

# Workers' Compensation: Time to Rethink the Options

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**T**HE workers' compensation schemes in the various States and Territories differ in their detail, but they all seem to attract criticism from both sides of the industrial fence.

Employers regard the current schemes as far too expensive and as a significant disincentive to job creation. Trade unions feel that the level of benefits is often inadequate and that this can create hardship for some severely injured employees.

In Victoria, common-law claims under that State's scheme were largely abolished by the former Coalition Government. They were recently restored by the current Labor Government—although, to the disappointment of the unions and of claimant workers, this was not done retrospectively.

As the quality of the debate on that matter left a lot to be desired, it is worthwhile looking at the subject from first principles, analysing the problem before looking at a possible solution.

## THE MORAL ASPECTS

The concept that, in a civilized society, persons who cause injury to other persons should, as a matter of morality, compensate their victims is well established.

This principle, long enshrined in the common law of England (and Australia), now covers all manner of situations and is not confined to the workplace. Naturally, compensation needs to have regard both to pain and suffering and to economic loss.

One difficulty which can arise in practice is that a party found liable in such circumstances might lack the wherewithal to meet the damages

awarded by a court (or agreed in an out-of-court settlement).

## THE START OF STATUTORY INTERVENTION

Many years ago a remedy for this was arrived at by the authorities, at least in two common situations. This remedy was to require compulsory insurance for employers, regarding injuries to their own employees; and for motor car drivers in regard to vehicle accidents on the roads.

Other injuries which might be equally harmful to the victims—for example, when a brick falls off a

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house onto a passer-by or even when a motorist drives into a tree—were left out of these arrangements. So this legislative approach, with its obvious anomalies, was really flawed right from the start.

As time passed, a number of so-called improvements were built into the workers' compensation system—for example, benefits were extended

to cover injuries on the way to and from work; and the definition of 'employee' was widened. The line between such schemes and social security started to get blurred.

## THE DEBATE

When discussing such issues, the public invariably mixes up two quite separate aspects:

- the overall costs of compensation to the community, and
- the best ways of meeting such costs.

The aggregate costs are a function of the dollars actually flowing to victims, to health professionals, to lawyers and to various administrative personnel. They are not a function of book-keeping—a factor which also applies to another frequent hot potato, health insurance.

The basic costs are going to be the same in total regardless of whether these are funded out of:

- direct payments by the persons causing (or deemed to cause) injury, or
- insurance premiums, or
- consolidated revenue.

However, the associated costs for lawyers and the like will, of course, differ considerably according to the way the community chooses to handle these issues.

One possible advantage of an insurance scheme is its ability to impose a discipline on employers, encouraging them to set up safe work practices. This can happen where premium rates are aligned to the perceived risks. Such a discipline, however, could also be imposed in other ways—for example, through the criminal law.

## EMPLOYER COSTS

If compulsory insurance is to be used in the workplace, then naturally the premiums become a cost to employers. But this applies equally to all the other expenses of running a business—wages, rent, electricity, telephones, and so on.

Employers do not expect to get their raw materials at less than cost, so why should they expect to pay less than the true worth of work-related injuries—which, after all, are just another part of the total costs of production?

Any system which denies common-law rights to some injured workers really amounts to a cross-subsidization from accident victims to their employers, which is hardly an ethical principle.

Naturally, any premium increases from making a scheme more generous have to come from somewhere. In practice, they are no doubt passed on by employers in the form of higher prices to their many customers, but if the present approach is to continue, then it seems more appropriate that customers themselves should pay a few extra cents for something in the supermarket than that a seriously injured employee should be deprived of thousands of dollars due by way of equitable compensation.

## FAULT

Another aspect of the debate which shows evidence of confusion concerns fault. Quite clearly, any system of no-fault compensation can save the community much money because it eliminates the costs of establishing through the legal system just who is to blame for any particular injury.

However, it merely shifts the dividing line between what is covered and what is not—after all, an injury incurred while playing sport will have exactly the same effect on the unfortunate victim as an identical injury while working for a boss.

No-fault cover can take two forms. It can preserve the common-law ap-

proach to damages in regard to the amount of damages awarded—so that the quantum but not the liability is still litigated. Naturally, this is the approach least favoured by those wanting to reduce the cost of claims.

Alternatively, no-fault cover can use a ‘table of maims’, a statutory schedule prescribing the number of dollars compensation for various types of injury. Although such a basis avoids the flow of

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money to lawyers, it is really a far less satisfactory approach in the case of serious injuries—as will be obvious by considering the effect of an injury to the hands of, say, a concert pianist.

True insurance is voluntary and involves premiums set in the marketplace by competitive forces having regard to individual risks. In contrast, social security involves universal coverage funded compulsorily out of taxation. Australians seem to favour a sort of middle course which is really only a form of ‘pretend insurance’. They are then getting the worst of both worlds.

## REFORM

The time has come to rethink the problem afresh and to face reality while making some compromises:

- The primary objective should be to compensate fairly (and, where

feasible, to rehabilitate) workers injured in the course of their employment.

- The secondary objective should be to do this at the lowest possible cost to employers, to customers, and to the wider community.

