The New South Wales Bar Association

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submission

SUBMISSION OF THE NSW BAR ASSOCIATION

RESPONSIVE TO PUBLICATION OF THE INTERIM REPORT OF THE PRODUCTIVITY COMMISSION ENQUIRING INTO NATIONAL WORKERS COMPENSATION OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

RELEASED 21 OCTOBER 2003

21 November 2003

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1. On 11 June 2003 the NSW Bar Association made a preliminary submission for consideration of the Productivity Commission in its current hearings (submission no.64). By circular published 21 October 2003 the Commission released its interim report and called for comment. This submission is made as part of that process.

2. In its submission published on 11 June 2003 the Bar addressed 11 areas of interest identified in the Commission's Issues Paper of April 2003 together with 12 specific matters which were referred to in paragraph 9 of the Issues Paper, ie "Scope of the Enquiry".

3. The areas of interest identified in the Issues Paper, supplemented by the specific matters, were:

   (i) national frameworks;
   (ii) national self-insurance;
   (iii) the Occupational Health and Safety model;
   (iv) reducing the regulatory burden and compliance costs;
   (v) access and coverage;
   (vi) benefit structures (including access to common law);
   (vii) cost sharing and cost shifting;
   (viii) early intervention, rehabilitation and return to work;
   (ix) dispute resolution;
   (x) premium setting; and
   (xi) the role of private insurers in workers compensation schemes.

4. On this occasion the Bar's submissions are directed to three particular areas:

   (i) national frameworks;
   (ii) access and coverage;
   (iii) benefit structures (including access to common law).

5. It appears on examination of the interim report that the other submissions made by the Bar Association on other matters converged with the views of other stakeholders and have been adopted by the Commission in its interim report.

6. The Bar wishes to make a further submission in relation to the specified areas, so as to identify and address what it perceives to be a lack of relevant information, as well as certain misconceptions and inconsistencies which emerge from a reading of the report as a whole.

National Frameworks

7. The interim paper does not endorse a universal a Comcare style scheme as an overarching framework for delivery of workers compensation benefits. It does, however, in the overview and in the detailed text, publish a preferred approach by which, on the first model, the Commission recommends that the Federal Government licence a limited number of eligible employers to self insure under the Comcare scheme subject to them meeting requirements as to prudential matters, claims management, occupational health and safety and other matters.

8. The Commission has also published as secondary models a preferred approach recommending that the Federal Government establish for eligible employers a new national scheme of workers compensation self insurance and, as a final position, that such scheme be available to *all corporate employers.*

9. The extension to all corporate employers, as opposed to *all* employers, would seem to be based upon a recognition of the limits of constitutional power as outlined by Henry Burmester QC and Damian Page, Chief General Counsel and Counsel of the Australian Government Solicitor (opinion published 15 September 2003).

10. Although not expressly adverted to, it seems apparent to the Bar Association that the new national scheme of workers compensation and self insurance and then a new national scheme of general insurance for corporate employers contemplates adoption of the Comcare model.

11. The Bar Association's concerns are activated by a number of matters:
    (i) according to the list of submissions (pp.301-306 of the Interim Report), there appears to have been no written submission lodged by Comcare Australia;
    (ii) according to the list of public hearings held by the Commission (pp.309-312 of the Interim Report), Comcare Australia does not appear to have made oral submissions to the Commission;
    (iii) according to the list of meetings published (pp.306-309 of the Interim Report) the Commission did at some stage meet with Comcare Australia in the Australian Capital Territory;
    (iv) although a Comcare style scheme is contemplated in the Commissions Recommendations to Government, there is little or no analysis of the management of that scheme or its financial viability;
    (v) the analysis of the performance of Comcare at paragraphs 1.20 to 1.31 in the

