Submission No 25

INQUIRY INTO 2022 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Business NSW

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BUSINESS NSW

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The Hon Chris Rath MLC
Committee Chair
Standing Committee on Law and Justice
By email: lawandjustice@parliament.nsw.gov.au

2022 Review of the Workers Compensation scheme

With a membership that overwhelmingly consists of employing businesses required to take out workers compensation, Business NSW takes an active role in discussion and debate on workers compensation and workplace health and safety (WHS) regulations.

Accordingly, Business NSW welcomes the opportunity to provide a submission to the *2022 Review of the Workers Compensation scheme* being conducted by the Legislative Council's Standing Committee on Law and Justice and notes that the focus of this review is on the increase in psychological claims.

Business NSW is a committed advocate for a workers compensation scheme and WHS regulatory framework that is both sustainable and fair over the longer term.

Business NSW recognises the need to support injured workers and the benefit, wherever practical, of allowing this recovery to occur at work. It needs to be emphasised, however, that support for injured workers needs to be appropriately balanced against maintaining the long term sustainability of the scheme.

Business NSW supports return to work as a key metric for the calculation of premium loadings. However, the system needs to be better calibrated to mitigate factors that fall outside an employer's control in delivering successful return to work outcomes, such as administrative failure by claims agents and access to medical resources.

This is particularly the case for claims relating to psychological injuries.

Business NSW's submission focuses on primary psychological injuries as opposed to secondary psychological injuries.

This submission is divided into two parts, where:

- Part A – explains the steps taken to progress a workers compensation claim in the NSW scheme, highlights the issues currently being experienced by employers within the scheme and contains suggestions for improvements based on member feedback.
- Part B - looks at whether, insofar as psychological injuries are concerned, the NSW workers' compensation scheme is fit for purpose.

Yours faithfully

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CONTENTS

PART A: THE CLAIMS JOURNEY 4
Early Notification of Workplace Injury 4
The Legislation 4
Feedback 4
Recommendation 4
Injury management provisions – object and application 5
The Legislation 5
Problem Statement 5
Recommendation 5
Injury management – income support – the general rule 6
The Legislation 6
Problem Statement 6
Recommendation 6
Injury management – income support – the exception 7
The Legislation 7
Problem Statements 7
Recommendations 8
Injury management – injury support – significant injuries 8
The Legislation 8
Problem Statements 9
Recommendation 10
Injury management – return to work obligations 10
The Legislation 10
Problem Statement 10
Recommendation 10
Injury management - penalty provisions - insurers 11
The Legislation 11
Problem Statement 11
Recommendation 11
Injury management - penalty provisions - employers 12
The Legislation 12
Problem Statement 12
Recommendation 12
Claims management – the ‘perception’ cases 13
The Legislation 13

Problem Statement 14
Recommendation 14
Claims management – section 11A 15
The Legislation 15
Problem Statement 15
Recommendation 15
PART B: IS THE SCHEME IS FIT FOR PURPOSE? 16
Problem Statement 16
Recommendation 17
CONCLUSION 17
For further information 18

PART A: THE CLAIMS JOURNEY

Business NSW has been advised that 'anxiety and depression' is the most common type of psychological injury claim, with bullying, sexual harassment and poor work design (in that order) being the top three causes.

This part of Business NSW's submission will focus on feedback provided in relation to that type of workers' compensation claim.

Early Notification of Workplace Injury

The Legislation

An injured worker must notify the employer that the worker has received a workplace injury as soon as possible after the injury happens[1]. The employer then has 48 hours in which to provide notice to the Nominal Insurer[2].

Feedback

A physical injury which occurs in the workplace is clearly observable. Typically, the injury occurs at work following which medical attention is sought.

By way of comparison, it is not clearly observable whether a psychological injury of anxiety and/or depression has occurred in the workplace and notification of injury is usually given after the worker has obtained a certificate of capacity from their general practitioner.

