SELECT COMMITTEE ON WORKERS' COMPENSATION

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
MONDAY, 23 AUGUST 2004

SESSION 3

Members

Hon Sue Ellery (Chairman)
Hon Ray Halligan
Hon Jim Scott

[4.35 pm]

NUGAWELA, MR BRIAN
Barrister, examined:

The CHAIRMAN: You will have signed a document titled "Information for Witnesses". Have you read and understood that document?

Mr Nugawela: Yes, I have.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them. Please ensure you do not cover them with papers or make a noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public or media in attendance will be excluded from the hearing. Please note that until such time as a transcript of your public evidence is finalised, it should not be made public. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. I note that you have someone with you as counsel. He can provide advice to you but we cannot hear directly from him. Would you like to make an opening statement to the committee?

Mr Nugawela: For what it is worth, I jotted down four points in relation to the submissions I made. I thought it would be a good warm-up before you threw questions at me. It would warm up my voice. They are not necessarily in any order of importance or significance; they are something that just struck me as I was thinking about what I would be doing later on today. As I read the Workers' Compensation (Common Law Proceedings) Bill, which we sometimes called the anti-Dossett Bill, it struck me that the provisions in relation to Hewitt v Benale were not included or incorporated as part of the common law proceedings Bill. This is my understanding from checking on the web site the current version of the Bill. One of the things I had a concern with is that aspects of common law proceedings will be dealt with by the common law proceedings Bill, whereas Hewitt v Benale, which is an important decision of the Supreme Court that impacts upon access to common law, is not going to be dealt with at the same time on an expedited basis. It was a concern because one of the case studies I recall putting in the submissions was a matter concerning a particular worker who would have been affected by three Supreme Court decisions, one of which was Hewitt and Benale. The common law proceedings Bill will disfranchise him but not give him back what was taken away from him by this division of issues. That is the first point. Of course, the rhetorical question that occurred to me was: what if the reform Bill does not get passed? Will there be no legislative correction of the Hewitt and Benale decision? It affects a number of workers, like a Mr Koljibabic. That was the first bullet point I had. I thought I would raise that as an issue. The second issue is the concept of retrospectivity. As I read the common law proceedings Bill a few days ago, I saw there is a prospective cut-off date of 23 June 2004 in respect of the High Court decision in Dossett. From my personal point of view, the retrospectivity issue raises a number of subissues. One issue is the rule of law, I suppose. Being a one-eyed lawyer, I believe that Parliament enacts the laws and the courts interpret the intention of Parliament on the meaning of those laws. If every time a court said that a law had a retrospective intention, and Parliament had not expressly stated that it wanted it to be retrospective, the Parliament were to pass further retrospective legislation to correct the court's interpretation, then we would have a dilution, I suppose, of the rule of law because the courts would no longer be potent in determining

Parliament's intention if Parliament could come in and fix that. You have a circularity of actions in this area if this is what is happening, which is what is proposed with the Workers' Compensation (Common Law Proceedings) Bill. The High Court has said that that could not have been Parliament's intention, and then Parliament has come in and said, "No, you have interpreted the law wrongly; this is our intention." That tends to detract from the separation of powers in our type of government. Madam Chairperson; is that how I address you? I am unfamiliar with these proceedings.

[4.40 pm]

The CHAIRMAN: Sure. "Chair" is fine.

Mr Nugawela: I photocopied six copies of an extract from the report of the Standing Committee on Uniform Legislation and General Purposes, which recently came to me. I have highlighted paragraphs 3.3 and 3.7. I will quickly read the first few sentences from paragraph 3.3 -

> National legislative schemes of uniform legislation were addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (**1996 Position Paper**). The 1996 Position Paper emphasised that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia.

Having said that, they have developed some scrutiny principles, which they express in paragraph 3.7 in the following way -

> One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:
>
> - does the Bill trespass unduly on personal rights and liberties;[5]

The footnote reads as follows -

> For example: Strict liability offences; reversal of the onus of proof; abrogation of the privilege against self-incrimination; . . . consistency with the principles of natural justice; personal privacy; . . . delegation of administrative power only in appropriate cases and to appropriate persons; retrospectively affecting rights and liberties, or imposing obligations; . . .

