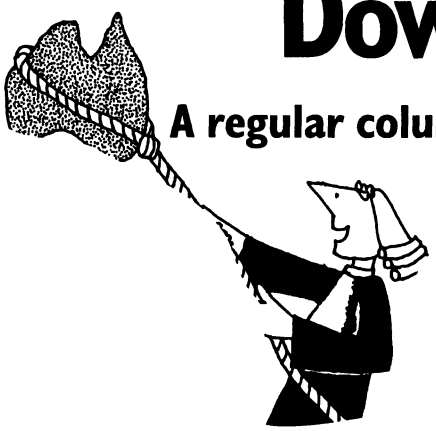
DownUnderAllOver

A regular column of developments around the country



Federal Developments

UN Committee finds native title amendments racially discriminatory

The Convention on the Elimination of All Forms of Racial Discrimination is one of the oldest and most widely accepted human rights conventions. Compliance with the Convention is monitored by the United Nations Committee on the Elimination of Racial Discrimination. The Committee generally acts in response to country reports or individual complaints. However, in August 1998, it took the unusual step of proactively requesting Australia to provide information concerning the compatibility with the Convention of the 1998 native title amendments, any changes in Aboriginal land rights and changes in the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner. This request was made pursuant to the Committee's rarely used early warning measures and urgent procedures, which have never before been used against a Western country.

The Australian government's submission to the Committee is an extraordinarily brief 16 pages. Remarkably, it makes no reference to the Convention and does not attempt to explain how the native title amendments are compatible with specific Articles of the Convention. Instead, it argues that the amendments respect the common law, clarify and streamline processes concerning how native title is to be handled, and provide certainty.

The Committee received a formal briefing from government representatives and questioned the government over an extended period. In contrast to the brevity of the government's submission, the Committee received a range of detailed non-government organisation (NGO) submissions, particularly in relation to the compatibility of the native title amendments with the Convention's standards. The Committee also met informally with NGOs.

Three issues were highlighted by the NGO submissions. First, they argued that international law requires the Convention to be interpreted according to the standard of substantive equality, rather than merely formal equality. As the Australian government is overtly committed to a standard of strict formal equality in its approach to indigenous native title rights, this indicates a general discrepancy between Australia's international obligations and Australia's actions.

Second, NGO submissions focused on the compatibility between the native title amendments and specific Articles in the Convention, particularly the general non-discrimination provisions (Articles 1 and 2), equality before the law (Article 5) and the right to own and inherit property in a non-discriminatory manner (Article 5(d)(v)). Four aspects of the amendments were particularly noted as breaching the Convention:

- Racially discriminatory validation of non-indigenous land titles granted between 1994 and 1996. These titles were otherwise invalid as they had failed to take account of the *Native Title Act 1993* due to an incorrect assumption that native title would not survive on a pastoral lease.
- Legislative provisions which assert that specific categories of land titles extinguish native title rather than allowing the common law to develop (so-called 'confirmation of the common law').
- Winding back the right to negotiate.
- Singling out native title land for non-consensual use by government or private interests (including expanded primary production uses of leasehold, renewals, extensions and pastoral lease title upgrades, management of air and water space) in circumstances which benefit non-native title holders.

Third, the government's amendment process breached the right to *effective participation* by indigenous peoples on matters of significant relevance to them, as required by Article 2 of the Convention and explained by the Committee in General Recommendations XXI and XXIII.

Unofficial reports indicate that the Committee was surprised at the Australian government's narrow assessment of the amendments only against the common law rather than against international law and the Convention, noting that the common law is itself racially discriminatory. The Committee's decision of 18 March 1999 reflects this concern (CERD/C/54/Misc.40/Rev.2). It found that although the original *Native Title Act 1993* was a delicate balance between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title. The Committee specifically highlighted the four provisions noted above as discriminating against native title holders; stated that the lack of effective participation by indigenous communities in formulating the amendments raised concern with respect to the Convention; and expressed concern at the proposed abolition of the Social Justice Commissioner. The Committee called upon Australia to address these concerns as a matter of urgency, including by re-opening discussions with indigenous peoples.

