



WORKERS' COMPENSATION AND THE COMMON LAW – PEAS IN A POD?

By Simon Morrison



For a country of 20 or so million people, Australia has 11 workers' compensation schemes. Each state and territory has a scheme, and the Commonwealth also operates three schemes.

These schemes operate under:

1. The *Safety Rehabilitation and Compensation Act* 1988.
2. The *Seafarers Rehabilitation and Compensation Act* 1992
3. The *Military Rehabilitation and Compensation Act* 2004.

Originally, all workers' compensation remedies in this country were sourced by the common law, modelled on the British system.

The introduction of the *Employment Liability Act* 1880¹ opened up the scope for greater success in the common law actions.

A push, particularly by the Trade Union Movement following federation, saw the introduction of no-fault statutory workers' compensation. This included limited weekly payments and medical expenses. Significantly, workers' compensation insurance in the early part of that century was not compulsory.

NSW was the first of the Australian states to introduce compulsory insurance in the 1920s, and most states followed thereafter. For several decades afterwards, most schemes operated as hybrid schemes incorporating statutory no-fault benefits and common law access. South Australia and the Northern Territory were the first states and territories to abandon access to common law in lieu of pure, no-fault schemes.

DEVELOPMENT OF THE SCHEMES IN AUSTRALIA²

Commonwealth compensation scheme

The Commonwealth Workers' Compensation Scheme began in 1912 as a consequence of the *Commonwealth Workmen's Compensation Act* 1912. Further amendments in the 1930s and 1970s were introduced; however, a major overhaul of the scheme did not occur until the 1980s. Significantly, the introduction of the *Safety Rehabilitation & Compensation Act* 1988 was focused heavily on rehabilitation as a major component of a compensation scheme.

Following these changes, amendments to the legislation in 1992 saw the issuing of licences to various government corporations and, thereafter, to private corporations competing with government corporations.

In 2007, the federal government ceased issuing licences pending further reviews of the Commonwealth Scheme.

Victoria

The Victorian scheme commenced as a consequence of the *Workers' Compensation Act* 1914. The scheme was a hybrid of common law access and no-fault statutory benefits. It was overhauled in 1985 with the introduction of the *Accident Compensation Act* 1985.

Significant reforms in the 1990s included establishing expert medical panels, limitations in access to common law, and conciliation systems for dispute resolution. In the latter part of that decade, common law access was removed and impairment benefits replaced the table of maims.

A change of government saw the reintroduction of common law access, but on a restricted basis. In June 2009, 151 recommendations from the Hanks Report³ were submitted to the Victorian government to improve the scheme. And in October 2010, further changes to the scheme were contemplated via restrictions to standard costs recovery.

NSW

The NSW scheme was commenced as a consequence of the *Workmen's Compensation Act*.⁴ The key change in the NSW scheme in 1926 was the introduction of the Workers' Compensation Commission.

Sixty years later, the *Workers' Compensation Act* 1987 saw the complete removal of common law access, which was only partially reinstated two years later in amended legislation.

In 1997, an enquiry was conducted into mounting financial problems in the NSW scheme, by which time the deficit had reached almost half a billion dollars.

More recently, since 2008, there have been changes to benefit levels.

Queensland

The Queensland Workers' Compensation Scheme was first introduced via *The Workers' Compensation Act* 1905. The scheme was then amended in 1916 and remained largely unchanged until 1990, when the *Workers' Compensation Act* 1990 introduced a new range of benefits to workers with key rehabilitation initiatives.

In 1996, the Kennedy Inquiry was held to review the deteriorating financial state of the scheme. Previously unfettered access to common law was replaced with a restricted access model featuring an election to common law, based on work-related impairment.

In 2003, the *Workers' Compensation & Rehabilitation Act* was introduced which, for the first time, separated out the administrative and regulatory functions of the Workers' Compensation Scheme in Queensland.

On 1 July 2010, substantial amendments to the *Workers' Compensation Rehabilitation Act* 2003 were effected to address further deterioration in the scheme.

Western Australia

The Western Australian Workers' Compensation Scheme commenced as a consequence of the *Workers' Compensation Act* 1902.

The Workers' Compensation Reform Bill 2004 brought into play a number of changes around access to common law, dispute resolution and statutory benefits.

In 2009, a further review into the WA Workers' Compensation Scheme was undertaken.

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South Australia

The South Australian Workers' Compensation Scheme was introduced following the *Workers' Compensation Act 1900*, with substantial amendments occurring in 1971.⁵

A review into the scheme in 1978 resulted in a range of recommendations, culminating in legislation in 1992 to abolish common law access. Further changes in that decade included amendments to commutation provisions, changes to internal review processes, changes to conciliation and arbitration systems, and the introduction of a Workers' Compensation Tribunal. In 2008, further amendments were introduced into the scheme following a review undertaken by Alan Clayton and John Walsh. The changes were largely predicated upon an intention to return the South Australian Scheme to full funding as soon as possible.

In 2009, WorkCover South Australia undertook a review of its regulations. In addition, in 2009 changes to the access to redemptions were introduced.

