# Emerging Law Around Australia

**Simon McGregor, National Policy Manager, Melbourne**

Simon McGregor

## Introduction

*The following is a brief summary of the policy developments around Australia since the National Conference in October last year, and some reflections on what lies ahead.*

As usual, I would like to thank the National Secretariat for the effective infrastructure support they provide to our lobbying programme. Without this support, the programme would not have achieved the results that it has.

During 1998, our campaigning began to develop consistency and coherency. Whilst we have room for improvement, last year provided us with our first significant experiences of efficient resource sharing in developing campaigns State by State, and improved internal education as to successful approaches to lobbying. The methods described in our "Structuring a Campaign" and "Preparing a Campaign" documents have provided checklists to help us considering all aspects of campaigns prior to their commencement.

The central process for developing consistency and assessing priority has been the development of our National Policy Agenda. Council members have exchanged comments on the Agenda, and the document will be finalised at the June National Council meeting.

Increased member awareness of our lobbying program has led to an improved intelligence network, and this growth should be encouraged at the State Branch level. Our members' participation rate in campaigns has also increased, and should similarly be encouraged. Active campaigning always boosts membership, and will in turn provide us with the necessary financial resources to continue with campaigns.

In the absence of sufficient resources to maintain our own complete information gathering processes, we must rely on effective liaison with related interest groups and conduct local media monitoring. One such tactic is comprehensively surveying members to map out existing networks that already cover certain areas, and deliberately placing APLA members on related forums we do not already cover.

I shall now summarise developments within substantive areas of law.

## 1. Motor Vehicle

### 1.1 Compensation Schemes

In South Australia, the Joint House Committee has voted 6-4 against the six month subsisting injury preclusion period for access to common law. Nick Xenophon was able to get on to the Committee, which helped the numbers in APLA's direction. This means the MAC proposal has been defeated for at least 12 months. There will now be a Senate Inquiry into the MAC's conduct. APLA will lobby for the introduction of a Charter of Conduct for the MAC that includes consideration of victims' rights. The Motor Accident Commission spent approximately $200,000 lobbying in favour of the proposal, including $100,000 on media consultants, whereas APLA resisted the proposal expending less than $10,000 excluding the cost of members time.

In New South Wales, Premier Bob Carr announced CTP premiums would drop by $100 per annum without revealing any details of how the saving will be accomplished

The final report of the Law and Justice Committee on the Motor Accident Scheme supported APLA's vigorously lobbied contention that lawyer's costs were not to blame for scheme costs.

The MAA's fall back position appears to have been to commence lobbying for a no fault scheme. APLA New South Wales heard rumours that Canadian schemes were under consideration. Tom Goudkamp, Maurie Stack, Brendan Sydes, Cathy Henry and Hannah Middleton worked on materials for meeting with the pro no fault lobby group. The no fault program is being steered by Shelley Miller, Q.C. who is known to our Canadian trial lawyer contacts. She refused to provide details of her retainer, saying only that she was assessing the stakeholders appetite for change and providing her experience from Canadian and US jurisdictions so that New South Wales can make effective changes should it wish to do so. In our view she is testing the effectiveness of likely opposition groups.

APLA New South Wales has set up a Politicians Network, identifying APLA members who have personal contact with MP's and Members of the Opposition. To date they have 8 Liberal, 5 Labor and 7 National Party members on file, and these MP's were immediately advised that APLA opposes the introduction of no fault schemes by stealth.

We have heard unconfirmed rumours that the ICA and MAA have a five year lobbying plan to get no fault auto schemes into Australia. Phase two of the undercover New South Wales program to introduce no fault has now commenced. Miller has convened an unofficial working group to assess alternatives including representatives from insurers, defence lawyers and Maurie Stack on behalf of APLA.

