



# SA UNIONS



Submission from SA Unions to the  
Review into the South Australian Workers  
Rehabilitation and Compensation Scheme

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# HISTORY AND BACKGROUND

SA Unions is the peak union organisation in SA. The workers compensation system is one of the three key areas of our core work, the others being occupational health, safety and welfare and industrial relations.

There is considerable expertise in the union movement about injury management, return to work, compensation and the impact of the system on individual workers and organisations. We were involved in the development of the Workers Compensation and Rehabilitation Act in 1986 and have had representatives on the

financial difficulties which were for years down played by the management of WorkCover to the Government and the Board.

With the election of the current Labor Government, the Board was replaced. The new Board discovered quite quickly that there were serious problems with management, priorities and accountability of the agents and that the financial position of the scheme has not been accurately portrayed to the public. The scheme was in financial difficulty due to long standing mismanagement of the Corporation as well as poor claims management of the agents.



Board since then. On a daily basis we represent workers who have been injured at work, are undergoing rehabilitation and seeking compensation under the Act.

We therefore are in an excellent position to comment on the scheme and its impact on workers as well as the financial standing of the scheme.

Our longstanding aim is to ensure that we have a well managed fund that is financially viable and where injured workers are treated fairly and are able to return to work and the community safely and quickly. We know workers overwhelmingly want to return to productive work.

The scheme is designed to balance the needs of injured workers and employers through a scheme that fairly compensates and cares for those who have been injured at work at a lower cost to business than would be available from private insurance.

From 1987 – 1993 the Workers Rehabilitation and Compensation Scheme functioned effectively including being fully funded. At that time claims were managed in-house and the WorkCover Board contained equal representation from employer and unions with one presiding officer and one rehabilitation expert.

In 1994, the then Liberal Government removed the existing Board, changed the Board structure, outsourced claims management of nine insurance agents and made other changes to the legislation that allowed redemptions into the scheme for the first time, where workers could be bought out of the scheme.

This was the beginning of the poor performance of the scheme and the source of many of the current problems.

The performance of the agents combined with the poor and unfocussed management of WorkCover sent the scheme into

The Board proceeded to replace the whole of the senior management, including the CEO. The Board also made a large number of significant changes:

- Developed a vision, mission and key performance indicators that clearly focused on the aims of improving return to work and having a fully funded scheme.
- Employed only one legal firm at a significantly lower cost.
- Undertook reviews of major parts of the scheme's operations such as the medical and rehabilitation processes and the code for self-insured employers.
- Re-wrote the contract for agents to be more accountable to the organisation's aims of return to work and being fully funded and employed one agent, Employers Mutual, rather than the four previous agents.

All these changes took time due to the legislative process (eg new agent contracts had to go through Parliament) and have only just begun to have an effect. The new agent has only been fully operational since March 2006.

In late 2006 the view that these strategies will turn the scheme around changed as the financial position of the scheme was assessed and actuarial reports gave a more pessimistic picture of the scheme's recovery.

The Board made recommendations to the Minister that recommended a legislative change agenda with corresponding reductions in workers' entitlements along the lines of the Victorian scheme. A dissenting report was also delivered to the Minister that contained a different view. (Appendix 1)

## THE FINANCIAL STATE OF THE SCHEME AND RETURN TO WORK RATES

There is no doubt that the funding ratio of the scheme is not satisfactory. SA Unions supports a well-managed scheme that is financially viable. We also want workers to be able to return to work and the community safely and quickly.

We know that overwhelmingly injured workers want to return to productive work. This is also therefore the aim of unions who advocate for injured workers.

The current focus on unfunded liability has produced a misleading picture of WorkCover's financial position. This, in conjunction with a particular methodology which is not performance based, gives a warped picture of the health of the fund. The better measure of the funds health is the funding ratio. Although not currently satisfactory, it is trending upward. If performance methodology was used the 2005/06 funding ratio would have been 76.6%. (*Getting WorkCover Back on Track*, Dr Kevin Purse)

The financial state of the scheme is contingent on a range of factors, but largely on return to work rates. Looking at return to work rates as a "worker only issue" is the fundamental flaw in the WorkCover Board recommendations.

A range of levers exist in the legislation and are designed to deliver the objects of the Act, which has both financial and social imperatives. There needs to be recognition in examining the financial state of the scheme that the factors that lead to good return to work rates are a combination of worker, employer, agent and rehabilitators behaviour. The review should include a specific analysis of the current levers within the legislation and whether those levers have been implemented effectively by the Corporation and/or Agents current and past.

## EMPLOYER LEVIES

We note that one of the key objectives of this review is a reduction in employer levy. We do not have any objections to decreases in employer levies. We would only object if the reduction of levies were paid for by reducing the entitlements and fair treatment of injured workers.

It appears that the WorkCover Board recommendations are more geared to reducing costs to employers rather than improving the operation of the scheme.

Reduction of costs to employers should not be the key imperative here. Employers can assist in the financial improvement of the scheme by taking more responsibility in getting workers back to work rather than looking only at their "bottom line" business costs. This is a far more responsible approach and in the long term will lead to a more viable scheme through better return to work rates.

It is a concern that employers in our state, who have an unacceptable level of workplace injury, are campaigning to reduce the workers compensation entitlements of injured workers through their peak body Business SA.

