

# Should the SA workers compensation scheme have common law?

**A discussion paper**

**February 2014**

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## Background

The SA workers compensation scheme had common law in its structure until it was removed by the Arnold Government with effect from December 1992<sup>1</sup>. Those provisions can be summarised as follows:

- It was limited to non-economic loss (NEL) and solatium (the latter being the legal term for 'pain and suffering').
- It was capped at 1.4 times the prescribed sum.
- Statutory payments made for non-economic loss under section 43 were offset against any common law damages award.
- Actions were dealt with under the *SA Civil Liability Act 1936*, which applied the standard civil burdens and standards of proof to cases seeking to prove negligence against employers, as well as to workers/plaintiffs for contributory negligence.
- Employers were indemnified against common law damages by the scheme.

At the time of the repeal, (which paradoxically was not supported outright by the Liberal Opposition), the following comments were made in Parliament that reflected the mixed views about common law:

*What we are doing is ensuring that that person is properly looked after, and we are delivering that at a lower cost than we were ever able to deliver it under the old scheme, because we have got rid of a lot of the high cost add-ons that never went near the worker. As members know, when you take out a common law claim, after the costs and legal fees have been deducted, the worker gets precious little.*<sup>2</sup>

*I do not believe that the retention of the common law option in the Act has merit. Because of adjustments to the third schedule it is not necessary in relation to injured workers getting adequate compensation; and, because we have been so strenuous (certainly I have) in attempting to maintain the no-fault provision so that it does not matter to what degree an injured worker may be argued to have been responsible for his or her accident, that has no effect on the compensation; likewise, no degree of negligence or fault of the employer directly increases the amount of compensation that will be paid to the injured worker. The way to deal with an unsafe workplace and a negligent and indifferent employer is through the Occupational Health, Safety and Welfare Act...*<sup>3</sup>

*...the abolition of common law rights will create injustice...*<sup>4</sup>

In 2007-08, major changes to the scheme were being contemplated, and a review was conducted to make recommendations with regard to amendments to the *Workers Rehabilitation &*

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<sup>1</sup> See *Workers Rehabilitation and Compensation (Miscellaneous) Amendment Act (No 84 of 1992)* section 16

<sup>2</sup> Hon R.J. Gregory (Lab), Minister of Labour Relations and Occupational Health and Safety, SA House of Assembly Hansard 27/10/92 page 1080

<sup>3</sup> Hon Ian Gilfillan (Aust Dem), SA Legislative Council Hansard 17/11/92 page 803

<sup>4</sup> Hon K.T. Griffin (Lib), SA Legislative Council Hansard 19/11/92 page 915

*Compensation Act 1986 (WRCA). During its deliberations, the review made the following comments on the option to re-introduce common law:*

*The Review argues for the South Australian scheme, at all levels of its operation, being focused on return to work outcomes. The delays associated with, and adversarial nature of, the common law action are inimical to that goal. As well, empirical studies of the operation of common law demonstrate that it tends to over-compensate minor injuries and significantly undercompensate more serious injuries compared to long tail statutory arrangements such as exist in South Australia. The pre-requisite requirement of having to demonstrate fault for access to common law damages departs from the philosophical no fault basis of statutory workers' compensation schemes. As well, the relatively high transaction costs associated with common law means that it is a less efficient mechanism for delivering benefits to injured and ill workers than statutory benefit arrangements.<sup>5</sup>*

The Review concluded, at page 43, that it ...*does not support the reintroduction of common law. Like redemptions, access to common law would seriously compromise the success of the other proposals and would lead to cost escalation in the medium term.* This became Review recommendation 18 - *That the existing exclusion on access to common law be maintained.*

High level discussion of common law thereafter remained in abeyance until January 2014. The workers compensation policy paper published by the SA Government on 24<sup>th</sup> January 2014 contained the following passage:

#### **Access to common law**

*Currently, there is no access to common law in the South Australian workers compensation scheme. Common law will be re-introduced to the South Australian system. This recognises that a variety of compensation approaches is often useful in a community, in order to suit different needs. A benefit dependency cycle may be avoided where a worker receives a common law settlement, and can then take responsibility for the ongoing management of their injury and control of their life.*

*Common law will be available to workers with a compensable work-related injury, subject to appropriate thresholds and restrictions. Our common law approach will ensure workers clearly understand the process, likely timeframes and estimated damages and costs. This will put workers in the best possible position to make their decisions. There will be special provisions for seriously injured workers to ensure funds for lifetime care and support are protected.<sup>6</sup>*

Notwithstanding the policy about-face that this development represents, the purpose of this paper is to assess the arguments for and against the presence of fault-based common law elements in a no-fault scheme.

