

## **Common law claims and the expansion of the SRC Act cont...**

compensation under ss. 24, 25 and 27 is not payable after the date of election in respect of the injury. It follows that compensation under all other sections of the SRC Act are not affected by an election under s. 45 of the SRC Act.

### **5. Liability in Common Law**

An employee, by instituting an action or commencing proceedings against his or her employer under s. 45 of the SRC Act, must prove an entitlement to damages in common law under the State or Territory where the tort occurred (*John Pfeiffer Pty Limited v Rogerson*). In other words the employee must prove that his or her injuries were caused by the negligence of his or her employer. If the employee is unsuccessful in his or her action for damages against the employer, the employee can not then claim compensation under the SRC Act under ss. 24, 25 or 27 as the election made before the proceedings were instituted extinguished all rights under ss. 24 25 and 27.

### **Conclusion**

The number of employees the subject of the Commonwealth Workers

Compensation SRC Act Scheme is likely to increase in the future given the recent failure in the Federal Court by Victorian Workcover to challenge the Ministers decision to declare Optus eligible to apply for a licence under the SRC Act Scheme (*Victorian WorkCover Authority v Andrews*). Other national employers similar to Optus who are carrying on business in competition with a corporation who is, or was a Commonwealth Authority, may apply to join the SRC Act Scheme under s. 100. This is particularly so given the premium and administrative cost savings identified by Optus in its submission to the Productivity Commission Inquiry into workers compensation.

SRC Act Scheme employees may have a right to institute proceedings against an employer for non-economic loss. This will depend on whether the employee's injuries were caused by the negligence of the employer and whether the employee's injuries meet the threshold requirements under the SRC Act. If an employee elects to institute proceedings against his or

her employer the election is irrevocable and extinguishes any right to permanent impairment compensation under ss 24, 25 and 27 of the SRC Act. However, such an election in common law does not interfere with other entitlements under the SRC Act such as economic loss and medical expense entitlements. An election to institute proceedings must be in writing and must be made prior to instituting proceedings. There is a further threshold requirement that compensation must be **payable** under ss. 24, 25 or 27 prior to the injured employee instituting proceedings. However, the Courts have interpreted this requirement to mean that as long as there is not a Determination declaring that compensation is NOT payable the employee may institute proceedings. Prior to instituting common law proceedings an injured employee needs to consider State and Territory common law procedural requirements and limits on non-economic loss following the changes to civil liability legislation made by most state and territory governments following the purported insurance crisis in 2002.①

## **Environmental law in the Territory**

By Gill Ainsworth

**Environment and planning law practitioners are rare as hen's teeth in the Top End. In fact Tom Cowen is the only lawyer practising environmental law in the Northern Territory.**

Tom Cowen is Principal Lawyer with the Environmental Defenders Office NT (EDONT), the Territory's representative member of the Australian Network of Environmental Defenders Offices (ANEDO).

The EDO NT is a community legal centre offering legal advice relating to the natural and built environment including: air, water and noise pollution; environmental impact assessment; heritage; mining; contaminated sites and toxic chemical control; land clearing; planning and development applications and decisions; and protection of water resources, wetlands, coastal areas and

biodiversity.

Tom regularly provides a free advice and referral service to members of the public, community groups and businesses seeking to protect the NT's natural and built environment.

It is also the EDONT's role to provide community legal education. Tom opened his 2005 series of Environmental and Planning Law workshops recently with a public lecture on implications of the Planning Act at the "Natural Capitalism: Smart Living" lecture in Alice Springs. Future workshops to be held in Darwin and Katherine over the coming months will be advertised shortly.

EDO NT also seeks reform of environmental laws where appropriate and is currently scrutinising the following four NT Acts: Fisheries Act, Pastoral Lands Act, Waste Management and Pollution Control Act and the Mining Act (including the Mines Management Act). Peer reviews are sought to assist with this process.

If you require any further information or can assist with providing a peer review please contact Tom Cowen, Principal Lawyer EDO NT on Freecall 1800 635 944, Monday to Friday. Free factsheets are also available on our website [www.edo.org.au/edont](http://www.edo.org.au/edont) ①