JOINT SELECT COMMITTEE

OF

INQUIRY

TASMANIAN WORKERS'

COMPENSATION SYSTEM

FINAL REPORT

1998

MEMBERS OF THE COMMITTEE

House of Assembly	*Legislative Council*
Mr Bacon *(to 21 March 1997)*	Mr Bailey
Mr Foley	Mr Ginn
Mr Goodluck	Mr Harriss
Mr Groom (Chairman)	Mr Wilkinson
Mr Lennon *(from 30 May 1997)*	

Secretary: Ms W Peddle

8 May 1998

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ABBREVIATIONS

ADR:	Alternative Dispute Resolution
AWE:	Average Weekly Earnings
HWCA:	Heads of Workers Compensation Authorities
JSC:	Joint Select Committee

LMC:	Labour Ministers Council
MAIB:	Motor Accidents Insurance Board
NWE:	Normal Weekly Earnings
PAYE:	Pay As You Earn Taxpayers
TCCI:	Tasmanian Chamber of Commerce and Industry
TTLC:	Tasmanian Trades and Labor Council
WCT:	WorkCover Tasmania
WR&C ACT:	*Workers Rehabilitation and Compensation Act 1988*
WSA:	Workplace Standards Authority

CHAPTER 1 – EXECUTIVE SUMMARY

1.1 The views expressed in this report and the recommendations made reflect the individual views of members of the Joint Select Committee. They have not been considered or endorsed by any political party.

1.2 For seven years following the introduction of the current Tasmanian workers' compensation scheme in 1988, the costs of insurance premiums rose dramatically, to the point where the scheme was one of the most expensive in Australia.

1.3 Although substantial reforms made in 1995 have halted the rise and brought some stability, workers' compensation in Tasmania is still seen as being more expensive than elsewhere in the country. This acts as a significant investment disincentive and limits Tasmania's economic growth.

1.4 The Joint Select Committee of Inquiry into the Tasmanian Workers' Compensation System was established to address this concern and to consider and recommend changes which would bring about further improvements and make Tasmania's scheme more competitive.

1.5 After considering a large number of submissions and taking considerable oral evidence, the Committee has found that:

1.5.1 Great caution should be exercised in comparing Australia's various workers' compensation schemes. The structural differences mean that comparison of average premium rates is very misleading.

1.5.2 More importantly, though, actuarial analysis of Tasmania's current performance suggests that scheme costs are influenced by the balance of business activity in the State, and by economy of scale issues. This means that premiums in Tasmania are likely to be higher, even if the same scheme design as another jurisdiction is adopted.

1.5.3 While the 1995 reforms have brought about considerable improvement in the performance of the Tasmanian scheme, more can be done to build on those reforms.

1.5.4 Adoption of the model recommended by the Committee for further consideration according to actuarial advice would be likely to result in a fall in the average premium rate from 3 per cent to 2.67 per cent of wages. In cost terms, this represents an 11 per cent improvement and would put Tasmania in the mid range of Australian schemes.

1.5.5 Coverage under the scheme should be clarified as much as possible, but not by restricting coverage as to do so would deny benefits to an increasing number of workers and expose employers to liability for which they may have no insurance cover.

1.5.6 Current provisions relating to journey, recess, and stress claims should be retained.

1.5.7 There is no compelling argument that Tasmania should follow the example of other States and completely abolish access to common law. However, there is strong evidence that it impacts on dispute resolution, rehabilitation and return-to-work, and also is a significant cost driver.

1.5.8 If there are to be changes to common law, workers should be provided with alternative fair and reasonable benefits from an extension of the no-fault scheme

1.5.9 Other reforms to the current benefit structure are suggested for further consideration, including the abolition of the current monetary cap on weekly benefits for those claimants who elect not to pursue common law. This is particularly beneficial to seriously injured workers.

1.5.10 Scheme administration should continue to support promotion and education aimed at improving workplace health and safety.

1.5.11 Improvements should be made to injury management and rehabilitation practices, including more widespread use of retraining for new employment opportunities.

1.5.12 A WorkCover Tribunal should replace the existing Workers' Rehabilitation and Compensation Tribunal. The new body should be charged with providing conciliation and, if necessary, adjudication on all disputed matters.

1.5.13 The current conciliation practices should be considerably strengthened and conciliators given real power under the Act. The dispute resolution system should also make use of medical panels.

1.5.14 The capacity to commence weekly benefit payments on a "without prejudice" basis should be introduced in cases where claims are disputed to enable further information to be obtained or there is other good reason for a delay in resolving the dispute.

1.5.15 Termination of weekly benefits should not be effected until any dispute is resolved.

1.5.16 Costs in the Tribunal system should be carefully structured to reinforce the desirability of early settlement.

1.5.17 There is no evidence to suggest that there would be significant benefit in introducing a single insurer, and the current, multi-insurer system should be retained. So, too, should the capacity to self-insure.

1.5.18 Compulsory accreditation of medical practitioners should be repealed, although the head of power to accredit service providers should be retained to be used if it is the only effective way to achieve scheme goals.

1.5.19 The capacity to establish fee schedules for service providers should be introduced.

1.5.20 WorkCover Tasmania should be established to replace the Workplace Safety Board of Tasmania. The membership should reinforce the key stakeholder role of employers and employees.

1.5.21 New legislation should be user friendly and, if possible, should incorporate plain text explanatory notes which do not form part of the law.

1.6 The recommended reforms will improve the Tasmanian scheme, making it more affordable, but at the same time ensuring workers are fairly treated and are supported in returning to work. These reforms will place Tasmania in a more competitive position to attract new investment and economic growth, which will benefit all Tasmanians.

CHAPTER 2 – TERMS OF REFERENCE

- ***whether allowing self-insurance enhances the viability and performance of the workers' compensation scheme in Tasmania;***
- ***the extent to which service providers and their charges should be regulated;***
- ***the means by which disputes can most effectively be resolved;***
- ***the most suitable arrangements for administration of the scheme.***
- ***the framework for new legislation;***
- ***any other matters incidental thereto.***

And that the Joint Select Committee be authorised to establish a Working Group to advise and assist

the Committee in its inquiry and deliberations and that the Working Group include, but not be limited to the following:

- ***the Chief Executive of the Workplace Standards Authority (or his delegate) as convenor;***
- ***the Chief Executive of the Tasmanian Chamber of Commerce and Industry;***
- ***the Secretary of the Tasmanian Trades and Labor Council;***
- ***an officer of the Workplace Standards Authority as Secretary.***

Chapter 3 – PROCESS OF THE COMMITTEE

Background

3.1 The decision to establish a Joint Select Committee arose from growing community concern, which was expressed in a number of ways:

3.1.1 concern about the rising cost of insurance premiums and the affordability of the scheme;

3.1.2 concern that the high cost was reducing the Tasmania's competitive position in relation to other States;

3.1.3 concern by unions and other groups that reforms introduced in August 1995 had acted to reduce the fairness of the scheme;

3.1.4 public debate surrounding the release of the Heads of Workers' Compensation Authorities Interim Report and the push for national consistency in workers' compensation arrangements.

3.2 In Australia over the past 20 years there has been a total of 17 separate inquiries into workers' compensation. In almost all cases these inquiries addressed issues of fairness, equity, affordability and efficiency. In the 1980s there were major concerns about fairness and equity arising from the limited scope of no fault arrangements. In the 1990s the primary concern has been with increasing costs and the impact on business competitiveness.

3.3 Cost pressures have been addressed in a number of ways:

3.3.1 increased attention to safety through promotion and use of economic incentives;

3.3.2 increased focus on rehabilitation and return to work to reduce the severity of accidents and illness;

3.3.3 strengthening tests for work-relatedness;

3.3.4 reduction in benefits and attendant costs;

3.3.5 introduction of price controls for medical and related services.

3.4 Consequently, the review of the Tasmanian system follows a well established trend started by Victoria (1992), South Australia (1992), Queensland (1996), and New South Wales (1996/97). A major review was also conducted by the Industry Commission in 1994.

The Committee's Consultation Process

3.5 The Committee actively sought submissions to the Inquiry through a series of advertisements in the State's three daily newspapers. After considering the 74 submissions received the Committee released an Issues Paper and invited interested parties to give evidence at public hearings held in Launceston and Hobart. The Committee took evidence from 38 witnesses and received additional written submissions during that period.

3.6 Evidence regarding the operation of the workers' compensation systems in Australia and overseas was obtained through discussion with the Working Group, departmental officers, interstate officials and leading authorities in the field. The Committee also considered numerous papers and reports on workers' compensation issues.

3.7 One Committee member travelled to the United States to investigate systems operating in Washington and Wisconsin. Other members attended

the Sixth National Workers' Compensation Conference held in Sydney on 25-26 June 1997.

3.8 Information on submissions and documents received and witnesses heard, together with the Minutes of Proceedings, are included in the Appendices to this report.

Assistance to the Committee

3.9 The Committee wishes to record its appreciation for the assistance provided by the Working Group established to advise and assist the Committee in its inquiry. The Working Group consisted of

George O'Farrell, Chief Executive of the Workplace Standards Authority, as Convenor.

Lynne Fitzgerald, Secretary, Tasmanian Trades and Labor Council.

Tim Abey, Chief Executive, Tasmanian Chamber of Commerce and Industry.

Rod Lethborg, Principal Policy Adviser, Workplace Standards Authority, as Secretary.

3.10 The Committee would also like to gratefully acknowledge the assistance and support from Wendy Peddle (Committee Secretary), Janet Harrison and Marlene Lee, from the Legislative Council; Marina Fusescu (Parliamentary Research); Debbie Crossin and Georgia Clark of the Workplace Standards Authority; and Marijke Addison, also of the Workplace Standards Authority who typed much of the report.

3.11 Special thanks go to Jenni Neary, Lew Owens and Alan Clayton for giving their time so freely to help the Committee come to terms with the many complex and potentially divisive issues which arose during the course of this Inquiry.

3.12 The Committee also acknowledges the expertise provided by Dave Finnis of Tillanghast, Towers and Perrin, actuarial consultants to the Committee.

CHAPTER 4 – FINDINGS AND RECOMMENDATIONS

Note: The numbering system used in this chapter relates to the Chapters of the Report. Hence the numbers start at 5 as there are no recommendations arising from Chapters 1 to 4.

5 – Effectiveness of Current Scheme

5.20 *The Committee found that:*

a) Great care should be taken when comparing the performance of the various Australian schemes.

b) Although the 1995 reforms have improved the performance of Tasmania's workers' compensation scheme, further improvements are necessary if the scheme is to be competitive with those operating in other jurisdictions.

6 – National Consistency

6.13 *The Committee endorses:*

a) The work currently being undertaken under the aegis of the Australian Labour Ministers Council to introduce a national system of comparative performance monitoring of workers' compensation and occupational health and safety.

b) The LMC's work in endeavouring to increase the ease with which self-insurers can operate in a range of jurisdictions.

6.14 *The Committee recommends that:*

a) Tasmania adopt the final recommendations of the LMC in relation to nationally consistent "cross border" provisions, noting that this will limit injured workers to being compensated in only one jurisdiction.

7 - Scheme Coverage

7.12 *The Committee recommends that:*

a) The common law concept of employment be retained as the fundamental determinant of who is covered by the scheme.

b) The legislation provide a mechanism to "deem" classes of worker to be covered or excluded, to enhance clarity in relation to coverage.

c) The existing provisions of the legislation dealing with the coverage of subcontractors be clarified to ensure that the principal's duty to provide coverage is discharged when the contractor carries their own coverage.

d) A duty be placed on insured businesses to advise the insurer of any directors, family members and contractors to be covered by the policy.

7.26 *The Committee recommends that:*

a) The fundamental test of whether an injury or disease is work related continue to be that it "*arises out of and in the course of employment*".

b) Current provisions dealing with journey, recess and stress claims be retained.

c) The definition of injury and disease be extended to cover the aggravation, acceleration, exacerbation or deterioration of an existing injury or disease.

8 - Scheme Benefits

8.20 *The Committee has found that:*

a) There is no compelling argument to retain unlimited access to common law so long as workers and their dependants are provided with alternative fair and reasonable statutory entitlements from an extended no-fault scheme and limited common law rights.

8.21 *The Committee recommends that:*

a) Given the limited resources available to it and the need for detailed work beyond the scope of its terms of reference, the Government should undertake consultation with the TTLC, the TCCI and other relevant bodies to determine the impact of the committee's proposals on employers and employees.

b) Further actuarial work be undertaken once consultation has occurred and there is some agreement on the final benefits model.

