

# **WORKCOVER: A NEO-LIBERAL MAKEOVER**

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An estimated 689,000 workers are injured a year in Australia (Australian Bureau of Statistics 2006: 10) and between 4,887 and 8,168 die as a result of work related injury and disease (Access Economics 2003: 8). Although the social costs cannot be adequately measured, some of the economic costs do lend themselves to quantification. The most recent estimate, for 2005-06, is that the annual cost of work related injury and disease is in the order of \$57.5 billion, a staggering 5.9% of Australia's GDP (Australian Safety and Compensation Council 2009: 2).

Apart from highlighting the pressing need for ongoing initiatives to reduce the incidence and severity of work related injury and disease, these figures also draw attention to the critical role of social protection legislation in catering for the financial and rehabilitation needs of injured workers and their families. In Australia, this important public policy space has largely been the province of workers' compensation laws.

Workers' compensation policy, however, has been a recurrent source of conflict between employers and workers, since even before the enactment of Australia's first no fault liability systems of compensation at the turn of the 20th century. The predominant fault lines over which contestation occur are the level of employer premiums and the amount of compensation payments available to workers. Workers' compensation policy may be conceptualised as a distributional struggle between capital and labour over the allocation of costs for work related injury and disease, at least in so far as these costs are captured by workers' compensation arrangements (Purse 2005: 9).

Within this framework workers' compensation payments may be regarded as the commodification of work related injury and disease – the 'price' paid by employers for the appropriation of workers' health associated with their employment (*ibid*: 8). In contrast to wages and most other working conditions, however, the type and quantum of payments to injured workers are determined directly by the state, largely in response to demands by business interests and trade unions. The process is further complicated by the federalist nature of the Australian state. Historically, this has often resulted in significant developments in one jurisdiction being adopted in others. Sometimes this policy transfer process has worked in favour of workers while on other occasions it has worked to the advantage of the employers. Examples of the former include the extension of eligibility for compensation from the 1940s onwards and improvements in weekly payments that occurred in several jurisdictions during the 1970s. Employers have benefited from the widespread adoption of step-downs – phased reductions in weekly payments – and a tightening of eligibility that occurred during the first half of the 1990s (*ibid*: 12-17).

More generally, workers' compensation policy in Australia can be depicted in terms of 'punctuated equilibrium', in which legislative change has followed a trajectory of largely incremental change interspersed with episodes of comparatively rapid, often radical, shifts in policy. Although the precise configuration of change has varied between the various jurisdictions, the years from the late 1980s through to the mid 1990s were a period of generalised rapid change characterised by a rollback of workers' entitlements, to a greater or lesser extent, in all States. With the exception of the 1987 New South Wales legislative changes enacted by the Unsworth Labor government, which abolished the right of injured workers to sue their employers for negligence and dramatically curtailed the duration of weekly payments for partially incapacitated workers, the rollback process was most vigorously pursued by Liberal and Liberal Coalition governments (*ibid*: 9-16).

This was nowhere more evident than in Victoria following the election of the Kennett Liberal Coalition Government in late 1992. The ailing WorkCare system was replaced by a new scheme based firmly on neo-liberal principles and directed at making "Victorian industry more

competitive with other States” (Victorian Parliamentary Debates, HA, 30/10/1992: 307). The major changes included an immediate step-down in weekly payments, a further step-down after 26 weeks of incapacity and the termination of weekly payments altogether for most injured workers after 104 weeks; the tightening of eligibility for compensation, the prohibition of claims for journey injuries incurred during travel between home and work; and an overhaul of the dispute resolution system (Victorian WorkCover Authority 1993: 12).

This was followed in 1997 by the abolition of the right of injured workers to seek common law damages against their employers for negligence (Accident Compensation (Miscellaneous Amendment) Act 1997: s 45). In addition, the restructuring of the scheme’s governance arrangements in 1992 dispensed with tripartitism, and with it trade union influence, in favour of a Board membership selected entirely from the world of business and commerce (VWA 1993: 16-17). As a result of the Kennett Government’s agenda, the average premium rate for employers was reduced by 25% after the first two full year’s operation of the new scheme, from 3.0% to 2.25% of payroll (Heads of Workers Compensation Authorities 1996: 6).

The quest for ‘competitive’ premium rates was also taken up by South Australia’s Liberal Coalition government, led by Dean Brown, after its ascent to office in December 1993. As with its Victorian and New South Wales counterparts, the state’s incoming government had a targeted average premium rate of between 1.8% and 2.2% as an overarching objective of its workers’ compensation policy (South Australian Parliamentary Debates, HA, 08/02/1995: 1474). However, as the Brown government did not have control of South Australia’s upper house of Parliament, much of its legislative program, particularly in relation to proposed reductions in weekly payments, was defeated by the combined votes of Labor and the Australian Democrats. Consequently, premium rates remained relatively high in South Australia compared to other States. Despite this turn of events, there was no evidence of a mass exodus of South Australian employers elsewhere in pursuit of ‘competitive’ premium rates.

