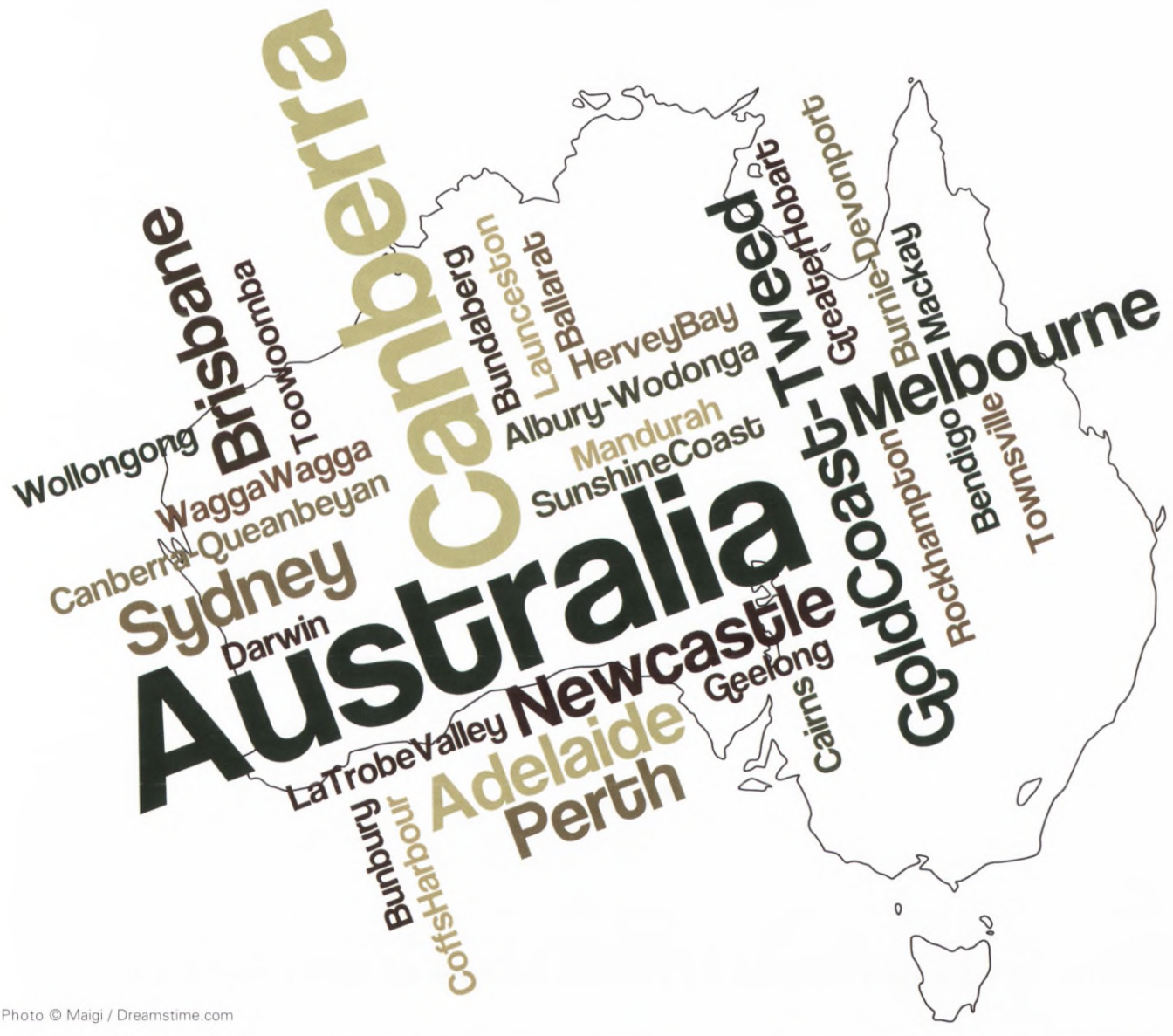
The 'TERRITORY or STATE OF CONNECTION' test

Nationally uniform workers' compensation law?

By Emma Reilly



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The majority of injured workers (apart from those covered by the *Safety, Rehabilitation and Compensation Act* 1988 (Cth)) must look to the workers' compensation schemes in each state or territory for compensation. In other words, workers' compensation law is, for the most part, state-based law.

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The increasing mobility of the workforce has created difficulties for workers, employers and their insurers in determining the law that should apply to injured workers. This is an important issue in border areas, in the ACT, as a small jurisdictional island in NSW, and in the case of transport workers and others who regularly cross into more than one territory or state for their work.

