

# CHINESE WHISPERS

Recently the ABC's 7.30 Report aired an item regarding a special remuneration package negotiated by the Chief Magistrate of the Northern Territory and government.

The subject matter of the program was presented as having raised concern within the judicial community throughout the country. Justice McPherson of the Queensland Court of Appeal was interviewed in his capacity as Chairman of the Australian Judicial Conference. The special remuneration package was described as a secret arrangement. Although documentation setting out the terms and conditions of the remuneration of other magistrates in the Territory is readily available to the public in the form of Remuneration Tribunal Determinations, the document setting out the terms and conditions of the "special arrangement" is yet to be made available for public scrutiny.

The issue directly raised by the ABC program is that of judicial independence. One of the principles at the core of judicial independence is that the remuneration payable to a judicial officer is fixed by law over the term of office, in the case of magistrates, to age 65 (see *Buckley v Edwards* [1892] AC 587). The special package that applied only to the Chief Magistrate was for a term of two years. The Attorney General Mr Burke told the 7.30 Report that: "as soon as I became aware of it I sought legal advice to find out when I could intervene, it was only after two years had expired, it is now expired and the Chief Magistrate will revert to the same package as recommended by the Tribunal with an open term." The Attorney General did not say when he became aware of the special package. The Attorney told the journalist that it was his view that the remuneration of magistrates should be "open and in accordance with the (decisions of) the Remuneration Tribunal". It is clear that the "special package" was lawful in that it came within the terms of Section 6 of the Magistrates Act. However neither the previous Chief Magistrate Mr Ian Gray, nor the other magistrates, have been the

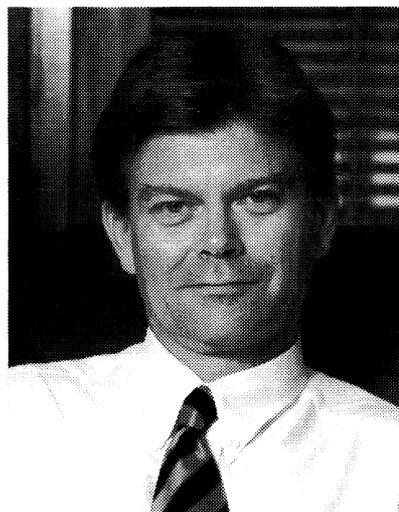
beneficiaries of such a "special package". Their remuneration has been fixed in accordance with determinations of the Remunerations Tribunal over their term of office.

Much has been said about judicial independence during the last decade. The Honourable Murray Gleeson AC then Chief Justice of the Supreme Court of New South Wales spoke at the Sir Earle Page Memorial Oration in 1997 in the following terms

*All judges, it is hoped, regard themselves as servants of the public. They are, however, not public servants. They are part of an arm of government which is separate from the executive arm, to which public servants belong. They have a tenure which is specifically designed to ensure their independence of the executive. The duty of a public servant is to implement the current policy of the Minister to whose department of State he or she belongs; that is not the duty of a judge. The duty of a judge is to administer justice according to law, not according to the wishes or directions of the executive government of the day.*

The words of Justice Gleeson were echoed in shorthand by Justice Angel of our own Supreme Court in an appeal against sentence of a juvenile who had received a one month suspended sentence from the Chief Magistrate. His Honour said: "The relevant consideration is what Parliament decides the law to be, not what the government says."

The *Act of Settlement* of 1701 has always been considered the foundation of judicial independence. It provided that judges should not hold their commissions at the will of the crown but should hold office during good behaviour, being liable to be removed only upon an address of both Houses of Parliament. That concept is to be found with modification for the Northern Territory Legislative Assembly in Section 40 of the Supreme Court Act. There was also the case with respect to magistrates in the Territory until Section 10 of the Magistrates Act was amended



Jon Tippett, President

in 1981. A magistrate became subject to removal from office, inter alia, if he or she failed to comply with a direction of the Chief Magistrate with regard to the assignment and apportionment of a magistrate's duties and the place where he or she was required to carry out those duties. Section 13A of the Act was introduced in 1998. For the first time the Chief Magistrate of the Northern Territory had the additional power of being able to direct magistrates how to perform their duties with the limitation that no direction can be given for the purpose of affecting the exercise of a magistrates discretion. By virtue of that provision the Chief Magistrate now has greater power over his fellow magistrates than does the Chief Justice of the Supreme Court over other judges. The additional power is all the more remarkable for its breadth as described by the words "may give directions (to other magistrates) in respect of the performance of those duties as are necessary". The power is a very personalised one. Why subsections 10 (a) and 13A(b) were amended in that form remains a mystery. It is a disturbing development. At about that time, legislation providing for fixed term appointments of magistrates was drafted but did not pass through parliament as a result of submissions made by the Law Society. Why that provision was introduced remains a mystery. It is a disturbing development. At about that time legislation providing for fixed term appointments of magistrates was drafted but not tabled in Parliament.

