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Piper Alderman Legal Update

The Victorian Infertility Treatment Amendment Act 2007 - the Stem Cell Debate Continues

Emma-Jane Clarke

Dispute resolution lawyer, Emma-Jane Clarke, explains the controversial Infertility Treatment Amendment Act 2007 which was passed in Victorian Parliament's Upper House in a rare conscience vote on 3 May 2007.

The legislation is the first of its kind to be passed by an Australian State parliament, following on from the amendments to the Federal legislation passed in December 2006. The Victorian Act comes into operation on 12 June 2007 and it mirrors the Federal legislation which also comes into effect in June this year. The Victorian legislation will provide legal certainty for scientists seeking to conduct embryonic stem cell research in Victoria as without it Victorian scientists and companies would have been unable to apply for Federal licences for stem cell research.

Both the Victorian and Federal legislation will allow for therapeutic cloning, which is also known as somatic cell nuclear transfer. Therapeutic cloning involves the removal of the genetic material of an unfertilised egg cell and insertion of the nucleus (which contains the complete set of DNA) from a somatic (body) cell. The egg which now contains the same amount of DNA as a fertilised egg is allowed to grow into a tiny embryo for approximately 6 days (the maximum permitted by the legislation is 14 days) and then the embryonic stem cells are harvested for research and medical purposes.

The previous legislation allowed researchers to use embryos donated from couples at the end of IVF. However, the issue is that stem cells derived from these embryos are not matched to donors or do not carry the trait of a particular disease, as they have the DNA of the couple who permits their use.

For the first time therapeutic cloning enables scientists to develop cell lines that carry the trait of a particular disease or to even match the stem cells to a particular patient who requires treatment.

For example, the use of therapeutic cloning will enable DNA from a patient with Alzheimer's disease to be injected into a donor egg which has had its nucleus removed. This will therefore enable the creation of the diseased cell line which will carry the traits of Alzheimer's disease, which will provide researchers with a platform to investigate the onset and progression of the disease, and hopefully lead to a cure being found for the disease.

Another potential use of therapeutic cloning is treatment for degenerative diseases, such as motor-neurone disease, being matched to individual patients. The process will start with a donated egg which will have its nucleus removed and the insertion of DNA material from the patient in the form of a nucleus taken from a patient's somatic cell. With the use of therapeutic cloning and the harvesting and manipulation of the stem cells removed from the embryo, it is hoped that successful treatment of the disease the patient suffers will be possible. It is thought that this treatment will have a higher success rate than current forms of treatment as there will not be the issue of the implanted cells being rejected by the patient's body as the cells will be genetically matched to the patient.

Still at issue is where to find the eggs necessary to perform therapeutic cloning. IVF clinics are an obvious choice via the donation of excessive eggs. However, it is thought that this will not be adequate. Another option is donation from women who would donate their eggs for research purposes. However, it is thought that there may be a donor shortage as donating eggs is an invasive process.

Both the Victorian and Federal legislation will continue to prohibit scientists from merging a sperm and an egg to create an embryo, to then use for research purposes (the use for IVF is still allowed). Also prohibited is human reproductive cloning, which is where a cloned egg is implanted into the uterus for development.

Therapeutic cloning is permitted in the US, Britain, Sweden, Japan, China, India and Israel. It was predicted that without these legislative amendments Victoria would not only lose its position as one of the world's leaders in stem cell research but also Victorian researchers and their potentially lucrative discoveries would have continued to disappear overseas.

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Whitlam v NRMA: Indemnity for Costs in Defamation Proceedings

Mitch Coidan

Dispute resolution associate, Mitch Coidan, explains the recent NSW Court of Appeal decision which explored the limits of corporate indemnities for directors.

Mr Whitlam was a director of NRMA who provided an interview to a television station, in his capacity as a director of that company. Following the interview, Mr Whitlam believed that extracts that were used and subsequently published were defamatory in nature, and instigated defamation proceedings in the Supreme Court of New South Wales. In addition, Mr Whitlam requested that NRMA indemnify him for his legal costs of those proceedings, under the Deed of Indemnity that the company had provided him as a director.

It was a term of the Deed of Indemnity between NRMA and Mr Whitlam, that NRMA would cover all "*liabilities*" incurred by him as an officer of any NRMA group. The term "*liabilities*", as it was defined within the Deed, meant "*any loss, liability, costs, charge or expense*" incurred as a result of him having held a director's position with the NRMA. Mr Whitlam's arguments were threefold:

1. That an attack on his person, and indeed subsequent damage to his reputation, was a "*loss*" as defined within the Deed of Indemnity, and when a loss is within the scope of a contract of indemnity, the indemnity also covers the costs of taking reasonable steps to mitigate the loss, in this case, the legal costs of bringing the defamation action.

