

This paper written by Dr. Kevin Purse was commissioned by SA Unions as a contribution to a broad community discussion about the problems facing the workers compensation system in SA.

Unions in South Australia want a well managed fund that is financially viable. We also want workers to be able to return to work and the community safely and quickly.

Injured workers overwhelmingly want to return to productive work.

We are concerned that in the current public debate there is a view that the financial position of the scheme can only be improved by blaming and punishing injured workers.

We are also concerned that employers' push for a reduction in their workers compensation costs and a levy reduction will be done at the expense of injured workers and their full recovery. Employers also have a responsibility to ensure workplaces are safe and if workers are injured they are rehabilitated and returned to work.

What we need is a calm and informed debate that balances the interests of employers and injured workers within a financially viable scheme.

We hope this paper will assist in this and we urge you to read and consider it.



Nick Thredgold  
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# OVERVIEW

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Several proposals have been developed by WorkCover to cut workers' entitlements in response to ongoing concerns with the scheme's performance.

The major change put forward involves the adoption of a modified version of the Victorian weekly payments regime, which is among the lowest in Australia. Under the Victorian scheme injured workers receive 95% of pre-injury average weekly earnings for the first 13 weeks of injury. If still incapacitated for work, their entitlement drops to 75% for the next 117 weeks, after which payments are terminated for all but the most seriously injured workers. The maximum amount injured workers can receive is currently capped at \$1190 a week.

The rationale offered for this approach is that the scheme needs to 'realign' its incentives in order to promote improved return to work rates by South Australia's injured workers, and that the Victorian scheme provides the appropriate model for such a realignment. It is important to note though, that under the WorkCover proposal, weekly payments would cease for most injured workers after only 104 weeks.

Aspects of the Victorian scheme which could benefit South Australian workers' such as the availability of common law damages in cases of employer negligence were not included in the WorkCover package.

It is also worth noting that the Victorian government is aware of the inadequate level of weekly payments available to injured workers in that state. During the lead up to the November 2006 election it gave an undertaking to review the current arrangements as part of a broader commitment to provide a 'first class' workers' compensation system for Victoria. Negotiations over this and a number of related issues are expected to commence shortly.

This highlights one of the many self-serving incongruities with the WorkCover proposals. At a time when WorkCover and some employer groups are attempting to pressure the State Government into reducing weekly payments for South Australian workers to levels below those in Victoria, the Victorian government is considering improvements for its workers that would more closely align weekly payments in Victoria with those in South Australia.

By any objective standard, South Australia's lacklustre workers' compensation performance is attributable to poor management by WorkCover and its former claims agents rather than the level of entitlements available to injured workers. The core problem has been the ongoing failure to manage the rehabilitation and return to work process. It also includes the failure to ensure that employers comply with their return to work obligations. Having said that, WorkCover's new claims agent EML needs to be given a reasonable opportunity to demonstrate that it is capable of improving the scheme's performance.

Attempts to blame injured workers for the scheme's shortcomings though are no more than a diversion from the real issues. It is all too easy to paper over management cracks by slashing workers' entitlements. This has explicitly been acknowledged by senior executives of Victoria's WorkCover Authority who have frequently emphasised the importance of achieving substantial improvements in scheme performance without resorting to cuts in workers' payments or hikes in employer premiums.

This is the approach that should be adopted in South Australia. For this to happen, however, the government will need to make it clear that WorkCover's proposals for wholesale legislative change are unacceptable and that it expects WorkCover management and its Board to focus their energies exclusively on innovative strategies that will substantially improve the scheme's operational and financial performance.

There is also merit in reassuring the employer community that the government has no intention of increasing average premium rates in the foreseeable future. This is especially so if it can be coupled with reciprocal undertakings from the major employer groups to engage in constructive efforts to improve the scheme.

Finally, there is an obvious need for all stakeholders to assist WorkCover in getting the scheme back on track. It is with this in mind that the following observations and proposals are put forward for consideration.

