organisation of Indigenous people, has been able to assist them in coordinating the case.

Terri Janke is studying law at UNSW and is a research assistant at the National Indigenous Arts Advocacy Association.

References

1. Commonwealth Attorney General's Legal Practice, *Stopping the Rip-Offs — Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples,* Issues Paper, October 1994.
2. *Ravenscroft v Herbert & New English Library* [1980] RPC 193.
3. Section 232(4) Corporations Law; Ormiston J in *Morley v Statewide Tobacco Services* [1993] 1 *VR* 423.
4. *City of Adelaide v The Australasian Performing Rights Association* (1928) 40 CLR 481.

CUSTOMARY LAW

One law for all?

KAREN PRINGLE discusses a recent case which rejected the concept of Aboriginal sovereign immunity.

The State of New South Wales brought an application by summons that an action commenced by Denis Walker be dismissed or alternatively stayed under Order 26 rule 18 of the High Court Rules, which provides, in part, that the Court or a Justice may order a pleading to be struck out on the ground that it does not disclose a reasonable cause of action or answer (*Denis Walker v The State of New South Wales,* High Court of Australia, Mason CJ, 16 December 1994).[1]

Further, that in such a case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Justice may order the action to be stayed or dismissed, or judgment to be entered accordingly, as is just.[2]

The State of New South Wales argued that the statement of claim filed in the action on behalf of Walker did not plead a reasonable cause of action. The statement of claim pleaded in summary as follows:

1. The matter is one within the original jurisdiction of the High Court as it is a matter involving a State and a resident of another State.
2. Walker is an Aboriginal person, a member of the Noonuccal nation, whose traditional lands are on the area commonly referred to as Stradbroke Island in the State of Queensland.
3. Walker has been charged with an offence under the laws of New South Wales which allegedly occurred at the town of Nimbin in the State of New South Wales and which is in the area of the Bandjalung nation.
4. By acts of state in 1788, 1829 and 1887 the lands now known as Australia were subjugated by the British Crown.
5. The peoples who were then living in the lands now known as Australia ('Aboriginal people') had organised systems of law and custom to govern relations between individuals, between individuals and the group and between groups.
6. Laws relating to relations between individuals, including violence, and the behaviour of persons from different tribes when on the land of other tribes formed an integral part of the legal systems of the Aboriginal people.
7. Aboriginal people continued to practise their laws and customs and continue to do so.
8. To the extent that laws of the British Crown and its successors have superseded the laws and customs of the Aboriginal people they are only valid to the degree that they have been accepted by the Aboriginal people on whose land they purport to operate.
9. The Parliaments of the Commonwealth of Australia and of the States lack the power to legislate in a manner affecting Aboriginal people without the request and consent of the Aboriginal people.
10. Further and alternatively, if the Parliament of the Commonwealth or of a State legislates in a manner affecting Aboriginal people the law in so far as it relates to Aboriginal people is of no effect until it is adopted by the Aboriginal people whom, or whose land, it purports to effect.

Walker sought declarations that the laws of New South Wales were not applicable to him and that any trial on any charge affecting him arising out of the events that occurred at Nimbin should be according to Bandjalung law. He also claimed such further or other order or orders or relief as the court saw appropriate. (See *Statement of Claim No. C8 of 1994*, In the High Court of Australia, Canberra Registry between Denis Walker, Plaintiff and the State of New South Wales, Defendant.)

Mason CJ in his judgment noted that Walker in his statement of claim accepted that he had been charged with an offence against the laws of New South Wales which allegedly occurred at Nimbin, being said to be a place within the area of the Bandjalung 'nation' of Aboriginal people (p.1; this and all further page numbers are from *Court's Reasons for Judgment* S. 94/005). He also noted that Walker was said to be a member of the Noonuccal 'nation' of Aboriginal people (p.1).

