BACKGROUND

This submission is made further to the NSW Minerals Council's initial submission of September 2003 and our appearance before the 4 December 2003 public hearing in Sydney. Our comments remain focused on workers' compensation and the perspective of the NSW coal owners and operators, this State's largest export industry held captive in a mandatory monopoly scheme whose design and benefit regime represent a significant risk to the future of investment to the industry and State of NSW.

COMMENTS

The NSW Minerals Council welcomes the Productivity Commission's Interim Report as it relates to national workers' compensation frameworks. We support the Commission's interim conclusions opposed to access to common law and on the need for a narrow definition of work-relatedness. Both of these features are key contributors to the idiosyncratic CMI scheme's "culture of claim" now endemic across the NSW coal industry. From experience under CMI's generous and loose common law provisions, we concur with the Interim Reports findings that:

- less seriously injured workers may be over-compensated where they could otherwise be expected to be rehabilitated and return to work; and
- common law access delays rehabilitation and return to work.

We support the Interim Report's recognition of the need for restricting common law should it be included at all to non-economic loss for the most seriously injured and the associated recognition of the importance of consistent impairment assessment such as the AMA guide and the use of independent medical panels to provide final and binding determinations on questions of medical opinion.

We also welcome the recognition and consideration of the particular circumstances, difficulties and issues associated with maintaining historic industry-specific schemes in this already complex framework. The Interim Report found that there was

> "…little justification for workers in the New South Wales coal industry to be subject to substantially different scheme requirements compared with other workers in the State." (p.252)

The Interim Report quotes from our initial submission:

- our long held view that coal industry employers in NSW are captive to the inefficient statutory monopoly scheme; *Coal Mines Insurance (CMI).* The ongoing financial crisis caused by these special monopoly NSW coal workers' compensation arrangements (CMI) is risking irreversible damage to this State's largest export earner.

- that the industry scheme is out of kilter with: other workers compensation scheme in NSW; with other workers compensation schemes in Australia; with community standards for NSW citizens seeking damages under tort law (e.g. motor accidents;

> public liability; medical negligence; professional negligence); and with international workers compensation schemes (of comparable economies) (p.251).

The coal industry has demonstrated the greatest improvement in safety performance of any Australian industry over the last decade, with claims frequency reducing from 80 per million hours worked in 1991/92 to less than 25 by 1999/2000 (Wilkins, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, for MCA, 2003). If there was ever a valid argument for special benefits for mine workers on the basis of risk, this no longer applies.

However, despite these dramatic improvements in health and safety in the coal industry and the ongoing drop in injuries and claims, the total cost of claims is still increasing. 02/03 workers' compensation premiums levied upon the NSW coal industry averaged 11.5% of wages - approximately three times the premium paid by coal companies in Queensland and over four times the average premium set by the NSW WorkCover Authority. Premiums exceed 30% of wages per year in some cases with many NSW operators paying in excess of $25,000 per worker per year in CMI premiums. Coal companies cannot continue to carry the cost of CMI and remain globally competitive, let alone keep up with Queensland. Addressing coal workers' compensation costs and the CMI monopoly is therefore an issue of State significance, essential for retaining/regaining the capital attractiveness of NSW for its largest export earning industry.

The CMI scheme fails each of the core workers' compensation objectives outlined in the Interim Report at XXXVIII: in terms of the design of financial compensation and its excessive components; in terms of poor drivers creating barriers to return to work and in terms of claims cost escalation and associated loss of affordability. The NSW Minerals Council continues to seek access to all available mainstream workers' compensation provisions be they State or national to:

- deliver support for injured workers' and their return to productive employment in line with prevailing community standards;
- refocus precious compensation dollars on injured workers instead of supplementary "social security" payments upon redundancy or retirement;
- control medical and legal costs;
- provide a secure and stable, affordable scheme and associated premiums;
- provide open competitive insurance delivery mechanisms, including access to self-management and self-insurance like every other NSW employer.

From the NSW Government in particular, we continue to repeat our urgent call to provide a firm commitment and timetable for legislative reform of the scheme; and to work with the coal companies to develop the detailed, costed reform package and associated implementation strategy.

The NSW Government has previously agreed that the Coal Mines Insurance Pty Limited, a subsidiary of Coal Services Pty Limited, is to be independently reviewed two years after the commencement of the Coal Industry Act 2001, as recommended in the Grellman Review of 2000. This review commenced in January 2004. The primary purpose of the review is to critically assess the scheme's monopoly arrangements in the context of the most efficient delivery of workers' compensation services to the NSW coal industry. Terms of reference for this review include exploration and costing of a range of future scenarios, including:

- The CMI scheme is incorporated into the NSW WorkCover scheme by 2005 (governing legislation and delivery mechanisms, including self-insurance);
- Greater alignment of key scheme drivers between NSW WorkCover and CMI schemes by 2005 (work with shareholders to identify drivers for analysis);
- The Commonwealth Government introduces "opt out" provisions and large employers withdraw from the CMI scheme.