2. That his legal costs were "*costs, charges or expenses*", as defined within the Deed and had reasonably been incurred as a result by him, as a director or officer of NRMA; and

3. That apart from the terms contained within the director's indemnity, NRMA would have to pay his costs in any event, at general law, by reason that his defamation action was essentially an action by him, as a director, on behalf of NRMA.

At first instance the Trial Judge agreed with all three arguments put by Mr Whitlam. On appeal, the New South Wales Court of Appeal rejected those arguments. In its reasoning, Beazley JA, with whom Campbell JA agreed, found that indemnity provided by the NRMA to Mr Whitlam did not sufficiently cover loss of reputation, and that while the statements made by Mr Whitlam during the course of the interview were made by him in his capacity as a director of NRMA, his personal commencement of defamation proceedings and the subsequent incurring of legal costs on account of those proceedings, were not in the scope of his duties as an officer of NRMA. The costs of the proceedings were therefore not "*liabilities*" within the Deed of Indemnity.

In relation to Mr Whitlam's argument that the NRMA should pay his legal costs in any event, at general law, the Court of Appeal rejected this on the basis that, unless the right to indemnity could be found in the express terms of the Deed of Indemnity, there was no basis to imply an obligation upon NRMA to indemnify from an event that was not covered by the Deed.

The Court of Appeal's decision generates more lingering uncertainty about the circumstances in which a director may be indemnified against legal costs under section 199A of the *Corporations Act 2001* (Cth).

What is important to note is that the court did not state that director and company officer indemnities could *never* cover the costs of an action commenced by a director or officer, and indeed this decision was limited to defamation actions, of the sort commenced by Mr Whitlam. When drafting and understanding director and officer indemnities, it will be important to ensure that the terms, in relation to liabilities covered by the Deed, are not drafted so as to cast ambiguity over its scope of coverage, particularly with regard to costs or expenses.

Divergent Opinions Regarding the New Cross-Media Ownership Legislation

Elizabeth McGill

Dispute resolution paralegal, Elizabeth McGill, explains the government's cross-media ownership legislative package which represents the most significant development in this area since the introduction of cross-media laws in 1987.

The legislative scheme is designed to curb cross-media ownership restrictions and to relax foreign ownership laws. These statutory changes may incite consolidation of the media market and therefore investors, directors and shareholders alike should be alert to the potential for increased movement in the industry.

The legislative package allows cross-media transactions to occur provided a minimum number of separately controlled media groups, or "voices", remain active in the specified area. In metropolitan areas, five voices represent the minimum, whilst in regional areas only four are required before further media consolidation is authorised. In addition to this, the government has adopted a *three-two rule*, whereby mergers in the one location will only be accepted between two, but not three, of the following sections: commercial television, commercial radio and associated newspaper.

Despite the foreseeable benefits of encouraging foreign investment into Australia and exploiting economies of scale pursuant to market consolidation, there is nonetheless significant opposition to the legislative scheme. Through second reading parliamentary debate Senator Ludwig, for example, argued that the legislation will lead to "an increased concentration of media ownership, a rationalisation of news and production services, a loss of diversity of media content and the boosting of the power and influence of a small number of media owners".

The diversity of broadcast and published opinion appears to have attracted the most debate, as central control of media assets is likely to reduce the range of independent opinions in the industry. This could adversely affect the "fourth estate" role of the media in its capacity to publicly scrutinise government activity. It could also reduce the local flavour of regional media.

Information obtained prior to the legislation coming into force from a Crickey survey conducted by a Roy Morgan Poll, indicated that 80% of journalists felt that the new legislation would lead to adverse changes regarding the independence and integrity of reporting. This detrimental change was argued to result from journalists being required to conform to the political persuasions of an increasingly smaller number of media owners.

Despite increased regulatory power regarding civil penalties, the effectiveness of the ACCC and the Australian Communications

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and Media Authority (ACMA) in curbing illegal and anti-competitive behaviour in the face of this legislative package has been called into question.

