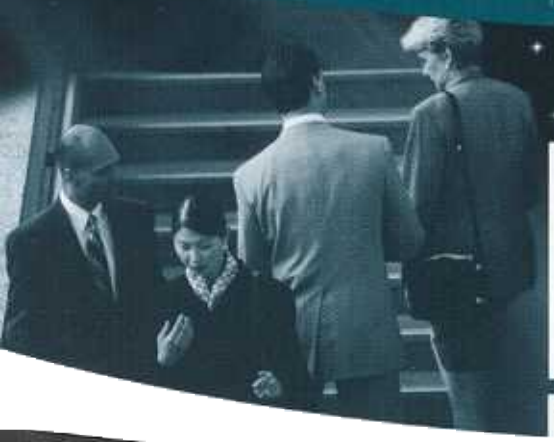
ISSUE 20
DEC' 1997

Newsletter of Mullins & Mullins Solicitors & Notary



M&M Report

Editorial

by Patrick J Mullins

As this newsletter goes to press, the republican issue is being widely debated around Australia by candidates for election to the constitutional convention. Unfortunately, the debate seems to have been hijacked. Both republicans and royalists alike only seem to be concentrating on one issue and that is whether we want an Australian as our Head of State.

There is much more to the republic than that and it seems to me more important to focus on how, under a republic, we can maintain the proper checks and balances that are necessary to ensure the balance of powers between the Executive, the Parliament and the Courts. Most of those checks and balances in our system are not derived from our written constitution, but rather from practices and unwritten conventions.

It is these institutions and the checks and balances between them that make up our democratic system of government and are our safeguard of freedom in Australia.

Some of us are excited about the prospect of a republic; others of us are not. In moving to a republic we should not sacrifice our stability and our democratic institutions in what is the best country on earth.

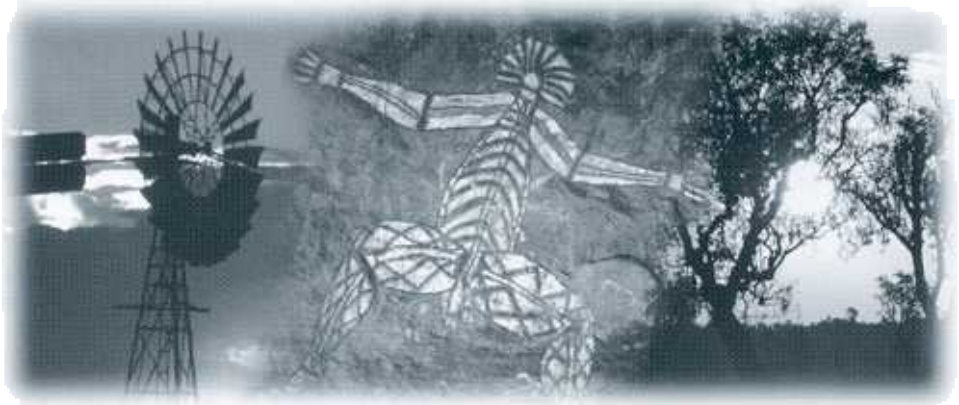
In the New Year the delegates to our constitutional convention will have a heavy responsibility. That will be to safeguard the framework of our democratic system of government.

Christmas time is a family time and Christmas 1997 may be an opportunity for us all to reflect on how lucky we really are to be raising our families in a safe and stable country.

The Partners and Staff of Mullins & Mullins wish you all a very peaceful and happy Christmas.

Print Post Approved PP 454 022/00073

Native Title and the Ten Point Plan



by Rob Stevenson

The High Court's decisions in the **Mabo** and **Wik** cases have fundamentally affected the certainty of an owner's title in his/her land. The Native Title Act 1993 attempted to establish a mechanism for determining claims to native title and to return certainty to our scheme of land ownership. There is consensus amongst all parties that the Act was not resulting in effective solutions and needed amendment. The Federal Government has stated four objectives in introducing the Native Title Amendment Bill. They are to reduce uncertainty and improve the workability of native title processes and to find a balance among the interest of all parties whilst maintaining respect for native title. Has this been achieved? This article sets out the background to the amendments, their substantive content and the major benefits and criticisms which have been raised.

