

WorkCover Under Siege

**Review into South Australia's Workers'
Rehabilitation & Compensation Scheme**

PSA Submission

**Prepared by Dr Kevin Purse
Adjunct Research Fellow,
Hawke Research Institute.
University of SA**

June 2007

Contents

The WorkCover Proposals – An Overview	3
Workers’ Compensation and Financial Incentives	6
Rehabilitation and Return to Work	10
Compensation for Non Economic Loss	17
Redemptions	19
Dispute Resolution	21
Occupational Health and Safety	25
WorkCover’s Governance Arrangements	27
Self Insurance	28
Other Legislative Proposals	29
References	30
Appendix	33

The WorkCover Proposals – An Overview

WorkCover management has put forward a series of far reaching legislative proposals designed to dramatically reduce weekly payments to injured workers. As outlined in the Appendix, these proposed cuts to compensation entitlements are accompanied by a raft of other measures intended to drastically curtail the right of injured workers to challenge WorkCover decisions concerning their claims.

These proposals have also been put forward within a discourse which has focused on the scheme's 'unfunded liability', which in February 2007 was estimated at \$708 million. While this headline figure has captured the attention of the media, politicians and employer groups; and forms the basis of demands on South Australia's Labor government to slash entitlements to injured workers, it has created a distorted picture of the scheme's finances.

WorkCover's financial position actually improved last financial year. This improvement has largely been ignored though because of the fixation with the headline unfunded liability figure. The scheme's funding ratio in 2005-06 was 65% funded compared with 63.4% the previous year. Although not a large improvement, it is a step in the right direction. The simplistic preoccupation with the scheme's 'unfunded liability' has also served to divert attention from a number of underlying management issues associated with WorkCover's continuing poor performance.

What also needs to be understood is that the WorkCover 'reform' package is the most draconian attempt to change South Australia's workers' compensation legislation since the WorkCover scheme was established in 1986. It is not simply a question of tinkering at the edges. The cuts on offer are worse than those put forward by the state's Liberal government during the mid 1990s, and bear more than a passing resemblance to the harsh legislative changes rushed through the Victorian parliament by Jeff Kennett's Liberal coalition government in 1992.

Under WorkCover's plan for income maintenance, weekly payments would immediately drop to 95% of an injured worker's pre-injury average weekly earnings for 13 weeks. In the event of an ongoing incapacity for work payments would fall to 75% for a further 91 weeks, after which they would be terminated altogether in most cases (WorkCover 2006a: 24-27). This contrasts with the current South Australian situation where weekly payments are set at 100% of pre-injury average weekly earnings for 12 months, then reduce to 80% and are reviewed again after two years of incapacity.

WorkCover has also proposed a substantial reduction in the cap on the maximum weekly amount of compensation an injured worker can receive. At present the cap is twice the state's average weekly earnings, but WorkCover wants to reduce the amount from \$1,930 to \$1,190 (Ibid: 22-24). In the event of injury this would have a significant impact on higher skilled workers in both the private and public sectors. In the private sector an obvious example would be mineworkers in the state's high risk mining industry; while in the public sector, many police and correctional services officers, disability workers, nurses, teachers and emergency services workers would be hard hit by this measure.

There is also a proposal to arbitrarily limit compensation for medical expenses. At present there is an obligation to pay all claim related medical expenses that are reasonably incurred. WorkCover wants to change this so that in future medical expenses would automatically cease 12 months after a worker's weekly payments cease (Ibid: 28). This ignores the obvious consideration that many injured workers who return to work do so with an ongoing disability directly attributable to their work which may, in some cases, require ongoing medical attention. This is more likely to be the case with workers who have suffered a serious injury. For WorkCover to claim that it should not be responsible for meeting such expenses is unprincipled, especially in light of its ability to contest these expenses where it has genuine grounds to believe that they are unreasonable. In practice, the WorkCover proposal would constitute a blatant cost shifting exercise that would place greater strain on the Medicare scheme and in the process create additional hardship for injured workers and their families.

The overall impact the WorkCover proposals, if adopted, would be most severely felt by seriously injured workers - most of whom would lose any rights to compensation after two years.

WorkCover claims that its package would 'align' the South Australian scheme with its Victorian counterpart. It wouldn't. What it would do is leave South Australian workers with a weekly payments regime among the lowest in Australia – even lower than in Victoria, as weekly payments in that jurisdiction continue for a longer period than proposed by WorkCover for South Australia (Heads of Workers Compensation Authorities 2005: 20). In addition, seriously injured workers in Victoria have access to common law damages where injuries result from their employer's negligence (Ibid: 30-32). This differs markedly from the situation in this state where injured workers do not have the right to sue their employers; and is one of the reasons why weekly payments are higher in South Australia than in Victoria.

The major problem with the WorkCover scheme has been its poor return to work rates, especially during the last decade or so. This is not a new problem but has been an ongoing cause of concern for many years. In 2005/06 WorkCover had the lowest return to work result of all the states and the second lowest in Australia (Campbell Research & Consulting 2006: 1). These low return to work rates translate into higher average claims duration and increased scheme costs. This in turn has contributed to the growth in WorkCover's 'unfunded liability' which in February 2007 was estimated at \$708 million.

Overwhelmingly, the main reason for the scheme's poor performance has been a continuing inability by WorkCover to effectively manage the return to work process. WorkCover's response, however, has been to blame injured workers for the scheme's mismanagement. Instead of seriously examining the reasons for the South Australian scheme's poor return to work rates, WorkCover's proposed solution is to slash workers' entitlements and impose unprecedented restrictions on their rights to question its claims decisions.

The rationale underpinning WorkCover's approach is that weekly payments for injured workers are too high and that this is the root cause of the scheme's poor return to work performance. For WorkCover this means that 'incentives' need to be realigned through significant step-downs - phased reductions - in weekly payments,

particularly for more seriously injured workers, as well as other scheme design changes that support the harsh new compensation regime it has proposed.

On closer analysis it is readily apparent that the 'incentives' argument employed by WorkCover to justify its draconian agenda for change lacks substance. In this sense, the WorkCover proposals can best be viewed as an exercise in papering over the cracks of its own lacklustre management at the expense of injured workers and their families.

Not only is WorkCover's assault on injured workers unjustified, it is also unnecessary. With innovative programs and a commitment to excellence, the scheme can be restored to health. There is no need to increase premium rates paid by employers or to cut entitlements to injured workers. What is needed though is a fundamental rethink of the way in which the scheme is managed.

Workers' Compensation and Financial Incentives

In WorkCover's view, step-downs in weekly payments are the essential incentive in the return to work equation. This is despite key findings from its own commissioned research which clearly indicate that return to work outcomes are determined by many factors (Foreman et al 2006: 4).

Step-downs impact hardest on low paid, particularly women, workers and those who are more seriously injured. As opposed to the rhetoric, the reality of step-downs is that they are arbitrary and their significance as a driver of the return to work process has been grossly exaggerated.

The relationship between weekly payments and return to work rates is considerably more complex than as is claimed by WorkCover (WorkCover 2006a: 18-20) or other bodies such as the Productivity Commission (Productivity Commission 2004: 195). Higher weekly payments are not necessarily associated with lower return to work rates. Conversely, low weekly payments do not guarantee high return to work rates.

Interstate Comparisons

The Federal government's Comcare scheme has Australia's highest return to work rate - in 2005/06 it was 92%. It also has the country's second highest level of weekly payments. Tasmania's scheme is also among the best performers in the return to work stakes with a return to work rate of 89%, despite having a considerably higher weekly payments regime than its Victorian counterpart. Indeed, the Victorian scheme's return to work performance in 2005/06 was beneath the national average of 87% (Campbell Research & Consulting 2006: 1), even though it has one of the nation's lowest weekly payment arrangements.

Comparisons between the Victorian and South Australian schemes are also quite revealing. In the six-year period to June 2006, return to work rates for the two schemes have been identical or only marginally different. The only exception was 2005/06 (Campbell Research & Consulting 2001-2006). However, that year cannot be regarded as representative of WorkCover's performance as it covered the disruptive transitional period during which WorkCover set about replacing its former claims agents with EML as the sole agent – a fact which WorkCover curiously overlooked in its assessment of its own return to work performance (WorkCover 2006a: 8-10). Needless to say, the otherwise comparable performance of the two schemes hardly provides a convincing justification for the slash and burn program put forward by WorkCover management.

