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A History of Homefund

Greg Kirk, *Principal Solicitor*

With the Federal Court's approval of the settlement of the HomeFund class actions in March, PIAC's involvement with the HomeFund debacle is coming to an end. This article considers the extent to which policy and lobbying work and litigation advanced the rights of HomeFund borrowers over the last seven years.

The Scheme's Design

HomeFund was a government-sponsored home loans scheme with the stated purpose of assisting people who could not afford to borrow on the private home loan market into home ownership. Commonwealth-provided housing moneys were used as security to borrow much larger amounts of money on the private market, which were then loaned to low-income borrowers.

From 1986 to 1993, 57,000 loans were issued to low-income borrowers. The essential features of these highly unusual loans were:

- The loans had fixed interest rates of 12% to 15.8% for 25 to 30 years.
- The initial repayments were low, in fact too low to cover the interest accruing on the amount borrowed. This resulted in the loan balance ballooning out for the first 10 years.
- The monthly repayments on the loans increased automatically by 6% each year. This was intended to eventually redress the ballooning debt problem.

The Scheme and more importantly the loan design, made certain assumptions about the Australian economy, all of which turned out to be untrue. It was assumed that inflation would remain at the high levels of the late 1980s, that commercial interest rates would remain correspondingly high, that wages would rise steadily by at least 6% per annum and that the employment market would remain so strong that the vulnerable low-income borrowers to whom the Scheme was targeted would remain in permanent employment for the whole of the life of their loan.

When all of these assumptions proved unwarranted, the impact fell heavily upon the borrowers. They were stuck with high fixed interest loans with annually increasing repayments and ballooning debt often exceeding the value of their homes. At the same time wages were flat, house prices in the areas where they had bought were either stable or falling and many of them had lost their jobs or if they retained them, had lost the benefit of overtime and other supplementary income. This didn't happen overnight and the signs had been apparent to those concerned about the borrowers over a period of time. However the government was deaf to those raising alarms and as a subsequent Inquiry concluded, put the accelerator to the floor expanding the Scheme at a time when it should have been putting the brakes on.

The Inquiry and Restructure

PIAC worked with financial counsellors, other legal centres and borrowers to bring the borrowers' plight to the attention of the public. Public concern and political pressure lead to a series of inquiries into the Scheme conducted by the (then) Trade Practices Commission, the State Ombudsman, and a Parliamentary Committee. The inescapable conclusion was that the Scheme had been ill-conceived at the outset and poorly managed in its implementation. Legislation was passed establishing a HomeFund Commissioner who received over 8,000 detailed complaints. The Commissioner held formal hearings at which PIAC presented submissions for the HomeFund

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From the Director

Andrea Durbach, *Director*

As governments of the world prepare for a major United Nations Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, to take place in Durban, South Africa from 31 August to 7 September this year, HREOC Social Justice Commissioner and Acting Race Discrimination Commissioner, Dr Bill Jonas AM told a National Summit on Racism held in Canberra in May, that the Australian Government's programme of preparation was deficient:

> "The efforts of our national government in the lead up to the World Conference can only be described as extremely poor. … (t)here has been very little effort made to either raise the profile of the World Conference in Australia, to take any steps towards engaging in a thorough and frank discussion about our race relations record, or to contribute internationally to the World Conference."

As refugees seeking comfort from brutal regimes are incarcerated and suffer further assault, as our Federal government maintains its refusal to apologise to the Stolen Generation and dismisses the very existence of their history and experience, as the far Right nutures racist sentiments, as synagogues are desecrated and complaints of racist behaviour are brought against the police, the notion of Australia as a tolerant and egalitarian society, happily linking arms to celebrate Harmony Day festivals, seems less and less authentic.

The lack of effort by the Australian government in preparing for the UN Conference is perhaps consistent with what Dr Jonas described as a "demonstrable lack of commitment (of the Australian government) to combating racism". It connotes one of two things: at best, massive denial of the existence of racism in a society which fears facing up to "the demons which haunt its past" and promise to eat away at our future; or, at worst, the condoning by our leaders of racist attitudes and behaviour.

I was filled with a mixture of shame and regret as I listened to the UN Special Rapporteur on Racism, Professor Maurice Glele-Ahanhanzo, address the Summit and speak of the Australian government's breach of our Racial Discrimination Act with its enactment of regressive amendments to the Native Title Act, of the racist underpinnings of mandatory sentencing laws, of the absence of reparations for the Stolen Generation. Shame at the decline of Australia's standing in the world on matters of human rights and respect. Regret that our current leaders have failed to use this important world event as an opportunity to engage with its citizens about their experience of racism and how best to combat its persistent growth.

Instead, our government has chosen to pay the UN World Conference on Racism scant attention, refusing to recognise, as former Prime Minister Paul Keating urged in his Redfern speech in 1992, that we have and continue to practice "discrimination and exclusion." The failure to embrace this "act of recognition", "to imagine these things being done to us" and to speak out loudly with the world in its attempts to stop those who profit from prejudice, "degrades us all".

HREOC's National Summit brought together NGOs concerned with racism to present their views and perspectives about the current state of racism in Australia today. HREOC is also seeking submissions on a discussion paper is has drafted and distributed, *Combating Racism in Australia*, which addresses the five major themes on racism which the UN Conference will consider. HREOC will present views and recommendations from the Summit and responses to the discussion paper to the Australian Government prior to the World Conference. Information on how to participate in HREOC's consultation process is available from the Commission's World Conference website – www.humanrights.gov.au/worldconference.

PIAC's Homefund Team: (L-R) Greg Kirk, Melissa Franklin, John Basten QC, Sylvia Winters.

Government's quick fix for medical errors

Amanda Cornwall and Jim Wellsmore, *Policy Officers*

A concerted campaign by insurers' and doctors' groups has resulted in the NSW Government announcing plans to restrict the amount people can claim for negligent medical errors. The campaign followed a significant rise in premiums for indemnity insurance for doctors last November. The rise was blamed on a blow out in medical negligence claims, a claim that has never been substantiated by publicly available data. One of the areas hardest hit by the rise in premiums is rural gynaecology, where doctors responded by withdrawing their services in public hospitals. As a result the Government was under overwhelming pressure to be seen to respond to doctors' demands.

People with catastrophic, long term injuries will be hardest hit by the Government's proposed reforms. PIAC has criticised this aspect of the reforms because it shifts costs from insurers to injured patients and their families.

