Submission No 16

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

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Date received: 31 August 2016

Wednesday, 31 August 2016.

This document is put together for submission to inquiries into workers compensation and work safety legislation of New South Wales. Although these are two separate inquiries, this document is my attempt at outlining an issue that I believe could be relevant to both. Hence, this submission is made to both inquiries with the understanding that each inquiry will be able to distil relevance, and organise ways to engage and cooperate as the necessity may become apparent.

1 Personal situation and motivations.

I am 42 years' old. I tried to build a career in software development. I decided I would do this at the age of about 15; about the age one might normally decide to take on a career. I found that writing computer programs was an enjoyable pastime because it was intellectually engaging and promised me the opportunity to work productively in an environment where I did not have to collocate with other colleagues. I wanted to work from my own home because I found that I could not concentrate on a task when I was asked to do this task in the physical company of others; too many uncontrollable distractions, too much sensory stimulation. I can work well in a quiet environment where I can control external inputs and in which I can concentrate on work that uses a small set of honed talents.

Almost 20 years and no less than seven major employers (including the NSW Police, IBM, Accenture, and Wollongong University) hence, in 2008, I saw a psychiatrist. I asked him why I couldn't keep a job, and why, when I asked my employer, did they without exception, tell me that I couldn't do my work from my own home. My psychiatrist asked me if I had ever bumped my head.

When I was twelve years old, I had a nasty accident on my pushbike. I suffered a traumatic brain haemorrhage, and spent three months in hospital as a result. When I returned to school at about June of 1986, I found that perhaps I was more easily distracted than before my accident, but people generally concluded that I had entered adolescence, and this behaviour was normal of people my age. I was glad to know that I was intellectually equal to my peers, and everyone including myself certainly did not wish to think that any lasting negative consequence became of me. I got on with my life as a teenager, though as the years advanced from secondary through tertiary eduction and into the workforce, my desire to work from home remained, as did the seeming irrationality of a society that was bent on impressing upon me the importance of working in an office.

In fact, not long after I made my career choice, I became aware of the stigma of malingering associated with my desire. People would tell me that I had to work from an office. I would challenge them, and I would get the thrust an parry of excuses such like “you have to be social”, or “we're all in this together”. When pressed, people would suggest to me that there were legal obstacles like OH&S or taxation that put telework out of the question.

When I asked for the reasons for why these obstacles were in place, I would get regularly shouted out of my managers' offices. Feeling that my depression was going to devour me, I would either resign, or would wait for a redundancy or other fate to befall me.

I have been unemployed since July 2008, and have been receiving a pension since about 2010. With insufficient income to support myself with a private rental or mortgage, I have been living in public housing since about 2013. I have no family of my own, and my ties with the family to which I was once a member as a child are dissolving. Generally, people of authority would say to me words to the effect that “[telework] aint gonna happen, so just shut up, get on with it, and banish your desire to work from home from your life”.

It appears to me that my society has pushed me into public housing and onto a pension because I don't have what it takes to work from an office or a factory or as a travelling salesman who likes to have an engaging social life like everyone else in one's convivial working milleu. This has to change, and I want it to change so I might have a chance at indulging the productive niche I saw at 15 and of feeling content that I belong to this society. For some time, I have felt it reasonable to put to people of authority that my life hasn't happened because people of authority unjustly withheld from me the opportunities I needed to make my life happen. I want people of authority today to correct the wilful mistakes that were made by their predecessors. I want the office block banished from my life.

2 The legal problem with work safety and worker's compensation legislation in NSW.

Before I continue, I must acknowledge the gracious efforts of the staff of Safework NSW and SIRA. Liesel Smith and her manager Christine Tumney of Safework NSW gave me some of their time to meet with me and talk about these issues. Furthermore, I would like to thank Alana Jagger and Melayne Williamson from SIRA who offered me further assistance specifically with the Workers Compensation legislation. These people all helped me understand that most of the legal substance of the changes I am asking for apparently rests with the Workers Compensation Act 1987 (the 1987 WCA) and the Workplace Injury Management and Workers Compensation Act 1998 (the 1998 WCA). I will simply use WCA to refer to both documents collectively. Additionally, the NSW Workplace Health and Safety Act 2011 is referred to in this document as the WHSA, and the NSW Workplace Health and Safety Regulation 2011 is referred to as the WHSR.

The WCA does not adequately delineate between activities that the worker engages as a consequence of their employment, and those activities that are not so. I think that this oversight is draconian, and would do little more than encourage perverse incentive from workers who may be permitted to telework under these current provisions. As a result of this inability to delineate, employers, wanting to control the possibility of perceived abuse of the WCA will generally move to block this perverse incentive by prohibiting telework; a perverse incentive of its own.