# WORKCOVER'S UNFUNDED LIABILITY

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WorkCover is again in the firing line over its finances. The current debate though, has become increasingly distorted as a result of a simplistic preoccupation with the scheme's 'unfunded liability'. Perversely, the criticisms have come at a time when WorkCover's bottom line is trending upwards.

Of even greater significance, if WorkCover's continuing strong investment results were taken into account the scheme's financial position would be better off by \$300 million.

An unfunded liability is the gap between a scheme's *estimated* liabilities and its assets. As workers' compensation is a long-tail form of insurance, where claims liabilities may extend over several decades, it is very difficult to accurately predict these long-term liabilities. For this reason unfunded liability estimates should not be taken at face value. An unfunded liability is not a debt in the conventional sense but rather an estimate of the amount that WorkCover might, or might not, need to be pay out over the next 40 to 50 years for existing claims - depending on how well the scheme is managed over this period. It is not an amount that needs to be paid out at any one point in time. It is also important to note that WorkCover is more than capable of meeting its current obligations to injured workers and service providers as they fall due.

In WorkCover's latest Annual Report its unfunded liability was reported as \$694 million, up \$42 million from 2004-05. This headline figure of \$694 million has captured the attention of the media, politicians and employer groups. It also forms the basis of demands on the SA government to slash entitlements to injured workers.

The problem with the unfunded liability concept as a measure of financial performance is that it only looks at one side of the equation. WorkCover's estimated liabilities may have increased but so too have its assets - from \$1.120 billion in 2004-05 to \$1.288 billion in 2005-06, an increase of \$168 million. As the increase in its assets was greater than the increase in its estimated liabilities, WorkCover's financial position in fact actually improved last financial year. This improvement has largely been ignored though because of the fixation with the headline unfunded liability figure

A more useful tool to assess WorkCover's financial position is its funding ratio - the value of total assets as a percentage of total estimated liabilities - since this provides a measure of the extent to which the scheme is fully funded. On this basis WorkCover was 65% funded in 2005-06, compared with 63.4% the previous year. Although, not a large improvement it was certainly a step in the right direction. This upward trend has continued and as of February 2007 the scheme - with assets of \$1.445 billion, estimated liabilities of \$2.153 billion and an unfunded liability of \$708 million - was 67.1% funded.

The larger reality of course is that workers' compensation liability estimates are crucially dependent on the economic assumptions used. Even minor changes can result in dramatic variations in the bottom line. The two critical assumptions that underpin liability estimates are the claims inflation rate and the discount rate. The first is used to estimate the extent of WorkCover's outstanding liability for existing claims over the next 40 to 50 years. The second is used to discount that amount so that it is expressed in today's dollar terms - its net present value.

The discount rate represents an assumed rate of return on WorkCover's investment portfolio. This variable is very sensitive - according to the fine print in WorkCover's Annual Report, a 1% change in the discount rate can increase or reduce WorkCover's outstanding liability by \$75 million.

Since its inception in 1987 WorkCover's investment performance has been excellent, resulting in an annual 10.6% rate of return. However, the rate of return currently used to discount its outstanding liability estimate is only 6.0%. This is the so-called risk-free rate of return. If the discount rate was adjusted to 10% it would more accurately reflect WorkCover's actual performance and reduce its liabilities by \$300 million. This approach incidentally would also maintain a healthy prudential margin.

More generally, the discount rate should be based on a rolling average of WorkCover's investment returns which now covers almost 20 years. In operational terms, the discount rate would increase whenever WorkCover's investment performance improves and vice versa. As both increases and decreases in performance would be cushioned by the averaging process, this approach has the advantage of combining greater realism while avoiding the volatile fluctuations in discount rates that could otherwise arise from short term variations in investment returns. Its adoption would be a win-win outcome for South Australian employers and workers.