Recommendation

That the NSW government consider:

- whether additional notification or other procedural measures need to be put into place prior to a worker seeking medical attention for a psychological injury, and
- how to accelerate an injured worker's access to a psychologist or psychiatrist following a general practitioner's diagnosis of a psychological injury.

[1] Subsection 44 (1) of the 1998 Act

[2] Subsection 44(2) of the 1998 Act

INJURY MANAGEMENT PROVISIONS – OBJECT AND APPLICATION

The Legislation

The object of having workplace injury management provisions in the legislation is "*to establish a system that seeks to achieve optimum results in terms of the timely, safe and durable return to work for workers following workplace injuries.*[3]"

They are found in Chapter 3 of the 1998 Act which contains provisions in relation to:

- interim support measures for the injured worker – in the form of:
  - income support (weekly benefits), and
  - injury support (medical treatment and rehabilitation),
- return to work obligations - imposed on:
  - the injured worker, and
  - the employer, and
- non-compliance – in relation to:
  - penalties for non-compliance, and
  - the ability to issue employer improvement notices.

They are complemented by the procedural requirements contained in Chapter 7 of the 1998 Act (both in relation to provisional payments and in relation to claims), do not depend upon a claim first having been made and any action taken will not affect liability.

Problem Statement

The fact that this support is only an interim measure is not adequately communicated to employers and their injured workers.

This is particularly problematic for psychological injuries as they are usually caused by some sort of interpersonal issue occurring within the workplace. Therefore, at the time the injury is said to have occurred, the relationship between the injured worker and the employer has already begun to break down.

Receiving income and injury support without clarification as to why it is being provided tends to result in the injured worker feeling vindicated. This can lead to the relationship deteriorating even further. Should the worker's claim be declined, they are left feeling bewildered and sometimes persecuted. At this stage, the relationship between the employer and the injured worker may have irretrievably broken down in which case it is extremely unlikely that the worker will return to their previous place of employment.

Recommendation

Require SIRA to prescribe the type of information to be communicated by insurers to employers and their injured workers, after first having consulted with employer and worker representatives.

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[3] Subsection 41(1) of the 1998 Act

INJURY MANAGEMENT – INCOME SUPPORT – THE GENERAL RULE

The Legislation

Psychological injuries are personal injuries (not disease injuries).

Therefore, to qualify for income support, an injured worker must be able to show that:

- under section 4 - the injury arose 'out of or in the course of employment', and
- under section 9A - the injury bore a 'substantial connection' to the workplace.

Section 9A contains a list of factors that can be taken into consideration. Those factors include:

- the time and place of the injury,
- the probability that the injury or a similar injury would have happened anyway,
- the worker's state of health before the injury
- the existence of any hereditary risks, and
- the worker's lifestyle and his or her activities outside the workplace.

Section 9A also states that a worker's employment is **not** to be regarded as a substantial contributing factor to a worker's injury merely because the injury arose out of or in the course of the worker's employment and has an incapacity for work.

If the insurer decides that the injured worker qualifies for this type of interim income support, it must commence making those weekly payments within 7 days after the initial notification of the worker's injury.

Problem Statement

Employers are not provided with a sufficiently detailed notice of decision and often cites a reliance on 'perception' cases based on information provided by the injured worker.

An injured worker's perception is necessarily subjective and is in direct conflict with the common law rules relating to liability for psychological injuries.

The employer is often unaware of the event that was alleged to have taken place and would therefore have no record of the alleged incident.

Recommendation

That:

- the NSW government consider whether the NSW workers' compensation scheme is fit for purpose insofar as it relates to psychological injuries, and
- if it concludes that psychological injuries should remain within the NSW workers' compensation system, improve the system by changing the legislation:
  - by requiring the insurer to provide a detailed notice of decision (including a statement of how each factor contributed to the decision and the evidence being relied upon in relation to each factor contained in section 9A), and
  - after examining the legislation of other jurisdictions to see how the NSW legislation can be improved.