Background

Prior to the historic **Mabo** judgement in 1992, the traditional legal view was that Australia was "terra nullius" or land belonging to no-one. On the arrival of the colonists, all land was declared to be owned by the Crown. Governments for the last 200 years have accordingly conferred title to land on the assumption that they could do so free of any consideration of the native inhabitants. Whilst the **Mabo** case was restricted on its facts to islands separate from the mainland, it is accepted as holding that indigenous Australians have native title rights in relation to land that are recognised by the common law.

The Court did not decide what is meant by the term "native title". The accepted view is that, unless extinguished, native title can exist where land has traditionally been used by indigenous Australians for purposes such as ceremonial activities, hunting and fishing. The degree to which native title exists over land may vary according to the extent of these traditional activities. The Court held that native title will only continue to exist where the current owner of the subject land does not have a right of exclusive possession, as is the case with freehold and most forms of leased land. Vacant crown land was thought to be the main title which would be open to native title claims.

The Act was a first attempt to accommodate this fundamental change to our traditional views within our existing land title system. It attempted to validate certain

Continued on page 2.

Family Law

Establishing Paternity

by Doris Chan

The issue of paternity ie who is the father of a child, is not in all cases a clear cut matter. It is often a very sensitive issue with both emotional and financial ramifications for all involved. How then, does the law treat this issue and what process is used to determine paternity?

Presumption of Paternity

Under the *Family Law Act* there are presumptions that a child is a child of both parties to a marriage if:-

- the child is born while the parties are married;
- the child is born within 44 weeks after the marriage is terminated, or if there has been a reconciliation within 44 weeks from the resumption of cohabitation (similar guidelines exist for defacto relationships);
- both parties register the child/children at birth;
- there is a judicial finding that a person is a parent of the child;
- one party acknowledges paternity; or
- paternity is established by virtue of artificial conception.

Paternity Testing

Paternity testing is a method now used regularly to assist the Court in determining this issue, where these presumptions do not apply. Parties may enter into a consent order for testing or it may be ordered by the Court where there is evidence which places paternity in doubt. Whilst the Court has the power to order testing, it has no power to compel a person to undergo testing without their consent. It can, however, draw adverse inferences from a refusal to undergo testing.

What exactly is paternity testing?

Paternity testing procedures involve blood group testing and genetic fingerprinting. The most common type of test used is DNA typing which is a combination of several tests utilised to establish on a sliding scale of percentages whether or not a person is a likely parent. These tests can cost between $800.00 and $1,500.00 depending on which testing centre is used. Family law regulations contain strict procedures concerning the obtaining of blood samples or bodily fluids which basically ensure the hygienic

Continued on page 4.

'Subject to Finance Claus

by Bob Lette

A vast majority of buyers of residential property do not pay cash for a purchase but require finance to complete the purchase. The current REIQ Terms of Contract provide a mechanism for a residential Contract to be made "subject to finance" upon completion of the Finance Section in the Items Schedule. This then triggers the operation of Part 3 of the Terms of Contract. Part 3 provides that the Contract will be conditional on the Buyer obtaining approval of a loan by the finance date inserted in the Items Schedule on terms and conditions satisfactory to the Buyer.

There is a 5.00 p.m. deadline on the finance date for notifying the Seller if finance is approved. If this is not done the Seller can then terminate the Contract. In effect, notwithstanding the conditions of Part 3, the Buyer may terminate the Contract at any time before the Seller gives the Buyer notice of termination and, in any event, before the due date for settlement. A Lender will issue a loan approval letter which sets out the Lender's terms and conditions one of which invariably reserves to the Lender the right to withdraw from the loan at any time should:-

- the Buyer's circumstances change;
- the valuation be insufficient to meet the Lender's lending ratio criteria;
- the Lender becomes aware that information supplied by the Buyer is incorrect or insufficient or which may be prejudicial to the Lender's interests; or
- all searches and enquiries regarding the Buyer or the Property are not satisfactory.

What happens, however, should the Lender actually withdraw its loan approval? The Seller has been notified that finance has been approved and is entitled to believe the Buyer will settle. Without the loan from the Lender, the Buyer cannot settle. The Buyer has paid a substantial deposit (usually 10% of the purchase price). Will the Buyer be in default under the Contract giving the Seller the right to forfeit the deposit and claim damages?

Simply put - yes. Once the Buyer has advised of the fulfilment of the finance

Native Title and the Te

Continued from page 1.

titles and provide a means by which native title issues could be resolved without recourse to lengthy and expensive court proceedings. In practice, these issues have not proved easy to resolve. The subsequent **Wik** decision at the end of 1996 was to the effect that pastoral leases do not necessarily extinguish all native title, as was previously thought to be the case. This has complicated attempts to bring certainty back into the system.

