

COMPAS

WORKERS COMPENSATION AND OH&S COMMENTARY March 2005

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In this Issue

Minister Della Bosca's 10
Principles
for workers compensation reform

“Government is about principle.
And the principle is don't rock the boat.
Because if you rock the boat all the little
consciences fall out.”

Sir Humphrey Appleby's diary, end of March
1987

Of Constitutions and Oxen

In this edition of COMPAS we explore some of the plans to improve a workers compensation system which has been the final straw for some employers, causing them to relocate overseas or interstate or simply forcing them out of business.

In workers compensation terms, NSW employers are perhaps the most hard done by of all Australian jurisdictions .

Not only do they have the lowest equity in their system and thereby the highest debt ratio compared to other jurisdictions, NSW has a premium system which ambushes those employers whose employees have claims.

To survive the NSW workers compensation system NSW employers need the constitution of an ox.

Significant reforms to the NSW workers compensation scheme have been introduced in 1986, 1987, 1989, 1991, 1992, 1994, 1995, 1996, 1997 and 1998 by various Governments and yet in 2000, the scheme was still massively under funded and inequitable.

On the 8th of June 2000 at 4.14 pm Minister Della Bosca addressed the Legislative Council and set out the ten principles which would guide the Carr Government's sixth attempt at workers compensation reform.

The reforms which would be introduced were aimed at addressing the concerns of employer and employee groups who wanted an affordable and fair compensation scheme.

As the fifth anniversary of the introduction of Minister Della Bosca's reform principles approaches, employers and employees could rightly expect that the scheme has improved. But is this the case?

In this issue of COMPAS an analysis of the impact of Della Bosca's ten principles is made and an assessment of their success or failure is attempted.

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WorkCover Scheme
Reform 2000, John
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❶

Hansard and Papers, Legislative Council 8.6.2000, page 6879, Ministerial Statement by The Hon. J. J. Della Bosca, Special Minister of State, Assistant Treasurer, Minister Assisting the Premier on Public Sector Management, and Minister Assisting the Premier for the Central Coast.
This is the reference for all of the Principles quoted which follow.

❷

The Concorde Excuse: It was a worthwhile experiment now abandoned but not before it provided much valuable data and considerable employment.

Sir Humphrey Appleby's Diary 14 March.

(Continued from page 1)

First Principle

"Attention will be given to the identification of further measures to increase the focus on injury management and early return to work.

The Government's attention will therefore focus on ways to assist the scheme's participants to achieve world best practice injury management. We need to encourage companies to recognise the benefits of injury management and return to work programs.

WorkCover will therefore establish two pilot projects, one regionally based and one industry based, to develop world's best injury management and return-to-work practices.❶"

Four pilots commenced in January 2001 and were split into two groups, those managed by insurers and those by non insurers. The purpose of the pilots was to:

1. identify the critical components of injury management
2. achieve measurable improvements in:
 - workers' health outcomes
 - return to work for injured workers
 - service use and costs
3. establish benchmarks in integrated injury and claims management.

According to the Pilots' Evaluation Report released by WorkCover in July 2004, the industry pilot failed to deliver according to contract and the contract was terminated in August 2001.

The same Pilot Evaluation report notes that injury management benchmarks could not be established from the evaluation as no factors emerged from the analysis to develop useful benchmarks.

The findings and conclusions which resulted from the first and second purposes of the Pilots were either axiomatic or had been previously reported or dealt with in the legislation, for example;

1. the importance of adopting high levels of customer service
2. a focus on the needs of both the injured worker and the employer will produce better outcomes
3. the need to have a consistent and easily contactable case manager
4. the importance of having adequate numbers of staff to efficiently handle the case load, including well-trained case managers familiar with the issues faced by the type of enterprise with which they work
5. attention to pro-active education of workers and employers about the injury management process, including return to work plans ensures that there are clear understandings of responsibilities and processes, and
6. the need to actively provide information and training about injury prevention.
7. the importance of employer involvement in return to work plans for injured workers should continue to be emphasised.

The final usefulness of the pilots is questionable❷.

