

Submissions

Review of the Exposure Draft of the *ACT Workers' Compensation Amendment Bill 2010*.

**Submitted on behalf of
SLATER & GORDON**

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EXECUTIVE SUMMARY

The ACT Workers' Compensation Scheme seeks to reduce the human and economic cost of work-related injuries to both workers' and employers. The Scheme was designed to protect workers' by ensuring the adequacy of the medical treatment and lost wage compensation outcomes available to injured workers'. Nothing is more fundamental than the adequacy and fairness of the benefits payable under the Scheme and the processes by which claims are managed.

INTRODUCTION

This submission has been prepared on behalf of Slater & Gordon and responds to the Exposure Draft of the *Workers' Compensation Amendment Bill 2010* released by the ACT Government for the purposes of consulting with all affected stakeholders.

It is our contention that the Bill, if enacted, will severely restrict the rights of plaintiffs to claim damages from their employers when they have suffered injury as a result of negligence in the work place. As such, this Submission:

- highlights the deficiencies in the Exposure Draft of the *Workers' Compensation Amendment Bill 2010*;
- recognises that the Government is seeking some changes to the system to provide a better workers' compensation scheme in the ACT – and in particular the Government's objective to improve rehabilitation outcomes for injured workers'; and
- proposes five steps the Government could take to ensure that the existing Workers' Compensation System in the ACT is viable and sustainable for all stakeholders without the need for comprehensive reform. This can be achieved without imposing serve restrictions on the workers' access to Common Law benefits.

The proposed amendments by the Government include the following:

1. Statutory compensation for permanent injury – Change from a table of permanent loss to a model of Whole Person Impairment (WPI).
 - Removes Schedule 1 of the Act.
 - Creation of Permanent Impairment Assessment Medical Panel
 - Single, independent assessment of a worker's Permanent Impairment (PI)
 - Determination of compensation benefits by Insurers
2. Change to existing dispute resolution process.
 - Participate in a compulsory settlement conference within 3 months of claim.
 - Can be conducted with assistance of independent councillor.
 - Exchange mandatory final offers of settlement in connection with common law damages claims, prior to hearing.
3. Adoption of a common law threshold
 - Imposing thresholds under AMA tables to limit common law claims in WC to 15% WPI for physical injuries and 20% WPI for psychological injuries.
4. Increase of maximum lump sum, death and funeral benefits.
 - Increase in maximum lump sum from \$126,600 to \$220,000
 - Increase in maximum death benefits from \$150,000 to \$450,000
 - Increase in maximum funeral benefits from \$4000 to \$9000
5. Regulation of service providers – costs and advertising.
 - Minister to determine maximum expenses and fees paid to legal service providers.
 - Limit advertising.

BACKGROUND

The ACT's *Workers' Compensation Act* 1951 has been amended and changed by successive governments over many years. Slater & Gordon recognise the challenges that this policy environment poses for Governments that need to balance the rights of workers, the sustainability of the scheme, the ongoing viability of the insurers', and the need to ensure that workers' receive rehabilitation so that they can continue to be productive and engaged members of our community. In fact, we note that the Act has been amended 35 times since 2000.

Importantly, the Act was significantly amended in 2002 to change the foundation of the scheme from one of entitlement to rehabilitation and return to work.

In addition, the ACT Government commissioned a full review of the *Workers' Compensation Act* in 2006. The final report of this review was released in August 2007 and it was a balanced and measured report that provided over 50 recommendations for improving the scheme for all stakeholders. Slater & Gordon believes the ACT Government should refer back to its own review, and again consider its recommendations.

KEY RECOMMENDATIONS

The key recommendations of this submission are that the ACT Government:

1. Re-visit its own report entitled: *ACT Workers' Compensation – How can we make it work better?* released in August 2007;
2. Reconsider the application of the AMA thresholds given that these thresholds were not developed for this purpose as it does not take into account all relevant factors when determining compensation entitlements, and given the evidence that their application for this purpose has been rejected in other countries;
3. Provide accurate comparative premium rate chart data to all stakeholders so that the issue of premium rates can be discussed and analysed based on the evidence;
4. Either provide evidence to support the assertion that the high premium rates are coming at an economic cost to the Territory or that it conduct an inquiry to determine whether this is the case prior to the introduction of the current Bill;
5. Seriously consider the prevalence of 'sham contracting' in the ACT and that the Government review the powers, resources, and outcomes of Work Cover prior to the introduction of the Bill as these could yield two alternative ways of reducing premium rates in the Territory;
6. Consider the following 5 steps (detailed later) that Slater & Gordon believes will improve the current system and ensure that it is efficient and sustainable over the longer term:

Step 1: Promote and support early / non-adversarial resolution.

