SUBMISSION

TO THE

PRODUCTIVITY COMMISSION

NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS INQUIRY

12 June 2003

Law Council
OF AUSTRALIA

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PRODUCTIVITY COMMISSION

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Summary

1. In response to the Productivity Commission's April 2003 *Issues Paper* in relation to its National Workers' Compensation and Occupational Health and Safety Frameworks Inquiry, the Law Council:

   (a) recommends that the national frameworks for workers' compensation should be a set of recommendations which can be adopted by the States and Territories if applicable (see paragraphs 10-13 below);
   (b) considers that, provided the issue of the categorisation of workers in cross-border issues is determined, then there would seem to be no justifiable reason for requiring mandatory national conditions and requirements in relation to self-insurance (see paragraph 14 below);
   (c) considers in relation to occupational health and safety ("OH&S") that, as for workers compensation, there is no need for national legislation – however a set of recommendations may be appropriate (see paragraph15 below);

(d) considers that recommendations in relation to OH&S should bear in mind that compliance costs relate more to the nature of respective schemes than to the divergent compliance required by cross-border employers, and give appropriate consideration to the compliance provisions which properly motivated employers are capable of meeting having regard to the location as well as the nature and risk of the enterprises undertaken (see paragraph 16 below);

(e) considers that the extent of workers' compensation benefit availability and the coverage of OH&S schemes should be considered at the State and Territory level, taking into account any national recommendations (see paragraph 17 below);

(f) in relation to benefit structures, considers that the checks and balances within individual schemes must be appreciated and considers that there may be some advantage in having, in respect of common law access, recommendations in response to the Negligence Review Panel report, with common assessment of damages for all personal injury torts (see paragraphs 18 and 19 below);

(g) considers in so far as there is cost shifting in respect of an injured workers' entitlement pursuant to any statutory scheme in the Commonwealth, it would seem that medical and associated benefits are payable pursuant to the respective scheme in place, rather than being shifted to the Commonwealth through Centrelink (see paragraph 20 below);

(h) early intervention, rehabilitation and return to work should be the prerogative of each of the States and Territories, however, there should be recommendations which can be taken up by the States and Territories as they wish (see paragraph 21 below);

(i) in relation to dispute resolution, reconfirms its position in paragraphs 7.15.1-7.15.6 of its submission to the Labour Ministers Council of April 1997 (see paragraph 22 below);

(j) considers that no overall common base for premium setting could viably address individual State and Territory issues –

however a “file and write” system, varying from jurisdiction to jurisdiction, could be put in place (see paragraphs 23-24 below); and

(k) considers that it does not matter whether workers’ compensation schemes are privately underwritten or government controlled provided they are tailored to their State or Territory and are affordable and equitable (see paragraph 25 below).

The Law Council of Australia

2. The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 36,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).

3. The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Queensland Law Society; and
- the Victorian Bar.

4. The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the

operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

5. The Law Council represents, through the representative Law Societies and Bar Associations, lawyers who act both for claimants, and for insurers and defendants.

Background to the Productivity Commission inquiry

6. The scope of this inquiry by the Productivity Commission into National Workers' Compensation and Occupational Health and Safety Frameworks approximates very closely the review and subsequent report provided by the Heads of Workers' Compensation Authorities (HWCA) Interim Report released in May 1996, which was responded to in the Law Council's submission of April 1997 to the Labour Ministers' Council. A copy of the Law Council's submission is **attached,** and forms part of the proposals made by the Law Council.

7. It is important to note that, except for agreement to address certain cross-border problems, none of the other initiatives or proposals of the HWCA's Interim Report were accepted by any of the States and Territories. It is therefore surprising that yet again, time and expense will be incurred in traversing the same kinds of issues.

8. It is relevant to consider matters raised in the earlier Law Council submission, namely:-

> "*1.4 On 20 May 1994 in Sydney, the HWCA was requested by the 54th Meeting of the Labour Ministers' Council to undertake the development of a detailed 2 year program to achieve substantially greater consistency in workers' compensation arrangements. More specifically, the Labour Ministers' Council directed HWCA to base its approach to national consistency "on excellence in service, design and delivery". That direction from*

the Labour Ministers' Council included a request to provide a common law option within the proposed structure of benefits payable to injured workers.