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<sup>5</sup> *Review of the South Australian Workers' Compensation System*, Bracton Consulting Services & PricewaterhouseCoopers, December 2007 page 19

<sup>6</sup> *A new recovery and return to work system for South Australians: A workers' compensation policy statement*, SA Government 28/1/14 page 5.

## General discussion

### Common law v no fault

The proponents and opponents of fault and no fault personal injury insurance have had a long-lasting debate, which was well summarised by Dr Andrew Fronsco in his 2001 paper on compulsory third party (CTP) insurance:

*The debate of no-fault V. common law with respect to compensation for the victims of motor vehicle accidents, is more than 75 years old. **Common law** has been subject to criticism with allegations that its costs are too high, it does not promote effective rehabilitation, and it results in inequitable outcomes. **No-fault** has also been subject to criticism with allegations that it infringes upon fundamental legal rights and results in the dilution of benefits available to those who are not responsible for accidents.*

The criticisms of common law noted by Fronsco echo the concerns of the 2008 review of the SA workers compensation scheme cited earlier. Fronsco went on to conclude that:

*Ultimately, discussion on whether a jurisdiction should adopt a no-fault V. common law compensation arrangements (or hybrid arrangements) is not a clearcut (sic) debate. Whilst many would support the utility of a scheme having generous benefits and event coverage, this must be balanced against premium affordability, equity and other competing scheme objectives. Meaningful discussion and debate on no-fault V. common law will necessitate scheme managers clearly articulating their scheme objectives and developing a framework to reasonably balance the trade-off between competing scheme objectives and stakeholder interests.<sup>7</sup>*

Bearing in mind that Fronsco was discussing CTP insurance rather than the more politically sensitive workers compensation, he nevertheless makes an important point about reasonably balancing "...the trade-off between competing scheme objectives and stakeholder interests".

In the workers compensation setting, the debate over common law in South Australia is clearly polarised:

- Unions and elements of the legal profession favour it.
- Business and other elements of the legal profession oppose it.

While it is not the purpose of this paper to analyse common law itself, (that is the subject of a separate paper), it is pertinent to point out that with the exception of the ACT scheme, every Australian workers compensation scheme that has common law heavily restricts access to it, limits its scope to one or two heads of damage and caps the quantum that can be awarded. It is not an 'open slather' that the term 'common law' can evoke in our minds.

### Can common law and no fault co-exist in a scheme?

The short answer to this is yes, based on a range of experience. Not the least of this is the seven out of nine primary workers compensation schemes in Australia that are no fault schemes with common law elements. Most of these schemes at present have sound funding positions and

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<sup>7</sup> A.L Fronsco, *Overview of Australian Compulsory Third Party (CTP) Insurance Schemes & 75 Years of Debate No-Fault V. Common Law Compensation for the Victims of Motor Vehicle Accidents*. December 2001, Page 41.

reasonable average premium rates<sup>8</sup>. In my mind it is fair to conclude that while the balance needs adjusting from time to time to maintain scheme integrity, common law and no-fault are not mutually exclusive at the practical level.

### Answering the rationale for having common law

The reason for having common law that I hear most often is that it allows for the legal pursuit of negligent employers that have caused injury and imposes penalties that act as a deterrent to such negligence in the future. It is worth noting, however, that this rationale did *not* appear in the Government policy paper in January 2014.

The reason for this is obvious. In 1986, as a State we chose to allocate this prosecution and sanction function to a separate workplace health and safety Act and regulatory arm. The task of punishing and deterring negligent employers was deliberately removed from the workers compensation jurisdiction. It was thought that where the worker's tort action was driving the claim into an adversarial situation, it acted as a major barrier to the collaboration between worker and employer that was essential to rapid recovery from injury or disease and return to work. With an independent health and safety regulator carrying out the enforcement process, the worker was out of the firing line and could focus on rehabilitation with the employer's cooperation.

There seems little reason to suggest that this arrangement should be disturbed, as this rationale for separate workers compensation and health and safety jurisdictions seems as valid today as it was in 1986. If elements of the community feel that employers are not pursued zealously enough for alleged negligent conduct, this must surely be levelled at the health and safety regulatory system, not re-assigned to the workers compensation scheme to make up for this perceived lack. This includes questions about the disposition of monetary penalties. The fact that WHS fines go to Government consolidated revenue and not to workers in the form of compensation or to fund safety initiatives is a different debate, and is not a justification for introducing common law to the workers compensation scheme.

Furthermore, there is no evidence that I am aware of that the theory of deterrence is valid – the existence of common law in workers compensation has no known links to workplace safety trends.

