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24 March 2010

The Director
Workers' Compensation Policy Unit
Department of Justice and Attorney-General
GPO Box 69
BRISBANE QLD 4001

Dear Director

THE QUEENSLAND WORKERS' COMPENSATION SCHEME: ENSURING SUSTAINABILITY AND FAIRNESS

Thank you for providing the Queensland Law Society with the opportunity to provide comments to the Discussion Paper entitled, *The Queensland Workers' Compensation Scheme: Ensuring Sustainability and Fairness*.

The Queensland Law Society is the peak Queensland body representing the solicitors of Queensland with a membership in excess of 7500 practising legal practitioners. The QLS represents both solicitors who act for defendants and solicitors who act for claimants in personal injury matters.

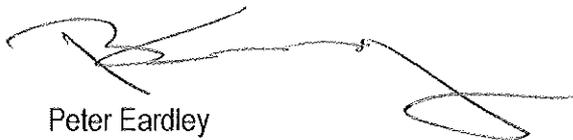
The matters raised in the Department's Discussion Paper are of significance as the reforms proposed would adversely affect injured Queensland workers, insurers and solicitors.

It is the paramount concern of the QLS that the entire Queensland workers' compensation scheme achieves two objectives:

1. the scheme is sustainable through the transparent application of good prudential practice; and
2. the scheme fairly rehabilitates and compensates workers injured as a result of their employment.

Should you or your officers wish to meet with representatives of the Society to explore further any of these issues please contact the QLS Principal Policy Solicitor on 3842 5889 or via email on m.dunn@qls.com.au.

Yours faithfully



Peter Eardley
President



Submission

Discussion Paper
*The Queensland Workers' Compensation Scheme:
Ensuring Sustainability and Fairness*

*A Submission of the
Queensland Law Society*

24 March 2010

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Executive Summary

The paramount concern of the QLS is to ensure that the Queensland workers' compensation scheme achieves two objectives:

1. the scheme is sustainable through the transparent application of good prudential practice; and
2. the scheme fairly rehabilitates and compensates workers injured as a result of their employment.

While it is accepted that WorkCover represents some 90% of the workers' compensation scheme, systemic reform must not be enacted solely in response to the results of this one insurer. In our analysis we have endeavoured, whenever possible, to address whole of scheme results. Basing reform on the experience of a single insurer may prove ineffective in the longer term if their experience is attributable to both external and internal factors which are not addressed.

It is the position of the QLS that:

- the Queensland Workers' Compensation Scheme is the best in the nation by any objective measure, and this is due to the short tail nature of the scheme based on its unrestricted access to common law to bring finality to claims and to avoid inculcating a 'welfare mentality' amongst claimants;
- recent losses experienced by WorkCover are as a result of number of factors but most relevantly due to premiums being held at an artificially low level thereby creating an over-reliance on investment returns to meet underwriting requirements consequently over-exaggerating the effects of the Global Financial Crisis;
- increases in the numbers of common law claims experienced are due to a number of factors including:
 - natural growth in the size of the pool of insured workers under the scheme and relatively consistent net claim incidence rates over the past five years;
 - uncertain economic conditions where terminated injured workers are less likely to gain employment and are more inclined to proceed with a common law claim against their employer;
 - a continual speeding of claims through the statutory benefits stage, including the quick assessment of incapacity by WorkCover of a number of matters just before the end of reporting periods, creating a 'flush' of claimants having to make a decision about commencing a common law claim at certain times;
 - the effect of decisions regarding the drafting of the *Workplace Health and Safety Act 1995* applying a very high duty of responsibility on employers with respect to injuries sustained in the workplace;
- projections provided to Deloitte by the WorkCover actuaries about growth in the incidence and quantum of common law claims in the coming years are inconsistent with the longer term trends in

claims and are extrapolated from too narrow a basis of claims experience giving an unreliable and overly-pessimistic result;

- **the introduction of any threshold, narrative or quantifiable, to access common law will detrimentally affect the 'short tail' nature of the scheme, will increase dispute rates bringing associated costs and will jeopardise the scheme's long term viability;**
- the QLS implacably opposes the introduction of any thresholds for access to common law;
- whole person impairment assessment is not a measure of work disability and an inappropriate tool to use for determining work related loss;
- to address the external and internal causes of WorkCover's recent results appropriate measures that should be taken to ensure the ongoing sustainability of the scheme are:
 - a significant immediate increase in premium to an underwriting breakeven level, a premium of \$1.55 appears to be the accepted figure;
 - introducing greater transparency in scheme prudential regulation, including involvement by the scheme regulator in actuarial modelling as well as the presentation of a yearly actuarial briefing to scheme stakeholders by the scheme regulator (similar to that which has operated so successfully over a number of years by the Motor Accident Insurance Commission);
 - addressing increased difficulty faced by employers in resisting claims for damages as a result of the drafting of the *Workplace Health and Safety Act 1995* as highlighted in *Bourk v Power Serve* [2008] QCA 225 and other decisions;
 - increasing obligations on third parties to fully participate in the resolution processes in the pre-proceedings process;
 - allowing the court to award costs against plaintiffs who pursue frivolous and / or unmeritorious claims;
 - reconsidering the appropriate level for the employer excess given the collection of sufficient premium at the initial stages for underwriting purposes; and
 - systemic rewards for employers be introduced for the successful implementation of workplace accident prevention strategies, to prevent injuries giving rise to claims rather than restricting the rights of those workers already injured; and
 - consideration of the application of the entirety of the *Civil Liability Act 2004* to workers' compensation claims before the introduction of arbitrary general assessment thresholds for access to common law claims.

