

## Australian Native Title Law

Melissa Perry and Stephen Lloyd

Native title issues continue to affect a wide range of interests, not only through native title litigation, but also in areas such as planning and development, and mineral exploitation.

This important new text provides a sound understanding of the law of native title in Australia. The *Native Title Act 1993* is annotated and explained in detail, with comprehensive references to relevant authority and materials. The introductory chapters place the Act in context, and explain essential concepts and principles, which underpin the Act, including relevant principles of constitutional, property and discrimination law. The authors' extensive experience in this and related areas finds reflection in the depth of analysis and practical insights provided by the book.

This outstanding new work will provide a valuable contribution to the area of native title law, and appeal to practitioners and those who advise in this area.

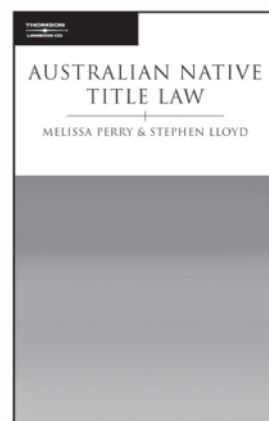
A resource CD is included for immediate access to the significant cases referred to in the text, and to key legislation.

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## Shining a light on electricity market reform

Jim Wellsmore, Senior Policy Officer

Many in the community would feel remote from debates in the energy industry about national regulators, revenue caps, access to infrastructure and investment signals. A key feature of these debates is the call for further price rises for essential services in electricity and gas.

The central question is what should happen with the energy market now the weaknesses of competition are becoming apparent. Australian governments embarked on competition reform in energy over a decade ago. Competition was to deliver consumer choice, innovation and efficiencies. Few of these promises have been fulfilled. Households have seen significant price hikes in recent years. Now the community is being softened up for further price rises; rises that we are told are vital to avoid a future 'crisis'.

### More reform 'medicine'

If competition reforms have not delivered benefits, is the next step to have more competition or less? The preference of governments is for more competition. Energy companies and investors share the view that the major failing of competition reform is that it has not gone far enough. As PIAC has argued previously, this is akin to saying, 'the patient is getting sicker so let's give them a large dose of the same medicine!'

Of equal concern is the growing chorus of demands for changes to the role of governments and regulators.

The argument is that independent regulators impose too many rules, which dampens profits.

Regulators determine the size of many of the components of energy prices. There are complex methods for calculating the cost of energy and determining how much suppliers may vary prices. In the past regulators were able to deliver price falls, especially for electricity. Are we paying the right price for our domestic energy? Is it reasonable for prices to rise? Can consumers absorb higher prices for essential services?

The view of PIAC remains that energy price protection is important for households given they are customers of what remain largely monopoly suppliers. Others counter that regulators are the cause of higher prices; that only unfettered markets can deliver real benefits. A key objective of the new National Electricity Law is to protect the long-term interests of consumers. This has been cast in narrow economic terms; price does not matter as much as competition and plenty of investors lining up to win a share of industry profits.

### Public interest and markets

What we know is that some households already struggle to pay their energy and water bills. Higher prices can only impose a further burden. Research by PIAC shows that financial hardship leads to a

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## From the CEO

PIAC has always had an interest in ensuring that governments are appropriately accountable to their electors and that the community has effective ways of participating in civil society. Since 11 September 2001, democracies across the globe, including Australia, have experienced a significant reduction in the protection afforded to civil and political rights. There has been an almost continuous flow of legislation tabled in the Federal Parliament in Australia that has removed important legal system protections that properly form the basis of the relationship between the government and those for whom it governs. There have been moves to close court proceedings to public scrutiny, to allow detention and questioning without suspicion of criminal activity, to permit indefinite detention of non-citizens, and to permit the government to remove a person's passport without that decision being subject to independent, judicial scrutiny.

While there has been vocal resistance

to those changes, in the main the legislation has had an easy passage. Critics are accused of being ideologues and soft on terrorism. It has even been suggested that human rights, upon which much of the resistance is based, are the product of a safe and comfortable history and that, inevitably, we must all accept a whittling down of human rights in the name of 'community rights'. Yet it is precisely because of abuse of power by Nation States against their own citizens that we have such a clear and internationally agreed articulation of human rights. There is nothing soft about expecting governments to uphold and comply with the rule of law.

PIAC is one of the critics of these attacks on fundamental rights and the rule of law. It believes that Australian democracy is at risk of being seriously undermined. It is concerned about the quickening shift towards notions that some people are less deserving of legal protections than others, and the consequent removal of rights from those

labelled different or unco-operative.

Australia is about to have a federal Government with a Senate majority for the first time in 30 years. So, at the same time as government has increasing power, there have been reductions in independent accountability mechanisms provided by the legal system.

The Prime Minister has promised not to abuse the privilege that the Senate majority affords his government. We must all find ways to ensure that this promise is kept and that the Government does not use its power to further undermine fundamental rights and freedoms. We must ensure that the machinery of government, the bureaucracy, has a culture that is consistent with democratic values. Democracies depend on their members to speak out when they see injustice and take action when they see the very principles of accountable and representative government being undermined.

## PIAC Staff



Front Row: (left-right) Jim Wellsmore, Hugh O'Neill, Sarah Winter, Emma Gollidge, Simon Moran

Middle Row: Pat Ranald, Charmaine Smith, Alexis Goodstone, Jemma Bailey, Robin Banks, Sandra Stevenson, Katharine Slattery, Melissa Pinzuti

Back Row: Carolyn Grenville, Fabiola Rofael, Ellena Galtos, Anne Mainsbridge, Jane King, Jane Stratton, Elissa Freeman

Absent: Madeleine Bennison, Marion Grammer, Sarah Mitchell, Jason Mumballa

## Indigenous Justice

### Introducing PIAC's new Indigenous Solicitor: Charmaine Smith



**Charmaine Smith has recently joined PIAC as its Indigenous Solicitor, replacing Shahzad Rind. Charmaine will continue the work of PIAC's Indigenous Justice Project. We've asked Charmaine to introduce herself to Bulletin readers.**

I joined PIAC in March 2005. I am a descendant of the Kurna people in South Australia, and studied law at Adelaide University. With my studies successfully over, I worked as a solicitor with two plaintiff law firms in Adelaide.

