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Workers' Compensation and OHS Productivity Commission
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Dear Sir

Response to Issues Paper on a National Workers' Compensation and OH&S Framework

Thank you for the opportunity to comment on a framework for a national workers' compensation and occupational health and system in Australia. The current state based systems are not adequately addressing the needs of employers, employees or the community at large and is in need of repair.

Aon is well placed to comment on the existing structures and the inherent costs involved for employers in managing within the current framework. As well as being the largest insurance broker in Australia, we have developed a specialist practice consulting with employers on how to improve the overall management of their workers' compensation responsibilities. Our services are utilised by a number of large employers, but equally as significant, we have also been appointed to protect and enhance the wealth of a significant number of small employers as well. We therefore have experience across the broadest employment base in Australia and have assisted clients to deal with the complexities of the state based schemes.

Employer issues

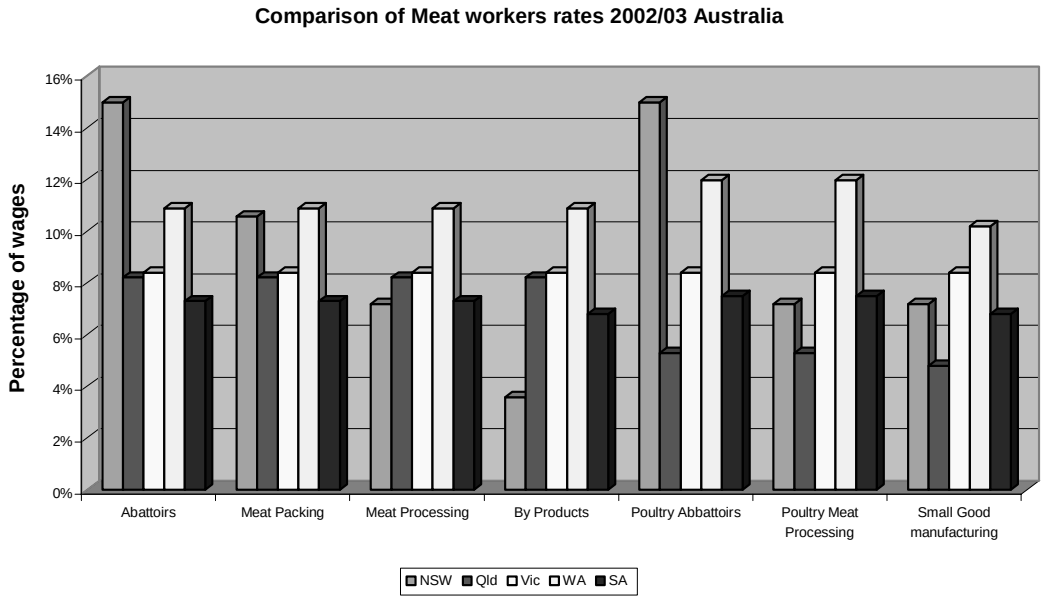
The issues to be addressed by the Productivity Commission appear to have the largest opportunity to impact on, and improve the situation, for all employers who operate in more than one state. These employers need to grapple with the complexities of

- Ensuring they have cover in all states where they work, not just the state where their business is based,
- Knowing if an employee is really an employee as these definitions are not consistent throughout Australia
- Knowing how to manage and ensure contractors are covered – again these definitions vary from State to State and an employer may find themselves responsible for the workers' compensation of a contractor
- Knowing how much to pay an injured worker – for instance an employee injured in Albury will not receive the same benefit as one injured in Wodonga – even though they may live next door to each other
- Knowing if an employee is covered while travelling to work
- Ensuring that they have the appropriate cover. We have advised several clients who have had to pay the premium for their workers' compensation insurance and then had to pay the benefit to the worker due to a loop hole in one State's legislation
- Declaring the correct salary and wages – even this is not consistent across the states.

