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philosophy espoused by the reports previously mentioned can be seen in this area. The *Disputes Tribunal Act* 1989 and *Residential Tenancy Act* 1987 have very little scope for lawyers to act within the forums created. Indeed these two Tribunals are empowered to consider justice and need not give effect to strict legal rights.[3] The recently enacted *Employment Contracts Act* 1991, *Children, Young Persons and their Families Act* 1989 and *Accident Rehabilitation and Compensation Insurance Act* 1992 allow room for lay advocates to operate, while the concept of the Family Group Conference in the *Children, Young Persons and their Families Act* has meant that many of the problems relating to young people are solved by the families themselves without the need for lawyers or the court system. The role law centres have in providing access to these forums is axiomatic and is clearly one reason for the recognition of our operation by the *Legal Services Act*. Increasingly an unmet legal need is being met by the Dunedin Community Law Centre for those criminal cases where legal aid is denied due to the perceived lack of seriousness of the offence by the Registrar. In such cases representation is provided by the law centre. We attempt to find a balance between providing representation so that the system works and our longer term goal of empowerment to ensure that true participatory justice can be achieved.

The attack on lawyers' monopoly of the legal system is continued under the *Legal Services Act* 1992 where the various statutory bodies responsible for the provision of legal services in New Zealand have places for non-lawyer/community involvement at a policy level. The *Consumer Guarantees Bill* 1992 currently before the House continues this trend through defining the protections for those consuming services sufficiently broadly to encompass the legal profession.

The importance of the Treaty of Waitangi in influencing the development of the law centre movement and indeed the shape of the New Zealand legal system itself should not be under-estimated. The development of a bi-cultural legal service was discussed in *Te Whainga i Te Tika* and in a 1988 report by Moana Jackson *Maori and the Criminal Justice System*.[4] The growth in Treaty jurisprudence has influenced the access to justice debate.[5]

The Treaty of Waitangi is set as the ridge pole to the Coalition's Constitution. This places an immense responsibility on Coalition members in terms of influencing the current monocultural legal system and focusing their operations on the local community. The recent release of the three-volume decision of the Waitangi Tribunal on the Ngai Tahu land claim, which details the history of land purchases/procurement in the South Island and the growing amount of reference in New Zealand legislation to the Treaty has also contributed to the Dunedin operation looking for guidance from and developing closer ties with local Ngai Tahu. In practical terms this has also meant the Dunedin operation making a clear division between case work and education/reform work.

The effect the *Legal Services Act* 1992 will have on the development of the law centre movement is unknown. Many issues will require resolution as the centralised board (through its local committees) and individual law centres (through the Coalition) develop a working relationship under the Act. The movement needs to address itself to the practical implementation of the concepts of the 'Treaty', 'empowerment' and 'community' in its operations for these concepts are still alive and well within the rhetoric of the New Zealand law centre movement. A forum for debate and frank discussion is badly needed within the movement. Such a forum would give the New Zealand access to justice movement a sense of where it has been and where it is heading. It would also provide the potential for the movement to influence the current provision of legal services.

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MABO DECISION

Fast tracking to a 'lawyers' picnic'?

SANDY TOUSSAINT reports on a recent Perth Conference convened to look at the implications of the Mabo High Court decision.

The setting is the Parmelia Hilton Hotel in Perth and the date is 28 August 1992. A conference, organised by the Centre for Commercial and Resources Law of the University of Western Australia and Murdoch

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University, has convened on the pretext of discussing the effect of the *Mabo* decision on 'Resource Development and Aboriginal Land Rights'.[1] Western Australia is to be the primary regional focus.

It is several months after the High Court has delivered its historical and profoundly important decision with respect to *Mabo v The State of Queensland* (also known as the *'Murray Island' case*). Legal history has been rewritten, the notion of *terra nullius* rejected and the land entitlement of the Meriam people, or Murray Islanders, recognised within the terms and conditions of native title at common law.

