THE BULLETIN

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1992 was a big year for Australian law. Virtually every month, a really important decision came down from the High Court. The *Mabo Case* exploded the myth of *terra nullius* and upheld a form of native title for Aboriginals. The *Dietrich Case* established an effective right to counsel if an unrepresented accused could not otherwise get a fair trial. The *David Securities Case* overturned a rule of English law two centuries old. Henceforth, moneys paid as a result of a mistake of law may be recoverable in Australia. The *Cleary Case* explored a little known provision of the Constitution concerning election to Federal Parliament. In *Chu Kheng Lim*, one of the boat people "refugees" gained a ruling that Parliament cannot lawfully exclude review of such cases by the courts. And in the *Electoral Advertising Case*, the High Court struck down the Act as incompatible with implied constitutional protections for free speech which were newly found not in the letter of the constitution but in the very nature of our Parliamentary democracy. In tribute to the late Justice Lionel Murphy, an earlier advocate of similar views, the *Alternative Law Journal* carried an editorial "Come Back Lionel". Certainly, that under-rated jurist would be smiling at the belated ascendency of some of his ideas.

Pundits - in and outside the legal profession - expressed reservations about this burst of judicial creativity and "discovery" of basic constitutional rights. Certainly, courts have to temper their development of new legal principles to the digestive capacity of society. Concern was also voiced about what other "implied rights" would be found lurking between the lines of the constitution to limit the law-making power of Australia's democratic parliaments. If 1992 taught our community anything it should be that law is often uncertain. Judges cannot simply pull a lever to find the correct answer. They must make choices. Things only seemed more certain when the choices were made across the water by the Privy Council in London. Now Australians devise their own laws - in courts as well as parliaments. The year past probably saw us reach the limit of the boundary of judge-made law. When the pips begin to squeak and the Minister for Justice (Senator Tate) angrily denounces common law rights in Federal Parliament it is probably true to say that we have had, judicially speaking, a very creative year!

Although the Privy Council has long since gone, 1992 opened with Australia voluntarily submitting its laws and practices to another body of foreign judges and lawyers - this time in Geneva. Henceforth, Australians, who have exhausted their remedies in domestic courts, can take a complaint to the UN Human Rights Committee asserting that our law, as found, breaches obligations under international human rights rules. Already, one such complaint is before the Committee. It is concerned with the laws of Tasmania, the only State which still punishes homosexual acts between consenting adults in private. The influence of international human rights law is another big feature of the High Court decisions of 1992. Several of the trail-blazing decisions were influenced by the fact that what Australian courts decide can now be scrutinized (and

criticised) by the UN body. Some people feel that this is unwarranted interference in our own laws- a self-inflicted wound. But others see it as a far-sighted recognition that human rights must be respected in every land if the next century is to bring lasting global peace.

On the State scene 1992 brought good news and bad. The seemingly endless debate about wigs was revived by the Attorney General for Western Australia (Mr J Berinson). The NSW Premier (Mr J Fahey) announced there would be no more QCs. He did so on the very day his Attorney General (Mr J Hannaford) issued a discussion paper on legal reform asking whether the position of QCs should be changed. In Victoria, the Attorney General (Mrs J Wade) presided over an unprecedented "dismissal" of 11 compensation judges. They were guaranteed by Parliament tenure until age 70. They were terminated by the simple expedient of abolishing their court. In NSW, the Independents secured the passage through Parliament of a constitutional amendment which will guarantee judges and magistrates against similar short-sighted action. Because they have to do strong and sometimes unpopular things to powerful people, judges and magistrates must be protected against such removal. The Victorian action is the most serious assault on judicial independence in Australia since Federation.

In the courts, major efforts were made in three States (NSW, Vic and WA) to clear the backlog of damages cases awaiting trial. A "blitz" was carried out, with all judges contributing to a big reduction. In New South Wales, for the first time in decades, the number of appeals fell slightly. The increase of the court filing fee fixed by the government from $500 to $1000 (since increased to $1250) might have something to do with it.

As for 1993, the lesson of the law is that the future grows out

of the past. The twin problems of delay and cost will continue to haunt us. The legal profession is under renewed scrutiny across Australia. A Senate Committee, the Trade Practices Commission and the NSW Attorney General's Department are scrutinizing professional practices to see if some of them should be changed by law. The Law Reform Commission of Victoria was also engaged in an examination of restrictions on legal practice but it was also abolished by Mrs Wade soon after the Kennett government came to office.

It seems likely that 1993 will see an increase in case management by courts and changes to some of the professional rules which add unnecessarily to the costs and delays of litigation. There will be attention to laws to redress discrimination against people with HIV/AIDS. New approaches will be needed to reduce prison overcrowding. As Australia becomes more visibly a multi-cultural society, there will be a need to rethink old rules devised for a more homogenous population. Perhaps we have some lessons to learn from the Confucian ethic of duties to the community to balance individual rights. And in the Year of Indigenous People there is sure to be a renewed effort to improve the impact of the law and its officers on the Aboriginal and Torres Strait islander people of this continent.

A starting point worth considering would be the implementation of the recommendations of the Australian Law Reform Commission on the recognition of Aboriginal customary laws, most of which have remained in the too-hard basket since the report was delivered in 1986.

The burst of legal creativity in 1992 gives us cause for hope that, properly directed, the same spirit will drive the process of reform in 1993 fulfilling Tennyson's ambitious promise:

> *"Ring out a slowly dying cause,*
> *And ancient forms of party strife;*
> *Ring in the nobler modes of life,*
> *With sweeter manner, purer laws."*

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