

**Submission  
No 3**

**INQUIRY INTO NSW WORKERS COMPENSATION  
SCHEME**

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## Joint Select Committee on the NSW Workers Compensation Scheme

Submission:

The NSW Workers Compensation Scheme operated with a reasonable degree of efficiency up until about the late 1970's. Some insurers then operating as licensed insurers sought to capture a greater share of the market for this type of insurance by offering premiums which were unsustainable in the long term.

All workers compensation policies of insurance contained what was called a "common law extension". This required insurers to pay damages if a worker successfully sued his or her employer for negligence or breach of statutory duty.

The action for negligence was available if the employer had an unsafe place of work or an unsafe system of work. It required the employee to prove that there was a reasonably foreseeable risk of injury in the way in which he or she was required to carry out their work and that there were reasonably available means by which that risk could have been obviated so as to avoid the injury. If those elements were established then the plaintiff would be entitled to damages under various heads of damage including pain and suffering, loss of earning capacity, medical and hospital expenses etc. If a verdict was obtained lump sum damages were paid. This finalised any workers compensation or other rights. Payments of workers compensation in the past had to be refunded from the lump sum verdict.

If there was a statute which had a particular safety provision which had as its purpose the protection of a particular class of employees from injury e.g. statutory obligations to guard dangerous machinery then in addition to the cause of action in negligence the employee would have a claim for damages for breach of statutory duty, to which contributory negligence was not a defence. A successful result also terminated any rights to future workers compensation and finalised all claims.

Starting in about 1984 the High Court of Australia decided a number of cases which expanded the law relating to employer's liability for common law damages. These cases included *Kondis v. State Transport Authority* (1984) 154 CLR 672, *McLean v. Tedman* (1984) 155 CLR 306, *Do Carmo v. Ford Excavations* (1984) 58 ALJR 287, *McLeans Roylen Cruises v. McEwan* (1984) 58 ALJR 423, *Braistina & Braistina v. Bankstown Foundry Pty Ltd* (1986) 160 CLR 301. The expansion of employer's liability by these cases meant that many claims which had previously been claims where the entitlement to compensation was limited by the statutory amounts under the *Workers Compensation Act* became claims which were worth a great deal more money to the plaintiffs and a practice developed to issue common law claims for damages in work injury cases much more frequently than hitherto had been the case.

Many of these actions for damages either succeeded at trial or, alternatively, produced the result that the settlement of the action was for a much greater amount of money than would have been the case if it had simply been a "redemption" of a previous workers compensation entitlement to weekly payments.

This increase in the amount of damages being awarded combined with the undercutting of workers compensation premiums in the previous decade to ensure a greater market share by some insurers produced the situation that the system was in crisis.

The lawyers were blamed for the crisis. An absurd proposition because lawyers do not cause workplace injuries and work within whatever system is in place. The result that it was thought desirable that the system be managed by a bureaucracy rather than through an adversarial system and that the role of the legal profession be minimised.

That reform was always bound to fail because all that happened, in practice, was that money that had been paid to lawyers on both sides of the record in an adversarial system went from the lawyers' pockets into the pockets of "rehabilitation providers" and bureaucrats. This, however, was not the main cause of the blowout in the cost of the scheme. The main cause of the blowout of the cost of the scheme is that on a claim by claim basis there was no mechanism to terminate the ongoing cost in any particular claim.

The common law has, for many centuries recognised the importance of finality in any kind of dispute but under the Workers Compensation Scheme all that happened was that uncapped and uncontrolled "rehabilitation" expenses were incurred and that partially incapacitated workers continued in receipt of weekly payments indefinitely. Not only was there considerable cost associated with the actual payments themselves the administration of the payments added a cost burden to the scheme.

The inability to "close off" claims for partially incapacitated workers, which was the vast majority and the lack of any mechanisms for controlling the operation of the bureaucracy were the main reasons for the blowout in the scheme.

What needs to be done is to get the administration of the scheme out of the hands of a large unwieldy bureaucracy, build in an adversarial component so that when one party is trying to minimise the cost to it and the opposite party is trying to maximise the cost for the benefit of the injured worker a middle ground or compromise can be reached which effectively will close off the liability by a lump sum payment thereby terminating any ongoing administrative cost in respect of any one claim.

A lump sum settlement also operates as a disincentive for an injured worker to stay on weekly payments of compensation indefinitely because once they have their lump sum compensation they are then free to look for and obtain employment within their restricted capacity. This is better for the injured worker, it is better for the community, and it is better for the overall cost of the scheme.

Of course, to work efficiently this would necessarily mean a greater involvement by members of the legal profession in the day to day functioning of the scheme. For about sixty years since the advent of workers compensation in New South Wales a scheme which involved members of the legal profession worked efficiently and it was only the matters identified earlier in this submission which caused it to cease to function.

What was put in place, as previously observed, was always doomed to fail.

For the scheme to work in an efficient and cost effective manner this is what needs to be done:

1. There needs to be financial incentives and disincentives which will minimise workplace injuries. For example, a statutory defence for an employer that would operate as a complete defence to a claim if the employer demonstrated that it had put in place a safety management system which complied with a particular model. The models of such systems are well known: identify the hazard, put in place systems for controlling the hazard so that it does not materialise to cause injury or damage etc. It is beyond the

scope of this submission to go into the detail of what would be required and well run organisations have such systems. That would be the “carrot” in the system. The “stick” in the system is a financial disincentive, for example, a significant amount of money having to be paid by any employer where there is a successful claim. One of the problems with the system as it existed for the first sixty years is that the cost of workplace injuries could be put effectively “off the balance sheet” by means of a policy of insurance which transferred the whole of the cost to an insurer rather than putting in place financial incentives to encourage safe work practices.

2. Remove the wasteful expenditure upon ongoing and unlimited “rehabilitation” so that the amount expended is finite and the worker is encouraged to return to work.
3. Bring back “lump sum” settlements in respect of partially incapacitated workers so as to bring finality and closure. This will reduce administration costs, prevent partially incapacitated workers remaining “on the drip” indefinitely and be much more likely to achieve real rehabilitation. The best rehabilitation for an injured worker is another job able to be performed within his or her existing capacity for work.
4. Increase the involvement of the legal profession in an adversarial manner in the resolution of the claims. Lawyers are always going to be better than bureaucrats at facilitating the finalisation of claims which, after all, is the method most likely to minimise the cost of a scheme. It is also the method which is going to be most beneficial to the physical and mental health of the injured workers and of overall benefit to the community at large.

The observations in these submissions are based upon what I have observed over thirty five years in practice as a barrister, including twenty years as Queen’s Counsel.

I am happy to further assist the Committee in its deliberations if required.

CT Barry QC