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WorkCover Scheme
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①

NSW Legislative Council Hansard, 31 March 1998, (article 36) Page 3396. The Hon. A. B. Manson: "My question without notice is addressed to the Attorney General, and Minister for Industrial Relations. Will the Minister inform the House of the outcome of a recent report prepared by Adrienne Bailey which reviewed the pilot Workers Compensation Resolution Service?"

②

A major claim is one which has a duration of 5 days or more. According to the WorkCover Authority 2004 Annual Report there were 51,000 major claims in 2002/03 which is the latest available data. In the absence of 2003/04 data, this figure has been used to compute the percentage quoted.

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What is undeniable is that 7 years after Richard Grellman recommended to the Government that the workers compensation system needed one, NSW still doesn't have a consistently applied best practice injury management model.

Second Principle

"Our second principle is to review dispute resolution processes and structures and to develop better dispute prevention measures. There is something fundamentally wrong with a scheme that invests massive amounts of time, energy and expense to resolve disputes which should not have arisen in the first place."

Those observers who have followed the tortured path of workers compensation reform over the last decade will recall the introduction of the Workers Compensation Resolution Service (WCRS) in 1998. Prior to the introduction of the WCRS a pilot resolution scheme had been running for approximately 12 months. The WCRS was introduced to streamline the dispute resolution process and keep matters out of the Courts.

Responding to a question without notice ① the then Minister Jeff Shaw stated:

"Honourable members may recall that the Department of Industrial Relations has a pilot model of conciliation for disputed workers compensation claims along the lines recommended by Sir Laurence Street. Legislation underpinning that model commenced on 1 March 1997. The model was commenced in the belief that effective conciliation will help to address the situation in which, after a lengthy time delay and the accumulation of substantial costs, parties reach agreement on the steps of the compensation court. Not only does effective conciliation reduce litigation, and therefore costs to the workers compensation scheme, but it also provides a fast and less stressful resolution of a dispute for the injured worker."

The WCRS only existed for a few short years. In its heyday, more than 50% of claims went before it because that was what the legislation required. It became cumbersome and ineffective and was rightfully dumped.

A new and "simplified" dispute resolution system was introduced in January 2002. The Compensation Court was to be abolished and replaced by a Commission (WCC) with Arbitrators used to resolve disputes instead of Judges.

According to the WCC 2003 Annual Review Report, the WCC aims to provide a just, timely and cost effective forum for the resolution of workers compensation disputes. The Commission's non- adversarial dispute resolution directly involves the parties in an accessible and accountable process that ensures injured workers obtain a fair and quick resolution to disputes about their workers compensation entitlements.

In 2003, 9,282 applications to resolve a dispute were registered (18% of major claims ②), in 2002 the number of disputes was 3,371. 75% (6,961) of new disputes in 2003 were for permanent impairment (S.66) claims.

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WorkCover Scheme Reform 2000, John Della Bosca's 10 Principles

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1 Claims payment types are published in full in the Workers Compensation Statistical Bulletins. Synopses are published in the WorkCover Authority Annual Reports. Both of these sources have been used to compile this data.

As most workers compensation practitioners would be aware, the acceptance of an offer from an insurer by a claimant cannot be approved until the claimant has taken independent legal advice.

The procedure goes along these lines: Claimant, " I've got this offer from the insurance company to pay me for my bad back, but I have to have a lawyer tell me if it is OK and the Union said I should come and see you." Lawyer, "Is that all they are offering? I reckon we can do much better than that." Bring on the dispute.

This legislative provision only exists in the workers compensation jurisdiction and continues to provide a healthy income to the legal profession. According to claim payments type dissections 1 legal costs as a percentage of total workers compensation claims costs have averaged 11.74% over the 10 years to 2003 (e.g. 2000, 11.8%; 2001, 11.8%; 2002, 11.6%; 2003 11.7%. 1996 had the lowest reported legal costs at 10.7%).

The legislative provision requiring independent legal advice treats claimants as though they were unable to make their own informed decisions (idiots) and as can be seen, is the major single cause of disputes.

