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12 December 2003

The Chair
Workers & Compensation and OHS
Productivity Commission
PO Box 80
BELCONNEN ACT 2616 ***By Facsimile: (02) 6240 3311***

Dear Chair,

RE: WORKERS COMPENSATION INQUIRY

INTRODUCTION

I am a Solicitor who practises in Queensland and specialises in Personal Injuries Law. I have served, for several years, on a variety of committees of the Queensland Law Society, the Australian Plaintiff Lawyers' Association and the Law Council of Australia. I have served on the Accident Compensation and the Tort Reform Co-ordinating Committees of the Queensland Law Society, the Consumer Law Committee of the Law Council of Australia and as a State Committee member of the Australian Plaintiff Lawyers' Association. I have had an active role in liasing on a range a personal injuries law and tort reform issues with the Queensland Treasury, the Motor Accident Insurance Commission and WorkCover Queensland on behalf of the above committees.

JURISDICTIONAL DIFFERENCES

Queensland is a unique jurisdiction. It is the only state to retain common law access in respect of all areas of personal injuries law. In addition, the regulatory schemes administered by WorkCover and the Motor Accident Insurance Commission operate in a prudential and profitable manner. This unique state of affairs is the antithesis of the current situation in all other WorkCover jurisdictions, particularly in New South Wales.

It is important to emphasise to the Commission that, in Queensland, very significant and substantial Tort reform was initiated approximately seven years ago. At this time the Workers' Compensation Board, as it was then know, was alleged to be in serious financial trouble. However, since that time, all of the stakeholders involved in the WorkCover scheme in Queensland have worked very closely together to ensure that the best interests of injured workers are protected and that premiums are kept at reasonable levels. In fact, the reforms have been so successful that premiums have decreased over the last seven years. Despite the decrease in premiums and, in addition, a decrease in legal fees, injured workers have retained full access to their Common Law rights where their employer has breached a duty of care owed to them.

The WorkCover schemes in other jurisdictions, however, must be put in stark contrast to the Queensland system. First, it must be noted that Queensland does not have long tailed schemes unlike other states. Secondly, the figures and official statistics that will be supplied to the Commission by Queensland Law Society, the Australian Plaintiff Lawyers Association and indeed, probably WorkCover, will conclude that Queensland does not have the "claim and blame" culture as experienced in some other jurisdictions.

Indeed, it seems that the legal profession in Queensland is the very antithesis of the New South Wales Profession. In Queensland the profession works very closely with WorkCover, ensuring that litigation is the last resort. This is not case in the more adversarial jurisdictions. Queensland, again in stark contrast to New South Wales, has enjoyed mandatory pre-litigation procedures in all areas of personal injuries law, resulting in one of the least litigious jurisdictions in Australia. It is amazing that these important facts are not reflected in the Commission's report.

If serious reform had been implemented years ago in other States as they were in Queensland, then Australia would never have experienced the so-called "insurance law crisis". It is submitted that the "crisis" would have been avoided all together had other jurisdictions followed the Queensland model of tort reform and co-operative personal injuries schemes.

In evaluating the Common Law and Workers' Compensation in its interim report, The Commission has concentrated on out of date information. Furthermore, they have concentrated on the examples of abuse of the Common Law, as well as the failure to introduce mandatory pre-litigation procedures, evidenced by the jurisdictions of New South Wales and Victoria. Compounding the problem, the Commission has based all of its recommendations on the basis that all WorkCover schemes are in debt or financial distress, which is certainly not the case and has failed to distinguish the different WorkCover schemes.

THE COMMON LAW EXPERIENCE IN QUEENSLAND

Remarkably, the Commission dwells on the failure of the Common Law in other systems and does not analysis the successful Queensland experience with the Common Law. It is submitted that if the Commission is seeking a national model, then it should be examining in great detail the only system that has enjoyed wide spread success.

Queensland Has A Harmonious System

It must be emphasised to the politicians and bureaucrats of the Commonwealth that, in Queensland, all stakeholders enjoy the unique situation of remarkably harmonious workers' compensation scheme. There is no significant body lobbying for any changes to the Queensland system and the Commission should respect this and not seek to impose a system that workers and employers do not want. This harmonious system has been brought about by involving all stakeholders in the process of reform and by creating a system where all parties work together to ensure that injured workers have the best possible scheme available, while at the same time premiums are kept to a reasonable level.

