AUSTRALIAN Sugar Milling COUNCIL

3 August 2012

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The Research Director
Finance and Administration Committee
Parliament House
George Street
Brisbane Qld 4000
fac@parliament.qld.gov.au

Dear Research Director

Operation of Queensland's Workers' Compensation Scheme

The Australian Sugar Milling Council (ASMC) is a voluntary organisation, established in 1987 to represent Australian raw sugar mill owners. The Australian sugar cane industry is located mainly along Australia's eastern coastline, from Mossman in far north Queensland to Grafton in northern New South Wales.

The Australian sugar milling industry comprises 24 sugar mills operated by eight different companies. As the peak policy forum for mill owners, ASMC facilitates the commercial development of the sugar industry in Australia, by working with its members, other industry organisations and government to develop and promote policies that enhance industry development. Membership of the ASMC represents some 95% of raw sugar produced in Australia.

Background - Industry commitment to improved WH&S

This submission is made on a theme of emphasizing injury prevention against the background that the sugar milling industry has a strong commitment to leading improvement in workplace safety performance. This was demonstrated most recently in the industry's active participation in the development and implementation of the harmonized OH&S laws.

In that process, the ASMC OH&S Committee welcomed briefings from WH&SQ staff regularly over the period of the laws being developed and actively participated in discussions on the proposed Act and Regulations. Once the content and intention of the legislation was apparent, the industry hosted seminars addressed by senior WH&S staff and lawyers to ensure directors, management, senior staff, safety representatives and the workforce in general were made aware of the then forthcoming harmonized legislation. By May 2011, more than 300 sugar milling people had attended these briefings.

In March 2012, the industry's annual safety conference, attended by 55 mill staff and safety representatives, was run on the theme of revisiting the first 90 days of the harmonized legislation. This conference also was addressed by senior WH&SQ staff, an OH&S partner in a leading law firm, and others.

ABN: 44 010 779 496 Australian Sugar Milling Council
IBM Building Level 3 / 348 Edward St Brisbane GPO Box 945 Brisbane Qld 4001 Australia
P +61 7 3231 5000 F +61 7 3229 2113 E asmc@asmc.com.au
www.asmc.com.au

The industry sees it as important to actively bring about change through leading improved safety performance rather than having a neutral approach or penalizing, after the event, those who are unfortunately injured at work. It is also appropriate that protection of someone accidently injured at work is tempered by the *Civil Liability* provisions inserted in Chapter 5 Part 8 of the Act in 2010.

The ASMC submission is that WH&SQ and WorkCover, in conjunction with employers, should take positive steps to raise employees' awareness of their safety responsibilities in the workplace particularly in an employee's contributory negligence or ignoring obvious risk. This would be intended to improve safety performance through ensuring workers use tools as intended, use Personal Protective Equipment, and follow their employer's safety practices.

The underlying principle of WorkCover as expressed in s.5 Objects of the Act is supported in this submission - it is essential to have a scheme that provides appropriate benefits for workers injured in the course of their employment at reasonable cost to the employer and which effectively encourages improved health and safety performance in the workplace.

The ASMC believes the WorkCover legislation is almost sufficient to meet the objects of the Act, however there needs to be greater awareness of the parties to their responsibilities under that legislation. The sugar milling industry's submission reflects Members' experience that achievement of the purpose of the scheme is diminished in certain aspects by the performance of the agencies that operate it - particularly WorkCover and those in the legal process.

ASMC made submissions to the 2010 review where the theme was *"Ensuring Sustainability and Fairness"*. The Council's submission stressed the underlying adverse impact on WorkCover of the "twin threats" of the accelerating volume of common law claims and growth in payments that of course leads to increases in industry and individual premiums.

The industry's submission proceeded to support introduction of a common law threshold of 10% or 15% Whole Person Impairment; improving rehabilitation and return to work processes; and introducing caps on common law damages.

The ASMC does not resile from that position in this submission. However, this submission goes beyond dealing only with the machinery of insurance and emphasises the need for co-ordinated support through the relevant agencies (WH&SQ, WorkCover and QCOMP) for initiatives taken by employers that deliver improved workplace health and safety performance at their workplaces. It examines what incentives can be introduced to encourage reduced incidence of compensable accidents in workplaces and therefore reduce workers' compensation costs; it seeks a strong emphasis on dealing with the fundamental principle of managing WorkCover - avoid the need to use it by emphasis on processes to reduce workplace accidents or illness.