Governments have a fascination with resolving workers compensation disputes, yet if the truth were known, it is their own legislative provisions which create the disputes in the first place.

The WCC is already experiencing difficulties and delays in the resolution of matters. In just over two years of operation 13% of disputes have taken more than nine months to settle. Lawyers who work in the field constantly complain about the quality of Arbitrators' decisions and the appeal rate is a massive 22%.

Of the 48 arbitral appeals which were resolved in 2003, 26 were withdrawn or did not meet eligibility requirements. The arbitrator's decision was overturned in six of the remaining 22, (27%) and was confirmed in 16 of the cases.

The costs of running the WCC are already beginning to approach those of running the Compensation Court. According to the WorkCover Authority Annual reports "Income and Expenditure Statements" costs of dispute resolution management for the past nine years are as follows:

	1996	1997	1998	1999	2000	2001	2002	2003	2004
Comp Court	27.138	20.55	19.622	21.154	20.199	22.562	22.481	27.202	41.204
WCRS	N/O	1.19	2.274	7.743	7.419	7.622	5.098	0.031	N/O
WCC	N/O	N/O	N/O	N/O	N/O	N/O	4.359	13.165	23.303
Total	27.138	21.74	21.896	28.897	27.618	30.184	31.938	40.398	64.507

Costs are in \$m

The aberration in 2004 Compensation Court cost is not properly explained but is believed to be the extra cost of winding up and the increase in matters brought before it prior to the wind up.

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WorkCover
Scheme Reform
2000, John Della
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① Medical protocols for back pain management and psychological injuries were introduced by the Victorian and South Australian WorkCover Authorities in the mid 1990s. In neither case were there any enforcement or incentives to encourage their use. Both initiatives have failed to have any measurable impact.

(Continued from page 4)

There is ample scope to reinstate the Workers Compensation Court, it is relatively inexpensive to run and all who go before it are dealt with by experienced Judges and other practitioners.

Any alternative system in which the umpire's decision is only correct in one out of four appeals and can takes over 9 months to come to a decision is surely bound to fail.

Third Principle

"Third, further consideration will be given to the development and implementation of medical treatment protocols. If successfully implemented, medical treatment protocols have the potential to significantly reduce scheme costs through better return-to-work outcomes. General practitioners need to be kept up to date both about the requirements of the workers compensation scheme and the most effective treatment for work injuries. General practitioners also need to have access to the support of their specialist colleagues."

In previous issues of COMPAS we have criticised the medical profession for its inability to consistently manage work related injuries. Educating medical practitioners post their qualifications and then introducing protocols which they are encouraged to employ is impossible without an incentive.

Insurers are remunerated on their performance. Physiotherapists are paid extra fees if they manage soft tissue injuries using work related activity. Lawyers are now paid according to a fee schedule.

There has been no attempt by the Government to introduce any incentive for medical practitioners to utilise the medical protocols that the WorkCover Authority is seeking to introduce ①.

If employers are to continue to pay for treatments to injured workers they have a right to expect that best practice treatment regimes are prescribed.

Only evidence based treatment should be funded by the workers compensation system (i.e. if there is no evidence that this treatment works it should not be paid for).

Fourth Principle

"Fourth, market incentives to reduce the incidence of workplace injury and encourage insurers and employers to actively participate in injury management, and early return to work programs will be developed."

In his introduction of his Fourth Principle, the Minister went on to say that he intended to develop performance benchmarks to encourage employers and insurers to meet their obligations under the OH&S Act within the scheme.

As noted earlier, the performance benchmarks which were to result from the pilot studies never eventuated.

An incentive scheme for employers to develop better OH&S and injury management practice was however introduced (premium discounts).

(Continued on page 6)

NOTES

①
The Hon. J. J. Della
Bosca; NSW
Legislative Council
Hansard, 20 June
2000, Page 7066.

(Continued from page 5)

According to the 2003/2004 WorkCover Annual Report the Premium Discount Scheme (PDS) is aimed at employers with high claims costs. So far 77% of employers who have participated in the PDS are in the \$25,000 to \$500,000 base tariff premium range which was the target for the scheme.

