By Kasarne Robinson

The hits just keep on comin' for workers

Storm clouds began to brew over the NSW Workers' Compensation Scheme in February 2012 when MP, Mr Greg Pearce, announced that the NSW WorkCover Scheme in its current form was untenable. He said the Scheme needed to be brought back into the black. This concern flowed from the PwC Actuarial Valuation of Outstanding Claims Liability for the NSW Workers' Compensation Nominal Insurer as at 31 December 2012, dated 12 March 2012, which identified a projected $4bn scheme deficit.

At the ALA's NSW state conference in March, Minister Pearce confirmed that a significant review of the NSW workers' compensation was imminent. On questioning about the level of consultation, he indicated it could be anywhere from a lot to very little. The latter was closer to the mark.

An Issues Paper released in April 2012 outlined options for reform and a Joint Parliamentary Committee set up to inquire into and report on the scheme. Key objectives within the Committee's Terms of Reference included better health and return-to-work outcomes for injured workers; the financial sustainability of the scheme; and inquiring into the functions and operations of the WorkCover Inquiry. A comparison of the workers' compensation schemes in other states and territories was considered in this process.

As part of the consultation process, submissions from stakeholders were made to the Inquiry and public hearings were held over three days in May 2012. The ALA's submission, along with others, suggested that the projected deficit was due to WorkCover's poor management of the scheme and that cuts to workers' benefits should be an absolute last resort.

On 13 June 2012, the Committee published its report, making 28 recommendations to the government. On the afternoon of 19 June 2012, the *Workers' Compensation Legislation Amendment Bill 2012*, a complicated Bill, was tabled in NSW Parliament. Many of the amendments proposed by the Bill were not foreshadowed in the Issues Paper or the Committee's report; nor were they raised at the public hearings. Debated in the early hours of 20 June 2012, the Bill was only very slightly amended from its first draft, and was passed in both houses of the NSW parliament by 3:00am on 20 June 2012.

Despite NSW workers already being subjected to one of the harshest schemes in Australia, the amendments contained in the NSW *Workers Compensation Legislation Amendment Act* 2012 (Amending Act) drastically slashed workers' benefits and go much further than anyone involved in the consultation process could have anticipated or imagined.

Digesting the Amending Act[1] is no small task. Despite its objective of simplifying the payment of weekly benefits to injured workers, the Amending Act is complex. The more one considers the Act's provisions,

the more one realises how quickly the legislation was rushed through, with what appears to have been little consideration of the effects the amendments would have on workers and their families.

Coalminers, police officers, fire fighters, paramedics, emergency service volunteers and workers with a dust disease are exempt from the changes in the Amending Act. The *Workers Compensation Act* 1987 (1987 Act) and *WorkPlace Injury Management and Workers' Compensation Act* 1998 (1998 Act) continue to apply to those workers as if the Amending Act did not exist.

The provisions of the Amending Act commenced in parts and all but Schedule 8 (amendments relating to commutations) are now in force. The original transitional provisions, which were Schedule 12 of the Amending Act, are now contained in Schedule 6 of the 1987 Act. Those transitional provisions posed more questions than they answered and, as a result, a number of test cases are being run in the Workers' Compensation Commission. On 1 October 2012, the *Workers Compensation Amendment (Transitional) Regulation 2012* was passed, which sought to clarify some of the anomalies in the transitional provisions.

THE CHANGES

Lump sum compensation payments

Workers now cannot receive lump sum compensation under s66 of the 1987 Act unless their degree of permanent impairment is greater than 10 per cent (including hearing loss). Section 67 of the 1987 Act has been repealed, so NSW workers are no longer entitled to receive compensation for pain and suffering if the amendments apply to them. Section 66(1A) of the 1987 Act provides that only one claim for permanent impairment compensation may be made, so workers who suffer a deterioration in the future cannot make a further claim for lump sum compensation.

The original wording of the transitional provisions, which commenced on 27 June 2012, provided that the amendments applied if a 'claim for compensation' was not made prior to 19 June 2012. Having regard to the definition of 'claim' in the 1998 Act, it was being argued in test cases in the Commission that as long as a claim for compensation of any type was made prior to 19 June 2012, then the amendments to lump sum compensation contained in the Amending Act did not apply.

