BALANCE

LAW SOCIETY NORTHERN TERRITORY

Edition 2/2012

RRP $18
(includes GST)

Access to Justice

Definitions aplenty

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Since my last article for *Balance*, I realised more and more that there is nothing as constant as change. This is probably another sign of ascending age, not necessarily maturity. However, I cannot help but note that on the international front, Greece has now had its election and a new government which promises to take the required steps to bring the country back from virtual bankruptcy. Other European nations are also doing it tough and the overall global and, in particular, European financial crises continue to dominate news headlines.

Closer to home, there was a blatant disregard for the Rule of Law, when the deputy prime minister of Papua New Guinea arrested the Chief Justice of the Supreme Court of that country on the charge of treason. There appeared to be no foundation to the charge, except that the arrest came days after the Chief Justice and two other Justices of the Court upheld an earlier ruling (December 2011), that Peter O'Neill had taken control of the government of Papua New Guinea unconstitutionally and should stand down and return the government reins back to and reinstate his predecessor, Sir Michael Solmare. The two other Justices who agreed with the Chief Justice's ruling in May have also been arrested.

Neighbouring countries, including Australia, have urged restraint on the O'Neill regime, hoping that the result of the country's election on 23 June 2012 would provide a solution to the problem. Counting of the votes from the election is well underway, but unlikely to be completed until the end of July.

However, preliminary indications from the votes counted thus far suggests that Sir Michael is likely to be successful in regaining government from the elections. O'Neill has stated that he is not perturbed by such a result. I guess that international communities will have to wait and see the final outcome, but such a flagrant breach of the fundamental rights of an individual and the rule of law should not be ignored.

> *"The law which rules - is the law according to the rulings of the courts, but it is applied in the offices and chambers of the legal profession. It is applied in drafting and advising; in consultations more than litigation."*
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> THE HON SIR GERARD BRENNAN AC, "ROLE OF THE LEGAL PROFESSION IN THE RULE OF LAW", SUPREME COURT, BRISBANE, 31 AUGUST 2007.

NLPR

On a more domestic front, I note that the progress of the National Legal Profession Reform (NLPR) continues to be problematic. At present only two states have confirmed their participation and implementation of the NLPR, namely Victoria and New South Wales. Queensland and the Northern Territory are said to be 'wavering'. The ACT conversely, now appears to have adopted a softer approach and may once again participate in the reforms.

The remaining states seem uninterested in the NLPR and / or they are waiting to see its progress following implementation in the two largest States.

One of the main concerns for Queensland and the Northern Territory remains the costs of implementing and operating within the parameters of the NLPR. There will be costs involved, and until there is some assurance that the costs of implementation and the like are not going to be passed to local practitioners, then it remains unlikely that Queensland and the Northern Territory will become part of the NLPR.

The general feeling is that Victoria and New South Wales will proceed with the reforms, irrespective of the views and positions of the rest of Australia.

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Naming and Shaming

I also note the recent media coverage in relation to the 'naming and shaming' of alleged young offenders.

You may be aware of the joint press release from the Northern Territory Children's Commissioner and the Information Commissioner, calling for changes to the *Youth Justice Act* to overcome this problem. Northern Territory is the only State or Territory in Australia that permits the naming of alleged young offenders. Such a practice can have a very detrimental effect on the minors named, their families, and their communities.

Being young and stupid at one time or another should not mean that a minor should be stuck with such a history forever in the eyes of newspapers, reports or other forms of media. There is a real risk that rehabilitation will fail if a young person, so named, forms the view that they may as well continue to behave and act in the manner so published because the public is already biased against them.

I raised this issue at the last meetings of the Council of Law Society and the Law Council of Australia in June 2012. Both organisations are writing to the Northern Territory Attorney-General seeking amendments to the legislation which would prohibit such practice. Hopefully some quick action can be applied to this issue.

Workers Rehabilitation and Compensation Act (NT)

On a topic closer to my practice, I note that further amendments to the *Workers Rehabilitation and Compensation Act (NT)* came into force on 1 July 2012. These contain some major amendments to the existing legislation which will affect insurers, employers and workers in the workers compensation jurisdiction in the Northern Territory.

