choose her for redundancy. Proof of what influenced the directors of ACCO to choose her for redundancy necessarily lay in cross-examination of them about their decision-making process. Exactly what evidence they would give would remain unknown until the cross-examination actually took place. This meant that running such a case could be riskier than proving that the termination was simply 'harsh, unjust or unreasonable'.

This risk was exacerbated as there was almost no existing case law, for there had been few if any cases decided under the unlawful termination provisions.

It was decided to go through the Federal Court, as it was felt that the case was strong enough, and that anecdotally the AIRC usually tends to award less compensation, and is less likely to order reinstatement.

The company was adamant that there had been no unlawful termination, as the termination was for reason of redundancy. It claimed that Ms Treadwell was only one of a number of employees who had been made redundant, and that the operational requirements of the business had required a reduction in staff.

However, Ms Treadwell was successful in her claim. She was awarded reinstatement and compensation for lost wages by Judicial Registrar Parkinson in judgment handed down on 16 December 1997.

In her decision, JR Parkinson considered whether or not there had been a genuine redundancy, and whether Ms Treadwell's absence on maternity leave had influenced ACCO's decision to terminate her. Specifically, she looked at the following issues:

- the duties Ms Treadwell was performing at the time she went on maternity leave;
- whether those duties were still being performed, and by whom;
- what other duties within the company Ms Treadwell had previously performed;
- what duties Ms Treadwell was qualified to perform; and
- whether the company had hired any staff while Ms Treadwell was on maternity leave.

JR Parkinson said:

> ... it was [Ms Treadwell's] lack of immediate availability to meet the requirements of the respondent in filling a vacant position which was the determining factor as to suitability. The evidence satisfies me that the absence of the applicant on maternity leave was part of the reason why the applicant was not appointed to or transferred to various of the vacant positions which became available during that time. The applicant's absence upon maternity leave resulted in her not being considered for these positions. Consequently the applicant became an employee without a position at a time when the respondent was identifying persons for redundancy.

This decision confirmed that an employer has a strong legal obligation to protect a worker's positions while she is on maternity leave, or to give her an alternative position if her original one no longer exists when she is due to return to work.

It also shows that an unlawful termination claim may be the most efficient manner of rectifying unlawful discrimination when it involves a termination of employment. This case was finalised a mere six months after the claim was lodged. There was much less delay than is often found in State and federal equal opportunity systems.

This is an area of law that can and should be expanded in the future.

Vanessa Eckhaus is a Melbourne lawyer.

Reference

1. *Treadwell v ACCO Australia Pty Ltd* (VG538 of 1997, unreported)

ABORIGINAL LAW

An honest claim of right

The implications of the recent case involving Galarrwuy Yunupingu being charged with assault and criminal damage are discussed by STEPHEN GRAY.

The Magistrates Court at Nhulunbuy received an unusual degree of media attention when Galarrwuy Yunupingu appeared before Gillies SM, charged with assault and criminal damage. Under the Northern Territory's mandatory sentencing legislation he faced a gaol term of 14 days if convicted of the criminal damage charge — although mandatory imprisonment is not, yet, the penalty for assault.

The charges arose out of an incident between Yunupingu and Michael McRostie, a professional photographer who had flown out to Gove to photograph a wedding. McRostie, who did not have a permit to be on Aboriginal land, was discovered by Yunupingu taking photographs of Gumatj people, including naked children. When McRostie refused a demand for $50 compensation, Yunupingu pulled the camera away from McRostie by the strap, technically assaulting McRostie in the process, and pulled out and destroyed the film.

The magistrate accepted that Yunupingu was entitled to act in this way under Aboriginal law, which does not allow photographs of Gumatj land or people without permission, since such photographs capture the spirit of the person and diminish the strength or wholeness of the land. Yunupingu raised a number of defences under the Northern Territory Criminal Code. The defence to which Gillies SM devoted the most attention, and which received the most subsequent publicity, was honest claim of right under s.30(2) of the Code.