What are the Government's proposals?

The Bill embodies the Government's "10 Point Plan" response to the **Wik** decision and the deficiencies in the Act. Its primary provisions are as follows:-

1. Validation

The Bill provides for the validation of so-called "intermediate period acts" over freehold and pastoral lease land and public works. These "acts" refer to actions of the Government in the form of legislation and the granting of rights and licences between 1 January 1994, the date of commencement of the Act and 23 December 1996, the date of the **Wik** decision, which might otherwise be invalid.

2. Confirmation

The Bill provides that certain "previous exclusive possession acts" have extinguished native title. This primarily refers to grants of freehold estate and leases for residential, commercial or community purposes. This confirmation extends to the acts of state and territory governments. The extinguishment of native title rights is permanent. There is to be compensation on just terms to former native title holders where this occurs. The Land Fund has been retained to enable Aboriginal people and Torres Strait Islanders to purchase land to remedy past extinguishments.

3. Pastoral Land

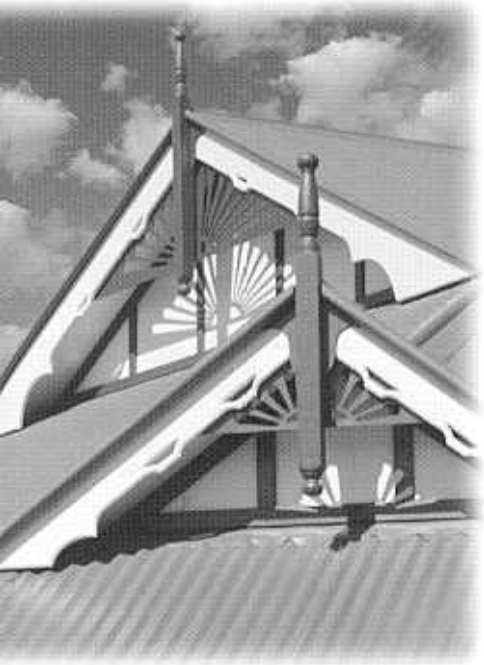
Pastoral leases will extinguish native title to the extent that such rights are inconsistent with those of the pastoralist. This will usually be the case where a right of exclusive possession has been conferred on the landholder. Where there is no right of exclusive possession the Bill specifically allows the conduct on the land of all activities pursuant to "primary production" as defined in the Income Tax Assessment Act.

These rights are to co-exist with any native title rights. The activities allowed are intentionally broad and extend to such things as farm stay tourism.

4. Right to Negotiate

The Act allows the Government to deal with land the subject of native title rights for purposes such as mining. This is subject to a right by the native title holders to negotiate over the terms of access to the land. This right to negotiate will be removed where it is inappropriate because of the limited native title rights that

- What is their effect?



approval condition the Contract is then unconditional, whether or not the Buyer's Lender subsequently fails to provide the funds for settlement. The Seller is entitled to certainty of Contract and notification of finance approval provides this.

It is essential that all terms and conditions of the Lender's approval be complied with before notification is given to the Buyer of finance approval. It is even more essential that the Buyer be completely truthful with the Lender to minimise the risk of the Lender withdrawing finance approval after the finance approval date. It is too late to withdraw from the Contract once a finance approval notice has been given to the Seller.

Clearly then, it is always prudent for a Buyer:-

- to require a Contract to be subject to finance;
- to ensure the finance is in place even if the Buyer has a "pre-approved" loan; and
- to satisfy all the Lender's terms and conditions if at all possible before giving notice of loan approval to the Seller.

Point Plan

could exist, their nature and impact on the subject land. Where the land is proposed to be used for mining or is land near towns and cities, a person claiming the right to negotiate will have to satisfy a more stringent standing test. The claimant will have to show a current or past physical connection with the land. There is no power to negotiate in relation to mining exploration or development on pastoral leases or Government infrastructure projects. The right to negotiate in relation to mining development on vacant Crown land will be retained. There will also be only one right to negotiate for each project; not at separate stages as is currently the case.