Benefit Model Recommended for Discussion

8.22 *The Committee recommends that the following benefits model be considered in the consultation process:*

Common Law

a) Access to common law damages continue to be available, but be limited to injured workers with a greater than 30 per cent whole-of-body impairment.

b) To access common law benefits, the claimant will have to make an irrevocable election to do so within 2 years of the date of incapacity. At this date access to all statutory benefits (other than medical benefits) will cease.

c) Common law awards for non-economic loss be capped at $200,000.

d) Courts be given the discretion to award common law damages in the form of a structured settlement.

Weekly Benefits

e) The following weekly benefit structure should be adopted:

Day 1 – Day 5	100% Normal Weekly Earnings

	(NWE) paid by the employer
Day 6 – 13 weeks	100% NWE
14 wks – retirement or return-to-work	70% NWE. However, this amount should be capped so that the maximum payment a person can receive is 150% of Average Weekly Earnings (AWE)

NWE = Normal Weekly Earnings defined as pre-injury ordinary time earnings plus regular overtime and regular allowances paid during the proceeding 12 months.

AWE = Average Weekly Earnings for the State of Tasmania as determined by the Australian Bureau of Statistics

Statutory Non-Economic Loss

f) The current Table of Maims be replaced by a whole of body assessment based on the American Medical Association Guides for the Assessment of Permanent Impairment, Fourth Edition, (AMA Guide) providing a maximum payment of $150,000.

g) There be two exceptions to the use of the AMA Guide:

- Hearing loss, which should continue to be determined in accordance with the Improved Procedure for Determination of Percentage Loss of Hearing published by the National Acoustic Laboratory using a conversion formula.

- Psychological impairment which should be addressed by the development of a method of assessment in consultation with the Royal Australian College of Psychiatrists.

Medical and Rehabilitation Expenses

h) All reasonable medical and rehabilitation expenses be paid without limit. However, where a claim is settled at common law, medical and rehabilitation payments should cease at settlement.

Redemption

i) There be no redemption of benefits in general. However, to provide for reasonable exceptions to be considered, the Committee recommends that redemption be allowed:

- where weekly benefit payments are less than 20 per cent of AWE; or

- in other cases where the Tribunal is satisfied that redemption is in the best interests of the injured worker.

Death Benefits

j)		The following benefits be payable to dependants in cases of death:
	Lump sum of $150,000	to be settled within 3 months of death or as soon as practicable thereafter
	0 – 13 weeks	100% Normal Weekly Earnings
	13 weeks – 3 years	50% Normal Weekly Earnings
k)		Reasonable funeral expenses be paid to an amount determined by the Minister from time to time.
l)		The dependants of a deceased worker retain the right to sue for damages. Should they wish to do so, they will be required to make an irrevocable election within 12 months or within 3 months of the completion of any coronial inquest, whichever

is the later. Payment of statutory benefits will cease from the date of election. Any statutory benefits paid are to be taken into account in the amount of damages awarded.

8.34 *The Committee recommends that:*

a) The legislation provide that any benefit received from any contract of assurance, insurance or superannuation scheme, which is funded by the employer, be considered in calculating the amount of weekly benefit payable under the Act.

8.36 *The Committee recommends that:*

a) Employers be required to continue any superannuation contributions for a period of 12 months following the date of incapacity unless the reason for the worker's employment has ceased to exist.

9 - Premium Setting

9.12 *The Committee recommends that:*

a) WorkCover Tasmania develop a "file and write" approach.

b) WorkCover Tasmania be required to develop and publish annual industry risk rates to inform the marketplace.

9.18 *The Committee recommends that:*

a) The basis of remuneration for premium calculations be more closely aligned with the definition applying for payroll tax purposes.

10 - Injury Prevention

10.5 *The Committee recommends that:*

a) The scheme continue to support economic incentives, promotion and education aimed at improving occupational health and safety standards.

b) The level of fines for breaches of occupational health and safety standards be reviewed and on the spot fines be introduced.

11 - Injury Management and Rehabilitation

11.16 *The Committee recommends that:*

a) Larger employers (≥ 50 employees) be required to nominate a suitably qualified person to perform the role of rehabilitation coordinator.

b) A second injury scheme be established to provide incentives for the re-employment of injured workers unable to return to their pre-injury employment.

c) The treating doctor be provided with copies of any medical report relating to the worker's claim, irrespective of whether the report is relied upon in assessing liability and incapacity, to ensure the best quality medical outcomes.

d) The scheme regulator have a proactive role in fostering a return-to-work culture, enforcing compliance and monitoring performance.

e) All referrals for vocational rehabilitation be decided in consultation with the employer, injured worker and treating medical practitioner.

f) An injured worker has the right to request a change of rehabilitation provider where a genuine reason exists, with the decision able to be reviewed in the Tribunal.

g) A vocational rehabilitation provider not be an agent of the insurer or employer but rather has a primary relationship with the injured worker.

h) Where appropriate, return-to-work plans include training for alternative

work which the worker is capable of undertaking.

i) Medical practitioners play a key role in the return-to-work process.

j) Insurers adopt claims management practices which support an injury management approach.

k) The practice of initiating rehabilitation in disputed cases be encouraged.

l) A process be developed to determine when an employer's obligation to provide rehabilitation should cease.

m) Data collection methodologies which support injury management performance indicators be developed.

n) An independent early intervention service be provided to assist in the resolution of injury management disputes.

12 - Dispute Resolution

12.17 *The Committee recommends that:*

a) The existing Workers Rehabilitation and Compensation Tribunal be restructured into two separate functional units: one dealing with conciliation, the other with adjudication. The new body will be known as the WorkCover Tribunal.

b) A senior position be created within the Tribunal to provide effective administrative management of the service, and that this role not be vested in the Chief Commissioner. The appointment will be on a fixed-term contract.

c) The Chief Commissioner and Commissioners be appointed by the Governor on fixed-term contracts.

d) The Tribunal be required to establish key performance indicators and report against them regularly.

12.21 *The Committee recommends that:*

a) WorkCover Tasmania ensure performance standards for insurers and self-insurers encourage high quality initial decisions and rapid internal review of those decisions.

b) The Tribunal be advised of the outcome of internal reviews of decisions within 7 days of a dispute being lodged.

c) Reasons for any adverse decision be provided at the time the decision is communicated and that the communication should be in a non-confrontational style backed by personal contact.

d) Written advice on further appeal or review rights available to either party be provided with any decision. Failure to provide such advice will extend the time period allowed by legislation for that appeal or review to occur.

e) The Tribunal not have jurisdiction to hear appeals against decisions in relation to the licensing of insurers and that this jurisdiction be conferred on the Supreme Court.

f) "Without prejudice" payments be available to injured workers following any decision to dispute a claim. Such payments should be available:

- in the event that a claim is disputed by an employer for the purpose of obtaining further information to determine whether or not to dispute the claim; or

- where, in the view of a Conciliator or Commissioner, delay in resolution or determination of the dispute is warranted.

g) Such "without prejudice" payments be only awarded for up to 10 weeks retrospectively and 12 weeks prospectively.

h) The Act provide for recovery of these "without prejudice" payments where the claim was vexatious or fraudulent.

12.24 *The Committee recommends that:*

a) Conciliators be given limited powers to make interim orders for the payment of compensation pending adjudication of disputes. Such payments should be restricted to 10 weeks retrospectively and 12 weeks prospectively.

b) Conciliation be compulsory for all types of disputes.

c) Referral for adjudication be allowed only where the conciliation officer is satisfied a genuine attempt has been made to resolve the matter.

d) Legislation require the exchange of all available relevant information prior to the conduct of the first conciliation conference and that an offence for failing to provide such information be created.

e) Admitted legal practitioners not be permitted in conciliation hearings except where the conciliator is of the view that there are special circumstances and both parties agree.

f) All disputes be screened to identify injury management issues and to expedite resolution on the basis of need.

12.29 *The Committee recommends that:*

a) Legislation should limit a "*medical question*" to the nature or extent of a disability, or whether a disability is permanent or temporary and require that any relevant medical report prepared during the life of a claim be provided to the panel.

b) Decisions of medical panels be made final and binding on all parties.

c) Matters be referred to a medical panel by a Conciliator. If there is dispute about whether the question is to be referred, it should be resolved by the Commissioner who may order the referral.

12.34 *The Committee recommends that:*

a) The existing process for adjudication of disputes be retained but be considered a separate process to conciliation.

b) In order to promote full disclosure of information at conciliation no new evidence be admitted at adjudication unless the Commissioner is satisfied that the information was not available during conciliation.

c) Commissioners have power to proceed expeditiously and to adjudicate on a matter in the absence of one of the parties provided that party does not have a reasonable excuse for absence.

12.36 *The Committee recommends that:*

a) Appeals from the Tribunal to the Supreme Court be allowed only on points of law.

12.40 *The Committee recommends that:*

a) The termination or reduction of weekly benefits not be effected until any dispute has been resolved or adjudicated.

12.43 *The Committee recommends that:*

a) In relation to costs:

- no costs be awarded at conciliation unless the Tribunal finds that the dispute is frivolous or vexatious; and
- costs follow the cause at adjudication; and
- the legislation provide for the determination of costs reflecting the nature of proceedings and providing economic incentives for early settlement — that is, the legislation should provide for differential levels of cost at the conciliation and adjudication levels.

13 - Insurance Arrangements

13.13 *The Committee recommends that:*

a) The current private multi-insurer delivery structure be retained with services being provided by licensed private sector insurers.

b) The administration of the scheme continue to be funded by a levy on insurers and self-insurers. To ensure greater equity, there should be a minimum annual contribution of $25,000 for licensed insurers and $5,000 for self-insurers The Crown should continue to contribute to the cost of administering the scheme.

c) Legislation provide for an application fee to be charged to insurers and self-insurers to cover the cost of assessing new licence sp;

- ongoing commitment to occupational health and safety.

h) The legislation allow group self insurance, for related bodies corporate, under criteria developed by WorkCover Tasmania.

i) WorkCover Tasmania undertake a review of the role of insurance brokers and insurance agents and the level of fees charged.

14 - Service Providers and their Charges

14.7 *The Committee recommends that:*

a) The compulsory accreditation of medical practitioners be abolished, although the general head of power allowing accreditation of service providers be retained.

b) Accreditation be pursued only where a desired objective cannot be achieved by another means.

c) Any accreditation of medical practitioners be limited to general practitioners or those specialists responsible for ongoing medical management of claims.

d) WorkCover Tasmania have discretion to set the period during which accreditation is current.

14.10 *The Committee recommends that:*

a) The legislation provide power to establish fee schedules and maximum fees. It should also be a requirement that fees and charges scheduled under the Act should be negotiated on an annual basis. Fee negotiations should also focus on service quality and utilisation.

b) WorkCover Tasmania maintain a schedule of fees for services unique to the workers' compensation environment.

c) Best practice guidelines for treatment of workplace injury and illness be promoted.

15 - Scheme Governance

15.8 *The Committee recommends that:*

a) The Workplace Safety Board of Tasmania be renamed WorkCover Tasmania and be restructured to extend the representation of employers and employees. The new body will comprise:

- two employer representatives;
- two employee representatives;
- a medical practitioner with experience in workers' compensation;

- an insurance expert;
- a legal practitioner with experience in workers' compensation;
- Head of the Government agency administering the legislation as chair.

b) In relation to occupational health and safety, WorkCover Tasmania be responsible for:

- monitoring the Workplace Standards Authority's occupational health and safety activities;
- providing advice to the Minister on any occupational health and safety issue;
- promoting high operational standards for safety management, injury management and return-to-work.

c) In relation to workers' compensation, WorkCover Tasmania be responsible for:

- management of the workers' compensation scheme;
- monitoring scheme performance;
- providing advice to the Minister on necessary changes to the legislation;
- developing policies and guidelines for the operation of the scheme;
- recommending to the Minister the annual levy to be imposed on licensed and self insurers to fund the administration of the scheme;
- advising the Minister on the annual strategic objectives and targets of the government department charged with the day-to-day administration of the legislation and the scheme.

d) In providing advice to the Minster on changes to legislation and regulations, WorkCover Tasmania be bound by the following provisions:

- only the employer and employee representatives may vote;
- there must be an equality of employer and employee members present when any vote on such an issue is taken;
- the Minister must be informed of the views of the non-voting members of the Board.

e) In all other matters to do with the governance of the workers' compensation scheme, each member of WorkCover Tasmania will have an equal vote.

f) WorkCover Tasmania be given responsibility for determining:

- criteria for approval or revocation of insurer licences and self insurer permits;
- variations of licence conditions for insurers and self insurers;
- indicative industry premium rates;
- notional premiums for self-insurers.

16.5 *The Committee recommends that:*

a) The legislation be redrafted so that employers and employees and the community generally should be able easily to understand their rights and obligations.

b) In order to facilitate this, Parliament should consider, as a matter of urgency, the inclusion of clause notes or other explanatory material in published Acts, provided that such information is not seen as forming part of the law.