The honest claim of right defence provides an excuse for an act done with respect to property in the exercise of an honest claim of legal right. To have such a defence to the criminal damage charge Yunupingu must have believed himself entitled to act as he did under the general non-Aboriginal, as well as under Aboriginal law. The majority of the High Court in *Walden v Hensler* (1987) 163 CLR 561 restricted the claim of right defence under an equivalent provision in the Queensland Code to offences 'in which there is an element of causing another to part with property or of infringing the rights of another over or in respect of property' (p.575). It might be argued that the criminal damage charge only incidentally involved causing another to part with property, and that the High Court in *Walden v Hensler* considered offences related to damaging or destroying property to be generally outside the ambit of the claim of right defence (p.574). However, Gillies SM's conclusion that the claim of right defence applied to the criminal damage charge seems only a modest extension of the existing law.

Gillies SM also found that the claim of right defence operated to excuse Yunupingu of the assault charge. This was

on the basis that the NT Criminal Code provision is materially different from the Queensland provision considered in *Walden v Hensler*. The Queensland provision excuses 'an act done with respect to any property', while the NT provision excuses 'an act done with respect to property'. It would appear that an extension of the excuse in this way is inconsistent with *Walden v Hensler*, as well as with the common law in *R v Skivington* (1967) 1 All ER 483, where the claim of right defence operated to excuse the defendant from a robbery charge but not from an assault.

The case should best be viewed as a recognition of the right of Aboriginal people to enforce at least some Aboriginal laws on Aboriginal land. Gillies SM notes that the prosecution was unable to point to any law of the Commonwealth or the Territory which prohibits a Yolngu senior elder on Yolngu land from enforcing Yolngu law. Indeed, Gillies SM found that the grant of land under the *Aboriginal Land Rights (NT) Act 1976* conferred a benefit which included an implied right to observe and administer Aboriginal law on that land, at least where any such laws are not specifically over-ridden by the general law. The magistrate, therefore, found that Yunupingu had a defence under s.26(1)(a) of the Code, that his actions were authorised by law.

This decision, if approved by a higher court, has potentially far-reaching implications for the application of Aboriginal law. The application of this law may be limited in some areas, for example, by earlier case law stating that spearing and other traditional punishments are not condoned by the general law. This case is unlikely to have gone to trial had Yunupingu not been in danger of imprisonment. It could be considered, therefore, an unintended consequence of the NT Government's mandatory sentencing legislation.

Stephen Gray teaches law at the Northern Territory University.

Legal Studies column continued from p.90

Director of Public Prosecutions. Theoretically it would be possible for a court to interpret the relevant provisions of the Western Australian *Criminal Code* in this way, by focusing on the limb of the defence that allows a procedure to be performed 'upon an unborn child for the preservation of its mother's life' and by interpreting the words 'preservation of ... life' literally. Since the important English case of *R v Bourne* was decided in the 1930s, however, this kind of restricted and literal approach to interpreting anti-abortion laws has been progressively abandoned throughout the common law world.[28] It should also be noted that only a small handful of countries today have laws that limit permissible abortions to those needed to save the pregnant woman's life. These countries include Iran, Uganda, the United Arab Emirates, the Philippines and Afghanistan.

The prosecutions of Drs Chan and Lee and subsequent events have made it clear, however, that it is no longer safe or reasonable to make any assumptions about the current — or future — state of Western Australia's abortion laws. The legal and political balls have been thrown in the air. Exactly where they will fall, and whether they will fall by legislative or judicial pronouncement, is anyone's guess.

Natasha Cica
3 April 1998

Natasha Cica is currently completing a PhD at Cambridge University, UK, on the Australian law on abortion and voluntary euthanasia.

