Wills and Power of Attorney

NEW - A NATIONAL WILLS AND POWER OF ATTORNEY REGISTER

Legal firms and their practitioners are set to benefit from a new Australia-wide register which aims to provide an independent, confidential and secure Australian facility to confirm the existence and location of every person's last Will and to record Powers of Attorney.

The national register of Wills and Powers of Attorney is the culmination of several years' planning and wide consultation by Adelaide-based company the WillsTrust of Australia Pty Ltd ("the WillsTrust").

Legal firms will be able to become "Register Members" and benefit from -

- regular reports of relevant deaths, collated from all Australian States and Territories
- electronic registrations of Wills and Powers of Attorney
- progressive 'validation" of existing will banks
- potential to improve risk management
- privileged access to the register
- efficiency in staying in touch with Will clients (address updates etc.)

The Wills register records -

- date of the last Will
- name and address of the executor/s
- location of the Will
- the existence of specific funeral directions
- the existence of pre arranged or pre paid funeral plan

The WillsTrust will not sight Wills, store original Wills or be involved in the preparation of Wills or the administration of deceased estates.

It costs $30 for testators to register a Will with spouses/partners paying a reduced fee for simultaneous applications. Power of Attorney registrations (including a photocopy) cost $30. Pensioner discounts apply.

Managing Director Mr Christopher Dean said the WillsTrust had identified a social benefit from having a register, which can be accessed by family members and their advisers at times of great stress to families. "At the time of death of a testator or whenever a person becomes legally incapacitated the national register will enable family members, legal advisers and funeral directors to source critical information", he said.

Mr Dean said that legal practitioners and their professional bodies have expressed great interest in the new service and that individual consultations with lawyers had enabled the WillsTrust to develop and tailor its service for the benefit of lawyers and their clients. The Wills Trust service is underpinned by strict confidentiality and security and access to the Wills register is generally only available after the WillsTrust has received a death advice from a funeral director or from death information collated from all Australian States and Territories.

For Further information please contact Christopher Dean on (08) 8227 0522 or facsimile on (08) 8227 0599 or e-mail: admin@willstrust.com.au. The company also has a web page at http://www.willstrust.com.au.

High Court Notes

By Thomas Hurley, Barrister, Vic., NSW, ACT
(Editor, Victorian Administrative Reports)

HIGH COURT NOTES
Suggested Title: Costs Orders Affecting Third Parties

Courts - costs - power of Family Court to make order "as to costs and security for costs" as is just - whether court may order stranger fund costs of party.

In *Re JJT; ex parte Victoria Legal Aid* ([1998] HCA 44, 25 June 1998) by s117(1) the *Family Law Act* provides that subject to ss117(2) each party is to bear its own costs. By s117(2) the Act authorises the court to make such order "as to costs and security for costs" as the court considers just. A judge in the Family Court relied on this provision to order that Victoria Legal Aid either provide legal services, or equivalent funds, to ensure a child who was a party to litigation between her parents was represented. The majority of the High Court held s117(2) of FLA referred to "costs" in the conventional sense and referred to payment by one party to litigation of money by way of a part indemnity for costs actually incurred by another party to the litigation. The majority concluded that s117(2) of FLA did not authorise an order that a stranger to the litigation provide resources to enable a party to the litigation to obtain representation: Gaudron J with Hayne J [91-94]; Gummow J with Callinan J [133]. Kirby J dissented. Callinan J distinguished cases where the court had accepted that a power to award costs included a power to award costs against a non-party as being limited to circumstances where the non-party has an interest in the subject of the litigation [131]. By s68L(2) the FLA authorised the Family Court to make such orders as were necessary "to ensure that separate representation" of children. The majority con-

International Bar Association

IBA's Human Rights Institute is organising a Fair Trial Training Day on Sunday 13 September at the start of the IBA's Biennial Conference in Vancouver, Canada.

