

Australia Unfair

Peter Carter, APLA National President



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The formulation of our constitution and the modern Olympics share a birth date around a century ago. By chance these events coincide again in the coming year.

The constitutional change which will accompany the transition to an Australian head of state and the staging of the millennium Games are both momentous events and important opportunities to define the soul of the society to which we aspire to belong.

By further coincidence, the Olympics exemplifies a corrupted noble institution and a reality cloaked by facade.

For Australia an unpalatable reality will also be hidden by that facade and the world invited to collude in a vision of wellbeing. As in the Olympic movement, the truth concealed involves favouritism, double dealing and seduction.

Australia advances to the new century and a republic with the rights of its citizens reduced below those they enjoyed at any other time since federation.

This has not been a gradual decline but rather a phenomenon mainly of the last decade which continues at an ever accelerating pace.

At the same time and partly as a result, the expectations of ordinary Australians have diverged markedly from those of the privileged whose position continues to improve.

The assault on rights has been disguised as a drive for competitiveness, for efficiency and for economic success. It has not been the privileged who have suffered. The weak and the maimed - those least able to offer resistance and to endure the consequences - have been the casualties of so called reforms.

Australian indigenous people have suffered the unilateral obliteration of their traditional land rights. In some states common law access for many injuries has already been entirely removed. In most of the remainder it has been seriously curtailed.

And we are the only developed democracy not to have basic liberties protected by a form of legislated or constitutional guarantee.

Responsibility lies squarely with the current generation of political leaders.

Rather than acknowledge at this important time, the degradation of fundamental freedoms and pledge their restoration, our politicians prefer to entrench the advantages of the powerful at the expense of the weak by creating even further barriers to justice.

In New South Wales and South Australia, secret negotiation is under way to remove common law access for motor accidents. A working group has been established for the legitimisation of a NSW no fault scheme coordinated by an overseas lawyer engaged for this purpose and with experience in implementing no fault accident schemes.

In Queensland, the state government has reneged on its promise to restore workplace injury compensation to pre 1997 levels. In Victoria, where workplace common law rights have already been abolished, there are further attacks on its motor accident scheme and Western Australia faces another assault on workplace common law rights.

For what justice remains, the dispensation of it is subject to vicious attack on the Courts themselves by those who despise the empowerment of the people. Regrettably the detractors of our justice system are often not only those who stand to materially profit as a result, but their proxies - elected legislators - who through ignorance, naivety or personal aggrandisement maintain a conspiracy to thwart legality and truth.

How then can our political leaders seek to portray the nation at this time as a caring mature democracy which treasures fairness and democratic values?

Whilst articulating in prose their version of modern Australia, the political

authors of the proposed constitutional preamble must surely have glimpsed the recent degradation of individual rights and their part in it. Surely at least they reflected on the increasing disparity between the affluent and the powerless which has resulted from their various policies.

Whether they have participated in the process through conscious deceit or reckless enthusiasm, they are surely aware that the beautiful child coming of age - the image they now present - is an illusion disguising the ugly deformity which is the product of their own contortions.

They are therefore doubly culpable as the knowing perpetrators of the demise and in the false portrayal which itself renders our citizens vulnerable to further plundering.

Simultaneously to the birth of the republic, our political leaders will seek international approbation through the spectacle of the Olympics. This will be their visual presentation of our nationhood: the cliché of a mature, industrious and prosperous population assuredly comfortable in an exotic landscape of red earth, white beaches and lush forests.

It is important that this picture not go unchallenged.

Indigenous people will probably have some success in this period of international exposure in revealing the injustices they have suffered and the current steps to eliminate their property rights.

As well as assisting the exposure of those hideous wrongs, we have a duty to uncover the oppression which all Australians face - the capacity of unrestrained executive government to remove fundamental rights and freedoms.

In the first instance we can point out to the million Olympic visitors (both tourists and temporary workers) that they have nil or diminished legal rights for transport and workplace accidents in most states. We can explain that the chance of Continued on page 19

a notice requiring the commencement of court proceedings. If the claimant does not comply with the notice within 3 months the claim is taken to have been withdrawn. The same provisions in relation to re-statement apply as above.