### Response to the Government's reasoning

In the January 2014 paper, the Government outlined its reasoning for re-introducing common law as follows: [Reintroducing common law]...*recognises that a variety of compensation approaches is often useful in a community, in order to suit different needs. A benefit dependency cycle may be avoided where a worker receives a common law settlement, and can then take responsibility for the ongoing management of their injury and control of their life.*

The question is why we need common law to achieve this. A properly articulated statutory entitlement structure can provide lump sum settlements with exactly the same effect without the time consuming and costly adversarial process of finding fault and the destructive effect that that has on the employment relationship. Moreover, if these sorts of settlements were limited to a

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<sup>8</sup> That is not to say this has always been the case. Common law has a habit of getting out of control. Most schemes have had to narrow access to common law and quanta payable after funding problems. Most recent of these was Queensland, which recently introduced a 5% WPI access threshold in response to growing numbers of relatively small common law payments that posed a funding risk to the scheme.

common law setting, workers whose employers are not found to have been negligent would not receive a lump sum and may be on risk for costs of the action. In this context, a common law approach can post real risks for workers. The no fault setting has none of those risks, although it should be added that disputes over statutory entitlements can assume major proportions as well.

Under the WRCA as it stands, the barrier to settling claims legally is section 119, which voids any agreement for a worker to waive rights under a claim. It is likely that this was done to stop unscrupulous employers from coercing workers to contract out of their rights. But the bar includes all such agreements, including a voluntary discharge that would be necessary to legally settle a claim on a once-and-for-all basis.

If section 119 was amended to allow for voluntary settlement discharges, then settlements could be done using a combination of existing entitlements under sections 42 and 43.

The suggestion that the scheme needs alternate compensation approaches other than 'drip feed' payments over extended periods is valid. The suggestion that some workers will be better off in charge of their own future injury management is equally valid. The suggestion that common law is the only way to achieve this is not valid. A properly expressed no fault structure can deliver the same thing in a far less adversarial setting, and this has to be the preferred approach for all concerned.

Furthermore, there can be no doubt that common law as a channel for claim finalisation is far slower than the delivery of statutory entitlements. A worker who, according to the Government policy paper, wants to 'avoid a benefit dependency cycle' will want to exit the scheme quickly. Common law, which can drag on for years, is the very antithesis of that solution and to this extent, the Government's reasoning is self-defeating.

### **Risks that the re-introduction of common law may pose**

Aside from the validity of the reasoning behind the proposal to re-introduce common law, there are some practical risks to consider.

1. Common law adds a whole new layer of complexity and cost to an already complex and costly scheme. Even if the damages awarded under common law are balanced out by reductions in entitlements elsewhere in the structure, there are other costs – legal costs, Court time and resources, administrative costs and so on.
2. Legal costs in particular may escalate – the legal cost of common law claims is substantially higher in cases where claims do not settle quickly.
3. The old criticisms that common law can bring rehabilitation and return to work activity to a stop while the focus shifts to winning a legal fight between the parties remains valid. If the worker's statutory entitlements remain on foot, the scheme or self insurer is at risk of prolonged exposure if the common law action drags out. This is at the very least an argument for the 'irrevocable choice' model in the Queensland scheme. Where a worker opts for common law, statutory entitlements cease permanently, isolating the scheme or self insurer from the risks associated with prolonged court action<sup>9</sup>.

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<sup>9</sup> This would depend on the heads of damage covered by common law. The need for the 'irrevocable choice' model in Queensland is mainly driven by the fact that common law cover includes economic loss as well as pain and suffering.

4. Common law costs can blow out beyond forecasts and put upward pressure on premiums unless the legislation that limits access, scope and quantum and bars double compensation is watertight and is absolutely non-contestable. The recent record in South Australia of producing watertight, indisputable legislation has not been strong, most especially in workers compensation. In this sense the experience in Queensland is instructive:



## Other issues

### Risk of conflicting outcomes

The burgeoning level of regulation in workplace safety, workers compensation and workplace relations in Australia has already generated conflicts and overlaps between major blocks of legislation that are, and will continue to, produce bizarre outcomes. An example of this is the relationship between the Federal Fair Work jurisdiction and State workers compensation law. There was a case in SA where the Fair Work Commission (FWC) determined that a worker was guilty of serious and wilful misconduct and was therefore fairly dismissed, but was granted weekly payments of compensation for the injuries the worker suffered as a result of that conduct because the Workers Compensation Tribunal (WCT) determined that regardless of the FWC findings, the case did not meet the WCT's own test of 'serious and wilful'. One can imagine the employer's dismay.

