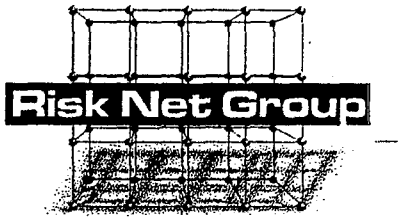

SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON WORKPLACE RELATIONS

INQUIRY INTO ASPECTS OF AUSTRALIAN WORKERS COMPENSATION SCHEMES

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Introduction

The RiskNet® Group was formed in 1997 to provide a broad range of risk management and insurance related services to insurers, insurance brokers, employers and injured workers. Our core competency lies in the holistic management of NSW workers compensation.

In this submission to the Standing Committee on Workplace Relations we have identified some of the issues which have brought the NSW workers compensation system to its knees.

To be fair to the NSW Government, a number of reforms have been introduced over the last two years with the intention of improving the NSW compensation system and to bring it into line with the performance of other State and Federally based schemes.

Background

Workers compensation in NSW is an employer funded social welfare system originally established so that genuinely injured workers are provided with reasonable benefits at an affordable cost.

Over the last decade, vested interests have been allowed to influence the way that the NSW system operates to collect premiums and pay claims, such that NSW's compensation scheme liabilities now exceed assets by more than $2.5 billion.

These vested interests are predominantly scheme stakeholders such as employers, unions and insurers but successive Governments have also been receptive to pressure from service providers such as lawyers and doctors.

The NSW Government's own inquiry into the WorkCover system (Grellman 1997) and most other observers recognised that major structural change to the NSW compensation system is needed if the system's objectives are to be met.

One compensation system feature that must present is the alignment of all of the financial incentives which operate within the system. The dispute resolution mechanism should not be adversarial and reliant on the Courts. Claimant and employer fraud (estimated to cost the NSW system at least $400 million each year) must be dealt with more effectively. NSW's benefit structure is a hotchpotch of statutory entitlements and common law and desperately needs to be realigned so that it mirrors the system's objectives. Over-servicing by provider organisations is rife and seemingly uncontrolled.

Even when the "perfect" compensation system has been implemented, the underlying poor performance of employers and workers in risk management will continue to bring the system down. Workplace safety must be regulated to raise standards to at least those enjoyed in Europe and the USA.

The major flaw in all workers compensation systems is that none have kept abreast of the changing nature of what constitutes a "work injury". Even though most observers would agree that the level of traumatic injury is too high, as a community we are improving. What is not taken into account in any of the compensation systems is the changing nature of "work injury".

We are experiencing a steady growth in lifestyle related injuries which, because they manifest themselves at work are more often than not compensable. For example, the grossly overweight worker who complained "my knee just went as I was climbing the stairs", or the unfit public servant who complained "the workload was too high and that caused my adjustment disorder."

Regulators need to factor this phenomenon into the way future compensation schemes are structured or risk either the continuation and growth of a privately funded social welfare scheme or worse, employers screening all but the very young and fit out of the workforce.

Premiums Unrepresentative of Risk Exposure

A succession of bad policy decisions over WorkCover is one of the reasons for the parlous financial state of the NSW compensation system. These bad policy decisions are not restricted to the current Government. Previous Governments began the rot when they first fixed premiums for political purposes.

To give it its due, the NSW WorkCover Board has advised its various Ministers that artificially fixing premiums is bad policy and should be discontinued, yet none have heeded that advice. NSW now has a system with accumulated debts of over $2.5 billion, all of which will have to be repaid by future NSW employers.

According to the NSW Auditor General[1], the WorkCover debt will rise to $3 billion by 2004 whilst ever the system remains relatively unchanged. If this

[1] Auditor General's Report to Parliament 1999 Vol 3 Page 500

does eventuate, rating agencies will no doubt take another look at NSW credit worthiness.

The Government has been convinced that NSW employers could not afford premium rates higher than an average of 2.8% of wages. This of course is a nonsense because so few NSW employers actually pay anything like the average rate. Employers in industries such as construction, meat processing, transport and manufacturing pay up to 30%, conversely, many other industries pay a lot less than 2.8%.

Citing a comparison of the average costs of workers compensation in other States, employer lobby groups conveniently ignore the facts that legal costs, employer premium avoidance schemes and cost shifting to the Federal Social Security system are significant influences on scheme costs. These influences exist in other jurisdictions to a greater or lesser extent than they do in NSW and valid comparisons of scheme costs are extremely difficult.

In 1999 - 2000 the average cost of the Victorian system was 1.9% of wages[2]. Victoria has an employer excess on claims of 10 days, low statutory benefits, no common law, limited legal costs and it shifts much of its costs to the Federal system. NSW has an employer excess on claims of 5 days, significant employer premium avoidance, high benefits, common law and massive legal costs.

Continuing to collect less in premiums than is paid out in claims through artificially pegging the average premium rate at 2.8% is irresponsible and quite simply, bad policy.

