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# Utilities and sustainability


Jim Wellsmore, Senior Policy Officer


Energy and water need to be affordable if the needs of household users are to be met. These essential services also need to be supplied reliably and they need to be safe.

Taken together, ensuring these consumer interests are protected will require a significant effort of resources. However, consumer interests—the public interest—are not limited to turning on a switch or a tap and still paying the bills each quarter. The broader issue for essential services is long-term sustainability. This involves investing in infrastructure to ensure we can 'keep the lights on', addressing the environmental impact of our use of energy and water and somehow ensuring that poorer households don't carry too large a burden.

PIAC's Utility Consumers' Advocacy Program (UCAP) held a major conference in October this year that sought to examine these challenging issues in a dialogue between community representatives, environmental groups, the energy and water industries and the NSW Government.

*Delivering Sustainability* was based on the premise that the public interest requires a balancing of consumer, industry and environmental needs. It included discussion of a range of challenges and some options already available to help resolve some of the problems. The conference was a great success not only because it brought together a range of speakers from each of these areas but because it focussed on making positive gains across social, industry and environmental goals.

Apart from affordability of these essential services, perhaps the most significant issue under discussion was climate change and the greenhouse gas emissions associated with the use of electricity and gas. Reducing these emissions is a major challenge for the supply industry and has the potential to be expensive for consumers. The difficulty for the community is that the effects of climate change, too, will be expensive.

Climate change also will have a direct impact on the availability of water and already there is considerable public awareness of the problems facing communities across Australia in retaining reliable water supplies.

For UCAP, a major motivation for convening the conference was to draw attention to measures for addressing infrastructure needs and the environment that do not rely simply on higher and higher prices for households. Elissa Freeman, UCAP Policy Officer, outlined for the conference a number of examples of recently introduced schemes aimed at achieving positive outcomes in terms of supply reliability or environmental outcomes that have failed to take account of the social dimension of sustainability.

The NSW Government used the conference to unveil its latest innovation. The Hon David Campbell, NSW Minister for Water Utilities, opened the conference with the public release of the Government's Water Industry Competition Bill. This initiative is intended to improve opportunities for private businesses to enter the water industry in Sydney


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# Human rights: a cornerstone of global peace and security

Robin Banks, Chief Executive Officer

Reflecting recently on the impact of the new legislative counter-terrorism framework and the nature of security and threats to it, I was reminded of Derrick Bell's advice to those whose words or actions can and do impact on the shaping of society. He said:

> We need to look in the mirror frequently and remind ourselves that our good intentions, even when supported by impressive skills and hard work, do not endow us with either the certainty of victory or any perfect sense of what those for whom we labour will consider victory.[1]

For me, this is an important reminder that all of us need to reflect on whether or not our actions are consistent with our purpose of achieving better outcomes for the community both locally and globally. It is a reminder, in the current context, to ask some key questions: What is national security about? What is it that we are seeking to protect? Is it about security at all costs or is it about securing our present way of life and protecting our shared values into the future?

The focus of a response to threats against our security must not simply be directed towards terrorism threats, but also at threats to our economic capacity, to our capacity to protect the most vulnerable, and threats to health and wellbeing and environment. These threats must be understood and prioritised for their capacity to affect us, our neighbours and the international community; and not simply in the short term.

A strong and resilient community capable of resisting such threats is one in which a diversity of views and skills is recognised and in which all the community's resources, and all its members, are engaged. Responses that don't engage the community, or provide it with accurate and realistic information and options, or that minimise or overstate the risks, are likely to fail through disengagement.

Most Australians are not and cannot be privy to intelligence available to government about the nature and urgency of the terrorism threat. But we can be part of trying to understand and respond to it. We can and must be permitted to be part of public discussion about how we respond in a manner that is consistent with the values we hold as central to our democracy. It is vital that those seeking to engage are not silenced by the fear of being accused of providing 'comfort to the enemy'.

So do Australia's recent responses to threats of terrorism strengthen our democracy and resilience? Is terrorism countered effectively by strengthening the capacity of our police and our army, or by giving more power to the executive to gather information, or by limiting public debate? These are not necessarily effective ways to achieve security. Indeed, some may weaken our capacity to respond. While some of the more than 30 laws relating to national security that have been passed since 2001 may have improved our capacity to diagnose problems, or to remove individual threats, they have done so at significant risk to our core values.

These laws undermine the rule of law and rights guaranteed under international human rights law. They bring into question the responsible use of the parliamentary process in light of the regular assertions by Government that the legislation is urgent, and risk discouraging public participation.

The legislative response has failed to acknowledge that we have obligations under international human rights law, and that these obligations are a useful framework against which to measure our response. This framework provides a mechanism for nations to balance the need to respond to direct threats to national security with the maintenance of human rights. The framework was developed in response to the atrocities of World War II; out of the recognition that human rights protection is central to ensuring peace and security. It developed out of a recognition that governments that assert community protection over individual rights can and do abuse the power they accrue.

The absence of comprehensive domestic human rights protection has meant that governments, in pursuing national security laws, have not had to consider the impact of those laws on human rights. In this regard, Australia can be distinguished from other countries, including the UK and Canada that have legislated in response to the threats.

The legislation has seen a big shift towards executive power and away from effective oversight by the judiciary and parliament. While some of the laws, such as that which provides for the proscription of organisations as terrorist organisations, provide for limited parliamentary oversight, the laws contain limits on the role of the judiciary, which is the third arm of government in the Australian Constitution.

Of the three branches of the Federal Government, it is the judiciary that is free from concern about retaining popular support. Parliament and the leaders of the executive are elected and are concerned about how their actions and decisions are viewed by voters. It is freedom from the need to retain popularity that makes the judiciary a vital element of our democracy, particularly at times of threat.

Repeatedly, Government has been cautioned against too extreme a response to the threat. Cautioned because of the potential such a response has to damage our democracy through radicalising those who feel targeted or

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## What privacy rights?

**Simon Moran**, Principal Solicitor

PIAC recently acted for a student from a state school, MT, who claimed that her privacy had been breached by the NSW Department of Education. The case resulted in a landmark decision from the NSW Court of Appeal: *Director General, Department of Education and Training v MT* [2006] NSWCA 270 (*MT*). This decision severely curtails the right of individuals to seek remedies for a breach of privacy.

