

**REVIEW OF THE EXPOSURE DRAFT OF  
THE WORKERS COMPENSATION  
AMENDMENT BILL 2010 (ACT)**

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**Dated: 30 November 2010**

## Introduction

1. In approximately 2000, the ACT Government of the time embarked upon a major process of workers compensation review and reform, consistent with a process which had been undertaken in most other Australian state and territory jurisdictions. That process which extended over some two years ultimately resulted in the enactment of the major workers compensation reforms in the Territory which commenced on 1 July 2002. It constituted the first major scheme reform undertaken in the Territory in some 50 years.
2. The government of the time indicated that their intention in the scheme reform process was to move away from an entitlement-based and litigation-focused framework to a scheme which was driven by injury management, early resolution and minimisation of litigation.
3. The process which was undertaken ten years ago commenced with the release of a discussion paper and a call for public submissions. There was then an extensive consultation process prior to the release of a draft bill. The government then formed working groups, drawing widely from scheme stakeholders, with such groups making a significant contribution to the reform process. Ultimately, the draft bill was tabled, and commenced in July 2002.
4. In 2010, the government has again heralded an intention to embark upon a process of major scheme reform. However, the process this time around has been very different. This government elected to proceed with the preparation of an exposure draft without any open consultation. Even with the deferring of the tabling of the exposure draft, and the call for submissions expiring on 30 November 2010, it remains the stated intention of the government to table the draft bill at the sittings in the week commencing 29 November 2010.
5. A key aspect of my submission is that major scheme reforms such as that envisaged by the government demands a proper and open process of consultation with all stakeholders. Unless that process occurs, there is a real risk that legislative reform will fail to deliver its stated objectives.
6. The balance of this submission is directed to a review of the stated objectives of the reform package, the extent to which there has been a proper process of analysis in relation to delivery of the present scheme against those objectives, and some comment on alternatives for the delivery of such outcomes.

### **Stated Objectives of the Bill**

7. In her explanatory statement, the Minister relevantly acknowledged that the ACT workers compensation scheme is an instrument of social welfare and industrial fairness. The scheme is intended to ensure that injured workers receive appropriate care, rehabilitation and compensation.
8. The Minister identified the need for reasonable balance between, on the one hand, the level of statutory benefits and protection provided to injured workers, and on the other, the affordability of the scheme as a whole. She also identified the important aspect of providing accountability for employers and an appropriate level of regulation and scrutiny for service providers.
9. The Minister went on to identify the key purpose of the bill as a desire to address existing inefficiencies within the scheme, and to create a robust, transparent and equitable framework going forward.
10. Central to an analysis of the proposed reforms is an assessment of whether, and to what extent they deliver the stated objectives.
11. In my submission, an essential element of the review process is a proper assessment of the extent to which the existing scheme is delivering those objectives, and an analysis of the scheme's shortcomings with regard to those objectives.

### **Existing Scheme Performance**

12. Regrettably, notwithstanding the government's stated desire to build a transparent framework around the ACT scheme, the level of data available about the scheme's performance supporting the present consultation process is poor. There is no up-to-date actuarial information which is publicly available which enables a proper assessment of the extent to which:
  - the existing scheme is delivering or failing to deliver the government's stated objectives;
  - the 2002 reforms have impacted on the scheme's performance, either positively or negatively, in terms of the stated objectives.
13. At a National Accident Compensation Seminar held in Melbourne in November 2009, the senior manager of the workers compensation policy branch of the ACT Office of Industrial Relations made the following observations about the performance of the ACT scheme:

- (1) The scheme delivers a high level of competition, with the market dominated by four insurers;*
  - (2) Average claim duration is stable;*
  - (3) Average claim size is stable;*
  - (4) Average claim frequency is stable; and*
  - (5) Premium rates reduced by between 3% and 10% over the five years prior to November 2009.*
14. The presentation on behalf of the ACT Government also included a number of graphical representations in respect of items such as continuance rates, common law claims as a component of overall claims, and average size of claims receiving common law damages. Unfortunately, it is not possible to comment on the graphical representations without access to the data underpinning them. It is noteworthy that in some cases, it appears that the government itself is hampered by a lack of available data, given that some of the graphical representations at the presentation in November 2009 were based on data which was by that time more than three years old.
15. Fundamental to my submission is the proposition that an effective reform process requires a proper analysis based on data concerning the performance of the current scheme.
16. The key measures in terms of the scheme performance cannot be items such as average premium rates in what is a privately underwritten scheme. For example, there is no sense in comparing premium rates in a market-driven scheme like the ACT, where insurers may adjust premiums upwards or downwards based on a range of market conditions, with premium rates in a managed fund scheme such as that which operates in NSW, where premiums are set in accordance with a strict formula calculated on the basis of claim estimates formulated pursuant to a methodology developed by actuaries to ensure that the managed fund scheme is fully funded.
17. **The most important measures of effective performance of a workers compensation scheme are:**
- **Claims frequency (that is, to what extent is the scheme driving good workplace behaviour resulting in a reduction in injury rates).**

- **Average claims duration (that is, to what extent is the injury management process effective in delivering early and durable return-to-work outcomes).**
- **Average claims cost (that is, to what extent is the scheme delivering a reduction in the severity and duration of workplace injury, such that overall claims costs are being reduced).**

18. Effective reform can only occur in circumstances where there has been an analysis of the performance of the current scheme with regard to the measures I have identified above. Only then it is possible to move forward and to undertake a proper analysis of proposed scheme reforms and their capacity to deliver improvement in respect of one or all of the key scheme performance measures.

## **Proposed Reforms**

### **Permanent Injury Compensation**

19. In 2002, the government commenced the process of reforming that portion of the workers compensation scheme dealing with permanent injury compensation. Prior to the 2002 reforms, the Act provided for compensation for permanent injury on the basis of a Table of Maims. The Table was previously intended to deal with loss of body part injuries such as amputation injuries and was not directed to the assessment of permanent injury in terms of the level of loss of function flowing from that injury. It provided no compensation for those suffering a permanent functional loss in respect of back or neck injuries. Nor did it provide any compensation in respect of permanent injury in the form of mental or psychological injury.
20. The 2002 reforms went some way towards introducing a broader model for no fault permanent injury compensation.
21. The government highlights the fact that the present level of benefits available in the ACT for permanent injury compensation, when compared with other jurisdictions, is too low. The shortfall is perhaps most starkly demonstrated with an analysis of the benefits payable in respect of a person who suffers a fatal injury in the course of their employment in the ACT when compared with a fatal injury suffered in NSW. If one considers a death benefit in terms of a multiple of average weekly earnings in the jurisdiction, the ACT does appear to have fallen well behind an acceptable level of compensation. As a result, I fully support efforts to increase the level of lump sum benefits for permanent injury payable in the Territory.

22. The other critical aspect of any system of permanent injury compensation is the method of assessment. The ACT Government proposes to adopt the measure of whole person impairment system provided by the American Medical Association Guide to the Evaluation of Permanent Impairment (5<sup>th</sup> Edition).
23. I note that the AMA Guidelines have not been adopted as a means of assessing permanent injury compensation in many of the American States, particularly California, which is the largest workers compensation scheme in the USA, on the basis that the Guidelines do not provide a reliable means of assessing compensation for permanent injury.
24. Perhaps the most significant limitation of the AMA Guide comes from the Guide itself which states that they are '*not intended for use as direct determinants of work disability*'. Thus, whilst the AMA Guide provides a system for the standardised measure of functional impairment, it does not adequately deal with the issue of disability which takes into account the extent by which an individual's capacity to perform particular tasks is impacted upon by injury. In this way, the adoption of an AMA measure of permanent injury will inevitably discriminate against those who suffer a minor degree of impairment but a significant level of disability. The particular occupational demands imposed upon an individual will impact significantly on the disability component of a permanent injury as opposed to the functional impairment component.
25. In my submission, if the government is to move with fairness towards a more complete system of permanent injury compensation, AMA 5 is an inadequate tool to use for the measurement of permanent injury. At the very least, the government should give proper consideration to alternative tools which are available and have been adopted in many of the jurisdictions in the United States which provide for assessment of permanent injury compensation with a better balance between the impairment and disability components of such injury.

