

**actlawsociety**



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**Comments on the Exposure  
draft of the *Workers  
Compensation Amendment Bill  
2010***

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**Minister for Industrial Relations, the Hon.  
Katy Gallagher MLA**

**30 November 2010**

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## Executive Summary

This submission responds to the exposure draft of the *Workers Compensation Amendment Bill 2010* (“**the WC Bill**”). The WC Bill will amend the *Workers Compensation Act 1951* (“**the WC Act**”) to severely restrict the rights of plaintiffs to claim damages from their employers where they have suffered injury as a result of negligence in the workplace.

This submission demonstrates that:

1. Whole person impairment (WPI) thresholds, based on the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment (the Guides)*, provide a very poor assessment of the impact of injury on a worker’s life.
2. The proposed 15% WPI threshold for physical injury will affect workers who suffer very serious injuries, not only ‘minor’ claims. A 15% WPI threshold will remove access to common law damages from approximately 90% of injured workers and seriously limit access to justice as a result.
3. A WPI threshold takes no account of pain and suffering, continuing disability, or loss of enjoyment of life due to injury. It also ignores the actual impact of an injury on a person’s capacity to work in their chosen field or engage in sporting or recreational activities.
4. A 20% WPI threshold for psychological injuries suggests that psychological injuries are somewhat less debilitating than physical injuries and is offensive to, and discriminates against, those affected by psychological illness.
5. The proposed cap on general damages and increase in the discount rate from 3% to 5% are unprincipled and inimical to the putative objectives of the draft WC Bill. The changes will impact most harshly on the youngest and most severely injured workers.
6. There is no evidence that ACT Workers Compensation scheme is not operating effectively, which brings into serious doubt the logical basis for the changes proposed by the draft WC Bill.
7. Limits on legal costs, in excess of already existing limits, and limitations on advertising by lawyers, tend to restrict access to justice on the part of those who most need legal advice and assistance. No evidence has been presented that either of these limitations is necessary or will have any impact on the cost of the scheme.
8. Since 2000, the WC Act has been amended on 35 occasions. Any further changes should only occur after an inquiry has been conducted into the scheme, examining evidence of the performance of the scheme and the likely impact of these proposed changes.
9. There is nothing in the draft Bill which will ensure the intended savings for workers compensation insurers, arising from severe restrictions to workers rights, are passed on to employers as premium reductions.

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This submission also outlines some positive suggestions for improvement of the ACT workers compensation system, which will increase efficiency and the size of the workers compensation “pool”, while driving down premiums for ACT business – without stripping away workers’ rights. This includes a “5-Point Plan for a Better Workers Compensation Scheme”, incorporating some of the elements of the proposed WC Bill, plus further measures to:

- (a) support early resolution of claims;
- (b) reduce inefficiencies in the scheme;
- (c) better manage court resources;
- (d) minimise problems associated with cross-border claims; and
- (e) reduce average premiums, increase the available pool of funds and increase coverage for ACT workers.

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## Introduction

The ACT Law Society (**ACTLS**), Bar Association of the ACT (**ACT Bar**) and Australian Lawyers Alliance (**ALA**) are pleased to provide the following submissions in response to the exposure draft of the *Workers Compensation Amendment Bill 2010* (**the draft WC Bill**).

Details of the ACTLS, ACT Bar and ALA are provided at **Attachment A**.

The ACTLS, ACT Bar and ALA strongly oppose several key elements of the draft WC Bill, which will severely and unnecessarily restrict the rights of ACT workers. In particular, we strongly oppose:

- (a) the introduction of a 15% WPI threshold for physical injuries and a 20% WPI threshold for psychological injuries, on the basis that it will strip away common law access for more than 90% of workers injured as a result of their employer's negligence;
- (b) use of a different threshold for psychological injuries and the required exclusion of consideration of so-called secondary psychological injuries on the basis that it is unfairly discriminatory against those with psychological injuries;
- (c) the appointment of medical panels to assess functional impairment under the AMA Guides, which will have no regard whatsoever for the actual impact of an injury on the injured worker's life; and
- (d) the imposition of a 5% discount rate, which will impact most severely on the youngest and most catastrophically injured and is an arbitrary and unfair mechanism for reducing compensation for future economic loss and care requirements (contrary to the putative objects of the draft WC Bill).

It is submitted that the proponents of the draft WC Bill should be required to demonstrate why it is necessary to impose such draconian restrictions on the rights of ACT workers. The changes envisaged in the exposure draft of the Bill are not accompanied by any form of explanation or analysis of what impact the changes will have in terms of benefits for workers, premiums for employers and profits for insurers. In particular, it is noted that:

- (a) there is nothing in the draft WC Bill that will improve health outcomes, as claimed in the Explanatory Statement. The Bill is directed almost exclusively toward restricting compensation and access to justice for negligently injured employees and lowering costs for employers;
- (b) there is no evidence that ACT workers are either slower or less willing than workers in other jurisdictions (where common law rights are severely restricted) to return to work after injury;
- (c) there is no evidence that the cost of the ACT scheme is substantially greater than in jurisdictions which prevent workers from seeking damages against a negligent employer. Nor is there any foundation for claiming that other schemes are less expensive because of restrictions on common law rights;
- (d) the draft WC Bill's proponents appear to draw significantly from the provisions

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applying in NSW, which is an entirely government-underwritten scheme, with no private insurers. However, they ignore the enormous surpluses declared under the NSW scheme, which would amount to enormous profits for insurers in a privately underwritten scheme (as discussed further below);

- (e) there is no evidence of any “insurance crisis”, or any substantial increase in claims or premiums that might justify a “re-balancing” of the interests of plaintiffs and insurers, let alone wholesale restriction on the rights of workers for the benefit of the insurance industry and employers; and
- (f) there is nothing in the draft WC Bill which will create an incentive for employers to address risks within the workplace. The Bill will, however, substantially remove the threat of common law action for negligence, meaning that a significant incentive to maintain a safe working environment will be largely removed.

It is submitted that if the draft WC Bill is unacceptable in its present form. If the draft Bill is to be introduced, the Government should revise it in accordance with the suggestions outlined in this submission.

In addition to the matters outlined in this submission, the ACTLS, ACT Bar and ALA have prepared responses to the template questions issued by the Chief Minister’s Department, which are attached to this submission at **Attachment B**.

## **Background and history**

### **The purpose of workers compensation legislation**

Workers compensation legislation has been around for over 100 years in Australia. Its purpose is to provide a no-fault insurance safety net for those injured in the course of their employment, including travel to and from it.

Historically, in the ACT, workers compensation legislation has co-existed with the right of injured workers to sue for damages if their injury was caused by the negligence of their employer or others.

In all jurisdictions, workers compensation schemes operate on a no-fault basis, such that statutory benefits are made available to partially or completely cover an injured employee’s medical expenses, rehabilitation and care needs and income loss. The purpose of these schemes is to assist workers to recover and return to work as quickly as possible after injury.

There are around 10 different schemes operating in Australia, including one for each state and territory and 3 operated by the Commonwealth. The ACT scheme is privately underwritten and there are currently around 6 insurers writing workers compensation policies in the ACT.<sup>1</sup> Other privately underwritten schemes exist in Western Australia, Tasmania and Northern Territory. All other workers compensation schemes in Australia are entirely government-funded and tightly controlled.

A key difference between publicly funded and privately funded schemes is that excess premiums in privately underwritten schemes largely turn into profit, whereas government funded schemes will declare either a ‘surplus’ or ‘deficit’.

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<sup>1</sup> Including Suncorp, Allianz, QBE, CGU, Zurich and Guild.

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Most schemes, both private and public, also permit workers to claim damages from their employer via common law, if the employer has been negligent. This element of workers compensation schemes has a different purpose: to compensate an injured worker fairly for pain and suffering caused by their employer's negligence, while creating an incentive for the employer to ensure the workplace is safe.

The draft WC Bill will do little to enhance the no fault safety-net. The rise in the death benefit proposed by the draft Bill is the only exception and there is an average of 1 compensated fatality in ACT workplaces each year.<sup>2</sup> The Bill predominantly seeks to curtail the rights of injured workers to pursue a claim in respect of negligence if they have not suffered permanent disability.

## Previous changes to the ACT scheme

The ACT *Workers Compensation Act 1951* ("WC Act") was substantially amended in 2002 as a result of the *Workers Compensation Amendment Act 2001* (ACT) ("Amendment Act"). In the explanatory memorandum relating to the Bill which brought about those changes, the ACT Government stated that:

"...the proposed legislative changes are focused on reshaping the current ACT Workers Compensation Scheme ("the Scheme") from one which is based on entitlement, to one which is based on rehabilitation, and return to work."

The Explanatory Statement further states that the development of the Scheme would be assisted by the use of information collected through the Accident Information Management System (AIMS) workers compensation database being developed by ACT WorkCover.

The Scheme, as amended, made changes to the approach to injury management and the use of rehabilitation.

## The 2006 Review of the Workers Compensation Scheme

In 2006, the ACT Government conducted a review of the ACT Workers Compensation scheme, at considerable cost. This review culminated in the publication of a report on 15 August 2007, entitled "ACT Workers Compensation – How do we make it work better?" ("the 2007 Report") on behalf of the ACT Chief Minister's Department. A review panel was formed, comprised of experienced professionals within the Scheme.<sup>3</sup>

The Review heard formal presentations and/or read submissions from a broad range of stakeholders. The resulting 2007 Report was both measured and balanced. It provided over 50 recommendations for improving the scheme to the benefit of all concerned. It is a matter of considerable regret that the Report has been largely overlooked.

In the foreword to the final report, the review panel confirmed that the underlying objectives of the Scheme were:

1. to provide adequate financial compensation in the event of workplace fatality, injury or illness;

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<sup>2</sup> Workplace Relations Ministers' Council, *Comparative Performance Monitoring Report*, (11<sup>th</sup> Edition), December 2009, Commonwealth of Australia, page 11.

<sup>3</sup> The Review Panel included David Segrott, a well known employer advocate and expert in workplace safety; Keith Fleming of Dibbs Abbot Stillman (now Dibbs Barker), a legal firm with extensive workers compensation experience for insurers; and Richard Cumpston of Cumpston Sarjeant Pty Limited, a leading actuarial firm.

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2. provide an appropriate injury management continuum of early intervention, rehabilitation and return to work assistance; and
  3. to ensure that employer contributions fully cover the cost of Scheme liabilities arising from current employers, in an affordable manner.