PIAC's client claimed that the Department had breached her rights under the *Privacy and Personal Information Protection Act 1998* (NSW) (the Act) because a teacher at her school had, through his position at the school, accessed information about her health, which he subsequently disclosed to a local sporting club where MT played sport.

The applicant was successful at first instance in the Administrative Decisions Tribunal (ADT) and on appeal at the ADT Appeal Panel. The Director General of the Department of Education then appealed the decision to the Court of Appeal, relying on four separate grounds. The Director General did not appeal a decision by the Tribunal that it had breached section 12 of the Act. (Section 12 relates to the retention and security of personal information.)

The Court of Appeal found it necessary to deal with only one ground of appeal, namely, whether the Department, as opposed to the individual employee, used or disclosed information in breach of the Act. Spigelman CJ found that the legislative scheme is concerned with the conduct of the public sector agencies acting for their public purposes and it makes separate and distinct provision for employees in section 62 of the Act. Spigelman CJ concluded:

> ... it leaves no scope for the extension of each reference to conduct of the public sector agency to encompass any conduct by an employee or agent, irrespective of whether it is within the scope of his or her functions as such. Where, as here, the 'use' or 'disclosure' of information was for a purpose extraneous to any purpose of the Department, it should not be characterised as 'use' or 'disclosure' by the Department or conduct of the Department. It is not appropriate to adopt a rule of attribution that extends so far.

This conclusion effectively divides the Act into two operational spheres.

Firstly, where the agency or an employee clearly uses or discloses information for the agencies public purpose but in breach of the Act, then the agency will be held liable under the 'use' provision (section 16) and the 'disclosure' provisions (sections 18 and 19).

Secondly, where an agency employee uses or discloses the information for their own purposes, then the agency will only have potential liability under section 12 of the Act, depending on whether or not it has taken 'such security safeguards as are reasonable in the circumstances'. If the agency had safeguards in place that were 'reasonable in the circumstances', then there would no remedy available to the individual despite the unlawful disclosure of personal information.

A criminal offence for breaches of privacy by employees of agencies applies, but it is highly unlikely that any privacy breaches will lead to criminal prosecutions. Even if the person who commits the breach is prosecuted, the individual whose rights have been breached will have no personal remedy for the wrong committed against them.

It is possible that an affected person could attempt to obtain compensation through an action for breach of the tort of privacy. However, it is not clear whether such a tort exists in Australia. The Queensland Supreme Court in *Grosse v Purvis* (2003) awarded damages for a tort of invasion of privacy. The plaintiff had been stalked and threatened over a number of years. This is an extreme case and may remain an isolated example of how privacy rights can be asserted under common law rather than setting a benchmark for general application.

The negative impact of *MT* could be remedied by an amendment to the Act making agencies liable, other than in exceptional circumstances, for the actions of their employees. This could be achieved through adding a provision similar to section 53 of the *Anti-Discrimination Act 1977* (NSW).

This section would allow a person to claim that use and disclosure provisions were breached and enable the agency to mount a spirited defence in circumstances where it had acted legitimately and implemented appropriate security and disciplinary mechanisms to protect against unlawful use and disclosure.

PIAC has outlined its concerns to the NSW Law Reform Commission, which has a current reference on whether or not NSW privacy laws provide an effective framework for the protection of the privacy of an individual. Of particular interest to PIAC in relation to this reference is the consideration to be given to whether or not it is desirable to introduce a tort of privacy in NSW.

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and the Hunter to provide new solutions for water and wastewater services. While the existing publicly-owned Sydney Water and Hunter Water already make extensive use of private companies to deliver their services, a number of private investors argued they can build new services for water and sewerage that are cost-effective and deliver better environmental outcomes.

PIAC is supportive of new initiatives that increase the use of recycled water or divert wastewater from the ocean outfalls. The Government consulted with PIAC prior to its release of the Bill and a number of PIAC's concerns are addressed in the new legislation. Chief among these concerns was the desire to ensure that the introduction of new private investors into the water industry does not have a negative impact on customers of Sydney Water and Hunter Water. (See the article titled, 'Competition policy down the drain', on page 8 of this issue for more discussion about the Bill.)

Tony Wood, General Manager with Origin Energy, outlined to the Conference many of the sustainability challenges for a major energy supply company. These include not only the direct environmental impacts of a company's operations but the need to balance the environment with social and economic imperatives. Mr Wood stressed that defining sustainability is a task that needs to be shared by businesses, investors, employees and the wider community.

The conference proceedings included two panel sessions. The first of these examined a range of initiatives already in place or being trialled to address environmental impacts of energy and water use. Tim O'Grady, Executive General Manager with EnergyAustralia, discussed the NSW Greenhouse Gas Abatement Scheme (GGAS) and alternatives such as mandatory renewable targets. Given that either path requires consumers to shoulder higher prices for energy there was considerable interest in Mr O'Grady's view of the effectiveness of the GGAS model.

The other NSW Government initiative discussed was the Energy and Water Savings Funds, with Yianni Mentis of the Department of Energy, Utilities and Sustainability outlining the success of some of the initiatives already funded under this scheme.

Interestingly, both these schemes rely on a mix of regulation to drive behaviour by suppliers and market or price signals to allow for new ideas and best practice initiatives to be trialled. The other members of the panel, Dr Chris Riedy, from the Institute for Sustainable Futures, and Jane Castle, from the Total Environment Centre, stressed that market-based initiatives need to be coupled with effective regulation to ensure that participants in these markets can deliver the necessary balance of consumer and environmental outcomes.

The problem of weak or ineffective regulation failing to balance these different interests was discussed by two members of the second panel: Dev Mukherjee, from the Council of Social Service of NSW (NCOSS), and Gerard Brody, of the Melbourne-based Consumer Action Law Centre. Both speakers detailed the negative impacts for households when economic reform and competitive markets are designed without sufficient attention to the broader 'public interest' needs of consumers.

It was the final two speakers, however, who really livened up proceedings with extremely positive examples of initiatives that readily deliver a balance of social, environmental and industrial goals. Brian Steffen, General Manager at Country Water based in Broken Hill described a program initiated by his business, which worked closely with the local community and its Area Health Service. The award-winning program has delivered significant reductions in water use in the Broken Hill area, but was tailored to take account of the needs of a community living in an environment heavily affected by dust and the presence of lead in the soil.

