



# Australian studies in law, crime and justice

## The Deputy Crown Solicitor and the bottom of the harbour scheme

Published in:

Wayward governance : illegality and its control in the public sector / P N Grabosky

Canberra : Australian Institute of Criminology, 1989

ISBN 0 642 14605 5

(Australian studies in law, crime and justice series); pp. 143-159

The deliberate stripping of a company's assets so that it is unable to pay its debts is a time-honoured practice. It also happens to constitute a criminal fraud. During the 1970s in Australia, variations on this practice were employed by hundreds of more affluent members of the community to avoid paying taxes. This genre of tax evasion was to contribute a new term to the Australian lexicon: Bottom of the Harbour.

At the time, a company with no debts and with an annual profit of \$100,000 would have a tax liability of \$46,000. To avoid this liability, the owner of the company had only to sell the company to a promoter for the value of the profits, less an agreed-upon commission (for example 10 per cent). Instead of finishing the year with \$54,000, the former owner of the company would walk away with \$90,000. The promoter, in turn, would keep the \$10,000 commission and dispose of the company by turning it over to a person of limited means, with no knowledge of the company's tax liabilities and no interest in retaining company records and books. The Australian Taxation Office and ultimately the honest taxpayers of Australia were \$46,000 the poorer.

More intricate variations on this 'simple strip' may or may not have involved fraud on the revenue, depending on whether the necessary elements of dishonesty could be established. Expertise within the Australian government, indeed, within the Australian legal profession, in prosecuting such matters, was all but non-existent.

When the bottom of the harbour schemes were in full flower, the sums involved were millions of dollars, not hundreds of thousands. Indeed, the full cost of this chapter of Australian criminal history ran to thousands of millions of dollars. Some 7,000 companies were involved (Sutton forthcoming).

The proliferation of extremely artificial tax avoidance schemes in the 1970s was to a large extent encouraged by members of the legal and accounting professions. The law reports indicate the lenient attitude taken by the courts during this period. Cases such as *Curran v. The Federal Commissioner of Taxation* 74 ATC 4296 and *Slutzkin v. The Federal Commissioner of Taxation* 140 CLR 314, provide examples of the extraordinary lenience with which courts tolerated artificial tax avoidance which in many cases bordered on the fraudulent.

The medium in which these massive frauds on the revenue flourished was bureaucratic inertia. As early as 1973, Rod Todman, a senior investigations officer of the Australian Taxation Office in Perth detected one variant of the bottom of the harbour fraud involving some fifty companies. Selecting one significant case for intensive investigation, he assembled sufficient evidence to raise a taxation assessment. In mid 1974, through the Deputy Crown Solicitor in Perth, he sought an opinion from a Queen's Counsel regarding the ramifications of the case in question. The nature of the opinion was such that the Deputy Commissioner of Taxation contacted the office of the Deputy Crown Solicitor responsible for handling the legal affairs of the Australian government in Western Australia, including the prosecution of criminal charges under the *Income Tax Assessment Act 1936* (Cwlth). In a letter dated 4 September 1974, the Deputy Commissioner said:

The recovery of company tax in this case and other cases acquired [by the promoter] raises issues which could have far-reaching implications on the collection of company tax generally (quoted in Australia 1982, p. 34).

The matter in question was delegated to a principal legal officer who was at the time second in charge of

the Deputy Crown Solicitor's Office. His initial reaction was that the facts of the case 'appear to be insufficient to support a fraud claim against any of the persons involved' (Australia 1982, p. 35).

At the end of 1974, the case was referred to a senior Queen's Counsel who strongly advised that the promoter of the scheme and two other individuals should be charged under Section 86(1)(e) of the *Crimes Act 1914* (Cwlth), which then specified the offence of conspiracy to defraud the Commonwealth. The opinion was based upon documentary evidence and upon facts which were easily proved.

After considerable delay, the case was referred to the Commonwealth Police for investigations. The police report recommended that charges be laid, and included a prepared brief for the prosecution.

In August 1975 the Commissioner of Taxation advised the Deputy Crown Solicitor in Perth that the three individuals involved in the scheme should be charged under the Crimes Act. The case had been identified as a test case, designed to determine the viability of subsequent similar actions against promoters of other bottom of the harbour schemes.

