



**REPORT ON THE IMPLEMENTATION
OF THE
LABOR PARTY DIRECTION STATEMENT
IN RELATION TO
WORKERS' COMPENSATION**

*Report to the
Workers' Compensation and Rehabilitation Commission*

*For the
Hon Minister for Consumer and Employment Protection*

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EXECUTIVE SUMMARY

Compensation systems represent intense examples of the ways in which governments must rationalise the complex, competing demands made upon them by a variety of powerful interest groups in the formulation and implementation of social policy.¹ Such systems are characterised by tensions between the need to promote industrial production and the operation of the labour market and at the same time provide adequate and affordable compensation payments to those who are physically and mentally disabled by these processes. Often changes to compensation legislation are met with by resistance from highly organised interest groups, including trade unions, employers, insurers, a variety of medical care providers, injured persons action groups, lawyers and government administrators. Frequently there are tensions within these groups. This panoply of groups makes the reform of compensation schemes a delicate balancing act.

Arup has described this balancing act as a kind of “morality play” which involves not just the competing concerns in relation to the costs and benefits of compensation systems, but also elements that have both financial and symbolic significance. These elements include the maintenance of work incentives, the authority of employment relations, the allocation of fault for disabilities suffered by workers, accident deterrence and prevention, the preservation of professional autonomy and workers’ rights.² The Insurance Council of Australia submission reflects one aspect of these competing concerns, it asserted:

The Industry strongly believes that all proposed reforms should be evaluated in terms of their effect on workers and employers as primary stakeholders. However, the competing interests of these primary stakeholders must be balanced. The cost of fair and appropriate compensation, treatment and support for injured workers can only be funded over time through affordable and sustainable premiums paid by employers.

The Industry also believes that Scheme structure and balance should provide attractive enough incentives for all Scheme participants to exhibit behaviours which provide the optimum outcomes for the primary stakeholders.

1 Arup, C. (1990) 'WorkCare: Administrative Rationality, Legal Process and Political Reform'. 3 *Australian Journal of Labour Law* 159 at 159.

2 Ibid at 160.

*In the interests of Scheme stability, it is important that any changes introduced be cost neutral to avoid adverse impacts on premiums and desired Scheme outcomes. Due to the complex and sensitive dependencies that exist in the Scheme structure, it is also important to undertake a thorough review of the actuarial impact of any changes to the Scheme to identify the cost impacts, probable changes in Scheme participant behaviours and likely Scheme outcomes.*³

The above approach implies that the employer is the sole source of funding of the compensation system and bears the whole cost of compensation claims. A more holistic approach would note that workers sacrifice higher wages in order that compensation systems be put in place, not to mention the enormous social impact of injury and disease the brunt of which is felt by injured workers and their families.⁴ Further, the community as a whole feels the impact of the costs of compensation systems because premium costs are passed onto the community as costs of the production and the price of goods and services.

In addition to the many interest groups that exert an influence on compensation policy, compensation claims are characterised by the potential for some groups to exert an influence on the results of individual cases. Medical practitioners in particular are able to express views not simply on medical matters, such as the diagnosis or prognosis in a case, but also on the credibility of the worker. Insurance companies sometimes initiate publicity campaigns that depict claimants as dishonest or unworthy.

Employers promote campaigns designed to show that the costs of compensation schemes are an unfair burden on them and that job losses will eventuate if premiums are not reduced. Campaigns by government, especially in recent years, have depicted lawyers as aggressive, self-interested and over-remunerated.

The discourse in relation to compensation systems therefore consists of strongly held views as to the range of persons who should be covered by the legislation, the type of conditions that should be compensable, the range of benefits available and who should bear the burden of any costs or losses.

3 Insurance Council of Australia Submission June 2001.

4 Considerable detail on this point appears in the *Industry Commission Report 1994* Appendix A.

Arup observes that the morality play is often acted out in a medico-legal setting, where questions of work-relatedness and incapacity for work are determined. The “medicalisation” of compensation claims may also operate to suppress conflict. Bale, for instance, asserts that:

The continuing class conflict over the value and meaning of workplace injuries was moderated as medicine helped re-channel the inquiry into the explosive questions of employer fault into a more manageable terrain.⁵

The means by which these questions and the conflict connected with compensation claims are resolved are crucial to the direction that a compensation scheme takes.⁶

In recent times medical assessment of disability has assumed great significance.

In 1993 the Western Australian Liberal Government made major changes to the system of workers' compensation entitlements and dispute resolution. These Western Australian reforms followed a series of significant changes to compensation systems around Australia, commencing in South Australia in 1984 flowing through to New South Wales, Victoria and the Northern Territory. By the early 1990's a second wave of reforms was taking place in most States and Territories. Of special significance were the 1992 reforms in Victoria, which heavily influenced the changes to the Western Australian system.