12. The Bar has identified in its previous submission that notwithstanding its limited coverage and generally white collar beneficiary pool that Comcare is experiencing difficulties in some areas. Comcare's Annual Report 2002/2003 noted a deterioration in performance in claims of 30 or more days incapacity. This was identified as leading in global terms to an overall increase in claims duration. Claims received were down, claims accepted were down yet overall costs increased from $459,000,000 million to $476,000,000. This was in respect of agencies administered or licenced under the Comcare scheme. The previous submission noted that even though there is a gradual diminution in the number of workers covered by the scheme, the scheme covers a preponderance of low-risk occupations, and that scheme records demonstrate a low incident rate and low frequency rate, nevertheless:
    (i) claim costs were higher than in most other jurisdictions;
    (ii) rehabilitation costs were higher than in most other jurisdictions;

(iii) the median number of days for compensation paid for by Comcare was 57 as opposed to a substantially lower national median of 38 days; and

(iv) half the injured Comcare workers incurred rehabilitation costs whereas one-third was the national average.

13. In its interim report the Commission referred to the Comcare scheme in these terms:

> *"Some jurisdictions need relatively long periods before the step down occurs. Under the Commonwealth schemes there is a full income replacement for the first 45 weeks, with a step down to 75% of pre-injury normal earnings that can be paid until normal retirement age (65 years of age)."*[1]

14. The Commission also identified the fact which must play heavily on the minds of those who will receive the formal report, namely a "generous" benefits structure may provide poor incentives for rehabilitation and return to work."[2]

15. It is for these reasons that the Bar Association believes that it is unsatisfactory (if it be the case) that the preferred model of the Commission should be based upon a scheme administered by an organisation which appears to have played little or no active role in the Commission's deliberations.

16. It is to be recognised that HoWCA (Heads of Workers Compensation Authorities) is referred to in the Interim Report as recommending a preferred benefits structure contemplating full income replacement for the first 13 weeks then stepping down to 70% of pre-injury normal weekly earnings. Benefits would continue at this level for five years and possibly until retirement age if an impairment threshold was met.[3] This recommendation is merely stated without further analysis.

17. The Bar Association submits that any recommendation to Government which contemplates self insurance and corporate insurance on the Comcare model should

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1 p.186 Interim Report

2 p.191 Interim Report

provoke detailed analysis. Not all the eligible employers or corporations will be white collar industries. The private employers, private insurers and, to a lesser extent, the administrators of state and territory schemes, dealing as they do with heavy industry and diverse economic bases, might well be in a better position to inform the Commission as to industrial realities than proponents of a model operating in the rather more artificial environment in which the postulated Comcare model operates.

18. As the first instance model (Model A) preferred by the Commission revolves around self-insurance, it will be important, in the submission of the Bar Association, for the Commission to make ultimate recommendations to government taking into consideration the report of Peter Martin, Australian Government Actuary, 24 September 2003, which is an annexure to the Interim Report. Mr Martin wrote:

> *"In particular it will be important to ensure that only substantial and soundly motivated employers were eligible to be granted a licence. Financial motivation may not be soundly based for some smaller employers who do not have a proper appreciation of all of the risks associated with self-insurance. "*

19. Mr Martin made this observation in the context of outlining a scenario in his report of the insolvency of a self-insurer. Mr Martin identified the nature of financial risks to the Commonwealth Government associated with expanding a group of self-insurers in this context. In the event of insolvency it would be anticipated the licence would be revoked.

20. Consistent with recent history concerning the role of the Federal Government in alleviating the financial distress of workers left high and dry by insolvency of their employer, Mr Martin, along this line, observed:

> *"However, there is likely to be an expectation, at least amongst claimants, that the Commonwealth will take steps to ensure that the liability is satisfactorily discharged. Certainly it would be expected that the*

[3] p.196 Interim Report

Commission would have an active role in managing the orderly exit of a self-insurer whose licence had been revoked. "

21. Any move towards self-insurance under a Comcare scheme must take account of the fact that an expectation exists that government will bail out defaulting insurers and employers in the case of insolvency. The Federal Government would labour under a political imperative to make good the loss.

22. It is in this context that a Comcare model must be assessed, especially in making recommendations to Government.

23. **The Bar Association submits:**

(i) The Commission is correct in proposing that each separate jurisdiction in Australia administer its own separate workers compensation scheme.

