Proposed QLD Worker's Compensation Legislation

The Kennedy Commission has recommended the following changes:

A. Changes benefiting workers

The statutory lump sum payments to be increased from $100,000 to $130,000. An additional amount of up to $100,000 also to be available where the worker is disabled by more than 50%. Weekly benefits paid until injury is "stable and stationary" for up to 5 year maximum. Note reduction in payments and that from 2-5 years workers with less than 15% WRI receive only DSS single rate pension (this is an additional cost to the fund which is currently met federally).

B. Changes hurting workers

1. A common law claims threshold of 15% for "work related impairment" is introduced. Only workers with greater than 15% (ie 16% or more) WRI are allowed to bring common law claims. On the Commission's own figures, 64% of common law claims fall in the 0%-14% bodily impairment range.

The 15% threshold was arrived at after the Commission held discussions with four of the Medical Assessment Tribunal heads ie head doctors of the Tribunals from the Workers' Compensation Board. These doctors conveyed their views that injuries up to and including 15% were "mild", that injuries with bodily impairment of 16%-40% were "moderate" and that a greater than 40% bodily disability was "severe". Other factors relevant to the threshold are:

(a) Definition of injury changed to be "personal injury arising out of or in the course of employment where the employment is the major significant factor causing injury". This of itself will eliminate many injuries, possibly a further 10%. This is a wholesale acceptance of a submission made by the MTIA employer group. The recommendation is said to remedy "lenient interpretations" by Industrial Magistrates Court and the difficulty which claims clerks are having interpreting the existing provision of "a significant contributory factor".

(b) Even if the impairment exceeds 15% WRI workers must irrevocably elect within 42 days of an offer of lump sum payment as to whether or not they intend to proceed at common law. Election to proceed at common law will probably mean the termination of statutory benefits. Acceptance of the lump sum will mean the right to sue is lost absolutely. Many workers will simply not be in a position to be able to refuse the lump sum offer as they will need income to meet living expenses. They will therefore be forced by economic circumstances to forgo a common law claim and possibly a hundred thousand dollars or more in damages.

There is no justification for an election procedure. It will allow the blatant misuse of the inequality of bargaining power between the powerful WorkCover Authority on the one hand and an injured or disabled worker on the other.

(c) Physical and psychological aspects of an injury cannot be aggregated to make up 15%. The 15% must be arrived at solely on physical disability.

(d) Certificate from the Board – the determination of bodily impairment will be made by the Workers Compensation Board and there will be no provision for appeal from any decision of the Medical Assessment Tribunal.

2. Journey claims and "recess" claims are abolished with an estimated saving of $13 million per year.

3. Carer (*Griffith v Kerkemeyer*) awards are abolished at common law but a maximum of $150,000 will be available by way of statutory payment for injuries of greater than 15% WRI. Payment of this benefit to be determined and paid by the Authority. This means that the victim will not be able to afford to pay for the care he needs and forces family members to also accept a life time task of providing care and domestic assistance. This is contrary to rights granted to Queenslanders as articulated by the High Court of Australia.

4. Contributory negligence – employees will be held liable in common law claims to a far greater extent than currently for their conduct. As to how this will work will depend on the legislation. The indications are however that the changes will be draconian given that the Commission estimates a $17 million per annum saving for this alone.

5. Future economic loss will be allowed only where the worker can prove on the basis of a greater than 50% probability that he will actually suffer economic loss in the future. This is contrary to Queenslanders' rights as articulated by the High Court of Australia.

6. Interest on damages for pain and suffering and the loss of amenities of life is abolished. Interest on other damages will only be payable if WorkCover unreasonably delays in settlement.

7. Scope of injuries covered will be reduced by definition of "Work Related Impairment".

8. Scope of persons covered will be reduced by restricting cover to PAYE employees.

C. How did the commission get it wrong?

A barrage of self serving employer submissions from a highly organised campaign overwhelmed the Commission with nearly 200 submissions. This campaign was designed to distort and convey a false impression that Queenslanders support an attack on their fundamental rights.

The Workers' Compensation Board presented misleading statistics as to the frequency of sprains and back injuries in order to over-represent and denigrate the sufferers of those types of injuries and to capitalise on widely held pre-conceptions.

The Commission accepted that a worker with a 15% bodily impairment only has a mild injury. This was based on the views of four head doctors from the WCBQ Medical Assessment Tribunals. Other specialists differ strongly as to what injuries are mild.

The requirement that the Commission make findings accommodating Queensland's "low tax" status also had the effect of doctoring the findings from the start. The Government put citizens' rights second after the pockets of careless employers right from the start.

As acknowledged by Mr Kennedy, the "terms of reference are not wide enough" to investigate the real cause of the problem, injury frequency and distribution.

The short length of the Inquiry sunk it from the beginning. Only near the end were some truths unearthed like 132 employers being responsible for 30% of common law claims. By the time this was discovered there wasn't enough time for a proper analysis to be made.

D. Restore the fund without stripping rights:

The scrapping of the Board, overhaul of the Division of Workplace Health and Safety and closure of the South Brisbane Centre as recommended by the Commission are a start.

The estimated savings from new efficiencies in management and delivery of benefits resulting from the replacement of the WCBQ by WorkCover are several millions per year.

The claims costs saving from the 5 day excess which took effect from 1 January 1996 is at least $20 million per year. The scrapping of Government taxes and other drains will save $35 million per year. A crackdown on premium evasion will add up to $50 million per year in revenue.

The reduction in the number of injuries resulting from the safety audit of at least 10% of Queensland workplaces as recommended by Kennedy will save huge sums. If every inspection prevents just one injury, the saving is over $41 million each year.

Making workplaces with poor claims records pay higher premiums as recommended by Kennedy will also increase premium revenue by several million dollars every year. The savings from injury prevention as careless employers learn it is cheaper to avoid injuries rather than pay premium penalties will be around $10 million each year.

The narrowing of the scope of cover to PAYE employees only will reduce payouts by several millions each year.

Queensland workers are not responsible for the problems of the fund. There is no justification for them bearing this burden. With all of the above, the $221-290 million forecast shortfall can be reversed in at least 4 to 5 years without limiting access to the courts.

Editor's Request

I would be most grateful if contributors to the APLA Update newsletter, seekers of information through the APLA Exchange, etc would observe the following conventions:

1. We prefer to receive your copy on a 3.5" computer disk, exported in generic word processing format (plain text or ASCII). A hard copy print should accompany each article.
2. The use of lower case letters for such words as plaintiff, defendant, statement of claim, law, county court etc. [NB Superior Courts and their Judges have capital letters]
3. The inclusion of case references, preferably accurate ones! Square brackets are generally used for dates, for example.
4. The use of the word 'represent' rather than 'act for' ... a client.
5. Direct, concise, gender-neutral language is appreciated.

with many thanks.