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the Hon. Justice J Dowd AO**

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A Lawless Society- A Report from East Timor

Hobart 2001 Judges' Conference 25 January 2001

“A Lawless Society- A Report from East Timor”

**By Justice John Dowd AO
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1 Background

1.1 The last decade of the last millennium was the United Nations decade of decolonisation. It was a fitting end to what has effectively been a century of decolonisation involving almost every continent in the world.

1.2 Although technically still a colony and subject to the supervision of the United Nations Fourth Committee, East Timor was a fitting last colony to achieve independence.

1.3 East Timor however was subject to an attempt at removal from the Fourth Committee in 1979 when the world wanted to sweep it under the carpet in the same way that it did with West Papua on the alter of United States foreign policy, aided and abetted by Christopher _____, to eliminate small states in the region. It was then in 1979, when I addressed the Fourth Committee on East Timor, that I met a young fellow called Jose Ramos Horta.

1.4 It would however be hard to imagine a worse preparation for independence than the preceding four hundred years of various colonial masters.

1.5 The Portuguese have very little to be proud of in the preparation and training which it gave to the East Timorese during the period of Portuguese administration to prepare them for independence. It must be remembered that there are no good colonising powers- there are only varying degrees of incompetence.

1.6 This was followed by the invasion of the governments of the Netherlands and Australia during WWII without the concurrence of the Portuguese Government, precipitating the East Timorese unwillingly into WWII. Thousands of East Timorese died during WWII assisting Australian and Australian military objectives.

1.7 The Japanese invasion which then followed and led to the Japanese occupation, would never have occurred but for the intervention of the Netherlands and Australian governments. Subsequent research into Japanese plans have demonstrated that there was not otherwise going to be a Japanese invasion.

1.8 The Portuguese resumed their administration until their withdrawal which led to the Declaration of Independence by the various political parties in East Timor. Australia was one the few countries to recognise a so-called “incorporation” of East Timor into Indonesia.

1.9 Again, the Australian government was involved in, depending on the evidence you accept, aiding and abetting; collaborating, acquiescing; assisting in the Indonesian invasion of East Timor, leading to a quarter of a century of rape, pillage, starvation and brutal military tactics which significantly depleted the East Timorese population.

1.10 The Australian Government did participate in convincing the Indonesian Government to have an Act of Free Choice. Fortunately, the Indonesian Government relied on the Army to advise it as to the likelihood of success, a result of which was something that seemed fairly obvious to those of us involved in getting the vote out for the Referendum, but not so obvious to Indonesian military strategists who clearly considerably under-performed as political polsters. The result was an overwhelming rejection of Indonesia, notwithstanding some appallingly brutal tactics.

1.11 Incredibly, to cap this off, neither the United Nations (UN) or any of the countries in the region had made any preparation for the inevitable devastation which occurred after the announcement of the Referendum result. Fortunately, Australia redeemed itself in part by leading the arrangements for the "Coalition of the Willing" for military forces to go in to prevent further devastation. We had to get something right. I could not believe that no diplomatic measures had been taken to prepare for the inevitable. Fortunately, our defence forces were prepared.

1.12 Since then, we have covered ourselves in considerable glory through the brilliant military administration of the Interfet forces, and those Australian and New Zealand forces who are now protecting East Timor at the "pointy end"- along the boundary with West Timor.

2 Cultural History

2.1 In order to understand some of the difficulties of the establishment of a new nation, I just wanted to remind you of some of the background characteristics of the people themselves, along with the linguistic and cultural problems that need to be overcome.

2.2 Portugal, like most Catholic colonial powers, had a higher level of mixture between the Portuguese and the indigenous people that were colonised, making for a higher level of intermarriage, both of the population, the language as well as the culture.

2.3 The principle language of East Timor is Eastern Tetum. The mother tongue of the two hundred thousand people in the Suai Balibo Viqueque areas in southern and north-western East Timor. A fully creolized-form known as Tetum-Praca (Tetem-Prasa) or Tetum-Dili. It is the first language of most of the capital, Dili, and the most common vernacular of almost the entire indigenous population of the territory, which today numbers some 800,000 people.

2.4 The liturgical medium of the East Timorese Catholic Church is Tetum-Praca, and is the second language for most. Many East Timorese who have grown up under Indonesian occupation speak a form of Tetum which has an Indonesian substratum. The East Timorese who have been absent during the occupation do not have this Indonesian substratum at all. The older people tend to speak Portuguese, which is the substratum language of East Tetum. The street language in Dili for many younger people would still be Indonesian.

2.5 The Tetum language has a large dependency on Portuguese. An understanding of Portuguese is of considerable assistance in understanding Tetum. Tetum for drug is drogadu, for twelve is doze, restbreak is intervalu, plant is planta, and to order is ordena. The people of the eastern end of East Timor tend to be the least fluent in Tetum where local dialects prevail, and there are therefore difficulties in the selection of teaching languages.

2.6 Tetum, like most of the eight Austronesian languages descended from the Celebes about a thousand years ago, displaced the Papuan vernaculars of Timor, of which three today survive.

2.7 The people are a cultured and in many ways cultivated people deriving culture from some of the Indianised nations from the first millennium of the common era, overlaid by subsequent Malay migrations. Many of the people are illiterate but are not necessarily uneducated.

2.8 These are not people who are used to turning up at the Supreme Court for a Declaration, nor are they used to filing a Summons in the Local Court to recover a debt. The village elders and indeed the local parish priest have enormous powers of dispute resolution. Resort to the courts is not a thought that is uppermost in the East Timorese mind.

2.9 An indication of the power of the local priest is the story which came to me of the young militiaman who went to confession, having been told that he had to kill a particular person, and asked his confessor what to do. The priest, with the years of experience which the Catholic Church had in these matters by virtue of confession, said that the penitent should send a message to the proposed victim to leave town. It must be remembered that many of the militia members were pressed into being involved, but nonetheless retained their community affiliations.

2.10 Indeed, on the night before the Referendum on 30 August 1999, in Liquica, a completely militia-controlled area, Indonesian policemen were seen to bring a militia man to stay at the house where I and some fifteen other observers were sleeping. My colleague, the Honourable Janelle Saffin MLC and I, kept the information to ourselves rather than frighten anyone else. I hasten to add that the house was burnt to the ground within a week of the Referendum. This was indeed a result which occurred with one of the other places in which some of our team of observers stayed.

2.11 The practicalities for the future is that Indonesian will recede as a language of communication for many people, being gradually replaced by Portuguese, Tetum and English, that last language now being the world's *lingua franca* and the one which leads to the greatest assistance from donor countries. English will continue to develop as the language of communication. The playground language in various parts of East Timor will be interesting to observe.

2.12 From this small summary of facts, you can see a country schizophrenic as to its culture, its language, let alone a sense of direction. It is stuck on the fringe of Asia and will attract donors from a range of different countries for a whole range of interests. From this background, the embryonic legal system starts to have a few problems.

3 The East Timorese Legal System

3.1 It can be assumed that there is no general consensus amongst the political elite in East Timor as to the direction the law will take. There are so many problems to be resolved at present on a whole range of government issues that there is little time to look at such fairly fundamental and significant questions as to the nature of the legal system. The question of which is to be the principle language of communication is still a matter to be worked out by the people themselves.

