

Injury Schemes Seminar

Balancing Outcomes

10-12 November 2013
Sheraton Mirage Gold Coast



Sustainability of Common Law

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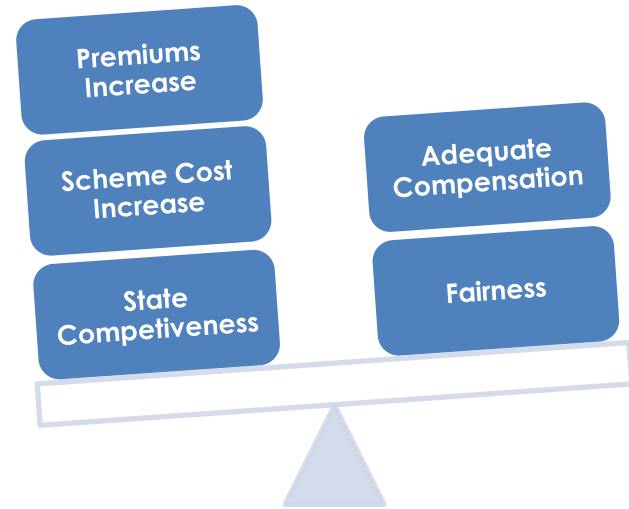
Reports of my death are greatly exaggerated

- A 30 year history tour
- How is common law cost managed?
 - Taxonomy
 - Case studies
- Scheme culture and no fault interactions
- A recipe for sustainable common law



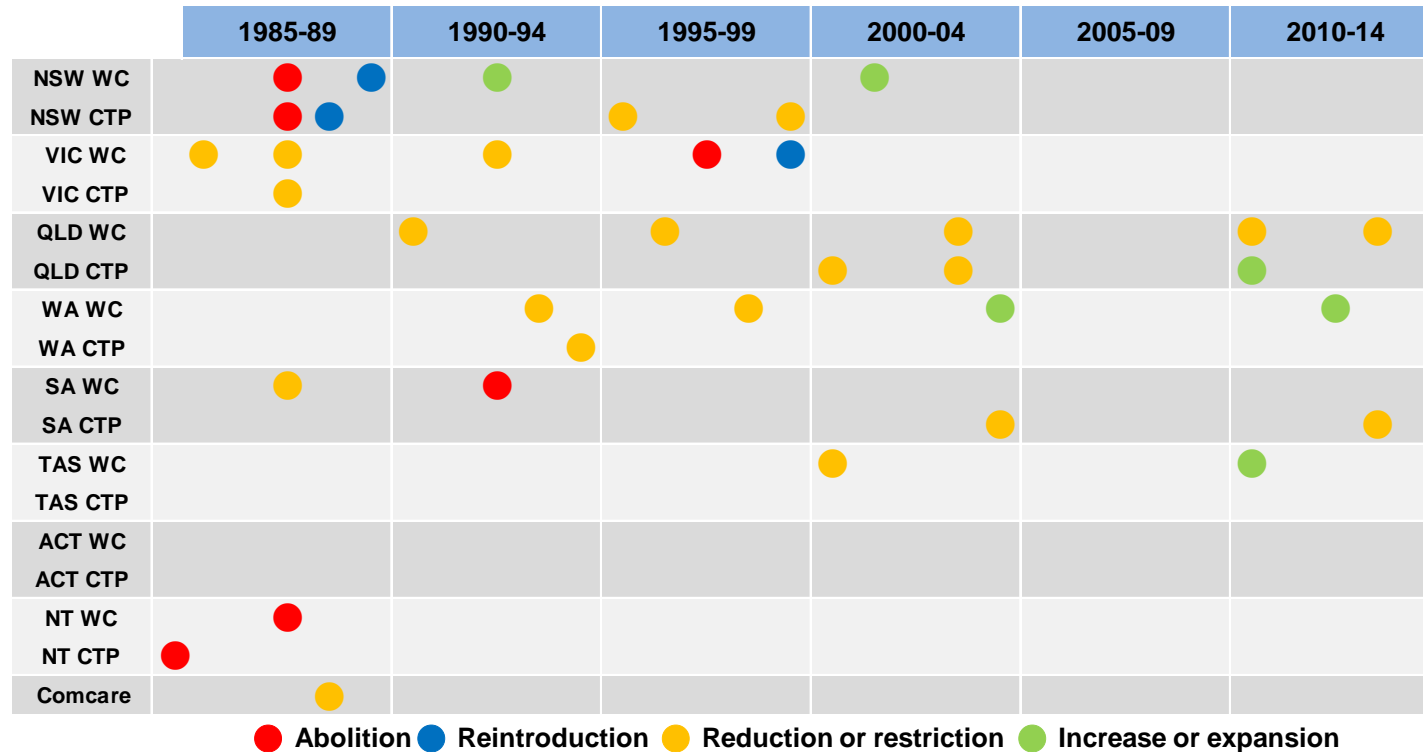
Economics trumps Ideology

- Reports and inquiries always cover the ideological debate about common law and the no fault alternatives
- The fundamental sustainability equation is to balance the competing interests of injured people and premium payers
- Scheme cost is nearly always the trigger for review



