COMPAS

WORKERS COMPENSATION AND OH&S NEWSLETTER

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Workers Compensation - Road to Nowhere?

"Maybe you wonder where you are
I don't care
Here is where time is on our side
Take you there ..... take you there
We're on a road to nowhere"

David Byrne, Talking Heads.

In the last issue of COMPAS we reviewed some of the bad policy decisions made by Governments which have brought the NSW workers compensation system to its knees. In this issue we have sought to keep the debate alive by previewing Minister Della Bosca's strategic directions to reform the system.

On 8 June 2000, Minister Della Bosca outlined to Parliament a series of review principles he intended to introduce to address the problems with NSW workers compensation. Shortly thereafter a taskforce was established by WorkCover to convert these principles into strategies for reform. The principles, widely referred to as "Della Bosca's 10 Point Plan" can be encapsulated as follows:

1 Pilot projects to be undertaken to develop best practice injury management
2 Review dispute resolution processes and structures and develop better dispute prevention measures
3 Introduce medical treatment protocols
4 Introduce market incentives to reduce incidence of workplace injury
5 Provide accurate and timely information to scheme participants
6 Introduce additional measures to control professional fees ensuring that scheme and participants receive best value for money
7 Develop mechanisms for gradual removal of existing cross-subsidies
8 Develop strategies to retire scheme deficit
9 Assess the use of industry based schemes and self-insurance
10 Develop strategies to target employer compliance

The 10 Point Plan and Legislative Amendment

On the face of things, each of the principles in the 10 point plan appears to have merit. A more considered evaluation however shows that most of the proposed reforms will have little if any effect on the underlying costs of the scheme or the inefficiencies of its operation. At best the activity they generate disguises an unwillingness by the Government to act decisively, at worst, they run the risk of *adding* to the cost pressures on the scheme.

On 11.10.2000 Minister Della Bosca tabled a draft of a Workers Compensation Legislation Amendment Bill. The Draft Bill does not contain any measures which seriously address the cost over runs of the scheme or any measures to significantly reduce the underlying running costs of the system.

1. Injury Management Pilots

Since 1987 when workers compensation underwent a radical change, there have been a number of different Governments, different Ministers, different WorkCover Boards, different WorkCover General Managers and Managers. One of the problems with a constantly changing administration is the propensity to misplace collective wisdom and learned experiences. This in turn leaves the door wide open for Yes Ministerism.

In 1990 a Rehabilitation pilot study was trialled by WorkCover in the Bathurst, Orange and Blaney Regions. Back then this was a good idea because workplace based rehabilitation was a very new concept and ways needed to be found to ensure its widespread acceptance.

In the lead up to the the introduction of the 1998 Injury Management and Workers Compensation Act where injury management principles were enshrined in the legislation, world best practice injury management was thoroughly researched. All of the stakeholders (Government, employers, unions, insurers, care providers etc.) were involved in complex and lengthy negotiations① over what injury management entailed and evidence from a number of overseas and local models was debated.

Work injuries have been managed in NSW since 1998② in accordance with the principles agreed and included in the legislation.

If the Government believes that these principles are not achieving the desired outcomes, would it not be preferable to examine the application and administration of the principles before spending more money on pilot studies to determine best practice and adding to the costs of the scheme?

The first place the Government should look to is the WorkCover Authority and the way that insurers are remunerated. There is a widespread view that insurers are not performing in their role as well as had been hoped. There is only one party that can be blamed for this poor performance and it is not the insurers, it is the WorkCover Authority which sets insurers' remuneration and controls the purse strings.

Insurers are paid approximately $180 million each year to administer the scheme. This includes business acquisition and retention, premium assessment and collection, injury and claims management and reporting to WorkCover. (Lawyers fees are are approximately $240 million.)

Insurers' remuneration is split between three main elements, a base fee of approximately $100 million, $15 million from investing scheme funds and the remainder in incentives for consistently achieving certain benchmarks.