The 2007 Report stressed that there were major difficulties in interpreting the factors driving such premiums because of the lack of proper data and reporting mechanisms and the failings of the AIMS database. The Review made recommendations about changing the way in which the Scheme was managed and monitored and the way data were gathered. While it appears that the ACT Government has implemented some changes in terms of the management of the Scheme, the Government remains unwilling to provide data to interested parties or the public, which would allow reasonable analysis of the Scheme's strengths and weaknesses. The Minister for Industrial Relations advised the ACTLS, most recently by way of letter of 29 November 2010, that "the Government does not intend to release any further statistical or claims data gathered in the course of preparing the WC amendment Bill."<sup>4</sup>

This absence of information supporting the changes proposed in the draft WC Bill is deeply concerning, as is the unwillingness of the Government to ensure the present debate is well-informed. The Government has made no effort to inform ACT workers, who will have their rights dramatically curtailed by the draft WC Bill if enacted, why the changes are necessary. For example, such dramatic changes were introduced in NSW (a publicly funded scheme) in 2001 in response to spiralling scheme costs and a >\$3 billion deficit. Following introduction of the 2001 changes (with a 15% WPI threshold), the scheme was in surplus within 3 years.

At present, no evidence has been presented by the Government that insurers' claim costs are excessive or have dramatically increased. Furthermore, the 2007 Report states that "...ACT private insurers have set premiums too high, making excess profits averaging about 24% above reasonable premiums..."<sup>5</sup> At present, there is no data to indicate the level of insurers' profitability since 2007. However, insurers are entitled to make reasonable profits and are required to act in the best interests of their shareholders. If the draft WC Bill is introduced, there is no guarantee that insurers will pass on the majority of the savings in claims costs, that the proponents of the draft WC Bill contend will arise from the changes. It is more likely that insurers' profits will rise at the expense of ACT workers.

Further, all recent data and estimates show there has not been any significant recent change in claim numbers (relative to the number of workers insured), while average workers compensation premiums have fallen dramatically in line with trends across the country.

It is against this background that ACT workers are now being told that changes to the Workers Compensation scheme are necessary and that the Government proposes to implement one of the most restrictive workers compensation schemes in the country. The 2007 Review did not suggest removing rights from of over 90% of the workers the scheme was designed to protect.

It is recommended that the 2007 Report should be revisited, with a view to implementing its recommendations. Alternatively, it is recommended that the draft Bill, if introduced in its

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<sup>4</sup> Letter from Katy Gallagher MLA to Law Society President, Athol Opas, dated 29 November 2010.

<sup>5</sup> Segrott, D., Cumpston, R. and Fleming, K., "ACT Workers Compensation – How do we make it work better?", *ACT Workers Compensation Data and Estimates for the Review of the ACT Workers Compensation System*, July 2007, Chief Minister's Department, ACT Government, page 7.

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present form, be referred to a Parliamentary Committee for a comprehensive inquiry into its likely impacts.

## Objectives of the draft Bill

According to the Explanatory Statement, the objective of the draft WC Bill is to:

“...provide a reasonable balance between statutory entitlements and protection provided to injured workers, affordability and accountability for employers and the level of regulation and scrutiny applied to service providers connected with the ACT Scheme.”

The Explanatory Statement contends that the draft WC Bill is directed at improving transparency and clarity around the assessment of compensation for permanent injury and implies that the cause of these problems is allowing injured people access to common law claims.

It is also claimed that “the statutory lump sum benefits available to injured workers ... are amongst the lowest in the country”<sup>6</sup> (although this is unsupported by evidence). If the statement is true, it ignores the availability of common law compensation, which is greatly superior to lump sum benefits available elsewhere. Publicly available data shows a reduction in ACT workers compensation premiums over several years, similar to most other State/Territory schemes. Pointing to amounts paid for settlement of workers compensation matters or common law settlement implies that such payments are bad for workers, insurers or employers (when the opposite is clearly true) and ignores the significant benefits to the scheme of settling matters to avoid funding for a “long tail” of unfinished claims.

Furthermore, the statement that “injured workers spend an average of 3 years waiting for resolution of compensation settlements”<sup>7</sup> is meaningless without context, supporting data, or some analysis of the causes of the elapse of time. A primary cause of delay is that the WC Act does not usually allow settlements of permanent injury compensation claims until at least 2 years from the date of injury. This requirement is appropriate, given the importance of ensuring the full extent of injury is understood and stabilised before a claim is settled or otherwise resolved.

It is contended by the Government that the objectives of the scheme will be primarily achieved through the introduction of a 15% WPI threshold for access to common law, assessed in accordance with the AMA Guides. This is in line with the Government’s apparent intention to “move away from the concept of loss as a basis for compensation and endorse a model based on the concept of WPI”.<sup>8</sup> This is interpreted as meaning that the Government is moving away from a model based on restitution, toward a model where “X” degree of impairment equals “Y” dollars worth of compensation. This is based on the notion that certainty for insurers and employers is more important than compensation based on the real impact of injury on the life of a worker; that transparency, using an “objective”, “scientific” measure of functional impairment is better than compensating workers fairly for the misery and pain they have suffered as a result of their injuries, often as a result of negligence by their employer.

It is our submission that, in seeking “transparency and clarity”, the Government is

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<sup>6</sup> Letter dated 23 September 2010 from Katy Gallagher MLA, Minister for Industrial Relations, to ACT Law Society.

<sup>7</sup> Ibid.

<sup>8</sup> Exposure draft *Workers Compensation Amendment Bill 2010* Explanatory Statement, page 3.

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sacrificing any capacity of the workers compensation scheme to assess the actual impact of injury on the life of an injured worker. It assumes that a back injury has the same impact on a labourer as it does an office worker, or that the loss of a finger has the same impact on a musician as it does an accountant or lawyer.

As will be discussed in further detail in this submission, thresholds based on WPI are a crude and arbitrary means of determining compensation. There is a human impact of injury that can never be measured with a ruler and protractor. There are a growing number of experts in this area who have reached the conclusion that functional impairment is in fact a very unfair way of determining compensation or limiting access to common law compensation.

## General comments

### Costs of the Scheme

It is clear from recent data provided by the Chief Minister's Department representatives that there remains a difficulty in identifying particular components of costs within the Scheme. For example, it appears impossible to identify what component of the Scheme costs are comprised of commutation of statutory payments (where a common law release is required by the workers compensation insurer even if there is no real prospect of a common law claim) as opposed to those where a separate common law claim for damages is made. Separating those various cost components in the Scheme apparently remains an intractable problem.

Accordingly, the saving to the scheme attributable to commutations, as opposed to a long tail scheme of ongoing weekly payments, is unable to be measured from available data.

Similarly, in relation to what is broadly termed "legal costs", there is no differentiation between the legal costs and investigation costs flowing to worker's representatives as opposed to those generated by the insurer's representatives, and what part of those legal costs are made up of disbursements rather than professional costs.

### Premiums

At a recent presentation to members of the ACTLS, the Chief Minister's Department suggested that the motivation for further changes to the Scheme was a perception that the Scheme was too expensive for employers. The ACTLS, the ACT Bar and ALA have seen no data which suggests any significant shift of employers away from the Territory based on the cost of workers compensation, despite undertakings by the Department to provide it. Contrary to this claim by the Chief Minister's Department, the ACT Office of Regulatory Services' 'Report Card' for the ACT workers compensation system over the period 2003/4-2007/8 clearly demonstrates a steady increase in the number of workers compensation insurance policies issued.<sup>9</sup>

It is noted that standardised average premium rates have been steadily falling in the ACT since 2004/5, in line with premiums across the country. Premiums have fallen over this period in the ACT from 2.99% of payroll to 2.23% - a drop of 25%.<sup>10</sup> Over the same period, premiums in NSW have fallen from 2.54% to 1.88%, a drop of 26%.<sup>11</sup> These data

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<sup>9</sup> See [http://www.ors.act.gov.au/workcover/pdfs/WorkComp/StatSheets/WC\\_Stats\\_2007-08/SB02\\_Scheme-Report-Card\\_2007-08.pdf](http://www.ors.act.gov.au/workcover/pdfs/WorkComp/StatSheets/WC_Stats_2007-08/SB02_Scheme-Report-Card_2007-08.pdf)

<sup>10</sup> Ibid, *op cit* 2, page 23.

<sup>11</sup> Ibid.

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do not indicate that the ACT workers compensation system is performing any worse than the NSW scheme.

In any event, it is not reasonable to compare the ACT's privately underwritten scheme with the scheme in NSW, which is entirely publicly funded and controlled. The other privately underwritten workers compensation schemes in Australia exist in Western Australia, Northern Territory and Tasmania. Accordingly, it is worth noting the following for the period 2004/5-2007/8<sup>12</sup>:

- In Western Australia (where a threshold of 15% WPI applied over the period) premiums fell from 1.73% of payroll to 1.27% - a fall of 26%.
- In the Northern Territory (where there is no access to common law) premiums fell from 2.29% to 1.81% - a drop of 21%.
- In Tasmania (where a threshold of 30% WPI applied over the relevant period), premiums fell from 2.10% to 1.49% - a drop of 29%. However, Tasmania recorded the lowest scheme expenditure on direct payments to claimants, at just 44%. Close to 30% of the costs of the scheme in 2007/8 related to "insurance operations", which includes administration and profit.<sup>13</sup> Again, it should be emphasised that insurers in Tasmania enjoyed a 30% WPI threshold at that time<sup>14</sup>, which permitted almost no-one to sue their employer at common law.

The substantially smaller reductions in workers compensation premiums were experienced in South Australia (-3%) and Comcare (-13%),<sup>15</sup> both of which are statutory, government-funded, no-fault schemes, with no access to common law.

At present, the ACT continues to be less expensive than the South Australian scheme and largely competitive with other privately underwritten schemes. Privately underwritten schemes are understood to be generally more expensive because insurers build profit into their premiums. There is currently little data available on the proportion of scheme costs paid by ACT insurers in direct compensation and services and the proportion spent on scheme "administration", nor is there data on the profitability of ACT workers compensation insurers. Because of the lack of proper data, insurers may be over-estimating risk and inadvertently building significant profits into premiums, no doubt because of their inability to properly identify the potential size of payments to be made in the future. This concern is vindicated in an actuarial report prepared for the ACT Chief Minister's Department in July 2007<sup>16</sup>, which estimates ACT workers compensation insurers had been recording profits in excess of 30%, on average, from 2000-2006.<sup>17</sup>

In light of the above data, it is very difficult to understand what is driving the Government to implement such draconian changes to workers compensation laws. It seems that the ACT workers compensation system is functioning effectively. Whilst the cost of premiums is marginally higher than comparable privately-underwritten schemes in some instances, the rights enjoyed by workers are substantially greater. Further, there is no evidence that the costs of administering the ACT scheme – including legal and other expenses – are greater than in other privately underwritten schemes.

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> The threshold is now 20%

<sup>15</sup> Ibid, *op cit* 12.

<sup>16</sup> Segrot, Ibid, *op cit* 4.

<sup>17</sup> Ibid, page 13

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## Rehabilitation

Further to the above, no evidence has been presented that ACT workers, who are injured in the workplace, are any slower or less willing to return to work following injury than workers in other jurisdictions.

