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Your Ref:

3 February 2004

Our Ref: GFW:GAM:SSC:km:Acc Compn

The Chair
Workers & Compensation and OHS
Productivity Commission P 0 Box 80
BELCONNEN ACT 2616

Dear Chair

WORKERS' COMPENSATION INQUIRY

Thank you for granting the Society a hearing in Sydney in December 2003.

This brief submission is made in response to the Commission's invitation (renewed at the Public Hearings in Sydney on 4 December 2003). Two previous submissions have been made by the Society to the Commission and representatives of the Society have had the benefit of discussions with the Commission at the Sydney proceedings. This submission will endeavour to summarise the concerns previously expressed.

Aspects of the Sydney proceedings focussed on comparative data of Australian compensation schemes published in the Comcare Annual Report 2002/3. The Society had previously drawn attention to that report and submitted to the Commission that much pertinent data from that report should have been extracted and re-published in the Commission's Interim Report with appropriate dispassionate commentary.

The Society further submitted that the national data demonstrated that certain key findings of the Commission relied upon to sustain the recommendation that workers' common law rights should be abrogated were in error; specifically the finding that common law is more expensive than statutory schemes.

The Society understands that the Commission now accepts the desirability of a more detailed examination of the material referred to it in the Society's previous submissions and is assured that this will occur. The Society is hopeful that such additional work will enhance the report and should lead to the deletion or qualification of many of the anecdotal references drawn from the submissions of those philosophically opposed to common law remedies.

The Society's submissions canvassed specifically the following hard data:The

aggregated data published in the Comcare Report discloses:

- Queensland has enjoyed (in the five years reviewed in the report) the lowest premium rate of all States and Territories. That rate, currently 1.48% and effectively identical with the Comcare rate of 1.44% is well below the Australian average of 2.4%.

  Subject to the election provisions, full common law remedies are available to injured workers in Queensland and the report discloses that those states which have abrogated or severely restricted common law remedies in favour of whole of working life pension plans impose the highest premiums (New South Wales exceeds 3% of payroll).

- The Comcare Report also discloses that direct compensation paid to injured workers as a proportion of total expenditure is highest under the Queensland scheme, exceeding all States, Territories and Comcare.

- The Comcare Report discloses that contrary to the assertions of the Commission at Page 182 of the Interim Report, Queensland (with common law remedies) enjoys the second lowest rate of legal costs as a percentage of total claim costs at 7%; the same rate as Comcare's incurred legal costs relating to claims.

- The published data also discloses that Queensland, fully-funded with additional prudential reserves at 127% is the best funded of all State, Territory and Commonwealth schemes while demonstrating that state jurisdictions which have abrogated or grossly diminished access to common law remedies in favour of deferred long-term pension liabilities are insolvent by up to 35% of gross liabilities.

The Society submits that these key indicators demonstrate that Queensland is the pre-eminent scheme in all States and Territories and more than the equal of the Commission's favoured Comcare model. The Society submitted previously that the effectively uninhibited common law access should be accepted as a factor in the comparative outcomes of the various schemes. The Commission's response was to say that the pre-eminence of the Queensland arrangements and their reliance upon common law remedies was "coincidental".

It is the submission of the Society that such response is seriously inadequate and tends to reinforce perceptions that aspects of the report are less than dispassionate.

The Commission has recommended that the powers of the Commonwealth should be stretched to their fullest extent to over-ride State and Territory opposition by mandating profound changes to their respective compensation arrangements. Those changes include the abrogation of common law rights for many sections of the national workforce.

Any advocate for such a profound change to State and individual rights must carry the burden of justifying those changes. The more profound the change the greater the burden must be, and in turn the more comprehensive and persuasive must be the arguments of the proponent of change.

It is neither comprehensive nor persuasive for the Commission faced with the fact that the best performed State scheme over the last five years is the antithesis of the Commission's preferred model, to dismiss that apparently unpalatable fact as a "coincidence".

Even if the Commission was successful in developing some respectable argument that management including change or cultural management was a significant factor in the Queensland success, such argument does not advance the Commission's apparent desire to interfere in the Commonwealth/State equation to the detriment of State rights or to abrogate (in the name of the Commonwealth) the

fundamental rights of significant groups of citizens. Access to the Courts of this country by its citizens for the redress of civil wrong should not be removed because of a perception that the change management skills of the States may be unequal or because some special interest groups believe that adjudication by the Courts of the land is too uncertain.