I also worked with the South Australian Equal Opportunity Commission, as a volunteer at Aboriginal Legal Rights Movement in Adelaide and at the Central Australian Aboriginal Legal Aid Service in Alice Springs.

In my role at PIAC, I will initially be focussing on policing issues. This will include advocacy work for clients with complaints against the NSW Police and examining the cultural awareness education and training the police receive. As a first point of contact between Indigenous people and the justice system, the police service plays a pivotal role in Indigenous justice issues. Many police officers enter the force having had little or no contact with Aboriginal people and are uninformed and unprepared to deal with the particular social and cultural aspects of policing in Indigenous communities. This can contribute to a culture of systemic racism within the police service. Consequently, while Aboriginal people are strongly encouraged to

join the police force, the numbers of Aboriginal police officers remain below the Government target of 2% and statistics demonstrate a relatively low retention rate.

I'm looking forward to meeting other Aboriginal people working at community organisations in New South Wales to gain an insight into other legal issues affecting local communities and those communities in rural areas.

My priority is to provide an accessible and culturally appropriate legal service for my clients and to meet with them in a comfortable environment, which often involves meeting with clients in their homes. I hope to continue to strengthen the links that PIAC has already established with Indigenous organisations in NSW.

*PIAC thanks Allens Arthur Robinson for its continued funding and support for PIAC's Indigenous Justice Project.*

### Our Strong Women - Speaking Up, Speaking Out

#### Carolyn Grenville, Training Co-ordinator

PIAC is once again partnering with the National Network of Indigenous Women's Legal Services Inc (NNIWLS) on a leadership and advocacy training project called *Our Strong Women - Speaking Up, Speaking Out*.

From August 2002 to June 2003, two hundred Indigenous women associated with Indigenous women's legal services across Australia completed a two-day advocacy and leadership training program. The training was run by NNIWLS and presented by PIAC, based on PIAC's accredited training program *Work the System - an introduction to advocacy*. Most of the funding was provided by the Office of the Status of Women.

In 2005, the Office for Women has again provided funding to NNIWLS to produce a version of the *Work the System* training kit that is tailored to the needs of Indigenous women. In March, PIAC's Training Co-ordinator, Carolyn Grenville, worked with a group of women from NNIWLS to design a customised two-day training program for Indigenous women. We came away from the writing days with many creative ideas for training to empower and equip Indigenous women to speak out on behalf of their communities.

These ideas have been developed into a training kit, consisting of a workbook for training participants, a training presenter's guide and overhead

transparencies. We are taking the kit on the road in the coming months to train Indigenous women at five regional workshops around Australia: Moree, Townsville, Darwin, Broome and Port Augusta.

The training includes a game that teaches about the branches of government. The women will also trace the impact of government on Indigenous people and the history of Indigenous advocacy through a timeline. There will be a chance to work on local community issues as part of the training.

In the future the project will train members of NNIWLS to run the advocacy and leadership training in their own communities.

## continued from page 1

high rate of disconnections for low-income households, those with large families, Indigenous families and people with ongoing health issues. The withdrawal of essential services from these people presents a major challenge for the energy industry.

The strict economic view is that governments need to provide a solution; taxes should fund relief schemes for poor and disadvantaged consumers. The dilemma is where to draw the line between good social policy and the proper functioning of markets. The NSW Government, for example, has been criticised by other state governments and the private sector for capping the electricity prices paid by residential and small business customers. By contrast the Victorian Government limits price rises for rural consumers by spending tens of millions each year on subsidies to private electricity providers.

The PIAC research suggests that the industry needs to replace its emphasis on credit management and cost recovery with a more determined effort to assist the minority of customers dealing with hardship.

Competition reform is supposed to deliver greater efficiency and more effective markets. Keeping suppliers profitable means keeping the lights on. Yet, public ownership and government investment achieved the same goals without higher prices and more disconnections.

Can markets and competitive behaviour be relied on to serve the public interest?

## Prices and regulation

One cause of higher electricity prices is extra spending on infrastructure: poles and wires. Some of this can be justified by population growth and the need to replace old assets. Yet the regulatory

rules favour traditional expensive infrastructure over energy conservation and demand management. These rules result in price increases, but were introduced by Australian governments to promote competition and privatisation.

NSW is facing pressure to provide extra electricity generation by building new power stations. The Government's preference is for private sector investment. This is the highest cost option for consumers; not only because private capital tends to be more expensive, but also because private investors generally seek incentives and assurances about profitability.

What has benefited consumers, particularly in NSW, is regulation of prices. The Independent Pricing and Regulatory Tribunal (IPART) is a statutory body with an obligation to consider the social impact of its decisions on prices. Prior to full competition in the NSW market, prices for electricity were falling. Competition is not to blame for all the price increases of recent years; yet the fact that consumers are facing still more price rises has not deterred the industry or the NSW Government from arguing that the role of the Tribunal should be reduced.

Debate is on in earnest about the merits of so-called 'light handed' regulation. Large infrastructure companies are campaigning openly for regulators to have fewer powers. Their argument is that the market should be freed to allow consumer prices to increase in order to provide incentives for private investment in energy and other sectors. The Productivity Commission agrees. Its recent report on competition reform suggested that regulators (rather than being independent arbiters between owners and customers) should favour private investors with higher prices.

By contrast, PIAC points out that these same regulators have been approving billions of dollars of extra revenue for energy suppliers, including to fund new investment. It is difficult to know how much more light handed regulation might be or how much greater favour for these companies is warranted.

## Higher energy prices to come

The NSW Government, still committed to competition in electricity, has signalled its intent to remove the price-capping powers of IPART and leave price protection to the vagaries of the market. Yet, energy retailers continue to assert that the same market can deliver stronger competition only when prices are much higher than at present.

