## CONTENTS



## APLA National Council



# Damning distortions

**Peter Carter, APLA National President**

Peter Carter

*There are two areas of national interest where the Association will be conducting campaigns over coming months.*

The first concerns the workplace application of the *Trade Practices Act* product liability provisions.

Given the erosion of common law workplace rights, it is reasonable and appropriate for injured employees to investigate the pursuit of compensation from sources other than their employer.

In many cases, one obvious avenue of pursuit is against the manufacturer of defective plant and equipment.

From July 1992 Part VA of the *Trade Practices Act* sensibly imposes liability on manufacturers for losses to any person using defective goods.

Significantly however the operation of the provisions do not apply to a loss *"...in respect of which an amount has been, or could be, recovered under a law of the Commonwealth, a state or a territory that ... relates to workers' compensation ..."*.

On its face, the section (75AI) excludes liability for product defects which result in workplace injuries.

When the provision was enacted, fair and universal workers' compensation schemes existed and presumably for public policy consideration it was considered appropriate to keep the direct costs of workers' injuries within that universal system.

Workers' compensation is no longer universal and it is certainly not fair. Since 1992 we have seen the removal or dilution of workers' rights in every Australian state. There is therefore no longer any logical basis for excluding the workplace application of the product liability law.

Equally there is no logical basis for protecting manufacturers from liability to workers when their defective plant and equipment causes an injury. Indeed in the current environment the legislation is discriminatory in that it allows compensation to a person if the defective product results in injury anywhere but to a worker.

Any argument which would seek to support the retention of the manufacturers' workplace exemption in circumstances where workers' common law rights have been so severely emasculated would surely be doubly distorted.

The second issue which will come into effect in 1999 is the grubby grab for cash from social security beneficiaries' damages awards.

There is some logic in the current system where recipients who recover damages, inter alia, for the impairment of their earning capacity, make repayments for the period they have received income support and are precluded from benefits for a further specified period.

The new rules, however, will impose repayments and preclusion periods upon the damages awards of DSS beneficiaries regardless of whether any damages are attributable to income loss.

The mechanism to achieve this result is to treat damages received as "income" for social security purposes.

This is clearly a distortion of the plain and clear fact that damages awards themselves are not income and that it is even less the case for any part of an award which is unrelated to income.

It is apparent that once again our legislators have been seduced by Treasury to legislate away basic rights and tax whatever they can get away with.

What is the moral justification for syphoning off any non-income compensation for the reimbursement of income support benefits? Having endured litigation to prove liability, causation, foreseeability and damage against a reckless or negligent tortfeasor why shouldn't a victim receive his or her full award for pain and suffering, out of pocket expenses, domestic care and

any other legitimate item?

Private lawyers have already repatriated DSS benefits of more than $230 million in just three years. This does not include the figures for 97-98. The value of benefits withheld during subsequent preclusion periods is estimated to be at least a further $200 million for the same three years. All this has been done at no cost to government.

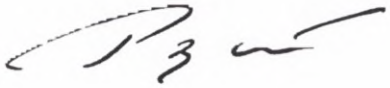
No wonder they think beneficiary recipients are an easy target and that no matter how hard they squeeze, no one will shout.

Regrettably this is a case of legislation by stealth. Where government hopes that those affected most - the weak, the elderly and the disabled will not have a loud enough voice to have their cries heard and not be sufficiently astute to expose the distortion.

*APLA, with its allies, hopes to make a difference in these campaigns. Members will be called upon to assist in various capacities.*

*For the workplace produce liability campaign, the aim is the repeal of section 75AI.*

*For the social security issue it is hoped to achieve a reversal of the policy so that non-economic loss payments will not be regarded as "income". An argument will also be advanced to seek to have government share Plaintiffs' legal costs proportionally to the extent of the overall recovery, where any repatriation of funds is achieved.*



# Plaintiffs' solicitors' costs in CTP claims

**Tom Goudkamp, Sydney**

Tom Goudkamp

*The NSW State Government has attempted to peg plaintiffs' solicitors' costs in MAA cases on the pretext that costs have escalated to a point where they are adversely affecting the viability of the Motor Accidents Scheme.*

The Government, without warning, introduced the Legal Profession Amendment (Costs Assessment) Bill 1998, seeking to give itself the power to regulate to fix "fair and reasonable costs for legal services in any motor vehicle accident matter".

The Bill sought to abolish solicitor/client costs by providing that:

*"A barrister or solicitor is not entitled to be paid or recover for a legal service an amount that exceeds the fair and reasonable costs fixed for the service by the Regulations under this Section."*

The Bill was introduced before the imminent release of a report by the Justice Research Centre which has carried out a detailed survey of plaintiffs' solicitors' fees and before the results of an enquiry on costs in MAA cases by the Law & Justice Committee of the Legislative Council have been published.

Much to the chagrin of the Premier the Bill was amended on the 29th June 1998 by the Legislative Council to the effect that the above provision "... does not apply in respect of any costs payable to a barrister or solicitor under a Costs Agreement with a client that relates to legal services provided in a motor vehicle accident matter if:

(a) before entering into the Costs Agreement, the barrister or solicitor made the disclosure required to be made under Section 175A, and
(b) the Costs Agreement complies with Division 3."

The Bill was further amended to provide that before a Regulation is made the Attorney General is required to ensure that:

(a) a copy of the proposed Regulation is forwarded to the Law & Justice Standing Committee of the Legislative Council, and
(b) the Committee is given a reasonable opportunity to review the proposed Regulation."

As most solicitors enter into conditional Costs Agreements in any event it is unlikely that any Regulations will be made. It remains to be seen however whether the Government will accept the amendments or will try again.

Earlier this year the Motor Accident Insurers Standing Committee (MAISC) engaged actuaries to prepare a detailed report into plaintiffs' legal costs in MAA cases. The actuaries reported that the problem in relation to costs lies "very much in the area of claims for minor injuries".

Had the Bill become law it is likely that the Government would have received recommendations by MAISC to set Regulations to impose a cap on plaintiffs' legal costs by setting maximum fees according to a percentage of the result, whether by settlement or verdict. The fixed costs would include Counsel's fees . Costs recoverable for medical and other expert evidence would be significantly restricted. The fixing of costs would not be restricted to minor claims.

The fixing of costs as a percentage of the result would have dire results for plaintiffs and their lawyers, including Counsel. The ability to properly prepare and present plaintiffs' claims would be severely inhibited and would be unfair because:

(i) The restrictions would apply to plaintiffs' costs only, thus resulting in an unlevel playing field.
(ii) Plaintiffs have no real control over the length and complexity of hearings. It would be uneconomical for many cases to proceed to a hearing.
(iii) A plaintiff would suffer unfair costs penalties if the result of a Court hear- ▶