If there is political recognition of the need to be careful about trespassing against personal liberties and rights conferred by the highest courts in the land, this common law proceedings Bill would provide an example of what should not go through rather than what should be supported, in light of these uniform principles.

The other thing is the broad question of there being no regulations present before Parliament. I have four points to make about that. First, the Full Court of the Supreme Court decision called Western Power Corporation v McMullen in this area of the law noted earlier this year that in order to understand how the legislative scheme works overall, one needs to see the regulations and read them together with the Act. Despite repeated calls from more than one source for the provision of these regulations, they have not been forthcoming. The Chief Justice of the High Court of Australia referred to governance by regulation. There is some material on the Internet from His Honour that talks about the democratic deficit and the denigration of the rule of law if there is no scrutiny in this area. In fact, I think a report of the Joint Standing Committee on Delegated Legislation looked into this issue about two years ago. The committee put out a paper and had some critical comments to make on this area of the law. We say that the absence of regulations at this stage that can be scrutinised in a democratic way before Parliament will probably result in numerous unnecessary challenges to courts on ultra vires matters, proportionality principles and the like. The last thing I have to report, Madam Chair, is that there are two decisions of the courts. One is a decision of the District Court in a matter called Short. Some mention was made in *Hansard* at the time this Bill

was looked at in the lower House on the significance of Short. That has now been delivered. There is another decision of the Compensation Magistrate's Court in a matter called Macphilomey. Again, that was one of the decisions that was debated when this Bill was before the lower House. If those two decisions are not accessible to you, I can make sure that they do come to you, because they are highly cogent to this area. Unless there is anything else, Madam Chair, those were the only points.

The CHAIRMAN: The first task ahead of us is to prepare an interim report for Parliament. We will be focusing in particular on the Workers' Compensation Reform Bill rather than the common law proceedings Bill in that interim report. I will describe it in this way: attention has been drawn to some big ticket items in the reform Bill; that is, the question of impairment versus disability and a range of issues with dispute resolution and the medical assessment panels. Do you have any comments that you would like to make on either one of those three things?

Mr Nugawela: My misunderstanding in relation to today's proceedings was that I was to be speaking about my submission specifically on the common law proceedings Bill.

The CHAIRMAN: And you may. I am just asking whether you have anything to say on that.

Mr Nugawela: Certainly. Having put that disclaimer, I am directly aware of the submission that APLA made, specifically in relation to the reform Bill. It avoided making any submission on the common law proceedings Bill. I entirely agree with everything within that written submission as it pertains to those three big ticket issues that you have identified. If I say any more, I will be diluting the effectiveness of what is there. Coincidentally, my counsel also had a governing hand in preparing that document on behalf of APLA. He is also the President of APLA.

The CHAIRMAN: Sure. However, we are not in a position to hear from him right now. I will ask my colleagues whether they have any questions. Ray?

[4.50 pm]

Hon RAY HALLIGAN: Thank you. You mentioned retrospectivity with the common law proceedings Bill. I take it that you have no problems with it being retrospective. However, considering that you also mentioned that some people would be disfranchised, how do you believe that could be corrected?

Mr Nugawela: Forgive me for not being articulate enough to emphasise that my personal view is that this Bill should not be retrospective and that it should try to incorporate the freedom to choose between one regime and another - the old regime or the new regime. It is not about having two bites of the cherry, because there is only one attempt at getting common law damages. It should not have been made retrospective in 1999, but two wrongs do not make a right - if I can use that colloquial expression - and it should not be made retrospective now. The High Court has ruled on the intention of Parliament; that is, it was not intended to be retrospective, notwithstanding the personal expressions of the minister. What is sought to be done now is actually a second negative. My personal view is that the individual worker should be given the freedom to choose between either method of assessment of common law damages. It can be quite done quite succinctly and simply with good drafting. I am not sure whether that is responsive to your question.

Hon RAY HALLIGAN: It certainly is, because I was going to ask what you think is good about this Bill and what you think is bad about it.