3.2 The largely Indonesian-trained Indonesian-speaking legal profession with a natural inclination towards Indonesian law and matters Indonesian, are not really able to assist from a philosophical standpoint as to the direction that the law should develop. There is no intellectual legal and political elite that can lead the discussion.

3.3 Most people from European civil law systems have an unhealthy mistrust of people from a common law system, and the early UN bureaucrats turned their faces steadfastly against assistance from common law countries such as Australia. This has not made the process of assistance easy. There are also many of the leaders who do not necessarily have a good view of Australia as a likely mentor country to the new East Timor, a view which is perfectly understandable in the circumstances.

3.4 There is quite a healthy argument that since few nations recognised the Indonesian occupation of East Timor, that the law which should apply prior to UN intervention is Portuguese colonial law as applied to East Timor. The alternative argument is that the law which applies is the law of the occupying country, that being the law that was applied during the period of Indonesian occupation. The early UN prosecutions for serious crimes have been initiated using Indonesian law.

3.5 One can however assume that Indonesian law will fade in popularity as the nation develops its own cultural and legal ethos. Those of you who have knowledge of Indonesian law will be aware that it is expressed, like the laws of the United States of America (USA), but more so in very general and somewhat vague terms, much of the law or practice being by way of Presidential Proclamations which do not necessarily have the force of law in Indonesia. It would not be one's first choice of law for a new developing nation, nor is a formal brutal administration likely to create advocates for retention of its legal system.

3.6 Indonesian law recognises *Adat* law or customary law. *Adat* law tends to be concerned with personal property, inheritance and family matters, and thus East Timor customary law will also have had and has some legal effect, particularly at a local level. I am not aware of Indonesian court decisions where customary law was applied by the Indonesian judges who sat in East Timor during the occupation. This customary law will have to be taken into account in the establishment of new laws.

3.7 You can see the difficulties as to prosecuting crimes which occurred during the Indonesian occupation as to which law was breached. The answer to the question may well be that several laws were breached simultaneously and may be available as alternative laws for commencing criminal proceedings. We therefore have customary law in place reflecting different customs in different areas, but traditionally recognised by the law of the various occupiers. There is an unresolved question as to the underlying law of Indonesia or Portugal. There is now the law put in place by the UN Security Council through its Transitional Administrator, all of which issues will remain during the period of UN Administration and beyond.

4 UNTAET Law

4.1 The United Nations Transitional Administration for East Timor (UNTAET) was established by Security Council Resolution 1272 of 1999. There had been a previous resolution granting some powers to the Interfet Forces to deal with offenders. The Special Representative of the Secretary-General, Mr Sergio Domello, the Transitional Administrator, was granted full legislative and executive powers. Although he has had various consultative bodies, nevertheless that power is absolute.

4.2 The United Nations did not have a ready package of laws for such circumstances. It is now working on having such a package ready. The establishment of nations by referendum is a fairly rare circumstance, one which our Australian ancestors enjoyed. Accordingly, those that came to work in the early days of the Administration brought with them some experience in Kosovo and other areas such as Rwanda. There was a tendency for ad hoc decision-making, based on the experience in those countries.

4.3 To give you an idea of some of the problems involved, ss 2 and 3 of Regulation No. 1999/1 on the Transitional Administration in East Timor contain the following provisions:

“Section 2 Observance of Internationally Recognized Standards

In exercising their functions, all persons undertaking public duties or holding public

office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in:

- The Universal Declaration on Human Rights of 10 December 1948;
- The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols;
- The International Covenant of Economic, Social and Cultural Rights of 16 December 1966;
- The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
- The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979;
- The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984;
- The International Convention on the Rights of the Child of 20 November 1989.

They shall not discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or all other status”.

“Section 3 Applicable law in East Timor

3.1 Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfilment of the mandate given to UNTAET under United Nations Security Council Resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator.

3.2 Without prejudice to the review of other legislation, the following laws, which do not comply with the standards referred to in section 2 and 3 of the present regulation, as well as any subsequent amendments to these laws and their administrative regulations, shall no longer be applied in East Timor:

- Law on Anti-Subversion;
- Law on Social Organizations;
- Law on National Security;
- Law on National Protection and Defense;
- Law on Mobilization and Demobilization;
- Law on Defense and Security.

3.3 Capital punishment is abolished”.

4.4 You can see from this that very many legal questions will arise as to whether a subsequent regulation has repealed a provision of Regulation 1999/1. Many questions will also arise from 1999/1 and the application of the Covenants on such issues as whether evidence has been properly obtained, matters such as the right of legal representation, appropriate warning, pressure to sign statements, unlawful detention and so on. It will be necessary to, because of the odd way that ss2 and 3 of Regulation 1999/1 is incorporated into East Timorese law, as to how that law is to be applied, both at a hearing and in terms of admissibility of evidence.

4.5 It will be remembered that this is a very immature legal system with a very inexperienced legal profession and almost completely inexperienced judicial officers. I must say, however, from my dealings with the newly appointed judges, that most of them are of an extremely high calibre, that they are very dedicated and are indeed very frustrated that they are not able to do more at this stage. There is a consciousness of their significance in the newly developing society, and a willingness to learn that all is well.

4.6 When I put to the then UNTAET Minister for Justice, he demonstrated a strong resistance to go back over decisions that had been made.

4.7 To demonstrate part of the problems of the UN Administration, the initial draft Criminal Code produced by a Venezuelan judge looked awfully like Venezuelan law. The Code which eventually came in despite strong opposition from the East Timor Jurists Association, shortly by the way to become affiliated with the International Commission of Jurists, is a code drafted by an American based on American civil procedures, with all the culture and terminology that that involves.

4.8 UNTAET officers, despite many being Australian, are unlikely to readily accept one of the Australian type common law consolidations, such as that used in Western Australia, Queensland and the Northern Territory. Such consolidations are however of fairly universal application, and would be easily applied by those in Australia who are likely to assist in the administration of justice.

4.9 Justice Greg James, of the Supreme Court of NSW, has offered to work such a consolidation. The difficulty will be to overcome negative emotional approaches to the adoption of such consolidations, rather than logical or

legal resistance. The diet of East Timorese courts for the next few years is likely to be overwhelmingly criminal, to the extent of ninety percent or more.

4.10 If you look down the track as to who is likely to be involved in the legal process, it is not unreasonable to assume that there will be a degree of assistance from Australian lawyers and judges. This is something which is acknowledged by the local legal profession, who also have a capacity to look ahead.

4.11 Indeed, a scheme for mentoring judges is being developed, to foster an arrangement whereby Australian judges go for a few weeks at a time, to act as a guide and mentor to the local, mostly English-speaking judges and English-speaking lawyers. Their purpose is to guide on a whole range of questions that must inevitably arise for a system which largely does not have legal traditions as such. A scheme to develop capacity-building and guidance for judges and the legal profession is being prepared for placement before the Asian Development Bank.

4.12 The Judicial Commission of NSW, which you know trains judges from all over Australia, the Pacific and some parts of South-East Asia, including Indonesia, is, as approved in principle, a scheme for the training of judicial officers in East Timor. The mechanics of this are currently being examined.

