8 August 2012

- 061

RECEIVED
08 AUG 2012
Finance and
Administration Committee

BAR ASSOCIATION OF QUEENSLAND

Ms Deborah Jeffrey
Research Director
Finance and Administration Committee
Parliament House
Alice and George Streets
BRISBANE Q 4000

E-MAIL

Dear Ms Jeffrey,

Re: Submission to Inquiry into the Workers' Compensation Scheme

I refer to the above inquiry and enclose our submission.

The Bar Association has a membership of approximately 1,000 barristers in private practice and approximately 200 barristers in public employment. A number of those regularly undertake advice and advocacy work in respect of the Scheme and so are well able to afford objective comment as to the workings of the Scheme at "the Coalface".

The Association, through its Workers' Compensation committee chaired by Richard Douglas SC, has canvassed widely in order to compile the submission.

In broad summary, for the reasons articulated in the submission:-

- The Scheme works well in the interests of the stakeholders, namely workers and employers.
- No significant amendment is required, and in particular any further impediment to access to common law rights ought be avoided (eg any threshold).
- The extensive 2010 amendments introduced significant additional robust measures for operation of the Scheme, and their impact is still resonating in effecting moderation of claims and distribution of losses across employer and non-employer wrongdoers.
- Claims for psychiatric injury continue to provide (perhaps inexorable) difficulty in management both at a statutory and common law level. Some modest amendments in the statutory level should be considered.
- In contrast with many other States, the Scheme is fully funded and premium levels are relatively low.
- Uniformity with cognate legislation ought be achieved.

BAR ASSOCIATION
OF QUEENSLAND
ABN 78 009 717 739

Level 5
Inns of Court
107 North Quay
Brisbane Qld 4000

Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905

chiefexec@qldbar.asn.au

Constituent Member of the Australian Bar Association

Mr Douglas and members of his committee are at your committee's disposal to assist with any inquiry and evidence gathering, and to appear and make submissions at your committee's hearings.

The Association's intention is to assist your committee in any way it reasonably can to inform the report to Parliament.

Please contact the Chief Executive, Mr Dan O'Connor, in relation to any inquiry.

Yours faithfully

Roger N. Traves.

ROGER N TRAVES S.C.
President

Submission to Finance and Administration Committee of the Queensland Parliament on a Referral to Inquire into and Report on the Operation of Queensland's Workers' Compensation Scheme

8 August 2012

Abbreviations used in this Submission

1.	BAQ	-	Bar Association of Queensland
2.	WorkCover	-	WorkCover Queensland
3.	Q-Comp	-	Q-Comp Queensland
4.	WCRA	-	*Workers Compensation and Rehabilitation* Act 2003
5.	WCQA	-	*WorkCover Queensland* Act 1996
6.	WHSA	-	*Workplace Health and Safety* Act 1995
7.	CLA	-	*Civil Liability* Act 2003
8.	WRI	-	Work Related Impairment
9.	WPI	-	Whole Person Impairment
10.	QIRC	-	Queensland Industrial Relations Commission

INDEX

Introduction:

1. The BAQ is uniquely qualified to make submissions on the issues required to be considered by the Finance and Administration Committee in its review of the operation of the Workers' Compensation Scheme. BAQ members:

   (a) represent injured workers and employers, self-insurers and Workcover Queensland, throughout the length and breadth of the State;

   (b) so represent those stakeholders not only in proceedings before all levels of Courts and Tribunals in Queensland, but also in alternative dispute resolution (as independent neutral mediator, and as advocate) and in advisory work (as procedure, prospects and evidence).

2. The BAQ made an extensive submission to the Department of Justice and Attorney-General in the lead up to the enactment of the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act* 2010 (No. 24 of 2010). A copy of that submission is attached. This submission does not propose to reiterate what was said on the earlier occasion, although many of the observations made in that submission remain pertinent.

3. This submission of the BAQ is in two parts, addressing the following aspects of the WCRA scheme:

   (a) first, no-fault statutory compensation benefits available to injured workers.

   (b) secondly, common law damages claims available to such workers.

Executive summary:

4. In the submission of BAQ:

(a) the Queensland scheme is working quite adequately and efficiently.

(b) the full effect of the 2010 legislative amendments are not yet capable of being fully analysed, but BAQ members consider that there has already been a downward trend in claim numbers and damages assessments arising from those amendments, particularly the removal of a cause of action for damages for breach of the WHSA.

(c) the scheme compares very favourably with schemes in other Australian jurisdictions. The Queensland scheme has the second lowest premium rate for employers nationally, and provides the fairest compensation regime for injured workers. It also has the advantage of being a "short tail" scheme.

(d) the objectives of the WCRA, particularly in s. 5, are being fulfilled by the current scheme, and the way in which WorkCover approaches it role.

(e) attention should be given to legislative amendment to s.32(5) of the WCRA.

(f) attention should be given to the management of psychiatric claims, both as to:

(i) the early reporting of such claims;

(ii) the manner in which applications for compensation are initiated and processed.

(g) the appeal process in statutory claims could be streamlined and made more cost-efficient;

(h) any threshold to making of a common law claim should not be introduced into the WCRA.

(i) it would be advantageous if uniformity could be achieved in the procedural law pre-litigation processes and substantive law assessment of damages provisions in all legislation presently governing personal injuries claims in Queensland.

Statutory claims:

(a) Psychiatric claims:

5. Q-Comp's *Queensland Workers' Compensation Claims Monitoring Report* of May 2012 noted, at page 23, that "Psychological / psychiatric claims are one of the most expensive injury types". It was further observed that "over 60% of psychological / psychiatric claims are rejected by the insurer".

6. As a consequence of that rejection rate, many of these claims progress through the Q-Comp administrative review and appeal processes.

7. A large proportion of these claims concern whether psychiatric injuries are excluded from the definition of "injury" by reason of the Reasonable Management Action exclusion in WCRA's s.32(5).

8. These appeals often require substantial resources in terms of document disclosure, witness conferences, hearing days and preparation time.

9. A number of matters have been identified as either potentially unfair or unnecessarily contributory to the complexity of the appeal process.

(b) Anomalies in the legislation – the wording of s 32(5) of the WCRA:

10. There are a number of apparent anomalies created by the wording of section 32(5) that pose difficulties for parties to appeals.

11. The phrase "arising out of" [reasonable management action taken in a reasonable way] has been interpreted so as to require the parties, and the adjudicator of fact, to identify and consider all of the surrounding circumstances of the psychiatric injury, whether medically causative of the injury or not.

12. As to this:

(a) section 32(5)(a) applies only in relation to reasonable management action taken in a reasonable way by a worker's employer. With the increasing prevalence of labour hire arrangements, this provision will not apply if management action in relation to a worker is taken by an entity other than the employer (eg, a host employer or contractor). There would seem to be no reason in principle why an injury should be excluded from the workers' compensation scheme based simply upon the status of the entity on whose behalf reasonable management action is taken.

(b) section 32(5)(b) applies only in relation to reasonable management action taken <u>against</u> a worker. This would seem to artificially limit the application of this section in a manner inconsistent with the wording of section 32(5)(a).

(c) section 32(5)(b) also provides only for a consideration of reasonable management action being taken against the worker as opposed to reasonable management action taken in a reasonable way as provided for by s.32(5)(a). The inconsistency is patent and has been the subject of judicial comment.

(d) it is inevitable in any psychiatric claim that the "perception" of the worker will differ from the "perception" of management. The proper operation of s.32(5)(b)

relies upon a finding as to the worker's "perception". This is a mixed question of fact and law rarely supported by relevant psychiatric evidence and the section is of little practical application in all but the most exceptional of cases.

(c) Issues pertaining to proof of claims:

(i) Applications for compensation:

13. A practice has developed, in recent times, of reducing all applications for compensation to a typewritten document, which is then stored electronically by WorkCover. This no doubt, is cost-effective in the management of claims however creates difficulty in relation to the various methods by which an application for compensation is made.

