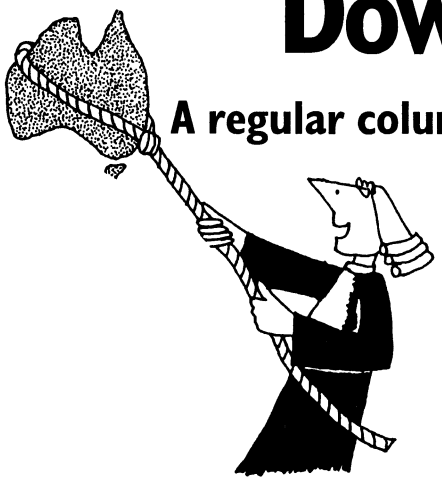
DownUnderAllOver

A regular column of developments around the country



Federal Developments

Indigenous copyright

On 3 September 1998 Von Doussa J of the Federal Court handed down his decision in *Bulun Bulun and Milpurrurru v R & T Textiles*, a case involving the vexed question of copyright in indigenous artwork.

The applicant, John Bulun Bulun, is a leading Aboriginal artist from Arnhem Land. He painted a painting known as 'Magpie Geese and Water Lilies at the Waterhole'. The painting depicts a waterhole that is sacred to the Ganalbingu people of Arnhem Land (of whom Mr Bulun Bulun is a member). The respondent, R & T Textiles Pty Ltd infringed Mr Bulun Bulun's copyright by using designs from the painting on their fabrics without his permission. As soon as Mr Bulun Bulun and George Milpurrurru (the most senior Ganalbingu person, acting in a representative capacity on behalf of all Ganalbingu people) commenced proceedings, R & T Textiles admitted infringement of the copyright and consent orders were made on that part of the case brought by Mr Bulun Bulun.

The applicants then revised their statement of claim to turn the case into a test case on the issue of indigenous copyright. The Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs sought, and was granted, leave to intervene. R & T Textiles took no active role in the hearing and the Minister assumed (in part) the role of contradictor.

The case was novel because the applicants sought to establish that the Ganalbingu people as a whole had an equitable interest in the copyright of the artwork — even though Mr Bulun Bulun alone had painted the artwork. The applicants pursued several avenues.

The first avenue was the law of native title. It was asserted that the Ganalbingu people were native title holders of the land on which the sacred waterhole in question is to be found and that equitable ownership of depictions of the waterhole was an incident of their native title rights. The argument foundered from the start as the applicants had never made a native title claim (under the *Native Title Act 1993* or at common law) in respect of the land on which the waterhole rested. A second avenue, under the *Aboriginal Land Rights (Northern Territory) Act 1978* (Cth) also foundered for procedural reasons of a similar kind.

A third avenue, the law of trusts, was a dead end. On the evidence, there was no express trust in the copyright, for Mr Bulun Bulun never had any intention to create one.

The last avenue, the law of fiduciaries, was more promising but did not result in an equitable interest of the Ganalbingu people in the artwork copyright itself. Von Doussa J accepted that Mr Bulun Bulun used, with permission, the 'ritual knowledge of the Ganalbingu people' and embodied sacred Ganalbingu knowledge in the painting. He thus owed fiduciary obligations to the Ganalbingu people 'to protect the ritual knowledge which he has been permitted to use'. Had he refused to bring proceedings against the company for infringement of copyright, the Ganalbingu people would have had an *in personam* right (as opposed to an equitable interest in the copyright itself) to bring action against Mr Bulun Bulun, their fiduciary, to fulfil his fiduciary obligations. However, since Mr Bulun Bulun had not been derelict in his duties (he had commenced proceedings against the company), there was no reason to make any declarations as to the second applicant's interest in the copyright in the painting. • **ACT committee**

ACT

Health Regulation (Abortions) Bill 1998 (ACT)

Women in the ACT have been quick to condemn the *Health Regulation (Abortions) Bill 1998* (the Bill). Introduced to the ACT Legislative Assembly by Paul Osborne (Independent) in August of this year, the Bill seeks to dramatically limit the circumstances in which abortions can be legally performed in the ACT. It also seeks to impose new procedural requirements on medical practitioners performing abortions, all of which are designed to restrict access to abortion.

