

# 2005 Policy Document



## **Statutory Workers' Compensation and Common Law**

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Common law rights to sue negligent employers for injuries caused to employees, once an accepted part of the industrial relations framework, have been eroded in many Australian jurisdictions: South Australia has a no-fault system with no access to common law; while NSW has set the injury threshold (30% whole person impairment or 'WPI') so high that it is almost impossible for workers to qualify.

Workers' compensation law of some kind has existed since the time of Bismarck. It was the humane state's response to increased danger in industrialised workplaces and remains a basic building block of law in Australia and other industrialised economies. Statutory workers' compensation benefits operate on a no-fault basis. To qualify for benefits, workers need show only that they were at work when injured - or, in some states, on the way to or from work. There is no need for workers to show that their employer was at fault.

Common law confers different rights on a worker. Where an employer breaches the terms of a work contract, or engages in a negligent act or omission, the worker may have a claim. Common law remedies always require proof that the employer was in some way at fault.

Combined with statutory schemes, common law remedies make a workers' compensation scheme cheaper and fairer by removing claims caused by negligent employers from the public purse: state resources are not used to subsidise negligent employers.

From an economic perspective, the award of common law damages also acts as an incentive to employers to provide safe working environments, since claims against them will increase their insurance premiums. Both through the economic imperative, and the public opprobrium associated with a finding of negligence, common law provides a valuable deterrent against dangerous work practices. Common law makes workplaces safer.

In some states, such as Queensland and Victoria, the two systems work very well together. An injured worker, needing medical treatment and no longer drawing a wage, is able to immediately access statutory benefits. Where the employer is not at fault, the worker can rely on the statutory scheme. But where an injury is caused through the fault of the employer, the worker can make a common law claim. Any damages awarded to the worker are then used first to repay the statutory scheme. The result is that the worker is prevented from 'double-dipping' and the statutory scheme recovers costs where fault is proved against the employer.

Comparisons of scheme performance show that well-structured schemes combining statutory and common law benefits financially outperform no-fault statutory schemes. Many state-run no-fault schemes run at a net loss to treasury. The role of common law in workers' compensation is therefore not only fundamental to the rights of workers, but also integral to the financial viability of statutory schemes.

The Australian Lawyers Alliance opposes any reduction in access to the common law in Australian workers' compensation schemes. We will continue to lobby for common law rights to be restored to those workers who have lost that access and promote workers' compensation schemes that combine statutory and common law rights as superior in every respect: in terms of financial viability, efficiency and fairness for workers.