4.13 Just to identify the sorts of problems that we will face, our Dust Diseases Tribunal President, Judge John O'Meally, the Honourable Janelle Saffin MLC and I, watched the delivery of a judgment on an interlocutory question. The issue was whether a detainee had been properly detained under either the jurisdiction of the special criminal courts dealing with serious crimes and war crimes, or under the normal criminal courts applying "the law in force before 25 October 1999".

4.14 The three-judge bench comprised of a Portuguese judge who was born in East Timor, an African judge from what I think was Uganda, and an East Timorese judge who had not practised law but was qualified in Indonesian law.

4.15 The judgment was delivered some three hours after the appointed time, and in delivery the presiding judge spoke in Portuguese. It was translated into English by one translator, and then in turn by another translator in Tetum. The presiding judge did not always wait for the Tetum translation to be completed, and would continue on.

4.16 The presiding judge eventually stopped in the middle of the judgment and indicated that an error had occurred, and that the judgment would have to be re-engrossed (???) and delivered the following day. The New Zealand Crown (*sic*) Prosecutor asked whether he had won or not. The presiding judge indicated that he would have to wait until the next day to find out. This was done without consultation with the other two judges.

4.17 The presiding judge then addressed the person in custody in Tetum without translation, and it became apparent that the view of the court was that the detention was unlawful, but he was given a little homily by the presiding judge about his need to report to the police periodically, but that he could go. The Legal Aid lawyer, dressed in an appropriately coloured T-shirt, realised that he had beaten the imported prosecutor from New Zealand- looked a little stunned, and then everyone took off and went home.

4.18 There was nothing wrong with the translators, but a little more experience is going to be needed to work out the court procedures and to stop the enormous expense of judges travelling great distances on what are fairly routine matters.

4.19 There is also the problem that the UN Administration is not quite sensitive to the doctrine of the Separation of Powers. One judgment of one of the East Timorese judges was considered inappropriate by the UNTAET Administration, who took some trouble to let the judge know that it was an inappropriate decision- that occurred without the official quite understanding that the judge was not answerable to UNTAET.

5 Legal Libraries

5.1 Some of you will remember that a call had gone out to the legal profession generally by the Law Council of Australia and Australian Legal Resources International (ALRI), which produced some hundreds of books, which reached the bookshelves of the legal section of UNTAET together with a lot of Indonesian books, but the judicial section of UNTAET some eighty metres away in an adjoining building could not work out why they had not received them nor could the judges. They had been there for some months while the desk officers worked out what they should do with them.

5.2 We did receive a letter at one stage last year from UNTAET suggesting that they had quite enough Australian books, and did we have any from other countries.

5.3 Members from the Australian Section of the International Commission of Jurists have now packed considerable numbers of the tonnes of the new and old legal books held by ALRI. Some of these books have been shipped through APHEDA, the trade union social welfare arm. Others have been taken in by some of us as hand luggage travelling on the domestic carriers.

5.4 The Defence Forces and major internal commercial travellers have agreed to transport books. We have now

sent books to the judges in Dili, the East Timor Jurists Association and the Human Rights Organisation, Yayasan Hak. We have, as well as delivering new and not so new textbooks, tried to give priority to sets such as the *Australian Law Journal*, the *Australian Law Journal Reports*, and Halsburys 2nd, 3rd and 4th editions, as sources for general principles to be applied by the courts.

5.5 Any set of books which has an Index is the best teaching tool available.

5.6 A large number of books are being supplied to the ICJ direct. These are now being boxed and forwarded. Many of them had come from the larger legal firms and from individual judges, both of the NSW Supreme Court and otherwise.

5.7 We have a long way to go to supply the law libraries of East Timor. We are still collecting for the East Timorese University, and will deliver those as soon as we are satisfied that they have proper security and storage for books.

6 The Development of New Laws for East Timor

6.1 The decision on the timing of the actual independence of East Timor or Timor Lorosae as many call the new country, will probably be made for emotional rather than logical reasons. There is clearly a long way to go in the preparation of East Timor for independence, but we are dealing with uncharted waters with an organisation such as the UN. Furthermore, the decision-makers in East Timor are not necessarily experienced in appropriate decision-making procedures. Part of the problem is the unpreparedness of the machinery of government.

6.2 Those of you that have to deal with the bureaucracy may find it difficult to accept that the overwhelming need of the East Timorese is for skills in bureaucracy. The Public Service games which are admirably demonstrated by the television program "Yes Minister" are not entirely without merit. I can remember once being subjected at a NSW Cabinet Meeting to an episode of the "Yes Minister" program. Sadly, it was probably a necessary educational tool (repeated at 6.4 below???)

6.3 The NSW Government and other State and even the Commonwealth Government, are sending many officers to undertake a number of different programmes, most of whom are teaching by example the East Timorese public servants.

6.4 The NSW Government, as well as other governments, have provided some officers who are teaching largely by a process of Osmosis, but the procedures of the television program "Yes Minister" are not without their merits. I remember once being subjected at a NSW Cabinet Meeting to an episode of "Yes Minister" on television. Sadly, it was not primarily done with a humorous aim.

6.5 The difficulty that we have is to educate the East Timorese leaders as to the need to develop a bureaucracy on which it can rely and which will assist it in the carrying out of its tasks.

6.6 The need for a public service note-taker being present at every meeting to make notes of what has been decided at a meeting, to go back to the Minister later on in the form of a Cabinet or Directive is not fully appreciated. I learnt this when as Head of the Australian Government Mission to oversee the Elections of the Palestinian Council, I also, on behalf of ALRI, assisted in the setting up of the procedures and standing orders for that legislative council.

6.7 Part of the discussions with the Head of the Legal Department was as to the need for a "Basic Law" or Constitution. At the end of the discussion, the head of the Department understood the point that I had been making, but no note was taken and nothing ever happened as a result of the discussion. They still do not have a Basic Law.

6.8 The simple point that I had made was that it was not necessary to have a Constitution as such, particularly in a society already governed by Sharia laws on matters of family law, estates and custody.

6.9 In East Timor there is a realisation developing as to the need for public servants, but there is only a limited amount of training available. UNTAET is trying to train as many as possible, but you cannot graft years of experience that is built up working within a public service structure. Most East Timorese public servants are at a fairly junior level. Some UN staff will have to stay on as Timorese staff.

7 Constitutional Developments

7.1 There is much talk in East Timor about the development of a Constitution. It must be realised that very few nations, Australia being a glaring exception, work out a Constitution until after they have some form of Legislature in place. In my view, a Constitution should be avoided altogether until after the East Timorese learn to be parliamentarians.

7.2 My recommendation in the ICJ Report on Hong Kong produced in 1991, "*Countdown to 1997*", recommended the election of a full Legislative Council. This was adopted but did not survive the Countdown. Nevertheless,

many of the parliamentarians now working in Hong Kong received their initial training during that electoral period.

7.3 In Palestine, there was no Constitution settled before the Legislative Council was set up. Instead, an electoral ordinance was established under which the Palestinian Council was elected, and people of that country are now used to seeing politicians heads on television. Those politicians who have gained experience in that Council will be better able to develop a Constitution.

7.4 I know that this is a bitter pill for judges to swallow, that I have just recommended the development of bureaucracy to follow that recommendation with a recommendation for the training of politicians.

