

AUSTRALIAN CAPITAL TERRITORY GOVERNMENT SUBMISSION: *INQUIRY INTO ASPECTS OF AUSTRALIAN WORKERS COMPENSATION*

1. Overview

1.1 Workers in the ACT are covered by two different workers' compensation schemes. Private sector employees are covered by the *Workers Compensation Act 1951 (ACT)*, while people employed by the ACT Government remain part of the federal Government scheme, which is established under the *Safety, Rehabilitation and Compensation Act 1988 (Cth)*.

1.2 The private sector scheme is privately underwritten and, in general, market forces set premium rates and the form of the insurance policy.

1.3 This submission only provides information about the ACT's private sector scheme. It is anticipated that the Committee will receive information about the Commonwealth Government scheme directly from Comcare.

2. Recent legislative changes to the ACT Workers Compensation Scheme

2.1 The ACT Legislative Assembly passed the *Workers Compensation Amendment Act 2001* on 28 August 2001. This Act significantly amended the *Workers Compensation Act 1951* (as outlined above, this Act applies to non-Government employees in the ACT). These amendments and complementary amendments to regulations commenced operation on 1 July 2002.

2.2 **Attachment A** to this submission contains a list of the key provisions of the new scheme.

3. The incidence and costs of fraudulent claims and fraudulent conduct by employees and employers, and any structural factors that may encourage such behaviour.

3.1 The ACT Government has no evidence that workers compensation fraud is widespread. If there is a belief in the community that workers compensation fraud is widespread, this may simply be due to a lack of awareness and understanding of the workers' compensation system, and sensationalist reporting in the media.

3.2 The nature and structure of compensation schemes, the adversarial approach often taken by parties to a compensation claim and an increasingly litigious attitude in the community make it very difficult to distinguish fraud with criminal intent from what simply amounts to each party asserting their legal rights in the system in which they find themselves operating. In combination with the lack of practical experience and understanding of the processes involved in compensation claims, it is common for

a claimant to be perceived as exhibiting behaviours that can be interpreted as fraudulent.

3.3 The greatest structural incentive to fraudulent claims is a scheme that is not tailored to rehabilitate a worker, but one that substitutes lump sum payments for a genuine injury management program. Such a scheme quickly creates an adversarial culture, setting employee, employer, insurer and doctor in opposition to each other. Adversarial schemes associate liability and responsibility with a cash settlement rather than a meaningful plan to assist injured people to return to work.

3.4 The ACT Government has no evidence that actual fraud is occurring on a significant scale, as opposed to the perception of fraud that an adversarial system engenders. In the event that the Commonwealth, or other jurisdictions, believe that the incidence of fraud warrants further investigation, it is suggested that the Commonwealth develop a database of such alleged activity, to which the ACT would be pleased to contribute information where there are proven cases of fraud.

- 4. *The methods used and costs incurred by workers compensation schemes to detect and eliminate:***
- (a) *Fraudulent claims***
 - (b) *The failure of employers to pay the required workers compensation premiums or otherwise fail to comply with their obligations.***

4.1 The new ACT workers' compensation scheme has a coherent approach to enforcing compliance. An effective model of compliance encourages compliant behaviours, and creates a clear disincentive for inappropriate behaviour. The new compliance model is designed to ensure that any person or entity engaging in, or intending to engage in, inappropriate behaviour faces a high risk that their activities will be detected and addressed. In addition, ACT approved insurers have their own 'data mining' mechanisms for the detection of patterns of claims that could be fraudulent.

4.2 The ACT has sought to eliminate the two types of fraud outlined in the terms of reference through legislative amendment.

- (a) Potentially fraudulent claim for an injury.

4.3 Section 118 of the *Workers Compensation Act 1951* provides that the medical certificate accompanying a claim for weekly compensation must comply with the method of assessment stipulated by the Regulations. Regulation 9 of the *Workers Compensation Regulations 2002* specifies that the injured worker's medical assessment must use 'evidence-based methodology'.