INJURY MANAGEMENT – INCOME SUPPORT – THE EXCEPTION

The Legislation

The 1998 Act[4] provides that:

- the insurer can refuse to provide interim income support if it believes there is a 'reasonable excuse' not to do so,
- a 'reasonable excuse' is prescribed by the Workers Compensation Guidelines (a regulatory instrument issued by SIRA)
- if the insurer believes there is a reasonable excuse, then within 7 days from the date the initial notification of injury was received, it must give the worker written notice providing details of that reasonable excuse.

One type of reasonable excuse listed in SIRA's *Guidelines for claiming workers' compensation* effective 1 August 2016 is that 'the injury is not work related' and, for this particular type of reasonable excuse, expressly refers to sections 4 of the 1998 Act, sections 9A, 9B and 10 of the 1987 Act.

Problem Statements

Listing section 4 of the 1998 Act instead of the 1987 Act

Section 4 of both Acts contain the definition of injury.

However, for a 'disease injury', the two definitions are inconsistent because, in 2012, the 1987 Act was updated to:

- strengthen the nexus required between the employment and a disease injury in section 4 and
- exclude disease injuries from the substantial contributing factor requirements of section 9A.

The 2012 amendments failed to update the definition of disease injury in section 4 of the 1998 Act. Therefore, section 4 of the 1998 Act reflects the pre-2012 position, which only requires the injured worker's employment to be 'a' contributing factor as opposed to 'the main contributing factor'.

Section 11A is no longer a 'reasonable excuse'

Section 11A, which is the reasonable management action exception, used to be listed as one of the relevant sections alongside sections 4 of the 1998 Act, sections 9A, 9B and 10 of the 1987 Act.

Section 11A was removed from the guidelines as being a 'reasonable excuse' when it was revised in 2016.

Sections 9A, 9B and 11A are all prefaced with the words "No compensation is payable…"

In effect, the 1998 Act has provided the regulator with the power to circumvent parliament's clear intent that section 11A should be treated in the same way as sections 9A and 9B.

The insurer's notice

Where a reasonable excuse applies, the insurer's notice containing the details of that reasonable excuse is only required to be sent to the worker.

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[4] Sections 267, 268 and 367(1)(c)

Where a reasonable excuse does not apply, the insurer is not required to provide a written notice explaining why it believes that such an excuse does not apply.

Recommendations

Listing section 4 of the 1998 Act instead of the 1987 Act

That the legislation be amended so that the definition of injury in section 4 of the 1998 Act simply refer to the definition contained in the 1987 Act.

Section 11A is no longer a 'reasonable excuse'

That the Act should be amended to remove the regulator's ability to circumvent parliament's clear intent that section 11A be treated the same way as sections 9A and 9B.

One way in which this could be done is by amending the definition of injury to specifically exclude psychological injury resulting from reasonable management action (similar to the way it is incorporated in section 32 of Queensland's *Workers' Compensation and Rehabilitation Act 2003).*

The insurer's notice

As a matter of urgency, the NSW government amend the legislation so it requires:

- the insurer to give a written notice to both the worker and its employer about its decision to provide or not provide weekly payments under sections 267 and 268 of the 1998 Act, and
- the insurer's written notice to contain reasons for that decision, such reasons to include a reference to the evidence plus the relevant legal authorities being relied upon by the insurer.

INJURY MANAGEMENT – INJURY SUPPORT – SIGNIFICANT INJURIES

The Legislation

A '***significant injury***' is defined[5] as meaning "*a workplace injury that is likely to result in the worker being incapacitated for work for a continuous period of more than 7 days, whether or not any of those days are work days and whether or not the incapacity is total or partial or a combination of both*".

As soon as an injury appears to the insurer as being a significant injury, the insurer must[6]:

- establish an injury management plan (an IM plan) in consultation with the employer, the treating doctor and the worker (to the extent that their co-operation and participation allow).
- provide both the employer and the injured worker with information relating to the IM plan (the worker's information is to include a statement about weekly payments ceasing if the worker fails unreasonably to comply with the Chapter 3 requirements), and
- keep the employer informed of significant steps taken or proposed to be taken under the IM plan.