14. An application for compensation can be made in the following ways:

(a) by telephone;

(b) over the internet; and

(c) by written application.

15. Problems arise more often than not in circumstances where the application has been made by way of handwritten application. The document eventually produced by an officer of WorkCover, more often than not, is different in material aspects to the original application.

16. In circumstances whereby, under the WCRA, this application is both the foundation for a statutory claim and, in turn, the "gateway" to a claim for common law damages, any discrepancy in this regard can have serious ramifications.

17. It is submitted that some method be employed in order that the original application might be preserved as it inevitably forms part of the proceedings in relation to any statutory claim and more often than not is also part of a common law claim.

18. The purpose of this is to avoid any unfairness to an applicant worker for compensation where the application might have been inadvertently misconstrued.

(ii) Early definition of issues:

19. In relation to psychiatric issues, where the relevant events may occur over a long period of time and involve different persons and occasions, the review and appeal process would be greatly improved by enabling early identification and refinement of the issues which are in dispute, and the relevant facts relied upon by the parties to establish their arguments.

20. While the process need not necessarily be as formal as the pleadings provisions in Court rules, a revised and simplified procedure would be an improvement on the present practice whereby no limits are placed on the ability of parties to introduce evidence of any matter said to be relevant, without any attempt to confine issues or evidence.

21. At present there exists a process for the worker, on occasion, to complete a statement in their own words or a supplementary form outlining the matters allegedly contributory to their psychiatric illness.

22. It is suggested that this procedure be refined to include the following:

(a) the institution of this practice as part of every psychiatric claim;

(b) the provision of resources for investigation and assistance in the delineation of issues at an early stage.

23. It is envisaged that a realistic attempt to isolate these issues early in the compensation process and the restriction of both parties to a hopefully limited number of issues at trial are avenues of reform that can work together rather than in opposition.

(iii) Limiting issues at trial:

24. Hearings in relation to appeals from the decision of the Review Unit of Q-Comp are now heard in the QIRC by way of a hearing *de novo*.

25. The effect of this is that any previous decision by Q-Comp as to any of the essential elements necessary for proof by an appellant (whether worker, WorkCover or employer) is not a matter that the appellant can rely on at trial.

26. In turn this means that a worker who has had the issue of "injury" decided in his or her favour must once again set about the task of securing medical evidence (and often expensive specialist medical evidence) to establish a matter which was seemingly not in issue by virtue of the decision of the body from which the appeal lies.

27. It is submitted that primary issues relevant to the appeal should not need to be re-litigated by an appellant.

28. In that regard the fairest approach would be to take those issues as having already been decided and allow of an application (with appropriate evidence) to be made by Q-Comp (as respondent) to "re-enliven" that issue at trial.

29. It is suggested that any costs attending such an application would be in the unfettered discretion of the QIRC.

Common law claims:

(a) Overarching submission:

30. BAQ submits that insufficient time has elapsed to properly assess the impact of the extensive legislative amendments effected to the WCRA in 2010, particularly with respect to common law claims. Those amendments are operative only in respect of injuries occurring on or after 1 July 2010.

31. Given the extensive pre-litigation work required of both workers and employers (by WorkCover or as self-insurer), and the over-arching three-year limitation period, those common law claims covered by the 2010 amendments are only now emerging more steadily.

32. It is the experience of BAQ members that, with respect to the claims or potential claims impacted by the 2010 amendments, those amendments have undoubtedly exerted downward pressure on both the number of claims and total claim costs.

33. In consequence it may be said, and with some force, that no further amendment to the scheme should be made until the full effect of the 2010 amendments is known.

34. Queensland is the only jurisdiction in Australia that maintains a "short tail" scheme[1] and retains full common law rights. That is a commendable position. It also satisfies the objective in s. 5(4)(a) of the WCRA.

35. Most other Australian jurisdictions harbour the prospect of an injured worker remaining on benefits until retirement age[2]. The effect of such potential long-term liabilities on the financial sustainability of the scheme is obvious.

36. Although it is said that New South Wales and Victoria retain common law rights, the percentage threshold in those States is such as to practically mean that very few injured workers have access to any common law benefits.

37. The effect of legislative amendments made in other Australian jurisdictions is to make an injured worker dependent upon the workers' compensation scheme for much longer periods than in Queensland. As the Information Paper at page 25[3] points out, the Queensland scheme enables WorkCover and self-insurers to reduce their tail of claims providing significant cost savings.

38. The Queensland scheme, unlike any other scheme, requires workers with a disability under 20% WRI to elect to receive lump sum compensation in discharge of any ongoing right to compensation, or alternatively elect to seek damages at common law.

39. The latter process involves the scheme's prudential measure of proving a breach of obligation (usually in negligence) on the part of the employer. The worker is often (probably due to proper prior advice by lawyers as to prospects) but not always unsuccessful.[4]

---

[1] One that does not enable the injured worker to be in receipt of benefits until retirement age.

[2] Subject to New South Wales requiring a 20% whole person impairment after 2 years. The requirement was recently introduced in New South Wales and as yet the financial effect of that is unknown.

[3] Information Paper prepared by the Department of Justice and Attorney-General, Q-Comp and WorkCover Queensland, June 2012

[4] Recent examples are: *Lusk v Sapwell* [2011] QCA 59; *Serra v Couran Cove Management Pty Ltd* [2012] QSC 130; *Marshall v Queensland Rehabilitation Services Pty Ltd* [2012] QSC 168.

40. The effect of removal, by the 2010 amendment, of what was perceived to be the relatively easier task of established liability under WHSA[5] s. 28 has not yet been quantified in terms of Court decisions. However, the experience of BAQ members is that it has made the employer's ability (by WorkCover or as a self-insurer) to contest liability issues significantly stronger. Indeed, it seems to have diminished claim numbers.

41. The Queensland scheme in the last 15 years, in requiring the said sub-20% WRI election between lump sum compensation and common law damages, has delivered either the lowest, or perhaps second lowest premium rate to employers throughout Australia. Further, the scheme is the only fully funded scheme in Australia.

42. The scheme's operation demonstrates plainly that the retention of full common law rights is compatible with a short tail scheme that requires relatively lower premiums.

43. The virtue of the present scheme consists in:

(a) for an insured employer, that the scheme maintains the relatively inexpensive premium rate, which is in accordance with the sustainability requirements of the scheme and maintains the competitiveness of Queensland businesses (in accordance with the objectives in ss. 5(4)(a)(ii) and 5(5) of the WCRA);

(b) for the injured worker, consistent with the right of a worker injured by the fault of the employer, to have the worker's right to the integrity of their livelihood and the sustainability of themselves and their family protected (in accordance with the objective in s. 5(4)(a)(i) of the WCRA).

44. Recent trends essayed in the Information Paper show a reduction in the lodgement of common law claims with WorkCover in the last three financial years [see the chart on p.26] and a reduction in the cost of the average claim over that period [see the chart on p.27].

---

[5] Now the *Workplace Health and Safety Act* 2011.

45. This data underscores the submission that the scheme remains fully funded and sustainable. It also underpins the submission that the 2010 legislative amendments seem to have addressed the growth in common law claims and claims cost that was evident in the years before those amendments.

46. The other Australian schemes which permit long tail claims (because the rights to common law damages are either non-existent in an actual or practical sense, or are so heavily regulated as to be non-existent):

(a) do not deliver cheaper premium notes to employers;

(b) deliver substantially reduced benefits to injured workers.

47. Victoria is the only state which has a lower premium rate than Queensland, but it delivers significantly inferior benefits to injured workers [see the table on p.9 of the Information Paper].

48. Of all of the central and hybrid schemes which are referred, Queensland delivers the greatest benefit to injured workers, and incurs the least costs in insurance operations and other scheme costs.