- Determining if they need to pay (ie cover the excess) or should this be claimed back from the insurer? There are different excess payments required in each State.
- Are employees covered if travelling overseas? Again these conditions are different across the states and employers have found themselves uninsured simply because them employed the workers in a State that has not provided them with the appropriate protection.

The above is just a short summary of the complexities and certainly does not address the total issues employers face in managing their workers' compensation obligations.

It has been recognised for some time that the States are interested in maintaining their control over the workers' compensation arrangements for employers and employees in their State. It has been used by some States for marketing the benefits of moving to that State – "Come to this State, we have the lowest workers' compensation premiums in Australia". There is certainly evidence of this as the following comparison on the meat industry alone shows:



It is likely that the work completed from one employing abattoir to another may vary and with market forces playing a role, the costs across employers will vary – however the significant variations from 7.3% of wages to 15% of wages is driven more by differences in the schemes, capping of benefits and the overall size of the premium pool rather than the experiences of employers. The Australian market is simply to small to have these significant variations for one industry alone.

Employee issues

As stated in my opening paragraph, I believe Aon is well placed to comment on the various states schemes from both an employers, employees and the broader community at large.

The current system is not equitable on employees either. There are different benefit levels across the states with seriously injured workers not being compensated equitably. A clear example of this is shown by reviewing the benefit levels payable for death – surely one life is not worth more in economic terms than another, simply based on the state where a claim is made.

Death compensation payment by State

(source Heads of Workers' Compensation Arrangements in Australia and New Zealand November 2001)

Comcare	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
$184,864.84	$266,800	$190,900	$204,645	$189,275	$126,145	$126,795	$124,815.60	$103,514.26

This table does not take into account the conditions relating to payment (ie the dependency tests nor payments to dependents – these also vary on a state by state basis).

Community issues

In addition to the very broad descriptions of the issues faced by employers and employees, there is also an issue for the broader community to consider as well. The current state based systems do not allow for all payments to be made within the scheme arrangements themselves. The significance of the capping of benefits results in a number of seriously injured workers in some states, defaulting into the federal governments social security system. Once a worker reaches the maximum benefit level for the state, any future economic support is funded by the tax payer through payments made through the social security arrangements. The capping removes the workers from the workers' compensation system and the responsibility for rehabilitation and return to work rests with social security. The capping also hides the true costs of workers' compensation and allows the states to reduce their workers' compensation rates.

The Productivity Commission has been given the onerous task of yet again reviewing the workers' compensation arrangements in Australia. The Commission will hopefully produce a result where previous enquiries have failed and introduce a standardised, simplified, funded workers' compensation system that is fair and equitable to workers, employers and the community at large. To assist the Commission, a paper is attached that addresses the key points identified in the issues paper.

Aon would be happy to assist the enquiry further.

Yours sincerely

Robyn Perkins
Principal, Workers' Compensation Solutions

Issue 1. Multiple jurisdiction-based regimes throughout Australia.

The current system of multiple jurisdictions causes problems for employers. The following is a summary of some of the key issues driven by the multiple jurisdiction regimes.

Nominal Policies

There are a significant number of "nominal" policies in place in most schemes that are there simply because of the potential uninsured risk employers have when their staff travel outside the normal state of business.

For instance, a small mining contractor primarily working in WA has won a contract to work for a short period in the Northern Territory. The contract is for two weeks and will involve approximately $10,000 in income. The WA policy he has will respond if the worker is injured in the NT, provided the worker decides to lodge the claim in WA. However, as the injury occurred in the NT, the worker can elect to claim in the NT. If this occurred the employer would be classed as uninsured because he did not have a policy in the NT and the employer would be fined. The principal would be held liable for the costs of the claim and this would increase their workers' compensation costs in the NT. Therefore the contractor is required to take out a nominal policy in the NT. This policy will currently cost $1,000 and if a national scheme was in place this would simply not be required.

The cross border arrangements being considered should address this issue but the various jurisdictions have been working on this for a number of years and the problem is still not resolved. Nominal policies are required in all states except SA and Qld. Again a confusion for employers. If you consider the number of contracts involved the unnecessary costs are enormous.

