Your Ref:

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19 June 2003

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

Dear Chair

WORKERS' COMPENSATION INQUIRY

The Queensland Law Society appreciates the opportunity to submit to the Inquiry assessing possible models for national frameworks for Workers' Compensation. The submission has been prepared with the assistance of the standing Accident Compensation Committee of the Council of the Queensland Law Society. That Committee was established in 1972 to address the then current national compensation proposals of the Federal Government. It has had a continuous active life since that date.

The twenty-three strong Committee comprises a wide cross-section of Queensland legal practitioners experienced in all forms of Accident Compensation law and practice including specialist plaintiff and defendant practitioners, representatives of private insurers, representatives of self-insurers, the Motor Accident Insurance Commission and the WorkCover (Qld) Board.

The Committee has monitored all accident compensation schemes in Australia and has prepared and presented submissions to every Queensland State and most Federal Government Committees of Inquiries in any area of Accident Compensation throughout the last twenty-five years.

Workers' Compensation - The Last 20 Years

The Committee has been much involved in responding to various workers' compensation inquiries since the *Cooney Report (Vic) 1986,* the *WorkCare Report (Rowe) Victoria 12987, the New South Wales Green Paper (1986) the Doody Report (NT) 1984 up* to the *Sheahan Report (NSW) July 2001.*

The Committee has also been much involved in the HWCA Inquiry and Report (1994), (1996) and immediately preceding that, in the 1994 Industry Commission Report.

It is fair to say that the current Inquiry must remind all parties concerned of the commitment of many local governments to the invariably unprofitable waste recycling industry. Much of the scope of the present Inquiry seems to extend beyond the bare bones of a desirable and minimalistic framework for State and Territory compensation schemes and to open debate upon irreconcilable differences in those schemes which have been identified by governments as properly within the sovereign decision-making powers of the respective States and Territories.

It is interesting to note the remarks of the Policy Director of the Commonwealth Department of Employment and Workplace Relationships in his Paper to the National Workers' Compensation Summit, Sydney, 17 February 2003. That Paper gave a clear insight into the intransigence of Commonwealth Departmental thinking and the clear departure of that thinking from the views expressed by Parliament and various Ministerial and Chief Ministerial Councils. The Paper provides an example of the worse features of adversarial argument, cherry-picking, supportive matters, re-running old arguments and displaying an astute avoidance of all contrary facts and contrary respected opinion.

It seems, with respect, that that bureaucratic mindset has, to an unnecessary degree, penetrated the structure of the present approach to the Terms of Reference of this Inquiry into the need for a national framework.

It is particularly important to note that the proposals of the 1994 Industry Commission Report and the interim report of HWCA in 1996, were not accepted by any State or Territory. The Industry Commission was the subject of a special communique of Premiers and Chief Ministers of all States and Territories in July 1994 which expressly stated in rejecting the Commission's proposals that workers' compensation arrangements "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". The communique did not accept any need for and strongly opposed the Industry Commission's proposals for a national Authority pointing specifically to increased premium costs for business. Those views have been mirrored by the Prime Minister (March 1997) and more recently by the Labour Minister's Conference 30 May 1997 which was of the view that all options for detailed schemed design at State and Territory level should be a matter for the individual jurisdictions.

The common link in the rejection of the key HWCA and Industry Commission recommendations is a justifiable reluctance to interfere with the flexibility of administration of State-run schemes in a manner that may commit to an uncosted benefits liability and require surrender by State and Territory Governments of their sovereign capacity to independently fix key factors of industry policy.

Adoption of the proposals contained in the HWCA and Industry Commission Reports would entrench their position and powers at a time when all are devoting considerable energy to enhancing the principles of competition policy.

While the Queensland Law Society is on record in supporting the proposals of the Small Business Deregulation Taskforce for a nationally consistent set of "framework principles", that recommendation does not extend to the benefits structure or to fundamental choices such as the retention of unfettered common law rights. A consistent set of "framework principles" does not require, in the submission of the Society, legislative intervention by Federal Government and can be the subject of negotiation between interested parties to endeavour to cure anomalies such as the various definitions of 'worker", "employee" and "injury".

