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INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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MASTER GROCERS AUSTRALIA

LIQUOR RETAILERS AUSTRALIA
Independent Liquor Outlets

Submission

Workers Compensation issues Paper

Master Grocers Australia

May 2012

Now incorporating…
STATE RETAILERS ASSOCIATION SRA of South Australia
NARGA National Association of Retailer Grocers of Australia

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a) About Master Grocers Australia

Master Grocers Association Australia (MGA) is a National Employer Industry Association representing independent grocery and liquor stores in all States and Territories. Independent supermarkets and liquor stores (independent supermarkets) comprise a significant subsector of the retail industry in Australia. They range in size from small, to medium and large businesses. Although many of the medium sized businesses would not be categorized as such from a legal perspective, they are in fact relatively "small" in comparison to the large supermarkets in the retail industry and therefore they struggle for survival against the power of the major retail chains. Nevertheless, despite competing in a dominated market, independent supermarkets play a major role in the retail industry and make a substantial contribution to the communities in which they trade.

In NSW there are 490 branded independent supermarkets that trade under brand names such as Supa IGA, IGA, FoodWorks, SPAR, Supabarn and Friendly Grocers with a further, approximately, 200 independent supermarkets which trade under their own local brand names. There are also Independent liquor stores throughout NSW trading under brand names such as Cellarbrations, Botllemart, The Bottle O and Local Liquor which are either single or multi store owners. The employees in these stores total more than 20,100 - they hold full time, part time or casual status in the independent supermarket industry, representing $2.7b in retail sales, and they work across a seven day working week. Independent supermarkets are traditionally community friendly entities and are committed to supporting their employees, many of whom include working mothers, tertiary students, schoolchildren, trainees and apprentices.

Independent supermarkets are small, community based, family-run businesses and they place great importance on maintaining safe workplaces. Through their membership of MGA they are regularly provided with information on the recent trends in health and safety in the workplace and particularly the NSW Work Health and Safety Act 2010. Despite the emphasis on safety at work that all independent supermarkets are encouraged to maintain, unfortunately there will be work accidents from time to time. Many independent supermarkets have experienced workers compensation claims and are fully cognisant of the problems that are associated with the current legislation. Consequently Independent supermarkets welcome the initiative by the NSW Government to make changes to the Workers Compensation Scheme.

b) Introduction

It is apparent from the high workers compensation premiums that are payable by NSW employers that the State of NSW will be unable to maintain a level of sustainable competitiveness with the rest of the country. Employers in NSW are constantly facing problems with such issues as employees being able to remain in the workers compensation system for inordinate periods of time while seriously injured workers are not properly supported. Furthermore there are no incentives to encourage workers to get back to work and the system is in itself complex and confusing which causes frustration and anger amongst employers. Premiums have risen in recent years and employers fear that once a worker makes a successful claim for compensation there will be severe repercussions for the viability of the business especially as many claims can be long drawn out, resulting in increased premiums There is an urgent need for reform, and the introduction of a new system is imperative for the future competitiveness of sustainability of NSW businesses.

This submission will address the "Options for Change" that have been developed in the Issues Paper in the light of the guide provided in the principles that have also been set out in the Paper.

c) Options for Change

1. **Severely Injured workers**

   MGA appreciates that no matter how vigilant employers are in providing safe workplaces for employees, accidents can and will happen in the workplace. Employees who are, unfortunately, seriously injured in the course of their employment deserve to be provided with every opportunity to return to their former position but, if that is not possible then the NSW Workers Compensation Scheme (the Scheme) should ensure that they are adequately protected in the future. MGA supports the proposal that a severely injured worker who has a whole of person impairment of more than 30% should receive income support, return to work assistance where feasible and generous lump sum compensation.

2. **Removal of coverage for journey claims**

   Queensland, Victoria, Tasmania and Western Australia all exclude journeys to and from work for the purposes of workers compensation. South Australia permits claims where there is a substantial connection between the employment and the incident causing the injury. The

Commonwealth allows a claim where the employer has control over the workers work during a journey or breaks.

There is a sound argument for excluding coverage for work journeys from workers compensation laws. Compensation is provided to a worker when a worker is "working", this is consistent with the intention of the legislation. An injury sustained at work could give rise to a claim, subject to the circumstances, because the worker is at the workplace performing the duties required under the terms of the employment contract. A worker may choose to commute to and from work or travel in their own vehicle, and that is an employee decision, it is not part of work and the employer should not have to carry the responsibility for making payments for injuries sustained during this period. However, if a worker is required to work at a place that is not their usual place of work and the employer directs the employee to work temporarily at a different location, then the journey to the temporary or alternative place of work may be considered a sufficient diversion from the usual course of the journey to warrant compensation in the event of an injury.

