

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

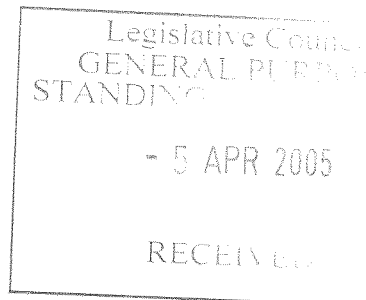
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Date Received: 05/04/2005

Subject:

Summary

30 March, 2005

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Dear Stephen,

RE: Personal Injury Compensation Legislation Inquiry

Unions NSW welcome this opportunity to respond to the Legislative Council's Inquiry into Personal Injury Compensation Legislation conducted by the General Purpose Standing Committee No1.

Unions NSW is aware that a number of our affiliated unions will also be presenting their own oral and written submissions to this Inquiry and will therefore cover the particular issues and concerns that are relevant to their industries.

Please find enclosed Unions NSW Submission Paper and attached appendices.

If you require further clarification or information please do not hesitate to contact me on 9286 1657 or 0408 931 899.

Yours faithfully,


Mary Yaager
OHS AND WORKERS COMPENSATION OFFICER



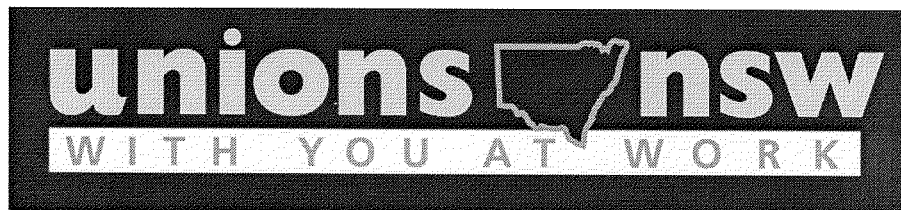
SUBMISSION

To

GENERAL PURPOSE STANDING COMMITTEE

No. 1

LEGISLATIVE COUNCIL



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1. EXECUTIVE SUMMARY - RECOMMENDATIONS

Recommendation 1

That seriously injured employees be given access to common law entitlements consistent with the provisions of the Civil Liability Act (NSW).

Recommendation 2

That the Industrial Relations Commission of NSW be given jurisdiction to hear and determine employee's entitlements to statutory benefits.

Recommendation 3

That the Industrial Relations Commission of New South Wales be appointed to arbitrate the question of appropriate legal costs to be payable to the legal representatives of the parties appearing in the proceedings currently before the Workers Compensation Commission or the Industrial Relations Commission of New South Wales in the event that recommendation two is adopted.

Recommendation 4

Persons who have sustained an injury arising out of a motor vehicle accident have access to damages consistent with the provisions of the Civil Liability Act (NSW).

Recommendation 5

The current guidelines for commutations should be reviewed. The Government should allow the Workplace Injury Management & OHS Council to make recommendations on new guidelines.

2. INTRODUCTION

Unions NSW (formerly the Labor Council of New South Wales) represents approximately 750,000 union members throughout New South Wales.

Unions NSW welcomes this opportunity to make oral and written submissions to this Inquiry on behalf of all our affiliated unions. Unions NSW is aware that a number of unions will be presenting their own oral and written submissions to this Inquiry and will therefore cover the particular issues and concerns that are relevant to their industry.

Unions NSW are of the view that particular reforms to the Workers Compensation Scheme have been beneficial to injured workers such as the new provisions for Provisional Liability and the acceptance and early payment of claims. However other changes appear to have had a detrimental effect and these highlighted in the following submission.

Unions NSW submission provides a broad approach to the terms of reference. Unions NSW understand that injured employees have been substantially disadvantaged by the retrospective amendments made to the Workers Compensation Act in 2001.

Unions NSW and individual unions would greatly appreciate the opportunity to present to the Inquiry individual case studies and personal accounts of injured employees. The purpose of the case studies is to highlight how the retrospective changes to the Workers Compensation System have disadvantaged injured employees.

Unions NSW have been advised that the changes have not only had an adverse impact on injured employees in high risk industries such as construction, there are also implications for other employees who work in other sectors such as finance, health, rural & emergency services.

Unions NSW welcome the opportunity for unions to present a number of case studies from a variety of industries to demonstrate the impact of these changes on their members.