The Commonwealth Government's *Comparative Performance Monitoring Report* (11<sup>th</sup> Edition)<sup>18</sup> demonstrates that the ACT is well below the national average in terms of frequency rates and incidence rates of serious injury and disease claims. The ACT is also below the national average in relation to incidence rates of long term claims (involving 12 or more weeks of compensation).<sup>19</sup>

It is further noted that the ACT had only 10% of claims continuing past 52 weeks in 2005/6. Comparing this with other privately underwritten schemes:

- the Northern Territory had 9% of claims continuing past that period, despite permitting injured workers no access to common law;
- WA also had 9%, despite applying a 15% WPI threshold, as is proposed for the ACT; and
- Tasmania had only 5% of claims continuing after 52 weeks, with a 30% WPI threshold.

These statistics do not demonstrate that access to common law undermines rehabilitation of injured workers.

Therefore, on what basis do the proponents of this Bill contend that it will in any way improve rehabilitation and return to work outcomes? It is submitted that this Bill, if introduced and enacted in its present form, will overwhelmingly disenfranchise ACT workers, while resulting in negligible gains in rehabilitation outcomes.

## Sham contracting

Of further significance is the acknowledgement by the Government that there was a need to respond to "sham contracting" so as to ensure that all ACT workers were covered by the Scheme and indeed all employers were contributing to the pool and therefore assisting in premium control. The ACTLS, the ACT Bar and ALA are firmly of the view that, before any steps are taken to reduce worker entitlements, it is imperative that the impact of the changes implemented by the ACT Government in 2009 are fully understood.

## Proposed changes

### Whole person impairment thresholds

Clause 17 will insert new sections 180A, 180B and 180C into the WC Act. Section 180C will establish an impairment threshold for access to common law damages, whereby a worker will not be permitted to sue their employer for the employer's negligence unless the injured worker's degree of WPI has been assessed as:

- (a) for physical injury – 15% or more; or
- (b) for psychological injury – 20% or more.

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<sup>18</sup> *Ibid, op cit 2.*

<sup>19</sup> *Ibid, op cit 2, pages 7-8*

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The assessment of WPI will be carried out under draft new section 54 by “an approved medical assessor”. The initial assessment under s 54 must then be peer reviewed by a “peer review assessor” under section 55.

A key concern with respect to thresholds based on the WPI scale under the AMA Guides is that measures of functional impairment replace any assessment of the actual impact of injury upon the injured worker. A person may suffer a back injury which effectively ends their career as a labourer or trades-person, destroying their business and threatening their family’s financial security, as well as the person’s emotional and psychological well-being. However, the WPI assessment has been specifically designed to exclude any consideration of subjective factors concerning the actual impact of the injury on the person’s life. It is very strange that access to damages for pain and suffering should depend on an assessment tool which precludes any consideration of the pain and suffering that has resulted from the injury.

The use of WPI thresholds to determine access to common law compensation has been embraced by many actuaries and Treasury officials, who generally regard them as a straight-forward, scientific method for sorting serious claims from minor claims. However, those jurisdictions which have implemented WPI thresholds as the sole determiner of damages for pain and suffering or access to common law compensation have subsequently been warned of their harsh impact and unintended consequences. For example:

- In NSW in 2005, 4 years after introducing a WPI threshold for workers compensation matters in 2001, a NSW Upper House Committee (comprised of MPs from all Parliamentary parties) unanimously recommended that the 15% WPI threshold be abolished and replaced with the fairer “most extreme case” threshold applying under the *Civil Liability Act 2002* (NSW). In particular, the Upper House Committee noted that “the Committee is completely opposed to the ongoing use of the MAA Medical Assessment Guidelines and WorkCover Guidelines (based on the AMA Guides). Quite simply, assessment of whether an injured person should qualify to access non-economic loss damages should be based on disability, not impairment.”<sup>20</sup> The NSW Government rejected the recommendations of the Committee on the basis that it preferred a methodology without any capacity to consider the subjective impact of injury and ongoing disability (largely because it considered removal of WPI thresholds using the AMA Guides might result in higher premiums).<sup>21</sup> This is despite enormous profits in the NSW CTP insurance industry (warned about by the MAA)<sup>22</sup> and a publicly funded WorkCover scheme which cleared a \$3 billion deficit within just 3 years of introducing a 15% WPI threshold.<sup>23</sup>
- In Tasmania, Alan Clayton (an actuary and long-time proponent of no-fault compensation schemes with limited or no access to common law) was commissioned to review the workers compensation scheme in 2007, in response to concerns expressed by Tasmanian workers about the 30% WPI threshold that

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<sup>20</sup> General Purpose Standing Committee No.1, *Report on Personal Injury Compensation Legislation*, 2005, NSW Legislative Council, page (xx).

<sup>21</sup> NSW Government, *Response to the Legislative Council General Purpose Standing Committee No.1 Report into Personal Injury Compensation Legislation*,

<sup>22</sup> According to data obtained by the Law Council of Australia from the MAA under the *Freedom of Information Act 1989* (NSW), between 1999-2004, NSW CTP insurers made average profits annually of around 27% of premiums. The MAA advises that profits in the range of 4-6% are considered “reasonable”: MAA Annual Report 2006.

<sup>23</sup> PriceWaterhouseCoopers Actuarial Pty Ltd, “Executive Summary – Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 30 June 2006, 14 November 2006. at pp. 10 and 24. (Document obtained by the Law Council of Australia under FOI).

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applied in that jurisdiction for access to common law compensation under the State's workers compensation scheme. Clayton recommended the introduction of a 'narrative' test, based on the model applying in Victoria, as an attempt to overcome the unfairness associated with the threshold. In particular, Clayton noted:

"As has been seen from the previous discussion, the problem with reliance upon a gauge of whole person impairment, such as the AMA Guides, as the sole threshold for access to benefits, such as common law, is that it measures the level of clinical impairment that results from a particular injury but not necessarily the impact and consequences of that injury, particularly in relation to an injured worker's employment prospects. That is, while it may be a very useful measure of clinical impairment, it is a very poor proxy measure for incapacity."<sup>24</sup>

Clayton further recommended replacing the AMA Guides with a different assessment tool, the International Classification for Functioning, Disability and Health (ICF).<sup>25</sup> Clayton noted that "...An assessment tool developed within the ICF framework...could truly measure incapacity in terms of the impact of impairment..."<sup>26</sup>

- In Queensland, thresholds have been eschewed, in favour of rigorous claims management and settlement processes. This approach has endowed Queensland with a workers compensation model that is the envy of most other jurisdictions. Queensland has the highest level of common law/lump sum benefits to injured workers, just 3% of claims continuing after 52 weeks, and the highest proportion of benefits going direct to the claimant of any jurisdiction (67.3%, compared with 47.3% in NSW, 49% in WA and 44% in Tasmania).<sup>27</sup>

Accordingly, there is an overwhelming view among those who support thresholds that the AMA Guides is a poor measure of disability. There is also clear evidence that schemes which do not apply thresholds are in fact performing better than those schemes with thresholds.

If there are perceived problems with the present system, policy makers should be required to explore solutions which do not amount to a crude, wholesale transfer of benefits away from injured workers in return for relatively minor reductions in premiums.

## Higher threshold for psychological injuries

Proponents of the draft Bill have set a higher WPI threshold of 20% for psychological/psychiatric injuries.

This seems to indicate mistrust of psychiatric/psychological injuries, despite centuries of medical and academic research and universal recognition of the serious impacts of psychological injury on enjoyment of life and capacity to maintain employment. In mild cases, mental illness can seriously affect a patient's well-being and relationships; and more serious cases can result in self-harm or suicide.

The ACTLS, ACT Bar and ALA submit that the present approach, which implies that those suffering from psychological injury are somehow 'making it up' is based on a callous, misguided point of view. In addition, the current approach of preventing WPI

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<sup>24</sup> Alan Clayton, *Review of the Tasmanian Workers Compensation System*, September 2007, page 106.

<sup>25</sup> *Ibid*, pages 106-109.

<sup>26</sup> *Ibid*, page 108.

<sup>27</sup> Comparative Performance Monitoring Report, *ibid*, *op cit* 2.

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assessments for physical and psychological injury being considered together is nothing more than a crude attempt to prevent those suffering clinical depression, anxiety and related disorders as a result of their physical injuries and disabilities gaining access to general damages for pain and suffering.

For example, a secondary psychological injury might include any of the following very debilitating consequences of injury:

- severe depression as a result of, for example, chronic severe back pain;
- adjustment disorder as a result repeated surgery or of side effects of surgery such as a golden staph (*Staphylococcus Aureus*) infection;
- chronic pain condition arising from an initial back or shoulder injury; or
- permanent cognitive impairment resulting from a problem in surgery to correct an injury.

Psychological injuries can cause permanent impairment and can be significant disabilities preventing workers from undertaking all or some of their previous worker duties and significantly disabling them in their non-work lives. There is no apparent reason in the Explanatory Statement, nor is there elsewhere, for the gross unfairness in proposed treatment for those with psychological injuries.

The approach under the Bill discriminates against those suffering psychological illness and may in fact be inconsistent with the ACT *Human Rights Act 2004*. There is further discussion about the human rights implications of the Bill below.

## **Use of AMA Guides for determining thresholds**

The AMA Guides (4<sup>th</sup> and 5<sup>th</sup> editions) were introduced in 2005 under the *Workers Compensation Regulation 2002 (ACT)*, for use in determining whether a worker could claim statutory lump sum compensation for permanent impairment.

It is now proposed that the AMA Guides will be used to determine whether a worker can claim common law damages from their employer.

All assessments are carried out using the AMA Guides (5<sup>th</sup> edition), and this is the sole determiner of whether an injured worker is able to claim damages from his or her negligent employer. However, it is well known that the AMA Guides were never intended to be used for this purpose. Every single edition of the Guides contains the following cautionary note:

“The Guides is not to be used for direct financial awards nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a component in disability assessment,”<sup>28</sup> (emphasis added)

Remarkably, many jurisdictions have adopted the *Guides* for precisely this purpose – to definitively determine financial awards, as the sole measure of impairment or disability. It should be concerning to all ACT residents that the ACT Government now proposes to introduce the *Guides* here, for the same purpose, using an even higher threshold than applies in most other jurisdictions.

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<sup>28</sup> *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, p. 12.

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It has been noted that:

“The *Guides* is not the objective, medical evaluative system it purports to be and that has been so appealing to legislators and other decision makers. Instead, like any impairment rating scheme, it rests in large part on important and difficult normative judgments. Yet the *Guides* obscures this from the reader; it is laden with hidden or poorly explained value judgments that frequently are gender-biased. The *Guides*’ flawed promises of objectivity are especially troubling because they appeal to the craving of legislators and other decision makers for certainty and clarity in the difficult arena of impairment and disability assessment.”<sup>29</sup>

In the United States, the *Guides* are almost exclusively used only for statutory workers compensation assessments. They are regarded as an improvement on the “Table of Maims” approach and have been widely adopted for that use. However, the *Guides* are not used in “common law” matters in the United States.