[5] Subsection 42(1) of the 1998 Act

[6] Section 45 of the 1998 Act.

Both the employer and the injured worker must[7]:

- participate and co-operate in the establishment of the IM plan, and
- comply with obligations imposed on them by or under the IM plan

Then, as soon as practicable after the insurer commences weekly payments (following the initial notification of injury), the insurer must give the worker notice that (amongst other things) '*the insurer will develop an injury management plan for the worker (if required to do so by Chapter 3)*'.

One of the penalties for an injured worker's 'unreasonable' non-compliance with the obligations contained in Chapter 3 is the suspension or termination of their weekly benefits.

Problem Statements

A psychological injury consisting of anxiety and depression is usually a significant injury as it typically involves more than 7 days of time lost.

Co-operation and participation

Where a psychological injury is alleged to be the result of bullying, sexual harassment and/or poor work design, it is usually the case that both the injured worker and their treating doctor are unwilling to co-operate and participate with the employer when an IM plan is being developed.

Where the psychological injury is anxiety and depression, employers can also be unwilling to participate for fear of exacerbating the worker's injury.

Lack of access to treatment

IM Plans for psychological injuries are often delayed for protracted periods of time due to the lack of access to psychologists and/or psychiatrists.

This was especially the case during COVID and will continue to be the case in regional areas.

Unreasonable non-compliance by the injured worker

Given the nature of anxiety and depression, from a practical perspective it will be difficult to determine whether, by failing to comply with their Chapter 3 requirements, the injured worker is being unreasonable.

This will have the effect of protracting the length of time an injured worker is in receipt of weekly payments, adding costs to the scheme and the costs used to calculate an employer's Claims Performance Adjustment.

Informing an employer of significant steps

Despite the fact that the injured worker is required to sign a form of consent on each Certificate of Capacity issued by the treating doctor, employers are often not kept informed of significant steps taken in the IM Plan due to 'privacy' reasons.

[7] Sections 46 and 47 of the 1998 Act

Recommendation

That the NSW government consider how to provide targeted support to enable workplaces to better manage recovery at work, thus reducing the level of demand for the type of services required to treat psychological injuries that result in a worker being incapacitated for more than 7 days.

INJURY MANAGEMENT – RETURN TO WORK OBLIGATIONS

The Legislation

Under the Act[8]:

- a worker with current work capacity must, in co-operation with the employer or insurer, make reasonable efforts to return to work in suitable employment or pre-injury employment at the worker's place of employment or at another place of employment, and

- where the worker has been totally or partially incapacitated for work as a result of an injury and is able to return to work, the employer is under an obligation to provide suitable employment for that worker. Non-compliance by the employer attracts a penalty of 50 penalty units.

Problem Statement

Where a worker has been diagnosed with anxiety and depression which is alleged to have been caused by bullying, sexual harassment or poor work design, treating doctors have a tendency to certify that the injured worker has no capacity to return to their previous workplace.

This is despite suitable duties appropriate to the situation having been offered by the employer.

Recommendation

That the NSW government consider how to provide targeted support to enable workplaces to better manage recovery at work, thus increasing the likelihood of workers with a psychological injury retaining at least partial work capacity following the diagnosis of a psychological injury.

[8] Sections 48 and 49 of the 1998 Act

INJURY MANAGEMENT - PENALTY PROVISIONS - INSURERS

The Legislation

The object of having workplace injury management provisions in the legislation is "*to establish a system that seeks to achieve optimum results in terms of the timely, safe and durable return to work for workers following workplace injuries.*[9]"

Section 55 of the 1998 Act provides that it is a condition of an insurer's licence that the insurer must comply with the requirements of Chapter 3 and that non-compliance with the section can result in cancellation or suspension of the insurer's licence, a pecuniary penalty being imposed, an amendment to the terms and conditions of the insurer's licence and/or a letter of censure being issued to the insurer.

Problem Statement

The Nominal Insurer's licence

The only condition that applies to the Nominal Insurer is to comply with the Market Practice and Premium Guidelines.