Step 2: Reduce scheme inefficiencies.

Step 3: Better manage court processes.

Step 4: Minimise cross border difficulties.

Step 5: Reduce average premium rates, increase available pool and coverage

These improvements can be made without taking away the Common Law rights of most of the injured workers' in the ACT; and

7. Delay the introduction of the Bills until early in 2012 to enable stakeholder submissions to be fully canvassed and considered – and where necessary to amend the current draft legislation to ensure a balanced, effective, efficient and sustainable workers' compensation scheme in the Territory.

OUTLINE OF SUBMISSION

At the outset, Slater & Gordon contend that the proposed amendments will result in gross unfairness to injured employees by severely reducing entitlements to compensation.

The proposed amendments will cause 80% of all injured workers' in the ACT to lose their right to common law damages for injuries sustained due to the negligent acts of their employers. In addition, 95% of all workers' with psychological injuries will be prevented from bringing common law claims.

Key issues canvassed in this submission that Slater & Gordon believe will be detrimental to the Workers' Compensation Scheme in the ACT include:

1. Answers to questions from the Consultation Documents;
2. The impact of the proposed new AMA thresholds on common law claims;
3. The impact of changes to the statutory compensation for permanent injury;
4. The high possibility that restricting the current Common Law entitlements will not reduce Insurance premiums or increase rehabilitation costs;
5. Flaws in the Government's analysis of the present Scheme's performance;
6. The impact of the proposed amendments on Rehabilitation; and
7. 5 steps to a better workers' compensation system.

1. Answer to Questions from the Consultation Documents

We note that the Consultation document has asked several questions. Some of these have been already been addressed in this Submission, however, for completeness we provide the following:

1. *Is it appropriate for the compensation for permanent impairment to be payable in respect of psychological injuries?*

Yes. It is appropriate for permanent impairment to be payable for psychological injuries. Psychological injuries impact on a person's ability to participate in the workforce and in our community. Persons who suffer psychological injury certainly should be compensated. These injuries are becoming more prevalent and workers' who suffer such injuries should not be discriminated against by not having a right to permanent impairment compensation.

2. *Is it appropriate to replace the timeline requirement for making a permanent impairment claim with a injury stabilization requirement?*

No. It is our contention that any such timelines set by legislation will be arbitrary and not reasonable. The question as to whether an impairment is permanent or not is a factual and or medical issue that should be determined by agreement between the worker and the insurer, and in the absence of such agreement by the Court.

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

No, we refer to our comments on page 10.

4. *Will the imposition of time frames around the determination of a workers' entitlement to compensation for permanent impairment assist workers' to receive timely compensation?*

No, we do not see any correlation between these two. A workers' injury may not stabilise such to become permanent for a number of years.

5. *Is the increase in statutory lumps from \$126,000.00 (single loss) to \$220,000.00 appropriate? If your answer is no, what would be appropriate?*

Yes. We accept that it is appropriate that the lump sum benefits are increased to \$220,000.00. We note that we have dealt with this earlier in this paper. We, however, do not support the view that such benefits should be increased if common law access is denied to the majority of injured workers'.

6. *Is the increase in the benefits payable for funeral costs from \$4,000.00 to \$9,000.00 appropriate?*

Yes, it is appropriate and equal to the Comcare Scheme.

7. *Is the increase in death benefits from \$189,000.00 to \$450,000.00 appropriate?*

Yes, it is appropriate and equal to the Comcare Scheme.

8. *Is the formula (WPI % x maximum lump sums) for 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.*

No. We do not believe that WPI approach is appropriate under the Act. This formula effectively means the only people who could achieve the maximum level are those who are the most seriously injured which would include paraplegic, quadriplegic and those with profound brain damage.

9. *Do the threshold 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 are the fair alternatives?*

No. As has been pointed out in this Submission we do not believe that these thresholds are reasonable. We rely on our comments on page 8.

