Finance and Administration Committee of the Queensland Parliament

Inquiry Into The Operation Of Queensland's Workers' Compensation Scheme

Submission by the Local Government Association of Queensland Ltd.

LGAQ
LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND

Introduction

The Local Government Association of Queensland Ltd (LGAQ) is the representative body for Queensland local governments.

Almost all local governments are involved in workers' compensation self-insurance arrangements. The only exceptions are some of Queensland's indigenous local governments. 65 local governments and local government controlled entities employing over 23,000 workers participate in the Queensland Local Government Workers' Compensation Self Insurance Scheme (LGW). LGW holds a classification group self-insurance licence. The LGAQ is the appointed representative of LGW scheme members. Four other councils hold individual self-insurance licences.

This submission is made on behalf of local governments and local government entities participating in the Queensland Local Government Workers' Compensation Self Insurance Scheme.

The LGAQ's submission focuses on the following three issues set out in the Legislative Assembly's referral to the Finance and Administration Committee:

- whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment;
- whether the reforms implemented in 2010 have addressed the growth in common law claims and claims cost that was evidenced in the scheme from 2007-08;
- the performance of the scheme in meeting its objectives under section 5 of the Act.

Throughout the submission the *Workers' Compensation and Rehabilitation Act 2003* is referred to as the "Act". Queensland's workers' compensation scheme is referred to as the "scheme".

Summary of Proposals

- The Act be amended to give Q-COMP the specific function of collecting and analyzing scheme data for the purpose of identifying and proactively preparing recommendations to the Minister on responses to risks to the scheme's objectives, balance and financial sustainability. It is further proposed that the Act provide for the Minister to respond to recommendations made by Q-COMP.

- The LGAQ does not propose any changes to the self-insurance licensing criteria.

- That Q-COMP be provided with statutory authority to collect and publish comprehensive data on legal costs and the proportion of damages awards or settlements that go towards legal costs and other costs.

- Section 347 of the *Legal Profession Act 2007* be amended so that the amount a law practice may charge and recover from a client for work done in relation to a speculative personal injury claim cannot exceed 30% of the net damages or settlement. Further, a schedule of charges should be developed to apply to legal services provided during the pre-proceedings process.

- Where lawyers run speculative common law claims the lawyers be liable for payment of costs granted by a court to the defendant.

- More detailed supporting information on factual circumstances, liability and the amount claimed be required to be provided in the notice of claim and that very strong disincentives be in place to prevent routine changing of notice of claim information at the compulsory conference.

- Meaningful limitations be placed on the levels and components of economic loss awards so that such awards are more objectively and consistently determined. In doing so it should be clear that the Act had altered the common law.

- A discount to damages should apply where workers pursuing common law claims are not actively and consistently seeking employment that they are capable of undertaking. It should also be compulsory for workers who are unable to return to work due to injury or who lodge common law claims to participate in Q-COMP's Return to Work Assist program. At present it is too easy for workers to simply state that they can't participate in the program due to their medical condition.

- It should be an offence for any person to seek to prevent an injured worker from participating in a medically approved suitable duties or return to work program or to unreasonably seek to disrupt or interfere with a medically approved suitable duties or return to work program.

- Unless otherwise determined by a court, an impairment assessment by the Medical Assessment Tribunal be accepted as the level of impairment for the purposes of a common law action. Where a further specialist medical report is to be obtained for a common law matter it should be prepared by a specialist drawn on a next available basis from a panel maintained by Q-COMP.

- The meaning of injury in the Act require that in the case of psychiatric/psychological disorders the employment must be the major significant factor causing the disorder. It is further proposed that the list of circumstances where a psychiatric/psychological disorder is not considered to be an injury be expanded to include circumstances where a reasonable person or person of reasonable fortitude would not be expected to sustain the disorder.

- The meaning of injury in the Act require that employment be the major significant factor causing the injury.

- After 26 weeks the rate of weekly compensation be reduced to the greater of 60% of QOTE or 75% of Normal Weekly Earnings.

- The sliding scale for reduction of the additional lump sum entitlement for latent onset injuries commence at age 60. A process for equitable apportionment of liability for latent onset claims should be developed.

- Solar claims be excluded from the latent onset provisions of the Act. The Act should also specifically recognise the substantial contribution that non work related exposure and non Queensland work related exposure would play in the development of solar related conditions. Work in Queensland should be the major significant factor causing the condition. A process for equitable apportionment of liability for latent onset claims should be developed.

- The scheme no longer provide compensation for workers injured on their journey between the home and the workplace, or for injuries that occur during an ordinary recess away from the workplace or in the course of voluntarily participation in activities during a recess or outside of working hours.