This finding of racial discrimination is extremely significant for indigenous peoples' struggle to have their rights respected, particularly considering the international spotlight will be on Australia with next year's Olympic Games. The Australian government has flatly rejected the Committee's decision. Attorney-General Daryl Williams stated that the Committee's 'comments are an insult to Australia and all Australians as they are unbalanced' (Press Release, 19 March 1999). The government noted that the Committee did not refer to the government's submission on native title issues (although this is presumably because the government failed to consider the amendments against the Convention's standards), and stated several times that the validity of native title legislation is a matter for Australia and not the Committee. This response clearly confuses issues of constitutional validity with international obligations. It

is nonetheless revealing — indicating that the government fundamentally misunderstands that our international obligations are measured according to objective, international legal standards, not according to the particular views of the government of the day.

Australians for Native Title and Reconciliation (ANTaR) ACT

ACT

Breaking news — judges in touch with middle-class morality?

On 5 March 1999 Justice Higgins of the ACT Supreme Court handed down his decision in *Costello and others v Random House Australia Pty Ltd.* The plaintiffs Peter Costello, Tanya Costello, Tony Abbott and Margaret Abbott, argued that they had been defamed by a story contained in Bob Ellis' book, *Goodbye Jerusalem: Thoughts of a Labor Outside*, published by Random House.

The story alleged that Mr Abbott and Mr Costello, while at university, had slept with a woman who one of them later married, and that they subsequently defected from the Labor to the Liberal Party as a result. All parties agreed that the story was false. The issue which arose was whether the story was defamatory?

Following a hearing which gained much publicity last year, Higgins J decided that all four plaintiffs had been defamed by the publication and awarded substantial damages to each of them. The decision is interesting because of the standards used by Higgins J to determine whether the plaintiffs had been defamed, and subsequently the quantum of damages that was appropriate in the circumstances.

The plaintiffs each made a number of assertions about the imputations of the published anecdote. Higgins J upheld the inferences argued by Mrs Abbott and Mrs Costello that the story led to the imputation that they had 'such low moral standards' that they used sexual relations to get others to change their political allegiance. He did not hold that the story conveyed the imputation that they were 'sexually promiscuous', although it did infer they had been 'unchaste' in having sex before marriage. This was enough, in the circumstances, to find that they had been defamed.

Among the imputations complained of by Mr Costello and Mr Abbott were that they were suspected of being 'weak and unreliable character(s) who allowed (their) political decisions to be dictated to' by their wives, and that their commitment was so shallow that they were willing to change their political allegiances for sexual favours. Higgins J upheld the latter but not the former. Interestingly, neither of the men complained that they had been defamed by the imputation that they had sex before marriage.

Higgins J makes much of the appropriate standard to be applied in defamation cases. In his view, the attitude of the 'ordinary reasonable reader' should be considered and such people would predominantly adhere to 'what Mr Alfred Doolittle in 'My Fair Lady' described as 'middle class morality". Readers of not only this journal but Bob Ellis' book may be surprised to hear their opinions being categorised in this way. That did not prevent Higgins J from making a further observation that:

> premarital sexual relations, in the absence of some justification such as the depth of the relationship or other circumstances, might be regarded by most right-thinking people as evidencing moral laxity.

'Moral laxity', according to Higgins J, was of such serious consequence that it could lessen a person's reputation. Higgins J did not specify whether that reputation would be lessened in the minds of 'right-thinking people', or otherwise.

In an astounding comparison, Higgins J said that the plaintiffs and defendant were 'as far apart in their frame of moral reference as the customers of a 19th century East End London ale house with the membership of the Anglican Synod of the same era'. Higgins J further lamented that the defendants seemed to view current norms as 'those of nineteenth century ale houses'. Those not lucky enough to be familiar with Higgins J's allusions may indeed wonder what went on in those ale houses over 100 years ago to make the conduct of their customers so reprehensible and removed from present-day standards.

The plaintiffs were awarded significant damages even though the actual diminution of their reputations was found to be 'transient'. The publisher had recalled copies of the book and pulped them. No-one claimed the story was true even before the hearing got underway.

