managed with reference to the aforementioned issue of relevance, and liable to become increasingly negotiated by appeals to the development of coronial expertise.[10] Echoing this, in August 2010 the Brisbane press cited Queensland State Coroner Barnes's introductory comments in the Office of the State Coroner's recently tabled 2008–2009 Annual Report.[11] In his comments, State Coroner Barnes notes the non-implementation of recommendations made by Commissioner Davies following the Commission of Inquiry into Queensland Public Hospitals; recommendations that related to the provision of medical expertise to the coroner as regards medical deaths.[12] Victoria has sought to mitigate against these issues with the establishment of a Coroner's Prevention Unit;[13] a policy initiative to enhance coronial expertise to ensure that recommendations are relevant by assisting in their development and evaluation, and to enable research to augment the death prevention capacities of Victorian coroners, a move that may well benefit other Australian jurisdictions.[14]

Clearly, whether legislatively enshrined or a policy directive, the focus on the importance of recommendations highlights the social value of the coroner who has a unique and capacious socio-legal role in improving health, safety and the administration of justice, and contributing to the avoidance of preventable deaths.[15] Concern with the scope of inquest, circumstances of death and the nexus between these matters and coronial recommendations have long been issues arising in judicial review of coronial decisions; coronial jurisprudence warns of the important relevant nexus between deaths being investigated and comments or recommendations.[16] Correspondingly, in conducting its current review of coronial law and practice in Western Australia, the LRCWA has noted concerns raised in consultations about the scope of WA inquests. The LRCWA's recently released Background Paper notes the 2007 'Kimberley Inquest' as one 'widely cited example' that reached beyond the 'acceptable scope of an inquest'.[17] WA State Coroner Alastair Hope investigated the deaths of 22 Aboriginal people who died between 2000 and 2007 in the Kimberley, holding an inquest to explore the reasons for a high death rate amongst Aboriginal people in the Kimberley 'whose deaths appeared to have been caused or contributed to by alcohol abuse or cannabis use and also, if possible, to identify reasons for an alarming increase in suicide rates'.[18] Concerned with both the underlying reasons for the deaths and the appropriateness of any comments to assist in 'reducing the number of avoidable deaths',[19] the State Coroner produced his statutory findings and a broader exegesis of issues in the Kimberley, including living conditions, education, housing, alcohol and drug use, health, policing and child protection.

That the LRCWA's consultations reveal concerns about 'wide-ranging' inquests with 'broad' recommendations 'tenuously connected' to deaths,[20] highlights that, notwithstanding the valuable role the coroner plays in drawing attention to the social context of death, the boundaries of the coronial purview (and thus power to comment) are not unfettered. Precisely how this balance is achieved continues to be an interesting area of coronial law and practice. With recent reforms strongly connected to preventive principles, and an increasing emphasis on the place of coronial recommendations and the accessibility and visibility of coronial decisions, these questions will receive more attention. Certainly, WA has witnessed significant coronial findings in recent years,[21] and so how such matters are tackled in this latest review, with its anticipated forthcoming Discussion Paper, will provide further insight into the productive refinement and contemporary evolution of this ancient office.

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10. See also LRCWA, above n 1, 45; see also Law Reform Committee, Parliament of Victoria, *Coroners Act 1985: Final Report* (2006) 330–360.

11. Daniel Hurst, 'Coroner complains of death probe "difficulties" ', *Brisbane Times* (Brisbane), 10 August 2010 <brisbanetimes.com.au/queensland/coroner-complains-of-death-probe-difficulties-20100809-11tss.html> at 8 November 2010.

12. Qld Office of the State Coroner, *Annual Report 2008–2009* (2009) 4.

13. See <coronerscourt.vic.gov.au/wps/wcm/connect/justlib/Coroners+Court/Home/Investigations/Who_s+Involved/Coroners+Prevention+Unit/> at 8 November 2010.

14. For a succinct yet comprehensive breakdown of the Victorian changes see Ian Freckelton, 'Opening a new page' (2010) 83(6) *Law Institute Journal* 28.