References

1. The relevant laws are discussed in some detail below.
2. 'Police back off after bungled self-abortion,' *Australian*, 13 February 1998.
3. Almost all these parliamentarians were men. They were predominantly members of the Liberal Party or the National Party, but there were also several members of the Australian Labor Party and some Independents.
4. 'WA Says Yes,' *West Australian*, 21 February 1998.
5. A range of 'pro-choice' groups soon co-ordinated their efforts under the organisational banner Coalition for Legal Abortion.
6. All these parliamentarians were women. Most were members of the Australian Labor Party or the Australian Democrats, as well as several Greens and some Independents.
7. *Criminal Code Amendment Bill* 1998 (WA).
8. Second Reading Speech, *Criminal Code Amendment Bill 1998* (WA).
9. At the time of writing, more detailed information about the exact form in which the Foss-Prince Bill was passed by the lower house was unavailable.
10. *Criminal Code Amendment (Abortion Bill) 1998* (WA).
11. Again, at the time of writing, more detailed information about the exact form in which the Davenport Bill was passed by the upper house was unavailable.
12. See 'Doctors warn of backyard abortions,' *West Australian*, 7 February 1998, 'Legal doubt on thousands of abortions,' *Weekend Australian*, 7-8 February 1998.
13. *Criminal Code 1913* (WA).
14. *Crimes Act 1958* (Vic), ss.65 and 66; *Crimes Act 1900* (NSW), ss.82, 82 and 84; *Crimes Act 1900* (ACT), ss.42, 43 and 44; *Criminal Code Act 1899* (Qld), ss.224, 225 and 226; *Criminal Code Act 1924* (Tas), ss.134 and 135; *Criminal Law Consolidation Act 1935* (SA), ss.81 and 82; *Criminal Code Act 1983* (NT), ss.172 and 173.
15. *R v Davidson* [1969] VR 667.
16. *R v Wald* (1972) 3 DCR (NSW) 25, *CES and Another v Superclinics (Australia) Pty Ltd and Others* (1995) 38 NSWLR 47.
17. *R v Bayliss & Cullen* [1986] 9 Qld Lawyers Reports 8.
18. *Criminal Law Consolidation Act 1935* (SA), s.82A. Section introduced 1969.
19. *Criminal Code Act 1983* (NT), s.174. Section introduced in 1974.
20. Nor has there been any judicial or legislative clarification of the anti-abortion laws in Tasmania and the Australian Capital Territory.
21. *Criminal Code 1913* (WA), s.259.
22. *Criminal Code Act 1899* (Qld), s.282.
23. [1969] VR 667 per Menhennitt J (often referred to as 'the Menhennitt ruling'). The applicability of the *R v Davidson* test in Queensland was confirmed in *R v Bayliss & Cullen* [1986] 9 Qld Lawyers Reports 8.
24. Health Department of Western Australia, *Women's Health and Well-Being: Report of the Working Party on Women and Health*, Perth, WA Department of Health, 1986.
25. Health Department of Western Australia, *Report of the Ministerial Task Force to Review Obstetric, Neonatal and Gynaecological Services in Western Australia*, Perth, WA Department of Health, January 1990
26. Chief Justice of Western Australia, *Report of the Chief Justice's Task Force on Gender Bias*, Perth, 1994.
27. Compare the situation in Canada, where judicial decriminalisation of abortion took place in 1988. In *Morgentaler, Smoling & Scott v the Queen* (1988) 44 DLR (4th) 385, the Supreme Court of Canada struck down the Canadian federal law criminalising abortion on the basis that it violated the rights of Canadian women under Canada's Bill of Rights (the *Canadian Charter of Rights and Freedoms*).
28. See *R v Bourne* [1938] 3 All ER 615 and [1939] 1 KB 687; *R v Bergman and Ferguson*, unreported, Central Criminal Court, May 1948; *R v Newton and Stungo* [1958] Crim LR 469; *R v Davidson* [1969] VR 667; *R v Wald* (1972) 3 DCR (NSW) 25; *R v Woolnough* [1977] 2 NZLR 508; *R v Bayliss & Cullen* [1986] 9 Qld Lawyers Reports 8.

Slevin references continued from p.60

5. Print M8600 *Re Comalco Aluminium Limited,* President O'Connor, Senior Deputy President Macbean, Senior Deputy President Polites, Deputy President Harrison, Commissioner Merriman, Sydney, 23 January 1996.
6. *Re Freight Rail Corporation* Print P3097 Senior Deputy President Harrison, Sydney, 17 July 1997.
7. *Coal and Allied Operations Pty Ltd v CFMEU* 74 IR 110.
8. *Re Coal and Allied Pty Limited,* Print P8382 Justice Giudice, Justice Munro, Commissioner Larkin, Sydney, 29 January 1998.