The Queensland Scheme Success Based on Common Law Access

The Queensland Law Society maintains that the two most successful accident compensation Schemes in Australia are those which have no significant restrictions on common law claims – the Queensland Workers' Compensation and Queensland CTP Schemes.

Conversely, the worst performing Schemes – measured by any major indicator (such as disputation rate, assets to liabilities ratio or proportion of scheme expenditure paid to the injured worker) – are those schemes that have been either severely restricted (by thresholds and other means) or have entirely abolished common law claims.

Figure 1: workers' compensation scheme comparatives

	Qld Common Law	SA No Common Law	NZ No Common Law	NSW Threshold to Common Law	VIC Threshold to Common Law
assets to liabilities ratio of scheme ¹	127%	56.7%	53% ²	89%	97%
proportion of scheme expenditure paid to the injured worker ³	67.3%	62.1%	46.7%	47.3%	52.5%
disputation rate ⁴	3.1%	13.6%	N/A (scheme covers all accidents)	6.6%	16.6%

Even after the poor results of the 2008 / 2009 year the Queensland workers' compensation scheme still has a positive funding rate of 127% - clearly the best of any Australian scheme. In contrast, the South Australian Workers' Compensation Scheme – which completely abolished Common Law Claims some years ago – as at 30 June 2009 was 56.7% funded (an unfunded liability of \$1.059 billion) and had an outstanding claims liability of \$2.38 billion.

The Tenth Comparative Performance Monitoring Report (August 2008) produced by the Workplace Relations Ministers' Council notes:

“The Queensland scheme is a predominantly lump sum scheme because of the relatively open access to common law provisions, and there are also slightly lower continuance rates. The resulting lower

¹ As at June 2009, per scheme annual reports

² The ACC 2008 / 2009 Annual Report discloses net assets of \$NZ 14.5 billion and liabilities of \$NZ 27.3 billion. This scheme covers more than just workers' compensation matters, however. The two workers' compensation accounts had positive \$NZ 1 million and negative \$NZ 2.1 billion in account reserves.

³ Workplace Relations Ministers' Council, Comparative Performance Monitoring Report, 11th Edition, accessed at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Documents/CPM11.pdf>

⁴ Workplace Relations Ministers' Council, Comparative Performance Monitoring Report, 11th Edition, accessed at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Documents/CPM11.pdf>

administrative costs along with strong financial and claims management, and business efficiencies allows for lower premiums.⁵

It is the position of the QLS that this inherent strength in the Queensland scheme compared to other schemes is based solely on the open access to common law the scheme provides. Experience of other scheme models show that limits on common law access and a greater focus on ongoing benefits leads to a degradation of a scheme's financial position thereby not providing the most sustainable result for injured workers.

Any restriction on common law claims will necessitate a significant adjustment to payments under the Statutory Scheme, thereby extending the tail of the scheme and bringing its ongoing viability under threat.

Nature of the Problem

Number of Claims

Claims experience in the 2008 / 2009 year shows an increase in the number of common law claims.

As the following graph shows from the year 2004 / 05 to 2008 / 2009 the total number of employees covered by the scheme has increased:

Figure 2: total employees covered by the Queensland workers' compensation scheme

Year	Total Number of Employees Covered by Workers' Compensation Scheme ⁶
2004 / 2005	1840300
2005 / 2006	1934700
2006 / 2007	2023300
2007 / 2008	2091200
2008 / 2009	2147100

Since 2004 / 2005 there has been a 16.67% increase in the number of employees covered by the Workers' Compensation scheme. Given such an increase in total number of insured workers an increase in the numbers of common law claims could be reasonably expected. It is only logical that if potential claim exposure increases, ie more workers covered by the scheme working, there should be a corresponding increase in claims experienced.

⁵ At p18

⁶ Q-Comp Statistics Report 08 / 09, p3

Figure 3: numbers of common law claims by year

Year	Total Number of Common Law Claims ⁷	Total Number of Common Law Claims against WorkCover ⁸
2004 / 2005	3301	2784
2005 / 2006	2873	2556
2006 / 2007	2956	2801
2007 / 2008	3152	3016
2008 / 2009	3768	3517 (3653 ⁹)

Since 2004 / 2005 there has been a 14.15% increase in the total number of common law claims within the scheme. Accordingly in the relevant period incidence of claims has actually grown by 2.52% less than the size of the insured worker pool during the five year period.

If claim drivers within the system remained constant we would expect an equivalent result between these two measures. However, total common law claims appear to have grown more slowly than the total number of workers at risk in the scheme.