Whilst the proposals are still very fluid, the one being discussed at time of print involves:

- First $500 medical treatment paid for by scheme.
- Medical assessment by a single panel doctor.
- Pre-litigation conciliation process at which legal representation will be permitted.
- 10% whole person impairment threshold before non-economic losses can be claimed.

- Cap on loss of earnings at $1,200 gross per week, with no scheme coverage for the first five days off work.
- Changes to be effective from 1 October 1999.

British Columbia insurers have scheduled a visit to Adelaide for July this year. We anticipate they will offer South Australia a similar package to the New South Wales proposal.

The Queensland Branch have heard of proposed MAA/CTP changes based on an MAIC Actuarial analysis showing an increase in both number of claims and average claim size. Insurers are asking for a 15-20% premium hike, which we know from New South Wales experience could push politicians to cut benefits to keep scheme costs down. We will need to start collecting data on insurer operations in that State should we need to lobby against them.

Victoria has experienced several significant clandestine scheme amendments:

*Tribunals and Licensing Authority (Miscellaneous Amendments) Act* 1998 reduces from twelve months to just twenty-eight days the time for reviewing certain decisions by TAC to the VCAT - including decisions under s23 for rehabilitation, and s70 for rejecting the claim. The amendment was buried at Schedule 1, matter 95, which is approximately 250 pages into the Act. There is an argument that any Applications for Review filed after twenty-eight days are without jurisdiction. In those cases Applicants who are out of time as a result of the misrepresentation of the twelve month appeal period by TAC may need to consider claiming directly upon TAC at common law.

*Traffic Accident (Further Amendment) Act* 1999 has amended s60 of the *Traffic Accident Act* so as to reduce compensation for domestic assistance from average weekly wage levels to "reasonable costs".

### 1.2 School Bus Safety Campaign

The Federal Office of Road Safety released a report saying that one in ten road deaths for children between 5 and 17 years occurs travelling to and from school. The issue is before the interjurisdictional Transport Ministers' forum known as the "Australian Transport Council". They have requested the collective group representing State and Federal Authorities administering the various schemes, "Austroads", to review current practice and policies concerning school bus safety across the country. As a result of APLA's lobbying on the topic, we will be invited to participate. The review will have resources allocated for further research, and presents an opportunity to gather data that could motivate real change.

In Victoria, Geoff Coates has assembled a campaign committee that has drafted a school questionnaire, and are assessing the merits of a regional pilot program in Ballarat. There is some indication that the message is getting through, with the State Government budget papers outlining a program to "increase school bus safety and amenity, particularly in rural and regional locations, with first aid facilities and training drivers, air-conditioning ... and two-way communication". The program will cost $5.6m in 1999-2000. ▶

## 2. Workers Compensation

### 2.1 Defective Products Campaign

The Coalition has affirmed its commitment to encourage state compensation schemes to adopt the HWCA model scheme. At the federal level, both Reith and Truss replied that they were opposed to our proposed amendments, and neither shadow replied to our letter. At the State level, Santoro (Queensland), was opposed to it, whilst Edwardes (Queensland), Carnell (ACT) and Kobelke (Western Australia) declined to support it. No politicians supported the proposal in writing.

Given that we still feel this is a worthy reform, we must now change our lobbying tact. Our options are to explain how the proposal will reduce workers' compensation costs to key employers/ insurers and approach government together, or to fund grass roots and media activity.

### 2.2 Other Federal Developments

Also at the federal level, we commenced lobbying HWCA's controlling body, the Labour Ministers' Council, in relation to collecting statistics which it is hoped will provide evidence of hardship to workers arising from existing benefit levels.

The July 1998 HWCA comparative statistics were released. Of interest is the South Australia scheme, which was the most expensive scheme in the country with a 3.2% average premium rate in 1992 prior to the abolition of common law. In the 6 years since then, the scheme has remained the most expensive and has only dropped to 2.86%. Yet again, common law does not appear to be a factor in scheme cost.

