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## **Workers' compensation schemes: issues and practices**

- 4.1 The Department of Employment and Workplace Relations (DEWR) argued that the complexity of the framework underpinning workers' compensation schemes, and the inconsistencies across jurisdictions may create possible confusion and opportunities for fraud and/or non-compliance by employers, employees and others.<sup>1</sup> Insurance Australia Group also attributes many of the problems with workers' compensation to the inherent structures and procedures of the schemes.<sup>2</sup>
- 4.2 Workers' compensation reform is rarely off the political agenda. It is very difficult to achieve a fair and equitable balance in a system of limited resources which is required to meet the needs of many injured workers.<sup>3</sup> Nationally, there is a lack of consistency, with some states treating fraud harshly while others take a different approach.<sup>4</sup>
- 4.3 The National Meat Association of Australia (NMAA) stated that the practical operation of schemes is the issue and not just the legislative scheme *per se*. The Association believes that systems are not perfect in practice and substantial changes are required to remedy the underlying defects in the framework. The NMAA provided an extensive overview of the primary problems it perceives in each scheme in relation to possible fraud and rehabilitation.<sup>5</sup>
- 4.4 The Committee views the term 'structural factors' as encompassing the full range of legislation, process and practice of the workers' compensation schemes. Issues that have been raised in submissions in relation to an

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1 Mr Rex Hoy, Department of Employment and Workplace Relations, *Transcript of Evidence*, 25 September 2002, p. 14; DEWR, Submission No. 48, p. i.

2 Insurance Australia Group Ltd, Submission No. 47, p. 2.

3 Mr Kim Mettam, Charles Taylor Consulting, *Transcript of Evidence*, 20 November 2002, p. 241.

4 Mr Richard Gilley, The RiskNet Group, *Transcript of Evidence*, 18 October 2002, p. 132.

5 National Meat Association of Australia, Submission No. 41, pp. 12-57.

aspect of the operation of the system which may impact on the outcomes of a claim have been incorporated in this chapter.

- 4.5 Mr Andrew Hemming commented that if governments listened to people who understand the issues the complexity of the system could be fixed. He argued that governments successively bandaiding legislation has not helped, and that workers' compensation legislation needs to be simple, easy to understand and a step by step process.<sup>6</sup>
- 4.6 Injuries Australia emphasised the need to involve injured workers in discussions of the effectiveness of a scheme and of potential improvements. The group cited the example of the review of independent medical assessment being undertaken in New South Wales, which does not have employers or injured workers represented on the Committee.<sup>7</sup>
- 4.7 In designing workers' compensation systems and making legislative changes, Mr Kim Mettam believes that there also appears to be a lack of knowledge about the problems that employers have with the dynamics of workers' compensation.<sup>8</sup> The National Meat Association of Australia also believes that deficiencies in the practical operation of schemes result in increased base premium rates for the industry or sector and the employer's specific premiums.<sup>9</sup>
- 4.8 There are a number of operational issues and current practices that may hinder the effectiveness of workers' compensation schemes. The issues raised in terms of the employees, employers, services providers, insurance companies and workers' compensation schemes are outlined below in instances where problems arise that can result in activities that can be perceived as fraudulent behaviour by the other participants in the process.

## Changing working arrangements

- 4.9 The Department of Employment and Workplace Relations considers that the inflexibility of workers' compensation schemes in not adapting to the different forms of employment is another factor contributing to the level of fraud and non-compliance.<sup>10</sup> Australians are making personal choices about work, lifestyle, family and security. The workforce is more mobile and employers are operating in more than one jurisdiction, and more workers are not covered under the existing arrangements:

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6 Mr Andrew Hemming, HEMSEM, Transcript of Evidence, 13 November 2002, pp. 175-176.

7 Mr George Cooper, Injuries Australia Ltd, Transcript of Evidence, 18 October 2002, pp. 91-92.

8 Mr Kim Mettam, Charles Taylor Consulting, Transcript of Evidence, 20 November 2002, p. 243.

9 National Meat Association of Australia, Submission No. 41, p. 5.

10 Mr Rex Hoy, Department of Employment and Workplace Relations, Transcript of Evidence, 25 September 2002, p. 14.

Increasingly, employers and employees are entering into non-traditional working arrangements which best suit their individual circumstances. Often these arrangements fall outside the scope of the traditional coverage under the various workers compensation schemes. The response by the states to these changes in the labour market has been to increase the regulatory complexity regarding coverage. This has tended to compound the problems whereby each state seeks its own solution. Each state scheme operates as if workers and employers are rigid and unchanging.<sup>11</sup>

- 4.10 The complexities of the various schemes may encourage or assist some employers in deliberately avoiding their obligations, or result in their inadvertently doing so.<sup>12</sup> DEWR estimates that about 40 per cent of the workforce may no longer be covered by the traditional arrangements in workers' compensation schemes.<sup>13</sup>
- 4.11 The Department believes that the various schemes approach the issue of coverage in different ways. DEWR added that it is fairly easy to establish whether an employer-employee relationship exists but that the various schemes have not recognised this as an issue and have not taken this into account.<sup>14</sup> DEWR considers that a single solution would enable workers to move between jurisdictions without confronting different solutions under each jurisdiction.<sup>15</sup>
- 4.12 DEWR made the point that there are alternative insurance markets available to contractors, subcontractors and others such as income support and disability support arrangements. In some cases, alternative forms of insurance and alternative arrangements may be more appropriate.<sup>16</sup> It is important to identify the extent to which these alternatives to workers' compensation are being accessed, whether there are adequate insurance arrangements and whether there is competition between the forms of insurance.<sup>17</sup>
- 4.13 The Department added that schemes tend to assume that most contractors have made alternative insurance arrangements or assume the risk themselves. DEWR made the point that:

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11 Mr Rex Hoy, Department of Employment and Workplace Relations, Transcript of Evidence, 25 September 2002, p. 14.

12 Mr Rex Hoy, DEWR, Transcript of Evidence, 25 September 2002, p. 14.

13 Mr Tom Kenna, DEWR, Transcript of Evidence, 25 September 2002, p. 19.

14 Mr Rex Hoy, DEWR, Transcript of Evidence, 25 September 2002, p. 23.

15 Mr Tom Kenna, DEWR, Transcript of Evidence, 25 September 2002, p. 19.

16 Mr John Rowling, DEWR, Transcript of Evidence, 25 September 2002, p. 25.

17 Mr John Rowling, DEWR, Transcript of Evidence, 25 September 2002, pp. 19-20.

The difficulty with assuming the risk themselves is effectively the community and the Commonwealth are also assuming the risk.<sup>18</sup>

## Employee issues

- 4.14 In workplaces where there is a poor relationship between the employer and employee the injured worker may be reluctant to return to that environment, and negative psychological factors can impede recovery.<sup>19</sup> There may be a stigma attached to being on a workers' compensation claim because of the loss of a bonus for others.<sup>20</sup>
- 4.15 Some television stations present sensationalised stories of workers' compensation claims that may not be accurate.<sup>21</sup> The Injured Workers Association believes that most mass media publications on workers' rehabilitation and compensation issues portray workers as fraudulent and trying to 'milk the system' and present very few items relating to injured workers being deprived of their rights.<sup>22</sup>
- 4.16 Another important issue is the delays within the workers' compensation system. Dr Paul Pers commented that the system is plagued by monitoring, delays and waiting which costs money and costs injured workers proper rehabilitation.<sup>23</sup> In some jurisdictions there are a significant number of employers who are late in reporting claims.<sup>24</sup>
- 4.17 Further, in situations where there is a company medical centre, injured workers can be treated in-house and this does not appear in workers' compensation statistics.<sup>25</sup> If the medical centre delays the process for some time, some injured workers may not be able to claim workers' compensation.<sup>26</sup>
- 4.18 If the costs are met in-house, the worker will not be disadvantaged immediately:

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18 Mr John Rowling, Department of Employment and Workplace Relations, Transcript of Evidence, 25 September 2002, p. 24.

19 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14a, p. 1.

20 Dr Peter Shannon, Submission No. 3, p. 1.

21 Injuries Australia Ltd, Submission No. 27, p. 4.

22 Injured Workers Association, Submission No. 29, p. 4.

23 Dr Paul Pers, Transcript of Evidence, 26 November 2002, p. 361.

24 For example, Victorian WorkCover Authority, *The Case for Change*, p. 9.

25 Ms Gwyneth Regione, Australian Manufacturing Workers' Union, Transcript of Evidence, 26 November 2002, p. 378.

26 Ms Gwyneth Regione, AMWU, Transcript of Evidence, 26 November 2002, p. 378.

but if there is the problem of access to a permanent impairment payment, for instance, then that whole process becomes incredibly difficult because of the delays through the system.<sup>27</sup>

## Benefit and compensation levels

4.19 The Australian Manufacturing Workers' Union considers one of the major difficulties to be that employers and workers see the workers' compensation system as a benefit system rather than a system of entitlement.<sup>28</sup> There are a number of issues relating to lack of access:

the people who are not covered, the people who do not claim and the people who claim but the processes take a very long time and so they are actually disadvantaged through the process. That is particularly the case for casuals and for labour hire employees, and unfortunately we are finding that a lot of self-insurers are also making it rather difficult for employees to actually claim when they are injured or made ill at work.<sup>29</sup>

4.20 The AMWU made the point that there are people who are not covered, and because of the reductions in the period during which people are able to access workers' compensation payments, these are the injured workers who go onto the Commonwealth assistance system.<sup>30</sup>

4.21 Another issue raised in evidence to the Committee was the possible effect of the levels and type of benefits and compensation on the recovery time. It was suggested that the statistics available on behaviour are totally inadequate due to the lack of a cohesive national examination of the issue.<sup>31</sup> The Chamber of Commerce and Industry of WA stated that:

Another important issue lies in the exaggeration of symptoms. With high benefit levels, individuals find that they are pressured to justify their absence and begin to exaggerate the extent of their injuries or illness. This process can have deep psychological implications, in that individuals often come to believe their own exaggerations, thus perpetuating the duration of absence and underpinning the potential for effective recovery.<sup>32</sup>

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27 Dr Deborah Vallance, Australian Manufacturing Workers' Union, Transcript of Evidence, 26 November 2002, p. 379.