At the crux of this successful model is the fact that Queensland has retained full access to the Common Law, while ensuring that the Courts are a last resort due to mandatory pre-litigation procedures enshrined in legislation.

A proper analysis of the role the Common Law has to play demands that the Productivity Commission examines the experiences of each jurisdiction properly. It will find that not all WorkCover jurisdictions are disastrous and, as such, its findings do not represent the true position of the Common Law. There are many examples of these erroneous conclusions which, when examined in light of the Queensland experience, simply cannot be supported.

In Queensland a very small percentage elect to proceed past the statutory claim to seek a Common Law resolution. Of this small percentage the large majority are settled through the mandatory pre-litigation procedures and only very few proceed to determination by the Courts.

The Time And Cost Of Common Law Claims

It is wrong for the Commission to suggest that Common Law claims are not resolved in a timely and cost effective manner as the Queensland Common Law process has proven that it is not slow and does not deny the victim access to timely compensation. Indeed, it has been my experience that once a worker elects to proceed with the Common Law, such claims are normally resolved within a few months of the date of the election from the statutory process. This speedy resolution is also the aim WorkCover Queensland.

I completely dispute the findings of the Commission that the Common Law transaction costs undermine the scheme's affordability. In Queensland the trend is for legal costs to be decreasing not increasing. Once again, this erroneous conclusion of The Commission is a result of the failure to properly examine all jurisdictions and the reliance on data in excess of 10 years old. The Queensland data clearly show that legal costs are becoming less of an issue in the WorkCover schemes, while in New South Wales, where injured workers have completely lost their Common Law rights, the transaction costs in that state are the highest in the Commonwealth of Australia. Again, the conclusions in the interim report simply cannot be supported when the Queensland experience is considered properly.

The are many cynics who offer a range criticisms about the role of the legal profession, particularly in regard to costs and fees. However, once again, these criticisms do not hold weight in respect to Queensland. The legal profession in Queensland pro-actively requested government to enact legislation to cap legal fees, achieving a balance between providing injured workers with reasonable compensation, full access to justice and ensuring that the costs involved are reasonable. Plaintiff lawyers operate on a speculative basis, not a contingency basis, and fund the necessary outlays for the claim. At the conclusion of the matter, legal fees are capped so that the injured worker is assured of receiving a reasonable amount from the lump sum payment without diminishing or limiting the quality of legal representation within the claim.

The legal profession has been much maligned by politicians, at both the State and Federal level, as increasing the amount of litigation in the courts. The facts, however, do not bear out this criticism. Indeed, the no win-no fee system, embraced internationally by progressive Governments such as the Blair Labor Government in the UK, have greatly reduced Legal Aid expenditure and have given greater access to justice to the ordinary person. It is not a system that encourages gratuitous or vexatious litigation because, as a matter of business efficacy, lawyers will only take on claims that have good prospects of success. Anecdotal evidence suggests that most plaintiff firms accept approximately only 10% of all enquiries and as a result of this careful selection process only legitimate claims are entertained. The "no-win no-fee" scheme in fact reduces litigation because of this careful selection process. Furthermore, the Federal taxpayer has benefited because of the large payment of statutory charges back to the HIC, Centrelink and CRS organisations of the Commonwealth Government.

Rehabilitation Is Encouraged By The Common Law And WorkCover Queensland

The Commission has levelled further criticism at the Common Law, arguing that it prevents rehabilitation. Yet again, the Commission has simply failed to take account of the Queensland experience of the Common Law. In this jurisdiction, clear principles of common law exist stating that plaintiffs have a duty to mitigate their loss. It is the duty of every lawyer acting for a plaintiff in a personal injuries claim to explain that the injured worker has a duty to mitigate loss and to ensure the client is actively involved in rehabilitation. Any solicitor or barrister who creates obstacles to rehabilitation, in order to increase damages, is subject to disciplinary action for professional misconduct, which could lead to suspension or striking off.