PIAC has applauded other aspects of the reform package, particularly the requirement that insurers provide data on trends in claims and notifications of errors. PIAC also supports the requirement that professional indemnity insurance become compulsory for doctors and the power for Government to regulate professional indemnity cover.

PIAC has campaigned for many years for detailed information to be made publicly available about medical negligence claims and the causes of increases in the cost of medical indemnity insurance. One of the big questions about the causes of increases in premiums is the ability of the major insurers to manage the funds. This is reflected in the AMA's call for an independent audit of United Medical Protection last year.

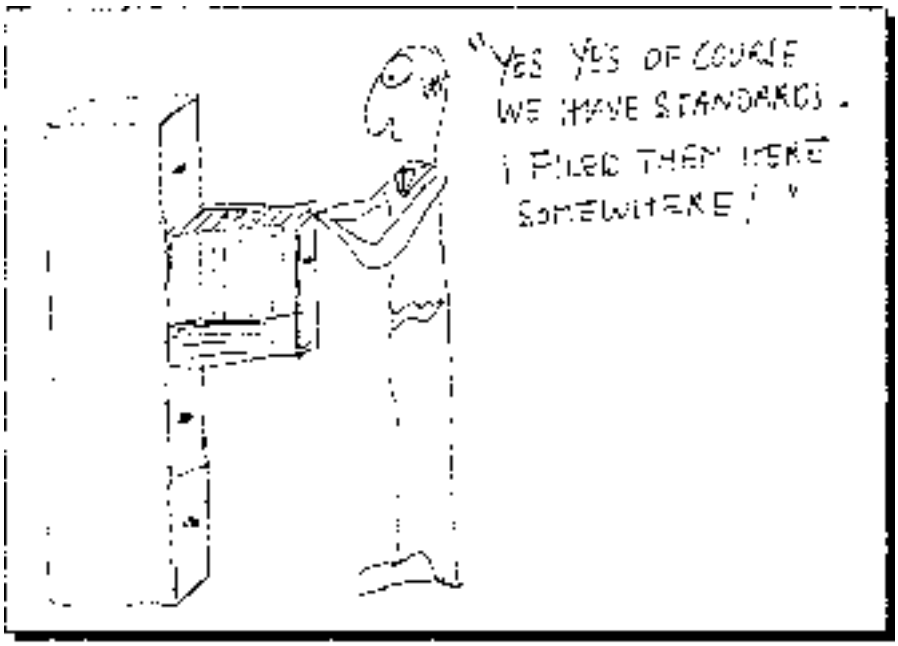
The need for publicly available data to inform public policy responses in this area was highlighted in the Commonwealth Government's Professional Indemnity Review in 1995. A major finding of the Review was that comparatively few medical errors resulted in legal claims by patients. NSW Health and the Attorney-General's Department convened committees of review in 1996 and 1999 in light of the Review's recommendations for tort law reform.

To promote a more informed debate on the Government's strategy, PIAC convened a public forum on *Patient Perspectives on Medical Error* in March 2001. The forum was addressed by the Minister for Health, the Hon. Craig Knowles, Health Care Complaints Commissioner, Amanda Adrian, Lorraine Long of Medical Error Action Group, Merryl Green of Maternity Alliance and Amanda Cornwall of PIAC. Consumers gave strong and sometimes moving accounts of their experiences of medical error, their attempts to find out what went wrong, the pain of litigation and what they want to ensure that errors are prevented.

The forum was attended by nearly 100 people, many of whom expressed frustration at the Minister's promise to listen to consumer views when decisions had already been made. The Government invited PIAC and Maternity Alliance to join a reference group to "fine tune" the reform package in late March. The reference group continues to meet during May and June to discuss regulations and other measures to implement the reforms.

The Government plans to have the legislation to implement the reforms, the Health Care Liability Bill, passed during the current session of Parliament. However, the HIH collapse threatens to seriously undermine the effectiveness of the Bill. Already the main medical indemnity insurers have announced that the HIH collapse will cause a rise in premiums for medical indemnity insurance this year regardless of the government's reforms.

Papers from the *Patient Perspectives* forum and a report from the consumers on the reference group are available from PIAC.



Acknowledgement: *The Australian Health Consumer No. 2, 2001.*

A History of Homefund

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Action Group. The Commissioner recommended a global solution. The government pushed through legislation on Christmas Eve 1993 which restructured the Scheme. This fell well short of meeting borrowers' needs and, most insidiously, took away borrowers' rights to sue for breaches of consumer protection and other laws in relation to the way the loans had been sold to them. As the politicians and beauracrats responsible moved gracefully on to new career challenges and rewards, the borrowers themselves were left stranded.

The Litigation

The statutory removal of borrowers' common law and legislative rights stood firmly in the path of a legal solution to borrowers' problems. To avoid this, litigation was commenced in the Federal Court seeking to rely on the *Trade Practices Act*. In 1994 two representative actions were commenced, the first by private solicitor Peter Breen for approximately 600 named borrowers and the second by PIAC, with a grant of legal aid, for the balance of the 57,000 borrowers who had suffered loss or damage. Within a few months PIAC had the carriage of both matters. The State together with each of the private joint venturers involved in the implementation of the Scheme were named as defendants.

The central claims under the *Trade Practices Act* were that the loan product was so unusual and so dangerous that it was unconscionable to sell it to low-income borrowers who had little or no financial experience, and that both the written promotional material and the oral statements made to many borrowers, were misleading and deceptive. Central to the claims of misleading and deceptive conduct was a promise made to many borrowers that they would never have to pay more than 27% of their income in repaying their loan. Whilst for some this was contractually true, borrowers were not advised that if their income was not sufficiently high the 27% repayments would result in their debt ballooning endlessly into millions of dollars.

The preliminary questions of whether the State, when acting through a government department, is bound by the consumer protection provisions of the *Trade Practices Act* and, if it is not, whether its private partners in the Scheme were bound, were referred to the Full Court of the Federal Court. The Full Court determined that the State is not bound and to the extent that the private partners were merely agents of the State, they too were not bound. On appeal, the High Court confirmed that the State was not bound by the *Trade Practices Act* but found that whether the State's private partners in the Scheme got the benefit of that "immunity" could not be determined in the absence of a full hearing.