Tasmania

The Tasmanian Workers' Compensation Scheme commenced in 1910. The scheme moved to compulsory insurance 17 years later, and remained largely unchanged until review in 1986.⁶

In 1988, the *Workers' Rehabilitation & Compensation Act* was passed, which provided improvements to payments, together with the introduction of the licensing of insurers and self-insurers. A further inquiry in the same year into the scheme⁷ recommended many changes, including the introduction of restrictions to common law access via thresholds, increases in step-down levels of weekly payments, and changes to dependency payments.

Following further review, *The Workers' Rehabilitation & Compensation Act 2007* was passed to include, *inter alia*, coverage for jockeys, amendments to 'work-relatedness tests' for injury, and changes to dispute resolution mechanisms, etc.

Two years later, a further review was conducted by Alan Clayton, which resulted in a number of changes to benefit levels in the scheme. In addition, the review recommended a reduction in the common law access threshold from 30 per cent to 20 per cent.

Northern Territory

The Northern Territory Workers' Compensation Scheme commenced as a result of the *Workmen's Compensation Act 1920*.

The scheme remained largely unchanged until a review in 1984.

The scheme provided for private underwriting, with no common law access. Further amendments in 2007 floated changes to dispute resolution, and changes to volunteer access.

Australian Capital Territory

The Australian Capital Territory Workers' Compensation Scheme commenced as a consequence of The Workmen's Compensation Ordinance 1951.

Further amendments occurred in 2002, largely focusing on rehabilitation and return-to-work provisions. A further review in 2007 culminated in a series of recommendations aimed at improving the financial health of the scheme. Further legislation⁸ was introduced in 2009, which focused largely on administration costs and compliance in the scheme.

STRUCTURAL OPTIONS

Table 6.6 – Common law provisions as at 30 June 2009

	Access to common law	Types of damages	Statutory threshold(s)	Is election of common law irrevocable?	Cap on damages?
NSW	Yes (limited) (known as Work Injury Damages 'WID')	<ul style="list-style-type: none"> Damages are paid as one lump sum to cover past and future economic loss of earnings only. The amount of weekly benefits already paid must be repaid out of the money awarded. Damages can be reduced if the worker's own negligence contributed to the injury: – Part 5, Division 3 (1987 Act) 	<p>To be eligible to make a claim for work injury damages, three criteria must be met:</p> <ol style="list-style-type: none"> The work injury is a result of the negligence of the employer. The worker must have at least a 15% whole person impairment. Claims for lump sum compensation for permanent impairment and pain and suffering must be made prior to or at the same time as the work injury damages claim, and must be settled prior to a WID claim being finalised. <p>A WID claim cannot be started for at least six months after the worker gave notice of the injury to the employer, or not more than three years after the date of injury: – Part 5, Division 3 (1987 Act)</p>	No. If a common law claim is not successful, the worker will continue to receive workers' compensation under the statutory scheme.	No.

Table 6.6 – Common law provisions as at 30 June 2009 (continued)

	Access to common law	Types of damages	Statutory threshold(s)	Is election of common law irrevocable?	Cap on damages?
VIC	Yes (limited) Access to common law is for workers injured on or after 20 October 1999.	<p>Damages for pain and suffering and/or economic loss may be pursued. There are additional requirements to prove a permanent loss of 40% earning capacity to be able to pursue economic loss damages: – s134AB</p> <p>If pain and suffering damages are awarded, the amount must be reduced by any lump sum impairment benefit paid: – s134AB(36)</p> <p>If economic loss damages are awarded, the amount is reduced by any past weekly payments made to the worker: – s134AB(36)</p> <p>No interest is payable on damages: – s134AB(34)</p> <p>The payment of damages does not affect any entitlement to medical and like expenses: – s99(13)</p>	<p>To obtain common law damages, a worker must first be granted a 'serious injury' certificate. There are two ways a worker can obtain a 'serious injury' certificate:</p> <ol style="list-style-type: none"> during the impairment assessment process, be assessed as having a whole person impairment of 30% or more (can combine physical and mental impairments); or the Authority or the County Court determines that the worker has a 'serious injury' pursuant to the narrative test. (<i>Accident Compensation Act 1985</i>: – s134AB(37) <p>A worker has the option of having their whole person impairment assessed first or by-passing the impairment assessment process and relying on the narrative test. Either way, the worker must make a serious injury application and have that application accepted or rejected by the Authority before they can proceed to the next step.</p> <p>If the worker's impairment assessment is under 30% and/ or their serious injury application relying on the narrative test has been rejected, the worker has 30 days to issue County Court proceedings for a judge to determine whether they have a 'serious injury' on the narrative test:– s134AB</p> <p>A worker can have a 'serious injury' that entitles them to pursue pain and suffering damages only and/or economic loss damages. To qualify for serious injury status for economic loss if serious injury is determined under the narrative test, the worker must prove they have suffered and will continue to suffer a loss of earning capacity of 40% or more:– s134AB(37) and s134AB(38)</p>	No. If a common law claim is not successful, the worker may continue to be entitled to statutory benefits.	<p>Damages for pain and suffering must not be awarded if the amount is less than \$49 460: – s134AB(22)</p> <p>Maximum amount for pain and suffering damages is \$484 830:– s134AB(22)</p> <p>Damages for economic loss must not be awarded if the amount is less than \$49 460: – s134AB(22)</p> <p>Maximum amount for economic loss damages is \$1 113 590:– s134AB(22)</p>
QLD	Yes	No damages available for gratuitous services	If the worker has WRI of less than 20% or no WRI, the worker must decide to either accept the lump sum payment or seek damages:– s189	Yes	No



