

MASTER BUILDERS ASSOCIATION OF THE ACT

**WORKERS' COMPENSATION AMENDMENT BILL
(EXPOSURE DRAFT) 2010**

SUBMISSION

16 December 2010

INTRODUCTION

We thank the ACT Government for the opportunity to comment on the Exposure Draft of the Workers' Compensation Amendment Bill (2010) (the Bill). We commend the Government on the transparent consultative process undertaken to this point in its attempt to drive much needed legislative reform in this area.

The key objects of the Act, namely common law reform, alternative dispute resolution (ADR), restraints on legal advertising, permanent impairment and cost control are all much needed, if the Act is to retain a viable compensation scheme into the twenty-first century.

A viable workers' compensation scheme must have a strong focus on rehabilitation, fairness and where applicable, appropriate compensation. In protecting these objectives the scheme must strike a balance between statutory benefits and protection of affected workers and affordability for employers. The two are not mutually exclusive and we believe the Bill is a necessary first step in achieving these laudable objectives.

COMPENSATION FOR PERMANENT IMPAIRMENT

We clearly support the need for a framework of assessment based on independent, objective medical assessment.

The peer review process, whilst notionally commendable, needs to be stringently managed to ensure efficient outcomes are obtained. The process is not served well if time lines are not adhered to and it is open to any number of participants. In essence we advocate the need for a process which is outcome focused and where delays are minimised.

The objective is in keeping with the stated aim of the proposed legislation, namely, to remove the need for multiple assessments by multiple doctors. The MBA ACT (MBA) is of the view that this neither currently serves the injured worker nor the employer. As to the appropriateness of compensation for psychological injury, the MBA does not wish to discriminate on the basis of illness. Psychological injury is compensatory and ought to remain so.

INCREASED STATUTORY BENEFITS

In broad terms we are in agreement with the increases in statutory lump sum and ancillary payments where properly assessed and proven. The caveat however is that these changes in benefits assist in the long term management of a compensation scheme that is currently under a deal of financial stress.

Assuming the changes result in a better managed, more efficient scheme with less imposts on employers, the MBA is in agreement.

COMMON LAW

The MBA supports the proposition that a compensation scheme ought to fulfil the primary objective of ensuring adequate and appropriate compensation for people injured in the workplace.

We therefore support the WPI thresholds outlined in the proposed legislation, on the basis that it strikes a sound balance between the accessibility of common law damages for seriously injured workers and the affordability of the ACT workers compensation scheme for employers.

One cannot discount the importance of objective medical criteria in assessing general damages. This retains the focus on the more serious injuries (where it needs to be), whilst dealing with the less serious in an objective manner. If the aim of these reforms is to create a more efficient, affordable scheme with a strong commitment to fairness, by awarding damages on the basis of the level of objective impairment, we support the imposition of the common law threshold.

We note that there will be numerous objections to the imposition of a threshold, primarily on the basis of access to justice. This view, apart from being naive and self-serving, fails to acknowledge the need for a balanced approach designed to ensure the long-term health of the scheme. That is also to say nothing about the impact of unfettered access to the common law on injury management. We refer directly to the increased legal and other costs which are both embedded within and a scourge on the current scheme. Eliminating these 'hidden' costs will reduce the costs of the scheme, which must be both a benefit and a goal of any proposed legislative reform.

So, a failure to stand firm on what we regard as a threshold reform would essentially mean the Government has bypassed the most important of the proposed reforms. In doing so, it leaves the task to others at a time when, in all likelihood, the task of meaningful reform will be nigh impossible.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

Any process that reduces the costs of litigation is welcomed by the MBA. The introduction of a pre-hearing conference is likely to go some way to achieving this necessary and essential outcome. That is, of course, assuming the parties enter into these arrangements in good faith, with a willingness to embrace a non-litigated outcome.

As to the efficacy of a conference without an independent conciliator, history tells us that the parties may struggle to achieve an outcome. Hence it is our view that ADR is best served in a formal environment with the use of an independent conciliator. It ought to be remembered, however, that matters remain open to be successfully negotiated by the parties at any time and a formal process can only assist. The use of a mandatory final offer may also assist in a resolution.

LEGAL ADVERTISING

Legal advertising in the personal injury jurisdiction is the bane of the profession. Unfortunately this jurisdiction encourages the contingency fee mentality and whilst self regulation is clearly preferred, it has been singularly unsuccessful. Of course the subjective view is that restricting the rights of lawyers to advertise is fundamental to the question of access to justice.

We respectfully disagree.

The reality is that the costs of the claim are intimately linked with legal costs. Any measures that are able to restrict these costs are welcomed by the MBA.

The current restrictions outlined in the *Legal Profession Act 2004* (NSW), whilst a useful guide, have proven to be utterly useless in restricting advertising in the personal injury area. As such, we submit that any restrictions here in the ACT jurisdiction need to be crafted tightly such that any breach is a strict liability offence. If this change assists in a reduction of touting, it is welcomed by the MBA.

CONCLUSION

The Act, as currently structured, is badly in need of reform. The amendments go some way to restoring a balance between the necessary fairness in access and compensation and cost to business. In achieving this balance the amendments rightly focus on service providers, recognising that the costs associated place great pressure on the system. The introduction of a more structured ADR is a very positive step towards reasonable outcomes whilst reducing costs, which, unless addressed, threaten to bring the system to a grinding halt.

In summary, the MBA strongly supports the intent of the proposed legislation and urges the government to stay the course in the face of what we anticipate will be a barrage of opposition from various vested interests. Our support is on the public record and we welcome the opportunity to add to that in the months that follow, prior to the legislation being debated in the Assembly.

JOHN MILLER
EXECUTIVE DIRECTOR
16 December 2010