WorkCover also claims that the timing of step-down plays an important role in promoting higher return to work rates (Ibid: 19). If this were the case, the schemes with the earlier (and steeper) step-downs in weekly payments should have higher return to work rates. Step-downs commence immediately in Victoria, at 95% of average weekly earnings, and are reduced again to 75% after 13 weeks. In all the other states, step-downs occur later and/or involve smaller reductions in the percentage of weekly payments. With the exception of South Australia, however, the interstate schemes all have higher return to work rates than Victoria (Campbell Research & Consulting 2006: 1).

International Research

The research literature on incentives and return to work rates is also more complicated than depicted by WorkCover. In examining the relationship between weekly payments and return to work rates reliance is often placed on econometric studies that have reported a statistically significant correlation between increased payment levels and the average duration of claims. The real meaning of this relationship, however, remains the subject of ongoing debate and conflicting interpretations on at least two major counts.

First, there is the issue of the strength of the relationship between the two variables. A systematic review of US studies in the late 1980s concluded that a 10% increase in weekly payments would increase the average duration of claims by only 2% (Gardner 1989: 37). A subsequent literature survey conducted in the mid 1990s concluded that a 10% increase in weekly payments would result in an increased duration of between 2% and 11% (Loeser, Henderlite and Conrad 1995: 34). More recently, there have been criticisms that US studies have overestimated the duration effects involved because of limitations in the statistical methods used (Campolieti 1999: 513). After adjusting for this, the same study reported an increased duration of only 0.09% - slightly more than an extra half day off work! While this finding can not be directly transposed to Australian conditions, it does highlight the fact that the duration of workers compensation claims "is not as sensitive to changes in benefits as some of the previous evidence from the United States suggests" (Ibid: 517).

The second issue of concern focuses on what more time off work actually means. In some academic studies, an increase in claims duration associated with higher payments is portrayed as proof of worker fraud or malingering (Wooden 1989: 230, Moore and Viscusi 1990: 123, Krueger 1990: 95). The evidence, however, contradicts this claim. A Federal parliamentary inquiry established by the Howard government, for instance, found that workers' compensation fraud by workers appeared to be "at very low levels" (House of Representatives Standing Committee on Employment and Workplace Relations 2003: 191), a finding that confirms earlier empirical evidence on this, often highly charged, issue (Garnett 2000: 11). An alternative explanation is that "*Higher benefits may enable injured workers to complete ... recovery before returning to work*" (Meyer, Viscusi and Durbin 1995: 338. Emphasis added.). By implication, where weekly payments are low, economic considerations may pressure injured workers into returning to work before they have recovered. This, in turn, may lead to an aggravation or recurrence of injury, further compensation claims and higher social and economic costs.

Step-downs or Return to Work?

The most draconian of the step-down 'incentives' proposed by WorkCover is the so called 'work capacity' review - a scheme design feature not concerned with assisting injured workers return to work but rather with getting most of them off WorkCover's books. In other words, these reviews are directed at the discontinuance of weekly payments rather than improved return to work rates.

The process would work through a ‘deeming’ arrangement whereby WorkCover or its claims’ agent could reduce or terminate an injured worker’s weekly payments on the basis of hypothetical or ‘notional earnings’ from a hypothetical job. For example, an emergency services worker, diagnosed with a permanent back injury and chronic pain unable to return to her pre-injury employment, and who previously received \$890 a week in weekly payments, could be deemed capable of working as a courier with a hypothetical salary of \$850 a week. On this basis, her weekly payments could be reduced to \$40 a week!

The issue of whether the worker had any realistic chance of obtaining such work would not need to be considered. The focus would almost exclusively be on whether the worker had any residual medical capacity without any regard to labour market considerations. Work capacity would be determined by Medical Panels rather than the Workers’ Compensation Appeals Tribunal. Decisions by Medical Panels would also be final and binding, with no appeals allowed other than on grounds of procedural fairness (WorkCover 2006a:42).

The scheme already has deeming provisions in place but the current arrangements are not as harsh as the Victorian provisions that WorkCover wants to import into South Australia. Contrary to the existing legislative situation, WorkCover would no longer be obliged to demonstrate that the jobs it deemed workers capable of performing actually constituted ‘suitable’ employment. This would inevitably result in all but the most seriously injured workers having their entitlements terminated or drastically reduced.

This proposal is the key strategy that has been developed by WorkCover to deal with the scheme’s ‘long tail’ of seriously injured workers. There is no doubt that if implemented it would result in an unprecedented cost shifting exercise that would see the liability for work related injury shifted decisively from employers to injured workers and taxpayers. An artificial reduction in the cost of work related injuries of this magnitude would also reduce the economic imperative on employers to improve workplace health and safety.

Anti-therapeutic Effects of Workers’ Compensation

WorkCover has also referred to findings that recovery from injury takes longer when compensation is involved and presents this as further evidence of an ‘incentives’ problem facing the scheme (WorkCover 2006a: 7-8). Other studies report contrary findings (Gallagher et al 1995: 305). The WorkCover claim, however, is quite misleading as it does not allow for other factors that can affect recovery and return to work prospects - it fails to compare like with like. More particularly, it ignores the fact that workers’ compensation schemes can be highly adversarial, and glosses over the deleterious impact that an adversarial approach to injury management can have on workers’ recovery and return to work prospects.

The anti-therapeutic effects of workers’ compensation on injured workers have long been recognised in the international research literature. Fortunately, most injured workers are able to return to work within a month or so. Consequently, they may not experience any anti-therapeutic effects. On the contrary, they may find it positively therapeutic. However, for longer term claimants with more serious injuries the

situation can be quite different, particularly where musculo-skeletal injuries are involved.

In Canada, delays in the handling of claims, excessive medical examinations and disbelief by claims managers of the validity of workers' injuries have all been found to contribute to anti-therapeutic consequences (Ison 1994: 78-79). This adversarial atmosphere in which workers are subjected to insensitive or uncaring treatment can lead to loss of self worth and depression, and is clearly counterproductive in terms of return to work outcomes (Lippel 1999: 542). Similar effects have been reported for the United States. One relatively recent study found that "many workers encountered suspicion, disbelief and sometimes surveillance by investigators. Antagonistic relations with insurer claims representatives frequently involved delay or denial of benefits. Many injured workers described the overall experience as demeaning and dehumanizing" (Strunin and Boden 2004: 338).

The fact that workers' compensation schemes can be bad for your health has also been documented in Australia. The Federal parliamentary report alluded to earlier, found that, a "slower than expected recovery is associated with the stress of the workers' compensation system. This frustration, bitterness and anger is due in part to workers feeling that insurers and providers show no real concern for the injured worker, and the belief that the worker is not being trusted by the employer" (House of Representatives Standing Committee on Employment and Workplace Relations 2003: 185).

Closer to home, a South Australian study of 85 long-term WorkCover claimants found that workers experienced a range of impediments in the "return to work process that created considerable stress and concern" (Roberts-Yates: 2003: 898). The obstacles encountered included a claims management system that "is too rigidly process-oriented" and ignores individual differences in workers' return to work needs (Ibid: 900). A lack of trust in case managers, who were frequently "perceived as the principal trigger for conflict and heightened emotional responses", was a related complaint (Ibid: 903). Another fundamental concern was that case conferences frequently ignored the views and needs of injured workers.

As one worker summed it up "I just felt like a number with skin on" (Ibid: 900).

Comments like this draw attention to the fact that injured workers are often regarded as little more than 'claims' by insurers, as opposed to employers who are typically regarded as 'customers'. It is also indicative of the old style insurance industry mentality that WorkCover still clings to and is underlined by its failure to appreciate the adverse impact that anti-therapeutic practices by workers' compensation schemes can have on return to work rates. This obsolete mentality is incompatible with the WorkCover legislation's return to work philosophy and objectives; and must be addressed as a priority in any reform program concerned with improving the scheme's return to work performance.