Table 6.6 – Common law provisions as at 30 June 2009 (continued)

	Access to common law	Types of damages	Statutory threshold(s)	Is election of common law irrevocable?	Cap on damages?
WA	Yes (limited)		As of 14 November 2005, access to common law is based on the worker's degree of whole person impairment. The threshold for accessing common law is not less than 15% WPI. Secondary psychological, psychiatric and sexual conditions are excluded:- Part IV, Subdivision 3 Causes of action that occurred before 14 November 2004 are dealt with under the old previous law regimes: - Part IV, Subdivision 2 - s93D & s93E		Where a worker has a WPI of less than 25% the maximum amount of damages that may be awarded is \$353 850 (indexed annually):- s93K Unlimited common law is available to a worker with a WPI of greater than 25%.
SA	No	N/A	N/A	N/A	N/A
TAS	Yes (limited)	Damages available for both economic and non-economic loss	A worker must suffer at least 30% WPI before he or she can elect to commence proceedings for an award of damages.	No. Election is required to commence proceedings in court. Can't make election unless tribunal accepts that worker has permanent impairment of at least 30%. All statutory benefits continue following election.	Unlimited damages is available to a worker with a WPI of at least 30%
NT	No	N/A	N/A	N/A	N/A
ACT	Yes	Unlimited	Nil	No. Benefits cease on settlement or outcome in favour of the worker. Benefits received prior to settlement are to be repaid from the damages settlement.	Unlimited, outside of workers' compensation scheme.

The table above⁹ sets out the access, damages, thresholds, elections and cap provisions that pertain to each of the Australian schemes, regarding common law provisions. As can be noted from the table, Northern Territory and South Australia are the states and territories respectively that have absolutely no access to common law while, at the other extreme, the ACT is the only scheme currently enjoying unfettered access to common law.¹⁰ NSW, Western Australia, Victoria and Tasmania all have varying degrees of thresholds.

Queensland and Comcare have election provisions.



STATUTORY BENEFITS

^ Entitlement benefits in Victoria, Western Australia, Tasmania, Northern Territory, Australian Capital Territory and New Zealand do not include superannuation contributions.

* Payment thresholds and specific benefit arrangements may also apply. The relevant jurisdiction should be contacted directly if further information is required.

** Benefits shown for employees working under an industrial award. If not under an award, benefits are 80% of pre-injury earnings for first 26 weeks. Different rates apply after 26 weeks.

*** NWE - normal weekly earnings, QOTE - Seasonally adjusted amount of Queensland full-time adult persons ordinary time earnings subject to work-related impairment.

Lump sum shared under statutory formulae between spouse and children. Pension payable to partner for 3 years and to children until age of 16 (or 21 in full-time study).

Appendix Table 8 – Entitlements under Australian workers' compensation schemes for award wage earners as at 1 January 2008^{^*}

	NSW	VIC	QLD	WA	SA	TAS	NT	ACT	Australian Government
Entitlements expressed as a percentage of pre-injury earnings									
0-13 weeks (total incapacity)	100% (excl overtime)**	95%	85% of NWE*** (or 100% under industrial agreement)	100%	100%	100%	100%	100%	100%
14-26 weeks (total incapacity)	100% (excl overtime)**	75%	85% of NWE*** (or 100% under industrial agreement)	100%	85%	100%	100%	100%	100%
27-52 weeks (total incapacity)	90% (excl overtime) up to \$367.70pw + allowances**	75% (excl O/T)	75% NWE or 70% QOTE***	100%	85%	75 - 90%	65% or stat floor	65% or stat floor	27-45 wks 100% 46-52 wks 75%
53-104 weeks (total incapacity)	90% (excl overtime) up to \$367.70pw + allowances**	75% (excl O/T)	75% NWE or 70% QOTE***	100%	80%	75 - 90%	65% or stat floor	65% or stat floor	75%
104+ weeks (total incapacity)	90% (excl overtime) up to \$367.70pw + allowances**	75% (excl O/T, subject to work capacity after 130 weeks)	75% NWE if >15% impairment, otherwise 65% NWE or 60% QOTE***	100%	80% subject to capacity review	80%	75 - 90%	65% or stat floor	75%

