

Injured Workers Denied Fair Compensation

Background Briefing Paper

February 2006

Fairer Compensation for Injured Workers



EXECUTIVE SUMMARY

This paper explains how Tasmanian workers, who are injured through no fault of their own, are denied fair compensation under the Tasmanian workers compensation system.

Under changes to the workers compensation system in Tasmania in 2001, people injured in the workplace now have to reach an injury threshold before they can sue for damages from a negligent employer. These changes were introduced to combat rising insurance premiums, despite mounting evidence that common law claims costs had little, if anything, to do with rising premiums in Tasmania.

As a result of the changes, Tasmanian workers are unable to claim fair compensation unless their injuries result in 30 per cent 'whole-person impairment' (WPI). This threshold is very difficult to achieve and presents a barrier for injured workers that is far more onerous than in other states, because the individual circumstances of each person are not taken into account when determining their level of impairment.

This paper concludes that the threshold should be immediately removed or, at the very least, reduced and a different test be adopted, which allows consideration of the impact of an injury on an injured worker's way of life.

The 2001 Changes to Tasmanian Workers' Rights

In July 2001, the Tasmanian Government introduced sweeping changes to the Tasmanian workers' compensation scheme.

It was claimed these changes were necessary because of alleged increases in insurance premiums blamed on a supposed "litigation explosion".

There Was No Litigation Explosion in Tasmania

By introducing the changes, the Tasmanian Government accepted unsubstantiated assertions by insurance companies that premiums were increasing due to the rising cost of claims and a "culture of personal injury litigation in Australia". These arguments were accepted despite mounting evidence that claims costs had little, if anything, to do with the situation in Tasmania, which is a small insurance market (where awards of damages are historically very low) when compared with other States.

For example, in Tasmania, up until the changes were introduced, the highest award of damages for pain and suffering caused by an injury was \$175,000. To place this in context, NSW has recently legislated to cap such damages at \$350,000 and the NSW Upper House Review of the Personal Injury Compensation Legislation recommended that the cap be reduced to \$300,000.

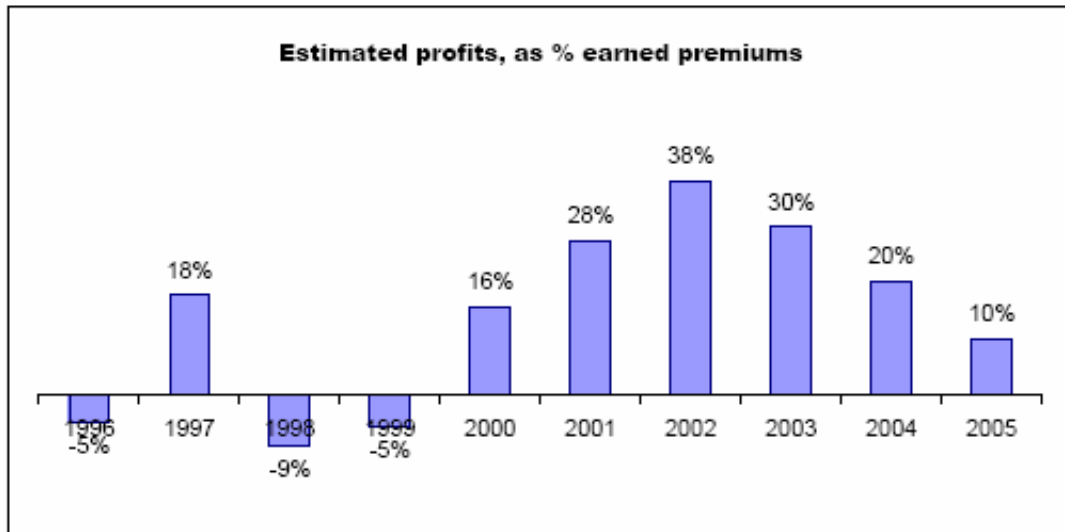
The Australian insurance industry operates in a global market and is therefore affected by "shocks", both domestically and overseas. A range of factors have been cited for the increasing cost of insurance, including:

- (a) aggressive competition and irresponsible pricing throughout the 1990s, culminating with the collapse of HIH in 2001;
- (b) changes in the international risk environment due to more numerous and severe natural disasters in recent years and the increasing threat posed by terrorism;
- (c) increased reinsurance costs;
- (d) the cyclical nature of insurance profitability and premiums; and
- (e) the impact of overlapping Commonwealth and State taxes and levies.