Rehabilitation and Return to Work

WorkCover's over-emphasis on the supposed significance of financial incentives is not only analytically deficient but detracts from other factors that are important determinants of return to work and essential to improving the scheme's performance. These include employer size, the attitude of employers towards injured workers, workplace culture and WorkCover's management of the rehabilitation and return to work process.

The failure of WorkCover to effectively manage the rehabilitation and return to work process has been a longstanding feature of the scheme's management. It is this factor that explains why premium income "has been insufficient to cover the costs of claims in 15 of the 19 years" (WorkCover 2006a: 12) since WorkCover came into operation - not the level of entitlements to injured workers. The scheme's funding position is worse now than what it was during the period from its inception through to the early 1990s - even though workers' entitlements were considerably greater then, than what they are now.

The report of the Stanley Committee highlighted many of the limitations underlying the scheme's poor rehabilitation and return to work performance. In particular, it drew attention to WorkCover's "failure to provide early, appropriate rehabilitation and to devise innovative and appropriate return to work arrangements" (Stanley et al 2002: 33). It also found a "loss of confidence by many workers and their representatives and some employers, not only in the individual programme, but also in conjunction with other problems, in the rehabilitation process more generally" (Ibid: 35). A follow-up consultancy report also found systemic weaknesses in WorkCover's management of its return to work responsibilities (Clayton 2005: 22-26, 35-47).

Yet despite these widespread and well founded criticisms, there has been little by way of reform other than the replacement in 2006 of four claims agents by a single monopoly agent. It is against this background, however, that WorkCover's expenditure on rehabilitation has more than doubled in recent years - from \$7.6 million in 1999/00 to \$19.3 million in 2005/06 (WorkCover 2007b: 6) - without any corresponding improvement in the scheme's return to work rates. On the contrary, WorkCover's performance in this crucial area has been such that it now languishes near the bottom of the return to work tables.

Restoring the scheme's financial and operational health is likely to require a greater investment in rehabilitation and return to work services. Consequently, it is essential that expenditure in these areas is clearly focused on outcomes. WorkCover's past efforts have resulted in a fragmented approach characterised by an overemphasis on process and case management rather than rehabilitation and return to work. This needs to change and must be accompanied by a system that provides value for money for injured workers and employers.

The main aim of rehabilitation must be to assist injured workers with an early and safe return to work wherever this is practicable. There are though a number of systemic obstacles that frustrate this objective. Overcoming these obstacles is the key to a successful reform effort.

Lodgement Delays

Delays in the lodgement of claims constitute one such obstacle. This is well recognised in both the international (Engleman and Vice 2001) and Australian literature (WorkCover Tasmania 2002). Delays in lodgement are not only undesirable but can also be very costly.

There are two sources of delay. The first involves injured workers who fail to provide early notification of injury to their employers. This can occur for many reasons including a lack of awareness of eligibility for compensation, job security fears or a belief that the injury was only minor. Well targeted campaigns aimed at providing information on the rights of injured workers to compensation, including protection from discrimination, and the importance of early reporting can materially assist in reducing worker lodgement delays, particularly where there is employer support.

The second source of delay concerns employers. Legally, employers are required to notify WorkCover within five business days of receiving a claim. Failure to do so can result in prosecution and a fine of up to \$1000, although in almost 20 years of operation WorkCover has yet to initiate proceedings against non-compliant employers. This is despite the additional cost these delays impose on the scheme. Having said that, it would be preferable to amend s. 52 of the Act in order to use on the spot fines for non-compliance rather than resort to prosecutions, other than in exceptional circumstances. Increased compliance activity in this area is essential, but should also be accompanied by increased publicity to assist employers in managing their obligations in this area.

In relation to the cost impact of late lodgement WorkCover does not appear to have conducted any analysis of its own. Other schemes have. WorkCover Tasmania, for instance, reported 23% non-compliance by employers in meeting notification requirements during a 22 month period from July 2000 to April 2002 (WorkCover Tasmania 2002: 1). More particularly, it found that delays in the forwarding of claims by employers resulted in considerable extra expense for the scheme. On average:

- claims forwarded in the second and third week cost approximately 13 per cent more than those forwarded in the first week
- claims forwarded in the fourth and sixth week cost approximately 25 per cent more than those forwarded in the first week
- claims forwarded in the seventh and twelfth week cost approximately 34 per cent more than those forwarded in the first week
- claims forwarded after 3 months cost approximately 91 per cent more than those forwarded in the first week (Ibid: 8).

As can readily be appreciated from these findings, addressing lodgement delays through improved monitoring along with greater compliance and education can make an important contribution to turning the scheme around.

Partial Return to Work Rates

It is also apparent that South Australia has higher partial return to work rates than other states. In 2005-06 the partial return to work rate was 36% as against the

Australian average of 25% (Campbell Research & Consulting 2006: 27). There can be no suggestion that this result is due to the behaviour of injured workers since they do not benefit financially in any way from a partial return to work (and in cases involving a partial return to work after 12 months incapacity actually incur what amounts to a 20% pay cut).

It may be the case, however, that South Australia's high partial return to work rate reflects the fact that a disproportionate number of workers are being returned to work on unnecessarily restricted duties - in effect a form of underemployment. This in turn may indicate, as suggested by Business SA "a failure to properly assess the sustainability of return(s) to work and also may reflect the employer's reluctance to provide real employment" (Business SA: 14).

To the extent that this is the case it means that WorkCover is failing to manage this important aspect of the return to work process. As a by-product, it would also suggest that WorkCover may well be subsidising the employers involved rather than ensuring that they comply with their obligation to provide suitable employment.

Whatever the precise detail, there is an obvious need to thoroughly investigate this issue and institute a comprehensive program to remedy the situation.

Durable Return to Work Rates

The non-durability of return to work outcomes in South Australia is also a matter of concern. A durable return to work is one that is sustained over time. A non-durable return occurs where an injured worker returns to work but subsequently ends up back on the scheme. South Australia has the second lowest durable return to work rate in Australia. Yet there was no analysis by WorkCover of the causal factors involved in its considerations on its return to work performance, despite the obvious cost impact on the scheme.

Durable return to work outcomes can be seriously compromised if workers are returned to unsafe work following recovery from injury.

A recent survey found that 42% of South Australian workers with lost time claims reported having had a previous compensation claim (Campbell Research & Consulting 2006: 23). While not all of these claims would have involved a recurrence of an injury associated with a previous unsafe return to work, it is likely that many did.

A safe return to work ought to be the conclusion to a successful return to work program both as a matter of principle and as a means of reducing scheme costs. At present, however, there is no requirement to ensure that this occurs. The government should require that procedures be put in place by WorkCover to remedy this omission, especially with respect to workers who have suffered more serious injuries.

In addition, as in the case of WorkCover's partial return to work performance, there is also a need to more fully explore the reasons for South Australia's excessively low durable return to work rates.

Provisional Liability

An even more fundamental issue concerns the claims determination process itself. Although early intervention is recognised as pivotal to the return to work process, the fact remains that rehabilitation is for all practical purposes a function of the claims determination process – the longer it takes to determine workers' claims, the longer the delays in commencing the rehabilitation and the return to work process.

Both New South Wales and Tasmania have sought to overcome this hurdle by introducing a system of 'provisional liability'. In New South Wales a worker's claim is generally accepted on a provisional basis for a period of up to 12 weeks. A different approach has been adopted in Tasmania but the principles involved are the same. By reducing unnecessary disputation and ensuring that rehabilitation is provided on a timely basis it is easier to assist workers in making an early return to work. In both schemes the introduction of 'provisional liability' has been viewed as having contributed to more effective scheme performance.

In South Australia, s.106 of the Act makes provision for a form of provisional liability that enables WorkCover to provide 'interim benefits' pending the final determination of a worker's claim. Unfortunately s. 106 is used only sparingly. By contrast several self-insured employers, in both the public and private sectors, begin the return to work process straight away. For s.106 to make a significant contribution to improvements in WorkCover's performance, it needs to be used on a comprehensive basis. A preferable approach would involve a replacement of s.106 with amendments to the Act drawn from the New South Wales or Tasmanian legislation.