Gaps in cover

We have encountered a number of companies who have found themselves uninsured even when they have taken out cover in all states. The particular problem is with the common law provisions and their application. The legislation in each State provides protection for statutory cover only. One of our large clients has found themselves in the situation of having to pay the damages component of a common law claim in Queensland. The problem has arisen, not because the client was uninsured, but due to the mis-matching of cover between NT and Qld. The client had cover in both states, the injured worker worked out of Qld, but was temporily employed in the NT when the injury occurred. The worker claimed in Qld and sued for damages. WorkCover has refused to provide indemnity to the client on the basis that the injury occurred in the NT. The client cannot claim under their NT policy as there is no common law in the NT and the worker has not claimed in the NT so their insurance policy will not respond. The common law claim, if successful is not covered by an insurance policy due to the inadequacies of the multiple jurisdictions.

Similarly we are currently trying to assist a client who has paid the premiums in Qld, but has found themselves uninsured for workers appointed to work for three month periods overseas. The policy in Qld has not responded to the claims, but if the employer was to employ these people out of NSW or WA, then they would be covered. The complexities in having to know and keep informed of these differences between the schemes is contributing to employment costs.

Other matters

A major disadvantage for employers and employees is the lack of consistency across the federal, state and territory jurisdictions. The federal scheme, which could provide national coverage, denies access to employers and their employees, unless the Minister for Employment and Industrial Relations declares each employer to be an eligible corporation. Such declarations are bound by restrictive definitions that are based in comparisons with the federal public service system. Those few eligible corporations that can avail themselves of this option gain a competitive advantage over non-eligible corporations, through reduced administrative costs in access to a single scheme and consistency of benefits for employees, regardless of their geographical location.

The states' schemes are a mixture of government monopolies, government licences and free-market for commercial insurers. The cost structures for national employers are many and are above free-market costs, where government monopolies and government-licensed schemes add additional premiums to claw back the unfunded liabilities from previous years. Employers in the government-monopolies schemes are denied choice, become subjects to bureaucratic, not free-market, performances and make payments into schemes that are devoid of employer or employee representations. This is possibly the only commercial overhead for any company that is entirely devoid of choice and devoid of performance management by the financial contributor, the employer.

The territorial schemes are reflections of the states' government licensing scheme and they inherit similar problems to that already described.

Comment:

One way Australian employers can contribute to gross domestic product is to reduce the financial inputs into manufacturing, services and supplies. At present the financial input associated with workers' compensation is not consistent across states and territories. Its value varies across the continent; the values are unstable due to frequent changes in government requirements and hence insurers' costs. These costs are not solely determined by employer performance but are driven by outcomes of various bureaucratic performances.

A single workers' compensation scheme, available by choice to all employers, through a competitive free-market consisting of both government agencies and commercial insurers would deliver consistency for employers and employees and contribute to an improved value in the gross domestic product, all other things being equal.

Issue 2. Cooperative framework

There are two ways of establishing a beneficially consistent national scheme. One is through cooperative arrangements through the Ministerial Council. History and past performances indicate this council experiences division due to party politics and power politics, depending on electoral cycles and other government business being negotiated, such as trade-off opportunities. While the Ministerial Council could be the genesis of a national scheme it is suspected that its delivery would take a long time.

A second way of establishing a national scheme would be to utilise the existing federal scheme by altering the restrictive membership requirements that are now enshrined in legislation. If membership was set to encourage a national scheme for the future, based on free-market choice and opportunities, then employers would be advantaged through consistent management of financial inputs and employees would be advantaged through consistent benefits set to a national economic framework.

Comment:

There is a national medical scheme that applies consistency of benefits for non-work related injuries and disease. Benefits structures are national and have a national economic rationale to their values. The same rationale could apply to a national scheme for work-related injuries and diseases. This can be achieved through cooperation between federal, states and territorial governments and the political will to improve the current fragmented system of workers' compensation.

