Parliamentary Committees

Inquiry into the Operation of Queensland's Workers' Compensation Scheme

Report No. 28
Finance and Administration Committee
May 2013

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Staff	Ms Deborah Jeffrey, Research Director
	Dr Maggie Lilith, Principal Research Officer
	Mrs Marilyn Freeman, Executive Assistant (to 4 January 2013)
	Ms Lynette Whelan, Executive Assistant
Contact details	Finance and Administration Committee Parliament House George Street Brisbane Qld 4000
Telephone	+61 7 3406 7576
Fax	+61 7 3406 7500
Email	fac@parliament.qld.gov.au
Web	www.parliament.qld.gov.au/fac

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Abbreviations

ABN	Australian Business Number
ACL	Australian Consumer Law (Cth)
AMA	American Medical Association
AMMA	Australian Mines and Metal Association
ANZSIC	Australian and New Zealand Standard Industry Classification
APRIA	Asia Pacific Risk and Insurance Association
ARPA	Australian Rehabilitation Provider's Association (Queensland)
ASIEQ	Association of Self-Insured Employers Queensland
ATO	Australian Taxation Office
BSA	Building Services Authority
CCF	Civil Contractors Federation
CCIQ	Chamber of Commerce and Industry Queensland
CIAQ	Crane Industry Association of Queensland
DIDO	Drive-In-Drive-Out
DJAG	Department of Justice and Attorney-General
ETU	Electrical Trades Union
FAC	Finance and Administration Committee
FIFO	Fly-In-Fly-Out
FNQLA	Far North Queensland Lawyers Association
FTE	Full-time equivalent
HIA	Housing Industry Association
IEUA-QNT	Independent Education Union of Australia, Queensland and Northern territory Branch
IPaM	Injury Prevention and Management program
ISV	Injury scale values
KPI	Key Performance Indicator
LACSC	Legal Affairs and Community Safety Committee
LGAQ	Local Government Association Queensland
MAC	Motor Accidents Compensation (NT)

MAIC	Motor Accident Insurance Commission (Qld)
MVA	Motor Vehicle Accident Compensation Scheme (NSW)
NRA	National Retail Association Limited
OSR	Office of State Revenue
PAYE	Pay as you earn
PIPA	*Personal Injuries Proceedings Act 2002*
PMSA	Presbyterian and Methodist Schools Association
PPI	Psychological or psychiatric injuries
PPS	Prescribed Payments System
QCU	Queensland Council of Unions
QFF	Queensland Farmers Federation
QHA	Queensland Hotels Association
QIC	Queensland Investment Corporation
QIRC	Queensland Industrial Relations Commission
QLS	Queensland Law Society
QNU	Queensland Nurses' Union
QOTE	Queensland ordinary time earnings
QTA	Queensland Trucking Association
QTT	Queensland Treasury and Trade
QTU	Queensland Teachers' Union
RNP	Regional Network Program
RTW	Return to work
RTWA	Return to work assist
SGIO	State Government Insurance Office
TWU	Transport Workers' Union
WCBQ	Workers' Compensation Board of Queensland
WCRA	*Workers' Compensation and Rehabilitation Act 2003*
WHO	World Health Organization
WHSQ	Workplace Health and Safety Queensland

Glossary

CTP	Compulsory Third Party Insurance which is a component of motor vehicle registration. The CTP insurance covers insurance for a personal injury resulting from a car accident.
EBR	Experience Based Rating (in Queensland) uses previous claims experience and wage information to determine the likely cost of claims for the next year for premium calculations.
ER	Experience Rating is a method that compares an employer's own claims experience to that of their industry for premium calculation purposes.
IBNR	An injury which has been incurred but the claim has not yet been reported. Injured workers have up to six months to lodge a statutory claim and up to three years to lodge a common law claim.
MAT	Medical Assessment Tribunals are independent panels of specialist doctors who on referral from insurers provide expert medical decision about injury and impairment sustained by the worker.
WPI	Whole Person Impairment is based on the American Medical Association guides for permanent impairment. The WPI score is calculated as the part of the body to a measure of the impairment of the whole person.
WRI	Work Related Impairment is the method used solely in Queensland and is based on the injured worker's WPI.

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Chair's Foreword

This report presents a summary of the Committee's examination of the Operation of Queensland's Workers' Compensation Scheme. The Parliament tasked the Committee with inquiring into and reporting on the scheme.

In particular the Committee is required to consider:

- the performance of the scheme in meeting its objectives under section 5 of the Act;
- how the Queensland Workers' Compensation Scheme compares to the scheme arrangements in other Australian jurisdictions;
- WorkCover's current and future financial position and its impact on the Queensland economy, the State's competitiveness and employment growth;
- whether the reforms implemented in 2010 have addressed the growth in common law claims and claims cost that was evidenced in the scheme from 2007-08;
- whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment;
- in conducting the inquiry, the Committee should also consider and report on implementation of the recommendations of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme.

The Attorney-General and Minister for Justice also requested that the Committee consider the definition of 'worker' as part of its inquiry.

The Act requires the Minister to ensure a review of the operation of the Workers' Compensation Scheme is completed at least once in every 5 year period. The amendment required that the first review be completed no later than 30 June 2013. This referral satisfies that requirement.

The Committee consulted extensively on the terms of reference. It received 246 submissions, held public forums in Mackay and Cairns, held 14 public hearings in Brisbane, including five in-camera hearings, and held three public departmental briefings.

Throughout the inquiry, the Committee heard allegations that 'the government was going to do this' or 'the government was going to do that' with regard to the Workers' Compensation Scheme. I can assure everyone that it was a completely open and transparent process that the Committee went through in order to come to what we consider to be the right conclusions and recommendations for the Parliament to consider. Every recommendation was the subject of robust debate. The Committee understands that not everyone will be happy with the recommendations. The Committee considers that the recommendations achieve the right balance between workers and employers and protecting the viability of the scheme.

The Committee wishes to thank those that took the time to provide submissions and meet with the Committee and provide additional information during the course of this inquiry. I also wish to thank the departmental officers for their cooperation in providing information to the Committee on a timely basis throughout the inquiry process.

Finally, I would like to thank the other Members of the Committee, including the former Members, for their valuable contribution and their continuing hard work in undertaking the work of the Committee.

Michael Crandon MP
Chair

Executive summary

On 7 June 2012 the Legislative Assembly agreed to a motion that the Finance and Administration Committee inquire into and report on the operation of Queensland's Workers' Compensation Scheme. The Committee was initially required to report to the Legislative Assembly by 28 February 2013. However, the Committee requested, and was granted, an extension to 23 May 2013 in order to enable the Committee to explore the information generated by the inquiry to the fullest extent possible.

In particular the Committee is required to consider:

- the performance of the scheme in meeting its objectives under section 5 of the Act;
- how the Queensland Workers' Compensation Scheme compares to the scheme arrangements in other Australian jurisdictions;
- WorkCover's current and future financial position and its impact on the Queensland economy, the State's competitiveness and employment growth;
- whether the reforms implemented in 2010 have addressed the growth in common law claims and claims cost that was evidenced in the scheme from 2007-08;
- whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment;
- in conducting the inquiry, the Committee should also consider and report on implementation of the recommendations of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme.

In addition, the Attorney-General wrote to the Committee requesting that the Committee consider the definition of 'worker' as part of its inquiry.

Is the performance of the scheme meeting its objectives under section 5 of the Act?

Definition of Worker

The Committee has considered and consulted extensively on the issue of the definition of worker contained within the Act. There are numerous views of the 'best' definition based on individual viewpoints.

The Attorney-General and Minister for Justice introduced *the Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013*. The Bill includes clauses amending the *Workers' Compensation and Rehabilitation Act 2003*. The Attorney-General stated when he introduced the Bill that the amendments clarify the definition of worker to assist employers identify who must be included in their workers' compensation policy.

The Committee would have recommended that no changes be made to the definition contained in section 11. The Committee's preference would be to see better use of Schedule 2 rather than change the definition of worker.

The Committee agreed that the definition, as it currently stands, has been tested at law and fundamentally works. Any change to that definition will impact on both employers and workers. There may also be unintended imposts on the scheme as any new definitions are tested in the courts.

Of major concern to the Committee is ensuring that the principle of universal coverage is protected and vulnerable workers are not unknowingly excluded. The Committee considers that there are several groups of workers who are in a disproportionate position of power when it comes to negotiating their entitlements. These groups include those whose employment status is unclear, the poorly educated and those from culturally and linguistically diverse backgrounds.

The Committee considers that an education, awareness and compliance campaign be undertaken by the Department to assist both employers and workers in understanding their rights, obligations and responsibilities with regard to workers compensation coverage.

Definition of injury

The Committee has considered the arguments about whether the definition of injury should be 'the' or 'a' major significant contributing factor and has concluded that the current definition is appropriate and should remain unchanged with the exception of psychological injuries. Psychological injuries are considered separately in section 4.4 – 4.5 of this report. The majority of the arguments centred around reducing the cost of premiums to employers by limiting the definition and, by default, the number of claims. The Committee considers that there are other methods of mitigating premiums without unjustly excluding injured workers.

How the Queensland Workers' Compensation Scheme compares to the scheme arrangements in other Australian jurisdictions

Journey claims

The Committee considered the various arguments for and against the inclusion of journey claims within the scheme. The Committee also considered the proposals to modify the current arrangements and concluded that these could be discriminatory and would ultimately be unworkable on a practical basis.

The Committee noted that the net cost of journey claims is comparatively small, representing only $0.05 of the average premium rate for all employers. Therefore the removal of journey claims would not result in a significant saving on premiums whilst having a significant impact on workers.

Psychological injury claims

The Committee was concerned that the area of psychological claims is the fastest growing category of claims and may place increasing pressure on the workers' compensation fund in the future. The Committee acknowledges that the growth in numbers is also a reflection of greater awareness of mental health issues in the broader community.

The Committee recognises that the legislation as it currently stands already treats traumatic event psychological injuries which would not come under the 'reasonable management action' test differently. However, the Committee considers that this needs to be defined more clearly in the legislation.

The Committee recommends that the legislation be amended to recognise the two types of psychological injury.

The Committee acknowledges that there would be those who would argue that the existing definition recognises the former category, however, the Committee has heard evidence that the 'reasonable management action' has been used to disqualify legitimate claims.

Currently, psychological injuries are included in the definition of injury and the exceptions that apply to these types of injuries are included in section 32(5). The Committee considers that it would be better if psychological injuries were included under separate provisions within the legislation.

The Committee recommends that the current exclusions for reasonable management action be removed and include specific exceptions for normal work place practices.

In order to mitigate the effect of the removal of this exemption from the legislation, the Committee recommends the definition be amended to be 'the major significant contributing factor' rather than the current 'a major significant contributing factor' for this type of claim.

The Committee also recognised that work place bullying is an issue in some Queensland workplaces. Incidents of work place bullying have the potential to impact on the Workers' Compensation Scheme through higher psychological claim rates. The *Work Health and Safety Act 2011* allow for fines and imprisonment of work place bullies. The Committee considers that the Attorney-General should initiate a review of that Act with a view to considering whether recompense to victims of workplace bullying could be made through mechanisms in that Act rather than through the Workers' Compensation Scheme.

Latent onset claims

Given the nature of latent onset diseases and the transience of populations in Australia, the Committee considers that a consistent national approach to these sorts of diseases is the most appropriate approach.

The Department advised that Safe Work Australia is considering this issue at a national level. In view of this, the Committee considers that the current provisions and management by WorkCover and Q-COMP of latent onset should remain unchanged.

The Committee encourages the Attorney-General to facilitate progression of this topic.

WorkCover's current and future financial position and its impact on the Queensland economy, the State's competitiveness and employment growth

Fraudulent and/or false claims

The Committee encourages WorkCover to continue with the policy of holding firm on mandatory final offers and its defence of matters. Anecdotal evidence suggests that this will influence the behaviour of claimants to accept early offers and therefore reduce the length of litigation proceedings.

The Committee considers that Q-COMP's suggestion that the legislation be amended to refer all allegations of fraud-related offences relating to WorkCover to Q-COMP for investigation and prosecution, consistent with the management of self-insurer fraud referrals is reasonable and should be adopted. WorkCover needs to work collegially with employers and workers and therefore should not be placed in the position where there could be any perception of bias.

Medical Assessment Tribunal (MAT)

The Committee is satisfied that the MAT is the most reasonable solution for independent medical assessment of injuries. The MAT is made up of experienced professionals who are in a position to provide their expertise.

The Committee notes that a specialty panel for psychological or psychiatric injuries is not included in the list of specialty medical assessment tribunals included under section 118A of the Regulation. Whilst the Committee recognises that psychologists and psychiatrists are included on the Tribunal when needed, it considers it appropriate that a specialty Medical Assessment Tribunal be established to include psychiatric or psychological medical specialists when considering psychological injury claims.

Return to work programs

The Committee considers that injured workers who participate in these programs are more likely to successfully return to work. The main criticisms that the Committee heard about these programs was with regard to the ability of the employer to find suitable duties for injured workers returning to work.

Whether the reforms implemented in 2010 have addressed the growth in common law claims and claims cost that was evidenced in the scheme from 2007-08

Impairment thresholds

The Committee believes that the extent of the 2010 amendments in addressing the increase in common law claims is yet to be fully realised as common law claims can be lodged up to three years from date of injury. As such, the Committee believes that there should be no changes to the current system.

The Committee recognises that imposing thresholds on accessing common law rights would improperly remove rights from one group of citizens that are available to other citizens. Imposing thresholds on WPI would break the nexus between workers' compensation and the ability of injured workers to perform their pre-injury employment. The Committee recommends retention of the existing provisions relating to access to common law.

'No-win-no-fee' legal fee arrangements

The Committee considers that 'no-win-no-fee' should simply mean 'no-win-no-fee'. This means that there should be zero out of pocket expenses for the claimant.

Of further concern to the Committee is the rule arrangements commonly known as the '50/50 rule' that are meant to limit the amount that is able to be charged for litigation. Whilst this is meant to be the upper limit of professional fees (including GST) that a law firm may charge, the Committee is concerned that the '50/50 rule' has become a target for some lawyers who may be earning super profits from these types of claims.

The Committee is interested in curtailing the super profits that are reportedly being derived from the 'no-win-no-fee' arrangements and the '50/50 rule' which provide the incentive to push the boundaries with advertising.

Whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment

The Committee considers that existing self-insurance arrangements are working reasonably effectively and therefore the Committee considered that little could be gained from making major changes.

The Committee considers that there should be some flexibility for existing self-insurers, who may fall below the required number of employees, provided they have a proven track record as a self-insurer and with continued financial viability.

Implementation of the recommendations of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme

The Committee notes the recommendations in the 'Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme' and supports the themes and outcomes contained in the report. The Committee is satisfied that the recommendations, where accepted, have either been completed or are progressing. The Committee endorses the continued implementation of the recommendations.

Recommendations

Recommendation 1 **37**

The Committee recommends that the definition of worker contained in section 11 remain unchanged and amendments are made to Schedule 2 to strengthen who is or is not considered to be a worker.

Recommendation 2 **37**

The Committee recommends that Schedule 2 be amended to include crews of fishing vessels, who are paid a percentage of catch as remuneration, as workers.

Recommendation 3 **37**

The Committee recommends that the Department undertake an extensive awareness education and compliance campaign to assist employers and workers understand their rights, obligations and responsibilities with regard to workers compensation coverage.

Recommendation 4 **37**

The Committee recommends that the Department prepare for and distribute guidance material to assessors to ensure that decisions are made in a clear and consistent manner.

Recommendation 5 **37**

The Committee recommends that the Department monitor the WorkCover policy for Queensland jockeys to ensure that it continues to include secondary income for jockeys and apprentice jockeys in the future.

Recommendation 6 **45**

The Committee recommends that the current definition of injury be retained in its current form with the exception of psychological injuries which are addressed separately in section 4.4.

Recommendation 7 **45**

The Committee recommends that the definition of injury be considered at the next review subsequent to the roll out of 'DisabilityCare Australia' formerly known as the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS).

Recommendation 8 **64**

The Committee recommends that the current provisions relating to journey claims be retained.

Recommendation 9 **64**

The Committee recommends that education programs incorporate journey claims as a topic when informing employers about workers' compensation rights and responsibilities.

Recommendation 10 **86**

The Committee recommends that psychological injuries be included under separate provisions within the legislation.

Recommendation 11 **86**

The Committee recommends that the definition of psychological injuries be amended to include the two types of psychological injury identified as category A and B above in section 4.5.

Recommendation 12 **86**

The Committee recommends that the current exclusions for reasonable management action be removed and be replaced with specific exceptions for normal work place practices such as:
a) where action is taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker provided that action is taken in a reasonable way;
b) where a decision is made not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment provided the decision is made in a reasonable way;
c) action by the Authority or an insurer in connection with the worker's application for compensation.
AND the definition be amended to be 'the major significant contributing factor' rather than the current 'a major significant contributing factor' for Category B type psychological injury claims.

Recommendation 13 **86**

The Committee recommends that the Queensland Mental Health Commission be directed to undertake a research study regarding the impact of the legislative changes if they are adopted and that this study must directly inform the next review of the Workers' Compensation Act.

Recommendation 14 **87**

The Committee recommends that the Attorney-General should initiate a review of the *Work Health and Safety Act 2011* with a view to considering whether recompense to victims of workplace bullying could be made through mechanisms in that Act rather than through the Workers' Compensation Scheme.

Recommendation 15 **87**

The Committee recommends that WorkCover review its psychological claims assessment processes, including a review of the reasons claims are set aside or varied upon review, with a view to reducing this ratio.

Recommendation 16 **87**

The Committee recommends that WorkCover undertake a review of its psychological claims management to include the following:
- ensure that there is provision for flexibility for claimants to provide necessary information;
- inclusion of a specialist unit with suitably qualified assessors;
- incorporation of a mentoring style approach to psychological claims management to help reduce anxiety levels for claimants;
- incorporation of mental health and wellbeing into education and awareness processes; and
- incorporation of consideration and analysis of employer claims history into claims process.

Recommendation 17 **96**

The Committee recommends that the Attorney-General and Minister for Justice facilitate the progression of a consistent national approach to latent onset claims.

Recommendation 18 **114**

The Committee recommends that provisions be included in the Act to enable the Minister to grant premium relief in certain circumstances.

Recommendation 19 **114**

The Committee recommends that the WorkCover/Q-COMP undertake an examination of its industry rate groupings with a view to ensuring that they more accurately reflect current industry size and risk exposure.

Recommendation 20 **114**

The Committee recommends that the Department investigate options to enable them to provide employers with a self-audit tool so they can assess whether they are complying with the requirements of the Act.

Recommendation 21 **120**

The Committee recommends that the Department undertake a review of its processes to ensure that decisions, including reasons, are communicated to all parties in a clear, concise and a timely manner.

Recommendation 22 **120**

The Committee recommends that the legislation be amended to refer all allegations of fraud-related offences relating to WorkCover to Q-COMP for investigation and, if necessary, prosecution, consistent with the management of self-insurer fraud referrals.

Recommendation 23 **125**

The Committee recommends that a psychological specialty medical assessment tribunal be included on the list of specialty medical assessment tribunals under section 118A of *Workers' Compensation and Rehabilitation Regulation 2003.*

Recommendation 24 **138**

The Committee recommends that the legislation be amended to include a requirement that employers must have a RRTWC where a statutory claims totalling 15 or more work days lost in any year and wages in Queensland for the preceding year totalling $2.146 million or more.

Recommendation 25 **138**

The Committee recommends that the Department implement an accreditation system for RRTWC.

Recommendation 26 **138**

The Committee recommends that the legislation be amended to make it mandatory for insurers to refer injured workers to an accredited return to work program if they are making a common law claim for future economic loss on the basis that they are unemployed except where the worker can demonstrate they are unable to participate in a return to work program.

Recommendation 27 **166**

The Committee recommends that the existing provisions relating to access to common law be retained.

Recommendation 28 **175**

The Committee recommends that the Attorney-General and Minister for Justice investigate the issues of 'no-win-no-fee' arrangements and the '50/50 rule' with a view to curtailing the speculative nature of some claims.

1 Introduction

1.1 Recommendations in this report

The recommendations in this report are addressed to the Attorney-General and Minister for Justice as the responsible minister.[1] Where recommendations are addressed to the 'Department' this includes the Department of Justice and Attorney-General (DJAG), the Workers' Compensation Regulation Authority (Q-COMP) and WorkCover Queensland (WorkCover).

1.2 Role of the Committee

The Finance and Administration Committee (the Committee) is a portfolio committee established by the *Parliament of Queensland Act 2001* and the Standing Orders of the Legislative Assembly on 18 May 2012.[2] The Committee's primary areas of responsibility are:

- Premier and Cabinet; and
- Treasury and Trade.

Section 92(2) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is to also deal with an issue referred to it by the Assembly or under another Act, whether or not the issue is within its portfolio area.

According to section 92(3) of the *Parliament of Queensland Act 2001*, a committee may deal with a matter under this section by -

(a) considering the matter; and

(b) reporting on the matter, and making recommendations about it, to the Assembly.

1.3 Referral

On 7 June 2012 the Legislative Assembly agreed to a motion that the Finance and Administration Committee inquire into and report on the operation of Queensland's Workers' Compensation Scheme. The Committee was initially required to report to the Legislative Assembly by 28 February 2013. However, the Committee requested, and was granted, an extension to 23 May 2013 in order to enable the Committee to explore the information generated by the inquiry to the fullest extent possible.

In particular the Committee is required to consider:

- the performance of the scheme in meeting its objectives under section 5 of the Act;
- how the Queensland Workers' Compensation Scheme compares to the scheme arrangements in other Australian jurisdictions;
- WorkCover's current and future financial position and its impact on the Queensland economy, the State's competitiveness and employment growth;
- whether the reforms implemented in 2010 have addressed the growth in common law claims and claims cost that was evidenced in the scheme from 2007-08;
- whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment;

[1] *Parliament of Queensland Act 2001*, s107

[2] *Parliament of Queensland Act 2001*, s88 and Standing Order 194

- in conducting the inquiry, the Committee should also consider and report on implementation of the recommendations of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme.

On 24 July 2012 and 1 August 2012, the Attorney-General wrote to the Committee requesting that the Committee consider the definition of 'worker' as part of its inquiry.

1.4 Reason for referral

In 2011, the *Work Health and Safety Bill 2011* was introduced by the then Minister for Education and Industrial Relations, Hon Cameron Dick MP. The Bill amended the *Workers' Compensation and Rehabilitation Act 2003* to require the Minister to ensure a review of the operation of the Workers' Compensation Scheme is completed at least once in every 5 year period. The amendment required that the first review be completed no later than 30 June 2013.

The Minister stated in his introductory speech at the time that the amendments:

> *…implement a recommendation of the Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme to mandate a review of the Workers' Compensation Scheme every five years.* [3]

1.5 Conduct of the inquiry

Subsequent to receiving the referral, the Committee resolved to call for public submissions. The initial closing date for submissions was Friday 3 August 2012. However due to a number of requests for additional time, this was extended to Monday 3 September 2012. The Committee also sought additional/supplementary submissions subsequent to the extension of time being granted. In total, the Committee received 246 submissions including a number of late and supplementary submissions. A list of those who made submissions is contained in Appendix A. Copies of the submissions, with the exception of confidential submissions, have been published on the Committee's webpage and are available from the committee secretariat.

On Wednesday 11 July 2012, the Committee held a public departmental briefing with officers from DJAG, Q-COMP and WorkCover to receive information on various aspects of the referral. In addition to the oral briefing, the Department provided a detailed written briefing/information paper. A list of participants at the departmental briefings is contained in Appendix B. A copy of the information paper and the transcript from the briefing has been published on the Committee's webpage and are available from the committee secretariat.

On Wednesday 22 August 2012, the Committee had a private briefing from officers from WorkCover regarding how WorkCover premiums are calculated.

The Committee agreed to hold public forums in Mackay and Cairns to hear from regional stakeholders prior to submissions closing. The Committee held a public forum in Mackay on Monday 27 August 2012 and in Cairns on Tuesday 28 August 2012. A list of participants at the forums is contained in Appendix C. Copies of the transcripts from these forums have been published on the Committee's webpage and are available from the committee secretariat.

The Committee held public hearings on Wednesday 31 October 2012, Wednesday 14 November 2012 and Friday 16 November 2012 to hear further from those who provided submissions. A list of witnesses at the hearings is contained in Appendix D. Copies of the transcripts from these hearings have been published on the Committee's webpage and are available from the committee secretariat.

[3] Queensland Legislative Assembly, Hon CR Dick MP, Minister for Education and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 10 May 2011: 1283

The Committee also held five short in-camera hearings on Friday 16 November 2012 with submitters who felt that they were unable to participate in the public hearings for a variety of reasons.

The Committee also agreed to accept supplementary submissions/material subsequent to the hearings. This material included additional comments that submitters and witnesses wished to add to their submission and/or testimony or responses to issues that have been raised at the hearings.

The Committee was invited to attend Q-COMP and WorkCover's fifth joint actuary presentation on Wednesday 21 November 2012. The Chair and Principal Research Officer attended on behalf of the Committee. The Committee sought additional information regarding the data presented subsequent to this seminar.

On Wednesday 28 November 2012, the Committee held a further public departmental briefing with officers from DJAG, Q-COMP and WorkCover to further examine the issues raised in the submissions and at the hearings. Subsequent to this departmental briefing the Committee sought additional written information from the Department. A copy of the written responses and the transcript from the briefing has been published on the Committee's webpage and are available from the committee secretariat.

The Committee also had a private briefing with Hickey Garrett, Legal Costs Consultants, regarding the calculation of legal fees on Wednesday 28 November 2012.

Q-COMP introduced their 'red tape reduction' proposal at the departmental briefing on the 28 November 2012. The Committee sought further specific details on the proposal from Q-COMP and the Department. The Committee also provided submitters with an opportunity to comment on this proposal and any additional information they felt would assist the Committee in its deliberations. The Committee held an additional public departmental briefing with Q-COMP on Wednesday 20 March 2013 to clarify some of the details in the proposal.

2 Background of Queensland's Workers' Compensation Scheme

2.1 History

Historically, low premium rates for employers based on low entitlements for injured workers have been a main feature of Queensland's Workers' Compensation Schemes. This was predominantly because tight limits were imposed on the total amount of statutory payments made to injured workers.[4]

Queensland has had some form of Workers' Compensation Scheme since 1886 when the *Employers' Liability Act of 1886* was enacted.[5] This Act permitted the recovery of common law damages in selected instances. The Act required employers to take out insurance to compensate workers who had sustained injuries at their workplace. Underpinning this obligation was the notion that such insurance would also perform a preventative function via the potential economic benefit of lowered premiums which would result if no claims were made.[6]

Queensland's first workers' compensation legislation was the *Workers' Compensation Act 1905*.[7] The Act placed financial obligations on employers to insure their workers against injuries suffered in the workplace. The Act prevented claims for an injury which required less than two weeks absence from work, however, this was amended in 1909 to shorten the time period to three days. The focus of this legislation was compensatory in nature and included no significant mention of preventative measures.[8]

With the election of the Ryan Labor government in 1915 on a platform that included reform of workers' compensation and the creation of state monopolies, legislation was introduced that changed the emphasis to an extensive, no-fault system which covered a majority of workers. The definition of employee was expanded which increased the coverage to include workers who had been refused coverage under previous Acts. The *Queensland Workers' Compensation Act 1916* repealed the former legislation however the focus remained on compensatory provisions. The Act introduced a scale for rates of compensation payable which allocated an amount payable according to the nature of the injury. Access to common law remedies was retained.[9]

Whilst both New Zealand and Victoria, on which the legislation was based, had previously introduced state-run workers' compensation departments, Queensland was the first to introduce a state-monopoly workers' compensation insurance department.[10]

The 1916 legislation became the foundation for the current legislation by establishing the following major precedents:

- Insurance became mandatory for employers (with the exception of government departments) and extended coverage from manual workers to practically all workers in the state;

[4] Purse K, 2011, 'Winding back workers' compensation entitlements in Australia', *Australian Journal of Labour Law,* Vol. 24, No. 3, (December): 238-251

[5] Q-COMP, Scheme History, http://www.qcomp.com.au/about-us/about-workers'-compensation/scheme-history.aspx [8 February 2013]

[6] Cowan P, 1997, 'From Exploitation to Innovation: the Development of Workers' Compensation Legislation in Queensland', *Labour History*, Australian Society for the Study of Labour History Inc. No 73 (November): 94

[7] Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, March 2011: 13

[8] Cowan P, 1997 'From Exploitation to Innovation: the Development of Workers' Compensation Legislation in Queensland', *Labour History*, Australian Society for the Study of Labour History Inc. No 73 (November): 99

[9] Cowan P, 1997 'From Exploitation to Innovation: the Development of Workers' Compensation Legislation in Queensland', *Labour History*, Australian Society for the Study of Labour History Inc. No 73 (November): 100

[10] Cowan P, 1997 'From Exploitation to Innovation: the Development of Workers' Compensation Legislation in Queensland', *Labour History*, Australian Society for the Study of Labour History Inc. No 73 (November): 101

- A monopoly on workers' compensation insurance was granted to the State Accident Insurance Office (later known as State Government Insurance Office (SGIO)) based on the principle that workers' compensation, being an essentially social service, should be administered by a single authority; and
- It provided for the inclusion of journey claims.[11]

A number of amendments were made between the 1916 legislation and 1990 as a result of legislative changes, judicial interpretation and administrative decisions. These changes included:

- 1930 – introduction of mandatory medical reports for compensation claims
- 1944 – term 'accident' was repealed and the definition of 'injury' inserted allowing compensation to a worker who had not met with a definite accident but was suffering from a condition brought about by their employment
- 1955 – first medical board established
- 1963 – merit bonus scheme introduced to provide accident and claim prevention incentives for employers and the extension of employers' insurance policies to cover against common law liability made compulsory
- 1972 – introduction of full award wages for injured workers during first 26 weeks of disablement
- 1973 – specific provision made for rehabilitation of injured workers
- 1978 – creation of a separate workers' compensation organisation, overseen by the Workers' Compensation Board of Queensland (WCBQ), with responsibility for the administration and control of workers' compensation from the Treasurer and SGIO to the Minister for Labour Relations.[12]

By the late 1980s, the legislation had become outdated and unwieldy and a review resulted in the introduction of the *Workers' Compensation Act 1990*. The structure of the scheme was retained, as was the basic philosophy to provide fairness and equity for employers paying premiums and for employees with work related injuries.[13]

Key features of the 1990 Act included increased and additional benefits for workers, rehabilitation initiatives, increased employer and worker representation on the WCBQ, increased penalties for fraud and failure of employers to insure and streamlined administrative arrangements.[14]

Between 1990 and 1996 further amendments were made to the Act including amending the definition of injury where employment was to be 'a significant contributing factor'; enhancement of the merit/bonus system with the introduction of penalties for adverse claims experience and providing greater financial incentives for employers to reduce the numbers and costs of workplace injuries; introduction of employer excess; introduction of surcharges on premiums; introduction of irrevocable election for common law; changes to statutory entitlements; and a comprehensive table of injuries including whole person impairment scales.

In 1995, Queensland public sector agencies were moved into a premium based system and the WCBQ took on the defence of common law claims on behalf of all government agencies.[15]

[11] Q-Comp, Scheme History, http://www.qcomp.com.au/about-us/about-workers'-compensation/scheme-history.aspx [8 February 2013]
[12] Q-Comp, Scheme History, http://www.qcomp.com.au/about-us/about-workers'-compensation/scheme-history.aspx [8 February 2013]
[13] Q-Comp, Scheme History, http://www.qcomp.com.au/about-us/about-workers'-compensation/scheme-history.aspx [8 February 2013]
[14] Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, March 2011: 13
[15] Q-Comp, Scheme History, http://www.qcomp.com.au/about-us/about-workers'-compensation/scheme-history.aspx [8 February 2013]

The government announced the appointment of Mr Jim Kennedy to undertake an Inquiry into Workers' Compensation and Related Matters in Queensland in 1996. This review was prompted by the deteriorating financial position of the fund. The Kennedy Report, tabled in Parliament in July 1996, made 79 recommendations.[16] The recommendations formed an integrated package designed to return the Workers' Compensation Scheme to full funding and provided for more stringent step-down arrangements and restricted journey claim injuries.[17]

The Kennedy Report had recommended the abolition of journey claims and a threshold for access to damages at common law where the extent of work related impairment (WRI) is assessed as entitling the worker to lump sum compensation of more than 15 per cent of the statutory maximum for the particular injury.[18] The government had initially agreed to implement all 79 recommendations, however, due to the make-up of the Parliament at the time, and indications that these recommendations would not be supported during the debate, the provisions were removed prior to the legislation's introduction to the Parliament.

The impetus for these recommendations was the sharp rise in claims for damages by injured workers under common law over the preceding five years which placed pressure on the Workers' Compensation Fund and played a major role, but not the only role, in bringing it to an unfunded position.[19]

The remaining 73 recommendations from the report formed the major elements of the *WorkCover Queensland Act 1996,* with a further two recommendations implemented at a later date. The majority of provisions commenced on 1 February 1997 and the remaining provisions commenced on 1 July 1997. Major elements included:

- establishment of a commercially oriented WorkCover Queensland Board;
- introduction of self-insurance and self-rating;
- establishment of the experience based rating (EBR) system of premium calculation;
- changes to definition of worker (excluded non pay-as-you-earn (PAYE) employees, working directors, and trustees) and injury (employment to be 'the major contributing factor'), journey claims, and industrial deafness;
- pre-proceeding process for common law claims to promote early settlement of claims and minimise legal costs; and
- strengthening employer and worker obligations for workplace rehabilitation and safety at work.[20]

The main structural change introduced by the 1996 Act was the replacement of the WCBQ as a division of a government department with an independent statutory body. Whilst the portfolio Minister had reserve powers to influence WorkCover operations, responsibility and accountability for the commercial performance and oversight of the enforcement of regulatory responsibilities rested with the Board.[21]

[16] WorkCover Queensland. A status review 1997 – 2011: 2
http://www.workcoverqld.com.au/__data/assets/pdf_file/0004/17419/WorkCover-Queensland-Status-Review.pdf [22 January 2013]
[17] Department of Justice and Attorney-General, Discussion Paper - The Queensland Workers' Compensation Scheme: Ensuring Sustainability and Fairness, Brisbane, 2010: 21
[18] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: iv
[19] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: iii
[20] WorkCover Queensland. A status review 1997 – 2011: 2
[21] Q-Comp, Scheme History, http://www.qcomp.com.au/about-us/about-workers'-compensation/scheme-history.aspx [8 February 2013]

With the change of government in 1998, the incoming Beattie government introduced the *WorkCover Queensland Amendment Bill 1999* which reversed some of the amendments made in the 1996 Act. The key elements of the Bill were:

- to amend the definition of worker to include all workers under a 'contract of service' and remove the PAYE restriction;
- to remove the restrictions to the definition of injury to ensure coverage for Queensland workers where employment is 'a significant contributing factor' to the injury;
- to strengthen self-insurance licence conditions and criteria including introducing occupational health and safety performance standards, increasing the number of workers required from 500 to 2000 and requiring self-insurers to assume liability for claims;
- to provide a more independent and transparent review process with emphasis on direct contact with applicants including establishment of a WorkCover Review Council to oversight these processes and advise the WorkCover Queensland Board on their performance and outcomes of the processes; and
- to remove the option of self-rating for employers.[22]

The explanatory notes outlined that the introduction of self-insurance from 1 July 1997 had resulted in a larger than expected number of employers proceeding to self-insurance, which could negatively impact on the smaller employers left in the general premium pool. There were insufficient safeguards with the system to ensure workers and employers operating with the self-insurance schemes are securely protected.[23]

In 2000, a National Competition Policy (NCP) Legislation Review of the *WorkCover Queensland Act 1996* was conducted in accordance with the intergovernmental NCP agreement. The review recommended retaining WorkCover's monopoly insurer status but considered that its regulatory arm be separated from the organisation and set up as an independent entity.

Q-COMP was established by legislation in 2003 as a statutory body to regulate Queensland's Workers' Compensation Scheme. Additional amendments were made in 2005 as a result of the national competition review.[24]

In 2007, a second Kennedy review was commissioned by the State Government. This review examined three aspects of the scheme as follows:

- premium rate for employers
- extra benefits for workers
- ways to ensure large corporate employers remained in the WorkCover fund.[25]

Overall the purpose of the review was to gauge the sustainability of the low premium rate for a further three years and to recommend improved worker benefits.[26]

[22] Explanatory Notes, *Workcover Queensland Amendment Bill 1999*: 1-2
[23] Explanatory Notes, *Workcover Queensland Amendment Bill 1999*: 2
[24] Department of Justice and Attorney-General, Workers' Compensation Regulatory Authority, and WorkCover Queensland, *Information Paper*, July 2012, Appendix 1: 41
[25] WorkCover Queensland. A status review 1997 – 2011: 2-3 http://www.workcoverqld.com.au/__data/assets/pdf_file/0004/17419/WorkCover-Queensland-Status-Review.pdf
[26] Department of Justice and Attorney-General, Workers' Compensation Regulatory Authority, and WorkCover Queensland, *Information Paper*, July 2012, Appendix 1: 41

The review confirmed the sustainability of a premium rate of $1.15 per $100 of wages for the following three years. Workers' entitlements were increased to 75 per cent of normal weekly earnings or 70 per cent of Queensland ordinary time earnings (QOTE) for the period from 26 weeks to five years. Additional lump sum compensation payable was increased to $218,400 and the threshold level of work-related impairment for accessing additional lump sum compensation was reduced from 50 per cent to 30 per cent.[27]

A further review process was undertaken following two consecutive years of operating deficits in 2009 and increasing common law claim numbers and costs. These legislative amendments mainly focussed around the growth in common law claims.[28] Some of the amendments to the Act included:

- Addressing the increased difficulty faced by employers in resisting claims for damages as a result of the Queensland Court of Appeal decision in Bourk v Power Serve Pty Ltd & Anor [2008] QCA 225, by stating that nothing in the *Workplace Health and Safety Act 1995* (WHSA) creates a civil cause of action based on a contravention of a provision under the WHSA. This amendment addressed a perception that strict liability attaches to an employer if a work injury has occurred, regardless of fault.[29]
- Increased obligations on third parties to participate meaningfully in pre-court processes, allowed a court to award costs against plaintiffs whose claims are dismissed and harmonised common law claims brought under the Act in terms of liability (standard of care), contributory negligence and caps on general damages and damages for economic loss.
- The amount of employer excess was increased to 100 per cent of QOTE or one week's compensation, whichever is the lesser. The option for employers to insure against their excess was removed. Changes also allowed self-insurers to take on a higher statutory reinsurance excess in order to lower reinsurance premium.[30]

The capping of general damages and damages for economic loss at three times ordinary time earnings were considered to be the most stringent in the country at the time of introduction, as it was seen to significantly disadvantage injured workers contemplating common law claims.[31]

In June 2010 the then Attorney-General and Minister for Industrial Relations, Hon Cameron Dick MP, announced an independent structural and institutional review into the state's workers' compensation system. The review was to consider claims management, common law settlements, rehabilitation and return to work, as well as legal costs and other associated legal matters. It was carried out by Mr Robin Stewart-Crompton, former chair of the national review into model workplace health and safety laws, and involved extensive consultation with stakeholders.[32]

[27] WorkCover Queensland. A status review 1997 – 2011: 2-3
http://www.workcoverqld.com.au/__data/assets/pdf_file/0004/17419/WorkCover-Queensland-Status-Review.pdf
[28] Department of Justice and Attorney-General, Workers' Compensation Regulatory Authority, and WorkCover Queensland, *Information Paper*, July 2012, Appendix 1: 42
[29] WorkCover Queensland. A status review 1997 – 2011: 9
http://www.workcoverqld.com.au/__data/assets/pdf_file/0004/17419/WorkCover-Queensland-Status-Review.pdf
[30] WorkCover Queensland. A status review 1997 – 2011: 9
http://www.workcoverqld.com.au/__data/assets/pdf_file/0004/17419/WorkCover-Queensland-Status-Review.pdf
[31] Purse K, 2011, 'Winding back workers' compensation entitlements in Australia'. *Australian Journal of Labour Law*. Vol. 24, No. 3 (December): 238-251
[32] WorkCover Queensland. A status review 1997 – 2011:3
http://www.workcoverqld.com.au/__data/assets/pdf_file/0004/17419/WorkCover-Queensland-Status-Review.pdf

The results of this review were released in October 2010 and made 51 recommendations regarding strategies and institutional arrangements to ensure clear roles and functions for all three agencies.[33] The 2010 legislative amendments are addressed further in section 8 of this report.

2.2 Structure of Queensland's workers' compensation system

In Australia, there are 11 main workers' compensation systems. Over time, each of the nine Australian jurisdictions, including the three Commonwealth schemes, have developed their own workers' compensation laws. This has resulted in numerous inconsistences in the operation and application of workers' compensation arrangements. Some inconsistences include scheme funding, common law access, level of entitlements, return to work and coverage. These inconsistencies can be attributed, in part, to the varying industry profiles and economic environments of each jurisdiction and judicial decisions that have led to legislative amendments.[34]

There are three main types of Workers' Compensation Schemes, all of which have varying degrees of government control. These are categorised as:

- private scheme – private insurance firms can compete for customers (both workers and employers). This type of scheme operates in Western Australia, Tasmania and Northern Territory.
- central scheme – is where a single public insurer performs most of the workers' compensation insurer's functions including underwriting the scheme.
- managed scheme - in this type of scheme, which is unique to Australia, the state government is responsible for underwriting the claims risks and setting premium rates but workers compensation services are outsourced to private insurers. These private insurers are paid by the government but do not bear the insurance claims risk. New South Wales, Victoria and South Australia use this type of scheme.[35]

Queensland has a centrally funded scheme.[36] The Queensland government is the sole provider of WorkCover insurance, acting as both regulator and service provider. The *Workers' Compensation and Rehabilitation Act 2003* establishes the statutory framework of workers' compensation for employers and employees.[37]

The Queensland Workers' Compensation Scheme operates as a form of no-fault insurance against workplace accidents/injuries. This means:

- Any worker injured through work is entitled to statutory compensation.
- Compensation may include weekly income replacement benefit and medical and rehabilitation and other expenses.
- If a worker suffers a permanent impairment, he/she may be entitled to a lump sum payment.

[33] WorkCover Queensland. A status review 1997 – 2011: 3 http://www.workcoverqld.com.au/__data/assets/pdf_file/0004/17419/WorkCover-Queensland-Status-Review.pdf
[34] Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, March 2011: 9
[35] Purcal S and Wong A, 2007, Australia Workers' Compensation: A review. October: 2 http://wwwdocs.fce.unsw.edu.au/actuarial/research/papers/2007/AustWorkComp_Purcal.pdf [25 June 2012]
[36] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 8
[37] Purcal S and Wong A, 2007, Australia Workers' Compensation: A review. October: 2 http://wwwdocs.fce.unsw.edu.au/actuarial/research/papers/2007/AustWorkComp_Purcal.pdf [25 June 2012]

Workers' Compensation Schemes are either short-tailed or long tailed schemes. The Queensland scheme is a short-tail scheme. Some of the features of the short-tail scheme are:

- Entitlement to weekly benefits stops when incapacity due to work related injury stops.
- When the period for benefits paid to an injured worker has reached the maximum time of five years or when weekly benefits have reached the maximum amount.
- Benefits will also cease if the worker's injury is considered stable and a lump sum payment has been accepted which is based on their permanent impairment.[38]

The worker has the ability to seek common law damages where workers can prove negligence against an employer and who has sustained a work injury defined by the Act.

In a long tail scheme, benefits are paid for the duration of a worker's incapacity, with heavily restricted or no access to common law remedies. Benefits may also be paid until retirement age.

2.3 Roles of government agencies

In Queensland, the *Workers' Compensation and Rehabilitation Act 2003* and the *Workers' Compensation and Rehabilitation Regulation 2003* establish the system of workers' compensation. Under the legislation, an employer must insure or self-insure against work related injury sustained by a worker of the employer where work is a significant contributing factor to the injury.[39]

The legislation is administered by the following:

- Department of Justice and Attorney-General (DJAG) – implements the government's policy and legislative agenda and manages the wider nexus between workers' compensation and work health and safety.
- Q-COMP – regulates insurers, provides legal and medical dispute resolution, provides rehabilitation advisory services and promotes education about the scheme.
- WorkCover – is the sole commercial provider of workers' compensation insurance and claims services in Queensland and is the insurer for 90 per cent of the claims made.
- Self-Insurers – there are 25 self-insurers that administer the remaining 10 per cent of claims lodged.

The roles of each of the government agencies are as follows:

Department of Justice and Attorney-General

DJAG is responsible for policy and legislative development in accordance to the government's policy and legislative commitments.

They are also responsible for managing the wider nexus between workers' compensation and work health and safety, as well as monitoring workers' compensation trends and statistics. DJAG also monitors changes in the labour and economic market and developments in common law claims.

The Department also advises the Attorney-General on issues relevant to the Attorney's responsibilities and powers for the monitoring and assessment of Q-COMP and WorkCover.

In addition, DJAG is also responsible for '*determining the work health and safety performance requirements of current and prospective self-insurers*'.[40]

[38] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 9
[39] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 8
[40] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 10

WorkCover Queensland

WorkCover is a government owned statutory body which operates as a commercial enterprise. It is established by the Act as the provider of workers' compensation insurance and claims services in Queensland. WorkCover is fully self-funded by premiums paid by employers and investment returns.

The WorkCover Queensland Board is accountable for WorkCover's accident insurance business, including claims management and premium setting.[41]

Workers' Compensation Regulation Authority (Q-COMP)

Q-COMP performs the regulatory function and is also established by the Act. Q-COMP is funded through a levy from self-insured employers and a contribution from WorkCover. The role of Q-COMP as regulator is to monitor all insurers (WorkCover and self-insurers), as well as provide administrative support for the Medical Assessment Tribunals.[42]

Q-COMP also conducts independent reviews of decisions relating to workers' statutory claims and employer premiums, maintains the scheme wide data base and monitors compliance with the workers' rehabilitation legislative provisions. As such, it also undertakes and administers dispute resolution processes in relation to workers' compensation claims.

The 'Return to work assist' (free) program which helps injured workers access training and/or job placement services is also operated by Q-COMP. This program helps those injured with accessing training and/or job placement services once compensation claims are finalised.[43]

2.4 Claims process

The scheme provides injured workers with statutory benefits that enable them to receive medical treatment, weekly payments of compensation for lost wages and rehabilitation during their recovery and return to work. Workers who are permanently impaired as a result of their injury may also be entitled to a lump sum payment of compensation.[44]

Claims for statutory benefits are assessed on a 'no fault' basis and benefits will be paid regardless of whether the worker or employer is at fault for the injury, and if it meets the definition of 'injury' specified in the Act.[45] The exception to this is psychological claims, which are covered in section 4.4 of this report.

The scheme provides for the following statutory benefits for injured workers including:

- Weekly compensation for lost wages.
- All reasonable medical, surgical and hospital expenses, as specified in the table of costs.
- Medical and other supplies.
- Rehabilitation treatment and equipment or services.

[41] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 11

[42] Medical Assessment Tribunals are independent panels of specialist doctors who on referral from insurers provide independent expert medical decision about injury and impairment sustained by the worker. Decisions of tribunals are final and binding unless fresh medical evidence not known about the worker at the time of the decision, can be produced within 12 months of the decision

[43] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 10

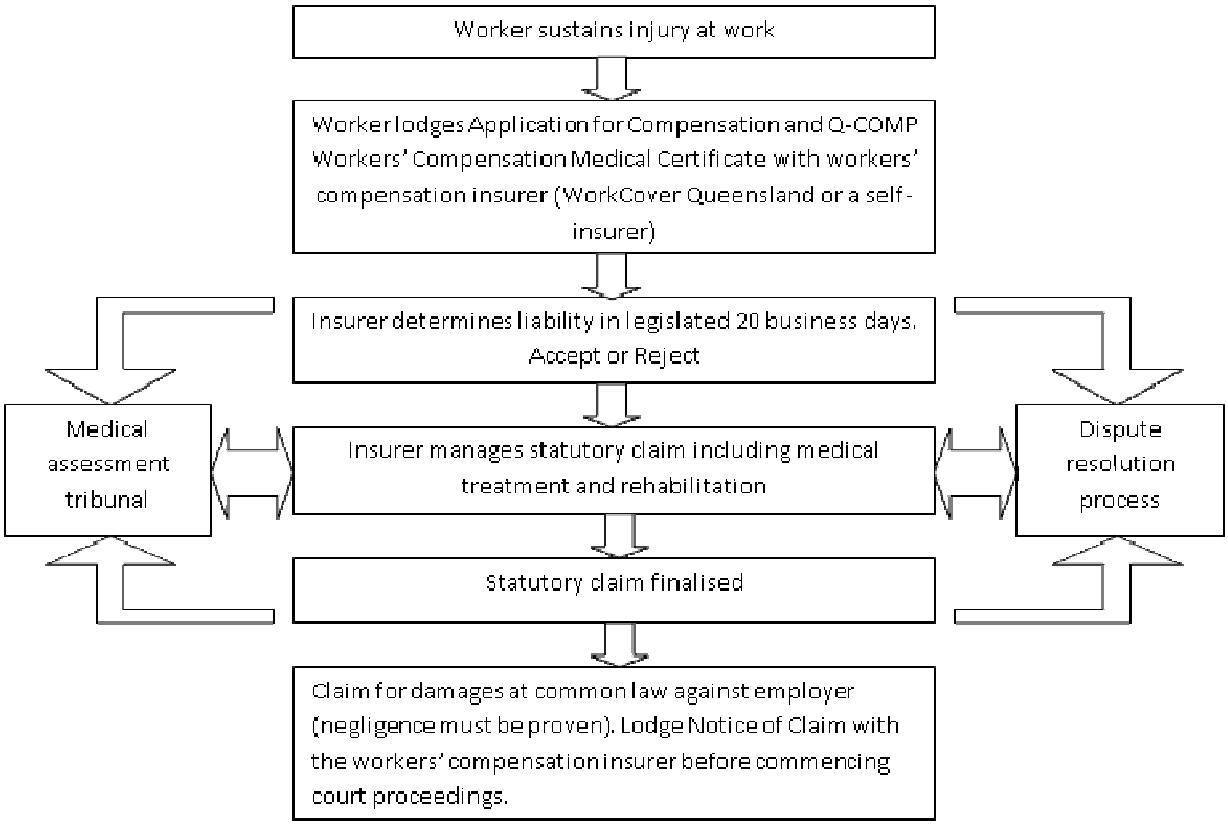
[44] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 19

[45] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 19

- Necessary and reasonable travelling expenses for the worker to obtain medical treatment or rehabilitation.
- Death benefits for dependants and funeral expenses.
- Lump sum compensation, based on the degree of permanent impairment.[46]

The figure below details the current claims progress through from statutory claims and to common law claims.[47]

Figure 1: Claims process



Source: Department of Justice and Attorney-General Information Paper: 11

An injured worker has up to six months after the date of injury to lodge a claim. A claim form must contain relevant personal details and details of the employer as well as a medical certificate from the initial consultation for the injury. Claims can be lodged together with the employer online, or via the medical provider.[48]

Once a claim has been lodged, the insurer will apply the following criteria from the Act which can include considering whether

- the claim was made within the time limits
- the person was employed at the time of the injury by an employer who's not self-insured
- the person is considered to be a worker

[46] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 19
[47] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 11
[48] WorkCover Queensland. Worker Checklist. http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/making-a-claim/worker-checklist [31 January 2013]

- the injury was caused by a work-related event, and
- the person was injured because of, or in the course of, employment if the employment is a significant contributing factor to the injury.

The onus is on the person who makes the claim to prove their claim. Generally, both worker and employer are contacted within three business days of the claim being made. Although WorkCover states that claims are determined as quickly as possible, a decision on a claim can take up to 20 days depending on whether all the required information is readily available. Once a decision is made, both the worker and the employer will be informed by WorkCover.[49]

The worker, claimant or employer can apply to have the decision on their claim reviewed by Q-COMP. The review service is free and reviews must be lodged within three months of receiving the insurer's written reasons for their decision. A review decision will be made within 25 business days and the person lodging the review has the opportunity for a 'right of appearance'.[50]

If the worker, claimant or employer is unhappy with a Q-COMP review decision, they can then appeal to the Queensland Industrial Relations Commission (QIRC) within 20 business days of receiving the decision. Q-COMP defends the review decision in the Commission. The parties to an appeal are:

- the appellant - the person who files the appeal
- the respondent - Q-COMP

If the employer appeals a review decision, the worker or claimant has a right to join the court action as a party to the appeal. However the worker must advise the Commission if they wish to make representations during the appeal and be responsible for the cost of any solicitor or third party they might hire.[51]

[49] WorkCover Queensland. A claim has been made. What next? http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-claim-is-made [31 January 2013]

[50] Q-COMP. What you need to know about a Q-COMP review. http://www.qcomp.com.au/services/review-appeals/q-comp-review-—-what-you-need-to-know.aspx [26 March 2013]

[51] Q-COMP. Appeal a review decision on a claims matter – a worker's step-by-step guide http://www.qcomp.com.au/services/review-appeals/appeal-a-review-decision-workers/appeal-a-review-decision-on-a-claims-matter-a-worker's-step-by-step-guide.aspx [26 March 2013]

3 Is the performance of the scheme meeting its objectives under section 5 of the Act?

The Committee was specifically charged with considering the performance of the scheme in meeting its objectives under section 5 of the Act under one of the terms of reference.

Section 5 of the *Workers' Compensation and Rehabilitation Act 2003* outlines the objectives of the Act. The relevant section is outlined below:

Section 5 – Workers' compensation scheme

(1) This Act establishes a workers' compensation scheme for Queensland—

(a) providing benefits for workers who sustain injury in their employment, for dependants if a worker's injury results in the worker's death, for persons other than workers, and for other benefits; and

(b) encouraging improved health and safety performance by employers.

(2) The main provisions of the scheme provide the following for injuries sustained by workers in their employment—

(a) compensation;

(b) regulation of access to damages;

(c) employers' liability for compensation;

(d) employers' obligation to be covered against liability for compensation and damages either under a WorkCover insurance policy or under a licence as a self-insurer;

(e) management of compensation claims by insurers;

(f) injury management, emphasising rehabilitation of workers particularly for return to work;

(g) procedures for assessment of injuries by appropriately qualified persons or by independent medical assessment tribunals;

(h) rights of review of, and appeal against, decisions made under this Act.

(3) There is some scope for the application of this Act to injuries sustained by persons other than workers, for example—

(a) under arrangements for specified benefits for specified persons or treatment of specified persons in some respects as workers; and

(b) under procedures for assessment of injuries under other Acts by medical assessment tribunals established under this Act.

(4) It is intended that the scheme should—

(a) maintain a balance between—

(i) providing fair and appropriate benefits for injured workers or dependants and persons other than workers; and

(ii) ensuring reasonable cost levels for employers; and

(b) ensure that injured workers or dependants are treated fairly by insurers; and

(c) provide for the protection of employers' interests in relation to claims for damages for workers' injuries; and

(d) provide for employers and injured workers to participate in effective return to work programs; and

(da) provide for workers or prospective workers not to be prejudiced in employment because they have sustained injury to which this Act or a former Act applies; and

(e) provide for flexible insurance arrangements suited to the particular needs of industry.

(5) Because it is in the State's interests that industry remain locally, nationally and internationally competitive, it is intended that compulsory insurance against injury in employment should not impose too heavy a burden on employers and the community.

In general, most submissions considered the current scheme to be meeting its objectives and highlighted the following main points:

1. Scheme is financially viable, with an excellent funding ratio.
2. Queensland has the second lowest premium in the country and has a strong focus on rehabilitation and incentive on return to work. It also has a better return to work rate (around 98% in 2011/2012) than other schemes.
3. Is successful because of the short-tail nature of the scheme.
4. The central scheme is successful and with premiums borne by employers, there is no cost to the Government.
5. Access to common law also supports the short-tail scheme and 2010 reforms have had good results in addressing unmeritorious claims.

A joint submission by The Australian Workers' Union of Employees (AWU), Queensland Shop, Distributive and Allied Employees' Association (Queensland Branch) Union of Employees (SDA) and Transport Workers' Union of Australia, Union of Employees (Queensland Branch) (TWU) also outlined the following notable strengths of the scheme:

- *In 2011/12, the Queensland Scheme posted a combined return to work rate for injured workers of 98.6% - this is an exemplary achievement in meeting the statutory objectives as outlined at s5(2)(f) of the Act.*
- *The Queensland Scheme has consistently lower rates of disputation than other domestic schemes (3% compared to 9.7% in Victoria), and nearly 82% of disputed claims in the Queensland Scheme are resolved within 3 months, which compares exceedingly favourably against Victoria (47.8%), New South Wales (45.3%) and Comcare (10%).*
- *Open access common law claims were down by a factor of 9.6% in 2010/11 due to the statutory reforms to the Queensland Scheme by the previous Labor Government, and are forecast to reduce by a further 2.5% in 2011/12.*
- *In 2010/11, average costs on common law claims were down 1.4%, and are forecast to decline by a further 6.3% in 2011/12.*
- *An average post-2010 reform total common law damages declined by 30% compared to pre-2010 reform totals.*[52]

The Australian Lawyers Alliance considers the '*scheme to be successful because the costs incurred for the "compensation" side of the scheme has been kept under control because of its legislative structure'.*[53] They advocate for the '*government to maintain the short-tail statutory scheme and reasonable access to common law*'.[54]

The Queensland Trucking Association Ltd (QTA) advised the Committee that the scheme operates relatively successfully on a comparative basis with similar schemes in other jurisdictions. They noted that Queensland has maintained its premiums to the point of being the second lowest in the country and a feature is the reward for effort for employers who maintain excellent safety standards and therefore limited claims experience.[55]

However, submissions and the public hearings identified a number of perceived shortfalls. The various aspects of each of these issues will be considered further in this report.

[52] Submission 137: 7
[53] Submission 72: 3
[54] Submission 72: 5
[55] Submission 135: 1

These perceived shortfalls included:

1. The balance between injured workers being compensated and the cost of this compensation to the employer is skewed towards the worker.[56]
2. The scheme does not recognise the efforts of employers who are proactive in safety initiatives.[57]
3. Assessment of premium rates is inflexible and does not provide employers with options.[58]
4. There was some confusion in the definition of 'worker' covered under the scheme and this should be harmonised with the definition under Australian taxation legislation.[59]
5. Concepts used in the Act are unclear.
6. Narrowing the definition of injury so that the workplace is the 'major contributing factor' or the 'significant contributing factor'.[60]
7. How claims arising from aggravation of pre-existing injuries are dealt with.[61]
8. Claims relating to latent onset diseases, such as solar claims, should demonstrate work as 'the major contributing factor'.[62]
9. Better business practices could be implemented to assist with the promotion and development of improved workplace practices and focus on injury prevention and responsive injury management in the workplace.[63]
10. The impact of journey 'to and from' work claims and the rationale for acceptance of such claims.[64]
11. Workers with psychological injuries are discriminated against because they do not have the same access to the same 'no fault' compensation for their injury as do workers with physical injury.[65]

The Association of Self-Insured Employers Queensland (ASIEQ) identified that the '*current short term no fault statutory scheme and common law system is advantageous to the Queensland economy'.* However, they recommended the amendment of section 5 to enhance better injury prevention by employers as follows:

> *Section 5 (1)(b) 'encouraging improved health and safety performance by employers' be amended to: 'encouraging improved health, safety and injury management performance by employers'.*
>
> *Section 5 (4) should be amended to include a new subsection (f) – Provide for flexible employer based injury management arrangements suited to the particular needs of industry*.[66]

[56] Submissions 40: 2; 166: 1
[57] Submissions 40: 4; 99: 3; 107: 2; 111:1, 119: 1; 129: 2
[58] Submissions 3: letter; 9: 1; 19: 1; 21: 1; 41: 2; 62 (confidential), 115: 3; 151: 4; 158: 2
[59] Submissions 45: 7; 60: 4; 113: 25; 133: 2; 154:3; 159: 13
[60] Submissions 29: 5; 47: 2; 107: 2; 109: 12; 111: 1, 113: 22; 119:1; 122: 2; 135: 2; 154: 3; 155: 5; 159: 15; 160: 7; 166: 2
[61] Submission 135: 2
[62] Submissions 99: 2; 109: 14
[63] Submissions 45: 4; 63: 8; 68: 1; 113: 13; 115: 2; 122: 1; 160: 22; 161: 5
[64] Submission 135: 2
[65] Submission 194: 1
[66] Submission 150: 7

Another area of concern identified was that the Act currently does not require '*employees to take a degree of responsibility for minimising their risk of injury in the workplace in a statutory claim*'. Sections 129 and 130 of the Act state that compensation is not payable if an injury is self-inflicted or caused by the worker's serious and wilful misconduct. However, the Electrical Contractors Association emphasised that WorkCover has never utilised these sections in any statutory claim.[67]

The *Work Health and Safety Act 2011* also specifies that workers must take reasonable care of their own health and safety (section 28) and '*co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers*'. In addition, sections 30 to 33 of the *Work Health and Safety Act 2011* outline the penalties for reckless conduct or failure to comply with health and safety duty.

The Department advised that the test of 'reasonable care' is objective but stated:

> *The requisite standard to be applied is that which should reasonably in all the circumstances have been expected of a worker carrying out the duties and discharging the responsibilities in a manner appropriate to the skills and expertise expected of a person holding himself or herself out to be able to undertake that work. In other words, the standard required of a plumber, for example, is that of an average trained plumber*.[68]

3.1 Encouraging improved health and safety performance by employers

Section 5(1)(b) outlines that one of the objectives of the scheme is to encourage '*improved health and safety performance by employers*'. WorkCover considers that this is achieved through the current experience based rating (EBR) system for calculating premiums. They submitted that:

> *The EBR formula provides the ability for employers to reduce their premium payable by implementing enhanced injury prevention and management strategies. We encourage employers, using demonstrated potential premium cost savings as a lever, to adopt these strategies and work with them to assist where we can.*[69]

WorkCover and Workplace Health and Safety Queensland's Injury Prevention and Management (IPaM) program was set up to assist employers develop better work health, safety and injury management program and in turn reduce their premium rates.[70] Work Health and Safety Queensland believes that '*IPaM has shown positive trends in terms of reducing claims and costs for employers, and overall costs to the scheme'*.[71]

There are many submitters who support the program, for example, Master Builders stated:

> *I should have said that in relation to the lifting of the cap, which was one of the changes. I meant that employers who had hit their cap could then be brought into a Workplace Health and Safety Program, which Ms Richards announced in her opening submissions, called IPaM. That is a program where those changes have targeted companies that have hit the cap of their WorkCover with the threat of having the cap lifted and them having to pay full fare if they did not participate properly in a full safety audit and management system approach. We believe that has revealed some tremendous results*.[72]

[67] Submission 99: 2-3
[68] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 31
[69] Department of Justice and Attorney-General Information Paper: 16
[70] Submission 94: 7
[71] Submission 165: 7
[72] Mr Crittall, Transcript 31 October 2012: 10

The Services Union considers the IPaM program to be one of the achievements of the 2010 reforms. They recommend that ongoing funding be provided for this program.[73]

However, there were some submitters that considered that there is still little financial incentive for employers to promote workplace health and safety processes. For example, the Ai Group suggested:

> *… employers should get a return on their investments in training, improved WorkCover related processes, improved workplace health and safety processes including updated plant and equipment, via lower WorkCover premium levels*.[74]

The Department advised that

> *While this would provide more immediate incentives for employers to invest in safety initiatives, there is a risk that the changes to their system might not translate to reduced claims frequency or reduced claims costs (if they do not also improve their rehabilitation and return to work processes). Other schemes who have analysed the performance of employers meeting safety standards and systems, and their claim frequency, have found that there is not necessarily a positive correlation between the two, that is, having good safety systems and procedures on paper does not always eventuate in the actions required to prevent or manage workplace injuries well*.[75]

Section 5.9 (return to work programs) outlines other workplace rehabilitation initiatives.

The work health and safety performance requirements of both self-insurers and prospective self-insurers are determined and audited by DJAG.

3.2 Definition of Worker

The Attorney-General requested that the Committee consider the definition of 'worker' as part of its inquiry.

The definition of worker varies between jurisdictions. In Queensland, a worker is defined as a person who works under a contract of service and only an individual can be a worker. Any person who is a director, trustee or a partner is not considered to be a worker.[76]

Who is a worker is set out in section 11 of the Act. Section 11 is supported by Schedule 2 which provides examples of who is and is not considered to be a worker. The relevant sections of the Act are outlined below[77]:

Who is a *worker*

(1) A *worker* is a person who works under a contract of service.

(2) Also, schedule 2, part 1 sets out who is a *worker* in particular circumstances.

(3) However, schedule 2, part 2 sets out who is not a ***worker*** in particular circumstances.

(4) Only an individual can be a ***worker*** for this Act.

[73] Submission 103: 4
[74] Submission 159: 17
[75] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 13
[76] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland Information paper: 37
[77] *Workers' Compensation and Rehabilitation Act 2003*, section 11 and Schedule 2

Schedule 2 Who is a worker in particular circumstances

Part 1 – Persons who are workers

(1) A person who works under a contract, or at piecework rates, for labour only or substantially for labour only is a worker.

(2) A person who works for another person under a contract (regardless of whether the contract is a contract of service) is a worker unless—

(a) the person performing the work—

(i) is paid to achieve a specified result or outcome; and

(ii) has to supply the plant and equipment or tools of trade needed to perform the work; and

(iii) is, or would be, liable for the cost of rectifying any defect in the work performed; or

(b) a personal services business determination is in effect for the person performing the work under the *Income Tax Assessment Act 1997* (Cwlth), section 87-60.

(3) A person who works a farm as a sharefarmer is a worker if—

(a) the sharefarmer does not provide and use in the sharefarming operations farm machinery driven or drawn by mechanical power; and

(b) the sharefarmer is entitled to not more than 1/3 of the proceeds of the sharefarming operations under the sharefarming agreement with the owner of the farm.

(4) A salesperson, canvasser, collector or other person (***salesperson***) paid entirely or partly by commission is a worker, if the commission is not received for or in connection with work incident to a trade or business regularly carried on by the salesperson, individually or by way of a partnership.

(5) A contractor, other than a contractor mentioned in part 2, section 4 of this schedule, is a worker if—

(a) the contractor makes a contract with someone else for the performance of work that is not incident to a trade or business regularly carried on by the contractor, individually or by way of a partnership; and

(b) the contractor—

(i) does not sublet the contract; or

(ii) does not employ a worker; or

(iii) if the contractor employs a worker, performs part of the work personally.

(6) A person who is party to a contract of service with another person who lends or lets on hire the person's services to someone else is a worker.

(7) A person who is party to a contract of service with a labour hire agency or a group training organisation that arranges for the person to do work for someone else under an arrangement made between the agency or organisation and the other person is a worker.

(8) A person who is party to a contract of service with a holding company whose services are let on hire by the holding company to another person is a worker.

Part 2 – Persons who are not workers

(1) A person is not a worker if the person performs work under a contract of service with—

(a) a corporation of which the person is a director; or

(b) a trust of which the person is a trustee; or

(c) a partnership of which the person is a member; or

(d) the Commonwealth or a Commonwealth authority.

(2) A person who performs work under a contract of service as a professional sportsperson is not a worker while the person is—

(a) participating in a sporting or athletic activity as a contestant; or

(b) training or preparing for participation in a sporting or athletic activity as a contestant; or

(c) performing promotional activities offered to the person because of the person's standing as a sportsperson; or

(d) engaging on any daily or other periodic journey in connection with the participation, training, preparation or performance.

(3) A member of the crew of a fishing ship is not a worker if—

(a) the member's entitlement to remuneration is contingent upon the working of the ship producing gross earnings or profits; and

(b) the remuneration is wholly or mainly a share of the gross earnings or profits.

(4) A person who, in performing work under a contract, other than a contract of service, supplies and uses a motor vehicle for driving tuition is not a worker.

(5) A person participating in an approved program or work for unemployment payment under the *Social Security Act 1991* (Cwlth), section 601 or 606 is not a worker.

Other persons entitled to compensation other than workers outlined in Chapter 1, Division 2 and 3 of the *Workers' Compensation and Rehabilitation Act 2003* are:

- volunteers (such as persons injured while engaged in disaster operations or volunteer fire fighter or in a non-profit charitable organisations or persons in voluntary position with religious organisations) - subdivision 1;
- persons performing community service (such as those performing community service order or fine option under the *Penalties and Sentences Act 1992*) - subdivision 2;
- students (including injury arising out of, or in the course of, work experience or vocational placement) – subdivision 3;
- eligible persons (these include contractors, director of a corporation, self-employed individual etc) – subdivision 4;
- other persons.[78]

The Department advised the Committee that the definition of worker has evolved over time in response to changes in employment relationships. They noted that as employment under traditional arrangements has declined, and new working arrangements have emerged, the definition has been modified to ensure that persons are not engaged in non-standard employment arrangements for the purpose of evading workers' compensation premiums and to ensure that workers under these non-standard arrangements are properly covered for workers' compensation.[79]

Q-COMP advised that a business may not declare 'wages' to WorkCover for workers they consider to be contractors for the purpose of determining premium. However, sometimes these contractors are ultimately determined to be 'workers' under the Act. Following audits by WorkCover, a business may face a premium penalty for failing to declare wages of these contractors/workers as remuneration and be forced to pay an ongoing workers' compensation premium for payments made to people that the business engaged as contractors. If a 'contractor' suffers an injury at work and submits a claim for compensation with WorkCover, sometimes they are determined to be a 'worker' and the claim is accepted. The costs of these claims are added to the claim history of the employer's policy as are any penalties.[80]

They advised that approximately 5 per cent of all applications for Q-COMP to formally review insurers' decisions are created as a result of the complex definition of 'worker' for the purposes of coverage by the employer's policy. Each review may involve consideration of large numbers of workers who are employed by a particular employer.[81]

[78] Queensland Government, Department of Justice and Attorney-General. Under the workers' compensation and rehabilitation legislation http://www.justice.qld.gov.au/fair-and-safe-work/workers-compensation-and-rehabilitation/rights-and-obligations/under-the-workers-compensation-and-rehabilitation-legislation [22 March 2013]
See also sections 12 – 26 of the Act

[79] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 37

[80] Submission 93: 3-4

[81] Submission 93: 3-4

3.2.1 Previous definitions – definition of worker

The Kennedy Review in 1996 considered the issue of definition of worker. Appendix E contains a copy of the relevant section of the Workers Compensation Act 1990 defining who was considered to be a worker

The report notes that:

> *The definition of a worker for the purpose of workers' compensation in Queensland has created considerable difficulty as summarised by the Housing Industry Association submission (No 120):*
>
> *"The most significant of these is an ongoing difficulty this industry experiences with defining precisely who it is that the Workers Compensation system aims to cover. The problem relates to the definition of "worker" within the Act.*
>
> *…The definition of worker has no resemblance to any other contractor/employee in common use eg The taxation distinction in the building industry between PAYE employees and Prescribed Payments System (PPS) contractors. Unfortunately many contractors and sub-contractors wrongly assume that if they are a contractor for taxation purposed then they are also a contractor for Workers Compensation. This causes great confusion.*[82]

Kennedy recommended that the new Workers' Compensation Act define a worker, who is covered by the Act, as one who is subject to the PAYE scheme and Group Tax deductions are paid or payable by the employer at the time when the injury occurred or as one who is otherwise eligible and has sought to take out personal injury insurance cover with WorkCover Queensland. Eligible workers would include sub-contractors, working directors, and self-employed persons.[83]

He argued that this approach was considered *based on the fact that the majority of people in employer/employee traditional arrangements are PAYE tax payers. Most people who work outside a PAYE tax paying arrangement do so by choice for the purposes of other benefits that accrue to themselves.*[84]

Kennedy listed the advantages of this concept to include the following:

- employment arrangements and wages are well defined, transparent and easily traced;
- individuals working outside a traditional employer/employee arrangement take personal responsibility for their insurance cover;
- compliance discipline would be imposed by the system design with the fund's liability extended to only those employment categories for which it obtained premium;
- some employers would strongly support such a system, given the confusion which currently exists among employers regarding their obligations in non PAYE arrangements;
- less opportunity for fraud;

[82] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 140-139

[83] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 143

[84] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 139

- costs and claim savings through certainty as to who is and who is not covered;
- more accurate ability to monitor and audit employers; and
- the system would go a long way to appeasing the view of some employers who believe that contract workers should take a greater responsibility for their own actions.[85]

He listed the disadvantages to include:

- it may encourage some employers to engage workers under PPS tax arrangements rather than PAYE to save on premiums; and
- workers might be unknowingly drawn into a non PAYE arrangement and would not have individual registration and cover.[86]

Kennedy's response to these disadvantages was to argue that workers in the last category could sue their employer at common law under these circumstances if negligence could be proven and that an extensive public advertising campaign would be needed to ensure workers were aware of the changes.[87]

The then Minister for Training and Industrial Relations, Hon Santo Santoro MP, introduced the *Workcover Queensland Bill 1996* on 27 November 1996. The Minister noted in his second reading speech that:

> *The current definition of worker has created confusion for many years for both employers and employees in understanding their obligations and coverage under the legislation. This confusion has resulted in failure by some employers to correctly declare wages for premium purposes.*
>
> *…situations may arise where persons are working in non-PAYE taxation arrangements as a result of genuinely not having a proper understanding of their taxation obligations. Examples might be minors or intellectually impaired persons. It is the intention of the government that a claim from such a person would be considered by WorkCover Queensland on the grounds that the employee should have been a PAYE taxpayer at the time of the injury. The claimant will be required to provide evidence that they have applied to the Taxation Commissioner for a ruling as to whether they should be taxed under the PAYE system for work performed at the time of the injury. As a ruling from the Taxation Commissioner may take some time WorkCover Queensland may, if it considers the circumstances appropriate, pay the claimant compensation in advance.*[88]

The explanatory notes state that the definition will:

- *assist employers in understanding their obligations because the new definition will be closely aligned with the Commonwealth taxation laws*
- *present employers with less opportunity for premium avoidance*
- *allow for more accurate monitoring and auditing of employers*
- *encourage contract workers to take a greater responsibility for their own actions*.[89]

[85] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 139-140
[86] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 140
[87] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 140
[88] Hansard, Hon S Santoro, 27 November 1996: 4459
[89] *Workcover Queensland Bill 1996*, Explanatory Notes: 10

As noted previously, the Beattie government introduced the *WorkCover Queensland Amendment Bill 1999* which reversed the amendments made in the 1996 Act.