49. Thus the Queensland scheme maintains a fair balance as required by s. 5(4)(a) of the WCRA.

50. No other State has a fully funded workers' compensation scheme; only Queensland has achieved that. This is consistent with the management of the fund achieving, in accordance with the requirements of the WCRA, a stable solvent scheme delivering a scheme at a sustainable cost to employers and protecting the livelihood of Queensland workers and their families.

(b) The 2010 amendments:

51. The 2010 amendments to the WCRA effected important changes to the implementation of the WCRA. The BAQ members' experience to date is that they have exerted downward pressure on the number of common law claims, damages awards and settlements, and premiums.

52. The amendments have had significant effects in the following areas:

(a) first, removing a breach of s.28 of the WHSA affording a civil cause of action for damages (and retroactively).

(b) second, introducing cost penalties for an unsuccessful litigant who fails in their action altogether.

(c) third, altering the assessment of liability and damages broadly in accordance with the CLA (the exception being gratuitous care principal).

53. East of these is canvassed in greater detail below.

54. The <u>first</u> amendment overcame the impact of the Courts interpreting a breach of WHSA s.28 as providing a civil cause of action for damages:

(a) the effect of pre-amendment position meant an injured worker faced a very low hurdle to succeed in a damages claim for personal injuries.

(b) in consequence, if WorkCover (for the employer) or self-insured employer could not show (the persuasive onus of proof being reversed) it had complied with its statutory obligations pursuant to the WHSA, it was placed in a position of almost strict liability.

(c) in practice, this had the effect that problematic liability cases would be instituted and proceeded with.

55. Since the introduction of the 2010 amendments, difficult liability claims are less likely to be instituted, let alone proceeded with when an injured worker is obliged to prove negligence against the employer in a more orthodox manner (namely, want of reasonable care).

56. It is the experience of BAQ members that this amendment has already had the intended effect of causing otherwise doubtful liability cases not proceed to claim, or claimed but to be withdrawn or compromised for insignificant sums of money.

57. The second abovementioned amendment altered the cost regime to include the situation where previously an unsuccessful claimant, in sub-20% WRI injury claims, would not have to pay costs if his claim was dismissed in its entirety:

(a) the previous regime was governed solely by the making of statutory compulsory conference mandatory final offers, such that a plaintiff would only receive an award of costs if he or she obtained an outcome better than his or her offer.

(b) the Queensland Court of Appeal in *Sheridan v Warrina Community Cooperative Limited* [2005] 1 Qd R at 187 held that notwithstanding the defendant was successful, and the plaintiff's case was dismissed, the defendant was not entitled to costs under the then prevailing costs regime.

58. The 2010 amendment introduced the usual costs penalty for unsuccessful claims confronted by all other court litigants. This provides a further disincentive for plaintiffs to bring problematic liability cases.

59. The third abovementioned amendment entail the WCRA being brought into line (broadly) with the liability and quantum provisions of the CLA (which applies to all other personal injury claims in Queensland except when s.5 of the CLA is invoked).

60. In particular, awards for pain and suffering and loss of amenities, previously assessed under common law principles, are now in accordance with the ISV scale pursuant to the CLA.

61. Depending upon the type of injury suffered, this amendment will mean a potentially significant reduction to the general damages component of each claim.

62. The awards for general damages, particularly under the pre-2010 legislation, have increased in the more recent cases. By way of example, in back injury cases:

(a) in *Cameron v Foster & Anor* [2010] QSC at 372 Douglas J awarded a plaintiff $80,000 for pain and suffering and loss of amenities.

(b) in *Kerr v Queensland Rail*, Douglas J awarded $50,000 for pain and suffering and loss of amenities.

(c) in *Corkery v Kingfisher Bay Resort Village* Lyons J awarded $60,000.

(d) in *Suna v Bridgestone* White J awarded $55,000.

(e) in *Taylor v In Vitro Technologies Pty Ltd* Boddice J awarded $60,000.

63. By comparison, under the ISV (Injury Scale Value) tables, significantly lower assessments of general damages are likely. An ISV of 10 (being at the top of the range for a moderate cervical, thoracic or lumbar spine injury) would result in an award of

general damages of $13,350. Even if there is an uplift for multiple injuries, a significantly lower assessment will still apply.

64. The prediction of lower claim numbers, lower general damages assessments, and correspondingly lower pressure on premiums seems to be borne out by the available data.

65. Since June 2008, statutory claims have been in line with employee growth, with the exception of 2009/10 where statutory claims decreased during the Global Financial Crisis. Statutory claims for 2011/12 are projected to reach 105,000.

2008/2009	103,667
2009/2010	100,420
2010/2011	104,746
2011/2012	105,000

66. Statutory payments have increased by 14% for 2011/12 due to an increase in weekly compensation payments. After adjusting for inflation, the increase from 2010/11 to 2011/12 is expected to be 9%. The WorkCover Annual Report 2010/11 (page 33) records for 2010/11 that statutory payments increased by 3% and common law payments decreased by 7%.

67. Common law claims post July 2010 legislative amendments have reduced by 9.6% for 2010/11 (from 4991 in 2009/10 to 4510 in 2010/11; 4400 claims are expected in 2011/12). This is to be compared to that reported in the WorkCover Queensland Report 2009/10 which noted that in the 2009/10 period 18% more new common law claims were lodged than in 2008/09[6].

68. Average damages have reduced over the last two financial years. After experiencing a 10.5% increase in average damages for 2009/10 ($126,336; up from $114,344 in

[6] At page 22.

2008/09), the average cost of damages reduced by 1.4% in 2010/11 ($124,562). The 2011/12 year to date average damages cost has reduced a further 6.3% to $116,680.00.

	Actual damages cost (no adjustment)		**Inflation adjusted average Damages cost**	
	Cost	**Change from previous year**	**Cost**	**Change from previous year**
2006/07	$96,568	9.3%	$130,508	9.4%
2007/08	$99,539	3.1%	$121,921	-6.6%
2008/09	$114,341	14.9%	$130,230	6.8%
2009/10	$126,336	10.5%	$134,389	3.2%
2010/11	$124,526	-1.4%	$126,992	-5.5%
2012/YTD	$116,472	-6.5%	$117,993	-7.1%

69. The introduction of ISV (Injury Scale Value) tables to determine general damages have seen a decrease in general damages from $30,533 (pre reform average) to $10,753 (post reform average). There has also been a reduction in the future economic loss component. The average total damages reduced by 30% from $113,078 (pre 2010 reform) to $75,257 (post 2010 reform).

	Average Damages paid		**General Damages**		**Future Economic Loss**	
	Pre reform	Post reform	Pre reform	Post reform	Pre reform	Post reform
No WRI	$22,958	$10,663	$6,258	$2,059	$14,599	$8,683
WRI 0%	$88,823	$53,874	$24,924	$8,988	$57,395	$39,287
WRI 0.1%-	$102,025	$83,234	$29,188	$10,565	$64,039	$62,173

4.9%						
WRI 5%-9.9%	$145,638	$116,549	$38,327	$14,126	$96,375	$96,375
WRI 10% +	$198,086	$168,224	$49,411	$30,789	$133,720	$140,727
Average	$113,078	$75,257	$30,533	$19,753	$73,724	$58,912

70. It is accepted that the Premium Rate has increased between 2011 and 2013 but this must be viewed in light of a thirteen-year hiatus in the period from 1997 to 2010.

71. With the reduction in the number of claims and claim costs, the pressure to increase the premium rate is minimized. The current Australian Average Premium Rate per $100 of wages is:

	2013	**2012**	**2011**	**2010**	**2009**	**2008**
QLD	1.45	1.42	1.30	1.15	1.15	1.15
NSW	1.68	1.68	1.66	1.69	1.77	1.77
VIC	1.298	1.298	1.34	1.39	1.39	1.46
SA	2.75	2.75	2.75	3.00	3.00	3.00
WA	1.691	1.55	1.55	1.74	1.58	1.85
TAS	2.28	2.19	2.10	1.97	1.83	1.94

72. It can be seen that Queensland sits comfortably as the one of the least expensive premium rate in the country, and the 2010 amendments can only have a downward effect on that premium rate. The objective in s. 5(5) of the Act, clearly, is being achieved.