These debates are particularly critical now because Australian governments have initiated major reforms to the regulation of electricity and gas industries. A new national regulator has been established and a new market objective—long-term consumer benefit—has been introduced. New rules will be created to deal with the complex tasks of setting prices for the various links in the supply chain. Some consumer protection rules could be standardised.

The strongest stakeholders in this process—governments, industry and regulators—all share broad agreement on a need for a freer market and higher consumer prices. PIAC and other community advocates assert that the real test for reform is not how much competition is created but how well the energy market caters for the needs of the smallest and weakest consumers: low-income households. After all, for these households a strongly competitive market based on higher prices will mean that the lights continue to be turned out.

## PIAC's view of 'a new security landscape'

PIAC continues to make submissions to NSW and Federal Parliamentary inquiries to insist that any legislative or policy measures in response to perceived terrorist threats do not compromise Australia's democracy, human rights obligations or the limits properly imposed on the exercise of government power by the rule of law, including the separation of powers.

PIAC is concerned to challenge the increasingly accepted wisdom that Australia is now in a 'new security landscape'. Certainly the Federal Government, in pursuing its suite of national security legislation, has relied on the logic that the world is a different place after 11 September 2001. This logic has been used to justify the conferral on ASIO of powers to detain people without trial, charge or suspicion of criminal activity, the closure of public courts where 'national security information' might be prejudiced, and the creation of broad and amorphous terrorist offences in the *Criminal Code 1995* (Cth).

PIAC firmly resists the prevailing logic that any such 'fundamental shift' has occurred or that we are living in a 'new security environment'. This is not to say that there is no terrorist threat, but that this threat does not mark a brave new world that would justify the laws that the Federal Government has pursued.

PIAC endorses the views of the Honourable Justice Michael Kirby and Simon Bronitt, both of whom caution, in different ways, against vitiating fundamental principles of the rule of

law, human rights and criminal justice on the basis of a 'new' putative threat of 'transnational terrorism'. They each seek to challenge the predominant rhetoric that, as Simon Bronitt puts it, 'we live in extraordinary times that demand ... extraordinary laws'. It is easy to say that 'these are new and dangerous times', but the Australian response to terrorism ought not to be led by fear. Australia should not depart from its human rights obligations nor centuries-old principles of the rule of law enshrined in our common law system.

PIAC's recent submissions in this area can be found on the website at [www.piac.asn.au/publications](http://www.piac.asn.au/publications). For information about this work, contact Jane Stratton on 02 9299 7833 or by e-mail to [jstratton@piac.asn.au](mailto:jstratton@piac.asn.au).

## Protecting Human Rights in Australia: a community education project

PIAC's *Protecting Human Rights in Australia* project continues apace.

The project has been running since June 2004 and involves three strategies: a community education kit; a nationwide train-the-trainer campaign; and finally, an advocacy campaign for comprehensive protection of human rights at local and state/territory and the federal level.

PIAC has distributed over 3,500 copies of the community education kit nationwide since the launch of the kit in June 2004. We were excited to learn in March 2005 that PIAC's application for

funding to the Law & Justice Foundation of NSW for translation of the kit into Arabic, Chinese and Vietnamese was successful. We hope to have the kit translated and distributed by August this year. The translated materials will be available in electronic format, with a limited print run of the translated kits distributed to key community groups.

PIAC aims to have conducted at least one train-the-trainer workshop in each state and territory by the end of 2005. Workshops have been conducted in Perth, Adelaide, Melbourne and Sydney. At the time of going to press, we are looking forward to the next workshop in Canberra in early June. PIAC hopes to deliver workshops in Queensland, Tasmania and the Northern Territory by the year's end.

Finally, PIAC is beginning to plan an advocacy campaign targeting local governments and supporting state and territory initiatives for comprehensive protection of human rights. PIAC believes that by engaging government and communities at a local level, we will begin to create a more sustainable culture of rights and an understanding of the value of human rights that will then lend support to the protection of human rights at a state, territory and federal level.

For more information, contact Jane Stratton on 02 9299 7833 or by e-mail to [jstratton@piac.asn.au](mailto:jstratton@piac.asn.au) or go to [www.piac.asn.au/publications/hrkit.html](http://www.piac.asn.au/publications/hrkit.html)

# Human Rights

## Paying the price of vilification

Alexis Goodstone, Senior Solicitor

In November 2004, the NSW Administrative Decisions Tribunal (ADT) found that John Laws, Steve Price and Radio 2UE had unlawfully vilified homosexuals in contravention of the *Anti-Discrimination Act 1977* (NSW). The vilification complaint was lodged by Gary Burns in 2003 after comments were made on Radio 2UE by Laws and Price about the appearance of a gay couple on the Channel 9 television program, *The Block*.

On 16 February this year, the ADT ordered that all of the respondents make public apologies. Laws and Price have been ordered to make public apologies on air, and Radio 2UE has been ordered to publish an apology in three major metropolitan newspapers and on its website.

The ADT also ordered that the respondents pay Mr Burns's legal costs. Legal costs are rarely ordered by the ADT. However, the Tribunal in this

case found that because of the 'public interest' nature of the complaint, an order for costs was justified. The orders have been put on hold pending the outcome of an appeal lodged by John Laws, Steve Price and Radio 2UE.

The decision of the ADT can be found on their website at

[www.lawlink.nsw.gov.au/adt](http://www.lawlink.nsw.gov.au/adt).

## Criminal Record and Employment Discrimination

Anne Mainsbridge, Solicitor

Many people with criminal records face serious barriers to finding work or receiving equitable treatment from employers. In theory, doing the time and/or paying the fine is society's punishment for a criminal act. However, in reality, many ex-offenders continue to be subjected to further punishment in the form of discriminatory employment practices.

Without stable employment, a person is less likely to have access to other crucial elements of the rehabilitation process such as housing, education and health care, and is (as a result) more likely to re-offend. There is a clear public interest in ensuring that people with criminal records are not subjected to discrimination and stereotyping by employers.

In December 2004, the Human Rights & Equal Opportunity Commission (HREOC) published a discussion paper titled, *Discrimination in Employment on the Basis of Criminal Record*. HREOC

called for public submissions 'to help develop practical solutions to the real problems faced by employers and employees in this sometimes confusing area of human rights law'.