The Texas Court of Appeals found that: “The impairment ratings generated from use of the *Guides* have no adequate scientific base and have no reasonable relationship to true impairment:

1. the 15% threshold as a qualification for supplemental benefits is arbitrary in and of itself and further that it is based upon an arbitrary use of the *Guides*; and
2. a significant number of workers ... who sustain disabling injuries will have less than 15% impairment based on the *Guides* and thus will be totally denied access to supplemental income benefits under the Act.”<sup>30</sup>

These findings have not been contradicted in subsequent appellate cases in the US. As pointed out in *Understanding the AMA Guides in Workers Compensation*,<sup>31</sup> the 6<sup>th</sup> edition of the *Guides* criticises previous editions as being not comprehensive, not based on evidence, and not having accurate ratings. Chapter 1 of the 6<sup>th</sup> edition quotes an article in the Journal of the American Medical Association, which stated that the numerical ratings in the *Guides* were more “legal fiction than medical reality”. Section 1.2a of *AMA Guides* (6<sup>th</sup> edition, 2008) says that the 5<sup>th</sup> edition used “antiquated and confusing terminology” and had “limited validity and reliability of the ratings.”

Given the criticism of the *Guides* both by commentators and within the *Guides* itself, adoption of the *Guides* in the ACT for uses not sanctioned or recommended by the *Guides* would be utterly unprincipled. The *Guides* has been introduced into a number of Australian compensation schemes. However, many authorities in this field have consistently argued that they should not be used to determine disability for the purposes of financial compensation and that they are a tool for limiting financial liabilities and for cost-shifting rather than for identifying genuine need.<sup>32</sup>

It is noted that use of the *Guides* in this way has not been recommended in any report or inquiry seeking to limit damages or restrict access to common law. For example, the Ipp

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<sup>29</sup> Ellen Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment*, 103 Harvard L. Rev. 964, at 965, 968, 976 (1990).

<sup>30</sup> *Texas Workers' Comp. Comm'n v Garcia*, 893 S.W.2d 504, 519-20 (Tex. 1995).

<sup>31</sup> Babitsky & Mangraviti, 4<sup>th</sup> edition, p. 3-4.

<sup>32</sup> Duncan, G, *Moral hazard and Medical Assessment* (2003) 34 VUWLR, page 433. See also Martha McCluskey "The Illusion of Efficiency in Workers' Compensation Reform" (1998) 50 Rutgers L Rev 657; Ellen Smith Pryor "Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment" (1990) 103 Harv L Rev 964; E Michael Shanahan and Leon le Leu "The American Medical Association's Guides to the Evaluation of Permanent Impairment" (1993) 10 Journal of Occupational Health and Safety - Australia and New Zealand 323.

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review into the law of negligence in 2002 recommended the development of an Australian version of the *Guidelines for the Assessment of General Damages in Personal Injury Cases*, based on a model presently operating in the United Kingdom. The UK Guidelines do not engage in artificial attempts to measure impairment as a basis for financial award, but set upper and lower limits for awards of damages for different types of injury.

The misuse of the *Guides* in relation to workers compensation damages claims would result in great injustice for ACT residents negligently injured in ACT workplaces and should be rejected. The ACT Government should instead inquire into other ways to bring greater consistency to damages awards, both for the benefit of injured workers and insurers. A number of suggestions are outlined in this submission, below.

## Likely impact of a 15% WPI threshold

On its face, a threshold of 15% impairment might seem relatively mild. In order to get a true understanding of how restrictive such a threshold might be, it is worth considering the experience of other jurisdictions which have applied such a threshold. NSW is the closest comparable jurisdiction and it is worth noting that, since the introduction of a 15% WPI threshold in 2001:

- common law claims have reduced by over 90%;
- the return to work rate has remained more or less unchanged;<sup>33</sup> and
- the most significant change in payments has been a dramatic fall in lump-sum compensation. There has not been a commensurate rise in statutory benefits or treatment expenses, and there has been no change in rehabilitation expenditure.<sup>34</sup>

These are the stark realities, despite the rhetoric of the NSW Government regarding increased benefits to injured workers and a greater focus on rehabilitation. The fact is that NSW workers are worse off than the workers of most other jurisdictions as a result of changes to the NSW WorkCover scheme in 2001.

## Case studies

No attempt has been made by the ACT Government to assess the likely human impact of the proposed changes to workers compensation laws. To demonstrate this human impact, some real examples from NSW of the effect of an AMA *Guides* 15% threshold are provided below.

- (a) 16 year old apprentice who was operating a sliding table saw. He was cutting through thin MDF board. As he did so he reached behind the saw to grab the push stick he was using to guide the board. The board suddenly jammed on the saw and pulled his hand onto the blade cutting through 3 of his fingers. Attempts were made to save one of the fingers which later died and required partial amputation. His employer had negligently removed the rear safety guard attached to the table saw. He was assessed at 10% WPI and is prevented from pursuing a negligence claim against his employer. While he has returned to work he has been left with a significant reduction to his earning capacity and a severely deformed hand.
- (b) Truck driver unloading 300kg granite slabs. While he was undoing the ties holding the slabs on an A Frame, the centre of gravity of the load changed due to a rear tyre deflating. The slabs fell like dominoes onto the plaintiff who managed to hold the load until it became too heavy. He suffered a severe injury to his lower back and

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<sup>33</sup> Ibid, page 35.

<sup>34</sup> See WorkCover NSW, Statistical Bulletin 2008/9, NSW Government, section 7.

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was assessed at 13% WPI. He has been unable to return to work. He has a dependant wife, 2 children under 5 and little prospect of returning to any form of work. He is barely surviving financially and receives ongoing weekly payments at the reduced statutory rate. He is precluded from bringing a claim in negligence based on the employer requiring him to use an unsafe system of work.

- (c) A 47 year old tradesman fell from an unsecured ladder when it overbalanced. He was carrying a radiator element. He injured his back and shoulder in the fall and underwent surgery to his back in 2008 and again in 2009. He also underwent surgery to his shoulder. His employment was terminated in 2009 and he has not found work since. He has attempted to retrain as a truck driver, without success. He now suffers from depression and takes anti-depressants and strong pain killers. He has gained 10kg. He has a dependent spouse and 2 children and is facing financial hardship. He was assessed at 12% WPI and therefore unable to pursue a negligence action.
- (d) An Executive with the NSW Health Department was provided with a faulty chair, which was known to be faulty. He sat on it at a meeting and it collapsed causing disc injury. He underwent a partial discectomy, but has had considerable ongoing problems. He has been able to return to work but it is likely that he will not be able to work to normal retiring age. He was assessed at 14% WPI and hence precluded from a common law negligence claim.
- (e) An employee working on a rural property was required to lift heavy drums of chemicals and not provided with proper lifting equipment or assistance. He sustained a serious back injury requiring surgery. He is now unable to work in any job for which he has experience or education. He has a dependent wife and children. He was assessed at 14% WPI and hence precluded from a common law negligence claim.
- (f) A female employee of NSW Police was systematically harassed at work by male colleagues, including very serious breaches such as assaults, having faeces left on her desk, being sent pornography, etc. She suffered psychological injury as a result of the abuse and harassment which prevented her from continuing work in police force and which has ended her career. Despite this, she will not reach the 15% WPI threshold for a common law claim (and certainly wouldn't reach the 20% WPI threshold proposed for psychological injuries). If she were able to file a common law claim, she would obtain substantial general damages and possibly punitive damages.
- (g) An employee of NSW Country Energy was required to drive a truck with a hoist mounted on the back. The hoist mechanism was broken so it did not lock into place on the truck. This fault had been reported on a number of occasions. In order to drive the truck safely, this required him to lift the hoist, weighing over 100kg, into place. While lifting the broken hoist, he suffered back injury, as a result of which he is permanently incapacitated for his job and unfit for any work for which he had training or experience. He now suffers serious ongoing pain and consequential depression. He was assessed at 7% WPI and hence precluded from a common law negligence claim.

## **Use of medical panels to conclusively determine issue of thresholds**

Under the draft WC Bill, so-called medical assessment "panels" will be established to make a binding determination of WPI under the AMA guides. The "panels" will in fact be

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comprised of a single, “approved” medical assessor, trained in the use of the Guides. The only check or balance on the decision of the assessor is that decisions are subject to peer review by another approved medical assessor.

There are a number of concerns with respect to the use of medical panels, as proposed under the draft WC Bill, which are summarised as follows:

- Where they have been established in other jurisdictions, medical panels conduct hearings and assessments behind closed doors and are not subject to questioning by a court or anyone else. This has had the effect of significantly reducing transparency and procedural fairness, putting the medical assessors in a position of practical unassailability as to their objectivity, lack of bias or their competence to give expert evidence. Like the use of the *Guides*, medical assessment panels promote the appearance of objectivity, while not permitting scrutiny of the decisions of the panels, on the basis of apprehended subjectivity and/or bias.
- It is noted that an approved person within the Australian Capital Territory Insurance Authority (ACTIA) will be responsible for the selection of a single approved medical assessor to examine a worker. There is no information as to what training or other qualifications the ACTIA delegate will possess in order to properly undertake this role. Further, it would seem that there will be no mechanism to appeal from a decision of the ACTIA delegate in relation to selection of the approved medical assessor, even in circumstances where there has been a referral to an inappropriate approved specialist.
- No explanation has been given concerning how ACTIA will avoid the perception of a conflict of interest arising from the medical assessor referral role, given that an ACTIA delegate will presumably be responsible for referring workers to approved medical assessors in matters involving the Default Insurance Fund administered by ACTIA. It is submitted that these arrangements are likely to foster apprehended bias on the part of persons being assessed.
- Section 58 proposes that a WPI assessment is final and conclusive of the degree of WPI. A worker can only apply to have the assessment set aside on the basis of “procedural unfairness”. However, a worker is likely to face substantial difficulty proving procedural unfairness. Medical assessors are unaccountable for anything done ‘honestly and without recklessness’ when exercising their functions (s 68(1)). Nor is the medical assessor compellable to give evidence in any proceeding or matter in which the assessor was involved in the exercise of their functions (s 68(3)). Therefore, not only is a medical assessor immune from facing any consequences for exercising their functions negligently, but they cannot be required to explain to a court or any other authority the basis for their WPI assessment.

The absence of a cheap but general appeal mechanism ignores the fact that such WPI assessments can include factual, medical or legal errors and will force those subject to wrong assessments to take expensive legal action in the Supreme Court either under the *Administrative Decisions (Judicial Review) Act 1989* or by way of the modern equivalent of prerogative writs, now in Part 3.10 of the *Court Procedures Rules 2006*.

- It is not clear whether a medical assessor will be required to provide a written statement of reasons for their assessment.
- The draft Bill provides that a WPI assessment must be automatically reduced by 10% for pre-existing conditions where there is no available evidence about the

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contributing amount. This is cast in such general terms that it appears the condition need not be one which has any bearing at all upon the new injuries relevant to the WPI assessment.

## **Cap on compensation for permanent impairment**

Section 59 sets the maximum amount which can be paid for permanent impairment (which is reached once the WPI assessment reaches 75%) at \$220,000. The formula to be established under s 60 for calculating the amount of compensation is  $\$220,000 \times \text{WPI}$ . For example, a person who has a WPI assessment of 25% will get \$55,000 for permanent impairment.

