Submission No 194

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Name: Mr Michael Peters

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Hon Robert Borsak MLC
Chair
Joint Select Committee on the NSW Workers Compensation Scheme
Parliament House
Sydney NSW 2000, Australia

May 15, 2012

Dear Hon Robert Borsak,

RE: Inquiry into the New South Wales Workers Compensation Scheme

Thank you for providing this opportunity to comment on the above and related matters that have been referred for examination to the Joint Select Committee on the NSW Workers Compensation Scheme (the Scheme).

The writer is a lecturer in business law including workplace safety and compensation at the University of New South Wales, and has written articles, columns, books and book chapters and is a regular media commentator on business and regulatory issues.

The Inquiry's terms of reference is on the performance of the Scheme in meeting its core objectives, the financial viability and management of the Scheme and its effect on the New South Wales economy.

The right to some form of financial and medical support for injured workers is a commonly accepted human right. The right to medical and rehabilitation should be the core focus of any scheme. A no-fault based scheme is critical to ensure that the human right of every person in the workplace is protected.

The current Workers Compensation Scheme provides a no fault compensation scheme. (the Scheme).

On 31 December 2011, the Independent Scheme Actuary noted that the Scheme had a $4.083 billion deficit. Although the initial reaction to determine the cause of the deficit would naturally be focused on claims alone the Inquiry terms of reference provide an opportunity to examine whether the Scheme is efficient and fair to both the insured and the injured and does not impede economic activity.

Like other no-fault compulsory schemes globally, the insurance premiums invested in the market place have not performed well in the past five years. The Global Financial Crisis is not an insignificant factor to the deteriorating health of the Scheme.

The performance of the Scheme poses a serious challenge beyond the budgetary position of the State.

There is little doubt that New South Wales employers are paying significantly more than their counterparts in other comparable states. It should also be noted, that the average wage in New South Wales is the highest in the Commonwealth.

Similarly, the cost of living, the cost of residential and commercial rent, the cost of travel, food and utilities are also the highest in the Commonwealth.

Conducting business in New South Wales is the highest in the Commonwealth irrespective of the cost of the Scheme.

It should also be noted that New South Wales has the largest economy, the biggest market, the largest workforce, and number of employers and is the most populous state in the Commonwealth.

When comparing the cost of the Scheme to employers in comparable states, the cost of living and doing business in New South Wales should be taken into account. Within this context it is not surprising that the NSW Scheme cost more to manage than in other states as a whole.

Comparing NSW Workers Compensation Scheme fees with other states is not comparing like with like. If the same rationale was to be applied to all statutory levies-taxes including the cost of green slips, payroll tax and land tax etc then Parliament should inquire into the entire costs levied on business in NSW and adjust all the levies – taxes to the rates charged if any by the competing states.

So why should Workers Compensation Scheme be any different?

Arguing that the Scheme is driving a significant number of businesses interstate has not been conclusively established. The question is whether the Scheme's deficit or competing with other states should be the priority for the Inquiry and the State Government.

If competition with other states is of prime policy concern, then a national scheme along the lines of Medicare is the most appropriate option. Under the current circumstances, it would appear from a legal perspective that workers, the government and employers would be best served with a national scheme. There are ample precedents to guide Parliament and government on how to achieve this goal, for instance the recently harmonised national OHS laws, the employment laws, competition laws, credit codes and the like. There is no reason why a National Workers Compensation Scheme could not be viable.

Further, to conclude that business has to carry the cost of the Scheme neglects the fact that the cost of the Scheme is imbedded in the price paid by the customer not the employer.

The cost of managing the Scheme, the cost of getting a claimant back to work, in addition to medical and rehabilitation costs is likely to always be higher in NSW if current trends continue.

The Inquiry provides an opportunity to focus on whether the Scheme provides value for its clients and viable outcomes for the claimants without having an adverse impact on the State's economy and the welfare of its citizens.

As the Scheme operates through "Agents" who in turn operate on a commercial basis, the Inquiry has an opportunity to examine the incentives offered if any to ensure the Agents fulfil the Scheme objectives and ensure that the Scheme is managed in a cost efficient manner.

The current Scheme is complex and daunting to all stakeholders. It is neither accessible nor designed for quick resolution of the claim. It tends to rely on process to drive the claim rather than achieving both budgetary and health outcomes.

The current system tries to be all things to all people, to ensure all injured workers get something. Inevitably this means that seriously injured workers as a consequence of their loss of earnings tend to receive less than acceptable weekly payments. Less injured workers appear to be locked within a process of rehabilitation without any prospect of returning to work. In all these instances, many appear to fall through the policy net of the Scheme.

The cost of managing the Scheme has consistently increased well beyond the inflation rate and disproportionately to the number of claims processed. On a cost to claim basis the Scheme is at the higher end of the cost scale.

Managing a Scheme of this size will always be prone to some inefficiency.

The increased cost of managing the Scheme through consistent increases in rental, wages, and medical costs should equally be of concern.

The greater use of technology to manage the claims and medical costs is an area that should be considered. There will always be a range of costs which are fixed and difficult to manage. However, like any compulsory Scheme, the Agents should be rewarded for managing their costs within well-established performance criteria.