With the limits placed on the action by the decision of the High Court, the prospect of a very lengthy hearing to determine the liability, if any, of the non-State defendants, concerns about costs orders and fears that the representative action might founder on the differing individual circumstances of borrowers, negotiations were commenced. A settlement proposal was developed and notified to borrowers by letter and notices published in the major newspapers. The settlement was approved by the Federal Court on 19 March 2001 and took effect on 2 April 2001.

The main beneficiaries are the 3,700 borrowers who still have HomeFund loans. Those loans have fixed contractual interest rates as high as 15.8%. Subject to discretionary government concessions borrowers were still liable to pay those high rates. Under the settlement those 3,700 become entitled to reduced interest rates which, whilst remaining marginally above commercial rates, will be dramatically less than their contract rate. In addition borrowers who have had their homes sold up but still owe money on their loan due to the ballooning nature of the loan will have that debt waived and their credit record amended. They number 2,300 and owe over $75 million.

Tremendous commitments of energy and resources were put into the HomeFund problem by PIAC, the Legal Aid Commission, barristers, primarily John Basten SC and Sylvia Winters, and countless other CLC lawyers and financial counsellors. Whilst the Commission of Inquiry and *Restructuring Act*, the result of their policy efforts, and the settlement, the result of the HomeFund litigation all fall short of providing true justice, they have improved the lot of many thousands of borrowers and made it far less likely that a State government will again so cavalierly gamble with the financial position of the vulnerable in the community. Whilst the position of borrowers was greatly advanced the history is demonstrative of the limitations of the various methods used to solve the crisis. Taking each in turn:

- The political system failed the borrowers because it sought a quick fix to the crisis at the least possible cost and failed to respect their accrued legal rights. Whilst there was much support from many politicians, the fact that both major parties were implicated in the debacle, the ALP as original designer and the Liberal coalition as the implementer and expander of the scheme, reduced the political pressure that could be brought to bear on either side. In addition, the Independents, whose eventual support was pivotal in the passage of the *Restructuring Act*, were never well enough resourced to analyse the situation independent of the persuasions of the executive government;
- The media, whilst a major vehicle for sounding the alarm, could not sustain interest in such long-running litigation nor analyse it in sufficient depth to get beyond the most extreme claims in order to perceive the long running injustice many borrowers faced;
- The legal system, hamstrung by the removal of borrowers' rights under State law, was too slow and inefficient a means to deal with problem. The case was tied up with preliminary issues, with long waits for judgments and delayed appeals, whilst all the time borrowers were having to meet their monthly repayments.
- The true cost to borrowers, in financial terms, and also in relationship breakdown, health and related problems under the crushing burden of debt, together with the flow on costs to the community, were never addressed or accounted for.

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Moving Forward:
Reparations for the Stolen Generations

Andrea Durbach, *Director* and Alexis Goodstone, *Solicitor*

The majority report of the Senate Inquiry into the Stolen Generations, tabled in November last year, recommended the establishment of a Reparations Tribunal and that "the model put forward by PIAC be used as a general template for the recommended tribunal". During April and May, PIAC undertook a national consultation project to determine the views of indigenous people on the PIAC proposal for a Reparations Tribunal.

Importantly, the consultation project, *Moving Forward*, which will culminate in a conference to be held on 15 and 16 August in Sydney, is about progressing the issue of reparations for the Stolen Generations towards an effective outcome. A joint initiative of PIAC, the National Sorry Day Committee and ATSIC, the project was based on the premise that those affected by past forcible removal policies, should be directly involved in the design and delivery of measures of redress.

The proposed Reparations Tribunal has been developed as an alternative to the current litigation as a means of securing redress. Based on legislation that acknowledges the legal wrongs of forcible removal policy, it would focus on delivering reparations measures such as acknowledgment and apology, guarantees against repetition, measures of restitution and rehabilitation, and monetary compensation. The proposal is outlined in an issues paper, *Moving Forward – Achieving Reparations*, which has been distributed widely through Aboriginal organisations.

What indigenous people want

Focus group meetings were held in various locations including Sydney, Bathurst, Melbourne, the Sunshine Coast, Adelaide, Broome, Hobart, Alice Springs and Darwin. These were organised and facilitated with the help of local ATSIC offices and Stolen Generations organisations.

The meetings and submissions received in response to the issues paper highlighted key features:

- the desire for acknowledgment and an apology;
- financial assistance to deal with activities such as family reunions, counselling, and meeting sites and places of significance designated for stolen generations people;
- the depth of pain and suffering can never be adequately compensated;
- "talkfests" about the issue need to end and urgent action is required; and
- local initiatives and solutions are essential.

The consultation project has been funded by The Myer Foundation, Rio Tinto Aboriginal Trust and the Reichstein Foundation. Copies of the issues paper, *Moving Forward*, are available at www.atsic.gov.au and www.journeyofhealing.com.

Moving Forward conference

Moving Forward: A two day conference on Reparations for the Stolen Generation, will be held at the University of New South Wales on 15 and 16 August 2001. The conference, to be hosted by PIAC, ATSIC and HREOC, aims to facilitate public debate about ways to provide reparations for the stolen generations. A central feature of the conference will be the presentation of a report and model for reparations developed during the course of the *Moving Forward* consultation project.

The conference will involve a mixture of presentations, panel discussions, and workshops. It will address topics such as:

- the adequacy of government measures so far to meet the needs of those affected by forcible removal;
- international law and models for dealing with reparations for violations of human rights; and
- reparations as a precursor to reconciliation.

In addition to Australian speakers from Government and the Opposition, ATSIC, HREOC, industry, the churches, the National Sorry Day Committee and Reconciliation Australia, the conference will feature international speakers including the Chief Judge of the New Zealand Waitangi Tribunal, George Williams, President of the Canadian Aboriginal Healing Foundation and a Commissioner from the South African Truth and Reconciliation Commission.

Each afternoon of the conference will be dedicated to facilitated workshops where speakers and delegates will consider a model for the delivery of reparations and strategies for implementation. Outcomes and recommendations from these workshops will be presented to the Government.

Hearing aids tune in to mobile phones

Alexis Goodstone, *Solicitor*

In recent years, PIAC has worked with both disability organisations and people with disabilities and has developed a strong commitment to advancing and protecting the rights of people with intellectual and physical disabilities. Disability discrimination casework now features significantly in our strategic plan and practice.