The period from 1995 to 2002 was one of relative stability for both South Australian workers and employers as far as workers’ compensation

arrangements were concerned. Nevertheless, there were signs that the scheme's financial performance was on the cusp of a serious deterioration. Consequently, following the 2002 election, the incoming Rann Labor Government took steps to improve scheme management through the appointment of a new Board. To a large extent this reflected its concern with the scheme's deteriorating funding position, which at June 2003 had an unfunded liability of \$591 million (WorkCover 2003: 2). The new Board established by Labor took up its responsibilities in August 2003.

When initially set up by the Bannon Labor government in 1986, WorkCover had a 14 person Board, comprised of a chair and a rehabilitation expert both of whom were nominated by the government, 6 employer nominees and 6 worker nominees. However, the Liberal Coalition Government overturned this governance structure in 1994 in accordance with its view that WorkCover should be governed by a "corporate board operating on commercial lines, without philosophical divisions over policy" (SAPD, HA, 08/03/ 1994: 305). The size of the Board was reduced to 9 and it was clear that the restructuring was intended to minimise trade union influence in WorkCover's decision-making process. This was achieved by reducing the number of worker nominees to 2. Although employer representation was nominally reduced as well, this was more than adequately compensated by the appointment of other members with business backgrounds and outlooks. Following the change of government in 2002, Labor replaced the Board members appointed by its predecessor, but more significantly, retained the Liberals' 'business' Board model of governance.

The new Board took steps to revitalise WorkCover's executive management during its first year of office. This was complemented in 2005 by a consolidation of WorkCover's legal services, with the selection of law firm Minter Ellison to manage the legal aspects associated with disputed claims. A change in WorkCover's outsourcing of claims management was the other major initiative undertaken by the Board. The outsourcing of claims management was another legacy inherited from the Liberal era and had been in place since 1995. Dissatisfaction with the performance of previous claims agents resulted

in the appointment of Employers Mutual Limited (EML) as the scheme's sole claims agent in 2006.

Of these initiatives, the appointment of EML was clearly the most substantive, and was described by WorkCover CEO, Julia Davison, "as one of the most significant changes for the Workers Rehabilitation and Compensation Scheme since the mid-1990s" (WorkCover 2006b). At the time of EML's appointment, Davison also claimed that the State's employers and injured workers would benefit "from an agent that has an outstanding track record and an excellent model for achieving improved recovery and return to work outcomes" (WorkCover 2006a). Most importantly, she indicated that the new claims agent was committed to liability reduction targets that would "deliver a fully funded scheme by 2012-13" (*ibid.*).

Yet within months of announcing this "sweeping reform to injury and case management" (*ibid.*) the Board, in a majority decision at its September 2006 meeting, adopted a radical new agenda based on wholesale legislative change involving major reductions in compensation payments combined with stringent restrictions on the rights of injured workers to challenge WorkCover claims decisions. The justification for this dramatic about face was actuarial advice to the effect:

that without a rapid and significant improvement in return to work rates, leading to a reduction in the number of injured workers remaining on income maintenance for the long-term, the Scheme could expect further deterioration of its funding position by up to \$300 million in the next one or two years (WorkCover 2006c: 4).

This claim was made despite a slight improvement in the scheme's funding ratio from 63.5% to 65% by June 2006 (WorkCover 2006d: 5), as well as the promised savings from the much vaunted EML outsourcing contract which was supposed to generate annual claims liability reductions of \$100 million within two years (*ibid.*: 19).

The Board's aggressive new agenda was opposed only by its two trade union members, who argued that the scheme's financial and operational woes were largely attributable to the past failure of WorkCover's claims agents to discharge their claims management obligations (Giles &

Watson 2007: 11). They drew attention to the findings of the actuarial firm Finity Consulting, commissioned by WorkCover to review the performance of its agents. The Finity review, though not publicly released, identified major flaws in the operation of agents, including a hands off approach to claims management, a failure to pursue return to work activities for injured workers, a reluctance to follow up with employers who failed to provide injured workers with suitable employment, and a lack of effective communication with stakeholders (*ibid.*). As it was WorkCover's responsibility to ensure that agents complied with the organisation's return to work objectives, the criticisms of the agents also extended to WorkCover itself. More generally, the two union nominees maintained that the existing legislative framework was more than adequate to turn the scheme's performance around provided it was "properly managed and implemented" (*ibid.*: 10).

