

UNIONSACT SUBMISSION ON WORKERS
COMPENSATION OCTOBER 2010



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INTRODUCTION

UnionsACT welcomes the opportunity to make a submission with relation to the current review of the ACT Workers Compensation System.

UnionsACT is the peak body of ACT trade unions and represents 24 affiliated unions who cover 32,000 members in the ACT. Given the complexity of workers' compensation. The UnionsACT submission will attempt to address issues raised in the recent consultation and the legislation but reserves its right to make further submissions as it may see fit beyond the deadline should matters arise.

A fundamental objective of any workers compensation systems needs to be an equitable, fair and just system of income protection; access to medical treatment for workers with work related injuries or illnesses; and a mechanism to aid injured workers back to work or given a form of lump sum payment if that is more appropriate to their circumstances.

Unions have a long and proud history of having been involved in lobbying Governments across Australia, of all political persuasions, concerning the rights of our members in particular, and the rights of all workers generally and in particular in regard to Occupational Health & Safety and Workers Compensation legislation. Our affiliates were actively involved in the early development of the ACT Worker's Compensation scheme and the drafting of the legislation.

This submission raises a number of concerns about the current proposed changes to the Workers Compensation scheme in the ACT and also recommends some changes that would improve the scheme and make it more affordable and efficient. I have canvassed feedback from all of our affiliates both here in the ACT and interstate. A list of key recommendations is outlined below;

Recommendations

- 1. The ACT government should set up a non litigious compulsory disputes panel to arbitrate disputed claims in relation to permanent injury claims.**
- 2. Where a claims dispute exists between the Insurer and a worker the status quo of weekly payments and medical/like expenses should remain until the dispute is resolved.**
- 3. The ACT scheme should implement a strategy for prompt data collection of injury management data**
- 5. Reduce the number of rehabilitation providers and develop a preferred provider panel or rotating pool of providers with clear performance criteria for achieving better return to work outcomes. All providers should meet the new national**

standards developed for rehabilitation providers. Providers should be accredited before being allowed in the pool. There are 2 accredited providers in NSW that should be approached to come into the ACT ie Worker's Health Centre and MEND.

6. Require all assessments of serious injury be undertaken within 72 hours by rehabilitation providers.

7. The ACT scheme should explore the options for growth particularly bringing in ACT government employees and small businesses who are excluded from the Commonwealth scheme. Those employers who are currently avoiding coverage under the ACT scheme or are underinsuring should also be pursued more vigorously by an expanded inspection team.

8. Employers who have recorded low injury rates over the life of the scheme should be surveyed to identify their best practice tools or alternatively impose a 2% non- insured deductible premium to employers who implement pro-active workplace safety initiatives.

9. ACT WorkCover needs to be better resourced and trained to check workers compensation compliance in general inspections and is not compromised in relation to investigations of injury of ACT Government employees.

10. Stronger OH&S compliance regulation would reduce injury rates and therefore reduce premium rates. The Workers compensation inspectors should share data with the ACT Leave Authority in relation to registration of employers and employees.

11. Employers should be encouraged to bear the cost of a minor injury that results in less than a week off work. The injury would still need to be reported to the insurer but a financial claim would not be made.

12. Consideration should be made of expanding the general inspectorate function of Workcover , It has been supported by all members of the Default Insurance Fund to support such increased resourcing through allocating some of their funds. Why has this not been properly investigated when industry supports it?

13. Set a minimum fee schedule for all common law claims.

14. Ensure that provisional liability access is being complied with by employers. Injured workers should not be required to chase their payments whilst recovering from their injury.

15. Workers compensation declarations should name the employees being covered in addition to the wages declared. In the case of the construction industry declarations should

be more frequent eg every 3 months to capture all the workers employed at various stages of a job/project

16. The workers compensation claim form should be simplified so that anyone can complete the first stage of the process .

17. The ACT Government should appoint an Industrial Magistrate who has the experience to deal with workers compensation matters in the ACT. Someone in this role would help to expedite claims, and would assist in regulating the environment to the scheme's benefit. This idea has support from most stakeholders and would effect long term cultural change.

A number of these recommendations were made in our original submission to the government in 2008. It should be noted also that a number of our earlier suggestions have been taken up since 2008 to make improvements to the scheme and we congratulate the government on being proactive in this regard.

Rationale

Any proposed changes to the scheme will be supported on a 'no loss of benefit to workers' basis by the affiliates of UnionsACT. Where it has not been demonstrated that there will be no loss then we will not be supportive of the change.

No data or evidence has been provided by the Government of the need for reform to the common law access to the scheme, nor the benefit to the Workers Compensation system of imposing a 15% threshold. The presentation given by Messrs Brighton, O'Neill and Centenera drew conclusions which are inconsistent with the presentation of Brighton of 22.11.09 which relies on substantially the same information/ powerpoint presentation. By way of example it was asserted that employers are leaving the ACT because of WC premiums. No evidence of this has been provided, nor the reasons behind such an occurrence if it is accepted to be the case. The same claims are made in NSW so where are these employers fleeing to? The real problem to the scheme is under-insurance ie not paying for all the people who work for an employer. This practice is chronic in the building industry. Another key problem is that the large supermarket retailers record the largest number of injuries and continue to be the driver to increased premiums in their industry.