## THE BOARD RECOMMENDATIONS

The Board recommendations are focused almost solely on reducing the entitlements of injured workers. There are no recommendations about changes in legislation that relate to the agent, employers or other players in the scheme. There are no recommendations to look closely at the management of injured workers, the practice of claims managers or the operation of the agent and key professionals such as rehabilitation providers and medical practitioners.

Workers compensation is a complex matter. It is well known and acknowledged that there needs to be a focus on all elements and participants of the scheme in order to ensure that it operates effectively. Just focusing on financial viability and employee entitlements gives a warped view of the issues and the solutions. We also need to look at employer behaviour and agent behaviour in managing claims and the role of rehabilitation and medical treatment.

## IMPACT OF THE BOARD RECOMMENDATIONS ON INJURED WORKERS

WorkCover Board Recommendation	Implications of the Change
1. 95% of the workers' Average Weekly Earnings (AWE) from commencement of claims.	<p>Workers would be punished for being injured. Low paid workers punished more. 95% of the minimum wage is only \$486.27 per week which would make it extremely difficult for an injured to support a family or pay their mortgage.</p> <p>It may lead to workers using up leave entitlements rather than lodging claims and increased stress due to family and income pressures.</p>
2. 75% of AWE from 13 weeks.	<p>Could lead to workers going back to work before they are better, leading to secondary injuries.</p> <p>The impact would be greater on low paid workers on a minimum wage. 75% of the minimum adult wage is only \$383.90 per week.</p>
3. Amend definition of AWE to reflect what the worker has earned in the previous 12 months, or a lesser period as is appropriate, as per Victoria.	Problems with defining it this way for seasonal workers and workers on daily hire or where pay is structured in step-ups.
4. Maximum AWE payable to an injured worker capped at \$1,190 (indexed).	<p>Too low wage level.</p> <p>High risk industries and jobs often have higher pay rates eg mining and are more likely to have injured workers.</p> <p>Could be a significant lowering of wages for many.</p>
5. Work capacity reviews to occur at the end of the second year using the Victorian model (cut off payments after 2 years).	<p>Will only lead to reduction in commitments to Return to Work efforts by Employers, Agents, Rehabilitation Providers, etc and will be contrary to the objects of the Act.</p> <p>Could encourage employers and agents to wait for the two years in order to get rid of injured workers. (This can be done through excessive disputation and delays which is already a problem).</p>
6. Allow WorkCover to deem a level of earnings for a partially incapacitated worker in the first two years of a claim. (Victorian provisions)	Again contrary to the objects of the Act and no guarantee of fairness and no right to dispute decision.
7. Cap entitlements to medical expenses at 12 months after the cessation of payments for income maintenance.	A number of claims are medical only with no time lost. This would disadvantage these people who are actually back at work and may lead to them having time off work due to a reduction in their treatment.
8. Use the Victorian provisions for non-economic loss (less payments overall but higher payments for severely injured).	<p>In principle not a bad concept in isolation but in conjunction with the reduction in payments for weekly earnings the proposal serves to shift the focus from the concept of "income maintenance" for the period of incapacity of an injured worker to "lump sum culture" within the scheme. This is totally contrary the culture required within the SA Scheme.</p> <p>It would mean some workers would get very little money to live on. It would only work if the levels of payments for all were at a livable rate.</p>
9. Lump sum payment upon the death of a worker be at a higher level (prescribed sum as per Victoria) \$363.660.	Increases in these circumstances would be welcomed in isolation, however it is clear this is proposed within the recommendations to crudely attempt to offset the significant injuries and rely upon the system through the injured period prior to return to work. It really only affects very few people. Most Sec 43 payouts are for workers at a lower level of injury.