Retraining

The reluctance by WorkCover to embrace retraining as an integral part of its return to work philosophy is a major barrier to improved scheme performance. At present, retraining occurs rarely and only where an application made by an injured workers' rehabilitation provider is approved.

What is needed is a systematic approach to retraining - one which provides tangible benefits for both the scheme and injured workers. Candidates for retraining would need to be carefully selected against a set of criteria designed to maximise return to work outcomes. The criteria involved could include such considerations as the nature and severity of the worker's injury, his or her existing skill set, the inability to return to work with the pre-injury employer and their aptitude for retraining.

As a rule of thumb, workers who have been unable to return to work for six months or more as a result of injury should be considered as the prime candidates for retraining, although in circumstances where the need is apparent retraining should be considered earlier. Retraining options could include apprenticeships, TAFE courses and, where warranted, university courses.

The selection of injured workers for retraining should be carried out within a broader framework that looks at the 'streaming' of long-term claimants. This should involve a redefinition of what constitutes a long-term claimant, as the current definitions based

on 1-3 years duration reflect a passive approach to rehabilitation rather than the proactive approach required to improve the scheme's return to work rates.

With unemployment at its lowest recorded level in over 30 years there has never been a better opportunity for WorkCover to incorporate retraining as a key return to work strategy. In addition to the benefits for the scheme's bottom line and the restoration of earning capacity of injured workers, a well designed retraining program could materially assist South Australian employers in coping with an impending skills crisis.

Employment Protection and Liability Management

WorkCover's long-tail is comprised disproportionately of workers who have had their employment terminated. Accordingly, the prevention of the loss of employment for injured workers is an essential component of any strategy to rein in claims costs.

Historically, WorkCover has been a leader in this area of workers' compensation management. As one commentator aptly observed "South Australia currently leads the country in this area, both in terms of the extent of the employer's duty and with the degree of seriousness with which this obligation is overseen and enforced. No other jurisdiction has taken up the systematic supervision of such an obligation to the degree that the WorkCover Corporation has" (Clayton 2005: 31).

The benefits of employment protection provisions are that, other things equal, they facilitate improved return to work rates and lower claims' duration costs - outcomes that benefit both workers and South Australia's employer community. The requirement placed on employers to provide suitable employment for workers who have recovered from injury is a key aspect of the WorkCover scheme and is a crucial liability management tool. Regrettably, attempts to undermine this scheme design feature appear to be high on the agenda of some business lobby groups. This is clearly the case with South Australia's leading business lobby. With more than a hint of hypocrisy, Business SA has called for more stringent return to work obligations to be placed on injured workers - while demanding a relaxation of the obligations on employers to provide suitable employment (Business SA 2007: 16-18).

A further concern is WorkCover's recent decision to outsource much of the responsibility associated with the employment protection function to EML. This is counter productive and is likely to result in confusion, a loss of accountability and deterioration in performance. The proposal is not based on poor performance by WorkCover's specialised s. 58B unit. Rather it reflects a blind faith in the capability of a claims agent with no experience in this area to discharge a complex quasi regulatory function. It hardly makes sense to outsource this core function, particularly given that it has been quite well managed.

On the last occasion WorkCover outsourced its employment protection responsibilities the results were disastrous (Purse 1998: 257-258). For its part, EML needs to focus on its core function of case management. Regulatory, and allied, responsibilities should continue to reside with WorkCover.

In terms of an improved legislative framework, the current arbitrary restrictions on the applicability of s. 58B and the notification requirements contained in s. 58C should be

repealed. A right of appeal for injured workers against WorkCover decisions in this area is also long overdue. In addition, there is a need to extend the protection afforded by s. 58B to workers who have lodged a claim but whose employment is terminated before their claim is determined.

Extra staffing for the s.58B unit also needs to be considered. In addition, efforts to address employment protection issues at the earliest opportunity need to be increased through closer liaison between WorkCover and EML.

Wage Subsidies

In Australia a number of workers' compensation schemes pay wage subsidies for specified periods to employers that provide suitable employment for workers unable to return to work with their original employers. Under the South Australian scheme this function is carried out through the RISE program.

Although the principles underlying RISE are sound enough, concerns have frequently been raised as to the program's effectiveness. Compounding this has been the recent decision by WorkCover to outsource this function to EML.

In relation to the effectiveness issue, it is comparatively straightforward to obtain placements for workers who have been off work for only a few months. The program's value as a liability management tool, however, can best be served by it concentrating on securing suitable employment for those workers who have been off work for longer periods - particularly those who have been on the scheme for 12 months or more. This may also necessitate consideration being given to higher back-end financial incentives to employers that provide suitable employment to these workers on an extended basis.

To optimise RISE performance, the decision to outsource this function to EML - which has no experience or track record in this area - should be reversed and the program incorporated into the s.58B unit or the proposed Return to Work Inspectorate.

Specialised Services

With certain categories of injury there is a compelling case for the provision of specialised treatment. Psychological injuries, which are often both complex and costly, fall into this category. As this type of injury also tends to be highly contested by claims agents, early intervention can prevent the emergence of adversarial attitudes which frequently compromise an early return to work. Similar comments apply to many musculo-skeletal injuries, particularly where chronic pain is involved.

Workplace Modification Fund

It is not always possible for employers to accommodate a return to work by injured workers due to the excessive cost involved in modifying the workplace. This is particularly the case with smaller employers.

Consideration should be given to establishing a Workplace Modification Fund to provide advice and funding grants to eligible employers to assist in making changes to the workplace that would enable injured workers, who would otherwise remain on the scheme, to return to work.

Ergonomic assessments would be among the services available. As musculo-skeletal injuries associated with poor ergonomic design are a major source of WorkCover claims, the provision of ergonomic assessments could make a useful contribution to both improved return to work rates and the prevention of injury in the first place.

To be effective the fund would have to be carefully designed and tightly targeted. Eligibility for employers should be based on clear, relevant and transparent criteria. In relation to targeting, the maximum benefit is likely to be achieved by selecting workplaces involving workers who have suffered serious injury.

The fund should operate on a pilot basis for a period of two years, and should preferably be financed by savings from other programs. It is suggested that an indicative budget of \$4 million dollars be considered.

Coordination and Oversight

There are ongoing reports by injured workers, unions and employers that rehabilitation services are often ad hoc, fragmented and poorly coordinated. It is also clear a 'silo' mentality often exists. This is characterised by poor communication and liaison with and between the various service providers. Although highlighted by the Stanley Review, this problem remains unresolved. Another recurring problem concerns the resolution of disputes in relation to rehabilitation and return to work programs. The adversarial climate and associated delays can often contribute to anti-therapeutic effects and poor return to work results.

The primary means for resolving these and many other related problems should be through a professional, well balanced and structured claims management model that has a clear focus on assisting injured workers through the return to work process. As a backup arrangement, however, consideration needs to be given to the establishment of a Return to Work Inspectorate. An Inspectorate along these lines has already been set up by the Victorian WorkCover Authority in response to similar problems.

The main objective of such a unit would be to promote earlier and more durable return to work rates. In contrast to the normal claims management system, the Inspectorate would have a troubleshooting role in a number of scheme critical areas. This role would include raising employer awareness in relation to return to work obligations; assisting employers in providing suitable employment for workers; encouraging more effective liaison between injured workers, employers and service providers; assistance in resolving return to work disputes at an early stage; and identifying non-compliance with return to work obligations.

In view of the overlap in responsibilities with the s.58B unit it would also be appropriate that the unit be incorporated into the Inspectorate. Inclusion of the RISE program within the Inspectorate would also be highly desirable.

Compensation for Non Economic Loss

Workers whose injuries result in the loss of body parts or permanent disability may be entitled to a lump sum payment for non economic loss. This payment is in addition to any weekly payments they might receive. In 20005/06 there were 5,563 injured workers in South Australia who received NEL payments. These payments amounted to \$67.3 million, approximately 14.5% of total claims payments (WorkCover 2007b: 6 -7).

NEL payments in South Australia are in the lower range compared with the others states. The maximum available NEL payment in Victoria is considerably higher than is the case in South Australia. However, the Victorian scheme also has a 10% whole person impairment threshold designed to avoid NEL payments to many workers who have incurred permanent disability as a result of work related injury. Although generally less serious from a purely medical perspective many of these disabilities have a significant impact on the workers involved and their families, both in terms of employment prospects and their quality of life.

