



## The People's Solicitors Pty Ltd

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No. 4 Dec 07

**The People's Solicitors Pty Ltd, a new idealistic venture in the legal profession. The Peoples Solicitors aims to provide legal advisory services and advocacy work at a high standard of efficiency and at low cost basis.**

The firm is generalist with particular interests in criminal, civil administrative, employment and immigration law.

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We are proud to announce that our firm, in contrast to most other firms, will still be open during the Christmas and New Year holidays. The three principal solicitors can always be reached on their mobile phones if the office number is not answered.

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### Getting Back On The Road

If you are caught by the police doing 45 kph over the speed limit, they can exercise the power to immediately suspend your license. This can happen in locations where road works have made it necessary that the speed limit is temporarily reduced from 80 kph to 60 kph and even to 40 kph.

A cabbie was recently put off the road when he went through a temporary 60 zone along Old Windsor Road at 3 am on Sunday morning. He was transporting an ill passenger who was about to vomit. We managed to convince the magistrate that there were special circumstances for Mr.

Singh. We argued successfully that it is not only the effect of the livelihood and hardship, but that there can be a positive spin on a cabbies' driving record where several infringements is considered a poor record.

Keep driving Singhie!

### When there are more than one police witnesses who accuse you of running through a red light

Like many cabbies, Jag was already down 12 points and was sitting on 2 points sweating through the twelve months of a good behaviour bond.

At Central railway station on Eddy Avenue, with its three sets of stop lights at Pitt Street, it was alleged by the Police that he ran the red light.

Jag maintained that he was in the special bus lane, dozed through a full traffic light sequence that started with a red light then a green light then a yellow, woke up and then took off through the yellow at the last moment. He reckoned that all this delay probably annoyed the Police who were at his immediate rear and were stuck for the full 6 minutes with Jag's blocking off their passage, wondering why this cab driver fell asleep or daydreamed.

He first went down at the Local Court. Then four months later on

appeal at the District Court, the judge agreed with the lawyer's submissions on the review of the hearing, that it was not plausible for Jag to have stopped at a red light and run through that same red light. Well, you just have to think on this point for a few minutes. This noble case is still echoing through the Downing Centre.

### Speeding down the off ramp at Blacktown from the M2

Winn was a taxi driver with an impeccable record. One speeding fine in 15 years!

He was recorded at 105 kph in a 60 zone. We explained that the case did not have sufficient merit, since the speeding scene was an obvious speed trap and there were just too many vehicles adjacent to and behind the taxi. The Police and the prosecutor did offer that the speed be considered as under 90 kph. The magistrate however, did not accept this arrangement.

Nevertheless the magistrate gave a section 10 no conviction verdict based on his consideration that the offence took place on Sunday at 5 pm, that it was still on the exit of a freeway with no pedestrian traffic and that Winn had great traffic record.

Kingsley Liu



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# High Court Appointments: The Potential For Transformation

By J.W. SHAW QC

With the change of government at the recent federal elections, the High Court of Australia has the potential to be transformed. Chief Justice Gleeson and Justice M.D. Kirby will be compelled to retire during the term of office of the next Government having reached the age of 70. This is jocularly referred to by the judges as the age of statutory senility. The challenge for the Executive would be to produce credible candidates with unfettered independence after their appointment but who may lead to the shift of balance in the court's thinking on the great constitutional issues of our time, particularly federalism, and the tenor of important decisions in civil and criminal matters which regularly come before the highest court in the land.

Justice Kiefel from Queensland, a competent trial Federal Court judge but an unknown on broader issues, has been appointed by the Howard government to replace Callinan.

Whilst constitutional rhetoric dictates a view, in accordance with that advanced by Sir Owen Dixon, of "strict and complete legalism", that is, black letter law, the reality is that policy considerations intrude upon the decision making process. Dixon

was prepared to imply terms in the Constitution to preserve the federal structure and judicial independence. The law is not an area of pure logic, but rather more than an art rather than science. There is a tension between continuity and change in the law, between following precedent and the evolution of principle to suit contemporary circumstances.