3. GOVERNMENT TO REVIEW LEVEL OF BENEFITS AVAILABLE IN THE SCHEME

Unions NSW have been advised by the Minister for Industrial Relations, the Hon John Della Bosca, that there will be a review conducted in relation to the level of benefits available within the NSW WorkCover Scheme.

Unions NSW look forward to participating in this review.

4. WORKERS COMPENSATION/COMMON LAW SYSTEM

- At present there are significant problems in respect of injured employees accessing statutory rights (weekly payments of compensation, medical expenses and lump sums for impairment) and common law damages. There are very few, if any cases since the retrospective changes to the Workers Compensation Act 2001
- The amendments of 2001 abolished the Workers' Compensation Court forcing employees to have their matters determined by the Workers Compensation Commission. It has been reported to Unions NSW by their legal representatives that injured employees are not receiving a fair hearing or fair and appropriate entitlements through the Commission. Furthermore, the view by employee representatives who appear in the Workers Compensation Commission is that the Arbitrators have no or little experience in the Workers Compensation system
- The 2001 amendments have effectively abolished common law damages for injured employees in New South Wales
- The present gateways for seriously injured employees to access damages are so severe that it is now almost impossible for injured employees to sue for damages
- This has resulted in seriously injured employees being put on weekly payments of compensation (often no better than social security payments) which by no means compensate them for their loss of wages, let alone other heads of damage such as pain and suffering, medical expenses and nursing care.

5. PROBLEMS FOR INJURED EMPLOYEES ACCESSING COMMON LAW

ENTITLEMENTS

- At present only employees who have obtained a certificate of not less than fifteen percent whole of person impairment can access common law damages
- Experience has shown that this threshold has effectively wiped out more than ninety-five percent of valid claims for seriously injured employees accessing common law damages
- The application of the AMA Guidelines for the evaluation of permanent impairment together with the Workers Compensation Guidelines for their application, have resulted in a draconian and unfair system for assessment of whole person impairment. WorkCover NSW has established a Medical Advisory Committee to oversee the application of the guidelines and to address any inconsistencies or anomalies. Eminent Doctors who are highly regarded in their profession and are represented on this committee and have advised WorkCover NSW that the guidelines for assessing permanent impairment to the spine are not sufficient for adequately compensating people with severe back injuries who are unable to return to their pre-injury profession, such as nurses and ambulance officers. Therefore, the assessment of spinal injuries requires an urgent review.

GENERAL DAMAGES/NON ECONOMIC LOSS

As will be seen in the case examples referred to later, employees with serious injuries which effectively render them incapacitated for their previous employment for the remainder of their working life do not go anywhere near obtaining the fifteen percent whole person impairment assessment.

PAST AND FUTURE MEDICAL EXPENSES

- At present under the 2001 legislation if a worker satisfies the fifteen percent threshold and brings their claim for damages they are given only economic loss but precluded from incorporating in the award any allowance for future medical treatment or nursing or domestic assistance.
- This is a grossly unfair system. When an employee does obtain damages they are not allowed claim ongoing medical expenses against the

statutory scheme. In other words he is being punished for bringing his claim for economic loss. This must be remedied.

- It is recommended that if an employee satisfies the Court that they have sustained a serious injury and has an entitlement for damages then the Court would allow them their past and future out of pocket expenses/medical expenses as part of their damages award.

ECONOMIC LOSS

Under the present Workers Compensation Legislation a worker who does satisfy the fifteen percent threshold cannot claim economic loss past the age of sixty-five. This is simply unacceptable having regard to the fact that all employees are being urged by both Federal and State governments to work past the age of sixty-five. It is not uncommon for employees to have an expectation to work until at least the age of seventy or seventy-five.

The restriction on claiming wages past the age of sixty-five for seriously injured employees should be removed.

JURISDICTION

All common law damages would continue to be assessed by the District Court of New South Wales in its civil jurisdiction. It is thought that this jurisdiction is the appropriate venue as it has judges who are experienced in assessment of damages in common law matters

6. STATUTORY BENEFITS UNDER THE WORKERS COMPENSATION/SYSTEM - LUMP SUM FOR PERMANENT IMPAIRMENT

- The present system of whole of person impairment in order to access lump sums should be substituted for a return to the previous Table of Maims as provided by Section 66/67.
- The new Table of Maims should incorporate an allowance for psychological injury in addition to physical impairments. The psychological injury must not be assessed in accordance with the PURS scale but rather standardised assessments of impairment.
- It is appropriate all loss of functions and/or impairments should be aggregated in order to arrive at a total figure assessment.