### 2.3 State Schemes

In Western Australia, Sukwhant Singh reports APLA has been victorious in defeating the scheme amendments which would have closed the 'second gateway' access to common law for claims exceeding $100,000 and allow access only to cases with 'serious injury'. APLA persuaded key politicians that scheme losses were due to poor management of investments rather than increasing common law claims. The media were influential in the debate, and APLA received good coverage by developing innovative responses to key issues. Ultimately, opposition to the Bill was so great the Minister for Industry left the portfolio and the Government did not even put it to the vote. The Western Australia Branch will finalise the campaign by preparing and distributing an actuarial analysis contrasting the cost/benefits associated with APLA's reform proposals with the defeated government scheme.

In Queensland, Labor appears to have fallen short of its commitment to reintroduce the 'Goss Model' which grants workers a 'money or the box' election of common law for injuries assessed with a less than 20% work related impairment. The changes will operate from 1 July 1999 and more details will be provided as they come to hand. The situation highlights the need to continue visits programs encouraging legislators to fulfil election promises.

In New South Wales, private insurers are scheduled to take over the underwriting of the scheme in October this year, with the transition supervised by the new Advisory Council. APLA is monitoring the situation. As the insurers complete their financial analysis of the scheme, they are as usual claiming it is not economic and want to double the existing premium rate.

In Victoria, the Opposition (ALP) policy for the upcoming State election includes restoring common law access for seriously injured workers. Unfortunately, the ALP is running a long way behind in the polls at this stage. APLA will consider sponsoring Injured Persons Association candidates to run in key electorates.

The first assessments under the new 4th Edition AMA Guides are coming through, and appear to be significantly lower than 2nd Edition Assessments. APLA is collecting data for detailed comparison.

## 3. Health Law & Medical Negligence

### 3.1 Media

Numerous pieces of adverse media appeared around Christmas, many of which expressly mentioned Medical Defence Organisations. It appears the MDO's have made a conscious policy decision to push for a capped liability scheme, and are allocating resources to sway public opinion.

As an example of APLA's improved intelligence networks and coherent policy program, we were able to use Workers Compensation Statistics prepared by HWCA to undermine MDO complaints of prohibitive litigation costs by showing the medical field expended far less proportion of income on injury insurance than the workers compensation system.

| State | Workers Comp. Premium as % of payroll | Med. Neg. Premium as % of income |
|---|---|---|
| Victoria | 1.9 | 0.4 |
| New South Wales | 2.8 | 0.79 |
| South Australia | 2.86 | 0.4 |
| Queensland | 2.145 | 0.324 |
| Western Australia | 2.73 | 0.47 |

We also calculated a Victoria statistic from HIC figures and court lists that, at most, 1 in 100,000 medical transactions ends in a common law action, and that on our estimate it is probably only 1: 500,000 so litigation is not out of control. Unfortunately, the media reply was not run, which highlights the issue that it is better to direct resources at media creation rather than response.

### 3.2 National Competition Policy

The Victoria, Department of Human Services conducted its National Competition Policy review of the *Medical Practice Act*. APLA submitted that registration as a Practitioner ought to require professional indemnity insurance, and that such indemnity ought to be non-discretionary. The New South Wales submission assisted the drafting of the Victoria submission. Member Sue Cohen also made a personal submission arguing similar points. The Department has not finalised its Cabinet briefing paper yet, but the preliminary conclusion was that the Act ought to be amended to allow the Board to require proof of insurance prior to registration.

The New South Wales Department of Health has just announced its National Competition Policy Review of the *Medical Practice Act*, covering areas such as access

to records and consumer advocacy. John Watts prepared a submission advocating maintenance of existing restrictions on commercial conduct of doctors, seeking a patient right to access records and compulsory non-discretionary professional indemnity insurance. The Departments report recommends further consultation on commercial medicine controls, and APLA will use the platform to argue against US style Health Maintenance Organisations. Unfortunately, the report makes no recommendation on access to records and deferred the issue of compulsory professional insurance until the New South Wales AG had finalised the Interdepartmental Review of Health Professional Liability. In response to that assertion, we again contacted the AG's Department who confirmed that said review had no timetable for completion due to lack of priority.