A comparison of claim rates per 1,000 employees over the past 5 years indicates that there has been negligible growth in the net rate of incidence of statutory claims or common law claims. While the change in claim rates for common law claims is more volatile than for statutory claims in aggregate over the five year period 2004 – 2005 to 2008 – 2009 there is little real change.

Figure 4: claims rates per 1,000 employees, statutory and common law

	2004 / 2005	2005 / 2006	2006 / 2007	2007 / 2008	2008 / 2009
Statutory Claim Rate per 1000 employees (total claims)	45.4	44.3	48.3	49.3	47.9
Change from previous year	-5.00%	-2.30%	8.90%	2.10%	-2.80%
Common law claims per 1000 employees (total claims)	1.79	1.48	1.46	1.51	1.75
Change from previous year	0.60%	-17.21%	-1.62%	3.17%	16.43%

From the 2004 / 2005 year to the 2008 / 2009 year the net change in the total statutory claim rate per 1,000 employees is 0.9%.

From the 2004 / 2005 year to the 2008 / 2009 year the net change in the total common law claim rate per 1,000 employees is 1.37%.

Additionally, and most importantly the total common law claim rate per 1,000 employees for the 2008 / 2009 year is still less than it was in 2004 / 2005.

Relative to the total population of insured workers and the incidence rates for statutory and common law claims the results for the 2008 / 2009 year are not aberrant, nor the beginning of a significant negative

⁷ Q-Comp Statistics Report 08 / 09, p37

⁸ PWC WorkCover Queensland Stakeholder Presentation, March 2010, Slide 11

⁹ WorkCover Annual Report 2008 - 2009

trend. If anything the 2008 / 2009 statutory claim rates decline should manifest itself in a decline in common law rates within the next year.

A comparison of the claims experience for WorkCover shows that during the period 2004 / 2005 to 2008 / 2009 WorkCover has experienced a significant increase in the proportion of claims it receives compared to other insurers.

Figure 5: % of common law claims received by WorkCover and other insurers

Year	% of common law claims received by WorkCover	% of common law claims against other insurers
2004 / 2005	84.34%	15.66%
2005 / 2006	88.97%	11.03%
2006 / 2007	94.76%	5.24%
2007 / 2008	95.69%	4.31%
2008 / 2009	93.34%	6.66%

While the general rates of claim have moved in net terms little between 2004 / 2005 and 2008 / 2009 it appears that claims now made are more likely to be brought against WorkCover than any other insurer. It is understood that in 2008 / 2009 insurers other than WorkCover make up approximately 11% of the insured workforce yet only represent 6.6% of claims.

Value of Claims

The Discussion Paper states that WorkCover has experienced an increase in net common law payments during the five years 2004 / 2005 to 2008 / 2009. Total payments are a function of two factors, numbers of resolved claims in any year and claim sizes. A higher than expected result for claim payments can occur if in a year the velocity of claims processing is increased and consequently more claims are settled than new claims are intimated. In this instance one or two years of elevated results will be followed by lower than expected results as any 'backlog' of claims is exhausted.

At its Actuarial presentation this year the independent actuaries for the Motor Accident Insurance Commission, Taylor Fry, advised that what they thought last year was the beginning of an adverse trend of increased claims frequency in the CTP scheme was actually the effect of an undisclosed continuous improvement program of one major insurer who was progressively speeding its claims notification to the Commission. The speeding of claims notifications had caused the observed trends to 'clump' as faster and slower claims were reported together.

Unfortunately data is not available to stakeholders on rates of common law claim finalisations for the scheme or for WorkCover to assess these propositions. Anecdotally the Society is aware that processing to settlement of WorkCover claims has been continually accelerating for some time and it is our view that some of the net claims experience is attributable to contemporaneous settlement of 'slower' and 'faster' claims.

In our view, however, average settlement costs are a better indicator of systemic problems in a workers' compensation scheme as that factor is less susceptible to distortion by operational processing changes.

Figure 6 average settlement sizes by year

Year	Average finalised settlement costs for scheme ¹⁰	Average finalised settlement costs for WorkCover ¹¹
2004 / 2005	\$87,503	\$119,520
2005 / 2006	\$87,757	\$129,822
2006 / 2007	\$97,154	\$143,482
2007 / 2008	\$99,650	\$135,359
2008 / 2009	\$115,663	\$142,656 (\$146,811 ¹²)

There has been growth in both the average finalised settlement costs for the scheme and for WorkCover over the five year period 2004 / 2005 and 2008 / 2009, by between 19% and 30%. However it must be kept in mind that a significant proportion of any common law award represents an amount for future economic loss. In this regard in the five years since 2004 / 2005 average weekly earnings for adults in Queensland have increased by 26.19% and as a direct result awards under this head of damage should also have increased during this time.

Figure 7 average weekly earnings for Adults in Queensland, August quarter

	Average Weekly Earnings ¹³
June Quarter 2005	\$1009.90
June Quarter 2006	\$1031.70
June Quarter 2007	\$1095.90
June Quarter 2008	\$1186.00
June Quarter 2009	\$1274.40

It must be noted that awards for future economic loss are one of the prime distinguishing features between a statutory lump sum and a common law award. Statutory payments are merely geared toward reduction in an individual's ability to perform the activities of daily life, while a common law claim is geared toward placing, as far as can be done, a claimant in the position they would have been if the injury had not occurred. These are two very different aims and not directly comparable.

