

The Secretary  
Standing Committee on Employment and Workplace Relations  
House of Representatives  
Parliament House  
CANBERRA ACT 2600

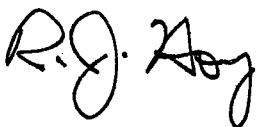
### **Inquiry into Aspects of Workers' Compensation**

I refer to the Hansard record of the Committee's hearings on the above Inquiry.

On 25 September 2002, the Department took on notice two questions from the Deputy Chair of the Committee, Mr Arch Bevis, MP (Hansard page 17 and 22). I now provide the Department's responses to these questions, numbered 1 and 2 respectively. I apologise for the delay in responding.

The Department has also provided a response to a question raised by Mr Bevis on 26 November 2002 during a hearing involving the CPSU about the application of compensation payments to employees whose AWAs may have expired (Hansard page 368).

The Department is prepared to provide any further assistance the Committee may wish in respect of these matters or any other matters relating to its Inquiry.



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Workplace Relations Legal and Policy Group  
23 January 2003

**House of Representatives  
Standing Committee on Employment and Workplace Relations  
Reference: Aspects of workers' compensation**

**Question on Notice - Department of Employment and Workplace Relations**

**Question No.1**

At page 17 of the *Hansard* of 25 September 2002, Mr Bevis asked:

How a range of those differences (differences in the operation of the various workers' compensation schemes) have a direct linkage to produce the problem of fraud”.

**Answer**

The Department of Employment and Workplace Relations (DEWR) submission to the Inquiry expressed the view that “The legislative framework underpinning the schemes is complex and inconsistent across the jurisdictions. This creates opportunities and potential confusion that could (*emphasis added*) generate avenues for fraud and/or non-compliance by both employers and employees” (page i Executive Summary). In evidence to the Inquiry, DEWR reiterated this view.

In reaching this view, DEWR recognised that some acts or omissions by employers/employees or service providers which are unintentional could be considered a fraudulent act by a scheme regulator or insurer. The DEWR submission expands on this point in paragraphs 28 – 32 pages 8 and 9.

At pages 11 and 12 of its submission, DEWR gave examples of the inconsistency across the schemes which might generate fraudulent and/or non-compliance activity by employers. Firstly, DEWR identified the complexity of setting remuneration for purposes of establishing premiums. The submission provided at Attachment B, the basis on which each jurisdiction establishes remuneration.

It may assist the Committee if the complexity surrounding the establishment of remuneration is presented in a clearer manner. At Attachment A to this response, DEWR has used material prepared by a commercial insurer. It is a listing of the definition of wages for the calculation of premiums and levies across the eight State and Territory schemes. This listing identifies significant differences across the jurisdictions that can only lead to confusion and potential non-compliance. While this list is accurate as at October 2001, DEWR understands no major changes have occurred with the exception of NSW. That State recently included superannuation payments as part of wages in the calculation of premiums.

The second area related to the uncertainty as to coverage for the purpose of workers' compensation and the legislative complexity and differences across the schemes.

In **Box 2** on page 11 of the DEWR submission examples were set out which would allow workers' compensation coverage in one jurisdiction but not another, or in one situation but not another. These examples of inconsistency in the legislative framework of the States'

workers' compensation schemes demonstrate, in DEWR's view, areas of potential confusion that could lead to fraud and/or non compliance.

DEWR notes the submission and evidence presented to the Committee by the Media Entertainment and Arts Alliance (MEAA) also draws attention to the uncertainty relating to coverage across the different schemes. As the MEAA submission observes "until such time as state and federal workers compensation legislation is harmonised, workers will continue to face circumstances where, through no fault of their own nor, often, of their employer, (*emphasis added*) they are not covered by a workers' compensation policy".

On page 12 of the DEWR submission a NSW Government report was identified which provided further support for the DEWR view. The report, *Workers' Compensation Insurance Compliance Green Paper*, September 2001, at page 9 noted that non-compliance by employers may be contributed to by the exclusion of deemed workers from wage declaration on the basis they are contractors (this is, in part, possible because of the uncertainty surrounding who is a 'deemed worker' [*emphasis added*]).

