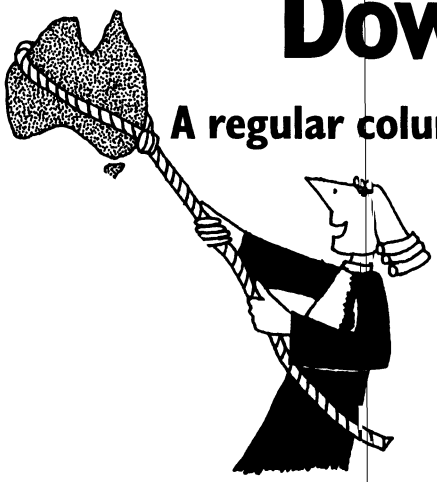
DownUnderAllOver

A regular column of developments around the country



Federal Developments

Sex discrimination roundup

A variety of developments have occurred over the past few months in the unending struggle against sex discrimination.

One of the most significant cases regarding equal pay for work of equal value brought in recent years has been lost by the union complainants (the AMWU and the ACTU). In *HPM v AMWU* (Dec. 253/98 M Print P9210) process worker and packer positions in which mainly women were employed, were compared with general hand and storeperson positions respectively, which are filled largely by male employees. The comparison was done on the basis of the work competencies (that is the skills) needed for the various jobs being compared. The Australian Industrial Relations Commission held that the appropriate method of comparison for the equal remuneration provisions in Division 2 of the *Workplace Relations Act* was one based on work value principles, the traditional method developed in the arbitration system over many years for comparing jobs. As this system has been used in the past to maintain traditional pay relativities, it must be asked whether it is in fact a non-discriminatory way of evaluating jobs. The unions have relaunched the case rather than appeal it and believe it stands a good chance of success.

Meanwhile submissions to a review of the *Affirmative Action (Equal Opportunity for Women) Act 1986* are being considered by an independent committee appointed by the Federal Government to conduct the review. Given the continuing struggle for equal pay illustrated by the HPM case, it is to be hoped that the Act is retained and strengthened. The Government has professed itself keen to assist women balance work and family life, and the Act is one of the mechanisms by which this aim can be furthered. Many submissions including that of the Women's Electoral Lobby have called for investigatory and audit powers to be given to the Affirmative Action Agency in order to make the legislation more effective.

An issue crucial in assisting women remain in the paid workforce is that of paid maternity leave. Material the Agency has collected indicates that between 1994 and 1996 paid maternity leave only increased from 14% to 20% of the workforce. Currently the International Labour Organisation (ILO) is considering the revision of the Maternity Provision Convention (Revised), 1952 (No. 103), and Recommendation, 1952 (No. 95). It has issued a questionnaire to governments on the possible content of a new ILO instrument. As the introduction to the questionnaire says, 'maternity protection measures are viewed ... increasingly as a necessary condition for equality in employment'. Australia is one of a minority of countries of the ILO without legislation enforcing paid maternity leave in the private as well as the public sector. The Convention recommends 12 weeks paid maternity leave and the payment of not less than two-thirds of the woman's previous earnings in countries which provide this through social security payments. Although the former is the standard in many parts of the public service in Australia, the EC minimum is 14 weeks, and in the UK, the Government is proposing to increase the minimum to 18 weeks. Interestingly, the NSW Labour Council has lodged a claim with the NSW Industrial Commission seeking paid parental leave from private sector employers of nurses, as well as certain community sector employers. ● **JE**

ACT

Changes to the *Small Claims Act* that make significant amendments to the jurisdiction of the Small Claims Court commenced recently. The jurisdiction of the Court is now $10,000, as opposed to the previous limit of $5000. Various other amendments are intended to streamline the procedure for running of matters. The increase in jurisdiction is significant as costs can only be awarded against a party in limited circumstances in the Small Claims Court, as before. The 'user friendly' procedures of the Small Claims Court will continue to apply; so the hurdles facing people with claims over $5000 but less than $10,000, who would previously have had to proceed in the Magistrates Court, are significantly reduced.