Graham Smith, of Barnardos in Penrith, spoke about the No-Interest-Loan-Scheme (NILS) operated by his centre and the support given to a number of these schemes by utility companies including Sydney Water and EnergyAustralia. Aimed at people in dire financial situations or chronic poverty, NILS loans can deliver improved quality of life for recipients and deliver clear environmental benefits by funding the use of more energy and water-efficient household appliances.

While the conference was not designed to produce immediate outcomes, it did result in possible initiatives to be followed up in coming months. Most importantly, it succeeded in encouraging all stakeholders in the energy and water industries to take a broader approach to planning for and protecting the future.

# Government and Democracy

## Proposed Smart Card sparks public interest concerns

Carol Berry, Solicitor

PIAC recently made a submission to the Access Card Consumer and Privacy Taskforce, headed up by Professor Allan Fels, that was established to examine consumer and privacy issues with the proposed Access Card, or 'Smart Card.'

The Federal Government's Smart Card proposal has been the subject of some controversy since its inception.

The head of the Taskforce overseeing the implementation of the Card, James Kelaher, resigned at the beginning of May 2006. Mr Kelaher resigned after citing concerns about the implementation of the Card, including the lack of oversight regarding privacy implications. Mr Kelaher had urged the Minister for Human Services, the Hon Joe Hockey, to set up an advisory board of experts outside Government to advise on and monitor issues including privacy and security. Mr Kelaher also urged the Government to establish a separate authority to oversee the administration of the Card. Both recommendations were rejected.

PIAC's submission to the Taskforce outlined an array of concerns with the proposed Smart Card from a public interest perspective.

One of the key concerns raised by PIAC is the lack of detailed information about the proposed Smart Card that is available to the public, with particular concerns noted about the limited release or non-release of key documents.

The Government has only been prepared to release a heavily edited version of the KPMG business case for the introduction of the Smart Card. PIAC is unconvinced that the proposed Smart Card will sufficiently benefit consumers to warrant the significant level of expenditure projected for its implementation. Public consultation about this significant public expenditure has been inadequate.

The Government has not released any part of the Privacy Impact Assessment prepared by Clayton Utz. Given that an information technology project of this size will have significant privacy and data protection implications, an informed public discussion around these implications should take place so that all can be assured about how personal information will be protected.

Both of these documents examine at length both the purpose and the implications of the introduction of the Smart Card and PIAC is concerned by the lack of transparency of the proposal with the release of only limited aspects of such key documents, particularly in light of the substantial amount of public money expended to produce them.

What *is* known about the 'Access Card' is that the Federal Government plans for it to replace the Medicare card and a range of other Government cards. However, according to the Government, the Smart Card will not be compulsory for every Australian and will not be a national identity card.

Aside from public assurances, there has been no detail disclosed on the legislative framework that will guarantee this. Indeed, it is unclear what legislative frameworks, if any, the Government is proposing to create in order to introduce the Smart Card. For example, there is no information on how the Government proposes to legislate to protect the privacy of the information stored within the Smart Card, or on the database related to the Card. Nor is there any information publicly available on how Government proposes to ensure legislative (and enforcable) limits on who will have access to the information stored in either location, or to protect against inappropriate demands for production of the Card for identity verification purposes.

Until such legislative frameworks are in place, the community will quite understandably have concerns about the protection of their personal information and about unrestrained expansion of the Card's use over time.

While the Government has stated that the Smart Card will not be compulsory, it is apparent that if you do not have a card once it is comprehensively introduced you will not be able to access Medicare or any other Government benefits. In PIAC's view, it is simply disingenuous and misleading to state that the Smart Card will not be compulsory.

PIAC holds some grave concerns about the current Smart Card proposal. PIAC believes that public debate must extend beyond the issues identified by the Taskforce and that the Government needs to be more transparent and accountable in relation to its proposal. Clarity and detail around the proposal and legislative safeguards are imperative. Until these basic requirements for a meaningful public discussion are met, PIAC will oppose the introduction of the Card: the proposal is too unclear, the potential to undermine privacy and health access rights is too high, and PIAC remains unconvinced that the aspects of the Smart Card that have been outlined are in the public interest.

In the interim, PIAC awaits the findings of the Taskforce, which it is hoped will be made public in early November.

For further information about PIAC's concerns with the Smart Card proposal, contact Carol Berry at cberry@piac.asn.au.

# Government and Democracy

## Values test for citizenship – more questions than answers?

Carolyn Grenville, Training Co-ordinator

The most moving and meaningful Australia Day I have ever spent included attending a citizenship ceremony in my local community. It was humbling to see people pledging Australian citizenship with all that implies in terms of leaving one's country of birth to embrace a new way of life.

Now Australia risks alienating the very people whom we hope will contribute to our community and way of life. Migrants would be quizzed on Australian values, history and way of life under a citizenship test being considered by the Federal Government. In September, Andrew Robb, Parliamentary Secretary to the Minister for Immigration and Ethnic Affairs, released a discussion paper, *Australian Citizenship: Much more than a ceremony*. The discussion paper invited consideration of the merits of introducing a formal citizenship test.

The discussion paper sees Australian citizenship as 'a privilege not a right'.[1] The rationale for introducing a formal citizenship test is that people who come to Australia should fully participate in Australian life as citizens, and that a citizenship test will provide a real incentive to learn English and to understand the Australian way of life, ensuring social cohesion and successful integration.

The discussion paper acknowledged 'the direct link between English ability and employment outcomes'.[2] No-one would argue with that, but would it not make more sense to put resources into assisting people to learn English rather than making it a hoop to be jumped through? The Adult Migrant English Program has been criticised as being inflexible. The Federation of Ethnic Communities' Councils has noted that often migrants do not attain a functional standard of English after they have completed the maximum 510 hours of English tuition. Rather than a citizenship test creating an incentive for learning English, more severe English requirements may create a barrier to taking up citizenship.

Interestingly, migrants from non-English-speaking countries have consistently far higher citizenship take-up rates than those from English-speaking countries, which would further demonstrate that language skills and uptake of citizenship are quite unrelated. While the average citizenship take-up rate for eligible residents from all nations in 2001 was almost 75%, immigrants from the United Kingdom had a take-up rate of 64% and New Zealand was only 43%.