Other entitlements	
Lump sums maximum	<p>>75% impairment: \$220,000 for multiple injuries or \$231,000 for back impairment + \$50,000 pain & suffering</p> <p>\$384,180</p> <p>\$218,400 if > 20% impairment</p> <p>\$168,499 + \$126,374 in special circumstances#</p> <p>\$137,900 + \$93,082.50 where lump sum >55%</p> <p>\$222,267</p> <p>\$220,147.20 permanent impairment</p> <p>\$150,000 cpi indexed</p> <p>\$146,016 + \$54,756 non-economic loss</p>
Limits – medical and hospital	<p>\$50,000 or greater amount prescribed or directed by WC Commission</p> <p>52 weeks from cessation of weekly payments##</p> <p>Medical – no limit. Hospital – 4 days (>4 days if reasonable)</p> <p>\$50,550+ \$50,000 in special circumstances</p> <p>No limit</p> <p>No limits, but entitlements cease after 9 years</p> <p>No limit</p>
Death benefits (all jurisdictions pay funeral expenses to differing amounts)	<p>\$425,000 + \$104,10pw for each dependent child</p> <p>\$257,210 (shared) + preinjury earnings-related pensions to a maximum of \$1 210pw for dependent partner/s and children</p> <p>\$409,090 + \$10,925 to dep. spouse + \$21,845 for each dep. family member under 16 or student + \$80.85pw per child to spouse while children are under 6 yrs + \$101.05pw per dep. child/family member while children/family members are under 16 yrs or a student</p> <p>\$230,992 + \$44,20pw for each dependant child + max of \$50 550 for medical expenses#</p> <p>\$230,983 + \$500pw for totally dependant spouse + \$125pw for each dependant child</p> <p>\$222,267 + 100% weekly payment 0-13weeks, 85% weekly payment 14-78 weeks, 80% weekly payment, 79-104 weeks + \$60.24pw for each dependant child</p> <p>\$275,184 + \$105.84pw for each dependant child to max of 10 children</p> <p>\$150,000 cpi indexed +\$50 pw cpi indexed for each dependent child</p> <p>\$197,121 + \$10,951 + \$72.98pw for each dependent child</p>

The above table¹¹ provides a summary of weekly payments, lump sums, medical hospital and death benefit across each of the schemes.¹²

The Comcare and South Australian schemes provide the most generous weekly payments, while Victoria provides the most generous lump sum maximums. NSW provides the most generous death benefits.

HOW DOES SCHEME STRUCTURE RELATE TO SCHEME HEALTH?

In the last decade, public data have become available to monitor the financial health of workers' compensation schemes in Australia.

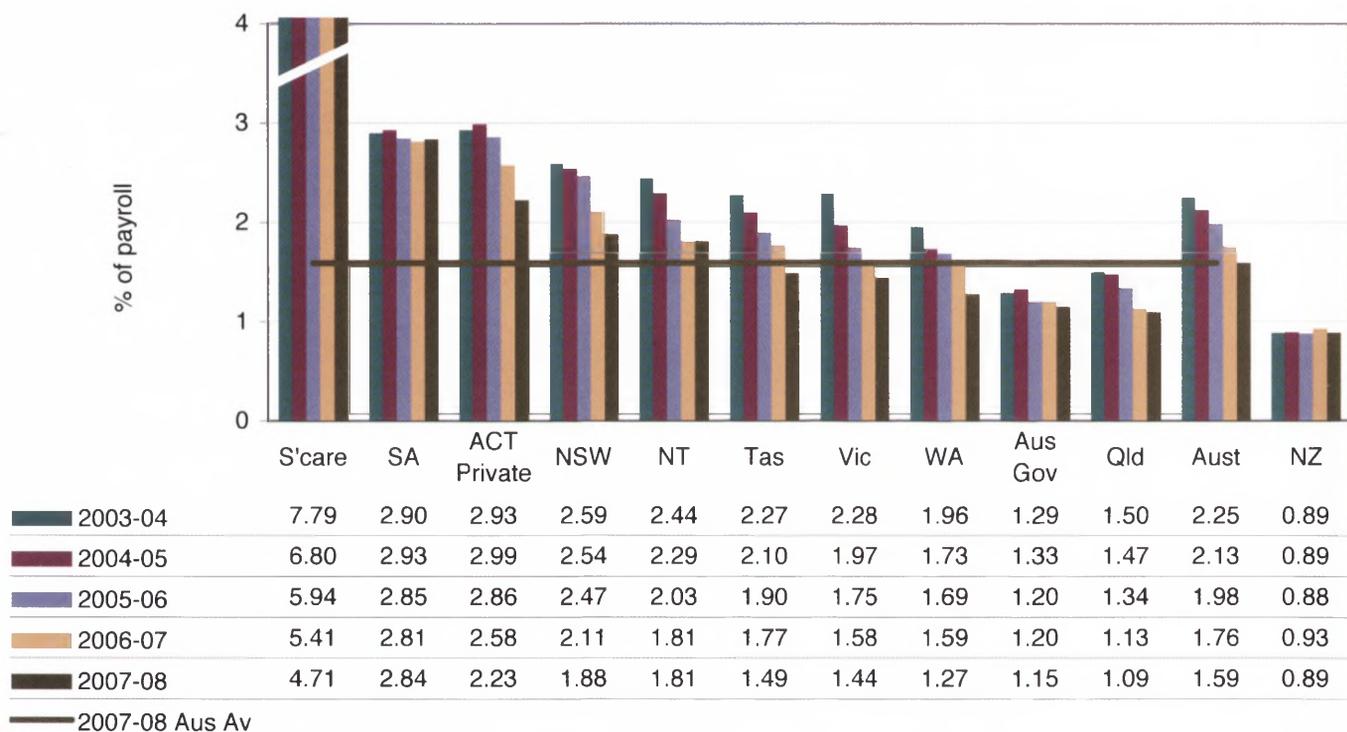
The data is provided courtesy of the Workplace Relations Ministers' Council publication, *Comparative Performance Monitoring Reports*. The 11th edition is the current published report.¹³