7.5 Part of the work of the ASICJ has been to advise on draft regulations and to discuss with some of the future East Timor parliamentarians the procedures for developing laws.

7.6 There is a lot of talk about Constitutions and the establishment of human rights principles. Unfortunately, there is very little understanding of the basic mechanics of electoral and decision-making processes.

7.7 It is very difficult to educate a people in electoral processes, and the very subtle but significant differences that occur under different electoral regimes which may in fact have greater consequences for the future people. Countries such as France and Italy have great Constitutions but hopeless electoral laws.

7.8 The stability of government is something of much greater consequence to a currency to those dealing with government, and for investment development _____ making new Constitution with all the rights that a liberty group could ever want for (tape becomes a bit fuzzy here).

7.9 One of the realisations is that the procedures for the establishment of a Constitution, to have any sort of effective result, are very difficult to put in place. There is talk of electing a Constituent Assembly so that some sort of debate can occur on a representative basis. There is also some talk of setting up a Constitutional Convention, with representation of all the usual suspects. And there is talk of setting up an Interim Constitution under a committee of UNTAET to last for the first term, an obligation being created, in that first term to settle the final Constitution.

7.10 My own view is that Constitutions should await development of sophisticated political and electoral systems, rather than set something in place which may be quite inappropriate.

7.11 One of the difficulties that exists is that Xanana Gusmao wishes to stay independent of the political process, without the realisation that the loss of his *imprimatur* on any new political party which may be a sum of the CNRT, the coalition of the parties, or may in fact be one of the new parties that is now being established, will leave an existing political structure such as Fretelin with a disproportionate influence in any Convention or Constituent Assembly process.

7.12 If Fretelin gets its own Constitution in its own right, that is a matter for the East Timorese. It should not get it by default.

8 Electoral Systems

8.1 The 30 August 1999 Referendum was a remarkably effective expression of will of an albeit intimidated people. Those people, many of whom may be illiterate, are not necessarily innumerate, and are capable of carrying out simple voting instructions. The difficulty is to teach both the East Timorese leaders and the people the subtlety of voting systems, along with the significant variations.

8.2 Anyone who has just seen the recent debacle in the US, and also understands the extraordinary opinion shifts created by the first-past-the-post system, will appreciate the importance of teaching the East Timor elite, as well as the East Timor voters, the workings of the preferential or non-preferential voting system. There will always be an attraction to simpler styles of voting. My experience in many countries throughout the world of voting systems is that most new countries adapt very quickly to new voting systems, and often can get a better result than some of our educated but casual Australian voters.

8.3 In my discussions with some East Timorese leaders, the point was made that there is unfortunately no elite to take part in discussions on the issue. There is an attraction towards the Presidential system, and the freedom of appointment of Cabinet Ministers which is involved in that process. The dangers of this are of course common; that you end with a government which is significantly remote from the parliamentarians, let alone the people.

8.4 It has been put to me that there is a need to discuss with the lawyers and the human rights organisations such as Yayasan Hak, how a voting system and electoral processes are carried out. It is very difficult for the lawyers who have very little or no experience of these matters to admit that they do not understand. The beginning of all learning is knowing what you do not know.

8.5 Constitutional processes of whatever form is taken is normally captured by a small Steering Committee which may represent a political faction or particular interest groups, or a group of politicians of various political

persuasions who understand the importance of the process and who will steer a draft Constitution to its conclusion. It is however often a lengthy process.

9 Form of Government

9.1 The body that will ultimately shape the laws and legal system of East Timor will be affected by the type of government that is in place. Again, the difficulty in East Timor is that there is not an informed debate or, indeed, a debate at all as to the niceties of the various types of government. There seems to be an assumption based on what happens in other Republics in the area that there will be a Presidential-type system.

9.2 Xanana Gusmao is reported to have expressed views in favour of such a system, and a desire on his part that he stand apart from the political processes. Jose Ramos Horta also has a similar view.

9.3 Those who are concerned however with the type of government have not looked at the differences between what I generally describe as the Westminster style of government from the US Presidential style.

9.4 Guerilla leaders do not inherently make good parliamentarians. Yasser Arafat did not enjoy the question time that was created by the Standing Orders that I assisted in drafting for Palestine.

9.5 Xanana Gusmao naturally has an inclination to follow a Presidential style.

9.6 The difficulty of this is that the new parliamentarians will not have an opportunity to spend as much time with the President, and the President will not have time to bring on the younger parliamentarians and to keep in touch with the electorate. A considerable amount of business is conducted in the corridors of Parliament House. A quick word here may result in an appointment and a discussion about a particular political issue. This is the sort of thing that happens in almost every Parliament in the world.

9.7 A Presidential-style appointment of Cabinet Ministers may well result in government by an elite, and a sense of remoteness from the political process. As unpleasant as party politics may be, it is an integral part of most political processes. The more transparent a government is, the more stable (or unstable?) it is likely to be. Unlimited question time is not something that is really understood as one of the most significant cornerstones of the parliamentary processes. Sometimes removal for misleading of the Parliament is the only real sanction that the people and their parliamentarians have for the inept, improper or corrupt Minister.

9.8 I have proposed a system which combines some of the benefits of both the Westminster and Presidential system. It has a degree of complexity about it, and therefore is less likely to proceed. A development in political sophistication will help its passage through the deliberative process.

9.9 The proposal is not that the President is elected independently of the Parliament, but that they become a member of that Parliament and that they must select their Ministers predominantly from within the elected members. A fixed proportion such as ten out of twelve or ten out of fifteen would allow some flexibility to bring in people inappropriate for the political process or having particular skills, but would mean that the predominance of the members of the parliament and thus are more likely to be in tune with the views of the popular representatives. The proposal is that the remainder be approved by an advice and consent process of the parliament, and that the parliament would have the power to remove the government excluding the President, with the President having the right to re-nominate his parliamentarians.

9.10 Question time then has some real meaning. The Ministers from outside the parliament would have the duty to attend for question time.

10 The Parliament

10.1 It is clear that East Timor will have a parliamentary-style democracy, although the discussion about the form of the democracy is at a fairly embryonic stage. It is likely that there will be a Unicameral system, which immediately creates the problem that if the franchise is either first-past-the-post, preferential or full preferential with single member constituencies, there may not be a proportionate spread of the political parties, nor will the representation necessarily be representative of the general will of the people.

10.2 If there are multi-member constituencies, then the problem is to determine an appropriate proportion which will result in fair representation in all areas for minority as well as majority parties. There will be some pressure to have a form of proportional representation which is either one single province or in a series of provinces. This will give an advantage to the established parties, and will not necessarily give everyone a local parliamentary representative in each district. The need for a local member representing each area is a fairly significant need in a newly developing democracy.

10.3 I have therefore recommended that a voting system along the lines of that of Papua New Guinea apply, which combines in one chamber the benefits of both systems. This requires a little bit of education and a little bit of work to try and get the best of both worlds. The overwhelming difficulty is the need to have education from those experienced in the system of the potential leaders of the debate, that is the human rights organisations and the lawyers as well as the political elite in the various systems so that they can talk with some authority and have

a meaningful debate. This, in my view, is one of the urgent areas of educational need for the East Timorese.

