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3 September 2012

Mr Michael Crandon MP
Chair, Finance and Administration Committee
Parliament House
George Street
Brisbane

By post and email: fac@parliament.qld.gov.au

Dear Mr Crandon

**INQUIRY INTO THE OPERATION OF QUEENSLAND'S WORKERS' COMPENSATION SCHEME**

Thank you for your correspondence to our office dated 13 July 2012, in relation to the Finance and Administration Committee's Inquiry into the operation of Queensland's workers' compensation scheme.

Slater & Gordon welcomes the opportunity to present a submission. Please find enclosed for the Committee's consideration, a submission prepared by Slater & Gordon, incorporating Trilby Misso Lawyers in Queensland.

Our lawyers provide advice and representation to injured workers from 13 locations throughout Queensland.

Should the Committee have time to hear oral submissions, Slater & Gordon would appreciate the opportunity to elaborate on the issues raised in our written submission.

Please do not hesitate to contact me on (07) 3220 2555.

Yours faithfully

K Simpson

Karen Simpson
Practice Group Leader – Personal Injuries
**SLATER & GORDON**

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# Inquiry into the operation of Queensland's Workers' Compensation Scheme

Slater & Gordon
*Lawyers*

A submission to the Finance and Administration Committee of the Queensland Parliament, prepared by Slater & Gordon.

3rd of September 2012.

Slater & Gordon provide advice and representation to injured workers throughout Queensland. The workers that we represent come from a wide range of industry sectors.

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Submitted by
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# 1. Summary

- There is a long standing legislative requirement of the Queensland workers' compensation scheme to provide a reasonable balance between the objectives of providing fair and appropriate benefits for injured workers and their families, and keeping the scheme reasonably affordable for employers. The Queensland workers' compensation scheme achieves the key objectives in the *Workers' Compensation and Rehabilitation Act* 2003 ('the Act') by providing adequate financial and medical support to injured workers, and competitive and consistently low premiums for employers;

- The current "short tail" structure of the Queensland workers' compensation scheme is unique among Australian jurisdictions. The structure is comprised of time limited statutory benefits and modified common law arrangements. In addition to providing appropriate compensation, both elements of the structure support significantly injured workers to exit the scheme relatively quickly, thereby reducing administrative costs.

- The scheme, underpinned by the short tail compensation structure, has for more than a decade consistently outperformed other jurisdictions in all key areas, except incidence rates;

- Subject to audit confirmation, the Queensland workers' compensation scheme funding ratio at 30 June 2012 is 117%. This financial position is the envy of other jurisdictions;

- Given the consistent strength of the financial position of the scheme and the relatively low premiums paid by Queensland employers, any further erosion of workers' rights and entitlements would breach the balance the scheme provides, and undermine the objective of the Act to provide fair and appropriate benefits for injured workers;

- The key focus for the next stage of improvements in the Queensland scheme should be directed towards further strengthening successful return to work (RTW) efforts, and sharpening the focus on health and safety and injury prevention to reduce incidence rates. This is the key to ensuring future reductions in claim numbers and premiums;

- The scheme was reviewed and amended extensively in 2010. The changes which took effect in July 2010, significantly constrained common law claims and associated claims costs. The reforms which are flowing through from the 2010 process has already reduced costs to the scheme and are working as intended;

- All the evidence illustrates that the impact of the 2010 reforms has already brought about the necessary change in scheme dynamics to preserve the sustainability of the scheme. Common law lodgement rates and average damages amounts have demonstrated pronounced downward trends;

- WorkCover Queensland's own assessment of the impact of these changes is that the current compensation structure is sustainable;

- Further scheme changes targeting fundamental rights, such as imposing an impairment threshold upon access to common law; create an imminent risk of altering the positive and co-operative culture present in the scheme. The maintenance of perceptions of balance and fairness are important to all areas that require cooperation between employees and employers, most importantly improving health and safety outcomes and return to work performance;

- The introduction of changes based on an argument that a particular provision exists in another jurisdiction, will lead to unjust outcomes. Australian compensation scheme structures have developed differently over time. Most schemes have different checks and balances to prevent unfairness and preserve sustainability. Lowest common denominator changes from other jurisdictions will engender disadvantage and unintended consequences for Queenslanders who have had their capacity to work irrevocably diminished by an accident;

- Savings attributable to changes that erode rights and entitlements create a real risk of inadvertently increasing scheme costs through increased disputation and negatively impacting other areas of scheme performance; the operation of the common law scheme has important health and safety benefits. This includes deterring employer risk-taking via the price sensitivity of premium ratings, and through the review and educative function of the common law enquiry process;

- Journey claims represent around 6% of claims covered under the scheme. The current workers' compensation coverage for journey claims is vital to workers reliant on a vehicle. Particularly in regional areas, workers must travel long distances to work, often late at night or in the early hours of the morning, and on inadequate roadways. Unlike most other jurisdictions, Queensland has a fault based Motor Vehicle Accident (MVA) compensation scheme so some injured workers would be left without any cover.;

- The definition of "worker" within the Act is critical for the protection of workers and should not be changed. Many workers would be left exposed by a dilution of the definition. Workers are not independent contractors if they work under the direction of an "employer" and do not have control of the safety of the workplace. These workers should not be precluded from accessing workers' compensation by virtue of registration to pay GST or some other artificial construct;

- The definition of "injury" within the Act should not be amended to include a definition of "the major contributing factor". This would be a significant change that would seriously disadvantage many injured workers, including those who have been exposed to multiple injury hazards. It would increase frictional costs within the scheme through increased rates of appeal to both Q-Comp and the Queensland Industrial Relations Commission. Further, an amendment to the definition of injury would not reduce the number of appeals against rejected applications for psychiatric injury;

- There are processes that can be improved to underpin the efficiency of the scheme. However, the current scheme works well and has avoided the difficulties experienced in other states. It is better than fully funded, and especially in these circumstances, there can be no justification for taking away the rights of injured workers.

