



Institute of Actuaries of Australia

Tort Reform: Scheme Impact

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Introduction

The “crisis” in public liability insurance three years ago led to tort reforms in most jurisdictions of Australia. Most of the reforms were focused on reducing general damages payments for minor claims, and eliminating trivial claims. Other reforms included procedural changes designed to speed up claim reporting and settlement, and limitations to legal costs on small to medium claims.

This paper examines the public liability reforms in the context of the Australian accident compensation schemes. The paper:

- compares, by state, the general damages available at common law for public liability claims with the equivalent pain and suffering/impairment/non-economic loss benefits available from the workers’ compensation and motor accident schemes
- describes the impact of the public liability reforms observed to date
- discusses the interactions between the public liability and scheme environments in each State
- discusses the extent to which these interactions may increase the risks to the schemes’ costs and stability.

In the post-reform environment, the schemes and the insurers are co-dependent – outcomes in public liability may impact on scheme outcomes, and vice versa. The obvious structural implication is that there should be a jurisdiction-based (not Sydney head-office based) structure by which schemes and insurers share information, co-operate and (if necessary) deal with governments, courts, law societies etc. This would be quite a new concept in Australia.

Comparison: Public Liability and the Schemes

In this section the general damages available at common law to public liability claimants are compared with:

- statutory pain and suffering, permanent impairment (non-economic loss) benefits available in the statutory schemes
- general damages available under common law in the workers’ compensation and motor accident environments, where applicable.

This paper focuses totally on the five largest states, and does not consider the situations in Tasmania, the ACT and the Northern Territory.

NSW

The table below sets out the NSW comparison.

Table 1 – NSW Comparison

	Public Liability	Workers' Comp	Motor Accidents
Scheme type		Stat + CL	Common law
GD threshold	15% most extreme case (physical + psych)	1% WPI (psych 15%)	10% WPI (psych 10%)
GD scale	Based on % MEC	Based on WPI	Based on WPI
GD assessment	Common law	Medical	Common law
GD max	\$385,000 (i)	\$250,000 (ni)	\$341,000 (i)
Max at	75%	75%	100%
Common law threshold		15% WPI (eco loss only)	

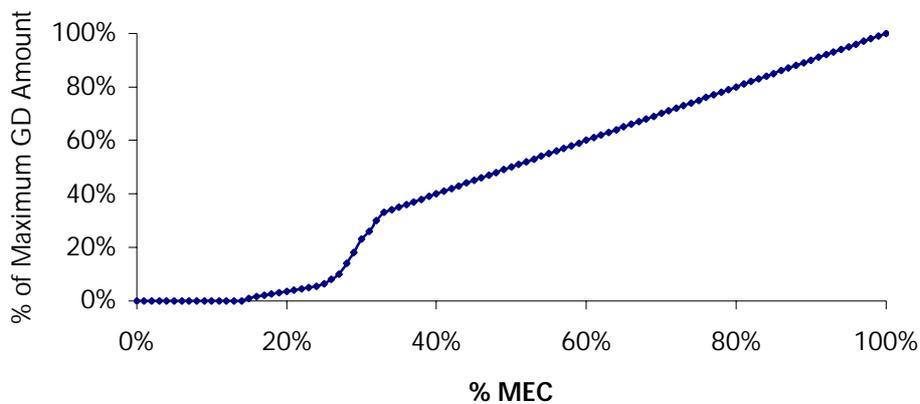
(i) = indexed; (ni) = not indexed

Public Liability

Prior to the public liability reforms, NSW would have been considered the most problematic jurisdiction in relation to claims experience, damages awarded and superimposed inflation. The NSW reforms, which took effect in March 2002, introduced a significant general damages threshold – 15% of the most extreme case (MEC). Physical and psychiatric impairment may be added together to reach the threshold.

The sliding scale of general damages means that the amount increases slowly with the MEC percentage until about 27% – see the figure below. This type of scale is designed to discourage individuals aiming for small increases in the MEC percentage assessment.