The majority of the Board, however, was not swayed by these arguments. Instead it sought the Labor Government's support for a program of extensive legislative change. The aim was to restructure South Australia's WorkCover scheme to achieve "a closer alignment with the Victorian model" (WorkCover 2006c: 14), the foundations of which had been put in place by the Kennett Government in 1992 in one of the most concerted assaults on the rights of injured workers in Australia's industrial relations history.

## **Compensation Payments and the 'Incentives' Agenda**

The core issue affecting the WorkCover scheme's performance from the Board's perspective was one of 'incentives', or more particularly the motivation of injured workers. In this view:

The structure of workers compensation weekly entitlements can exert an influence on an injured worker's drive to return to work. In the event that an injured worker has a moderate, but observable reduction in income as a result of a workplace injury, there is a significant personal interest in achieving an early and sustainable return to work (*ibid.*: 18).

This view assumed that worker motivation is the predominant factor in determining improvements in return to work outcomes. It also excluded any consideration of the role played by employers in facilitating, or inhibiting, the return to work process. In addition, it neglected the performance of claims agents and the rehabilitation industry, despite the stringent criticism of both by the Stanley Committee of inquiry set up by Labor shortly after coming into office (Stanley *et al* 2002: 33-44, 77-82).

The Board's one dimensional view of the return to work process essentially attributed WorkCover's poor performance to 'malingering' by injured workers – a claim for which no evidence was presented. It also presumed that better return to work outcomes could best be shaped by step-downs in weekly payments. The only evidence put forward was a flawed comparison between the South Australian, Victorian, New South Wales and Queensland schemes which purported to show that the step-downs in these schemes produced better return to work outcomes. The data used was derived from interviews conducted in 2005-06 with samples of workers 7 to 9 months after lodgement of their claims and showed that the durable return to work rate for South Australia was 67%, compared to 77% for Victoria, and 81% for both New South Wales and Queensland (Campbell Research & Consulting 2006: 2).

If incentives were as important as claimed by the Board, the return to work rate in Victoria should have been higher than in New South Wales and Queensland because of Victoria's steeper step-downs - but this was not the case. Of course, the Board was primarily concerned with the comparison of return to work rates between South Australia and Victoria, as it wanted to align South Australia's weekly payments regime with that of Victoria. But here too all was not what it appeared to be. The 2005-06 financial year covered the period during which EML took over from WorkCover's former claims agents. As this was an unavoidably disruptive transition period, 2005-06 should not have been treated as providing a representative picture of the scheme's return to work performance. A more meaningful comparison required a longer time frame. If data for the six year period to June 2006 is considered it is apparent that return to work rates for the Victorian and South Australian schemes, with the exception of the changeover year, have been either identical or only marginally different (Campbell Research & Consulting

2001-06). In other words, although the Victorian scheme immediately reduced weekly payments to 95%, and then to 75% of a worker's average weekly earnings after 26 weeks, there was no significant difference in the return to work rates between the two schemes; even though weekly payments were maintained at 100% in South Australia.

It is readily apparent that many factors can impinge upon return to work outcomes. Apart from the nature and severity of injury, other factors such as employer support, the size of the enterprise and workplace culture are all important considerations. So too is the workers' compensation system itself. Poor administration and claims management practices can also delay and hinder efforts by injured workers to return to work. None of these factors were considered by the Board. This was all the more indefensible given that WorkCover had itself commissioned a research project, published in July 2006, that highlighted the multiplicity of factors that can assist or frustrate the return to work process (Foreman *et al* 2006: 4-5).

Nevertheless, it was on this flimsy foundation that the Board put forward the most far-reaching package of legislative proposals since the establishment of the WorkCover scheme. The most fundamental changes proposed concerned compensation payments rights of injured workers to challenge claims decisions by WorkCover.

With compensation, the major changes put forward were those dealing with weekly payments and compensation for non-economic loss. Under the scheme's longstanding arrangements, weekly payments were set at 100% of pre-injury average weekly earnings for the first 12 months of incapacity for work and 80% thereafter, subject to a further review if the incapacity lasted beyond 24 months. Under the Board's proposal these provisions were to be replaced by an entirely new regime. This included an immediate step-down to 95% of average weekly earnings and where an injured worker was unable to return to work within 13 weeks, a further step down would kick in, reducing weekly payments to 75% of his or her average weekly earnings.

The Board also argued, where workers were incapacitated for more than 104 weeks (or earlier if considered appropriate by WorkCover), that weekly payments should be subjected to a 'work capacity review', with

'deeming' provisions that would enable WorkCover to terminate or reduce weekly payments by virtue of hypothetical, or 'notional', earnings from a notional, job regarded by WorkCover as 'suitable' employment (WorkCover 2006c: 25). In the legislative prescription advocated by the Board the question of whether or not a worker would have any realistic prospect of securing such employment would not be relevant. The issue would be determined exclusively by whether or not he or she had any residual capacity for work, irrespective of labour market conditions. Moreover, work capacity would be assessed by Medical Panels instead of the Workers' Compensation Appeals Tribunal, with decisions by the Panels being treated as final and binding with no right of appeal, other than in relation to issues of procedural fairness. The Board's proposals contrasted dramatically with the then existing legislative situation which required WorkCover to demonstrate that jobs it deemed a worker capable of carrying out actually constituted 'suitable' employment.

