WorkCover Queensland Review

Submission August 2012

Australian Lawyers Alliance

Prepared for: Queensland Government Finance and Administration Committee inquiry into the operation of Queensland's workers' compensation Scheme

The Queensland Workers' Compensation Scheme has delivered the lowest premiums in the country for nearly all of the last fifteen years, providing a reliable cover for Queensland employers and employees.

Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

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1. Introduction

This briefing has been prepared on behalf of the Australian Lawyers Alliance (ALA), a national association with over 1,500 legal practitioner members with approximately 500 members operating across Queensland. Most ALA members are also members of the Queensland Law Society or Bar Association of Queensland.

ALA provides this submission in response to the Queensland Government Finance and Administration Committee inquiry into the operation of Queensland's Workers' Compensation Scheme (Scheme). The submission addresses each of the terms of reference:

(i) The performance of the Scheme in meeting its objectives under section 5 of the Act.

(ii) How the Queensland workers' compensation Scheme compares to the Scheme arrangements in other Australian jurisdictions.

(iii) WorkCover's current and future financial position and its impact on the Queensland economy, the State's competitiveness and employment growth.

(iv) Whether the reforms implemented in 2010 have addressed the growth in common law claims and claims cost that was evidenced in the Scheme from 2007-08.

(v) Whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment.

2. Overview

The Scheme has delivered at or close to the **lowest premiums** in the country over the last fifteen years. Much of the credit for this is due to the fundamental structural basis given to the Scheme by legislative reform in the 1990s, including the 1996 amendments introduced by the Borbidge Government. These fundamentals are:

- A '**short-tail**' statutory Scheme, which limits the period over which weekly benefits and expenses can be claimed, thereby encouraging return to work; or alternatively
- Access to **common law** proceedings, although this is limited practically and financially by significant restrictions on damages, more onerous requirements in proving liability and non-recovery of legal costs.

The reasons why the Queensland Scheme has been so successful are that the costs incurred for the "compensation" side of the Scheme (that is no-fault weekly benefits) has been kept under control because of its **legislative structure**. On the common law side, legislative restrictions have typically meant that only those claims that are financially viable are pursued.

ALA understands the importance of periodically reviewing the structure and performance of the Scheme. The 2010 WorkCover review and Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme provide evidence of the benefits of such approach. ALA was prominent amongst around 60 stakeholder groups in contributing to that process.

The review considered a wide range of performance issues of the Scheme. One element that received particular consideration was common law rights to compensation for Queensland employers and employees. The driver for this was supposedly based a view that common law claim payments were negatively affecting the financial performance of WorkCover and causing increasing costs to employers.

The majority of industry and the Government strongly rejected efforts to overturn or modify the dual system of statutory and common law rights that operates in Queensland.

A small number involved continue to pursue the argument that by the Scheme providing even the restricted common law rights that apply today, that this is resulting in exorbitant claims and high premiums. **The evidence simply does not support these assertions about high premiums in Queensland.**

Further, the notion of introducing a whole of person impairment (WPI) threshold, as part of a definitional change to injury, has been touted as a mechanism for restricting access to common law. Importantly, there is wide agreement in the global medical profession that **impairment percentages do not measure work disability.**[1]

Any introduction of a WPI would be a high-risk approach resulting in:

(i) Significantly reduced equity for workers.

(ii) Increased legal costs to employers and to the Scheme in contesting or defending threshold assessments (as occurs in other States).

(iii) Potential worsening of return to work rates.

(iv) Failure to reduce premiums as evidenced in other jurisdictions.

Common law rights are a fundamental strength of Queensland's system and should be retained without restrictive impairment thresholds. This view was supported in the 2010 review by numerous industry and community groups including; the Queensland Resources Council, the Retailers Association, the Master Builders Association, the Housing Industry Association, the Queensland Hotels Association, and more latterly the Queensland Police Union.

The retention of common law rights, and the almost unanimous support of the existing structural framework, also reflected a fundamental community view: those injured at work deserve a fair system of compensation.

The 2010 review did follow a period of declining financial performance of the Scheme. This decline largely resulted from:

(i) Falling investment returns due to global economic conditions.

[1] Refer to case studies in Section 8.4

(ii) Decisions by the Scheme executive which substantially changed to claim management processes and outcomes.

This latter matter was of particular concern to industry due to the sharp **increase in both statutory and common law settlement decisions for unmeritorious claims in 2008-10.** Furthermore, much of the perception that continues to exist amongst industry about high premiums and poor claims treatment by WorkCover can be attributed to decision made during that period.

The 2010 review resulted in significant policy changes, which have substantially **corrected the concerns about unmeritorious claims** during 2008-10. These changes, which were widely supported by industry, included imposing tougher thresholds for access to the Scheme and increased the restrictions on amounts that can be claimed (refer Section 8). The impact is now flowing through the system, placing **downward pressure on claims and delivering improved financial performance.**

Any policy decision by Government or the executive that compromises the relatively short term, definitive nature of claims payments through common law will create the **single most significant risk to the long-term viability of the Scheme.** New South Wales, South Australia and New Zealand each adopted such policies supporting an extended statutory Scheme, and each of these funds are in dire financial positions.

3. Recommendations

ALA is advocating the following policy positions to ensure the ongoing strength, protection and affordability of the Workers' Compensation system in Queensland.

1. The Queensland Government should **maintain the short-tail statutory Scheme and reasonable access to common law;** the two fundamentals of the existing Scheme.
2. **Policy changes of the 2010 review should be maintained** (these changes were supported by the LNP when introduced). The new policy increased the deterrent thresholds for speculative, non-meritorious claims making the system fairer for employers and employees with genuine cases. The policy effects are now flowing through the system:
    - Deterring people from making speculative claims (claimants may be required to pay costs in the event of losing the case); and
    - Resulting in the reduction of size and number of claims (due to the operation of the WorkCover common law scheme now coming under the *Civil Liability Act 2003*, part of the national tort reform package).
3. **Common law access should remain without impairment threshold restrictions:**
    - There is no evidence to show that the removal or restricting of common law claims through introduction of impairment thresholds will have a material effect on the performance of the fund or reduced costs to employers.

- The State with the highest rate of employer premiums (and the worst return to work outcomes), South Australia, (see Figure 2) is the State in which there is no access to common law. South Australia's employer premiums are more than double the rate paid by Queensland employers. Similarly, the scheme in New South Wales is in dire financial deficit. The absence of common law accompanied by much higher employer premiums is not mere coincidence.

- Queensland's dual system has delivered historically lower premiums and high overall levels of employer and employee satisfaction when compared to other jurisdictions that operate with threshold restrictions.

4. ALA is advocating **additional areas for further reform** to WorkCover policies and operations that will help ensure the enduring viability and affordability of the fund and the protection it provides to Queensland industry and employees.

   - Recent improvements to WorkCover's **claims management practices should be further strengthened** to ensure industry funds are expended efficiently, having regard to both the operation of the business and market level claims payments.

   - WorkCover should **expand its utilisation of external legal panels** that have the skills to properly analyse the merit of claims and undertake negotiation of claims on behalf of WorkCover.