The WorkCover Annual Report for 2008 / 2009 states that they experienced payments of \$395M for settling common law claims for the year, equating to an average payment of \$146,811. QCOMP reports that the average cost for settling a common law claim for the total Scheme, including self-insurers is \$115,663¹⁴.

Average common law payments from WorkCover are in excess of \$30,000 greater than the overall scheme average cost for settling a common law claim in the 2008 / 2009 financial year. Average claim settlement figures reported by WorkCover are 26.93% higher than the total scheme averages reported by Q-Comp for that year. During the past five years, the above table illustrates that the average scheme settlement cost in 2008 / 2009 is still less than the level of average settlement cost incurred by WorkCover five years ago.

¹⁰ Q-Comp Statistics Report 08 / 09, p41

¹¹ PWC WorkCover Queensland Stakeholder Presentation, March 2010, Slide 24

¹² WorkCover Annual Report 2008 - 2009

¹³ ABS Average Weekly Earnings, product 6302.0, TABLE 11C. Average Weekly Earnings, Queensland (Dollars) - Trend

¹⁴ Q-Comp Statistics Report 08 / 09, p41

WorkCover's actuaries PricewaterhouseCoopers state in their stakeholder presentation relevantly:

"A focus on early resolution of common law claims could have kept average [claim] sizes lower, but may also be contributing to an increased frequency."¹⁵

WorkCover is undeniably experiencing increased levels of claims frequency compared with other insurers in the scheme and this coupled with higher than scheme average settlement rates must surely be contributing to their net common law payments results.

WRI or WPI Assessment

One of the proposals contained in the Discussion Paper is the abandonment of the Work Related Impairment (WRI) scale in favour of the Whole Person Impairment (WPI) scale for assessment of impairment and use in triggering a threshold for access to common law.

The WPI scale is based on medical practitioners ascribing a numerical value out of 100 to injured workers according to the methods and assessments set out in the American Medical Association *Guides to the Evaluation of Permanent Impairment*. It is not, however, a scale calibrated to work related disability, but rather, focused on quantifying a reduction in a person's ability to function in their everyday life.

Relevantly the *Guides* state:

Impairment percentages or ratings developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common **activities of daily life (ADL)**, *excluding* work. Impairment ratings were designed to reflect functional limitations and not disability. The **whole person impairment percentages** listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding* work, ...

The medical judgement used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities common to most people. Work is not included in the clinical judgement for impairment percentages for several reasons: (1) work involves many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with such other factors as the worker's age, education, and prior work experience to determine the extent of work disability. For example, an individual who receives a 30% whole person impairment due to pericardial heart disease is considered from a clinical standpoint to have a 30% reduction in general functioning as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there may be little or no decline in their work ability although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% reduction in work capability. Similarly, a manual labourer with this 30%

¹⁵ PWC WorkCover Queensland Stakeholder Presentation, March 2010, Slide 24

impairment rating due to pericardial disease may be completely unable to do his or her job and, thus, may have a 100% work disability.

As a result, impairment ratings are not intended for use as direct determinants of work disability.¹⁶

The *Guides* go on to explain the larger issue of work related disability:

The *Guides* continues to define **disability as an alteration of an individual's capacity to meet persona, social, or occupational demands or statutory or regulatory requirements because of an impairment**. An individual can have a disability in performing a specific work activity but not have a disability in any other social role. ...

The impairment evaluation, however, is only one aspect of disability determination. A disability determination also includes information about the individual's skills, education, job history, adaptability, age, and environment requirements and modifications. Assessing these factors can provide a more realistic picture of the effects of the impairment on the ability to perform complex work and social activities. ...

As discussed in this Chapter ... medical impairments are not related to disability in a linear fashion. An individual with a medical impairment can have no disability for some occupations, yet be very disabled for others. For example, severe degenerative disk disease may impair the functioning of the spine of both a licensed practical nurse and a bank president in a similar fashion when performing their activities of daily living. However, in terms of occupation, the bank president is less likely to be disabled by this impairment than the licensed practical nurse. An individual who develops rheumatoid arthritis may be disabled from work as a tailor but may be able to work as a child care aide. A pilot who develops a visual impairment, correctable by glasses, may be able to perform all of their daily activities but is no longer able to fly a commercial plane. An individual with repeated hernias and repairs may no longer be able to lift more than 20 kg (40 lbs) but could work in a factory where mechanical lifts are available.

The *Guides* is not to be used for direct estimates of work disability. Impairment percentages derived from 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 disability¹⁷.

These extracts from the *Guides* themselves show how the assessment of whole person impairment is undesirable to use in the context of assessing work disability. A WPI assessment is not a work related measure and is accordingly even more inappropriate a measure to use to select those individuals who should have access to common law by way of a threshold.

As the *Guides* clearly state, it is only an assessment of a person's impairment in the overall context of a work related disability assessment, as is conducted in a common law damages claim with regard to all prevailing factors can a 'realistic picture of the effects of the impairment' be made.