Some key indicators include:

1. Standard average premium rates;
2. Standardised ratio of assets to net outstanding claims liabilities, otherwise known as a 'funding ratio';
3. Direct compensation payments by type and jurisdiction; and
4. Proportion of claims with dispute, otherwise known as the 'disputation rate'.

Standardised average premium

Indicator 15 – Standardised average premium rates (including insured and self-insured sectors) by jurisdiction



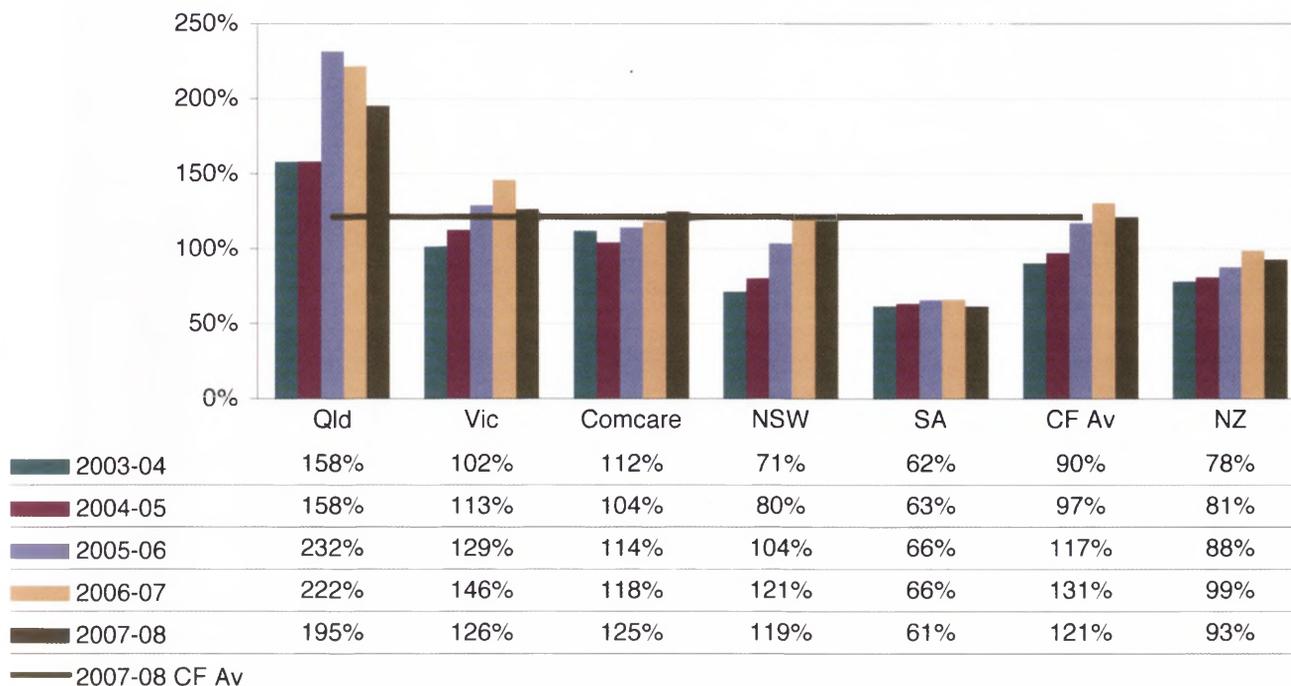
As can be evidenced by this data,¹⁴ the trend in Australian workers' compensation schemes in the last seven years has been a continual reduction in premium rates, from an Australian average of 2.25 in 2003/04 down to an average of 1.59 in 2007/08. Whether any conclusions can be drawn from premium rate levels, regarding which structure is the best for a scheme, remains in question.

For example, the lowest premium rate in the published report rests with Queensland, a scheme that has maintained common law access, albeit on an election basis. Yet at the same time, the Comcare scheme has a premium rate of \$1.15, and has virtually no common law access.