73. It may be thought that some further amendments to the WCRA could make the scheme even stronger financially, and, in particular, reduce premium rates further. The BAQ submits that without assessing the true effect of the 2010 amendments, which can only occur with the passage of further time, such changes are unwarranted.

(c) Thresholds:

74. There is a body of anecdotal evidence that consideration may be given to the imposition of an injury threshold, below which no common law claim can be brought.

75. The BAQ strongly opposes the introduction of thresholds (even a 0% threshold) for a number of reasons:

(a) a work-related impairment is not and should not be used as a measure of disability. The losses sustained by claimant workers now are real, reflecting a measure of lost capacity for work and the reality of future expense caused by work injury.

(b) if there is no access to common law damages, one would expect that there would ordinarily be an accompanying increase in statutory payments. The increase in statutory entitlements would apply to a far greater number of injured workers than to those common law claimants who might lose their right to bring a common law claim.

(c) the introduction of thresholds on common law damages claims has not, in other jurisdictions, resulted in lower premiums for employers.

(d) the introduction of thresholds harbours the tendency to shift the focus of disputes to the Medical Assessment Tribunal, which is ill-equipped to deal with such matters.

(e) the actual loss suffered by an injured worker, irrespective of the extent of their disability or impairment, may vary considerably depending upon their occupation, age, education and needs. A common law assessment has the flexibility to account for those variables.

76. The introduction of thresholds, historically, has not resulted in lower employer premiums in Worker's Compensation schemes. By way of recent example, in New

South Wales, a 15% WPI threshold has been introduced. Despite that, employers have incurred significant premium cost increases, long tailed claim payouts have risen, and there are reported levels of increased general dissatisfaction with that NSW scheme.

77. The current employer premium is $1.68 compared with Queensland's current premium of $1.42. The New South Wales fund liabilities grew in the six months ending 30 June 2011 from $994 million to $2.4 billion (70% increase)[7]. Similarly, South Australia no longer has common law claims, but its premiums are the most expensive of all states.

78. The reasons for this outcome are complex. The reduction of workers' rights on the one hand is likely to result in increased pressure on another part of the scheme. Actuarial modelling assists in projecting potential outcomes based on assumed scenarios, however, they are unable to predict with any certainty the practical consequences of the changes.

79. The BAQ submits that the current Queensland scheme is functional, affordable and well controlled. This is a remarkable achievement in difficult economic times. To introduce a threshold on common law claims that have historically been unsuccessful in improving the financial viability of a scheme would introduce a degree of volatility that is simply unwarranted.

(d) Impact on statutory scheme – increased payments:

80. Any proposal to impose thresholds on access to common law damages is likely, for political and social reasons, to require a substantial increase in benefits paid in the statutory scheme. In particular, it is likely that the result will be increased lump sum payments for injuries that do not exceed the threshold.

---

[7] Australian Financial Review, 25 August 2011.

81. As noted by Q-Comp[8], less than 5% of statutory claims progress to common law. Increasing statutory lump sum payments would result in 95% of statutory claimants, who do not and will not bring common law claims, in receiving increased payments that must have a significant financial impact upon the scheme as a whole.

82. In cases where a claimant worker has an impairment that does not exceed the threshold, but has a potential for a significant common law claim, an assessment below the threshold is likely to increase litigation at that point in the claims process.

83. For example, in one of the case studies identified by the Q-Comp submission[9], the claimant was a male labourer, 29 years of age, who was engaged in road construction. He suffered a lower back injury after scaffolding gave way and he fell down two flights of stairs. He received an assessment of 0% WPI impairment by the Medical Assessment Tribunal. His ultimate net damages were $164,310.00, with an allowance of $94,759.00 for future economic loss.

84. An assessment of impairment below the threshold is likely to result in statutory appeals, with concomitant cost.

85. Moreover, because the assessment of impairment will potentially become such a significant factor, lawyers would be involved at a much earlier point in the process (for both WorkCover and the injured worker), resulting in increased cost, and a more rigid and potentially adversarial process at the Medical Assessment Tribunal. This may have unintended consequences, such as dissuading medical practitioners from agreeing to be part of the process.

86. The impact on the statutory scheme of the introduction of a threshold, of course, is unknown. However, BAQ are familiar with the sharp spike in procedural litigation

[8] Queensland Workers' Compensation Scheme Monitoring, May 2012.
[9] At page 33 of 88, Case 3.

following the introduction of the WCQA[10]. There is no reason to think that history will not repeat itself.

87. In any event, the use of a WPI (whole person impairment) assessment as a threshold to a common law claim confuses the purpose and nature of that assessment.

88. The *Guides to the Evaluation of Permanent Impairment*, published in the Journal of the American Medical Association, is now in its fifth edition. The guides are used expressly for the purpose of measurement of impairment, rather than the measure of disability. The journal states:

> The *guides* continue to define disability as an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment …
>
> 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 environmental 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. If adaptations can be made to the environment, the individual may not be disabled from performing that activity … As discussed in this chapter and illustrated in Figure 1.1., 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 …

---

[10] See, for example, *Lau v. WorkCover Queensland* [2002] QCA 244; *Thompson v. WorkCover Queensland* [2002] QSC 119; *York v. General Medical Assessment Tribunal* [2002] QSC 014; *Tanks v. WorkCover Queensland* [2001] QCA 103; *James v. WorkCover Queensland* [2000] QCA 507; *Scott v. WorkCover Queensland* [2000] QSC 414; *Conway v. WorkCover Queensland* [2000] QSC 406; *WorkCover Queensland v. Stergioulas & Anor.* [2000] QSC 389; *Neuss v. Roche Brothers* [2000] QCA 130; *Bonser v. Melnacis* [2000] QCA 013; *Re Lankheet* [1999] QSC 073; *Re Robinson* [1999] QSC 011.

> **The guides are not intended to be used for direct estimates of work disability. Impairment percentages derived according to the guide's criteria do not measure work disability. Therefore, it is inappropriate to use the guide's criteria or ratings to make direct estimates of work disability.**[11] [Our emphasis added]

89. The imposition of a threshold based on a WPI (or like) assessment, is not designed to measure work disability, and is unfair.

90. Irrespective of the matters referred to above, the actual loss to a person based upon disability or impairment will vary dramatically according to the particular individual. The primary purpose of any compensation system is to compensate for financial loss.

91. Most families in Queensland have to meet financial obligations on a day-to-day basis. The payment of a mortgage, school fees, various personal loans and credit cards are all part of our daily life. The loss of a wage as a consequence of a work-related injury, even for a relatively short period, can have a dramatic impact upon a family. Most could not afford (let alone join) private disability insurance.

92. However, a physical impairment to one person may result in a completely different financial loss to another. An employed solicitor who sustained a back injury with long-term pain may be able to continue working with little or no financial loss. A manual labourer, as described in Case 4 above, is likely to have a significant financial loss. A WPI assessment based upon the guides referred to above makes no distinction between the two.

93. If both are excluded from bringing a common law claim because of the threshold, the injured labourer suffers a gross injustice. A claim for common law damages permits an assessment of compensation that takes into account the individual circumstances of the claimant.

---

[11] American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 5th Edition, Chapter 1, paragraph 1.2(b).

94. A common law assessment has the flexibility to recognise (in a positive and negative way) a person's actual financial loss (or lack thereof) as a consequence of a particular injury. The fact that there is little or no financial loss in the majority of cases may be a reflection as to why 95% of cases do not convert to common law claims.

(e) Approach of WorkCover in common law claims:

95. It is the experience of BAQ members that WorkCover, and self-insured employers, in the litigation of common law claims, have properly adopted the approach of being a "model litigant". This accords with the objectives outlined in s. 5 of the WCRA.