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① The Interim Advisory Council and the Interim Rating Bureau were the principal negotiators with the Government

② Even though the Act became Law in August of 1998, Injury Management provisions were not enforced because none of the stakeholders were ready.

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The total income available to insurers represents approximately 9% of a premium pool which is artificially pegged at 2.8% of wages and much less than the true costs of running the scheme (hence the deficit).

In other general insurance products the average ratio of expenses of running the business to premiums is approximately 22%[①]. General insurance company managers know that scrimping on business management expenses causes claims costs to rise. This is a lesson yet to be learnt by the WorkCover Authority. One of the ramifications of cutting down on insurers' fees is claims officers with case loads of 300 plus active claims, twice the number that can be managed effectively. If you pay peanuts.....

2. Dispute Resolution

The workers compensation system is riven by dispute. There are approximately 120,000 claims made each year of which half are simple matters which resolve in under 5 days. Of the remaining 60,000 or so major claims nearly half are disputed (some 25,000).

There is no other insurance based system anywhere in the developed world where disputes are so much a function of claims settlement.

Two of the system's design flaws which force disputes even though none may in fact exist, are the automatic disputing of claims by insurers unable to accept a claim within the specified 42 days and the requirement that the registration of a settlement for permanent disablement (s.66) must be signed off by a lawyer.

The Workplace Injury Management and Workers Compensation Act[②] requires an insurer makes weekly benefit payments within 21 days. If the insurer has a genuine reason for not making a decision on liability they must decide within 42 days of the claim being duly made.

One of the major problems facing insurers in the administration of this provision of the legislation is the inability of employers to comply with their legal obligation under the Act to submit the claim to the insurer within 7 days[③]. When employers report claims late, insurers must either make payments without properly assessing the claim or place the claim in dispute[④].

The other scheme design flaw which forces disputes involves the insurers' requirement to make an offer of settlement to a claimant within 12 weeks of becoming aware that a permanent disability exists. Normal practice is that the insurer will organise a medical assessment for the claimant to determine the extent of any disability. When this is quantified an offer of settlement is made.

If the claimant decides to accept the insurer's offer, as is often the case, the insurer proceeds to register the settlement with the WorkCover Authority. The Authority however, is unable to register the agreement until it is satisfied that the claimant has received independent legal advice[⑤]. This forces the claimant into the arms of the legal profession who in the majority of cases bring on a dispute.

Neither the Draft Bill nor the 10 Point Plan addresses the removal of these two scheme design flaws which force disputes. The Government prefers to introduce "best practice" features to improve the resolution system. This soft option looks as though some worthwhile activity is being undertaken but will do nothing to reduce the number of disputes in the system.

Removal of the two provisions discussed above would result in a halving

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① Pricewaterhouse-Coopers Insurance Facts and Figures 1999

② Section 93 Clauses 1 - 6

③ Section 69

④ Section 94 imposes penalties up to $5,500 if a payment is not made or the claim placed in dispute

⑤ Workers Compensation Act 1987 S66 (4A)

Dispute Resolution

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in the number of disputes and a significant reduction in the cost pressures on the scheme.

The Draft Bill introduces measures to cap the cost of legal representation on both sides at $500[①]. This would seem to the uninformed observer to be an effective cost cutting measure, however capping lawyers' costs will only save the scheme about $30 million each year[②].

An adverse consequence of capping the lawyers' fees will be the "downlining" that this will encourage and claimants will tend to receive a lower standard of representation.

3. Medical Treatment Protocols

The introduction of evidence based medical treatments is long overdue in NSW. Medical protocols have been a feature of the South Australian workers compensation system since 1993 and the Victorian scheme since 1996. The Victorian WorkCover Authority has published "Guidelines for the Management of Employees with Compensable Low Back Pain" which detail diagnostic and treatment protocols for back injury. They clearly dispel the myth that long periods of bed rest and inactivity are indicated in the treatment of low back pain and are designed to assist in the prevention of long term chronic conditions and illness behaviour.