- The Act provide a more equitable process for implementation of Statutory Review decisions that balances the interests of workers and insurers. A Statutory Review decision should be able to be stayed if the decision was subject to appeal. Action, including reintroduction of the option for matters to be heard by Magistrates, should also be taken to reduce the time taken to bring on and hear appeals.

- Section 186 of the Act should require a worker to provide reasonable information, including medical evidence, to support disagreement with an assessment of permanent impairment. The insurer should have an opportunity to consider the information and then either issue a fresh notice of assessment or refer the matter to a Medical Assessment Tribunal.

A Balanced and Sustainable Scheme

The LGAQ welcomes the Queensland Legislative Assembly's referral to the Finance and Administration Committee to inquire into and report on Queensland's workers' compensation scheme.

One of the primary reasons for welcoming the referral is that it has not been urgently made in direct response to an identified financial crisis in the scheme. An unfortunate characteristic of legislative action relating to workers' compensation in Queensland, and elsewhere, has been a failure to recognise and respond to scheme risks before their impact becomes critical and / or unsustainable. This inevitably leads to a breadth of legislative change that has its own risks arising from hastily developed proposals, uncertain amendment interactions and alienation of stakeholders.

In late 2009 the WorkCover Queensland Board made a number of recommendations to the Queensland Government as a result of a review of WorkCover Queensland's financial position. The LGAQ submits that some of the factors contributing to that position were identifiable and required legislative attention prior to action taken by the Government in early to mid 2010.

One such factor was the almost immediate impact of the Bourk v Power Serve[1] decision in 2008. The decision increased the difficulty for employers in defending common law actions and created the perception in many quarters that common law claims could not be defended. That scenario was always going to lead to an increase in common law claim lodgements. Looked at in the context of WorkCover Queensland's then approach to settlement of common law claims, and the existing limitation on the costs deterrent for bringing unmeritorious claims flowing from the decision in Sheridan v Warrina[2] , it is submitted that an urgent need for action should have been identified prior to 2010.

[1] Bourk v Power Serve P/L & Anor [2008] QCA 225
[2] Sheridan v Warrina Community Co-operative Ltd& Anor [2004] QCA 308

The position was compounded by the Government not properly identifying and addressing these common law cost risks after having made numerous enhancements to statutory claim entitlements since 1999. As a result, the scheme was left facing significant increases in both statutory and common law costs.

The importance of taking a proactive approach to reviewing the scheme was noted in Robin Stewart-Crompton's 2010 report[3]. Whilst establishment of a regular scheme review program is welcome, it is also essential that there be a formal, ongoing process for scheme risks to be identified and acted on. As is demonstrated by the position advised to the Government by WorkCover Queensland in 2009, a lot can happen in workers' compensation over a period of five years.

This process should go further than various bodies agreeing to meet and share information. There should be a specific statutory responsibility for the collection and analysis of scheme data for the purpose of identifying and preparing recommendations on responses to risks to the scheme's objectives, balance and financial sustainability.

Q-COMP is considered to be in a position to undertake such a role. It has the data and in more recent times has become more involved in scheme analysis, rather than just reporting. However the LGAQ's perception is that the lack of a specific statutory responsibility relating to scheme analysis and proactive development of recommended scheme changes has created uncertainty over roles and led to operational blockages. The Government should provide Q-COMP with specific funding to undertake the scheme analysis and development role. Also, if a more proactive approach is taken to analyzing the scheme and recommending adjustments it is vital that someone be listening and responding to that work.

The LGAQ proposes that the Act be amended to give Q-COMP the specific function of collecting and analyzing scheme data for the purpose of identifying and proactively preparing recommendations to the Minister on responses to risks to the scheme's objectives, balance and financial sustainability. It is further proposed that the Act provide for the Minister to respond to recommendations made by Q-COMP.

Self-insurance

The outcomes achieved by self-insurers in Queensland since the first licences were issued in 1998 demonstrate that self-insurance should have a continuing role in Queensland's workers' compensation scheme.

Workers employed by Queensland's licensed self-insurers have received their compensation entitlements, have access to effective rehabilitation and return to work programs and work for organisations with independently assessed workplace health and safety management systems. There could be no serious dispute in relation to this.

The LGAQ believes that two factors have been most important to the successful introduction of self-insurance in Queensland. The first factor is that as a result of circumstances at the time self-insurers were able to access experienced workers' compensation professionals to conduct or oversee their self-insurance operations. Workers compensation is a specialised field requiring extensive background knowledge on the interpretation and efficient application of precedents and legislation. Most self-insurers were able to engage highly experienced former WorkCover Queensland staff in claims management and managerial positions. This provided the knowledge and experience that generally enabled self-insurers to hit the ground running and avoid the regulatory and operational pitfalls that could easily have arisen.