28 Ms Gwyneth Regione, AMWU, Transcript of Evidence, 26 November 2002, p. 376.

29 Dr Deborah Vallance, AMWU, Transcript of Evidence, 26 November 2002, p. 375.

30 Dr Deborah Vallance, AMWU, Transcript of Evidence, 26 November 2002, p. 375.

31 Chamber of Commerce and Industry of Western Australia, Submission No. 21, p. 2.

32 Chamber of Commerce and Industry of Western Australia, Submission No. 21, p. 3.

## Structure of weekly benefits

4.22 The Australian Industry Group (AIG) suggested that weekly benefits should be based on ordinary time earnings. In New South Wales the current compensation rate is set at below ordinary time earnings and the additional compensation comes from employer arrangements and awards and industry agreements.<sup>33</sup> AIG believes that in order to discourage fraudulent activity, there should be a message that people are better off back at work, and describes the current situation as :

What you should do, perhaps, is standardise all of that. Having standardised that some people may receive more than they currently do. In that light, we would still like some sort of control mechanism that sends a signal that people are better off back at work. This is a crude control mechanism, but it is probably borne of our frustration with the system.<sup>34</sup>

4.23 AIG cited the example of employees returning to work and never getting better because while they are partially injured they can get overtime benefits without working for it.<sup>35</sup>

4.24 The NMAA suggested that in some circumstances people can get paid more to stay home than to work under certain legislation, awards and industrial agreements.<sup>36</sup> In the meat processing industry, employees can be stood down and not paid when there is no work but the person on workers' compensation continues to get paid.<sup>37</sup>

## Medical and rehabilitation costs

4.25 Concerns were voiced by a range of witnesses to the Committee on overservicing by service providers.<sup>38</sup> Although not quantified, AIG suggested that both service providers and workers may benefit from overservicing. As an example in the Victorian system the APLA suggested that the system may support overservicing as the review process to

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33 Mr Mark Goodsell, Australian Industry Group, Transcript of Evidence, 18 October 2002, p. 64.

34 Mr Mark Goodsell, AIG, Transcript of Evidence, 18 October 2002, p. 64.

35 Mr Mark Goodsell, Australian Industry Group, Transcript of Evidence, 18 October 2002, p. 65.

36 Mr Garry Johnston, National Meat Association of Australia, Transcript of Evidence, 13 November 2002, p. 164.

37 Mr Ross Wotherspoon, National Meat Association of Australia, Transcript of Evidence, 13 November 2002, p. 165.

38 For example Mr Mark Goodsell, AIG, Transcript of Evidence, 18 October 2002, pp. 53, 65; Mr Simon Garnett, Australian Plaintiff Lawyers Association, Transcript of Evidence, 26 November 2002; p. 406; Mr Mary Yaagar, Labor Council New South Wales, Transcript of Evidence, 18 October 2002, p. 119.

continue entitlements requires monthly reviews for WorkCover certificates.<sup>39</sup>

- 4.26 The Australian Industry Group suggests that one mechanism to control the amount of overservicing would be to require employees to pay some of the medical costs and rehabilitation service costs. The Group argued that this would provide an incentive to keep the treatment focused and the costs to a minimum.<sup>40</sup>

This proportion would [be] recoverable when the employee achieves a return to work on pre injury duties or on conclusion of the claim where the employee is accepted as permanently unfit for their pre injury duties.<sup>41</sup>

- 4.27 The Labor Council of NSW suggests a more pivotal role for doctors to monitor other providers to ensure that overservicing does not occur, and to control costs in that area.<sup>42</sup>

- 4.28 The opposing experience is also present where there is delayed or no access to rehabilitation services. Where insurers refuse the claim, the worker cannot access rehabilitation.<sup>43</sup> For people who are not covered, or think they cannot claim, or where there are significant delays workers are actually disadvantaged through the process. The Australian Manufacturing Workers' Union suggests that this is particularly the case for casuals and for labour hire employees. The AMWU also suggests that self-insurers are also making it difficult for employees to claim,<sup>44</sup> effectively to minimise their costs.

- 4.29 The Australian Rehabilitation Providers Association also comments on limits to accessing rehabilitation:

there needs to be continuing emphasis on the education of employers facilitating their level and assumption of responsibility of the injury management of their own employees. Again, we support the idea of assisting employers to keep their injured workers in employment instead of having them look at the simplest and easiest way to remove them from their books to remove a problem. We all

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39 Australian Plaintiff Lawyers Association, Transcript of Evidence, 26 November 2002; p. 406

40 Mr Mark Goodsell, AIG, Transcript of Evidence, 18 October 2002, p. 63.

41 Australian Industry Group, Submission No. 53, p. 25.

42 Mr Mary Yaagar, Labor Council New South Wales, Transcript of Evidence, 18 October 2002, p. 119.

43 Mrs Margaret Pursey, Injured Persons Action and Support Association, Transcript of Evidence, 12 February 2003, p. 454.

44 Dr Deborah Vallance, Australian Manufacturing Workers' Union, Transcript of Evidence, 26 November 2002, p. 375.

know that what tends to happen is that these people move from the state based system quite often into a federal system through Centrelink and some form of income maintenance program. That is not helping Australia as a whole.<sup>45</sup>

## Return to work

4.30 Initially, injured workers usually want to return to work, and the current structures may not be providing adequate support to enable them to do so in a timely manner:

an occupational physician at a seminar once said that he had never treated an injured worker on the day of injury who did not actually want to return to work. It was only as time went by that the psychosocial issues developed. The injury became less of the actual problem and more the external issues and the legal involvement and those sorts of things actually developed. If there is a good management culture within the employer organisation towards assisting an injured worker's return to work immediately and safely and seeing them within four hours of the injury, then a relationship is strengthened with the employer and the employee rather than one where the employee goes off to see a solicitor because their neighbour over the back fence says, 'You've got to go and do this,' or they have seen a television ad that says, 'Come and see us and you will get the compensation you are entitled to.' It is that 'entitled to' expectation that needs to be taken out of the system, and people should just get back to work.<sup>46</sup>

4.31 The link between workers' compensation programs and insurance schemes imposes budget limitations and timeframes.<sup>47</sup> The focus, expertise and timeframe variations of workers' compensation schemes can lead to an increase in fraudulent behaviour by injured workers.<sup>48</sup>

The limited time frame of workers' compensation systems results in the development of different objectives, expertise and strategies to assist clients. Federal Government programs operate within a more holistic and socio-economic framework, with a "never-ending" responsibility to the community and welfare agenda.<sup>49</sup>

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45 Mr Brendan Delaney, Australian Rehabilitation Providers Association, Transcript of Evidence, 18 October 2002, p. 108.

46 Mr Robert Gordon, Australian Rehabilitation Providers Association, Transcript of Evidence, 18 October 2002, p. 115.

47 MAXNetwork Pty Ltd, Submission No. 4, p. 2.

48 MAXNetwork Pty Ltd, Submission No. 4, p. 2.

49 MAXNetwork Pty Ltd, Submission No. 4, p. 2.

- 4.32 In situations where light duties are required for the rehabilitation of an injured worker, Dr Sherryl Catchpole has found that frequently co-workers will agree to give up the lighter duties for a limited time.<sup>50</sup> Others have seen situations where employers have denied light duties to an injured worker on the basis that they did not want them back even though they offered similar light duties to other injured workers.<sup>51</sup>
- 4.33 There is a reluctance for insurers to 'dob in' employers who refuse to offer alternative duties because large employers are their clients and they may lose their business to another insurer.<sup>52</sup>
- 4.34 The strategies developed by government programs to meet the ongoing responsibility for community and welfare agenda differ from those used by workers' compensation schemes. The time and costs constraints on workers' compensation systems do not always lead to the most effective approach to long term issues and rehabilitation.<sup>53</sup> The delays and 'fraudulent' activity can hinder the effectiveness of employment service assistance.<sup>54</sup> MAXNetwork comments that:

Typically those professionals involved in the short term programs of workers' compensation systems possess clinical skills more related to medical intervention, rehabilitation, ergonomics and return to work programs within a relatively short time period following injury. As compared with those staff involved in federal welfare and employment programs whose skills need to be more about improving social and economic participation, facilitating attitudinal and behavioural change, and over coming longer term (and often multiple) barriers to employment.<sup>55</sup>

- 4.35 There is a small percentage of cases where injured workers develop an 'imposed disability function' where they genuinely believe they have a disability which is more severe than it is. The perception becomes reality and that drives the next step, which is not returning to work. These workers need some kind of assistance.<sup>56</sup>

They actually genuinely believe that it is the real thing, and they believe that because it is appropriate in their life. Some people would say it is a way of socially withdrawing from the workplace or

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50 Dr Sherryl Catchpole, Workers' Medical Centre, Transcript of Evidence, 22 November 2002, p. 347.

51 Ms Anita Grindlay, Transcript of Evidence, 26 November 2002, p. 357.

52 Ms Anita Grindlay, Transcript of Evidence, 26 November 2002, p. 357.

53 MAXNetwork Pty Ltd, Submission No. 4, p. 2.

54 MAXNetwork Pty Ltd, Submission No. 4, p. 3.

55 MAXNetwork Pty Ltd, Submission No. 4, p. 2.

56 Dr Christine Roberts-Yates, Transcript of Evidence, 21 November 2002, p. 266.

it is a way of being able to make somebody responsible for some problems in their life.<sup>57</sup>

### Support for major career changes

4.36 Workers' compensation schemes commonly do not have the expertise needed to assist injured workers in developing positive career plans. The person managing the initial stages of the injured worker's case is not usually accountable or responsible for the long term consequences if the client is unable to return to work, or for the potential costs in the form of common law settlements. There are particular skills and expertise required in supporting injured workers to change careers and employment options.<sup>58</sup>

4.37 There are situations in which transitional jobs will not solve the problem for some injured workers and there needs to be a permanent change of job.<sup>59</sup> Those unable to return to their previous work often present as feeling helpless and lack insight into alternative work options or methods to find other work.<sup>60</sup>

It is a different set of skills required to help the client develop positive career plans, adequate self esteem and self efficacy and understanding the mechanisms involved in accessing new areas of the labour market. This expertise is not commonly observed within most workers' compensation systems.<sup>61</sup>

4.38 The Council of Small Business Organisations of Australia states that at some point the provider should identify the individual's capacity to return to pre-injury employment:

If that is assessed in the beginning, it would make sense to stop working right away with that individual to get them retrained into something that they can do. But having got them retrained, the question is: who employs them? If the small business does not, then who do we offer it to.<sup>62</sup>

4.39 Dr Peter Shannon also made the point that retraining costs money and that people on workers' compensation usually have families who are dependent on them and so do not get the retraining. Some of these people

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57 Mr Kim Mettam, Charles Taylor Consulting, Transcript of Evidence, 20 November 2002, p. 245.

