Perth he has been involved in two armed robberies and is presently incarcerated. He has stated that he feels lost. He doesn't feel able to fit into mainstream white society or traditional Aboriginal society. He feels very upset that he is unable to easily associate with his own people.

Legal issues

Through the actions of governments and authorities, Aboriginal people were denied their fundamental human rights in regard to land and association with family, tribe and culture. The forcible removal of children from their families arguably constitutes genocide under Article 2 of the United Nations Convention Against Genocide, which defines genocide as acts committed with the intent to destroy, in whole or in part, a national ethnic, racial or religious group. It also contravenes Paragraph 6 of the Draft Declaration on the Rights of Indigenous Peoples.

Governments and church groups could be liable for breaching their fiduciary duty to Aboriginal people. When governments and other organisations undertook guardian or wardship roles in respect of Aboriginal children a fiduciary relationship developed. Being taken away from their families and placed in missions was rarely in the best interest of the children.

Bringing an action in equity for breach of fiduciary duty may overcome the non-discretionary six-year limitation period for bringing an action that otherwise would apply under s.38(1) of the *Limitation Act 1935* (WA) (the Act). The Act should be interpreted to not apply to equitable actions generally, because it is worded so as to apply only to some specifically mentioned actions based on equity (s.24). In the New South Wales case of *Williams v The Minister, Aboriginal Land Rights Act 1983 and Anor* (unreported, NSW Court of Appeal, 23 December 1994) it was held that no extension of time under the *Limitation Act 1969* (NSW) was required to bring a claim for equitable compensation for breach of fiduciary duty. The case concerned an action brought by an Aboriginal woman against the NSW Government for negligence, wrongful detention and breach of fiduciary duty relating to the conduct of the Aboriginal Welfare Board in 1947 in removing the applicant from a home containing Aboriginal children on the grounds of her fair skin. Similarly the Canadian case of *KM v HM* (1993) 96 DLR (4th) 289 at 289 which was concerned with an action brought by a woman against her father for damages for incest, shortly after being given therapy, held that 'the *Limitations Act* does not apply to equitable action such as an action for compensation for breach of fiduciary duty'. In that case it was presumed that the victim did not discover the nexus between the injuries and abuse until the therapy commenced.

Governments may also be liable for other causes of action including misfeasance in public office (knowingly engaging unlawful conduct), breach of statutory duty and unlawful conduct. However, the cause of action under these heads may be statute barred due to the expiration of the six-year limitation period.

Outcomes

Irrespective of the legal argument, governments have a responsibility to initiate actions that will go some way towards redressing the injustices inflicted upon Aboriginal people. All the people who have contacted the Aboriginal Legal Service of Western Australia have felt that part of them has been forever removed. Many children and families feel alienated and are unable to cope adequately with their lives. Whilst the extent of the physical, psychological, emotional and spiritual hurt suffered by indigenous people is not fully known, we believe it is a significant factor in current problems including the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system; physical, mental and emotional health problems; domestic violence; welfare dependency; substance and alcohol abuse; the breakdown of traditional family structures; parenting difficulties; and the loss of cultural and personal identity.

Some initiatives that governments should take include:

- acknowledging that past policies and practices towards Aborigines were wrong;
- supporting or establishing a counselling service run and staffed by Aboriginal counsellors for people who have been affected by such policies;
- better educating the wider community as to past policies and practices towards Aborigines and the consequent effects on the Aboriginal community (this is important so that the imposition of such policies never happens again); and
- providing monetary compensation for affected individuals.

Governments must respond to the real consequences of removing Aboriginal children from their families if the reconciliation between indigenous people and the broader community is to be genuine and effective.

Tony Buti is a solicitor at the Aboriginal Legal Service of WA (Inc.).

COPYRIGHT

The carpets case

TERRI JANKE reports on a recent case involving the application of intellectual property laws to Aboriginal artists.

A recent decision in the Federal Court awarded record damages to Aboriginal artists whose works were reproduced on carpets without their knowledge or permission. Von Doussa J in *Milpurrurru & Others v Indofurn Pty Ltd & Others* (unreported, No. DG 4 of 1993, Von Doussa J, Adelaide, 13 December 1993) awarded an amount of $188,640 to three living artists and the personal representative of five deceased artists. The decision comes in the wake of the Federal Government's review of intellectual property laws as they apply to Aboriginal and Torres Strait Islander arts and cultures.[1] (See also the article by Catherine Hawkins on p.7.)

The facts

The action was brought against a Perth-based company, Indofurn Pty Ltd, which was known as Beechrow Pty Ltd at the time the alleged infringements occurred. Beechrow imported the carpets from Vietnam, a country without copyright laws, and sold them in Australia for up to $4000 each.

The artists whose works were reproduced without permission were all very prominent Aboriginal artists including George Milpurrurru, the first Aboriginal artist to have a solo

exhibition at the Australian National Gallery. His work *Goose Egg Hunt*, which was reproduced on the carpets, is presently owned and displayed by the Australian National Gallery. It was adopted as a design for the 85 cent stamp issued in 1993 to celebrate the International Year of the World's Indigenous Peoples. The other works reproduced are from the Australian National Gallery or private collections by the artists Banduk Marika, Tim Payunka, Ngaritj, Gamarang, Jangala, Tjapaltjarri and Wamut (skin names used for deceased artists).