Apart from the issue of whether damages for defamation are out of line with what the community would consider just and fair, this decision also represents another example of judges expressing views about societal standards which many would find strange.

Random House has appealed the decision to the full Federal Court on the grounds that the damages it was ordered to pay to the plaintiffs was excessive. Other grounds of appeal are that the defendant was denied natural justice due to a change in the women plaintiff's argument, and that the court misinterpreted the author's words.

Two months before the decision, the ACT government announced that defamation laws in the ACT were to be revised. An options paper released in September 1998 will form the basis for the changes, which may include:

- removal of the 'public benefit' defence, which would make truth the only defence;
- demonstration of actual loss by a plaintiff in assessing damages;
- encouraging early corrections or apologies;
- requiring the Court to ensure that there is an 'appropriate and rational' relationship between harm done and the damages awarded. • **BC**

NSW

Update on Macquarie

The February issue of the *Alt.LJ* included two articles about events at Macquarie University. The matter went to the Committee of Australian Law Deans (CALD) seeking its intervention. CALD met on 19 March 1999 and made two resolutions. The first was 'that the Committee of Australian Law Deans is concerned with the structure of legal education, but also recognises that structures are related to context. In this situation, the Committee does not express an opinion with respect to the restructuring of the academic unit of the discipline of Law at Macquarie University'.

A second issue concerned Macquarie's representation on CALD. With two branches in law (a Division of Law and a Department of Legal Institutions within the Division of Humanities, both teaching the LLB, under the umbrella of an Institute of Legal Studies), two representatives seemed appropriate, after all Rome

had two consuls. CALD's second resolution was to keep Macquarie's representation at one. Because of the 'new administrative order' at Macquarie the head of the Institute of Legal Studies is a biologist.

CALD was also asked to consider referring the matter to the NSW Ombudsman, as an appropriate person to investigate the matter. This course of action would not have required CALD to express an opinion about the merits of the case of either side.

One of the members of the ostracised eight has now written to the NSW Ombudsman suggesting an investigation.

'The three wise women'

This title was applied in a press report about the first sitting of the NSW Court of Criminal Appeal where the bench consisted of three women.

Both press reports (*Australian* and *Sydney Morning Herald* of 16 April 1999) noted how it was believed to be the first all female bench anywhere in Australia, as well as in other common law jurisdictions, including England and New Zealand. Justices Beazley, Bell and Simpson dealt with three matters but why should this outcome (or is it output) of judicial rostering in our managerialist courts be newsworthy?

A NSW politician said it was all part of the Carr government's plan to change the face of the judiciary. One of the barristers appearing said it was a 'bit unusual' to face an all female bench, but made a quick recovery to say how delighted he was they ruled in favour of the Crown case in his matter. Beazley JA was quoted as saying: 'It was nice to be part of history, but from now, this will happen from time to time, as there are more women in the judiciary' (SMH). At the end of the day, three judges heard three appeals but I wonder what Hutley JA would have made of it all? • **PW**

NT

Case stated: claim of right

In February 1998, an Aboriginal elder successfully defended a charge of assault using the excuse that he was exercising an honest claim of right referred to in s.30(2) and the authorisation in s.26(1)(a) of the NT *Criminal Code* (the Code) (DPP Ref. No. 1 of 1999, available on internet via ScalePlus). The person charged, Y, was a senior elder of the Gumatj clan. Y has responsibility to enforce his Yolngu law as a responsibility to the land of the clan which occupies it and with which it identifies.

A professional photographer went onto the beach adjacent to the Gove Yacht Club. This beach is Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976*. According to the Yolngu law it is wrong for a stranger to come onto land without permission of the senior elder and also for a person to take photographs of the land for commercial purposes without permission. Should such acts occur, it is expected that the person expiate their wrongdoing, and pay a penalty or make other amends, such as an apology. This involves the giving of compensation and, if not given, more dire sanctions may follow.

