Review of the:

Accident Compensation Act

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Submitted by:
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Introduction

The Australasian Meat Industry Employees Union (AMIEU) makes this response to Discussion Paper of the Accident Compensation Act Review released on 13th March 2008. We appreciate the opportunity to make this response, but we are concerned that the process of review has not involved public hearings and regional meetings where the injured workers could actively participate in the Review of the Act.

Background

The meat industry has been built over many years and has continued from generation to generation. Work in meatworks and associated workplaces has always been physically hard, dangerous and skilful. Without the strength of organized labour, the AMIEU, it would undoubtedly be more dangerous.

Workers' compensation is a dramatic understatement of the level of work related injuries and illnesses in the meat industry and we will indicate some of the elements of this related to the issues of claims suppression and discrimination.

Assuming that a worker spends his/her whole working life in this industry, on the basis of probability, he/she is almost certain (99.96%) to experience a serious, compensated work-related injury/disease over the course of his/her working life.

(Probability will depend on the occupation and age of a worker and while some workers will actually avoid an injury/disease over the course of their working lives, others will experience more than one).

The meat processing industry is amongst the worst performing industries with respect to compensation. For example in Victoria in 2003:

- Highest claims frequency rate – 3.65 claims per $1m remuneration;
- Second highest claims cost rate - $101,593 per $1m remuneration;
- Meat is 1.8% of the manufacturing industry, yet accounts for 7.5% of all compensation claims and 8.5% of all costs.

As this data suggests, current and potential consequences of poor OH&S performance is a threat to the health of workers in the industry. Reductions since this time do not, unfortunately, reflect improvement but actually reflect the development of the use of labour hire, for example employers such as Tasman Meats no longer employ anybody, however the labour hire companies that they now use have injuries that have appeared as a different industry.

AMIEU Commitment to Workers' Compensation

Adequate and just compensation is a fundamental and longstanding pursuit of the AMIEU on behalf of its members. For example:

- There has been a full time compensation officer for more than 50 years.
- The Victorian Branch of the AMIEU established a medical centre in 1964 because of the need for medical practitioners who were capable of

recognising and providing proper treatment for zoonotic infections and other work related conditions suffered by workers in the meat industry.

- The AMIEU was actively involved in developing/drafting the Accident Compensation Act in 1984/5.
- The AMIEU Assistant Secretary (now Secretary) was a member of the Accident Compensation Commission from its inception until it was abolished by the Kennett Government.
- A representative of the AMIEU is regular participant in tripartite and government bodies associated with workers' compensation and health and safety.

AMIEU members, their families and their communities are extremely interested in the outcomes of this Review. The AMIEU therefore values the opportunity to make written submission to the Review.

The AMIEU supports the submission of the Victorian Trades Hall Council. *Our submission draws your attention to particular issues that specifically affect our members and providing examples*.

Overview

Brief History of the Act

We note that the Discussion Paper provides a selective history. There is no reference to the existence, and abolition, of the Victorian Accident Rehabilitation Council or the Workers' Compensation Tribunal, nor is there any reference to the reduction of the period of weekly payments for workers with partial incapacity from age 65 (if there is no employment offered) to 2 years.

The ACC, VARC and VOHSC were all tripartite bodies. The establishment of the Board of Directors of the Victorian WorkCover Authority specific removed any representation for workers and occluded the occupational health and safety and compensation decision-making bodies. We note that in the area of OHS there is a commitment of COAG to 'harmonisation' between the States and the Commonwealth.

Victorian WorkCover Authority

The VWA Board of Directors has a major focus on the financial aspect of the scheme which we recognise as important, however it is not sufficient. There must be a separation of powers.

The AMIEU strongly believes that the decision making bodies for Health and Safety and Compensation should be established as separate statutory authorities.

In particular with regards workers' compensation, we support the establishment of a statutory authority with the objectives to:

- manage the accident compensation scheme as effectively, efficiently and economically as possible;

- ensure that appropriate compensation to workers who are so entitled is delivered in the most socially and economically appropriate manner and as expeditiously as possible;
- ensure a co-ordinated approach in the implementation of the accident compensation scheme in liaison with OHSA that emphasizes accident prevention, rehabilitation and operational efficiency;
- promote the goal of effective rehabilitation and return to work by injured workers;
- encourage the provision of suitable employment opportunities to workers who have been injured; and
- develop such internal management structures and procedures as will enable the Authority to perform its functions and exercise its powers effectively, efficiently and economically.[1]

The decision making bodies in WorkCover in other States are tripartite bodies. We believe that union representatives should be appointed to provide a voice for workers in the decision making bodies.

Entitlement to Compensation

Work-related injuries and illnesses

Workers' compensation must be based on a comprehensive definition of injury arising out of or in the course of employment as defined in section 82(1). This definition was developed in the Victorian Worker's Compensation Act in 1953 so that 'injury' included gradual process disease and injury. It was adopted in the Accident Compensation Act 1985.

The issue was reviewed in 1988 and continued until 1992 when the Kennett government dramatically reduced the rights of workers to adequate and just compensation, contrary to the objects of the Act.

The introduction of section 82(2A) has "led to major administrative cost increases, extensive delays and further expansion in the adjudicative/adversarial system to decide thorny interpretation issues and resolve a quagmire of conflicting evidence"[2] as predicted by the WorkCare Committee in 1988. We would add that the 1992 amendment has caused aggravation and exacerbation of the stress related injuries suffered by workers, arising out of or in the course of employment.

The AMIEU supports the VTHC Recommendation that sections 82(2A), 82(2B), and 82(2C) be repealed.

Journey and recess claims

The AMIEU supports the VTHC Recommendation that section 83(2)(b) and (c) be repealed and that there be no change to the current entitlements to compensation for injuries occurring during authorised breaks.

