



WORKCOVER QUEENSLAND

**“A WORKABLE SOLUTION
TO RESTORING THE FUND”**

20 March 2010.

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INTRODUCTION

The Queensland Government has issued a Discussion Paper entitled:

“The Queensland Workers Compensation Scheme : Ensuring Sustainability and Fairness”

The paper calls for responses by 24 March 2010. Contained in the paper is a recommendation from WorkCover Queensland, primarily involving the introduction of a 10% Whole Person threshold, to resolve the funding shortfalls currently occurring the Scheme.

The Australian Lawyers Alliance does not accept that the changes proposed in the discussion paper are necessary or justified. Queensland has a healthy Workcover scheme which has been the most successful scheme of its kind in the country.

However the Alliance understands that the Government’s position that some change is required, and consequently now seeks to engage on what these alternatives might be. The purpose of this is to assist in developing a solution which maintains the viability of the fund, while also protecting the fundamental components of the existing scheme which have ensured its continued success.

This document lays out an alternative recommendation which necessarily avoids the need for the implementation of thresholds. The recommendation coupled with appropriate adjustments to premium income and a return to investment income should see the fund recover to satisfactory levels within a reasonably short period of time.

Some Key Drivers

The three key drivers to restoration of the fund are:

Investment
Income

Premium
Income

Underwriting
Result

The bulk of this document will focus on key legislative changes to produce a far improved underwriting result, but will also include premium adjustment to improve income from that source.

Telling Story

Graph No.1 below depicts the common law intimations mapped from 1990 through to 2009.



Graph 1. Common Law Intimations 1990-2010. Source QComp.

Overlaid on the graph are ten key milestones occurring in that 19 year period which played significant roles in the changing levels of common law intimations.

The Ten Milestones.

It is essential to understand the impact that key milestones have had on scheme behaviour. These milestones can be mapped as follows:

1. Workers Compensation Act 1990

Common Law in Queensland as at 1990 was completely unfettered. The 1990 legislation brought about changes predominantly in the area of statutory benefits including improvements to weekly payments, maximum benefits, and adding casual workers to the definition of “worker”.

2. Motor Accident Insurance Act 1994.

In 1994 the Motor Accident Insurance Act was passed. The Act made substantial changes to the procedures governing the litigating of motor vehicle common law claims. In particular the Act involved the shortening of timeframes within which proceedings could be brought. A logical consequence of this was a migration by lawyers to workers’ compensation claims which did not impose similar restrictions.

3. Workers Compensation Act amendment Act 1995

The Act was the Labor Government’s response to the unfunded liabilities of \$320M, in particular key changes included the introduction of the irrevocable election for common law for impairments under 20% and the abolition of the cost indemnity rule.

4. WorkCover Queensland Act 1996

The amendments to the 1995 Act were soon followed by the abolition of that Act and the introduction of the WorkCover Queensland Act 1996. Specifically legislation was passed introducing strict restrictions surrounding liability and damages.

The combined effects of the introduction of an irrevocable election, abolition of cost indemnity, and introduction of strict liability and damages provision resulted in a dramatic reduction in the number of common law claims. In fact, reported scheme claims reduced from 3520 at the peak to 1954 in 3 years. This represents nearly a 45% reduction in common law claims lodged over a 3 year period.

This position remained stable for 2 years before a rise in claims between 2001 and 2005.

