Legal Insights

AAMHP SAFER Handling Conference 2014

Plenary Session 5: Wednesday 28 May 2014

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This afternoon's session….

- Health and Community Services (HACS) industry snapshot
- Industry performance and trends
- Successfully managing workplace injuries
- Manual handling injuries in the workplace and employer liability
- Case study

Snapshot – HACS industry

Who makes up the wider industry?

- Hospitals (public and private)
- Medical and other health care services, such as general practice and specialist medical services, pathology and diagnostic imaging and allied health services
- Residential care services
- Social assistance services (including disability services and child care)

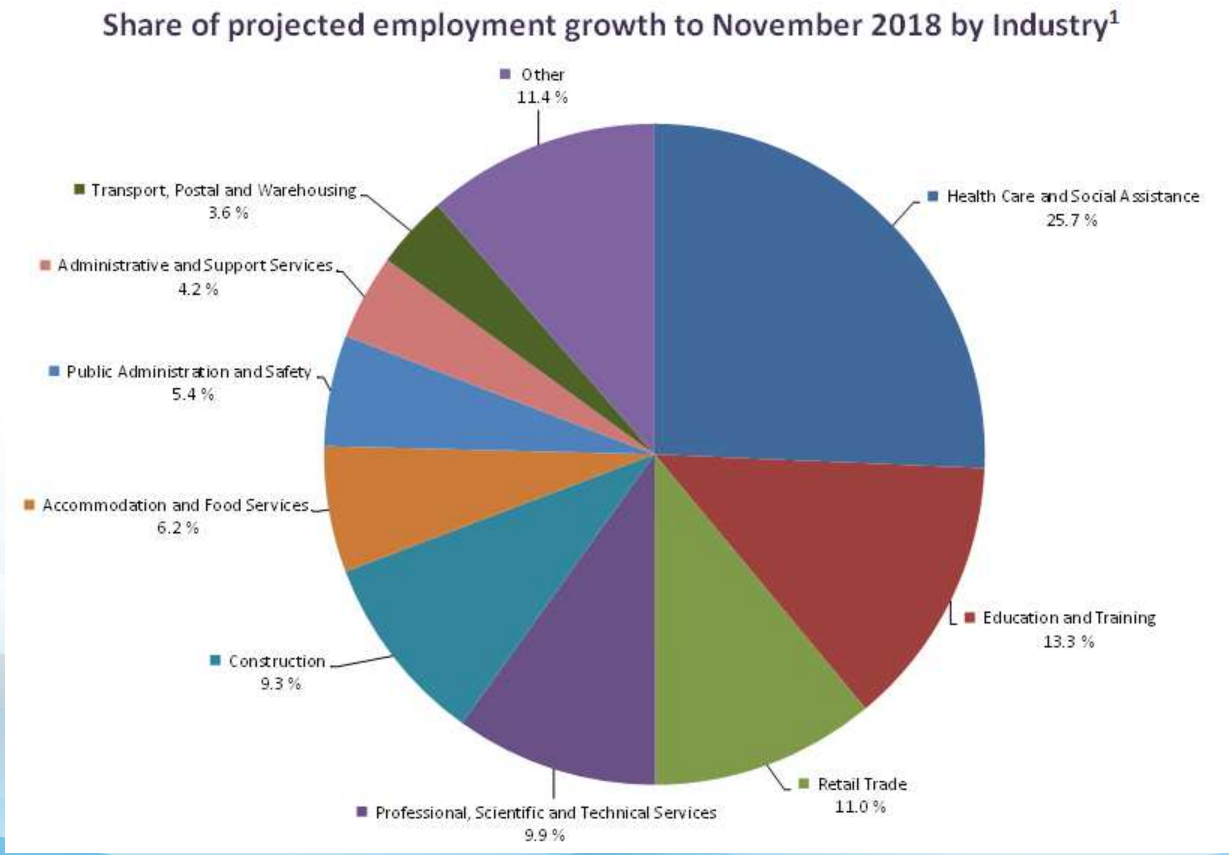
Snapshot – HACS industry

What do we know about the industry?

- The HACS industry employed 1.57 million people in 2011–12 (14% of the Australian workforce).
- Within the HACS industry 91% of workers were classed as employees and covered by workers' compensation.
- Employers in this industry paid 1.7% of payroll in 2011–12 to provide workers' compensation coverage for their employees i.e. average premium rate