Figure 1 – NSW Public Liability General Damages Scale



Workers' Compensation

The NSW WorkCover statutory scheme provides compensation for impairment and pain and suffering for individuals with Whole Person Impairment (WPI) in excess of 1% (i.e. effectively no threshold); there is a 15% WPI threshold for psychiatric impairment. WPI is medically assessed.

Access to common law in NSW workers' compensation is restricted to individuals with WPI over 15%, and common law benefits are restricted to economic loss only.

Motor Accident Compensation

NSW CTP is a common law based scheme, with general damages restricted to those with WPI assessed more than 10%. General damages are linked to WPI via a sliding scale.

Victoria

Victorian public liability general damages entitlements are compared to the benefits available under the two accident compensation schemes below.

Table 2 – Vic Comparison

	Public Liability	Workers' Comp	Motor Accidents
Scheme type		Stat + CL	Stat + CL
GD threshold	5% WPI (psych 10%)	10% WPI (psych 30%)	10% WPI (psych 10%)
GD scale	n/a	Based on WPI	Based on WPI
GD assessment	Common law Medical panels assess 5%	Medical panels	TAC assessed
GD max	\$383,000 (i)	\$350,000 (i)	\$80,000*
Max at	n/a	80%	100%
Common law threshold		Seriously injured 30% WPI or narrative Max GD \$438,000 (i)	Seriously injured 30% WPI or narrative

* Will increase to \$250,000 under new legislation

(i) = indexed; (ni) = not indexed

Public Liability

The Victorian public liability reforms took effect from May 2003. They introduced a threshold of 5% WPI for general damages (10% for psychiatric impairment). While the general damages amount is assessed at common law, assessment of whether an individual exceeds the 5% threshold is made by the medical panels used by Victorian WorkCover for WPI assessment (see below). In the public liability context, the

medical panel only assesses whether or not a claimant has impairment greater than 5%; the panel does not make a WPI determination.

Workers' Compensation

Under Victorian WorkCover's statutory scheme, permanent impairment and pain and suffering benefits are available to those with WPI in excess of 10% (30% for psychiatric impairment). The amounts depend on WPI, which is assessed by the Medical Panels. The medical panels are an independent group of medical practitioners who are trained and registered to make WPI assessments.

Access to common law is available to individuals who meet a Serious Injury requirement via either:

- WPI in excess of 30%
- satisfying a narrative test.

Motor Accident Compensation

The Victorian motor accident compensation scheme (TAC) is similar in structure to the WorkCover benefits: a statutory scheme with common law overlay for those who satisfy a serious injury (WPI or narrative) test.

Access to statutory impairment benefits is available to individuals with WPI of 10% or more (10% for psychiatric impairment). The percentage WPI is assessed by TAC.

Queensland

The table below sets out the Queensland comparison.

	Public Liability	Workers' Comp	Motor Accidents
Scheme type		Stat + CL	Common law
GD threshold	None	None	None
GD scale	100-point scale	Based on % impairment	100-point scale
GD assessment	Common law	Medical	Common law
GD max	\$250,000 (ni)	\$325,000 (i)	\$250,000 (ni)
Max at	100 pts	Applies to GD + wklies	100 pts
Common law threshold		< 20% elect CL or stat > 20% can get CL + stat	