The adoption of its deeming proposals was depicted by the Board as critical to its view of a 'balanced' workers compensation scheme (*ibid.*). However, their use elsewhere, as in various Canadian jurisdictions, has been described as "one of the greatest causes of distress and injustice in the history of workers' compensation" (Ison 1989: 102). This is because their main function is not so much to facilitate return to work as to provide a mechanism for discontinuing weekly payments for seriously injured workers. For example, there were 4,957 WorkCover claimants in receipt of weekly payments for more than 12 months at September 2006 and of these, 2,500 to 3,000 were subsequently identified as a likely 'target segment' for work capacity reviews and the associated deeming provisions (Bracton Consulting Services and PricewaterhouseCoopers 2007: 201). Moreover, it was estimated that their removal from the scheme would reduce WorkCover's liabilities by \$200 million (*ibid.*: 202). Contrary to the rhetoric of 'balance', these arrangements were put forward as the centrepiece of an unprecedented cost cutting exercise at the expense of injured workers (WorkCover 2006c: 26).

Cost cutting was also the driving factor behind the Board's proposals for restructuring compensation for permanent disability. An integral feature of the South Australian scheme, and all other Australian schemes, is that where workers suffer permanent impairment they may be entitled to a

lump sum payment which is generally referred to as payment for non-economic loss. A payment for non-economic loss is in addition to compensation received by way of weekly payments.

As with weekly payments, the Board's proposals for non-economic loss payments were based on the Victorian model. A distinguishing feature of the Victorian model is a 10% eligibility threshold designed to limit access to non-economic loss payments by injured workers. This eligibility criterion is the most restrictive in the country (HWCA 2005: 26-29) and contrasted markedly with the then South Australian position which did not impose any such arbitrary restrictions, other than in the case of hearing loss where a 5% threshold applied. In 2005-06 some 5,663 injured workers received compensation for non-economic loss, involving \$67.3 million or 14.5% of WorkCover's total claims payments (WorkCover 2007: 6-7).

In line with the Victorian approach, the Board's proposal entailed the adoption of a 10% threshold. The Board argued that it was "a key design feature which weights the payment of lump sums for non-economic loss to the most seriously injured" (WorkCover 2006c: 30). Even if this view were to be accepted, it does not follow that other injured workers with less severe permanent disabilities should have their entitlements abolished. Moreover, although a 10% threshold seems quite modest, its effect would be to exclude over 40% of otherwise eligible claimants from access to non-economic loss payments (*ibid.*).

The Board also argued that its proposal would reduce disputation in this area. This was a disingenuous assessment as the anticipated reduction in disputes was predicated on the denial of entitlement to all those workers whose impairments did not exceed the 10% threshold. Equally disingenuous was the claim that this method of reducing disputation would "also have a positive impact on injured workers" (*ibid.*: 32). The Board declined to explain exactly how denying injured workers with permanent disabilities access to non-economic loss payments would result in this 'positive impact'.

As a means of sugar coating the adoption of the 10% threshold, there was also a recommendation to increase the maximum amount for non-economic loss from \$219,425 to \$363,660 (*ibid.*: 31). But this too was

deceptive, as in practice very few workers would receive the maximum and those that did would have to be catastrophically injured or very nearly so.

New assessment criteria were also proposed by the Board. Non-economic loss payments were to be assessed on a ‘whole person impairment’ basis using the American Medical Association’s *Guide to the Evaluation of Permanent Impairment* (*ibid.*). This contrasted with the then prevailing framework where non-economic loss payments were mainly determined for individual disabilities and expressed as a percentage of a ‘prescribed sum’ set out in a ‘table of maims’.

The Board’s proposals for the restructuring of non-economic loss payments were couched in terms of a ‘more generous’ approach (*ibid.*: 31), but the reality was different. As obliquely acknowledged elsewhere, the overriding aim of the exercise was to reduce total payments to injured workers for non-economic loss by a massive 50% (*ibid.*: 33), through a combination of the application of the 10% eligibility threshold and the proposed changes to the assessment of impairment (*ibid.*: 32).

It was only in relation to lump sum payments for work related deaths that there was an unambiguously beneficial proposal to increase payments. In part, this constituted recognition that in South Australia lump sum payments were inferior to those of most other States where workers are killed (ASCC 2006: 64-65). As the number of claims in this area is relatively few, any increase in payments for work related death would be minimal in terms of overall claims payments.

