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9 March 2011

Inquiry into Disability Care and Support
Productivity Commission
GPO Box 1428, Canberra City ACT 2601

Email: disability-support@pc.gov.au

CC:-

Clinton Pobke
Senior Research Economist
Productivity Commission

Email: cpobke@pc.gov.au

Dear Sir/Madam

RE: PRODUCTIVITY COMMISSION ENQUIRY INTO A NATIONAL DISABILITY LONG-TERM CARE AND SUPPORT SCHEME – THE ROLE FOR MODERN COMMON LAW IN A NATIONAL NO FAULT SCHEME

As the brother and uncle of disabled people (caused by medical negligence) I fully support the primary view of the Productivity Commission that there should be a no fault scheme for properly assessed and severely disabled people. No reasonable person or politician could disagree with such a scheme.

The Productivity Commission's Terms of Reference were to investigate the feasibility of such a scheme.[1] However, the Productivity Commission has embarked on an unbridled attack on the common law that is *ultra vires* their Terms of Reference. I was astonished that the Productivity Commission could so quickly recommend a review to consider the nationwide abolition of the common law in 2020 without a proper analysis of the facts.

I have been a Solicitor for 28 years specializing in compensation law and have served for many years on various committees of the Queensland Law Society and Law Council of Australia. In particular I served on the Queensland Law Society Torts Reform Task force which worked very co-operatively with Queensland Treasury, Queensland Attorney-General, the AMA, WorkCover, other insurers and stakeholders in the common law system. In Queensland the Legal Profession has been very proactive in response to reasonable criticism of the common law unlike other States, and in particular New South Wales.

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Over that time I believe that I have acquired a balanced view of how the common law can be of benefit to society.

I was very concerned by the Productivity Commission's inaccurate view of the common law. It appears as if the comments were written by the architects of the failed New South Wales and Victorian WorkCover and MAIC regulatory schemes (the worst performing schemes in Australia). I also found it bewildering that the Productivity Commission has used the disastrous New Zealand compensation scheme as being a model to replace the common law which now functions well in jurisdictions such as Queensland as a result of the Ipp Tort Reforms.

Furthermore, the regulatory schemes of New South Wales and Victoria deliver the worst outcomes to injury victims because of unfair thresholds and yet have the highest premiums in Australia.[2] The architects of these failed schemes should have no part to play when analysing the common law in this country.

New Zealand's Failed Social Experiment

Why did the Productivity Commission not emphasize the fact that the Accident Compensation Corporation (ACC) of New Zealand is a failed social experiment of epic proportions?[3] The Productivity Commission recommends a similar scheme be implemented in Australia after 2020.

The ACC is currently $10.5 billion dollars in deficit.[4] New Zealand has a population of approximately 4.5 million. That equates to a current debt of approximately $2,395 for every man, woman and child in New Zealand.

Extrapolating these figures to Australia's population of approximately 22 million would equate to a deficit in the vicinity of $52 billion if a similar scheme to that of New Zealand was introduced. The Productivity Commission gave no analysis to this fact.

New Zealand's very unsafe roads and lax public safety are as a direct result of removing common law in that country.

Tort Reform in Queensland

Following the 'Review of the Law of Negligence – Final Report' by Justice Ipp there has been significant tort reform in Queensland and throughout Australia over the last decade.[5] Queensland has never had the problems and abuses experienced in jurisdictions such as New South Wales. Following tort reform in Queensland the system has been operating smoothly. Queensland has one of the lowest rates of litigation in the world. Citizens receive reasonable compensation based upon just common law principles. Premiums are low.

Under the Queensland WorkCover scheme there is a 78% approval rating by workers and 79% approval rating by employers.

In Queensland litigation is a last resort and the vast majority of claims are concluded out of Court in a very time and cost efficient manner - only around 1% of claims ever go to

Trial. The examples referred to by the Productivity Commission simply do not reflect the post Ipp Reforms in Queensland.

Common Law as a Deterrent

The Productivity Commission refers to common law not being a deterrent. In doing so it has only mentioned the Compulsory Third Party (CTP) motor vehicle situation.

It is certainly the case that In WorkCover and public liability matters insurers 'sheet home' the cost of any claims through increased premiums and excesses, same as any other type of insurance. Tortfeasors have significantly higher premiums for years to come. This is very effective in helping to ensure a safer public and work environments as there *are* consequences for negligent tortfeasors.

The Productivity Commission should instead recommend increases in CTP insurance premiums and excesses for negligent drivers that repeatedly cause accidents and injury to others.

One only has to look at New Zealand to see the consequences that taking away the common law in that country has resulted it's very unsafe roads and lax public safety. There is a plethora of valid criticism of that disastrous scheme.