Chapter 5 – Effectiveness of Current Scheme

Effectiveness Of The Current Scheme

5.1 The major driving force for this Inquiry was the realisation that, from a number of perspectives, the Tasmanian workers' compensation system was not meeting the objectives of a modern compensation system. Evidence for this view was partly anecdotal, from complaints and views expressed by employers, workers and service providers. The hard evidence was revealed in figures showing:

5.1.1 average premium rates higher than all other state schemes;

5.1.2 volatile premium rates which often did not reflect actual risk;

5.1.3 a claim frequency higher than all other Australian schemes;

5.1.4 average costs increasing well above inflation levels;

5.1.5 increasing claim disputation;

5.2 However, there is now clear evidence the major reforms of August 1995, and the Workplace Safety Board's "Workplace Safe" media campaign have had a significant impact on scheme performance in the 1996-1997 financial year.

5.3 An actuarial review prepared for the Board found that:

5.3.1 projected aggregate costs had fallen for the second year in a row;

5.3.2 incurred claims had decreased by 13%;

5.3.3 premium levels had stabilised and were sufficient to fully fund projected claim costs for the 1996-1997 year;

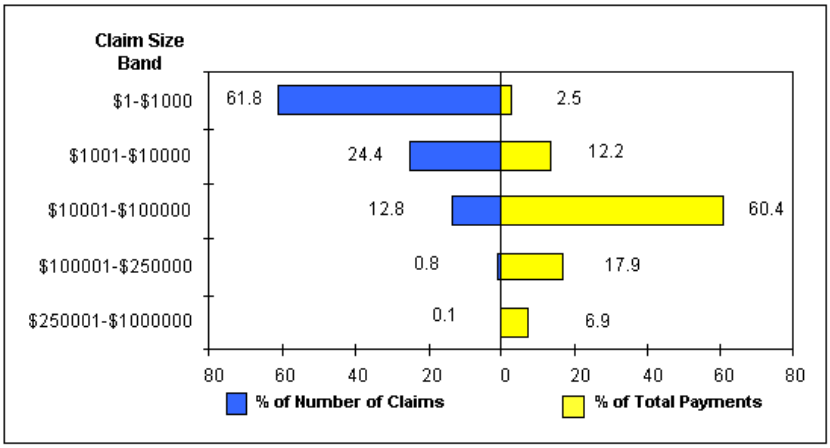
5.3.4 average claim size was stable and there were decreases in some types of payments.

5.4 On the down side the report noted that common law settlements had increased by 36%, representing 33% of total payments, compared to 25% in the previous year. In respect to this trend the actuary commented –

"This area needs new initiatives at either a legislative or management level to arrest this poor trend".

5.5 Although the report reveals some positive trends it must be viewed with some caution as many of the changes of August 1995 are yet to reveal their full effect. The overall scheme cost is largely dictated by the number of serious claims that may emerge over a period of years and which are influenced by economic, social and cultural factors which are not entirely predictable. The relationship between claim size and number of claims is shown in the following chart.

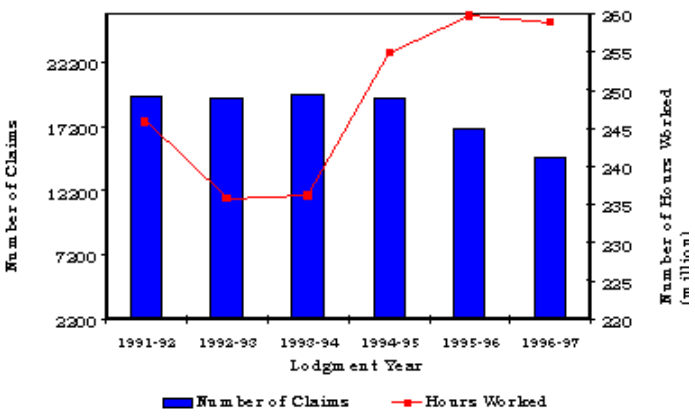
Total Payments by Claim Size - Payments made in 1996-97



5.6 It is often possible to show a direct link between labour market activity and increases and decreases in workers' compensation claims. However, the table below provides evidence that change in the labour market has had only limited influence on the number of claims.

Number Of Claims And Number Of Hours Worked

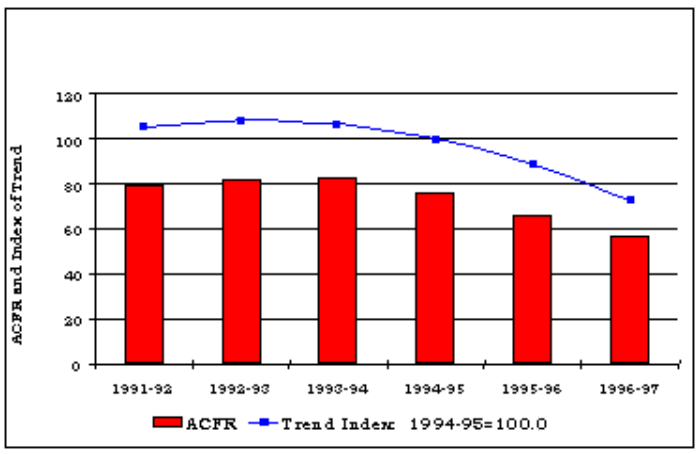
1991-92 to 1996-97



5.7 Further evidence of improvement is shown in the claim frequency rate which has shown a steady decline since 1993-1994.

All Claims Frequency Rate

1991-92 to 1996-97



5.8 Despite this improvement the very broad conclusion drawn from the actuary's report and from experience in other schemes, is that no significant

cost reduction can be expected unless the number of common law claims is curtailed.

Comparison of Premium Costs in Tasmania

5.9 A report prepared for the JSC by Tillinghast-Towers Perrin has highlighted the danger in comparing the cost of the various Australian compensation schemes. Commonly, this is done by comparing the average premium rate of each scheme.

5.10 Quite apart from obvious differences in scheme coverage and benefits there are two other significant factors which inflate the average premium level in Tasmania.

5.11 Firstly, the spread of employment in Tasmania represents a greater weighting of "riskier" activities such as forestry, logging, agriculture and heavy manufacturing than other Australian states.

5.12 Secondly, there are economy of scale factors which increase scheme administration costs from 0.35% of wages in large states to 0.60% of wages in Tasmania.

5.13 The actuary believes these factors must be taken into account in any comparison with schemes elsewhere in Australia. To illustrate the significant impact of these factors the actuary used data from New South Wales and Victoria to calculate an adjustment factor to "level the playing field". The adjustment factor would vary from state to state, but was reasonably consistent for New South Wales and Victoria.

5.14 The following table shows the effect of using the adjustment factor to compare the cost of the current Tasmanian scheme with those of New South Wales and Victoria.

Comparison of Average Premium Rates for 1997 –1998

	TASMANIA	TASMANIA (ADJUSTED AVERAGE)	NEW SOUTH WALES*	VICTORIA
Average Premium Rate as % of Wages	**3.00**	**2.25**	**2.80**	**1.80**

- *Note for the period between 1991 and 1995 New South Wales had an average premium rage of 1.8% and was considered a model scheme. The New South Wales Scheme has suffered a serious cost blowout and in response premium rates have risen sharply.*

Comparison of Costs in Specific Industries

5.15 An analysis of rates in selected industries produced further evidence that simple overall premium rate comparisons are unfair due to the predominance of "riskier" industries in Tasmania.

5.16 The industries selected for comparison were forestry, food processing, metal product manufacturing, tourism and aquaculture.

5.17 On a combined basis Tasmanian rates for these industries were between those of Victoria and New South Wales.

5.18 Comparison of individual industries reveals some volatility, with Tasmanian rates for forestry and aquaculture being higher than both the other states. Conversely, the rates for food processing and metal product manufacturing were lowest in Tasmania.

5.19 This analysis should be viewed with some caution as it involved relatively small segments of Tasmanian industry. However, it does illustrate the danger of using simple comparisons to measure scheme performance.

Findings

5.20 *The Committee found that:*

a) Great care should be taken when comparing the performance of the various Australian schemes.

b) Although the 1995 reforms have improved the performance of Tasmania's workers' compensation scheme, further improvements are necessary if the scheme is to be competitive with those operating in other jurisdictions.

Chapter 6 – National Consistency

The workers' compensation system must reflect a fair and equitable balance of the rights and interests of employers, employees and the community.

6.3.3

The system must have a primary focus of ensuring that injured workers are returned to meaningful work.

6.3.4

Prevention and return-to-work objectives must be supported by the delivery of high quality claims management, medical, rehabilitation and other services.

6.4

It follows that the compensation system has three key objectives:

6.4.1

to ensure that persons injured at work receive adequate financial support while recovering from work caused injury or illness; and

6.4.2

to ensure that, wherever possible, a person injured at work is able to return to meaningful employment as quickly as possible; and

6.4.3

to reinforce the mutual responsibility of employers and employees to minimise the social and financial impact of work related injury or illness.

6.5

The LMC remains committed to achieving greater national consistency. However, the LMC has commissioned the development of a model to allow national comparative monitoring and increased mutual recognition for self-insurers.

6.6

Evidence put to the Committee revealed little support for national consistency. However, there was support for a more gradual process of harmonisation through the borrowing of legislation and policies which have proved effective in other jurisdictions.

6.7

The HWCA reports have provided a sound basis for examination of the Tasmanian system. In a number of key areas the Committee has endorsed recommendations which, if adopted, will align the Tasmanian system with the HWCA model.

Cross Border Provisions

6.8 One consequence of vesting responsibility for workers' compensation at a state level is that a person may have an entitlement to compensation under more than one workers' compensation statute in respect to a particular injury. This may arise where a worker employed in one state suffers an injury in another state. As a consequence prudent employers are taking out insurance coverage in multiple jurisdictions to indemnify themselves against the possibility of workers seeking compensation in a jurisdiction other than their home state.

6.9 The need for a uniform basis to define primary entitlement to provide clarity and certainty for employers and workers who work in more than one State, was identified by HWCA. The matter has been taken up by LMC which is currently awaiting advice on legislative provisions to deal with the issue.

National Standards for Self Insurance

6.10 Large national employers who wish to self-insure their workers' compensation liabilities are among the strongest advocates for national consistency. In particular national employers seek reform of administrative processes to make it easier to self-insure nationally.

6.11 In response to these requests the LMC agreed in principle to the development of a mutual recognition framework for the approval of self-insurance for national employers.

6.12 A national working group was established to progress this issue and report back to the next LMC meeting.

Findings and Recommendations

6.13 *The Committee endorses:*

a) The work currently being undertaken under the aegis of the Australian Labour Ministers Council to introduce a national system of comparative performance monitoring of workers' compensation and occupational health and safety.

b) The LMC's work in endeavouring to increase the ease with which self-insurers can operate in a range of jurisdictions.

6.14 *The Committee recommends that:*

a) Tasmania adopt the final recommendations of the LMC in relation to nationally consistent "cross border" provisions, noting that this will limit injured workers to being compensated in only one jurisdiction.

CHAPTER 7 – SCHEME COVERAGE

Introduction

7.1 All workers' compensation systems establish definitions to clarify who is entitled, and in what circumstances, to access benefits provided by the scheme. The critical definitions are those of employer, worker, injury (including disease) and entitlement (ie which scheme should bear responsibility).

7.2 These definitions are critically important as the absence of clear scheme boundaries increases disputation and cost to the system. The HWCA Report argues that one of the most important scheme design principles is to enable employers and workers to determine in advance whether or not they are covered by the workers' compensation system.

Who Should Be Covered?

7.3 The Committee received a number of submissions recommending the adoption of nationally consistent definitions of employer, worker, injury etc. Unfortunately there is currently no consistent view among the States and Territories, on who should be covered by a workers' compensation system. A wide range of views was also reflected in evidence to the Committee.

7.4 The Committee accepts the view that all employers must maintain insurance cover for all employees (workers). However, whether "employee" should be defined broadly or not is a more difficult issue.

7.5 The ICA, in its submission, commented –

"In selecting the extent of cover to be provided by the system consideration should be given to the impact on cost outcomes – the broader the cover, the greater the cost. The avoidance of disputation in determining specific instances of coverage will reduce cost, so that certainty in definition and the application of definitions is important in achieving cost efficiency."

Common Law Definition of Worker

7.6 Until recently all Australian workers' compensation systems relied on the simple distinction between a contract of service (employee) and a contract for service (independent contractor). The critical element in making this distinction was the employer's control of the manner in which the work was

to be performed. With changes in the nature of work and employment relationships the question of control has been judicially reinterpreted as the right of control rather than actual control.