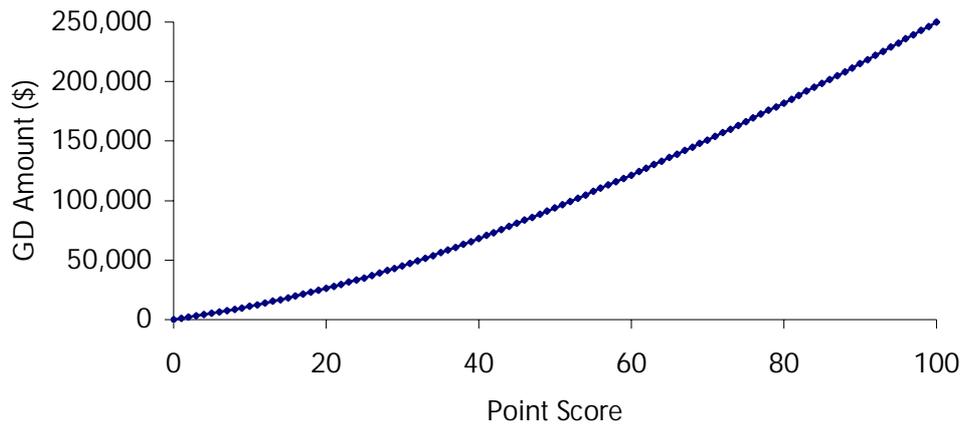
(i) = indexed; (ni) = not indexed

Public Liability

The public liability reforms in Queensland saw changes including the following:

- procedural reforms via PIPA (the Personal Injuries Proceedings Act 2002)
- the introduction of a 100-point injury scale for assessment of general damages. There is no threshold – but the general damages available at low points values are reasonably low.

Figure 2 – Qld General Damages Scale



Workers' Compensation

Statutory impairment (“lump sum”) benefits are based on medically assessed impairment. The cap of \$325,000 (indexed) on the total of weekly benefits and lump sum benefits effectively means impairment benefits are limited for those with significant economic loss.

Claimants with impairment assessed at 20% or above have access to common law benefits in addition to statutory benefits.

Motor Accident Compensation

Queensland CTP benefits are common law based. General damages are assessed using the same approach and scale as used for public liability; changes to adopt the scale were made to the CTP and public liability environments at the same time (effective December 2002).

South Australia

South Australian public liability and accident compensation schemes are compared below.

Table 4 – SA Comparison

	Public Liability	Workers' Comp	Motor Accidents
Scheme type		Stat	Common law
GD threshold	7 days impairment or \$3,000 (i) med	None	7 days impairment or \$3,000 (i) med
GD scale	60-point scale	Based on WPI	60-point scale
GD assessment	Common law	Medical	Common law
GD max	\$245,000 (i)	\$200,000 (i)	\$245,000 (i)*
Max at	60 pts		60 pts
Common law threshold		No common law	

* Increased from around \$110,000

(i) = indexed; (ni) = not indexed

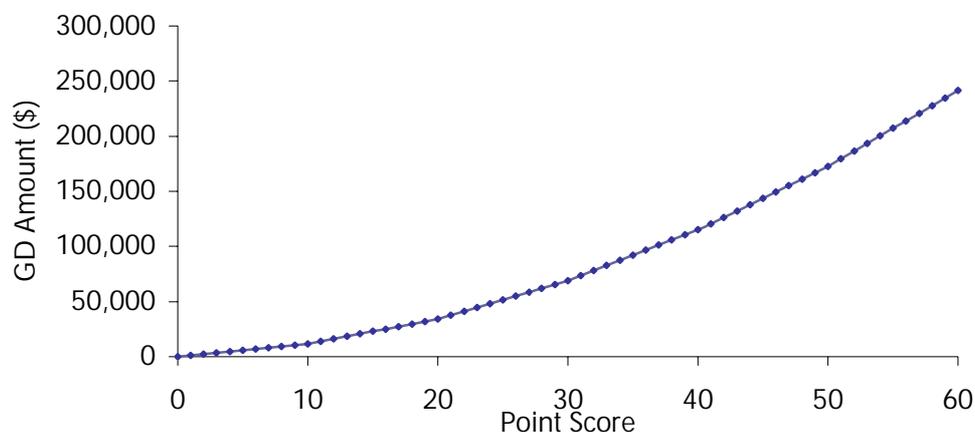
Public Liability

The South Australian public liability reforms (effective December 2002) saw the introduction of a 60-point severity scale for assessment of general damages, with the number of points related to the seriousness of the injury. A relatively weak threshold of seven days' impairment, or around \$3,000 in medical costs, applies.