## 2. Introduction

We thank the Committee for providing the opportunity to comment on the operation of the Queensland WorkCover scheme. We do so from the perspective of experienced workers' compensation practitioners, well placed to describe the experiences of many thousands of Queenslanders who have been injured at work. As a national firm, we are also able to draw comparisons from the experiences of workers in other states.

A commitment to injury prevention is the starting point for the contentions set out in this submission. It is a goal that we believe is widely shared by employers and the workers and Unions that Slater & Gordon represent.

We share the view that the long term stability and sustainability of the scheme is critical. Similarly, competitive and cost effective premiums are important objectives to the extent that premiums have the potential to impact on jobs growth and the economy.

In terms of the broader objectives of the scheme; preventing workplace accidents and work related illness; promoting positive RTW outcomes and providing adequate support and fair compensation to injured workers and their families, the Queensland workers' compensation scheme strikes an appropriate balance between providing adequate benefits for injured workers and affordable premium rates for employers. This balance is maintained and underpinned by a sound legislative, policy and regulatory base.

Many informed stakeholders in Queensland would argue that compared to other jurisdictions, Queensland provides the most balanced, competitive and sustainable workers' compensation scheme in the country.

The key features of the compensation scheme, and the basis for its cost effectiveness relative to other jurisdictions, are the combination of “short tail” statutory weekly and medical benefits, and access to the common law. These arrangements are unique to Queensland, and have been supported by broad based stakeholder support. Where these arrangements come under challenge, so too does the balance of the scheme and the support the scheme enjoys.

Withstanding external factors such as the Global Financial Crisis (GFC), the Queensland scheme has been well balanced (lower premiums, adequate compensation arrangements, emphasis on health and safety and early, improved RTW outcomes – 97.1% in 2011/12). The scheme has been relatively stable for some time and has a funding ratio of 117%, subject to the annual audit process.

The scheme has only recently been subject to significant benefits and process revisions in the area of common law. Although difficult for some injured workers, these changes have enhanced the rigour of compensation claim outcomes and removed or reduced costs that the scheme would have otherwise incurred. The effect of the downward pressure on scheme costs resulting from the 2010 changes is already evident, and will be more fully understood in the next 3-5 years.

Whilst asserting that protecting the health and safety of the Queensland workforce is the most important objective of the scheme, we acknowledge and support the policy objective of maintaining the stability and sustainability of the scheme. It is clear on any objective view that the current compensation arrangements do not jeopardise the stability or sustainability of the scheme.

After a sustained period of reform starting in the mid-1990's Queensland has achieved and maintained one of the lowest average workers' compensation premium rates of any Australian jurisdiction. Indeed, the current average premium rate remains the envy of other jurisdictions. Queensland workers have restricted but generally reasonable workers compensation arrangements and return to work outcomes are pursued positively by all key stakeholders.

We would urge decision makers to build upon the sound financial performance and strengths of the Queensland scheme. From time to time, other jurisdictions have sought to address scheme problems or fiscal management failings by cutting benefits and taking away fundamental rights of injured workers.

Taking into account that the Queensland scheme is fully funded and significant reforms to reduce common law liabilities were introduced as recently as mid-2010, it would be gratuitous and unfair to endeavour to take away rights or to cut benefits further.

Any derogation of rights threatens to break an important and brittle link of faith that exists between the compensation scheme and the Queensland community.

## 3. TOR No.1 – The Performance of the Scheme in Meeting its Objectives under the *Workers Compensation & Rehabilitation Act 2003*

The workers' compensation scheme in Queensland broadly satisfies the objectives set out in Section 5 of the Act. In respect of key objectives, the scheme provides fair and appropriate benefits for injured workers and their families and competitive and relatively low premiums for employers. For more than a decade, employers have had the lowest or second lowest premium rates in the country.

Disputation rates are relatively low, with dispute resolution mechanisms operating effectively to support fairness. Responsible agencies are generally well regarded. WorkCover Queensland has been successful for more than a decade at engaging stakeholders to cooperatively address problems as they emerge.

The overall performance of the scheme has been efficient and stable over an extended period of time.

There is one key area, (relevant to occupational health and safety objective of the Act) in which the Queensland system is arguably not equal to or better than other jurisdictions, and this relates to injury notifications. This is the most important area of focus for future reform efforts.

It is noted that there are effective injury prevention programs in Queensland, such as the joint initiative between WorkCover and Workplace Health & Safety to undertake Injury Prevention and Management (IPaM). We discuss below the importance of consideration being given to the expansion of injury prevention efforts to complement the incentives provided through premium calculations and the Experienced Based Rating EBR.

### 3.1. Strengths of the Queensland Workers' Compensation Scheme

From a national perspective, our observation is that the Queensland scheme is less volatile than in other states. Further, there are a number of strengths of the Queensland scheme that result in claims of shorter duration compared to other states, and thereby support the relatively good financial performance of the scheme. These strengths include:

(a) A strong scheme wide focus on rehabilitation and RTW (WorkCover, Scheme Agents, Employers, workers and Unions all share this objective when RTW is reasonably possible), with improved and relatively high return to work rates. Indeed, we note that the Q-Comp Queensland Workers' Compensation Scheme Monitoring report of May 2012 report this figure at 98.6%;

(b) Time limits placed on access to income replacement benefits (weekly benefits) and injury related medical and rehabilitation expenses;

(c) Relatively low disputation levels and faster dispute resolution compared to other states;

(d) Access to common law redemptions where the injury or illness is the result of negligence, which serves the important purpose of enabling injured workers to get on with their lives and exit the workers' compensation system;

(e) Common law processes which promote the open examination of circumstances that have resulted in a death, injury or illness of a worker. Critically, this examination provides "lessons" that will serve to help prevent re-occurrence of workplace tragedies, and hold responsible parties to account. Further impetus for employers to take care is promoted by the premium calculation system (EBR);

(f) Relatively low administrative costs, which is perhaps a structural efficiency in the "short tail" character of the scheme;

(g) Projected future sustainability - WorkCover Queensland note at page 4 of their submission that "*based on current claims trends being sustained and average investment returns of 7.5%, we would expect the current financial position and average premium rate to be maintained for at least 3 to 5 years".*

### 3.2. Expanding Injury Prevention – a key area for future efforts

The position and competitiveness of the scheme could be strengthened even further by extending efforts to have employers participate in successful existing programs to improve the health and safety of employees in the workplace.