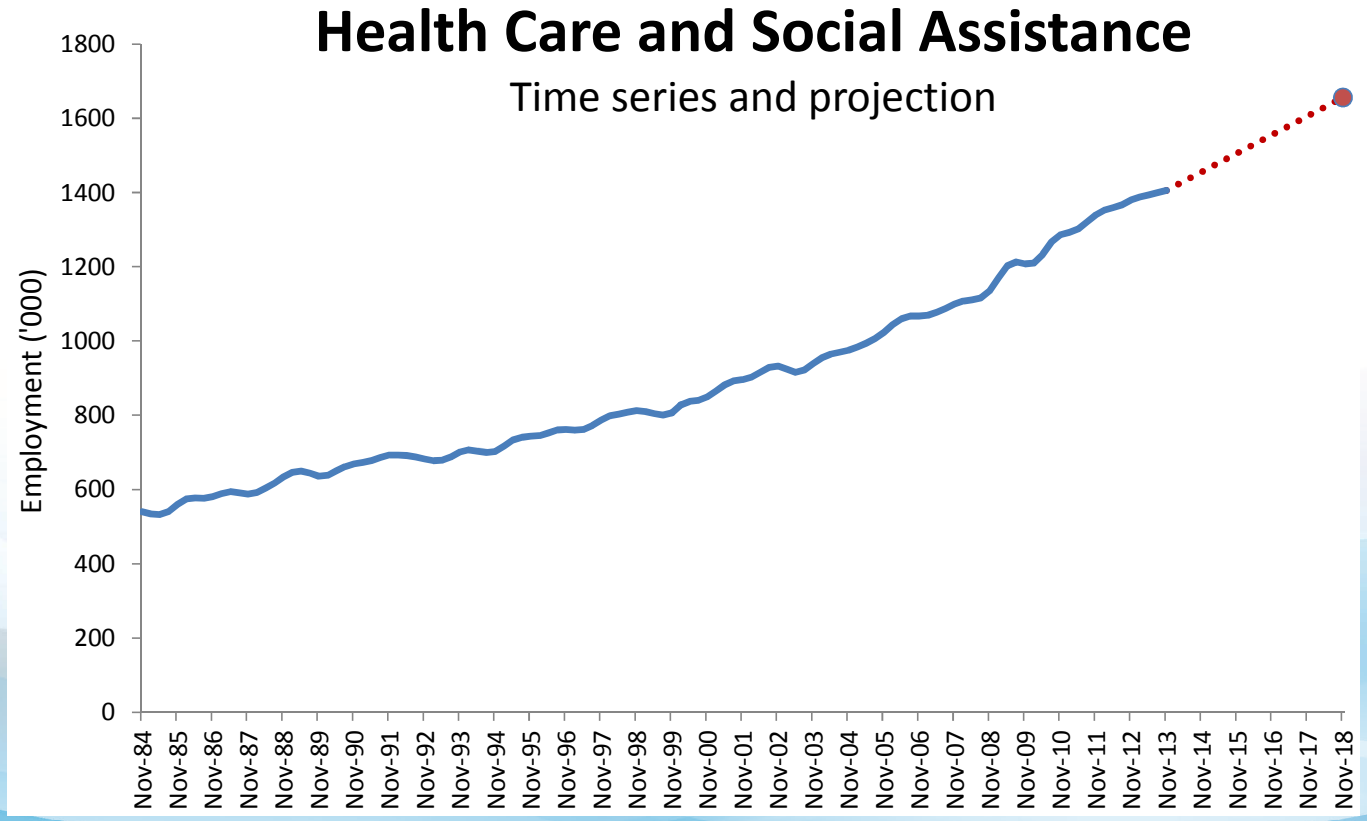
- Source: Health Fact Sheet 2011-12 (Safe Work Australia)

Snapshot – HACS industry



- Source: Industry Employment Projections 2014 Report (Department of Employment, Australian Government)

Snapshot – HACS industry



- Source: Industry Employment Projections 2014 Report (Department of Employment, Australian Government)

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Snapshot – HACS industry

Industry	Employment level - November 2013 ('000)	Department of Employment Projections		
		Projected employment level - November 2018 ('000)	Projected five year employment growth to November 2018	
			('000)	(%)
Health Care and Social Assistance	**1405.3**	**1634.7**	**229.4**	**16.3**
Hospitals	**357.2**	**386.5**	**29.3**	**8.2**
Hospitals	357.2	386.5	29.3	8.2
Medical and Other Health Care Services	**451.3**	**574.3**	**123.0**	**27.3**
Medical and Other Health Care Services, nfd	57.3	68.3	11.0	19.2
Medical Services	141.1	190.1	49.0	34.7
Pathology and Diagnostic Imaging Services	53.7	66.2	12.5	23.3
Allied Health Services	172.8	215.8	43.0	24.9
Other Health Care Services	25.4	32.9	7.5	29.5
Residential Care Services	**235.2**	**252.1**	**16.9**	**7.2**
Residential Care Services	235.2	252.1	16.9	7.2
Social Assistance Services	**362.6**	**422.7**	**60.1**	**16.6**
Social Assistance Services, nfd	28.2	34.4	6.2	22.0
Child Care Services	133.7	157.2	23.5	17.6
Other Social Assistance Services	201.2	231.6	30.4	15.1
Health Care and Social Assistance, nfd	**0.1**	**0.1**	**0.0**	**0.6**
Health Care and Social Assistance, nfd	0.1	0.1	0.0	0.6
ALL INDUSTRIES	**11,604.5**	**12,442.7**	**838.1**	**7.2**

- Source: Industry Employment Projections 2014 Report (Department of Employment, Australian Government)

Snapshot – HACS industry

What do we know about the industry?