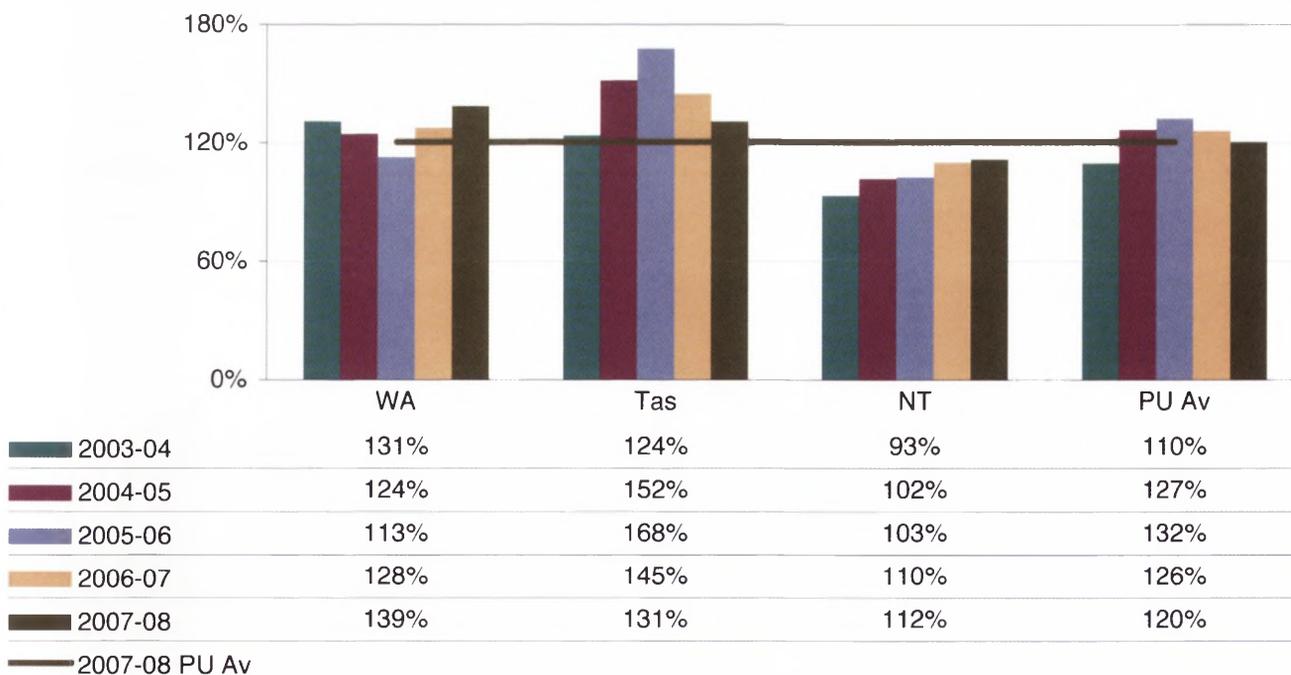
Of note is the fact that the highest premium rate in the country rests with the South Australian scheme, at \$2.84, which has no common law access and hasn't for almost 20 years.

Standardised ratio of assets to net outstanding claims liabilities

Indicator 18a – Standardised ratio of assets to net outstanding claim liabilities for centrally funded schemes



Indicator 18b – Standardised ratio of assets to net outstanding claim liabilities for privately underwritten schemes



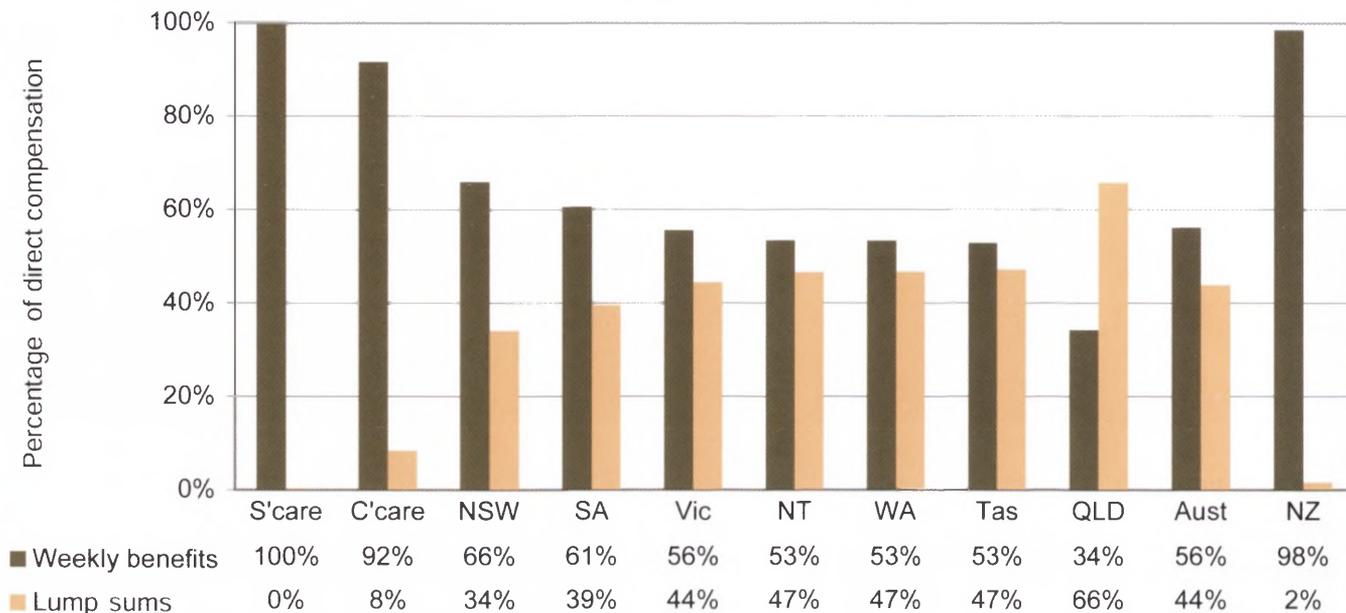
The previous data¹⁵ is broken into centrally funded schemes – being Queensland, Victoria, Comcare, NSW, South Australia – and privately underwritten schemes, including Western Australia, Tasmania and Northern Territory.