The works were reproduced from an educational portfolio of Aboriginal artworks produced by the Australian National Gallery and a calendar produced by the Australian Information Service. According to evidence given to the Court, these publications were at the Vietnamese carpet factory when a director of Beechrow first visited it. In both publications the name of the artist and a brief description of the subject matter appeared with the artwork making it clear that the subject matter concerned creation stories of spiritual and sacred significance to the artist.

Permission to reproduce the artistic works as carpets was never sought from the artists or their representatives. Beechrow did attempt to contact the Aboriginal Arts Management Association (AAMA), an organisation set up to advise Aboriginal artists on copyright issues, in order to obtain permission from the artists. However, this was done after the carpets had already been produced. The initial letter seeking assistance to obtain permission from the artists was sent to the wrong address. Without any reply from AAMA, Beechrow released the carpets for sale in Australia. This meant that the carpets were being exhibited, sold and distributed before the artists were even aware that their works were being reproduced on carpets.

According to some of the artists, permission would never have been granted because of the important cultural value of the artistic works and because of the secret and sacred nature of the stories represented in them. While the artists and the traditional owners of the images are pleased to have such works reproduced in culturally sensitive ways for the purposes of educating the wider community about Aboriginal art, it was not appropriate for their artwork to be reproduced without authorisation and in such a culturally offensive way.

Aboriginal concepts of ownership of images

Under Aboriginal law, the right to create artworks depicting creation and dreaming stories, and to use pre-existing designs and totems of the clan, resides in the traditional owners as custodians of the images. The traditional owners have the collective authority to determine whether these images may be used in an artwork, by whom the artwork may be created, to whom it may be published, and the terms, if any, on which the artwork may be reproduced. The extent to which an artwork can be reproduced will depend on the subject matter of the work. For instance, an artwork that is associated with a public story or ceremony might have fewer restrictions than an artwork that embodies say, a dreaming or creation story.

Aboriginal artwork will often depict secret parts of a dreaming that will only be recognised and understood by those who are initiated into the relevant ceremonies, or at least have a close knowledge of the cultural significance of the story. It is therefore important that any reproduction is accurate in every respect and done with full, proper permission of the artist and community so as to not offend the traditional owners.

The traditional owners have the responsibility to take action to maintain the dreaming and to punish those considered responsible for the breach. If permission has been given by the traditional owners to a particular artist to use traditional images in his or her artwork and that artwork is later inappropriately used or reproduced by a third party, the artist is held responsible for the breach which has occurred, even if the artist had no control over, or no knowledge of, what occurred (at 7). Punishment can range from removal of the right to reproduce the image, to exclusion from the right to participate in ceremonies and even death. The Court also heard that punishment of the Aboriginal law breaker may to a large extent be determined by the success or failure of action in the courts (at 9).

The images used by Banduk Marika in *Djanda and the Sacred Waterhole* are associated with her ancestral creation place, Yelangbara. Her rights to use the image arise by virtue of her membership of the land owner group in that area. Although Banduk Marika owns the copyright in the artwork under Australian copyright law, under Aboriginal law she holds the image on trust for all other Yolngu who have an interest in the story. She cannot use an image in such a way as to undermine the rights of her beneficiaries.

Ms Marika created the work for display in culturally sensitive ways and for the purpose of educating others about Aboriginal arts and culture. The reproduction of the artwork on carpets, where it would be walked on, is totally opposed to the cultural use of the imagery employed in her artwork. Such misuse has caused her great upset.

Subsistence of copyright in Aboriginal artworks

The issue of whether works incorporating pre-existing images satisfied the requirement of originality so as to attract copyright was raised by the respondents (at 11). Von Doussa J did not consider the issue to be relevant in the present case, for, 'although the artworks follow traditional Aboriginal forms and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality' (at 12). With reference to Gamarang's artwork, Van Doussa J stated that, 'whilst the dreaming of the Wititj is often told in Aboriginal artwork, the particular depiction of the tail and the rarrk used in this artwork is original and distinctive' (at 41).

Copyright infringement

The Court found that the carpets reproduced substantial parts of the artworks as per ss.14(1)(a) and 31(1)(b). Three artworks were examined in detail.

The Wititj carpet was found to substantially reproduce Gamarang's artwork, *Wititj*. The artist used a stylised representation of an olive, adult python and its children. Although the carpet had only one snake whose body travelled along the border of the carpet, it reproduced the same basic colours and hues. According to Von Doussa J, 'the depiction of the adult python's vent, the cross-hatching or rarrk which infills the body sections, and the shape of the head are distinctive' (at 37). There was no question that the parts of the Wititj had been copied on the snake carpet (at 39).

The Green Centre carpet design was found to reproduce Tim Payunka Tjapangati's artwork, *Kangaroo and Shield Dreaming*, but as a more simple design. The work adopts common western desert symbols as part of the originality (at 44). The pattern taken from the artwork constitutes a striking

feature of the carpet. Hence, copying was found to be substantial.