### 3.3 Health Insurance Commission

In Victoria, the HIC has reversed its policy of allowing plaintiffs reduced repayments when claims have been compromised for any 'risks of litigation', and will now insist on strict compliance with s24(8). The section only permits reduced repayments where a plaintiff has a judgment or express terms of settlement specifying contributory negligence. APLA is lobbying the State Minister of Health to reverse the Department's interpretation, or amend the section.

At the federal level, the Department of Health and Family Services is reviewing the operation of the HIC scheme. The terms of reference cover, inter alia, the effectiveness of the legislation in,

- Preventing 'double dipping',
- Preventing cost shifting for medical expenses onto injured persons,
- Providing an administrative framework to achieve the objectives of the Act, and
- Achieving recoveries.

APLA's submission was that the existing scheme was inefficient and ought to be simplified. We also argued that the current scheme shifted costs onto plaintiffs by failing to allow a reduction in repayments where litigation had been compromised on the basis of risk assessment rather than contributory negligence. Our full submission can be viewed at www.apla.com

In a bizarre policy outcome, the strict interpretation of s24(8) will disadvantage those who were not contributorily negligent but merely compromised their claims in the interests of resolving litigation.

### 3.4 Other Insurance Matters

The Private Health Insurance Ombudsman has issued a discussion paper entitled "Private Health Insurance and Compensation: Falling through the cracks" considering the interplay between private health cover and compensable injuries. The Ombudsmen will hold round table discussions with stakeholders on a State by State basis commencing with New South Wales in June. Tim Crouch from Queensland has prepared a model response for each State to consider.

### 3.5 Coronial Inquests

The Victorian AG has tabled draft legislation giving the Coroner discretion to withhold the names of Doctors called at Inquests.

### 3.6 Access to Records

In Victoria, the Health Services Policy Review discussion paper has recommended granting patients an enforceable right to access records.

The Federal Government announced in late December that it would introduce privacy laws applying to the private sector. As a result of the announcement the Privacy Commissioner has delayed release of a discussion paper with draft Principles for Privacy in Health. That task may now be coordinated by the Federal Department of Health. There is an opportunity for us to argue that this is an appropriate time to introduce complementary pro-consumer legislation granting a right to access records.

Another opportunity to argue for expanded access to records arises from the National Principles for the *Fair Handling of Personal Information* prepared by the Office of the Privacy Commissioner in the Human Rights and Equal Opportunity Commission. Principle 6.1 (h) says a private body holding information about an individual should grant the individual access on request insofar as that information would be accessible under the relevant laws of discovery. ▶

### 3.7 Cosmetic Surgery Review

Bill Madden has prepared APLA's submission to the New South Wales Cosmetic Surgery Review. It is available on our website **www.apla.com**

We also located two cosmetic surgery victims who had not yet filed claims but were willing to go public about their conditions. The case studies received national television exposure on two occasions, Today Tonight (8/4/99, estimated audience 1.5 million) and Channel 7 main news bulletin (12/4/99 estimated audience 1.8 million)

## 4. Litigation and the Common Law

### 4.1 Proportionate Liability

The Victorian Attorney-General is reviewing the principle joint and several liability in the civil jurisdiction, and seems to support proportionate liability despite an expert report prepared by her own Law Reform Advisory Council (available at www.law.unimelb.edu.au/aglrac) which says there is no evidence to suggest that changing the principle will reduce the cost of civil justice. APLA has made a submission supporting the retention of joint and several liability across the board. The main supporters of proportionate liability are the commercial law firms, accountants and insurers. So far, none of the stakeholders are arguing that joint and several liability ought be abolished for personal injuries, but such an outcome is within the AG's terms of reference and must be guarded against since insurers are participating in the lobbying process. There are also significant non-personal injuries jurisdictions of concern to APLA which would be materially affected by this change, such as consumer transactions, property damage cases, industrial and commercial law.