Historically, the workers' compensation legislation in each state has provided for 'extra territorial' cover. For example, previously in NSW, a worker injured out of that state was entitled to benefits under NSW legislation if the contract of employment was entered into in NSW. This created a degree of overlap, as some workers could potentially be entitled to compensation under more than one scheme. Employers tended to purchase 'notional' policies in neighbouring jurisdictions, an unsatisfactory mechanism to ensure appropriate cover.

After consultation between the territories and states, the attorneys-general reached agreement in principle in 2003 to enact uniform provisions in respect of jurisdiction for workers' compensation claims. This was aimed at providing workers and employers with certainty about workers' compensation entitlements, eradicating the possibility of duplicate benefits and reducing the opportunity for choice of law-shopping. Each worker would be connected to one territory or state, the territory or state of connection ('TOSOC'), for the purpose of workers' compensation and work injury damages claims, regardless of where the subject injury occurred. The insurer of the employer that issued a policy in the TOSOC would be called upon to indemnify in respect of the claim.

The choice of law provisions enacted with the TOSOC test provide that the law of the TOSOC applies to work injury damages claims, regardless of where the injury occurred, or where proceedings are brought.

The passing and commencement of the legislation has been, in practice, significantly less than uniform. The TOSOC test was introduced in:

- Queensland on 1 July 2003;
- ACT on 5 April 2004 (although there was a similar 'worker of the Territory' test previously);
- Victoria on 1 September 2004;
- Tasmania on 17 December 2004
- Western Australia on 22 December 2004; and
- NSW on 6 February 2006.

Despite the legislative intent to simplify issues of jurisdiction via the TOSOC test, there remain a multitude of interesting claims where jurisdiction is in issue, including in matters where the TOSOC test had commenced in one jurisdiction and not another, at the time of the injury.

THE PREVIOUS WORKERS' COMPENSATION LAW

The High Court initially looked at the issue of the scope of workers' compensation schemes in the case of *Mynott v Barnard*.[1] That case involved the death of a worker who was injured in NSW. The worker and his employer were residents of Victoria, and the contract of employment had been made in Victoria. However, the contract was to perform work solely in NSW. An action for death benefits under the Victorian legislation by the worker's dependants failed, essentially because the Court held that there was insufficient nexus with Victoria to invoke that legislation.

The High Court judges had different views as to why the claim failed, and the Court arguably did not provide a clear guide as to the connections that were required to bring into operation a local *Workers' Compensation Act* where the character of the employment or the place of the injury was outside the jurisdiction where the claim was brought.

Previous to the TOSOC test, if there was sufficient nexus with NSW to invoke the *Workers' Compensation Act* 1987 (NSW), compensation could be payable even where the worker was injured outside NSW, as a result of the extra-territorial cover in the previous s13 of the Act.

Section 13 of the Act specified that the Act would apply to an injury, and compensation was accordingly payable, where:

- an employer had a place of employment in NSW, or was

present in NSW, and employed a worker there;
- the worker, while outside NSW, received an injury under circumstances which, had the injury been received in NSW, would entitle the worker to compensation under the Act.

The relevant question was therefore the location in which the contract of employment was entered into.

The NSW Court of Appeal decision of *Starr v Douglas*[2] involved a NSW resident who obtained employment with a pastoral business in the Northern Territory, by speaking with his brother, who managed the business, by telephone. The business was operated through a partnership. One partner was in NSW and one was in South Australia. The worker was injured in the Northern Territory. He attempted to claim benefits under the extra territorial cover of the NSW workers' compensation scheme. This required an examination of where the worker was taken into employment.

It was held that the employer was in the Northern Territory when the contract was entered into, by way of its agent at that location on the telephone, and NSW compensation was not available.

The recent decision in *Ormwave Pty Limited v Smith*[3] reiterated that the phase, 'there employs a worker' in s13 of the NSW Act referred to the place where the person was engaged, and not the place where the work was performed.

The ACT had a precursor to the TOSOC test, in the form of the 'worker of the Territory' test, introduced to replace extra-territorial cover in the *Workers' Compensation Act* 1951 (ACT) on 13 January 1998.

The previous s7A of the Act provided a three-tier test, as follows:
- Tier 1 – The territory or state in which the worker usually carries out the work of the employment concerned.
- Tier 2 – The territory or state in which the worker's base for the purposes of that employment is located.
- Tier 3 – The territory or state in which the worker was hired for or otherwise taken into employment.

