

# NSW Law Reform Commission

## REPORT 37 (1983) - COMMUNITY LAW REFORM PROGRAM THIRD REPORT: SERVICE OF CIVIL PROCESS ON SUNDAY

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**REPORT 37 (1983) - COMMUNITY LAW REFORM PROGRAM THIRD REPORT: SERVICE OF CIVIL PROCESS ON SUNDAY**

## **Terms of Reference and Participants**

### **New South Wales Law Reform Commission**

The Honourable D.P. Landa, LLB., M.P.,

Attorney General for New South Wales.

### **COMMUNITY LAW REFORM PROGRAM**

Attached to this document is the report of this Commission pursuant to the reference dated 28 July 1982 and headed "Service of Civil Process on Sundays".

Ronald Sackville

(Chairman)

Russell Scott

(Deputy Chairman)

Denis Gressier

(Commissioner)

J.R.T. Wood

(Commissioner)

August 1983.

### **Terms of Reference**

Pursuant to section 10 of the Law Reform Commission Act 1967, I *HEREBY REFER* to the Law Reform Commission the following matters for inquiry and report to me:

(2) *Service of Civil Process on Sundays*

The law relating to the service of civil process on Sundays, and, in particular, without limiting the foregoing the service of initiating process issued out of a civil court and the service of subpoenas,

(4) Any matter incidental to the foregoing.

F.J. WALKER,

*Attorney General.*

28 July 1982,

**New South Wales Law Reform Commission**

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967.

The Commissioners are:

**Chairman**

Professor Ronald Sackville

**Deputy Chairman**

Mr. Russell Scott

**Full-time Commissioners**

Mr. Denis Gressier

Mr. J.RT Wood, Q.C.

**Part-time Commissioners**

Mr. I.MCC. Barker, Q.C.

Mr. J.H.P. Disney

The Hon Mr. Justice Adrian Roden

The Hon Mr. Justice Andrew Rogers

Ms. P. Smith

Mr. H.D. Sperling, Q.C.

**Research Director**

Ms. Marcia Neave

**Members of the research staff are:**

Ms. Helen Mills

Mr. Ian Ramsay

Ms. Fiona Tito

Ms. Meredith Wilkie

The Secretary of the Commission is Ms. Mariella Lizier and its offices are at 16th Level Goodsell Building, 8-12 Chifley Square, Sydney, N.S.W. 2000 (telephone: (02) 238 7213).

|||[Click here for current contact details](#)|||

This is the Third Report of the Commission under its Community Law Reform Program. Its short citation is LRC.37.

## Participants

### **Commission Members:**

For the purpose of the reference the Chairman in accordance with section 12A of the Law Reform Commission Act, 1967 created a Division comprising the following members of the Commission -

Professor Ronald Sackville (Chairman)

Mr. Russell Scott (Deputy Chairman - in charge of this reference)

Mr Denis Gressier

Mr J.RT. Wood, Q.C.

### **Secretary:**

Ms Mariella Lizier

### **Research:**

Ms Ruth Jones (until 17 June 1983)

### **Word Processing:**

Mrs Deborah Donnellan

Mrs Zoya Wynnyk

**REPORT 37 (1983) - COMMUNITY LAW REFORM PROGRAM THIRD REPORT: SERVICE OF CIVIL PROCESS ON SUNDAY**

## **Summary of Recommendations**

The law of New South Wales should be amended so as to make lawful the service of civil process on Sunday. A substantial amount of legal process may already be lawfully served on Sunday in New South Wales. This includes all criminal process and all the process of the Federal Court of Australia and the Family Court of Australia. Adoption of the recommendations in this report will mean that, in addition to the federal process that may now be served in New South Wales on Sunday, all legal process issued under New South Wales law may be lawfully served on that day.

The recommendations may be effected by the repeal of section 41 of the Imperial Acts Application Act, 1969. In addition, as far as the District Court is concerned it would be necessary to repeal rule 4 of Part 8 of the District Court Rules which makes direct reference to service of process on Sunday.

It is desirable for the relevant statutory provision to go further than the simple repeal of section 41. The reform should spell out the lawfulness of those acts which section 41 has hitherto made void.

## REPORT 37 (1983) - COMMUNITY LAW REFORM PROGRAM THIRD REPORT: SERVICE OF CIVIL PROCESS ON SUNDAY

# 1. Community Law Reform Program and this Reference

### INTRODUCTION

1.1 This is the third report in the Community Law Reform Program. The Program was established by the then Attorney General the Hon F.J. Walker, Q.C., M.P., by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter included the following statement:

This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s.10 of the Law Reform Commission Act, 1967.

1.2 The Commission wrote on 9 June 1982 seeking its first Community Law Reform references. By letter of reply dated 28 July 1982 the Attorney General referred three matters to the Commission the second of which is the subject of this report. The first two reports were handed to the Attorney General respectively, on 8 February and 15 February 1983. The present reference requires the Commission to inquire and report in the following terms:

*Service of Civil Process on Sundays*

The law relating to the service of civil process on Sundays and, in particular, without limiting the foregoing the service of initiating process issued out of a civil court and the service of subpoenas.

Any matter incidental to the foregoing ...

The background of the Community Law Reform Program is described in greater detail in the Commission's Annual Report for 1982.

### LAW REGULATING SERVICE OF CIVIL PROCESS ON SUNDAY

1.3 The present law in New South Wales regulating the service of civil process on Sunday, and its background, are described in detail in Chapter 3. The primary provision is section 41 of the Imperial Acts Application Act, 1969 which provides:

Service of any writ, process, warrant, order, judgment or decree (except in case of an offence, breach of the peace or any warrant, writ or process for the apprehension of any person) upon a Sunday shall be void.

Section 41 is, in modern form, a re-enactment of section 6 of the English statute entitled the Sunday Observance Act 1677.

### WHAT IS CIVIL PROCESS?

1.4 Not all texts define the word "process" in the context of legal proceedings in the same way. The following definition is given in *Jowitt's Dictionary of English Law*:<sup>2</sup>

*Process*, the proceedings in any action or prosecution real or personal civil or criminal from the beginning to the end; strictly, the summons by which one is cited into a court, because it is the beginning or principal part thereof by which the rest is directed.

In civil actions process is of two kinds, viz., process against the defendant being either process to compel him to appear, now consisting of a writ of summons or originating summons, or process of execution, by which the judgment, decree, etc., is executed or carried into effect ... and process against persons not parties to the action e.g. process to summon jurors, witnesses, etc.

The first paragraph of this definition was cited with approval by Mr Justice Gibbs (as he then was) in *Boilermakers Society of Australia, Queensland Branch, Union of Employees v Brisbane Welding Works Pty. Ltd.*<sup>3</sup> Mr. Justice Jeffries and Mr. Justice Lucas agreed with Mr. Justice Gibbs' reasoning. His Honour continued:

In its broader sense it [the word "process" includes all proceedings in the course of litigation but in its narrower sense it is restricted to refer to the summons writ or other mandate by which a person is brought into court and the litigation is formally commenced.<sup>4</sup>

For the purposes of this report we use the term "process" to include not only documents initiating legal proceedings, but also documents, such as subpoenas issued in the course of proceedings. In addition we use the term to apply to documents relating to the execution of judgments or orders of the court, but not to the act of execution itself.

1.5 Our terms of reference refer to the service of "civil process". In this report we use that expression to refer to process employed in civil proceedings, as distinct from "criminal process", which is employed in criminal proceedings. It is important to emphasise that under New South Wales law it is already lawful to serve criminal process on Sundays. This contrasts with the fact that generally it is not lawful to serve civil process on that day, although there may be exceptions even to this rule.

1.6 Section 41 of the Imperial Acts Application Act, 1969, speaks neither of "civil process" nor "criminal process". It makes void the service on Sunday

of any writ process, warrant, order, judgment or decree (except in case of an offence, breach of the peace or any warrant, writ or process for the apprehension of any person).

The exceptions in section 41 may extend to legal process other than that normally associated with criminal proceedings. For example, it may be that a "warrant, writ or process for the apprehension of any person" includes process related to civil proceedings aimed at the committal of a person for contempt of court, or for not doing or not abstaining from doing an act in accordance with a judgment of the court.<sup>5</sup> It may also be that such process should be called "civil process". If this is the case, it would be correct to say that section 41 also makes lawful the service on Sunday of some civil process.<sup>6</sup> However, it is not necessary to analyse in detail the precise limits of the various exceptions in section 41. The recommendations in this report, if accepted, will permit service of all process on Sunday.

## THE ISSUE FOR LAW REFORM

1.7 The immediate reason for the Commission giving preliminary consideration to the subject matter of this report was a request from the Attorney General following his receipt of a letter from a corporate member of the Institute of Mercantile Agents. This company is engaged in the business of service of Legal process and submitted to the Attorney General that the present law prohibiting in New South Wales the service of civil process on Sunday should be repealed. The submission argued that recent years have seen substantial changes in social attitudes in Australia towards commercial activity and public entertainment on Sunday, a wider range of activity now being regarded as permissible. The submission suggested that the time has arrived for reform of the law so as to reflect these changes.

1.8 Ignoring social considerations for the moment and focusing solely on the words of section 41, we again draw attention to the fact that that section envisages that certain types of legal process may be served in New South Wales on Sunday. Even the English Act of 1677 permitted the service of some legal process on Sunday.<sup>7</sup> The service of all process issued out of a number of courts established by Commonwealth legislation is also lawful on Sunday.<sup>8</sup> As discussed elsewhere in this report<sup>9</sup> legal process that may already be lawfully served in New South Wales includes the following:

- (i) all criminal process issued out of New South Wales courts;
- (ii) process “for the apprehension of any person” issued out of New South Wales courts, which appears to include some process properly described as “civil”<sup>10</sup> and
- (iii) all process of the Federal Court of Australia (including bankruptcy notices and bankruptcy process) and the Family Court of Australia.