The 60-point scale is the same as the scale that has been used successfully in the South Australian CTP context for over ten years. Changes were made to the calculation of general damages amounts, as follows (these changes were also made at the same time in the CTP context):

- the maximum amount was increased from around \$110,000 to \$250,000
- the relationship between points value and amount was changed from a straight-line relationship to a relationship whereby the increase in general damages per point increases as the points value increases (see figure below).

Figure 3 – SA General Damages Scale



Workers' Compensation

Workers' compensation benefits in South Australia are provided under a statutory scheme, with no access to common law. Impairment benefits of up to \$200,000 which are based on medically assessed WPI are provided; there is no threshold.

Motor Accident Compensation

As mentioned above, general damages under the common law-based South Australian CTP scheme have been assessed for more than ten years using the 60 point scale. At the time the scale was implemented in the public liability environment, the maximum amount available was more than doubled and the scale was changed to a non-linear scale where the increase in general damages per additional point increases as the points increase.

Western Australia

The Western Australian comparison is set out below.

Table 5 – WA Comparison

	Public Liability	Workers' Comp	Motor Accidents
Scheme type		Stat + CL	Common law
GD threshold	\$12,000 pre-reform	None	\$12,000
GD scale	Sliding scale to \$48,500	Based on % disability	Sliding scale to \$48,500
GD assessment	Common law	Medical	Common law
GD max	n/a	\$136,000 (i)	n/a
Max at	n/a	Applies to GD + wklies	n/a
Common law threshold		16% disability < 30% elect CL or stat > 30% can get CL + stat	

(i) = indexed; (ni) = not indexed

Public Liability

The Western Australian public liability reforms which became effective 1 January 2003 introduced:

- a threshold of \$12,000 on general damages
- a sliding scale which applies up to (pre-reform) general damages of \$48,500.

Workers' Compensation

Statutory disability benefits are based on medically assessed disability (note the contrast with **impairment** in other schemes). The cap of \$136,000 (indexed) on the total of weekly benefits and pain and suffering effectively means disability amounts are very limited for those with significant economic loss.

Claimants with disability assessed at 30% or above have access to common law benefits in addition to statutory benefits.

Motor Accident Compensation

General damages for Western Australian motor accident claims have been assessed for several years using the same monetary threshold and sliding scale which have now been introduced in the public liability context.

Impacts of Tort Reform – and Scheme Interactions

General

Claim Numbers

The public liability reforms have reduced claim numbers; this effect has been observed across jurisdictions. It is the small claims which are no longer being made. This impact can be attributed to the introduction of thresholds on general damages; historically, general damages have represented around 40-50% of the cost of claims up to \$50,000.

Claim Costs

In addition, insurers are observing that the size of small to medium claims has been reduced by the general damages reforms. Claims up to around the \$40-50,000 level have been impacted.

Insurers are not observing any impact on the size of medium to large claims; this is expected, since the main thrust of the reforms was to reduce costs of smaller claims. It is still too early to assess the impact on large claims, however, because only small numbers of post-reform large claims have been settled.

Other Influences

It is difficult to separate the impact of the public liability reforms from other changes which have occurred in the public liability environment, including:

- the impact of the HIH collapse and the September 11 event
- most insurers have made changes to terms and conditions, underwriting and deductibles

- a number of insurers have had significant changes in the makeup of their public liability portfolios in recent years
- there have been changes in community and court attitudes over the last few years, showing a swing against plaintiffs who are considered to have contributed to their accidents in some way.

Courts and Lawyers

After the reforms, the Courts of Appeal in particular are observed to be carefully interpreting and adhering to the provisions relating to general damages.

One of the by-products of the reforms is that lawyer involvement in primary public liability claims is reduced; in a number of jurisdictions limitations on legal costs for smaller claims have been introduced. As a result increased lawyer activity has been seen in other areas, including:

- recoveries from public liability insurers by the workers' compensation schemes; in addition, a number of the schemes are more actively chasing recoveries
- professional indemnity claims.