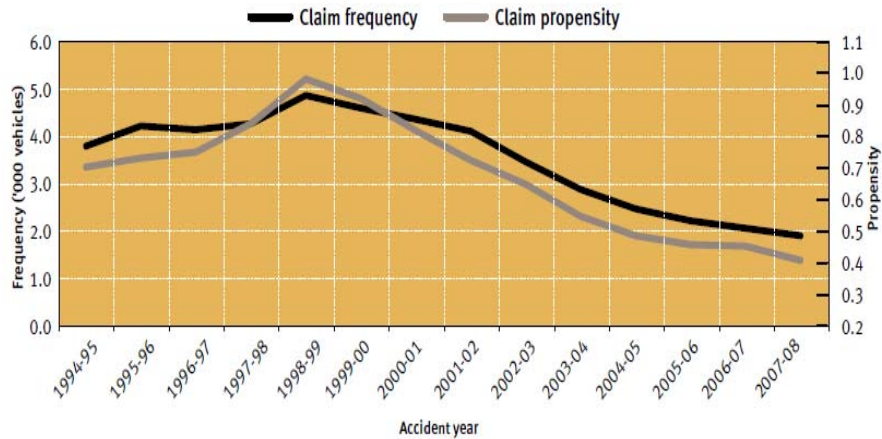
A number of milestones occurred in this period which included the following:

5. WorkCover Queensland Act 2001 amendments

Significantly the Government passed crucial amendments which relaxed a number of the restrictions put in place in 1996. These included repealing the provisions surrounding liability controls and removing a number of the restrictions around damages.

6. Civil Liability Act / Personal Injuries Proceedings Act

In 2002/2003 the Government passed the Civil Liability Act and the Personal Injuries Proceedings Act which brought in sweeping changes to procedures, liability and damages provisions affecting both motor accident claims and public liability claims.



Graph 2. Motor Accident Claims lodgments 1994- 2008. Source MAIC

By way of example, claim lodgment data in the Queensland Motor Accident Insurance Commission shows that in the year prior to the passage of this legislation CTP claims (by accident year) claim lodgments were 10,310. In the 12 months following the passage of that legislation claims for the full year had dropped to 7843 and by the accident year July 2005 to June 2006 claims had reduced to 6633. This represents potentially upwards to a 40% reduction in claims pre the passage of legislation over a 3 year period.

7. Workers' Compensation and Rehabilitation Act 2003.

In 2003 the Workers' Compensation and Rehabilitation Act 2003 was passed. The legislation was brought about largely as a result of the decision to separate WorkCover Queensland's commercial and regulatory functions.

8. Sheridan v Warrina Community Co-Operative Ltd & Anor

In 2004 the Queensland Court of Appeal upheld an appeal in the decision of the Sheridan v Warrina Community Co-Operative Ltd & Anor [2004] QCA 308. Importantly the decision eliminated all risk of adverse cost exposure for unsuccessful plaintiffs in common law workers compensation claims. The impact that this decision had was to remove a notable barrier to commencing claims that otherwise might be regarded as highly speculative.

9. Legislation affecting injured workers' job security, or perceived job security

In late 2005, the Industrial Relations Act was amended to increase protection from dismissal for injured workers for 12 months up from 6 months.

In early 2006, the "protection for injured workers" provisions were moved from the Industrial Relations Act to the Workers' Compensation and Rehabilitation Act. (This move appears to have been an attempt to ensure that the relevant protections were not affected by "Work Choices".)

10 Bourk v Power Serve Pty Ltd & Anor, and Parry v Woolworths Ltd

In 2008 the Court of Appeal in their decision of Bourk vs Power Serve Pty Ltd & Anor [2008] QCA 225, reversed the decision of the single judge who had found no negligence resting with the worker's employer in a common law action commenced by the worker. Importantly the Court of Appeal upheld the worker's reliance on the provisions of the Work Place Health & Safety Act as providing an alternative avenue for succeeding at common law when negligence cannot be proven.

Further in 2009 the Court of Appeal again upheld the Bourk provision in the decision of Parry v Woolworths Ltd [2009] QCA 26.

What Can We Solve?

**Investment
Income**

Actuarial assessments have given projections around returns to investment income. These projections include a 9.1% return for the financial year 2010 and an average return of 7.5% for the financial years 2011 through to 2018. For the purposes of this document those projections will be accepted.

Premium Income

The Deloitte Report provides various projections of adjustments to premium income culminating in a recommendation by WorkCover Queensland to adjust the existing rate of \$1.15 to \$1.40 over an 8 year period. ALA will provide in separate costings, recommendations about premium changes necessary.

