

PRODUCTIVITY COMMISSION INQUIRY

**NATIONAL WORKERS' COMPENSATION AND
OCCUPATIONAL HEALTH AND SAFETY
FRAMEWORKS**

INTERIM REPORT 2003

COMMENT

Centre of Policy Studies and the IMPACT Project
Building 11E, Clayton Campus
Monash University, Victoria 3800
30th January 2004

ATT: MS JILL IRVINE
Workers' Compensation and OHS
Productivity Commission
PO Box 80
Belconnen ACT 2616

Dear Ms Irvine,

Enclosed is a comment upon the Productivity Commission's Interim Report October 2003 concerning National Workers' Compensation and Occupational Health and Safety Frameworks.

I am affiliated with the Centre of Policy Studies and the IMPACT Project, Monash University, but submit this as a private individual.

J. S. Willis
Honorary Researcher

The following comments upon the Productivity Commission's Interim Report, *National Workers' Compensation and Occupational Health and Safety Frameworks* (October 2003) are made from the perspective of an injured worker. The remarks are confined to the area of workers' compensation.

There appear to be very few submissions to the Inquiry which have been either written by a workers' compensation claimant, or represent the viewpoint of a claimant. This fact is regrettable, for the experiences and views of this 'stakeholder' group are arguably the most significant of all, as a new system or 'framework' for the operation of workers' compensation is developed in Australia.

The following comments address four aspects of the Productivity Commission's Recommendations as outlined in the Commission's Interim Report on *National Workers' Compensation and Occupational Health and Safety Frameworks* (October 2003). These four aspects are:

- 1) The Need for a Non-Adversarial System or National Framework for Workers' Compensation in Australia.
- 2) Analysis and Research of Workers' Compensation Data.
- 3) Statutory Benefit Structures.
- 4) Dispute Resolution.

1) The Need for a Non-Adversarial System or National Framework for Workers' Compensation in Australia.

As the QBE submission to the Inquiry states, workers' compensation in Australia is primarily a form of statutory, 'no fault' compensation, although common law actions in negligence remain.

Perhaps it could be argued that because the Productivity Commission recommends that common law should not be included in a national framework for workers' compensation, the system envisaged may become less adversarial in the future.

However, there is no mention anywhere in the Commission's Interim Report of the 'revolutionary' (rather than evolutionary) approach that is recommended by the Australian Psychological Society (APS) in its submission no. 38 (pp. 3, 5, 9, 16, 22, 27, 28, 44) and in its supplementary submission (no. 165).

The APS (p.5) explains it thus:

The suggested change from an adversarial to a non-adversarial system is likely to be of a paradigm-shift kind. It would involve crafting a different role for lawyers and insurers, towards an approach much more like that now being employed in the Family Court context – reliant initially on careful evaluation of all claims, and making use of conciliation and conflict-resolution methods rather than making early use of formal legal avenues. The latter would be the basis for subsequent appeals if required...

Our suggestions include changing people's thinking about OHS and WC. In the WC systems in particular, there are many false or inadequate premises, wrong assumptions, defective mental models and associated biases and prejudices, that stand in the way of full system productivity and social value. Indeed they are actively damaging to some injured workers.'

I submit that a paradigm shift as envisaged by the APS to a non-adversarial model is absolutely critical to the needs of injured workers, whatever model or framework is eventually adopted in Australia. Currently, claimants are harassed and persecuted in the constant need to prove the validity of their claim. A more respectful environment would promote speedier recovery and save governments, employers and insurance companies costs. It would also provide a more appropriate 'framework' of care for some of the most vulnerable members of our society.

Hopefully the Productivity Commission's final recommendations will specifically acknowledge the need for such an attitudinal, administrative and cultural change in the development of a new model or national frameworks for workers' compensation in Australia.

2) Analysis and Research of Workers' Compensation Data

The Commission recommends (p. XXIX) the establishment of a new national body for workers' compensation. One of the main functions of this body would be to

'... collect data and undertake/coordinate analysis and research, and monitor and report on the performance of workers' compensation arrangements;...'

Several submissions to the Productivity Commission's Inquiry of 2003 have commented upon the dearth of data and have called for the need for more research regarding workers' compensation in general. There is an urgent need for research that documents the impact of administrative procedures of the workers' compensation scheme upon injured workers.

3) Statutory Benefit Structures

The Productivity Commission recommends in the Interim Report (p. XLII):

'a benefits structure should provide sufficient incentives for injured or ill employees to participate in rehabilitation. Benefit step-downs and caps are appropriate mechanisms for providing these incentives;'

Most submissions agree with this principle. However, most submissions made to this inquiry represent the interests of insurers, employers, government departments/statutory bodies, lawyers, rehabilitation providers, medical practitioners or academics. Only a small proportion represent the interests of workers' compensation claimants.

I challenge the assumption that 'step-downs' (automatic decreases) and 'caps' (maximum, or 'ceiling' amounts) of weekly benefits provide motivation for claimants to 'recover' and return to work more quickly than otherwise.

I suggest that most people want to return to the sense of participation and relative financial security of their job as soon as possible. When one is ill, one needs more money (for medications, treatments and support services) not less. The stress of having to manage on a less than normal wage in this situation and then to be subject to arbitrary 'step-downs' and 'caps' creates difficulties and prolongs recovery.

The assumption is that the insurer willingly provides the required medications, treatments and support services. This is not the case. It can take months or years for a claimant to fight for these necessities and, having won them, can see them disappear at the stroke of a pen.

Much of the research quoted by the Commission in favour of this principle has been carried out in the United States. However one cannot automatically extrapolate research findings from the United States - where the social, cultural and economic milieu is different - to the environment of workers' compensation in Australia. It is also relevant to ask whether one is measuring the outcome of step-downs and caps in terms of the monetary savings to the system or in terms of the emotional and physical health of the injured or ill employees.

I suggest that this is one area where the proposed new national body for workers' compensation needs to research, analyse, and evaluate data, particularly within an Australian context.

4) Dispute Resolution

The Productivity Commission's recommendations regarding dispute resolution are excellent in theory.

However, there remains the problem that agents/insurance companies may not follow the dispute resolution guidelines of the government statutory body that oversees their scheme. Other submissions to the Inquiry also mention that this can be a problem at times in regard to self-insurers.

A formal system of feedback and evaluation by claimants would help to reduce this problem. Once again this could be part of a general restructure of workers' compensation into a non-adversarial framework.

In conclusion, whatever model or 'framework' of national workers' compensation is selected and/or gradually implemented, I submit that it is critical from a claimant's point of view that there be a 'paradigm shift' to a system which is non-adversarial.