   - ALA is supportive of the industry based functional structure that underpins WorkCover's client service strategy, however the implementation of this structure has impacted detrimentally upon localised services in regional and rural Queensland. WorkCover should implement a **strengthened regional service and engagement strategy.**

   - Q-COMP's initiative, **Return to Work Assist**, should be expanded, as early return to work reduces the incidence of damages claims.

5. ALA considers there would be **merit in reviewing the industry ratings approach,** particularly with a view to provide greater smoothing of increases for smaller industry sectors. This is based on feedback received by ALA members from a small number of employers that they have experienced higher than anticipated premium increases through adjustments to industry ratings, where the individual employer had no injury claims.

6. The recent changes to the WorkCover and Q-COMP Boards have received broad support from industry. ALA commends the composition of the new Boards because insurance and legal experience and expertise now has a greater focus. It is important that these Boards **improve alignment of strategic goals and cooperation** more than has occurred in the past.

7. Together with the Department of Workplace Health and Safety, continued effort must be exerted and responsibility placed on workers and employers to **reduce work injury rates in Queensland below national average levels.** Reduction in injury rates is the single most important front-end objective of any Workers' Compensation Scheme: less

work injuries equates to less financial and administrative imposts on business, and less trauma and dislocation to injured workers and their families.

8. Importantly ALA considers that given the recent turnaround in the Scheme performance, there should be **downward pressure placed on premiums over the medium term**, with WorkCover being required to introduce published premium targets (for example returning to a premium of $1.30 by 2015).

9. Q-COMP and WorkCover operate sound practices in **pursuing fraudulent claim behaviours**. The legislation has stringent punitive provisions to deal with fraud. ALA considers that while the incidence of fraudulent claims is very low, there is an opportunity to increase resources to this function. This will result in overall savings to the Scheme and improved integrity.

4. WorkCover

4.1. Background

- WorkCover is a statutory body that provides and manages workers' compensation insurance for Queensland Workers.
- WorkCover is a self-funded body and operates commercially whilst being owned by the Queensland Government.
- WorkCover's income is derived from premiums paid by policyholders, and returns from invested funds.
- WorkCover operates under the auspices of section 383 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act) and in essence, is the exclusive provider of accident insurance for work-related injuries in Queensland with the exception of self-insured companies and organisations. Around 90% of Queensland employers insure through WorkCover Queensland.
- WorkCover covers employees for the cost of workers' compensation claims and also provides injured workers with compensation, medical costs and other benefits following workplace accidents.
- WorkCover falls within the ambit of responsibilities of the Attorney General.
- Under the WorkCover Scheme, injured workers have access to a statutory payments regime until the injury stabilises. Then, subject to certain criteria and extensive procedural requirements designed to resolve claims quickly and fairly, injured workers can choose to access common law. Common law claims finalise compensation rights **for all time** leaving the Scheme, and employers, with no ongoing liability and therefore are described as **'short-tail'** claims.
- Schemes based on statutory payments often result in ongoing compensation and support payments through to nominal retirement age or beyond and are described as **'long-tail'**, or pension-type schemes.

5. Performance of the Queensland Scheme in meeting its objectives

The objectives of the Scheme are described under Section 5 of the Act and the performance of the Scheme against these objectives is addressed herein. As a result of the 2010 reforms that are now flowing through the system, the overall performance of the Scheme in achieving the objectives of the Act is very sound and improving. It operates against key indicators at levels of performance equal or better than other schemes across Australia. Importantly it provides for a high level of certainty for employers and employees.

5.1. Section 5(1) - Benefits to Workers and Improved Health and Safety

The Scheme achieves the objectives of Section 1 of the Act providing benefits for workers who sustain injury in their employment, for dependants if a worker's injury results in the worker's death, for persons other than workers, and for other benefits; and in encouraging improved health and safety performance by employers. Evidence of this is discussed throughout this section of the submission.

5.2. Section 5(2) – Provisions to Injured Workers

Each of the provisions Section 5(2)(a) through (h) are provided for under the Scheme for workers who have sustained injuries. The provisions are consistent in substance with other schemes operating across Australia and throughout most advanced countries that operate compensation schemes. Features to ensure financial integrity include:

(i) Claims for psychological injury that result from reasonable management action are excluded.
(ii) Injuries from serious and wilful misconduct are excluded.
(iii) Queensland's fraud provisions are stringent: proven fraud not only ends the statutory claim but require a refund of any benefits already paid[2], and also preclude any damages claim.

5.3. Section 5(3) – Non-worker Categories

The extension of the Scheme to apply to certain categories of persons other than workers is provided for adequately under the current arrangements. Examples include the extension of the scheme to cover volunteer disaster management personnel from the SES, honorary ambulance officers and rural fire fighters. Coverage is subject to the Government taking out the appropriate policy of insurance at their discretion.[3] Directors and partners of an employing entity are excluded from coverage.[4]

5.4. Section 5(4)(a) – Balance for Workers and Employers

The current operation and performance of the Scheme does meet the objective of Section 4 (a) of the Act in that it provides a reasonable balance between providing fair and appropriate benefits for injured workers or dependants and persons other than workers; and ensuring reasonable cost levels for employers.

[2] Workers' Compensation and Rehabilitation Act 2003 (Qld) (WCRA), s537(3)
[3] WCRA ss 13, 14, 16 and 17
[4] WCRA Schedule 2, Part 2

Benefits for workers are evidenced through numerous indicators, which suggest the Scheme is performing against this objective including, for example[5]:

(i) Statutory claims continue to grow approximately proportionate to growth in employee numbers, projected to reach 105,000 claims in 2011/12.

(ii) Return to work rates for injured workers has increased from 93.7% in 2010/11 to 97.1% in 2011/12.

(iii) Reduction in work related fatalities from 151 in 2007/8 to 69 in 2011/12.

(iv) No changes to the proportion of journey claims lodged over the past ten years (6% of all statutory claims lodged).

(v) Continued access to common law rights albeit with increased threshold restrictions as a result of legislative amendments. There is an indicative reduction of 2.5% in lodgements and a 5.8% reduction in average damages costs from 2010/11 to 2011/12.

The Scheme provides highly **reasonable costs for employers**. Queensland has enjoyed close to or the lowest cost employer premiums in Australia over the past 15 years. In terms of cost comparisons, the Queensland Scheme, with its dual statutory and common law system, has the **lowest average premium in Australia** per $100 of wages[6]. Premium adjustments in 2011/12 place Queensland second to Victoria in costs to employers, and around half of South Australia. Refer to Section 6 of this submission for further detail.

Of note is that following the legislative amendments, the number of **nil damages settlements** has increased from 12.3% in 2009/10 to 16.3% for 2011/12, suggesting improved management of non-meritorious claims.

5.5. Section 5(4)(b) – Fair Treatment by Insurers

ALA considers that the Scheme is currently operating in a manner that ensures that injured workers or dependants are treated fairly by insurers. The short-tail nature of the Scheme has always ensured **low disputation rates**.