And in multicultural Australia, is good English really a prerequisite for making a valuable contribution to our community anyway? Many of us could think of friends and relatives, if not famous 'Australians' where this has not been the case!

It is important to note, as the discussion paper does, that Australia already has requirements under the *Australian Citizenship Act 1948* that most applicants for citizenship have a basic understanding of English and an adequate knowledge of the responsibilities and privileges of being a citizen. The success of this system, with over 3.5 million immigrants becoming citizens since 1949, is reflected in the decision to maintain the essence of the present provisions in the Australian Citizenship Bill 2005[3], currently under consideration.

If Australia is to require a demonstration of a commitment to Australian values, what are these values? If Australia is to require a demonstration of a commitment to Australian values, what are these values? The right to express your own culture and beliefs and an obligation to respect the rights of others to do the same, within the bounds of the law, would normally be accepted as an Australian value, one that may very well be under threat from the citizenship test proposal.

PIAC is concerned that a formal citizenship test could have the potential to be applied in a discriminatory way, given the possibility that the kind of test under discussion could be introduced without amendment to the legislation, as a matter of policy at the discretion of the Minister for Immigration and Ethnic Affairs.

At a time when there is much community concern about particular ethnic groups feeling disaffected from Australian society, will it help or hinder to make it more difficult for people to 'sign up' to our way of life by becoming a citizen? If the Australian Government is so concerned about upholding Australian values perhaps our Federal politicians should instead rethink their response to endorsing a core set of human values in an Australian Charter of Rights.

PIAC's submission can be found on the PIAC website at piac.asn.au.

Notes

1 Australian Government, *Australian Citizenship: Much more than a ceremony* (2006) 8.

2 Ibid, 11.

3 Australian Citizenship Bill 2005 (Cth) cl 21.

## Broken trust - American Indian leads the way

Charmaine Smith, Solicitor

On Wednesday, 11 October 2006 PIAC and Australians for Native Title and Reconciliation (ANTaR) hosted a Community Forum on Stolen Wages at the Redfern Community Centre. The keynote speaker was Dr Eloise Cobell, an American Indian woman and member of the Blackfeet Indian tribe of Montana. Dr Cobell was brought to Sydney by PILCH and was in Australia with the assistance of the three PILCH organisations: QPILCH, PILCH Victoria and PILCH NSW.

Dr Cobell is the lead plaintiff in the largest class action against the Government of the United States of America. The lawsuit, *Cobell v Norton*, was filed in 1996 on behalf of 500,000 American Indians and relates to the misappropriation of Indian trust fund monies.

In 1887, the Government of the USA divided up 90 million acres of Indian reservation land into allotments and set up trust accounts to collect money from leases it granted to oil, timber and other corporations. The Government and private companies have become wealthy from exploiting the resources of this land while Indian landowners have been paid sporadically and received substantially less than what is owed.

Dr Cobell claims that the Government has been grossly negligent in managing the trust accounts and has demanded an accurate historical accounting of the trusts, which has led to over a decade of legal argument on how much money the Government has mismanaged, lost or stolen. The lawsuit is ongoing, largely due to continued stalling tactics of the Government.

In a moving speech, Dr Cobell spoke of the fear that she experienced in meeting with government representatives in Washington DC and realising the enormity of the battle she was taking on in launching her multi-billion dollar class action law suit against the Government of the USA. Dr Cobell recounted that when she began to think she couldn't continue, she took courage from a friend who said to her, 'If *you* don't, then who will'. From that point on, she has not looked back.

Dr Cobell acknowledged in her speech that while the circumstances of the trust fund accounts were different between the USA and Australia, the same abuses of power occurred and governments in both countries had failed dismally in their role as trustees. Dr Cobell encouraged stolen wages claimants in Australia to remain strong and committed to the fight for justice.

The Forum was followed by a launch of Dr Rosalind Kidd's latest book, *Trustees on Trial: Recovering the Stolen Wages*, which deals with the history of stolen wages in Queensland and includes comparisons with the experience in North America.

## Stolen wages victory

Charmaine Smith, Solicitor

On 25 September 2006, PIAC appeared before the Aboriginal Trust Fund Repayment Scheme Panel to challenge an Interim Assessment of the Aboriginal Trust Fund Repayment Scheme.

The basis of the challenge was that the assessment had relied upon incomplete archived records. A short-coming of the claims process is that the Scheme relies heavily on written records. This reliance has the potential to be seriously detrimental to Aboriginal claimants.

The State of NSW was responsible, through a number of agencies, for keeping records of trust monies in a complete, comprehensive and accurate manner, and it failed to do so. The people for whom the monies were held in trust had no control over either the collection or disbursement of these monies, nor over the maintenance of these records.

In order to supplement the information in the records, the claimant was invited to provide oral evidence to the Panel about her recollection of her financial circumstances. The claimant gave evidence that she did not receive the cheque payments that were suggested by the documentation as she was not residing at a fixed address and was financially naïve with respect to banking and financial matters.

The Panel took into account the oral evidence of the claimant and exercised its authority under paragraph 8 of the Scheme's Guidelines to review the assessment and make a recommendation for a substantially higher amount.

PIAC was pleased that the Panel placed due weight on the oral evidence of the claimant during the review process. PIAC will have a further two matters before the Panel in November.

# Utilities

## Competition policy down the drain

Elissa Freeman, Policy Officer

Competition policy has again extended its reach into our homes. The Water Industry Competition Bill, introduced into the NSW Parliament on 24 October 2006, establishes the ground rules for private companies to sell potable water, recycled water and wastewater services to residential and industrial customers.

In the absence of an approved access regime, a private company had used the provisions of the *Trade Practices Act 1972* (Cth) to force Sydney Water into private negotiations for access to their network. The new State-based regime provides an alternative, transparent negotiation process and ensures the interests of consumers and the environment are built into licensing arrangements.

Access regimes at the State and national levels have previously been applied to gas, electricity and rail networks. This is the first time in Australia that a government has established a third-party access regime to enable retail competition in water services. Indeed, it is the most extensive water access regime seen around the world.