7.7 The rapid change in employment relationships for example through enterprise agreements, individual contracts, and telecommuting, raise the question of whether compulsory coverage for workers' compensation should keep pace with these changes. In some cases, employers have entered into new arrangements to avoid oncosts imposed by the traditional employer/employee relationship. Whilst the formal designation of the relationship may have changed from "employee" to "contractor" the substance of the relationship may be largely unchanged.

7.8 These developments have increased the level of uncertainty about coverage and entitlement. Some schemes have attempted to provide clarity by extending deeming provisions to include categories of work which are not easily determined by reference to the common law test. Deeming provisions may also extend to contractors who work predominantly for one person or organisation.

7.9 Both Queensland and Northern Territory have moved in another direction to achieve clarity and possibly to reduce cost. Both jurisdictions have adopted the definition of the pay as you earn (PAYE) taxpayer to define "worker".

7.10 The importance of clarity and simplicity cannot be overstated, however, this should not be achieved by restricting cover. To do so would be to deny benefits to an increasing number of people and expose employers to liability for which they may have no insurance cover. The aim should be to provide workers' compensation cover to all persons who perform work exclusively or predominantly for a person or organisation. Cover should not be extended to the true self-employed contractor who provides services to a range of clients.

7.11 Although the Committee accepted that reliance on the common law test of employment was increasingly inadequate, it formed the view that it still provides the best basic test. It should, however, be augmented by a simple deeming provision which would allow classes of worker to be included or excluded.

Recommendations

7.12 *The Committee recommends that:*

a) The common law concept of employment be retained as the fundamental determinant of who is covered by the scheme.

b) The legislation provide a mechanism to "deem" classes of worker to be covered or excluded, to enhance clarity in relation to coverage.

c) The existing provisions of the legislation dealing with the coverage of subcontractors be clarified to ensure that the principal's duty to provide coverage is discharged when the contractor carries their own coverage.

d) A duty be placed on insured businesses to advise the insurer of any directors, family members and contractors to be covered by the policy.

What Injuries or Disease Should Be Covered?

7.13 It is generally accepted that for injuries and diseases to be compensable there must be a "substantial" causal link with the person's employment.

7.14 The difficulty this creates for the medical profession is illustrated in the following comment from the Tasmanian Branch of the Australian Orthopaedic Association.

"Some injuries and conditions are indisputably attributable to a specific injury or risk factor in the workplace. However, many conditions are not so clear cut. For instance, there are often predisposing factors such as an underlying degenerative process, past injuries, pre-existing disease, age-related factors etc. A specific incident can result in a flare up or aggravation of a pre-existing condition. It then becomes almost impossible to determine how much such an incident has aggravated the condition…"

7.15 There is no simple solution to this problem, barring arbitrary exclusion of certain types of injuries and diseases. Such an approach was suggested in

evidence but is not supported by the Committee. Employers must take workers as they find them; that includes accepting liability for any aggravation, acceleration, exacerbation or deterioration of an existing injury or disease.

7.16 The 1988 legislation required that a disease must not only stem from employment, but also that employment must make a *substantial* contribution. The clear intent was that *substantial* meant the equivalent of considerable or to a great extent, rather that its alternative meaning of simply having substance.

7.17 However, the provision was not interpreted this way. The case of *University of Tasmania v Cane* was notable in that it established that "substantial" was to be construed as anything "more than trivial or inconsequential".

7.18 Consequently, in 1995 the legislation was amended again to restore the intent of the legislation. Although workers strongly opposed the changes in 1995, it has not emerged as a major issue during this Inquiry.

7.19 It is noteworthy that most other Australian jurisdictions use the expression "arise out of or in the course of employment" rather than requiring that an injury (or disease) "arise out of and in the course of employment". However, it is generally accepted that a person's employment must make a substantial contribution to the injury or disease.

7.20 The issue of including "aggravation" and "recurrence" in the definition of injury is vexed. Such provisions are not included in the current Tasmanian legislation but do appear in other jurisdictions.

7.21 A "recurrence" is the term used when there is a re-emergence of the symptoms of an injury or disease which has already been compensated without apparent cause. It does not generate a new claim; rather it reactivates the claim.

7.22 An "aggravation" requires that there be a specific incident which aggravates an existing condition. While it might be a condition for which compensation has previously been paid, it could also be a previously dormant condition.

7.23 The importance of the distinction is that, where there is a recurrence, the employer's liability is limited to the extent that compensation has already been paid. The Committee believes it to be important that the legislation provide for this distinction.

Journey, Recess and Stress Claims

7.24 In August 1995, coverage for journey claims was removed and the test on the compensibility for stress related illness tightened. These changes brought Tasmania into line with most other states. The effect of these changes is shown in the following tables:

JOURNEY CLAIMS (BY LODGEMENT YEAR)				
	Number of Claims	**Cost**	**% change >486.4**	
1992-93	770	1,695,503	71.9	29.8
1993-94	807	3,086,393	4.8	82.0
1994-95	874	2,162,527	8.3	-29.9
1995-96	238	681,395	-72,8	-68.5
1996-97	68	224,927	-71.4	-67.0
Total	**3,236**	**9,832,164**		

STRESS CLAIMS (BY LODGEMENT YEAR)

	Number of Claims	Cost	% change number	% change cost
1988-89	10	51,222		
1989-90	84	2,163,068	740.0	4122,9
1990-91	145	2,825,428	72.6	30.6
1991-92	241	5,624,284	66.2	99.1
1992-93	308	8,314,202	27.8	47.8
1993-94	446	14,460,119	44.8	73.9
1994-95	482	17,828,421	8.1	23.3
1995-96	473	12,774,681	-1.9	-28.3
1996-97	414	7,521,507	-12.5	-41.1
Total	**2,603**	**71,562,932**		

7.25 The Committee concluded that the vast majority of "journey claims" are adequately covered by the Motor Accidents Insurance Board (MAIB) scheme and that the restriction on entitlement to compensation for stress has had no dramatic impact on the number of compensable claims. The Committee accepted that entitlement to compensation for stress related illness should be limited to circumstances beyond what is considered normal and acceptable. Although in practice this means testing issues of both fault and causation the Committee agreed that, given the often highly subjective nature of stress related conditions, it was the most appropriate way of defining entitlement.

Recommendations

7.26 *The Committee recommends that:*

a) The fundamental test of whether an injury or disease is work related continue to be that it "*arises out of and in the course of employment*".

b) Current provisions dealing with journey, recess and stress claims be retained.

c) The definition of injury and disease be extended to cover the aggravation, acceleration, exacerbation or deterioration of an existing injury or disease.

CHAPTER 8 – SCHEME BENEFITS

Design Principles

8.1 In the context of this inquiry, consideration of scheme benefits includes a review of the cost, structure, and behavioural implications of benefits and entitlements available through both the statutory scheme and common law.

8.2 The level of benefits is the major cost driver in a workers' compensation system.

8.3 It is critical that the form and level of benefits is aligned with the objectives of the system. Thus benefits which encourage dependency or maintenance of symptoms are incompatible with the objectives of the Tasmanian system.

8.4 The form of the benefit structure embodies a balance between the interests of employers (affordability) and the interests of workers (benefit adequacy). Selecting a benefit structure also involves a balance between the interests of severely disabled workers and those sustaining minor injuries and illness.

8.5 The vast majority of workers suffer from transient or minor injuries and illness which allow them to resume work immediately or within a period of weeks. A small number are left with permanent impairment which removes

or restricts their ability to earn an income. In designing a benefit structure these two groups need to be considered.

Weaknesses of Current Model

8.6 The Committee received a large amount of evidence suggesting that the current benefit structure:

8.6.1 produced a high cost outcome which impacted on job growth and business competitiveness;

8.6.2 severely hindered effective injury management and return-to-work;

8.6.3 encouraged a compensation culture in which financial reward was the expected outcome of workplace injury or illness.

8.7 In reaching a view on the appropriate form of benefits to be provided, the Committee noted insurance and actuarial advice that common law based systems are likely to produce adverse cost outcomes, or at least uncertain cost outcomes. The Committee also accepted that the statutory scheme was intended to provide adequate compensation for the vast majority of injured workers without the need to prove fault. The Committee rejected the view that the two systems must be considered in isolation from one another.

8.8 Consequently, the Committee endorses changes to the benefits available for seriously injured workers which reinforce scheme objectives whilst preserving access to long-term income support and other benefits.

Common Law

8.9 The most contentious area considered by the Committee was whether or not access to common law should be limited in some way. The Committee received evidence that it was one of the major contributors to the cost of the current scheme's benefits. It also notes that most other Australian jurisdictions have moved to limit access to common law. Indeed, only Tasmania and the ACT retain unfettered access to common law actions. A table of common law provisions in Australian jurisdictions appears at the end of the chapter.

8.10 The alternative view presented to the Committee was that access to common law is a fundamental right which should not be limited and that it is the most equitable way of establishing the extent of damage suffered by injured workers. Advocates of common law also argued that it provides an important incentive for employers to provide safe workplaces.

8.11 The Committee recognises that it is unlikely that a consensus position on this issue can be reached. It believes that if the cost of Tasmania's workers' compensation scheme is to be contained, access to common law must be limited in some way. However, any limitation must be achieved in a way which ensures there is protection for the seriously injured.

8.12 The Committee endorses the view there is no compelling argument to retain unlimited access to common law so long as workers and their dependants are provided with alternative fair and reasonable statutory entitlements.

8.13 However, although the committee has devised a benefits model on the basis of this principle, it recognises that there are other options and that further detailed negotiations — which it has neither the authority nor the resources to undertake — are required. Any agreed model which results from those discussions should be the subject of detailed actuarial advice before being adopted.

Structured Settlements

8.14 The 1991 *Law Reform Commissioner of Tasmania, Report No. 67, Damages for Personal Injury* recommended that legislation be enacted to authorise Courts to award all or any damages by way of structured judgements including periodic payments. This recommendation was widely supported but was not progressed.

8.15 One of the stronger arguments against lump sum settlements has been based on research which has shown payments are frequently used for purposes other than those for which they are intended. In the majority of

cases they prove inadequate to meet the future needs of recipients who then must resort to social welfare programs for their ongoing support. Commonwealth agencies have attempted to minimise this transfer of cost to the community by establishing preclusion rules, reporting requirements and recovery processes.

8.16 However, the preference for undifferentiated lump sums is reinforced by Commonwealth taxation policy which treats these payments as non-taxable capital although, in reality, payments for lost earnings may form the major component of the lump sum. There is a strong likelihood a lump sum paid by periodic payment would be regarded as income not capital. Lump sums are widely criticised for contributing to the compensation or "tattslotto" culture and therefore weakening a shift to a dominant return-to-work focus.

8.17 The HWCA Report recommended that economic loss settlements at common law be paid by structured settlement. However, in its Final Report the HWCA recommended urgent action by the Australian Taxation Office to provide certainty about the taxability of periodic and lump sum compensation.

8.18 Transport accident compensation schemes are also keenly interested in this issue. The Motor Accident Authority of New South Wales has recently completed a major report identifying the cost benefit to the Commonwealth of allowing structured settlements to be regarded as capital for tax purposes. This report has been presented to the Commonwealth Government.

8.19 Due to the current uncertainty regarding the taxability of differentiated lump sums and periodic payments, it is not possible to proceed immediately to implement a structured settlement approach. However, the Committee supports this approach and recommends that structured settlements be enacted in legislation as early as possible. Commutation or assignment of a worker's right to periodic payment should be at the discretion of the Court.

Findings

8.20 *The Committee has found that:*

a) There is no compelling argument to retain unlimited access to common law so long as workers and their dependants are provided with alternative fair and reasonable statutory entitlements from an extended no-fault scheme and limited common law rights.

Recommendations

8.21 *The Committee recommends that:*

a) Given the limited resources available to it and the need for detailed work beyond the scope of its terms of reference, the Government should undertake consultation with the TTLC, the TCCI and other relevant bodies to determine the impact of the committee's proposals on employers and employees.

b) Further actuarial work be undertaken once consultation has occurred and there is some agreement on the final benefits model.

Benefit Model Recommended for Consideration

8.22 *The Committee recommends that the following benefits model be considered in the consultation process:*

Common Law

a) Access to common law damages continue to be available, but be limited to injured workers with a greater than 30 per cent whole-of-body impairment.

b) To access common law benefits, the claimant will have to make an irrevocable election to do so within 2 years of the date of incapacity. At this date access to all statutory benefits (other than medical benefits) will cease.

c) Common law awards for non-economic loss be capped at $200,000.

d) Courts be given the discretion to award common law damages in the form of a structured settlement.

Weekly Benefits

e) The following weekly benefit structure should be adopted:

Day 1 – Day ACE="Century Schoolbook">

The current Table of Maims be replaced by a whole of body assessment based on the American Medical Association Guides for the Assessment of Permanent Impairment, Fourth Edition, (AMA Guide) providing a maximum payment of $150,000.

g) There be two exceptions to the use of the AMA Guide:

- Hearing loss, which should continue to be determined in accordance with the Improved Procedure for Determination of Percentage Loss of Hearing published by the National Acoustic Laboratory using a conversion formula.