The principal legal officer who was handling the case in the Perth Deputy Crown Solicitor's Office, a Mr Abe Gleedman, took no action after he received instructions from the Tax Office in August 1975. On 25 November he advised the Tax Office that 'he intended to commence the action required to bring about the charges' (Australia 1982, p. 40). A fortnight later he admitted that 'no action ... commenced as yet due to pressure of work.' (Australia 1982, p. 40). Despite the firm assurances from senior silk, Gleedman remained uncomfortable with what he perceived to be a lack of sufficient evidence of intent to defraud.

In March 1976, still uncertain about the strength of his case, Gleedman referred the matter to the Commonwealth Police for additional investigation. He was either under the mistaken impression that investigations might obtain additional evidence by interviewing the suspects, or sought a pretext for not proceeding forthwith to lay charges.

In November 1976 the police report recommended that prosecution of the three suspects proceed, despite the absence of any admission on their part. The police concluded, as did the Queen's Counsel some months earlier, that the documentary evidence was more than sufficient. Four more months elapsed before any further action was taken. In April 1977, Gleedman prepared draft instructions to counsel regarding the criminal charges. They were fraught with error, with regard to both fact and law. Gleedman undertook to revise them and in June 1977, before departing on sick leave, he handed the instructions to his successor for delivery to counsel. Gleedman subsequently retired because of ill health, and never returned to work.

Gleedman was succeeded by Mr Sean O'Sullivan, the son of the Deputy Crown Solicitor at the time. He approached the Tax Office investigator Mr Todman, with instructions to counsel which was not the document which had been revised by Gleedman prior to his departure on sick leave, but rather the original Gleedman instructions which were so riddled with errors.

At this point, the situation deteriorated further.

In the following twelve months Mr O'Sullivan deliberately avoided Mr Todman. Whenever Mr Todman was able to contact him, Mr O'Sullivan stated that he was working on the matter when he was not. He made appointments to see Mr Todman which he did not keep. He made appointments for Mr Todman to come and see him on days which he was on leave. He cancelled appointments. He promised to contact Mr Todman, but failed to do so. He was deliberately seeking to avoid Mr Todman during this six month period (Australia 1982, p. 48).

Inquiries from the Taxation Office in Canberra to the Crown Solicitor in Canberra led to the latter's request for a written report from DCS Perth. The response claimed falsely that a further report was expected from the Deputy Commissioner of Taxation in Perth.

On 1 June 1978, O'Sullivan prepared a minute for the Deputy Crown Solicitor (DCS) to send to the Crown Solicitor's Office in Canberra, highlighting difficulties which were assumed to exist. The difficulties were later found to be imaginary, if not erroneous:

1. He suggested that there would be 'very great difficulties encountered' by reason of the fact the Defendants were not all resident in the same state.
2. He suggested that there should be a further interview of one of the Defendants, without indicating that two interviews of the man had failed.
3. He suggested there were difficulties in obtaining the co-operation of the original shareholder and his accountant, without stating that they had been granted an indemnity from prosecution and that a subpoena would overcome the problems.
4. He claimed that the matter required investigation by 'a very experienced and capable

Commonwealth Police Officer', without stating that such an investigation had been completed 18 months earlier.

5. He suggested that if the prosecution 'is considered worthwhile', it would require the services 'of an experienced investigator', without stating that the investigation had been completed 18 months earlier, that it had available to it Mr Todman, a very experienced senior Investigation Officer of the Taxation Office, and a very experienced Commonwealth Police Officer.
6. He suggested that one of the Defendants 'will fight with unlimited resources any prosecution', although no person in our community could be expected to match the financial resources of the Commonwealth.
7. He suggested that the investigation was continuing, when in fact it had been completed. He even suggested that Mr Todman was still investigating the matter, while Mr Todman's activities at this time were confined to pressing Mr O'Sullivan to get on with it.
8. He stated that the matter would have to be 'briefed out' but suggested that such action 'would still only involve the time of one of my officers to an extent that cannot be afforded'. He did not indicate that the brief to counsel had been prepared and was ready for delivery (Australia 1982, pp. 50-1).

Two months after the Crown Solicitor in Canberra had been thus misinformed, Mr O'Sullivan incorrectly advised the Deputy Crown Solicitor's Office in Sydney that the matter had been terminated. No such decision had been made by the Crown Solicitor. The suggestion that the case had been terminated led officers of DCS Sydney to advise against proceedings against one of the suspects, who was also facing charges in Sydney.

