

**Submission  
No 270**

## **INQUIRY INTO NSW WORKERS COMPENSATION SCHEME**

**Name:** Mr William McNally

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**INQUIRY INTO THE NEW SOUTH WALES WORKERS'**  
**COMPENSATION SCHEME BY JOINT SELECT COMMITTEE.**

**SUBMISSIONS BY WILLIAM GRANT MCNALLY.**

I have had over 50 years experience as a lawyer practicing in Industrial and Employment Law and am an accredited specialist in that area of the law. I felt that it may be useful to draw the attention of the members of the Joint Select Committee on the NSW Workers' Compensation Scheme to a piece of history.

Mr Justice Sheehy in *Dispute: Building Trades, re Accident Pay* 1971 AR 241; AILR REP 325; 26 IIB 1217 by award provided for makeup pay to full award rates up to a maximum of 26 weeks for injured employees who were receiving workers' compensation payments.

This scheme survived jurisdictional challenges in the Supreme Court in *Ex Parte Master Builders Assn of NSW; Re Industrial Commission* [1971] AILR Rep 424 AILR Rep 611, 686; 26 IIB 2380, 2622 and merit appeals to the Full Bench of the Industrial Commission.

Within 12 months the principle had become an accepted part of industrial jurisprudence and "accident pay clauses" were introduced into the majority of awards. An example of such a clause taken from the Clothing Trade (State) Award is Attachment A.

In 1977 the Hon FJ Walker (then Attorney General) introduced the *Workers' Compensation (Rates) Amendment Bill*. It introduced for the first time in legislation the

principal that injured workers would be paid workers' compensation at their current award rate for the first 26 weeks of incapacity. The rationale was that employers were already paying premiums for accident pay by way of make-up award rates. In effect, the legislation shifted the burden of the accident pay from the employer to the insurer and later to WorkCover.

Following the enactment of the Bill, Accident Pay clauses were removed from most awards as the *Workers Compensation Act* provided identical entitlements as those provided by award in relation to the first 26 weeks of incapacity.

If that entitlement is to be now reduced, we may well ask whether history will repeat itself and Accident Pay clauses will be reinserted into awards and enterprise agreements with a consequential transit of liability to compensate for workplace injury being transferred away from WorkCover and back to the employer.

In Western Australia where an inadequate workers compensation scheme exists and there are no journey provisions and the total weekly entitlements are capped, a practice is accelerating of inserting into enterprise agreements "Income Protection Clauses" such as the clause found in the Van Oord MUA Enterprise Agreement which is in these terms:

**45. INCOME PROTECTION INSURANCE**

- 45.1.** The Union shall maintain an Income Protection Insurance (Sickness and Accident) Policy (hereinafter referred to as "the Policy") for all employees covered by this Agreement.
- 45.2.** The Employer shall pay premiums for the Policy by way of contributions to **Protect** at the rate of 2% of payroll pro rata for the time employed on the gross base (i.e. overtime and allowances are excluded) salary level for each MUA classification for the applicable Group Vessel indicated in this Agreement. The figure of 2% is inclusive of stamp duty and GST. The insurer will manage all claims and payouts.

45.3. The premiums for the Policy will be collected and administered by *Protect*.

Dated 17<sup>th</sup> May 2012

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W G McNally

## ATTACHMENT A

### *48. Accident Pay*

*48.1 An employer shall pay and an employee shall be entitled to receive accident pay in accordance with this clause.*

*48.2 Definitions - For the purposes of this clause and subject to the terms thereof the words hereunder shall bear the respective definitions set out hereunder:*

*48.2.1 Workers' Compensation Act - The Workers' Compensation Acts applicable in New South Wales are the Workers' Compensation Act 1987 as amended from time to time, and the Workplace Injury Management and Workers Compensation Act 1998 as amended from time to time.*

*48.2.2 Injury - Injury shall be given the same meaning and application as applying under the respective Workers' Compensation Acts. No injury occurring at the place of employment shall result in the application of accident pay unless an entitlement exists under such Acts .*

### *48.2.3 Accident Pay -*

*(i) Total Incapacity - In the case of an employee who is or is deemed to be totally incapacitated within the meaning of the Workers Compensation Acts means a weekly payment of an amount representing the difference between, on one hand, the total amount of compensation, including other allowances, paid to the employee during incapacity for the week in question and, on the other hand, the total weekly award rate and weekly overaward payment, if any, being paid to such employee at the date of the injury. Provided that, in making such*

*calculation, any payment for overtime earnings, shift premiums, attendance bonus, incentive earnings under any system of payment of results, fares and travelling time allowances, penalty rates and any other ancillary payments payable by the employer shall not be taken into account.*

*(ii) Partial Incapacity - In the case of an employee partially incapacitated within the meaning of the Workers' Compensation Acts, means a weekly payment of an amount representing the difference between, on the one hand, the total amount of compensation paid to the employee during incapacity for the week in question, together with the average weekly amount the employee is earning or is able to earn in some suitable employment or business (as determined expressly or by implication by the appropriate Accident or Workers' Compensation Tribunal or its equivalent in the State or Territory of employment or as agreed between the parties) and, on the other hand, the total weekly award rate and weekly overaward payment, if any, being paid to such employee at the date of the injury. Provided that, in making such calculation, any payment for overtime earnings, shift premiums, attendance bonus, incentive earnings under any system of payment by results, fares and travelling time allowances, penalty rates and any other ancillary payments payable by the employer shall not be taken into account.*