The Law Institute has advised the AG that, whilst the reform ought not extend to personal injuries, proportionate liability would on balance reduce the costs of litigation.

The broader national context is that proportionate liability in professional negligence claims is a key factor which allows professions to apply to the Productivity Commission for a scheme of capped liability. Solicitors in New South Wales and Western Australia, have already done this, and the Australian Law Council has resolved to attempt to introduce it in the federal sphere. There is a significant self interest component to the profession's work here, and there exists great media potential for APLA to lobby in the interests of the public as opposed to our profession by opposing these changes.

Finally, the Law Council of Australia has developed a policy of supporting the development of Multi-disciplinary practices provided consumer's interests are adequately protected. This will be done by requiring all lawyers to fully comply with their existing ethical obligations as practitioners in their native jurisdictions. On this issue the input of APLA members on the LCA's Consumer Law Section seems to have been influential.

The LCA will apply to the Professional Standards Council for a scheme to limit liability on negligence claims for participating practitioners.

### 4.2 Y2K Litigation

The federal government has passed the *Year 2000 Information Disclosure Act 1999* that will grant liability protection to businesses which disclose their state of Y2K preparedness. Constitutional limitations require the States to pass mirror legislation. The statements must be in writing, declare themselves to be made under the Act, relate solely to Y2K issues and will not attract protection if fraudulently or recklessly made.

This is a good lobbying opportunity to show the importance of common law rights to a socio-economic group who are not usually concerned with traditional workers' compensation type issues.

The Y2K liability issue has received significant legislative attention in the US, with some states (including Utah, Kansas, Wyoming and Maryland) passing sovereign immunity acts.

### 4.3 Limitations

The Queensland Law Reform Commission Review has recommended a general limitation period of the lesser of (a) three years from the day the plaintiff ought to have known that she had suffered an injury attributable to the conduct of some other person which warranted bringing proceedings, or (b) ten years from the date on the conduct giving rise to the claim. Judges also have a general public interest discretion to extend the period.

### 4.3 Litigation Decrease

The Productivity Commission released the Report on Government Services 1999 (see **www.pc.gov.au/service/gspindex.html**) has found that between 1994-5 and 1997-8, civil lodgments decreased in the Federal Court by 65%, the New South Wales Supreme Court by 36%, the Victoria Supreme Court by 21% and the Queensland Supreme Court by 27%. The report raises issues of declining rights to access courts and the success of lawyer driven case management systems.

### 4.4 Structured Settlements

Bill Madden is participating in an informal working group considering whether a structured settlement package acceptable to plaintiffs can be developed. The Insurance Council of Australia, the AMA, Injuries Australia and the Law Council of Australia are also involved in the group. APLA's criteria for the scheme is that it must not provide any incentive, either direct or indirect, for plaintiffs to take up the scheme, and selecting such a scheme must be entirely at the plaintiff's discretion.

Bill Madden and Simon McGregor prepared response to the federal Dept. Family & Community Services discussion paper "Non-economic Loss Compensation Payments".

### 4.4 Multi-disciplinary Practices

The Law Council of Australia has resolved to support MDP's, provided their criteria for operation permit no lessening of practitioners' existing ethical obligations to their clients.

## 5. Tax Reform

On a bright note, Assistant Treasurer Rod Kemp said the Tax Act would be amended so that interest on personal injury compensation could not be taxed.

Our GST campaign was moderately successful. Peter Carter and Simon McGregor prepared APLA's submission and gave evidence to the Senate Select Committee. The occasion provided us ▶

with a subsequent opportunity to put our views to Treasury again, and we await their reply. APLA was the only legal body invited to give evidence, despite the Law Council making an extensive submission.

