

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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Submission to the Joint Select Committee on the **NSW Workers Compensation Scheme**

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17 May 2012

Joint Select Committee on the NSW Workers Compensation Scheme
Legislative Council
NSW Government
NSW

Dear Sir/Madam,

NSW Workers Compensation Scheme

Thank you for the opportunity to make a submission on the issue of the NSW Workers Compensation Scheme. We hope our submission assists the Committee, particularly in respect of its efforts to provide our experience of operating a small business within NSW. We have first hand experience of the differences between the operations of WorkCover in NSW in comparison to QLD - where our business was previously located. Our business is a timber manufacturing business. It has been in operation since the early 1900's. We have owned and operated the business since 1998, which was located in Queensland up until 2010. We have been located in regional NSW since then. We make this submission in our capacity as Directors who are actively engaged in the daily operation and management of the business in regional New South Wales, Australia.

Overview

In summary our experience of WorkCover in NSW has been one which we believe has caused us to suffer significant financial hardship to the extent that we face daily difficulties operating our business due to human resource issues. This has in large part been as a result of a number of vexatious claims by former employees as well as due to weekly absenteeism from employees who exploit the weak requirements to demonstrate illness to medical practitioners.

Our experience in dealing with WorkCover in NSW has been that there is an institutionalised opposition to business, the culture of which assumes businesses are in the wrong in all instances. WorkCover places excessive burdens on employers to demonstrate that they have 'done no wrong' and places very little accountability on employees to provide evidence of their claims. Further there is very little consideration given to the actions of employees, for instance ignoring health and safety warnings, when evaluating any claims made.

To this end it has become inevitable that any claim by an employee will result in a financial payout, in our opinion, despite the lack of evidence provided or in some instances with evidence provided to the contrary which demonstrates negligence by the employee.

Our submission focuses on three key areas:

1. **The lack of engagement with and assistance to business owners to improve their capacity to understand and meet WorkCover requirements;**
2. **the lack of accountability of employees (especially w.r.t. providing sufficient evidence of injury or illness); and**
3. **An absence of equal representation and rights for business owners.**

In addressing these three points we make specific comment to the terms of reference, providing our experience particularly with regard to points (b) and (c) listed below. However we believe our experience provides insight into the success of the scheme in achieving point (a).

Terms of reference:

- (a) the performance of the Scheme in the key objectives of promoting better health outcomes and return to work outcomes for injured workers,
- (b) the financial sustainability of the Scheme and its impact on the New South Wales economy, current and future jobs in New South Wales and the State's competitiveness, and
- (c) the functions and operations of the WorkCover Authority.

We believe that addressing these issues (our recommendations are listed below) would vastly improve the performance of the WorkCover Scheme and be mutually beneficial to employees and employers. The successful operation and growth of businesses is critical to the performance of the New South Wales economy, growth in jobs and the State's competitiveness. Whilst the protection of individual's rights and safety is paramount and undisputed, it is to the benefit of all that businesses are also enabled to provide employment without the fear of financial penalties that occur due to malicious or fraudulent claims or overly onerous bureaucracy that assumes immediate guilt.

Our recommendations for the consideration of the Joint Select Committee are:

- 1.1 **That WorkCover actively engage with employers to provide education and capacity building to enable them to understand and meet existing or new requirements.** Formal training programs as well as the existence of an advice line where employers can access information and advice on legal procedures and policies would enable employers to better understand and meet the requirements of them. It would also enable them to seek legal advice where they feel they are being unfairly penalised. The Work Cover site is very difficult to navigate and businesses have to pay for a copy of the Work Cover manual.

1.2 **That the current policies and reporting requirements of employees to demonstrate injury or illness be reevaluated to ensure adequate evidence is provided and treatment given is in the best interests of employee's recovery and rehabilitation.**

Currently the requirements of employees are very weak to demonstrate injury or illness actually occurred at the work place. For instance other than the Medicare card which has no photographic record, no attempt is made to verify that worker's identity or that the individual reporting the injury is in fact the same person making the claim against the employer. There is no onus placed on the Doctor to verify the employee's version of what s/he states is the job carried out. The insurance companies accept the word of the medical profession over that of the insured.

