

CHIEF MINISTER'S DEPARTMENT



Workers Compensation Amendment Bill (EXPOSURE DRAFT) 2010

Consultation Arrangements and Guide

October 2010

FOREWORD

In 2009 the ACT Government introduced its first tranche of improvements to the private sector worker's compensation scheme (the ACT Scheme) focused on enhancing the compliance framework underpinning the *Workers Compensation Act 1951*, streamlining administrative requirements for business and restoring the Default Insurance Fund to its intended purpose.

The exposure draft *Workers Compensation Amendment Bill 2010* (the exposure draft Bill) continues the work begun in 2009 and is intended to achieve reasonable balance between the statutory benefits and protection provided to injured workers, affordability and accountability for employers and the level of regulation and scrutiny applied to third party service providers.

The exposure draft proposes an optimal framework for the sustained, efficient and effective operations of the ACT Scheme including the:

- adoption of a robust and established model of whole person impairment in place of a limited table of permanent loss;
- creation of a framework to manage the transition of claims from the statutory to the common law environments;
- increase of maximum lump sum, death and funeral benefits available under the statutory framework;
- enhancement of the existing dispute resolution provisions to ensure timely and cost effective resolution of disputes where possible;
- regulation of third party service providers via controls on fees and advertising.

A number of factors have guided the development of the exposure draft including the need to:

- improve the overall performance of the Scheme in terms of its affordability, efficiency and long term viability;
- reduce the potential for unnecessary litigation and create incentives for and mechanisms to facilitate timely resolution of disputes;
- improve the maximum statutory benefits payable to ACT workers in the event of death or permanent injury;
- create rigour around the remuneration of and advertising by legal service providers connected to the Scheme.

This consultation guide is an important tool for assisting the community to understand the purpose and primary provisions of the exposure draft Bill. However, it is also a means for the community to put forward its views in relation to the questions raised in this guide.

HOW TO MAKE A SUBMISSION

In formulating your submission you are encouraged to refer to the issues and questions that are raised in this guide. However submissions are not limited to the questions and comments on any aspect of the exposure draft Bill are most appreciated.

Submissions may be made in three ways:

1. Written submissions using the template

The attached template may assist in preparing your submission. It covers all major issues. You are welcome to answer all questions or just the parts that interest you.

2. Written submissions in any form

Please provide reasons or explanations in your submission to assist in understand the nature of your views. Again, you are welcome to express views on the entire exposure draft, or just parts.

All submissions will be made publicly available.

The closing date for submissions is close of business **30 November 2010**.

Submissions may be lodged by:

Email: oir@act.gov.au

Mail: Workers Compensation Bill: Consultation
Office of Industrial Relations
Chief Minister's Department
GPO Box 158
Canberra ACT 2601

Inquiries about the exposure draft can be made –

by email to oir@act.gov.au or by telephone on 6205 3095.

THE EXPOSURE DRAFT BILL

The ACT Scheme is a statutory framework created under the *Workers Compensation Act 1951* (the Act). It provides a safety net of benefits to workers who suffer an injury that arises 'out of, or in the course of' their employment (a compensable injury).

Workers who suffer a compensable injury have access to a range of statutory benefits including income support, the cost of medical and rehabilitative treatment and compensation for permanent injuries.

ACT private sector employers are obliged to obtain and maintain compulsory workers' compensation insurance coverage in respect of their employees - the premium paid for this insurance meeting the costs of the ACT Scheme. Where an employer defaults on these responsibilities, the injured worker's entitlements are met by the Default Insurance Fund.

The rights and benefits provided for by the Act Scheme intersect with the availability of damages at common law where the injured worker has a cause of action against a contributing third party (e.g. for negligence or breach of contract etc).

Whether a worker elects to remain within the statutory framework or moves into the damages environment, the ACT Scheme bears the cost of the assistance, compensation or damages provided to the worker. In all cases, it is the policy of insurance that responds to the claim, meaning that all claims impact upon the performance and costs of the ACT Scheme.

GOVERNMENT OBJECTIVES

Fundamentally, the ACT Scheme is an instrument of social welfare and industrial fairness – it ensures that Territory workers receive necessary care, rehabilitation and where appropriate, compensation, in the event of injury.

To operate effectively and meet its return to work and rehabilitative objectives, the ACT Scheme must provide for reasonable balance. Reasonable balance in terms of the statutory benefits 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.

