Submission No 47

INQUIRY INTO PROPOSED CHANGES TO LIABILITY AND ENTITLEMENTS FOR PSYCHOLOGICAL INJURY IN NEW SOUTH WALES

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Submissions in response to the Government's proposed amendments to the *Workers Compensation Act 1987* (NSW) and the *Workplace Injury Management & Workers Compensation Act 1998* (NSW)

– Workers Compensation Legislation Amendment Bill 2025

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A. Introduction

1. My name is David Baran. I have been a Barrister for 34 years.

2. I was admitted in the Supreme Court of New South Wales on 1 November 1991 and shortly thereafter in the High Court of Australia. I practice exclusively in

personal injury, torts and workers compensation. I appear for both injured workers and also for workers compensation insurers together with corporations who have a system of self-insurance for workers compensation purposes and associated common law purposes. I hold a Diploma of Law from the University of Sydney and a Master of Laws with Distinction from the University of Technology, Sydney. I am a lecturer in torts at the University of Technology and also have lectured in medicine and the law. For most of my career I have lectured at seminars and conferences as well as being the author of many papers on personal injury litigation including workers compensation.

3. I am aware of the current crisis as outlined by the Government and believe it will be of great assistance to the Committee's work and any ultimate recommendations to have the benefit of an experienced practitioner provide an important insight as to the some of the material causes as to why there has been not only a cost blowout in the scheme, but also why far too many workers who have suffered from a psychological injury are not returning to work.

4. I am also prepared to give evidence either by way of general assistance or as an expert.

B. The concerns of the Government regarding workers compensation and in particular matters involving claims for psychological injuries

5. On Friday, 9 May 2025 a media release[1] identified a commitment by the New South Wales Government to modernise the workers compensation system. It was observed that workplace health and safety and workers compensation laws are failing to both prevent psychological injury and treat those with psychological injuries quickly. On the current estimates approximately 50% of workers with a psychological injury are returning to work within a year. This is contrasting with 95% who have a physical injury. Moreover that under the current system it is

[1] Media release 'Workers Compensation Exposure Draft Release' 9 May 2025.

estimated that seven times the cost is fixed on keeping an injured worker away from the workplace as opposed to returning to work. The consequence of these and other matters is an increase in premiums forecast to be 36% over the next three years.

6. This submission proposes to outline for the benefit the inquiry a number of key features of the system which are material causes of unnecessary and prolonged psychological disputes which either should never have been commenced and have led to unnecessary proceedings in the Personal Injury Commission on a significant scale for the recovery of compensation which is a deterrent to a return to work. The increase in claims and the decrease in returning to active employment has been caused by a number of decisions which have unnecessarily expanded workers compensation claims which were never intended so as to substantially increase the amount of claims going forward which, if the law had been applied correctly, would never have occurred.

7. The draft Bill needs to address those particular matters as they apply both to exempt and non-exempt workers to restore workers compensation to its original and intended purpose, namely as primarily a short term means of economic relief for injured workers whilst they recover from their injuries with a focus to always be on a return to work if possible. That should comprise the majority of such claims and the minority then move on to long term compensation to be extinguished by common law damages.

8. The current system also does not offer employees and employers as well as insurers the freedom to resolve the totality of claims by way of a lump sum unless strict criteria are met for a commutation or a damages claim can be brought and then resolved as the payment of damages operates to extinguish all claims. The lead up to those claims will often be a considerable period of time, some three to five years, which requires the Committee to seriously consider.

C. The Bill must eradicate the ability to bring a 'perception' case

9. The Court of Appeal in *State Transit Authority of NSW v Chemler* [2] observed in the context of a harassment and vilification claim what was said in by his Honour Windeyer J in *Federal Broom Co Pty Ltd v Semlitch* [3] where his Honour said:-

> *'Can the event to which a disordered mind irrationally attributes physical suffering that is real to the patient but delusional if properly called a contributing factor? Ordinary concepts of cause and consequence are perhaps not appliable. Yet it to seems to me that the incident which precipitated or stimulated however irrationally the worsening of her condition could be regarded as a factor contributing to it'.*

10. In the Court of Appeal, his Honour the Chief Justice at [54] observed that a perception of real events which are not external events can satisfy the test of injury.

11. This fallback position of perception of real events has led to cases where workers are at work and are perceiving otherwise innocuous events or events that would otherwise be insignificant but have led to a psychological condition.