96. Workcover has been exemplary in observing its "model litigant" status.

97. WorkCover's more recent "early best offer" approach is an appropriate one, and one which accords with its "model litigant" approach.

98. BAQ cautions, however:

(a) a defended early offer ought only to be made when all necessary and appropriate inquiries and investigations and expert evidence has been obtained.

(b) an offer which is intended to be defended either at a compulsory conference, dispute resolution process, or most importantly at trial, should only be done in circumstances where an appropriate advice is first obtained from a panel lawyer.

99. In order to monitor the efficacy of WorkCover's "early best offer" policy, BAQ suggests that WorkCover/Q Comp assemble appropriate statistical data by which an appropriate comparison can be made between the offer sought to be defended, and the

ultimate outcome of the claim. Such data would enable a monitoring of any significant variations between offer and outcome.

100. It is not the experience of BAQ members that the effect of the decision in *Cameron v Foster* has had any significant impact on the increase in claims for care or on the resolution of common law claims generally.

101. The involvement of WorkCover as the insurer of a labour hire employers continues to be problematic in the determination of some common law claims involving multiple other parties insured by general risk insurers.

102. BAQ members have identified that WorkCover, with some regularity, becomes involved in a litigated common law claims, despite its "best offer" policy, in circumstances where the remaining co-defendants do not have a similar approach to the resolution of the litigation. This has resulted in WorkCover being involved in more protracted litigation.

103. The issues involved in attempting to rationalise this difficulty are complex and may involve scheme and premium implications for WorkCover, however BAQ suggests some inquiry might be instigated to address possible modes of resolving this problem. BAQ are not a position to determine whether or not the 2010 amendments in relation to mandatory final offers at the compulsory conference concerning contribution claims have had any effect on this issue.

104. BAQ notes that there will always be a measure of tension between WorkCover's need to resolve common law claims quickly, consistently with the "short tail" nature of the Queensland scheme, and the need for an injured worker's claims to fully mature so that the full and proper measure of the claimant's damages can be identified.

105. BAQ submits that the current balance in the administration of common law claims and the pace at which they determined presently reflects a reasonable resolution of this tension for both claimants and WorkCover.

Potential areas for amendment to the scheme:

106. The concept of an homogenous legislative scheme pursuant to which all common law claims for damages for personal injury are litigated and determined is one that should be pursued.

107. It is difficult to justify the need to comply with different legislative pre-proceeding schemes (namely *Motor Accident Insurance Act* 1994, *Personal Injuries Proceedings Act* 2002 and the WCRA) that impose different pre-litigation requirements, and require the assessment of damages in different ways. This inevitably occurs when a worker is injured in circumstances also giving rise to liability on an entity other than his or her employer. The damages and costs available against particular respondents to the claim may be quite different.

108. To that end uniformity of procedures (not legislation of) the schemes should be pursued. It would have an inevitable favourable effect on legal costs.

109. In 2004 Mr Richard Douglas SC chaired, at the invitation of the Attorney-General the Hon Rod Welford, a committee of twenty stakeholders and achieved consensus as to procedural uniformity across the schemes. His report to the Attorney, with respect, was ignored by successive ALP Attorneys-General.

110. At a substantive law level, consideration could also be given to a legislative amendment whereby damages for care and assistance are subject to an ISV threshold in the same manner as loss of consortium claims are subject to an ISV threshold. That will conclusively determine that vexed issue and link domestic assistance claims to the most serious cases.

111. Currently, with the *Syben v. TFS Mackay* exception and the *Cameron v. Foster* exception, domestic assistance can still be sought in the smaller claims that, it would seem, is not the Parliamentary intent.

112. Section 5 of the CLA ought be repealed to the extent it excludes the CLA where there is a WCRA compensation entitlement. WCRA adoption, from 2010, of most of the CLA liability and damages principles dictates as much. The present provision leads to inequality, and difficulty in contribution assessment, concerning liability and damages assessment between employer and non-employer defendants sued for the same damage in the same claim or proceeding.

113. Consideration can also be given to excluding from the ambit of the WCRA true journey claims, ie, journey claims to and from work, as opposed to journeys from one place of work to another. It may (as can be seen in the New Haven funeral submission to this inquiry) work an injustice.

114. Certainly the innocent worker injured in a motor vehicle accident will not be disadvantaged by such an amendment as he or she will often harbor rights against a CTP insurer for loss suffered. Those, however, who cause accidents whilst not on their employer's business but in fact driving to or from their employer's place of business do not merit further protection than the ordinary citizen. The abolition of this type of journey claim could be expected to cause a not in-significant reduction in scheme expenditure.

115. One of the sad outcomes of our mining boom is the fact that many miners after working 12-hour shifts for a number of consecutive days are choosing to drive home immediately when they are exceedingly fatigued. The dire consequence is that there have been numerous miners who have lost their lives driving home in single vehicle accidents essentially caused by their own fatigue. This was the subject of a Coronial Inquiry by Annette Hennessey in 2010.

116. The abolition of journey claims would affect such workers and their families, but, as with other high income earners, they could afford to insure themselves privately, under disability insurance policies, against injury or death during journeys to and from work. Such an amendment would ideally require an education campaign.

117. The mining analogues of the WHSA must be amended to reflect the WHSA abolition of a right of action for damages for breach of statutory duty (see above). The present require effects inequity between the rights of mining and non-mining employers. That requires urgent amendment. It is long overdue.

Regional issues:

118. Any concern of WorkCover or self-insured employers that damages claims in the northern Courts are on the rise, is mis-placed. There has in fact been a decrease in the trend of damages. The highest award to a non-catastrophically injured high earner miner remains *Brunker v. CMG* [2008] QSC 198 at $885,000 gross.

119. In the more recently litigated cases in the northern jurisdiction the defendants have achieved results more favourable than their offers, ie, *Hunt v. AAMI* [2011] QSC 378; *Geary v. REJV Services* [2011] QSC 419 and *Roach v. O'Meara* [2012] QDC 145. There is thus no demonstrable upward trend in litigated cases in northern Queensland. Indeed, the position is to the contrary.

120. BAQ members in regional areas are supportive of the re-introduction local WorkCover offices for at least two reasons:

(a) first, it provides a local office that the injured worker can attend and a more informed interaction can take place than is possible over the telephone.

(b) secondly, expertise is undoubtedly acquired of local problems and trends in particular industries.

121. It is a fair argument to say that since there has been a decentralisation of the State's legal resources by having a Far Northern Judge in Cairns, a Northern Judge in Townsville and a Central Judge in Rockhampton, then at the very least there should be WorkCover common law officers in each of these Centres specialising in the industry in and about the area and decreasing the administrative costs of WorkCover. The system worked perfectly well for many years but fell into disuse under the former ALP administration.

Further assistance:

122. BAQ is available to assist further if the parliamentary committee requires.

RJD;dgr

15 June 2010

BAR ASSOCIATION OF QUEENSLAND

The Hon Cameron Dick MP
Attorney-General and Minister for Industrial Relations
Queensland Government
GPO Box 149
Brisbane Qld 4001

COPY

Dear Attorney

Re: Submission – Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2010

There are two aspects of the Act, passed last week, that concern the Bar Association.

Retrospective operation of the amendments to the *Workplace Health and Safety Act* 1995

Retrospective legislation often causes harm to citizens who have acted in a way permitted by the law and have done no harm to the community or to a fellow citizen. It is for this reason that legislators, law reformers and the courts have favoured legislation having prospective rather than retrospective effect.

In the circumstance of s.45 and in particular s.197(b), the Association foresees that some workers (and their families) will suffer hardship. It is likely that some workers will have declined offers of lump sum compensation for permanent impairment and elected to claim damages relying upon the cause of action based upon the statutory duty that is to be abolished. Some of these workers may have rejected mandatory final offers of damages and commenced court proceedings relying upon the statutory duty. The provision as enacted will abolish the rights for workers even if they started their action after 8 August 2008 but have been unable to bring the proceedings to a trial in the interim.