[3] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme, p.10

The second factor is that almost all of the licensed self-insurers are large, long established organisations with strong management and corporate governance structures. Such structures are considered vital to successfully integrating statutory self-insurance obligations into an existing corporate entity. The necessary integration includes establishing robust protocols around the exercise of statutory responsibilities and processes for management of confidential workers compensation information.

If self-insurance licensing criteria were weakened by potentially allowing large numbers of organisations to obtain a licence the number of self-insurers could very significantly increase. Under such circumstances the factors outlined above that have directly contributed to the success of existing self-insurers would not be present to the same degree to underpin the position of larger numbers of new organisations taking on self-insurance. In that situation Q-COMP would face considerable regulatory and cost burdens and almost inevitably turn back the clock on a self-insurance regulatory environment that has taken some 14 years to properly mature. It is considered that this would run counter to current moves to reduce the regulatory burden on businesses.

It is agreed that the 2000 employee threshold is not a conclusive test of financial capacity and durability, although it would have some utility in that regard. However a substantial employee threshold is considered a much stronger indicator than pure financial measures of an established organisational capacity to take on a direct role in the implementation of public policy as a self-insurer. It is relevant to note that of the small number of organisations that obtained a self-insurance licence because the initial employee threshold was less than 2000, two were Local Governments that were still very substantial organisations with a range of legislatively prescribed governance and management systems.

The LGAQ is not aware of there being an ongoing, demonstrated need for any action to be taken in relation to the current licensing criteria. Employers have the capacity to pursue self-insurance on an individual basis or, as local government has done, through a group self-insurance licence. Arguments in support of changing the licensing criteria appear to be more philosophically based. We do however see very material risks arising from changes to the licensing criteria. It will be left to others to comment on the impact on WorkCover Queensland's financial position and policyholders. But the LGAQ is strongly of the view that the positive impact of self-insurance on the Queensland scheme has resulted from the robust management and governance frameworks of self-insurers. The existing licensing criteria have played an important role by successfully acting as a reliable indicator of organisations with that capability. It is considered that establishing concise and objectively measurable alternative criteria directly focusing on management and governance capability would be problematic. The LGAQ does not support action that would involve unnecessary risks to a mature, cost effective regulatory environment for self-insurers.

The LGAQ does not propose any changes to the self-insurance licensing criteria.

Common Law

As is the case with psychiatric/psychological claims (that will be discussed latter in the submission), there are suggestions that common law claim lodgements may be stabilizing. If that is indeed the case then they are stabilizing at an unacceptably high level. This is readily apparent by comparing pre and post 2008/9 common law claim numbers.

The LGAQ has also noted various comments based on information relating to reduced average damages costs for the Queensland scheme in the 2010/11 and 2011/12 years. Great care needs to be taken in interpreting the average claim cost data as to the LGAQ's knowledge the average cost has been calculated on a payment year basis rather than an injury year basis.

Given the substantial increase in common law lodgements in the 2008/9 and 2009/10 years and the progressive increase in claims based on lower WRIs, a reduction in the average cost of claims paid in the two years following 2009/10 would not be unexpected. Q-COMP's May 2012 scheme monitoring report[4] identifies a steady increase in the proportion of common law claims with work related impairment (WRI) of 0%. It is also important to note the growth in the percentage of statutory claims converting to common law over the last five to six years.

The LGAQ submits that there is no basis for believing that the task of bringing common law costs back to a sustainable level has been achieved, or is even close to being achieved. It is considered particularly important to address the level of scheme resources being consumed by common law claims related to lower levels of impairment. There will be suggestions that this occur through introduction of an impairment threshold for access to common law. The LGAQ does not rule out use of a threshold and believes that this should remain a serious option.

But, in the short term, rather than adopt a measure that may create some cases of disadvantage, it would be preferable to address factors that unreasonably encourage the lodgement of large numbers of speculative claims. These factors involve profit driven business models being pursued by plaintiff lawyers and weaknesses in the common law process that facilitate such models.

The Parliamentary Committee has been provided with data showing that in 2010/11 common law claims made up 46% of workers' compensation claim costs[5]. The proportion of damages awards and settlements consumed by legal costs is potentially very significant. Robin Stewart-Crompton's 2010 report considered this issue[6] and recommended a survey to examine the percentage of settlement amounts paid to lawyers, medical professions or for other purposes. Consideration would then be given to introducing a statutory requirement for legal costs to be disclosed to Q-COMP. It would appear that Robin Stewart-Crompton's recommendation was not adopted by the then Government. The continuing lack of data in relation to a significant area of scheme expenditure is not acceptable.

