

Your Ref:

Our Ref: Accident Compensation / Tort Law Committee

26 November 2012

The Research Director
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: fac@parliament.qld.gov.au

Dear Research Director

OPERATION OF QUEENSLAND'S WORKERS' COMPENSATION SCHEME - Supplementary

Thank you for providing the Queensland Law Society (the Society) an opportunity to lodge a supplementary submission to the Finance and Administration Committee (the Committee) for its Inquiry into the Operation of the Queensland Workers' Compensation scheme (the Scheme).

Representatives of the Society appeared before the Committee on 14 November 2012 and we were pleased to be able to assist the Committee. This submission addresses in some detail issues raised at the hearing by the Committee, as well some issues raised by other stakeholders.

The Society notes that since our initial submission the 14th Edition of the Comparative Performance Monitoring Report has been released as has updated actuarial analysis by Q Comp and WorkCover. Where relevant we have included information from those sources.

Thank you again for the opportunity to provide these supplementary comments and observations. The Society would be pleased to respond to any questions from the Committee relating to legal practitioners, or to assist the Committee in any way it can.

Please contact our Principal Policy Solicitor, Mr Matt Dunn, on 3842 5889 or via email on m.dunn@qls.com.au.

Yours faithfully



Dr John de Groot
President

Supplementary Submission

Inquiry into the Operation of the Queensland Workers' Compensation Scheme

Queensland Parliamentary Finance and Administration Committee

*A Submission of the
Queensland Law Society*

26 November 2012

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Opening statement

At the 14 November 2012 public hearing of the Committee, the Society's President, Dr John De Groot, made the following points in his opening statement:

- QLS is the peak body for the solicitors of Queensland and our members represent injured workers, employers and insurers in the workers' compensation scheme
- The paramount concern of the Society is that the scheme achieves three objectives:
 - the Scheme is sustainable
 - the Scheme is fair
 - the Scheme encourages safer workplaces
- The Queensland workers' compensation scheme is the best in the nation. It is:
 - strong because of its short tail nature
 - tracking very well with positive results
 - achieving the right balance between entitlements for injury and access to common law to bring finality
- All major stakeholders agree that the fundamental short tail structure of the scheme should not be changed
- The financial crisis in 2007/08 had massive global impacts. The workers' compensation scheme weathered those upheavals. Now all actuarial analysis of the scheme is positive
- Change to the structure of the scheme will create uncertainty and problems for the scheme. Some stakeholders have called for thresholds to access common law. This will fundamentally alter the nature of the scheme and will have an adverse impact on public liability premiums and yet not have a net benefit for industry.
- With open access to common law claims, Queensland has the second lowest workers' compensation premium of any scheme in the nation second only to Victoria, just marginally below Queensland. Last financial year WorkCover Queensland made a \$199Million **profit** after tax. Worksafe Victoria, with the lowest premium and restrictions on common law, made a \$676Million **loss** after tax
- In summary:
 - WorkCover, and the workers compensation scheme generally, is in a secure financial position which compares exceptionally well with other schemes
 - more needs to be done to reduce the rates of injury through regulatory activity, education and incentives
 - there is no justification for structural change to the Scheme.

Lowering premiums and proper comparisons

Recently other major workers' compensation schemes in Australia have returned very bad results compared to the solid results in Queensland. This is in part attributable to longer tail claims systems, soft conditions which currently exist for bond yields and external pressure to lower premiums artificially.

OPERATION OF QUEENSLAND'S WORKERS' COMPENSATION SCHEME

Given recent results and current trends, and in the absence of the maintenance of artificially low premiums, the scheme could expect to have the lowest premium in Australia in the 2013 – 14 year.

Jurisdiction	Premium 2012-13	Premium change from 2011 – 12 year	Financial result 2011 - 12	Equity Position 2011 - 12
Worksafe Victoria (excluding employer excess buy out)	1.298	-0.05	\$675.6M loss after tax	54% <u>worsening</u> to \$688M assets
Worksafe Victoria (including employer excess buy out)	1.4278			
WorkCover Queensland	1.45	+0.03	\$199M profit after tax	58% <u>improvement</u> to \$541M assets
WorkCover NSW	1.68	0	\$866 profit	\$1,497M <u>deficit</u>
Comcare	1.80	+0.39	\$564M loss	\$549M <u>deficit</u>
WorkCover SA	2.75	0	\$437M loss	\$1,426M <u>deficit</u>

Source: agency annual reports 2011 / 12 & review briefing document

The only State in Australia with a lower premium than Queensland, Victoria, last year suffered a \$675.6M loss and a 54% worsening of its equity position. In the 2011 / 12 year Worksafe reported a premium income of \$1.878M and claims expenses of \$2.955M. This coincided with a decision to reduce its premium by 3% from the previous year.