In the opinion of the Association, it is unacceptable that workers who have acted on legal advice based upon a law long established by the Parliament and reinforced by the courts will lose not only the benefit of a right to damages but also the opportunity to consider their position as they might if an offer of lump sum compensation or a mandatory final offer of damages was available for acceptance.

In the circumstance, the Association suggests that s.197(b) be amended so as to read:

> a contravention of a provision of this Act, whether as originally enacted or as amended since its original enactment, that happened after 18 May 2010.

BAR ASSOCIATION
OF QUEENSLAND
ABN 78 009 717 739
Level 5
Inns of Court
107 North Quay
Brisbane Qld 4000
Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
chiefexec@qldbar.asn.au
Constituent Member of the Australian Bar Association

The date suggested by the amendment commends itself as that is the date that the Bill was introduced into the House and the Minister delivered his Second Reading Speech.

The operation of the *Civil Liability Act* 2003

The Association notes that significant attempts have been made to harmonize the operation of the *Workers' Compensation and Rehabilitation Act* 2003 with the provisions of the *Civil Liability Act* 2003. This is a step that was supported by the Association. The Association also commends the Attorney's intention to review some aspects of this matter in two years time announced in the Second Reading Speech on 18 May 2010.

Nevertheless, the Association considers that s.5(1)(a) and (b) of the *Civil Liability Act* 2003 creates an unintended consequence requiring immediate attention.

The effect of the changes to the *Workers' Compensation and Rehabilitation Act* 2003 recently enacted will be that workers who sustain an injury and pursue damages for their injuries as regulated by that Act will (subject to some variations) have their action determined upon the same law as injured members of the public whose rights are regulated by the *Civil Liability Act* 2003. However, there will be a small number of working men and women who will be entitled to sue for damages but whose claims will not be regulated by either legislative scheme.

This will flow because of the retention of s.5(1)(a) and (b) of the *Civil Liability Act* 2003. That class of injured persons are workers who are injured in the course of their employment away from their employer's premises, plant or equipment in circumstances where they have rights to sue other tortfeasors such as the occupiers of premises or the manufacturers of plant or equipment. In the circumstance where those workers sue an occupier or a manufacturer, neither legislative scheme will regulate their claims for damages.

In short, those workers will have liability issues determined and have a potential to recover damages (usually more generously) on a different basis than other injured workers or other citizens who may be injured as a result of dangerous premises, plant or equipment or in motor vehicle accidents.

Generally speaking, it is not good public policy to differentiate between citizens and their rights with respect to justice simply on account of the circumstance of where they were when injured or under whose control they were when injured. The Association brings this circumstance to your attention for early consideration.

Yours sincerely

Richard Douglas S.C.
President

Bar Association of Queensland

Submissions in response to Department of Justice and Attorney-General

Discussion Paper

The Queensland Workers' Compensation Scheme

Ensuring Sustainability and Fairness

Index

Introduction

The attached submissions are in response to the Department of Justice and Attorney-General's discussion paper entitled The Worker's Compensation Scheme: *Ensuring Sustainability and Fairness*.

Abbreviations Used in the Submissions

BAQ:	Bar Association of Queensland
WCQ:	WorkCover Queensland
QCOMP:	QComp Queensland
QLS:	Queensland Law Society
WCRA:	Worker's Compensation and Rehabilitation Act 2003
WCQA:	WorkCover Queensland Act 1996
WHSA	Workplace Health and Safety Act 1995.
CLA	Civil Liability Act 2003
WRI:	Work Related Impairment
WPI:	Whole Person Impairment

Bar Association of Queensland

The Bar Association of Queensland is the professional association representing the interests of barristers in practise in Queensland.

The Association was established in 1903.

The objects of the association have at their core, the promotion of the cause of justice for litigants in Queensland.

Many members of the private bar in Queensland are briefed in matters related to the subject matter of the discussion paper. Barristers in Queensland are involved, on an almost daily basis, in matters involving claimants, WCQ litigation, QCOMP litigation, pre-court proceedings and in litigated trials involving WCQ common law claims.

As a consequence, the bar, being independent, is uniquely in a position to provide a balanced and objective analysis of the matters the subject of this discussion paper.

Overview

The discussion paper and the various presentations provided to stakeholders, including the Delloite report, the Price Waterhouse Presentation and the Finity report have all provided a wealth of statistical and other material for the purpose of considering the discussion paper questions.

In BAQ's submission this identifies a measure of tension between, on the one hand, a large bulk of statistical information, and on the other hand, a set of general principles and objectives which are the subject of the WCRA and its administration. In the circumstances of the time frame for consultation BAQ has not attempted to examine in detail the vast bulk of statistical material. BAQ, however, raises the prospect that statistical material can always be the subject of outcome dependent upon the assumptions from which that material was drawn. Actuarial analysis simply provides mathematical outcomes dependent on the assumptions upon which the statistical material for that actuarial analysis is based. BAQ does not seek to enter upon any detailed analysis of that statistical material for the purpose of these submissions but it notes the comments by QLS in its submission.

BAQ strongly counsels against any change in substance to the WCRA and its administration without a close consideration of the fundamental underlying principles of the scheme, the objects of the WCRA as expressed in that Act, and the underlying basis for a universal and compulsory workers compensation scheme in Queensland. Change

based solely or largely upon statistical or actuarial information only without proper reference to principle is almost certainly likely to lead to anomalies and injustice.

The Historical Perspective

In BAQ's submission it is important to recognise that the context of the matters raised in the discussion paper arise out of a perception, set out in the discussion paper that

> "WCQ like other insurers was adversely affected by the global financial crisis over the last two financial years..... Notwithstanding the effects of the global financial crisis, WCQ also incurred an underwriting shortfall over the same period of approximately $500 million. These two factors contributed to an accumulated operating deficit of approximately $1.3 billion before tax..."[1]

The unique significance of the global financial crisis should be recognized, however, in BAQ's submission, because if substantial alterations are to be undertaken to the administration of the WCRA such alterations should not reflect a simple "knee jerk response" to a unique global event but should be soundly based upon a proper principled approach to the issues.

That this is so can be seen by a simple reference to the history of the administration of worker's compensation in Queensland. An almost identical set of circumstances were considered in the Commission of Inquiry into Workers Compensation and Related Matters (The Kennedy Inquiry) in 1996. The Kennedy Inquiry was conducted as a consequence of a perceived crisis in the financial viability of the Queensland Worker's Compensation fund with estimates of significant unfunded liability as a consequence of a significant increases in common law claim outcomes. A broad ranging series of recommendations were made, including severe restrictions in accessibility to common law damages. Almost all of the recommendations were enacted, save those that restricted accessibility to common law damages.

---

[1] Discussion Paper Executive Summary Paragraph 1

In the years that followed the Kennedy recommendations and the legislative enactment of those recommendations, the difficulties in the explosion of common law claims which were envisaged did not materialise. Indeed the fund moved to a position of significant financial return. BAQ submission is that there must be every expectation that similar cyclical conditions will again prevail and that investment income is likely to significantly improve. Accordingly any changes of substance to the manner in which the administration of workers compensation in Queensland is conducted should not simply reflect a response to current conditions but should be analysed in terms of proper principle.

In particular, it must be recognised that the continued access to common law damages, the restriction of which was a central plank of the Kennedy reforms, can be seen in the historical context to have not caused a devastating explosion in the non-financial viability of WCQ.

Identifying an Increase in Claim Numbers

The discussion paper identifies the Deloitte investigation as having determined that there is a growth in common law claim numbers and payments compared to statutory claim numbers and payments and that this growth is "based upon a systemic issue that is undermining the sustainability of the fund" [2]

The discussion paper also identifies a higher claims cost on an average basis for common law claims than for statutory claims.

The Price Waterhouse Cooper stakeholder presentation slide 5 identifies a comparison between the frequency of statutory and common law claim in various years between 1986 and 2010. That analysis confirms an upward trend in claims from about 2003.