In Queensland there is no evidence whatsoever for the statement that access to Common Law is inimical to rehabilitation and return to work because it promotes confrontation between the employer and the employee. This conclusion is the result of poor analysis of all the jurisdictions and is certainly not the experience in Queensland. The Common Law in Queensland does not delay rehabilitation or hamper effective injury management because damages are determined by the severity of the injuries sustained. The Queensland system includes rehabilitation programs, organised by WorkCover, in the statutory process that the lawyer is not involved in. In fact, only when the injury has stabilised is an assessment made by the Medical Tribunal, which becomes the basis of an offer by WorkCover to finalise the claim, can the injured worker elect to move on into the Common Law processes. This ensures that any rehabilitation required by the injured worker in provided by WorkCover prior to the Common Law claim proceeding.

The Common Law, however, is not completely separated from the provision of rehabilitation to injured workers. At the successful conclusion of the Common Law claim, all of the costs incurred by WorkCover are repayable, in the form of a statutory charge over the settlement. Most importantly for the Australian taxpayer, the Commonwealth Government is repaid any statutory charges it holds at the conclusion of the matter. The Health Insurance Commission, WorkCover and the Commonwealth Rehabilitation Service are all reimbursed for treatment costs.

The Australian Tax Payer And Injured Workers Benefits From The Common Law

Federal politicians have an obligation to understand the great importance of the Common Law and the fact that under such a system the Australian taxpayer does not have to bear the burden of a negligence claim. Federal politicians have an unyielding duty to the Australian taxpayer to ensure that the cost of providing services to workers injured by the negligence of others is not paid from the public purse.

I own a small personal injuries practice and I would estimate that the amount of money that I remit back to the Commonwealth Government alone, just from my practice, is in the order of many hundreds of thousands of dollars. This amount is claimed as part of the final settlement and comes from the pocket of the negligent party, not the injured worker or the Australian taxpayer.

It is a basic principle that injured workers who have been injured by a negligent act through no fault of their own and whose livelihoods are affected permanently, with great potential to become social welfare recipients, are entitled to more than just the statutory claim for damages. The statutory no fault scheme makes no allowance for the great risk and disadvantage a worker will experience in the open labour market place. Where a worker is injured through negligence and cannot return to work, it is the negligent party that should bear the cost, not the welfare system. The Australian taxpayer has the right to protection from the costs of maintaining and supporting workers injured through the negligent act of a third party. A statutory scheme that does not make allowances for future economic loss and

the risks on the open labour market is an insufficient scheme. A statutory scheme which assess compensation on a generalised, rather than individual basis, such as Comcare does, is a second rate system for injured workers.

The Adversarial System Is Sometimes Necessary

While the Queensland system operates primarily in the non-adversarial pre-litigation arena, the Government must understand that sometimes there is a need for the adversarial court system. Sometimes, though rarely, injured workers may malinger or be fraudulent in their claims. The employer is entitled to the use of the adversarial system to ensure that such claims are not successful. Conversely some employers or some injured workers do not make reasonable offers of settlement and therefore it is necessary to proceed to Court to ensure a reasonable lump sum offer is achieved. A system that retains access to the Common Law, while managing claims efficiently and effectively through pre-litigation procedures ensures that this adversarial safety net is not removed from workers and employers alike. The Common Law acts to contain costs, fraudulent claims and, above all, is fair.

The Certainty of Benefits

It is remarkable that the Commission states that statutory benefits ensure the certainty of compensation. The statutory benefits in Queensland are determined simply by a medical assessment with reference to arbitrary percentage of impairment. The payment of statutory benefits, in itself, is completely uncertain because it depends entirely upon the opinion of a doctor. ***The injured worker has no access to independent doctors during the statutory phase*** and as such must rely solely upon the doctors comprising the WorkCover panel. These doctors have a vested interest in ensuring that injured workers receive very low impairment percentages. Time and time again, my firm has represented injured workers whom WorkCover has assessed as having a zero percent impairment who, once they proceed to the Common Law, receive independent medical assessments which lead to proper compensation of their injuries. There is no basis for the Commission to say that statutory benefits ensure a certainty of compensation where those benefits rely solely on the discretion of doctors chosen by the statutory scheme. ***The only certainty for the injured worker is that the statutory scheme will give them a low percentage of impairment.***

The Common Law And Risk Management

The Common Law is the best catalyst for risk management. It is clear that employers will implement risk management procedures with more diligence when they can be held liable for any breach of their duties. Where an employer has taken all possible steps to avoid the injury, the Common Law will find no negligence. ***On the other hand, a no-fault scheme will hold an employer liable whether they implement risk management programs or not.*** The huge Tort Reform that occurred in the last several years in Queensland ensures that the Common Law system is extremely well balanced and has taken into account the rights and concerns of injured workers as well as the premiums to be paid by employers. These issues have been vigorously debated over the last seven years and as mentioned, all of the interested stakeholders are content that a balanced and harmonious system has been achieved. The Queensland Treasury has understood this and implemented risk management in the *Civil Liability Act* 2003 (QLD) as means to contain premiums.