In the absence of fundamental scheme restructuring or fiscal intervention by government, it would not seem unreasonable to expect premiums in Victoria to rise to respond to the worsening financial position there.

With respect to Victorian premium levels it is also important to remember that a different employer excess structure applies than in Queensland. Under the Victorian model an employer is responsible for paying the first 10 days off work and the first \$629 (indexed annually) in medical and like expenses (the employer's excess) unless they take out the buy-out option on their WorkSafe insurance policy. The buy-out option costs an employer an additional 10%¹ of their WorkSafe insurance premium. Therefore an employer paying the average 2012 / 13 premium in Victoria who elects to take out the buy-out option pays a premium of **1.4278% of wages**.

The Victorian Government has also recently introduced a dividend facility payable to Government from the WorkSafe scheme.

¹ <http://www.worksafe.vic.gov.au/insurance-and-premiums/calculating-your-insurance-premium>

A similar 10 day employer excess introduced into the Queensland scheme would potentially remove:

1. from the scheme 24% of statutory claims made for time lost; and
2. a proportion of the 36% of claims which are made for medical expenses only (being 24,796 time lost claims and a proportion of the 38,209 claims for medical expenses on 2010 / 11 data)².

In the absence of undertaking this exercise it is very difficult to make a direct comparison of the average premium rate for Victoria with that of Queensland.

The unique element of the Victorian excess is that it puts more emphasis directly on employers to reduce injury rates in their workplaces. Doing so produces for them an immediate financial benefit. Conversely, employers with poor attention to workplace health and safety can be more quickly incentivised to take steps to improve their injury record. In this way the Victorian excess serves to remove some of the premium burden on diligent employers while ensuring that injured workers still have recourse to benefits and rehabilitation.

Change brings actuarial uncertainty

The most recent actuarial consideration of the workers' compensation scheme shows that the scheme is returning to a more predictable (and long term sustainable) claims pattern following the amendments made in 2010.

The Society is concerned that any change to the scheme needs to be very soberly considered and targeted to ensure that it does not have a short-term detrimental effect.

Actuarial consideration of outstanding claims liabilities is based on a number of assumptions that existing trends will continue. This is driven by consideration of recent experience, which is grossed up for relevant inflation and then padded with a contingency value.

When elements of the scheme are changed, it is more difficult for actuaries to rely on recent experience as a predictor of future trends. Actuaries are then inclined to make educated assumptions, sometimes called guesses, about what may occur. This is usually undertaken with a very great degree of conservatism and actuaries will often prefer to overestimate funds which will be needed in the future rather than underestimate, if possible. This natural conservatism in professional guesswork leads to higher estimates in outstanding liabilities than may be necessary, which in turn requires greater collection of premium.

Recent actuarial data indicates that the trends of increasing common law claims numbers which were projected in 2009 have simply not come to pass. Experience has shown that common law claims are now

² For the entire scheme, from Q-Comp, Qld workers' compensation claims monitoring report Jun 2012

reducing, rather than increasing and it appears that the best estimates from 2010 are now about 10% higher than experience has demonstrated. Premium has therefore been collected to meet those claims liabilities which did not occur. Given the uncertainty which the 2010 amendments introduced to the claims patterns it is not surprising that there may have been over-estimation. In simple terms, the actuarial projections in 2009 were erroneous and there is some evidence that even without the changes to the scheme in 2010, the then identified trends in common law claims would have reversed.

This issue also resounds for the future, in that, when amendments are made to the scheme, actuarial projections become inflated due to natural conservatism. This can dampen expected decreases in premiums or fuel premium increases which may prove to be unnecessary.

0% WPI threshold for common law access

The Society continues to oppose any type of common law access threshold, noting particularly that:

- whole person impairment gives no indication of the disability of the individual arising from the injury, including the effect on their employment and career prospects;
- the scale for limiting general damages introduced in the 2010 amendments was originally developed for the motor accidents insurance scheme to operate in lieu of access thresholds; and
- whole person impairment ratings are very subjective and the differential between 0 and 1 (or between 5 and 6, or 9 and 10) can be very arbitrary.