- The HACS and Education and Training industries had the highest staff retention rates, with almost two-thirds (63%) of people working in these industries in 2006 working in the same industry in 2011.
- Source: Australian Census Longitudinal Dataset 2013 (ABS)

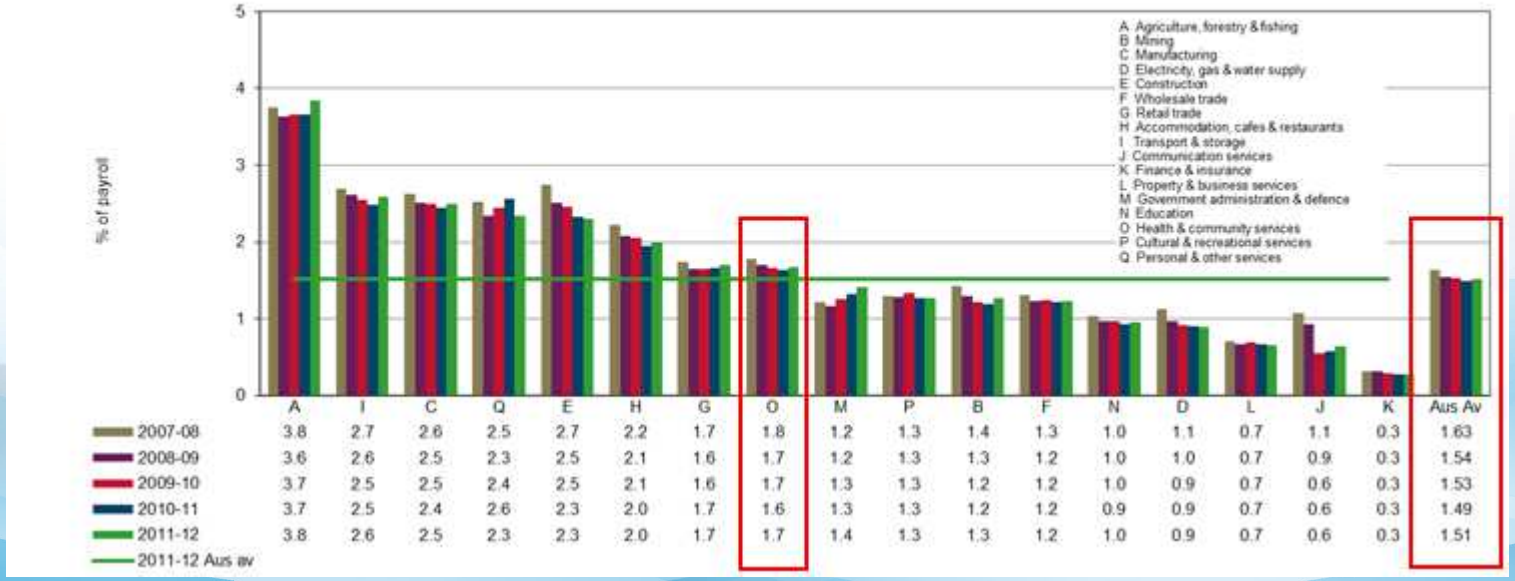
- Female 75 % (all other industries 45%) - steady 2005 to 2010
- Aged over 55 years 19% (all other industries 17%) – grew by 26% 2005 to 2010
- 60% employed in Hospital, Medical, Allied and Other Health services
- 40% employed in Residential and Social Care services

* Source: Australia's Health 2012 (Australian Institute of Health and Wellness)

Snapshot – HACS average premium rates

How does it compare to other industries?

Indicator 24 – Australian average premium rates by industry



	A	I	C	Q	E	H	G	O	M	P	B	F	N	D	L	J	K	Aus Av
2007-08	3.8	2.7	2.6	2.5	2.7	2.2	1.7	1.8	1.2	1.3	1.4	1.3	1.0	1.1	0.7	1.1	0.3	1.63
2008-09	3.6	2.6	2.5	2.3	2.5	2.1	1.6	1.7	1.2	1.3	1.3	1.2	1.0	1.0	0.7	0.9	0.3	1.54
2009-10	3.7	2.5	2.5	2.4	2.5	2.1	1.6	1.7	1.3	1.3	1.2	1.2	1.0	0.9	0.7	0.6	0.3	1.53
2010-11	3.7	2.5	2.4	2.6	2.3	2.0	1.7	1.6	1.3	1.3	1.2	1.2	0.9	0.9	0.7	0.6	0.3	1.49
2011-12	3.8	2.6	2.5	2.3	2.3	2.0	1.7	1.7	1.4	1.3	1.3	1.2	1.0	0.9	0.7	0.6	0.3	1.51
2011-12 Aus av																		

* Source: Comparative Performance Monitoring Report October 2013 (Safe Work Australia)

Snapshot – HACS industry and premium rates

What about the different sections of the wider industry?