There have also been changes to the *Residential Tenancies Act 1997* giving tenants greater protection against actions by landlords in relation to eviction, rent increases and enforcement of breaches. ● **ST**

NSW

Judging a judge

For the first time this century the NSW Parliament is being asked whether to sack a Supreme Court judge. A judicial officer can only be sacked by the Crown (in the form of the Governor) after a vote by Parliament, on the grounds of incapacity or proved misbehaviour.

In 1986 Parliament enacted the *Judicial Officers Act*. The Act created a Judicial Commission with various functions including both education of judicial officers and the handling of complaints against them, via a Conduct Division within the Commission. The Act erects an interesting wall between judicial independence and judicial accountability.

In 1997 the Judicial Commission was aroused from its somniferous and quiescent life to deal with complaints against a Supreme Court judge and a Local Court magistrate. On 26 May 1998, the Attorney-General tabled four documents in Parliament, three concerning the judge: a report of the Conduct Division of the Judicial Commission about Justice Vince Bruce, concluding among other things that 'incapacity to perform judicial office has been proved' and thereby justifying Parliamentary consideration for removal; a copy of the reasons of one member of the Conduct Division (out of three) opining Parliament would

not be justified in removing him; and a response by the judge's solicitors, disputing the findings in the Conduct Division's report. The fourth document tabled concerned the magistrate, who was apparently allowed to resign on medical grounds. A pity — his story was likely to be far more colourful than that of the judge.

The judge failed in the NSW Court of Appeal to stop the Minister tabling the documents but subsequently sought an order quashing the Conduct Division's report, and thereby Parliament's entitlement to consider his removal, on the basis the report was flawed. At the time of writing the Court had reserved its decision.

The judge's case against sacking rested on his depressive illness, its effect on his work, and his treatment and subsequent recovery. In essence, the judge asserted not only that the Judicial Commission got it wrong but also that any incapacity he had was past. The judge has certainly done the community a service by exposing depression as an issue that affects far more people than is readily admitted.

Whatever the outcome, the judge's case will inspire many learned academic articles, probably a thesis or 20, and has already led to numerous editorials. Most of the material I have read so far, with one exception in the *Australian Financial Review,* has missed the point revealed by the cases — the failure of a real accountability management system for our Courts. Maybe the Yanks have the right idea — elect the judges, along with the congress persons, the sheriff, the mayor, the dogcatcher and so on?

As an aside, the writer observed one day of the two day Court of Appeal hearing on the case and was able to see the new NSW Chief Justice, James Spigelman, at close quarters. He was very impressive, knows his cases and was able to cut through the waffle in the arguments to get to the point. His patience and courtesy were aweful (meant in its real sense).

One entertaining issue is whether the Supreme Court could overturn a decision of Parliament on the basis it acted unreasonably if, for example, it decided to dismiss the judge on the strength of the Conduct Division's report, once this report was found to be flawed. The short answer for those who believe in parliamentary sovereignty is 'No'. Otherwise one could challenge any piece of mindless legislation, or indeed any decision of parliament, and then where would we be??? ● **PW**

Northern Territory

Self-defence and battered women

After a lengthy saga and retrial, a woman has been found not guilty of manslaughter arising from the killing of her violent partner, in the first successful application of the so-called 'battered woman' defence in the Northern Territory. Helen Secretary shot her partner while he was asleep. She had originally been tried and convicted of murder, but on appeal the Court of Criminal Appeal ordered a new trial because of the trial judge's failure to leave to the jury the issue of self-defence (see *Secretary* (1996) 5 NTLR 96). The Court of Criminal Appeal held that the assault constituted by threats of death uttered before he fell asleep, taken in the context of the history of violence in the relationship, continued until the fatal shot.

The 'battered woman' defence has received some recognition at common law (*Runjanjic* (1991) 53 A Crim R 362). However, in the Northern Territory the defence is particularly difficult to establish because of the requirement that an accused be defending herself against an 'assault which causes the person reasonable apprehension of death or grievous harm' (s.28(f) NT Code). The case recognises, therefore, that self-defence may be available to women who resort to lethal self-help in situations where domestic violence has reached an intolerable level. ● **SG**

The fourth uranium mine: Jabiluka

A large group has established a blockade in Kakadu National Park to protest against the proposed Jabiluka Uranium Mine. The proposed mine is on land excised from the Park. The Park and the mine site are each on Aboriginal land granted to traditional Aboriginal owners pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Energy Resources Australia (ERA) holds the mineral lease and asserts that it has the requisite consent required under the *Land Rights Act.* ERA also operates the nearby Ranger Uranium mine which is also excised from the Park. The senior traditional owner of the area, Yvonne Margarula, disputes the validity of the consent held by ERA.

