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Massive changes to Victorian WorkCover

Simon Garnett, Melbourne

Despite massive public opposition as a result of the campaign by the Victorian branch of APLA, the Victorian Injured Workers Group, the Law Institute and Trades Hall Council, the Victorian Parliament has enacted the *Accident Compensation (Miscellaneous Amendment) Act* 1997.

Practitioners in Victoria will have to familiarise themselves with further complex changes to an already complicated (some might say unworkable) piece of legislation. Practitioners in other states should take note of these changes as various conservative state governments are looking to follow them. Indeed, even the ALP Government in NSW is talking of keeping changes to the workers compensation system. The major changes can be summarised as follows:

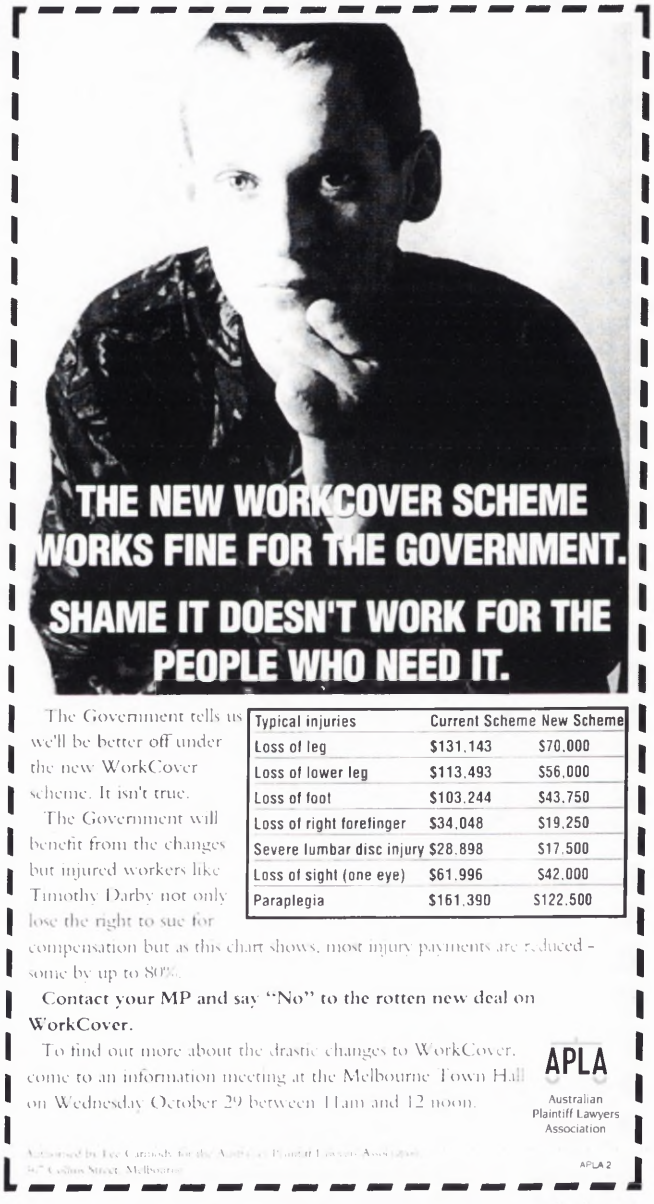
Common law

The Act abolishes a worker's right to sue at common law for injuries sustained on or after 12 November 1997, except in relation to death claims arising out of a transport accident in the course of employment or arising out of or due to the nature of employment where negligence is involved. For those injured in negligent circumstances prior to 12 November 1997, proceedings must be commenced within six years of the accident but no later then 31 December 2000.

Non-economic loss claims

The Act has replaced table of maims claims and pain and suffering claims with "**non economic loss**" claims to a maximum of $300,000 assessed according to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th Edition) with a 10% whole person impairment threshold for non-psychiatric claims and a 30% threshold for psychiatric claims.

The Act establishes a procedure for "non-economic loss" claims to be paid by way of an initial lump sum up to $10,000 and the balance by monthly instalments of at least $600 thereafter. (The implementation of this section is subject to further discussion and clarification between the relevant Minister and Centrelink (DSS)).



Advertisement used in APLA's Protect Victims' Rights Campaign in 1997.