The "twin threats" of growth in WorkCover settlements and increasing cost and number of common law settlements continue to exist and require attention. The ASMC submission is that they may be addressed on four fronts:

- By improving safety performance through incentives in reduced premiums for those who invest in safety improvement programs which achieve improved performance;
- Dealing with the injured worker and the treating doctor;
- Stricter scrutiny and where appropriate, rejection of WorkCover claims, particularly against the civil liability provisions inserted in Chapter 5, Part 8 of the Act; leading to
- Establishment of some parameters around the processes for access to, and settlement at, common law.

1. Improving safety performance

On the first or these points, ASMC submits that improved WH&S performance must inevitably lead to improved WorkCover performance. Accordingly, where an employer invests in a recognised system of leading change in safety management (for example) and there is a resultant improvement in safety performance then that commercial investment should be recognised and rewarded through an immediate adjustment in the employer's WorkCover premium instead of them having to wait for the adjustment through the existing method. An incentive could be by way of a bonus, although this bonus should not be made instead of the reduction in the premium, but rather in conjunction with that reduction.

ASMC recommends recognition, by immediate premium adjustment, for demonstrated significant improvement in safety performance ahead of it later being reflected in the premium.

2. Injury and the treating Doctor

The ASMC submission is that an employer should be able to elect to appoint a doctor or a number of doctors to deal with all their workplace health insurance matters. That doctor or doctors should be encouraged to refer a sick or injured employee to an appropriate specialist for expert opinion about the employee's injury where necessary.

That doctor or doctors should also gain an understanding of the employer's operations to the extent that they are able to make appropriate judgment about an injured employee's early return to work.

Doctors dealing with sick and injured employees for workcover purposes should be required to apply a clear understanding of WorkCover insurance and its purposes.

WorkCover should more actively exercise its obligation to co-ordinate the employer, the worker, and the treating doctor in rehabilitation and return to work.
ASMC recommends in the event of a long-running case (eg after one month) the case must be referred to a relevant specialist for expert medical opinion considering the employee's own WorkCover record, nature of the injury, likelihood of work being the major contributing factor and the ability for the worker to enter a return to work program.

3. Scrutiny of claims in WorkCover

ASMC would expresses concern that WorkCover claims are being processed with scant scrutiny. Accepting that WorkCover is a no blame process, claims should nevertheless not proceed on the basis that there should be automatic payment just because the injury has occurred. Once the claim has been accepted, the employer becomes responsible for establishing the evidence if they believe the claim should not succeed. WorkCover decides to accept or reject claims - and in almost every case accepts them regardless of representations made by employers as to merits of the claim.

At the point of making the claim, the onus is on the employee to provide evidence that the injury has occurred and that it is linked to work. Their evidence is usually the opinion of the treating GP. While this is not necessarily expert opinion of the nature or cause of the injury, it is usually the evidence that the claim succeeds on. That evidence is often based on the GP having taken the employee's word that the injury was work-related, while a medical expert in workplace injuries might have a significantly different opinion.

ASMC submits it is appropriate to limit WorkCover to claims where employment is the major contributing factor in the injury and this should be substantiated by expert workplace injury medical opinion.

ASMC submits it is appropriate to more carefully examine claims where there might be a suspicion of fraud. This might arise where the employer expresses concern about the circumstances surrounding the claim or where the employee's own WorkCover records might raise suspicions.

If a person sustains an injury away from work precluding them from earning an income, they might have a significant problem and WorkCover may be seen as a potential (or indeed perceived as the only) solution. It may be appropriate for workers to have access to advice regarding legitimate alternatives to pursuing a potentially fraudulent claim through WorkCover. Such alternatives might include government pension or income protection insurance through their compulsory superannuation. **ASMC would support an analysis of compulsory income protection insurance via employees' superannuation schemes.**

4. Parameters around Common Law

Access to common law should include evaluation of the employee's claim history known to the insurer; circumstances of the injury; disclosure (or not) to the employer, before or after engagement, of any pre-existing injury and its impact on the potential for the injury; expert medical opinion; the employee's evidence; and the employer's evidence.

The Act's Object 5(4)(da) requires that workers or prospective workers not be prejudiced in employment because they have sustained injury to which the legislation applies. The fundamental principal of insurance is that the insured advise the insurer of known risks. This precaution is not available in a prospective employment contract where the employer is excluded from finding out if a prospective employee has a pre-existing injury that may prejudice their ability to safely carry out the work being offered.

When considering the risk of exacerbating a pre-existing injury there is a paradox. The insurer may well be aware of the risk through its experience of a worker, while the employer, who might incur a penalty, is constrained from finding out enough about the worker to be able to protect themselves from the risk of exacerbating the pre-existing injury. The employer is constrained from discovering a potential risk and therefore determining how to manage or avoid it.