At paragraph 69 of the DEWR submission reference was made to the difficulties that can arise in those schemes that allow access to common law for work-related injuries. Inconsistencies between jurisdictions may mean that employees in those States which allow access to common law may be encouraged or advantaged by making false or exaggerated claims regarding work injuries. This would be less likely in those jurisdiction where there is no or only limited access to common law.

For example, an employee who is injured at work may return successfully to work in the same position that they were injured in even though they are left with a residual permanent impairment from the injury. In Queensland for example such an employee may have a right to pursue a common law claim in respect of the relevant work related injury if negligence was involved. In another jurisdiction such common law actions may be precluded altogether, such as in South Australia, while under the Commonwealth workers' compensation legislation only very restricted common law damages is available.

Given the scope and amount of damages available in a common law action by an employee under the Queensland scheme, including damages for future economic loss, arguably there is an increased scope, potential and incentive for an employee to falsify or exaggerate their residual disabilities resulting from the injury in this example. Such claims may often be made a number of years after the incident which caused the injury and call into question the employee's ability and continued capacity to perform the duties involved in their position, even though they may have been assessed after the incident and rehabilitation as safe and suitable to return to that position. This situation creates a legal minefield for employers in relation to competing employment, discrimination and occupational health and safety obligations to the employee. The same position could apply under any of the common law schemes.

However under the Commonwealth scheme, given the limited scope of common law claims i.e. they are restricted to non-economic loss damages only up to a maximum amount of \$110,000, there is less incentive for an employee to exaggerate or falsify their residual disability as part of their common law claim, particularly in respect of claims which go to their ongoing capacity to perform duties involved in their employment.



# Definition of Wages

For the calculation of premiums and levies

## Comparison of Workers Compensation Schemes

The information is provided as a guide only and is subject to change by various workers' Compensation government authorities. It is accurate as at October 2001.

DESCRIPTION	NSW	WA	TAS	NT	VIC	ACT	SA	QLD
Annual & Public Holiday inc Loadings	Y	Y	Y	Y	Y	Y	Y	Y
Board & Lodging	Y	N	Y	Y	Y	Y	Y	Y
Bonuses	Y	Y	Y	Y	Y	Y	Y	Y
Car Allowance	N	Y	N	N	Y	N	Y	N
Clothing Allowance	N	Y	N	N	Y	N	Y	N
Commission	Y	Y	Y	Y	Y	Y	Y	Y
Company Car	Y	N	Y	N	Y	Y	Y/N	N
Company House	Y	N	Y	N	Y	Y	Y/N	N
Construction Allowance	Y	Y	Y	Y	Y	Y	Y	Y
Directors Fees	N	Y	Y	Yx	Y	N	Y	N
Payment to Working Directors	Y	Y	Y	Yx	Y	Y	Y	N
Dirt Money	Y	Y	Y	Y	Y	Y	Y	Y
Distant Work Money	Y	Y	N	Y	Y	Y	Y	N
Early Retirement Benefits	N	N	N	N	Y	N	Y/N	N
Entertainment Allowance	N	Y	N	Y	Y	N	Y	N
Ex Gratia Payments	N	N	N	N	Y	N	Y/N	AILE
Fares & Travelling Time	N	N	Y	N	Y	N	Y	Y
Fringe Benefits (quantifiable)	Y	Y	Y	Y	Y	Y	Y	Y
Height Money	Y	Y	Y	Y	Y	Y	Y	Y
Housing Loans	N	N	N	N	Y	N	Y	Y
Laundry Allowance	N	Y	Y	Y	Y	N	Y	Y
Living Away from Home Allowance	N	Y	Y/N	Y	Y	N	Y	N
Long Service Leave	N	Y	N	Y	Y	N	Y	Y
Lump Sum, in lieu of Holiday/Sick Leave	Y	Y	Y	N	Y	Y	Y	N
Meal Allowance	N	Y	Y	N	Y	N	Y	N
Over Award Payments	Y	Y	Y	Y	Y	Y	Y	Y
Overtime Payments	Y	Y	Y	Y	Y	Y	Y	Y
Payments in Lieu of Notice	N	N	N	Y	Y	N	Y	Y
Penalty Rates	Y	Y	Y	Y	Y	Y	Y	Y
Redundancy Payments	N	N	N	N	N	N	N	N
Reimbursement of expenses incurred	N	N	N	N	N	N	N	N
Retrenchment Payments	N	N	N	N	N	N	N	N
Salary	Y	Y	Y	Y	Y	Y	Y	Y
Severance Payments	N	N	N	N	N	N	N	N
Shift Allowance	Y	Y	Y	Y	Y	Y	Y	Y
Sick Leave	Y	Y	Y	Y	Y	Y	Y	Y
Site Allowance	Y	Y	Y	Y	Y	Y	Y	Y
Staff Discounts	N	N	N	N	AFBT	N	N	N
Superannuation Payments	N	N	Y*/N	N	Y	N	Y	Y/N
Tool Allowance	N	Y	N	Y	Y	N	Y	N
Travelling Allowance	AILE	Y	N	N	Y	AILE	Y	N
Termination Payments	N	N	N	N	N	N	N	N
Workers Compensation Payments	N	N	N	N	N	N	N	N
Third Party Remuneration ( School fees)	Y	N	Y	N	Y	Y	Y	Y