Using its networks, particularly through the Homeless Persons' Legal Service (HPLS) and the Indigenous Justice Project, PIAC prepared a submission in response to the HREOC Discussion Paper. PIAC's submission noted the particular disadvantages faced by Indigenous people with criminal records, and explored the relationship between homelessness and employment discrimination on the basis of criminal record. A key feature of the submission was a number of case studies reflecting the personal experiences of people with criminal records who had been consulted by PIAC about their experiences of discrimination in the workplace.

PIAC recommended clear and consistent legislative prohibitions at the Federal, state and territory levels against

discrimination in employment on the ground of criminal record. PIAC also called for a unification of the 'spent convictions' schemes across Australia, as these schemes currently cause confusion to both employers and to people with criminal records.

PIAC's submission also examined the interaction between privacy laws and discrimination laws, noting with concern the apparently high level of access to criminal records information currently being provided to employers both with and without a person's consent. This indicates serious breaches of existing privacy legislation as well as a lack of awareness by individuals of their existing rights under that legislation.

PIAC's submission is available on its website at [www.piac.asn.au/publications](http://www.piac.asn.au/publications).

# Trade Justice

Jemma Bailey, Policy Officer

## Protecting our essential services from trade

In April, PIAC joined with people around the world to participate in the Global Week of Action for Trade Justice. During the week, community groups joined forces to affirm people's rights to food, a livelihood, water, health and education, and to reject unjust trade agreements brokered by governments behind closed doors.

PIAC and other members of the Australian Fair Trade and Investment Network (AFTINET) focussed on the current round of negotiations in the World Trade Organisation's General Agreement on Trade in Services (GATS). The aim of the GATS is to remove barriers to trade across all service sectors. However, it only covers those services that each government agrees to list in GATS. Most governments have so far not agreed to list essential services, such as water, health, education and postal services.



Protesters outside Sydney Water at the public rally held by PIAC, AFTINET and the ASU on 12 April.

Australian governments have to date recognised that equitable access to essential services requires careful public regulation and often government provision. If included in the GATS, essential services would be treated as tradable commercial goods under international trade law. This would create pressure for commercialisation and privatisation. It would also enable other governments to challenge the regulation of these services on the grounds that such regulation is a barrier to trade. This would reduce the ability of governments to ensure that essential services are accessible and affordable across Australia and are provided in a way that is environmentally sustainable. Transnational corporations see these essential services as potentially profitable markets and are lobbying governments to include them in the GATS. The European Union has asked that Australia and other countries list water for human consumption in the GATS. In response to a strong community campaign, the Government has committed not to include the ownership of water resources in the GATS, but has remained silent on the management of water services. The

Australia-USA Free Trade Agreement set a dangerous precedent by not excluding water services from the agreement.

The danger is that essential services like water will be traded away behind closed doors in return for gains in other areas of World Trade Organisation (WTO) negotiations (such as agriculture) that are conducted in parallel with the trade in services negotiations.

The negotiation process will intensify in the lead-up to the next WTO ministerial meeting in Hong Kong in December and will continue into 2006.

To highlight concerns about the danger of including water services in GATS, PIAC and AFTINET held a public rally with the Australian Services Union outside Sydney Water on 12 April attended by over 200 people. AFTINET also launched a postcard campaign, urging the Trade Minister not to include water and other essential services in the GATS.

In addition to the GATS campaign, PIAC, AFTINET and the Australian Social Justice Council (ACSJC) launched *Trade Justice*, an ACSJC social justice paper. Written by PIAC's Principal Policy Officer, Pat Randal, and Sister Suzette Clark of the ACSJC, *Trade Justice* analyses the global trade system from the critical perspectives of social justice and human rights. It shows how current trade agreements are influenced by the most powerful economies and transnational corporations at the expense of developing countries. It outlines proposals for the exclusion of essential services and social policies from trade agreements and for a fairer and more democratic trade system.

The publication was launched during the Global Week of Action by Bishop Patrick Power at the Pitt Street Uniting Church. Sharan Burrow, President of the Australian Council of Trade Unions, spoke on the impact of trade agreements on workers' rights and of the importance of collective action between church groups, unions and community groups. For a copy of *Trade Justice*, e-mail [info@acsjc.org.au](mailto:info@acsjc.org.au) or call 02 9956 5811. For more information, see [www.aftinet.org.au](http://www.aftinet.org.au) or contact Jemma Bailey on 02 9299 7833 or by e-mail to [jbailey@piac.asn.au](mailto:jbailey@piac.asn.au)

# Public Interest Law Clearing House (PILCH)

## Submission on Expert Witnesses

In February 2005, the Clearing House provided a submission in response to Discussion Paper 25 of the NSW Law Reform Commission (LRC) on Expert Witnesses.

The LRC Terms of Reference required, in summary, that it inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in NSW.

The PILCH submission dealt with the proposal to prevent experts from being engaged on a speculative basis. PILCH opposed this proposal because it would impact hardest on those ordinary litigants who are unable to meet the significant expenses involved in litigation.

The submission contained three recommendations:

1. That the LRC not recommend the introduction of any measures to ban or discourage the use of contingency fees by experts until such time as there is due consideration given to the impact on the ordinary person's access to justice.
2. That, in the event that the LRC recommends such a ban, that it recommend it in the context of a wider scheme of changes to ameliorate the negative impacts of such a ban and mechanisms introduced to redress them, such as the expansion of legal aid.
3. That the LRC recommend that concerns regarding the potentially negative consequences of experts being engaged on a contingency basis be addressed through disciplinary mechanisms by relevant professional bodies and allowing courts to refer experts directly to such bodies for action.

## Children in Detention Advocacy Project

PILCH member firms and barristers are working with PIAC and Legal Aid NSW to address systemic deficiencies in the criminal justice system resulting in the unlawful detention of children. These deficiencies will be addressed not only through litigation, but also through policy and advocacy work.