The Bill's explanatory notes state that the definition of injury and definition of worker introduced under the 1996 Act placed increased restrictions on workers' access to the workers' compensation system. These restrictions were proving to be detrimental to the livelihood of many workers and their families because they do not belong to the diminishing group of PAYE tax payers or their work is not considered 'the major significant factor' causing the injury. The government considered that the requirement for a worker to be a PAYE taxpayer to be inequitable as it provides compensation for only one category of tax paying worker. The explanatory notes also stated that employers are also exposed to common law damages for negligence for those workers who had been excluded from coverage.[90]

The then Minister for Employment, Training and Industrial Relations, Hon Paul Braddy MP, stated that the amendments have ...*resulted in significant reductions in the rights of workers to compensation and added exposure to common law for some employers*.[91]

He stated that:

> *The definition of "worker" will be changed so that all people who work under a contract of service, regardless of their tax paying status, will be eligible for workers compensation. To assist decision makers in determining whether a contract of service exists, administrative guidelines will be developed by the department and WorkCover Queensland. For further clarification, the schedule to the Bill contains provisions that declare certain groups of workers, such as those paying tax under PPS while working under a contract of service, are excluded from compensation. They must seek their own personal injury insurance at their own cost.*
>
> *The legislation also lends itself to unscrupulous employers forcing workers into PPS tax arrangements so they do not have to pay workers compensation premiums. Employers can also be exposed to common law damages for negligence for those workers who have been excluded from coverage.*[92]

3.2.2 Arguments for change – definition of worker

As was the case with during the Kennedy Review in 1996, the leading agitators for change are the building and construction industry. However, employers in other industries have also indicated some concerns.

Master Builders advised the Committee that they are seeking a restoration of a strong nexus between the employer, workers and the injury. They advised that they have experienced a continual bracket creep of 'who is a worker' caused by common law decisions. They advised that they consider the goal of providing insurance with the best possible benefits and rehabilitation programs for workers at the lowest possible premiums for employers has lost its meaning in their industry where builders are required to pay premiums for an ever widening array of subcontractors, consultants and operators.[93]

[90] *Workcover Queensland Amendment Bill 1999,* Explanatory Notes: 2

[91] Queensland Legislative Assembly, Hon PJ Braddy MP, Minister for Employment, Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 25 March 1999: 851

[92] Queensland Legislative Assembly, Hon PJ Braddy MP, Minister for Employment, Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 25 March 1999: 852

[93] Submission 155: 4

The Housing Industry Association (HIA) advised the Committee that:

> *One of the biggest problems with the current definition of 'worker' from the point of view of an employer in the building industry is that you cannot tell in advance whether you are meant to be covering that person or not. It can only ever be done retrospectively. That is a very dangerous position for any business to be in.*
>
> *….the first test that is used in workers compensation, which is a common law test, is if people are genuine employees they get picked up. The next level of test which impacts on our industry is the test about whether somebody is providing substantially labour only. If they are providing substantially labour only, they are deemed to be a worker. The problem is that since the legislation was amended in 2003, the definition of 'substantial' has morphed with every court decision on an injured worker and even the definition of 'labour' has shifted over that time. So it is a very difficult concept to convey to somebody.*[94]

They further advised that WorkCover have been unable to provide substantial advice to employers in the building industry about whether somebody is a worker or not. They noted their concern that a worker's status can change, not just during the course of a year but the course of a day. They advised that:

> *If somebody is injured because they are doing something in a way that an employer directed them to do it rather than something that they decided to do themselves, it has been argued successfully that for that particular point in time they were a worker, even though for every other purpose they were not a worker. It is that kind of fluid, uncertain, unpredictable environment that makes the current definition very unworkable for employers in our industry*.[95]

The HIA added that:

> *Who should be covered by a business's workers compensation policy is the key cause for concern in the home building industry. The contract nature of the industry does not lend itself to the typical employer/employee relationship and paradigm around which the workers' compensation scheme has been developed. The result is a red-tape tangle that has cost some HIA members their businesses.*[96]

The Civil Contractors Federation (CCF) confirmed that they have had numerous requests for advice from members who are confused about who to include when they are submitting their annual WorkCover return, upon which their premium calculation is based. They advised that there is a high level of anxiety around the definition of worker which has changed over the years and now focuses on whether a contract is "substantially labour only".[97]

CCF supported the HIA's statements with respect to the definition of worker. They advised that:

> *Fundamentally, our industry is separate. We struggle with the way in which workers can change their status through the life of a year—from contractor to self-employed, to partner, to labourer, to labour hire worker, to hourly rate worker. So we need a definition that is clear so that the parties know exactly where they stand so that the WorkCover scheme can either apply or not apply and that people can then make decisions around that.*[98]

[94] Mr Temby, Transcript 31 October 2012: 6
[95] Mr Temby, Transcript 31 October 2012: 6
[96] Mr Temby, Transcript 31 October 2012: 2
[97] Submission 154: 2
[98] Mr Crittall, Transcript 31 October 2012: 2

Visual Diversity Homes advised the Committee that in the current building environment most residential builders build a home by using a variety of sub-contractors. They have found that currently, a sub-contractor employed in the building industry may be considered to be a worker for WorkCover purposes. They advised that it is not immediately clear to the employer whether the sub-contractor is an employee and the level of complexity is such that this determination can only be made on a case by case basis and is often only made retrospectively after an injury has occurred.[99]

Visual Diversity Homes confirmed that as a result of the uncertainty surrounding this employment relationship, as it applies to WorkCover, their business must choose between being under-insured, and having a potential claim or audit made against them, or overpaying their WorkCover premiums.[100]

The Queensland Trucking Association expressed the view that the definition of worker extending to sub-contractors is one of the elements leading to legitimate employer angst.[101]

Carpet Call (Qld) Pty Ltd advised the Committee that independent, non-employee, carpet installers are from time to time considered to be workers by WorkCover. They advised under their business model floor coverings are sold to customers and installed by installers who operate as independent contractors. The installers conduct their own independent business supplying installation services. In addition to their labour they supply and maintain their own motor vehicle, supply all tools of trade, supply materials for incorporation into the work, employ others if they wish to assist in the work, charge GST, maintain their own insurance, are responsible for rectifying defective work and/or damage and general conduct themselves as self-employed business people.[102]

They advised that WorkCover, while accepting that the installers are not workers under section 11(1), nevertheless from time to time assert that some installers are workers under the provisions of Schedule 2 Part 1 on the basis that they are supplying "labour only or substantially labour only" or that they fail the "results" test. They have found that they are having to respond to repeated WorkCover investigations and inquiries and to object to any assessments in respect of installers.[103]

The Australian Industry Group (Ai Group) advised the Committee that:

> *This is a particularly difficult definition when it comes to employers who have been audited by WorkCover. Often the difficulty is that the contractors who are in question who are being scrutinised have the view that they are independent contractors and have not seen themselves as workers either, so it is a shared perception. So it often comes with great surprise. The only way really to get around it is to only deal with contractors—workers—who have an interposed corporate identity, and that for many small trade businesses and so on is just not an option. But that is the only way that some of our employers have been able to deal with this because, particularly in the building industry and so on, it is really a problem.*[104]

[99] Submission 167: 1
[100] Submission 167: 1
[101] Submission 135: 2
[102] Submission 215: 1-2
[103] Submission 215: 2
[104] Ms Tucker, Transcript 31 October 2012: 38-39

The Australian Mines and Metals Association (AMMA) suggested that in regards to section 5(4)(2), *amendment of some definitions in the Act is necessary to ensure balance is appropriate*. They stated that:

> *Clearer drafting and definitions consistent with the nature of contemporary work, workplaces and work arrangements would promote greater certainty as to the legislative intent and better meet the objectives of the scheme. This would result in significant reductions in both compliance burdens and premiums; that is, ensure reasonable cost levels for employers', and greater clarity for all users of the system.*[105]

AgForce noted that there is confusion between the definition of a worker and a contractor in the rural industry sector. They provided the following example:

> *…in the fencing industry in that you contract someone to do your fencing but as a pastoralist if you supply the posts then they all become workers and are no longer contractors.*[106]

The Queensland Farmers Federation (QFF) supported these comments and stated that:

> *These days with the new workplace health and safety legislation it imposes even further problems because of the relationship between the person conducting the business or undertaking and his workers in terms of who is responsible for what. So you have it starting at that level and then it rolls down from there to issues like workers comp.*[107]

The Department advised that genuine contractor arrangements are not intended to be captured by the definition of 'worker'. They advised:

> *This is achieved by excluding from the definition of 'worker' any person who has a personal services business determination in effect for the work under the Income Tax Assessment Act 1997 (Cwlth) or who is able to satisfy all three elements of the results test. The three elements of the results test include:*
>
> - *the person performing the work is paid to achieve a specific result or outcome;*
> - *the person performing the work has to supply the plant and equipment or tools of trade needed to perform the work and;*
> - *the person is, or would be, liable for the cost of rectifying any defect in the work performed*.[108]

Masters Builders recommended the 'Results Tests' in the Act be removed as it is considered to be an *'unnecessary burden and a failure to industry'*.[109,110]

They advised that they were a strong supporter for the introduction of the 'Results Test' into the Workers' Compensation Scheme. However the Industrial Court's interpretation of the legislative drafting over the past ten years has seen the unanticipated application of the 'majority labour only test' applied first.

[105] Submission 245: 3
[106] Mr Finlay, Transcript 31 October 2012: 38
[107] Mr Sansom, Transcript 31 October 2012: 39
[108] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 37 (section 11 and Sch 2 of the Act)
[109] Submission 155: 3-4
[110] Submission 191: 2

In their view the current sequencing of the tests consists of seven steps as follows:

Step 1 Contract for performance of work (written or verbal)

Step 2 Specific exclusions

Step 3 Specific inclusions

Step 4 Contract of service versus contract for service

Step 5 Contract for labour only or substantially for labour only

Step 6 Personal services business determinations

Step 7 Results test

They consider that this sequencing of the tests has completely eroded the intended benefit to industry of the Results Test.[111]

3.2.3 Arguments against change – definition of worker

Many submissions and witnesses supported the current definition and consider that it should remain unchanged. For example, the Independent Education Union of Australia, Queensland and Northern Territory Branch (IEUA-QNT) believe that *all workers must be protected from loss resulting from injuries that occur at work.*[112] They, along with QCU, considered that restricting the definition would only reward employers who are engaged in sham contracting to evade their statutory obligations.[113,114]

The Far North Queensland Lawyers Association (FNQLA) advised the Committee that the definition has been looked at many times over the years. They advised that:

> *It has gone from what it was to a new definition back to what it was. I think the definition that we currently have works well. It really looks at the true nature of the work situation rather than what it is called. The current definition in the legislation is in line with High Court authority, so I think it not only has legislative backing but also has the court's backing as something that fits well with the community—to look at the true nature of the work that is being done and the employment relationship rather than what the employer chooses to call it—or the employee, for that matter, chooses to call it. So I think the definition works well.*[115]

The Bar Association of Queensland also supported this premise. They advised that:

> *…obviously workers under contracts of employment are the subject of workers compensation benefits, and that is expanded by schedule 2 to the act which is headed 'Who is a worker in particular circumstances'. That specifies persons who are workers and persons who are not. So if you fall within part 2, you are out of it. … the subject matter of those exceptions that widen the definition of worker have been honed over a period of about 60 or 70 years by workers compensation decisions all the way to the High Court—the Humberstone case and cases like that. To disturb those exceptions will cause a real disruption.*[116]

[111] Submission 155: 3
[112] Submission 131: 6
[113] Submission 192: 1
[114] Submission 190: 3
[115] Mrs Neil, Transcript 28 August 2012: 7
[116] Mr Douglas, Transcript 14 November 2012: 17

Of major concern, should the definition of worker be altered, was the possibility of 'sham' contracting. The Electrical Trades Union (ETU) advised the Committee that:

> *Sham contracting, as we call it, is a massive issue in the building industry, although not so much in our trade any more. It was under the old PPS scheme, where an employer would turn up to work one week and the next week they would turn up and there would be an independent contractor—there would be an independent labour-only contractor. So the only service they would provide the prime contractor would be their services as a worker, their skills as a worker. That definition has always been cloudy in the building industry. The previous government sought to fix that through the current definition of what a worker is. That is still not perfect in itself.*
>
> *What we come across as unions when we go onto building sites is that, when someone has had an injury and they were a labour-only contractor, they are supposed to take out their own insurance. In my experience, nine times out of 10 they do not. So you end up with a worker who is out of work, who is severely injured, with no cover for anything. We try to find who we can blame for doing that, because nine times out of 10 it is a sham. The person is a worker. They should be on an hourly rate. They should not be an independent contractor. But they have been forced down that road, in many cases, by the employer and some by their own choice, I must admit.*
>
> *Before you start fooling with the definition of 'worker' as it is currently, go up to Darwin and pick up the paper any day of the week and you will see house cleaners, bricklayers, any trade, any occupation you could possibly think of and it will say, 'Cleaner wanted for a house; must have own ABN.' That is how blatant it is in the Northern Territory. Thankfully, we have not got that here to that extent, but certainly if we start mucking around with the definition and make it too loose, that is exactly what we will have. That impacts. It might make it cheaper for the workers comp scheme, but it is certainly going to make it a nightmare for our hospitals, our lawyers and our courts in deeming who is responsible for someone's injury.*[117]

The Queensland Teachers' Union (QTU) noted that employers are used to dealing with different legislation, such as for superannuation and workers compensation, treating workers differently.[118]

3.2.4 Suggested alternatives – definition of worker

A number of suggested alternative definitions were posited by submitters and witnesses. These included:

- declaration by workers that they wish to be considered to be an independent contractor;
- registration and claiming of GST as a prerequisite;
- registration for an Australian Business Number (ABN); and
- consistency with Federal legislation that governs industrial relations and taxation.

The Committee considered the arguments for and against each of these scenarios.

[117] Mr Simpson, Transcript 31 October 2012: 6
[118] Ms Drew, Transcript 31 October 2012: 38

Master Builders advised that they consider that the current definition is unworkable and there is a need for a clear and simple identifier of 'who is a worker'. They advised that they have struggled with this issue for over ten years and acknowledged the 'results test' contained in the Act has failed.[119] They advised the Committee that:

> *The building industry has made strong submissions over many years because of the nature of the industry and the fact that the status of a worker can change throughout a year, depending on what contract they have, depending on what work they do, depending on how they form to do particular work. The onus has been always on the employer or the principal contractor when they are engaging the contractors. We find that that becomes onerous when the status of these people changes during the life of the working year. So we were looking for a third-party endorsement where the worker themselves can declare what they want to be. In the submissions of Master Builders and the HIA, we have said that if somebody wants to declare themselves to be an own-account worker or an in-business worker or a self-employed in-business worker where they are not going to receive workers comp because they are not deemed to be a worker, then they need to take a step to actually register themselves for GST and claim the GST.*
>
> *This does two things. It means that they are declaring to the tax office that they are independent workers responsible for their own taxation and subsequently claiming GST rebate. It also means that normally your income would be over $75,000 before you would bother and the typical ABN worker who is just on an hourly rate who does not register for GST would still be deemed to be a worker. What we are trying to do is have a third-party endorsement where the worker takes responsibility for declaring their status as an independent worker or an in-business worker, they register for GST, it is independently assessed and they then declare themselves to be on that basis and then, therefore, they are outside the scheme for WorkCover. They would have to take out their own accident insurance policies. It takes the onus off the engaging party who thinks they are engaging a contractor and that they do not have to cover them for WorkCover, only to find when there is a claim or an injury that the status has changed and the person declares themselves to be a worker for the purposes of getting workers comp.*[120]

They recommend a definition that can be applied and understood, that if you are 'in business' you must have your own insurance placing the obligation where it should be on the person 'in business' and not their clients. For this reason they supported a further statutory exemption to exclude all persons who charge GST for their services.[121]

Master Builders acknowledged that supporters of the 'majority labour test' will argue many labour only subcontractors in the industry are 'workers' and should be entitled to workers compensation. They agreed that the industry is presently undergoing a significant move away from the 'ABN Worker' due to increased Australian Taxation Office (ATO) reporting in the construction Industry from 1 July 2012.[122]

Master Builders advised that their experience is that any remaining ABN Workers who are supplying labour only are not charging GST. ABN Workers who are under $75,000 turnover or have entered into a tax withholding arrangement through a voluntary agreement do not charge GST and are therefore still included in the scheme.[123]

[119] Submission 155: 2
[120] Mr Crittall, Transcript 31 October 2012: 5-6
[121] Submission 155: 2
[122] Submission 155: 2
[123] Submission 155: 2

HIA agreed with the approach suggested by the Master Builders and advised that the use of the GST system would be a transparent means of determining who is a worker.[124]

However, the Queensland Bar Association cautioned against this suggestion. They advised that:

> *What will happen is that we as lawyers will be running cases on behalf of these employees, as has happened in the past when there were attempted changes, saying, 'That was a sham. That arrangement whereby someone was registered for GST was a sham.' Can I tell you, fortunately, the judges will be falling over themselves to find that it was a sham, because anything that is a device obviously to avoid what is a person's rights under this legislation or any other legislation is going to be viewed very dimly by the courts. I think the legislature has got it right by reference to those exceptions—that is, the wider breadth that has been provided by schedule 2—and this parliament ought be very cautious in modifying those any further.*[125]

Slater and Gordon also cautioned against this suggestion. They advised:

> *…on a practical level what we really need to look at is the fact that we will see employers actually specifically telling their workers, 'Go away and get registered for GST or you can't work on the site.' There is no reason why they would not do this. They are actually going to save money; they are not going to be paying premiums. There is nothing about that that will benefit the scheme, and it is certainly not going to give them any incentive to make sure that their work sites are safe.*[126]

Visual Diversity Homes recommended that those employed as sub-contractors, who are sole traders or who have an ABN, should be responsible for their own WorkCover policy.[127]

The Queensland Trucking Association considered there is a *need to manage the scheme with a definition which is consistent with Federal and State Taxation Legislation'*.[128]

The submission from CCF also stated their confusion over the definition of workers and *recommended that definition of worker be reviewed to align more with Federal legislation that governs industrial relations and taxation*.[129]

They noted that:

> *The definition of worker in the workers' compensation area is also vastly different from that used by governments for other purposes, creating further complexity for small businesses that do not employ Return to Work Co-ordinators or others who are specialists in this area. For instance, the definitions under Q Leave, the Work Health and Safety Act, the Fair Work Act and the Australian Taxation Office all differ in their definition of worker*.[130]

The Queensland Hotels Association (QHA) suggested *the definition of 'worker' should be reflective of the definition of 'worker' in federal and state tax legislation to avoid confusion and simultaneous claims involving the liabilities of contractors and sub-contractor under workers compensation legislation.*[131]

[124] Mr Temby, Transcript 31 October 2012: 2
[125] Mr Douglas, Transcript 14 November 2012: 17
[126] Ms Simpson, Transcript 14 November 2012: 17
[127] Submission 167: 1-2
[128] Submission 135: 2
[129] Submission 154: 3
[130] Submission 154: 3
[131] Submission 45: 7

O'Donnell Legal suggested that in order to promote economic efficiency, the definition of worker or employee should be standardised across all legislation. They noted that this would include working with the Commonwealth government to include relevant federal legislation such as superannuation and taxation laws. They considered that harmonisation of the definition of worker would remove the anomalous situation where a person may be a worker under one regime but not under another legislative regime.[132]

This premise was rejected by the Australian Lawyers Alliance who advised:

> *In utopia, I would agree entirely with that proposition. The difficulty we have is that in a federated system we have eight different schemes all at different levels of financial health, and when governments have to make decisions about what levers they pull to get the schemes back into shape they are at different ends of the spectrum. I say, with respect, that that is why governments have failed for decades to come up with harmonised solutions. So my only observation is that the government needs to be very careful about which levers to pull to ensure that this scheme stays in a good state of health.*[133]

3.2.5 Schedule 2 – Part 2 – Persons who are not workers

The Act, under Schedule 2, specifically excludes certain groups of workers from being considered to be workers. This includes professional sportspeople and fishing crews under certain conditions. The Committee heard examples of the impact on groups of workers specifically excluded.

The Queensland Jockeys Association advised the Committee that jockeys are considered to be professional sports people and are therefore only covered under a Contract of Insurance (COI) with WorkCover.[134] The Committee heard that *being deemed as professional sportsmen means that any concurrent income or other jobs that they have are not covered under the WorkCover Act*. As Queensland is the only state that does not deem jockeys as employees of the race club they ride at, they requested the definition of worker be amended to include jockeys.[135] However, they also noted that current increases in premium cannot be sustained as *they are also not getting enough money (proportion of prize money) from racing*.[136]

Racing Queensland Limited advised the Committee that they believe that *the current contract of insurance has worked reasonably well over the past five to six years as they have a very good working relationship with WorkCover*.[137] They further advised that *if the definition is amended, there will be further significant premium increases as there are no other 'industry' participants to balance the costs*. They advised that *the impact on Racing Queensland's premium would be significant*.[138]

The Department advised that prior to the *WorkCover Queensland Act 1996,* jockeys were included as workers under the *Workers' Compensation Act 1990.* While amendments in 1994 excluded professional sportspeople from coverage, the exclusions specifically did not apply to jockeys. The *WorkCover Queensland Act 1996* removed specific reference to jockeys and they fell into the excluded category of professional sportspeople. However, the 1996 Act provided for WorkCover to enter into a Contract of Insurance with a person to insure against injury sustained to another person who would not be covered by the Act. This provision allows WorkCover to continue to provide cover to the Queensland Principal Club on a commercial basis to cover jockeys and stable hands who were previously deemed to be workers under section 8(7) of the *Workers' Compensation Act 1990.*[139]

[132] Mr O'Donnell, Transcript 14 November 2012: 9-10
[133] Mr Morrison, Transcript 14 November 2012: 17
[134] Submission 2: 8-9
[135] Mr Prentice, Transcript 31 October 2012: 3-4
[136] Mr Prentice, Transcript 31 October 2012: 10 & 12
[137] Mr Carter, Transcript 14 November 2012: 26
[138] Submission 138: 2
[139] Correspondence from Department of Justice and Attorney-General, to FAC dated 13 July 2012: 2

Subsequent to the public hearings, Racing Queensland has negotiated with WorkCover Queensland to include secondary income to the Workers' Compensation Policy for jockey and apprentice jockeys. This means that there will be an increased level of cover for Queensland jockeys in the event of an accident.[140] The Queensland Jockeys Association confirmed that they are satisfied with this outcome.[141]

In considering the definitions contained in Schedule 2, the Committee also considered the other groups who are not considered to be workers including crews of fishing ships who are not considered to be workers if their remuneration is contingent upon the working of the ship producing gross earnings or profits and the remuneration is wholly or mainly a share of the gross earnings or profits.

3.2.6 Queensland Treasury and Trade – definition review

The Committee was advised that Queensland Treasury and Trade (QTT) was facilitating a whole of government review of the definition of 'worker' for the purposes of payroll tax, workers' compensation, Building Services Authority contractor licensing and portable long service leave entitlements. The Committee sought a copy of the results of this review in order to inform the Committee's deliberations further on this issue.

However, the Assistant Minister for Finance, Administration and Regulatory Reform advised the Committee that the specific work undertaken by QTT was response to a request from the HIA in June 2012 proposing that the definition of 'contractor' be aligned across the four key agencies regulating the home building industry. She advised that specific work undertaken was focussed on the definition of 'contractor' and the potential to standardise the definition and did not extend to a review of the appropriateness of the broader definition of 'worker' and related provisions in the *Workers' Compensation and Rehabilitation Act 2003*.[142]

HIA confirmed that they had submitted to the Government a recommendation that the four State government agencies dealing with the building industry align their definition of 'worker' into one consistent approach.[143] The Assistant Minister advised that HIA's preferred method was to define a contractor as an entity, incorporated or not, that is registered for GST with the Australian Tax Office which charges its principle GST on its invoices. HIA also proposed that, alternatively, a standard definition could be adopted based on the application of Common Law Tests or a Results Test.[144]

The Assistant Minister advised that during the review, QTT consulted with relevant State Government agencies such as the Office of State Revenue (OSR), Queensland Building Services Authority (BSA), WorkCover and QLeave. The potential financial, administrative and operational implications of standardising the definition of 'contractor' for business, government and the community were considered.[145]

[140] WorkCover Queensland News: Racing Qld introduces secondary income to WorkCover for jockeys. 2 April 2013 http://www.workcoverqld.com.au/news/2013/racing-qld-introduces-secondary-income-to-workcover-for-jockeys [23 April 2013]
[141] Correspondence from Mr G Prentice, President, Queensland Jockeys Association to FAC dated 8 May 2013: 1
[142] Correspondence from Mrs D Frecklington, Assistant Minister for Finance, Administration and Regulatory Reform, to FAC dated 7 February 2013: 12
[143] Submission 60: 4
[144] Correspondence from Mrs D Frecklington, Assistant Minister for Finance, Administration and Regulatory Reform, to FAC dated 7 February 2013: 2
[145] Correspondence from Mrs D Frecklington, Assistant Minister for Finance, Administration and Regulatory Reform, to FAC dated 7 February 2013: 2

The Assistant Minister informed the Committee that the:

> *Outcomes of the review indicated that standardisation (or partial standardisation) of the definitions (under any of the three approaches proposed) is likely to: have significant impacts on stakeholders (both industry and consumers); reduce the effectiveness of the regulatory instruments; have substantial revenue implications for the Government; and result in potential inconsistencies with existing and proposed cross-jurisdictional agreements. Further, the review indicated that the standardisation of definitions could have potential implications for businesses ….and those operating in multiple jurisdictions.*[146]

The Committee was advised that on this basis the government does not intend standardising 'contractor' definitions at this time due to the potentially significant impacts. HIA have also been informed of this outcome.[147]

The Assistant Minister advised that there may be other opportunities for agencies to assist business in the home building industry to better understand and meet their regulatory obligations. Mrs Frecklington has written to the relevant Ministers requesting that their departments liaise directly with HIA regarding other actions to help address HIA's concerns including:

- QLeave consulting with the HIA to clarify specific elements of definitions in the *Building and Construction Industry (Portable Long Service Leave) Act 1991.*
- DJAG consulting with WorkCover Queensland and HIA to identify the most effective way to help educate individuals within the industry regarding their regulatory obligations, particularly in relation to approaches to requesting and providing invoices.
- Work Cover and QLeave giving further consideration to the extent to which annual reporting processes for contractors could be simplified, aligned or potentially rationalised across the two agencies.
- Building Services Authority (BSA) consulting with HIA regarding the relevant fact sheet made available to industry to determine whether there are any issues that can be clarified in terms of its content.
- Office of State Revenue (OSR) consulting with HIA in relation to specific issues that may warrant the development of new rulings or other published material to provide more clarity and certainty.
- OSR consulting with HIA regarding the potential to hold seminars in conjunction with HIA to educate clients on the contractor provisions related to payroll tax.

[146] Correspondence from Mrs D Frecklington, Assistant Minister for Finance, Administration and Regulatory Reform, to FAC dated 7 February 2013: 2

[147] Correspondence from Mrs D Frecklington, Assistant Minister for Finance, Administration and Regulatory Reform, to FAC dated 7 February 2013: 2

3.2.7 Other issues relating to the definition of worker

The Committee has noted that the issue is further confused by the definition contained within the *Work Health and Safety Act 2011*. All workers, including employees, contractors, subcontractors, outworkers, apprentices and trainees, work experience students, volunteers and employers who perform work, are covered by this Act. The relevant section of that Act is outlined below:

7 Meaning of *worker*

(1) A person is a ***worker*** if the person carries out work in any capacity for a person conducting a business or undertaking, including work as—

(a) an employee; or

(b) a contractor or subcontractor; or

(c) an employee of a contractor or subcontractor; or

(d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or

(e) an outworker; or

(f) an apprentice or trainee; or

(g) a student gaining work experience; or

(h) a volunteer; or

(i) a person of a prescribed class

3.3 Proposed legislative changes – definition of worker

On 30 April 2013, the Attorney-General and Minister for Justice introduced *the Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013*. This Bill has been referred to the Legal Affairs and Community Safety Committee (LACSC) under Standing Order 131.

The Bill includes clauses amending the *Workers' Compensation and Rehabilitation Act 2003*. The Attorney-General stated when he introduced the Bill that the amendments clarify the definition of worker to assist employers identify who must be included in their workers' compensation policy. The Bill proposes to amend the Act to align with the 'pay as you go' (PAYG) test applied under Australian Tax Office (ATO) laws.[148] Appendix G contains the relevant sections with track changes.

The Attorney-General stated that confusion with the current definition of 'worker' represents the most common areas of complaint made to government members in respect of the operation of the Workers' Compensation Scheme. He stated that while the FAC is currently undertaking a review of the scheme, the reporting time frame does not enable the government to consider its response to any recommendations in time to impact premium renewals for the 2013-14 period.[149]

The Attorney-General wrote to the Committee on 30 April 2013 advising of the introduction of the Bill and noting that it contains an amendment to the definition of worker under the Act which aligns with the definition of worker with ATO PAYG withholding requirements. He advised the Committee that:

> *I understand that the issue of confusion and cost associated with this definition has been raised in no less than 17 individual submissions to your Committee's review into Queensland workers' compensation scheme. This issue has also been the single biggest concern raised by employers with my office and other members of government in respect of workers compensation. Further, the Chair of the WorkCover Queensland Board, Mr Glenn Ferguson,*

[148] Queensland Legislative Assembly, Hon J Bleijie MP, Attorney-General and Minister for Justice, Introduction of Bill, *Parliamentary Debates (Hansard)*, 30 April 2013: 1305

[149] Queensland Legislative Assembly, Hon J Bleijie MP, Attorney-General and Minister for Justice, Introduction of Bill, *Parliamentary Debates (Hansard)*, 30 April 2013: 1305

> *also wrote to me on 20 February 2013 to request this change as a matter of urgency to alleviate the associated administration and compliance costs to the scheme.*
>
> *…such a definitional change impacts the wages assessable for premium purposes. Its introduction therefore needs to align with the commencement of a financial year to avoid the additional costs and red tape associated with multiple wages declarations and premium reassessments for the one period of insurance. For this reason, the introduction of this amendment prior to your final reporting date, which was extended from 28 February 2013 to 23 May 2013, is considered necessary to allow the amended definition to commence from 1 July 2013.*[150]

The Attorney-General also provided a copy of the letter from Mr Glenn Ferguson, Chair, WorkCover Queensland. That correspondence identifies that WorkCover has undertaken preliminary costing of a change from the current definition of 'worker' to a definition that is consistent with that of the ATO. He notes that the impact on the scheme, as a standalone change, is a relatively minor saving. He states that:

> *…the most positive aspect of such a change would be alignment of 'worker' definitions for the purposes of the ATO and workers' compensation in Queensland, which is clearly a reduction in 'red tape' for Queensland employers.*[151]

The explanatory notes state that the current definition of 'worker' in the Act *is considered to be unworkable; it creates uncertainty and adds to the regulatory burden on employers who have to interpret the definition ie who is a worker and who is a contractor.*[152]

The Attorney-General identified examples of persons who will no longer be covered for workers' compensation as a result of the change to the definition are those who supply and operate their own plant, such as earthmoving equipment or trucks as part of their contract. Further, individuals providing substantial materials, such as carpenters providing the timber or plasterers providing the necessary plasterboard to complete the work, will no longer be defined as 'workers'. He noted that many of these individuals currently already have 24-hour sickness and accident insurance, and the change will provide clarity for them and reduce costs to the employers with whom they contract.[153]

The proposed legislation amendment removes the Results Test contained within Schedule 2 of the Act. This Test identified that a person was not a worker if the person performing the work was:

- paid to achieve a specified result or outcome; and
- has to supply the plant and equipment or tools of trade needed to perform the work; or
- was or would be liable for the cost of rectifying any defect in the work performed; or
- a personal services business determination was in effect for the person performing the work under the *Income Tax Assessment Act 1997* (Cwlth), section 87-60.

[150] Correspondence from Hon J Bleijie MP, Attorney-General and Minister for Justice, to FAC dated 30 April 2013: 1
[151] Correspondence from Hon J Bleijie MP, Attorney-General and Minister for Justice, to FAC dated 30 April 2013: Attachment
[152] *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013,* Explanatory Notes: 3
[153] Queensland Legislative Assembly, Hon J Bleijie MP, Attorney-General and Minister for Justice, Introduction of Bill, *Parliamentary Debates (Hansard)*, 30 April 2013: 1305

The Committee notes that the change to the definition will place reliance on the definitions contained within the Taxation legislation. Guidance material is published by the ATO to assist in determining if workers are employees or contractors. This guidance material identifies that there are six factors to consider as follows:

- ability to sub-contract/delegate;
- basis of payment;
- equipment, tools and other assets;
- commercial risks;
- control over work; and
- independence.

3.4 Committee comments – definition of worker

The Committee has considered and consulted extensively on the issue of the definition of worker contained within the Act. There are numerous views of the 'best' definition based on individual viewpoints.

In the absence of the proposed legislative amendment discussed in section 3.2 above, the Committee would have recommended that no changes be made to the definition contained in section 11. The Committee's preference would be to see better use of Schedule 2 rather than change the definition of worker.

The Committee agreed that the definition, as it currently stands, has been tested at law and fundamentally works. Any change to that definition will impact on both employers and workers. There may also be unintended imposts on the scheme as any new definitions are tested in the courts.

The Committee also considered that the suggestion regarding contractors' registration for GST has some merit. The Committee considers that the guidance material published by the ATO to assist in determining who is a worker and who is a contractor could have been incorporated into the 'Results Test' without the need for amending the definition contained in section 11. The Committee considers that if a contractor is registered for GST then this could assist with determining whether a person is a contractor or a worker. This, however, should not be the sole determinant.

Of major concern to the Committee is ensuring that the principle of universal coverage is protected and vulnerable workers are not unknowingly excluded. The Committee considers that there are several groups of workers who are in a disproportionate position of power when it comes to negotiating their entitlements. These groups include those whose employment status is unclear, the poorly educated and those from culturally and linguistically diverse backgrounds.

As noted above, the Committee considered the issue of crews of fishing vessels who are not considered to be workers in certain circumstances. The debate as to whether it is equitable to exclude this group from the definition of worker has continued for several decades. The Committee is concerned that, despite extensive education campaigns, many fishing vessel crew members participate in these ventures without adequate insurance coverage. The Committee considers that this type of work equates with that of a salesperson, whose work is paid either partially or entirely by commission, who are included in the definition of who is a worker.

The Committee considers that if fishing vessel crews fit the definition of workers in all other aspects, then the way remuneration is paid should not preclude these workers from the Workers' Compensations Scheme. However, the cost of the workers' compensation policy should form part of the expenses associated with the venture and therefore be eligible to be deducted prior to the payment of any proceeds.

The Committee is also concerned that one of the potential consequences of the proposed legislative change may be an increase in 'sham' type arrangements. However, the Committee takes some comfort in the fact that the ATO has recently increased reporting requirements with respect to businesses with an ABN. The Committee considers that any finding of 'sham' type arrangements, as a result of the change of definition, need to be prosecuted immediately and publicly by the Department.

The Committee considers that an education, awareness and compliance campaign be undertaken by the Department to assist both employers and workers in understanding their rights, obligations and responsibilities with regard to workers compensation coverage. This education campaign should include material that employers can provide to workers and/or contractors and target those workers whose employment status is unclear, the poorly educated and from culturally and linguistically diverse backgrounds. However, the Committee cautions that provision of education material should not exempt anyone from their responsibilities.

The Committee is concerned that employers are reporting that WorkCover is unable to assist them in determining who are workers and that even subsequent to decisions being made, WorkCover are continuing to investigate these instances. The Committee considers that sufficient guidance material should be made available to WorkCover assessors to enable such decisions to be made promptly and in a consistent manner.

The Committee is satisfied that an equitable outcome has been achieved for Queensland jockeys with regard to providing a balance between the funding arrangements for Racing Queensland and the protection of jockeys in this high risk industry. The Committee does not consider that any changes are currently required to the definition of jockeys as professional sportspeople. However, the Department should continue to monitor the status of the WorkCover policy to ensure that the jockeys' entitlements are retained in subsequent agreements.

Recommendation 1

The Committee recommends that the definition of worker contained in section 11 remain unchanged and amendments are made to Schedule 2 to strengthen who is or is not considered to be a worker.

Recommendation 2

The Committee recommends that Schedule 2 be amended to include crews of fishing vessels, who are paid a percentage of catch as remuneration, as workers.

Recommendation 3

The Committee recommends that the Department undertake an extensive awareness education and compliance campaign to assist employers and workers understand their rights, obligations and responsibilities with regard to workers compensation coverage.

Recommendation 4

The Committee recommends that the Department prepare for and distribute guidance material to assessors to ensure that decisions are made in a clear and consistent manner.

Recommendation 5

The Committee recommends that the Department monitor the WorkCover policy for Queensland jockeys to ensure that it continues to include secondary income for jockeys and apprentice jockeys in the future.

3.5 Definition of injury

Compensation is payable to a 'worker' who has sustained an injury out of or in the course of employment. Section 32 of the *Workers' Compensation and Rehabilitation Act 2003* provides the requirements in which an 'injury' is established. There are three requirements in establishing 'injury' for the purpose of the Act; these are:

- a personal injury;
- which arises out of or in the course of employment; and
- that employment must be a significant contributing factor to the injury.

In Queensland, a worker may be eligible for compensation if the injury was incurred at work, while travelling to and from work or travelling for work purposes, or while on a break from work.

Examples of different types of injuries include:

- physical injuries such as lacerations, fractures, burns, industrial deafness;
- psychiatric or psychological disorders such as stress or depression;
- diseases such as asbestosis or Q-fever;
- aggravation of a pre-existing condition; or
- death from an injury or disease.[154]

Workers cannot receive compensation for certain psychological injuries that arise out of or in the course of reasonable management action, as they are excluded from the definition of injury. In addition, workers cannot receive compensation for injuries that are self-inflicted or caused by the worker's misconduct.[155]

Section 32 (2) provides for exemptions where employment need not be a significant contributing factor to the injury (see below for relevant section of the Act).

32 Meaning of *injury*

(1) An *injury* is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.

(2) However, employment need not be a significant contributing factor to the injury if section 34(2) or 35(2) applies.

(3) *Injury* includes the following—

(a) a disease contracted in the course of employment, whether at or away from the place of employment, if the employment is a significant contributing factor to the disease;

(b) an aggravation of the following, if the aggravation arises out of, or in the course of, employment and the employment is a significant contributing factor to the aggravation—

(i) a personal injury;

(ii) a disease;

(iii) a medical condition if the condition becomes a personal injury or disease because of the aggravation;

(c) loss of hearing resulting in industrial deafness if the employment is a significant contributing factor to causing the loss of hearing;

(d) death from injury arising out of, or in the course of, employment if the employment is a significant contributing factor to causing the injury;

(e) death from a disease mentioned in paragraph (a), if the employment is a significant contributing factor to the disease;

(f) death from an aggravation mentioned in paragraph (b), if the employment is a significant contributing factor to the aggravation.

[154] WorkCover Queensland. Injuries at work. http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work [15 January 2013]
[155] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 21

(4) For subsection (3)(b), to remove any doubt, it is declared that an aggravation mentioned in the provision is an injury only to the extent of the effects of the aggravation.

(5) Despite subsections (1) and (3), ***injury*** does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—

(a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;

(b) the worker's expectation or perception of reasonable management action being taken against the worker;

(c) action by the Authority or an insurer in connection with the worker's application for compensation.

Examples of actions that may be reasonable management actions taken in a reasonable way—

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker
- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment

3.5.1 Previous definitions – definition of injury

The *Workers Compensation Act 1990* was amended in 1994 following the decision in the case of Timbs v Workers Compensation Board[156], where the Queensland Industrial Court ruled that work need only be 'a contributing factor' to establish entitlement to workers' compensation.[157] The Act was amended to define 'injury' as meaning a personal injury arising out of, or in the course of, employment if the employment was a significant contributing factor to the injury.[158] The then Minister for Employment, Training and Industrial Relations, Hon Matt Foley MP, noted at the time that the case had resulted in a progressive extension of the liability of employers with a need to accept a growing number of claims for conditions where work was only a minor contributing factor.[159]

The Kennedy Review in 1996 also considered the issue of definition of injury. The report notes that the 1994 amendments were made in the belief that the inclusion of 'if the employment was a significant contributing factor' would be adequate to exclude injuries which had a minor work relationship. However, the experience since the 1994 amendments indicates that Industrial Magistrates and Courts are applying lenient interpretations, similar to that which applied before the legislative change. The report also noted that claims staff were having great difficulty determining what a significant contributing factor meant.[160]

Kennedy recommended that the definition of injury be clarified so that injury means 'personal injury arising out of or in the course of employment where the employment is the major significant factor causing injury'.[161]

This amendment was introduced in November 1996. The then Minister for Training and Industrial Relations, Hon Santo Santoro MP, noted that by requiring employment to be 'the major significant contributing factor' causing the injury, the legislation will exclude those injuries which have only a minimal work-related component. The definition will require the link between employment and the injury to be stronger and intended to ensure that employers were held liable only to the extent that

[156] *Timbs v The Workers' Compensation Board of Queensland* (1993) 34 WCR 57

[157] Queensland Legislative Assembly, Hon MJ Foley MP, Minister for Employment, Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, Hansard, 28 October 1994: 10125

[158] *Workers' Compensation Amendment Bill 1994*, Clause 6

[159] Queensland Legislative Assembly, Hon MJ Foley MP, Minister for Employment, Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, Hansard, 28 October 1994: 10125

[160] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 159

[161] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 170

their employment of the worker contributed to the injury, or aggravation or acceleration of a pre-existing non-work related condition.[162]

The definition was again amended in 1999 to requiring employment to be 'a major significant contributing factor'. The then Minister for Employment, Training and Industrial Relations, Hon Paul Braddy, stated that a strong link between the injury and employment would still be required but the definition which required that employment be the major significant factor causing the injury had proven to be harsh as it excluded some workers from receiving the compensation they should have been entitled to. He noted that this was particularly the case for work-related aggravations.[163] This amendment brought the definition into line with other Australian jurisdictions.[164]

3.5.2 Arguments for change – definition of injury

The Committee heard evidence that there was concern regarding the definition of injury, in relation to the interpretation of the meaning of a significant contributing factor. Some submitters called for the wording of the Act to be amended.

The Civil Contractors Federation considered that the current definition is vague and open to interpretation. They stated that:

> *…the use of "substantial" in the definition of worker, the use of "significant" in relation to injury does not provide a clear interpretation of the magnitude required.*[165]

Timber Queensland agreed in that there is no test in the Act to define what is deemed to be significant.[166]

Aged Care Employers Self Insurance also supported this view stating that:

> *…the fact is that at the moment 'a significant' can mean one per cent. So you are getting claims in where people may just be at work walking along, their knee goes, they fracture a foot and they are not doing any type of work but because there is one per cent significant in that they are at work you are wearing very expensive claims. So I agree it should go back to 'the major'.*[167]

The Committee also heard that there was concern over exaggeration of injuries, attributing unrelated injuries to the workplace and pre-existing injuries.

The Australian Meat Industry Council stated that the definition should revert back to the pre 2003 definition "*the major significant factor causing the injury*".[168] They advised the Committee that:

> *… we support the fact that it should be amended so that it is 'the major contributing factor'. The primary reason for that - and, again, there are other reasons – is to distinguish the point as to where the work related scenario is principally the cause of that injury or illness, because there have been many occasions where it has been integrated or involved aspects of pre-injuries from previous employers and/or aspects of degenerative situations.*[169]

Rosenlund Contractors supported a change in the definition of an injury from being "a significant contributing factor" to better reflect the workplace being the *major* contributing factor to an injury before becoming liable for workers' compensation. They also considered that changes to the

[162] Queensland Legislative Assembly, Hon S Santoro MP, Minister for Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 27 November 1996: 4459
[163] Queensland Legislative Assembly, Hon PJ Braddy MP, Minister for Employment, Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 25 March 1999: 852
[164] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 20
[165] Submission 154: 3
[166] Submission 29: 5
[167] Transcript 14 November 2012: 4
[168] Submission 206: 7
[169] Mr McKell, Transcript 31 October 2012: 24

definition of an injury should also take into account situations where a worker exaggerates injuries to increase perceived damages and time taken to assess the damages. [170]

Hyne Timber considered that the *'changes in 1999 to the definition of an injury from being "the significant contributing factor" to "a significant contributing factor" has inappropriately expanded the opportunity to attribute unrelated injuries to the workplace'*. Their submission provided examples where an injury may have occurred outside of work but a claim is lodged citing work as the cause. They recommended *'that for an injury to be attributed to a workplace that it should be the major contributing factor'*.[171]

Timber Queensland advised that they believe the amendments to the definition in 1999 had inappropriately expanded the opportunity to attribute unrelated injuries to the workplace.[172]

Other submitters such as JBS[173] and the National Retail Association[174] agreed that unrelated or tenuously related injuries are allowed under the current definition. JBS stated:

> *The Kennedy inquiry recommended that to address the problems that were existing in the scheme then, and those same problems still exist today. That definition only existed for two years in the history of this scheme. We submit that it should go back to that. There are too many injuries which are being allowed into the compensation scheme which have a very tenuous relationship to employment.*
>
> *There is also the situation around the medical aspects where people have pre-existing conditions and merely suffer some exacerbation or their condition becomes symptomatic at work and the employers are considered liable for that through the current definition. If we changed to 'major significant contributing factor' we will eliminate a lot of those anomalies and employers can then focus on what they really can control.*[175]

St Vincent de Paul submitted that:

> *External factors need to be considered when deciding/reviewing an employee's claim as both physical and physiological injuries can be impacted on external hobbies/actives or events that happen outside of work.*[176]

The Australian Sugar Milling Council provided the Committee with an example which highlights how external factors can influence an injury:

> *Anecdotal evidence that I received yesterday coincidentally was that a worker injured themselves on a motorbike over a weekend. They came to work Monday morning, struggled through part of the day and said, 'I sustained an injury.' It might well have been legitimate in that the injury had been exacerbated by being at work. It was not until the company tried to rehabilitate the worker that they got expert medical attention for the worker and it was discovered then that the injury was not consistent with something that happened at work, and in fact the worker said, 'I did injure myself on the weekend on my motorbike.' We would not have got that evidence otherwise.*[177]

As such, they consider processes that might lead to better workplace health and safety should be explored. They recommended implementing campaigns to raise parties' awareness of the impact of

[170] Submission 97: 3
[171] Submission 107: 5
[172] Submission 29: 5
[173] Submission 160: 7
[174] Submission 57: 2
[175] Mr Gomulka, Transcript 14 November 2012: 4
[176] Submission 63: 4
[177] Mr Warren, Transcript 31 October 2012: 31

contributory negligence, obvious risk and misconduct on WorkCover, especially employees' risk of reduction in damages.[178]

3.5.3 Arguments against change – definition of injury

A number of submissions and witnesses supported the current definition. They advised that restricting the current definition '*will both disadvantage and prejudice workers who injure themselves at work*'.[179] The Queensland Law Society outlined that they have strong objections to '*any change to the definition of injury*' and greater emphasis should be placed instead on effective workplace health and safety to reduce the number of injuries.[180]

Slater and Gordon emphasised *'that the current definition should remain unaltered'*. They explained:

> *The current definition has not adversely affected claim numbers and no evidence exists to suggest that an alternation to narrow the definition would result in a decrease in the number of statutory claims opened by WorkCover.*
>
> *Should an amendment be considered to narrow the definition of injury, this would have a severe and deleterious impact on workers. Specific industry groups such as nurses, for example, frequently suffer physical injuries defined as aggravations of pre-existing degenerative conditions of their spine. It would be manifestly unfair to exclude a nurse from receiving medical rehabilitation under the workers' compensation scheme if a doctor found that worker suffered non symptomatic pre-existing degeneration.*[181]

The QLS confirmed that the change in definition in 1999 did not have a significant impact on claim numbers. They advised that:

> *The point we would make is that, for the period of time that the definition of injury involved 'major contributing factor', there was no significant change in claims numbers. In that period of time between 1997 and 1999 when that definition applied and thereafter when the definition changed back again, there was no indication of any particular change in claims numbers*.[182]

The Queensland Council of Unions (QCU) supported the proposition that a change of definition to the major significantly contributing factors would have *the potential to exclude a large number of reasonable claims for nurses and other workers into the future.*[183]

The Queensland Nurses' Union (QNU) confirmed that any change would severely disadvantage their members as a significant number of injuries their members sustain are aggravations of pre-existing conditions. They considered that any change to the definition could lead to an increase in litigation around claim acceptance.[184]

The Services Union agreed that the present definition ensures that is a connection with the workplace and that that connection has to be clear and able to be understood. They advised that they do not consider there would be any benefit in changing the definition.[185]

[178] Submission 49: 9
[179] Submission 192: 2
[180] Submission 163: 2
[181] Submission 146: 23-24
[182] Mr I Brown, Transcript 14 November 2012: 17
[183] Submission 190: 3
[184] Mr Gilbert, Transcript 31 October 2012: 24
[185] Mr Henderson, Transcript 31 October 2012: 24

The Queensland Asbestos Related Disease Support Society Inc. considers that amending the definition of injury would have a significant detrimental impact on those with asbestos disease.[186] They advised the Committee:

> *….if we did not have the 'a' significant contributing factor, which generally is applied Australia-wide in asbestos claims, workers run the risk of missing out. They might have equal exposure in four different jurisdictions. If it is 'the' major contributing factor, none of them would satisfy that test. It is not as if one jurisdiction would be penalised because in all of the workers compensation systems there is a right of recovery, usually from negligent third parties - namely, asbestos manufacturers or employers in other states. So there is always a spreading of the burden at the end of the day. But the test for 'a' significant contributing factor is very important in asbestos disease claims.*[187]

The Australian Lawyers Alliance rejected the assertion that injuries with only tenuous relationship to employment are being accepted. The advised that:

> *'Significant' means more than insignificant and that depends on the factual circumstances in each individual case. If there were to be a change away from the current definition, then that would drive disputation rates up and that would impose additional costs and administrative burdens on the scheme. There is no correct suggestion in WorkCover's data that people with only a minimal contribution from work are getting claims accepted. We simply do not accept that proposition. Also, if the definition was significantly tightened up such that 'major' became part of it, that would take workers who had genuine work related injuries out of the scheme, out of the ability to return to work through the rehabilitation mechanisms available under the WorkCover scheme, and that would be a very bad thing for productivity in a labour shortage environment that we have in Queensland*.[188]

3.5.4 Aggravation injuries

There was some concern expressed regarding the inclusion of aggravation injuries.

Section 32(3)(b) of the Act defines injury as an aggravation which arises out of, or in the course of, employment and the employment is a significant contributing factor to the aggravation—

> *(i) a personal injury;*
>
> *(ii) a disease;*
>
> *(iii) a medical condition if the condition becomes a personal injury or disease because of the aggravation;*[189]

Q-COMP explained that *'whether the injury is an "aggravation", as used in the Act'* requires consideration of all available evidence. They stated that the *'Act provides that "an aggravation" is an injury only to the extent of the effects of the aggravation (section 32(4)). The worker is only entitled to compensation for the "aggravation" and only to the extent of the effects of the aggravation' (section 108(2))*.[190]

[186] Submission 199: 2-3
[187] Mr Blundell, Transcript 16 November 2012: 15-16
[188] Mr Hodgson, Transcript 14 November 2012: 16
[189] *Workers' Compensation and Rehabilitation Act 2003*, section 32
[190] Q-COMP Q & A's. A Barrister's perspective, Stephen Gray. 17 May 2011 http://www.qldbar.asn.au/eventtest/event_mp3s/1081303117_.pdf [23 April 2013]

A paper presented at Q-COMP's Statutory Law Cases Seminar in 2006 outlined that *'it is not necessary in order that an applicant may be successful to establish that the primary injury which is aggravated was caused by a work related event. What is necessary and is the subject of the greater majority of decisions in this area is to establish that the aggravation was work related'*. The author highlighted that decisions in each and every case requires an examination of the particular circumstances of the aggravation together with the medical evidence as to its significance particularly having regard to possible other causes.[191]

3.5.5 Other issues – definition of injury

Some submissions identified that age related injuries were increasing under the current definition. The Civil Contractors Federation considered that:

> *With an ageing population comes an increasing problem of degenerative and pre-existing conditions for which employers are increasingly becoming liable. This is a concern to our members whose premiums are being affected by high cost claims such as knee reconstructive surgery where the injury was at least partly attributable to age or activities outside of work.*[192]

Another submission outlined that *'older employees … are expecting to have no aches or pains related to just getting old. Somehow employers are blamed for this'*.[193]

Sucrogen recommended that part of the Act should be aligned with the New South Wales amendments where diseases, heart attack and stroke injuries are only covered if the nature of the employment gave rise to a significantly greater risk of the worker suffering the injury'. Furthermore, they consider that *'for a disease injury, the workers' employment must be the main contributing factor (example: aggravation of underlying or pre-existing osteoarthritis)'*.[194]

3.6 Committee comments – definition of injury

The Committee has considered the arguments about whether the definition of injury should be 'the' or 'a' major significant contributing factor and has concluded that the current definition is appropriate and should remain unchanged with the exception of psychological injuries. Psychological injuries are considered separately in section 4.4 – 4.5 of this report. The majority of the arguments centred around reducing the cost of premiums to employers by limiting the definition and, by default, the number of claims. The Committee considers that there are other methods of mitigating premiums without unjustly excluding injured workers.

The Committee heard numerous examples of where an employer considered the injury was unrelated to the workplace but was accepted by WorkCover as being work related. The Committee considers that there are sufficient mechanisms available to enable investigations of such claims and revision of the definition is not appropriate to counteract such claims.

Whilst the Committee concedes that the area of pre-existing and degenerative injuries is highly contentious, it considers that the system as it stands fundamentally works.

[191] Stuart Sapsford 2006. Aggravation. Paper presented at Q-COMP's Statutory Law Cases Seminar - A Significant Contributing Factor on 29 May 2006 and 18 July 2006. http://www.qcomp.com.au/media/19061/a-significant-contributing-factor-aggravation[1].pdf
[192] Submission 154: 3
[193] Submission 8: confidential
[194] Submission 58: 3

The Committee is uncertain about the impact the expected roll out of 'DisabilityCare Australia' formerly known as the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS) may have on the Workers' Compensation Scheme. On that basis, the Committee recommends that the definition of injury be included as a topic for consideration at the next review.

Recommendation 6

The Committee recommends that the current definition of injury be retained in its current form with the exception of psychological injuries which are addressed separately in section 4.4.

Recommendation 7

The Committee recommends that the definition of injury be considered at the next review subsequent to the roll out of 'DisabilityCare Australia' formerly known as the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS).

3.7 No-fault system

All Australian Workers' Compensation Schemes operate as a no-fault scheme, which means that workers have the right to apply for statutory benefits, no matter who or what caused their workplace injury.[195, 196]

In Queensland, there are two types of claims:

1. statutory (no-fault) claims
2. common law claims (where the employee seeks common law action through the courts against their employer).

All claims in Queensland are usually lodged initially as a statutory (no-fault) claim and if approved compensation is made regardless of who was at fault for causing the injury. Common law claims involve an injured worker suing their employer for negligence,[197] therefore 'fault' has to be proven.

There were many positive comments regarding the no-fault scheme. In particular, many submitters highlighted that the Queensland scheme's financial stability is attributed to it being a short-tail no fault statutory scheme.[198]

The Asbestos Related Disease Support Society Queensland further explained:

> *The Queensland workers compensation system has had an excellent track record of compensating those with asbestos disease and the society's submission is that benefits should stay as they are. Those with asbestos disease form a unique category of injured workers. They were exposed to a deadly substance through no fault of their own, usually over many years, with minimal, if any, precautions being taken*.[199]

[195] Safe Work Australia, Key Workers' Compensation Information, Australia 2012: 4 http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/key-wc-information-2012 [2 April 2013]
[196] WorkCover Queensland. Rehab and claims http://www.workcoverqld.com.au/rehab-and-claims [28 March 2013]
[197] Queensland Government. Workers' compensation http://www.qld.gov.au/jobs/entitlements/pages/compensation.html [28 March 2013]
[198] Submissions 36, 46, 79-86, 88
[199] Mrs Colbert, Transcript 16 November 2012: 13

However, some submitters highlighted that there was a need to introduce a percentage of fault particularly if thorough training had been provided[200] or the injured worker had been negligent.[201, 202] The CCIQ submitted that the *'no-fault scheme undermines employee responsibility for their own health and safety'*[203] and added:

> *When workplace accidents occur as a result of employee misconduct or negligence, due to the 'no fault' operation of the scheme, there tends to be little investigation of the accident and claims are paid out regardless of whether or not the employee contributed to the accident through their omissions or carelessness.*[204]

However, the exception of 'no fault' scheme is psychological injuries. This is issue covered in detail in section 4.4 of this report.

3.8 Committee comments – no-fault system

The Committee supports the retention of the no-fault system as it currently exists in Queensland.

[200] Submission 129: 3
[201] Submission 113: 18
[202] Submission 91: 2
[203] Mr Behrens, Transcript 31 October 2012: 28
[204] Submission 113: 18

4 How the Queensland Workers' Compensation Scheme compares to the scheme arrangements in other Australian jurisdictions

As outlined in section 2.2, Queensland has a central scheme where the government (or a single public insurer) is the sole underwriter of the scheme as well as being the responsible party in setting premium rates.[205] A comparison of the schemes in all Australian jurisdictions is shown in the table below:

Table 1: Workers compensation comparisons between jurisdictions[206]

	QLD	NSW	VIC	SA	TAS	WA	ACT	NT
Type of scheme	Central	Hybrid	Hybrid	Hybrid	Privately underwritten	Privately underwritten	Privately underwritten	Privately under-written
	Short-tail Max 5 years	Short-tail Max 5 years	Long tail	Long tail	Long tail (with restrictions)	Long tail	Long tail	Long tail
No of workers covered (2008-09)	1,857,900	3,008,600	2,447,800	705,100	211,800	1,047,700	128,800	109,800
Journey claims	Yes	Limited	No	Limited	No	No	Yes	Yes (excludes motor accidents)
Average premium rate (2009-10)	1.15%	1.69%	1.39%	3.00%	1.97%	1.74%	2.44%	2.10%
Average premium rate (2012-13)	1.45%^	1.68%*	1.3%*	2.75%*	2.28%*	1.691%*	2.37%*	Private insurers set their own premiums. No update from WorkSafe NT

Source: Department of Justice and Attorney-General Information Paper, Appendix 2

* 2012-13 rates obtained from Finity Actuaries July 2012 News[207]

^ Queensland rates from insurance news[208]

[205] Purcal S, and Wong A, 2007, Australia Workers' Compensation: A review. (October): 2 http://wwwdocs.fce.unsw.edu.au/actuarial/research/papers/2007/AustWorkComp_Purcal.pdf [25 June 2012]

[206] Department of Justice and Attorney-General Information Paper, Appendix 2

[207] Finity. Workers Compensation News – July 2012 http://www.finity.com.au/wp-content/uploads/2012/07/dfinitive_Workers-Comp-News_20120713.pdf [20 May 2013]

[208] Insurance news: Queensland announces new WorkCover rates and a review 18 June 2012 http://www.insurancenews.com.au/regulatory-government/queensland-announces-new-workcover-rates-and-a-review [20 May 2013]

A paper presented at the Asia Pacific Risk and Insurance Association (APRIA) conference in 2008 reviewed the different Australian Workers' Compensation Schemes.[209] The authors found that the managed scheme (such as that in South Australia and New South Wales) had the worst claims management performance, the highest frequency rate of injury and the highest cost ratio. The managed scheme also has the highest premium rate on average and the poorest funded scheme and although it had the lowest injury rate, it still had a higher cost ratio and lower funding ratio.[210]

The above review also suggested the best scheme to be that of the government run central scheme in terms of best claims management performance. The central scheme was the only scheme to have recorded a funding ratio above 100 per cent in each of the years examined in the study.[211]

Public underwriting of workers' compensation insurance is estimated to account for approximately 85 per cent of total workers' compensation levies paid by employers. However, private insurance companies are still responsible for the underwriting of scheme finances in Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory. There are also provisions for self-insurance in all states and territories. The relevant legislation and agencies in each state and territory is shown in Table 2.

Table 2: Legislation and agency in Australian states and territories

State/Territory	Legislation	Agency
Queensland	*Workers' Compensation and Rehabilitation Act 2003* *The Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2010*	WorkCover Queensland
New South Wales	*Workplace Injury Management and Workers Compensation Act 1998* *Workers Compensation Act 1987.*	WorkCover NSW
Victoria	*Accident Compensation Act 1985* *Accident Compensation (WorkCover Insurance) Act 1993*	WorkSafe Victoria
Tasmania	*Workers' Rehabilitation and Compensation Act 1988.* *Workers Rehabilitation and Compensation Amendment Act 2009* *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011*	Licensed private sector insurers subject to WorkCover Tas oversight.
South Australia	*Workers' Rehabilitation and Compensation Act 1986* *WorkCover Corporation Act 1994.*	WorkCover SA
Western Australia	*Workers' Compensation and Injury Management Act 1981* *Workers' Compensation and Injury Management Amendment Act 2011*	Insurers subject to WorkCover WA oversight.
Northern Territory	*Worker's Rehabilitation and Compensation Act* *Work Health Administration Act 2011* *Work Health and Safety (National Uniform Legislation) Act 2011* *Work Health and Safety (National Uniform Legislation) Implementation Act 2011*	Private sector insurers
Australian Capital Territory	*Workers Compensation Act 1951* Workers' compensation arrangements for ACT Public Sector (ACTPS) workers are provided under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act). [212]	Private sector insurers

Source: Adapted from Safe Work Australia Comparison of Workers' Compensation Arrangements in Australia and New Zealand April 2012: 165 – 166

[209] APRIA UNSW Sydney. Schedule papers in concurrent sessions. http://wwwdocs.fce.unsw.edu.au/actuarial/news/apria2008/APRIA2008ConcurrentProgram.pdf [18 February 2013]

[210] Purcal S, and Wong A, 2007, Australia Workers' Compensation: A review. (October): 16 http://wwwdocs.fce.unsw.edu.au/actuarial/research/papers/2007/AustWorkComp_Purcal.pdf [25 June 2012]

[211] Purcal S, and Wong A, 2007, Australia Workers' Compensation: A review. (October): 16 http://wwwdocs.fce.unsw.edu.au/actuarial/research/papers/2007/AustWorkComp_Purcal.pdf [25 June 2012]

[212] ACT Government. ACT Public Sector Managing Injury and Illness in the Workplace. Policy Statement WHS 07 -11. Issued February 2012. http://www.cmd.act.gov.au/__data/assets/pdf_file/0004/287419/whs0711.pdf [18 June 2012]

Claims for any type of workplace injury are lodged with WorkCover Queensland. An injured worker lodges a claim form completed with relevant details including personal details, details of their employment and details of the injury.[213]

The majority of the submissions received considered the Queensland scheme to be the best in the country and in particular noted that the short-tail system works very well. The two key jurisdictional differences highlighted by submitters were journey claims and access to common law.

4.1 Journey claims

In Queensland, a worker is eligible for a journey claim when the injury has resulted while travelling to and from work or while on a break from work. Sections 35 and 36 of the Act contain the provisions relating to journey claims.

The relevant sections of the Act are outlined below:

35 Other circumstances

(1) An injury to a worker is also taken to arise out of, or in the course of, the worker's employment if the event happens while the worker—

(a) is on a journey between the worker's home and place of employment; or

(b) is on a journey between the worker's home or place of employment and a trade, technical or other training school—

(i) that the worker is required under the terms of the worker's employment to attend; or

(ii) that the employer expects the worker to attend; or

(c) for an existing injury for which compensation is payable to the worker—is on a journey between the worker's home or place of employment and a place—

(i) to obtain medical or hospital advice, attention or treatment; or

(ii) to undertake rehabilitation; or

(iii) to submit to examination by a registered person under a provision of this Act or to a requirement under this Act; or

(iv) to receive payment of compensation; or

(d) is on a journey between the worker's place of employment with 1 employer and the worker's place of employment with another employer; or

(e) is attending a school mentioned in paragraph (b) or a place mentioned in paragraph (c).

(2) For subsection (1), employment need not be a significant contributing factor to the injury.

(3) For subsection (1), a journey from or to a worker's home starts or ends at the boundary of the land on which the home is situated.

(4) In this section—

home, of a worker, means the worker's usual place of residence, and includes a place where the worker—

(a) temporarily resided before starting a journey mentioned in this section; or

(b) intended to temporarily reside after ending a journey mentioned in this section.

36 Injury that happens during particular journeys

(1) This section applies if a worker sustains an injury in an event that happens during a journey mentioned in section 35.

(2) The injury to the worker is not taken to arise out of, or in the course of, the worker's employment if the event happens—

(a) while the worker is in control of a vehicle and contravenes—

(i) the *Transport Operations (Road Use Management) Act 1995*, section 79, or a corresponding law, if the contravention is the major significant factor causing the event; or

(ii) the Criminal Code, section 328A or a corresponding law, if the contravention is the major significant factor causing the event; or

[213] WorkCover Queensland. Claim form. http://www.workcoverqld.com.au/__data/assets/pdf_file/0015/3057/Claim-form-FM106-v9.pdf [24 January 2013]

(b) during or after—

(i) a substantial delay before the worker starts the journey; or

(ii) a substantial interruption of, or deviation from, the journey.

(3) However, subsection (2)(b) does not apply if—

(a) the reason for the delay, interruption or deviation is connected with the workers' employment; or

(b) the delay, interruption or deviation arises because of circumstances beyond the worker's control.

(4) For subsection (2)(b)(i), in deciding whether there has been a substantial delay before the worker starts the journey, regard must be had to the following matters—

(a) the reason for the delay;

(b) the actual or estimated period of time for the journey in relation to the actual or estimated period of time for the delay.

(5) For subsection (2)(b)(ii), in deciding whether there has been a substantial interruption of, or deviation from the journey, regard must be had to the following matters—

(a) the reason for the interruption or deviation;

(b) the actual or estimated period of time for the journey in relation to the actual or estimated period of time for the interruption or deviation;

(c) for a deviation—the distance travelled for the journey in relation to the distance travelled for the deviation.

(6) In subsection (2)(a)(i) and (ii)—

corresponding law means a law of another State that is substantially equivalent—

(a) for subsection (2)(a)(i)—to the law mentioned in that provision; or

(b) for subsection (2)(a)(ii)—to the law mentioned in that provision.

When determining whether a delay, interruption or deviation is 'substantial', consideration is given to:

- the reason for the delay;
- the actual or estimated period of time for the journey in relation to the actual or estimated period of time for the delay, interruption or deviation;
- for a deviation, the distance travelled for the journey in relation to the distance travelled for the deviation.

Even if there is a substantial interruption, deviation or delay, the claim will still be accepted as a journey claim if the reason for the delay, interruption or deviation is directly connected with the worker's employment (i.e. the worker was complying with an employer policy or procedure).[214]

Q-COMP advised that where the only 'substantial' deviation or interruption in a journey is to take a rest break in accordance with an employer fatigue management policy or under a health and safety management system, a worker will be covered for journey claims under the Act. This is providing the journey otherwise falls within the provisions of the Act, insurers should not consider a rest break to be a substantial deviation or interruption in the journey.[215]

[214] *Walker v Wilson* (1991) 172 CLR 195, *Workers' Compensation Board of Queensland v Howie* (1991) No. C12; *Riley v WorkCover Queensland* (1997) No. C23; *FAI v University of Queensland and Workers' Compensation Board of Queensland* (1997) QCA 259

[215] Q-COMP. Fatigue-reducing rest breaks and journey claims. http://www.qcomp.com.au/news-publications/news/fatigue-reducing-rest-breaks-and-journey-claims.aspx [28 February 2013]

4.1.1 Work related travel claims

Section 34 of the Act covers injuries that arise out of or in the course of the worker's employment. The relevant sections of the Act are outlined below:

> **34 Injury while at or after worker attends place of employment**
>
> (1) An injury to a worker is taken to arise out of, or in the course of, the worker's employment if the event happens on a day on which the worker has attended at the place of employment as required under the terms of the worker's employment—
>
> (a) while the worker is at the place of employment and is engaged in an activity for, or in connection with, the employer's trade or business; or
>
> (b) while the worker is away from the place of employment in the course of the worker's employment; or
>
> (c) while the worker is temporarily absent from the place of employment during an ordinary recess if the event is not due to the worker voluntarily subjecting themself to an abnormal risk of injury during the recess.
>
> (2) For subsection (1)(c), employment need not be a significant contributing factor to the injury.

These types of claims are not considered to be journey claims. However the Committee has found that confusion still exists regarding what constitutes a journey claim.

Newhaven Funerals submitted that their premium had been affected when one of their workers was involved in a motor vehicle accident and claimed compensation.[216] This incident was a work related travel claim.

The QCU submitted that this incident, by definition, is not a journey claim as journey claims are not included in premium calculations.[217] They advised the Committee that:

> *…premiums increased as a result of a motor vehicle accident sustained by an employee. Considerable media reporting surrounding this inquiry has focused on the journey to work aspect of workers' compensation. By definition however, this accident could not have been a journey claim because it did result in an increased premium for the employer. The removal of journey claims would not have assisted this employer in the circumstances outlined in the submission*.[218]

QCU has advised that this incident was represented in the press as a journey claim.[219] However, it should be noted that Newhaven Funerals themselves did not consider this incident to be a journey claim but rather argued that their increase in premium was caused by workers compensation not being contestable like other forms of insurance.[220]

A number of submissions and witnesses made reference to the recent case of Qantas Airways v Kennerley when referring to journey claims. This case involved injuries sustained by a flight attendant following a motorcycle accident when travelling to attend an employer arranged appointment to renew his US entry Visa which was a requirement of his employment. The circumstances of the claim was unusual in that it occurred when the worker was travelling between his home on the Gold Coast and a friend's home in Brisbane where he intended to stay overnight in order to make it easier to catch a 5:00 am flight to Sydney to attend a 8:45am appointment at the US Consulate to renew his US Visa. The claim was initially rejected by Qantas, a self-insurer, but overturned on appeal by Q-COMP. Qantas then appealed to the Industrial Court, who dismissed the appeal.[221]

[216] Submission 3: 1
[217] Submission 190: 2
[218] Submission 190: 2
[219] Submission 190: 2
[220] Submission 3: 1
[221] http://www.qirc.qld.gov.au/resources/pdf/published/2012/october/decision_c16_c18_2012_191012.pdf [16 May 2013]

The Department confirmed that this case was not decided on the basis that the worker was on a journey at the time of injury but rather that his injury arose in the course of his employment and that employment was a significant contributing factor. Qantas actively facilitated the renewal of the Visa. The Industrial Court found that the nature and terms of employment together with decisions and initiatives of Qantas, caused Mr Kennerley to be riding his motorbike where and when he was injured. The Department advised that had Qantas merely stated that only persons with a US Visa would be permitted to work on long haul flights to the US then the decision may have been different.[222]

4.1.2 Other jurisdictions

Queensland and the ACT are the only two jurisdictions that have no restrictions on journey claims. In some jurisdictions, an injury incurred in the course of employment and if travelling for the reason of the employee's duty or by request of the employer is covered (e.g. South Australia and Victoria). However whilst injuries incurred travelling on the way to or from work to home are covered by other authorities such as Transport Accident Commission (Victoria) or Motor Accidents Compensation scheme, MAC (NT).

Table 3 shows the comparison of journey claims between all Australian jurisdictions.

Table 3: Comparison of journey claims

Jurisdiction	Journey claims	Clarification
QLD	Yes	An injury to a worker during the following journeys is compensable under Section 35 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld): • Journey to or from home or the workplace, and a trade, technical or other training school which the worker is either required to attend under the terms of his/her employment, or that the employer expects the worker to attend; • If the worker has an existing injury for which workers compensation is payable and he/she is journeying between his/her home or place of employment and a place to obtain medical or hospital advice, attention or treatment; or to undertake rehabilitation; or for a medical examination; or to receive payment of compensation; • Travel between the worker's place of employment with one employer and the worker's place of employment with another employer. The Act states that the worker needs to have started the journey without any significant delays or deviations.[223]

[222] Correspondence from Mr J Sosso, Director-General, DJAG to FAC dated 11 January 2013: 1

[223] WorkCover Queensland. Journey Claims http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-claim-is-made/journey-claims [1 August 2012]

Jurisdiction	Journey claims	Clarification
NSW	Limited	Section 10 of the *Workers Compensation Act 1987* (NSW) outlines: A worker may be able to make a claim for injuries suffered in the course of most journeys (without significant interruption or diversion) to and from the worker's: • home (place of abode) and place of employment • home, place of employment and educational institution if it is required for the worker's employment • home, place of employment and any other place the worker is required to attend for work-related reasons. A worker will not be able to receive compensation for a journey claim if there is 'serious and wilful misconduct' by the worker. For example, if a worker is involved in a car accident on the way home from work and is found to be under the influence of alcohol or other drugs which contributed to an injury sustained in the car accident.[224]
VIC	No	Section 83 of the *Accident Compensation Act 1985* (Vic) defines whether an injury occurs during the course of employment. An injury which is incurred while a worker is travelling from home to or from work is **not** covered by workers compensation in Victoria.[225]
SA	Limited	'Journey' claims are only covered by WorkCover in South Australia for a work-related journey. If a person leaves home and travel straight to work and have an accident, generally this is not covered. However, all cases are individually analysed and determined by the case manager.[226]
TAS	No	Section 25(6) of the *Workers Rehabilitation and Compensation Act 1988* (Tas) sets out a number of circumstances in which a journey claim is not compensable. These are as follows: • a journey in either direction between the worker's place of residence and his/her place of employment, except if it occurred at the request or direction of the employer, or if the journey is work related, with the authority (expressed or implied) of the employer; or • a journey between places where the worker is employed by different employers. An injury on a journey is compensable if a worker deviates from the normal route and suffers an injury between home and work and the deviation is at the request or direction of the employer, or is work-related with the authority of the employer.

