



## The People's Solicitors Pty Ltd

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Newsletter No. 3

### **The People's Solicitors Pty Ltd, a new idealistic venture in the legal profession. The Peoples Solicitors aims to provide legal advisory services and advocacy work at a high standard of efficiency and at low cost basis.**

The firm is generalist with particular interests in criminal, civil administrative, employment and immigration law.

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Kingsley: *Oh dear...oh dear, oh dear...oh dear, oh dear, oh dear...*

Janice: *What's wrong?*

Kingsley: *Oh, nothing...just thinking aloud.*

Jeff: *I feel nothing but pride, a hopeless vanity, a dreadful arrogance, a stupefying futile conceit...but at least it's something to hang onto.*

(With gratitude to Peter Cooke)

Please hit our brand new Peoples Solicitors website at [www.peoplesolicitors.com](http://www.peoplesolicitors.com) and be better informed, if no wiser.

### **New Paralegals**

**Brett Crowley** is a Chartered Accountant and qualified legal practitioner. He is a former partner of Ernst & Young in Hong Kong and Australia, being particularly involved in tax and corporate finance. Mr Crowley is on the board of NRL club, Cronulla Sharks, responsible for the finance division. His recent public company experience includes Chairman of BSA Limited and Managing Director of Phoslock Water Solutions Limited.

**Harvey Kim** was born and raised in South Korea where he worked as a business manager in Samsung before

coming to Australia. He has an MBA and Bachelors in Economics and graduated from the UNSW Law School in May 2007. Building on his past experience, he would like to become a successful Corporate and Commercial lawyer.

### **Caretaker Government**

Given the statute prescribed four year term for the New South Wales Parliament (and an election held on March 2007) and the looming but more flexible dated federal elections, there has been some discussion of the role of a "caretaker" government once the relevant writs have been issued to facilitate an election and parliament prorogued.

During this interregnum in New South Wales a question, which ultimately did not need determination, was raised as to whether a conciliation process under the unfair contracts (Industrial Relations Act 1996 (NSW), s106) could proceed with a view to settlement of the claim. Could the crown give appropriate instructions to resolve the matter?

This gave rise as to some research as to what was precisely the status of the caretaker mode and its impact upon extant litigation.

There was no sitting Parliament. But there was an executive government with Ministers and responsible public servants.

A study of the written material gives rise to reasonable clarity as to the principles involved:

This notion is one of a convention, not a legally binding principle.

- The normal business of government continues until the wishes of the incoming government are known; however, administrative actions of the government should not be made binding on a potential successor.
- There are no "hard and fast" rules but rather the application of the caretaker conventions require judgment and commonsense in individual cases
- However, there are some areas into which a caretaker government should not intrude: significant appointments, major contracts or contentious agreements.
- Consultation with the Opposition or delegation to department officers can provide a solution to some of the dilemmas that might arise.
- The Executive Council would only rarely meet during the caretaker period, save to approve the issue of writs. (The writers acknowledge the analysis in Hawker Britton, *Caretaker Conventions: Federal Election 2004*, available at [http://www.hawkerbritton.com/file\\_libraries/occasional\\_papers/federal-caretaker-conventions.pdf](http://www.hawkerbritton.com/file_libraries/occasional_papers/federal-caretaker-conventions.pdf) viewed on 1st March 2007.)

Nothing in these principles impinges upon the role of the courts – whether in the process of litigation,



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conciliation or mediation. On the contrary, it seems that the Crown has an obligation to comply with the process of the court, including court ordered conciliation.

However, the matter is not free from difficulty with competing arguments between the “pragmatists” and “constitutionalists”, although there does seem to be consensus that the litmus test is “self restraint”: see Boston J, Levine S, McLeay E, Roberts N, Schmidt H, Caretaker Government and the Evolution of Caretaker Conventions in New Zealand, [1998] VUWLRev 30

Jeff Shaw Q.C.  
Amanda Pickles

*If it weren't for my lawyer, I'd still be in prison. It went a lot faster with two people digging.*

- Joe Martin, *Mister Boffo*

## When is a Taxi Driver Available on the Rank?

Recently the NSW District Court sitting at Parramatta (Judge Ellis) needed to deal with the question as to whether a taxi-cab driver allowed his cab to stand in a taxi zone when the cab was “not available” for hire.