We consider totally inappropriate that a worker who rides a bicycle to work but falls off and breaks a leg when swerving to avoid hitting a pedestrian on

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[1] Accident Compensation Act 1985 Reprint No. 2
[2] WorkCare Committee Final Report 1988 Volume 2 page 292

the way to work has to pay all medical costs and has no paid time off work. If the worker was not going to work, he/she would not have been injured.

Coverage of Contractors

The AMIEU supports the VTHC Recommendation that a working party be established to draft an appropriate section and that it is critically important that the deeming provisions are retained to ensure that independent contractors who are controlled by others are critical to the scheme.

Access to Benefits and Services

Notifying injuries

The AMIEU strongly objects to the 30 day rule, particularly the time limits imposed by section 102(5). Firstly because there are technical disputes about when to lodge notification of injury with cumulative injuries.

With conditions such as Carpal Tunnel Syndrome does the worker have to record the injury when there is pain, or when the fingers are numb, or when they wake in the night with pain and tingling in the fingers or when they can't grip their knife properly, or when they go to the doctor, or when an EMG is performed showing CTS? The Notice of Injury must be made within 30 days of the working becoming aware of the injury. This leads to technical arguments and disputation about what is meant by "becoming aware".

It is in the worker's best interest if it is reported in the Injury Register early because the risk management can be undertaken and possibly the injury prevented from developing. However, this is not necessarily the time for a WorkCover claim to be lodged.

For prevention it is preferable to record incidents early but there is a potential problem for a worker who puts an entry into the Injury Register a significant time before a claim is needed as PIAWE is calculated on the date of the Notice of Injury.

Example: A worker placed a report in the Injury Register when he started to get pain in his wrists and numbness in his fingers on 1 January 2006. The policy of the workplace where he worked was that pain=injury and should be recorded in the Injury Register. If he did not make an entry then it would be claimed that he had not given a Notice of Injury within 30 days.

He continued to work on full duties and performed regular overtime until August 2006 when the doctor diagnosed the wrist injury and certified that he could only work on modified duties. There were not certificates until 11 August 2006. A claim was lodged. The letter accepting the claim was written on 18 September 2006.

The worker required surgery for CTS and had time off work and then a Return to Work on Limited Hours and alternative duties.

On 26 September the claims agent wrote again calculating PIAWE at $791.00 (ordinary term earnings for 12 months before 1 January 2006)

As the condition was cumulative and there were no certificates for the wrist injury and he performed full normal duties and overtime until 11 August 2006,

we considered that PIAWE should be calculated over 52 weeks prior to 11 August 2006. PIAWE for 12 months before 11 August 2003 was $1060.

The worker asked for recalculation of PIAWE. The employer/insurer refused. The worker took the issue to ACCS but the employer/insurer still refused to recalculate PIAWE and the Conciliation Officer did not have sufficient power to resolve the issue.

The worker had to take the issue to the Magistrates Court.

The issue was settled 'on the steps of the court' on 5 October 2007 and recognised that the appropriate calculations were based on the injury 'crystallising' in August 2006 not January 2006 when Notice of Injury had to be given in accordance with 101(3) and 102(1). This process caused significant distress and financial disadvantage to the worker for 15 months.

AMIEU strongly supports the VTHC recommendation that section 102(1) be repealed.

Genuine claimants with latent or insufficiently diagnosed conditions or who attempt to 'soldier on' after injury should not be disadvantaged or otherwise deterred.

Release of medical information

The relationship between patient and treating health practitioner is one which relies on trust. It also relies on confidentiality. Long term treating health practitioners have built a relationship with their patient and also have knowledge and experience of the total physical and psychological functioning and reactions of the individual This assists in the recovery of the patient.

The AMIEU supports the VTHC recommendation that irrevocability not be included in the AC Act and that reference to it be removed from the current claim forms.

Possible factors contributing to delays

Provisional liability

The current situation means that workers with injuries mostly have to wait more than 6 weeks with no income and no specific treatment. The most common practice in the meat industry is that the employers only accept 'blood on the floor' claims and pay the excess payments after the claims agents' letters have been sent. This creates hostility in the workplace and means that injuries are not treated at the appropriate manner.

The AMIEU strongly supports the VTHC recommendation that the AC Act be amended to introduce a system of provisional liability in which payments will commence within 7 days of a claim being made.

This would be in line with 'harmonisation' as recommended by COAG.

Allowing notification to substitute the lodging of a claim (in certain circumstances)

The AMIEU considers that the current requirement of lodging both claim forms and WorkCover Certificate of Capacity (for weekly payments) is unnecessarily complex and introduces perfect opportunities for claims

suppression by employers (addressed in the following section on claims suppression)

The AMIEU considers that access to weekly payments and medical and like expenses should be able to be initiated by the worker lodging injury notification on the VWA (this could be in the form of a WorkCover Certificate of Capacity).

Claim suppression

In clause 59 of the Discussion Paper there is reference to section 101(1). The way that this is explained by the VWA is that 'by displaying the poster IF YOU ARE INJURED in a prominent place for your employees, you are complying with the law'. This is clearly insufficient in a workplace where many workers do not have good English skills or where literacy skills are limited. In many meatworks these conditions apply.

Workers who cannot read English are not being given any information on how to claim workers' compensation. They do not know how to make a claim. This is exploited by some employers.

We have come across numerous workers who suffer a traumatic injury at work when the employer immediately drives the worker to a doctor of the management's choice (not telling the worker that they can see their own treating doctor). The doctor gives the worker a WorkCover Certificate of Capacity indicating that the worker is totally unfit for any duties (which the worker cannot read). The worker gives this to the employer who does one of two things:

- Sometimes they ignore the certificate and tell the worker that they must stay at work and do "light duties". The worker's injury gets worse.
- Alternatively the worker is sent home, but they are not informed that they need to fill in a claim form. Lost time is taken from the worker's entitlements, if the worker has any. However the worker thinks that they are in receipt of WorkCover, particularly when the pay slips shows 'WC pay'. Some employers even pay the worker at 95% and 75% (deducted from the worker's entitlements).