Weekly payments

The rate of a worker's weekly payments is subject to whether he or she has a "current work capacity" or no "**current work capacity**".

If a worker has no current work capacity he or she is entitled to receive during the first 13 weeks of incapacity (the first entitlement period) 95% of pre-injury average weekly earnings (PIAWE) to a maximum of $850 gross per week and for the period 13 weeks to 104 weeks (the second entitlement period) 75% of PIAWE. Payments will cease after 104 weeks unless the worker is assessed as having no current work capacity and the

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is constantly changing, increasingly legalistic and complex where no one is responsible for producing satisfactory outcomes.

Astonishingly, Grellman could not find anyone who was legally and financially responsible for the statutory fund created by premium contributions. His summary of legislative amendments to the *Workers Compensation Act* since 1987 took up 44 pages of his report and contained almost 150 major amendments to the Act in 10 years of operation. He also identified other weaknesses including lack of incentives for and heavy regulation of insurers, the conflicting roles of WorkCover, deficiencies in the premium system, a flawed benefits structure and insufficient incentives for the resolution of disputes.

It is therefore not surprising that the stakeholders are unhappy with the operation of the current system. They are faced with a complex and logically flawed system regulated by a schizophrenic bureaucracy driven by political imperatives that change with the political colour of the government in power at that time.

Grellman's solution to the dilemma was to return control of the system to the stakeholders through the operation of a governing body known as the Administrative Council. This council would comprise equal numbers of employee and employer representatives, representatives from the insurance industry, an actuary and a chairman. The chairman would be the general manager of WorkCover and only that person and the employer and employee representatives would be voting members. The objectives of the Council would be the maintenance of the workers compensation system and its responsibilities would include recommending legislative changes to the system and advising the key participants in the system.

The Council would meet regularly to discuss and monitor workers compensation issues and to advise WorkCover and insurers. The Advisory Council would establish working parties and industry specific groups to advise it and hold annual public forums to comment on and suggest reforms to the system.

A compensation system moulded and administered by the stakeholders with the influence of WorkCover Authority diminished would mirror the process whereby other systems of industrial regulation are achieved in a modern society and forever remove the administration of the system from political intervention.

Such a suggestion warrants serious consideration. The outcomes are not set or even predicted by Grellman but rather in the hands of the people and organisations affected by its operation.

Do we want to consider such a change or should we rather await the inevitable outcomes suggested by HWCA Report or the Victorian experience? The Grellm[illegible] Report deserves serious consideration. This may just be the last chance. ■

Don Cameron is a Partner with Adams Leyland in Albury NSW. He can be contacted on **phone** 02 6041 3306.

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...worker is likely to continue indefinitely to have no current work capacity.

If a worker has a current work capacity during the first entitlement period he or she is entitled to receive the difference between 95% of PIAWE and "notional earnings" or current earnings or the difference between $850 gross per week and "notional earnings" or current earnings, whichever is less. During the second entitlement period the worker is entitled to receive 60% of the difference between PIAWE and 60% of notional earnings or the difference between $510 gross per weeks and 60% of notional earnings, whichever is less.

Medical panels

The use and power of medical panels has been **extensively increased** and medical panels' opinions are binding on the Court. In non-economic loss claims, the medical panel assessment cannot be challenged by way of Court of Appeal.

Pre-employment disclosure

The Act now requires a worker to **disclose to a prospective employer all pre-existing injuries or diseases** which may be affected by the proposed employment. Failure to do so will disentitle the worker or his/her dependants to compensation in the event of any aggravation, accleration, etc, of the injury or disease.

Statutory offers and counter-statutory offers

A new procedure has been introduced in relation to existing common law claims, disability and pain and suffering claims and the new non-economic loss claims requiring insurers and workers to make statutory offers and counter statutory offers with **significant cost penalties** if the worker fails by way of a subsequent C[illegible] Order to obtain 90% of his or her counter-statutory offer.

Summary

These changes may set an ominous precedent for a further erosion of benefits to transport accident, medical negligence and occupiers liability victims and the fight will have to be maintained to prevent further abolition or restriction of the rights of injured persons in Victoria and in other states and territories. ■

Simon Garnett is the National Chair of APLA's Workers Compensation Special Interest Group and can be contacted at Ryan Carlisle Thomas on **phone** 03 9238 7823 or **fax** 03 9238 7825.