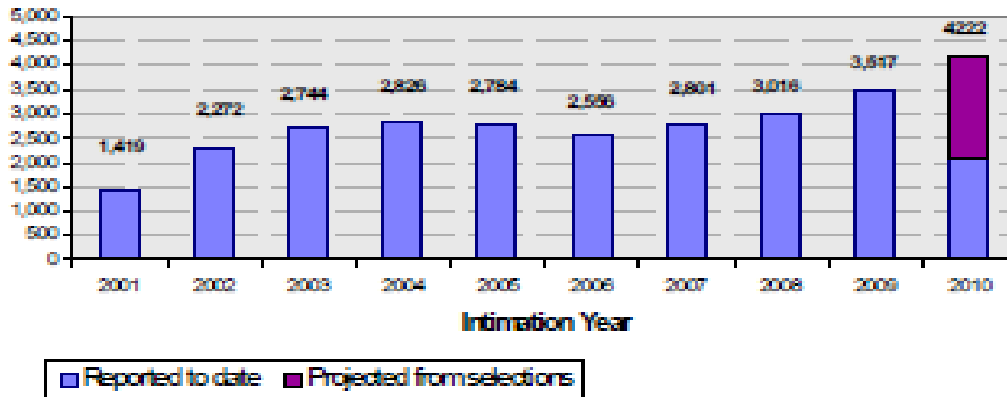
Underwriting Result

It is clear that the two drivers around the underwriting result are:-

- 1) Movement in claim lodgments and
- 2) Movement in claim payments.

Claim Lodgments.

Number of Common Law Claims Intimated



Unquestionably the rise in claims lodgments from the 2008 year onwards is a key driver for the concern around the viability of the fund. An examination of the claims numbers between 2002 and 2008 represents a reasonably stable pattern in lodgment behaviour.

What is causing increases in claim intimations?

Any prudent approach to considering how to 'peg back' claim lodgments would require a considered analysis of the underlying reasons for the increase in claims intimations.

Currently, WorkCover has experienced substantial common law intimations increases for less than two years. That is, for FY08-09 and the first part of FY09-10.

WorkCover's actuary has come up with some assumptions about why this increase in the very recent past may have occurred.¹ However, these assumptions substantially speak of behavioural change, without adequately attempting to assess the underlying causes for such behavioural change. Importantly, the assumptions have not been subject to any empirical testing as to workers' motivations for bringing common law claims.

¹ Slide 25, March 2010 presentation by PWC

For example, no empirical research has been undertaken amongst injured workers who have recently made common law claims or who are likely to make claims, as to their reasons for doing so. (It is unclear why this has not occurred, given the asserted urgency. With the small number of common law claims, a statistically significant sample would be small and manageable to survey.)

In the circumstances, government is presented with:

- a very short period, in the context of the scheme, founding the assertions by WorkCover and its actuaries that there will be an ongoing sharp increase in claims intimations resulting in financial difficulties for the fund; and
- no, or no adequate, research or evidence as to the underlying causes for the increases that have occurred over the short period (less than two years) concerned.

ALA has considered the history of the scheme, and our members' own experience in working within it. We have views as to the means by which to 'peg back' common law claims, which are set out below. Before going to those means, however, we make the general observation that government should refrain from taking any drastic steps, such as those recommended by WorkCover, in the absence of an evidence-based assessment as to likely future intimations increases, and the underlying causes of such increases.

How to Peg Back Claim Lodgments?

There are three central sources to focus on in pegging back claim lodgments. These are:

1. Legislative solutions – Barriers to entry
2. Legislative reversal of past Judicial Decisions
3. Realignment of Stakeholder Claims Management practices

1. Legislative Solutions – Barriers to Entry

A telling graph is the scheme common law intimations from 1990 through to 2008/2009.

(Graph No 1, pg 2 above.) Notably the period 1996 to 2000 saw a 45% reduction in common law claims lodgments. This is attributable to the introduction of stringent barriers around liability and damages, the imposition of the irrevocable election, the removal of primary standard cost recovery, and the altering of claims management procedure.