Subjectivity in assessing permanent impairments

By way of example of this last point the Q-Comp quick reference tool for the table of injuries guidelines includes the following items with potentially 0% impairment assessments:

Injury	Permanent Impairment Range
Sensory loss to palmar surface of index finger	0-8
Sensory loss to palmar surface of middle finger	0-8
Crush injury to hand with multiple fractures (healed with no deformities) but resulting in mild loss of motion of all fingers with extensive scarring and soft tissue damage	0-40
Carpal tunnel syndrome, whether operated or non-operated with residual subjective symptoms or signs such as dysaesthesia or muscle wasting	0-2
Fractured scaphoid, operated	0-5
Fracture of radius or ulna or carpus bones with moderate limitation of wrist movements and mild limitation of elbow movements	0-16

Injury	Permanent Impairment Range
Medial or lateral epicondylitis of elbow, whether operated or non-operated with residual subjective symptoms or signs e.g. pain and tenderness	0-2
Injury to elbow region resulting in moderate loss of all movements	0-31
Injury to shoulder region resulting in mild loss of all movements	0-6
Injury to shoulder region resulting in moderate loss of all movements	0-16
Fracture of any metatarsal, worst possible outcome e.g. pain or loss of weight transfer	0-10
Mild aggravation of pre-existing degenerative disease in knee with subjective symptoms, but no significant clinical findings other than degenerative changes on X-ray	0
Moderate to severe aggravation or acceleration of pre-existing disease in knee with subjective symptoms, but no significant clinical findings other than degenerative changes on X-ray	0-7
Mild aggravation of pre-existing degenerative disease in hip joint with subjective symptoms, but no significant clinical findings other than degenerative changes on X-ray	0
Moderate to severe aggravation or acceleration of pre-existing disease in hip joint with subjective symptoms, but no significant clinical findings other than degenerative changes on X-ray	0-7
Injury to hip region resulting in mild loss of all movements	0-12
Injury to hip region resulting in moderate loss of all movements	0-25
Severe vertigo with subjective symptoms and signs and totally dependent	0-70
Loss of smell	0-3
Loss of smell and taste	0-6
Loss of speech	0-35

These examples demonstrate that impairment ranges are often overlapping between various severities of injury and tend to rely upon the judgement of the medical practitioner to differentiate between mild and moderate loss of function. This distinction is both subjective and somewhat arbitrary in any particular case. Take as an example an aggravation of a pre-existing degenerative condition in a hip joint. Whether it receives a 0 or greater score depends on whether the aggravation is mild or moderate to severe. This fine distinction could quite easily be the subject of differing expert medical opinion.

Given the nature of the permanent impairment ranges, the Society fears that any access threshold for common law claims based on permanent impairment assessments will be open to significant disputation and associated costs for the scheme as well as injured workers.

Injury Scale Values

The long term impact on common law claims of the introduction of injury scale values (ISV) should not be understated. Recent actuarial data demonstrates that since the introduction of ISV ratings, general damages have decreased by 15% which has driven strong reductions in the average size of overall common law damages.

ISV ratings originally applied to motor accident claims from 1 December 2002 and over the following years have delivered a very positive effect on the stability and affordability of the CTP scheme. Subsequently ISV ratings were introduced to the workers' compensation scheme in the 2010 amendments. The ISV scale was introduced in the *Civil Liability Bill 2003*. The then Attorney-General explained the rationale for its introduction in the second reading speech³:

The bill also changes the method of assessment of damages for personal injuries. It includes provisions containing a number of measures aimed at reducing awards of damages in personal injuries actions. In particular, the bill provides a new method for assessing general damages in personal injury cases. The method is based upon models in use throughout the world and is similar to that enacted in South Australia. A court will be required to assess an injury and allocate a value on a scale between zero and 100 to that injury. Assistance will then be provided to the court in assessing injuries under guidelines relating to those values—values which should normally be attributed to certain specified injuries. These guidelines will be developed in a similar form to the guidelines in use in the United Kingdom and will be given the force of law through publication as part of a regulation under the act.

Once a court has assessed the scale value of the injury, the act provides a simple mathematical calculation of the general damages that would be awarded for that injury. This system will provide certainty to parties in assessing general damages and assist in avoiding inappropriate awards or settlements.

ISV ratings were introduced into the CTP scheme at a time when there was pressure on the affordability of the scheme due to rising claims payouts. In the 2002 / 2003 Annual Report the Motor Accident Insurance Commissioner said⁴:

To maintain the affordability of CTP, expectations of further growth in claims payouts will need to be contained. The Commission believes this should be achieved through tort reform introduced in the *Personal Injuries Proceedings Act 2002* and the *Civil Liability Act 2003* as some of the provisions contained within these Acts extend to CTP.