[224] New South Wales Government. WorkCover Authority of NSW. Journey and work break claims http://www.workcover.nsw.gov.au/injuriesclaims/makingaclaim/Pages/Journeyandworkbreakclaims.aspx [1 August 2012]
[225] Workplace OHS. Injury Management. Journey Claims Victoria. http://www.workplaceohs.com.au/injury-management/journey-claims/victoria [1 August 2012]
[226] WorkCover SA. Frequently asked questions. Compensation and lodging a claim (Workers) http://www.workcover.com/worker/reference-library/frequently-asked-questions [1 August 2012]

Jurisdiction	Journey claims	Clarification
WA	No	Section 19(2) of the *Workers Compensation and Injury Management Act 1981* (WA) outlines: A worker shall not be treated as having suffered personal injury by accident arising out of or in the course of the worker's employment if the worker suffers an injury - (a) during a journey - (i) between a place of residence of the worker and the worker's place of employment; or (ii) between a place of residence of the worker and a place mentioned in subsection (1); or (iii) if the worker has more than one place of residence, between those places; or (b) during a journey arising out of or in the course of the worker's employment if the injury is incurred during, or after, any substantial interruption of, or substantial deviation from, the journey, made for any reason unconnected with the worker's employment or attendance mentioned in subsection (1).[227]
ACT	Yes	Section 36(1) of the *Workers Compensation Act 1951* (ACT) makes it clear that a personal injury received by a worker on an employment-related journey is an injury arising out of, or in the course of, the worker's employment. However, if the injury is received during or after a non employment-related interruption of, or deviation from, an otherwise employment-related journey, it is compensable only if the risk of injury was not materially increased because of the interruption or deviation (sec 36(4)).[228]
NT	Yes (excludes motor accidents)	Section 4 of the Northern Territory Work Health Act provides that a worker is entitled to compensation if he/she is injured on the way to or from work, unless the accident involved a motor vehicle. Journey claims to and from work involving motor vehicles are covered by the Motor Accidents Compensation Act.

Source: Adapted from Safe Work Australia Comparison of Workers' Compensation Arrangements in Australia and New Zealand April 2012: 17

4.1.3 History – journey claims

The Kennedy inquiry investigated journey claims. The report states that:

> *Journey and recess claims outside of the workplace have been removed from workers' compensation coverage in a number of other jurisdictions. The argument for this action is that employers have little or no control over these claims and therefore should not be held liable. These claims are also considered to be more open to fraud, as there are rarely any workplace witnesses regarding the incident.*[229]

Kennedy had recommended the abolition of journey claims between a worker's residence and place of work and the abolition of recess claims where injuries occur during a recess away from the workplace when the activity is not sanctioned by the employer.[230]

[227] Western Australian Consolidated Acts Workers' Compensation and Injury Management Act 1981 http://www.austlii.edu.au/au/legis/wa/consol_act/wcaima1981445/s19.html [1 August 2012]

[228] Workplace OHS. Injury Management. Journey Claims ACT. http://www.workplaceohs.com.au/injury-management/journey-claims/act [1 August 2012]

[229] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 163

[230] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: iv

The government initially accepted this recommendation but did not proceed with these provisions subsequent to the Member for Gladstone indicating that she would not support the abolition of journey claims.[231]

In 1999 the Act was amended to clarify that a journey from or to a worker's home starts or ends at the boundary of the land on which the home is situated. The Act was also amended to remove the requirement for a journey to or from work to be by the shortest convenient route, as there was concern regarding the strict interpretation and application of the provision.[232]

4.1.4 Arguments against retention of journey claims

Many submissions suggested that changes should be made to journey claims in Queensland. Many employers argued that the employee's actions outside of work are beyond the control of the employer and therefore employers should not be held responsible for journey claims.[233,234,235]

Other arguments included:

- that journey claims be made available only for claims where there is a real connection between employment and accident during a journey[236,237,238];
- that journey claims mirror arrangements in other jurisdictions for consistency[239];
- that the definition of injury state that employer/employment is the major significant contributing factor[240]; and
- that journey claims to be removed altogether.[241,242,243,244,245]

Timber Queensland noted that:

> *…liabilities for injuries should only be relevant to being at the workplace or actually performing work. As such, injuries occurring while travelling to or from the workplace should not be considered workplace incidents (unless travelling in a work supplied vehicle), and not should injuries occurring while a worker is temporarily absent from the workplace during an ordinary recess.*[246]

[231] WorkCover Queensland, A status review 1997-2011, June 2011: 29
[232] Workcover Queensland Amendment Bill 1999, Explanatory Notes: 8
[233] Submission 55: 1
[234] Submission 60: 5
[235] Submission 166: 4
[236] Submission 20: confidential
[237] Submission 62: confidential
[238] Submission 70: 10
[239] Submission 4: 2
[240] Submission 40: 4
[241] Submission 109: 15
[242] Submission 111
[243] Submission 113: 20
[244] Submission 123: 2
[245] Submission 55: 1
[246] Submission 29: 6

The Housing Industry Association also supported the view that employers cannot be responsible for injuries incurred during travel as it is outside of the workplace. They stated:

> *Our view is that employers should not be paying for something over which they have no control. They have no control over people's journey to work, whether they come on a scooter, a bus or a bike. I do not deny that people get injured on their way to work. They can cover themselves privately for those sorts of injuries. I do not believe that it is something that employers should be responsible for as they ultimately have no control over it.*[247]

AMMA believes that the Act is out of step with other jurisdictions and proposes that sections 35 and 36 be amended to exclude journey claims and ensure consistency with contemporary work practices in the resource industry.[248]

Some employees such as '*police officers are often recalled to duty and required to attend major accidents, travelling directly from their place of residence. This occurs in all manner of situations - from on-call police and special emergency response teams attending a siege, through to detectives being recalled following the commission of a serious crime*.'[249] The Police Union advised the Committee:

> *In relation to journey claims, police are police officers 24/7. When they leave home, if they come across a traffic accident outside there is an expectation that they will stop and assist members of the public, which we do. If there is a wild party down the street, it is up to us to go down there and attend to it, even though we are off duty. So the journey claim is very important to us*.[250]

Therefore there are some difficulties in differentiating between commute and work-related activity for police officers, who are required to deal with any disturbances or other incidents which arise, despite being off duty.[251] As such, the Queensland Police Union believes that special exceptions should be maintained for police officers if journey claims are removed from the scheme.

Further, access to journey claims is significant for shift workers[252] or whose work are roster based and revolve around driving for their work are unable to obtain public transport to and from work after hours. The Asbestos Related Disease Support Society Queensland Inc. commented that:

> *…for employees whose work revolves around driving for their work, i.e. firies, ambos, police and nurses who drive and work late hours and night shifts. Those people do not have a choice. They cannot get public transport to and from work. Nine times out of 10 these days people are employed for their expertise not how close they live to the job …*[253]

The Queensland Nurses' Union provided as an example the experience of one of their members highlighting the importance of the journey claim provision. The injured worker stated ' *… I wouldn't have been at that intersection at that time on a Wednesday morning if I wasn't going to work*'.[254]

[247] Mr Temby, Transcript 31 October 2012: 5
[248] Submission 245: 4
[249] Snr Sgt Maxwell, Transcript 31 October 2012: 16
[250] Snr Sgt Maxwell, Transcript 31 October 2012: 18
[251] Submission 136: 5
[252] Submission 192: 2
[253] Mr Colbert, Transcript 16 November 2012: 19-20
[254] Submission 185: 1

Another witness commented that:

> *With things like coal, gold and iron ore and all of that having the unfortunate tendency of being situated so far away from the major centres, you have got fly-in fly-out, drive-in drive-out instances becoming more and more common. The journey claim is part of prevention as much fatigue and what not. Finally, they would not be on the road at that time travelling that path if they were not going to work. It is the only reason they are on the road.*[255]

The Masters Builders Association agreed that journey claims should be maintained in the scheme as their employees cannot live on the sites they are working on.

> *We canvassed this heavily in our submissions in the sense of the membership because we do a lot of travelling. Building workers cannot live beside the job. At the end of the day, whilst we understand that it is a cost impost on the scheme, we strongly support keeping journey claims as part of the scheme, even though I suspect other employer brothers and sisters of mine may disagree. The building industry strongly supports keeping the cover*.[256]

The majority consensus was that journey claims are significant issue particularly in rural and regional areas.[257,258,259] The Committee heard from the Australian Lawyers Alliance and Far North Queensland Lawyers Association and North Queensland Legal Association in Cairns who stated:

> *The mining industry contributes significantly to this state's economy. Nearly half of the mining workforce in North Queensland are drive-in or fly-in fly-out workers. Continued access to journey claims under the current scheme is vital in ensuring that the large number of workers in this important sector are not penalised or placed at a higher risk by choosing to work in a remote or rural location, which necessitates longer periods of travel. Any curtailment of current entitlements may dis-incentivise those workers, potentially having a severe impact on the state's ability to maximise on this resource.*[260]

Other peak body organisations such as the Australian Manufacturing Workers' Union (AMWU) agreed that:

> *The decentralised nature of the state means that travel forms a major part of the work day for each Queenslander. In recent times, we have seen a significant increase in the distances travelled by workers in Queensland. The mining boom has created a huge group of employees who Fly In Fly Out ("FIFO) and Drive In Drive Out ("DIDO").*[261]

The Electrical Trades Union (ETU) provided additional information on where journey claims were considered a necessity for regional Queensland. For example, a project at Injune or Roma requires workers to travel to work by bus as the local airport cannot handle the traffic. The ETU provided another example of workers at a project in Dalby/Chinchilla who have to drive home after their last rostered shift because there is insufficient accommodation provided for them to stay on site.[262]

The Committee was also advised that roads leading to and from many work sites in regional and rural Queensland are not in '*pristine*' condition[263] and a worker suffered a serious back injury because of the road condition he had to travel on to/from work.[264]

[255] Mr Moloney, Transcript 16 November 2012: 20
[256] Mr Crittall, Transcript 31 October 2012: 4
[257] Submission 36: 3
[258] Submission 43: 2
[259] Submission 157: 6
[260] Mrs Neil, Transcript 28 August 2012: 2
[261] Submission 32: 5
[262] Submission 202: 7 (Attachment 1)
[263] Submission 46: 2
[264] Submission 201

A study based on work related crashes in NSW found that '*being involved in a crash on rural roads also increased the risk of fatality or permanent disability'.*[265] The Transport Workers' Union (TWU) stated that *'the risk of injury to one of their workers in a journey accident is perhaps greater than workers in other sectors'.* They recommended that existing journey claims be maintained without modification as:

> *Notwithstanding the existence of State and Federal legislation that targets fatigue management while a transport worker is at work, the effects of fatigue from long hours behind the wheel of a truck are still present on the journey to or from work*.[266]

A further study by the Institute for Breathing and Sleep in Victoria found that night shift workers are at increased risk of crashes driving home after work. They studied driving performance immediately following night shift using laboratory based driving simulations. The results of the study indicated that driving performance and reaction time is impaired.[267]

Some submitters argued that journey claims could be removed as injuries incurred in a motor vehicle accident is covered under Compulsory Third Party (CTP) insurance.[268] The Crane Industry Association of Queensland (CIAQ) submission stated:

> *Journey claims 'to and from work' are invariably outside the employer's control. Though these claims are only approximately 6 per cent of all claims they are substantially more expensive as an average claim cost. The current scheme is easily exploited and duplicates the existing CTP insurance schemes.*[269]

4.1.5 Arguments for retention of journey claims

In contrast, many submissions noted that workers would be disadvantaged without the provision of journey claims given that the reason for their travel is work. For example, O'Donnell Legal stated in their submission that:

1. *Unlike other types of claims, journey claims do not impact upon an individual employer's annual worker's compensation premium;*
2. *The abolition of journey claims would place an increased strain on the state budget as the Queensland Government would take over the cost of medical expenses and rehabilitation of workers injured in travel to and from work;*
3. *The abolition of journey claims may cause an increase, in CTP claims; and*
4. *Journey claims are important for workers in regional areas who often have to travel long distances to and from work*.[270]

[265] Boufous S and Williamson A, 2009, 'Factors affecting the severity of work related traffic crashes in drivers receiving a worker's compensation claim'. *Accident Analysis & Prevention*, Vol 41, Issue 3: 467-473
[266] Submission 12: 3
[267] Howard M, 2012, Driving after Night Shift – Simulation, Instrumented Vehicles and the Ditch, Institute for Breathing and Sleep, Presentation at 24th Annual Scientific meeting of the Australasian Sleep Association and the Australasian Sleep Technologists Association (October): 7
[268] Submission 78: confidential
[269] Submission 133: 1
[270] Submission 132: 3

The Electrical Contractors Association also identified that motor vehicle accidents would be covered by various types of insurance, however, the time lag that may impact on those people could be an issue.[271] Other submissions acknowledged that the fault based CTP would not cover many types of injuries currently incurred in journey claims[272,273] or CTP claims may increase.[274]

As an employer, St Vincent de Paul advised that:

> *Overall we do not have a strong objection against journey claims being included. At present they are considered separate to our premium calculation because there is an acknowledgement that we do not have control over those things…*[275]

The Department advised the Committee that journey claims provide protections to workers who are injured in no-fault traffic accidents, who would not be able to demonstrate an element of negligence required to claim against the Nominal Defendant under the *Motor Accident Insurance Act 1994*. They confirmed that if journey claims were abolished the Motor Accident Insurance Commission (MAIC) would cover the fault based motor vehicle accidents but there would be gaps.[276]

Q-COMP confirmed that journey claims in the workers compensation field it is a no-fault system. They advised that some recovery is made from Compulsory Third Party (CTP) insurance. However, in the recuperation by WorkCover from a CTP insurer, the injured worker has to be not at fault.[277] They confirmed that

> *One of the other issues that we have at present is if, for example, when we are talking about recovery if a person is injured in a journey to or from work, in our scheme journeys are covered, and there are those for whom there is no-one else to put at fault, I guess, because the motor accident insurance scheme is a fault based scheme. It relies upon being able to establish someone else's negligence or fault. If we were to, for example, lose journey claims from the workers comp scheme, those who potentially miss out from a social perspective, in terms of who covers their injury and who looks after them in those particular instances, if the workers comp scheme is not picking it up and there is no fault to establish anywhere else.*[278]

In addition, dependents of those killed would be deprived of compensation if journey coverage was abolished.[279] Single vehicle incidents caused by driver fatigue are not compensable under the fault-based motor accident insurance scheme, but may be compensable under the Workers' Compensation Scheme.[280]

The Queensland Law Society emphasised that journey claims cover more than work related injuries as they presently incorporate other modes of vehicles such as private vehicles on large grazing properties.[281] A study based on NSW Road Traffic Authority crash vehicle data in 2004 found that there is an '*increased risk for farmer-registered vehicles for both casualty and fatality outcomes…' Rates of work-related deaths in the agriculture industry are among the highest in Australia …*'[282]

[271] Mr O'Dwyer, Transcript 31 October 2013: 5
[272] Submission 146: 12
[273] Submission 117: 5
[274] Submission 132: 3
[275] Mrs Shearsmith, Transcript 16 November 2012: 19
[276] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information paper: 38
[277] Ms Woods, Transcript 28 November 2012: 2-3
[278] Mr Francis Transcript 28 November 2012: 2-3
[279] Submission 188: 3
[280] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 3
[281] Submission 163: 24
[282] Stuckey R, Glass D C, LaMontagne AD, Wolfe R, and Sim M R, 2010, 'Risk factors for worker injury and death from occupational light vehicles crashes in New South Wales (Australia)'. *American Journal of Industrial Medicine* Vol 53: 931 -939

Slater and Gordon highlighted the recent changes in NSW where the removal of journey claims transferred responsibilities of liabilities to the Motor Vehicle Accident (MVA) Compensation Scheme. They stated:

> *It is important to note that even if a worker is injured on the way to or from work and is able to commence a claim against a third party for the purposes of fault based CTP/MVA insurance, that scheme lacks the vocational and workplace based approach to rehabilitation and support for return to work.*[283]

4.1.6 Arguments for variations to journey claims

Some submissions suggested that some restrictions or modifications could be introduced. As an opposing argument, the Queensland Bar Association, whilst acknowledging the need for journey claims in rural areas, suggested that:

> ***..****there is some scope for the journey provisions to be qualified in terms of their operation. …there could be an amendment to the effect that if a person had to travel more than a particular number of kilometres to their place of work.*[284]

The Committee sought responses from the Department on the implications of the suggested restriction on journey claims. They used an example of restricting journey claims only for those who had to travel in excess of a specified distance of 20kms from work to home. The advised that:

- *commuting choices are more heavily influenced by the time investment required, than by physical distance. For example, a commute from the Gold Coast to Brisbane in 1991 involved a much larger time investment than is required in 2012, due to greatly improved roads*; and
- *there is a potential inequity arising from a distance based restriction. A person commuting by train from Caboolture to Brisbane is travelling around 50km in relative safety compared to a cyclist commuting from the inner suburbs to the city and travelling less than 5 km who has a much higher risk of sustaining an injury*.[285]

The Committee heard that restricting journey claims for work only purposes would result in some difficulties in defining the line between a commute/recess and work related activity in some professions such as police officers as discussed above.[286]

4.1.7 Other issues identified

Some submissions and witnesses acknowledged that journey claims are not included in the premium and considered that journey claims could be used to contemplate how work rosters are structured. For example, St Vincent de Paul suggested:

> *…when we do have journey claims, particularly in some of the regional areas with employees driving long distances, one of my first questions, if there is a pattern or appears to be a pattern, is, right, what are the circumstances, is there a connection, what are the shift patterns, to see whether we are contributing to the fact an accident has occurred where there is a fault component of the employee. I think there is still a role for an employer to consider about how work is structured, particularly on the end-of-journey claims.*[287]

[283] Submission 146: 12
[284] Mr Douglas, Transcript 14 November 2012: 13
[285] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 3
[286] Submission 136:5
[287] Mrs Shearsmith, Transcript 16 November 2012: 19

The Department advised that in Victoria a dedicated statutory no-fault transport accident scheme provides coverage.

WorkCover confirmed that in calculating premiums the premium is predicated on the basis that there is a recovery from those CTP insurers, as allowed and that if there were no recovery, the cost to the scheme would be increased in gross terms and the cost to the scheme in gross terms increase would mean a commensurate increase in premium.[288]

4.1.8 Cost of journey claims

Journey claims currently represent six per cent of all claims lodged and this rate has remained stable over the last 10 years. The cost of journey claims is not included in the individual premium calculation for employers as it is acknowledged that employers do not have a control over incidents outside of the workplace. Further, any claims made do not affect the individual premium calculation in future years.[289] Table 4a below shows the number of claims since 2001/02.

Table 4a: Journey claims and payments by year (WorkCover)[290]

Year	Journey claims	Accepted claims[1]	Net Payments ($M)[2]
2001/02	3,385	3,033	14.8
2002/03	3,833	3,189	18.5
2003/04	4,258	3,606	18.1
2004/05	4,438	3,885	25.7
2005/06	4,708	4,233	30.6
2006/07	5,441	4,893	38.8
2007/08	5,921	5,490	44.5
2008/09	6,302	5,816	48.6
2009/10	5,865	5,138	40.3
2010/11	6,078	5,134	36.5
2011/12	6,120	5,103	39.3

[1] Decisions are based on decision year [2] Payments are based on payment year
Note that journeys 'to work' cannot be distinguished from journeys 'from work' due to inconsistency in injury occurrence coding
Source: Department of Justice and Attorney-General 11 April 2013: 13

Table 4b: Statutory lodgements by injury occurrence[291]

	2009-10		2010-11		2011-12	
	Lodgements	%	Lodgements	%	Lodgements	%
Journey to work/from work	6,495	6%	6,777	6%	6,766	6%
Nature of work journey	1,196	1%	1,290	1%	1,274	1%
Not a journey claim	92,729	92%	96,679	92%	97,345	92%
TOTAL	100,420	100%	104,746	100%	105,385	100%

Source: Department of Justice and Attorney-General 11 January 2013: 4

[288] Mr Hawkins, Transcript 28 November 2012: 3
[289] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information paper; 38
[290] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 13
[291] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 4

Of the WorkCover claims payments totalling $1.35 billion, during the 2011/12 year, $69 million is journey (to/from work) claims. The Department advised that $27 million of this $69 million (nearly 40 per cent) is refunded primarily from CTP motor vehicle insurers.[292,293]

Based on the figures provided above, total journey claims make up 5.11 per cent of total claim payments and around 2 per cent of total claim payments after claims are recovered from CTP motor vehicle insurers.

The Committee asked whether there was a link between the recovery from CTP to the change in premium or to the scheme in total and was advised:

> *Obviously you are referring there to motor vehicle, but you are talking more, say, public liability where there could be a slip or a trip or a fall on their way to work, which may not involve a motor vehicle, so yes. Clearly at the moment the premium is predicated on the basis that there is a recovery from those CTP insurers, as allowed. Clearly, if there was no recovery, the cost to the scheme would be increased in gross terms and the cost to the scheme in gross terms increase would mean a commensurate increase in premium, solely on that basis*.[294]

It should be noted, however, that Self-insurers bear the full cost of these claims. The Association of Self Insured Employers Queensland (ASIEQ) noted that:

> *…whereas with WorkCover policy holders, it is part of the central fund where it does not have any personal impact on their premium. The courts are sort of broadening the definition and the scope of cover provided, so I think it needs to be investigated further and you might need to strengthen the provisions and investigate how journey claims should be managed. I think in other jurisdictions they have the traffic accident authorities and those various things.*[295]

4.1.9 Impact of removal

Based on the figures in Table 4b, removing journey claims would result in a reduction of around 6,766 claims or by 6 per cent. The Department advised that the total cost to the scheme from journey claims is approximately $43 million per year, equivalent to $0.05 of the average premium rate for all employers.[296,297] They further advised that journey claim costs '*are not allocated specifically to each individual employer but spread across the industry*'.[298] Therefore the removal of journey claims would not result in a significant saving on premiums.

Removing journey claims may result in a shifting of cost to some employers, some service providers, CTP insurers or onto injured workers and their families. For example, a worker driving to work, is killed in a motor vehicle accident where the other vehicle involved was stolen and being driven by a teenager, would have limited access to any form of compensation.

[292] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 11
[293] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 13
[294] Mr Hawkins, Transcript 28 November 2012: 3
[295] Ms Barham, Transcript 14 November 2012: 7
[296] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 14
[297] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 38
[298] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 13

The North Queensland Law Association (NQLA) advised that if journey claims were to be removed it would have significant impact on regional workers, in particular 'drive-in-drive-out' (DIDO) or 'fly-in-fly-out' (FIFO) workers. [299] The Queensland Police Union of Employees (QPU) noted that it would also impact on special category workers, such as police officers and nurses, who are called upon for assistance regardless of whether they are on a rostered shift.[300]

4.2 Committee comments – journey claims

The Committee considered the various arguments for and against the inclusion of journey claims within the scheme. The Committee also considered the proposals to modify the current arrangements and concluded that these could be discriminatory and would ultimately be unworkable on a practical basis.

The major argument against journey claims made in the evidence provided to the Committee was that as employers do not have control over the employee's actions outside of work, these claims should not be the responsibility of the employer. However, this argument was countered by suggestions that employers influence the hours and location of the employment which can impact on workers' journeys. The Committee supports the suggestion that employers should be using the data available from Q-COMP to assist with management of how work is structured in order to minimise the risks which can result in journey claims.

The Committee considers that the provisions contained in section 36, including not allowing substantial deviations in journeys and not covering workers for journeys where they have broken the law, strengthen the connection to the work environment. Whilst the Committee concedes that the word 'substantial' is open to interpretation, there are sufficient legal precedents available in order to define this term.

The Committee noted that the net cost of journey claims is comparatively small, representing only $0.05 of the average premium rate for all employers. Therefore the removal of journey claims would not result in a significant saving on premiums whilst having a significant impact on workers.

The Committee also considers that journey claims are necessary particularly for workers in rural and regional Queensland. The Committee found no compelling evidence for any change to the provision of journey claims. The Committee has concluded that journey claims are an important component of the Workers' Compensation Scheme in Queensland and should be retained.

The Committee noted that many have erroneously suggested that journey claims are those which involve travel as part of work (e.g. someone whose work involves driving or travelling). Journey claims occur when an injury has resulted while travelling to and from work or while on a break from work. Therefore, the Committee recommends that education programs incorporate journey claims as a topic when informing the community about workers' compensation rights and responsibilities.

[299] Submission 117: 5
[300] Submission 136: 6

Recommendation 8

The Committee recommends that the current provisions relating to journey claims be retained.

Recommendation 9

The Committee recommends that education programs incorporate journey claims as a topic when informing employers about workers' compensation rights and responsibilities.

4.3 Access to common law

Another area that was highlighted in the jurisdictional comparison was common law. Access in Queensland is available to a worker who can prove negligence against their employer and has a work injury as defined by the Act.

As the Committee was also charged with considering 'whether the reforms implemented in 2010 have addressed the growth in common law claims and claims cost that was evidenced in the scheme from 2007-08', common law claims and the impact of the reforms will be discussed in section 6.4.

4.4 Psychological injury claims

Psychological injury claims were also highlighted as an area of concern for some submitters. Psychological or psychiatric injuries (PPI) may include work related stress, anxiety or depression. To be compensable, the injury must have occurred at work and resulted from a single event or over a period of time. Examples of causes may include exposure to a catastrophic event, workplace bullying, harassment, unfair action taken by management or an excessive workload.[301]

4.4.1 How a typical psychological claim is assessed by WorkCover

The Committee asked the Department to provide details of how a typical psychological claim was assessed by WorkCover. They advised the following:

> *As soon as a psychological injury claim is lodged with WorkCover it is investigated by an experienced claims representative who is aligned to that employer and industry. Subject to the size of the employer, one claims representative will investigate all claims for that employer.*
>
> *The injured worker is immediately contacted by telephone to explain WorkCover's investigation process. This process typically focuses on the events that caused the condition and whether it was 'reasonable management action' (section 32(5)). They will provide a written and/or verbal statement to WorkCover about what they allege caused their condition. This information is then shared with the employer who can also provide a written and/or verbal statement about their version of events. Both the employer and injured worker are also asked to provide details of any witnesses and WorkCover will obtain statements from these witnesses. Alternatively, the employer might obtain the witness statements. To meet 'natural justice' obligations, we must then provide a copy of the employer's information to the injured worker so they can respond.*

[301] WorkCover Queensland. Psychological or psychiatric injury claims. http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-claim-is-made/psychological-or-psychiatric-injury [30 January 2013]

Based on the above information, WorkCover will then review all the evidence and documentation and make a decision within the legislated 20 business days (section 134(2)). This decision is communicated verbally to both the injured worker and their employer and either party can request written reasons and apply for a review of the decision by Q-COMP.

WorkCover does not typically obtain medical evidence (other than the treating doctor's medical certificate) prior to making the decision about the claim. This is because in the majority of decisions about psychological injury claims, whether the action was 'reasonable management action' is the key issue. Even if the injured worker had a history of mental illness, the claim must still be accepted if work aggravated the pre-existing condition (section 32(3)(b)). If an injury has been diagnosed and the factual investigation confirms it is due to unreasonable management action, or management action taken in a reasonable way, then the extent of the illness or aggravation is relevant for the duration of the claim, not whether the claim is accepted or not.

If the claim is accepted, WorkCover will obtain detailed medical information from the treating doctors and from independent specialists. This helps ensure that all treatment and rehabilitation required as a result of the work events is provided to the worker.[302]

4.4.2 Legislative definition

The definition of psychological injuries is included in section 32. The relevant components of this section are detailed as follows:

(1) An *injury* is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.

(5) Despite subsections (1) and (3), ***injury*** does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—

(a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;

(b) the worker's expectation or perception of reasonable management action being taken against the worker;

(c) action by the Authority or an insurer in connection with the worker's application for compensation.

Examples of actions that may be reasonable management actions taken in a reasonable way—

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker
- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment

The definition excludes psychological injuries from compensation where they are caused by reasonable management action taken in a reasonable way by the employer or management. The Department advised the Committee that this exclusion is an attempt to balance an employer's freedom to manage its business operations with an employee's protection from injury.[303]

The Department also confirmed that the onus of proof rests with the claimant to show evidence that, on the balance of probabilities, the injury was caused by their employment. In an application for compensation where management action is nominated as the stressor, there must be evidence that the management action was unreasonable for the claim to be accepted. When considering what is reasonable, WorkCover must have regard to relevant case law in previous rulings on the interpretation of the term. The Department advised that WorkCover takes a wide interpretation of the term 'reasonable management action taken in a reasonable way'.[304]

[302] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 1
[303] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 October 2012: 1
[304] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 October 2012: 1

The Department outlined that the following 'reasonable management action' tests must all be satisfied to activate section 32(5):

- Did the injury arise from management action?
- Was the management action reasonable?
- Was the management action taken in a reasonable way?[305]

The Department further outlined that:

> *'Q-COMP review officers consider the evidence on the insurer file plus any submissions received during the review process. Inevitably, the question of whether the management action is 'reasonable' or not, will form part of the review decision'.*
>
> *Review officers do have regard to:*
>
> - *'reasonable' means reasonable in all the circumstances of the case and whether a reasonable observer of all the circumstances of the case would find the employer's actions reasonable in the same circumstances;*
> - *be reasonable the management actions do not have to be perfect or ideal – the onus is on the claimant to prove the management actions justify characterisation as unreasonable rather than blemishes;*
> - *the 'unreasonableness' must be the reality of the employer's conduct and not the employee's perception of it;*
> - *was the action a significant departure from the established employer policies or procedures, and if so, in these circumstances was it reasonable'*.[306]

4.4.3 Reasonable management action

The provisions relating to work place stress were first introduced in 1994. The definition of injury was amended to state that:

> *'injury' does not include a personal injury, disease, or aggravation or acceleration of a disease, suffered by a worker because of–*
>
> *(a) reasonable disciplinary action taken against the worker in connection with the worker's employment; or*
>
> *(b) failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment.*[307]

The explanatory notes identify that the clause sets out to amend the definition of injury to limit the grounds for compensation for a stress related condition resulting from certain work incidents.[308]

[305] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 1
[306] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 3
[307] *Workers' Compensation Amendment Bill 1994*, Clause 5
[308] *Workers' Compensation Amendment Bill 1994*, Explanatory Notes: 3

The then Minister for Employment, Training and Industrial Relations, the Hon Matt Foley MP, stated that:

> *A marked increase in the number and cost of stress-related claims over the past three years has resulted in the need for a substantially enhanced response to the management of claims for stress-related conditions. This response requires not only the amendments contained within this Bill but also a much improved management response to a range of issues which are at the root cause of this problem. Accordingly, this Bill makes it clear that a compensable injury must have employment as "a significant contributing factor" and does not include an injury, disease or aggravation or acceleration of a disease suffered by a worker because of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment.*[309]

The definition was further amended in 1995 to include the words 'taken in a reasonable way'. When introducing the amendments, the then Minister for Employment and Training and Minister Assisting the Premier on Public Service Matters, Hon Wendy Edmond MP, said:

> *The Bill also expands the current definition of "injury" in relation to stress. It will exclude cases where reasonable action has been taken in a reasonable way to transfer or redeploy a worker. In instances where such action is not reasonable, stress claims will still be accepted; for example, unreasonable action could be where an education administrator demands that a teacher who has taught in Brisbane for 20 years is moved to a regional centre the following week. The reform measures contained in these amendments will apply to injuries which occur on or after 1 January 1996.*[310]

The Kennedy review in 1996 also considered the issue of stress related conditions. The report noted that most jurisdictions had moved to legislate precise provisions to limit claims for stress related conditions in response to an increasing number of claims being lodged where remedial action regarding poor work performance, workload and other reasons were the stimulus for claims.[311]

The report recognised that Queensland had introduced new provisions in respect to stress from 1 January 1996, however, considered that, based on experience to date, further changes were needed to prevent some claims of this type. The inquiry found cases where employers were being held liable for stress claims where reasonable management action had been undertaken. The inquiry noted its concern that the term 'reasonable' in relation to management action was susceptible to interpretation in relation to individuals' particular circumstance.[312]

The government supports this recommendation. The then Minister for Training and Industrial Relations, Hon Santo Santoro MP stated that:

> *The provisions relating to the definition of injury for psychiatric or psychological conditions have been strengthened in response to an increasing number of claims where reasonable management action, for example remedial action regarding a worker's poor work performance, has been the stimulus for the worker lodging a claim.*[313]

[309] Queensland Legislative Assembly, Hon M Foley MP, Minister for Employment, Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 28 October 1994: 10125

[310] Queensland Legislative Assembly, Hon W Edmonds MP, Minister for Employment and Training and Minister Assisting the Premier on Public Service Matters, Second Reading Speech, *Parliamentary Debates (Hansard)*, 2 November 1995: 945

[311] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 160

[312] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 160

[313] Queensland Legislative Assembly, Hon S Santoro MP, Minister for Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 27 November 1996: 4459

The Minister further stated that:

> *Amendments to the definition of "injury" were introduced in January 1996 in an attempt to control this trend. However, under these amendments, employers have still been held responsible for claims where reasonable management action had been taken. This is considered to be inappropriate, especially when a worker may have a pre-existing disposition to psychiatric or psychological disorder. It is intended that regard be had, when making a decision about the reasonableness of the management action, as to how a worker of ordinary susceptibility would have reacted. A "reasonable person test" has also been introduced so that consideration must be given to whether a reasonable person in the same situation would have been expected to sustain an injury.*[314]

The following definition was included in the Bill for the new Act when it was introduced in November 1996:

(4) 'Injury' does not include a personal injury, disease, or aggravation of a disease sustained by a worker if the injury is a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—

(a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;

(b) the worker's expectation or perception of reasonable management action being taken against the worker;

(c) action by WorkCover or a self-insurer in connection with the worker's application for compensation;

(d) circumstances in which a reasonable person, in the same employment as the worker, would not have been expected to sustain the injury.

Examples of actions that may be reasonable management actions taken in a reasonable way—

- *action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker*
- *a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment.*

(5) For subsection (4), in deciding in a particular case whether management action was reasonable or whether management action was taken in a reasonable way—

(a) regard must be had to what action or way of taking action would have been reasonable for a worker of ordinary susceptibility to psychiatric or psychological disorder; and

(b) regard must not be had to a particular worker's susceptibility to a psychiatric or psychological disorder.

The provisions relating to stress related claims have largely remained the same since 1996 with the exception of section 34 (4)(d) and 34(5) above which were removed in the amendments made in 1999. The explanatory notes identify that:

> *…the tests for a "reasonable person" and "ordinary susceptibility" in subsections 34(4)(d) and 34(5) have been removed, as these were difficult to interpret and apply. These tests related to psychological and psychiatric injury (stress claims).*[315]

Under section 32 of the Act, an insurer has two key considerations when determining a non-traumatic psychological claim. Firstly, employment must be 'a significant contributing factor' to the injury, and then the claim can only be accepted if the injury arose out of or in the course of unreasonable management action.

The Department advised that the process of assessing psychological claims is no different to that for any other type of claim. The injured worker is contacted by telephone to explain the investigation process which typically focusses on the events that cause the condition and whether it was 'reasonable management action' (section 32(5)).[316]

[314] Queensland Legislative Assembly, Hon S Santoro MP, Minister for Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 27 November 1996: 4459-4460

[315] *Workcover Queensland Amendment Bill 1999*, Explanatory Notes: 8

[316] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 1

The Committee heard from a number of witnesses who had had their claims rejected on the basis of 'reasonable management action'. These submissions and testimony were considered in-camera by the Committee.

One submitter considered that workers with psychological injuries are discriminated against because they do not have the same access to 'no fault' compensation for their injury as do workers with a physical injury.[317] The submitter emphasised that '*what should be compensable is injury or disorder, not short-lived disappointment or resentment'* and that workers claiming compensation need to have a properly diagnosed psychological injury or disorder.[318]

One confidential submitter was concerned that decisions regarding what is reasonable management action are made by individuals at WorkCover and Q-COMP with no particular training, tertiary qualifications, experience or expertise in management theory and practice or its application in work environments which by their very nature are diverse, interactive and complex.[319]

The submitter considers that in their case the WorkCover and Q-COMP officers misapplied section 32(5) resulting in a bias in favour of the employer. The submitter advised that under the interpretation applied an employee with a psychological injury is required to demonstrate unreasonableness on the part of the employer. The decision was made to reject the claim on the basis that the claimant did not advise management of unreasonable workloads which lead to the psychological injury. Further, the inference was that the employer's failure to act was based on ignorance of the effects of their inaction and therefore they were holding the employee responsible for not relieving the employer of that ignorance.[320]

A submitter advised that decisions about the status of a physical injury or the degree of impairment following injury are made by medical specialists with substantial expertise in their fields. For psychological injuries, decisions are made by WorkCover claims assessors or Q-COMP review officers who are authorised to assess a complex and interactive dynamic such as whether the actions of particular people towards a particular employee in a particular context in a particular organisation with particular policies and procedures in a particular industry are 'reasonable' or not.[321]

The suggested remedy for this was that WorkCover could establish a team whose role is to assess psychological injuries, and one which has undertaken specialised training to understand all aspects of psychological injuries (e.g. basic counselling skills).[322]

A confidential submitter also advised the Committee that their claim was one of several claims of psychological injuries rejected on the grounds of reasonable management action from the same employer.[323]

The Committee asked the Department whether employer claims history is considered in deciding whether management action is reasonable. The Department advised that whilst they may recognise patterns they do not consider it is their place to decide whether there is or is not workplace bullying.[324] They further advised that they only consider whether there is reasonable management action and in particular whether the manager is aware of the problem and what action is taken.[325]

[317] Submission 194: 1
[318] Submission 194: 2
[319] Submission 194: 2
[320] Submission 170 confidential
[321] Submission 194: 2
[322] Submission 78: confidential
[323] Transcript In-camera hearing 16 November 2012: 13
[324] Ms Stratford, Transcript 28 November 2012: 8
[325] Mr Hawkins, Transcript 28 November 2012: 8

The Department advised that:

> *…separate to the process of claims management that WorkCover and Q-COMP are dealing with. Several years ago we set up a psychological unit to deal with these sorts of claims. We do follow up with them and people ring into our system. We look at the nature of them. If we did pick up a pattern with a particular employer, then we would go in and talk to people and make an assessment with our psychosocial people about what might be happening in that workplace. The other thing from our point of view—and obviously there is quite a lot of discussion about how you deal with bullying at the moment—we have put a lot of effort both in the public sector and working with private sector employers on the development of our diagnostic tools, People At Work, to try to provide employers with the capacity to pick up on what their environment is like. We acknowledge that this is probably a very difficult area in which to take decisive action. As Tony says, there might be one manager that a lot of people are not particularly happy with, but nonetheless they are doing the right thing from a management point of view. I think that is a challenge. What we are trying to do is to get people to take a much more proactive approach to the management of the managers within their organisation and employees. That is why we have had a number of inquiries into workplace bullying.*[326]

Another confidential submitter noted that the interpretation of what constitutes 'reasonable' management action is too broad and the current interpretation has resulted in claims where workplace bullying has occurred causing psychological injury deemed 'reasonable' while ignoring the actual event that caused the injury in the first place.[327] The submitter stated that '*section 32(5) of the Act appears to be a 'fault' rather than 'no-fault' scheme*' on psychological claims.[328]

Q-COMP agreed that the exception to the 'no fault' statutory claims is claims for '*psychiatric/psychological injuries ('psychological claims'), which are fault based*'. However, they stated that the fault based rule does not apply to psychological claims arising from a traumatic incident, such as an 'armed hold up'.[329]

The Committee heard evidence that this is not always the case. The Queensland Teachers' Union advised that they had an example of a claim by a teacher assaulted by a student rejected on the basis that:

> *a) the management action following the assault was reasonable; or*
>
> *b) managing students with difficult behaviour is a normal part of a teachers' employment, are not acceptable in a modern workplace and do not correctly interpret the legislation'.*[330]

[326] Dr Blackwood, Transcript 28 November 2012: 8
[327] Submission 182: 6
[328] Submission 182: 6
[329] Submission 93: 5
[330] Submission 48: 9

The Presbyterian and Methodist Schools Association (PMSA) remarked that they were seeing an increasing tendency of work-related stress.

> *…. at the beginning point of an employer's action in relation to performance management of an employee, before we even get to the first performance management formal interview, that an employee is going off on sick leave and obtaining a doctor's certificate that makes it work-related stress. That puts the whole performance management issue into a very difficult position, because it has occurred before the performance management formally takes place. But I am not sure whether that is being encouraged by work colleagues or by other sources, but we are seeing an increasing prevalence of that.*[331]

The Committee sought further clarification on the reasoning for the use of 'reasonable management action' in the case of psychological injuries. The Department advised that:

> *…the exclusion of 'psychiatric and psychological injuries in certain circumstances from the definition of 'injury' was in response to an increasing number of claims where remedial action regarding a workers' poor performance (one example of reasonable management action) was the stimulus for the claim. It was considered that some claims were beyond the control of the employer or impacted by an individual's personality or psychological make-up. They acknowledged that 'an employer could implement world's best practice performance management systems and still have its business impacted by a psychiatric or psychological claim for example, conflict between co-workers'.*[332]

The Department further explained that:

> *The term 'management action' has been given a broad interpretation but essentially covers such instances as interactions with supervisors, workload, procedural and strategic decisions, transfers, promotions and disciplinary processes, amongst other actions. The Courts have also interpreted that management action need not be perfect or without blemish when considering the application of s.32(5).*[333]

The PMSA supported that current provisions advising that:

> ***…****the current scheme and the current act in terms of workers compensation is very good in the provision that the scheme can actually remove claims under the act that have occurred as a result of reasonable management action taken in a reasonable way in relation to a person's employment*.[334]

4.4.4 Other issues raised regarding psychological injury claims

In addition to the 'reasonable management' action issues raised during the inquiry, there were a number of other areas of interest. Arguments included:

- exclusion of a proportion of these types of claims;[335]
- inclusion of these types of claims on a 'no-fault' basis, like other types of injury;[336]
- amending the definition to make it fairer to workers;[337] and
- strengthening the definition to consider the pre-dispositions of claimants.[338]

[331] Mr Willis, Transcript 14 November 2012: 28
[332] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 5
[333] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 9
[334] Ms Beames, Transcript 14 November 2012: 28
[335] Submission 109: 10; Mr Swan, Transcript 31 October 2012: 35
[336] Submission 170: confidential
[337] Submission 182: 6
[338] Submission 150: 18

Other issues identified included the relationship to the workplace, what is appropriate compensation[339], medical diagnosis, cost, WorkCover staff training, time frames and secondary claims.

The Queensland Hotels Association (QHA) recommended '*that for stress and psychological claims to be successful, the workplace must be the significant contributing factor causing injury*'.[340] However, it can be argued that a psychological injury would not have resulted if the worker had not been employed by the particular employer.[341]

CPM Engineering Queensland suggested that 'stress leave' claims should be further investigated.[342]

The Local Government Association advised that:

> *Our view is that there are certainly some psychological claims that do not belong in the system, because the major cause or originating factor of the problem is not work related. The work related component is probably a small component, which is probably just enough to get it through the door of the workers compensation system but because there are so many other factors involved the workers compensation process really is not equipped properly to deal with all of those other factors—and nor should they, because they are not work related. So there is this very unfortunate and very difficult to manage mixture of work related issues and non-work related issues.*
>
> *What we are saying is that there are some circumstances where the non-work related issues are the predominant issues and they need to be dealt with through some other sort of mechanism, because our experience is that trying to deal with that mix when there is that predominant non-work related component just does not really work in the workers compensation setting.*[343]

The PMSA agreed advising the Committee that:

> ***…**normally somebody has got a multitude of complicating factors when they lodge a claim for a psychological injury. It is probably one per cent work related and probably 99 per cent something else, but the employer is the very easy target, because it is much easier to put a workers compensation claim in against your employer than it is to actually have to deal with your financial or marriage problems or those sorts of things. It becomes very difficult.*[344]

The PMSA also advised that they have identified that even though the legislation specifically identifies examples of what is reasonable management action they have found 'stress' scenarios being used in relation to performance management issues. They advised that:

> *We are seeing an increasing tendency, at the beginning point of an employer's action in relation to performance management of an employee, before we even get to the first performance management formal interview, that an employee is going off on sick leave and obtaining a doctor's certificate that makes it work-related stress. That puts the whole performance management issue into a very difficult position, because it has occurred before the performance management formally takes place. But I am not sure whether that is being encouraged by work colleagues or by other sources, but we are seeing an increasing prevalence of that.*[345]

[339] Submission 24: letter
[340] Submission 45: 7
[341] Submission 194: 1
[342] Submission 179 & 210
[343] Mr Swan, Transcript 31 October 2012: 35
[344] Ms Beames, Transcript 14 November 2012: 28
[345] Mr Willis, Transcript 14 November 2012: 28

The ASIEQ recommended a review of the provisions relating to primary psychological injuries to determine whether they can be strengthened. They considered that there could be the need to consider predisposition of the claimant to psychological conditions.[346]

St Vincent de Paul recommended that urgent consideration be given to claims for psychological injuries in terms of pro-active case management, post traumatic stress disorder, day-to-day activities of the injured workers, secondary injuries e.g. depression and lack of control in case management.[347] They advised:

> *…people have a lot of factors that impact on their overall wellbeing. One particular incident in the workplace that they may be able to deal with on one day they might not on the other, because of all the other things that they are going on in their life. We are seeing WorkCover assessors really struggle with complying with the strictness that they used to previously be able to apply.*[348]

The CCF considered that '*most jobs contain some elements that can cause stress to some people at some time'*. They argued *that stress is a normal human emotion that everyone feels at some time and should not be a compensable illness under the workers' compensation legislation. However, where work is the major contributing factor in illnesses such as depression or posttraumatic stress disorder then individuals should be provided with support and compensation to maximise their chances of returning to work*'.[349] They further recommended '*that compensable psychological or psychiatric illnesses be restricted to those with a clear DSM IV diagnosed condition from a psychiatrist or psychologist, not a vague diagnosis of stress'.*[350]

CCIQ recommended that specialist medical advice and documentation should be sought in relation to psychological claims.[351] The Department explained that:

> *WorkCover does not typically obtain medical evidence (other than the treating doctor's medical certificate) prior to making the decision about the claim. This is because in the majority of decisions about psychological injury claims, whether the action was 'reasonable management action' is the key issue. Even if the injured worker had a history of mental illness, the claim must still be accepted if work aggravated the pre-existing condition (section 32(3)(b))'. If an injury has been diagnosed and the factual investigation confirms it is due to unreasonable management action, or management action taken in a reasonable way, then the extent of the illness or aggravation is relevant for the duration of the claim, not whether the claim is accepted or not*.[352]

Others agreed that specialist medical advice and documentation should be sought and accompany psychological 'stress' claims.[353]

The cost of psychological claims was another factor identified. One of the submitters identified that there are further implications arising from this section in that there are indirect costs such as resource cost (such as engaging specialist injury lawyers) for both injured worker and employer. Other costs for unsuccessful applicants for compensation include:

- *Cost of social welfare payments.*
- *Cost of income insurance payments.*

[346] Submission 150: 18
[347] Submission 63: 7
[348] Mrs Shearsmith, Transcript 16 November 2012: 15
[349] Submission 154: 4
[350] Submission 154: 4
[351] Submission 113: 23
[352] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 1
[353] Submissions 119, 122, 123

- *Direct cost associated with the injury (e.g. Medicare, medication etc.).*
- *Indirect cost associated with the injury e.g. lost productivity for both worker and employer (allocation of resources for replacement or recruitment).*
- *Increased demand on professional services.*[354]

The Local Government Association Queensland (LGAQ) recommended that *'a significant proportion of psychological claims be excluded from the system'* as they are currently resulting in negative outcomes for both workers and employers. LGAQ noted that psychological claims generally involved significant investigation as they are complex and as such can be costly. They further stated:

> *The reality of the process involved in making a decision on a psychiatric/psychological claim and then management of an accepted claim through the workers' compensation medical model will typically create an injury management environment that is the direct opposite of an optimal return to work model.*[355]

Their submission included a comment regarding psychological claims by an experienced HR professional with sound return to work outcomes for physical injuries, which states:

> *The current process seems to be used in circumstances where professional and external mediation would be a far more appropriate response. I am struggling to recall any successful reintegration back into the workforce once a claim is lodged.*[356]

The Bar Association advised the Committee that as a consequence of the high rejection rate many claims progress through the Q-COMP administrative review and appeal processes which often require substantial resources in terms of document disclosure, witness conferences, hearing days and preparation time.[357]

The Queensland Teachers' Union (QTU) advised that they would support any avenue to provide training to decisions makers in Workcover. They advised that anecdotal evidence shows Q-COMP performs its functions professionally, courteously and impartially and its officers are well educated and trained to understand the legislation they are applying. In comparison, '*WorkCover decision makers appear to receive little or inadequate training in the legislation*'. Their decisions frequently do not reflect that the decision maker has considered each step in the process to make the decision. QTU considers that '*well written, well reasoned decisions would be more likely to be accepted by workers and not pursued to application for review or appeal stage*'.[358]

The issue of the appropriateness of time frames provided to workers and employers was also raised in a confidential submission.[359] The Committee was provided with an example where a psychological claimant was provided with only four days to respond to a request for information but the employer was given 15 days. The claimant was then only given two days to respond to the employer's counter claim. The Committee asked the Department to explain the reasons why this might occur.

[354] Submission 194: 6-7
[355] Submission 109: 10 & 11
[356] Submission 109: 12
[357] Submission 61: 5
[358] Submission 48: 9
[359] Submission 200: 1-2

They advised that:

> *A range of factors will come into play in seeking information from employers, workers and others. For example, the amount of material lodged with the claim by the worker, whether witnesses were available for the employer to obtain additional information from and whether there was anything that would have made a material difference to the worker's original claim, in the information provided by the employee. In total, all claims need to be decided within 20 business days, so set timeframes for responses cannot be applied to every situation.*[360]

The same submitter alleged that the employer failed to respond within the timeframes given by WorkCover.[361] In response to the Committee's questions regarding what sanctions are available to ensure compliance, the Department advised that there may be genuine reasons why the required timeframes cannot be met by a worker or their employer. They advised that WorkCover has flexibility to amend requirements within reason to afford both parties natural justice. However, in situations where timeframes cannot be extended or reasonable requests for information have not been met, then WorkCover makes a decision based on the available information. They indicated that for an employer, this may mean that a decision is made without their input. Their experience is that the possibility of this occurring means more often than not the required information is produced within the set timeframes.[362]

A number of witnesses identified secondary psychological claims as a growing issue. This includes identification of psychological injury subsequent to a physical injury.[363,364] The Act does not refer to secondary psychological claims and they are treated the same as any other injury.

The Bar Association of Queensland also identified that 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 (e.g. 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.[365]

4.4.5 Fault based injury

One submission emphasised that '*section 32(5) is adversarial and requires the injured worker to engage in a process whereby the worker has to prove the employer has been unreasonable'*.[366] As such, there is significant potential for a psychological injury to be exacerbated as the worker is required to:

- *Engage in an adversarial process at a time of substantially diminished psychological capacity;*
- *Respond to adversarial statements made by the employer;*
- *Argue a case for 'unreasonable' behaviour by the employer without any criteria for what constitutes 'unreasonableness' under the Act*.[367]

[360] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2012: 8
[361] Submission 200: confidential
[362] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2012: 8
[363] Mr Puller, Transcript 14 November 2012: 28
[364] Mr B Brown, Transcript 14 November 2012: 28
[365] Submission 61: 6
[366] Submission 194: 2-3
[367] Submission 194: 2-3

Q-COMP's statistics show that '*rejections and claims for psychiatric and psychological injuries take longer to decide'* and *'claims for psychological and psychiatric injuries have a higher chance of rejection'*. The average decision time for psychological and psychiatric injuries is 26.9 days (2011/12) compared to 6.1 days for back strains and sprains. Q-COMP statistics also show that females account for over 58 per cent of psychological and psychiatric injury claims.[368] As the statistics above indicate, the rejection rate for psychological claims is considerably higher.

Psychological and psychiatric injury cases are also more likely than physical injury cases to proceed to a Medical Assessment Tribunal (MAT) for determination of ongoing incapacity. Psychological and psychiatric claims are also the most expensive despite accounting for only 2.7 per cent of all claims finalised. They currently have an average finalised time lost claim cost of $36,640 which is over three times the average time lost claim cost of physical injuries ($11,764 for 11/12).

Given that psychological injury claims are also more costly, it was suggested that repealing section 32(5) would save substantial resources as there would no longer be a need to address the issue of management action, whether it was reasonable or not. Similarly, costs associated with taking a matter to the QIRC would also be substantially reduced given the number of matters currently brought to them for review.[369]

Psychological and psychiatric injury claims also represented 8.3 per cent of all common law claim lodgements in 2011/12.[370]

4.4.6 Suggested changes to the legislation

AMMA submitted that feedback from their members consider that '*substantial resources must be directed to existing review and appeal process'* for psychiatric injury claims. They added that section 32(5)(a) should exclude 'reasonable management action' from the definition of injury to provide:

> *a) a clearer and more specific drafting, rather than the broadly worded and ambiguous 'reasonable management action'*
>
> *b) a higher procedural threshold, requiring provision of medical evidence as to the particulars of the claim*.[371]

Another submitter 'considered that section 32(5)(b) of the Act is not a particularly helpful provision, and should be removed in its entirety' on the basis that the outcomes of claims based on the current tests are often decided on technical terms, such as the words a claimant uses in describing their stressors and the language used in section 32(5)(a) is very vague and ambiguous, leading to difficulties for workers to ascertain their rights prior to lodging a claim. The submitter consider that if workers were able to understand more clearly whether their claim would succeed, this may lead to lower administrative costs in terms of processing claims. The submission recommended that the current sections 32(5)(a) and (b) should be replaced with:

> *Compensation is not payable to a worker for a psychological or psychiatric injury arising out of:*
>
> *a) action taken to monitor or review the worker's performance;*
>
> *b) reasonable action taken to discipline the worker;*

[368] Q-COMP 2011/12 Statistics Report: 11-12 http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [5 February 2013]
[369] Submission 194: 4
[370] Q-COMP 2011/12 Statistics Report: 39. http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [1 February 2013]
[371] Submission 245: 3

c) a failure to obtain a promotion, transfer or benefit; or

d) action taken to demote, transfer, retrench or dismiss the worker.[372]

The Bar Association of Queensland identified a number of apparent anomalies created by the wording in section 32 (5). They noted that:

- *The phrase 'arising out of' has been interpreted so as to require the parties and the adjudicator of fact, to identify and consider all the surrounding circumstances of the psychiatric injury, whether medically causative of the injury or not.*
- *Section 32(5)(b) applies only in relation to reasonable management action taken against 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).*[373]
- *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 section 32(5)(a). The inconsistency has been the subject of judicial comment.*
- *It is inevitable in any psychiatric claim that the perception of the worker will differ from the perception of management. The proper operation of section 32(5)(b) relies upon finding 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 cases.*[374]

Past rulings highlight that even in cases where the conduct of an appellant's immediate supervisor and the employer's systems of work were not without fault, the management action still fell within section 32 (5)(a) (see *Bowers v WorkCover Queensland*).[375]

Another submitter recommended amending the 'reasonable management action' provisions in relation to claims for psychological injury in section 32 (5) to mirror that in the New South Wales Act.[376] Sections 11 (A)(1) and 11 (A)(7) of the *New South Wales Workers Compensation Act 1987*:[377]

11A No compensation for psychological injury caused by reasonable actions of employer

(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.

(7) In the case of a claim for weekly payments of compensation in respect of incapacity for work resulting from psychological injury, the medical certificate required to accompany the claim must (in addition to complying with the requirements of section 65 of the 1998 Act) use, for the purpose of describing the worker's condition, accepted medical terminology and not only terminology such as "stress" or "stress condition".

[372] Submission 100: 2
[373] Submission 61: 6
[374] Submission 61: 6-7
[375] O'Grady G, 2006, *Management action "taken in a reasonable way", perceptions of management action and evidentiary matters*. Presentation at Q-COMP's Statutory Law Cases Seminar 19 September 2006 and 10 October 2006: 6 http://www.qcomp.com.au/media/19068/reasonable-management-action-taken-in-a-reasonable-way[1].pdf [1 February 2013]
[376] Submission 182: confidential
[377] New South Wales. Workers Compensation Act 1987 No 70. Current version 1 October 2012. http://www.legislation.nsw.gov.au/maintop/view/inforce/act+70+1987+cd+0+N [30 January 2013]

However, a jurisdictional analysis of workers' compensation claims for psychological injuries in 2006 indicated *'that there are not major differences between the Australian jurisdictions in regard to the provision of compensation for psychological injuries suffered by an employee'*.[378] The study concluded that *'the solution to increasing psychological injury claims is unlikely to be found in the amendment of legislation'*.[379]

4.4.7 Statistical comparisons between psychological and physical injury claims

ASIEQ advised the Committee that rejection rates for psychological claims are in excess of 50 per cent compared to physical injuries which have a rejection rate of 5 per cent.[380]

Q-COMP confirmed the high rejection rate advising the Committee that:

> *With psychological claims, unlike physical claims in the statutory scheme, there is a fault based system. There are a couple of tests that the claim has to go through. Firstly, has the person suffered a psychological injury that can be identified through actions at work? There is a defence to the claim, and that is if there has been reasonable management action taken then that would defeat a claim. A person may have a psychological illness, but if there has been reasonable management action then that would defeat the claim. In order to determine all of those factors, it takes time and, because the doctor does certify them as having a psychological illness, they put their claim in and they are not really aware of this second step of reasonable management action. It does take time and there is a high rate of rejection and it takes a lot of the whole scheme time, because we also provide the dispute resolution mechanism, and a large number of our disputes relate to psychological claims.*[381]

The Committee obtained statistical information from the Department and comparative figures are outlined below (Table 5 and 6). Q-COMP advised that psychological or psychiatric claims as a primary injury represent 4.3 per cent of all intimations (4,522 lodgements in 2011/12). The number of psychological or psychiatric claims has increased over the past five years from 2969 claims in 2007/08 (i.e. 2.9 per cent of all statutory lodgements) to 4522 (4.3 per cent of all statutory lodgements) in 2011/12. This growth is predominantly driven by non-government organisations, which has seen an increase of psychological claims from 1.7 per cent (in 2007/08) to 2.8 per cent (in 2011/12) of all statutory claims.[382]

Q-COMP also indicated that psychological/psychiatric are one of the most expensive injury types at $33,155 for time lost claims for 2011/12. In 2011/12 psychological/psychiatric claims represented just over 7 per cent of total statutory payments ($52.5 million for 2011/12).[383]

[378] Commonwealth of Australia 2006, Australian Workers' Compensation Law and its Application: Psychological Injury Claims, Australian Safety and Compensation Council: 8-9 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/104/AustralianWorkersCompensationLaw_ApplicationPsychologicalInjuryClaims_2006_ArchivePDF.pdf [16 April 2013]

[379] Commonwealth of Australian 2006, Australian Workers' Compensation Law and its Application: Psychological Injury Claims, Australian Safety and Compensation Council: 11. http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/104/AustralianWorkersCompensationLaw_ApplicationPsychologicalInjuryClaims_2006_ArchivePDF.pdf [16 April 2013]

[380] Submission 150: 17

[381] Ms Woods, Transcript 28 November 2012: 6

[382] Q-COMP, *Queensland workers' compensation claims monitoring*, June 2012: 21 http://www.qcomp.com.au/media/223530/Qld%20workers%20compensation%20scheme%20monitoring%20-%20June%202012.pdf [8 April 2013]

[383] Q-COMP, *Queensland workers' compensation claims monitoring*, June 2012: 21 http://www.qcomp.com.au/media/223530/Qld%20workers%20compensation%20scheme%20monitoring%20-%20June%202012.pdf [8 April 2013]

Table 5: Psychological claim lodgements by insurer decision (financial year)

	2007-08			2008-09			2009-10			2010-11			2011-12		
First decision on claim	No of claims	% reviewed under section 32(5)	% lodgements appealed	No of claims	% reviewed under section 32(5)	% lodgements appealed	No of claims	% reviewed under section 32(5)	% lodgements appealed	No of claims	% reviewed under section 32(5)	% lodgements appealed	No of claims	% reviewed under section 32(5)	% lodgements appealed
Admit	970	3%	0%	1188	7%	1%	1220	7%	1%	1261	8%	2%	1118	7%	1%
Reject	1435	29%	6%	1494	27%	6%	1735	28%	5%	1770	30%	6%	1545	31%	6%
Other *	564	7%	2%	842	8%	2%	1026	5%	1%	1419	7%	2%	1859	8%	2%
Total	2969	16%	3%	3524	16%	3%	3981	16%	3%	4450	16%	4%	4522	15%	3%
Rejected	48.3%			42.4%			43.6%			39.8%			34.2%		
Rejected^	59.7%			55.7%			58.7%			58.4%			58.0%		

* The insurer decision of "Other" includes claims which are withdrawn by the worker, or the claim is deemed 'no action required'. Data is as at 30 Jun 2012
^ % rejected recalculated when 'Other' is omitted from total. Source: Department of Justice and Attorney-General 11 January 2013: 28 - 29

Table 6: Physical injury claims lodgements by insurer decision (financial year)

	2007-08			2008-09			2009-10			2010-11			2011-12		
First decision on claim	No of claims	% reviewed under section 32(5)	% lodgements appealed	No of claims	% reviewed under section 32(5)	% lodgements appealed	No of claims	% reviewed under section 32(5)	% lodgements appealed	No of claims	% reviewed under section 32(5)	% lodgements appealed	No of claims	% reviewed under section 32(5)	% lodgements appealed
Admit	87,667	1%	0.1%	85,939	1%	0.1%	80,397	1%	0.1%	79,918	1%	0.1%	77,375	1%	0.1%
Reject	1,835	21%	2.7%	1,952	20%	2.4%	2,332	20%	1.9%	2,446	24%	2.7%	2,452	23%	2.9%
Other *	4,849	2%	0.6%	5,370	2%	0.4%	7,302	2%	0.4%	11,246	2%	0.4%	14,359	2%	0.2%
Total	94,351	2%	0.2%	93,261	2%	0.2%	90,031	2%	0.2%	93,610	2%	0.2%	94,186	2%	0.1%
Rejected	1.9%			2.1%			2.6%			2.6%			2.6%		
Rejected^	2.1%			2.2%			2.8%			3.0%			3.1%		

* The insurer decision of "Other" includes claims which are withdrawn by the worker, or the claim is deemed 'no action required'. Data is as at 30 Jun 2012.
^ % rejected recalculated when 'Other' is omitted from total. Source Department of Justice and Attorney-General 11 January 2013: 28 - 29

The data from Tables 5 and 6 support claims by some submitters that a significantly higher proportion of psychological claims are rejected compared to physical injury claims (i.e. 34.2 per cent of psychological claims compared to 2.6 per cent of physical injury claims in 2011-12). The tables also show that there are a higher percentage of those reviewed and lodgements appealed for psychological claims in comparison with physical injury claims. This imbalance is attributed to the assessment of claims using section 32(5) 'reasonable management action' clause and the lack of a clear interpretation of the clause. As mentioned above, some submitters considered the interpretation of what constitutes 'reasonable' management action too broad which allow for legitimate claims to be rejected by the insurer.

The Department advised that '*when considering the number of overturned review decision, it should be noted that the vast majority of appeals are finalised before ever reaching Industrial Magistrate or Industrial Relations Commission*'. In 2011-12, 86 per cent of all appeals finalised occurred before reaching court, with most of these withdrawn by the appellant.[384]

The difficulty in assessing these claims is highlighted by the fact that a higher proportion of decisions on psychological claims i.e. over 15 per cent are reviewed when compared with physical injury claims two per cent in 2011-12. In addition, of those rejected and reviewed, six per cent of lodgements are appealed for psychological claims compared to 2.9 per cent for physical injury claims (for 2011-12) (Table 5 and 6).

The comparison of the number of review decisions for psychological and physical claims also highlights that a greater majority of psychological review decisions are upheld compared to that of physical injury reviews. For example, in 2011-12 69 per cent (486 from a total of 699) of psychological review decisions are confirmed meaning the insurers' decision is confirmed by the Review Unit, whilst 47 per cent (744 from a total of 1594) of physical injury review decisions are confirmed. The number of insurer decisions set aside/varied by the Review Unit and a new decision substituted or varied for psychological claims total 140 (20 per cent) compare to 410 (25.7 per cent) for physical injury claims for 2011-12 (Tables 7 and 8).

For the tables below the following review definitions apply:

Confirmed: Insurers' decision is confirmed by the Review Unit.

Set aside: Insurers' decision is set aside by the Review Unit and a new decision substituted.

Varied: Insurers' decision is varied by the Review Unit [385]

[384] Correspondence (supplementary) from Department of Justice and Attorney-General, to FAC dated 24 December 2012
[385] Correspondence (supplementary) from Department of Justice and Attorney-General, to FAC dated 24 December 2012

Table 7: Psychological reviews by review decision and number overturned (financial year)

Claim lodgement yr	2007-08			2008-09			2009-10			2010-11			2011-12		
Review decision	No of reviews	No of appeals	Reviews overturned at appeal *	No of reviews	No of appeals	Reviews overturned at appeal *	No of reviews	No of appeals	Reviews overturned at appeal *	No of reviews	No of appeals	Reviews overturned at appeal *	No of reviews	No of appeals	Reviews overturned at appeal *
Confirmed	363	81	4	392	81	5	461	82	4	496	113		486	102	
Set Aside/Varied	81	16	1	122	33	4	128	27	1	170	50		140	27	
Set Aside/Undecided	33	0		32	0		32	0		36	0		49	0	
Other	10	0		8	0		10	0		23	0		24	0	
Total	487			554			631			725			699		
% confirmed	75%			71%			73%			68%			69%		

Source: Department of Justice and Attorney-General 11 January 2013: 28 - 29

Table 8: Physical reviews by review decision and number overturned (financial year)

Claim lodgement yr	2007-08			2008-09			2009-10			2010-11			2011-12		
Review decision	No of reviews	No of appeals	Reviews overturned at appeal *	No of reviews	No of appeals	Reviews overturned at appeal *	No of reviews	No of appeals	Reviews overturned at appeal *	No of reviews	No of appeals	Reviews overturned at appeal *	No of reviews	No of appeals	Reviews overturned at appeal *
Confirmed	801	124	8	861	126	8	897	118	3	972	162	2	744	94	1
Set Aside/Varied	345	30	3	402	28	2	427	25	3	464	33		410	41	
Set Aside/Undecided	193	1		218			198			225	1		256	1	
Other	169	2		151	1		196	8		182	3	1	184		
Total	1508			1632			1718			1843			1594		
% confirmed	53%			53%			52%			53%			47%		

* Due to delay between claim lodgement and the appeal outcome, the 2010/11 and 2011/12 years are still yet to develop fully. The review decision of "Other" includes reviews which are withdrawn by the applicant, not reviewable, out of time or still open. Source: Department of Justice and Attorney-General 11 January 2013: 28 - 29

The Committee raised concerns about the number of claimants who ask for a review and the number of reviewed claims which are varied in some way after review. The Department advised that:

> *…very few rejected psychological claims are "overturned" in the review process' i.e. only around 20 per cent of review are overturned (see table 9).*[386]

Table 9 identifies the number of psychological claims rejected and the result of reviews.

Table 9: Number of psychological claims rejected and review results

No of claims rejected per year	No of reviews of rejected claims	No of review confirmed	No of reviews overturned	No of reviews returned to insurer
1,500 approx. 60 per cent	650 approx. 40 per cent	470 approx. 70 per cent	130 approx. 20 per cent	50 approx.

Source: Department of Justice and Attorney-General 11 April 2013: 9

The number of psychological claims rejected, number of review confirmed or overturned is disproportionate to the number of physical injury claims. For example, using data from Table 8 on page 81, the number of physical injury reviews confirmed totalled 744 or approximately 47 per cent in 2011-12 and the number of reviews overturned for the period was one (0.06 per cent).

4.4.8 Other jurisdictions

The most recent comparative analysis of the exclusionary provisions for psychological injuries was undertaken by Safe Work Australia and published in April 2012. That report identified that statutory threshold requirement for psychological injuries vary significantly from physical injuries and there are significant differences in the way in which each jurisdiction assesses psychological impairment.[387] Appendix H contains a copy of the jurisdictional comparative data of exclusionary provisions for psychological injuries.

The Department advised that in 2006 the Office of Australian Safety and Compensation Council commissioned Professor Dennis Pearce to conduct an analysis of arrangements in Australia of the management of workers' compensation claims for psychological injuries.

The study identified the causal connection test, which is the description used in the various jurisdictions for the required level of contribution that has to be shown for an injury to qualify for compensation, was as follows:

- "material" - Commonwealth, Northern Territory
- "substantial" - ACT, New South Wales, South Australia
- "significant" - Queensland, Victoria, Western Australia
- "major or most significant" – Tasmania.[388]

The study concluded that

> *All jurisdictions apply similar statutory provisions for assessing eligibility for compensation of psychological injuries suffered by employees. There are some exceptions, but generally one employee in one jurisdiction can expect a similar outcome on eligibility for compensation to a different employee working in another jurisdiction.*

[386] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 9
[387] Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, April 2012: 64
[388] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 9

Professor Pearce's assessment was that *'most cases are dealt with based on their unique circumstances and by and large any difference in relevant legislation in each jurisdiction was unlikely to impact on the outcome'*. He found that it was unlikely that the solution to the increasing psychological injury claims would be found in the amendment of legislation. He also noted '*that the approach in each jurisdiction was generally consistent and the law in each jurisdiction was also generally applied consistently by relevant courts and tribunals*'.[389]

4.5 Committee comments – psychological claims

In considering this issue the Committee needed to balance its compassion for those suffering from psychological injuries with the need to maintain a financially viable system of universal workers' compensation.

The Committee was concerned that the area of psychological claims is the fastest growing category of claims and may place increasing pressure on the workers' compensation fund in the future. The Committee acknowledges that the growth in numbers is also a reflection of greater awareness of mental health issues in the broader community.

Significant discussion relating to this classification centred around the current increase and expected future increase in claims relating to psychological injury and the obvious difficulty for the Workers' Compensation system and for medical experts. The Committee recognises that the same level of trauma or offense will produce markedly different responses in different people.

The Committee considers that psychological injuries can be defined as two types:

A. Where a psychological injury is attested to by medical evidence and it results from an event or series of events that deliver such significant trauma that it would reasonably be expected it would impact adversely in the short, medium and long term on a significant proportion or the majority of the population were they exposed to such significant events.

   Examples of such events would include serious work related assault occasioning bodily harm and in particular residual physical disability. Other events, that if supported by medical evidence of ongoing psychological injury, may include people exposed to severe physical threat such as hold-up, work place invasion such as robberies or where workers are exposed to victims of road and rail incidents in the course of their employment.

B. All claims other than those identified above. This would include claims such as workplace harassment and those types of claims where it is anticipated it would only produce a lasting psychological injury to people whose pre-existing psyche is vulnerable. This type of claim is more difficult to assess because the events around them are likely to be influenced by non-work psychological stresses, pre-existing psychological issues such as substance abuse, pre-existing depression, personality disorder, bipolar disorder etc.

   The Committee considers that the level of proof required for acceptance of a claim under the second type of claim should be quite high.

The Committee recognises that the legislation as it currently stands already treats traumatic event psychological injuries which would not come under the 'reasonable management action' test differently. However, the Committee considers that this needs to be defined more clearly in the legislation.

The Committee recommends that the legislation be amended to recognise the two types of psychological injury as defined above.

[389] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 10

The Committee acknowledges that there would be those who would argue that the existing definition recognises the former category, however, the Committee has heard evidence that the 'reasonable management action' has been used to disqualify legitimate claims that could clearly have been categorised as Group A.

It became clearer to the Committee during the course of the inquiry that psychological claims are fraught with emotive issues and have not been well managed by the Department. The Committee considers that the words used in the legislation have contributed to this. Further, the high numbers of rejected claims would indicate that workers are unclear on their rights with regard to these types of claims.

It was also clear to the Committee that the use of the 'reasonable management action' exemption may have precluded legitimate psychological injuries from the scheme where the work place was the major significant factor contributing to the injury. The Committee considers that employers who allow situations to develop in their work places which injure their workers, whether physically or psychologically, should not be allowed an unreasonable exemption.

The Bar Association of Queensland also identified a number of anomalies created by the wording in section 32(5) and the reliance on case law to interpret the legislation supports this.

Currently, psychological injuries are included in the definition of injury and the exceptions that apply to these types of injuries are included in section 32(5). The Committee considers that it would be better if psychological injuries were included under separate provisions within the legislation. The reason for this recommendation is that the Committee considers that it would assist with the recognition that these claims are treated differently from other types of injuries.

The Committee recommends that the current exclusions for reasonable management action be removed and include specific exceptions for normal work place practices such as:

a) *where action is taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker provided that action is taken in a reasonable way;*

b) *where a decision is made not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment provided the decision is made in a reasonable way;*

c) *action by the Authority or an insurer in connection with the worker's application for compensation.*

In order to mitigate the effect of the removal of this exemption from the legislation, the Committee recommends the definition be amended to be 'the major significant contributing factor' rather than the current 'a major significant contributing factor' for this type of claim.

A suggested alternative for the new definition might be:

An accepted psychological injury is a psychiatric or psychological disorder arising out of, or in the course of, employment if the employment is <u>the</u> significant contributing factor to the injury.

A psychological injury is not accepted in any of the following circumstances—

d) *where action is taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker provided that action is taken in a reasonable way;*

e) *where a decision is made not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment provided the decision is made in a reasonable way;*

f) *action by the Authority or an insurer in connection with the worker's application for compensation.*

The Committee agrees that what should be compensable is a properly diagnosed psychological injury or disorder, not a short-lived disappointment or resentment.

The Committee also seeks to include provisions that identify that even if a claimant has a history of prior psychological issues, this does not automatically preclude them from workers' compensation if the work place is the major significant factor in causing the psychological injury.

The Committee recognises that claimants with psychological injuries are in the most vulnerable position when it comes to dealing with the requirements of making a claim and managing the consequences of having a claim rejected. The Committee considers that clear, concise, accurate and timely communication with claimants is a key to ensuring satisfactory outcomes.

The Committee also acknowledges that psychological injuries are a complex area with a high level of uncertainty surrounding diagnosis. The Committee was conscious of not putting in place structural impediments for legitimately injured workers, however, there also needs to be recognition that for workers' compensation to apply, the work place must be the cause of the injury rather than other factors. The Committee considers that the proposed changes will make it both simpler for those workers who are injured because of specific events in the work place and clearer to those who are not eligible before they are caused more stress by 'fighting the system'.

However, in making the above recommendations, the Committee remains concerned that it may inadvertently preclude legitimate claimants. It therefore recommends that the Queensland Mental Health Commission be directed to undertake a research study regarding the impact of the legislative changes if they are adopted and that this study must directly inform the next review of the Workers' Compensation Act.

The Committee also recognised that work place bullying is an issue in some Queensland workplaces. Incidents of work place bullying have the potential to impact on the Workers' Compensation Scheme through higher psychological claim rates. The *Work Health and Safety Act 2011* allow for fines and imprisonment of work place bullies. The Committee considers that the Attorney-General should initiate a review of that Act with a view to considering whether recompense to victims of workplace bullying could be made through mechanisms in that Act rather than through the Workers' Compensation Scheme.

The Committee also has concerns regarding the disproportionate number of rejected claims, the number asking for a review and the number of reviews where the decision is either set aside or varied. The Committee considers that the number of set aside or varied claims reflects on WorkCover's assessment processes. If a significant number of rejected claims are later either set aside or varied upon review, then the conclusion is that the initial assessment was flawed.

The Committee was also concerned, given the nature of psychological claims, that a significant number of lodgements not reviewed may be genuine cases where claimants are unable to "manage" pursuing the claim further. The Committee recommends that WorkCover review its assessment processes, including a review of why claims are set aside or varied upon review, with a view to reducing this ratio.

The Committee was not satisfied with the response from the Department regarding consideration of employer history. The Committee questions how management action can be considered to be reasonable if a particular employer has several similar claims made against them. The Committee considers that employer history needs to be considered as part of the process even if it is found at the end of that process that their actions were reasonable. It should be noted that employer history involves both proven and unproven claims.

The Committee has a number of recommendations relating to the way psychological claims are managed by WorkCover including:

- examining the process of reviewing psychological claims and to ensure that there is provision for flexibility for claimants to provide necessary information;
- improving their claims process in dealing with psychological claims, including a specialist unit with suitably qualified assessors;
- incorporating a mentoring style approach to psychological claims management to help reduce anxiety levels for claimants;
- incorporating mental health and wellbeing into education and awareness processes;
- incorporating consideration and analysis of employer claims history into claims process.

Recommendation 10

The Committee recommends that psychological injuries be included under separate provisions within the legislation.

Recommendation 11

The Committee recommends that the definition of psychological injuries be amended to include the two types of psychological injury identified as category A and B above in section 4.5.

Recommendation 12

The Committee recommends that the current exclusions for reasonable management action be removed and be replaced with specific exceptions for normal work place practices such as:

a) where action is taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker provided that action is taken in a reasonable way;

b) where a decision is made not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment provided the decision is made in a reasonable way;

c) action by the Authority or an insurer in connection with the worker's application for compensation.

AND the definition be amended to be 'the major significant contributing factor' rather than the current 'a major significant contributing factor' for Category B type psychological injury claims.

Recommendation 13

The Committee recommends that the Queensland Mental Health Commission be directed to undertake a research study regarding the impact of the legislative changes if they are adopted and that this study must directly inform the next review of the Workers' Compensation Act.

Recommendation 14

The Committee recommends that the Attorney-General should initiate a review of the *Work Health and Safety Act 2011* with a view to considering whether recompense to victims of workplace bullying could be made through mechanisms in that Act rather than through the Workers' Compensation Scheme.

Recommendation 15

The Committee recommends that WorkCover review its psychological claims assessment processes, including a review of the reasons claims are set aside or varied upon review, with a view to reducing this ratio.

Recommendation 16

The Committee recommends that WorkCover undertake a review of its psychological claims management to include the following:

- ensure that there is provision for flexibility for claimants to provide necessary information;
- inclusion of a specialist unit with suitably qualified assessors;
- incorporation of a mentoring style approach to psychological claims management to help reduce anxiety levels for claimants;
- incorporation of mental health and wellbeing into education and awareness processes; and
- incorporation of consideration and analysis of employer claims history into claims process.

4.6 Latent onset claims

The Department advised that new categories of compensable latent onset injury, such as cancers related to passive smoking and sun exposure, are beginning to appear in a workers' compensation context. They advised that unlike typical occupational diseases such as silicosis[390], emerging compensable conditions may include significant non work-related exposure. They advised that claims for work-related solar and passive smoking injuries are currently rare but are expected to increase in the future.[391]

The Department advised that the legislation did not contemplate these types of claims and no other jurisdiction has a particular approach. They identified that the issue is currently being examined at a national level as part of a Safe Work Australia convened strategic issues group on worker's compensation issues.[392]

[390] Silicosis is a respiratory disease caused by breathing in (inhaling) silica dust http://www.nlm.nih.gov/medlineplus/ency/article/000134.htm [16 May 2013]
[391] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 39
[392] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 39

4.6.1 Legislation relating to latent onset injuries

Changes to the legislation were introduced in 2005, giving greater certainty of the payment to workers in the position of having latent onset diseases. The then Minister for Employment, Training and Industrial Relations, Hon Tom Barton MP, noted that the amendment:

> *…is actually a big improvement for people in relation to the point when they are diagnosed with asbestosis or mesothelioma, that is, it is the date at which they get the actual diagnosis. The test that is referred to in that provision goes back to the test of whether they actually were in contact with asbestos in the workplace or elsewhere. That is the test that we are talking about. We are not talking about the test of did they have asbestos at that earlier date or how the exposure took place. Clearly if they were ripping the asbestos roof off a house 10 years earlier and that was the only known contact with asbestos, then clearly it would not be workers compensatable because they were doing it in a private capacity rather than in a workplace. But if they were a worker who was ripping a roof off and they contracted mesothelioma or some form of asbestos from exposure 10 years ago, it means that they get the maximum payout; they get today's payout. That is what is intended rather than them getting the payout that was a far lower figure at a much earlier date*.[393]

The relevant sections of the Act are outlined below:

Division 6 Injuries, impairment and terminal condition

Subdivision 1 Event resulting in injury

31 Meaning of *event*

(1) An *event* is anything that results in injury, including a latent onset injury, to a worker.

(2) An *event* includes continuous or repeated exposure to substantially the same conditions that results in an injury to a worker.

(3) A worker may sustain 1 or multiple injuries as a result of an event whether the injury happens or injuries happen immediately or over a period.

(4) If multiple injuries result from an event, they are taken to have happened in 1 event.

Subdivision 3A When latent onset injuries arise

36A Date of injury

(1) This section applies if a person—

(a) is diagnosed by a doctor after the commencement of this section as having a latent onset injury; and

(b) applies for compensation for the latent onset injury.

(2) The following questions are to be decided under the relevant compensation Act as in force when the injury was sustained—

(a) whether the person was a worker under the Act when the injury was sustained;

(b) whether the injury was an injury under the Act when it was sustained.

(3) Section 131 applies to the application for compensation as if the entitlement to compensation arose on the day of the doctor's diagnosis.

(4) Subject to subsections (2) and (3), this Act applies in relation to the person's claim as if the date on which the injury was sustained is the date of the doctor's diagnosis.

(5) To remove any doubt, it is declared that nothing in subsection (4) limits section 236.

(6) Subsections (2) to (4) have effect despite section 603.

(7) In this section—

relevant compensation Act means this Act or a former Act.

[393] Queensland Legislative Assembly, Hon TA Barton MP, Minister for Employment, Training and Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 27 October 2005: 3658

Subdivision 5 Terminal condition

39A Meaning of *terminal condition*

(1) A ***terminal condition***, of a worker, is a condition certified by a doctor as being a condition that is expected to terminate the worker's life within 2 years after the terminal nature of the condition is diagnosed.

(2) A condition is a terminal condition only if the insurer accepts the doctor's diagnosis of the terminal nature of the condition.

Division 5 Workers with latent onset injuries that are terminal conditions

128A Application of div 5

This division applies to a worker if a latent onset injury sustained by the worker is a terminal condition.

128B Entitlements of worker with terminal condition

(1) The worker is entitled to compensation for the latent onset injury calculated only under this division.

(2) The worker is entitled to lump sum compensation equal to the sum of the following amounts—

(a) $200000;

(b) additional lump sum compensation for care of 10% of the amount payable under paragraph (a);

(c) additional lump sum compensation of up to $200000 payable according to a graduated scale prescribed under a regulation, having regard to the age of the worker when the worker lodges an application for compensation for the latent onset injury.

(3) However, the amount payable under subsection (2)(a) is subject to any reduction made under section 128C.

(4) The worker is also entitled to compensation under chapter 4, part 2, but only until the worker receives lump sum compensation under subsection (2).

128C Reduction of amount payable

(1) This section applies if any of the following payments have been made in relation to the worker's latent onset injury—

(a) a weekly payment of compensation;

(b) a redemption payment;

(c) a payment of lump sum compensation;

(d) a payment of compensation or damages under a law of Queensland, another State or of the Commonwealth.

(2) The amount of compensation payable under section 128B(2)(a) must be reduced by the total of all payments mentioned in subsection (1).

128D Worker's dependants

(1) This section applies if the worker has dependants.

(2) The worker's dependants are entitled to lump sum compensation equal to the sum of the following amounts—

(a) 15% of the amount payable under section 200(2)(a);

(b) 2% of the amount payable under section 200(2)(a) for the reasonable expenses of the worker's funeral.

(3) An insurer may pay the compensation under this section—

(a) to the worker; or

(b) to the worker's dependants at the same time as the insurer pays the worker lump sum compensation under section 128B.

(4) The worker's dependants are not entitled to further compensation under chapter 3, part 11 for the death of the worker.

(5) In this section—

dependant, of a worker, means a member of the worker's family who is completely or partly dependent on the worker's earnings.

member of the family, of a worker, means—

(a) the worker's—

(i) spouse; or

(ii) parent, grandparent or step-parent; or

(iii) child, grandchild or stepchild; or

(iv) brother, sister, half-brother or half-sister; or

(b) if the worker stands in the place of a parent to another person—the other person; or

(c) if another person stands in the place of a parent to the worker—the other person.

128E To whom payments made for death of worker

(1) This section applies if—

(a) the worker dies because of the latent onset injury; and

(b) the worker had received a payment of lump sum compensation under section 128B for the latent onset injury; and

(c) if the worker left dependants—an insurer had not paid the worker or the worker's dependants the lump sum compensation under section 128D to which the worker's dependants were entitled.

(2) The compensation under section 128D for the worker's dependants is payable—

(a) to the worker's legal personal representative; or

(b) if there is no legal personal representative—to the worker's dependants.

(3) The worker's legal personal representative must pay or apply the compensation to or for the benefit of the worker's dependants.

Division 1 Costs applying to worker with WRI of 20% or more, worker with latent onset injury that is a terminal condition, or dependant

310 Application of div 1

This division applies only if the claimant is—

(a) a worker, if the worker's WRI is 20% or more; or

(b) a worker, if a latent onset injury sustained by the worker is a terminal condition; or

(c) a dependant.

311 Principles about orders as to costs

If a court dismisses the claim, makes no award of damages or makes an award of damages in the claimant's proceeding for damages, it must apply the principles set out in sections 312 to 314.

312 Costs if written final offer by claimant

(1) This section applies if—

(a) the claimant makes a written final offer that is not accepted by the insurer; and

(b) the court later awards an amount of damages to the claimant that is equal to or more than the written final offer; and

(c) the court is satisfied that the claimant was at all material times willing and able to carry out what was proposed in the written final offer.

(2) The court must order the insurer to pay the claimant's costs, calculated on the indemnity basis.

313 Costs if written final offer by insurer

(1) This section applies if—

(a) the insurer makes a written final offer that is not accepted by the claimant; and

(b) the claim is dismissed, the court makes no award of damages or makes an award of damages that is equal to or less than the insurer's written final offer; and

(c) the court is satisfied that the insurer was at all material times willing and able to carry out what was proposed in the written final offer.

(2) The court must—

(a) order the insurer to pay the claimant's costs, calculated on the standard basis, up to and including the day of service of the written final offer; and

(b) order the claimant to pay the insurer's costs, calculated on the standard basis, after the day of service of the written final offer.

314 Interest after service of written final offer

(1) This section applies if the court gives judgment for the claimant for the recovery of a debt or damages and—

(a) the judgment includes interest or damages in the nature of interest; or

(b) under an Act, the court awards the claimant interest or damages in the nature of interest.

(2) For giving judgment for costs under section 312 or 313, the court must disregard the interest or damages in the nature of interest relating to the period after the day the written final offer is given.

4.6.2 Solar claims

The Department advised that solar claim intimations have increased from around 20 claims per quarter to over 40 claims per quarter over the past two years. The average cost of a solar claim is over $50,000 and it is expected that these types of claims will continue to increase into the future.[394] The following table shows solar claim lodgements since 2001.[395]

Table 10: Solar claim lodgements since 2001

Year	Lodgements[1]			Admitted[2]			Rejected[3]		
	WCQ	SI	Total	WCQ	SI	Total	WCQ	SI	Total
2001-02	26	7	33	20	5	25	1	0	1
2002-03	20	12	32	23	10	33	1	1	2
2003-04	18	47	65	16	31	47	1	1	2
2004-05	29	34	63	23	38	61	3	0	3
2005-06	34	23	57	26	20	46	2	0	2
2006-07	57	34	91	24	28	52	[a]34	0	34
2007-08	30	31	61	19	26	45	7	2	9
2008-09	36	32	68	17	26	43	8	0	8
2009-10	37	26	63	27	22	49	0	1	1
2010-11	93	19	112	71	13	84	5	3	8
2011-12	141	35	176	103	26	129	2	4	6

Notes to table:

[1] Lodgements are based on the year the claim was lodged.

[2] Decisions are based on the year the claim was decided. Note the discrepancy between the number of solar claims lodged and the number decided is due to a large number of solar claims being report only.

[a] The spike in rejections for solar claims in 2006/2007 was subsequently overturned in the decision of Q-COMP v Robinson [2007] QIC 43.

- All data is as at 30 June 2012.
- Solar injury claims are claims that relate to sun induced skin diseases. This incorporates claims with the primary injury nature code of '862', '863' and '865' as per Type of Occurrence Classification System, Third Edition, and injury nature codes '820', '830' and '850' as per Type of Occurrence Classification System, Second Edition, as published by Safe Work Australia.

Source: Department of Justice and Attorney-General 11 April 2013: 15

[394] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 39

[395] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 15

The Committee was advised that Workplace Health and Safety Queensland (WHSQ) currently provide information and guidance to industry and workers on sun safety and heat stress. WHSQ has also coordinated a health and wellbeing pilot project called the Construction *WorkHealth* Initiative. The project involved conducting free health and skin assessments on over 1,000 construction workers. In total, 964 skin assessments were conducted between September 2008 and February 2009 (representing 0.45% of total construction industry workforce of 245,000 workers). As a result of this pilot project, DJAG together with Queensland Health has jointly overseen the Outdoor Worker Health Taskforce with the purpose of developing and implementing strategies to lessen the burden of skin cancers and other preventable diseases.[396]

The increasing number of solar claims was a significant issue for those businesses with high proportions of outdoor workers. However, the major concern was the impact of non work-related exposure and how to measure that.

The LGAQ highlighted their concern that solar claims will soon become a significant and unwarranted burden on the scheme and one which needs to be addressed. They considered that there ought to be a need to more reasonably and equitably take into account non work-related exposure.[397]

Northside Trusses and Frames indicated that whilst they provide relevant solar protection, they have no control over what protections their employees take outside of work time. They advised that:

> *We provide hats, we provide long-sleeve shirts for employees, we provide sunscreen and we can do that all week but we do not know what they are doing of a weekend. I think it is just extremely difficult if someone does suffer an impact from sun, which I certainly have. I have been involved in outdoor work all my life until recently. So it is a difficult situation, but I do not see why the employer should be in that situation*.[398]

Queensland Rail also highlighted the recent increase in this type of claim. They too identified their concern that with compensable latent onset injury for solar claims always include significant non work-related exposure.[399]

The ASIEQ emphasised '*that recognition should be given to the non-work related exposure that occurs prior to employment and externally to employment'* for solar claims.[400]

Master Builders stated that in their opinion '*recent increases in solar claim numbers reflect plaintiff lawyer behaviour and an aging workforce in general'*.[401]

In contrast, the organisation 'Danger Sun Overhead', which was founded to highlight the dangers of sun exposure particularly for outdoor based industries and workers, called for continued assistance and continue compensation for those affected by work-related skin disease or melanoma.[402]

The Melanoma Patients Australia highlighted in their supplementary submission that *'solar claims have declined in the last 6 months'* and '*compensation payments for solar claims are already capped*'. They also added that rigorous measures are already in place to ensure attribution from sun exposure in the workplace.[403] They concluded that there is no justification to alter the Act as it adequately addresses work related melanoma diseases claims.[404]

[396] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 5
[397] Submission 109: 4
[398] Mr Hay, Transcript 14 November 2012: 23 and submission 40: 4
[399] Submission 55: 2
[400] Submission 150: 19
[401] Submission 155: 7
[402] Submission 96: 2
[403] Submission 193: 1
[404] Submission 98: 3

The Committee heard number of suggestions regarding how solar claims could be managed.

Master Builders considered that the *'majority of solar damage is caused prior to working age and recommends a 30 per cent in compensation for non-work related diminution of solar claims'*.[405]

The Electrical Contractors Association suggested that solar claims attributed to excessive sun exposure needs to demonstrate work as the 'major contributing factor' in order to warrant a claim. They further noted that:

> *The damage caused by excessive sun exposure has also been common knowledge for many years, with the "Slip, Slop, Slap" public education campaign having been ongoing since 1981. Workers must also accept some personal responsibility for their sun exposure outside of the workplace that could contribute to a solar related medical condition.*[406]

ASIEQ recommended the current provisions be reviewed to '*determine whether there is a need for greater recognition of the latency period for these types of injures and clarify liability for exposure as a 'worker' in Queensland.*[407]

Queensland Rail recommended that:

> *Solar related claims be managed with similar provisions that relate to Industrial Deafness claims. This would recognise their latent onset and clarify that liability is only for exposure as a "worker" in Queensland, and limiting entitlement to say 12 months after retirement*.[408]

The LGAQ recommended that:

> *Solar claims be excluded from the latent onset provisions of the Act. The Act should also specifically recognise the substantial contribution that non work related exposure and non Queensland work related exposure would play in the development of solar related conditions. Work in Queensland should be the major significant factor causing the condition. A process for equitable apportionment of liability for latent onset claims should be developed.*[409]

Alternatively, the LGAQ suggested that the Act be amended requiring solar claims to be lodged within 12 months of ceasing employment, and a reduction of 50 per cent should apply to solar related permanent impairment assessments based on exposure through non-work related activities.[410]

The Committee asked the Department about whether there were any plans to develop cross border processes to these types of claims and was advised that:

> *There are currently no processes for cross border apportionment of liability for solar related claims. This would require a national approach with participation by all Commonwealth, States and Territories. It is likely that significant difficulties would be associated with the development of an equitable method of apportionment. Plans to develop cross border processes would be a matter for consideration by Safe Work Australia.*[411]

[405] Submission 191: 8
[406] Submission 99: 2
[407] Submission 150: 19
[408] Submission 55: 2
[409] Submission 109: 4
[410] Submission 220: 3
[411] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 6

The Department advised the Committee that the process used to assess whether solar claims are work related considered the same factors by WorkCover for all claims. These processes are:

- *whether the claimant was a 'worker' in Queensland at the time of their exposure;*
- *what 'event' caused the condition (i.e. what work related exposure); and*
- *whether the claimant suffered an injury as a result of that event, in particular, is employment a 'significant contributing factor' to the condition?*[412]

Their investigations also included obtaining:

- *proof of employment;*
- *statutory declaration from the worker about their work and non-work sun exposure;*
- *confirmation of work related sun exposure including details of the employment duties and the worker's industry;*
- *complete medical history from treating practitioners;*
- *details of worker's non-work sun exposure;*
- *independent medical review to confirm the significance of the employment exposure; and*
- *confirmation of the worker's diagnosis in particular, whether or not the condition is terminal.*[413]

DJAG advised that 'the quantum of benefits payable will depend on the nature of the worker's condition'.[414]

4.6.3 Asbestos related diseases

Asbestosis and other asbestos-related diseases can occur following lengthy periods of exposure to high levels of asbestos fibres. Mesothelioma however can develop from short or lengthy periods of low or high concentrations of asbestos. It can take up to 40 years or more after initial asbestos exposure for disease caused by asbestos to become evident.[415] Australia has the highest reported incidence rates of mesothelioma in the world, and men are more likely to be diagnosed with the disease than women.[416]

Past exposures to asbestos fibres occurred while mining asbestos, manufacturing asbestos containing products, or using those products, primarily while constructing buildings. Currently the main source of exposure to asbestos fibres is from old buildings undergoing renovation or demolition where building maintenance and demolition workers are employed.[417]

[412] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 6
[413] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 6
[414] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 6
[415] Safe Work Australia. Asbestos-related disease indicators. October 2012: 2 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/723/Asbestos-related-Disease-Indicators-2012.pdf [27 February 2013]
[416] Safe Work Australia. Asbestos-related disease indicators. October 2012: 3 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/723/Asbestos-related-Disease-Indicators-2012.pdf [27 February 2013]
[417] Safe Work Australia. Asbestos-related disease indicators. October 2012:3 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/723/Asbestos-related-Disease-Indicators-2012.pdf [27 February 2013]

The total number of new cases of mesothelioma in Australia increased from 156 in 1982 to 668 in 2007. Since then the number of new cases has slightly declined to 661 in 2008. Mortality data from the Australian Institute of Health and Welfare shows that since 1997 the overall number of deaths resulting from mesothelioma increased from 416 to 551 in 2007. The number of deaths from mesothelioma increased to 642 in 2010.[418]

Asbestosis is a chronic lung disease caused by the inhalation of large numbers of asbestos fibres over an extended period. Symptoms of the disease typically appear about 10 years after initial exposure to asbestos fibres: a much shorter latency period than for mesothelioma.[419] There were 1394 hospitalisations in Australia related to asbestosis, of which 97% were men. There were 154 accepted asbestosis-related compensation claims in 2010; this is a 55% decrease from the 342 compensated claims in 2003. Since 1997 the number of deaths attributed to asbestosis increased from 29 to 112 in 2010.[420]

Queensland is the only jurisdiction that does not provide weekly benefits to workers with latent onset injuries that are terminal, but instead lump sum compensation is made. However, if a worker is diagnosed with an asbestos related disease that was not deemed to be a terminal condition, regular compensation arrangements would apply (section 128B of the Act).[421]

The Asbestos Related Disease Support Society Queensland Inc. advised the Committee that the '*aims of section 5 of the Act are met in the work workers with asbestos disease are compensated*'.[422] However, a workers' compensation claim is not possible if exposure is not through 'employment' but instead indirectly through someone exposed to asbestos. The Committee was advised:

> *The ways in which people are exposed to asbestos are endless – in employment, outside of employment, home renovations; you name it. But if someone is exposed from the clothes of another person – their work clothes or through home renovations, not in an employed setting – the remedy is not through the workers compensation scheme; it would be against the manufacturer of the product, or through some other avenue, but not through the workers compensation scheme in that setting.*[423]

As there is a long latency between exposure to asbestos and diagnosis of mesothelioma, usually between 20 and 40 years, it is expected that the incidence of mesothelioma will not peak until 2014 to 2021, depending on the projection methodology. There is also a prediction that the number of new cases in Australia will peak in 2017.[424]

[418] Safe Work Australia. Asbestos-related disease indicators. October 2012: 4-5 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/723/Asbestos-related-Disease-Indicators-2012.pdf [27 February 2013]
[419] Safe Work Australia. Asbestos-related disease indicators. October 2012: 7 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/723/Asbestos-related-Disease-Indicators-2012.pdf [27 February 2013]
[420] Safe Work Australia. Asbestos-related disease indicators. October 2012: 7-9 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/723/Asbestos-related-Disease-Indicators-2012.pdf [27 February 2013]
[421] Safe Work Australia. Asbestos-related disease indicators. October 2012: 7-9 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/576/ComparisonWorkersCompensationArrangementsAsbestosRelatedDiseaseAusNZ2011.pdf [27 February 2013]
[422] Mr Blundell, Transcript 16 November 2012: 15
[423] Mr Blundell, Transcript 16 November 2012: 16
[424] Safe Work Australia. Mesothelioma in Australia. August 2012: 2 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/706/MesotheliomaInAustralia2012.pdf [27 February 2013]

CSR considers that WorkCover's asbestos liability will be significant and recommends:

> *If section 207B was amended so as to provide WorkCover with a right of subrogation then issues associated with the James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005 may be avoided.*
>
> *Section 207B(7) of the Act ought to be amended so that each tortfeasor's liability for the indemnity in WorkCover's favour is proportionate rather than joint and several (i.e. so as to avoid situations where only one tortfeasor is named in proceedings and there is more than one tortfeasor responsible for the worker's injury).*[425]

However, the Queensland Asbestos Related Disease Support Society Inc. considers that there is no further need for any amendments in the Act as the latent onset injury provisions is adequately dealt with asbestos claims.[426]

4.7 Committee comments – latent onset claims

Given the nature of latent onset diseases and the transience of populations in Australia, the Committee considers that a consistent national approach to these sorts of diseases is the most appropriate approach.

The Department advised that Safe Work Australia is considering this issue at a national level. In view of this, the Committee considers that the current provisions and management by WorkCover and Q-COMP of latent onset claims should remain unchanged.

The Committee encourages the Attorney-General to facilitate progression of this topic.

Recommendation 17

The Committee recommends that the Attorney-General and Minister for Justice facilitate the progression of a consistent national approach to latent onset claims.

4.8 Cross jurisdictional/border arrangements

Prior to 2003, employers were required to obtain workers' compensation insurance for an individual worker working in more than one State or Territory. However, in July 2003, legislation was passed in Queensland to simplify workers' compensation insurance arrangements in circumstances where workers work across State and Territory boundaries. In this national model for territorial or 'cross-border' coverage, employers will only need to obtain workers compensation coverage for a particular worker in one State or Territory.

The effect of the 'cross-border laws' is to:

- Eliminate the need for employers to obtain workers' compensation coverage for a worker or deemed worker in more than one State and enable employers to readily determine the State in which to obtain that insurance;
- Ensure that workers and deemed workers temporarily working in another State only have access to the workers' compensation entitlements available in their "home" jurisdiction (including arrangements applying in relation to common law);
- Provide certainty for workers about their workers' compensation entitlements;

[425] Submission 183: 3
[426] Submission 106: 2

- Eliminate forum shopping; and
- Ensure that each worker is connected to one State jurisdiction or another.[427]

Section 113(4) of the Act provides that the home jurisdiction is the State in which the ship is registered (or if registered in more than one State, the State where last registered) for those workers on ships.[428]

Under the cross-border workers' compensation legislation, a worker is only entitled to the benefits available in the "home" jurisdiction regardless of where an injury occurs. This includes any benefits available under common law. In relation to common law access:

1. a claim in tort in respect of a work related personal injury suffered by a worker is to be determined in accordance with the substantive law of the State with which the worker's employment is connected (as determined by the tests above) at the time of the injury;
2. "substantive" law includes any procedural provisions applying under the workers' compensation legislation and any other relevant legislation of the home jurisdiction;
3. courts apply the substantive law of the home jurisdiction; and
4. the relevant rules apply to actions taken against an employer.[429]

The worker's home jurisdiction is:

1. the State in which the worker usually works in their employment; or
2. if no State or no one State is identified by test (a), the State in which the worker is usually based for the purposes of that employment; or
3. if no State or no one State is identified by tests (a) or (b), the State in which the employer's principal place of business in Australia is located.

Test (a) –

A worker's employment is connected with the state in which the worker usually works in that employment.

This first test is likely to determine the "State of Connection" in the majority of instances where workers usually work in one particular State for an employer. These workers may be required to travel temporarily to other States in the course of their duties. But, if a worker usually spends the greater proportion of their time working in only one State, they would be considered to 'usually work' in that State.

Test (b) –

If it is not reasonably clear where a worker 'usually works' and the "State of Connection" cannot readily be determined using test (a), it will be necessary to proceed to test (b).

An assessment of the worker's duties may usefully determine that the worker is 'usually based for the purposes of that employment' in one State over the other/s. That is, there is a place in one particular State that is most closely connected with the worker's work, or a place that serves as a base for that worker's operations.

[427] WorkCover Queensland. Cross border workers compensation. http://www.workcoverqld.com.au/forms-and-resources/national-workers-compensation-initiatives/cross-border-worker-compensation-arrangements [2 April 2013]
[428] WorkCover Queensland. Cross border workers compensation. http://www.workcoverqld.com.au/forms-and-resources/national-workers-compensation-initiatives/cross-border-worker-compensation-arrangements [2 April 2013]
[429] WorkCover Queensland. Cross border workers compensation. http://www.workcoverqld.com.au/forms-and-resources/national-workers-compensation-initiatives/cross-border-worker-compensation-arrangements [2 April 2013]

Factors to consider in determining where the worker is based for the purposes of employment include, but are not limited to:

- The place where the worker regularly attends to collect or use materials, equipment or other items associated with the performance of the work;
- The place to which the worker reports in connection with the performance of the work; and
- The place where the employer keeps any records or other information in connection with the worker's work.[430]

If no State is identified by these tests, a worker's employment is then connected with the State that their injury occurred in and the worker is not entitled to compensation for the same matter under the laws of a place outside Australia. If the worker's employment situation satisfies the first test, there is no need to progress to the next test.

WorkCover Queensland advised that

> *the 'determination of the home jurisdiction will not be affected by the worker undertaking a temporary period of work for the same employer for a period up to and including six months in another State/Territory'. Similarly, 'the benefits of the home jurisdiction will apply to a worker temporarily working in another State or Territory for the period of work up to and including six months. When six months has expired, the intention of the employer and the worker as to the temporary nature of the work in the other jurisdiction must be reviewed'.*[431]

The following table identifies the legislative reference for each state or territory.

Table 11: Legislative reference for each state/territory[432]

State	Act Reference
ACT	Employment connection test implemented June 2004, section 36B of the *Workers Compensation Act 1951*.
Northern Territory	Worker's employment connected with State implemented 26 April 2007, Section 53AA of the *Work Health Act*.
New South Wales	Liability for compensation implemented 1 January 2006, section 9AA of the *Workers Compensation Act 1987*.
Queensland	Employment must be connected with State implemented July 2003, section 113 of the *Workers Compensation and Rehabilitation Act 2003*.
South Australia	Territorial Application of Act implemented 1 January 2007, section 6 of the *Workers Rehabilitation and Compensation Act 1986*.
Tasmania	Implemented December 2004, section 31A of the *Workers Rehabilitation and Compensation Act 1988* is the Employment connection test.
Victoria	Implemented September 2004, section 80 of the *Accident Compensation Act 1985* is the entitlement to compensation only if employment connected with Victoria.
Western Australia	Compensation not payable unless worker's employment connected with this State. This was implemented December 2004, section 20 (Part 111, Division 1) of the *Workers Compensation and Injury Management Act 1981*.

Source: QBE Factsheet AO 1765 10/07

[430] WorkCover Queensland. Cross border workers compensation. http://www.workcoverqld.com.au/forms-and-resources/national-workers-compensation-initiatives/cross-border-worker-compensation-arrangements [2 April 2013]

[431] WorkCover Queensland. Cross border workers compensation. http://www.workcoverqld.com.au/forms-and-resources/national-workers-compensation-initiatives/cross-border-worker-compensation-arrangements [2 April 2013]

[432] Cross Border provisions – A National Model. QBE Connect. QBE Factsheet AO 1765 10/07

In summary, the cross-border arrangements eliminates the need for employers to insure a particular worker in more than one State provided that the other State has also passed cross-border workers' compensation legislation (that is, the employer will not need to declare and pay premium on more than 100% of that worker's wages).

4.9 Committee comments – cross jurisdictional/border arrangements

Most submissions did not consider cross jurisdiction arrangements to be of concern, however national employers who are also self-insurers are subject to different licencing requirements between jurisdictions. This is discussed further in section 7.3.

The Committee has concluded that there are currently no major issues of concern with cross jurisdictional/border arrangements.

5 WorkCover's current and future financial position and its impact on the Queensland economy, the State's competitiveness and employment growth

5.1 Financial performance

Poor financial performance of Queensland's Workers' Compensation Scheme has been the impetus for many reviews of the scheme in recent decades. The unfunded liabilities of up to $260 million in 1996 was the reason for the first Kennedy inquiry which recommended a major restructure of how the Workers' Compensation Scheme was funded.

The financial position of WorkCover Queensland as at 30 June 2012 is summarised as follows:

Table 12: WorkCover Queensland Summary of Financial Performance for the year ended 30 June 2012

Financial results	2012 $'000	2011 $'000
Statement of comprehensive income		
Net premium revenue	1 441 670	1 136 273
Net claims incurred	(1 233 540)	(1 492 624)
Underwriting expenses (net of claims handling)	(22 033)	(18 985)
Investment income	100 039	316 116
Other income	897	980
Other expenses	(4 660)	(4 718)
Income tax equivalents (expense)/benefit	(82 736)	21 345
Operating result for the year after income tax equivalents	199 637	(41 613)
Statement of financial position		
Total assets	3 409 853	3 284 958
Total liabilities	2 868 789	2 942 382
Net assets	541 064	342 576
Statement of changes in equity		
Reserves	17 274	18 423
Accumulated surplus	523 790	324 153
Total equity	541 064	342 576

Source: WorkCover Queensland, Annual Report 2011-2012: 38

The net premium revenue was $1.442 billion for the year, representing a 26.9 per cent increase on the same period last year (2010-2011: $1.136 billion). This increase was primarily due to an uplift in the premium rate to $1.42 in 2011-2012 and higher than expected wages growth.[433]

The premium rate was increased to $1.45 for the 2012-13 year. WorkCover noted that this rate allows them to continue balancing the needs of policy holders with the needs of injured workers whilst ensuring financial stability.[434]

[433] WorkCover Queensland, *Annual Report 2011-2012*: 38
[434] WorkCover Queensland, *Annual Report 2011-2012*: 38

The Department advised the Committee that WorkCover holds an investment portfolio of more than $2 billion managed by the Queensland Investment Corporation (QIC). They advised that WorkCover's return on investments has a significant bearing on its funding position. In 2000, the WorkCover Board established an investment fluctuation reserve to minimise investment market volatility. The instability of markets over the past ten years, which resulted in two years of negative investment returns (2007-08 and 2008-09) was able to be absorbed by the investment fluctuation reserve.[435] Investments subsequently recovered with a gross return of around three per cent as at 30 June 2012.[436]

WorkCover confirmed that their income is derived from premiums paid by employers and returns from funds invested. From this income, they pay claims and cover operating expenses as well as provide contributions to Q-COMP and workplace health and safety. They are legislatively required to maintain a fully funded financial position.[437]

The Department advised that outstanding claims liability is an actuarial measure necessary for the sound financial management of insurance schemes. WorkCover holds amounts in reserve to offset its outstanding liability for accrued, continuing and future claims for injuries sustained by workers.[438]

WorkCover explained that they hold funds for provisioning for all claims. The provision covers all claims that have been incurred to date but necessarily reported. This is called the actuarial provision and the actuaries use their scientific methods to determine what the provision should be. The provision is approximately $2.3 billion. Of that approximately $500-$600 million is for current claims that are rolling over. Most of the provision is for longer than 12 months and are held with QIC. They advised that the funds are relatively liquid and held in in a balanced fund. They advised that they generally target around 7.5% average long term as an investment return.[439]

5.2 Rating system

Workers' Compensation Schemes, as with most other types of insurance, are based on a system of differentiated risk. Different employers in the same risk-rating category are not distinguished in premium setting or levy rates as actual premium paid are calculated as a level of the employer's payroll that is subject to rating purposes and the employer's levy rate.

One way of differentiating between employers within the same risk-rating group is through their individual risk profile which is also known as 'merit rating'. There are three main forms of merit rating:[440]

- Schedule rating – one of the earliest approaches to experience rating but has since been superseded by other forms of experience rating. Schedule rating operates on the basis of premium credits or surcharges that are given to the employer following an actual inspection of the workplace by a safety inspector.[441]

[435] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 13
[436] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 13
[437] Mr Hawkins, Transcript 11 July 2012: 3
[438] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 13
[439] Mr Hawkins, Transcript 11 July 2012: 7
[440] Clayton A, 2002, 'The prevention of occupational injuries and illness: the role of economic incentives'. Working paper no 5. National Research Centre for OHS regulation. Australian National University (August): 12. https://digitalcollections.anu.edu.au/bitstream/1885/41128/3/working_paper_5.pdf [18 July 2012]
[441] Clayton A, 2002, 'The prevention of occupational injuries and illness: the role of economic incentives'. Working paper no 5. National Research Centre for OHS regulation. Australian National University (August): 12 https://digitalcollections.anu.edu.au/bitstream/1885/41128/3/working_paper_5.pdf [18 July 2012]

- Prospective experience rating – is when '*claims experience on which the deviation from the manual rate is made, is that of a given period prior to the current policy year*.' This type of rating was initially used in the early 1900s in the US.[442]
- Retrospective experience rating – This rating emerged in the US in 1936. This type of experience rating gave the insurer comparative advantage on risk particularly if the insurer had been the employer's insurer for a number of years and has knowledge of the claims experience.[443]

The type of rating system used in Australian states is broadly as follows:

- Retrospective experience rating – Victoria and New South Wales
- Prospective experience rating – Queensland
- Bonus and Penalties arrangements (until 2010) – South Australia[444] (new arrangements have been in place since 1 July 2012 where medium and large employer's premiums are calculated using their size, the level of their industry's risk and their individual claims experience)

The general premise of the above systems is similar in that the main aims of the schemes are to improve workplace health and safety through the lowering of claims costs.

Queensland adopted an experience based rating premium setting system in 1997. This was one of the recommendations coming from the Kennedy inquiry. Kennedy recommended that the existing premium rating system be replaced by a merit bonus system with a premium setting system based more on direct experience. Kennedy also recommended that common law costs be taken into account in the experience based premium rating system.[445]

The 'Experience Based Rating' (EBR) model can be viewed as a form of motivation for improving workplace health and safety. But some employers do not fully understand the connection between premiums and workplace health and safety, and may fail to adjust their workplace safety measures. The Experience Rating (ER) system does not adequately account for indirect costs. For example, some accident costs including lost productivity and other accident-related costs including hiring and training of replacement workers are costs not covered by the insurance mechanism of experience rating. Therefore, the costs of workplace accidents are far greater than savings in the premiums associated with ER programs.[446]

[442] Clayton A, 2002, 'The prevention of occupational injuries and illness: the role of economic incentives'. Working paper no 5. National Research Centre for OHS regulation. Australian National University (August): 14 https://digitalcollections.anu.edu.au/bitstream/1885/41128/3/working_paper_5.pdf [18 July 2012]

[443] Clayton A, 2002, 'The prevention of occupational injuries and illness: the role of economic incentives'. Working paper no 5. National Research Centre for OHS regulation. Australian National University (August): 15 https://digitalcollections.anu.edu.au/bitstream/1885/41128/3/working_paper_5.pdf [18 July 2012]

[444] Clayton A, 2002, 'The prevention of occupational injuries and illness: the role of economic incentives'. Working paper no 5. National Research Centre for OHS regulation. Australian National University (August): 15 https://digitalcollections.anu.edu.au/bitstream/1885/41128/3/working_paper_5.pdf [18 July 2012]

[445] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 142

[446] Purse K, 2012, Experience rating: an Australian post mortem. *Policy and Practice in Health and Safety* 2012 Issue 1: 25 - 61

5.3 Rating system and premium calculation

The rating system in Queensland uses previous claims experience and wage information to determine likely cost of claims. The calculation takes into account:

- claims cost experience (past three years of claims cost and the next two years of damages claims);
- business size relative to the industry; and,
- industry's claims cost performance

5.3.1 Legislation

Setting of premium is described in Section 54 of the *Workers' Compensation and Rehabilitation Act 2003*:

54 Setting of premium

(1) WorkCover must set the premium payable under a policy.

(2) The premium payable for the policy for a period of insurance must be assessed according to the method (the *method*) and at the rate (the *rate*) specified by WorkCover by gazette notice.

(3) If no rate is specified in the notice for an employer's industry or business, WorkCover must decide the rate to be the rate applying to the industry or business classification specified in the notice that most closely describes the employer's industry or business.

(3A) Without limiting subsection (2), the gazette notice may state a method or rate that provides for a premium payable by an employer in the event that the employer's premium rate repeatedly exceeds the relevant industry rate.

(4) Before WorkCover publishes the gazette notice, it must notify the Minister and the Authority of the proposed specification of method or rate.

(5) The specification is subject to any direction the Minister may make under section 481.

(6) An assessment of premium must be made on the following basis—

(a) wages paid or estimated to be paid during the period of insurance—

(i) are taken to have been paid in equal weekly instalments during the period; or

(ii) if the employer establishes to WorkCover's satisfaction the wages were paid by the employer in another way, are paid in the other way during the period;

(b) the premium payable for the period of insurance is according to the method and at the rate in force from time to time during the period.

(7) An employer to whom a premium notice is given must pay the premium as assessed by the due date.

(8) If the employer is a corporation and an administrator is appointed under the Corporations Act to administer the corporation, the administrator must pay the premium for the period during which the corporation is under administration.

(9) If an employer is aggrieved by WorkCover's decision, the employer may have the decision reviewed under chapter 13.

(10) In this section—

employer's premium rate means the premium rate calculated for the employer by using a formula that takes into account the number and cost of claims made against the employer's policy during previous financial years.

relevant industry rate, in relation to an employer, means the industry or business classification rate applying to the industry or business classification—

(a) stated in the gazette notice under subsection (2) for the employer's industry or business; or

(b) as decided by WorkCover under subsection (3)—for the industry or business that most closely describes the employer's industry or business.

55 Setting premium on change of ownership of business

(1) This section applies if a person (a *new employer*) acquires the whole or a part of a business from an employer (a *former employer*) who is currently insured under a policy with WorkCover.

(2) In calculating the premium payable by the new employer, WorkCover may have regard to the claims experience of the business under the former employer.

(3) In deciding whether to have regard to the claims experience of the business under a former employer, WorkCover may consider any relevant matter, including the following—

(a) if the new employer is an individual, whether the new employer is or was—

(i) a partner of the former employer; or

(ii) an officer or shareholder of the former employer; or

(iii) an officer or shareholder of a related body corporate of the former employer;

(b) if the new employer is a partnership, whether any of the partners of the new employer is or was—

(i) an individual who was the former employer; or

(ii) a partner of the former employer; or

(iii) an officer or shareholder of the former employer; or

(iv) an officer or shareholder of a related body corporate of the former employer;

(c) if the new employer is a body corporate, whether the new employer is or was a related body corporate of the former employer;

(d) if the new employer is a body corporate, whether any of the officers or shareholders of the new employer is or was—

(i) an individual who was the former employer; or

(ii) a partner of the former employer; or

(iii) an officer or shareholder of the former employer; or

(iv) an officer or shareholder of a related body corporate of the former employer.

(4) However, subsection (2) applies only if the predominant industry activity of the business remains the same as under the former employer.

(5) In this section—

officer has the meaning given by the Corporations Act.

56 Reassessment of premium for policy

(1) This section applies if in either the latest period of insurance for an employer's policy or any of the 3 preceding periods of insurance—

(a) WorkCover has made an assessment for an employer's policy for the period of insurance; and

(b) WorkCover considers that the assessment does not accurately reflect the employer's liability under the Act for the period.

(2) WorkCover may reassess the premium for the period and issue a reassessment premium notice for the period.

(3) WorkCover must reassess the premium—

(a) for any period starting on or after 1 July 2003—under this division; or

(b) for any period between 1 July 1997 and 30 June 2003—under the repealed *WorkCover Queensland Act 1996*; or

(c) for a period before 1 July 1997—under the repealed *Workers' Compensation Act 1990*.

(4) If, after the premium is reassessed, WorkCover is satisfied that premium for the period has been overpaid, WorkCover must refund or credit the amount of overpayment to the employer to whom the reassessment premium notice is given.

(5) If, after the premium is reassessed, WorkCover is satisfied that premium for the period has been underpaid, the employer to whom the reassessment premium notice is given must pay the premium as reassessed.

(6) If an employer is aggrieved by WorkCover's decision, the employer may have the decision reviewed under chapter 13.

(7) This section does not limit another provision of this Act that—

(a) allows WorkCover to recover an amount, whether by way of penalty or otherwise; or

(b) creates an offence for a contravention of this Act.

5.3.2 Jurisdictional comparison

Queensland has the second lowest premium rate at present behind Victoria, whilst South Australia has consistently recorded the highest premium rate (see Table 13).[447] WorkCover SA recorded a overall loss of $437 million in financial year 2011-12 and a scheme funding ratio of 59.2 per cent.[448] The Queensland Law Society's submission outlined that WorkSafe Victoria had suffered a 54 per cent worsening of its equity position and a loss of $675.6M in 2011-12 (excluding employer excess buy out).[449] Their supplementary submission noted that *'there are substantial differences between WorkSafe Victoria and WorkCover Queensland's financial positions'.*[450] The NSW scheme recorded a deficit of $4.1billion in 31 December 2011 and legislative changes were put in place in 2012 to address this.

In contrast, WorkCover Queensland's operating result for 2011-2012 was $199.637 million (after tax) and a funding ratio of 119 per cent.[451] Finity reported that premium rates for privately underwritten jurisdictions such as Western Australia, Tasmania and the ACT have increased in 2012/13. For example, suggested rates for WA have increased by almost 8 per cent to 1.691 per cent in 2012-13. Premium rates in NSW and South Australia has remained stable.[452]

Table 13: State comparison of average premium rates[453]

	2004-05 $	2005-06 $	2006-07 $	2007-08 $	2008-09 $	2009-10 $	2010-11 $	2011-12 $
Queensland	1.55	1.43	1.20	1.15	1.15	1.15	1.30	1.42
NSW	2.65	2.57	2.17	1.86	1.72	1.69	1.66	1.68
Victoria	1.98	1.80	1.62	1.46	1.39	1.39	1.34	1.34
SA	3.00	3.00	3.00	3.00	3.00	3.00	2.75	2.75
WA	2.25	2.32	2.12	1.85	1.58	1.74	1.50	1.55

Note – Average premium rates for Tasmania, Northern Territory and ACT are not available as premiums are set by private insurers.

Source: Department of Justice and Attorney-General, Information Paper: 15

The Queensland Law Society suggested that the statutory and common law claims and payment downward trend would lead to downward pressure on premiums. Actuarial analyses for the scheme indicate that *'there will be capacity and opportunity to reduce premiums'*.[454]

[447] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 15
[448] South Australia, WorkCover SA Annual Report 2011-2012: 5 http://www.workcover.com/workcover/workcover/strategic-plan-and-annual-report
[449] Submission 195: 3
[450] Submission 239: 2
[451] WorkCover Queensland, Annual report 2011 – 2012: 7-10 & 38 http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2012/5412T1115.pdf [5 March 2013]
[452] Finity, *d'finitive* Self Insurance News June 2012: 6 http://www.finity.com.au/wp-content/uploads/2012/07/df_Self-Ins_Jun-2012_SP_Final11.pdf [5 March 2013]
[453] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 15
[454] Submission 195: 9

The Department advised that the average premium rate per $100 of wages for 2012-13 is $1.45 and that the following breakdown applies:[455]

Table 14: Base claims costs per $100 of wages

Base claims costs	Per $100 wages	% of target rate
Statutory claims	0.594	41.0
Common law claims	0.555	38.3
WorkCover expenses (e.g. staff)	0.108	7.5
Q-COMP levy (includes WHS grant)	0.069	4.8
Queensland Health public hospital payment	0.049	3.4
Stamp Duty	0.075	5.0
TOTAL	1.450	100

Source: Department of Justice and Attorney-General 11 April 2013: 12

5.3.3 Calculation of premiums

The Department explained that employer premiums in Queensland are based on the calculation which multiplies employer's wages with their premium rate. The actual premium paid by an employer in Queensland is similar to that of South Australia in that premiums are dependent on the size, claims experience and industry of the employer. The smaller the employer, the more their premium is based on their industry rate and the larger the employer, the more their premium is based on their own experience.[456]

The claims experience includes the statutory claims costs arising from injuries incurred in the past three financial years and common law claims costs arising from injuries that occurred in the two financial years prior to that up to a maximum of $175,000 for each claim. For example an employer's 2012-13 premium will be affected by statutory claims arising in 2009-10, 2010-11 and 2011-12; and, common law claims arising from injuries that occurred in the 2007-08 and 2008-09 financial years.[457]

Premium calculations use industry codes which are based on the workers' compensation insurers' coding of industry to the divisions from the Australian and New Zealand Standard Industry Classification (ANZSIC 2006). Industries are given an alphabetical code and a corresponding number for sub-classification. For example, 'Education and Training' has the industry code 'P' with 'Preschool and School Education' listed as P80.[458]

The employer pays the premium provisionally i.e. the insurance is paid at the beginning of a period and adjusted at the end. Estimated wages are used for the current financial year to calculate the provisional premium. On renewal, actual wages for the past financial year is used to calculate actual premium. The provision premium paid for the past financial year is subtracted from the actual premium for that year.[459]

[455] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 12
[456] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 15
[457] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 15
[458] Q-COMP 2011/12 Statistics Report Appendix 2: 70
http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [19 February 2013]
[459] WorkCover Queensland. Calculating premium. http://www.workcoverqld.com.au/insurance/calculating [22 March 2013]

For policies with premium above $1,200 for the previous year, a declaration of prior year's actual wages and current year's provisional wages are required to be declared to WorkCover for premium calculation. For those policies with premiums under $1,200, the policy is automatically assessed using prior year's provisional wages plus 10 per cent as current year's provisional wages. Employers can declare wages at any time during July and August if their actual wages differ significantly from WorkCover's estimates.[460]

Costs of journey claims are not taken into account when determining an employer's experience based rating in Queensland as it is deemed that employers cannot exercise any control over the safety of their workers on their journeys to and from work.

5.3.4 Criticisms of premium calculations

Some submissions highlighted some dissatisfaction with the current premium calculation method. These criticisms included:

- System creates disincentives for injury prevention;
- System creates incentives not to claim;
- Confusion about how premiums are calculated;
- Confusion and concern about the industry ratings applied;
- No flexibility available in how premiums are applied; and
- Overall concern about the quantum of premium payments.

PMSA considered that the current EBR formula fails to provide recognition or incentives for employers who have implemented injury prevention, workplace rehabilitation and return to work programs across their organisations.[461] There were concerns that the duration of some claims unfairly impacts on the premium because of the costs involved, and that even when '*claims are proven to be unfounded or false, costs are still reflected in employer's premiums'*.[462,463]

CCIQ advised that their members continue to express dissatisfaction with the EBR on which Queensland premiums are calculated. They advised that the system is not yet adequately representing the investments employers are making in workplace health and safety training and infrastructure and this results in proactive employers being penalised and carrying the burden of higher premiums. They consider that premium calculation should be providing an incentive for employers to improve workplace health and safety and injury prevention. [464]

QSuper advised the Committee of *'anecdotal evidence that some employers were steering employees to QSuper instead of WorkCover as there is no cost to the employer with a QSuper claim by way of, of example, increases in premium'*.[465]

[460] WorkCover Queensland. Renewing your policy. http://www.workcoverqld.com.au/insurance/renewing-your-policy [22 March 2013]
[461] Submission 149: 2
[462] Submission 21: 1-2
[463] Submission 34: confidential
[464] Submission 113: 13
[465] Submission 42: 1

Several submissions noted a lack of understanding over how premiums were calculated. For example, Building Service Contractors Queensland noted that:

> *… one of our large problems as an association in communicating with our members is trying to understand exactly why our premiums are what they are. They do not seem to be linked to anything as far as we can see. We do not have any information made available to us about why, for example, the cleaning industry premiums have increased from 3.233 per cent to 4.041 per cent over the last 12 months. We do not know why. From our internal research there has been no spike in injuries, there has been no discovery of any long-term illness caused by chemicals or anything that could require a long tail in the insurance system. All we know is that we have been hit with these large increases*.[466]

Hyne Timber provided an example of how their premium created confusion:

> *I have heard a lot and read a lot of the submissions that say it is supposed to be a balanced scheme in that it is not broken so do not fix it. We have reduced our statutory claims by 69 per cent in the last five years. We have reduced the cost of those statutory claims by 67 per cent in the last five years. Our wages have reduced by 14 per cent in the same period. Our premium costs have increased 72 per cent. So how is it a balanced scheme and how is it not broken? From an employer's perspective, we manage a safe workplace, we have common law claims that last for years and drive significant costs. They are out of our control in a lot of cases because many of them are vexatious claims and very low impairment rates, yet our premiums have gone up by 72 per cent on the back of 67 per cent improvement in safety performance*.[467]

When considering WorkCover premium notices, the Electrical Contractors Association advised that:

> *...one of the toughest things I have had to do in a past life is explain to a rather large employer of 3,000 employees about their $450,000 increase in premium. We actually then had to analyse the data about how much of that was related to an increase in wages—because obviously wages have increased over a period of time—how much was experience data and how much was change about what we do not control, which is the WIC codes. I think some employers or even industries may benefit from actually having that data freely available or available on the premium notice to say, 'We have estimated the increase is $450,000.' Then there would be the three columns so you can then have clarity about what is controllable from the employer's point of view, what is not controllable in terms of the WIC code and then what else is going on in the actual premium rate.*[468]

In addition, some industry groups consider that the use of industry classes to calculate premiums inadvertently causes financial burden on lower risk industries/businesses. The Australian Lawyers Alliance *'considers there would be merit in reviewing the industry ratings approach, particularly with a view to provide greater smoothing of increases for smaller industry sectors'*.[469]

[466] Mr Pollard, Transcript 31 October 2012: 10
[467] Mr Murtagh, Transcript 14 November 2012: 21
[468] Mr O'Dwyer Transcript 31 October 2012: 9
[469] Submission 72: 6

Marine Queensland stated that:

> *…the boat building classification encompasses the building of boats from small alloy tinnies through to large complex ships. Accordingly risk factors that may be present in building ships are loaded onto employers whose primary business is building small recreational craft. The practical effect of this issue is extremely expensive premiums for builders of recreational craft when compared to other high risk industries. The burden of these premiums on these employers is significant*.[470]

They confirmed that:

> *Core to the concerns of our membership is the complexity of the formula used to calculate premiums. I field inquiries from small manufacturers totally mystified as to how the formular is calculated. We have done a couple of case studies with individual manufacturers who are under significant duress, and I have to say it took us a good number of days to sit down and dissect the formula to find out where the problem was. We ended up with a problem where when we engaged with Q-Comp it was like, 'Oh well, it is out of our control. That is tough,' in effect. It is not only the classification but that is clearly a cause of the issues that we have been raising. I would also suggest the complexity of the formula is not conducive to enabling employers to sit down and understand what it is that they are actually paying for*.[471]

Similarly, Poppy's Chocolate (a small business with four employees) called for '*the system to be changed so that there are different categories or it takes into account the size of the business*' in premium calculations. They stated in their submission:

> *I am just grouped in with other huge confectionery manufacturers whom would have a lot of possibly dangerous equipment and possibly very hot products and assigned a number of 4.11 because that is the risk factor assigned to all confectionery manufacturers. So, my workers compensation bill is 4.11xwages. This is way too much for a small business like mine to cope with*.[472]

CCIQ advised the Committee that their members have expressed concern over their industry classification on the basis that they do not feel it accurately reflects the risk profile and the business activity they are undertaking.[473]

HIA also highlighted their concerns about premium calculation methods which appears to group 'home building' with 'general construction'. They stated that:

> *There is a perception - and that is all it is, because we do not have the evidence - and the perception is that home building is safer than general construction yet the premium is calculated on the basis of the whole of that industry. Whether that perception is true or not, nobody has tested and nobody seems to be able to test'.*[474]

[470] Submission 54: letter
[471] Transcript 31 October 2012: 33
[472] Submission 171: letter
[473] Mr Behrens, Transcript 31 October 2012: 33
[474] Mr Temby, Transcript 31 October 2012: 9

HIA considered that differentiating between respective '*employer's claims and their claims experience for the home building industry from the general construction industry*' would be helpful in that it would '*provide some more substance to our members around why their premiums are being calculated the way they are*'.[475]

The Committee heard evidence of concern regarding a lack of flexibility in premium payments, particularly when businesses are having to reduce their work forces.[476] A lack of flexibility when employers have fundamentally changed their business was another concern expressed by Ai Group. They advised that:

> *There is also another concern that we specifically have with regard to businesses that go through a growth spurt and maybe a significant management change and a change of their main business activity. They often inherit from their previous history, when they were smaller and less dynamic maybe, a claims history that comes back to bite them in terms of the calculation of their premium. We have recently had a very graphic example of that when one of our members was presented with something like an $800,000 premium bill for this round relating to a common law claim back in 2005 simply because they are still the same entity but they have fundamentally changed their business and their whole profile. But the way the formula is applied it has this magnifying and very disproportionate effect*.[477]

Sunfresh Linen, a commercial laundry business employing approximately 200 people, advised the Committee that the Act is so rigid that it does not include any opportunity to reward investment in workplace safety. They provided the example of how they have relocated their business to a 'world best build building, complimented by the best machinery available' in order to achieve a much safer work place'. Their premium is affected by substantial claims which occurred prior to the relocation. They stated that if they have had a change of ownership with the change of location as well as the change of location the previous claims history would have been cleared for the purpose of the premium calculation.[478] The Committee is not aware that such exemption exists under the Act.

The other major complaint related to the overall cost of premiums. Kemp Meats Pty Ltd advised the Committee that:

> *The impact the high costs of Work Cover have had on our family owned company mean that our company is no longer viable to operate. Our current cost of workcover equates to $1o,ooo per employee to pay to workcover for the 2012/2013 financial year. We are not in an industry that can just put up the prices to cover this huge impost. So the impact it has had on our region is that there will then be 13 local people who no longer have work which for some of them they have worked for us for over 10 years.*[479]

They questioned why their Workcover premium was so high when public liability insurance for $20 million costs $5,000.[480] It should be noted that the premium in this case was affected by a substantial amount relating to the previous financial year due to the wages being under estimated.

[475] Mr Temby, Transcript 31 October 2012: 9
[476] Mr Sorensen and Mr Kemp, Transcript 27 August 2012: 9
[477] Ms Tucker, Transcript 31 October 2012: 33
[478] Submission 9: 1
[479] Submission 158: 1
[480] Mr Kemp, Transcript 27 August 2012: 8

The Department explained the reasoning for the current premium formula as follows:

- Larger employers generally have their own claim experience so any improvement made in their claims frequency and claims costs will impact on their premium.
- For smaller employers, the impact of their own experience is reduced so improvements to safety and claims experience have less direct impact so their overall industry experience becomes the driver of the premium rate. This effectively protects smaller employers for the immediate impact of expensive serious injuries and also makes their premium more predictable. Unfortunately this also means that there is less recognition for good individual employer experience in the premium calculation.

The Department advised that nearly 70 per cent of all employers with an EBR rate (i.e. not new businesses) pay less than the published industry rate; and 95 per cent of small employers pay less than the published industry rate. There is also some provision which takes employers' safety initiatives into account in the premium calculation, particularly for employers with little or no claims experience during the year. It is estimated that approximately 80 per cent of employers with an EBR formula rate receive a reduction in their premium calculations.[481]

WorkCover observed that:

> *Clearly, the intention of an experience based rating formula in premium setting is to reward people with good claims experience. That probably has not gone as well as we would have liked. Obviously you have to create the appropriate incentives without compromising the financial viability of the fund in doing so. I think it is about education, particularly of employers. We are working with Workplace Health and Safety and Q-Comp to provide that assistance.*[482]

5.3.5 Suggestions for change

Newhaven Funerals suggested that a work place health and safety compliance scoring system relating directly to employer worker insurance premiums could be developed.[483] Timber Queensland recommended *that workplace initiatives be better recognised when establishing premiums, and that common law claims for incidents older than 3 years should not be taken into account*'.[484]

HIA submitted that '*employers of apprentices in New South Wales and Victoria do not pay a workers compensation premium on the wages of the apprentices that they employ*'. HIA considers that current premium for employers in the building industry in Queensland include the wages of apprentices. In order to boost the home building industry, HIA recommends that apprentices' wages be exempt from the calculation of workers' compensation premiums.[485] Master Builders also agrees that exempting apprentices' wages would encourage employers to keep apprentices and trainees in the industry.[486]

[481] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 14
[482] Mr Hawkins, Transcript 11 July 2012:6
[483] Submission 3: letter
[484] Submission 29: 9
[485] Submission 60: 5-6
[486] Submission 155: 6

The Committee sought a response from the Department regarding the impact this type of exemption would have on the scheme. The Department advised that:

> *While this may encourage more employers to employ apprentices, if they are injured at work apprentices would receive compensation. This is particularly an issue as they are a high risk group due to their age and inexperience. The associated claims costs would be incorporated into the employer's claims experience and premium calculation. The scheme would still need to collect sufficient premium to cover these claims costs either from the specific employer, the relevant industry or spread across all industries (including those without apprentices).*
>
> *In the case of employers who only employ apprentices, for example Group Training Organisations, they will not pay premium for these workers and this may discourage further improvements in safety.*[487]

WorkCover does not record whether or not wages and claims relate to apprentices, however, they estimated that the proposal would remove $1.14 billion in wages from the fund with no related reduction in claims costs. This would need to be spread across employer groups via the industry rate. The impact will be greatest in industries where apprenticeships are most common.[488]

CPM Engineering suggested that for companies paying higher premiums (e.g. in excess of $200,000), there could be some consideration for a 'refund or no claims bonus' if they have not had a claim for three years.[489] Galvanizers Association of Australia recommended that employers' excess *'could be increased to allow for lower annual premiums'*.[490]

The Committee asked whether the Department has ever investigated an excess system, as occurs in other types of insurance, where the excess amount is set at various levels in exchange for a reduced premium. They advised that under the EBR system employers pay for their own experience in ways – by excess and experienced based rating. The portion that employers pay as a result of EBR varies with employer size and some capping mechanisms for very large claim costs. All claim costs above those paid by employers through excess and EBR are passed into cross subsidy within the fund and shared by all employers.[491]

The Department advised that the most important consideration for allowing excess amounts to be both variable and financially significant is that there is an inherent risk that the employer will not be able to honour the excess arrangements, for example for reasons of solvency and/or bankruptcy. When this happens the employer's unfunded outstanding claims liabilities will be covered by the remaining employers in the fund.[492]

They identified the following additional considerations for the fund:

- a reduction in cross subsidy can increase premium rate volatility for other employers;
- implementing a second system with significant operational considerations and complexities will create significant risk;
- motivation to self-insure may be reduced, maintaining fund size and stability; and
- shifting outstanding claims liabilities from WorkCover to employers.[493]

[487] Correspondence from Department of Justice and Attorney-General, to FAC dated 4 January 2013: 11
[488] Correspondence from Department of Justice and Attorney-General, to FAC dated 4 January 2013: 11
[489] Submission 210
[490] Submission 47: 2
[491] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 6-7
[492] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 7
[493] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 7

CCIQ recommended increased recognition of efforts and investment by employers in workplace health and safety and injury prevention through lower WorkCover premiums.[494]

The Committee was advised by Spantech that WorkCover had conducted an audit on their efforts to reduce the number and costs of claims. They recommended that *'employers should be provided an incentive to implement an independently certified safety system by factoring this into the calculation of premiums'*.[495]

Spantech recommended that *'employers could be provided with a self-audit tool so employers can assess whether they are complying with the requirements of the Act'*.[496] OH&S World's suggestion was to implement a software safety management system that is linked to Q-COMP and WorkCover on compliance and safety records and the award of a 'safety tick' would result in premium reduction.[497]

5.4 Committee comments – premium calculation

The Committee appreciates that the way the premium is calculated has a direct effect on the amount paid by businesses. The premium is calculated on the basis of the premium rate multiplied by wages. The premium rate is based on a combination of claims experienced and industry rates.

Most of the criticisms of the premium calculation were based on the quantum of the result rather than the way the premium was derived. It is accepted that employers with a poor claims history should have increased premiums over those with a good claims history. The concern was over the significant impact this has on the premiums. In highlighting their concerns about the impact on premiums, a number of employers indicated that what they consider to be fraudulent claims was being reflected in their claims history. This issue is considered in section 5.5 of this report.

Whilst the Committee sympathises with those employers who are impacted significantly by their claims history, the Committee considers that the calculation provides a balance whereby penalties are applied to those who cost the scheme the greatest.

The Committee accepts that the scheme only indirectly rewards employers who have implemented injury prevention, workplace rehabilitation and return to work programs across their organisations. Good claims histories reflect in lower premium rates being applied.

However, the Committee considers that there should be scope for providing premium relief to employers who have taken significant active measures to improve the safety of their workplace. These significant measures include relocation or construction of new or renovated buildings to industry best standards. The relief could take the form of clearing or modifying the claims history in the calculation of the premium. The Committee considers that provisions should be included in the Act to enable the Minister to allow for relief in these circumstances. It is anticipated that the granting of such relief would be infrequent but would provide incentives to employers who have undertaken large investments in workplace safety.

The Committee heard numerous examples of different types of businesses being grouped with other businesses unlike their own because of the industry scales used by WorkCover to calculate the industry rates. In the interests of fairness, the Committee considers that this issue requires further examination. The Committee recommends that the Department undertake an examination of its industry rate groupings with a view to expanding the groupings to accommodate more industry types. The purpose of this review is to ensure that businesses are not being impacted unfairly by the structure of the industry rating scales.

[494] Submission 113: 13
[495] Submission 246: 2
[496] Submission 246: 1
[497] Submission 87: 2

However, the Committee does not consider that it is feasible that the industry ratings be split within businesses that might have large numbers of employees working in different categories. The majority workforce should continue to be the applicable industry grouping.

The Committee considers that the suggestion by Spantech to provide employers with a self-audit tool to enable them to assess whether they are complying with the requirements of the Act is sensible. The Committee recommends that the Department investigate this option.

Recommendation 18

The Committee recommends that provisions be included in the Act to enable the Minister to grant premium relief in certain circumstances.

Recommendation 19

The Committee recommends that the WorkCover/Q-COMP undertake an examination of its industry rate groupings with a view to ensuring that they more accurately reflect current industry size and risk exposure.

Recommendation 20

The Committee recommends that the Department investigate options to enable them to provide employers with a self-audit tool so they can assess whether they are complying with the requirements of the Act.

5.5 Fraudulent and/or false claims

The issue of allegations of fraudulent and or/false claims was raised on numerous occasions throughout the Committee's inquiry.

5.5.1 Legislation

There are provisions within the *Workers' Compensation and Rehabilitation Act 2003* that address the giving of fraud, false and misleading statements.

Section 533(1) states that '*a person must not in any way defraud or attempt to defraud an insurer, and the maximum penalty of 400 penalty units or 18 months imprisonment applies*'.

Section 534 stipulates the penalties for providing false and misleading information or documents:

534 False or misleading information or documents

(1) This section applies to a statement made or document given—

(a) to the Authority or WorkCover for the purpose of its functions under this Act; or

(b) to an entity or person as a self-insurer; or

(c) to a registered person for the purpose of an application for compensation or a claim for damages.

(2) A person must not state anything to the Authority, WorkCover, a self-insurer or a registered person the person knows is false or misleading in a material particular.

Maximum penalty—150 penalty units or 1 year's imprisonment.

(3) A person must not give the Authority, WorkCover, a self-insurer or a registered person a document containing information the person knows is false or misleading in a material particular.

Maximum penalty—150 penalty units or 1 year's imprisonment that provide false or misleading information in relation to a claim for compensation.

5.5.2 Discussion – fraudulent and/or false claims

Some submissions expressed their dissatisfaction with the scheme in that it is seen '*to allow for ease of fraudulent activity by some injured workers*'[498] and the *'lack of investigation on claims allows for misleading and fraudulent claims'*.[499]

At the Committee's hearings in Mackay, the Committee heard numerous examples of what the employers considered to be fraudulent or frivolous claims. These employers identified the following areas of concern to them:

- The general acceptance of what the employers consider to be frivolous claims.
- The ability of employees, with these types of claims, being able to take action under common law.
- The feeling that WorkCover is not allowing them to defend against claims.
- The agreement by WorkCover to settle out of court when they consider that the claim was defensible.
- The impact of these settlements on their claims history.

Auto Corner Pty Ltd advised the Committee that:

> *I want to put our position that as an employer we are not about trying to dissolve or weaken the workers compensation scheme insofar as it should protect workers from legitimate claims. The issues that we have as an organisation, and I think that a lot of other employers have at the moment, is the viability or lack thereof of the current system and the ability of people to take advantage of it with claims that you would have to question as being anything but frivolous. I do not understand the legal system but I do understand from WorkCover's perspective that once something goes to common law they find it almost impossible to try to defend it. Therefore, we find ourselves in positions where claims that you would have to find at least questionable being settled out of court for sums which are exorbitant. The claims that we find we are questioning ourselves fairly significantly seem to be settled out of court for an enormous amount of money.*[500]

These concerns were supported in many of the submissions received. For example, Exotica Plants noted that *'false claims are being accepted by Workcover before, as in our recent experience, any injury has been reported to the employer'*.[501] Exotica Plants also emphasised that although '*the burden of proof of a claim is on the employee and not up to the employer to disprove baseless claims, this is not the case in reality when dealing with Q-COMP. The burden of proof should be about the claimant proving how and when the incident occurred and not just providing a medical report stating that they have an injury*'.[502]

[498] Submission 8: confidential
[499] Submission 34: confidential
[500] Mr Glanville, Transcript 27 Aug 2012:1- 2
[501] Submission 64: 1
[502] Submission 64: 1

Australian Sugar Milling Council (ASMC) expressed the concern that workers' compensation claims are being processed with scant scrutiny. Whilst accepting that the Workers' Compensation Scheme is a no blame process, they considered that claims should not proceed on the basis that there should be automatic payment just because an injury has occurred. Their experience is that claims are accepted regardless of representations made by employers as to the merits of the claim. They stated that:

> *At the point of making the claim, the onus is on the employee to provide evidence that the injury has occurred and that it is linked to work. Their evidence is usually the opinion of the treating GP. While this is not necessarily expert opinion of the nature or cause of the injury, it is usually the evidence that the claim succeeds on. That evidence is often based on the GP having taken the employee's word that the injury was work related.*[503]

They considered that it is appropriate to more carefully examine claims where there might be a suspicion of fraud, in particular where the employer has expressed concerns about the circumstances surrounding the claim.[504]

The Committee requested clarification from the Department about how claims considered likely to be fraudulent are investigated. They were advised that WorkCover will immediately investigate if inconsistencies are found with a worker's version of events or are alerted to a fraud issue in the claim. These issues may include exaggeration of the injury. Investigation process could involve further statements, medical and employment history or surveillance. As these investigations potentially involve an invasion of the worker's privacy, WorkCover must have some suspicion of fraud before they investigate the worker's history or engage surveillance.[505]

The Department advised the Committee that once claims are lodged, '*WorkCover will telephone both the worker and employer to obtain their statement about the claim*'. They also stated that in cases '*where an employer is unable to confirm the worker's version of event, the claims must still be medically supported*'. If a claim is considered high fraud risk, '*typically the worker will be questioned in more detail and asked for details of any witnesses. In the absence of contrary evidence about how the incident occurred, the injured worker's version of events if it is factually and medically plausible, will be accepted*'.[506]

[503] Submission 49: 4
[504] Submission 49: 4
[505] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 25
[506] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 22

With regard to undertaking investigations when employers suspect a fraudulent claim, WorkCover advised that:

> *…with due respect to some of those employers who you are talking about, some of them believe that every person is exaggerating their injury. One of the benefits of the Queensland WorkCover scheme is that people get paid quickly to go back to work. One of our great successes across the scheme is good return-to-work outcomes. To get good return-to-work outcomes, you really need to get very quickly to the injured worker. It is probably not dissimilar to the fault scheme that you are talking about for statutory. If you start to bog it down with lots of investigation at the front end, and particularly if you then find that the person was genuinely hurt with no fraud at all, just the view of the employer who said that this person is doing it, the employer ends up spending all of that time with that person being off on the claim before you even get moving to the return-to-work outcome. So there are some cost benefits in doing that. I think the other thing, too, is that clearly the word 'fraud' is a very strong word. I think there is a difference between fraud and exaggeration or something. Clearly, to answer your question, in terms of prosecution, if we prosecuted for fraud it would clearly come back off the policy. If it is an exaggeration, then it becomes a question of someone's opinion versus ours on that.*[507]

The Committee also heard that WorkCover will adjust an employer's premium if there was evidence of fraud in a claim against them.

> *In most of those cases, or a fair majority of those cases, we probably would not recover that money—it has gone—whether the person is charged or not. However, those costs which would have previously been attributed to that particular policy are then reversed out of that policy.*[508]

WorkCover further explained:

> *We have a number of claims that we prosecute for fraud. Certainly, in those places it is very clear cut. There are some grey areas as well. You get a lot of complaints from employers and we do the necessary surveillance and checking – those sorts of things. But sometimes it is a matter of maybe not outright fraud but maybe an exaggeration of symptoms. That is where the whole grey area can be. So while we may not be able to prosecute for fraud in those circumstances, we can certainly use a lot of the information that we get to have influence over the person's treating doctor, show them the information and then we can work with them to try to close claims down if there is enough grey area*.[509]

The Committee heard from WorkCover that there are two types of fraud.

> *There is worker fraud, which is in the case of a person, for example, who may have been paid on claim and who goes back to their calling and still continues to receive benefits when they should not. From an employer perspective, they may be under declaring their wages or the nature of their employees that they have the ability to prosecute for fraud…. In terms of injured worker fraud, yes, there will be some happen and, yes, we prosecute where we find those. Like anything, we do not get it 100 per cent right all of the time, but we are comfortable that it is not either a significant financial or quantitative issue.* [510]

[507] Mr Hawkins, Transcript 28 November 2012: 4
[508] Mr Hawkins, Transcript 28 November 2012: 4
[509] Ms Stratford, Transcript 28 November 2012: 4
[510] Mr Hawkins, Transcript 11 July 2012: 11

WorkCover confirmed that they rely on GPs when assessing claims. They advised:

> *With respect to the medical provision, they are our gatekeepers as to who comes into the system. The only way we will accept a claim is through a medical certificate provided by a general practitioner. At this stage we do not allow—or the legislation does not allow—for chiropractors or physiotherapists or whatever to do that. So it does have to come through a GP. Clearly, on the basis of their professional judgement, this person is either injured or not and we make that call.*[511]

The Committee asked the Department about evaluation of incidents of multiple claims. WorkCover cautioned against grouping people who genuinely hurt themselves working in hazardous industries with those who are trying to defraud the system and advised that not all multiple claims arise from fraudulent behaviour.[512]

However in regards to investigating a worker's history or commencing with surveillance, WorkCover advised the Committee it is not a decision that is taken lightly due to the cost and whether it would have any impact on the medical opinion in terms of the nature of the injury.[513]

The Queensland Council of Unions considers that fraudulent claims which receive significant amount of attention from the media are isolated examples of anecdotal evidence of supposed fraudulent claims.[514] One medical practitioner stated that in his 20-year involvement with the Medical Assessment Tribunal (MAT), he observed '*very few individuals coming to the tribunal are exaggerating their degree of impairment with a view to monetary gain*'.[515] The Australian Lawyers Alliance emphasised that Queensland has one of the strictest fraud legislative provisions in Australia.[516]

The Department indicated that they have listened to employers and made a policy decision to not settle cases early. This was supported by the Australian Lawyers Alliance who observed that:

> *I think there were claims about spurious claims. My response to that is that that is something that WorkCover needs to deal with when the claims are made. My own personal experience of late, within the last two years, is that WorkCover has been fighting them a lot harder in my view and that was aided by a change in the law, which I appreciate my friends are not aware of. In my view, the previous state of the law has only arisen out of a particular case which I will not bore anyone with, but that was ridiculous. It did not have balance and it was not fair to employers. That operated for a period and it was closed off.*[517]

QLS confirmed that their experience is that previously WorkCover would depart from their mandatory final offer too easily in order to secure a quick resolution of a claim. They advised that one of the changes implemented by WorkCover has been to defend mandatory final offers and not to materially resile from that figure. QLS is of the view that this initiative has resulted in changes in perception, and thus behaviour, by plaintiff lawyers, who now appreciate that WorkCover's mandatory offer is firm. Their opinion is that this appears to be driving the following outcomes:

- lawyers are more likely to advise clients to settle earlier as it is unlikely that WorkCover will change its position, and

[511] Mr Hawkins, Transcript 28 November 2012: 4-5
[512] Mr Hawkins, Transcript 28 November 2012: 6
[513] Mr Hawkins, Transcript 28 November 2012: 4
[514] Submission 190: 4
[515] Submission 93:Attachment 2: 3
[516] Submission 188: 4
[517] Mr Worsley, Transcript 27 August 2012: 4

- lawyers may be less likely to advise clients to make claims where there are significant liability issues as WorkCover is more resolute in its defence of matters.[518]

It is a requirement for self-insurers to refer matters to Q-COMP for further investigation if they have a 'reasonable suspicion of fraud' (under Section 536 of the *Workers' Compensation and Rehabilitation Act 2003*).

The costs incurred while investigating an alleged fraud (whether or not fraud is established) are absorbed by the WorkCover Fund, and have no impact on the employer's premium calculation. WorkCover and Q-COMP statistics for the past five years show that there were 80 and 21 workers successfully prosecuted for fraud or related offences by respective organisations.[519] The number of fraudulent or false claims is low in comparison to the total number of over 100,000 statutory claims processed each year.

5.5.3 Suggestions for change – fraudulent and/or false claims

Q-COMP proposed that the legislation be amended *'to refer all allegations of fraud-related offences against WorkCover to Q-COMP for investigation and prosecution (consistently with the management of self-insurer fraud referrals)'*.[520] At present, section 536 of the Act outlines that fraud or false or misleading information or documents, is to be given to WorkCover. Q-COMP suggests that

> *This amendment would be consistent with Q-COMP's primary function to regulate the scheme and would improve clarity between the functions of WorkCover as a commercial insurer and Q-COMP as the scheme regulator.*
>
> *There would be less likelihood of actual or perceived bias being attached to WorkCover as it would no longer be required to investigate and prosecute injured workers in relation to claims which it administers.*[521]

One submitter agreed and considered that there is a need to more clearly define the roles of Q-COMP and Work Cover to ensure that appropriate regulatory functions sit with the regulator and that all insurers are subjected to the same set of standards and guidelines. They advised that at present WorkCover undertakes a number of functions that could better rest with the scheme regulator. For example, imposing a penalty on non-compliance with the legislation e.g. in regards to premium collection should not rest with the insurer who is collecting the premium. In other states' workers' compensation, this would rest with the regulator responsible for monitoring compliance with the legislation.[522]

The Committee sought the Department's response to Q-COMP's proposal and was advised that:

> *Under the Act, WorkCover must undertake its own investigations and prosecutions relating to allegations of fraud made by employers holding a WorkCover policy. At the time, it was viewed that this was appropriate as WorkCover is a third-party insurer, not the employer, as is the case with self-insurer's therefore it was not a conflict for WorkCover to investigate an injured worker for fraud.*

[518] Submission 195: 9
[519] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 26
[520] Submission 93: 7
[521] Submission 93: 7
[522] Submission 62: confidential

The reason for this recommendation is to improve clarity of roles for WorkCover and Q-COMP. The implementation of this change would allow WorkCover to maintain its focus on providing commercially sound insurance and case management services. It would remove any potential for the perception of bias in WorkCover investigating fraud by workers or employers while it is attempting to rehabilitate a worker or provide customer service to an employer.[523]

5.6 Committee comments – fraudulent and/or false claims

The Committee considers that the incidence of fraudulent and/or false claims has probably been over stated. The Committee considers that exaggeration of injuries may be more of an issue, however, this is a factor of human nature.

The perception for many employers, is WorkCover is too accepting of medical evidence without sufficient regard to the role the work place played in the injury and that payments are made without sufficient consultation with them. The Committee acknowledges WorkCover's arguments that in order to get good return-to-work outcomes injured workers need to be managed quickly. The Committee considers that WorkCover needs to communicate its decisions, including reasons, more comprehensively to employers.

The Committee encourages WorkCover to continue with the policy of holding firm on mandatory final offers and its defence of matters. Anecdotal evidence suggests that this will influence the behaviour of claimants to accept early offers and therefore reduce the length of litigation proceedings.

The Committee considers that Q-COMP's suggestion that the legislation be amended to refer all allegations of fraud-related offences relating to WorkCover to Q-COMP for investigation and prosecution, consistent with the management of self-insurer fraud referrals is reasonable and should be adopted. WorkCover needs to work collegially with employers and workers and therefore should not be placed in the position where there could be any perception of bias.

Recommendation 21

The Committee recommends that the Department undertake a review of its processes to ensure that decisions, including reasons, are communicated to all parties in a clear, concise and a timely manner.

Recommendation 22

The Committee recommends that the legislation be amended to refer all allegations of fraud-related offences relating to WorkCover to Q-COMP for investigation and, if necessary, prosecution, consistent with the management of self-insurer fraud referrals.

5.7 Medical Assessment Tribunal (MAT)

The Medical Assessment Tribunal's (MAT) role is to '*provide independent, expert medical decision about injury and impairment sustained by workers'*. The MAT is usually made up of up to five independent medical specialists. The tribunal may be required to assess any degree of permanent impairment resulting from an injury. Q-COMP acts as the secretariat to the MAT and is responsible for coordinating appointments of referrals (i.e. the worker).[524]

[523] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 33

[524] Q-COMP. Insurers' information on referring a worker. http://www.qcomp.com.au/services/medical-assessment-tribunals/insurers'-information-on-referring-a-worker.aspx [18 February 2013]

Only an insurer can make a referral to a Tribunal. The insurer should inform the worker that a matter is to be referred to a Medical Assessment Tribunal before sending the referral paperwork to Q-COMP for processing. Matters referred to the tribunal relate to:

- *conflicting medical opinions about whether the injury is work-related*
- *a claim previously accepted by the insurer but with uncertainty about whether there is any ongoing incapacity from the work-related injury*
- *assessing the degree of permanent impairment resulting from a work-related injury*.[525]

5.7.1 Legislation

Chapter 11 (sections 490, 490A and 491) of the Act covers MATs. The Act is supported by Part 8A of the *Workers' Compensation and Rehabilitation Regulation 2003* (sections 118A-G). The Act (section 490) provides *'for an independent and non-adversarial system of medical review and assessment of –*

(a) injury and impairment sustained by workers or other persons for which compensation is payable under this Act or a former Act; and

(b) other personal injury sustained by persons for which payment of an amount is payable under an Act prescribed under a regulation'.[526]

The provisions contained in the Regulation relating to the MAT are as follows:

Part 8A Medical assessment tribunals

118A Medical assessment tribunals

(1) Each of the following medical assessment tribunals is a tribunal continued in existence under section 635 of the Act—

(a) a General Medical Assessment Tribunal;

(b) the following specialty medical assessment tribunals—

(i) Cardiac Assessment Tribunal;

(ii) Orthopaedic Assessment Tribunal;

(iii) Dermatology Assessment Tribunal;

(iv) Ear, Nose and Throat Assessment Tribunal;

(v) Neurology/Neurosurgical Assessment Tribunal;

(vi) Ophthalmology Assessment Tribunal;

(vii) Disfigurement Assessment Tribunal.

(2) Also, a composite medical assessment tribunal (***composite tribunal***) is to be maintained for section 492 of the Act to assess workers with an injury or injuries who may require assessment by a number of different specialists.

118B Constitution of General Medical Assessment Tribunal

(1) For deciding a matter referred to it, the General Medical Assessment Tribunal is constituted by—

(a) its chairperson; and

(b) 2 appointees to the panel of doctors for the Tribunal, designated by the chairperson.

(2) In designating a member of the panel to the Tribunal, the chairperson must have regard to the branch of medicine that is a recognised specialty under the Health Practitioner Regulation National Law that is relevant to the matters referred to the tribunal for decision.

118C Chairperson and deputy chairperson of General Medical Assessment Tribunal

(1) The chairperson must preside over meetings of the General Medical Assessment Tribunal.

(2) If the chairperson is not available to attend to the business of the General Medical Assessment Tribunal, a deputy chairperson must act as its chairperson.

[525] Q-COMP. Insurers' information on referring a worker. http://www.qcomp.com.au/services/medical-assessment-tribunals/insurers'-information-on-referring-a-worker.aspx [18 February 2013]

[526] *Workers' Compensation and Rehabilitation Act 2003*, section 490

(3) A deputy chairperson may act as a member of the General Medical Assessment Tribunal only if the chairperson has designated the member for the purpose.

118D Constitution of specialty medical assessment tribunal

(1) For deciding a matter referred to it, a specialty medical assessment tribunal is constituted by—

(a) its chairperson; and

(b) 2 appointees to the panel of doctors for the tribunal, including persons appointed to the panel as deputy chairpersons, designated by the chairperson.

(2) In designating a member of the panel to a specialty medical assessment tribunal, the chairperson must have regard to the branch of medicine that is a recognised specialty under the Health Practitioner Regulation National Law that is relevant to the matters referred to the tribunal for decision.

118E Chairperson and deputy chairperson of specialty medical assessment tribunal

(1) The chairperson must preside over meetings of a specialty medical assessment tribunal.

(2) If the chairperson is not available to attend to the business of a specialty medical assessment tribunal—

(a) if there is only 1 deputy chairperson of the tribunal—the deputy chairperson must act as its chairperson; or

(b) if there is more than 1 deputy chairperson of the tribunal—a deputy chairperson designated by the chairperson must act as its chairperson.

118F Constitution of composite tribunals

(1) The constitution of a composite tribunal is to be decided by—

(a) the chairperson of the composite tribunal; and

(b) the chairperson of each specialty medical assessment tribunal relevant to the matters to be decided; and

(c) if the chairperson of the composite tribunal is not the chairperson of the General Medical Assessment Tribunal—the chairperson of the General Medical Assessment Tribunal.

(2) The chairpersons must consult with the secretary of the composite tribunal about the constitution of the composite tribunal.

(3) In deciding the constitution of the composite tribunal, the chairpersons must have regard to the branch of medicine that is a recognised specialty under the Health Practitioner Regulation National Law that is relevant to the matter referred to the composite tribunal for decision.

(4) For deciding a matter referred to it, a composite tribunal is constituted by—

(a) its chairperson; and

(b) at least 2 but not more than 4 appointees to the panel of doctors for the composite tribunal designated by the chairperson.

(5) The composite tribunal must consist of at least 1 specialist for each type of injury that is a subject of the reference to the tribunal.

(6) However, the number of specialists for each type of injury must be equal.

Example—
A worker has a post-traumatic stress disorder and a fractured arm, leg, and ribs. The tribunal would consist of—
(a) 1 psychiatrist and 1 orthopaedic surgeon; or
(b) 2 psychiatrists and 2 orthopaedic surgeons.

(7) If, because of subsection (5), there would be an even number of members on the composite tribunal, the chairperson must also designate a physician to be a member of the tribunal.

Example—
A worker has 3 different types of injuries. The tribunal would consist of the chairperson and 3 specialists. A physician is also to be a member of the tribunal.

118G Chairperson and deputy chairperson of composite tribunal

(1) The chairperson must preside over meetings of a composite tribunal.

(2) If the chairperson is not available to attend to the business of a composite tribunal—

(a) if there is only 1 deputy chairperson of the tribunal—the deputy chairperson must act as its chairperson; or

(b) if there is more than 1 deputy chairperson of the tribunal—a deputy chairperson designated by the chairperson must act as its chairperson.

5.7.2 Discussion – Medical Assessment Tribunal (MAT)

The Committee received a submission from a physician, Dr John Douglas AM, who has been on the tribunals for the past 22 years. Dr Douglas advised that in his view Tribunals provide a very satisfactory way of resolving claims and he expressed the view that whilst that at times the Tribunal makes errors in both under valuing and over valuing claims it is his experience is that the Tribunals make relatively few errors of judgement.[527]

Dr Douglas advised the Committee that for the Tribunal process to operate in a maximally useful way certain requirements need to be in place, including:

- The Tribunal doctors must be:
  - credible individuals and well respected by their peers;
  - very experienced Doctors, well used to assessing the validity of medical histories and claimant's presentations;
  - able to carry out physical examinations of claimants in a kindly and competent manner; and
  - courteous and considerate in the way they interact with claimants and the claimant's legal advisors and support persons who may accompany claimants to the Tribunals.
- The claimant must feel at the end of the Tribunal process that:
  - they have had a good and thorough hearing;
  - they have had maximum opportunity to present all the information they feel is relevant to their claim;
  - the process has not been rushed; and
  - they have been treated with courtesy and kindness and their sensitivity is respected.[528]

Dr Douglas noted that the MAT provides the opportunity for the claimant to state their case and have their day in court, without the potential trauma of actually being a law court arena. He considered that the Tribunal process is working well and has the appropriate checks and balances in place.[529]

Q-COMP advised that the MAT decide issues of permanent impairment or ongoing incapacity. The MAT had 2,500 referrals last year and currently has an eight-week waiting period. They advised that 90 per cent of decisions are delivered in five days. They also consider the system to be a good and quick with speed to resolution being critical to sustain a short-tail scheme.[530]

The Department advised that the assessment by the medical specialists remain independent by ensuring *'the members determining a particular matter have no prior knowledge of, or association with, the injured worker other than by way of a previous tribunal hearing'*.[531]

[527] Submission 101: 2 & 5
[528] Submission 101: 1-2
[529] Submission 101: 2 & 5
[530] Ms Woods, Transcript 11 July 2012: 2
[531] Correspondence from Department of Justice and Attorney General, to FAC dated 11 April 2013: 2

In 2011/12, 2722 cases were referred to the tribunal and although this figure is an increase from the previous year, the number of cases referred varies between 2,475 and 2,778 (see Table 15 below).

Table 15: Number of MAT referrals[532]

	2007/08	2008/09	2009/10	2010/11	2011/12
No of cases	2,778	2,475	2,656	2,522	2,772

Source: Q-COMP 2011/12 Statistics Report: 52

Q-COMP stated in their statistics report that almost half of all cases (1,093) heard at a General Medical Assessment Tribunal was related to psychiatric claims.[533] The Bar Association Queensland emphasised that the high number of referrals or reviews is attributed to the high rejection rate of psychological or psychiatric claims and they consider this area to be one of concern in the Act.[534] A large proportion of referrals are also dealt with by the Orthopaedic Assessment Tribunal (908 cases in 2011/12).[535]

They also stated that at present over half of the cases (1,174) heard by the MAT relates to permanent assessment, PI (527 for 2011/12) and disputed PI (647 for 2011/12), with the MAT also dealing with a large proportion of referrals for 'ongoing capacity for work' reason (964 for 2011/12).[536]

Table 16: Key Performance Indicator (KPI) for Medical Assessment Tribunals[537]

Year	KPI 1 (Target 90%)	KPI 2 (Target 80%)	KPI 3 (Target 80%)	KPI 4 (Target 90%)
2006-07	95%	84%	81%	73%
2007-08	95%	92%	79%	90%
2008-09	95%	90%	88%	88%
2009-10	99%	87%	80%	91%
2010-11	99%	87%	87%	89%
2011-12	97%	70%	83%	93%
2012-13 YTD	96%	84%	83%	93%

KPI 1: Business days lapsed between validation of referral from insurer to documentation being sent to worker - Target is 90% of referrals within 10 days.

KPI 2: Business days lapsed between validation of referral to date of hearing for Orthopaedic, Neurological and General Medical Assessment - Psychiatric Tribunals - Target is 80% of referrals within 8 weeks.

KPI 3: Business days lapsed between validation of referral to hearing for all other tribunals - Target is 80% of referrals within 10 weeks.

KPI 4: Business days lapsed between date of hearing and decision sent to insurer/worker - Target is 90% of decisions sent within 6 days of hearing.

Source: Department of Justice and Attorney-General 11 April 2013: 1

[532] Q-COMP 2011/12 Statistics Report: 52
http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [19 February 2013]
[533] Q-COMP 2011/12 Statistics Report: 53
http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [19 February 2013]
[534] Submission 61: 6
[535] Q-COMP 2011/12 Statistics Report: 53
http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [19 February 2013]
[536] Q-COMP 2011/12 Statistics Report: 54
http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [19 February 2013]
[537] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 1

The Aged Care Employers Self Insurance submitted that the differences of opinion between medical professionals on a worker's injury have led to an increased number of claims being referred to the MAT. They recommended that the referral process be reviewed to determine if appointment processes can be better arranged and timeframes shortened.[538]

JBS believes that there was a bias towards claimants as the injured worker is not required to supply grounds for disagreeing with impairment assessments issued by the insurer. They explained in their submission that the MAT is not a cost effective way to resolve permanent impairment assessments. JBS recommends that a disputed assessment should be accompanied by fresh medical evidence.[539]

JBS also recommended that *'only doctors trained in the appropriate permanent impairment assessment guide be permitted to conduct the assessment under the Act'*.[540]

5.8 Committee comments – Medical Assessment Tribunal (MAT)

The Committee is satisfied that the MAT is the most reasonable solution for independent medical assessment of injuries. The MAT is made up of experienced professionals who are in a position to provide their expertise.

The Committee notes that a specialty panel for psychological or psychiatric injuries is not included in the list of specialty medical assessment tribunals included under section 118A of the Regulation. Whilst the Committee recognises that psychologists and psychiatrists are included on the Tribunal when needed, it considers it appropriate that a specialty Medical Assessment Tribunal be established to include psychiatric or psychological medical specialists when considering psychological injury claims.

Recommendation 23

The Committee recommends that a psychological specialty medical assessment tribunal be included on the list of specialty medical assessment tribunals under section 118A of *Workers' Compensation and Rehabilitation Regulation 2003.*

5.9 Return to work programs

Q-COMP provides a range of programs and services including 'Workplace rehabilitation' and 'Return to Work assist'.

'Workplace rehabilitation' involves helping injured workers back to safe and suitable work at the earliest possible time. The process may involve:

- a suitable duties program;
- on-the-job training to acquire new job skills; and,
- special assistance for severely injured workers.

Q-COMP also provides a free initiative called 'Return to work assist' for injured workers whose workers' compensation claim has closed and who are unable to return to their former employer. 'Return to Work Assist' links people with career advice, training, job placement services and support to assist in achieving their career goals.[541]

[538] Submission 70: 9
[539] Submission 160: 19
[540] Submission 160: 19
[541] Q-COMP services http://www.qcomp.com.au/services.aspx [17 January 2013]

WorkCover and Work Health and Safety Qld have a joint initiative called the 'Injury Prevention and Management program' (IPaM). This program is designed to help develop better workplace health, safety and injury management systems. IPaM works with employers whose WorkCover premium rates were capped at twice the industry rate for three of more consecutive years. Around 1,200 employers have been involved in the program to date. As a result of these strategies, the return to work rate has improved from 90 per cent in 2009-2010 to over 97 per cent in 2011-2012.[542]

5.9.1 Legislation

The Act requires that the Workers' Compensation Scheme provide for employers and injured workers to participate in effective return to work programs (section 5(4)(d). The other relevant sections of the Act are as follows:

Division 7 Rehabilitation

40 Meaning of *rehabilitation*

(1) *Rehabilitation*, of a worker, is a process designed to—

(a) ensure the worker's earliest possible return to work; or

(b) maximise the worker's independent functioning.

(2) ***Rehabilitation*** includes—

(a) necessary and reasonable—

(i) suitable duties programs; or

(ii) services provided by a registered person; or

(iii) services approved by an insurer; or

(b) the provision of necessary and reasonable aids or equipment to the worker.

(3) The purpose of ***rehabilitation*** is—

(a) to return the worker to the worker's pre-injury duties; or

(b) if it is not feasible to return the worker to the worker's pre-injury duties—to return the worker, either temporarily or permanently, to other suitable duties with the worker's pre-injury employer; or

(c) if paragraph (b) is not feasible—to return the worker, either temporarily or permanently, to other suitable duties with another employer; or

(d) if paragraphs (a), (b) and (c) are not feasible—to maximise the worker's independent functioning.

41 Meaning of *rehabilitation and return to work coordinator*

A ***rehabilitation and return to work coordinator*** is a person who—

(a) has met the criteria for a rehabilitation and return to work coordinator prescribed under a regulation; and

(b) has the functions prescribed under a regulation.

42 Meaning of *suitable duties*

Suitable duties, in relation to a worker, are work duties for which the worker is suited having regard to the following matters—

(a) the nature of the worker's incapacity and pre-injury employment;

(b) relevant medical information;

(c) the rehabilitation and return to work plan for the worker;

(d) the provisions of the employer's workplace rehabilitation policy and procedures;

(e) the worker's age, education, skills and work experience;

(f) if duties are available at a location (the ***other location***) other than the location in which the worker was injured—whether it is reasonable to expect the worker to attend the other location;

(g) any other relevant matters.

43 Meaning of *workplace rehabilitation*

Workplace rehabilitation is a system of rehabilitation accredited by the Authority that is initiated or managed by an employer.

[542] WorkCover Queensland Annual report 2011-2012 http://www.workcoverqld.com.au/flipbooks/annual-report-2011-2012/index.html [22 January 2013]

44 Meaning of *workplace rehabilitation policy and procedures*

Workplace rehabilitation policy and procedures are written policy and procedures for workplace rehabilitation that are accredited by the Authority.

45 Meaning of *accredited workplace*

An ***accredited workplace*** is a workplace that has workplace rehabilitation policy and procedures.

Part 3 Responsibility for rehabilitation

Division 1 Responsibility for rehabilitation

220 Insurer's responsibility for worker's rehabilitation

(1) An insurer must take the steps it considers practicable to secure the rehabilitation and early return to suitable duties of workers who have an entitlement to compensation.

(2) An insurer is responsible for coordinating the development and maintenance of a rehabilitation and return to work plan in consultation with the injured worker, the worker's employer and treating registered persons.

(3) Subsection (4) applies if an injured worker is unable to return to work with the worker's former employer when the entitlement of the worker to weekly payments of compensation under chapter 3, part 9 stops.

(4) The insurer must notify the Authority in the way decided by the Authority.

(5) In this section—

former employer means any employer of the worker at or after the time the worker was injured.

221 Authority's responsibility for rehabilitation

(1) The Authority must—

(a) provide rehabilitation and return to work advisory services for workers, employers and insurers; and

(b) ensure employers and insurers comply with their rehabilitation requirements under this Act.

(2) If the worker consents, the Authority must refer a worker for whom a notice has been given under section 220(4) to programs that may help return the worker to work.

Examples of programs—
vocational assessments, reskilling or retraining, job placement, host employment

Division 2 Insurer's liability for rehabilitation fees and costs

222 Liability for rehabilitation fees and costs

(1) This section applies if an insurer considers rehabilitation is necessary for a worker for whose injury the insurer has accepted liability.

(2) In addition to compensation otherwise payable, the insurer must pay the fees or costs of rehabilitation that the insurer accepts to be reasonable, having regard to the worker's injury.

(3) Under the table of costs, the Authority may impose conditions on the provision of the rehabilitation.

(4) The insurer's liability under this division stops when the worker's entitlement to compensation stops.

223 Extent of liability for rehabilitation fees and costs

An insurer must pay the following fees or costs for rehabilitation for an injury, whether provided at 1 time or at different times—

(a) for rehabilitation provided to a worker by a registered person—the fees or costs accepted by the insurer to be reasonable, having regard to the relevant table of costs;

(b) for other rehabilitation—the fees or costs approved by the insurer.

Part 4 Employer's obligation for rehabilitation

226 Employer's obligation to appoint rehabilitation and return to work coordinator

(1) An employer must appoint a rehabilitation and return to work coordinator if the employer meets criteria prescribed under a regulation.

(2) The rehabilitation and return to work coordinator must be in Queensland and be employed by the employer under a contract (regardless of whether the contract is a contract of service).

(3) The employer must, unless the employer has a reasonable excuse, appoint the rehabilitation and return to work coordinator—

(a) within 6 months after—

(i) establishing a workplace; or

(ii) starting to employ workers at a workplace; or

(b) within a later period approved by the Authority.

Maximum penalty—50 penalty units.

(4) A rehabilitation and return to work coordinator, who is employed under a contract of service at the workplace, is not civilly liable for an act done, or an omission made, in giving effect to the workplace rehabilitation policy and procedures of an employer.

(5) If subsection (4) prevents a civil liability attaching to a rehabilitation and return to work coordinator, the liability attaches instead to the employer.

227 Employer's obligation to have workplace rehabilitation policy and procedures

(1) This section applies if an employer meets criteria prescribed under a regulation.

(2) The employer must have workplace rehabilitation policy and procedures.

Maximum penalty—50 penalty units.

(3) The employer must, unless the employer has a reasonable excuse, have workplace rehabilitation policy and procedures—

(a) within 6 months after—

(i) establishing a workplace; or

(ii) starting to employ workers at a workplace; or

(b) within a later period approved by the Authority.

Maximum penalty—50 penalty units.

(4) The employer must review the employer's workplace rehabilitation policy and procedures at least every 3 years and must comply with reporting requirements as prescribed under a regulation.

228 Employer's obligation to assist or provide rehabilitation

(1) The employer of a worker who has sustained an injury must take all reasonable steps to assist or provide the worker with rehabilitation for the period for which the worker is entitled to compensation.

(2) The rehabilitation must be of a suitable standard as prescribed under a regulation.

(3) If an employer, other than a self-insurer, considers it is not practicable to provide the worker with suitable duties, the employer must give WorkCover written evidence that the suitable duties are not practicable.

229 Employer's failure in relation to rehabilitation

(1) This section applies if an employer, other than a self-insurer, fails to take reasonable steps to assist or provide a worker with rehabilitation.

(2) WorkCover may require the employer to pay WorkCover an amount by way of penalty equal to the amount of compensation paid to the worker during the period of noncompliance by the employer.

(3) WorkCover may recover the amount from the employer—

(a) as a debt; or

(b) as an addition to a premium payable by the employer.

(4) The employer may apply to WorkCover in writing to waive or reduce the penalty because of extenuating circumstances.

(5) The application must specify the extenuating circumstances and the reasons the penalty should be waived or reduced in the particular case.

(6) WorkCover must consider the application and may—

(a) waive or reduce the penalty; or

(b) refuse to waive or reduce the penalty.

(7) If the employer is dissatisfied with WorkCover's decision, the employer may have the decision reviewed under chapter 13.

Part 5 Worker's mitigation and rehabilitation obligations

230 Application of pt 5

This part applies to a worker who has sustained an injury and is required to participate in rehabilitation.

231 Worker must mitigate loss

(1) The common law duty of mitigation of loss applies to the worker.

(2) The worker's duty may be discharged by participating in rehabilitation.

(3) Without limiting subsection (2), a worker must satisfactorily participate in any return to work program or suitable duties arranged by the insurer or the Authority.

(4) The worker's duty under this section is in addition to any duty the worker may have under section 267.

232 Worker must participate in rehabilitation

(1) The worker must satisfactorily participate in rehabilitation—

(a) as soon as practicable after the injury is sustained; and

(b) for the period for which the worker is entitled to compensation.

(2) If the worker fails or refuses to participate in rehabilitation without reasonable excuse, the insurer may, by written notice given to the worker, suspend the worker's entitlement to compensation until the worker satisfactorily participates in rehabilitation.

(3) If the insurer suspends the worker's entitlement to compensation, the worker may have the decision reviewed under chapter 13

The Act is supported by provisions contained in the *Workers' Compensation and Rehabilitation Regulation 2003* (Part 6).

5.9.2 Discussion – return to work programs

The excellent return to work rate was noted in several submissions[543] as a strength of Queensland's scheme; for example:

> *Bennett & Philp – 'The Queensland scheme has a strong emphasis on rehabilitation and return to work.'*[544]

> *Rio Tinto Australia – 'The Queensland scheme is a short tail scheme which focusses on return to work (RTW) systems and high levels of benefits are provided to workers. Rio Tinto considers that the Queensland Schemes' success is largely due to the importance place on RTW, the collaborative arrangements between workers and employers in managing work injury and the existence of the Medical Assessment tribunals (MAT), which contribute significantly to ensuring claims durations and costs are controlled'.*[545]

The Committee also heard that rehabilitation programs are working well for medium-sized employers such as Hyne Timber.

> *We are a medium-sized employer. We fluctuate between 600 to 1,000 employees. I believe the rehabilitation programs are generally effective. Most of our rehabilitation programs work well. We have dedicated resources on each of our sites to support return to work*.[546]

There is strong emphasis on returning an injured worker to work as soon as practicable. However, in rural settings, it is often difficult to provide a return to work program or return to suitable duties. In particular, there is a need to recognise that '*there are no light duties generally especially in broad acre agriculture to put these people into back on the properties*'.[547] Agforce further added:

> *Implementing a suitable duties plan or graduated work program within agricultural enterprises is challenging and financially detrimental to most producers.*[548]

> *AgForce recommends that a strategy between WorkCover, Workplace Health and Safety Queensland and the agricultural industry needs to be developed to address what are very industry specific issues concerning injury prevention and management of return to work programs*.[549]

[543] Submission 105: 5
[544] Submission 35: 1
[545] Submission 41: 2
[546] Mr Murtagh, Transcript 14 November 2012: 25
[547] Ms Nash, Transcript 31 October 2012: 31
[548] Submission 162: 2
[549] Submission 162: 2

The 'Return to Work Assist' program has received positive comments from many submitters; for example, K M Splatt and Associates outlined:

> *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".*[550]

Return to work plans in the agricultural industry are problematic as they require supervision to ensure that injured workers do not 'reinjure' themselves doing the heavy work that they were doing previously.[551] Agforce suggested that *'work aspirations of the employee should also be considered in that a casual worker may not wish to pursue agriculture as a career therefore should not be returned to work in that industry'*.[552]

In this case, WorkCover can assist by organising a 'host' employer if the pre-injury employer is unable to facilitate a return to work program. WorkCover are also able to visit the workplace or arrange for an external provider to assist in identifying suitable or modified duties so other options may be available to agricultural employers.[553] Whilst the worker is on the host program, WorkCover continues to pay weekly benefits compensation to the worker. The Department advised that *'the compensation paid will be part of the claims costs included in EBR for premium calculations for the original employer'*. In addition, *'if the worker is re-injured in the first six months after a host has employed the worker, the claims costs do not get included in the EBR calculation for the new (i.e. host) employer's premium'*.[554]

Some employers however disagreed with the emphasis on return to work programs as this '*places unrealistic pressure on employers to provide suitable duties for injured workers who maintain an incapacity for work, when their period of recovery is considerably longer than for non-compensation related injuries of the same type'*.[555] Another submitter advised that *'there is the expectation that an employer will have light duties available, and can carry the cost of a person not at full productivity … And the employee ends up doing mundane and menial tasks because that is all that is available'*.[556]

RSCA added:

> *In the on-hire sector, these cases are heavily dependent on our client's ability and willingness to provide suitable duties. This is further prejudiced by the behaviour of injured workers, and it is not uncommon for non-compliant workers to damage client relationships*.[557]

The Committee also heard from witnesses that return to work rate statistics should apply only to those returning to work with the original employer.

> *'…. but we also have some issues with the 97 per cent reported return-to-work rate—the statistic—because certainly our reports indicate that that probably applies to return to work generally but not necessarily to return to work with the actual original employer ….The impact of what we view as the sabotaging effect of a common law claim damages the prospect of returning to work with the original employer, and we want to see more statistics in terms of returning to work with the original employer, not just within six months but maybe within a year as to whether return to work is sustained in that context'*.[558]

[550] Submission 66: 8
[551] Mr Finlay, Transcript 31 October 2012: 34
[552] Submission 162: 2
[553] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 9
[554] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 16
[555] Submission 173: 8
[556] Submission 7: confidential
[557] Submission 173: 8
[558] Ms Tucker, Transcript 31 October 2012: 34

Ai Group raised their concern of the effect of secondary psychological claims on return to work plans.

> *Our membership has some serious issues with secondary psychological injury claims which overlay a primary injury claim and the prevalence with which we are seeing them and the effect they have on return-to-work plans, because effectively they make it almost impossible for an employer to fulfil their rehabilitation obligations or to even challenge, because they have no separate life apart from the initial injury. We have quite serious issues with that. We see that as a very significant impediment at times to effective return to work and obligations being observed.*[559]

It was agreed that return to work is more complex where the process may take longer for psychological injuries compared to physical injuries.

> *Psychological injuries are a substantial issue for teachers arising from a whole range of things—assaults by students, bullying, harassment issues in the workplace and the remoteness sometimes of communities that they are working in. The return-to-work process is probably slower for a psychological injury than for a physical injury. There is a need for greater medical involvement in a psychological claim. There is a need for a psychiatrist or a psychologist - someone of a specialty - to provide input about the speed at which a person needs to go back to work. So it is a more complicated process'*.[560]

The department advised that WorkCover is currently trialling a pilot program, called 'blueprint for return to work' with three private sector employers to help address accepted claims for workplace conflict. The aim of this pilot is to ensure a prompt and safe return to work for claimants and employers.[561] The program is being run in consultation with the Construction, Forestry, Mining and Energy Union (CFMEU), Master Builders Association of Queensland and four major Queensland contractors.[562]

The Committee was also advised that return to work programs could be further improved particularly in regional areas.[563] As WorkCover is centrally based in Brisbane, services in the return to work assist programs in regional areas could be expanded.[564] The Department advised that the Regional Network Program (RNP) was developed by Q-COMP in 2011 following feedback from regional employers who reported that they were unable to access the same information and educational opportunities as those in metropolitan areas. Q-COMP has provided 64 Regional Network Programs across Queensland and Regional Representatives have been appointed in 10 regions including North Queensland cities of Rockhampton, Mackay, Townsville and Cairns.[565]

In contrast, some employers stated that whilst the return to work program has merit, *'workers do not participate in rehabilitation programs or suddenly cannot continue with return to work programs in order to improve their likely outcomes under a common law claim'*.[566] So *'if a worker fails to participate, there is little incentive to change this. Despite the best attempts of employers and insurers to rehabilitate injured workers, they may still pay for economic loss if the injured worker chooses not to participate in rehabilitation'*.[567]

[559] Ms Tucker, Transcript 31 October 2012: 34
[560] Ms Drew, Transcript 31 October 2012: 35
[561] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 11
[562] WorkCover Queensland. WorkCover to partner with associations for early return to work. Article 22 May 2012. http://www.workcoverqld.com.au/construction/articles/return-to-work-project [22 January 2013]
[563] Submission 108: 2
[564] Ms Neil, Transcript 28 August 2012: 2
[565] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 7
[566] Submission 29: 3 & 8
[567] Submission 160: 15

Northside Trusses & Frames recommends that '*if a worker refuses to participate in return to work programs developed in combination with medical practitioners and/or Occupational Therapists then access to common law should be barred'*.[568] Alternatively, the National Retail Association suggested that payment of benefits should be suspended or ceased if an employee refuses to participate in a rehabilitation program or does not follow the directions of the rehabilitation co-ordinator.[569]

St Vincent de Paul Qld suggested that appropriate controls for performance should be placed on an injured employee to participate in the rehabilitation process as at present, there is no encouragement for injured workers to do so.[570] They stated that

> *… it is the more active case management between WorkCover - and the employer obviously has a role in that - but a more coordinated case management process. We often see that there will be a specialist over here and there will be a GP over here but they are not necessarily talking together. …There is this whole matrix of people, but everyone is not seeing the same material. There is then the opportunity for some - and I will say only for some …. a few people who have taken advantage of the loopholes in the WorkCover system of late…*[571]

However, the Committee heard from some witnesses that the prevalence of secondary psychological injury which overlays a primary injury claim makes it difficult for employers to fulfil their rehabilitation obligations.[572] The LGAQ agreed in that the *'typical medical management of those (psychological) claims is completely contrary to the normal objective of getting a person back to work'*.[573]

Hyne Timber considered secondary psychological claims to be a problem. They stated in the hearing:

> *…if we have a claim, usually it is backs. They usually cannot come back to work or they will not come back to work or we cannot get the doctor to get them back to work, even though we have suitable duties available. They will go off second psych.*[574]

Q-COMP statistics reveal that claims where there is both a physical and psychological component were least likely to return to work i.e. 12.1 per cent in 2011/12 were not fit for work at the end of their claim. 94.5 per cent of claims with a physical injury only returned to work with the same employer at the end of their claim in 2011/12. Those with psychological injuries only were over five times less likely to return to work (5.6 per cent) compared to physical injuries only claims (0.5 per cent).[575]

The Committee received a confidential submission outlining the experiences of an injured worker who returned to work following a psychological injury claim and was advised to commence their RTW program elsewhere. The submitter was concerned that the employer was able to use information regarding the medical condition to prevent the worker from returning to work. Although section 572A of the Act prohibits the use of a worker's compensation information about the worker for employment purposes, the submitter suggested that the employer has 'broken the law'. The submission suggested that *'there needs to be a single agency responsible for investigating and ensuring complaints regarding non-compliance with the Act are dealt with'*.[576]

[568] Submission 40: 3
[569] Submission 57: 2
[570] Submission 63: 5
[571] Mrs Shearsmith, Transcript 16 November 2012: 16
[572] Ms Tucker, Transcript 31 October 2012: 34
[573] Mr Swan, Transcript 31 October 2012: 34
[574] Mr Puller, Transcript 14 November 2012: 28
[575] Q-COMP 2011/12 Statistics Report : 31
http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [1 February 2013]
[576] Submission 238: confidential

As such, the rehabilitation process for injured workers should also take into consideration their psychological status. The Committee was advised by the Australian Physiotherapy Association:

> *I think if you asked our physiotherapists who were treating injured workers they would say that part of the rehabilitation of any injured worker is actually taking into consideration their psychological status. So even though physiotherapists are not necessarily employed or taken on to deal with the psyche of a patient, it just comes within the treatment. As I said, I think most physiotherapists dealing with an injured worker would tell you that part of their rehabilitation process is dealing with the way that they are thinking about getting back to work and their injury and their rehabilitation'.*[577]

It was also proposed that 'return to work' programs could be improved by engaging workplace or work site assessments at the start of the claim process rather than at the end. The Human Factors & Ergonomics Society of Australia Inc. believes that ergonomic advice or pro-active risk assessment advice could be provided as a way of minimising and/or eliminating injuries and preventing claims.[578] The Australian Physiotherapy Association also recommends that early intervention, through the provision of evidence-based treatments and early workplace assessments would assist a worker return to work more quickly.[579]

Dr Cunneen for the Australian Medical Association advised:

> *…Really, the challenge I would say—and I suspect everyone here would agree—is to bring that forward to the earlier part of the claim. So it is all very well doing it for the 1,200 or 1,500 who are not going to return to their previous employment by virtue of their lack of education or their skill mix or just physically or psychologically not being up to return to their previous employment, but that is at the end of the claim. Really, if we are going to be proactive, we need to apply that across other areas of the claim.*
>
> *The challenge is to apply that sort of logic to the claim or the injury or the illness the person has and think about what is in their best interests at the start rather than just pure medical or allied health management at the start. Certainly, I think having Return to work assist—because that is what we are talking about; getting back to work—at the end of the claim is good, but I believe the challenge is to put it at the start of the claim, particularly those that go for more than three weeks.* [580]

ARPA considers that the scheme would benefit if vocational rehabilitation occured during the statutory phase as presently RTW Assist services, available at the end of the claim, are only provided to workers who are self-motivated.[581] Even though the Australian Lawyers Alliance agrees that the return to work rate is a success, they recommend two improvements:

- *consolidate the current Q-COMP and WorkCover RTW programs into a single one; and*
- *legislative mandating for (return to work) RTW participation, on reasonable terms.*[582]

[577] Mrs Goodier, Transcript 16 November 2012: 9
[578] Submission 39: 3
[579] Submission 51: 7
[580] Dr Cunneen, Transcript 16 November 2012: 8
[581] Submission 38: 5-6
[582] Submission 188: 4

The scheme's return to work rate is 97.1 per cent in 2011/12, which is an improvement from 94.3 per cent in 2010/11. If the Q-COMP 'Return to work assist' program is considered, the combined return to work rate increased by an additional 1.5 per cent, resulting in the combined return to work rate of 98.6 per cent.[583] However, the return to work rates for psychological injury claims continues to be low.

The Committee was advised that Bond University, Queensland was undertaking an evaluation of the Return to Work Assist program and presented the following outcomes (see also Table 17):[584]

A total of 1826 Return to Work Assist (RTWA) clients were included in the study. Three levels of service were analysed. The levels include:

> *Type 1 – clients who have had contact with RTWA staff but have not yet received practical assistance (i.e. resume or job searches)*
>
> *Type 2 – clients that have received assistance which include but are not limited to job search, referral to a provider, update a resume, performed research to assist etc.*
>
> *Type 3 – clients that have commenced some form of accredited retraining (e.g. injured worker initiated license, certificates, short courses or arranged by RTWA) whilst on the RTWA program.*[585]

Table 17: Return to Work Assist results from Bond University evaluation

	Return to Work Status		
	Did not return to work	**Return to work**	**TOTAL**
Type 1	190(28.8%)	470 (71.2%)	660
Type 2	146(20.4%)	569 (79.6%)	715
Type 3	96 (21.3%)	355 (78.7%)	451
Total	**432**	**1394**	**1826**

Source: Department of Justice and Attorney-General 11 April 2013: 19

The results highlighted:

- *Younger age at injury, male gender, lower percentage of physical impairment and lower percentage of psychological impairment, were significant predictors of positive return to work outcome.*
- *Male gender, higher percentage of physical impairment, higher percentage of psychological impairment and greater amount of financial settlement were significant predictors of greater numbers of hours lost due to injuries.*
- *Higher percentages of both physical and psychological impairment, as well as greater amount of financial settlement, were robust significant predictors for negative return to work outcomes as well as greater numbers of hours lost due to injuries.*[586]

[583] Q-COMP Queensland workers' compensation claims monitoring June 2012: 24 http://www.qcomp.com.au/media/223530/Qld%20workers%20compensation%20scheme%20monitoring%20-%20June%202012.pdf [8 April 2013]
[584] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 19
[585] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 19
[586] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 19

5.9.3 Suggestions for change – return to work programs

Q-COMP noted in their submission that stakeholder feedback has highlighted that there is unnecessary red tape around the requirement to have a rehabilitation and return to work coordinator (RRTWC). They noted that a jurisdictional comparison showed that while Queensland has some of the most stringent requirements for employers, the return to work rates are comparable nationally and with individual states.[587]

They also noted that successful completion of a workplace rehabilitation course accredited under the *Vocational Education, Training and and Employment Act 2000* is the only avenue available to qualify as a RRTWC.[588]

Q-COMP has made the following recommendations which are intended to provide greater flexibility for employers to meet their workplace rehabilitation obligations:

- Legislative amendment of criteria for employers to have a RRTWC, to include an additional requirement that employers must have had statutory claims totalling 15 or more work days lost in any year.
- Where employers have within their employ staff who are specialised in workplace rehabilitation (i.e. allied health providers, rehabilitation counsellors etc.), those staff are automatically accepted as RRTWCs without further training.
- Employers who have in place detailed systems to support injured workers can apply to Q-COMP for exemptions from the requirement to have a RRTW.
- Remove the additional legislative requirement that the employer notify Q-COMP that they have received the workplace rehabilitation policy and procedures.

They have advised that the consequences of adopting these recommendations will assist employers by providing a meaningful education with respect to workplace rehabilitation and reduce unnecessary costs for those who frequently interact with the scheme.

Q-COMP advised the Committee that:

> *Employers who meet certain criteria have to have rehabilitation and return-to-work coordinators. They facilitate the return-to-work results for those employers. Currently, there is our suggestion to amend the criteria for employers that have to have a rehab and return-to-work coordinator to include a requirement that they have to have employees who must at least have had a claim of 15 days or more in any one year in order to have the necessity to have a rehab and return-to-work coordinator. Currently that would take about 36 per cent of those employers out of the system who do not really have much of a workers compensation issue. There are employers of significant size, but it takes that obligation away. So just arguing against myself, it could be argued that the presence of a rehab and return-to-work coordinator could prevent injuries, but that generally is the job of—well, it was—the workplace health and safety officer. So it is a separate role.*[589]

[587] Submission 93: 8
[588] Submission 93: 8
[589] Ms Woods, Transcript 20 March 2013: 10

Currently, an employer who has wages in Queensland of $7.049 million for the preceding financial year; are in a high risk industry, as defined in Schedule 5A of the Regulation; with wages in Queensland for the preceding financial year of $2.146 million, must:

- have a workplace rehabilitation policy and procedures accredited by Q-COMP which outlines:
    - their commitment to assist injured workers to access necessary treatment and rehabilitation
    - specific steps they need to take to achieve a safe, timely and durable return to work
- appoint a RRTWC registered with Q-COMP who will:
    - initiate early communication with an injured worker
    - develop the suitable duties program with the worker and their employer, in line with the current medical certificate.[590]

Q-COMP advised that:

> *The other thing is that rehab and return-to-work coordinators are often paramedicals—so physios, OTs and that type of thing—and there is a current requirement, though not in other states, for them to attend a particular course. Our submission is that if an employer has been good enough to go and employ a registered occupational therapist that person does not need to go and do a course, again reducing red tape. Also, employers who have very detailed systems of how they manage their workplace injuries and so on potentially could make a submission and be excused from having rehabilitation and return-to-work coordinators. The other thing is there is this other system, so if you are this type of employer you also have to have what is called policies and procedures around rehabilitation at the workplace, and that is a whole separate other process. So we are proposing that if you have to have a rehabilitation and return-to-work coordinator that that registration is combined with the employer's workplace policies and procedures, so it is done in one transaction.* [591]

Q-COMP advised that the RTWA is designed to assist injured workers find a job after their statutory claim is finalised. They advised that it is having a positive impact on the Workers' Compensation Scheme by reducing common law costs. They identified that this is achieved through a reduction in the:

- amount awarded under the 'past economic loss' head of damage when RTWA injured workers with an open common law claim return to work;
- amount awarded under the 'future economic loss' head of damage when RTWA injured workers with an open common law claim return to work because economic loss is reduced when injured workers return to employment demonstrating residual earning capacity; and
- number of injured workers who pursue a common law claim due to their involvement in the program.

[590] Q-COMP, Employer Obligations, http://www.qcomp.com.au/services/workplace-rehabilitation/employer-obligations.aspx [21 May 2013]

[591] Ms Woods, Transcript 20 March 2013: 10

Q-COMP are recommending that the legislation be amended to make it mandatory for insurers to refer injured workers to the RTWA program if they are making a common law claim for future economic loss on the basis that they are unemployed. The amendment would allow the worker to opt out of participating in the program but this would be taken into account in the settlement of the worker's common law claim.

5.10 Committee comments – return to work programs

The Committee heard many positive comments about the return to work programs and the Committee considers that injured workers who participate in these programs are more likely to successfully return to work. The main criticisms that the Committee heard about these programs was with regard to the ability of the employer to find suitable duties for injured workers returning to work. This is a difficult area, however, the Committee would encourage the Department to invest further in the host employer program to assist employers in this area.

The Committee has considered Q-COMP's recommendations with respect to both employers' workplace rehabilitation and the return to work assist program.

The Committee considers that it makes sense that the criteria requiring employers to have a RRTWC be more flexible and considers the time frame suggested by Q-COMP to be reasonable. However, the Committee considers that this should work in conjunction with the existing minimum wage criteria. The Committee considers that where a work place has 'lost days' below 15 days it is likely that the injuries are more minor in nature and it is unlikely that a RRTWC will be called upon. However, this recommendation should not preclude employers from having a RRTWC if they so wish. Employers who meet this threshold will need to engage a RRTWC as soon as the requisite number of days are reached.

Q-COMP recommended that specialised workplace rehabilitation staff be automatically accepted as RRTWC without further training. The Committee partially agrees with this recommendation. Whilst it should not be a requirement that these specialised staff complete the accredited workplace rehabilitation course, the Committee considers that a form of accreditation should still be required to ensure that standards are maintained. Once these RRTWC are accredited then this accreditation would be transferable to other work places. It is anticipated that this would merely be a checking process to ensure the credentials of those to be appointed as a RRTWC are appropriate.

Q-COMP also recommended that employers who have in place detailed systems to support injured workers be able to apply to Q-COMP for exemption from the requirement to have a RRTWC. The Committee considers that it would be larger employers who would have in place these sorts of systems and therefore it would be appropriate for them to also have a RRTWC.

With regard to the 'Return to Work Assist' program, Q-COMP recommended that it be made mandatory for insurers to refer injured workers to an accredited return to work program if they are making a common law claim for future economic loss on the basis that they are unemployed. The Committee considers that workers must have the ability to opt out in reasonable circumstances. The Committee notes that workers have a common law duty to mitigate loss. Participation in this type of program can fulfil this requirement.

Recommendation 24

The Committee recommends that the legislation be amended to include a requirement that employers must have a RRTWC where a statutory claims totalling 15 or more work days lost in any year and wages in Queensland for the preceding year totalling $2.146 million or more.

Recommendation 25

The Committee recommends that the Department implement an accreditation system for RRTWC.

Recommendation 26

The Committee recommends that the legislation be amended to make it mandatory for insurers to refer injured workers to an accredited return to work program if they are making a common law claim for future economic loss on the basis that they are unemployed except where the worker can demonstrate they are unable to participate in a return to work program.

5.11 Claims management

Whilst the majority of the submissions received by the Committee were positive regarding the claims process managed by WorkCover, there were some criticisms of the process which fell into three categories:

- communication;
- investigation and dispute management; and
- time frames allowed.

These criticisms included that not all information is passed onto the injured workers[592] and some employers feel that WorkCover does not consider them in decisions.[593] A number of these issues have been considered in other sections of this report.

A number of submissions commented on the inconsistency of timeframes in providing information or responding to counter claims. One example highlighted that a worker was given only four days to respond while the employer was allowed 15 days to comment on the worker's claim.[594] Another commented that WorkCover's efforts to speed up the claims process has resulted in some aspects of decision making process being omitted.[595]

The Committee sought clarification from the Department regarding the timeframe inconsistencies. The Department advised that *all claims need to be decided within 20 business days, so set timeframes for responses cannot be applied to every situation* and *the availability of key staff or the volume of information required to make a determination, needs to be considered*.[596]

[592] Submission 22: 2
[593] Submission 26: 3
[594] Submission 200: 1
[595] Submission 47: 2
[596] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 8

The Department also explained that in circumstances where the required timeframes cannot be met by a worker or an employer, WorkCover may amend the requirements within reason, to afford both parties natural justice. However they added that:

> *…in situations where timeframes cannot be extended or reasonable requests for information have not been met, then WorkCover makes a decision based on the available information. For an employer, this may mean that a decision is made without their input. The possibility of this occurring, means more often than not the required information is produced within the set timeframe.*[597]

There were also suggestions that more emphasis could be placed on promoting safe workplaces.[598]

The Committee received a detailed example of issues an employer has had when dealing with WorkCover offices. The submission noted that inconsistent and conflicting advice was received and what the submitter had understood was to be done did not happen.[599]

5.12 Committee comments – claims management

The Committee reiterates its previous statements that clear, concise, accurate and timely communication is a key to ensuring satisfactory outcomes for both workers and employers.

[597] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 8
[598] Submission 161: 5
[599] Submission 168: 1-2

6 Whether the reforms implemented in 2010 have addressed the growth in common law claims and claims cost that was evidenced in the scheme from 2007-08

6.1 2010 legislative reforms

In May 2010 the then Attorney-General and Minister for Industrial Relations, the Hon Cameron Dick MP, introduced *the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2010*. The objective of this Bill was to implement legislative amendments to ensure WorkCover Queensland's ongoing financial viability, while maintaining access to common law remedies for workers.[600]

This legislation was the result of a consultation process which included issuing a discussion paper in February 2010, acceptance of 60 written submissions and establishment of a stakeholder reference group.

The Minister advised the Parliament, when he introduced the Bill, that the following three themes were consistently raised by stakeholders during this process:

- the need for a much stronger focus on rehabilitation and return-to-work outcomes;
- concern that WorkCover accepts claims too easily and settles common law claims for sums that are too high; and
- concerns regarding the transparency of the scheme including institutional arrangements involving the timely release of information to stakeholders.[601]

The explanatory notes accompanying this bill identify the reasons for the bill as follows:

> *On 18 November 2009, the WorkCover Queensland Board presented the Attorney-General and Minister for Industrial Relations with the outcomes of a review of WorkCover Queensland. The review analysed WorkCover's financial position and identified possible solutions to ensure it remains solvent. Phase 1 of the review was completed in early July 2009 and identified the drivers of WorkCover's current financial position as a combination of the following three factors:*
>
> 1. *increasing cost of claims, particularly a disproportionate increase in common law claims payments and the number of claims when compared to statutory claims payments and the number of claims;*
> 2. *premium income not keeping pace with net claims growth; and*
> 3. *two consecutive years of negative investment returns due to the global financial crisis.*
>
> *These three factors resulted in a deficit of $381 million before tax in 2007-08, followed by a deficit of $894 million in 2008-09, resulting in a total accumulated operating deficit of $1.3 billion before tax. These losses have been absorbed by WorkCover's investment fluctuation reserves.*

[600] Workers' Compensation and Rehabilitation and other Legislation Amendment Bill 2010 Explanatory Notes: 1

[601] Queensland Legislative Assembly, Hon CR Dick MP, Attorney-General and Minister for Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 18 May 2010: 1546

> *Phase 2 of the review commenced in August 2009, and sought to quantify the extent of WorkCover's present and future financial position, and made a number of recommendations to maintain fund solvency. The review estimated that if all factors are held constant, the recurrent funding gap would be in the order of $400 million per annum.*[602]

The policy objectives of the Bill were to be achieved by:

- *harmonising common law claims brought under the Workers' Compensation and Rehabilitation Act 2003 with those brought under the Civil Liability Act 2003 in terms of liability (standard of care), contributory negligence and caps on general damages and damages for economic loss;*
- *addressing the increased difficulty faced by employers in resisting claims for damages as a result of the Queensland Court of Appeal decision in Bourk v Power Serve Pty Ltd & Anor [2008] QCA 225;*
- *increasing obligations on third parties to participate meaningfully in pre-court processes;*
- *allowing a court to award costs against plaintiffs whose claims are dismissed;*
- *increasing the amount of employer excess to 100 per cent of Queensland Ordinary Time Earnings or one week's compensation, whichever is the lesser;*
- *removing the option for employers to insure against their excess;*
- *allowing payments to parents of workers aged under 21, if the worker dies and the parents live interstate; and*
- *allowing self-insurers to take on a higher statutory reinsurance excess in order to lower reinsurance premium.*[603]

The decision in Bourk v Power Serve affirmed that if a worker is injured at work and there is a causal connection between the injury and work, the employer has breached its duty under the Workplace Health and Safety Act. This led to increasing numbers of common law claims based on the perception that strict liability attaches to an employer in common law proceedings if a work injury has occurred, regardless of fault. The Bill amended the Act to remove any private civil right of action arising under the Act. This meant that a worker is not able to rely on a breach of the Workplace Health and Safety Act to support their claim of common law negligence.[604]

The amendments in 2010 introduced caps on the amount of general damages that can be awarded for pain and suffering, loss of amenity, loss of expectation of life and general disfigurement. These caps are aligned with the Workers' Compensation Scheme with the *Civil Liability Act 2003*.[605]

[602] *Workers' Compensation and Rehabilitation and other Legislation Amendment Bill 2010* Explanatory Notes: 2
[603] *Workers' Compensation and Rehabilitation and other Legislation Amendment Bill 2010* Explanatory Notes: 2-3
[604] Queensland Legislative Assembly, Hon CR Dick MP, Attorney-General and Minister for Industrial Relations, Second Reading Speech, *Parliamentary Debates (Hansard)*, 18 May 2010: 1547
[605] Q-COMP Queensland workers' compensation claims monitoring June 2012: 35 http://www.qcomp.com.au/media/223530/Qld%20workers%20compensation%20scheme%20monitoring%20-%20June%202012.pdf [1 March 2013]

A limit on the amount of compensation that can be awarded to an injury based on the severity of the injury, or its 'injury scale value' (section 61 of the *Civil Liability Act 2003*; see also *Civil Liability Regulation 2003* for injury scale value) was also outlined in the amendments.

> *Another area of difference between the Civil Liability Act 2003 and the Workers' Compensation and Rehabilitation Act 2003, apart from the contributory negligence provisions, is the requirement for damages to be assessed in accordance with a set scale. To determine general damages, an injury scale value, or ISV, will be used to assess a worker's dominant injury. The ISV scale is the same as the scale set up in the Civil Liability Regulation 2003. The effect of the ISV is that it compresses claims at the lower end of the scale and benefits more seriously injured workers.*[606]

General damages were capped at $302,850 (indexed annually) and damages for economic loss were capped at three times the annual rate of Queensland Ordinary Time Earnings, QOTE for the purpose of calculating loss of future earnings.[607]

6.2 Statutory claims

The statutory scheme covers around 96 per cent of all claims with the maximum statutory lump sum available in 2012-13 of $287,605.[608] Workers with a work related impairment of over 15 per cent may also receive a lump sum compensation for gratuitous care, if they require day to day care.

Statutory claims have increased in the 10-year period since 2001 (Figure 2). In 2001, there were 86,171 claims and this increased by nearly 20,000 claims to 104,921 in 2012.[609] According to Q-COMP annual statistics, over 80 per cent of lodgements are accepted, approximately 5 per cent are rejected and 15 per cent of claims do not proceed. Of those accepted, over 35 per cent of claims do not result in time off work.

Q-COMP also noted that the statutory claims have been in line with employee growth since 2008 and statutory claims per 1,000 employers have been stable over the last three years. In 2011/12, there were 46.3 claims per 1,000 employees.[610]

WorkCover and Q-COMP's focus on returning injured workers back to work through rehabilitation and their return to work programs has resulted in an increase in the return to work rates. The average number of work days lost is approximately 39.1 days in 2011/12.[611]

[606] Queensland Legislative Assembly, Hon Cr Dick MP, (Former) Attorney-General and Minister for Industrial Relations, Second Reading, 18 May 2010: 1546 http://www.parliament.qld.gov.au/documents/tableOffice/HALnks/100518/WorkersComp.pdf

[607] Safe Work Australia, Key Workers' Compensation information Australia 2012: 21 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/691/Key_Workers_Compensation_Information_2012.pdf [5 April 2013]

[608] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 24

[609] Statistical data obtained from the Department of Justice and Attorney-General.

[610] Q-COMP 2011/12 Statistics Report: 3-4 http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [5 February 2013]

[611] Q-COMP 2011/12 Statistics Report : 4 http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [5 February 2013]

Figure 2 shows that the increase in the number of zero days lost, but the number of 20+ plus days lost has been relatively stable since 2008. There is a slight decrease in the <20 days lost category from a peak in 2008 (35,447) to 30,488 in 2012.

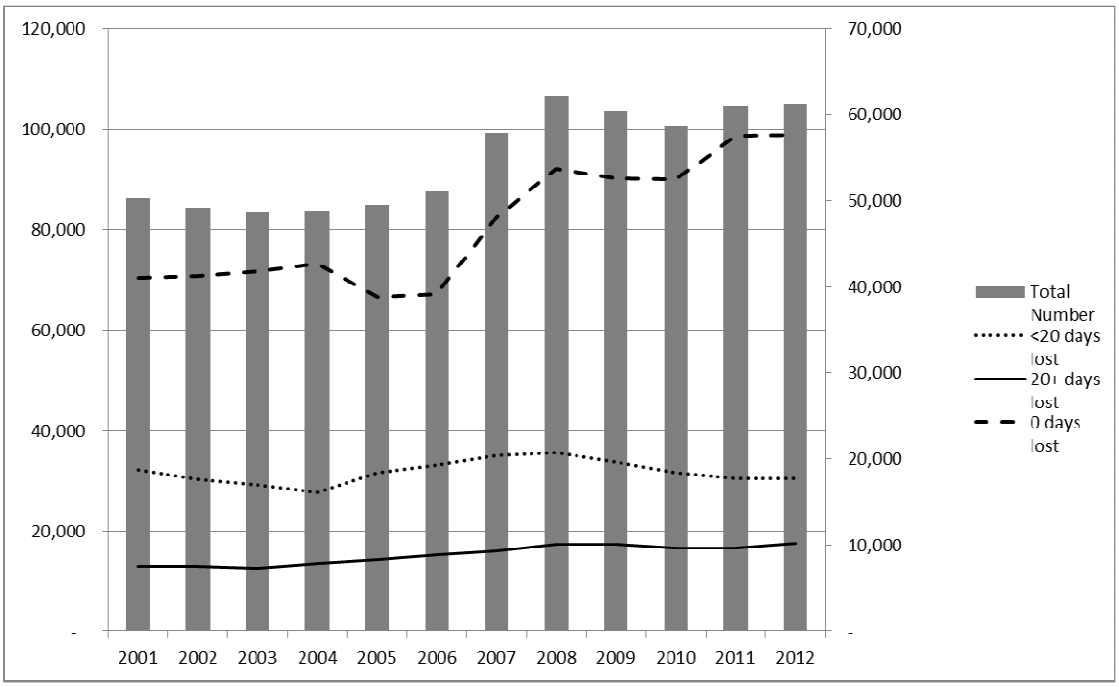


Figure 2: Number of statutory claims (bars) and days lost for work related injury (lines).
Source: Data obtained from Department of Justice and Attorney-General and Q-COMP

The three industries with the largest proportion of claims lodged are:

- Manufacturing (around 18 per cent or $98.4M)
- Health Care and Social Assistance (around 12 per cent or $81.6M)
- Construction (around 11 per cent or $105.8M)

The industry with the lowest proportion was Information Media and Telecommunications ($2.2M).[612]

[612] Q-COMP 2011/12 Statistics Report: 11-12
http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [5 February 2013]

Q-COMP statistics also show that strains and sprain injuries account for just over one-third (31 per cent) of all injuries lodged in 2011/12. There were 4,522 psychological injuries claims lodged in 2011-12. In general, males represented over two-thirds of claims lodged for physical injuries whereas females account for over 58 per cent of psychological and psychiatric injury claims (see Figure below).[613]

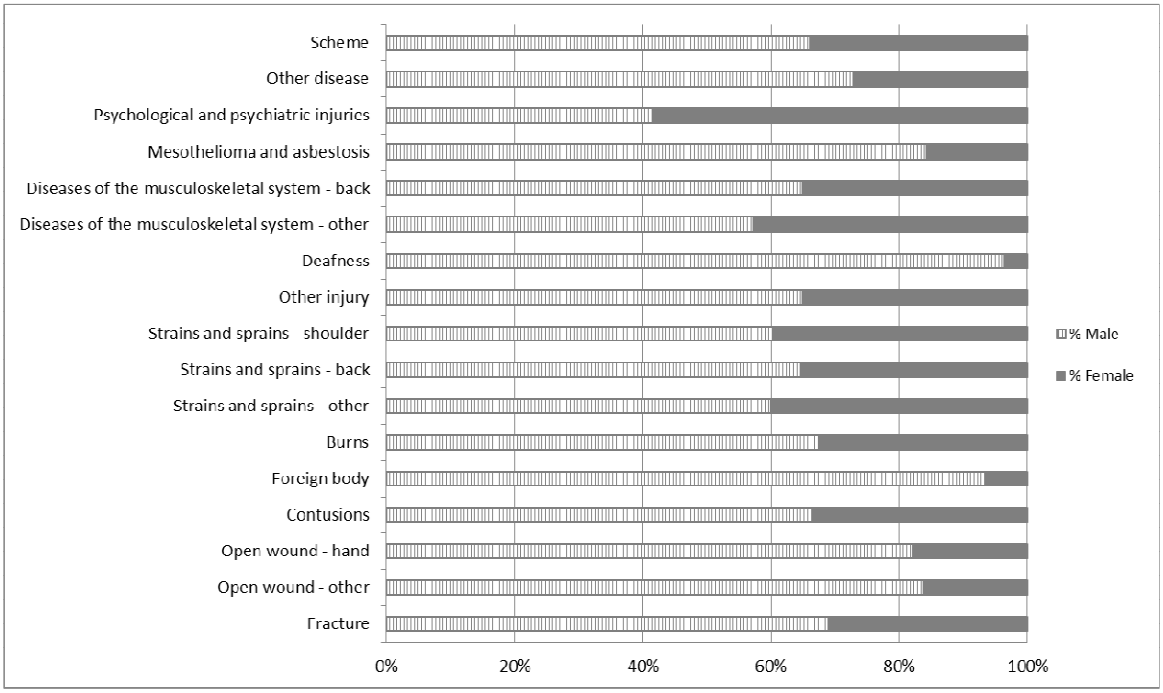


Figure 3: Proportion of statutory claim lodgements by injury type and gender 2011/12
Source: Q-COMP 2011/12 Statistics Report: 11-12

6.3 Common law claims

The Queensland Workers' Compensation Scheme provides employers with insurance cover for the provision of common law damages. Access to common law is available to all workers in Queensland who can prove negligence against their employer and who have a work injury as defined in the Act.[614]

However, as a result of the amendments made to the legislation in 2010, if the worker's work-related impairment (WRI) is less than 20 per cent, the worker must choose between receiving the statutory lump sum compensation payment and seeking damages at common law. If the WRI is assessed at 20 per cent or more, the injured worker may accept both the lump sum payment and seek damages at common law.[615]

Definitions of Whole Person Impairment (WPI) and Work Related Impairment (WRI) are discussed in further details in section 6.5.

[613] Q-COMP 2011/12 Statistics Report : 11-12
http://www.qcomp.com.au/media/267754/40268%20qcomp%20statistics%20report%20web.pdf [5 February 2013]
[614] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 26
[615] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 26

6.3.1 Jurisdictional comparison –common law

Queensland and the ACT are the only two jurisdictions to have unlimited access to common law, whereas New South Wales, Victoria, Tasmania and Western Australia have limited access to common law, where a Whole Person Impairment (WPI) threshold applies (Table 18). A worker's degree of impairment can be assessed once the injury is considered stable and stationary (i.e. the injury is not likely to improve with further medical treatment). In Queensland, if a worker's level of work related impairment is assessed as less than 20 per cent, they must decide whether to accept the lump sum payment or to seek damages under common law.[616]

Table 18: Common law in all jurisdictions

	QLD	NSW	VIC	SA	TAS	WA	ACT	NT
Common Law/ criteria	Yes	Limited WPI 15%	Limited WPI 30%	No	Limited WPI 20%	Limited WPI 15%	Yes	No

Source: Adapted from Safe Work Australia Comparison of Workers' Compensation Arrangements in Australia and New Zealand April 2012: 13

In New South Wales, an injury has to be completely stabilised to pursue a common law claim. The work related impairment must also be over 15 per cent for physical and psychological injuries and negligence has to be established from the workplace accident, or attributed to employer negligence.[617] The 2012 review of the NSW Workers' Compensation Scheme identified that common law costs will represent 11 per cent of gross scheme costs for projections for 2012-13. This figure does not include legal cost for the scheme or cost made to compensate for pain and suffering. In Queensland, pain and suffering are compensated by common law.[618]

In Victoria, workers injured in the course of employment on or after 20 October 1999 may have a right to sue for damages for those injuries. To be entitled to sue for damages the injury or injuries must be "serious", as defined in the *Accident Compensation Act 1985* (Vic) where the injury is assessed at 30 per cent WPI.[619] Common law payments represented 25.6 per cent of gross claims expenses incurred in 2012.[620]

In Tasmania, common law can only be accessed when the permanent injury/ impairment is more than 20 per cent. In addition, to be eligible the injury must be shown to be caused by someone else in that they were negligent or failed to discharge a statutory duty.[621]

[616] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 15
[617] New South Wales. NSW Compensation Claims Laws http://www.claims.com.au/compensation-law/nsw#sthash.umeozdEZ.dpbs [21 December 2012]
[618] Department of Justice and Attorney-General, Question on Notice 4. 23 November 2012: 8
[619] Victoria. WorkSafe Victoria Common Law http://www.worksafe.vic.gov.au/laws-and-regulations/accident-compensation/common-law [21 December 2012]
[620] Department of Justice and Attorney-General, Question on Notice 4. 23 November 2012: 8
[621] Tasmania. Workplace Standards Tasmania http://www.wst.tas.gov.au/employment_info/workerscompensation/worker/claim_9 [21 December 2012]

In Western Australia, a worker choosing to pursue a claim for common law damages against their employer must have a level of permanent WPI of not less than 15 per cent. The worker must also prove that their workplace injury was caused by negligence or other tort committed by their employer and meet certain eligibility requirements to pursue a claim for damages outside of the statutory workers' compensation system. Lastly, timeframes, also known as 'the termination day', which is the date at which the worker ceases to be eligible to make a claim, is applicable for a worker seeking access to common law damages.[622] In Western Australia, common law payments ($78.5M) represented around 8.9 per cent of total claim payments ($662.6M) in 2010-11.[623]

6.3.2 Background – common law amendments

The issue of common law claims has been examined numerous times since the implementation of the first Workers' Compensation Schemes.

The Kennedy Review in 1996 undertook a detailed examination of the issue. Kennedy noted at the time that:

> *If there is one single issue associated with workers' compensation is Queensland that has polarised opinions put before this Inquiry, it is that claims under common law. The complex and divisive issue of common law claims cannot be avoided, and yet there is unlikely to be a totally acceptable compromise*.[624]

The inquiry found that the statutory 'no fault' component of the scheme had been reasonably stable, however, the payments for common law claims had escalated both in number and in size of payments.[625]

The impetus for the Kennedy Review was the unfunded liability issue and it was tasked with finding a way to resolve this financial issue. The 'blow out' in the funded liabilities was attributed to this escalation in common law claims and settlements[626]

Submissions to the Kennedy Inquiry suggested common law thresholds at varying levels of whole person impairment (WPI) levels. The report notes that in many other states a threshold to common law damages is set at either 25 per cent or 30 per cent.[627]

After considering various other options recommended in submissions, Kennedy concluded that it was essential to retain access to common law settlement of damages for all but the milder injury cases arising from employer negligence.[628]

[622] Western Australia. WorkCover WA http://www.workcover.wa.gov.au/Workers/Common+law+claims/Default.htm [21 December 2012]
[623] Department of Justice and Attorney-General, Question on Notice 4. 23 November 2012: 8
[624] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 144
[625] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 144
[626] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 144
[627] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 148
[628] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 146

Kennedy recommended that:

- common law claims for damages be permitted only where the work related impairment level exceeds 15 per cent WRI.
- Injured workers with greater than 15 per cent WRI be required to make an irrevocable election within 42 days of being offered a statutory lump sum compensation, between accepting either a statutory lump sum payment or pursuing damages at common law, once their injury is 'stable and stationary'.[629]

The report notes that in determining the impairment level threshold, Kennedy was advised by specialists that an impairment level of 15 per cent or below was regarded as a 'mild' impairment. An impairment level of 15 per cent to 35 or 40 per cent was regarded as a 'moderate' impairment while impairment in excess of those levels was 'severe'.[630]

This recommendation was initially accepted by government but following the announcement by the Member for Gladstone that she would not support the introduction of any impairment threshold for common law access, or extension of the current irrevocable election provisions, the government made a decision not to progress with those recommendations.[631]

Prior to reforms in 2010, the WorkCover Queensland Board made a number of recommendations to the then Minister to address WorkCover's ongoing viability issues. These recommendations included introducing a common law threshold of 10 per cent or 15 per cent WPI while at the same time extending common law coverage to host employers and principal contractors who have a WorkCover policy. This recommendation was canvassed as part of the review and rejected by the government at the time.[632]

6.3.3 Common law process

Even though in Queensland, there are no restrictions to accessing common law claims, a common law claim requires evidence to prove the employer was either negligent (at fault) or did not meet their obligations to prevent injury. A common law claim can be lodged up to three years from the date of injury.[633]

A common law claim can arise after a statutory claim has ended. For example, an injured worker may be able to lodge a claim for a further injury that has not been identified or managed at the statutory level. If the additional injury is considered to be the dominant or primary injury, or is likely to impact the settlement amount, it will go through the same decision and review process as in the statutory phase.[634]

In some cases a worker may elect not to claim for statutory benefits and proceed directly to common law. These applications are subject to the same injury investigation, determination and review process as statutory claim applications.[635]

[629] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 168
[630] Commission of Inquiry into Workers' Compensation and Related Matters in Queensland, *Report of the Commission of Inquiry into Workers' Compensation and Related Matters in Queensland*, June 1996: 149
[631] WorkCover Queensland, A status review 1997-2011, June 2011: 27
[632] WorkCover Queensland, A status review 1997-2011, June 2011: 27
[633] WorkCover, Make a claim http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/making-a-claim [1 March 2013]
[634] WorkCover, Common law secondary injuries http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-common-law-claim-is-made/common-law-secondary-injuries [1 March 2013]
[635] WorkCover, Common law only claims http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-common-law-claim-is-made/common-law-only-claims [1 March 2013]

Once the claim has been determined, the claim is managed according to the common law claims management framework.[636]

The initial phase of the common law process is the pre proceedings (before litigation). The pre proceeding process commences with a notice of claim for damages (NOC) being lodged with both WorkCover and the employer. At this stage, all the information is reviewed by WorkCover to ensure the compliance of the NOC, the WorkCover will contact both:

a. the employer to discuss the claim and management process, and to obtain any information the employer may have regarding the injury and/or worker

b. the person making the claim (usually the plaintiff solicitor) to discuss the claim, compliance of the NOC and identify claims for informal negotiation.[637]

Following this, the pre-proceeding process or informal negotiations are as follows (Figure 4 below):

1. *Initial review*: WorkCover representative will review the statutory file and determine the best management plan for the claim.
2. *Investigation*: Information obtained from the employer as well as reports and communications recorded on the worker's statutory claim will be investigated. Additional investigations may take place depending on the claim specifics, for example a medical review or referral to a factual investigator to obtain witness statements.
3. *Disclosure*: All relevant information is released to the plaintiff solicitors as it is received. This process is an obligation of both parties.
4. *Liability quantum*: WorkCover is required to make a decision on liability (whether the employer was at fault) within six months of receiving the NOC. The employer and plaintiff solicitor is contacted to discuss the decision as early as possible. At this point WorkCover is usually in a position to make an offer of settlement.
5. *Conference offers*: If a claim is unable to settle informally, WorkCover and the plaintiff solicitor will proceed to compulsory conference within three months of WorkCover's liability decision. Employers will be invited to attend these conferences. The conference is an opportunity for all parties (including any other involved party, for example host employer, manufacturer of equipment etc) to meet and discuss the claim facts, who should be held liable (at fault) and how much the claim is worth.[638]

Figure 4 below shows diagrammatically how the process works.

Figure 4: Common law process (source: WorkCover Queensland)
Source: WorkCover Queensland

[636] WorkCover, A common law claim has been made. What next? http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-common-law-claim-is-made [1 March 2013]
[637] WorkCover, A common law claim has been made. What next? http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-common-law-claim-is-made [1 March 2013]
[638] WorkCover, A common law claim has been made. What next? http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-common-law-claim-is-made [1 March 2013]

Claim settlement: If the claim settles, that is the injured worker agrees to a settlement figure, they will sign an agreement that prevents them from making any other claims relating to the event at work and keeps the terms of the settlement confidential.

If an agreement to settle is not reached, all parties must exchange mandatory written final offers, which are open for 14 days. A worker has 60 days from the date of the settlement conference to commence litigation. The litigation process is as follows:

1. If the claim does not resolve following the compulsory conference, the injured worker can commence court proceedings by serving the employer and WorkCover with a claim and statement of claim (SOC) within 60 days of the conference.
2. Within 28 days of the service of a SOC, WorkCover will file a:
    a. notice of intention to defend and defence, and
    b. statement of expert and economic evidence (which outlines the evidence to be used to defend the case). Any other parties involved in the claim must also file a third party claim and statement of claim (third party proceedings and procedures are governed by the Uniform Civil Procedure Rules). Usually this marks the close of pleadings.
3. As with the pre proceeding phase, full disclosure must take place. This occurs through the delivery of a list of documents within 28 days after the close of pleadings.
4. Within 28 days of close of pleadings, the plaintiff must serve a written statement of loss and damage that clearly details the amounts being claimed for damages.
5. Wherever possible mediation is attempted; this should be convened no later than six weeks after the close of pleadings.
6. If the claim is unable to be resolved at mediation, WorkCover will deliver a request for trial date and the case will be set down for trial.
7. The trial will then take place on a date set by the Court, after which judgment will be given.[639]

Litigation claims are managed by a WorkCover panel solicitor who is an external solicitor, but a WorkCover employee will continue to oversee the process.[640] In response to the 2010 changes, WorkCover altered its strategy for settling common law claims to help contain costs. Since then, there has been an increase in the number of claims that have been settled close to the initial offer amount.[641]

6.4 Results of 2010 legislative reforms

The Committee asked witnesses if they considered the 2010 legislative changes to have had any changes to the level of common law claims.

[639] WorkCover A common law claim has been made. What next? http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-common-law-claim-is-made [1 March 2013]

[640] WorkCover A common law claim has been made. What next? http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/what-happens-after-a-common-law-claim-is-made [1 March 2013]

[641] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 28

CCIQ advised that '*common law claims continue to cause increasing concern to employers. The lack of restraint and easy access to litigation remains an area in need of urgent reform despite the 2010 changes'.*[642] They stated:

> *That outcome in terms of the increase in premiums from $1.15 to $1.45 was largely seen as a result of the 2010 inquiry failing to address the issue of access to common law. Our members and businesses more broadly continue to highlight that unfettered access to common law is something that ultimately must be addressed. The chamber is not seeking to change the nature of the scheme. We are not seeking to move the scheme from being short tailed in nature to being long tailed. However, we are seeking to have implemented that those injuries that are minor in their nature be steered towards the statutory benefits pathway as opposed to the more costly outcomes achieved through the legal system.*[643]

However, the Australian Lawyers Alliance disagreed and considers that the 2010 review has already addressed the increase in common law claims where tougher thresholds for access to the scheme and increased restrictions on amounts that can be claimed were imposed. Their submission considered that '*these significant policy changes have substantially corrected the concerns about unmeritorious claims during 2008-10'*.[644]

The Bar Association of Queensland submitted that the 2010 amendments have had significant effects because they have:

- *Removed a breach of s.28 of the Work Health and Safety Act 1995 affording a civil cause of action for damages (and retroactively).*
- *Introduced cost penalties for an unsuccessful litigant who fails in their action altogether.*
- *Altered the assessment of liability and damages broadly in accordance with the Civil Liability Act 2003 (the exception being gratuitous care principal).*[645]

The Bar Association advised that '*the 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'*. They considered that the introduction of the 2010 amendments have resulted in *'difficult liability claims being 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)'.*[646]

WorkCover stated that the common law claim numbers have decreased as has the average cost of common law claims.[647]

[642] Submission 113: 13
[643] Mr Behrens, Transcript 31 October 2012: 37
[644] Submission 72: 5
[645] Submission 61:14
[646] Submission 61:14-15
[647] Submission 94: 8-9

The Queensland Teachers' Union considers that there have been positive impacts from the 2010 amendments advising that

> *The 2010 amendments resulted in an immediate reduction by something like 9.6 per cent in the cost of common law claims in the immediate following year. With common law claims you can make your claim three years after the injury. That decrease is going to continue for another year and then there is going to be a tail beyond that of claims lodged but not yet resolved. So I think that the comment that the 2010 reforms did not go far enough is probably not borne out by the statistics and it also needs to be borne in mind that the 2010 amendments are continuing to reduce both claim costs and numbers of claims.*[648]

The QLS advised that the most recent actuarial consideration of the Workers' Compensation Scheme shows that the scheme is returning to a more predictable (and long term sustainable) claims pattern following the amendments made in 2010. They noted that when elements of a scheme are changed, it is more difficult for actuaries to rely on recent experience as a predictor of future trends. Actuaries are then included to make educated assumptions about what may occur. This is usually undertaken with a great degree of conservatism which leads to higher estimates in outstanding liabilities than may be necessary, which in turn requires greater collection of premium.[649]

Their analysis of recent actuarial data indicates that the trends of increasing common law claims numbers which were projected in 2009 have not come to pass and that common law claims are now reducing, rather than increasing.[650]

Q-COMP actuarial presentation in November 2012 also confirmed that common law claims have been decreasing since 2010 (see Figure 5).

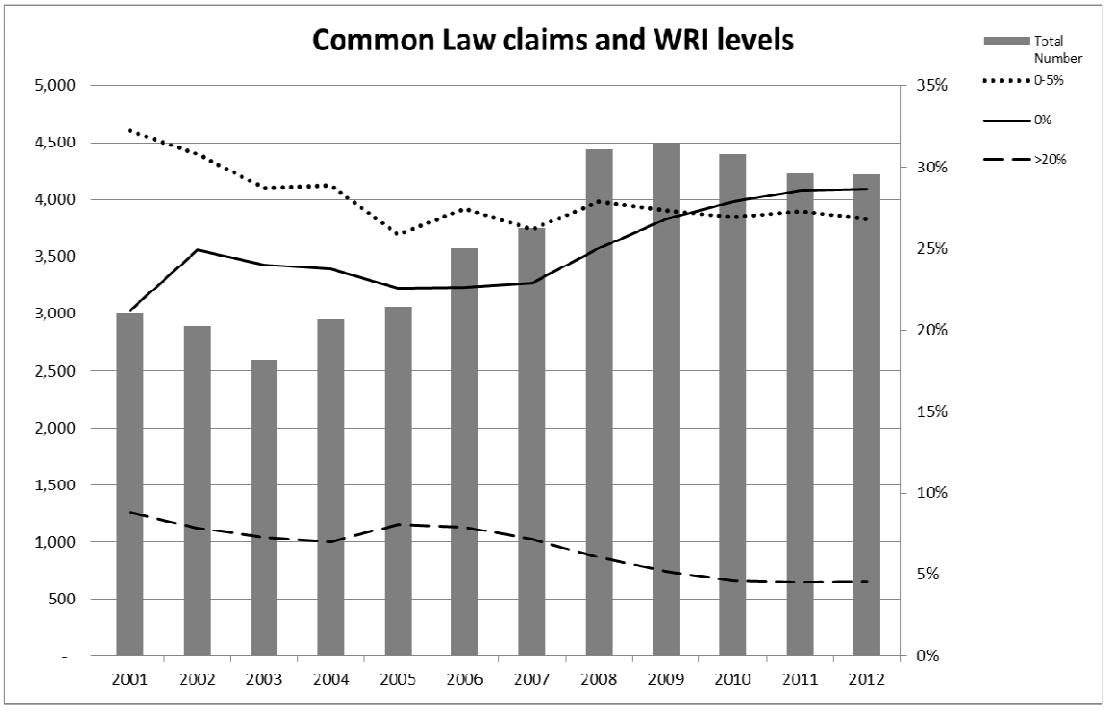


Figure 5: Common law claims and WRI levels.
Source: Data obtained from Q-COMP

[648] Ms Drew, Transcript 31 October 2012: 37-38
[649] Submission 195: 4
[650] Submission 195: 4-5

Figure 5 also show that over the 11-year period since 2001, the total number of common law claims had increased from 3,011 in 2001 to 4,222 in 2012, with a peak of 4,503 in 2009. Since then, there has been a steady decline in the number of claims. There has been an increase of claims with zero (0) per cent WRI whilst those with WRI of 0 to 5 per cent has decreased. The increase in the past five years since 2007 is particularly notable from 23 per cent (of total claims) in 2007 to 29 per cent (of total claims) in 2012.[651]

The Department stated that the '*reduction in common law claims lodged since July 2010 is due to a number of factors including*:

- *a decline in the frequency of injuries (based on the number of statutory claims lodged); and*
- *legislative changes introduced from July 2010*.[652]

However, it should be noted that common law claims can be lodged up to three years after the incident.

WorkCover and its actuaries monitor common law claim numbers based on when the injury occurred. WorkCover's actuary is predicting a small decline in common law claims from 2010-11. They suggest that this is due in part, to legislative changes introduced from 1 July 2010 including:

- reversal of Bourk v Power Serve P/L & Anor [2008] QCA 225 and the abolition of a cause of action arising from a breach of statutory duty
- capping general damages payments – reducing the payment for small claims and making them less economic to pursue
- allowing the court to award costs against claimants whose claims are dismissed, creating an economic risk to claimants who run speculative claims.[653]

Less than 5 per cent of claims progress to common law (Table 19). Although this figure has declined from the 2009 and 2010 peak, the rate has increased steadily since 2001.[654] However, as common law claims can be lodged up to three years from the date of an accident, the figures in the table include those where the injury has occurred but the claim is not yet reported (IBNR). As such from 2011, a significant proportion of the common law claims are those not yet reported, i.e. 1,967 (from 4,231 claims) in 2011 and 3,713 (from 4,222 claims) in 2012) are IBNR.

Similarly, as statutory claims can be lodged up to six months after the date of injury, the 2012 figure of 104,921 includes 10,593 injuries not yet reported.[655] Therefore conversion rates can be difficult to compare accurately until the claim periods has been reached.

[651] Figures obtained from Finity and Q - COMP (actuarial presentation 21 November 2012)
[652] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 17
[653] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 January 2013: 19
[654] Figures provided by Q-COMP from Finity presentation November 2012
[655] Figures provided by Q-COMP from Finity presentation November 2012

Table 19: Conversion of statutory claims to common law claims

Accident year ending 30 June	Statutory claims reported (including IBNR + gross up)	Common law claims (including IBNR)	Conversion rate of common law from statutory claims
2001	86,171	3,011	3.5%
2002	84,409	2,901	3.4%
2003	83,590	2,592	3.1%
2004	83,809	2,952	3.5%
2005	84,874	3,067	3.6%
2006	,87,452	3,568	4.1%
2007	99,164	3,757	3.8%
2008	106,391	4,443	4.2%
2009	103,500	4,503	4.4%
2010	100,650	4,402	4.4%
2011	104,583	4,231	4.0%
2012	104,921	4,222	4.0%

Source: Q-COMP (from Finity presentation November 2012)

The average cost of finalised common law claims has increased since 2000-01 financial year with a peak in the financial year 2009-10 (Figure 6).[656]

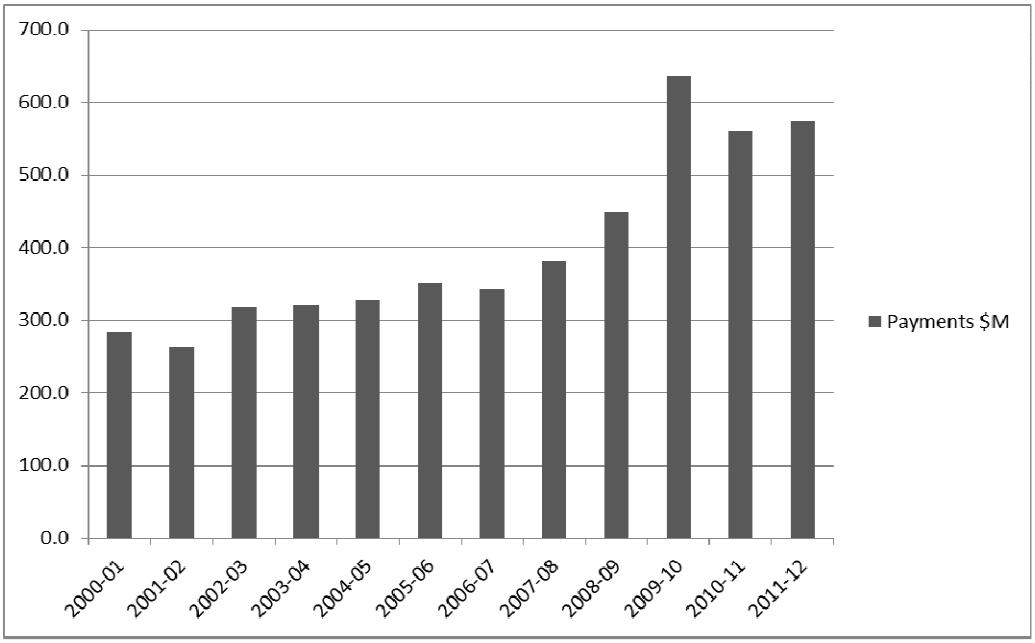


Figure 6: Common law payments since financial year 2000-01 ($M).
Source: Data obtained from Department of Justice and Attorney-General 23 November 2012: 7

[656] Department of Justice and Attorney-General. Question on Notice 4. 23 November 2012: 7

WorkCover cautions that while the downward trend is positive, *'common law claims can take up to three years to develop so ongoing future monitoring is vital'*.[657] The Department advised further that common law claims have stabilised:

- *Year to date there has been 2,854 new common law claims, which is a reduction of three per cent from the same period last year.*
- *The average cost of common law damages for 2012-13 year to date is $128,743. By comparison, the average common law damages claim in 2011-12 was $137,628 and the average in 2010-11 was $147,798.*
- *The reduction in average cost of damages has contributed to the reduction in common law payments. Year to date, common law payments total $355 million. This is 10 per cent reduction on the same period last year.*[658]

6.5 Assessment of impairment

The *Workers' Compensation and Rehabilitation Act 2003* sets out the requirements for assessing permanent incapacity or permanent impairment.

All Australian jurisdictions (except Queensland) use the *Whole Person Impairment (WPI)* methodology which is based on the American Medical Association (AMA) guides for permanent impairment. A WPI score is based on the part of the body as a measure of the impairment of the whole person. For example, an injury resulting in the structural loss of a hand or arm below the elbow could equate to a score of 90 per cent permanent impairment. On the other end of the scale, a mild aggravation of pre-existing degenerative disease in the lumbosacral spine with subjective symptoms may equate to a score of 0 per cent permanent impairment.[659] The WPI is not a scale that calibrates work related disability, but instead is a measure of a person's ability to function in their everyday life.

The World Health Organization (WHO) defines impairment as *'a problem in body function or structure'*[660] and in the context of health experience, *'impairment is any loss of abnormality of psychological, physiological or anatomical structure or function'*.[661]

Queensland uses a *Work Related Impairment (WRI)* method which is a more complex and abstract concept in that the WRI is a figure based on a worker's WPI. WRI is also expressed as a percentage, and is worked out as the percentage of the maximum amount of lump sum receivable in the Queensland scheme that the individual worker is being offered. Impairment is assessed by a doctor using the AMA guides. This percentage is worked out according to a formula in the *Workers' Compensation and Rehabilitation Regulation 2003* and Table of Injuries (Schedule 2, section 92 of the Regulation).

[657] Submission 94: 8
[658] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 21
[659] Q-COMP. Quick reference tool. Table of injuries guidelines from AMA Guides Edition 4 http://www.qcomp.com.au/media/30370/quick-reference-tool---guidelines-for-the-table-of-injuries.pdf [15 January 2013]
[660] World Health Organization. Disabilities http://www.who.int/topics/disabilities/en/ [28 February 2013]
[661] Townsend E, Ryan B, and Law M, 1990, 'Using the World Health Organization's International Classification of Impairments, Disabilities, and Handicaps in Occupational Therapy' *CJOT* Vol 57, No 1. http://www.caot.ca/cjot_pdfs/cjot57/57.1townsend.pdf [28 February 2013]

Section 95 of the Regulation stipulates:

> *...a worker's WRI is the percentage calculated using the following formula –*
>
> (LSPI x 100)/ MSC
>
> (2) In subsection (1) -
>
> ***LSPI*** means the lump sum compensation payable under the table of injuries for the degree of permanent impairment for the injury.
>
> ***MSC*** means maximum statutory compensation under chapter 3, part 6 of the Act.
>
> *Example –*
> A worker loses a thumb. The lump sum compensation payable under the table of injuries is $45,495. The maximum statutory compensation is $157,955. The worker's WRI is 28.8% [(45495 x 100) ÷ 157,955][662]

In Schedule 2(4), the following formula is used to work out the amount of lump sum compensation payable for single or multiple injuries to the upper extremity:

> (DPI x MLSC)/100
>
> DPI – degree of permanent impairment of the upper extremity assessed by a registered person as resulting from the injury or, for multiple injuries, the injuries.
>
> MLSC – the maximum lump sum compensation specified in section 1(2).

For a single injury (other than an injury involving sensory loss) to the index, ring or little finger, the following formula must be used –

> (DPI x MLSC)/MDPI
>
> DPI – degree of permanent impairment of the upper extremity assessed by a registered person as resulting from the injury or, for multiple injuries, the injuries.
>
> MLSC – the maximum lump sum compensation specified in section 1(2)
>
> MDPI – the maximum degree of permanent impairment resulting from the injury or another relevant injury set out in column 2 of the table of injuries.

A list of capped injuries is also included in the Table of Injuries in the Regulation, which prevents an assessor assigning a permanent impairment rating higher than the amount specified in the Table.

As the Table of Injuries is taken into account when calculating the amount of compensation payable for some injuries (for example upper or lower limb injury), WRI is effectively higher than the WPI for the same injury. As such there is an artificial inflation of some injuries over others.

Schedule 2 also outlines the maximum lump sum compensation payable for respective injuries, for example, for an upper extremity injury is $160,000

6.6 Impairment versus disability

The scheme provides compensation for impairment not disability and neither WPI nor WRI take into account disability and the impact on a person's capacity for pre-injury employment.

The AMA Guides (fifth edition) considers that disability is '*an alteration of an individual's capacity to meet personal, social, or occupational demands because of an impairment'.* According to the World Health Organisation (WHO), disability is an '*activity limitation that creates a difficulty in the performance, accomplishment, or completion of an activity in the manner or within the range considered normal for a human being*'.[663]

[662] Workers Compensation and Rehabilitation Regulation 2003: 78
http://www.legislation.qld.gov.au/LEGISLTN/current/W/WorkersCompR03.pdf [9 April 2013]

[663] Holmes E B, 2011, Impairment Rating and Disability Determination. Medscape Reference
http://emedicine.medscape.com/article/314195-overview#showall [15 January 2013]

Therefore differentiating between impairment and disability is important in that one person can be impaired significantly but have no disability while another can be disabled with limited impairment. The AMA Guides also stated that their impairment ratings are not intended for use as direct determinants of work disability. Some submissions outline their concerns over the guidelines as they are *'not a reflection of the ability of the person to work or the financial impact on that person.*[664,665]

In addition, the QLS notes that the '*Q-COMP quick reference tool for the table of injuries guidelines includes several items with potentially 0 per cent impairment assessments*'. They consider that:

> *…the examples in the table of injuries demonstrate that impairment ranges are often overlapping between severities of injury and tend to rely on the judgement of the medical practitioner to differentiate between mild and moderate loss of function. … the distinction is both subjective and somewhat arbitrary in any particular case.*[666]

Barrister, Andrew Munt, agrees and considers that '*any guidelines which seek to judge the "severity" of the injury simply cannot address the effect which a particular injury will have upon an individual as they have no regard to individual circumstances*'. Furthermore, '*any guidelines contain "gaps' where the true severity of the injury cannot be measured*'.[667]

The Central Queensland Law Association emphasised that the *'impairment is the "focus of the guides" and the Guides do not assess disability'*.[668] Far North Queensland Law Association explained that '*historically the scale in the guides is favourable to workers with limb injuries but not to workers with back injuries'*. They consider that '*there is no real justification why an employer who causes one type of injury should not be held liable for another type of injury*'.[669]

The ETU identified that:

> *Our biggest issue about the introduction of any sort of threshold to a common law claim is the disconnect between a work related impairment and the actual disability suffered by the worker and the impact that that disability has on the person's capacity to earn wages. …you might end up with a person with a very low work related impairment but the impact on their capacity to go back to their pre injury job is that they either cannot go back or they are limited in their capacity to go back.*[670]
>
> *…the problem is the definition of impairment. It is the disconnect between the two issues; it is the disconnect between the disability and the impact on a person's work. I am an industrial officer. If I break my leg I can go to work. My state secretary used to be a linesperson. If he breaks his leg, he cannot go to work. If he ends up with serious long-term damage, he can never work as a linesperson again and he has to end up as a state secretary of a union! All jokes aside, I think we need to look at the reality of the fact that it is not just about the injury, it is not just about the disability; it is about the impact on your capacity to go back and perform your pre-injury work and the impact that then has on your capacity to earn an income, provide for your family and engage in what we would consider to be all the normal activities that go around family and community.*[671]

[664] Submission 36: 2
[665] Submission 43: 1
[666] Submission 195: 5-6
[667] Submission 30: 2
[668] Submission 71: 2
[669] Submission 73: 5
[670] Ms Rogers, Transcript 31 October 2012: 11
[671] Ms Rogers, Transcript 31 October 2012: 11

The Bar Association of Queensland advised that the Guides to the Evaluation of Permanent Impairment, is now in its fifth edition. Their submission included the definitions from the journal:

> *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. Accessing 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 … medical impairments are not related to disability in a linear fashion'*.[672]

Q-COMP acknowledged that the AMA guides do not measure pain. They also acknowledged that a worker with a permanent impairment of zero under the scale can still be in a lot of pain and a worker with a larger permanent impairment with not much pain. Q-COMP identified that:

> *…one of the things that common-law type damages do is try to put the person in a position that they would have been in but for the injury. So it is very much dovetailed to the person's individual circumstances.*[673]

The Australian Lawyers Alliance agreed that impairment does not equal disability. They advised:

> *I do not think that it can seriously be argued by anyone who has a reasonable understanding of how impairments are carried out that an impairment level in any way reflects what a person's actual disability is in terms of the type of work that they can perform. The concern that we have is that, if a threshold were to be introduced using an impairment basis, it would discriminate very unfairly against workers in heavier type occupations and industries. It also discriminates against age. Perhaps the easiest example I can give is that of an 18-year-old concert pianist and a 65-year-old labourer who both lose their left pinkie fingers. It can quite easily be seen by anyone, I think, that the impact of that injury is very different on each of them in terms of their future working life. However, in terms of impairment they have exactly the same impairment level. It does not take into account what we as normal, caring, human beings would see as important. It would in my view be very arbitrary.*[674]

The difference between 'impairment' and 'disability' is most obvious in cases of psychological injuries. As an example, the Queensland Teachers' Union advised the Committee:

> *Most psychological injuries, certainly within the teaching area, are between two per cent and five per cent. Some of those are people who have gone back to work. The two per cents tend to be those who go back to work. Frequently we will see people who get only a five per cent permanent impairment who will never work again because of some incident in their workplace.*

[672] Submission 61: 23
[673] Ms Woods, Transcript, 11 July 2012: 5
[674] Mr Worsley, Transcript 27 August 2012: 2

> *The most common situation we will see is a teacher who has been attacked in some way or assaulted in some way by a student or a group of students who simply cannot walk through the door of a teaching institution. So they will never work again, but they get only a five per cent permanent impairment because that is the way that the system of medical assessment of permanent impairment actually rolls it down*.[675]

Many other submissions and witnesses from the hearings emphasised the difference between disability and impairment. For example, the Melanoma Patients Australia advised the Committee:

> *… asbestos disease permanent impairment levels are very difficult. Asbestos disease is a late onset injury. Impairment levels move over a long period of time. They cause pain which is not easily measured on the impairment level scheme. The second point is that there was mention about a hearing loss type scheme for skin cancer claims. Like asbestos disease, it would be unworkable because these are late onset injuries. Workers do not have these injuries 12 months after retirement.*[676]

6.7 Impairment thresholds

The Committee heard many arguments for and against the introduction of an impairment threshold for access to common law.

6.7.1 Arguments for change – Impairment thresholds

Access to common law in Queensland is not without some restrictions in that the current scheme requires workers with a WRI of less than 20 per cent to make an irrevocable choice between receiving the statutory lump sum on offer or pursuing damages at common law.[677,678] Since 2009, a cap on individual claims of $175,000 for claims lodged on or after 1 July 2009 and $150,000 for claims lodged before 1 July 2009 is applicable. This cap applies separately to both statutory and common law claims arising from the same event.[679]

Many submissions considered that there was a need for a level of impairment threshold to be introduced in order to keep the workers' compensation fund financially viable.[680,681]

CCIQ considered that '*outcome in terms of the increase in premiums from $1.15 to $1.45 was largely seen as a result of the 2010 inquiry failing to address the issue of access to common law. Our members and businesses more broadly continue to highlight that unfettered access to common law is something that ultimately must be addressed*'.[682]

The HIA advised that they consider that having a minimum threshold provision would make the Queensland scheme more consistent with other jurisdictions.[683] Colonial Timber Products stated that '*the entry into the common law system is too easy for workers and seems to always result in a payout*'.[684] Hyne Timber considered the current access to common law for lesser injuries to be a major burden of the scheme.[685]

[675] Ms Drew, Transcript 31 October 2012: 37
[676] Mr Ryan, Transcript 16 November 2012: 20
[677] WorkCover Queensland. Irrevocable election, Glossary http://www.workcoverqld.com.au/home/glossary [5 February 2013]
[678] Submission 89: 7
[679] Department of Justice and Attorney-General, Question on Notice 3. 23 November 2012: 15
[680] Submission 68: 1
[681] Submission 90: 2
[682] Mr Behrens, Transcript 31 October 2012: 38
[683] Submission 60: 7
[684] Submission 40: 3
[685] Submission 107: 2

From those wanting to see the implementation of a threshold the majority recommended a WPI threshold of at least 10 per cent which will be in line with other states[686]; and others consider 15 per cent WPI should be introduced for common law claims.[687,688,689,690,691,692,693,694] The Australian Meat Industry Council advised the Committee that:

> *All we are doing is actually gifting them a large amount of money… It is actually becoming endemic in the system, that you do not actually have to have an impairment to get access to a common law claim. It is our belief that there should be an impairment threshold and that that threshold should be set at 15 per cent.*[695]

Bundaberg Sugar believes that injured workers should receive appropriate compensation and some rules should be placed on who can use the common law process and a 20 per cent impairment threshold should be set.[696]

Master Builders considered that '*a low WPI percentage threshold would deliver a 25 percent reduction in common law claims by workers who have recorded a 0 per cent WPI*'.[697]

Timber Queensland considers that *'a permanent impairment assessment automatically occur once the injury is assessed as stationary and stable, and associated damages paid automatically'.*[698] The Queensland Hotels Association (QHA) considers *'a working group could be established to determine at what level a threshold could be introduced'*.[699]

Some submitters consider that injured workers (in some instances) can be re-trained for other types of work and may have the capacity to earn an income without returning to their pre-injury employment. For example, the Electrical Contractors Association stated in the hearing:

> *I just want to respond to what Pat said in that I have had personal experience with a friend of mine many, many years ago through the workers compensation scheme who was working for a government department on the roads and suffered a serious back injury. In terms of his process and what he has been retrained to do through that - and this is many years before this legislation was in place - he was completely retrained and his capacity for earnings actually increased compared to his previous career path. So I think we need to be careful about the ultimate effect of saying can someone never earn an income again because of the injuries they sustained. Some workers are in that boat absolutely, and we need to take care of them. However, other people, such as Pat's example, can retrain and their earnings may increase over that period of time.*[700]

[686] Submission 56: 2
[687] Submission 47: 2
[688] Submission 107: 2
[689] Submission 206: 8
[690] Submission 57: 2
[691] Submission 92: 3
[692] Submission 97: 3
[693] Submission 115: 2
[694] Submission 142: 2
[695] Mr Goode, Transcript 31 October 2012: 18
[696] Submission 50: letter
[697] Submission 191: 7
[698] Submission 29: 9
[699] Submission 45: 6
[700] Mr O'Dwyer, Transcript 31 October 2012: 11

The Committee asked the witnesses for suggestions on how common law impairment thresholds could be addressed. The Queensland Teachers' Union considered that the assessment of permanent impairment could perhaps be updated using the Fifth Edition of the AMA guide (currently the Fourth edition is used). They also suggested that:

> *WorkCover could certainly come up with its own scales. It need not be attached to the American Medical Association guides. The WorkCover regulations do have a set of scales in them which over time have become more and more general. They were originally more specific in that, for example, a broken leg gives you X percentage. It is now a much more generalised leg injury and gives you a range rather than a specific. So that is an alternative - that is, WorkCover goes back to relying on its regulations rather than the AMA guides.*[701]

Haycroft Workplace Solutions advised:

> *We have noticed, in our dealings with common law claims, that we have no problem when there is an injury and someone has a fairly significant impairment. The frustration, at the moment, is if someone has a zero per cent impairment and they can still take that claim to a common law aspect. An injured worker goes through the statutory phase and they return to work, then suddenly they do not feel that they have been remunerated well enough and they can still go and start a common law claim on this thing. At the moment, there is two, three, four - I do not know how many around, but it seems to be clogging up that aspect of the common law system. If you have been through an independent doctor and then through a MAT and they have both said zero, why are you still able to then go and ask for a common law negligence claim? That is the main reason why. I suppose it is a frustration from our side of the business and we are seeing it with our clients in the industries. The structure that they have over in WA - and I think it is very similar in Victoria - is that it is a 15 per cent impairment before you can have that triggered to do a common law claim. Obviously, 15 per cent is quite a lot, but at least it is a starting point.*[702]

The Australian Sugar Milling Council observed that:

> *…one of the problems that we have encountered is that common law settlement is easy to access. In our case they mostly come back into the workforce and the settlement that the person receives is seen by some in the workforce as a reward for having got themselves injured. The other problem that we see with common law at the moment is that the injured worker does not get a very significant payout once other payments have been taken from the settlement that is offered and any process that gave the injured worker a greater percentage of the settlement would be encouraged by us.*[703]

[701] Ms Drew, Transcript 31 October 2012: 38
[702] Mr Haycroft, Transcript 16 November 2012: 19
[703] Mr Warren, Transcript 31 October 2012: 38

6.7.2 Arguments against change – Impairment thresholds

Currently, an injured worker is able to access common law with or without a permanent impairment assessment. The difference between a 0 per cent WRI and no WRI is explained by Q-COMP as follows:

> ***No work related impairment*** *– the claimant does not pursue statutory compensation and proceeds directly to common law. Either no assessment of permanent impairment is conducted and therefore the degree of work related impairment is unable to be assessed, or the information is not available through the insurer's data submission to Q-COMP.*
>
> ***Zero per cent work related impairment*** *– the claimant is assessed for a permanent impairment when the injury is stable and stationary but is found not to have any permanent impairment resulting from the injury. The work related impairment is therefore calculated at 0 per cent.*[704]

The majority of arguments against an imposition limits to common law access based on an impairment threshold is centred around fairness.

The Bar Association opposed '*the imposition of a threshold based on a WPI (or like) assessment*' as they consider that '*it is not designed to measure work disability, and is unfair*'.[705] The Bar Association provided a list of reasons why they opposed the introduction of thresholds, even a zero per cent threshold including:

- *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.*
- *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.*
- *The introduction of thresholds on common law damages claims has not, in other jurisdictions, resulted in lower premiums for employers*
- *The introduction of thresholds harbours the tendency to shift the focus of disputes to the MAT, which is ill-equipped to deal with such matters.*
- *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.*[706]

[704] Q-COMP Queensland workers' compensation claims monitoring June 2012: 29 http://www.qcomp.com.au/media/223530/Qld%20workers%20compensation%20scheme%20monitoring%20-%20June%202012.pdf [8 April 2013]
[705] Submission 61: 24
[706] Submission 61: 20

The QLS did not support the introduction of an impairment assessment threshold for making a common law claim, for various reasons including:

- *the current threshold requirement for succeeding in a common law claim is that the employer must have been negligent;*
- *the impact of an access threshold on the deterrent effect of a common law claim is to send a message that some negligence in workplace health and safety is permissible by implying that some injuries are more negligently caused than others;*
- *currently there are three injury scales for assessing injuries in workers' compensation claims (WRI – work related impairment, WPI – whole person impairment and ISV – injury scale value), which are not consistent and can produce greatly varying results , ie a 4% limb impairment may translate to a 0% whole person impairment; and*
- *the introduction of assessment thresholds in other jurisdictions has increased rates of disputation, elongating periods injured workers remain on benefits and increasing costs. The capacity in Queensland to support greater rates of disputation of impairment assessments through the Medical Assessment Tribunals without significant delay is highly doubtful.*[707]

Q-COMP agreed that any changes to the common law threshold would impact on the MAT. They stated that:

> *A potential issue in relation to putting a common-law threshold is that, if you use the MAT system in order to arbitrate those differences of opinion about whether or not you have crossed whatever that line is, we have exhausted the complete supply of medical specialists that are appropriate to serve on the tribunals in all of Queensland. So we currently enjoy an eight-week waiting period and that must necessarily then just expand out endlessly because there are no more specialists to be had.*[708]

Q-COMP advised that the number of claims has decreased from pre-2010 level and suggested that workers below threshold impairment (if introduced) would contest the impairment.[709] This could result in an increase workload for the MAT who currently deal with disputed impairment assessments. Q-COMP also has concerns that '*there may not necessarily be more specialists available in Queensland with appropriate qualifications to sit on tribunals*' even if the number of tribunals were to be increased.[710]

[707] Submission 163: 3
[708] Ms Woods, Transcript 11 July 2012: 4
[709] Submission 93: 18
[710] Submission 93: 18

Many submissions expressed concern that an introduction of a percentage impairment threshold will result in many injured workers assessed with zero per cent impairment ineligible for compensation (and unable to continue to work in the same capacity). More specifically, if the injury has been caused by an employer's negligence, it was considered inequitable that the injured worker is then unable to access common law. WorkCover highlighted that there has been an increasing proportion of claims lodged with an impairment of zero per cent[711] although there has been a decrease in the proportion of claims with no WRI i.e. without an assessment.[712] However, no WRI claims represent only seven per cent of finalised claims compared to claims with zero per cent WRI which represents 26 per cent of finalised claims. Around 40 per cent of claims with no WRI are withdrawn.[713]

The ETU argued against the introduction of any form of threshold on the basis that impairment does not equal disability. They advised that:

> *We believe that to introduce the threshold with a link to the work related impairment would be an incorrect step and it would disadvantage the injured worker and their family and it would have knock-on effects in the community.*[714]

The QTU argued that when considering WPI, percentage of impairment is in relation to the whole body and therefore percentages can be quite small but still have a big impact. They considered that:

> *They are very small assessments of permanent impairment, so whatever threshold is set is going to be just arbitrary and that is what has been done in other states. I will make the point that over the years the Queensland workers compensation system has been quite responsible in managing those claim costs, so the average claim cost in Queensland is at a sustainable level.*[715]

TressCox Lawyers highlighted that no other form of compensation imposes a permanent impairment threshold (e.g. someone injured in a motor vehicle accident does not have to show a permanent impairment over a certain threshold to access damages).[716] Some submitters consider that the '*common law systems promotes a safe work environment as it is a major deterrent in relation to unsafe work practices, policies and procedures*'[717,718] and the implementation of thresholds allow for unsafe working practices to continue.[719]

Slater and Gordon advised:

> *There is absolutely no evidence to suggest that by introducing a threshold they will actually achieve a lower premium. What we actually do know is that if you have employers who have poor safety records and high time lost injuries they do find that they do have an increase in their premiums. It would seem to make sense that if you are looking at how to restrict injuries happening in the first place you are going to achieve the result that both the employer is looking for as well as everybody in this room. No-one wants to see people getting injured at work.*[720]

[711] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 28
[712] Q-COMP Queensland workers' compensation claims monitoring June 2012: 29 http://www.qcomp.com.au/media/223530/Qld%20workers%20compensation%20scheme%20monitoring%20-%20June%202012.pdf [9 April 2013]
[713] Q-COMP Queensland workers' compensation claims monitoring June 2012: 33 http://www.qcomp.com.au/media/223530/Qld%20workers%20compensation%20scheme%20monitoring%20-%20June%202012.pdf [9 April 2013]
[714] Ms Rogers, Transcript 31 October 2012: 11
[715] Ms Drew, Transcript 31 October 2012: 37
[716] Submission 187: 1
[717] Submission 32: 5
[718] Submission 35: 3
[719] Submission 141: 3
[720] Ms Simpson, Transcript 14 November 2012: 10

The Committee received many submissions from claimants who highlighted that they were able to pursue common law claim because their injury resulted from their employer's negligence (see submissions[721]); these submitters consider that the assessment of zero per cent impairment does not reflect their injury and inability to return to work.

The Australian Lawyers Alliance agreed and stated that *'thresholds are also fundamentally inequitable because impairment does not equate to work disability'.*[722]

The Committee was provided with a real life example from an injured worker, Mr Wendell Moloney. He explained that he was an apprentice when he fell from a power pole injuring his right arm and hand. He was assessed as having a 7.5% WRI. He advised the Committee that:

> *It might sound trivial, but when it is your right arm and hand and your trade revolves around your ability to climb power poles this is devastating*.[723]

Mr Moloney received compensation through a common law claim which he feels does not fully compensate him for future losses but it helped with medical expenses and gave him time to find another job, even though it paid less.[724]

Mr Moloney observed that:

> *There already is a threshold. It is called the law of negligence and it is regulated by our courts. If no negligence is established, no damages are awarded. If there is an issue around greedy profiteering lawyers then instead of punishing injured workers on their behalf government should restrict the ability of law firms to advertise so aggressively. To remove an injured worker's access to fair compensation when injured because of their employer's negligence is to discriminate against workers in general. A patient injured through a doctor's neglect can seek fair and just compensation as can the passenger in a car injured by a driver who runs a red light. Why should an injured worker be treated any differently?*[725]

The Queensland Nurses' Union strongly opposes the introduction of common law thresholds as '*some of their members remain unable to continue in their role even in cases where impairment is assessed at 0 per cent. This is because of the inherent requirements of nursing work which includes manual handling'*. They also stated that '*their members continue to experience significant pain and loss of mobility despite being assessed as having a zero per cent permanent impairment*'.[726]

Some submitters consider that the introduction of an impairment threshold would put the financial health of the existing scheme at risk[727] and would deny access to common law for workers negligently injured by the carelessness of others.[728] Others stated that '*it would, for the first time, make the Queensland scheme a pension based scheme. That type of scheme has demonstrably failed in other States'*[729,730] and has increased costs and frustration for employers.[731]

[721] Submissions 6, 10, 11, 14, 15, 16, 17, 18, 23, 24, 25, 28, 77, 172
[722] Submission 188: 2
[723] Mr Moloney, Transcript 16 November 2012: 14
[724] Mr Moloney, Transcript 16 November 2012: 14
[725] Mr Moloney, Transcript 16 November 2012: 14
[726] Submission 74: 7
[727] Submission 46: 1
[728] Submission 12: 4
[729] Submission 46: 1
[730] Submission 36: 1
[731] Submission 104: 8

QLS and KM Splatt & Associates[732] highlighted the increasing number of common law claims in Victoria as an example:

> *The recent Victorian scheme claims experience reinforces the Society's long-held position that the imposition of thresholds in order to access common law claims entitlements:*
>
> - *does not necessarily impact upon common law claims rates*
> - *will not, going forward, result in the removal from the scheme of that cohort of claims which presently meet the claims profile which could be excluded by the imposition of a threshold.*[733]

Although the Bar Association of Queensland agrees that '*the change in the process of assessment from WRI to WPI is justified to promote national consistency'*, they *'strongly caution against using WPI as a measure of disability.* They stated that *'the Guides to the Evaluation of Permanent Impairment published in the Journal of the American Medical Association include an express caveat on the use of WPI as an assessment of disability*'.[734] The QLS considers that the use of injury scale values (ISV) has been an effective cost containment strategy beneficial than an access threshold. Actuarial data has shown that '*general damages have decreased by 15 per cent, which has driven strong reductions in the average size of overall common law damages*' since ISV ratings were used.[735]

The Department advised that the three most and least common types of claims that progress to common law from statutory claims are consistent each year. Of the 4,013 common law claims in 2011-12, the three most common types of claims that progress to common law are:

- strain/sprain - back (581),
- strain/sprain - other (543),
- diseases of the musculoskeletal system - back (532).

Although the three most and least common types of claims can vary each year for those claims proceeding directly to common law, the claim types were similar in 2011-12. Most common types were:

- strain/sprain - back (73),
- diseases of the musculoskeletal system - back (63),
- diseases of the musculoskeletal system - other (57).

The three least common types of claims to progress to common law from statutory are deafness (7), foreign body (12) and mesothelioma/asbestosis (12).[736]

As highlighted by many submitters and witnesses, sprains or muscular strain injuries often have low WPI or WRI but can easily result in long term inability to commence work.

Q-COMP submitted that there will be a need to have more MATs if a permanent impairment was introduced as workers assessed below the threshold could be likely to contest the impairment. They believe that '*the current eight week waiting period for a tribunal will expand as there are no more doctors to do the work'*.[737]

[732] Submission 66: 3-4
[733] Submission 239: 3
[734] Submission 61: 47
[735] Submission 195: 7-8
[736] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 20
[737] Submission 93: 18-19

6.8 Committee comments – impairment thresholds

After considering all of the arguments for and against imposing an impairment threshold, the Committee considers that an impairment threshold should not be imposed.

The Committee believes that the extent of the 2010 amendments in addressing the increase in common law claims is yet to be fully realised as common law claims can be lodged up to three years from date of injury. As such, the Committee believes that there should be no changes to the current system.

The Committee considers that the fact that in order to have a successful common law claim, employer negligence needs to be proven in the courts, provides some protection.

The Committee recognises that imposing thresholds on accessing common law rights would improperly remove rights from one group of citizens that are available to other citizens. Imposing thresholds on WPI would break the nexus between workers' compensation and the ability of injured workers to perform their pre-injury employment. The Committee recommends retention of the existing provisions relating to access to common law.

The Committee notes that the term zero impairment has created a perception that claimants are being paid when it is suggested there is nothing wrong with them. This is not the case, however, because zero WPI does not mean the claimant is not suffering from some disability or pain. The Committee has found that there is confusion over the terms which provide an inadequate explanation or representation of loss incurred by the claimant.

Recommendation 27

The Committee recommends that the existing provisions relating to access to common law be retained.

6.9 'No-win-no-fee' legal fee arrangements

The no-win-no-fee arrangements were introduced in response to a growing community concern that access to legal justice was beyond the reach of many without the financial means to pay for it. Access to funding from Legal Aid is limited to those on low incomes or Centrelink benefits and is rarely available for civil actions (other than for child protection proceedings, domestic/family violence matters, and discrimination claims).[738]

6.9.1 Definition and relevant legislation

The legislation governing conditional costs agreement and no-win-no-fee arrangements is the *Legal Profession Act 2007*.

Section 300 of the *Legal Profession Act 2007* defines a conditional costs agreement as:

> *…a costs agreement that provides that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate, as mentioned in s323, but does not include a costs agreement to the extent to which s325(1) applies*.

[738] Legal Aid Queensland. Can I get legal aid? Factsheet Jan 2012 http://www.legalaid.qld.gov.au/publications/Factsheets-and-guides/Factsheets/Documents/FS-means-test-jan2012.pdf [25 February 2013]

The Legal Services Commission explains that a 'no-win-no-fee' costs agreement means *'that a lawyer agrees with a client not to charge any fees for their services unless and until the client 'wins' their case. The lawyer agrees to take the risk that the case might lose – and if this happens, the lawyer does not charge any fees. The client agrees to pay the lawyer if the case succeeds (typically, but not always, out of the money recovered from the other party)'*. However they also advised that the law firm is still entitled to recover their outlays (also known as disbursements), which are typically monies spent in pursuing the claim and include court filing fees, the cost of expert reports and barristers' fees.[739]

Once a lawyer and client agree to proceed with a 'no-win-no-fee' claim, the *Legal Profession Act 2007* imposes certain requirements, one of which is an agreement that sets out:

- the circumstances that constitute a 'successful outcome' of the matter;
- provision for outlays to be paid (possibly with interest) irrespective of the outcome of the matter; and
- provision for payment of an 'uplift fee' (further details on an 'uplift fee' are outlined below).

This agreement must be in writing; in clear plain language; and signed by the client. It must also contain a statement that the client has been informed of his/her right to seek independent legal advice before entering into the agreement. Lastly, the agreement must contain a cooling-off period of not less than five clear business days during which the client, by written notice, may terminate the agreement.[740]

The Legal Services Commission advises that '*the agreement must be read carefully and the terms understood and, if in doubt, the client should seek independent legal advice*'.[741]

Section 347 of the *Legal Profession Act 2007* (LPA) provides that the maximum amount of legal costs (inclusive of GST) that a law practice may charge and recover from a client for work done in relation to a speculative personal injury claim must be worked out under the costs agreement with the client for the claim, or under the LPA. Section 347 is designed to ensure that a client is not financially worse off after pursuing the claim[742] so costs should also be stated in the agreement.

6.9.2 Discussion – no-win-no-fee arrangements

There were many criticisms of the "no win no fee" services or advertising to injured workers in many submissions. For example, Robertson Brothers Sawmills advised that '*lawyers are able to offer "no win no fees" services to WorkCover claimants knowing that there will be a settlement regardless of whether it's a legitimate claim or not. There is no "no win no fee" service for employers*'.[743] Kemp Meats Pty Ltd considered that the '*advent and extreme advertising of no-win-no-pay solicitors and the stories other spread about how easy it is to get a common law claim, with the employer left to disprove any false or misleading claims ….*'.[744]

[739] Legal Services Commission: 'No-win-no-fee' costs agreements (version 2) 6 December 2012: 3 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/108580/No-win-no-fee-costs-agreement.pdf [25 February 2013]
[740] Legal Services Commission: 'No-win-no-fee' costs agreements (version 2) 6 December 2012: 5 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/108580/No-win-no-fee-costs-agreement.pdf [25 February 2013]
[741] Legal Services Commission: 'No-win-no-fee' costs agreements (version 2) 6 December 2012: 3 & 7 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/108580/No-win-no-fee-costs-agreement.pdf [25 February 2013]
[742] Legal Services Commission: 'No-win-no-fee' costs agreements (version 2) 6 December 2012: 6 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/108580/No-win-no-fee-costs-agreement.pdf [25 February 2013]
[743] Submission 21: 2
[744] Submission 158: 1

One submitter advised of a personal experience '*where a good employee who did not wish to claim without talking to the employer first was told by his Lawyers that he could not do that and even if successful the impact on the Company was $950. He was awarded $270,000 for falling off a collapsed chair*'.[745] Rio Tinto suggested that a broader review of the common law claims in particular of the lawyer advertising protocols should be pursued.[746] The QHA noted that although they are *'not aware of the inter-action of advertising and claim trends'*, limiting advertising of no-win-no-fee could be worthy of consideration.[747]

However, the Queensland Law Society (QLS) suggested that '*lawyers who conduct speculative fee arrangements do for their clients every day*' so '*lawyers who undertake that type of litigation do not do it lightly*'.

> *There is a significant risk involved in the conduct of litigation. The practice of law is an expensive one, as you would well know, and lawyers act as a very effective filter in relation to claims at the front end in terms of claims that will proceed and claims that will not proceed. Lawyers simply do not undertake litigation claims that have no realistic prospect of success…*[748]

Cam Schroder Lawyers advised that '*a rule of thumb among personal injuries lawyers is that the claim must be worth $80,000.00 or it is not worthwhile even taking the case on'.*[749] The Australian Lawyers Alliance added:

> *The other issue that is particularly relevant to workers compensation claims is that we have another element in terms of the fraud provisions inside our legislation. So not only does the lawyer have to ensure that the merits of the case are sufficient that the case can succeed, but if they fall foul of the fraud provisions then there are disastrous consequences. I think Queensland is the state that has the harshest provisions in fraud—that is, if you are convicted of fraud as defined in the WorkCover legislation, all of your entitlements cease, past and future. So for the lawyer who is putting all of that fee on the line, it is all over for everybody. It is about as tight as it can get and I think it is a good thing for the scheme*.[750]

The Legal Services Commission confirms that '*law firms typically offer no win - no fee terms only in cases where there is, or is likely to be, money available to pay the costs after the matter is settled*'.[751]

Section 420 of the *Legal Profession Act 2007* outlines that '*charging excessive costs in connection with the practice of law'* is a conduct capable of *'constituting unsatisfactory professional conduct or professional misconduct'*. The Legal Services Commission drew attention to the fact that *'the 50/50 rule merely prescribes the maximum fees legal practitioners are entitled to charge in speculative personal injury matters and they must ensure having complied with the rule that their fees are in any event fair and reasonable'.*[752]

[745] Submission 31: 4
[746] Submission 41: 5
[747] Submission 45: 6
[748] Mr Brown, Transcript 14 November 2012: 18
[749] Submission 37: 2
[750] Mr Morrison, Transcript 14 November 2012: 18
[751] Legal Services Commission 'No-win-no-fee' costs agreements (version 2) 6 December 2012: 3 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/108580/No-win-no-fee-costs-agreement.pdf [25 February 2013]
[752] Legal Services Commission 'Guidelines for charging fees in speculative personal injury matters ': 2-3 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0003/97824/guidelines-for-charging-fees-in-speculative-personal-injury-matters.pdf [25 February 2013]

Associate Services Pty Ltd advised that no-win-no-fee should not be confused with the American concept of contingency fees, '*where the lawyer charges based on a percentage of what is recovered from the claim*'. They advised that *'a solicitor can only charge for the actual work that is done on a file, irrespective of outcome'*.[753]

There were also some concerns that the no-win-no-fee process increases the claim rates. However, the QLS advised:

> *There is no evidence of that. The Law Society has looked at this issue very closely over a lengthy period of time, and there is no correlation between advertising and claims rates. It is a common misconception. It is a view that is peddled by industry and insurers. In fact, it was what underpinned the Ipp review many years ago that the Howard government undertook. That review was told to simply accept that there was a problem with litigation, there was a claims explosion, and that fundamental underpinning was simply not borne out by the evidence.*[754]

The QLS outlined in their supplementary submission that:

> *…conditional costs agreements (also known as speculative fee agreements or 'no win, no fee' costs agreements) are a type of contract between a lawyer and their client for the provision of legal services. Such contracts generally provide that if a claim is unsuccessful, the client does not have to pay legal fees and outlays expended to the law firm*'.[755]

The QLS considered that *'agreements such as no win / no fee are often seen as a beneficial access to justice initiative which permits impecunious injured workers to exercise their legal rights'.*[756]

6.9.3 Suggested improvements – no-win-no-fee arrangements

Chris Trevor and Associates made a suggestion on how to limit legal fees in workers compensation cases:

> *…our suggestion is that a sliding scale of professional costs should be implemented for common law claims e.g. $20,000.00 for a claim settled for under $100,000.00 net. We are aware of a recent example when one of the better known firms carrying out personal injury work in the state attempted to charge a client $80,000.00 on a settlement of $300,000.00 when the matter had progressed only to the early stages of litigation with a compulsory conference and mediation being conducted. If there were restrictions on legal costs the client in this example would have been able to settle his claim at an earlier stage saving costs to the client and WorkCover Queensland. In the example given above our firm would not have charged more than $40,000.00 for professional costs. This huge disparity in legal costs being charged by firms is undermining the scheme and damaging the reputation of the legal profession. If the goal of the scheme is truly to protect injured workers a sliding scale of professional costs should be implemented without delay.*
>
> *The other alternative we suggest a ban on personal injury advertisements. We noticed that some of the larger firms are still actively encouraging claims by advertising aggressively despite the restrictions in the Personal Injuries Proceeding Act 2002. Aggressive television campaigns during the 2012 Olympic coverage which make a pretence of complying with the Personal Injuries Proceeding Act 2002 are promoting claims. The State Government should ban personal injury advertising.*[757]

[753] Submission 76: 5
[754] Mr I Brown, Transcript 14 November 2012: 18
[755] Submission 195: 9-10
[756] Submission 195: 10
[757] Submission 108: 4

JBS observed that:

> *Whilst Q-COMP, WorkCover and ASIEQ have continued to promote injury management strategies, the litigious culture encouraged by many plaintiff law firms instead takes the focus away from rehabilitation. It is well known that that injured workers have at times been discouraged from pursuing vocational options until their common law claim is resolved. Furthermore, insurers often note a change in attitude in injured workers after they start consulting a lawyer. Severe penalties should be introduced to stop lawyers from advising their clients not to engage in vocational rehabilitation.*
>
> *Plaintiff lawyers also embark on unscrupulous marketing methods such as advertising in medical centres and cold calling workers who have attended certain medical or health practitioners. This type of marketing should be banned and a more ethical set of professional standards should be established. Some review of these professional standards occurred after the Kennedy Inquiry but unfortunately, stricter legislative controls are now needed.*[758]

6.9.4 Risks and costs of no-win-no-fee arrangements

There are some risks associated with 'no-win-no-fee' agreements. Section 300 of the *Legal Profession Act 2007* allows a law firm to charge an 'uplift fee'. The 'uplift fee' is an additional fee over and above fees otherwise payable. This fee may be stated in dollar terms is usually calculated as a percentage (excluding outlays) up to 25 per cent. According to the Legal Services Commission, '*the lawyer must give the client an estimate of what the uplift fee is likely to be, and explain what they will take into account in deciding how much the fee will be'*.[759] They also advised that people who change law firms in the course of a claim should be aware that both firms may charge a fee. They stated:

> *Usually, the firm that acts first will release the file to the second firm with an agreement from the client, or the second firm, to pay their fees once the matter is finalised. However, not all firms will agree to this arrangement'.* [760]

The Committee was also advised about the '50/50 rule' at the hearing with the legal profession. According to the QLS, *'this rule limits the amount of legal fees which can be recovered by a lawyer pursuant to a conditional costs agreement in personal injuries matters'*. They stated:

> *The original rule was introduced by the Queensland Law Society by Council ruling on 22 August 2002 to respond to community concern about the outcome for injured people who received small payments of compensation but had to pay fees for the services of their lawyer. The ruling provided that the fees that a lawyer may recover from a client in a speculative personal injury matter could be no more than 50% of the settlement amount after the payment of outlays (ie medical report fees etc) and refunds to government departments (ie Medicare, Centrelink etc). The ruling did not operate as an American-style contingency fee, permitting a lawyer to charge 50% of the settlement funds. Rather, it capped the amount of money lawyers could recover from their clients, depending on the manner in which such fees were calculated under the relevant agreement'.*[761]

[758] Submission 160: 6
[759] Legal Services Commission: 'No-win-no-fee' costs agreements (version 2) 6 December 2012: 5 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/108580/No-win-no-fee-costs-agreement.pdf [25 February 2013]
[760] Legal Services Commission: 'No-win-no-fee' costs agreements (version 2) 6 December 2012: 7 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/108580/No-win-no-fee-costs-agreement.pdf [25 February 2013]
[761] Submission 195: 11-12

The Legal Services Commission brochure explains that the '50/50 rule' puts an upper limit on the professional fees (including GST) that a law firm may charge. The maximum a law firm can charge (including GST) is one half (or 50 per cent) of the settlement amount after refunds (e.g. to Medicare or Centrelink) and outlays have been deducted.

The formula used is roughly stated as follows:

Maximum fees = [settlement amount – (refunds + disbursements) ÷ 2][762]

6.9.5 No-win-no-fee advertising

The Queensland Hotels Association (QHA) called for 'no-win-no-fee' advertising to be limited or banned as one way of curbing growth in common law applications.[763] Some legal professions including Chris Trevor and Associates[764] and Associate Services Pty Ltd recommended that a 'complete ban on television, radio and bill board advertising for all lawyers' be introduced to contain common law.[765]

Restrictions on lawyer advertising have been among many reforms in the past few years. Rule 36 of the Australian Solicitors Conduct Rules covers solicitors' advertising in general. It provides as follows:

> *36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:*
>
> - *false;*
> - *misleading or deceptive or likely to mislead or deceive;*
> - *offensive; or*
> - *prohibited by law.*
>
> *36.2 A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words "accredited specialist" or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional body.*[766]

In addition, the Australian Consumer Law (Cth), ACL prohibits misleading or deceptive conduct (section 18), false or misleading representations about services (section 29) and misleading conduct regarding the nature etc. of services (section 34). These provisions also apply as a law of Queensland – see Part 3 *Fair Trading Act 1989*.[767]

[762] Legal Services Commission: 'No-win-no-fee' costs agreements (version 2) 6 December 2012: 6 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/108580/No-win-no-fee-costs-agreement.pdf [1 March 2013]
[763] Submission 45: 6
[764] Submission 108: 4
[765] Submission 76: 2
[766] Queensland Law Society. Ethics Centre. Australian Solicitors Conduct Rules (commenced 1 June 2012) http://ethics.qls.com.au/sites/all/files/u108/QLS_Australian_Solicitors_Conduct_Rules_2012.pdf [26 February 2013]
[767] The ACL replaced the *Trade Practices Act 1974* (Cth) applies in Queensland pursuant to Part 3 of the *Fair Trading Act 1989* (Qld): see Queensland Law Society, http://ethics.qls.com.au/faq/what-are-rules-about-solicitors-advertising-generally.html

Advertising in relation to personal injuries claims is regulated under the *Personal Injuries Proceedings Act 2002* (PIPA). Section 66 of PIPA provides that only the following advertising of personal injury services by a practitioner or another person, whether or not the other person is acting for a law practice, is permitted:

- the publication of a statement that states only *the name* and *contact details* of the practitioner/practice plus information about the practitioner's/practice's *area of practice or specialty*; and
- the statement is published by an '*allowable publication method*', defined in section 65. Such method includes (but is not limited to) publication in the print media (including a newspaper, periodical, directory etc.) or reproducing the statement on a website that is an electronic version of the printed publication (such as an online version of the *Courier Mail*). It also includes a public exhibition of the statement (e.g. on a building sign); or display of the statement on documents, such as flyers, thrown into or left on premises or shown on a receipt for goods.

PIPA prohibits the inclusion of statements in advertisements for personal injury services other than the "allowable content" and, accordingly, prohibits:–

- *Photographs or images of any kind, including photographs of practitioners, their offices, and local landmarks;*
- *Statements amounting to self- promotion of the practitioner or law firm such as "We have a reputation for getting great results" or "Our caring, professional yet tenacious approach ensures success" (and other examples);*
- *Logos which are based on legal images or themes, slogans or mottoes such as "industry leaders" or "20 years experience";*
- *Statements about the conditions under which the practitioner or law firm is prepared to provide personal injury services including, but not limited to:*
  - *'no win, no fee'*
  - *'competitive rates'*
  - *'free initial consultation'*
  - *'home consultations by arrangement' and*
  - *'personal and thorough service'.*[768]

JBS called for severe penalties to be introduced to stop lawyers from advising their clients to not engage in vocational rehabilitation. They also called for stricter legislative provisions to curb marketing and touting practices of lawyers.[769]

[768] Legal Services Commission. A Guide to Advertising Personal Injury Services, version 3, June 2009: 2-3 http://www.lsc.qld.gov.au/__data/assets/pdf_file/0014/106331/guide-to-advertising-personal-injury-services.pdf [26 February 2013]
[769] Submission 160: 6

Associate Services Pty Ltd considers several advertisements circumvent current regulations by '*not directly mentioning 'personal injury' or 'compensation' but contain indirect references such as images of workers in hard hats*'. There are also advertisements '*that flout the restrictions openly advertise legal services for compensation*'. They suggest:

> *…simplify the current regulation so that it is not necessary to determine whether a particular advert pertains to 'personal injury' or not by introducing a ban all lawyer advertising on the television, radio, bill boards and print media.*[770]

Section 67 of the PIPA bans touting. Section 67(1)(a) outlined that *'a prohibited person must not solicit or induce a potential claimant to make a claim';* examples include personnel attending an accident scene or the hospital after an incident possibly involving personal injury (such as tow truck drivers, police officers, ambulance officers, doctors or hospital staff).

Section 67(1)(b) states that *'a person, other than a prohibited person, must not solicit or induce in a way that would be unreasonable in the circumstances, a potential claimant involved in the incident to make a claim'*. The example given in section 67 is a nearby resident who helps the potential claimant immediately at the scene of the incident, and takes it upon himself or herself to contact a law practice and insist the injured person speak with a practitioner at the practice about a possible claim. The maximum penalty for touting at the scene is fine of up to $33,000.

Other forms of touting are also prohibited by section 67(2)-(5). These relate to the giving of contact details of a law practice to potential claimants by a wider range of persons than those prohibited from touting at the scene (above). Again, the maximum penalty is fine of up to $33,000.[771]

However the QLS assured the Committee that advertising is not adding to the cost of the Workers' Compensation Scheme. They advised that:

> *There is no evidence of that. The Law Society has looked at this issue very closely over a lengthy period of time, and there is no correlation between advertising and claims rates. It is a common misconception. It is a view that is peddled by industry and insurers. In fact, it was what underpinned the Ipp review many years ago that the Howard government undertook. That review was told to simply accept that there was a problem with litigation, there was a claims explosion, and that fundamental underpinning was simply not borne out by the evidence.*
>
> *There is no correlation between lawyers offering speculative fee arrangements for clients and claims rates. If there was, you would see trending upwards of claims. You do not see trending upwards of claims either in the workers compensation scheme or indeed in the motor vehicle accident scheme. I think that is a very clear indication of the fact that there is no correlation between claims and lawyer conduct.*[772]

6.10 Committee comments – no-win-no-fee arrangements

Despite the assurances of the QLS that there is no correlation between lawyers offering speculative fee arrangements and claims rates, the Committee remains concerned that these arrangements do, and will continue to, impact on the Workers' Compensation Scheme.

[770] Submission 76: 3

[771] Section 67A exempts a person from offending against this prohibition if the person is acting on behalf of a community legal service or an industrial organisation.

[772] Mr I Brown, Transcript 14 November 2012: 18

Whilst no-win-no-fee arrangements have merit, in that they provide access to the legal process to those who may not ordinarily be able to finance a legal case, the Committee has identified a number of interrelated areas of concern including:

- Advertising of these arrangements;
- Implications of the language used in describing these arrangements as 'no-win-no-fee'; and
- Conditions attached to these arrangements.

The Committee has concerns that the advertising of 'no-win-no-fee' arrangements may attract unsuspecting clients on the basis that it strongly suggests that they are not going to pay anything if they do not win. It therefore could encourage them to make a speculative claim. The reality is the term 'no-win-no fee' usually relates only to the solicitor's professional fees and the client may be responsible for paying the other party's costs, indemnity costs and out of pocket expenses.

The Committee considers that 'no-win-no-fee' should simply mean 'no-win-no-fee'. This means that there should be 'zero out of pocket expenses' for the claimant.

Whilst legislation requires disclosure information to be provided, the Committee considers that there is a risk that clients may not heed this information or they may not have the capacity to fully comprehend the legalities of the cost agreements.

The Committee has received assurances that the documentation provided to users of these services makes it clear they may be liable for the defendant's costs. However, claimants using these services may be in no position to bargain when it comes to negotiating costs, may not have capacity to bargain and may not know they can bargain.

The Committee had identified a further concern that once clients have signed up to no-win-no-fee arrangements they are unable to discontinue proceedings or change legal representatives without incurring substantial costs.

Of further concern to the Committee is the rule arrangements commonly known as '50/50 rule' that are meant to limit the amount that is able to be charged for litigation. Whilst this is meant to be the upper limit of professional fees (including GST) that a law firm may charge, the Committee is concerned that the '50/50 rule' has become a target for some lawyers who may be earning super profits from these types of claims.

The Committee acknowledges that these issues may go beyond the scope of the Workers' Compensation Scheme and may need to be examined in the wider context, however, the Committee's concern is the impact these issues may have on the scheme.

The Committee has considered a number of possibilities to limit the over charging that may be occurring. These options included:

- A sliding scale fee arrangement where legal services earn a proportion up to a reasonable amount, for example 50 per cent of the first $15,000, and then a lesser percentage thereafter, for example 20 per cent on fees above $15,000. This arrangement would recognise that there is a minimum cost that applies to mounting a legal case but eliminates the super profits from the system
- A reduction in the '50/50 rule' to a lesser amount. For example 30/70 or 25/75.

The Committee is interested in curtailing the super profits that are reportedly being derived from the 'no-win-no-fee' arrangements and the '50/50 rule' which provide the incentive to push the boundaries with advertising.

The Committee considers that the following areas need to be investigated further:

- whether 50 per cent is the appropriate limit; and
- irrespective of the limit set, whether all fees, charges and expenses should be included within that limit.

Recommendation 28

The Committee recommends that the Attorney-General and Minister for Justice investigate the issues of 'no-win-no-fee' arrangements and the '50/50 rule' with a view to curtailing the speculative nature of some claims.

Recommendation 29

The Committee recommends that the Attorney-General and Minister for Justice investigate the issue of portability of records associated with the 'no-win-no-fee' arrangements.

7 Whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment

Employers are able to self-insure if they meet certain requirements and are able to demonstrate financial capacity to fully fund future liabilities. Self-insurers must also be able to demonstrate their ability to manage health and safety, injury management and return to work arrangements or programs in addition to effectively managing workers' compensation. The WRCA provides for Q-COMP to manage the licenses and oversee the performance of self-insurers.

There are currently 25 self-insured employers in Queensland. As at 23 May 2013, these are:[773]

- Aged Care Employers Self-insurance Group
- Arnott's Biscuits Limited
- Arrium Limited
- Aurizon Operations Limited
- Australia and New Zealand Banking Group Limited
- BHP Billiton Limited
- Brisbane City Council
- CSR Limited
- Coles Group Limited
- Council of the City of Gold Coast
- JBS Australia Pty Limited
- Jupiters Limited
- Local Government Workcare
- Myer Holdings Limited
- Qantas Airways Limited
- Queensland Rail Limited
- Redland City Council
- Sucrogen Australia Pty Ltd
- Teys Australia Meat Group Pty Ltd
- The University of Queensland
- Toll Holdings Limited
- Townsville City Council
- Westpac Banking Corporation
- Woolworths Limited
- Xstrata Queensland Limited

[773] Q-COMP. List of Workers' Compensation Insurers http://www.qcomp.com.au/media/21305/selfinsurerlist.pdf [23 May 2013]

Many of the above self-insurers are national employers and as such, would be subject to requirement for self-insurance in each jurisdiction. Section 7.2 below outlines the comparison between jurisdictions and eligibility criteria as well as comments from submitters are addressed in section 7.3.

7.1 Eligibility in Queensland

Q-COMP may issue or renew a licence for a single or group employer to be a self-insurer if the employer meets the following criteria (as set out under section 71 *Workers' Compensation and Rehabilitation Act 2003*):

- The number of full-time equivalent (FTE) workers employed in Queensland is at least 2000.
- Occupational health and safety performance is satisfactory.
- The licence will cover all workers employed in Queensland.
- The employer has given Q-COMP an unconditional bank guarantee or cash deposit.
- The employer has reinsurance cover.
- All workplaces are accredited by Q-COMP, or if not are adequately serviced by a rehabilitation and return to work coordinator who is in Queensland and employed under a contract (the contract can be a contract of service).
- The employer has workplace rehabilitation policy and procedures.
- The employer is fit and proper to be a self-insurer.[774]

The FTE calculation is as follows:

1. The number is calculated using the total number of ordinary time hours of all workers with that employer during a continuous six month period in the year immediately before the employer applies for the licence or renewal (the six month period is chosen by the employer).
2. The total number of hours is then divided by 910 to identify the total number of full time workers, (910 is the equivalent of one person working 35 hours each week for 6 months/26 weeks).[775]

Employers wanting to self-insure must first pay a non-refundable fee to Q-COMP of $15,000 for single employers and $20,000 for group employers. Q-COMP then has up to six months to decide on the application. Licences are issued for up to four years with an initial licence for two years.

Once a self-insurance licence is issued, the employer must:

- take on liability for outstanding WorkCover claims before receiving their self-insurance licence which is assessed by actuaries appointed by the employer and WorkCover Queensland;
- pay an annual levy to Q-COMP;
- pay workers' compensable claims;
- resource and manage workplace rehabilitation;
- maintain adequate workplace health and safety systems and resources;

[774] Q-COMP. Self-insurance criteria http://www.qcomp.com.au/services/self-insurance-licensing/self-insurance-criteria.aspx [21 December 2012]

[775] Correspondence from Department of Justice and Attorney-General, to FAC dated 11 April 2013: 11

- commit financial and management resources to comply with the legislation and any other licence conditions imposed by Q-COMP;
- provide annual actuarial reports, and maintain bank guarantees and re-insurance;
- renew licence at least 90 days before the licence period ends.[776]

7.2 Jurisdictional comparison

New South Wales and South Australia has the highest number of self-insurers while the territories have the lowest (see Table 20).

Table 20: Comparison of self-insurance in all Australian jurisdictions[777]

State/Territory	QLD	NSW	VIC	SA	TAS	WA	ACT	NT
No of self-insurers	25	67	38	67	13	27	8	4
Eligibility criteria – number of full time equivalent workers	2000	500	N/A	200 set by WorkCover SA (legislation does not specify)	N/A	N/A	N/A	N/A
Other eligibility criteria	Long term financial viability Lodgement of bank guarantee $5 million or 150% of estimated liability	Long term financial viability	Financial statements and indicators dependent on industry sector	Net worth of $50 million or higher and other profitability measures	Financial history Provide financial undertaking from APRA approved financial institution	Adequate financial resources as set out by the WA Act	Financial history for previous 3 years	Financial history for previous 3 years
Duration of licence	Initial approval up to 2 years, renewal up to 4 years	Granted for 3 years, renewal 3 years	Initial approval for 3 years, then renewal up to 4 or 6 years.	Initial approval for 2 years, renewal up to 3 years.	Initial approval one year, then depending on audit – up to 3 years.	No initial duration. Reviewed yearly.	Up to 3 years	One year

Source: Adapted from Safe Work Australia Comparison of Workers' Compensation Arrangements in Australia and New Zealand April 2012: 139-143

[776] Q-COMP. Becoming a self-insured employer http://www.qcomp.com.au/services/self-insurance-licensing/becoming-a-self-insurer.aspx [21 December 2012]

[777] Commonwealth Government, Safe Work Australia, Comparison of Workers' Compensation Arrangements in Australia and New Zealand. April 2012: 139-143 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/687/ComparisonWorkersCompensationArrangements2012.pdf [21 January 2012]

7.3 Self-insurance eligibility

The Committee posed the question of the perceived strengths and weaknesses of self-insurance in the hearings. One of the witnesses explained that employers who are self-insurers had '*control over their workers with regard to safety and rehabilitation*'.[778] Similarly, the Australian Country Choice highlighted their perception of a strength to be the '*control and the speedy services that can be delivered*'. They also explained:

> *You are not waiting for a third-party insurer. Nine times out of 10 you are on the ground and you are there within the first instance of a claim being made. So you can virtually refer the person to surgeons for more specialist medical opinions very promptly.*[779]

There are criticisms of the current eligibility criteria of 2,000 full time equivalent workers threshold. Some submissions highlighted that a reduction of the minimum number would increase the number of self-insurers. For example, the Australian Shipowners Association noted:

> *Section 71 of the Act determines that the Authority must be satisfied an organisation meets certain criteria before a licence to self-insure may be issued. The criteria is quite specific and it would be ASA's recommendation that a comparison be undertaken with equivalent regimes in other State and Territory regimes to determine whether this criteria, and in particular the requirement for a minimum of 2000 full time workers employed in Queensland, is appropriate…. It is essential that employers not be unduly prohibited from entering into self-insurance arrangements provided they have the financial capacity to do so and the Authority is satisfied that the employer company will satisfactorily meet all the requirements of the Act*.[780]

Similarly, Sucrogen believes that *'a competitive and financially stable workers' compensation scheme is the key to maintaining a strong economy in Queensland'* and recommends a reduction of the number of full time employees to at least 1,000.

> *An amendment should be made to reduce the number of full time staff, but no other changes to the provision. By lowering the number of full time employees, the option for further companies to access self-insurance is greater*.[781]

A confidential submitter considered that the current requirement of 2,000 FTEs does not reflect the change in the nature of the workforce in that there is a shift to a more flexible workforce such as part-time and casual workers.[782,783] In addition, some submitted that the 2,000 FTE criteria is not reasonable and considers this to be a '*barrier'* or a *'severe deterrent on companies becoming self-insured'*.[784,785,786]

The Department of Transport and Main Roads submitted that Government Agencies could be provided with other options to better manage their workers' compensation claims management function. One example was to implement a '*Managed Fund arrangement similar to Western Australia's RiskCover'* which would include *'a Whole-of-Government collaborative approach to*

[778] Mr B Brown, Transcript 14 November 2012: 25
[779] Mr Matthews, Transcript 31 October 2012: 25
[780] Submission 52: 4
[781] Submission 58: 3
[782] Submission 20: confidential
[783] Submission 197: confidential
[784] Submission 114: 2
[785] Submission 70: 7
[786] Submission 124: 3

managing workers' compensation claims to embed a risk management culture resulting in reduced costs and greater business efficiencies across the public sector'.[787] They advised the Committee:

> *The main thrust of our submission was obviously the option of self-insurance if possible for government departments, because we presently cannot do so. Obviously we feel we have no option to insure elsewhere, so we have a belief through anecdotal evidence that we would be able to manage our risks better obviously*.[788]

The Committee also heard from various self-insurers and self-insured employer groups; many of which recommended lowering the employee number threshold and using financial viability of an employer as an alternative criteria. For example, the Association of Self Insured Employers Queensland (ASIEQ) stated:

> *With regard to the threshold, in other states where there is no threshold it appears that financial viability is more of an indication as to whether self-insurance works or not. In fact, there have not been any ramifications in relation to that in other states. Therefore I think there is no reason why there should be a threshold as such for opening up self-insurance.*[789]

It was also highlighted that the number of employees does not change how an employer operates in relation to implementing its safety system or managing workers compensation claims.[790]

The ETU considered that reducing the 2,000 employee threshold *'would not only have an impact on claims management of the individual employees, but could also impact on the financial viability of the current WorkCover Scheme*'. The ETU used the example of *'South Australia which has the highest proportion of self-insurers and also has the highest premiums at $2.75 per $100'*.[791]

There were suggestions that reducing the minimum number of employees would enable increased participation, which in turn, be more economical.[792] However the QCU considered that the nature of an open market will have the opposite effect.[793] The Transport Workers' Union (TWU) has concerns that an increase in the number of self-insurers may result in an upward pressure on premiums:

> *When large employers leave the State system it puts upward pressure on premiums. …. Any reduction in the threshold requirement of 2000 employees may allow other employers to self insure under the Act. The granting of new licences under the Act is likely to put upward pressure on premiums and that may be a matter upon which the Committee should seek further information and actuarial advice*.[794]

Q-COMP emphasised in their submission that the '*solvency risk to the scheme posed by self-insured employers is very low'*.

> *The risk of self-insured employers not being able to meet their workers' compensation liabilities is managed by the requirements for them to lodge bank guarantees for at least 150 per cent of their estimated claims liability and to have a specified level of reinsurance, and by Q-COMP monitoring their performance and financial results.*
>
> *Reinsurance is required to be with an APRA-approved insurer and the retention amount per event is required to be between $300,000 and $1 million*.[795]

[787] Submission 69: 2
[788] Mr Richards, Transcript 14 November 2012: 20
[789] Ms Barham, Transcript 14 November 2012: 3
[790] Submission 20: confidential
[791] Submission 95: 11
[792] Submission 4: 2
[793] Submission 190: 5
[794] Submission 12: 7
[795] Submission 93: 21

The Australian Lawyers Alliance considered that having the '*2,000-employees is a sound criterion*'. They advised the Committee that they considered a *'relaxation of the criteria under which self-insurance licences are granted would be a retrograde step in their view and believes it would risk leakage from the current scheme and, therefore, potentially place at risk the solvency of the scheme'*.

> *It would also risk an increasing number of cowboys entering the scheme thinking that they could do things better than a scheme that is performing very well. If there was upward pressure due to leakage from the scheme, that would place pressure on premiums. They may well head northwards with a risk to those people remaining within the scheme*.[796]

Q-COMP's independent actuary Finity provided some analysis on employee threshold requirement. They stated:

> *The proportion of individual employers with greater than 2,000 (FTE) employees i.e. those currently eligible to apply for self-insurance, is around 0.04% of all employers (one in every 2,500 employers). However, this group are responsible for 29% of wages. Reducing the size threshold to*
>
> - *1,000 FTE – would roughly double the number of eligible individual employers, and add another 7% of potential wages (36% of wages in total)*
> - *500 FTE – would increase the number of eligible individual employers to around 0.2% of total, covering 44% of total wages'.*[797]

Finity also noted that '*not all eligible employers will choose to apply for self-insurance'.* They considered that reasons for this include:

- *Managing workers compensation claims can be seen as a distraction from core business.*
- *Financial consideration – such as increased volatility of workers compensation costs, requirements to hold bank guarantees (which restrict other borrowings), and significant upfront costs.*
- *Administrative considerations – such as the time and effort associated with maintaining a workers' compensation claims management team, additional IT requirements, the need to manage reinsurance arrangements, and annual actuarial and compliance requirements.* [798]

Based on the above information on threshold changes above, Finity suggested that *'lowering the employee threshold to 1,000 FTE would likely increase the level of self-insurance wages by around $5 billion to $16 billion in total. It would reduce the WorkCover wages pool by around 5 per cent. Lowering the entry threshold to 500 FTE would likely increase the level of self-insurance wages by around $9 billion, to $20 billion in total, and reduce the WorkCover wages pool by around 10 per cent'*.[799]

[796] Mr Hodgson, Transcript 14 November 2012: 16
[797] Submission 93 Attachment 3: 2
[798] Submission 93 Attachment 3: 2
[799] Submission 93 Attachment 3: 3

Finity also examined the implications for premium affordability. They advised that *'WorkCover's expenses (excluding Q-COMP levy) have been around $110 million per annum, which equates to around 10 per cent of premium revenue'.* If 70 per cent of WorkCover's expenses are variable with the scale of the operation, this would mean that fixed costs of around $35 million would be incurred regardless of the size of the operation. They considered that *'the impact on remaining employers of funding an additional share of these costs is less than 1 per cent of premiums if the self-insurance threshold were to be reduced to 1,000 or 500 FTEs'*.[800]

Rio Tinto stated in their submission that '*other schemes use financial viability as the main indicator of an employer's appropriateness to self insure, with the number of employees as a secondary indicator'*. They consider that *'financial viability as a more robust assessment of an employer's ability to fund and manage their risk and liabilities'*.[801]

When asked what other considerations could be taken into account to be eligible for self-insurance, the Committee was advised:

> *Obviously the financial viability of the employer is a critical determinant for self-insurance. We think it needs to be taken on balance. There is the direct employer consideration around their ability to obviously administer and manage their capacity to proactively rehabilitate and integrate injured workers back into the workforce. They are all significant requirements which predominantly the larger employers have the resources and the capacity to do*.[802]

QCU expressed the concern that if the numbers of self-insurers was increased or businesses were allowed to 'shop around' for workers compensation insurance, it is likely that the price would increase as insurers would use premiums in such a way as to decrease their risk and deliberately price some employers or industries with a perceived high risk out of the market. They also advised that:

> *If self-insurance licensing criteria were weakened by potentially allowing large numbers of organisations to obtain a license the number of self-insurers could very significantly Increase. Under such circumstances the factors outlined above that have directly contributed to the success of existing self-insurers would not be present to the same degree to underpin the position of larger numbers of new organisations taking on self-insurance. In that situation Q-COMP would face considerable regulatory and cost burdens and almost inevitably turn back the clock on a self Insurance regulatory environment that has taken some 14 years to properly mature.*[803]

7.4 Impact of self-insurance on Workers' Compensation fund

A number of groups expressed concern about those left in the Workers' Compensation Scheme if the number of self-insurers increased substantially. The Committee noted that both employer and employee groups were in agreement regarding this issue.

[800] Submission 93 Appendix 3: 4-5
[801] Submission 41: 6
[802] Mr McHugh, Transcript 14 November 2012: 32
[803] Submission 190: 5-6

The Electrical Contractors Association advised that:

> *In terms of self-insurance, again I think we need to be careful and use a cautionary tone when it comes to the effect that they may have on the remnants of the compensation scheme itself. In my view and what I have seen with self-insurance over the last 10 to 15 years with the larger employers going who were contributing a very large amount of premium and perhaps were more capable of making sure they have the lowest injury rates, it puts more pressure on a scheme if you take those sorts of employers out. So, in terms of the long-term stability, I would be very cautious about how you change the ability for employers to go to self-insurance.*[804]

Master Builders agreed that they see no need for any change in the diminution of the requirements. They considered that is cross-subsidisation in the fund now where industries that have higher claims experience are cross-subsidised to a degree to encourage those industries to continue. They advised they would hate to see that pressure on the fund and then it being picked up by every other employer.[805]

The ETU agreed with both the ECA and the Master Builders on this issue and stated that:

> *…if you increase the number of self-insurers it can potentially have a huge impact on the people who remain within the workers compensation scheme. I have read some submissions where they seek to increase the number of self-insurers. I have not actually seen an argument why they want to do that other than that they want to. I think our punchline was that you would need to do a very detailed and thorough investigation using actuarial information before you made that sort of change, because potentially it could have a strongly negative impact on a system that is working very well.*[806]

7.5 Potential for conflict of interest with small self-insurers

There were also concerns that relaxing the criteria for self-insurance would risk the stability of the scheme as an increased number of small employers who may be unable to fulfil all the requirements for self-insurance may self-insure. The Bar Association considers that:

> *The people who do self-insurance well are the larger organisations. They are larger. They have access to reinsurance, which is one of the qualifications. They have access to the resources in respect of the important component of rehabilitation of workers, which is really at the core of the scheme. They have the ability to properly investigate claims, deal with claims. Often they do not have the financial restraints in terms of settling claims. Pushing it out is likely to move it down in terms of people entering into self-insurance who perhaps really should not be doing so; they should be doing it through WorkCover.*[807]

As such, there are concerns that there could be a 'conflict of interest' for the management of claims particularly for smaller employers who may be unable to separate the 'hiring' from the workers compensation claims area. The Committee received a confidential submission highlighting an experience with a self-insurer where there was no clear distinction or delineation between insurer and management areas.[808] The AMWU also advised that they have experienced incidents '*in which self-insured employers have unlawfully and inappropriately utilised medical records … as a means of terminating and/or damaging the employment of an injured/ill worker'.*[809]

[804] Mr O'Dwyer, Transcript 31 October 2012: 12
[805] Mr Crittall, Transcript 31 October 2012: 13
[806] Ms Rogers, Transcript 31 October 2012: 13
[807] Mr Douglas SC, Transcript 14 November 2012: 17
[808] Submission 186: confidential
[809] Submission 32: 6

Schultz Toomey O'Brien Lawyers noted '*from experience that because of their obvious self interest, the conflict of interest looms large and workers engaged by companies who self insure are often treated somewhat more harshly than other workers whose claims are managed by WorkCover Queensland*'.[810]

The ETU and United Voice also stated their concern for '*the potential for a conflict of interest where the employer is the insurer as well as the employer'*. The ETU submission emphasised that '*there needs **to** be greater scrutiny to ensure that the role of the insurer and the role of the employer remain separate and that the information provided to the employer, in the guise of the self-insurer, is not used to impact on the employment arrangements of any injured workers'*.[811] United Voice advised:

> *United Voice has concerns regarding any reduction in the requirement of the 2,000 threshold at the moment. We have concerns that the process can sometimes be self-serving and it can be inherently biased without an independent assessment from WorkCover or Q-Comp.*[812]

The Australian Rail, Tram and Bus Union (Qld)[813] and the Services Union advised the Committee of cases where sensitive and private medical information had been used to negatively impact employment arrangements of the injured worker.

> *It is our experience in dealing with self-insurers that from time to time the information provided to the workers' compensation unit of the employer as a self-insurer. In particular, sensitive and private medical information is used to negatively impact the employment arrangements of the injured worker. Further, our observation is that return to work obligations of the employer and the return to work obligations of the employer as self-insurer are not at times being adequately met. Our observation is that members whose claims are managed through WorkCover Queensland have on the whole, better return to work outcomes than those managed through self-insurance.*[814]

However, Q-COMP who is the current regulator of self-insurers disagrees and advised that the rate of complains in the self-insured is low.[815] Q-COMP advised the Committee:

> *There is the argument in relation to how can you be a good self-insurer when you potentially have a conflict of interest—that is, that your self-insurance department are the employees of the employer. So that is the issue. We are certainly very cognisant of that and a lot of audits and a lot of data collection ensure that that does not happen. I suppose we can never give a 100 per cent guarantee, but certainly on all our performance measures—and there are many—we have not seen examples of that. If we get a complaint through, for instance, that might suggest some sort of issue such as 'I not have been returned to work because the boss says I cannot and the self-insurance unit has carried out that order', it is thoroughly investigated'.*[816]

[810] Submission 33: 2
[811] Submission 95: 11
[812] Mr Le, Transcript 31 October 2012: 25
[813] Submission 105: 8
[814] Submission 103: 5
[815] Submission 93: 21
[816] Ms Woods, Transcript 11 July 2012: 7

Q-COMP suggested further in their submission that their '*comprehensive performance management program, including regular reviews of statistics, audits and fielding complaints about self-insurers, concludes that there is no evidence to support a systemic problem relating to conflict of interest*'.[817]

The Committee also heard from one witness who had worked for a self-insurer and managed self-insurance. Mr Matthews stated, '*the obligations and the legislation are very clear. If there are breaches, there are mechanisms in place with Q-Comp to deal with those breaches or perceived breaches or allegations of breaches. I know they are treated very seriously. The separation and confidentiality is not an issue that I have ever come across'*.[818]

The Australian Country Choice explained the requirements for self-insurance were onerous although they considered this to be one of the weaknesses of self-insurance:

> *There are no two ways about it; it is very onerous. There are audits, requirements, entry requirements, insurance requirements and, most of all and most importantly, there are occupational health and safety requirements. You must have a good occupational health and safety system to get in the door. If you do not have that, my belief is that you should not be going through the door*.[819]

7.6 Duration of licence

Some submitters recommended that the length of time for licensing of self-insurers could be extended up to six years instead of the current two for initial and four for renewals.[820] For example, the Association of Self insured Employers Queensland[821] advised the Committee:

> *With regard to lengthening time for six years, if a self-insurer proves to be worthwhile and can meet certain criteria and satisfies Q-Comp's fit and proper criteria, maybe that is an option. It is a lot of administration and a lot of process and a lot of gathering together to re-licence each two years, four years, or whatever you have. If those processes are good, is there a reason it cannot be extended to six years?*[822]

Similarly, JBS Pty Ltd considered the renewal process for self-insurance licences to be an '*unnecessary burden'* and recommends '*that legislative amendment be made to allow for self-insurers who are not in their initial licence period, to be granted licences for up to six years*'.[823]

The Department advised the Committee that the maximum licence period was extended from two to four years in 2005 following a National Competition Policy Review of Certain Aspects of the *Workers' Compensation and Rehabilitation Act 2003.* The 2005 review addressed the outstanding matters from the 2000 review and '*recognised that there were benefits in extending renewal periods such as reduced administrative costs and more time to implement quality claims and injury management programs'*. The Department also explained:

> *Four year licence renewals are considered appropriate in terms of good governance and ongoing due diligence. Self-insurers are required to provide annual actuarial reports, and licence renewal is significantly less onerous and expensive than initial application. In addition, Queensland has the second longest licence period in Australia.*[824]

[817] Submission 93: 21
[818] Mr Matthews, Transcript 31 October 2012: 25
[819] Mr Matthews, Transcript 31 October 2012: 25-26
[820] Submission 124: 3
[821] Submission 70: 8
[822] Ms Barham, Transcript 14 November 2012: 6
[823] Submission 160: 21
[824] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 January 2013: 46

7.7 Current renewal requirements

At present, comprehensive information is sought from self-insurers in the renewal process. Financial viability will be assessed by Q-COMP to determine the self-insurer's liability to continue to meet its liabilities. Q-COMP advised the Committee that under the Act, self-insured employers must apply to them for renewal of their licence and in the past a total of 36 items was required for renewal process. These 36 items include:

- corporate and general information such as the full legal name of the group and number of full-time workers in Queensland;
- financial information including a copy of the most recent audited financial statements;
- claims administration and rehabilitation management details such as name of the person responsible for claims administration and details of how workers have access to the complaints system;
- data management i.e. whether any changes to the computer system may impact the ability to provide data in accordance with Q-COMP specifications;
- workplace rehabilitation procedures including a list of all current rehabilitation and return to work coordinators; and
- education and consultation such as details of programmes in place for ongoing education of current and new employees regarding workers' compensation matters.

In February 2013, Q-COMP board approved their renewal requirements and concluded that 30 items from the current 36 items in the *self-insurance licence renewal schedules* be removed. The six items now required are:

1. A list of all current rehabilitation and return to work coordinators stating registration number and expiry date.
2. Details of the program in place for ongoing education of current employees regarding workers' compensation matters. Copies of all education material are to be attached to the renewal application.
3. Details of the program in place for education of new employees regarding workers' compensation matters including the process of lodging claims. Copies of all education material are to be attached to the renewal application.
4. Details of the time frame when new employees are given education about the workers' compensation system.
5. Details of how the workers have access to your complaints system for workers' compensation related issues.
6. Identify the unions, or organisations representing the workers including the mailing address for each.

7.8 Committee comments – self insurance arrangements

The Committee considers that for existing self-insurers, renewal of licence should not be dependent solely on one criteria (e.g. number of FTEs). The Committee believes that other existing factors such as the long term financial viability and lodgement of bank guarantee and past performance of the self-insurer should be taken into consideration for renewals, particularly for existing self-insurers who are in the process of renewing their licencing arrangements.

The Committee was conscious that the stability of the scheme is reliant on the majority of employers being in the scheme administered by WorkCover. The Committee considers that existing self-insurance arrangements are working reasonably effectively and therefore the Committee considered that little could be gained from making major changes.

The Committee considers that there should be some flexibility for existing self-insurers, who may fall below the required number of employees, provided they have a proven track record as a self-insurer and with continued financial viability.

The Committee commends Q-COMP for its pro-active stance with regard to streamlining of self-insurance renewal arrangements.

Recommendation 30

The Committee recommends that the legislation be amended to give the Minister flexibility to grant an extension of self-insurance arrangements for a further period for existing self-insurers.

8 Implementation of the recommendations of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme

8.1 Background

A review of the institutional and working arrangements of the Queensland's Workers' Compensation Scheme was undertaken in 2010 by Mr Robin Stewart-Crompton, the former CEO and member of the National Occupational Health and Safety Commission. The review was conducted in response to concerns raised about the following:

- Lack of available information on scheme performance compared to other jurisdictions
- Lack of clarity around the roles of Q-COMP, and WorkCover
- Role of lawyers and the level of legal costs in the system

The review was supported by a stakeholder reference group comprising two employer representatives, two union representatives, two legal representatives, the chief executives of WorkCover and Q-COMP and the (then) Associate Director-General of the Department of Justice and Attorney-General.

This review was conducted under the terms of reference below i.e. that the Minister be advised of:

1. Appropriate strategies and institutional arrangements to ensure the roles and functions of Q-COMP, WorkCover Queensland and the Department of Justice and Attorney General in Queensland workers' compensation are clear and well understood by stakeholders and the broader community.
2. Arrangements that can be put in place to enhance transparency and ensure that information is readily available to stakeholders and the broader community on the Workers' Compensation Scheme performance.
3. Strategies to improve the efficiency and effectiveness of the workers' compensation claims management and common law settlements processes.
4. The appropriateness of the current level of legal costs and management of the legal profession in workers' compensation matters.
5. What actions can be taken by scheme stakeholders to improve rehabilitation and return to work.[825]

8.2 Outcomes of the review

The report of the review made 51 recommendations to improve various aspects of the scheme. The list of recommendations and actions is listed in Table 21. In general, the 51 recommendation fell within five key areas:[826]

[825] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 7 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]

[826] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 34

8.2.1 Roles and functions of the scheme

The review examined the inter-connection between the Regulatory Authority (Q-COMP), the *Workplace Health and Safety Act 1995* and the organisation (Workplace Health and Safety Queensland) as well as with the Department of Justice and Attorney General. There was a perceived lack of easily understood information to explain the relationship between the abovementioned organisations, their resources and how these resources were used and their respective roles in the Workers' Compensation Scheme.

The review report recommended that Workplace Health and Safety Queensland should be responsible for developing and managing the development of an overarching cross-agency strategy preventing work-related harm and responding to its consequences. The strategy requires WorkCover Queensland, Q-COMP and Workplace Health and Safety Queensland to share data and other information that is relevant to the various responsibilities of the abovementioned bodies; and, co-ordinating activities which could include developing beneficial guidance material to all stakeholders.[827]

The report also recommended that WorkCover Queensland provide funding separately to Q-COMP and to Workplace Health and Safety Queensland but Q-COMP should continue to provide amounts collected from self-insurers to Workplace Health and Safety Queensland.[828]

8.2.2 Transparency

There was a perceived shortage of useful information about the performance of the fund and the scheme in general and there appeared to be differing views about the operational standards that underpinned, or should underpin, the scheme. There were also concerns as to whether Q-COMP was sufficiently equipped to act as a regulator.[829]

In addition, there were concerns that individual employers and workers did not have ready access to simple, reliable and current information about the system and whether all those affected by WorkCover Queensland decisions were aware of the review process.

There was also a view that some government departments and agencies were falling short of the standards expected of employers under the *Workers Compensation and Rehabilitation Act 2003*.[830]

The recommendations in the report proposed action in four broad areas:

- improving the information flow about the scheme to persons affected by WorkCover's decisions;
- addressing gaps in Q-COMP's powers;
- requiring all government departments and agencies to adopt best practice standards of compliance with workplace health and safety and workers' compensation obligations; and,
- requiring a review of the Workers' Compensation Scheme at least once in each five year period after the 2012 review.[831]

[827] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 15 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]
[828] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 16 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]
[829] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 17 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]
[830] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 17 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]
[831] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland, Information Paper: 35

8.2.3 Strategies to improve efficiency and effectiveness

The fairness, efficiency and effectiveness of the management and settlement of claims, including those involving common law actions are factors that have an impact on the operation of the scheme. Poor performance in these areas may undermine the achievement of the scheme's objectives, and claims management and settlement issues attracted much attention in the review.[832]

There were concerns about the level of engagement with employers and the objectivity of investigators. Other issues identified under this term of reference included the perceived lack of useful information about the claims process, the effects of centralised claims management, how claims were investigated and the use of external lawyers and medical experts by WorkCover Qld.[833]

The report recommended that a revision be made to WorkCover's service charter and plain English information on the claims management process be made available. In addition, the report recommended that medical experts be appointed to advise claims managers on medical aspects of claims.[834]

8.2.4 Legal costs and management of the legal profession

Concerns regarding (excessive) legal costs in claims in that these costs absorb too much of settlements or awards of damages were raised in the review. Issues were also raised about the differences in the regimes that apply under Queensland laws to proceedings for personal injuries. However as those matters were outside the terms of reference, they were not considered in the report.[835]

The report recommended that Workplace Health and Safety Queensland should commission annual surveys, by a third party, of claimants and lawyers, to ascertain the proportion of a settlement paid to the claimant, to the claimant's lawyers, for medical services or for any other expenses.[836]

Other recommendations in the report include identifying the effects of legal services advertising on claims for workers compensation and whether further action is required to control such activity.[837]

8.2.5 Rehabilitation and return to work

In general, the structure of the existing rehabilitation and return to work system was well received in the review but there was some dissatisfaction among stakeholders about its operation. Stakeholders considered that there was a need for greater focus on return to work and rehabilitation process and ensuring compliance with the statutory obligations of employers and workers. Other main issues identified include implementing better linkages between WorkCover and Q-COMP was needed, better guidance for all interested parties and better training for rehabilitation and return to work coordinators.[838]

[832] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 31 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]
[833] Department of Justice and Attorney-General, Q-COMP, WorkCover Queensland. Information Paper: 37
[834] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 37 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]
[835] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 39 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]
[836] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 44 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]
[837] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 44 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]
[838] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 48 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]

The report recommended that return to work and rehabilitation should be a primary object of the Act. The report also recommended that provisions to give enforceable directions to employers in relation to return to work and rehabilitation obligations, where compliance cannot be achieved otherwise be included in the Act and WorkCover and Q-COMP develop complementary policies and programs to facilitate better understanding of return to work and rehabilitation services.[839]

8.3 Implementation of the recommendations

The Department advised that all the recommendations were implemented and legislative amendments were made where required for some recommendations (Table 21). However, there are some areas which have not occurred because of significant cost and privacy issues.

The Committee notes that some of the recommendations have been raised again by many submitters in this inquiry (see Table 21). In general, the following issues were raised:

- Claims process – lack of scrutiny
    - Some employers felt that claims were not properly scrutinised and that 'fraudulent' claims were not thoroughly investigated. The Department advised the Committee of the process and the Committee believes that all stakeholders could be better informed of the process.
- Management of psychological injuries claims
    - Some submitters considered that WorkCover could improve in the handling of psychological injury claims. In particular, psychological injury claims should be process by more suitably trained case managers (i.e. have qualifications in the field of psychology or have basic counselling skills).
- Premiums – no recognition of good workplace safety improvements
    - Some employers were concerned that their premiums do not reflect their efforts to improve their workplace health and safety and suggested there be a tiered approach to setting of premiums (e.g. one claim over three years should be not be subjected to the same increments as multiple claims).
- Common law claims and lawyer fees
    - Recommendations 4.1 – 4.7 (i.e. managing legal costs and the legal profession) from the Stewart-Crompton review were not implemented. The Department considered these areas to be beyond the scope of the Workers' Compensation Scheme and the Act as lawyer obligations fall under the *Legal Profession Act 2007*.
    - These issues were been discussed in many of the hearings and the Committee has ongoing concerns about the level of legal costs and the no-win-no-fee advertising. Refer section 6.9 of this report

[839] Report of the Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme: 50 http://www.deir.qld.gov.au/workplace/resources/pdfs/wc-structural-review-report.pdf [6 May 2013]

Table 21: Structural review recommendations[840]

Key to table below

✓ Recommendation implemented
✕ Recommendation not implemented
ESO Electrical Safety Office
IRC Industrial Relations Commission
WCRA Workers Compensation and Rehabilitation Act 2003
WCR Workers Compensation and Rehabilitation Regulation 2003
WCQ WorkCover Queensland
WHSQ Workplace Health and Safety Queensland

	Recommendation	Action	Comments
1.1	There should be an overarching cross-agency strategy for more effectively preventing work-related harm and responding to its consequences, which should be developed for ministerial endorsement by 31 March 2011. WHSQ should be responsible for managing the development of the strategy.	✓	Completed. Strategy endorsed by all agencies
1.2	The overall goal of the strategy would be to strengthen the interaction between WHSQ, the ESO, Q-COMP and WCQ so that the benefits of better co-ordinating their activities relating to preventing work-related harm, and responding to its consequences are realised.	✓	Completed. Strategy endorsed by all agencies
1.3	The interaction should include: a) sharing data and other information that is relevant to the various responsibilities of the WHSQ, the ESO, Q-COMP and WCQ; and, b) where appropriate, co-ordinating their activities, including the development and distribution of guidance material, with priority given to any activities of mutual benefit to some or all of the participants.	✓	Completed. Strategy endorsed by all agencies
1.4	Under the strategy, WHSQ, the ESO, Q-COMP and WCQ, should be required: a) when each engages in strategic or business planning, to take account of the goal of the overarching strategy and of any common or complementary goals, policies and programs of the participants; and b) to identify and, where appropriate, undertake joint activities that would assist in achieving the goal of the overarching strategy.	✓	Completed. Strategy endorsed by all agencies
1.5	The strategy should be outcome based. Activities and results would be reported against the strategy's key result areas in existing periodic reporting to the Minister.	✓	Completed. Strategy endorsed by all agencies
1.6	After the draft strategy has been prepared and approved by the chief executives of the entities to which it applies, taking account of stakeholder views, it should be submitted to the Minister for Industrial Relations for endorsement.	✓	Strategy approved on 19 July 2011.

[840] Correspondence from Mr T Ryan, Acting Director-General, DJAG to FAC dated 17 July 2012

	Recommendation	Action	Comments
1.7	Subject to the Minister's endorsing the strategy: a) the Minister should consider seeking the Government's support for the strategy; and b) the strategy should commence no later than 1 July 2011 and operate at least until the 2012 review of the workers' compensation scheme has taken place and the government has decided its response to the review's report.	✓	Strategy has commenced. Government support for the strategy as recommended was not sought.
1.8	Subject to the Government's support, Ministers in other portfolios in which there are safety regulators (Natural Resources, Mines and Energy; Transport) should be invited to commit to the strategy and to authorise the safety regulators concerned to participate.	✗	As government support for the strategy was not sought this recommendation has not progressed.
1.9	Easy to understand guidance about the respective roles, powers and functions of Q-COMP, WCQ, WHSQ, the ESO and DJAG and how they interact should be prepared jointly and made available on their websites. Such guidance should include links to more detailed material which may be found on those web sites	✓	Information is available on each web site.
1.10	Instead of WCQ providing funding to Q-COMP which includes funding for WHSQ, WCQ should provide funding separately to Q-COMP and to WHSQ. Q-COMP should continue to provide, under s.479 of the WCRA, amounts collected from self-insurers to WHSQ.	✓	
2.1	At least until the government's response to the 2012 review is known, WCQ and Q-COMP should agree, for example, through a MOU, on a program of twice-yearly joint presentations to all interested stakeholders reporting on: a) the financial status of the fund, including an actuarial report; and b) performance in all areas that are critical for the scheme's ongoing viability and the achievement of its objectives.	✓	Bi-Annual actuarial presentations held. Forums are well attended by stakeholders and presentations are made available to attendees.
2.2	The data so presented and related material information should be available as soon as reasonably possible for interested persons.	✓	The data presented is made available to all attendees.
2.3	Q-COMP should be empowered under the WCRA to develop, subject to the regulatory assessment statement process, minimum advisory standards in respect of prescribed matters for the workers' compensation scheme, and recommend such standards to the Minister. If the Minister agreed to a proposed standard, it would be published in the *Gazette*. Such standards could not be inconsistent with the WCRA or WCR Regulation or any other applicable law and should not be inconsistent with any standards set by WorkCover in relation to matters for which WorkCover is responsible. Where Q-COMP considered it appropriate, it should be able to set licence conditions for a self-insurer which were inconsistent with a minimum advisory standard.	✗	Subject to amendment taking effect. Requires legislative change
2.4	Where an insurer did not comply, or did not intend to comply, with an applicable standard, the insurer should be required to provide written notice as soon as reasonably possible to Q-COMP and, in the case of WorkCover, to Q-COMP and the Minister, explaining the reason for non-compliance.	✗	Subject to amendment taking effect. Requires legislative change

	Recommendation	Action	Comments
2.5	Q-COMP should be required to include information about such non-compliance by insurers in its periodic reports to the Minister and in its Annual Report.	✕	Subject to amendment taking effect. No standards are yet in place to report against
2.6	Without limiting any other matters that it might wish to consider, Q-COMP should be empowered under the WCRA to take into account any instances of non-compliance by a self-insurer with an applicable minimum advisory standard (and any failure to report non-compliance) when considering an application for the renewal of a self-insurance licence.	✕	Subject to consideration by Parliament. Requires legislative change
2.7	Before making a recommendation to the Minister for a code of practice relating an insurer's claims management under s.486A of the WCRA, Q-COMP would be required: a) to consider whether a minimum advisory standard should be gazetted instead, or if a standard had been gazetted, why a code of practice should be made in relation to the same matter; and b) to advise the Minister of Q-COMP's views on the matter.	✕	Subject to consideration by Parliament. Requires legislative change
2.8	In deciding on the prescribed matters that could be the subject of minimum advisory standards, consideration should also be given to providing for a wider range of matters that may be the subject of a code of practice under s.486A.	✕	Subject to consideration by Parliament. Requires legislative change
2.9	The Minister should be empowered to request in writing formal advice from Q-COMP about any matter relating to the overall operation of the workers' compensation scheme and, where the Minister did so, an insurer would, under the WCRA, have to comply with any reasonable written request from Q-COMP: a) for information or data in relation to the matter to which the Minister's request relates; and b) for access to any persons or documents who may assist Q-COMP in responding to the Minister's request. *Note: Any powers of Q-COMP in this respect would not:* • *limit the powers exercisable by an authorised person under Chapter 12, Enforcement, of the WCRA, which could be extended for this purpose;* • *displace the Minister's powers under s.486 to ask the department chief executive to investigate and report on any matter relating to WorkCover or the powers of the department chief executive under that section.*	✕	Subject to consideration by Parliament. Requires legislative change
2.10	Q-COMP should be required to respect the confidentiality of any information so obtained but would not be precluded from disclosing it to the Minister for the purposes of its advice.	✕	Subject to consideration by Parliament. Requires legislative change
2.11	The WCRA should be amended to require the maker of a decision that is reviewable or open to appeal under Chapter 13 of the WCRA to provide the person who is affected by the decision with a written information notice about that person's right to apply for review.	✕	Subject to consideration by Parliament. Requires legislative change Chapter 13 of the WCRA amended
2.12	The WCRA should empower Q-COMP to determine the minimum qualifications for an actuary for the purposes of the Act.	✕	Subject to consideration by Parliament. Requires legislative change

	Recommendation	Action	Comments
2.13	The WCRA should be amended to provide for a review of the operation of the workers' compensation scheme at least once each five years after 2012.	✓	The requirement to conduct a review of the scheme every five years passed into legislation in 2011.
2.14	The Minister should seek the government's support for all government departments, agencies and other bodies to seek to meet best practice standards of prevention in relation to work-related harm and in the use and application of the workers' compensation scheme.	✓	Refer recommendations 1.7 and 1.8
2.15	Progress in giving effect to all matters agreed upon by the government after considering this report should be reported to the Minister in the quarterly reports by each of the implementing bodies and included in their Annual Reports.	✓	All agencies[841]
3.1	WCQ's service charter should be amended as soon as reasonably possible to commit WCQ to ongoing effective engagement with employers about claims management, including advising them at specified times of a claim's progress and what action is being taken.	✓	New service charter developed and implemented since 1 July 2011.[842]
3.2	WCQ should continue to hold interactive seminars with interested stakeholders relating to common law claims management at least annually and should consider similar seminars in relation to statutory claims management (and return to work and rehabilitation).	✓	Regular stakeholder forums are held. Industry forums are also held.[843]
3.3	By 31 March 2011, WCQ should, in consultation with stakeholders, prepare easy to understand guides for employers and injured workers about what to expect in the claims process, how they can facilitate a claim's fair and effective progress, their review and appeal rights and how to obtain more information, if necessary. Similar material should be available for other persons who may be involved at a workplace (such as managers, supervisors, RRTW coordinators). WHSQ should contribute information on good WHS practice as to injured workers who are at work under an RTW arrangement. At the same time, Q-COMP should, in consultation with self-insurers and other interested stakeholders, prepare similar material.	✓	Feedback from stakeholders was used to develop guidance material in a variety of forms. In addition to improving the standard letters that are sent to customers, WorkCover has developed a number of films and tailored industry based information. WorkCover has been collaborating with industry associations and has had a number of articles published in industry magazines.
3.4	By 31 March 2011, WCQ should review whether claims management would be improved by appointing medical experts to whom WCQ staff managing claims could have ready access for advice on medical aspects of claims. Such experts might also be available for professional discussions with medical practitioners dealing with workers under the scheme.	✓	WorkCover engages the services of a Medical Advisory Panel. Senior specialists have been appointed to this panel and are available to advise WorkCover claims staff.[844]

[841] WorkCover Queensland Annual Report 2011-2012: 6 http://www.workcoverqld.com.au/forms-and-resources/publications/annual-reports/2011/1423621077.pdf [7 May 2013]
[842] WorkCover Queensland Annual Report 2011-2012: 15 http://www.workcoverqld.com.au/forms-and-resources/publications/annual-reports/2011/1423621077.pdf [7 May 2013]
[843] WorkCover Queensland Annual Report 2011-2012: 16 http://www.workcoverqld.com.au/forms-and-resources/publications/annual-reports/2011/1423621077.pdf [7 May 2013]
[844] WorkCover Queensland Independent opinions http://www.workcoverqld.com.au/service-providers/medical-services/independent-opinion [7 May 2013]

	Recommendation	Action	Comments
3.5	By 31 March 2011, WCQ should give further consideration to whether any action needs to be taken to strengthen the knowledge and understanding of centralised claims managers of regional circumstances that may be material to dealing with a claim or to provide them with better access to such knowledge and relevant information.	✓	Completed. New customer service model implemented.
3.6	By 31 March 2011, WCQ should, in consultation with stakeholders, review its policies and practices about the investigation of applications for compensation to consider whether WCQ's capacity to investigate is used appropriately and to make any necessary adjustments.	✓	Completed. A new customer relationship model will help to address concerns raised by employers. There is also a provision to appeal or have a claim reviewed under section 541.
3.7	To put the matter beyond doubt, the WCRA should be amended to permit WCQ to rescind at its own initiative a decision to reject an application for compensation where WCQ was satisfied that the decision was wrongly made or that material information had not been taken into account. Any such decision would only be able to be made where the parties were afforded due process and where WCQ gave notice within a prescribed period of the original decision to the parties of WCQ's intention to consider such rescission. If WCQ took such action, it would not preclude review of the confirmed or changed decision.	✗	Subject to consideration by Parliament. Requires legislative change
3.8	By 31 March 2011, WCQ should consider whether sufficient use is being made of legal panel members or other skilled practitioners to assist in the training of WCQ staff who are engaged in claims management to improve the skills and knowledge of less experienced staff.	✓	Completed Training courses and other programs such as 'Insight Management' program as well as access to Certified Personal Injury Professionals programs were provided.[845]
3.9	Where WCQ is considering taking action to increase the premium of a poor performing employer, WCQ should be able to consider accepting a voluntary undertaking about improved performance by the employer and to agree not to impose the increase if the agreed improvements occur.	✓	Injury Prevention and Management (IPaM) has been implemented. However IPaM only works with employers that have had premium rates capped at twice the industry rate for three or more consecutive years. These businesses have been recognised as having the potential to develop strategies to decrease their frequency of workplace incidents, and to fill gaps in their injury prevention and management systems. There are currently 1200 employers who have been invited to take part in the program.[846]

[845] WorkCover Queensland Annual Report 2011-2012: 8 http://www.workcoverqld.com.au/forms-and-resources/publications/annual-reports/2011/1423621077.pdf [7 May 2013]

[846] WorkCover Queensland Injury Prevention and Management (IPaM) program http://www.workcoverqld.com.au/insurance/calculating/employer-consultancy-services/injury-prevention-and-management-program-ipam [7 May 2013]

	Recommendation	Action	Comments
3.10	By 31 December 2010, WHSQ should commission a survey by an impartial third party to identify why injured workers take common law actions for damages, and seek to have the results publicly available by no later than 30 June 2011.	✕	The survey of the type recommended was determined by the previous government to involve significant cost and privacy issues and as a consequence, this recommendation has not been acted on
4.1	WHSQ should commission periodic surveys, by an impartial third party, of claimants and lawyers (no more frequently than annually, with the results of the first survey to be available by 30 June 2011) to seek to ascertain how much of a settlement has been paid: a) to the claimant, b) to the claimant's lawyers c) for medical services d) for anything else. *Note: Due regard should be had for the privacy of those concerned and for protection of information thus collected – see recommendation 4.2 below*.	✕	The recommendation was made at a time when an increasing number of common law claims were being lodged and common law claims costs increasing. Currently the number of common law claims and claims costs are reducing. WorkCover and Q-COMP use the twice yearly stakeholder forums as a vehicle to engage stakeholders such as lawyers on cost issues, which negates the need to survey.
4.2	Any survey results should be de-identified and aggregated in the survey report, so that the confidentiality of any information provided to the person conducting the survey is protected, and the survey reports should be publicly available.	✕	The survey of the type recommended was determined by the previous government to involve significant cost and privacy issues and as a consequence, this recommendation has not been acted on
4.3	Subject to further consideration of the information obtained through the surveys, consideration should be given in 2012 to whether there should be a statutory requirement for such information to be disclosed by legal practitioners to Q-COMP on a confidential basis. *Note: Such disclosure might be direct or through a professional supervisory body, with use of representative samples, if appropriate.*	✕	The survey of the type recommended was determined by the previous government to involve significant cost and privacy issues and as a consequence, this recommendation has not been acted on
4.4	After the results of the first survey are available, a conference should be promptly convened by WHSQ with the Law Society, the ALA, WorkCover, Q-COMP and other interested parties to discuss options for managing legal costs. The fixed party and party costs model used in Victoria should be an option.	✕	The survey of the type recommended was determined by the previous government to involve significant cost and privacy issues and as a consequence, this recommendation has not been acted on

	Recommendation	Action	Comments
4.5	Further work should be undertaken by WHSQ to identify how the advertising of legal services is affecting claims for workers compensation and whether further action is required to control such activity. This should, if possible, be completed by the end of June 2011 and the results reported to the Minister.	✓	Legal advertising will continue to be monitored, however, it is acknowledged that regulation of the legal profession goes wider than workers' compensation, with the obligations of lawyers under the *Legal Profession Act 2007* sufficient in most instances. The *Fair Trading Act 1989* and the *Competition and Consumer Act 2010* (Cwlth) also prohibit advertising or activity that is false or misleading. The Defamation Act 2005 prohibits comments that may impute harm to a person's reputation, including entities such as WorkCover. No amendments to the *Workers' Compensation and Rehabilitation Act 2003* to regulate the legal profession further are proposed. WorkCover is able to refer any concerns about these activities to the Legal Services Commission
4.6	By 31 December 2010, Q-COMP should prepare simple information in a check list for claimants which would explain to them in an easy to understand way: a) that a claimant may be legitimately charged for legal and other costs relating to a claim; b) that a claimant must be advised by a legal practitioner about such legal costs, including how they are to be met; c) what rights a claimant has if the claimant is concerned that the charges may be excessive or otherwise unreasonable; d) how to get further advice about legal fees.	✓	This is already a requirement under section 308 of *the Legal Profession Act 2007*
4.7	A legal practitioner should be required to provide a copy of the check list to a client at the point of engagement and at the final disposition of the matter.	✓	This is already a requirement under section 308 of *the Legal Profession Act 2007*
5.1	Return to work and rehabilitation should be a primary object of the WCRA.	✗	Subject to consideration by Parliament. Requires legislative change
5.2	There should as soon as possible be stronger enforcement of: a) the period within which a notice of claim is given under s.133 of the WCRA; b) an employer's obligations as to an injured worker's return to work and rehabilitation; c) a worker's obligations as to return to work and rehabilitation.	✓	WorkCover's return-to-work outcomes have improved (97.6 per cent of workers with time lost claims returned to work[847]).

[847] WorkCover Queensland Annual Report 2011-2012: 8 http://www.workcoverqld.com.au/forms-and-resources/publications/annual-reports/2011/1423621077.pdf [7 May 2013]

	Recommendation	Action	Comments
5.3	Additional enforcement powers should be provided under the WCRA in relation to return to work and rehabilitation obligations, including, where compliance cannot be achieved otherwise, powers to give enforceable directions to employers.	✗	Subject to consideration by Parliament. Requires legislative change
5.4	By 31 December 2010, WCQ and Q-COMP should develop their respective RTW and rehabilitation policies and programs in consultation with each other to make them complementary and to facilitate better understanding of the potential demand for RRTW services when claimants cease to be within the scope of WCQ's programs. Such policies and programs should be reviewed in consultation at least annually.	✓	Ongoing The Q-COMP Board has approved the Regional Network Program Initiative. Amongst other things this program will promote better understanding of RRTW services. A regional Return to work Conference and Expo was held in Townsville in 2012.[848]
5.5	Q-COMP should at least annually, in consultation with WCQ and self-insurers, review and revise its best practice guidance for any person with RTW and rehabilitation obligations or needs under the workers' compensation system. This might, for example, relate to the conduct of employers, claimants, legal representatives and medical and related professionals advising claimants or insurers. Such guidance should take account of any relevant minimum advisory standard made by Q-COMP.	✓	Ongoing analysis and review to ensure strategies meet with stakeholder need. Ongoing development and strengthening of relationships with peak professional bodies to support joint education initiatives.[849] Q-COMP has appointed an experienced rehabilitation and insurance profession to specifically review and revise the guidance material.
5.6	Q-COMP should at least annually examine the effectiveness of RRTW coordinators and whether further training and support by Q-COMP should be provided to them.	✓	Ongoing. Continuing education system implemented for training and development opportunities.[850]
5.7	No later than 30 June 2011, WHSQ, Q-COMP and WCQ should develop mechanisms to encourage the more effective use of WHSOs and RRTW coordinators up to and after the introduction of the model *Work Health and Safety Act* in 2012, including by: a) promoting the value of WHSOs and RRTW coordinators to employers in securing better prevention of work-related harm as well as better return to work and rehabilitation outcomes; b) supporting training that recognises and strengthens the complementary roles of WHSOs and RRTW coordinators; c) making relevant information and advice readily available to WHSOs and RRTW coordinators; d) monitoring the use and effectiveness of WHSOs and RRTW coordinators to improve the support available to them.	✓	A cross agency business process group has prepared an initial project plan and identified this area as the priority. The group will progress the issue and update the Minister on a quarterly basis.

[848] Q-COMP Annual Report 2011-2012: 62 http://www.qcomp.com.au/media/267748/40232%20q%20comp%20annual%20report%20f_web.pdf [7 May 2013]

[849] Q-COMP Annual Report 2011-2012: 21 http://www.qcomp.com.au/media/267748/40232%20q%20comp%20annual%20report%20f_web.pdf [7 May 2013]

[850] Q-COMP Maintaining your rehabilitation and return to work coordinator registration http://www.qcomp.com.au/services/workplace-rehabilitation/return-to-work-zone/how-to-become-a-rrtwc/maintaining-your-rehabilitation-and-return-to-work-coordinator-registration.aspx [7 May 2013]

	Recommendation	Action	Comments
5.8	Consideration should be given to authorising a suitably trained health and safety representative to be entitled to perform functions that facilitate the return to work and rehabilitation of an injured worker to a workplace (as part of the implementation of the model *Work Health and Safety Act*).	✕	Subject to consideration by Parliament. Requires legislative change A rehabilitation and insurance professional has been appointed to specifically review and revise best practice guidance material for any person with rehabilitation and return to work obligations or needs under the workers' compensation system.
5.9	The WCRA provisions (Part 6) relating to the reinstatement of an injured worker should be strengthened by allowing the Industrial Relations Commission: a) where reinstatement to the worker's original position is impractical, to order the worker's employment in another position that the employer has available that the IRC considers suitable; b) to make any other order that appears necessary to the Commission for ensuring that the reinstatement is fair and effective, including an interim order.	✕	Subject to consideration by Parliament. Requires legislative change

8.4 Committee comments – Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme

The Committee notes the recommendations in the 'Structural Review of Institutional and Working Arrangements in Queensland's Workers' Compensation Scheme' and supports the themes and outcomes contained in the report. The Committee is satisfied that the recommendations, where accepted, have either been completed or are progressing. The Committee endorses the continued implementation of the recommendations.

Some of the issues contained in the review have been considered in other sections of this report.

9 Other issues

9.1 Q-COMP – 'Reducing red tape for employers' proposal

Q-COMP submitted to the Committee a proposal aimed at lowering the number of claims lodged to WorkCover. Q-COMP explained that the Queensland scheme has *'significantly more claims than any other scheme i.e. 94,000 claims in 2011/12 lodged with WorkCover, of which around 33,000 were medical expenses only claims'*. Their proposal outlines that reducing the employers' excess would result in a reduction of 40,000 to 44,000 claim lodgements. Q-COMP considers that their proposal would also reduce the workload as WorkCover administers all claims from the beginning, including those where the excess period for weekly compensation is not exceeded.[851] Section 9.1.2 outlines Q-COMP's proposal in further detail. The Committee received several versions of the proposal as statistical information was further refined. A copy of the proposal is contained in Appendix I.

9.1.1 Current process for excess payment

If a worker is injured at work or in the course of work, a claim can be lodged with WorkCover for benefits. Once a claim for weekly compensation has been accepted by WorkCover, the employer is required to pay an excess. The excess is similar to that of other insurance policies and represents the first payment of weekly compensation, which is paid to the worker by their employer.[852] From 1 July 2012, the excess amount is calculated as the lesser of:

- 100 per cent of Queensland full-time adult's ordinary time earnings (QOTE) (this amount is declared annually by the Australian Statistician) or
- the worker's weekly compensation (in most cases this is 100 per cent of the award or 85 per cent of normal weekly earnings, whichever is the greater).[853]

QOTE is $1330.50 (this rate applies to all claims with a date of injury on or after 1 July 2012). The amount payable for the excess is set out in the Act under sections 65 and 66.[854]

The relevant sections of the Act are as follows:

65 What is the *excess period*

1) The ***excess period***, in relation to a worker who sustains an injury for which compensation is payable, is the period that starts on the day that the worker's entitlement to compensation arises under chapter 3, part 7.

(2) The ***excess period*** ends at the end of the day that the amount of weekly compensation paid to the worker exceeds an amount prescribed under a regulation.

66 *Employer's liability for excess period*

(1) This section applies to -

(a) an employer who is not a self-insurer and who is, or is required to be, insured under a WorkCover policy; and

(b) a worker, other than a household worker employed by the employer, who sustains an injury for which compensation is payable.

(2) The employer must pay the worker an amount equal to the weekly payment of compensation that, if this section did not apply, would be payable to the worker by WorkCover for the excess period.

(3) WorkCover is not required to pay the compensation to the worker, subject to subsection (5).

[851] Correspondence from Q-COMP (revised), to FAC dated 1 March 2013
[852] WorkCover Queensland, Employer excess http://www.workcoverqld.com.au/rehab-and-claims/support-and-benefits/weekly-compensation/employer-excess [8 March 2013]
[853] WorkCover Queensland, Employer excess http://www.workcoverqld.com.au/rehab-and-claims/support-and-benefits/weekly-compensation/employer-excess [8 March 2013]
[854] WorkCover Queensland, Employer excess http://www.workcoverqld.com.au/rehab-and-claims/support-and-benefits/weekly-compensation/employer-excess [8 March 2013]

(4) If the worker is employed by more than 1 employer when the worker sustains an injury, the amount under subsection (2) –

(a) must be paid by the employer in whose employment the injury was sustained; and

(b) is the amount that relates to the amount payable to the worker under the contract of service with that employer.

(5) If the employer fails to pay the amount to the worker within 10 business days after receiving notice from WorkCover that the worker's application for compensation has been allowed, WorkCover must make the payment to the worker on the employer's behalf.

(6) WorkCover may recover from the employer the amount of the payment made by it together with a penalty equal to 50% of the payment -

(a) as a debt under section 580; or

(b) as an addition to a premium payable by the employer.

(7) The employer may apply in writing to WorkCover to waive or reduce the penalty because of extenuating circumstances.

(8) The application must specify the extenuating circumstances and the reasons the penalty should be waived or reduced in the particular case.

(9) WorkCover must consider the application and may -

(a) waive or reduce the penalty; or

(b) refuse to waive or reduce the penalty.

(10) If the employer is dissatisfied with WorkCover's decision, the employer may have the decision reviewed under chapter 13.

(11) This section does not limit section 50.

(12) In this section—

household worker means a person employed solely in and about, or in connection with, a private dwelling house or the grounds of the dwelling house.

An employer's responsibilities also include:

- their duty to tell WorkCover if the worker asks for, or employer makes, a payment (s133A);
- payment to the worker for day of injury (s144), which is additional to any compensation the worker may receive. This compensation is not part of the employer excess and is paid at the workers' normal pay rate;
- assisting with, or provide rehabilitation for, an injured worker while they are receiving compensation payments (s228 and s229).

133A *Employer's duty to tell WorkCover if worker asks for, or employer makes, a payment*

(1) An employer, other than a self-insurer, must give WorkCover written notice in the approved form if -

(a) a worker asks the employer for compensation for an injury sustained by the worker; or

(b) the employer pays the worker an amount, either in compensation or instead of compensation, that is payable by the employer or WorkCover under the Act for an injury sustained by the worker.

(2) If the employer fails to comply with subsection (1) within 8 business days after the request or payment is made, the employer commits an offence, unless the employer has a reasonable excuse.

144 *When employer must pay worker for day of injury*

(1) For the day the worker stops work because of the injury, the worker is entitled to compensation under this part for the injury.

(1A) Subsection (1) applies despite anything in an industrial instrument or contract of employment applying to the worker.

(2) Despite section 109, the employer must pay the compensation.

(3) The amount of compensation under this part that is payable is in addition to any other compensation payable to the worker under this Act.

(4) The day for which compensation under this part is payable is not to be included in the excess period under section 66.

228 *Employer's obligation to assist or provide rehabilitation*

(1) The employer of a worker who has sustained an injury must take all reasonable steps to assist or provide the worker with rehabilitation for the period for which the worker is entitled to compensation.

(2) The rehabilitation must be of a suitable standard as prescribed under a regulation.

(3) If an employer, other than a self-insurer, considers it is not practicable to provide the worker with suitable duties, the employer must give WorkCover written evidence that the suitable duties are not practicable.

229 *Employer's failure in relation to rehabilitation*

(1) This section applies if an employer, other than a self-insurer, fails to take reasonable steps to assist or provide a worker with rehabilitation.

(2) WorkCover may require the employer to pay WorkCover an amount by way of penalty equal to the amount of compensation paid to the worker during the period of noncompliance by the employer.

(3) WorkCover may recover the amount from the employer -

(a) as a debt; or

(b) as an addition to a premium payable by the employer.

(4) The employer may apply to WorkCover in writing to waive or reduce the penalty because of extenuating circumstances.

(5) The application must specify the extenuating circumstances and the reasons the penalty should be waived or reduced in the particular case.

(6) WorkCover must consider the application and may -

(a) waive or reduce the penalty; or

(b) refuse to waive or reduce the penalty.

(7) If the employer is dissatisfied with WorkCover's decision, the employer may have the decision reviewed under chapter 13.

At present, section 133 of the Act stipulates that employers have a duty to complete a report of an injury to WorkCover within eight business days. The information required by WorkCover at present is:

- the worker's full name, date of birth, and personal contact information
- employer's policy number or entity's name, ABN or ACN for verification
- details of the injury, with how and when it occurred.[855]

WorkCover explained that they are already working to reduce administrative pressure on employers as well as on insurers, and have implemented the following key red tape reduction initiatives:

- *renewing and paying policies can be done completely online, phone, fax or mail;*
- *statutory claims can be lodged by workers, their treating doctors or their employers. Claims can be received online, fax, phone or via mail. The claim 'form' is the equivalent to two pages (reduced from four pages), with the first page being primarily the worker's details. For large employers using online services, some details are pre-populated;*
- *large employers, due to the volume of injuries and claims, work closely with our account managers to manage their portfolio. Last year, more sophisticated access to information for employers was developed, which enables them to see 'up to date data' for claims and also graphical representation of claims trends. WorkCover has been advised by national employers, that this system is now the benchmark for their other insurers; and*

[855] WorkCover Queensland Employer checklist http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/making-a-claim/employer-checklist [4 April 2013]

- *Previously notification and report only claims were required to be lodged. In recent years, WorkCover has actively discouraged these claims, as they do not require action. However, some workers and employers still submit these as a method of keeping records. Most notably, this has occurred recently with Education Queensland (e.g. renovating schools) due to concerns about exposure to asbestos materials.*[856]

9.1.2 Q-COMP's proposal

At present, the employer excess is calculated using the Queensland Ordinary Time Earnings (QOTE), which is currently $1,330.50 or the value of the first week of weekly benefits if under that amount.

At the Committee's public departmental hearing on 28 November 2012, Q-COMP provided a proposal to the Committee option for employer excess payment:

- *Amend the legislation to remove the requirement for claims to be lodged with the insurer until 50% of QOTE ($665.25) is reached with medical or compensation for loss of wages.*
- *Retain the right for the employer or injured worker to lodge a claim with the insurer immediately if there is:*
    - *dispute*
    - *strong indication that the claim will cost more than QOTE.*[857]

On 1 March 2013, Q-COMP advised the Committee that they had revised the figures in their proposal and submitted a revised proposal reducing the excess amount to $450 (36 per cent of QOTE).

Q-COMP proposes that if the injured worker returns to work and does not require further treatment that goes beyond the nominated excess, the employer is under no obligation to lodge the claim. Q-COMP suggests that the Act be amended to enable claims to be lodged through the employer if the claim is below the excess. Claims are only required to be lodged with WorkCover once the cost of medical expenses and/or compensation for loss of wages to a value of $450 is reached. The Committee received a submission that suggested that '*most employees just want their injury recorded and their medical bills paid*', so '*if employers paid the first $300 of medical bills (like an Excess) for employees injured at work claims would be halved …*'[858]

Q-COMP outlined the benefits as follows:

- *Reduce red tape and allow employers, workers and treating doctors to manage low impact and uncomplicated injuries themselves and get on with business*
- *Cost neutral to the scheme*
- *Reduction in administrative savings for WorkCover*
- *Earlier intervention of claims with time lost. Having shorter excess period puts greater emphasis on the employer to be proactive in the early intervention of claims and return to work*.[859]

[856] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 45
[857] Correspondence from Q-COMP (revised), to FAC dated 1 March 2013: 2
[858] Submission 67: letter
[859] Correspondence from Q-COMP (revised), to FAC dated 1 March 2013: 3

The Committee wrote to submitters on the 27 February to provide them the opportunity to comment on the (original) proposal, which initially suggested 50 per cent (or $665.25) as the excess. The Committee then held a public departmental briefing with Q-COMP to clarify aspects of their proposal on Wednesday 20 March 2013.

A total of 34 submissions were received; those who supported the proposal such as ARPA considered that the *'proposed change would be of significant benefit to injured workers and the return to work outcomes, as it would encourage early intervention practices by employers'*.[860] Other submissions considered the proposal will also reduce cost and time.[861,862] Similarly, Suncorp *'broadly supports the initiative proposed'* and believe that it should be *'aligned with harmonised key scheme design aspects outlined in their previously lodged submission'*. They consider that *'it is important to ensure that early intervention is not adversely affected by changes to injury reporting'*.[863]

Some submissions indicated a level of support for the proposal but sought further clarification. In particular, it was unclear why the requirement was set to 36% or 50% of QOTE and not 100% of QOTE, or why the method in which excess is calculated should not be changed (i.e. *'do away with the complicated QOTE system'*).[864] The LGAQ considers that '*the proposal requires far more detailed data and analysis than has been put forward to date by Q-COMP'*.[865] The Electrical Contractors Association agrees and suggested that more financial modelling on the savings that would be made from the proposal should be released by Q-COMP for consideration.[866] Clarification on the resulting reduction or savings for employers in premiums was also sought by some submitters.[867,868]

Although the Civil Contractors Federation supports the proposal, they believe '*that incident reports should be lodged together with claims to form part of the determination of whether a claim should be accepted or not. This enables the employer to confirm the time, location and severity of injury*'.[869] The Association of Self Insured Employers Queensland (ASIEQ) also supports the proposal but *'cautions against the use of a dollar amount to determine the relevant threshold'*. They stated that *'a finance threshold is not a consistent measure that has relevance to the severity of the injury or the incapacity.'* and uses the example below to illustrate this point:

> *For example, a worker may have a knee strain and start physiotherapy with one visit every two (2) weeks. It may be potentially three (3) months before the financial threshold is reached at which time a doctor may require surgery and a claim is lodged. The insurer is disadvantaged as the case is three (3) months old and pressure will mount for early decisions to facilitate surgery when it may be difficult to determine liability or the work relationship to the current condition*.[870]

[860] Submission 226: 1
[861] Submission 208
[862] Submission 209
[863] Submission 218
[864] Submission 212: 1
[865] Submission 220: 6
[866] Submission 214: 3
[867] Submission 214: 3
[868] Submission 210
[869] Submission 225: 1
[870] Submission 224: 1

As such, the ASIEQ suggested additional requirements as follows:

- *Both the employer or the worker should have the right to request that a claim be lodged for any work related injury;*
- *a claim must be lodged where a lost time injury is sustained; and,*
- *a claim must be lodged when the certified incapacity exceeds seven days of restricted work or 14 days of medical treatment from the date of injury*.[871]

In contrast, over half of the submitters had some concerns with the proposal. The key areas of concerns are:

- Loss of data relating to injuries or minor claims

Some submitters noted that 'claims data can be used '*to identify fraud, aggravation of pre-existing injuries, double-dipping and appropriate management of common law claims or investigation'*[872] *and is an important as part of a holistic risk assessment and management plan'*.[873] The Queensland Nurses' Union also noted that as the *'it will be much more difficult for the regulator to carry out* analysis when the data has been obtained *'from many sources that may not be accurate'*.[874] In addition 'minor' claims currently being logged with WorkCover are '*important as frequency of minor injuries may be a more meaningful indicator of an unsafe workplace*'.[875]

Master Builders highlighted that *'a key role of WorkCover … is to track claims and claimants to identify fraud, aggravation or pre-existing injuries, double dipping, and the appropriate management of common law claims or investigation'*. They considered that '*a significant reduction in claims being logged will reduce WorkCover's capacity to manage and identify these issues*' and '*anticipates the poor management and loss of knowledge will increase the cost of claims and prolong proper intervention to assist injured workers return to work'*.[876]

Furthermore, one submitter considered that the '*current scheme works so well because minor claims do not require an assessment process*' and '*not a lot of administration is required from the insurer for the application of minor claims'*.[877]

Many submitters considered that there are risks in placing the onus on the employer to maintain a register; these risks include *'poor record keeping procedures, delays in payments, breaches of privacy and additional record keeping costs for employers'*.[878] In particular, submitters emphasised their concerns that the proposal may result in the loss of official records or the register of minor claims particularly if a business becomes bankrupt, and for arrangements to be put in place for these scenarios.[879]

[871] Submission 224: 2
[872] Submission 222: 6
[873] Submission 214: 2
[874] Submission 221: 3
[875] Submission 214: 2
[876] Submission 222: 6
[877] Submission 216: 2
[878] Submission 231
[879] Submission 214: 1

With regard to notifications, Q-COMP advised that:

> *One of the things that a lot of employers, and I am working into workplace health and safety territory here, will have in place in their workplace is some sort of system of reporting workplace incidents in the first instance, which in itself, whilst related to the Workers' Comp scheme, is quite independent of it in its own right, I suppose. That is where I think there would be certainly a degree of emphasis upon those individual employers and a degree of trust in those individual employers' incident reporting processes which they would in most instances go through anyway I suggest*.[880]

Q-COMP also advised that:

> *If I could say one thing quickly to that: when you are considering our scheme, which is different to how it works in the other states, we do not rely on employers to put in the form and fill in the paperwork on every single claim. About a third of the claims come directly from the doctor to us. The employer does not have to do anything. About another third come directly from workers. So employers do not do it. It is only in a third that the employers put it in.*[881]

The Committee asked Q-COMP about the possibility of records being lost in the event an employer goes out of business or retires:

> *In the current scheme we have asbestos claims, we have long latent onset claims where employers have long since disappeared, even their doctors - solar claims, that type of thing. So that is already an issue. And so there are ways to work around it. As I said I think in one of my opening remarks, the common law only claims, there's no statutory claim so you have to go really to the doctor who is generally around. So I guess employers are more likely to - my submission would be you could get employers coming and going but certainly doctors tend to keep their records for a long time.*[882]

The Committee suggested that the data may be required or useful for future amendments and reviews of the scheme. Q-COMP advised:

> *It probably wouldn't. My suggestion would be that these minor claims simply clog up the system. Other schemes around Australia look to serious injuries and they define it in different ways and they report on those as being, I guess, relevant if you are thinking about prevention which is obviously workplace health and safety. So it is serious injuries. A swollen ankle for one day is not going to change what you are going to do. Alternatively, the other reason you would be looking at figures and numbers for a scheme is for outcomes - other than costs, of course - and return to work outcomes. These people are already back at work so it doesn't add any information that is going to be useful for managing claims, would be my submission*.[883]

[880] Mr Francis, Transcript 28 November 2012: 11
[881] Ms Stratford, Transcript 28 November 2012: 11
[882] Ms Woods, Transcript 20 March 2013: 5
[883] Ms Woods, Transcript 20 March 2013: 4

To overcome any potential loss of data, the Electrical Contractors Association and the Queensland Law Society[884] suggested that an online portal for claims could be set up by Q-COMP or WorkCover so employers or workers could directly report claims.

> *The online portal could be driven by the unique policy number allocated to each business and provide a ready means to record details of injuries and the expenses outlaid. This would overcome the problem of documentation being lost in the event of a business' closure and ensure adequate information is available for the purposes of any common law statutory claims or actuarial or statistical analysis.*[885]

However, WorkCover has streamlined the claims process where the injured worker can lodge a claim directly through the medical provider or together with the employer. The employer does not have to assess a claim prior to lodging it with WorkCover as all claims are assessed by WorkCover; as the lodgement of a claim requires only the medical certificate and normal weekly earnings wage figures for the injured worker.[886] Under the proposal, the employer with medical only claims may be required to obtain more information as well as make an assessment as to whether to make a payment for the medical only claim (see next section for statistical analysis and explanation).

- Mishandling of claims by employers leading to loss of benefits for injured workers

The Queensland Law Society (QLS) advises that there are risks with the proposal as '*employers with poor record keeping processes may assert that a genuine injury had not been reported and therefore, did not occur. In such cases any ensuing dispute will have the potential to be costly and administratively burdensome for both employers and WorkCover'*.[887] In addition, '*injuries which at the time might be considered minor may, in the fullness of time, be more significant.*[888,889,890] Another submitter provided examples to the Committee where injuries have not been recorded or where major injuries have been incorrectly recorded as 'minor' as examples resulting in employees being disadvantaged.[891]

The Committee was also advised that WorkSafe Victoria have received various complaints, one of which:

> *The employer doesn't record a claim and just pays the injured worker. Later on if the worker is dismissed or changes employers and the worker requires an operation for example, WorkSafe says that makes it difficult for them as there is no record of an injury.*[892]

[884] Submission 239: 4
[885] Submission 214: 1
[886] WorkCover Queensland, Employer checklist http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/making-a-claim/employer-checklist [9 April 2013]
[887] Submission 239: 4
[888] Submission 239: 4
[889] Submission 221: 3
[890] Submission 221: 2
[891] Submission 227: 2-3
[892] Submission 223: 3

Furthermore, IEUA-QNT considers that *'there is potential for injured workers to be discriminated against due to the lack of separation between the employer and the management of the claim'*.

> *The employer will have unregulated access to medical information that is usually controlled by the insurer. The employer will become the judge, jury and executioner in those initial stages and there will be added pressure for employees not to seek treatment from their own treating medical professionals. The QComp proposal does not provide any mechanism to ensure that there is separation in the roles as insurer and as employer. Unless there are regulatory measures put in place, we have no doubt this will impact on the industrial rights of workers.*[893]

The Queensland Council of Unions highlighted notable differences between the Victorian and Queensland scheme. They considered that the *'proposal totally disregards any rights of workers to be part of a process that compensates them for being injured at work'*.[894] Their concerns are also supported by United Voice.[895] The Australian Manufacturing Workers' Union (AMWU) is also concerned that the *'proposal would result in cases of employees being denied access to the scheme'*. They considered that the *'notification only claims are essential in protecting the rights of employees who may develop diseases or injuries in the future from a workplace incident/s'*.[896]

- More administrative burden on employers

The AMMA submitted that their members would be subjected to *'undue regulatory burden and the proposal would not maintain an appropriate balance between benefits for injured workers and reasonable costs levels for employers'*.[897]

At present, section 133 of the Act stipulates that employers have a duty to complete a report of an injury to WorkCover within eight business days. The information required by WorkCover is:

- the worker's full name, date of birth, and personal contact information
- employer's policy number or entity's name, ABN or ACN for verification
- details of the injury, with how and when it occurred.[898]

The Q-COMP proposal requires the employer to maintain a recording of injuries which may require comprehensive information compared to the current requirements regardless of whether a claim is lodged.

As such, some submitters highlight the potential increase in administrative workload given the current process requires minimal information to be lodged and all records are maintained by WorkCover. The AMWU stated that '*the imposition on employers to develop and maintain a fulsome injuries register creates greater amounts of red tape and adds a further layer of bureaucracy to the workers' compensation scheme'*.[899]

CCIQ are concerned about the non-dollar burden on small business that the proposal could potentially create through the employer having to manage the medical expense process. They indicated that they have reservations over '*the already time-poor employers being burdened by the complexity of payment of medical bills, general process oversight and familiarisation*'.[900]

[893] Submission 244: 3
[894] Submission 229: 8
[895] Submission 231
[896] Submission 228: 2
[897] Submission 245: 3
[898] WorkCover Queensland Employer checklist http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/making-a-claim/employer-checklist [4 April 2013]
[899] Submission 228: 4
[900] Correspondence from CCIQ to FAC dated 8 February 2013: 1

There are also concerns that unlike medium to large employer who already have the in-house resources to manage the process, small employers will be more affected by the proposal.[901] For example, the Australian Industry group considers that the proposal *'appears to have potential merit, particularly for larger, better resourced businesses'* but they consider '*small to medium businesses may simply lack the capacity and resources to take on any additional internal responsibilities*'.[902] Another submitter believes that employers would be required (under the proposal) to '*undertake new administrative processes including making an assessment as to whether a claim should be lodged with WorkCover immediately*

Agforce also had similar concerns and outlined:

> *Most agricultural producers are small to medium size businesses that are currently time poor and dealing with the many workplace health and safety compliance issues that are already in existence. The added burden of developing and maintaining a register of minor injuries and relevant supporting documentation will increase red tape for these businesses.*[903]

They further added:

> *Employers are also faced with an arbitrary judgement as to whether or not the injury will reach the threshold of 50% of QOTE to choose the path to be followed for management of the workers injury. Should the injury initially be deemed minor and then end up to be more severe, the employer will have to change tact on the injury management process and lodge a WorkCover claim. This will involve more time and further expense for the employer.*[904]

The Department of Transport and Main Roads' submission concurs with Agforce's observation and that *'TMR would be required to make a determination on the complexity of possible claims and whether or not the injury would meet the legislative requirements necessary to allow compensation'.*[905]

The Department of Transport and Main Roads considered that the proposal would *'increase the administrative and resource burden'* on them. They stated that *'implementing the changes would require the transfer of a number of functions from WorkCover to employers, which would in turn be required to have higher levels of competency, additional administrative systems, and increased interaction with medical providers'*.[906]

- Increase in disputes and impact of scheme's efficiency

The Committee was advised that the proposal may generate potential disputes between employer and worker and *'workers may be intimidated to making a claim for medical costs for fear of their employment'*.[907] The Committee asked Q-COMP whether they have heard about any *'hidden concerns regarding disputes in the Victorian situation'* and was advised:

> *With respect to anything that relates to a dispute, so if you are an injured worker and your employer says, 'No, I'm not paying for it; you can take it out of your sick leave', it amounts to a dispute. Under our proposal, that sort of claim would be submitted to the insurer. Any sort of misconduct, shall I say, by an employer can easily be addressed in a very easy way by simply filling out a form and placing it with the insurer and it gets sorted out then.*[908]

[901] Submission 223: 3-4
[902] Submission 235: 1
[903] Submission 233: 2
[904] Submission 233: 2
[905] Submission 232: 1
[906] Submission 232: 1
[907] Submission 222: 6
[908] Ms Woods, Transcript 20 March 2013: 2

The Queensland Council of Unions highlighted the current efficiency in which disputes are currently resolved (i.e. 83 per cent of disputes are resolved within three months)[909] and emphasised that Queensland has the lowest dispute rates in Australia.[910,911] As such, the proposal may potentially increase the disputation rate. SafeWork Australia's comparative data shows that disputation rates for Queensland for 2010-11 was 3.1 per cent (the lowest rate of all jurisdictions) compared to Victoria's 10 per cent.[912]

The Australian Industry Group also stated their reservations in regards to the option to lodge a claim with WorkCover in the event of a dispute. They consider that '*in the context of the "culture of entitlement" that has developed in regards to workers' compensation, this could have significant potential to undermine and derail the effectiveness and intent of the option*'.[913]

- Financial burden on employers

The IEUA-QNT considers that there will also be set up costs for employers '*needing to initiate a new system to manage the burden of initial claims and injury reporting... Unless there could be demonstrated long term gains from this, employers should not be expected to bear the brunt of these expenses that are currently covered by the scheme'.*[914] They highlighted that

> *The proposal outlines the need for an employer to complete paperwork and then manage this documentation which will increase the administrative load for many employers who manage their injuries differently at the moment. This proposal effectively means that initially all employers will be required to manage as if they are self-insurers. Self-insurers go through significant assessment and accreditation processes because it is important that employers can establish their capacity to comply with the basics in managing claims. We do not believe that a vast majority of employers, particularly those in the small to medium-sized bracket, will have the infrastructure, the knowledge or experience to deal with the initial stages of a claim.*[915]

Many submitters advised that the proposal will create additional workload for small employers in that those *'who have never had a claim or have only had "medical only" claims will be required to formally set up pay systems with medical practitioners, incident recording and reporting system for minor injuries while paying higher costs than they currently pay now*'.[916,917]

In addition, Master Builders advised that *'employers are unfamiliar with the 'Schedule of Fees' published by Q-COMP for medical costs and have no capacity to control fees. These costs are not paid by employers at the moment and represent an additional cost of employers'.*[918] The Department of Transport and Main Roads considered that *'medical providers … would need to forward their invoices directly to TMR for payment, instead of to WorkCover. …. the processing of additional invoices each year would impact on TMR's financial resources'.*[919]

[909] Submission 89: 2
[910] Submission 89: 16
[911] Submission 229: 5
[912] Safe Work Australia, 2012, Comparative Performance Monitoring Report: Comparison of work health and safety and workers' compensation schemes in Australia and New Zealand. 14th Edition (October): 35 http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/716/CPM_14.pdf [4 April 2013]
[913] Submission 235: 2
[914] Submission 244: 1-2
[915] Submission 244: 1
[916] Submission 222: 2
[917] Submission 220: 6
[918] Submission 222: 6
[919] Submission 232: 2

The Committee clarified with Q-COMP how medical costs could be handled in the event that an employer suggested to the injured worker to cover their own medical cost and be reimbursed later. Q-COMP acknowledged that this could be a problem that would require some thought:

> *...in trying to reduce red tape, you are trying to give employers that responsibility and then by putting more rules you may well change that. I think the only way I keep coming back to those sort of problems is, if a dispute arises, you just put it into the insurer and that is that.*[920]

The Electrical Contractors Association also sought clarification around the handling of medical certificates if the proposal was implemented. They queried *'the implications for employers and their responsibilities in handling medical information under the National Privacy Laws'*.[921]

- Other comments about the proposal

Some submitters did not consider the proposal to have merit with one stating that the proposal was not well presented. NIBAA provided an example as follows:

> *For example, why does the proposal apply to values up to 50% of the excess? Why does the proposal not apply to the full value of the excess? There is no rationale for this proposition.*[922]

The Committee also has concerns that the statistics used to compare the number of claims between Victoria and Queensland is not consistent. For example, the Victorian figures do not include 'notification only' or 'medical only' claims, nor does it include journey claims. But these categories were included in the Queensland figures. One submitter highlighted this:

> *…the statistics quoted fail to identify their context. Through the public briefings it was explained that other jurisdictions do not record "notification only" claims and these are included in the Queensland figures. QComp have also advised that other jurisdictions do not record "medical expenses only" claims, which again are also included in the Queensland figures. These two factors added together approximate the number of claims QComp believes the statistic will be reduced by. However, the QComp proposal will not remove the need for these claims to be made, and if adopted, they will continue to exist but simply be absent from the statistics we see in the future.*[923]

NIBAA considers that the proposal was *'not about reducing red tape. The issues raised in the paper concern the most preferable arrangements for handling claims that fall below the amount of the excess'*.[924]

Agforce states that *'the proposal would be of most benefit to WorkCover and not the employer'*.[925] However, WorkCover disagrees and considers that the Q-COMP proposal *'will do the opposite in that it would increase red tape and increase costs to the WorkCover Fund',* although they *'support all initiatives aimed at sustainable red tape reduction.'*[926]

[920] Ms Woods, Transcript 20 March 2013: 7
[921] Submission 214: 2
[922] Submission 236
[923] Submission 244: 1
[924] Submission 236
[925] Submission 233: 2
[926] Submission 219: 1

9.1.3 Response from WorkCover

WorkCover[927] submitted the following:

- *Employers will need to pay weekly compensation albeit less but also medical accounts as well as maintain registers. Given economies of scale WorkCover are more efficient with record keeping and account payment than individual employers who may struggle with this requirement.*
- Currently 40 per cent of claims are lodged by employees. Another 30 per cent are lodged by doctors while employers account for remaining 30 per cent of claims lodgements with WorkCover. With the proposal, '*all claims will need to go to employers so current expeditious lodgements by doctors and workers will no longer be applicable. Employers will pay excess (medical and weekly compensation), maintain register and records, and then submit any claims over the excess amount to WorkCover*'.
- *Initial changes to WorkCover's processes, systems and communication information to implement the proposal with cost associated with transition and education estimated to be around $0.5M in the first year. Potential for ongoing cost to be added to the scheme of $18M per annum*.
- Concerns that *workers may be disadvantage and may be asked to pay medical bills upfront with no guarantee as at present that services will be paid for by an employer. Workers may also inadvertently miss out on entitlements by being paid sick leave or annual leave instead of compensation rightly due and/or not having their injuries recorded for future claims.*
- Medical providers may also be impacted. For example, payments to doctors are guaranteed for payment by WorkCover and there may be some cost shifting to Medicare.
- At present, medical treatments with specialists such as physiotherapists are facilitated immediately after a claim is lodged, but the proposal may results in be delayed treatment particularly if the worker has to pay upfront and/or gaps.