10. *Will maintaining an unlimited common law damage environment for the Territory seriously injured workers' maintain the integrity of the Scheme?*

It is our position that unlimited common law damages can be maintained in the Territory for all persons who were injured at work in circumstances where there is negligence and not limited to any “seriously” injured workers’. There is no indication in this question as to what is defined as a “seriously injured worker”.

11. Will the use of compulsory pre-hearing settlement conference reduce unnecessary litigation and provide greater certainty for injured workers’?

Yes. We endorse any effort to better manage the court and claim process. This has been addressed elsewhere in this document.

12. Should parties be able to conduct compulsory pre-hearing settlement conference without a independent conciliator?

Yes. Many cases in the ACT are already resolved through informal settlement conferences that are arranged between the legal representative for the worker and the insurer.

13. Are additional dispute resolution measures required to assist in the timely resolution of disputes and reduction of unnecessary litigation?

Yes. We would again, however, encourage the Government to reduce the Scheme inefficiencies and better manage the court process as set out in paragraph 6 of this document. It is our case that all workers’ are entitled to be represented and any effort to impose a Scheme which makes it difficult for workers’ to be legally represented does not provide fairness to justice for those workers’.

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?

Yes. The ability of workers’ to redeem or commute their compensation benefits is important as the workers’ obtain certainty and finality in respect of their claims. It often assists in the rehabilitative process and is certainly cost effective from an administrative point of view in funding matters.

15. *What measures should be introduced to ensure reasonable legal costs in connection with workers' compensation claims/disputes and related action for damages?*

It is appropriate that in smaller common law claims (without legal complexity) that there be some statutory restriction placed on costs that can be recovered equally for the legal costs for both workers' and insurers.

16. *Is a 5% discount rate reasonable? If no, what would be reasonable?*

No. We do not believe that the current rate of 3% should be changed to 5%. No evidence or data has been provided as to why such an increase should be made and such a change reduces the entitlement of injured workers' with respect to their future economic loss, future medical expenses, and future care and support costs.

2. The impact of the proposed AMA thresholds on common law claims

There are significant deficiencies with regards to the application of the AMA thresholds in the ACT Scheme.

The impact of the 15% WPI threshold for claims related to physical injuries is as follows:

- 85% of injuries / claimants fall below 15% WPI threshold. For example, most claimants with vertebral fractures would be precluded from applying for common law damages.
- The 15 % threshold is not appropriate. It will affect claimants with serious injuries and does not take into account the specific employment requirements of injured persons.
- The proposed threshold does not take pain, suffering or continuing disability into account.
- It excludes workers' with serious injuries and long hospitalisation and multiple surgeries ultimately leading to the public impression of "insignificant" person injury.
- The higher threshold may lead to an increase in the number of negligent employers as the curb on negligent behaviour is diminished compared to the current regime. This is particularly so with psychological cases where "bullying and harassment" claims are now common.

The Law Society submission provides a number of case studies, which we draw to your attention. These case studies serve to illustrate the points above.

The impact of the 20% threshold for claims related to psychological injuries:

- Over 95% of injuries (claimants) will fall below 20% WPI for psychological injury.
- These changes will discriminate against workers' who suffer psychological injuries. The Bill as it stands discriminates against psychological injuries by solely focusing on physical injuries.
- Further, a consequence of the Bill is that in assessing WPI, a secondary psychological injury must be ignored and therefore not compensated. This is a significant concern as many people who suffer injury and have chronic pain will also often suffer depression and anxiety as a secondary injury.

Workers' Entitlement's:

- It is likely that the proposed amendments will be a Workers' Entitlement's concern as they greatly reduce the availability of damages for pain and suffering. In addition they may promote the unethical behaviour of those normally liable for such damages.
- Further, this draft Bill does not take into account the individual circumstances of individuals who are injured. For example, the impact of a particular injury differs across a myriad of employment situations. Thus, the earning capacity for some individuals would be more severely affected than others.
- Slater & Gordon believe that the ACT Government should seek independent legal advice about this matter prior to the introduction of the Bill and that this advice be made public.

Perverse deviation:

As previously discussed, Slater & Gordon believe that the ACT Government should reconsider the application of the AMA guidelines in the ACT Workers' Compensation scheme.