In South Australia there is no such threshold for NEL payments, other than in cases involving hearing loss where a 5% threshold applies (HWCA 2005: 26-29). Victoria has the highest threshold in Australia. In every other jurisdiction there is either no threshold, or one that is considerably lower than in Victoria (Ibid).

In an effort to soften its proposed introduction of a 10% threshold WorkCover has recommended an increase in the maximum amount available for NEL - which for 2005/06 would have resulted in the maximum rising from \$219,425 to \$363,660 (WorkCover 2006a: 31). This sounds good and for workers who remain eligible, NEL payments might increase, but in view of the criteria used for assessing the degree of impairment very few would obtain anything like the maximum amount.

Although WorkCover's NEL proposals are put forward in the guise of fairness they need to be seen for what they really are - a cost cutting exercise intended to slash overall NEL payments to injured workers by 50% (Ibid: 32-32).

Almost as an aside, WorkCover has also suggested that a 10% threshold would assist in reducing disputes over NEL payments, which currently account for some 23% of its disputes (Ibid: 30). While this measure would reduce disputes it would do so on a grossly inequitable basis. Disputes over NEL payments are not initiated solely, or even primarily, by injured workers. Most are directly attributable to WorkCover's own actions. Accordingly, it is unreasonable that injured workers should be penalised for what in fact is largely a problem of WorkCover's own making.

It is also worth noting that most disputes concerning NEL payments are resolved at the conciliation stage within the Workers' Compensation Appeal Tribunal usually through compromise agreements. Only a very small percentage becomes the subject of judicial determination by the Tribunal. While there is scope for reducing disputation in this area, it should not be done in an arbitrary manner or in a way that deliberately attempts to discriminate against injured workers. What is required is an approach that discourages ambit claims by the parties. This could provide not only an equitable solution but one that is accepted as such.

A much more fundamental problem concerns the methodology by which permanent disability is assessed. Over the last 15 years there has been an increasing reliance on various versions of the *American Medical Association Guides to the Evaluation of Permanent Impairment*. The AMA guides have been the subject of much criticism, in part because they fail to provide a reliable and unbiased system for determining impairment ratings but also because they are inappropriately used by workers' compensation authorities (Speiler et al 2000).

Reform in this area is long overdue. Unfortunately, it is likely to remain that way while WorkCover persists in approaching the assessment of permanent disability with a cost cutting mentality.

Redemptions

Redemptions have been a longstanding feature of the WorkCover scheme since its inception, although their use has varied substantially over this period. The main advantages of redemptions are that they finalise liability for insurers and provide injured workers with some form of closure. This comes at a price though, in that their use can cut across the return to work process.

The dilemma is that redemptions provide a short-term fix which can become a long-term problem - one which is by no means confined to Australia.

This predicament was once highlighted by a leading US workers' compensation law expert as one in which "practically everyone associated with the system has an incentive - at least a highly visible short-term incentive - to resort to lump-summing. The employer and the carrier are glad to get the case off their books once and for all. The claimant is dazzled by the vision of perhaps the largest sum of money he has ever seen in one piece. The claimant's lawyer finds it much more convenient to get his full fee promptly out of a lump sum than protractedly out of small weekly payments. The claimant's doctor, and his other creditors and his wife and family, all typically line up on the side of encouraging a lump sum settlement. Who then is to hold the line against turning the entire income protection system into a mere mechanism for handing over cash damages and retribution for industrial injury? It should be the administrator but even he all too often is relieved to get the case completely removed from his docket" (Larson 1993: 122).

In the period from 1995 to 2002, there was an excessive reliance by WorkCover on redemptions as a means of achieving discontinuance. In effect, the use of redemptions became the mainstay of the scheme to the virtual exclusion of rehabilitation and return to work in achieving discontinuance targets. In 2002/03 redemptions amounted to \$57.6 million. In the wake of election of the Labor government and the subsequent changes in WorkCover's Board and management, there was less reliance on redemptions for a short period, with redemption payments falling to \$24.5 million in 2003/04. However, by 2005/06, they had again escalated, this time, to \$77.8 million, and by this time accounted for 16.7% of total claims payments (WorkCover 2007b: 6). Once again redemptions had become WorkCover's main means for managing the scheme, while return to work programs were relegated to the back seat.

South Australia's major employer organisation has sought to blame injured workers for this, accusing them of "waiting for the lump sum payout" (Business SA 2007: 14). This overlooks the fact that the excessive use of redemptions has been driven by WorkCover, not by injured workers. Redemptions cannot occur without WorkCover's agreement and in most cases redemptions have been initiated by WorkCover. The overwhelming majority of injured workers want to return to work. However, where this is frustrated by their employers or inept management of the return to work process, some eventually reach the stage where they feel that they have little option but to accept a redemption settlement when presented with one by WorkCover. If nothing else it enables them to exit the scheme with a modicum of dignity.

WorkCover now wants to drastically curtail the use of redemptions. This change of heart is based solely on its assessment that the more draconian 'work capacity' review process it has proposed will largely dispense with the need for redemptions. A much more sensible, and sustainable, approach is to focus on WorkCover's key legislative responsibilities - the rehabilitation and return to work of injured workers wherever this is achievable. Within this framework there would continue to be scope for the use of redemptions. They should, however, be more selectively targeted than has been the case in the past, and should generally be avoided where a successful return to work is a realistic option.

Where redemptions are used it should also be on a more equitable basis. WorkCover's practice of using s. 35 (6a) is not only inequitable but often counterproductive as well. Instead of encouraging an acceptance of redemption offers it has the opposite effect, as many workers are understandably reluctant to sign off on a redemption offer that precludes weekly payments in the event of new injury. They also have reservations about accepting redemption settlements that exclude ongoing medical expenses associated with their injury.

In this respect, WorkCover should follow the lead of both private and public self insurers which have adopted a more reasonable approach in relation to these issues.

Dispute Resolution

An effective dispute resolution system is an integral part of an efficient and equitable workers' compensation scheme. The essential ingredients of such a system are fairness and timely, low-cost-high quality, decisions.

The current Workers' Compensation Appeal Tribunal is widely recognised as being accessible, balanced and highly professional in its treatment of injured workers, employers and insurers. For these reasons it is broadly supported by the trade union movement and many other stakeholders.

There is, of course, scope for improvement. From a scheme design perspective, much more emphasis needs to be placed on measures that can prevent disputes in the first place. The introduction of provisional liability is one example of good scheme design that could substantially reduce disputation and contribute to improved scheme performance, particularly in the area of return to work outcomes.

In other scheme critical areas, consideration needs to be given to the expedited resolution of disputes. This is especially necessary with respect to disputes concerning rehabilitation and return to work issues.

In contrast to these positive proposals, WorkCover seems more interested in undermining the rights of injured workers and the role of arbitrators, lawyers and the judiciary. Of particular concern are its attack on the Tribunal along with proposals to introduce unaccountable Medical Panels with far reaching powers, discontinue injured workers' weekly payments where disputes concerning income maintenance occur, and reduce the ability of workers to contest dubious decisions by lowering the legal costs to which they are currently entitled. These proposals conform to a narrow insurance industry mentality designed to disempower workers (Guthrie 2001).

The Tribunal

At present, parties dissatisfied with a decision in relation to a dispute can appeal to the Full Bench of the Tribunal on matters of law; whereas previously appeals of this nature were heard by the Supreme Court prior to a change in the legislation in 1995.

WorkCover wants to change this arrangement and have the Supreme Court take over the role of the Full Bench, apparently on the basis that the Full Bench is not up to the job. In support of this view it undertook a review of 54 workers' compensation decisions by the Full Court of the Supreme Court. Most of these decisions relate to cases lodged before 1996 and according to WorkCover 42.5% of Tribunal decisions were overturned by the Supreme Court (WorkCover 2006a: 38).

It is difficult to gauge the accuracy of Workcover's claim given that it has not provided any details of the cases in question. On closer consideration it is apparent that many of these matters did not actually relate to appeals to the Supreme Court. A more comprehensive review of Supreme Court decisions since Workcover's inception suggests that of the 57 workers' compensation appeals involved only 16 were dismissed – an error rate of only 28%, not 42.5%.