(ii) Recommendations which have as a preferred model the availability of an alternative scheme based on the Comcare model for self-insurers and then corporate employers should be approached with great caution.

Access and Coverage; Benefit Structures (including access to common law)

24. Parts 7 and 8 of the interim Report consider the interrelated questions of access to common law as opposed to statutory benefits, and desirable or undesirable features of each.

25. In the context of the statutory benefits structure, the Commission has had identified, in particular, scheme affordability as a priority.[4]

26. The Commission has also identified as a fact that the benefit structures of statutory schemes reflect historical compromises between the stakeholders in each Jurisdiction.[5]

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[a] p.185 Interim Report

[5] p.191 Interim Report

27. Of course this historic compromise necessarily involves consideration of access to common law. The variability of statutory benefits and the means of their delivery is only one part of the equation.

28. It should be noted that in New South Wales the compromise presently reached between two major stakeholders, injured workers and employers funded by the statutory scheme (WorkCover) is that, in effect, there is no access whatsoever to common law benefits. The compromise as between the two, therefore, in NSW, is an abandonment of common law delivery of benefits in favour of what is perceived to be a more generous statutory structure.

29. In the longer term, however, it may become apparent that the deprivation of common law is in fact a statutory endorsement of a biased result in favour of NSW WorkCover and its client employers rather than merely a compromise between common law as opposed to statutory benefits. If this results in lower premiums at the expense of injured workers then at least the true nature of the compromise will be apparent. These compromises are called "trade-offs" by the Commission.

30. The Bar is concerned that particular factors may be passed over without analysis in regard to statutory schemes whilst the same factors are regarded to be of weight in a debate on the merits or otherwise of common law.

31. As an example, the Commission recognises, as indicated, that a generous benefit structure may provide poor incentives for rehabilitation and return to work. This nostrum passes without further detailed analysis in Part 8. Part 8 deals with no fault statutory schemes. By contrast however, the perceived generosity of common law is a factor thought by the Commission to militate against common law. The expression "windfall" is reserved for common law. Narrative on the statutory schemes use no such expression. It is unhelpful and in many respects provocative.

32. The Bar is also concerned with the inconsistency of analysis on the question of benefit levels and methods of delivery. It is suggested on one hand that statutory schemes ensure certainty of compensation. This is seen to be desirable. By contrast, in the

context of common law, the Commission cites the view that common law can in many cases be shown to deliver damages on a "tariff' basis, awarding most injured people very similar amounts. This is unhelpful and inconsistent and would best be ignored.

33. As a general proposition it should be observed, and clearly stated, that the driver from an employer's point of view is lower premium. This may or may not be coupled with beneficence.

34. The driver from an injured worker's point of view is to receive adequate if not generous benefits.

35. All other stakeholders between these two identifiable groups compete from different viewpoints referrable to the main debate. This is so whether the contributors to debate are rehabilitation providers, OHS consultants, administrators, insurers, lawyers or any of the other participant.

36. It is the Bar's submission, however, that the overriding concerns of the Commission in its recommendations to Government, should be squarely focussed on occupational health and safety outcomes. As previously submitted, rehabilitation *after injury* and delivery of benefits *after injury* have an effect on the wellbeing and financial security of the injured worker and the premium payable by the employer but of themselves play no role whatsoever in the prevention of accidents in the first place. Premium may affect post accident behaviour.

37. So viewed, it is the submission of the Bar Association that the arguments in favour of statutory benefits against access to common law which are recited in sections 7 and 8 of the Interim Report do not in fact touch upon the primary matter.

38. If, for example, the Commission takes the view that a less generous statutory scheme, coupled with restricted or no access to common law, would have the incentive of forcing workers into rehabilitation and thence re-employment, then the flow on effect will be lower premiums without regard to the facts and circumstances which gave rise to the injury in the first place.

39. If statutory benefits are paid at a uniform level in the particular jurisdiction, give or take some adjustment for lump sum payments referrable to a statutory maximum, then the variable facts and circumstances which gave rise to the injury in the first place become irrelevant. It is the worker's medical condition which will govern the level of benefits (subject to step down provisions and other deemed employment provisions).