The LGAQ proposes that Q-COMP be provided with statutory authority to collect and publish comprehensive data on legal costs and the proportion of damages awards or settlements that go towards legal costs and other costs.

Current pre-proceedings processes enable common law claims to be lodged and pursued to the point of conference with relatively limited effort on the part of plaintiff lawyers. It is not difficult to have enough information to prepare a compliant common law notice of claim. Section 347 of the *Legal Professions Act 2007* provides that a legal firm conducting a speculative personal injury claim is able to charge the client up to 50% of the net damages award or settlement (ie: the damages amount less statutory refunds and disbursements). It is noted that disbursements may also include fees for barristers commonly used by plaintiff lawyers to provide advice and representation for the compulsory conference. If settlement can be achieved around the time of the compulsory conference the combination of the limited, low cost preparation requirements and the proportion of the settlement able to go to the plaintiff lawyers provides a very clear profit incentive to pursue speculative matters based on less serious injuries. It is believed that this was discovered by WorkCover to its great cost when pursuing its pre-2010 common law claim settlement strategy.

As can often happen when limits are placed on any sort of fee there is a danger that the limit will become the accepted fee level.

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[4] Queensland Workers' Compensation Scheme Monitoring, May 2012, Q-COMP, p.34
[5] Departmental Information Paper to the Finance and Administration Committee, p.26
[6] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme, p.42

There is a concern that in some quarters this has occurred with speculative common law claims. The LGAQ has seen instances where, if legal costs at or near the limit provided for in the *Legal Profession Act* 2007 were charged, workers with less serious injuries would only have achieved the same or very similar net outcomes from common law compared to statutory lump sums. But in the process, significant amounts would have been paid in legal fee and disbursements.

The LGAQ proposes that section 347 of the *Legal Profession Act 2007* be amended so that the amount a law practice may charge and recover from a client for work done in relation to a speculative personal injury claim cannot exceed 30% of the net damages or settlement. Further, a schedule of charges should be developed to apply to legal services provided during the pre-proceedings process.

The ability of courts to make costs orders should discourage unmeritorious common law claims. There are many cases where this just does not work. In cases where LGW has been awarded costs the worker is generally not in a financial position to pay. The only option for LGW in such situations would be to try and force the worker to sell their house. LGW of course has not taken that approach. Plaintiff lawyers are therefore able to pursue speculative claims without the full level of risk that should apply. In many cases they can effectively hide behind the worker to avoid the consequences of costs orders through the expectation that insurers will not pursue costs from a worker with limited financial resources.

The LGAQ proposes that where lawyers run speculative common law claims the lawyers be liable for payment of costs granted by a court to the defendant.

A factor encouraging the low cost high volume business model of some large plaintiff law firms is the relatively low demands placed on them by the Act to file a common law claim and move it to the compulsory conference stage. Given the limitations period there is no good reason why more detailed information relating to the circumstances of the claim and the claimed amount cannot be included in the notice of claim. The original amount claimed invariably fails to reflect reality. Over the last 10 injury years, LGW's total finalised common law payments for each year have consistently represented between 30% and 35% of the original notice of claim amount for those claims. The lack of realistic detail in the notice of claim relating to the claimed amount also limits scope for early settlement of matters as in many cases plaintiff lawyers have simply not done the work necessary to have a view on a reasonable settlement amount. In the majority of cases, realistic settlement discussions are only able to occur around the time of the compulsory conference and by that stage significant legal costs for both the claimant (as opposed to their lawyer) and the insurer have been incurred. It is noted that plaintiff lawyers often appear to minimise their own costs and increase the level of disbursements by using barristers to provide advice and representation for the compulsory conference.

The LGAQ proposes that more detailed supporting information on factual circumstances, liability and the amount claimed be required to be provided in the notice of claim and that very strong disincentives be in place to prevent routine changing of notice of claim information at the compulsory conference.

Whilst the pre-2010 common law claim settlement strategy adopted by WorkCover had weaknesses, the LGAQ understands why it would have been considered important to avoid going to court. A common feature of periods of high insurance and common law costs is an environment where insurers are reluctant to take defensible matters to court. This was clearly the position that existed during the late 1990s and early 2000s in the lead up to Australia's public liability insurance crisis. There is a reluctance to be directly critical of the courts and that was also the case prior to the public liability crisis. But when the crisis manifested in widespread withdrawal of cover for community groups and recreational activities, criticism of court judgements, in a number of instances by judges, became commonplace.

