally translates as 'friend of the court'.

An *amicus curiae* is not a party to a proceeding but usually has a strong connection to an important issue raised by the case at hand.

An *amicus curiae* brief can be a good way to bring public interest perspectives to the attention of a court, especially where litigation has implications beyond the interests of the parties involved.

The *amicus curiae* is required to seek leave from the presiding judge to make submissions on aspects of a matter that are otherwise unlikely to receive full or adequate treatment by the parties.

In some cases, it may be in the interests of the administration of justice that the Court has the benefit of a larger view of the matter than the parties are able or willing to offer.

However, an *amicus* has no right to file pleadings, lead evidence, examine witnesses or to appeal. An *amicus* is not normally subject to costs orders.

In 1996, PIAC submitted an *amicus* brief on behalf of the Consumers Federation of Australia (CFA) to oppose the National Australia Bank, which was arguing that the NSW Court of Appeal should overturn a long-standing banking law that causes a bank to bear loss when a forged cheque is paid without a customer's authority.

PIAC was successful in arguing that this would pose a major disadvantage to consumers who were illiterate, intellectually disabled, or had difficulty understanding banking practices.

In 1997, PIAC took on two major cases – *Lange v Australian Broadcasting Authority* and *Levy v State of Victoria*. In *Lange*, PIAC submitted an *amicus* brief on behalf of the Media Entertainment & Arts Alliance (MEAA). The High Court affirmed the existence of the implied right in the Australian Constitution of freedom of political communication – something that is fundamental to protect our system of representative government.

In the case of *APLA v NSW Legal Services Commissioner & the State of NSW* [2005] HCA 44, PIAC represented a group of community legal centres who were concerned about the unintended consequences of legislation designed to limit plaintiff lawyers from advertising their services.

PIAC's *amicus* submission to the High Court concerned the scope of the constitutional protection for freedom of political speech. While the decision ultimately did not advance this protection any further, PIAC was able to put these arguments squarely before the Court in a way that would not have occurred were it not for this intervention.

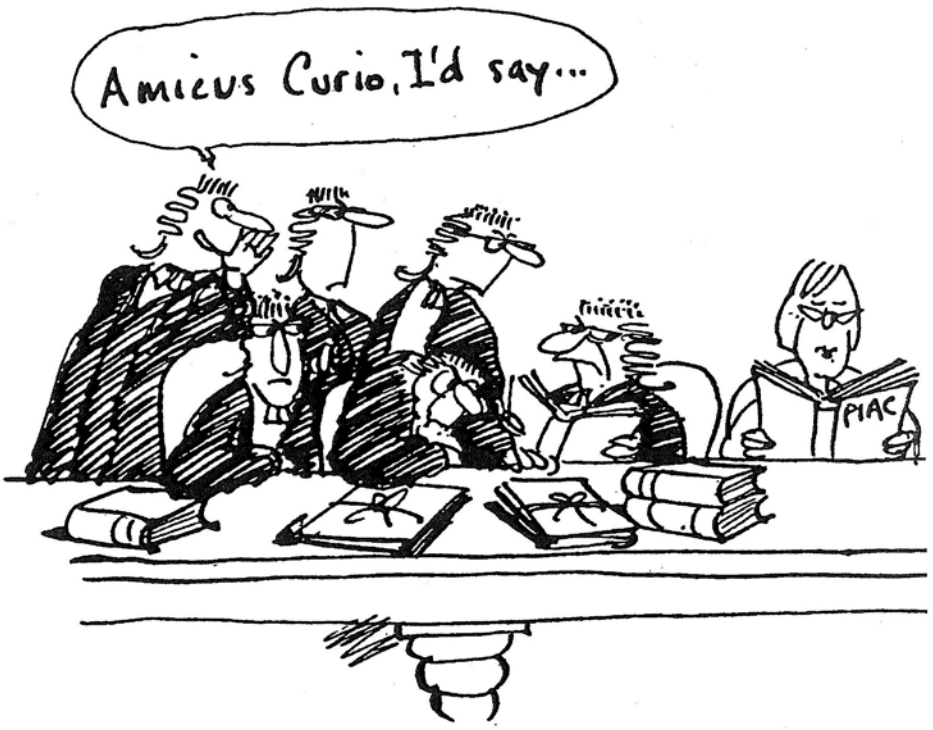


Illustration: Jenny Coopes.