The medical profession is currently incentivised to prolong treatment because of the higher rates paid to them for Work Cover Injuries. The number of rehabilitation organisations opening point to the very lucrative commercial opportunities which have been created because of the current Work Cover model.

1.3 **That sufficient resources are made available to ensure employers are protected from malicious or fraudulent claims.**

The current onus is weighted against employers to prove that they have done no wrong, however WorkCover currently provides no support to businesses when presented with evidence that employees are misusing the system or making fraudulent claims. Work Cover asks for no financial payments from Workers but offers no financial or legal support to employers to defend charges. In frequent circumstances employees are forced to accept fault because they simply do not have the financial or time resources to defend claims.

1. Our experience

Our business is a small timber manufacturing business which has operated in Australia since the early 1990s. We manufacture and supply Australian made timber products nationally to a number of owner-operated and large hardware stores.

We currently employ over 10 people full-time but at our peak employed over 20 people. We also provide work to sheltered employment facilities and indirect employment to freight companies and other suppliers and providers.

We are currently located in regional NSW, in an area which has an “above average unemployment rate” of over 8% (ABS). We located here as the Council was very proactive in trying to attract business as well as for the locational advantages of access to timber products.

Since our arrival in NSW we have had an estimated 300% increase in WorkCover visits. During our time in Queensland we had one series of visits, which was as the result of a genuine accident. The accident was one which was genuinely upsetting to all involved and we did not dispute the injury and provided our full support to the employee who was injured. As a result of the incident we became even more vigilant in our approach to health and safety.

When locating to NSW we called upon our industrial representatives (TTIA) and employed their workplace health and safety consultant who is an expert in our industry to advise us in setting up our workplace health and safety protocols and documentation including machine guarding. These arrangements were made in advance of our move to NSW to ensure everything was in place before we begun our relocation and operation. A safety audit and documentation was provided for us and all employees go through an induction. We have regular tool box talks and safety meetings.

However we have had over 10 visits since we began operation in January 2010. We believe that a number of these visits are as a result of a local Union representative making vexatious complaints to WorkCover. He had threatened us that unless we allowed him unfettered access to our site he would call in Work Cover. In the initial instances we found WorkCover to be antagonistic in their approach to dealing with us. However, as their own patience has been strained by these vexatious complaints this has become less so. Unfortunately due to current policy they are bound to follow up every complaint. This has been a frequent disruption to the operation of our business as Work Cover arrives unannounced, allowing us no preparation for the issues to be discussed and we are obliged to provide immediate attention even despite the fact that discontinuing production means we get no orders out and subsequently lose money.

We understand that Work Cover has an obligation to follow up on all complaints including anonymous ones. We have however found a correlation between work place safety warnings to employees and a visit thereafter from Work Cover. In one instance a worker who was frequently late or absent from work and who boasted to other employees

that "all you have to do to look busy around here is to carry a handle from one shed to the other", assumed the practice of carrying around a mobile phone and photographing his peers at work telling them he was preparing a folio for Work Cover. Predictably when his employment ceased, Work Cover visited with a complaint about our fork lifts. The forklifts were in good working order but we had to pay for a company to visit our site and test the forklifts to provide documentary evidence that this was the case. We are sympathetic to cases where complainants should be protected but find the current system to be a form of McCarthyism where complaints apparently do not have to be proven or complainants identified or at least have their relationship and history with the company about which they are complaining made known. The current system lends itself to nuisance claims and vexatious behaviour by people who in our opinion are motivated by spite.

Injury Claim

In June 2011 an employee (A) who was employed as a casual at our company lodged a claim for a soft tissue back injury subsequent to being stood down from our employ.

We stood him down as a casual on a Monday as we had insufficient work to provide him with further employment. This was done by phone to his home once we had established he was there safely.

He called us frequently the next day (Tuesday) to demand his job back and to issue threats. He made no mention of an injury to us at that time.

We subsequently discovered that (A) visited the local hospital a day after his employment was suspended.

(A) visited our site on Wednesday and was verbally abusive and threatening. He was also derisive of other employees. At that point we wrote a letter confirming that we would not employ him because we could not countenance employing someone who behaved in that manner. (Subsequently we discovered that A had a doctor's letter in his possession but he neither referred to it nor produced it).