A concept of 'defined temporary arrangement' covered workers engaged interstate for a period. The previous ACT law did not impact on the determination of applicable law for common law purposes.

THE TERRITORY OR STATE OF CONNECTION TEST ('THE TOSOC TEST')

How does one determine which territory or state is the TOSOC for the purposes of a workers' compensation claim or work injury damages claim?

In a similar way to the previous ACT 'worker of the Territory' test, the largely uniform TOSOC test provides for a three-tiered approach to determine which territory or state a worker is connected to. The three levels of the test are:

(a) the territory or state where the worker usually works in the employment;

(b) if no territory or state, or no single territory or state, is identified by paragraph (a) – the territory or state where the worker is usually based for the purposes of the employment; and

(c) if no territory or state, or no single territory or state, is identified by paragraph (a) or (b), the territory or state where the employer's principal place of business in Australia is located.

The present ACT legislation provides that, in deciding whether a worker usually works in a territory or state, regard must be had to the following:
- the worker's work history with the employer over the preceding 12 months;
- the worker's proposed future working arrangements;
- the intentions of the worker and employer; and
- any period during which the worker worked in a territory or state (a relevant place) or was in a relevant place for the purposes of employment, whether or not the worker is regarded as working or employed in the relevant place under the workers' compensation law of the relevant place.

The legislation specifies, however, that regard must not be had to any temporary arrangement under which the worker works in a territory or state for a period of not longer than six months.

COMMON LAW CLAIMS – CHOICE OF LAW

As part of a federation, the states of Australia may be described as separate countries in law. Legal disputes in court will often have a factual connection with more than one territory or state. The rules a court applies to determine >>

which of two or more laws should be applied to resolve the legal questions at issue are called 'choice of law rules'.

Previously, for common law work injury damages claims, the law of the place of the tort applied, usually the location of the injury, regardless of where the person was employed or where proceedings were brought, in accordance with the decision of *Pfeiffer v Rogerson*.[4]

The uniform cross-border provisions include choice of law rules for common law claims resulting from industrial accidents. These rules provide that the law of the TOSOC applies, regardless of where the injury or tort occurred.

A 'damages claim' for the purposes of the choice of law provisions includes a claim for damages in relation to a work-related injury caused both by the negligence or other tort of the employer, or a breach of contract of the employer.

This means that the choice of law provisions cannot be circumvented by 'choice of action' shopping, or by bringing a claim in contract rather than tort, as occurred, for example, in the case of *Dean v More than A Morsel Pty Limited*.[5]

APPLYING THE TEST

As described above, the legislative reform giving rise to the TOSOC test was intended to reduce the need for employers to have multiple workers' compensation policies. The uniform legislation was designed to provide greater clarity on the issue of jurisdiction for workers' compensation claims. However, early decisions from the courts demonstrate that there is still room for dispute in the application of the test.

> The increasing mobility of the workforce has created difficulties for workers, employers and insurers in determining which law applies to injured workers.

The leading authority that has emerged thus far in explaining the first tier of the test is the decision of Justice Gray of the ACT Supreme Court in Michael *Hanns v Greyhound Pioneer Australia Limited*.[6]

Mr Hanns was an interstate bus driver for Greyhound, based in Canberra, but performing his duties over routes through NSW and occasionally to Victoria and Queensland. He spent approximately 80 per cent of his working hours in NSW. Mr Hanns' employer argued that the word 'usually' should be applied quantitatively, so that the place where a worker spends most of their working hours should be regarded as their usual place of work. That was the approach adopted by the magistrate at first instance.

Justice Gray rejected this approach, finding that 'usual' should be interpreted in the sense of 'customary' or 'habitual'. Applying this reasoning, Gray J concluded that there was no single usual place of work. It was customary for Mr Hanns to perform his work in more than one jurisdiction. As such, the second tier of the test was invoked, and as the worker's base for employment purposes was the ACT, Gray J determined that the ACT was the territory of connection.

More recently, Special Magistrate Cush of the ACT Magistrates Court applied the test in the matter of *Falls v Avon Products Pty Limited*.[7]

Ms Falls was an Avon Sales Manager who, at the time of her injury, was responsible for operational area 255, which was located exclusively within the bounds of the ACT. Her evidence was that she spent approximately eight to ten hours each day working her area in the ACT. However, Ms Falls lived in NSW, and it was her habit to perform about two to three hours at home each evening doing bookwork, which was an essential function of her employment.

Ms Falls suffered a psychological injury due to bullying and harassment, and purported to claim ACT compensation. The employer argued that the TOSOC was NSW.