This performance-based approach contrasts with the current methodology where WorkCover's outstanding liabilities are estimated on an ultra conservative basis. This ultra conservatism results from the adoption of new accounting standards and more particularly the imposition of tougher prudential requirements on private insurance companies following the spectacular collapse of HIH in 2001. These new obligations are not binding on WorkCover but were designed to curb the excesses that have been a feature of private insurance markets over the last decade. It should also be emphasised that the risk profile of publicly underwritten schemes is much lower than those for privately underwritten schemes. This is because of the different scheme dynamics that operate.

In privately underwritten schemes there is competition between insurers for market share. This results in periodic cycles of artificially low premiums followed by large increases. This volatility can also result in insurance company bankruptcies - such as occurred in the 1970s and early 1980s, and most recently with HIH. By contrast, there has never been a bankruptcy of a publicly owned workers' compensation insurer anywhere in Australia, and nor is there likely to be. With publicly underwritten schemes, governments can always intervene to adjust employer premium levels, change worker entitlements or initiate structural improvements in scheme management.

There is no objective reason WorkCover should be treated as though it were HIH or penalised by a one-size fits all approach to measuring its liabilities. If judged on a performance basis, a realistic estimate of WorkCover's 2005/06 unfunded liability is \$394 million which is equivalent to a scheme funding ratio to 76.6%.

The introduction of a performance-based methodology for the estimation of WorkCover's long-term liabilities needs to be seriously examined by the government and WorkCover. Of course, any proposal involving a shift from a risk-free to an average rate of return discounting methodology is likely to attract opposition from Treasury and other quarters that could make its adoption difficult if not impossible. It will be a big ask to move such critics out of their comfort zone.

As an interim measure, however, it should at least be possible to have the results of both approaches included in WorkCover's Annual Report - the former in order to comply with the current accounting standards and the latter to provide a more statistically robust financial overview of the scheme. In this regard, it should be noted that New South Wales WorkCover no longer relies exclusively on one measure to depict the financial performance of its scheme. It's time South Australia started moving in the same direction.

### Summary Points – WorkCover's Unfunded Liability

- The current focus on its unfunded liability has produced a misleading picture of WorkCover's financial position.
- A more useful performance indicator is the funding ratio which attempts to measure the extent to which the scheme is fully funded.
- The current methodology used to determine WorkCover's funding ratio is overly restrictive.
- It ignores WorkCover's excellent investment performance which means that the scheme's liabilities have been seriously overstated.
- A shift to a performance-based methodology would result in a more accurate and statistically robust assessment of WorkCover's financial position.
- Its use in 2005/06 would have reduced WorkCover's unfunded liability by \$300 million and increased its funding ratio from 65% to 76.6%.
- Serious consideration needs to be given to adopting a performance-based methodology for measuring WorkCover's financial performance.
- As an interim measure the results of both the current approach and the performance-based methodology should form part of WorkCover's financial reporting and be included in its Annual Report.



# OTHER ECONOMIC MISCONCEPTIONS

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Two other misconceptions frequently used to justify cuts to workers' compensation entitlements are the need to keep employer premiums 'competitive' and the necessity for 'incentives' to ensure injured workers return to work. While superficially plausible these arguments are conceptually flawed and lack a sound evidentiary basis.

## 'Competitive' Premiums

The idea that workers' compensation premiums in one state must be competitive with those in other jurisdictions is part of the ideological armoury of Australia's major employer groups. It is also a view embraced by many scheme administrators and state governments.

The key claim is that unless competitive premiums prevail there will be an exodus of firms and jobs from the offending jurisdiction. The threat of a flight of capital is frequently used to play one jurisdiction off against another. In the 1990s this resulted in state and territory governments competing with each other to see who could reduce workers' entitlements the most. It was aptly described by the Industry Commission as a form of 'invidious competition'.