It is important, however, to note that the upward trend in claims is identical to that which preceded the last significant investigation into the fund in 1996. A similar upward trend in claim was identified, but that trend dropped away after the Kennedy Report recommendations were in place. Again, it is important to identify that, in an historical context, there are always certain cyclical features associated with the movements in the fund, and movements in claims history generally.

There is no doubt that an increase in claims is based upon a variety of issues. These can be identified as follows:

---

[2] Discussion Paper page 9 para 6

1. The inappropriateness of statutory offers in circumstances where a common law outcome is almost inevitably better;
2. Changes in perceptions of risk concerning liability outcomes ie the *Bourk* and *Parry* issue;
3. The fact that there is no costs sanction upon plaintiffs in losing cases thus enabling a more entrenched bargaining position in settlement negotiations;
4. A recent perception that there are likely to be changes in the fund, and therefore circumstances prevail where prudent claimant's lawyers will commence proceedings and deliver notices of claim in order to protect extant rights for claimants;
5. An increase in economic activity in Queensland, particularly in the mining sector throughout the period 2000 to the present, which had given rise to an increase in claims particularly in the manufacturing and mining sectors[3];
6. In BAQ submission, however, the most important reason for a continuation in significant common law claims is the perception that appropriate compensation for injured workers is not provided within the statutory scheme, but is provided within the framework of the common law system.

Each of these reasons contributes to a differing degree to the increase in claims numbers. In those circumstances, simple accessibility to common law damages and the increased compensation likely to be received for injury, should not be targeted alone, or principally, in the context of wide ranging amendments to the financial viability of the scheme.

---

[3] QComp 2008-2009 Statistics Report pg 4 figure 5

Change in Assessment of Permanent Impairment from WRI to WPI

BAQ agrees that the change in the process of assessment of permanent impairment as provided for in the WCRA from WRI to WPI can be justified for the following reasons:

1. As outlined in the discussion paper this promotes a measure of national consistency with other schemes;
2. The measure of WPI also promotes an intra-state consistency with the assessment of impairment used by the Motor Accident Insurance Act scheme, and generally used in the assessment of impairment in a medico legal context for other injury claims;
3. WPI has the sanction and imprimatur of the medical profession, and there is a degree of familiarity with its use in accordance with the American Medical Association guidelines.

BAQ strongly cautions, however, that WPI not be used as a measure of disability. *The Guides to the Evaluation of Permanent Impairment* published in the Journal of the American Medical Association, now in its fifth edition include an express caveat on the use of WPI as an assessment of disability. The Journal states:

> "The *Guides* continue to define disability as an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment....
>
> 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. If adaptations can

> be made to the environment, the individual may not be disabled from performing that activity.....as discussed in this chapter and illustrated in figure 1.1, 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....
>
> The Guides are not intended to be used for direct estimates of work disability. Impairment percentages derived according to the Guides criteria do not measure work disability. Therefore, it is inappropriate to the use the Guides criteria or ratings to make direct estimates or work disability." [4]

BAQ draws particular attention to the extract from the AMA *Guides* referred to above. If WPI is to be used as the determinative for entitlement to damages, either statutory benefits or common law damages, and more particularly if WPI is to be the determinative of any threshold to accessibility to common law damages, then it must be recognised that it is a wholly inappropriate measure of a persons incapacity to perform either occupationally or in a social context. Impairment assessment can only be undertaken by examining in some detail the factors which the *Guides* identify, being a determination about "the individual skills, education, job history, adaptability, age, and environment requirements and modifications".

It is for this reason that other statutory workers compensation schemes have imposed a qualitative rather than quantitative analysis of impairment and disability as the relevant necessary criteria for determining the measure of impact an injury has had upon an individual's social, domestic and occupational activities.

---

[4] American Medical Association *Guides to the Evaluation of Permanent Impairment* 5th Addition, Chapter 1 paragraph 1.2b

Justice to injured workers and their families can only be achieved when, so far as is practical, the circumstances of the individual are taken into account when compensation or damages are in issue.

Host Employer/Labour Hire/Principal Contractor Indemnity

Labour hire arrangements significantly impact upon the conduct of common law claims. Significant delays are often experienced in bringing claims involving non WCQ indemnified principal contractors in pre-proceedings, compulsory conferences and the like, and in the event that the matter becomes litigated considerable further costs are often incurred as a consequence of the involvement of these additional parties.

BAQ recognises that significant streamlining in pre-court proceedings and litigation in common law claims could be achieved if the arrangements between WCQ indemnified employers and non WCQ indemnified contractors could be resolved. BAQ is not in a position to comment in relation to the financial viability of that exercise. However it would seem that considerable legal costs savings could be achieved, and the time taken for the finalisation of claims could certainly be shortened if this issue could be resolved.

Definition of Injury for Common Law

The discussion paper invites submissions in relation to the proposal that the definition of "injury" in Section 32 of the WCRA should be amended such that the current definition with provides that employment is "a significant contributing factor" to the injury, is changed so that employment is the "major significant contributing factor".

The definition of "injury" has changed a number of times, most recently in 1997 and 1999. Its major impact, in BAQ's submission is likely to be in qualifying for statutory benefits and also possibly in pure psychiatric injury cases, colloquially referred to as "stress claims". These cases are often ones in which multi-factorial reasons give rise to the claimant's ultimate psychiatric decompensation.

The discussion paper recognises the difficulty in attempting to ascertain the effectiveness of such an amendment. Amendments which simply add "by degree" to a measure of contribution to injury are difficult to implement in an evidentiary sense if the matter becomes litigated. BAQ is not persuaded that an amendment to the definition of "injury" would have a significant effect upon the number of common law claims.

The Effect of *Bourk v Power Serve Pty Ltd* and *Parry v Woolworths Limited*

BAQ supports legislative amendment to counter the effect of the decisions in *Bourk v Power Serve Pty Ltd* and *Parry v Woolworths Limited.*[5]

The amendment to the WHSA is straightforward and can be achieved by simply including a provision in that Act confirming that a breach of any of the provisions of the Act, or codes of practice made pursuant to the Act and Regulations, does not give rise to a civil right of action for damages for injury resulting from such breach.

This is intended in the *Safe Work Australia Bill* 2009 (Commonwealth) and draft provisions made pursuant to that Bill at Section 249.

It is clear that the consequence of the resort to a claim for damages based on the WHSA by these decisions has been to create a significant imbalance in risk perceptions between claimants and WCQ in the assessment of liability in common law cases. That shift in risk assessment has forced WCQ to settle on terms more favourable to claimants than would otherwise have been the case but for the decisions referred to. These decisions have elevated cases that previously had marginal, if any, prospects of success on liability

---

[5] Bourk v Power Serve Pty Ltd [2008] QCA 225
Parry v Woolworths Limited [2009] QCA 26

issues to ones where claimants can forcefully assert a liability outcome if the matter were to be litigated at trial and against which risk WCQ is required to compromise the case.

BAQ submits that the cases have had an inappropriate effect upon claimant's perceptions of outcomes, and as a consequence a significant effect upon WCQ's ability to prudently and fairly compromise common law claims.

BAQ also notes the observations contained in the Discussion Paper[6] that the commencement of the trend in increasing common law claims was coincidental in time with these decisions. This suggests that removing the effect of these decisions may have a reasonably significant impact on the fund.

[6] Discussion Paper page 16

Increasing Obligations on Third Parties to Participate in Resolution Mechanism

BAQ supports any legislative intervention which promotes early settlement of claims.

It is the experience of BAQ members that until all potential respondents/defendants have been joined to pre-court proceedings or litigated proceedings, and a conference arranged between all of those parties the prospect of early compromise of the claim is significantly diminished. Any process which imposes compulsion upon those parties to attend and reasonably and genuinely participate in compromise negotiations at an early stage can only be beneficial.