In April 2005, PILCH member firm, Deacons, hosted a training session for lawyers participating in the project. PILCH member firms, Phillips Fox, Baker & McKenzie and Blake Dawson Waldron, along with a panel of barristers from PILCH member floor, 6th Floor Selborne/Wentworth Chambers, have agreed to assist with a number of civil cases identified by Legal Aid NSW. For more information about the project contact PIAC Senior Solicitor, Alexis Goodstone, at [agoodstone@piac.asn.au](mailto:agoodstone@piac.asn.au)

## Homeless Persons' Legal Service (HPLS)

The HPLS, a joint initiative of PILCH and PIAC, celebrated its first year of operation in conjunction with the launch of a new legal clinic on 18 May 2005. (See article on page 10.)

In addition to the support that PILCH members provide to the operation of the now six legal clinics, PILCH members assist with the HPLS training program for lawyers. In March 2005, the first continuing training seminar was held at Clayton Utz, with Jane Sanders from Freehills' Shopfront Legal Centre presenting on fines. In April 2005, TressCox hosted a lunchtime training session for HPLS lawyers, presented by speakers from the Tenants' Union. In May 2005, Baker & McKenzie hosted the induction training for HPLS lawyers. The induction session on Family Law was presented by a speaker from PILCH member firm, Watts McCray.

## The Board

The PILCH Board for the current year is:

- John Sheahan SC, President
- David Robb, Vice-President, Allens Arthur Robinson,
- Cassandra Michie, Secretary/Treasurer, PricewaterhouseCoopers
- Jim Boynton, Mallesons Stephen Jaques
- Robert Bryden, Bryden's Law Office
- Harriet Grahame, Frederick Jordan Chambers
- Chris Greiner, Blake Dawson Waldron
- David Hillard, Clayton Utz
- Michelle Hannon, Gilbert + Tobin
- Shauna Jarrett, Agostini Jarrett
- Geoff Lindsay SC, 8th Floor Wentworth Chambers
- Keith Robinson, Minter Ellison

## New members

PILCH is delighted to welcome as members the law firms of Swaab Attorneys, and Banki Haddock Fiora. Swaab Attorneys practices in corporate and commercial law, finance, foreign investment, intellectual property, litigation, family law and family provision proceedings. Banki Haddock Fiora provides legal services in intellectual property, litigation, commercial and corporate law.

## Staffing

Our thanks to Henry Davis York secondee to PILCH, Davyd Wong, who completed his secondment on 4 February 2005.

In the absence of a secondee, PIAC employed a part-time paralegal, Sarah Winter, to assist with the assessment and referral scheme. Sarah joined PILCH on 22 February and worked with PILCH staff until 3 June. Mallesons Stephen Jaques secondee, Alex Newton, has recently replaced Sarah and will be with PILCH until the end of September 2005.

PILCH is now seeking secondees for the following periods:

- 31 September 2005 to 31 January 2006;
- 30 January 2006 to 31 May 2006.

Please contact PILCH Co-ordinator, Sandra Stevenson, for further information about secondments or if your firm can assist: [ss Stevenson@piac.asn.au](mailto:ss Stevenson@piac.asn.au)

## Referral highlights

PILCH thanks all its members for their ready acceptance of matters through the referral scheme.

**David Robertson**, barrister, advised the client of a Community Legal Centre who is seeking to challenge exemptions granted to a charitable organisation under the *Anti-Discrimination Act 1977* (NSW) in relation to the provision of services to trans-gender clients.

A service that provides primary carer respite services is being advised by **Clayton Utz** on its responsibilities

when seeking consents for collection of health information.

**Sigrid Higgins**, barrister, provided advice in relation to appealing a decision in a discrimination complaint that raised issues of a principal's liability for the discriminatory conduct of its agents.

**Phillips Fox** is advising an organisation that provides services to people with intellectual disabilities about its obligations when asked to release its clients' confidential information to government departments and tribunals.

**Blake Dawson Waldron** is assisting with the establishment of a regional charity that aims to provide people with disabilities with access to sporting activities.

**TressCox** is providing tax advice to a non-profit organisation focussing on improving literacy and community access to public information.

**Geoffrey Flick SC, 6th Floor Selborne/Wentworth Chambers**, advised an organisation that provides services to prison inmates on the

# News and Views

prospects of success of judicial review of a decision that impedes the organisation's ability to act on behalf of inmates in complaints to external bodies.

**Holding Redlich** is assisting a client to obtain redress against a local council for its failure to provide appropriate wheelchair access to council properties.

A non-profit Indigenous organisation facing the possible loss of culturally significant land is being advised by **Freehills**.

## Co-ordination between NSW referral schemes

The PILCH Board is exploring mechanisms for greater co-ordination between the three *pro bono* assessment and referral services: PILCH, the Law Society of NSW Pro Bono Scheme and the NSW Bar Association Legal Assistance Scheme. The impetus for this initiative came from a number of members.

## PILCH Events

### Annual Summer Clerks Function

Each year PILCH reports that a record number of clerks attended the PILCH annual summer clerks' function and this year is no exception. Over 100 summer clerks from PILCH member firms attended a cocktail function hosted on 1 February 2005 by Corrs Chamber Westgarth. Corrs Chambers Westgarth's Pro Bono Partner based in Melbourne, David Todd; PILCH Director, Robin Banks; and Henry Davis York secondee, Davyd Wong, addressed the clerks on the importance of *pro bono* practice and the range of *pro bono* opportunities available through PILCH. This annual PILCH event provides a significant opportunity to inform senior law students about the work of PILCH and its members, and encourages clerks to embrace *pro bono* work as part of their legal practice.

### PILCH Seminar: Taxing Issues for Non-Profits

PILCH member, Allens Arthur Robinson, hosted a successful PILCH seminar, 'Taxing issues for Non-Profits', on 2 December 2004. Over fifty participants from the non-profit sector were addressed by speakers from Allens Arthur Robinson, PricewaterhouseCoopers, the NSW Office of State Revenue, WorkVentures and NCOSS.