When it made the changes in 1993 the Western Australian Liberal Government was concerned about the increasing costs of the compensation system. The reforms to the Western Australian system were essentially twofold. First, a number of reforms were directed at the financial costs of the system. In this regard the focus was on the benefits available under the *Workers' Compensation and Rehabilitation Act 1981 (WA)* (the Act) and frequency of claims made for damages for employer negligence.

5 Bale, A. (1989) 'Medicine in the Industrial Battles: Early Workers Compensation' 8(11) *Social Science and Medicine*, 1113 at 1121. Note also Arup, C.(1998) 'WorkCover 1997 and the Abolition of the Common Law' 11 *Australian Journal of Labour Law* 186 at 201.

6 Arup, C. (1990) 'WorkCare: Administrative Rationality, Legal Process and Political Reform'. 3 *Australian Journal of Labour Law* 159 at 161.

In relation to these issues the government amended the Act to abolish travel claims (to and from work) limit claims for stress related disability and, most significantly, reduce the rights of workers to sue employers for damages. In addition, the government severely restricted the right of workers to negotiate lump sum payments under the Act. Second, in relation to dispute resolution the government adopted the recommendations of the Inquiry into Workers' Compensation Dispute Resolution System 1993 (The Chapman Report). The terms of reference of that Inquiry were:

...[T]o examine, review and recommend on the most efficient and cost effective non-adversarial procedures and practices that can be implemented in this State for the resolution of disputed claims in the workers' compensation system.

The *Chapman Report* recommended the establishment of a non-adversarial system of dispute resolution which included provisions to reduce the rights of parties to be legally represented, require the parties to bear their own legal costs and to implement a system of (so-called) administrative conciliation and review rather than judicial adjudication.

The effect of these recommendations was that the Workers' Compensation Board ("The Board"), which had resolved compensation disputes since 1948, was abolished. In place of the Board, the Government established the Conciliation and Review Directorate ("the Directorate"). The impetus for change in the workers' compensation dispute resolution system was said by the Government to be the need to reduce the cost of disputes, to improve the rate of settlements, to reduce delays and litigation costs and to remove adversarial processes from compensation disputes.

In the context of disputed compensation claims, the tensions revealed in morality play referred to in the opening paragraphs are acted out in the dispute process. These tensions relate to process-orientated values often asserted by key players around the right to adjudication of claims, the right to legal representation, and the independence of medical care providers.⁷ The reform of dispute resolution systems therefore is no less contentious than the reform of benefits and entitlements.

7 Arup, C. (1990) 'WorkCare: Administrative Rationality, Legal Process and Political Reform'. 3 *Australian Journal of Labour Law* 159 at 162.

Disputed compensation claims are a unique area of dispute resolution because they involve the interaction of a disparate cluster of powerful interests groups, the transference of tensions characteristic of industrial disputes to the compensation arena and the complexities inherent in the juggling of social and economic policy.

This report is prepared at the request of the Minister for Consumer and Employment Protection. The purpose of the report is to investigate the implementation of the Labor Party Direction Statement on Workers' Compensation. A copy of the direction statement is contained in *Appendix One* to this report. In general terms the direction statement requires an examination of the following areas:

1. The balance between common law entitlements and statutory benefits.
2. The access of workers to common law entitlements.
3. Dispute resolution procedures.
4. Improvements in statutory benefits.
5. Insurance arrangements.
6. Rehabilitation and injury management.
7. Legal representation.
8. The role of medical panels in compensation disputes.

In addition, some comments are made in relation to recent reviews of Medical Costs and Insurance Arrangements. In order to provide a background to the matters discussed in this report Chapter one provides an overview of the previous reports and enquiries into the workers' compensation system in Western Australia and nationally in the last decade.

The most striking feature of the 1993 changes was that they were based on scanty evidence and research and often in disregard of cautions expressed by a number of interest groups. To address this aspect four detailed discussion papers accompany this report. In addition some suggestions for future research are detailed in the closing chapter of this report.

National inquiries have generated a considerable body of literature and are a good source of information, but it should be noted that often the competing State and Federal interests have exacerbated the tensions inherent in compensation systems.