15. Watterson, Brown and McKenzie, above n 4.

16. *Harmsworth v State Coroner* [1989] VR 989; *Chief Commissioner of Police v Hallenstein* [1996] 2 VR 1; *R v Coroner Doogan; Ex parte Lucas-Smith* (2005) 158 ACTR 1. For comment see Ian Freckelton, 'Reforming Coronership: International perspectives and contemporary developments' (2008) 16 *Journal of Law and Medicine* 379, 389–390; and for discussion see Law Reform Committee, above n 10, ch 7.

17. LRCWA, above n 1, 45.

18. *WA Inquest* (Unreported, WA Coroner's Court, State Coroner Hope, 25 February 2008) 37/07, Executive Summary.

19. Ibid 9.

20. LRCWA, above n 1, 45.

21. See, eg, inquest into the 2008 death in custody, *WA Inquest into the death of Ian Ward* (Unreported, WA Coroner's Court, State Coroner Hope, 12 June 2009) 9/09, which led to various points of inquiry and response such as the WA Standing Committee on Environment and Public Affairs, *Inquiry into the Transportation of Detained Persons* (2010); and Dept of Attorney-General, *Review of WA's system of Justices of the Peace* (2010).

ACCESS TO JUSTICE

Remembering the Rule of Law

MELISSA CASTAN considers the significance, once again, of 11 November

Remembrance Day is commemorated on 11 November; on that day, we recall those who fell in the Great War fighting for their country. Some also recall it as 'Dismissal Day,' marking one of the most turbulent political events in Australian history. In Australia this year we celebrated a 'Rule of Law' day on 11 November, as the High Court handed down decisions in three important cases that reflected the fundamentals of fairness, natural justice and equality before the law.

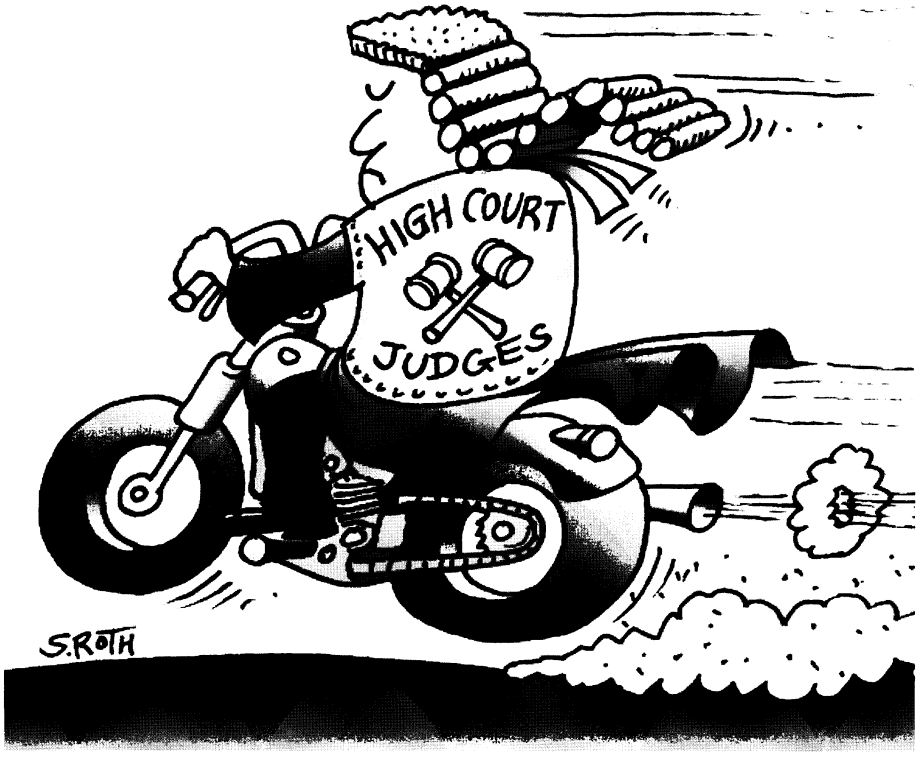
The first case (*Plaintiff M61/2010E v Commonwealth*, and *Plaintiff M69/2010 v Commonwealth* [2010] HCA 41) centered on the laws and policies regarding visas for asylum seekers. The Justices unanimously found that it was an error of law for the government, when reviewing a refugee status assessment as part of an 'offshore processing regime', to treat provisions of the *Migration Act 1958* (Cth) and the decisions of Australian courts as not binding. It held that two Sri Lankan (Tamil) citizens who arrived at Christmas Island claiming refugee status were also denied procedural fairness in the review of the assessment of their claims. This came about because the Australian policy has been that, when refugees are processed as 'offshore entry

