

**SUBMISSION BY THE WORKERS' COMPENSATION AND
REHABILITATION COMMISSION OF WESTERN AUSTRALIA**

TO THE

**PRODUCTIVITY COMMISSION INQUIRY INTO NATIONAL WORKERS'
COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY
FRAMEWORKS**

RESPONSE TO THE PRODUCTIVITY COMMISSION'S TERMS OF REFERENCE

- a. a consistent definition of employer, employee, workplace and work-related injury/illness and fatalities relevant to both workers' compensation and OHS that could be adopted consistently across Australia.**

The Workers' Compensation and Rehabilitation Commission (the WCRC) supports the concept of establishing consistency in the definition of terms such as "employer", "employee", "workplace" and "work-related injury/illness and fatalities" relevant to both workers' compensation and Occupational Health and Safety (OHS). However, the Productivity Commission should be aware that particularly in relation to workplace injury/illness the relationship may vary as OSH legal coverage extends beyond workers' compensation cover.

National consistency has been the subject of various reviews from the Industry Commission Report of 1994 to the recently completed Royal Commission into the Building and Construction Industry. Attempts have also been made through national bodies such as the Heads of Workers Compensation Authorities (HWCA) and the Labour Relations Ministers' Council, however, establishing national consistency has proven to be problematic. It is suggested that the Productivity Commission (the Commission) consider these previous reviews and the possible reasons why the recommendations of these reviews were not implemented in part or in full as part of this current inquiry.

The issue of coverage has been raised at a national level through the HWCA and the Productivity Commission should be mindful of the following recommendations made by the HWCA in its report, *Promoting Excellence: National Consistency in Australian Workers' Compensation*:

- The common law concept of employment should be the fundamental determinant of coverage as a worker under the Workers' Compensation system, and that coverage should not be extended to the self-employed.
- The boundaries of eligibility should be broadened to include contractors who are incorporated, but who operate as a sole proprietor or in a partnership, in circumstances where they are deriving a personal service income from predominantly one organisation.
- There should be standardised categories through which deemed coverage could be granted to certain classes of worker while deeming other categories of worker not to be workers. Jurisdictions would also have the ability to add marginally to this list in the light of local conditions.

As reported to the Royal Commission into the Building and Construction Industry, one of the most significant problems WorkCover WA has identified revolves around employers in the building industry not insuring workers. This appears to be based on a misconception by builders and contractors that individuals they engage on a subcontract basis are not workers, but are treated as independent businesses, responsible for running their own business. In considering a standard definition of the term “worker” there is need to ensure clarity in the definition, particularly in relation to issues such as superannuation, industrial relations and taxation, and for it to be broad enough to cover the changing nature of work in Australia.

b. a consistent benefits structure that provides adequate levels of compensation, including income replacement and medical and related costs, for injured workers and their families.

The concept of consistent benefit structures is supported in principle. In terms of the process for achieving national consistency the Commission supports a cooperative approach between the States and Territories through bodies such as the HWCA, as opposed to the models identified in the Issues Paper.

It should be noted that national consistency has previously been considered by the HWCA, however, as there are ten different systems with significant structural difference, it is difficult to see how a single model can provide consistency in the area of workers’ compensation without serious dislocation to individual schemes.

Consideration of the interrelationship between the statutory and common law system is important (see item c.). If common law was to be further restricted, a more attractive statutory benefits scheme as an alternative to common law, would be necessary.

c. the implications of retaining, limiting or removing access to common law damages for work-related injuries/illness and fatalities on the models identified.

A uniform position on either retaining, limiting or removing access to common law damages would have serious implications for schemes, depending on whether common law is currently included or excluded. Where common law has been abolished there has generally been a commensurate increase in the statutory benefits and entitlements in the relevant compensation legislation. The issue of balance between common law claims and statutory benefits is therefore a matter for careful consideration.

With respect to schemes that allow access to common law, there is wide variation across schemes in terms of limitation of access and types of damages awarded. Some schemes restrict claims for certain types of loss, and access may be limited by minimum impairment and entitlement thresholds, and maximum benefit levels. The stage at which an injured worker must elect between statutory compensation and common law also differs significantly across schemes. There would be significant implications for schemes in attempting to develop national consistency in these areas.

d. the most appropriate workplace based injury management approaches and/or incentives to achieve early intervention, rehabilitation and return to work assistance to injured workers and to care for the long-term and permanently incapacitated, including the opportunities for re-employment or new employment of people with a compensable injury, and the incentives and disincentives for employers with regard to the employment of workers who have suffered a compensable injury.

Seven key principles identified as underpinning an effective injury management approach are:

1. recognition that employers and injured workers are the primary stakeholders within the workers' compensation system;
2. maintenance in or a safe return to work is the expected outcome for injured workers;
3. medical practitioners and employers play a central decision making role in the return to work of injured workers;
4. the focus of all services should be workplace based;
5. the injury management process should be a transparent, cost efficient and effective process;
6. early intervention and proactive injury management is critical in achieving return to work goals; and
7. when vocational rehabilitation is required all parties are involved in a process that is transparent and requires joint decision-making.