WorkCover Board Recommendation	Implications of the Change
<b>10. Exclude common law</b>	<p>Common law is part of the Victorian scheme. It is interesting therefore that the recommendations pick up most of the aspects of the Victorian scheme except for common law. The current common law exclusion in SA is a fundamental response to the pension concept inherent in the current legislation. It therefore follows if the concept is to be altered the reintroduction of Common Law access for workers has to be the response.</p>
<b>11. Dispute resolution process to consist of 3 stages</b> <ul style="list-style-type: none"> <li>• conciliation</li> <li>• where not resolved, a full hearing by single presidential member of Tribunal</li> <li>• Appeal to Supreme Court on matters of law</li> </ul>	<p>Could lead to employer behaviour where they refuse to conciliate and push to the final stage knowing that workers do not have the capacity to pay Supreme Court costs.</p> <p>This model could be more expensive and could lead to more costly disputes.</p> <p>Currently the percentage of disputes resolved at conciliation is very high and judicial determination is very low.</p> <p>The Tribunal system is low cost, speedy and fair. This system would benefit those with money eg employers.</p>
<b>12. Establish medical panels based on</b> <ul style="list-style-type: none"> <li>• Victorian legislative framework – operations, functions, and scope of panels</li> <li>• Queensland approach for selection – use of stakeholder selection committee</li> <li>• Broad design outlined in proposal</li> </ul>	<p>SA has had the Medical Panel concept in place previously under the current Scheme. It was abolished for good reasons and should not be reintroduced for the same good reasons.</p> <ul style="list-style-type: none"> <li>• traditionally treating practitioners have been reluctant to participate in medical panels in other jurisdictions</li> <li>• the constitution (and process) of medical panels moves away from the strong regard held for an injured workers treating practitioners</li> <li>• there is no appeal process</li> <li>• there is no accountability of the sitting members giving their medical opinion (no cross examination)</li> <li>• there will be little scope to bring medical disorders/injuries to the panel for test, that fall on the fringes of 'traditional' injuries</li> <li>• in other common law jurisdictions, the judiciary is charged with determining questions of a medical nature.</li> </ul>
<b>13. Legal costs</b> <ul style="list-style-type: none"> <li>• Change structure of legal costs.</li> <li>• Limit amount a solicitor can recover from a worker to costs claimable to WorkCover.</li> <li>• Solicitor able to have costs made against them if costs incurred were the solicitors fault.</li> <li>• Workers put "at risk" if matter goes to judicial determination.</li> </ul>	<p>Injured workers must be guaranteed access to the dispute resolution process. If a cap on legal fees are regulated, private law firms will be reluctant to represent injured workers, taking into account the possible complexities of dispute and time involved. This may adversely impact on an injured worker being able to access professional assistance in resolving a dispute.</p> <p>It is good to have costs made against the solicitor if they cause unreasonable delay or deferring of cases.</p> <p>To put workers at risk if the matter goes to judicial review is in contradiction to the principles of natural justice.</p> <p>It could also lead to employers and agents pushing matters to JD in order to discourage workers using their rights to dispute.</p>
<b>14. Income maintenance discontinued while there is a dispute. If dispute is found in workers favour, arrears of weekly payments should be paid, with interest.</b>	<p>This is just straight punishment.</p> <p>Costs can be recovered under the Act. This is just a way of ensuring workers are discouraged from disputing claims which should be their right and not be reliant on whether or not they can afford to dispute.</p>

WorkCover Board Recommendation	Implications of the Change
<p><b>15.</b> If the above is implemented WorkCover has power to intervene with self-insured employers if they are using this power improperly.</p>	<p>Who?</p> <p>How?</p> <p>And how would you know what was happening?</p> <p>How would workers be able to raise these issues if they believed it was happening?</p> <p>WorkCover does not have a good record with policing compliance.</p>
<p><b>16.</b> Notice period for cessation of payments for less than 12 weeks – immediate, 12-52 weeks – 14 days, and over 52 weeks – 28 days.</p>	<p>Double whammy for workers when read in conjunction with 14.</p> <p>Anecdotal evidence suggests around 70% of decisions made by the Agents on behalf of the Corporation are overturned. To pursue this amendment is to confine those workers to an immediate cessation of income and subsequent deprivation for their family only to find some considerable time later that they still had an entitlement. The damage by then is already done and the likelihood of the worker remaining on the scheme has increased as supported by many researchers with expertise in this area.</p>
<p><b>17.</b> Levy</p> <ul style="list-style-type: none"> <li>• Increase statutory cap on levy to 15% with transition provisions.</li> <li>• WorkCover Board to set the minimum levy.</li> <li>• WorkCover levy to be paid in advance.</li> <li>• Employers with annual remuneration under \$10,000 per annum not required to pay levy unless a claim is lodged by one of their workers.</li> </ul>	<p>These are good changes to levy setting and collection.</p> <p>The current system does not accurately reflect the rate of injury in some workplaces.</p> <p>Very small businesses have very few claims and it seems a large administrative impost on these businesses to pay the levy.</p> <p>These recommendations would provide a fairer way of funding the scheme through levies.</p>
<p><b>18.</b> Self insured employers</p> <ul style="list-style-type: none"> <li>• Requirement of 200 workers for self-insurance to be legislated.</li> <li>• Allow for groups of incorporated associations to qualify for registration as self-insurers.</li> <li>• Allow for restructures and reorganisations to be specifically provided for with WorkCover having the discretion to transfer, split, amalgamate or extend registrations where appropriate.</li> <li>• Allow for the change of the nominated employer in a self insured group.</li> <li>• Incorporate the one in all in rule into legislation.</li> <li>• Allow WorkCover to consider the effect on the fund when a group of employers increases its number through acquisition of further subsidiaries.</li> </ul>	<p>The requirement for 200 needs to be legislated as the situation is currently confused. It is one of the lowest levels in the country as a requirement to be self-insured.</p> <p>SA has the highest percentage of self-insured employers in the country. (Over 40%)</p> <p>The theory is that this should lead to better outcomes for injured workers. Unfortunately, this is not the case and the performance of self-insured employers is not necessarily better than registered employers in a number of industries.</p> <p>Experience is that many employers will do anything they can to avoid their workers compensation and industrial obligations. All these recommendations could lead to this as employers restructure in order to shift and reduce costs.</p>
<p><b>19.</b> Technical amendments.</p>	<p>A number of these are necessary in order to allow for the smooth running of the current scheme and in light of recent legal cases.</p>

## DISSENTING THE BOARD VIEW

The recommendations of the Board were not unanimously endorsed. A Freedom of Information request made by Nick Thredgold, President of SA Unions reveals that a dissenting report was also given to the Minister of Industrial Relations that was not released publicly at the time of the announcement of the Review. (Appendix 1)

This dissenting view provides an alternative to that determined by the Board at the meeting in November 2006.