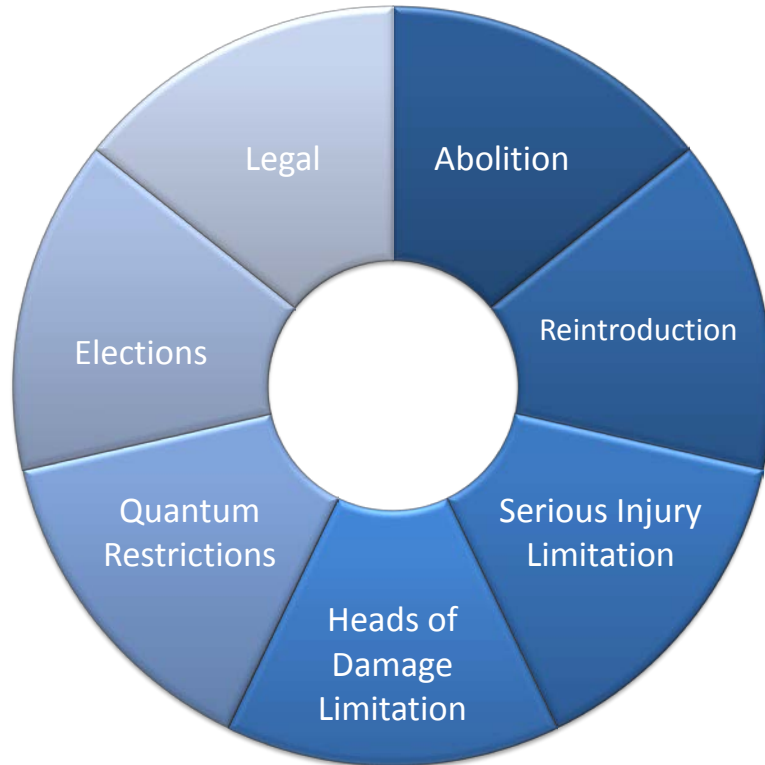


How sustainable has common law been?





Modifications to Common Law



- Apart from abolition, five forms of modification
- Restriction to 'serious injury' cases is the most prominent
- Restricting certain heads of damage and limits on quantum are also used
- Elections of common law vs statutory have not been very successful
- Legal process requirements and fee controls have more potential



Abolition

- The following schemes have successfully abolished access to common law
 - Comcare since 1988 (effectively)
 - Northern Territory CTP since 1979 (residents only)
 - Northern Territory workers' compensation since 1987
 - South Australian workers' compensation since 1992
- However there are examples of abolition followed soon after by reintroduction
 - NSW CTP and Workers Compensation
 - Victoria Workers Compensation



Serious Injury

- Allowing common law access only for 'more serious injuries'
- Easily the most common control

Dollar Thresholds

- Workers: Comcare
- Motor: WA

Whole Person Impairment Only

- Workers: NSW, QLD, WA, TAS
- Motor: NSW, SA

Narrative

- Workers: VIC
- Motor: VIC



Case Study: WA Workers Serious Injury Definition

	1993	1999	2004
Problem	Rising costs	Low pecuniary loss threshold	Impairment assessments highly variable and difficult for conditions not stabilised within 6 months
Reform	Access based on either: <ul style="list-style-type: none"> • 30+% impairment • Pecuniary loss threshold Impairment based on WorkCover Guides WA	<ul style="list-style-type: none"> • Capped damages for 16-29% impairment • No capping for 30+% impairment • Election made within 6 months of first payment Impairment based on WorkCover Guides WA, AMA Guides and Schedule 2 of the Act	<ul style="list-style-type: none"> • AMA guidelines for WPI assessments • Capped damages for 15-24% WPI • No capping for 25+% WPI • Election made within 12 months of first payment, with possible extensions
Impact	Small	Initial claims reductions	Reasonably stable at present



Quantum Restrictions

- Attempt to control cost through the introduction of caps, discount rates and earnings limit

Examples:

- NSW CTP has a variety of caps
- QLD CTP uses its ISV scale
- SA CTP has picked up elements of both NSW and QLD schemes