The relevant part of the Passenger Transport (Taxi-cab Services) Regulations 2001, clause 48(1) required that “the driver of a taxi-cab must not cause or allow the taxi-cab to stand in a taxi zone if the taxi-cab is hired or is not available for hire.”

The magistrate had held that the availability had to be “immediate” and that the suggestion that the driver had needed to visit the toilet was “immaterial”. Accordingly, a fine was imposed and costs were awarded against the defendant.

On appeal, his Honour adopted a more flexible construction of the prescription. He followed a Scottish case: *Leonard v Burns* (1965) S.L.T 83 which can be summarized as follows:

It was an offence in the County of Dundee for someone not holding a cab operator's license to operate a cab.

The relevant legislation is *deemed* that a vehicle was operated as a cab if, *inter alia*, when in a public place the cab was “made available for hire with the services of the driver for the carriage of passengers and their effects...”

The question before the High Court of Justiciary was whether the cab was relevantly “available”.

Lord Justice-Clerk (Grant) held:

- It was argued that a cab was not “available” unless a member of the public could approach the driver “directly” and enter into a contract of hire with him.
- The cab was not “available” in that sense.
- The only “availability” was *indirect* i.e. if telephone or two way radio is used (the case did not support availability for any member of the public approaching the driver directly).
- Availability for hire is broad and general – not qualified by the notion of a *direct* approach from a member of the public. No such qualification can be implied.

Lord Strachan held:

- The cab was available for hire, even though the hire could only be obtained through “the office”, even if (as it was) that office was some distance away from the place where the cab is parked.

Lord Wheatley held:

- It is irrelevant that there is no evidence that anyone sought to hire the car
- A cab is not “available” for hire merely because it [should have been] available to anyone who comes up and hires it on the spot.
- As to availability, it is a matter of “indifference” as to whether there is a direct approach to the driver or whether there was a telephone communication to the central office by radio (or otherwise) to pick up the fare.

And so the appeal at Parramatta succeeded.

Jeff Shaw Q.C.

*Laws are like sausages. It's better not to see them being made.*

- Otto von Bismarck



## Working with Ministry of Transport, as both Friend and Foe

As a taxi driver it is quite daunting to get a letter from the Ministry of Transport which either says “show due course” or “licence cancelled”. This is usually preceded by a letter seeking attendance for interview. This is only the start of a rather daunting process.



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### **The Interview**

Attendance for interview is usually a scary experience because the Ministry officials, acting in pairs, will conduct an interview with a sound recording and typing up of a transcript that you are asked to sign and it can be used in evidence against you. The interview is conducted by questions from the ministry officials. These questions are generally leading questions which require a yes or no answer. These questions automatically assume a preformed point of view from the Ministry. In a number of cases, the taxi driver will be unaware of what complaints or problems that the ministry has lined up for the interview. In instances when The People's Solicitors has attended these interviews with taxi drivers, we have sought the details of what these issues were before we were able to answer any further details. In certain cases, we advised the cabbie not to proceed with the interview because of lack of procedural fairness coming from the interviewers.

Many a taxi driver has been disadvantaged by these interview procedures. The main aim of these procedures is to gather information and evidence that would support a suspension or cancellation of a taxi drivers authority by the MOT.

### **The Letter of Show Due Cause**

This is the stage where the Ministry has decided upon the basis of information before it that there is evidence from its point of view that is serious enough to warrant a disciplinary action. This means that taxi driver is given the opportunity to explain formally and provide any reasons why a disciplinary action should be not taken. The letter from the ministry transport will indicate exactly what the complaint is and what the problems are and are spelt out in detail together with documentary evidence that may have

been provided by the customer service sections of the networks (such as TCS or Premier).

