Queensland Council of Unions

Response Submission to the

Productivity Commission's Interim Report

"National Workers' Compensation & Occupational Health and Safety Frameworks"

28 January 2004

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▪ INTRODUCTION

The Queensland Council of Unions (QCU) is the peak body for Unions in Queensland. The QCU represents 40 affiliated Unions and approximately 350 000 Union members in Queensland.

The QCU has been closely involved in negotiations with the State Government regarding the current workers' compensation and workplace health and safety legislation. We continue to regularly discuss these matters with the State Government and employer bodies.

The QCU supports an approach towards national consistency in both workers' compensation and workplace health and safety regimes. The QCU totally opposes any national approach that seeks to reduce standards to the lowest common denominator.

Whilst the QCU supports an approach towards national consistency in workers' compensation standards, we oppose the establishment of any national scheme that may erode the state regimes. The Queensland Workcover scheme is a financially viable one that currently serves the needs of both employers and employees. Any national approach must not adversely affect this.

The QCU strenuously opposes any national self-insurer scheme. There is no doubt that such a national scheme would seriously undermine the current strong Queensland scheme to the detriment of workers and small and medium businesses in Queensland.

The QCU submits that any workers' compensation scheme must provide early intervention strategies that facilitate a swift return-to-work, adequate and timely statutory compensation to ensure common law proceedings are not necessary and adequate employer contributions that ensure any scheme is financially viable and that such contributions also act as a deterrent to poor safety and injury-management practices.

The QCU submits that the state and territory level is the best suited level to manage such schemes. Further, any national approach should be used to ensure that best practice that accommodates a changing workforce, as well as the needs or employees and employers, is promoted and utilised in all both workers' compensation and workplace health and safety regimes.

The Queensland Council of Unions fully supports the submission by the ACTU and wishes to expand on the following issues:

1. NATIONAL FRAMEWORKS FOR WORKERS' COMPENSATION

The QCU has a policy position that all employers should be in a common, no fault workers' compensation scheme and thus opposes self-insurance for employers for the following reasons:

- There is no evidence to demonstrate that self-insurance delivers an improved workers' compensation and claims management system. The inherent conflict of interest in the employer being both the employer and the insurer is often ignored by legislators. There is an imbalance of power between the employer and an injured worker which is not present in the 'arms length' relationship which exists with an external workers compensation insurer;

- Workers' compensation is a no fault compensation and rehabilitation issue and should be treated as a general injury insurance issue which aims to provide fair, just and secure entitlements free from the direct employment relationship;

- There exists a culture of rejection of claims within self-insurers due to the drive to cut costs. This seriously impacts on rehabilitation and timely settlement of claims. This is contrary to the interests of injured workers;

- There is a lack of effective Government control or regulation of the insurance industry in general and particularly, where employers who self-insure adopt practices contrary to best practice claims management systems. The Productivity Commission report does not address this issue.

The QCU has found that some self-insurers have trouble separating their role of both insurer and employer. This makes the equitable management of workers' compensation claims very difficult. Often the same work unit or even the same individual may manage day to day industrial issues which may include disciplinary proceedings. That work unit or individual may also manage workers' compensation claims. This potential conflict of interest may hinder the effective management of claims and give the appearance of a process that is biased against claimants.

The QCU is opposed to the development of a new national scheme for the following reasons:

- Employers who operate across states are currently able to join the Comcare scheme and have chosen not to because of the provisions offered to injured workers. The QCU is concerned that any new national scheme is merely an exercise in setting up an alternative national scheme that reduces overall current provisions for injured workers and a race to the lowest common denominator.

- The exodus of large and some medium-sized employers from state schemes would place the current state schemes in financial jeopardy. In the case of Queensland, a financially sound scheme could be placed at great risk.

The Queensland Workcover scheme is guaranteed by the Queensland Government. There are a number of stringent prudential safeguards in place. The Queensland scheme also has safeguards against the insolvency of a self-insurer. The QCU is concerned that a national scheme that did not offer adequate prudential safeguards may risk workers entitlements. Further to this the report fails to outline the claims management process or workplace health and safety requirements. Therefore there can be no confidence from any stakeholder that the proposed scheme would be viable or workable.