Common Law Remits Millions to Government Coffers

Through the common law large statutory refunds are remitted back to the Federal Government and statutory authorities such as Centrelink and Medicare. These refunds are in the vicinity of millions (in fact probably billions) of dollars.

Injury victims are not a burden upon the Australian taxpayer because they have received fair and reasonable damages. Under the common law, the taxpayer is recompensed by the torfeasor's insurer thus saving the Australian taxpayer huge amounts of money. The Productivity Commission was very remiss in not analyzing this very important fact.

Any Australian Government that implements no fault care for disabled and catastrophically injured people should be aware of the complimentary role modern common law systems can play in ensuring the ongoing feasibility of the system. I would have thought it obvious that the Australian Government's consolidated revenue must provide proper ongoing care for catastrophically injured citizens and decent disability entitlements for pensioners as well as for their carers.

However, that is not to say people injured through the negligent acts of others should be deprived of recovering proper compensation. They ought to be placed in the position they would have been in but for their injuries. It was astonishing that the Commission could suggest that in 2020 that it is logical for the Australian Government to extend the disability and insurance scheme to subsume economic loss and all the other heads of damage to become a full no fault system.

Australians would find it morally repugnant and financially irresponsible to suggest that injury victims of negligence become social welfare recipients and a burden on the tax payer.

It would result in great unfairness to victims who sustain injury through negligence and be a huge burden upon the Australian taxpayer. They deserve proper economic loss and other damages tailor made to their circumstances and not become social welfare recipients where damages are determined by a beaurocratic process. It is obvious that implementing the Productivity Commission's plan would be financial irresponsibility and all Australian politicians both State and Federal have a duty to ensure that they understand that the taxpayer would have a huge burden and the injury victim unsatisfied with being a social welfare recipient.

Conclusion – Modern Common Law 'Hand in Hand' with a No Fault Scheme

The Productivity Commission seem to promote the worst performing schemes in terms of financial viability and outcomes to injured citizens such as New Zealand and New South Wales. It would certainly appear the architects of these disastrous schemes seem to have somehow infiltrated the minds of the Productivity Commission and Politician's should be well aware and understand that the Commission has failed in it's duty when analyzing the common law. Most of the examples of abuse cited by the Productivity Commission should not occur in any jurisdiction post the Ipp Reforms.

Should any Australian Government follow the Productivity Commissions proposal that the common law be abolished in 2020 then certainly we will have a far more disastrous situation than that of New Zealand.

Australian public servants and Politicians have a duty to ensure that the Australian taxpayer is not unnecessarily burdened. The common law as it applies in Queensland would be of great benefit to ensure the feasibility of any National Disability Care and Support Scheme. Such schemes should work together in unison with the common law.

Should you wish to discuss this matter with me I would be more than happy to speak with you.

Yours faithfully
KM Splatt and Associates

Per:

Kerry Splatt

[1] Productivity Commission's Terms of Reference:-

http://www.pc.gov.au/projects/inquiry/disability-support/terms-of-reference

[2] Failure of Thresholds:-

Thresholds have not contained costs in New South Wales and Victoria and these Workcover schemes have in fact resulted in schemes which are still burdened by massive debt and liability:-

- Worksafe Victoria Annual Report 2009 – shows a loss of $1,254,459,000
- Workcover NSW Annual Report 2008/2009 – shows a deficit of $1,482,000,000.

Thresholds have certainly **not** contained costs in those jurisdictions and have been a spectacular failure. Far from being profitable these schemes become more a form of 'pseudo' social security - there are better alternatives.
Thresholds are arbitrary and result in doctors' making decisions about common law rights which is extremely unfair to injured citizens. To understand how thresholds are unjust a sound knowledge of the American *Medical Association Guides to Assessment of Permanent Impairment* is necessary.

Problems with thresholds based on AMA type assessments:-

Permanent impairment percentages are often determined by medical practitioners using the 'American Medical Association Guides to the Evaluation of Permanent Impairment' (AMA).

Anyone familiar with the operation *Guides* will realize that they are an arbitrary administrative tool. Various percentages act more as a broad descriptor of a particular injury. They do not take account of the impact that a various injury may have upon a particular individual, in particular work ability. The guides themselves make this perfectly clear.