The Waterholes carpet design was considered to be a substantial reproduction of Jangala's *Emu Dreaming*. Again the artwork was a complex, detailed design which incorporated blue and purple colours on a background of differing shades of ochre (at 45). Von Doussa J considered that the waterholes carpet took from the artwork the outer border which appears on two sides of it and extends completely around the design. This was found to be strikingly similar to the central feature of the original artwork: the 'visual appearance of the carpet remains fundamentally the same except on very close examination' (at 47).

Von Doussa J considered that the most important consideration in deciding whether the respondents had infringed the applicant's copyright was whether there was any *animus furandi*,[2] that is, whether there was an intention on the part of the respondents to appropriate the artworks 'for the purpose of saving themselves labour' (at 42). This consideration was satisfied, according to Von Doussa J, because the carpets were obviously 'the result of the instruction to produce carpets in designs that were less busy than the original artworks' (at 15).

Importation of infringing works

For a claim of infringement under s.37 of the *Copyright Act 1968* (Cth) to be made out by the importation of the carpets, it must be established that the importer knew or ought reasonably to have known that the carpets would, if made in Australia by Beechrow, have constituted an infringement of the copyright. Von Doussa J was satisfied that the company, via Mr Bethune, the active director, had constructive knowledge; that is, knowledge of facts that would suggest to a reasonable person, particularly one about to engage in the business of distributing carpets in Australia, that a breach of copyright law would be committed if the carpets were to be made in Australia.

Liability of silent directors

The action was also taken against the two other 'silent' directors who did not take part at any time in the management of the company. Their role was considered to be entirely formal as there were no directors meetings (at 53). The affairs of the company were left entirely in the hands of Mr Bethune. It was unlikely that they had knowledge of the company's importation of carpets.

Despite this, Von Doussa J found that the two directors were liable for damages. After being issued with the proceedings, they had knowledge of the importation of the carpets. The Court found that they took no action when served with the proceedings other than to accept Mr Bethune's explanation and to instruct solicitors. They did not make any enquires, or make any other effort to verify that the company had ceased importing or selling carpets bearing the infringing designs. They continued on as 'sleeping or passive directors' (at 65) and left the affairs of the company in the unchecked control of Mr Bethune. Had they acted with the requisite care and diligence of a reasonable person in a similar position in a corporation,[3] they would have made enquires concerning the carpets. Such enquires would have revealed that the carpets were still being imported and actively promoted (at 58).

Von Doussa J considered that such acts of indifference and omission implied that the other directors gave permission for the continuing importation and sale.[4] Hence, they should be held personally liable for the subsequent infringements committed by the company (at 56). An additional amount of $43,222 was awarded against the 'silent' directors. An appeal has been lodged by the silent directors.

Infringements under the *Trade Practices Act*

The issue as to whether the carpets infringed ss.52 and 53 of the *Trade Practices Act 1974* (Cth) was also briefly discussed. Von Doussa J found that the labelling which stated that 'Royalties are paid to Aboriginal artists' was misleading. This labelling had also been attached to other carpets which had no Aboriginal association at all. By using such labelling, Beechrow was misleading the consumer to believe that the copyright in the artworks belonged to the company, or was licensed to it, or the carpets were approved or made under the licence and approval of the Aboriginal artists. In Von Doussa J's opinion, such false and misleading conduct amounted to an infringement of ss.52 and 53.

Von Doussa J also observed that if the carpets were not substantial reproductions of the artworks, as the respondents alleged, then it would have been false to describe the carpets as designed by Aboriginal artists.

Damages awarded

The Court granted a remedy under s.116 of the *Copyright Act 1968* (Cth) for conversion damages and the delivery of the unsold carpets.

Special punitive damages were awarded by Von Doussa J given the flagrancy of the infringement and the fact that the respondents refused to admit the copyright ownership of the artists in their artwork from the outset. The respondents' tactic of denying copyright exacerbated the seriousness of the infringement and therefore warranted additional damages to compensate for the cultural and personal hurt to the artists.

In accordance with the applicants' wishes, the Court allocated an aggregate amount to the artists rather than as individual judgments. This would allow the artists to divide the damages in a way they considered culturally appropriate. In this way, the traditional owners of the designs and images could also share in the proceeds.

Reaction of the Aboriginal artists

The award is the largest ever made to Australian artists for infringement of copyright in an artwork. Ms Banduk Marika expressed relief at the result:

> . . . I am sure that all the artists and their families and communities will feel the same. It is important for all artists but especially for Aboriginal artists to assert their rights to cultural and artistic freedom.

The artists have not yet decided what they will do with their carpets. One of the artists would like to burn the carpets that reproduce that artist's work in a special ceremony at the artist's community.

Ms Bronwyn Bancroft, artist and chairperson of the National Indigenous Arts Advocacy Association (NIAAA, formerly AAMA) said:

> The judgment is a landmark in the protection of indigenous cultures in Australia. For too long people have seen it as 'open season' on Aboriginal and Torres Strait Islander arts and cultures. In taking this action, the Aboriginal artists and their communities have sought to show that they will protect their rights under Australian law. I am proud that AAMA, as an

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.]