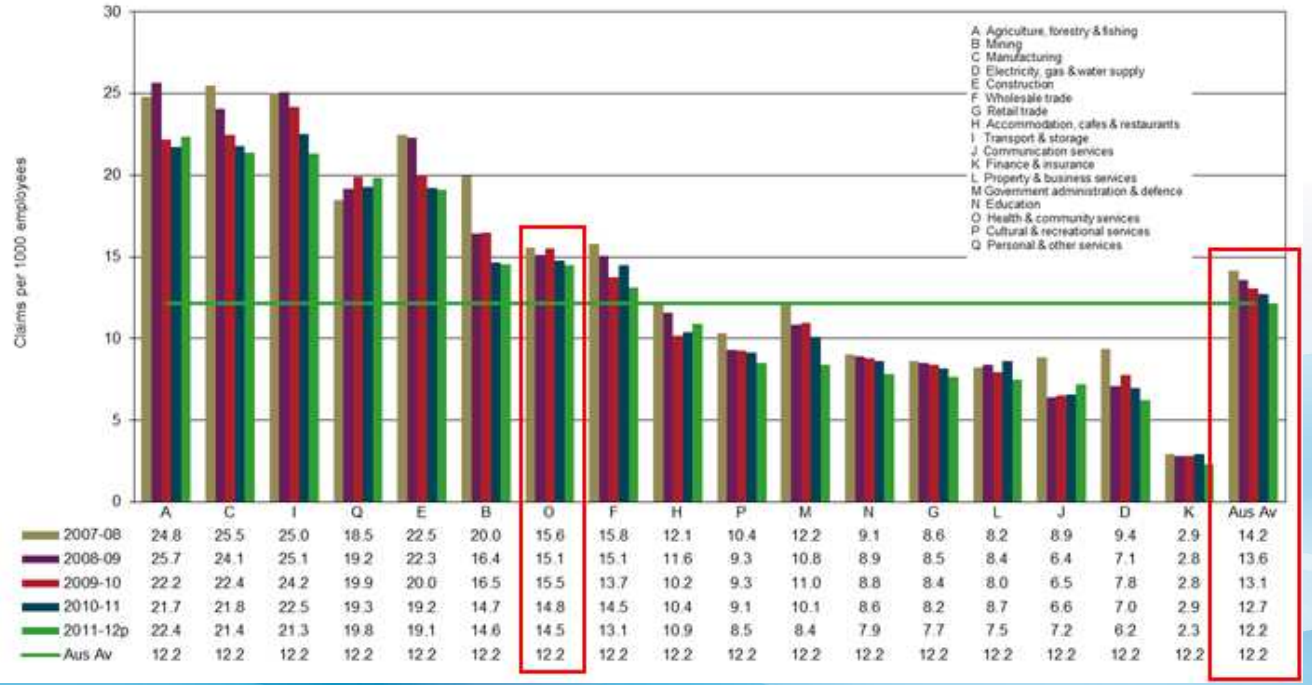
Industry Classification	Average Premium Rate %
HACS (All)	1.373
Hospitals (excl. Psych Hospitals)	1.112
Psych Hospitals	0.839
Social Assistance	1.815
Child Care	1.167
Allied Health Services	0.317
Medical Services	0.319
Pathology and Diagnostic Imaging Services	0.623
Residential Care Services	3.127

* Source: WorkCover Queensland May 2014

Injuries – HACS incidence rates

How does it compare to other industries?

Indicator 23 – Incidence rate of serious claims* by industry



	A	C	I	Q	E	B	O	F	H	P	M	N	G	L	J	D	K	Aus Av
2007-08	24.8	25.5	25.0	18.5	22.5	20.0	15.6	15.8	12.1	10.4	12.2	9.1	8.6	8.2	8.9	9.4	2.9	14.2
2008-09	25.7	24.1	25.1	19.2	22.3	16.4	15.1	15.1	11.6	9.3	10.8	8.9	8.5	8.4	6.4	7.1	2.8	13.6
2009-10	22.2	22.4	24.2	19.9	20.0	16.5	15.5	13.7	10.2	9.3	11.0	8.8	8.4	8.0	6.5	7.8	2.8	13.1
2010-11	21.7	21.8	22.5	19.3	19.2	14.7	14.8	14.5	10.4	9.1	10.1	8.6	8.2	8.7	6.6	7.0	2.9	12.7
2011-12p	22.4	21.4	21.3	19.8	19.1	14.6	14.5	13.1	10.9	8.5	8.4	7.9	7.7	7.5	7.2	6.2	2.3	12.2
Aus Av	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2	12.2

* Source: Comparative Performance Monitoring Report October 2013 (Safe Work Australia)

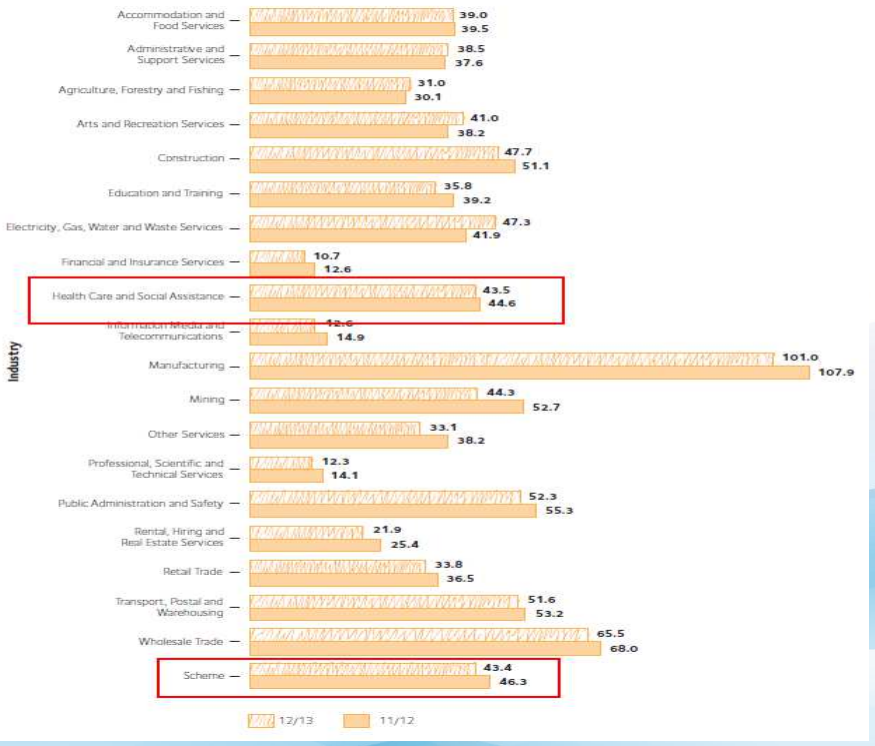
Injuries – HACS incidence rates

Industry	Age group (years)					
	15–24	25–34	35–44	45–54	55 & over	Total
	Incidence rate (injuries per 1000 workers)					
HACS	79.1	45.3	56.5	72.9	80	65.8
All Industries	66.1	50.8	51.5	67.8	53.9	57.9
	Frequency rate (injuries per million hours worked)					
HACS	56.2	29	36.9	45.7	53.5	42.8
All Industries	48.8	28	28.7	37	32.4	33.8