For example, the *Industry Commission Report 1994* produced important observations in relation to a number of issues and raised the potential for a competitive Federally based insurance system. The *Promoting Excellence; National Consistency in Australian Workers' Compensation Report 1997* is impliedly critical of those recommendations in the *Industry Commission Report 1994* which attempt to nationalise the compensation system. After examining the actuarial data, dispute resolution data and taking into account numerous submissions, major findings of this report are:

1. Many of the sound recommendations of previous enquiries have not been acted on and should be implemented. These recommendations related to the need to implement systems of:
 - Injury Management;
 - Employer Incentives in relation to insurance premiums;
 - Employer Incentives in relation to return to work for disabled workers;
 - Fairness in dispute resolution.
2. Western Australia has been overly conservative in its approach to the above matters and clearly needs to implement systems to progress these processes.
3. The current state of the compensation system is that it is reasonably stable insofar as there is a trend towards lower premiums and reduced costs within the system. Common law claims have markedly reduced since late 1999 and are back to the proportion of claims experienced in 1984, namely less than 1% of all claims.
4. The benefits of overall reduced premium costs have not been widely felt and are probably isolated to larger employers. The average premium rates for Western Australia are comparable with other states and may, after taking into account a range of variables, be lower than most other states.
5. Worker benefits and entitlements have declined since 1999 in particular and are probably out of step with other states.
6. In relation to (5) above, Western Australia probably has lower rates of weekly payments for the first four weeks of incapacity than most comparative

jurisdictions. Further, the duration of weekly payments in Western Australia is limited by the prescribed amount which does not apply in most other States. Common Law access has been severely reduced since 1999. The combination of these limitations have helped to reduce the costs of the Western Australian system. The capping on weekly payments introduced in 1999 has had a mixed effect on workers and employers, with some cost savings to the compensation system shifted into wage costs.

7. Insurer profitability is currently the most favourable it has been for the last 5 years. This must be substantially related to the 1999 changes. Amendments effected in 1993 did not show any appreciable effects on costs reduction for three years. The effect of the 1999 changes has been almost immediate.
8. If worker benefits are lower in Western Australia, and insurers are making modest profits, then it would appear that there are problems with continued cross-subsidisation of premiums across employer groups, with smaller employers generally paying gazetted premium rates and larger employers being able to negotiate discounted premium rates.
9. Notwithstanding, a review of Western Australian insurance arrangements in 2000, no systematic process of premium discounting is currently in place. There is a need for a statutory formula to provide consistency and fairness in premium discounting, rather than to rely on the insurers "competitive pricing" to reduce premium rates, as has been the case in the past.
10. Premium rate discounts should take account of employer performance and return to work successes.
11. The approach to the workers' compensation needs to be more holistic. In the past Government has struggled with the issues of rising costs and has often attacked worker benefits as a means of containing the problem. This leads to enormous tension between the parties to the system. The common interest of all parties is the return to work of disabled workers, and mechanisms to facilitate this process should be given priority. Therefore better practice in Injury Management is a key. The reduction of the use of rehabilitation as a claims management tool and greater

focus on the maintenance and creation of meaningful work for disabled workers is important.

12. Legislation for Second Injury funds and schemes has not been implemented in Western Australia and should be given formal status.
13. Return to work provisions currently in the Act should be bolstered to allow for the assertion of worker rights to job protection in a suitable jurisdiction.
14. Notwithstanding a review of rehabilitation practices in 1997, complaints as to the practices of insurers in relation to rehabilitation continue. The principle of Injury Management needs re-statement in legislative procedures. Rehabilitation Providers should not be overborne by insurers.
15. The use of medical tables to establish thresholds for common law claims is fraught with difficulties and is unlikely to be effective in the long term if used in the current mode. There are substantial objections to the use of the tables in their current form from most participants in the system. Heavy reliance on the tables is inappropriate, irrelevant to common law thresholds for smaller claims, and unfair.
16. Limited use of the tables is appropriate in relation to severely disabled workers, however the tables require urgent revision.
17. Caution needs to be shown with the increasing medicalisation of claims, through emphasis on impairment as a means to establish entitlements. Compensation systems are historically based on principles relating to concepts which require the examination of the workers ability to work rather than examination of loss of function.
18. Assessment of loss of function should as far as possible be confined to Schedule 2 disabilities.
19. The dispute resolution processes are showing signs of strain and need to be made fairer and quicker. There should be a recognition of the institutional power imbalances that exist in the system and efforts should be made to re-dress those

imbalances by allowing legal representation to all parties, with suitable legal cost provisions and sanctions for delays.

