FAR NORTH QUEENSLAND
Law Association INC.

21 August 2012

The Research Director
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Committee

Re: Operation of Queensland Workers' Compensation Scheme

Thank you for the opportunity of providing a submission to your Committee in relation to the operation of Queensland's Workers' Compensation Scheme.

Our Association represents lawyers who practice in the far north of the State, approximately from Cardwell through to the Torres Strait.

We represent lawyers who work **both** for injured workers, and for employers and insurers. As such, we have a unique perspective on attitudes to the workers compensation system.

Regional Considerations

Our region of the State presents unique challenges to an effective workers' compensation system. These include:

- A high level of uncertainty in prevailing economic conditions, with the high Australian dollar impacting on tourism and other local industries;
- At the same time, mining opportunities for remote locations such as Weipa provide a source of employment to residents of the far North, but invariably require workers to travel long distances to find and maintain employment, and the nature of such employment has a high degree of danger and risk;
- The prevalence of indigenous communities within our area and an acknowledged rate of disadvantage in terms of education and employment levels within these communities;

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- Our geography rendering the region vulnerable to natural disasters such as Tropical Cyclones Larry and Yasi, on a semi regular basis and the impacts of those disasters upon businesses and upon workers.

Current Scheme

The current Workers' Compensation Scheme is an essential safety net for persons employed in the far north of Australia. Injury from work, which may result in the reduced ability to undertake work, has a much larger effect upon workers in the far north than in the rest of the State. Local economic conditions mean that it is often difficult for workers to transfer or find alternative employment in those circumstances. It is also often difficult for employers to provide alternative work for those persons. High levels of innumeracy and illiteracy, especially within the local indigenous populations, often contribute to poor outcomes when an injury causes a worker unable to perform work in a variety of physical occupations.

The nature of opportunities within the mining industry create pressures in and out of the workplace, and many workers in this industry are the sole breadwinners with families dependent on the income generated by that employment. Employment in that industry is predominantly physical, and when injuries occur to such employees, there is often a devastating loss of functional capacity to work in that industry, resulting in inevitable unemployment.

Employers in the far north also want certainty in relation to not only premium levels and costs, but in relation to outcomes of workers' compensation claims. Employers especially wish to avoid long tail workers' compensation claims characteristic of non-common law States of Australia.

Regulation of Work Practices

In the far north of Australia there exist limited resources in relation to governmental regulation of the workplace, while inspection and monitoring of workplaces in a large and disparate region of the State is impractical. As a consequence, a prosecution by Workplace Health and Safety Queensland for breaches of safety at work is an irregular event, and provides little incentive for employers to maintain safe systems of work

The retention of common law rights of workers to be able to commence proceedings against their employer where the employer has been negligent, and where such an injury has been accepted by WorkCover, or a self-insurer, is a key motivating factor which continually drives change and improvement in workplace health and safety in places where government regulation alone is impractical.

It would seem unfair that employees in regional centres be afforded less protections at work than employees in major urban centres.

Workplace Health and Safety

We have noted that in some employers' submissions to this review, much has been made in relation to refocussing efforts on Work Health and Safety, as opposed to compensation.

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The active promotion of work health and safety by both employers and employees to prevent injury in the workplace should be encouraged.

However, it does not follow that a compensation scheme somehow removes incentives for employers or employees to implement work health and safety. If anything, increases in premiums following common law claims serves to encourage the implementation of work health and safety in the workplace, ultimately securing a more productive labour force in Queensland with less interruption and cost due to work-related injuries.

Financial Considerations

It is obviously in the interests of both workers and employers to have a financially sound workers' compensation system.

WorkCover's financial position for the 2012 financial year (projected as at 30 June 2012) indicates that WorkCover received $1.435 billion in premiums for employers across the State, whereas net claims paid were only $1.145 billion. After factoring in underwriting and investment income, WorkCover Queensland made an operating profit before tax of approximately $230 million in the last financial year. The operating result after tax was approximately $160 million.

As can be seen from these figures, WorkCover Queensland is a sound financial position and the existence of the Scheme is a significant positive revenue stream for the State Government.

This is especially in light of precarious Government finances inherited from the previous Labor Government. From a purely financial point of view, the retention of WorkCover Queensland as an entity existing under its current legislation would appear to be the sound financial decision to make.

This is especially so when considering that the average premium rate to achieve this result was only $1.42 per $100.00 in wages for the 2012 financial year. Only Victoria has a better premium rate. It is noted however that Victoria has a distinctly inferior system of compensation to injured workers. New South Wales, Western Australia and South Australia, for whom we note have restricted common law rights, all have higher premium rates than Queensland.