On this point and consistent with s.5(1)(b) Objects of the Act, the ASMC submits there is contributory negligence by the employee where the employee has failed to advise their employer or prospective employer that they had a past injury or illness (that may affect their work) and such injury or illness was subsequently aggravated by work and led to a WorkCover claim. This submission is made with the intent that an obligation to disclose pre-existing injury would lead to improved safety performance in the workplace to the advantage of the worker, management, fellow workers and the performance of their insurance, and not in any punitive sense against the injured worker.

On the issue of disclosure, known insurable risk and aggravation of a pre-existing injury, it may also be appropriate to deal with claims in two distinctly separate groups:

- Those where the injury or illness is an aggravation of a pre-existing injury of which the employer was aware before their decision to engage that worker; settlement of a claim of this nature would affect the employer's WorkCover premium.
- Those where the worker had a pre-existing injury that became exacerbated or has already had a claim with WorkCover for an identical or a similar injury; settlement of a claim of this nature should not affect the WorkCover premium of the subsequent employer where the injury had not been disclosed to that subsequent employer prior to the exacerbating injury.

The 2010 amendments to the Act removed the principle in the *Bourke* decision thus facilitating argument against automatic access to Common Law for a workplace accident.

Presently there is significant scope for case managers to run on opinions (perhaps opinions of a GP, or their own observations) rather than strict tests and objectivity. There is presently a 3 stage process of:

- Notice of claim for damages to be allocated to expert case managers;
- Before the matter proceeds at all, hold a case conference between the employer (client), case manager, and legal officer;
- Consideration of material prepared by the employer for the case conference.

ASMC recommends that any *pro forma* that the employer must complete for the case conference includes a requirement for detail on issues arising under chapter 5, Part 8 and s.130 - contributory negligence, obvious risk and injuries caused by misconduct. If the injury is exaggeration of a pre-existing injury, the pro forma would also seek data on the employer's knowledge or otherwise on the employee's disclosure of that pre-existing injury.

For example, the pro forma would be designed with the purpose of establishing the initiatives the employer had in place to avoid the kind of injury (or illness) the employee suffered and whether they were applied by the injured worker. This might cover:

- the employer's own safety management policies and procedures;
- the personal protective equipment that was provided and whether the employee was using it;
- the extent to which the employee was contributory negligent;
- was there other misconduct involved; and
- evidence that the employee would have been aware of their obligations especially those surrounding contributory negligence.

This would be part of the process of raising awareness of the Act provisions about parties' responsibilities under contributory negligence, obvious risk, and injuries caused by misconduct. Clearly it would also improve employer ability to defend a matter that might go to common law.

When a common law settlement is made, there is perhaps an element that an employee with a loss of potential earnings should be compensated out of WorkCover insurance rather than have them relying on a government pension. However there is no control on a compensated employee spending the lump sum and then ultimately suffering from loss of future earnings anyway.

Accordingly, **ASMC recommends examining ways of managing the component of settlements associated with loss of future earnings as a periodic payment rather than a lump sum.** This would be relevant where there is compensation for loss of potential

earnings, especially where the employee suffers no immediate loss of earnings (eg remains in their existing employment in the job in which they were injured).

Lawyers' fees create a complication in the cost of common law settlement and these fees seem to be escalating. Legal costs are factored into settlements, the costs of settlements continue to increase, and compensated employees end up with only a share of the settlement. What role does the lawyer or barrister play in a common law settlement if there is no advocacy of a legal case before a court? The process becomes one of "horse-trading" where little skill or qualification is required. **ASMC recommends if there is no case to be advocated by either side, then settlements be made according to a table.** It is suggested this could be structured like an unfair dismissal case, run with a process of conciliation, a settlement offered and declaration of likelihood for success if it went to court. The choice to go to court would be against the knowledge that there is risk of costs, or a lesser settlement and expenses.

Inquiry Terms of Reference - 2012

The underlying ASMC submission on this inquiry's Terms of Reference is that the legislation, as it stands, is probably sufficient in almost every respect to provide fair and balanced WorkCover outcomes. The obvious deficiencies in the performance of the scheme can be influenced by the parties and those who operate the scheme, not by adjusting the legislation.

ASMC makes the following submissions on the inquiry's terms of reference:

a) **The performance of the scheme in meeting its objectives under section 5 of the Act**

The ASMC submission is that the scheme has the potential to deliver almost every aspect of its objects but in its application there's a significant deficiency in the balance mandated in ss.(4)(a)(i) and (ii) and in (4)(c) and (4)(da).