In order to implement these findings the following recommendations have been made:

Summary of Direction Statement	Summary of Response to Statement	Recommendations in this Report*	
Closer Relationship between WorkCover and WorkSafe/Restructure WorkCover	Machinery of Government has effected changes to WorkSafe and WorkCover	8.8.1 8.8.2 8.8.3	
Encourage and promote safer workplaces	Changes to allow premium discounts based on lost time performance and return to work will encourage safer work practices.	7.8.1 7.11.1 7.11.2 7.11.3	
Better balance between statutory benefits and common law/better balance in benefits/Greater access to common law/alternative gateway	Improved access to common law provided, different formula, not as reliant on impairment assessment. Improved access to redemption. Increased benefits for Schedule 2 and extension of weekly payments and medical expenses	3.2.1 3.2.2 3.2.3 3.2.4 3.2.5 3.2.6 3.2.7	3.2.8 3.2.9 3.2.10 3.4.1 3.4.2 3.4.3
Less bureaucratic procedures	Dispute resolution simplified. Reduced need to assess will reduce technicalities. Election process simplified	3.2.5 4.2.4 4.2.5 4.2.6 4.3.1.1	4.3.1.2 4.3.2.2 4.3.2.3 4.3.2.4 4.3.2.5
More time for medical conditions to stabilise	Extension of election for common law access to 12 months	3.2.2	
Encourage insurance gap for weekly payments	Reconsidered cap to increase to 2 times AWE	3.4.3 3.5.2.2	
85% Step down to apply only to individual contracts	Adjust definitions in Act to apply to individual contracts. No further step downs proposed after first four weeks.	8.4.1	
Improve statutory benefits	Redemption applications allowed. Schedule 2 allowed in addition to Weekly payments. Extension of weekly payments and medical increased	3.5.2.1 3.5.2.2 3.5.3.1 3.5.3.2 3.5.3.3	3.5.3.5

* The report also contains a range of other recommendations which facilitate the implementation of the Direction Statement.

Summary of Direction Statement	Summary of Response to Statement	Recommendations in this Report*	
Achieve full and equitable payment of premiums	Formula for discounts on premiums allows for right to discount based on good performance. Poor performers to be identified to WorkSafe for action.	7.8.1	
Better outcomes through improved market competition between insurers	Formula for discount on premiums will allow better access to reduced premiums for small/medium business	7.8.1	
Rebate scheme to provide lower premiums	Discount formula suggested.	7.8.1	
Vocational rehabilitation more effective/ get support for injured workers	Creation of Injury Management structures. Return to work provisions strengthened. Second injury scheme proposed. Early referral mechanism proposed.	5.3.1 5.4.1 5.4.2 5.6.1 5.6.2 5.7.1 5.7.2 5.7.3	5.7.4 5.8.1 5.8.2 5.8.3 5.9.1 6.5.1 6.5.2 6.5.3 6.5.4
Allow legal representation/reform dispute resolution	New dispute resolution model allows legal representation. New model provides for two tiers of resolution	4.1.2 4.1.3 4.1.4 4.1.5 4.1.6	4.1.7 4.2.1 4.2.2 4.2.3
Review the role of Medical Assessment Panels	Medical panels not to be binding in most cases. Provision for parties to refer to be strengthened.	4.11.1 4.11.2 4.11.3 4.11.4 4.11.5	4.11.6 4.12.1
Stamp Duty on insurance policies	Referred for action by Minister		
Extensive Actuarial analysis of issues	Models considered by Actuary used as guide for recommendations, attached as appendix to report	Appendix Three	
More responsive management to dynamic forces in compensation system	Provide for key provisions to be subject to regulations to adjust thresholds, time limits and election periods.	9.1 9.2 10.1	

* The report also contains a range of other recommendations which facilitate the implementation of the Direction Statement.

RECOMMENDATIONS

- 3.2.1 The threshold of 30% impairment of the body as a whole be implemented. Workers who sustain an impairment equal to or in excess of this level be entitled to access to common law entitlement in accordance with the current limitations applying to workers who suffer a 30% degree of disability. The 30% threshold would be established by a binding decision of a medical assessment panel at the time provided for election.
- 3.2.2 Where a worker sustains an impairment less than 30% and elects to pursue a common law claim within 12 months from the date compensation is payable there is to be access to common law with caps on damages as currently apply to workers with a *significant disability*. The maximum cap should continue to apply to the most extreme case.
- 3.2.3 A court shall not award damages unless there is an assessment of damages equal to or in excess of 50% prescribed amount of *weekly earnings*. Such loss to have accrued within 3 years of the date of disability. The relevant prescribed amount is to be the prescribed amount at the time of issuing the writ.
- 3.2.4 In the event that a court assesses damages to be in excess of 50% of the prescribed amount of *weekly earnings* the court shall deduct from any award of damages a sum equal to 25% of prescribed amount as at the time of issuing the writ. This deductible to apply only to those workers whose damages have been assessed at less than the prescribed amount.
- 3.2.5 The threshold requirements referred to in 3.2.3 and 3.2.4 above are to be determined at trial.
- 3.2.6 The Act is to be amended to provide that Schedule 2 entitlements be available exclusive of (in addition to) the prescribed amount for weekly payments and other entitlements.