Issue 3. State-based schemes

The various models of state-based schemes have been identified previously. For employers, the cost is amplified by discrepancies between the various models in terms of regulation, compliance, benefits, appeals mechanisms and insurance options. For employees, the cost is amplified by discrepancies in benefits for similar injuries or diseases, different appeals mechanisms and various limits to geographical coverage. As for the price of life, it takes on different values for the surviving family, including any dependent children, according to geographic location. The result of this complexity is higher derived costs across all schemes as employers, employees and insurers all engage legal counsel to establish levels of liabilities, opportunities for recoveries from third parties and appropriate durations for benefits. The same can be said of the medical professions not directly involved in the treatment of a condition, but in opinions around the condition. In the end the costs of the legal and medical opinions flow into the schemes with different effects, but ultimately at cost to the employer.

Inherent in all state-based schemes at present is the direct relationship between the regulator and the insurer. There is a structural and managerial dichotomy in this arrangement. Would a regulator make decisions that diminish the operational efficiency of the insurer, but enhance the operational efficiency of the employer? This is particularly important when the regulator becomes the determining authority for an appeal by an employer against the government insurer. To agree with the employer is to diminish its partner, the insurer, both in level of authority and probably financially as well. This is a basis for conflict-of-interest decisions. It is particular relevant in the New South Wales scheme at present where an appeal against the succession rule awaits a decision.

Comment:

The disparate state-based schemes add financial burdens for employers, employees and insurers. The additional costs of advisory professions is testimony to the inherent complexities faced by participants in the schemes, at additional cost that ultimately flows back into their payments to a regulator/manager duopoly that is isolated from the financial consequences of their decisions. These costs ar borne by employers and are passed on as input costs for manufacturing, services and supplies.

Issue 4. Access to self-insurance

Self-insurance across the federal, states and territory jurisdictions is an example of inconsistencies in regulation, inconsistencies in compliance requirements and denial of cross-border applications for a common business purpose. Eligibility requirements differ markedly across all jurisdictions. Some have employee numbers embedded in eligibility tests; some do not. Most have financial ratios as requirements, but they are either not defined or left to the discretion of the regulator as to which are considered of importance. There is a diversity of prudential requirements across jurisdictions so that self-insurance in some jurisdictions is easier, financially, than in others. Access to self-insurance is an ill-defined process to a national corporation that seeks to have an option of insurance risk retention for workers' compensation.

Comments:

Previous comments have clearly indicated a bias towards a national scheme based on free-market opportunities for government agencies and insurers alike. Similar arguments apply to those corporations that have a scale of operations that allow them to manage their own insurance risk profiles. Such corporations already decide their own risk-cover/risk-retention ratios for all other types of business insurance eg. business interruption, professional indemnity, assets, property, etc.. Workers' compensation insurance needs to be granted the same freedom of choice as other insurances so that efficiencies can be gained.

The viability of a corporation to maintain its status as a self-insurer is paramount to any scheme. At present the range of prudential requirements adds uncertainty to the process. An obvious regulator for prudential requirements is Australian Prudential Requirements Agency (APRA) and its standards and conditions should be applied to all self-insurers, commercial insurers and government agency insurers. It is understood that most of the state-based workers' compensation schemes could not meet these requirements. However a corporation that could meet APRA's requirements can be denied a self-insurance licence because it has 1,950 employees, not 2,000 as required by the Queensland regulator. There are thoughts that this is because the regulator is protecting the size of the government insurance pool at the expenses of good commercial practice. If so, then this is one - reason for having a single national scheme based on one large insurance pool, which would not be unduly affected by a single corporation becoming a self-insurer.

Issue 5. Regulatory burden and compliance costs

Inconsistent regulation and differing compliance requirements have been highlighted previously. Inconsistencies across jurisdictions mean that corporations that are active in different jurisdictions are faced with a number of mandatory requirements, systematic and administrative. It is obvious that such burdens have a negative financial impact on such corporations.

