

DISCUSSION PAPER - THE QUEENSLAND WORKERS' COMPENSATION SCHEME: *ENSURING SUSTAINABILITY AND FAIRNESS*

SUBMISSION BY KM SPLATT & ASSOCIATES

I refer to the discussion paper released by the Attorney-General on the 23rd February 2010.

The Workcover Queensland Scheme has traditionally been healthy and profitable and can easily be so again by implementing the measures discussed in this submission.

In the past I have served on the Accident Compensation Committee of the Queensland Law Society, Torts Task Force Committee of the Queensland Law Society, Motor Accident Insurance Committee of the Australian Lawyers Alliance (Queensland branch) and Law Council of Australia Consumer Law Committee. Since the Minister tabled the costs blowout in November 2009 I have had many discussion with colleagues within the legal procession. These discussions indicate to me a view that the profession realise there will need to be compromise to address the situation. However, this can be done *without* introducing a draconian threshold which will not solve the problem.

Criticism of WorkCover Board's Recommended Package

The Board's submission to impose thresholds will result in un-necessary, massive industrial unrest which was certainly the case approximately a decade ago when the then WorkCover Minister, Santo Santoro, attempted to then introduce thresholds.

Failure of Thresholds in other Jurisdictions

The Government should look at the examples and models of other States where thresholds have been introduced. Thresholds have not contained in these schemes and in fact resulted in schemes which are still burdened by massive debt and liability.¹ Thresholds have certainly **not** contained costs in those jurisdictions. Why stakeholders continue to press for thresholds when they have been a spectacular failure in other jurisdictions mystifies me.

The WorkCover Queensland scheme has historically been a 'short tailed' scheme with full access to common law. Introduction of thresholds and restricting access to common law results in a shift to very expensive 'long tail' schemes. The experience in other states have shown that far from being profitable these schemes become more a form of 'pseudo' social security.

Thresholds should never be contemplated as a solution to debt. All states with thresholds in place have failed to reduce debt. There is great concern as to the huge administrative costs associated with administering thresholds and I refer to recent commentary on the Victorian scheme in this respect.

A 10% threshold would wipe out around 34% of legitimate common law claims while a 15% threshold would wipe out approximately 80-90%.²

¹ Worksafe Victoria Annual Report 2009 – shows a loss of \$1,254,459,000
Workcover NSW Annual Report 2008/2009 – shows a deficit of \$1,482,000,000.

² The Discussion paper quotes impairments less than 5% constitute 42% of common law claims; 5-10 percent constitute 24%; therefore greater than 10% constitute 34%.

Thresholds are arbitrary and result in WorkCover doctors' making decisions about Common Law rights which is extremely unfair to injured workers. To understand how unjust a threshold are a sound knowledge of the American *Medical Association Guides to Assessment of Permanent Impairment* is necessary.

Problems with thresholds based on AMA assessments:-

Permanent impairment percentages are determined by medical practitioners using the 'American Medical Association Guides to the Evaluation of Permanent Impairment' (AMA).

Anyone familiar with the operation *Guides* will realise that they are an arbitrary administrative tool. Various percentages act more as a broad descriptor of a particular injury. They do not take account of the impact that a various injury may have upon a particular individual, in particular work ability. The guides themselves make this perfectly clear.

It is imperative to understand the distinction between 'impairment' and 'disability'. Any policy maker should at familiarise themselves with **Chapter 1 – Philosophy, Purpose and Appropriate Use of the Guides**. The following are some relevant excerpts from the Chapter:-

Impairment percentages or ratings... 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 living (ADL), 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 the daily activities common to most people...

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...

An individual with a medical impairment can have no disability for some occupations, yet be very disabled for others...

...the Guides is not to be used for direct financial awards nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a component in disability assessment...

Impairment percentages derived from the Guides criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary first step for determining disability.³ (all emphasis in original text)

Take the example of a fairly common 5% lumbar spine injury. For an educated bank manager this injury is not going to overly effect his ability to complete his work. However, for a labourer a 5%

³ Excerpts from American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1 – Philosophy, Purpose, and Appropriate Use of the *Guides*

lumbar spine injury could carry disastrous consequences and prevent him from any sort of future employment involving heavy lifting / labouring etc. To deny such a person access to common law damages based on a threshold is unjust since if the same injury mentioned in this example occurred in a motor vehicle accident or public place he would have access to common law damages.

