

Issues for Public Liability Insurers Arising Out of the Queensland Government's Proposed Reforms to the Workers' Compensation Scheme

Introduction

In late February 2010, the Queensland government circulated a Discussion Paper setting out proposals for significant reforms to the Queensland Workers' Compensation scheme. The proposals are aimed at addressing a stated underwriting shortfall caused by the Global Financial crisis and an increase in claim cost and frequency.

These reforms have the potential to significantly affect public liability insurers operating in Queensland. The closing date for submissions is 24 March 2010. Given the gravity of the reforms and their potential to cause unintended outcomes insurers may wish to make submissions.

Reforms that may effect Public Liability Insurers

The reforms that we consider have the greatest potential to effect Public Liability Insurers are:

- extending coverage of the WorkCover scheme to "host employers" who have a WorkCover policy;
- introducing a 10% or 15% Whole Person Impairment ("WPI") threshold for claiming damages against employers;
- allowing common law claims against **employers** only where employment is the **major contributing factor** to the injury;
- increasing certain no-fault benefits including weekly payments and statutory lump sums
- increasing the obligations of third parties to participate in the compulsory pre-court procedures of the *Workers' Compensation and Rehabilitation Act 2003* ("WCRA"); and
- reversing the effect of the decision of *Bourk v Power Serve P/L & Anor [2008] QCA 225* which places the **onus on the employer** to establish a defence under the *Workplace Health and Safety Act 1995* in order to defend a claim;

Alternatives such as applying the damages regime of the *Civil Liability Act 2003* ("CLA") and only excluding workers from common law who have a permanent impairment of nil have also been proposed.

Public Liability Claims that may be affected

A significant proportion of public liability claims and more particularly higher quantum claims involve concurrent claims under the WCRA. These claims include:

- where a worker is employed by a labour hire company and is injured whilst under the control and supervision of a "host employer";
- where a worker is injured due to the negligence of both an employer and an independent contractor;
- where a worker sustains injury whilst attending a third party's premises in the course of their employment; and
- where a worker alleges they sustained injury due to a faulty product or inadequate maintenance performed by a third party



The Effect of Extending Coverage of the WorkCover Scheme to Host Employers and Principal Contractors

This proposal probably has the most potential to affect public liability insurers. Public liability claims against host employers and principal contractors account for a significant and growing number of the claims that would be affected by the government's proposed reforms. It is not clear whether it would be compulsory for host employers to carry insurance with WorkCover however it would appear unworkable for this not to occur.

The effect of the proposal would be for the monopoly provider of workers' compensation insurance in Queensland, WorkCover, to receive a significant stream of additional premium income at the expense of public liability insurers. It is not clear how this cover would be priced however given the fact that host employers and principal contractors do not currently have the responsibility to fund no fault benefits it is likely that the expense would be significantly higher than those in the current arrangements.

Further, host employers and principal contractors may be forced to take on rehabilitation obligations for lengthy periods of time and lose the flexibility of choosing to have higher deductibles. The unintended consequence of the reform may be for host employers and principal contractors to lose a significant benefit of not employing workers directly. Further they may be exposed to the higher duty required by employers.

The Effect of Thresholds for Claiming Common Law Damages

The introduction of thresholds would dramatically reduce the number of common law claims made under the WorkCover scheme. The statistics provided by WorkCover in the discussion paper reveal the following:

- in 66% of all claims between 2004/05 and 2008/09 the worker's WPI was 0 to 10;
- in 2008 common law claims where the WPI is nil accounted for 25.5% of all claims; and
- in 42% of all claims between 2004/05 and 2008/09 the worker's WPI was 5% or less

Examples of injuries with a permanent impairment of 5% or less include tennis elbow and the aggravation of pre-existing degeneration in the spine causing a minor permanent impairment. An example of an injury with a 5% to 8% permanent impairment is a operated disc prolapse with no residual problems.

If thresholds are enforced we assume there will be a significant amount of litigation regarding a workers' permanent impairment and hence the percentage of workers with whole person impairments above the proposed thresholds would increase. Notwithstanding this a significant number of workers will lose the right to pursue common law rights under the *WCRA*. To the extent that any reform retains coverage for claims against third parties under existing arrangements it is expected this will cause a significant increase in claims against them (i.e. a worker will embark on a search for third parties to commence actions against).

For example in *Modbury Triangle Shopping Centre v Anzil [2000] HCA 61; 205 CLR 254; 176 ALR 411; 75 ALJR 164* a video store employee who was injured as a result of an assault by a criminal whilst at work. The worker was unable to commence an action against her employer under South Australia's worker's compensation system and hence commenced a claim against a shopping centre operator for inadequate security.

Introduction Requirement for Employment to be the Major Significant Contributing Factor to Injury

In order to pursue damages under the WorkCover scheme a worker must establish that employment was a 'significant contributing factor' to their injury. There is no such statutory restriction in the *Personal Injuries Proceedings Act 2002* ("PIPA"). A large proportion of all claims involve an aggravation of pre-existing symptoms. There is already the potential for a worker who is unable to meet the definition of injury under the *WCRA* to pursue a third party. It is envisaged that the introduction of a much higher test would increase this potential significantly thus shifting a further burden onto public liability insurers.



Increasing No-Fault Benefits

Currently the Queensland workers' compensation scheme arguably provides the most generous access to common law entitlements and the least generous no-fault benefits. Workers who are assessed as having a whole person impairment of 20% or less must make an irrevocable election to pursue common law or accept a statutory lump sum. Any benefits paid under the *WCRA* must be refunded out of any damages settlement and legal fees are incurred by pursuing damages. Accordingly it is envisaged that higher lump sums may make it less attractive to pursue damages against employers or third parties.

Increasing Obligations of Third Parties to Participate in the Compulsory Pre-Court Procedures of the WCRA

The discussion paper suggests that the obligations of third parties should be increased to provide that they exchange relevant documents, provide mandatory final offers and estimates of legal costs. In our experience most public liability respondents are already providing WorkCover with all relevant documents. Further that they genuinely attempt to resolve matters at compulsory conferences. It is envisaged that the proposed reforms will simply add to the compliance costs of public liability insurers and create unnecessary complexity in the area of mandatory final offers without the any savings to the scheme's stakeholders.

Reversing the Effect of *Bourk v Power Serve*

The effect of *Bourke v Power Serve* is that it is very difficult for employers to defend damages claims. Lowering the duty employers may well have the effect of increasing the relative contribution of third parties in awards of damages.

Applying the Damages Regime of the *CLA*

The common law currently applies to claims made by workers against third parties to which the *WCRA* concurrently applies. The effect of this is most dramatically demonstrated in *Wright v Thomas Borthwick & Sons Australia Pty Ltd (2008) QSC 86 (8 May 2008)*. In that case a worker was variously assessed by the medical experts as having a permanent impairment of between 2% and 10%. The Court was not required to determine what the actual percentage was however it expressly ruled out an injury at the more serious end of the range. In that case the worker was awarded \$50,000 for general damages. Under the *CLA* the maximum award for general damages would have been something in the order of \$11,000. Assuming that any reform to the application of the *CLA* damages regime also applied to third parties this reform has the potential to significantly lower the quantum of claims and in some cases make them unviable for Claimants to bring.

Summary

The reforms discussed above have the potential to have a major effect on the environment in which Public Liability insurers operate in Queensland. If you would like to discuss the above in detail please do not hesitate to contact our Ed Zappert on (+61 7 3002 3080).

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