The photographer took photos of Aboriginal children. The elder has a special role to protect children, including the preservation of their wellbeing. The elder requested $50 from the photographer for the children. When this was refused, the film was demanded because the spirit of the children was captured on it. This request was also refused so Y grabbed the strap of the camera. The tug of war that ensued resulted in pressure being exerted on the photographer's body. On obtaining the camera, Y opened it, removed the film and threw it in the bin. The camera was then returned to the photographer.

The magistrate found that Y had exercised a right recognised by law and that he had exercised an honest claim of right without intention to defraud and was therefore excused from the assault. As a result of this decision, two questions of law were reserved for decision by the NT Supreme Court.

1. Can traditional Aboriginal law found an honest claim of right within the meaning of s.30(2) of the Code? The DPP's submission was that unless the particular aspect of Aboriginal law relied on is recognised by the general law in force in the Territory, an honest claim of right based on that law cannot give rise to an excuse under s.30(2) of the Code. The Crown relied on *Walden v Hensler* (1987) 163 CLR 561 where an Aboriginal was found guilty of being in unlicensed possession of fauna that he had hunted as bush tucker. It was found in that case that a right must be a right recognised in law, and not merely one which owes its existence to a moral order, religious code or other non-legal regimen.

The NT Supreme Court agreed with the DPP. It found that where a person holds a positive belief that his action is lawful, 'lawful' means within the general law in force in the Territory, of which Aboriginal law is not a part.

2. Was Y's assault able to be excused and authorised by s.26(1)(a) of the Code in this case? It was submitted on behalf of Y that there had been a general grant or recognition of the right he was exercising, as one of the many rights attached to common law native title of land which have not been extinguished. However, the court held that the rights asserted by Y were neither granted or recognised by common law or statutes of the Territory. The title that is referred to is proprietary, possessory, occupational and usufructuary rights and interests in land held and this title may be extinguished by the valid exercise of sovereign power inconsistent with the continued right to enjoy the title.

This NT Supreme Court decision reiterates that Aboriginal law is not recognised as part of the general law in the Territory and is seen as more akin to a moral and religious code. • **KB**

Politics

The Northern Territory political scene saw a major shift in early February. First, on 2 February 1999, Maggie Hickey resigned as Leader of the Opposition in the NT. Ms Hickey led the Labor Party to one election in 1998. Former ABC radio journalist Clare Martin, who is serving her second term, replaced Ms Hickey on 3 February 1999. Ms Martin faces the challenge of attempting to topple the CLP, which has held power in the Northern Territory for 21 years.

Within days of Ms Hickey's announcement, a vote of no confidence had been passed against the Chief Minister of the Northern Territory, Shane Stone. His replacement, Denis Burke was sworn in on 8 February. The former Chief Minister, who was also the Attorney-General, will be remembered for appointing himself a QC; introduction of mandatory sentencing; failing to return a vote from the electorate supporting statehood for the NT; and referring to the Chairman of the Northern Land Council, as a 'whinging whining carping black'.

Mr Burke indicated that he would be adopting a more conciliatory approach to Aboriginal people and reviewing the NT's controversial mandatory sentencing laws. • **FH**

Queensland

New evidence laws

The Queensland parliament is considering proposed legislation which would enable witnesses to give evidence via audio and video link-up. It would also be possible for courts to arraign and sentence people via audio and video link-up where all parties agreed to this approach. It would still be possible for a magistrate or judge to order a defendant or witness to attend in person at the hearing where they considered this necessary. While the major political parties support the proposed legislation, criminal lawyers have expressed concern that juries may not be given the opportunity to directly assess the demeanour of important witnesses.

First Indigenous magistrate

Brisbane solicitor, Jacqui Payne, has been appointed as a magistrate. Ms Payne has worked as a solicitor for the past 13 years and will be Queensland's eighth female magistrate on a bench of 73. Attorney-General, Matt Foley stated that it had taken too long for an Aborigine to be appointed to the judiciary.

Strip search concerns

Queensland Police Commissioner, Jim O'Sullivan, has warned police officers against conducting routine strip searches at police watchhouses. The warning appears to have come in response to recent claims of inappropriate strip searches being conducted at the Ipswich watchhouse. The Police Operation Procedures Manual states clearly that searches involving the removal of clothing should not be routinely conducted.