12. The current Bill needs to address this and extinguish the right to bring such claims.

13. This concept of perception of 'real events' without limitation has led to a substantial amount of psychological claims that otherwise would have no prospect of success. For example; let it be assumed that a worker is at work and observes two people talking but believes that the conversation is a form of bullying or harassment or some other form of victimisation. Then in those circumstances, based on *Chemler,* the applicant would have a right of action.

14. In *Attorney Generals Department v K* [4] the Deputy President observed at [40] that if events actually occurred in the workplace but perceived as creating an offensive hostile work environment and a psychological injury followed it was open to the

[2] [2007] NSWCA 249.
[3] (1964) 110 CLR 66, 642.
[4] [2010] NSWWCCPD 76.

Commission to conclude that causation was established relying on the judgment of his Honour Basten JA in *Chemler* [5].

15. Records kept by the workers compensation insurer and iCare who manage these kinds of claims will confirm that perception cases are rife and do not properly reflect what was intended by Parliament when Parliament began legislating in respect of psychological injuries some time ago.

D. Two awards of compensation

16. Exempt workers such as police officers, ambulance officers and fire and rescue officers may be entitled to claim two awards of compensation upon the basis that an injury or injuries are, in effect, causing separate incapacities so as to justify two awards of compensation. This has led to an unnecessary burden on the scheme where all other workers are only entitled to one award of compensation and needs to be legislated out of existence as it is both inconsistent with the purposes of the legislation and its promotion of early resolution of claims. It is inconceivable that the statutory purpose could be fulfilled whilst this is permitted to continue and needs to be legislated out of existence.

E. The persistent reliance on *Kooragang Cement Pty Ltd v Bates* [6]

17. In all workers compensation claims, irrespective of what the legislation provides, the Personal Injury Commission and its predecessors have persistently and somewhat slavishly relied upon the observations of his Honour the President, as his Honour then was, in *Kooragang Cement Pty Ltd v Bates*. This focuses upon the concept of causation and the concept of what 'results from' a relevant work injury which is a question of fact. However, what has been the subject of wide and

[5] Ibid [69].
[6] (1994) 35 NSWLR 452.

impermissible application is a test of 'common sense evaluation' which is not to be found in the legislation. It is religiously observed by the Personal Injury Commission as was the predecessors where his Honour said:-

> *'What is required is a common sense evaluation of a casual chain. As the earlier cases demonstrate, the mere passage of time between a work incident and the subsequent incapacity or death is not determinative of the entitlement to compensation.'*

18. This has been interpreted as a 'common sense causal chain' of the injury.

19. *Kooragang* was a case involving a seriously injured worker who also developed understandable psychological distress and died from a myocardial infarction. The Court of Appeal upheld a finding that the death resulted from the work-related injury.

20. The Court of Appeal relied heavily as has other first instance tribunals on what, having looked at all the facts, makes common sense.

21. With great respect this is entirely divorced from how the law of causation is treated elsewhere. For example, pursuant to s 5D of the *Civil Liability Act 2002* (NSW) causation is treated as both factual and legal. On the one hand the injured person has to demonstrate that the sole cause of the injury was the negligence of the defendant or, in the workers compensation case, it should be the sole cause of the injury was the particular event proven directly or by specific rational inference. Further, as in s 5D there should be a further provision as to whether or not legal causation is established, namely that other countervailing factors such as remoteness did not play a role and it is appropriate that the scope of liability, or in the workers compensation context the legal liability, should be imposed upon the employer and/or its insurer.

22. Further, the concept of common sense causation, as it has come to be known, is a term of such width and ambiguity so as to permit awards of compensation often without a sound evidentiary basis.

23. The draft Bill should include provisions to extinguish that test and to incorporate the appropriate test which is the common law test governing claims under Part V, namely that the injuries either directly caused or materially contributed to the worker's injury or disease.

F. Certain psychiatric conditions must be excluded

24. There is ample regulation making power in the legislation. There are certain psychiatric conditions which as a matter of ordinary medicine simply cannot be caused by a workplace pure psychiatric injury. Amongst them is schizophrenia yet there is an unacceptable amount of claims where schizophrenia is agitated as either a work injury or the manifestation of an aggravation of a previous work injury, or alternatively, that the schizophrenia itself has been aggravated by a particular work stressor. As a matter of medical fact this is impossible. Schizophrenia develops by way of a prodrome, either with or without stressors, and then ultimately lead to completeness which can only be treated and there is no known cure.

25. These kinds of claims including other psychotic diseases, which the Minister should receive advice about from the Minister for Health after consultation with the Royal College of Psychiatry, need to be the subject of regulations to be promulgated to have them excluded as injuries capable of constituting claims for workers compensation.