* Source: Australian work-related injury experience by sex and age (2009–10) 2012 (Safe Work Australia)

Injuries – HACS incidence rates

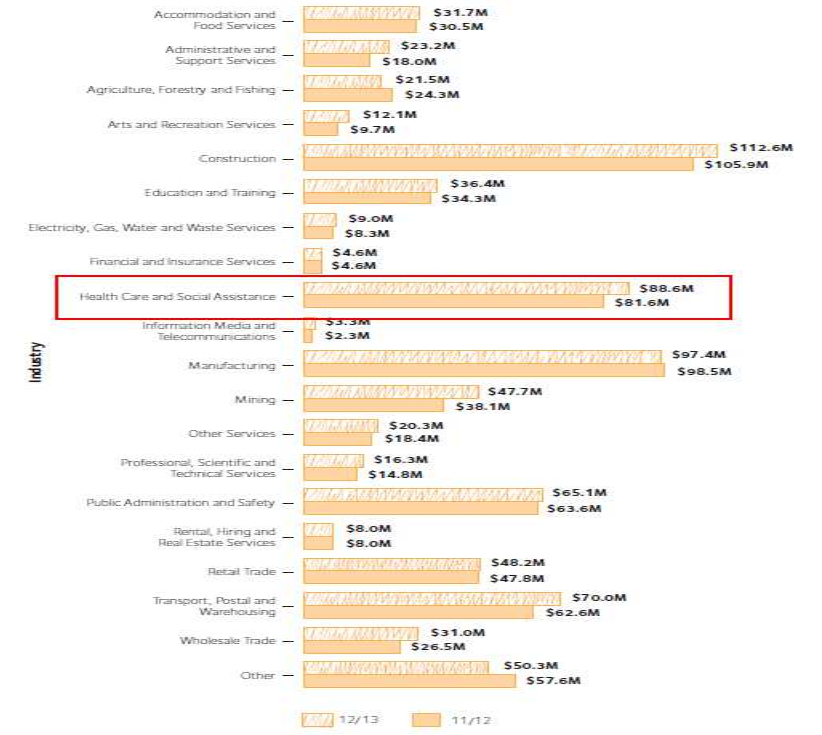
Fig 8: Claim rates (per 1,000 employees covered by the scheme) by industry 11/12 and 12/13



* Source: Q-COMP Statistics report 1213 (Q-COMP)