In particular, the Commission is of the view that the likely benefits flowing from the introduction of the injury scale values for general damages in the *Civil Liability Act 2003* should result in cost containment.

³ Record of Proceedings, 11 March 2003, page 368

⁴ MAIC Annual Report 2002 / 2003, p2

The move to capping general damages based on injury scale values arose from the 1999 Review Committee of the Compulsory Third Party Insurance Scheme chaired by Bernard Rowley⁵. Significantly the review committee looked at both issues of thresholds for bringing claims and injury scale ratings. With respect to general damages the Committee made the following recommendation:

3.14 If the affordability of the scheme comes under pressure and payments in respect of general damages are identified as a significant contributing factor, then further consideration will need to be given to the early implementation of a disability points scale similar to the South Australian model.

With respect to the issue of access thresholds the Committee said⁶:

Submissions regarding thresholds were mixed with particular recognition that thresholds could become less effective as scheme participants devised ways to get around them.

Also the Committee opined⁷:

There is general support for the retention of unlimited access to common law on the basis that caps and thresholds in other States have not been proven to result in lower insurance premiums.

In the view of the Society, the introduction of an ISV scale is a more effective cost containment strategy than an access threshold. This view is supported by the recommendations of the 1999 CTP scheme review and the positive claims and financial experience in the CTP scheme generally. The most recent results in the workers' compensation scheme, arising from the 2010 amendments, again demonstrate the effectiveness of the ISV scale and support the Society's fundamental submission that common law access thresholds are neither warranted nor appropriate in the workers' compensation scheme.

Positive results

Recent actuarial information indicates that the progress of the scheme is very good.

The Society notes as follows:

- statutory claims *frequency* expectations have decreased by around 3% this year
- statutory claims *payments* expectations have decreased by around 5% this year
- common law claims *frequency* expectations have decreased by around 5% this year to be similar to 2007 levels
- common law claims *payments* expectations have decreased by around 11% this year.

⁵ Available at http://www.maic.qld.gov.au/forms-publications-stats/pdfs/ctp_review.pdf

⁶ Review of the Queensland Compulsory Third Party Insurance Scheme Report, 1999, page 46

The Society notes that the average size of current common law payments is 15% less than comparable claims made prior to the 2010 amendments.

These continuing outstanding results demonstrate that the scheme fundamentals are strong and remain so.

The very positive results referred to will also lead to downward pressure on premiums. All analyses undertaken by actuaries for the scheme and for stakeholders indicate that in the short to medium term there will be capacity and opportunity to reduce premiums. Significant change to the scheme is likely to put in jeopardy the relative certainty now developing in claims and financial trends.

Changing claims behaviour

Recent actuarial data suggests that claims handling procedural changes at WorkCover following the 2010 reforms have also been successful in achieving the positive trends identified above. Previously, at least anecdotally, WorkCover would depart from their mandatory final offer too easily in order to secure a quick resolution of a claim. One of the changes implemented by WorkCover has been to defend mandatory final offers and not to materially resile from that figure.

It is now the experience of the Society's members that WorkCover does not vary from its mandatory final offers and this is confirmed by the recent analysis undertaken by the actuaries for Q Comp and WorkCover.

The Society is of the view that this initiative has resulted in changes in perception – and thus behaviour - by plaintiff lawyers. Lawyers now appreciate that WorkCover's mandatory final offer is firm. This appears to be driving the following outcomes:

1. lawyers are more likely to advise clients to settle earlier as it is unlikely that WorkCover will change its position; and
2. lawyers may be less likely to advise clients to make claims where there are significant liability issues as WorkCover is more resolute in its defence of matters.

These two behavioural factors may be contributing to the downward trend in common law claims rates.

'No win – no fee' cost arrangements

Conditional costs agreements, also known as speculative fee agreements or 'no win, no fee' costs agreements are a type of contract between a lawyer and their client for the provision of legal services.

⁷ Review of the Queensland Compulsory Third Party Insurance Scheme Report, 1999, page 53

Such contracts generally provide that if a claim is unsuccessful, the client does not have to pay legal fees and outlays expended to the law firm.

Conditional cost agreements are sanctioned and regulated by the *Legal Profession Act 2007*, which provides in s323(3) for mandatory requirements in any such agreement:

323 Conditional costs agreements

(1) A costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate.

...

(3) A conditional costs agreement—

- (a) must set out the circumstances that constitute the successful outcome of the matter to which it relates; and
- (b) may provide for disbursements to be paid irrespective of the outcome of the matter; and
- (c) must be—
 - (i) in writing; and
 - (ii) in clear plain language; and
 - (iii) signed by the client; and
- (d) must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement; and
- (e) must contain a cooling-off period of not less than 5 clear business days during which the client, by written notice, may terminate the agreement.