It should be emphasised that injury management is impacted by systemic structures, therefore consideration should be given to ensuring that the statutory and common law frameworks support the principles of injury management and do not create a disincentive to return to work.

The WCRC Commission endorsed the principle of injury management in 1999 and the WA Government is currently preparing legislation to further enhance its effectiveness.

e. effective mechanisms to manage and resolve disputes in workers' compensation matters that:

- i. encourage the development of internal dispute resolution processes by employers;**
- ii. encourage the involvement of the employer, the employee, and insurers/schemes;**
- iii. encourage the use of alternative dispute resolution including mediation and conciliation; and**
- iv. retain an appropriate appellate structure for employers and employees.**

Many of the tensions inherent in workers' compensation systems are revealed in the area of disputes and setting the rules to govern dispute resolution is considered an essential part of the framework.

It is the Commission's view that the alternative dispute model is more appropriate to workers' compensation than the traditional adversarial model as disputation is minimised, the exchange of information is encouraged and facilitated, and the chance of a satisfactory negotiated outcome is maximised. Unlike the traditional adversarial systems, the alternative model is conducive to maintaining an ongoing employer/employee relationship and strategically intervenes to direct parties away from confrontation. It appears that schemes using alternative dispute resolution models at the early stage of disputes are more effective at reducing costs and delays. However, dispute resolution frameworks need to be reinforced by the development of strong practice directions to enable the enforcement of timelines and effective disposal of minor claims.

In the 2001/02 period, 77% of disputes were resolved through conciliation in the Western Australian dispute resolution process, which is indicative of the effectiveness of the alternative dispute resolution model.

- f. the premium setting principles necessary to maintain fully funded schemes while delivering to employers equity, stability and simplicity. In doing so, the Commission is asked to identify models that provide incentives for employers to reduce the incidence of injury and improve safety in the workplace.**

The Commission supports the HWCA principles outlined below, noting they accord with current provisions under the WA scheme:

- remuneration should be the appropriate variable factor for calculating premiums, provided the definition of remuneration remains constant over time;
- the premium classification system should be industry based, using standardised industry codes (i.e. ANZSIC);
- premium systems should be based on key principles of equity, stability, prevention incentives and simplicity;
- experience rating and/or bonus and penalty factors should apply to all employers. This provision is achievable in WA by means of multi-insurers, industry classifications and the ability of insurers to discount or surcharge on recommended rates (It should be noted that small employers must be considered as a group/pool because a single incident could result in a risk rate the following year, which would push the business out of operation); and
- premium rates must be sufficient to ensure a fully funded, financially viable scheme.

Given WA operates a privately underwritten scheme, the WCRC does not support the use of direct financial incentives for employers because in a privately underwritten scheme, market forces will apply and there is usually no direct relationship between the financial incentives offered and improved OHS and claims performance. Depending on the funding arrangements, incentive schemes can also involve significant cross subsidisation.

- g. a regulatory framework which would allow suitably qualified employers to obtain national self-insurance coverage that is recognised by all schemes.**

The WCRC does not support a centralised arrangement for national employers, for example, administered under the umbrella of an expanded Comcare model. While it is appropriate for the Commonwealth Government to deal with its workforce in this manner there is real concern at the creation of a two level process within a State where workers and employers are dealt with differently when the same circumstances apply.

The HWCA has considered the issue of national self insurance and recognised the need for simpler administrative processes to be satisfied in order to self insure nationally. It suggested that an application for national self insurance could be lodged with the jurisdiction where the company's head office is located. That jurisdiction would then liaise with the other responsible jurisdictions and, with their approval, coordinate the issuing of self insurance licences by each jurisdiction under an umbrella self insurance arrangement. Where a national self insurance licence has been granted to a company, a jurisdiction would then be able subsequently to revoke the application of that licence in that jurisdiction should the jurisdiction consider the action justified.

It is the WCRC's view that the setting of prudential requirements and operational matters such as service delivery requirements should remain with the jurisdictions, although consideration may be given to a uniform framework for registration only.

There are concerns that the departure of large employers could have a negative impact on residual premium pools. Premium systems require industry premium pools of sufficient size to reduce the pendulum effect of large claims.

It is essential the appropriate percentage balance between underwritten and self insurance is maintained for the workers' compensation system to achieve long-term stability.

- h. a regulatory framework which would allow licensed insurers to provide coverage under all schemes. In doing so, the Commission should identify and assess the likely impact on employers, employees and the wider community from the introduction of competition, including on the level of premiums;**

The WA workers' compensation scheme is based on a multi-insurer, free enterprise model. Insurance companies are not restricted from accessing the workers' compensation insurance market in WA provided they meet certain prudential and service delivery requirements, as provided under section 161 of the Act.