In the first case it is only after the worker has been further injured and regular visits to the 'company doctor' do nothing to help them get better that they seek further help. In the second case it is after they stop receiving any pay that they make their way to the Union.

We then have to help them to lodge claim forms and explain, to the Claims Agents, why the worker did not lodge a claim earlier. The employer has complied with section 101(1) and they have not refused the claim i.e. breached section 242(3). The AC Act provides the injured workers no protection from these actions.

The AMIEU recommends that a WorkCover Certificate of Capacity, requiring time off work; limited hours of work or medical treatment should serve as the lodging of a claim.

There are also workplaces where workers hear, on the grapevine, that if they are injured they should not claim WorkCover because there will be no work

for them if they do. The outcome of this is claim suppression. This is particularly common when the workers are employed by a labour hire firm. In the meat industry it is not uncommon for the abattoirs to be in regional towns, to be the largest employer in the area and to be several hundred kilometres away from the next abattoir. It is also not uncommon for the labour hire firm and the abattoir to be owned by the same people. The outcome is claim suppression.

Another form of claim suppression is the employer who pays for short term injuries, as long as a claim is not lodged. Firstly this is not to save money but is done to avoid having a record of work related injuries. As WorkSafe operates on the principle that a workplace is safe if there are no claims and generally pays limited attention to them, the employer is willing to pay directly. Unfortunately for the worker, if the injury does not respond to short term treatment the willingness to pay dries up. Then, when the worker claims WorkCover, the claim is disputed because it was not lodged 'as soon as practicable after the incapacity arising from the injury becomes known'.

The other factor that contributes to claim suppression is precarious employment. One of the impacts of the use of labour hire staff in the place of permanent employees is the pressure on the workers not to claim compensation to which there is no question of their legal entitlement. These workers know that having claimed compensation will reduce the likelihood of placement and so they do not lodge a claim.

The AMIEU does not think that it is a coincidence that only 7 of the 28 workers, who developed Q Fever in one workplace, claimed compensation. The workers were employed by a labour hire company.

Discrimination

It is our experience that discrimination against workers who have had work injuries and WorkCover claims is rife. Workers who have been injured (even if completely recovered) are seeking new employment are caught in a Catch 22 created by the AC Act.

It is our experience that, in the meat industry, if a worker tells a prospective employer that they have previously suffered a musculoskeletal disorder they will not obtain employment.

However, the requirement in section 82(7) is that the employee must inform the prospective employer of their previous injury or they will not be able to claim WorkCover if they suffer recurrence, exacerbation, acceleration, aggravation, deterioration of the musculoskeletal disorder in the new job.

This means that currently the Act is setting up injured workers to be discriminated against and unable to prove discrimination. It also encourages employers to breach the Equal Opportunity Act.

The AMIEU requests that section 82(7) be repealed.

The Maxwell review of the Occupational Health and Safety Act 1985 found that the issue of division was not sufficiently well covered. The Stenholz review of the 2004 Act recommended that the further amendment was required and that, in particular, the AC Act should be reviewed for amendment.

In the AMIEU's submission to the Stenholz review, we pointed out that the employees of Labour Hire companies can be discriminated against by the 'host' employer with no consequence for the employer.

The AMIEU recommends that there should be a section/division on prohibition of discrimination which would apply to an employer or prospective employer; and an employee or prospective employee; and any person assisting a prospective, actual or past claimant of compensation.

It must be an offence to dismiss an employee, demote an employee, injure an employee, alter the position of an employee to the detriment of an employee, or to threaten an employee or treat an employee less favourably if an employee seeks:

- *information or advice about compensation rights and entitlements (including the making of a claim); or*
- *to make a claim for compensation; or*
- *to continue a compensation claim; or*
- *to return to work; or*
- *to return to pre-injury employment; or*
- *suitable alternative employment with an employer; or*
- *information, advice, support or representation on any of the above matters.*

It must also be an offence to do any of the above to any person assisting an employee in any of the above.

For the purposes of the proposed section:

a. *a reference to an employee must include a reference to an independent contractor engaged by an employer and any employees of the independent contractor; and*
b. *the duties of an employer under the section must extend to an independent contractor, in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control (as per S. 21 (3) OHS Act 2004)*

An employer or prospective employer may be guilty of an offence against these sections if compensation is the dominant reason why the employer or prospective employer engaged in the conduct.

An employer or prospective employer who is guilty of an offence must be liable to the penalties of the OHS Act. That is:

Natural person - 6 months jail, or 500 penalty unit fine or both; and

Body corporate - fine up to 2500 penalty units (as per S.76 (4) of the OHS Act 2004)

The AMIEU recommends that any party who is provided with protection from discrimination under the terms of this Act should be able to initiate a prosecution for breach of the rights set out in this Act.

The AMIEU recommends that the defendant must bear the onus of proof (as in section 77 of the OHS Act 2004)

The AMIEU recommends that there must be orders for damages or reinstatement (as in section 78 of the OHS Act 2004)

Return to work

The AMIEU strongly supports the rights of workers to return to work soon after injury. We recognise that work is extremely important for self-image, self-respect, social contact and many other intangibles as well as the necessity for finance.

Work provides most people with dignity, identity, social contact and self worth as well as the means of survival. Workers do not willingly give up these things to embrace isolation, stigmatisation and loss of self worth which go along with the pain, suffering, poverty and disruption of life that are part of being on WorkCover and unable to return to work.

We are extremely concerned, however, that the Return to Work has been made the end in itself. We strongly believe that it is necessary to assist injured workers to return to work, or if that is not possible to normal social life. We consider that the focus on return to work and the lack of focus on returning the workers to maximum capacity has negative effects.

