HPL HALL PAYNE LAWYERS

Submission to the Finance and Administration Committee of the Parliament of Queensland on an Inquiry into and report on the operation of the Queensland Workers' Compensation Scheme.

3 September 2012

The Terms of Reference

On 7 June 2012 the Legislative Assembly agreed to a motion that the Finance and Administration Committee inquire into and report on the operation of Queensland's workers' compensation scheme.

In particular the committee is required to consider:

- the performance of the scheme in meeting its objectives under section 5 of the Act;
- how the Queensland workers' compensation scheme compares to the scheme arrangements in other Australian jurisdictions;
- WorkCover's current and future financial position and its impact on the Queensland economy, the State's competitiveness and employment growth;
- 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;
- whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment;
- in conducting the inquiry, the committee should also consider and report on implementation of the recommendations of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme.

Executive Summary

1. We do not propose to address all of the terms of reference.
2. Queensland is one of only two jurisdictions within the Commonwealth with open access to common law remedies for workplace injuries.
3. The Queensland scheme is working well and is adequately funded.
4. The scheme is demonstrably the best performing of its type in the country.
5. The scheme benefits the interests of the stakeholders, i.e. employers and workers.
6. The scheme is fair, affordable, and sustainable and places no burden on consolidated revenue.
7. There is no cogent evidence to support a need for any change to be made to the present scheme.
8. An important feature of the Queensland scheme is that it continues to provide cover to and from work ("journey claims"). Given the increasing amount of travel that is required for employees travelling to and from work sites around the State it is important to retain insurance coverage for journey claims under the statutory scheme.
9. A removal of, or a limitation on the right to access common law remedies for workplace injuries, will do nothing to better the stated objectives of the legislation.
10. Limiting or denying access to common law will:
    - Do nothing to assist the worker meeting the true cost of his / her disability
    - Will discourage the injured worker from attempting to move forward with his / her life
    - May well increase the premium cost to the employer
    - Will do nothing to improve the efficiency, responsiveness, and cost effectiveness of the scheme.

Submissions

The paramount objective of the Workers' Compensation and Rehabilitation Act 2003 (the Act) is to maintain a balance between providing fair and appropriate benefits for injured workers' and their dependants and ensuring reasonable cost levels for employers.

In making this submission we attempt to co- relate the inquiry's terms of reference to the maintenance of that paramount objective.

The expansive terms of reference do not direct that a submission address the entirety of the matters the subject of the enquiry.

These submissions are limited to those aspects of the terms of reference upon which we can usefully respond.

The Current Queensland scheme

There is presently insufficient objective evidence to compare and contrast the results of the amendments enacted by the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act* 2010 (No. 24 of 2010) ("the 2010 amendments").

The flow on effect of the 2010 amendments is, in reality, not yet capable of proper forensic analysis.

Notwithstanding, statistical data, as released by WorkCover Queensland to date confirms a downtrend in both the cost and frequency of common law claims. Further:

1. In respect of statutory claims, payments have increased by 14 % for the fye 2011/2012 due to the increase in weekly compensation payments. The WorkCover Annual report [1] acknowledges an increase in statutory payments by 3 % and, significantly, a decrease in common law payments of some 7 %.
2. Common law payments post the 2010 amendments have reduced by 9.6% compared with the 2010 projections of claims increasing by 18%.

[1] WorkCover Queensland Annual Report 2010/2011 – page 33

3. Clearly the concern expressed by WorkCover in 2010 in respect of the anticipated significant increase in common law claims has failed to materialise.
4. Further, the then WorkCover submission expressed concern as to the further impact on the quantum of common law claims payments consequent upon then recent decisions.
5. The most recent amendments to the Act of significance to this inquiry were made in 2010. These amendments dealt with changes to the operation of the scheme in respect of those injured post 1 July 2010.
6. The full effect and impact of those changes are yet to be seen. It is entirely premature to make further changes to the scheme when the results of the 2010 amendments are yet to become available for proper analysis.

A Threshold Test to Access Common Law Damages

It is submitted that the imposition of a threshold test to enable an injured worker to access common law remedies will only go to serve a grave injustice upon the injured worker.

Other commentators have said that the introduction of a threshold test would be unjust, inequitable and a retrograde step. We adopt those observations and go further. In our submission the introduction of a threshold test will deny the majority of the most deserving of the inured worker's the right to access common law remedies.

Common law damages awards are not to be considered as a reward to an injured worker; rather the award of common law damages is designed to put the injured person into the situation he /she would have been in, had not the injury occurred, as best as money can do. A damages payment at common law will never, no matter how high be the quantum, ever be sufficient to properly restore the injured worker to his / her pre accident situation.

Regrettably (although never admitted to be such) prejudices prevail against previously injured workers such that a previously injured worker carrying an injury, even one assessed at 0%, is highly unlikely to succeed in obtaining employment when up against non-injured applicant(s).