It is not my purpose here to discuss the implications of the *Mabo* decision,[2] but rather to discuss whether the decision will provide a pathway for further recognition of Aboriginal rights in relation to land or whether it will provide a pathway, or 'fast track', to a 'lawyers' picnic'. Apart from the sum of $10 million being sought from the Aboriginal and Torres Strait Islander Commission by Rosemary O'Grady, an Adelaide solicitor bent on putting a claim forward in relation to a Kimberley group, one of the early signs that the latter may be the case emerged at the Parmelia Hilton.

Entry to the day-long conference cost $135 per person, $80 for students and articled clerks. These costings immediately excluded many interested people. This process of exclusion was notable in the audience, numbering about 200 people, when Brian Wyatt, Assistant Commissioner of the Western Australian Aboriginal Affairs Planning Authority, asked people to identify whether they had legal, bureaucratic or 'Aboriginal' interests.

Most members of the audience identified as having legal and bureaucratic backgrounds (although one person ventured to say that some had both legal and Aboriginal interests, and there were clearly a number of Aboriginal bureaucrats present).

Proceedings commenced with an opening speech from the Chief Justice of Western Australia, the Honourable Justice Malcolm. Despite the eloquence of Justice Malcolm's speech, and the attention he paid to forms of cultural recognition and social and economic equity (e.g. he made reference to the findings of the Royal Commission into Aboriginal Deaths in Custody), the ideas and moral overtone of his speech were rarely reflected elsewhere. Indeed throughout the day it became apparent that the conference was not so much about resource development and land rights, as it was about providing a forum for the airing of various legal interpretations and opinions. Most opinion revolved around whether or not a 'native title' claim could be successful in Western Australia. In the opinion of some it could, in the opinion of others it could not.

Throughout the day, various opinions were delivered and contested. Ambiguous and contradictory claims were defended on the grounds that the 'law is always uncertain'. Some claims were made that could not be adequately supported or substantiated. Richard Bartlett, Professor of Law and one of the conference conveners, stated, for example, that 'the content and proof of native title are applicable in parts of Western Australia, except for the south-west', while conceding that he had 'not actually carried out any research yet'.

Bartlett also took the view, with reference to Western Australia, that the *Land Act* and *Mining Act* would not necessarily have served to extinguish native title. Such a view overlooks the varied consequences of mining activity in this State. That activity, against the background of other forms of dislocation, has caused massive disruption to social, cultural and historical relations to land. Without such disruption, many Aboriginal groups may have been able to prove traditional connections with, or occupation of, the land in keeping with the requirements of native title. Elsewhere, however, Bartlett acknowledges that:

> The traditional connection to the land may have been lost by forcible removal or expulsion of the land under the removal and confinement of provisions of State legislation respecting Aboriginal people.[3]

Conference participants were also treated to a discussion of the *Aboriginal Heritage Amendment Bill*, currently under discussion in Western Australia, by Clive Senior, a solicitor and barrister. In his overview of some of the provisions contained within the Bill, Senior failed to advise members of the audience that criticism and concern about the limited scope of the amendments has been levelled at the State Government by Aboriginal bodies such as the Kimberley Land Council and the Aboriginal Legal Service. General criticism is directed at the fact that the Bill accommodates the requirements of developers more so than Aboriginal interests.

The conference was not without its expression of concern for Aboriginal interests. Sandy Davies, State Chairperson of the Aboriginal Legal Service, raised the matter of Aboriginal, or customary, law, but his call for recognition was largely treated with an embarrassed silence; clearly, this was not a subject the lawyers wanted to broach. Brian Wyatt raised the matter of the historical consequences of land rights struggles in Western Australia. Graeme Neate, Chairperson of the Queensland Land Tribunal, observed that some of the matters being put forward had already been considered in various claims in the Northern Territory which had come within the terms and conditions provided in the *Land Rights (Northern Territory) Act* 1976; e.g. the process of 'succession' to traditional land ownership by certain Aboriginal groups following the extinction of other groups. Rob Riley, Executive Officer of the Aboriginal Legal Service, stressed the need for caution. Recalling an expression put forward earlier by Brian Wyatt, Riley commented that it may be time for Aboriginal people to withdraw from any part in the negotiating process; things were all looking a bit too much like a 'lawyers' picnic'.