(A) returned to our site on Friday and behaved in the same manner. He was told clearly that he would not be employed by us. At that point he reached into his pocket and pulled out a piece of paper and said "Well then, you are just going to have to wear this". This was a letter from a Doctor attesting to a work place injury.

We have a very clear process of declaring injuries on site including an injury register plus supervising employees who are constantly present. No comment was made to any one and no injury reported in any form while (A) was on site.

On the medical certificate provided the Doctor had not printed his/her name and had not given a provider's number and in our opinion it was of dubious origin. [redacted] called the Doctors rooms without success to identify the doctor. We contacted our industry lawyer

who shared our opinion and said not to submit the document to Work Cover. We were subsequently threatened by the Union because they claimed that we had fired an injured worker because he had sustained an injury on site. We proceeded with the Work Cover claim under this threat and the worker has been employed on full benefits for 6 months and lesser benefits for the following 6 months on a totally fabricated claim made by a worker who has admitted to the investigator that he fabricated his resume and also worked illegally while drawing compensation for his previous (and we believe fraudulent) claim. The easiest solution in this current climate is to make the employer pay and ignore the difficult task of refusing the worker's claim.

In summary as a consequence of this person we have had our insurance premiums go from \$17000.00 per annum to \$32000.00. He frequently delayed unreasonably when requested to attend appointments. We know he is working "in the black" in the area and have seen him on several occasions in hi-vis and working boots. We have also had information from outside sources that (A) is, and always has been working while claiming a year's compensation from us.

We have discovered that we are the 4th company to have similar claims made by this individual but as statutory periods have elapsed our insurance company claimed they could not deny his claim. The small business before us nearly lost his entire business as a result of (A)'s claims of an injury on the way to work.

We have had 2 further injuries claims from a worker who has had several warnings for attending work with fake acrylic nails. These nails clearly inhibited that worker's ability to grip handles securely and operate machines safely but the worker continued to ignore safety warnings resulting in two injuries. When the worker returned from the second injury having been cleared for full return to work by the doctor that worker still had the same acrylic nails attached. We subsequently terminated that worker's employment but still had the Union support an unfair dismissal claim through Fair Work which we paid because we simply do not have the money to pay for lawyers to represent us in an equal way to the funds made available to workers by the Unions.

Employee Absences

We experience continual employee absences from work and despite instructions to our workers to phone in and keep us advised we are rarely contacted.

Employees do not give us any warning that they will not be coming to work. Medical certificates have been provided by doctors a week after absences, this is despite our workers admitting that they have never attended these doctors before. We have no recourse to dispute what we believe to be dubious medical certificates without significant financial risk of penalty through time lost from running our business.

We are required to pay sick leave in these instances. This results in a financial loss to us as we are not able to operate as needed to meet our business orders, but are still required to pay for a full days work.

Where illness is genuine we believe that this should be awarded, but have had many instances where illness we believe is fabricated. Sick leave is viewed by some as an extension of annual leave.

Impact on business and community

The impact of the injury claim as stated has resulted in a rise of our Workers compensation insurance from \$17000.00 per annum to \$32000.00 as well as in significant business disruption and distress to us.

We have always loved our business and enjoyed the satisfaction of being an Australian manufacturer of an iconic, niche product but the last couple of years in NSW dealing with what feels like a malicious and counter productive process has had enormous impact on our health and also our certainty of being able to continue. There is always the nagging fear that anyone can lodge a Work Cover claim; in this economic environment a casual worker would see good sense in assuring payment for at least a year by, as in the case of ex employee A, lodging a claim for a muscular type injury. We would never have countenanced that this could happen until we experienced the issues we have had in NSW. We are left disillusioned and devastated by an onerous and unwieldy system which polarizes employees and employers. This current Work Cover system has to change although sadly it probably will be too late for a lot of businesses to recover.

The impact on business owners is multiplied when it results in the long term loss of employment to others. We have had to reduce our employee numbers, and are very hesitant about employing new people as a result of our experience. Should our business continue to struggle with these human resources issues we see a very real probability that we will cease trading. This would result in a further 10+ job losses. In a community with already high unemployment the probability of these people finding other employment is not good. The impact on communities like the one in which we live is as a result of job losses is tangible.