11 Law Reform Commission

11.1 During my discussion with Gita Welch, the Head of Judicial Affairs and a Cabinet Member for Judicial Affairs. There seemed to be a fair measure of support for the setting up of a Law Reform Commission as a training ground and to commence the discipline of law revision, both of the existing UN laws, some of which will need to continue for some time, and the news laws which need to come into effect.

11.2 One of the usual decisions of UNTAET was to appoint in excess of thirty judges, both prosecuting judges in the civil law sense, and presiding judges as well as a number of prosecutors, without there being much work for them to do. At the moment, there is a need for some seven or eight judges rather than thirty. The Law Reform Commission will enable them to not only apply themselves, but to learn about the process.

12 The Way Ahead

12.1 As I have endeavoured to show, there is a large number of problems to be resolved. Much of it will be resolved by Australian lawyers getting to know their neighbours, and forming associations with them as many of you have done with people you have met from Indonesia and other areas of judicial training through the Judicial Commission courses.

12.2 Australians have shown a readiness to volunteer to assist and have already had significant influence in the development process.

12.3 (Beginning of tape cut off) and friendships which ultimately will lead to a strengthening of the judicial system in East Timor.

12.4 I have proposed to the Commonwealth Secretariat in London that consideration should be given to admitting East Timor to the Commonwealth. This will be an unpopular idea with the UN and will create some resentment for those who think that East Timor can do it on its own. The last member to join the Commonwealth was in fact the other Portuguese colony, Mozambique, the first admitted from outside the former British Commonwealth. There are very many third world countries in the Commonwealth which, through the Commonwealth Parliamentary Association could fairly readily provide experience of positions such as the Parliamentary Council and various aspects of parliamentary education, so essential to a developing nation such as East Timor. The use of a parliamentary council within Australia and exchanging officers with East Timor is of greater consequence to the future development of East Timor than some of the infrastructure programs that are already under way.

12.5 If it ends up costing Australian taxpayers a bit of money, then it is the least that we can do in our part of the betrayal of the East Timorese people by a very ungrateful Australian community and some fairly cynical public servants.

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Former Leader of the New South Wales Opposition
Former Deputy Chairman of the New South Wales Law Reform Commission

Developments of the criminal law in New South Wales, Australia

2nd International Conference of the Australian-Italian Lawyers Association

Sponsored by

the Italian-Australian Chamber of Commerce

“Developments of the criminal law in New South Wales, Australia”

by The Hon. Justice John Dowd AO

A Judge of the Common Law Division of the Supreme Court of NSW

Delivered at Messina, 27 April 1999

Many people throughout the world who may consider themselves likely to be charged with criminal offences arising out of international human rights violations will have watched with concern the events concerning the extradition of former President Pinochet in the United Kingdom. It is a manifestation of the growth of what we lawyers from a common law system say is a growth in international human rights common law, which may eventually have some deterrent effect on those who perpetrate crimes in breach of international treaties and convince those who commit human rights abuses, that there may be no safe place to hide. I have been around too long however, to think that we are going to easily deter the abuses of militaristic dictators.

Although I am not primarily speaking to you about international law matters as such, in this paper I want to take the opportunity to mention the difficulties of the application of international law and its incorporation into the domestic law of a country which is party to an international treaty. Similarly, it is desirable that legal machinery be incorporated in our domestic law to facilitate implementation of laws which are clearly established as international common law, such as crimes against humanity. My aim in this reference to international treaty law is to endeavour to persuade those of you who are politically active that there may be work to be done in both Italy and Australia to further our international obligations, and to put into context the international developments in Australian criminal law to which I propose to refer.

The Pinochet case reminds us of the case of the Genocide Convention, to take one example of a country's treaty of obligations, which has recently had its 50th birthday.

Most Australians, and I suspect most Italians, do not have a detailed understanding of international law and treaties and the way in which they are applied and enforced. We in Australia have additional problems in international law because we, like the United States and Canada, are a federated state. The enforcement of laws agreed to in an international treaty may not be within the power of the central government which signed that treaty. Treaties in Australia are entered into by the Commonwealth Government, which is the government representing the whole of Australia, which government does not have necessarily the legal machinery to enforce laws that a treaty obliges it to enforce.

In the Australian Federation the Constitution provides that when the Federation of Australia came into existence the residual powers that were not conferred in the central government by the Constitution, remained in the States. Ours is a common law country; everything is not set out in a code or consolidation of the law. It is primarily judge-made law as amended by statutes of Commonwealth and State parliaments. Most of the criminal law is the law of the States even though there are some offences established, of course, under Commonwealth Law.

The Genocide Convention, which is a treaty and therefore an agreement or contract with other nations, does not of itself create substantive laws and offences as such. Many a politician or

government will trumpet to the effect, as does the Australian Government, that it has signed and ratified a particular treaty such as the Genocide Convention and therefore all is well with the world, but on closer examination it will be found that the Genocide Convention does not prohibit any genocide activity. It does not create any enforceable crimes. It does not establish any penalties. It is merely an agreement with all the other nation states that it will create offences which would penalise those who commit the terrible crime of genocide, and an agreement to establish extradition treaties in order that international criminals can be repatriated to the countries against whose citizens the offences have been committed, so that criminal can be tried under the domestic law of the victim's country.

The treaty assists in establishing an international common law on genocide, but the vagueness of the treaty and the lack of precision in defining the various components which make up the offence of genocide require legislation, not only to implement the treaty in terms of punishing offences and extraditing offenders but a need to set up legal machinery for the enforcement of international common law offences. In the Australian context it is desirable for maximum penalties to be established rather than leave such matters at large.

I have been urging in Australia, and will continue to urge for, increased application of extradition treaties and international common law and the creation of legislative arrangement for the repatriation of criminal offenders. I will deal with one such international arrangement later in this paper.

A world connected instantaneously by email, the fax and the Internet, where international corporations and governments are increasingly active beyond their own borders, requires the carrying into force of appropriate extradition arrangements and a regime of offences and penalties that may help to deter international offenders. I appreciate that we have difficulty enough in enforcing domestic law with our own countrymen. We still have a duty however in this shrinking globe to reduce, where we can, international crime, by the creation of offences and machinery for determining guilt and enforcing penalties.

I want to discuss the experience in NSW, which is largely reflective of the law throughout all of the Australian States and Territories, in relation to some developments in our criminal law and the developments of that law which work within Australia, some of which have international ramifications and consequences in terms of the criminal and civil law.

In no way do we presume that we have anything to teach any other country. I do not know the extent to which Italian law makes similar law to Australian Law. I only wish, in this paper, to tell members of this conference who come from Italy, and remind those from Australia, of the extent to which the law has progressed and our experience with that progress. I believe that increasingly, ready electronic access to the laws of other countries will make it very much easier for the sophisticated western nations of the world to learn from others' experience in legal reform.

I want to remind the Australians here, and explain to our hosts, that the Australian Federal system has some curious benefits, as well as a lot of inconvenience in overlap of the law. We have a system in Australia whereby each of the Ministers of each state and the central government meet on a regular basis to discuss developments in various areas of the law and administration. We have a meeting of Health Ministers, Child Welfare Ministers, Police Ministers and all the various government activities which are carried out in Australia. The territories, which are not the States, also have similar government administrations, and send to the meeting of Ministers the Ministers from those territories. We move around Australia like a lot of tourists to the various capitals of the state or the commonwealth, hosting those meetings. I was for several years, as Attorney-general for NSW, a participant in those meetings. Curiously, from a non-Australian and indeed from an Australian point of view, we include the independent nation of New Zealand in our meetings.