The system provides for an approved insurer and employer to negotiate a premium based on a recommended "gazetted rate". The current system is designed to encourage market forces to operate freely. The legislation provides that recommended rates can be discounted by any amount, or surcharged by no more than 100% unless the Commission approves a higher rate. Accordingly, an employer and approved insurer are expected to negotiate to arrive at a premium which reflects the employer's risk factor. This allows negotiation and market forces to operate freely and provides a mechanism to reward employers who maintain a good safety record and penalise those who do not.

The Productivity Commission should be cognizant of the shrinking insurance market in Australia (in WA the number has dropped from 52 in 1981 to 10 in 2003) and consider the potential consequences for competition if this trend continues.

- i. options to reduce the regulatory burden and compliance costs imposed on businesses of different sizes across Australia by the existing legislative structures for workers' compensation and OHS, within the context of the national objective to improve the workplace health and safety of workers. In doing so, the Commission should examine the interrelation between the workers' compensation and OHS legislative frameworks with other statutory regimes in place.**

There is consensus within the WCRC that the primary aim of a workers' compensation system (as distinct from an OHS authority) is injury and claims management, rather than prevention, and the Commission supports separate structures on this basis. Notwithstanding the formal separation, the WCRC supports cooperation between the workers' compensation and health and safety agencies in the pursuit of accident prevention through appropriate data sharing arrangements. The WCRC supports the need for the regulatory burden and compliance costs to be reduced but considers the current workers' compensation requirements are not onerous.

It should be noted that while a national framework has been achieved for OHS through the development of the National OHS Framework supported by the National OHS strategy 2002-2012, which has been endorsed by the Workplace Relations Ministers' Council, no similar development has occurred for workers' compensation.

- j. the appropriate boundaries of responsibility for the cost of work-related injury/illness and fatalities between the employer, employees and the community. In doing so, the Commission is asked to report on the current level of employee coverage by the workers' compensation schemes and the current sharing of costs and to identify under any national framework model for workers' compensation, an appropriate sharing of costs for work-related injury/illness and fatalities; and**
- k. the costs to the community of complementing or supplementing the coverage of existing workers' compensation arrangements, such as income support and Medicare benefits that may be paid to injured persons.**

In determining what constitutes appropriate boundaries the Commission should acknowledge that the issue of cost shifting is not limited to that of State systems to the Commonwealth. For instance, in the WA system injuries and illnesses attributable to multiple causes provide the opportunity to shift cost onto the workers' compensation scheme. A number of injuries and diseases covered by workers' compensation relate to the aggravation or acceleration of pre existing injuries, degeneration, environmental or social causation factors which would otherwise be met via the Commonwealth social security or medical health budgets if they did not occur or present in the work environment.

The cost balance between the Commonwealth and State systems is also impacted by legislative changes and where changes are made (for example increasing or restricting benefits, access limitations) these are likely to have a flow on effect.

Historically the community was responsible for all injured workers where negligence by an employer could not be established. The introduction of "no fault" statutory schemes represented a significant shift in cost to employers. The trade off was that reasonable limits would apply to the level of benefits available to injured workers originally set at 3-4 years times average award rates of pay.

In WA the maximum statutory entitlement potentially covering weekly benefits, medical and allied costs, vocational rehabilitation and schedule two table of maims exceeds \$275,000. In 2000/01 there were 46, 703 claims, of which only 19, 647 were lost time (87.3 % were less than 120 days lost time).

- l. the national and State and Territory infrastructure and relative costs necessary to support the models identified in establishing national frameworks for workers' compensation and OHS.**

There are concerns that the proposed models would cause serious dislocation to individual schemes and have serious implications for scheme funding. Many of the models identified in the Issues Paper raise very complex issues relating to the structure of premiums and the mix between statutory benefits and common law. There would be a major impact on employers in regard to the level of premiums, and impact on employees with respect to the level of entitlements.

It is suggested the Productivity Commission examine alternative models for achieving national consistency, for example, national consistency based on best practice principles, as endorsed by the HWCA. The HWCA model for national consistency is not overarching, but genuinely leaves primary responsibility for workers' compensation to the States and Territories, relying on beneficial competition between schemes to drive scheme improvements and service delivery innovations.

As an example if the "Cross Border" proposals of the HWCA were enacted (currently committed to or under serious consideration by all States and Territories) many of the problems for employers

whose operations crossed State boundaries, i.e. transport groups, would be addressed.

The HWCA model promotes national consistency by establishing mutually agreed benchmarks for key aspects of system design and performance. Where best practice can quite clearly be identified, this may lead to some uniform standards, for example, standardised industry classification codes for premium setting. In other areas, where best practice requires a generalised direction, there will be consistent approaches, but schemes can diverge from these to meet local requirements, for example the specific process for dispute resolution being variable within a generalised alternative dispute resolution framework. Where there is no clearly identified best practice, for instance in the structure and processes for delivering compensation and services, there may be quite different approaches which allow for experimentation and refinement, which in turn will inform continuous improvement in other schemes.

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