

WIRO Sydney Seminar 20 February 2019

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2018 Reforms in Workers Compensation

Whilst this seminar day is about the 2018 workers compensation reforms, I am going to allow other speakers to cover those topics in what is a very comprehensive program of talks that you have today.

As the new President of the Commission, I want to talk to you about the Commission's work and some themes that I want to pursue as the Commission moves into the next stage of its existence. Every organisation must move with the times to remain relevant to those whom it serves.

The Workers Compensation Commission is a venerable institution, which first sat on the 3rd August 1926. The Commission was established under the Workers Compensation Act 1926, the 1926 Act, which removed workers compensation matters from the courts (District Court). It was constituted by a chairman, who had the rank and precedence of a District Court judge. Little in that regard has changed in almost 100 years.

Whilst, as a jurisdiction, the Commission has had its trials and tribulations, and every human organisation encounters these tests, it is

still here in 2019, in its latest incarnation, dispensing justice to the people of this state who are injured in work-related circumstances, and it continues the proud tradition of delivering justice stretching back to 1926. All of you here in this room share this history.

When I reflect on the work of the Commission, I don't mean the drafting of documents, their filing with the Commission and the processes which are then undertaken. Rather, I want to talk about the human aspects of the work, which rightly ought to be at the centre of everything we do.

The Commission, and its predecessors, has had contact with a broad cross section of our community – Harbour Bridge workers, shearers, labourers, teachers, emergency workers, you name it. As the NSW economy has changed and developed, so has the nature of cases filed in the Commission. But the one thing that has remained constant is the Commission's application of justice to each dispute.

In this jurisdiction, you are dealing with real people. You are dealing with injured workers who may be for the first time in their life encountering the law. This is not like a commercial matter where the outcome will simply affect the end of year financial result. The outcome in a compensation case may dictate the health and economic well-being of the applicant. It is a significant responsibility no matter which side you represent.

Since I have commenced in this role, I have undertaken a deep dive into all aspects of the Commission's operations. I have spoken to as many people as I can who are involved in the Commission's work including external stakeholders. Arising from these discussions the following conclusions are evident:

1. The Commission is held in high regard by practitioners.
2. Its decisions are delivered promptly, the quality of decision making and writing is high. The decisions are well-reasoned and provide a detailed explanation of the result.
3. The Commission is viewed as impartial across its arbitrator cohort. Importantly for the group here today, it is apparent to me that no applicant or respondent attends the Commission fearful of whom they might draw. Which means that the profession has confidence in the Commission's operations and its dispassionate application of legal principle to cases conducted by the Commission.
4. But another aspect is evident. In delivering justice, the Commission relies heavily on the quality of the legal representation and the assistance each party brings to the table to resolve disputes and to fairly represent their cases for determination.

So, the main theme of this talk this morning is what it is that I want to do at the Commission. The first thing is what I don't want - I don't want to disturb something that is working well. The system of requiring certain documents to be prepared and filed at the outset of the case, I think, is one of the manifest strengths of the system. It means that every applicant receives a comparable level of preparation to any other applicant. It also means the employer, or its insurer, is aware of the case to be met and can focus their reply and evidence accordingly. This sets up the best opportunity at the outset to focus on resolution rather than litigation and the case can then proceed in an efficient and orderly manner through the Commission's dispute resolution phases.

I have mentioned the importance of the legal profession. It is my intention to work with the profession to enhance the status of practice in this jurisdiction. For many years the Compensation Court, and the Commission before it, was a marvellous training ground for the legal profession – both young solicitors and young barristers. Former High Court Judge, The Hon. Michael Kirby, has spoken and written very fondly of his early days in the law which were spent preparing and conducting cases in the then Workers Compensation Commission. In Michael Kirby's view, the Commission was a wonderful training ground for young lawyers.

Firstly, he recounts that to be a lawyer in this jurisdiction requires each practitioner to be highly skilled in statutory interpretation. The rights that workers have are found in statute and lawyers who practise in this jurisdiction are streets ahead of others in this important aspect of legal practice.

Secondly, because one was always dealing with one's opponents, practitioners quickly learnt that their word, if not kept, would never be retrieved. Honest dealing with fellow practitioners thus became a hallmark of practice here and still is.

Thirdly, the lawyer was taught how to get along with other people, be they other lawyers or other litigants. When you are conducting numerous cases day in, day out, courtesy and respect are paramount.

When I started in the profession 30 years ago, there was a clear career path in the area of compensation and personal injury law for those who wanted to follow it. It has been a place where the training and principles learnt are able to be applied to other areas of practice, even in the case of Michael Kirby to the High Court bench.