The right to a fair trial has been established in several international human rights instruments. The HRI receives requests to observe an increasing number of trials each year where there are concerns that proper standards for the administration of justice may not be met, and where international standards are being violated. It also encourages bar associations and law societies to do likewise.

HRI is keen to ensure that its observers, and observers sent by member organisations, are fully briefed in the skills necessary for trial observation. The Training Day, led by lawyers highly experienced in fair trial standards will focus on the provisions of international and regional standards, the role lawyers can play in ensuring these provisions are guaranteed, and will examine how, in practice, to observe and report on a trial.

The days programme has been drawn up and will be led by Dr Chaloka Beyani, Professor, London School of Economics and Oxford University. Dato' Param Cumaraswamy, UN Special Raporter on the Independence of Judges and Lawyers, will be a key-note speaker.

It promises to be a challenging and valuable introduction to trial observation for lawyers from all disciplines. If you, or representatives from your Bar, would like to participate, please contact the Law Society for an application form. There is no registration fee and lunch will be provided by IBA. Delegates will receive course material in advance.

FAIR TRIAL TRAINING SESSION

Sunday 13 September 1998

Session One

0945 - 1030

The Right to Fair Trial as an International Human Right Fair Trial Standards under the Covenant on Civil and Political Rights

Session Two

1100 - 1230

Fair Trial and Regional Human Rights Systems; European, American &African

Session Three

1400 - 1500

Fair Trial and the Role of Lawyers Guidelines on a Fair Trial

Session Four

1500 -1530

How to Observe a Trial Practice Assesing and Reporting the Fairness of a Trial

High Court Notes

Continued from page 19

cluded this provision did not authorise the orders made. The majority observed the Family Court could ensure funding of separate representatives for children by making appropriate maintenance orders: Hayne J [102]. The court did not find it necessary to consider whether the orders made by the Family Court were constitutionally invalid as an exercise by the judiciary of executive powers outside and incompatible with Constitution Chp III or because the orders were contrary to the Federal Principle. Order nisi for certiorari to quash the relevant order made absolute.

Criminal law (SA) - power to reserve questions of law when person "tried on information and acquitted" - when person tried - power of court to refuse to accept ***nolle prosequi.***

In ***DPP (SA) v B*** ([1998] HCA 45, 23 July 1998) by s350(1A) the *Criminal Law Consolidation Act* 1935 (SA) provides that where a person "is tried on information and acquitted" the court on the application of the prosecution may reserve a question of law "arising at the trial" for the determination of the Full Court (SA). The prosecution witnesses failed to attend at court when B was to be arraigned. The trial judge declined to accept a *nolle prosequi* at the request of the prosecution and acceded to B's request that the trial proceed before a judge alone. On the prosecution then tendering no evidence the trial judge found the accused not guilty. At the request of the prosecution the trial judge stated a case questioning whether he had the power to refuse the *nolle prosequi* tendered by the prosecution. The Full Court (SA) held [(1996) 66 SASR 450] that the trial judge did have such a power. Before the High Court the validity of the case stated was raised. The majority concluded that B's trial had only begun after the judge had declined to receive the *nolle prosequi* and B was arraigned before him. The majority therefore concluded that the questions concerning the *nolle prosequi* did not arise "at the trial" within s350(1A): Gaudron, Gummow, Hayne JJ JJ [22]; McHugh J [32]. Kirby J gave the phrase "arising at the trial" a generous construction [49]. He considered when courts may refuse to entertain a *nolle prosequi* for fear that it may lead to an abuse of process [65]. Appeal allowed; order that it is inappropriate to answer either of the questions.

Criminal law (Tas) - murder - murder by means of unlawful act - proof that accused knew, or ought to have known, act likely to cause death - stabbing person in neck with long knife.

