

**Submission  
No 59**

**INQUIRY INTO NSW WORKERS COMPENSATION  
SCHEME**

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I moved a motion at the National Party State Conference last year calling for an inquiry into the Workers Compensation System. I am disappointed that the Inquiry is only going to be for ONE MONTH as I suspect the rush will not ultimately provide a satisfactory result.

As a Solicitor who has represented both Employers and Injured Workers over many years, I believe there is so much wrong with the system both from an employers point of view and an injured workers prospective.

But first....

NSW Workers Compensation System.....

First some history

Up to 1986 NSW had a perfectly functional and functioning Workers Compensation system. The system was a well oiled machine and apart from some minor tinkering little needed to be changed. The system meant that private insurers funded the system.

This did have inherent problems, not the least being that irresponsible conduct by insurers went unpunished. One insurer, National Employers Mutual, became insolvent as a result of its practices. This insurer's business model was evidently to undercut every other insurer in the market on price, collect the premium and then deny every claim that was made on it. The problem was that it denied legitimate claims and when Court awards started to mount up it did not have the funds to meet its liabilities. Pretty much the same model that HIH Insurance employed a few years later.

The conduct of Insurers in the present day is overseen and regulated by the Australian Prudential Regulation Authority (a Federal Government body) and it would be difficult (but not impossible) for another National Employers Mutual to exist today.

Many people consider that the failure of National Mutual Employers provided the political impetus to overhaul the workers compensation system in NSW and give the Government more control. And it gave then Labor Government reason to deny genuine Injured Workers to get "just and fair" compensation. It also sent premiums for employers through the roof.

In its wisdom the Barry Unsworth Labor Government introduced a new Workers Compensation Act, 1987. It also created the bureaucratic behemoth known as WorkcoverNSW which set the price of insurance premiums for employers, and had the power to prosecute employers for work place injuries. What a conflict of interest!

But the so called "sneaky lawyers" continued to make money out of the system preying on the misery of injured workers (so the song sheet of the Labor Government went) – even though the might of Workcover had more power than the NSW police in gathering evidence against and then prosecuting an employer. It is interesting to note that the so called sneaky lawyers were never allowed to charge the clients for their actual costs and had to abide by a set scale of cost. No other industry is so regulated!

So in rode Bob Carr on his trusty steed named Della and together they saved the system (so they said) and introduced a brand new Act in 1998 and with many amendments later on.

It is said that Bob never has liked lawyers. Some trace this dislike back to his early days as a worker at the Labour Council of NSW where the Union lawyers mocked him about the fact that he could recite the Gettysburgh address verbatim. This story may well be apocryphal. Bob of course denies that he hates lawyers but in his diary he noted "I have cost the law profession hundreds of millions. First, freeing business conveyancing from the lawyers' monopoly in 1995.....reforming of accident compensation (cost them hundreds of millions alone) in 1999. Now cutting them out of the action on workers comp. It's not worth being Premier unless you can take privileges off the undeserving". Bob's got over that and now upsetting all our neighbouring countries so it seems.

The problem....Workcover

The problem now is that the system stinks. It is overly bureaucratic. Workcover oversees the Insurers down to the last scrap of paper they use. Workers have no idea how the system works. Similarly the novices that are appointed as claims managers have no idea how the system works. It should be noted that if you are a good claims assessor working for an insurer, then they go to their other claims departments.

Employers hate it, workers hate it, but Workcover loves it because it collects the premium and then if a claim is made against an employer it basically collects the premium all over again by recovering the costs of the claim from the employer. And this is supposed to be an insurance system!

The Workers Compensation System is so complex and only a few can actually understand it. And if you do not believe me then this is what the Judges says:

"Reliance was placed upon Attileh –V- SRA in which the Court of Appeal examined this somewhat labyrinthine legislation" so said Supreme Court Justice Hidden in the case of Wilson –v- SRA & Anor [2009] NSWSC 537 on 17.6.2009 when he was referring to all the Workers Compensation Legislation which he rightly described as labyrinth or maze.

Or "The statutory regime governing the entitlement of an employer to claim indemnity from a third party for compensation payable under the Workers Compensation Act is extraordinarily complex," so said Justice Sackville in the case of Mansour Taouk –v- Maroun Taouk & Anor [2010] NSWCA 372 on 22nd December, 2010.

And then we look at what Workcover has said in their guidelines (orders to Insurers): "From January 1, 2010 psychologists and counsellors must be approved by Workcover to deliver treatment services to injured NSW workers." So Workcover selects your psychologists and counsellors and in rural areas that makes it even more difficult. But it does not stop there.....Workcover now wants to force Injured Workers to go to Workcover to have their treating Doctors and Lawyers approved Is this big brother or what! You can imagine the outcry from the public if they had to go to a doctor or lawyer who they do not want.