APLA's campaign was economical, in that it involved direct request to all 630 APLA members on email to participate in a letter writing campaign, and we received favourable responses from members. Presumably in response to this campaign, the Treasury Department asked us to resubmit our earlier GST paper. This is a significant achievement in light of the fact that the Federal Government was not at that time calling for submissions from the public or on our key issue of access to justice. To the best of our knowledge APLA was the only legal group lobbying on the issue, and as such this is a significant lobbying success. Federal Shadow Minister for Finance Lindsay Tanner utilised our argument in Parliament.

### 6. Social Security

The Commonwealth government is now assessing what commercial income stream products are available in the marketplace to utilise in conjunction with the 1998 Budget proposal to include lump sum compensation for non-economic damages within means testing for social security benefits. Bill Madden and Simon McGregor prepared a submission to the Senate Community Affairs Committee (see **www.apla.com**), and assisted other Pensioner groups to prepare their submissions. APLA has replied opposing the change.

As a result of the submission, we were invited to give evidence to the Senate Committee, and Richard Faulks of the ACT appeared on behalf of APLA.

### 7. Bill of Rights

The Coalition announced that the Constitutional Referendum will proceed in November 1999, and be based on the recommendations of the Convention. It will also contain a second question asking citizens to endorse a non-binding statement of acknowledging God, prior occupation by Aboriginals, representative democracy, the federal system, the rule of law and gender equality.

Funding for advertising the Referendum was set at $15m, with Monarchists/Republican panels to distribute half each. Our Bill of Rights Campaign could lobby these panels for an allocation of funds to informing people of rights based issues.

The Federal Government has released for public comment drafts of The *Constitution Alteration (Republic) Bill* and The *Presidential Nominations Committee Bill*, both of which are available at **www.dpmc.gov.au/referendum**

The CARB provides for

- A President as head of state
- A committee to receive nominations and select a President, and
- Presidential powers

Whilst the PNCB provides the mechanism for establishing the committee and the nomination process.

Jay Weatherill drafted a new Constitutional Preamble for consideration by the Constitutional Centenary Foundation.

Another related rights based opportunity for lobbying is via the Australian Citizenship Council review of citizenship policy and law. The Issues Paper is at **http://www.immi.gov.au/citizen1/issues.dpf**

### 8. Consumer Law & Class Actions

The Representative Actions Handbook was collated by Neil Francey, and he has started working on the first update. The loose leaf volume can be purchased from the National Office.

On the stolen generations issue, PIAC/PILCH are proposing a Reparations Tribunal to administer claims if the Test cases are successful. They would welcome APLA input, and I have a copy of the proposal available to interested persons.

Several of our recommendations to the Insurance Council of Australia's Review of the General Insurance Code of Practice were adopted, including that dispute resolution avenues be explained to consumers in plain English, that consumers be granted access to all documents ultimately 'discoverable' should the matter be litigated, and that statistics on individual companies which breach the code be made public. The report also noted at p.56 that 30% of consumer complaints were resolved in favour of consumers, indicating insurers were generally not complying with the spirit of the services they claimed to be offering.

### 9. Tobacco

The Federal Attorney-General has ruled out following the recently successful US tactic which forced tobacco companies to compensate public health funds for the enormous cost of illness caused by their product.

Following Neil Francey's lobbying, we have received a 15 page, 26 clause draft tobacco control Bill from the New South Wales Parliamentary Draftsman and New South Wales Independent MP Peter MacDonald. We will now assess the Bill and what lobbying/media should be done on the issue. In short, we have a sympathetic ACT Independent Minister for Health, and upcoming State elections in Victoria and Western Australia.

### 10. Victims of Crime

In Victoria, payments for pain and suffering were abolished, and scheme payments dropped from $44 million from over 5000 claims during 1996-7, to $800,000 in 124 claims for 1997-8. APLA supports the reintroduction of pain and suffering payments.