¹⁶ AMA, *Guides to the Evaluation of Permanent Impairment*, fifth edition, pages 4 - 5

¹⁷ AMA, *Guides to the Evaluation of Permanent Impairment*, fifth edition, pages 8 - 9

On this basis, a WPI assessment is not appropriate to be applied as the sole determining factor of disability in a workers' compensation context, nor as a threshold to a proper assessment of a work related disability.

Thresholds for Access to Common Law

The QLS implacably opposes the introduction of any threshold for access to common law in workers' compensation matters. It is the long standing view of the Society that the success of the Queensland workers' compensation scheme has been due in large measure to the finality and closure that a common law action can bring to the rehabilitation of an injured worker.

The financial performance of the NSW WorkCover scheme, which incorporates a threshold for access to common law claims, provides little reassurance that the application of thresholds in Queensland will bring a boon for WorkCover. In fact, NSW WorkCover reported in their 2008 / 2009 Annual Report a deficit of \$2,107,417,000 in their operating accounts.

NSW reported earned premiums accounting for \$2.5 Billion and claims costs of \$3.3 Billion, exacerbated by a negative investment result of \$798 Million.

Cautioning against long tail liability in a workers' compensation scheme and indicating that common law thresholds are ineffective at providing sustainability, the NSW 08 / 09 Annual Report states:

"At inception the funding ratio [of the scheme] was 80 per cent. The funding ratio peaked at 107 per cent in June 2007 and declined to 89 per cent in June 2009. The funding ratio is currently expected to improve ..." at p 30.

APRA regulated commercial insurers are required to maintain funding ratios of at least 120%¹⁸ and any commercial insurer which was only 89% funded would be liable to be described as insolvent. In the case of the South Australian scheme at 56.7% funding the implication of insolvency would be all the stronger.

De facto abolition of Common Law in Queensland

The QLS notes that the proposal of the WorkCover Board for a 15% whole person impairment threshold would eliminate approximately 96.8%¹⁹ of common law actions. Such a proposal is (in the view of the Society) not the imposition of a threshold but the de facto abolition of access to common law for Queenslanders injured at work. **The Society can not express in stronger terms its objection and opposition to a de facto abolition of access to common law actions in the workers' compensation scheme.**

The QLS notes that the proposal of the WorkCover Board examined in the Discussion Paper is for a 10% whole person impairment for access to common law. It is accepted in the Paper that this would amount to a 66% reduction in common law claims.

¹⁸ <http://www.apra.gov.au/General/upload/Final-GPG-110-July-2008.pdf>

¹⁹ Based on 2009 results in PWC WorkCover Queensland Stakeholder Presentation, March 2010, Slide 22

The effect of an initiative which precludes two-thirds of injured Queenslanders from access to common law claims associated with their work related injuries is a significant erosion of rights and for the majority an abolition of the common law.

It is the position of the QLS that unfettered access to common law has been the foundation of the success of the Queensland workers' compensation scheme and accordingly this proposal will threaten the scheme's long term viability.

The workers' compensation schemes operating in South Australia and New Zealand have applied a complete abolition of common law claims. These two schemes are unique in Australasia as returning the worst financial results of any of the operating schemes. Both schemes operate solely on the long-tail model.

In its 2008 / 2009 Annual Report the New Zealand Accident Compensation Corporation reported:

Total levy income \$NZ 4.1 Billion
Total outstanding claims \$NZ 23.8 Billion

With regard to the parts of the scheme which deal with injuries sustained at work the scheme reported:

Work Account: (post 1 July 1999 injuries)

Total levy revenue \$NZ 539 Million
Total Outstanding Claims Liability: \$NZ 2,248 Million

Residual Claims Account (ongoing costs of pre 1 July 1999 injuries)

Total levy revenue \$NZ 496 Million
Total Outstanding Claims Liability: \$NZ 3,619 Million

The results prompted the responsible Government Minister to comment in the Annual Report that the model of a long tail no fault scheme as a 'concept is sound but poor policy in recent years has put the scheme at risk. ... **The underlying cause has been a shift from ACC being a public insurance scheme to it becoming an extension of the welfare state.**' (emphasis added).

Also the Minister stated in the Report:

"This annual report discloses a financial loss of \$4.8 billion [\$NZ] for the 2008 – 2009 year, amounting to more than \$1,000 for every New Zealander. ... The growth in ACC's liabilities from \$9.4 billion in 2004 – 2005 to \$23.8 billion in 2008 – 2009 is unsustainable."

The ACC Chair stated in the Report:

"The most significant feature of the ACC's situation at the end of 2008 – 2009 is that its financial position has become unsustainable."

The gap between the Corporation's assets and liabilities has grown to the point where the accounts now show a \$13 billion deficit. That deficit grew almost \$5 billion in the last year alone.

If this trend is allowed to continue the Scheme's very existence could be under threat."

These results demonstrate the most compelling evidence of the futility of implementing a scheme which relies on the 'ongoing benefit' model in preference to the finality and closure of a common law claim.

Incidentally, the ACC Chair also notes in the Report:

“New Zealand’s rate of injury in the workplace, on the roads and at home continues to be of concern and in many cases is worse than comparable countries such as Australia.”