G. Whole person impairment and elections

26. In previous versions of the workers compensation legislation, workers could elect as to whether or not they would claim whole person impairment compensation as opposed to damages and the election would be irrevocable. The irrevocable election would only be the subject of any further review by a court in exceptional circumstances as outlined in previous versions of the Act going back to 1987. Those provisions should be reintroduced.

27. The effect of those provisions, if they are reintroduced, would mean that where there was a threshold injury for psychological injury the injured worker would not receive whole person impairment lump sum if they elected to bring a common law claim, but rather, the workers compensation claim would end immediately as the 'no contracting out' provisions of the Act need to be brought into line to permit freedom of contract between workers and insurers. This would cater for those claims which could and should be extinguished relatively quickly and not be resurrected at a future time with the workers compensation insurer effectively always being on risk until the age of retirement.

28. There is no reason why upon an election being made and a certificate of advice being executed by a solicitor as to the consequences of the receipt of the s 66 payment terminating all rights to workers compensation including any awards that had been ordered by the Personal Injury Commission that such a system should not be introduced.

29. Conversely, where an election is made to claim common law damages, the scheme would save a significant sum by not having to pay out whole person impairment lump sums.

30. One of the most significant problems with the scheme as currently constituted is the existence of medical assessors and medical appeal panels. It has led to a Leviathan of unnecessary cost where there is a dispute about whole person

impairment and the referral off to a medical assessor. Thereafter, in at least 50% of cases, this leads to an appeal to the medical appeal panel constituted by a Member and two Doctors. The medical appeal panel is bound to only take into account two grounds of appeal however there are two remedial grounds of appeal that effectively mean that a worker can come back because of a deterioration in his or her condition.

31. To compound matters where either the worker or the employer has still been unsuccessful before the medical appeal panel there is then the scope of judicial review, being Supreme Court proceedings to correct an error of law on the face of the record, jurisdictional error, a denial of procedural fairness or constructive failure to exercise jurisdiction to name but a few grounds. Those proceedings are expensive and unnecessary. They have also not infrequently made their way into the Court of Appeal. These kinds of extraneous proceedings are no doubt costing the scheme a substantial amount of money and are entirely unnecessary when it can be the subject of specific legislation to deal with the issue of common law rights. This is dealt with below so far as the 31% whole person impairment threshold is proposed is concerned.

H. Certificates of Capacity

32. Currently for a worker to receive ongoing weekly payments of compensation a certificate of capacity must be signed off by a treating Doctor. It has been my experience and that of many other Barristers when cross-examining workers claiming to be totally incapacitated that these documents often contain significant false histories and some members of the medical profession are prepared to certify that a person is totally unfit for work even though there is very compelling evidence that they are either partially fit or have made a total recovery. There is no sugar coating that can be applied to this type of behaviour. It is fraud in its purest form.

33. Workers compensation insurers and iCare are paying unnecessary amounts of workers compensation to many workers who are falsely being certified as being unable to work and the only way the practice will stop is to legislate, in conjunction with the HCCC and SIRA. Very significant penalties need to be imposed on Doctors who engage in this kind of behaviour which should not require proof beyond a reasonable doubt but rather on the balance of probabilities applying the *Briginshaw standard* which can be dealt with in NCAT. Fines for this kind of behaviour should not be indemnified by medical indemnity insurers but rather any medical practitioner who engages in this kind of behaviour runs the risk of having to pay fines in the hundreds of thousands of dollars if false certificates, which are deliberately false and known to be false, are nonetheless provided to as to cause the fund to suffer losses that it will not recover.

34. There have been far too few prosecutions of workers who are also engaged in this kind of behaviour and similar attention to that which has been given to SafeWork prosecutions should also be given to prosecutions for fraud against workers who are proven on the balance of probabilities, again at a high state of persuasion, to be engaging in this behaviour and must be sued to recover the funds that rightfully should belong to the fund and should never have been paid over.

35. In the more extreme cases where it is specifically proven beyond a reasonable doubt that at the time when a worker was in receipt of total incapacity payments but beyond a reasonable doubt was in fact capable of working and was working which is the subject of evidence or surveillance, then those penalties require revisiting and should extend to include a custodial sentence. Remedies and restitution should also now be well and truly on the table for discussions against workers who have cheated the scheme including against those such as partners or spouses who knew about the workers compensation claim yet derived a benefit from the fraud, similar to the rule in *Barnes v Addy.*

I. Specific Observations of the proposed Bill

36. ***s 8A***

(a) The definition of psychological injury should be subject to regulations to ensure that psychotic diseases as referred to above such as schizophrenia are excluded.