The problem with the competitive premiums argument is simple - a lack of evidence. The reason for this lack of evidence is also quite straightforward. The difference in average premium rates between the states and territories in Australia is rarely more than 1.5% of payroll - hardly a sufficient reason for the relocation of business from one jurisdiction to another.

From an economic perspective the decision to invest, or relocate from one jurisdiction to another, is the result of a range of financial and strategic factors. These include total labour costs - which in South Australia are considerably lower than in the eastern states - as well as non-labour costs and other variables such as access to markets and technology. When decisions to invest are being made it is the total package that counts, not a relatively minor issue such as marginal differences in workers' compensation premiums.

When examined more rigorously it is quite apparent that South Australia is in reality a highly competitive location in which to invest.

In a 2006 review of international of business competitiveness that included 99 cities from 9 countries in the Asia Pacific region, Europe and North America, the global consulting firm KPMG found that Adelaide had the third lowest business costs of the cities surveyed. Adelaide also outperformed Sydney, Melbourne and Brisbane - the other Australian capitals included in the survey.

As the Premier pointed out at the time "South Australia can take great confidence from these findings, which confirms that Adelaide has maintained its very competitive global position". This is not to suggest that lower employer premiums are not desirable. At 3% of payroll, South Australia's average premium rate is among the highest in the country. However, premium reductions should be based on improvements in scheme performance rather than spurious claims about competitiveness.

## Summary Points – ‘Competitive’ Premiums

- It is frequently suggested that WorkCover premiums need to be ‘competitive’ with premiums in other states; otherwise there will be an exodus of firms from South Australia and an associated loss of jobs.
- Though superficially attractive this claim is not supported by the evidence.
- Investment, and business relocation, decisions are made on the basis of a mix of financial and strategic considerations, not marginal differences in average WorkCover premiums of 1%-1.5% of payroll.
- In terms of overall business competitiveness Adelaide out-performs Sydney, Melbourne and Brisbane.
- Adelaide is also highly competitive internationally and was rated among the top 3 of 99 cities - from the Asia Pacific region, Europe and North America - in a survey conducted by KPMG in 2006.
- Reductions in employer premiums should only be supported on the basis of better workplace health and safety performance and improved return to work outcomes.
- Artificial reductions in premiums by cuts to workers’ entitlements is an approach described by the Industry Commission as a form of ‘invidious competition’.

## Incentives

It is often claimed by employer groups, scheme administrators and economists that workers need ‘incentives’ to return to work. The term itself is code for cuts in compensation payments, which are invariably described as being ‘too generous’. The incentives discourse gained momentum in the 1980s, became embedded during the 1990s and remains at the forefront of workers’ compensation policy in Australia.

The main means of reducing payments to injured workers involves the use of ‘step downs’ - phased reductions in weekly payments. All Australian workers’ compensation schemes now have step downs of one sort or another, although the extent and timing varies substantially between the states and territories. Many jurisdictions also terminate weekly payments after a specified period or when they exceed a specified dollar value.

One of the perverse features of step downs is that they generally penalise workers with the most serious injuries. The ‘incentives’ argument also overlooks the fact that injured workers overwhelmingly want to return to work since it is through work that most people define themselves.

The real role of step downs is not to provide incentives but to artificially reduce workers’ compensation premiums for employers at the expense of injured workers’ entitlements. Step downs do not reduce work-related injury costs, but simply transfer a greater proportion to injured workers and the social security system. And to the extent that financial considerations influence their behaviour, artificial reductions in premiums also reduce the economic imperative on employers to improve workplace health and safety.

The notion that injured workers require cuts in payments to return to work is in part based on studies which show that return to work outcomes involving compensation recipients are lower than for non compensation recipients. The critical flaw in these studies is that, in overlooking the fact that workers' compensation schemes are much more adversarial and give rise to anti therapeutic effects which frustrate the return to work process, they compare apples with oranges rather than like with like.