In ***Simpson v Q*** ([1998] HCA 46, 23 July 1998) by s157(1)(c) the *Criminal Code Act* 1924 (Tas) provides that culpable homicide is murder if it is committed by means of an unlawful act which the offender "knew, or ought to have known, to be likely to cause death in the circumstances ...". The appel-

Society Noticeboard

ALRC new home

The Australian Law Reform Commission (ALRC) has moved its homepage to a new site, joining AustLII, one of the Internet's largest providers of legal information.

The new web site address is:
http://www.austlii.edu.au/au/other/alrc/

movement at the station

Patrick Loftus and ***John Dearn*** wish to advise members that they have moved and will be operating from:

Ground Floor National Mutual Centre
9-11 Cavenagh Street Darwin

as from the 1st September 1998

Patrick Loftus: Ph: 8941 3070
John Dearn: Ph: 8941 7434
Fax: 8941 9978
E-mail: abcdarwin@octa4.net.au

movement at the station

Jonathon Nolan is practicing on his own. Jonathon's new address is:

2/14 Priest Circuit
GRAY NT 0830

PH: 8931 0176
FAX: 8931 0174

Supreme Court Box 36

Ray Minahan has changed address.

68 Cavenagh St
DARWIN NT 0800

PH: 8981 0586
FAX: 8941 1530

Alison Lowrie and ***Anne Cunningham*** have both joined the team at Cridlands.

Merran Short has left Morgan Buckley and has started with De Silva Hebron.

movement at the station

Heather Bedson has left Clayton Utz and is now with the Department of Education.

Fiona Allison, formerly of DPP (Alice Springs) is now with Domestic Violence Legal Help.

Kaye McGuiness has commenced practice with DDP.

Barbara Tiffin has returned to NAALAS.

Kim Kilvington has returned to CAALAS.

Ariel Couchman has left Domestic Violence Service and has joined CAALAS.

Dannielle Howard has recently been Admitted and is working for Hunt & Hunt.

HIGH COURT NOTES

Continued from page 22

lant was convicted of murder after he stabbed the victim in the neck with a pocketknife with a 7cm blade. The High Court concluded that it was open to the jury to find that the appellant, as a competent 21 year old, ought to have known that stabbing persons in the neck or upper chest might cause bleeding that could cause death. Gaudron, McHugh JJ [17]; Kirby, Callinan J [43]; Hayne J [54]. Appeal dismissed.

Defence - court martial - questions decided by vote cast in ascending order of seniority - misdirection as to voting order - whether "material irregularity" causing "substantial miscarriage of justice".

In ***Hembury v Chief of the General Staff*** ([1998] HCA 47, 23 July 1998) by Rule 33 the Defence Force Discipline Rules require that any question to be determined by a court martial is decided by members of the court voting orally in order of seniority commencing with the junior in rank. The appellant was convicted of offences at a court martial which was instructed to vote in order of seniority. On sentencing the court martial was instructed to vote in the correct fashion. By s23(1)(c) the *Defence Force Discipline Appeals Act* provided that the Defence Force Discipline Appeal Tribunal shall allow an appeal to it and quash the conviction where it appeared to the tribunal that there was "a material irregularity" in the proceeding "... and that a substantial miscarriage of justice has occurred". The DFD Appeal Tribunal declined to allow the appeal to it; this conclusion was affirmed by the majority of the Full Court, Federal Court (1997) 144 ALR 601. The appellant's appeal to the High Court was allowed. It was conceded that there had been a "material irregularity". The High Court concluded that a "substantial miscarriage of justice" was made out where the appellant established the irregularity went to the root of the proceeding and that this question was not the same as whether the appellant had lost a chance of acquittal fairly open to him: McHugh J [23, 26], Gummow J, Callinan JJ [37, 40], Kirby J [65], Hayne J [84]. All members of the High Court observed that the jurisprudence developed to enable the Courts of Criminal Appeal to decline to dismiss appeals if "no substantial miscarriage of justice has actually occurred" did not apply to determine appeals under s23(1)(c) of the *DFD Appeals Act*: [17, 41, 73, 83]. Appeal allowed; matter remitted to the DFDAT.