

Medical indemnity reform & structured settlements

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There are two main ways an injury victim can receive compensation under a settlement. One is by lump sum, the other is by way is by annuity under a structured settlement. Structured settlements are quite common in the USA where they provide an alternative for catastrophically injured claimants who would rather trade the worry of managing a lump sum settlement for a guaranteed income stream. At the present time they are virtually non-existent in Australia.

For structured settlements to be a real option they must comply with certain minimum safeguards. For example, they must (naturally) be optional to the claimant. They must be flexible enough to cater for a claimant's occasional need for capital rather than income. The institution providing the annuity must be 100% secure.

Finally, they must receive the same tax treatment as lump sum settlements. In the Australian context, this means they must be tax-exempt. They are not currently tax-exempt in Australia and this is why they are not currently an option in this country.

For a number of years now APLA has lobbied for structured settlements to be made tax-exempt. In the last few weeks it seems that this issue is finally on the political agenda.

Recently the Federal Opposition indicated that structured settlements

would be given tax-exempt status if they were to win the next Federal election. There are some indications that the current Federal Government may soon make an announcement on this issue and also propose to make structured settlements tax-exempt. At the time of writing we are all waiting to see if, finally, injury victims in Australia will get greater choice in how they can receive their compensation in the future.

Enough of the good news, now for the bad!

Structured settlements have also received a mention in the Federal Opposition's policy for medical indemnity reform. Not because of the flexibility they offer injury victims, but (seemingly) because of perceived advantages they may offer medical indemnity insurers. The ALP's Federal Health Policy suggests that structured settlements could be advantageous to medical indemnity insurers! Even a moment's reflection about this type of proposal should make medical consumers very nervous.

Structured settlements are not a means to assist insurers overcome short-term liquidity problems. People who suggest the contrary appear oblivious to the fact that thousands of injury victims around Australia have recently lost billions from the collapse of HIH. They also seem oblivious to the fact that many doctors have recently had to 'tip in' to cover a funding crisis with their medical

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indemnity insurer.

Structured settlements are not an option if they are less than 100% secure over the life of the settlement. Any institution providing structured settlements must meet the highest credit rating and prudential standards before they can qualify. And, as mentioned above, they must also be entirely optional to the claimant. Otherwise we will, again, witness injury victims having to subsidise the viability of insurers. This has occurred too often in the past in Australia and cannot be allowed to happen again.

The most recent example of this genre is the NSW *Health Care Liability Act 2001*. Some of this Act is good, but some (such as restrictions of the compensation entitlements of victims of medical incompetence) is repugnant. The Federal Opposition Health Policy document suggests the Act is a template for adoption in other states.

The Australian Health Minister's Advisory Council (AHMAC) is currently working on a number of reports on, among other things, providing 'Sustainable Solutions to Address Long Term Care Costs', and 'Reducing the Administrative and Legal Costs

Associated with Health Care Litigation'. These issues need to be considered in the context of the NSW *Health Care Liability Act 2001* and the Federal Opposition's Policy. Let's all hope that, somewhere, somehow, someone remembers the people who count the most, namely those who have to live with the consequences of 'medical misadventure'.

APLA has been invited to participate in a Consultative Forum with the AHMAC and we hope that our participation will bring some bal-

ance and consumer perspective to AHMAC's final report on these issues.

On another front, the NSW Government has again struck another blow against its own citizens' access to justice. On the 26 May 2001 Regulation 73E of the Worker's Comp Regulations made it unlawful for a lawyer to publish any statement that "...may reasonably be thought to be intended or likely to encourage or induce a person: ...to make a claim for compensation or damages for a work related injury". Since then, the WorkCover Authority has been furiously telling lawyers throughout NSW to cease advertising for per-

sonal injury work or face prosecution. Some firms who do not even do workers compensation work have been told to cease their usual personal injury advertisements. In one case a firm was threatened with prosecution for advertising details of an action that was taking place in the UK!

The NSW Government's actions are reminiscent of conduct in Police States attempting to control the thoughts of their citizens. The target of these laws is not the lawyers but the citizens of the state itself. The law attacks their right to be informed of their legal rights and the availability of the means to enforce those rights. In so doing it seeks to restrict their access to justice. APLA's policy on this issue is quite clear. There is no difference between "...not having rights and not knowing that you have rights". While the Carr Government's actions might not be out of place in George Orwell's *Nineteen Eighty-Four*, they are not appropriate in a democratic society that professes respect for the rule of law. It is in the public interest that legislation such as this be challenged. APLA is currently investigating a number of options in this regard and hopefully we will report to you further on these developments in the next issue.

I look forward to seeing you all at the National Conference at Coolum. ☐

Rob Davis