The sudden exodus of large employers to any national scheme would result in the remaining employers facing increased premiums. Small and remaining medium businesses would be most affected by this. The state scheme would be seen as an insurer of last resort. This major issue and its impact needs to be given more consideration in the report. It is only addressed briefly in the report.

Recent initiatives by Queensland, New South Wales and Victoria regarding cross-border coverage provide a solution regarding the issue of interstate coverage. This has been identified in the Productivity Commission report.

The QCU would support a national advisory body that could monitor, report on and make recommendations regarding the performance of state and territory regimes to ensure best practice for all stakeholders.

Defining Access and Coverage

The QCU submits that any definition of employee must not be exclusive. Any definition must not exempt any person currently covered in a workers' compensation scheme.

Any definition must include casual employees, volunteers, labour-hire employees, outworkers or any employees defined as contractors or sub-contractors designed to avoid WHS or workers' compensation obligations. Sham employment arrangements aimed to avoid premiums must be exposed and eliminated.

The profile of the workforce is dynamic. Methods of employment are more tenuous than ever before. Workers' compensation schemes must be able to cover all workers, no matter the type of engagement. The QCU agrees that any scheme must be flexible in ensuring that changing work arrangements can be included and coverage broadened to include workers who may not be covered.

The QCU is concerned in relation to the recommendations regarding work-related injuries especially in regards to the definition and test of a workplace injury.

The QCU supports the test for workplace injuries being "significant contributing factor" so that injuries where work is a significant factor to an injury remain covered.

We totally reject the definition being "major contributing factor" as it places the test far too high and eliminates injuries that have legitimately occurred as a result of a worker's employment.

It is essential that any workers' compensation scheme acts to adequately compensate workers who are injured as a consequence of their work. The test of "major" rather than "significant" has the effect of eliminating legitimate claims for injuries that are sustained in the course of employment. This is an undesirable outcome for both workers and the Federal Government. Workers excluded from making claims would have to rely on the social security system for payments rather than via workers' compensation. This is contrary to the object of the Productivity Commission's objectives in this review as one of the objectives of the commission was to improve occupational health and safety in workplaces. The only outcome of setting the test at "major" rather than "significant" would achieve would be to reduce the number of legitimate workers' compensation claims but do nothing to improve workplace health and safety in the workplace.

The QCU strongly believes that journeys to and from work must be included in any workers' compensation scheme and totally opposes any removal of this provision. We do not accept that lack of control by an employer is a reason for omitting this important provision. There are many situations in employment where the employer cannot control the employee eg walking to meetings in another building and labour hire situations. The QCU submits that but for work, the worker would not be in the situation and therefore should be entitled to a no fault workers compensation scheme.

Full coverage must be afforded to recess, meal breaks and work-related events. Not to cover these times is inequitable in that a worker may be subjected to control such as disciplinary action and/or rostering. This creates an anomalous situation where a worker is in the employers control but not covered for injury, particularly if rostering arrangements have made it impossible for workers to leave their workplace during breaks.

Injury Management

The QCU supports rehabilitation to the current position as a major priority. The QCU submits that safeguards must be placed around rehabilitation and return to work plans such as:

- Workers must have the right to access their own doctor and develop a suitable rehabilitation plan without unreasonable employer interference. The Queensland Act provides that rehabilitation plans must be agreed to by the treating doctor and prepared in consultation with the injured worker. Any changes to the rehabilitation plan must also be agreed to by the treating doctor. Any breaches of the rehabilitation process may be referred to the regulator (Q Comp) for investigation.

- Employers must not have the power to refer an injured worker to an employer-nominated doctor if the employee is being treated by their own doctor.

- Employers must be required in legislation to provide suitable rehabilitation and to cooperate with rehabilitation and return to work plans for injured workers. Employers should also be subjected to penalty, as workers are who fail to co-operate with rehabilitation plans, when unreasonably refusing to provide adequate rehabilitation to injured workers.

Common Law Access

The QCU is opposed to any diminishing of an injured worker's ability to access common law and will not support removal of this right to injured workers in Queensland. Unfortunately, entitlements under workers compensation can be removed/amended through legislation by governments, which often results in reduced benefits and/or stricter definitions of worker, injury, etc. This does nothing to improve OH&S performance, but reduces workers compensation costs at the expense of injured workers' benefits. Common law is viewed as an absolute right to seek damages where the negligence of an employer has caused injury and where statutory entitlements under the no fault scheme are not adequate to fully compensate the injured worker.