Community legal service review

The Queensland and Commonwealth governments are conducting a joint review of Queensland community legal centres. A Community Legal Centre Advisory Group has been established to develop strategies to improve access to services, especially in rural areas. The Advisory Group (two of the seven members are from CLCs) is expected to report within 12 months. • **JG**

Western Australia

In the aftermath of the 1998 Christmas day riot at the Casuarina Prison near Perth, the chief executive officer of the Ministry of Justice made a 30-day 'isolation order' in relation to a large number of 150 prisoners alleged to have participated in the riot. On the expiration of the original order in January 1999, a *further* 30-day order was made. The orders were made pursuant to the *Prisons Act 1981* (WA). The Act empowers the chief executive officer to make an order for 30 days for the purpose of maintaining the good government, good order or security in a prison. The effect of an order is to confine a prisoner to their cell for 23 hours each day.

No criminal charges were laid against prisoners the subject of the orders. If a charge had been laid, the *maximum* period of isolation that could have been ordered by a magistrate on *convicting* a prisoner of the offence of riotous behaviour would have been 28 days.

Can an isolation order be renewed indefinitely? The Act neither expressly authorises, nor expressly prohibits the renewal of an order. If the Act cannot be construed so as to prohibit the indefinite renewal of an isolation order, an aggrieved prisoner may need to invoke the decision of the High Court in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353. The prisoner would argue that the chief executive officer must not renew an isolation order without considering whether the effect of the renewal would be to violate the relevant articles of the International Covenant on Civil and Political Rights. It would be argued that the renewal violates the right to life by creating a risk of suicide (Article 6 ICCPR) and also violates the prohibition on cruel, inhuman or degrading treatment or punishment (Article 7 ICCPR). • **MF**

Victoria

A new leader

Victoria's Labor party, struggling in Opposition, unanimously endorsed a new leader in March. Steve Bracks, formerly shadow treasurer, has taken over from John Brumby, who still retains a frontbench position. Since his elevation, Bracks has been consistently described by commentators as 'a nice guy' and there has been some speculation over his ability to counter the force of Jeff Kennett in full flight. In response, Bracks has been emphasising his 'inner strength' and 'internal fortitude'.

As it happened, Bracks' reception from Kennett and colleagues at his first question time as the new Opposition leader was remarkably mild. This is not to say that Bracks should discard either of his professed internal qualities. Kennett has indicated an imminent election call and opinion polls are indicating a landslide win to his government at the next election. Bracks will need all the strength and fortitude he can muster to pull Victorian Labor into shape in time to offer any realistic challenge to the Kennett juggernaut.

Defamation

Things have not all been flowing Jeff Kennett's way however. In early March, he lost a defamation action against the *Australian* and was ordered to pay the publisher's costs of the litigation.

Kennett's action arose out of an article published in the *Australian* in January 1997 which referred to 'unsubstantiated accusations of infidelity' and 'rumours however unfactual' that Kennett had had extramarital affairs with two different women. Lawyers for the *Australian* had not even attempted to argue that the rumours were true, choosing instead to argue that the statements in question did not give rise to a defamatory imputation. In a decision that surprised most defamation lawyers, but probably not the voting public, the jury of six agreed with the *Australian*.

It had been Kennett's choice to take his case to a jury, presumably on the basis that voters would be more sympathetic than a judge. It seems instead that the jury expected Kennett to be as robust in dealing with reports about himself as he is perceived as expecting others to be when dealing with him. • **MC**

[DownUnderAllOver Editor's Note: Wondering how this decision by a jury fits with the distaste of Higgins J in the ACT for the 'morality of nineteenth century ale houses'. Perhaps 'middle class morality' in the ACT is different from that in Victoria? MS]

DownUnderAllOver was compiled by Karen Bowley, Belinda Carman, Maddy Chaim, Jeff Giddings, Fiona Hussin, Martin Flynn, and Peter Wilmshurst.