Conditional costs agreements such as 'no win / no fee' arrangements are often seen as a beneficial access to justice initiative which permits impecunious injured workers to exercise their legal rights.

Legal Aid Queensland ceased funding civil litigation matters (in circumstances where a costs order can be made) from 20 July 1992. Up to that time legal aid was also an avenue for impecunious injured workers to be assisted in making common law claims. In May 1993 the Civil Law Legal Aid Scheme was introduced which directed limited funding from the Public Trustee of Queensland to meet the outlays and disbursements connected with a workers' compensation claim, amongst other matters, if certain means and merits tests are met. One prerequisite for such funding is that the injured workers' solicitor must agree to take the matter on a 'no win / no fee' basis. The Civil Law Legal Aid Scheme also seeks reimbursement of all funds it has paid from a successful claimant.

Costs in the workers' compensation scheme

Traditionally a large part of the legal costs of a successful claimant would be paid by an insurer.

Over time, schemes such as the workers' compensation scheme have changed the way they deal with legal costs. Currently injured workers with a lower order injury must pay their own legal costs without any

contribution by the insurance company. This was seen as providing a disincentive to the bringing of smaller common law claims and a way to address losses and unfunded liabilities in the scheme.

In Queensland this change was introduced with the *Workers' Compensation Amendment Bill (No 2) 1995*, which commenced from 1 January 1996. At that time the scheme had just made a loss of \$173.0M and had an unfunded liability of \$114.3M. The amendments applied to where a worker had an entitlement to a lump sum of at least 20% of the statutory maximum compensation and settlement was reached at an amount between each parties final offers. Costs would be awarded to a successful claimant only if the final compensation award exceeded the claimant's offer.

In reality, settlements are generally reached between the parties expectations, rather than beyond them.

The *Workers' Compensation and Rehabilitation Act 2003* (WRCA) now regulates the issue of legal costs in common law claims in a similar way, by stating:

- if a claimant has a WPI of 20% or more the insurer will pay a contribution to the claimants costs⁸
- if a claimant has a WPI of less than 20%, then an insurer will only pay a contribution to the claimant's costs if a claim is resolved for more than the claimant's written final offer⁹
- if a claimant has a WPI of less than 20%, then the claimant will pay a contribution to the insurer's costs if a claim is resolved for less than the insurer's written final offer
- In all other circumstances each party pays their own legal costs.

Under the *WorkCover Queensland Act 1996*, an injury from an event that results in a work related impairment (WRI) of a worker of 20% or more was known as a 'certificate injury'. The threshold for the payment of costs to a claimant in that Act was the claimant having a certificate injury. This terminology was mentioned at the public hearing and is roughly equivalent to the test in the current Act.

One of the natural consequences of each party bearing their own costs is that in smaller claims where there has been significant disputation, a successful claimant may find that the legal costs accrued equates to a significant proportion of the settlement sum.

The costs reduction rule – also called the “50 / 50” rule

There was some discussion of the so-called '50/50' rule at the public hearing. This rule limits the amount of legal fees which can be recovered by a lawyer pursuant to a conditional costs agreement in personal injuries matters.

⁸ Sections 312 and 313

⁹ Section 316

The original rule was introduced by the Queensland Law Society by Council ruling on 22 August 2002 to respond to community concern about the outcome for injured people who received small payments of compensation but had to pay fees for the services of their lawyer. The ruling provided that the fees that a lawyer may recover from a client in a speculative personal injury matter could be no more than 50% of the settlement amount after the payment of outlays (ie medical report fees etc) and refunds to government departments (ie Medicare, Centrelink etc). The ruling did not operate as an American-style contingency fee, permitting a lawyer to charge 50% of the settlement funds. Rather, it capped the amount of money lawyers could recover from their clients, depending on the manner in which such fees were calculated under the relevant agreement.

To this day, only the Queensland legal profession has embraced this important consumer protection measure, despite the Society and the Australian Lawyers Alliance urging our interstate colleagues to do so.

The ruling of the Council was challenged and the Supreme Court found in *Holland v Queensland Law Society Incorporated* [2003] QSC 327 that the ruling had no legal effect and that a statutory provision was required. Consequently at the request of the Queensland Law Society, Government included in the *Justice and Other Legislation Amendment Bill 2003* a provision to give statutory effect to the Council ruling.

The Council ruling continues in effect today, in a revised and clarified form, in s.347 of the *Legal Profession Act 2007*.