4.4 Consistent, evidence-based injury management exposes fraudulent claims. Traditionally, claimants that were suspected of being fraudulent were put under surveillance, sent to a plethora of specialists and their claims were assessed for legal options. This approach drives the claim towards litigation, and eventually to court or a legal settlement. On the other hand, a consistent injury management program inevitably exposes individuals who are intentionally pretending to be injured.

4.5 The four categories of aetiology, diagnosis, prognosis, and medical treatment provide a structure for all medical assessments. These categories, in combination with the requirement for treating doctors to reference clinically-relevant research and guidelines, aim to provide the insurer's injury management program with essential medical information to make informed decisions.

4.6 The Regulations require medical assessments for workers compensation to be conducted using evidence-based methodology. The record of a doctor's assessment must reference relevant research, if the research is known to the doctor. Referencing enables the insurer and the rehabilitation provider to see the reasons for the doctor's assessment.

4.7 Regulation 5 of the Workers Compensation Regulations 2002 allows the Minister to approve the development of medical guides to assist doctors in their assessments. Draft guides are not in place yet, but these are currently being developed by the ACT's Workers Compensation Advisory Committee.

4.8 It is necessary for doctors to consider the particular investigations of a person (clinical examination, X-rays, blood tests etc) and any known clinically-relevant research, or guidelines, when conducting a medical assessment. When recording the assessment, the doctor must reference the research or guideline.

4.9 Regulation 23 requires rehabilitation providers to keep detailed, written records about cases referred to them by insurers. The requirements are consistent with the intention that personal injury plans should be tailored to the particular injured worker. The records should accurately reflect the deliberations leading to the personal injury plan, the specifications of the plan itself and anything that led to a change in the plan.

4.10 This ensures that each plan is a precise record of the injury management agreement. This tailored record provides insurers, rehabilitation providers and employees with the detail needed to reduce ambiguity and misunderstandings. Should a dispute arise, this information will provide the Conciliator, or the Magistrate, with a precise record of the agreement, and what led to the agreement.

4.11 Under the Act, rehabilitation providers are charged with considering the medical information provided by the doctor, any clinically-relevant research that affects the rehabilitation of the person, and best practice timelines of rehabilitation. This is information shared between the doctor, the injury management program and the rehabilitation provider. The rehabilitation provider must discuss these matters with the doctor and insurer, as well as the employer and the employee.

4.12 Section 213 of the *Workers Compensation Act 1951* provides that where a claim is made that the claimant knows to be false, this is an offence subject to a maximum fine of 50 penalty units, imprisonment for 6 months or both. A penalty unit is currently set at \$100 for an individual and \$500 for a company.

- (b) Employers failing to declare remuneration/wages and numbers of employees for the purposes of evading or minimising an insurance premium.

4.13 Sections 156 and 157 of the *Workers Compensation Act 1951* require employers to provide insurers with a certificate from a registered auditor stating the total wages paid in the relevant period, and a statutory declaration setting out the total wages paid, the number of paid and unpaid workers and the approximate amount of time that each individual worked in the period of time.

4.14 Regulation 66 of the *Workers Compensation Regulations 2002* provides that an employer who under-reports their wages bill by at least 10% must pay the insurer double the difference between the premium paid and the premium that the employer would have paid had the employer correctly declared their true wages bill.

4.15 The effect of these sections is to provide a check against employers who may be tempted to distort their actual wages bill to achieve a lower premium.

5. ***Factors that lead to different safety records and claims profiles from industry to industry, and the adequacy, appropriateness and practicability of rehabilitation programs and their benefits.***

5.1 There are several factors influencing the subject of different safety records and claims profiles. Arguably, the most pressing matter to be addressed is the introduction of a nationally consistent system of coding for all injuries, irrespective of whether those injuries are work-related or not.