The critical question in this reference may be narrowly stated. Some civil process may now be served on Sunday, namely, that included in the scope of subparagraphs (ii) and (iii) above. Should other, or all civil process be permitted to be served on that day? In short should section 41 of the Imperial Acts Application Act 1969 be amended or repealed. General issues of Sunday observance and business activity are not here involved, although in our view some understanding of the background and history of Sunday observance assists in examining the question which arises.<sup>11</sup>

## **UNDERLYING PRINCIPLE**

1.9 Civil proceedings are normally commenced by filing in court a formal document such as a statement of claim or a summons, followed by service of that document on the defendant. There can be no justification for a general prohibition of service of originating process, or any other process, on a particular day or at particular hours, unless there is good reason, for example, that the act of service conflicts with established community opinion. The succeeding chapters show that the Commission’s inquiry has revealed no good reason for the continuation in New South Wales of section 41 of the Imperial Acts Application Act 1969.

1.10 The principles and conclusions underlying our recommendations are discussed in Chapters 5 and 6. They include recognition that there is a world-wide (but not universal) acceptance of Sunday as a day of rest for citizens from normal weekday activities and that this acceptance is a characteristic of the New South Wales community, further, that under modern conditions. Sunday is a day of rest for secular rather than religious reasons. Correlative conclusions are that the community accepts the entitlement of any member to choose to work on Sunday, conversely, however, the “right” to have Sunday as a day of rest and leisure does not mean that a citizen necessarily has an entitlement to immunity or freedom from unwanted or unpleasant experiences, for example, service of legal process.

1.11 In Chapter 6 we discuss a number of positive reasons for permitting the service of civil process on Sunday. These include the desirability of uniform legal rules within New South Wales. This is a significant point in view of the substantial quantity of State process and Federal process that may already be served on Sunday and the inconsistency between the rules governing the service of much Federal civil process and State civil process.<sup>12</sup> Other positive reasons for reform are the general relaxation in recent years of statutory restrictions on commercial and other activity on Sunday, and the recurrent necessity in urgent matters for courts to grant injunctions and make orders permitting service of process outside normal business hours.

## **PARLIAMENTARY COUNSEL**

1.12 In relation to this report, as with the first and second reports in the Community Law Reform Program, we are indebted to Parliamentary Counsel, Mr D R Murphy. We wish to record our thanks to him for assistance and advice on the form and content of the draft legislation submitted with this report in the Appendix.

## **FOOTNOTES**

1. Section 6 of The Sunday Observance Act 1677 is set out in para 2.18.



2. (2nd ed 1977), vol 2, pp-1438-1439; see also *Stroud's judicial Dictionary* (4th ed 1974). Vol 4, pp. 2129-213.

3. [1965] Qd R. 598.

4. Id, at p.605. The judgment of Gibbs J. Was applied by menhennitt J. In *Aurel Jorras Pty. Ltd. v. Graham Karp Developments Pty. Ltd.* [1975] V.R. 202, at p.218.

5. See Supreme Court Rules, 1970, Parts 42, 55.

6. See, however, W. Tidd, *The Practice of the Courts of King's Bench and Common Pleas* (1828), vol 1, p.218. for analysis of s.6 of The Sunday Observance Act 1677 (paras. 1.3, 2.18) in relation to this question. The author suggests that" process of contempt [is] of a criminal nature".

7. See para 2.18.

8. See Chapter 3 and Table to that Chapter.

9. Paras 1.5, 1.6, 6.4 - 6.7.

10. See para. 1.6.

11. See Chapter 2.

12. See paras 1.3, 1.6, 1.8, 3.4-3.11.

## 2. Sunday, Sunday Observance and the Law - Historical and Other Influences

### INTRODUCTION

2.1 In New South Wales and in many other communities around the world Sunday has special characteristics that set it apart from other days of the week. Those characteristics have been moulded by a variety of influences including religious and customary practices of ancient origin as well as more recent (but now well-established) social attitudes towards labour and leisure. Some understanding of the institutional nature of Sunday and Sunday observance and its background and history is necessary for a balanced consideration of the reform of law (even a relatively minor law such as the one here in question) that regulates a particular activity on that day. It is desirable to know why such law was enacted in the first place.

2.2 The purpose of this Chapter is to provide a perspective in relation to the diverse laws that control Sunday activities in New South Wales and in particular the laws relating to the service of legal process. For this reason it is necessary to devote some attention to the history of English legal developments, particularly from the early seventeenth century. For much of the material in paragraphs 2.3 to 2.12 we are indebted to the Ontario Law Reform Commission's detailed and thorough Report *on Sunday Observance Legislation*, presented in 1970, and to assistance given us by Rabbi Raymond Apple of The Great Synagogue, Sydney.

### HISTORICAL BASIS

#### Before Christianity

2.3 The concept of a regularly recurring Sabbath with special restrictions and rituals observed on that day, is of ancient origin. In his Introduction to *the Critical Study and Knowledge of the Holy Scriptures*, as quoted in the report of the Ontario Law Reform Commission T.H. Horne wrote:

One of the most striking collateral confirmations of the Mosaic history of the creation is the general adoption of the division of time into *weeks*, which ... has equally prevailed among the Hebrews, the Egyptians, Chinese, Greeks, Romans and northern barbarians, nations some of which had little or no intercourse with others, and were not even known by name to the Hebrews.<sup>1</sup>

However, the weeks into which time was divided did not always comprise seven days, nor were they always of equal length. Weeks were usually subdivisions of the lunar month; some communities divided the month into four, with three seven- day weeks and one eight- or nine- day week; others divided months into three, five or six parts, thereby obtaining ten-, six- or five- day weeks. A ten- day week was customary among ancient Egyptians, Greeks, Chinese and Japanese as well as some African and American Indian tribes, but almost everywhere it has long since been superseded by the Semitic seven-day week. Some writers trace a link between the notion that the phases of the moon were critical days, and the institution of a weekly day of rest when certain types of activity are specially proscribed or prescribed.

2.4 The Greeks and Romans of antiquity named the days of the week in honour of planets and deities. The first day of the week was to them "the day of the sun", the second "the day of the moon", and the seventh or last "the day of Saturn".<sup>2</sup> The names so given to days of the week have survived unchanged (except for literal translation) to the present time in many Western societies. Thus, "the day of the sun" became "Sunnandaeg" to the Anglo- Saxons, "Sonntag" to the Germans, and "Sondag" to the Swedes and Danes.<sup>3</sup> Sunday was both the product of and the proper time for the pagan practice of sun worship.

2.5 In many societies the weekly Sabbath became a day of rest for man and beast and a day of religious worship, thus assuming a different character from the evil or unlucky days which was the character given by other societies to the phases of the moon. In the Bible, the seventh-day Sabbath, independent of the phases of the moon is so firmly rooted an institution<sup>4</sup> that in Genesis 2:2-3 (and elsewhere), its commencement is dated from the creation of the world:

And on the seventh day God ended his work which he had made; and he rested on the seventh day from all his work which he had made. And God blessed the seventh day and sanctified it: because that in it he had rested from all his work which God created and made.<sup>5</sup>

2.6 The fourth of the Ten Commandments given to Moses begins (according to the Book of Exodus) with the words:

Remember the sabbath day, to keep it holy.<sup>6</sup>

The word "remember" implies that the Sabbath is a long established institution.

### **Sunday Observance After Christianity**

2.7 The observance of the Sabbath (on Saturday) had become a hallmark of Judaism by the beginning of the Christian era.<sup>7</sup> Christian belief holds that Christ died on Good Friday and that his resurrection occurred two days later on the first day of the week. Following his death Sunday soon came to be known among Christians as "the Lord's day".<sup>8</sup> While the followers of Christianity remained identified with the Jewish faith the weekly commemoration of both the Sabbath (Saturday) and the Lord's day (Sunday) by its adherents became established. It is to be remembered that the earliest centre of Christianity was Jerusalem and that the first Christians were also Jewish. It has been written that "without the Jewish heritage of observing one day in seven as holy, the weekly commemoration of the resurrection would hardly have arisen".<sup>9</sup>

2.8 This pattern persisted whilst Christianity remained predominantly Jewish. As it became predominantly gentile the Saturday Sabbath was gradually abandoned and the Sunday Lord's Day was emphasised.<sup>10</sup> Judaism however, has continued to maintain its seventh-day Sabbath whilst Islam denominated Friday as the day of public worship and observance.

### **Roman Laws for Sunday Observance**

2.9 The first formal laws requiring Sunday observance under pain of punishment "are attributed by virtually all authorities to the Roman Emperor Constantine in 321 A.D."<sup>11</sup> Constantine's edicts were more consistent with pagan sun worship than with Christian beliefs and began with the words "Let all judges and all city people and all tradesmen rest upon the venerable day of the sun."<sup>12</sup> At that time Christians numbered only about 5 per cent of the population of the Roman Empire.

2.10 However Christianity spread with such rapidity that in 380 A.D. it was made the official religion of the Roman Empire. Six years later the first civil legislation to use the term "Lord's day" was published in Rome. It began with the words:

On the day of the sun, properly called the Lord's day by our ancestors, let there be a cessation of law-suits, business and indictments ...<sup>13</sup>

### **Sunday Observance Laws Under the Holy Roman Empire**

2.11 From the fifth century onwards most of Europe was under the sway of Christendom and laws requiring the observance of Sunday as part of the Christian religion became normal.<sup>14</sup>

## **ENGLISH EXPERIENCE**

## **Sunday Observance Laws in England Before and After the Norman Conquest**

2.12 In Saxon England laws regulating behaviour on Sunday were inspired by the edicts of the Holy Roman Empire and were in force at the time of the Norman Conquest in 1066. Thereafter Sunday observance in England (and Europe generally) declined and it was not until the fifteenth century that strong legislation began to reappear.<sup>15</sup>

## **Sunday Observance Laws in England After the Reformation**

2.13 After the appearance of Protestantism post-Reformation Europe saw the assertion of a stricter and more authoritarian attitude to religious practice. From the sixteenth to the nineteenth century England created extremely restrictive Sunday observance legislation. These laws not only curtailed work commercial activities and recreation on Sunday but required open adherence to the practice and doctrines of the established Church of England.<sup>16</sup>

## **Sunday Observance Laws in England - the Seventeenth Century**

2.14 The first “modern” Sunday observance legislation was enacted in the early seventeenth century. It was a time of intense political-religious controversy between those politicians who combined with Protestant non-conformists (Calvinists) on the one hand, and those who combined with orthodox Anglicans and Roman Catholics on the other. This had a powerful effect upon legislation Holdsworth writes:

it is true that there is no necessary connection between the theories at the root of Calvinistic Protestantism and parliamentary government, any more than there is between the theories at the root of high Anglican tenets and prerogative government But ... as the reign [of James I after 1603] went on ... the successes of Roman Catholics on the Continent ... and the relaxation of the penal laws against the Roman Catholic gave to [the Calvinists] ... a greatly increased strength. [Their] demands were met not by concession but by repression. The order to read the Declaration of Sports, which struck at widespread views as to the manner of keeping holy the Sabbath day, raised so great a resistance that it was necessary to withdraw it ... religious questions took a place of constantly increasing importance in the debates of the House of Commons.<sup>17</sup>

[W]e can trace Puritanical influences in legislation directed against profane swearing, and against the profanation of the Lord s day either by doing certain kinds of work or by meetings of persons for sport out of their own parishes.<sup>18</sup>

2.15 The Sunday Observance Act 1625<sup>19</sup> was the earliest of these “modern” statutes, Originally entitled “An Act for punishing of divers abuses committed on the Lords day called Sunday”, it forbade

meetings, assemblies or concourse of people out of their own parishes on the Lord s day within this realm of England, or any dominions thereof for any sports or pastimes whatsoever.