In July 1999, PIAC was asked to represent three hearing impaired people who sought to achieve equal access to mobile phone networks. Following a successful conciliation facilitated by the Human Rights and Equal Opportunity Commission (HREOC), Telstra, Optus and Vodafone have:

- launched schemes to accommodate the needs of people with hearing impairments;
- published information brochures for consumers with hearing impairments; and
- have undertaken to fund a seminar to examine and debate the accessibility of hearing aids with current and emerging mobile phone technologies.

The basis for the claim of discrimination

Many hearing aid users can not access digital mobile phones due to electromagnetic interference between their hearing aid and the mobile phone. They have experienced accessibility problems since the closure of the largely accessible analogue network. The new CDMA network provides an accessible option for many hearing aid users, however public information about the accessibility of CDMA has not been widely available until recently.

PIAC lodged a representative complaint under the *Disability Discrimination Act* with HREOC. The complaint was made on behalf of the three individuals and Australian residents with hearing disabilities who are unable to use, or experience difficulties with, the digital mobile network because of electromagnetic interference with their hearing aids. The complaint was made against, amongst others, Telstra, Optus and Vodafone.

Public Inquiry

HREOC conducted a public inquiry into the issues raised by the complaint. The public inquiry process is used where sensitive or personal information is not involved, and where the issue requires broad policy change. Details of the inquiry are available on HREOC's website at www.humanrights.gov.au/disability rights.

The Settlement Package

After the public inquiry, PIAC and its clients entered into negotiations with the mobile phone companies, with the assistance of HREOC as conciliator, to explore the terms on which the complaint might be resolved. A settlement was reached comprising three key elements.

1. Schemes to facilitate access

The schemes offer free or reduced cost accessories to facilitate access to the digital mobile network, or the opportunity to swap to the CDMA technology in some circumstances where applicants can satisfy various criteria. Customers should contact their particular network to obtain details. Dedicated phone numbers can be obtained from PIAC.

This aspect of the settlement addresses the need for hearing aid users who experience interference between their mobile phone and their hearing aid to be able to properly access those phones (through accessories or an exchange to a more suitable CDMA phone). There was a significant lack of adequate information for hearing aid users about alternative mobile phone services following the closure of the analogue network, and the schemes aim to ensure that any unsuitable purchases made during that time can be rectified.

2. Brochures

Brochures with information for hearing aid users about the accessibility of the mobile telephone network are being produced by Optus and Vodafone, and will be available in stores soon. Telstra has revised its existing brochure and taken steps to ensure that it will be more widely available and easier to access.

The brochures will address the urgent need for accurate and up-to-date information and advice to be provided to hearing aid users in order to make informed decisions when purchasing a mobile phone. The brochures include information about the pros and cons of digital and CDMA technology for people with hearing aids.

3. Seminar

Telstra, Optus and Vodafone also agreed to fund a free Information and Demonstration Day on Mobile Phones for the Hearing Impaired. Co-hosted by HREOC and the Deafness Council of NSW, the seminar was held on 2 June at the Australian Hearing Theatre. For more information about the seminar outcomes contact Peter Kerley on Tel/TTY: 9713 9903.

Litigation Report

Greg Kirk, *Principal Solicitor*

Gambling first in the Court of Appeal

The claim of our client, Mr Chris Reynolds, against Katoomba RSL Club, for losses resulting from his compulsive gambling, reached the NSW Court of Appeal in May. The first such case to go on appeal anywhere in the world, it takes place against a background of increasing community alarm about the manner in which gambling services are provided to vulnerable consumers. The club cashed personal, business and third party cheques for Mr Reynolds enabling him to gamble well beyond his means. Mr Reynolds claims that Katoomba RSL breached its duty of care to him to responsibly provide gaming services and exploited his vulnerability by assisting him with funds to gamble when the Club knew his gambling was compulsive and beyond his means.

PIAC is examining a similar case involving a major Sydney leagues club and much larger amounts of money. We are also considering an amicus curiae intervention on behalf of concerned community organisations in one of a number of current cases where a local council's efforts to limit the number of new poker machines in its area is being challenged.

Disability Issues

PIAC, having undertaken a series of cases highlighting disability discrimination in school enrolment processes, has now had success in a claim concerning the treatment of a child once attending a school. The Federal Magistrates' Court found that the NSW Department of Education had unlawfully discriminated against primary school student, Stephanie Travers. Stephanie claimed that she was denied access to a disabled toilet at Paramatta West Public School and that this caused her embarrassment and distress. Stephanie has spina bifida, which results in her suffering bowel and bladder incontinence. Federal Magistrate Raphael found that it would have been reasonable for Stephanie to have been given a key to the disabled toilet. He found that whilst the school had no intention of discriminating against Stephanie, the fact that they required her to utilise a toilet which was not accessible, amounted to unlawful discrimination.

School-related claims of disability discrimination are a current focus of concern amongst parents and within the community. PIAC continues to receive more enquiries for assistance than it can manage. Another recent case we undertook was resolved through mediation. Whilst litigation can highlight the issue and create incentives for good practice, it is not the solution. Efforts must continue at the administrative level to ensure that children with disabilities are given every possible opportunity.

Institutional Care

Those held in insitutions, whether due to their physical or mental condition, immigration status or past conduct, are amongst the most vulnerable in the community. PIAC is currently involved in a diverse range of cases in which it is contended that the duty of care to such people has been breached.

We have commenced proceedings on behalf of a Somali woman seeking damages for assault and negligence arising from events which took place whilst she was being held in the Villawood Detention Centre. The claim is against the Commonwealth and Australasian Correctional Management. Our client, already traumatised by her experiences in war-torn Somalia, was hospitalised as a result of her treatment.

Other matters include ongoing investigation of treatment of residents in the Lachlan Centre, and potential claims against the Department of Corrective Services as a result of a rape in prison and a death in custody. In the latter cases, there is evidence that officers were aware of the risk to the inmates involved but failed to take appropriate measures to protect them. PIAC is also examining the rights of what appear to be many, mostly Vietnamese, permanent residents who though they have served their sentences following criminal convictions, remain languishing in prison because they are subject to deportation orders that the government is unable to implement. Some have been held in prison for up to two years on this basis.

Finally, our efforts with the peak organisation, People with Disabilities, to ensure that State-funded institutions comply with the *Disability Services Act*, received a setback when the Administrative Decisions Tribunal recently determined that the decision to fund the institutions involved is not reviewable. We are currently examining the prospects of seeking a review of the Minister's approval of the transition plans for the institutions involved.