- Psychological impairment which should be addressed by the development of a method of assessment in consultation with the Royal Australian College of Psychiatrists.

Medical and Rehabilitation Expenses

h) All reasonable medical and rehabilitation expenses be paid without limit. However, where a claim is settled at common law, medical and rehabilitation payments should cease at settlement

Redemption

i) There be no redemption of benefits in general. However, to provide for reasonable exceptions to be considered, the Committee recommends that redemption be allowed:

- where weekly benefit payments are less than 20 per cent of AWE; or

- in other cases where the Tribunal is satisfied that redemption is in the best interests of the injured worker.

Death Benefits

j) The following benefits be payable to dependants in cases of death:

Lump sum of $150,000	to be settled within 3 months of death or as soon as practicable thereafter
0 – 13 weeks	100% Normal Weekly Earnings
13 weeks – 3 years	50% Normal Weekly Earnings

k) Reasonable funeral expenses be paid to an amount determined by the Minister from time to time.

l) The dependants of a deceased worker retain the right to sue for damages. Should they wish to do so, they will be required to make an irrevocable election within 12 months or within 3 months of the completion of any coronial inquest, whichever is the later. Payment of statutory benefits will cease from the date of election. Any statutory benefits paid are to be taken into account in the amount of damages awarded.

Cost Implications of the Proposed Benefit Model

8.23 Tillinghast-Towers Perrin has calculated that the annual cost of the system would be reduced from 3.0% of wages under the current system to 2.67% of wages under the proposed benefit model. Any actuarial analysis involves a degree of uncertainty, particularly when it involves major benefits changes. The actuary reported that the major areas of uncertainly are:

8.23.1 The ongoing annual cost of the system has changed markedly over recent years and, due to the long-term nature of a significant proportion of workers' compensation claim costs, the ultimate cost of the current year is difficult to predict; and

8.23.2 Perhaps even more significantly, the proposed benefit change is likely to engender a number of changes to claimants' attitudes in particular, and the claims culture in general.

8.24 These changes are largely based on the potential to change the focus from lump sum to regular benefit payments and may affect cost outcomes in a way that is difficult to predict.

8.25 A comparison of costs by benefit type is shown in the following table:

COMPARISON OF COST OF CURRENT AND PROPOSED BENEFIT MODEL

Benefit Type	Current Benefits Structure			Proposed Model			
	Cost $M	% of Total Cost	Cost as % of wages	Cost $M	% of Total cost	Cost as % of wages	Change
Medical	21.7	19.2		22.1	22.0		0.4
Weekly	43.9	38.8		45.5	45.2		1.4
Common Law	34.6	30.6		13.8	13.7		-18.4
Lump Sum	3.5	3.1		9.3	9.2		5.2
Death	0.6	0.5		1.1	1.1		0.4
Other	8.8	7.8		8.8	8.8		0.0
Total	**113.1**	**100.0**	**3.0**	**100.6**	**100.0**	**2.67**	**-11.0**

8.26 The major impact is in the area of common law, however, costs in other benefit types are increased due to an expected rise in the number of claims for these types of benefits.

8.27 The effect of imposing an impairment threshold and irrevocable election on access to common law will be to preserve common law for serious claims involving employer negligence. The Committee believes that the less seriously injured are not disadvantaged as statutory benefits are significantly increased by:

8.27.1 The removal of the cap on weekly benefits.

8.27.2 An increase in statutory lump sum benefits which incorporate an allowance for pain and suffering.

8.28 In addition, for those workers who elect to take common law action, access to medical and related costs will continue until settlement or judgement.

8.29 Employers will also benefit through the removal of the $200 excess on medical and related costs and through lower premiums generally.

8.30 The Committee considers the proposed model represents a fair balance between the interests of workers and employers, that is consistent with the broader objectives of a modern compensation system

Recognition of Salary and Other Benefits in Calculating Weekly Compensation Payments

8.31 Section 69(5) of the current Act prevents any consideration of sums paid or payable under any contract of assurance, insurance or from a superannuation or sustentation fund in determination of the amount of compensation to be paid to a worker.

8.32 In certain circumstances this provision allows workers to access combined benefits for the same injury well in excess of their pre-injury earnings. This acts as a disincentive for rehabilitation and return-to-work and prevents the use of alternative income protection arrangements which could reduce an employer's workers' compensation liability.

8.33 "Double-dipping", insofar as it arises when an injured worker is able to access both workers' compensation benefits and superannuation inability benefits, ought to be outlawed except to the extent to which the additional benefit has been purchased directly by the worker.

Recommendations

8.34 *The Committee recommends that:*

a) The legislation provide that any benefit received from any contract of assurance, insurance or superannuation scheme, which is funded by the employer, be considered in calculating the amount of weekly benefit payable under the Act.

Superannuation

8.35 A degree of uncertainty exists in regard to an employer's obligation to maintain superannuation contributions whilst a worker is absent from work on workers' compensation. The Committee believe this should be clarified and recommends that an employer's obligation should be linked to the requirement to maintain a worker's position, that is 12 months unless the reason for the employment no longer exists.

Recommendation

8.36 *The Committee recommends that:*

a) Employers be required to continue any superannuation contributions for a period of 12 months following the date of incapacity unless the reason for the worker's employment has ceased to exist.

Common Law Arrangements in Australian Workers Compensation Schemes

Common-wealth	**Victoria**	**New South Wales**	**South Australia**	**Western Australia**	**Queens-land**	**Tasmania**	***Tasmania (Recom-mended Model)***	**Northern Territory**	**ACT**
Most common law rights abolished from December 1998	Common law rights abolished from 12 November 1997	Election between Table of Disabilities/pain and suffering or modified common law	Common law rights abolished from 3 December 1992	Limited common law rights Only available for death or serious	Limited common law rights A worker with a permanent impairment	Unlimited access No threshold. There are no ceilings,	*Limited common law rights.* *Threshold of 30% whole-of-body impairment.*	Common Law rights against employer or fellow workers abolished from 1	Unlimited access

The threshold is determined by state legislation No ceiling to third party actions Non economic loss is limited to $110,000. There are no limits on claims by dependants.		Non-economic loss limited to $226,650. Economic loss awarded only for death or serious injury (more than 25% of maximum amount under Table of Disabilities or non-economic loss entitlement greater than $53,350. There is no award for non-economic loss if it is assessed at less than $40,000, and reductions occur when the award is between $40,000 and $53,350.		disability (30% or greater impaired) or if a worker can demonstrate a future pecuniary loss greater than the prescribed amount ($104,810) Non-economic loss limited to $209,000	of at least 20% or more is entitled to lump sum compen-sation and access to common law. A worker who sustains a permanent impairment of less than 20% of the statutory maximum compen-sation must make an irrevocable election between accepting the lump sum offered or access to common law.	except that any amount received as compen-sation under the statutory scheme must be deducted from the settlement.	*Irrevocable election after 2 years* *Cap of $200,000 on non-economic loss* *Courts have discretion to award damages as a structured settlement.*	January 1987	

This information was derived from the *Comparison of Workers' Compensation Arrangements in Australian Jurisdictions* compiled for the Secretariat of the Heads of Workers Compensation Authorities by the Victorian WorkCover Authority.

CHAPTER 9 – PREMIUM SETTING

Background

9.1 In August 1995 the Workplace Safety Board commissioned Deloitte Touche Tohmatsu to investigate premium levels and related insurance issues. The report concluded:

"The basis for premium setting by insurers is unscientific, erratic, unpredictable and frequently unrelated to claims experience…

It is obvious that the current system in relation to, the setting of premiums and the funding of claims costs by premium collected is unsustainable, unless insurers begin to set premiums at levels which reflect the claims experience of individual employers."

9.2 To a very large extent the rapid increase in premiums in recent years is due to the insurance market correcting errors in pricing in earlier years of the scheme. However, there is no evidence that insurers have attempted to recover past losses. It appears that overall pricing reflects the current cost of the scheme in the 1996-1997 financial year. However, because the premium structure is unregulated, there is still considerable potential for erratic and volatile pricing of individual policies. Insurers themselves admit that the major problem with unrestricted pricing is that insurers have historically demonstrated a propensity to pursue market share by discounting premiums to unsustainable levels. These premiums are then replaced by very rapid increases as the true cost emerges. The Tasmanian workers' compensation insurance market shows clear evidence of this trend.

Experience Rating

9.3 It is a basic tenet of insurance that premiums are risk related. In workers' compensation insurance this involves balancing the principles of equity, stability, simplicity and promoting prevention. Experience rating is a way of balancing the principle of insurance against that of user-pays in a way

that ensures premiums are fair for employers whilst satisfying the broader scheme goals of stability and full funding.

9.4 In a multi-insurer scheme, experience rating must be modified to encourage innovation and competition within clearly defined parameters.

9.5 Employers have expressed concern that placing restrictions on the pricing mechanism may deny employers access to the full benefits of a competitive market. That is true to an extent; however, premium regulation is aimed at providing long-term scheme stability and protecting employers from the serious financial problems caused by excessive volatility in pricing.

Additional Incentives for Occupational Health and Safety

9.6 There has been a recent trend towards modifying experience-rating systems to provide a more direct incentive for employers to invest in safety. This is provided by way of a bonus or penalty, based on some form of survey of each employer's business or workplace. This approach is implied in the current legislation that requires insurers to set premiums that reflect:

9.6.1 the claims experience of the employer;

9.6.2 an employer's commitment to workplace health and safety;

9.6.3 an employer's agreement to provide suitable alternative duties.

9.7 Because experience rating can operate effectively only for larger organisations, the use of bonuses and penalties is an effective way of providing incentives for small business.

Regulation of Premium Setting

9.8 The Insurance Council of Australia has proposed the adoption of a model which has widespread use in privately underwritten schemes in the United States. A similar approach is also used by the NSW Transport Accident Scheme.

9.9 This model is commonly known as a "file and write" process. The principle objectives of this model are:

9.9.1 to ensure premiums are fair and equitable in relation to risk;

9.9.2 to minimise cross-border subsidisation between employers;

9.9.3 to provide financial incentives for good performance and financial penalties for poor performance;

9.9.4 to inform the market on industry rates and increase the transparency of the premium setting process;

9.9.5 to approve broad industry rates for each insurer rather than approving each individual contract of insurance;

9.9.6 to ensure full funding of the system.

9.10 The Committee considers this approach to be a sensible compromise between the objective of premium stability and the benefits provided by a competitive free market.

9.11 To oversee the premium setting process the Committee recommends the establishment of a process which will develop and publish annual industry risk rates to inform the market place.

Recommendations

9.12 *The Committee recommends that:*

a) WorkCover Tasmania develop a "file and write" approach.

b) WorkCover Tasmania be required to develop and publish annual industry risk rates to inform the marketplace.

Earnings Base for Premium Calculations

9.13 It is generally accepted that remuneration is the appropriate variable factor for calculating premiums.

9.14 This issue was considered in some depth by the HWCA and was reviewed again at the request of the LMC. The HWCA concluded that the definition of remuneration should be as broad as possible to reduce the scope for avoidance. Narrowing the definition does not somehow reduce the amount of premium that any employer pays; it simply increases the apparent premium level when expressed as a percentage of wages.

9.15 The HWCA did consider tying the definition to that applying to payroll tax. However, at that time, each State had its own unique definition for payroll tax purposes, consequently the idea was rejected as failing to achieve national consistency. That situation now appears to be changing. The earnings base for payroll tax in Tasmania was broadened with effect from 1 July 1997, and is now broadly aligned with that applying in Victoria.

9.16 There is a sound argument for using the same definition for both payroll tax and workers' compensation. However, as the earnings base is used for different purposes, strict uniformity may be neither possible nor appropriate.

9.17 The critical issue is the inclusion of employer superannuation payments in the definition. The Workplace Safety Board recently resolved to include only salary-sacrificed superannuation payments. On balance the Committee supports a broad-based definition which includes all employer superannuation contributions.

Recommendations

9.18 *The Committee recommends that:*

a) The basis of remuneration for premium calculations be more closely aligned with the definition applying for payroll tax purposes.

CHAPTER 10 – INJURY PREVENTION

10.1 Improvement in occupational health and safety performance is the most productive area for reducing scheme costs and has been adopted by some schemes as a primary goal of the compensation system.

10.2 There is no doubt that prevention has a direct impact on the viability of the compensation system but in an operational sense it cannot be seen as a primary goal. The compensation system can influence safety through the use of economic incentives in the premium system, through the use of funds for promotion, and through the rehabilitation process. These strategies are applied to the current system and should be continued.