WorkCover Queensland in its submission noted at page 2 that *"one area where Queensland does not perform as favourably is in the comparison of incidence rates across jurisdictions. While improving, more can be done to prevent injuries, which in turn will reduce premium for employers and costs for the scheme".* We strongly support this contention.

The IPaM system for Queensland businesses should be further developed because it has been successful. The data accessible to agencies should be further utilised to develop a more extensive training and educational program designed for specific industries.

The current IPaM venture commenced in July 2010 and has recorded positive outcomes for the 200 employers who have been involved in the program during 2011-2012. The Department of Justice and the Attorney-General reported a reduction in the average claims cost of 24% for participants. The combined savings recorded by the employers who took part in the program totalled $2.2 million in the first year.[1]

The IPaM provides tools for improvement to employers who are currently experiencing the biggest health and safety problems. Perhaps even more pertinently though, it is to be expected that the benefits of the IPaM would be even greater if the program was extended to a greater number of workplaces.

The significant reduction in premiums for employers who have participated demonstrates the need for a stronger requirement for participation in the program. The implementation of safe work procedures and induction programs and training, will reduce the number of workplace injuries, reduce premiums for employers, and enhance the sustainability of the workers' compensation scheme. Current educational programs could become a requirement, which would aid in ensuring all employers focus on injury prevention within Queensland. We note that the current EBR premium calculation formula provides in-built incentives for employers to reduce their own premiums by improving health and safety performance. The EBR is another strength of the Queensland system.

**1** Workplace Health and Safety Queensland, Department of Justice and Attorney-General - Injury prevention and management case study: DEPCO June 2012.

## 4. TOR No.2 - Inter-jurisdictional Comparison of Workers' Compensation Arrangements

Comparative arrangements and data are set out in detail in the ***Comparative Performance Monitoring Report 13th Edition***, produced by Safe Work Australia. We do not endeavour to detail this data here but have relied on the data for the contentions set out in this section.

In relation to the main indicators, and in particular those relevant to the objectives of the Act referred to above, Queensland has done remarkably well and has performed better than other jurisdictions over an extended period. The exception is incidence rates, and more needs to be done to bring these rates down.

For more than a decade Queensland has maintained the lowest average premium rates and it is only Victoria that has come close in recent times.

Queensland's disputation rates have been consistently lower than other jurisdictions and disputes are generally resolved quicker. These factors, combined with the “short-tail” framework of the compensation scheme, have facilitated the effective and efficient management of administrative and legal costs. In recent times, there has also been a major improvement in Queensland's RTW outcomes – from 93.7% in 2010/11 to 97.1% in 2011/12.

We note that Australian workers’ compensation schemes have evolved differently in each jurisdiction. It is important to bear this in mind whenever we look to other states. The manner of scheme evolution has tended to keep in check patent unfairness where the evolution occurs organically and with an eye for local context.

Conversely, when policy makers reach hap hazardously for a grab bag of random “lowest common denominator” reform items, the balance in the scheme will lurch into developmental disarray; the inherent checks and balances of incremental progressive change are unseated. It is an approach that tends to guarantee both disadvantage and unintended consequences. We expand upon this important point below with reference to common law, its importance to the Queensland workers’ compensation system and the lack of merit in the proposal for a threshold for access to common law.

The Information Paper prepared by the Department of Justice and Attorney-General, Q-Comp and Workplace Health and Safety Queensland notes that some other states have introduced a threshold for access to common law. This may be so, but they are not “short tail” schemes like Queensland, so are schemes with a fundamental difference in structure and character.

We also discuss below why Queensland workers would be particularly disadvantaged if “journey claims” were to be removed from the workers’ compensation system.

### 4.1. Common Law

Access to common law not only supports an effective “short tail” scheme, it lowers disputation rates over statutory benefits. Access to common law redemptions where the injury or illness is the result of negligence enables injured workers to achieve finality of their claims, and get on with their lives.

A key issue to be considered here is the potential cost impact of removing or reducing common law claims by the introduction of a threshold. In our contention, and that of other key stakeholders, this would remove one of the vital strengths of the scheme. The current common law arrangements complement no fault benefits. Further, access to common law provides a number of other direct and indirect benefits to the scheme.

Without access to common law, many workers would, at the expiration of statutory benefits, have no choice but to rely on already stretched government and community organisations due to an inability to financially support themselves and their families.

### 4.2. Access to Common Law – Thresholds

The Information Paper, at p.26, outlines the following *"…only broad comparisons can be made between these three jurisdictions [QLD, NSW, Vic] because of the diversity of the statutory thresholds and compensation amounts in various schemes. Queensland's unlimited access to common law offsets the short tail nature of the scheme, that is, workers can access common law to receive damages to meet their future needs arising from disability…The finalisation of common law claims [in Queensland] enables injured workers to exit the workers' compensation system years earlier than in other jurisdictions…providing significant savings. The lump sum payment allows workers to move on with their lives rather than remaining on benefits for many years as is the case in some jurisdictions."*

Attempts to set thresholds and use the American Medical Association ('AMA') guides to establish the level of a worker's permanent disability for the purposes of accessing and calculating compensation has led to disputation and dissatisfaction in other jurisdictions.

Thresholds, where used, have resulted in workers who have experienced extremely painful injuries, through no fault of their own, being prevented from holding a negligent employer to account.

There is a wide body of support for the view that a fixed impairment percentage does not equate to the actual disability an individual experiences in the context of the work for which they are able to qualify.