### Practising in the Public Interest (PIPI) Course

The 2005 PIAC/PILCH PIPI Summer School was conducted from 21-25 February for later-year law students from Sydney University and Macquarie University. A significant factor in its ongoing operation and success is the contribution that PILCH members make, particularly in the placement component of the course.

Baker & McKenzie hosted the three-day training component of the course, co-ordinated by PIAC Training Co-ordinator, Carolyn Grenville. PILCH Board member, David Hillard of Clayton Utz, presented the session 'Introduction to *Pro Bono*'.

Students undertook two-day placements at PILCH member firms: Allens Arthur Robinson, Blake Dawson Waldron, Clayton Utz, Freehills, Gilbert + Tobin, and Mallesons Stephen Jaques; as well as at Maurice Blackburn Cashman, the Human Rights and Equal Opportunity Commission, Legal Aid NSW, and the Sydney Regional Aboriginal Corporation Legal Centre.

# Access to Justice

## Hundreds of homeless people seek justice

Emma Gollidge, HPLS Co-ordinator

The first birthday of HPLS was marked by the expansion of the service in conjunction with law firm Baker & McKenzie and the Salvation Army. This expansion is a reflection of the demand in HPLS's first year. Since May 2004, HPLS has provided advice to 350 clients and has undertaken ongoing casework for over 100 clients. HPLS now operates from six locations with the assistance of seven PILCH member law firms.

The first year of HPLS has confirmed the connections between homelessness and the law. It has also reinforced the primacy of the law reform work of the Service, and the need to articulate the way in which the law disadvantages

people living in poverty, even when they have access to the services of a lawyer. In particular, the widespread incidence of clients with fines, sometimes amounting to tens of thousands of dollars, has raised the efficacy of the fines system as a clear law reform issue for the Service to pursue in its second year.

The success of the first year of HPLS has been testimony to the widespread support and goodwill toward the Service. HPLS lawyers have demonstrated a commitment to the clients that has extended beyond the call of duty and workers at our host agencies have provided pragmatic support to the project. Community Legal Centres have

provided legal training and back up for HPLS lawyers and we have been expertly guided by a Reference Group.

The achievements of HPLS would also not have been possible without our funders, the Federal Department of Family and Community Services through the National Homelessness Strategy and the Hon Bob Debus MP, NSW Attorney General through the Public Purpose Fund.

For more information about HPLS contact HPLS Co-ordinator, Emma Gollidge, on 9299 7833 or at [egollidge@piac.asn.au](mailto:egollidge@piac.asn.au)

## PIAC Training

PIAC is a Registered Training Organisation under the Australian Quality Training Framework. PIAC is registered by the NSW Vocational Education Training Accreditation Board to deliver training, conduct assessment and issue the training qualification Undertake Systems Advocacy – CHCAD3A.

PIAC regularly presents two public courses *Work the System – an introduction to advocacy* and *Effective Advocacy Skills And Strategies* in the Sydney CBD.

PIAC also customises its training to the needs of groups and organisations. Sessions can be mixed and matched, case studies tailored to your issues, and the training can be presented at times and locations convenient to you.

PIAC is committed to taking the training to regional areas, within the limits of PIAC's training resources. If you live in a regional area where there is interest and a need for advocacy training, please contact PIAC.

For more information call Training Co-ordinator, Carolyn Grenville, on 02 9299 7833 or by e-mail to [cgrenville@piac.asn.au](mailto:cgrenville@piac.asn.au).

### Training Tip: How to write an advocacy letter

Next time you are writing to a politician to voice your opinion or request action, run through this checklist to make sure you haven't forgotten anything!

- Your letterhead and address, and date.
- Full name and title of the person to whom you are writing.
- Subject line: limit to one issue per letter.
- Who you are, and your connection to the issue.
- Define the problem concisely.
- Name the relevant policy or legislation.
- Ask specific questions.
- Request action within a specific time frame.
- Offer solutions.
- Suggest a meeting in person.
- KISS (Keep It Simple Sweetheart!).
- Include relevant attachments.
- Contain your anger.

# Detention

Alexis Goodstone, Senior Solicitor

## Immigration detention and the new Removal Pending Bridging Visa

PIAC continues to advocate for an end to the indefinite detention of people in immigration detention. To this end, PIAC has awaited with interest the Government's introduction of the regulation to create the Removal Pending Bridging Visa. The new visa is designed for long-term detainees who are awaiting removal. PIAC has the following concerns about the new visa:

- **Signing away rights:** People should not be required to forego their right to pursue a section 417 application (for a visa on humanitarian grounds) or a section 48B application (for a chance to make a fresh visa application on the basis of changed circumstances) to the Immigration Minister in order to be eligible for the visa.
- **Length of time:** As soon as it is determined that it is not possible to arrange the removal of a person, that person should automatically be considered for the visa.
- **Certainty:** After two years, a person on the visa should be granted, or be eligible to apply for, permanent residence.
- **Determining eligibility:** Given the highly politicised nature of the issue, an independent panel of experts should assess applications to determine eligibility for the visa.
- **Review Rights:** The decision not to grant a visa should be reviewable.
- **Reporting conditions:** Reporting conditions should be reasonable and not interfere with the person's ability to hold down employment or enjoy a normal life in the community.

It appears that very few detainees will be eligible for the visa unless the eligibility criteria address these issues.

PIAC met with Liberal MPs Petro Georgiou, Bruce Baird and Judi Moylan to congratulate them on their work in pressing for the new visa, and to raise PIAC's concerns. In addition, PIAC discussed the case of PIAC client, Peter Qasim, who is the longest serving detainee in Australia. The MPs had already made representations to the Immigration Minister about Mr Qasim's situation. It was also an opportunity to outline PIAC's opposition to the Temporary Protection Visa regime, mandatory detention and the Pacific Solution, and to highlight the need for the urgent implementation of the Human Rights and Equal Opportunity Commission's recommendations in relation to children in immigration detention.