The purpose and effect of these conferences is that we are endeavouring to bring together the laws of each of the States and Commonwealth to achieve some degree of uniformity or similarity our laws. One of the benefits of these conferences that we have, in the same way that the Italian ministers will find in their meetings of the European Union, is that they are exposed to a range of ideas from the other States and the Commonwealth, some of which become attractive and are adopted as policy in our own states or territories. The very fact of that exposure enables more speedy development in our various laws.

We in Australia also have the benefit of being part of what was known as the British Commonwealth but which we now call the "Commonwealth of Nations", being more than one quarter of the world's

nations, many of them small nations but nevertheless having membership of the United Nations representing one quarter of the world's population, and having a similar background and framework. We have a similar opportunity therefore in our meetings of Commonwealth parliamentarians, lawyers and government officials to learn from each other. The rapid advance of electronic technology means that this process has developed in recent years, much to the concern of many technophobes and those like me who are just acquiring some limited skills in the use of the Internet.

At a meeting in London in June last year a colloquium of judges, magistrates and parliamentarians established a series of guidelines which endeavoured to establish the relationship between the parliament and the judiciary throughout the Commonwealth countries. It is hoped that all of us, including countries like Australia, can keep our laws not too far behind legal advances in this technologically changing world.

You may be amused to know that a organisation of which I am Deputy Chairman provides Australian Judges to the Caribbean to assist some poorer nations to adapt their law and clear up enormous backlogs of cases. Our Italian colleagues may consider that Australia is a long way away, but in some ways we are not quite as remote as our geography would suggest.

Developments in NSW Law

One of the laws which arose out of the meetings of the Attorneys-General in Australia, is Commonwealth and State legislation concerning confiscation of the proceeds of crime. I have not attempted to consider Italian law to see if you have anything similar. I will merely let you know what we have done, and our experience.

There was considerable cynicism in Australia when the confiscation laws were brought in. Indeed, when I as Shadow Attorney-General supported, in my State, the confiscation of profits legislation, most parliamentarians did not consider that criminals were likely to have assets, and in any event any such assets were unlikely to be found. One of the very pleasant aspects of this legislation is that the Commonwealth and the States are in fact recouping considerable sums of money from criminals - whether drug related money or another criminal activity - who have amassed considerable fortunes and quite sophisticated assets, who suddenly find that all of those ill gotten gains are removed and provided to the people of the state or Commonwealth against whose laws they have offended.

In Australia we have Federal officials who authorise telephone listening devices, but in the States it is the State judges like myself who authorise warrants for the placement of listening devices and authorise orders for the confiscation of assets. If there is a particularly large raid about to occur in relation to some major criminal activity it is very rewarding, even from a dispassionate judicial point of view, to realise that the order that one has made freezing millions of dollars of assets was a precursor to the arrest of the perpetrators of the crime, and indeed ultimately to find that those assets are removed from the criminals concerned.

I would now like to outline some of the principle provisions of the Commonwealth confiscation legislation to let you know not only the effect it is having in Australia and similarly in each State, but ultimately the effect it may have on people with assets as far away as this beautiful and ancient land of Italy.

Confiscation of Proceeds of Crime Act 1989 (Commonwealth)

Section 3(1) of this Act provides that the principle objects of the Act are:

“(a) to deprive persons of the proceeds of, and benefits derived from, the commission of offences against the laws of the Commonwealth or the Territory;

(b) to provide for the forfeiture of property used in or in connection with the commission of such offences; and

(c) to enable law enforcement authorities effectively to trace such proceeds, benefits and property.”

The objects of the Act also include, in s. 3(2) of the Act:

(a) providing for the enforcement in the Territories of forfeiture orders, pecuniary penalty order and restraining orders made in respect offences against the laws of the States;

(b) facilitating the enforcement in Australia, pursuant to the Mutual Assistance Act, of forfeiture orders, pecuniary penalty orders and restraining orders made in respect of foreign serious offences; and

(c) assisting foreign countries, pursuant to the Mutual Assistance Act, to trace the proceeds of, benefits derived from and property used in or in connection with the commission of foreign serious offences.”

Section 43 of the Act gives the Director of Public Prosecutions (our District Attorney) the power to apply to a court for a restraining order, which may prevent the distribution of a defendant’s property and may also direct the Official Trustee to take custody and control of his property. An application such as this may be made upon conviction for any relevant Commonwealth indictable offence. Where the offence is a “serious offence” the court is obliged by s.44(1) to make a restraining order , subject to specific exceptions:

ss 44(3), (4), (7A), and (10).

Section 30 of the Act provides that where there has been a conviction for a serious offence and there is a restraining order in force six months after the date of conviction, the property which is the subject of restraining orders - and which is not the subject of an order pursuant to s.48(4) - is automatically forfeited to the Commonwealth at the end of a period of six months from the day of the conviction. The time for such forfeiture can be extended by application pursuant to s. 30A of the Act.

Section 48(4) of the Act provides that where a person has been convicted of a serious offence, and a court has made a restraining order against property in reliance on the conviction, the defendant, where he has an interest in that property, may apply to the court for a declaration that the restraining order relating to that property be disregarded for the purposes of s.30.

A declaration, under s.48(4), may be made if the court to which the application is made is satisfied that:

“....

(i) the property was not used in, or in connection with, any unlawful activity and was not derived, directly or indirectly, by any person from any unlawful activity; and

(ii) [his] interest in the property was lawfully acquired.”

“Unlawful activity” is defined in s.4(1) of the Act to mean

“an act or omission that constitutes an offence against a law in force in the Commonwealth, a State, a Territory or a foreign country.”

The words “any unlawful activity” are not limited. The offences encompassed need not be, or be equivalent to, the “serious” offence of which the applicant was convicted or an indictable offence: *Director of Public Prosecutions (Cth) -v- Jeffrey (1992) 58 A Crim R 310*.

The phrase “usedin connection with” was interpreted by Hunt CJ at CL in *Jeffrey* as requiring:

“a substantial connection between the activity in question and the use of the property. It is not sufficient for there to be a mere accidental or incidental connection. The unlawful activity must be related to, or dependent upon, or could not have been committed without, or have resulted directly from, the use of the property.”

If the court is satisfied of the matters contained in paragraph (e) of s.48(4) the property will not be the subject of automatic forfeiture at the expiry of the relevant period.

The purpose of the Act is to confiscate proceeds of crime. The Act is expressed in the clearest of terms and the Act clearly sets out a power to bring proceedings to confiscate proceeds, and to only allow a benefit to the person guilty of a crime where it can be shown that those assets were lawfully obtained whether here or in other jurisdictions.

If I may cite a case which was heard some few months ago before me, our Italian friends may find it interesting to observe the complications of Federation, that the Commonwealth of Australia brings proceedings before a State judge in a State court to enforce a Commonwealth law. Indeed, the Commonwealth even prosecutes Commonwealth offenders in State courts, and people are incarcerated in State prisons by State judges for Commonwealth offences. This case, *Department of Public Prosecutions v Spiteri* indicates some of the developments that have occurred in our law.