The LGAQ considers current trends in damages awards, particularly in relation to future economic loss, are negatively impacting on the pursuit of a sustainable common law environment.

A worthwhile recent step in bringing common law costs back to sustainable levels was action taken to limit general damages through application of the ISV scales. This is a step that needed to be taken but the extent of its impact is still unclear. The LGAQ's concern is that the imposition of restraint on general damages may be undermined by damages awarded for past and future economic loss. Significant common law payments exceeding $400,000 are being seen by LGW in matters involving WRIs at or less than 5% based largely on amounts for past and future economic loss. Particular areas of concern are the impact of pre-existing conditions on damages awards, interest levels on past economic loss and the increasing use of secondary injuries to supplement common law claims. In many cases the common law payments are based on probabilities and speculation related to future events and the sifting of long lists of ambit damages categories and claimed amounts. It must be questioned whether basing large common law payments in cases of less serious injury on such imprecise grounds is properly fulfilling the objective of access to common law in the Queensland scheme.

There should also be a strengthening of mitigation obligations in the Act to discourage the inflation of past and future economic loss claims.

The LGAQ proposes that meaningful limitations be placed on the levels and components of economic loss awards so that such awards are more objectively and consistently determined. In doing so it should be clear that the Act had altered the common law.

The LGAQ proposes that a discount to damages should apply where workers pursuing common law claims are not actively and consistently seeking employment that they are capable of undertaking. It should also be compulsory for workers who are unable to return to work due to injury or who lodge common law claims to participate in Q-COMP's Return to Work Assist program. At present it is too easy for workers to simply state that they can't participate in the program due to their medical condition.

The LGAQ proposes that it should be an offence for any person to seek to prevent an injured worker from participating in a medically approved suitable duties or return to work program or to unreasonably seek to disrupt or interfere with a medically approved suitable duties or return to work program.

An issue that is faced in many common law claims relating to low impairment levels is the sourcing of further impairment assessments. In the case of matters that have gone before the Medical Assessment Tribunal, an impairment assessment has already been made by three eminent specialists. Invariably in the common law action a further report is obtained showing a significantly different level of assessment. This just leads to further disputation and cost. If costs were not driven up by obtaining multiple medical reports workers could receive a greater proportion of claim outcomes and overall costs would be reduced.

The LGAQ proposes that unless otherwise determined by a court, an impairment assessment by the Medical Assessment Tribunal be accepted as the level of impairment for the purposes of a common law action. Where a further specialist medical report is to be obtained for a common law matter it should be prepared by a specialist drawn on a next available basis from a panel maintained by Q-COMP.

A common reaction to increased common law costs is to increase statutory lump sum benefits in an attempt to enhance their relative attractiveness. Statutory lump sum entitlements have been significantly increased on numerous occasions over the past 12

years but the increases have comprehensively failed to produce a sustainable common law cost outcome for the Scheme. In the context of continuing access to common law, the LGAQ does not support further increasing statutory benefits as a response to increased common law costs.

If an effective and sustainable package of measures cannot be developed to significantly reduce the number of common law claims, and particularly the number of low impairment claims, there would appear to be little choice but to move towards an impairment threshold between 5% and 10%.

Psychiatric/Psychological Claims

The LGAQ believes there are strong arguments that support a significant proportion of psychiatric/psychological claims being excluded from the workers' compensation system. The current situation is continually resulting in negative outcomes for both workers and employers.

The May 2012 Scheme Monitoring Report released by Q-COMP demonstrates the existing financial impact of psychological claims and also the significant risk to the scheme of a continuing increase in the number of such claims. The report shows a 2011/12 year to date average cost for finalised psychological claims of $32,185. Aside from asbestos related claims, this is by far the highest average claim cost for any injury type. The report also shows that psychological claims have the longest average decision time frame - again by a considerable margin. Previous Q-COMP reports consistently record psychological claims having by far the longest average period of time lost. Q-COMP's 2010/11 Statistical Report[7] shows that in the 2010/11 year psychiatric/psychological claims represented 4% of statutory claim lodgements but 8.3% of common law claim lodgements.

In the synopsis of Q-COMP's May 2012 Scheme Monitoring Report[8] it is stated that the proportion of psychiatric/psychological claims has remained stable over the past two years. The LGAQ does not agree with that assessment. The Q-COMP report goes on to clearly show the increase in the proportion of psychiatric/psychological claims over the last five years and that the increase is in fact continuing[9]. Given the average cost and duration of psychiatric/psychological claims the continuing increase is significant.