As set out in the Explanatory Statement to the exposure draft Bill, the key purpose of the Bill is to address existing inefficiencies within the ACT Scheme and create robust, transparent and equitable frameworks around:

- the assessment and award of compensation for permanent impairment;
- resolution of claims for workers' compensation and related damages actions;
- transition of claims from the statutory to the common law environment;
- the cost of services provided by third parties connected to the Scheme; and
- advertising and marketing by legal service providers connected with the Scheme.

KEY PROPOSALS

Statutory compensation for permanent injury – a model of whole person impairment (WPI)

The exposure draft Bill proposes amendments to remove Schedule 1 to the Act and adopt a robust framework for the compensation of permanent impairment (as opposed to permanent loss) arising as a result of a compensable injury.

Key features of the proposed Framework include:

- creation of a Permanent Impairment Assessment Panel (the Panel), comprising independent medical specialists trained and approved in the use of the approved impairment guidelines;
- assessment of permanent impairment based on the *American Medical Association Guides to the Evaluation of Permanent Impairment* (4th and 5th Editions) and the NSW *WorkCover Guides for the Evaluation of Permanent Impairment* (1st Edition);¹
- creation of a streamlined process to obtain a single, independent assessment of a worker's possible permanent impairment; and
- determination of compensation benefits by Approved Insurers (or Self-insurers) within statutory timeframes and limits, based upon clear, independent medical evidence.

An enhanced framework for the resolution of disputes

The exposure draft Bill sets out a clear and robust framework for the use of alternative dispute resolution mechanisms as compulsory steps on the pathway to formal litigation (for a damages claim) or arbitration (for workers' compensation disputes).

Practically, the proposed framework would require parties to:

- participate in a compulsory settlement conference within 3 months of having filed an application for arbitration or having commenced an action for damages; and
- exchange mandatory final offers of settlement in connection with common law damages claims, prior to proceeding to hearing.

The compulsory settlement conference could be conducted simply between the parties to the claim and their legal representatives or with the assistance of an independent conciliator where the parties so wish.

The proposals in effect codify the existing practices of some segments of the Canberra legal community, who use informal mechanisms to seek early resolution of their clients' disputes where appropriate.

¹ These guidelines were approved for use by the ACT Government in 2005.

Adoption of a common law threshold

The ACT Scheme is a return to work scheme that provides a rigorous framework of rehabilitation, care and compensation to assist injured worker's overcome the impact of an injury and make a full return to employment and life.

The exposure draft Bill proposes amendments to rebalance the ACT Scheme and introduce a threshold that injured workers will need to satisfy in order to pursue common law damages as follows:

- For claims related to physical injuries – 15% or more WPI;
- For claims related to psychological injuries – 20% or more WPI.

Workers who satisfy the threshold will be entitled to uncapped damages as awarded by the Court.

Those workers whose degree of WPI is less than the relevant threshold, will remain within the statutory framework and continue to receive the rehabilitation, return to work and benefit support which it facilitates. Significantly, these workers will remain entitled to lump sum compensation.

Enhanced statutory benefits

In recognition of the changes to common law, the exposure draft Bill proposes substantial increases in specific statutory benefits as follows:

- Maximum lump sum payable – increase from \$126,600 to \$220,000;
- Maximum death benefits – increase from \$150,000 to \$450,000; and
- Maximum funeral benefits – increase from \$4,000 to \$9,000.

These maximum benefits are available to injured workers under the statutory framework, meaning that they can be claimed and paid without the expense or delay of having to commence Court related action.

For instance, a worker who is assessed as having a 6% WPI would be entitled to statutory lump sum compensation of \$13,200 – payable within 10 days of their employer's insurer receiving notice of their declared assessment by an approved medical assessor.

Regulation of service providers – costs

The Act currently allows for the making of regulations with respect to the maximum fees that may be required in relation to third party service providers connected with the ACT Scheme (e.g. Lawyers, medical professionals, rehabilitation service providers etc).

The exposure draft Bill proposes minor amendments to allow the Minister to determine (by notifiable instrument) the maximum expenses and fees that may be charged by or paid to legal service providers in connection with the Scheme.

Moreover, the exposure draft Bill clarifies that any costs so prescribed by the Minister cannot be circumvented through the use of a costs agreement or any other tool

entered into between an individual and a service provider. Similarly, the amendments make clear that in making an order for costs, the relevant Court must abide by the limitations set down by the Government.