It is submitted that States must maintain the capacity to adjust compensation arrangement unilaterally and to take into account the significant differences that occur between States and Territories in respect of average wages, cost of living, mortgage/take home pay ratios, housing affordability, transport and infrastructure costs.

Any statutory framework which inhibits the flexibility of the States to fix policy is unnecessary, counterproductive and must be opposed.

National Frameworks

The Discussion Paper raises a number of heads for comment, the first of which is the viability of national frameworks and their capacity to deliver "comprehensive and consistent workers' compensation arrangements across Australia". The Issues Paper is, not unnaturally, coy in its failure to state clearly the fundamental tensions in any proposal for a presumably legislative "national framework" for workers' compensation.

It has been the consistent view of Labour Ministers Council and Chief Ministers Council during the period referred to above, that the States and Territories are delivering schemes which meet the needs of the workers in each State and that options for scheme design should remain a matter for those individual jurisdictions. The development of the schemes in the various jurisdictions in the past 10 years has seen the growth of marked differences in fundamental areas notwithstanding that the general agreement is that the several schemes do meet the needs of workers in each jurisdiction.

The various approaches to the treatment of long term (no fault) liabilities have resulted from time to time in extreme and gross under-funding with subsequent severe diminution of rights and benefits in the jurisdictions concerned. Some schemes are philosophically antagonistic to others in key areas. For example, there are schemes which have abrogated or severely limited access to common law while others retain, essentially unscathed, a full range of traditional common law remedies.

It is submitted that it is unrealistic to contemplate legislating for "consistent workers' compensation programs across Australia" or for a "consistent benefits structure". The existing Australian schemes are simply not amenable to a "one size fits all" approach. Matters such as common definitions can, as has been mentioned above, be addressed by amendments agreed between all jurisdictions and enacted in their respective legislation and no special Commonwealth legislation is required to effect that accord.

National Self-Insurance

The Society agrees that there is no justifiable reason for requiring mandatory national conditions. The elements relating to categorisation of workers in cross-border issues can be addressed by negotiations between States and Territories to reduce or eliminate conflict in key definitions and by careful consideration of policy wordings to embrace the individual conditions which may apply in the various jurisdictions where national employees may be called upon to work in the course of their employment.

Benefit Structure - Access to Common Law

This heading provides a clear example of the difficulty which will be faced by any superimposed national framework, in that the common law rights are supported firmly in some jurisdictions and abrogated in others. Common law rights are the only pathway which guarantees a workers injured as a result of breach of duty of the employer, access to compensation crafted to fully recompense the individual for the loss suffered by the individual as a result of the injury.

It is most disturbing to see the question "Should access to common law damages be part of any national Workers' Compensation framework?" raised again in this present Paper. Before proceeding further in the response to your Paper, the Society would briefly outline the present Queensland position.

The Queensland Position 2003

Queensland has the lowest rate of workers' compensation premium for employers at 1.55% (mean) of payroll. That rate has applied for the past two years and will apply next year. The rate is significantly lower than all other States and Territories and indeed is much lower than would first appear when regard is had to the deductibles that apply in many other jurisdictions in relation to no fault liability workers' compensation claims.

The Inquiry is particularly directed to those deductibles which apply by way of limiting payments for injuries to those (excluding medical expenses) which endure for more than five days (off work). The true cost to the employers in States which carry such deductibles can best be measured by the additional premium which is charged in those jurisdictions to employers who wish to avoid bearing the deductible. That additional premium, when added to existing premium, results in some cases in Queensland having the lowest premium by a factor of 4:1.

At the same time Queensland maintains access to common law benefits for injured workers and the scheme including common law remedies is fully funded.