By the end of 1978 the Canberra and Perth offices of the Crown Solicitor's Office were each advising the Australian Taxation Office that the other was handling the case. The brief to counsel lay in the bottom drawer of Mr O'Sullivan's desk in Perth for five years, until it was discovered in the course of inquiries by the Costigan Royal Commission in 1982.

In 1979, the DCS Perth advised the Crown Solicitor's Office in Canberra that evidence was insufficient to prosecute. On 3 April 1979 the Crown Solicitor conveyed this advice formally by letter to the Australian Taxation Office. The Tax Office, with its traditional priorities for revenue collection over prosecution reinforced by the permissive climate created by the Courts, did not press the matter further. The would-be prosecution had lapsed. Criticism of the conduct of the case was scathing.

The consequences of the gross negligence in the Crown Solicitor's Office are difficult to understate. There have been many promoters of schemes similar to that which this case is about. With the lack of action in the court confidence grew that the law could be broken with impunity. The Crown Solicitor's Office failed to discharge its primary duty, namely, to uphold the law. By its negligence, it permitted the law to be disregarded and brought into contempt. The loss to the revenue is enormous (Australia 1982, p. 70).

In his defence, the then Crown Solicitor argued that conspiracy proceedings were not the most appropriate and cost-effective approach to the case at hand.

The view I had was that conspiracy law requires very careful and costly investigation, is complex to provide and, in the result, does not get any money back. I thought that conspiracy as a criminal charge was an inadequate and ineffective remedy in this field . . . I think it is an insufficient response in the same way as I would think that the commissioning of a Taborer with a wheelbarrow is an insufficient response to the task of removing Capital Hill. He may ultimately achieve the end result but it will take him a long time. The way to attack this sort of problem seemed to me ... through new legislation which would enable the Government not only to impose criminal sanctions but also to combine with those criminal sanctions a capacity to recover tax that was unpaid (Australia, Senate Estimates Committee A, 13 September 1982, p. 287).

It is interesting to note that this lack of enthusiasm for conspiracy law did not prevent the prosecution of Social Security beneficiaries discussed in Chapter 6 above.

As it happened, further shortcomings in the operations of the office of DCS Perth were to be identified. The spouse of one of the senior legal officers operated what was euphemistically termed an escort service, and served as secretary of a number of companies which were involved in bottom of the harbour activities linked to the promoter who was the subject of Mr O'Sullivan's inattentions. The precise extent of

involvement in these activities on the part of the DCS legal offices became a matter of great concern.

Although it had been alleged that the telephone number of the Perth office of the Crown Solicitor had appeared in an advertisement for the escort service, the officer in question maintained that he was not involved in his wife's commercial activities. Whatever the involvement, the association was close enough to cause profound embarrassment, not only to the Crown Solicitor, but to the entire Australian government. The casual observer could perhaps have been excused for concluding that the legal arm of the Australian government was itself involved in the very activities it was responsible for prosecuting.

Perhaps the most obvious factor contributing to the difficulties of the Crown Solicitor's Office was a lack of competence on the part of the officers handling the case. The officer initially responsible, Mr Gleedman, suffered from a chronic depressive illness which eventually led to his retirement on account of disability. Notwithstanding his disability, he was ill-equipped to handle bottom of the harbour prosecutions. He had no previous experience with the law of criminal conspiracy, and little in company law. Gleedman's inhibition to establish the intent to defraud by inference from overt acts reflected this inadequacy.

Gleedman's successor, O'Sullivan, was even less well equipped to deal with the fraud case. He had no experience in either criminal law or company law. The description of his conduct of the case in the interim report of the Costigan Royal Commission (Australia 1982, pp. 48-52) is a textbook example of a desperate search for a 'too-hard basket'. In short, O'Sullivan's tepid pursuit of bottom of the harbour schemers led him into water which was far above his head.

That the shortcomings of Gleedman and O'Sullivan were allowed to persist reflected adversely on the managerial efficacy of the Deputy Crown Solicitor in Perth, and on the Crown Solicitor in Canberra.

