Submission No 4

REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY

Organisation: RiskNet Pty Ltd

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Submission to the Legislative Council Standing Committee on Law and Justice

(Inquiry)

Review of the exercise of the functions of the WorkCover Authority

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Introductory Comments.

No doubt the members of the Standing Committee on Law and Justice (the Committee) will form their own opinions on the content of the WorkCover Authority Annual Report 2102 – 2013 and the NSW WorkCover Scheme Report 2012 – 2013 (the Reports), they make interesting reading.

It is noted throughout the Reports that the WorkCover Authority (WCA) receives funding from a number of sources including the majority funder, the Workers Compensation Insurance Fund (WCIF) through the Nominal Insurer. It is also noted that the WCIF's income is derived from employers' premiums; it is not derived from the public purse.

The Reports are specific in relation to the financial responsibility for the WCIF; this belongs with the Nominal Insurer and not the State of NSW nor any of its Authorities.

Thus the WCA draws its funding mainly from NSW employers but it is not accountable in any way to those employers.

There is a tried and tested mechanism for NSW taxpayers to make changes to the way that the State is governed. There is no corresponding mechanism for NSW employers to make changes to the way that WCA conducts itself, indeed the membership of Board of the Safety, Return to Work and Support Division (SRWSD) which oversees the WCA, is not represented by any employer representative; however there is a Board member who represents the Union movement.

According to the Reports, the WCA is one of Australia's largest insurance businesses and was responsible for net assets of approximately $13.8 billion as at 30 June 2013, surprisingly, none of the SRWSD Board members appear to have any insurance experience.

The Reports are prepared and authorised by the CEO of the SRWSD who although a Board Member, does not report to the Board; indeed the Board has no authority over the WCA other than in an advisory sense. In his evidence to the GPSC1 Inquiry into Bullying in Workcover, the Chair of the SRWSD Board said of the CEO of the SRWSD "She does not report to me. Let us not be ambiguous about that. She does not report to me."

Amongst other things, it is most unusual that a CEO writes and authorises their own performance statement with no superior input, yet this is the case with the WCA. Surely this ought to raise governance concerns?

Observers might remark that the WCA is subject to audit by the NSW Auditor General and that the community can have confidence in that process; the Auditor General's audit however, specifies that it does not provide assurance that the WCA has either carried out its activities effectively, efficiently and economically nor does it provide assurance about the effectiveness of the WCA's internal controls.

One of the conclusions which can safely be drawn and which might bear further scrutiny by the Committee is that NSW employers have no means of ensuring that their insurance premiums are being well spent, particularly in relation to the operations and funding of the WCA.

Matters related to the management of WCA personnel

The GPSC1 Inquiry into Bullying in Workcover is currently sitting and will no doubt prepare a report of its findings and recommendations. This is an inquiry into a specific aspect of the management of the WCA which gives rise to other issues of management.

WCA has a Code of Conduct which is not in the public domain but was referred to in evidence in Wayne Butler and Safety, Return to Work and Support Division [2013] NSW IR Comm 45 (the Butler case).

Included in the Code of Conduct is a message from the Chief Executive Officer stating:

"WorkCover is part of the NSW Public Service, and public employment carries with it an obligation to the community to conduct our business professionally, efficiently, impartially and with integrity.

The purpose of this Code is to set out WorkCover's Policy on the standard of behaviour, values and principles that are expected from everyone employed by WorkCover including contractors, agency and temporary staff. It is designed to assist you to make ethical and responsible decisions and is the foundation upon which we conduct our activities.

WorkCover is committed to complying with New South Wales Government legislation, policies and directives, to promote a culture of fair and ethical behaviour and to encourage the reporting of corrupt practices and breaches of the law and other matters which be detrimental to services provided by WorkCover and its reputation."

In the Butler case, DP Harrison found that the conduct by the WCA to be shabby and disgraceful. He found that it lacked any objectivity and had the characterisation of institutional bullying.

This finding should, in any other circumstances, give rise to an investigation into the conduct of the employer by the Regulator. In the Butler case however, one of the senior employees of the WCA involved in the case is also the General Manager of the Work Health and Safety Division responsible for the Inspectorate.

WCA has not apparently developed a process for investigating itself for possible breaches of the WHS Act 2011 the provisions of which it is committed to comply with.

In the Butler case DP Harrison also found that the manner in which the WCA investigation was conducted and the subsequent treatment of Mr Butler was in his view deplorable. The decision to conduct the investigation was devoid of any common sense or fairness to Mr Butler. The conclusions reached and the logic behind them conveys an attitude of premeditation and witch hunt, not a process grounded in fairness or objective, evidence based decision making.