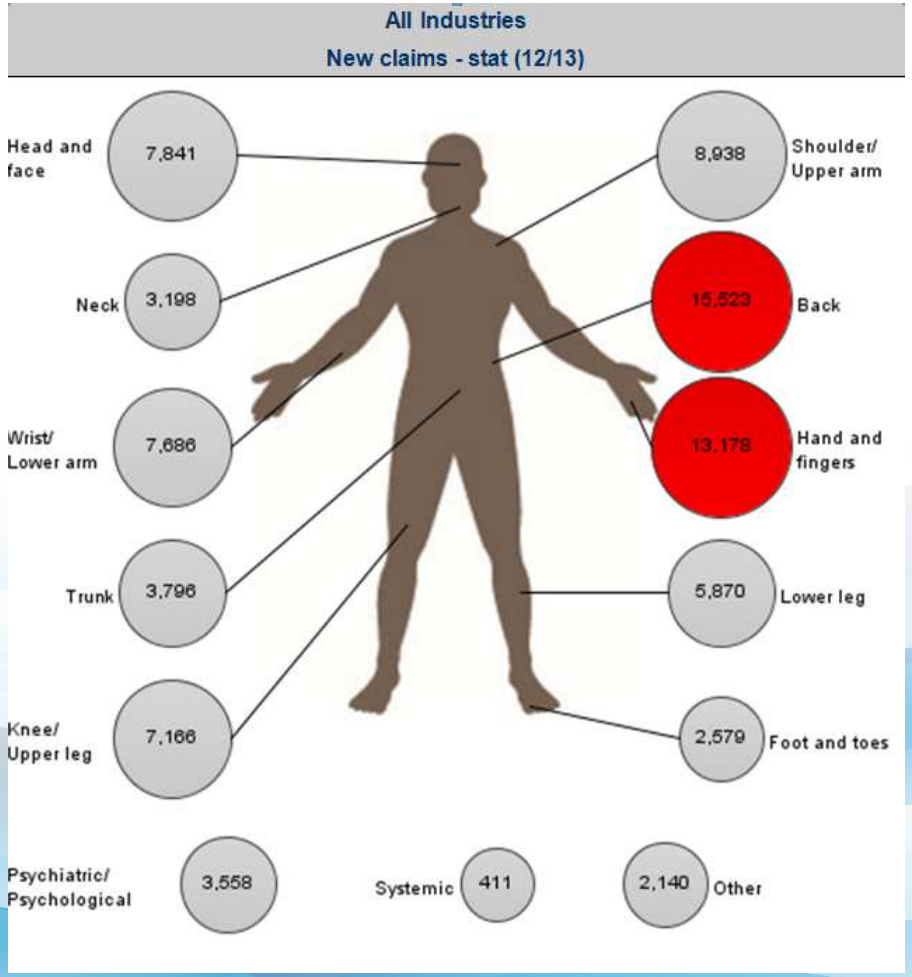
Injuries – HACS claims costs

Fig 25: Statutory claim payments by industry 11/12 and 12/13



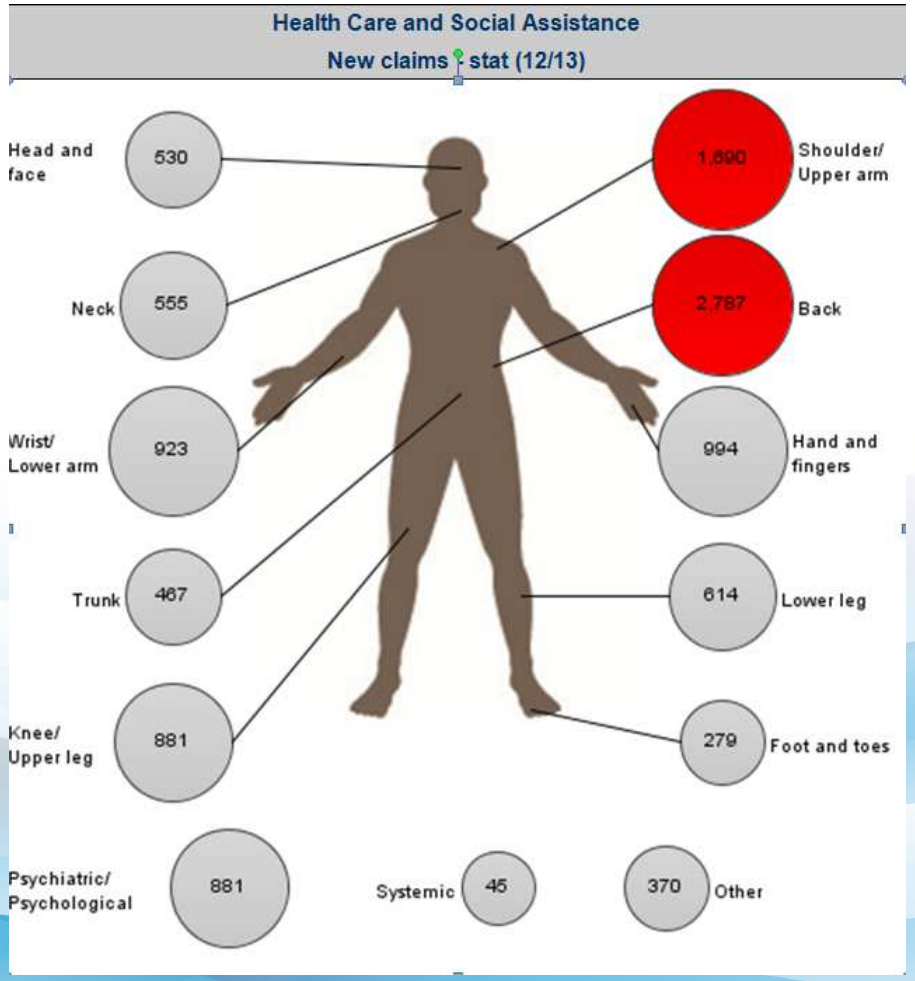
* Source: Q-COMP Statistics report 1213 (Q-COMP)