It also prohibited bear- baiting, bull- baiting, common plays, and other pastimes by all persons ,. within their own parishes”.

2.16 The 1625 Act was followed two years later by another unofficially called The Sunday Observance Act of 1627,<sup>20</sup> which imposed additional restrictions on Sunday activity. The 1627 Act was entitled “An Act for the further reformation of sondry abuses committed on the Lords Day comonlie called Sunday”, and was aimed at “carriers, waggoners, carters, waynemen, butchers and drovers of cattle”, who were all forbidden to travel or carry on their trades on Sunday.

2.17 The statute that achieved the most far-reaching effect was The Sunday Observance Act 1677.<sup>21</sup> Section 1 of this Act related to Sunday trading and labour generally, prohibiting every tradesman, artificer, workman, labourer, “or other person whatsoever” from doing or exercising any “worldly labour, business, or work of their ordinary callings upon the Lords day”. The section also imposed restrictions upon retail trading, as did section 2 upon the behaviour of drovers, horsecourers, waggoners, butchers

and higliers. The Act (section 3) made concession to a few of the facts of ordinary life by permitting on Sunday the sale of milk before 9am and after 4pm, and the sale of meat in “inns, cookeshops or victualling houses” for people who were unable to provide their own.

2.18 As mentioned in paragraph 1.3 current New South Wales legislation governing the subject matter of this report stems from the provisions of section 6 of The Sunday Observance Act 1677, which was in the following terms:

*6. Service of process on the Lords day (exception) void- Persons serving the same liable to action -* Provided also that no person or persons upon the Lords day shall serve or execute or cause to be served or executed any writt, processes warrant, order judgment or decree (except in cases of treason felony or breach of the peace) but that the service of every such writt, processes warrant, order judgment or decree shall be void to all intents and purposes whatsoever and the person or persons soe serveing or executeing the same shall be as lyable to the suite of the partie grieved and to answere damages to him for doeing thereof as if he or they had done the same without any writt, processe warrant order judgment or decree at all.

2.19 The 1677 statute remained in force in England until 1969,<sup>22</sup> and was a model for legislation in many countries including Australia, where parts of it remain in force by one means or another to this day.<sup>23</sup>

### **Sunday Observance Laws in England - the Eighteenth and Nineteenth Centuries**

2.20 Restriction by law of Sunday entertainments and performances was introduced in England in the eighteenth century by The Sunday Observance Act 1780.<sup>24</sup> Prohibitions under this act forbade public entertainment including the practice of opening places of amusement on Sunday evenings and holding debates upon biblical texts “by incompetent persons”.<sup>25</sup> Places kept for these purposes for which an admission fee was charged were deemed to be disorderly houses and their keepers were liable to pay a fine of 200 for each day that the place was kept open Other penalties, down to 50, were imposed on their managers, door- keepers, and persons concerned in advertising them.<sup>26</sup> The gravity of these offences as seen by Parliament, may be gauged from the fact that 100 was some three hundred times more than a typical average weekly wage of an agricultural or industrial worker (six or seven shillings).

2.21 Statutory reform in the nineteenth century removed some of the inconveniences to society caused by the 1677 Act. The Sunday Observation Prosecution Act 1871<sup>27</sup> was passed for the express purpose of limiting prosecutions under the 1677 Act. Section 1 made prosecution more difficult by requiring the previous consent in writing either of the chief officer of the police district in which the offence was committed, or of two justices of the peace, or of a stipendiary magistrate having jurisdiction in the place where the offence was committed. A justice of the peace or a magistrate who gave such a consent was prohibited from hearing the case itself.<sup>28</sup> The 1871 Act has been described as having the effect of virtually abolishing the Sunday Observance Acts of the seventeenth century insofar as Sunday trading was concerned.<sup>29</sup>

2.22 Sunday observance statutes also had an effect upon the laws of contract. At common law a contract made on a Sunday is valid, but it was held in 1827, pursuant to The Sunday Observance Act 1677, that contracts made and completed on Sunday in relation to “any business” were unlawful void and invalid.<sup>30</sup> On the other hand, contracts not within the ambit of the Act could, in principle, be enforced even though made on a Sunday.

### **Sunday Observance Laws in England - the Twentieth Century**

2.23 In England the strictness of the Sunday observance statutes was gradually relaxed in the twentieth century. However, a deal of regulation by statute still persists in relation to retail trading, entertainment sport and working conditions.<sup>31</sup> In 1906 a joint Select Committee of both Houses of Parliament inquired into Sunday trading.<sup>32</sup> In 1947 the Gowers Committee reported on the closing hours of shops.<sup>33</sup> In 1964 another Government Committee, under the chairmanship of Lord Crathorne, produced a

substantial report on the Law of Sunday Observance.<sup>34</sup> Following the Crathorne report the British Parliament in 1969 repealed the bulk of the Sunday observance statutes enacted prior to the twentieth century. The Statute Law (Repeals) Act 1969 specifically repealed,<sup>35</sup> so far as unrepealed to that time, The Sunday Observance Act 1625, the so-called Sunday Observance Act of 1627, The Sunday Observance Act 1677 and The Sunday Observation Prosecution Act 1871.

### England - Effect of Sunday on Parliamentary and judicial Proceedings

2.24 Parliament in England has on occasions sat on Sunday in times of national emergency, and Saturday sittings have taken place which have extended into the early hours of Sunday.<sup>36</sup>

2.25 The courts developed their own principles concerning the validity of judicial activities on Sunday. In 1966, in proceedings entitled *In re "N" (INFANTS)*,<sup>37</sup> Mr. Justice Stamp of the Chancery Division of the High Court of justice, traced the history of English common law and equitable rules governing judicial acts on Sunday. The particular litigation involved a parental dispute over the custody of two schoolchildren who, by agreement between their parents, had been at school in Switzerland. On Saturday, 15 October 1966, the father removed them from the school and took them to Australia. On the next day, Sunday, the mother applied in England as a matter of urgency to a High Court Judge at his private residence, for an order that the father return the children to the school or bring them into England. The judge made the order sought. Subsequently, doubt was expressed by officers of the court as to the validity of the order because it had been made on a Sunday. An application for directions was then made by the wife to the Chancery Division to determine the question. Mr. Justice Stamp held that the interlocutory injunction was not invalid or defective because it had been made on a Sunday. In the course of his judgment His Lordship made the following observations:

The authorities show, beyond doubt, that at common law, Sunday, like other holy days, was a *dies non juridicus*:<sup>38</sup> see *Mackalley's Case* a case decided in 1611, which was considered to be of so much importance that all the judges in England were called together to consider whether a man could lawfully be arrested on Sunday and where, according to the report, it was held that "... no judicial act ought to be done on that day, but ministerial acts may be lawfully executed on the Sunday, for otherwise peradventure they can never be executed", *Swann v. Broome*, where Lord Mansfield held that by law a valid judgment could not possibly be given on a Sunday and, therefore, a judgment could not be supposed to have been given. See also Lord Coke: "*Dies non juridici sunt dies Dominici*",<sup>39</sup> the Lords days, throughout the whole year." See Blackstone's Commentaries, 16th ed. (1825), Vol III, at p.276:.. no proceedings can be held, or judgment can be given or supposed to be given on the Sunday and see also *Harrison v. Smith*, where it was held that a judgment for want of a plea could not be signed on a *dies non juridicus* at common law. It is clear that at common law Sunday was not to be profaned by the tumult of forensic litigations.

I accept the submission that acts which in the language of common lawyers, were described as judicial acts could not, and subject to statute providing to the contrary, cannot, now be lawfully done on Sunday.<sup>40</sup>

2.26 Mr Justice Stamp held that although Sunday was a *dies non juridicus* at common law, the equitable jurisdiction of the Lord Chancellor was historically a separate jurisdiction that could be exercised on Sunday. He also found that this jurisdiction could still be exercised by judges whose powers include applying the rules of equity. The power to make the orders sought in the instant case was derived from equitable jurisdiction and could therefore be properly exercised on Sunday.

2.27 It will be seen from *In re "N" (INFANTS)* that at common law "ministerial acts" (which include the service of court process) may be lawfully be carried out on Sunday. This reservation justifies the limited meaning given to the expression *dies non juridicus* as "a day on which no judicial act can lawfully be done". Without such an interpretation the word *juridicus* might well extend to more acts than judicial acts, for example to the service of process, which some might regard as covered by the expression "judicial administration". In the case in question the court decided that although Sunday was a *dies non juridicus* at common law the development of the equitable jurisdiction of the Lord Chancellor had taken a course under which when rules of equity are applicable, an injunction may be granted on Sunday.

