Ceremonial Sitting to mark 100 years of Workers Compensation

Speech by the President of the NSW Bar Association

1. It is a privilege to be invited to speak at today's Ceremonial Sitting.

2. I thank the Chief Judge, Justice Huggett, and the President of the Personal Injury Commission, Judge Phillips, for hosting today's celebration, and inviting me to speak for the Bar.

3. I'll start, if I may, at the beginning.

4. Workers' compensation legislation was first introduced in New South Wales in 1910 with the *Workmen's Compensation Act of that year*. That Act marked the introduction of no-fault workers compensation in this State, but its scope was confined to a limited number of "dangerous occupations".

5. From these earliest stages, the very concept of workers compensation was a contested idea.

6. An advertisement, as we might now understand it, was run in newspapers across New South Wales espousing the moral foundations of this new scheme. It read:[1]

> "The toll of death and injury in connection with industry, with and without carelessness or misconduct, is unhappily heavy, notwithstanding the adoption of modern safeguards and closest supervision on the part of the employer. In this connection, employers have always felt a great moral responsibility; now under new legislation they are charged with a material responsibility."

7. Not all of New South Wales shared in the vision of these new reforms, however – with criticisms from both the right and the left of politics. In an open column, published in the *International Socialist* in August 1910, a Mr Ray wrote that:

> "If the NSW Bill is allowed to pass in its present form, great injustice will be done to hundreds of thousands of NSW workers. Moreover, small employers would have difficulty in retaining the services of their employees, because of the latter not being covered against accidents."[2]

8. The same Mr Ray took particular umbrage at the resemblance that the NSW Bill had to similar legislation in Queensland. He noted that the only substantive difference was that a Queensland employer could be liable for up to 400 pounds

[1] See: 10 Feb 1911 - THE WORKMEN'S COMPENSATION ACT, 1910. - Trove

[2] See: 13 Aug 1910 - Open Column. - Trove.

for an accident at work, while the upper limit in NSW was only 100 pounds. Mr Ray, rather uncharitably, wrote that:

> "I wonder, Mr Editor, if Mr Wade [the then Minister] simply instructed his office boy to copy out the Queensland Act and the latter made a clerical error in the figure?"[3]

9. Another criticism, published in a now defunct periodical for the building industry, was that:

> "This Act is long and involved. It is hard to understand, tortuous, complex. I am inclined to believe that a great deal of money must be expended in costs before some of the mists are cleared away."[4]

10. It seems that some things never change!

11. Despite the misgivings of some, it was exactly 100 years ago today that the *Workers Compensation Act 1926* came into effect, marking a critical turning point in the development of workers' rights in Australia.

12. The *Workers Compensation Act* created our State's first comprehensive workers compensation scheme. It established a broader no-fault system, covering a much wider range of workplace injuries and diseases than the 1910 Act had done.

13. During his second reading speech, the Honourable A C Willis provided his rationale for the need for a such a scheme. He said:

> "You have to picture the position of a man who has been unable to carry on his work for several years. The amount that he has drawn as compensation is admittedly a very meagre allowance. You have to picture the position of his wife, possibly with several children, struggling to exist on that meagre allowance, which has been gradually eaten up. It goes from 500 pounds to 600 pounds, and possibly to the limit of 750 pounds. Then if the breadwinner dies as the result of the accident, those who for several years had a hard struggle to exist find there is not a fraction to be drawn, just when something for the family may be wanted most. I think that side of the question will appeal to honourable members."

14. While the language and the currency may have changed, the underlying justification for the scheme has scarcely done so in the 100 years since its comprehensive inception.

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[3] See: 13 Aug 1910 - Open Column. - Trove.
[4] See: Vol. 3, No. 37 (12 Sept., 1910).

15. Germane to our celebration today, of course, is that the *Workers Compensation Act* established the Workers Compensation Commission – the first specialist tribunal of its particular kind in Australia.

16. From its earliest days, there was a clear rationale for the establishment of a standalone commission: namely, removing lawyers from the decision-making process. In comparing the new Workers Compensation Commission with our neighbours to the north, the formerly mentioned Mr Willis spoke favourably in his second reading speech of how, in Queensland, "an enormous sum of money has been saved that would otherwise have gone to lawyers", thanks to the establishment of a not dissimilar tribunal.

17. Here, again, some of the debate around the 2025 amendments to the workers compensation scheme suggest that history may well be repeating itself.

18. As had been the case in 1910, however, not all sectors of society welcomed the introduction of the *1926 Act*. It was characterised, in various circles, as government overreach and an attack on industry.

19. During the parliamentary debate, the Honourable E H Farrar said that:

> "There are limits beyond which we should not go in placing impositions on industries in this State, while industries in the other States are not carrying such burdens. We are now [at] about the breaking point, and if the Government persists in passing this legislation we shall in many industries get over the breaking point, and workers whom this kind of legislation is supposed to benefit will be the very persons who by losing their employment, will suffer."

20. This view was colourfully described in an article published in *The Bulletin* in July 1926:[5]

> "If [Premier] Lang and [Minister] Baddeley had wanted to create a scare and frighten employers into sacking men wholesale, they couldn't have improved much on their *Workers Compensation Act*."

21. *The Bulletin* went on to describe the reforms as a "calamity" and "Lang's supreme piece of folly", which was designed to "round up these capitalist ruffians".

22. In September 1926, that once great masthead, *The Gundagai Independent and Pastoral, Agricultural and Mining Advocate,* bemoaned the impact the new Act

[5] See: Vol. 47 No. 2422 (15 Jul 1926).

was having on local businesses. Fruit-growers in Batlow had been hit by the increasing price of timber and staffing costs had skyrocketed for the Adelong Creek dredging company.