The introduction of medical protocols will improve the quality of claimants' medical management thereby reducing scheme costs and unnecessary suffering at the hands of incompetent health care providers.

4. Introduce Market Initiatives to Reduce Incidence of Workplace Injury

As discussed in the previous issue of COMPAS, the best mechanism to encourage better safety standards is to reward good performers and penalise poor performers. It needs to be a balanced approach.

Two years ago the WorkCover Authority was given information by insurers on 436 policy holders whose safety record appeared (from their claims experience) to be significantly worse than their industry average performance.

WorkCover has still not acted to investigate or manage these 400 poor performers whose collective claims costs are equal to 10% of the total costs of claims in the scheme.

The best way to reward good performers is to introduce a system of selective underwriting of workers compensation risk. This is the principle adopted in all other business insurances and ought to operate in workers compensation as recommended in the Government's own enquiry into the scheme[③].

The Draft Workers Compensation Amendment Bill provides[④] for discounts on premiums as a market initiative to reduce the incidence of workplace injury. In the case of the large employer a mechanism (experience rating) already exists within the current premium methodology to reward good performance. If it is the intention to further discount the premiums of the large good performers in a particular industry, the question must be asked "what will be the consequences on the cross subsidies within that industry's premium rate?"

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① Draft Workers Compensation Legislative Amendment Bill Schedule 23.1.(5)

② There are approximately 12,000 cases heard at Conciliation each year. Currently legal costs for both parties average $3,000

③ Grellman Inquiry into Workers Compensation 1997

④ Draft Workers Compensation Legislative Amendment Bill Schedule 2.1.(2)

Market Initiatives to Improve Safety

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① Source Pricewaterhouse-Coopers

② Draft Workers Compensation Legislative Amendment Bill Schedule 2.1.(2)

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Surely the best option would be to ensure that the correct premiums were being paid by all employers in the first place.

The concept of introducing discounts is well nigh impossible to apply equitably in the case of the small business. The table at the bottom of the page shows average policy and claims distributions in the NSW system.

As can be seen the vast majority of policies are held by small businesses. SMEs have a very low claims (accident) frequency (ave: 1 in 17 man years[①]) and a relatively high business failure rate (anecdotally around 20% p/a). Those SMEs which survive have very few claims, those which fail leave their claims behind them.

The current operation of the cross subsidies in the workers compensation scheme has larger employers cross subsidising small employers.

This means that any introduction of a premium discount for the SME will be paid for by adding to the cross subsidy from the larger employer.

The manner of applying a discount for the SME will probably be prospective and based on maintaining/attaining certain OH&S and other standards. This will need to be administered as envisaged in the Draft Bill by "Accredited Persons[②]" who will be authorised to award different levels of discount.

If such a system is to be introduced and be capable of serving all 300,000 NSW policy holders in the scheme a whole new industry of "Accredited Persons" will need to be established. This will of course attract its own massive costs which will need to be funded by employers' premiums!

5 Provide Accurate and Timely Information for Scheme Participants

Under the current administration the WorkCover Authority has been encouraged to either close down or severely restrict public access to what was previously an excellent information resource - WorkCover Publications and advice.

Closing the WorkCover Bookshop in Kent Street and maintaining minimal supplies of information booklets, etc. at WorkCover offices does nothing to assist in the provision of information to stakeholders.

The NSW WorkCover Web Site is the meanest in terms of information of any of its competing jurisdictions (Victoria, South Australia). A quick visit to www.workcover.com (S.A.) and then to www.workcover.nsw.gov.au will immediately show which jurisdiction is better at providing high quality information on OH&S and Injury Management to stakeholders.

Until the establishment of the Rating Bureau, there was no organisation able to independently advise the Government on scheme developments. The Rating Bureau needs to be utilised more by Government and made available to any other interested parties as a source of information about the scheme.