Commonwealth DPP v Spiteri:

Spiteri was convicted of importing a prohibited drug, cocaine, of a quantity being not less than the commercial quantity. That offence is a "serious narcotics offence" as defined in s.7 of the Act. Spiteri was sentenced to 14 years imprisonment with a non-parole period of 8 years. The Commonwealth obtained a restraining order pursuant to s.43(2)(a) of the Proceeds of Crime Act, preventing Spiteri or any other person from dealing with any of his property which was to be forfeited pursuant to s. 30 of the Act unless a declaration was made pursuant to s.48(4) of the Act that the property or part thereof was otherwise excluded from the restraining order. Spiteri applied for the exclusion of his property.

The property to which the restraining order applied was:

1. Approx \$(US) 20,000.00 held in Spiteri's name with the Chemical Bank, New York, USA and other sums in various Maltese, Panamanian, U.S, and Australian bank accounts.
2. Two motor vehicles including a Mercedes Benz in Malta
3. Works of art and sculptures created by Spiteri which are located in the United States of America.
4. \$4,000.00 (AUD) seized by the Australian Federal Police on 4 June 1996.
5. \$250,000.00 (US) held in an account in Spiteri's name with the Banca Nazionale Del Lavoro, in Roma Italy.

Spiteri's case was that all of the property to which the application related was acquired lawfully from legitimately earned sources, investment in property, savings and earnings and interest on those earnings, the proceeds of the sale of works of art and sculptures made by the Spiteri, proceeds from the sale of various motor vehicles and real estate, and loans from members of his family.

Under s.48(4)(e) of the Act the onus of establishing that the property was not derived from any unlawful activity as described in the Act is clearly placed by the statute as being on the applicant. It is the applicant who bears the legal and ultimately the persuasive onus of satisfying the court of the factors in paragraph (e).

In order to establish the negative facts stated in sub-paragraph (i) of Section 48(4)(e) an applicant must not only to deny on oath in general terms that the subject property was used in or derived from unlawful activities but must also establish the activities it was in fact used in and derived from: per Hunt J in *Jeffrey*. Where an applicant swears a denial that his property was used in the commission of an unlawful activity, or derived from such unlawful activity, he has in fact set up a prima facie case. If his account is accepted by the court as being honest and accurate his onus is discharged.

The applicant submitted, and his evidence was, that all of the property identified had been not been used in or in connection with any unlawful activity, and was not derived directly or indirectly from any unlawful activity but was derived from his savings over a

significant period of time from legitimate earnings, principally from paid employment, from loan funds obtained from relatives, and from the sale of his artistic items being various art works and sculptures.

I was not convinced by Spiteri's story as to the acquisition of the assets, and eventually made orders which had the effect of Spiteri forfeiting all of his assets internationally, with the exception of the sum of \$US 30,00.00 which I considered was a proper estimate of the assets that he had lawfully obtained. Assets in Europe, USA, Italy and Panama were not protected from Australian law.

Mutual Assistance in Criminal Matters Act (Cth) 1987

One of the Australian legislative measures that assists in recovery of international criminal assets was referred to by me in that judgment in *Spiteri*, that is the *Mutual Assistance in Criminal Matters Act (Cth) 1987*. This Act sets up a scheme for the international assistance for enforcing offences under the criminal law of Australia, and for preventing money laundering and other international crime. The objects of the Act are to provide for international criminal assistance in other countries when a request is made by a foreign country for the taking of evidence, or the issue of warrants or recovery of pecuniary penalties in respect of a foreign serious offence, and the restraining of dealings in property that may be forfeited or confiscated. The Act facilitates the provision of

international assistance in criminal matters in Australia, and facilitates the obtaining by Australia of international assistance in criminal matters.

This Act obviously will incorporate treaties made between particular countries. Some of you may be aware, but some of you may not, that Australia and the Republic of Italy, desiring to promote collaboration in the field of assistance in criminal matters, have entered into such a treaty applying the Mutual Assistance Act, that treaty having been signed in October 1988, and regulations under the Act commenced that Mutual Assistance Treaty with domestic application in both countries on 1 April 1994. Those of you who have clients charged with criminal matters or who may be the sort who are likely to commit such offences may be reminded of the provisions of the legislation.

The Act provides that whether or not assistance is to be provided is determined by the Australian Attorney-General: s.9.

A request for assistance by Australia to a foreign country may only be made by the Attorney-General: s.10(1). Part II of the Act sets out what kind of requests can be made by Australia (s.12) to a foreign country and visa versa (s.13). Such requests may include the following:

- evidence to be taken in the foreign country in accordance with the law of that country;
- a document or other article in the foreign country to be produced in accordance with the law of that country.

Section 12(3) provides that when making any such request Australia may also request that an opportunity be given for the person giving evidence, or producing the document or other article, to be examined or cross-examined through video link from Australia.

Part III of the Act deals with requests for assistance in relation to search and seizure by Australia (s.14) and foreign countries (s.15). Part IV of the Act deals with the arrangements for persons to be extradited to give evidence or assist in investigations.

In conjunction with this Act or other Commonwealth Acts there are a number of Regulations that have been passed in addition to the Italian regulation. The *Mutual Assistance in Criminal Matters (Traffic in Narcotic Drugs and Psychotropic Substances) Regulations* for example, which were assented to on 9 December 1992 and which commenced on the date of the commencement of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*, list the countries to which the Act applies. Italy is listed as one of those countries.

International outreach of New South Wales Law:

NSW Crimes Act - Section 3A:

To give you an idea of the outreach of criminal law in my State, a new s 3A was inserted by the *Crimes (Application of Criminal Law) Amendment Act 1992* to our Act, dealing with almost all crimes, in the words of the Minister introducing the Bill in his Second Reading speech, "to overcome the difficulties of establishing jurisdiction which arises in certain criminal cases where there is no evidence to indicate the place of commission of all of the elements of the crime or where different elements occur in different jurisdictions". Section 3A relevantly provides as follows;

"Territorial application of the criminal law of the State

- (1) An offence against the law of the State is commenced if:
- (a) all elements necessary to constitute the offence (disregarding territorial considerations) exist; and
 - (b) a territorial nexus exists between the State and at least one element of the offence.
- (2) A territorial nexus exists between the State and an element of an offence if:
- (a) the element is or includes an event occurring in the State; or
 - (b) the element is or includes an event that occurs outside the state but while the person alleged to have committed the offence is in the State."

Section 3A has not been considered at great length by the courts in New South Wales but has been considered in two conspiracy cases: *R v Catanzariti (1995) 81 A Crim R 584* and *R v Issac and Others (NSW Court of Criminal Appeal, 5 February 1996)*.

I have myself, some little time ago, heard a case applying s.3A. That case was subject to an appeal which about two or three weeks ago was withdrawn, and my decision therefore stands.

In the case known as *DPP v Martin*, the facts were that

a Summons was issued seeking a determination of a Stated Case under s.101 of the Justices Act 1902 by way of appeal from a magistrate, who had entered judgment for the defendant, Martin, dismissing a charge against him under s.112 of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") on finding that the information laid against him under s.52 of the *Justices Act 1902* was invalid.