The *State Insurance and Care Legislation Amendment Bill 2022,* which was introduced by the NSW government into the Legislative Assembly on 30 March 2022 and passed with amendments on 18 May 2022.

It contains provisions that strengthen regulatory oversight over the Nominal Insurer and expressly deals with the above problem statement.

It was introduced into the Legislative Council on 19 May 2022 but has not progressed any further.

The penalty

Any pecuniary penalty imposed on the Nominal Insurer can only be paid from the Workers Compensation Insurance Fund, the deficit of which is the sole financial responsibility of employers through their premiums.

The Nominal Insurer's poor injury management practices are already imposing a significant cost impost on employers, especially those who have to pay a Claims Performance Adjustment in addition to their Basic Tariff Premium.

Recommendation

The Nominal Insurer's licence

Progress the passage of the *State Insurance and Care Legislation Amendment Bill 2022* in the Legislative Council for debate so it can be passed as soon as possible, ensuring that regulatory oversight over the Nominal Insurer is strengthened.

The penalty

That the ability to impose a pecuniary penalty on the Nominal Insurer be removed from the Act and that this amendment be effected as a matter of urgency.

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[9] Subsection 41(1) of the 1998 Act

INJURY MANAGEMENT - PENALTY PROVISIONS - EMPLOYERS

The Legislation

The object of having workplace injury management provisions in the legislation is "*to establish a system that seeks to achieve optimum results in terms of the timely, safe and durable return to work for workers following workplace injuries.*[10]"

Section 56(1) of the 1998 Act provides that:

"*Any increased costs associated with a failure by an employer to comply with a requirement of this Chapter can be taken into account (in conformity with the requirements of this Act with respect to the determination of premiums) in the calculation of a claims experience factor for the employer for use in the determination of the premium payable for an insurance policy by the employer.*"

Problem Statement

All increased costs which are due to the payment of weekly benefits are included in the calculation of the Claims Performance Adjustment, regardless of whether that increase is "*associated with a failure by an employer*" or not.

As explained throughout this submission, the degree by which increased costs relating to psychological injuries within the scheme can be attributed to any failure on the part of the employer are likely to be minimal.

In addition, the multiplier used in the calculation of the Claims Performance Adjustment is extremely volatile and produces unacceptably high increases that bear little resemblance to the level of financial responsibility that should be properly allocated to employers.

Recommendation

Amend, as a matter of urgency, the legislation to:

- require the Nominal Insurer's approved premium filing to be published, and
- ensure the costs attributable to psychological injuries is excluded from the Claim Performance Adjustment calculation.

[10] Subsection 41(1) of the 1998 Act

CLAIMS MANAGEMENT – THE 'PERCEPTION' CASES

The Legislation

In the absence of there having been any reasonable management action, the relevant provisions from the 1987 Act are sections:

- 4 – definition of injury, and
- 9A – substantial contributing factor

Their contents have been explained on pages 6 and 7.

These provisions have been judicially considered by the NSW District and Supreme Courts as well as the NSW Court of Appeal.

The following cases are important to note.

State Transit Authority of New South Wales v Fritzi Chemler

The NSW Court of Appeal decision of *State Transit Authority of New South Wales v Fritzi Chemler*[11] considered section 4 of the 1987 Act.

It was a case where Mr. Chemler's work colleagues erected racially slurred signs in the workplace 'as a joke'.

Mr Chemler did not regard them as being 'a joke' but found them to be offensive.

The Court of Appeal:

- Observed that perception is necessarily a pre-condition to psychological injury,
- Held that as long as the event (that was alleged to have occurred in the workplace) was real, it can be said that the event caused the psychological injury, and
- upheld the decision that "Mr Chemler perceived he was being subjected to harassment and victimisation, and it was this perception that caused his psychological injury."

It should be noted that the Court confirmed that the 'substantial contributing factor' test was found to have been satisfied in that case.