In the ACT, the Attorney-General proposed reducing victims of crime compensation along similar lines to recent Victorian changes. Richard Faulks rallied APLA and Law Society opposition, and managed to get the ACT Assembly to defeat the amendments. The Bill has gone to the Justice & Community Safety Committee, where APLA has presented its arguments in detail. The ACT branch has gathered expert psychological evidence to use in their submission, and will also fly up the Victorian President of VOCAL to give evidence on the harm the changes will bring. It is hoped this will counteract the strange support the ACT branch of VOCAL has extended to the amendments.

### 11. National Competition Policy

Our submission to the Commonwealth Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy highlighted the harmful effects of NCP, and is available at www.apla.com

We also participated in two NCP reviews detailed in the health Law section. Generally, we should keep in mind that all legislation in Australia will be reviewed

under NCP criteria. The Policy-Media Office has a short guide on how to effectively participate in these reviews available to interested parties. The guide was prepared by the Catriona Lowe of Consumer Law Centre of Victoria.

### 12. Web Site

Our SIG email List Servers are now up and running, although only the Workers Compensation SIG has used the facility. We have had one request from a journalist to join that email list, which was declined on the basis that the information passed in this manner was intended to be confidential.

Jane Staley and our web consultant have developed an online membership database, accessible to members only.

### 15. Expanding APLA

#### 15.1 New Special Interest Groups

The new Employment Law SIG scored an early lobbying victory when the proposed federal changes to the unfair dismissal laws were defeated by the Democrats in the Senate. Chair John Kotsifas prepared our submission.

The Commercial SIG has now issued its first circular canvassing issues of concern.

#### 15.2 Other Bodies

Research for the Civil Justice Foundation proceeded. We have made enquiries about similar programs in the US and received copies of documents from four different state schemes. Any members interested in a copy should contact me.

Injuries Australia produced their first report, copies of which are available on request. The group is very grateful for APLA's support ($5000 in April '98), and overall has achieved good results on a shoestring budget. IA gave evidence at two New South Wales Legislative Council Standing Committee Inquiries (Motor Vehicle and Workplace safety) and has nominated its members for Directorships with both Authorities. They have also prepared a National Competition Policy submission, as well as papers on 'personal consequences of workplace injuries', 'managing the injured worker', 'debate over seat belts & buses', 'the information needs of injured persons' and 'Fatality in the workplace'. The group now has chapters in Newcastle, Albury, Dubbo, and Tamworth. They also have a newsletter, and are applying for further research grants.

Please email them on **mail@injuriesaustralia.com.au** for client membership brochures or if you have a suitable client who can open a local chapter.

#### 15.3 International Issues

APLA has been invited by the Commonwealth Solicitor General to participate in a forum to discuss Australian's attitude to the Proposed Hague Convention on international enforcement of private civil judgments. Bill Madden will attend on APLA's behalf.

Rob Davis, sitting as an international member of ATLA's Board of Governors, will also participate in an international liaison committee involving Canadian, UK and European Trial Lawyers. ▶

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# Burnside speaks out over waterside dispute victory

**Andrew Burrell**

The Melbourne barrister who led the Maritime Union of Australia to victory in last year's bitter waterfront dispute has detailed publicly for the first time the tactics used by his legal team in the headline-grabbing litigation.

In a paper to be delivered to an Australian Plaintiff Lawyers Association conference tomorrow, Mr Julian Burnside QC speaks of the MUA team's "daring responses" to the huge challenges involved in the case.

Mr Burnside was senior counsel for the MUA during the lengthy legal war against Patrick Stevedores in what is regarded as one of the biggest industrial disputes in Australian history.

The case was fought in the Federal Court, the Full Federal Court and the High Court during the early months of 1998.

In the paper, Mr Burnside said the union's lawyers needed to think creatively and decisively to successfully counter a series of moves by Patrick that at one stage led to a sense that "we had fallen into an abyss".