The Society now refers to two further relevant reports. They are:

- The Workplace Relations Minister's Council Comparative Performance Monitoring (Fifth Report) and
- The Queensland Workers' Compensation Scheme 2002/2003 Statistics Report (The Workers' Compensation Regulatory Authority of Queensland

Much of the data in those reports is drawn from the material aggregated in the 2003/4 Comcare Report but some is new and some is presented in a more helpful format.

The reports reinforce the Society's earlier submissions that Queensland is the best funded of all State and Territory schemes and that those States which have moved to whole of working life pension-based no-fault compensation (as the Commission wishes to mandate) are in the majority of cases presently insolvent. The new reports also corroborate the low premium rate in Queensland and the fact that the highest level of compensation paid to injured workers as a proportion of total expenditure is paid in Queensland.

It is the Society's submission that these factors may go some way to explaining another "coincidence" disclosed in the data; namely that Queensland has by far the lowest disputation rate (6% compared with a national average of 14% and 350% less than the Comcare disputation rate of 27%).

Insolvency is not fatal to compensation schemes provided that governments maintain control of the levers, Many governments have created gross insolvencies in the schemes for which they are responsible. The New Zealand compensation scheme reached something of a record deficit at $NZ8.8 billion before terminating the majority of long term benefits in favour of a much reduced capital payout to the former recipients. The Wran New South Wales Government cynically slashed premiums for insolvent mandatory insurance funds pre-election. Provided that future employers and workers are not concerned by bearing increased premiums and reduced benefits to adjust for past excess, this course is always open.

The Society submits that recent and present insolvency of State funds which have deferred liabilities by providing no-fault whole of working life pension benefits may serve as a caution to the Commission such as may cause it to qualify some of its interim recommendations.

The Society's concerns with the Commissions' National Self Insurance Models are known to the Commission and are similar to the criticisms of the Commission's recommendation that the Commonwealth should intervene to erode and ultimately remove common law rights from the workplace. The Society repeats the Commission must carry and discharge the burden for its recommendations so far as they potentially affect the financial stability of State-run schemes and the capacity of each State and Territory to regulate their own industrial policies.

The reports commissioned from the Australian Government Actuary and from Taylor Fry do not with respect justify or support the Commission's recommendations. The Commission has not published the briefs delivered by it for any of the advice it has sought. That omission may colour the perception of the opinions of those who lack the benefit of the exact questions raised or the information provided in those briefs.

It is however clear that both actuarial reports are heavily qualified, uncertain and replete with warnings of potentially adverse results if the Commission's course is pursued.

The Society's second submission (26 November 2003) to the Commission deals with the risks to the Commonwealth to taxpayers (and ultimately to injured workers) which are identified in the AGA Report. There may be a perception that the facility with which the Commission has discounted or avoided the actuaries' qualifications and warnings (to the extent they are contrary to the Commission's preferred course) shows a boldness unlikely to be found in those who would otherwise face the potential of personal liability for engineering advice whether civil or social.

Similarly, the Taylor Fry Report in relation to the risk to existing State schemes by the Commission's proposals, is guarded and qualified on many issues and carries the conclusion that the likely cost facing self-insurers under the Commission's proposals will exceed that under existing schemes. The Taylor Fry Report draws attention to the fact that deferred liabilities created by Comcare-type pensions could add liabilities to employers' Balance Sheets which may ultimately grow to 50% of total payroll.

The Commission is aware of the Society's concerns regarding any compensation scheme which may visit an employer with a liability to pay a lifetime pension to a young worker disabled by a workplace accident in circumstances where there is absolutely no prospect of any breach of duty or negligence being alleged against the employer. Whether the employer is a large self-insuring corporation or a one-man business with a single employee, it is inappropriate to fix the employer with the massive liability of a lifetime pension. The circumstances of such no-fault welfare arrangements should properly be borne in part by the general welfare arrangements funded by the entire body of taxpayers for the benefit of the disabled.

Before closing these submissions it is suggested that the Interim Report could be further improved by the addition of a table drawing together the responses of the States and Territories and their relevant compensation instrumentalities to the Commission's Interim Report. It would be an advantage if the key points of support and of opposition to each recommendation by each State was presented in tabular form.

On behalf of the Society, I sincerely commend these submissions to you and thank you again for the courtesies extended to the Society's representatives at the Sydney proceedings of the Commission and for the opportunity to submit generally on these important issues.

Yours sincerely
President

Glenn W Ferguson