Mason CJ referred to the allegation in the statement of claim that the common law is only valid in its application to Aboriginal people to the extent to which it has been accepted by them (p.1). Further, he referred to the allegations concerning statute law, namely, that the Parliaments of the Commonwealth of Australia and of the States lack the power to legislate in a manner affecting Aboriginal people without the request and consent of the Aboriginal people and that further and alternatively, if the Parliament of the Commonwealth or of a State legislates in a manner affecting Aboriginal people the law in so far as it relates to Aboriginal people is of no effect until it is adopted by the Aboriginal people whom, or whose land, it purports to effect (p.1).

With respect to the allegations in the pleading relating to statute law, Mason CJ held that 'couched as they are in terms of the legislative incapacity of the Commonwealth and State Parliaments, those pleadings are untenable' (p.1). According to him:

> The legislature of New South Wales has power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever. [*Constitution Act* 1902 (NSW).] The proposition that those laws could not apply to particular inhabitants or particular conduct occurring within the State must be rejected. [p.1.]

In support of his decision, Mason CJ referred to Gibbs J (with whom Aickin J agreed) in the case of *Coe v The Commonwealth of Australia* (1979)[3] and in particular to Gibbs J's statement that 'the aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside' (p.1). Mason CJ noted that in the Coe Case all the justices on appeal upheld the view which he had taken at first instance,[4] rejecting the plaintiff's claim that sovereignty resided in the Aboriginal people (pp.1-2). Mason CJ referred to the recent decision in *Mabo [No.2]*[5] and stated that there is nothing in that decision '... to support the notion that the Parliaments of the Commonwealth and New South Wales lack legislative competence to regulate or affect the rights of Aboriginal people, or the notion that the application of Commonwealth or State laws to Aboriginal people is in any way subject to their acceptance, adoption, request or consent'(p.2). According to Mason CJ, 'such notions amount to the contention that a new source of sovereignty resides in the Aboriginal people' (p.2). However, he noted that this suggestion was rejected by *Mabo [No. 2]* (p.2) and referred to his statement in *Coe v The Commonwealth*[6] as follows:

> *Mabo [No. 2]* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a 'domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law. [p.2.]

Mason CJ accordingly held that '... in so far as it is based on the proposition that the legislatures lacked power to legislate over Aboriginal peoples, the statement of claim discloses no reasonable cause of action' (p.2).

Mason CJ went on to note that counsel for Walker put the matter somewhat differently in his oral submissions and submitted that '... the question which arose was whether customary Aboriginal criminal law is something which has been recognised by the common law and which continues to this day, in the same way that *Mabo [No. 2]* decided that the customary law of the Meriam people relating to land tenure continues to exist' (p.2). Mason CJ stated that counsel relied on a passage in Blackstone's Commentaries on the introduction of English law into a country that had been outside the King's dominions,[7] and which read as follows:

> Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony. [p.3.]

Mason CJ noted that this passage was approved by the Privy Council in *Cooper v Stuart*[8] and cited by Brennan J in *Mabo [No. 2]*[9] (p.3). He stated that it was submitted 'that statutes must be construed so as to accord with what was said to be the common law principle set out by Blackstone, with the consequence that the criminal statutes of New South Wales did not apply to people of Aboriginal descent' (p.3). However, according to Mason CJ, such a proposition had to be rejected (p.3). He stated that 'it is a basic principle that all people should stand equal before the law' (p.3) and 'a construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle' (p.3).[10] Mason CJ espoused the position as follows:

> The general rule is that an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters. [Bennion, *Statutory Interpretation*, 2nd edn, (1992) at 255.] The rule extends not only to all persons ordinarily resident within the country, but also to foreigners temporarily visiting. [*Re Sawers; ex parte Blain* (1879) 12 *Ch. D* 522 at 526; *Gold Star Publications Ltd. v Director of Public Prosecutions* [1981] 1 *WLR* 732 at 734.] And just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burdens those laws impose. [Bennion, *Statutory Interpretation*, 2nd edn, (1992) at 260.] The presumption applies with added force in the case of the criminal law, which is inherently universal in its operation, and whose aims would otherwise be frustrated. So, in *Quan Yick v Hinds*, Griffith CJ when dealing with the more general question whether the entirety of Imperial law was in force in Australia stated [(1905) 2 *CLR* 345 at 359]: 'It has never been doubted that the general provisions of the criminal law were introduced by the [*Australian Courts Act* 1828]'. [9 *Geo. IV c.*83.]'