The blockade is located in the Park and operates under a permit granted by Yvonne Margarula as well the regulations relating to the Park. The blockade has attracted the attention of ERA security guards and the Northern Territory Police. The police and guards have conducted surveillance and filmed protest actions. A number of protesters have been charged with trespass as a result of protest actions conducted on the ERA lease. Police have commenced stopping vehicles driving through the Park and some protesters have been charged with minor motor vehicle offences. Police have sought to impose conditions of bail that limit the ability of those charged with continuing to be involved in the blockade. Recent protests culminated in the arrest and charging of Yvonne Margarula and other traditional owners with trespass offences.

Robyn Dyall

Robyn Dyall works in the Environment Defenders Office, NT

QUEENSLAND

Postcard from a marginal electorate

The Queensland election campaign is in full swing and will be all over by the time this column makes its way to you. My family lives in the most marginal electorate in the State, Greenslopes, which means that the pollies are all of a sudden very interested in our views in the lead up to the June 13 poll. The party hacks are busy distributing election material, ignoring the 'No Junk Mail' sticker on our letterbox.

One issue has dominated the campaign so far: Pauline Hanson. Hanson's One Nation Party has received substantial support in recent opinion polls. There has been talk of One Nation winning seats from both the National/Liberal Coalition and from Labor. The preferences of One Nation voters are likely to be very important in deciding other seats and the Coalition has looked increasingly desperate in its attempt to hold onto power. In all but one seat, the Coalition's How-to-Vote cards call on voters to allocate their preference to One Nation ahead of Labor. This approach to preferences appears to be seriously undermining the Liberal Party's support in the Brisbane region. By contrast, Labor has directed preferences to the Coalition ahead of One Nation. So much for John Howard's prediction that

if we all ignored Hanson, she would just fade away.

The other issues which the pollies have been pushing are (surprise, surprise):

- law and order. Labor says that the Coalition has opposed increased maximum jail sentences. The Coalition says that Labor has opposed a range of 'Tough on Crime' reforms.
- health. Hospital waiting lists are a key concern.
- job security. Labor obviously considers the Coalition to be vulnerable on this point. The Labor candidate for Greenslopes has written to me, emphasising the following statements: 'You never know when you'll be "downsized" or "surplus to requirements"... [The Coalition] don't even have an Employment Minister... No one will ever convince me that sacking people helps the economy.'

The Queensland poll is very important as a guide to the likely nature of the forthcoming federal election. At this stage, it appears that Labor will win seats from the Liberals in and around Brisbane. As to what happens in regional Queensland, it looks likely that there will not be a clear trend across the State with One Nation playing a major role in deciding the outcome in each seat. ● **JG**

South Australia

Drugs

South Australians are falling prey to the drug PMA (paramethoxyamphetamine). Like Ecstasy, PMA is a derivative of amphetamine. This lethal drug has claimed the lives of six South Australians in the past 15 months. Despite these deaths, users remain ignorant about the potent nature of designer drugs and the current risk in South Australia that users of Ecstasy are exposing themselves to PMA packaged as Ecstasy. The question remains, how do officials get the message across to our youth that they are exposing themselves to a real danger? Moralising and scare tactics will not prevent those high on the invulnerability of youth from risk taking behaviour. Perhaps a better approach would be to provide information to club venues and to universities and secondary schools on the nature of the designer drugs, their risks and how to handle emergencies.

Debt

The debate continues over the privatisation of South Australian assets — namely the Electricity Trust of South Australia (ETSA) and Optima. It is not surprising that the Olsen Government has broken its election promise to retain public ownership of ETSA, after all no one believes election rhetoric. Both surprising and alarming is the current belief that our State can progress without its assets. Whilst we all want to reduce our mortgage, very few of us contemplate selling the house to do it.

