

**Submission
No 191**

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Leading Edge Group

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18th May 2012

Joint Select Committee on the NSW Workers Compensation Scheme
Parliament House
Macquarie Street
SYDNEY NSW 2000

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Dear Honourable Robert Borsak, MLC,

Leading Edge Group Limited is a group of over 1,200 independent retail businesses, accounting for over \$350 million of purchases per annum. As the businesses are in all states, we have an Australia wide perspective.

We greatly appreciate the opportunity to comment on the Issues Paper and generally in relation to legislative reform.

NSW Workers Compensation premiums are prohibitively expensive in NSW, increasing the cost of employment. This reflects an Act that focused on "worker rights" and provides financial incentives for workers not to do what is good for them; return to work (RTW).

The Issues Paper is well designed and has our support. The areas we would like to comment on go to what must occur for these changes to work.

The NSW deficit at 31 December 2011, was \$4.1 billion. NSW employers, already battling the tough conditions of a high dollar, internet shopping and a lack of skilled resource can't afford premium increases, be that 28% or the substantially higher premium increases that would occur with:

1. A continuation in the deterioration in the NSW scheme; and
2. The further drop in investment returns since 31 December 2011.

The combined actions of the Worker Compensation Commission (WCC) and previous WorkCover management developed a culture and precedents that have fundamentally changed the operation of the legislation. While it was already unbalanced, the manner in which it works has become completely unsustainable, unfair on employers and a negative influence on injured workers.

We strongly support the changes to the legislation recommended in the Issues Paper that use capacity as a gate to ongoing entitlement to compensation. Workers with less than 15% incapacity should not be incentives to remain on the compensation scheme. As studies around the world have proven the longer that a person is on compensation the reduction in their life expectancy.

We support the Issues Paper and believe it should be considered in light of the following.

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Workers Compensation Commission (WCC)

Decisions of the WCC:

- Can only be appealed on matters of law. This would be a reasonable system if there was a medical panel that decided on medical questions. As it is, people without medical experience are making decisions based on evidence that varies from GPs to specialists. This system is deeply flawed (see next heading). As the system is, the decisions of the WCC appear heavily worker biased and unfair. We recommend that appeals on matters of fact and law go initially to two Presidents, thereby allowing a system of checks and balances over the equity of the system.
- Appeals raised by Agents with WorkCover approval. The WorkCover legal department denies appeals as a matter of course, denying natural justice to employers.

The functioning of the WCC is systematically biased against employers. Applicant solicitors use this process to increase their fees and encourage workers to remain on compensation:

- The system is based on an onus of proof of inability rather than ability, conditioning workers behaviours to be negative rather than positive.
- Employers must place all evidence before the WCC, but applicant solicitors wait, providing them the opportunity to alter their submissions.
- Employers can only seek around \$800 of legal advice per claim per year, while applicant solicitors are not limited.
- Applicant solicitors can commence an action without merit and are still paid.
- Applicant solicitors can commence an action, discontinue and recommence. The employer solicitor does not have time to reconsider and gain new evidence to contradict what is effectively a new approach by the worker's solicitor.
- Employers solicitors do not get paid if they appeal and are unsuccessful.
- Workers have more rights in terms of when they must place evidence (after all employer evidence), their rights to legal representation and the workers right to appeal without requiring approval from WorkCover – which is most often denied.

Workers compensation schemes around the world working in an adversarial legal environment need to be reviewed and the legislation tightened periodically. Worker solicitors try different approaches and over time achieve an expansion of coverage. This is not different what happened with Public Liability, requiring legislative change. While this is generally the case, in NSW it has been 'open season', with what appear to be supportive actions by the previous WorkCover management and the WCC.

Along with any changes to the legislation, we strongly recommend that the legislation and regulations around the WCC are rebalanced in favour of equity between 'worker rights' and actions that support workers' obligations to return to work in accordance with their capacity.

Medical Assessments

Whole Person Impairment (WPI) assessments regularly vary significantly. With few exceptions the assessments support the party that appointed them. The differences in WPI are staggering and systematic. It is not surprising that applicant solicitors find WPI assessments that are materially higher than WorkCover Agent assessments. If an Approve Medical Specialist (AMS) provides high assessments, they get more work and make more money. This is a fundamental flaw in the system.

WPI claims should also be limited to primary injury. The recent increase in cost in this area appears to have eventuated through be driven by adding secondary illness as a result of poor diagnosis or treatment, including sustain medication, of the primary injury.

We strongly recommend that there should be one medical panel in NSW for all compensation scheme injury assessments. Ideally it would be controlled by a single entity. We recommend the Motor Accidents Authority, as they have shown a great success in the management of the panel to achieve fair assessments. WorkCover have an abundance of cultural and capacity issues during this process of reform.

It is critically important that referrals come from the WCC and that the assessment is binding.

Without these changes we consider the Issues Paper reforms will not achieve the success necessary to achieve lower deficit reduction or improved return to work.

Use of Work Injury Specialists to Support RTW

Another fundamental flaw in the system is the use of family doctors to provide medical certificates. General Practitioners (GP) have a financial incentive to ensure the worker is happy with the certificate, thereby supporting continued family medical practice referrals and in the case of regional areas live in the same community. In addition, GPs have neither the experience nor the time to dedicate to discussing RTW options with employers. Employers are extremely focused that GPs are a central part of the system when their conflicts are so apparent.

While we do not propose an injured worker should not be able to visit their GP, we recommend that should a claim exceed four weeks, the Agent should appoint a Work Injury Specialist (WIS), being a doctor trained in occupational medicine. The legislation should give predominance to the WIS in matters that relate to RTW.

Excluding Non-Work Injuries

While we support the exclusion of Journey Claims and heart attacks, we believe these exclusions do not reflect the material increases in coverage that have occurred. The most significant increases relate to the coverage of non-work related injuries within the definition of work being 'a substantial contributing factor'. To correctly rebalance this, we believe the legislation should be amended to 'the substantial contributing factor'. A reading of the definition in the legislation indicates that the

section was designed to exclude claims where there was not a strong link, but it has been watered down to the degree it is virtually redundant. As with many areas of the legislation, the only way to recalibrate it is to amend the wording.

We believe the legislative changes in the Issues Paper are critical to reduce the deficit and support premium decreases so that NSW business can compete with states like Victoria and Queensland. We believe that that the changes around capacity and the measurement of capacity are also critical to support outcomes that are good for workers. The current focus on 'worker rights' (rather than obligations and Return to Work) destroys many workers lives, resulting in poor health outcomes, depression and breakdown in relationships.

Many people state 'workers rights' as a moral issue, but it is more fundamental than that. A system that focuses on quality of life, ahead of "rights", obtained through injured workers ability to reengage with society through employment by balancing coverage with cost is what is needed in NSW.

We wish you all the best in what is a very important and will no doubt, be a very political process. The outcomes of the reforms should be designed to enhance return to work, which is in everybody's best interests.

Yours Sincerely,

Tony Middlebrook
Managing Director