The information laid against the Respondent alleged that Martin "on 20 August 1995 at Townsville in the State of Queensland did make a publication in contravention of a direction given under s.112 of the ICAC Act 1988, in that he did publish to a person the fact that another witness had given evidence at a hearing before the Independent Commission Against Corruption, such publication being in contravention of a direction given on 15 August 1995 at Redfern in the State of New South Wales by the Hon. B.S.J O'Keefe, AM QC, Commissioner".

The I.C.A.C. Act 1988 was introduced by my government partly based on a similar Act in Hong Kong to combat systemic corruption within certain criminal areas of government, particularly the police force. It was a curious irony that the Premier of my then government, over a public service appointment, was being found to be corrupt by the Independent Commissioner Against Corruption who he had appointed. The matter went on appeal, but he was obliged to resign in the meantime. He was held on that appeal not to have been corrupt, but that was little consolation to him.

In *DPP v Martin*, Martin submitted that section 3A of the Crimes Act did not save the information, as there is no element of the offence having a territorial nexus with the State of New South Wales.

Counsel submitted that the offence was a “result offence”, the result occurring outside the jurisdiction of New South Wales;

Brownlie v State Pollution Control Commission (1992) 27 NSWLR 78 and Union Steamship Company of Australia v King (NSW Court of Appeal 3 November 1987, unreported). In *Brownlie v State Pollution Control Commission*, the Court defined the term “result offence” as one being:

“[t]he occurrence, or likelihood of occurrence, of a certain consequence is a necessary element of the offence” (at p.83).

Chief Justice Gleeson delivering the leading judgment of the Court then held that:

“...a New South Wales Court does have jurisdiction to try a person with a “result offence” where the result is one that occurs, or is likely to occur, in New South Wales, even though the acts bringing about that result took place outside New South Wales...” (at pp.83-84).

Counsel for the defendant in that case submitted that because the s.112(2) offence occurred in Queensland and not in New South Wales, courts in New South Wales did not have jurisdiction to hear the matter. I held that this was not the correct test to determine whether a territorial nexus exists.

Section 3A(2) of the Crimes Act sets out the test to determine whether a territorial nexus exists between the State and an element of an offence. The provision states that for a territorial nexus to exist the element of an offence must occur or must include an event occurring in the State: s3A(2)(a), or the element must occur or must include an event that occurs outside the State but while the person alleged to have committed the offence is in the State: s 3a(2)(b). A territorial nexus will thus exist if an element is or includes an event occurring in the State.

The word “element” in section 3A means “all elements necessary to constitute the offence”: s 3A(1)(a). “Event” is defined in s 3A(10) as meaning “any act, omission, occurrence, circumstance or state of affairs (not including intention, knowledge, or any other state of mind)”. The term “event”, it appears, has been given a broad definition.

I accepted and agreed with the submissions put to me by counsel for the Appellant, that the direction given by Commissioner O’Keefe on 15 August 1995 was clearly an element of the offence under s.112(2). In terms of the language of the section the direction must be a “circumstance” or “state of affairs”. I found that the direction, in being an element of the offence, was an “event” for the purposes of s.112(2)(a). The direction is not an element that is a state of mind (as was the case in *R v Issac and Others* cited above), which is nevertheless excluded from the definition of an event but is, in broad terms a “circumstance”: s.3A(10). The Australian Macquarie Dictionary defines the term “circumstance” to mean:

“1. a condition, with respect to time, place, manner, agent, etc.. which accompanies, determines, or modifies a fact or event..”

I found that the direction was a condition with respect to manner which accompanied an event, namely the giving of the evidence, and was thus a circumstance. The direction thus being a circumstance, is therefore by the definition of s.3A(10), an event.

I also found that the direction occurred in the State of New South Wales. This being so, a territorial nexus under s.3A(2) can be said to have existed, and s.3A is applicable.

It is therefore now a lot easier to commit an offence which is substantially an overseas offence, and thus which may have consequences in terms of a criminal conviction in New South Wales. This case is but one example of the way in which offences outside Australia can be punished in Australian courts.

Other Legislation:

In addition to the provisions of the Confiscation Acts which I have set out above, with its international ramifications, there is other legislation such as operated by our NSW Crime Commission with similar bodies in other States, which enforces confiscation of assets, and I cite in particular the *NSW Criminal Assets Recovery Act 1990*. That act provides for the confiscation, without requiring a conviction, of the property of a person if the Supreme Court finds it more probable than not that the person has engaged in serious related activities, and to enable the proceeds of serious crime related activities to be recovered, and to enable law enforcement with the authorities to identify and recover crime.

Our sophisticated and indeed not so sophisticated perpetrators of crime may have their lives rendered a little more difficult. We may even deter a little crime, but we will have at least have recovered some of the enormous costs of law enforcement in the assets that we confiscate.

Child Sex Tours:

I just want to remind our Australians, and to enlighten others at this conference, that Australia has not just confined its activity to the recovery of property and punishing property and drug offences in its international outreach. I refer to the Commonwealth law, the *Crimes (Child Sex Tourism) Amendment Act 1994*.

The Commonwealth Parliament and to some extent the State Parliaments have set up procedures for the examination of legislation before it is introduced into Parliament. The Commonwealth Government, irrespective of which party has been in power, has had an impressive Parliamentary Select Committee procedure whereby evidence is taken in various States and reports are submitted on proposed legislation, and in many cases the legislation that is produced is much better and more effective legislation.

We have a problem in Australia that offences relating to the perpetration of sex offences against children, which were prohibited in Australia, could be carried out by Australians in nations in our region where children are readily available. This disgusting trade was a blot on Australia's reputation and an indictment of the way Australians deal with the citizens of neighbouring countries. To this end legislation was introduced, with the support of all political parties, to stop this pernicious trade.

In my capacity as President of the Australian Section of the International Commission of Jurists (ASICJ) I was asked and happily gave evidence before that Parliamentary Select Committee pointing out a series of problems that the ASICJ found.

This Act specifically provides for the prosecution of sexual offences against children committed overseas, that is, not in Australia. In brief, the Act deals with who can be prosecuted for an offence committed overseas. Evidence can be taken by videolink and the conduct of the trial can take place in Australia.

The Act aims to ensure that crimes committed against children outside Australia which are not prosecuted in the country in which they were committed can be prosecuted effectively in Australia. The Act also deals with the activities of those who promote, organise and profit from child sex tourism. Provided they operate from Australia, or have a relevant link with Australia, they too will be able to be prosecuted for their contribution to the abuse of children in a foreign country.

This legislation was passed on the basis of Australia's obligations to protect children, that is, as a signatory to the United Nations Declaration of the Rights of the Child.

Summary:

I have endeavoured to give an overview which demonstrates the recent Australian legal developments which have tipped the balance of law enforcement a little more in favour of the people of Australia against those who commit crime. That law is still developing and unfolding.

As you can see, it has international ramifications which can now easily extend to countries such as Italy, and there are now many overseas people who may have to consider whether their activities come within the purview of Australian laws. This will be an increasingly difficult task on which Australian and overseas lawyers may have to advise.

I hope I have been able to give you some insight into the way the law has developed in a country such as Australia. I hope that this conference will assist us all in learning from the experience of each other in carrying out our domestic and international obligations.

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