Thresholds shift the cost burden to the taxpayer

When thresholds are applied it shifts the burden and costs associated with workplace injury from negligent tortfeasors (employers) to the tax payer. Tax payers should be aware of the costs to Government as a result of introduction of thresholds.

Thresholds will also shift the burden on to other Government organisations such as social security and then onto the taxpayer. Solicitors who have experience in jurisdictions that have thresholds (such as Victoria) can vouch for the fact that Workcover costs are actually increased when thresholds are used.

Thresholds are simply unjust

Injured workers should have the same rights as any other injured citizen who has been injured by the negligent act of another. Injured citizens have the right to Common Law in all Australian States subject to the *Civil Liability Act* which contains and controls common law damages.

Injured workers should never be denied the same rights as other citizens and should have full access to common law. For employers or Workcover to suggest otherwise is abhorrent and deserving of the stringent criticism by unions and the community as being completely self interested.

Thresholds have not contained costs in other jurisdictions

Unjust thresholds are costly and do not actually contain costs - there are better alternatives. It must be emphasized that all the jurisdictions (NSW & Victoria) which have introduced thresholds have not contained blow outs and costs.

It should not be underestimated that introduction of thresholds will surely cause widespread industrial unrest and chaos. Peaceful and other sensible solutions are available.

Option C – Align the Workers’ Compensation and Rehabilitation Act 2003 with the Civil Liability Act 2003 by imposing caps on common law damages

It must be accepted that common law damages need to be contained to ensure the viability of the scheme while ensuring workers rights to proper compensation. Option C is the most sensible way to proceed and the following measures will help ensure the future sustainability and fairness of the scheme:-

Capping common law damages in the same way as under the Civil Liability Act 2003

Of great importance when considering the current problems faced by WorkCover Queensland is the fact that similar ‘viability’ issues arose several years ago in both the public liability insurance scheme and the motor vehicle CTP scheme (the ‘insurance crisis’).

In response to the 'crisis' and as a result of the Ipp Review⁴ the *Personal Injury Proceedings Act* and *Civil Liability Act* were enacted and amendments also made to the *Motor Accident Insurance Act*. The WorkCover scheme was excluded from the operation of the *Civil Liability Act* and other legislative reforms at the time.

This legislative response has been successful at controlling common law damages. In particular it introduced a sophisticated scheme regarding general damages – the Injury Scale Value (ISV).

General Damages and the Injury Scale Value (ISV)

The perceived 'insurance crisis' in Queensland prompted tort reform in the public liability and motor vehicle schemes. Traditionally general damages were awarded by a Judge for 'pain, suffering and loss of amenities of life' and there was little guidance as to the award of such damages apart from precedent – as such general damages were somewhat of an 'unknown quantity' for insurers.

The Motor Accident Insurance Commissioner, John Hand, when dealing with similar cost blowouts in the motor vehicle scheme several years ago did not favour thresholds. Instead the ISV was implemented and the motor vehicle scheme is now profitable for insurers whilst maintaining full access to common law.

The ISV was developed as one response to the 'crisis' and heavily restricted awards of general damages in motor vehicle and public liability claims by up to around 50%. Following tort reform and introduction of the ISV public liability and motor vehicle schemes are in a good state with insurance companies reporting healthy profits. Premiums have also been contained.

There is currently no regulation of general damages in the WorkCover scheme; they remain an 'unknown quantity'. Accordingly claimants are recovering substantially more for general damages in workplace matters than for a comparative injury in the motor vehicle or public liability schemes.

Introducing the ISV to the WorkCover scheme will significantly contain damages currently recoverable for general damages. It will also correct disparity and ensure consistency across all schemes. It will be a simple matter to introduce the ISV as it is already widely in use and widely accepted by injured citizens, insurers and lawyers for some time. The success of the ISV in the motor vehicle scheme speaks for itself, as confirmed in actuarial studies.