Litigation Planning Day

The litigation team took a morning away from the office on 4 June to consider future plans and strategies. It was a very successful meeting and made some practice and procedural decisions as well as developing some new target areas for PIAC's legal work. Key issue and decisions were:

- Review of advice recording and file keeping systems arising from Professional Indemnity Insurance Cross Check results.
- Plans for increased focus on the evaluation of the legal service and of the merits of particular completed cases.
- Plans for promotional visits partly allied with the investigation of new target areas but also to taditional constituents.
- New target areas for initial research, investigation and networking;
  - Homeless people
  - Accommodation for older people
  - Treatment of refugees in detention
  - Police and public order issues, particularly as they affect Aboriginal people.

PILCH News and Views

Kathleen Searles, *PILCH Secondee Solicitor*

PILCH external review

Given various developments over the years in relation to the delivery of pro bono services – the NSW Law Foundation Review and Report, the Federal Attorney General's National Conference on Pro Bono and the establishment of the National Pro Bono Taskforce, the Law Council of Australia's Working Group on Pro Bono, the recent NSW Law Society Discussion Paper on Pro Bono service delivery and individual firm initiatives – it is perhaps timely and appropriate that the Clearing House and its role and future directions be evaluated and considered.

PILCH was last evaluated as part of an overall review of PIAC in 1996. PILCH itself, however, has not been separately reviewed since its establishment in 1992. PILCH has now set in train arrangements for a review to be undertaken by external consultants. The terms of reference for the review, approved by the PILCH Board, include an assessment of the aims and objectives of PILCH and the extent to which these have been met; the capacity of PILCH to identify, target and contribute towards addressing unmet legal needs; the ongoing appropriateness and viability of PILCH's eligibility criteria; the capacity of PILCH to engage in policy, project work and community education and whether it is appropriate for PILCH to undertake such activities; and membership, management and resourcing issues.

Tax Seminar for Non-Profit Organisations

In recent months, with a barrage of changes to tax laws and reforms to corporations law, PILCH has received numerous request for assistance and advice from member lawyers. PILCH member firm Allen Allen & Hemsley agreed to host and present a seminar for non-profit organisations, focusing on the new tax system and issues of governance for non-profit organisations. The seminar entitled *" 'Need to Know' – Issues for Non-Profits"*, was well attended by a variety of non-profit organisations and attendees were treated to a wealth of critical information delivered in an accessible way.

Seminar topics included obtaining and maintaining tax deductibility and tax exemption status, the impact of the new tax system on non-profit organisations, choosing the right legal entity for non-profit organisations and fundraising guidelines.

The following Fact Sheets, based on the seminar topics, have been prepared by Allen Allen & Hemsley and are now available to non-profit organisations from PILCH:

1. The new tax system and non-profit organisations
2. Tax changes affecting gift deductibility
3. Tax changes affecting income tax exempt charities
4. Choosing the right structure for your organisation
5. Australian Charitable Fundraising Legislation – a summary
6. Key duties for directors of charities

If you would like a copy of any of these Fact Sheets, please contact PILCH Administrator Melissa Franklin.

Practising in the Public Interest

In February, PILCH and PIAC, in conjunction with the University of Sydney and the University of New South Wales, ran the first of this year's *Practising in the Public Interest,* a program initially developed by PIAC with the University of Western Sydney (Nepean) last year. The program is designed to introduce students to systems advocacy and public interest law and expose them to organisations which are directly involved in public interest and pro-bono legal work. It presents an important opportunity for law students to explore a variety of avenues which can accommodate their interests once they graduate.

The five day program has attracted interest from a variety of universities across Australia and this year it was presented as a Summer School in February hosted by PILCH member firm, Mallesons Stephen Jaques, and will be conducted again in July as a Winter School.

The training component of the program, which covers issues such as public interest litigation, campaign development and media strategies, international human rights principles, the history and operation of community legal centres and legal aid,

Students comments on the 2001 Summer School:

"Thank you all for teaching and coordinating one of the most exciting and inspiring courses in my law school experience. I will never think about law in quite the same way again – you have convinced me that 'something (a lot of things!) can be done' to reduce systemic disadvantage…"

"…a very intensive and very informative course – I will be thinking about the issues throughout my career and I've been inspired to undertake further independent research in pubic interest advocacy and volunteer work"

"I was very excited at the opportunity to participate and was not disappointed. Felt inspired, challenged and confronted at times; learnt many new things and was struck by the range of strategies utilised."

was presented by PIAC staff, barrister Sarah Pritchard and speakers from the NSW Law Society and the NSW Bar Association. Students spent two of the five days on placements with PILCH member firms Allen Allen & Hemsley, Blake Dawson Waldron, Clayton Utz, Gilbert & Tobin, Freehills and Mallesons Stephen Jaques and with the Law Society of NSW, the NSW Bar Association, the Legal Aid Commission of NSW, PIAC and PILCH, where they were introduced to pro bono programs and initiatives and the workings of legal aid.

Following the success of the Summer School in February 2001 and the Winter School in June 2000, this year's *Practising in the Public Interest Winter School* will be run in conjunction with the University of Western Sydney (Nepean) once again and the University of Wollongong, hosted by PILCH member firm Henry Davis York.

Secondees

PILCH continues to rely on the support of its members in providing secondee solicitors to the Clearing House. Providing a secondee is one of the most significant and valuable contributions a firm can make to the Clearing House and it also provides an excellent opportunity for the secondee, who is able to gain experience and skills in a wide range of legal issues, undertake considerable client contact and be exposed to a variety of legal, policy and social issues.

The work of secondees is varied and challenging. Secondee solicitors assess Clearing House matters and requests for assistance for compliance with Clearing House eligibility criteria. This involves an exploration and interpretation of the public interest aspects or components which the matter may present, as well as an assessment of the merits and prospects for legal resolution. Once a matter has been accepted for referral, the secondee solicitor is responsible for liaising with PILCH members to refer the matter appropriately, drafting briefing materials, attending an introductory conference between the client and the PILCH member and monitoring the progress of the matter until completion.

From December 2000 until February 2001, the Clearing House was assisted by Yvette Holt, from Allen Allen & Hemsley. The current secondee solicitor is Kathleen Searles from Minter Ellison. Kathleen's secondment commenced in March 2001 and she will be followed by a secondee from Blake Dawson Waldron in July 2001. Freehills have also agreed to provide a secondee from December 2001 to February 2002.