Cush M determined that although bookwork was a part of the worker's duties, it was a subsidiary part. He observed that she could have performed the bookwork anywhere, and the fact that she did so at her place of residence in NSW was essentially irrelevant to the task which she had been retained

to perform. She was not required by the employer to do that aspect of the work in any particular place. As such, it was held at first instance that the ACT was the territory of connection.

Cush M expressed the view that it would be an undesirable consequence of the test if an activity by a worker, not required to be done in a particular location by the employer, could result in the change of applicable workers' compensation coverage.

On appeal, this decision was initially upheld by Chief Justice Higgins of the ACT Supreme Court. Higgins CJ stated that:

> 'Clearly, the worker could be said 'usually' to have worked on behalf of the employer, both in the ACT and in NSW. The former being an essential matter, the latter being advantageous.'

It was accepted that the test for identifying what it meant to 'usually work' was not mathematical. However, Higgins CJ thought that reference must be given to those places where the worker was 'expressly or by necessary implication' contracted to work in the contract of employment with the employer.

These decisions have now been reversed by the ACT Court of Appeal, which determined in *Avon Products Pty Limited v Falls*[8] that NSW was the state of connection in respect of the worker's employment.

At the commencement of the appeal, counsel for the employer made application to adduce additional evidence, consisting of a further affidavit from the human resources manager of Avon Products about its provision of a dedicated fax machine and telephone line to Ms Falls' home office in NSW for use with her Avon work. Counsel for Ms Falls also tendered a new affidavit, confirming this dedicated home phone line. Their Honours considered it was in the interests of justice to admit the evidence.

Turning to the first tier of the test to determine where Ms Falls 'usually worked', the Court of Appeal found that she usually worked in the ACT and she usually worked in NSW. It was held that 'it does not matter that Ms Falls could have chosen to do all her planning and all her bookwork in the ACT. As a matter of fact, she did not, and as a matter of fact, her employer provided facilities in NSW that she routinely used in performing required parts of her work.'

The Court of Appeal stated that the absence of a requirement as to where work should be performed was not relevant. The test was where the work was actually done, rather than where it was required to be done, or whether it is required to be done anywhere in particular. Consistent with the decision in *Hanns*, there were found to be two states or territories where the work was performed, and no single state or territory that would make the first limb of the test determinative.

Looking then, at the second limb of the test – as to where Ms Falls was 'usually based' for the purposes of her employment under s36B(3)(b), their Honours concluded that the evidence before the court showed no particular usual base. That Ms Falls did some work from home did not necessarily mean that place was her base for the purposes of her employment. It was stated that: 'Something more than a convenient place for part of her duties to be carried out is required before it can be said that her residence was her base in an employment sense.' In fact, while working in her sales district in the ACT, her vehicle might also be her base.

The court commented that if the employer provided a particular place from where the worker was expected to operate, that would have relevance. However, the employer provided no such place in the matter at hand. Accordingly, their Honours could not answer the question posed in s36B(3)(b).

Having found:

1. no single territory or state where duties were performed; and
2. no particular base for employment

their Honours turned to the third limb of the test, as to where the employer's principal base of business was located in Australia. Their Honours held that the relevant state of connection was NSW, because the head office of Avon, and its principal place of business, were located in Brookvale in Sydney, NSW.

Consideration was given to the meaning of 'usually works' by the District Court of Western Australia in *Tamboritha Consultants Pty Limited v Knight*.[9]

This case involved a contractor, Mr Knight, who was regarded as a deemed worker under the relevant >>

compensation scheme. It was accepted that he performed work in Western Australia, Victoria and in various overseas locations in the course of his employment with Tamboritha. It was a relevant consideration that the arrangement between Knight and Tamboritha was such that each job was offered with reference to a specific location, with each new job regarded as a new contract.

Commissioner Herron took the view that the nature of the arrangements between the parties was not covered by the first tier of the territory or state of connection test. The fact that over the course of his employment, Knight had performed the majority (approximately 75 per cent) of his work in Western Australia did not, in the view of the Commissioner, provide any useful guide or assistance in determining where he usually worked.

The Commissioner was unable to determine whether Knight's employment was connected with either Western Australia or Victoria, on the basis that for each period or contract of employment, he would perform his work in a single State. The Commissioner was not minded to conclude that, because the injury occurred in Victoria, the usual place of employment for the relevant contract was the state of Victoria.

The second tier of the test was therefore relied upon, and the base for employment, Western Australia, was found to be the state of connection.

In NSW, there are two reported decisions of the Workers' Compensation Commission dealing with the TOSOC test found in s9AA of the *Workers' Compensation Act* 1987 (NSW).