It is remarkable that a Commission charged with examining the productivity of WorkCover schemes throughout Australia has simply failed to understand that risk management is the main consequence of the Common Law. All inquiries into the Common Law understand this and the Commission's findings are at odds with every recent report.

THE COMMISSION'S RECOMMENDATIONS

First and foremost, it must once again be emphasised that the conclusions and recommendations of the Commission have been based on flawed analysis, gross generalisation and reliance on out of date information. Moreover, the Commission has relied on the submissions of such bodies and organisations such as the Mineral Council of Australia and Optus who have vested interests in seeing that injured workers are stripped of Common Law entitlements which hold negligent employers directly accountable for their own breach of duty.

Strict Liability Does Not Control Schemes or Costs Like the Common Law Does

The Commission concludes that a rule of strict liability may provide better incentives for harm reduction than a rule of negligence on the basis that: -

1. It ensures that liability is established quickly;
2. It ensures the costs of workplace harm are internalised by the employer;
3. It ensures that the employer will be found liable and, underneath that, it provides certainty the amount for which the employers will be found liable.

Liability does not have to be determined at all, let alone quickly, under a no-fault scheme. Nor does such a rule provide certainty as to the amount that the employers will be found liable, as these amounts are completely dependent upon medical assessments.

The "ComCare" Model Is A Flawed Model Compared To WorkCover Queensland

After reviewing the ill-maintained schemes in New South Wales and Victoria, and disregarding the Queensland system, the Commission concluded that its preferred model for a National framework of workers compensation is the Commonwealth "ComCare" model. This is a remarkable conclusion given that only recently Comcare's annual report revealed that Commonwealth employees were faking injury and had been swindling taxpayers out of millions of dollars in bogus compensation claims.

Indeed, ComCare's annual report confirmed that it investigated 179 injured workers at random and found that 60, about 1/3 were legitimate. ComCare also found that another 22 had some capacity to work, while 103 of the workers had no legitimate claim for ongoing payments. This sample group alone cost taxpayers approximately $2 million in unwarranted compensation payments and, disturbingly, none of these fraudulent claims resulted in prosecutions. Commonwealth Public Service employees lodged almost $220 million in personal injuries claims last year and a flying squad of personal injury investigators found that compensation claimants were still receiving payments when they were fit to return to work.

ComCare current has a backlog of claims equalling $1.4 billion. This seems hardly surprising when there were 6,347 compensation claims at about $20,000.00 per claim everywhere except Canberra. In the capital, bureaucrats pocketed an average of $27,000.00 per injury. Additionally, the ComCare annual report concludes that working for a Commonwealth agency is almost twice as stressful as working for the ACT Government, where the average psychological injury claim just $50,000.00.

In addition to the unsupportable monetary payments, there are increased costs in requests for sick leave, an increase in psychological claims and an increase of litigation in the Commonwealth scheme. Approximately 1,800 workers annually appeal their unsuccessful ComCare claims, with each claim attracting legal bills for the Commonwealth of

approximately $16,000 per case. Injured workers must have a threshold 10% impairment to have access to Comcare, but in the Queensland system, there is no threshold, only an election by the injured worker.

It is submitted that to introduce a federal model based on a scheme as expensive and as inefficient as the ComCare system belies the very purpose of a Productivity Commission. The Commission has concluded that the Common Law is not an appropriate vehicle for workers' compensation claims, but it is apparent that the ComCare model would benefit from the application of the Common Law. For example, in Queensland the Common Law has acted to make negligence claims for Repetitive Stress Injuries exceptionally difficult and accordingly extremely rare, while they are still claimed regularly and with ease under the Commonwealth system. Further, ComCare has reported that there has been an alarming increase in psychological injuries which now represent a mere 6% of cases but account for more than 20% of the total cost of compensation because of the longer periods off work required. The Common Law would reduce these claims through the application of age-old principles that require a recognisable psychological disturbance – not mere "stress", thus controlling the types of claims.