In contrast, it is argued that sufficient diversity and competition in the market will remain notwithstanding the new legislation, given that several media providers are excluded from the "voices" requirement. Exclusions include the ABC in its various forms, SBS, national newspapers such as *The Australian* and the *Financial Review*, newspapers published less than four times per week, out-of-zone newspapers such as *The Sydney Morning Herald* in the Canberra market, pay television and the internet. Therefore, even in the most condensed media market allowed under the legislation, consumers will nonetheless be offered considerable choice.

Although the internet was proposed as a means of ensuring adequate diversity of opinion, given that much of the information downloaded by the Australian public can be sourced from traditional media owners, the internet may be largely ineffective in safeguarding media variety. For example, ninemsn.com.au is operated by PBL, news.com.au is owned by News Ltd, Fairfax controls smh.com.au and theage.com.au and the ABC is responsible for abc.net.au.

In addition, the current number of media owners in Australia is considerably higher than the number required under the new legislation. Therefore the changes will necessarily allow for a less competitive and diverse Australian media market. For example, there are currently 12 major media owners in Sydney, 11 in Melbourne and 10 in Brisbane. However, these could be reduced to only 5 if the market consolidation potential under the legislation is fully realised.

Current developments regarding media ownership include a $9 billion Fairfax/Rural Press merger, competition between PBL Media and WIN over Channel 9 in Perth and increasing interest by WIN over NBN Television in central and northern NSW. There is also speculation of a takeover of Austar by Foxtel or Seven.

The new cross-media ownership legislation has purportedly liberalised the media market in allowing greater freedom of transaction and consolidation, particularly across international markets. However, it has simultaneously attracted great criticism for its failure to protect diversity in the media. Although activity has already begun in relation to the legislation, the market is yet to fully capitalise on the new opportunities available.

Mizzi v Reliance Financial Services

Leonora Roccisano

Dispute resolution associate, Leonora Roccisano, discusses a recent decision challenging a contract as unjust under the Contracts Review Act.

The plaintiff was a widowed pensioner of Maltese origin. Unable to speak English very well and being generally poorly educated, Mrs Mizzi left management of all personal and financial affairs to her husband. After his death, she remained living in the home her and her husband had owned and occupied for most of their married life in Australia, in Heckenberg, New South Wales ("the Heckenberg property").

In late June 1999 Mrs Mizzi was asked by her grandson, Stefan, for a mortgage on the Heckenberg property. The next day Stefan's wife took Mrs Mizzi to a solicitor's office and was given a number of documents to sign. The solicitor explained that the documents said that Stefan would pay back the money borrowed and told her the interest rate. Stefan's wife explained that the documents were like a guarantee that Stefan would pay back the money. Mrs Mizzi commented that she still didn't understand what it was all for, but she thanked the solicitor for helping Stefan, and signed the documents.

It was found that Mrs Mizzi signed, with a witness, a mortgage securing advances to her of $115,000 payable by 5 July 2000. The mortgagees were clients of law firm Kremnizer & Co ("the Kremnizer loan"). Mrs Mizzi was not given copies of any of the documents.

Default in payment of this loan led to proceedings being filed against Mrs Mizzi, by Kremnizer, claiming possession of the Heckenberg property, judgment for $50,000.00, interest and costs.

Stefan's accountant, Sam Cassaniti, was also the principal of Reliance, a finance company ("Reliance"). In November 2000, Stefan spoke to Mr Cassaniti about the proceedings against his grandmother and sought Reliance's assistance.

On 9 November 2000, Reliance's lawyers wrote to lawyers retained on behalf of Mrs Mizzi to advise that they were considering an advance to Mrs Mizzi in the sum of $125,000 for three months, using the Heckenberg property as security. They included in this correspondence a loan agreement, mortgage, property inquiry statutory declaration, authority to complete, business purpose declaration and requisitions on title. They also listed numerous usual requirements to be satisfied prior to settlement, including that she obtain independent legal advice.

A valuation of the Heckenberg Property was also carried out on 13 November 2000 at the instruction of Reliance. It was valued at $180,000.

On this same day, Mrs Mizzi was taken to an independent solicitor, Mr Kekatos, for advice. Mrs Mizzi's only recollection and understanding of the meeting was that the solicitor gave her papers which she signed. She said that he did not explain what the documents were. However, it was the solicitor's evidence that he advised Mrs Mizzi, in English and on her own, of particular relevant clauses in the loan documentation. He explained that the interest rate was much higher than a standard mortgage and that if the money was not repaid she would be sued and Reliance could "kick her out" of the Heckenberg property.