It is interesting to note that the premiums and claims distributions by employer size within the NSW workers compensation premium system would suggest that the target audience may have been wrongly identified. The table below shows the approximate distributions.

Premium Size	% Proportion of Total Premiums	% Proportion of Total Claims Costs
\$1K—\$10K	26.30	31.64
\$10K—\$100K	33.01	30.86
\$100K—\$500K	20.92	19.89
\$500K +	18.78	17.61

Approximately 95% of policyholders pay less than \$10,000 in premiums. These policyholders have a loss ratio of over 120%. Policyholders in other premium bands all fare better with loss ratios under 100%.

Any incentive for improvement should surely be targeted primarily at the poorer performers.

A limited small business strategy that ran for 3 years was introduced and 1,540 employers participated. They received aggregate discounts of nearly \$6.2 million. \$117 million has been returned to the larger employers who participated in the PDS.

As any of the larger employers can tell you, what is given by one hand can be taken back with the other and the ambush of employers in June 2004 by increasing F Factors, is explicit evidence of this.

F Factors are used to gross up the cost of claims so that they reflect their ultimate cost. They are meant to be a reflection of superimposed inflation and incurred but not reported costs which are not catered for in case estimates.

The chart on the following page shows how the value of F Factors has progressed over the last decade. Note that there was no major change until 2000/2001, coincidentally the same time that the Government fixed the NSW target premium rate at 2.8% of wages even though the underlying cost was 2.97% ①.

Whilst it is far too early to determine the effects of the PDS on the overall workers compensation scheme performance, we suspect that by returning premium to employers it will only serve to increase the deficit.

Certainly, raising F Factors without a transparent excuse dilutes the incentive for employers trying to improve OH&S and injury management through participation in the PDS.

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WorkCover Scheme
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①

This table was provided by WCD Workers Compensation Solutions Pty Ltd and we are indebted to them for its use. The views and comments expressed in this edition of COMPAS are not necessarily those of WCD Workers Compensation Solutions Pty Ltd.

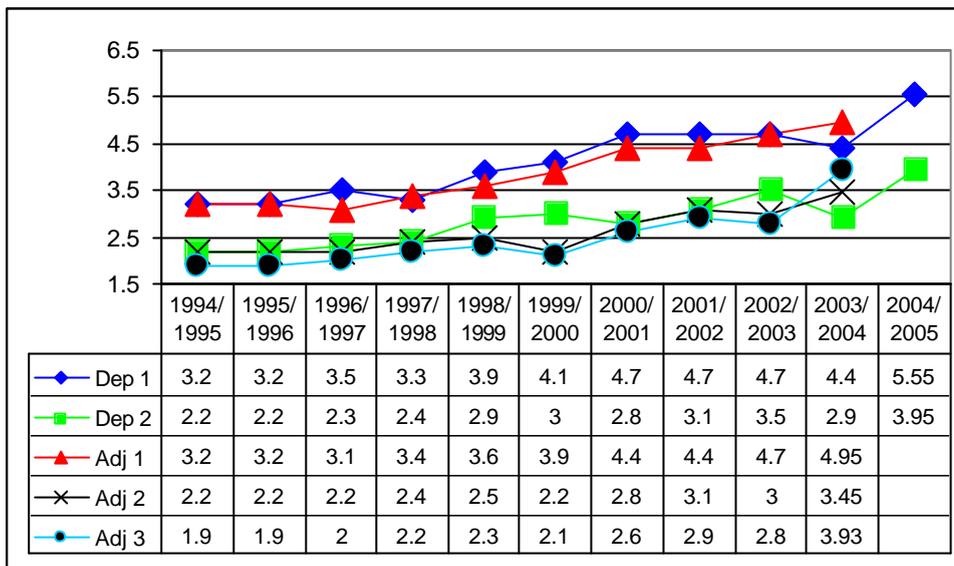
②

"It is axiomatic with Civil Servants that information should only be revealed to their political masters when absolutely necessary, and to the public when absolutely unavoidable."