- 3.2.7 Section 84E be amended to provide an extension for weekly payments of up to an additional 75% of the prescribed amount.
- 3.2.8 The provisions relating to common law entitlements have operation as from the date of enactment.
- 3.2.9 The provisions increasing the statutory benefits be available to all workers notwithstanding the date of disability, provided that the worker has not otherwise settled a claim.
- 3.2.10 In relation to those claims currently being dealt with under existing legislation, there should be transitional provisions which make clear that the disabilities/impairment assessment obtained for the purposes of commencing proceedings is not to be a factor taken into account in assessing damages: that is, the most extreme case should not have regard to the disabilities/impairment rating.
- 3.2.11 Consistent with the *Ansell Report* insurance against common law liability should be compulsory and shall be fixed under section 151 of the Act. Sections 152 and 153 should apply to any such premiums fixed.

Notes on these recommendations

The recommendations above differ slightly from the models costed by the actuary. Costs savings would be made if Schedule 2 entitlements were not increased across the board. If Schedule 2 entitlements were made exclusive of all other entitlements those workers who had exhausted weekly payments would be entitled to the Schedule 2 amount over and above the prescribed amount for weekly payments. Therefore this amendment would only increase costs to the extent of the numbers of workers who exceed the prescribed amount or those whose claims would have been reduced because the Schedule 2 entitlement would exhaust the prescribed amount. This is likely to offer further incentive for workers to stay in the statutory system and save legal and other costs of common law proceedings.

The deductible has been reduced and is to apply to only those workers who have awards less than the prescribed amount. This, it is submitted, is equitable as it is more closely aligned with the situation in relation to motor vehicle claims and given that it does not apply to workers with higher awards, should avoid complications with the current cap on damages. It would increase the costs of the models to somewhere between models E and F, but given the savings in relation to Schedule 2 entitlements would probably still be close to the costing of Model E. Finally this model reduces heavy reliance on medical tables, and fulfils the Direction Statement objective of greater access to common law and reduction of bureaucratic procedures.

3.3.1 That the assessment of impairment for the purposes of ascertaining access to common law exclude assessment of secondary psychological or psychiatric disability.

3.4.1 That pre-litigation compulsory conference provisions be enacted, which require attendance at a conference within 3 months of issue of a writ to negotiate settlement of common law claims.

3.4.2 That it be a requirement of the compulsory conferences that the parties negotiate in good faith: that the employer/insurer be required to make an offer to settle at the conference and that the worker supply all relevant documentation to the employer/insurer prior to the conference.

3.4.3 That there be provision for payment of costs at such conferences.

3.5.1.1 The cap in relation to weekly earnings be increased to twice the average weekly earnings for Western Australia.

3.5.1.2 That the Minister be empowered to make regulations to vary the multiple of the average weekly earnings in relation to weekly payments of compensation.

3.5.2.1 Section 67 to be amended, to allow workers to make application for redemption and to provide that an order redemption of the prescribed amount discounted by 5% be made where the worker can establish special circumstances.

3.5.2.2 Applications for redemption are to be allowed to be joined with any other application on foot.

3.5.3.1 Section 84E be amended to delete reference to the sum of \$50,000 and insert in its place reference to a proportion (75%) of the prescribed amount.

3.5.3.2 The proportion of the prescribed amount should for the time being be 75%.

3.5.3.3 There be regulations which allow the Minister to adjust the proportion of the prescribed amount referred to in Section 84E.

3.5.3.4 Without limiting the scope of the requirement of total and permanent incapacity; workers who have a 30% impairment of the body as a whole be deemed to be totally and permanently incapacitated.

3.5.3.5 A worker who has obtained an order to extend weekly payments under section 84E shall be required to elect between taking a Schedule 2 entitlement or continuing weekly payments in accordance with the order obtained. Reference to Schedule 2 herein is a reference to the enhanced Schedule 2 entitlement discussed above.

4.1.1 That there be a two-tier dispute resolution system, know as the Workers' Compensation Commission, consisting in the first instance of Review Officers, and in the second instance Compensation Commissioners.