We have a number of case studies of deliberate non compliance as evidenced in the following examples;

- A construction employer with 25 employees who held a workers compensation policy for one worker for a premium of \$1!
- A bricklayer who was contracted to an ACT Government school project who had 18 employees whom he had inducted onto the job but was only insured for four people under a \$70,000 policy !

These examples clearly demonstrate a deliberate effort by employers and insurers to avoid compliance with the legislation. Neither of these examples were uncovered by the inspection team, but were discovered by the union who covered these workers. The other most cogent example of rorting in the scheme was demonstrated by the employers who undertook the failed concrete pour on the GDE which resulted in the bridge collapse. Half of that workforce were not insured at all or underinsured.

We can conclude from these examples and others that workers are not rorting the scheme but a significant number of employers are and the insurance companies have aided some to do so by deliberately allowing ridiculous levels of coverage to go through. We have raised these concerns with the Insurers and they have responded well to our advice in this regard.

The assertion by the Government that the ACT operates a low benefit/ high cost scheme is incorrect. It is our opinion that on the whole the ACT scheme provides the best weekly benefits and medical expenses of any WC scheme in Australia. The availability of common law further augments the benefits available the injured workers and is the most beneficial common law scheme in Australia for injured workers. On the government's own presentation premiums have fallen consistently since 2005/2006. The reason, if accepted, that ACT premiums are higher than other jurisdictions is due to the fact that the other schemes provide substantially lesser benefits to workers. The major noose around the scheme's neck is that not all employers are contributing to the pool and that there is some deliberate draining of the scheme by some unethical law firms.

The proposed common law threshold of 15% will exclude and disenfranchise three quarters of presently entitled injured workers from their common law rights absolutely. This proposal is strongly opposed by all affiliates of UnionsACT and we can see no benefit to our members or other injured workers in this recommendation. Firstly it is the experience of our affiliates in NSW is that there was a reduction by 85% in common law claims as a result of the introduction of the threshold. We also suspect that the introduction of a 20% threshold for psychological injuries will result in up to 95% of claims being knocked out. There is no justification to limit claims to such an extent! It is a very blunt instrument to deal with cost issues where the injured worker is the party being made to bear the cost and all of the pain. We are unsure why a threshold has become the main driver in the whole review and why injured workers are the sole bearer of this responsibility. This was not the main item raised with unions when we agreed to be part of the Review process and we fail to agree that it is now the threshold issue upon which we must agree to secure fairness in the system.

Another concern for affiliates is that the threshold system only refers to permanent impairment and it would not allow for common law damages for someone who may have suffered a serious injury but may have rehabilitated themselves back to better health which may take several years. Such a system may in fact be a disincentive for injured workers to be proactive in their rehabilitation.

A threshold system requires a significant regime of processing, monitoring and compliance in terms of human and other resources. Where will this work be undertaken and by whom?

It is our view that all stakeholders in the scheme should share the burden of responsibility and pain caused by any changes to the scheme. This is not evident from the key planks of the reforms recommended. In fact injured workers appear to be coping the biggest share of the burden.

The formal/mandatory dispute resolution process at a suitably early stage is agreed in principle, and is consistent with the practices of **most** plaintiffs and defendants in the ACT. Proper resourcing as recommended by the Supreme Court Working Group and case management in the Supreme and Magistrates Courts may help to expedite hearings and greater efficiency.

The reforms suggested have not addressed, nor allowed to take effect, the increase in jurisdiction of the Magistrates Court from \$50,000.00 to \$100,000 which may reduce legal costs and expedite the listing of matters. We would like to know what the likely impact of this change will be.

In consultation with my affiliates and our legal representatives we would like to recommend a four-step plan of action that will improve the working of the ACT Workers Compensation Scheme. Addressing the following issues should achieve the objectives that we see as the most critical impediments to the scheme at present for our members.

1. Promote and support early / non-adversarial resolution
 - Compulsory conference before proceedings
 - Mandatory final offers before proceedings in common law matters with costs consequences
 - Medical panel assessments of permanent injury compensation claims with defined time frames
2. Reduce scheme inefficiencies
 - Formal case management measures overseen by industrial magistrate
 - Specialist industrial magistrate to hear workers compensation list and common law industrial accident claims in the Magistrates' Court
 - Introduction of pre-court election provision between lump sum and common law claims
3. Manage court delays
 - Shorten hearing delays in Supreme Court by management of court resource
 - Appoint an industrial magistrate
 - Formal case management process in Supreme Court
 - Imposition of guidelines for acceptable reserved judgment period
4. Minimise cross border difficulties

- Tighten 3 tier test with better definition of base for employment purposes
- Tighten test for 3rd tier by replacing “principal place of business” with “place of hire or engagement” test.