Mr Nugawela: What is good about the Bill is the albeit belated intention to ameliorate the harshness of the Full Court decision in Dutch, which is quite an old decision. The minister indicated - I think about two years ago - that he was going to bring in legislation to fix the harshness of Dutch. It has eventually been incorporated in this legislation. That is the good thing about it. There are aspects of it that do not go far enough. For instance, some litigants' actions were struck out and they were ordered to pay costs because of the Dutch decision. Their representatives have been saying over the past few years to bring in legislation quickly to fix and save them. That has

not been done and they are completely gone. They have to pay significant legal costs. To some extent this Bill ameliorates that harshness. What is not good enough, from my reading of it, is that it does not bring in the Hewitt v Benale Pty Ltd amendments. What is bad is that it seeks to remove the protection given by that High Court decision in Dossett by giving legitimacy to the presumption against retrospectivity twice over; that is, in 1999 and again in 2004.

Hon RAY HALLIGAN: Considering the other cases that you just mentioned that you say this Bill does not take into consideration, have you submitted any proposal to the Government, or are you in a position to submit a proposal to the committee, about the types of amendments that might be included in the Bill?

Mr Nugawela: In the very early stages I prepared a clause that got some mention in *Hansard* towards the close of business in the lower House before its vacation. That is something that can be improved upon. However, as a template, it is a good starting point. Of course, when that clause was done, we did not have the benefit of the Short decision or the Macphilomey decision. Now that they have been delivered, the clause can be improved on to incorporate those changes. The changes brought about by the Short and Macphilomey decisions actually allay a lot of the concerns expressed on behalf of the insurance industry about giving workers the freedom to choose. Organic to these decisions is a judicial solution to those types of problems. For instance, if I can elaborate briefly on the Short decision, one of the complaints that the insurance industry was making was that some workers settled their common law actions before the High Court handed down its decisions in December 2003 under the new system on the assumption that their rights had been retrospectively abolished and that they would fall within the new system. Because they did not get very far in the new system, they settled their claim at a gross undervalue. Then the High Court bestowed upon them the right to go under the old system, which is based on future pecuniary loss. The workers tried to reopen their settlements and go back under the old system because of the High Court decision. The insurers were saying that these people were having a second bite at the cherry. They were keeping their settlements and redemptions of about $10 000 or $20 000 under the new laws, and then they were having another go at common law rights under the old system and trying to say that they will give credit for the $20 000 that they settled under the new system. The District Court decision in Short said that they could not do that. They have to set aside the old judgement, repay the $20 000 that was taken and go under the old system. They cannot have a foot in either camp. The reason that I say freedom of choice is important is simple: if one were to find oneself injured - for instance, a concert pianist - with a degree of disability under the new system of 10 per cent loss with the loss of a finger, that person may well be better off under the old system because that would be the end of his economic career. They will not be able to earn an income and would lose hundreds of thousands of dollars. They would be compensated for under the old system. Under the new system, which is based on the degree of disability, soon to be made harder with impairment, they would get $20 000 under the second schedule if they redeemed their claim. Those people who unfairly thought they were stuck with the new system because the High Court had not handed down its decision might say “I will beg, borrow or steal my $20 000, repay the insurer and have a go at getting just compensation for the loss of my career.” I believe that the limited number of people in that category through a misunderstanding of what the law was until it was clarified in 2003 should be given the benefit to decide which method compensation.

Hon RAY HALLIGAN: There certainly may be other aspects to this. It is a complicated subject. Have you spoken to the Australian Medical Association about these assessments? It tended to go down a slightly different path.

Mr Nugawela: When I last looked at this issue, my apprehension of the AMA’s position on the impairment and degree of disability dichotomy is that it is not in opposition to APLA’s position. I thought that its position was that there is an unnecessary shift from disability to impairment. I could be wrong.

The CHAIRMAN: In one part.

Hon JIM SCOTT: You mentioned the regulations. With most legislation people do not actually have the regulations. Do you believe that the regulations that are yet to come on in all this legislation, including the principal Act, will have a greater effect than normal regulations? Do you think that some of those should be a part of the Act, and not regulations?