There should be no restrictions on the compensation available under common law. There is no evidence to suggest that this has interfered with effective rehabilitation and return to work plans, in fact, this issue has never been raised in Queensland where such a successful system exists.

Compensation based on a scale of percentage of impairment may not reflect the effect the injury has on a worker's ability to be carry out the requirements of a job. This means compensation awarded via a scale of percentage may not adequately compensate an injured worker for the effect the injury has on their ability to perform tasks required in employment. Common law action can correct such occurrences.

Common law action is also an effective tool in ensuring that employers improve occupational health and safety in the workplace where negligence has been established.

Workers may have had an injury incorrectly assessed and denied fair and adequate compensation under a statutory scheme. Common law proceedings allow this to be corrected thus ensuring workers are appropriately compensated. As stated earlier, a fair and timely offer of compensation under a statutory scheme will ensure that injured workers will not access common law proceedings.

Statutory Benefit Structures

The QCU submits that any scheme should provide appropriate compensation for injured workers. Whilst the QCU fully supports rehabilitation for injured workers, it is essential that benefits are not so 'low' as to force injured workers into rehabilitation prematurely.

Lump sum payment must be retained for injured workers suffering a permanent impairment with no minimum impairment thresholds. The QCU does not support any minimum thresholds and believes that all injured workers should receive and be entitled to statutory lump sum payments for permanent impairments regardless of severity.

Premium Setting

The QCU submits that any scheme needs to be adequately funded by employers and supports an experience based rating system.

The QCU requires further information regarding incentives for preventing workplace fatality, injury and illness and promoting rehabilitation and return to work before we can support or reject such a proposal. We believe that any incentives should go well beyond meeting legislation requirements in such instances and employers should not be rewarded for merely meeting their legal requirements.

The QCU submits employers who do not provide a safe workplace and/or appropriate rehabilitation should be penalised via increased premiums using an experience rating system.

The Role of Private Insurers

The Queensland scheme is a viable, sustainable one delivering the lowest premiums in the country. It is a Government Statutory Authority with no private insurers. The schemes that use private insurers are no better off and are indeed worse off than this statutory scheme. No case has been made by the Productivity Commission that sustains the need for private insurers. The QCU is totally opposed to a role for private insurers to provide coverage under all schemes.

The QCU opposes outsourcing of the functions of the public schemes. There is no evidence that the private sector can provide a more efficient system with greater prudential protections than the public system.

Self –insurance

The QCU is opposed to self-insurance, however as self-insurance is a reality, the following strict requirements must be included in any self-insurance scheme:

- Self-insurers must adequately resource any workers' compensation section to ensure that claims are processed expeditiously. Any conflict of interest between workers' compensation claims management and other industrial practices must be avoided;

- Self-insurers must be strictly regulated to ensure full compliance with legislation, regulations and equitable claims management. Any breaches should result in the loss of a "self-insurance licence";

- Licence fees must be adequate to insure that any public schemes are adequately compensated for large employers being self-insurers, otherwise small and medium businesses will have to subsidise the public scheme;

- Any self-insurer must be adequately resourced to ensure all obligations are able to be met, must demonstrate OH&S requirements, and only apply to large employers based on minimum employee requirements as this is essential in ensuring maximum operational value. The QCU rejects the findings of the Commission in this matter.

Dispute Resolution in Workers' Compensation

The QCU submits that any scheme must include a review process that is transparent, consistent, equitable and low cost.

The QCU submits that injured workers should have the right of appeal to the appropriate jurisdiction on all matters. This cannot be a financial burden on the injured worker.

The current Queensland scheme allows a non-adversarial, prompt review by the regulator (Q Comp) where a party is aggrieved by a decision from an insurer. The aggrieved party must make an application for review within three months of receiving the decision. Q Comp must review the decision by the insurer and make a decision within 35 days.

If a party is aggrieved by the decision of Q Comp, it may be appealed to the Magistrates Court. A decision by a Magistrate can be appealed to the Industrial Court.

The QCU submits that the use of medical review panels must not be used to unreasonably delay claims and must be used on questions of medical opinions only and not on questions of causation.