Providing suitable employment

Too often we see workers who have never seen the Return to Work Plans that have been drawn up, but they are supposed to comply with Return to Work Offers of Employment. In some cases the plans/job offers are totally inappropriate and have not been discussed with the worker, their representatives or their treating health practitioners. However, with the current requirements of the AC Act the employer has complied.

The AMIEU strongly supports the VTHC proposal that the AC Act be amended to require the employers to consult and reach agreement with the injured workers and their treating practitioners on offers of employment suited to the worker.

The AMIEU recommends that the AC Act should be amended to recognise the health and safety representatives elected under the Occupational Health and Safety Act 2004 and recognises their powers.

The AMIEU recommends that the AC Act should state that the injured workers have the right to be represented by HSRs, Job Delegates or Union Officials.

The AMIEU supports the VTHC proposal that section 5 be amended to read "employment suited to the worker", meaning employment for which the worker is currently suited and work that is available.

The AMIEU strongly supports the VTHC recommendation that the employers' obligation to provide pre-injury employment (when the worker is fit to perform them) or suitable employment (if the worker has a capacity to work but is not fir for pre-injury employment) should be extended to be the period of the weekly payments.

The AMIEU recognises that section 155B has exempted employers from their obligation to provide suitable employment to injured workers, even if this was not the Minister's intention. The effect is contrary to public policy. Hence *the AMIEU supports the VTHC recommendation that section 155 be deleted.*

The AMIEU also supports the VTHC recommendation that the AC Act be amended to give workers the right to take their own legal action in relation to failures to offer suitable or pre-injury employment, initially through the ACCS. Such a right should be underwritten by the VWA.

In the meat industry the use of Labour Hire firms is widespread. Approximately 40% of employment in Abattoirs is with labour hire. However, this does not mean short term employment or moving from one host employer to another. A significant number of meat industry companies use labour hire firms to provide the entire workforce permanently. Often workers who have worked in the same place every day for many years only discover that their employment, which was initially with the meatworks, is with a Labour Hire firm, after they have been injured.

Because the injured worker is only able to perform restricted duties, they are unable to compete successfully on the open labour market and the host employer avoids all responsibility for placement of the workers that they have injured.

Injured labour hire employees remain dependent on the scheme for longer than workers who retain their employment. This increases the cost to the scheme and causing the worker serious disadvantage. It is not reasonable for employers to dump their injured - they have a moral responsibility to help them recover and return to work.

Further, the Labour Hire Companies are sometimes established by the same people as own the meatworks and provide labour to nobody else. In our experience distinction between the responsibilities of the host employer and the labour hire is spurious. The host employers should not be able to avoid responsibility for the return to work of workers who are injured in their workplaces.

The AMIEU strongly supports the VTHC recommendation that the legislation be amended to provide a dual obligation on both the labour hire firm and the host employer to provide suitable employment.

Returning to work with a new employer

It is, unfortunately, the case that some workers will never be able to return to the meat industry because of the nature of the injuries.

Many of the workers in the meat industry start working when they are very young and have many skills that do not transfer easily to other industries. A lifetime of manual work will not automatically transfer to intellectual labour when the worker is injured and cannot return to manual labour. These workers need training to develop other skills and the confidence necessary to obtain employment with new employers in other industries.

Additionally the latest migrants to Australia (including refugees) often come to work in the meat industry. These workers may have skills and qualifications obtained in other countries that are not recognised in Australia.

There are meatworkers who have been teachers, accountants, lawyers and social workers in their country of origin. Bridging training to obtain recognition of existing qualifications would be of benefit to the society as well as the injured worker. Such training for injured workers is currently not even considered in WorkCover.

Without retraining it is almost impossible to obtain new employment, particularly new employment which is financially on a par with slaughtering or boning.

However with the current Act retraining is usually only offered for 6 week courses or not at all. This is totally insufficient for many injured workers.

The injured workers who are unable to return to the pre-injury employers often need retraining. WorkCover seldom offers it.

New employers will not take on inexperienced, untrained, injured workers..

Risk management and occupational rehabilitation programs

The AMIEU certainly considers that risk management requirements must be retained in the AC Act. The requirement to investigate the cause of injuries complements the OHS Act but does not duplicate it.

However, there is virtually no enforcement of these requirements. Enforcement of risk management and occupational rehabilitation programs is essential.

The AMIEU supports the need for a Compensation Inspectorate who has powers that mirror the powers and responsibilities of the inspectorate in the OHS Act.

The occupational rehabilitation service of "modification to a work station or equipment used by a worker that is likely to facilitate the return to work of the worker after the injury" is rarely used in our experience. If there were more focus in the area of risk management there would better rates of return to pre-injury employment and fewer new injuries or repeat injuries.

The AMIEU supports the VTHC recommendation that the existing requirements under the AC Act for risk management plans be retained.

Enforcement

As stated already, the AMIEU believes that there should be a comprehensive enforcement regime to enhance a compensation inspectorate. We consider that the inspectors should be able to issue formal notices, requiring employers to prepare return to work plans; to offer employment suited to the worker; to offer pre-injury employment when the worker is fit to do so; to prepare risk management and occupational rehabilitation programs in consultation with the health and safety representatives and the workers. We believe that copies of all reports and notices should be given to the health and safety representatives similarly to the requirements of section 103 of the OHS Act.

Incentives to promote return to work

It is our experience that meaningful and sustained return to work is the goal of injured workers.

The possibility of prosecution with sufficient penalties should provide an employer with incentive.

One area where there is currently a disincentive for treating practitioners is the unwillingness of some employers to allow them to inspect the workplace and to assess possible duties.

The AMIEU supports the VTHC recommendation that treating practitioners and health practitioners should be paid travel allowances to attend workplaces.