10.3 The Committee considers that prevention should primarily be addressed through compliance with occupational health and safety laws and standards and recommends that the level of fines be reviewed.

10.4 However, the Committee expressed concern that the fines recently imposed by the courts did not reflect the serious nature of the offences committed.

Recommendations

10.5 *The Committee recommends that:*

a) The scheme continue to support economic incentives, promotion and education aimed at improving occupational health and safety standards.

b) The level of fines for breaches of occupational health and safety standards be reviewed and on the spot fines be introduced.

CHAPTER 11 – INJURY MANAGEMENT AND REHABILITATION

Introduction

11.1 The term "injury management" is used in the report to emphasise the need for a coordinated and managed process from the time of injury. Injury management incorporates all of the processes required to achieve an early

return to safe employment. Injury management requires the involvement of a range of parties, especially the co-operation and support of the medical practitioner, employer and insurer. It is particularly relevant in circumstances where injury or illness requires a targeted intervention to achieve a return-to-work or to maintain workers in their existing position or in modified duties. In complex cases the services of a suitably qualified rehabilitation provider may be required to prepare and co-ordinate a rehabilitation program or to provide specific vocational services such as ergonomic assessment or vocational assessment.

11.2 Effective rehabilitation and return-to-work is a key objective of the compensation system in terms of its economic and social outcomes. Monetary compensation cannot restore the social benefits that work provides, a point made abundantly clear by workers who appeared before the Committee.

11.3 The Committee also formed the view that the initial responses to a claim often had a major impact on the ultimate outcome. The importance of personal and supportive contacts by the employer and early rehabilitation assessment cannot be overstated. Actual practice appeared to fall very short of the mark, with employers and insurers being accused of hostile and defensive responses.

11.4 Achieving best practice in injury management requires a culture of care that actively supports return-to-work and employment maintenance strategies. Central to this approach is the importance of maintaining positive relationships between the two key players, employers and workers. Too often this relationship breaks down following the lodgement of a claim.

11.5 The Committee received evidence suggesting it is universally recognised in the medical field that compensable patients will have a worse outcome than non-compensable patients. It is suggested that this is due to the fact that the compensation system "rewards" illness or injury related symptoms. Unless the system becomes more orientated toward recovery and return-to-work, little improvement can be expected.

Rights and Obligations

11.6 To be successful all parties must embrace the concept of injury management as a focal point of the system. Best practice cannot be achieved by legislating for it. However, legislation can and should establish the framework within which best practice can flourish.

11.7 The Committee received little comment on the current legislative provisions for rehabilitation. The rights and obligations placed on employers and workers were strengthened in 1995 and are consistent with both the HWCA model and legislation applying in most states. They are:

11.7.1 where reasonably practicable an employer must hold a worker's position open for a period of 12 months following the day on which the worker became incapacitated;

11.7.2 where reasonably practicable the employer must provide alternative duties for at least 12 months following injury;

11.7.3 each employer with more than 20 employees must have a written return-to-work policy developed in accordance with guidelines published by the Board;

11.7.4 in each case where incapacity exceeds 14 days, a return-to-work plan must be prepared in consultation with the injured worker;

11.7.5 workers are obliged to participate in a rehabilitation program or suitable alternative duties recommended by their employer.

11.8 The Committee recommends that these obligations be retained with minor modification. The Committee makes some further recommendations aimed at reinforcing the focus of the scheme on rehabilitation and return-to-work.

Second Injury Scheme

11.9 The *Workers Rehabilitation and Compensation Reform Act 1995*, provided for the establishment of a second injury scheme to assist in the re-employment of workers unable to return to their pre-injury employment. Although major stakeholders support the concept it is not seen as a high priority under the current scheme.

11.10 The importance of providing incentives for employers to engage impaired or incapacitated workers is well understood in schemes providing long-term income support, particularly in times of limited labour market opportunities. The culture in Tasmania has been somewhat different due to the common practice of settling claims as soon as the medical prognosis is clear.

11.11 In view of the Committee's recommendations on the benefit structure it is recommended that a second injury scheme be established which provides:

11.11.1 indemnity for a specified period in the event of an aggravation of prior injury;

11.11.2 training allowance;

11.11.3 premium holiday (for 12 months) in respect to any worker engaged under the program.

11.12 The criteria for entry into the scheme should be at the discretion of WorkCover Tasmania and take account of the likely cost.

Removing Impediments to Injury Management and Return-to-Work

11.13 The Committee received evidence of structural and cultural impediments to effective injury management and return-to-work. The major ones were:

11.13.1 poor communication;

11.13.2 absence of information on rights and entitlements;

11.13.3 lack of support from employer and/or insurer;

11.13.4 industrial relations problems;

11.13.5 failure to provide all medical reports to the treating doctor;

11.13.6 a benefit structure which encourages dependence and maintenance of symptoms;

11.13.7 a dispute resolution system that does not recognise workers' needs for treatment and early rehabilitation.

11.14 In regard to the last points the Committee has made recommendations elsewhere in this report which, in part, are aimed at improving return-to-work outcomes.

11.15 The Committee also endorses the view that the scheme regulator has a key role in fostering a return-to-work culture, enforcing legislative compliance and performance monitoring. Some examples of the function and activities of the regulator are:

11.15.1 providing incentives to employ injured workers unable to return to their pre-injury employer;

11.15.2 developing outcome focussed performance standards and monitoring of such standards to ensure compliance at both the claims and service provider level;

11.15.3 promotion and enforcement of the legislative framework;

11.15.4 continual development and promotion of best practice initiatives in consultation with other stakeholders;

11.15.5 collecting and analysing data to ensure that objectives and outcomes are met;

11.15.6 ensuring appropriate information and educational services are available and accessible to employers, workers, insurers and service providers;

11.15.7 facilitating the involvement of parties in the dispute resolution process.

Recommendations

11.16 *The Committee recommends that:*

a) Larger employers (≥ 50 employees) be required to nominate a suitably qualified person to perform the role of rehabilitation coordinator.

b) A second injury scheme be established to provide incentives for the re-employment of injured workers unable to return to their pre-injury employment.

c) The treating doctor be provided with copies of any medical report relating to the worker's claim, irrespective of whether the report is relied upon in assessing liability and incapacity, to ensure the best quality medical outcomes.

d) The scheme regulator have a proactive role in fostering a return-to-work culture, enforcing compliance and monitoring performance.

e) All referrals for vocational rehabilitation be decided in consultation with the employer, injured worker and treating medical practitioner.

f) An injured worker has the right to request a change of rehabilitation provider where a genuine reason exists, with the decision able to be reviewed in the Tribunal.

g) A vocational rehabilitation provider not be an agent of the insurer or employer but rather has a primary relationship with the injured worker.

h) Where appropriate, return-to-work plans include training for alternative work which the worker is capable of undertaking.

i) Medical practitioners play a key role in the return-to-work process.

j) Insurers adopt claims management practices which support an injury management approach.

k) The practice of initiating rehabilitation in disputed cases be encouraged.

l) A process be developed to determine when an employer's obligation to provide rehabilitation should cease.

m) Data collection methodologies which support injury management performance indicators be developed.

n) An independent early intervention service be provided to assist in the resolution of injury management disputes.

CHAPTER 12 – DISPUTE RESOLUTION

Issues In Dispute Resolution System Design

12.1 Dispute resolution is a key element in the successful operation of the workers' compensation system. However, successful scheme administration is not only concerned with the manner in which disputes are resolved but must also have as a guiding goal the prevention of disputes. Prevention in this context includes reducing or limiting opportunities for escalation of disputes.

12.2 The number of disputes is influenced by a number of factors including:

12.2.1 clarity of scheme boundaries;

12.2.2 benefit structure;

12.2.3 time periods for liability decisions;

12.2.4 quality of decision making.

12.3 The traditional approach to dispute resolution is through a formal framework which exists to arbitrate or adjudicate on a dispute by means of a binding decision. In almost all fields of dispute resolution this formal approach is now viewed as only one of a number of levels in a hierarchy. Experience also demonstrates that the majority of workers' compensation

disputes are capable of resolution through a variety of non-adversarial processes aimed at getting the parties to reach agreement on an outcome.

12.4 Low levels of disputation and effective means of resolution have a major beneficial impact on scheme performances by delivering:

12.4.1 higher return-to-work rates;

12.4.2 more effective treatment regimes;

12.4.3 greater integration of partially incapacitated workers to useful work;

12.4.4 lower costs.

12.5 In workers' compensation there are four basic levels in the dispute resolution hierarchy:

12.5.1 an initial decision prompting the grievance (primary decision);

12.5.2 facilitated alternative dispute resolution (ADR), ie mediation and conciliation;

12.5.3 adjudication (formal hearing on the merits);

12.5.4 review of the law (assessment of interpretation and application of law in the adjudication level).

Weaknesses of the Current Scheme

12.6 The major thrust of evidence received by the Committee supports change to facilitate early resolution of disputed matters in an informal, non-adversarial environment. It was generally accepted that the Tribunal structure and procedures supported the formal adjudication of disputes but was largely ineffective in resolving the majority of disputes capable of resolution by alternative processes.

12.7 The 1986 Law Reform Commission Report on the 1927 Act recommended the establishment of a Tribunal and commented:

"The general committee desired that methods of conciliation, negotiation and informality should replace the system based on adversarial litigation…"

12.8 Criticism of the current system came from all parties and is perhaps best summarised by the following comment from BHP Temco:

"The workers' compensation dispute resolution system as exists has also been found to be frustrating for both management and employees who seek quick resolution of matters and the settling down of the emotional and other issues which can negatively impact rehabilitation and return to productive work"

The Basis for a New Approach

12.9 The Committee resolved that the dispute resolution system should aim to provide a cost effective, equitable and speedy dispute resolution service having regard to:

12.9.1 fairness;

12.9.2 accessibility;

12.9.3 independence;

12.9.4 speed;

12.9.5 informality;

12.9.6 cost.

12.10 The major thrust of the Committee's recommendations is to establish conciliation as the means by which most disputes are resolved. The success of this strategy is not only dependent on the quality of legislation but also on the preparedness of the parties to make this approach work. All parties have much to gain from avoiding protracted, bitter and costly

disputes. The chances of successful medical and rehabilitation outcomes can be greatly improved by early and sensitive interventions to resolve problems before positions become entrenched and positive relationships break down.

12.11 The Committee is of the view that the dispute resolution system should be restructured to provide:

12.11.1 formal reconsideration of primary decisions by insurers;

12.11.2 compulsory conciliation of all disputed matters;

12.11.3 fast tracking of cases to the most appropriate forum for resolution;

12.11.4 determination of medical questions by medical panels;

12.14 The Committee does not believe that the current structure and procedures of the Tribunal support the early resolution of disputes by facilitating the parties in reaching agreement. The focus of the Tribunal is on the adjudication of disputes in a court setting. That is a comfortable environment for most legal practitioners and Commissioners but not for workers, employers and, to some extent, insurers. The Committee has resolved that the primary focus of the system should be on the conciliation of disputes. There are a number of administrative issues which flow from that decision.

12.15 An option for the Committee was to recommend that the adjudication level be separated from conciliation by transferring administrative responsibility to the court system. However, the Committee has observed that successful integrated models operate in both Western Australia and South Australia, each achieving very high levels of resolution without the need for adjudication. Consequently the Committee recommends that the two levels continue to reside within a single structure as separate functional units but utilising a single registry and case-flow management system.

12.16 The Committee recommends the creation of a new management position with primary responsibility for the efficient operation of the Tribunal including all administrative functions. The position would be responsible to the Chief Executive of the Workplace Standards Authority for administrative matters, and to the Minister for dispute resolution matters. The position may have a conciliation role; however, the primary function would be administrative and include appointment of medical panels, allocation of cases, case-flow management and performance assessment.

Recommendations

12.17 *The Committee recommends that:*

a) The existing Workers Rehabilitation and Compensation Tribunal be restructured into two separate functional units: one dealing with conciliation, the other with adjudication. The new body will be known as the WorkCover Tribunal.

b) A senior position be created within the Tribunal to provide effective administrative management of the service, and that this role not be vested in the Chief Commissioner. The appointment will be on a fixed-term contract.

c) The Chief Commissioner and Commissioners be appointed by the Governor on fixed-term contracts.

d) The Tribunal be required to establish key performance indicators and report against them regularly.

Primary Decision Making

12.18 The decision to accept or reject a compensation claim is a crucial trigger point in terms of determining the ongoing dynamics of the claim. A poor decision can lead to anger and a process of antagonistic confrontation and disputation.