The grounds for a legal abortion

Clause 5 of the Bill provides for just two categories of lawful abortion. First, subclause 5(1) of the Bill provides that an abortion may be lawfully performed at any stage of pregnancy where the pregnant woman is 'subject to grave medical risk', defined as 'a medical condition of a pregnant woman that makes it necessary to perform an abortion to avert substantial and irreversible impairment of a major bodily function'.

Second, subclause 5(2) of the Bill provides that an abortion may be legally performed where the probable gestational age of the foetus is not more than twelve weeks if the woman is subject to 'grave psychiatric risk', defined as 'a psychiatric condition of a pregnant woman that makes it necessary to perform an abortion to avert a mental disturbance or defect, to a substantially disabling degree, of perceptual interpretation, memory, motivation or emotion'.

The grounds for legal abortion in clause 5 are much more restrictive than the current law in the ACT and in any other Australian State or Territory. The Bill would effectively take the ACT back to, and beyond, the legal situation in England in the 1930s, as stated in the important case *R v Bourne* [1938] 3 All ER 615.

The grounds for legal abortion contained in the Bill are, on their most

liberal reading, in line with the laws in countries such as: Kuwait, Saudi Arabia, Pakistan, Rwanda, Burundi, Burkina Faso, Peru, Ecuador and Argentina. On a more restrictive reading, the Osborne grounds purport to place the abortion laws in the ACT on foot with the laws in countries such as the United Arab Emirates, Iran, Yemen, Libya, Oman, Congo, Angola, Uganda, Somalia, Nicaragua and Ireland.

Where a pregnancy is terminated under subclause 5(1), the doctor must take all reasonable steps to ensure that a foetus which is capable of surviving on delivery is delivered live. Ethically, this provision could compromise a doctor's ability to fulfil his or her professional duty to act in the best interests of the pregnant patient. There may be circumstances where attempting to ensure a live delivery of the foetus is actually against the health interests of the pregnant woman, for example, because it would be safer to terminate the pregnancy using a method that kills the foetus. Legally, requiring a doctor to attempt to ensure a live delivery in an abortion context could expose that doctor to liability for homicide, if the child subsequently dies as the result of the abortion procedure. If the child does not die but is injured as a result of the abortion procedure, the doctor could be exposed to civil liability in negligence.

Procedural requirements

Clause 6 of the Bill requires that an abortion must be approved by a second medical practitioner with specialist qualifications — a specialist in obstetrics/gynaecology in relation to an abortion performed to avert 'grave medical risk', and a specialist in psychiatry in relation to an abortion performed to avert 'grave psychiatric risk'. This requirement will increase the time and financial expense involved in obtaining an abortion in the ACT. The very low number of doctors with the appropriate specialist qualifications in the ACT creates the prospect of women encountering difficulties obtaining the requisite second opinion.

The current law on abortion in the ACT does not impose a second opinion requirement. Nor does the law elsewhere in Australia, except South Australia and the Northern Territory, where the requirement has restricted women's access to abortion.

Clause 4 of the Bill provides that, except in a 'medical emergency', an abortion must be performed by a duly registered medical practitioner in an 'approved facility'. There are similar legal requirements under the legislation in South Australia, the Northern Territory and Western Australia. The South Australian experience appears to indicate that this procedural requirement would have a restrictive impact on women's access to abortion.

Before an abortion can proceed under subclause 5(2), clause 7 requires a medical practitioner not employed or associated with the approved facility to make an assessment of the probable gestational age of the foetus (by ultrasound). This effectively requires a third doctor to be involved before the abortion can proceed and would increase the time and financial expense involved in obtaining an abortion in the Territory.

Where an abortion is proposed, a medical practitioner who will not perform or assist in performing the abortion shall inform the woman in person of a number of matters, including the probable gestational age of the foetus, the particular medical risks associated with the procedure (such as the risks of infection, haemorrhage, breast cancer and infertility), the possible detrimental psychological effects of abortion, and the agencies in the ACT which offer assistance to women through pregnancy or which make arrangements for adoption (clause 8).

In some circumstances, these requirements may conflict with the approach of the High Court in *Rogers* v *Whitaker*, in particular the judges' emphasis on the need for the doctor to respond to the individual needs, concerns and circumstances of the patient when providing her with information about a proposed medical procedure.