persons' (ie arriving by boat), the government and non government assessors of the claim for refugee status proceed to make their decisions as a 'non statutory' exercise of executive power, without any obligation to accord procedural fairness, or observe Australian law.

The High Court found that these decision-making processes were flawed; the Minister for Immigration and Citizenship acts under the Migration Act, and thus the administrative decisions made by and for his department must observe that Act, and also accord procedural fairness, natural justice and accord with the law. Thus the Commonwealth law and policy which sought to exclude refugees from accessing their legal rights was impugned. The Migration Act itself, and the Minister's power to exercise his discretion was upheld. It is no longer plausible for the executive to treat the claims of refugees arriving by sea to a lesser standard of legal process than those arriving any other way.

The second major case handed down on the same day was the decision on South Australia's anti-organised crime laws enacted in 2008 in response to bikie gang violence. In *South Australia v Totani* [2010] HCA 39, the High Court found (with Justice Heydon in dissent) that control orders made under the Act were invalid, due to a *Kable* (1997) style 'incompatibility' with the Magistrates Court's 'institutional integrity'.

The High Court found that s 14(1) of the *Serious and Organised Crime (Control) Act* 2008 (SA) obliged the Magistrates Court to impose serious restraints on a person's liberty by reason only of being a member of a 'declared' organisation, whether or not that person had committed (or was ever likely to commit) a criminal offence. *Kable* incompatibility arose as the impugned section enlisted the Court to carry out the decisions of the executive, and undermined the state court's reality and appearance of independence and impartiality. It is consistent with the other recent application of *Kable* incompatibility, *International Finance Trust Co v NSW Crimes Commission* (2009). It is also consistent with some other recent cases that refer to Ch III of the Commonwealth Constitution as a source of limitation on government action.



The sting in the government's tail came with the case of *Commissioner of Taxation v Anstis* [2010] HCA 40, which dealt with a not-so-exciting provision of the *Income Tax Assessment Act* 1997 (Cth), s 8–1, on allowable deductions on assessable incomes. Ms Anstis, a student on youth allowance (under ss 540-567F of the *Social Security Act 1991* (Cth)), sought to deduct her various education expenses such as the depreciation in value of her computer, her textbooks and stationery, student administration fees, supplies needed for her teaching rounds, and her non-university travel expenses; she argued these all were incurred in gaining her 'assessable income' for s 8–1 purposes. The High Court agreed, and found against the Tax Commissioner, as the entitlement to youth allowance is dependent on the student undertaking full-time study. The Tax Commissioner has until now always rejected claims for deductible education expenses against welfare income, although others regularly claim for such expenses. Tax cases usually involve plaintiffs with deep pockets, but this one involved a student making a claim for some $920 worth of expenses. Her solicitor father represented her before all the various decision-makers and courts, including the High Court.

The case opens the way for thousands of students to claim back their self-education expenses, as all those studying while on Youth Allowance, ABSTUDY, and Austudy may be able to rely on this authority if they are earning enough part-time income to generate a tax liability. It has been suggested that other welfare recipients may also be able to make similar claims for deductions, where they are required to undertake certain tasks in order to remain entitled to allowances. Treasury and the Tax Office are now considering the implications, and whether revenue foregone will be displaced to other taxpayers.

No-one has immunity from the law, not even the government, and on November 11 the High Court reminded the executive governments of the states and Commonwealth that everyone is equal before the law, no one can be punished other than for a breach of law proved in court, and arbitrariness in the law should be avoided. All concepts worthy of Remembrance Day.

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