

# “Restoring the Fund”

A Working Analysis  
By The Australian Lawyers Alliance

## 1. BACKGROUND

WorkCover’s annual report revealed that the WorkCover fund in Queensland is experiencing some apparent financial difficulties.

The Attorney-General has foreshadowed a number of possible measures to ameliorate those difficulties. Among the possible suggestions is a threshold for access to common law damages claims.

While we apprehend that the current government is unlikely to introduce such a drastic and radical measure on the basis of the limited evidence available to it, within the context of the Global Financial Crisis, we nonetheless consider it appropriate to make some preliminary comment about thresholds.

It is the ALA’s position that thresholds:

- are fundamentally inconsistent with the structure of the current scheme;
- will not have the financial effect on a sustainable basis that is likely being sought;
- would have catastrophic consequences for the quality of life of a high proportion of injured workers, irrespective of where the threshold, in percentage terms, were set.

This paper seeks to offer some suggestions to assist the government to maintain Queensland’s position as the state with Australia’s premium workers’ compensation scheme; one that has for over a decade delivered to injured workers, unions and employers alike, maintaining an appropriate balance between financial sustainability and premiums on the one hand, and benefits to injured workers on the other.

## 2. SOME NUMBERS

WorkCover is traditionally, at least for the last decade, a very strong fund. In 2008 and 2009, it posted poor operating results which are undoubtedly in a significant measure attributable to the global financial crisis. Economic indicators suggest a recovery is on foot and accordingly decisions should not be made based on anomalous financial results in the short term.

	03/04	04/05	05/06	06/07	07/08	08/09
Operating result	\$192,963	\$87,872	\$669,104	\$64,758	(\$259,224)	(\$567,060)

The Table at paragraph 4, below, shows the underwriting and investment performance of WorkCover Queensland over a ten year period. Some key observations can be drawn from the data:-

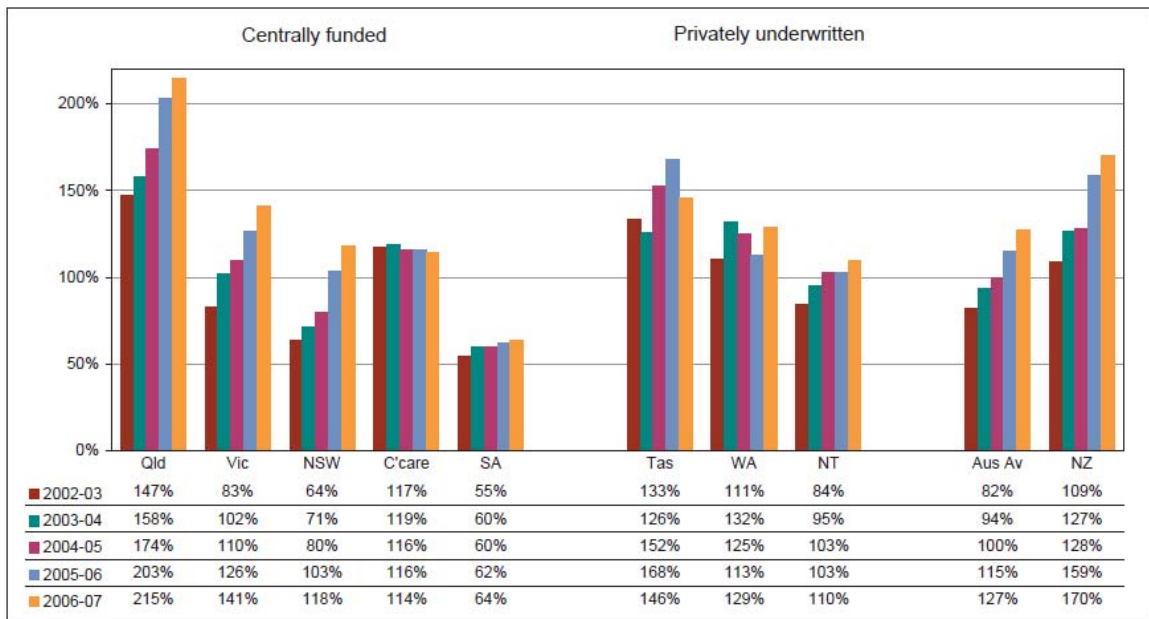
- Until the last two years the underwriting results appeared relatively stable.
- Investment Income had historically assisted in leaner underwriting years, but the GFC has had a considerable impact on this.
- Premium Income has not matched rises in expenses.