Lionel Keith Murphy was a QC at the Sydney bar during the 1960s located on the 4th floor of Wentworth Chambers where many non-establishment barristers were gathered. He was backed in heavily by Ray Geitzelt, Federal Secretary of the Miscellaneous Workers Union, and, perhaps incongruously, by the conservative Australian Workers Union. Ultimately, he was preselected for the senate, and rose to become leader of the Labor Party in the upper house. However, he always aspired to the leadership of the party and hence was a perennial rival of EG Whitlam who reformed the party in the late 1960s and led it to victory in 1972.

As part of the incoming Whitlam revolution, Murphy was frustrated by his exclusion from the duumvirate executive of Whitlam and Lance Bernard (who carried the government through weeks of major reform sitting as the only members of Cabinet). Whitlam argues that it would have been both legally and politically inappropriate for Murphy to be part of that group but nonetheless it exacerbated the tensions between the leadership and Murphy's ambitions.

Whitlam had no inhibitions in appointing Murphy as his Attorney General and letting him loose to a variety of reforms, including no fault family divorce, trade practices reform, abolition of censorship and insuring that the Australian Security Intelligence Organisation kept a close watch on right wing provocateurs, as distinct from their traditional role of scrutinizing what they regarded as fellow travellers of the Communist Party.

So, Murphy became part of the Whitlam team, regarded as the pre-eminent lawyer in that group and the mysterious question arises as to why he wanted to bail out in 1975 and take a position on the High Court of Australia. Was it his idea, or was it the idea of Gough Whitlam? Did he fear electoral defeat or did he foresee a higher, more powerful role?

According to Whitlam, there is no question about it. Murphy wanted the job and sent his friend Dr. JF Cairns to Whitlam indicating that he was willing and able to take it up. Sir Douglas Menzies had died on 29 November 1974 and there was much gossip at a Sydney Bar dinner that evening as to who the replacement would be. Murphy's name was not prominent in the orthodox list of candidates.

When Whitlam received the representation by Cairns on Murphy's behalf he was sympathetic. He pushed the proposition through cabinet with the sole dissenting voice of Tom Uren, not because Uren had anything against Murphy but because he regarded him as the great left wing leader of the future



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who should not squander his time on some esoteric legal work on a court. Nonetheless it was approved, and when Whitlam phoned Sir Garfield Barwick (the Chief Justice) that evening to inform him of the new appointee, Barwick hung up the phone.

Subsequently, Barwick complained about the appointment to Bill Hayden, who was sitting as a member of the Executive Council. The new judge was stigmatized as “unqualified”. Whitlam is alleged to have said to Hayden, “Tell the Chief Justice that I have improved the Court, and improved the Parliament”, presumably with tongue firmly in cheek.

Murphy’s jurisprudence reflected clarity and simplicity. Eschewing esoteric doctrine and sceptical as to the binding virtues of precedent, Murphy made his views plain, whilst not hesitating to refer to American and other overseas analogues. Excessively rigid adherence to earlier cases was, for Murphy, to risk serious injustice.

There are enigmas surrounding the Murphy Shakespearean tragedy. Why were so many journalists out to get him on the basis of relatively trivial allegations? Why did the Hawke Labor government not simply accept his acquittal at the second trial and allow his restoration to a seat on the court without further judicial enquiry? The enquiry was deeply conservative in its personnel and aborted only by Murphy’s ill health and subsequent death. These

questions deserve greater exploration.

Governments should appreciate that the judicial projectory of an appointee is unpredictable. Liberation from prior constraints has led to innovative law-making. Think, for example, of the relatively conservative backgrounds of U.S. Chief Justice Earl Warren or our own Justice William Deane, who turned out to be iconoclastic on the Bench.

So, will the newly elected Rudd Labor government attempt another radical Murphy-style appointment, or would it opt for legal orthodoxy? Only time will tell.