In any event, the value of a review of cases that are between 11 and 15 years old is at best limited. This is particularly so when it is recalled that, in a judicial sense, this period covered the early days of the WorkCover scheme when key aspects of a brand new Act were being tested and where precedents were being created. By contrast, the law on the WorkCover legislation is now much more consistent and settled than what it was then. Consequently, the likelihood of the Supreme Court overturning decisions of the Tribunal to the same extent as may have happened during the early 1990s is remote.

It is also worth noting that there has been no widespread demand for the agenda that has been proposed by WorkCover either by the employer community, the legal profession or the trade union movement. It is difficult to avoid the conclusion that WorkCover is pushing for this change because it is dissatisfied with having its claims decisions overturned by the Tribunal on a regular basis. The real solution to this problem is not to alter the jurisdictional arrangements but rather for WorkCover to improve its decision making.

Recourse to the Supreme Court would also create a number of serious problems. These would include increased costs as well as extended delays in hearings and judgments - which in the case of judgements could run into years not weeks or months! As the Chief Justice has pointed out on several occasions, the Court's workload is already very high. The addition of a workers' compensation portfolio to this workload would not make matters any easier. And it would certainly not contribute to an 'optimally efficient' dispute resolution system.

Medical Panels

Workcover's proposal to transfer responsibility for adjudication on a wide range of issues concerning workers' entitlements from the Tribunal to Medical Panels is fundamentally flawed. It may best be viewed as part of a cost cutting strategy rather than an equitable basis of resolving claims disputes.

Underpinning the Medical Panels proposal is the notion that medical practitioners are best placed to make, what in effect, are judicial decisions on a wide range of disputed workers' compensation matters. While medical practitioners are best placed to make diagnoses of medical conditions, the definition of 'medical issue' proposed by WorkCover goes much further than this, and includes issues of causation, capacity for work, the suitability of alternative duties for injured workers and related matters - all of which have a socio-legal dimension. Moreover, there was no evidence presented by WorkCover to suggest that medical practitioners have any special expertise that is not otherwise available to the Tribunal.

The key issue in resolving disputes is establishing the full facts of the case and this requires training and experience in evidentiary procedure. It also requires a proper hearing, in accordance with natural justice and the rule of law, rather than a panel discussion. Medical practitioners generally do not have any legal training. It is unwise and inappropriate that decisions of a judicial (and quasi judicial) nature be delegated to persons with no formal legal training or expertise. This is not intended as a criticism of medical practitioners who, in their areas of expertise, perform invaluable work for the benefit of society. But, just as society does not permit judicial

officers to work as medical practitioners, why should it allow medical practitioners to discharge the functions of judicial officers?

It is also clear that Workcover's claim that Medical Panels would "improve the quality and speed of decision-making, thus improving return to work and claims management outcomes" (Ibid: 45) lacks both substantiation and credibility. Medical Panels were in fact used for a short period in South Australia in the past but were scrapped in the early 1990s - because of excessive delays, poor quality decision making and difficulties in constituting panels on a timely basis. Through an apparent process of corporate amnesia though, this seems to have been overlooked by WorkCover.

It is also probable that many treating medical practitioners would be reluctant to become Medical Panels members, partly because of their attitudes towards WorkCover but also because of other commitments. This in turn strengthens the likelihood that such panels would be dominated by practitioners with links to insurers and the conflict of interest issues that this entails.

If implemented it would result in a third rate system that would subject workers to third rate justice. The situation would be compounded further by Workcover's insistence that there be no right of appeal from decisions by Medical Panels other than on procedural grounds.

This also highlights the double standards that are at the heart of Workcover's dispute resolution proposals. On the one hand, it wants appeals to the Supreme Court to be reinstated on some issues while on the other, it is categorically opposed to appeals to the Supreme Court (or anywhere else) as far as decisions by its proposed Medical Panels are concerned. The government should not hesitate in rejecting this contradictory and self serving approach to dispute resolution.

Discontinuance and Workers' Legal Costs

In certain circumstances a worker's weekly payments can be discontinued provided the worker is given 21 days notice. Where the decision is challenged, the worker is entitled, under s. 36(4) of the Act to ongoing weekly payments until the matter comes before a Conciliator. The Conciliator can refuse to make an order for a continuation of weekly payments, depending on the circumstances. Weekly payments can and are discontinued where warranted, although this is not a common occurrence. Where the worker loses the appeal, steps can also be taken to recover the amount of weekly payments received during the interim period.

WorkCover maintains that cutting off weekly payments would be a "key motivator" for influencing the behaviour of injured workers (Ibid: 49). There can be no doubt that the threat of financial ruin does influence behaviour, but this hardly justifies the creation of a scheme that would be based on the abuse of WorkCover superior financial clout.

One of the major achievements associated with the introduction of the WorkCover scheme in 1987 was the provision for ongoing weekly payments pending the outcome of disputed claims. Insurers almost invariably have deeper pockets than injured

workers. Prior to Workcover it was always possible for an insurer to terminate payments to workers as an exercise in the use of their greater economic power. Of course, if the worker could successfully challenge the insurer's decision payments would be reinstated, but there was no real reason for the insurer to resolve the dispute in a timely fashion and in the meantime the worker had no payments coming in. This power imbalance often resulted in extended delays and hardship. It was a source of great injustice.

To its great credit the Bannon Labor government put an end to this insidious practice. And to its credit the Brown government did not rescind Labor's reform of this scheme design feature. It modified the ground rules to an extent but did not turn back the clock to the pre-WorkCover days. Consequently, there has been longstanding bipartisan support for the rights of injured workers in this area.

WorkCover management, however, does want to turn the clock back. The ostensible reason for terminating weekly payments where disputes arise is couched, yet again, in terms of the need to provide the necessary incentives for workers to return to work (Ibid: 49). It has also proposed that the notice period for discontinuance be reduced from 21 days to none at all, for all disputes where workers have been in receipt of compensation for up to 12 weeks (Ibid: 50).

WorkCover's discontinuance proposals are complemented by equally disingenuous moves to reduce legal costs available to workers as a result of claims disputation. These costs are already capped, but WorkCover claims that this is insufficient "for workers and their solicitors to seek an early end to a dispute" (Ibid: 48). Once again, no evidence or statistical data is put forward by WorkCover to support its case. WorkCover also seems to be oblivious to the fact that many disputes and the delays in their resolution are due to its own poor decision making. Its proposals to reconfigure the structure of legal costs are deliberately designed to undermine the capacity of injured workers to challenge these decisions.

There are also concerns in relation to its recommendations regarding the amount that lawyers can recover from workers. Needless to say, there are no corresponding proposals to address the amount that WorkCover and its agent can spend on lawyers. Lawyers' fees can sometimes be an issue, whether with WorkCover or injured workers, but it should not be forgotten that WorkCover itself has a vested interest in this matter. Its concern is not with the interests of injured workers but rather with discouraging the legal representation of workers in challenging its claims decisions.

Summary

The combined effect of the WorkCover proposals for changes to the resolution of disputes would be a return to the pre-WorkCover era. This period was one where decisions were often based on cost cutting rather than an impartial adjudication of workers' claims, and where the capacity to appeal such decisions was prejudiced by cost hurdles, extended delays, a lack of accountability and other impediments.

A return to this type of dispute resolution system would be a recipe for capricious decision-making and would provide WorkCover with the means and incentive to ride roughshod over the rights of injured workers.

Occupational Health and Safety

In 2005/06 more than 37,400 South Australians workers lodged compensation claims as a result of work related injury (WorkCover 2007a: 10). The actual level of injury, however, was much higher. According to the Australian Bureau of Statistics, 49,100 workers in South Australia experienced a work related injury during this period (ABS 2006: 12). This was 31% higher than the WorkCover figure and illustrates the point that many people who suffer a work related injury do not, for a range of reasons, seek compensation.

Put simply, workers' compensation statistics invariably understate the real level of work related injury in the community. To paraphrase 19th century British Prime Minister Benjamin Disraeli, there are lies, damned lies and workers' compensation statistics!