Notwithstanding its enthusiasm for other aspects of the Victorian WorkCover scheme, the Board was adamantly opposed to incorporating Victoria’s common law provisions – restored by the Brack’s Labour Government in 1999 – into its proposed realignment of the South Australian scheme. To do so, it argued, would be “a fundamental departure from the ‘no-fault’ basis” of the WorkCover scheme (WorkCover 2006c: 33). This is despite the fact that payment of common law damages in cases of employer negligence are a feature of all other State schemes, and that access to common law has been an integral design feature of workers’ compensation in Australia since the introduction of the first schemes in the opening decades of the 20<sup>th</sup>

century. In contrast to some countries, such as the United States and Canada, the no-fault statutory scheme has never been the ‘exclusive remedy’ for the compensation of work related injury and disease in Australia. On the contrary, a mixed, or two-track, system incorporating both statutory payments and common law damages has been one of the defining features of workers’ compensation arrangements in Australia.

The Board also maintained that common law “is a naturally-adversarial process that pits workers against employers” (*ibid*: 34). While there is certainly anecdotal support for this view, it is unclear whether this is universally so. There are also many features of the no-fault system, however, which are adversarial, including disputation over the acceptance of workers’ claims and compensation for non-economic loss, as well as antagonistic attitudes by employers towards workers which in some cases even extends to the mere lodgement of a claim for compensation. Further, many actions for common law damages are taken by workers who have incurred serious work related injuries but are ineligible for ongoing statutory payments because of arbitrary limits on weekly payments. In this context, access to common law damages often provides a modicum of redress.

The Board’s sweeping claims concerning the supposed adverse impact of common law on return to work outcomes were even less compelling. The suggestion that common law “in many ways encourages the maintenance of illness behaviour and may financially reward the prolongation of compensable injury” (*ibid*: 35) was put forward without evidence.

The contention that common law “would undermine the philosophy and objective of early return to work” (*ibid*: 35) also lacked any supporting evidence. In practice, return to work activities, and proceedings for common law damages, usually follow different time trajectories. In most cases, the return to work process is best achieved through timely intervention during the early life of a worker’s claim. By contrast, proceedings for common law damages rarely get under way until much later in the life of a claim. By that time “most workers who require vocational rehabilitation will have – or should have – received it, thereby minimising much of the scope for conflict in this area” (Purse 2000: 274-275).

If it was the case that common law does undermine return to work outcomes then, *prima facie*, it would be reasonable to expect that those schemes with a greater reliance on common law would have lower return to work rates than those that do not. However, from the comparative return to work rates cited earlier, it is apparent that the performance of the common law States of Queensland and New South Wales is superior to that of South Australia.

### **Undermining Workers' Rights**

The Board's assault on compensation payments was complemented by a raft of other proposals designed to restrict the capacity of workers to challenge WorkCover claims decisions. These proposals were put forward not as a judicious set of measures designed to improve either the fairness or effectiveness of the scheme's dispute resolution system but rather as an exercise by a partisan player intent on tilting the playing field to its own advantage at the expense of injured workers.

Yet the importance of an equitable and efficient dispute resolution system to the overall effectiveness of a smoothly functioning workers' compensation scheme cannot be underestimated. Notwithstanding the rhetoric concerning the 'non-adversarial' nature of no fault insurance, claims disputation is an inbuilt feature of workers' compensation schemes. Disputes arise from a wide range of issues. These include challenges to the compensating authority's decisions concerning a worker's initial entitlement to weekly payments, the amount of weekly payments, discontinuance of weekly payments, eligibility regarding lump sum payments as well as issues associated with the return to work process.

In addition to the essential issue of fairness, the main features of a well designed dispute resolution system are timely, high quality and relatively low cost decisions – of benefit to both workers and employers. In South Australia claims disputes have been handled by the specialist Workers' Compensation Appeal Tribunal since the inception of the WorkCover scheme. Although there have been changes in its operations over the years, the Tribunal has continued to attract widespread respect within the

workers' compensation community in South Australia and is widely regarded as independent, balanced, and highly professional in its resolution of disputed claims.

Despite this exemplary track record, the Board advocated a transfer of much of the Tribunal's role to non-judicial Medical Panels based on the Victorian model. Within this model, any dispute involving a 'medical issue' would, as already indicated, be the sole preserve of Medical Panels. Doctors and specialists play a pivotal role in the diagnosis of medical conditions suffered by workers, but the definition put forward by the Board of what constitutes a 'medical issue' went far beyond these considerations. Underlining this conclusion was WorkCover's own assessment that approximately "one-third of all disputes could be referred to a medical panel" (WorkCover 2006c: 43). More particularly, the Board's approach incorporated the wide ranging Victorian definition (*Accident Compensation Act 1985*: s. 5), which includes the all important socio-legal questions of work capacity and the suitability of alternative employment, issues on which medical practitioners have no expertise that is not otherwise currently available to the Tribunal.