Mason CJ went on to hold that 'even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application' (p.4). He noted that in *Mabo [No. 2]* the Court held that 'there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown' (p.4). However, according to Mason CJ, 'there is no analogy with the criminal law' (p.4). He stated as follows:

> English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in *Mabo [No. 2]* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people. [p.4.]

Mason CJ stated that the summons taken out by the State of New South Wales only sought an order that the action be dismissed or, alternatively, stayed. However, he noted that in proceedings under Order 26 rule 18 that it is appropriate for a pleading that does not disclose a reasonable cause of action to be struck out and accordingly ordered that the statement of claim be struck out and the action dismissed (p.4).

Comment

In this case Mason CJ has clearly affirmed the legislative capacity of Commonwealth, State and Territory parliaments over Aboriginal people and that Aboriginal people like all other citizens are subject to the laws of the Commonwealth and States or Territories where they reside. The concept of sovereign immunity residing in the Aboriginal people has been expressly rejected.

Most importantly, the proposition that customary Aboriginal criminal law continues to survive today has been rejected, it having been extinguished by legislatures passing criminal statutes of general application. It was stressed that the criminal law position was in no way analogous with the decision in *Mabo [No. 2]* with respect to land tenure. Therefore the proposition that criminal laws of general application do not apply to Aboriginal people was untenable and it was emphasised that Australian criminal law does not accommodate an alternative body of law operating alongside it.

For those people, especially Aboriginal people, who had anticipated that eventually the decision of the High Court in *Mabo [No. 2]* would have positive implications for the recognition of Aboriginal criminal customary law in our legal system, this decision curtails their expectations. While being prepared to recognise laws and customs for the purpose

of supporting subsisting rights in land, there is little preparedness to go further and recognise Aboriginal customary laws in the area of criminal law. The High Court in this area has clearly baulked 'at recognising, without legislative mandate, Aboriginal law as an independent and autochthonous system of legally enforceable rules, surviving the assumption of sovereignty'.[11] It is disappointing that such a significant matter was determined on an interlocutory application before a single judge of the High Court.

There have, of course, been numerous cases in which Australian Courts have acknowledged the continuing reality of Aboriginal law, including Aboriginal laws in what the Australian law defines as the 'criminal' domain. The ALRC Report No.31 on *Recognition of Aboriginal Customary Law*[12] identified a number of areas relating to liability and sentencing where Aboriginal law has been recognised. The difficulty in the Walker case appears to have been that it raised issues of sovereignty.

Karen Pringle is a Brisbane solicitor and works at the AJAC Secretariat, Queensland.

References

1. See Order 26 rule 18(1).
2. See Order 26 rule 18(2).
3. See *Coe v The Commonwealth of Australia* (1979), 53 *ALJR* 403 at 408; 24 *ALR* 118 at 129.
4. See (1978) 52 *ALJR* 334; 18 *ALR* 592.
5. *Mabo v Queensland [No. 2]* (1992) 175 *CLR* 1.
6. See (1993) 68 *ALJR* 110 at 115; 118 *ALR* 193 at 200.
7. *Commentaries*, 5th ed. (1773) Bk I, ch. 4 at 107.
8. *Cooper v Stuart* (1889) 14 *AC* 286.
9. See *Mabo v Queensland [No.2]* (1992) 175 *CLR* at 34.
10. See *Racial Discrimination Act* 1975 (Cth), s. 10.
11. K.E. Mulqueeny, 'Folk-law or Folklore: When a Law is Not a Law. Or is it?', In: M.A. Stephenson and Suri Ratnapala, (eds), *Mabo: A Judicial Revolution* 1st ed., Brisbane: University of Queensland Press, 1993, p 178.
12. Australian Law Reform Commission, *Recognition of Aboriginal Customary Law*, Report No.31, AGPS, Canberra, 1986 (recently reprinted).

