before the war

BY BILL REDPATH, CANBERRA

Common Law rights are under threat and this is looming as a battle for the ACT Law Society and Plaintiff lawyers.

As the ACT is one of the few jurisdictions to have unrestricted access to Common Law by injured workers and a (minority) conservative Government, it is probably not surprising that sooner or later there would be changes proposed to the system.

By way of background, the *ACT Workers Compensation Act* 1951 covers private sector employees in the Territory. (Public sector employees are covered by the *Safety, Rehabilitation and Compensation Act 1988 - the Comcare Act*).

It is an old fashioned Workers Compensation Act based on similar British legislation of the early twentieth century. There have been surprisingly few modifications to the Act since 1951. It is very much a residual safety net scheme that does not interfere with full Common Law rights, with damages calculated using the usual principles of negligence without reference to "caps" or "thresholds".

The scheme is fully privately funded with a number of major insurance companies involved in the marketplace and premiums set by "market forces".

ACT Workcover provides regulatory supervision only and there is no subsidy in respect of premiums.

Crisis? What Crisis?

It all started with the release of a Government Discussion Paper on Workers Compensation which was released in May 1999. The discussion paper indicated gloom and doom for the scheme - that it was under-funded with a large increase likely in costs, the insurance companies were not making any money out of the scheme and that premiums were too high. Employers were about to leave the ACT and move to Queanbeyan and other more favourable parts.

It is proposed that the usual suspects be rounded up. Namely, that Common Law rights be severely curtailed, journey claims be abolished and legal and medical costs be curtailed.

The tone of the paper is at odds with the facts.

On the basis of the Heads of Workers Compensation Authorities comparative statistics, the ACT had average premiums in 1998-1999 of 2.12% which was the fourth lowest jurisdiction and these rates have declined since 1996-1997.

The retort was that this was hardly surprising given the ACT industrial base but on an industry by industry comparison, ACT premiums are still more favourable than NSW industry.

The ACT Law Society commissioned an actuarial analysis by Cumpston Sargeant which indicated that Common Law is not the major cost driver in the system. This is in fact redemptions and associated legal costs.

This was confirmed by investigations of the ACT Magistrates Court (which deals with Workers Compensation Claims). It showed that redemptions had increased from 34 in 1992-1993 to 343 in 1998-1999.

This has major implications for the calculation of super-imposed inflation, the measure of whether the system is under-funded and as to cost pressures in the future.

Super imposed inflation is claims for payment in excess of claim numbers and inflation. It assumes that payments are constant in respect of claims and the significant increase in redemptions belies this assumption. Redemptions bring forward the payments that provide future savings in terms of weekly benefits, medical expenses etc.

Given that redemptions require both the consent of the insurance company and the worker, it would seem that there is an active decision by these insurers to bring forward these costs on the basis that they would ultimately provide them with savings. This is presumably part of a calculated, rational process of decision-making.

The exact situation is complicated by the lack of objective, verifiable statistical data but it seems that it is far from clear that there is any real crisis of the ACT system.

What Happened Next?

The Government established a committee to review the Act based on its Standing Committee on Workers Compensation, a body consisting of representatives of employers, trade unions, insurance companies and assisted by Departmental officers.

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This was expanded to include a representative from the ACT Law Society, the ACT branch of the AMA, ACTCOSS (ACT Branch of ACOSS) and a representative of rehabilitation providers.

There was a call for public submissions and some 50 submissions were received and considered by the Committee.

The Committee met on a weekly basis and its report was presented to the Minister in early March 2000.

Major Recommendations

The most controversial issue was the question of restriction of Common Law. On this issue the Committee were evenly divided.

Employers, insurance and the rehabilitation representative favoured the introduction of a 25% whole person threshold using the Fourth Edition, AMA Guide.

The Law Society, Trade Union representatives, ACTCOSS and the AMA opposed this recommendation in favour of retention of the existing system.

It should be noted that the actuarial modelling of this proposal suggests that the effect was to largely abolish Common Law claims as they would move from 5.3% of existing claims to 0.8%.

There was agreement that the existing private sector based scheme should be retained with competitive market premiums.

There was also agreement within the Committee (with one or two dissenting elements) in relation to a wide number of issues. This included:

- Increasing the level of statutory benefits to 65% pre-injury earnings with a minimum floor. These benefits to cease at age 65 years.
- Increase in permanent impairment to an expanded table of maims. Interestingly, the NSW model was preferred by the Committee over any "Whole Person Impairment" criteria.
- Increase in the death benefit.
- Maintaining a broad definition of 'worker'. Given the changes in the labour market this is particularly important in ensuring broad coverage under the Scheme and broad premium collection.
- A reduction of the limitation period in which to commence Common Law actions from six years to three years but the Courts retaining some discretion to increase the period. The Committee rejected the complex election processes that exist in a number of other States.
- Improved rehabilitation provisions and obligations on employers, insurers and employees.
- Recommendation of larger occupational health and safety penalties and penalties regarding premium evasion.
- Redemption of existing redemption arrangements. It seems that insurers and employers believe large lump sums are bad but small lump sums are good.
- Retention of journey claims. As the ACT has full Common Law rights for motor vehicle accidents, the cost to the scheme is minimal although employers and representatives still recommended the abolition of these entitlements.

It is proposed to not simply amend the existing Act but to rewrite it in its entirety and to rename it the "Workplace Injury Management and Compensation Act".

What Next?

At the time of writing the Minister has yet to publicly release the Committee's report.

Although the Committee was evenly divided regarding restriction to Common Law, given the politics, the Government is ultimately likely to put forward legislation that attempts to deny access to Common Law rights.

It is hard to predict the Government's timetable but the task of rewriting the whole Act is a mammoth one and draft legislation is unlikely to be ready before October 2000 and is more likely to be released in the sittings in March 2001.

Given that this would constitute a major change of law, it is hoped and anticipated that the legislation would warrant examination by a specialist Committee of the ACT Legislative Assembly.

The issues are likely to remain on the boil throughout the second half of 2000 and 2001, possibly including the ACT election which is scheduled for October 2001.

ACT members would welcome the input of APLA and other State representatives for what is likely to be a long and difficult fight. PL