Comment:

Employers are, in part, captives of the performances of the various regulators and insurers, as they exist across all jurisdictions. Employers fund these various operations but they are not always able to influence or even contribute towards regulatory or compliance requirements. An example would be the composition of the Safety, Rehabilitation and Compensation Commission in the federal jurisdiction. It has eligible corporations as self-insurers in the scheme but there is no corporate representative in the commission. They have always been represented by a member of a federal government business enterprise, which has a business acumen completely different from that of a commercial corporation. Isolation of the commercial corporations from direct contributions towards regulations and compliance requirements is a double imposition. They bear the costs and their business intellect is neglected by non-business regulators.

Issue 6. Access and coverage

The main barrier to access and coverage is inconsistent definitions across jurisdictions. Employees are different entities across different jurisdictions. Contractors have different status with principals, depending on which jurisdiction is being referenced. Therefore, access into one scheme does not necessarily imply acceptance into another. Such passive or active discrimination distorts all efforts towards national consistency and hence directly affects coverage and access to benefits.

Comment:

As mentioned previously, the non-workplace injury and disease scheme is based on social equity, which has been a public issue recently promoted in the media. Currently, workplace injuries and diseases are subject to social inequities arising from inconsistent access and coverage. The requirement for national definitions to eliminate scheme discriminations should be a primary outcome of this inquiry.

Issue 7. Common law

The issue of common law, or 'damages' in the Queensland scheme, is one that will draw considerable attention. However, there is one particular point to recognise that often is hidden due to common misconceptions. There is considerable attention given to workers' compensation being a 'no-fault' legislation. When subjected to scrutiny this proposition is seen to be false. If 'no fault' is a reality, then an employee does have access to common law against an employer, but an employer equally should have have similar rights against an employee. This is denied by all legislations. In addition, most workers' compensation legislation that includes common law provisions also includes opportunities for employees to press for common law in tort outside of the workers' compensation scheme. This redundancy calls into question any rationale for having common law enshrined into any workers' compensation legislation.

Comment:

The existence of inequitable common law provisions, employee prosecutions of employers but not vice versa, in workers' compensation legislation is based on discriminatory opportunities for the employee. However, these opportunities concurrently exist in tort and employees often use this approach. Access to common law from within a workers' compensation scheme is redundant and it needs to be removed. Common law provisions are not only inequitable they promote an adversarial system between employees and employers that stifles cooperative solutions to return-to-work (RTW) plans. They often result in lump-sum payments rather than distributed payments. The latter would be more consistent with the workers' compensation philosophy of benefits due to an inability to work during a normal working life.

It would be appropriate at this point to raise the issue of multiple payments arising from a single workplace injury or disease. There are cases on record where an employee has received a lump-sum payment as common law settlement under workers' compensation, a lump-sum payment for a qualifying level of impairment and then the employee applies for and receives benefits under superannuation insurance for having a permanent disability. This duplication of accessibility to two separate benefit structures for the same injury increases the premium payments for an employer in the two schemes, workers' compensation and superannuation. Such duplicity needs to be eliminated to prevent employees from having an employer paying twice, through premiums, for a single injury or disease.

Issue 8. Early intervention, rehabilitation and RTW

Across the federal, states and territory jurisdictions there are various models for rehabilitation. Where government licensed insurers are engaged there is a propensity for the employer to be shut out of the model, except for providing the workplace for a returning employee and then carrying the cost. The insurer controls the model, organises the employee and rehabilitation providers and then charges the employer through the premium system. Such insurers are committed to meeting the regulator's performance indicators while at the same time the employers have to subsequently pay for plans over which they have little or no control. Such schemes need to include employers as active participants in developing RTW plans; not have employers as passive payers of employee rehabilitation.