It is not clear from the draft Bill or explanatory statement what methodology has been used to set the maximum amount at \$220,000. No justification is offered in the Explanatory Statement for the cap and it is noted that most other jurisdictions have set a higher cap than is proposed for the ACT under the draft Bill

For example, in NSW the cap is set at \$408,000 (indexed annually), in Western Australia it is \$337,000 (indexed) and in Victoria it is \$438,000 (indexed). The fact that no principled basis exists for setting caps, other than creating certainty for insurers and governments, brings into question the very basis for their existence.

It is bizarre that, in a draft Bill which the Government asserts will “enable scheme funds to be redirected to those with major/severe injuries”, there is a provision designed specifically to place an arbitrary limit on the amount of compensation that group of injured workers should receive.

## **Raising the discount rate from 3% to 5%**

Proposed section 184A provides that the current discount rate of 3% on lump sum payments for “future economic loss” (set by the High Court in *Todorovic v Waller* (1981) 150 CLR 402) will be increased to 5%. This applies to loss of future earnings, loss of expectation of financial support and “the value of future services of a domestic nature or services relating to nursing and attendance” or “a liability to incur expenditure in the future”.

No explanation is offered in the Explanatory Statement as to why it is proposed that the discount rate should be raised from 3% to 5%. There is also no indication that the Government has even considered what impact this change will have, particularly on the most catastrophically injured people to whom the Government purports to redirect compensation

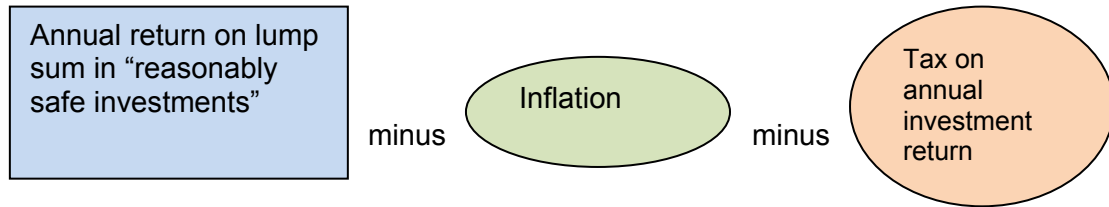
### Rationale for discount rates

The rationale for discount rates is to account for the benefit gain by the injured person in receiving future income today, which can theoretically be invested at a reasonable rate of return. The discount rate is therefore, in theory, intended to be roughly equivalent the annual return the plaintiff might receive if the lump sum were immediately invested in “reasonably safe investments”, which is reduced to account for inflation and taxation of the annual return on the investment (i.e. capital gains).<sup>35</sup>

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<sup>35</sup> (1981) 150 CLR 402, per Gibbs CJ and Wilson J.

That is, the discount rate should be approximately equal to:



As noted by the Ipp review panel:

“...in the Panel’s opinion, using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing the total damages bill.”<sup>36</sup>

Impact of discount rates set too high

The following table illustrates the damaging impact of setting discount rates too high.

<i>Net income</i>	<i>Weekly</i>		<i>20yrs</i>	<i>35yrs</i>	<i>45yrs</i>	<i>55yrs</i>
\$56,000.00	\$1,076.92	3%	\$1,427,246	\$1,117,846	\$848,508	\$486,446
		5%	\$1,035,462	\$885,231	\$717,662	\$444,662
<b>Difference</b>			<b>\$391,785</b>	<b>\$232,615</b>	<b>\$130,846</b>	<b>\$41,785</b>
\$100,000.00	\$1,923.08	3%	\$2,548,654	\$1,996,154	\$1,515,192	\$868,654
		5%	\$1,849,038	\$1,580,769	\$1,281,538	\$794,038
<b>Difference</b>			<b>\$699,615</b>	<b>\$415,385</b>	<b>\$233,654</b>	<b>\$74,615</b>
\$141,000.00	\$2,711.54	3%	\$3,593,602	\$2,814,577	\$2,136,421	\$1,224,802
		5%	\$2,607,144	\$2,228,885	\$1,806,969	\$1,119,594
<b>Difference</b>			<b>\$986,458</b>	<b>\$585,692</b>	<b>\$329,452</b>	<b>\$105,208</b>

As indicated, a 20 year old who earns \$56,000 per annum after tax, who is catastrophically injured such that he or she will never work again, might receive

<sup>36</sup> Negligence Review Panel, *op cit* 1, page 210.

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\$1,427,246 for future loss of earnings, on the assumption that they will continue to earn that amount until they reach retirement age (discounted at a rate of 3%). An increase in the discount rate from 3% to 5% will reduce the award by \$391,785.

Similarly, a 35 year old earning net income of \$100,000, who is catastrophically injured with no prospect of returning to work, is projected to lose around \$415,385 if the discount rate is increased from 3% to 5%.

This can also have a devastating effect on coverage of an injured person's future care need. For example, a person who is incapacitated at the age of 30, requiring constant care costing \$1,000 per week has a life expectancy of 55.21 years. With a 5% discount, he or she will receive a lump sum to pay for their care needs of \$997,000, instead of the lump sum of \$1,418,000 he would have received with a 3% discount. A lump sum discounted by 5% will run out long before the injured person dies, forcing them to find care worth \$421,000 elsewhere.

#### How should the discount rate be set

As noted in the following table, recent actuarial analysis<sup>37</sup> suggests the appropriate rate is currently 2.65%. This analysis shows that even the 3% discount rate is slightly too high. The most compelling aspect of this analysis is that, having regard to the long-term government bond rate, the after tax investment rate and the long term investment rate, the net, after-tax investment rate (which should be generally equivalent to the discount rate) has remained within the 2-3% range, despite large variations in inflation and interest rates over the last 30 years.

	1981	2010
Long term government bond rate	13.00%	5.33%
plus bond premium	3.00%	1.40%
Long term "market" bond rate	16.00%	6.73%
less allowance for taxation	23%	22%
After-tax investment rate	12.32%	5.25%
less long-term inflation rate	-10.00%	-2.60%
Net, after tax investment rate	<b>2.32%</b>	<b>2.65%</b>

The ACT should not simply follow an unprincipled approach of choosing to adopt a 5% discount rate. It is noted that:

“The statutory rates are usually higher than the rate set by the High Court, which itself is probably too high. They therefore protect insurers, and the premium paying public, at the expense of seriously injured people.”<sup>38</sup>

Adopting a 5% discount rate would impact most severely on the youngest and most severely injured people, in particular those who will require a lifetime of care and support.

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<sup>37</sup> Plover & Sarjeant, *Financial compensation – inconsistencies, absurdities and bad judgments*, available at [http://www.cumsar.com.au/PDF/Financial\\_Compensation.pdf](http://www.cumsar.com.au/PDF/Financial_Compensation.pdf).

<sup>38</sup> Luntz, H., *Assessment of Damages for Personal Injury and Death (4<sup>th</sup> Edition)*, [7.4.9] p. 413.

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This is contrary to the government's apparent objectives of ensuring fair compensation for serious injury.

## Legal costs

Chapter 11A enables the Minister to cap legal costs at an amount set by notifiable instrument and a lawyer will subsequently be precluded from claiming costs above that amount, except in "exceptional circumstances".

These proposed restrictions, if enacted, will overlay existing restrictions on legal costs under the WC Act, which prohibit payment of solicitor-client costs for a compensation claim under the Act (but not in relation to common law damages claims)<sup>39</sup> and the limits on legal costs for common law claims set by Chapter 14 of the *Civil Law (Wrongs) Act 2002*.

### What are legal costs?

Legal costs are broadly divided into:

- (a) party-party costs, which are costs of the proceedings usually paid by the unsuccessful party;
- (b) solicitor-client costs, which are the agreed legal fees payable to the solicitor by the client under the retainer; and
- (c) disbursements/out-of-pocket expenses, such as expert report and investigation costs, etc.

### Problems with the proposed new restrictions

The Law Society, ACT Bar and ALA have identified a number of very concerning aspects of the exposure material with respect to very heavy handed regulation of legal costs in workers compensation matters. The Explanatory Notes do not provide any plausible justification or support for why 'disincentives for excessive servicing, unnecessary delay and needless litigation' are required, nor any evidence that those practices actually occur.

The capping of legal costs, which can be recovered by a legal practitioner under section 197C, to an amount set by the Minister is a major barrier for access to justice. It is unreasonable and unjustified in a number of respects:

- A fundamental principle of the law is that individuals may seek to bargain with each other on their own terms. Governments have introduced laws to ensure that consumers are protected from being overborne by stronger parties and being made to comply with unfair terms. The *Legal Profession Act 2006* provides significant consumer protection for clients of lawyers. There is nothing in the draft Bill to indicate that the Minister must consult before capping costs at a particular level (only a requirement that he/she 'may' consult). The decision rests entirely with the Minister to decide what is a fair level of remuneration for workers compensation practitioners.
- Professional standards information does not show any compelling evidence of systemic abuses or inappropriate conduct in the charging of costs that would justify such an imposition on the legal profession.

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<sup>39</sup> ACT Supreme Court Procedure Rules 2006.

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- Solicitor-client costs are not borne by the workers compensation scheme and have no impact on premium levels. The restrictions proposed will not have a positive outcome for the insured but will only serve to reduce the number of legal service providers willing to take on workers compensation claims and thereby further frustrate access to justice in the ACT.
  - The concept of fixing solicitor-client costs was abandoned in Victoria in the *Transport Accident and Accident Compensation Legislation Amendment Act 2010* (VIC). That Act simply introduced fixed party and party costs paid by the insurer in workers compensation matters.
  - The restrictions on the discretion of the court with respect to the awarding of costs proposed in sections 197D and 197E are not well defined, are unduly prejudicial and an unnecessary fetter on the Court's discretion to do justice in any given claim.

## Lawyer advertising ban or limitation

Section 200B of the draft Bill is proposed to restrict advertising by lawyers offering representation in workers compensation matters. It effectively prohibits advertising which does not comply with a regulation made under s 200B.

Unfortunately, the proposed regulations are not available for consideration and therefore the extent of the proposed restriction is unknown. This in itself is a cause for concern, as it is impossible for the electorate to know what impact the restriction will have.