The QCU supports in theory the use of voluntary alternative disputes resolution processes. The details of any alternative disputes process needs to be outlined before the QCU can indicate support. An alternative disputes process must be voluntary, cost-efficient and non-adversarial.

The QCU submits that employer-initiated appeals be limited to genuine cases and that employers should be penalised for the lodging of frivolous or vexatious appeals. Self insuring employers should be prohibited from appealing claims submitted through the review process, i.e., they cannot be the insurer one day and then the employer the next should the review not go their way.

2. NATIONAL FRAMEWORKS FOR OHS

Incidence of injury and illness

The Commission has used workers compensation data to measure the incidence of injuries and deaths, and claims that the frequency is decreasing. This claim should not be made since the reduction in workers compensation claims has not arisen from improved OHS performance, but has occurred due to factors such as:

- Labour market shifts where increased self-employment and casualisation has rendered significant numbers of individuals ineligible for workers compensation. Many of these people are concentrated in extremely high-risk industries such as construction. Since work in non-traditional forms of employment is increasing, a reduction in claims will continue to occur independent of safety improvements;

- Ongoing difficulties with judging the number of occupational diseases due to the latency gap between exposure to causative agent and diagnosis and therefore with proving work-relatedness. For example, the marked increases in death from asbestos-related causes has not been reflected in workers compensation claims;

- Increased self-insurance and therefore increased rejection of claims which would previously have been granted.

Regulations

The Commission has argued that prescriptive regulation should be restricted. However, the parties to the National Occupational Health and Safety Strategy 2002-20012 agreed that a mix of performance-based and prescriptive regulations was central to improvements in OHS.

This national strategy has already formed the basis of significant activity (including tripartite input from employers and unions through the Industry Sector Standing Committees).

The majority of Queensland workplaces are small (<10) and have very few resources for OHS. Performance based and risk management-based legislation is best for large employers with WHSOs or specialist or dedicated OHS personnel. Prescriptive regulation removes doubt and clarifies legislative expectations for small business without this expertise.

Consultation

The QCU supports the ACTU submission in respect to the increased level of safety performance where WHS Reps and committees are present.

Enforcement

In Queensland there is a balance between education and enforcement (including the current introduction of enforceable undertakings) for achieving compliance OHS legislation. Education, however, is not a substitute for enforcement. The penalties for causing injuries, illnesses and death should reflect the seriousness of the problem, both to the worker and their family, and the cost burden on the community via the social security and public hospital system.

Changing working arrangements

The QCU supports Michael Quinlan's research cited in report; subcontracting, outsourcing, self-employment and other precarious employment has exposed workers to increased OHS risks and decreased access to compensation.

Precarious employment is increasing and the Queensland legislation has recently been changed to place obligations on labour hire companies and host employers. This legislation has yet to be tested.

OHS & IR

The division between IR and OHS is artificial. The greatest number of injuries are manual handling injuries and control measures involve consideration of staffing, work rates, work breaks and other issues. The increasing focus on psychosocial issues such as stress, violence, harassment and shift work all involve issues relating to working conditions and systems of work.

Enterprise agreements and awards are an appropriate place to advance OHS. Legislation reflects minimum standards, workplaces should be able to agree on above minimum working conditions and have these formalized.

NOHSC

The QCU supports the role of the NOHSC as the national body to develop health and safety standards and believes that the resources should be increased and that it must remain tripartite.

National Strategy

- The QCU support the National OHS Strategy and has done considerable work towards implementing the strategy through the tripartite process with Department of Industrial Relations (WHS) through the Board and Industry Sector Standing Committees.

National Framework

The QCU supports the development of national standards by NOHSC and the implementation of these in Queensland. This will lead to a greater consistency for workers and employers across jurisdictions. The QCU will continue to work with Department of Industrial Relations for their adoption in Queensland

Commission's framework

The QCU supports consistency across jurisdictions for OHS. The Commission's consideration that companies should be free to choose to operate under either a national or state OHS regime is not a good idea because companies would chose the lowest-penalty/lowest imposition option.

The Commission does not state how providing companies with this choice would reduce injuries, illnesses or deaths but appears to base most findings solely on economic grounds and not on best practice in the delivery of workplace OH&S.