Sir Humphrey
Appleby's Diary 29
January 1987.

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Chart showing the movement in F Factors ①



Fifth Principle

"Fifth, strategies will be developed to provide accurate and timely information to scheme participants to meet their needs and enable them to fulfil their obligations."

According to the WorkCover web site, the aim of the Workers Compensation Statistical Bulletin is to provide an overview of the major claims in New South Wales. Statistical information presented in this bulletin enables industry and individual workplaces to better understand the nature and extent of a problem in their area and identify the issues for priority action.

At the time of writing, (17.2.05) the last Statistical Bulletin released related to claims which occurred 2000/2001. It is now more than three and a half years out of date!②

In 1998, Industry Profiles were made available by WorkCover to Industry Reference Groups (IRG). These profiles provided a very comprehensive data set which incorporated detailed claims information, data from OH&S databases and workforce and labour cost data from the ABS.

Ten year trends were examined and analyses of occupations that experienced high numbers of claims were made. These analyses provided a clearer understanding of high-risk situations which lead to injuries sustained within the IRG.

These industry profiles or similar should be provided annually if Minister Della Bosca's fifth principle is to be applied.

The workers compensation information currently released by WorkCover into the wider employer and employee communities is paltry and out of date.

WorkCover Scheme
Reform 2000, John
Della Bosca's 10
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NOTES

①
Refer Inquiry into
Workers'
Compensation
System in NSW
15.9.1997 by
Richard Grellman
Paras: 7.5 and 7.6.

②
June 2000

Sixth Principle

"Sixth, additional measures will be considered to control professional fees and ensure that the workers compensation scheme and its participants get best value for money."

Considerable success has been made in this regard with the introduction of fixed fees for lawyers and agreements over fee schedules with medical care provider organisations. If ways can be found to improve the uptake by doctors of evidence based treatment protocols even greater savings will eventuate. However, until the dispute resolution mechanism is reformed, legal costs will continue to be a significant feature of the scheme.

Seventh Principle

"Seventh, mechanisms will be developed for the gradual removal of existing cross-subsidies."

Grellman's inquiry into the NSW workers compensation system recommended sweeping changes to the algorithms used for premium assessment^①. These changes involved combining a restructure of industry rating and employer-size experience rating.

The Rating Bureau which was established in 1998 to develop a premium mechanism, filed Risk Premium Methodologies in 1999 and 2000.

These methodologies took the Grellman recommendations one step further and introduced differential rating by employer size (small, medium and large) and F Factors applied to an Experience Rating Group.

These two initiatives, combined with a new industrial classification system (ANZSIC) abolished premium cross subsidies. Needless to say, the Government has not taken up this work and some five years later, cross subsidisation is rife and increasing.

More importantly, unsafe employers are not getting the right messages normally delivered through a pure risk rate.

The increase in cross subsidisation comes about by the application of the current Premiums Order which risk rates only the larger employer. Industry rates are the same regardless of size, however smaller employers premium is either not risk rated at all or the impact of claims is very, very small. As noted earlier, the movement in F Factors has increased the amount of premium collected from large employers.

Eighth Principle

"Eighth, development of strategies to retire scheme deficit will be implemented. As honourable members would be aware, the scheme has been charging a premium rate below the true cost of the scheme for several years. That has led to the creation of a deficit. The deficit stands at approximately \$1.8 billion as at 31 December 1999, and it is forecast to reach \$2 billion by the end of this month^②."

By December 2002, the scheme's deficit had risen to \$3.23 billion, however had improved to \$2.353 billion by June 2004.

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WorkCover Scheme Reform 2000, John Della Bosca's 10 Principles

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❶ The collapse of self insurer Blue Ribbon Meat Products in Tasmania is a case in point. By June 2003, the Tasmanian Nominal Insurer had paid a total of \$429,000 from funds obtained from the bank guarantee lodged by Blue Ribbon Meat Products as a requirement of being granted a permit to self-insure. The Nominal Insurer was also negotiating with the liquidator to obtain additional funds to meet expected future liabilities.