The 2012 Regulation seeks to clarify the ambiguity by making it clear that the amendments apply unless a claim for lump sum compensation under ss66 and 67 of the 1987 Act was made prior to 19 June 2012. The validity of the 2012 Regulation is uncertain.

The President of the Commission, Judge Greg Keating, handed down his decision on 22 October 2012 in *Goudappel v Adco Constructions Pty Limited*.[2] Answering a question of law, he held that the amendments to Division 4 of Part 3 of the *Workers Compensation Act* 1987 introduced by Schedule 2 of the *Workers Compensation Legislation Amendment Act* 2012 do apply to claims for compensation made under s66 on and after 19 June 2012, where a worker has made a claim for compensation of any type in respect of the same injury before 19 June 2012. The President concluded that a 'claim for compensation' in Clause 15[3] is clearly a reference to a claim for lump sum compensation and not a claim of any kind. This conclusion made it unnecessary for the President to consider whether the 2012 Regulation was *ultra vires*.

Workers will need to seriously consider the appropriate time to make a claim for lump sum compensation if they only have one shot at receiving compensation. The indication that s66 benefits would be increased to counter the loss of pain and suffering entitlements has not occurred, and the monetary dollar entitlements and related formulas remain the same.

The retrospectivity of these changes was not anticipated and many workers who had not stabilised, or who were awaiting medical examinations or reports, may be severely affected by these amendments. For many workers, their rights simply disappeared overnight.

Weekly payments

For many years, NSW workers incapacitated for work have been able to claim weekly payments, potentially until 12 months after retirement age, albeit only very meagre amounts. Much was said during the consultation process in Victoria and the amendments to the entitlement to incapacity benefits for NSW workers largely mirror the Victorian scheme.

The Victorian workers' compensation scheme provides generous total incapacity payments of 95 per cent of pre-injury earnings for the first 13 weeks, reducing to 80 per cent of pre-injury earnings for up to 2.5 years. Workers can then remain entitled to ongoing incapacity payments in certain circumstances. South Australia, Queensland, Western Australian, Tasmania and the Commonwealth all provide for payment of 100 per cent of pre-injury earnings for periods ranging between 13 and 45 weeks; reducing in some states to 75-90 per cent after that time. The definition of 'pre-injury earnings' in those states permits the inclusion of shift allowances and overtime in the assessment of pre-injury earnings. One good thing about the Amending Act changes is that the definition of 'pre-injury earnings' of NSW workers can now include overtime and shift allowances, which were not previously permitted, but only for the first 52 weeks of compensation.

NSW workers will be subjected to a complete cut-off of benefits after a maximum of five years unless the worker suffers a degree of permanent impairment greater than 20 per cent. Most workers, however, will be unable to access weekly benefits after 2.5 years because of the operation of the new s38 of the 1987 Act, which sets out restrictive criteria for the ongoing entitlement to weekly compensation.

Under s38 of the 1987 Act, as amended, a worker has to have either no current working capacity, or have a current working capacity and be working for more than 15 hours per >>

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week and earning more than $155 gross per week before they can claim weekly compensation beyond 130 weeks (2.5 years).[4] Those workers are entitled only if they apply in writing to the insurer and the insurer is satisfied they are not capable of working any more hours. So workers who are not totally unfit, who have a capacity for work but cannot find work, or cannot work for at least 15 hours, have no entitlement to weekly compensation under s38. Having a *current work capacity* means being unable to return to pre-injury work but being able to work in *suitable employment*. The insurer can decide what constitutes *suitable employment* and does not have to have any regard for whether the work is actually available to the worker because of the worker's place of employment, or whether that work is readily available on the labour market.