Common Law

Throughout the history of the common law system in Queensland since the *WorkCover Queensland Act 1996* was introduced, Queensland has retained historically low premium rates compared to other State throughout its existence. This suggests not only that the existing Scheme is well thought out and financially viable in the long term, but also that other attempts in other States to replace common law systems with statutory based compensation systems have, in the long term, increased premiums to employers in those States rather than saving money for employers.

The reason for this is somewhat counter-intuitive. One would expect that by reducing or abolishing common law rights, one would save money. However the figures from News South Wales and other jurisdictions indicate that the opposite is true.

The reason for this is as follows. Of the very slim minority of workers who make common law claims, (estimated at only 3% of statutory claims), those workers who do make common law claims are more often than not able to settle their claims within a reasonably short period of time. It should be noted that such settlements compensates the worker for the rest of their lives for that injury. The cost of injury to the insurer therefore remains fixed in dollar terms at the time of settlement, meaning no ongoing liability to the insurer.

Where statutory compensation schemes have been put in place as in other States, the cost of the claim invariably increases as time goes by. Workers in those schemes have little encouragement or inducement to get off workers' compensation or to return to work while they remain a recipient of a long term benefit. On the other hand, workers who litigate claims where the injury is caused by the negligence of the employers, achieve both vindication, and compensation in reasonably short period of time. The fact that the compensation is then awarded once and for all, and cannot be re-awarded, if the worker's condition deteriorates or for that matter improves, means that the worker thereafter has no disincentive to return to work.

As such, the retention of common law system in our view remains a key reason behind the financial success of the Scheme in Queensland, and also for the States significantly high return to work ratio.

It should also be noted that there is often, as evidenced by some submissions, confusion between the acceptance of a statutory claim and a common law claim. The latter requires proof of negligence whereas the former does not. Perhaps it is this confusion which leads to concern by some groups that common law damages are too easily accessed.

Our experience is that this is not the case. The fact that only 3% of statutory (no-fault) claims progress to common law claims indicates that the scheme performs as expected. Generally these are the injuries which are more serious and where there has been some form of negligence on the part of the employer. The provision of the irreversible election for claims where there is a less than 20% impairment, together with restrictions on costs, provide sufficient incentive for the worker to consider very carefully whether or not to pursue a common law claim.

Also, the proof of negligence, lying on the balance of probabilities, with the onus on the worker, is not very well understood. Under the current arrangements, the worker personally bares the overwhelming risk of failing in litigation against the employer. The worker has to prove the negligence and prove the injury, undergo numerous medical examinations, undergo an examination of the back-ground to the claim, and ultimately face cross-examination about the claim by WorkCover at trial. In reality, the process of litigation is an extremely stressful one for the worker, and is not undertaken lightly. The perception by some that the common law system is somewhat of a rort for workers is an unfortunate one. There is no foundation at all for any such perception. The undertaking of frivolous or unmeritorious claims is the exception, not the rule.

Thresholds

There have been some submissions by some groups urging the introduction of thresholds. The introduction of arbitrary thresholds is opposed by many groups, for good reason.

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Essentially, the issue is one of fairness.

Determinations of permanent impairment are done by doctors according to a pre-set scale. The scale is designed itself for insurance purposes. At the outset, it should be acknowledged that the scale is deliberately designed to be favourable to employers and insurers, and designed to minimise objective impairment for workers.

Historically, the scale is favourable to workers with limb injuries but is not favourable to those workers with back injuries. The reason for this is quite unscientific – it is generally harder to verify back injuries compared to limb injuries, so back injuries are "discounted".

As such, it is quite common for a minor finger injury to be awarded a small impairment, and a more serious and disabling back injury to have an even smaller impairment, or a zero impairment.

Given advances in medical science, there seems no policy reason why the worker with the back injury should have less rights than the worker with the finger injury. There appears to be no real justification why an employer who causes one type of injury should not be held liable for another type of injury.

Further the introduction of thresholds removes consideration of what actions were taken by the employer and the employee, i.e. the cause of the injury. Instead the focus lies on the injury itself, or more specifically, a doctor's opinion of it. It would introduce a level of subjectivity about the exercise of fundamental rights. The medical profession would end up being the gatekeepers to both the rights of workers and employers. This would be disadvantageous for both employers and employees.

The introduction of thresholds would also cause more litigation with both workers and employers having to retain lawyers for the challenge of assessments of permanent impairment which fall just below the threshold.

In other states, experience has shown that because of unfairness introduced in those schemes, doctors who are sympathetic (or unsympathetic) to the particular workers will simply be more or less generous in the application of the scale over time.