Also of concern is the apparent rise in the number of more serious work injuries - involving two weeks or more off work. As reported by employers registered with WorkCover, the number rose from 5,352 in 2000/01 to 5,474 in 2005/06 (WorkCover 2007a: 11).

Despite their limitations, these figures do nevertheless underline the fact that occupational health and safety continues to be a critically important issue for South Australia and the WorkCover scheme; and although primary responsibility for occupational health and safety now resides with SafeWork SA, WorkCover can play a supportive role in promoting improvements in this critical area.

This should include a thorough, independent, review of the effectiveness of its existing programs.

One long-standing problem (Purse 2000) is WorkCover's flagship bonus and penalty scheme which continues to enable less scrupulous employers to exploit the scheme by manipulating their claims costs to obtain bonuses when they should be receiving penalties. Costs associated with 'secondary disabilities' are not included in calculations for bonuses and penalties. As highlighted in a submission to the Stanley Review "... if an employer has got someone smart to help them they can get many of their claims recoded (Stanley et al 2002: 96)" as secondary disabilities as a means of obtaining a bonus without any improvement in their occupational health and safety performance.

As manipulation of this nature only serves to bring the administration of the scheme into disrepute, the government must take immediate steps to terminate this corrosive feature of its operation.

Another problem concerns the provision of OHS hazard information to workers. The availability of workplace hazard information to workers is an important, though often neglected, consideration (Purse 2004: 610-6110) and one that is an essential accompaniment to improved OHS performance. S. 112A of the Act empowers WorkCover to provide workers with information on their employer's claims record, including details on the number, type and cost of claims. This provision has been part of the WorkCover legislation for almost 15 years but has never been acted on. Surely

in this day and age, South Australia's working population is entitled to information on the OHS performance of their employers - it is after all their health and safety that is on the line. Once again, the government needs to step in and take decisive action to remedy a situation that can only be described as scandalous.

On a more positive note, WorkCover's recommendation to increase the statutory cap on employer premiums to 15% is a step in the right direction. It will ensure that the cross subsidisation of high risk employers by employers with a lower risk profile is substantially reduced. In doing so it may also stimulate these high risk employers into making more strenuous efforts to improve their OHS performance.

It would also be useful if WorkCover increased its use of television advertising to promote the need for improvements in occupational health and safety management. This is an area in which it has been active in the past. Initiatives in this area should be renewed in collaboration with SafeWork SA. Special emphasis should be given to developing commercials that can be used in conjunction with campaigns involving targeted inspections by SafeWork SA.

WorkCover's Governance Arrangements

Although nominally tripartite in structure, the WorkCover Board continues to be dominated by appointments from business circles. This is a legacy of legislation brought in by the Liberal government in 1994, legislation that was designed to minimise the role of trade union involvement in overseeing the management of the WorkCover scheme. At present, only two of the nine Board members have been drawn from a workers' background.

It is essential that people familiar with the experiences and problems of South Australia's working men and women be more adequately represented on the WorkCover Board, not only because of their expertise on workers' compensation matters but also because of their familiarity with the day to day problems experienced by injured workers. There should of course continue to be people with a business background on the Board but there needs to be greater balance.

There is also scope for increasing the size of the Board, both to strengthen its tripartite basis and to ensure that its responsibilities are more effectively discharged.

Accordingly, section 5 of the *WorkCover Corporation Act 1994* should be amended to provide for a WorkCover Board comprised of 11 members, 4 of whom should be appointed by the Minister following consultation with Business SA and 4 following consultation with SA Unions. The Presiding Officer and the other two members should be appointed by the Minister following consultation with Business SA and SA Unions. In relation to the last two appointments serious consideration should be given to appointing someone from the injured workers' advocacy community as well as a person with extensive experience in vocational rehabilitation and the return to work process.

A more balanced Board is essential not only in restoring a sense of fairness to the scheme, but also in returning WorkCover to its core business.

In appointing a new Board the government needs to send a very simple but clear message to all concerned - that WorkCover needs to return to basics. This proposed return to the organisation's core business means that WorkCover needs to understand its own legislation, administer it without fear or favour, ensure that workers are not disadvantaged as a result of injury, and overcome the many obstacles which often hinder the return to work process.

It will inevitably require a change in the current management culture. WorkCover's management practices are widely regarded as inflexible, often misdirected and too hands off. Ever since it outsourced its claims' management responsibilities WorkCover has lost its edge and the experience that comes with fully understanding its business. The organisation is also unreflective, slow to respond to changing circumstances and intolerant of advice and criticism, both from its own staff and the broader stakeholder community.

If these problems are to be addressed change will need to start at the top. The sooner this process of reform commences the sooner it will bear fruit.

Self Insurance

Self insurers are employers licensed under the scheme to administer relevant sections of the WorkCover legislation with respect to their own workers. They are also required to assume responsibility for any associated liabilities arising from claims by their workers. In practice, self insurance is confined to large corporate employers along with state government departments and agencies.

South Australia has the highest incidence of self insurance in Australia. At present, self insurers account for approximately 40% of the state's workforce (WorkCover 2006b: 3). The disproportionate extent of self insurance in South Australia means that the scheme's average premium rate is higher than would be the case if self insurers contributed to the funding of the scheme on the same basis as other employers.

In line with policy changes initiated by the Howard government there have been concerted efforts, over the last few years, to enable state based self insurers to migrate to the Federal Comcare scheme, a development which has the potential to undermine state and territory workers' compensation schemes as well as the entitlements of injured workers (Guthrie et al 2006: 263-267). Regrettably, the WorkCover discussion paper does not concern itself with any of these issues.

Instead, its focus is on a range of proposals to liberalise self insurance arrangements in South Australia. Some of these proposals have merit, others are of questionable value. However, in view of the lack of detail provided and the more fundamental issues confronting the scheme and its management the proposals put forward by WorkCover on self insurance matters should be deferred - other than those that can be shown to be scheme critical - until these more fundamental issues have been resolved.

Other Legislative Proposals

There are some 27 issues referred to under this heading which WorkCover has listed for legislative change. While some of these proposals are self evident and innocuous, the position with the number of others is unclear particularly in light of the level of detail provided by WorkCover.

Under the circumstances WorkCover should be directed to provide sufficient detail in order to facilitate an adequate appreciation of the implications arising from these proposals prior to their further consideration.

References

- Australian Bureau of Statistics (2006), *Work-related injuries, Australia*, Cat. No. 6324.0, Commonwealth of Australia, Canberra.
- Business SA (2007), *Workers' compensation: a program for reform in South Australia*, Adelaide.
- Campbell Research & Consulting (2001-2006), *2005/06 Australia & New Zealand return to work monitor*, Melbourne.
- M. Campolieti (1999), Workers' compensation benefits and claims duration: some Canadian evidence, *Applied Economics Letters*, No. 6, pp. 513-517.
- A. Clayton (2005), *Review of the framework for rehabilitation in the South Australian WorkCover scheme*, Adelaide.
- A. Engleman and P. Vice (2001), *First report of injury: impact on claims costs*, riZx, inc., Toronto.
- P. Foreman, G. Murphy and H. Swerissen (2006), *Barriers and facilitators to return to work: a literature review*, Australian Institute for Primary Care, Melbourne.
- R. M. Gallagher, R. A. Williams, J. Skelly, I. D. Haugh, V. Raugh, R. Milhous and J. Frymoyer (1995), Workers' compensation and return-to-work in low back pain, *Pain*, Vol. 61, No. 2, pp. 297-307.
- J. A. Gardner (1989), *Return to work incentives: lessons for policy makers from economic studies*, Workers' Compensation Research Institute, Cambridge MA.
- S. Garnett (2000), Workers' compensation fraud: fact or fiction?, *Plaintiff*, No. 39, pp. 10-16.
- R. Guthrie (2001), Power issues in compensation claims, *Australasian Dispute Resolution Journal*, Vol. 12, No. 4, pp. 225-239.
- R. Guthrie, K. Purse and F. Meredith (2006), Workers' compensation and self-insurance in Australia – national priority or trojan horse? *Insurance Law Journal*, Vol. 17, No. 3, pp. 256-267.
- Heads of Workers' Compensation Authorities (2005), *Comparison of workers' compensation arrangements in Australia & New Zealand*, Melbourne.
- House of Representatives Standing Committee on Employment and Workplace Relations (2003), *Back on the job: report into aspects of Australian workers' compensation schemes*, Commonwealth of Australia, Canberra.
- T. G. Ison (1994), *Compensation systems for injury and disease: the policy choices*, Butterworths, Toronto.