The LGW scheme involves Local Governments employing more than 23,000 workers. LGW data relating to psychiatric/psychological claims is set out below.

Year	Total Claims Lodged	Psych Claims Lodged	Psych Proportion
2006/07	1773	67	3.78
2007/08	1823	67	3.67
2008/09	1713	81	4.73
2009/10	1823	99	5.43
2010/11	1646	93	5.65
2011/12*	1436	101	7.03

* Data as at 10/7/12

[7] 2010/11 Statistical Report, Q-COMP, p42
[8] Queensland Workers' Compensation Scheme Monitoring, May 2012, Q-COMP, p.9
[9] Ibid, p.23

LGW psychiatric/psychological claim numbers have not stabilized and the proportion they represent of total claims most definitely has not stabilized. However, even if it could be argued that the level across the scheme was stabilizing, the stabilization would be occurring at an unacceptable level with no prospect in sight of any reduction.

The LGAQ submits that the disproportionately negative impact of psychiatric/psychological claims on every scheme performance measure is a direct result of the workers' compensation framework being incapable of effectively dealing with many cases of alleged work related psychological/psychiatric injury. The clearest demonstration of this position occurs when comparing the objectives and provisions of the Act relating to rehabilitation and return to work with the reality of most psychiatric/psychological claims.

The Act's objectives and provisions reflect the well known health benefits of work and the critical roles that maintaining contact with the workplace and achieving an early return to work play in successful return to work outcomes. The reality of the process involved in making a decision on a psychiatric/psychological claim and then management of an accepted claim through the workers' compensation medical model will typically create an injury management environment that is the direct opposite of an optimal return to work model.

Psychiatric/psychological claims generally involve significant investigation as they can involve complex interactions between personal and workplace factors. Given the costs that can be involved in accepted claims, and limitations on insurers' capacity to restrict such costs, it is understandable that insurers will carefully investigate claims. Q-COMP data[10] shows that psychiatric/psychological claims have the longest average decision time for admitted statutory claims. This can exacerbate stress factors by placing a worker who may already have a perception regarding the impact of the workplace on their health into a situation that may be perceived as adversarial or harassment.

During the decision period the physical isolation from the workplace is likely to commence. So too can the perception that not just particular workplace factors, but the workplace as a whole is a source of stress. The likelihood of positively addressing any workplace issues, whether the claim is approved or not, is thereby diminished.

If a claim is accepted (and generally also during the decision period) the overwhelming approach of treating medical practitioners is separation from the workplace. It is then not uncommon for the worker to seek almost total isolation from the workplace with obvious implications for issue resolution and return to work planning.

The LGAQ does not suggest that this occurs in all cases but there is a concern that for a number of reasons, including time pressures, medical practitioners who may defer excessively to the worker's account of their experiences and concerns may unwittingly reinforce workplace avoidance issues whilst other pre-existing life problems are not addressed and become refocused on the workplace. This can easily lead to increased adversarial interactions with the workplace (including return to work initiatives), unrealistic expectations of redress and expectations of open-ended access to psychiatric/psychological treatment.

In too many cases it is considered that workers with existing vulnerabilities or exposure to non work related stressors are pursuing workers' compensation claims based on conditions that predominantly relate to those non work related factors. Far less significant factors related to the workplace provide the basis for a workers compensation claim. As mentioned above, in such situations it becomes extremely difficult to resolve any workplace related issues and of course the non work related issues are beyond the capacity (and responsibility) of the workplace to deal with.

[10] Queensland Workers' Compensation Scheme Monitoring, May 2012, Q-COMP, p.17

There should be encouragement for workplace grievances or conflicts to be dealt with through workplace processes such as grievance procedures and mediation. External professional support can, and often is used, as part of such processes. Industrial Tribunals also provide avenues for dealing with issues in an environment that emphasises resolution through conciliation. But unfortunately the Act, and the progressive erosion of checks and balances that should apply at the Statutory Review level, encourages workers to instead commence a claim process that will often be a dead end experience for all involved.

When discussing psychiatric/psychological claims with the LGAQ, an experienced HR professional from a large Queensland Council with sound return to work outcomes for physical injuries made the following comment:

> "The current process seems to be used in circumstances where professional and external mediation would be a far more appropriate response. I am struggling to recall any successful reintegration back into the workforce once a claim is lodged."

The LGAQ proposes that the meaning of injury in the Act require that in the case of psychiatric/psychological disorders the employment must be the major significant factor causing the disorder. It is further proposed that the list of circumstances where a psychiatric/psychological disorder is not considered to be an injury be expanded to include circumstances where a reasonable person or person of reasonable fortitude would not be expected to sustain the disorder.