## England - Sunday and Labour Laws

2.28 In 1788 Parliament enacted the first of the statutes that were to be woven into another strand in the thread of Sunday observance- the regulation of Sunday labour conditions aimed to preserve the interests of employees. In that year “An Act for the Better Regulation of Chimney Sweepers and their Apprentices”<sup>41</sup> provided that every master chimney sweep was obliged to cause his “apprentice to be thoroughly washed and cleansed from soot and dim ... and to attend the public worship of God on the Sabbath Day.....”

2.29 In paragraph 5.2 we comment on the changed character of Sunday to day as compared with the past three centuries, and the recurrent social habit of moulding existing social conventions to new circumstances. Comparable adaptation of Sunday observance is disclosed by paragraphs 2.3 to 2.11. In England the development of the industrial revolution saw the emergence of new and positive industrial attitudes towards Sunday and existing rules of Sunday observance. There was an increasing demand for Sunday retail trading. As the Crathorne Report observes, many workers did not receive their wages until Saturday night and because of the long working day their only opportunity for shopping was on Sunday.<sup>42</sup> At the same time, the need for at least one day of rest or leisure for workers led to pressure to restrict work on Sunday by means of laws that controlled retail trading, delivery of goods, and other activities and imposed “penalty” rates for Sunday work. In the result a great deal of industrial law and regulation has evolved around Sunday over the past 150 years.<sup>43</sup>

## OTHER COUNTRIES - SUNDAY AND LABOUR LAWS

2.30 The 1921 Convention of the international Labour Organisation relating to weekly rest in industrial undertakings recognised the possibility of decentralisation of laws relating to the requirement of one days rest in seven when it provided in Article 2(3) that the day of rest “shall wherever possible be fixed so as to coincide with the days already established by the traditions or customs of the country or district”. As pointed out by the Law Reform Commission of Canada in its report *Sunday Observance* in 1976, it was conceivable (but not probable) that the day of rest should be stipulated as a day other than Sunday. The Canadian Commission continued:

In fact only one of the many nations which are signatories of the 1921 ILO Convention the State of Israel has specified a day other than Sunday, although clearly there are federal countries like the United States, Australia and Germany where the substantive rules of Sunday regulation are determined at the local rather than the national level.<sup>44</sup>

2.31 In its lengthy historical review of international Sunday observance in 1970 the Ontario Law Reform Commission observed that

[t]he principle of a weekly rest of at least one day in seven is provided by law in practically every country in the world. The International Labour Organisation has established weekly rest conventions for industry and for commerce and offices.<sup>45</sup>

There are very few countries in the world in which Sunday has not been chosen as the uniform pause day by legislation.<sup>46</sup>

The Ontario report cites secular and non-Christian societies such as Soviet Russia, Yugoslavia, and Japan as examples of those who have selected Sunday for this purpose.<sup>47</sup>

## FOOTNOTES

1. Ontario Law Reform Commission Report on Sunday *Observance* Legislation (1970), p.73.
2. Oxford English Dictionary, (1933), vol X. p.156: Id., vol VI, p.601: Id., vol IX, p.125.

3. *Id.*, vol X p.156.
4. Ontario Law Reform Commission note 1 above, p.71.
5. *Id.*, p.69.
6. Old Testament Exodus 20:8-11: see also Deuteronomy 5:12 for an alternative beginning of the Fourth Commandment.
7. See New Testament, Mark 2:23-28; Luke 6:6-11; John 5:1-16.
8. New Testament first reference in Revelations 1: 10: see note 1 above, p.72.
9. Ontario Law Reform Commission note 1 above, p.72.
10. *Ibid.*
11. *Id.*, p.383.
12. *Ibid.*
13. *Id.*, p.385.
14. *Id.*, pp.74, 387, 388
15. *Id.*, pp.391, 392.
16. Law Reform Commission of Canada, Report on *Sunday Observance* (1976), p.8.
17. Sir William Holdsworth, *A History of English Law* (1966 reprint), vol VI, pp.129-130.
18. *Id.*, vol IV, p.514: see also vol VI, p.404.
19. 1 Charles 1 c.1. The modern title was given by the Short Titles Act 1896 (Eng.) (59 & 60 Vic. c.14).
20. 3 Charles 1 c.2.
21. 29 Charles 2 c.7: "An Act for the better Observation of the Lords day commonly called Sunday."
22. See para-2.23.
23. See Chapter 4 generally.
24. 21 Geo.3 c.49: "An Act for preventing certain abuses and Profanations on the Lord's Day, called Sunday."
25. Sir William Holdsworth, note 17 above, vol XI, p.547.
26. The Sunday Observance Act 1780, ss. 1,3; see also para. 3.5.
27. 34 & 35 Vic. c.87.
28. *Id.*, c. 1.
29. *Encyclopaedia Britannica* (1962 ed), vol 21, p.566.
30. *Smith v. Sparrow* (1827) 4 Bing 84:130 ER 700, per Best C.J., Park Burrough and Gaselee JJ. Respectively at pp.701-702.



31. For summary of English law, see note 1 above, Appendix 111, at pp. 419-424.
32. Report of the joint Select Committee (House of Commons) (1906), p.275.
33. *Report of Committee of Inquiry into the Closing Hours of Shops* (Cmnd. 7105, 1947).
34. *Report of the Departmental Committee on the Law on Sunday Observance* (Cmnd. 2528, 1964).
35. See s.1 and Part IV of the Schedule to the act. The repealed acts include the whole of the Sunday Observance Act 1677 "so far as unrepealed" and other Acts of the fifteenth, seventeenth nineteenth and twentieth centuries.
36. *Encyclopaedia Britannica* (1962 ed), Vol 21, p.566.
37. [1967] CLD. 512.
38. "*Dies non juridicus*" means "a day on which no judicial act or act involving judicial administration maybe performed".
39. "*Dies non juridici sunt dies Dominici*" means "Sundays are days on which no judicial act or act involving judicial administration may be performed".
40. [1967] Ch.D. 512, at p.523.
41. 28 Geo.3 c.48 (1788), see note 1 above, p.401.
42. Crathorne Report note 34 above, p.4.
43. See note 1 above, p.419 *et seq.*
44. Law Reform Commission of Canada, note 16 above, p.56.
45. Ontario Law Reform Commission note 1 above, p.265.
46. *Id.*, p.269.
47. *Id.*, p.270.

### 3. Sunday - the Present Law in New South Wales

#### PREVIOUS WORK OF THIS COMMISSION

3.1 In November 1967 this Commission presented a report on Imperial (British) Acts still in force in New South Wales.<sup>1</sup> Some provisions of the Imperial Acts described in the report were plainly still in force in New South Wales, while the status of others was less obvious because of inappropriate language, obsolescence or other reasons. The report discussed, inter *alia*, The Sunday Observance Act 1625,<sup>2</sup> The Sunday Observance Act 1627,<sup>3</sup> and The Sunday Observance Act 1677.<sup>4</sup> The Sunday Observance Act 1780 had been repealed in the preceding year by the Sunday Entertainment Act 1966.<sup>5</sup>

3.2 This Commission took the view that the 1625 Act did not apply in New South Wales because its application depended upon the existence of parishes in the English sense and in any event it appeared to have been repealed in part by the Sunday Entertainment Act, 1966, section 7.<sup>6</sup> The 1627 Act was therefore considered to be obsolete.<sup>7</sup>

3.3 The Act of 1677 related to Sunday trading and labour generally. *In Ex parte Rogerson*, an 1888 decision of the Full Court of the Supreme Court of New South Wales, the 1677 Act was held to be in force in New South Wales, in addition to a local statute restricting Sunday trading.<sup>8</sup> In our 1967 report we made the following comment on the 1677 Act:

The only portion of the Statute which we recommend for reproduction is that portion of section 6 which relates to service of process on the Lord s Day.<sup>9</sup>

No detailed reasons were provided for this recommendation. In the event, our recommendation was accepted, and the 1677 Act was repealed by the Imperial Acts Application Act 1969.<sup>10</sup> Section 41 of the 1969 Act effectively reproduced section 6 of the 1677 Act.<sup>11</sup> At the time of our report neither the Federal Court nor the Family Court had been created by the Commonwealth and in general there were few exceptions to the rule prohibiting service of civil process on Sunday.

#### NEW SOUTH WALES - PRESENT LEGAL RESTRICTION ON ACTIVITIES ON SUNDAY

##### Service and Execution of Legal Process

##### Courts of the State of New South Wales

3.4 Criminal process be served and executed in New South Wales on Sunday.<sup>12</sup>

3.5 Subject to the matters mentioned in paragraph 1.6 no civil process of the Supreme Court,<sup>13</sup> District Court,<sup>14</sup> or a Local Court<sup>15</sup> may be served on Sunday. Civil process of the Supreme Court and Local Courts may be executed on Sunday, but execution of civil process of the District Court on that day is forbidden by the District Court Rules.<sup>16</sup>

3.6 It has been suggested in one text that the word "service" in section 41 of the Imperial Acts Application Act, 1969 may include "execution".<sup>17</sup> If this were so the result would be to prohibit execution of process on Sunday. We do not think this interpretation is correct, since there is a clear distinction between the procedures involved in service and those involved in execution. This distinction is recognised by the Supreme Court Rules. The respective writs covered by the expression "writ of execution" in Part 44 rule 2 are each addressed "to the Sheriff" and require him to levy execution against the land, goods, or other property, as the case maybe, of the judgment debtor. Execution of a judgment

or order is thus a procedure of a different kind from the service of process, whether initiating process such as a writ, or other process such as a subpoena.

### **Federal Courts: the Family Court**

3.7 Process of the Family Court of Australia may be served as well as executed on Sunday. Regulation 28 of the Family Law Regulations provides:

- (1) Service of applications, notices, summonses, decrees or other documents in proceedings in the Family Court may be effected on any day other than Christmas Day or Good Friday.
- (2) A warrant may be executed at any time.

### **Federal Courts: the Federal Court of Australia**

3.8 Process of the Federal Court of Australia may also be served as well as executed on Sunday. Order 7 of the rules of the Federal Court regulates service of process and contains no restriction on the days upon which service may occur. Orders 37 and 47 deal with the enforcement and execution of judgments and orders, and contain no restriction upon the days upon which these procedures may occur.