The ACTLS, ACT Bar and ALA are fundamentally opposed to restrictions on legal services advertising, because such restrictions:

- (a) are unnecessary;
- (b) amount to little more than censorship;
- (c) are anti-competitive, restricting the capacity of new law practices to establish themselves alongside existing and established firms;
- (d) limit access to justice and the appropriate information for injured people about their legal rights;
- (e) restrict freedom of speech; and
- (f) impose double standards for lawyers, depending on whom they represent,

Injured people, including injured workers, are often unaware of their legal rights and may be reluctant to seek advice due to concerns about the cost of legal services. The Report by the Access to Justice Taskforce puts it:

*“There is anecdotal evidence that people often do not see a lawyer because they are perceived to be too expensive. In many cases, seeking professional legal advice can be relatively inexpensive, and the cost of not seeing a lawyer can be much higher. ... Lack of information about the cost of legal services means that many consumers are not in a position to make informed decisions about legal issues. Increased information on legal fees, through advertising, will provide a more accurate picture of the true cost*

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*of legal services. It may also increase competition between legal firms, thereby driving legal costs down.*<sup>40</sup>

The provision of 'no win no fee' services and pro bono legal services are fundamental mechanisms for injured workers to gain equal access to the law. People who seek compensation for personal injuries are generally in a position of significant disadvantage, as they are pitted against an insurer with extensive financial resources, extensive experience defending damages claims and access to experienced lawyers. Advertising enables the public at large to be informed that they may access legal services in many circumstances where they otherwise could not afford upfront legal fees.

Law practices, like all other businesses, are subject to rules that proscribe misleading advertising under the *Trade Practices Act 1974* (Cth). Legal practitioners are also subject to legal profession regulation restricting advertising that is misleading or deceptive. These schemes provide the most appropriate method of ensuring appropriate advertising standards.

Ensuring that people are adequately informed of their rights is essential in a modern, democratic society, and should be actively encouraged - not prohibited or unreasonably limited.

The proposal to restrict or prohibit legal services advertising should be rejected.

## Other comments

### Human rights concerns

It is submitted that the draft WC Bill contains a number of provisions which may be inconsistent with the ACT *Human Rights Act 2004*, which are outlined as follows:

#### Section 7 Other Rights

The *Human Rights Act 2004* is not exhaustive of the rights an individual may have under domestic or international law. Compensation for personal injury is a basic right of protection of the person which citizens have had for hundreds of years. It should not lightly be removed or cut down. If the right to fair compensation is removed, it is unlikely ever to be restored.

Tort law provides compensation when somebody has been *wrongfully* injured. This right is not the creation of governments. It is not the gift of the State provided under a statutory scheme to be expanded and contracted by the governments from time to time. It is everyone's right as a person not to be damaged physically, psychologically or economically by deliberate or negligent behaviour.

The right to sue for personal injury has been recognized as a valuable right. In *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 the High Court held an attempt by the Federal Parliament to take away injured workers' accrued rights of action against the Commonwealth and its agencies to be an unjust acquisition of property and unconstitutional.

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<sup>40</sup> Access to Justice Taskforce, 2009, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Attorney-General's Department, page 124.

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While caps and thresholds will not affect the right of every potential plaintiff, they will clearly affect the damages payable to some injured people and in other cases completely obliterate an injured person's cause of action. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, the High Court held that laws limiting the assessment of damages to be a matter of substance and not a matter of procedure.

This adverse effect on the injured affects the welfare of a "vulnerable group" in the community and it falls within "Main Objects" of the Human Rights Commission as set out in paragraph 6(2)(b) and (c) of the *Human Rights Commission Act 2005*:

*(b) identify and examine issues that affect the human rights and welfare of vulnerable groups in the community; and*

*(c) make recommendations to government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community*

It would be a peculiar outcome if the Assembly:

- (a) enacted the *Human Rights Act 2008* and the *Human Rights Commission Act 2005* to protected rights such as freedom of movement, freedom of thought, peaceful assembly, freedom of expression, taking part in public life, the right to liberty and security of the person, humane treatment when deprived of liberty and compensation for wrongful conviction; and
- (b) legislated to provide compensation if people have their rights infringed<sup>41</sup> in some cases; but
- (c) in the case where someone has been physically or psychologically injured so that the person's ability to enjoy those rights is destroyed or diminished – legislates to take away or reduce that person's ability to obtain compensation.

#### Section 8 - recognition and equality before the law

The Act ensures protection of human rights without distinction or discrimination of any kind. The caps and thresholds draw a distinction between psychological injury and physical injury. This is discriminatory. It also prevents the aggregation of psychological injury with physical injury when determining whole person permanent impairment.

The example of discrimination provided in section 8 includes discrimination on the basis of a number of characteristics "or other status". It is difficult to conclude that if a member of the public and a supermarket employee were walking down the same aisle of a supermarket and they both slip on say a greasy patch of spilt cooking oil that has not been cleaned up in a reasonable time, that there is not some discrimination on the basis of "status" if the member of the public is entitled to full common law damages whereas the employee may not be entitled to anything or substantially lesser amount.

#### Section 21 - fair trial

The appointment of medical assessors by the "chief executive" of the workers compensation authority raises questions about a competent, independent and impartial court or tribunal providing a fair and public hearing of a person's rights. The ability to contest this determination in a court is virtually non-existent (cl 68), as is challenge against

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<sup>41</sup> *Human Rights Act 2004*, sections 18 and 23.

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the decisions of a person who has not been legitimately appointed to the role (cl 67(5)). Medical assessment of less than 15% WPI would mean that no action is available at all in workers compensation cases.

There is no obvious form of review for medical assessments in workers compensation other than denial of procedural fairness (cl 58).

## Cost-shifting

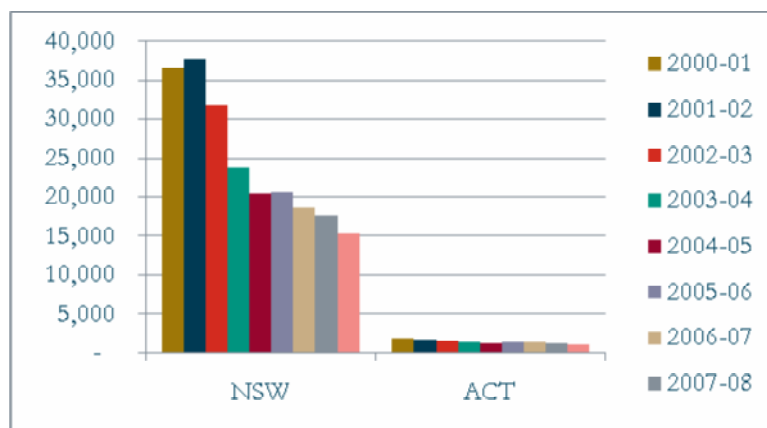
It is submitted another negative outcome of the proposed WC Bill, if enacted, will be the shifting of costs of caring for injured workers from insurers to the tax payer.

Whenever an injured worker receives treatment through the public health system or bulk-billing practice, which is covered by Medicare, the cost of that treatment must be recovered by Medicare from any statutory or common law compensation payment. That is, the cost of the treatment is reclaimed from the insurer by Medicare if it is treatment related to the compensation claim for injury. This ensures that Australian taxpayers do not pay for medical treatment that should be met by private insurance companies. A simple way of measuring this cost-shifting effect is to examine the number of claims registered with Medicare Australia and amounts recovered by Medicare from compensation sums awarded by courts, tribunals or other compensation authorities.

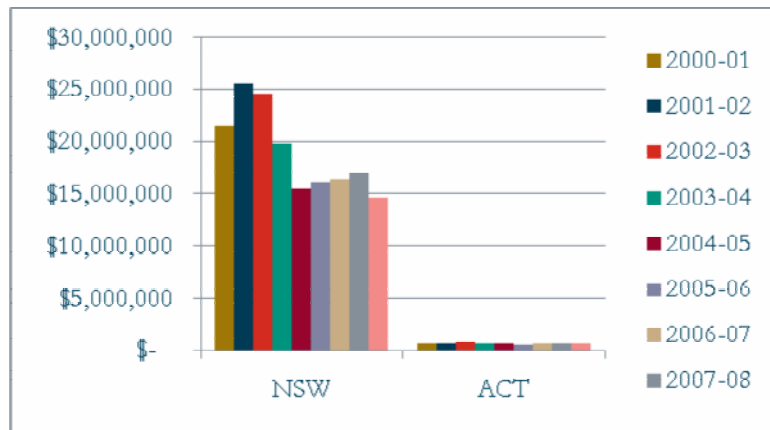
The simple fact is this: workers who are prevented from claiming compensation for medical and treatment expenses from their employer's workers compensation insurer will fall back on Medicare and Centrelink. That is, treatment expenses that would previously have been met by insurers in accordance with indemnity arrangements under insurance policies will instead be paid for by tax payers through Medicare and Centrelink.

The following tables demonstrates the extent of cost shifting that has occurred in NSW, compared to the ACT, as a result of WPI thresholds and higher discount rates.

**Total cases**



**Total compensation recovered**



The above tables demonstrate the number of compensation claims each year between 2001-2009 which were registered with Medicare as requiring reimbursement of medical expenses; and the total amount of treatment costs recovered by Medicare from insurers. Clearly, in NSW there has been a substantial reduction in treatment expenses recovered, due to significant restrictions on common law rights. This is because the thresholds and other restrictions in NSW, upon which the draft Bill is modelled, have forced more people to seek treatment through the public health system, placing more pressure on public hospitals and bulk-billing medical practices.

The following table demonstrates numerically the impact of the restrictive NSW workers compensation scheme on compensation recoveries:

Year	Total recoveries (\$)	Total cases
2000-01	\$11,178,727	21,128
2001-02	\$13,594,963	23,140
2002-03	\$12,791,142	19,360
2003-04	\$10,693,109	15,050
2004-05	\$7,420,134	13,121
2005-06	\$7,683,818	12,888
2006-07	\$7,139,841	10,833
2007-08	\$7,724,042	10,128
2008-09	\$6,573,324	8,632

Whilst there has been an appreciable fall in workplace claims in NSW over the same period,<sup>42</sup> the above data indicate that NSW workers compensation cases notified to Medicare have fallen dramatically, to less than half of 2001 levels. There has been a similar reduction in the amount recovered by Medicare each year as a result.

<sup>42</sup> In NSW between 1999-00 and 2008-09 there was a 10% drop in claims for temporary disability and a 42% drop in claims for permanent disability: WorkCover NSW Statistical Bulletin 2008/09, page 14.

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In NSW, the workers compensation scheme is entirely government funded and therefore this represents a shift in treatment costs from NSW employers to all Australian taxpayers, which should be a concerning development for taxpayers in other jurisdictions including the ACT. However, in the ACT, which is a privately underwritten scheme, the changes proposed by the draft WC Bill would result in a shift in costs of treating and caring for workplace injuries from insurance companies to the taxpayer, for no obvious reason and to the detriment of ACT workers.

This will simply place even greater pressure on the public health system, including already overstretched ACT hospitals and bulk-billing medical practices, which must absorb the additional cost and additional patients. It will also place greater pressure on injured workers, who will invariably have to cover the “gap” in medical treatment expenses from doctors and specialist, over and above the Medicare scheduled fee. The only beneficiaries of this will be workers compensation insurers.

## **Positive elements of the draft Bill**

There are some useful provisions in the Bill which are likely to improve the scheme. These are summarised briefly below:

### **Death and funeral benefits**

The draft Bill increases death benefits from \$150,000 to \$450,000 and funeral benefits from \$4000 to \$9000. These proposed changes are welcomed. However, it is noted there has been an average of 1 death in ACT workplaces each year over the last 5 years.