Perhaps we must shrink our public sector to balance the State's budget in the aftermath of the State Bank fiasco. Whatever the rationale, South Australians enjoy one of Australia's highest unemployment rates and we earn considerably less than the rest of our fellow Australians. To correct this, the Liberals now try to create employment and wealth by offering incentives to attract businesses away from the eastern seaboard. Unfortunately, providing incentives is a waste of money if the company taking the incentive subsequently fails as pay TV operator Galaxy did during May. So we need to attract employment and wealth to overcome the effects of a shrinking public sector and we shrink our public sector to cover the cost of failed attempts to create employment and wealth! Is this a vicious circle? Round we go, where we will stop nobody (including Premier Olsen) knows. SA going *all* the way?

And a baby blue frock

On a brighter note, South Australians were graced by the presence of minor royalty for the Adelaide Cup, the high spot of the South Australian fashion calendar. To celebrate this occasion none other than Australia's favourite neighbour, Kylie Minogue, attended. For a fee of $30,000, Kylie, dressed in baby blue regalia, walked around in a muddy paddock and dispensed much needed relief from the realities of our State's continuing fiasco. It wasn't all work for Kylie when she caught up with her sister Danni who is appearing in *Grease* at the Entertainment Centre. Perhaps the Olsen Government might consider solving our State's unemployment problem by getting us all a role in the chorus line of this production.
● **DM and PR**

Victoria

Credit cards

Jeff Kennett's Government continues to be dogged by allegations of abuse of state-funded credit cards by ministers and senior bureaucrats. In May, two directors of the Museum of Victoria resigned after questions were raised about their spending records. One of the directors has been shown to have spent over $60,000 on his credit card over two years, while the other has been shown to have charged more than $30,000 to his card since 1995, including a $100 visit to a doctor. Other notable uses of the credit cards include the purchase of cushions for her home by the Attorney-General and payment for a Liberal fundraising dinner by the Minister for the Environment.

In almost all cases, the money spent on the cards has been repaid. The Government has maintained that the repayment of the money means that the cardholders have not fraudulently obtained a benefit and so have not broken any law. The guidelines for cardholders stipulate that unofficial and private use of the cards is not condoned in any situation as it impinges on sales tax exemptions, so that restitution alone is an insufficient remedy. The guidelines also state that misuse of the card may result in proceedings being instituted against the cardholder under State law, including the *Public Services Act*, the *Audit Act* and the *Crimes Act*.

The Opposition claims to have received advice from a QC that the private use of official cards can constitute an offence under the *Crimes Act* and result in charges of defrauding the Commonwealth by avoiding sales tax. In a letter to Mr Kennett, the President of the Museum of Victoria, Dr David Pennington, has asserted that the private purchases on the credit cards by the former directors of the Museum transgressed State legislation. The Auditor-General has found that breaches of internal procedures were committed by senior members in the Department of Premier and Cabinet in their use of the state-funded credit cards.

Mr Kennett's response so far has been to issue new guidelines to the staff of his Department on the use of state-funded credit cards. At the time of writing, no action has yet been taken by the police or other relevant authorities to pursue the possibility that State law has been broken. It remains to be seen whether pressure from the Opposition and the public will change that situation. ● **MC**

'SIT DOWN GIRLIE'

Legal issues from a feminist perspective

Western Australia

Breastfeeding

Whether women are revered or reviled for breastfeeding their children (and both approaches are clear throughout history), the way in which women do (or don't do) this has been the subject of much controversy and external intervention. There have been no reported decisions directly concerning breastfeeding and weaning in the Australian family law arena. However, the Family Court of Western Australia has now entered the fray. In *D v D*, a recent unreported decision, an order that forced a mother to wean her 11-month-old son so that his father could exercise lengthy contact periods, has been upheld on appeal.

In interim residence proceedings a Magistrate had granted the father three days a week residence of the couple's two children. This order was deferred in respect of D for two months, during which time D's visits were limited to three days (not nights) each week. This deferral recognised that D was still breastfed, the Magistrate expecting, however, D to be weaned within the two months. The mother sought unsuccessfully to vary this order and then appealed. Not surprisingly, her case relied upon proving some psychological detriment would flow from weaning at this stage. The husband's experts, on the other hand, suggested that psychological problems might flow from, among other things, the mother's selfish indulgence of *her* need to continue breastfeeding. Unfortunately, the parties' total reliance on expert evidence allowed the Court to avoid a crucial issue: to what extent should the Court become involved in parenting issues such as weaning, simply because an application is made? For instance, how would the Court approach an application to force a mother to breastfeed a newborn infant? Hiding behind the mantra that each case turns on its own facts merely helps to obscure the more important issues underlying the court's decision-making in this arena.