58 MAXNetwork Pty Ltd, Submission No. 4, p. 2.

59 Mr Kim Mettam, Charles Taylor Consulting, Transcript of Evidence, 20 November 2002, p. 247.

60 MAXNetwork Pty Ltd, Submission No. 4, p. 3.

61 MAXNetwork Pty Ltd, Submission No. 4, p. 2.

62 Mr Michael Potter, Council of Small Business Organisations of Australia Ltd, Transcript of Evidence, 4 December 2002, p. 419.

have years of work experience, and when their life is in chaos they become depressed in a system that is not retraining or helping them.<sup>63</sup>

The acute rehabilitation is great for those 95 per cent of people who are going to go back to their jobs, but it is that five per cent who tend to be the longer term, more difficult, more costly cases. They are the people who need to be identified and perhaps rehabilitated, if that is the word, in a different way, before those feelings of negativity et cetera are entrenched. It is important to offer them the options, the self-efficacy and the skills early on so the Job Network members or social welfare system is not picking them up, six or 12 months down the track. The intervention needs to be earlier. The interventions are right in both places. They are just timed wrong. They are not married together.<sup>64</sup>

4.40 Mrs Leonie Green of MAXNetwork stated that:

The mindset of the workers comp system is very focused, and rightfully so, about going back to the same job and the same employer. Their ability to do alternate jobs is only at a beginning stage.<sup>65</sup>

4.41 Queensland has introduced a host employment program, where other employers assist in rehabilitating injured workers back to work. When every endeavour to get people back to their pre-injury employment has not succeeded, the host employment program is used to get people work hardened to return to their original employer or to provide another job.<sup>66</sup>

4.42 Mrs Green believes that injured workers may develop an 'imposed disability' because their coping strategies are diminished. People's ability to cope and adapt can be influenced by the opportunities and the skills of the managers who present the alternatives. It needs to be explained that there are other options:

They do not need to exaggerate their illness, because they are not going to be forced into a job that they cannot do. They will be given the assistance that they need. When people see that, they respond and those impediments disappear.<sup>67</sup>

4.43 If people are linked in with the services to get them back to work instead of doing cash in hand work:

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63 Dr Peter Shannon, Transcript of Evidence, 20 November 2002, p. 198.

64 Mr Paul Stokes, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 337.

65 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 337.

66 Ms Evron McMahan. WorkCover Queensland, Transcript of Evidence, 22 November 2002, p. 323.

67 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 338.

This could reassure them that they would not be harmed. The issue raised before was that medical practitioners can be overly cautious and protective of their patients, which keeps them out of work. I do not have an issue so much with the pay scale but with individuals seeing that there are other options.<sup>68</sup>

- 4.44 Mr Robert Guthrie made the point that getting people back to work involves skilled injury management which recognises the person's potential to return to work, the right medical advice and treatment and a job to go to. He adds that the return to work may be to another employer and that incentives may assist in that process.<sup>69</sup>

### Lump sum payments

- 4.45 The ACT Government put the view that:

The greatest structural incentive to fraudulent claims is a scheme that is not tailored to rehabilitate the worker, but one that substitutes lump sum payments for a genuine injury management program. Such a scheme quickly creates an adversarial culture, setting employee, employer, insurer and doctor in opposition to each other. Adversarial schemes associate liability and responsibility with a cash settlement rather than a meaningful plan to assist injured people to return to work.<sup>70</sup>

- 4.46 MAXNetwork believes that the process of returning injured workers to their existing employer is being well addressed by the relevant state bodies but that the people who take lump sums are the ones falling through the cracks.<sup>71</sup> The person who manages the initial stages of a claim is not the person ultimately accountable and does not have to explain the cost of unemployment in the Senate estimates process:

They work in a fairly repetitive loop. People are injured, they go through to that lump sum payment and then the emphasis of the insurance company goes back to the new client, and it becomes a federal responsibility for those other people. I do not know that insurers have demonstrated a good insight into that.<sup>72</sup>

- 4.47 The Department of Employment and Workplace Relations commented that:

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68 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 339.

69 Mr Robert Guthrie, School of Business Law, Curtin University, Transcript of Evidence, 20 November 2002, p. 191.

70 Australian Capital Territory Government, Submission No. 45, p. 2.

71 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 333.

72 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 333.

A key consideration in the design of any benefit structure for a workers' compensation scheme should be focussed on the rehabilitation of the injured worker. Allowing access to common law for a workplace injury can break the connection of the injured worker with a scheme, thus inhibiting rehabilitation and return to work. There are also the added factors of uncertainty as to compensation and the time lag in receiving any compensation.<sup>73</sup>

- 4.48 Insurance Australia Group commented that the cost of a workers' compensation scheme can be twice that of an injury being handled through another system.<sup>74</sup> IAG believes that current workers' compensation schemes encourage employees to remain ill or incapacitated.<sup>75</sup> IAG make the point that:

insurance claims that encourage a person to appear injured so they can be awarded more favourable compensation is unlikely to produce a state of mind focused on recovery.<sup>76</sup>

- 4.49 The Australian Industry Group also commented that people who go through a long-term disputed claim may be worse off than if they had actually gone back to work as early as possible, and often do not find employment again.<sup>77</sup> Mr Mark Goodsell of AIG told the Committee that people involved in a long-term workers' compensation claim focus on the lump sum and the process and do not consider the longer-term benefits of a return to work.<sup>78</sup>

The people who do the immediate return-to-work programs are very medically and ergonomically orientated and do those things exceptionally well. A different set of professional skills are needed to help people change their mindset from focusing on the lump sum to seeing that it is in their long-term benefit to get another option. I do not see it as a real issue with the employer because most times that is addressed by WorkCover. I think the issue is getting people to consider other options when returning to their original job is not an option because of the discrepancy between their physical abilities now and what they used to do.<sup>79</sup>

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73 Mr Tom Kenna, Department of Employment and Workplace Relations, paper presented to Workers' Comp 2003, National Workers' Compensation Summit, Sydney, 17 February 2003, p. 9.

74 Insurance Australia Group, Submission No. 47, p. 14.

75 Insurance Australia Group, Submission No. 47, p. 12.

76 Insurance Australia Group, Submission No. 47, p. 13.

77 Mr Mark Goodsell, Australian Industry Group, Transcript of Evidence, 18 October 2002, p. 66.

78 Mr Mark Goodsell, AIG, Transcript of Evidence, 18 October 2002, p. 66.

79 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 335.

- 4.50 In relation to the level of benefit awarded, Mr Kim Mettam of Charles Taylor Consulting stated that:

I have seen some people who have been very seriously injured and I do not think that they got anywhere near enough money out of the system for their serious injuries, whereas I have seen some people with extremely tenuous links to work enjoy very large benefits. This is where there is an imbalance in the allocation that society makes in workers compensation.<sup>80</sup>

- 4.51 Injuries Australia sees the amount of the settlement as a 'big raffle':

it depends on who's the judge, how good your lawyer is, what the weather is like today and who is the other solicitor. You can see similar injuries and the figures are anywhere.<sup>81</sup>

- 4.52 In evidence from Injuries Australia, Mr Graham Stewart told the Committee that the settlement he received was 'peanuts' compared to what he was capable of earning, and that substantial medical and legal fees were then taken out of the settlement.<sup>82</sup>

- 4.53 The Committee is concerned that in some situations injured workers come to believe that there is no advantage in returning to work as they believe that the lump sum will set them up for the rest of their life. Injuries Australia made the point that:

The people who get hurt are the ones who do the three Ds—the dirty, the difficult and the dangerous. They have not had the good fortune to have the education that you and I might have had. So some smart solicitor waves a cheque in front of them, it seems like a lot of money and it is the end of the world. We know that, to their credit, even the solicitors have tried to set up a system to help people to handle their money. But where do they go from there? Listen to what I said before: get them back to work before there is any talk of settlements.<sup>83</sup>

- 4.54 Mr B Glover believes that workers' compensation payments are inadequate, are less than or equivalent to the dole and are probably one of the worst circumstances in the community.<sup>84</sup> The alternative view is that scheme benefits are an incentive to exaggerate symptoms and the extent of disability.<sup>85</sup> It was suggested that recovery after settlement is a sign of a

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80 Mr Kim Mettam, Charles Taylor Consulting, Transcript of Evidence, 20 November 2002, p. 242.

81 Mr George Cooper, Injuries Australia Ltd, Transcript of Evidence, 18 October 2002, p. 98.

82 Mr Graham Stewart, Injuries Australia Ltd, Transcript of Evidence, 18 October 2002, p. 93.

83 Mr George Cooper, Injuries Australia Ltd, Transcript of Evidence, 18 October 2002, p. 98.

84 Mr B C Glover, Submission No. 44, pp.1-2.

85 HEMSEM, Submission No. 28, p. 4.

fraudulent claim, although it is also argued that recovery is more likely after the pressure of the claim has been removed.<sup>86</sup>

4.55 Injuries Australia pointed out that in some cases settlements may be the appropriate option, particularly in very severe cases where people need to be looked after.<sup>87</sup>

4.56 AIG stated that a system that could provide structured settlements might assist in addressing some wider issues to ensure the best overall outcome for the injured worker:

The main concentration is on saying, 'Here is a person who has rights; those rights have been infringed. Let's get a legal process remedy for those immediate rights. The minute that is resolved we do not want to know about that particular person.'<sup>88</sup>

4.57 The Insurance Australia Group commented on the move away from tort based compensation. Money compensation is about compensating people for their loss and not about fixing the problem, while compensation schemes are moving towards early intervention and return to work and a normal life.<sup>89</sup> Injuries Australia also emphasised that safety and workers' compensation schemes are about looking after the health of people and that the money is just another tool for getting the job done.<sup>90</sup>

4.58 The Committee is concerned that injured workers continue to focus on lump sum payments and do not appreciate that this may result in them being on the disability support pension, if they are eligible, for the rest of their life. MAXNetwork argues that state based insurers could do more to help people to see other options. People are motivated by safety concerns and do not return to work for fear of being reinjured as well as because of issues of self-esteem and self-efficacy. They are motivated by the lump sum in the absence of an alternative as they cannot access other options until they get into the Commonwealth system.<sup>91</sup>

4.59 Mr Robert Guthrie made the point that an injured worker simply cannot make a profit from workers' compensation:

Everyone who goes into the compensation system suffers some kind of loss, either because they stay on weekly payments for an extended period and the system says that those payments should be capped

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86 HEMSEM, Submission No. 28, p. 4.