Inevitably and no matter what the WRI assessment might be, the injured worker will never fully recover from the financial consequences of the injury and the financial hardship that ensues.

The significant majority of awards made by the Courts of this State in actions involving workplace injury derive from the initial WRI assessment ranging as between 0% and 5%.

In addition the introduction of the ISV tables following the 2010 amendments has meant a reduction in the payment of gross common law damages by reducing the quantum of general damages applicable.

Pre 2010 reform average general damages equated to $ 30,533.00 whereas post 2010 reform general damages for the identical injury have been reduced to an average of $10,753.00.[2]

Any introduction of a threshold test, even a 0% threshold is strongly opposed. This is because:

- A WRI cannot properly measure the true impact of a disability
- A WRI cannot reflect the lost capacity for work
- A WRI fails to reflect the future expense to be incurred by an injured worker
- A WRI fails to differentiate as between a workers age, occupation, rate of pay, education, needs, and expenses.

The consequences of the introduction of a threshold

Other Australian schemes which provide for long tail claims administration typically do not result in reduce premium costs to employers. At the same time they deliver substantially reduced benefits to injured workers.

Should an injured worker fail to meet a WRI threshold, inevitably a longer running statutory claim will ensue and / or an increase in the payments of statutory benefits would apply to a

[2]Extract - Bar Association of Queensland submission 8 August 2008

much greater number workers than those who might otherwise have been able to access common law damages.

Consequently, a threshold test for a WRI will have no impact whatsoever on reducing the employers' premiums.

Disputes as to the applicable WRI to any given injury will inevitably lead to significant delays in the Medical Assessment Tribunal process.

Already the delay is some 8 weeks.

There are no suitably qualified medical practitioners, other than those already sitting, who either are prepared to sit or are qualified to sit on Medical Assessment Tribunals - hence a very significant blow out in the time taken to appear before a Tribunal for assessment. This delay will lead to an extended period of payment of statutory entitlements to the inured worker.

Less than 5% of statutory claims actually proceed to common law. An increase in statutory lump sum payments would therefore result in increased payments to 95% of statutory claimants and in turn drain the fund as a whole. [3] Lawyer intervention at an earlier time will add to the cost and a more rigid and adversarial process at the Medical Assessment tribunal stage.[4]

The imposition of a threshold based upon a WRI is unfair because:

- It does not measure disability,
- Relies upon a legislative direction to apply tables incapable of assessing the degree of the work disability,
- Fails to differentiate as between an inordinate number of variables pertaining to a particular individual,
- Fails to differentiate the consequence of an impairment to one person and which may have a completely different impact financially upon another individual.

[3] Queensland Workers' Compensation Scheme Monitoring, May 2012.
[4] Bar Association of Queensland submission 8 august 2012

Conclusion

No other State/Territory scheme which provides for compensation for injured workers achieves, for the employer, a relatively inexpensive premium, and for the worker, his or her right to protection of their livelihood to the extent that a properly provided for scheme of workers' compensation can achieve that.

The Queensland scheme, put simply, maintains a fair balance as is required by section 5(4)(a) of the WCRA.

No other State has a fully funded workers' compensation scheme. It is important to consider that statement against the historical backdrop of the state that the scheme was in circa the mid 1990's. At that time, the then conservative Borbidge government commissioned a review into the then state of the workers' compensation scheme (the "Kennedy Enquiry"). Mr Kennedy concluded that the only way out of the mess that the workers' compensation scheme was in at that time, was to introduce a 15% threshold. However, due to important and robust parliamentary debate, that did not occur. Rather, the present scheme of requiring the injured worker to elect between lump sum compensation and common law damages (for injuries below 20% WRI) has resulted in a scheme with one of the lowest premium rates to employers throughout Australia. At the same time the scheme has remained the only fully funded one in the country.

Further, it is important to highlight that over the period since the Kennedy Enquiry through to 2010, premium rates for employers in Queensland had not only seen no increase, but dropped significantly in that time (to a low of $1.15 per $100.00 of wages).

Any reduction in workers rights to access common law (which would of course occur in the event that a threshold was introduced) is most likely to result in the need to increase quantum of benefits payable during the statutory claim phase, including consequential increases in lump sum payments for injuries which do not exceed whatever threshold may apply.

Finally, as has been commented on by others, it is very difficult, if not impossible to justify imposition of a threshold to apply to an individual injured as a result of workplace

negligence, where no such similar limitation exists to access to common law damages for those injured other than as a result of a workplace mishap (specifically those individuals whose claims would be administered under the *Motor Accident Insurance Act* 1994; *Personal Injuries Proceedings Act* 2002).

Yours faithfully
HALL PAYNE LAWYERS