Judicial comment receives comment

Dear Ed,

I notice that the June edition of *Balance* contained an item concerning a comment by His Honour Mr Justice Wilcox on the need to establish some fair practice with regard to counsel's fees.

As one who has been bitten on two occasions now by southern counsel claiming cancellation fees in situations where: (a) no prior arrangements were made, and; (b) counsel appeared to have a day's work waiting for them in any event, I feel I cannot but agree with the comments made by His Honour.

For my part, I believe there are situations where cancellation fees are fair and proper — particularly so when a large slab of counsel's time is booked so as to disrupt their practice if the case does not proceed.

On the other hand, however, there are many cases which do not run for the expected length of time, or do not run at all, but were expected to take up only a few days of counsel's time.

My experience with Territory counsel is that, generally speaking, they are busy (otherwise our opinions would be done much quicker) and that therefore there are few occasions when counsel cannot be profitably engaged in their practice when cases are cancelled.

Let me say that I do not seek in any way to overturn the old concept of counsel being entitled to his brief fee upon the delivery of the brief — in many cases this is only charged by counsel in any event where they have put some time into the preparation of the matter for trial.

Apart from this aspect, much of the argument in favour of windfall benefits to counsel has dissipated with the modern practice of charging on an hourly and daily basis.

Subject to other arguments to be raised by members of the Bar, I express my view that the Society should not seek to take away from counsel their ability to earn fees on any day when they would normally expect to be able to earn income, but I do oppose the prospect of counsel being paid twice in respect of the same day.

If, therefore, the Society proposes to take up the matters raised by His Honour (and I recommend that it does), it is my suggestion that cancellation fees should only be charged where previously arranged and that those fees bear some relationship to the actual loss sustained by counsel in the conduct of his practice.

Hugh Bradley
Ward Keller

Work Health decision a lesson for all

In deferring liability under ss 85(1) and (7) of the *Work Health Act*, the employer must ensure the worker receives the deferral within seven working days after receipt of the claim. So held Mr Gillies SM in Gavin v Westpac Banking Corporation on 8 August this year.

The worker had delivered a claim on 12 April.

By letter dated and posted 22 April, the employer wrote to the worker's solicitors deferring liability under s85(7), seeking further medical information.

That letter did not reach the solicitors until 26 April and was not read by them until 29 April.

However, on 26 April, the worker commenced proceedings in the Court, seven working days after the date of receiving the claim, 12 April, having expired at midnight on 23 April.

After receiving the further medical information, the employer accepted the claim.

The only question remaining was one of costs of the proceeding.

In resisting an order for costs, the employer argued that the worker had commenced proceedings precipitately.

It said that at 26 April the worker did not have a cause of action or a right of recourse to the Court because the claim

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Problem caused by misunderstanding

A Tennant Creek couple who misunderstood a Building Inspection Report has an expensive termite problem in their newly-purchased home.

The couple assumed the Inspection covered the structural soundness of the property they wished to purchase.

It didn't.

The Building Branch of the Department of lands and Housing advised that an Inpection Report covers only whether the structures on the plan have been issued in accordance with the relevant permits.

The couple's solicitor arranged the building inspection and, when the report was favourable, the couple assumed the house was structurally sound.

It was not until after they'd taken possession that they discovered they had a significant termite problem.

The couple has no claim against their solicitor or the Department of Lands and Housing.

Their experience should be borne in mind by solicitors and perhaps pointed out to home buyers before an Inspection Report is sought.

It may also be advisable that in areas of known termite infestation home buyers be advised to commission a pest check of the property.

what's new?

66.7 per cent of men's pay, despite decisions allegedly securing equal pay for women?
"The truth is tha many women are forced into prostitution through economic reality or through physical brutality."
Dr Scutt said women can and should fight back.
She said there are avenues for demonstration — making non-sexist films with the limited resources women have, taking action against sexist advertising and continued political activism in the political and employment arenas.
"The law can also be used," she said. "Laws must be changed to address the harm done to women in the making, distribution and consumption of pornography."

She said a definition of pornography as sexual discrimination must be included in equal opportunity and anti-discrimination legislation so that coercion into performing for pornography, forcing pornography on a person, assault or physical attack due to pornography and trafficking in pornography became offences.
She said these remedies would sit alongside any existing criminal remedies such as sexual assault legislation.
She also encouraged women to take legal action, despite the argument that courts are not women-friendly, particularly in sexual assault cases.
"There are many responses to this argument, which is designed to deprive women of the will to take action.
"I would not profess to believe that courts are woman-friendly, nor friendly to any subordinate or oppressed group.
"Nor is the law.
"Yet nor is any institution existing in our current society.
"Do we therefore give up and bow down to all existing institutions, confessing our inability to change them or use them?"
No, she said.
Dr Scutt said women should use the institutions of the system simultaneously with working outside the system.
"In this world, no one will own women, nor women's bodies, nor women's sexuality, nor women's sexual identity.
"Women will not be property.
"We as women will not *own* our bodies.
"Rather, there will be a recognition that *we are our bodies*."
Dr Scutt examined examples of sexism in magazines such as *Pix*, *People*, *Penthouse*, *Playboy* and *The Picture*.
Of the latter magazine, she said promotions have included a poster of a large-breasted blonde woman with a gun to her temple and the headline "Buy this magazine or we shoot this girl."

And a competition to match photographs of women's naked bottoms to their faces "and win $1000."
"Ultimately, the wrongs of violence against the exploitation of women, the ownership of women, will be ended only when patriarchal values cease to order the way of life lived the world over.
"Only then will the buyers of pornography cease to buy; the sellers cease to sell; and the makers cease to make.
"Only when the value system promoting women as sex objects to be bought, bartered, used and abused — or the equally undesired reverse, woman as paragon on a pedestal — is ended, will women be themselves.
"It is only then that a vision of woman as equal with man, as equally worthy, will become the reality, and pornography and the notion of woman as property will cease to be," Dr Scutt said.
Interested people can procure a full copy of Dr Scutt's speech from the Law Society, telephone 815104.

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had been successfully deferred under s85(7).
That section, combined with subsection (1), enables an employer to defer acceptance or rejection of a claim by requiring, within seven working days, further medical information.
To do so, however, the employer "shall **immediately advise** the claimant of that fact..." (emphasis added).
The question then became whether or not the advising had to take place within seven working days and, if so, what amounted to advising.
His Worship held that: "If the employer does not wish to be placed in a position where it is deemed to have accepted liability it must **communicate** its decision to the worker before the expiration of the period of seven working days after receipt of the claim for compensation." (p3, emphasis added)
Note that in this passage "communicate" is used synonymously with "advise." His Worship came to the conclusion that they were synonymous because: "To immediately advise means to without delay inform or notify. The act of advising is not a unilateral act. If advice is (sic) has not been received the act of advising has not taken place." (p4)
Accordingly, as the worker's solicitors did not receive the deferral until after midnight on 23 April, ss85(1) and (7) had not been complied with and the deferral was not successful.
This meant that as at 26 April the worker had a cause of action or, perhaps more correctly, a right of recourse to the Court.
The employer's mistake in this case was to send the letter of deferral by ordinary prepaid post.
His Worship held that there was no requirement under s85 that a deferral of liability be in writing, so instead of simply posting the letter, the employer should have faxed it to the worker's solicitors or used some other form of instantaneous communication.
He said that if an employer found itself had no such facilities available, it could accept liability subject to receiving further medical information under s85(1)(b) or require further medical information under s85(1)(c).

-- Cameron Ford.