The increased number of Section 66 claims (Pain and Suffering) lump sum claims is of concern but this may be based on claimant's having better access to advice, and improved medical diagnosis to assess pain and suffering.

Healthcare costs in Australia have consistently increased well in excess of the CPI annually. The cost of medical treatment is likely to rise despite advancements in treatment and the application of new technology. It is noted that the management of the healthcare – rehabilitation sector has contributed to the deficit of the Scheme.

Measuring the success of this sector to help injured workers return to work, is a vexed question and requires careful examination. Whether the Scheme is getting value for its money to help the injured worker should be a policy and management pursuit of the Scheme.

The increase number of claimants on weekly benefits should be examined within the context of the growth of the NSW workforce.

It is unlikely that the cost blowout can be isolated to any one factor. It is the culmination of many factors which brings about the current perfect storm. Rewarding the injured, the Agent and the employer should be part of the solution to achieve the policy objectives.

The proposition that legal fees or lawyers are the cause of the current deficit has little foundation. It should be noted that lawyers are hired by injured workers. The role of lawyers has been reduced over time and there has been the emergence of a rehabilitation industry which has far exceeded the cost paid to the legal profession.

Perhaps the Joint Committee should go back to basics. In the past common law claims were well documented and tested the issues in dispute and a final settlement was concluded. The current Workers Compensation Scheme provides an opportunity not to cap the costs, as workers are placed into an ongoing rehabilitation treatment treadmill while continuing to receive weekly payments for an indefinite period. The ongoing nature of their claim, with administrative costs, is a burden on the

Scheme and does not provide the encouragement or hope for the worker to return to some form of employment.

In the alternative, if a final lump sum settlement was to be provided with a one off employment assistance fee to secure employment provided by existing work search Centrelink type providers, there would be a system in place to actually assist workers to return to work. It would be of benefit to the Scheme, the employers and importantly to the employee to help them obtain employment relative to their capacity.

Recommendations

1. There is no pro –active education programme, engaging all employers and workers to better manage risk in the workplace. Such a programme would be central to encourage a productive, safe and harmonious workplace.

2. Reward employers who adopt risk minimisation and pro –active education programmes and policies. At the moment workers who engage in such activity are neither formally recognised nor given credit for their efforts. Such workers provide less risk to the Scheme and should be rewarded. Some employers will be engaged in high risk activity; in that instance they should also be rewarded for better managing their risk.

3. The Scheme should reward injured workers who actively seek recovery and return to work. The Scheme should promote the health benefits of returning to work early and preventing further injury. Every injured worker returning to work could be an ambassador to promote a safer workplace.

4. Assess the injury – impairment and budget the cost of medical and financial support at an early stage in the claim process, so that the resources to treat and get the worker back to work is ascertained and managed.

5. Reward injured workers who regain financial independence. This could be achieved by setting viable goals with a “return to work allowance” to help either re-train or re-employ the injured worker back to work.

6. Introduce a two-step claims process and make it simpler for injured workers, employers and service providers to work in a co-ordinated manner to achieve the return to work objective within viable time limits.

7. Introduce a “Rehabilitation with Results” Programme to strongly discourage payments, treatments and services that do not contribute to recovery and return to work.

8. Introduce a commutation process early in the claim process to encourage an agreement between the injured worker, employer and Scheme Agent this will alleviate future uncertain liability and bring about some certainty as to the cost of the claim. This can be done by amending Section 87EA of the Workers Compensation Act 1987 by reducing the permanent impairment to 10 per cent whole person impairment, reducing the period to eighteen months since the claimant received weekly payments for the injury and the after all opportunities to return work have been fully exhausted.

9. Redefine “necessary treatment” to discourage payments / treatments /services that do not contribute to recovery and return to work to be administered by an independent review panel.

10. Work capacity testing is critical even at an early stage to ensure the Scheme is aware of the potential cost of the claim, such a test would focus on a return to work formula designed to reward and encourage the injured worker back to some form of meaningful employment.

11. Have a pro-active management of long term injured workers by managing both medical and financial support.

12. The calculation of the benefit should be simplified and accessible .

13. The range of entitlements should be simplified, more transparent and easier to understand.

14. Partially incapacitated workers should receive a lump sum as final settlement of their claim, with a one off employment assistance allowance enabling them to be placed with employment placement service providers. This will finalise their claim and prepare them for employment within their limitations supported by a placement service provider.

15. The involvement of the legal profession will always be a controversial issue. The fact is that the profession has much to offer as the clearing house or "agent" to settle claims. The profession has the skills and the capacity to work towards the most efficient outcome, more likely to minimise the cost of the Scheme. The Scheme has insurance agents to achieve the same objective; likewise, the profession offers an "agency "role similar to that provided by the existing Scheme agents. If both agents could have a more defined role, it would cut out much red tape and costs and produce a better outcome for all stakeholders concerned.

The writer is prepared to formally address the Joint Select Committee on the NSW Workers Compensation Scheme.

Yours sincerely,

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