The AMA itself has stated that "*the guides are not intended to be used for direct estimates of work disability...[and] Impairment percentages derived according to the guide's criteria do not measure work disability.*"[2]

Mr Jon Douglas, Physician, provides an explanation of the current arrangements for the Medical Assessment of Injured Workers. It has been provided by Q-Comp at attachment 2 of the Q-Comp submission. Mr Douglas illustrates the difference between the "impairment" guides and the medical concept of impairment, as opposed to "disability". He says at pp. 2-3 of Attachment 2 that;

*"Disability may be thought of as the gap between what a person CAN do and what the person NEEDS or WANTS to do…Whilst it is acknowledged that in general, the workers with the greater degrees of permanent impairment, usually have the greater degrees of disability, this is not always do. Some workers with relatively small degrees of permanent impairment may have significant degrees of disability, in relation to their specific occupations…"*

**2** AMA - Guides to Evaluation of Permanent Impairment, 5th Edition, Charter 1, paragraph 1.2(b).

It is often not well understood how serious, painful and traumatic a workplace injury can be for workers and their families. The impact that an injury will have on an individual's ability to work will generally depend on the type of work the person is capable of performing. Identical injuries can have vastly different consequences on different workers.

There are a plethora of obvious examples. An electrician is more likely to be occupationally disabled by the loss of a finger than a bank manager. An aged care nurse or a builder's labourer is more likely to be disabled by a shoulder injury than a Hospital Chief Executive or a property developer. This is a further reason why a generic, one size fits all impairment threshold for common law leads to arbitrary and inequitable outcomes.

There are many workers who have been painfully injured as a consequence of negligence who would be excluded by the adoption of an impairment threshold. The following case examples illustrate some of the impacts of workplace trauma, and that some injuries result in less than 5% permanent impairment, but cause major disability and limitations on a worker's capacity:

### 4.3. Illustrative examples

a) The injured worker in this case was a 24 year old miner performing above ground drilling who was injured when his left thumb was crushed against a steel cage. The worker and a co-worker were instructed to move a heavy steel cage weighing over 30 kilograms. As the cage was being moved the worker's left thumb became jammed in the hinge of the steel rod guard. At the time of injury he was earning around $1,000 net per week and had a very promising future as a miner. He underwent a partial left thumb amputation and was assessed by WorkCover as suffering a 5.6% WRI and offered $15,291. He is no longer able to perform mining work and after being unable to resume normal duties as a driller's offsider, he commenced looking for work in the country town where he lived with his family. The injured miner found work as a butcher's hand with restricted duties involving delivery driving and making meat products as he is not able to work with a knife. He now earns around $570 net per week and will be unable to perform moderate or heavy physical work due to the amputation. Although he has found work, he continues to experience pain and embarrassment due to his injury. He pursued a Common Law claim and his employer admitted liability for the injury. His claim was settled for, $300,000. The worker has over 40 years of working life remaining and continues to earn around half his pre injury income.

b) The worker in this case was a 47 year old single mother working in a factory. She was injured when she was directed to lift a heavy crate of produce without manual or mechanical assistance. At the time of injury, she worked full time earning $645 net per week. She suffered an injury to her lower back and was assessed by WorkCover as suffering a 5% WRI and offered $5,461. She was left financially distressed when her employer terminated her employment as she was no longer able to perform her work duties. The single mother of three lives in a country town west of Brisbane, and has struggled to find alternative employment. She is not suited to office work having left school at 15 and is unable to perform manual work due to her injuries. She continues to look for work so that she can support her family. Due to her injury, she continues to suffer significant back pain and relies on assistance from her eldest child to help her with domestic duties. She experiences severe spasms of pain requiring medication. She pursued a Common Law claim and settled for $150,000.

c) A 19 year old labourer was injured when he was required to lift bags of cement from a pallet to a wheelbarrow. He lifted in excess of 40 kilograms and suffered a prolapsed disc at L5/S1 in his lumbar spine. He underwent extensive rehabilitation and has been unable to find employment since the injury. He has only ever worked in low skilled, physically demanding occupations for which he is now unfit. He attended secondary school to year 10 which he was academically unable to finish. He has no tertiary education or diplomas and would struggle to undertake any courses. He requires intensive, specialised job seeker assistance. Surgical treatment is unlikely to help him and as a result of his injury he is now unable to find gainful employment. Workcover assessed him as suffering 7% WRI and offered him $15,929. He pursued a Common Law claim and settled for $250,000. He continues to suffer pain and experiences restricted movement. As he continues to search for future employment, he will require a sympathetic employer given his physical restrictions and ongoing pain.

These examples demonstrate the effect changes to the legislation would have on working Queenslanders who have suffered the misfortune of being injured at work due to the negligent actions of their employer. Many workers would find themselves reliant on government and community organisations to fund their living expenses and the public health system for health care. Without adequate access to common law, financial strain would impact immediately as well as resulting in a lack of adequate superannuation for the workers future retirement.

### 4.4. The Importance of Common Law as a Deterrence Factor

A critical purpose of common law also relates to injury prevention. Common law processes promote the open examination of the circumstances that have resulted in a death, injury or illness of a worker. This examination provides “lessons” that will help prevent re-occurrence as well as ensuring access to justice for the injured and holding persons responsible to account

First and foremost, common law promotes better health and safety outcomes by exposing the causes of a workplace death, injury or illness. Common law processes assist employers, employees and regulatory bodies to work together to eliminate the causes of the harm.

When successful, common law actions against employers for “failing to provide a safe system of work” or for negligent or reckless breaches of the employers duty of care, can result in a premium increase. This price sensitivity operates as a direct incentive to employers to invest in health and safety to seek to mitigate the consequences of premium impacts.

### 4.5. Journey Claims

“Journey claims” account for around only 6% of workers compensation claims per annum.[3] They are relatively low in number and present no complexities for the Queensland Workers’ Compensation scheme.