### Public interest considerations

Competition is introduced into traditional public services subject to an important public interest test. The community looks to see that the benefits will outweigh the costs of reform. We also seek to ensure that the introduction of competition does not impact adversely on interests of consumers, the environment or public health and safety. The uneven impacts of competition reforms within the community have historically been difficult to redress through community service obligations.

PIAC has lobbied the NSW Government for inclusion in the Bill of strong consumer protections, equitable pricing arrangements and the promotion of public health and environmental obligations. Many of PIAC's recommendations have been incorporated in the Bill.

A primary consideration for PIAC is the equity of prices paid by residential consumers for these essential services. This has been addressed in two ways. Firstly, the Bill includes provisions for arbitrated access negotiations to have consideration of specified pricing principles. These principles require that consideration be taken of existing price determinations made by the independent economic regulator. Second, the Bill includes provisions for new private monopoly suppliers to have their prices regulated, for example, providers of recycled water in the new development areas in the north-west of Sydney.

A range of significant consumer protections will still need to be addressed through regulations made under the Act.

One area to be included in licence conditions is a requirement for retailers to have payment plans for bill smoothing and hardship programs for customers unable to pay their water bill. The requirement to establish social programs ensures that retailers acknowledge the essential nature of the service they are providing and avoid disconnecting households who are experiencing financial hardship.

Following unacceptable increases in disconnections last year, energy retailer obligations are due to be strengthened as soon as next month. This is one area where Government will be able to learn from the weaknesses of the energy-licensing regime. Strong, effective and enforceable social programs will protect vulnerable customers in the context of a competitive market for water services.

### Licence compliance and enforcement

The need for a strong compliance and enforcement regime is also critical to the success of the policy. A poor record of compliance among new entrants in the electricity industry suggests that the status quo on regulatory compliance in the delivery of an essential service remains inadequate.

The NSW Government has increased the penalties for non-compliance with licence obligations for private, new entrant, water retailers. There are high risks associated with breaches of licence conditions and there is a corresponding low toleration by the public. The compliance and enforcement regime will ensure that private companies providing essential services are held accountable for their actions.

### Global Reporting Initiative

Elissa Freeman has been appointed to represent household consumers on an international, multi-stakeholder working group developing international benchmarks for the energy industry around 'triple bottom line' reporting and corporate social responsibility. The working group is a project of Global Reporting Initiative (GRI), a partner in the UN Environment Program.

More information about the global reporting initiative can be found at http://www.globalreporting.org/Home

## Nitschke book seized by Customs

Carol Berry, Solicitor

On 19 September 2006, Dr Philip Nitschke, a prominent euthanasia campaigner, had 45 copies of his most recent publication, *The Peaceful Pill Handbook*, seized by Customs at Brisbane International Airport.

Dr Nitschke was on his way to Sydney to attend the 10th Anniversary Conference of the Northern Territory's *Rights of the Terminally Ill Act*, where he was planning to launch the book. The books were seized under Customs regulations and deemed a 'prohibited import'.

*The Peaceful Pill Handbook*, co-authored with Dr Fiona Stewart, published by Exit International US, discusses a range of options available to people who are seriously ill and who want to consider their end-of-life options. As the book states, it is meant to

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excluded, and through undermining the very rights and freedoms that make our democracy healthy and sustainable.

Despite this, we have recently heard suggestions that further incursions into rights may be warranted and Muslim groups are concerned about increased surveillance of their communities, resulting in a feeling of disempowerment and a growing reluctance to speak out on political issues.

We are creating a gap between our espoused values as a nation and our actions. The espoused values of tolerance and acceptance, of freedom and openness are increasingly hard to identify in how we are living our lives and in how we are being governed.

Notes

1 Derrick Bell, Ethical Ambition: Living a Life of Meaning and Worth (2002) 160.

be read by those suffering from terminal illnesses 'for whom there is little hope that their quality of life will ever recover to a level that is satisfactory to them'.

When the books were seized, Dr Nitschke expressed concern that countries like the USA, Canada and NZ would never consider banning books like *The Peaceful Pill Handbook*. The seizing of the books by the Australian Government appears to be an attempt to quell discussion and debate, and to restrict the dissemination of information around end-of-life options for people who are terminally ill.

Euthanasia continues to be a difficult subject for the Federal Government. Senator Amanda Vanstone recently called for euthanasia to be legalised, with appropriate safeguards. Ironically, Senator Vanstone made her comments at the conference where Dr Nitschke intended to launch his new book. Senator Vanstone was reported as saying, 'I believe that people in the unenviable position of facing the end of their life should have the dignity to control the manner of that journey'.[1]

It is important that the public not be prevented from participating in informed debate about such difficult subjects through the banning of books.

To find out more about Dr Nitschke's case, contact Carol Berry at cberry@piac.asn.au.

Notes

1 Rhianna King, 'Honour in euthanasia: Vanstone', *The West Australian*, (24 September 2006).

## Homosexual hate speech case

Simon Moran, Principal Solicitor

PIAC recently acted for Henry Collier, a long-standing member of the Gay and Lesbian Rights Lobby, in a homosexual vilification case against John Sunol. Mr Collier's complaint related to eight statements published by Mr Sunol on various websites during September and October 2004 that Mr Collier claimed vilified homosexuals.

The statements posted Mr Sunol by on the internet asserted the 'evil and corrupt' nature of homosexuality. At first instance, the Administrative Decisions Tribunal (the Tribunal) found that five of the eight statements constituted homosexual vilification. The Tribunal found that epithets of this nature contained the element of incitement to serious contempt or hatred required to satisfy the test for vilification under the *Anti-Discrimination Act 1977* (NSW).

The decision was upheld on appeal and Mr Sunol was ordered to remove the offending material and make a public apology. His application for costs was refused.

The Appeal Panel's decision provides guidance for considering whether comments or actions amount to vilification and consolidates the jurisprudence in relation to vilification. It also provides guidance on the approach to be taken in such appeals.

This case is the first homosexual vilification decision in NSW relating to the posting of material on the internet.

PIAC would like to like Sarah Pritchard of counsel who represented Mr Collier, and Inner City Legal Centre, which handled this matter in its earlier stages.

# Human Rights

## NSW Charter Group

Vijaya Raman, Policy Officer

### Introduction

Australia is the only modern democracy without a national charter of human rights. As a result, some states and territories have taken up the challenge of addressing the lack of comprehensive human rights protection.