The ratio of assets to liabilities, otherwise known as the funding ratio, is a little bit like a company's balance sheet.

The Queensland scheme, which enjoys common law access, remains the best performer on the basis of a funding ratio, while the South Australian scheme – which has no common law access – has the poorest funding ratio of all the schemes. >>

Direct compensation payments¹⁶

Indicator 20 – Direct compensation payments by type and jurisdiction, 2007–08

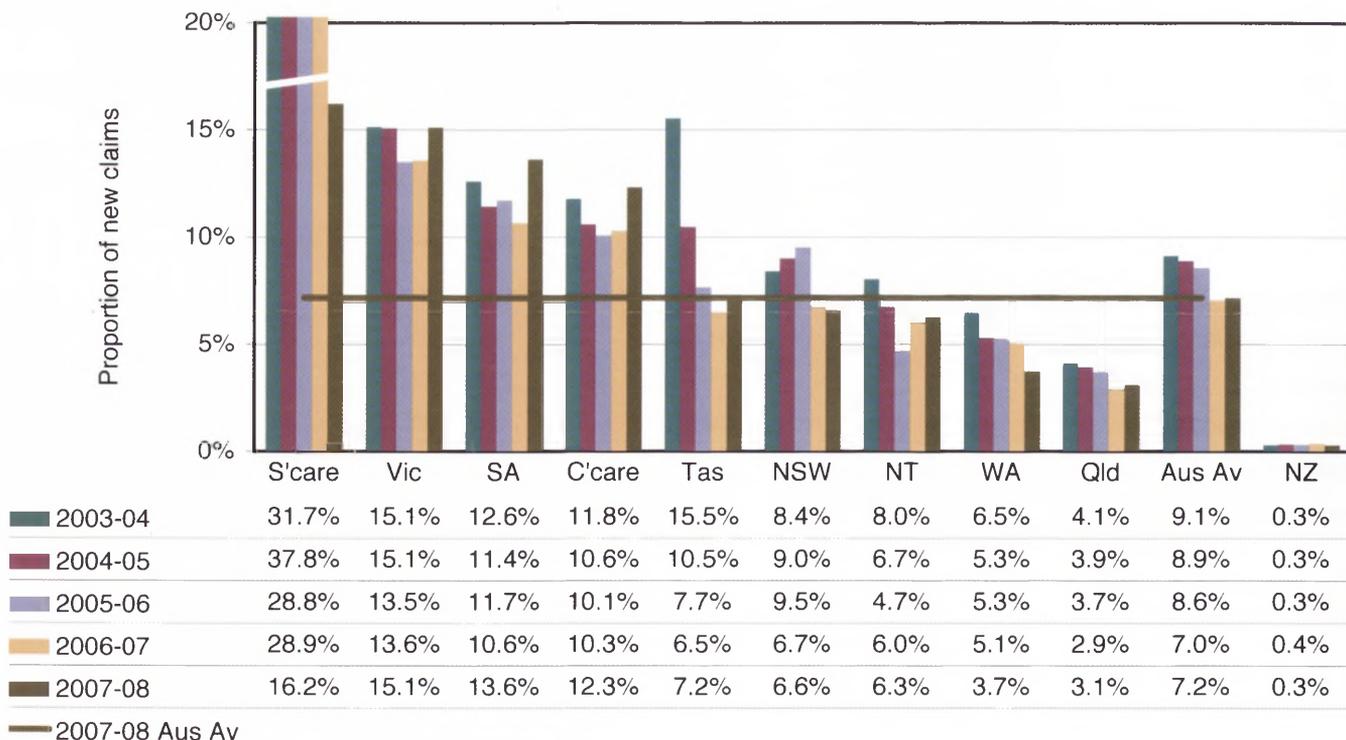


This indicator measures the percentage of weekly payments in a workers' compensation scheme, as against lump sums.

As can be seen, the Queensland and Comcare schemes are the two greatest extremes, in that the Comcare scheme is overwhelmingly a weekly benefits scheme with very little lump sum component, while the Queensland scheme is more heavily weighted to lump sums than weekly payments. Some of the more balanced weightings include Northern Territory, Western Australia and Tasmania.

Proportion of claims with dispute¹⁷

Indicator 22 – Proportion of claims with dispute



It can be said that schemes with high levels of dispute generally can expect to have higher cost bases, because of the need for processes to deal with disputes. The Comcare, Victorian and South Australian schemes have the highest levels of disputation, while the Western Australian and Queensland schemes have the lowest.