Key: N: Non-assessable Y: Assessable AILE: Assessable in legally enforced AFBT: Assessable if FBT applies  
Y/N: Depends on Circumstances. Please check with underwriter or relevant authority  
\* If salary sacrifice from 1/7/98 x Only if cover requested

## Question No 2

At page 22 of the *Hansard* of 25 September 2002, Mr Bevis asked:

For details on MOUs between the jurisdictions that seek to address workers injured while working in another jurisdiction.

### Answer

DEWR has not been able to obtain from the jurisdictions any details of what the MOUs cover and which jurisdictions have them in place, although we are aware that NSW and Queensland do have such an MOU.

The relevance of the MOUs may, however, no longer be an issue. We understand that NSW, Victoria and Queensland have reached agreement on legislative provisions that seek to resolve cross-border jurisdictional issues concerning entitlement to, and insurance against liability for, statutory workers' compensation for workers who work in more than one State.

On 28 November 2002, the *Workcover Queensland Amendment Act 2002* was passed. The cross-border provisions will commence on 1 July 2003.

On 11 December 2002, the *Workers Compensation Legislation Amendment Act 2002 (NSW)* was passed. The cross-border schedule will commence on Proclamation.

The legislation passed in New South Wales and Queensland is identical and provides that:

- statutory workers' compensation will only be payable where employment is relevantly connected with that State (the 'home' jurisdiction); and
- connection is determined on the basis of:
  - (a) where the worker usually works (considering the worker's history with the employer, but excluding any temporary arrangements of less than six months);
  - (b) in the absence of (a), where the worker is usually based for employment purposes; or
  - (c) failing (a) and (b), the location of the employer's principal place of business.
- Once a 'home' jurisdiction is established, the compensation payable shall be as prescribed in that jurisdiction only.
- If no 'home' jurisdiction is established, the default 'State of connection' is where the injury is sustained provided the worker has no other statutory right to workers' compensation in a place outside Australia. This provision is necessary to ensure that there are no gaps in coverage for Australian workers. It will however preclude an overseas worker obtaining workers' compensation in Australia where he or she has entitlements in another country.
- An employer who insures their workers' compensation liability based on a reasonable belief that that State is the 'home' jurisdiction will be shielded from any liability for being uninsured in the actual State of connection. This provides certainty for employers.
- There is mutual recognition of judicial decisions about a worker's State of connection.

- Common law choice of law rules are overridden — the applicable common law for personal injury claims will be the law of the State in which statutory compensation is payable for that injury (disregarding statutory exclusions or limitations).

It is understood all other States and Territories, with the exception of Western Australia, have agreed in-principle to consider mirror legislation in the next parliamentary year. Western Australia is seeking further legal opinion. The States and Territories have also agreed to finalise draft administrative arrangements for public comment - including common scenarios illustrating some of the outstanding issues (for example, the tests for determining where a worker usually works or is based). The consultation process will be through the Heads of Workers Compensation Authorities.

### Question No 3

At page 368 of the *Hansard* of 26 November 2002, Mr Bevis:

Indicated that this (how do Comcare base the injured employee rate of pay if their AWA term has expired) is something that he will need to ask Comcare and the department about.