### **Whole Person Impairment Thresholds**

26. The other component of the scheme to be impacted upon by the use of AMA 5 Guidelines is that of access to common law damages. The introduction of a 15% whole person impairment threshold for physical injuries and a 20% whole person impairment threshold for psychological injuries before there is access to common law damages is premised on the basis that the government seeks to '*rebalance the ACT scheme*'. The government asserts that historically, the scheme has provided unfettered access to common law rights, regardless of the severity of injury. The implication is that the provision of a scheme with a rigorous framework of rehabilitation and adequate compensation has removed the necessity for access to common law rights other than in the case of the most severely injured.

27. It must first be noted that the experience of a 15% threshold for common law damages in the context of workers compensation claims in NSW removed access to common law benefits for approximately 85% of the persons who previously enjoyed such access. The ACT Government proposal is therefore intended to deliver a very dramatic reduction in the availability of access to common law rights.
28. The Minister's explanatory statement suggests a desire to more closely align the compensation benefits available in the Territory with those presently offered by other State schemes.
29. At the time of undertaking the reform process in 2002, the ACT Government expressly stated a commitment to the retention of full common law rights on the basis that the fettering of those rights in other jurisdictions had failed to deliver cost savings and/or scheme efficiency. That begs the question, what has changed?
30. Accepting that this is a different government, the government of the day in 2002 had formed the view that major scheme reform and the fettering of common law entitlements had not delivered cost savings or improved efficiency.
31. In line with the government's stated objective of creating a robust, transparent and equitable scheme framework, it is highly desirable that before the ACT embarks upon a reform process which would deny 85% of injured workers access to common law rights, there should be a transparent process of analysis of the extent to which access to common law rights is impacting negatively on the existing scheme, and of the extent to which fettering access to common law rights in other jurisdictions has delivered outcomes consistent with the stated objectives of the ACT Government.
32. In my respectful submission, the other important aspect of the delivery of a package of reforms which reduces the scope for individuals to access common law benefits is the extent to which such individuals in turn become an increased burden on the welfare system in other ways. It must be recognised that a reduction in workers compensation premium rates as the basis for restricting access to common law damages does not provide a complete picture of the cost of workplace injury if there is no contemporaneous reduction in the key measures I have identified above, being:
- Claims frequency;
  - Average claims duration; and
  - Average cost of claims.

33. Put simply, if individuals are denied access to damages through the workers compensation system, but claims frequency, claims duration and claims cost are not changed, those individuals will be a financial burden on the State with such burden met by the health and other welfare systems, rather than the compensation system.
34. Finally, the rationale for differentiating between those individuals suffering a mental injury as opposed to a physical injury is not explained. On its face, the differential approach taken in respect of those suffering mental injury appears discriminatory, at a time when so much work is being done in other areas of government to raise the level of awareness and recognition of the impact of mental injury in our community.

### **Framework For Dispute Resolution**

35. I endorse the proposal for the introduction of a compulsory conference system before parties are permitted to proceed to a litigated outcome.
36. It is not apparent whether the government has undertaken any analysis of the extent to which pre-court conferencing is utilised in matters currently, before moving to a system of mandated settlement conferences. Anecdotally, as a legal practitioner practising in the workers compensation area for in excess of 20 years, my observation is that the use of pre-court conferencing in the ACT is now relatively widespread, and it would be a most unusual outcome for a matter to proceed to a court hearing without there being some prior attempt at resolution via an informal conference.
37. For that reason, I consider it unlikely that the mandating of settlement conferences will of itself deliver any substantial improvements in scheme efficiency. It is my submission that such conferences will only produce significantly positive outcomes where they are overseen by a specialist judicial officer who:
  - Understands the legislation;
  - Understands the complex medical issues which emerge in the workers compensation jurisdiction; and
  - Has the respect and confidence of the parties, such that the overseeing officer is in a position to be a person of influence in the resolution process. I have reservations about the efficacy of a case management process that does not include such specialist oversight.
38. I fully support the proposal to introduce a mandatory final offer system as a means of forcing parties to be less adversarial in their settlement negotiations. If costs consequences flowing

from a mandatory final offer system are to be effective, there must be reasonably significant limitations on the exercise of the court's discretion in respect of awarding costs.