It was generally considered that the Australian Attorney-General's Department had not, until shortly before the revelations of the Perth debacle, taken management and management training very seriously (Australia 1983, p. 76). The Crown Solicitor's Division of the Attorney-General's Department consisted of a central office in Canberra and a Deputy Crown Solicitor's office in each of the six states and two territories of Australia. At the time of the difficulties experienced in Perth, the Perth office was not a large one, consisting of twenty-three staff of whom eleven were qualified lawyers.

Gleedman's illness and its adverse effect upon his work were no secret. As second in charge of the office, he might have been subject to greater scrutiny on the part of the Deputy Crown Solicitor himself. At the very least, on the occasion of Gleedman's retirement, it was incumbent upon the Deputy Crown Solicitor to review each of his files to determine whether or not they were in order. If such a review did occur, it was by definition ineffective.

Problems of inadequate oversight were compounded by an inordinate degree of turnover in those who served as Deputy Crown Solicitors during the period in question. At the time Gleedman was handling the case, the Deputy Crown Solicitor was Lance Odum. Odum was succeeded as Deputy Crown Solicitor by Mr Clem O'Sullivan at the time his son, Sean O'Sullivan, took over the bottom of the harbour case from Gleedman. In June 1978 the elder O'Sullivan retired, and was succeeded by an acting deputy crown solicitor for a period of some three months at which time a Mr Peter Massie assumed the office. Such lack of managerial continuity could not help but hinder the degree of oversight and supervision required to ensure the efficient management of active case files.

The office of the Crown Solicitor in Canberra also failed to exercise adequate supervision over the case in question. It was the conscious policy of the Canberra office to give as much autonomy as possible to each Deputy's office. Whilst there was no doubt a sound basis for delegating a certain degree of authority, the practice went so far as to contribute to a feeling on the part of DCS officers in Perth that they were neglected by central office. Indeed, the situation reached a state which was subsequently described as a breakdown in communications. Periodic reports on pending major litigation were submitted to Canberra, but rarely if ever did they elicit feedback. In 1979, an explicit request for Canberra's reaction to a report from Perth met with no reply. The Perth office stopped submitting the reports altogether (Australia 1983, p. 102).

The Taxation Office must bear its share of responsibility for the matter. Apart from the original instructions in 1974 that the case in question 'could have far-reaching implications' it neither communicated to the Crown Solicitor nor to the DCS the full dimensions of the problem, nor stated that the case was a 'test case'. Having regard to the extent of the matter and its revenue implications, the case should have been taken up by the Treasurer with the Attorney-General.

The 'forgotten' bottom of the harbour case was first called to the Crown Solicitor's attention by the Commissioner of Taxation in 1978. A request to the Perth office for a report on the matter was ignored. It allowed the Sydney and Perth offices to 'pass the buck' to each other for a period of some months. The

Crown Solicitor himself visited Perth on one subsequent occasion without availing himself of the opportunity personally to enquire into the matter.

Whilst there may be good reasons for a decentralised approach to the conduct of Australian government business in the states and territories of the federation, it is obvious that a degree of central managerial oversight is necessary to achieve that purpose. Such oversight was lacking in this case.

A number of factors combined to aggravate the managerial difficulties experienced by the Crown Solicitor's Office. The economics of the legal profession in Western Australia were such that talented practitioners could often achieve greater material rewards in the private sector than in government. The situation was expressed more bluntly by the outspoken Senator from Western Australia, Reg Withers:

When I was a law student if you were a mug you went to work for the government. If you weren't much good, you were referred to as 'real Crown Law material.' (*The National Times* 24 August-4 September 1982, p. 5).

Moreover, for those who were committed to a career in public service, salaries in the state crown law office were greater than in the service of the Australian government. The most talented lawyers in Western Australia were thus not usually attracted to employment with DCS Perth.

In addition, the late 1970s were years of growing fiscal austerity in the Australian public service. The imposition of staff ceilings often meant that overworked offices could not count on staff augmentation to alleviate their caseloads. Indeed, at one point a decision was made actually to reduce staffing levels in the Deputy Crown Solicitor's Office.

One lesson which might be learned from the difficulties encountered by DCS Perth is that attempts to implement public policy 'on the cheap' may go astray. With historical hindsight one may surmise that a greater commitment of resources to combatting fraud on the Commonwealth revenue would have paid for itself many times over.