This clearly demonstrates that the greater the emphasis placed on extension of ongoing benefits as 'welfare' to injured workers the greater the tendency for injured workers to enter the scheme.

In our view the only responsible and fair approach to workers' compensation is to have unfettered access to common law to promote the sustainability of the scheme by keeping its tail short and also to ensure that the scheme is not a de facto extension of the welfare state, but, quite the reverse, it leads injured workers to rehabilitation and to move on in their lives beyond their injuries.

A 0% WPI Threshold

The QLS is opposed to the introduction of a 0% whole person impairment threshold for access to common law.

The assessment regime for impairment does not reflect the incapacity of a worker to engage in their profession and does not equate to the incapacity of the individual.

Consequently a 0% assessment of whole person impairment can be made for a worker who has suffered a work related injury which is significant enough to prevent that individual from ever again engaging in their profession or occupation. Nor is a 0% assessment any indication of the merits of the injured workers claim, nor the responsibility of their employer for the injuries they have sustained.

There are a number of scenarios where the introduction of a 0% assessment threshold will bring significant injustice. These have been outlined by other stakeholders in some detail.

The QLS opposes the introduction of a 0% WPI threshold for access to common law, as it:

- will operate unjustly against many individuals where their incapacity they suffer from is not well reflected in their WPI assessment; and
- is not a valid indication of an unmeritorious claim which should be precluded; and
- does not take any account whatsoever of the economic loss sustained by the injured worker.

As discussed above in the Section on WRI and WPI assessments, **a worker with a 0% WPI assessment is not necessarily a person who is fit to work. It certainly does not mean that the individual is injury free.**

Nature of Assessing Impairment

As discussed above, the AMA *Guides* for assessing Whole Person Impairment are not a suitable measure of work related disability. Additionally, an assessment is a matter of estimation by a medical professional of the extent of an injured workers' impairment and accordingly a matter of personal opinion.

Views of an assessment will, naturally, vary depending on the individual assessors and results will conflict.

In the situation where any threshold is applied for access to common law there will be increased pressure and dispute about competing expert assessments where a worker is given assessments close to the threshold amount.

Unexpected Results

The application of a threshold bringing a curtailment of common law rights will result in unfair outcomes where a person injured in the course of their employment in a motor vehicle accident or on another party's property would have an entitlement to claim damages but a person suffering injuries in the workplace would have no such entitlement.

Eliminating a worker's access to damages by imposing a threshold will result in significant cost shifting and an increase in employer's costs associated with increased public liability premiums. A worker who is injured in the course of their employment where a tortfeasor other than the employer will be liable, will pursue a claim for damages against the other tortfeasor. That other tortfeasor will not be able to seek a contribution from the employer (see *Bonser v Melnaxis & Anor* [2000] QCA 013).

The net result of this scenario would be increased payouts by public liability insurers, offset by increased premiums charged directly to or ultimately to employers.

Consider the example where, person A works for a principal and person B works is a contractor. A and B work together in the performance of their employers' contract. A and B each suffer injury (less than the threshold limit) in the same event caused by the principal's negligence.

In this example A could not claim damages at all, but B could claim damages against the principal in a public liability claim.

General Problems Associated with Thresholds

1) Bracket Creep

Bracket creep is an acknowledged issue associated with the implementation of thresholds and in this context relates to the potential for claimants whose assessment for their injuries does not qualify them for access to common law claims to seek to inflate their assessment to qualify for the benefit. This may be the re-rating of a 0% assessment as 1% or a 9% assessment as a 10% assessment.

The effect of 'bracket creep' is to reduce any potential cost reductions to flow from a proposed thresholds as:

- medical examiners giving an assessment just below the threshold amount may be inclined to report a slightly higher value given the knowledge the small difference in assessment will have a substantial impact on the claimant;
- introduction of a threshold at a level where a large number of claimants are affected will significantly increase the effects of bracket creep as the number of claimants intent on inflating their assessment will be larger; and
- a 'cut off' model of threshold brings the greatest impetus to inflate assessments and thereby reduce its effectiveness compared to a sliding scale.

It is accepted actuarial experience that savings from the application of a threshold will *always* be lower than past claims experience and patterns would dictate.

2) Type of Threshold

A 'cut off' model threshold based on the AMA Guides is susceptible to many forms of distortion in its application as:

- the AMA Guides are not definitive;
- the effects of bracket creep are accentuated; and
- the incentive to dispute assessments is heightened.

3) Increased Disputation

Given the substantial financial effect on the claimant of the 'cut-off' threshold the potential for dispute is heightened. This may manifest itself in increased rates of disputes with insurers or increased rates of referrals to the Medical Assessment Tribunals (MAT). The Queensland workers' compensation scheme has prided itself on its low disputation rates and in the last five years the rates of referrals to the MAT has been steadily declining. In all likelihood the application of a threshold for access to common law claims would reverse these trends as the consequences flowing from only a small re-rating may be very significant.