Thus the introduction of thresholds are likely to increase costs, not reduce them.

Structured Settlements

The introduction of structured settlements under the *Civil Liability Act 2003* reforms has not been taken up. These had been called for by employers because of perceptions that settlements are largely wasted by recipients. The experience of our members indicates that this perception is false, and there is no evidence of same. Lawyers are acutely aware of the need for injured persons to apply the proceeds of settlements in their best interests, and appropriate advice is given.

The introduction of structured settlements does not take into account the fact that Centrelink, Medicare and other government agencies require a refund of any amounts paid. It is far from clear if those agencies would accept a structured settlement of their refunds.

Further, the implementation of structured settlements is extremely expensive to the insurer, who has to maintain a file in relation to the payment for the duration of the settlement period. This will ultimately raise costs and hence premiums.

Finally, the imposition of structured settlements would remove incentive to return to work, and promote a dependence culture.

2010 Amendments

Since the 2010 amendments came into force, it has been the experience of our members that there has been a significant decrease in common law claims made. The reason for this is two-fold:

- There is no ability to claim costs (except in very serious cases). This combined with Section 347 of the *Legal Profession Act* 2007, means that small claims (which are the most costly to WorkCover) are uneconomical for those firms to take on. As such, those claims tend not to be taken on by law firms.

- The 2010 amendments already reduces further the ability to claim common law damages, which has resulted in less overall being paid in claims.

Figures also published by WorkCover verify this experience. In 2011 financial year, which predominantly would have included claims for injuries prior to the 2010 amendments, of which claimed for costs was $157,710.00. This has been dramatically reduced to $139,845.00 in the space of one year.

Anecdotally, it is our experience that the 2010 amendments have caused a dramatic falloff in the number of claims being lodged. Any submissions to the contrary are unlikely to be true. In the 2012 financial year, it appears that WorkCover budgeted for approximately 800 common law claims which were not in fact received.

Certainly in the far north, it is our experience that the number of claims has dropped off by an excess of 20%. This, however, is likely to underestimate the number of claims which are not proceeding, given that there are a still claims that are still in the pipeline which predate the 2010 amendments. It is expected that by the third anniversary of the amendments (1 July 2013) the number of claims would have decreased significantly.

Conclusion

It is acknowledged that the modern workers' compensation system has come a long way from simply being a means by which to claim money for time off work. The modern Scheme dramatically improves both safety outcomes and also return to work outcomes, both by the use of the statutory scheme and the common law scheme combined with programs such as Return To Work Assist, and other programs.

No doubt some submissions received will point to examples of where fraudulent claims were made, where claims were not scrutinised, or where return-to-work outcomes were not achieved. It is to be acknowledged that some poor outcomes occur from time to time. However the experience

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of our members is that these outcomes are rare. Trying to target the fringe with legislative change (as opposed to administrative enforcement of existing rules and powers) is not necessary and will result in a bad law for all.

What the FNQLA fears is that proposals to amend the Scheme and in particular, abolishing common law rights, restrictions with arbitrary thresholds, and replacing with some form of statutory compensation scheme would ultimately deliver a negative outcome for both workers and employers in the far north. Those outcomes would include:

- A significant increase in the duration of claims as workers, without common law access to damages, seek to maximise the benefits of a statutory scheme with the help of doctors and other rehabilitation providers, who would have no disincentive to maintain workers on such a regime, promoting a reliance on welfare culture and reducing their return to work outcomes;

- Increasing costs associated with the inevitable increased cost of long-term medical services, which results in higher payments per claim with poorer outcomes for workers;

- Abolition of the ability of the worker to sue for negligence will result in more employers being negligent, with little other incentive for employers to carry on safe work practices, resulting in more injuries, more statutory claims and more adverse outcomes for both workers and employers;

- The inability of workers to achieve vindication of their rights, especially where their injury is caused through the fault of another;

- Increased call on a State provided system will invariably decrease returns on premiums, and possibly convert WorkCover Queensland from a net asset to a net liability requiring top-ups from consolidated revenue from the State Government;

- The turning of WorkCover from an insurance organisation with an insurance culture into a welfare organisation with a welfare culture, with all of the necessary inefficiencies and negative outcomes associated with same.

It is the overwhelming view of those in the profession in the far north who deal with workers' compensation matters up here on a day to day basis that the prevailing Scheme works well and effectively strikes a balance between workers' rights while providing low costs to employers.

Bottom Line

We would therefore urge the Committee to observe the old adage "*if it ain't broke don't fix it*".

We thank the Committee for consideration of our submission.

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Yours faithfully

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