### **Payment of medical expenses**

The draft WC Bill will amend s 70 of the WC Act to enable advance payment of future medical expenses by an employer. This would change the present position, which requires an employee to incur the expense and then seek reimbursement afterwards.

The proposed change to s 70 is applauded and reflects submissions made by the Law Society that the WC Act should provide for payment of medical costs which are properly required, e.g., for a future operation, without the injured worker having to incur the costs before claiming them.

### **Compulsory conferences**

Part 11.2 of the draft WC Bill will create a new requirement for parties to participate in compulsory settlement conferences.

It is noted that informal settlement conferences almost invariably already occur. The requirement in the WC Bill will ensure that settlement conferences are held in the very few matters where they do not already occur, and in a timely manner. The provisions will also ensure all available relevant information is disclosed by the parties, prior to entering into negotiations.

The proposed provisions are broadly similar in effect to Part 4.7 of the *Road Transport (Third Party Insurance) Bill 2010*. However, beneficially, the parties are not required to sign a certificate of readiness for hearing, prior to the conference.

It is noted that the informal conferences which already occur are intended to be able to be recognised as compliance with the requirement. As such, the provisions should achieve

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their objects, to facilitate the just and prompt resolution of claims and to encourage parties to avoid unnecessary delay and expense, without adding any onerous or unnecessary layer of compliance giving rise to extra costs.

Section 196C(2) provides the Court with the ability to dispense with the compulsory conference, which will be necessary if there is a complex issue of law, multiple parties or another issue that is likely to make negotiations futile, resulting in unnecessary legal costs if the conference is entered into.

It should be noted that there may be some problems associated with a compulsory conferencing scheme which affects injuries giving rise to both a statutory compensation claim and a common law claim. For example, in claims involving multiple defendants, the non-employers will not be bound by the provisions of the *Workers Compensation Act* and compulsory conferencing without those defendants would be futile. Also, the statutory proceedings and common law proceedings are rarely managed at the same rate, due to a number of factors including interlocutory processes and the delays in having matters listed for hearing in the Supreme Court.

Overall, the compulsory conferencing provisions are an example of added efficiency, without taking away from the rights and entitlements of workers. The provisions should be beneficial for all scheme participants.

## **Mandatory final offers**

Part 11.3 of the draft WC Bill will require the parties to exchange mandatory final offers prior to commencing proceedings. Exchange of offers is something which almost invariably occurs in the context of common law claims, however the provision should ensure that offers are made in the few cases where they might not otherwise be made.

It is noted that a potential difficulty with the “mandatory final offers” provision, as drafted, is that it appears not to differentiate between matters which are entirely based on statutory workers compensation and those which include a common law element. Often only the latter are reducible to simple dollar terms for settlements.

## **Other ways to improve the scheme**

There are several ways in which the Bill misses the opportunity to improve the ACT workers compensation scheme. Some improvements, which should be investigated or pursued, are presented briefly below.

Insurers have indicated that a significant element of the costs of the scheme is small and unmeritorious common law claims, which could be more expensive to defend than to pay. Such claims could well be significantly reduced by limiting costs payable to lawyers running such claims.

Provisions concerning Mandatory Final Offers could be improved by requiring the parties to settle at a midpoint if the offers are not more than a specified amount apart (and if the lowest offer is not zero). This would preclude the expenditure of costs and court time in the pursuit of relatively minor amounts. So long as the “specified amount apart” was kept modest, it would not unfairly disadvantage any parties.

## **5 steps to a better workers’ compensation system**

1. Promote and support early / non-adversarial resolution

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- Compulsory conference before common law proceedings being instituted (both Magistrates Court and Supreme Court).
  - Mandatory final offers before proceedings in common law matters with costs consequences.
  - Medical panel assessments of permanent injury compensation claims in workers compensation in cases where agreement is not reached by formal case management (see 2 below).
2. Reduce scheme inefficiencies
- Formal case management measures overseen by specialist person (which ideally would be a specialist workers compensation magistrate) with a view to attempting resolution at the earliest stage of the proceedings and in the event of no resolution, ensuring that the matter is effectively case managed through the court by directions.
  - Specialised magistrate(s) to hear workers compensation list and common law industrial claims in the Magistrates Court (with a view to enabling them to gain greater expertise in assessing medical evidence).
3. Better managed court process
- Shorten hearing delays in the Supreme Court by management of Court resource (current delay of up to 12 months from Certificate of Readiness to hearing).
  - Imposition of guidelines for acceptable reserved judgment period (Current delay from hearing to judgment of up to 2 ½ years).
  - Formal case management process in both the Supreme Court and the Magistrates Court – similar to what has been adopted in the District Court of New South Wales or the Federal Court.
4. Minimise cross border difficulties (state or territory of connection)
- Tighten three tier test with better definition of “base” for employment purposes.
  - Tighten test for third tier by replacing “principal place of business” with “place of hire or engagement” test.
5. Reduce average premium rates, increase available pool and coverage
- Increase resources to ensure appropriate insurance is paid and reducing no insurance / under insurance.
  - Ensure fines and prosecution in cases where there is proven to be under insurance or no insurance.
  - Broaden the premium pool by clamping down on sham contractors, particularly in the building and cleaning industries.
  - An increase of 10,000 individual workers covered in the ACT earning an average income and paying at the average premium rate would increase the ACT workers compensation pool by \$21 million. The current pool is about \$170

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million. In other words, an increase of 10,000 workers on average would increase the pool by 12.5%. The government proposes that its reform will reduce premiums by up to 4%. This initiative alone with only an additional 10,000 workers will deliver premium reductions of more than three times that figure.

- If all ACT Government employees changed from the Federal to the ACT workers compensation system then there is potential for an even more dramatic reduction in premiums. It is estimated that transferring ACT Government employees, covered presently by Comcare, into the ACT scheme would increase the premium pool by an estimated \$34 million.<sup>43</sup>

## Conclusion

The draft WC Bill should not be introduced in its present form. As outlined in this submission, the draft WC Bill, if implemented, will impact most severely on ACT workers with severe/major injuries, while preventing over 90% of injured workers from suing an employer who has failed to provide a safe workplace or system of work (a reduction of over 80%).

The primary justification presented by the proponents of the draft WC Bill is providing “reasonable balance in terms of statutory benefits and protection provided to injured workers, affordability and accountability for employers and the level of regulation and scrutiny applied to service providers...” However, as demonstrated above, the draft WC Bill goes much further than this. If introduced, the draft Bill will create some of the most draconian restrictions on workers’ rights in the country.

No evidence has been presented by the Government that there is any problem that the draft Bill is intended to address, which might outweigh this assault on workers’ rights. There is no insurance crisis, there is no major concern in the community about the cost of workers compensation insurance, there is no evidence presented that Canberrans are becoming “more litigious” and no other justification has been presented by the Government that would justify implementing such draconian restrictions on the rights of workers injured negligently in the workplace.

It is most concerning that the Government has failed to inform the community of the likely impact of the changes proposed by the draft WC Bill. Based on the experiences of other jurisdictions which have implemented similar restrictions, such as NSW:

- 90% of workers injured by negligent employers would be ineligible to claim compensation for pain and suffering and loss of enjoyment of life;
- the majority of the proposed changes, including the cap on general damages and increase in the discount rate from 3% to 5%, will impact most harshly on the youngest and most catastrophically injured people;
- there will be many people with very serious, life-changing injuries, caused by a negligent employer or colleague, who will not be able to claim fair compensation as a result of these changes; and

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<sup>43</sup> Segrot, D. “ACT Workers Compensation – How do we make it work better?”, *Final Report for the Review of the ACT Workers Compensation System on behalf of the ACT Chief Minister’s Department*, August 2007, page 32

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- insurance companies will be the primary beneficiaries of the changes, which will result in substantially increased insurer profits, only a portion of which will benefit employers in terms of slightly reduced workers compensation premiums. However, this will be at enormous cost in terms of workers' rights to fair compensation and access to justice.

Furthermore, the draft Bill may be inconsistent with the ACT *Human Rights Act 2004*, would shift the cost of caring for injured workers from insurers to the tax payer and will remove a significant incentive for employers to ensure they maintain a safe and healthy work environment.

The Chief Minister's Department should begin a process of genuine engagement with employee and employer groups, the insurance industry and the legal profession, to develop balanced and fair proposals to address perceived problems with the workers compensation scheme.

It is strongly submitted that the Bill should not be introduced in its present form. The draft Bill should be amended, as follows:

1. **Remove** all sections of the draft Bill relating to WPI thresholds, medical assessment panels, changes to the discount rate, legal costs, and arbitrary limits on legal advertising.
2. **Enhance** provisions of the draft Bill relating to compulsory conferences, mandatory final offers, in accordance with the suggestions in this submission.
3. **Incorporate new provisions** giving effect to the "5 point plan" outlined in this submission.
4. **Retain** provisions of the draft Bill which improve death benefits and indemnity for medical expenses.

It is submitted that the alternative proposals outlined in this submission will substantially reduce scheme costs, improve the claims process, result in less disputation and ultimately drive workers compensation premiums lower. These changes would give effect to the objectives of the draft WC Bill without subjugating the rights of injured workers.

The ACTLS, ACT Bar and ALA would be pleased to further elaborate upon the beneficial changes to the ACT workers compensation scheme outlined in this submission.

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## Attachment A – Who Are We?

### **ACT Law Society**

**actlawsociety**

The ACT Law Society was established in 1933 and today represents around 1500 solicitors and associate members. The Law Society exists to represent, advance and defend the interests of an independent legal profession in the ACT. The Law Society also strives to protect the public interest in the ACT system of justice through the efficient regulation of the profession and to promote access to justice and equality before the law.

The Society endeavours to achieve these objectives by lobbying for "good law" and taking an active role in policy development by producing authoritative and influential submissions on proposed legislation and its impact.



### **Australian Lawyers Alliance Ltd**

The Australian Lawyers Alliance is a national association of lawyers and other professionals, dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia.

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. We promote the development of expertise in areas such as workers' compensation, public liability, motor vehicle accidents and professional negligence.



### **Australian Capital Territory Bar Association**

Since its inception in 1962, the ACT Bar Association has promoted and fostered the growth of a strong and independent Bar in the Territory. The ACT Bar Association's aim is to promote the administration of justice by ensuring that the benefits of the administration of justice are reasonably and equally available to all members of the community.

The ACT Bar Association also endeavours to represent the views of its members by making recommendations with respect to legislation, rules of the court and the business and procedure of the courts.

**These submissions reflect the united voice of the ACT Law Society, the Australian Lawyers Alliance and the ACT Bar Association.**

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## Attachment B – Template questions

### RESPONSE TO SPECIFIC QUESTIONS:

<b>Question 1</b>	<b>Is it appropriate for compensation for permanent impairment to be payable in respect of psychological injuries?</b>
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It is entirely appropriate for compensation to be payable in respect of psychological injuries. However issue must be taken with the differing thresholds assigned to physical and psychological injuries.