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Premium Band $	Average # Policies p/a	% of Total Policy #	Average Premium $	% Proportion of Premium	% Proportion of Total Claims Costs	Average Claim Size $
1- 10 K	279,215	94.55%	1,075	26.30%	31.64%	16,247
10 - 100 K	14,663	4.97%	25,691	33.01%	30.86%	13,148
100 - 500 k	1,215	0.41%	196,450	20.92%	19.89%	10,100
500 k+	204	0.07%	1,106,443	19.78%	17.61%	9,825

Provide Accurate and timely Information

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The intellectual and other knowledge resources available through the Rating Bureau must not be overlooked, by severely limiting its powers as envisaged in the Draft Bill the Government is shutting off the only independent scheme review mechanism currently available.

If Minister Della Bosca were to reverse the current trend of making scheme information hard to get then he will enable a more informed understanding of the operation of the scheme, in turn refuting much of the mis-information currently being peddled by self interest groups.

6. Control of Professional Fees

Controlling fees is a cost saving mechanism over which a deal of caution needs to be exercised. The consequences can include a risk of certain professional services being curtailed. In the case of medical and other care service provision, fee fixing or control can mean lower standards for victims of accidents because of the compensation payment mechanism. It will encourage the best providers to avoid compensation cases.

This in turn defeats a major scheme objective - that of getting high quality, appropriate care to the injured as soon as indicated so that they recover as quickly as possible.

If the market was allowed to operate freely care professionals' fees would be market driven and thus controlled.

Controlling legal costs through legislative mechanisms has never worked successfully. The best way to control legal costs is to remove lawyers from the dispute resolution process.

This could easily be achieved in the case of disputes over medical opinions (most of the disputes in the scheme are medically related) by establishing panels of medical experts whose decisions are binding on both parties.

Binding medical panels exist in many other jurisdictions both locally and overseas and operate very efficiently. One even exists in NSW in relation to noise induced hearing loss claims.

7. Develop Mechanisms for Gradual Removal of Cross Subsidies

Insurers have provided the Government with a simple and equitable methodology to introduce ANZSIC rating to the scheme and remove cross subsidies more than 18 months ago.

In the 18 months that the Government has failed to take any action to remove the cross subsidies, the scheme has deteriorated a further $500 million and 90,000 serious injuries have been recorded.

Many of these injuries and extra scheme debt would have been avoided had the Government acted to fix the costs where they are incurred, ANZSIC rating would do just that.

Using the ANZSIC rating system was recommended in the Government's own inquiry[①] into workers compensation in 1997 and has been recommended to Government by its own WorkCover Authority.

It is difficult to understand in the light of all of this advice, why the Government has taken so long to act to change the rating system to one which is fair to all employers and one which encourages better injury prevention behaviour in employers.

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④ Grellman Inquiry into Workers Compensation 1997

8. Develop Strategies to Retire the Scheme Deficit

No matter how unpalatable it may seem, the $3 billion scheme deficit (by 2004) will need to be funded. The Government has so far refused to formally advise employers that the shortfall must be made up by employers even though in his last report the Auditor General advised the Government that this was necessary[①].

The obvious and simplest way to claw back the deficit is to apply a levy to all employers and this is again foreshadowed in the draft bill under the new provisions for "exiting) employers.

Any such deficit reduction levy will need to be in the order of at least 10% of premiums and will probably apply for a minimum of 7 years.

Obviously the longer the current premium structure remains unchanged the greater will be the deficit and any reduction levy will reflect this.

Some of the other changes proposed in the Draft Bill, such as the election provisions for common law[②], are intended to rein in costs thereby reducing debt. Changes such as restoring the election provisions will have a minimal if any effect on scheme costs.

Again, they appear to be "toughening up on the Act" but only a change in access to common law such as restoring the 33% impairment threshold would have any meaningful effect.