He said the first example of creative thinking was in the way the MUA legal team was assembled, primarily by Maurice Blackburn & Co solicitor Mr Josh Bornstein.

On his own appointment to the team in February 1998, Mr Burnside said: "On any view, I was a surprising choice, since I had no industrial relations experience and no discernible political leanings. As Josh (Bornstein) tells the story, a number of people were hostile to the idea that I be briefed."

Mr Burnside said the addition of junior barristers Mr Michael Gronow and Mr Peter Fox were also regarded as unusual choices for the case.

"The result was a very eclectic team of lawyers who would never have imagined they might work together as a single team, and some of whom might never have imagined that they would be acting in the interests of a union, let alone a union with the MUA's history.

"Each member of the team brought to bear on the case their somewhat different skills, knowledge and experience. None of us could have done the case alone, but together we felt invincible."

Mr Burnside said the MUA surprised Patrick with its "unorthodox" response to rumours that the stevedore company was preparing to sack its entire workforce around Easter last year. The union sought an injunction seeking to restrain Patrick from carrying out the sackings or disposing of their assets.

**Julian Burnside QC, who courted success for the MUA.** Picture: ERIN JONASSON

As the injunction hearing was about to proceed, however, Patrick effectively sacked the workers and installed masked guards on the nation's wharves.

Patrick had also put four subsidiary labour-supply companies employing its dock workers into voluntary administration.

"In court that morning we learned that administrators had been appointed to the labour-supply companies ... none of us understood the reference to labour-supply companies," Mr Burnside said.

"Patricks argued that we were not entitled to proceed in litigation against companies under administration; they argued it was too late for the court to do anything. We all sensed that we had fallen into an abyss, and all around was dark."

Mr Burnside said there was one ray of hope for the team - a case in which a court had ordered that building work completed by a defendant after the issue of a plaintiff's motion should be taken down pending trial. This was similar to the MUA case.

Justice Tony North later granted an injunction restraining the labour supply companies from dismissing the employees - a decision upheld by the Full Federal Court and the High Court.

At the core of the waterfront case was the MUA's action against Patrick, the National Farmers Federation, the Federal Government and others, alleging contraventions of the Workplace Relations Act and conspiracy to injure.

"Pleading a conspiracy is a bit like spotting an iceberg. It is axiomatic that there is more beneath the surface," Mr Burnside said. "It is very hard to know in advance just how much is beneath the surface."

Mr Burnside said conspiracy to injure was a rare tort suggested by MUA barrister Mr Herman Boronstein.

"It is interesting to reflect on the fact that conspiracy to injure emerged in 19th century jurisprudence as a response to the growing trouble caused by organised labour," Mr Burnside said.

"Herman Boronstein's creative idea was to turn the weapon back on the forces which created it."

Mr Burnside said another remarkable aspect of the case was the skill shown by union leaders such as Mr John Coombs and Mr Greg Combet in restraining the Patrick workers after the revelation of the sackings.

The Australian Financial Review 14/5 1999. Reproduced with permission.

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**16. The Next Six Months...**

Our priorities should be to obtain information concerning law reform proposals, conduct visits programs in all States, participate in significant reviews, find allies and research the likely tactics of our opponents.

As our visits program is yet to be conducted in each jurisdiction, and the results are yet to be assessed and compared, it is hard to predict where the major demands on our resources will arise. By the time of the Sydney Conference, it would be great if all Branches had visited and recorded key politicians views on our core areas, and located which APLA members had sufficient personal relationship with those politicians to have 'behind the scenes' political influence. This will allow us the most realistic opportunity to assess which campaigns are winnable, and therefore worthwhile uses of our scarce resources.

On current form, Motor Vehicle and Medical Negligence look to be facing the greatest threats to common law. SIG's in these areas should raise campaign funds now, and consider tactics.

Without our media resources, and with policy output halved, the National Office will be more reliant than ever on State Branch and member contributions.

I hope you have been inspired to help. ■

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