It is significant to understand the mindset of lawyers advising workers during that period. It is undisputed that these factors delivered such a significant reduction in claims lodgments.

As noted in the milestones above, an unwinding of many of these barriers has seen a commensurate change in behaviour in claims lodgments in the years that followed. There are two basic choices available to reintroduce similar barriers to alter claims lodgment behaviour. These are:

- (i) Reintroduce the liability and quantum provisions contained in the repealed WorkCover Queensland Act 1996.

Reintroduce the requirements around the obtaining of conditional damages certificates and leave to proceed despite non compliance.

- (ii) Introduce various components of the Civil Liability Act 2003 including restrictions around liability and damages.

An examination of the scheme data in the Motor Accident Insurance Commission tells a similar story around claims lodgment behaviour following the introduction of the Civil Liability Act provisions into that scheme.(Graph No 2. pg 4 above) Of significance is the stabilization of claims lodgments in the motor accidents scheme since that time. It is important to note that unlike the WorkCover scheme there have **not** been a series of relaxations in the years that followed the Civil Liability Act which is consistent with claims lodgments being kept at a stable level.

2. Legislative Reversal of Past Judicial Decisions

A series of judgments in the Queensland Court of Appeal have demonstrably changed workers' attitudes to lodging common law claims. These decisions have been highlighted in the milestones references above. The decisions and their impacts are as follows:

1. Sheridan v Warrina Community Co-Operative Ltd & Anor [2004] QCA 308.

The effect of the Sheridan decision is well known in the scheme. The responses by WorkCover's actuaries to references to the Sheridan decision in the Queensland Government's Discussion Paper focused simply on the actual impact of the Sheridan decision on claims. In other words the actuaries considered the number of cases in which Sheridan had direct application and then considered the cost to the scheme. The impact of the Sheridan decision in scheme behaviour goes well beyond the focus of WorkCover's actuaries. It is the impact of the decision on scheme behaviour that needs to be understood in the context of legislative solutions. The net outcome in the Sheridan decision was that in the event that a worker lodged a dubious or speculative common law claim which ran to trial and for which negligence was not proven, there was no cost risk to the worker in speculating on such a claim. This is contrasted against the situation where another worker could take a claim to trial, receive an award of damages lower than WorkCover's written final offer at compulsory conference and the exposed to cost risk.

It is critical to understand the mindset of the worker and the worker's representatives in assessing whether or not to lodge a common law claim. If there is no risk in the event of a loss at trial for the worker, coupled with the willingness to speculate that a case will resolve commercially, the behaviours in lodging speculative claims, particularly at the lower level of damages changes dramatically. It is widely known within the scheme that the Court of Appeal's decision in Sheridan demonstrably made easier the risk analysis exercise that needs to be undertaken when confronted with the irrevocable election.

2. Bourk v Power Serve Pty Ltd & Anor [2008] QCA 225.

Similarly to Sheridan the impact of the Bourk decision cannot be overstated. It is the combination of the decisions in Sheridan and Bourk, supported by the later decision in

Parry that has eased the complexity of risk analysis when determining whether to elect to proceed at common law.

The facts and the consequences of Bourk are well known. In short, if the perception in the minds of the worker and his or her representative is that there is no longer the requirement to prove negligence at common law, then a decision to proceed to common law is simply a decision based on the assessment of damages. This is in fact a de facto impairment scheme.

The Queensland Workers' Compensation Scheme was not designed for this purpose.

An elimination of this perception coupled with a return to the proper principles associated with proving negligence will alter dramatically the risk analysis undertaken at the time of an irrevocable election.

3. Realignment of Claims Management practices.

A key practice that was formed in the late part of the 1990's was the formation with WorkCover Queensland of a stakeholder group that met formally to monitor the practices of the stakeholders and produce protocols to assist in the better management of the Workers compensation processes.