There is also a considerable economic literature that maintains that higher weekly payments result in increased claims duration. While there is a statistical connection between the two it is much more modest than often claimed. The more important issue concerns the meaning of this linkage. Advocates of step downs argue that longer periods off work are evidence of malingering by injured workers. A more plausible explanation is that higher payments enable workers to recover more fully before returning to work. Conversely, substantial cuts in payments create economic pressures injured workers into returning to work before they have recovered which often increases the risk of an aggravation or recurrence of their initial injuries.

In 2005/06 Campbell Research and Consulting found that Comcare, which lays claim to the country's second highest level of weekly payments, has Australia's highest durable return to work rate was at 89%. Similarly, the Tasmanian scheme's return to work rate of 81% was higher than that of its Victorian counterpart, at 77%; despite weekly payments levels in Victoria being considerably lower than in Tasmania. Put simply, the level of income replacement is not a key determinant in driving return to work performance.

There are a number of other factors which do significantly influence a scheme's return to work rate. Apart from the nature and severity of injury, these include the size of the employing organisation, the attitude of its management towards injured workers, the organisation's workplace culture along with the rehabilitation process and its administration.

In relation to the rehabilitation process it is clear that WorkCover's own performance, and that of its former claims agents, has been less than satisfactory, a fact that is well known to stakeholders. It was also highlighted by the Stanley Review in its report to the state government in December 2002 where it drew attention to WorkCover's failure to provide rehabilitation on a timely basis and its lack of innovative return to work programs.

It has been the continuing failure in this area that is largely responsible for the South Australian scheme's poor return to work performance which, at 67%, is currently the second lowest in the country. Consequently, it is in this area that the greatest effort needs to be made in order to improve WorkCover's performance.

## Summary Points – Incentives

- Workers' compensation schemes make extensive use of step downs in weekly payments as return to work 'incentives' for injured workers.
- The evidence that step downs are necessary to improve return to work rates is both limited and unconvincing.
- The step downs argument fails to explain why schemes with higher weekly payment levels often obtain better return to work rates than those with lower weekly payments.
- Overwhelmingly, injured workers want to return to work but often need the assistance of their employers and WorkCover to do so.
- The nature and severity of injury, employer size, the attitude of management towards injured workers and workplace culture are critical determinants of return to work outcomes.
- The role of the compensating authority in managing the rehabilitation process is also a crucial consideration.
- This is one of WorkCover's strategic weaknesses; one that needs to be addressed as a matter of priority.

# REHABILITATION AND RETURN TO WORK

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Since the turn of the century there has been a marked increase in rehabilitation expenditure – from \$7.6 million in 1999/00 to \$19.3 million in 2005/06 – without any corresponding increase in WorkCover's return to work rates.

It is too early to judge whether the approach adopted by WorkCover's new agent EML will reverse this trend. However, as restoring the scheme's financial and operational health is likely to require a greater investment in rehabilitation services it is essential to ensure that expenditure on rehabilitation provides value for money.

The main aim of rehabilitation is to assist injured workers with an early return to work wherever this is practicable. There are though a number of systemic obstacles that frustrate this objective.

## Lodgement delays

A delay in the lodgement of claims is one such obstacle. There are two sources of delay. The first is where injured workers fail to provide early notification of injury to their employers. This can occur for a number of reasons including a lack of awareness of eligibility for compensation, job security fears or a belief that the injury was only minor. These issues can be addressed by 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.

The second source of delay involves employers, who 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. In almost 20 years of operation WorkCover has not once initiated proceedings against non-compliant employers. Instead of prosecuting employers, however, other than in exceptional circumstances, it would be more effective to issue on the spot fines for non-compliance - with relatively small fines for first offences and graduated increases for repeat offenders. Where delays are the result of circumstances beyond the employer's control no sanction should be applied. This proposal would require amending s. 52 of the Act.

## Provisional liability

A more fundamental issue concerns the claims determination process itself. Despite the importance attached to early intervention the fact remains that rehabilitation is for all practical purposes a function of the claims determination process - the longer it takes to determine a worker's claim, the longer the delay in commencing the return to work process and, where required, rehabilitation.