5.2 Also to be considered are particular features of various industries, such as how intrinsically dangerous the nature of some work is relative to other work, levels of trade union membership (data demonstrate that there tend to be lower injury rates where there is active union membership in the workplace) and employers' and employees' commitment to and understanding of the principles of occupational health and safety. It is very important that new employees are made aware of their rights and obligations under the relevant occupational health and safety legislation, and that training in occupational health and safety is available on a regular basis for all employees.

5.3 An additional consideration should be promoting the active incorporation of occupational health and safety into management practises for all business, regardless of their size.

5.4 Integral to the philosophy underpinning the new ACT workers' compensation scheme is the principle of injury management at the earliest possible opportunity. The Act is structured to foster a culture of early treatment, rehabilitation and return to work of injured workers. The Act prescribes specific, short time-frames for the reporting of injuries by employees to employers, and by employers to insurers.

5.5 The new Act recognises that all parties have a role to play in minimising the impact of injury on the capacity of the injured worker to re-enter the labour market, and to gain and keep meaningful employment.

5.6 All parties are obliged to participate in the rehabilitation of the injured worker. If an injured worker is unable to return to their original employment, the parties are obliged to assist in broader occupational rehabilitation. The Act allows for arrangements to be entered into that will encourage the employment of an injured worker by providing financial incentives to a new employer in relation to insurance liabilities.

5.7 Insurers and rehabilitation specialists are directly and indirectly regulated. Rehabilitation providers are approved for no more than three years at a time.

5.8 With injury assessments guided by evidence-based medicine, swift response times for injury management programs, commitment and responsibility from all parties, and a minimisation of adversarial conduct, the often underestimated psychological consequences of a compensable injury are minimised, facilitating a more constructive use of resources.

5.9 The net result for the worker, employer, insurer and the community is a positive improvement in opportunity and productivity.

Australian Capital Territory Workers Compensation Act 1951

Key features of the legislation and scheme are:

- Privately underwritten scheme, by ACT Government approved insurers
- Dictionary of definitions a part of the Act
- Plain English language used
- Increased emphasis on rights and obligations of all parties
- Clear explanation of who is and is not a worker under the Act, including contractors and labour hire employees
- Definition of what is an injury, including a test of substantial contribution attached to injuries caused by disease
- Employment-related journey claims commence and conclude at the boundary of the claimants home and by the most direct route
- Employers obliged to keep an injury register
- Medical referees appointed by the Minister
- Employers required to have a compulsory insurance policy
- Insurance policies are not prescribed, allowing innovation and diversity
- Flexible insurance products able to be matched to individual company needs
- Insurers can collect double the difference between the premium paid and the premium that would have been paid but for the employer under-reporting wages
- The Nominal Insurer is entitled to recover an amount equal to triple the payable premiums from employers who do not have a compulsory insurance policy
- Substantial focus on rehabilitation programs
- Strict time limits (48 hours) on an employer to notify an injury to their insurer
- Strict time limits (72 hours once notified of an injury) on an insurer to initiate three point contact between worker, the employer and the treating doctor
- Insurers required to establish and maintain an injury management program
- Insurers required to establish a personal injury plan for any worker with a significant injury (defined as being incapacitated for work for a continuous period of seven days)
- Individual workers obliged to take part and co-operate in the personal injury plan
- Individual workers obliged to make all reasonable efforts to return to work with the pre-injury employer as soon as possible, considering the injury.
- Significant increases in penalties to encourage scheme compliance
- Increases in benefits to workers who are injured
- Continued access to common law entitlements
- Approval of Rehabilitation Providers, Insurers and Brokers operating in the scheme
- *Workers Compensation (Acts of Terrorism) Amendment Act 2002* establishes a temporary reinsurance fund in the event of a terrorist attack. The purpose of the fund is to ensure that workers injured as a result of a terrorist act are able to receive their entitlements under the *Workers Compensation Act 1951*.