

JOURNAL OF JUDICIAL ADMINISTRATION

Volume 19, Number 1

July 2009

ARTICLES

Executive toys: Judges and non-judicial functions – *Hon RS French*

Judges today are asked to perform a variety of non-judicial, administrative functions, such as issuing search warrants or preventative detention orders. But are these the kinds of things that judges should do? Responses to this question are often “knee-jerk”; they are not part of the judicial function and the judge can become an agent of the Executive. In this article, Chief Justice French refers to the doctrine of the separation of powers in the Australian context to show that such knee-jerk responses are not helpful; it is important to develop a sense of the history and traditions of the judicial role and its proper limits and a sense of those things which are incompatible with it. 5

Reflections on best judicial practice – *Dr Peter Spiller*

The New Zealand Disputes Tribunals, the equivalent of small claims courts in other countries, are run by judicial officers called referees. As a group, they have a remarkably low rate of successful appeals against them. Recently, 13 of the best-performing referees were asked to reflect on why they thought they had had such an admirable record. They noted the need for pre-hearing preparation. They commented on the need to: engage with the humanity of the parties in hearings; run a clear and transparent process; keep focused on the relevant issues and law; be honest with the parties; observe the principle *audi alteram partem*; and foreshadow the essential elements of the decision that was likely to emerge. They also reflected on the need to express their decision appropriately, with the loser in mind, and (where applicable) respond appropriately to appeals. While the referees rightly conduct their hearings in line with the rules of natural justice and legal principles, they also preserve and nurture the essential humanity of a forum for lay litigants. 22

Anglo/Aboriginal communication in the criminal justice process: A collective responsibility – *Dr Michael Cooke*

The main players involved in the administration of criminal justice in respect of Indigenous people of a non-English speaking background effectively combine to prop up a dysfunctional system where unrecognised miscommunication is pervasive and insidious, resulting in many Aboriginal defendants being unfairly disadvantaged in police interviews, in instructing counsel, in giving evidence and in understanding trial proceedings. Many do not acknowledge barriers to communication or do not seek to adequately address them. Some seek to exploit miscommunication for tactical reasons. The use of interpreters does not solve the problem when they are inadequately trained or skilled for legal interpreting. Police, lawyers, courts, interpreter providers and interpreter trainers contribute to and tolerate dysfunctional communication – often with good intentions. While strategies are suggested to improve communication, resolution ultimately requires courts insisting that miscommunication issues are redressed before proceeding with trials. 26

Client legal privilege and in-house counsel: Current law, recent developments and overseas comparisons – *Nik Andersen*

This article explores the rationale for the client legal privilege doctrine, the Australian case law history of the application of that doctrine to communications involving in-house counsel and recent developments and recommendations in Australia regarding the application of client legal privilege to such communications. The author argues against the imposition of an independence test to the application of client legal privilege in respect of communications involving in-house counsel, on the basis that such a test is ill-founded and impractical, and derogates from the fundamental rationales for the existence of the client legal privilege doctrine. This argument is explored by reference to a comparison of the position under the common law systems of New Zealand, England and Canada. The article also analyses the recent abuse of the client legal privilege doctrine in Australia, and provides recommendations to counteract such abuse. 36

Theft: A study of the use of fines by courts in Australia and China – *Li Wenwei*

In Western countries the modern use of a monetary fine as punishment for crime has developed as an alternative to a short prison term and reflects a general trend towards mitigating punishment. However, in China, the criminal law mainly uses fines against greedy crimes. Through analysing the relevant legislation and practices of fines against theft in New South Wales and South Australia, this article finds that, when fines are used against theft, fines and prison terms are alternate choices and that judges take into account the wealth and income status of criminals while considering the penalty of a fine. On the basis of a detailed comparison with Chinese legislation and judicial practices, the article concludes that, in China, fines are nearly always used along with imprisonment. While there are good reasons for this, in the Chinese context, more attention should be given to the functions of fines in mitigating punishment and acting as an alternative to short prison terms. 58

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SUBSCRIPTION INFORMATION

The *Journal of Judicial Administration* comprises four parts a year.

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THOMSON REUTERS

© 2009 Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 1036-7918

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW