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Finance and
Administration Committee

The Research Director
Finance and Administration Committee
Parliament House
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Brisbane Qld 4000

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Dear Committee

RE: Operation of Queensland's Workers' Compensation Scheme

I refer to the review of the Queensland workers' compensation scheme to be undertaken by the Parliamentary Finance and Administration Committee which was announced by the Attorney-General on 7th June 2012.

I am proud to be a personal injury Solicitor for some 30 years. I have served for approximately 12 years on various committees of the Queensland Law Society and Law Council of Australia. In particular I served on the Queensland Law Society Torts Reform Task force which worked very co-operatively with Queensland Treasury, Queensland Attorney-General, the AMA, WorkCover, other insurers and stakeholders in the common law system. I have also served as an Associate to a former Chief Justice of Queensland.

Over that time I believe that I have acquired a balanced view regarding the operation of the Queensland Workers' Compensation Scheme and how access to the common law can be of benefit to society.

The Workcover Queensland Scheme has traditionally been healthy and profitable and will continue to be for the reasons outlined in this submission.

2010 Amendments – A drop in common law claims and payments

The 2010 amendments introduced some beneficial changes to liability and quantum provisions as well as claims management to ensure the ongoing viability of the scheme. Early indications are that there has been a significant downward trend in both the number and cost of common law claims. This is no doubt in large part due to the 2010 amendments and my view is that that trend will continue.

However it must be emphasised that the amendments have only recently introduced reforms that have been in place in other schemes for nearly a decade, such as the motor vehicle CTP scheme. Furthermore, the current review has been brought forward. WorkCover Queensland note in their Annual Report 2010-2011:-

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Given the small number of claims that have resolved, it is not possible to identify clear trends or to comment on the impact of these reforms. It is expected that a clearer picture will become available at the end of the 2011-2012 year.

However, of some note is the fact that the overall number of common law claims dropped by 399 (from 4,262 to 3,863) and gross common law payments have also dropped from $554.8M to $514.5M.[1] These figures certainly indicate a downward trend on common law claims and payments and indicates the reforms are having an early impact.

The latest information from WorkCover indicates the scheme is healthy

WorkCover Queensland have also released more up-to-date actuarial figures as at May 2012 which demonstrate the following trends:-

- Queensland has the second lowest premium at $1.43 (lowest being Victoria at $1.29 – but it must be noted Victoria restricts access to common law and does not provide anything like the benefits to injured workers);
- Common law claim costs are stable;
- Return to work rates continue to increase and are now in the vicinity of 97%;
- Both statutory and common law claims frequency continue to decrease;
- Average common law settlements continue to decrease and are the lowest since at least 2006;

Common law remits millions of dollars to government coffers

Of the utmost importance is the fact the current Queensland workers' compensation system currently does not cost the taxpayer a cent. "Tinkering" with the current system, for example excluding workers from common law damages by introducing thresholds, will simply transfer the cost of injuries (ie time lost off work / medical expenses etc) away from negligent employers and onto the public health system and Centrelink etc.

It is important to understand that the common law system in Queensland is unique and different to other Australian states. Firstly, there has been significant tort reform in Queensland over the last decade. Secondly, common law systems remit millions (and perhaps billions) of dollars back to government agencies such as Medicare, Centrelink, public hospitals, WorkCover and Veterans Affairs to name a few. **In doing so the common law system in Queensland relieves the burden on taxpayers who would otherwise be 'flitting the bill' for the consequences of personal injuries.**

Injury victims are not a burden upon the Australian taxpayer because they have received fair and reasonable compensation. Under the common law, the taxpayer is recompensed by the negligent employer thus saving the Australian taxpayer huge amounts of money.

Return to work and workplace health and safety have a significant role to play

I also wish to emphasise that beyond the 2010 reforms, workplace health and safety and return to work programs play an extremely important role in the future viability of the workers' compensation in Queensland. There is opportunity for a more proactive role to be taken by Workplace Health and Safety Queensland with increased emphasis on injury prevention. Additionally, continuation of excellent schemes such as Q-Comp's "Return to Work Assist" also have an extremely important part to play in the ongoing viability of the workers' compensation scheme and keeping common law claims in check.

[1] WorkCover Annual Report 2010/11

Citizens should not have to resort to social welfare

Australians would find it morally repugnant and financially irresponsible to suggest that those injured through the negligence of others ought to become social welfare recipients and a burden on the taxpayer. Such injury victims deserve proper economic loss and other damages tailor made to their circumstances. Furthermore, those injured through the fault of others should not be a burden on the taxpayer.

Australian politicians, both State and Federal, have a duty to ensure that they understand that if common law rights are altered or abolished (for example by introducing a threshold) a huge burden would shift to the taxpayer and injury victims will be left unsatisfied and often a social welfare recipient. They also have a duty not to make careless, reckless and wrong statements that common law is 'out of control'.

The Failure of Threholds

There has been some recent conjecture, mainly emanating from business lobby groups, regarding the introduction of thresholds.

The Government should look at the examples and models of other States where thresholds have been introduced. Thresholds have not contained costs in these schemes and in fact resulted in schemes which are still burdened by massive debt and liability.[2] Why stakeholders continue to press for thresholds when they have been a spectacular failure in other jurisdictions mystifies me.

Furthermore, thresholds will result in un-necessary, massive industrial unrest by employees.

Long-tail schemes are 'pseudo' social security

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 'long tail' schemes which are extremely expensive to administer. The experience in other states have shown that far from being profitable these schemes become more a form of 'pseudo' social security.

Thresholds lead to large administrative costs

One other issue with the introduction of thresholds is that it will lead to very significant increase in the number of appeals to the Medical Assessment Tribunal with workers challenging the percentage of impairment in order to reach an arbitrary threshold. I understand from Q-Comp that the resources of the MAT are currently stretched and there are simply not enough specialist doctors available should there be an increase in appeals to the MAT.

To understand how unjust thresholds 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 of the *Guides* realises that they are an arbitrary administrative tool. Various percentages act more as a broad descriptor of a particular injury.

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[2] 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.

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 decision makers understand the distinction between 'impairment' and 'disability' and 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% 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 taxpayer. Taxpayers 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 and workers' rights and compensation restricted or abolished when thresholds are used.

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[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*

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. Citizens injured in a motor vehicle or other type of incident have the right to common law in Queensland subject to the *Civil Liability Act* 2003 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.

The case against 0% thresholds

At the time of the last review one idea was that of a 0% threshold. 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 the MAT 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 assessed 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…*[4]

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 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.

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

Tort Reform in Queensland Over the Last Decade

Of great importance when considering WorkCover Queensland's current situation is the fact that '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 Review[5] the *Personal Injury Proceedings Act* 2002 and *Civil Liability Act* 2003 were enacted and amendments also made to the *Motor Accident Insurance Act* 1994. 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 the schemes to which they were applied. In particular it introduced a sophisticated scheme regarding general damages for pain and suffering – 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 in 2003 and the motor vehicle scheme is now profitable for insurers whilst maintaining full access to common law for injured citizens.

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.

The ISV system has only recently been introduced to the WorkCover scheme and will significantly contain damages currently recoverable for general damages. The success of the ISV in the motor vehicle scheme speaks for itself, as confirmed in actuarial studies. However, it must be noted the system in the motor vehicle context has been in operation for nearly a decade and it may take a little while for the benefits to the Queensland workers' compensation scheme to become fully apparent. However, all the available data indicates the amendments are having the desired effect.

The 2010 Amendments

The 2010 amendments introduced a number of changes to how claims operate. I have already seen these amendments operating in my own practice to reduced payouts in common law claims.

Further restrictions recently introduced include the cap on damages for future economic loss at three times average earnings. Caps on damages such as gratuitous assistance in workplace matters remain in place.

Previously the *Workplace Health and Safety Act,* by providing a statutory civil right of action, subjected employers to a very high standard and what was seen as 'strict liability'. The

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

legislative changes, by retrospectively abolishing this cause of action, will significantly impact the number of common law claims that can succeed. It signals a return to pure common law / negligence principles where the injured worker has to prove negligence on the part of the employer. Into the future, 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.

Negligence in workplace incidents often involves more complex fact scenarios then for example a standard motor vehicle accident. Removing '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 in applicable cases and has great potential to significantly reduce damages.

The legislative changes have also increased the obligations on third parties to fully participate in the pre-proceedings process and will assist WorkCover to 'spread the damage' when there are other liable parties involved. 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.

Lastly, allowing courts to award costs against plaintiffs whose claims are dismissed remedies a drafting 'glitch' in the legislative scheme. Closing this loop-hole will be of assistance in acting as a strong disincentive for those wishing to bring frivolous claims.

I again reiterate that whilst these changes are significant it may take some time for the benefits to the scheme to fully 'filter through'. However, I emphasise that all the current data is demonstrating the amendments are already taking early effect.

Sensible 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 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.

Emphasis on injury prevention and workplace health and safety

Common sense dictates that the best way of reducing workers' compensation claims across the board (both statutory and common law) is to reduce the number of injuries occurring. Serious injury rates in Queensland have been improving but are still higher than in NSW and Victoria.[6]

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[6] In 2009 / 10 Queensland serious injury rate was 13.8 injuries per 1000 workers, compared to 12.2 in New South Wales and 8.1 in Victoria, source Information Paper to the review, available at http://www.parliament.qld.gov.au/documents/committees/FAC/2012/OpQldWorkersComp/ip-20120710-JAG.pdf

Unlike the situation in other states (such as Victoria) workplace health and safety in Queensland has been largely separated from workers compensation. Furthermore, traditionally workplace health and safety in Queensland has tended to take a reactive role; often only investigating and prosecuting an employer after a serious injury has occurred. This is opposed to the more proactive role in other states that place higher emphasis on the promotion of safe work practices and injury prevention.

If the Queensland Government want a holistic approach and are truly serious about reducing the number of workers compensation claims then they should aim to reduce the number of injuries occurring by directing further resources into workplace health and safety.

Return to Work

Until recently another area where the Queensland workers' compensation scheme has been found lacking is with respect to return to work programs, until quite recently this task instead falling to other agencies such as Centrelink.

However, I refer to the recent excellent work done by Q-Comp and the Queensland success story of the Q-Comp program "Return to Work Assist".

"Return to Work Assist" began in July 2008 but it really seems to have been making significant in roads with respect to return to work outcomes in 2011 and 2012. This is evidenced by the current excellent combined return to work rate of 98.6% of 2011/12.[7]

This extremely high return to work rate will have the effect of not only continuing to reduce the number of common law claims but also reduce the awards of damages in common law claims under heads of damage such as past and future economic loss.

It can not be emphasised enough that maintaining such excellent return to work rates is imperative to reducing the cost to the scheme in years to come.

Conclusion

Thresholds are not the answer. They represent an arbitrary and unjust 'sledgehammer' approach and are not cost effective in any event. 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 persevering with the 2010 amendments, which cap common law damages while allowing access to common law, is the best way to proceed. No one stakeholder can have any major objections to it. The 2010 amendments are fair, contain damages and claims as indicated in all the available data, and represent a shift towards uniformity across all schemes.

In the motor vehicle scheme and public liability scheme damages were capped almost a decade 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 and not introduced until 2010.

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[7] Year-to-date figure, Q-Comp Queensland workers' compensation scheme monitoring May 2012, page 9

It should be noted that WorkCover Queensland premiums continue to be one of the lowest in Australia. The WorkCover scheme is again on its way to being profitable as confirmed by the latest actuarial data. Furthermore, this can be done *without* introducing a draconian threshold which will not solve the problem. It should not be underestimated that introduction of thresholds will surely cause widespread industrial unrest and chaos. Peaceful and other sensible solutions are available.

In time it will become clearer that the 2010 amendments will serve to contain common law damages but also enable claims to proceed in a more cost and time efficient manner. Common law damages for workers with worthy claims will be maintained while frivolous claims are 'weeded out'. Downwards trends in claim costs and frequency are already clearly apparent from the available data. However I would suggest it may take some more time for the impact of the 2010 amendments to become fully realised.

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

Yours faithfully,

KM SPLATT & ASSOCIATES

Per:-

Kerry Splatt