Some comments from the Department in response to an earlier version of the proposal (with a different excess figure) are also worth noting. In particular, they suggested that the proposal:

- *may legitimise and incentivise employers to pay their own claims costs, i.e. keep paying past the threshold as a way to keep premium costs lower, or hide claims;*
- *assumes the operational costs for WorkCover will reduce substantially due to a significant amount of claims being managed by the employer. There is an expectation that a reduction in premium would follow. However, this proposal affects claims that are simple to process, and to some extent, WorkCover has streamlined the processes involved in the registration, determination and payment of these claims, taking advantage of the economies of scale and IT systems available to the organisation; and*
- *the average cost of processing a statutory claim up until a decision is made, is $71 per claim. Where the average cost of processing a simple statutory claim, which would be excluded under the excess proposal is $52 per claim. Based on 48,000 simple claims being excluded from the scheme, the administration savings to WorkCover are in the order of $2.5 million.*[928]

In addition, there were 1,370 injured workers with multiple claims in the same period in 2011/12.

[927] Submission 219
[928] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 43-44

The Department provided a comparison of excess period for other jurisdictions:

- New South Wales - one week's wages or $1868.50, whichever is greater.
- Victoria – ten days wages and the first $629 of medical and like services.
- South Australia – two weeks wages.
- Tasmania – one week's wages and first $200 of medical and like services.
- Northern Territory – one day's wages.
- Australian Capital Territory – all wages from date of injury until the employer notifies the insurer.
- Western Australia and Comcare do not have an excess for their schemes.[929]

The following comparison points were raised by the Department:

- Victoria allows employers to pay an extra 10 per cent on their premium to buy out their excess. Employers who have bought out their excess must lodge all claims within 10 days of the worker lodging the claim with the employer. In 2011-12, 16,157 employers (approximately 8 per cent) bought out their excess. These employers employed 40,905 full time employees and 106,603 part time employees, which is equivalent to approximately 3% of the Full Time Equivalent workforce covered by the Victorian Scheme.
- Employers in Victoria are required to lodge a claim with the insurer within 10 days of becoming aware of the claim unless the claim is a medical expenses only claim and the medical expenses are not likely to exceed $629. All claims for medical expenses below $629 must be reported at no less than three monthly intervals.
- Employers in New South Wales and South Australia are required to lodge a claim with the insurer within five days of becoming aware of the claim. The employer's excess will be waived if they lodge a claim with the insurer within five days of becoming aware of the claim.
- All jurisdictions require employers to make a record of all injury claims. Employers in jurisdiction with private insurance providers are required to retain these records for a minimum of 5 years.[930]
- Feedback received from jurisdictions with an excess indicate that employers in those jurisdiction have no current issues except for Tasmania. The Tasmanian regulator has indicated that employers and insurers seek to have the medical excess component removed or increased to $1,000 as the cost of administering the medical expenses excess of $200 outweighs the savings provided to the scheme; this matter is currently being reviewed by the regulator.[931]

9.2.1 Submissions on the Queensland and Victorian scheme comparison

Q-COMP's proposal makes a comparison with Victoria; both of which have low premium rates and states that Victoria has about 30,000 statutory claims compared to Queensland's 94,000 (reported claims only).

[929] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 45
[930] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 45
[931] Correspondence from Department of Justice and Attorney-General, to FAC dated 21 December 2012: 45

The comparison between the two jurisdictions is outlined in Table 22 below.

Table 22: Comparison between Queensland and Victoria

	Queensland	Victoria
Number of employers insured	150,000 (as at 2011/12)[932]	207,001 (as at 2010/11)[933]
Number of employees covered	1.892 million	2.535 million
Number of claims 2011/12	*93,000[934]	*29,261[935]
Employer excess	$1330.50 No buyout option	$629 (as at 1 July 2012) Excess buyout option – cost of an additional 10% of premium
Employer payment	100% of QOTE or worker's weekly compensation (usually 100% of award or 85% of weekly earnings, whichever is greater) Represents the first payment of weekly compensation – paid to worker	First 10 days of worker's absence (i.e. days in which the workers would have worked if they had not been injured). E.g. if a worker is employed for only 1 day a week, the employer's liability would extend for 10 weeks. First $629 medical expenses
Process	1. All injuries are required to be lodged as an employer's report even if no time is lost within eight days of the injury (s133). 2. Report must contain workers details, employer's policy number and details of the injury.[936] 3. Medical invoices are usually received by WorkCover directly from the service provider rather than sent via the employer (i.e. doctor sends WorkCover an invoice). 4. WorkCover currently pays for medical services for injured workers. 5. Employers can lodge a claim form together with the injured worker.	1. Injured worker gives form to employer for sign off 2. Employer completes an employer injury claim report 3. Documentation (worker injury claim form, employer injury claim report, worker's medical certificate and other documentation including medical expenses) to be submitted to WorkSafe Agent to be submitted. 4. These are to be submitted within 10 days if medical expenses are likely to exceed $629, or if medical expenses under $629* are not paid pending a decision on the claim by WorkSafe, or if any time off work is required. 5. If claims is for medical expenses only and not likely to exceed the excess of $629, and employer has paid, the claim can be submitted at no greater than three month intervals.[937]

*Victorian statistics on number of claims exclude journey claims and medical claims under employer excess.

Source: Adapted From WorkCover Queensland and WorkSafe Victoria

[932] WorkCover Queensland. Annual Report 2011-2012 http://www.workcoverqld.com.au/forms-and-resources/publications/annual-reports/2011/1423621077.pdf [18 March 2013]
[933] WorkSafe Victoria Statistical Summary 2011/12. http://www.worksafe.vic.gov.au/__data/assets/pdf_file/0017/43352/Statistical-Summary-2011-12.pdf [18 March 2013]
[934] WorkCover Queensland. Annual Report 2011-2012 http://www.workcoverqld.com.au/forms-and-resources/publications/annual-reports/2011/1423621077.pdf [18 March 2013]
[935] WorkSafe Victoria Statistical Summary 2011/12. http://www.worksafe.vic.gov.au/__data/assets/pdf_file/0017/43352/Statistical-Summary-2011-12.pdf [18 March 2013]
[936] WorkCover Queensland. Employer checklist. http://www.workcoverqld.com.au/rehab-and-claims/injuries-at-work/making-a-claim/employer-checklist [19 March 2013]
[937] WorkSafe Victoria. The claims process for employers. http://www.worksafe.vic.gov.au/injury-and-claims/the-claims-process-following-an-injury/the-claims-process-for-employers [18 March 2013]

The Committee was advised that the Victorian system was difficult to navigate as their system *'requires the employer to focus their time and energy chasing invoices from medical practitioners rather than on return-to-work for injured workers'.* In addition, *'not all claims under threshold are recorded in Victoria, and there has been an increase in unmeasured medical costs and in the lengths of the claims'.*[938]

ACES added that:

> *…this is not a simple issue. Q-COMP claims in their proposal that it would reduce "red tape" and allow employers to manage low impact and uncomplicated injuries themselves and get on with business. If they are going to copy the Victorian system, this would not be true particularly for the majority of small employers. WorkSafe Victoria's "Guide for employers - what to do if a worker is injured" is 43 pages long. It is a complex process for employers in circumstances where employers have many other Government compliance obligations'.*[939]

QLS commented on the Victorian employer excess structure in their supplementary submission and stated:

> *A similar 10 day employer excess introduced into the Queensland scheme would potentially remove:*
>
> 1) *from the scheme 24% of statutory claims made for time lost; and*
> 2) *a proportion of the 36% of claims which are made for medical expenses only (being 24,796 time lost claims and a proportion of the 38,209 claims for medical expenses on 2010/11 data).*[940]

The QLS stated that the employer excess model *'puts more emphasis directly on employers to reduce injury rates in their workplaces, which in turn provides them with a financial benefit'*. They stated that '*the Victorian excess serves to remove some of the premium burden on diligent employers while ensuring that injured workers still have recourse to benefits and rehabilitation*'.[941]

QLS also advised that '*there has been a sustained surge in common law claims which have added about $150M to WorkSafe Victoria's liabilities in first half of the 2012-13 year'*.[942]

Despite some support to adopt the Victorian system[943], IEAU-QNT considers that comparisons between jurisdictions cannot be easily made as the range of the scheme and definitions vary between jurisdictions.[944] Similarly, QCU considers that *'the Queensland scheme is significantly different to all other schemes in Australia and the claim number reporting differences are historical, well known and accepted in the industry'*.[945] QCU further highlights the differences in the types of businesses between jurisdictions; Queensland is 95 per cent small businesses.[946] IEUA-QNT added that *'… (Qld's) short tail scheme has proven over every other model to be far more cost-effective for both insurers and employers because it is designed to reduce costs'.*[947]

[938] Submission 216: 3
[939] Submission 223: 3
[940] Submission 195: 4
[941] Submission 195: 4
[942] Submission 239: 2
[943] Submission 211
[944] Submission 244: 1
[945] Submission 229: 2
[946] Submission 229: 7
[947] Submission 2443: 2

One submitter who has an '*excellent working knowledge of all Workers Compensation jurisdictions across Australia'* considers the Queensland *'system to be the BEST in the country'*. At present *'submitting an application for Workers Compensation is an easy process'* and '*applications can be submitted on line, over the phone and at the doctors',* therefore if *'it is not broken, there is no need to fix it'.*[948]

9.1.3 Statistical analysis

The Committee requested some statistics on the current number of claims in which weekly compensation payments are made for claims with work days lost and the number of medical expenses only claims.

Figures are based on statutory lodgements for 2011/12 which totalled 94,346 claims comprising:

- time lost claims – 41,576
- medical expense only claims – 32,713
- report only claims (notification including withdrawn) – 15,000 (rounded up to nearest 1000)
- rejected claims – 3,500 (rounded up to nearest 1000)
- other including lump sum only and undecided claims – 1,000 (rounded up to nearest 1000)

Table 23: Number of statutory lodgements in the tiers ($450 or less, $450 to QOTE and >QOTE)

CURRENT	$450 or less	$450 to QOTE	Greater than QOTE	Total	Explanation/Notes
Statutory lodgements	43,597	18,089	32,660	94,346	
Distribution of claims (% of total)	46.2%	19.2%	34.6%	100%	Total number of lodgements below QOTE 61,686 (65.4% of total)
Number of (time lost) claims	4,075	10,522	26,979	41,576	
Number of medical expenses only claims	21,110*	7,058	4,545	32,713	See table 23 below for actual number of claims for each tier under $450
Medical expense only claim payments	$4.6M	$5.2M	$28.2M	$38.0M	
Employer pays (wage component only)	$0.8M	$5.3M	$23.0M	$29.1M	At present, employers pay wages or weekly compensation only for under QOTE.
WorkCover pays (wage component only)	$0.0M	$0.0M	$244.9M	$244.9M	
Workcover pays (medical)	$5.8M	$9.0M	$544.6M	$559.4M	All medical expenses are currently paid by WorkCover.
Total	**$6.6M**	**$14.3M**	**$567.6M**	**$588.5M**	
PROPOSED					
Employer pays	$6.6M	$8.1M	$14.7M	$29.4M	Medical expenses included
WorkCover pays	$0.0M	$6.2M	$552.9M	$559.1M	
Total	**$6.6M**	**$14.3M**	**$567.6M**	**$588.5M**	Total amounts and number of claims do not change.

Source: Q-COMP

[948] Submission 216:1

The data in Table 23 above highlight the following points:

- Current statutory claims below QOTE (i.e. below $1330.50) comprise of 65.4 per cent of all statutory lodgements.
- Number of time lost claims under $450 represent 9.8 per cent of total number of time lost claims (41,576).
- Medical expense only of $450 or less total 21,110 (i.e. 64.5 per cent of total).
- Only the wage component is payable at present for employers ($0.8M), whilst all medical expenses are paid by WorkCover ($5.8M) for all claims under $450 (highlighted in the darker shade in the table).
- Under Q-COMP's proposal, employer pays for medical and wage component with WorkCover no longer responsible for medical expenses for claims under $450 (highlighted in the lighter shade in the table).
- Employers will also be required to pay for some medical expenses incurred for claims between $450 and QOTE. Table shows that employer costs would increase from $5.3M to $8.1M.
- However for those claims greater than QOTE, the employer payments in that tier decreases because employers only have to pay the excess of $450 (instead of current $1330.50).
- The total payments or number of claims does not change. However, the responsibility for managing 'medical only' claims shifts from WorkCover to employers for claims under proposed $450 and for a proportion of claims between $450 and QOTE.

The proposal appears to have less impact on employers with claims currently over QOTE in that their claim process remain unchanged. However, employers with claims currently between $450 and QOTE will be required to manage medical only claims (under $450) themselves. The proposal is most likely to have the greatest implication for employers with claims currently under $450 (i.e. medical only claims) as they would be required to implement relevant procedures to manage these claims themselves. The Australian Industry Group notes that *'the proposal requires thorough investigation of potential unintended consequences for businesses of all sizes and resourcing levels, and the QLD economy more broadly'*.[949]

[949] Submission 235: 3

Table 24: Impact on employers

	Small employers (wages $1M or less)			Medium employers (wages $1M -$5M)			Large employers (wages >$5M)		
	Employers	Current	Proposed	Employers	Current	Proposed	Employers	Current	Proposed
Medical expense only	2,831	$0.0M	$1.6M	981	$0.0M	$1.6M	211	$0.0	$6.3M
Weekly compensation of $450 or less and no medical expense	162	$0.1M	$0.1M	93	$0.1M	$0.1M	20	$0.2M	$0.2M
Weekly compensation of $450 or less with medical expense	1,238	$0.3M	$0.5M	799	$0.5M	$0.7M	246	$1.2M	$1.7M
Weekly compensation greater than $450	5,796	$5.4M	$3.4M	3,119	$5.6M	$3.1M	1,683	$15.7M	$8.3M
Other (report only, rejected, lump sum only claims)	1,819	$0.0M	$0.4M	427	$0.0M	$0.4M	74	$0.0M	$0.8M
Total	11,846	$5.8M	$6.0M	5,419	$6.2M	$5.9M	2,234	$17.1M	$17.3M

Source: Q-COMP

Under the proposal, processing 'other' claims including report only claims will be managed by all employers.

Medical expense only claims will have an impact on all tiers of employers as at present, all medical expense claims are handled by WorkCover. However, the proportion of small employers (as a percentage of those paying medical expenses only) is significant i.e. 70 per cent of those who will have to pay the medical expenses are small employers. Medium sized employers represent around 24 per cent with the remaining 5-6 per cent are large employers.

Similarly, the number of small employers required to pay weekly compensation and medical expense also represent the majority of those impacted by the proposal (i.e. 54 per cent). However for large employers, the increase in expenses is greater (i.e. by $0.5M) compared with small and medium employers ($0.2M respectively).

However, there will be a saving on weekly compensation greater than$450 e.g. 5,796 employers will pay $3.4M instead of $5.4M (see Table 24).

Table 25: Number of medical expense only claims by (tiered) claim value

Claim value	Number of medical expense only claims	Cumulative number
Less than $100	4,215	4,215
$100 - $200	5,576	9,791
$200 -$450	11,319	21,110
$450 - $600	2,708	23,818
$600 - $800	1,997	25,815
$800 - $1,000	1,172	26,987
Greater than $1,000	5,726	32,713

Source: Q-COMP

Medical expenses only claims have no time lost component, and Q-COMP suggests that introducing a $450 excess would remove 21,110 claims from the system (Table 25). Of the 21,110 medical expense claims under $450, Q-COMP advised that 19,751 are single injuries with the remaining 1,359 recorded as multiple injuries. Out of the total number of claims (32,713), 7.9 per cent of claims are those with multiple injuries (i.e. 2,574).

IEUA-QNT drew particular attention to the fact that employers do not pay an excess for medical expenses only claims at present and added:

> *Under the QComp proposal, employers will now pick up a cost they have not had to outlay before.*[950]

Q-COMP also advised that there were 1,370 injured workers with multiple claims in the same period in 2011/12. Therefore caution should be exercised in making a definitive comparison in workload reduction in that the 'medical only claims' become the responsibility of the employer (as already highlighted in Table 23 on page 217) even if the statistics are removed from the overall number of claims lodged with WorkCover.

As one submitter had highlighted, the proposal concerns '*the most preferable arrangements for handling claims that fall below the amount of the excess*'.[951] KPC agrees and considers that *'the most significant benefit in KPC's view is the elimination of WorkCover Queensland's need to administer low risk claims. It is also fair to say that some employers will need to perform extra administrative functions, if they are not doing this already, to manage this component'*.[952] RCSA also agreed that *'the proposed amendments will not reduce the number of claims made overall, only who processes them. Furthermore … the cost of medical expenses of up to 50% of QOTE will transfer to employers'.* However they are supportive of the proposal and suggested that *'the number of claims will not reduce in a material way unless there is a requirement for an injured worker to submit their claim directly with their employer'*.[953]

9.2 Committee comments – 'Reducing red tape for employers' proposal

The Committee has some concerns that loss of notification only claims through poor record keeping may inadvertently interrupt continuity of claims and create gaps in future reviews. This notification could be a simple electronic notification of the incident.

The Committee believes that this proposal requires further investigation and closer examination by the Department, WorkCover and Q-COMP.

[950] Submission 244: 2
[951] Submission 236
[952] Submission 243: 1
[953] Submission 243: 3

Recommendation 31

The Committee recommends that, given potential for numerous unintended consequences, the Attorney-General and Minister for Justice investigate Q-COMP's 'red tape reduction proposal' before any consideration is given to implementation of the proposal.

9.3 Section 107 – Entitlements to compensation under industrial instruments

Section 107B(3) of the Workers' Compensation and Rehabilitation Act states:

> (3) If a worker is employed in an industry that is seasonal in nature, the amount payable to the worker must reflect the relevant season under the industrial instrument.

Sucrogen advised that, as a seasonal sugar industry with two distinct seasons – the 'crushing' season and the 'maintenance' season – it has employees that only work for one season (26 weeks per year). They identified that in the past they have had many injured workers lodging workers' compensation claims, who have worked within the 'crushing' season and sustained an injury just before the cessation date of the season, and their employment.

They stated that:

> *Their injuries are only certified with suitable duties, however as they do not have employment with Sucrogen nor have they attempted to find employment, they are paid wages from the Sucrogen self-insurance unit. These types of claims can linger and be manipulated to run for a period of 26 weeks until the next crushing season commences.*

They recommended that a provision be inserted into section 107B (Entitlement to weekly benefits) to state:

> *If a worker is continuously employed, and has been continuously employed for more than two consecutive seasons in an industry that is seasonal in nature, the amount payable to the worker must reflect the relevant season under the industrial instrument*.[954]

The Department advised the Committee that there is potential scope within section 107E of the Act for the Q-COMP Board to approve such an arrangement. They also suggested that formulation of the worker's industrial instrument may also be an alternative way of achieving this outcome.[955]

9.4 Committee Comments – Section 107

The Committee considers that this proposal is suggesting there is an element of fraud to these types of claims. This would be a matter for investigation under sections 533 and 534 of the Act. The Committee considers that amending the Act, as proposed by Sucrogen, may in fact discriminate against legitimately injured workers.

9.5 Host employers/principal contractors

Master Builders have identified what they consider to be an anomaly in the way workers' compensation applies to employees of subcontractors who work on construction sites. They have recommended that '*common law coverage be extended to host employers/principal contractors in cases of injuries to workers employed by labour hire firms and contractors where the host employer/contractor has a policy with WorkCover*'.

[954] Submission 58: 4
[955] Correspondence from Department of Justice and Attorney-General, to FAC dated 25 July 2012: 2

Currently the Act only indemnifies the employer for any common law damages. Principal contractors and host employers in charge of a workplace are not indemnified. WorkCover presently indemnifies the employer and seeks indemnity/contribution from the host under the host's public liability insurance. This causes substantial delays in managing common law claims including associated legal costs. Arguably WorkCover has collected a premium for the full wages paid to the worker by the employer and is obtaining a windfall by seeking contribution from the host employer.[956]

Master Builders identified the problem as follows:

> *A typical example of the problem is where an employee of a subcontractor is injured on site. The common law settlement often occurs years after the incident with the Principal Contractor left to pay tens of thousands of dollars. This payment usually results in a claim against its public liability insurance. The impact of this issue has seen huge increases in the excess payments under the public liability policies of the Principal Contractors. Some companies are finding it hard to even secure this form of cover. The cost shifting causes a great deal of uncertainty without adding any benefit to the scheme or the injured worker. The settlement amounts can be very significant where WorkCover seeks to split the compensation payment between itself and the Principal Contractor who in turn tries to process the claim through their Public Liability insurer. The settlement amounts can be very significant where WorkCover seeks to split the compensation payment between itself and the Principal Contractor's Public Liability Insurer. The current burden on the Principal Contractors and the insurance industry has left some Principal Contractors unable to secure Insurance or carry an unworkable $100,000 excess from their public liability Insurers.*
>
> *Master Builders has always contended that Principal Contractors who have their own WorkCover policy should be indemnified against claims by third parties who also have their own WorkCover policy. The building and construction industry has a complex series of relationships, responsibilities, and contractual obligations. This in turn means that there is a high level of co-dependency by Principal Contractors and subcontractors. The current situation creates an untenable arrangement where both the Principal Contractor and the Subcontractor (employer of the injured worker') have their own WorkCover policies but WorkCover continues to seek compensation from the Principal Contractors public liability Insurer rather than settle the matter between the two parties within the WorkCover process and legislative framework.*
>
> *Master·Builders supports the re-Instatement of an indemnity for Principal Contractors whereby the Principal Contractor is "deemed" to be the "employer" of every person who carries out work for the Principal Contractor. This deeming provision was part of the Workers Compensation Act 1990(Qld) and removed in 1997. While acknowledging that this recommendation does come at a cost to the scheme, resolving this anomaly will dramatically Improve the risk sharing arrangements between Principal Contractors and subcontractors and their employees.*[957]

[956] Correspondence from Department of Justice and Attorney-General, to FAC dated 28 September 2012: 2
[957] Submission 155: 3-4

Master Builders have identified that restoring common law coverage (as per section 47 of the repealed *Workers' Compensation Act 1990)* for Principle Contractors will deliver a number of key advantages to the industry and the Workers Compensation Scheme in Queensland including:

1) Removes the operation of the *Personal Injuries Proceedings Act 2002(Qld)* preventing the recovery of plaintiff lawyers' costs and ensures damages are assessed under the *Civil Liability Act 2003(Qld).*

2) Significant efficiencies and cost reductions are gained through dealing with one insurer (WorkCover Queensland) delivering faster claim resolution, capturing additional premiums for the Insurer, delivering larger claim payments to workers, and proportionate liability split between the Principle Contractor and subcontractor employers allowing for premium assessment on claims history.

3) The advantage of a single Insurer will allow joint responsibility for rehabilitation where the Principal Contractors are better resourced to manage the process and possess a wider range of alternative duties producing a better return to work outcome for the Industry.[958]

The Department advised that public liability insurers are increasingly excluding this type of cover from their policies so host employers will potentially be uninsured for these types of claims. WorkCover has in the past proposed an amendment to the Act so that a host employer/principal contractor is also the employer for common law damages claims only. WorkCover would then indemnify both the employer and the host employer on a presumed apportionment basis of 75%/25%. However, as the estimated impact would be an additional $10-15 million in common law costs per annum offset by additional premium, this proposal has not been implemented to date.[959]

The Department advised that an alternate option would be to allow WorkCover to offer an insurance product to principal contractors and host employers to cover these claims, however, this would then result in WorkCover providing an insurance product in competition with private insurers.

9.6 Committee Comments – Host employers/principal contractors

The Committee considers that this is an issue requiring further investigation to examine the financial implications of the suggested alternative methods offered before addressing this anomaly.

Recommendation 32

The Committee recommends that the Attorney-General and Minister for Justice investigate the financial implications of the suggested alternative methods offered before addressing this anomaly.

[958] Submission 191: 6
[959] Correspondence from Department of Justice and Attorney-General, to FAC dated 28 September 2012: 2

Appendices

Appendix A – List of Submissions

Sub #	Submitter (name of individual OR organisation)
1	National Council of Self Insurers
2	Queensland Jockeys' Association
3	Newhaven Funerals
4	Shipping Australia Ltd
5	C. Duffy
6	P. Conboy
7	Confidential
8	Confidential
9	Confidential
10	G. Barnes
11	R. Smith
12	Transport Workers' Union Queensland Branch
13	P. Mahar
14	C. Ferstera
15	B. Morgan
16	A. Peaker
17	C. Bailey
18	M. Fornier
19	Clubs Queensland
20	Confidential
21	Robertson Brothers Sawmills Pty Ltd
22	M. Dekker
23	P. Luck
24	A. Bassett
25	N. Taylor
26	Employers Mutual

27	APM
28	K. Wilkins
29	Timber Queensland
30	A. Munt
31	Name Suppressed
32	AMWU
33	Schultz Toomey O'Brien
34	Confidential
35	Bennett & Philp - Lawyers
36	Kelly Legal
37	Cam Schroder Lawyers
38	ARPA Queensland
39	HFESA
40	Northside Trusses and Frames
41	Rio Tinto
42	QSUPER
43	SR Wallace and Wallace Lawyers
44	R. Aurbach
45	QHA
46	Given Law
47	Galvanizers Association of Australia
48	Queensland Teachers' Union
49	Australian Sugar Milling Council
50	Bundaberg Sugar
51	Australian Physiotherapy Association
52	Australian Ship Owners Association
53	Direct Selling Association of Australia Inc.
54	Marine Queensland
55	Queensland Rail
56	M. McBride

57	National Retail Association Ltd
58	Sucrogen Australia Pty Ltd
59	Beenleigh Yatala Chamber of Commerce Inc.
60	Housing Industry Association
61	Bar Association of Queensland
62	Confidential
63	St Vincent de Paul Society
64	Exotica Plants
65	Occupational Therapy Association Qld
66	Splatt & Associates
67	A. Osborne
68	Commerce Caboolture
69	Department of Transport and Main Roads
70	Aged Care Employers Self-Insurance
71	Central Queensland Law Association Inc.
72	Australian Lawyers Alliance
73	Far North Queensland Law Association
74	Queensland Nurses' Union
75	Kilcoy Pastoral Company
76	Associate Services Pty Ltd
77	D. Gunston
78	Confidential
79	M. Murrell
80	J. Bruce
81	B. Harm
82	M. Tyrell
83	K. McNamara
84	J. Quinn
85	K. Steed
86	D. Milwater

87	O H & S World
88	L. Formston
89	Queensland Council of Unions
90	Cookcare Group
91	Reef Magic Cruises
92	Haycroft
93	Q-Comp
94	WorkCover Queensland
95	Electrical Trades Union Queensland
96	Danger Sun Overhead
97	R. Rosenlund
98	Melanoma Patients Australia
99	Electrical Contractors Association
100	B. Vass
101	Medical Assessment Tribunals
102	Trilby Misso
103	The Services Union
104	Sciacca's Lawyers
105	Australian Rail, Tram and Bus Union (Queensland)
106	Asbestos Related Disease Support Society Qld Inc.
107	Hyne Timber
108	Chris Trevor & Associates
109	Local Government Association of Qld
110	Russland Pty Ltd
111	Southern Gold Coast Chamber of Commerce
112	I. Chalmers
113	Chamber of Commerce and Industry Queensland
114	Leading Age Services Australia - Queensland
115	Sanreef Pty Ltd
116	R. Hodges

117	The North Queensland Law Association
118	National Union of Workers
119	Redcliffe Peninsula Chamber of Commerce
120	Chiropractor's Association of Australia (Qld)
121	Trilby
122	Queensland Country Press
123	Printing Industries Association of Australia (Qld)
124	Wesfarmers
125	Suncorp
126	The Australian Meat Industry Council
127	All Tree Services Australia
128	Maroochydore Chamber of Commerce
129	Caravanning Queensland
130	Tin Can Bay Chamber of Commerce
131	Independent Education Union of Australia Qld & NT
132	O'Donnell Legal
133	Crane Industry Association of Queensland
134	Brisbane North Chamber of Commerce
135	Queensland Trucking Association Ltd
136	Queensland Police Union of Employees
137	Joint Submission - AWU, SDA and TWU
138	Racing Queensland
139	Downs & South Western Law Association
140	Building Service Contractors Association of Australia
141	Gouldson Legal
142	Australian Prawn Farmers Association
143	Hall Payne Lawyers
144	Purcell Taylor Lawyers
145	Smith's Lawyers
146	Slater & Gordon Lawyers

147	South East Brisbane Chamber of Commerce
148	AMA Queensland
149	Presbyterian & Methodist Schools Association
150	Association of Self Insured Employers Queensland
151	Bundaberg Fruit & Vegetable Growers Cooperative Ltd
152	Insurance Council of Australia
153	Townsville City Council
154	Civil Contractors Federation
155	Master Builders
156	Aon Hewitt
157	United Voice
158	Kemp Meats Pty Ltd
159	Australian Industry Group
160	JBS Australia
161	Queensland Farmers' Federation
162	AgForce Queensland
163	Queensland Law Society
164	Westfarmers
165	Office of Fair and Safe Work Queensland
166	Ardent Leisure Limited
167	Visual Diversity Homes
168	L. Petterwood
169	T. Smith
170	Confidential
171	Poppy's Chocolate
172	W. Moloney
173	RCSA
174	Mulgrave District Chamber of Commerce
175	McNamara & Associates
176	Rostron Carlyle

177	NIBA
178	Gayndah Chamber of Commerce
179	CPM Engineering
180	Confidential
181	Confidential
182	Name Suppressed
183	CSR Limited
184	Confidential
185	Supplementary submission - Queensland Nurses' Union
186	Supplementary submission - Confidential
187	Supplementary submission - TressCox Lawyers
188	Supplementary submission - Australian Lawyers Alliance
189	Supplementary submission - Association Self Insured Employers Qld
190	Supplementary submission - Queensland Council of Unions
191	Supplementary submission - Master Builders
192	Supplementary submission - Independent Education Union of Australia
193	Supplementary submission - Melanoma Patients Australia
194	Supplementary submission - G. Keir
195	Supplementary submission - Queensland Law Society
196	Supplementary submission - Employers Mutual Limited
197	Supplementary submission - Confidential
198	Supplementary submission - Confidential
199	Supplementary submission - Queensland Asbestos Related Disease Support Society Inc.
200	Confidential
201	D. Hayes
202	Supplementary submission - Electrical Trades Union
203	Supplementary submission - Chamber of Commerce & Industry Queensland
204	Supplementary submission - Timber Queensland

205	Supplementary submission (second) - Chamber of Commerce & Industry Queensland
206	Supplementary submission - Australian Meat Industry Council
207	C. Jacques
208	Supplementary submission - Northside Trusses & Frames
209	Supplementary submission - Timber Queensland
210	Supplementary submission - CPM Queensland
211	Supplementary submission - C. Duffy
212	Supplementary submission - RD Williams
213	L. & B. Waldock
214	Supplementary submission - Electrical Contractors Association
215	Carpet Call (Qld) Pty Ltd
216	Supplementary submission - M. McBride
217	Supplementary submission - Queensland Asbestos Related Disease Support Society Inc.
218	Supplementary submission - Suncorp
219	Supplementary submission - WorkCover
220	Supplementary submission - LGAQ
221	Supplementary submission - Queensland Nurses' Union
222	Supplementary submission - Master Builders
223	Supplementary submission - ACES
224	Supplementary submission - ASIEQ
225	Supplementary submission - Civil Contractors Federation
226	Supplementary submission - ARPA Qld
227	Supplementary submission - M. Dekker
228	Supplementary submission - AMWU
229	Supplementary submission - Queensland Council of Unions
230	Supplementary submission - Bar Association of Queensland
231	Supplementary submission - United Voice
232	Supplementary submission - Department of Transport and Main Roads
233	Supplementary submission - AgForce Queensland

234	Supplementary submission - RCSA
235	Supplementary submission - Australian Industry Group
236	Supplementary submission - NIBA
237	Supplementary submission - Haycroft Workplace Solutions
238	Confidential
239	Supplementary submission - Queensland Law Society
240	J. Campagna
241	Supplementary submission - Australian Lawyers Alliance
242	Supplementary submission - Queensland Rail
243	Supplementary submission - Kilcoy Pastoral Company Limited
244	Supplementary submission - IEUA-QNT
245	Australian Mines and Metals Association (AMMA)
246	Spantech

Appendix B – List of Attendees at the departmental briefings

Departmental briefing – Wednesday 11 July 2012

Dr Simon Blackwood, Deputy Director-General, Office of Fair and Safe Work Queensland, Department of Justice and Attorney-General
Mr Robert Cordiner, Executive Manager, Review and Appeals, Q-COMP
Mr Michael Francis, Executive Manager, Finance and Insurer Services, Q-COMP
Mr Paul Goldsbrough, Senior Director, Policy, Workplace Health and Safety Queensland, Department of Justice and Attorney-General
Mr Tony Hawkins, Chief Executive Officer, WorkCover Queensland
Mr David Heley, Chief Financial Officer, WorkCover Queensland
Ms Sharon Stratford, General Manager Customer Services, WorkCover Queensland
Ms Irene Violet, General Manager Corporate Services, WorkCover Queensland
Ms Elizabeth Woods, Chief Executive Officer, Q-COMP

Departmental briefing – Wednesday 28 November 2012

Dr Simon Blackwood, Deputy Director-General, Office of Fair and Safe Work Queensland, Department of Justice and Attorney-General
Mr Robert Cordiner, Executive Manager, Review and Appeals, Q-COMP
Mr Michael Francis, Executive Manager, Finance and Insurer Services, Q-COMP
Mr Paul Goldsbrough, Senior Director, Policy, Workplace Health and Safety Queensland, Department of Justice and Attorney-General
Mr Tony Hawkins, Chief Executive Officer, WorkCover Queensland
Mr David Heley, Chief Financial Officer, WorkCover Queensland
Ms Sharon Stratford, General Manager Customer Services, WorkCover Queensland
Ms Irene Violet, General Manager Corporate Services, WorkCover Queensland
Ms Elizabeth Woods, Chief Executive Officer, Q-COMP

Departmental briefing – Wednesday 20 March 2013

Ms Elizabeth Woods, Chief Executive Officer, Q-COMP
Mr Warren Hawkins, Executive Manager, Data Management Analysis, Q-COMP
Mr Christopher Tsockallos, Senior Data Analyst, Data Management Analytics, Q-COMP

Appendix C – List of Participants at the regional public forums

Regional public forum – Mackay – Monday 27 August 2012

Ms Julieanne Gilbert, Delegate, Queensland Council of Unions, Mackay Branch
Mr John Glanville, Owner/Employer, Auto Corner Proprietary Limited
Ms Donna Heideman, Financial Controller, Auto Corner Proprietary Limited
Mr Andrew Kemp, Business Owner/Director, Kemp Meats Pty Ltd
Mr Ian Lambley, Group Business Manager, Auto Corner Proprietary Limited
Mr Craig Worsley, Partner of Taylors Solicitors for Australian Lawyers Alliance

Regional public forum – Cairns – Tuesday 28 August 2012

Mr Christopher Duffy, Safety Officer, self-employed
Mrs Laura Neil, Member, Australian Lawyers Alliance and Far North Queensland Lawyers Association and North Queensland Legal Association
Mr Alick Osborne, Chief Executive Officer, Tully Sugar Limited
Ms Rebecca Rodd, General Manager, Administration, Reef Magic Cruises Pty Ltd
Mr Stuart Traill, President, Queensland Council of Unions, Cairns

Appendix D – List of Witnesses at the public hearings

Brisbane – Wednesday 31 October 2012 (8.15am – 9.45am)

Mr Peter Biagini, State Secretary, Transport Workers' Union
Mr Dean Cameron, Senior Adviser, Workplace Relations, Master Builders Association
Mr John Crittall, Director of Construction Policy, Master Builders Association
Ms Carla Jones, Industrial and Women's Officer, Rail, Tram and Bus Union
Ms Sarah Mawhinney, Communications Officer, Transport Workers' Union
Mr Jason O'Dwyer, Workplace Relations Manager, Electrical Contractors Association
Mr Craig Pollard, Representative, Building Service Contractors Queensland
Mr Glen Prentice, President, Queensland Jockeys Association
Ms Amanda Richards, Assistant General Secretary, Queensland Council of Unions
Ms Pat Rogers, Industrial Officer, Electrical Trades Union of Employees
Mr Peter Simpson, State Secretary, Electrical Trades Union of Employees
Mr Warwick Temby, Executive Director, Housing Industry Association Ltd

Brisbane – Wednesday 31 October 2012 (10.00am – 11.30am)

Ms Kylie Badke, Senior Industrial Officer, United Voice Queensland
Mr David Foote, Australian Meat Industry Council
Mr James Gilbert, Health and Safety Officer, Queensland Nurses' Union
Mr Pat Gleeson, Australian Meat Industry Council
Mr Dean Goode, Australian Meat Industry Council
Mr Neil Henderson, Industrial Coordinator, The Services Union
Mr Daniel Le, Industrial Officer, United Voice
Mr David Matthews, Group HR and OH&S Officer, Australian Country Choice
Senior Sergeant Shayne Maxwell, Vice-President, Queensland Police Union of Employees
Mr Ken McKell, Australian Meat Industry Council
Ms Beth Mohle, State Secretary, Queensland Nurses' Union
Mr Simon Tutt, Queensland Police Union of Employees
Ms Danielle Wilson, Industrial Officer, Independent Education Union of Employees, Qld & NT

Brisbane – Wednesday 31 October 2012 (11.45am – 1.15pm)

Ms Sophie Andrew, Senior Policy Analyst, Chamber of Commerce and Industry Queensland
Mr Mark Anghel, Assistant Secretary Services, Queensland Teachers' Union
Mr Nick Behrens, General Manager, Advocacy, Chamber of Commerce and Industry Queensland
Ms Rachel Drew, Representative, Queensland Teachers' Union
Mr Brent Finlay, General President, AgForce Queensland
Mr Dan Galligan, Chief Executive Officer, Queensland Farmers Federation
Mr Donald Jones, Chief Executive Officer, Marine Queensland
Ms Jennifer Nash, Policy Officer, AgForce Queensland
Mr Dominic Nolan, Chief Executive Officer, Australian Sugar Milling Council
Mr Gary Sansom, Director, Queensland Farmers Federation
Mr David Swan, Manager, Commercial Solutions, Local Government Association of Queensland
Ms Cecily Tucker, Principal Adviser, Workplace Relations, Australian Industry Group
Mr Peter Warren, Manager, Industrial Relations, Australian Sugar Milling Council

Brisbane – Wednesday 14 November 2012 (8.15am – 9.15am)

Ms Victoria Barham, Chair, Association of Self Insured Employers Queensland
Ms Trish Bassett, Manager, Self Insurance, RSL Care, Aged Care Employers Self Insurance
Mr Justin Crowley, Deputy Chair, Association of Self Insured Employers Queensland
Ms Lesley Dame, Claims Team Manager, Wesfarmers
Mr David Gomulka, Queensland Workers' Compensation Manager, JBS Australia Pty Limited
Mr John Hastie, Licence Manager, Aged Care Employers Self Insurance
Mr John Randolph, Manager, Risk Management and Self Insurance, Tricare, representing Aged Care Employers Self Insurance

Brisbane – Wednesday 14 November 2012 (9.30am – 10.30am)

Mr Rod Hodgson, Representative, Australian Lawyers Alliance
Mr Simon Morrison, Representative, Australian Lawyers Alliance
Mr Richard Douglas SC, Representative, Bar Association of Queensland
Mr Kevin Holyoak, Representative, Bar Association of Queensland
Ms Catherine Cheek, Representative, Downs and South Western Law Association
Mr Tom O'Donnell, Principal, O'Donnell Legal
Mr Ian Brown, Vice-President, Queensland Law Society
Dr John De Groot, President, Queensland Law Society
Mr Matthew Dunn, Principal Policy Solicitor, Queensland Law Society
Mr Michael Garbett, Senior Partner, Sciaccas Lawyers and Consultants
Mr Luke Giribon, Senior Associate, Sciaccas Lawyers and Consultants
Mr Vince Kartelo, Partner, Sciaccas Lawyers and Consultants
Ms Karen Simpson, Practice Group Leader, Slater & Gordon Lawyers
Ms Robyn Davies, Principal Lawyer, Trilby Misso Lawyers

Brisbane – Wednesday 14 November 2012 (10.45am – 12.00pm)

Ms Jennifer Beames, Human Services Risk Manager, Presbyterian and Methodist Schools Association
Mr Rangi Bell, Employee Rehabilitation Manager, Kilcoy Pastoral Co. Ltd
Mr Bill Brown, Manager, Workers Compensation, Queensland Rail
Mr Adam Carter, Acting CEO, Racing Queensland
Mr Tim Connolly, Newhaven Funerals
Mr Chris Hay, General Manager, Northside Trusses and Frames
Mr Angus Hutchings, Group Safety Manager, Ardent Leisure Ltd
Mr Daniel Keating, Senior Consultant (Claims Management), Department of Transport and Main Roads
Mr David Murtagh, Risk Manager, Hyne Timber
Mr Noel Puller, OH&S Manager, Hyne Timber
Mr Matthew Richards, Senior Consultant (Injury Management), Department of Transport and Main Roads
Mr Neile Rosenlund, Managing Director, Rosenlund Contractors Pty Ltd
Mr Michael Willis, Executive Director, Presbyterian and Methodist Schools Association

Brisbane – Wednesday 14 November 2012 (12.15pm – 1.00pm)

Mr Jason Allison, Chief Workers Compensation Underwriting and Portfolio, Suncorp
Mr Dallas Booth, Chief Executive Officer, National Insurance Brokers Association
Mr Mark Coyne, Chief Executive Officer, Employers Mutual
Mr Simon Godfrey, Head of Business Development, Aon Hewitt
Mr Cameron McCullagh, Managing Director, Employers Mutual
Mr Chris McHugh, Executive General Manager, Statutory Portfolio and Underwriting Management, Suncorp
Mr Peter Roberts, Board Director, National Insurance Brokers Association
Mr Paul Smeaton, Executive General Manager, Claims, Suncorp

Brisbane – Friday 16 November 2012 (9.45am – 10.45am)

Dr Chris Cunneen, Occupational Physician, Australian Medical Association
Ms Tamlyn Faulkner, Vice-President, Australian Rehabilitation Providers Association
Mrs Sam Goodier, Queensland Branch Manager, Australian Physiotherapy Association
Ms Michelle McBride, Private capacity
Dr Craig Matthews, President, Chiropractors Association of Australia, Queensland branch
Ms Anna Osborne, Private capacity
Ms Susan Smith, Divisional Council Member, Occupational Therapy Australia, Queensland Branch

Brisbane – Friday 16 November 2012 (11.00am – 12.00pm)

Mr Thady Blundell, Committee Advisor, Asbestos Related Disease Support Society Queensland Inc.
Mrs Helen Colbert, President, Asbestos Related Disease Support Society Queensland Inc.
Mr Raymond Colbert, Secretary, Asbestos Related Disease Support Society Queensland Inc.
Dr Margaret Cook, Member, Human Factors and Ergonomics Society of Australia
Ms Jo Crotty, Education and Awareness Manager, Danger Sun Overhead
Mr Dennis Dadds, Director, Recruitment & Consulting Services Association
Mr Ben Haycroft, Director, Workplace Health and Safety, Haycroft Workplace Solutions
Ms Leeha JAMES
Mr Will Kerkhof, CEO, Melanoma Patients Australia
Ms Emma Long, Senior Rehabilitation Consultant, Advanced Personnel Management
Mr Wendel Moloney
Mr Nick Ryan, CEO, Leading Age Services Australia Queensland
Mr Sean Ryan, Advisor, Melanoma Patients Australia
Mrs Sharon Shearsmith, People Manager, St Vincent de Paul Society

Appendix E – Definition of Worker – *Workers' Compensation Act 1990* – Reprinted as in force on 20 December 1996

The definition of 'worker' was as follows[960]:

Interpretation – Section 5

"worker" means a person who works under a contract of service or apprenticeship or otherwise with an employer in work of any description, whether the contract is oral or written, express or implied, and includes –

(a) a person declared by section 8, or otherwise prescribed, to be a worker for the purposes of this Act;

(b) a person to whom, or on whose account, compensation under this Act is payable in respect of an injury suffered by the person as a worker;

but does not include a person declared by section 9 not to be a worker for the purposes of this Act.

Persons declared to be employers or workers – Section 9

8.(1) For the purposes of this Act, a person declared by a provision of this section to be an employer or a worker is an employer or, as the case may be, a worker in the circumstances prescribed by the provision.

(2) Where a holding company lets on hire the services of a waterside worker or a supervisor stevedore—

(a) the holding company is the employer of the waterside worker or supervisor stevedore before the worker or stevedore commences work for the person to whom the services are let on hire, and after the termination of the hire; and

(b) the person to whom the services are let on hire is the employer of the waterside worker or the supervisor stevedore upon the worker or stevedore commencing work for that person under the hire, until the termination of the hire.

(3) Except as prescribed by subsection (2), a person who lends or lets on hire the services of a worker who is party to a contract of service with that person continues to be the employer of the worker while the worker's services are so lent or let on hire.

(4) A labour hire agency that arranges, for reward, for a worker who is party to a contract of service with the agency to do work for someone else continues to be the worker's employer while the worker does the work for the other person under an arrangement made between the agency and the other person.

(5) A person who works under a contract, or at piecework rates, for labour only or substantially for labour only, including one who supplies tools of trade designed for use by hand, is a worker for the purposes of this Act, employed by the person for whom the labour is provided.

(6) A tributer working in a mine within the meaning of the *Mines Regulation Act 1964*, and any wages-worker employed by the tributer in the mine, is a worker employed by the person with whom the tributer has made the tribute agreement.

(7) A jockey riding or driving a horse on a racecourse, or doing on the racecourse anything incident to riding or driving a horse on the racecourse, is a worker employed by the club or association for the time being in occupation of the racecourse.

(8) A person who works a farm as a sharefarmer, and any wages-worker employed by that person, is a worker employed by the owner of the farm except where—

(a) the sharefarmer provides and uses in the sharefarming operations farm machinery driven or drawn by mechanical power; and

(b) the sharefarmer is entitled to not less than two-thirds of the proceeds of the sharefarming operations under the sharefarming agreement;

in which excepted case the sharefarmer is not a worker and the owner of the farm is not the employer of any such wages-worker.

[960] *Workers' Compensation Act 1990*, section 5, section 8, section 9

(9) A salesperson, canvasser, collector, or other person paid wholly or partly by commission is a worker employed by the person by whom the commission is payable, except where the commission is received for or in connection with work incident to a trade or business regularly carried on by the salesperson, canvasser, collector, or other person, individually or by means of a partnership.

(10) If a contract is made with a contractor (other than a person declared by section 9 not to be a worker) for the performance of work that is not incident to a trade or business regularly carried on by the contractor, individually or by means of a partnership, and the contractor—

(a) neither sublets the contract nor employs a wages-worker; or

(b) although employing a wages-worker, performs part of the work personally;

the contractor, and any wages-worker employed by the contractor in performance of the work, is a worker employed by the person who makes the contract with the contractor.

(11) In this section—

"arrangement" includes agreement, promise, scheme, transaction, understanding and undertaking (whether express or implied).

"holding company" means—

(a) for a waterside worker—Stevedoring Employers of Australia Limited or its successor; or

(b) for a supervisor stevedore—the Association of Employers of Waterside Labour or its successor.

"labour hire agency" means an entity, other than a holding company, that conducts a business that includes the supply of services of workers to others on a temporary basis.

Persons declared not to be workers – Section 9

For the purposes of this Act, a person of a description specified in a provision of this section is not a worker in the capacity described except in circumstances prescribed by the provision—

(a) a person, other than a person mentioned in section 8(7),8 who, as a professional sportsperson—

(i) participates in a sporting or athletic activity as a contestant; or

(ii) is training or preparing for participating in a sporting or athletic activity as a contestant; or

(iii) performs promotional activities offered to the person because of the person's standing as a sportsperson; or

(iv) engages on any daily or other periodic journey in connection with the participation, training or performance; or

(b) a member of the crew of a fishing vessel, if the member's entitlement to remuneration is contingent upon the working of the vessel producing gross earnings or profits and the remuneration is wholly or mainly a share of the gross earnings or profits; or

(c) a person who supplies any material used in performance of a contract or in provision of the person's labour at piecework rates, being material incorporated in the product of the work performed;

or

(d) a person who works under a contract, other than a contract of service or apprenticeship in a calling governed by any award or industrial agreement, and who supplies and uses in performance of the contract—

(i) equipment, plant, machinery (other than tools designed for use by hand), or a motor vehicle (being a commercial motor vehicle fitted with a commercial type body) used for carrying goods (other than tools designed for use by hand) or animals; or

(ii) a motor vehicle of any kind used for driving tuition; or

(e) a member of a partnership as defined in the *Partnership Act 1891*, section 5 and as determined in accordance with rules specified in section 6 of that Act; or

(f) a director of a corporation, unless, where the director works for the corporation under a contract of service or apprenticeship, the director is specially insured under or is specially covered by a policy under the director's election to be so insured or covered; or

(g) a trustee, unless the trustee is specially insured under or is specially covered by a policy under the trustee's election to be so insured or covered.

Appendix F – Definition of Worker – *WorkCover Queensland Act 1996* – Reprinted as in force on 1 July 1997

The definition of 'worker' was as follows[961]:

Division 2—Workers

Who is a "worker" – Section 12

Section 12

12.(1) A "worker" is an individual who—

(a) works under a contract of service; and

(b) is a PAYE taxpayer in relation to the remuneration or other benefit received for the performance of work under the contract of service.

(2) However, for subsection (1)(a), a person is not a worker because the person performs work under any of the following contracts of service—

(a) a contract of service with a corporation of which the person is a director;

(b) a contract of service with a trust of which the person is a trustee;

(c) a contract of service with a partnership of which the person is a member;

(d) a contract of service with the Commonwealth.

(3) Also, a person who performs work under a contract of service as a professional sportsperson is not a worker while—

(a) participating in a sporting or athletic activity as a contestant; or

(b) training or preparing for participation in a sporting or athletic activity as a contestant; or

(c) performing promotional activities offered to the person because of the person's standing as a sportsperson; or

(d) engaging on any daily or other periodic journey in connection with the participation, training or performance.

Meaning of "PAYE taxpayer" – Section 13

13. A **"PAYE taxpayer"** is—

(a) a worker in relation to whom the worker's employer makes deductions from amounts paid to the worker for work performed for, or services provided to, the employer under the *Income Tax Assessment Act 1936* (Cwlth), part 6, division 2;3 or

(b) a worker in relation to whom, when the worker sustained an injury, the worker's employer had not made the deductions mentioned in paragraph (a) only because the employer was not required to make the deductions because of—

(i) the length of time during which the worker had been in the employer's employment; or

(ii) the amount of money paid to the worker; or

(iii) a written direction or certificate from the Taxation Commissioner under the *Income Tax Assessment Act 1936* (Cwlth), section 221D or 221E.4

[961] *WorkCover Queensland Act 1996,* section12, section 13

Appendix G – Definition of Worker – Proposed Legislation with tracked changes

Who is a *worker*

(1) ~~A *worker* is a person who works under a contract of service.~~ A *worker* is a person who –

(a) works under a contract; and

(b) in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the *Taxation Administration Act 1953* (Cwlth), schedule 1, part 2-5

(2) Also, schedule 2, part 1 sets out who is a *worker* in particular circumstances.

(3) However, schedule 2, part 2 sets out who is not a ***worker*** in particular circumstances.

(4) Only an individual can be a ***worker*** for this Act.

Schedule 2 Who is a worker in particular circumstances

Part 1 – Persons who are workers

~~(1) A person who works under a contract, or at piecework rates, for labour only or substantially for labour only is a worker.~~

~~(2) A person who works for another person under a contract (regardless of whether the contract is a contract of service) is a worker unless –~~

~~(a) the person performing the work –~~

~~(i) is paid to achieve a specified result or outcome; and~~

~~(ii) has to supply the plant and equipment or tools of trade needed to perform the work; and~~

~~(iii) is, or would be, liable for the cost of rectifying any defect in the work performed; or~~

~~(b) a personal services business determination is in effect for the person performing the work under the *Income Tax Assessment Act 1997* (Cwlth), section 87-60.~~

(~~3~~1) A person who works a farm as a sharefarmer is a worker if—

(a) the sharefarmer does not provide and use in the sharefarming operations farm machinery driven or drawn by mechanical power; and

(b) the sharefarmer is entitled to not more than 1/3 of the proceeds of the sharefarming operations under the sharefarming agreement with the owner of the farm.

(~~4~~2) A salesperson, canvasser, collector or other person (***salesperson***) paid entirely or partly by commission is a worker, if the commission is not received for or in connection with work incident to a trade or business regularly carried on by the salesperson, individually or by way of a partnership.

(~~5~~3) A contractor, other than a contractor mentioned in part 2, section 4 of this schedule, is a worker if—

(a) the contractor makes a contract with someone else for the performance of work that is not incident to a trade or business regularly carried on by the contractor, individually or by way of a partnership; and

(b) the contractor—

(i) does not sublet the contract; or

(ii) does not employ a worker; or

(iii) if the contractor employs a worker, performs part of the work personally.

(~~6~~4) A person who is party to a contract of service with another person who lends or lets on hire the person's services to someone else is a worker.

(~~7~~5) A person who is party to a contract of service with a labour hire agency or a group training organisation that arranges for the person to do work for someone else under an arrangement made between the agency or organisation and the other person is a worker.

(~~8~~6) A person who is party to a contract of service with a holding company whose services are let on hire by the holding company to another person is a worker.

Part 2 – Persons who are not workers

(1) A person is not a worker if the person performs work under a contract of service with—

(a) a corporation of which the person is a director; or

(b) a trust of which the person is a trustee; or

(c) a partnership of which the person is a member; or

(d) the Commonwealth or a Commonwealth authority.

(2) A person who performs work under a contract of service as a professional sportsperson is not a worker while the person is—

(a) participating in a sporting or athletic activity as a contestant; or

(b) training or preparing for participation in a sporting or athletic activity as a contestant; or

(c) performing promotional activities offered to the person because of the person's standing as a sportsperson; or

(d) engaging on any daily or other periodic journey in connection with the participation, training, preparation or performance.

(3) A member of the crew of a fishing ship is not a worker if—

(a) the member's entitlement to remuneration is contingent upon the working of the ship producing gross earnings or profits; and

(b) the remuneration is wholly or mainly a share of the gross earnings or profits.

(4) A person who, in performing work under a contract, other than a contract of service, supplies and uses a motor vehicle for driving tuition is not a worker.

(5) A person participating in an approved program or work for unemployment payment under the *Social Security Act 1991* (Cwlth), section 601 or 606 is not a worker.

(6) A person is not a worker if –
(a) the person works for another person under a contract; and
(b) a personal services business determination is in effect for the person performing the work under the *Income Tax Assessment Act 1997* (Cwlth), section 87-60

Appendix H – Safe Work Australia – Comparison of Workers' Compensation Arrangements 2012 – Exclusionary provisions for psychological injuries[962]

Insert pages 67 – 69 Safe

[962] Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, April 2012: 67-69

Table 3.13: Exclusionary provisions for psychological injuries

	Exclusionary provisions for psychological injuries	Impairment threshold	Diagnostic methodology of assessment
New South Wales	1987 Act, s11A(1) "No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers." – s65A "(1) No compensation is payable … (either as permanent impairment compensation or pain and suffering compensation) in respect of permanent impairment that results from a secondary psychological injury. Note: This does not prevent a secondary psychological injury from being compensated under section 67 as pain and suffering resulting from permanent impairment (but only if that permanent impairment results from a physical injury or a primary psychological injury). (2) In assessing the degree of permanent impairment that results from a physical injury or primary psychological injury, no regard is to be had to any impairment or symptoms resulting from a secondary psychological injury. (3) No compensation is payable … (either as permanent impairment compensation or pain and suffering compensation) in respect of permanent impairment that results from a primary psychological injury unless the degree of permanent impairment resulting from the primary psychological injury is at least 15%. Note: If more than one psychological injury arises out of the same incident, section 322 of the 1998 Act requires the injuries to be assessed together as one injury to determine the degree of permanent impairment. (4) If a worker receives a primary psychological injury and a physical injury, arising out of the same incident, the worker is only entitled to receive compensation … in respect of impairment resulting from one of those injuries, and for that purpose the following provisions apply: i. the degree of permanent impairment that results from the primary psychological injury is to be assessed separately from the degree of permanent impairment that results from the physical injury ii. the worker is entitled to receive compensation … for impairment resulting from whichever injury results in the greater amount of compensation being payable to the worker … (and is not entitled to receive compensation … for impairment resulting from the other injury), iii. the question of which injury results in the greater amount of compensation is, in default of agreement, to be determined by the Commission. Note: If there is more than one physical injury those injuries will still be assessed together as one injury under section 322 of the 1998 Act, but separately from any psychological injury. Similarly, if there is more than one psychological injury those psychological injuries will be assessed together as one injury, but separately from any physical injury."	15% WPI for a primary psychological injury.	Ch 11 WorkCover Guides for the Evaluation of Permanent Impairment, using the Psychiatric Impairment Rating Scale (PIRS).
Victoria	There is no entitlement to compensation in respect of an injury to a worker if the injury is a mental injury caused wholly or predominately by any one or more of the following: (a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer; or (b) a decision of the worker's employer, on reasonable grounds, to take, or not to take any management action; or (c) any expectation by the worker that any management action would, or would not, be taken or a decision made to take, or not to take, any management action; or (d) an application under section 81B of the Local Government Act 1989, or proceedings as a result of that application, in relation to the conduct of a worker who is a Councillor within the meaning of section 14AA – s82(2A). In s82, management action, in relation to a worker, includes, but is not limited to, any one or more of the following- (a) appraisal of the worker's performance; (b) counselling of the worker; (c) suspension or stand-down of the worker's employment; (d) disciplinary action taken in respect of the worker's employment; (e) transfer of the worker's employment; (f) demotion, redeployment or retrenchment of the worker; (g) dismissal of the worker; (h) promotion of the worker; (i) reclassification of the worker's employment position; (j) provision of leave of absence to the worker; (k) provision to the worker of a benefit connected with the worker's employment; (l) training a worker in respect of the worker's employment; (m) investigation by the worker's employer of any alleged misconduct- (i) of the worker; or (ii) of any other person relating to the employer's workforce in which the worker was involved or to which the worker was a witness; (n) communication in connection with an action mentioned in any of the above paragraphs - s82(10).	30% WPI – not arising secondary to physical injury.	The Guide to the Evaluation of Psychiatric Impairment for Clinicians (GEPIC).

	Exclusionary provisions for psychological injuries	Impairment threshold	Diagnostic methodology of assessment
Queensland	An injury does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances: (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment (b) the worker's expectation or perception of reasonable management action being taken against the worker (c) action by the Authority or an insurer in connection with the worker's application for compensation. Reasonable management actions include action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker, a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment – s32(5).	None.	AMA Guide (4th Edition).
Western Australia	Treatment of stress for compensation purposes Compensation is not payable for diseases caused by stress if the stress wholly or predominately arises from the worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment, or the worker's not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to employment or a worker's expectation of a matter or decision unless it is considered to be unreasonable or harsh on the part of the employer – s5(4). Treatment of secondary conditions in assessment of impairment Secondary conditions are not included for the purposes of assessing impairment for common law, specialised retraining programs of payments of additional medical expenses. "Secondary condition" means a condition, whether psychological, psychiatric, or sexual, that, although it may result from the injury or injuries concerned, arises as a secondary, or less direct, consequence of that injury or those injuries.		WorkCover WA Guides 3nd Ed. Psychiatric Impairment Rating Scale (PIRS).
South Australia	s30A—Psychiatric disabilities A disability consisting of an illness or disorder of the mind is compensable if and only if— (a) the employment was a substantial cause of the disability; and (b) the disability did not arise wholly or predominantly from— (i) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, counsel, retrench or dismiss the worker; or (ii) a decision of the employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with the worker's employment; or (iii) reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment; or (iv) reasonable action taken in a reasonable manner under this Act affecting the worker. In addition, a permanent impairment benefit does not arise under s43 in relation to a psychiatric impairment.	N/A.	N/A.
Tasmania	Compensation is not payable in respect of a disease which is an illness of the mind or a disorder of the mind and which arises substantially from: (i) reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline or counsel a worker or to bring about the cessation of a worker's employment (ii) a decision of an employer, based on reasonable grounds, not to award or provide a promotion, transfer or benefit in connection with a worker's employment (iii) reasonable administrative action taken in a reasonable manner by an employer in connection with a worker's employment (iv) the failure of an employer to take action of a type referred to above in relation to a worker in connection with the worker's employment if there are reasonable grounds for not taking that action, or (v) reasonable action taken by an employer under this Act in a reasonable manner affecting a worker – s25(1A).		
Northern Territory	Compensation is not payable if the injury is: (a) Due to reasonable disciplinary action (b) Due to failure to obtain promotion, transfer or benefit, or caused as a result of reasonable administrative action taken in connection with the worker's employment – s3(1).	None	N/A
Australian Capital Territory	A Mental Injury (including stress) does not include a mental injury (including stress) that is completely or mostly caused by reasonable action taken, or proposed to be taken, by or on behalf of an employer in relation to the transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of a worker or the provision of an employment benefit to a worker – s4(2).	0% WPI.	-

	Exclusionary provisions for psychological injuries	Impairment threshold	Diagnostic methodology of assessment
C'wealth Comcare	Compensation is not payable in respect of an injury (being a disease) if the injury is: (a) Due to reasonable administrative action taken in a reasonable manner in respect of the employee's employment s5A(1) – a non-exclusive list of what might be taken to be 'reasonable administrative action' is included at s5A(2). (b) Intentionally self-inflicted – s14(2). (c) A disease, if the employee, for the purposes connected with his/her employment has made a wilful and false representation that he/she did not suffer, or had not previously suffered, from that disease – s7(7).	10% WPI.	American Medical Association Guidelines to the Evaluation of Permanent Impairment (2nd Edition), Ch. Mental Conditions.
C'wealth Seacare	Compensation is not payable in respect of an injury (being a disease), if the injury is a result of reasonable disciplinary action taken against the employee, or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment – s3.	10% WPI.	American Medical Association Guidelines to the Evaluation of Permanent Impairment (2nd Edition), Ch. Mental Conditions.
C'wealth DVA	Psychological injuries are not treated any differently than other injuries or diseases.	Initial compensation - 10 impairment points (IP).	Additional compensation - 5 IPs. As per Chapter 4 "Emotional and Behavioural", GARP V (M)
New Zealand	Cover does not exist for mental injuries if the mental injury is not caused by physical injuries – s26(1)(c), the result of a sudden traumatic event – s 21B, or as a consequence of certain criminal acts – s21.		

Appendix I – Q-COMP's 'Reducing red tape reduction' proposal

Reducing red tape for employers

Employer excess payment

Issue – to reduce red tape in Queensland Worker's Compensation scheme for employers

Addressing the relatively high number of claims under the Queensland scheme.

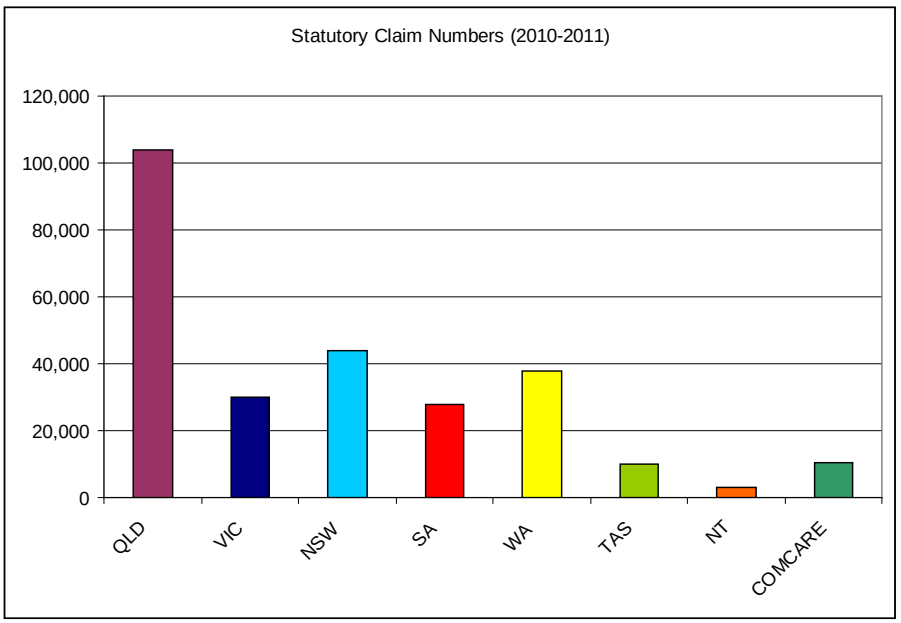
Facts

One of the features of the Queensland workers' compensation scheme is that it has significantly more claims than any other scheme. The number of claims is disproportionately high relative to other schemes when adjusted for labour force and safety records of the respective schemes.

The reason is the current employer excess and claim lodgement arrangements in Queensland.

Graph 1 shows the disparity in terms of claim numbers.

Graph 1 – Annual statutory claim numbers for Australian schemes



In Queensland injured workers are required to lodge an application for compensation with the insurer to receive compensation regardless of how minor in nature and insurers need to administer the assessment and compensation process.

In 2011/12, there were approximately 94,000~~94,001~~ claims lodged with WorkCover Queensland, of which around 33,000 ~~32,787~~ were medical expense only claims and around 15,000~~15,148~~ report only claims.

The excess in Queensland is Queensland ordinary time earnings (QOTE) which is currently $1,330.50 or the value of the first week of benefits if under that amount. QOTE is adjusted annually for inflation. In 2011/12 employers paid approximately $29.1M in excess payments for weekly compensation.

Reducing red tape for employers

WorkCover Queensland administers all the claims from the beginning, including those where the excess period for weekly compensation (QOTE or the value of the first week of benefits) is not exceeded. Medical expenses are not covered by the excess and payment needs to be made by WorkCover either directly to the medical provider or by reimbursing the worker.

Option for employer excess payment: ~~a~~Amend the legislation to remove the requirement for claims to be lodged with the insurer until 36%~~50%~~ of QOTE ($450) is reached with medical or compensation for loss of wages. ~~is reached ($665.25).~~

Reducing the excess to 36% of QOTE ($450) for all claims will result in the total amount of excess paid by employers being comparable to existing arrangements.~~The amount of excess remains the same.~~

Retain the right for the employer or injured worker to lodge a claim with the insurer immediately if there is:

- dispute
- strong indication that the claim will cost more than QOTE.

In all other jurisdictions claims are lodged through the employer. In Victoria for example, where claims are lodged with the employer, the employer is not required to pass that claim on to the insurer for 10 days. The excess amount payable by an employer in Victoria is the first 10 days of compensation and the first $610 of medical expenses. If the injured worker returns to work and does not require any further treatment within the bounds of these excess provisions the employer is under no obligation to lodge the claim. The employer is simply required to keep a register containing details of the injury. Victoria has about 30,000 statutory claims a year compared to about 105,000 in Queensland.

Both Queensland and Victoria enjoy low premium rates.

Consequences – claims reduced from 105,385 to between 61,000 to 65,000~~55,519~~

If Queensland employers were not required to lodge claims unless 36%~~50%~~ of the QOTE value is reached in payment of wages or medical expenses, it is estimated that between 40,000 to 44,000~~49,866~~ claims would be removed from the system. If any of those claims were disputed the employer could lodge the claim with WorkCover.

Table – Reduction in WorkCover lodgements based on excess value
Based on lodgements for 2011/12, QOTE for 2011/12 - $1,263.20.

Excess $	% of QOTE	Excess payments ($M)	Potential reduction in Lodgements
300	24%	20.5 - 21.5	32,000 - 35,000
400	32%	26.0 - 27.0	38,000 - 41,000
450	36%	28.5 - 29.5	40,000 - 44,000
475	38%	30.0 - 31.0	41,000 - 45,000
500	40%	31.0 - 32.0	42,000 - 46,000
632	50%	37.0 - 38.0	45,000 - 50,000
700	56%	40.0 - 41.0	48,000 - 50,000

The revised figures in the above table are based on data as at 31st January 2013.

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Reducing red tape for employers

~~Excess $~~	~~Excess payments ($M)~~	~~Potential reduction in Lodgements~~
~~300~~	~~19.5~~	~~35,270~~
~~400~~	~~23.2~~	~~41,157~~
~~500~~	~~26.2~~	~~45,692~~
~~600~~	~~30.3~~	~~48,847~~
~~632~~	~~31.2~~	~~49,866~~
~~700~~	~~35.1~~	~~51,638~~
~~800~~	~~37.8~~	~~53,832~~

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Using a value for excess of 36% of QOTE ($450) achieves a comparable level of excess payments to existing arrangements.

Medical expense claims and report only claims represent around 80% of the potential reduction in claims. Analysis using the 2010/11 lodgement year provides similar results using 2011/12 lodgement year.

While this option reduces red tape for employers in interacting with WorkCover, it includes the requirement for employers to develop and maintain a register for minor injuries.

Benefits

There are a number of benefits including:

- This would reduce red tape and allow employers, workers and treating doctors to manage low impact and uncomplicated injuries themselves and get on with business.
- Cost neutral to the scheme – In 2011/12 employers paid approximately $29.1M in excess payments for weekly compensation. By reducing excess to 36% of QOTE ($450) for all claims, the total amount of excess paid by employers would be at a comparable level to existing arrangements.~~;~~

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- Reduction in administrative costs~~savings~~ for WorkCover.
- Earlier intervention of claims with time lost. Having a shorter excess period puts greater emphasis on the employer to be proactive in the early intervention of claims and return to work.