Should the Commonwealth Government move to adopt the national self-insurance and/or insurance schemes along the lines of the Interim Reports models B and C (recommended steps 2 and 3), we would implore coverage to be broad and inclusive of all industry sectors, including the coal industry in NSW, to provide equitable access to competitive mainstream workers' compensation arrangements.

ANSWERS TO SPECIFIC QUESTIONS

Commissioners invited responses to the following questions when we appeared at the 4 December public hearing. Following consultation with member coal companies, summary responses are provided below.

How could OH&S for the coal industry be incorporated into the Commonwealth's OHS standards and legislation?

A new national piece of OHS legislation would need to be created as an overarching standard for all companies in Australia to operate under. Regulations from that legislation would then need to be created to address industry specific requirements, such as coal mining, etc. to regulate the additional criteria for that industry to comply with.

It must be stressed that NSW coal companies concerns lie heavily with the monopoly workers' compensation scheme. Great effort has gone into coal OHS legislative and regulatory reform over the past decade and our current focus is on developing modern regulations under the Coal Mine Health and Safety Act rather than seeking any alternative to it. In general, coal companies seek access to modern, mainstream, outcomes based OHS legislation and believe coal mines can be effectively regulated under mainstream provisions just like any other heavy industry.

Would it be difficult for the Commonwealth to develop OHS standards if the Commonwealth did not have any to start with?

No. The Commonwealth could establish what was considered "Best Practice" in another jurisdiction and tailor it for national legislation.

Would employers in the NSW coal scheme move to self-insure under a national scheme if it was similar to the current Comcare scheme (assuming the coal industry does not change)?

Possibly. Depending on what liabilities they would need to take with them from the existing CMI scheme, company level negotiations with their workforces and whether changes were made to the Comcare scheme to rectify problems that existing employers currently face with the scheme.

How many employers in the scheme have at least 500 workers? Of these how many would consider self insurance?

Four companies in the CMI have at least 500 workers, with a fifth company closely approaching that number. Whilst very few individual mine sites have 500 workers, the great majority of the approximately 10,000 employees in the NSW coal industry are employed within a handful of major corporations or contractors who own and/or operate these mines.

Some of these have indicated they would consider self insurance under a national scheme. Others have no experience in this field, do not see this as core business and simply want access to mainstream scheme arrangements with choice of insurance fund manager. All are concerned by the current CMI scheme design, claims costs, premiums and loss of prudential reserves and wish to explore all options that can deliver equitable benefits and support to injured workers and best aid their return to productive work and quality of life.

What are the main factors within the Comcare scheme that would concern employers?

The Comcare scheme's definitions are fairly out of date in comparison state based legislation. Amendments would be necessary if mainstream employers were to be attracted to move in that direction. Examples of changes required are below:

1. Liability - Injury and Disease

> 1.1 The definition of 'injury' requires amendment to bring it into line with recent State and Territorial Act amendments following the decision in MGH Plastics v Zickar. The definition in the SRC Act still allows for the end process of a disease to be treated as an injury 'arising out of or in the course of employment': e.g. heart

attack or ruptured aneurism at work, in circumstances where the work has not been a contributing factor to the heart attack or the rupture of the aneurism.

1.2 The definition of 'disease' needs to be extended to bring it, in line with current State/Territorial workers' compensation schemes, to provide for liability to arise only in circumstances where what the employee actually does in that employment, to be compensable, must be 'a significant contributing factor' in the cause of that disease. This is particularly so given the broad deeming provisions contained within the disease provisions and the schedule of the SRC Act in respect of specific diseases.

1.3 The definition of 'injury' excludes payment of compensation in connection with the failure to obtain a benefit, transfer or promotion or in respect of reasonable disciplinary action in the course of the employment. The section should be amended such that it is consistent with State and Territorial legislation.

2. Benefits

2.1 The definition of 'suitable employment' for the purposes of determining whether an employee is "able to earn" income on the open labour market and whether that income is to be taken into account in reducing weekly payments requires urgent amendment. The definition as it presently stands is ambiguous, and on one view, would lead to circumstances where if an employee was validly terminated from his or her employment for gross misconduct, then from that point onwards the employer would be precluded from the advantage of being able to take into account the dismissed employees ability to earn on the general labour market.

2.2 Injured employees are entitled to 100% of normal weekly earnings for the first 45 weeks of incapacity. This is overly generous compared to some State schemes.

3. Journey Claims

3.1 The SRC Act provides for liability in respect of journeys to and from the employees place of residence to the employees place of employment. Journey claims have been removed from most schemes.

4. Contribution

4.1 The SRC Act does not provide any express provision for appropriate contribution between several employers who have in some way contributed to the incapacity, impairment or death of an employee.

5. Impairment Guide

5.1 The Act provides for Comcare to produce a guide to the degree of permanent impairment as a key mechanism in the payment of lump-sums under the SRC Act, both for economic and non-economic loss. The Guide is also used to determine the threshold degree of impairment necessary for entitlement to limited common law rights. The Guide has been criticised frequently by the Administrative Appeals

Tribunal and the Federal Court of Australia in respect of the ambiguity associated with the various tables contained within the guide. The Guide has been the subject of review by Comcare but the review has yet to produce any appropriate practical amendment.