Secondees are now being sought for the remainder of 2002. Secondments are usually for 3 months and are on a full-time basis. If you can assist or you have any queries in relation to PILCH secondments, please contact Sandra Stevenson or Andrea Durbach at the Clearing House.

Membership

PILCH welcomes its newest member – Seven Wentworth Chambers. The Clearing House now has 72 members comprising law firms, barristers, floors of barristers, accountancy firms and mediators.

QPILCH

PILCH staff have been advising lawyers at Legal Aid Queensland who are currently seeking to re-establish a Public Interest Law Clearing House in Queensland. So far the response from Queensland firms has been positive and it is hoped that QPILCH will be operational later this year. The establishment of QPILCH will mean that PILCH has a presence in three states – Queensland, New South Wales and Victoria.

National Pro Bono Task Force

Following the First National Pro Bono Law Conference, *For the Public Good*, hosted by the Federal Attorney General in August last year, a National Pro Bono Task Force was established to develop a Draft Action Plan for submission to the Attorney. PILCH Co-ordinator and PIAC Director, Andrea Durbach, is a member of the Taskforce.

It is anticipated that the Action Plan will cover issues such as encouraging, co-ordinating and developing pro bono practice in Australia, communication and information flow on a national level, barriers to pro bono practice and quality assurance and best practice issues.

While the Action Plan is expected to have a national focus, it is envisaged that the actual implementation of the plan may occur at a local or state level.

Fundraising lunch with Justice Unity Dow

PILCH and PIAC are delighted to have as their guest speaker at a fundraising luncheon international human rights lawyer, Justice Unity Dow. The luncheon, to be hosted by PILCH member firm Minter Ellison, will be held on Tuesday 21 August 2001.

Justice Dow was the first woman to be appointed to serve on the High Court of Botswana. She is a well known advocate of human rights and the rights of women and children.

She was the plaintiff in a landmark case in Botswana which ultimately lead to Botswana's nationality law being overturned, making way for legislation which allowed women to pass on their nationality to their children.

Justice Dow has recently published her first novel and will be a guest at the Melbourne Writer's Festival. At the luncheon, copies of her novel *Far and Beyon'* will be available for sale. All proceeds of the luncheon will go to PIAC and PILCH's project on the Stolen Generation.

For more information about the lunch, see notice on page 14 of this Bulletin. #

WTO Trade in Services Negotiations: Privatisation by Stealth?

Dr Patricia Ranald, *Principal Policy Officer*

Discussion of new agreements in the World Trade Organisation (WTO) has been stalled since its Seattle meeting in November 1999. Civil society groups outside the meeting and governments from developing countries inside, both demanded more democratic structures and review of unfair trade rules.

The WTO has yet to respond to these demands, but will hold its next meeting in November 2001 in Qatar, a small country in the Middle East where protest is illegal!

Meanwhile, WTO negotiations on the General Agreement on Trade in Services (GATS) are still going on quietly behind closed doors because this agreement had a built-in agenda for further change. These changes could reduce the power of governments to regulate in the public interest and could give transnational companies market access to our public health and education systems. This transfer of powers beyond national policy debate and democratic accountability could be very convenient for governments as public opposition to deregulation and privatisation grows. "The WTO made us do it" could become the justification for policies which government knows might not be endorsed through the ballot box.

What is GATS?

GATS was signed by the Australian government and other member governments of the WTO in 1994. It applies to all services, from banking to transport and telecommunications, to health, education and prisons. GATS aims to promote international trade in services, and to remove barriers to such trade.

GATS commits governments to increase over time the range of services included in the agreement, without any review of its impacts.

Like other WTO Agreements, GATS rules are legally binding on governments, and can be enforced through the WTO dispute system. Governments face trade sanctions if another government successfully complains that they have broken the rules.

What changes are proposed to GATS and who wants them?

GATS now has some rules which recognise the right of government to regulate services and to provide and fund public services. Also most GATS rules only apply to service sectors specifically listed by governments in the agreement. Australia has not so far included public services like health and education in its list.

Governments have been pressured by global services corporations to change these rules. These include companies like Columbia/HCA, the world's largest private hospital corporation, and Vivendi, the global water company which now runs Australia's only privatised urban water system in Adelaide. They are organised into regional lobbying groups like the US Coalition of Service Industries and the European Services Forum. These companies see public health, education and water services as trillion dollar markets which should be opened up to them. From their perspective, government regulation and provision of public services can be barriers to trade.

There is a proposal to apply a "necessity test" to some government regulation of services. This would mean that regulation would have to be "least trade restrictive" and could be challenged under the WTO disputes process and possibly defined as barriers to trade. These tests would apply to licensing requirements, qualifications and technical standards, all of which are extremely important in the regulation of services.

There is also a move in the GATS negotiations to apply "national treatment" rules to government purchasing and subsidies. This could give transnational corporations access to government purchasing contracts and to government funding of public services. These changes are due to be finalised over the next two years.

What would it mean for Australia?

Public interest regulation of services could come under challenge. For example, the NSW government, following extensive community consultation, has recently introduced innovative regulation in the context of the introduction of competition into the retail electricity market. This regulation was supported by PIAC through our Utility Consumers Advocacy Program (UCAP). It enables the entry of both domestic and international competitors but aims to protect consumers from the dramatic price fluctuations which occurred recently under competitive regimes in the USA, notably in California. It achieves this by placing certain restrictions and obligations on existing companies.

If the "necessity test" and "least trade restrictive" criteria were applied, the NSW regulation, which does not exist in the USA, might not be regarded as "necessary" or "least trade restrictive" by US companies wishing to enter the NSW market. Under such a GATS regime companies might prevail upon the US government to lodge a WTO complaint. Previous decisions of the WTO disputes panel have most often given precedence to trade issues rather than to public interest issues. It is doubtful that it would give due weight to the public interest considerations which have been extensively debated in NSW.