The New South Wales and Tasmanian schemes have sought to overcome this impediment 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 somewhat 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 is a form of provisional liability in that it enables WorkCover to provide 'interim benefits' pending the final determination of a worker's claim. To date WorkCover has used this section of the Act only sparingly. By contrast a number of self-insured employers, in both the public and private sectors, begin the return to work process straight away. However, if s.106 is to make a significant contribution to an improvement in scheme performance, it needs to be used on a comprehensive basis. Alternatively, it could be replaced by amendments to the Act based on 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, if 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 necessary 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 programme could materially assist South Australian employers in dealing with an increasing skills shortage.

## **Employment Protection for Injured Workers**

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 WorkCover's costs. Historically, WorkCover has been a leader in this area of scheme management.

The recent proposal, however, to outsource much of the responsibility associated with this function to EML is likely to result in confusion, a loss of accountability and deterioration in performance. This proposal is not based on an unfavourable review of WorkCover's own specialised unit. Rather it reflects a blind faith in the capability of a claims agent which has no track record in this area to discharge a complex quasi regulatory function.

On the last occasion WorkCover outsourced its responsibilities in this area the results were disastrous. For its part, EML needs to focus on its core function of case management. Regulatory, and allied, responsibilities should continue to reside with WorkCover.

On the legislative front, the current arbitrary restrictions on the applicability of s.58B and the notification requirements contained in s.58C should be repealed. There is also 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.

Consideration also needs to be given to determining whether additional staffing for the s.58B unit is required. If a cost benefit case can be made extra staff should be provided. In addition, every effort should be exerted to address employment protection issues at the earliest opportunity.

### **Financial Incentives**

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.

### **Safe Return to Work**

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

The 2006 Return to Work Monitor conducted by Campbell Research and Consulting found that 50% of South Australian workers, with a claim of 10 days duration or more, reported having had a

previous compensation claim. While not all of these recent injuries were necessarily the result of a recurrence of an earlier injury due to an unsafe return to work in the past, it is likely that many were.

A safe return to work should be the conclusion to a successful return to work program. At present, however, there is no requirement to ensure that this is actually the case. 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 such as those who have been off work for three months or more.

### **Specialised Services**

For some types 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.

### **Workplace Modification Fund**

It is sometimes not practicable for otherwise sympathetic employers to accommodate a return to work by injured workers because of the excessive cost involved in modifying the workplace. This is particularly the case with smaller employers, WorkCover's largest employer cohort.

Consideration should be given to establishing a Workplace Modification Fund to provide 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.

To be effective such a 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 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 in the Victorian scheme.

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.

It is envisaged that the functions of the Inspectorate 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.

### Summary Points – Rehabilitation and Return to Work

- Rehabilitation and affective return to work program are the key to improving WorkCover's performance.
- Delays in the lodgement of workers' claims by employers are an ongoing issue that requires a greater compliance response by WorkCover.
- A system of provisional liability should be introduced at the earliest opportunity to facilitate earlier return to work outcomes.
- Retraining of injured workers should be embraced as an integral part of WorkCover's to return to work philosophy.
- Responsibility for s.58B and c should be retained by WorkCover, additional staffing should be considered and amendments to extend the coverage of employment protection enacted.
- WorkCover's decision to outsource the RISE program to EML should be reversed, the program should be incorporated into the s.58B unit (or the proposed Return to Work Inspectorate) and greater emphasis placed on securing suitable employment for long-term claimants.
- A safe return to work program should be introduced to promote more durable rehabilitation outcomes.
- Specialised services for complex injuries - eg occupational stress – should be provided to achieve earlier return to work rates.
- A Workplace Modification Fund to assist smaller employers help injured workers return to work should be piloted.
- A Return to Work Inspectorate should be adopted to promote compliance with return to work obligations.
- WorkCover's coordination and oversight of return to work services needs to be substantially improved.