[5.00 pm]

Mr Nugawela: The second question is a lot harder to answer because it involves the act of double prophesying; prophesying what the content might be and then carrying out the second stage, which is to see whether it should be the proper subject matter for delegated legislation or should be part of the legislation. I can try to answer the first part in this way: if history is anything to go by, the proliferation of regulations after 5 October 1999, when the legislation was last amended in a significant way, and the number of challenges to those regulations to the Full Court of the Supreme Court and the comments of the Full Court that the legislative scheme cannot be understood without the regulations being read conjunctively, gives cause for concern. This is what happened in Western Power v McMullen, which was delivered in February 2004. There was a particular understanding of how the statute operated but then, when it was informed by the regulation, the Full Court changed its mind and said that it meant something else. This follows from the ex parte Woodford decision in December 1999 by Justice Miller, in which regulation 19M, as it then stood when read with the Act, meant this. However, when the amended regulation 19M came back to the Full Court in February 2004, the Full Court said that it meant something exactly the opposite. Then it put out the cautionary comment that to understand and distribute rights between competing parties in this area of the law, at least in this Act, you have to read the regulations with the Act. When I did happen to speak with the minister in late January-early February and asked him specifically whether the regulations would be made available so as to forestall these potential problems down the track, he said they were certainly not available but the drafting instructions would be made available by the time of the second reading speech. There is some evolution in that position now: we do not even have the drafting instructions.

I accept what you say, Sir, that in a majority of cases regulations are not tabled at the same time, but in this area of the law there has been a propensity to actually regulate on matters of substance that affect substantive rights and not merely procedural rights, as history has demonstrated. So there is a call for caution. The consequences of not having a cards-on-the-table approach, of course, would be to entrench injured workers and their families in litigation for 10 years.

Hon JIM SCOTT: Do you have in mind any particular parts of the proposed Act that could be affected significantly by regulation in this way?

Mr Nugawela: I cannot give you an answer extempore that would be accurate, but it would be a simple word-processing task for me to actually type in "regulation" in the context of the Act, see what it throws up and go through the various sections. Some, no doubt, would be innocuous, some would be non-eventful, but others, when it comes to conferring powers and discretions upon executive bodies and persons, could be problematic, as history has shown. I can undertake to do that in a very short time if it is of any assistance.

The CHAIRMAN: I am not sure that it would help us, as we have our advice right here.

Hon JIM SCOTT: Another issue that has been raised a number of times already with the legislation as it exists, and as it is proposed to be amended, is the complexity of the legislation itself creating its own problem. Do you have any comment about that, especially how that might impact on both the management and cost of the system? Do you think it is overly complex and difficult to understand?

Mr Nugawela: Yes.

Hon JIM SCOTT: I would like to think that legislation that affects people should be reasonably understandable by the people who are affected by it, as well as the people who interpret it for them. My question is in that regard, and how it might add costs and difficulties to the system itself.

Mr Nugawela: My intuitive response is that, firstly, costs can and should be quantified in more than monetary ways. The personal costs, particularly when you are talking about injured people, are to their psychological welfare and the welfare of their families. In our practice we see that delay introduces an element of personal cost in frustration and marital breakdowns, which often are not quantifiable in monetary terms. However, turning to the monetary aspect of this, I certainly think it would introduce unnecessary cost pressures to the system, because what you will see happen is injured workers will be the first to take what is known as the kitchen-sink approach, as a result of uncertainty, by filing every application and taking every legal step they can in the hope that one day the law will be clarified. So you will see a proliferation of applications in a multiplicity of jurisdictions just to preserve rights out of uncertainty. I think part of the initial problem was in 1993 when they attempted to bring in restrictions on common law damages using a no-fault statutory scheme as a template. They thought that by fiddling with the no-fault statutory scheme - the Workers' Compensation and Rehabilitation Act - and by adding restrictions to common law damages, they could have somehow a synchronous base that was easily tamed, managed, understood and written. History has shown that every cumulative amendment to this non-statutory vehicle has brought about tremendous confusion. Even our Supreme Court justices are grappling with statutory concepts. They are trying to fit them into the common law mould, finding it impossible and throwing their hands up in despair. You see this constant refrain commencing at reasons for decisions from all of the justices. When I say "all", I mean the majority of them: "This is yet again another Bill concerning the operation of the workers' compensation Act". I think there must be a simpler solution. The sheer volume of the changes sought to be wrought by these two pieces of legislation will, regrettably, complicate it in a way that we have not seen before. If 1993 was bad and 1999 was worse, 2004 will probably go down in the annals of history as creating the greatest wealth for lawyers, to the detriment, though, of the people whom we are here to serve. That is my reaction to it. It sounds like a lot of hyperbole, but we see what happened in the past. Two High Court challenges arising out of state legislation dealing with workers' compensation, I think, says a lot.