A. Larson (1993), *Workmen's compensation for occupational injuries and death*, (Revised by L. K. Larson) Matthew Bender & Co., New York.

K. Lippel (1999), Therapeutic and anti-therapeutic consequences of workers' compensation, *International Journal of Law And Psychiatry*, Vol. 22, Nos. 5-6, pp. 521-546.

A. B. Krueger (1990), Incentive effects of workers' compensation insurance, *Journal of Public Economics*, Vol. 41, No. 1, pp. 73-99.

J. D. Loeser, S. E. Henderlite and D. A. Conrad (1995), Incentive effects of workers' compensation benefits: a literature synthesis, *Medical Care Research and Review*, Vol. 52, No. 1, pp. 34-59.

B. D. Meyer, W. K. Viscusi and D. L. Durbin (1995), Workers' compensation and injury duration: evidence from a natural experiment, *American Economic Review*, Vol. 85, No. 3, pp. 322-340.

J. Moore and W. K. Viscusi (1990), *Compensation mechanisms for job risks*, Princeton University Press, New Jersey.

Productivity Commission (2004), *National workers' compensation and occupational health and safety frameworks*, Commonwealth of Australia, Canberra.

K. Purse (1998), Workers' compensation, employment security and the return to work process, *Economic and Labour Relations Review*, Vol. 9, No. 2, pp. 246-261.

K. Purse (2000), Workers' compensation, secondary disabilities and workplace safety incentives, *Journal of Occupational Health and Safety - Australia and New Zealand*, Vol. 16, No. 1, pp. 23-28.

K. Purse (2004), Work-related fatality risks and neoclassical compensating wage differentials, *Cambridge Journal of Economics*, Vol. 28, No. 4, pp. 597-617.

C. Roberts-Yates (2003), The concerns and issues of injured workers in relation to claims/injury management and rehabilitation: the need for new operational frameworks, *Disability and Rehabilitation*, Vol. 25, No. 16, pp. 898-907.

E. A. Spieler, P. S. Barth, J. F. Burton Jr, J. Himmelstein and L. Rudolph (2000), Recommendations to guide revision of the guides to the evaluation of permanent impairment, *Journal of the American Medical Association*, Vol. 283, No. 4, pp. 519-523.

B. Stanley, F. Meredith and R. Bishop (2002) *Review of workers compensation and occupational health, safety and welfare in South Australia*, Vol. 2, Adelaide

L. Strunin and L. I. Boden (2004), The workers' compensation system: workers' friend or foe? *American Journal of Industrial Medicine*, Vol. 45 No. 4, pp. 338-345

M. Wooden (1989), Workers' compensation, unemployment and industrial accidents: an inter-temporal analysis, *Australian Economic Papers*, Vol. 28, No. 3, pp. 219-235.

WorkCover Corporation of South Australia (2006a), *Proposed legislative changes to the South Australian Workers Rehabilitation and Compensation Scheme*, Adelaide.

WorkCover SA (2006b), *Annual report 2005-06*, Adelaide.

WorkCover SA (2007a), *Statistical review part 1, 2005-06*, Adelaide.

WorkCover SA (2007b), *Statistical review part 2, 2005-06*, Adelaide.

WorkCover Tasmania (2002), *Timeliness of claims reporting*, Hobart.

Appendix - WorkCover's Recommendations

1. Amend the *Workers Rehabilitation and Compensation Act 1986* (WRCA) to establish an immediate step-down in weekly payments to 95 per cent of average weekly earnings to apply from the commencement of a claim.
2. Amend the WRCA to establish a step-down in weekly payments at 13 weeks to 75 per cent of average weekly earnings.
3. Amend the definition of average weekly earnings in the WRCA to reflect what the worker had earned in the previous 12 months employment, or a lesser period as is appropriate, reflecting the equivalent Victorian provisions.
4. Amend the WRCA to provide that maximum average weekly earnings payable to an injured worker be capped at \$1,190 (indexed).
5. Amend the WRCA to provide for work capacity reviews to occur at the end of the second year after the injury using the Victorian model.
6. Amend the WRCA to replicate the Victorian provisions to allow the compensating authority to deem a level of earnings for a partially incapacitated worker in the first two years of a claim.
7. Amend the WRCA to cap the entitlement to medical expenses at 12 months after the cessation of payments for income maintenance.
8. Amend the WRCA to replicate the Victorian provisions for compensation for non-economic loss in the South Australian Scheme.
9. That if the Victorian provisions for non-economic loss are applied in the South Australian Scheme, that the lump sum payment upon the death of a worker be the prescribed sum.
10. Maintain the existing exclusion on access to common law.
11. Amend the WRCA to provide that the dispute resolution process consist of three stages - conciliation - where the matter is not resolved at conciliation a full hearing by a single presidential member of the tribunal - appeal to the Full Court of the Supreme Court on matters of law by special leave of the Supreme Court.
12. Amend the WRCA to provide for the establishment of medical panels based on
 - the Victorian legislative framework as related to operations, functions and scope of the medical panels
 - the Queensland approach as related to the selection process and use of stakeholder selection committee nominated by the Minister
 - the Victorian model of appointments following the outcome of the stakeholder selection committee
 - and the broader specific design features.
- 13.1 Change the structure of legal costs.

13.2 Pass a regulation pursuant to s88G of the WRCA to limit the amount a worker's solicitor can recover from a worker by way of costs, to that amount which is payable by WorkCover to a worker under the WRCA.

13.3 Amend the WRCA to allow for an order for costs to be made personally against a solicitor where costs are incurred solely as a result of the fault of the solicitor.

13.4 Amend the WRCA to put workers 'at-risk' on costs in the event that a matter proceeds to judicial determination. This provision would be subject to the Workers Compensation Tribunal's discretion to make orders to the contrary if appropriate and where the judicial determination is the first hearing.

14. Amend the WRCA to provide that where weekly payments of income maintenance are discontinued under s36, that the weekly payments are not reinstated for the duration of the dispute. If the dispute is found in the worker's favour, arrears of weekly payments should be paid, with interest.

15. Subject to the implementation of Recommendation 14, amend the WRCA to give WorkCover the power to remove or suspend the power of a self-insurer to discontinue weekly payments under s36 where it is satisfied that the power is being improperly applied.

16. Amend the WRCA to provide that the notice period for cessation of weekly payments of income maintenance be changed so that a worker who was in receipt of weekly payments for less than 12 weeks have their entitlements cease immediately, between 12 and 52 weeks receive 14 days' notice and (subject to the adoption of recommendation 14) greater than 52 weeks receive 28 days' notice.

17.1 Amend the WRCA to increase the statutory cap on the WorkCover Levy to 15 per cent with appropriate transitional provisions.

17.2 Amend the WRCA to allow the WorkCover Board to set the minimum levy.

17.3 Amend the WRCA to provide that the basis for payment of the WorkCover Levy is that the levy be paid in advance.

17.4 Amend the WRCA to provide that employers with an annual remuneration of less than \$10,000 per annum are not required to register and pay a levy unless a claim is lodged by one of their workers.

18.1 Amend the WRCA to require a size limit for self-insured employers of 200 full time workers or an equivalent remuneration limit.

18.2 Amend the WRCA to allow for groups of incorporated associations to qualify for registration as self-insurers.

18.3 Amend the WRCA to allow restructures and reorganisations to be specifically provided for, with WorkCover having the discretion to transfer, split, amalgamate or extend registrations where appropriate.

18.4 Amend the WRCA to allow for the change of the nominated employer in a self-insured group.

18.5 Amend the WRCA to incorporate the 'one-in-all-in' rule into the legislation.

18.6 Amend the WRCA to allow WorkCover to consider the effect on the Compensation Fund when a group of employers increases its number through acquisition of further subsidiaries.