Definition of a "worker"

Perhaps the most important of the changes is the amendment to the definition of a "worker" for the purpose of the Act. Previously the Act excluded from compensation entitlements any person doing work for another person if he or she had provided an ABN number for the work. The purpose of the provision of the ABN number was to exclude parties providing work/works as an independent contractor being classed as a worker and being entitled to compensation under the Act for any work-related injury. However, the ABN provision appeared to have been misused, as persons who should be workers under the Act were prevented from working unless they provide the employer with an ABN. Person(s) desperate for employment would obtain and provide an ABN, but without the usual protection of obtaining their own insurance for any work-related injury, and if they are injured from their employment then they could not access the benefits and provisions of the Act. Traditionally, the classic independent contractors would have their own insurance to rely on if they were injured from their work.

The amendments provide a three-point results test. If a person or worker satisfies all three requirements of this test, then he or she would not fit within the definition of worker for the purpose of the Act, and as such would not be entitled to compensation under this legislation. The three requirements are that:

- The person is engaged to provide work or services to achieve a specific outcome or purpose;
- The person provides his or her own tools and equipment for the work that he or she is to provide; and
- The person is liable to fix, repair or remedy any defects in their work.

The amendment again seeks to exclude the 'classic independent type contractors' from being

> *... the ABN provision appeared to have been misused, as persons who should be workers under the Act were prevented from working unless they provide the employer with an ABN.*

classed as workers and thereby preventing them from obtaining compensation under the Act. Although the intention of the amendments is well-meaning, the definition as it presently stands is likely to lead to ambiguity and further arguments before the Courts.

For example, interstate medical specialists who visit and consult at hospitals or medical centres in the Territory may be categorised as workers irrespective of their agreement with the providers of the premises, and their mutual understanding that such specialists would not be workers for the purpose of the Act, nor employed by the providers of the premises.

In the example above, it would be arguable if the specialists are engaged for a specific outcome or to achieve a particular result, given that they would be seeing and treating a variety of patients. Although the specialists may use some of their own tools and equipment, the provider of the premises for the consultations or treatment would no doubt be providing part of the equipment required by the specialists. It would also be highly arguable whether or not such specialists are specifically liable to repair, or remedy, any defects or faults in their service or treatment. It would be unusual for a patient to want to be further treated by the same doctor or specialist if he or she has not done the job properly the first time. Further, the specialists would be paid by their patients not the provider of the premises, although they may be regarded as workers for such providers as they may arguably not fully satisfy all three requirements of the results test. I suspect that there will be some litigation in relation to this amendment, and until there is some case law on the interpretation and effect of the new definition, the traditional class of independent contractors may have to be more conscious of the terms of their agreement(s) with third party providers.

"The amendments now provide that workers who reside overseas may be entitled to continue weekly compensation payments provided that they satisfy the criteria set out in the current Act, ..."

Overseas visa workers

Another significant amendment deals with overseas visa workers who are validly able to work in Australia, including the Territory. Previously the Act provided that injured workers who leave Australia to reside overseas prior to the completion of their rehabilitation will no longer be entitled to payment of weekly compensation. The amendments now provide that workers who reside overseas may be entitled to continue weekly compensation payments provided that they satisfy the criteria set out in the current Act, and continue to provide medical certificates and declaration of ongoing incapacity or unfitness for work due to the work injury. The rationale behind this set of amendments, was to not disadvantage overseas workers who are required to go home after they are injured at work and cannot return to their employment, or, alternatively, for overseas workers whose visa permitting them to remain in Australia has expired. The overall effect of these amendments means that, an injured worker from overseas who resides outside of Australia, may continue to receive weekly compensation for a period of up to four years or more.

The insurers and employers' potential difficulty with these amendments is their limited ability to provide treatment, rehabilitation, and to properly monitor the worker's progress in terms of recovery from the injury and possible return to suitable employment in a foreign country.