Arnold Dayton v Coles Supermarkets Pty Limited

The NSW Court of Appeal decision of Arnold Dayton v Coles Supermarkets Pty Limited[12] concerns section 9A.

It was held that the worker alleged that stressful events which occurred at work caused him to develop schizophrenia and sought workers' compensation.

[11] [2007] NSWCA 249

[12] [2001] NSWCA 153

Not only were the trial judge's findings that:

- the stressful events at work were not a substantial contributing factor, and
- the major causes of the appellant's illness was a genetic or biological susceptibility to schizophrenia and his prolonged use of marijuana,

upheld, but the Court of Appeal also held that:

- it was open on the evidence that
    - the worker did not suffer any injury, but a mere emotional reaction, and
    - many of the stressful events complained of were not acts arising out of or in the course of the worker's employment, and
- a contributing factor which is minor in comparison with two other substantial factors, is not a substantial contributing factor, and
- the words 'substantial contributing factor' in s9A of the Act require that compensation be paid only when the employment contributed to the injury in a manner that is "real and of substance".

Problem Statement

Due to the lack of transparency surrounding the Nominal Insurer's decisions as to whether or not there has or has not been a 'reasonable excuse', it is not possible to tell whether or not due regard has been had to the legal principles set out in the relevant authorities.

Business NSW can therefore only go by the anecdotal evidence provided by its members.
That feedback would tend to suggest that due regard is not being given to the relevant authorities and that this is resulting in an avalanche of psychological injury cases being accepted, either provisionally or otherwise.

Recommendation

As a matter of urgency, the NSW government amend the legislation so it requires:

- the insurer to give a written notice to both the worker and its employer about its decision to provide or not provide weekly payments under sections 267 and 268 of the 1998 Act, and
- the insurer's written notice to contain reasons for that decision, such reasons to include a reference to the evidence made available to the insurer to enable it to make the decision plus the relevant legal authorities being relied upon.

CLAIMS MANAGEMENT – SECTION 11A

The Legislation

Subsection 11A(1) provides that:

"*No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.*"

Problem Statement

Employers seeking assistance from Business NSW in relation to their workers compensation issues are reporting that, when a treating doctor discovers that the worker's psychological injury relates to performance management in the workplace, they issue subsequent certificates of capacity that state the injury to be caused by an event of bullying pre-dating the commencement of the performance management activities.

In some cases, the Nominal Insurer has failed to take into account the employer's advice that the earlier date falls on a day when the worker was on leave or not rostered to work.

Business NSW has made enquiries about the type of data captured from the Certificates of Currency and understands that this type of data is not collected by the Nominal Insurer.

Recommendation

That the NSW Government conduct a review of the type of information that is captured by the Nominal Insurer and make recommendations relating to the changes required to:

- ensure compliance with the legislation and
- restore confidence in the system.

That section 11A be amended to clarify that the 'perception cases' cannot be relied upon when determining whether or not the action was reasonable.

In this respect, consideration should be given to the suitability of adopting the approach taken by the Queensland Government in their *Workers Compensation and Rehabilitation Act 2003*

PART B: IS THE SCHEME IS FIT FOR PURPOSE?

An example illustrating the difficulties in identifying the cause of anxiety and depression is the NSW District Court case of ***Bailey v The Workers Compensation Nominal Insurer (previously sued as Hardy Bros Mining & Constructions Pty Ltd) [2017] NSWDC 57***

In that case, there was a confrontation between the worker and his supervisor (with whom he previously had a good relationship) which took place on a particular day.

The worker described this confrontation as being 'harassed, abused and victimised' yet had not reported the incident or talked to anyone about it.

In evidence, the employer's witnesses did not agree with the worker's version of events but did concede that the supervisor could be 'at times abrasive in his general manner'.

The worker went to his doctor and obtained a certificate which stated he was unable to return to work because of the 'anxiety and stress in the workplace'.

The worker had previously been diagnosed with anxiety and depression and had recently stopped taking his medication (as prescribed by his psychiatrist). This information had been withheld during medical investigations.