Implicit in the Board's position was the assumption that medical practitioners are better equipped than judicial officers to adjudicate on a wide range of disputed workers' compensation claims matters that involve not only medical issues, as normally understood, but also what are often complicated matters of fact and law (WorkCover 2006c: 40). It also implied that this approach would not only lead to improved decision-making but improved return to work rates as well (*ibid*: 43), although there was no substantiating evidence that supported these contentions.

The central issue involved in resolving claims disputes is the establishment of the relevant facts and the application of the law to those facts. This process requires both training and experience in evidentiary procedures and workers' compensation law. As medical practitioners lack these requisite skills, it is difficult to justify the use of Medical Panels for judicial decision making purposes. The operation of Medical Panels could also have a profoundly adverse effect on the capacity of injured workers to challenge WorkCover decisions as there would be no independent right to legal representation when appearing before a Panel.

As stipulated in the Victorian legislation, “Any attendance of a worker before a Medical Panel must be in private” (*ACA 1985*: s. 65 (4)) unless otherwise determined by the Panel. Moreover, as proposed by the Board, decisions by Medical Panels are intended to be final and binding. Injured workers would be denied the right to seek judicial review other than on grounds of procedural fairness.

In the process, the transparency of the dispute resolution system would inevitably be compromised. This in turn casts further doubt on whether the use of Medical Panels as a means of resolving claims disputation would be either fair or reasonable. The full impact of Medical Panels would be felt most keenly in cases involving work capacity reviews, where decisions concerning ‘work capacity’ and ‘suitable employment’ would facilitate WorkCover’s ability to cease payments to injured workers without challenge. Consequently, Medical Panels can best be viewed as part of WorkCover’s cost cutting strategy.

Another critical proposal put forward by the Board concerns the scheme’s discontinuance provisions. Under this proposal WorkCover would be able to cut off weekly payments where there was a dispute over a worker’s ongoing entitlement to compensation (*WorkCover 2006c*: 51). Payments would only be resumed – and arrears paid – in the event that the dispute was subsequently resolved in the worker’s favour. Needless to say, a policy prescription of this nature would inevitably give rise to serious financial hardship. This approach is in stark contrast to the prevailing arrangement where weekly payments continued until the matter was first considered at the Tribunal. At this stage in proceedings the Tribunal could decide to discontinue payments, although in practice this was a rare occurrence. In effect, weekly payments to injured workers continued until the dispute was resolved, although if the worker lost there were provisions that enabled WorkCover to seek recovery for the amount received during this period.

Part of the Board’s rationale for discontinuing payments to workers during disputes was that it would provide “a key tool for influencing their behaviour in relation to participation in return to work activity” (*ibid.*: 49). This rationalisation conveniently ignored the obvious objection that many disputes occur over issues that have little, if anything, to do with workers’ motivation in relation to return to work

considerations. Disputes concerning the quantum of weekly payments or non-economic loss payments are but two examples of this. Moreover, many disputes associated with return to work issues are directly attributable to misinterpretation of the law by WorkCover and its agents. This is evident from the right afforded workers to pursue expedited decisions in cases where there has been undue delay (Workers Rehabilitation and Compensation Act 1986: s. 97). In 2007-08, there were 6,758 matters lodged with the Workers Compensation Tribunal, of which 30% were applications for expedited decisions (Second Annual Report of The Senior Judge Industrial Relations Court and The President Industrial Relations Commission, Adelaide 2008: 29). Although not all such applications would have been lodged by workers there can be no doubt that many were. To penalise them for delays occasioned by other parties is neither justified nor desirable.

More fundamentally, the Board's approach would exacerbate the power imbalance that exists between a compensating authority and injured workers. One of the most significant achievements of the Bannon Labor Government was the attempt to even up the playing field to constrain the compensating authority from riding roughshod over the rights of injured workers by virtue of its superior economic power. In the pre-WorkCover days, the private insurance companies which administered the scheme were able to discontinue payments as a matter of course where claims disputes arose. Not infrequently, claims disputes were manufactured by insurance companies to disadvantage injured workers. As the Byrne Committee of inquiry observed in its path breaking report that paved the way for the creation of the WorkCover scheme, "it may not necessarily be in the purely financial interests of the insurance company to accelerate settlement" of disputes (Byrne 1980: 24). The frequently protracted delays often resulted in severe economic hardship for injured workers (*ibid*: 23). By ensuring that weekly payments to injured workers continued pending the outcome of disputes, the Bannon government was able to successfully curtail the worst excesses of the pre-WorkCover system.

However, the changes proposed by the Board entail a return to the pre-WorkCover era, when claims decisions were often predicated on cost cutting instead of an impartial adjudication of workers' entitlements.