The quality of the answer provided by the taxi driver will determine the response from the ministry. We have analysed and sought particulars of a number of these complaints for taxi drivers in order to work out the best response in writing. This is rather a tricky step because there has to be some balance between re presenting the evidence to show that the taxi driver was not fitting the definition of a "not fit and proper person" or "not of good repute" and showing that there may be areas to address for potential rehabilitation and retraining of the taxi driver. These "not fit and proper person" or "not of good repute" categories are legal definitions of which there has been a number of previous cases before the Administrative Decisions Tribunal that have described it in great detail.

A legal practitioner's job is to present a written submission that the Ministry of Transport will find credible and worthy of adopting its suggestions whether to halt its action or discuss agreed actions. The staff at the People's Solicitors has represented many drivers over the last 12 months and have engaged in an informal negotiation process with the Ministry with as much protection for the rights and interests of the taxi driver involved.

It is very important to get this dialogue correct, because it forms the basis of a permanent history file lodged at the Ministry and is referred to each time the Ministry wishes to review the authority of the taxi driver.

It is noted that many taxi drivers will choose to answer be "show due course" by presenting their own written submission. But a number of submissions fail at this juncture. A number of authorities are cancelled as a result of poor presentation and

ineffective communication to the Ministry of Transport in what is to be addressed in regards to the not fit and proper person" or "not of good repute" category.

### **The Cancellation**

Once the Ministry cancels or suspend your authority, your avenue of defence to appeal it to the Administrative Decisions Tribunal. This is a court process that is best done with representation by a lawyer. Evidence is presented by either side to argue whether the MOT decision is correct or not. This process will take a number of months to complete.

The decision of the ADT can also be appealed against by application to the Administrative Appeals Tribunal. Here a panel of three tribunal members review the decision made by the ADT.

Any further appeal can be taken to the Supreme Court.

### **A Recent Case History**

Virginia Ellis and her partner Judy Rae are operators and drivers in the Blue Mountains at the Katoomba Cooperative.

Whilst Virginia and Judy have been driving on clean record for many years, they were surprised to be an object of intense investigation by the MOT. This started out of the blue in 2003. Virginia has been driving over 10 years in Katoomba. The MOT alleged improper and late filling out of TSCS and documents in the initial proceedings. The cancellation of Virginia's authority was stayed by her lawyers at the ADT. Judy's investigation was halted at this juncture.

Curiously there was a massive sweep by a MOT official for statements by passengers who had been supposed to be complaining about Virginia.



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There was this “sudden” list of persons who did not want Virginia in taxi 20 to be their driver. There were over 16 statements by individuals who testified that Virginia was swearing, talked about artificial insemination, boasted about pinching bookings, drove dangerously and gave poor service.

The court proceeding were delayed a number of times. There were continued sweeps for more statements and other evidence to build up the MOT case.

The lawyers analysed the M7 list which purportedly showed that an incredible number of calls were about Virginia. It seemed that nearly all of the 50 odd complaints came from only 4 individual parties. The alleged improper TSSS dockets were not so, according to spirited testimonies of the invalid passenger who took the pains to take trips from the Mountains to attend the court in support of Virginia. There is a pile of letters confirming that Virginia was a great lady and one of the best drivers in the Blue Mountains. These poured into her lawyer's mail box over the past 4 weeks once they heard of the relentless MOT pursuit.

By coincidence there is a former contestant of Virginia's in a Supreme Court battle over a disputed Tattslotto win has been working for the Katoomba Cooperative operations for the past 3 years.

In a final showdown on 18 June 2007 before the ADT hearing to determine the matter, the lawyers for Virginia accepted the MOT offer to stop their case. The outcome is that Virginia is to keep to the regulations of the MOT.

The ridiculous fact of the matter is that Virginia had always abided by the rules and regulations of the MOT anyway for many years.

In a pure waste over one year, Virginia had been subjected to an

unnecessary pressure and stress in a draconian investigation. It is a well known fact that this lesbian couple has been subjected to a vicious campaign of victimization and ridicule by the homophobic element in the Katoomba Cooperative. Did these persons prompt the MOT witch hunt? Anyone's guess!

Virginia is a strong independent and refined lady who lives with her tough talking partner Judy in Wentworth Falls. They are very hard working couple in a operator-driver business. Good Luck to Virginia and Judy. Their refusal to back down against an unjust investigation won the day.

Kingsley Liu