The meeting closed around 5 p.m. following a panel discussion titled 'The Future'. The convener of the ses-

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sion commented, largely in response to the concerns expressed by Riley, Wyatt and others, that one of the things that had emerged from the conference was that Aboriginal people had not understood sufficiently well some of the legal technicalities and implications of the *Mabo* decision. He commented further that lawyers should take heed of these concerns and make some attempt to 'explain things better'. Of course, that is not what had been suggested. In fact the different legal interpretations and opinions were, on most occasions, clearly stated. What was of concern, however, was the shift away from a discussion on resource development and land rights (the conference pretext), to a discussion on points of law as understood and contested by various legal theorists and practitioners. Some dovetailed their arguments, others stood in direct opposition (as papers contained in the conference proceedings indicate).

There are many other critical matters that could be questioned and commented on here, for example, Bartlett's poorly informed understanding of the notion of a 'tribe' (see, for example, pp.30-31 of conference paper); his naive view being that, somehow, there will be no ambiguities about the membership of groups claiming collective native title. But ultimately those comments and questions can be tailored to just two. Firstly, are we to dismiss the struggle for the recognition of indigenous rights in relation to land when Aboriginal people are unable to meet the legal requirements as defined within native title at common law? Secondly, will the final recognition of native title, fought for so long and hard by Eddie Mabo and others, prove, ironically, to have given birth to a 'lawyers' picnic'?

There is no doubt that lawyers are a necessary and integral part of the process whereby Aboriginal people can, in some parts of Australia, and hopefully will in others, be able to lay claim to land. With respect to Western Australia, which remains without any form of land rights legislation despite the findings of the Aboriginal Land Inquiry,[4] such a part must be conditioned not by the promise of increasing litigation, but by a recognition of the complex and elaborate social, cultural and historical relations to land that are sustained by many Aboriginal people in this State.

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ADMINISTRATIVE LAW

Blowing the whistle

JOHN GOLDRING evaluates a new NSW Bill.

The *Whistleblowers' Protection Bill* 1992 (NSW) has received little public attention or discussion. It was introduced into the Parliament earlier this year as a result of the agreement between the Greiner Government and the Independents who hold the balance of power in NSW.

The Bill makes it a criminal offence for anyone to treat a public official detrimentally after that official, acting in good faith, has informed either the Ombudsman, the Auditor-General or the Independent Commission Against Corruption of alleged corrupt behaviour, maladministration or substantial waste. The public official is also given certain rights to apply for remedial action in the Government and Related Employees' Appeal Tribunal. It does not provide any other remedies or sanctions, and contains no definition of maladministration or substantial waste. 'Corrupt conduct' has the same meaning as it has in the *Independent Commission Against Corruption Act* — where it was recently construed by the NSW Court of Appeal in proceedings brought by former Premier Greiner.

There was no Parliamentary debate when the Bill was read a second time by the Deputy Premier, Mr Wal Murray. The first significant discussion was at a seminar organised by the Royal Australian Institute of Public Administration (RAIPA) to consider the legislation. The following comments are an impressionistic summary of the papers and discussion at that seminar, which was attended by over 70 senior public servants, but not by the promoters of the legislation, the NSW Cabinet Office.

It became apparent at the seminar that, when the legislation was being prepared, the Cabinet Office did not bother to consult the three agencies (the Ombudsman, the Independent Commission Against Corruption (ICAC), or the Auditor-General's Office) who will have to administer and enforce the legislation if it is enacted in its present form. Much of the Bill is indefensible, in terms of drafting and structure.

The whistleblowing issue has been part of the debate on administrative law and public administration in Australia for 20 years, since the Coombs Royal Commission into Australian Government Administration produced some discussion papers dealing with whistleblowers and their protection.

Whistleblowing has been debated in the United States fairly constantly over the last 20 years. The basic issue of protecting whistleblowers is one of