Injuries – All Industries



* Source: WorkCover Queensland May 2014

Injuries – HACS industry



* Source: WorkCover Queensland May 2014

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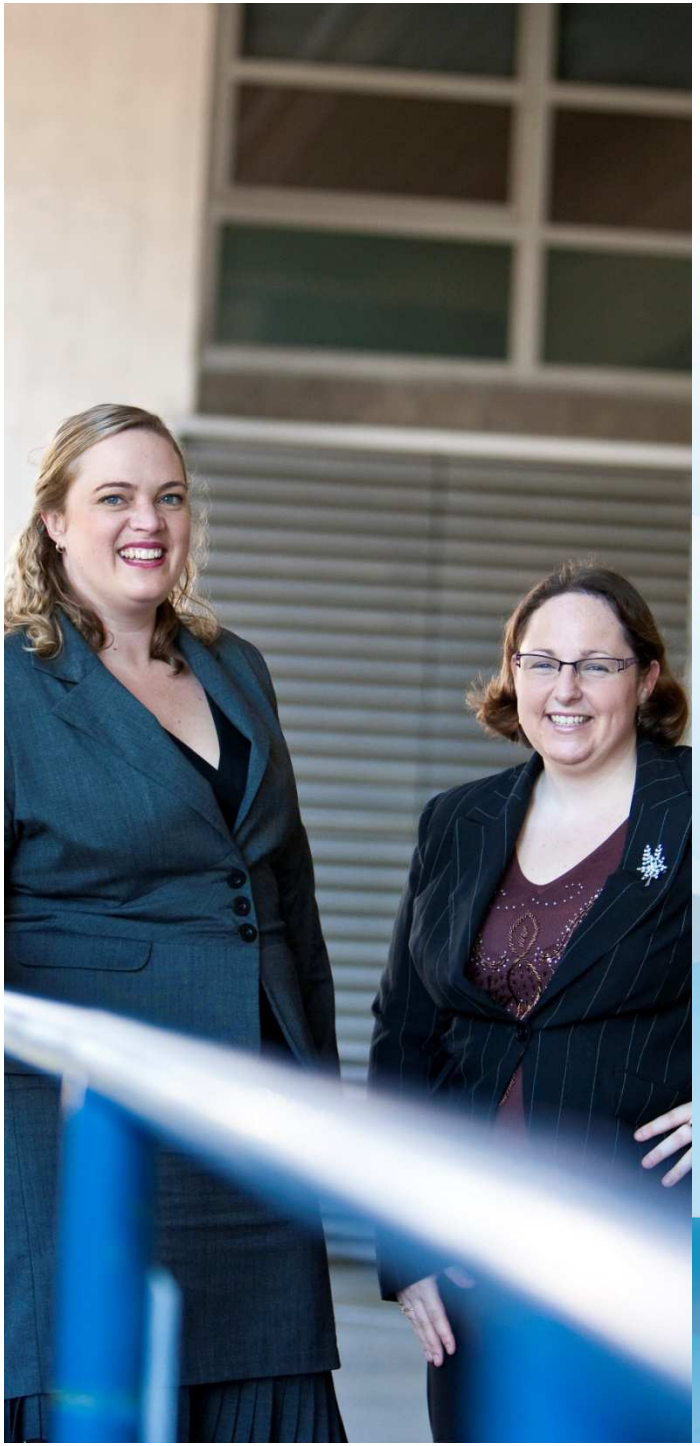
Work-related injuries … what does this mean?

- Statutory claims are no fault
- Basic principles
  - Worker + Injury + Event = Claim
  - “arising out of or in the course of employment”
  - “employment being a significant contributing factor”
- What about aggravations to pre-existing conditions



Return to work: What we know

- Early return to work reduces the risk of long-term disability
- Injured workers who are offered suitable duties are twice as likely to return to work
- The longer someone remains off work the less likely it is they will ever return.

If someone is off work for:

- 20 days, the chance of ever getting back to work is 70%
- 45 days, the chance of ever getting back to work is reduced to 50% and
- 70 days, the chance is then again reduced to 35%

* Source: *Realising the Health Benefits of Work*, April 2010, Australasian Faculty of Occupational and Environmental Medicine.

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What can you influence and control?

- Prevention is the key
- Be aware of injuries in the workplace
- Lodge claims early
- Availability of meaningful suitable duties
- Early identification of suitable duties
- Facilitation of a supportive work environment
- Active and constructive participation in injury management
- Open communication with all parties
- Be involved in worksite visits and case conferencing
- Empower and support your line managers and supervisors

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Key Messages - Injuries

Prevent injuries: Provide a safe place and system of work; training and induction; supervision and reinforcement; assess and manage risks

Early intervention and Stay at Work: Be aware of injuries in your workplace. Encourage reporting of injuries. Lodge claims early. Be proactive. Focus on keeping injured workers at work

Early identification and availability of suitable duties: Research demonstrates that stay at work and return to work is not only in the best interest for injured workers but it also has a positive impact on our premiums.

Focus on capacity and develop a supportive work environment: Focus on what your injured workers can do. Match capacity with appropriate duties. Be flexible. Provide a supportive workplace that encourages “recover” at work.

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What is common law?

- Common law is any law that has been established by a judge or court and it isn't set out in legislation.
- A worker's right to sue is a common law right and the relevant legal principles have evolved over time.
- Statutory claims are no fault
- Common law claims are at fault i.e. the injured worker must prove fault
- Benefits payable on statutory and common law claims are quite different

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How does common law work?

- A common law claim for damages as it relates to a workplace injury consists of two elements:
  - establishing **liability** (e.g. a breach of the duty of care owed by an employer to an injured worker)
  - determining **quantum** (the amount of damages) caused by the breach of duty

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Duty of care

- An employer owes a duty of care to a worker
- The duty owed by an employer to its worker, at common law and under the contract of employment, is to take reasonable care to avoid exposing the injured worker to unnecessary risk of injury
- This is duty is a non-delegable duty

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Duty of care

- **Identify**: identify the risk of injury
- **Investigate**: determine ways to reduce that risk of injury
- **Implement**: implement a safe system of work
- **Enforce:** supervise and enforce the safe system of work

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Breach of duty

- Was the risk of injury reasonably foreseeable?
- Was the injury preventable i.e. was it reasonably practicable to obviate the risk?
- The employer who knowingly (subjective) exposes the worker to a substantial risk of loss, breaches that duty
- The employer who fails to realise the substantial risk of loss to the worker, which any reasonable person [objective] in the same situation would clearly have realised, also breaches that duty.

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Factual causation

- Did the breach of duty lead to the injury?
- Need to consider whether the injury would have occurred before, or without, the employer's breach of the duty owed to the injured worker

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What about….?

- Contributory negligence
- Vicarious liability
- Patient vs. Staff duty of care
- OHS laws vs. statutory claim liability vs. common law liability

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How do you prevent common law claims?

- Prevent injuries in the first place
- Safe business is good business
- Ensure proper safety procedures are in place
- Effective and timely record keeping and documentation
- Properly train and induct staff
- Undertake risk assessments and implement systems to address identified risk
- Ensure that non-complying staff activity is addressed i.e. enforce your system of work
- Promote safety through educating and involving the staff e.g. staff undertake their own risk assessments, participate in toolbox talks etc.