The amendments provide that an insurer can make binding *work capacity decisions* about the worker's *current work capacity*; about what constitutes *suitable employment;* what a worker can earn in suitable employment; the amount of a worker's pre-injury earnings or current weekly earnings; and decisions as to whether a worker is unable to engage in certain employment. Once a *work capacity decision* has been made, a worker has very limited rights of review, and a lawyer cannot be paid to assist a worker in relation to a dispute concerning a *work capacity decision*. The Commission has no jurisdiction to determine any dispute about a *work capacity decision* and is not to make any decision in respect of a dispute before the Commission that is inconsistent with a *work capacity decision* of an insurer.[5]

The proposed changes to the weekly payments provisions are retrospective. The provisions require the insurer to conduct a *work capacity assessment* on an existing recipient of weekly payments within 12 months of the commencement of the provisions (date of assent).[6] Three months after the *work capacity assessment*, the amendments apply to the worker. The 2012 Regulation provides that the amendments do not apply until at least 1 January 2013.

No workers, other than those with a degree of permanent impairment of more than 20 per cent and who meet the criteria under s38, are entitled to receive weekly compensation after an aggregate period of five years.[7] Payments prior to 1 January 2013 do not count towards this period.

While NSW workers' entitlements have been brought into line with Victorian workers, in some instances, Victorian workers have a fair common law system for fault-based benefits. Those workers injured through the fault of their employer are properly compensated. NSW workers, despite having their no-fault benefits slashed by this new legislation, still suffer unfair fault-based modified common law benefits. An injured worker in NSW suffering injury at the hands of their negligent employer must suffer a degree of permanent impairment of 15 per cent before they can make a claim. If they do suffer an injury severe enough to meet this threshold, they can only claim compensation for economic loss and cannot claim any medical expenses or attendant or domestic care. Thus, a severely injured worker in NSW, such as a paraplegic or amputee, may be unwise to pursue a work injury damages claim as they would forfeit their right to claim medical expenses and much-needed care.

Medical expenses

Newly introduced into the 1987 Act, s59A provides that payment of medical and related expenses will end either 12 months after the claim for compensation is made, or 12 months after the last payment of weekly benefits; whichever is the latest. For claims made prior to 1 October 2012, that 12-month period starts no earlier than 1 January 2013.[8] With early return to work being the focus of the scheme, this provision clearly disregards the need of some workers to have ongoing treatment to maintain a capacity to work. This restriction does not apply to a 'severely injured worker' (those with a degree of permanent impairment of over 30 per cent). The affect of this amendment is that say an amputee (under 30 per cent WPI) who requires prosthetics will not be entitled to payment of these expenses for more than one year after their entitlement to weekly payments ceases.

Journey claims

The journey claims provisions have been amended with the insertion of s10(3A) into the 1987 Act, which applies to injuries received on or after 19 June 2012. A journey claim can be made in respect of a journey to or from a worker's place of abode only if there is a '*real and substantial connection between the employment and the accident or incident out of which the personal injury arose*'. The genesis of this amendment is the equivalent South Australian legislation, the *Workers' Rehabilitation and Compensation Act* 1986 (SA), which uses the terminology 'real and substantial connection'. Section 30(5)(b) of the SA legislation states that '*the fact that a worker has an accident in the course of a journey to or from work does not in itself establish a connection between the accident and the employment for the purposes of* s30(5)(b)'. Such a clarification has not made its way into the NSW legislation and it will be interesting to see how 'real and substantial connection' is interpreted.

Heart attack or stroke injuries

Injuries that consist of, are caused by, result in, or are associated with a

heart attack injury or stroke injury are not compensable, following the amendments, unless the nature of the employment concerned gave rise to a significantly greater risk of the worker suffering the injury than had the worker not been employed in employment of that nature.[9] This amendment applies to injuries received on or after 19 June 2012.

Disease injuries

Section 9A of the 1987 Act, which requires the employment to be a substantial contributing factor to the injury for it to be compensable, has been amended to read *'other than a disease injury'*. Section 4(b) of the 1987 Act has been amended to the effect that in the case of a disease injury, the worker's employment must be *'the main contributing factor'*. This would seem to require a comparison of the contributing factors to the disease injury to determine the main contributing factor. The amendment relates to an injury received on or after 19 June 2012 and regard needs to be had for the deeming provisions in s16(1) of the 1987 Act when assessing the date of the injury.