While some lawyers and judges do not like the ISV as they see it as prescribed and taking away judicial discretion it must be conceded by the legal profession that it has contained general damages and insured compensation schemes remains viable.

Other aspects of the Civil Liability Act

The *Civil Liability Act* has other aspects that could be of use in capping damages in common law claims, for example the cap on damages for future economic loss at three times average earnings.

⁴ Review of the Law of Negligence Final Report – can be found at http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf

There has been concerns raised, however, that bringing the scheme into line with some heads of damage (for example gratuitous assistance) would result in more generous awards under that head of damage than currently exist under the *Workers' Compensation and Rehabilitation Act*. In this respect, there is no reason why current caps on damages such as gratuitous assistance in workplace matters cannot remain in place.

Address Bourke v Power Serve P/L & Anor [2008] QCA 225

Currently the *Workplace Health and Safety Act*, by providing a statutory civil right of action, subjects employers to what can be seen as 'strict liability'. This measure is easily implemented by simple legislative change; by making it clear that the *Workplace Health and Safety Act* does not give rise to a statutory civil right of action.

This measure has the potential impact greatly on common law claims. It would signal a return to pure common law / negligence principles where the injured worker has to prove negligence on the part of the employer. This measure will definitely reduce the number of common law claims brought and also greatly assist WorkCover in successfully defending many more. This measure will be of major benefit to ensuring the viability of WorkCover and can be done quickly and cheaply.

Negligence in workplace incidents often involves more complex fact scenarios than say a standard motor vehicle accident. Removing the 'strict liability' will ensure a 'fair playing field' and give WorkCover plenty more 'ammunition' to argue liability aspects and defend claims. Even if particular claims are not defeated entirely contributory negligence will also have a place and in applicable cases and has great potential to significantly reduce damages.

Increase obligations on third parties to fully participate in the pre-proceedings process

This will go some way to assisting WorkCover to 'spread the damage' when there are other liable parties involved. It will also assure parity with various litigants across the schemes. This is particularly pertinent where a labour hire company is the 'employer in law' (and covered by the WorkCover scheme) and the injury occurs whilst the workers is undertaking his duties at a 'host' employers premises. These circumstances are now increasingly common. Requiring such parties to properly and fully participate in pre-court negotiation process will be of great assistance to WorkCover by 'sharing the cost' of common law claims with other liable insurers.

Allow courts to award costs against plaintiffs whose claims are dismissed

This aspect seems to have arisen as a drafting 'glitch' in the legislative scheme and one that is easily remedied. Closing this loop-hole will be of some assistance, in particular if liability issues under *Bourke v Power Serve* are also addressed. In some cases it will definitely act as a strong disincentive for those wishing to bring frivolous claims.

Increase employer excess / premiums

Over recent years there has been decreasing employer premiums. Every other business cost has increased and it is amazing that Governments allow such costs to decrease. There seems to be competition between the States to have the lowest premiums. Governments which compete with each other to lower premiums in relation to regulatory schemes eventually end up with useless

schemes which are of no benefit to injured workers **and only burden the taxpayer.**

Premiums need to be increased (within reason) and set at an appropriate level. Premiums should increase gradually with time like every other business cost even if it is just CPI. The business community should not complain about any reasonable increase. It is unrealistic for anyone to think that premiums will not increase at least in line with CPI increases and inflation.

Criticism of Option A – Allow common law claims only where employment was the major significant contributing factor to the injury

This particular measure will probably be of very limited effect. Limiting access to common law based on a statutory definition will mean disputation costs will sky rocket. The Queensland scheme currently has very low disputation rates (and associated costs).

If this measure is introduced I can guarantee you will find an ‘explosion’ of lawyers disputing decisions on statutory definitions with Qcomp and/or the Industrial Magistrates Court. This measure is therefore of no value, will do nothing to ensure the viability of the scheme, and will serve only to increase WorkCover’s costs.

