NOTES AND TOPICS

With this issue we inaugurate a new section in the Melbourne University Law Review. Notes and Topics *is intended to provide scope for the publication of short comments on legal developments worthy of note but not justifying a full length article or falling within any existing sections of the Review. It is hoped that it will provide a forum where developments in other disciplines, which have implications for the law, may be brought to the attention of our readers, where comment may be made on proposed or recently-enacted legislation, on statements of government policy, or on legal developments overseas. The range of potential topics is as wide as the range of matters which touch upon the law. There is no minimum length for contributions. The Editors invite contributors to contact them at the following address:*

The Editors
Melbourne University Law Review
Faculty of Law, University of Melbourne
Parkville, Victoria, Australia 3052

INFLATION — ENGINE OF LAW REFORM?

1981 will be remembered in the legal world, amongst other things, for the High Court of Australia recognizing that we are living in a world of double digit inflation.

Barrell Insurances Pty Ltd v. Pennant Hills Restaurants Pty Ltd[1] saw the long held practice of allowing substantial discounting of damages awards (to take account of investment earning potential) altered. Previously, in cases taken on appeal to it, the High Court had declined to interfere with discount rates struck in lower courts unless it was to restore a rate arrived at at first instance. What emerged from the Barrell case was (1) an undiscounted approach favoured by Stephen, Murphy and Aickin JJ.; (2) a 2% discount rate suggested by Gibbs, Mason and Wilson JJ. whilst Barwick C.J. thought a rate of 5% should be retained. State Supreme Courts have responded with reductions to their own most commonly applied discount rates.

The early public response to this phenomenon probably amounted to a mild cheer at the possibility of extra funds flowing to some deserving accident victims.

The Insurance Industry response has been one of grave concern and given that State Governments are heavily involved in motor accident and workers' compensation insurance, much thought is being given to the consequences of this change at the Governmental level as well.

But could it transpire that this judicial initiative of significance in tort and contract law will help defeat or limit the tort system itself?

The reasons for asking this question are that, on the one hand, the notion that inflation should be taken into account in making damages awards (by way of reducing the discount rate) is based on sound common sense. Yet, on the other, we are told that this recognition of reality and delivery of basic justice spells ruin or at least great distress for our current accident liability insurance schemes!

Now for a long time there have been strong advocates of abolition of adversary tort litigation with respect to accidental personal injury cases. In particular the Woodhouse Committee Report of 1974 recommended the establishment of a National Compensation Scheme for Australia (to cover sickness as well as accidental incapacity). A bill based on the Committee's Recommendation ultimately became one of the casualties of the dismissal of the Whitlam Government.

Despite a marked deceleration from the brisk pace of the early 70s some reform proposals have been going ahead. In South Australia a Tripartite Committee's Report

[1] (1981) 34 A.L.R. 162.

on the Rehabilitation and Compensation of Persons Injured at Work was released in September 1980. The Committee recommended the establishment of a Workers Rehabilitation and Compensation Board which would exclude the operation of private insurers in the field. Abolition of the right of action at common law in any workers' compensation matter was also recommended.

It is understood that a report covering the possibility of introducing a No-Fault Motor Accident Scheme for the same State has also been prepared.

In New South Wales the Law Reform Commission is considering a feasibility investigation of a comprehensive accident compensation scheme for that State.

And there is growing evidence that people outside the reform movement are beginning to question the effectiveness of our accident liability insurance schemes. For example, in the light of requests from the State Insurance Office in Victoria for post-*Barrell* increases in third party motor car insurance premiums there were the predictable comments in the press about the unceasing cost escalations associated with third party motor car insurance premiums. However, some editorials (e.g. *The Age*) did consider that a more fundamental and fruitful change would be to extend the present limited no-fault system (which has operated in Victoria since 1974) into a full compensation scheme that excluded negligence actions.

It is also interesting to note that a national workers' compensation insurance company has been placing stress in their advertising of late, on safety auditing and rehabilitation of workers.

There is evidence of change at more personal levels also.

A judge of the Victorian Supreme Court recently observed that, while he was once a vehement opponent of the Woodhouse proposals, he now saw it as inevitable that accident compensation would eventually have to be taken out of the courts. He went on to note that approximately 25% of the Victorian Supreme Court's very clogged list constituted motor accident cases. Thus, amongst the many other benefits that would flow from reform of the tort system would be a significant contribution towards solving the endemic 'log jams' in court lists throughout the country.

Clearly the *Barrell Insurance* case has not directly influenced the reformers to set to their task but the dramatic growth in payout amounts which the case seems to have precipitated makes the task of arguing *against* the present schemes somewhat easier. Firstly, as the amounts grow in size the process of 'calculating' once and for all damages is seen more than ever for what it is — almost pure guesswork, and, secondly the potential for significant over-compensation for some, whilst many other accident victims receive no compensation whatsoever, is greater than ever.

Operating alternatives to our current mix of accident liability compensation schemes are to be seen close at hand. The cost effectiveness of the Victorian no-fault Motor Accident Scheme in comparison with the regrettably still-operating Victorian Third Party Insurance Scheme is clearly evident. An even more compelling guide to the manner in which we should be approaching the problem is provided by the successful New Zealand national accident compensation scheme. The economic and humanitarian attractiveness of such an alternative indicates that the sooner more people can be persuaded to consider the topic of accident compensation the sooner the no-fault alternative will be seen for what it really is — orthodox, desirable and inevitable.

It is largely to the *Barrell* case that we owe a vote of thanks for raising the broad issue of accident compensation as a matter for media attention in 1981.

RICHARD W. CULLEN*

FREEDOM OF INFORMATION

After almost nine years as a plank of Federal government policy, freedom of information legislation was passed by one House of Parliament — the Senate — on 12 June 1981. The Freedom of Information Bill 1981 was introduced into the House of Representatives on 18 August 1981, and is expected to be passed before the House

* A Law Student at the University of Melbourne.