It was found that the documents Mrs Mizzi signed on this occasion were a deed of loan, a mortgage to Reliance and a statutory declaration to the effect that she had received independent legal advice regarding the loan and security documents in respect of the proposed loan from Reliance. It was also found that after receiving that advice, Mrs Mizzi freely and voluntarily signed the deed of loan and mortgage together with a declaration that the credit to be provided was to be provided wholly or predominately for business or investment purposes.

On 16 March 2005, Reliance's solicitors served section 57(2)(b) notices on Mrs Mizzi for $702,948 and vacant possession of the Heckenberg property within 14 days.

Mrs Mizzi sought to have the Reliance loan avoided on the grounds that it was unjust pursuant to the *Contracts Review Act (NSW) 1980* ("*Contracts Review Act*") or unconscionable, or alternatively, on grounds that because of a subsequent transaction she was in fact released from the loan. Reliance cross-claimed for the moneys secured plus interest, totalling $200,000 as well as possession of the Heckenberg property.

Mrs Mizzi's argument that the contract was unjust relied on the Contracts Review Act. An unjust contract requires a lack of both substantive and procedural fairness.

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The Court concluded that the contract was not unjust for the following reasons:

1. Mrs Mizzi wanted to enter into the transaction to help Stefan;

2. Mrs Mizzi chose to refinance for the purposes of satisfying the Kremnizer loan rather than seek to have it avoided, pursuant to advice obtained;

3. Although Mrs Mizzi would have been unable to service the Reliance loan, the refinance with Reliance gave Stefan further time to pay if off for her, without materially worsening her financial position. The only alternative was judgment for possession to satisfy the Kremnizer loan;

4. Although the interest rate charged by reliance was high, it was not as high as many "lenders of last resort";

5. Given Mrs Mizzi's experience with the earlier transaction and the advice given to her by Mr Kekatos and others, she did possess a basic understanding of the risks associated with transactions such as the Reliance loan, as well as the specific risks and nature of that loan in particular.

Furthermore, the question as to whether discretionary relief would have been granted, the second limb to the statutory test, was not satisfied. It was found that Reliance was entitled to accept that proper legal advice had been given to Mrs Mizzi and that Reliance had undertaken a valuation of the Heckenberg property and correctly secured the mortgage with that property. Further, although her age and the ultimate purpose of the loan being to benefit Stefan may have caused alarm bells to ring for any lender under normal circumstances, Reliance was aware of the necessity of the refinance in that if the refinance was not provided, Mrs Mizzi stood to lose her home.

The Court ultimately found that Mrs Mizzi was released from the Reliance loan because of a third party agreement, which is not analysed here.

Functional Art Will Not Sail - Copyright for Artistic Design

John Maciel
William Frost

Intellectual Property & Technology partner, John Maciel, and paralegal, William Frost, discuss the recent High Court decision of *Burge v Swarbrick* in which the Court held that reproductions of the hull and deck of a yacht were not protected by the *Copyright Act 1968* (Cth) (the Act) as their functional purpose outweighed their artistic qualities.

The issue for the Court concerned the construction and application of the term "a work of artistic craftsmanship" in the definition of "artistic work" in the *Copyright (Amendment) Act 1989 (Cth)*.

The general rule for artistic designs is that a three dimensional reproduction of a two dimensional form would infringe copyright. Copyright in the case of an original artistic work includes the exclusive right to reproduce it in a material form.

The exception exists where the artistic work or design, for example a sculpture, has been applied industrially to produce saleable articles. This excludes a building or a model of a building, or a work of artistic craftsmanship. However, copyright protection is lost if a corresponding design is registered as a design.

The Court did not exhaustively define what amounted to a work of "artistic craftsmanship". Nevertheless, its evaluation turned on "assessing the extent to which particular work's artistic expression, in its form, is unconstrained by functional considerations". Unlike artistic pieces that have significant scope for design choice, in Burge there were specifically imposed design constraints with little scope for real and substantial artistic effort. Thus the reproduction of the hull and deck was overly functional in nature and accordingly was not covered by copyright provisions.

An evaluation of the design's requisite functionality is essential. This is weighed against the scope for encouraging real and substantial artistic effort. The encouragement of real and substantial artistic effort underpins the favourable treatment accorded by the Act to certain works when applied to industrial designs. It is unclear whether mass produced functional articles, such as a specific motor vehicle, can be protected as an article of artistic craftsmanship given the Court's decision.

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