5. Other Changes

- For claims already registered but not dealt with, the claimants right of interim access to the land will be confirmed where the claimant can show they regularly accessed the land at the time of the **Wik** decision.
- The Bill attempts to move the emphasis from a "claims driven" regime to the reaching of agreements between parties.
- The role of indigenous representative bodies in the negotiation process will be strengthened.
- There is a "sunset clause" which only allows for native title determinations under the Act and claims for statutory compensation to be made within 6 years of the Bill becoming law. This will presumably not prevent common law claims from being made after that time.

Benefits and Criticisms

Amongst the benefits said to flow from the Bill are:-

- much improved certainty for pastoral lessees;
- restoration of a proper balance between the interest of native title holders and the need to ensure that economic development is not impeded;
- recognition and protection of co-existing native title over most of Australia's rangelands; and
- transparency and predictability of processes for resource industries.

The major criticisms which have been levelled at the Bill are that:-

- the validation and confirmation of extinguishment provisions will result in the extinguishment of many valid claims;
- the authorisation of pastorally related activities on pastoral leases has been extended too far; and
- the scope of the right to negotiate many claims has been greatly reduced.

Conclusion

The proposed amendments attempt to address a number of concerns with the operation of the Native Title Act and strike a balance between the interests of native title holders, pastoralists, resource developers and other Australians. There has been considerable criticism of the proposals on the basis that the pendulum has swung too far in the interests of landholders. There are also arguments about the constitutional validity of the proposed amendments. The amendments are currently being debated in the Senate. The Government has said that if they are not passed by the end of the year, the Bill will be resubmitted in the new year to the Parliament. If the Bill is not then passed, it could be used as a trigger for a double dissolution election. The issues to be resolved in the native title debate are complex and wide ranging and will take many years to be settled. They should be the subject of informed debate in the community. However, any election fought on native title issues will be potentially divisive and should be avoided.

Contributory Negligence

Changes under the Workcover Qld Act 1996

by Daniel Williams and Rob Stevenson

The new act regulating the compensation of workers came into force on 1 February 1997 and applies to all work accidents occurring after that time. Its provisions will significantly change the way in which claims for compensation are made and the way in which any common law damages are assessed. Of particular note is the legislature's attempt to force the Courts to give more weight to the issue of contributory negligence. It is fair to say that of recent times, and particularly with the advent of comprehensive insurance schemes, the Courts have been placing a greater emphasis on employers' responsibilities to provide a safe working environment for their employees.

The Act sets out a number of circumstances which, if found to exist, will result in a compulsory reduction of damages by at least 25% for each one. There are 6 separate circumstances set out, so this could theoretically lead to a reduction of damages of 150%! The relevant section (s.314) provides that a Court must make a finding of contributory negligence if the worker:

- failed to comply with instructions;
- failed to use or "inappropriately misused" protective clothing and equipment provided by the employer;
- was affected by the intentional consumption of alcohol, drugs or other substances; or
- failed to attend safety training courses organised by the employer on more than 1 occasion.

It remains to be seen how the Courts will interpret these provisions and whether these changes will achieve the Act's stated goal of strengthening workers' obligations for their own safety.

Establishing Paternity

Continued from page 2.

collection of blood samples and also govern the identification of those blood samples before testing is to take place.

All parties that provide a bodily sample are required to consent to the testing and also provide a photograph to the sampler who then signs across the photograph indicating that they are one and the same persons from whom the sample has been collected. Once all the samples have been collected they are then transported to an appropriate testing centre for DNA testing and/or blood grouping to take place. The test results are presented as a percentage of how likely the male is to be or not to be the father of the subject child.

There are other techniques available such as sperm count testing but DNA typing is the usual method used and offers a degree of reliability not previously available through such tests.

Conclusion

The law makes certain presumptions of paternity and it is only when one of those presumptions are called into doubt that means of ascertaining paternity must be used. Paternity testing has now become a common place method of determining the likelihood of a certain person being the father of a child and offers a substantial degree of certainty.

Sport

The Tigers

Those who know John Mullins or the Mullins Family will know of the family's close affiliation with Easts Rugby Club. John was president for three years up to 1994.

Easts in 1997 celebrated their 50th Anniversary by winning their first A Grade Premiership. The Tigers came back from 16-3 down at half time to record an exciting 18-16 victory over favourites Souths.

The game was followed by celebrations of a magnitude not seen since Queensland won the Sheffield Shield.