87 Mr George Cooper, Injuries Australia Ltd, Transcript of Evidence, 18 October 2002, p. 98.

88 Mr Mark Goodsell, Australian Industry Group, Transcript of Evidence, 18 October 2002, p. 66.

89 Mr Douglas Pearce, Insurance Australia Group, Transcript of Evidence, 18 October 2002, p. 77.

90 Mr George Cooper, Injuries Australia Ltd, Transcript of Evidence, 18 October 2002, p. 90.

91 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 335.

and reduced, or because overall there is a loss of earnings because they have not returned to work and they could have made extra money.<sup>92</sup>

- 4.60 Mrs Leonie Green commented that in situations where an injured worker receives a lump sum and will move onto the social security system after a period of time:

terrible negative behaviours and patterns and well adapted nonworking lifestyles have been found.<sup>93</sup>

- 4.61 The point was made that there is not sufficient data on cases once they leave the insurers' books, and that more longitudinal monitoring of return to work outcomes is needed.<sup>94</sup> WorkCover Queensland, as is also the case in other jurisdictions, does not have contact with people after a common law claim has been completed.<sup>95</sup>

### Employee penalties

- 4.62 Employers First pointed out that individuals may simply 'try it on' and that the scheme or the employers bear the cost of the investigation. Mr Garry Brack suggested that perhaps the individual should be required to bear the costs because in the present system they do not lose anything.<sup>96</sup> The National Meat Association of Australia has a similar view and argued that lodging a fraudulent claim should be a criminal offence punishable by a substantial fine or imprisonment, as it is stealing from the employer, affects other employers in the industry and may cost other employees jobs and work.<sup>97</sup> The Association of Risk and Insurance Managers of Australia (ARIMA) concludes that improved prosecution rates for fraudulent claims will assist in the removal of the incentive for fraud.<sup>98</sup>
- 4.63 The Chamber of Commerce and Industry of Western Australia is also concerned at the ease of entry into the workers' compensation system and the lack of enforcement of penalties for fraudulent entry into the system.<sup>99</sup> The Chamber suggested that employees should be required to contribute

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92 Mr Robert Guthrie, School of Business Law, Curtin University, Transcript of Evidence, 20 November 2002, p. 190.

93 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 337

94 Mr Paul Stokes, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 337.

95 Ms Evron McMahon. WorkCover Queensland, Transcript of Evidence, 22 November 2002, p. 324.

96 Mr Garry Brack, Employers First, Transcript of Evidence, 18 October 2002, p. 84.

97 National Meat Association of Australia, Submission No. 41, p. 5.

98 Association of Risk and Insurance Managers of Australasia, Submission No. 11, p. 4.

99 Ms Annette Bellamy, Chamber of Commerce and Industry of Western Australia, Transcript of Evidence, 20 November 2002, p. 203.

to the cost of the investigation of any claim found not to be work related and that strategies be put in place to identify and punish fraudulent behaviour.<sup>100</sup>

4.64 The Victorian Automobile Chamber of Commerce suggested that:

Penalties, such as demerit points to reduce future compensation claims and subsequent payments, could be given to employees who lodge a claim of a fraudulent nature, that was successfully disputed by the employer.<sup>101</sup>

## Employer issues

4.65 Dr Christine Roberts-Yates identified as a major concern of employers that workers have nothing to lose by lodging a fraudulent claim but that the claim could cost the employer everything. Further concerns are that there is a psychological extension of the claim which is deemed as fraudulent and that there is a crossover between industrial issues and claims.<sup>102</sup>

## Complexity

4.66 The Chamber of Commerce and Industry of Western Australia describes the regulatory framework for workers' compensation as 'unnecessarily complex and convoluted'. The Chamber argued that governments should not treat workers' compensation liability differently from other forms of compulsory insurance.<sup>103</sup> The CCI added that:

The level of statutory intervention in the provision of workers' compensation has stifled competition and the process of determining premiums creates stagnancy and discourages innovation, negotiation and adaptation.<sup>104</sup>

## Non-compliance

4.67 Employers may be disadvantaged through fraudulent claims by the employee, the non-compliance of other employers and through the increased premiums because of industry classifications. The Risknet Group suggested that in comparing average workers' compensation costs employer groups should also consider the legal costs, employer premium

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100 Chamber of Commerce and Industry of Western Australia, Submission No. 21, p. 4.

101 Victorian Automobile Chamber of Commerce, Submission No. 65, p. 7.

102 Dr Christine Roberts-Yates, Transcript of Evidence, 21 November 2002, p. 256.

103 Chamber of Commerce and Industry of Western Australia, Submission No. 21, p. 3.

104 Chamber of Commerce and Industry of Western Australia, Submission No. 21, p. 3.

avoidance schemes and cost shifting to the Commonwealth social security system, which are significant influences on scheme costs.<sup>105</sup>

In challenging a claim, the cost and any other action required to disprove the claim rests with the employer. The direct and indirect costs associated with mounting a challenge are generally prohibitive for minor claims. In addition, the employer bears a cost through increased premiums.<sup>106</sup>

- 4.68 The Victorian Automobile Chamber of Commerce believes that the limited categories in the WorkCover Industry Classification system create a number of problems for employers across many industries.<sup>107</sup> In the meat industry:

Every claim that is paid out ultimately generates further revenue for WorkCover through the premium calculation formula. I am aware of one member who, over a five-year period, has paid out just over a million dollars in premium and the claims paid on that employer's behalf are about \$260,000.<sup>108</sup>

- 4.69 The Chamber of Commerce and Industry of Western Australia agree that workers' compensation insurance should be compulsory and fraud prevented, but argues for deregulation to:

provide a more equitable system where employers can insure against their own performance at a relevant and competitive price rather than what many now perceive to be at a premium that subsidises other employers.<sup>109</sup>

- 4.70 The Australian Manufacturing Workers' Union also raised the issue of company doctors advising employees to use income protection insurance in 7 to 10 per cent of claims, to avoid the company's workers' compensation responsibilities. The insurance companies then deny the claim as these are compensable injuries and the injured worker is left in the position of making a claim some months after the injury.<sup>110</sup>

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105 The RiskNet Group, Submission No. 10, p. 4.

106 Victorian Automobile Chamber of Commerce, Submission No. 65, p. 4.

107 Victorian Automobile Chamber of Commerce, Submission No. 65, p. 3.

108 Mr Ross Wotherspoon, National Meat Association of Australia, Transcript of Evidence, 13 November 2002, p. 162.

109 Chamber of Commerce and Industry of Western Australia, Submission No. 21, p. 3.

110 Ms Gwyneth Regione, Australian Manufacturing Workers' Union, Transcript of Evidence, 26 November 2002, p. 377; Dr Deborah Vallance, Australian Manufacturing Workers' Union, Transcript of Evidence, 26 November 2002, pp. 382-383.

## Compliance incentives

4.71 The Master Cleaners Guild of Western Australia supports a performance based system that rewards a sound safety and injury management system and further premium incentives based on achievement of positive performance indicators:

To some extent the recognition of such efforts can be built into risk assessment formulae that ensures uniformity in incentive or penalty subject to management performance in workers' compensation and occupational safety and health. These two management areas should be closely linked in policy, planning, management and evaluation.<sup>111</sup>

4.72 Mr Hemming of HEMSEM also suggested the following improvements:

- no claims bonuses - incentive;
- workplace safety auditing and accreditation – recognition of practice;
- injury management system auditing – recognition of best practice;
- government subsidy of premiums for one year – incentive;
- statutory monetary caps on claims – disincentive for monetary gain;
- statutory review of premium – premium fixing body; and
- statutory review of claim process including rehabilitation – gatekeeper.<sup>112</sup>

4.73 As an incentive to improve work safety on farms, the Western Australian Government provides a 15 per cent reduction in premiums for farmers who attend a farm safety course, implement a farm safety plan and have no claims for twelve months. WorkCover Western Australia believes that an incentive approach has affected the attitude of a lot of employers.<sup>113</sup>

4.74 Some incentives may have different outcomes in practice. The Recruitment and Consulting Services Association provided the example of exemption from WorkCover premiums as an incentive for employers to take on. RCSA argued, however, that these incentives mean that employers are not accountable to create a safe work environment, there is no incentive to have apprentices return to work and they can be employed elsewhere while receiving their workers' compensation payments.<sup>114</sup>

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111 Master Cleaners Guild of Western Australia Inc, Submission No. 59, p. 9.

112 HEMSEM, Submission No. 28, p. 6.

113 Mr Harry Neesham, WorkCover Western Australia, Transcript of Evidence, 20 November 2002, p. 183.

114 Recruitment and Consulting Services Association, Submission No. 20, p. 9.

## Relationship between employer and injured worker

4.75 Workers' compensation claims may be considered by employers to be:

doubtless an irritation, extra expense and frequently a cause of disruption to work schedules ... When the negative view is expressed openly and forcefully, as is often the case, it is my clear experience that things tend to deteriorate from a functional and psychological point of view.<sup>115</sup>

4.76 In situations where an employer does not believe that the injury is work related, the employer may go on to believe that the worker is also not ill.<sup>116</sup>

When there is a poor relationship between employer and employee, the injured worker is reluctant to return to the workplace. There is a psychological component to all illness and, if negative, this may impede recovery. The perception by the employer that the worker is malingering will, if communicated to the injured worker, significantly erode any remaining trust and ensure that the worker remains focused on being ill.<sup>117</sup>

4.77 Dr Sherryl Catchpole gave the example of an employer about to take punitive action against a terminally ill worker.<sup>118</sup>

Making a workers' compensation claim is stressful for a patient who is ill, who often is unfamiliar with bureaucracy and who is going through a time of reduced income. It is my observation that when patients perceive that they are not being treated with dignity they become resentful. Recovery and rehabilitation then become more difficult. If the illness is prolonged beyond the expectation of the employer, the situation deteriorates ... It is my observation that these situations are likely to engender perceptions in the employer that the patient is committing fraud both with the claim and with the slow recovery.<sup>119</sup>

4.78 Research by Dr Christine Roberts-Yates has found that the relationship between the claimant and the employer depends on a number of factors:

It is based on the needs of the individual. It is even based on the personalities of both the worker and the employer. It is based on the

115 Dr Peter Shannon, Submission No. 3, p. 1.

116 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14a, p. 1.

117 Dr Sherryl Catchpole, Workers' Medical Centre, Transcript of Evidence, 22 November 2002, pp. 342-343.

118 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14a, p. 1.