The **appeals process** for dissatisfied claimants appears to operate effectively. The self-insurance market is regulated by Q-COMP under a strict compliance regime. As referenced, there is merit in considering an increase to Q-COMP and/or WorkCover resources allocated to pursuing fraudulent claims and behaviours, which would further strengthen the integrity and transparency of the system.

[5] Statistics in this section sourced from Queensland workers' compensation claims monitoring, May 2012, Q-Comp

[6] 2011 WorkCover Annual Report

5.6. Section 5(4)(c) – Protection of Employers' Interests

The Scheme in its current form is operating in a manner that provides protection of employers' interests in relation to claims for damages for workers' injuries. The evidence for this is discussed in greater detail in Section 8 of this submission, including the:

(i) Reduction in the number of both statutory and common law claims.

(ii) Reduction in the average damages awarded.

(iii) Increase in nil damages settlements suggesting improved management of non-meritorious claims.

There are two further matters of note in relation to this objective.

(i) The first is the feedback from a small number in industry about allegedly **excessive premiums increases.**

Blame for such increases is sometimes attributed to common law rights. However as indicated throughout this submission, the availability of common law has no material impact on premiums, and indeed other jurisdictions that restrict rights have substantially higher premiums.

Increases in premiums are principally attributed to poor injury and claims records of individual employers. As is appropriate, premiums are designed to recognise good performance through premium reductions and to provide incentive for employers to correct poor performance through increases in costs.

There is unequivocal evidence that **employers with poor claims experience can modify behaviours** and result in speedy and sharp premium reductions (including in cooperation with WorkCover and Workplace Health and Safety). WorkCover has worked diligently with employers with poor safety records to improve safety and achieve resultant premium reductions. Those initiatives should be encouraged to continue.

ALA does however receive feedback about higher than anticipated premium increases for employers with no claims records as a result of adjustments to industry ratings.

ALA considers there is merit in considering options to further smooth such adjustments, particularly for 'thin' industry sectors (or sub-sectors).

Finally, there may be individual employers impacted through unintended consequences of policy changes, and/or errors. The Scheme does provide an easily accessed appeal process for cases where employers consider they have been inappropriately treated, including through their premium increases. **ALA considers that WorkCover could disseminate more information to employers about this appeal mechanism.**

(ii) The second relates to feedback from ALA members about **service gaps in regional Queensland.**

WorkCover has implemented industry based portfolio approach through centralised customer service teams. ALA recognise the merit of adopting an industry focus, however members consider that there is an important gap in services delivered regionally. There is an increasing perception that services at the local level have deteriorated and become less personalised, impacting on employers, employees and members.

ALA considers it important that WorkCover develop a more effective engagement and service strategy for regional and rural Queensland.

5.7. Section 5(4)(d)(da) – Effective Return to Work for Injured Workers

The Scheme, in conjunction with Q-COMP and Workplace Health and Safety Queensland is providing a range of services, support and advice to employers and injured workers to participate in effective return to work programs; and provides for workers or prospective workers not to be prejudiced in employment because they have sustained injury to which this Act or a former Act applies.

Reducing lost work time, and preventing injuries in the first instance, requires ongoing and sustained strategies from Government, industry associations, unions, employers and employees. Through this collective effort, including contributions from the Scheme, **return to work rates** for injured workers has increased from 93.6% in 2010/11 to 97.1% in 2011/12; and there has been a reduction in **work related fatalities** from 151 in 2007/8 to 69 in 2011/12. The benefits to industry in productivity gains, reduction of administrative burdens and workforce cohesiveness are obvious.

5.8. Section 5(4)(e) – Flexible Insurance Arrangements

The Scheme provides some flexibly for insurance arrangements suited to the particular needs of industry:

(i) Premiums are both claims and industry risk sensitive. Industry frameworks are also in place for managing claims and client relationships. Industry and claims risk rating is a standard practice globally for countries with mature worker insurance schemes.

(ii) Employers that meet certain criteria have the option to self-insure (refer Section 9).

ALA acknowledges that other jurisdictions have greater flexibility in insurance arrangements as hybrid or privatised schemes, compared to Queensland's predominantly centralised WorkCover scheme. As evidenced throughout this submission, Queensland's scheme rates highly against all key criteria in comparison to other jurisdictions indicating that there is no rationale for substantive structural reform.

5.9. Section 5(5) – Contributing to Queensland Industry Competitiveness

The Scheme supports Queensland industry in being locally, nationally and internationally competitive, through maintaining very low premiums across all employers and industries when compared to other States and territories, and to New Zealand.

Through the comparatively **'short-tail'** nature of the statutory component of the Scheme and the defined nature of common law claims, the Scheme promotes high levels of certainty for forward fund liabilities. This translates into **higher certainty** for premiums and employer obligations under the Scheme. The 'hassle-factor', the administrative and time burdens on business, is greatly reduced by the short-tail nature of Queensland's Scheme.

Queensland employers have enjoyed the lowest premiums across the country for most of the last 15 years, which is evidence that the Scheme is achieving the objective of not imposing too heavy a burden on employers and the community.

The Scheme is operating with **strong and increasing fund balance**. As indicated earlier, any policy decision that comprises the relatively short term, definitive nature of claims payments through common law will create the single most significant risk to the long-term viability of the Scheme. New South Wales, South Australia and New Zealand each adopted such policies supporting a statutory scheme, with removal of common law access. Each of these funds is in dire financial positions, requiring that they be underwritten by the respective jurisdictions (eg: the New Zealand scheme is supported by multi-billion dollar contributions from that country's consolidated revenue; and the New South Wales scheme has in excess of $4 billion in unfunded balances).

The Queensland Scheme performed well by maintaining low premiums during a period of **rapid growth in employment** in the State. Queensland also has a larger proportion of employers in agriculture and mining when compared to other major jurisdictions. Both of these are **sectors with high industry risk profiles**, which indicates the Queensland Scheme is responding well to the specific needs of its industry sectors.

Queensland's **improving return to work rates** (Section 5(4)(d)(da) – Effective Return to Work for Injured Workers) directly contributes to improved productivity through workers being available sooner, and by providing greater certainty to employers and employees. The Q-COMP Return to Work Assist program has proven to be an effective strategy to support this outcome.

6. Comparison of Queensland Scheme to other jurisdictions

Regular benchmarking is undertaken nationally on the performance of the Workers' Compensation schemes across Australia and New Zealand. The key indicators of performance demonstrate that the Queensland Scheme compares very favourably against other schemes.

6.1. Snapshot of Schemes in Select Jurisdictions[7]

The following provides comparisons of the structure and coverage of select schemes. The key features of the Scheme are that it:

(i) Is predominately a centralised fund with a small number of self-insurers.

(ii) Is strongly self funded and does not draw on consolidated revenue.

[7] Finance and Audit Committee Information Paper, Department of Justice and Attorney General, Q-COMP, WorkCover Queensland, Appendix 2

(iii) Provides access for both statutory and common law claims (with reasonable restrictions to deter unmeritorious claims access).