In *Bradley Robert Adams v Don Watson Pty Limited*,[10] arbitrator, Jackie Curran, considered a claim by a truck driver who sustained injuries in a motor vehicle accident which occurred in the course of his employment. The respondent asserted that the worker was employed in Victoria and therefore the workers' compensation insurer in Victoria was liable to provide indemnity.

It is unclear from the judgment as to where the injury occurred.

The worker's log book and other evidence established that the majority of the worker's driving took place in NSW, although he also drove in Victoria, Queensland and the ACT. He lived in NSW and the address of his 'usual workplace' shown on the claim form was in NSW.

The arbitrator purported to apply the test in *Hanns*. She noted that it was clear from that test that the fact that the worker spent the majority of his time driving in NSW did not, of itself, result in a finding that he usually worked in NSW. The term 'usually' should be given its more obvious meaning of 'habitual or customary' or 'in a regular manner'. Nevertheless, the evidence as a whole indicated that NSW was the only state in which the worker in question usually worked for the respondent. Reliance was placed on s9AA(6), which states that, in deciding where a worker usually works,

It has been accepted that the test for identifying what is meant to 'usually work' is not mathematical – it is not a majority or percentage test.

regard must be had to the work history and the intention of the worker and employer.

In *Ian John Mcintyre v Valconti Pty Limited*,[11] arbitrator, Christine D'Souza, considered a claim by a fisherman who sustained injuries due to gutting fish and other heavy work. The fishing boat worked between Eden in NSW, and Hobart in Tasmania. The worker had worked for about eight months prior to the injury, although there was no clear evidence of where he worked for most of that time. However, the worker had lived in Hobart for six months and in Eden for six months. The respondent was incorporated in Victoria.

The arbitrator found, on the evidence, that the contract of employment was entered into in Eden, NSW, and that Eden was the principal place of business of the respondent. The wage records consistently referred to the unloading port as being in Eden.

The arbitrator made no reference to any case law in the decision. However, consistent with the reasoning in *Hanns*, she applied the second limb of the TOSOC test, as she could not identify a single state in which the worker usually worked. The arbitrator found that the worker's employment was usually based in NSW prior to the injury. If wrong on that, she found that the principal place of business of the respondent was Eden, NSW.

CONCLUSION

The cases indicate that the first question to ask is – where does the worker usually perform their duties? Most workers usually perform their duties in one place, and rarely leave that territory or state for the purposes of work, such that this is an easy question to answer. However, some workers work on various building sites or perform delivery duties, moving in and out of one territory or state, and through another.

If the worker has a single usual place of employment, that place is the TOSOC.

If the worker has performed 60 per cent of his or her work on ACT building sites and 40 per cent on NSW building sites over the past year – where is the usual place of employment?

The word 'usual' is not defined in the legislation, so we must turn to the ordinary or dictionary meaning. The Concise Oxford Dictionary defines 'usual' as: *such as commonly occurs or is observed or done; customary; habitual.* Thus, as found in the decision of *Hanns*, 'usual' is not a majority or percentage test.

A person who spends 60 per cent of his time in one state and 40 per cent in another could be described as someone with NO single usual place of employment – their place of employment varies. Therefore, the second tier of the test should be turned to in determining the TOSOC.

It remains to be seen whether the TOSOC test and the corresponding choice of law provisions will result in clarity as to the applicable state workers' compensation scheme for claims. At this stage, it would appear that employers who have employees who move between the territories and states of Australia remain with some risk of uncertainty in that regard, despite the legislative attempt to clarify the applicable law for each worker. ■

Notes: **1** *Mynott v Barnard* [1939] HCA 13. **2** *Starr v Douglas* (unreported) BC 9404946. **3** *Ormwave Pty Limited v Smith* [2007] NSWCA 210. **4** *Pfeiffer v Rogerson* [2000] 203 CLR 503. **5** *Dean v More than A Morsel Pty Limited* [2004] ACTSC 105. **6** *Hanns v Greyhound Pioneer Australia Limited* [2006] ACTSC 5. **7** *Falls v Avon Products Pty Limited* [2009] WC 08 / 234. **8** *Avon Products Pty Limited v Falls* [2010] ACTCA 21. **9** *Tamboritha Consultants Pty Limited v Knight* [2008] WADC 78. **10** *Bradley Robert Adams v Don Watson Pty Limited* (29 August 2008). **11** *Ian John Mcintyre v Valconti Pty Limited* (24 September 2008).

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