- The *Journal of the American Medical Association* describes the AMA guidelines as a sometimes inaccurate but nevertheless standardised tool used to convert medical information about permanent impairment into numerical values.
- The AMA guide was never intended to be used solely for the arbitration of WPI for workers' compensation matters. This has been recognised in various jurisdictions within the United States of America.
- Considerable controversy exists in the medical profession regarding the accuracy and usefulness of the AMA Guides. Studies have shown the AMA Guides have significant limitations in their ability to accurately measure impairment.¹
- The AMA guides do not provide a valid, reliable, evidence based system for rating for impairments.
- The AMA guides do not reflect an individual's actual loss of function and quality of life.

¹ Correlation between the Measures of Impairment, According to the Modified System of the American Medical Association. *The Journal of Bone and Joint Surgery*. Vol 80: 1034-42, 1998. 1041 ; Recommendations to Guide Revision on the Guides to the Evaluation of Permanent Impairment. *The Journal of the American Medical Association*. Vol. 283 No. 4: 519-523, 26 January 2000. 519.

- The AMA guidelines are not universally accepted as a system for measuring impairment and in fact are based on consensus rather than on scientific evidence. Although some States in the U.S. do rely on AMA WPI ratings, other states such as Utah have taken proactive steps to clarify problem areas that exist with the AMA guidelines and have established their own impairment guides.

Some examples of the inadequacy of the AMA guidelines follows:

*Example A*²

AMA Guides measure impairment to knee joints by Range of Motion (ROM), gait, muscle weakness, or sensory abnormalities. Furthermore impairment may be rated on surgical procedures such as meniscectomy, or by radiographic evidence of space narrowing which are all reasonable methods of determining impairment. However, many types of severe knee joint abnormalities are not rated by this system. For instance if an individual experiences a traumatic knee injury that causes a severe, deep, femoral condyle cartilage lesion that is well circumscribed, that injury cannot be rated according to joint space narrowing on radiographic findings. No provision has been made for ratings based on magnetic resonance imaging (MRI) or arthroscopic findings or cartilage lesions. If the lesion causes gait abnormalities or ROM defects then the impairment can be rated and the individual can receive disability compensation. However, this does not often occur and this type of injury can be quite variable and subject to interpretation.

AMA guides do not provide a valid, reliable, evidence-based system for rating of impairments. Some argue that the ratings do not reflect an individual's actual loss of function and quality of life.

California which has the largest state workers' compensation system has declined to use the AMA system largely due to the concerns that exist in the AMA Guidelines.

² Attached: (see Impairment Rating and Disability Determination, eMedicine @<http://emedicine.medscape.com/article/314195-overview>) (Attachment No 1)

*Example B*³

In the matter of *McLane Western Inc v Industrial Claim Appeals Office of State of Colorado No 99CA0473 – December 09, 1999*.

The use of the AMA was criticised in this matter for not taking into account an individual worker's abilities, education and earning capacity when calculating permanent impairment.

As such "a physical worker with limited abilities and no high school education might suffer a back injury identical to that suffered by a clerical worker with excellent abilities and a college degree. The resulting physical impairment may be identical. However, aside from any difference in the average weekly wage used to calculate the benefits, the impact on the earning capacity of the physical worker might be substantially greater because of more limited employment alternatives with the impairment.

The detrimental financial impact of the AMA Guides falls most greatly on those whose earning capacity is most compromised and those most in need of permanent disability benefits.

³ *McLane Western Inc v Industrial Claim Appeals Office of State of Colorado No 99CA0473 – December 09, 1999. (Attachment 2).*

3. The impact of changes to the statutory compensation for permanent injury

Slater & Gordon contend that there are ways that Government can achieve an appropriate balance in the system between court time, costs and payments. There are clear deficiencies with the proposed Medical panel, and the single and independent assessment of a worker's Personal injury. Slater & Gordon do, however, welcome the proposed changes to the maximum amounts set for Permanent Impairment and congratulate the ACT Government in making this decision.