1.5 *At its meeting on 18 December 1996, the Labour Ministers' Council considered the Interim Report and requested that the HWCA finalise its report in particular on:*

- *a consistent definition of employee;*
- *two long-term benefit options, one with and one without common law;*
- *consistency in the earnings base and premium structure; and*
- *mutual recognition opportunities including self insurance and self management options. [footnote omitted]*

1.6 *At its December 1996 meeting, the Law Council passed a unanimous resolution adopting a policy in respect of workers' compensation and the preparation of a Law Council Submission being a detailed response to the HWCA Report. The Policy supports the following:*

(a) *A no fault workers' compensation scheme which is:*

(i) *affordable;*
(ii) *paid for by the employer, not the taxpayer; and*
(iii) *fair to the injured worker;*

(b) *A fully compensatory workers' compensation system which:*

(i) *is based on 100 years of judicially determined common law principles;*
(ii) *reflects the consequences for injured workers of negligent or unsafe practices or systems;*

(iii) *encourages best practice in occupational health and safety; and*

(iv) *allows the worker to take responsibility for his or her own future through a lump sum payment;*

(c) *Prevention of fraudulent practices whether by employers, contractors or workers;*

(d) *Sensible reform of administrative practices;*

(e) *Encouragement of early settlement of claims;*

(f) *Adequate rehabilitation, adequate medical care and adequate support for injured employees;*

(g) *A market-based competitive insurance industry; and*

(h) *Adequate enforcement of employers' insurance obligation.*"

9. This policy guides the Law Council in its response to the issues identified in the Productivity Commissioner's April 2003 *Issues Paper* in relation to this inquiry. The Law Council responds below to each issue identified in the Issues Paper (underneath the heading for each issue).

National frameworks

10. As an overview, it is relevant to consider paragraph 4.5 of the Law Council's earlier submission:

"*4.5 In Australia, the 1994 Industry Commission Report proposed changes based on criticism of the common law approach. The report attracted considerable discussion and commentary. The report was not accepted by any State or Territory. At a meeting*

of the Premiers and Chief Ministers of the States and Territories on 29 July 1994, a Communiqué was issued which specifically addressed workers' compensation. It was agreed that:

"…consistency and best practice in delivering workers' compensation could be best achieved through a co-operative process between States and Territories. This is an area where the States and Territories are delivering schemes which meet the needs of workers in each State and Territory and provide a degree of competition to keep the pressures on costs.

Premiers and Chief Ministers see no need for and strongly oppose the Industry Commission's proposals for a National Workcover Authority and a nationally available workers' compensation scheme, because of adverse impacts on rehabilitation of workers and increase premium costs for business."

11. The Commonwealth view was expressed by the Prime Minister's response on 24 March 1997 to the (Bell) Report of the Small Business Deregulation Task Force, which was to agree with that report's recommendation 16, which was in the following terms:

"*Recommendation 16*

That the Labour Ministers' Council agree nationally consistent workers' compensation framework principles to be mirrored in all jurisdictions.

That workers' compensation provide for mutual recognition of workers' compensation insurance cover obtained in other jurisdictions for employees operating temporarily in other than the States or Territories in which their employer is based.

That premiums be better focused on the circumstances of individual sectors and employer sizes, with risk related premiums where appropriate. Where risk related premiums are inappropriate, base premiums with penalties and bonuses based on performance and implementation of OH&S management strategies should be available.

That arrangements be available for small business to form groups to negotiate lower premiums and better strategies for rehabilitation, accident prevention and return to work arrangements.

That the proposed workers' compensation arrangements be in place by 1 July 1998."

12. Although the Law Council acknowledges that it is desirable to have commonality in both workers' compensation and schemes, it must be appreciated and factored into this aim that the States and Territories differ substantially. Again it is relevant to consider the following paragraphs from the Law Council's earlier submission:

"*7.8 The HWCA recommendations for income replacement are inequitable. Whilst the Law Council readily concedes the need for commonality with respect to definitions for key terms and the application of one common policy for employers with employees travelling inter-State, it would be inequitable to provide for uniformity "across the board" in respect of "benefits" or obligations upon employers for re-employment. The States substantially differ. We only need to contrast:*

(i) geographically – Western Australia and Tasmania

(ii) industrially – Queensland and Victoria

(iii) population base – Tasmania and New South Wales

(iv) economically – South Australia and New South Wales.

7.9 In the United States of America, these differences are recognised and acknowledged. The National Commission on State Workmen's Compensation Laws has developed 19 essential recommendations for a workers' compensation scheme. The essential recommendations are not mandatory – the States are able to determine or select which recommendations are relevant to their needs and capacity to implement – but there is not national uniformity."

13. The Law Council does not consider it likely that the States and Territories would accept an expanded Comcare based scheme nor a scheme which does not reflect the individual issues of States and Territories. At best what should be aimed for are recommendations which can be adopted by the States and Territories if applicable.

National self-insurance

14. Self-insurance is available under most schemes, and provided the issue of the categorisation of workers in cross-border issues is determined, then there would seem to be no justifiable reason for requiring mandatory national conditions and requirements. Employers who seek self-insurance vary in size in much the same way as the respective States and Territories where they operate.

The OH&S Model

15. Again it is submitted that there is no need for national legislation, but this does not mean that there can not be recommendations which can be adopted by the respective States and Territories if considered to be applicable and beneficial. It may, for instance, be desirable to have more restrictive provisions in highly industrialised States, as opposed to those where employers are more rural based in more diverse and isolated locations.