7. ACCESS TO STATUTORY SCHEMES

It is recommended that the Workers Compensation jurisdiction which presently has jurisdiction over statutory benefits (that is weekly payments, medical expenses and lump sum benefits) be transferred to the Industrial Relations Commission of New South Wales.

8. MOTOR ACCIDENTS ACT

- Motor accidents affect all employees in New South Wales to some degree. Motor accidents incorporate journeys to and from work, and injuries that may have been sustained in a motor vehicle accidents whilst in the course of employment
- Just as importantly a train or bus accident is deemed to be a motor accident thus employees who commute to work on public transport are caught by the drastic provisions of the Motor Accidents Act Compensation Act 1999.
- At present persons injured as a result of motor vehicle accidents do not receive money for pain and suffering unless they sustain a greater than "ten percent whole person impairment". Experience has now shown that this is an impossible threshold to achieve. Some ninety-five percent or more of injured people do not receive compensation for pain and suffering. Serious injuries such as catastrophic back injuries, neck injuries, orthopaedic injuries and psychological injuries do not go anywhere near achieving the greater than ten percent threshold.
- The Motor Accident Compensation Act 1999 has been carefully designed to really wipe out people's entitlements for pain and suffering.
- It is also recommended that in respect of the Motor Accidents Act, that as with industrial accidents a person's entitlement to damages for pain and suffering should be assessed in accordance with the Civil Liability Act.

9. CIVIL LIABILITY ACT 2001

- The Civil Liability Act was introduced by the present Government in 2001 and trumpeted as being an appropriate response to the concerns of the Government and the insurance industry over the burgeoning common law system.
- The Civil Liability Act places severe restrictions on injured persons obtaining awards for the following heads of damage
 - i. General Damages/Pain and Suffering
 - ii. Past and Future economic loss
 - iii. Past and Future gratuitous care
 - iv. Superannuation entitlements
- It has been recommended in the body of this submission that if the Civil Liability Act is what has been purported to be by the present Government then injured employees should also have access to benefits under this scheme
- Reasons why employees would benefit by having their claims assessed under the Civil Liability Act
- General damages are assessed in accordance with a sliding scale. Employees with minor injuries or assessments by a Court of less than fifteen percent of a most serious case receive nothing for pain and suffering
- Employees who are assessed as being between fifteen and thirty-three percent of a most serious case are awarded money for pain and suffering on a sliding scale. There are severe restrictions in relation to the person's entitlements for non economic loss/pain and suffering, however they are not as draconian and not as irrational as the present system under the Workers Compensation Legislation
- Similarly past and future economic loss should be assessed in accordance with the Civil Liability Act. The Civil Liability Act provides significant restrictions on the ability of an injured person to claim damages and requires strict proof that the loss either past or future would have occurred but for the accident
- There are no thresholds as to whole of person impairment in order to assess a person's entitlement to economic loss
- Under the present regime a person may sustain a modest whole of person impairment but may effectively wipe out their earning capacity under the present Workers Compensation Legislation and it is simply bad luck for

the worker as they would have no entitlement to bring a claim for economic loss

- Past and future gratuitous care and nursing assistance. Under the Civil Liability Act injured persons are not entitled to be compensated for past or future gratuitous care unless such care has been provided for not less than six hours for not less than six months. This protects the defendant from having to fund gratuitous care which is paid in cases of only modest injury

10. COMMUTATIONS

Under the current Workers Compensation scheme the guidelines for commutation are far too restrictive and need to be reviewed. To the knowledge of Unions NSW there has not been any commutations under the new system, further, the self-insurers have requested the Government to review the current guidelines and allow self-insurers to commute. A number of self-insurers have experienced a significant increase in their claims cost as a consequence of not being able to commute claims. Therefore commutations should be viewed as being beneficial to both the employer and the injured employee. It is recommended that the guidelines for commutations be reviewed.

11. ACCESS TO STATUTORY SCHEMES

It is essential that employers and employees in the New South Wales Workers Compensation System have access to appropriate and professional advice in relation to Workers Compensation, in addition employers and employees should also have access to adequate representation. Otherwise there is a manifest of inequality of bargaining power to the detriment of NSW working people. There is criticism about the current arrangements in relation to injured employees obtaining advice and affiliates have indicated to Unions NSW that a number of employees are not receiving the appropriate advice or adequate representation under the current system. Therefore there is a need to review the current cost structure in relation to obtaining professional advice or representation.