## Children in Detention Advocacy Project

PIAC and the Public Interest Law Clearing House (PILCH) have recently launched a project with Legal Aid NSW that aims to challenge unlawful and unnecessary detention of children in the criminal justice system. The Children in Detention Advocacy Project will provide *pro bono* legal representation to people who may have a cause of action arising from actions taken against them while they were minors by law enforcement agencies and private security personnel, including false arrest, unlawful detention and/or the use of excessive force.

The cases have been identified by Legal Aid NSW and will be referred by PILCH

to participating member firms. They include allegations of:

- minors being arrested on warrants where there are deficiencies in the warrant;
- minors being arrested for breach of bail conditions where there was no breach of bail;
- police using excessive force in arresting minors;
- minors visiting relatives in gaol being caught up in police investigations and strip-searched without reason; and
- malicious prosecution.

Legal Aid NSW has indicated it has a regular flow of applications from juveniles in similar circumstances. This suggests systemic deficiencies in the administration of the criminal justice system. The right to liberty is a fundamental human right. Considering the vulnerability of children and the negative consequences of any period of detention, it is in the public interest that these cases be resolved and the repeat of such incidents be prevented.

Legal challenges are only one part of the strategy envisaged to challenge these practices. It is proposed that lawyers working on these cases will meet regularly to identify the systemic practices resulting in the unlawful or unnecessary detention of children. This group will help inform and, where possible, be involved in associated policy work such as meeting with the Police and advocating for changes in Police procedures.

PILCH has enlisted the help of a number of member firms. Further firms are invited to join now the project is underway. Barrister members of PILCH have also agreed to provide advice and advocacy. A number of Community Legal Centres will also be involved.

# Human Rights and Trade Justice

## Labour rights and environment protection vital in China trade deal

Pat Ranald, Principal Policy Officer

On 18 April 2005, the Australian Prime Minister, John Howard, and the Chinese Prime Minister, Wen Jiabao, signed a formal statement of intent to begin negotiations on a free trade agreement. The Governments' Feasibility Study, released subsequently, claims economic benefits for both countries, but assumes that all trade barriers will be removed from 2006; an assumption that our Government acknowledges is wrong.

The statement of intent included Australia's recognition of China as a full market economy. This status will make it more difficult to object if Chinese goods are being dumped at prices that don't reflect their full production cost. Only Australia and New Zealand have granted China this status.

PIAC consistently argues that bi-lateral trade agreements should require both parties to comply with United Nations and International Labour Organisation Conventions on Human Rights, Labour Rights and Environmental Protection. This was not considered in the study.

Studies show that ninety million Chinese workers lack the essential rights to bargain for improved conditions. Many of these workers are producing items for local firms subcontracting to transnationals including Nike and Mattel. Workers often work 12-16 hours a day, seven days a week without proper overtime payment. Wages for many of these workers have fallen over the last decade, despite enormous economic growth and wealth creation.

Reports of deaths and injuries in the mining and other industries in China indicate that health and safety conditions and environmental pollution are also often appalling.

Transnational corporations are moving investments to China to take advantage of its lack of labour rights and environmental standards. Free trade agreements without commitments to employment and human rights facilitate this global race to the bottom.

PIAC's submission to the Senate Foreign Affairs, Defence and Trade Committee Inquiry into Australia's relationship with China raised these issues. The submission is available at [www.piac.asn.au](http://www.piac.asn.au) and further information is available at [www.aftinet.org.au](http://www.aftinet.org.au).

## Making rights count - a Victorian Charter of Rights?

Jane Stratton, Policy Officer

The Victorian Attorney-General, Rob Hulls, is leading the move to a Charter of Rights for Victoria. With an election due in late 2006 and a majority in both Houses of Parliament, Victoria's Labor Government has a rare but limited opportunity to introduce legislation to protect and promote human rights.

The road towards a Charter of Rights began in May 2004 when the Victorian Attorney-General issued a Justice Statement that included a commitment to 'ensure that human rights are valued and protected and that issues of inequality and disadvantage are demonstrably addressed by the justice system'. This serves as the policy basis for a Charter of Rights.

On 18 April 2005, Hulls released a Statement of Intent that outlined the Government's approach to a charter of

rights. The first step is a community consultation process through the Human Rights Consultation Committee. The Committee will accept written submissions and will report by the end of November 2005.

The Government has clearly signalled that it will not consider a model that delivers directly enforceable rights, such as exist in Canada and South Africa. Rather, it is interested in what is known as the 'dialogic' model that currently operates in the United Kingdom, New Zealand and the ACT. This model requires Parliament to consider the human rights implications of proposed legislation, and exposes legislation to judicial declarations of inconsistency.

The focus is also on civil and political rights, rather than all human rights. The Government claims its 'primary

purpose ... is to adequately recognise, protect and promote those rights that have a strong measure of acceptance in the community'. It further justifies this focus by arguing that 'Parliament rather than the courts should continue to be the forum where issues of social and fiscal policy are scrutinised and debated'. PIAC advocates for a Charter protecting all of the internationally recognised human rights and the indivisibility and interdependence of political, civil, economic, social and cultural rights.

PIAC will monitor developments and work with groups in Victoria advocating for a Charter of Rights. PIAC's *Protecting Human Rights in Australia: A Community Education Project* materials are being used by Victorian organisations to educate the community about human rights and competing models.

# Democracy and Government

## Integrity of Local Government elections

Alexis Goodstone, Senior Solicitor

PIAC acts for Cheryl Borsak in proceedings in the Administrative Decisions Tribunal, against Karin Cheung, a recently elected Councillor of Ashfield Council. Ms Borsak sought an order that Ms Cheung be dismissed from office pursuant to section 329(1) of the *Local Government Act 1993* (NSW) (the Act), on the basis that she was not

a resident of the Ashfield Local Council area and was therefore not eligible to be elected.

The case raises the issue of whether a person can have two residential addresses for the purposes of the relevant part of the Act. PIAC is arguing that the correct interpretation is that a

person may be a 'resident' of only one place for the purpose of being elected as Councillor. The term 'resident' is defined in section 269 of the Act and has not been considered in any previous cases. The hearing finished in February and PIAC and Ms Borsak are awaiting the decision of the Administrative Decisions Tribunal.