119 Dr Sherryl Catchpole, Workers' Medical Centre, Transcript of Evidence, 22 November 2002, p. 343. See also Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14a, p. 2.

records for those who have preceded the injured worker ... So it is terribly complex in terms of social factors, psychological factors, work factors, colleagues, family, the worker's financial dilemma, whether the worker's relationship has broken down, whether depression has set in and whether everybody says, 'I've had enough'—and then everybody really just wants an out.<sup>120</sup>

- 4.79 Recovery and rehabilitation are more difficult and prolonged in situations where there is a poor relationship between the employer and the claimant.<sup>121</sup> The Injured Workers Association believes that the hostilities and isolation of management and co-workers jeopardises rehabilitation attempts and adds to the deterioration in the health of the injured worker.<sup>122</sup> Mr Harry Neesham of WorkCover WA referred to the introduction of an injury management program in 1997:

where the relationship between the injured worker and the employer and the treating medical practitioner was emphasised, in an endeavour to focus more at the very point of injury on what the future for the injured worker was—how it can best be managed. So instead of creating a gap between the worker and the employer the aim is to maintain contact, which is the best outcome for a worker. If they are able to go back to their same employer with the same or modified duties that is certainly a better outcome in terms of the person concerned.<sup>123</sup>

- 4.80 In situations where recovery is prolonged and the relationship with the employer deteriorates:

A number of patients in the above situations become stuck and no improvement occurs until prolonged legal action is completed. The likelihood that there will be significant improvement in the medical condition diminishes with time. In fact, work that has been done suggests that, if an injured worker is not rehabilitated within six months, there is a minimal chance of getting that person back to work<sup>124</sup>

- 4.81 Dr Roberts-Yates found that over a three year period up to June 2000, 579 injured workers were dismissed by employers in South Australia after

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120 Dr Christine Roberts-Yates, Transcript of Evidence, 21 November 2002, p. 258.

121 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14a, p. 2.

122 Injured Workers Association, Submission No. 29, p. 4.

123 Mr Harry Neesham, WorkCover Western Australia, Transcript of Evidence, 20 November 2002, p. 183.

124 Dr Sherryl Catchpole, Workers' Medical Centre, Transcript of Evidence, 22 November 2002, p. 343.

workers' compensation claims.<sup>125</sup> The need to access Centrelink payments which have to be paid back, and the 80 per cent reduction,<sup>126</sup> was a cause of stress. On the other hand employers believe that an earlier introduction of the 80 per cent reduction would be an incentive to return to work:

So there are these two perspectives: the employer is stating, 'Somebody is getting paid for staying at home and adopting a sick role,' and the worker is saying, 'But I was injured; this was not my fault. I have a mortgage to pay, I have financial commitments, and I can't do it.' It is a question of how to turn it around so that they are returning to work as quickly and as safely as possible when they are healthy enough to do so.<sup>127</sup>

- 4.82 The Victorian WorkCover Authority has introduced measures to address the approximately 12,000 claims submitted late each year, and also the 26 per cent of injured workers in Victoria that do not return to work due to 'loss of job attachment'.<sup>128</sup> The Victorian Trades Hall Council (VTHC) suggested that employer organisations should have an obligation to educate employers of the benefits of early claim reporting and providing return to work opportunities.<sup>129</sup> The VTHC also raised the issue of the inadequacy of unfair dismissal laws, as they currently operate in Victoria, in relation to the dismissal of injured workers who claim under the *Victorian Accident Compensation Act 1985*.
- 4.83 Ms Vicky Behrakis found from her experience as an employer that employees who lodge fraudulent claims are getting increasingly 'street-wise' and perhaps passing on instructions to others. Small business owners feel unsupported compared to the support available to the employee and some are becoming very cynical towards the system when they see or hear about so many fraudulent cases.<sup>130</sup>

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125 Dr Christine Roberts-Yates, Transcript of Evidence, 21 November 2002, p. 255.

126 This refers to step-downs: a reduction of benefits for all claimants after a given period. Each jurisdiction has its own step-down timing. See CPM Fourth Report, Australia and NZ, OHS and Workers' Compensation Schemes, August 2002 p. 92.

127 Dr Christine Roberts-Yates, Transcript of Evidence, 21 November 2002, p. 265.

128 Victorian Trades Hall Council, Submission No. 26, pp. 2-3 citing Victorian WorkCover Authority *The case for change*, pp. 9, 14.

129 Victorian Trades Hall Council, Submission No. 26, p. 3.

130 Ms Vicky Behrakis, Submission No. 23, p. 4.

## Service providers

### Medical practitioners

4.84 The Master Cleaners Guild of Western Australia was critical of the medical practitioners' role in supporting injured workers' return to work. The Guild stated that the general operation of a medical practice means that there is a high turnover, short consultations and, in the common practice based model, the doctor does not leave the office.<sup>131</sup> This restricted contact with the injured worker and employer is exacerbated by a lack of communication, and because of the litigious nature of the system, the doctors are reluctant to provide certification without direction from a specialist. This can cause delays in the doctor being prepared to allow the injured worker to return to work.<sup>132</sup>

4.85 Dr Paul Pers stated that specialist surgeons and others are highly paid people and the community expects some accountability from them.<sup>133</sup>

So GPs might have five minutes on their books. Workers compensation is not just about injury, and we would argue after six weeks it is not about injury at all in the majority of cases. There are often a lot of other complex issues that cause the claim. GPs neither have the time nor necessarily the skills to work through those issues.<sup>134</sup>

### Support for medical practitioners

4.86 One suggestion was having a trained case manager, directly accountable to the system, who can support the medical practitioners. It was argued that training doctors would not improve the system as they do not have the time and the case manager could have responsibility for developing a proactive plan and aligning employer and employee expectations and getting the employee back to work.<sup>135</sup>

### Participation in the process

4.87 The RiskNet Group saw doctors as gatekeepers through the provision of the medical certificates needed to lodge a claim.<sup>136</sup> The Group's concerns

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131 Mr Kerry Jones, Master Cleaners Guild of Western Australia, Transcript of Evidence, 20 November 2002, p. 213.

132 Mr Kerry Jones, Master Cleaners Guild of Western Australia, Transcript of Evidence, 20 November 2002, p. 218.

133 Dr Paul Pers, Transcript of Evidence, 26 November 2002, p. 361.

134 Ms Anita Grindlay, Transcript of Evidence, 26 November 2002, pp. 361-362.

135 Ms Anita Grindlay, Transcript of Evidence, 26 November 2002, p. 362.

136 The RiskNet Group, Submission No. 10, p. 10.

include the refusal of doctors to communicate and cooperate with employers and a lack of awareness or understanding about their role in workers' compensation. The Group suggested that employers and rehabilitation providers should be able to ensure that the injured worker is treated by a medical practitioner who is prepared to cooperate.<sup>137</sup>

- 4.88 The Victorian Automobile Chamber of Commerce commented that medical practitioners appear reluctant to verify the accuracy of events and do not necessarily have an understanding of the situation in which the injury occurred or the employee's work environment.<sup>138</sup> The Chamber suggested that medical practitioners should be required to investigate incidents prior to making their assessment and should have a checklist of appropriate questions to ask the injured worker. The Chamber also suggested that examinations should only be conducted by occupational physicians trained to deal with work related injuries.<sup>139</sup>
- 4.89 Where there are legislative requirements for medical practitioners to participate actively in the injury management process, there has been minimal enforcement.<sup>140</sup> Moreton Exhibitions and Events outlined an employee's compensation case which 'defies medical science' according to the specialist, but for which the treating the doctor is prepared to provide ongoing certification.<sup>141</sup>
- 4.90 The NMAA commented that in cases where employers submit a list of alternative duties on the basis that people get better at work, these may not be considered by the doctor who will still write a certificate on the opinion of the patient, stating that the injured worker is unfit for any duties.<sup>142</sup>
- 4.91 The Master Cleaners Guild of Western Australia argued that there is evidence of widespread failure by doctors to communicate with the workplace, with employers and other service providers in support of the injured worker's return to work:

There is uniform evidence of the failure to properly investigate the workplace when a worker submits for what is reportedly a work related injury. There is often a failure to consult and/or identify at the work site the nature of the duties other than by means of what the worker reports. With due respect to the worker, the reality is that

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137 The RiskNet Group, Submission No. 10, p. 10.

138 Victorian Automobile Chamber of Commerce, Submission No. 65, p. 4.

139 Victorian Automobile Chamber of Commerce, Submission No. 65, p. 5.

140 Insurance Australia Group, Submission No. 47, p. 15.

141 Moreton Exhibitions and Events, Submission No. 63, pp. 1-2.

142 Mr Andrew Westlake, National Meat Association of Australia, Transcript of Evidence, 13 November 2002, p. 162.

many workers cannot describe in sufficient detail the content that is necessary to make an informed and professional decision on which we believe certification should occur and, for that matter, it is not an independent assessment.<sup>143</sup>

- 4.92 In relation to treating doctors, the AIG also believes that many certificates are being completed in a most cursory fashion with little response to the opportunity for the doctor to contact the employer and take a more active role in injury management. AIG suggested that medical certificates should require contact between the treating doctor and the workplace to establish the nature of the work, whether suitable duties are in fact available and any other facts relevant to the accurate diagnosis of injury.<sup>144</sup>

People get into their minds that they have a WorkCover injury, they have a WorkCover certificate, they have a doctor who is going to continue to write out a certificate based on what they say, and so they stay at home and convince themselves that they are actually quite unwell, whereas in fact they could come to the workplace and genuinely contribute, not aggravate their condition, and let it heal over time, as it would ... Certainly the employer would never want the employee to feel like they were being forced back to work, but the doctors need to be aware that there are genuine duties available.<sup>145</sup>

- 4.93 The Committee believes that requiring appropriate treating professionals to contact the workplace and determine if suitable duties are present would hasten the rehabilitation and return to work process.
- 4.94 Mr Peter Reynolds submitted to the Committee that his experience as an investigator suggested that some doctors avoid, ignore and/or cover over certain important pertinent information relevant to the individual claimant who is being assessed in the claims system.<sup>146</sup> Mr Reynolds expressed concern that this adds considerable monetary cost to the system and social cost to the injured worker and family.<sup>147</sup>
- 4.95 The Workers' Compensation Support Network believes there is an over-emphasis on doctors' reports and that more importance should be placed on the work situation, witnesses and the consideration of all relevant

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143 Mr Kerry Jones, Master Cleaners Guild of Western Australia, Transcript of Evidence, 20 November 2002, pp. 213-214.