(On 17 December 2002, the Committee secretariat asked the Department to provide a response on the issue Mr Bevis raised.)

#### Answer

AWAs are written agreements between individual employers and individual employees, dealing with matters pertaining to the relationship between an employer and an employee. The emphasis is on the parties reaching their own agreements about employment issues at the workplace, including rates of remuneration.

In the case of retired former employees, the opportunities for agreement making through AWAs are not available. An amendment to the *Safety, Rehabilitation and Compensation Act 1988* in 2001 has addressed this issue for former employees by providing for the updating of 'normal weekly earnings' on which compensation is based by a prescribed index. The Safety, Rehabilitation and Compensation Amendment Regulations 2002 prescribe the ABS Wage Cost Index, Australia - total hourly rates of pay excluding bonuses/all Australia/all industries/all occupations - for this purpose.

In the case of a current employee covered by an AWA, who is unable to work following a compensable injury, the employee's compensation benefits would continue to reflect the provisions of the AWA including any adjustments to normal weekly earnings that may be prescribed in the agreement. An AWA that has reached its nominal expiry date continues to operate until such time as it is replaced by a new agreement or terminated.

Where an AWA has reached its nominal expiry date and there is a continuing employment relationship, the employer and the employee may negotiate a new AWA. The fact that the employee is in receipt of workers' compensation benefits is not a barrier to the negotiation of a new agreement. Alternatively, the employer and the employee may terminate the AWA by written agreement or in the manner provided for in the AWA or the AIRC may, on application by either party, terminate the AWA if it considers that it is not contrary to the public interest to do so. Where an AWA is terminated, an employee would revert to being covered by any relevant certified agreement and/or award according to their terms.

An employee would therefore continue to receive workers' compensation benefits following the nominal expiry date of an AWA. The workers' compensation benefits paid would reflect the individual circumstances of the employee and the relevant instrument governing their employment, including any new agreements that may be negotiated. Since this issue was raised by the Committee, Comcare has clarified the position by issuing a revised jurisdictional policy advice, a copy of which is at Attachment A.

330/4/1008

## Jurisdictional Policy Advice No. 2003/02

### Normal Weekly Earnings in a Changed Remuneration Environment

#### Background

1. On 15 October 2001 Comcare issued Jurisdictional Policy Advice (JPA) No 2001/16 on this subject. A copy of that advice is attached.
2. Comcare has recently received advice that the terms of JPA No 2001/16, as they relate to expiry of Australian Workplace Agreements (AWAs) or certified agreements, are not strictly consistent with the provisions of the *Workplace Relations Act 1996*. This is because AWAs remain in force after they reach their nominal expiry date. The following policy advice therefore replaces the relevant provisions of JPA No 2001/16

#### Policy approach

3. Variations in NWE for employees covered by AWAs or certified agreements which have reached their nominal expiry date should be managed under the following conditions.

##### *Renegotiation of AWA*

- i) The option of negotiating a replacement AWA with the injured employee remains available.

##### *Reversion to rate in certified agreement where AWA is terminated*

- ii) Where an employee's AWA reaches its nominal expiry date and no new AWA is negotiated the provisions of the existing AWA, including salary rate, continue to apply. Alternatively, the employer and employee may agree to terminate it or the Australian Industrial Relations Commission (AIRC) may terminate it on application by either party if it is not contrary to the public interest to do so. If the parties or the AIRC terminate the AWA, then the employer will need to determine whether the employee is covered by a certified agreement.



- a) Where there is a remuneration arrangement for an equivalent "class of employees" in the agency's certified agreement, the employee's NWE is based on the salary available under the provisions of that agreement (as advised to the determining authority by the agency).
- b) Where there is no equivalent "class of employees" no adjustment of NWE is available unless a new AWA is negotiated.

*Provision for adjustment of remuneration after nominal expiry date or renegotiation*

- iii) Where an employee's certified agreement passes its nominal expiry date, NWE is adjusted in accordance with any provisions in the agreement for continued adjustment of remuneration.
4. The policy approach to other issues dealt with in JPA 2001/16 remains unchanged.
  5. Any issues relevant to this policy advice may be discussed with the Compensation and Injury Management Policy Group on 1300 366 979

SRC Act Policy and Support

Comcare

January 2003