A similar scenario is likely if common law returns to the SA workers compensation scheme, all the more marked because the work health and safety (WHS) legislation that it will compete with is criminal law. An employer may be not guilty of a WHS offence but still found to be negligent for the purposes of compensation. At the grass roots level, there will be little heed to the difference between the criminal and civil burdens of proof. From the employer's standpoint, one jurisdiction says not guilty and another says guilty.



There also the probability of the reverse case. Where an employer is charged under the WHS Act but is found not guilty under the criminal burden of proof and the worker pursues common law action, that action must fail because it has been established to the criminal standard, (beyond reasonable doubt), that the employer did all that was reasonably practicable to keep the worker safe. This ought to trump the civil burden required for negligence to be found, (on the balance of probabilities). In such a case the worker would receive no lump sum compensation where it would have been forthcoming, probably without contest, in the no fault scheme.

#### **Loss of damages through worker contribution**

Common law would also bring with it questions of contribution. Workers will find themselves in some cases defending their own conduct against allegations that their own negligence contributed to the injury. In such cases the damages awarded may well be substantially reduced if high levels of contribution are established under the civil burden of proof. Decades of no fault coverage may have dulled awareness that workers opting to enter into common law action in preference to no fault coverage are discarding the relative impunity from counter-action that the no fault environment confers.

One final point is the effect common law might have on employers' willingness to plead guilty and/or to enter into enforceable undertakings under the WHS laws. A recording of a guilty plea would serve as a virtual guarantee of a finding of negligence in the civil jurisdiction. If the stakes are high enough, it may push more WHS cases into protracted trials, greatly increasing costs all round. In such cases, the civil jurisdiction may well adjourn its proceedings while the WHS prosecution is played out rather than risk being overturned on appeal if damages are awarded and the employer is later found not guilty of the criminal offence. That could greatly prolong the worker's already long wait for a common law decision.

For workers, the demand for common law access may well be a case of being careful what you wish for.

#### **Risk of inflating claim duration**

Most actuaries agree that the availability of lump sums of any description at a certain point will encourage claimants to 'hang out' until the lump sum becomes available. Certainly the easy availability of redemption payments for claims that reached 2 years was thought to be a primary factor in the SA scheme's funding problems prior to the 2008 amendments. In the Government's package, if all but seriously injured claims are to cease income maintenance at 2 years, it is possible that some will exhaust that 2 years' entitlements and only seek common law damages when the entitlement is about to expire. It is for this reason that an 'irrevocable choice' rule similar to that of Queensland<sup>10</sup> be part of any SA common law arrangements – once a worker opts for common law, statutory entitlements cease.

#### **Cost to compensating authorities**

The cost of common law to the scheme and to self insurers is likely to be higher than forecast if thresholds and limits are insufficient to contain unanticipated growth, legislation is not watertight or if there are no provisions to offset damages against statutory entitlements. If there is a low access threshold, (0% to 5% WPI) and/or if the heads of damage are not restricted, and/or if the quantum

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<sup>10</sup> *Workers Compensation & Rehabilitation Act 2003* (Qld) section 239

of damages is not capped, common law could on its own put somewhere between 10% and 20% upward pressure on premium rates (or direct costs to self insurers). That could be exacerbated if the relevant legislation has unintended weaknesses that allow wider access to common law than was intended. This will seriously erode the downward pressure expected from the balance of the changes and, in a worst case scenario, nullify the expected changes altogether.

## Conclusions

- There is nothing in history to suggest that common law and no fault cannot coexist in a scheme from a practical standpoint.
- If the real purpose of re-introducing common law is the prosecution and punishment of negligent employers, then it is redundant because that function has long since been devolved to the health and safety jurisdiction.
- There is no evidence that the existence of common law in workers compensation has any influence over workplace safety trends.
- If the real purpose of re-introducing common law is the provision of more flexible compensation and settlement options, then the same result can be achieved with very minor modification of the existing provisions and with none of the complexities, costs and risks associated with common law.
- Common law is the very antithesis of a system that allows the swift exit from the scheme for workers seeking to break benefit dependency.
- There is a range of consequential problems stemming from overlaps and conflict between jurisdictions and the prospect of workers being held to have contributed to their injuries that will in all probability make common law a less attractive option for workers than it first appears.
- Common law may well have an adverse effect on claim duration unless highly specific legislative steps are taken to prevent this.
- The cost of common law (especially if access is too widespread) will erode the savings expected from the balance of the reform package. At its worst, it could wipe out the savings altogether.
- There is therefore no compelling case to re-introduce common law in any form to the South Australian scheme and a range of valid reasons not to.

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February 2014