It is important to understand the distinction between 'impairment' and 'disability'. Any policy maker should at familiarize themselves with *Chapter 1 – Philosophy, Purpose and Appropriate Use of the Guides*:-

> *Impairment percentages or ratings... reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common* ***activities of daily living (ADL),*** *excluding work...*
>
> *The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for the daily activities common to most people...*
>
> *The impairment evaluation, however, is only one aspect of disability determination. A disability determination also includes information about the individual's skills, education, job history, adaptability, age and environment requirements and modifications...*
>
> *An individual with a medical impairment can have no disability for some occupations, yet be very disabled for others...*
>
> *...the Guides are not to be used for direct financial awards nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a component in disability assessment...*
>
> ***Impairment percentages derived from the Guides criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary first step for determining disability.***
> (all emphasis in original text)

Take the example of a fairly common 5% lumbar spine injury. For an educated, elderly bank manager this injury is not going to overly effect his ability to complete his work. However, for a young labourer a 5% lumbar spine injury could carry disastrous consequences and prevent him from any sort of future employment involving heavy lifting / labouring etc. To deny such a person access to common law damages such as economic loss based on a threshold is unjust.

Thresholds shift the cost burden to the taxpayer

When thresholds are applied it shifts the burden and costs associated with injury away from negligent tortfeasors and onto the tax payer (in the form of increased social security). Tax payers should be aware of the costs to Government as a result of introduction of thresholds.

Solicitors who have experience in jurisdictions that have thresholds (such as Victoria) can vouch for the fact that Workcover costs are actually increased when thresholds are used.

[3] Further reading:-

The Accident Compensation Scheme:- A Case Study in Public Policy Failure, Bryce Wilkinson:- http://www.austlii.edu.au/au/journals/VUWLRev/2003/18.html

New Zealand's No-Fault Accident Compensation Scheme: Paradise or Panacea? Colleen M. Flood:- http://www.law.ualberta.ca/centres/hli/userfiles/floodfrm.pdf

[4] The Accident Compensation Corporation's Deficit:-
http://www.acc.co.nz/about-acc/overview-of-acc/WPC088749#P12_1895

> *We need to ensure we have sufficient assets (money) to meet our liabilities (pay out on claims) in the long term. Between 2004 and 2009, ACC had a steadily worsening deficit (a gap between its assets and liabilities). The deficit reached **$12.8 billion in 2009**, which raised concerns about the Scheme's long-term sustainability.*
>
> *A number of factors contributed to the deficit, including:*
>
> - *increasing numbers of claims – yearly increases were recorded until about 2009*
> - *increasing costs of medical treatment – these kept rising well above inflation*
> - *expansion of the entitlements provided under the Scheme*
> - *falling rehabilitation performance - ie results in New Zealand followed a worldwide trend which saw people taking longer to recover from injuries, on average.*
>
> *These factors all increased our liabilities. But for some time, ACC levies weren't increasing sufficiently to match our liabilities. This caused the deficit to grow. The problem was compounded by the economic recession, which caused a sharp drop in ACC's investment returns in 2009.*
>
> We've since made lots of changes to reduce the deficit, which **fell** to around **$10.3 billion** in 2010. [emphasis added]

[5] Tort Reform in Queensland:-

Capping common law damages

It has been accepted in Queensland that damages need to be contained to ensure the viability of common law schemes while ensuring proper compensation for citizens injured through negligence.

Of great importance when considering the common law is the fact that 'viability' issues arose several years ago in both the public liability insurance scheme and the motor vehicle CTP scheme (the 'insurance crisis').

In response to the 'crisis' and as a result of the Ipp Review the Queensland Parliament enacted the *Personal Injury Proceedings Act* and *Civil Liability Act* and amendments were also made to the *Motor Accident Insurance Act*. More recently changes to the *Workers' Compensation and Rehabilitation* have brought Queensland workers' compensation into line with the other schemes.

This legislative response by the Queensland Parliament has been successful at controlling common law damages. In particular it introduced a sophisticated scheme regarding general damages – the Injury Scale Value (ISV).

Review of the Law of Negligence Final Report can be found at:

http://revofneg.treasury.gov.au/content/report2/pdf/law_neg_final.pdf

General Damages and the Injury Scale Value (ISV)

Traditionally general damages were awarded by a Judge for 'pain, suffering and loss of amenities of life' and there was little guidance as to the award of such damages apart from precedent – as such general damages were somewhat of an 'unknown quantity' for insurers.

The Motor Accident Insurance Commissioner, John Hand, when dealing with similar cost blowouts in the motor vehicle scheme several years ago did not favour thresholds. Instead the ISV was implemented and the motor vehicle scheme is now profitable for insurers whilst maintaining full access to common law.

The ISV was developed as one response to the 'crisis' and heavily restricted awards of general damages in motor vehicle and public liability claims by up to around 50%. Following tort reform and introduction of the ISV public liability, motor vehicle and workers' compensation schemes are in a good state with insurance companies reporting healthy profits. Premiums have also been contained. The success of the ISV speaks for itself, as confirmed in actuarial studies.

Other aspects of the Civil Liability Act

The *Civil Liability Act* has other aspects that have capped damages in common law claims, for example the cap on damages for future economic loss at three times average earnings and restrictions on gratuitous assistance.