Commutations

An amendment, not yet in force, allows targeted commutations permitting WorkCover to commute a matter they deem appropriate. Unfortunately, though, with the amendments to weekly payments cutting off payments in most cases after two-and-a-half, or five years, the value of commutation settlements will be very low.

The legal profession's role

The flavour of the entire amending legislation is to give a great deal of power and discretion to WorkCover and its scheme agents and, in certain circumstances, prevent lawyers from assisting in the scheme. A worker may now waive the right to obtain independent legal advice before entering into a Complying Agreement on a lump sum settlement and the insurer can certify that it is satisfied that the worker has obtained independent legal advice, or has waived the right to obtain independent legal advice, before entering into the agreement. A lawyer cannot charge any fees in relation to a dispute regarding a *work capacity decision*, leaving a worker without the ability to obtain assistance from a lawyer in relation to such a dispute. The result of the amendments in NSW may be a cost-shifting exercise over to the Commonwealth as NSW workers find themselves having to seek assistance from Medicare and Centrelink to survive.

WORKERS' RIGHT TO PAYMENT OF LEGAL COSTS

A last-minute amendment to the originally tabled Amending Bill was proposed by Fred Nile MP which creates a user-pays system, with each party to bear its own costs. This amendment to s341 of the 1998 Act, now proclaimed, creates an enormous imbalance in favour of the insurer and may leave many injured workers without access to legal advice.

On 26 September 2012, the NSW government announced a 'free legal review service' for injured workers. This was a clever diversionary tactic to stave off criticism of the Nile amendment. The minister's announcement that the *'government has acted to ensure that there will be no unnecessary financial burden on injured workers'* is somewhat misleading. There was no financial burden on injured workers prior to the introduction of the Nile amendment, as NSW workers have been entitled to legal advice from the legal profession at no cost to them since 1926.

The government announced that injured workers will have access to this free legal review service, ILARS (the Independent Legal Assistance Review Service), and 'may' also be provided with independent legal representation where the insurer disagrees with the legal advice provided by ILARS.

The previous costs provisions apply to a claim for compensation made before 1 October 2012, provided proceedings are commenced in the Commission before 1 January 2013. For legal services provided after 1 October 2012 there is a small increase on the maximum costs payable under Schedule 6, but workers will now have to meet those costs themselves, unless granted access to 'legal aid' by ILARS.

ILARS operates from the office of Kim Garling, who has been appointed WorkCover's Independent Review Officer (WIRO). Mr Garling has written to various stakeholders briefly setting out his role. At the time of writing, many questions remain unanswered as to how and when injured workers will be granted access to 'legal aid'. Mr Garling's office is currently taking applications by individual lawyers to be appointed as approved legal service-providers. Workers not granted approval to seek paid legal assistance will have to pay for their own lawyers to lodge disputes in the Commission.

New guidelines

Practitioners wishing to remain working in this area should familiarise themselves with, or be able to direct injured workers to, the new WorkCover Guidelines for Claiming Compensation Benefits; Guidelines for Work Capacity Decision Internal Reviews by Insurers and Merit Reviews by the Authority; Guidelines on Injury Management Consultants; and Work Capacity Guidelines gazetted 27 September 2012.

It is unfortunate that injured workers, in need of assistance, have borne the brunt of the financial cuts to reduce the alleged projected deficit of the scheme, before any attempt was made to address systemic issues within WorkCover. ■

Notes: **1** *Workers' Compensation Legislation Amendment Act* 2012 (NSW). **2** *Goudappel v ADCO Constructions Pty Limited & Anor* [2012] NSWWCCPD 60. **3** Part 19H, Div 3, Clause 15, *Workers' Compensation Act NSW* 1987. **4** Section 38 of the 1987 Act. **5** Section 43(3) Amending Act. **6** Part 19H, Div 2, Cl 8, 1987 Act (Clause 12, Amending Act). **7** Section 39. **8** 2012 Regulation. **9** Section 9B of the 1987 Act.

Kasarne Robinson *is Director of Stacks/Goudkamp Pty Ltd.* **PHONE** *(02) 9237 2222* **EMAIL** *kas@stacksgoudkamp.com.au*