One additional factor was specified as having contributed to the inefficient collection of revenue by the Australian government - the secrecy provisions of the Income Tax Assessment Act. These provisions were originally incorporated in the Act in the belief that the confidentiality of taxpayer information will enhance compliance with the law. It was argued that in the absence of such protection, taxpayers would be less inclined to be completely candid in their dealings with the Tax Office.

History, it would appear, has shown that it takes more than confidentiality to ensure candour on the part of taxpayers. Meanwhile, the operation of secrecy provisions serves to inhibit proper ministerial oversight of revenue collection. In the words of the Costigan Report:

It appears to me that the principal beneficiaries of the secrecy provisions of the Income Tax Assessment Act are the errant civil servants identified in this Report. By the imposition of secrecy, they have been able to escape detection when the normal ministerial function of supervision may have resulted in their early exposure.

There is a real danger to the community however, by the loss of proper ministerial supervision. It is essential that the Treasurer of the Commonwealth of Australia should be able to gain full access to taxation information so that he can see the extent to which the Revenue of the Commonwealth may be affected by fiscal policy, or by the depredations of thieves and rogues (Australia 1982, pp. 25 and 95).

The difficulties experienced by the Crown Solicitor's Office lay largely unappreciated outside bureaucratic circles until an unlikely chain of events led to their disclosure. Articles in *The Bulletin* about racketeering on Metbourne's waterfront tempted the Commonwealth and Victorian governments to appoint a Royal Commission into the activities of the Federated Ship Painters and Dockers Union. Cynics were perhaps excused for suggesting that the *raison d'être* of the Royal Commission was to discredit an unsavoury element of the trade union movement and perhaps discredit one or two notables of the Labor Party. But the Royal Commission's terms of reference were very broad, and the Commissioner, Frank Costigan Q.C. was to learn that the activities of the Painters and Dockers were quite diverse. Costigan's final report describes the moment of discovery:

It was in the early months ... that the extent of the tasks became apparent. Perhaps the first moment of real light occurred one morning in the Fitzroy Court. A witness was giving evidence in relation to the activities of a company said to be engaged in ship repairing. Subsequent investigations showed that not one dollar ever had been earned in that activity; nonetheless it was full of interest, involving classic racketeering and on any view right in the centre of my Terms of Enquiry. The witness had some documents, he said; not in court but back at the office. Would he mind, I politely asked him, if I adjourned for a short time while he

returned to his office to collect them and bring them back into court. I offered him the assistance of one of my solicitors and a Federal policeman. He could hardly decline such an offer. The documents were provided just before lunch. I should tell you that prior to that morning I had not seen signs of money exceeding five thousand dollars or thereabouts. Imagine my surprise to find in the files a cheque for one million, five hundred thousand dollars. Two or three minutes later I found an application by an associate company to the Reserve Bank to bring into this country from Lebanon, four million, five hundred thousand dollars. It didn't really seem to fit in with ship repairing. I decided to look more carefully at this associated company. It had a bank account in a distant suburb in another state. The bank vouchers were subpoenaed. I found that in the three months some two hundred and fifty million dollars passed through that account. It was one of a dozen such accounts throughout Australia (Australia 1984, pp. 4-5).

This paper trail, as it came to be called, led eventually to the Deputy Crown Solicitor's Office in Perth to Mr O'Sullivan's bottom drawer, and to the escort service.

The release of the interim report of the Costigan Royal Commission elicited a predictable uproar. In addition to the abuse directed against the Fraser government, there was an element of black humour. As was said at the time, the average bloke in the corner pub may have had some difficulty coming to grips with the complexities of buying and selling companies and with the neglect of prosecutorial responsibilities, but the suggestion (albeit not entirely correct) that a prostitution service was being run from the government's legal office could not fail to elicit ridicule.

A management review of the Crown Solicitor's Division had commenced in 1979 in response to an earlier request by the Crown Solicitor for increased resources. Its implementation began in 1980, but encountered delay as a result of the Review of Commonwealth Functions, otherwise known as the 'Razor Gang'.

In contrast to the stringent staff ceilings which preceded the Costigan disclosures, they were followed quickly by the appointment of seventy new lawyers to the Crown Solicitor's Office. Implementation of the management review resumed. Management systems were introduced to permit a greater level of control and supervision, both within the regional offices and from the Crown Solicitor's Office in Canberra. Particular attention was paid to the monitoring of work backlogs.