Of note is the New Zealand disputation data. The rate in New Zealand is extremely low simply because of the structure of the scheme; namely, the New Zealand scheme has very broad coverage.

WHAT CONCLUSIONS CAN BE DRAWN ABOUT SCHEME STRUCTURE?

As referred to earlier, there are three basic models for workers' compensation schemes in Australia:

1. Pure common law schemes;
2. Pure statutory no fault schemes; and
3. Hybrid common law/statutory schemes.

All schemes in Australia are currently hybrid schemes, with the exception of the Northern Territory and South Australia.

Comcare's common law access is so limited that it is generally regarded as a no-fault scheme.

For many years, commentators have debated as to whether workers' compensation schemes should or should not include common law access.

There are two approaches that could be offered in the context of this question:

1. The philosophical approach; or
2. The economic approach.

The philosophical approach

As can be seen from the history of schemes in this country, Australia originated as a country with pure common law access, modelled on the British system. When it emerged that elements of unfairness at common law required attention, statutory protections were enacted to provide coverage on a no-fault basis.

Decisions made by governments in following decades to remove common law access were largely economic

decisions (see below). But some have argued that workers' compensation should be regarded as a form of social benefit, in an occupational context, as opposed to a form of insurance.

Whatever philosophical approaches people have, the view that appears to be shared by all commentators is that coverage for workers should be fair.

The economic approach

With the increase in available data to analyse the financial performance of workers' compensation schemes, economic considerations around the structure of schemes has become prevalent.

Remedial legislation by governments that commenced in the decades following federation appeared to centre on economic arguments around scheme structure. That is, decisions to remove common law access were based on information suggesting that the cost to provide common law access in some schemes was becoming prohibitive.

When the data is examined above,¹⁸ assumptions that common law access in workers' compensation schemes leads to economic deterioration of a scheme could reasonably be challenged.

THE PERFECT MODEL?

On the analysis of both the history of workers' compensation schemes in Australia and the financial underpinning of those schemes, it would seem that the perfect model for a workers' compensation scheme in Australia would have the following elements:

- Fair statutory benefits;
- Flexibility in the payment methodology of benefits; and
- Choice to access common law remedies in a well-structured environment.

A fascinating exercise would be to take each of the elements of the various schemes in Australia that appear to work very well and put them together in a prototype model to examine its potential viability. Logic would dictate that, if done properly, the prospects of a workers' compensation scheme >>

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in Australia being sustainably viable (that is, not lurching in its financial position), would be extremely high.

THE ROAD AHEAD

For many years, Commonwealth governments have considered the nationalisation of workers' compensation schemes. Various attempts to producing models have occurred in the last two decades, with the current harmonisation process well underway in Australia.

Inevitably a national model will be produced at some point in the future, but it remains to be seen whether the architects of any such model can produce a sustainably viable model incorporating all of the elements of successful schemes in Australia.

A breakthrough of this nature would arrest a substantial part of the debate that we have witnessed in this country now for many years. ■

Notes: **1** British Legislation enacted to assist plaintiffs to overcome defences based on contributory negligence, common employment and voluntary assumption of risk. **2** Information provided herein is largely sourced from Safe Work Australia Comparison of Workers' Compensation Arrangements in Australia and New Zealand, current as at February 2010. **3** Review of the *Accident Compensation Act 1985* undertaken by Peter Hanks QC, as commissioned in December 2007. **4** 1910, with additional legislation introduced 16 years later in the form of *The Workers' Compensation Act 1926*. **5** *Workers' Compensation Act 1971*. **6** Tasmanian Law Reform

Commission Report 1986. **7** Joint Select Committee of Enquiry into the Tasmanian Workers' Compensation System. **8** *Workers' Compensation Amendment Act 2009*. **9** Table 6.6 – Common law provisions as at 30 June 2009 – comparison of workers' compensation arrangements in Australia and New Zealand – Safe Work Australia document – see Note 2 above. **10** Note that, currently, in the ACT the communication from the ACT government has indicated a change to this position. **11** Appendix Table 8 – Entitlements under Australian workers' compensation schemes for award wage earners as at 1 January 2008 – *Comparative Performance Monitoring Report*, 11th edition, December 2009 (CPM). **12** *Comparative Performance Monitoring Report*, 11th edition, December 2009. **13** *Ibid*. The CPM, 11th edition, provides key information regarding the financial positions of the various schemes around the country. **14** Indicator 15 – Standardised average premium rates (including insured and self-insured sectors) by jurisdiction – CPM, 11th edition, December 2009. **15** Indicator 18a – Standardised ration of assets to net outstanding claim liabilities for centrally funded schemes; Indicator 18b – Standardised ration of assets to net outstanding claim liabilities for privately underwritten schemes: CPM, 11th edition, December 2009. **16** Indicator 20 – Direct compensation payments by type and jurisdiction, 2007-08, CPM, 11th edition, December 2009. **17** Proportion of claims with dispute – CPM, 11th edition, December 2009. **18** CPM, 11th edition, December 2009.

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