In Australia, widespread public consultation has supported the development of Charters of Rights in the ACT and Victoria, and such protections are also being currently considered in Tasmania and Western Australia. A recent survey undertaken for Amnesty International on human rights and security in Australia indicates that NSW has a higher level of strong support for human rights protection than other states and territories.[1]

A NSW Charter of Human Rights would guarantee basic human rights and would be a vital tool for ensuring that NSW laws and Government policies and procedures are consistent with these rights.

Earlier this year, the NSW Attorney General, the Hon Bob Debus, announced that he would consider putting a proposal to Cabinet on a NSW Charter of Rights. Following the announcement, PIAC organised a community forum on the issue and a small volunteer working group was formed to advocate for and support the introduction of a NSW Charter of Rights.

### What is the NSW Charter Group?

The NSW Charter Group is a group of concerned individuals and organisations advocating for community consultation on human rights with a view to NSW adopting of a Charter of Human Rights.

### What does the Charter Group want?

The NSW Charter Group is calling for widespread community consultation on how best to protect and promote human rights, on the value of adopting a NSW Charter of Human Rights, and on what the Charter of Human Rights should include and how it should work.

Following the community consultation, the Group will seek Government support for the adoption of a NSW Charter of Human Rights as an Act of the NSW Parliament.

### Why does NSW need a Charter of Human Rights?

NSW has a robust system of democracy. A Charter of Human Rights would complement this system by protecting the very rights and values that underpin it.

Although most people in the community and Government respect human rights, many of the rights we take for granted have no protection under law.

Although some rights are protected by equal opportunity and anti-discrimination laws, these laws are patchy and cover only limited areas of rights. For example, the right to vote, freedom of expression, the right not to be arbitrarily detained, and the right to join a union and have access to collective bargaining are not clearly protected.

Human rights belong to all of us. A Charter of Human Rights is a form of democratic insurance that helps to keep governments accountable.

Human rights are about the fair treatment of individuals and are put in place to ensure that people are treated with dignity and respect. They are particularly important for people who suffer disadvantage. Human rights are a means of promoting social justice for people who have been subjected to historical disadvantage including Indigenous peoples.

Current concerns over terrorism require a government commitment to ensure that new laws and counter-terrorism measures do not infringe human rights and do not work against the democratic values we are trying to protect.

### What can you do?

To join the NSW Charter Group or for further information visit the website www.nswcharterofhumanrights.org

Write a letter/e-mail of support for a NSW Charter of Human Rights to your local member and other NSW Members of Parliament.

Learn more about protecting human rights in NSW and Australia through PIAC's community education kit, *Protecting Human Rights in Australia*, available online by following the link from piac.asn.au. For a hard copy of the kit, e-mail piac@piac.asn.au.

The NSW Charter Group has been meeting monthly and has recently finalised a Briefing Paper and is the final stages of building its website.

For further information on the NSW Charter Group or to join, please contact Vijaya Raman at vraman@piac.asn.au.

**Notes**

1 Amnesty International Australia, *human rights and security in australia* (2006) <http://www.amnesty.org.au/Act_now/campaigns/human_rights_and_security/about/australia> at 16 October 2006.

## WTO failure shows need for change in world trade system

Pat Ranald, Principal Policy Officer

The announcement by the Director-General of the World Trade Organisation (WTO) at the end of July 2006 that the current round of WTO negotiations (the Doha development round) were suspended, reveals much about the shortcomings of the WTO as a global institution.

The decision to suspend the talks was made at a meeting of only six of the 149 members of the WTO: the USA, the European Union (EU), Japan, Australia, Brazil and India. The suspension was reported to a later full General Council meeting of WTO members, but there was no formal voting procedure to endorse it.

This process shows that the WTO continues to be dominated by the most powerful economies, especially the USA and the EU. The majority of developing countries remain marginalised from WTO decision-making.

The USA's electoral cycle will determine whether talks are likely to resume next year, with Congressional elections in November 2006 and the expiry of the Presidential Trade Promotion Authority in July 2007. The Presidential Trade Promotion Authority enables the President to present trade agreements to Congress for endorsement or rejection without amendment, and its renewal depends on the outcome of the Congressional elections.

Despite the continued dominance of major players, the substantial reasons for suspension of the negotiations also show that the developing countries have become more organised, and more capable of demanding that the WTO live up to its promises that trade policies should support development and alleviate poverty. Developing countries, led by Brazil and India, with the support of the majority in Latin America, Asia and Africa, demanded that the USA and EU make genuine proposals to end unfair agricultural export subsidies. Developing countries were no longer prepared to lower tariffs on agricultural imports only to be flooded by unfairly subsidised imports that destroyed the livelihoods of farmers, and added to rural unemployment and urban migration.

Developing countries rejected the convoluted offer from the USA on agricultural subsidies. That offer, in reality, changed definitions to preserve subsidies at current levels. The developing countries also pressed the EU for genuine subsidy and tariff reductions.

Studies by prominent economists like Joseph Stiglitz, former chief economist of the World Bank, show that rapid liberalisation and deregulation in low-income economies with high unemployment does not contribute to economic growth but, rather, worsens poverty. Other more recent studies, including from the World Bank itself, have confirmed that many developing countries had little to gain from the USA and EU proposals, with most of the gains flowing to rich countries. Governments of developing country are seeking the 'special and differential treatment' under WTO rules that would recognise their development needs.

There were also problems in the Trade in Services negotiations. Both the USA and EU wanted to include essential services like health, education, water and postal services in the WTO General Agreement on Trade in Services (GATS). This would treat these services as traded goods and open them up to transnational investment. The Australian Government also promoted a proposal to apply stricter trade rules to regulation of services that would have reduced governments' ability to regulate in many areas. These proposals were also resisted by developing countries. Following WTO decisions under existing rules that challenged regulation around internet gambling and genetically engineered food labeling, this proposal was too radical even for the USA to support openly, and it bowed to pressure from USA State Governments, which feared erosion of their rights to regulate services in the public interest.

The suspension of negotiations provides an opportunity to rethink multilateral trade rules and develop a more inclusive system that delivers genuine gains for developing countries and enables all governments to retain their rights to foster local development and regulate essential services. It also provides an opportunity to press for a more transparent and accountable Australian trade policy, with Parliament, not Cabinet, making decisions on trade proposals and voting on trade agreements.