Principal legal officers were thereafter engaged for approximately 10 per cent of their time on their own cases; the remainder of their schedule was devoted to supervision and management of other matters under their purview. Procedures for improved client liaison were instituted wherein Deputy Crown Solicitors and their senior officers met regularly with their counterparts in those offices of the Australian government which were their major clientele. Management training programs were established at central office, and regular communication between Crown Solicitors and their Deputies was restored. Computer and word-processing systems were installed.

The Attorney-General, Senator Peter Durack, whose misfortune it was to receive most of the criticism in the aftermath of the Costigan disclosures, conceded responsibility for the unfortunate events but refused to resign. As a close ally of the Prime Minister, his resignation was not requested. Withering attacks from press and opposition were to take their toll however, and he suffered a heart attack within weeks.

Immediate steps taken by the government in the aftermath of the Costigan revelations included the suspension of two officers in Perth pending disciplinary proceedings under the *Public Service Act 1922* (Cwlth), and an invitation to the President of the Law Council of Australia to examine the Crown Solicitor's Office and its operations.

Major tax prosecutions were taken out of the hands of the Crown Solicitor and his Deputies with the enactment of the *Special Prosecutors Act 1982* (Cwlth) and the subsequent appointment of Special Prosecutors Gyles and Redlich. These set the stage for a total reorganisation of the conduct of criminal prosecutions by the Federal government.

Legislative activity in the area of tax avoidance had preceded the Costigan revelations; it intensified thereafter. The *Crimes (Taxation Offences) Act 1980* (Cwlth) had made it a criminal offence to enter into (or to aid or abet) an arrangement with a purpose of reducing or removing the capacity of a company or trustee to meet an income tax or sales tax liability. The *Taxation (Unpaid Company Tax) Act 1982* (Cwlth), and related legislation, provided for the recoupment of tax evaded in 'bottom of the harbour' strips.

by whom?

Extensive investigations of the DCS Perth office revealed that contrary to initial speculation, legal officers were not themselves accomplices in the scheme to defraud the Commonwealth; nor was an escort service being run from offices of the Australian government. The husband of the proprietress of the escort agency

was, however, just sufficiently involved in his wife's activities that he was dismissed from the Public Service. *The escort service was advertised via his office telephone service. He was eventually struck off in 1984.*

In 1983, after a change of government, legislation was enacted creating a new Director of Public Prosecutions, whose office would thereafter conduct prosecutions on behalf of the Commonwealth.

In 1984 a Major Fraud Division was established within the DPP to take over the work of the Special Prosecutors. Investigators seconded from the Australian Federal Police and the Australian Taxation Office assisted DPP staff in the preparation of cases for prosecution. With the significant increase in the number of complex fraud cases prosecuted in the 1980s, the dearth of expertise which characterised prosecuting authorities in the previous decade became a thing of the past.

The individual who had been the Crown Solicitor during most of the period discussed in Costigan's Interim Report had become, by the time of the Report's publication, the Secretary of the Commonwealth Attorney-General's Department. After the change of government in 1983 he was made a Judge of the Federal Court of Australia.

The Tax Office, which had become the subject of unfavourable comment by the Costigan Royal Commission, the Special Prosecutors, various members of Parliament and the Auditor-General of Australia, among others (Grabosky & Braithwaite 1986, Chapter 12), began to enhance its capabilities. Increases in staff, improvements in information storage and retrieval systems and greater attention to its enforcement role, all followed.

Luck finally ran out for the two promoters of the bottom of the harbour scheme whose activities were allowed to flourish for nearly a decade. Brian Maher and Errol Faint were finally charged by the Special Prosecutor, Roger Gyles. Proceedings were long and complex. Preparatory work entailed the efforts of teams of investigators, and the committal hearing lasted for three months. Responsibility for the prosecution was eventually transferred to the new Director of Public Prosecutions. Faint pleaded guilty and received a two year prison sentence. After a five month trial, Maher was found guilty on one count of conspiracy to defraud the Commonwealth, and one count of conspiring to defraud a named company. He was sentenced to two years and nine months imprisonment on the first charge, and five years on the second, to be served concurrently. In July 1987, the High Court of Australia set aside the conviction and sentence on the second count.

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URL: <http://www.aic.gov.au/publications/lcj/wayward/ch9t.html>; Last modified: 27 February 2004

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Printed: 13 Sep 2008