Criticism of Option B – Exclude workers who are assessed as having 0% impairment from accessing common law

As Option B involves a threshold it will NOT work. The cost of administering any threshold will not serve to contain costs. A 0% threshold will ensure a massive increase in disputation costs. It will result in a dramatic increase in appeals to the Medical Assessment Tribunal (MAT) by lawyers trying to ensure their client’s get above 0%. This in itself will drastically increase costs across the board. Furthermore, in instances where a MA returns a 0% assessment there is scope for review of such decision under the *Judicial Review Act*. Such reviews would be very complex and time consuming affairs and also serve to ‘blow out’ disputation costs in administering the scheme.

As said before, the commentary of the Victorian scheme recently is that there has been great concern about the huge administrative and disputation costs of enforcing thresholds.

Apart from the fact that it will not contain costs a 0% threshold is extremely unfair. Shortcomings of the AMA Guides have already been discussed but again I must emphasise a clear understanding on what is meant by ‘impairment’ vs ‘disability’ is absolutely necessary. The *Guides* can only assess impairment in relation to activities of daily living. They do not account for impact of a particular injury on someone’s ability to work and disability.

A 0% whole person impairment rating is assigned to an individual with an impairment if the impairment has no significant organ or body system functional consequences and does not limit the performance of the common activities of daily living...

An individual can have a disability in performing a specific work activity but not have a disability in any other social role...⁵

In my practice, despite the a 0% assessment, I still often proceed with a common law claim because I am aware of the effect that the injury has upon the injured worker and the fact that the 0% assessment does not address ongoing difficulties that worker may now be experiencing at

⁵ Excerpts from American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1 – Philosophy, Purpose, and Appropriate Use of the *Guides*

work. The injured worker then is allowed to be assessed by truly independent doctors both by my firm and by the defendant's doctors. Often, both these independent doctors come back with a percentage impairment. Even if such reports do not return an impairment they can still highlight issues with disability and work. The bottom line is that zero *impairment* under the *Guides* does not take into account the *disability* that an injured worker may suffer or ongoing difficulties completing work activities. Accordingly a 0% threshold can not be supported.

Conclusion

Thresholds are not the answer. They represent an arbitrary and unjust 'sledgehammer' approach and are not cost effective in any event. Indeed, schemes that have thresholds are in a much worse financial state to that of Workcover Queensland. Thresholds simply do not contain costs and have not improved the profitability of those schemes. Unions in Queensland will never accept thresholds, as we have learnt from past battles. Thresholds will result in upheaval and industrial action. Governments must concede that thresholds are an absolute failure in ensuring sustainability and fairness.

All stakeholders must agree that capping common law damages while allowing access to common law is the best way to proceed. Option C is the most sensible way to proceed. No one stakeholder can have any major objections to it. It is fair and contains damages. Option C also represents a major shift towards uniformity across all schemes.

As discussed above the following measures will all be effective in containing common law damages and as such ensure the sustainability and fairness of the scheme:-

- Capping common law damages in the same was as under the Civil Liability Act 2003;
- Address *Bourke v Power Serve P/L & Anor* [2008] QCA 225;
- Increase obligations on third parties to fully participate in the pre-proceedings process;
- Allow courts to award costs against plaintiffs whose claims are dismissed;
- Increase employer excess / premiums.

In the motor vehicle scheme and public liability scheme damages were capped several years ago in response to the 'insurance crisis'. Damages in the motor vehicle scheme have been contained through the excellent work of John Hand, architect of the ISV scale. These positive effects have also flowed into the public liability scheme. All lawyers recognise that this scheme has worked. To deny this is merely posturing and not helpful to the debate. For one reason or another, these legislative changes were not brought into the Workcover scheme at the time. It seems now is the time to do so.

Option C will contain common law damages but also enable claims proceed in a more cost and time efficient manner. These measures will also bring damages awards into line across all schemes. The above measures represent a reasoned response to the problem of profitability of the scheme and are relatively simple to implement. Common law damages for workers with worthy claims will be maintained while frivolous claims a 'weeded out'.

The measures outlined represent a peaceful, effective solution that will quickly restore viability to the scheme, just as they have has in the motor vehicle and public liability schemes.

Should you require any further commentary from me please feel free to contact me in relation to any part of this submission.

Yours faithfully
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Per:-

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