### 3. MODELLING

The Queensland WorkCover scheme is a hybrid of statutory payments and Common Law Access. It is a short tail scheme.

Comparable to the other workers compensation schemes in the Australia, It has enjoyed a significant funding ratio as can be see by the table below.

Indicator 18 – Standardised ratio of assets to net outstanding claim liabilities



Some other schemes in the country operate as pure No-fault Schemes, e.g. South Australia and Northern Territory.

Other states impose significant barriers to entry to common law.

No other state or territory scheme, in the last decade has performed as well as WorkCover Queensland.

In the opinion of the Australian Lawyers Alliance (“ALA”) a primary reason why the WorkCover fund in Queensland has enjoyed the highest funding ratio in the country for a significant time, can in large, be attributed to the model under which the Queensland fund operates.

As a short tail fund, its structure focuses on adequate benefits through the statutory phase coupled with a swift process for claim finalisation supported by an election for a statutory lump sum or Common Law Benefits, for the majority of claims in the scheme.

Having reviewed the other schemes in the country, ALA’s view is that:-

- Queensland has eliminated significant claims and administration costs that burden other schemes.
- The provision of an election provides choices for workers not available in any other scheme in the country.

- Significant dispute costs are reduced, if not eliminated, by providing a streamlined process for claims determination.
- The gradual development of a well defined Common Law process, avails workers with true disability (as opposed to impairment), the opportunity to achieve access to compensation rightfully determined on the basis of disability.
- A well defined cost structure generally has the capability of providing proper incentives for the avoidance of spurious claims and early settlement of commenced claims.
- The scheme structure is the best working example of a scheme that can effectively distinguish between impairment and disability to provide an appropriate balance between workers who, given disabilities, require appropriate compensation and those who although impaired are not disabled.
- Allows through its structure, superior RTW outcomes.
- The availability of common law damages without barriers is a significant disincentive to unsafe employers.
- The scheme is in a strong position because of, among other things, its ability to achieve positive underwriting results regardless of investment income.

Given the key strengths of the scheme structure, and impressive results vis-à-vis other Australian schemes, what, apart from GFC impacts, have detrimentally affected scheme performance over the last two years?

#### 4. ISSUES

Changes in scheme behaviour, resulting in less favourable underwriting results, can, in the view of the ALA, be rectified by a number of modifications canvassed in this paper, without the imposition of barriers to common law.

Three main issues have been identified in the course of discussion as key contributors to the underwriting results for WorkCover. They are:-

- (i) Decreased Premium Income
- (ii) Increased Claims Payments
- (iii) Increased Claims intimations/lodgements.

#### 5. DECREASED PREMIUM INCOME

Queensland's premiums have progressively decreased for several years:

	98/99	99/00	00/01	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09
Qld premium	\$1.85	\$1.75	\$1.55	\$1.55	\$1.55	\$1.55	\$1.55	\$1.43	\$1.20	\$1.15	\$1.15

Queensland employers have had the lowest premium rate among the state based schemes for many years. The current premium rate is over twenty percent below the next lowest state, Victoria, at \$1.39. (The highest premium is \$3.00 in South Australia, a state with no access to common law, and whose unfunded liabilities are now in excess of \$1B.)

Of concern is the fact that while some indicators were emerging that claims payments trends and claims intimation trends were rising, no upward adjustment was made to premium levels, and instead, they continued to decrease.

In ten years the premium rate has almost halved. In the years when it was apparent that payment levels were on the rise, premiums did not adjust accordingly. Premium revenue was less than the gross claims paid for the first time in the last decade, in 2007/2008.