"Long Tailed" Schemes

The inherent nature of ComCare as a "long tailed" system means that a claimant has difficulty re-establishing himself or herself in the workforce after an injury. Indeed, there is a propensity to breed dependence on the system. It is submitted that the Common Law provides injured workers with closure and some financial comfort to cope with being at risk in the open labour market in the future.

"Injured Workers Cannot Be Trusted to Handle Lump Sum Payments"

It is claimed that injured workers will disperse their lump sum payments under the Common Law in an unproductive manner and for this reason such lumps sums are not as preferable as a long term payment system. This view is patronising, embracing the basic notion that the average worker is incapable of managing his or her own affairs. The Common Law, however, encourages workers to be prudential with their money, making discounts for reasonable investment. The Courts presume that claimants will invest their settlement at a certain rate of interest and so discount any "future" payment, such as loss of working capacity or future medical expensive by that same rate equal, currently 5%. Therefore, if the claimant fails to invest their money appropriately they are merely "short changing" themselves. The welfare preclusion periods, however, remain regardless of whether the investment is made and so the public is protected from bearing the costs of imprudent claimants. The ComCare system, by comparison, offers no mechanism by which a claimant can be removed from the system, offering only a "drip feed" which, by any standard, can hardly be regard as meeting the needs of the compensation recipient. An injured worker would always prefer a lump sum and a conclusion to the process.

The Commission's interim recommendation was that injured workers should not receive lump sums because some injured workers have dissipated the funds unwisely. The Commission should understand that most injured workers suffer financial distress as a result of an injury. They often have to borrow for normal living expenses and recurrent loans which can't be serviced. Therefore injured workers need lump sums to repay these debts and also to provide some comfort and buffer to assist if they become at risk in the open market labour place.

Furthermore, pursuant to Queensland legislation injured workers are informed of structured settlements which give them the voluntary incentive to receive tax free periodic payments if they so need and in fact a Court can so order. For people under a legal disability there

continues to be a sanctioning process by the Court or the Public Trustee. There is more than sufficient safeguards in Queensland to address the problem of injured workers dissipating funds unwisely. Perhaps a Court should also have the capacity to order that lump sum payments can be paid into a Super Fund if there is any great concern.

The ComCare scheme does not address any of these concerns and simply allows the injured worker a drip feed dependency upon a bureaucratic system which is expensive and inefficient and of no help to the injured worker or the Australian taxpayer or the employer who has to pay the premium. It would appear that the Commission in making this recommendation has had no regard whatsoever to the plight of the injured worker and the financial distress that an injured worker is placed in as a result of an injury.

In the last couple of years there has been widespread media reports of a certain former Senator from Queensland who dissipated his lump sum retirement benefit on fast cars and high living, leaving him unable to satisfy debts to both his own family and his creditor. Perhaps on the same basis, Senators should be denied lump sum payments because of the inability of one particular Senator to manage his affairs.

Failure To Account For The Rights And Interests Of Workers And Only Concerned With The Employer

Perhaps one of the largest concerns arising from this report is that it seems to be focused on the expediency of interstate business. It does not address the concerns of Queensland workers who enjoy a profitable WorkCover scheme that is well administered and well run with reasonable benefits to injured workers. Nor does it address the issue of workers who are currently covered by an effective and fair scheme if their interstate employer elects to transfer to the inferior ComCare model. It appears from all the facts that the Commission is interested only in the welfare of large interstate employers and not with the consequence for the workers when their employer transfers from the Queensland system into a failing Commonwealth model.

The conclusion that the Common Law should not be included in a national framework for workers as it does not offer strong incentives for accident reduction is simply without grounds. Under a no-fault scheme, there is no incentive for better risk management. The imposition of personal liability for negligence under the Common Law, res ipsa loquitur, provides are far better incentive.

Amount Of Compensation Under Statutory and Common Law Schemes

The Commission has further concluded that the Common Law does not compensate injured workers to any greater extent than statutory schemes. In Queensland, the Common Law provides a much more exhaustive and personalised settlement, far outweighing the "textbook" offers made under statutory schemes. Coupled with this are the reduced legal costs associated with the Common Law in Queensland. In New South Wales, where access to the Common Law has been removed, legal and administrative costs are the highest in any jurisdiction. The Queensland system, with access to the Common Law, has one of the lowest costs in terms of legal fees and administration in Australia.