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The Minister's comments about charging a premium which did not reflect the cost of the scheme go to the heart of the matter.

For at least ten years, the Government has artificially fixed premiums at an acceptable level to employers, because the alternatives of pure risk rating or slashing benefits have been politically unpalatable.

The underwriting results for the scheme over the past 10 years give an indication of how political interference with premium setting can impact on a large insurance operation.

Year	1995	1996	1997	1998	1999
Underwriting Result	(593,640)	(759,603)	(952,958)	(1,165,783)	(166,868)
Year	2000	2001	2002	2003	2004
Underwriting Result	(390,370)	(1,359,335)	222,231	(37,057)	138,724

As can be seen, on only two occasions in the last 10 years did the net premiums exceed the net claims, begging the questions; What was the WorkCover Board doing? What is the quality of the actuarial advice given over target premiums and expected claims costs?

Woe betide any Board of management in the private sector which consistently delivered such a business result.

When pure risk premiums are charged, the business and wider communities can be sure that stakeholders of the future will not be stuck with massive deficits due almost entirely to political machinations.

Ninth Principle

"Ninth, the Government is assessing the use of industry-based schemes and self-insurance as a means of achieving better outcomes."

Industry based schemes are a child of the future and to date only one new scheme has been developed. As with promoting self insurance, industry based schemes deliver a consequent risk of diluting the remaining insurance pool. This gives rise to greater scheme volatility and means that funding mechanisms will be less certain in their application. This is not good news for employers forced to remain in the scheme who seek budgetary certainty.

A further risk of promoting industry based and self insurance lies in the prudential regulation of the self insurers.

Workers compensation self insurers should be subject to the same prudential controls as other insurance companies and should fall under APRA's supervision. Without this supervision, NSW runs a much greater risk of having to pick up the outstanding claims for a belly up employer who was a self insurer❶.

In 1995 there were 52 self insurers, in 2004, 66. Interestingly nearly half of the self insurers are government or government related employers.

(Continued on page 10)

WorkCover Scheme Reform 2000, John Della Bosca's 10 Principles

NOTES

①

“The Law of Inverse Relevance: The less you intend to do about something the more you have to keep talking about it.”

Sir Humphrey Appleby's Diary end of July 1987.

②

Report titled: Partnerships for Recovery: Caring for injured workers and restoring the financial stability to workers compensation in NSW 2002.

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The number of licensed insurers has more than halved under the current Government from 13 to 6. This reduction is mainly due to industry consolidation but also reflects the difficulties of doing business under such a harsh regulatory and compliance regime instituted by WorkCover.

The lack of competition has resulted in mediocre services from insurers which is bad for the viability of the scheme.

Tenth Principle

“Tenth, strategies to target employer compliance will be developed.”

Much has been talked about employer non compliance but the evidence suggests that this is not a major issue^①. Most employers are anxious to pay the correct premiums and are honest in the way that they make their insurance arrangements.

According to the WorkCover Authority 2004 Annual Report, approximately 13,000 audits of employers were carried out, netting just \$26.5 million in extra premiums (i.e. 1.06% of premiums received).

Approximately 225 (i.e. 0.068% of policyholder numbers) non insurance matters were investigated with an average premium avoided of \$2,041. Obviously these were mainly small businesses and would probably have acted in ignorance rather than deceit.

The Score Card then...

This analysis has to some extent been overshadowed by the McKinsey Report^②. It had become clear that the recommendations made by Richard Grellman in 1997 either did not go far enough or were not capable of alignment with the political process so a further review costing \$6 million was commissioned.

A project has been established by WorkCover to implement McKinsey's recommendations and will no doubt provide COMPAS with much future material to report on.

We have simplistically scored the application of Minister Della Bosca's 10 Principles out of 10 and admit to a degree of bias. You may wish to compile your own scores.

Principle	Score	Principle	Score
First	1	Sixth	8
Second	1	Seventh	2
Third	3	Eighth	3
Fourth	3	Ninth	2
Fifth	1	Tenth	2

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