**Recommendation: that the Queensland Government give consideration to premium rate adjustments in the scheme to assist in the recovery of the fund. A significant buffer exists between Queensland and the next lower state.**

The 2008/2009 WorkCover annual report refers to the cap on claims costs as follows:

*“The premium calculation includes a cap on the claims costs that are taken into account for premium calculation. This figure has been fixed for the last four years at \$150 000 and was not reflective of the increase in actual claims costs. For claims lodged after 1 July 2009, claims costs of up to \$175 000 per claim will be taken into account. This amount will be monitored and indexed in the future. It applies to both statutory and common law claims.”*

**Recommendation: that the figure of \$175,000 should be further reviewed.**

Such a further revision would be an added disincentive to unsafe work practices.

## **6. INCREASED CLAIMS PAYMENTS**

### *Common law*

Attention has been focussed on the fact that there has been a twenty-percent increase in total common law claims costs in the 08/09 year.

The annual report does not make explicit whether this is attributable to:

- An increase in claims incidence; or
- An increase in cost per individual claim; or
- A combination of both (and if so, in what proportion).

It may be noted that the increase in total common law claims costs in previous years has been:

03/04	04/05	05/06	06/07	07/08	08/09
1.14%	3.08%	8.56%	1.64%	8.69%	20.30%

Total claims cost increases, for common law claims, vary greatly from year to year. An anomalously high result in one financial year should not be the basis for a radical change in policy. Broader considerations, such as the fast increasing Queensland workforce, should also be taken into account.

### *Statutory claims*

The total cost of statutory claims has also been subject to greatly varying increases:

03/04	04/05	05/06	06/07	07/08	08/09
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3.76% 12.56% 29.06% 15.46% 12.30% 11.27%

Following the nearly thirty-percent increase in statutory claims cost in 2005/2006, there was no radical statutory or structural change. In fact, premiums decreased that year, after five years without change.

#### *Claims cost – overall*

Of course, the anomalous increase in common law claim costs cannot be considered in isolation. The total increases to gross claims paid (common law plus statutory) have been as follows:

03/04	04/05	05/06	06/07	07/08	08/09
2.01%	7.94%	14.77%	9.74%	11.29%	14.27%

## **7. FACTORS AFFECTING INCREASES IN COMMON LAW CLAIMS COSTS**

It appears that a number of factors have contributed to the spike in common law costs. These include:

- Anecdotally, increased activity in 3 key sectors being mining, manufacturing and construction.
- Changes in behaviour by WorkCover in payment levels.
- Changes in behaviour by WorkCover in managing “nil” claims.
- “Band Creep” of claims from lower average bands, to higher bands;
- Increase in payment in claims over \$400K.

## **8. INCREASED ACTIVITY IN KEY SECTORS**

Common law claims do not occur in the absence of negligence.

A focus on claims incidence in key sectors requires consideration of workplace health and safety regulation, enforcement, practices and culture.

The Queensland government has supported harmonisation of OH&S laws. We assume that government expects that the harmonisation will lead to safer workplaces, better work practices, more accountability by employers, and less common law damages claims as a consequence.

## **9. PAYMENT LEVELS**

ALA believes a number of measures could be considered which would see a reduction of payment levels for claims. This paper addresses the following:

1. Scheme Behavioural issues.
2. Structural Issues.

### **9.1 Scheme Behavioural Issues**

Less than 1% of the Common Law case load of WorkCover actually runs to trial. It is therefore impossible to attribute any increase on any direct judicial involvement or control over scheme payments.

ALA encourages WorkCover to consider the following practical changes.

#### 1. Reduction of “Band Creep”

“Band Creep” refers to the movement of numbers of claims from “nil” claims and the smaller bands e.g. up to 70K, into the larger bands, 100K plus.

Band creep develops when the perception of receiving a reasonable payment, even on the lodgement of a spurious (no reasonable prospects of proving liability when objectively analysed), or small, claim is involved.