### **Federal Courts: Bankruptcy**

3.9 The question of the validity of service of a bankruptcy notice on Sunday was answered by a decision of the Federal Court in 1980 in *Re Hopper, Ex parte Esanda Ltd.*<sup>18</sup> Mr. Justice McGregor noted that the Bankruptcy Rules (which were made under the Bankruptcy Act 1966 (Cth)) make no direct reference to the service of a bankruptcy notice on Sunday. His Honour considered that the rules

are comprehensive, deal fully with service and do not admit... that there has been any lack of provision on any subject which is then to be found elsewhere.<sup>19</sup>

On that basis he held that the rules do not forbid the service of a bankruptcy notice on Sunday. Service of bankruptcy notices and creditors' petitions is regulated by Division 3 of Part 11 of the Bankruptcy Rules, while "service of process" is regulated by Division 4 of Part IX which also lacks direct reference to service on Sunday. The reasoning in *Hopper* would seem to be applicable to bankruptcy process generally so that service of all such process may be made on Sunday.

### **Federal Courts: the High Court of Australia**

3.10 The rules of the High Court of Australia forbid the service of the courts process (except for warrants) on Sunday. Rule 9(1) of Order 60 provides:

Service of pleadings, notices, summonses, orders, rules and other documents, other than a warrant, shall not be made on Sunday, Christmas Day or Good Friday.

It is significant that the notes to this rule (the present High Court Rules came into force on 1 January 1953)<sup>20</sup> refer to rule 12 of Order 67 of the rules of the Supreme Court in England.<sup>21</sup> That rule, at the time of making the present High Court Rules, related to the service of "instruments" in Admiralty actions, and contained the following words:

No instrument except a warrant shall be served on a Sunday, Good Friday, or Christmas Day.

The notes to rule 12 indicated that it originated in 1859.<sup>22</sup> In 1953 in England, service generally of court process was still covered by section 6 of The Sunday Observance Act 1677.<sup>23</sup> Since the repeal of that Act<sup>24</sup> in 1969, the rules of the Supreme Court of England have contained specific reference to the service of process on Sunday, imposing a general prohibition on such service but allowing the court to authorise it in urgent cases.<sup>25</sup> To summarise, it may be said that the present High Court rule restricting

the service of process on Sunday was based on an English Supreme Court rule which is no longer in force and which itself had a much earlier origin.

### **Tabulation**

3.11 We attach to this Chapter a Table that shows in relation both to the courts of the State of New South Wales and the courts of the Commonwealth the process that may and may not be served and executed on Sunday.

### **Sunday Entertainment**

3.12 The Sunday Entertainment Act 1966, in addition to repealing the Act of 1780, authorises public entertainments and meetings after 12.30 pm on Sunday (and earlier by special permission of the Minister for Leisure Sport and Tourism). "Entertainment includes "amusement, exhibition sporting event or contest". This legislation was intended, among other things, to permit the opening of cinemas and the conducting of public sporting fixtures on Sunday (except for horse race meetings which are forbidden by section 53 of the Gaming and Betting Act, 1912).

### **Shops Trading on Sunday**

#### **Prior to 1962**

3.13 Prior to 1962, The Sunday Observance Act 1677, supplemented by specific New South Wales statutory prohibitions, operated to keep shops shut on Sunday.<sup>26</sup> The Factories, Shops and Industries Act, 1962<sup>27</sup> introduced a much more permissive approach to Sunday trading.

#### **Scheduled Shops, Small Shops and General Shops**

3.14 Section 84 of the Factories, Shops and industries Act, 1962 permits "scheduled shops" and "small shops" to open on Sunday.<sup>28</sup> Shops other than "scheduled shops" and "small shops" may not open on Sundays. In this report they are referred to as general shops.

General shops which are not defined, but include butchers and hairdressers, and supermarkets, jewellery, hardware, electrical footwear and clothing shops, may not open on Sunday unless they are "small shops".

"Scheduled shops", that is, those classes of shops (mainly food shops) listed in Schedule III to the Factories, Shops and Industries Act, 1962, may open on Sunday.

"Small shops" may also open on Sunday. "Small shops" are defined by section 76A of the Act as having not more than two owners who must be actively engaged in the business and must have no interest in another shop.

Bread can be sold in small shops and scheduled shops on Sunday, but under the awards governing the working hours of bakers throughout New South Wales, cannot be baked on Sunday.

#### **Pawnbrokers**

3.15 Under section 27(1) of the Pawnbrokers Act, 1902, pawnbrokers are prohibited from carrying on business on Sunday, Christmas Day or Good Friday.

#### **Sale of Alcoholic Liquor**

3.16 Since 1979, the Liquor Act 1912 has provided that the holder of a publican's licence or Australian wine licence may keep the licensed premises open between the hours of 12 noon and 10 pm for the sale of liquor upon any Sunday, other than a Sunday on which Christmas Day (or a day proclaimed in the Government Gazette) falls.<sup>29</sup>

## **An Inquiry into Retail Trading Hours**

3.17 An inquiry into retail trading hours in New South Wales is currently taking place under the auspices of the Department of Industrial Relations. It is anticipated that submissions will be made to it supporting the enlargement of retail trading on Sunday.

### **WORKING ON SUNDAY - EMPLOYEES**

3.18 Some industries, such as certain manufacturing industries must function twenty-four hours-a-day, seven days-a-week. In such cases "shift allowances" are usually included in the applicable industrial awards for persons required to work on Sunday. Most other employees are covered by industrial awards which provide overtime rates so that work on Sunday entitles them to be paid at rates such as "time and a half", "time and three-quarters", or most commonly, "double time". For obvious reasons, penalty rates of this kind are not included in awards applicable to employees of shops or businesses that are forbidden by law to trade on Sunday. Accordingly, it could be argued that industrial laws in New South Wales do not aim to prohibit or prevent the performance of paid work on Sunday, but may have the effect of discouraging such work by means of higher award wages.<sup>30</sup>

### **OFFICIAL INQUIRIES IN NEW SOUTH WALES RELATING TO SUNDAY OBSERVANCE**

3.19 Official inquiries held in New South Wales in relation to Sunday observance have concerned liquor trading<sup>31</sup> and retail trading hours.<sup>32</sup> Neither of these reports examined the historical background behind Sunday as a day of rest and relaxation. We referred above to a pending inquiry into retail trading hours.<sup>33</sup>

3.20 The Anti-Discrimination Board anticipates that it will issue in 1983 a report on "Discrimination and Religious Conviction." That report we understand, will examine the gradual breaking down of laws placing Saturday and Sunday in a special category on the basis of religious significance.

### **FOOTNOTES**

1. New South Wales Law Reform Commission Report on the Application of Imperial Acts(LRC. 4, 1967).
2. *Id.*, at pp.93, 145 (s.8): see also para. 2.15.
3. *Ibid.*: see also para. 2.16.
4. *Id.*, at pp.57-58, 143-144 (s.5), 162 (s.41); see also paras. 2.17-2.19.
5. Sunday Entertainment Act 1966, s.7.
6. New South Wales Law Reform Commission note 1 above, p.93.
7. *Ibid.*
8. (1888) 9 NSWLP, 30, at p.34, per Darley C.J.
9. New South Wales Law Reform Commission note 1 above, p.58.
10. Section 5(2) and the First Schedule.
11. See paras. 1.3, 2.18.
12. Imperial Acts Application Act. 1969, s.41; see also paras.1.3 *et seq.*

13. *Ibid.*

14. District Court Rules, Part 8 rule 4.

15. Imperial Acts Application Act. 1969. s.41. The commencement of the Local Courts Act, 1982 has not yet been proclaimed. Upon that commencement courts of Petty Sessions will become known as Local Courts. Such courts are in this report called Local Courts and the courts of Petty Sessions (Civil Claims) Act, 1970 is referred to as the Local Courts (Civil Claims) Act, 1970, its prospective title.

16. District Court Rules, Part 34 rule 10.

17. S.V. Jackson and G. Byrom *Courts of Petty Sessions (Civil Claims) Practice* (2nd ed. 1980), para. 380.

18. (1980) 43 FLR. 452.

19. *Id.*, at p.455.

20. High Court Rules, Order I rules 2, 3.

21. *Id.*, Order 60 rule 9(1).

22. *The Annual Practice 1952* (Eng.), p.1536.

23. *Id.*, p.65.

24. See para. 2.23.

25. See para. 4.19; see also *The Supreme Court Practice 1982* (Eng.), pp.1148-1149 (RSC, 0.65 r.10).

26. See *Ex parte Rogerson* (1888) 9 NSWLF, 30, at pp.30-31; see also the Police Offences Act 1901, s.61.

27. Act No.43, 1962.

28. in this regard, see the Report of the Committee of Inquiry into *Retail Trading Hours* (N.S.W.) (1977).

29. in this regard, see the Report of the Select Committee of the Legislative Assembly upon *Liquor Trading* (1979), pp.18-19.

30. See generally, C.P. Mills, *Industrial Law-New South Wales* (4th ed. 1977), para. 282; see also C.P. Mills and G.H. Sorrellt *Federal Industrial Laws* (5th ed. 1975), paras.212-221, esp. Paras. 219, 221.

31. See note 29 above.

32. See note 28 above.

33. See para.3.17.

### **Table to Chapter 3**

(See paragraph 3.11)

New South Wales

	Process of NSW Supreme Court					Process of NSW District Court				Process of NSW Local Court			
	Service	Criminal Execution	Service	Civil Execution	Service	Criminal Execution	Service	Civil Execution	Service	Criminal Execution	Service	Execution	Civil
Monday to Friday	+	+	+	+	+	+	+	+	+	+	+		+
												Except between 8 pm on one day and 7 am the next day <sup>1</sup>	
Saturday	+	+	+	+	+	+	+	+	+	+	+		+
												(Same exception as above)	
Sunday	+	+	x <sup>2</sup>	+	+	+	x <sup>3</sup>	x <sup>4</sup>	+		x <sup>2</sup>		+
												(Same exception as above)	
Public Holidays	+	+	+	+	+	+	+ All public holidays except Christmas Day and Good Friday <sup>3</sup>	+ All public holidays except Christmas Day and Good Friday <sup>4</sup>	+	+	+		+
												(Same exception as above)	

1. Local Courts (Civil Claims) Act, 1970, s.61.

2. Imperial Acts Application Act 1969, s.41.

3. District Courts Rules, Part 8 rule 4.

4. District Courts Rules, Part 34 rule 10.

The symbol “+” means that service or execution (as the case may be) of process may be carried out.

