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LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND

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Finance and Administration Committee

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Mr Michael Crandon MP
Chair
Finance and Administration Committee
Queensland Parliament
Parliament House
BRISBANE QLD 4000

Dear Mr Crandon Michael

Thank you for your letter dated 27 February 2013 advising of the revised reporting date for the Finance and Administration Committee inquiry into Queensland's workers' compensation scheme and providing details of Q-COMP's proposal for reducing red-tape. The Local Government Association of Queensland Ltd (LGAQ) welcomes the opportunity to provide some updated information specifically relevant to our submission to the Committee and also comment on the Q-COMP proposal.

The LGAQ's submission to the Committee sought to provide details of a number of specific risks to the workers' compensation scheme's objectives, balance and financial sustainability. Included in those risks were solar claims, the current statutory meaning of injury and common law claims for minor injuries. We are in a position to provide relevant, updated information relating to those areas of risk.

Solar Claims

The LGAQ's submission to the Committee drew attention to the potential for solar claims to become a significant and unwarranted burden on the Scheme. Specific reference was made to a speculative group of solar claims forwarded to Local Government Workcare (LGW) by a particular law firm. The claims related to mostly long retired workers with ages ranging from 65 to 84.

LGW had rejected the claims on the basis that the claimants had received often extensive skin cancer related treatment over a number of years and in accordance with the *Workers' Compensation and Rehabilitation Act 2003* (the Act) the claims were considered out of time. Each claim decision was taken to Statutory Review by the claimant. Outcomes from Statutory Review have now been received with three of LGW's decisions being upheld and four set aside.

The decisions clearly demonstrate the potential such claims have to adversely impact on the Scheme and the scope provided by existing provisions of the Act for that impact to occur.

Most of the claimants had received quite extensive skin cancer related treatment over a number of years prior to the claims being lodged. Typically, claims made so long after treatment had been received for a condition would be rejected on the basis that under the Act the application was considered to be out of time.

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However the claims in question are being pursued on the basis that despite the individuals having received treatment for skin cancers over many years, the condition referred to in the Workers' Compensation and Rehabilitation Regulation Table of Injuries of "solar induced skin disease that is malignant" had not previously been specifically diagnosed. Each application was accompanied by a medical certificate from the same dermatologist with the same diagnosis of "solar induced skin disease that is malignant"

The claims do not seek treatment but rather, permanent impairment lump sums. It is worth noting that medical reports provided as part of the claims also included assessments for scarring and disfigurement. That part of each claim has not been pursued.

Determining the claims involved applying to the extensive background of each claim the often complex interaction of Act provisions dealing with date of assessment by a doctor, diagnosis of injury, latent onset injuries and various legal precedents relevant to these provisions. After consideration of these issues the Statutory Review decisions have essentially turned on a determination as to whether during extended periods of past skin cancer treatment the treating doctor can be considered to have diagnosed the individual as having a solar induced skin disease. In the circumstances, a medical certificate would not reasonably be the only acceptable evidence of such a diagnosis. Therefore, in order to form a view on whether a diagnosis was made it becomes necessary to examine medical records going back many years and, if they are still practicing, question doctors over the exact nature of the many discussions they have had with their patient during the course of skin cancer treatment.

One of the claims that LGW rejected as being out of time, and which Q-COMP has overturned at Statutory Review, involved an individual who (apart from other skin cancer treatment) had been seen on more than 40 occasions by a particular solar clinic since retiring from work.

It was concluded by Q-COMP that over the course of that treatment the individual had been specifically advised that his skin cancers were sun related and that there was a need for ongoing vigilance and sun protection. Despite that conclusion, Q-COMP found that during the treatment nothing was said that amounted to advice or a diagnosis that the skin lesions were a manifestation of solar induced skin disease.

This amounts to splitting hairs as during the course of skin cancer treatment there would not be a particular reason why a medical practitioner would, in so many words, make the specific diagnosis appearing in the Workers' Compensation and Rehabilitation Regulation Table of Injuries. But all patients with any ongoing development of skin cancer lesions would be advised to maintain a more regular timetable of check ups. It could be argued that it would be negligent for doctors not to recommend more regular check ups for patients with a history of skin cancer lesions. This advice would clearly be based on an assessment of the risk, for that individual, of further lesions appearing. The suggestion that patients with a history of skin cancer lesions and treatment are not aware after ongoing discussions with their doctor and specialist that personal medical circumstances (however they may have been referred to) now exist impacting on the likelihood of further lesions appearing is absolute nonsense.