Costs against Unsuccessful Plaintiffs

BAQ supports an amendment to Section 316 of the WCRA to impose upon plaintiffs who lose a case an obligation to pay WCQ's costs. Following upon the decision in *Sheridan's Case* [7], losing claimants have been protected from an adverse costs order against them.

The effect of these decisions enables claimants to obtain a hugely disproportionate negotiating position with WCQ in cases where liability is highly arguable, and against which WCQ, in the face of substantial costs to litigate a claim, may be forced to compromise.

Anecdotally it has been reported by BAQ members that in a number of cases which have proceeded to trial, a plaintiff against whom adverse credit findings have been made, lost the action with no sanction of an adverse costs order.

An amendment to remove the effect of this interpretation restores the historical and appropriate outcome that in litigated claims, except for the effect of mandatory final offers, costs should follow the event of the judgment.

---

[7] *Sheridan v Warrina Community Cooperative Limited and Anor* [2004] QCA 308

Thresholds

In BAQ's submission this is the most contentious of the proposals contained in the discussion paper. The discussion paper identifies that Deloitte's have recommended to WCQ a 10% WPI as a threshold entitlement to accessibility for common law damages. The Deloitte advice identifies that the imposition of such a threshold would reduce common law claims by 66%.

BAQ is strongly opposed to the introduction of thresholds for two reasons. Firstly, thresholds are fundamentally unjust because thresholds create an inequality in access to justice between citizens of the State. Secondly, thresholds move the financial pressure onto the statutory scheme and do not necessarily relieve the perceived burden on the fund.

To deal with the second issue first, any proposal to impose thresholds on the access to common law damages is likely for political and social reasons to require a substantial increase in benefits paid in the statutory scheme and in particular may require a substantial increase in lump sum payments. To put it bluntly injured workers will require some compensation for a loss of rights. Any change that substantially increases payments for statutory benefits places further inexorable pressure on the fund as a whole. No no-fault compensation scheme of any size in Australia has avoided the burden of unfunded liabilities.

Returning to the issue of justice. Under the current scheme, whilst workers have an entitlement to no-fault compensation, should they choose to pursue a common law claim, then taht compensation becomes refundable from the damages. These are in no different position to any other citizen of the State who suffers an injury and chooses to pursue a tortfeasor for damages arising from that injury. Thresholds deny many that right, leaving those claimants with benefits substantially less than damages which courts have awarded for the same injury. This injustice would be accentuated because of the "short tail" nature of the Queensland workers compensation scheme in which injured workers have their injuries assessed by medical assessment tribunals and have their statutory claims determined in a relatively short period of time, compared to other States in Australia. Common law damages identify the past and future economic loss a worker may sustain from his or her injury and awards compensation in the particular circumstances. To remove this right arbitrarily and without regard to the particular circumstances is, in BAQ's submission, wrong in principle, and contrary to the intended universality of a worker's compensation scheme.

Because WCQ is the monopoly insurer for workers compensation, subject to limited self-insurance exceptions, then in BAQ's submission it must accept that for the reasons identified in the earlier part of these submissions under the heading "Identifying an increase in claims" there will from time to time be changes in the economic circumstances of the State, and of the world, that might give rise to financial difficulties. Historically these cyclical changes have always had varying effects on the scheme. A proportion of injured workers should not have rights removed permanently, and be the

only citizens of Queensland who are subject to such a restrictions, simply because of a cyclical economic downturn.

If WCQ chooses to remain the monopoly insurer for workers compensation in Queensland, then in BAQ's submission it must adopt prudential insurance processes, including appropriate premium rates which provide sufficient premium income to meet risks. To simply adopt, as a rationale for a restriction on the rights of citizens in Queensland to sue a negligent employer, the prospective financial non-viability of the monopoly insurer's scheme, is unjust and discriminatory. It shifts the burden for maintaining the viability of the scheme entirely onto workers and their families.

The potential for injustice arises in different ways. It can be seen from the quote from the AMA guidelines referred to above, that the simple imposition of a WPI is wholly inappropriate to identity the measure of disability a person suffers as a consequence of an injury. WPI is an inappropriate measure of disability as compared to impairment. Use of WPI to impose a threshold on accessibility to common law damages will promote arbitrary discrimination against citizens of Queensland entitled, at law, to recover damages for negligence.

The application of thresholds poses significant difficulties, in BAQ's submission for WCQ. Injustice can arise in unexpected ways when thresholds are in force. The threshold becomes a "gate" through which a claimant must pass before that claimant has an entitlement to common law damages. The "gatekeeper" becomes an external medical

officer, or medical assessment tribunal, who provide an assessment based upon examination of the claimant. Under the present structure of the WCRA there are limited rights to review an assessment. Claimants are therefore left with a limited opportunity to challenge, or review the assessment of WPI which could have significant effect upon their capacity to recover substantial damages. Such a system, in that form, simply does not provide appropriate justice to a significant group of injured workers.

Excluding Workers with O% Whole Person Impairment from Access to Common Law Damages

For all of the reasons set out in the previous section under the heading "Thresholds" BAQ submits that no worker should be prohibited from an entitlement to recover damages.

Anecdotally, BAQ members report that numerous 0% WPI assessed claimants recover substantial damages in circumstances where the disability consequent upon the injury has had significant idiosyncratic issues for the claimant. This underscores the injustice which can be done to injured workers and their families who suffer relatively minor injuries but who, for particular circumstances, suffer a significant loss of capacity to work and provide for their family.

Other measures, including adverse costs orders and the mandatory final offer process provided for under the provisions of the WCRA should satisfactorily cater for lower end injury cases where claimants choose to pursue exorbitant damages.

Apply Civil Liability Act to Common Law Claims

BAQ does not oppose the application of the CLA to WCRA claims.

Prima facie it is just that all injured claimants in Queensland, who recover damages, should have their damages assessed consistently. BAQ points out however that the fettering of a court's discretion imposed by the CLA occasionally can work injustice. Nevertheless BAQ submits that any person, who suffers injury in Queensland and is successful in recovering damages, should have those damages assessed consistently with any other claimant. That WCRA claimants presently have damages assessed in accordance with the common law, whilst a claimant with an identical injury is assessed pursuant to the provisions of the CLA does give rise to a perception of an inequality of justice. Extreme examples can be identified, but are unhelpful when examining the matter as one of proper principle.

A consistency in the application of the CLA could be introduced concurrently with the changes suggested above to promote the early resolution of claims involving multiple parties. The provisions of the Personal Injuries Proceedings Act could also be made applicable to WCRA claims, with common claim forms, common pre-court processes and the like. This should effect costs savings and expedite the resolution of claims.

Summary

In summary BAQ's response to the matters raised in the Discussion Paper can be summarized as follows:

- Any changes to the administration of the WCRA must first be examined in terms of the objects of the WCRA and should only be based upon a proper principled approach to change.
- The matters the subject of the current Discussion Paper should also be examined in the historical context in which they arise.
- Increasing common law claims numbers have occurred for a variety of diverse reasons.
- BAQ agrees that a change from WRI to WPI can be justified, but strongly cautions that WPI not be used as the sole measure of a worker's disability.
- BAQ acknowledges as appropriate any changes to streamline multi- party, principal contractor sub-contractor and labour hire litigation.
- BAQ is not persuaded that an amendment to the definition of "injury" will have a significant effect upon the numbers of common law claims.
- BAQ supports legislative amendment to counter the effect of the decisions in *Bourk v Power Serve Pty Ltd* and *Parry v Woolworths Limited.*
- BAQ supports any legislative intervention which promotes early settlement of claims.
- BAQ supports an amendment to Section 316 of the WCRA to impose upon plaintiffs who lose a case an obligation to pay WCQ's costs.

- BAQ is strongly opposed to the introduction of thresholds
- BAQ is opposed to removal of access to common law damages for workers with a 0% assessment of impairment.
- BAQ does not oppose the application of the Civil Liability Act to WCRA claims.