What doesn't change?

It will still be necessary for the claimant to comply with Section 42 (Report to the Police), 43 (Notice within 6 months), 48 (furnish further and better particulars), 49 (medical examinations) and 52 (commencement of court proceedings within 3 years).

Where liability is denied and/or the claimant's injuries have not stabilised within 18 months of the date accident it will be necessary for the claimant to provide the insurer with a Section 50A Statement rather than a Section 44C Statement.

Section 50A has been amended so that it is no longer necessary to provide a prognosis for future recovery. Rather what is required is an estimate of the future medical condition of the plaintiff in respect of the injuries which haven't stabilised which can be made at the time the details are given.

Other amendments

Liability

Liability is now the key to whether the new procedures apply.

Section 44H requires the insurer to give written notice to the claimant as expeditiously as possible within 6 months after having received the Notice of Claim as to whether or not liability is admitted, wholly or partially.

If partially, the Notice must give details sufficient for the claimant to ascertain the extent to which liability is admitted.

If no written notice is given liability is deemed to have been denied totally.

Section 45

Section 45 will include the payment of care provided to a seriously injured claimant who is in need of constant care over a long term, if the services are provided by a person with the appropriate training, ie. commercial care. Services provided by a relative or on a voluntary basis are excluded, although an insurer

may agree to pay for such services.

Section 45 Disputes

As a result of *Stubbs v NRMA Insurance Limited* (1997) 42NSW LR550 (NSW.CA) which held that the insurer's obligation under Section 45 is unenforceable by a court, a dispute resolution mechanism has been created (45A).

Where a dispute arises as to whether or not an insurer ought to pay an expense pursuant to Section 45 either party may refer the matter to the Authority which will evaluate the claim and make a recommendation as to whether or not the insurer ought to pay.

The Authority may refer the dispute to arbitration, which will be binding on both parties. The Authority may require the claimant to undergo a medical examination and request particulars.

Regulation of Legal Costs

The Government has been given the power to regulate legal costs and CTP claims, by capping or fixing costs available to both plaintiffs' or defendants' lawyers.

Commencement Date of Amendments

It is expected the amendments will apply for claims made on or after 1 July 1999, although the Amendment Act has not yet been proclaimed.

Conclusions

In claims where liability has been admitted and the injuries are likely to stabilise within 18 months of the date of the accident, court proceedings cannot commence until the parties have exchanged offers and a conciliation has been held.

Where liability is denied and/or it is likely that the injuries will not have stabilised sufficiently within 18 months before a proper assessment of damages can be made, the parties will be encouraged to litigate the claim. In such cases the normal procedure will apply, including the requirement of the claimant to provide the insurer with a Section 50A Statement prior to litigation. ■

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receiving fair compensation for any injury suffered as a result of reckless or negligent behaviour in these areas is remote.

We can illustrate that government, despite rhetoric to the contrary, prefers to maintain and create barriers to justice because it fears the invigoration of the populace armed with the keys to the courthouse and the greater level of accountability which results.

We can say that employers in the main have no incentive to avoid reckless work practices as the person suffering the greatest financial penalty from a unsafe workplaces is the worker.

We can demonstrate that successive governments have preferred to have lower insurance premiums for business and overly profitable insurance companies rather than schemes that fairly protect workers and consumers for the true cost of tragedies.

We can reveal government being frightened to legislate and protect citizens for fear of distressing those to whom they are beholden.

We can show that "mateship" can mean nepotism and advantages to the privileged at the expense of the feeble.

Just as immense as the politicians' deceit of the public is the public's need for any new constitution to state unequivocally our priorities and goals - to enshrine the basic individual freedoms which Australians are entitled to take for granted. A Bill of Rights.

But we can not expect this to be offered by any political party as that would draw attention to their role in the destruction and signal the arrival of a nation whose citizens are in control of their future rather than executive government as is the case today.

As at the time of our first constitution, lawyers must play an important role in these historic events which will define the nation's personality, our place in the world and our hopes for the future.



Peter Carter, President