In Tasmania, there was little correlation between premiums and claims costs. Even before the 2001 amendments, workers' compensation claims costs had been decreasing in Tasmania. Despite continuing reductions in claims costs through 2000 and 2001, premiums continued to rise. For example, from December 2000 to December 2001, there was a 7.8 per cent average reduction in claims across all industries. In the same period, average premiums increased by 3 per cent.

Insurers Profit At The Cost of Workers

Insurers are the only beneficiaries of the restrictive laws in Tasmania. In an actuarial analysis of the Tasmanian scheme commissioned by the Law Council of Australia, Cumpston Sarjeant concluded that the high premiums have resulted in “high profits for insurers”, as demonstrated by the table below.



Ironically, the changes in Tasmania have not resulted in any significant benefits for employers, through reduced premiums. However, the 2001 changes have resulted in significant injustice for Tasmanian workers, who generally earn less than workers on the Australian mainland.

Restrictions on Common Law Damages

The most dramatic and far-reaching change introduced in July 2001 relieves insurers of any responsibility to pay proper compensation for injuries in the workplace.

This was done by introducing severe restrictions to common law damages, which mean that, where an employee is injured at work, they are unable to obtain adequate compensation unless the injury permanently leaves them with at least 30 per cent “whole person impairment”.

What Are Common Law Damages?

Damages are awarded by a court as a means of compensating an injured person for injury caused by the fault of another. Damages may be described as compensation in the form of money that must be paid to an injured person by the party at fault. The objective is to put the injured person as close as

possible to the position that they would have been in had the injury not occurred.

Damages take into account all of the effects of an injury on the injured person, including the impact of an injury on that person's future employability, and their enjoyment of day to day life, social, recreational and sporting activities and so on.

Other forms of monetary compensation, such as the limited "no fault" compensation provided for injured workers under workers' compensation legislation, are quantified without regard to the impact of an injury on that person.

What Is Wrong With the 30% Threshold?

Whole Person Impairment (WPI) is assessed in a way that measures the effect of an injury on the mechanical function of body parts and joints by comparison with tables of "normal" standards. It does not take into account the personal effect of the injury on the individual worker.

This assessment is made in accordance with guidelines published by the American Medical Association (The AMA Guides).

The Tasmanian Government chose to impose these American guidelines on Tasmanian workers, even though the guidelines themselves contain a warning that they are not suitable for, and should not be used for, assessing disability caused by an injury.

Some jurisdictions impose reasonable restrictions to prevent people with minor injuries from litigating unnecessarily. Reasonable thresholds create a barrier to courts awarding damages for pain and suffering unless the injured person has a certain level of disability.

While 30 per cent may not sound like a high threshold, under a "whole body" impairment scale, many severe, debilitating injuries will fall short of the threshold. It excludes, for example, most back and neck injuries even when there is disc damage and ongoing pain. It also excludes loss of fingers, most injuries to shoulders, elbows, wrists, knees and ankles, even where they have required operative treatment, and limit the injured person's ability to work and undertake normal daily activities. Similarly, psychological injury and skin conditions are excluded.

Use of the AMA Guides, especially with a threshold as high as 30 per cent WPI, is fundamentally flawed because they fail to take into account the impact of an injury on a person's individual lifestyle. Neither does the guide subjectively assess a person's ability to continue working in their chosen field.

For example, a nurse or manual labourer who suffers a debilitating back injury may be assessed at 10 per cent WPI, but in many cases this will result in a complete inability to perform their required duties.