This scenario would strengthen WorkCover's capacity to resolve disputes in its own favour but would do so at the cost of fairness to injured workers and the integrity of the scheme. It would be a recipe for capricious decision-making that would provide WorkCover with the scope to ride roughshod over the rights of injured workers – the very people the scheme was designed to protect.

## **Labor's Response**

The WorkCover Board's 2006 proposals for addressing the scheme's financial difficulties were arguably the most draconian in the history of worker's compensation in South Australia. The only comparable push for such a radical set of changes was the series of attempts undertaken by the Liberal Coalition Government in the mid 1990s that were foiled by Labor and the Australian Democrats.

Between 1994 and 2006, however, Labor's policy stance had undergone a dramatic transformation. Whereas in 1994 it had championed the rights of injured workers, by 2006 it had abandoned this legacy in favour of a policy stance more concerned with meeting the demands of the State's employer interests for lower WorkCover premiums.

A number of factors contributed to this seismic shift. At a philosophical level there had been a conspicuous move to the Right, with Labor's social democratic outlook, exemplified by Keynesian interventionism, largely replaced by the embrace of a pro-business, neo-liberal ideology as the guiding principle underpinning economic and social policy. This was subsequently epitomised by Premier Rann's boast that his government was "unashamedly pro-business ... more than any other Labor government in Australia" (Owen 2009: 27). These developments occurred against a backdrop of declining union density, which between 1993 and 2007 fell from 30.2% to 21.5% in South Australia (ABS 2008: 31, ABS 2000: 42). The downward slide in union density was accompanied by a waning of influence by unions and by Labor's Left faction in the shaping of Labor policy. In contrast to the pivotal role it played in promoting workers' rights during the policy debates and negotiations that preceded the drafting of the WorkCover legislation in

1986, the Left faction's influence on policy under the Rann Government has been minimal. The dominant Right faction has fully supported the government over the WorkCover issue. Consequently, the Labor leadership was in a strong position to pursue a hardline neo-liberal workers' compensation agenda.

Notwithstanding Labor's shift in outlook, the timing of the WorkCover Board's far reaching proposals created a serious problem for the Rann government. Any move to implement these proposals in 2007 would have inevitably put the Government on a collision course with much of its trade union support base. From a political perspective this was a disconcerting prospect, as a major conflict between the industrial and political wings of the labour movement during what was expected to be a federal election year could have seriously damaged federal Labor's election prospects in South Australia.

This dilemma was solved by establishing an 'independent review' into key aspects of the WorkCover scheme, announced by the Minister for Industrial Relations in conjunction with the Treasurer in March 2007. The terms of reference for the review, conducted by two business consultants, were most directly concerned with three objectives – reductions in average premium rates for employers, from 3% to between 2.25% to 2.75% by July 2009; the elimination of the scheme's unfunded liability; and 'fair and equitable financial' support for injured workers. The consultants were also required to review the recommendations put forward by the Board (SAPD, HA, 29/03/2007: 2242-2243). Most importantly, they were not required to report to the government until 30 November 2007 (*ibid*: 2243), a timeline (subsequently extended to the end of December 2007) that had the effect of defusing the prospect of any conflict with the trade unions until after the federal election, held in November 2007.

There was an inherent tension between the review's objectives of lower premium rates, full funding and fair compensation entitlements. However, an undertaking purportedly given by the Minister to the President of the State's peak union body, SA Unions, that workers' entitlements would not be cut (SA Government Media Monitoring Service 2008: 3) had the effect of reassuring many within the trade union leadership of the Government's *bona fides*. Moreover, relations between

SA Unions and the Rann government had generally been amicable, with both intimately involved in the Australia-wide campaign against the Howard government's *Work Choices* legislation. The upshot though was that, whereas the South Australian Labor government worked hand in hand with SA Unions throughout 2007 to defeat the Liberal Coalition federal government over 'unfair' industrial relations laws, it was poised to inflict its own unprecedentedly unfair workers' compensation laws on a largely unsuspecting labour movement a few months later.

The report that emerged from the review formed the basis of Labor's *Workers Rehabilitation and Compensation (Scheme Review) Amendment Bill*, formally announced by the Premier on 26 February 2008. Although more nuanced, this report largely endorsed the thrust of the WorkCover Board's report. Of the 18 proposals for legislative change, 15 were directly concerned with compensation payments and workers' legal rights and, of these, 5 endorsed recommendations by the Board; a further 8 were supported on a modified basis, whereas 2 were rejected.