This view states

*The basis of the conflicting views at the Board can be best characterised as:*

- a) Whether the decisions of the Board taken in the last 3 years will be sufficient to provide the scheme improvements required to deliver a sustainable workers compensation system in South Australia, or*
- b) Whether legislative change is necessary in order to deliver the sustainability required.*

The paper goes on to state that there is confidence at the Board level that the reforms and decisions made have been the right ones in the context of the objectives of the legislation and the expectations of Government and the community.

It suggests that the changes be given time to take effect before legislative change be considered. This view is supported by a report commissioned by the Board.

(Finity – Claims Baseline review) which highlights the failings of the Agents with regard to implementation of the current legislation.

This analysis revealed that it is not the legislation that is necessarily at fault but the implementation of the levers that exist in the legislation not being used effectively by the agents.

In particular

- A failure in appropriate levels of communication by Agents with stakeholders of a claim.*
- A lack of identification initially, and throughout the life of a claim, of the likely duration of the claim in order to match the claim management strategy to the potential duration of the claim. (A major plank of Employers Mutual strategy).*
- Abrogation of claim management responsibility of Agents to rehabilitation providers. (A hands off approach).*
- A lack of pursuit of return to work activities by Agents claims managers, particularly total to partial incapacity. This is a likely contributor to increased income maintenance payments and increased claim durations.*

- “Mitigation strategies” (incentive levers) were only proactively implemented in 74% of claims where the review found such strategies would have been appropriately utilised.*
- Employer obligation to provide employment were not pursued by Agents in 60% of claims requiring enforcement of those obligations (Section 58B). Finity found fulfillment of those obligations ‘would contribute to better outcomes’.*
- Agents did not proactively seek out ‘stabilisation status of the injury’ in 48% of claims. (This information of itself is important in determining strategies for return to work and discontinuance).*
- The preparation for review at 24 months of the claim was found by Finity to occur too far into the life of the claim to be effective in determining the continuance or otherwise of the claim. (This has manifested into the view held by decision makers as the ‘don’t bother, we can’t win’ attitude).*

The dissenting paper points out that there were other elements of claims management that could be improved but those above, they believed, would deliver the sustainability desired by all stakeholders.

The paper concludes that Employers Mutual was selected as the sole agent based on their focus on better claims management.

*The agent and the corporation management should be given the opportunity to deliver on their mutual beliefs, and for that matter the Board’s belief, that decisions of the last 3 years are the right decisions before resorting to the tailoring of the legislation to avoid having to implement the current Act.*

## OBJECTS OF THE ACT AND RESPONSIBILITY OF THE BOARD

The objects of the Workers Rehabilitation and Compensation Act are:

To **establish** a Workers Rehabilitation and Compensation Scheme that achieves a reasonable balance between the interests of employers and the interests of workers:

- That provides for the effective rehabilitation of disabled workers and their early return to work.
- That provides fair compensation for employment-related disability.
- That reduces the overall social and economic cost to the community of employment-related disabilities.
- That ensures that employers’ costs are contained within reasonable limits so that the impact of employment-related disabilities on South Australian businesses is minimised.



To **provide** for the efficient and effective administration of the scheme.

To **establish** incentives to encourage efficiency and discourage abuses.

To **ensure** that the scheme is fully funded on a fair basis.

To **reduce** the incidence of employment-related accidents and disabilities.

To **reduce** litigation and adversarial contests to the greatest possible extent.

The Act also makes it clear that:

*A person exercising judicial, quasi-judicial or administrative powers must interpret this Act in the light of its objects without bias towards the interests of employers on the one hand, or workers on the other.*

It is the view of SA Unions that there is a bias in the Board recommendations in favour of the interests of employers, particularly in the focus on the reduction of the employer levy rate and the lack of emphasis on the responsibilities of employers in the return of injured workers to work. This is not appropriate considering the imperative under the Act that the Board interpret the Act without bias towards the interests of employers or workers.

The recommendations of the Board do not meet the objects of the Act that relate to:

#### **Reasonable balance between the interests of employers and the interests of workers**

The recommendations will mean that workers entitlements would be decreased in exchange for a reduction in employer levies. Employers would be significantly better off financially and workers would be significantly worse off.

#### **Effective rehabilitation and return to work**

Cutting off and reducing financial support to injured workers does not assist in rehabilitation. It may assist in return to work but could mean that injured workers go back to work due to financial hardship, not because they have recovered from their injuries.

#### **Fair compensation**

The changes proposed would be unfair.

#### **Reducing the overall social and economic cost to the community of employment-related disabilities**

The recommendations could lead to financial hardship leading to social and economic costs to the community. This is likely to shift the cost of workplace injury from the employer and workers compensation scheme to the general community and other systems of support such as the welfare system and disability services.

#### **To establish incentives that encourage efficiency and discourage abuses**

The focus of the Board recommendations are on the worker and do not in any way address the problem of employer avoidance of their obligations under the Act or the ineffectiveness of the Corporation and its Agents to implement the current legislation as identified by Finito in their review referred to earlier in this submission.

It is of concern by SA Unions that the Board has focused so much on reducing entitlements to injured workers and not examined the issues in a balanced way that also looks at the behaviour of employers and levers that seek to enforce employer obligations to keep workers safe and return them safely to work.

### **EMPLOYER BEHAVIOUR**

The area not discussed by the Board recommendations is the impact of employer behaviour in improving return to work rates. It is often the management of the worker and the claim that leads to unsatisfactory return to work, rather than any avoidance on the part of the worker.