Christmas Closure

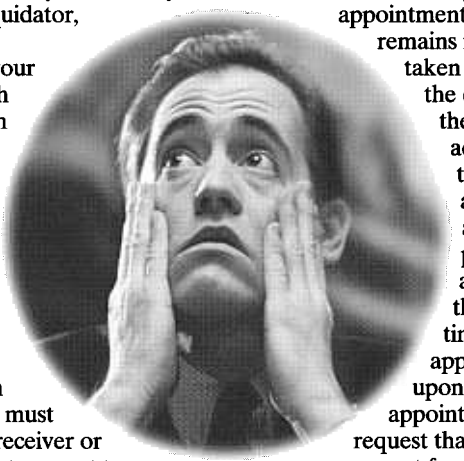
To enable the Partners and Staff to share the Christmas period with their family and friends, we will close the office on Christmas Eve and re-open on Monday 5th January. For urgent matters over this period refer to the White Pages or obtain mobile telephone numbers from us before the break.

Insolvency - What can a creditor do when a customer goes broke?

by Paul Luivey

What do you do when you receive notice from a liquidator, receiver or voluntary administrator that a company with which you normally deal and which owes you money is in liquidation, receivership or voluntary administration?

There is not a lot that you can do. If you have supplied goods to the company and you have in place a valid and enforceable retention of title agreement you can, subject to the consent of the liquidator, receiver or voluntary administrator, reclaim your goods. The effect of such agreement is that title in the goods remains with you and does not pass to the company until the company has paid for the goods. This is a complex area of law and you may require legal assistance to enforce your rights. Otherwise, if you are an unsecured creditor, you must wait for the liquidator, receiver or voluntary administrator to report to you concerning the affairs of the company. Each type of administration creates different functions to be performed by the appointed insolvency practitioner.



Liquidation

Firstly, in the case of a liquidation, in most cases, the liquidator is appointed because the company is insolvent, ie. it cannot pay its debts. The liquidator takes immediate control of all of the company's assets upon his or her appointment subject to the rights of secured creditors to appoint a receiver to deal with the assets that are secured. Simply put, the liquidator's role is to realise all of the assets and then pay in priority:-

- The costs in relation to obtaining the order to wind up the company;
- The liquidator's costs;
- Outstanding employee entitlements; and
- Unsecured creditors.

In a lot of cases, by the time it gets down to the unsecured creditors, there is no money to go around. Business people would be aware that dividends to unsecured creditors are not common given the number of liquidations occurring. The liquidator, subject to sufficient resources being available, may also conduct investigations into the affairs of the company and carry out a public examination of officers and other people with knowledge of company transactions. A director is personally liable for debts incurred, and it is an offence for a company to trade, whilst insolvent.

Receivership

A receiver can be Court appointed or appointed pursuant to an agreement to which the company is a party. In most cases this agreement is a charge given by the company and it is therefore the secured creditor who appoints the receiver when a breach of the charge has occurred. A receiver appointed by the secured creditor takes control of the assets which are subject to the charge and has the power to deal with such assets in an effort to protect the interests of the secured creditor.

Voluntary Administration

A voluntary administrator has completely different functions to perform upon appointment. The company remains in existence and is taken out of the hands of the directors and is under the control of the administrator from the time of his or her appointment. The administrator is personally liable for all debts incurred by the company from the time of his or her appointment. Therefore, upon his or her appointment, he or she will request that the company open a new account for trading purposes. Obviously for the administrator to be liable, he or she must authorise the incurring of the debt.

The idea of a voluntary administration is to save the company or, if that is not possible, maximise the return to creditors. The administrator is bound by time frames as to when he must conduct meetings of creditors. By the second meeting of creditors, the administrator must recommend one of three possibilities:-

- That the administration end;
- That a Deed of Company Arrangement be entered into by the company; or
- That the company be wound up.

It is the creditors who vote on one of the three possibilities and decide the fate of the company. The administrator would have, in the time permitted, examined the affairs of the company so as to have reached his recommendation. However, ultimately, the fate of the company rests in the hands of the creditors.

Mullins & Mullins
SOLICITORS & NOTARY
Level 5, GIO Australia Building
GPO Box 2026, Brisbane Q 4001
200 Mary Street, Brisbane Q 4000
Phone: (07) 3229 2955
Fax: (07) 3229 8075
Email: mullins@tpgi.com.au

Postscript: The information contained herein whilst accurate is of a general nature. If you have any queries in relation to the information contained herein we ask that you consult the partners or solicitors of Mullins & Mullins with whom you usually deal. If you have any comments regarding our newsletter we would like to hear from you.