[2] Heads of Workers Compensation Authorities Comparison of Workers Compensation Arrangements in Australian Jurisdictions January 2000

Common Law Claims Explosion

When the NSW WorkCover system was established in 1987, access to common law was abolished. In changes made in the early 1990s common law was reintroduced but access was modified with the intention of filtering out all but the seriously injured cases. Access thresholds were set which included a 33% impairment before an action could commence.

In another example of bad policy, this threshold was reduced to 25% by the Greiner Government.

When the current NSW Government capped the Statutory WorkCover Benefits for permanent injuries at $100,000, it obviously did not consider the ramifications of this cost cutting exercise. These ramifications have manifested in a significant growth in the number of common law claims.

Insurance industry sources have indicated that common law claims grew by 25% in 1999 and at December represented 16% of claims costs up from 12% in May. In 1995 common law workers compensation claims represented approximately 2% of total claims costs.

When the NSW Government made changes to to cut the costs of Greenslips, (one of which was to modify the operation of common law making common law actions for motor vehicle accident claims less attractive compared with workers compensation common law) it caused a shift of actions which involved work related motor vehicle accidents (either journeying to and from work or at work) into the workers compensation jurisdiction. Thus any changes made to the compensation system need to be considered in the light of their potential cross jurisdictional effects.

The employment sector hardest hit by the explosion in common law is the Government itself and therefore the taxpayers of NSW. A very worrying trend is the emergence of a growing number of common law claims for psychological (stress) injuries. The Government employment sector is where the majority of psychological injury claims occur as could be expected, with employment involving public service in Health, Police, Child Welfare and Education.

In the most recent round of legislative change (December 2001), the NSW Government has intoduced a number of changes which appear to have very significantly reduced access to common law. Obviously the legal profession and the Court system will ultimately decide the success of these changes.

Aligning Financial Incentives

The single feature needed to have the greatest effect on the financial operation of any workers compensation system is to apply financial incentives to all participants which encourage improved performance.

Currently, incentives are applied to employers via the premium methodology, but these are grossly flawed by the rating system and its cross subsidies. Incentives are applied to claimants via the benefits structure being linked to early return to work but these are frustrated by the antics of the Courts and recalcitrant employers. Incentives are applied to insurers via their remuneration structure but again these are ineffective and in many cases unachievable by insurers.

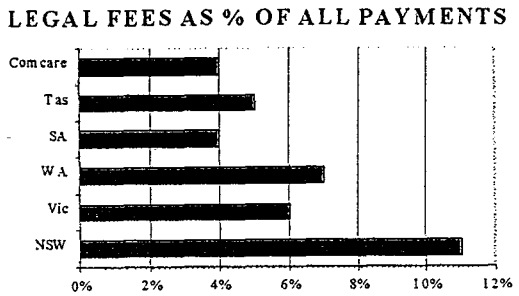
Not only is the NSW WorkCover system charging a lower premium rate than represented by the risk, but cross subsidies are rife. The cross subsidisation in the system means that safe employers pay for their unsafe competitors and whilst the unsafe employers continue to get away with not paying for their poor performance, they will never lift their game. The majority of the cross subsidies flow from larger employers to the smaller ones, yet the rating system does not differentiate on employer size.

The mechanism which would immediately provide the necessary incentives involves the transfer of the workers compensation risk to private insurers through a controlled system of competitive underwriting.

Legal Costs Highest in NSW

Another bad policy perpetuated by Governments is the entrenchment of the legal profession in the WorkCover system. Cynics might say that this has a lot to do with many WorkCover Ministers being lawyers themselves. NSW WorkCover is a no fault scheme, yet it has the highest involvement by the legal profession of any Australian workers compensation jurisdiction.

To give the legal involvement context, insurance companies are paid up to $180 million (approximately 9% of system costs) each year to administer the system, doctors are paid $160 million, lawyers are paid $240 million.



Fraud

In the USA the National Association of Insurance Commissioners estimate that 10% -20% of all insurance claims are fraudulent. The California State Compensation Insurance Fund estimates that fraud accounts for up to 25% of workers compensation costs.

In a survey conducted by the Insurance Council of Australia, one in four Australians admitted to knowing someone who had committed a fraud on an insurance company. Insurers are fair game - workers compensation in NSW is regarded as insurance.

Employee Fraud

The incidence of staged claims in NSW workers compensation is believed to be very low. Insurers claim to be assiduous in determining liability and in recent times there have been very few if any prosecutions for fraudulently staging a claim.

Fraud means obtaining a benefit by false representation and like it or not, any claimant who exaggerates the extent of his/her injury is guilty of fraud. Whilst there is no empirical evidence to prove the extent of fraud by exaggeration, it is widely estimated within the workers compensation insurance industry to represent at least 10% of claims costs, ie $200 million each year.

In workers compensation, the anecdotal evidence is that many doctors are, or have been guilty of aiding and abetting fraud through exaggeration. Most don't see it that way, they are acting on their judgment which is based on a combination of factors.