This finding is in stark contrast to the requirements of the Code of Conduct stating that WCA is committed to promoting a culture of fair and ethical behaviour.

The Butler case highlights just two significant issues which have not been effectively dealt with; one being an apparent disregard of the law, the other a disregard of its own Code of Conduct.

In this regard, the Committee may wish to investigate further whether WCA has complied with its obligations provided by Section 23 (1)(j) of the Workplace Injury Management and Workers Compensation Act (the Act). Certainly the exercise of sound judgement by senior members of the WCA management team must be brought into question.

Matters relating to Statements of Performance in the WorkCover Annual Report 2012 - 2013

In a media release on 1 May 2013, the NSW Premier Barry O'Farrell, said that "The NSW Government's actions to fix WorkCover mean that no employer will receive a base rate increase in 2013 and businesses will save an average of 7.5 per cent on premiums."

In the performance statement of the General Manager, Workers Compensation Insurance Operations, SES Level 7 signed off by the CEO Of the WCA is the following statement of performance:

"Reduced premiums by an average 7.5% from 30 June 2013 for two thirds of employers in NSW operating across 346 industries that have demonstrated improvement in workplace safety and claims performance, returning over $200 million back to NSW business."

Given the Premier's statement, can this aspect of the General Manager's performance be credible?

It should be noted that the CEO of the WCA is also an SES Level 7, which begs the question "How much confidence can the community have in the performance statement process when colleagues of equal rank can sign off one another's performance?"

As noted earlier, the CEO signed off on her own performance statement, making a complete mockery of the process.

In the Butler case, DP Harrison found that the decision to terminate Butler's employment was harsh, unreasonable and unjust. The decision was made by Mr John Watson, General Manager, Work Health and Safety Division, SRWSD. Mr Watson was the independent decision maker in respect to the allegations against Mr Butler. DP Harrison concluded that of the eight allegations against Butler, six had no substance, or were not the basis for any disciplinary action, or had no evidentiary support. Two of the allegations concerned flex sheets; in relation to these DP Harrison concluded:

"Mr Butler was tardy in meeting his obligations in respect to submission of his time sheets. This conduct was part of a pattern of conduct within ITSB that was allowed by management and ignored by the Human Resources Department. That the situation required correction is not arguable. It is not however open to allocate the totality of blame and culpability upon Mr Butler.

It is of concern that Mr Butler and others were allowed to become negligent in their time keeping records to the extent evidenced here; so much so that it amounts in my opinion to a systemic failure within the organisation and particularly those responsible for payroll administration and human resources who failed to insist upon the submissions of flex sheets in accordance with policy.

I find the evidence of Mr Devine that Mr Butler was subject to disciplinary action because he made a false declaration that the times submitted were correct, whilst another was exempt because there

was no declaration at all, quite bizarre and extremely unfair to Mr Butler. The assertion that Mr Butler made a false declaration is not substantiated. The Respondent (WCA) did not put even one time sheet into evidence to support the allegation of inaccuracy or to challenge Mr Butler's deposition that the times were conservative in favour of WorkCover."

In Mr Watson's Performance Statement signed off by the CEO there is no mention of the Butler case nor Mr Watson's role in making the decision to terminate Butler. The decision to terminate Butler has brought on a Court Case in the Industrial Relations Commission, the findings of which would appear to be detrimental to WCA's reputation, which also appears to be a distinct breach of the WCA Code of Conduct.

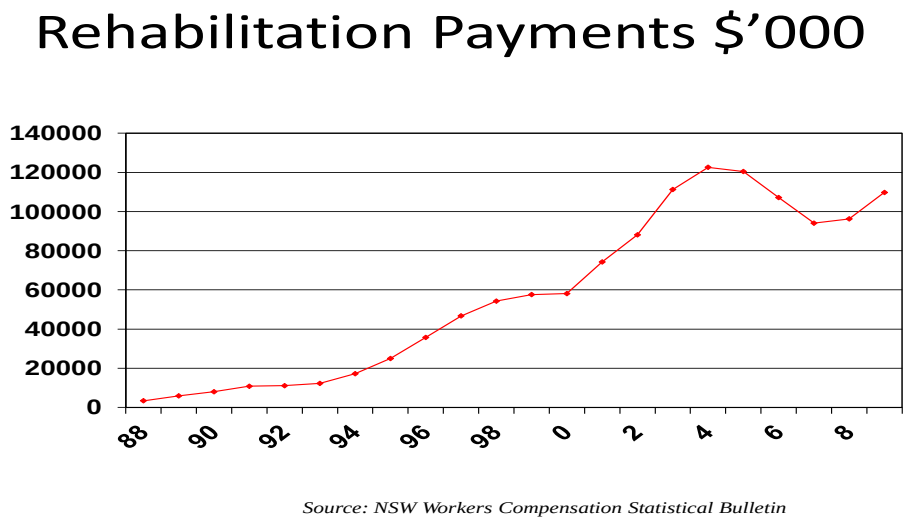
This again begs the question that the Committee may wish to investigate further "How much confidence can the community have in the performance statement process?"