39. An alternative final offer system is to impose an obligation on the parties to litigation to provide a final offer which most closely reflects their view of the ultimate outcome in the case. Where a matter is not resolved on the basis of the exchange of such offers and the court moves to an assessment of damages, damages are awarded at the level of the offer most closely matching the court's assessment. Such a mechanism provides an enormous incentive for parties to exchange offers which properly reflect the likely outcome in a disputed matter. By necessity, such a system also encourages early preparation of matters so that parties are in the best possible position to accurately assess the quantum of a claim.

#### **Alternative Scheme Reform Mechanisms**

40. **It is my submission that the key measures of an effective workers compensation scheme are:**

- **Claims frequency;**
- **Average claim duration; and**
- **Average cost of claims.**

41. I endorse and commend to the government the five steps to a better workers compensation system put forward by the ACT Law Society. In adopting the five points raised by the Law Society, I would also encourage the government to consider a sixth step in the reform process. My 6 step proposal may be summarised as follows:

#### **1. Promote and Support Early Resolution of Claims**

- (i) The adoption of a compulsory conference system with costs consequences in appropriate matters.
- (ii) The adoption of mandatory final offers before proceeding in common law matters or alternatively, the adoption of a best offer system as described above.
- (iii) The use of medical panels for the assessment of permanent injury compensation claims in workers compensation matters where such matters are not resolved by formal case management.

## **2. Case Management**

- (i) Formal case management overseen by a specialist industrial magistrate. Based on the experience in other jurisdictions, case management is most effective when overseen by a senior court officer with an intimate understanding of the scheme and the capacity to make directions as to the future conduct of proceedings.
- (ii) Specialist judicial officers to hear workers compensation and common law matters up to the jurisdictional limit of the Magistrates Court, to enable those judicial officers to gain the greatest possible expertise in assessing medical issues and medical evidence.
- (iii) Introduction of an election process, such that before instituting proceedings for permanent injury compensation or common law damages, a worker must choose between the two, thus preventing unnecessary litigation.

## **3. Court Efficiency Issues**

- (i) Present delays in the Supreme Court from the filing of a certificate of readiness until the receipt of a hearing date are unacceptable, and better resourcing of the court and court processes is called for.
- (ii) The present case management system in the Supreme Court does not appear to be resulting in effective management of the disputed matters leading up to trial. More strict case management guidelines such as those adopted in the NSW District Court would be of benefit.

## **4. Minimise Cross-Border Issues**

- (i) Tighten the three-tier test with better definition of '*base for employment purposes*'.
- (ii) Tighten the test for the third tier by replacing '*principal place of business*' with '*place of hire*', or '*engagement*' test.

## **5. Reduce Average Premium Rates and Increase Available Pool and Coverage**

- (i) Increase resources to ensure appropriate insurance is paid and reduce lack of insurance/under-insurance issues.
- (ii) Ensure fines and prosecution in cases where there is proven to be under-insurance or no insurance.
- (iii) Broaden the premium pool by:

- (a) Amending the '*worker*' definition to limit cover to PAYE workers only;
- (b) Require all PAYG workers to take out workers compensation cover in their own names (identified as Group B workers);
- (c) Mandate that, where Group B workers perform greater than 80% of their working hours in a three-month period for a single entity, they shall be entitled to reimbursement by that entity for the full workers compensation premium paid by the Group B worker for that insurance period; and
- (d) Mandate that insurers are responsible for the management of premium reimbursement to Group B workers as described above.

**6. Deductible Component on All Claims**

- (i) Introduce a mandatory deductible percentage contribution on all claims, such that employers will be required to share directly in the cost of compensation, with a view to creating a stronger direct incentive for better workplace management (recognising that such a deductible may, for practical purposes, be limited to larger workplaces).
- (ii) Utilise the deductible component so collected to create a fund which could be utilised for matters such as:
  - (a) Partial underwriting of the default insurance scheme; or
  - (b) Creating a rebate to be payable to employers with the best workplace management records from a workers compensation perspective.

42. I look forward to having the opportunity to discuss this submission and the issues arising in more detail.



**Andrew Muller**

Dated: 30 November 2010