The Symbol “x” means that service or execution (as the case may be) of process may not be carried out.

### Australia

	Process of Family Court		Process to High Court		Process of Federal Court (including bankruptcy)	
	Service	Execution	Service	Execution	Service	Execution
Monday to Friday	+	+ <sup>2</sup>	+	+	+	+
Saturday	+	+ <sup>2</sup>	+	+	+	+
Sunday	+	+ <sup>2</sup>	x <sup>3</sup>	+	+	+
					As to service of bankruptcy notice on Sunday, see <i>re Hooper</i> (1980) 43 FLR 452	
Public Holidays	+	+ <sup>2</sup>	+	+	+	+
			Except Christmas Day and Good Friday <sup>4</sup>			

### Notes:

1. Family Law Regulations, reg.28(1).

2. Family Law Regulations, reg.28(2).

3. High Court Orders, Order 60 rule 9(1).

The symbol “+” means that service or execution (as the case may be) of process may be carried out.

The symbol “x” means that service or execution (as the case may be) of process may not be carried out.



## 4. Sunday - the Present Law Outside New South Wales

### OTHER STATES AND TERRITORIES OF AUSTRALIA

#### Victoria

4.1 In Victoria the Supreme Court Act 1958<sup>1</sup> preserves the effect of section 6 of The Sunday Observance Act 1677.<sup>2</sup> Section 62(1 B) of the Supreme Court Act 1958 provides:

Service of any writ, process, warrant, order, judgment or decree (except in cases of an offence, breach of the peace or any warrant writ or process for the apprehension of any person) upon a Sunday shall be void.

4.2 The Sunday Entertainment Act 1967 repealed in Victoria the English statute of 1780<sup>3</sup> and permitted cinemas to open after 1.30 pm on Sunday. The Act confers powers upon the Chief Secretary in relation to the issue of permits for entertainment on Sunday.<sup>4</sup> In granting a permit the Chief Secretary takes into account the public interest, whether church services are being held in the vicinity, any objection raised by the municipality concerned the nature of the entertainment and its cost.<sup>5</sup>

4.3 The opening of shops in Victoria on Sunday is regulated by the Labour and Industry Act 1958. That Act permits petrol shops and shops of the classes or kinds mentioned in the Fifth Schedule to be open for the whole of the day, but with those exceptions. requires shops to be closed on Sunday.<sup>6</sup> The Fifth Schedule is similar to but not identical with the Third Schedule to the Factories, Shops and Industries Act 1962 (NSW).<sup>7</sup> In addition the Minister may grant an exemption from Sunday closing rules for a holiday resort.<sup>8</sup> Butchers' shops cannot open on Sunday.<sup>9</sup>

#### Tasmania

4.4 The law relating to Sunday observance in Tasmania was examined in 1967 in the Phillips Report.<sup>10</sup> The Sunday Observance Act 1968 was thereafter enacted. Section 5 provides that service of process on Sunday is void with certain exceptions which include cases of crime and breach of the peace.

4.5 The Sunday Observance Act 1968 prohibits people from carrying on their ordinary calling or doing any work for reward on Sunday, but there are many exceptions. These include public utilities, transportation agriculture, fishing, the provision of food in hotels and restaurants, sports and entertainments.

#### Western Australia

4.6 Section 6 of The Sunday Observance Act 1677 appears to prohibit service of civil process of the Supreme Court on Sunday. The rules of the Local Courts in Western Australia provide that no summons, warrant or other process (except a warrant of commitment) shall be served or executed on Sunday, Christmas Day or Good Friday.<sup>11</sup>

4.7 Under section 3(2) of the Sunday Entertainments Act 1979 public entertainments on Sunday are restricted to cases for which the Minister gives his permission.

4.8 Under the Factories and Shops Act 1963-1981, shops other than "exempted shops", privileged shops" and "small shops" must close on Sunday. "Exempted shops" are similar to scheduled shops" in New South Wales and "small shops" are similar to "small shops" in New South Wales.<sup>12</sup>

#### Queensland

4.9 In Queensland The Sunday Observance Act 1677, prohibits service of civil process on Sunday. The Queensland Law Reform Commission in a Working Paper,<sup>13</sup> in relation to Imperial statutes in force in Queensland, has recommended<sup>14</sup> that in lieu of the 1677 legislation a provision be enacted whereby service of civil process upon a Sunday shall be void. The Commission has offered no specific reason or principle for this recommendation.<sup>15</sup>

4.10 The Factories and Shops Acts 1960-1975 provide that the occupiers of “exempted shops” (which include chemist shops, book stores, bread shops, fruit shops, restaurants, fish shops and service stations) may agree among themselves as to their trading hours.<sup>16</sup> “Exempted shops” need not comply with section 61 of the Acts, which operate to preclude all other shops from opening on Sunday.

4.11 Sunday entertainment in Queensland is regulated by local government authorities under section 30 of the Local Government Act 1936-1982.

### **South Australia**

4.12 Service on Sunday of civil process of the Supreme Court of South Australia is prohibited by The Sunday Observance Act 1677. The rules of the South Australian Local Courts provide that no process shall be served on Sunday, Christmas Day or Good Friday.<sup>17</sup>

4.13 The Shop Trading Hours Act 1977-1980 requires shops other than “exempt shops” to be closed on Sunday.<sup>18</sup> “Exempt shops” include chemists’ shops, restaurants and newsagencies.<sup>19</sup>

4.14 The Places of Public Entertainment Act 1913-1972, which repealed the British statute of 1780,<sup>20</sup> empowers the Minister to grant a permit authorising the holding of public entertainment on Sunday. However, the Minister must first consider the following:

any increase in the number of persons working on Sunday,

the practice existing before the Act was passed;

any disturbance to the locality.<sup>21</sup>

### **Australian Capital Territory**

4.15 In 1970 the Joint Committee on the Australian Capital Territory issued a report on Sunday observance.<sup>22</sup> The report did not deal with service of civil process on Sunday. It was subsequently implemented in relation to trading hours and Sunday entertainment. In August, 1982 the report of a Parliamentary Joint Committee was issued recommending the relaxation of Sunday trading hours.<sup>23</sup>

### **Northern Territory**

4.16 The Supreme Court Rules of the Northern Territory are silent on the matter of service of civil process on Sunday, but in the Local Courts, process cannot be served or executed on Sunday, Christmas Day or Good Friday.<sup>24</sup>

4.17 In addition to the specific rules applicable to Local Courts, The Sunday Observance Act 1677 still applies as it does in South Australia, to prohibit service of civil process.<sup>25</sup>

## **OTHER COMMONWEALTH COUNTRIES**

### **England**

4.18 The Crathorne Report of 1964<sup>26</sup> did not deal with service of civil process on Sunday, but did recommend a general relaxation of entertainment and trading restrictions on Sunday. As a

consequence, parts of the report were adopted by the enactment of the Sunday Cinema Act 1972 and the Sunday Theatre Act 1972.

4.19 Since the repeal in England in 1969 of The Sunday Observance Act 1677, both the rules of the Supreme Court and the County Court Rules have introduced specific reference to service of process on Sunday.<sup>27</sup> These rules modify the prohibition embodied in section 6 of the 1677 Act by providing for leave to be granted to serve process in urgent cases. For example, rule 10 of Order 65 of the Supreme Court Rules provides:

(1) No process shall be served or executed within the jurisdiction on a Sunday except in case of urgency, with the leave of the Court

(2) For the purposes of this rule" process" includes a writ judgment notice, order, petition originating or other summons or warrant.

### **Canada**

4.20 In 1976 the Law Reform Commission of Canada issued its report on Sunday observance.<sup>28</sup> That report proposed that the federal Lords Day Act 1906 should be repealed and that the Provinces and Territories should be free to enact independent secular measures respecting the observance of Sunday. It did not deal specifically with service of process on Sunday.

4.21 We are advised that the Canadian Law Reform Commissions report has not been implemented through legislation.<sup>29</sup> Following the report, the Canadian government did offer to the Provinces to repeal the Lords Day Act 1906 if they were prepared to implement their own legislation. However, despite two Federal - Provincial conferences, the Provinces have yet to take legal action.<sup>30</sup>

### **Canada - Province of Ontario**

4.22 The Ontario judicature Act<sup>31</sup> provides that no person upon the Lords Day shall serve or execute, or cause to be served or executed any writ process, warrant order or judgment except in cases of treason felony, or breach of the peace, and that such service on the Lords Day is void. We are advised that this Act is under review by the Ministry of the Attorney General and that present thinking is to permit service on a Sunday in cases of urgency.<sup>32</sup>

### **New Zealand**

4.23 In New Zealand service of civil process of the Supreme Court<sup>33</sup> and the District Court<sup>34</sup> is not permitted on Sunday.

## **FOOTNOTES**

1. Supreme Court Act 1958 (Vic.), s.62(1 B).
2. See paras 1.3, 2.18.
3. 21 Geo.3 c.49; see paras.2.20, 3.12.
4. Sunday Entertainment Act 1967 (Vic.), s.9.
5. Id., s.7.
6. Labour and Industry Act 1958 (Vic.), s.80.
7. See para.3.14.