The court held that there was no system of bullying and the worker's employment did not cause the worker's symptoms.

In that case, the court also noted[13] that the "*relevant principles to apply to a plaintiff bringing a claim for injury suffered in the course of his or her employment are for the common law as unaltered by the Civil Liability Act 2002 (NSW) but as varied by the Workers Compensation Act 1987 (NSW): Kubovic v HMS Management Pty Ltd [2015] NSWCA 315 at [5]-[7].*"

Problem Statement

An overview of the common law rules regarding psychiatric injuries and a useful comparison on how the application of those rules can lead to different outcomes can be found in the High Court decision of *Tame v New South Wales* [2002] HCA 35; 211 CLR 317; 191 ALR 449; 76 ALJR 1348 (5 September 2002)

That case reiterates the importance of distinguishing physical injury from psychiatric injury.

In essence, the general rule for common law liability for psychiatric injuries is governed by the concept of 'normal fortitude' which is important because "*there may be something about the vulnerability or susceptibility of a particular plaintiff that makes it unreasonable to require a person to have in contemplation the kind, or perhaps the degree, of injury suffered*"[14]

The exception to this rule is where the plaintiff "*knows, or ought to know, of the peculiar susceptibility of a plaintiff*".[15]

Once liability has been established, that vulnerability or susceptibility is protected through the application of the egg-shell skull rule (which is a rule relating to remoteness of damage once liability has been established).

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[13] At [71]

[14] Per Chief Justice Gleeson at [16]

[15] At [16]

In effect, that rule ensures that, when compensating the plaintiff for the psychiatric injury, the defendant must "*take him as they find him*" (that is, the award of damages must accommodate the individual's particular vulnerability or susceptibility).

Recommendation

That the NSW government consider:

- confining the type of injuries covered by the NSW workers' compensation scheme to personal bodily injuries and, if applicable, any secondary psychological injury which may be a consequence of the personal bodily injury,
- conducting modelling work to see whether, insofar as psychological injuries are concerned, there is a better-suited alternative scheme design which can still:
  - provide income support for workers whose mental health conditions interrupts their ability to attend their usual workplace and earn income for extended periods of time, and
  - promote the benefits of recovery at work, and
- extending the provisions of the *Civil Liability Act 2002 (NSW)* to all psychiatric injuries, regardless of how caused.

CONCLUSION

On Friday 22 July 2022, the Australian Bureau of Statistics released its summary statistics on key mental health issues taken from its National Study of Mental Health and Wellbeing.
Its headline statistics are that:

- Over two in five Australians aged 16-85 years (43.7% or 8.6 million people) had experienced a mental disorder at some time in their life.
- One in five (21.4% or 4.2 million people) had a 12-month mental disorder.
- Anxiety was the most common group of 12-month mental disorders (16.8% or 3.3 million people).
- Almost two in five people (39.6%) aged 16-24 years had a 12-month mental disorder.

It is clear that managing mental health conditions, whether within the workplace or elsewhere is a societal issue and a joint responsibility.
The importance of joint responsibility is recognised in the WHS Act, where workers are responsible for their own H&S and those of others as are individuals who happen to be at the workplace.

The importance of joint responsibility seems to have been lost in the NSW workers' compensation system which, in the interests of being non-adversarial, tends to result in responsibility for all mental health conditions alleged to have occurred in the workplace by way of 'perception' falling solely on the employer.

Unlike physical injuries, it can be extremely difficult to prove that a mental health condition has been caused by a workplace-related event.

This uncertainty, coupled with the manner in which these types of claims are managed, are rapidly driving the scheme to unsustainable levels.

BUSINESS NSW

By ‘unsustainable’, we are including the experience of employers throughout NSW (especially those who must pay a Claims Performance Adjustment) and the inability on the part of those employers to continue to underwrite the poor performance of the scheme.

This needs to be addressed as a matter of urgency.

FOR FURTHER INFORMATION

For further information about our submission, please contact Elizabeth Greenwood, Policy Manager, Workers Compensation, WHS and Regulation, on or

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