4.1.2 Compensation Commissioners shall be legally qualified with not less than 5 years' experience.

4.1.3 Review Officers shall be legally qualified.

4.1.4 Review Officers shall conduct Review Conferences in respect of all applications lodged with the Directorate.

- 4.1.5 Compensation Commissioners shall hear and determine all matters referred to them by Review Officers or the parties.
- 4.1.6 The current office of the Director be retained, together with such support staff as necessary for the operation of the Workers' Compensation Commission.
- 4.1.7 Members of the Workers' Compensation Commission who have arbitral powers are not to be subject to any direction in relation to those functions.
- 4.2.1 Within 14 days of lodgement all applications filed with the Workers' Compensation Commission shall be listed for a Review Conference.
- 4.2.2 Review Conferences shall be conducted on an informal basis.
- 4.2.3 Review Officers shall have power to make interim orders in respect of the following matters:
- Order of up to 12 weeks weekly payments;
 - Order payment of up to \$2,000 medical expenses incurred pursuant to clause 17 of Schedule 1 and \$2,000 in respect of clause 18A of Schedule 1;
 - The commencement, continuation, alteration or cessation of any rehabilitation program;
 - Make a finding that a worker has or has not refused, ceased or failed to reasonably co-operate with rehabilitation; for this purpose the Review Officer may sit and determine any such dispute with the assistance of an accredited rehabilitation provider;
 - Re-instatement or suspension of payments consequent upon a section 64/65 matter;
 - Issue Evaluation Certificates in relation to applications under sections 60/61/62 and 74 of the Act and any other matters dealt with;
 - Determine disputes in respect of rehabilitation providers.
- 4.2.4 The Director issue practice directions in relation to the filing of applications, answers and certificates of readiness.

- 4.2.5 Regulations/Rules be proclaimed to facilitate filing of applications and answers to applications.
- 4.2.6 Regulations/rules be proclaimed to facilitate filing of notices to admit any fact matters or things relevant to any proceedings.
- 4.3.1.1 The Director issue practice directions which facilitate in-person applications, and allow for the waiver of any directions that may hinder any unrepresented persons from making a claim.
- 4.3.1.2 That Review Officers have power to make all directions necessary to facilitate the hearing of a matter before a Compensation Commissioner, and may make those directions without requiring the attendance of the parties.
- 4.3.2.1 That the Director continue to promote case management of claims.
- 4.3.2.2 That there be a separate stream for stress claims to allow them to be expedited.
- 4.3.2.3 That where the Workers' Compensation Commissioner and/or the parties consider it appropriate that Commissioner may sit and determine a matter with the assistance of a medical practitioner.
- 4.3.2.4 The Director and/or WorkCover may impose such conditions as they think fit for the selection of medical practitioners for the purposes of the above recommendation.
- 4.3.2.5 That there be a special stream for small claims and in-person applications.

- 4.4.1 Insurance Licensing Agreements provide that all insurers (including self insurers) establish internal dispute resolution procedures.
- 4.4.2 Internal dispute procedures should provide for the review of all adverse first instance decisions by a senior claims official.
- 4.4.3 Section 84K be amended to provide that in the event that the insurer/employer does not provide relevant documents requested in a timely fashion that those documents may not be used in any proceedings under the Act.
- 4.4.4 Section 57 be amended to require increased particularity in relation to rejection of a claim, or the pending of a claim.
- 4.4.5 In the event that an adverse decision is pursued in the Workers' Compensation Commission, the insurer shall file (1) an answer to the application, (2) a copy of the section 57 notice forwarded to the worker.
- 4.5.1 That all parties be entitled to legal representation at all levels of dispute resolution at the Workers' Compensation Commission.
- 4.6.1 In relation to costs (given that legal representation should be allowed at all levels of dispute resolution) a cost scale be imposed at modest levels on the basis of various composite fees set according to the tasks to be done and not in relation to any particular hourly rate.
- 4.6.2 The scale would have effect on all parties. Any agreement in excess of the scale should be void.
- 4.6.3 Awards for party-party costs would be within the power of the Workers' Compensation Commissioners and Review Officers.
- 4.6.4 Workers who are not legally represented should be allowed disbursement costs.

4.6.5 The proposed scale would apply to advocates (ie. other than legal practitioners) but be awarded at 50% of the scale.

4.6.6 For the purposes of the scale, union officials who represent workers should be entitled to recovery of 50% of the scale and disbursements.

4.7.1 The Review Officers and Workers' Compensation Commissioners have power to order costs and/or disbursements in the following circumstances:

- In favour of the worker where the worker has been successful in whole or in part in any application;
- In favour of the worker, where notwithstanding that the worker was not successful, the Review Officer and/or Workers' Compensation Commissioner considers that by reason of the insurer's/employer's conduct (which includes delay) the worker was required to make an application to obtain the determination of a matter which was pending;
- Against a legal practitioner or advocate where they have consistently failed to comply with directions resulting in a delay in proceedings;
- Against a worker where the application was frivolous, vexatious or fraudulent;
- The costs awarded shall be in accordance with a composite scale of costs.

4.8.1 The Director in receipt of a complaint by a Review Officer or a Workers' Compensation Commissioner may:

- refer a matter to the Legal Practice Board;
- in any event suspend a legal practitioner advocate or union official from appearing in the jurisdiction for up to 3 months.