NSW removed journey claims for some categories of workers recently. However, it is an example that bears out the risk of poor and indeed brutal outcomes if one scheme blindly follows in the footsteps of another without properly contemplating the broader policy environment. The comparison between Queensland and NSW in this context is genuinely

**3** Source: Q Comp Queensland Workers Compensation Claims Monitoring.

one of apples and oranges. Fundamentally, this is because the removal of journey claims in NSW is against the back drop of the existence of a hybrid MVA/CTP scheme that includes no fault benefits.

In many ways the changes in NSW are abhorrent and retrograde, but these characteristics would be even more pronounced were similar changes to occur in Queensland.

Recent changes to the law in this area in NSW has lead to a range of anomalies with regard to the treatment of different categories of workers and there is wide spread dissatisfaction. Furthermore, the removal of journey claims from the NSW workers' compensation system occurred on no sound policy basis, but rather to transfer responsibilities for liabilities to the Motor Vehicle Accident Compensation Scheme.

The NSW Government continues to endure criticism. In the end it backed down in respect of some categories of workers (e.g. Police and emergency workers), but has still left other workers exposed and reliant on the MVA/CTP scheme.

If Queensland were to move even partially down this track, the situation for workers injured on the way to or from work would be far worse than NSW, particularly where they could not provide negligence against a third party. Without the ability to bring a claim against a negligent third party, many workers injured in journey trips would require medical treatment and rehabilitation through the public health system and the welfare system for income support.

It is important to note that even if a worker is injured on the way to or from work and is able to commence a claim against a third party for the purposes of fault based CTP/MVA insurance, that scheme lacks the vocational and workplace based approach to rehabilitation and support for return to work.

Without access to workers' compensation, many workers will be seriously disadvantaged and left without financial stability during periods of medical rehabilitation.

Many workers are required to travel significant distance to work and are unable to access public transport either due to the location of their worksite, the distance they are required to travel or the requirement to perform shift work.

Queensland workers, including nurses, emergency service workers, farm workers, construction, mining and of course transport industry workers are all examples of workers who could suffer personal hardship if the scheme removed access to journey claims.

Emergency services workers and nurses provide services vital to the community 24 hours per day, 7 days per week. The work is often arduous and stressful. Night and early shifts in particular expose workers to fatigue and require workers to travel by vehicle to and from work because typically there are no public transport options.

We note the rapid growth of industry sectors like mining and associated construction. This has occurred without corresponding investment in roads and transport links to meet the expansion. Given the distances that many workers must travel to get to work without public transport options available (particularly workers living in rural and regional Queensland) and given the reliance of many industries on the mining, construction and indeed the transport and logistics workforce, we strongly urge that the current modest arrangements be preserved.

Amending the current legislation to remove journey claims without a no fault CTP/MVA scheme leaves the majority of workers with no ability to obtain income relief without become reliant on welfare and medical treatment and rehabilitation without joining the long queue in the public health system. This would create major economic disadvantage, slow down recovery and hinder the injured workers successful return to work.

## 5. TOR No.3 – WorkCover's Current and Future Financial Position and its impact on the Queensland economy

The financial position of the Queensland WorkCover scheme is competitive, sound and improving. There is no publicly available evidence to indicate that this is likely to change. At the end of June 2012, following another sound year of performance, WorkCovers' financial position is the envy of other schemes nationally.

The main driver of WorkCovers' financial situation in 2008 was external factors (investment returns). Other Australian statutory insurance schemes and institutional investors experienced the same downturn in investment returns. The Queensland Investment Corporation invests the schemes funds and its performance has either been in line with or better than returns achieved through funds invested in other states.

To the extent that it could be argued that there were structural scheme drivers to the 2008/09 problems, these have been addressed by the 2010 reforms that amended both legislation and administrative practices in order to reduce liabilities for common law.

There are two further points to make about average premium rates; firstly, that relative premium rates are fundamentally more important to the process of bringing business to Queensland than absolute rates, and secondly, that premium rates experienced by individual businesses are substantially within their own power to mitigate.

On the first point, the question of winning business is one of competitive advantage between states. All states have compulsory workers' compensation premium requirements, and this cannot be avoided if a company chooses to do business in Australia. Thus the actual premium rate, while accepted as being a cost of doing business, is less important than the relative rate as it exists between states. It is not actual premium rates that influence business investment decisions as much as it is comparative rates across jurisdictions.

In this regard, Queensland has long enjoyed a competitive advantage over other jurisdictions. Even now, it is only challenged by one other state. It needs to be remembered that one of the key factors in the success of the Queensland scheme is that it is perceived by its Queensland stakeholders as fair. This creates an element of good faith that then augments performance in occupational health and safety and return to work rates, which in turn, keeps scheme costs down and preserves the competitive premium advantage.

There is a strong argument that if a scheme seeks to increase competitive advantage by removing rights, what happens is that it strikes at the core benefit of fairness that otherwise underpins the success of the scheme. Where fairness is diluted, it can have the flow on effect of diminishing the good faith that exists in dealings within the scheme.

The message is that schemes ought to avoid the impulse to reach for quick fix financial levers which rely upon reducing existing rights. To do so creates a severe risk of undermining the cooperation and positive culture of the scheme. This cultural aspect is a far more powerful influence on the ongoing sustainability of the scheme.