Weekly benefits

The insecurity of income that is provided under workers' compensation compounds the difficulties caused by being injured at work.

Duration

The introduction of 104 weeks termination of weekly payments unless the injured worker is able to demonstrate that they are totally incapacitated and that this incapacity is likely to last indefinitely was in 1992. This was changed to "no current work capacity" in 1997. In 2006 the arbitrary termination period was extended to 130 weeks.

Prior to 1992 the weekly payments continued until the worker was aged 65.

The arbitrary termination is harsh and unfair to workers who are unable to return to previous employment and for whom rehabilitation has been unsuccessful because of the nature of the injuries or because employment to the worker's maximum capacity has not been found.

Example: A worker started work in the meat industry when he was 13. Obviously he had limited education He continued to work in the industry for 40 years and had skills as a slaughterer, a slicer and a boner. He suffered multiple cumulative injuries to his neck, shoulders, elbows, wrists and hands and underwent several operations. After every period of recovery he returned to work. He was well respected by his co-workers for his skill and his commitment to workers in the industry.

He earned good money and obtained a mortgage based on his income. However his injuries got worse until he was unable to hold a knife, lift his arms or turn his head, his hands were clawed. The medication that he needed meant that he could not drive. All medical opinion suggested that he could not return to any manual employment. No retraining was considered for him because of his limited education. Being unable to work in the industry he lost his self-esteem and became depressed.

At 130 weeks his payments were terminated as it is considered that he has a current work capacity for something theoretical. At conciliation there was no resolution the matter is now heading for the County Court. In the meantime the worker is likely to lose the roof over his head and is developing more severe depression. The WorkCover system is causing psychological injury.

A system where a worker who has left school at grade 6, performed manual labour for 40 years until injured so severely that he has no capacity for manual labour, has their payments terminated arbitrarily at 130 weeks is harsh, unfair and unjust and must be changed.

The AMIEU strongly recommends that the period of entitlement to weekly benefits for workers with a partial incapacity be increased to 260 weeks.

Weekly payments after 130 weeks for workers with a partial capacity for work

Obviously, in line with the previous recommendation we consider that the second entitlement period should be extended from 130 weeks to 260 weeks.

The current provisions in section 93CD are sometimes unworkable.

Example: A worker on a beef line in an abattoir in a regional town was injured. The abattoir was the major employer in the town.

The worker's injury was so severe that he could never return to his pre-injury employment. In particular, he was limited in the weights that he could handle, and his hours of work were limited to 4 hours a day i.e. 20 hours a week.

His employer gave him work on the pork line (weights in pork are less than in beef). However the pork line did not function 5 days a week. The pork contracts, that the employer had, only required 3 days production in a week.

After 130 weeks the worker was working 12 hours a week. However he was not working to his maximum capacity as there was no more work available.

The worker, his treating practitioner and his employer considered that there was no more work available, that the worker was capable of performing. He was also undergoing education so that he would be able to perform meat inspection in the future.

The worker's skills and work experience were entirely in the meat industry. Apart from the abattoir where he worked, the nearest meatworks were over 100 km away. He was performing all of the work within his capacity that was available within his region. He was also undergoing training to develop the skills to perform further duties.

The VWA rejected his entitlement for payment because of the arbitrary 130 week termination and the fact that the worker was not working to his maximum capacity despite the fact that he was performing all of the work that was available.

Clearly the application of section 93CD should not make it impossible for a worker who has returned to work and is working in all of the work available should not be penalised. Currently they are. The Act must be amended.

The AMIEU supports the VTHC supports the recommendation that section 93CD be replaced with a provision that workers with a partial incapacity for work to continue to receive weekly payments in circumstances where they are unable to return to pre-injury employment and their employers fail to provide employment suited to the worker.

Pre-injury average weekly earnings

Normal Weekly Earnings, including piece rates, overtime, penalties, bonuses and allowances should be the basis for entitlements. Many industries operate 24 hours a day and seven days a week. Workers' wages in these industries are based on piece rates, penalties and allowances being integral, not

something additional. Studies of patterns of working life show that the average working week for workers has increased considerably and any penalties and overtime are relied on as an integral part of workers' incomes

Private savings in Australia are extremely low, which indicates that most workers use their entire disposable income for survival purposes. Thus, major drops in income are likely to place workers in financial jeopardy.

Supermarkets are open 7 days a week and between 18 and 24 hours a day. A butcher who permanently works Monday to Friday earns approximately $730 a week (Normal Weekly Earnings). A butcher who permanently works Wednesday to Sunday earns approximately $1000 a week (Normal Weekly Earnings). Both of these workers will need their entire income for survival.

However, the definition of PIAWE will ensure that if the workers are seriously injured and have no work capacity after 26 weeks the worker who worked Monday to Friday will receive 75% of his NWE and the worker who worked Wednesday to Sunday will receive 55% of his NWE.

Workers on an AWA at one of the abattoirs have a normal week of 6.00am to 5.00pm Monday to Thursday then 6.00am to 4.00pm Friday and Saturday i.e. a standard week of 58 hours, normal weekly earnings of $1160. However, when their WorkCover weekly payments are calculated on their 'ordinary time' rates they will receive 75% of a 40 hour week or 51% of their normal weekly earnings.

This is not 'adequate and just compensation' for workers whose injuries are so serious that they have no work capacity after 26 weeks or whose employers do not provide suitable alternative duties if they are partially incapacitated.

The AMIEU strongly recommends that PIAWE be replaced by "normal weekly earnings" that includes piece rates, penalty rates, overtime, allowances, commissions, bonuses, salary packaging and the like.

Superannuation

Under the AC Act superannuation is part of remuneration. Premiums are paid on superannuation but payments for weekly payments for injured workers do not require superannuation contributions to be made on their behalf.