Queensland does not have the exposure to long term no fault liabilities which has caused gross under-funding **(technical insolvency)** to the pension-based schemes in some other jurisdictions. Queensland has achieved an outcome that delivers full common law access to injured workers, provides a no fault safety net for those workers while remaining financially viable and levying the lowest level of premiums faced by employers anywhere in Australia. The procedures developed in Queensland to contribute to this outcome are many and they include in respect of common law actions, statutory provisions facilitating early settlement by structured and compulsory pre-court process and restrictions upon legal costs.

There is substantial separation from government of the WorkCover Authority responsible for the administration of these processes in Queensland. That separation has served Queensland well by diminishing or excluding political pressure for pre-election pork-barrelling with compulsory premium levels. Political pork-barrelling and fundamental underwriting principles cannot co-exist.

Structures can be developed to contain costs without the arbitrary abrogation of citizens' rights as must necessarily follow from the introduction of any inhibition upon the right to bring common law claims. In addition, there is ample evidence that access to common law remedies facilitates rehabilitation rather than inhibiting rehabilitation in any way.

It is the contention of this submission that the Queensland scheme, including common law remedies, is the pre-eminent workers' compensation scheme in Australia. It is affordable, fully funded and maintains the traditional rights of injured workers to seek individual compensation assessments that recognise the specific circumstances that the individual claimant brings to each case.

Costs Sharing and Costs Shifting

This issue, together with the issues or rehabilitation, dispute resolution, premium setting, private insurance and related matters, have all been addressed at length in the Society's comprehensive (19 pages) paper to the Industry Commission Inquiry in 1993. A copy of that submission (under cover of the Society's letter of 29 November 1993) forms an annexure to the hard copy of the current submission and deserves careful consideration.

In relation to the issue of cost shifting (which is dealt with at length in the 1993 submission) it is sufficient to reiterate that only 30% of the Australian population are engaged in private sector enterprise. An additional 30% are the non-working dependants of those engaged in the private sector. All of the balance of the Australian population (exception self-funded retirees), rely wholly or in part upon the public purse for disabling injury. To require private employers to be responsible for health costs, rehabilitation costs and (up to 95% pre-accident earnings) whole of working life pension in respect of employees seriously injured through no fault or breach of duty by the employer, is both impractical and grossly unfair.

It is the submission of the Society, the safety net to maintain the long term unemployed is the responsibility of the entire community and should be funded from the widest possible tax base including income tax and all indirect taxes.

If potential employers are at jeopardy of responsibility for prior injury or chronic poor health, employment opportunities and rehabilitation opportunities must rapidly diminish for those who do not enjoy youthful good health.

Early Intervention and Rehabilitation

It is submitted that it is impractical and unworkable to render industry responsible for working life pensions at rates similar to pre-accident remuneration (where there is no breach of duty). Working life pensions can be demonstrated to operate as a disincentive to rehabilitation. That disincentive is not present where once and for all common law awards are made or where redemption of weekly pension rights is available. A number of eminent specialists support this view. See, for example, Dr Naomi Wing, Department of Rehabilitation Medicine, Royal South Sydney Hospital:

> "Periodic payments do not make the disabled self-reliant, instead they make them dependant and the disabled lose all motivation to improve their status. Such payments do not allow closure but continue and reinforce the accident process".

Similarly Dr Paul Koran, a leading psychiatrist and Victorian Government WorkCare Review are quoted at length with identical sentiments in the Society's submission of 29 November 1993 to the Industry Commission. Those observations are commended to you.

Premium Setting

The Society does not believe that there is any place for national intervention or guideline in structures for premium setting. The Society refers to and repeats the observations in the earlier submissions to the Industry Commission that premium fixing where common law claims are available can have effective regard to penalty premiums and bonus refunds which can be demonstrated to have greater deterrent impact upon the employer than draconian criminal sanctions for perceived inadequacies in workplace systems.

Your Inquiry is directed particularly to the actuarial support for that view.

The Society will be happy to respond to questions arising out of these submissions and affirms that it sees no need for Commonwealth legislative intervention in workers' compensation in any manner which has the capacity to diminish the present flexibility of States in the creation and management of their respective workers' compensation schemes.

Yours faithfully

Tom Sullivan
President