

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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Partially Confidential

Underpayment of premium

The fund could benefit from time devoted to collection of avoided payment of premiums. There has been too much emphasis on examination of wage books by WorkCovers. Specialist compliance unit.

There is a cash economy that auditing of wage books does not detect. WorkCovers compliance activities need to involve field officers in the identification of the numbers of paid workers of Persons Conducting a Business or Undertaking. Work methods need to change to include examination of order books to identify current and future work sites where the total number of workers can be ascertained. This may require enhanced powers and training by WorkCover personnel.

At present most time is devoted to checking whether a business has a policy. WorkCover already knows that non insurance is an insignificant problem. WorkCover has reinforced its longstanding policy that inspectors should also check the correctness of the industry classification and the total wage bill. This policy statement will not on its own encourage inspectors to investigate this when they are under tight time frames to dispose of files that generally originate as a complaint or notification of an incident.

Inspector Work Methods

Inspectors could be given some flexibility in resolving the issue of suspected underpayment. In most cases the inspector can use an informal approach that allows many more interactions for a given allocation of time by the inspectorate. Inspectors can use their perceived power over both safety and workers compensation matters to encourage the business to voluntarily get their house in order without the need for formal enforcement through notices and audits. This might normally take up to ten days by the time the business has its 5 working days (effectively 7 working days when legally a day begins and ends at midnight) after a request for a certificate of currency. The inspector could be far more effective if the certificate of currency was required to have attached to it a statement of the total declared wages. Currently the inspector would have to follow up receipt of the certificate of currency by enquiries to the insurer. The inspector might also face a delay because the insurer may need the business to produce wage records prior to issuing the certificate of currency.

There will always be cases that are more complex that require more time to investigate. These includes where a business operates in multiple work sites. Inspectors will be unlikely to spend this time unless the matter is dealt with as a new file with its own time allocation. Inspectors investigating complex cases may also need specialist support. It may also assist if individuals are given recognition for the amount of hitherto unpaid premium that is collected.

Insufficient Premium Adjustment for Claims Experience

Many businesses are small businesses that have a basic premium of less than \$10,000. Their premium will not rise regardless of how many workers are seriously injured. They who often have

the least ability to manage safety also have insufficient incentive to do so. After an injury they will not be impacted by excessive claims costs that result from failures to provide suitable light duties. Government businesses are in a similar situation. Their budget at the workplace level is not affected by costs of premiums and claims. Managers at workplace level in Government have the ability but not the financial incentive to prevent injuries and contain claims costs by early return to work. It would be unusual for safety and workers compensation performance of managers to be measured and included in performance evaluations and recruitment.

Redesign of the scheme

The scheme creates little incentive for small businesses to minimise injuries and claims costs. It makes whole industry sectors including good performers subsidise poor performers. The reason for the current limitation on adjusting premiums according to claims experience is that nobody wants to see businesses bankrupted by a run of bad luck. The problem is that this objective is not appropriately balanced with the objective of making the users pay. One way of achieving both objectives is to have all early costs met by the business. Only later (say after 6 weeks) should the scheme come to the rescue to protect the viability of the business. The administration costs for the scheme would be lower if it did not get involved in paying these early costs. Businesses could be barred from privately insuring themselves for the first six weeks wages. They could be given the choice to privately ensure for medical and other costs.

The scheme would need to retain its feature of a fast flow of funds to the injured worker. The scheme would retain the current principle that it is not necessary to prove who was a fault in the cause of the injury unless one chooses to take a common law action outside the standard benefits of the scheme. The business could simply decide if an injury occurred in the course of a workers employment and commence payments. The business itself (rather than the insurer) could more quickly assure the worker of weekly payments and the acceptance of provisional liability for the first six weeks.

However, one disadvantage of this decision falling to the employer is that the decision could more frequently go against the injured worker than if the decision was made by the insurer. Without some countermeasure there would be a risk of losing the current schemes minimal disputation costs over straightforward claims. The counter measure could be that if the informal dispute mechanism found in favour of the worker the employer would have to pay the informal disputation costs. If the informal dispute process went against the worker, then the fund would bear those costs. With the employer having the initial right to commence provisional liability but facing the risk of ongoing dispute costs should there be unnecessary delay, there will be some balanced pressure to be reasonable. There would be

an improvement on the present scheme that risks being taken advantage of by paying provisional liability to malingerers. There would usually be a decision in favour of paying a claim early as the injury and a medical certificate are good evidence that are not easy to dispute.

Workers fearful of a possible delay to commencement of weekly benefits could separately to the scheme choose to take out a form of income protection insurance to provide wages and or medical costs that would be re-credited to their income protection insurer when the business or the workers compensation scheme paid those costs. This could be low cost if it were only to cover delays or until recovery from short term claims of up to six months. The scheme would be mainly paying for wages, medical and rehabilitation costs past the six week point. The scheme can temporarily carry informal disputation costs before passing them back to the employer that chose not to accept provisional liability.

If the insurer decides that there is a genuine matter for the employer to dispute and agrees with the denial of liability the workers last option would be the courts. The worker will not frivolously take a case to court if they face a low prospect of success. Solicitors would not be keen to take such cases. The courts will award costs as they see fit. The final change proposed for the scheme is to allow free access to common law claims for damages. Such claims, if pursued by abandonment of the safety net of the scheme, would reduce the costs to the scheme. The costs would be awarded to those individuals that the courts decided were responsible. This respects the idea that some unsafe businesses or workers should not expect others in the fund pay for their safety failures. It also respects the idea that workers should have the same rights as anyone else in the community to seek redress for harm done to them through the negligence of others. Currently seriously injured workers who have not returned to work within two years can have their benefits reduced below the statutory rate by the insurer assessing their theoretical earning ability and deducting that assessment from their statutory rate regardless of whether the labour market provides them an opportunity to earn that assessed amount. This can have the effect of casting the injured worker onto the welfare queue. Reform of the Workers Compensation scheme may have to consider its relationship with the new national disability insurance scheme.

The redesign of the scheme as above would dramatically reduce costs for the first six weeks, moderate dispute costs for claims beyond that point and provide such incentive to avoid injuries that injury rates and costs will reduce. Premiums could be lower because the scheme would be covering less of the risk.

I provide these thoughts as a private citizen.