If this seems fanciful, consider the fact that US drug companies have recently prevailed on the US government to lodge a complaint against the governments of Brazil on the grounds that its AIDS treatment program violates their intellectual property rights as defined in a WTO Agreement. The Brazilian government has committed the crime of having the most successful AIDS treatment program in South America by manufacturing cheap generic drugs and distributing them free to those who need them. This WTO action follows the recent legal action in South African

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Policy Report

Patricia Ranald, *Principal Policy Officer*

Health Consumers' Network (NSW)

A proposal for a statewide health consumer organisation in NSW has been tested in a community consultation program by NSW Health. The proposal is detailed in a report from a Consumer and Community Participation Group established by NSW Health in June 2000. PIAC has actively supported Health Consumers Network (HCN) since it was established in early 2000, lobbying for funding for consumer advocacy training and representation. A report is expected in July.

Amanda Cornwall chairs the Consumer Perspectives working party of the *NSW Council on Quality in Health Care.* One of the priorities identified by the working party, based on a proposal submitted from PIAC and HCN, is the need for training for consumer representatives. The working party will report in June 2001.

Health Privacy

PIAC continues to be active on consumer rights in the electronic health environment.

Amanda Cornwall is a member of the Federal Ministerial Advisory Committee on the Better Medication Management Scheme – a scheme to nationally link patient pharmaceutical records held by doctors and pharmacists.

PIAC is working with health consumer groups in NSW to respond to draft Health Privacy Guidelines. The Guidelines, which include a right of access to medical records, were developed by the Federal Privacy Commissioner to assist people to understand how the *Privacy Act* applies to the private health sector from December 2001.

Federal Parliamentary Inquiry into the WTO and government response

Pat Ranald presented the submission of the Australian Fair Trade and Investment Network, (AFTINET) to the public hearing of the Joint Standing Committee on Treaties held in Sydney in February. The submission argued for fairer trade rules and for greater public accountability of trade policy. The government has responded in part by announcing a public consultation process in most capital cities leading up to the WTO Ministerial Meeting to be held in Qatar in November. Written submissions from the community on the WTO existing agreements, future agenda and Australia's interests are invited by 1 July 2001. A WTO Advisory Panel is to be formed later this year which will include, for the first time, NGO community representatives as well as industry representatives.

Corporate Code of Conduct Bill Inquiry

The PIAC submission to the Joint Statutory Committee on Corporations and Securities Inquiry, which considered the Democrats' Corporate Code of Conduct Bill, argued that voluntary codes of conduct were ineffectual and that legal enforcement of standards for corporate behaviour were required.

The Bill applies environmental, employment, health and safety and human rights standards to the conduct outside Australia of Australian corporations, requires corporations to report on their compliance with such standards, and provides for the legal enforcement of the standards. The Bill is opposed by the Government but the inquiry is an opportunity to debate the issues and to build Opposition support for the concept in the event of a change of government.

WTO Trade in Services Negotiations: Privatisation by Stealth?

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courts by drug companies against the South African government for the same reason. The drug companies withdrew this action after global condemnation but the WTO action is the next step in the strategy.

If "national treatment" rules were applied to government subsidies it could mean that transnational corporations could compete for the funding of public health and education. This could mean privatisation of our public health and education systems.

Australian government position and Community Campaign

In spite of submissions from PIAC and many other community organisations, the Australian government has supported a stricter WTO test to reduce national rights to regulate in the public interest. It has refused to exclude public health and education from the GATS negotiations.

This is unacceptable. Decisions on regulation and funding of essential services must be made by governments after public debate, not secretly signed away in trade agreements.

We must make our government accountable for its actions on GATS and the WTO. Community organisations have launched a public campaign calling for a halt to GATS negotiations to enable a review of the impact of the existing agreement and full public discussion of proposed changes. They want commitments from governments and opposition parties that they will oppose any reduction in the rights of national regulation in the public interest and that they will exclude public services from trade agreements. They want public debate and full parliamentary scrutiny of all trade agreements before they are signed.

For more information see the Australian Fair Trade and Investment Network website www.aftinet.au

Regional and Rural Training

Cathie Sharp, *Training Co-ordinator*

While Australian politicians have paid increasing attention to the needs of people living in rural and regional areas, the legacy of cuts in government services and the impact of deregulation and globalisation lives on in these communities. PIAC's focus on the needs of those who are marginalised or disadvataged has taken us into these areas, primarily via our training program.

PIAC has a goal of providing advocacy training outside the metropolitan area at least three times per year. So far we have met this goal and these programs are always extremely rewarding and well-received. As many regional and rural centres are often at a disadvantage when it comes to receiving information and support and training, when training courses are held in these areas, the response is usually very positive with high demand. Given that distance, transport and resource issues affect the viability to access courses, participants often represent communities from outlying districts and then disseminate information and materials to ensure the skills and experience are widespread.

In recent months, PIAC has delivered training in Broken Hill, Bega and Albury. At Albury we were invited by the Albury City Council to conduct a one day *Advocacy* course for community workers. Although quite a well resourced community, Albury still suffers from the tyranny of distance from metropolitan areas with the resultant lack of information and support in many key community services. Participants were thus keen to explore how they could manage local issues using a range of systemic advocacy strategies.

Albury was also the location for one of the four two day Advocacy programs we have delivered for the Commission for Children & Young People. The other programs were in Sydney for the Commission's Youth Reference Group and in Bega. Participants in Bega and Albury were aged between 13 and 18 and were a mix of school students, homeless youth, young unemployed and trainees. All of the young people very much appreciated the opportunity to learn about and discuss advocacy strategies and more particularly how they could put it into action. Skills development in speaking up about the concerns of young people in regional areas was the aim of the training and was well received by these enthusiastic young people. The Broken Hill program was provided with the assistance of the NSW Law and Justice Foundation and Broken Hill Community Inc of Broken Hill City Council as part of their Community Roundtable. This Roundtable included speakers and workshops on various topics and projects aimed at empowering the community, fostering stronger community networks and exploring solutions to local issues. In addition to PIAC, speakers and workshop facilitators included representatives from the NSW Premier's Department, the Department of Prime Minister and Cabinet and Murdoch University.

Five courses were delivered by PIAC, three of them being part of the Roundtable program. These included a one day course *Introduction to Advocacy, Media Skills* and *Negotiation Skills*.

The two additional courses were provided to the Australian Inland Water and Energy Customer Council and the Far West Area Health Advisory Committee on *Effective Consumer and Community Representation*. These courses were designed specifically for the members of these advisory bodies to assist them clarify their roles as consumer advocates and to explore opportunities for consulting with and reporting back to the community. Many customer and advisory councils have been established throughout Australia however little training has been provided to members to assist them effectively represent the needs of the community.