So here at the start of my term as President, I say to you that one of my real aims over the years ahead is to make this an even more valued jurisdiction for practitioners to practise in. But that starts with you. The

fact that practitioners and clients are coming to the Commission, and not to the Supreme Court, should not mean that the standards we expect of each other should be any less, and when you consider how important it is for the groups that I have earlier discussed, indeed the responsibility might be higher than in any piece of commercial litigation.

So, in terms of the jurisdiction, I think there are a few expectations which I have that I would like to share with you. As this is a specialist jurisdiction we must be careful that we as members of the Commission, or you as those who regularly appear in the Commission, do not take ourselves out of the mainstream of legal thought or legal principle. For example, whilst the rules of evidence don't formally apply, this does not mean that there are no rules. The authorities tell us that even though those rules might not apply, they are as good a guide as any when it comes to considering evidence. So, in short, do not think that the preparation of evidence is easier in the Commission because it will be examined and if found wanting will be given little weight. All evidence relied on should be logical, probative, relevant to the facts in issue and issues in dispute, and not based on speculation, unsubstantiated assumptions and unqualified opinions.

It is important to recall that even in Commission or tribunal work, the flexibility that the Parliament has bestowed on such places has its

bounds. In this regard there is, as a number of learned authors have stated, an uneasy tension between the flexibility bestowed upon tribunals and legal rules. So bear in mind, the better the quality of your evidence, the closer it is prepared to comply with the rules of evidence, the further away you take yourself from the grey area between flexibility and evidence having little or no probative value.

I want to talk about the Commission's blended model of conciliation and arbitration. I know that there are some lawyers, perhaps some in this room, who have concerns about this model, particularly that the same arbitrator who conciliates may then also arbitrate.

Don't.

The vast majority of cases before the Commission resolve by agreement. A small number are determined by arbitration and an even smaller number then go on appeal. This is achieved through the blended model, which incidentally is mandated by the statute. If I have seen the growth of one new approach to dealing with disputes over the past 30 years, it is the growth of alternative dispute resolution. Those of you in this room know that whilst I have practised in this jurisdiction, a large part of my practice was in industrial commissions. It is very common in those commissions for the same commission member to attempt to conciliate the dispute before rapidly moving into arbitration. This is

particularly the case if essential services are involved. Clearly this is not an issue in the vast majority of cases and is not an issue ever agitated on appeal. Conciliation, by its very nature, is inquisitorial. Arbitrators may form preliminary views and express them. This is often quite helpful to identify the real issues and real problems in a particular case, provided the Arbitrator retains a mind open to persuasion.

But I would ask you to reflect upon what is really a black and white letter lawyer's objection to this system. The alternative is a system attended upon by strict legalism and delay. In that circumstance, I would ask you to consider would this be truly serving the injured person's interests? That is why I started this talk in the way that I did, focusing upon the people at the heart of the system because they are who we need to have in mind when these discussions are taking place. Employers are also prejudiced by cases which go on for too long and which may only add to the costs of the claim and insurance premium.

And in terms of how the law has developed over my time in practice, ADR is now mainstream and becoming a proficient practitioner in it enhances your legal skills. This system of conciliation and arbitration in my view is tailor made for the types of disputes brought in the Commission – my advice to you would be immerse yourself in this discipline and become a skilled practitioner in it.

In terms of the Commission's practice, we are moving towards paperless cases. Soon our online portal will be open upon the conclusion of our trial. We have conducted a trial run of it with 9 law firms; they have given us good feedback and I think that the finished product will be very user friendly. Practitioners ought derive great benefits from it. Legal practitioners will be able to access all documents lodged in a dispute from their PC or laptop, 24/7. Access to subpoenaed documents can be obtained from your desk – so there will be no more need for clerks or agents to attend the registry and copy them. You will be able to “electronically” brief your counsel, by providing them with online access to the Commission file rather than preparing and delivering a hard copy of those documents. When it's up and running we will of course have a help desk in operation to provide assistance to users. Our hearing rooms and conference rooms are all designed for laptop use.

A system that is efficient and fair, and seen to be so, must be our purpose. To that end, the Commission is achieving its purpose.

The future for the Commission and for those who frequent it looks bright. Rightly, a significant effort has been put into better claims management and better outcomes for workers. However, workers compensation remains a technical jurisdiction and there is still a need for a Commission and legal representation. But what makes our work

objectively important, is the people that require access to its services.

Ray Burke, who was a judge of the Compensation Court when I first practised in the jurisdiction, summed it up so simply, “Compensation law is about people. That is why it is so important.”