*The total weekly award rate and weekly overaward payment abovementioned shall be the same as that applying for a total incapacity. Provided that, where an employee receives a weekly payment of compensation under the Workers Compensation Acts and subsequently such payment is reduced pursuant to the said Act, such reduction shall not increase the liability of the employer to increase the amount of accident pay in respect of that injury.*

*(iii) Payment for Part of a Week - Where an employee receives accident pay and such pay is payable for incapacity for part of a week the amount shall be a direct pro rata.*

*48.3 Qualifications for Payment - Always subject to the terms of this clause, an employee covered by this award shall, upon receiving payment of compensation and continuing to receive such payment in respect of a weekly incapacity within the meaning of the Workers' Compensation Acts, be paid accident pay by their employer who is liable to pay compensation under the respective Acts. The liability by the employer for accident pay may be discharged by another person on the employer's behalf, provided that:*

*48.3.1 Accident pay shall only be payable to an employee whilst they remain in the employment of the employer by whom they were employed at the time of the incapacity. Provided that if an employee on partial incapacity cannot obtain suitable employment from their employer but such alternative employment is available with another employer then the relevant amount of accident pay shall still be payable.*

*Provided further that, in the case of the termination by an employer of an employee who is incapacitated and receiving accident pay, accident pay shall continue to apply subject to the provisions of this clause except in those cases where:*

- (i) the termination is due to serious and/or wilful misconduct on the part of the employee; or*
- (ii) arises from a declaration of liquidation of the company, in which case the employee's entitlement shall be determined by the appropriate New South Wales legislation.*

*In order to qualify for the continuance of accident pay on termination an employee shall, if required, provide evidence to their employer of the continuing payment of weekly workers' compensation payments.*

*48.3.2 Accident pay shall not apply in respect of any injury sustained during the first five normal working days of incapacity.*

*48.3.3 An employee on engagement may be required to declare all workers' compensation and/or accident claims made pursuant to the Acts as herein defined in the previous five years. In the event of false or inaccurate information being deliberately and knowingly declared the employer may require the employee to forfeit their entitlement to accident pay under this award.*

*48.4 Maximum Period of Payment - The maximum period or aggregate of periods of accident pay to be made by an employer shall be a total of 26 weeks for any one injury as defined in clause 48.2.2*

*48.5 Absences on Other Paid Leave - An employee shall not be entitled to the payment of accident pay in respect of any period of paid annual leave or long service leave or for any paid public holiday in accordance with the appropriate award provisions.*

*48.6 Notice of Injury - An employee upon receiving an injury for which the employee claims to be entitled to receive accident pay shall give notice in writing of the injury to their employer and of its manner of happening as soon as practicable and shall provide in writing all other information as the employer may reasonably require.*

*48.7 Furnishing of Evidence - An employee who has suffered any injury for which they are receiving payment or payments for incapacity in accordance with the provisions of the respective Workers Compensation Acts shall furnish evidence to the employer from time to time as required by the employer of such payments. Compliance with this obligation shall be a condition precedent to any entitlement under this clause.*

*Any employee who is receiving or who has received accident pay in respect of any injury shall, if required by the employer or other person on the employer's behalf, authorise their employer to obtain any information required concerning such injury or compensation payable from the insurance company.*



*48.8 Medical Examination - Nothing in this clause shall in any way be taken as restricting or removing the employer's rights under the respective Workers Compensation Acts to require the employee to submit themselves to examination by a legally qualified medical practitioner, provided and paid by the employer. If the employee refuses to submit themselves to such examination or in any way obstructs the same, the employee's right to receive or continue to receive accident pay shall be suspended until such examination has taken place.*

*Where in accordance with the respective Workers Compensation Acts a medical referee gives a certificate as to the condition of the employee and the employee's fitness for work or specifies work for which the employee is fit and such work is made available by the employer and refused by the employee or the employee fails to commence the work, accident pay shall cease from the date of such refusal or failure to commence the work.*

*Where an employer is unable to provide work of the nature stipulated by the medical referee, an employee shall take all reasonable steps to obtain such work with another employer and, in the event of the employee's failure to do so, payment of accident pay shall cease.*

*48.9 Redemption or commutation of Weekly Payment - Where there is a redemption or commutation (as the case may be) of weekly compensation payments by the payment under the respective Act of a lump sum the employer's liability to pay accident pay shall cease as from the date of such redemption or commutation.*

*48.10 Insurance Against Liability - Nothing in this clause shall require an employer to insure against the employer's liability for accident pay nor shall it affect the right of an employer to terminate the employment of the employee.*

*48.11 Variation in Compensation Rates - Any changes in compensation rates under the respective Acts shall not increase the amount of accident pay above the amount that would have been payable had the rates of compensation remained unchanged.*

*48.12 Death of Employee - All rights to accident pay shall cease on the death of an employee.*

*48.13 Safety Regulations - Without prejudice to the terms of this clause the Union shall use its endeavours to have its members carry out all statutory and other regulations applicable to the employment of such members and to further carry out any orders relating to the preservation of safety given by or on behalf of any employer of its members.*

*48.14 Superannuation - An employer shall pay superannuation contributions paid in accordance with clause 55, Superannuation, to an employee receiving accident pay in accordance with this clause.*