It follows that administrative expenses should be kept as low as possible and that lawyers should be kept out of the process as far as possible.

This could be achieved by treating industrial injuries as a community responsibility, and by extending the current social security system to embrace what have traditionally been regarded as workers’ compensation claims.

This would have a number of distinct advantages:

- Benefits could be integrated with the existing disability support pensions and with payments to carers.
- Benefits would become uniform throughout Australia.
- All genuine claims lodged by injured workers would be handled speedily and sympathetically with a ‘social welfare’ attitude rather than as part of an adversarial culture.
- The concepts of fault and deemed fault would become irrelevant.
- The relatively inexpensive existing Centrelink appeal mechanisms would become available—the Social Security Appeals Tribunal (SSAT) and the Administrative Appeals Tribunal (AAT).
- There would be recourse to the Commonwealth Ombudsman and the ability to use the *Freedom of Information Act*.
- The long delays involved in the present court system would be avoided. (Incidentally, keeping such cases out of the congested courts would also help to reduce the delays for other litigants.)
- Money would not be wasted on the administrative effort currently required to collect and process employer premium payments and to prosecute employers who fail to pay the correct amounts.

# Cultural Wars

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- Benefits other than reimbursements of actual expenses would be paid in the form of ongoing pensions rather than as lump sum awards.
- Pensions would be automatically adjusted for inflation.

A new two-step approach to fund the above arrangements is also needed:

- While employers would be relieved of the need to pay insurance premiums as such, they should pick up the first \$2000 (say) of each claim—a sort of ‘excess’ in insurance terminology. Apart from leading to savings on the overall claims budget, this would act as a useful financial incentive for all employers to put in place safe working conditions for their staffs. It would also automatically reward sound occupational health and safety practices. Such an excess would also reduce handling costs by keeping very small claims out of the system.
- The balance of the cost would be met out of taxation revenue—which, of course, already includes large sums paid by employers by way of payroll tax and by their customers in the form of the GST. As these two taxes both flow to State Governments, whereas social security is a Commonwealth responsibility, some financial adjustments between the State and Federal Governments would probably be necessary.

One final point. The above approach would provide better protection for employees than the present legislation, because all large claims would be capable of being met even in the event of insolvency on the part of an employer or an insurance company.

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I P A

## GaitaManne

In a 1997 *Quadrant* essay on ‘Genocide: the Holocaust and Aborigines’, Raimond Gaita made a strange admission. Stating that ‘many Australians are now obliged to examine their consciences for reasons similar to those which obliged Germans to do it after the war’, he offered an anecdote designed to show that this was not just hyperbole.

During the late 1960s he had attended a meeting of the Melbourne University Labor Club, then a club of the radical Left, at which a visiting speaker said that Right-wing émigrés, from the southern states of the USA, ‘had moved to Queensland, where they sometimes went on hunting parties in their four-wheel-drives to shoot Aborigines’. Acknowledging that this story was ‘almost certainly false’, Gaita excoriated himself and the others at the meeting, claiming ‘that although we found the story credible, I am sure that not one of us did anything to find out whether it was true’.

One does not expect a moral philosopher to trouble himself with empirical evidence. But I suspect that he is being too harsh on his comrades, in the narcissistic expectation that they were all like him. Perhaps many of them understood only too well that this was just another example of the outrageous humbug which saturated those times. But in any case, how can he be so sure that no-one attempted to check the story?

Nevertheless, I recently had occasion to recall Gaita’s anecdote after hearing another Queensland tale from Chris Mitchell, the editor of the Brisbane *Courier-Mail*. If Gaita was really serious in his 1997 essay, he could now be expected to ask his protégé and comrade-in-virtue,

Robert Manne, to examine his conscience as well.

Two years ago, Mitchell offered to send Manne on a trip to learn about genuine cases where Queensland Aborigines are being destroyed. Manne would travel with Noel Pearson and the *Courier-Mail*’s veteran reporter Tony Koch, who for some time has been writing searing accounts of the appalling violence, sexual abuse and other forms of social breakdown in Aboriginal settlements in the state. Manne would then be in a position to use his considerable influence to inform the denizens of the leafy suburbs of Sydney and Melbourne that circumstances were not quite as their fantasies would incline them to believe. Mitchell was dismayed to find that Robert Manne showed no interest in the proposal, even though all expenses would have been met by the *Courier-Mail*.

This seeming indifference to the contemporary suffering of Aborigines is in marked contrast to Manne’s very public identification with the suffering of the ‘stolen generations’. In his most recent writing on the Aboriginal victims of past child-removal policies, in the first issue of *Quarterly Essay*, he condemns ‘the Right’, who are supposedly ‘in denial’ about what really occurred. Those who do not ‘hunt in packs’ are mostly too ‘mean-spirited’, too lacking in ‘empathy’, to appreciate the ‘depth of grief and bitterness and powerlessness’ that Aborigines suffered. So they have become willing parties to a supposed conspiracy directed against the ‘stolen generations’ that has been orchestrated by his successor at *Quadrant*, Paddy McGuinness, and strongly supported by the Howard Government.

Perhaps Manne feared that his own abundant capacity for empathy ▶