Similarly, a concert pianist who loses a finger may be assessed at 8 per cent on the WPI scale, but will never perform again, while a butcher who loses a finger will be assessed to have the same WPI and will very likely return to work within a short time.

A doctor, accountant or Member of Parliament may suffer 30 per cent WPI, but still be able to work full time.

Therefore it is clear that:

- these laws unfairly discriminate between workers who suffer the same injuries but with vastly different personal consequences; and
- most of the kinds of injuries commonly suffered at work, frequently caused by an employer's negligence, often leave a worker with a very severe permanent disability, but will not reach the 30 per cent WPI threshold.

Injury in the workplace has a dramatic and often devastating impact on a worker's occupational and personal life. The Tasmanian workers' compensation system is unable to take account of the overall effect of an injury on a person's way of life.

Tasmanian Workers Deserve Better

These laws not only unfairly discriminate between workers who suffer the same injuries, they also discriminate against Tasmanian workers, as opposed to Tasmanians injured in other ways.

For example, a person struck by a falling brick when walking past a construction site may be entitled to claim damages, while a construction worker injured in the same way when working on that site may not.

Likewise, a person who is injured when driving to work will be entitled to claim proper compensation for their injuries without having to meet a WPI threshold, but a truck driver injured while driving a vehicle in the course of their employment will not.

Tasmanian workers are also disadvantaged compared to their equivalents on the mainland.

For example, Victoria has a 30 per cent WPI threshold but its harmful effects are reduced by the option of an alternative test that assesses the personal impact of an injury on the injured worker's lifestyle.

The law in Tasmania does not allow workers the opportunity for consideration of their individual and personal circumstances.

The changes to Tasmanian workers' compensation law in 2001 have resulted in exclusion from access to common law damages for all but the most

catastrophically injured. It means that over 95 per cent of Tasmanians injured at work will not receive fair and just compensation.

The Cost To The Community

Restricting access to common law damages undermines three key policy objectives of the common law system, which are:

- fair compensation according to a victim's personal circumstances;
- deterrence from careless conduct; and
- responsibility for the consequences of careless conduct.

The common law has developed over centuries as a reliable means of ensuring that people injured through the fault of others are restored as closely as possible to the position they would have been in but for their injury.

Employers whose carelessness may cause harm to their employees are presented with a strong deterrent against negligent behaviour and a strong incentive to invest in the safety of their workers.

The law of negligence also effectively distributes the cost of injury among those responsible for causing injury.

Is There A Better System?

Yes, there is.

In Victoria, workers have the option of being assessed either under a Tasmanian-style WPI assessment or under a test, which measures the real personal impact of injury on each individual worker. That system is still designed to limit common law access to the more seriously disabled victims of fault-caused injury but does it in a much fairer and subjective way, personal to each individual claimant.

The Victorian system is also fully funded, demonstrating that a workers compensation scheme can operate effectively, while allowing fairer access to common law damages. In May 2005, the Victorian WorkCover Authority announced that it was reducing its premiums to the lowest levels in the scheme's history and improving the level of benefits available to injured workers and employers.

What Needs to be Done?

Tasmanian workers should not be denied access to fair compensation.

The 30 per cent WPI threshold imposes an arbitrary and unfair restriction on common law rights.

The 30 per cent WPI threshold in Tasmania creates an almost insurmountable barrier to fair and reasonable compensation for most workers who are injured in workplace accidents. It excludes all but the most catastrophically injured people.

The affordability of insurance is important. However, a system that permits insurers to reap profits well in excess of what can be considered reasonable, at the expense of injured workers, cannot be tolerated.

The 30 per cent WPI threshold goes much further than can ever be justified in the cause of limiting unnecessary litigation. Therefore,

- the threshold should be removed or, at the very least, immediately reduced; and
- if there is to be a threshold, an alternative subjective test of serious injury should also be introduced, similar to that currently used in Victoria.

These changes are the least that must be done to ensure Tasmanian workers receive a fair go.

The Tasmanian Government must act now to reverse the injustices being suffered by workers in this State and make Tasmania a fairer place in which to live and work.

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