12.19 Quality decision making requires:

12.19.1 personal contact;

12.19.2 access to all relevant information;

12.19.3 decisions to be internally reviewed;

12.19.4 assessments must be consistent and objective;

c) Reasons for any adverse decision be provided at the time the decision is communicated and that the communication should be in a non-confrontational style backed by personal contact.

d) Written advice on further appeal or review rights available to either party be provided with any decision. Failure to provide such advice will extend the time period allowed by legislation for that appeal or review to occur.

e) The Tribunal not have jurisdiction to hear appeals against decisions in relation to the licensing of insurers and that this jurisdiction be conferred on the Supreme Court.

f) "Without prejudice" payments be available to injured workers following any decision to dispute a claim. Such payments should be available:

- in the event that a claim is disputed by an employer for the purpose of obtaining further information to determine whether or not to dispute the claim; or

- where, in the view of a Conciliator or Commissioner, delay in resolution or determination of the dispute is warranted.

g) Such "without prejudice" payments be only awarded for up to 10 weeks retrospectively and 12 weeks prospectively.

h) The Act provide for recovery of these "without prejudice" payments where the claim was vexatious or fraudulent.

Conciliation

12.22 In the context of the new system the conciliation function includes all alternative dispute resolution processes aimed at resolving a dispute without the need for a formal legal determination. It also includes the process of screening disputes and directing them into the most appropriate forum for resolution.

12.23 The success of the conciliation function is directly influenced by the degree of control the dispute resolution service has over the process and the availability of information. Conciliation requires open communication and access by both parties to all available information. Conciliators require a good understanding of workplace issues in addition to specific conciliation skills. They should also be involved in ongoing training and quality assurance programs.

Recommendations

12.24 *The Committee recommends that:*

a) Conciliators be given limited powers to make interim orders for the payment of compensation pending adjudication of disputes. Such payments should be restricted to 10 weeks retrospectively and 12 weeks prospectively.

b) Conciliation be compulsory for all types of disputes.

c) Referral for adjudication be allowed only where the conciliation officer is satisfied a genuine attempt has been made to resolve the matter.

d) Legislation require the exchange of all available relevant information prior to the conduct of the first conciliation conference and that an offence for failing to provide such information be created.

e) Admitted legal practitioners not be permitted in conciliation hearings except where the conciliator is of the view that there are special circumstances and both parties agree.

f) All disputes be screened to identify injury management issues and to expedite resolution on the basis of need.

Medical Panels

12.25 Medical questions constitute a major source of dispute as there are often divergent views on disability and impairment.

12.26 Provision for medical panels has existed since 1988, however, little progress has been made in bringing the concept to reality.

12.27 There now appears to be strong support for their establishment and the co-operation of medical practitioners is expected.

12.28 In workers' compensation there are often "worker" doctors and "insurer" doctors. Typically they take extreme positions and become "duelling experts". Medical panels are intended to stop this type of problem. Research suggests there are a number of critical factors in their success:

12.28.1 cases must be carefully screened and questions confined to purely medical issues;

12.28.2 the Conciliator or Commissioner should be responsible for drafting medical questions;

12.28.3 panel decisions must be final and binding;

12.28.4 access to medical panels should be available at all stages of the dispute resolution process and, to avoid delays and overloading, should be considered a last resort;

12.28.5 panels must include experts practising in the field in which expertise is required.

Recommendations

12.29 *The Committee recommends that:*

a) Legislation should limit a "*medical question*" to the nature or extent of a disability, or whether a disability is permanent or temporary and require that any relevant medical report prepared during the life of a claim be provided to the panel.

b) Decisions of medical panels be made final and binding on all parties.

c) Matters be referred to a medical panel by a Conciliator. If there is dispute about whether the question is to be referred, it should be resolved by the Commissioner who may order the referral.

Adjudication

12.30 In Western Australia and South Australia it is not a requirement that an Adjudicator be a legal practitioner. This contrasts with the requirement in Tasmanian legislation that a Commissioner be a practitioner or barrister of not less than five years' standing.

12.31 It is apparent that proceedings in those jurisdictions are less formal and are less likely to involve technical legal argument or medical witnesses.

12.32 In other jurisdictions adjudication occurs within a specialised or general court structure.

12.33 The Committee considers that the existing adjudication function within the Tribunal works well and should be retained. Concerns about delay should dissipate with the establishment of an effective conciliation process.

Recommendations

12.34 *The Committee recommends that:*

a) The existing process for adjudication of disputes be retained but be considered a separate process to conciliation.

b) In order to promote full disclosure of information at conciliation no new evidence be admitted at adjudication unless the Commissioner is satisfied that the information was not available during conciliation.

c) Commissioners have power to proceed expeditiously and to adjudicate on a matter in the absence of one of the parties provided that party does not have a reasonable excuse for absence.

Review of the Law

12.35 The Law Society argued in its submission that there should be access to the courts on both matters of fact and law. The Committee believes such a change is unnecessary and would only add further delay and cost to the dispute process.

Recommendations

12.36 *The Committee recommends that:*

a) Appeals from the Tribunal to the Supreme Court be allowed only on points of law.

Termination or Reduction of Weekly Compensation

12.37 The Committee is aware that major problems exist with the current legislation which outlines the grounds and process for the termination or reduction of weekly benefits. The Committee accepts that major redrafting is required to overcome the technical problems identified by the Supreme Court.

12.38 As the legislation stands, an employer may terminate weekly benefits 10 days after serving the proper notice on a worker. The worker must then appeal that termination in order to have benefits restored.

12.39 The Law Reform Commission considered this approach unjust and recommended that a worker be given a limited period to dispute the termination and that, pending the outcome, weekly payments should continue. This approach is followed in Western Australia and South Australia. The Committee believes this approach to be consistent with the beneficial nature of the legislation and provides a strong incentive for the employer to have the dispute heard.

Recommendations

12.40 *The Committee recommends that:*

a) The termination or reduction of weekly benefits not be effected until any dispute has been resolved or adjudicated.

Costs

12.41 The Committee has considered the issue of costs for legal practitioners involved in dispute resolution. It is important that the structure of costs to be paid reinforces the need for early dispute resolution rather than providing inherent incentives for delay.

12.42 Costs should not be awarded for conciliation, unless there is some reason. However, if the dispute reaches the adjudication level, the current rule that costs follow the cause should be retained.

Recommendations

12.43 *The Committee recommends that:*

a) In relation to costs:

- no costs be awarded at conciliation unless the Tribunal finds that the dispute is frivolous or vexatious; and

- costs follow the cause at adjudication; and

- the legislation provide for the determination of costs reflecting the nature of proceedings and providing economic incentives for early settlement — that is, the legislation should provide for differential levels of cost at the conciliation and adjudication levels.

CHAPTER 13 – INSURANCE ARRANGEMENTS

Insurance Delivery: Single or Multiple Insurer

13.1 The Committee's terms of reference require it to consider the most appropriate mechanism for the delivery of insurance services.

13.2 The Committee received some evidence recommending adoption of a single insurer model based on the Motor Accidents Insurance Board (MAIB) motor accident scheme. The benefits of this model were seen to be:

13.2.1 a greater emphasis on accident prevention and research;

13.2.2 greater expertise in claims handling and the avoidance of unnecessary disputes;

13.2.3 a stronger and better coordinated focus on rehabilitation and return-to-work;

13.2.4 a more efficient insurance pool.

13.3 On the other hand, insurers argue that it is the insurer's business to take financial risks, not the Government's. They also claim that competition –

"…Will provide the stimuli for cultural, regulatory and organisational improvements which will enable workers' compensation programs to continue to improve their overall performance and cost structure for the benefit of all Australians"

13.4 Around the world there are examples of successful multiple and single insurer schemes. No scheme is immune from adverse performance. The key difference is that when things go wrong in a single publicly underwritten scheme, it is the government and the community which is held financially accountable.

13.5 The MAIB scheme was cited by a number of witnesses as a very successful scheme, both functionally and financially. However, there are critical differences between workers' compensation and compulsory third party accident schemes which do not guarantee successful transplantation of a particular model from one scheme to another.

13.6 Whilst there are valid concerns about the performance of private insurers the Committee recommends that the current multi-insurer delivery structure be maintained.

Insurer Performance

13.7 The major concerns received in evidence were:

13.7.1 focus on cost minimisation not injury management or return-to-work;

13.7.2 lack of people skills;

13.7.3 poor decision making causing unnecessary disputes.

13.8 Since 1995, the Workplace Safety Board has imposed tougher conditions and standards on insurers to address deficiencies identified in the Deloitte Report. New performance standards are aimed at improving claims processing and injury management. They appear to have had a beneficial impact on insurer performance.

Self Insurance

13.9 Self-insurance is considered an effective option for larger employers able to manage claims effectively. Self-insurance provides a powerful incentive

to improve safety as all claim costs are borne directly by the employer.

Insurance Brokers

13.10 Insurance brokers can provide a useful advisory role for employers in respect to:

13.10.1 provision of workers' compensation insurance;

13.10.2 calculation of premiums;

13.10.3 selection of insurer;

13.10.4 advice regarding risk management, compliance with legislation, codes of practice and guidelines.

13.11 However, the Committee questions the role of insurance brokers in claims management and in the rehabilitation of injured workers.

13.12 Effective claims management requires a partnership between an employer and its insurer. That is, the insurer is expected to provide the expertise in claims management, not the insurance broker. Likewise there are appropriately qualified rehabilitation providers to advise on rehabilitation and return-to-work issues.

Recommendations

13.13 *The Committee recommends that:*

a) The current private multi-insurer delivery structure be retained with services being provided by licensed private sector insurers.

b) The administration of the scheme continue to be funded by a levy on insurers and self-insurers. To ensure greater equity, there should be a minimum annual contribution of $25,000 for licensed insurers and $5,000 for self-insurers The Crown should continue to contribute to the cost of administering the scheme.

c) Legislation provide for an application fee to be charged to insurers and self-insurers to cover the cost of assessing new licence applications.

d) Existing performance standards be revised and, where possible, should focus on performance outcomes not administrative process.

e) Insurers be required to develop and maintain training programs and competency standards for all personnel involved in workers' compensation insurance underwriting and claims management.

f) The right to self-insure be retained based on the capacity of the employer to manage, and meet the cost of, claims.

g) The grant of a self-insurance permit be based on an analysis of the employer's:

financial history;

ability to satisfy prudential standards (eg bank guarantee and catastrophe cover);

capacity to provide high quality claims' management; and

ongoing commitment to occupational health and safety.

h) The legislation allow group self insurance, for related bodies corporate, under criteria developed by WorkCover Tasmania.

i) WorkCover Tasmania undertake a review of the role of insurance brokers and insurance agents and the level of fees charged.

CHAPTER 14 – SERVICE PROVIDERS AND THEIR CHARGES

Accreditation

14.1 In 1995, the legislation was amended to require the accreditation of medical practitioners, as well as other classes of providers, by prescription.

14.2 The amendment provided automatic accreditation of medical practitioners in respect of the issue of prescribed medical certificates.

14.3 The amendment does not preclude non-accredited medical practitioners from providing treatment, however, they may not issue medical certificates.

14.4 The Workplace Safety Board has progressed the development of an accreditation training program for medical practitioners in an environment where concerted opposition could make the system inoperable. The concerns of medical practitioners have been addressed as far as is possible to avoid outright confrontation. The end result is an accreditation system which has been criticised by some as little more than a token exercise.

14.5 The Committee believes there is merit in this argument, and that the provision requiring compulsory accreditation of medical practitioners should be repealed. However, the general power should be retained to be used if it becomes the only method by which the scheme's objectives can be met.

14.6 The principal aim of accreditation is to improve the operation of the system by equipping service providers with the necessary knowledge and understanding to provide high quality services in the workers' compensation system. Accreditation also provides a vehicle for removing from the system service providers who have been found to be negligent or unethical.

Recommendations

14.7 *The Committee recommends that:*

a) The compulsory accreditation of medical practitioners be abolished, although the general head of power allowing accreditation of service providers be retained.

b) Accreditation be pursued only where a desired objective cannot be achieved by another means.

c) Any accreditation of medical practitioners be limited to general practitioners or those specialists responsible for ongoing medical management of claims.

d) WorkCover Tasmania have discretion to set the period during which accreditation is current.

Regulation of Fees and Services

14.8 In most Australian systems, regulation of fees and services is negotiated with the relevant professional bodies. Service providers generally maintain that they should be able to set their own fees without interference from the regulator. On the other hand, scheme regulators have a responsibility to ensure that services are:

- high quality;
- cost effective;
- reasonably priced;
- within limits imposed by legislation.

14.9 The scheme regulator's role also extends to protecting the scheme against cost increases through overcharging, over-servicing or other unethical practices. Approximately 25% of all claim payments go to service providers.