Lisa Young

Lisa Young teaches law at Murdoch University.

DownUnderAllOver was compiled by Alt.LJ committee members Maddy Chiam, Jenny Earle, Jeff Giddings, Stephen Gray, Daniell Misell, Phil Ritson, Sarah Todd, Peter Wilmshurst; together with invited writers listed under their contribution above.

Testing time for feminists

In a landmark decision on 15 May, the Family Court ordered that an 18-month-old girl be returned to her birth mother after a failed surrogacy agreement. Baby Evelyn's birth mother used her own genetic material to act as surrogate for her infertile friend and the baby's natural father. Despite living with her genetic father for over a year, the Full Court held that it was in the child's best interests to return to her birth mother and be raised with her biological siblings.

This decision coincides with the 10th birthday of the first (publicised) surrogate child in Victoria, Alice Kirkman, who was born after her mother's ova and donor sperm were implanted in her aunt's womb under the IVF program. This kind of arrangement is unlikely to be allowed under current law. The *Infertility Treatment Act 1995* (Vic.) has effectively outlawed even altruistic surrogacy in Victoria, banning *all* payments for surrogacy, including hospital fees. Additionally, even in States where altruistic surrogacy is allowed, surrogacy agreements are unenforceable.

The sensitive issue of surrogacy has raised the ire of both right wing moralists and feminists in the past. Mainstream arguments surrounding it mesh the conservative claims that it 'undermines the fundamental concept of the family' with the feminist considerations that surrogacy dehumanises women by treating their bodies as incubators.

Girlie suggests other questions need to be raised, such as the right of autonomous women to use their body as they see fit; as well as the privileged legislative criteria for IVF candidates. While feminists have fought long and hard for the right to our children, the primacy given to this question has often been used to limit our choices. With increasing numbers of women undertaking paid surrogacy in the US, and the potential abuses this evokes, it is an important issue for feminist consideration!

Equality at last

Girlie readers will be relieved to know of course that some of these tricky decisions may be (continue to be) made for us. *Girlie's* Man of the Month (hardly), Vincent Patrick, recent founder of the men's Equity Network wants men to 'regain control of their own reproductive capacity', including having a say in abortion.

Patrick was just one of hundreds of men who attended a Men's Forum in Canberra early in June, organised by Federal Attorney-General Darryl Williams. While a number of academic speakers pointed out that men are not actually operating at a disadvantage under the heavy burden of ferocious feminists, the high attendance of members of men's networks reflects the burgeoning number of men's networks worldwide. While ranging in extremes, a great many of these organisations believe that feminism has 'gorn too far' in one of *Girlie's* favourite phrases; that the Family Court discriminates against men, that child support is punitive etc.

Barry Mathias, founder of the oldest men's movement in Australia is pushing for a class action by men against the Family Court and Federal Government (which may save the Court from facing those other niggly questions) and explains that men are simply seeking equal opportunity. John Clarke, head of Dads against Discrimination, says that the men's movement is where feminism was 20 years ago and that men are simply doing what feminists have done (well that's alright then!).

The problem is, Clarke explains, that there is no funding available to bring this equality about. 'We're not coloured, we're not handicapped, we're not gay', says Clarke. 'We don't qualify as a disadvantaged group in our own right.'

Girlie thinks that Mr Clarke may not get out that much, and would like to helpfully suggest that she can think of a few men who are coloured, handicapped and, at a stretch, even gay, but perhaps these men haven't suffered the ultimate discrimination on the basis of their gender that Mr Clarke seems to have experienced.

Echoing movements in the US, such as the Promise Keepers, who seek to 'reinstate men to their rightful role as head of the family', these movements are apparently encouraged by 'feminists who concede that feminism has gone too far'. *Girlie* is not too sure who these unidentified unhelpful feminists are, but no doubt *Girlie* readers are equally excited at the prospect of equality at last after so many years in a matriarchy.

Dee Lusion

Dee Lusion is a feminist lawyer.