40. No distinction ever need be drawn in no fault schemes as to the circumstances in which an injury occurred because no fault benefits are based upon the *fact of injury*

and the fact of incapacity rather than its cause.

41. Of course if there are a large number of injuries then premiums will reflect this fact, and may cause a responsive employer, with an involved insurer, to look at the causes of the accident. If there is an injury caused by negligence the cause will be known. Remedial steps can be taken to prevent further injury.

42. For the reasons outlined in the Bar's previous submission, most of the deficiencies of common law articulated in previous Industry Commission reports (and repeated in the present Productivity Commission report) do not reflect a sophisticated analysis of the realities of the legal system which in fact operates in New South Wales.

43. The Bar Association believes it to be a matter of concern that substantial assertions of theory and fact in the Interim Report are based upon a 1996 Oxford University Press publication and a 1992 Adelaide Law Review research paper.

44. If anything, these two publications must be regarded as demonstrably out of date and pay no regard to the subtleties of what may be done by Government by clever legislative action and deft administrative approaches so as to balance the interests of stakeholders in a workplace injury compensation. The Bar Association made these points in paragraphs 3.17, 3.18 and 6.1 to 6.51 of its submission of June 2003. By way of supplementary submission the Bar would make the following observations:-

45. Concerns about speculative common law actions and excessive legal costs have been addressed in New South Wales in the public liability debate. The New South Wales Government addressed the concept what might be styled "entrepreneurial" litigation by its enactment of professional misconduct provisions through passage of the Civil Liability Act 2002. There is no reason to believe that such provisions could not be enacted in other states and territories so as to ensure that legal advisers paused and carefully considered the merits before litigation was commenced. This is especially so in the area of workplace injury where common law thresholds are considered. In the event that a legal adviser forms the view that thresholds will not be exceeded, then, with sophisticated legislative action, the threshold test becomes potent. Legal advisers will not recommend commencement of common law proceedings where there is the spectre of professional misconduct for a demonstrably unsustainable litigation.

46. In New South Wales the Civil Liability Act, 2002 also introduced stringent costs limits in public liability matters. The Bar Association argued at the time that the costs strictures were punitive. It remains of that view. Nevertheless, the point to be made in the current context is that the simple mantra "it costs too much" is simplistic and fails to explore what has been and can be done on the question of legal costs.

47. Although the New South Wales Government has effectively extinguished workplace common law actions nevertheless it may be seen that Commission, should it wish to analyse the question of legal costs in workplace common law in other states and territories, could, if so concerned, examine the Civil Liability Act, 2002. This would be an approach preferable to reliance upon anecdote or dusty academic treatise.

48. There are other matters of concern. The Commission stated:[6]

> *"In most countries, the role of common law is an avenue of providing compensation has largely been replaced by statutory workers compensation schemes, while its role as a deterrent has been largely assumed by OHS regulations. Germany, the first country to introduce a workers compensation scheme, prohibits common law action for work related*

> *fatalities, injuries and illnesses. Common law actions are also disallowed in New Zealand. ... Common law actions for workplace injury are also generally disallowed in the United States and Canada - the only two countries (other than Australia) to have Federal systems of workers compensation. "*

49. Germany has never been a nation which had common law as a fundamental underpinning and a constituent part of its Rule of Law. Reference to other countries outside the common law tradition is apt to mislead, unless the point sought to be made is that these schemes now have and have had a pension-type scheme throughout their history. The interim report should not put Germany forward as a country which has abandoned common law in favour of statutory schemes. It never had it.

50. The abandonment of common law in New Zealand, a small country with a small industrial base, should not, in the submission of the Bar Association, be put as the yardstick by which Australian conditions should be assessed.

51. Although there is reference to a general disallowance of common law for workplace injury in the United States and Canada, no further information is provided by way of appendix or footnoting. The Commission has not attempted, particularly in relation to the United States, to assess the availability of common law actions for employees against other parties outside the employment relationship who may be responsible for negligently inflicted injuries and hence liable to pay common law damages.