Issues such as this can and will be raised on appeal but the situation will quickly become unsustainable if this is to be the approach to dealing with such claims. A high percentage of older Queenslanders would be receiving skin cancer treatment whether they worked in an outdoor occupation or not. The Queensland Cancer Council advises that two in three Australians will be diagnosed with skin cancer by the time they are 70.

Many tens of thousands of retired Queensland workers would have received skin cancer treatment and would have had some level of sun exposure in the course of their work. Workers' compensation claims similar to those lodged with LGW could potentially be made on behalf of each of those retired workers. The time and cost involved in just investigating such claims would be enormous. Because of the potential numbers involved, insurers would be forced to conduct a detailed investigation of each claimant's medical history and defend decisions through reviews and appeals or else face an endless stream of permanent impairment payments to retired workers.

Many forms of injury and illness can leave individuals in difficult or even tragic circumstances. It is beyond question that they should receive strong support from the broader community. But that in itself is not an argument for such support to be provided through a workers' compensation system. The prevalence of skin cancer in Queensland and data such as that from the Queensland Cancer Council relating to skin cancer rates in older Australians clearly point to this issue being much broader than the working environment. Exposure during youth and a lifetime of private activities will have played a role. There is no clear mechanism for quantifying that role, but it cannot be ignored and provides a sound basis for the issue to be dealt with on a much broader scale than the workers' compensation system.

This is an issue that needs to be dealt with immediately and decisively so as to prevent the emergence of another significant legal costs driven drain on Queensland's workers compensation scheme resources.

The LGAQ has proposed that the meaning of injury in the Act be changed to require employment to be the major significant factor causing the injury. Implementing this change will assist in developing a more balanced legislative approach to dealing with solar claims. But it has become clear that this needs to be supported by more specific measures.

It is proposed that the Act require that solar claims be lodged within 12 months of ceasing employment. Further, as occurs with industrial deafness claims it is important that the contribution of non-work related factors is recognised. Based on the critical exposure during youth and also exposure during years of recreational / non-work related activities it is considered that a reduction of 50% should apply to solar related permanent impairment assessments. Specific steps must also be taken to address the potentially damaging business strategy of pursuing solar claims on behalf of retired workers despite the often extensive past treatment received for the condition on which the claim is based. Such steps need to include a more common sense approach to dealing with the questions of diagnosis and assessment of solar related conditions in the context of the time limitation for making claims.

Meaning Of Injury

As stated above, the LGAQ has proposed that the meaning of injury in the Act require that employment be the major significant factor causing the injury. Our initial submission to the Committee provided information on how application of the existing meaning of injury to degenerative, pre-existing and particularly psychological injuries was impacting on the Scheme.

A recent Statutory Review decision has highlighted the implications of the current meaning of injury for future solar related claim costs.

The Statutory Review decision related to a skin cancer claim that was initially rejected by LGW. The rejection was based on employment not being a significant factor causing the injury.

Briefly, the facts were that the claimant lodged a workers' compensation claim for a skin cancer on the nose. It was claimed that employment with a Queensland Council was a significant contributing factor to the skin cancer. Prior to working with Council the claimant stated that during a long working life both interstate and in Queensland approximately 9 years were spent in jobs that involved indirect sun exposure and the 7 years with Council involved "direct" sun exposure.

It was determined that during the course of employment with the Council the claimant was always provided with personal protective equipment including broad brimmed hat, gloves, long sleeved shirt, long pants, sun screen and lip balm. The claimant always wore the hat when outside the work truck but did not wear it inside the truck and believed direct sun exposure had occurred when leaning out of the window to check whether road infrastructure required maintenance. The claimant stated that the sunscreen provided by Council was only applied approximately 60% of the time.

Specialist medical evidence quoted by Q-COMP as part of determining whether the claimant had sustained an injury under the Act noted the claimant had multiple skin cancer risk factors. This included genetic factors evidenced by hair and eye colour and pale skin. It was also noted that the claimant had a melanoma removed and had sun spots removed from various parts of the body prior to commencing work with the Council. The medical evidence therefore concluded that the claimant had a prior genetic predisposition to skin cancer and had experienced sun damage to the skin before working with the Council.

The Specialist stated as follows:

> *"I believe the overall risk from the [Council] point of view is that in the risk assessment, taking into consideration the [Claimant's] skin types, past history of melanoma prior to this, other skin cancers and protective clothing I believe the [Council] could take no more risk level other than 10% of the total risk."*

In determining the Statutory Review application Q-COMP stated as follows:

> *"It is the opinion of* [name of specialist] *that, whilst you have multiple risk factors for the injury, your work related sun exposure with the* [Council] *would contribute 10% to the aetiological factors' of your condition. While the Act does not define the meaning of 'significant', I consider that 10% is sufficiently large enough to make a finding that your employment with the* [Council] *was a significant contributing factor to the basal cell carcinoma on your nose.*
>
> *On the available medical and factual evidence and the balance of probability, although there may have been other factors contributing to the basal cell carcinoma on your nose, I am satisfied that your employment with the* [Council] *would have been a significant contributing factor to the injury.'*

As a result, LGW's decision to reject the claim was overturned. The reasoning adopted in this Statutory Review decision, and in the decision discussed in the section above dealing with solar claims, could potentially apply to very large numbers of current and past workers. This is an undeniable risk to the Scheme.