144 Australian Industry Group, Submission No. 53, pp. 18-19.

145 Mr Andrew Westlake, National Meat Association of Australia, Transcript of Evidence, 13 November 2002, p. 163.

146 Mr Peter Reynolds, Submission No. 9a, p. 1.

147 Mr Peter Reynolds, Submission No. 9a, p. 1.

facts.<sup>148</sup> Workers perceive that the use of medical practitioners to deny workers' compensation claims is fraud by the Workers' Compensation Board in Queensland.<sup>149</sup> The Network, made the point, however, that some witnesses in the work environment do not tell the truth for fear of losing their own jobs.<sup>150</sup>

- 4.96 The Australian Industry Group commented on the usual two-way relationship between a doctor and his patient in which no third party is affected by the quality of the diagnosis or the cost of the treatment. The AIG argued that medical practitioners will accept the word of the patient and will not usually be required to verify the accuracy of the employee's statements.<sup>151</sup> Under a compensation claim, there is a legitimate third party interest in the treatment of the injury and the patient's presentation.<sup>152</sup> It should be a requirement that the medical practitioner contact the workplace in a workers' compensation case.<sup>153</sup>

It is a very great source of frustration for employers that there is this third party called a medical provider who is making judgments about their businesses and has never had any contact with them.<sup>154</sup>

- 4.97 The Labor Council of New South Wales believes that medical practitioners need to be educated to take more of a role in the clinical management of the injured workers, to make sure that there is no over-servicing and that there is a return to work.<sup>155</sup> WorkCover Queensland has a qualified doctor on staff who is able to speak with treating doctors when a problem arises, and this model appears to be working well.<sup>156</sup>
- 4.98 The Committee believes that supporting doctors in practice in workplace injury management, and encouraging greater communication with experienced occupational physicians and or other appropriate health professionals and workplaces would be of great benefit.

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148 Workers' Compensation Support Network, Submission No. 5, p. 5.

149 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14b, p. 2.

150 Ms Muriel Dekker, Workers' Compensation Support Network, Transcript of Evidence, 22 November 2002, p. 349.

151 Australian Industry Group, Submission No. 53, p. 11.

152 Mr Mark Goodsell, Australian Industry Group, Transcript of Evidence, 18 October 2002, p. 56.

153 Mr David Russell, AIG, Transcript of Evidence, 18 October 2002, p. 57.

154 Mr Mark Goodsell, AIG, Transcript of Evidence, 18 October 2002, p. 57.

155 Ms Mary-Louise Yaagar, Labor Council of New South Wales, Transcript of Evidence, 18 October 2002, p. 119.

156 Ms Evron McMahan. WorkCover Queensland, Transcript of Evidence, 22 November 2002, p. 331.

## Pressure on medical practitioners

4.99 Medical practitioners form an important structural link between the insurer and the workplace, and doctors have a very significant power in convincing the patient whether or not to proceed with a claim. Dr William Marchione has seen the threshold at which people make a claim fall and told the Committee that:

it depends on external influences rather than on their own problem. A determinant might be a financial problem, so basically how sick they are will depend on other problems in their life - and often money is the solution ... If you are in a situation where the patient trusts you and they have been seeing you for years, you are in a dilemma. They may have admitted to you that it is fraudulent. You have a dilemma as to whether to reveal the fraudulent nature of the claim or abide by the fiduciary doctor-patient privacy relationship.<sup>157</sup>

4.100 Dr Marchione believes that privacy laws and the rules relating to the nature of the doctor-patient fiduciary relationship need to change. He argued that workers' compensation claims should go to a general practitioner other than the worker's regular doctor.<sup>158</sup> He added that medical practitioners have a dilemma about not reporting someone for fear of breaching privacy provisions, but they have an obligation to report a criminal act:

The national privacy principles, which came into effect in December last year, very specifically outline an exemption in 2(f). A group is exempt if 'the organisation has reason to suspect ... unlawful activity'. It used to be only in a life or death situation; now they have expanded it. If you get doctors to document undesirable patient behaviour - that is, fraudulent behaviour ... and you can provide an adequate indemnity to them, or any member of the public, you can have a system that prevents fraud before it happens, rather than wait to count the costs afterwards and lose all that money.<sup>159</sup>

4.101 The problem of medical practitioners writing a certificate to protect themselves from liability could be changed by forming a network of approved registered WorkCover doctors from which the employers could select, whom employees could see if injured at work.<sup>160</sup>

4.102 Mr Hemming emphasised that while there will always be a doctor-patient relationship, doctors need to understand the consequences of issuing a

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157 Dr William Marchione, Transcript of Evidence, 18 October 2002, pp. 125-126.

158 Dr William Marchione, Transcript of Evidence, 18 October 2002, pp. 126-7.

159 Dr William Marchione, Transcript of Evidence, 18 October 2002, p. 126.

160 A&B Industries, Submission No. 2, p. 1.

workers' compensation certificate. He suggested training that demonstrated:

the potential for protecting the doctor-patient relationship and yet still achieved a good outcome for the rest of the parties in the system. It will be employers and insurers who will be most interested in that.<sup>161</sup>

- 4.103 The Chamber of Commerce and Industry of Western Australia commented that there are two aspects of the role of medical practitioners, the medical condition and the work relatedness of the condition.<sup>162</sup> The CCI believe that medical practitioners should have a choice on whether they make a determination in relation to the work relatedness of a claim:

That brings in a sharing of the responsibility in regard to the acceptance or denial of a claim because the responsibility now is totally on the employer, possibly through the insurer, to do it.<sup>163</sup>

- 4.104 The New South Wales legislation requires only that work be 'a' substantial contributing factor and not 'the' substantial contributing factor. According to Insurance Australia Group, the wording in the legislation does create areas of greyness for insurers in regard to being able to detect it.<sup>164</sup> The Australian Industry Group argued that there is an institutional bias towards accepting claims as being work related rather than having been caused by some other source.<sup>165</sup>
- 4.105 The CCI (WA) suggested that doctors be provided with the option of determining the work relatedness of an injury or alternatively declaring an inability to make conclusive determination, and also that doctors be held statutorily responsible for their determinations of work relatedness.<sup>166</sup> In relation to medical practitioners having such a statutory responsibility, Dr Peter Shannon pointed out that the decisions would be open to common law claims if doctors made outrageous suggestions about individuals working or not working.<sup>167</sup>

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161 Mr Andrew Hemming, HEMSEM, Transcript of Evidence, 13 November 2002, p. 176.

162 Ms Annette Bellamy, Chamber of Commerce and Industry of Western Australia, Transcript of Evidence, 20 November 2002, p. 208.

163 Ms Annette Bellamy, CCI of WA, Transcript of Evidence, 20 November 2002, p. 205.

164 Ms Carolyn Ingram, Insurance Australia Group, Transcript of Evidence, 18 October 2002, p. 77.

165 Mr Mark Goodsell, Australian Industry Group, Transcript of Evidence, 18 October 2002, p. 61.

166 Chamber of Commerce and Industry of Western Australia, Submission No. 21, p. 4.

167 Dr Peter Shannon, Transcript of Evidence, 20 November 2002, p. 201.

### Specialist opinions

- 4.106 The NMAA argued for a system of accreditation and the capacity for the employer to seek a second opinion. Currently employers are concerned at the lack of cooperation from doctors and the fact that claims management goes to the insurer and is taken out of the hands of the employer.<sup>168</sup> The Master Cleaners Guild of Western Australia believes that relying on one opinion very severely erodes the possibility of getting an unbiased and accurate assessment of a patient's abilities.<sup>169</sup>
- 4.107 The Workers' Compensation Support Network also raised the issue of workers' reliance on WorkCover doctors' reports, as the injured is often not able to pay for an independent specialist opinion. They added that some medical practitioners will not treat injured workers because WorkCover will not pay if the injury is considered not to be work related. The Network added that some workers feel that the delay in receiving medical treatment can decrease the likelihood of recovery,<sup>170</sup> that injured workers should have the doctor of their choice and that Medicare should accept injured workers visits to ensure speedy treatment.<sup>171</sup>
- 4.108 The Australian Industry Group considers that while there is an efficiency in using the local medical practitioner in short term claims, the longer a claim continues, the more value there might be in having a different practitioner involved.<sup>172</sup>
- 4.109 In an adversarial system, each side will attempt to get the best evidence it can to further its case. The Insurance Australia Group supports the use of independent, accredited doctors measuring impairment and for that measurement to be binding as long as it is a standard process.<sup>173</sup> The lack of uniformity of impairment ratings nationally, and the lack of a standardisation in approach, makes the validity and reliability of assessments very questionable.<sup>174</sup>

If it were the case that all licensed doctors had to adhere in assessment of workers to a standardised impairment rating, then the

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168 Mr Garry Johnston, National Meat Association of Australia, Transcript of Evidence, 13 November 2002, p. 148.

169 Mr Kerry Jones, Master Cleaners Guild of Western Australia Inc, Transcript of Evidence, 20 November 2002, p. 219.

170 Workers' Compensation Support Network, Submission No. 5, p. 4.

171 Workers' Compensation Support Network, Submission No. 5, p. 5.

172 Mr Mark Goodsell, Australian Industry Group, Transcript of Evidence, 18 October 2002, pp. 56-57.

173 Mr Douglas Pearce, Insurance Australia Group, Transcript of Evidence, 18 October 2002, p. 75.

174 Mr Kerry Jones, Master Cleaners Guild of Western Australia Inc, Transcript of Evidence, 20 November 2002, p. 215.

probability of bias would to a great extent be eliminated. By process of random allotment of reviewing medical specialist to certify impairment, the ability of various proponents to manipulate outcomes would be better controlled.<sup>175</sup>

#### Evidence based medicine approach

4.110 Employers First are pursuing an effective workers' compensation system partly through an injury management and evidence based approach. They argued that if the medical practitioner is complicit with injured workers' fraudulent representation of return to work capacity, the rehabilitation process is undermined and the doctor's certificates provide support in court debates about the dispute resolution.<sup>176</sup>

4.111 There would be benefit in the development of treatment protocols for particular injuries, outlining best practice using evidence based medicine to assist medical practitioners in managing claims.<sup>177</sup> The Master Cleaners Guild of Western Australia supports the use of management protocols by specialists and emphasises that return to work should be one of the fundamental points of discussion in the overall patient care.<sup>178</sup>

Very often I see workers and they say, 'I have never put in a claim before; I did not know what happened', and they are quite mystified. I have seen some situations where employers bend over backwards to help workers, and that seems to work very well. Sometimes the employers do a whole lot to help somebody and then feel that it has not worked, and then they get frustrated, but at other times people are not dealt with well, right from the very beginning. That is where a good, clear protocol would play a very important role, ensuring that everybody knew what to do.<sup>179</sup>

4.112 The RiskNet Group believes that evidence based medicine is one way of controlling medical costs. The Group suggests that treatment protocols could be developed for the top three or four cost impact injuries. Some protocols are already in use in Victoria and South Australia and enable the audit of treatments against the protocols and monitoring of recovery times against those expected.<sup>180</sup> This approach has already been taken for back

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175 Master Cleaners Guild of Western Australia Inc, Submission No. 59, p. 4.