For example, there was full support for the introduction of Medical Panels, the continued exclusion of access to common law damages and the proposal to discontinue weekly payments in the event of claims disputes (BCS and PwC 2007: 137, 126, 142). In relation to the Board's proposals on step-downs and work capacity reviews there was qualified support. Instead of an immediate reduction in weekly payments to 95% of pre-injury average weekly earnings followed by a further reduction to 75% after 13 weeks, the consultants favoured a step-down to 80% after 13 weeks. Not dissimilarly, they recommended that injured workers be subjected to work capacity reviews after 130, rather than 104, weeks of incapacity (*ibid*: 100, 112). There was also qualified support for the Board's non-economic loss proposals, with full support for the adoption of the 'whole person impairment' model of loss assessment but a rejection of the 10% eligibility threshold proposal in favour of a 5% threshold for physical impairment and a 10% threshold for psychiatric impairment (*ibid*: iii-iv). Notwithstanding these changes, the differences between the Board's position and the recommendations contained in the review report on these critical issues were essentially matters of degree rather than of principle.

Following the Premier's announcement, the Minister for Industrial Relations two days later gave his second reading speech on the Bill. During the intervening period, despite opposition from some sections of the backbench, the Bill was bulldozed through the Labor Caucus with the backing of the Right faction and the leadership of the Left. Debate on the Bill took place in the House of Assembly during March and at the beginning of April a number of minor concessions were made to the unions (Wright 2008: 1). The legislation was the subject of sustained criticism in the Legislative Council by the Greens, the other minor Parties and the Independents but, as Labor had the support of the Liberal opposition, it was eventually passed and assented to in June 2008 (SAPD, HA, 19/06/2008: 3896).

## **Concluding Comments**

The WorkCover Board's diagnosis of the scheme's financial difficulties was based on a faulty and self-serving analysis of WorkCover's performance. The scheme's inadequate return to work results were attributed almost exclusively to what was depicted as a lack of motivation by injured workers, which in turn was insinuated as being due to an overly 'generous' level of weekly payments. Evidence that challenged or contradicted this view was ignored and compounded by a failure to include any assessment of WorkCover's own contribution, or that of employers, to the scheme's unacceptable return to work outcomes.

Certainly, there is little doubt that WorkCover's management of the scheme has been a fundamental problem. The outsourcing of its claims management responsibilities – its core business – has been a conspicuous and ongoing failure (Purse 2009). More generally, WorkCover has widely been regarded as having failed to adequately manage its injury management and rehabilitation responsibilities. This failure was highlighted in 2002 by the Stanley Committee which found that many of the scheme's problems derived from WorkCover's inability "to provide early, appropriate rehabilitation and to devise innovative and appropriate return to work arrangements" (Stanley *et al* 2002: 33). These criticisms have continued (Self Insurers of South Australia: 2-11, Australian

Lawyers Alliance 2007: 61-64, SA Unions 2007: 8-9), particularly in relation to WorkCover's poorly focused management of the 'long tail' of claimants which, though relatively small in number, constitutes a large percentage of the scheme's outstanding liabilities.

The real significance of the Board's report was twofold. First, it papered over the scheme's long-standing management failures. Second, it provided a policy platform designed to make possible an early reduction in the average premium rate for South Australian employers, based on a legislative program of unprecedented cuts in compensation payments to injured workers.

Although the Government did not fully endorse all of the WorkCover Board's proposals for change, it did embrace the essential scheme design elements to facilitate this outcome. Under the legislative provisions enacted in June 2008, weekly payments reduce to 90% after 13 weeks of incapacity and to 80% after 26 weeks, followed by work capacity reviews for most of those incapacitated for more than 130 weeks (WRACA 1986: ss.35-35C). Many workers with a permanent impairment will no longer be able to obtain non-economic loss payments because of the 5% impairment threshold now in place for physical injuries (*ibid*: s. 43), while those who do qualify will have to contend with the new 'whole person impairment' method of assessment. There are also various restrictions on the capacity of workers to challenge decisions by WorkCover; notably the discontinuation of weekly payments where a dispute arises in relation to weekly payments (*ibid*: s. 36) and the absence of any right to be represented in proceedings before Medical Panels or to appeal Panel decisions (*ibid*: ss. 98G-90H).

Having withstood the onslaught on workers' entitlements that reached its pinnacle during the 1990s, the South Australian WorkCover scheme was subjected to a neo-liberal makeover in 2008. In supporting the thrust of the WorkCover Board approach, the Rann government has emulated Victoria's right-wing Kennett Government in providing a legislative framework that will deliver a cut-price workers' compensation scheme for employers. In providing bipartisan support for this neo-liberal solution, it has legitimised assaults on workers entitlements as the default option for dealing with problems of scheme management. The inexorable result is that thousands of injured workers will be

disadvantaged as a result of the new WorkCover provisions. In the process, Labor's changes will also dramatically increase the cost shifting associated with work-related injury and disease from South Australian employers to workers and the federal, taxpayer funded, social security system.

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