Unions representing their members see examples of this behaviour which include:

- Late lodgement of claims with WorkCover.
- Excessive disputation by employers and agents even of small and straightforward claims.
- Disputing claims after the agent has accepted them.
- Hostility to the injured worker and lack of support from the employer in accessing rehabilitation.
- Lack of attention to workplace safety and fixing issues that have caused the injury.
- Using disputation and pressure in the hope that workers will leave the organisation.
- Not supporting workers to find alternative duties.
- Lack of support for training for alternative duties.
- Lack of understanding and/or commitment to their responsibilities to their employees who are injured.

We are happy to provide real examples and case studies that illustrate all of these issues.

There are of course examples of employers who use good practice when it comes to safety and workers compensation and do not see the WorkCover levy as an impost, but rather part of the obligations of employing people.

In tackling the issues facing the scheme it is far more responsible for employers to reflect on the impact of their behaviour on the return to work rate. To deny that they have responsibilities in the matter and instead seek to reduce their costs through a radical reduction in the support and fair treatment of injured workers is not constructive.

## AGENT BEHAVIOUR

Poor return to work rates can also be attributed to the management of the claims by the agents.

Over many years we have witnessed a range of behaviours that have got in the way of speedy and safe return to work eg

- Lateness in determining claims
- “Hands off” approach to files and injured workers
- A culture of insurance which beset workers under the 1971 Act
- A focus on their bottom line as opposed to the scheme’s bottom line
- Late referral to rehabilitation providers in cases where early referral would have returned better outcomes

We applaud the WorkCover Board for recognising the poor performance of the past and making the significant move to redesign the agent contract and employ only one agent with a good track record of achieving fast and safe return to work.

Unfortunately, the Board has not allowed enough time to determine if the new agent will bring the desired results before looking at reducing worker entitlements through legislative change. It would be more effective in our view to concentrate on fully supporting the agent to improve the return to work rate rather than focusing on the legislation.

There are in our view enough levers for both workers and employers for agents to use to improve the operation of the scheme. There is a lever to remove workers from being in receipt of income maintenance when they are no longer incapacitated wholly or partially. There is a lever to prevent workers from nonparticipation in return to work plans or programs. There is a lever to issue penalties upon employers for failure of their obligations to report claims within timeframes, to fail to provide suitable duties to the partially incapacitated. There is a lever to overcome delays in determinations. We could go on but it is suffice to say any claim by the Corporation that it requires “levers” to assist in the fulfillment of its obligations must be severely questioned.

Further, Employers Mutual, in tendering for the sole agency, must surely have been confident that they could deliver the requirements of the Corporation in reigning in the unfunded liability by effective management of claims and return to work strategies and make a profit under the current legislation. One has to question why, so soon after the shift to one Agent, the Corporation is suddenly lacking confidence in its strategy. If the Agent tendered on the basis of the current legislation the Agent should be given the time to carry out that which it is hired for. (They have only had control of all claims for around 12 months and have had to function through a significant transitioning process).

To focus on the legislation as the problem could lead to the agent not fully focusing on their own performance and using the legislation as an excuse for not dealing adequately with their issues.

## WORKERS' BEHAVIOUR

We acknowledge that there are workers who also behave in ways that do not act in the interest of their own return to work. However, these people are very few in number and as stated earlier the levers currently exist to correct such behaviour.

We repeat that it is our strong experience that workers do not seek to be injured and if they are unfortunate enough to be injured; their main desire is to return to productive work. Being on ‘compo’ is not an attractive way of living or working.

It is also true to say that the evidence shows the longer a person is on the scheme; the less likely they are to return to work. We believe this says more about the way people are treated than anything else.

The Board recommendations in some instances seem to assume that workers are “on the take” and need to be forced back to work and discouraged from disagreeing with their employer or WorkCover through financial punishment.

It is also important to recognise the unequal power that exists in the employer/worker relationship. The employer is responsible for creating a safe workplace.

Workers have far less structural power in the workplace and fewer resources. The SA Workers Compensation Scheme is designed to balance this unequal power through the provision of an income safety net and access to a free tribunal.

The higher levels of job insecurity because of increased casual work and no access to unfair dismissal protection has increased the power of employers. That is why it continues to be important to recognise the power indifference and the current legislation does so in its objectives.

Solutions that deny this imbalance only serve to increase it. Fairness and balance should continue to be guiding principles in the SA Compensation system as they are in the SA Industrial system and the SA OHS system.

## REHABILITATION

A significant and important review was commissioned by WorkCover into rehabilitation in 2006. This provided some excellent recommendations. SA Unions supports these recommendations and urges them to be implemented. It is our view that the professionalism and standards of rehabilitation providers is not consistent and sometimes not at a high standard. If we are to improve the return to work rate this area needs considerable work.

## SELF-INSURED EMPLOYERS

The Board has also reviewed this area in the last three years and a system established which is delivering better employer commitment to OHS and injury management through a “natural consequences” model. This review has also led to Government agencies coming under the scrutiny of WorkCover as self-insured employers for the first time.