176 Mr Garry Brack, Employers First, Transcript of Evidence, 18 October 2002, p. 87.

177 The Risknet Group, Submission No. 10, p. 9.

178 Mr Kerry Jones, Master Cleaners Guild of Western Australia Inc, Transcript of Evidence, 20 November 2002, p. 218.

179 Dr Peter Shannon, Transcript of Evidence, 20 November 2002, p. 199.

180 The Risknet Group, Submission No. 10, p. 9; Mr Richard Gilley, The RiskNet Group, Transcript of Evidence, 18 October 2002, p. 135.

injuries and stress claims in Victoria and South Australia and could perhaps be adopted in other jurisdictions.<sup>181</sup>

The central point of system performance in this process pertains to the failure across States to adopt a uniform definition and protocol on disability and impairment rating, such that when one begins to talk about comparisons in systems performance, the validity and reliability of statistically comparisons is highly questionable. It is further observed that emphasis is nevertheless placed on quantitative measures of system performance rather than a balance alongside qualitative measures the latter likely to reveal detail of the attitudinal and cultural issues that underpin participant responses within the system.<sup>182</sup>

### Training and accreditation of medical practitioners

- 4.113 The National Meat Association of Australia believes that doctors involved with workers' compensation claims and rehabilitation programs should be trained and accredited and fully conversant with the operation of the systems. The NMAA sees as one of the issues the fact that the doctor issuing the certificate is not familiar with the workplace.<sup>183</sup>
- 4.114 The Australian Industry Group saw the training of doctors as a common issue across jurisdictions. The professional training for doctors engaged in occupational medicine should cover the difference between treating an injury in the work environment and treating for a 'private injury', because there is a employer-employee relationship overlaying the injury.<sup>184</sup>
- 4.115 The AIG suggested a split approach to the accreditation of doctors and argued that the implementation of national accreditation would need to have a positive cost benefit. The AIG suggested that potentially significant problems could be addressed in an accredited medical scheme.<sup>185</sup>
- 4.116 Mr Andrew Hemming of HEMSEM argued that the medical profession is a pivotal part of the workers' compensation system and that there needs to be proper registration, certification and accreditation, followed up by meaningful and continuous training of medical practitioners, to ensure that workers' compensation systems can properly discourage fraudulent behaviour.<sup>186</sup>

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181 Mr Richard Gilley, The RiskNet Group, Transcript of Evidence, 18 October 2002, p. 135.

182 Master Cleaners Guild of Western Australia Inc, Submission No. 59, p. 4.

183 National Meat Association of Australia, Submission No. 41b, p. 3.

184 Mr Mark Goodsell, Australian Industry Group, Transcript of Evidence, 18 October 2002, p. 57.

185 Mr Mark Goodsell, AIG, Transcript of Evidence, 18 October 2002, p. 67.

186 Mr Andrew Hemming, HEMSEM, Transcript of Evidence, 13 November 2002, p. 172.

4.117 The Western Australian system gives the injured worker the right to a choice of doctor. This may mean that in some circumstances the medical practitioner may not be skilled in occupational medicine, unless every doctor is trained in this field. The training of GPs in injury management is voluntary but it would be helpful if:

medical practitioners had a degree of knowledge of occupational medicine and knowledge of the occupations in which their patients operate, because it would give them a much clearer understanding of the ability to be part of injury management.<sup>187</sup>

4.118 Some educational programs are already available. For example, WorkCover Queensland participates in a general practitioners education program.<sup>188</sup> In Western Australia, however, over 90 per cent of doctors have not been able to avail themselves of the training offered and their lack of understanding of the system means that the advice that they give to injured workers can be fundamentally flawed.<sup>189</sup>

4.119 The Master Cleaners Guild of Western Australia (MCGWA) commented on the lack of uniform training available throughout Australia for this speciality area of practice and the need for an implementation schedule, after which workers' compensation matters will only be dealt with by accredited practitioners who have demonstrated competency.<sup>190</sup>

4.120 The Guild members are disillusioned with the performance of medical practitioners and strongly recommend the licensing of medical practitioners, because they believe that:

It is further noted that over statement in claims arises very often from the inception of medical certification, often a manifestation of medical incompetence and unprofessional behaviour than necessarily, a result of calculated worker behaviour.<sup>191</sup>

4.121 MCGWA argued that doctors are not familiar with the scheme and therefore do not:

communicate and demonstrate commitment to early intervention and return to work principles and familiarise themselves with the

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187 Mr Harry Neesham, WorkCover Western Australia, Transcript of Evidence, 20 November 2002, p. 185.

188 Ms Evron McMahon, WorkCover Queensland, Transcript of Evidence, 22 November 2002, p. 331.

189 Mr Kerry Jones, Master Cleaners Guild of Western Australia Inc, Transcript of Evidence, 20 November 2002, p. 214.

190 Mr Kerry Jones, Master Cleaners Guild of Western Australia Inc, Transcript of Evidence, 20 November 2002, p. 219.

191 Master Cleaners Guild of Western Australia Inc, Submission No. 59, p. 3.

specifics of the worker's duties and work environment, severely erodes in our view the validity and reliability of the contribution made, to the point that such actions are tantamount to contributory negligence and mal practice in the system.<sup>192</sup>

- 4.122 They argued that medical practice in workers' compensation must be recognised as a specialised field, and that occupational physician training is needed in Western Australia to overcome the current structural limitations on the ability of practitioners to improve their performance.<sup>193</sup>

### Medical panels

- 4.123 It was suggested that review by a panel of doctors could provide a speedier and more precise estimation of disability and lead to earlier rehabilitation with better goals.<sup>194</sup> The Rehabilitation Providers Association of Western Australia, were of the view that if the process involves a panel would delay the process even further and the indications were that this is already blowing out.<sup>195</sup> However, it was also suggested that having an independent panel to adjudicate claims on the facts to break the conundrum between competing medical opinions, provided it was conducted in a forensic, structured medical way, has a lot to offer.<sup>196</sup>

Some countries have panels of assessors who are regarded as leaders in their profession. They do not work for either side; they are randomly selected and they monitor and assess each other via a peer review. I have always thought that is an outstanding way to go to produce the best possible result.<sup>197</sup>

- 4.124 Injured workers also raised a number of concerns about the operation of medical panels. It was alleged that medical panels can be 'handpicked' and are therefore biased.<sup>198</sup> The accuracy of the information provided to

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192 Master Cleaners Guild of Western Australia Inc, Submission No. 59, p. 3.

193 Master Cleaners Guild of Western Australia Inc, Submission No. 59, p. 3.

194 Dr Peter Shannon, Submission No. 3, p. 2.

195 Mr Robert Gordon, Rehabilitation Providers Association Western Australia, Transcript of Evidence, 20 November 2002, p. 238

196 Mr Harry Neesham, WorkCover Western Australia, Transcript of Evidence, 20 November 2002, p. 182.

197 Dr Robert Kaplan, Transcript of Evidence, 18 October 2002, p. 103.

198 Mrs Lorraine Briggs, Injured Persons Support and Action Association, Transcript of Evidence, 12 February 2003, p. 446; see also Mrs Margaret Pursey, Injured Persons Support and Action Association, Transcript of Evidence, 12 February 2003, p. 442; Mr Paul O'Halloran, Transcript of Evidence, 20 November 2002, p. 223.

medical panels on which these determinations were based was also questioned.<sup>199</sup>

- 4.125 Dr Sherryl Catchpole put the view that the general practitioner is the effective person in the area of workers' compensation as they see a patient all the way through the process and access the various services. She said that the system operates better if the doctor is kept in the loop, and that panels can be used for advice but should not manage the claim.<sup>200</sup>

#### Medico-legal opinions

- 4.126 There were a number of concerns in relation to the use of doctors conducting medico-legal assessments.<sup>201</sup> It was suggested that they:

- are required to recommend treatment even if they have no experience in treating patients with a particular condition;
- are expensive;
- present polarised views that do not assist either party;
- lack independence as they derive the income from insurers;
- may cause pain while forcing patients to make particular movements; and
- do not always follow the AMA code of practice and treat patients disrespectfully by being curt or by making remarks about their bodies.<sup>202</sup>

- 4.127 It was also argued that patients are at a disadvantage if they do not understand the nature of a medico-legal consultation.<sup>203</sup> One witness found the three psychiatrists involved in his case to be unscrupulous, unprofessional and intimidating.<sup>204</sup>

- 4.128 A number of submitters referred to the inappropriate manner in which they were treated by the doctors preparing medico-legal reports. The RSI and Overuse Injury Association of the ACT commented that injured

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199 Mrs Muriel Dekker, Workers' Compensation Support Network, Transcript of Evidence, 22 November 2002, p. 349; Mrs Lorraine Briggs, Injured Persons Support and Action Association, Transcript of Evidence, 12 February 2003, p. 446.

200 Dr Sherryl Catchpole, Workers' Medical Centre, Transcript of Evidence, 22 November 2002, p. 346.

201 This is an independent assessment of a person's present and potential capacity for employment or independent living. It may be presented as evidence in a law court. The assessment will include recommendations regarding future needs. Assessments are generally requested by solicitors or insurance companies. Source: CRS Australia: <http://www.crsrehab.gov.au/176.htm>.

202 The RSI and Overuse Injury Association of the ACT, Submission No. 24, p. 1; Ms Ann Thomson, RSI and Overuse Injury Association of the ACT, Transcript of Evidence, 16 October 2002, p.35.