8. Labour and Industry Act 1958 (Vic.), s.80A.
9. *Id.*, s.81.
10. Report of the *Board of Inquiry on Sunday Observance in Tasmania* (1967).
11. Western Australian Local Court Rules, Order 38 rule 14.
12. See para.3.14.
13. Queensland Law Reform Commission Working Paper in Relation to an Examination of the Imperial Statutes (QLRC W.23, 1979).
14. *Id.*, p.2, cl9.
15. See also para.6.9.
16. Factories and Shops Acts 1960-1975 (Qld.), ss.60, 63.
17. Rule 53.
18. Shop Trading Hours Act 1977-1980 (SA), s.53.
19. *Id.*, s.4.
20. Note 3 above.
21. Places of Public Entertainment Act 1913-1972, (SA), s.20.
22. Joint Committee on the Australian Capital Territory, Report on *Sunday Observance in the Australian Capital Territory* (1971).
23. Joint Committee on the Australian Capital Territory, *Report on Retail Trading Hours in the ACT* (1982).
24. Northern Territory Local Court Rules, rule 24.
25. The Northern Territory was part of the Colony of New South Wales until 1860 when it became part of South Australia. It was transferred to the Commonwealth in 1911 and became self-governing in 1978. Laws in existence in the Territory at that time were continued by the Northern Territory (Self-Government) Act, 1978. These included The Sunday Observance Act 1677.
26. Report of the Departmental *Committee on the Law on Sunday Observance* (Cmnd 2528, 1964): see also para 2.23.
27. See Order 65 rule 10 of the Rules of the Supreme Court and Order 7 rule 3 of the County Court Rules 1981; see also para 3.10.
28. Law Reform Commission of Canada, *Report on Sunday Observance* (1976).
29. Letter from Law Reform Commission of Canada, dated March 17, 1983.
30. *Ibid.*
31. *judicature Act* RSO 1980, c.223, s.132.
32. Letter from Ontario Law Reform Commission dated March 9, 1983.

33. New Zealand Code of Civil Procedure, rule 33.

34. District Courts Rules 1948, rule 86.

## 5. Sunday Observance and Service of Process - Our Conclusions

### SUNDAY - A DAY OF REST AND RELAXATION

5.1 It is clear that Sunday is regarded in Australia and other Western communities as a day of rest and recreation for citizens. Sunday has this character for diverse historic reasons, alluded to in Chapter 2. In this Chapter we consider whether the reasons for its observance today are such that service of civil process on Sunday should continue to be prohibited by law.

### RELIGIOUS AND SECULAR INFLUENCES

5.2 The Sunday observance legislation of the English Parliament in the seventeenth and eighteenth centuries institutionalised, in the furtherance of religious beliefs, the restriction and repression on Sunday of normal weekday activities.<sup>1</sup> These laws were adopted or copied in other countries including Canada and Australia.<sup>2</sup> New South Wales inherited much of the English legislation<sup>3</sup> and also enacted its own Sunday observance statutes.<sup>4</sup> With the rise of the industrial revolution the existence of Sunday observance legislation appears to have provided a ready-made base for the introduction and spread of laws aimed to protect the welfare of employees by ensuring that Sunday should be available to them as a day of rest or at least that they should be compensated for giving up their day of rest. Such laws are now widespread.<sup>5</sup> It is reasonably clear that Sunday today retains its character as a day of rest for reasons that are secular rather than religious. Society has, throughout history, taken established social conventions and adapted them to changed circumstances.<sup>6</sup>

5.3 If support is needed for the proposition that the nature of Sunday observance has changed it can be obtained from statements made in official reports and judgments in a variety of countries. In *McGowan v. Maryland*<sup>7</sup> Chief Justice Warren of the United States Supreme Court said in 1961:

In light of the evolution of our Sunday closing laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.<sup>8</sup>

In Australia in 1970 the joint Committee on the Australian Capital Territory accepted as the principle underlying its recommendations, the rights (and responsibilities) of persons to pursue on Sunday activities involving "spiritual, social and physical recreation and the enjoyment of leisure".<sup>9</sup> The Parliamentary joint Committee on the Australian Capital Territory recommended in 1982 that the sale of all goods should be permitted on Sunday except by major retailers.<sup>10</sup> In 1976 the Canadian Law Reform Commission commented in relation to the Lords Day Act of 1906 that "its practical application and enforcement today is secular in nature and effect."<sup>11</sup> Earlier, in 1970, the Ontario Law Reform Commission had concluded its survey of Sunday as a day of rest in non-Christian as well as Christian societies with these words:

In short, there are sufficient precedents throughout the world for the legislative selection of Sunday as a uniform pause day for secular rather than religious purposes.<sup>12</sup>

In England, the Crathorne Committee reported in 1964 that "the statutes of the 17th and 18th centuries are no longer needed to secure their original purposes..."<sup>13</sup>

### RECENT REFORMS IN NEW SOUTH WALES

5.4 In the past twenty years many reforms have taken place in the New South Wales laws relating to Sunday. Nevertheless, specific statutory regulation of commerce and industry on Sunday still exists, for example, in relation to retail trading, and penalty pay for employees. The law still restricts commercial Sunday sport and entertainment. Even so, it is fair to say that the tendency of lawmakers in this period has been to relax earlier restrictions and remove legal inhibitions on individual freedom of action. It could even be said that the apparatus of rules in the 1962 legislation on retail trading is designed to further freedom of trade, at least for small business.

### **IS SERVICE OF CIVIL PROCESS INCOMPATIBLE WITH THE CONCEPT OF REST?**

5.5 If we accept that Sunday is now a day of rest and recreation for predominantly secular reasons, we face an important question. This is whether serving legal documents on that day is inconsistent with the concept of rest and recreation. If the answer to this question is “no”, we can then consider whether there are positive reasons favouring reform.

5.6 In posing the question in this way, we do not deny that there will be groups who believe, for religious or other reasons, that an extension of the right to serve legal process on Sunday should not be permitted - For example, the Anglican Church Diocese of Sydney, in its response to a draft of this report stated:

While we recognise a certain desirability of having a uniformity in legal processes, we regret extensions of this which will make Sundays more and more like an ordinary work day.

The response of Archbishop Clancy, the Roman Catholic Archbishop of Sydney, was similar, but with some difference of emphasis:

In a word, I would accept the Service of Civil Process on Sundays on purely pragmatic grounds, but I wish to record my vigorous opposition to the rejection of the religious dimension of Sunday, and its reduction to nothing more than a “secular pause” day.

As may be seen from Chapter 2 and the earlier paragraphs of this Chapter, this Commission does not take the view that Sunday is now solely a “secular pause” day. However, for reasons we have explained we think that the question whether service of process is inconsistent with the concept of Sunday as a day of rest should not be considered or answered only by reference to the beliefs of those who would see commercial activity as an infringement of their religious principles. Those beliefs and principles must be respected and taken into account in determining appropriate policy, but should not foreclose the issue.

5.7 We take the view that the service of process would not be inconsistent with the concept of Sunday as a day of rest and recreation. We have several reasons for this view:

The community obviously accepts that many people must work on Sunday in order for society to function.

In our view, the classification of Sunday as a day of rest and recreation does not necessarily mean that rest and recreation should be compulsory for all.

A correlative of the “right” to have Sunday for rest and recreation is the entitlement of any person to choose to work on that day. This policy is, in our opinion implicit in current legislation governing Sunday retail trade and industrial conditions. Small businesses (with some exceptions) may trade on Sunday. The restrictions on trading by large retailers are not necessarily inconsistent with the general principle that people are entitled to choose to work on Sunday, since the restrictions may have other justifications.<sup>14</sup> Further, there is a clear difference in principle between the imposition by an employer upon an employee of an obligation to work and a voluntary decision by a person to carry out his or her normal business or trade activity on that day.

Some of the restrictions in current legislation are arguably designed to facilitate the exercise of individual freedom of behaviour on Sunday. For example, laws concerning Sunday entertainment

often relate to particular hours of the day, which suggests that they are designed to allow the give and take necessary to accommodate the conflicting interests of particular groups, such as those who wish to go quietly to their churches and those who are football supporters (and players).

The act of service of process is simple. Apart from reluctance or personal annoyance experienced by the, recipient of unwanted process, the interruption to the days activities is small.

### **INCONVENIENCE TO PERSONS SERVED ON SUNDAY**

5.8 A further question is whether prejudice could be caused to a person served with civil process on a Sunday because of the fact that the courts will be closed on that day. Could a subpoena served on Sunday require the production of documents or the attendance of the party served to give evidence on the very next day? The answer is, that in general, the rules and practice of the courts of New South Wales would not permit this to happen for reasons mentioned in the following paragraph It should be borne in mind that the same considerations of inconvenience apply to the service of process on Sunday as apply to service on Saturday or at any time after normal business hours on Friday. Indeed, the same considerations would also apply to the service of process after normal business hours on any day if the process purported to require compliance upon the next day.

5.9 The Supreme Court Rules make specific provision concerning the time of serving subpoenas for personal attendance or for production of documents. The general requirement (in relation to Sydney) is that they must be served at least five days beforehand (in the case of medical experts, generally fourteen days beforehand).<sup>15</sup> In principle, any person served with a subpoena is entitled to seek the indulgence of the court if the time given for compliance is unreasonable:

Service should be within a reasonable time before trial so as to enable the witness to be put to as little inconvenience as possible in attending.<sup>16</sup>

5.10 In dealing with "time" the Supreme Court Rules contain the general statement that when the court registry is closed on the "last day for doing a thing... the thing may be done on the next day on which the registry is open..."<sup>17</sup>

### **LIMITS ON THE CONCEPT OF REST**

5.11 Acceptance of Sunday as a day of rest and relaxation to which citizens in general are entitled does not in our opinion lead to the conclusion that this "right" confers the additional entitlement to freedom from unpleasant experiences. Accepting Sunday as a day of the kind described above does not necessarily mean that citizens should also be entitled to immunity from events and experiences which they would prefer to avoid. If there are good reasons for permitting service of civil process on Sunday, the act of service should not be regarded as necessarily an unwarranted interference with the entitlements and expectations of the person served.

### **CONCLUSION**

5.12 We therefore conclude that it is not inconsistent with the concept of Sunday as a day of rest and recreation for litigants to be permitted to serve civil process on Sunday. In the next Chapter we go further and describe those considerations which in our view make reform of the law desirable so as to permit such service. We also set out and explain our recommendations for reform.

### **FOOTNOTES**

1. See paras. 2.14-2.22. Compulsory and lugubrious religious observance did not in the past, always characterise Sunday. The Ontario Law Reform Commission drew attention to the fact that the Sabbath was originally a day of rejoicing and was regarded as a time for festivity.



The Christians too regarded their Sunday in like manner... "We keep the eighth day for festivity." In recognition of this joyous character of the Sabbath, no fasts were allowed in judaism ...