PIAC has hosted the Australian Fair Trade and Investment Network (AFTINET) of 90 community organisations for the last six years.

AFTINET is moving in November to new premises. The new contact details are:

Room 627, Level 6
3 Smail Street
Broadway 2007

phone: 02 9212 7242
e-mail: campaign@aftinet.org.au
website: www.aftinet.org.au

# Health

## Finding into the death of Scott Simpson

Carol Berry, Solicitor

PIAC represented the family of Scott Simpson at the inquest into his death in custody at Long Bay Prison in June 2004. On 17 July 2006, the Coroner found that Scott hanged himself after a long period of suffering mental illness, which was not adequately managed or treated.

Scott Simpson suffered from a severe case of paranoid schizophrenia. He died awaiting admission into the acute ward of Long Bay Prison Hospital. The Coroner found that Justice Health had not done enough to prevent the deterioration of Mr Simpson's mental health over a long period of time.

Scott had a lengthy criminal history. His final period of incarceration was particularly troubling and tragic.

Scott was taken into custody at the Metropolitan Remand and Reception Centre (MRRC) in March 2002. He was on remand facing charges relating to a relatively minor offence that involved violence.

Scott was granted protection status, and was placed in a two-out cell with another inmate who was also in protective custody. Within 15 minutes of being placed in the cell, Scott had brutally attacked his cell-mate, and kicked him to death.

The Supreme Court later found that Scott was not guilty of this offence on the grounds of mental illness. As a result he became a forensic patient held by the Department of Corrections.

After killing his cell-mate, Scott was placed in segregation, otherwise known as solitary confinement. Except for two short periods, he remained in solitary confinement at various prisons for the final 26 months of his life until he hanged himself in his cell on 7 June 2004.

Coroner Pinch made the following observation:

> The evidence before me indicates that Simpson's mental illness was not something incidental to his incarceration. His delusional beliefs and his actions in accordance with them were the very reason he was in custody.

In order to place the cell-mate's death, and Scott's own suicide, in perspective it is interesting to look at what was happening in his life during the previous six months before he arrived at the MRRC.

On 12 October 2001, police were called to Granville where Scott was seen climbing over garage roofs. He told the police that he was being watched by ASIO and the NCA. He was subsequently admitted for treatment of a psychotic episode to Cumberland Psychiatric Hospital.

Following his discharge a couple of weeks later, he went to Coffs Harbour to see his family. His behaviour became violent and bizarre and he was charged with offences arising out of assaults on family members. Scott was taken into custody at the MRRC and discharged on 14 January 2002.

On 29 March 2002, during a psychotic episode Scott attacked a person and their vehicle. The Custody Manager at Windsor Police Station, where Scott was taken after his arrest, considered that Scott could 'snap at any moment'.

The following day he was taken back to the MRRC. Unfortunately, Scott's psychotic state was not identified at his Reception Assessment by Justice Health. Scott was placed with another remandee with a terrible consequence.

The Inquest heard that Scott should then have been transferred to D Ward, the (then) acute psychiatric ward at Long Bay Prison Hospital and the Coroner found that Scott should have been very high on the priority list: he was demonstrably acutely mentally ill to the extent that he had killed another person.

However, instead of receiving treatment in hospital he was sent to a segregation cell at Goulburn Prison with minimal opportunities for adequate psychiatric care. The result was that, while Scott's condition fluctuated depending on his compliance with the medication regime, the time spent in segregation led inevitably to a deterioration of his mental state.

Scott was transferred to Long Bay prison in March 2004. His treating psychiatrist, Dr Robert Lewin, was gravely concerned about Simpson's mental state and agitated to have him transferred to D Ward as quickly as possible. Dr Lewin stated that he was so concerned about being unable to get Mr Simpson into hospital that he threatened to call the Minister:

> I have never had a higher index of concern about a patient. I felt powerless because it was absolutely apparent that he needed to be cared for in hospital and this was not happening.

On 7 June 2004, Simpson appeared at Penrith Local Court for the matters on which he was remanded. The charges were withdrawn and he returned to Long Bay as a forensic patient. Just under seven hours later he was found hanging in his cell.

Coroner Pinch made a number of important and far-reaching inquest findings.

She recommended that Justice Health establish standardised criteria for admission to Long Bay Prison

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## The regulation of litigation funding

Simon Moran, Principal Solicitor

The cost of litigation can be so high that many Australians decide they cannot afford to take action when their legal rights have been breached. Consequently, they are left to rue their losses and move on. However, the development in Australia of litigation funding has enabled some people to overcome the massive obstacle of legal costs, particularly in the area of class actions.

Litigation funders agree to pay for the costs of litigants' legal representation in return for a percentage of any damages that the litigant receives. Significantly, litigation funders also agree to indemnify the litigant against the expense of any adverse costs award (usually, the unsuccessful party is ordered to pay the costs of the winning party). The fear of an adverse costs award leads many individuals to decide not to pursue their rights in court.

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Hospital and that there be a review of the Minister's powers to review recommendations of the Mental Health Review Tribunal.

She also recommended that the Department of Corrective Services adopt the policy that inmates diagnosed with a mental illness be placed in segregation only in exceptional circumstances and for a limited period. This reflects international human rights standards.

PIAC is following up to ensure that the Coroner's recommendations are implemented.

For further information about Scott's case, or the Coroner's findings, please contact Carol Berry at cberry@piac.asn.au.

Litigation funders have funded multiple litigants in large-scale class actions and defendants have identified the involvement of a litigation funder as a potential point of weakness with the case. As a consequence, a number of challenges have been mounted in such cases on the basis of the involvement of litigation funders.

The most recent, and now most important, challenge was determined by the High Court in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited; Australian Liquor Marketers Pty Limited v Berney* [2006] HCA 41. This matter was a representative proceeding brought by tobacco retailers against tobacco wholesalers that had not repaid monies owed to the retailers. PIAC represented the Australian Consumers Association (ACA), which was granted leave to appear as *amicus curiae*, in the proceedings.

The defendants challenged the representative proceedings on the basis that the involvement of a litigation funder infringed the modern law of champerty, was an abuse of process as the parties were subservient to the interests of the litigation funder, and that the litigation funder was a trafficker in litigation.