52. Finally, on this point, the Commission does recognise that the United Kingdom allows unrestricted common law access. No analysis has been made of this system.

53. The Bar Association also suggested in its initial submission that the Commission look to and examine those particular states and territories where there remains in whole or in part a common law remedy available to injured workers. Such an endeavour may permit a more sophisticated analysis to examine whether:

    (i) there is a better OHS record in these states and territories;

(ii) there is a better rate of return to work or rehabilitation in these states and territories;

(iii) in the longer term injured workers have more satisfactory financial outcomes in a hybrid scheme encompassing the choice between statutory benefits and common law damages in the case of negligently inflicted injuries.

54. This would permit an approach whereby the Commission could actually make recommendations to Government on an empirical basis as to whether or not common law has a role in the elevation of workplace safety standards.

55. Another matter which should be squarely addressed in this context is the perception that common law liability cannot have a timely effect on employer behaviour because of delays between injury and award of damages. New South Wales experience encompasses the raising of an estimated reserve and premium affectation from date of claim, not from award of damages. There is no reference to this in the Interim Report.

56. In any event the Commission has not explored the raw material in New South Wales on this question of delay. The PriceWaterhouseCoopers study 2001 referred to in the Interim Report reportedly found an average time for finalisation of a common law claim in the year 2000 was 4.7 years. This cannot easily sit with the statistics referred to in paragraph 6.27 of the Bar's previous submission. Almost every workplace common law matter in New South Wales is litigated in the District Court of New South Wales. The median period between commencement of litigation and finalisation by arbitration is 11.5 months. In the period January 2002 to September 2002 only 100 individuals out of 4,789 cases arbitrated applied to be reheard by a judge. These rehearings occur generally within three months.

57. This is a simple example of the Commission utilising out of date material. The PriceWaterhouseCoopers study published in 2001 cannot have any reference whatsoever to the reality of contemporary time lags. The 11.5 month period of course could be extended to reflect the fact that litigation may not be commenced for some years until the injury is stabilised. This however is neutral, of course, from the

Commission's point of view, as the same lack of stabilisation is encountered in the administration of benefits under any no-fault statutory scheme.

58. There are further assertions that in the ultimate workers accepting common law lump sums are financially prejudiced through poor investment and the like. It is put that the common law is therefore productive of hardship and contributes to eventual dependency upon social security safety nets (pp 175, 198ff Interim Report). This is based primarily upon the 1992 South Australian research paper. It is clear that in the main the administrators of schemes consider a pension type benefit scheme as the counter to this cost shifting.

59. In this respect careful attention should be paid to Table 8.1 in the Interim Report. New South Wales and Victoria have facilities for cessation of benefits after two years. These provisions may be acted upon even though the worker remains unemployed. Queensland permits cessation of benefits after five years and Tasmania ten years. Some schemes provide for step downs, in the case of New South Wales, a dramatic one. In these circumstances can there be any surprise that workers avail themselves of Federal social security safety nets.

60. The answer given by HoWCA is to introduce better benefits in a pension environment. This directly increases premium levels, creates a "tail" (in insurance parlance) and is contrary to sound management of insurance business. Pension type schemes cannot, and will not, be operated by private insurers as there are significant on going claims administration costs and no predicable extinguishment of liabilities.

61. In summary, assertions of considerable time delays and the assertion that legal costs represent a significant proportion of workers compensation costs (in contemporary rather than historical experience) do not assist the government in working through a federal approach. The Bar can speak of New South Wales. Other assertions arise from incomplete analysis.

62. In its previous submission the Association was concerned that sophisticated answers should not be sought on the basis of anecdotal evidence. In its previous submission the

Bar Association sought to refer the Commission to the findings of previous Government organisations, the submissions of various stakeholders, and to encompass the present debate within contemporary statutory regimes. The Bar Association sought to address the matter on an analytical basis rather than focussing simply on the deprivation of rights under the rule of law.

63. The Bar Association believes that a great deal more work needs be done before comprehensive recommendations of far reaching effect can be made to Government.