For instance, the WCA stipulates that if I was nominally working for my employer from home and I got up from my computer, entered my kitchen, boiled water in my kettle, and spilt this boiling water down myself causing an injury, my employer would be liable and I could claim worker's compensation from them. My employer, recognising their liability in this situation, will want to minimise the possibility of these events occurring. My employer cannot control how I use and maintain my kettle in my kitchen, but my employer recognises that they would be able to control the safe use of a kettle and a kitchen if these items were under my employer's control. Hence, to reduce the likely hit to my employer's bottom line that compensation claims like these would take because of the operation of the WCA, my employer would want me to work from an office space chosen by my employer.

I recognise that my kettle and my kitchen are mine. They are not my employer's, and even the thought that an employer would be able to conduct a workplace safety audit on what is mine is an intrusion and an impost for me and my employer. Neither of us really want to do this, and even when I suggested doing something like this to previous and prospective employers, they have refused, citing that they could find someone who was happy to work with them in their office. As for the possibility that I might be able to work as a business entity contracting my services for a fee, such a suggestion places a whole weight of responsibility of running a business on my shoulders.

Regular employment implies division of labour which offers me the chance to give everything I am good at to my employer, and everything else to other colleagues who find their passion in other responsibilities. My brain injury makes a distraction like BAS or insurance or finding work while I'm doing the work I have been given an intolerable burden to impose on me. I came to the realisation that running a business of my own was not what I was looking for before I was 20. I reason that if there are organisations today that I can pay to take distractions away from me, then I would contend that these organisations are doing nothing more than the traditional roles of regular employers. I see no reason why regular employment shouldn't be practised in today's society as it was in my father's.

The suggestion that I could claim compensation from my employer by making an injury claim from an incident that occurred in my own home is anathema manifest by a society held back by a culture of the factory floor and the office block, still largely beholden to a time where the electric telegraph was cutting edge. This mindset has to change, and no mindset will be free to make the change it must while ever provisions in work safety legislation remain to anchor society in a bygone era by anchoring its citizens to office desks. Before this perverse incentive was suggested to me when I was about 25, I had absolutely no idea I could claim compensation from my employer in this way. I did nothing about it then because I thought that this is the law, and hence must be there for a reason. I have since found this not to be true in any way that accords with the application of rational thought.

I think my society should be ashamed that acts of fate visited upon me as a child still render me likely to be regarded as a skiver or a shirker or even (as one ex-boss from IBM remarked) a “loser”. Such off-handed remarks, callous and utterly devoid of any attempt at empathy though they truly are, might have been excusable in a society that once had no knowledge of the long term effects of traumatic brain injury nor knowledge of the avenues through which individuals so injured can take their place as productive contributors.

Today's society isn't ignorant any more, so society should stop pretending that old-word moralisms are still sufficient to fill old-world knowledge gaps which no longer exist. Society should turn away from hubris to get on with its job of maximising the productive contribution of everyone therein. This statement is as much an affirmation of the underlying purpose of society as it is an appeal to people of good conscience who occupy positions at its helm.

3 A sketch of the proposed solution.

I offer the following as a solution to this anomaly. Section 21A of The Commonwealth's Disability Discrimination Act 1992 (the DDA) defines the term “inherent requirements”. In order to narrow the scope of an employer's liability so this liability only includes those acts by a worker that comport with this definition, the WCA perhaps can refer to this definition. Being that I would use my kettle in my kitchen whether or not I was doing what is inherently required of me by my employer at the time this event occurred, my employer should not fear that they bare any liability for the possibility that I might spill boiling water down myself; boiling water is not an inherent requirement of my job.

In referring to my earlier example, I would agree that spilling boiling water down myself is a big deal for me, but there are mechanisms like Medicare and the public hospital system that are available to help me deal with such an unfortunate event. I would perhaps argue that workers should be provided with every assistance necessary to get back to work as quickly as possible, and the employer would benefit from rendering some of this assistance. However, regardless of these points, an employer should not be held liable for acts the worker engages in where those acts do not compose the inherent requirements of the job the worker is tasked to do.

Additionally, I would further argue that boiling water indeed becomes an inherent requirement of my job if I cannot perform this act without my employer's supervision. For instance, my employer would indeed be responsible if my employer provided me a kettle and a kitchen to boil water by necessity that I do my job from a place chosen by my employer.

Hence, the employer would still be liable for injury if and only if the employer involved themselves in this process. A mechanism such as this would give employers an opportunity to decide whether they need workers to work in a workplace chosen by the employer, or whether letting their workers work from wherever they think it best will have no effect on the performance of the inherent requirements of their job. The WCA thus altered would appropriately reduce the take from an employer's bottom line necessary for employment insurance premiums to cover the possibility of a worker spilling boiling water on themselves, but only if the employer lets the worker boil water in one's own kettle from one's own kitchen because the employer lets the worker make their own choice of workplace.