2. Recommendations for reform of WorkCover Scheme:

We believe in the protection of all employees and are strong advocates of adhering to health and safety practices. However the perverse application of these laws enables some people to exploit Australia's labour laws and undermines the system for those genuinely requiring it. This also undermines the ability of businesses to operate in an environment where their rights are equally protected. Everyone loses.

It could be easy to dismiss our experience as isolated or not the norm, but the fact remains that the benchmark performance of NSW in comparison to QLD and Victoria points to a very real trend. Secondly, these incidents have the impact of crippling small business. The current 10+ employees stand to lose their jobs, as do we due to continued WorkCover claims. Even one malicious claim has a very real impact.

While a very strong regulatory environment exists for employees there is no protection or support to business owners except at their own expense and risk. The perception of business owners as unfairly exploiting their employees is for most businesses an outdated and unfair characterisation. We have worked incredibly hard to establish our business, at significant financial risk to ourselves. We work 6 days a week in order to ensure we can continue to operate and employ local residents as well as providing work to sheltered employment centers. We conform to all of WorkCover requirements, however none of this effort and cost is taken into account when a claim is made. Further despite this we are not ourselves covered by WorkCover and have few free resources available to protect ourselves and the business which provides employment directly and indirectly to many people.

Our experience is that there is an imbedded culture within the system which encourages individuals to try to extract as much value as they can from employers and WorkCover.

We believe that by working on partnership with business, particularly small businesses that are responsible for nearly 50% of employment in the industrial sectors in Australia (Department of Innovation, Industry, Science and Research, 2011), rather than in opposition the aims and objectives of WorkCover will be better met.

Our main recommendation to the joint committee is that WorkCover should be an organisation whose mandate is to improve the operation of health and safety environment of businesses to the mutual benefit of employees and employers.

Our three key recommendations for the consideration of the Joint Select Committee are:

1.1 That WorkCover actively engage with employers to provide education and capacity building to enable them to understand and meet existing or new requirements. Formal training programs as well as the existence of an advice line where employers can access information and advice on legal procedures and policies would enable employers to better understand and meet the requirements of them. It would also enable them to seek legal advice where they feel they are being unfairly

penalised. The Work Cover site is very difficult to navigate and businesses have to pay for a copy of the Work Cover manual. We believe WorkCover should first instigate a genuine process of education and then enforcement, rather than immediate penalty. We believe WorkCover's current initiatives do not meet the needs of employers.

- 1.2 **That the current policies and reporting requirements of employees to demonstrate injury or illness be reevaluated to ensure adequate evidence is provided and treatment given is in the best interests of employee's recovery and rehabilitation.** Currently the requirements of employees are very weak to demonstrate injury or illness actually occurred at the work place. For instance other than the Medicare card which has no photographic record, no attempt is made to verify that worker's identity or that the individual reporting the injury is in fact the same person making the claim against the employer. There is no onus placed on the Doctor to verify the employee's version of what s/he states is the job carried out. The insurance companies accept the word of the medical profession over that of the insured.

The medical profession is currently incentivised to prolong treatment because of the higher rates paid to them for Work Cover Injuries. The number of rehabilitation organisations opening point to the very lucrative commercial opportunities which have been created because of the current Work Cover model.

Employees themselves and their behaviours and failure to observe health and safety protocols are also not taken into account when evaluating claims. They are absolved of any responsibility for their welfare as soon as they are begin work.

- 1.3 **That sufficient resources are made available to ensure employers are protected from malicious or fraudulent claims.** The current onus is weighted against employers to prove that they have done no wrong, however WorkCover currently provides no support to businesses when presented with evidence that employees are misusing the system or making fraudulent claims. Work Cover asks for no financial payments from Workers but offers no financial or legal support to employers to defend charges. In frequent circumstances employees are forced to accept fault because they simply do not have the financial or time resources to defend claims.

We trust that our experience and our recommendations provide useful insight into the operation of WorkCover in NSW and urge you to look into the reforms required to protect all employees, employers and the local communities which rely on small business for employment.