In this latter section we address the questions posed in the Exposure Draft.

Questions from the Consultation Document

Question 1 **Is it appropriate for 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. The AMA guidelines include psychological injury. It is our view that they are as compensable as physical injuries. Given the issue

Question 2 **Is it appropriate to replace the timeline requirements for making a permanent impairment claim with a injury stabilized requirement?**

We believe that timelines set by legislation is not useful or fair to victims The question as to whether an impairment is permanent or not is a factual or medical issue and the permanency should be a matter agreed between the parties after expert advice or be the decision of a court in the absence of that agreement.

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

Not in our view. Where the panel is initiated by the insurer it may conduct an assessment without relevant medical evidence from the affected worker. The decision by any such panel appears to be final and the worker has no appeal rights which we view as unfair. We feel that this type of panel in the form described does not provide adequate 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?**

No we feel that imposing time frames around the determination of permanent impairment will not assist on the question of liability with respect to weekly benefits of compensation or to medical, hospital and treatment expenses.

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?**

We commend the ACT Government on this change which is overdue in our view. However we have a less favourable view if common law access is

	removed to achieve it.
Question 6	<p>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?</p> <p>Yes it is much more realistic.</p>
Question 7	<p>Is the increase in death benefits from \$189,000 to \$450,000 appropriate? If your answer is no, what would be appropriate?</p> <p>UnionsACT commends the government on this amendment.</p>
Question 8	<p>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.</p> <p>No we don't believe that the whole person impairment approach is necessarily appropriate under the Act. This would effectively mean that the only people who would achieve this level would be paraplegics, quadraplegics and those with profound brain damage. Our colleagues from NSW have shared this as the likely outcome as a result of the changes of a similar nature to the NSW scheme.</p>
Question 9	<p>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?</p> <p>We do not agree with the proposition that the imposition of thresholds provides a "reasonable balance between the accessibility of common law for serious injured workers and the affordability of the scheme for policy holders." The evidence has not been presented to us that the scheme is unviable with common law access intact.</p>
Question 10	<p>Will maintaining an unlimited common law damages environment for the Territory's seriously injured workers maintain the integrity of the Scheme?</p> <p>ACT Government has not defined what you mean by seriously injured worker. We feel that the present unlimited common law damages regime which currently operates will not undermine the integrity of the scheme and we fell that it is a "bridge too far" The accessibility to common law damages has been critical for many of our members from a range of different industries including community services, cleaning, construction and transport to achieving fair outcomes for injured workers who may not be able to continue working in their chosen occupation following an accident.</p>
Question 11	Will the use of compulsory pre-hearing settlement conference reduce

unnecessary litigation and provide greater certainty for injured workers?

It is our advice from our affiliates that the majority of Plaintiffs and defendants already utilize pre-hearing settlement conferences on an informal basis. We do not oppose the introduction of compulsory pre-hearing conferences but we hope that it does in fact do what you hope it will do in reducing unnecessary litigations.

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

Yes but we note that the imposition of an independent conciliator is likely to increase costs rather than lessen costs for the scheme.

Question 13 Should parties be able to conduct compulsory pre-hearing settlement conferences without an independent conciliator?

Perhaps but we feel that money would be better spent improving access to court sanctioned mediations as they once occurred when Justice Connelly was in charge of this area. We would not recommend to our members that workers undertake these processes without legal representation.

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

Same as above.

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?

Yes. The ability of workers to redeem their compensation benefits is an important ability for workers to obtain certainty and finality in respect of their compensation claims. We believe it is important to the recovery process that the ability of workers to commute their workers compensation rights will also assist in ending the process and the victim getting the most manageable outcome, especially for those who end up with a permanent injury. We believe this would also be more cost effective from an administrative point of view in relation to long term claims.

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

We support any actions that help to reduce workers legal costs in taking a compensation claim through the process. We do emphasise however that it is very important to us that all our members have access to proper legal representation with respect to workers compensation and common law rights and a costing schedule of appropriate rates is desirable. However we do note that this regime must also ensure that insurance companies do not drive the process by prolonging their cases by their own legal representatives ie it has to work both ways, workers should not be the only ones monitored in this process.

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

We can see no argument have been made as to why the current 3% discount rate should not remain. Any increase in this rate will effectively reduce the entitlement of injured workers with respect to their future economic loss, future medical expenses and future caring support costs. We have seen no actuarial evidence that would support the introduction of a 5% discount rate.

In conclusion we think that the general thrust of the changes you propose are positive but we differ markedly over the common law issue and the need or benefit of setting a threshold. Several affiliates have indicated to me that they will also lodge their own submissions but all have been involved in the drafting of this submission.

I would also seek the opportunity to speak to this submission at some future point post 30 November.

In order to achieve the best outcome for all we urge the government to delay the tabling of this Bill till February 2010 to enable a negotiated outcome that will not disadvantage our members to be achieved.

We look forward to being involved in any further consultations.

Kim Sattler
Secretary, UnionsACT
2010

26 November