The overwhelming aim and effect of clause 8 will be to ensure that women contemplating abortion are provided with information that is designed to persuade them to reach a particular decision about the abortion: namely, not to proceed. The clause provides no support or assistance for women who have no doubt that they wish to proceed with the abortion. Further, this clause may be interpreted by doctors as legally requiring them to provide information about alleged medical and psychological risks associated with abortion that have not been scientifically substantiated.

There is in clause 9 of the Bill a new requirement that a woman give her written consent before an abortion can lawfully proceed. Nowhere in Australia is written consent required before any medical procedure can lawfully proceed, including an abortion procedure. The Bill changes the law in the ACT so that an abortion can no longer be performed on a legally competent patient aged under 18 years without the consent of her parent or other legal guardian.

A medical practitioner cannot perform an abortion until at least 72 hours after the woman (or parent/guardian) has provided written consent and the medical practitioner has provided the information required by clause 8. Current ACT law does not impose any 'cooling off' period of this kind, nor does the law in any other part of Australia. In the context of a proposed legislative regime which effectively limits abortion to the first 12 weeks of pregnancy unless the pregnant woman is subject to grave medical risk and which also imposes a requirement that gestational age be measured by ultrasound, an additional 72 hours may make the difference between an abortion that may be performed lawfully and one that may not. The compulsory 'cooling off' requirement also manifests a lack of respect for the ability and indeed right of women to make their own decisions about abortion, in their own time, and in their own way. • **NC & SM**

NSW

Native Title in NSW

Amendments to the *Native Title (New South Wales) Act 1994* (NSW) were passed by Parliament on 23 September 1998. The majority of provisions in the Act were proclaimed and came into operation on 30 September 1998 (the same day as the majority of federal native title amendments).

The legislation has two main purposes. The amendments seek to affect native title in ways which have been authorised by the Commonwealth legislation, such as through the introduction of confirmation and validation provisions. Without Commonwealth authorisation the States would lack the constitutional authority to introduce these provisions. Secondly, the amendments seek to ensure that native title and other legislation in NSW is consistent with the Commonwealth *Native Title Act* as amended (CNTA), and is therefore constitutionally valid on the basis of s.109 of the Commonwealth Constitution.

The main features of the Act are:

1. *Validation.* 'Intermediate period acts', done by the State in the period 1 January 1994 (the introduction of the CNTA) to 23 December 1996 (the date of the *Wik* decision), are validated where they are invalid, possibly because of the failure of the State to comply with the provisions of the CNTA.

Validation has the effect of completely or partially extinguishing native title, or applying the non-extinguishment test (under the CNTA) to affected native title rights and interests, depending on the category into which the act falls.

For intermediate period acts involving mining rights which have been validated by the State, notification must be provided to relevant indigenous people and groups within six months of the commencement of the amendments.

Grants under the NSW land rights legislation, which may have been invalid where they were granted without being subject to any continuing native title rights and interests, have also been validated. Furthermore, the amendments provide that the effect of validation may be altered by the terms of an Indigenous Land Use Agreement

2. *Confirmation.* The amendments confirm that acts defined under the CNTA as previous exclusive or non-exclusive possession acts, completely extinguish, partially extinguish, suspend, or prevail over native title, according to how the act is categorised. These provisions pre-empt the as yet undeveloped common law on these issues.

3. *Indigenous Land Use Agreements (ILUAs).* The amendments do not introduce a State based registration scheme for ILUAs. However, they ensure the validity of provisions in ILUAs which authorise the doing of a future act or seek to change the effect of a validated intermediate period act, where the State is a party to that agreement.

4. *State Tribunal provisions.* The NSW Act, prior to these amendments, contained uncommenced provisions that would have conferred native title jurisdiction on the NSW Land and Environment Court and NSW Warden's Court. The amendments repealed these provisions and so NSW claims will continue to be dealt with by the National Native Title Tribunal.

5. *Compulsory Acquisition provisions.* The amendments ensure that the minimum procedural requirements for compulsory acquisitions of native title by the State laid down in the CNTA are met. The NSW Administrative Decisions Tribunal will have power to hear objections to compulsory acquisitions by the State.