## SEC 58B/C – OBLIGATIONS OF EMPLOYERS IN EMPLOYING THEIR INJURED WORKERS

SA Unions is concerned that there has been inadequate enforcement of the employer's obligations under section 58B for many years. This area of WorkCover's work has been poorly resourced and there has been a systematic downplaying of its importance by WorkCover management. We believe this is because there has been an uneasiness to tackle employers in a way that demands they comply with these obligations under the Act, yet it is one of the most important determinants in recovery of injured workers.

In 2006, there was a proposal to outsource this function that was strongly opposed by the union movement. This was because we saw it as an enforcement function that as the regulator was better done by WorkCover.

The Board commissioned a review of this function to determine whether it should be outsourced. Unfortunately, it appears that the outsourcing will take place regardless of a number of recommendations made by this review.

## RETRAINING

There are a number of workers where everyone agrees will not be able to go back to their previous employment once they are injured, eg store persons who have serious back injuries.

It is of great concern therefore that there has been very little focus by WorkCover and the agents on the issue of retraining. The cost of retraining a worker with alternate skills may seem high but compared to the costs – both financial and human, of sitting on the Scheme for many years, they are small.

The Scheme has failed to implement retraining as a form of rehabilitation, which is clearly identified as a provision of the Act, in seeking to reduce the reliance of injured workers on the scheme particularly those workers who have little or no transferable skills at the time of getting injured at work.

## WHAT WE KNOW WORKS FOR EARLY RETURN TO WORK

It is agreed in the workers compensation community that speedy and safe return to work is more likely if there is:

- Fast lodgement of determination of the claim
- Claims agents with good people skills
- A supportive work environment
- Early and effective rehabilitation
- Placement back into the workplace in meaningful work
- Retraining where necessary

## THE VICTORIAN SCHEME

The Board recommendations look to the Victorian Scheme as the answer to the financial situation of the SA scheme. It is important therefore to examine this scheme not just from a financial standpoint but also in relation to its impact on injured workers.

As part of this submission we attach a briefing note about the background and operation of the Victorian Scheme. (Appendix 2)

It is our understanding that the Bracks Government has committed to review and improve the entitlements to workers in the Victorian Scheme and discussion about this will occur later this year.

It is simplistic to adopt aspects of another scheme with a different context and history, transplant aspects of it into our state and expect that it will automatically deliver the same financial results.

Workers compensation schemes are complex and the answers to their financial and social success require us to look at a range of interactive measures.

SA's workforce and economy is unique. For example, we have a different mix of industries to Victoria and we also have a significantly higher percentage of self-insured employers compared to other states.

We need South Australian answers to our issues that recognise the need for a sophisticated approach that takes into consideration all the aspects of what we know works. There is no easy answer and we are concerned that just picking up aspects of the Victorian scheme as the solution could actually be a disastrous social experiment at the expense of workers.

## REFERENCES

The WorkCover Rehabilitation Review  
The Review of the Code for Self-Insurance  
Review of Section 58B/C  
Finity – Claims Baseline Review

We suggest the Review team obtain and consider these reports in their deliberations.

We would be keen to discuss this submission and any other matters with the Review team and reserve the right to provide additional information and comment during the Review process.



# APPENDIX 1 –

## THE MINORITY REPORT

**TO: MINISTER FOR INDUSTRIAL RELATIONS**  
**RE: WORKCOVER SCHEME STATUS**

### INTRODUCTION

This paper has been prepared to provide an alternative view to that determined by the Board at the meeting held on 28th September 2006.

This paper does not seek to criticise the Board for its decision but to provide substance to the position adopted by dissenting members of the Board in relation to the issue of the status of the scheme.

The basis of the conflicting views at the Board can be best characterised as:

- a) whether the decisions of the Board taken in the last 3 years will be sufficient to provide the scheme improvements required to deliver a sustainable workers compensation system in South Australia, or
- b) whether legislative change is necessary in order to deliver the sustainability required.

There exists significant confidence at the Board that the decisions taken in the last 3 years have been the right decisions and necessary if we are to achieve the objectives of the legislation and the expectations of Government and the broader community. The confidence of the Board remains high that the structural changes within the Corporation, including the Management Team, the single Agent, the single Legal Services arrangement, the revised arrangements with all other service providers as well as current and ongoing internal operational changes will contribute to the stated objectives and expectations referred to above.

The recent annual results were a disappointment to all members of the Board and has clearly formed the foundation of the Board decision carried at the 28th September 2006 meeting, as is evidenced within the communication to Government.

We, the undersigned Board Members, differ on the view as to whether the significant changes “alone” will be sufficient to improve the scheme to sustainable levels of funding without changes to the legislative framework.

It is our considered view the changes should be allowed to take effect before any foray into the Parliament be considered.

There are a number of considerations which are available and support this view. Below represents part of those considerations.

The Board has recently received a report (Finity – Claims Baseline Review). This report highlights the underlying failings of the Agents with regard to implementation of the current legislation. It therefore follows the Corporation, being the responsible authority has to accept its part in those failings.

This report identifies those failings based upon a review of claimants’ files to analyse what Best Practice activities have

or have not been carried out or inadequately implemented. The report is revealing in that it confirms the Board and Management’s views, held since the appointment of the current Board, in relation to the performance of Agents.

Moreover, the report succinctly captures the fundamental areas of the legislation that have to be implemented at and throughout the life of a claim in order to prevent claims remaining, unnecessarily, in receipt of payments for durations currently and historically evident in the statistics.