23. Despite these initial concerns, history has told a very different story. The 1926 Act, and the new Commission, ushered in a model for what many would agree provides “a fair go” for injured workers. Its influence spread across the country and to jurisdictions overseas.

24. It was the 1926 Act that established the foundational principle that the cost of workplace injury should be shared, and not simply borne by the individual and his (and it invariably was his) family. It established that workers’ compensation is, and should always be, a hallmark of a civilised society – and that it is integral to such a society that it protect and provide for its most vulnerable members.

25. Of course, almost everyone here will have their own stories about the Workers Compensation Commission, and its various successors in the decades that followed.

26. If you’ll indulge me, I’d like to make some brief observations of the Compensation Court in the late 1980’s, when I first came to instruct there as a callow, wide-eyed youth who had just got a job at McCaw Johnson, a well-respected mid-sized insurance firm led by Clifford Boyd-Boland.

27. I, and another employed clerk (they call them paralegals now), would lump our files (and a bag of 20 cent pieces for the phone to ring back to the office for orders) down to Citra House on Macquarie St where we’d be required to “instruct” counsel. I couldn’t, for the life of me understand what I could possibly “instruct” them in. I didn’t know anything. Otherwise, we’d be appearing before the former military man, Registrar Cross, who ran the court with military efficiency and might be said to have been an early example of nominative determinism, though in hindsight I think he actually had the patience of Job.

28. The legal profession room would often be thick with smoke as all assembled to try and resolve the many cases each seemed to be briefed in on any given day. The regular characters included Horrie Miller (whom I more than once heard tell his worker client that if he ran his case he’d get “Duck eggs, master!”), Jim Poulos, Vaughan Jurisic (whose nickname was Gladesville because he was always half way between the Sydney and Parramatta courts), Michael Newton (whose nickname can’t here be explained), Annie Quirk (later to become a judge of the Court), Paul Rickard, Paul Sweeney, Steve Campbell (now of the Supreme Court), Steve Flett, Ian “Firm but Fair” MacFarlane, Stuart Grant, John Sharpe, Deborah Moore and Michael Cranitch (who was the first person I knew

to own one of the mobile phones we fondly referred to as bricks) – and that's just to name a few of the characters.

29. Sharpe conducted one of the shortest cross-examinations in history in a case in which he appeared for an employer. The worker had given his evidence and, it's fair to say, had laid it on pretty thick. Sharpe was invited to cross-examine. He slowly rose to his feet, looked across to the worker, and said "*you're bungin' it on, aren't you*?", to which the worker responded, "*Maybe a little bit*". **SHARPE:** "*That's the cross-examination, your Honour*".

30. Counsel and the judges all knew each other well. Poulos QC and Judge O'Meally had a particularly mischievous relationship. In one case, Poulos, acting for the employer, was cross-examining a doctor who had been qualified by the worker. This was in the time of the rise of RSI – the symptoms of which often included what we, as lay people, might describe as pins and needles, but which the medical profession liked to describe as formication. The worker had worked at a chicken factory, on the processing line, where she had been required to perform a process which the doctor himself had described as necking. Polous, plainly having taken the view that the case was already lost for his client, decided to have some fun. The cross examination went something like this:

> **POLOUS:** "Doctor, you describe this process that the worker was undertaking as necking, do you?
>
> **DOCTOR:** Yes, that's how I describe it. That's how I understand her to describe it.
>
> **POLOUS:** And you say that arising of the repetitive process she was undertaking, that she now suffers from pins and needles, do you?
>
> **DOCTOR:** Well, yes, that is one of the symptoms of which she complains.
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> **POLOUS:** So really what you're saying is that too much necking leads to formication."

31. In 1996, I took up employment at McClellands, of which Greg Keating, who is here today, was the senior partner, and, of course, as your Honour Judge Neilson has mentioned, became the second President of the second iteration of the Workers Compensation Commission. Greg interviewed me for the job. He asked me (and I had been expected this question):

> **KEATING:** "Well you've worked for the employer and insurer's side; what makes you want to come and work for us?"

I gave him my prepared answer:

> **TOOMEY:** "Well, I think, Mr Keating, that, you know, it's probably a good thing to introduce some balance into your work experience."

There was a pause, and he said:

> **KEATING:** "Got sick of losing, did you?"

32. I remained at McClellands from 1996-1999, when I went to the Bar. When I did so, the Honourable Michael Campbell KC was then Chief Judge of the Court. I did quite a bit of work in the Court in my first two years at the Bar. It was, it has to be said, a wonderful training ground, where young barristers could learn general court craft and, importantly, how to cross-examine experts. It is a matter of great regret that a similar forum doesn't exist for the new barristers today, who can struggle to build courtroom experience in their early years.

33. Chief Judge Campbell was, if I may say so, a very fine judge. He had a perfect court temperament and a calm authority.

34. I also appeared on numerous occasions before Judge O'Meally, and I will share one more anecdote, if I may. I was acting for the worker. I had called him to give evidence. Judge O'Meally said to him:

> **HIS HONOUR:** "Sir, I am required to enquire of you whether you wish to make an affirmation or take an oath?"

To which my man responded:

> **WORKER:** **"**What's the difference?"

> **HIS HONOUR:** "The difference, Sir, is simple. If you make affirmation and tell a lie, you will go to jail. If you take an oath and tell a lie, not only will you go to jail, but also to hell."

To his great credit, he took an oath.

Closing remarks

35. I conclude by observing that, as we look ahead, it would be naïve to expect that the scheme will not continue to face challenges. No doubt those challenges will evolve. What I sincerely hope will remain, however, is a role for courts and independent specialist tribunals in its administration, and with that, for the independent Bar.

36. As we mark this centenary, we recognise the considerable contributions of those who have served on and in the courts and tribunals that have administered the scheme – many of whom join us here today.

37. May it please the court.