Normal Weekly Earnings

A further important amendment relates to the definition of a worker's normal weekly earnings (NWE). There has been quite extensive litigation and authorities in relation to the reference to the term remuneration in the definition of the worker's NWE. The Courts have long held that a worker's NWE may consist of both wages and other types of remuneration such as additional benefits that the worker received as part of his or her employment. The Courts have also found that in calculating a worker's NWE, it is necessary to take into account the worker's monetary and non-monetary remuneration, otherwise more commonly referred to as non-cash benefits. The value of such non-cash benefits to the worker is the value that should be added to the worker's monetary wages to calculate the worker's NWE. Examples of the types of non-cash benefits that the authorities have held to form part of a worker's NWE to date include:

- Accommodation,
- Meals,
- Board,
- Use of employer's car,
- Phone,
- Computer,
- Gym membership,
- Electricity,
- Linen / laundry services,
- Fuel and others.

The amendments that have come into force seek to restrict the types of non-cash benefits that can be taken into account in the calculation of a worker's NWE. The amendments provide that the only non-cash benefits that should be included in a worker's NWE from 1 July 2012 are:

- Accommodation,
- Food, and
- Electricity.

No other non-cash benefits are to be included in calculating a worker's NWE. Although the amendments more precisely define and limit the variety of non-cash benefits that have been allowed previously, they do not put a value for those benefits. Therefore, there may still be some further arguments and litigation as to the value of the allowed non-cash benefits that should be included in a worker's NWE.

In addition to the above, there are also amendments in relation to the usual retiring age for workers to increase same to age 67, in line with Federal legislation to the same effect. The age amendments have a staggered effect for those workers who are injured when there are aged 60 or above, so that their entitlement to weekly compensation may extend beyond age 65, depending on the worker's age at the date of the injury.

Interest rate

There are amendments to the interest rate applicable for late or delayed payment of compensation to injured workers. The previous rate of 20% has now been reduced significantly, by adopting the interest rates for judgments set out pursuant to the Northern Territory Supreme Court Rules (around 10 or 10.5%). Interest is now mandatory in relation to any late payment of compensation due to the worker, even if the employer or insurer had validly disputed liability for the worker's claim at first instance. Provided that the worker is ultimately wholly or partly successful in his or her claim, then interest will apply automatically under section 89 of the amended Act.

Prior to the amendments, the award of interest for periods prior to a Court's decision remains in the discretion of the Court, and subject to the findings of the Court and submissions by the parties. The powers of the Supreme Court regarding appeals from the Work Health Court have also been better defined in the latest set of amendments.

It will be interesting to see the application of the amendments as the interpretation of the changes are likely to be progressively tested through the Northern Territory Work Health and Supreme Court. Certainly, all workers, employers and insurers alike, will need to become familiar with the effect of the amendments to ensure that proper and appropriate insurance is obtained for the various employment or contractor relationships throughout the Territory.

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And finally...

Following on from the success of the opening of legal year lunch, law week dinner / lunch and the close defeat of my team by the Chief Justice's XI in the annual cricket match, the next social function on the Law Society calendar is the Annual Dinner in September. This year's annual Law Society dinner will be held at Pee Wees at East Point on Saturday 1 September. I urge as many practitioners and their partners as possible to attend the dinner as it should be a great night. We expect that the President of the Law Council of Australia, Catherine Gale, and the LCA's Secretary-General, Professor Sally Walker will be in Darwin for the annual dinner, so please come along and meet these two very interesting ladies. Also, an early reminder for the Law Society's Annual General Meeting which will be held on 10 October, with Christmas drinks to follow in early December. So much to do, so little time... So please remember the Annual Dinner and join me for an interesting evening under the stars.

Finally on a personal note, the dry season for the Northern Territory in 2012 has been spectacular thus far, and long may it continue, hopefully well into late August to prevail over the Darwin Festival Period. The mid-year four weeks school holidays are about to end, and I am sure the parents are looking forward to school re-commencing, I certainly am. These school holidays included a trip to Bali for my daughter and I, to attend a very dear friend's wedding, which was of course spectacular. I would highly recommend getting hitched in Bali, some locations are magnificent, and the locals are very friendly and nice. Nothing is too much trouble, and they practically arrange most of the wedding and related preparations. The weather in Bali was cool and a large number of cocktails were sampled by moi ... Margarita, Martini, Daiquiri,Bintang.... Cheers!