ATSIC

Money and power

PETER POYNTON examines ATSIC's defunding powers

ATSIC's impartiality has been impugned in two recent cases. *In ATSIC v Jurkurrakur Aboriginal Resource Centre, in Liq* (1992) 10 ACSR 121, Asche J ordered a liquidator to step down because 'an appearance of partiality or conflict of interests' was able to be construed from the circumstances (at 124). ATSIC was to be the major beneficiary in any distribution of assets and ATSIC's account represented 10% of the income of the Alice Springs office of the liquidator's employers. An apprehension of bias could clearly be made out.

Western Districts Foundation for Aboriginal Affairs (The Foundation) v ATSIC[1] concerned ATSIC defunding an Aboriginal Corporation in Western Sydney. The Foundation alleged bad faith and unreasonableness on the part of ATSIC. One element of the bad faith argument was that ATSIC bureaucrats had stalled funding to the Foundation purposively, to build up the ability of a competitor organisation to assume delivery of some welfare services the Foundation provided. The Foundation also alleged that ATSIC bureaucrats had withheld the findings of a financial review on the Foundation's workings. Wilcox J accepted that the delay in releasing the report might have been mere bureaucratic caution, not unfairness, describing the delay as 'unfortunate', and adding:

> Under the circumstances, I think the report should immediately have been delivered to the Foundation, with an invitation to comment. [at 18]

Without wishing to ascribe *mala fides* to the bureaucracy, stalling is a favourite game and time-worn tactic often used to the disadvantage of parties with whom bureaucrats differ.

Wilcox J had other peremptory advice for the ATSIC bureaucracy. He reminded them that their role 'is not to save money but to ensure that it is effectively expended', and that ATSIC's responsibility is:

> . . . not to any particular grantee or organisation, but to the public; *to the people that the organisations were supposed to assist* and to the taxpayers, throughout Australia, who provide the funds available for distribution.' [at 18; emphasis added]

Going on, Wilcox J pointedly noted:

> Of course, the adoption of a fair procedure does not negative bad faith if a decision maker is in fact influenced by an improper motive. [at 19]

Unreasonableness, a ground Australian courts tend to 'treat with circumspection',[2] was the second ground in the Foundation's case. It is arguably the most powerful ground of administrative review as a favourable finding negates the merits of a decision on a wide variety of grounds, including: misdirection; improper purpose; disregard of relevant considerations; and advertence to immaterial factors;[3] the decision being returned to the decision-maker for reconsideration, 'according to law' as laid down in the given judgment.[4]

Wednesbury[5] unreasonableness has been used in England to overturn a politically motivated decision disguised in administrative drag. In *Wheeler v Leicester City Council* [1985] AC 1054 the Leicester City Council attempted to force the local football club to pressure some of its players not to join a rugby tour of South Africa in support of a sports boycott against apartheid. Dissatisfied with the football club's response, the Council refused the club leave to utilise its football ground, which use it had extended to the club for many years under statutory discretionary power. On appeal, the House of Lords found that the Council was attempting '. . . to force acceptance by the club of their own policy on their own terms . . . ', which, in combination with the threat of a sanction, came within the pale of *Wednesbury* unreasonableness (at 1078).

The focus in such cases is often the competing elements of social policy, '. . . a conflict which pervades the whole spectrum of judicial review on the ground of unreasonableness'.[6] The Australian judiciary have been reluctant to address competing public policy agendas and their impact on people. In discussing public policy considerations in relation to legitimate expectation, however (and the point is equally applicable to unreasonableness), Mason CJ has boldly declared unlocked Brennan J's 'gate which shuts the court out of review on the merits',[7]and taken up arms against a sea of troubles.[8] He has held: