



**Responses to Specific Questions raised
in the Department of Justice and
Attorney-General
Discussion Paper
February 2010.**

**Australian Lawyers Alliance
Queensland Committee
20 March 2010.**

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Question 1. – Statutory Benefit Changes.

Will the changes to statutory benefits and the rehabilitation and return to work initiatives reduce claim duration and foster return to work?

The Australian Lawyers Alliance supports any credible initiatives involving Return to Work (RTW) outcomes for injured workers.

Our experience is that there is a strong link between workers who are forced out of work or forced back to work before they are properly rehabilitated and the initiation of common law proceedings.

Undoubtedly a focus on rehabilitation and return to work is in the interests of individual workers and the scheme as a whole.

It should not however be provided to the exclusion of adequate and appropriate compensation which recognises ongoing disability.

The proposed changes to statutory benefits will NOT reduce claim duration but indeed extend them considerably. Seeking to abolish Common Law access for 66% of Queensland Workers, combined with an increase in the formula to weekly payments, will lead to the inevitable result that is being experienced in other schemes which have migrated to a longer tail. Workers, instead of being able to achieve an early assessment of losses and crystallise them through a short tail model, will have no option but to either stay on weekly payments for the full term of the payment model, or engage in continual disputation with the Insurer to receive the payments, in the event that the Insurer rejects them.

In the opinion of ALA, it is not a coincidence that South Australia and Northern Territory, the two State based Workers' Compensation schemes in the country which have no Common Law model to assess loss early and crystallise it, but have a substituted long term model, have the worst RTW outcomes in Australia.

Optimal RTW outcomes require motivation for RTW on the part of both the worker and the worker's employer.

The strongest motivator for a worker to RTW, from a legislative perspective, is a well drafted mitigation provision, placing an onus on the worker to act reasonably in achieving appropriate RTW.

This coupled with appropriate RTW measures (including both incentives for, and regulatory requirements of, employers) and a proper system to assess and crystallise any future losses will create the benchmark for RTW outcomes.

Most workers want to return to work. All workers faced with a choice of the injury not occurring in the first place or adequate compensation would choose the former every time.

Question 2.- Common Law Claim Numbers and WPI.

In your view, how can the issues driving the increase in common law claim numbers and claim costs be addressed for the long term?

Is the proposal to move to national consistency in the assessment of permanent impairment i.e. from WRI to a WPI measure, a desirable outcome?

The Discussion paper erroneously provides:-

“ Impairment thresholds remove less serious injuries from the common law system, enabling the statutory claims process to deal with these claims more efficiently and for less cost.”

As is known to the Queensland Government, small impairment levels, indeed even 0% impairment levels in the Queensland system, can result in enormous disability and consequential loss.

Impairment is not an accurate measure of serious loss...or indeed any loss involving work injuries.

WorkCover Queensland in its own actuarial material concedes that it pays an average of \$70,000 in Common Law settlements. Court awards into

the hundreds of thousands of dollars are not uncommon for workers assessed by the Queensland system as having no impairment.

This serves to highlight the ineptness of a model predicated on impairment.

The Queensland Workers' Compensation model was re-designed in 1995/6 to produce a methodology of quickly assessing true loss, measured by disability and crystallising that loss to conclude a claim.

Aspects of that design have been eroded in recent years, but the solution to this erosion is dealt with by ALA in its Workable Solutions Document.

A move to attempt to assess and crystallise a worker's true losses through a statutory impairment model is destined for failure.

An examination of schemes in other states stands testament to the economic failures associated with attempting such a model.

The scheme that has the oldest history of attempting this can be found in South Australia.

With a model to provide early assessment and crystallisation of loss, being abolished, and replaced with a long tail statutory model has seen the scheme with funding ratios below 60% for up to a decade, caused by mounting costs, high disputation, and low RTW.

Any early attraction to a threshold as means to curb claim lodgement will quickly be subsumed by the creation of a long tail, soaring costs and no long term viability to the scheme.

While it is noted that the Queensland Government has maintained that it has made no decision to support the imposition of thresholds, it is fair to say that Queensland workers and their families will be shocked to hear that a proposal to eliminate true compensation for 2 out of 3 Queensland Workers, and put the long term viability of the fund at substantial risk, is being supported by the Government that they elected.

A workable solution aimed at returning to the true intent of the successful Queensland Workers Compensation model, will see the issues driving common law claim numbers and costs, addressed satisfactorily.

ALA has provided the Department with such a solution which carefully

analyses the drivers behind the increases, examines the components of the scheme that are not currently working , and devises a solution which will see the adjustment in claim lodgements required to return the scheme to it's sustainable effectiveness.

Importantly, unlike some of the other modelled solutions, the solution retains the successful components of the core model which has produced the superior results that the scheme enjoyed until recent years.

The proposal to move to national consistency in the assessment of permanent impairment is NOT a desirable outcome. Assessment of Impairment is one of the greatest flaws existing in all Workers' Compensation Schemes in Australia.

In the context of the current Queensland Review, clearly a move to WPI from WRI will mean that the estimate that 2 out of 3 working Queenslanders will be denied access to Common Law remedies, is understated.

Neither WorkCover nor the Department has quantified the degree to which this estimate is understated.

Workers' Compensation schemes should be designed to compensate for disability, rather than impairment. Given the forthcoming discussions around National Harmonisation of Workers' Compensation, this issue should be considered very carefully to ensure optimal outcomes in any changes to the design of schemes. The Queensland Government has an opportunity to provide leadership in this critical issue and should not be encouraging proposals which run contrary to the interests of injured workers.

Question 3. – Other Options.

Are there any other options that you can suggest?

The ALA has provided an extensive alternative option in its Workable Solutions Document provided to the Department. Key features of the Solution Document include:-

- A swift return to financial health for the scheme.

- Retention of the proven successful model of the Queensland Workers' Compensation Scheme.
- Historical data to support the conclusions reached in addressing the funding issues in the scheme.
- Retention of a methodology to **properly** compensate injured workers according to disability.
- A mechanism to carefully monitor the performance of the scheme involving key stakeholders in the scheme.
- A methodology that provides for a workable solution for all stakeholders affected by the scheme, rather than compromising the key interests of any one stakeholder.
- A platform to return the Queensland Scheme to the National Benchmark it previously enjoyed.

ALA urges the Queensland Government to properly assess the alternate solution put to it and to carefully consider the ramifications of choosing a solution that does not properly address the interests of all stakeholders.

Question 4. Different "Injury" Definition.

In your view, is it appropriate to have a different definition of injury for common law?

A different definition of "injury" for Common Law, is in reality an alternative form of entry threshold to Common Law.

While the proposed definition, as a form of threshold, is not nearly as severe on Queensland Workers as the proposal from WorkCover Queensland, it is nonetheless an entry threshold.

Entry thresholds by their very nature serve two poor purposes in Workers' Compensation Schemes:-

1. They create discrimination among workers. Not surprisingly, Governments which introduce discriminatory measures against the workers that elected them, meet hostile reactions to such moves.

The secret to the modelling of the Queensland Scheme has been its ability to provide controls on the scheme without blatant

discrimination. This has been achieved through the mechanism of an irrevocable election.

While election does involve risk, it retains the critical component of “choice” for workers. When choice is taken away, hostility ensues.

2. Thresholds, by their very nature, by locking people out of entitlements, result in substantial time and money being expended in trying to meet the imposed threshold.

It is evident in other States in Australia that have imposed thresholds, the ever increasing costs components to schemes around the issue of meeting a threshold.

This becomes a self perpetuating process of Review and Decision and Appeal.

Any form of threshold should be avoided by Scheme designers at all costs. A range of other solutions exist to control Scheme costs that do not involve the imposition of thresholds.

Question 5.- The Bourk Decision.

Is it appropriate for the effect of the Bourk decision to be addressed? What measures could be taken to achieve this?

Yes. As is outlined in the ALA Workable Solutions Document, the Common Law was intended that in order for a worker to be entitled to damages at Common Law, negligence must be proven.

While the Queensland Court of Appeal cannot be criticised for applying existing legislation to the facts of the Bourk case, the solution is clearly to legislate ensure that the Workplace Health and Safety legislation is not applied for unintended purposes.

The following extract in the discussion paper deserves comment:-

“The advice from the actuary, is that, while amending the legislation in response to the Bourk decision will slow down the growth in common law frequency, it is not likely to arrest the growth in common law as a single measure. Consequently, the pressure on the solvency of the fund will remain.”

It is clear from the various responses provide by the actuary to the Department, regarding the relative impacts on the scheme from various court decisions, that the actuary has declined to consider the true impact on claims lodgements, that reversing the impact of various court decisions, will have on the scheme’s funding position.

This will be discussed in more detail below.

Clearly a single measure will not of itself arrest claims growth. The cumulative effect of a series of measures around both Judicial decisions and legislative barriers, will have extraordinary impacts on claims lodgements.

It is this combination that the actuary has elected not to consider, as evidenced by the costings provided to the department by the actuary.

Question 6.- Third Party Tortfeasors.

How effective do you think this proposal will be in resolving claims earlier and reducing legal costs? In what other ways can legal costs be reduced?

What other measures could be taken to achieve these goals?

The ALA supports any mechanism that will solve current scheme inefficiencies in handling Common Law claims that involve third party tortfeasors.

A solution needs to be built around

1. The early identification and joinder of third parties to the process.
2. Streamlined interlocutory processes.
3. Concurrent motivations for WorkCover / Self Insurers and Third Parties to resolve claims at Compulsory Conferences.

Currently the process necessarily involves the operation of disparate pieces of legislation, being the WCRA on the one hand and the CLA and PIPA, on the other.

ALA supports the reconsideration of a legislative solution to achieve the outcomes identified above. It acknowledges that the financial impacts of this issue currently are not near the magnitude of other issues the scheme is currently facing.

Question 7.- The Sheridan Decision.

How effective do you think this proposal will be in limiting speculative claims?

What other implications does this proposal have for injured workers?

This proposal will both of itself, but more particularly in combination with other proposals have enormous impact in limiting speculative claims.

The true impact of this proposal appears to have eluded WorkCover and its actuary as evidenced by the passage below contained in the discussion paper:-

“WorkCover advises that claims where the Sheridan decision has an impact are low in frequency. The impact on claim costs is limited to reducing the legal fees incurred by WorkCover when this type of claim is brought. In 2009, WorkCover finalised 249 claims with no damages payment. The reasons vary from third party contributions exceeding the level of damages and compensation paid or required to be paid by WorkCover for these types of claims. The total amount paid by WorkCover in legal fees and outlays to defend these claims was \$2.97 million in 2008-09. On an assumption that 50% of these costs were related to this type of claim, WorkCover estimates that the saving would have been \$1.49 million in 2008-09. However, the deterrent effect of this legislation in bringing unmeritorious claims must also be taken into account.”

There are two obvious ways of assessing the impact of a proposal like the Sheridan proposal. The first, which WorkCover has adopted, is to consider the number of claims currently affected by the decisions and to cost the consequences of them in the scheme.

The second is to understand the impact that the Sheridan decision has had on claim lodgement behaviour, and cost the impact accordingly.

The passage above demonstrates, on the part of WorkCover and its actuary, a key misunderstanding of the impact of various court decisions and their relevance to claim lodgement behaviour.

As set out in the ALA solutions document, the impact of the Sheridan decision was to **eliminate** all risk for speculative claims that are commenced but fail.

If a scheme operates whereby there is no risk to a losing party, the motivation to commence a speculative claim is heightened dramatically.