Documentation is key

Document:

- Records of induction and training
- Refresher training courses
- Risk assessments on task(s) performed
- Evidence of the enforcement of the safe work practices
- Record keeping from the worker's start date
- Competency based assessment

We should never assume a new starter is trained in safe work practices due to their experience as this does not discharge the duty of care imposed on the employer

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Types of documentation

Record keeping in areas such as:

- Diary notes
- Incident reports
- Application for Compensation and other claim related documents
- Statements from witnesses
- Competency Based Assessment

These are just some examples of key evidence, which can greatly improve your chances of defending negligence in a common law claim. Contemporaneous evidence overrides any later inconsistent versions of events.

Case study – ‘onus of proof’

Marshall v Queensland Rehabilitation Services Pty Ltd [2012] QSC 168 Philippides J 19 June 2012

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Background

- On 27 July 2009 the injured worker was employed as an Assistant in Nursing (AIN).
- She was relatively experienced with the tasks required of an AIN and whilst trying to transfer a patient, she sustained neck, shoulder and back injuries.
- The injured worker asserts that she advised the employer about a previous back and shoulder complaint in February 2009.

Case study – ‘onus of proof’

The Facts

- Liability and quantum were in contention at trial.
- Liability was in contention because the Claimant continued to allege that the employer knew of her previous back and shoulder complaint. In addition to this, the Claimant changed her version of events numerous times throughout the claim. The employer had provided the Claimant with adequate training and support to fulfil her duties as an AIN which contradicted the Claimant’s arguments.
- Quantum was in contention because the Claimant’s expectations were too high. WorkCover had made appropriate offers of settlement to the Claimant during the pre-court process, however the Claimant was very unreasonable.

Case study – ‘onus of proof’

The Claimant argued that the Defendant breached its duty of care to her on two basis:

1. The Defendant failed to take reasonable precautions in response to the Claimant’s special vulnerability of which it was or ought to have been aware: and

2. The Defendant breached its duty by failing to provide the Claimant adequate training, supervision, and assistance to enable her to perform her duties safely on 27 July 2009.

Case study – ‘onus of proof’

Special Vulnerability

- In relation to the special vulnerability claim, Phillippides J stated she did not consider there was anything in the circumstances which did or should have altered the Defendant to the Claimant having a special vulnerability to spinal injury or that there was a need for special further inquiry following February 2009.
- Phillippides J stated the Claimant simply reported an isolated occasion of having a sore neck, which required no treatment and only a few days’ rest, and the Claimant returned to work with a medical certificate when she was fit to do so.

Case study – ‘onus of proof’

The Pleaded Injury

- Phillippides J stated the Claimant’s evidence as to how her injury was sustained lacked clarity and was at times inconsistent.
- Phillippides J stated there were discrepancies in the evidence regarding the actual date of the injury (22 July 2009 or 27 July 2009) due to the fact that the Claimant had been experiencing similar symptoms on the 22 July 2009 and appears to have clearly connected these symptoms with the injury date.
- In addition to this, Phillippides J stated the special vulnerability was unable to be known by the Defendant who remained unaware of the Claimant’s symptoms she had been experiencing on or after the 22 July 2009 until 27 July 2009.

Case study – ‘onus of proof’

The Pleaded Injury

- The difficulty with the Claimant’s case is that there was no evidence to indicate that it was unreasonable for the Defendant to require the Claimant to engage in the transfer procedure in the circumstances pertained.
- Phillippides J also referred to the Claimant’s submissions which concerned lack of adequate training, adequate supervision and adequate assistance.

Case study – ‘onus of proof’

The Pleaded Injury

In relation to these submissions Phillippides J stated:

The Claimant did receive some instruction in respect of the care of dementia patients and under cross examination she accepted she received instruction that if a resident resisted the process of being rolled she was to stop that procedure. There was no evidence as to what particular additional instruction or training ought to have been given, nor what specific respects the instruction and training given, nor what specific respects the instruction and training given was deficient, nor any evidence as to how such instruction would have prevented the injury.

Case study – ‘onus of proof’

The Pleaded Injury

In relation to these submissions Phillippides J stated:

It was contended the resident’s uncooperative behaviours could have been obviated by the Defendant requiring three workers to attend the resident. Phillippides J stated there was no evidence that such a system could have alleviated the risk of injury. The cost of implications of having a third person were not subject of evidence either.

Case study – ‘onus of proof’

Judgement

- The Court found in favour of the employer and WorkCover Queensland and the Claimant was ordered to pay WorkCover’s costs (over $50,000.00 in total)
- The Court believed that the Claimant would have recovered approximately $130,000.00 if she was successful on liability which was closer to WorkCover’s pre-conference offer than the Claimant’s offer

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Key Messages – Legal liability

Basic Principles: Common law and the right to sue your employer for negligence is a long established right for injured workers and is the final stage of entitlement to compensation for injured workers. Statutory claims are no fault and common law claims are at fault

Prevention: Common law claims can be prevented by preventing injuries and with effective communication between all parties to ensure successful rehabilitation and RTW outcomes

Risk management: Common law claims can be better defended by identifying risk; implementing a safe place and safe system of work; ensuring adequate training and induction; providing adequate supervision, assistance and enforcement and good record keeping and documentation

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Any questions?