Reducing the regulatory burden and compliance costs

16. It should be noted that compliance costs relate more to the nature of the respective OH&S schemes than to the divergent compliance required by cross-border employers. Accordingly any recommendations should be drafted with this factor in mind and give appropriate consideration to the compliance provisions which properly motivated employers are capable of meeting, having regard to the location as well as the nature and risk of the enterprises undertaken.

Access and coverage

17. There may well have to be some limit on benefit availability under the various workers' compensation schemes in operation in the Commonwealth, but this will depend upon the financial viability of the schemes themselves and the capacity of employers to provide adequate funds. In relation to the OH&S schemes, likewise consideration should be given to their extent; for instance in New South Wales, compliance is required in respect to entrants upon premises who are neither employees nor invitees and would seemingly, as the legislation has not yet been tested on this point, extend to trespassers or illegal entrants. The extent of workers' compensation benefit availability and the coverage of OH&S schemes should be considered

at the State and Territory level, taking into account any national recommendations.

Benefit structures (including access to common law)

18. Reference is again made to the earlier submission by the Law Council and it must be appreciated that the individual schemes in place operated on checks and balances, with some being more restrictive in relation to compensation benefits, but more generous in relation to access to common law damages. It will therefore be inappropriate to take the most generous of all schemes as a template for recommendations.

19. There may be some advantage in having, in respect of common law access, recommendations in respect of liability and damages formulated in response to the Negligence Review Panel ("Ipp inquiry") report, with common assessment of damages for all personal injury torts.

Costs sharing and cost shifting

20. In so far as there is cost shifting in respect of an injured worker's entitlement pursuant to any statutory scheme in the Commonwealth, it would seem that medical and associated benefits are payable pursuant to the respective scheme in place, rather than being shifted to the Commonwealth through Centrelink.

Early intervention, rehabilitation and return to work

21. This should be the prerogative of each of the States and Territories. However, there should be recommendations which can be taken up by the States and Territories as they wish.

Dispute Resolution

22. Dispute resolution does differ as between the various State and Territory workers' compensation schemes. However, the Law Council reconfirms its position in paragraphs 7.15.1-7.15.6 of its earlier submission, namely:

"*7.15.1* *Dispute resolution is strongly supported by the Law Council. It is only effective when the parties understand their rights and obligations. The HWCA recommendations would emasculate the process of informed dispute resolution between the parties. We reject the intervention of "experienced gatekeepers" proposed in paragraph 9.106 of the Interim Report, as being invasive, cumbersome and not cost-effective.*

7.15.2 *The Law Council does not support the utilisation of medical panels to determine issues of fact not related to a worker's medical condition eg the extent to which the incapacity was caused by the disability. The Law Council also supports the view that parties ought to have the right of legal representation and the right to make submissions to a medical assessment panel on the basis that the determination is final and binding. The Law Council does not support the recommendation that the findings of medical panels should be final and binding on the decision maker.*

7.15.3 *The HWCA recommends that the "determination phase" of the dispute resolution process should be conducted by a specialist tribunal in each jurisdiction, with appeals from this body to the court system only on questions of law. The Law Council rejects this proposal. It would not support a system which effectively abolishes the right of*

parties to be represented before a specialist tribunal from which there is no right of appeal on a question of fact.

7.15.4 *The Law Council is fully supportive of the introduction of a system of conciliation and review, but with the right of the parties to be represented and with the right of appeal.*

7.15.5 *The Law Council is pleased to note that the Interim Report does not appear to be recommending the replacement of the adversarial system for the resolution of disputes by an inquisitorial process similar to that which now operates in Western Australia.*

7.15.6 *Since December 1993, Review officers in the worker's compensation jurisdiction have been authorised to perform an inquisitorial role in the determination of claims. Review officers are usually not lawyers. Whilst they usually have reasonable experience in the "industry", their lack of legal training has meant a significant increase in the potential for a miscarriage of justice. For example, claims are invariably determined on documentary evidence without witnesses being called and on the contents of conflicting medical reports, without the medical practitioners being called to give evidence.*"

Premium setting

23. It should be apparent that the divergence of the various schemes in relation to premium setting arrangements reflects the individuality of the employment forces in each of the States and Territories. These varied arrangements have no doubt had to be adopted to stabilise and secure the presence in each of the jurisdictions of their industries, thereby providing employment.

24. No overall common base for premium setting could viably address these issues. What could, however, be put in place would be the establishment of a "file and write" system requiring the insurer/fund managers to present proposed premiums for each new financial year which would need to be signed off by the regulators in each State and Territory. It would have to be appreciated, however, that the components which would be incorporated in this "file and write" system would vary.

The role of private insurers in workers' compensation schemes

25. Workers' compensation schemes are traditionally difficult to control, both in terms of premiums and benefits, and if a scheme can be devised which is tailored to the needs of each State and is affordable and equitable, it matters not whether it is privately underwritten or government controlled.

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