6. *Right to negotiate.* In contrast to legislation proposed in other States, the Act does not take up the opportunity to establish an alternative State-based regime to replace the right to negotiate over pastoral leasehold land, as envisaged by s.43A of the CNTA. The government has indicated that it is awaiting the decision in *Wilson v Anderson*, a test case currently being heard by the Supreme Court of NSW, before considering further whether an alternative procedure should be introduced. This case will determine whether the Western Division leases amount to exclusive possession leases and therefore extinguish native title.

In provisions which are yet to be proclaimed, the legislation amends the State's mining and petroleum legislation to ensure that it meets the minimum standards set down in the CNTA relating to low impact exploration acts, and gem and opal mining acts. By meeting these minimum standards the State can apply for a determination by the Commonwealth Minister that these categories of acts meet the required standards, thereby exempting them from the right to negotiate provisions. The gem and opal mining provisions are particularly significant in areas of NSW such as White Cliffs and Lightning Ridge where there are approximately 11,000 titles granted each year.

7. *Western Division lease provisions.* The amendments introduce provisions allowing for the subdivision of the Western Division leases, without requiring the surrender of the leases (as is currently required). The reason for subdivision generally is to allow diversification and upgrading to conduct primary production activities. While the CNTA allows leaseholders to upgrade their activities to the level of 'primary production', Western Division leaseholders must continue to comply with environmental and other obligations associated with upgrading leases under other laws.

Notably, the amendments do not confirm that the Western Division leases are exclusive possession leases. The opposition parties sought to amend the Act to confirm that these leases do extinguish native title, but this was resisted by the government. If the leases are found to be exclusive possession leases then the confirmation provisions of the act already ensure that native title is extinguished, and if they are not exclusive possession leases, then any attempt to extinguish native title would run contrary to the CNTA and be unconstitutional.

Two main issues become evident looking at these amendments. First, while the NSW amendments take a minimal approach to implementing the principles driving the CNTA, particularly when compared to the Western Australian Bill or recently passed Northern Territory Act, their effect on native title is substantial. Second, the amendments are, so far as native title legislation goes, relatively simple. Yet this brief explanation of the main provisions indicates the enormous complexity of the legislation, which surely run counter to the declared aims of the federal government, namely 'certainty' and 'workability.'

Darren Dick

Darren Dick is lawyer with the Human Rights and Equal Opportunity Commission in Sydney.

QUEENSLAND

The Queensland contribution to the August 'DownUnderAllOver' column focused on the strong showing of One Nation at the State election. The October 3 federal election has since seen the wheels fall off the One Nation bandwagon. Queensland Senator-elect Heather Hill will be One Nation's sole Federal parliamentarian after Pauline Hanson failed to win the lower house seat of Blair. In contrast to the positive (obsessive?) media coverage of One Nation prior to the Queensland State poll, Hanson's erratic campaigning style for the federal poll brought her into seemingly constant conflict with the media. The rest of this column outlines some State-based examples of the central role played by the media in setting the public policy agenda in Queensland.

Forgetting the presumption of innocence

The *Courier-Mail* newspaper disclosed the name of a Labor backbencher who has been the subject of allegations of sexual abuse of school students. The abuse is alleged to have occurred in 1970. Premier Peter Beattie quickly

called for the MP to stand aside despite the fact that the MP had not been interviewed by police in relation to the allegations, let alone been charged. The MP refused to resign and, at the time of writing, the MP has not been charged with any offences. The Criminal Justice Commission is investigating the circumstances surrounding the leaking of the investigation details. It is disappointing to see Premier Beattie forget the importance of the presumption of innocence.

Citizens initiated referenda

Key Independent MP Peter Wellington proposed a model for Citizens Initiated Referenda (CIR) which drew strong criticism from the major parties. Under Wellington's model, a successful referendum would automatically result in relevant laws being changed. Former Premier, Rob Borbidge described the Wellington model as 'loopy' and suggested it would 'usurp, denigrate and destroy' the role of government. In response, Wellington told the media that Borbidge had made his comments without being briefed on the detail of the proposed model. CIR will remain on the agenda in Queensland with the National Party, Liberal Party and One Nation all indicating that they intend to propose CIR models in the near future.