Given the problems of isolation and distance, often, the only way remote areas can receive sufficient resourcing to enable training courses such as those offered by PIAC to occur, is via subsidisation of these activities. PIAC will continue its work with communities such as Broken Hill and looks forward to working with other agencies who may wish to commence or continue to provide training support in regional and rural areas.

Participants at Albury course. *Photo courtesy of NSW Commission for Children & Young People.*

UCAP REPORT

Trish Benson and Jim Wellsmore, *UCAP Policy Officers*

CONSUMER PROTECTION IN NEW MARKETS

Electricity and full retail competition

Full retail contestability (FRC) in the NSW electricity industry is assured with the passage of amending legislation in mid-December. The first months of 2001 have seen the Government finalising regulations that establish the final planks of its consumer protection strategy. Much of this framework accords with the proposals advanced by PIAC and other consumer representatives and should ensure that, at the very least, residential consumers do not suffer any hardship with the introduction of the new retail market.

The new regulatory framework for FRC includes:

- a retail marketing code of conduct;
- minimum core provisions for standard and negotiated customer contracts;
- a strengthened role for the Energy and Water Ombudsman; and
- price protection for consumers who elect to remain with their default or incumbent retailer.

PIAC has expressed its concerns over the impact of FRC on residential consumers, especially the poor and disadvantaged. However, we are broadly happy with the outcome of the design process for the new market – particularly given that the NSW Government has adopted much of our policy development and advocacy on these issues.

An outstanding issue centres on the use of "average price" profiles to measure household consumption or the mandating of new time-of-use meters. PIAC has argued consistently that the mandating of meters cannot be justified on the balance of costs and benefits to consumers – a position shared by the NSW Government. At the time of writing PIAC is hopeful that the Australian Competition and Consumer Commission (ACCC) will recognise the strength of these arguments in a formal determination on this issue.

Gas framework

The gas industry, too, will see the introduction of retail competition by year's end. Necessary legislative amendments have passed through the NSW Legislative Assembly and are expected to be approved by the NSW Legislative Council in late May/early June. While many of the new measures reflect the consumer protections introduced to electricity, PIAC is pleased to have had the opportunity to shape a number of important provisions. These include a new obligation for retailers to supply domestic consumers who are connected to a distribution network.

PRICE REGULATION

Price protection was one matter for which PIAC had argued strongly. We were especially pleased by the decision of the Independent Pricing and Regulatory Tribunal (IPART) in late December to impose a tight price cap on prices for so-called "default" consumers in the new market. As reported previously (see PIAC Bulletin No. 12), new retailers had insisted that competition be stimulated by price hikes for those households electing to stay with their incumbent electricity retailer. The Tribunal has ensured that increases in the retail component of final prices are limited roughly to changes in the CPI. Moreover, some consumers will see gradual falls in retail charges over the next few years. However, since the network component of prices is regulated separately there is no guarantee that total prices will not increase at a faster rate.

PIAC expects to continue its close work with the Tribunal over the coming months. With a number of major price determinations now completed attention has turned to the role of regulation in relation to standards of service from utility providers. PIAC is participating in these debates with particular interest centres on "trade-offs" between price regulation and what levels of service are appropriate to a given price.

HOME ENERGY EFFICIENCY

The Community Home Energy Efficiency Partnership (CHEEP) involving PIAC and a number of other organisations has developed a proposal to provide a state-wide retrofitting service in NSW (reported in PIAC Bulletin No. 11). Now titled REFIT, this project has developed over the past year with EnergyAustralia having committed $300,000 per annum for the remainder of the current electricity distribution pricing determination.

A pilot scheme will be run in the lower Hunter commencing in early late 2001.

REFIT will use the funding from EnergyAustralia to install energy efficient devices into homes of low-income private tenants. Those households not on low incomes will be able to purchase the REFIT service for approximately $120.

The products/service that will be provided include:

- an energy audit;
- 2 compact fluorescent light globes;
- 1 AAA rated shower head;
- cistern weights; and
- tap aerators.

The CHEEP Committee have agreed on a budget for the administration of REFIT that includes a contributions either financial or in-kind. For example, from the Sustainable Energy Development Authority (SEDA) and Newcastle City Council. The final budget and a reworked project plan has been approved by Energy Australia and is now being implemented.

PIAC People

Staff News

In April we were delighted to welcome Trish McEniery, our Senior Solicitor back from maternity leave. Trish is back on board 3 days per week. We have also recently farewelled Christopher Johstone a long term secondee from Baker and McKenzie. Our thanks to both Chris and Bakers.

College of Law

Our thanks go to Matthew Zurstrassen who was our College of Law placement from October 2000 to January 2001. Matthew is now working in Canberra with AusAid and we wish him all the best. Our most recent College of Law placement is Jacqui Gal, who joined us in February and will be with us until June.

Student University Placements and Volunteers

PIAC student placements and volunteers over the last 6 months have made a significant and valuable contribution to the centre's operations. All the staff of PIAC thank Johanna Geddes, Yudi Burhan (from Indonesia), Sarah Hill (on external placement from Sydney University) and Julian Schimmel for their time, donated to PIAC on an on-going basis.

PILCH Secondees

In the last 6 months the Public Interest Law Clearing House has functioned with the assistance of secondees from member firms, Mallesons Stephen Jaques and Minter Ellison. Our thanks also go to Rebekah Mansour of Mallesons Stephen Jaques and Kathleen Searles from Minter Ellison.

Unity Dow Luncheon

PIAC and PILCH are delighted that Justice Unity Dow has agreed to address a fundraising lunch in August to be hosted by PILCH member firm, Minter Ellison.

Ms Dow is the first woman to be appointed to serve on the High Court of Botswana. She is well known as an advocate for human rights and the rights of women and children. Ms Dow was the plaintiff in a landmark case in Botswana which ultimately lead to Botswana's nationality law being overturned, making way for legislation which allowed women to pass on their nationality to their children.

Ms Dow is visiting Australia as a guest of the Melbourne Writer's Festival. Copies of her first novel, *Far and Beyon,'* will be available for sale. All proceeds of the luncheon will go to PIAC and PILCH's project on the Stolen Generation. Anne Summers will introduce Ms Dow at the luncheon.

Date: Tuesday 21 August, 2001

Place: Minter Ellison, Aurora Place, 88 Phillip Street, Sydney

Time: 12.30pm

Price: $65.00 per head

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