*Report on Sunday Observance Legislation* (1970), p.23.

2. See paras 4.1-4.17, 3.1-3.3, 4.20-4.22.'

3. See paras 3.1-3.3, 3.13.

4. *Ibid.*

5. See paras 2.28-2.31, 3.18.

6. One of the most eminent authorities to have noted the adaptation of pagan festivals by christian churches for their own good reasons was Sir James Frazer who supplies many examples in his classic work *The Golden Bough*; see 1954 ed. (Macmillan), CH.XXXVII.

7. (1961) 366 U.S. 420.

8. *Id.*, p.444.

9. joint Committee on the Australian Capital Territory, *Report on Sunday Observance in the Australian Capital Territory* (1971), Ch.3, para.35.

10. joint Committee on the Australian Capital Territory, *Report on Retail Trading Hours in the AC.T.* (1982), Ch. 8, para 2.25.

11. Law Reform Commission of Canada, *Report on Sunday Observance* (1976), p.51.

12. Ontario Law Reform Commission note 1 above, p.270.

13. Report of the *Departmental Committee on the Law on Sunday Observance* (Cmnd 2528, 1969), Ch 3, para 39.

14. See para 3.14.

15. Part 37 rules 7(7), 7A.

16. A V Ritchie, *Supreme Court Procedure N. S. W.*, p. 128. 1.

17. Rule 2(4); see also rule 6 for business hours and opening registry in cases of urgency.

## **6. Proposals for Reform**

### **INTRODUCTION**

6.1 In Chapter 5 we suggested that Sunday is now a day of rest and recreation for predominantly secular, rather than religious reasons. We also suggested that to permit the service of legal documents is not necessarily inconsistent with the concept of Sunday as a day of rest and recreation. We now consider a further question namely, whether there are positive reasons for permitting service of civil process in New South Wales on Sunday.

### **CONSIDERATIONS IN FAVOUR OF REFORM**

#### **Relaxation of Sunday Observance Legislation**

6.2 There are two major considerations which support the view that service of civil process should be permitted on Sunday. The first is the general relaxation of the laws governing commercial and other activity on Sunday. We have drawn attention to the general repeal of pre-existing Sunday observance legislation by the Imperial Acts Application Act 1969.<sup>1</sup> Other reform legislation which we have already described includes the Factories, Shops and Industries Act 1962<sup>2</sup> and the Sunday Entertainment Act 1966.<sup>3</sup> One result of this legislation is that New South Wales no longer has laws designed to compel religious observances on Sunday. Another is that sports and entertainments may now be played and presented on Sunday, albeit under legal controls. Further, although there are legal restrictions on some trading activities, there is at the same time wide freedom for industry and small traders to carry on business and professional activities if they wish.<sup>4</sup>

#### **Process Already Served on Sunday**

6.3 While the legislative trend has been marked, this of itself might not be sufficient to justify a change in the law governing the service of civil process on Sunday it could be argued that although service of such process would not necessarily be inconsistent with Sunday as a day of rest and recreation no pressing reason exists for making further inroads into the restrictions that continue to apply to Sundays. However, there is an important second consideration. This is the fact that, under existing State and Commonwealth law, a large amount of legal process may lawfully be served on Sunday in New South Wales.

6.4 We have described in Chapter 3 the kinds of legal process that may already be served on Sunday in New South Wales. We summarise them as follows:

all criminal process issued out of New South Wales courts;

process "for the apprehension of any persons" issued out of New South Wales courts, which (as we have explained) appears to include some process properly described as civil;

all process issued out of both the Federal Court of Australia (including bankruptcy notices and bankruptcy process) and the Family Court of Australia.

6.5 Our inquiries indicate that not only can criminal process be served on Sunday, but it is in fact served on that day. The New South Wales Police Department has advised us that first instance warrants, search warrants and warrants for commitment and apprehension are served on Sunday, as are summonses and subpoenas. The Department points out that service tends to occur less frequently on Sunday than on other days of the week not because of any policy of Sunday observance, but because duty rostering of officers makes it more efficient for process to be served on weekdays (including

Saturdays). Nonetheless, service on Sunday is not uncommon. The Police Department also has advised that it often seeks to interview and take statements from members of the public on Sunday.

6.6 Service of civil process issued out of Federal courts also occurs on Sunday. In the Family Court for example, a high proportion of proceedings for dissolution of marriage are conducted by the parties in person. We understand that in such cases process is frequently served at the weekend, including Sunday, since this is the most practical time to locate the other party. In addition there is no legal barrier to parties who are legally represented arranging service of process on Sunday. Our discussions with judges and officers of the Federal Court and the Family Court have disclosed that they are not aware of any difficulties or complaints arising from service on Sunday or the rules which permit such service.

6.7 The fact that a large amount of process can be and is lawfully served on Sunday in New South Wales is a powerful consideration in favour of permitting all civil process to be served on that day. We think it is desirable that there should be uniformity in New South Wales between State and Commonwealth law. We think it can hardly be suggested that the character of Sunday as a day of rest and recreation will be preserved by the retention of the prohibition under State law on service of (most) civil process on Sunday yet will not be impaired by the service of civil process under Commonwealth law. We do not know of any move to prohibit service of civil process on Sunday under Commonwealth law. Therefore, it would seem that unless State law permits civil process to be served on Sunday, the absence of uniformity will continue.

### **Urgent Matters and Convenience for Litigants**

6.8 A third factor to take into account is that there are some occasions on which Sunday is the most convenient time for service of process, and other occasions when it is the only time in which service could have an effect. The element of convenience is illustrated by those cases where a defendant actively avoids service, or where work keeps a defendant away from home during week days. Cases of the second kind could involve, for example, the need for immediate service of notice of the granting of injunctions to prevent the destruction of property or documents, of applications for so-called *Mareva* injunctions to prevent a person from removing assets from the State, and of orders concerning children who may otherwise be taken out of the jurisdiction. Again it is not uncommon for urgent applications to be made to a judge on a Friday afternoon for orders which envisage the hearing of an injunction application on the following Monday and the service of short notice of the proceedings during the weekend. The urgency of some cases is such that we would be surprised if there have not been occasions on which judicial orders have been made on Sunday requiring notice by telephone or telegram of the granting of an injunction to be given on the same day by a plaintiff to a defendant. The case of *In re "N" (INFANTS)* discussed earlier<sup>5</sup> was one of extreme urgency where the father had removed his children from a school on a Saturday. As it happened, the question before the court was not the validity of service on Sunday, but the validity of the court's order because it was made on a Sunday. It is significant that since that time the English Supreme Court Rules have been amended so as to permit service of process on Sunday when urgency requires it.<sup>6</sup> These examples show that there can arise the need for swift action by litigants and by the courts due to modern business practices and technology which enable money to be transferred and transactions to be completed electronically, and persons and property to be moved with great speed. If notification of service of court process remains prohibited on Sunday, it is possible that justice could be defeated in some cases.

### **CONCLUSION**

6.9 We have come to the conclusion that these considerations provide sufficient reason for recommending reform of the law of New South Wales relating to the service of civil process on Sunday. We are, of course, aware that in other Australian States and overseas countries service of civil process is still prohibited on Sunday, although there are exceptions to the prohibition in some jurisdictions. However, in none of the reports we have cited - English, North American and Australian - is there one clear statement of principle that specifically supports the prohibition on service of civil process. More importantly, none has been concerned with the particular situation which prevails in New South Wales, under which service of much civil process is permitted by Commonwealth law but (subject to limited exceptions) is not permitted by State law.

## **RECOMMENDATIONS**

6.10 We recommend that the law of New South Wales be amended so as to make lawful the service of civil process on Sunday. Without limiting the scope of the recommendation it should extend to the service of initiating process issued out of all civil courts, and of subpoenas. If this recommendation is adopted the result will be that all legal process under New South Wales law may be lawfully served on Sunday in New South Wales.

6.11 Our recommendation could be implemented by the repeal of section 41 of the Imperial Acts Application Act 1969, which is the sole statement of law that at present renders void the service on Sunday of civil process issued out of the Supreme Court and Local Courts. As for the District Court it would also be necessary, in order to implement our recommendation to repeal rule 4 of Part 8 of the District Court Rules which makes direct reference to service of process on Sunday.

6.12 We are, however, of the opinion that it is desirable, if our recommendations are accepted, for the statutory provision to go further than the simple repeal of section 41. The provision should we think, spell out the lawfulness of those acts which section 41 hitherto made void.

## **NO RECOMMENDATION FOR RESTRICTED HOURS**

6.13 We have considered the question of legal limit upon the hours of the day during which service of process may be effected. Apart from a statutory prohibition of execution of Local Court judgments between 8 pm and 7 am there is no present restriction under New South Wales law of the hours of service or execution of process. Our view is that a general statutory restriction of this kind should be considered only if there is cause to suggest the existence of unreasonable behaviour at unreasonable hours on the part of persons serving process. We are aware of no such behaviour, and do not consider that specific controls should be imposed simply by way of precaution. Accordingly, we make no recommendation for a limitation of this kind.

## **DRAFT LEGISLATION**

6.14 Submitted with this report in the Appendix is draft legislation which reflects our recommendation. The draft legislation if accepted and enacted, would have effect in all courts. It would override the provisions of the District Court Rules referred to above. Those rules would no doubt be formally modified by the judges of the District Court pursuant to section 161 of the District Court Act 1973, in due course.

## **FOOTNOTES**

1. See paras. 3.1-3.3.
2. See paras. 3.14. 3.20.
3. See paras. 3.1, 3.12.
4. See Chapter 3.
5. See para. 2.25.
6. See para. 4.19.

## **Appendix - Sunday (Service of Process) Bill 1983**

### **A BILL FOR**

An Act relating to the service of process on a Sunday, and to repeal section 41 of the Imperial Acts Application Act 1969.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:-

### **Short title.**

1. This Act may be cited as the "Sunday (Service of Process) Act 1983".

### **Commencement.**

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

### **Service of process on a Sunday.**

3. Any writ, process, warrant order, judgment or decree may be served on a Sunday.

### **Amendment of Act No. 30, 1969.**

4. Section 41 of the Imperial Acts Application Act, 1969, is repealed.