It is within the control of WorkCover to take a more vigilant stance on the disposition of small or spurious claims.

This can include, adopting a key policy position on “nil” claims and committing to paying no damages on the real “nil” claims.

The practical consequence of tightening the stance on such claims (i.e. by making a ‘nil’ settlement offer) will be to render it futile to proceed beyond a compulsory conference.

Tightening the stance, coupled with the “Cap Rule” in the Legal Profession Act, will make it uneconomic to proceed further with smaller or spurious claims.

In the short term, this will have the effect of eliminating a significant number of claims at compulsory conference but in the longer term will eliminate the claims being lodged at all.

For example, if only 10% of claims were eliminated by the introduction of this policy, this would result in an 83M saving in the first year of operation, and continuing annually.

**Recommendation: That WorkCover adopt a practice of making more realistic offers in respect of spurious and small claims.**

#### 2. Utilisation of the Costs Rules

Most claims result in settlements that tend to “factor in” some allowance for costs, particularly if the parties are at a close position in the negotiations at the Compulsory conference.

It has been anecdotally suggested amongst Plaintiff Lawyers in the last couple of years that there has been a tendency on the part of WorkCover to commonly pay at or close to the upper end of the quantum range, in the spirit of resolving claims at conference.

Whilst alternative dispute resolution processes have clearly been advantageous to the scheme, the claimant, when deciding whether to accept a written final offer by WorkCover at Compulsory conference or go to trial, considers:-

- it could cost an additional \$50,000 to run a case to trial.
- the cap rule will have the effect of restricting the lawyer’s entitlement to a fee, notably in the smaller claims.

Therefore the worker has to determine whether the net position of taking a case to trial will result in the worker being any better off.

The worker's lawyer needs to determine whether, having regard to the cap rule, taking a case to trial will mean the case will be uneconomic for both the claimant and lawyer.

It is the ALA's view that a more strategic approach, by WorkCover, to the commercial considerations of this rule would result in a reduction in the average payments made prospectively on existing claims.

**Recommendation: That WorkCover consider the development of protocols which recognise the commercial realities, for claimants, of running matters to trial, within a cost capping (Legal Profession Act) regime.**

### 3. Target Trial (Test Case) Strategy

While the practice of settling more claims and litigating fewer to trial is certainly a sensible strategy from a cost reduction perspective, a side effect of this that some key types of cases which should be tested by the Courts, result in settlements.

It is generally accepted by all litigants in Common Law WorkCover litigation that there are categories of case that attract more questions than others.

WorkCover adopted in the early part of this decade to "test" the willingness of the courts to entertain common law damages claims for some types of injuries. Judgments in favour of WorkCover had the effect of immediately reducing the volume of lodgements in certain types of cases, at least at Common Law.

**Recommendation: WorkCover should be encouraged to return to a "target" policy to test categories of cases which, on an objective view, are worthy of determination by the Courts.**

### 4. Interlocutory Policy

When the WorkCover Queensland Act became law it had the effect of introducing a new level of complexity to the lodgement and management of common law claims.

This included:-

- The requirement to obtain either conditional damages certificates of leave of the court to commence claims at risk of being statute barred;
- The testing of adherence to "compliance" requirements set out in the Act and Regulations, surrounding the lodgement of valid notices of claim;
- The disclosure process being more narrowly circumscribed.

An unintended consequence of co-operative protocols in the processing of claims has been a "lightening up" on some of the rigours of these interlocutory processes.

This had the consequence of encouraging less experienced and less specialist legal firms back in WorkCover space. Previously such firms had ceased practising in the area because of an apprehension that it was increasingly complex to run WorkCover litigation.

There is a great deal of competition amongst the many specialist experienced firms in the area. Encouraging generalists to 'chance their arm' does not lead to better competition or better outcomes for consumers.

**Recommendation: cooperative protocols should be revised to ensure that they do not have the unintended effect of encouraging spurious and/or small claims by inexperienced practitioners.**

5. Third party (PIPA) Tortfeasors

Some behavioural change would be appropriate in this regard, to complement structural change. These are each addressed below.