## PIAC's electoral preferences

Robin Banks, Chief Executive Officer

After each Federal Election, the Joint Parliamentary Committee on Electoral Matters conducts a broad-ranging inquiry into the conduct of the election. For the first time this year, PIAC made a submission to the Inquiry.

Given PIAC's long-standing focus on accountability of government and the need to ensure an effective civil society, we saw this is a prime opportunity to identify and comment on concerns with the electoral process and provide suggestions for change. PIAC had been particularly concerned about renewed calls by Senator Minchin for the abolition of 'compulsory voting' and his assertion that the level of informal vote at the 2004 Federal Election meant that there are 'thousands of Australians who do not want to vote but are forced to'.

In its submission, PIAC focussed on:

- the duty and right to vote and requirement to do so;
- closing of the electoral rolls;
- postal and remote polling;
- disenfranchisement of prisoners;

- preferential voting systems;
- electoral terms; and
- truth in campaigning.

In relation to 'compulsory voting', PIAC observed the need to understand the myriad of reasons an informal vote may be cast, rather than relying on a simplistic and politically opportunistic view that it is an expression of discontent with having to vote.

The submission also argued against any reduction in time between the issuing of the electoral writs and the closing of the electoral rolls. Prior to the Federal Election, the Federal Government had tabled its Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Bill 2004, whereby it sought to close the rolls on the same day as the writs are issued rather than retaining the existing seven-day grace period. This grace period is important for ensuring that transient and first-time voters—including those who have just turned 18, and those who have recently become citizens—are not excluded from the rolls.

The right to vote of members of another marginalised group was also of concern to PIAC. Parliament recently removed the eligibility to vote from prisoners serving terms of three or more years. PIAC raised a potential constitutional objection to this legislation, as well as observing that it breaches Australia's international human rights obligation to ensure equal and universal suffrage.

PIAC argued that before Parliament legislates to actively disenfranchise any potential voter, it must have clear, cogent and compelling reasons to do so.

Focussing on improving voter confidence and understanding of the electoral process, PIAC also called for a clearer mechanism for the allocation of voter preferences, and for fixed, four-year terms for the Federal House of Representatives.

PIAC will continue to focus on a range of strategies to strengthen democratic processes and community participation in political and civil society. Its submission is available at [www.piac.asn.au/publications](http://www.piac.asn.au/publications).

## PIAC and PILCH People

The first half of 2005 has seen lots of new faces at PIAC and PILCH. But inevitably, with all the welcomes, there had to be some farewells.

Most recently, the Board has grown with the appointment of two new Directors. The Hon Kevin Rozzoli is the Law and Justice Foundation's nominee. Kevin was, for seven years, the Speaker of the NSW Legislative Assembly and served over 30 years in the NSW Parliament as the Member for Hawkesbury.

The other new Director, Britta Bruce, has a background in financial management and organisational planning and development. Most recently she was UTS Director of Connections, University Enterprises where she managed commercial activities and business relationships for the University.

We were all delighted to welcome back Sarah Mitchell from 12 months maternity leave. Sarah is back with us part-time, taking on the administration around PIAC's training work.

Our other Sarah, Sarah Winter, who was a summer clerk with PIAC over Christmas, was employed by PIAC as a paralegal to work with PILCH for four months to fill the gap between secondments. Sarah's energy and

passion for social justice, made her well suited for the pace and diversity of our work. Sarah was with us from February to June, when we welcomed to PILCH Mallesons Stephen Jaques secondee, Alex Newton.

PILCH was also very capably assisted by Minter Ellison secondee, Catherine Capelin, until February this year. We were delighted to discover that Catherine will be working closely with PIAC in future through Minter Ellison's involvement in the Homeless Persons' Legal Service.

PIAC's first Indigenous Solicitor, Shahzad Rind resigned in February to take up a position with Native Title Services. His work will be very capably continued by PIAC's new Indigenous Solicitor, Charmaine Smith (see welcome on page 3).

In February, Policy Officer Annie Pettit resigned to take up a PhD scholarship at Monash University in Victoria. Through the scholarship, Annie will continue her important work on the impact of increased national security laws on human rights.

Jane Stratton was appointed to fill Annie's position. Jane worked with Gilbert + Tobin before completing a Masters of Law at New York University

while working with Professor Philip Alston at the New York Centre for Human Rights and Global Justice. Jane brings a passion for human rights and community development to her work and will be focussing initially on PIAC's *Protecting Human Rights in Australia* project.

Louise Southalan bid us farewell in November to explore language and human rights in South America. In her place, Jemma Bailey has taken on Trade Justice work with equal gusto. Jemma came to PIAC from Mallesons Stephen Jaques. She has worked with the National Children's and Youth Law Centre, Oxfam in Peru and with the Mineral Policy Institute.

The Homeless Persons' Legal Service has as its first Policy Officer, Ellena Galtos. Ellena came to PIAC from the Energy and Water Ombudsman, after a long history of working in community sector organisations. In April, HPLS Administrator, Nya Gregor Fleron left us to focus on setting up a yoga school.

Our current College of Law placement, Hugh O'Neill has maintained the high standards set by his predecessor, Sophie Clarke. Both have provided excellent support to PIAC's legal team. We've also been joined by Laura Thomas, PIAC's current Sydney University placement.



Above: Jennifer McVicar, National Co-ordinator, Pro Bono and Community Service Programs, Baker & McKenzie; The Hon Bob Debus MP, NSW Attorney General; Robin Banks, CEO of PIAC and Lieutenant Colonel Robert Street, Chief Secretary of the Salvation Army celebrate the first birthday of the Homeless Persons' Legal Service and the launch of the new clinic.

Left: The Hon Bob Debus speaking at the launch of the new HPLS clinic on 18 May

### Public Interest Advocacy Centre Board

	Annette O'Neill (Chair)	Ben Slade (Deputy Chair)	
Britta Bruce		Bill Grant	Gary Moore
Alan Cameron		Shauna Jarrett	The Hon Kevin Rozzoli
The Hon Elizabeth Evatt AC		Rodney Lewis	Merrilyn Walton

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