Hon JIM SCOTT: Another issue that I have heard a number of times is about the tension between the statutory and common law systems. Do you know of any sort of scheme that does not actually interact them in the same way as we do here?

Mr Nugawela: Yes.

Hon JIM SCOTT: Because, clearly, there is a huge, I suppose, shuffling of cards to try to get a balance between the two systems. I suppose politicians need to struggle to look at something better.

Mr Nugawela: I understand. This may sound ironic, but I think the paradigm that was introduced in 1993, in trying to balance the no-fault access to compensation with common law, was probably a better paradigm than the 1999 one. I will explain it in this way. I will simplify it to this point, perhaps being a bit inaccurate: the paradigm, as I saw it in 1993, was based on economic loss; that is, putting the injured person back in the same position, or as near as possible to the same position, as he or she would have been in but for the injury. That operated in the no-fault statutory scheme, and still does, as that is the function of the workers' comp Act: to compensate with weekly workers' compensation payments substantially. That operated with Mr Kierath's then future pecuniary loss provision. That is the basis of compensating someone, and the largest loss is always future pecuniary loss. Then the paradigm shifted in 1999 to this so-called objective effort of assessing degree of disability, which had absolutely no necessary connection and very often was antithetical to the notion of putting a person back in the same position as he or she would have been. Go no further than the concert pianist analogy. I think trying to bring about the so-called objectifying idea

of switching from “disability” to “impairment” will not make it any better. In my view you will still get one eminent expert saying impairment is five per cent and another saying impairment is 10 per cent. All you will do is introduce a different scale instead of the second schedule. You may have an AMA guide, a US guide, a WA guide or a modified New South Wales guide; it will not increase consistency and results. I do not know whether that is responsive to your question.

[5.10 pm]

Hon JIM SCOTT: Yes, it certainly is in part. It was a fairly big question, I suppose, in that sense. You mentioned the issue that when you put a lot of weight on the regulations you may end up with a greater amount of litigation. I do not quite understand that as a layperson. Can you explain that a bit, please.

Mr Nugawela: There is a very good book that was put out by a professor in this area of the law - in very good, simple English, thankfully - called *Delegated Legislation in Australia*. His name is Professor Pearce, and he goes through in a very useful way the bases upon which an individual can challenge the validity of regulations. I remember doing an e-mail summarising the seven or eight bases, and I cannot reproduce that faithfully now, but off the top of my head one is the notion of ultra vires, which is “beyond power”, so that if the section of an Act does not authorise the making of regulations in this area, you can challenge the regulations as being ultra vires. Another is if the regulation if not reasonably proportional or adapted to suit the legislative ends; so if the aim of the legislation is to delegate the regulation-making power in one area and the regulations that are produced are so broad as to exceed that power, they can be struck down. Another area of course is direct inconsistency, whereby the legislative intention as manifest in the intention of Parliament is conflicted out by a regulation. I think from recollection there were about seven bases. A quick glance at just the index pages of that book - because he organises it on a chapter by chapter basis - would give one an intuitive feel for how things can go wrong. The Chief Justice of the High Court of Australia, His Honour Chief Justice Gleeson, produced a very good paper in 2001 for a convention of parliamentarians in New South Wales, and he referred to this as the democratic deficit. They studied this three years ago in New South Wales at a convention - I think the paper is obtainable - and they looked at these types of issues and problems with the proliferation of regulations.

In answer to one of your earlier questions, which was about the methodology for deciding access to compensation and what is fair and what is not fair, I talked about the paradigm and said I had reservations about whether I had actually answered it. In my view the Queensland model provides a far better adjustment of competing rights in this area than does ours.

The CHAIRMAN: Thank you very much for giving evidence this afternoon. We appreciate your taking the time. It has been very useful to our deliberations.

Committee adjourned at 5.13 pm