Matters related to WCA Statutory Obligations

Section 23(1)(a) of the Act requires that the WCA initiates and encourages research to identify efficient and effective strategies for the prevention and management of work injury and for the rehabilitation of injured workers.

S23 (1)(b) of the Act requires that the WCA ensures the availability of high quality education and training in such prevention, management and rehabilitation.

Whether the WCA has complied with these rehabilitation obligations may be an area of further consideration by the Committee, given the following information:

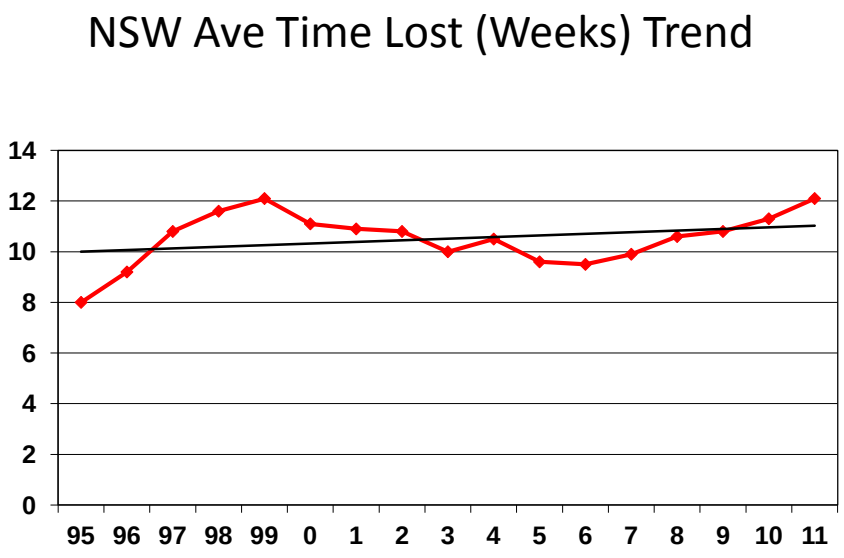


Source: NSW Workers Compensation Statistical Bulletin

The chart above depicts payments made for rehabilitation purposes. Payments peaked in 2004/5 then fell rapidly as a result of a WCA directive to its Agents encouraging them to become more involved in the return to work process rather than sub contracting rehabilitation providers.

Rehabilitation payments fell but as the following chart shows there was no improvement in average time lost per claim. Average time lost is an indicator of return to work effectiveness.

In fact average time lost per claim has steadily increased and as at 2011 stood at 12 weeks per claim.



Source: NSW Statistical Bulletins

Section 23(1)(c) of the Act requires WCA to develop equitable and effective programs to identify areas of unnecessarily high costs in or for schemes to which the workers compensation legislation or the work health and safety legislation relates. The assumption is that this includes or ought to include the premium calculation system. Employers have railed against the manner in which premiums have been calculated and modest rate reductions have not provided much relief.

For example a client of RiskNet which is a small to medium labour hire employer, in the period 2009 to 2013 paid a total of $859,172 in premiums (this includes the estimated premium for policy year 2014).

In the same period, the total cost of claims including journey injury and recess claims was $246,725.

In this case, the like of which is commonplace, this employer has paid three and a half times the cost of claims in premiums.

Even if we were to gross up the current cost of claims for IBNR and IBNER purposes by 100% (which any actuary would judge to be massively over provisioned) and then added a claims handling charge of 25% (again much more than would be needed) and a risk premium of 15% (total $709,334) this employer's premiums are still 21% more than their claims.

Obviously a premium system as punitive and inequitable as the one in NSW is not sustainable and needs an urgent overhaul. The WCA has not undertaken a full system review since 2005 and it would be timely to revisit the premium system given the changes made to benefits in 2012.