The costs provisions of the WCRA and its predecessors could not have intended a consequence that would absolve unsuccessful claimants of any adverse cost liability, while at the same time penalising claimants that succeed but fail to beat a written final offer.

ALA supports the proposal. More importantly it urges upon the Department to gain an understanding of the real impact of the reversal of various court decisions, when considering policy, rather than relying on actuarial advice that overlooks that real impact.

Question 8.- Employer Excess.

Should Queensland seek to harmonise the employer excess in line with other jurisdictions?

Will increasing the employer excess place greater emphasis on the prevention of injuries in the workplace?

Inevitably harmonisation will be cast upon State Governments at the request of the Commonwealth. While ALA does not strictly oppose the concept of harmonisation if, structured properly, ALA cautions against any change to the Queensland Scheme based purely on the desire to harmonise as opposed to the critical interests of the Scheme.

ALA supports any initiative that places greater emphasis on prevention of injuries in the workplace. It offers no specific proposal on the issue of Employer Excess.

Question 9.- 0% Threshold.

What is your view of a 0% common law claims threshold – is it fair and equitable?

A 0% threshold is neither fair nor equitable. Refer to ALA response to Question 2 above.

A 0% threshold will not provide either a constructive or viable solution to the issue confronting the scheme.

The methodology of determining the disability and consequential loss of injured Queensland Workers is fundamentally flawed adopting a 0% threshold, or indeed any percentage threshold.

The Chairman of the Medical Assessment Tribunals in Queensland, Dr Jon Douglas, a medical practitioner with considerable experience, and appointed by the Queensland Government Regulatory Body, QCOMP, as the Chair of its Assessment Tribunals summed it up perfectly in his recent presentation to the Stakeholder Group, extracted below.:-

Permanent impairment assessments, under the current Legislation, do not take into account disability. Permanent impairment assessments, at present, are made in accordance with the AMA Guides.

The AMA Guides specifically state;

“The Guides are not intended to be used for direct estimates of work disability. Impairment percentages derived according to the Guides criteria do not measure work disability. Therefore it is inappropriate to use the Guides criteria or ratings to make direct estimates of work disability”.

Apart from the fact that the American Medical Association has, since the inception of the Guides, warned strongly against the use of the guides as means of determining disability, it is obvious to those who understand the distinction between “impairment” and “disability” that not only is impairment assessment improper as a means to determining access to compensation because of a disability, it is manifestly unfair to the very people who are supposed to be compensated, namely the injured workers.

The ALA fundamentally opposes any move by a Government to implement such improper practices.

Question 10.-Civil Liability Act 2003.

What aspects of the *Civil Liability Act 2003*, if any, should be reflected in the *Workers’ Compensation and Rehabilitation Act 2003*?

The ALA supports the inclusion of various aspects of the Civil Liability Act 2003, as part of a package to address the issues confronting the Scheme.

Refer ALA Workable Solutions Document for details.

Question 11.- Which Option?

Which of the options – among WorkCover’s recommendations, the three alternatives or any that you have suggested – do you consider as striking the best balance between providing benefits to all workers, affordable costs for employers and the ongoing viability of the WorkCover fund?

ALA categorically opposes the WorkCover recommendations for the extensive reasons outlined in the following documents:-

- ALA’s Submission to Government
- ALA’s Workable Solutions Document
- ALA’s Response to Specific Questions Document.

Alternative Options.

1. ALA opposes Option A in the Discussion Paper, (other than those aspects of Option A that are contained in the ALA Workable Solutions Document).
2. ALA opposes Option B contained in the Discussion Paper.
3. ALA supports Option C as part of the options contained in ALA's Workable Solutions Document.

ALA supports a solution based around the options it has provided to Government in its Workable Solutions Document. It considers that this solution provides the best balance between Workers and Employers and provides the best framework for a financially healthy scheme without compromising the interest of stakeholders in the Scheme.