Secondly is the issue of self-determination in premium experience. Whatever the vagaries of statistical premium calculations, there remains at the heart of the equation the ability of an employer entity to be master of its own destiny in this regard; investments in workplace

safety return a clear dividend in premium reduction. Consider the following example provided in evidence to this Committee by Queensland WorkCover CEO Tony Hawkins:

*"Those employers who are adopting good workplace health and safety practices undoubtedly reap the benefits of that. At this stage not everybody is adopting that same attitude, so therefore their rates are probably not coming down as well. They are stabilising. I think we would all like to see them come down a lot more and in a far greater trend than they are now. For example, if you can reduce your statutory claims by 20 per cent—that is close to 20,000 statutory claims—you are talking about hundreds of millions of dollars in savings[.]"*[4]*...*

*"Again, if I could answer and then I will let Simon talk about the whole workplace health and safety framework. I can quote an example of a particular employer whom I like to quote. They came to us several years ago and I am happy to say it was in the meat industry. I will not identify the employer, but it was in the meat industry. They had a very, very poor claims experience. Obviously the reason that the CEO came to see us was that their premium was up. CEOs tend to have a driver that not always is workplace health and safety, although now, through initiatives like Zero Harm at Work it is very good. This individual CEO came to us and said, 'How and what do we need to do?' He brought along with him, as you said, a good workplace health and safety person. They addressed those issues over the next 12 to 18 months and their premium plummeted. It absolutely plummeted. What happened? That organisation was purchased and acquired by another organisation which did not put the same emphasis on workplace health and safety, and within 12 to 18 months their premium was back up to where it was. I think the answer to your question is, yes, if you have good internal workplace health and safety mechanisms, they will benefit the organisation."*[5]

This evidence goes to the heart of the issue of the sustainability of compensation schemes. Safety records, good and bad, are earned.

Queensland employers are not powerless in impacting the equation by which premium rates are calculated. Quite the opposite is the case; the premium experience of Queensland employers is substantially in their own hands. This is the key driver to overall scheme performance, and it is here that we should focus efforts at improving scheme performance before contemplating the removal of fundamental rights and entitlements.

**4** Public Hearing – Inquiry into the Operation of the Queensland Workers' Compensation Scheme: Transcript of Proceedings, Wednesday, 11 July 2012, Mr Tony Hawkins, CEO – WorkCover Queensland, p.6

**5** Public Hearing – Inquiry into the Operation of the Queensland Workers' Compensation Scheme: Transcript of Proceedings, Wednesday, 11 July 2012, Mr Tony Hawkins, CEO – WorkCover Queensland, p.10

## 6. TOR No.4 – Effectiveness of 2010 Reforms in relation to common law claims and claims costs

Significant changes to the legislation were introduced including liability restrictions precluding a common law cause of action arising out of a breach of the *Workplace Health & Safety Act* (WH&S).

Injured workers who are able to commence a claim due to the negligence of their employer, are now restricted in the amount of damages they are entitled to receive. The legislation has also been amended to allow penalties against claimants who fail to prove their employer was negligent.

There is no evidence other than that the 2010 reforms are successfully fulfilling their intended objectives. Forecast lodgements are trending significantly downwards, decreasing 12% in the last 2 years, and average damages are similarly down 13% in the same period.[6] These figures suggest the 2010 reforms have brought about a rapid correction to behaviours and outcomes in the common law market.

It would be reasonable to observe that evidence such as this has informed the comments of Mr Tony Dawkins, CEO of WorkCover Queensland, who has already submitted the following evidence to this Committee "...*the initiatives taken back in July 2010 had some changes and impacts on what was an increasing claim situation. To date, in those two years, the trends with regard to those claims costs look extremely promising.*"[7]

Mr Dawkins went on to say that subject to the maintenance of current claims experience, he had confidence that the current common law structure would not apply further upward premium pressure to the scheme.

In our submission, it is difficult to conceive of a more compelling endorsement of the predicted sustainability of the current regime.

The Queensland workers' compensation scheme experienced a number of amendments which took effect on 1 July 2010. These amendments follow other measures to restrict common law access that commenced almost two decades ago.

One of the key elements of the July 2010 amendments restricted access to common law claims by virtue of a breach of section 28 of the WH&S legislation. This restriction limits a claimant's ability to commence common law claims without ensuring their claim has merit to establish the employer was negligent at common law.

Further restrictions on liability were introduced with the defining of the tests of negligence and contributory negligence and the introduction of the concept of "obvious risk" in the Act. The hurdle has been raised for common law claims, "knocking out" cases where, irrespective of the seriousness of the injury, employer negligence is difficult to prove.

For injuries occurring after 1 July 2010, new measures also include cost penalties for unsuccessful litigants, and the reduction and regulation of general damages through the introduction of the Injury Scale Value.

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**6** Finance and Administration Committee – Inquiry into the Operation of Queensland's Workers' Compensation Scheme; Information Paper, at p.5.
**7** Public Hearing – Inquiry into the Operation of the Queensland Workers' Compensation Scheme: Transcript of Proceedings, Wednesday, 11 July 2012, Mr Tony Hawkins, CEO – WorkCover Queensland, p.3

With the amendments to the legislation in 2010, claimants currently experience a number of deterrents to commencing a common law claim and have already experienced a significant reduction in the award of damages. It is important to note the scheme funding ratio significantly exceeds 100%, and claimants are deterred from accessing common law claims without establishing the circumstances of the injury was due to negligent actions of their employer.

Q-Comp Queensland Workers' Compensation Scheme Monitoring (May 2012) indicated the following initial trends following the 1 July 2010 changes. These trends re-affirm the downward cost pressures created by the changes:

- Claims are down by 9.6% in 2010-11 and forecast to fall further in 2011-2012.
- Damages are on average down by 30% for claims lodged post the changes.

The full effect of the July 2010 changes is not yet known, but the significant trend on claims is downwards and this is expected to continue. The full impact of the changes will be better understood in the next 3-5 years but the changes appear to have demonstrably reduced common law claims, the amount of damages paid, and legal costs.

## 7. TOR No.5 – Self Insurance Arrangements

Self-insurance arrangements diminish the workers' compensation insurance funding pool and the cohesion of the system overall. The current arrangements have been an established part of the system for some years, and we would argue that that the arrangements and proliferation at current levels is sustainable.

However, further expansion of self-insurance should not be further considered until a full analysis of the impact on small to medium size businesses is understood.

Providing Q-Comp ensures that self-insurers are meeting their health and safety obligations, and fully meeting their legislative obligations to compensate and assist workers to return to work if they are injured, continuation of the current policy arrangements is justifiable.

The "2,000 employee requirement" in the Act should be retained because a significant expansion of the self-insurance program is not in the long term interests of the workers compensation system or the small to medium size businesses that employ the majority of Queensland's workforce.