4.9.1 The WC101 (Insurance claims expenses data form) be amended so as to require insurers and self insurers to provide data in relation to the following:

- Costs awarded in favour of the worker as fixed or agreed in the Workers' Compensation Commission;
- Insurance/employer lawyer legal costs (which in most circumstances would be equivalent to worker costs above);
- Medical disbursement costs (medical report fees etc);
- Insurance investigator disbursement costs;
- Other costs incurred in legal proceedings.

4.11.1 Save for cases where an opinion in relation to whether a worker has a 30% bodily impairment, the opinions of medical assessment panels not be final and binding.

4.11.2 The parties have the option of referring a matter to a MAP at any stage of proceedings. In such cases the parties are to jointly prepare a brief of the facts for the MAP.

4.11.3 A worker may submit to a MAP unilaterally, at no cost to the worker.

4.11.4 The MAP may at its discretion request submissions from the parties.

4.11.5 There be protocols for the MAP in relation to video evidence and the constitution of panels where women workers are examined.

4.11.6 That reciprocal arrangements between States be made to allow workers to be examined by medical panels in other States.

4.12.1 An expert medical panel be appointed to re-write the AMA Guides currently incorporated into the Act. Without limiting the scope of re-write the intention should be to compile a single narrative impairment guide for use in the assessment of permanent impairment for the purpose of the Act.

4.12.2 Section 24 be amended to make reference to disability in place of injury by accident.

4.12.3 Section 25 be amended to refer to *impairment*.

4.12.4 Schedule 2 be amended to replace the heading "type of injury" with *Body part or faculty impaired*.

4.12.5 Section 93(D) or its successor be amended to delete reference to the phrase "degree of disability" and substitute in its place the term *impairment*.

5.3.1 The Act be amended to require:

1. Large employers to develop and implement Injury Management Plans;
2. Large employers be required to appoint an Injury Management Co-ordinator;
3. The Injury Management Plan be published and displayed in the workplace;
4. Workers have a duty to attempt rehabilitation where appropriate, and to attempt to return to work;
5. Insurers develop Injury Management Plans for use by small/medium employers in accordance with WorkCover guidelines;
6. Insurers be entitled to delegate the implementation of injury management plans to Insurance Brokers provided the plans set out clear lines of authority and communication;
7. Small/medium employers be encouraged to develop their own plans;
8. Guidelines for Injury Management be embraced in regulations to the Act;
9. The Act be amended to provide power to WorkCover to regulate in relation to Injury Management.

5.4.1 Regulations for Injury Management assert the pre-eminence of Rehabilitation providers as the Injury Management professionals.

- 5.4.2 The regulations should provide that it is an offence for any party to hinder a rehabilitation provider in the implementation of an injury management plan which has been approved by employer, worker and medical practitioner.
- 5.7.1 Injury Management Plans prepared by large employers should include Risk Management procedures that require the employer to assess risks and implement preventative strategies following a disability to a worker.
- 5.7.2 Documents created by reason of a Risk Management Plan should be privileged and not subject to disclosure for court proceedings.
- 5.7.3 The Rehabilitation Review Unit should continue, but any determinative role should be assumed by the Workers' Compensation Commission.
- 5.7.4 The Act be renamed the *Workers' Injury Management and Compensation Act (WA)*.
- 5.8.1 Section 84AA be amended to require the employer give the worker 28 days notice of its intention to terminate the worker's employment and a copy of the notice be forwarded to WorkCover and the employer's insurer.
- 5.8.2 The *Industrial Relation Act 1979 (WA)* be amended (using New South Wales provisions as a model) to provide remedies for dismissal contrary to section 84AA – such remedies to include reinstatement and/or compensation.
- 5.8.3 The failure of an employer to comply with section 84AA be taken into account for the purpose of assessing the employer's insurance premiums.
- 5.9.1 Second injury provisions be enacted to provide for:
- indemnity for new employers of disabled workers for a period of 12 months in respect of any aggravation and/or recurrence of the same pre existing disability (a second injury);

- premium exemption for new employers so as not to take into account any second injury incurred within 12 months;
- using the WISE system as a model, regulations be enacted/or insurance licensing provisions provide for subsidies for new employers including;
 - start up subsidies;
 - work stability payments;
 - retention allowances.

6.5.1 Injury Management Plans should contain specific procedures for stress claims, which provide that the worker may, with the worker's consent, be referred on lodgement of a stress related claim for the following:

- Counselling;
- Rehabilitation provider;
- Specialist referral;
- Workplace mediation.

6.5.2 That the Injury Management Plan specify an early intervention strategy in relation to stress claims.

6.5.3 Upon receiving notice of a stress related claim the employer and/or worker shall be entitled to arrange the above services forthwith and payment of the above services up to a maximum of \$2,000 shall be made by the insurer/self insurer on a without prejudice basis in the first instance and shall in any event not be recoverable from the worker or employer in the event that the claim is declined.