Some however, appear to have done so deliberately in order to maintain their business relationship with their patient. The workers compensation system does not hold the doctors accountable, they are never pursued through the Courts because exaggeration of a symptom is very hard to detect.

To be fair to the doctors, they are in an invidious position when they see a workers compensation patient. Much of their diagnosis is history based, they only have the claimant's side of the story to go by. In many injuries (stress, sprains, strains) there may be no signs of injury whatsoever, the doctor only has symptoms to go by and these are in the hands (minds) of the claimant.

Insurers and other stakeholders have recommended ways of minimising the potential for fraud by exaggeration. Developing treatment protocols is one of the best. Best practice protocols for various injuries are developed using evidence-based medicine. These are used by GPs in their management of claimants and the compensation payer audits treatments against the protocols and monitors recovery times against those expected. Some of these protocols have been in place in South Australia and Victoria for a number of years.

Another mechanism is the use of binding medical panels when there is a dispute over the fitness level of a claimant. These panels also introduce a "decision consistency" not achieved by the Courts or other dispute resolution mechanisms.

What is more common in workers compensation is fraud through non-disclosure. In these cases, claimants recover either partially or fully but do not tell their doctor, they lie about the extent of their disability.

Insurers claim that they constantly monitor a claimant's progress towards recovery and return to work using medical and physical surveillance. In many cases, concealing the extent of the disability is part of a legal strategy, recovery will affect the size of an award so that there is little motivation to return to work in litigated claims.

The recent introduction by the NSW Government of provisional workers compensation payments, which only require verbal notification by a worker or his/her agent to lodge a claim for benefits have created another opportunity for rorting. This notification can be given to the employer or directly to the insurer. In cases where more than 7 days off work are expected, the insurer must commence weekly payments within 7 calendar days of notification, giving little or no time at all to properly assess a claim.

Employer Fraud

A major incidence of fraud, is that which is committed each year by employers who deliberately under declare the wages paid to employees thereby avoiding paying their full premium. In one industry alone (Construction) under declaration is admitted by peak industry bodies to be at least 30%. In the wider employer community fraud by under declaration is believed to be at least 10% of the total premium ie. $200 million each year.

Insurers are required by the WorkCover Authority to audit their customers to ensure that the correct wages are declared but a strong legislative force does not support these audits. The rate of prosecution of fraud by under declaration is low and the fines applied by the Courts are inconsequential. Anecdotally, many employers deliberately run the risk on under-insurance of workers compensation because the penalties when detected and prosecuted are much less than the premium avoided.

A perfectly legal employer mechanism used to avoid paying a premium which represents the risk, is setting up an unrelated employment trust to take advantage of loopholes in the workers compensation legislation. Another legal means is to split the employer into a number of smaller companies and thereby take advantage of the Two Times Rule.

Medical Practitioners Frustrate Rehabilitation

The Treating Doctor is the gatekeeper in the early return to work of an injured employee because the evidence of an injury needed to lodge a workers compensation claim is usually in the form of a medical certificate.

Doctors are notorious for their refusal to communicate with employers about their patients and many seek to hide behind the veils of patient confidentiality, the medical system per se or they are ignorant of their role in workers compensation.

The doctor's role in workplace rehabilitaion is to determine the restrictions which would apply if the worker returned to work on altered (suitable) duties and to facilitate that return. The vast majority of doctors involved in workers compensation do not understand their role or in the alternative (and arrogantly) refuse to cooperate with an employer's injury management initiatives.

Where the treating doctor refuses to cooperate with the injury management process, the employer or the rehabilitaion provider should have the option to force the worker to change doctor to one who is prepared to fully cooperate.

NSW Injury Prevention Record

NSW has an unenviable record when it comes to work related fatalities. On average we kill 3.48 workers each week in work related accidents.
Our fatal injury incidence rate per 100,000 employees stands at 7.2.
On average, 290 employees are permanently disabled every week.
Each year 5,270 are so badly injured that it takes over 6 months for them to fully recover from their work related injury

Sadly all too few employers are responsible for these appalling injury statistics. It has been estimated that about 450 employers in NSW are under-performing by at least 20% compared to the average for their industry. There are approximately 320,000 employers in NSW covered by WorkCover, the poor performers represent 0.15% of the numbers yet account for an estimated 20% of injury costs.

According to evidence presented to the NSW Upper House General Purpose Standing Committee No.1 "Enquiry into Workers Compensation", approximately 30% of employers are unaware of their legal responsibility to provide a safe place of work. Training in safe work practices is only given to 54% of new employees and supervisors in 40% of workplaces did not receive any health and safety training.

The NSW Government has recently introduced a system of Premium Discounts which is modelled on the Massachusetts Assigned Risk Pool premium discount scheme. The NSW version of the system is ideally suited to good performers and is not targeted towards poor performers.

If NSW is serious about workplace health and safety a regulatory and financial regime needs to be established which penalises poor performers and rewards good ones.