A vital response to that risk is the LGAQ's suggested change to the meaning of injury. The LGAQ again emphasises that it fully recognises the difficult and sometimes tragic impact that certain injuries can have on individuals and their families. They should receive strong support from government and the community. But this does not necessarily mean that such support should be provided by a workers' compensation scheme.

Common Law Claims

The LGAQ's submission highlighted risks to the Scheme from business models adopted by some large plaintiff law firms. A recently emerging element of some business models is television advertising that needs to be considered in terms of personal injury advertising limitations under the *Personal Injuries Proceedings Act 2002* (PIPA).

PIPA places restrictions on personal injury advertising and specifically prohibits statements such as "no win no fee" being made in personal injury advertising.

An example of recent advertising noted by the LGAQ is an advertisement for Shine Lawyers. The advertisement used the slogan "Right Wrong" which is a variant of the theme of similar advertising being run by large plaintiff law firms. The advertisement shows a man getting out of bed. In the house with him are persons who would appear to be his partner and young children. As he walks out of his bedroom the shot focuses on photos of what would appear to be his family and then a pile of papers is momentarily shown with the word "overdue" visible on the top sheet. His demeanour is clearly of a troubled person.

As he moves downstairs there is a brief but critical scene where he is shown to carefully place his hand on the hand rail of the staircase and as he does so take a very slow and deliberate step down the stairs. He then just as slowly commences to raise his leg to take the next step. What appears to be tea being infused in a cup is then shown suggesting he is not going anywhere in a hurry. The man is then shown looking longingly or despondently out of his window (apparently early in the morning) at a man dressed in a shirt resembling an orange work shirt placing an esky in the back of a tray back utility. He is then shown looking at a family photo and shown wearing a wedding ring.

The Shine advertisement concluded with the words "No Win No Fee" being prominently displayed. From the imagery in the advertisement the LGAQ formed the view that the advertisement was showing a man in financial difficulty who was experiencing some form of physical limitation that he perceived was impacting on his family, and that the limitation was affecting his capacity to leave home and/or go to work. The man's slow laboured approach to moving down the stairs is only brief but it is critical to this interpretation of the advertisement's imagery. No doubt it would be argued that other interpretations were open or preferable.

At the time of writing, the advertisement (without the scene showing the words no win no fee) was able to be viewed on the Shine website. The LGAQ respectfully submits that the Committee may wish to form its own view on the advertisement. It would also be respectfully submitted that the Committee may wish to give consideration to the objectives of the PIPA personal injury advertising limitations.

Q-COMP Red-Tape Reduction Proposal

The LGAQ's observations on the proposal are as follows:

- Q-COMP's description of the claim process in Victoria does not appear consistent with information published by WorkSafe Victoria. The LGAQ's understanding of the Victorian process is that the employer is required to lodge a claim received from a worker for weekly payments irrespective of whether the duration of time lost is covered by the excess. Information on the covering page of the WorkSafe Worker's Injury Claim Form includes the following statement of the employer's responsibility for lodging the form :

  "If you are claiming weekly payments, they must send the completed form and any WorkSafe Certificates of Capacity (medical certificates) to the Agent as soon as possible, but no latter than 10 days after receiving them from you – or they may be financially penalised."

  Claims only involving medical expenses that do not exceed a certain excess related threshold are not required to be lodged within 10 days but still do need to be lodged at 3 monthly intervals.

- The Victorian system has an established practice of claims being lodged through the employer due to the involvement of claim Agents in the system.

- The Q-COMP proposal would involve a large number of medical expenses only claims that are currently paid by WorkCover being paid instead by the employer. Whilst it may be suggested that other aspects of the proposal would offset this cost to employers, inadequate information is provided to assess whether that would in fact be the case.

- The Q-COMP proposal will require employers to undertake new administrative processes including making an assessment as to whether a claim should be lodged with WorkCover immediately. Most employers have little experience in making such assessments.

The LGAQ submits that this is a complex issue that requires far more detailed data and analysis than has been put forward to date by Q-COMP.

Yours sincerely

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CHIEF EXECUTIVE OFFICER