Public Liability/Scheme Interactions

There a number of different areas in which the public liability and scheme environments may interact and impact each other:

- use of common thresholds and scales – in South Australia, Queensland and Western Australia, the public liability reforms have introduced the same general damages thresholds and scales as are used in the CTP schemes
- where these similarities exist, decisions made by the courts or trends in court decisions in one forum will naturally flow to the other
- the operations of the different forums may also impact each other in an administrative sense. For example:
 - the use of the same medical assessment mechanism may have workflow or other impacts (Victorian WorkCover and public liability are now using the same medical panels)
 - when there is interaction between the different forums, different claim reporting limits may, for example, complicate the interactions
- changes such as limitations to the involvement of lawyers in one context may impact another context (due to a change in the lawyers' area of focus).

All of these possible interactions mean that, more than before, the public liability insurers and the schemes are dependent on each other. The corollary is that they may benefit from sharing of information, and cooperation.

NSW

Tort Reform Impacts

In NSW, the public liability insurers have experienced significant reductions in claim numbers in the last couple of years. The reductions are attributed to the reforms, as well as to increases in deductibles, stronger underwriting and so on.

The damages awarded have been reduced for claims of up to \$30-40,000, due to the reductions in entitlements to general damages.

There are observed to be pressures on the 15% threshold – as would be expected. These include:

- the use of psychiatric impairment to “boost” individuals above the threshold
- there is still subjectivity around the assessment of the percentage of the most extreme case
- the arbitrators and District Courts are seen to be weaker in their application of the threshold and scale, leading to a situation where the expectations of individuals have not reduced significantly after the reforms.

The reforms have not had a noticeable impact on larger claims – noting that it is early days yet for these.

Insurers are observing a greater willingness on the part of claimants and lawyers to settle early; this would be at least in part linked to the limitations on legal costs.

One of the questions around the robustness of the NSW reforms is how hard the system will be on out-of-time claims. The three year reporting period will have expired in March 2005 for the first post-reform accidents – and interest in how the system responds to late reports will be keen.

Interactions with Schemes

There do not appear to be any major sources of direct interaction between the public liability environment and the NSW accident compensation schemes. With both the CTP scheme and public liability claims operating in the courts, general trends in the courts would be expected to impact on both.

The public liability insurers are seeing an increased focus on recoveries from public liability in relation to NSW WorkCover claims. This is thought to be driven in part by lawyer activity in this area.

Victoria

Tort Reform Impacts

Public liability insurers have seen very few post-reform claims to date – claims seem to have “dried up”. This is attributed to several factors:

- the general damages regulations have been released only recently and lawyers and claimants are not yet familiar with the new environment
- attention is focused on dealing with the “spike” in claims made before the reforms.

The introduction of an objective threshold (5% WPI) is seen as a positive development.

All up, however, it is too early at this stage to gauge the success of the Victorian reforms.

Interactions with Schemes

As mentioned earlier, in Victoria the VWA medical panels will be used to assess whether a claimant meets the WPI 5% threshold in the public liability context. The interactions this may cause are described below.

Public liability claimants with WPI at or slightly below the 5% general damages threshold may apply pressure to get their WPI assessed higher in order to get over the threshold. Any resulting upwards trend in WPI assessments may mean that larger numbers of workers’ compensation claimants satisfy the statutory impairment benefit threshold of 10%. Impairment benefit costs may therefore increase.

Another possible impact is that the increase in the workload of the medical panels arising from assessments on public liability claims may negatively impact on their workflow and turnaround times for workers’ compensation claims.

It is worth noting that WorkCover in Victoria does not foresee problems in either of these areas – and to date has not seen any impact on the medical panels’ capacity to deal with workers’ compensation WPI assessments.

The determination of WPI in the motor accident environment is done by the TAC, and since this is completely independent of the VWA medical panels no pressure on TAC’s 10% impairment benefit threshold is anticipated.

As for NSW, the public liability insurers are seeing an increased focus on recoveries from public liability in relation to workers’ compensation claims. This is thought to be driven in part by lawyer activity in this area.