For example in the early part of the last decade when costs were mounting given the increasing number of disputes in the Courts around compliance with the then section 280 of the Act, a protocol was produced by agreement of WorkCover Queensland and the Australian Plaintiff Lawyers Association (now The Australian Lawyers Alliance) to curb the legal and administrative costs associated with compliance disputes.

As with this protocol, many issues emerged which the stakeholder group confronted and resolved.

Most importantly the group could keep “in check” the state of play surrounding the number of claims coming through the system and the payments going out.

In recent years the group has not met with the frequency with which it used to. Regrettably this has meant that some of the issues now being confronted by the scheme may have been identified at a much earlier stage, and strategies developed to resolve them.

The Fundamental Principles of Success Underpinning the Queensland Model

The Queensland Workers' Compensation Scheme **DOES** have a unique and superior structure to any scheme in the country. There are a number of principles that underpin the success of this structure. Aspects of these principles in recent years have been eroded which have caused the financial position the scheme now finds itself in.

It is important to examine the principles, understand them and put in place solutions that embed the core principles so that the scheme can once again operate as successfully as it has demonstrably done in the last decade. The principles are as follows:

Short Tail Hybrid.

Unlike most schemes in the country, Queensland enjoys a SHORT TAIL, Hybrid scheme with a mix of Statutory benefits and Common Law access. It is this unique model that keeps disputation down, returns workers to work early and achieves greater economic outcomes for the scheme.

There has been an unwritten code within the scheme that lawyers tend not to get involved in the statutory mechanism of the scheme, but rather become involved once a worker reaches the point of confronting the irrevocable election.

The benefits of this unwritten code allow the insurer to manage the statutory component of the claim including the provision of appropriate weekly compensation medical expenses, rehabilitation, return to work options, and finally assessment of impairment.

Traditionally involvement of lawyers was all but limited to the simple issue of scheme access, namely the determination of “worker” and “injury” within the statutory scheme.

This is to be contrasted with other schemes in the country where the involvement of lawyers in the statutory processes of a claim are significantly higher, pushing up disputation rates, claims management costs, and other associated costs.

It is through the hybrid structure that the insurance tail has been kept short.

The relationship between the worker and the insurer in the statutory process is certainly a key consideration to be examined in the context of a rising conversion rate to common law.

Put another way, if the insurer were free to manage the statutory frameworks in an environment where there is less adversarial impact, the probability is that the conversion rate to common law should reduce accordingly.

Common Law

When considering the changes in the Queensland scheme behaviour from 1995, one of the cornerstones to the change was the introduction of an irrevocable election.

The schemes around the country that have sought to control increasing common law costs have introduced various mechanisms to curb common law lodgments. Traditionally these mechanisms have been either the introduction of thresholds or caps or both.

The introduction of a threshold poses an arbitrary solution to the control of claim lodgments. By its very mechanism it takes away from the scheme the ability for workers to be compensated for disability. It is this significant inequity that has resulted in dramatic deterioration in scheme behaviour in those schemes that have introduced thresholds.

The beauty of an irrevocable election is that it achieves the purpose of restricting or controlling claims lodgment numbers provided the election is set up to achieve its purpose, but importantly, it enables workers to be compensated for disability.

It is clear that a rising conversion rate to common law is demonstrative of deterioration in the true purpose of the irrevocable election. The solutions proposed in this document are aimed squarely at reintroducing the true intention of an irrevocable election and thereby controlling claims lodgment numbers to acceptable levels.

Package of Solutions

The solutions modeled below are based on the following considerations:-

1. Examining the underlying successful Core structure of the WCQ scheme following the scheme re-design in 1995/6.
2. Mapping the Claims lodgment movements in the scheme from 1990-2010.
3. Examining the impact of key milestones in the 20 year period that have contributed to changes in Claims lodgement and payment behaviour.
4. Producing a solution that:-
 - (i) Remedies the recent lodgment and payment behaviour;
 - (ii) Builds in stable growth projection moving forward.

The following solutions are recommended.

1. Either:
 - a) a reintroduction of the WorkCover Queensland Act 1996 Liability & Quantum Provisions, or
 - b) an introduction of the Civil Liability Act 2003 Liability & Quantum Provisions.