It is sufficient, for the purposes of this paper, to highlight some of the findings:

- A failure in appropriate levels of communication by Agents with stakeholders of a claim.
- A lack of identification initially, and throughout the life of a claim, of the likely duration of claim in order to match claim management strategy to the potential duration of the claim. (A major plank of Employers Mutual strategy)
- Abrogation of claim management responsibility of Agents to Rehabilitation Providers. (A hands off approach)
- A lack of pursuit of return to work activities by Agent claims managers particularly total to partial incapacity. This is a likely contributor to increased income maintenance payments and increased claim durations.
- “Mitigation strategies” (incentive levers) were only proactively implemented in 74% of claims where the review found such strategies would have been appropriately utilised.
- Employer obligation to provide employment were not pursued by Agents in 60% of claims requiring enforcement of those obligations. (Section 58B). Finity found fulfillment of those obligations “would contribute to better outcomes”.
- Agents did not proactively seek out “stabilisation status of the injury” in 48% of claims. (This information of itself is important in determining strategies for return to work and discontinuance).
- The preparation for review at 24 months of the claim was found by Finity to occur too far into the life of the claim to be effective in determining the continuance or otherwise of the claim. (This has manifested into the view held by decision makers as the “don’t bother, we can’t win” attitude).

The Finity review identified other elements of claims management where room for improvement existed. However, the elements identified above have been selected for this paper as they represent basic, but fundamental provisions of the current legislation which are the “incentive levers” (so strongly called for in the Board decision) in achieving the objectives

of the Act and the Scheme and if properly managed and implemented objectively will deliver the sustainability desired by all stakeholders.

Employers Mutual were selected to become the sole Agent based on their performance in other jurisdictions in achieving return to work and discontinuances by better management of claims. In reports provided to the Board, either by Corporation Management or Management of Employers Mutual presentations, their focus on proper management of claims has been at the forefront.

This paper suggests Employers Mutual and the Corporation Management should be given the opportunity to deliver on their mutual beliefs and for that matter the Board's belief, that the decisions of the last 3 years are the right decisions before resorting to the tailoring of the legislation to avoid having to implement the current Act.

For these reasons we the undersigned did not support the decision of the Board.

**Jim Watson**  
**BOARD MEMBER**

**Janet Giles**  
**BOARD MEMBER**

# APPENDIX 2

## WORKERS' COMPENSATION PAYMENTS IN VICTORIA

### BRIEFING NOTE

As a result of its ongoing inability to manage the state's workers' compensation scheme, WorkCover management is seeking to selectively import aspects of Victoria's workers' compensation entitlement regime into South Australia. The changes proposed are designed to drastically cut compensation payments for injured workers in order to artificially reduce scheme costs and employer premiums. The aim of this briefing note is to provide some background on changes in Victoria's approach to compensation payments over the last 15 years.

### The Kennett Cuts

The origins of the current approach to workers' compensation in Victoria can be traced to the Kennett government. Following its election in 1992 the incoming government took immediate steps to overhaul Victoria's workers' compensation arrangements. This included a tightening of eligibility for compensation and a comprehensive restructuring of weekly payments.

With the enactment of the *Accident Compensation (WorkCover) Act 1992* employment had to be a 'significant contributing factor' for the injury to be treated as work related. In addition, coverage for journey injuries to and from work was abolished.

For weekly payments, compensation was set at 95% of the worker's pre-injury average weekly earnings, capped at \$603 per week, for the first 26 weeks of incapacity. In the event that the injury necessitated more than 26 weeks off work, weekly payments were streamed into three distinct categories. In cases of 'serious injury' workers were entitled to 90% of their pre-injury average weekly earnings, while in cases of total incapacity the amount was reduced to 70% of pre-injury average weekly earnings (both capped at \$603 per week, indexed annually). For partially incapacitated workers payments were reduced to 60% of pre-injury average weekly earnings (capped at \$362 per week, indexed annually). After 104 weeks weekly payments were terminated altogether other than for workers who were totally and permanently incapacitated or those who were 'seriously' injured.

To be defined as 'totally and permanently incapacitated' a worker had to virtually be in a vegetative state. 'Serious injury' was also very narrowly defined. In order to satisfy this definition an injured worker had to have an impairment rating of 30% or more. While a 30% rating may not seem overly restrictive, in practice it excluded many injuries that most people would regard as 'serious'. When adopted in 1992, it was pointed out that this definition would, for example, exclude ongoing compensation for injuries involving multiple fractures of the leg or a shattered ankle.

Weekly payments could also be reduced by 'notional earnings' at any time based on a theoretical income a worker was deemed capable of earning from 'suitable' employment, irrespective of whether or not he or she was actually able to obtain such

employment. By way of example, an Aged-Care nursing sister with a permanent back injury unable to return to her pre-injury employment, who previously received \$600 a week in weekly payments, could be deemed capable of working as a personal assistant with a salary of \$550 a week. On this basis, her weekly payments could be reduced to \$50 a week.

In the wake of these and related changes to the Victorian scheme, there was a marked drop in employer premiums. Whereas in 1992/93 the average premium rate was 3.0%, by 1994/95 it had fallen to 2.25%, a reduction of 25%. This decrease was not attributable to better return to work outcomes or improved scheme management, but overwhelmingly to the reduction in payments to injured workers, particularly those arising from the termination of entitlement after 104 weeks and the ever present threat of the scheme's 'deeming' provisions.