9. Assess the use of Industry Based and Self Insurance Schemes

The Rating Bureau has done a great deal of work on alternatives to funding workers compensation benefits through a centrally managed fund. Competitive underwriting is the most realistic of the options. Self insurance has also long been recognised as a viable alternative and more than 60 employers in NSW have adopted this option.

Almost no work has been done on the viability of industry based schemes (none at all by the Rating Bureau) and currently only five Specialised Insurer Licences have been issued[③]. Of these only three are industry based.

In the case of one (The Joint Coal Board) there was such widespread disaffection by the participants with the operation and costs of the scheme that Premier Carr was forced to order a review last year. (The review was conducted by Richard Grellman who also inquired into the Workers Compensation scheme in 1997).

Some work has been done[④] on a Construction Industry scheme, but much of this has been questioned by insurance experts. Richard Grellman has professed great doubts about its funding and operation as proposed and Garry Brack of the Employers' Federation has refused to support the proposed scheme.

The only organisation with the intellectual, actuarial and scheme management knowledge and experience to properly assess industry schemes and the effects that they may have on NSW workers compensation generally, is the Rating Bureau.

The Minister ought to refer any new proposals for scheme changes to the Rating Bureau, in this way WorkCover would need to have less regard of the views of the combined Advisory Council and OHS&R Council.

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① Auditor General's report to Government 1999

② Draft Workers Compensation Legislative Amendment Bill Schedule 4.1.(1)

③ Guild Insurance Ltd
Catholic Church Insurances Ltd
North Insurances Pty Ltd
Joint Coal Board

④ Sandy Halley - Aurora Consultants

10 Develop Strategies to Target Employer Compliance

Only 31% of major claims are reported to insurers within 10 days with a further 27% dribbling in over the next 10 days[①].

12% of major claims are still not reported to insurers 90 days after the claim has been made on the employer.

These massive delays in claims reporting by employers have a twofold effect. Firstly, the insurer is unable to commence injury management measures when it really matters and has the most potential impact, i.e. early on. Secondly, the decision making process in more than 50% of major claims is significantly curtailed and of necessity rushed.

Enforcing the seven day claims reporting requirement (this has been a requirement of the 1987 Act for more than a decade) by employers would have a truly dramatic effect on the management of serious claims.

This "enforcement" could easily be achieved by the introduction of a simple scheme of excesses. For example, if a large employer fails to report a claim within seven days then they would be required to pay the first $3,000 of claims costs. A small employer could be required to pay the first $1,500 of claims costs should they fail to report on time.

Strangely, the 10 Point Plan and the Draft Bill are silent on this issue even though the Minister, his advisers, or the WorkCover Authority have been aware of its significance for a number of years.

Only 14% of major claims are reported to insurers in the first 5 days - imagine the improvements in the scheme's operation and management of injuries if all claims were to be reported on time.

Other measures contained in the Draft Bill deal with premium avoidance issues and are long overdue. As noted in the previous issue of COMPAS some 20% of scheme premium is avoided by employers either deliberately or as an oversight.

It is a pity that the Government has so far refused to act on the other 20% of fraud being committed against the scheme - that of claimant exaggeration of injuries. This could easily be overcome by introducing binding medical panels' opinions over the extent of an injury.

The Workers Compensation policy obtained by employers in accordance with s.144 of the Workplace Injury Management and Workers Compensation Act 1998 contains a policy condition requiring employers to take all reasonable precautions to prevent injury.

To date no insurer has ever denied a workers compensation claim on the basis of this condition even though there have been ample opportunities to show that many employers have not complied.

Perhaps insurers should begin to enforce the Workers Compensation policy conditions much as they would in any other insurance arrangement. This would certainly change the behaviour of employers if they realised that claims could be denied if they were wanton in their disregard of safety provisions.

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① Source Pricewater-houseCoopers