D12/13128

NEW SOUTH WALES BAR ASSOCIATION

ANSWERS TO QUESTIONS TAKEN ON NOTICE BEFORE THE JOINT SELECT COMMITTEE ON THE NEW SOUTH WALES WORKERS COMPENSATION SCHEME

Questions 1 and 2 – What are the differences between both the step down weekly benefits and the common law rights which are available to injured workers in Victoria and Queensland compared with New South Wales? (Hon Adam Searle MLC, pp 52-53 Uncorrected Transcript)

A. The Queensland Common Law Scheme

i. Queensland has a much more generous common law scheme than the New South Wales Scheme

ii. The Queensland scheme provides for an award of damages similar to that which was available to workers injured in New South Wales up until 26 November 2001. Queenslanders recover the full array of common law heads of damage. Damages are awarded for pain and suffering assessed as a proportion of an injury of the "gravest conceivable kind". Damages are available for past and future domestic assistance, past and future medical expenses and past and future loss of earnings.

iii. A common law claim is more readily available in Queensland because there are two ways of accessing damages. One is by obtaining a whole person impairment (WPI) assessment equal to or greater than 20%. The other is by making an election to give up an entitlement to lump sum workers compensation in exchange for common law damages.

iv. Damages for Queensland workers are also available in cases involving the death of a worker for loss of consortium in certain cases. Awards of exemplary damages may also be made against an employer for which the employer is directly liable. Those damages are not recoverable from the workers compensation fund. They are not recoverable at all in NSW.

v. The *Civil Liability Act* 2003 (Qld) is excluded from the operation of liability in relation to claims for damages by injured workers against their employers.

vi. Contrary to what is set out in the comparative table which appears as Appendix 3 to the Government's Issues Paper, journey claims are available in Queensland under Section 35 of the *Workers Compensation & Rehabilitation Act 2003*. This is also confirmed by the Government's own Issues Paper on page 15.

vii. The NSW common law scheme for workers is limited to actions for past economic loss in so far as it has not been paid already, and for future economic loss. The action cannot be brought unless all rights under the Workers Compensation scheme have been completely claimed and paid. No damages may be recovered in NSW for future treatment, common law pain and suffering, domestic care or indeed any other head than past and future economic loss.

B. The Victorian Common Law Scheme

i. The Victorian Scheme provides access to modified common law damages through either a finding of at least 30% WPI or alternatively a determination that a worker has suffered a "serious injury". While 30% WPI is a high threshold "serious injury" is less so. The provision in Victoria for common law claims is both more generous and more flexible than for NSW workers. It allows the action to include a payment for common law general damages for pain and suffering from a scale as well as past and future economic loss (with caps). But the real benefit for the worker is that a common law action might provide a lump sum for the heads claimed but it allows ongoing claims for treatment and care needs. The New South Wales scheme relies only upon the WPI assessment threshold though lower than 30%. It allows claims only for past and future income loss and it terminates all other and future rights to the workers compensation system including that of treatment despite not allowing damages for future treatment in the common law claim. That means that common law benefits are more readily accessible in Victoria although they are all capped.

ii. The requirement that there be a "serious injury" is one which can be determined by a Court which is a fairer way of determining the consequences of an injury for a particular worker than by WPI.

iii. In relation to weekly payments, workers who return to work for at least 15 hours per week receive "make up pay" under the Victorian Scheme. That approach provides a stark contrast to cutting people off arbitrarily as would occur if there was a single whole permanent impairment test for continuing weekly benefits.

iv. The *Wrongs Act 1958* (Vic)(the Victorian equivalent of the *Civil Liability Act*) is excluded from the operation of liability in relation to claims for damages by injured workers against their employers.

C. Workers Compensation Weekly Payments Step-Down Periods

i. In NSW workers are paid 100% of the award rate or 80% of earnings if there is no award in place for 26 weeks. Thereafter workers are paid at a lower statutory rate of $432 for a single person with additional amounts for each dependent. This usually involves a substantial cut in family income especially for higher paid workers. If incapacity is permanent the right to payments continues until the age of 66 years. In Victoria workers are paid pre-injury average weekly earnings less 5% for 13 weeks and 80% thereafter. After 130 weeks there is a right to continuing payments if there is or is likely to remain no work capacity.

ii. In South Australia there are arrangements generally more generous than Victoria including that after 130 weeks payments continue but at 80% of pre-injury earnings until retirement.

iii. The Queensland scheme has an arbitrary cap of 5 years or $200,000. It pays 100% of award for 26 weeks. In that period there is an array of step-down periods from 1-26, 27-104 and 104 weeks to the end of the 5 year period or the expenditure of $200,000. During those periods the rate steps down from 100%

to 85% to 75% or 70% depending upon whether the basis of payment is an award payment.

iv. It is notable that the Queensland system is the harshest. The Commonwealth is the most generous for the first period of payment. It pays 100% of pre-injury AWE for 45 weeks. Thereafter the rates drop significantly to 75% with a cap of 150% of national AWE as the maximum payable in any event—that affects the higher income earners such as those in qualified trades positions.

v. The step down of rates is presumably designed to give increasing incentive to return to work. In the experience of the Association it does no more than ratchet up stress and pressure in the households of families where the worker in question is the principal breadwinner and remains unfit for work.

Question 3 - Recent cases relating to Section 9A Workers Compensation Act 1987 (Mr Mark Speakman MP, p 54 Uncorrected Transcript)

The three recent decisions of the Court of Appeal which relate to the operation of s 9A are *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited* [2009] NSWCA 324(8 October 2009); (2009) 75 NSWLR 503; *Van Wessem v Entertainment Outlet Pty Ltd* [2011] NSWCA 214 (29 July 2011) and *Da Ros v Qantas Airways Limited* [2010] NSWCA 89 (28 April 2010). *Badaawi v Nexon Asia Pacific Pty Limited* was also cited by the Court of Appeal in *Watson v Qantas Airways Limited [*2009] NSWCA 322 (8 October 2009)

The Court of Appeal made the following observations about the operation of s9A in *Badawi v Nexon Asia Pacific Pty Limited*:

i. It is not enough to find that injury arose out of employment and then to conclude that the employment concerned was a substantial contributing factor to the injury;
ii. An injury arises out of employment if the fact that the claimant was employed in the particular job caused, or to some material extent contributed to, the injury. The phrase involves a causative element and is to be inferred from the facts as a matter of common sense;
iii. The phrase "substantial contributing factor" in s 9A also involves a causative element. It is different and additional to the requirement "arising out of" employment;
iv. For employment to be a "substantial contributing factor" to the injury for the purposes of s 9A the causal connection must be "real and of substance";
v. Attention must be paid to the nature of the work performed and the particular tasks of that work and not to what the employee was doing at the actual time of the injury; and
vi. The test to apply to the facts is whether the contribution of the employment to injury was real or of substance.

The Association notes that the relevant statutory test in Victoria and Queensland is that the employment must be a 'significant' contributing factor, a less stringent requirement than the 'substantial contributing factor' applicable in NSW.

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