According to evidence from the WCA actuaries given to the Joint Select Committee on the NSW Workers Compensation Scheme in June 2012, the overall reform package implemented by the Government in 2012 would result in a breakeven premium rate of 1.19% of covered wages, this is down from 1.64%. The reform package has made the NSW scheme more affordable than it has ever been since 1980.

As noted earlier all of the liabilities of the scheme are owned by NSW employers who have no control over the management of the scheme. The current managed fund arrangements suffer significant disadvantages compared with privately insured systems such as in Western Australia. For example, few if any of the financial incentives are aligned and in particular there is no sharing of the risk between an insurer and the employer.

In NSW there are specialised insurers which privately underwrite the workers compensation risk and although these are in the main industry based, their results are much better than the WCA managed fund scheme both in terms of return to work for injured workers and cost. The liabilities of the specialised insurer are properly valued and remain with the insurer.

In the WCA scheme, liabilities of current employers are actually owned by future employers and as evidenced by the situation which came about prior to the reform package introduction (scheme deficit of $4 billion) a 28% increase in premiums would have been required to fund the deficit.

One of the issues which need to be revisited is the introduction of private insurance for all NSW workers compensation risk.

In June 2013 WCA introduced changes in what it referred to as “Premium incentives and less red tape”. One of the changes was to shift the basic premium threshold of a small business employer to $30,000. This change means that 95% of NSW employers receive few meaningful financial signals in relation to their safety performance and ought to be seen as a most retrograde move.

The compensation system not only provides a range benefits for injured workers, it ought to provide employers with an incentive through the premium system, for improved safety standards.

An upfront 10% discount is offered to small employers as a safety incentive which can be retained if there are no injuries which require more than four weeks off work. This works well for small employers which pay less than $10,000 in basic premium but provides little or no incentive to those paying up to $30,000.

The basic premium threshold should be moved back to its previous level of $10,000 and under and the discount (10%) retained. For those employers whose basic premiums are between $10,000 and $30,000 the discount should be set at 20%.

Section 23 (1)(i) of the Act requires WCA to facilitate and promote the establishment and operation of work health and safety committees at places of work and return to work programmes.

The WHS Act 2011 introduced new provisions for employers in relation to Consultation with workers. These new provisions are part of the harmonised WHS legislative package agreed to by the Commonwealth and most of the other Australian jurisdictions.

The emphasis has moved away from the WHS Committee structure (indeed there is no longer any requirement for members of a WHS Committee to be trained) towards WHS Representatives.

It does not appear the WCA has given consideration to the new provisions and made the appropriate amendments to the Act.

A requirement of Section 52 of the Act is that an employer must establish a Return to Work Programme in accordance with WCA Guidelines. Section (v) of the Guidelines for Workplace Return to Work Programmes gazetted in June 2011, deals with providing suitable duties and/or vocational retraining/job placement assistance.

The Guidelines set out a range of options for an employer to use in providing suitable duties for an injured worker as part of a graduated return to pre injury work. It is now a common practice of employers to provide suitable duties in order to keep injured workers in work; the practice however is now in jeopardy as a result of the activities of the NSW Industrial Relation Commission.

It does not appear that WCA has recognised the threat to workplace based rehabilitation posed by recent decisions in the IRC.

When medical or other evidence emerges that a worker on suitable duties is unlikely to ever return to their pre injury role, the employer needs to withdraw suitable duties. This is because suitable duties are not usually suitable employment; rather they are manufactured duties that the worker is able to perform and are not a full time role.

The IRC has formed the view (we believe erroneously) that withdrawal of suitable duties constitutes dismissal. The IRC is then empowered under S243 of the Workers Compensation Act 1987 to order the reinstatement of the worker to employment of the kind for which the worker has applied, in other words, the suitable duties provided as part of a return to work programme.

RiskNet has clients who have had this experience in the IRC and which experience has now caused them to reconsider providing suitable duties to injured workers. If this experience becomes widespread, employers will more generally need to reconsider providing suitable duties as part of a workplace based rehabilitation programme. This will have significant ramifications for injured workers.

The WCA needs to recognise that the activities in other jurisdictions can have very damaging consequences to the WorkCover scheme. Consideration should be given to appropriately amending the Section 243 of the Act particularly in light of the general protections and other protections afforded by the Fair Work Act.