The creation of a Permanent Impairment Assessment Medical Panel:

- Slater & Gordon contend that the Bill should allow the parties to agree on a level of applicable WPI without requiring an expensive formal assessment process.
- The Bill could provide for the Insurer and injured worker to garner medical evidence, and that evidence could be part of the injured workers' costs as defined in the proposed new s60(3)(b). The proposed medical panel will not allow for this option. The current s10(6) of the *Workers' Compensation Regulation 2002* requires medical evidence from all parties.
- The coverage of permanent injury was significantly expanded in 2002 with introduction for back, neck and pelvic injuries. At that time lump sum permanent impairment coverage was not expanded for other injuries as the Government was maintaining Common Law rights. There maybe merit to suggestion that the increase in permanent impairment will encourage workers' to this option rather than Common Law. There could be an election provision so that workers' can elect between receiving a lump sum amount under the statutory scheme or commencing a Common Law claim.

The flaws with the proposed Single, independent assessment of a worker's Person Injury:

- Workers' need to be able to exercise their right to seek a second opinion and the law needs to recognise that different opinions are possible and where they differ, that the court has a role in deciding. Imposing only one medical assessment infringes on a person's rights as it does not take into account the fact that medical opinion can differ as to the effect and consequences of an injury on a particular worker. It will almost become 'luck of the draw'.

- A single assessment can lack transparency and independence. The only check or balance of the position of the assessor is that they are subject only to peer review by another approved Medical Officer and not by review by a Court or Tribunal. Further, the medical assessor is not compelled to give evidence in any preceding matter in which the assessor was involved. This compromises transparency and unbiased opinion.

Maximum amounts set for Permanent Impairment:

- It is noted that s60 sets a maximum amount that can be paid for permanent impairment at \$220,000.00. This increase is welcome, however, it is noted that other jurisdictions have set a higher cap than what is currently proposed for the ACT. Death and funeral benefits certainly provide better compensation in respect of these benefits. The change of Death Benefits up to \$450,000.00 and Funeral Benefits to \$9,000.00 is also welcomed.

4. The high possibility that restricting the current Common Law entitlements will not necessarily reduce Insurance premiums or increase rehabilitation costs.

It is acknowledged that one of the objectives of the ACT Government with these amendments is to reduce insurance premiums and improve rehabilitation rates in the ACT. It is asserted however, that the Bill as it currently stands will not achieve this objective and that there is little evidence that has thus far been presented to support the need for premium reductions.

In addition, there is no evidence of an insurance crisis in the ACT. In fact, the Territory has a healthy competitive economy. Recently, the ACT in conjunction with WA, was the equal top jurisdiction in Australia in economic growth and economic activity.

- The current Bill will strip current benefits from the scheme and provides no guarantees that insurers will reduce their premiums.
- The NSW experience with Civil Liability Reform is such that the percentage reduction in benefits to injured persons did not flow through to a equivalent reduction in premiums. Instead a windfall situation was created for the insurers. It is likely that the same will follow in the ACT.
- Using the comparative premium rate chart, it is clear that the rates available in ACT as compared to other jurisdictions are 1% higher than NSW, NT and WA and 2% higher than TAS, VIC and QLD. This chart also shows that the ACT rates have been steadily decreasing over the 2003 to 2008 period, demonstrating that previous reforms in this area have been delivering lower premiums.
- As identified by the Office of Industrial Relations in 2009, ACT premiums fell from 3.95% in 2004-2005 to 2.23% in 2007-2008 a significant downturn trend. The 2009 Report also suggested that the ACT Insurance market is competitive, stable and profitable leading to premium rate reductions of 3-10% per annum over the previous 5 years.
- Slater & Gordon have been unable to obtain up-to-date data and therefore it is not possible to accurately predict whether this trend has continued since 2008.
- It is recommended that the ACT Government provide accurate comparative premium rate chart data to all stakeholders so that the issue of premium rates can discussed based on evidence.

- Slater & Gordon understand that the ACT Government is concerned that the current Scheme is too expensive for employers. We have attempted to determine the veracity of this argument, however, we have found no evidence that employers are leaving the ACT because the Scheme is too expensive. It is recommended that the ACT Government either provide evidence to support this assertion or that it conduct an inquiry to determine whether this is the case prior to the introduction of the current Bill.
- It is our view that one of the real issues in the ACT is under-insurance or no insurance. ‘Sham contracting’ is an issue well known to the ACT Government. Greater enforcement measures are one solution and these would be likely to increase the pool and reduce premiums without the need for a restrictive threshold. ‘Sham contracting’ is especially prevalent in the construction industry. Slater & Gordon, and indeed the union, can provide evidence of this in the ACT. For example we are aware of a case where an employer had 17 employees and only 1 employee was insured. This employer was simply relying on only one worker being injured at any given time.