(iv) Offers coverage for reasonable journey claims.

(v) Importantly is a short-tail scheme that limits future liabilities for the fund.

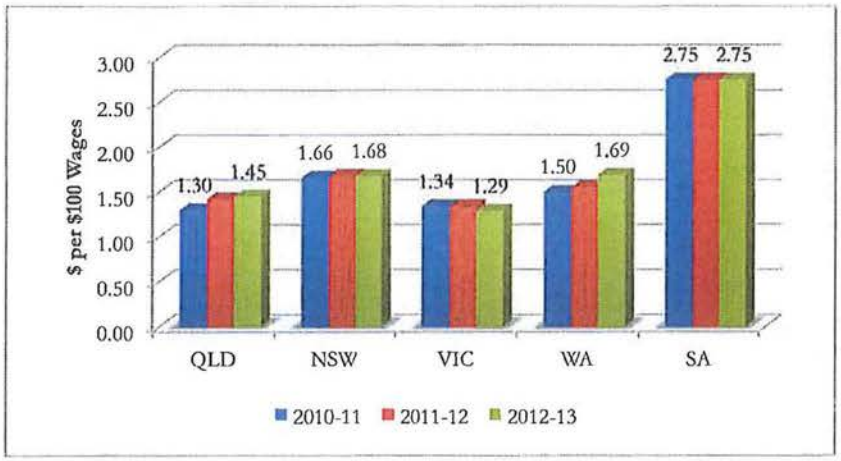
Figure 1: Snapshot Comparison of Select Schemes

Jurisdiction & Fund Type	Workers Covered	Self-Insurers (% workers, % employers)	Funding Ratio	Journey claims	Common law	Benefits Structure
QLD (Central)	1,857,900	25 (10%, 0.16%)	117 % (30 June 2012)	Yes	Yes	Short-tail, statutory benefits cease upon medical stabilisation
NSW (Hybrid)	3,008,600	67 (17%)	78% (31 Dec 2011)	Limited	Limited	5 yrs if WPI < 20% retirement age if WPI >20%
VIC (Hybrid)	2,447,800	38 (5.9%, 0.09%)	97% (31 Dec 2011)	No	Limited	Long-tail
SA (Hybrid)	705,100	67 (36.5%, 0.35%)	61.6% (31 Dec 2011)	Limited	No	Long-tail
WA (Private)	1,047,700	27 (9.28%)	n/a	No	Limited	Long-tail

6.2. Employer Premiums in Australia

The Queensland scheme, with its dual statutory and common law system, has enjoyed close to or the lowest cost employer premiums in Australia over the past 15 years, with the lowest average cost per $100 of wages[8]. Premium adjustments in 2011/12 placed Queensland second only to Victoria in costs to employers, and just over half of South Australia.

Figure 2: Comparison of Workers' Compensation Premiums 2010/11 to 2012/13



[8] Ibid, page 15

The longitudinal graph (Figure 2) shows the cost to employers of premiums across the States highlighting Queensland's historically low levels of premiums[9]. It shows artificial compression of rates during 2008 and 2009, and subsequent moderate adjustments.

Sound actuarial data provided by Workcover and Q-COMP predicts improving solvency. The fundamental structure of the Scheme, combined with benign trends on claims intimations; an increasing percentage of unmeritorious common law claims being managed out of the system; good and improving return to work rates; and the escalating effect of the 2010 amendments all point to further improvements in the solvency of a very healthy scheme.

ALA contents that in this environment; WorkCover should adopt clear targets for premium levels aiming for reduction in the medium term (eg: to $1.30 by 2015).

Figure 3: Comparison of Worker's Compensation Standard Average Premiums

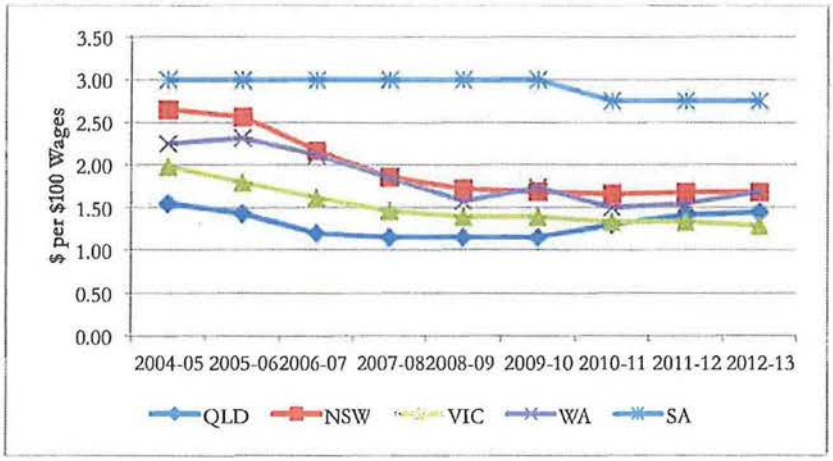
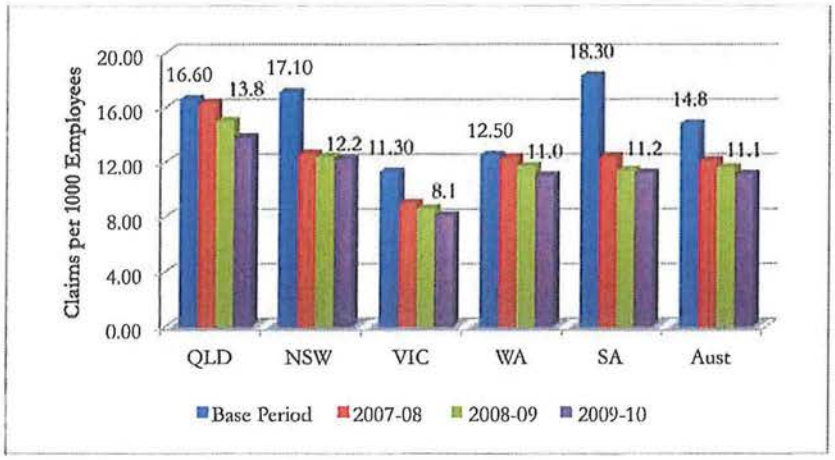


Figure 4 shows a broader measurement of incident rates. A range of factors, including the State's industry profile and the related reporting requirements, impact upon comparative incident rates. There is clearly need for continued improvement, with Queensland remaining above the Australian average. The lowering incident rates over the past four years have had a positive impact on the Scheme's financial performance.

[9] Ibid.

Figure 4: Incident Rates per 1000 Employees



6.3. Injury and Return to Work Rates

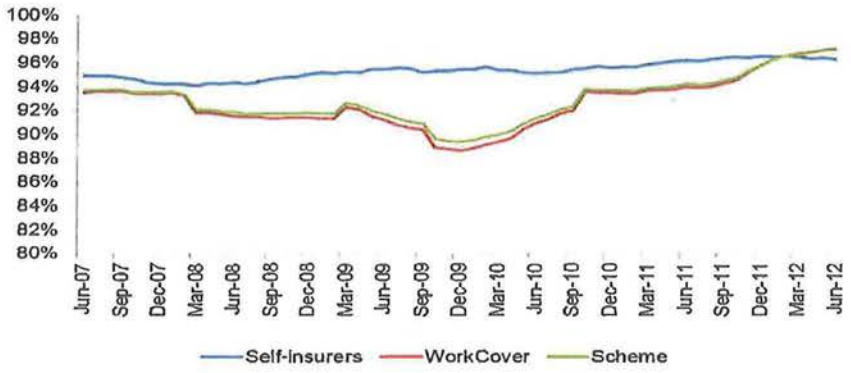
Since June 2008, **statutory claims for injuries** have been in line with employee growth in Queensland, with the exception of 2009/10 where statutory claims decreased during economic downturn. Forecast statutory claims for 2011/12 of 105,385 are in line with 2010/11 of 104,478.

Figure 5: Growth in statutory claims compared to Queensland workforce

The Queensland **return to work rate** has improved strongly in recent years. The rate is calculated using finalised time lost claims within the insurers' data submissions. For 2011/12 the Scheme's return to work rate is 97.1%, up from 94.3% in 2010/11.

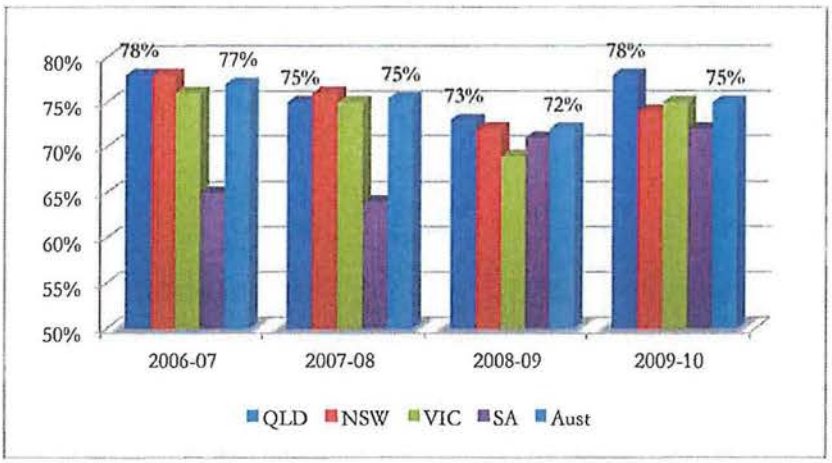
When the Q-COMP Return to Work Assist program is considered, the 2010/11 return to work rate increases 1.6%, resulting in a combined rate of 95.9%, and the 2011/12 return to work rate increases an additional 1.5%, resulting in a combined rate of 98.6%.

Figure 6: Rolling twelve month average RTW rate WorkCover v Self-insurers



Queensland's comparative performance for **durable return to work** (workers returning to paid jobs) has exceeded or matched the performance of other major jurisdictions in recent years. This reduces the cost to Government and industry through short-tail compensation payments and earlier return to productivity. Queensland's average durable return to work rate over the period was 76% compared to 75% nationally, 74% in Victoria and 68% in South Australia.

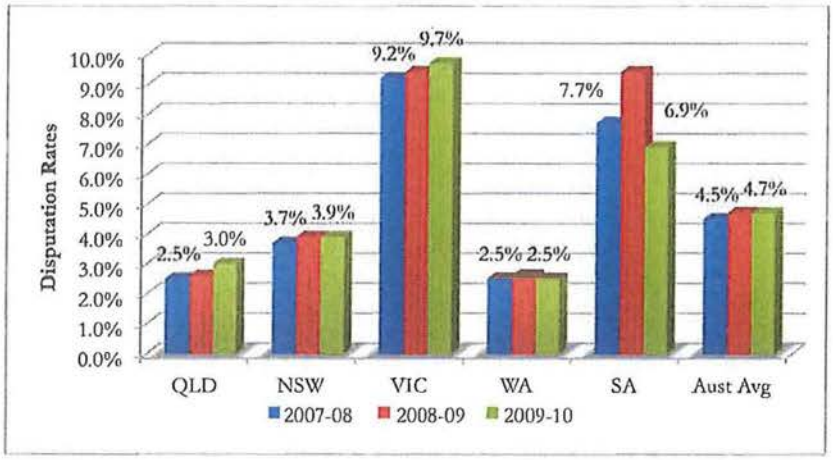
Figure 7: Durable Return to Work Rates



6.4. Disputation and Resolution Rates

Queensland **disputation rates** as a proportion of annual claims are very low compared to other States and the national average. This is attributed to more timely and efficient dispute resolution procedures than other jurisdictions and relatively low appeal rates. Long-tail schemes generate more disputes. Logically, the longer a claimant is captured within a scheme the more likely it is that a more costly dispute will occur.

Figure 8: Disputation Rates



6.5. Other Jurisdictions

New South Wales: On 19 June 2012, the New South Wales Parliament enacted major changes to that state's scheme to address a deficit of over $4 billion. The deficit had arisen through poor management and the long-tail nature of the New South Wales Scheme, which includes severe restrictions on access to common law.

Major restrictions were placed on:

(i) Lump sum claims.

(ii) Weekly benefits; in particular the vast majority of claimants will cease to be eligible for payments after 2.5 years.

The Queensland Scheme already achieves these short-tail outcomes, and does so whilst maintaining access to both statutory and common law claims, with a sound financial position, and without the disputation, which the NSW structure will increasingly generate.

South Australia: This State has the most expensive cost of all States (see figure 1), and restricts rights of employers and employees through a range of mechanisms including no access common law claims. The Scheme has unfunded liabilities of over $1 billion dollars.

Victoria: Victoria has a hybrid scheme. In contrast to Queensland, Victoria's long-tail statutory scheme is fraught with high disputation rates. These are administratively burdensome for employers. Victoria's common law scheme has thresholds to access common law benefits. These generate a two-stage, lengthy and costly disputation process. This cost is largely external to the premium paid by employers.

That Victoria's premiums have recently improved is attributable to management improvement rather than any structural change. For reasons already stated, Queensland should avoid any long-tail structure.

7. WorkCover's financial position and its economic impact

WorkCover's current and future financial position is sound and is having a positive impact on the Queensland economy, the State's competitiveness and employment growth.

WorkCover's fund balance as at end of June was around $160 million (unaudited), following a strong year of investment returns. The financial performance of the fund has been improving since the difficult period from 2007/8 to 2009/10. The negative financial returns during that period were the result of a combination of factors; principally:

(i) Investment losses due to low returns during the global financial crisis (GFC).

(ii) Poor management practices and policy directions in relation to common law claim handling that resulted in excessive payments for non-meritorious or partially meritorious claims.

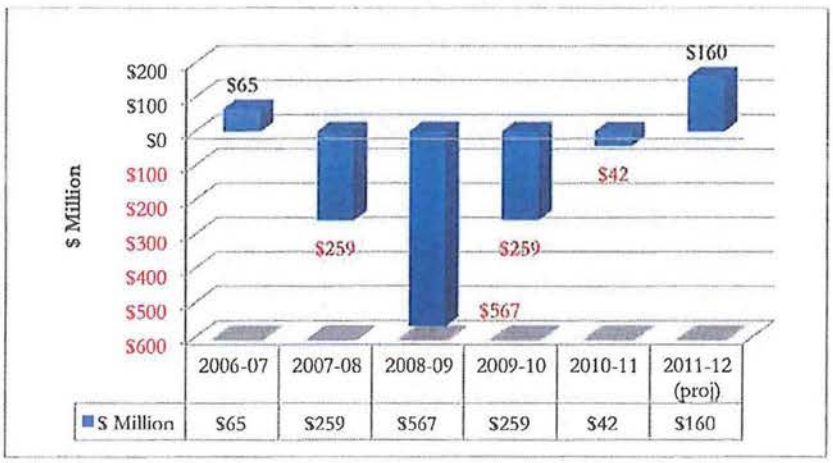
(iii) Apparently a conflicted Board that appeared to be in need of refresh to achieve a skills mix that would be considered more suitable.

(iv) The Government artificially held back increases and reduced premiums over several years, resulting in the need for significant and abnormal increases in 2010 (back to 2006 levels). Instead of annual CPI style adjustment, these hikes in premiums alienated some businesses and led to an increase in self-insurance.

(v) A steady decrease in available funds invested in capital reserve by the Queensland Investment Corporation on behalf of WorkCover.

ALA contends that decisions that fundamentally affect citizens' rights ought not be made in response to the short-term cyclical variations in investment performance. In any event, changes implemented in 2010 are now flowing through the system contributing to the surplus position of the fund. These changes, along with improved investment returns, have contributed to the strong performance of the fund over the past two years as shown in Figure 9.

Figure 9: WorkCover Fund Balance ($million)



The fall in income yield shown in Figure 10 only partially explains the decline in the fund performance. Poor management practices and non-meritorious settlements were a significant contributor to the fund's poor results in 2008 to 2010. In 2012, these issues have been substantially and effectively addressed.

Figure 10: WorkCover Investment Yield Performance ($billion)

The capital reserve funds invested with the Queensland Investment Corporation on behalf of the Scheme has showed a steady upturn since 2010 with improved fund returns and reduced claims payments.

ALA commends the current Queensland practice of retaining the reserves and profits as sensible prudential conduct. The profits and reserves of some interstate schemes have been appropriated by Government and reallocated elsewhere. This unwise practice poses risks to the financial health of compensation schemes when less manageable factors such as poor overseas investment performances, come to the fore.

In an international investment climate that remains uncertain, the capital reserve presently held is an excellent result and a positive predictor for the future.

8. Impact of Queensland Scheme 2010 reforms

8.1. 2010 Reforms

The reforms introduced through the *Workers' Compensation & Rehabilitation & Other Legislation Amendment Act 2010* were widely supported by industry and included:

(i) An obligation on insurers to notify Q-COMP of injured workers who fail to return to work.

(ii) Significant limits to the amount of common law damages through provisions similar to the *Civil Liability Act 2003*, including the "regulation of damages paid to a worker, including loss of earnings, general damages determined by assigning an injury scale value,

structured settlements, and indexation. These provisions apply to injuries arising after 1 July 2010 or if the date of diagnosis of a latent onset injury is on or after 1 July 2010"[10].

(iii) Provisions to allow a court to award costs against plaintiffs whose claims are dismissed; and to expand the instances where a court must make orders as to costs to "include situations where a court dismisses a worker's claim, makes no award of damages, or makes an award of damages that is equal to or less than the insurer's final written offer"[11].

(iv) Amendments to the *Workplace Health and Safety Act (1995)* to prevent an alternate route to common law when negligence could not be proven[12].

8.2. Impact of Reforms

The reforms were introduced in July 2010 and are now only at the early stages of flowing through the system. This is because most common law claims take around one to two years from injury stabilisation to finalise. Whilst some reforms had immediate impact, there were indicative claims in the system at July 2010 that required management in 2010/11, thus resulting in mixed performance across the indicators. **Performance improvements** were achieved in 2011/12 and are anticipated to continue and further strengthen, providing evidence that reforms have addressed the growth in common law claims.

In Queensland common law awards are decided by Judges, not juries. This operates as an inbuilt check on excessive claims awards.

The imposition of the Civil Liability Act on injured workers effectively **operates as a restrictive threshold** by making it more difficult to access damages and imposing restrictions on various heads of damage.

Overall, the existing scheme **minimises unmeritorious and financially unviable claims.**

Through successive reforms over the past 17 years (including those implemented by the Borbidge government in 1996), significant impediments have been put in place to pursuing a common law claim. There is therefore incentive to accept a statutory lump sum without recourse to common law.

Those impediments operate by way of legislative provisions relating to liability, and restrictions on the amount of damages that may be claimed. The liability restrictions include:

(i) Abolition of a cause of action for breach of the *Workplace Health & Safety Act.*

(ii) Definition of the test of negligence.

(iii) Inclusion of concepts of "obvious risk" in the assessment of liability.

(iv) Legislative statements of the test for contributory negligence.

[10] Queensland workers' compensation claims monitoring, Q-COMP, May 2012, page 8.
[11] Ibid.
[12] Reversal of the decision in Bourk v Power Serve Pty Ltd & Anor (2008) QCA 225

These provisions make it harder for a plaintiff to establish liability against an employer and ensure that a common sense approach to liability applies.

More significantly, a plaintiff who can establish that an employer was negligent is restricted in the amount of damages that can be claimed. Damages are limited in the following ways:

(i) The amount which can be claimed for pain and suffering is severely limited by legislation. For example, a person with a back injury causing a 5% whole person impairment which causes ongoing pain and discomfort would ordinarily receive a maximum of only $12,950.00 for pain and suffering. This would compare to a likely award, without these restrictions, of $25,000 to $35,000 - a saving of over 50%.

(ii) There is a very limited entitlement to damages to cover the cost of paid care and assistance for an injured person's personal care needs, domestic assistance (such as cleaning) or other assistance around the home and there is no entitlement to compensation for purely voluntary care provided by family and friends.

(iii) Interest is no longer payable on most categories of damages, or is limited to a rate of about 2%.

(iv) No legal costs are payable by an insurer to a plaintiff in the vast majority of cases (the exception being injuries with an assessed impairment of greater than 20% or where an insurer has imprudently rejected an earlier offer of settlement by a plaintiff).

The combination of these measures makes it financially unviable to pursue unmeritorious claims.

In doing so, the scheme remains not only financially viable and cost-effective, but also fairer. The existing system therefore balances the needs and rights of injured workers with the overriding requirement for financial viability.

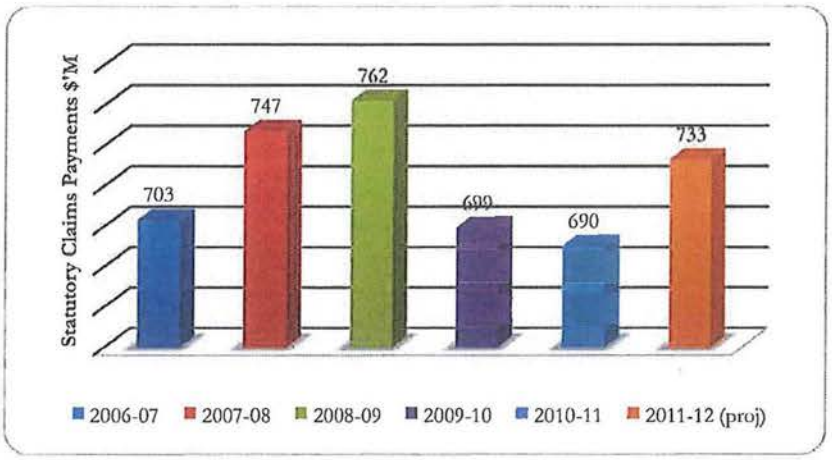
8.3. Statutory Claims Performance

Statutory claims lodged have increased from 98,600 in 2006/07 to 103,980 in 2010/11, which corresponds to a 5.4% increase. During the same period, employees covered by the Scheme increased from 2.095 million to 2.307 million; a 10.1% increase in employees. This has resulted in a **reduction in claims rate per 1,000 employees** from 48.8 in 2006/07 to 46.5 in 2010/11.

Statutory claims payments have average $722 million over the past six years with a moderate variance of around +/- 4% experienced over this time. The projected increase in 2011/12 correlates with the increased number of claims from 100,400 in 2009/10 to 103,980 in 2010/11.

These figures demonstrate continuing stability in the statutory component of the Scheme.

Figure 11: WorkCover Statutory Claims Payments (inflation adjusted) ($million)



8.4. Common Law Claims Performance

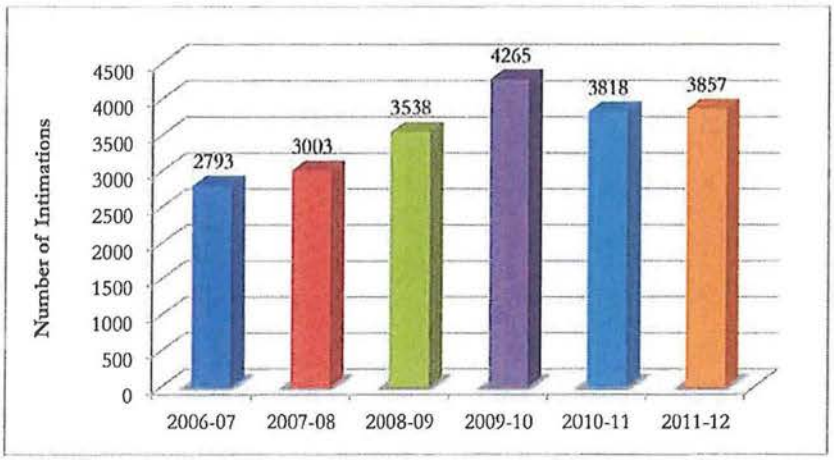
In 2010/11 there were 3,818 common law claims arising out of 103,982 statutory claims (3.67%). Statutory claims have, by far, the greatest impact on the financial viability of the Scheme. As interstate evidence demonstrates, any changes to common law rights will have little impact on the Scheme and will greatly increase pressure to raise statutory entitlements.

The number of common law claims over the past five years has remained predictable and rose largely in relation to increased economic activity. The exception was the large increase in 2010 ($554m up from $395m in 2009), which cannot be attributed to increased injuries or economic activity, but rather, stemmed from a Workcover management decision to substantially modify its claim handling and management practices:

- Management introduced practices and policies contrary to the long running and successful formula of utilising a panel of appointed external defendant lawyers negotiating common law claims on behalf of WorkCover and against plaintiff lawyers.
- Internalising this practice resulted in significant expansion of WorkCover's legal, para-legal team and bureaucratic claim handlers, who were unfortunately at the lower end of experience.
- Settlement values were being determined largely without recourse to benchmarks of the true legal settlement value of claims. Direct settlement became common practice driven by expediency rather than proper analysis, due diligence or negotiating rigour.

Combined, these factors resulted in an increased number of people electing to access common law remedies and in an increase of significant settlements for often unmeritorious or marginally meritorious claims. As a result of the 2010 reforms and changes in WorkCover practices, common law claims intimated decreased by 10.4% in 2010/11 and incurred a small rise in 2011/12 (see Figure 12). WorkCover supported by key stakeholders has acted to address those sub-optimal factors. ALA is confident that those remedial steps are working. The increasing percentage of "nil $" common law outcomes supports that confidence.

Figure 12: WorkCover Number of Common Law Claims Intimated



Average damages costs increased from $115,022 to $144,128 (25.3% increase) falling in 2011/12 to an indicative $139.258 (3.4% reduction).

The table above reflects the early effects of the 2010 amendments, and improved claims management by WorkCover.

8.5. Consequences of Restricting Common Law

ALA understands that a small number in industry will advocate for the restriction of common law rights through whole of person impairment (WPI) thresholds. This would be a high-risk approach for the Queensland Government because:

(i) There is **no evidence of lowered employer premiums** when impairment threshold restrictions are introduced. On the contrary, there is evidence of increased costs and frustration for employers and employees.

(ii) Implementing impairment assessments to gain access to common law will **greatly increase legal challenges** in already stretched administrative tribunals, throughout each of the key stages of the claim process, driving up costs for employers, workers and the Scheme to contest and defend assessments.

(iii) Common law thresholds **shift costs to employer public liability premiums** due to workers pursuing claims in that arena.

(iv) The abolition of common law access to large numbers of Queenslanders will require adjustment to statutory rights thereby **extending the Scheme tail for statutory payments.** The profound risks of pension-type schemes are clear from interstate and international example; significantly increasing the financial risk to the fund.

(v) Restricting common law access will substantially increase damages claims against third parties such as host employers and manufacturers of equipment as injured workers seek to recover lost redress from other parties.

(vi) There are clear **equity issues** in such a dramatic change to the rights of Queenslanders whose current rights would be significantly diminished. The community expectation of a fair and balanced WorkCover scheme remains strong:

a. Any WPI restriction would remove access to common law compensation for a disproportionate number of Queenslanders who suffer from injury.

b. Injured motorists and citizens injured in public liability circumstances in Queensland have unrestricted access to common law. Impairment thresholds would mean injured employees would have rights inferior to injured motorists and those injured in the public arena or as a result of medical negligence.

(vii) Impairment assessments are an **inaccurate or inappropriate estimate of work disability.**

a. The level of work disability is highly specific to the circumstances, job duties, etc. and further do not provide an accurate correlation to potential economic loss.

b. The American Medical Association Guides used in Queensland to determine whole person impairment state "*Impairment percentages derived according to the Guides criteria do not measure work disability*". It is therefore inappropriate to use the criteria to make direct estimates of work disability.

c. Even workers with 'low' impairment can be so disabled their career is ended. For example a person in their mid fifties who has only ever done one type of job suffers a back injury and is assessed at 0% AMA whole person impairment. The person cannot return to the previous job and does not have the skills or training to find another. A worker like this would have no rights if common law access were subject to any threshold.