Object 5(4)(a) requires a balance between providing fair and appropriate benefits on the one hand at reasonable cost to the employer on the other. The sugar milling employers' experience is that this is out of balance. Further, it is not necessarily the employee taking the benefit of the imbalance; there is a sense that the barristers' fees are often extremely disproportionate to the injured employee's share of the settlement.

Object 5(4)(c) requires protection of the employer's interests in relation to claims. The Sugar milling employers' experience is that their insurance is too easily accessed through scant assessment of claims.

ASMC recommends stricter assessment of claims in relation to:

- **the impact of work on the injury;**
- **the treating doctor's understanding of WorkCover;**
- **consideration of the employer's comments about the claim; and**
- **more rigid testing of claims in their progress into common law.**

b) **How the Queensland workers' compensation scheme compares to the scheme arrangements in other Australian jurisdictions**

None of the ASMC Members operates across state borders. One of the Members is located within NSW. Accordingly, any commentary about interstate comparisons is limited but it is noted that: -

- the Queensland premiums are very competitive; and
- the NSW common law cap is an attractive element of that State's scheme and employers under the Queensland scheme have pressed for a similar element in the past few reviews.

c) **WorkCover's current and future financial position and its impact on the Queensland economy, the State's competitiveness and employment growth**

The sugar industry produces a global traded commodity; therefore it must remain cost competitive against its major international trading partners if it is to remain viable. The cost of employment and its associated costs such as workers compensation insurance are significant components of this overall cost structure. If the workers compensation scheme is not structured and managed appropriately and premiums and associated costs become a significant financial burden to our members their cost competiveness is eroded. This in turn adversely impacts on this industry's contribution to the Queensland economy.

d) **Whether the reforms implemented in 2010 have addressed the growth in common law claims and claims costs that was evidenced in the scheme from 2007-08**

How the 2010 legislation is intended to work is clearly enunciated in the Bill's Explanatory Notes: -

"The policy objectives of the Bill are to be achieved by:

- harmonising common law claims brought under the *Workers' Compensation and Rehabilitation Act 2003* with those brought under the *Civil Liability Act 2003* in terms of liability (standard of care), contributory negligence and caps on general damages and damages for economic loss ...

Among ASMC Members, there are unfortunate experiences of more, rather than fewer, matters going to common law in conjunction with ever-increasing cash settlements.

The industry's experience is that the majority of injuries contain a significant element of contributory negligence or misconduct such as an injured employee having failed to use personal protective equipment, or ignored an obvious risk, or using a power tool that has been modified contrary to the maker's specifications, or ignored the employer's safety policies, practices or procedures.

The ASMC does not advocate penalizing an injured employee but it does advocate exploring processes that might lead to improved health and safety in the workplace with a view to avoiding incidents. **ASMC recommends implementing campaigns to raise parties' awareness of the impact of contributory negligence, obvious risk and misconduct on WorkCover, especially employees' risk of reduction in damages.**

ASMC also recommends the more frequent selection of test cases to be taken to Court in an attempt to have Courts recognize changes in the law and the need to rule on the basis of the legislature intention.

e) **Whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment**

On this point, **ASMC reiterates its submissions in the 2010 WorkCover review where it suggested the conditions for self-insurance might be relaxed (for example on the required number of full time workers employed in Queensland) to provide easier access for employers who want to self-insure.**

One member of the ASMC, Sucrogen, self-insures and has historically represented about 40% or more of the industry in terms of production, while the remaining 60% of production was owned by 9 milling groups, some of whom represented less than 5% of production

Over the past few years, changing ownership in the industry has seen significant consolidation. Queensland's 21 sugar mills are owned by 7 companies.

Although the working environment has not immediately changed, the change in size and ownership of Queensland sugar milling companies may result in a greater interest in self-insurance by the new owners particularly where the risk/reward of greater emphasis of worker safety is not reflected in the premiums charged to the industry and/or individual member.

Another option that may be worthwhile considering would be to open up the WorkCover insurance to private competition and providing choice of WorkCover insurance to employers. This might allow employers unable to qualify for self insurance (perhaps smaller businesses) the opportunity to access alternative insurance.

Public hearings

In the event that the Inquiry holds public hearings in Brisbane or regional Queensland, ASMC will take the opportunity to attend and provide verbal submissions and some ASMC Members may also seek to attend in their region where they would introduce discussion of their own experiences in the workers' compensation system.

Yours sincerely

Dominic V Nolan
Chief Executive Officer