This has a major detrimental impact on retirement savings for the individual worker and impacts greatly on quality of life at retirement age.

When compulsory superannuation was introduced in 1987 workers forwent wage increases. The policies of successive governments have reinforced the compulsory payment of employer contribution to superannuation.

Workers should not be forced into post retirement poverty because of their injuries at work. Superannuation is a vital component of workers' income and savings.

The decision by the Northern Territory Court of Appeal that superannuation should be taken into account in determining weekly payments should be reflected in payments in Victoria.

The AMIEU recommends that superannuation payments be made into a complying fund for the duration of the entitlement period.

Rate of payments

The AMIEU submits that there should be an increase in the level of entitlements for weekly payments to 100% of NWE for the first 12 months of weekly payments following injury.

In time of extremely tight household budgets, rising interest rates and mortgage stress for workers, any reduction of anticipated earnings can have catastrophic results.

It is in everybody's interest to focus on recovering health, rehabilitation and return to work early in the injury. This is more easily achieved if the worker is not suffering financially.

Victorian weekly payments are the lowest percentage of pre-injury earnings in any other States in nearly all categories of payments to workers.

The AMIEU supports the VTHC recommendation that the rate of weekly payments be increased to 100% of NWE for the first 12 months and then 80% for the remainder of the receiving weekly payments.

The method of calculating entitlement periods

Under the AC Act the receipt of weekly payments of any amount during a week constitutes a week payment. This disadvantages the workers who try to stay at work despite their injuries.

Example: A worker in a country town tore the ligaments in her shoulder when a 38 kg box of meat fell and she tried to catch it. Initially she took two days off work and lodged a claim. She returned to work using only one arm performing alternate duties. Initially it was diagnosed as bruising and inflammation. She attended physiotherapy at the only practice in the town. The only appointments that she could get were during working hours. For 12 weeks she continued to attend physiotherapy once a week. On those days she took 3 hours off work to attend treatment. After 12 weeks an ultrasound was performed and the torn ligaments were identified. Surgery was approved by the claims agent.

When the worker underwent surgery she was paid 75% of her PIAWE, even though she had only lost 2 full days and had been 36 hours off work in 3 months.

The AMIEU supports the VTHC recommendation that the AC Act be amended to provide that the calculation should be by way of reverence to individual days of incapacity, rather than weeks in which any payment is made for incapacity.

Notional earnings

The AMIEU is totally opposed to the concept of Notional Earnings. It is nonsensical that any worker's income can by reduced by an amount of income which exists only in somebody's imagination. We reject the premise that injured workers will not return to work unless they are driven by poverty. Notional Earnings can only be justified by this fallacy.

Notional Earnings has been used in several ways that we have come across.

1. A worker was injured in a boning room in Dandenong. The claim was accepted. There was no return to work plan developed in the workplace that the worker was informed about. The treating doctors identified the injury as such that he would not be able to return to boning. The spouse of the worker accepted work in Queensland. He informed the claims agent before relocating. Three months after the worker relocated to Queensland the boning room in Dandenong sent a return to work job offer. The worker advised that he was looking for suitable duties in Queensland; that his doctor had asked for retraining for him because he would never be able to return to pre-injury work; and he could not daily commute 2,000 km. The claims agent then applied Notional Earnings stating that suitable employment had been offered and distance was not relevant to the incapacity.

   This was taken to conciliation. A genuine dispute was the outcome. It was pursued through the Courts and settled several years later.

2. A worker was injured, his claim was accepted, after 6 weeks he returned to work in suitable employment. He continued on suitable alternative duties for more than 3 years. Then he was dismissed. There was no warning given, verbally or written, the worker was not allowed to have the Union present in the meeting. It was impossible to take the issue to the IRC as harsh, unfair and unjust because it was a workplace where there are fewer than 100 employees. The claims agent applied Notional Earnings.

   After 3 months in which the worker had no wages the claims withdrew the notice.

The AMIEU strongly supports the VTHC recommendation that Notional Earnings be removed from the Act.

Gap payments

The AMIEU supports the VTHC recommendation that a worker should be entitled to weekly payments up until the payment of any common law damages, not simply the date terms of settlement are agreed.

Repeal section 93B(4)

We submit that the draconian approach of section 93B(4) is harsh, unfair and unjust. The idea that a worker who does not start on the day proposed by in a return to work job offer can have their payments terminated forever is outrageous.

We have dealt with cases when the worker is given a return to work job offer on Friday to start on Monday with no opportunity to talk to the treating practitioner before returning. The failure of the worker to start work until one week later when there has been time to discuss with the doctor was sufficient to apply 93B(4).

The most punitive clause that could be considered would be a parallel to section 112(2).

The AMIEU submits that section 93B4 be repealed.

Medical and like expenses

Limits to the extent and duration of medical and like expenses

The current lack of legislative time frames for determination of issues in relation to medical and like issues creates some appalling situations.

Example: A fit young worker fell at work and suffered a serious knee injury. Initially the treating doctor practiced conservative medicine, physiotherapy and the use of a calliper. The worker returned to work on alternative duties, initially on limited hours and in a short time on pre-injury hours. After some months of conservative treatment the orthopaedic surgeon requested permission to perform an arthroscopy with the possible need for a knee reconstruction.

The claims agent did not answer for many months. When they eventually responded they stated that the worker had returned to work and therefore the surgery would not be provided by WorkCover. With assistance from the Union, multiple reports from s112 doctors and WorkCover Conciliation (it was pre ACCS) approval for arthroscopy was eventually given.

Because the worker had returned to work, the claims agent considered that it was perfectly sufficient to leave the young man with a calliper for the rest of his life! The position taken by WorkCover meant that the surgery did not happen for several years and the limp that came from the knee injury resulted in ankle problems.