8.5.1. Case Studies – Impairment Tests

The following examples demonstrate the inadequacy of a medical impairment test and the equity and flexibility of common law.

Case Study No. 1

A 49 year old retail employee slipped on a recently mopped floor, which had not been dried, and there were no warning signs in place. She suffered a fractured sacrum and a soft tissue injury to her coccyx. She underwent three operations, including a coccygectomy.

Despite the operation, the claimant suffered ongoing symptoms and in particular had difficulty standing for long periods of time, sitting for long periods of time, bending and squatting. She returned to employment, but limited the hours which she performed, such that she suffered an ongoing loss of income of around $250 per week.

Once her condition was stable, an assessment was made that she had a 0% work-related impairment.

In a common law claim, she would be entitled to claim her ongoing loss of $250.00 per week for as long as doctors were able to link that loss to her injury. If she was limited to a statutory lump sum, she would be entitled to nil.

Case Study No. 2

A young man contracted Q-Fever in the course of work as an excavator driver. It is a potentially fatal illness. The claim was accepted. He remains off work, very ill. He is no longer fit to hold a heavy vehicle licence.

The Medical Assessment Tribunal assessed the man as having a 0% impairment. This clearly does not reflect the actual impact on his health and career, as he remains unemployable in any work he is qualified to do.

Case Study No. 3

A 55 year old sheet metal worker suffers a crush injury to a finger. He has six weeks off work, covered by his entitlement to WorkCover benefits. He returns to work after that time and has no ongoing loss. His assessment for permanent impairment and scarring is 5%, entitling him to a lump sum payment of $14,780.[13]

By comparison, following the 2010 amendments his entitlement to damages for pain and suffering is significantly limited, likely between $5,000 – $10,000. He may be entitled to an award for future economic loss for the risk that he might lose his employment and be less employable because of his injury of perhaps $20,000. The range which he could expect from a court would be somewhere between $20,000 - $30,000. He is not entitled to any legal costs so after expenses for medical reports, experts reports, barristers fees and solicitors fees his "in-hand" amount would be no more than about $10,000. It is simply not financially viable in those circumstances for him to pursue that claim, and a prudent lawyer would advise him to accept the statutory lump sum.

8.6. Journey claims

Queensland's Workers' Compensation Scheme provides coverage for injuries sustained on the way to or from work. These are known as journey claims.

ALA strongly supports the retention of journey claims within Queensland's scheme:

(i) During the 2009/10 WorkCover review there was no suggestion that journey claims were a problem for the Scheme and hence no suggestion that there ought to be any amendment to the rights of Queenslanders injured travelling to or from work.

(ii) Queensland is the only State in Australia where more people live outside the state capital and its immediate surrounds than in it. As a consequence, longer journeys to and from work are common.

[13] WCRA Regulation Schedule 2, Part 1, Division 2, - Structural loss of distal joint of ring finger; Schedule 2, Part 5 moderate linear scarring

(iii) The rapid investment in Queensland's mining infrastructure has not been matched by residential infrastructure to service the mines. Drive-in and drive-out employment is increasingly frequent.

(iv) Queensland's Compulsory Third Party (CTP) insurance scheme is solely fault-based and accordingly the retention of journey claims may often be the only method by which workers injured in motor vehicle incidents can receive compensation.

(v) In an environment of workforce and skills shortage, journey claim compensation provides support for rehabilitation and return to employment. Any consideration of reducing access to journey claims would therefore contribute to longer rehabilitation periods and reduced labour productivity.

8.7. Deemed Worker Provisions

ALA understands that some within industry will advocate for a dilution of the provisions designed to restrict artificial arrangements to characterise those who are truly employees, as contractors.

ALA advocates that these current arrangements implemented by WorkCover provide an appropriate balance for employers and employees with no changes to this provision required.

Since 2003, the definition of "worker" has ensured those working on contract of service arrangements are covered by the Scheme. Any person who works for another person under a contract is a "worker" unless they can satisfy all three elements of a test designed as to whether the arrangement is that of a true contractor.

WorkCover is legally bound to cover those injured individuals who are regarded as workers at law, and utilises both education and enforcement mechanisms. These mechanisms have the effect of informing employers on the correct criteria to be applied to determine those individuals for whom premiums are payable. WorkCover will pursue employers who seek to create an artifice by which premiums are avoided.

The current arrangements ensure that individuals who are truly contractors are not part of the premium pool. Any dilution of the existing arrangements would:

(i) Leave those who are truly workers without coverage.

(ii) Encourage artificial arrangements.

(iii) Reduce the pool of premium income generated by the scheme.

(iv) Possibly lead to consequential outcomes on the collection of payroll tax and compulsory superannuation levies. .

(v) Leave WorkCover Queensland as an "insurer of last resort" whereby they were obliged to pay a claim on the basis of the person being found to be a worker, yet premiums had not been paid for that cohort of workers.

9. Current self-insurance arrangements in Queensland

ALA contents that the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment and consider there is no compelling case for structural reform.

In Queensland there are currently 25 licences issued to self-insurers, covering some 260 employers and 170,000 workers.

The current system of self-insurance is based on a system of licencing and self-management via a number of strict criteria and statutory requirements. Issuance or renewal of self-insurer licences includes a number of mandatory criteria including:

(i) Unconditional bank guarantees or substantial cash deposits (150% of their estimated claims liabilities).

(ii) A satisfactory Workplace Health and Safety record.

(iii) Accreditation with Q-COMP.

(iv) Comprehensive coverage of all workers in the jurisdiction.

(v) A minimum number of full-time workers employed in the jurisdiction, currently set at 2000.

(vi) Adequate Injury management and return to work arrangements.

The current fiscal position and solvency of the self-insurers in Queensland is generally sound, as evidenced through current annual reports, available financial data and Q-COMP reports. Q-COMP holds an unconditional bank guarantee for approximately three (3) times its estimated claims liability.

The self-insurers all operate under the same access arrangements for common law and statutory claims, and it is understood to be generally managed well.

The overall financial strength of the self insurers along with strict legislated guidelines and regularly re-assessed bank guarantees and other safeguard financial instruments, ensure that risk remains very low as part of the broader Workers' Compensation framework.

ALA understands there has been some discussion about the prospect of lowering the employee number threshold for an employer to qualify for self-insurance. There are two key issues for consideration:

(i) The potential impact of increasing the number of self-insured employers would have on WorkCover in terms of fund size, returns and pressure on premiums.

(ii) Ensuring all of the other criteria remain in place (including the 150% of their estimated claims liabilities in bank guarantee) to provide for adequate protections for workers and the State.

ALA believes that one of the key reasons for Queensland's stable Scheme is that WorkCover covers around 90% of the market. Accordingly, the ALA believes that current self-insurance mechanisms strike an appropriate balance.

10. Contacts

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