Queensland

Tort Reform Impacts

The Queensland public liability reforms included significant changes to processes, which were made with the intention of speeding up claim reporting and settlement.

After the reforms, insurers are observing faster reporting of claims, and claims are moving faster through the system. Claim frequency is lower, with reduced numbers of small claims.

Under the Queensland claim process, co-defendants can be joined to a claim in the early stages without incurring a cost penalty. What appears to be happening as a result is that a “scattergun” approach to joining defendants is resulting in insurers sometimes being joined on claims where this is not ultimately appropriate. The effect of this is some increase in costs. Overall, however, legal costs have been reduced on claims to date. Insurers are also observing an increased willingness to settle from claimants and lawyers.

The introduction of the Queensland injury scale, with its objective approach to determining damages, is seen as a positive in both public liability and CTP environments. General damages awards do appear to be lower for small claims. The broader operation of the scale, however, is essentially untested at this stage.

Interactions with Schemes

In Queensland, claim outcomes in both public liability and CTP now depend on the success of the injury scale. Trends or precedents in one of these forums will naturally flow to the other, leading to a high level of co-dependence between public liability and CTP.

Public liability insurers operating in Queensland have observed that different pre-litigation procedures and reporting periods now apply in public liability, workers’ compensation and CTP. When there is administrative interaction between the forums (e.g. when recoveries are made), this can cause some complication.

The fact that CTP insurance in Queensland is undertaken in the private sector should help liability and CTP insurers to coordinate their activities. New lines of communication will be needed to share information.

Queensland public liability insurers are also seeing an increased focus on recoveries from public liability in relation to workers’ compensation claims. Once again this is thought to be driven in part by lawyer activity in this area.

South Australia

Tort Reform Impacts

In South Australia, public liability insurers are seeing reduced numbers of claims after the reforms, with small claims being affected.

It is too early to form a view of the overall impact of the reforms, including the impact of the 60-point injury scale. The increase in certainty which is expected as a result of the introduction of the scale is seen as a positive – while it is acknowledged that (as in other jurisdictions using scales) there is still some subjectivity around the points value ascribed to an individual.

Interactions with Schemes

As for Queensland, the South Australian public liability and CTP environments are now co-dependent - both using the 60-point impairment scale for general damages.

In the South Australian context, the fact that the 60-point scale has been used successfully in CTP for over ten years may assist the success of the scale in the public liability context. On the other hand, any unfavourable trends which arise in the use of the scale in the public liability context may impact negatively on the stability of the CTP scheme. We also note that the change in the shape of the curve, along with the significant increase in the maximum amount, compared to the previous situation in CTP could potentially be destabilizing as well.

Western Australia

Tort Reform Impacts

The WA general damages threshold has had a significant impact, ruling out claims for minor injuries. As a result the claim frequency is reduced.

Interactions with Schemes

The post-reform position in Western Australia is similar to those in Queensland and South Australia – with CTP and public liability outcomes depending on the same general damages structure and therefore being highly co-dependent.

The issues in Western Australia are limited to the monetary threshold and sliding scale for general damages. It will be interesting to observe progress as the monetary form of threshold has not been robust in other jurisdictions.

Scheme Risk

The table below ascribes a level of risk to each of the accident compensation schemes in the five states discussed in this paper. The risk represents the extent to which, in the post-reform environment, developments in the public liability context may impact on scheme claim costs and operations. One asterisk represents low risk, and three asterisks denotes the schemes considered to be at greatest risk.

Table 6 – Scheme Risk

	WC	CTP
NSW	*	*
Vic	**	*
Qld	*	***
SA	*	***
WA	*	***

The schemes assessed to have some risk are:

- Victorian workers’ compensation, with some risk arising from the use of the WorkCover medical panels in public liability. The risk factors are “slippage” in the 10% WPI workers’ compensation threshold and interruptions to the medical panels’ workflow
- the CTP schemes in Queensland, South Australia and Western Australia – which are now co-dependent on claim outcomes in public liability.

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