The lack of legislated time frames and the WorkCover Authority's focus on Return to Work and not on returning the worker to maximum capacity resulted in further injury and further costs to WorkCover.

The AMIEU strongly recommends that a 28 day time limit for determination of medical and like expenses is introduced, with failure to provide determination in this period resulting in the claim, or treatment, being determined to have been accepted

Time frame for termination

The AC Act is social legislation to ensure that injured workers are assisted with rehabilitation.

Section 99(11) seeks to impose an automatic termination of reasonable medical and like expenses 12 months after weekly payments cease.

This does not ensure that reasonable medical and like expenses that are necessary for rehabilitation to normal social life. The only grounds for decisions, about medical and like expenses is whether the treatment/facilities are appropriate for the injury and their reasonableness.

Governance of medical providers

There are currently restrictions on health providers who can provide treatment in that they must be recognised by the relevant professional bodies. This is already a professional gate keeping mechanism. It is not appropriate for the VWA (an insurance body) to usurp the role of the professional registration boards.

It must also be recognised that there is also a process of self-selection among health professionals with many professionals declining to treat patients with WorkCover claims.

Having limited numbers of specialised doctors who are able to provide certificates would create major bottle necks in access to the system. There is already an extremely uneven distribution of the medical profession. Patients in some metropolitan areas and many regional areas already have to travel long distances or wait long times to see health professionals.

The relationship between patient and treating health practitioner is one which relies on trust. It also relies on confidentiality. Long term treating practitioners have built a relationship of trust with their patients and also have knowledge and experience of the total physical and psychological functioning and reactions of the individual. This assists in the treatment and recovery of the injured worker.

The idea of WorkCover practitioners who are distinct from the overall health care of the injured worker is counterproductive and inefficient. Work injuries do not happen to machines, they happen to people who exist and work with all of their weaknesses and strengths. To provide treatment for a work injury in isolation from the other health needs of the individual, is not efficient and could be dangerous. For example, a worker could be prescribed medication for a work-related condition which is an antagonist or synergist for the medication prescribed for a non-work-related condition being treated by the family practitioner. The result could be extremely harmful to the worker.

The AMIEU considers that the injured workers must have the choice of their own treating health practitioners.

The United Nations Permanent Peoples Tribunal *Charter on Industrial Hazards and Human Rights* sets out rights to professional services in Article 27. The AMIEU believes that these rights should be reflected in the Act.

Co-ordinated care programs

The AMIEU supports the removal of co-ordinated care plans (section 99AAA) from the AC Act.

Impairment benefits and maims payments

We will not comment in detail on the issue of impairment and maims payments.

The particular issues that we wish to comment on are:

- The issue of total reliance on the *American Medical Association Guides to the Evaluation of Permanent Impairment 4th edition*; and
- The exclusion of secondary psychiatric injuries.

Meatworkers are skilled manual labourers. When they receive serious physical injuries that prevent them from pursuing their chosen occupations and are unable to pursue a normal life, such as picking up their young children or carving the roast (which they used to produce) they can suffer serious psychiatric consequences. These workers' lives are often destroyed by the work injuries.

The loss of full use of the dominant hand may not have a serious affect on an intellectual labourer, however the pain and suffering for a boner or a slaughterer from such an injury is extremely significant.

The total reliance on the AMA Guides mean that the compensation for Pain and Suffering is exactly the same no matter the impact of the injury on the worker.

Moving away from disability and replacing it with AMA Impairment was a significant reduction in "adequate and just compensation for injured workers". The removal of evaluation of secondary psychological injuries in 1997 was a further step away from "adequate and just compensation".

The AMIEU believes that further work needs to be carried out on developing an appropriate method of measuring the pain and suffering from disability and impairment.

Until such measures have been developed and agreed on the AMIEU supports the VTHC on their submission that the threshold for all injuries including psychiatric, should be a consistent threshold of 5%

Common law

The AMIEU supports the submission of the VTHC with regards Common Law. We do not feel that there is need for more argument.

We support all of the VTHC recommendations.

Dispute Resolution

Powers of Conciliation Officers

Conciliation Officers have limited powers to resolve disputes when the agent/employer maintain their position and will not consider any alternative.

The employers' freedom of choice of claims agent (from the VWA list) can result in the claims agents being unwilling to contradict employers, for fear of losing the account.

In our experience it is not uncommon for a claims agent to know that an entitlement to compensation exists, but to have a client (the employer) who wishes to deny liability. In many cases the claims agent would advise the employer to accept the claim. If the employer objects to the advice, the claims agent is faced with a choice:

- accept the claim but risk losing the policy of the employer; or
- accept the employer's position, fight the claim and go to court over a claim which the claims agent knows should be accepted.

Claims agents, acting on market imperative, often reject the claim.

These claims go on to Conciliation where they are not resolved and usually go to be settled on the steps of the Court. This incurs unnecessary costs in the form of numerous medical reports obtained by both sides, additional administrative costs and legal costs for both sides

The worker does not get paid, does not get essential treatment and work relationships break down.

The AMIEU assists members with conciliation. We see a number of instances that should never have needed conciliation. We see many where resolutions should have been reached at conciliation but they are not because of:

- the symbiotic relationship between the claims agent and the employer; and
- the lack of powers given to the Conciliation Officers.

The AMIEU has provided assistance to members with the conciliation process since WCS/ACCS was established. We attend an average of 3-4 conciliations every week.

In that time the major improvement that we have seen, which would resolve disputes reasonably quickly, treat workers more fairly and save the VWA significant costs would to give the Conciliation Officers the power to arbitrate.