**9.2 Structural Changes**

ALA considers that it is likely there will be significant improvements in the viability of the fund by embracing the proposed recommendations above.

In the event that this is not accepted, the more radical option of structural changes (not thresholds/barriers to entry to common law) could be considered. Commentary in that regard follows.

However, it is ALA's further view that structural changes are at least premature, and probably unnecessary, given the matters referred to above.

1. Statutory abrogation of the effect of *Sheridan v WorkCover*

It is anomalous and inconsistent that a plaintiff who falls below WorkCover's mandatory final offer suffers costs consequences for taking the matter to trial, yet a plaintiff who receives no damages as a consequence of a finding of no liability is not required to pay WorkCover's costs.

**Recommendation: Amend costs rules to provide that a plaintiff who loses a case outright is required to pay WorkCover's costs.**

2. Adopt methods by which WorkCover can force third party tortfeasors to pay their fair share

It is the anecdotal experience of ALA members that in joint WorkCover-PIPA circumstances (most commonly, labour-hire arrangements), WorkCover commonly agrees to contribute a higher proportion of the damages than that for which it may be found liable by a court.

To achieve this, government might consider legislatively conferring on WorkCover such power as is necessary to require third-party tortfeasors to participate meaningfully in Alternative Dispute Resolution processes.

Moreover, within WorkCover, at a behavioural level, a more robust approach, to seeking contributions from third party tortfeasors, should be adopted.

Statutory measures to codify the common law in respect of the relationship between host employers and labour hire companies could be considered.

**Recommendation: consider legislative change to enable WorkCover to better ensure that third parties pay their fair share.**

### 3. Consideration of a statutory measure to respond to *Woolworths v Parry*

Strict common law liability flowing from a breach of some provisions of the *Workplace Health and Safety Act 1995* may have engendered a belief by WorkCover that such cases are incontestable at common law.

**Recommendation: consideration of a statutory provision confirming that strict liability does not flow from a breach of workplace health and safety legislation.**

#### **9.3 Structural changes not supported by the ALA**

The ALA apprehends that government may consider:

- Re-introduction of the Liability and Quantum Restrictions; and/or
- Introduction of the Civil Liability Act provisions in respect of both liability and quantum.

Such changes would be radical, tough on injured workers, and unnecessary in light of the recommendations above.

#### **10. INCREASED CLAIMS LODGEMENTS**

The measures suggested in respect of claims payments will have a corresponding braking effect on claims lodgements.

In addition we propose that government ensure appropriate resourcing for WHS agencies.

Common law claims are far less likely in a well-regulated WHS environment.

The move to harmonisation must be accompanied by adequately resourced compliance agencies. Increasing the number of inspectors within the harmonised framework and vigorous pursuit of investigations and prosecutions of substandard workplaces will contain injuries numbers, and, therefore, the number of common law claims.

#### **11. SUMMARY**

A review of the ten year underwriting history of the WorkCover Scheme reveals that the Scheme has been run profitably without over-reliance on investment income.

Policy-makers should not respond to the GFC and the 08/09 increase in claims costs with extreme, radical, premature, or profoundly anti-worker measures. The Scheme's long term performance and underlying strength and stability should not be disregarded. A calm, steady approach should be taken.

Barriers to injured workers' access to common law damages claims, of the magnitude mentioned by the Attorney-General to parliament would result in the vicinity of around 85% – 95% of injured workers, who presently have access to common law, being precluded.

Such barriers ignore the reality for injured workers that small impairments often have massive disability consequences.

WorkCover's sustainability can be restored, in the view of ALA, without drastic measures, by implementation of the recommendations contained in this paper.

Curtalement or abolition of common law rights has been the genesis, in some other states, of worsening scheme financial difficulties.

The ALA and other stakeholders, including trade unions, have cooperatively engaged with WorkCover throughout the past decade, and are committed to both the ongoing sustainability of the scheme, and ongoing dialogue to achieve that purpose.

Justin Harper, President, ALA Qld