3. Prevention of nervous shock claims from relatives or dependants of deceased or injured workers

MGA notes that the objective of the legislation is to provide income support, medical assistance and rehabilitation support for workers injured during the course of their employment. MGA supports the provision of the current death benefit to a deceased worker's immediate family and weekly benefits payable to dependants of a deceased worker. However, the provision of compensation to relatives and dependents of workers for nervous shock appears to fall outside the clearly stated objectives of the legislation. Whilst MGA does not seek to underestimate the emotional distress that may be caused to family members in the event of a workplace accident, nevertheless the nature of the relationship should be taken into account when making a decision as to compensation. That is, it is necessary to consider the closeness of the relationship. Furthermore, the development and extent of nervous shock to family members is a circumstance over which an employer has very limited control.

MGA agrees that workers who witness a workplace death of a colleague and who then suffer a significant recognized psychological injury should still be able to make a claim under the legislation – in this instance it is possible that the origin of the psychological condition is founded in the course of employment.

4. Simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings

In respect of employees who are paid a salary or a full time or part time wage that is a precise amount then the calculation for the payment of benefits should be the amount that the employee was earning as at the date of the injury. The weekly payment should be exclusive of allowances.

However, there are inevitable complications in respect of benefits payable to employees whose wages are subject to additional penalties and these are particularly problematic when calculating pre-injury earnings for a casual employee. The definition for the calculation of pre-injury earnings it is submitted must be amended in circumstances where hours fluctuate or there are several penalties to be considered, to allow for more efficient and simplified processes.

It is suggested that where hours are varied over the 12 months period prior to the injury that the average wages earned during that period be established. Where there are regular and systematic penalties applied to the hours of work then these should be included in the calculation of the final weekly rate. Overtime and other penalties or allowances should not be included

Such amendments to the current system of calculations have the potential to not only reduce the administrative burden but also decrease the number of disputes pertaining to the calculation of pre-injury earnings.

5. Incapacity payments – total incapacity

MGA agrees with the suggestion that greater step downs should occur alongside regular assessment of capacity in alignment with other jurisdictions. The current first step down of 26 weeks fails to appropriately consider the diverse range of work illnesses and injuries that occur.

As recognized in the Issues Paper, for example, most fractures heal within six weeks. The current regime could be a deterrent to an injured worker to fully participate in a return to work program during this initial 26 week period because they will be in receipt of full weekly benefits during this time.

The step down of compensation payments at an earlier period would create an incentive for some workers to be more actively engaged in the rehabilitation process. In addition, much research has been conducted regarding the positive impact for workers who can return to meaningful employment promptly. Engaging in the return to work process can have significant positive psychological benefits to a worker and reduce the instance of depression and feelings of failure associated with being unable to participate in their normal work or social activities.

6. Incapacity Payments – partial incapacity

MGA agrees with the suggestion that the current legislative scheme concerning payments for partial incapacity does not encourage recovery and return to full employment.

The objective of the Act is to rehabilitate injured workers back into the workplace as soon as possible. However, unless the legislation is amended to provide disincentives that will stop long terms absences due to the ease of reliance on compensation then costs will continue to escalate. In Victoria, for example, there is provision for full payments to the injured worker from the first week less any amount that the worker could earn in suitable employment. There are further reductions in pre injury earnings at weeks 14-26, then at 27–130 weeks less any amount the employee is able to earn, and after 130 weeks the full amount of pre injury earnings is paid if the injured employee has no work capacity. Arrangements such as these are far more likely to encourage earlier return to work rather than prolonging dependence on the system. However, this is also dependent on the level rehabilitation support that is given and unfortunately the rehabilitative process is very slow and this causes long delays in the recovery process. This in turn causes injury management time to become excessive and expensive.

A lengthy rehabilitation process appears to be a significant contributor to the costs of a claim. This is especially apparent in country regions.

In many cases what may commence as a minor injury can blow out into a much more serious issue because there is very little incentive for a swift return to work. Often the claim is accepted without a full investigation being conducted and lengthy periods of time off work are often inconsistent with the nature of the injury.

7. Work Capacity Testing

MGA strongly supports the introduction of regular work capacity testing. This is necessary to

ensure that workers and employers are provided with an indication of how soon the injured worker will be returned to the workplace. This then enables those are assessed as having a demonstrated work capacity are reintegrated back into the work force as soon as possible.

Active engagement in the return to work process can have numerous benefits on the worker including the notion of placing less emphasis on the injury and can allow the worker to move forward. This approach is likely to mean that a worker is less enveloped in the 'sick role' and the perception that they are 'injured' may be removed.

The requirement for work capacity testing is also consistent with the objectives of the Act to provide rehabilitative support to injured workers.

Both Victoria and South Australia have a work capacity testing facility in the legislation but these are at least once every 2 years in Victoria and they are automatic in South Australia after 130 weeks. It is suggested that in NSW these should be undertaken earlier than in these states.