6.5.4 Advice in relation to the above entitlements to be given to the worker on lodgement of the claim by the employer or as soon as practicable by the insurer. Failure to advise the worker of the availability of these services is a matter which may be taken into account in the event of a dispute.

- 6.5.5 Where a stress claim is before the Workers' Compensation Commission the parties are to file and serve on the other side witness statements prior to any Review Conference setting out the substance of the evidence which would be given at a hearing before a Compensation Commissioner.
- 6.5.6 The number of witnesses is to be limited by the number of statements filed with the Workers' Compensation Commission prior to the Review Conference. If a statement is not filed at the time of the Review Conference the witness cannot appear.
- 6.5.7 A Compensation Commissioner may require a witness to place a statement on oath and that statement may stand as the evidence of that witness without the witness being called.
- 6.5.8 As a general rule, a stress claim matter shall be regarded as complex for the purposes of the costs scale.
- 6.5.9 A Workers Compensation Commissioner may be assisted in any determinations by a medical practitioner(s) selected from the register compiled under section 145B.
- 6.6.1 Sections 64, 65 and 66 be amended to limit referrals of workers to three (3) specialist medical practitioners.
- 6.6.2 A Review Officer may approve further referrals where it is shown that there is justification for further opinion.
- 6.6.3 Further referrals shall be made by selection from a list of medical practitioners maintained by the Director under section 145B.
- 6.6.4 WorkCover be allowed to set guidelines/criteria for doctors who wish to be maintained on the Director's list.
- 7.1 That regulations be put in place to provide for mutual self insurance systems, such regulations to make provision for the management, membership and accountability of mutuals. Further regulations should provide for reasonable provision for re-insurance.

- 7.8.1 That there be a statutory minimum discount on insurance premiums which is based on *Stable Lost Time and Injury Management Rate* as set out in the body of this report.
- 7.11.1 WorkCover pursue information sharing arrangements with the ATO and/or other Western Australia Government departments to obtain employer information on wages and employees.
- 7.11.2 Employers be required to display in their principal place of business a current certificate of insurance, with special provisions for other employer who do not have a permanent place of business.
- 7.11.3 WorkSafe inspectors have powers to inspect employer's documents for the purposes of establishing that they are insured.
- 7.11.4 WorkCover and WorkSafe inspectors have power to issue on the spot fines (using the *Workers Compensation Act 1951* (ACT) Part VIB as a model) to employers who do not hold proper insurance.
- 7.11.5 The fines for compensation fraud be reviewed.
- 8.1.1 That the *Limitation Act* be amended to include chemical exposure/poisoning as a latent disease.
- 8.2.1 The definition of spouse under the Act be amended to include provision for same sex relationships.
- 8.3.1 Schedule 2 be amended to allow for an item for loss of immune system by reason of HIV/AIDS.
- 8.3.2 The allowance for the item for HIV/AIDS be 100% of the prescribed amount.
- 8.4.1 The definition of award in the Act be clarified.

- 8.5.1 Clause 18A of Schedule 1 be amended to allow the worker to be indemnified in respect of medical expenses up to \$2,000, thereafter the worker be entitled to seek a declaration that the insurer is liable for payments of reasonable medical expenses.
- 8.5.2 Clause 18A of Schedule 1 be amended to provide that in *exceptional circumstances* there be payment of unlimited medical expenses.
- 8.6.1 That the SGIC provide optional journey cover to workers to provide entitlements equal to the Act to workers who suffer injury by accident in a motor vehicle accident in a journey and to and from their place of employment.
- 8.7.1 That the Workers' Compensation Commission have power to order interest on late or delayed compensation payments.
- 8.8.1 That insurers provide information to WorkSafe so as to identify poor performing employers.
- 8.8.2 WorkSafe shall develop criteria as to describe poor performing employers and regulations or licensing requirements should incorporate this criteria.
- 8.8.3 That in any event insurers notify WorkSafe of any surcharge imposed upon an employer.
- 8.9.1 In applications under sections 73/74, the Workers' Compensation Commission be entitled to make orders requiring employers/insurers in dispute to pay the Workers' Compensation Commissions costs of the hearing and any costs of the worker.
- 9.1 That regulations provide that caps, limitations, thresholds and election periods within the Act be subject to regulations which allow for variation.
- 9.2 The amount of variation in each case be limited to no more than 25% increase or decrease.

- 10.1 That a Workers' Compensation Ombudsman be appointed to investigate and report to Parliament and the Minister responsible on a range of complaints relating to the compensation system.