It has been widely acknowledged that the implementation of thresholds introduces greater disputation into any scheme as cases at or near the threshold amount will often be disputed. This is especially the case where medical assessments, based on subjective opinions of incapacity, will vary greatly depending on the practitioners involved. Greater costs will flow from enhanced rates of disputation of medical reports and assessments, as well as from appeals arising from such assessments.

Experience from other jurisdictions shows that greater disputation rates flow from schemes where a threshold is applied for access to common law claims or where common law is abolished altogether.

Figure 8: disputation rates by jurisdiction

	Qld Common Law	SA No Common Law	Comcare No Common Law	NSW Threshold to Common Law	VIC Threshold to Common Law
disputation rate ²⁰	3.1%	13.6%	12.3%	6.6%	16.6%

For the calendar year 2008 the NSW Workers Compensation Commission reports that 42% of its 8,898 referred disputes related to permanent impairment and threshold issues. In addition to these disputes 655 matters were taken directly to their Medical Appeal processes²¹. In total around 4300 disputes in 2008 related to assessments and impairments directly.

In Victoria, the Accident Compensation Conciliation Service reported that in 2008 / 2009 it received 5108 referrals relating to medical issues and 5418 referrals relating to rejection and termination of claims²².

Conversely, in Queensland a significant downward trend is being experienced by the Medical Assessment Tribunals, receiving only 2,475 referrals in 2008 / 2009²³.

The heightened levels of disputes relating to threshold issues found in other jurisdictions clearly demonstrates that there is the potential for the application of thresholds to de-stabilise the overall dispute culture of the scheme in Queensland. Greater levels of disputation in a scheme must lead in to increased costs in scheme administration, defeating the original rationale for the imposition of the threshold.

4) Operational Costs

It is accepted that operational costs of the scheme will increase as the result of the application of a threshold as insurers would need to:

- implement threshold management strategies to attempt to mitigate the effects of the risks mentioned above;
- resource being engaged in increased levels of disputes; and
- monitor and measure the impact of the changes.

²⁰ Workplace Relations Ministers' Council, Comparative Performance Monitoring Report, 11th Edition, accessed at <http://www.deewr.gov.au/WorkplaceRelations/WRMC/Documents/CPM11.pdf>

²¹ Workers Compensation Commission Annual Review 2008, pages 20 - 21

²² Accident Compensation Conciliation Service Annual Report 2008 / 2009 page 3

²³ Q-Comp Statistics Report 08 / 09, p47

Our Proposals

Increase in Premium

A fundamental tenet of good prudential practice for an insurer is to set their collection of premiums, at least, at an underwriting breakeven level, if not at a small profit. The nature of investments can be unreliable and over-reliance on investment income to meet underwriting requirements is to assume a great degree of risk in prudential management of a scheme.

For these reasons the QLS proposes that premiums under the workers' compensation scheme are set at an underwriting breakeven level.

In this regard the QLS proposes a premium increase to \$1.55 within a sufficiently short period of time to correct the underwriting issues currently apparent from premium levels being held at artificially low levels.

While an understated option, and in our view based on an unnecessarily inflated claims rate, the Deloitte report obtained by the WorkCover Board indicates that simple premium increases can address the results experienced by WorkCover. This, along with a suite of other internal and external measures, would be the best way to address WorkCover's position.

A corollary of increased premiums levels to a breakeven underwriting level may be the necessity to reconsider the current claims levy loading applied to an employer's future premiums. If an appropriate level of initial premium were collected it would seem apparent that levy loadings should be able to be adjusted.

Greater Transparency in Actuarial Analysis of Scheme

The QLS proposes that there be greater transparency in workers' compensation scheme prudential regulation, including involvement by the scheme regulator in actuarial modelling as well as the presentation of a yearly actuarial briefing to scheme stakeholders by the scheme regulator (similar to that which successfully conducted by the Motor Accident Insurance Commission for many years).

The model of scheme regulation adopted by MAIC with the compulsory third party scheme has seen that scheme escape the worst ravages of the global financial crisis as well as being better able to respond to the fluctuating nature of injuries compensation claims. The CTP scheme is strong, sustainable and is unfettered in its access to common law claims.

It is the QLS view that the adoption of a similar system of oversight and transparency would be equally of benefit to the workers' compensation scheme.

Stakeholders have experienced difficulty in costing their proposals based on the limited information available to the public, including fundamental data such as numbers of common law claims received in any year and numbers of common law claims finalised in any year.

Drafting of Workplace Health and Safety Act 1995

While the increase in incidence of common law claims is undoubtedly due, in part, to an increase in unemployment and job opportunities during the GFC, a significant factor is also the onerous (if not impossible) duty imposed on employers in Queensland by our *Workplace Health & Safety Act 1995*.

Since its inception, the *Workplace Health & Safety Act* has imposed a duty on employers to 'ensure' the workplace health and safety of its employees. The duty is currently cast in absolute terms such that once a link is established between the employment and the injury, the onus then passes to the employer to discharge one of the defences provided by the Act.

For small employers of limited means, it has been difficult, if not impossible, to do so and even larger employers have been unsuccessful in raising defences as is evidenced in decisions such as *Bourke*²⁴ and *Lawlor*²⁵. But the legal landscape is about to change dramatically with a swing of the pendulum towards the interests of employers once the harmonized *National Occupational Health & Safety Laws* take effect in 2011.