Comment:

There is much emphasis placed upon the workers' compensation benefit structure being a motivator for employees to return to work. The reduction in benefits at defined intervals is often quoted as being one such motivator. In recent times this worthwhile proposition has been eroded through industrial actions and agreements outside of the workers' compensation jurisdictions. There are in existence enterprise bargaining agreements (EBAs) that stipulate employers have to provide salary continuance insurance for employees. The effect of such EBAs is to devalue rehabilitation incentives as, if an employee reaches a point of reduced benefits under the workers' compensation scheme the salary continuance insurance pays the employee the difference between the workers' compensation benefit and the normal level of wages. The employee is not financially disadvantaged and hence the incentive to return to work diminishes greatly. Early intervention, rehabilitation and RTW plans become secondary considerations for an injured employee having access to salary continuance insurance benefits. It is important for employees to have access to salary continuance benefits for non-work related absences, but it should not apply to absences arising from work-related injuries or diseases.

Issue 9. Premium setting

Inequity occurs in premium settings across federal, states and territory schemes. Each jurisdiction has its own premium model with various elements, such as claims history, having different weights in different schemes. Some premium models concentrate on being financially viable to meet current and expected costs of claims. Others include additional elements to retrieve past deficiencies and raise costs to employers to cover current unfunded liabilities. A national scheme with a single premium model would assist employers in managing inputs to production, services and supplies.

Any national scheme should provide employers with predictable premiums and provide employers with the ability to choose the levels of retention their business can sustain, rather than the arbitrary setting of excess payments are required in the current state based schemes.

Comment:

Part of the current problem of having various models arises from the jurisdictional pools being too small. The inherent risks are spread across too few participants, the employers. A single national scheme would have an expanded pool to share the risks and hence there would be greater stability in such a scheme.

The current outstanding liabilities of the existing schemes could be tendered out to various insurers to manage over a five-year period. Take NSW as an example, the state currently has unfunded outstanding liabilities of some $2.3b. The state could tender insurers to manage those claims for $2.0b,save $0.3b in the process and if the insurers could settle all claims for $1.8b then they have benefited by $0.2b. The values in this example could be subject to comment but the principal is already used in the Victorian and Queensland jurisdictions when a new self-insurer is required to manage its pre-licence claims after receiving its licence. A single national premium model can be achieved if there is a political will.

Flexibility in the underwriting methodology should be examined. We have assisted some clients to determine the level of insurance they require to purchase for WA, NT, Tas and ACT. We have been able to work with insurers to design programs that are flexible, result in the employer sharing in the risk, return a positive impact on cash flows and with the financial risk associated with the companies capacity to pay, rather than just dollar swapping for an insurance policy. The clients who have adopted these style of premium have developed premium management systems that have seen a strong reduction in the number of injuries and vastly improved claims management outcomes. The magnitude and timing of these savings have not been possible in the NSW, Vic or SA systems as the premium models are simply not as responsive to positive client improvements.

Issue 10. Private and licensed insurers

There has been considerable debate over the access of private or licensed insurers. In Australia there is considerable diversity in the States from a government monopoly to claims agents in Vic and SA, and licensed insurers in NSW and fully private schemes in WA, NT, Tas and ACT.

Comment:

Much has been said previously about the various roles that private insurers can take. For workers' compensation to become an efficient service to employees and employers there must be free-market competition between insurers, including government agencies that now operate a monopoly. There must be a level field for all parties, including the need for participants to meet APRA requirements for insurers.

A single national scheme that diminishes the values of private and licensed insurers is one that will add costs to employers and hence dull any competitive edge from Australian production.

In assessing the performance of the various schemes, the privately underwritten markets are more focussed on the risk management practices of both the employer and their own operations. We have found that this system actually rewards both the employer and the insurer if they can reduce injuries and then manage injuries better. The reason for this is simple. The insurers are interested in protecting their loss ratios and are driven to work with employers to achieve this, and the employers are interested in reducing their premiums, which will happen if the insurer has improved loss ratios. The privately underwritten schemes provide incentives to focus on outcomes, not process and the reward and remuneration systems underpin this.