By assigning a lower threshold to physical injuries than psychological injuries, it is implied that the psychological impairment is less debilitating than a physical impairment and this is discriminatory. Psychological symptoms that are commonly triggered by a workplace accident include depression, somatosensory disorders, trauma and anxiety. These symptoms can have debilitating effects on an individual's quality of life and can have social, financial and occupational consequences as well as effecting personal relationships.

It is also problematic to use the proposed editions of the American Medical Association's *Guides to Evaluation of Permanent Impairment* (the *Guides*) to evaluate a psychological injury as a method for determining percentage of psychological impairment is not prescribed within the 5<sup>th</sup> edition of the *Guides* (the edition proposed to be used) and it is even recommended by the *Guides* that percentages ought not to be assigned. The authors clearly state:

*"Percentages are not provided to estimate mental impairment in this edition of the guides. Unlike cases with some organ systems, there are no precise measures of impairment in mental disorders. The use of percentages implies a certainty that does not exist. Percentages are likely to be used inflexibly by adjudicators, who are then less likely to take into account the many factors that influence mental and behavioural impairment..."*<sup>[1]</sup>

The exclusion of a "secondary psychological injury": see proposed s54(2)(b) is unclear, but is assumed to mean a psychological injury relating to or stemming from a physical injury. There is no principled reason why this should be excluded considering that, but for the injury sustained in the workplace accident, it is likely that the claimant would not have suffered the psychological injury. It is also obvious that psychological injuries are closely associated with chronic physical injury and pain.

<b>Question 2</b>	<b>Is it appropriate to replace the timeline requirements for making a permanent impairment claim with a injury stabilized requirement?</b>
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The power to determine whether or not an impairment is permanent should rest with the court, subject to hearing of evidence relevant to the issue, and should not be subject to any arbitrary timeframe.

**Question 3**

**Does the medical panel and its peer review requirements provide appropriate protection to the clinical integrity of permanent impairment assessments?**

Within the closed system of permanent impairment assessments under the AMA Guides by medical panels appointed by government, a peer review system may assist with consistency.

However, 'clinical integrity', (whatever that is), is not the central issue when it comes to fair assessment of the effect of injury on an individual, when conclusive assessments by a panel member are not exposed to questioning on behalf of the injured person. Such assessments lack transparency.

In addition, the assessments are based on the AMA Guides, which have been described:

*"The Guides is not the objective, medical evaluative system it purports to be and that has been so appealing to legislators and other decision makers. Instead, like any impairment rating scheme, it rests in large part on important and difficult normative judgments. Yet the Guides obscures this from the reader; it is laden with hidden or poorly explained value judgments that frequently are gender-biased. The Guides' flawed promises of objectivity are especially troubling because they appeal to the craving of legislators and other decision makers for certainty and clarity in the difficult arena of impairment and disability assessment."*<sup>[ii]</sup>

Concern is also raised about the treatment of an impairment that is not covered by the *Guides*. An example arising out of the United States is in the case of a claimant suffering from fibromyalgia which is not covered. What is to happen to an injured road user in the ACT if their impairment is not covered by the *Guides* and therefore unable to be given a percentage of WPI? Are they to be excluded from the system altogether? This is a worrying concern as even though the *Guides* are broad they do not cover all impairments.

There is also no provision in the proposed Bill for the Panel to have access to the reports and other medical evidence from the injured worker. This is contrary to the current regulations (Workers Compensation Regulation 2002 reg10(6)) where all parties are to provide a medical assessor with all medical evidence. Using the evidence of one party but not the other will further lessen the integrity of the assessments made.

**Question 4**

**Will the imposition of timeframes around the determination of a worker's entitlement to compensation for permanent impairment assist workers to receive timely compensation?**

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It is unclear at this point in time whether the imposition of timeframes around the determination of a worker's entitlement to compensation will ultimately result in timely compensation for the worker.

It appears that a compulsory conference must be held within 3 months after the date of the proceeding commencing or if not then as soon as possible after. If no agreement between the parties can be reached then an application must be made to the Court to decide on a date. This has the potential to lead to more litigation and also does not give an indication as to what acceptable reasons for delay would be (s 196E).

<b>Question 5</b>	<b>Is the increase in statutory lumps from \$126,000 (single loss) to \$220,000 appropriate? If your answer is no, what would be appropriate?</b>
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We believe that the increase in statutory lump sums from \$126,000 to \$220,000 is appropriate. However, it may be that such an increase is ephemeral, because the maximum amount will be less available with assessment under the AMA Guides.

<b>Question 6</b>	<b>Is the increase in the benefits payable for funeral costs from \$4,000 to \$9,000 appropriate? If your answer is no, what would be appropriate?</b>
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We believe the increase in the benefits payable for funeral costs from \$4,000 to \$9,000 is appropriate.

<b>Question 7</b>	<b>Is the increase in death benefits from \$189,000 to \$450,000 appropriate? If your answer is no, what would be appropriate?</b>
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We believe the increase in the death benefits from \$189,000 to \$450,000 is appropriate.

<b>Question 8</b>	<b>Is the formula (WPI % x maximum lump sums) for the payment of the statutory lump sums appropriate? Under this formula workers with a WPI of 75% or more would receive the maximum lump sum available.</b>
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No. We do not support the imposition of a WPI threshold. The probability of any injured worker exceeding 75% WPI is remote and is likely to be restricted to cases of quadriplegia or severe brain injury.

<b>Question 9</b>	<b>Do the thresholds of 15% (physical) and 20% (psychological) whole person impairment provide a reasonable balance between the accessibility of common law for seriously injured workers and the affordability of the Scheme for insurance policy holders? If not, what</b>
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<b>are the fair alternatives?</b>
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By introducing a threshold limit to access for common law following an injury suffered in the work environment, the proposed Bill in introducing Whole Person Impairment (WPI) Thresholds of 15% for physical injuries and 20% for psychological injuries is removing the common law rights to compensation for a large number of injured workers.

It is estimated that approximately 90% of all claimants would be precluded from making a claim for general damages by the imposition of a 15% physical and 20% psychological threshold assessed in accordance with the *Guides*. Such a limitation of rights is grossly unfair to the workers of the Australian Capital Territory.

A system that limits access to approximately 90% of claimants does not provide a reasonable balance between the accessibility of common law for injured workers and the affordability of the Scheme.

A fair alternative would be a system that does not prevent access by injured workers to the common law when they have been injured due to the negligent actions of an employer. Why should negligent employers be protected when a worker is injured due to their actions? By allowing access to the common law to injured workers the Scheme could discourage the sacrificing of vulnerable workers' health for the pursuit of profit by the insurance policy holders.

<b>Question 10</b>	<b>Will maintaining an unlimited common law damages environment for the Territory's seriously injured workers maintain the integrity of the Scheme?</b>
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Common law damages are not unlimited and it is incorrect to label them as such. Damages under common law are limited to injuries caused by an employer's negligence and, in amount, by precedent and assessment of the individual's circumstances. Maintaining access to common law damages for those workers injured by their employers' negligence is essential to maintain the integrity of the Scheme.

<b>Question 11</b>	<b>Will the use of compulsory pre-hearing settlement conference reduce unnecessary litigation and provide greater certainty for injured workers?</b>
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The provision of a compulsory pre-hearing conference reflects standard practice. There is a potential to increase the amount of litigation with the strict time limits involved.

Approximately 95% of all matters are settled before hearing and in those that are not commonly contain attempts to settle, be it through a settlement conference and correspondence.

Having a compulsory pre-hearing settlement conference does not mean that there will be an increase of settlements.

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**Question 12****Should parties be able to conduct compulsory pre-hearing settlement conferences without an independent conciliator?**

Parties should be able to conduct compulsory pre-settlement conferences without an independent conciliator. To insist on one would increase the cost of the Scheme and has the potential to create a quasi-judicial officer in a conference which could become adversarial.

**Question 13****Are additional dispute resolution mechanisms required to assist in the timely resolution of disputes and reduction of unnecessary litigation?**

The dispute resolution provisions could be enhanced by requiring that, especially for smaller matter, offers which are not more than certain amounts apart must be settled at a mid-point of the offers. This could preclude the running up of additional court expenses and legal costs for no significant gain on either side. For example, the Bill could provide along the following lines:

- a. if the highest mandatory final offer is not more than \$30,000.00 and the mandatory final offers respectively put on behalf of the claimant and the respondent are not more than \$6,000 apart, then the parties must settle the matter for an amount mid-way between the two mandatory final offers and that mid-point is taken to be the mandatory final offer which is accepted (for purposes of above costs provisions).
- b. If the highest mandatory final offer is more than \$30,000 but not more than \$50 000 and the mandatory final offers respectively put on behalf of the claimant and the respondent are not more than \$9,000 apart, then the parties must settle the matter for an amount mid-way between the two mandatory final offers and that mid-point is taken to be the mandatory final offer which is accepted (for purposes of above costs provisions).

**Question 14****Is the maintenance of workers' ability to redeem their compensation benefits appropriate and in line with the return to work goals of the Scheme?**

The maintenance of the worker's ability to redeem their compensation benefits is appropriate and in line with the return to work goals of the Scheme.

This maintenance enables the injured worker to find employment appropriate to their post injury condition without unnecessary bureaucracy and negative input from overly prescriptive insurers and

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rehabilitation providers.

<b>Question 15</b>	<b>What measures should be introduced to ensure reasonable legal costs in connection with workers' compensation claims/disputes and related action for damages?</b>
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A system already exists to ensure reasonable legal costs in connection with workers compensation claims and related actions for damages. Any restraint imposed on the present system is likely to penalise workers access to justice.

<b>Question 16</b>	<b>Is a 5% discount rate reasonable? If no, what rate would be reasonable?</b>
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The Bill, without any justification, changes the 3% discount rate applicable to lump sums at common law and pursuant to the High Court judgment in *Todorovic v Waller* (1981) 150 CLR 402. The change is to a 5% discount rate: proposed new s184(2)(b). This discount figure is used to access actuarial tables to reduce any lump sum for future losses on the basis that the lump sum is received at settlement or judgment not in the future and can be invested until it is needed over future years.

Applying the 5% discount figure is unreasonable to injured workers as it assumes that the worker can invest the money at very low risk, for a continuing return of 5% AFTER tax and after inflation. That is a quite unrealistic assumption. Actuarial evidence suggests even the 3% discount rate is slightly unrealistic. Because the assumption is so unrealistic, the burden of future losses is thrown on the injured worker and removed from the insurer. This change in the discount rate does not affect smaller claims but harms seriously injured workers. A worker on an average income of about \$70,600 who is unable to work for the next 20 years because of their injury would get \$132,000 less under the new proposal.

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<sup>[i]</sup> AMA, *Guides to Evaluation of Permanent Impairment* (5<sup>th</sup> ed) American Medical Association (2000) at page 361

<sup>[ii]</sup> Ellen Pryor, *Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment*, 103 Harvard L. Rev. 964, at 965, 968, 976 (1990).