There are a number of other issues related to psychiatric/psychological claims that require attention. These include the tactical use of psychiatric/psychological claims to disrupt employee performance management processes, the overloading of the Statutory Review process with psychiatric/psychological claims and the fact that, due to the definition of injury in the Act, successful psychiatric/psychological statutory and common law claims are now being made by council chief executive officers and departmental heads. It is hoped that amendments to the definition of Injury would also address such issues.

The point was made earlier in this submission that early action should be taken in response to identified threats to the objectives, balance and sustainability of the workers compensation scheme. The LGAQ considers that more than sufficient evidence exists to justify taking action to address existing pressures and further risks to the scheme arising from psychiatric/psychological claims.

Meaning of Injury

The existing meaning of "injury" in the Act does not enable the scheme to fully direct its resources to pursuing the Act objective of providing benefits for workers who sustain injury in their employment. As an insurer, LGW regularly deals with claims related to minor or unspecific events where, after investigation, it is determined that the claimant has a significant existing condition. Too much scope is available for pre-existing and degenerative conditions to be moved into the workers compensation arena based on varying interpretations of the words "significant contributing factor". The focus of the Act on work related injuries needs to be strengthened and be more definite.

The LGAQ proposes that the meaning of injury in the Act require that employment be the major significant factor causing the injury.

Step Down in Weekly Compensation

The LGAQ believes that a well targeted step down in weekly compensation payments coupled with active return to work processes plays an important role in encouraging early return to work. In many sectors, including large parts of the local government workforce, the existing step down after 26 weeks has become ineffective due to growth in the level of Queensland Ordinary Time Earnings (QOTE). In recent years the growth in QOTE has far exceeded increases in the Consumer Price Index. The rate to apply after 26 weeks (70% of QOTE) is currently higher than many workers' normal weekly pay.

The LGAQ proposes that after 26 weeks the rate of weekly compensation be reduced to the greater of 60% of QOTE or 75% of Normal Weekly Earnings.

Latent Onset Claims

The LGAQ believes that lump sum payments able to be received in relation to latent onset condition claims can be disproportionate. There is no doubt that the claimants are deserving. However it is the case that a 70 year old claimant with a terminal latent onset condition can receive up to $695,000 in statutory compensation. Whilst the significant impact of the additional lump sum on the total payment is reduced through a sliding scale after age 70, the amount received up to age 70 is seen as very disproportionate compared to lump sums paid to younger workers with significant injuries, or compared to what could be achieved through common law. The level of statutory damages also means that claimants often do not pursue other potential avenues of action against parties such as asbestos manufacturers resulting in the scheme bearing the full cost.

The current Act provisions relating to liability for latent onset claims also place an unreasonable burden on the employer at the time the condition is diagnosed. This is despite the work with that employer often having significantly lower potential contribution to the injury than work with previous employers or other non work related factors. LGW has been involved in matters where long term smokers have been diagnosed with lung cancer and the claim against the employing council at the time of diagnosis being upheld on the basis of relatively limited exposure to asbestos. A more equitable process for apportionment should be developed.

The LGAQ proposes that the sliding scale for reduction of the additional lump sum entitlement for latent onset injuries commence at age 60. A process for equitable apportionment of liability for latent onset claims should be developed.

Solar Claims

It is believed that solar claims will very soon also become a significant and unwarranted burden on the scheme. There are two issues to be addressed. The first is the need to more reasonably and equitably take into account non-work related exposure. It is submitted that it would be very typical for older workers currently in the workforce to have had significant childhood exposure (when the sun safe message was far less prominent than it is today) and significant recreational/private exposure. A reasonable balance must be found between non-work related exposure and entitlements available through a work related injury compensation scheme.

Secondly, a growing number of claims are being lodged seeking to creatively utilize latent onset provisions in the Act that, it is submitted, were developed more specifically for conditions such as asbestos related diseases.

Between November 2011 and March 2012 LGW received (among other solar claims) 7 claims seeking assessments for lump sum payments related to skin cancer. The claims appear to be driven by plaintiff lawyers and have all been forwarded by the same law firm. The ages of the claimants at the time of lodgement were 78, 81, 65, 70, 70, 70 and 84 and almost all had been many years retired.

The argument being used was that the worker is entitled to claim on the basis that, well after their retirement, a doctor had only now diagnosed and issued a medical certificate for an underlying condition manifesting in the skin cancers. This is despite, in many cases, the workers having had skin cancer treatment over many years but not having made a claim in relation to that treatment. The claims typically just seek lump sum payments and so are not directed towards the provision of any ongoing treatment.