Celebrating 30 years interest advocacy

public interest ADVOCACY CENTRE LTD

Hundreds of dedicated people have breathed life into PIAC over the past 30 years. This includes staff members, directors, volunteers, students, chief executives, clients and donors.

As well as the people who have held formal positions with PIAC, including the organisation's executive directors, chief executive officers and board members, there are many barristers, private law firms and their lawyers, staff from other CLCs, members of steering committees and reference groups, trainers and academics who have contributed enormously to PIAC since its inception in 1982.

PIAC acknowledges and thanks its many friends and supporters. Visit us online at www.piac.asn.au to read some of our '*30 years, 30 stories*'. Meanwhile, here are some photos from PIAC's 30th anniversary dinner in Sydney on 28 February 2013. The event was generously hosted by Herbert Smith Freehills and sponsored by Transurban.

Alexis Goodstone, Robin Banks, Rosemary Workman

The Hon Elizabeth Evatt AC & The Hon Kevin Rozzoli

Ralph Pliner & Deirdre Moor

Rebecca Gilsenan

Janis Dunnicliff, Anna Payten, Emma Robb, Hashini Panditharatne, Sylvia Arzey

The Hon Justice Stephen Gageler & Prof Rosalind Croucher

Juliana Warner

Nicola McGarrity, George Williams, Phillip Boulten SC, Michael Small, Graeme Innes AM

Jane Sanders, Vavaa Mawuli, Leanne Wolf

# of public

Prof Joellen Riley, Faith & David Weisbrot, Prof David Dixon
All photos by Chris Gleisner

Clockwise from left: Terry Purcell, Hon Elizabeth Evatt AC ,
Prof Peter Cashman, Ed Santow, Annmarie Lumsden, Robin Banks,
Andrea Durbach, Shauna Jarrett

Alan Kirkland

Prof Lisa Maher & Hon Kevin Rozzolli AM

Peter Waters & Michelle Hannon

Vivian Mercadal & John Thame

Chris Saxon

Guests at PIAC's fundraising dinner, Herbert Smith Freehills, 28 February 2013

Ellis Varejes, Leonard Lloyd & David Bastian

Kathy Wright & Alastair McEwin

Prof Gillian Triggs, Peter & Jill Butler

Myra Salkinder & Katrina Zdrilic

Ed Santow, The Hon Greg Smith SC, & The Hon Justice Julie Ward

Legal Journals from Thomson Reuters

Australasian Dispute Resolution Journal
Ruth Charlton

Australian Business Law Review
Professor Robert Baxt AO

Australian Intellectual Property Journal
David J Brennan

Australian Journal of Administrative Law
Dr Damien J Cremean

Australian Journal of Competition and Consumer Law *(formerly Trade Practices Law Journal)*
Dr R J Desiatnik

The Australian Law Journal
Mr Justice P W Young AO

Australian Tax Review
Professor Chris Evans, Professor Michael Walpole

Building and Construction Law Journal
John B Dorter

Company and Securities Law Journal
Professor Robert Baxt AO, Assoc Professor Paul Ali

Criminal Law Journal
Stephen J Odgers SC, Professor Mirko Bagaric

Environmental and Planning Law Journal
Dr Gerry Bates

Family Law Review
Dr Anthony Dickey QC,
Adjunct Professor Jennifer Boland

Insolvency Law Journal
Dr Colin Anderson

Journal of Banking and Finance Law and Practice
Gregory Burton SC, Professor Robert Baxt AO

Journal of Judicial Administration
Professor Greg J Reinhardt

Journal of Law and Medicine
Dr Ian Freckelton SC

Local Government Law Journal
John Mant, Mary-Lynne Taylor

Local Government & Planning Law Guide
Glen McLeod

Northern Territory Law Journal
Cameron Ford

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