The Workers Compensation Commission...

The Commission is not a Court but rather some ad hoc Tribunal which fails miserably to allow its Arbitrators to have any real discretion. When considering lump sum claims.....the Medical Practitioners have all the say.....not a lot of justice there. The Compensation Court was abolished in 2002 (except for Coal Miners who had some political muscle and now use the District Court) and replaced by the Labor Party's Commission, currently headed by Judge Greg Keating (brother of Ex-Prime Minister Paul Keating).

Further it seems the Arbitrators Practice Manual is a secret document not available to the public.....So because of this one must ask why? Judges and Magistrates have no secret Practice Manual.

Unfair System?

Why do we have the Workers Compensation system being different to the Motor Accident system and then we have the Civil Liability System which is also different. For example, a back injury under the Workers Compensation System is assessed differently to that under the Motor Accident system and then differently again under the Civil Liability System.

Even the so called 'bible' that doctors use to assess permanent impairment, is different. (The 'bible' I refer to is called the American Medical Association Guide to the Evaluation of Permanent Impairment.) If you have a Motor Accident and you have an injury, the 4th Edition of this 'bible' is used. But 5th Edition is used for the Workers Compensation. Just as an aside, the 'bible' in America is being done away with as each State in America comes to terms with its inequities.

Whilst on the subject of doctors, one has to be concerned about some of the doctors that are allowed to give what is known as "Medico Legal Medical Reports" which are assessment reports. In other words judgments on degrees of peoples impairments.

On the 28th August, 2010; the Sydney Morning Herald reported that the Medical Practitioners Board had a duty to protect the public but yet it said: "...Dr Lucire has not been permitted to treat patients since December, 2008. Yesterday the (Medical Practitioners) Tribunal made orders prohibiting her treating managing or advising patients and restricting her practice to providing medico legal reports." So there is a case where some doctor can not treat anyone but still has the ability to assess injuries!

The unfairness of the systems can also be highlighted by the maximums imposed by each system. If you have a Workers Compensation injury, the maximum possible is \$256,900.00 whilst if you have a similar injury under the Civil Liabilities Act, the maximum possible is \$500,500.00. And of course under the Motor Accidents Act, the maximum possible is \$432,000.00. (Note some of these figures have changed recently but the inequity remains)

Employers are hit with premium bills and basically can not argue with Workcover or their Insurer as to how the premium is arrived at. Maybe that is because the Insurer has not idea how it is arrived at??? The Insurer says they are only agents for the Workcover Authority when assessing premiums and you can not shop around for a better premium as you would say with house insurance. Workcover is the sole arbitrator, insurer and authority.

As to the fairness of the Workers Compensation system, I leave you with the words of Judge Diane Truss of the NSW District Court who was reported as saying in the Sydney Morning Herald on 19th October, 2010: "I think the government (she is referring to the then Labor Government) dealt the workers a bad deal in that most people don't have a choice about whether they work and those who get injured are more likely to be in the manual occupations. I think it is most unfair that if you're injured in a motor car accident or you fall over in the supermarket you are likely to receive more damages for the same injuries than if you're injured at work."

#### The Solution

There is a solution. Return to the old days and give the market back some power. Return the control of the Workers Compensation system to private insurers, and give employers and workers a right to review a decision of an insurer by an independent Court. If an employer is a bad risk then they will not be able to get insurance and therefore they will go out of business. If an employer puts good work practices in place their risk will be assessed accordingly by insurers. Private insurers would pay genuine claims early and fight the dodgy claims hard and a Court would determine the merits of the contest. And the insurers conduct would be overseen by the Australian Prudential Regulation Authority.

The Workcover Authority currently controls Health and Safety, the Insurance Fund, Workers Compensation Premiums, the Benefits paid, which Physio you see and they want to control which doctor and lawyer the worker sees. Get rid of the bureaucratic Workcover Authority whose only aim is to control and not to make the system work.

#### Way forward....

Having said all this, there firstly needs to be a full enquiry into the Compensation system in NSW, including Motor Accidents, Civil Liability Accidents and Workers Compensation.

I leave you with this thought.....It constantly amazes me that in an accident your motor car gets more than you do if you are physically injured and six times as fast....why because insuring your motor vehicle is not compulsory and insurers are competitive.

Mark Olson,

PS. Why does public servants in Sydney when contriving forms (such as this) think everyone has to live in a "suburb". Alot of the population actually live in towns, villages and sometime even farms.