Common Law and Statutory Schemes Can Work Together

The conclusions of the Commission are premised on the idea that statutory schemes and the Common Law are mutually exclusive. In practice, Queensland, due to comprehensive tort reform, has a system where the Common Law works in conjunction with the statutory scheme to ensure that compensation is relative to the extent of the injury and that rehabilitation and return to work programs are not only available, but effective. As noted

previously, the system provides return to work programs and rehabilitation before the Common Law process even begins. It is submitted that the Commission is completely unaware of the Tort Reform process undertaken in Queensland and that it must be examined thoroughly before the Queensland model can be discarded out of hand.

The Commission has recommended that access to the Common Law should be restricted only to the catastrophically injured and claims for non-economic loss. This is in direct contradiction to the IPP report, which recommends that the taxpayer should assume responsibility for the catastrophically injured in medical negligence claims.

THE COMMISSION IS ENTERING INTO AREAS IT WAS NOT SET UP TO DO

The Commission was initially established to investigate the possibility of introducing a degree of compliance amongst the State workers compensation schemes. The specific terms of reference were to ease the strain on large, multi-state employers who were suffering from the need to implement a range of compliance procedures.

Regretfully, the Commission has gone beyond its terms of reference and now seeks to impose a national system of compensation, even on jurisdictions with profitable WorkCover schemes, rather than merely introducing a degree of parity. It appears that the Commission seeks to utilise the provisions of the Corporations Act to avoid issue of jurisdiction and to empower the Commonwealth to legislate outside it's Constitutional granted heads of power. There can be no criticism of the goal of reducing the compliance burden for large multi-state employers. However, the extension of the Commission's investigations threatens to undermine the stable and profitable WorkCover systems that exist in the jurisdictions of Queensland and the ACT. The Commission has approached its task entirely from the perspective of the employer and given scant regard to the rights of workers and the need to protect them.

It must be pointed out that Queensland will not accept the imposition of a federal system that provides workers with less protection that they currently receive under the joint statutory and Common Law scheme. To attempt to remove the current system will certainly create industrial unrest.

The Commission must realise that in removing the rights of injured workers it is making a strong political comment. The national media is now beginning to take an interest in the issue, reporting on rights that are removed and subjecting those responsible to questioning and criticism. Workers' rights are a fundamental issue to the Australian public and the removal of those rights will have an impact at the ballot box.

It is admitted that the systems in place in some jurisdictions are lacking and as such those jurisdictions should be presented with the option to implement a nationally conforming model. However, the Commission should not destroy the functional and profitable systems that currently exist in Queensland, the ACT and to a degree, Tasmania.

CONCLUSION

The Commission has not conducted a thorough analysis of the Common Law and how it operates differently in various states. It has ignored the benefits of Queensland experience. It has made generalisations and assumptions on old data and failed jurisdictions only.

I implore the Commission to spend the time and resources to properly analyse the success of the Queensland system. It is a system in which the statutory scheme works hand in hand to protect workers and employers, to compensation fairly and to process claims efficiently. It

is acknowledged that there are significant problems with the workers' compensation schemes in other states and that their failure to implement the appropriate reforms has left the Common Law dishevelled and in tatters. I ask that in realising this, the Commission does not merely close the books but rather that it turns its eyes to a system that works. I ask that the Commission examine and review the Queensland system. It will find not only a system where the Common Law is healthy and productive but it will find a model that is everything a national system for compensating injured workers should be. It will find a model that is effective, fair and profitable.

Finally, it is submitted that the Commission should not, on any terms or reasoning, interfere, undermine or destroy the profitable and functional WorkCover schemes that currently operate in Queensland and the ACT. These schemes are not only functional but operate in a harmonious fashion and to the satisfaction of all stakeholders. To impose a national framework over these working schemes on the basis that other jurisdictions are floundering is unfair, unjust and will surely be unpopular with States such as Queensland. The Commission should make its recommendations only in relation to failed jurisdictions, not those that have successful WorkCover schemes.

Yours Faithfully,

Keiron Splatt
Solicitor [Accredited Specialist Personal Injuries (QLD)]