

**THE QUEENSLAND COUNCIL OF UNIONS
DRAFT RESPONSE SUBMISSION TO THE
PRODUCTIVITY COMMISSION'S INTERIM REPORT
“NATIONAL WORKERS’ COMPENSATION & OCCUPATIONAL HEALTH
AND SAFETY FRAMEWORKS”**

21 November 2003

The Queensland Council of Unions fully supports the submission by the ACTU and wishes to expand on the following issues:

1. NATIONAL FRAMEWORKS FOR WORKERS’ COMPENSATION

- The QCU has a policy position that all employers should be in an common no fault workers’ compensation scheme and thus opposes self-insurance for employers for the following reasons:
 - There is no evidence to demonstrate that self-insurance delivers an improved workers compensation and claims management system. The inherent conflict of interest in the employer being both the employer and the insurer is often ignored by legislators. There is an imbalance of power between the employer and an injured worker which is not present in the ‘arms length’ relationship which exists with an external workers compensation insurer;
 - Workers’ compensation is a no fault compensation and rehabilitation issue and should be treated as a general injury insurance issue which aims to provide fair, just and secure entitlements free from the direct employment relationship;
 - The existence of a culture of rejection of claims within self-insurers due to the drive to cut costs. This seriously impacts on rehabilitation and timely settlement of claims. This is contrary to the interests of injured workers;
 - Lack of effective Government control or regulation of the insurance industry in general and particularly, where employers who self-insure adopt practices contrary to best practice claims management systems;
- The QCU is opposed to the development of a new national scheme for the following reasons:
 - Employers who operate across states are currently able to join the Comcare scheme and have chosen not to because of the provisions offered to injured workers. The QCU is concerned that any new national scheme is merely an exercise in setting up an alternative national scheme that reduces overall current provisions for injured workers and a race to the lowest common denominator;
 - The exodus of large and some medium-sized employers from state schemes would place the current state schemes in financial jeopardy. In the case of Queensland, a financially sound scheme could be placed at great risk;

- The sudden exodus of large employers to any national scheme would result in the remaining employers facing increased premiums. Small and remaining medium businesses would be most affected by this. The state scheme would be seen as an insurer of last resort.

2. Defining Access and Coverage

- The QCU submits that any definition of employee must not be exclusive.
- Any definition must not exempt any person currently covered in a workers' compensation scheme;
- Any definition must include casual employees, volunteers, labour-hire employees, outworkers or any employees defined as contractors or sub-contractors designed to avoid WHS or workers' compensation obligations, sham employment arrangements aimed to avoid premiums must be exposed;
- The QCU agrees that any scheme must be flexible to ensure that changing work arrangements can be included and coverage broadened to include workers who may not be covered.
- The QCU is concerned in relation to the recommendations regarding work-related injury. The concerns are as follows:
 - The QCU supports the retaining of "significant contributing factor" as injuries where work is a significant factor remain covered. We totally reject the definition being "major contributing factor" as it places the test far too high and eliminates injuries as previously mentioned;
 - The QCU strongly believes that journeys to and from work must be included in any workers' compensation scheme and totally opposes any removal of this provision. We do not accept that lack of control by an employer is a reason for omitting this important provision. There are many situations in employment where the employer cannot control the employee. – Eg walking to meetings in another building and labour hire situations. The QCU submits that but for work the worker would not be in the situation and therefore should be entitled to a no fault workers compensation scheme.
 - Full coverage must be afforded to recess, meal breaks and work-related events. Not to cover these times is inequitable in that a worker may be subjected to control such as disciplinary action and/or rostering. This creates an anomalous situation where a worker is in the employers control but not covered for injury, particularly if rostering arrangements have made it impossible for workers to leave their workplace during breaks.

3. Injury Management

- The QCU supports rehabilitation to the current position as a major priority. The QCU submits that safeguards must be placed around rehabilitation and return to work plans such as:

- Workers must have the right to access their own doctor and develop a suitable rehabilitation plan without unreasonable employer interference;
- Employers must not have the power to refer an injured worker to an employer-nominated doctor if the employee is being treated by their own doctor;
- Employers must be required in legislation to provide suitable rehabilitation and to cooperate with rehabilitation and return to work plans for injured workers. Employers should also be subjected to penalty, as workers are who fail to co-operate with rehabilitation plans, when unreasonably refusing to provide adequate rehabilitation to injured workers.

4. Common Law Access

- The QCU is opposed to any diminishing of an injured worker's ability to access common law and will not support removal of this right to injured workers in Queensland. Unfortunately, entitlements under workers compensation can be removed/amended by legislation by governments, which often results in reduced benefits and/or stricter definitions of worker, injury, etc. This does nothing to improve OH&S performance, but reduces workers compensation costs at the expense of injured workers' benefits. Common Law is viewed as an absolute right to seek damages where the negligence of an employer has caused injury and statutory entitlements under the no fault scheme are not adequate to fully compensate the injured worker.
- There should be no restrictions on the compensation available under common law. There is no evidence to suggest that this has interfered with effective rehabilitation and return to work plans, in fact, this issue has never been raised in Queensland where such a successful system exists.
- Workers must have the right to any suitable compensation under common law in that:
 - Compensation based on a scale of % of impairment may not reflect the effect the injury has on a worker's ability to be carry out the requirements of a job. This means compensation awarded via a scale of % may not adequately compensate an injured worker for the effect the injury has on their ability to perform tasks required in employment.
 - Common law action is also an effective tool in ensuring that employers improve occupational health and safety in the workplace where negligence has been established.