There are often problems with getting some injured workers back to work promptly because the system is too slow. There is a tendency to leave a worker on workers compensation leave for some time, even in minor cases, especially in country regions. One employer complained that he estimated that a cut finger that required 2 stitches and 2 weeks off work effectively cost him in the vicinity of $23000. He said that he had paid workers compensation premiums of approximately $3800 per year for 6 years and had only one claim in that time yet the repercussions of one minor incident impacted significantly on his business.

8. Cap weekly payment duration

The suggestion of capping weekly payment duration is also supported by MGA. This would again provide encouragement to workers who are able to demonstrate some work capacity to return to work.

It would be beneficial to provide for a cap after a specific number of years or a lump sum amount, whichever is the sooner of the two. Allowing payment of weekly benefits up until retirement age and after only fosters the notion that a worker is permanently incapacitated. It is not in the best interests of any party to allow for on- going remuneration to be paid to an injured worker.

9. Remove pain and suffering as a separate category of compensation

A benefit of a review of the current NSW workers compensation legislation would be to provide a simpler and more efficient way of dealing with difficult areas of the act. The issue of payment for "pain and suffering'" has resulted in significant costs to employers. Now that the Act has the availability for an injured worker to make a common law claim it seems inappropriate to retain a right to claim for pain and suffering with the legislation also. It would therefore be logical to remove the ability to make a "pain and suffering" claim from the Act and provide for lump sum payments for injuries with "whole person impairment" greater than 10%.

10. Cap medical coverage duration

It is reasonable to provide for a cap on medical expenses related to a single claim. Providing access to ongoing medical benefits for lengthy periods following the date of injury is an expense that impacts heavily on the employers premiums. To place a cap on medical benefits for up to one year following the cessation of benefits is a more realistic approach. Provided that the worker is adequately compensated for the injury it is an unreasonable expectation that medical expenses should continue and it is suggested that a period on one year following the cessation of benefits is an appropriate period for the maintenance of medical benefits.

11. Strengthen regulatory framework for health providers

The high cost of medical expenses and rehabilitative services already has an enormous impact on the premiums of employers. The current legislation wherein there is provision only for "reasonably necessary medical expenses" is far too wide and allows far too much scope for the provision of services that are not always required or they are far too lengthy. This places enormous cost on the system and on the premiums of employers. On a comparative basis most other states have a greater control over the limitation of medical treatment and rehabilitation providers. It is therefore advisable in the interests of cost reduction, which will not necessarily impact on the well- being of injured workers to introduce greater control over the provision of medical services, especially in the area of over servicing and poor billing processes**.**

12. General comments

MGA sought comments from our members who have been directly involved with workers

compensation claims for injured employees. Although our members place great emphasis on providing safe workplaces and although the claims records of our members are relatively low, when accidents happened the impact can be very severe on the viability of the business and on employees.

It is therefore appropriate to provide the Committee with comments from our members on their experiences of the impact of the high cost of the NSW workers compensation on their small businesses.

- It was suggested that in order to reduce the high cost of workers compensation premiums there should be provision for discounts on premiums to those employers who provide industry specific proof of implementation of safe work practices. They would be entitled to a year after year discount on their premium similar to a no claim bonus. It was a reasonable expectation that if an employer has a "blemish free' record then there should be the potential to reduce the annual premium significantly in recognition of that achievement. Currently, the debt ridden workers compensation regime is seen as reactive rather than proactive with little incentives for employers to benefit from maintaining safe work places.

- Another employer complained that he has had a claim that has been ongoing for an 18 months period which began when he employed a worker who had previously injured his back in a former job, he aggravated his back with the new employer so that there are currently 2 open claims. There has been no progress with the apportionment of liability by the insurers and therefore no progress with a return to work plan. The legal costs are mounting for the second employer who has to personally establish the extent of his liability.

- Other employers have complained about the availability of annual leave and long service for injured workers under the current Act, the lack of investigation into claims and in some cases the swift acceptance of liability and the unrealistic future estimates on claims costs.

- It was suggested that the total wage costs of trainees as well as apprentices should be deducted from workers compensation premiums.

- In one small business, even a few claims over a period of 10 years causes a massive escalation in the premiums that linger over several years and there is little or no understanding of the effects of the increased costs on the business operations. The concern was that the costs of the rehabilitation processes were costly and slow.

Conclusion

There is widespread support for changes to be made to the NSW workers compensation system. MGA receives many complaints from members who find the system expensive, cumbersome and inefficient. Claims are long drawn out, the return to work process is slow and employers find it increasingly difficult to recover from the impact of the cost of a claim.

The review of the legislation is welcomed and MGA appreciates this opportunity to provide the above comments to the NSW Government.

Jos de Bruin

CEO

Master Grocers Australia

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