Other states and the federal government probably all need to be involved in this process of law reform. This can be done with the mechanisms provided through COAG, and the federal government may ultimately have to change the DDA to clarify the meaning of inherent requirements in a way that makes incorporation into state legislation easier.

I do not know the case law precedent for cases where a worker, allowed to work at home, has received worker's compensation because of an injury they have acquired, even though the injury was due to some domestic incident that the employer couldn't have been able to reasonably foresee. However, I would contend that, at the very least, precedent is unclear. If this is indeed the case, the inquiry should consider what an employer would feel compelled to do to protect themselves; to prohibit telework.

4 Some suggested legislative changes in more detail.

Below are mere suggestions as to how legislation can be changed to recognise telework as a legitimate way of adding value to business and to the society in general. These suggestions are not exhaustive.

1. Firstly, telework and it's opposite, collocated work, need to be defined. This might best occur in section 3 of the 1987 WCA, and an appropriate definition would say that telework might be defined as a mode of work where the employer does not specify the location of the worker's workplace; collocated work would therefore be where the location of the workplace is specified by the employer.

2. It might be advantageous to state that workers can switch between telework and collocated work modes and that the application of worker's compensation changes appropriately when the worker changes working mode. To leave no doubt to what is being implied, a luncheon, a meeting with colleagues, or other “recreational” activity done by the worker on behalf of their employer would be classified as collocated work so that there is no change to what is currently provided for these occasions.

3. A worker switches from telework to collocated work when they set out on a journey from a designated starting place to where the designated work or meeting place is. They would switch back to telework when the worker arrives at a destination designated as the end of the worker's journey back from this designated work or meeting place. A journey's ending place may be different to the journey's starting place, and these details would be arranged between the worker and their employer.

4. Points 2 and 3 above could be covered in schedule 1 of the 1998 WCA.

5. A compromise between teleworking and what is covered under the WCA would need to be recognised. A teleworker would trade worker's compensation cover for greater autonomy. The employer would trade lower workplace injury insurance premiums for less supervision. This feature of the employer/worker relationship may need to be covered in its own section of the WCA, or perhaps even the WHSR. Perhaps such a compromise as this may be politically contentious, but I would challenge those who may oppose this compromise to ask themselves what compromise is there in expanding the opportunities for productive work?

6. Section 48 of the WHSR may not apply in the case of the telework because the teleworker can demonstrate that the nature of their work does not expose them to any additional environmental hazards that arise because of what the employer tasks them with. Other provisions of the WHSR and the WCA may still apply if the employer required the worker use bespoke equipment or specific online facilities as these specific actions could expose the worker to additional risk not in the teleworker's environment but for the fact that the teleworker is working.

7. A third clause could be added to the meaning of the workplace as defined in section 8 of the WHSA that states that a teleworker's workplace is any location chosen by the teleworker at any point in time, provided that the location chosen by the worker generally permits the worker to perform the “inherent requirements” (cf. s21A of the DDA) of their work.

8. Sections 63 and 256 of the 1998 WCA do not define a register of injuries accessible through an online medium. A teleworker would reasonably only be able to enter incidents through a register provided online. Sections 62 and 255 should state that a submission in the online medium provided for the register of injuries should be considered service of a notice of injury.

9. The 1987 WCA at 150 and 150B(3) talk about vicarious liability, and hence the statements given in these sections should be considered in relation to acts by others that may take place in the teleworker's environment while they are working. Certainly, the employer should not be liable for the acts of people in the teleworker's environment who are not also affiliated with the teleworker's employer.

10. The 1987 WCA at 150C refers to legislation of other states [of Australia]. Hence, other states will probably also require legislative changes for provisions in this section to have a desired effect. Other sections of the WCA, WHSA, or WHSR not mentioned in this document may have a similar effect, and hence cooperation between all COAG members is essential for effective law reform.

5 Conclusion.

I believe changes like the ones outlined in this document that acknowledge telework's place as a legitimate way of productively contributing to one's society will be effective, and I believe they would make meaningful life available to people who's potential to contribute is being wilfully ignored by society where old-world moralisms act merely as an old-world barrier of ignorance to productive employment for far too many Australians.

Implement legislative reform to the work safety and worker's compensation mechanisms of this state and nationally because I and many others for a number of reasons currently have no opportunity to contribute productively to society. While ever these draconian throwback provisions exist, society has no room to change. Society's future and present generations will never truly come to terms with the technological fruits of the labour of present and past generations until these changes are made.

Owen.