It is not believed that the latent onset provisions of the Act were specifically drafted with the intent of having application to solar claims and particularly to the way many claims are now being pursued. If such claims need to be approved and, due to an inadequacy in the Act, entitlements based on the latent onset provisions arise, the flow on cost potential would be very significant.

The LGAQ proposes that solar claims be excluded from the latent onset provisions of the Act. The Act should also specifically recognise the substantial contribution that non work related exposure and non Queensland work related exposure would play in the development of solar related conditions. Work in Queensland should be the major significant factor causing the condition. A process for equitable apportionment of liability for latent onset claims should be developed.

Journey and Recess Claims

The LGAQ does not believe that justification exists for the no fault coverage of workers compensation to extend to journeys to and from work or recess journeys. It has and continues to be repeatedly argued that employers have little or no control over such journeys. No justification can be found for individuals who were at fault in the event causing injury during the journey to or from work to have greater protections than other members of the community. Where the negligence of others resulted in the injury avenues for recourse are available through the *Motor Vehicle Insurance Act* or tort law. As is often the case where motor vehicles are involved there are instances where significant injury has occurred. It is not argued that such cases are not deserving of support. It is argued that justification does not exist for that support to be provided through the workers compensation scheme.

Clear inequities are also arising with injuries occurring during recesses away from the place of employment. It can be the case that compensation is payable when workers are taking a meal break away from the workplace and experience an everyday event such as breaking a tooth while eating lunch or experiencing an acute medical event. There is no good reason why such events are compensable but the same events occurring in some other setting are not.

Many employers are now also looking to assist and support employees in maintaining a healthy lifestyle through health and wellness programs. Local Government is participating with Queensland Health in a project directed at developing healthier workforces. A major hurdle with such programs is the grey area relating to workers compensation entitlements of participants. In many cases councils look to facilitate voluntary participation of employees in healthy activities but often hesitate due to concerns that the proximity of the program to the employment relationship will give rise to compensation entitlements for everyday events.

This is a similar dilemma to that faced by many public authorities around the time of the public liability insurance crisis when the capacity to accept risks associated with providing a range of community infrastructure was in question.

The LGAQ proposes that the scheme no longer provide compensation for workers injured on their journey between the home and the workplace, or for injuries that occur during an ordinary recess away from the workplace or in the course of voluntarily participation in activities during a recess or outside of working hours.

Statutory Review Decisions

An insurer can be seriously disadvantaged by incorrect decisions of Q-COMP in statutory review matters. Whilst there is scope for the insurer to have a decision by Q-COMP overturned on appeal there is no scope to recover compensation payments required to be made as a result of that decision. LGW has been forced by Q-COMP to make substantial payments following review decisions in cases where the review decision was subsequently overturned in court. In such matters Q-COMP has demanded (and accompanied the demand with threats relating to breaches of the self-insurance licence) that immediate payment be made following the Statutory Review decision. As a result, workers can and have received significant payments that they were subsequently found not to be legally entitled to. It is known that LGW is by no means the only insurer to have suffered this disadvantage.

A key issue in this regard is the time being taken for matters to be heard by the Queensland Industrial Relations Commission. At the current time it is not unusual for LGW to experience delays of some 7 to 8 months before a matter can be fully heard by the Commission. It is particularly relevant to note the workload being imposed on the Statutory Review and appeals processes by psychiatric/psychological claims.

The LGAQ proposes that the Act provide a more equitable process for implementation of Statutory Review decisions that balances the interests of workers and insurers. A Statutory Review decision should be able to be stayed if the decision was subject to appeal. Action, including reintroduction of the option for matters to be heard by Magistrates, should also be taken to reduce the time taken to bring on and hear appeals.

Medical Assessment Tribunals

Current arrangements enable the process for workers to disagree with permanent impairment assessments to be subject to abuse. LGW has been involved in instances where workers have disagreed with assessments made by their own treating doctor or admitted that they disagreed with the LGW assessment because it involved a “free trip” to Brisbane. There should be some onus on workers to provide reasonable information supporting disagreement with an assessment. This would be consistent with Section 85 of the Workers Compensation and Rehabilitation Regulation which requires a worker applying for compensation to provide reasonable proof of injury and its cause. Allowing the insurer to give consideration to the information put forward in relation to the worker’s disagreement would reduce the number of matters being referred to the Tribunals.

The LGAQ proposes that section 186 of the Act should require a worker to provide reasonable information, including medical evidence, to support disagreement with an assessment of permanent impairment. The insurer should have an opportunity to consider the information and then either issue a fresh notice of assessment or refer the matter to a Medical Assessment Tribunal.