Drug trial proposal

The Beattie Government has proposed a trial of the heroin treatment drug Naltrexone which is used in controversial treatment programs in Israel. This proposal was apparently prompted by widespread media reports about Sydney-based drug dealers moving into the Ipswich area and targeting children as customers. The former National/ Liberal Coalition Government had also proposed trials of Naltrexone prior to the State election. • **JG**

VICTORIA

No gas zone

The Victorian gas crisis, apart from demonstrating the resourcefulness of many Victorians, has resulted in potentially the largest class action suit in Australian history. The early stages of the crisis saw front page reports of individuals refusing to allow their gas supply to be turned off and at least 410 Victorians had their gas meters disconnected for contravening gas bans. At the same time, hotels, city pools, office buildings and some Victorian residents were offering hot showers (BYO towel) to all those unlucky enough to have the options only of cold showers or bucket baths.

Cold showers were the least of many Victorians' worries as factories, manufacturers, restaurants and other businesses shut down and were forced to stand down workers. Industries in New South Wales and South Australia were also affected and losses to the Australian economy have been predicted to hit $1.4 billion.

The legal ramifications of the gas crisis became evident early. Slater & Gordon lodged an action in the Federal Court alleging breaches by Esso of the Trade Practices Act, the Fair Trading Act and Esso's common law duties in negligence. The action has been lodged on behalf of one Plaintiff, Johnson Tiles, but Slater & Gordon intends to seek to expand the claim into a class action. Maurice Blackburn also commenced an action against Esso, as well as the Victorian Energy Network Corporation (VENCorp) and several gas companies. The Maurice Blackburn action is on behalf of four classes of litigants: householders, stood-down workers, restaurants and industrial users of gas. It names five Plaintiffs, with the intention of including more.

The legal action prompted an accusation from Jeff Kennett that the law suits were in 'bad taste' and that the law firms were behaving in a 'totally inappropriate' fashion. Kennett's response was ironic in light of the Victorian government's refusal to offer financial assistance to victims of the crisis. Treasurer Alan Stockdale has defended this position by suggesting that victims seek redress for their losses through legal avenues.

Other issues arising from the crisis include: the responsibility of insurers for losses to individuals and businesses and the possibility that those who violated the gas bans, as well as having to pay fines of $10,000, may face criminal prosecution.

Gas supply will have been restored (although not fully) by the time this is published, but whither Victorians' faith in their utilities? • **MC**

DownUnderAllOver was compiled by Alt.LJ committee members Maddy Chiam, Natasha Cica, Jeff Giddings and Sonja Marsic together with invited writers listed under their contribution above.

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Ernie awards

Last month saw the staging of the 1998 Ernie Awards at Parliament House in Sydney. Organised by NSW MP, Meredith Burgmann, the Ernie Awards are an annual event attended by the cream of Sydney feminists, and are named after a former member of the AWU in recognition of the outrageously sexist comments he made to Ms Burgmann and her friends. Apparently a fairly drunken affair, nominations for the awards are made by all invited and a 'boo off' is then held to determine the winners in the various categories. Those men who deliberately go to great lengths to get nominated are precluded from winning.

Some of the awards included the Political Silver Ernie, which was a tie between the aforementioned Tony Smith for remarking that 'women have a duty not to provoke men into domestic violence' and Iain Maclean, a Western Australian MP, who said during the abortion debate that '[women] think they are the centre of the universe and will abort a baby just because it is inconvenient or summer is approaching and they want to wear a bikini'. The 'Clinton' award for repeat offenders went to John Howard (although surely not, as suggested above, for the same kind of thing?); the 'Elaine' for unhelpful remarks from women to Bettina Arndt for, not surprisingly, 'just about everything'. An honourable mention went, amongst others, to Bruce Ruxton for asking 'Mr Chairman, what's gender balance?' and the Gold Ernie to one Judge Clarke who when giving a man who had abused his 12-year-old stepdaughter a two year suspended sentence said 'indulgence is a pleasurable, curiosity-seeking activity by an intelligent precocious girl'. *Girlie* is restraining herself from even commenting on this last one.

Girlie would like to hear about any other awards ceremonies taking place around the country and suggests that feminists in other States might like to start their own. We can be fairly assured that there will be no shortage of candidates, nor a shortage of reasons why feminists should gather together to eat, drink and generally have a good time!

Sally Brate

Sally Brate is a Feminist Lawyer.