Continued over



## CHINESE WHISPERS Continued from page 3

On 14 April 1997 Sir Gerard Brennan, then Chief Justice of Australia issued a "Declaration of principles on judicial independence". That declaration set out that;

*It should not be within the power of the Executive Government to appoint a holder of judicial office to any position of seniority or administrative responsibility or of increased status or emoluments within the judiciary for a limited renewable term or on the basis that the appointment is revocable by Executive Government, subject only to the need, if provided for by statute, to appoint acting judicial heads of Courts during the absence of a judicial head or during the inability of a judicial head for the time being to perform the duties of office.*

The declaration made the point that there is a crucial link between judicial impartiality and the principles of judicial independence, understood as a set of protective safeguards. Sir Gerard Brennan stressed that one of the fundamentals of a free society is government by the rules of law, administered without fear or favour by an independent judiciary. Chief Justice John Doyle of the South Australian Supreme Court observed during his presentation at the Eighth Robert Harris Oration in October 1998 that public confidence in a system of justice that depends on maintaining the approval of the government of the day or of powerful interests would quickly evaporate. The key to retaining public confidence in the judiciary is its manifest impartiality. In short that means no "special remuneration packages" that are contained in documents which are not made available for public scrutiny and which may be the subject of renegotiation.

The Attorney General of the Northern Territory frankly and openly concedes he does not have legal training. However he considered the question of the Chief Magistrates "special package" to warrant the taking of legal advice once he became aware of it and to move to put an end to it when that step became available to him. He said that he did not believe there was anything untoward about the Chief Magistrate's remuneration over the two year period. That may be so, but until the documentation that sets out the precise terms of the agreement is released to the

public it remains a secret deal. Secret deals have a habit of giving rise to ongoing comment that is damaging to the status of the Court and can be the subject of ill informed and embarrassing speculation. Remember playing Chinese whispers as a child? Most members of the legal profession have never got over the experience. So, questions linger. How much was the package worth? Was the package capable of being renegotiated after two years? What precise entitlements did it provide that were not the subject of the previous Chief Magistrate Gray's remuneration as fixed by the Remuneration Tribunal? And why was the package only for a period of two years when the appointment of the Chief Magistrate was to age 65?

Two matters need to be attended to immediately. The first is that the documentation that sets out the "special package" should be made public. The second is that Section 6 the Magistrates Act should be amended to ensure that the remuneration of all magistrates is tied directly to determinations of the Remunerations Tribunal.

Judicial independence is an important protection of individual liberty. Almost all criminal cases are fought as contests between the government and a citizen. Governments are frequently involved in civil litigation, either directly or through corporations in which they have a stake. The idea of judicial independence is so very fundamental to the functioning of our justice system that it can not, and should never be, the subject of barter or trade to any degree whether that be at a personal level or more broadly within the halls of power.

If you like westerns, which I do a lot, you should hire the film *The Jack Bull* featuring actors John Cusack and John Goodman from your local video store. The film is set at the turn of the century in the territory of Wyoming. It explores the issues of the independence of the judiciary, the importance of the impartiality of the rule of law and, oddly enough, statehood. Central to the tale is the fate of a decent man who is determined to find redress done to him and another only within the legal system. It may be a Hollywood parable but it makes some nice points.

## Dame Roma

Continued from front page

"She was a woman of enormous intellect with such an interest in people," said Judge Thomas. "She was able to relate to people in all walks of life."

"She was also very supportive of women in the law."

Dame Roma's encouragement of women in the law has been appreciated by a generation of women lawyers who look to Dame Roma's life as a model of achievement. She took particular effort to assist young women, believing all offices and positions should be open to women.

Reflecting on her nomination as Australia's first female Supreme Court Judge, Dame Roma later commented "I said at the time that I hoped I would live long enough to see the appointment of women to the benches of superior courts being accepted as not worthy of particular comment."

After taking up the position of Governor in 1991, aged 77, she commented that "...any new position for a woman is a good thing in that it is one more recognition of the fact that nothing should be barred to a woman."

Over her long career she never lost her enthusiasm for a life in law:

"Whatever the path which the LLB graduate may finally follow, my belief is that a career in the law is one which, whether the financial rewards be great or moderate, ensures that one's working life will be interesting and stimulating."

Dame Roma's life was certainly both those things.

She died peacefully in hospital in the company of her parish priest Father Maurice Shinnick who later told his congregation that "it was a wonderful end to a rich life".

A state funeral was held in her honour at St Francis Xavier Cathedral with a packed congregation of 1400 mourners. Lawyers, politicians, Aboriginal and church leaders, family and friends gathered to pay their respects.