The AMIEU supports the VTHC recommendations that:

- The powers of the Conciliation Officers at the ACCS be amended to provide for a full Administrative Review of any dispute relating to a claim for compensation, with the right to appeal to the Court. The AC Act should provide that Conciliation Officers can affirm, amend, or replace a decision of an agent/employer/self insurer that has created the dispute.
- The AC Act be amended to unequivocally provide that a worker be represented throughout the dispute the process.
- The Conciliation Officers be given the powers to issue directions with respect to return to work obligations.

Medical Panels

The AMIEU believes that there must be amendment to the definition of 'medical question' in section 5. A number of the questions that are defined as medical are, in fact, legal questions.

According to section 5(aba) Medical Panels currently have the power to give the answer to the question "what employment would or would not constitute suitable employment"

According to the Claims Manual the question of capacity for 'suitable employment' must include the question:

> "Would the worker's residual capacity be sufficient to enable the worker to perform a particular job? (consider the worker's pre-injury employment, age, education, skills and work experience)"

This requires an understanding of the current labour market. What training do doctors have to give them the skill to assess this?

The injustice that exists in this situation is exacerbated by section 68(4) which states that the opinion of the medical panel on a "medical question" must be accepted as "final and conclusive".

Example: A worker who was a boner, a skilled manual labourer. He was a boner for 16 years with the same employer. In 1998 he ceased work with an ongoing bilateral hand disability. He did not work again. He had been

determined by his treating doctors and the doctors nominated by the WorkCover Agents to have no work capacity, so that he received weekly payments for 5 years. Then he was terminated when the insurer obtained a report that suggested that he had a current work capacity. The Medical Panel gave the opinion that he *"is unable to perform his pre injury duties as a boner"* and that his *"incapacity is still materially contributed to by the claimed work injury".* However the medical panel also gave the opinion that *"there is work for which the worker is currently suited".*

The worker about whom this was stated was aged 64 years old and had extremely limited education He was fluent in Macedonian but spoke very little English and was not literate in English.

The AMIEU recommends that section 5 of the AC Act be amended to redefine "medical question" so that Medical Panels are confined to determining matters within their expertise. That is whether the workers have total, partial or no incapacity.

Premium

The AMIEU would like to draw your attention to issues that has not been canvassed in the Discussion Paper. Currently the way to ensure that premiums will be as low as possible is to sack all staff and start again with new workers particularly using labour hire (and probably a new company name). The management of Belandra indicated this in evidence in the Supreme Court (AMIEU vs Belandra 2003). When premiums rise in the labour hire firm the host employer can then change labour hire firms.

In the meat industry there is a trend to sack the entire permanent workforce and contract a labour hire company to provide the entire workforce permanently, but the workers are casual with none of the rights of permanent employees. As stated earlier, the labour hire forms are sometimes established by the meatworks management.

The AMIEU believes that if an employer transfers from a permanent workforce to labour hire the concept of succession should apply and the labour hire company should have to pay the premiums inherited from the host employer.

Currently the definition of remuneration excludes traineeships and therefore premiums are not paid on these workers.

The AMIEU submits that traineeships should be included in remuneration and premiums should be paid on these wages.

The practice of at least one large employer in the meat industry is to bring in workers on traineeships and dismiss them when they can no longer be classified as trainees. In the workplace where there are approximately 350 effective full time workers there have been 100 new traineeships each year for at least 5 years. This workplace is the only large employer in the regional town where it is located so when the person has been 'trained' there is nowhere else for the worker to go. The workers are brought in, chewed up (sometimes literally) and spat out. This practice is encouraged by the definition of remuneration in the AC Act.

Other employers in the industry employers keep workers for 20 to 40 years, they should not be penalised for having a long tern commitment to their workforce.

To enhance the workplace link between workers' compensation and OHS performance there should be a set minimum percentage of the revenue raised for workers' compensation premiums/levies should go to the development of workplace injury prevention strategies.

The AMIEU recommends that premiums should be offset against major health and safety investments.

Because of the fact that 60% of injuries in the meat industry are cumulative, the employer who invests in improving health and safety, and employs workers on an ongoing basis, should have prevention investment offset against premiums.

Currently, in most States, the way to ensure that premiums will go down in the short term is by sacking all the staff and starting with new workers, particularly using labour hire, and turning over young trainees. Good employers who do not throw injured workers on to the scrap heap and who make health and safety improvements should be rewarded.

Self insurance

The AMIEU supports the VTHC submission that there should be no self insurance in the Victorian workers compensation scheme.

Self insurance is regulated poorly. There is, in all cases, a commercial focus rather than social legislation emphasis.

In Victoria self insurers do not consider themselves as having to meet the same procedures and interpretation as the WorkCover Claims Agents. This is totally unacceptable.

If self insurance is allowed to continue a self insurer who does not recognise the rights of employees who are injured should have the right to self insure withdrawn.

The AMIEU strongly recommends that if self insurance is allowed to continue self insurers must have to comply with the claims manual.

If self insurance is allowed to continue, at the very least, the request by a company to self insure should have the support of the workers' industrial body and the policies and procedures should be negotiated and agreed by the employer and the unions. Licenses must have to be applied for on a regular basis.

The AMIEU strongly recommends that if self insurance is allowed to continue the only companies who are licensed self insurers must have total commitment to constantly improving health and safety.

It is not sufficient to have commitment to OH&S paper exercises. Evidence of commitment to health and safety must be available. These employers should be subject to state OH&S audits as all other employers. In particular,

evidence that the OH&S is not being maintained should result in the withdrawal of the license to operate as a self insurer.

The AMIEU strongly recommends that if self insurance is allowed to continue workplace deaths should result in immediate withdrawal.

Unfortunately there are employers who have a record of deaths who are still operating as self insurers.

One of the major disadvantages of allowing self insurance is that it can be detrimental to the whole scheme, take out the good performers (the self-insurance) and leaves the compensation system with less money. By definition they are large employers, because there are no premiums this removes a lot of money from the system making it more likely for the increased costs of insurance for medium and smaller employers.