If larger companies continue to elect to self-insure (or do so in greater numbers); it will diminish the overall size of the premium pool needed to resource the system. The system will become proportionately more reliant on small to medium size businesses for funding and whose premiums will still need to resource the administration of a state-wide workers' compensation and OH&S system.

A diminished insurance fund pool will be more vulnerable and those left in the system will bear the associated risk. South Australia, which has the highest level of self-insurance of any state, is a case in point, with employers who remain in the statutory scheme bearing the highest average premiums in the country to cover the risk of the most underfunded scheme.

## 8. TOR No.6 – Implementation of the Structural Review and Working Arrangements of the Scheme

We are advised that the relevant government agencies will report extensively on the outcomes and implementation of this review. As a stakeholder and an employer within Queensland, we are supportive of the directions of the review and actions in response taken by agencies to date.

## 9. Critical Protections for injured workers - Additional Submissions

### 9.1. Scheme coverage and definition of a "worker"

The current definition of a "worker" in the Act should not be weakened.

Some industry bodies, such as the Housing Industry Association (HIA) and Master Builders Association (MBA), continue to argue for a narrowing of the definition of a "worker" in the Act to absolve responsibilities to pay premiums. The Q-Comp submission at page 1 indicates that Review Officers identify the definition of a "worker" as an issue for them.

The change to the definition of a "worker" in the Act would have particularly serious consequences for workers in high risk industries like the building and construction industry. Over the last 5 years alone, more than 2,500 workers have suffered "serious bodily injuries". It is of grave concern that there have been 43 tragic fatalities during the same period, 10 fatalities in 2011/12 alone. Faced with these alarming injury rates like this, it is our submission that policy makers must not weaken the laws; rather the current laws should be re-affirmed through guidelines that will put beyond doubt that workers subject to direction on a worksite are clearly covered by the Queensland workers' compensation scheme.

To either narrow the definition of "worker" or expand the definition of "contractor" in the Act will be highly detrimental to potentially significant numbers of labourers and trades people. The example below illustrates in practical terms below how this could occur. The definition of "worker" was amended in 2000 from a PAYE taxpayer to a person working under a contract of service.

Currently, employers are generally not responsible and don't pay premiums for persons who are truly independent contractors.

When determining whether a contractor is a worker under the Act, consideration is given to whether the injured person is working under a contract for services for substantially labour only, or whether they are engaged as an independent contractor who has been contracted to perform a specific set of tasks.

The HIA have submitted the legislation should be amended to provide all "workers" registered to pay GST should be exempt from the Act. This would result in many workers, under the direction of their employer and using their employer's tools, being excluded from the workers' compensation scheme. The proposed changes would also be a significant and unjustified move to redefine the way in which the law defines workers and would leave many without workers' compensation cover.

It would create an extraordinary shift in responsibility for health and safety and for the payment of premiums, and create a perverse financial incentive for employers to place ongoing employees on artificial contract arrangements.

The current definition of a “worker” in the Act ensures coverage for all workers employed at a worksite, even if the worker is contracted and not a permanent employee. Employers are generally not responsible and don’t pay premiums for persons who are truly contractors.

The HIA would have it that certain workers on building and construction sites deemed as “contractors” merely because that worker has paid or registered to pay GST. This presumably creates a risk for the worker who may or may not be employed for a short period on the site (many trades people) to bear responsibility for safety at the site, and presumably to pay premiums to cover themselves in the event of injury.

The definition of worker within the Act has continued to be problematic particularly for contractors who are not truly "independent" and are given daily direction by their immediate supervisors and/or employers, who are seeking changes to the Act to distance themselves from the employee/employer relationship.

Historically, upon every variation to the definition of worker, there have continued to be appeals from workers who have been denied compensation on the basis of being a contractor rather than a worker.

A further variation to the definition of "worker" would leave workers, particularly in the building and construction industry, vulnerable to employers who would insist they set themselves up to meet the criteria to be precluded from being a worker under the Act. WorkCover has clear policy guidelines around the application of indicia which the Court has applied when determining the appropriateness of a worker's application for compensation.

The Act in its current form is beneficial legislation, designed to assist injured workers, amongst the most vulnerable of all members of the community.

Proposed legislative amendments to the definition of worker will not capture true independent contractors. An example of worker's vulnerability was identified in applications recently made in the Fair Work Division of the Federal Magistrates Court of Australia which involved workers being forced into taking out an ABN to operate as a contractor, even though they were working for only one employer.

These disputes demonstrate how proposed legislative changes provide an unintended opportunity for employers to void the need to purchase workers’ compensation insurance for their workers by being able to stipulate that a prerequisite to gain employment is for the worker to obtain and supply an ABN. If the legislation is amended to further expose vulnerable workers, it will leave them reliant on the taxpayer funded public health and social security networks. In some cases brought before the Federal Court, workers told the Court of employers removing them from paid wages and forcing them to take out an ABN or face the sack.

Such cases demonstrate a serious vulnerably for worker rights should the proposed amendments come into effect, including employers being able to avoid paying entitlements such as superannuation, sick leave and workers' compensation.

For these reasons a change or watering down of the current definition of a worker would have a significant financial impact on many workers, and if injured the impact could be devastating.

Further, financial incentives for employers to promote a narrowing of the definition of "worker" for the purposes of premium payments could include avoidance of the payment of leave entitlements and payroll tax payments.

It is noted that the current national process working towards greater harmonisation of workers compensation laws is working towards a consistent approach towards coverage. Any unilateral change adopted in Queensland seems likely to unseat this process.

*Illustrative example:*
*Mick applied for a job performing general labouring work for a construction company on a building site in regional Queensland. The boss told him 'you need and ABN and to be GST-registered for this job'. Mick jumped on line and got an ABN and GST registered because he needed the job. He never realised that this might preclude him from WorkCover protection if he got injured. He also had no income protection insurance or award coverage. Within weeks of starting, Mick learned from other labourers he spoke to that they were also told the registering for GST was a condition of getting the job.*

### 9.2. Definition of injury within the Act

The definition of injury contained within section 32 of the Act, provides for the injury "arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury".

