

**Senate Foreign Affairs, Defence and Trade
References Committee**

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

Submission No: P70

Date Received: 19.10.04

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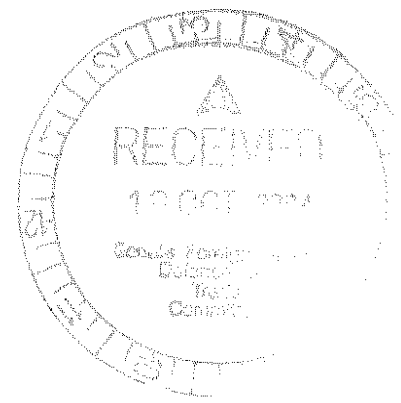
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ERNST WILLHEIM

Barrister



13 October 2004

The Secretary
Senate Foreign Affairs and Trade References Committee
Parliament House
Canberra 2600

Dear Committee Secretary

This submission addresses paragraph 2.(b) of the Committee's terms of reference, the handling of the investigations into the fire on the HMAS Westralia.

More specifically, this submission concerns non payment of my fees as counsel appearing on behalf of the families of the deceased crew at the State Coroner's inquest into the deaths of four members of the crew of HMAS Westralia and the implications of non-payment of counsel's fees for the future availability of lawyers in Defence matters..

The submission may be seen as supplementing evidence given to the Committee by Mr Lyndon Pelly on 22 April 2004.

Mr Pelly in his evidence referred to aspects of the Coroner's inquiry including contact between one of his counsel, Mr Collaery, Commonwealth counsel Mr Martin QC and a Department of Defence officer Mr Millar.¹ Mr Pelly went on to say

CC LAW is still waiting for their cheque.

One wonders if this is a deliberate ploy by the government to dissuade lawyers from taking on such cases.²

I was briefed by Mr Collaery's firm, CC LAW, to appear as counsel on behalf of the families of the deceased crew (including Mr Pelly). My role related primarily to the complex international maritime law issues the families wished to raise, in particular, failure to comply with the standards established by a range of important international shipping conventions to which Australia was a party. These standards related to matters such as safety of life at sea, including the design and construction of the ship, the qualifications and training of the master, engineer and crew and the question of sovereign immunity. I appeared at the inquest on 10 sitting days, 28 April 2003-9 May 2003.

¹ Transcript, 22 April 2004, 32.

² Transcript, 22 April 2004, 33.

My fees for appearance at the inquest have not been paid. I note in this respect that I billed at an extremely modest daily rate, well below market rate for counsel of my experience and specialist expertise in relation to complex international law issues.

I should explain that, as counsel briefed by CC LAW, I formally look to CC LAW to pay my fees. I am not a party to any arrangements made by my instructing solicitors, CC LAW, with their clients (the families) or with Defence for obtaining payment.

I understand, however, that in briefing me CC LAW relied on an assurance from Defence that Defence would meet the costs of 2 lawyers to represent the families. The 2 lawyers who appeared for the families at the inquest for the 10 days 28 April – 9 May 2003 were Mr Collaery and myself. The Commonwealth was represented by a large team of lawyers, senior and junior counsel and several instructing solicitors. By comparison the legal team representing the families of the deceased was very modest.

I understand from CC LAW that Defence through Mr Richard Millar has refused to pay CC LAW in respect of my fees. I note that Mr Millar was present at the inquest on the days I appeared. We greeted each other daily. At no stage during these 10 hearing days did Mr Millar intimate to me that there would be any problem in meeting my fees. One would have thought that, had he seen any reason to decline payment in respect of my appearance on behalf of the families, he would have drawn that to attention at the time.

Mr Pelly said to the Committee that 'CC LAW is still waiting for their cheque'. I am unable to speak for CC LAW but I believe this may have been intended as a reference to payment by Defence to CC LAW in respect of my fees. I can of course confirm that I have not been paid.

Mr Pelly went on to say 'One wonders if this is a deliberate ploy by the government to dissuade lawyers from taking on such cases'. I am unable to provide the Committee with any information as to the intentions of the Government but it must surely be obvious that lawyers will be less willing to appear in matters of this kind if they cannot have confidence that their fees will be paid.

I submit that pursuant to paragraph 2.(b) of its terms of reference it is appropriate for the Committee to consider this aspect of the process and handling of the Westralia inquest, namely failure by Defence to pay the fees of counsel representing the families at the Westralia inquest and the implications of that failure for the availability of lawyers to appear in Defence related matters.

Yours faithfully



Ernst Willheim