Recommendations

14.10 *The Committee recommends that:*

a) The legislation provide power to establish fee schedules and maximum fees. It should also be a requirement that fees and charges scheduled under the Act should be negotiated on an annual basis. Fee negotiations should also focus on service quality and utilisation.

b) WorkCover Tasmania maintain a schedule of fees for services unique to the workers' compensation environment.

c) Best practice guidelines for treatment of workplace injury and illness be promoted.

Chapter 15 – SCHEME GOVERNANCE

Stakeholder Ownership

15.1 Workers' compensation systems exist to serve the interests of the two key parties, workers and employers. Maintenance of the balance between the interests of these parties is essential to the enduring success of the system. Many schemes fail because this balance is not reflected in the scheme design or the operational oversight is deficient.

15.2 One of the perceived weaknesses of the current scheme is the lack of ownership by the two key parties. Traditionally major legislative amendments have been instigated in response to pressure from one group or the other. Members of Parliament are often then besieged by parties who have an interest, pecuniary or otherwise, in the shape of reforms. The danger with this approach is that any attempt to maintain a balance of interests or a cohesive and efficient structure can be undone by last minute lobbying. The Committee believes that greater onus should be placed on the two key parties to manage the scheme.

15.3 However, the Committee acknowledges the importance of the key stakeholders being well informed by other key participants in the scheme.

15.4 Such a belief is not founded on a view that the current governance arrangements have failed. Indeed, the Committee acknowledges the excellent work done by the Workers Compensation Board and, more recently, the Workplace Safety Board to improve scheme performance. The development of performance standards for licensed and self insurers; the accreditation of medical practitioners; and the major Workplace Safe promotional campaign have been significant innovations which have helped the 1995 reforms succeed.

15.5 However, to increase the focus on the responsibility of the scheme owners, further reform would be beneficial.

15.6 To further this objective, the Committee believes there should be a clear distinction between management and policy advisory roles of the governing body. In respect of providing policy advice to the Minister, WorkCover Tasmania should record only the votes of employer and employee representatives. The Minister should, however, be required to be informed of the views of other members of the Board.

15.7 This will not be an easy process and it may take some time to bridge the philosophical divide which marks existing stakeholder positions. The aim is to develop an orderly process for scheme management and reform.

Recommendations

15.8 *The Committee recommends that:*

a) The Workplace Safety Board of Tasmania be renamed WorkCover Tasmania and be restructured to extend the representation of employers and employees. The new body will comprise:

- two employer representatives;
- two employee representatives;

- a medical practitioner with experience in workers' compensation;
- an insurance expert;
- a legal practitioner with experience in workers' compensation;
- Head of the Government agency administering the legislation as chair.

b) In relation to occupational health and safety, WorkCover Tasmania be responsible for:

- monitoring the Workplace Standards Authority's occupational health and safety activities;
- providing advice to the Minister on any occupational health and safety issue;
- promoting high operational standards for safety management, injury management and return-to-work.

c) In relation to workers' compensation, WorkCover Tasmania be responsible for:

- management of the workers' compensation scheme;
- monitoring scheme performance;
- providing advice to the Minister on necessary changes to the legislation;
- developing policies and guidelines for the operation of the scheme;
- recommending to the Minister the annual levy to be imposed on licensed and self insurers to fund the administration of the scheme;
- advising the Minister on the annual strategic objectives and targets of the government department charged with the day-to-day administration of the legislation and the scheme.

d) In providing advice to the Minster on changes to legislation and regulations, WorkCover Tasmania be bound by the following provisions:

only the employer and employee representatives may vote;

there must be an equality of employer and employee members present when any vote on such an issue is taken;

the Minister must be informed of the views of the non-voting members of the Board.

e) In all other matters to do with the governance of the workers' compensation scheme, each member of WorkCover Tasmania will have an equal vote.

f) WorkCover Tasmania be given responsibility for determining:

- criteria for approval or revocation of insurer licences and self insurer permits;
- variations of licence conditions for insurers and self insurers;
- indicative industry premium rates;

- notional premiums for self-insurers.

Workers Rehabilitation and Compensation Fund

15.9 Administration of the workers' compensation system and promotion of occupational health and safety is fully funded by a levy on participating insurers and self-insurers. Administration includes Government and Ministerial activity as well as activities directly related to the specific functions of the Board.

15.10 The Committee does not propose any change to this arrangement. However, the Fund is currently only able to obtain monies which are to be expended in the year in which they are raised. As some of the Fund's liabilities will accrue over a number of years it is recommended that the legislation allow the accrual of funds to meet these liabilities.

Recommendations

15.11 *The Committee recommends that:*

a) Scheme er in addition to any penalty imposed.

b) Provision be made for the issue of infringement notices (on-the-spot fines) for such clear offences as failure to develop and display a rehabilitation policy and failure to produce details of the policy of insurance.

Access to Data

15.14 Comprehensive and reliable data is essential for effective scheme management. Many other groups, too, seek relevant data to identify areas for improvement in prevention and return-to-work programs. Insurers also require data for the calculation of premium rates.

15.15 The Committee was advised that the existing data collection is to be reviewed and a new system put in place.

Recommendations

15.16 *The Committee recommends that:*

a) The review and assessment of the design and implementation of a new centralised database be given high priority by the Workplace Standards Authority.

CHAPTER 16 – LEGISLATION

16.1 During the course of taking evidence and in its deliberations, the Committee was constantly reminded of the complexity of the *Workers Rehabilitation and Compensation Act 1988*. It is a substantial piece of legislation with a multitude of provisions. It is further compounded by the extensive interpretation of its provisions by the Courts.

16.2 The Committee is of the view that a new, clearer Act is required. It is further of the view that Tasmania should take a step forward in the presentation of its legislation by including explanatory notes in the printed Act. For example, the text of the Act could be presented on one page with simple explanatory information presented on the facing page.

16.3 The Committee recognises that this would be a significant step to take, but believes it should be seriously contemplated by the Parliament. One of the issues to emerge from any consideration of workers' compensation is that excessive disputation arises from a lack of understanding and a lack of information. This adds time and cost to the system and does little to aid the recovery of injured people.

16.4 This lack of information could be considerably relieved by more "user friendly" legislative packages. An Act which sets out not only the law but a clear statement of what it is expected to achieve, could go a long way to adding to the general understanding of the Parliament's intentions.

Recommendations

16.5 *The Committee recommends that:*

a) The legislation be redrafted so that employers and employees and the community generally should be able easily to understand their rights and obligations.

b) In order to facilitate this, Parliament should consider, as a matter of urgency, the inclusion of clause notes or other explanatory material in published Acts, provided that such information is not seen as forming part of the law.

Appendix A

List of Witnesses

Azzopardi, S	Tasmanian Chamber of Commerce and Industry Ltd
Buchanan, N	
Baker, D	Incat
Buchanan, N	Cadbury Schweppes
Van Hardeveld,R	
Burns, S	Insurance Council of Australia
Davey, I	
Ellis, B	
Trafford, D	
Butorac, R (Mr)	Orthopaedic Surgeon
Crean, S R (Dr)	Chiropractors Association of Australia (Tas) Ltd
Davey, I	TGIO Ltd
Walker R	
Dixon, R	Tasmanian Country Sawmillers' Federation Ltd
Ralph, F	
Fitzgerald, L	Tasmanian Trades and Labor Council
Ford, A	McCains Foods (Aust) Pty Ltd
Cousens, S	
Green, J	
Green,C	HACSU
Grenness, S	Sound Advice
Groom, G	Tasmanian Association of Vocational Rehabilitation Providers
Stephens, S	
Harris, R J	
Hemming, A	Commissioner
	Workers Rehabilitation and Compensation Tribunal
Jackson, P	Law Society
Kirwan, J	Kirwan and Associates
Lowe, D	Australian Medical Association
Matthews, G	HIH Winterthur Casualty and General Insurance Ltd
Ellis, B	

Michell, P	National Insurance Brokers Association
Goninon, I	
O'Farrell, M	Tasmanian Bar Association
Cooper, S	
Wilkins, M	
Obendorf, D (Dr)	
(on behalf of Newman, P)	
Obendorf, D (Dr)	
Poate, J	Australian Education Union
Quarmby, P	
Read, K	Jennings Elliott
Rice, K	Tasmanian Farmers and Graziers Employers' Association
O'Connor, R	
Riddoch, S	Australian Physiotherapy Association
Drew, J	
Hunn, P	
Ridgway B	Working Women's Centre
Wilson, K	
Sykes, B (Dr)	General Practitioner
Toulson, J	Four Workers from DC & HS
Tremayne, G	Crisp Hudson and Mann
Troje, M	
Turvey, A	Millers Pty Ltd
Tucker, G	
Goldsmith, D	
Van Essen, K	
Wilson, A	Tasmanian Minerals Council Ltd
Masson, I	
Wise, D	Psychology Centre

Appendix B

WRITTEN SUBMISSIONS TAKEN INTO EVIDENCE

1	Mr L G Spencer
2	Dr D Obendorf
3	Simplot Australia Pty Ltd
4	Miss P Newman
5	Tasmanian Country Sawmillers' Federation
6	Rae & Partners
7	Australian Medical Association (Tasmanian Branch)
8	Mr R Butorac, Orthopaedic Surgeon

Morris' Store

Mr J Green LL.B

Workers' Rehabilitation and Compensation Tribunal

Mr N A Atkins

Dr J B Sykes

Ms K Wilson

Ms K Heier

Crisp Hudson & Mann

GIO Australia

Tasmanian Independent Wholesalers

Insurance Council of Australia

The Law Society of Tasmania

Tasmanian Bar Association

North Forest Products Ltd

Temco

HIH Winterthur Casualty and General Insurance Ltd

Retirement Benefits Fund Board

Kirwan & Associates

Coles Myer Ltd

National Insurance Brokers Association of Australia

R W L Turner Pty Ltd

Aberfoyle Resources Ltd

Mrs A Taylor

Sound Advice

Australian Hotels Association (Tasmanian Branch)

Tascot Templeton Carpets Pty Ltd

Australian Physiotherapy Association (Tasmanian Branch)

Australian Association of Occupational Therapists

Commonwealth Rehabilitation Service

MMI Insurance Group

Tasmanian Minerals Council Ltd

Australian Psychology Society

Incat Tasmania Pty Ltd

National Mutual

Royal Australasian College of Surgeons

TFGA Industrial Association

Lander & Rogers

Tasmanian Chamber of Commerce and Industry Ltd

HACSU

Forestry Tasmania

Australian Manufacturing Workers' Union

Tasmanian Association of Vocational Rehabilitation Providers

51	P Quarmby
52	Workers Rehabilitation and Compensation Tribunal (Confidential)
53	Four Workers from DC&HS – North
54	Tasmanian Trades and Labor Council
55	Working Women's Centre
56	McCain Foods (Aust) Pty Ltd
57	Mrs M Thomas
58	Workplace Safety Tasmania
59	Cadbury Schweppes Pty Ltd
60	Specialist Engineering Construction Services Pty Ltd
61	Local Government Association of Tasmania
62	Jennings Elliot
63	The Police Association of Tasmania
64	Ms M Troje
65	Tasmanian State Service Workers' Compensation Committee
66	Australian Education Union
67	The Chiropractors' Association of Australia (National) Limited
68	Chiropractors' Association of Australia (Tas) Ltd
69	Department of Social Security (Commonwealth)
70	Mr C J Bartlett
71	Mr G Fettke
72	Mr K van Essen
73	TGIO Limited
74	Millers Pty Ltd (Confidential)
75	Ms A Taylor
76	Ms G Elphinstone
77	National Castings Pty Ltd
78	Tassal Limited

APPENDIX C

DOCUMENTS TAKEN INTO EVIDENCE

1	The Nature and Extent of Occupational Stress in the Tasmanian Public Sector.
2	Copy of an article in the Sunday Tasmanian dated 2 February 1997 entitled PS Stress bill $31m.
3	Transcript of meeting requested by Diane Green and Associates dated 13 February 1997.
4	Letter dated 22 July 1997 – Mr G Matthews, HIH Winterthur.
5	Letter from Ian Morrison dated 17 September 1997 and Chairman's reply dated 27 October 1997.

6	Draft Actuarial Evaluation of an Alternative Workers' Compensation Benefit Model for Tasmania, 2 December 1997.
7	Material collected by the Hon. Ross Ginn, MLC relating to Washington and Wisconsin States' Workers' Compensation Schemes.
8	Letter from Wilson Dowd, Barristers & Solicitors dated 4 August 1997 and reply from Workplace Standards Authority dated 13 January 1998.
9	Tillinghast – Towers Perrin (Actuary) – Actuary's Draft Report dated 3 February 1998.
10	Tillinghast – Towers Perrin (Actuary) – Actuary's Final Report dated 11 May 1998.

APPENDIX D

MINUTES OF PROCEEDINGS

The complete Minutes of Proceedings will be included in the printed version of the report.