37. ***The 31% proposed amendment***

(a) It is proposed to amend the threshold to claim work injury damages to 31% and also to limit payments to persons suffering from psychological injury to 130 weeks unless they are at least 31%.

(b) The function of common law damages cannot be understated from both the worker's and employer's point of view. It is the only way realistically that a resolution of all controversies between a worker and the employer can end.

(c) That is because Part V of the *1987 Act* clearly provides that once damages are paid it extinguishes all liabilities to the worker. Usually a common law damages settlement will involve a deed of agreement containing release clauses so that all issues as between the worker and the employer/insurer are settled once and for all. If the estimates are undertaken in terms of those workers who are 21% or 31% or more staying on the scheme compared to the way in which work injury damages settlements are concluded, it will be seen at once that the work injury damages scheme under the current thresholds does impose substantial savings on the scheme. That is because about 80% to 90% of the settlements did not involve whole person impairments anywhere near 31% and they are settled on the basis of a potential future exposure by negotiation, usually five years as opposed to say 15 or 20. This obviates the need to have any deduction against the worker's interests to repay any workers compensation that would otherwise be ordered in the event of findings of past and future economic loss and a contested trial.

(d) The mathematics of the scheme incontrovertibly demonstrate substantial savings to the scheme, particular in the case of someone who was 31% who elected to stay on the scheme and was relatively young whereby the scheme would be liable for ongoing weekly payments, medical expenses and the provision of care in certain circumstances. The cost to the scheme of weekly payments alone would be substantially higher than the common law settlement and if one adds to that an amount of money which reflects the likely future ongoing medical expenses, it will be seen immediately that it is far better to keep the threshold lower than to raise it to 31% which will only mean more contested applications for medical assessments, medical appeal panel hearings and judicial review applications.

(e) Once the 31% mark has been achieved then the risk to the scheme is significant as many workers would opt to stay on the scheme until the age of retirement.

(f) Further, even during the 130 weeks if common law can be organised within that time by the parties (and often it is) then there is a substantial saving within that 130 weeks by the workers compensation insurer not having to pay out workers compensation for the duration of that time.

38. For the reasons observed above regarding medical assessors, medical appeal panels and judicial review, it is appropriate to reconsider the whole concept of these whole person impairment percentages which were never designed for litigation as the American Medical Association Guidelines make very clear. Rather, the Act should now recognise, in the context of a psychiatric injury, moderate injuries which meet the AMA criteria for at least 15% which should be determined by a Member not a medical assessor.

39. A serious injury would be at least 21% or more (currently a worker with high needs), again assessed by a Member with a deeming provision where assessments

provided to the insurer from a qualified psychiatrist demonstrate a significant injury.

40. This will eradicate the waste that currently is suffered by the scheme, on medical assessors, appeal panels and having to defend or prosecute judicial review applications together with appeals to the Court of Appeal.

41. The provisions regarding threshold, namely s 39A and s 151H(2)(b), would have the effect of extinguishing a common law right to bring an action for psychiatric or psychological injury. This also occurred some time ago when without notice s 151P was repealed by Parliament which gave the right of persons in a position of close love and affection to a deceased to sue a negligent employer upon the basis of a breach of duty of care owed by the deceased as well as to those persons who were related to him or her.

42. A lower threshold means a faster settlement and no risk of ongoing claims management the scheme saves money on a lower threshold saving substantial amounts to use damages to extinguish claims this will rarely occur at 31%.

J. In terms of common law

43. s 151D in its current form needs to be amended to enact provisions that would have the effect of commencing time to run from either the agreement or finding of a moderate or serious injury, alternatively if the percentage scheme is to be maintained then from the date when a threshold percentage injury is either determined or agreed upon and executed by way of complying agreement. This will save a substantial amount of unnecessary notices of motion which are currently heard in the District Court of NSW as the law currently and fictitiously has as the limited period three years from the date of the infliction of injury, however whole person impairment is not determined in many cases until well after the expiration of the limitation period. If however time started from the time when a final whole person impairment was completed, then substantial amounts of motions and

judicial work could be saved and resources spent elsewhere, particularly in crime where District Court judges urgently have to deal with the backlog of criminal cases.

44. However in all other respects the 15% threshold, if percentages are to be maintained, should not be lifted to 31% as it has the effect of extinguishing a common law right. If there is to be an increase it should be to no more than 21% to allow settlements to ensure that the current scheme of common law damages in these cases can be the subject of quick resolution.

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K. Bibliography

Articles

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Legislation

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