5. Statutory Benefit Structures

- The QCU submits that any scheme should provide appropriate compensation for injured workers. Whilst the QCU fully supports rehabilitation for injured workers, it is essential that benefits are not so 'low' as to force injured workers into rehabilitation prematurely.

- Lump sum payment must be retained for injured workers suffering a permanent impairment with no minimum impairment thresholds. The QCU does not support any minimum thresholds and believes that all injured workers should receive and be entitled to statutory lump sum payments for permanent impairments regardless of severity.

6. Premium Setting

- The QCU submits that any scheme needs to be adequately funded by employers and supports an experience based rating system.
- The QCU requires further information regarding incentives for preventing workplace fatality, injury and illness and promoting rehabilitation and return to work before we can support or reject such a proposal. We believe that any incentives should go well beyond meeting legislation requirements in such instances and employers should not be rewarded to meet their legal requirements.
- The QCU submits employers who do not provide a safe workplace and/or appropriate rehabilitation should be penalised via increased premiums using an experience rating system.

7. The Role of Private Insurers

- The Queensland scheme is a viable, sustainable scheme delivering the lowest premiums in the country. It is a Government statutory authority with no private insurers. The schemes that use private insurers are no better off, or are indeed worse off than this statutory scheme. No case has been made out by the Productivity Commission that sustains the need for private insurers. The QCU is totally opposed to a role for private insurers to provide coverage under all schemes.

8. Self –insurance

- The QCU is opposed to self-insurance, however as self-insurance is a reality, the following strict requirements must be included in any self-insurance scheme, the Queensland scheme is a good example:
- Self-insurers must adequately resource any workers' compensation section to ensure that claims are processed expeditiously. Any conflict of interest between workers' compensation claims management and other industrial practices must be avoided;
- Self-insurers must be strictly regulated to ensure full compliance with legislation, regulations and equitable claims management. Any breaches should result in the loss of a "self-insurance licence".
- Licence fees must be adequate to insure that any public schemes are adequately compensated for large employers being self-insurers, otherwise small and medium businesses will have to subsidise the public scheme;

- Any self-insurer must be adequately resourced to ensure all obligations are able to be met, must demonstrate OH&S requirements, and only apply to large employers based on minimum employee requirements as this is essential in ensuring maximum operational value. The QCU rejects the findings of the Commission in this matter.

9. Dispute Resolution in Workers' Compensation

- The QCU submits that any scheme must include a review process that is transparent, consistent, equitable and low cost.
- The QCU submits that injured workers should have the right of appeal to the appropriate jurisdiction on all matters. This cannot be a financial burden on the injured worker.
- The QCU submits that the use of medical review panels must not be used to unreasonably delay claims and must be used on questions of medical opinions only and not on questions of causation.
- The QCU supports the use of voluntary alternative disputes resolution processes.
- The QCU submits that employer-initiated appeals be limited to genuine cases and that employers should be penalised for the lodging of frivolous or vexatious appeals. Self Insurer employers should be prohibited from appealing claims submitted through the review process, that is, they cannot be the insurer one day and then the employer the next should the review not go their way.

NATIONAL FRAMEWORKS FOR OCCUPATIONAL HEALTH & SAFETY

The Queensland Council of Unions fully supports the ACTU submission regarding this section of the Commission Interim Report, however offers the following further submission:

Incidence of injury and illness

- The Commission has used workers compensation data for injuries & deaths. This is a gross underestimation because of (a) less people are covered because of labour-market shifts (eg increased self-employment, outsourcing etc) & (b) difficulty in proving work-relatedness for diseases (long latency)
- No evidence that injuries & deaths have declined the Commission should not use workers comp data to claim this finding, eg. Changes to the definition of injury and/or worker can be a significant reason for decline in number of claims with no improvement in OH&S workplace performance.

Regulations

- Prescriptive regulation should not be reduced.
- The majority of Queensland workplaces are small with few resources
- Performance based and risk management-based legislation is best for large employers with WHSOs or specialist or dedicated OHS personnel.
- Prescriptive regulation removes doubt and clarifies legislative expectations.

Consultation: WHS Reps and committees have contributed positively to OHS

Enforcement: The penalties for causing injuries, illnesses and death should reflect the seriousness of the problem, including Industrial Manslaughter charges.

Changing working arrangements: The QCU supports Michael Quinlan's research cited in report - subcontracting, outsourcing, self-employment & other precarious employment has exposed workers to increased OHS risks and decreased access to compensation.

OHS & IR: Enterprise agreements and awards are an appropriate place to advance OHS. Legislation reflects minimum – workplaces should be able to agree on above minimum and have these formalized (esp. for OHS matters such as shiftwork that are also working conditions).

NOHSC: The QCU supports the role of the NOHSC as the national body to develop health and safety standards and believes that the resources should be increased and must remain tri-partite with all relevant stakeholders.

National Strategy: We support the National OHS Strategy and we are working with the DIR (WHS) through Board and SSCs to implement recommendations.

National Framework:

- The QCU supports the development of national standards by NOHSC and the implementation of these in Queensland.
- This leads to a greater consistency for workers across jurisdictions.
- The QCU works with DIR WHS for their adoption in Queensland

Commission's framework

- The QCU supports consistency across jurisdictions for OHS.
- The Commission's consideration that companies should be free to choose to operate under either a national or state OHS regime would be unduly confusing, especially since companies would chose the lowest-penalty/lowest common denominator option.
- The Commission does not state how providing companies with this choice would reduce injuries, illnesses or deaths but appears to base most findings solely on economic grounds and not on best practice in the delivery of workplace OH&S.