The prevalence of cases such as these in the ACT means that the insurance pool is smaller and more pressure is put on the Default Insurance Fund and Insurers who must contribute depending on their share of the market. Anecdotal evidence indicates that there are thousands of sham contractors in the construction industry. For every 1,000 such contractors this represent a premium pool impact of not less than 8 million dollars or 5% of the total pool. A more responsive and responsible measure to reduce worker compensation premiums could be an increase in the investigative and prosecutorial resources of Work Cover. Slater & Gordon calls on the ACT Government to seriously consider the prevalence of sham contracting in the ACT and to review the powers, resources, and outcomes of Work Cover prior to the introduction of the Bill.

5. Flaws in the Government's analysis of the present Scheme's performance

There are a number of flaws present in the Government's analysis that could be impacting on the mechanisms through which it is seeking to amend the current Scheme.

- The ACT Government claims that statutory lump sum benefits available to injured workers' are among the lowest in the country. This, however, does not take into account workers' injured in circumstances where they are entitled to make a claim in Common Law. It also does not take into account that the incapacity payments provided in the ACT Scheme are better (and in fact the highest in Australia), with no step down after 2 years unlike most other jurisdictions.
- The Government claims that the current scheme provides the lowest lump sum benefits in Australia. This does not take into account the fact that in the ACT injured workers' can avail themselves of Common Law damages in cases of negligence and further does not take into account the superior incapacity benefits to workers' in the ACT.
- The ACT Government claims that 10% of injured worker claims account for 80% of total payments made to ACT injured workers'. This statement does not take into account the larger payments that would have been made in more serious cases. It also does not take into account medical expenses and incapacity payments. No data has been provided to show how the Government arrived at this assertion. In fact, one must question whether this means there is a problem with the existing system or not, noting that the Government is attempting to severely limit access to common law for injured persons in the ACT.
- The ACT Government claims that of the 80% of total payments made to ACT workers' – 57% is paid in legal provider fees, common law damages, settlements, straight redemptions and statutory lump sums. This is a meaningless statistic. Common Law damages, settlements and redemptions by their nature are predominantly made up of the lump sum purchase of a prospective right to future incapacity compensation entitlements.
- The ACT Government claims that 17.5% of annual ACT Scheme costs are paid in legal costs. Again, stakeholders have not been provided with data or evidence to support this assertion. That is, how much of the 17.5% relates to worker costs, Insurer costs, to disbursements such as medical reports, and on investigative fees and the like. In fact, the provided statistics do not demonstrate that there is any problem with the existing Scheme. It should also be noted that the 2006 ACT Government Review found that it was difficult to

identify individual components of costs within the Scheme. It is disappointing that now four years later, we are still not provided with any further data to assist in the analysis of Scheme costs.

- The ACT Government claims that 62% of Common Law claims are settled for less than \$100,000, suggesting prevalence for Common Law claims for low level injuries. This is clearly not the case. This does not take into account the number of Workers' Compensation redemptions with Common Law releases, even where Common Law rights were not considered by the worker. Again, this statistic is somewhat meaningless as it reflects the usual mix of workplace injuries in any Scheme. In other words, it is likely that the fewest claims are the most serious of injuries. If the Government is suggesting that costs in Common Law matters are disproportionate at times to the size of the settlement or judgement, then this can be dealt with by regulating costs. It is also noted that elderly workers' that is, those workers' who are coming to the end of the careers, would only be entitled to a relatively small claim for economic loss. This is reflected in the total damages they would receive, however, it does not reflect the nature or extent of the injury they sustained at work. It is unfair to say, therefore, in those cases that they have a low level injury on the basis that they could only recover a small amount (if any) for economic loss.
- The ACT Government argues that most settlements take 3 years on average without presenting any evidence on this issue. The ACT Government does concede that the time for resolution has decreased. The Government has failed to analyse the actual causes for the lapse of time including factors such as the Plaintiff's condition stabilising, disputes between the various Defendants and Third Parties and the fact the Scheme does not allow permanent impairment cases for claims to be settled before 2 years from the date of injury, unless leave of the court is granted. Further, there are a significantly large number of matters which are settled before hearings in both the ACT Magistrates Court and the ACT Supreme Court. Workers' Compensation callover and hearing lists have reduced significantly over the last 5 years and generally now most sittings are not full. An examination of the Workers' Compensation callover list dated 7 September 2010 reveals that statutory claims that do not settle prior to court hearings generally involve cross border or state of connection applications, more than one employer or insurer, or more than one injury. Compulsory settlement conferences are supported.
- Improvements can be made to the system, (which are discussed at number 7 below). The existing Scheme does demonstrate decreasing premiums, quicker resolution of claims and more out of court settlements than court claims. This is entirely consistent with