The Kennett changes of 1992 changes did not reduce overall costs, but simply shifted costs from employers to injured workers, their families and the social security system.

Despite further declines in Victoria's average premium rate, which by 1997 had fallen to 1.8% of payroll, the Kennett government decided to abolish the common law right of injured workers to sue their employers for negligence. This was achieved after that year with the enactment of the *Accident Compensation (Miscellaneous Amendment) Act 1997*. The new legislation also introduced thresholds to restrict eligibility for lump sum payments for permanent impairment or the loss of body parts. In the case of physical injuries a 10% threshold was adopted while for psychiatric injuries the threshold was set at 30%.

The 1997 legislation also resulted in a restructuring of weekly payments, with a shift in emphasis from the seriousness of the injury to the 'work capacity' of injured workers. Under the new arrangements weekly payments were 95% of pre-injury average weekly earnings for 13 weeks, not 26 weeks as was previously the case. From 14 to 104 weeks, weekly payments underwent step downs to either 75% or 60%, depending on whether workers were determined as having no or some capacity for work. For workers in the latter category weekly payments were then terminated, unless it could be shown that they had returned to work at their maximum work capacity, were working at least 15 hours a week and earning \$100 or more per week. Workers able to meet these restrictive criteria were entitled to no more than the difference between 75% of their pre-injury average weekly earnings and 75% of their current weekly earnings.



## The Bracks Years

Following the demise of the Kennett government in 1999 the incoming Labor government sought to partially restore workers' common law rights. This took place with the passage of the *Accident Compensation (Common Law and Benefits) Act 2000*. Under the new arrangements common law damages could be achieved through two separate getaways. The first required the worker to have a permanent impairment of at least 30%. The second involved the worker demonstrating that the injury had resulted in an ongoing loss in gross income of 40% or more.

The 2000 legislation also increased lump sum payments and included regular overtime and shift allowance payments as part of the calculation for weekly payments.

Subsequently, in 2006, the Bracks government enacted the *Accident Compensation And Other Legislation (Amendment) Act 2006*. Among other changes, the legislation extended entitlement for compensation from 104 to 130 weeks.

As of July 2006, weekly payments for workers determined as having no current work capacity were set at 95% of pre-injury average weekly earnings for the first 13 weeks, reducing to 75% until 130 weeks. In cases of an ongoing lack of work capacity, payments may continue at this rate until retirement age. For workers considered to have a current work capacity but had not been able to return to work, weekly payments were the same for the first 13 weeks and for the period from 14 weeks to 130 weeks. For both categories of workers the maximum amount of weekly payments that could be received was set at \$1190 a week (indexed annually). Thereafter, partially incapacitated workers had to demonstrate that they had returned to work at their maximum work capacity, were employed for 15 hours or more a week and earning at least \$139 a week. Workers who satisfied this requirement were entitled to the difference between 75% of their pre-injury average weekly earnings and 75% of their current weekly earnings, subject to the \$1190 a week ceiling.

The major improvement that has occurred under Labor since its return to office in 1999 has been the limited restoration of workers' common law rights. Although, there has also been a modest improvement in weekly payments, it is readily apparent that Victoria's weekly payments regime is significantly inferior to South Australia's and the restrictions involved in accessing these payments are much more stringent, particularly for workers who are seriously injured, but not totally and permanently incapacitated. Following the re-election of the Bracks government in late 2006, the Victorian trade union movement is now seeking further improvements in weekly payments as well as easier access to common law damages.

## Labor's Credentials

While Victoria's Labor government is considering improvements to workers' entitlements South Australia's Labor government is being urged to embark upon a legislative programme that would slash weekly payments for injured workers and drastically curtail their rights to challenge WorkCover decisions.

During the 1990s South Australia's Liberal government also pursued changes designed to cut compensation payments to injured workers. The *Workers Rehabilitation And Compensation (Benefits And Review) Amendment Bill* and the *Workers Rehabilitation And Compensation (Miscellaneous) Amendment Bill*, introduced in 1994 and 1995 respectively included proposals to radically restructure weekly payments. This culminated in a proposed benefits regime under which weekly payments would be set 100% of average weekly earnings for the first 12 months. After this period injured workers were to be subjected to deeming provisions similar to those introduced by the Kennett government. For workers determined to be totally incapacitated, weekly payments were to continue at 85%, while for the few partially incapacitated workers who survived the deeming test weekly payments were to continue at 75% for the second year and 60% thereafter. The Liberal government frankly acknowledged that its amendments constituted a "harsh piece of legislation".

The Liberal's agenda for change was vigorously opposed by Labor both inside and outside the parliament. The then Leader of the Opposition and now Labor Premier, Mike Rann, described the Liberal proposals as "an assault on the rights, dignity and lives of workers and their families", which, if enacted, would have resulted in South Australia having "the worst and most draconian workers' compensation laws of any State in the nation." In conjunction with other parliamentarians in the Legislative council, Labor succeeded in preventing the wholesale undermining of workers' entitlements.

With workers and their families now confronted with proposals from WorkCover management that are even more draconian than those advocated by the Liberals in the 1990s Labor once again needs to take a stand in defence of the rights and dignity of South Australian workers unfortunate enough to be injured through their employment.



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