# REDEMPTIONS

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Redemptions have been a feature of the WorkCover's scheme since its inception, although their use has very substantially over this period. The main advantage of redemptions is that they finalise liability for the insurer and provide injured workers with some form of closure. The major disadvantage is that they can cut across the return to work process.

In the past, particularly during the period from 1995 to 2002, there was an excessive reliance 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.

Redemptions continue to be widely used but need to 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.

They should also be offered on a more equitable basis. In particular, WorkCover's practice of using s. 35 (6a) is not only inequitable but often counterproductive as well. Instead of encouraging the acceptance of redemption offers it has the opposite effect, as many workers are reluctant to sign up to a redemption offer that precludes weekly payments in the event of new injury. Similarly, many are unwilling to accept a redemption if it excludes ongoing medical payments associated with their injury.

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

## Summary Points – Redemptions

- Redemptions should continue to be used but on a more selective and equitable basis.
- WorkCover needs to revise its use of s. 35 (6a) in relation to new injuries and ongoing medical expenses.

# DISPUTE RESOLUTION

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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, however, 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 attacking the rights of injured workers and the role of arbitrators, lawyers and the judiciary. Of particular concern are its proposals to discontinue injured workers' weekly payments where disputes concerning income maintenance occur, and reduce the ability of workers to contest dubious decisions by reducing the legal costs to which they are currently entitled.

There are also proposals to transfer responsibility for adjudication on a wide range of issues concerning workers' entitlements from the Tribunal to Medical Panels. They were used briefly in the past but were scrapped because of excessive delays, poor quality decision making and difficulties in constituting panels on a timely basis. More fundamentally, it is inappropriate that decisions of a judicial (and quasi judicial) nature be delegated to persons with no formal legal training or expertise. Even more inappropriate is the WorkCover proposal that there be no right of appeal from decisions by Medical Panels.

The combined effect of these proposals would be a return to the pre-WorkCover era. This period was characterised by decisions that were often based on cost cutting rather than an impartial adjudication of workers' claims, and where workers' capacity to appeal such decisions were prejudiced by cost hurdles, extended delays, and 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.

## Summary Points – Dispute Resolution

- The current system works well but can and should be improved.
- The adoption of provisional liability could eliminate many unnecessary disputes.
- An expedited process for the resolution of disputes concerning rehabilitation and return to work issues also needs to be introduced.
- WorkCover's proposals to curtail workers' rights should be rejected as a recipe for capricious decision-making.
- The proposed replacement of the Workers' Compensation Appeal Tribunal by Medical Panels to adjudicate on key entitlement issues for injured workers is unnecessary, inappropriate and should not be proceeded with.

# WORKPLACE HEALTH AND SAFETY

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Workplace health and safety remains as a major issue for the WorkCover scheme. This is particularly so as far as serious injuries are concerned. Since the start of this century the number of injuries that have incapacitated workers for 10 days or more has actually increased, to an estimated 5460 in 2006. The real number is likely to be considerably higher given that many workers, for various reasons, do not report their injuries.

Although primary responsibility for workplace health and safety now rests with SafeWork SA, WorkCover can play a supportive role in promoting improvements in this critical area.

This should include a thorough, independent, review of its existing programs. This includes its flagship bonus and penalty scheme which continues to allow unscrupulous employers to rot the scheme by manipulating their claims costs to obtain bonuses when they should be receiving penalties.

On a more positive note, WorkCover has in the past used television advertising to promote the need for improvements in workplace health and safety management. 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.

## Summary Points – Workplace Health and Safety

- Work-related injury in South Australia remains at an unacceptable level.
- Workcover should provide ongoing funding to SafeWork SA for TV advertising and public education campaigns including involving targeted inspections by SafeWork.
- WorkCover's other programs should be independently reviewed to determine their integrity and effectiveness.