presentations made on behalf of the Government at an Accident Compensation Seminar in Melbourne in November 2009. However, there are measures that can be taken that will ensure that the Scheme can work better, be more cost effective and be more sustainable and viable.

6. The impact of the proposed amendments on Rehabilitation

Slater & Gordon welcome the ACT Government's continued commitment to rehabilitation and support its objective to make the system work better in this regard. The current Bill, however, does not meet this objective.

- It is contended by the Government that the introduction of this legislation will allow greater money to be made available for rehabilitation and will encourage workers' to return to work. There is nothing in the amendments nor any mechanism therein that supports this view.
- There has been no data or evidence provided to indicate that the current rehabilitation system in the ACT is not working or that ACT workers' who are injured in the work place are taking longer to return to work following injury than in any other jurisdiction. Further, there is no data to demonstrate that there is any impact on rehabilitation in cases where workers' have an entitlement to common law.
- Rehabilitation has been a compulsory component of the Workers' Compensation Act in the ACT since 2002. The experience over the last 8 years is that the rehabilitation cost in all Workers' Compensation Claims has dramatically increased the cost of each claim.
- It would appear that there is already sufficient funding for rehabilitation in the ACT and the current requirements for rehabilitation under the Workers' Compensation Act are adequately provided for. However, there is a need to better regulate rehabilitation providers to ensure better outcomes for workers' at reasonable costs.
- There has also been no analysis of the effectiveness of the reforms introduced in 2002.

7. Five steps to a better workers' compensation system

It is submitted that the ACT Workers' Compensation system can be greatly improved, and made more efficient and sustainable without taking away the rights to Common Law for most of the injured workers' in the ACT. Those steps are as follows:

1. Promote and support early / non-adversarial resolution

- 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)
- Introduction of pre-court election provision between lump sum and common law claims. Workers' will be required to choose between lump sum benefits under the statutory scheme and common law benefits damages

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 judgement period (Current delay from hearing to judgement 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

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:
 - Amending the worker definition to limit cover to PAYE workers’ only
 - Require all PAYG workers’ to take out workers’ compensation insurance in their own names (group B workers’)
 - Mandate that where group B workers’ (PAYG) perform greater than 80% of work 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.
 - Mandate that insurers are responsible for the management of premium reimbursement.

- 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 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

There have been arguments that the ACT should have thresholds as there are thresholds in all other jurisdictions. This is not a conclusion. The reason for this is:

- The ACT has a small population of about 350,000 people and is geographically very small.
- All other jurisdictions either have a much greater population or geographically much larger and therefore the pressures placed on their Workers' Compensation Schemes differ from that of the ACT.
- The ACT Scheme is one of the few Workers' Compensation Schemes that is completely privately underwritten by insurers. The Scheme is viable not requiring dramatic changes to the benefits of workers'.
- The ACT has proved in the past that it does not just follow a national trend and good examples of this is the passing of the Bill of Rights and the parting Industrial manslaughter laws.
- The ACT currently has a booming economy and is rated with Western Australia with as the top jurisdiction in Australia for economic growth and prosperity.

We believe that the Scheme does not need to be amended in the way suggested in the exposure draft of the *ACT Workers' Compensation Amendment Bill 2010*.

Thank you for the opportunity to provide this Submission and for engaging in a process of consultation with all stakeholders that have an interest in these matters.

Slater & Gordon look forward to being able to present this Submission and our ideas at meetings with ACT Government representatives over coming months. We recognise that these are complex issues and that it can take time for Governments to work through them to ensure an appropriately balanced Scheme for ACT workers'.

For this reason, we also ask that the Government delay the introduction of the Bills until early in 2012 to ensure that all stakeholders have the opportunity to present their submissions and for government to consider all the proposals.

Gerard Rees

30 November 2010