*Definition in relation to physical injuries:*

The Act was amended in February 1997 to provide the definition of injury to be "the major significant contributing factor." It was further amended in July 1999 to the current definition of "a significant contributing factor". It has been submitted the definition should be narrowed further to "the major contributing factor". WorkCover reported a 3.7% increase in statutory claims in 2000 following the amendments to the definition of injury. [8]

Actuarial advice provided to WorkCover in 2010 confirmed the recommended amendment to the definition of "injury" to "the major significant contributing factor" would have an impact which "would not be very large".[9] In our view, the definition of injury should remain unaltered. The current definition has not adversely affected claim numbers and no evidence exists to suggest that an alternation to narrow the definition would result in a decrease in the number of statutory claims opened by WorkCover.

Should an amendment be considered to narrow the definition of injury, this would have a severe and deleterious impact on workers. Specific industry groups such as nurses, for example, frequently suffer physical injuries defined as aggravations of pre-existing

**8** Department of Justice and Attorney - General Discussion Paper The Queensland Workers' Compensation Scheme: Ensuring Sustainability and Fairness February 2010.
**9** Department of Justice and Attorney - General Discussion Paper The Queensland Workers' Compensation Scheme: Ensuring Sustainability and Fairness February 2010, p.15.

degenerative conditions of their spine. It would be manifestly unfair to exclude a nurse from receiving medical rehabilitation under the workers' compensation scheme if a doctor found that worker suffered non symptomatic pre-existing degeneration.

The nursing workforce - predominantly a female workforce, is exposed daily to multiple health and safety hazards, including physical, chemical and psychosocial hazards. In the course of a nurses working life because of the nature of nursing duties, in all likelihood she or he will experience more than one workplace injury or aggravation of a pre-existing injury.

A new definition of "injury" has been proposed by some industry bodies such as the Galvanisers Association of Australia and the Australian Sugar Milling Council. They have proposed new definitions respectively as follows; injury as "the major significant contributing factor" and injury as "the major contributing factor". If either of these proposals were adopted it is clear that the most disadvantaged workers would be those exposed to multiple hazards such as nurses and particularly people who have been in the work force for an extended period of time. We submit that leaving nurses and other workers exposed by this type of change would create a harsh unintended consequence, and therefore changes to the definition of injury for the purposed of workers' compensation coverage, should not be pursued

*Definition of psychiatric injury:*

Currently workers are greatly restricted in accessing workers compensation when suffering a psychiatric injury. The Act restricts claimants by expressly preventing injuries arising out of "reasonable management action". Due to the complexity of injuries of this nature, many appeals continue to take place. To further narrow the definition of injury to specify "the major significant contributing factor" would serve to increase the number of appeals. With increased numbers of employees suffering stress related injuries, it highlights the need to address injury prevention which would in turn see a reduction in applications and appeals.

## 10. Conclusion and recommendations

The Queensland workers' compensation scheme is currently in a state of sound financial health. It has a funding ratio the envy of compensation jurisdictions nationally.

To the extent that emerging liability issues previously existed in the common law area of the scheme, reform measures implemented in 2010 have demonstrably addressed this temporary pressure point. All the evidence points to ongoing stability in this area of the scheme based on current and predicted claims experience.

To the extent that this inquiry provides an opportunity to look to evaluate further reform options, there is clear opportunity to do so in the arena of injury prevention. There is otherwise no dividend likely to be delivered to the scheme through embarking upon some definitional frolic into exclusionary concepts concerning journey claims, and the meaning of 'injury' and 'worker'. Indeed, interference in these areas is only likely to introduce or exacerbate structural disadvantage for injured Queensland workers, who are amongst the most vulnerable members of our community.

No policy or financial imperative exists that is capable of justifying interference with, or diminution of, the rights of injured Queenslanders at the current time.

A summary of the key recommendations outlined within this submission are as follows:-

1. The key area of focus for further improvement and reform should be Workplace health and safety. Further efforts in this area and a reduction in “incidence rates” will underpin the sustainability of the scheme and provides the best opportunities for both individual employer and State wide premium reductions. Sustained efforts to improve return to work outcomes are also supported.

2. The current “short tail” workers’ compensation scheme in Queensland is unique in Australia and broadly supported by key stakeholders. It provides appropriate financial and medical assistance to injured workers and also serves employers well. The current structure of the scheme and its binary elements – time limited statutory benefits and access to common law - should be retained without additional barriers for injured workers.

3. In the event an injured worker suffers an injury due to the negligent actions of an employer, the worker should not be further restricted from accessing Common Law by the imposition of a threshold. Significant changes to Common Law arrangements were made in 2010 and these changes have already reduced damages and costs. Continued implementation is supported to ensure the policy objectives of the changes are met. No threshold for accessing Common Law should be introduced because of the disadvantageous consequences for injured workers and the scheme as a whole.

4. Journey claims represent a low percentage of claims under the scheme. The protection journey claims offer to injured workers reliant on a vehicle to travel to or from work is critical because QLD has a fault based Motor Vehicle Accident Compensation Scheme only. It is noted that Queenslanders, particularly in regional areas, must travel long distances to and from work, often on inadequate roadways. We recommend access to workers’ compensation for journey claims remain unchanged.

5. The definition of “worker” within the Act should not be changed as it would render many workers vulnerable and without workers compensation cover. Contractors who are not

independent and work under the direction of their “employer” on site should not be precluded from accessing workers compensation by virtue of registration to pay GST or some other artificial construct. We recommend the definition of “worker” remains unchanged.

6. The definition of “injury” within the Act should not be amended. It would increase frictional costs within the scheme through increased rates of appeal. Defining “injury” as “the major contributing factor” would disadvantage workers exposed to multiple injury hazards. An amendment to the definition of injury would not reduce the number of appeals against rejected applications for psychiatric injury. We recommend the definition of “injury” remains unchanged.

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