These amendments are intended to provide for the early resolution of issues and disputes by agreement, while creating disincentives for excessive servicing, unnecessary delay and needless litigation.

Regulation of service providers – advertising

The exposure draft Bill introduces amendments to prohibit the advertising of legal services in relation to a claim for compensation under the Act or a related damages claim unless the advertising complies with the relevant provisions of the Regulations.

Legal service providers will continue to be able to advertise their skill or experience within the personal injury environment and the availability of specialists to assist injured workers to understand their entitlements.

SPECIFIC QUESTIONS FOR CONSULTATION

COMPENSATION FOR PERMANENT IMPAIRMENT

Part 4.4 of the exposure draft Bill establishes the new framework to apply for the consideration, assessment and determination of a worker's entitlement to compensation for permanent impairment arising from a compensable injury.

As indicated above, the major changes proposed by this part relate to:

- the removal of Schedule 1 and the adoption of a whole person impairment framework;
- creation of a medical panel to undertake permanent impairment assessments;
- provision for peer review of medical assessments to ensure accuracy and fairness;
- removal of the need for multiple assessments by multiple doctors – allowing for one, independent and binding assessment;
- the imposition of set timeframes for the determination, by an insurer, of a worker's entitlement to compensation for permanent impairment.

However, the exposure draft Bill also proposes amendments allow injured workers to pursue a claim for compensation for permanent impairment as soon as their injury has reached maximum medical improvement and resulted in a permanent impairment. Presently, the Act requires workers to obtain the leave of the Court to pursue these claims earlier than 2 years after the date of injury.

Question 1	Is it appropriate for compensation for permanent impairment to be payable in respect of psychological injuries?
Question 2	Is it appropriate to replace the timeline requirements for making a permanent impairment claim with a injury stabilized requirement?
Question 3	Does the medical panel and its peer review requirements provide appropriate protection to the clinical integrity of permanent impairment assessments?
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?

INCREASED STATUTORY BENEFITS

Increases to statutory lump sums for permanent impairment, death and funeral expenses are proposed by the exposure draft Bill.

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| Question 5 | Is the increase in statutory lumps from \$126,000 (single loss) to \$220,000 appropriate? If your answer is no, what would be appropriate? |
| Question 6 | 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? |
| Question 7 | Is the increase in death benefits from \$189,000 to \$450,000 appropriate? If your answer is no, what would be appropriate? |
| Question 8 | 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. |

COMMON LAW

As outlined above, the exposure draft Bill introduces a threshold to access common law based on upon a worker's whole person impairment. Once above the threshold, workers will have access to unlimited and uncapped damages as awarded by the Court.

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| Question 9 | 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 are the fair alternatives? |
| Question 10 | Will maintaining an unlimited common law damages environment for the Territory's seriously injured workers maintain the integrity of the Scheme? |

ALTERNATIVE DISPUTE RESOLUTION

The exposure draft Bill imposes mandatory dispute resolution procedures that must be undertaken in order for a matter to proceed to arbitration or hearing before a Court.

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| Question 11 | Will the use of compulsory pre-hearing settlement conference reduce unnecessary litigation and provide greater certainty for injured workers? |
| Question 12 | Should parties be able to conduct compulsory pre-hearing settlement |

conferences without an independent conciliator?

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

COMMUTATIONS

The exposure draft Bill does not propose to change the existing arrangements that allow workers' to redeem their compensation benefits, receive lump sum pay outs and exit the ACT Scheme.

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?

LEGAL COSTS

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

DISCOUNT RATE

The exposure draft Bill proposes introduction of a discount rate, applied to awards of future economic loss, of 5%. This rate is consistent with that proposed by the *Road Transport (Third-party Insurance) Amendment Bill 2010*.

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

Workers Compensation Amendment Bill 2010: Exposure Draft

SUBMISSION

**All submissions will be made publicly available.
Submissions must be received by close of business 30 November 2010**

Email: oir@act.gov.au

Mail: Workers' Compensation
Office of Industrial Relations
Chief Minister's Department
GPO Box 158
Canberra ACT 2601

Name:

Organisation:

Postal Address:

Contact (phone/email):

OPENING COMMENTS:

RESPONSE TO SPECIFIC QUESTIONS:

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Question 2	Is it appropriate to replace the timeline requirements for making a permanent impairment claim with a injury stabilized requirement?
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Is the increase in death benefits from \$189,000 to \$450,000 appropriate? If your answer is no, what would be appropriate?

Question 8

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

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