Section 23 91)(j) of the Act requires the WCA to investigate workplace accidents. It is difficult to determine how effective WCA has been in relation to this obligation from the publically available information. Suffice it to say that according to the Reports, in 2011 – 2012 there were 55 traumatic fatalities whist the person was at work and 129,706 employment injuries. In 2012 – 2013 WCA charged 130 defendants for breaches of the legislation. Whether this is a good representation of overall activity in accident investigation or not is perhaps an issue the Committee might wish to pursue.

Section 23 (1)(m) of the Act requires WCA to collect, analyse and publish data and statistics, as the Authority considers appropriate.

RiskNet has been collecting and analysing WorkCover Statistical Bulletins since 1993. In 2008/09 WorkCover ceased to publish a Statistical Bulletin. This has meant that neither employers, observers, WHS professionals nor workers, have any publically available, contemporary information on which to base judgements about the effectiveness of WHS initiatives or workers compensation management matters.

In this regard the WCA has failed to comply with its statutory obligation and is the only Authority in Australia to do so. Otherwise, the WCA must now consider that the data published for the past two decades is no longer appropriate (in which case why was so much time wasted in the past in publishing Statistical Bulletins?)

As we understand it there have been plans made by WCA to implement a system of on line retrieval of statistical information. This should be progressed from a plan to full implementation.

A full Scheme Valuation is provided to WCA by the WCA Actuaries. In the past this Valuation has been made publically available, however in the past two years only a very simplistic “executive summary” has been provided. The information contained in the WorkCover Scheme Report provides scant information and no recommendations, which are typically provided by the actuaries.

Full scheme valuations should be made available to the public when they are provided to WCA (usually twice a year).

Matters related to the operation of the Scheme

Capacity assessments and decisions are keystones of the reform package. As we understand it, the WCA has instructed its Agents (insurers) that capacity assessment cannot be undertaken at any time in the life of a claim, even though this is a provisions of Section 44A of the Workers Compensation Act 1987. This decision has had very costly implications for clients of RiskNet.

For example, one employer has two claimants where it has been accepted that capacity assessments need to be conducted, however the agent concerned has reported that the assessment cannot be made until proof has been obtained that the worker concerned can perform the duties. This proof needs to be in the form of a job trial, finding alternative suitable employment or being on a job search for three months. When challenged, the Agent stated that this was because of a directive from WCA.

Both of these claims have had reserves for future income loss in excess of $150,000 applied to them. The effect of these reserves is estimated at an extra $200,000 in premium charges.

In another case, a claim has been reasonably excused and a reserve for future income loss has been raised. In this case the Agent has refused outright to conduct a capacity assessment (believing this to be the correct interpretation of the 1987 Act) because as far as they are concerned, there is no claim. Interestingly, the Agent is happy to spend money on medical and other investigations.

In this case the cost of the claim is $39,389 and the premium impact is in excess of $107,000.

Obviously Agents may be confused; however any operational instruction issued by WCA must comply with the law in letter and in spirit, it would appear from these examples that this may not be the case.

Section 65 of the Act contains the provisions for the making of a claim for compensation. Where the claim is for weekly benefits it must be accompanied by a medical certificate completed by a medical practitioner who is required to comment of capacity for work. In this way general practitioners (GP) are the gatekeepers of the entry to the compensation system. GPs are trained to diagnose injuries and other medical complaints and to prescribe appropriate treatments; they rarely if ever deliver the treatment particularly when it relates to soft tissue or psychological injury.

GPs generally are not trained nor interested in injury management matters other than where these require their diagnostic or prescription skills. For this reason it would make good sense to broaden the incapacity certification authority to include other health care providers such as physiotherapists and psychologists who are responsible for treatment delivery.

Conclusion

There will be many and varied submissions to this inquiry and some will deal with the structure of the WCA. Currently this combines the functions of a Regulator and Advisor; whether these sit comfortably together or not needs to be considered. We do not believe that they do and that there is a perceived conflict of interest in the current structure.

The WCA acts for the Nominal Insurer yet it does not conduct itself as a private insurer would, given the premium income it enjoys. There are many examples of not for profit insurance vehicles which are resourced by properly qualified insurance personnel, reporting to a Board well versed in the operations and management of an insurer. This is not the case of the WCA and ought to be addressed.

As noted earlier, the financial stakeholders of the WCA are not represented by a Board of Directors acting in their best interests, the Board is appointed by the Minister who is not elected by NSW employers.

A key consideration by the Committee should be the introduction of privately underwritten workers compensation insurance; the managed fund system has run its course and is no longer appropriate for NSW.

Should the Committee require any clarification of matters raised in this submission or need to seek more information from the author, please feel free to contact me on