2. Legislative wind back of the consequences of the following decisions:

Sheridan v Warrina Community Co-Operative Ltd and Anor [2004] QCA 308

Bourk v Power Serve Pty Ltd & Anor [2008] QCA 225

Parry v Woolworths Ltd [2009] QCA 26

3. Reformation of the WorkCover Stakeholder Group.

The financial impact of the legislative amendments regarding liability and quantum provisions can be easily quantified. Insofar as the WorkCover Queensland Act provisions are concerned, this is known from historical data.

Insofar as the Civil Liability Act, the consequences are at least measured in respect to the impact on the Motor Accident Insurance Scheme.

Some actuaries suggest that given the schemes are different in nature it is difficult to attribute the impact of legislation on another scheme to potential consequences within this scheme. For lawyers advising claimants in both schemes, it is clear as to the impact that the introduction of the Civil Liability Act if enacted into the Workers' Compensation Scheme would have. As history has shown remedial provisions applied previously in the WorkCover Scheme and the Motor Accident Scheme have produced a 40-45% reduction in claims following the legislation, and while left in place, have produced controlled stable claims growth thereafter.

It is noted that costings provided by PWC to the Department have demonstrated either an inability to understand and cost these impacts, or a decision not to do so. PWC's costings have largely been limited to the impact on claims left in the system following a remedial change.

It is this significant omission from PWC's costings that is of considerable importance when considering remedial options.

Financial Impacts of Package of Solutions.

The financial impacts of the solutions package are dealt with in two tranches:-

1. The financial impact of remedial legislation to peg back current claim lodgments;
2. The financial impact of remedial legislation on claims growth forecasts.

An introduction of either the WorkCover Queensland Act L & Q Provisions or the Civil Liability Act L & Q Provisions is capable of conservatively producing a 25% reduction in claims lodgments. This is against a **known** reduction of between 40% and 45% based on historical data. A bar set at 25% reduction rather than the known 40% to 45% reduction provides significant comfort to guard against those doubting the historical data known to Government.

A second assumption has been taken in relation to claims payments. The effect of the introduction of barriers to entry, combined with core remedial legislation restricting the level of damages payable, will have an immediate alteration in relation to claims payment. These issues are entirely within the control of insurers but the additional legislative frameworks provide a legitimate platform for greater controls over current payment levels. An assumed 15% reduction in claims payment is considered a conservative view having regard to the impact of past changes.

Scheme savings.

ALA is currently having it's solutions package costed by it's actuary and expects to provide figures to the department within 48 hours, but preliminary estimates based on the following criteria, demonstrate that the scheme can be returned to funding ratios well in excess of required levels very quickly.

1. Claims lodgments reduced by 25% from current estimates.

2. Claims payments reduced by 15% from current estimates.
3. Premium adjustment to \$1.35 from FY10

Moving forward.

An analysis conducted by ALA of the growth in Common Law claims based on the historical remedial legislative measures noted above, demonstrate the following levels of average annual growth, following the introduction of the legislation:-

1. Claims lodgments: 3.5%
2. Claims payments: 3.25%

It is clear, from historical analysis that this growth control is most likely to follow the introduction of the remedial legislation referred to above.

The package recommended achieves the two key requirements of , arresting immediate concerns regarding claims lodgment and payment levels , achieving a 25% reduction in claims lodgments and a 15% reduction in claims payments, and secondly controls future growth to levels not exceeding 3.5% pa.

The solution enables Government to quickly remedy the current problems facing the scheme without damaging the successful scheme structure.

Summary

A solution built around accepting the conservative projections on future investment returns, a highly competitive adjustment in premium level, and legislative reforms to control claims lodgment and claims payment should see a timely return to the health of the Queensland scheme. This solution critically, provides a positive outcome for all stakeholders and most importantly does not tamper with the core principles that underpin the highly successful model that the Queensland Workers' Compensation Scheme has enjoyed in the last decade.