Current GD Caps

State	Workers	Motor
NSW	No access	\$477,000
VIC	\$543,920	\$497,340
QLD	\$319,050	Unlimited
WA	\$416,5691 when WPI<25%, unlimited otherwise	\$364,000
SA	No access	\$300,000
TAS	Unlimited	Unlimited
NT	No access	No access
Comcare	\$138,571	N/A



Legal Process and Costs

- Restrictions on normal litigation process in some way including
 - Controls on legal costs for claimant's representatives
 - Compulsory settlement conferences
 - Compulsory arbitration/mediation
 - Tribunals prior to court etc.
- Some controls could be characterised as alternative dispute resolution (ADR) systems
- These modifications have an important place in making common law sustainable, however they are complex and perhaps outside the core competence of many scheme designers.

This has serious potential for more work



Scheme Culture

“The Way We Do Things Around Here”

Culture

Can be a powerful force!

Changing legislation alone will not change ingrained behaviours

For example, in NSW and SA legal activity shifted seamlessly to redemptions and impairment/pain & suffering lump sums

Lessons

Minor changes to rules are unlikely to achieve much

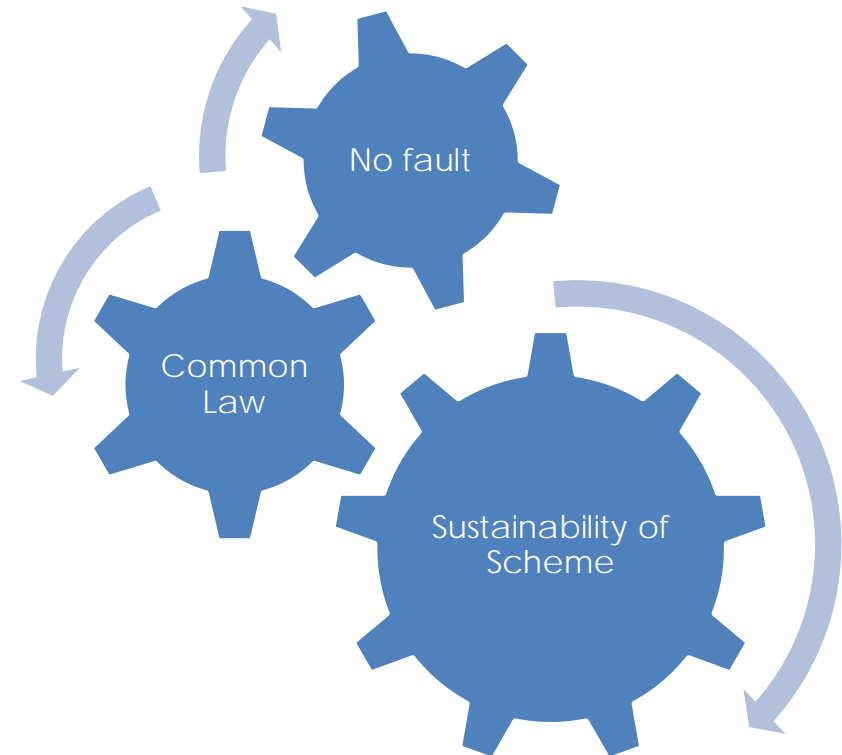
Major changes can achieve more than expected if accompanied by forces to change scheme culture

Any plan for changes should be accompanied by a careful assessment of how ‘the system’ works



Interaction of No Fault and Common Law

- No Fault and Common Law are not alternatives to each other
- The interaction between common law and no fault, when mixed together in a scheme, is a complex cocktail, and vitally important to sustainability





What can we learn?

- Most jurisdictions have limited common law access (with some successfully abolishing access)
- Common Law is usually the first target when scheme costs are rising
- Limiting common law access to serious injury is by far the most common response
- The serious injury threshold hence becomes an important decision
- Other forms of limitation are not the most important factors in sustainability
- Effective legal processes and cost rules are important



My Recipe for Sustainable Common Law

Take care of the catastrophically Injured

Provide time limited statutory benefits on a no-fault basis

Provide common law for those that can demonstrate negligence and meet thresholds

Case managed litigation in the intermediate court system

Eco loss based on earnings capped at a low multiple of AWE and a 5% discount rate

Non-eco loss based on a modest maximum with narrative approach within the max

Medical, care and the like subject to the same provisions as civil liability

Clarity that 'buffers' are not to form part of damages, with non-eco loss covering the relevant possibilities

Event based legal costs rules until the court hearing stage

Statutory restrictions on solicitor-client costs and no-win-no-fee uplifts

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*“Prediction is very difficult, especially if
it’s about the future”*

Niels Bohr