Spigelman C.J of New South Wales would be a primary candidate to succeed Murray Gleeson.

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## Arrangement for the Performance of Work and Time Limitations

By J.W. SHAW QC

It seems that the New South Wales legislature took the view that too many cases were being heard under the unfair contract provisions of the *Industrial Relations Act 1996* (NSW) (“the Act”) or alternatively that the verdicts in cases where contracts had been terminated were excessive. So it was that

Parliament applied a 12 month limitation period upon the making of such claims, and that, subsequently, by different legislation allowed the Commission to extend that period if the application was within three months after the expiry of the twelve month period: see s 108B (1) and (3) of the Act.

There have not been many cases arising under these time limitation periods but one recent case was that of *Field v Jenolan Caves Reserve Trust* [2007] NSWIRComm 242<sup>1</sup> where it was argued that an arrangement subsisted extending beyond the twelve month period and that there was no occasion to seek leave to further extend the period but, in the alternative, leave should be granted since the application was lodged in the three month period following the prima facie period of limitation and there were “exceptional circumstances” sufficient to prompt the exercise of discretion.

The Commission accepted that Mr Field remained a party to the arrangement whereby the work was performed in an industry (the section comprehending not only contracts but less formal arrangements) and did so on the basis that he remained a

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<sup>1</sup> <http://www.lawlink.nsw.gov.au/ircjudgments/2007nswirc.nsf>



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director of the company which was the lessee of Jenolan Caves House, that he had duties under the corporations law arising from that position, that he was also a guarantor of the company's financial interest in administering what has been a traditional tourist institution in New South Wales.

During the course of argument, attention was paid to the academic literature on what constituted an "arrangement" as distinct from a "contract" for the purposes of the section and there is a remarkable amount of discussion on this point, which can be summarised as follows:

A barrister (described in the tradition of those days as J.W.S) writing in (1976) 50 ALJ at 420 referred to a Privy Council decision in *Newton v Federal Commission of Taxation* [1958] A.C. 450 at 465 saying: "*arrangement is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons- a plan arranged between them which may not be enforceable at law.*"

G.D. Woods and P.L. Stein in "Harsh and Unconscionable Contracts of Work" (Law Book Co., Page 33) said: "...the word arrangement is used together with the words "contract" and "agreement",

*an arrangement will be found when there exists a concerted action by a number of persons to bring about a particular result."*

What is an "arrangement" whereby work is performed in an industry? Certainly it does not require the parties to physically or personally work in the industry: *Brown v Rezzitis* (1970) 127 CLR 157; and a finance company linked with finance companies is a party to a relevant arrangement for the purpose of the statute: *Custom Credit Corporation Ltd v Goldsmith* (1976) AR (NSW) 98 .

R.P Meagher QC in his article "Contracts and Employment in the Industrial Arbitration Act" (*Law Society Journal*, October 1976) in a trenchant analysis containing a critique of self-imposed jurisdictional limits said: "*So then it amounts to this, that the orders can be made either against the contracting party or against anybody else, provided, in the latter case, one can say of that anybody else that he either participated in the transaction or benefited from it.*"

See also Peter Hall "*Unconscionable Contracts and Economic Duress*" (CCH Australia, 1985) Jeffrey Phillips SC and Michael Tooma "*The law of Unfair Contracts in New South Wales*" (Lawbook Co. 2004) ; RMP Smith, "*Contracts for*

*Work in Industry*" (NSW) (Butterworths, 1981).

So the Commission did not need to examine whether it would exercise a discretion to extend the relevant time period because the matter remained in time and on foot. This is yet another example of what W.S Sheldon J. described as "a radical law" which was capable of undoing or rewriting contracts and arrangements, which led to a concept captured by the broader law under the guidance of the late Professor Peden who suggested to the government that there ought to be general unfair contracts legislation; a concept duly embraced by the legislature.

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