While ultimately the appeal succeeded, a majority of the High Court dismissed these arguments. The majority, considering the abuse of process argument, concluded at [88]:

> Shorn of the terms of disapprobation, the appellants' submissions can be seen to fasten upon Firmstone's seeking out those who may have claims and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones. But none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.

Gummow, Hayne & Crennan JJ stated at [93] that fears about the possible conduct of litigation funders could be 'addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's process'. As a consequence of the decision in this case, the validity of the involvement of litigation funders in proceedings now seems indisputable.

The Standing Committee of Attorneys General (SCAG) is, however, considering whether and how litigation funding in Australia should be regulated. SCAG recently called for submissions and ACA and PIAC made a joint submission on consumer protection and access to justice issues.

PIAC believes that litigation funding has the potential to significantly enhance access to justice. Accordingly, it supports regulatory mechanisms that give certainty to litigation funders and the parties they fund, and that limit the potential for costly and prolonged litigation challenging the involvement of litigation funders in proceedings. At the same time, PIAC is concerned to protect the rights of consumers, the litigants in the proceedings.

You can view the joint PIAC and ACA submission to SCAG through the publications link on PIAC's website at piac.asn.au.

# PIAC Submissions / Publications

## July 2006 to October 2006

**Are the rights of people whose capacity is in question being adequately promoted and protected?** (July 2006)

Submission to the Attorney General's Department of NSW. In recognition that all members of the community may at some point have their capacity affected or questioned, PIAC recommends the development of clear legal definitions as well as processes for determining capacity, and for implementing formal substitute or supported decision-making where capacity is absent or limited.

**Towards comprehensive human rights protection** (July 2006)

Submission to *New Matilda* on its draft Human Rights Bill. PIAC commends *New Matilda* on its work to develop a Federal Human Right Bill and on its campaign to seek community engagement with this process. Overall, PIAC supports the content and framing of the Bill, but proposes expanding the protection in the area of social, economic and cultural rights. PIAC also supports a more robust role for the judiciary in dealing with incompatible legislation and more clarity in respect of the provisions that provide for limiting human rights protection in certain circumstances.

**Comments to the Federal Attorney-General's Department on the Draft International Convention on the Rights of Persons with Disabilities** (July 2006)

PIAC, the NSW Disability Discrimination Legal Centre and Australian Lawyers for Human Rights joined to write this submission, which focuses on the definitions of disability and 'reasonable adjustment' in draft Article 2, on Articles 12 and 17 dealing with the right to recognition before the law, capacity and compulsory treatment, and on the monitoring mechanisms to be included in the final treaty. The submission supports a comprehensive regime to monitor and report on compliance with the Convention.

**Immigration detention in Australia: the loss of decency and humanity** (July 2006)

Submission to the People's Inquiry into Immigration Detention. The Submission examines the history of privatisation of immigration detention services in Australia; the track record of the current provider; the Detention Services Contract and Immigration Detention Standards; staffing and training issues; corporate responsbility and human rights issues; the performance linked fee; gaps in the regulation of the operations of immigration detention and lack of transparency and accountability mechanisms.

**Discrimination against People in Same-Sex Relationships: financial and work-related entitlements and benefits** (June 2006)

Submission to the Human Rights and Equal Opportunity Commission Inquiry. The Submission focuses on where Australia sits globally in relation to discrimination against same-sex couples in the areas of financial and workplace entitlements.

**Submission to the Department of Foreign Affairs and Trade on the Feasibility Study into a Possible Free Trade Agreement between Australia and Mexico** (July 2006)

This submission looks at proposed Australia-Mexico FTA and raises a number of concerns about the lack of democratic transparency in the negotiations and the potential of the agreement to undermine standards on human rights, labour rights and the Government's ability to regulate in the public interest.

**Health and social services access card** (July 2006)

PIAC's submission into the Federal Government's Taskforce consultation on the proposed Smart Card. From a public interest perspective, PIAC is unconvinced that the proposed Health and Social Services Access Card will sufficiently benefit consumers compared with the projected level of expenditure that is proposed for the introduction of the Card.

**Prisoners and reproductive health services** (July 2006)

PIAC opposed a NSW Bill that would remove the provision of reproductive health care services to certain prisoners. PIAC's key concern is that the Bill reduces the protection of the right to access health care and health care procedures.

**Submission to IPART's Draft Determination on Recycled Water Prices** (Aug 2006)

Ongoing drought, changing community attitudes and a re-vamped industry structure are driving metropolitan water agencies in NSW to invest in recycled water schemes for residential customers. This submission argues for strong price regulation to protect captive customers from price discrimination by monopoly water agencies and ensure the equitable and affordable delivery of essential water services.

**Submission to Energy Reform Implementation Group** (Aug 2006)

The Energy Reform Implementation Group (ERIG) has been established by the Council of Australian Governments to consider the need for further reforms in the national energy market. PIAC uses this submission to argue that the economic reforms being considered by the ERIG must be designed so as to benefit the community. The submission presents the case for public policy objectives to be considered in parallel to the promotion of competition and economic efficiency.

**Litigation funding - consumer protection and access to justice** (Sept 2006)

Submission to Standing Committee of Attorneys General on Litigation Funding in Australia. Litigation funders agree to pay for the costs of litigants' legal representation in return for a percentage of any damages that the litigant receives and also indemnify the litigant against the expense of any adverse costs award. This paper addresses the need for litigation funding in Australia and examines the regulatory requirements that would enable its expansion, while ensuring that consumers of legal services are not exploited.

**Stolen Wages: Unsettled Debt** (Sept 2006)

Submission to the Senate Stolen Wages Inquiry. PIAC's submission focusses on the general elements of the injustice of stolen wages, the process of repayment undertaken by the NSW Government and the potential for an action to recover compensation for those beyond the jurisdiction of the NSW scheme.

**Submission to the Independent Pricing and Regulatory Tribunal on the Review of Regulated Retail Tariffs for Electricity** (Oct 2006)

A submission to the Independent Pricing and Regulatory Tribunal for its review of regulated electricity prices for 'small' users from July 2007 to July 2010.

**All PIAC publications are available on PIAC's website: piac.asn.au.**

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