The transition to a national system is being coordinated by *Safe Work Australia*, an authority formed by the Rudd Government on 1 July 2009. All states (except for Western Australia) have agreed to repeal existing occupational health and safety legislation and replace them with the new national laws by December 2011.

The model places some responsibility on employees to ensure their own safety and, as presently drafted, only requires an employer to do everything 'so far as is reasonably practicable' to ensure the safety of workers. The change is an enormous deterrent to workers who might otherwise be tempted to bring a common law damages claim. That is because under the current laws, an employer in Queensland does not have available to them the 'reasonable practicality' defence that is available, for example, in New South Wales.

A reversion to common law principles and a less rigorous standard of statutory duty of care will not only mean that more claims will fail, but will discourage (would be) claimants from taking a punt where a statutory lump sum offer otherwise presents a 'bird in the hand'.

Anecdotal evidence from plaintiff lawyers suggests that perhaps as many as 25% of claims currently being made would not be commenced without the benefit of the current sec. 28(1) of the *WHS Act*.

On this basis the QLS proposes that amendments to section 28 of the *WHS Act* are made prior to the commencement of the national laws.

Pre-proceedings Processes

The QLS supports proposals that obligations on third parties to fully participate in the resolution processes in the pre-proceedings process should be increased.

²⁴ *Burke v Power Serve Pty Ltd & Ors* [2008] QSC 29 (26 February 2008)

²⁵ *Woolworths Limited & Anor v Lawlor* [2004] NSWCA 209 (24 June 2004)

It is an important aspect of any successful compensation scheme that every opportunity is presented for meritorious claims to settle at an early stage for fair levels of compensation.

Costs against Unsuccessful Plaintiffs

The QLS supports proposals that the court be empowered to award costs against plaintiffs whose common law claims are found to be frivolous or without merit by the courts.

It is the general and accepted rule in civil litigation that costs should follow the event. It appears to us not unreasonable that if a claim by a plaintiff is found to be without merit by the court the plaintiff should bear a costs burden as a result. It is expected that such a reform will disincentivise claimants proceedings with spurious or ill founded claims.

Excesses and Premium Incentives

The QLS does not object to proposals to increase an employers' excess, however, if appropriate levels of premium are collected initially to meet underwriting requirements there is less imperative to collect additional moneys from employers against whom a claim is made.

It is accepted that an excess fulfils other roles beyond simply meeting capital requirements needed to answer claims, ie acting as deterrent to risky behaviour and providing an incentive to adopt safe work system etc. It is the position of the QLS that these should be the prime drivers for setting levels of excess and that supplementing revenue should be only a secondary consideration in setting excess levels.

A further aspect that should be explored is the introduction of premium incentives for employers who either:

- have a period of 'no claims' such as a no claims bonus; or
- implement within their workplaces effective systems to improve the safety of their workforce which translate into improved claims experience.

Employers should be incentivised to adopt claim reduction strategies and behaviour modification programs for their staff against risky workplace practices. Such initiatives should not only be rewarded financially, but also represent increased focused on claims prevention rather than claims reduction through denial of rights.

Civil Liability Act 2004 Application

In the past the Society has been vocal in calling for amendments to the *Civil Liability Act 2004* and does not call for its extension to workers' compensation claims as a stand alone measure. However, it is the preference of the QLS that it be applied to workers' compensation claims in its entirety as a last resort in preference to any threshold for access to common law.

The application of the *Civil Liability Act 2004* has undeniably reduced claims experience in the motor accidents insurance scheme. As reported by independent actuaries to the CTP scheme, Taylor Fry, in their annual review of risk premium components to stakeholders, claims frequency experienced a downward trend between March 2004 and March 2008 dropping from around 0.28% to a low of 0.19%. Additionally they opined that the effect of the Act was to reduce claim sizes in the lower severity claims. In the context of the CTP scheme this has translated in average claim sizes levelling off at an unchanged level since approximately September 2006 and significant reduction and stabilising of risk premium levels since September 2002 levels²⁶.

Yet systemic reform, such as the application of the *Civil Liability Act 2004* to the workers' compensation scheme is only appropriate, and ultimately only effective, in response to a systemic deficiency in the scheme. Systemic scheme reform will not be effective in addressing factors external to the scheme, nor any internal factors including a speeding of claims handling within WorkCover.

Concluding remarks

It is the Society's view that the application of thresholds, quantifiable or narrative, will ultimately erode the financial stability of the scheme and will result in an unjust outcome for injured workers and an unsustainable result for employers and insurers. It is imperative that the Queensland workers' compensation scheme remain a short tail scheme which is open to all.

The QLS reiterates that it opposes thresholds being applied for access to common law, through either the assessment of impairment or through amendments to the narrative test for connection with employment. For the reasons we have already stated with regard to disputes and increased costs on fine legal points the QLS does not support the adoption of a heightened narrative test for access to common law claims.

²⁶ Taylor Fry MAIC Annual Review of Risk Premium Components, 10 March 2010, Slides 12, 60, 69 & 70