203 The RSI and Overuse Injury Association of the ACT, Submission No. 24, p 1.

204 Mr Stig Hellsing, Submission No. 33, p. 2.

workers who are badly treated by a medico-legal doctor will not complain to the Australian Medical Association as they are already dealing with conflict in a number of other areas.<sup>205</sup>

## Psychological issues

- 4.129 Ms Gwyneth Regione from the Australian Manufacturing Workers' Union told the Committee that 80 per cent of the long-term injured people that she sees suffer from psychological disorders due partly to living in pain and with a disability but also partly to the stigma attached to being on workers' compensation and going through the workers' compensation system. According to Ms Regione there is a high incidence of depression and suicide among injured workers, and the South Australian WorkCover Corporation is examining the issue.<sup>206</sup>
- 4.130 The Committee was told that there needs to be a more useful and reliable way of assessing psychological injury. The existing tools for measuring psychological disorders are not necessarily applicable to the disorders associated with workers' compensation claims. The development of a reliable scale for assessing psychological impairment could be a great advance in resolving difficulties in this area.<sup>207</sup> The scales being introduced into New South Wales are the subject of significant debate, and there is an attempt to draft a more objective set of criteria.<sup>208</sup>
- 4.131 The Committee was told that the image seen in courts or tribunals for compensation may be very different from that seen at the 'coalface'. Representatives of injured workers involved in the process may collude with the claimant to produce the best financial outcome, which may be to the detriment of the claimant's return to health or to work. Treating and assessing agents who are not sufficiently trained in psychiatric diagnosis are a significant aspect of the problem. Some do not accept that there is a degree of emotional distress in workplace stress claims that does not constitute a psychiatric disorder and which is not compensable. It was suggested that the available codes are underutilised. There is a certain degree of stress which is regarded as excessive or pathological and is considered a disorder.<sup>209</sup> Similarly Comcare commented that stress claims

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205 Ms Ann Thomson, RSI and Overuse Injury Association of the ACT, Transcript of Evidence, 16 October 2002, p. 36.

206 Ms Gwyneth Regione, Australian Manufacturing Workers' Union, Transcript of Evidence, 26 November 2002, p. 381.

207 Dr Peter Shannon, Submission No. 3, p. 3.

208 Mr Garry Brack, Employers First, Transcript of Evidence, 18 October 2002, p. 85.

209 Dr Robert Kaplan, Transcript of Evidence, 18 October 2002, pp. 101-103.

should not be awarded or liability granted unless there is an actual mental illness.<sup>210</sup>

### Illness based conditions

- 4.132 Mr Kim Mettam suggested that 10-15 per cent of claims account for 80 - 85 per cent of the costs and should be looked at. He suggested that most of the costs relate to 'illness based conditions'. For example, an individual's back problems may be a symptom of personal problems, as an inability to cope with stress can make the back susceptible to soft tissue injury and heightens vigilance in reporting pain symptoms. He cited the example of a Boeing study in the United States that found that the strongest predictor for sprains, strains and back injuries was the employee's happiness in the job.<sup>211</sup> Mr Mettam argued that you cannot change the motivation of an injured employee if the job does not satisfy the employee's needs.<sup>212</sup>

When you have people with illness based conditions who may be imposing disability because of reasons to do with life coping skills or a whole series of particular problems, it becomes so much more difficult to make that transitional job available. Once you bring a person back in, you undermine the morale of the working group who look around and quickly frame a view that might say, 'This person is really here for reasons other than a medical reason, it might be a life coping reason.' Often a work force will be less sympathetic or understanding, particularly when it happens to them over a sustained period of time with many cases.<sup>213</sup>

- 4.133 It was suggested that workers' compensation should move to exception based reporting and management. An injury that should be healed in six weeks would be looked at before the 26 or 52 review period, which reflects the legislative time schedules. Review periods should be changed to reflect the appropriate healing periods for particular injuries.<sup>214</sup> Currently insurers do not have IT systems that will support this and you cannot manage something that is not measured.<sup>215</sup>

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210 Mr Barry Leahy, Comcare, Transcript of Evidence, 18 September 2002, p. 2.

211 Mr Kim Mettam, Submission No. 54, pp. 1-2.

212 Mr Kim Mettam, Charles Taylor Consulting, Transcript of Evidence, 20 November 2002, p. 242.

213 Mr Kim Mettam, Charles Taylor Consulting, Transcript of Evidence, 20 November 2002, p. 243.

214 Ms Anita Grindlay, Transcript of Evidence, 26 November 2002, p. 360.

215 Dr Paul Pers, Transcript of Evidence, 26 November 2002, p. 360.

## Stress claims

- 4.134 There is considerable cost to the community, workers and insurance systems from work related stress. Dr Kaplan has found that in some occupational groups many claims that are based on workplace stress are dubious and may have an external agenda and he suspects that occasionally these are fraudulently based.<sup>216</sup> Work related issues can be slow to settle, and have numerous psychosocial elements such as work dissatisfaction, intended litigation and relative ease of process with no outlay to the individual and motivation.
- 4.135 Stress related injury is difficult to prove and can therefore be denied by the insurer.<sup>217</sup> Stress does not fit neatly into the reporting guidelines or time frames and it may not be easy to identify the time the injury occurred.<sup>218</sup> It is not in the interests of the employer to recognise stress as it is a sign of poor management.<sup>219</sup>
- 4.136 Also, there may be an underreporting of incidences as workers believe that stress related illnesses do not have any chance of getting through the workers' compensation system and that the trauma of the process will not help.<sup>220</sup> Because of the difficulty in proving a stress claim, many people simply elect to use sick leave and bear the costs, as the process of lodging and fighting a claim often ends up exacerbating the original injury.<sup>221</sup>
- 4.137 Mr Stig Hellsing stated that in stress related claims the current workers' compensation system and the court system exacerbate the condition, and argued these claims should be approached differently to minimise the additional trauma on the injured worker.<sup>222</sup> The claims could be minimised by recognising stress in the workplace and providing early intervention.<sup>223</sup>
- 4.138 The legal system aims to win monetary compensation for the injured worker while some claimants are fighting to regain 'some sort of life'.<sup>224</sup> Stress can result from a gradual change and it is difficult to regain normal functions when the process has been going on for a number of years.<sup>225</sup>

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216 Dr Robert Kaplan, Transcript of Evidence, 18 October 2002, p. 102.

217 Mr Stig Hellsing, Submission No. 33, p. 2; Community and Public Sector Union, Submission No. 42, p. 8.

218 Mr Stig Hellsing, Submission No. 33, p. 2.

219 Mr Stig Hellsing, Transcript of Evidence, 16 October 2002, p. 49.

220 Dr Deborah Vallance, Australian Manufacturing Workers' Union, Transcript of Evidence, 26 November 2002, p. 389.

221 Community and Public Sector Union, Submission No. 42, p. 8.

222 Mr Stig Hellsing, Submission No. 33, p. 1.

223 Mr Stig Hellsing, Transcript of Evidence, 16 October 2002, p. 44.

224 Mr Stig Hellsing, Transcript of Evidence, 16 October 2002, p. 48.

225 Mr Stig Hellsing, Transcript of Evidence, 16 October 2002, p. 49.

Mr Hellsing suggested that if these workers had their concerns addressed, conflicts resolved and rehabilitation programs commenced at an early stage, this would limit the extent to which the original stress injury is exacerbated.<sup>226</sup>

In many stress cases, it is not the monetary compensation that is the driving force; rather, it is a desire for acknowledgement of the injury, conflict resolution and some sort of justice.<sup>227</sup>

4.139 Dr Peter Shannon agreed that the adversarial approach is the worst way to deal with stress claims but added that a better way has not been developed.<sup>228</sup> He suggested that there is some exaggeration of stress claims when people do not feel that they have been taken seriously and blame the original injury when they become agitated.<sup>229</sup>

4.140 Dr Robert Guthrie referred to insurance companies which accept stress claims without serious investigation, as it is more economical to treat the person to try to facilitate their return to work than it is to aggravate the injury by taking them through the compensation system.<sup>230</sup>

4.141 Particularly stressful for some injured workers is the fact that they do not have their payments made promptly, concerns about the future, the community stigma, family disbelief and suspicion, alternative duties that are demeaning particularly for tradespeople and, for older people, the requirement to retrain:

There is an arousal of emotions that is escalated by the process - by the perceived cavalier fashion of stakeholders, including rehab providers and case managers and including doctors that the worker believes are on the side of the employer. They also have family issues and relationship breakdowns within the family. Then they have the frustration of not being able to do the chores and having to be dependent on other people. There is all of this.<sup>231</sup>

4.142 It was suggested that in relation to stress claims, an independent team should provide support and mediation to try to resolve the workplace problem instead of referral to the legal system. If stress is recognised early

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226 Mr Stig Hellsing, Submission No. 33, p. 1.

227 Mr Stig Hellsing, Transcript of Evidence, 16 October 2002, p. 44.

228 Dr Peter Shannon, Transcript of Evidence, 20 November 2002, p. 199.

229 Dr Peter Shannon, Transcript of Evidence, 20 November 2002, p. 199.

230 Mr Robert Guthrie, School of Business Law, Curtin University, Transcript of Evidence, 20 November 2002, p. 193.

231 Dr Christine Roberts-Yates, Transcript of Evidence, 21 November 2002, p. 264.

it may be rectified with professional help.<sup>232</sup> Centrelink has developed some early intervention programs in an attempt to reduce premiums.<sup>233</sup>

### Personality

- 4.143 Personality can influence workers' compensation claims. The insurer may use personality factors in an attempt to diminish a claim. Some assert that a worker's personality may contribute to the situation. The assessment of personality is an issue of debate and there should be caution in listing personality as an important aspect in the workplace.<sup>234</sup>
- 4.144 To use personality factors in a worker's compensation claim may result in the oversimplification of a complex situation, as workplace changes may affect the capacity of a worker to continue in a particular position. The example was given of the thoroughly meticulous person subjected to new and unexpected pressures. It was argued that the selective use of personality factors is neither scientific nor fair.<sup>235</sup>

### Disability assessments

- 4.145 In relation to psychiatric disability assessment, Dr Kaplan argued that minor disabilities that are treatable should be treated and the worker rehabilitated. He added that he has assessed people who have been on disability support for a very long time and was surprised at the extent to which they had been 'cruising in neutral in the system without any checks and balances'.<sup>236</sup>

### Insurance companies

- 4.146 There are a number of submissions that raised concerns about the manner in which insurance companies manage claims. It was suggested that some claims procedures have been identified as needing improvement, and claims have been inappropriately accepted or denied on the basis of inefficiencies and inadequacies in administrative practices. These are listed in Chapter 2.
- 4.147 One key issue relates to insurance companies aggressively opposing a claim and the assumption that every claim is fraudulent. This may exacerbate symptoms and prolong the difficulties, particularly if

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232 Mr Stig Hellsing, Submission No. 33, p. 3.

233 Mr Simon Cocker, Community and Public Sector Union, Transcript of Evidence, 26 November 2002, p. 369.

234 Dr Peter Shannon, Submission No. 3, p. 4.

235 Dr Peter Shannon, Submission No. 3, p. 4.

236 Dr Robert Kaplan, Transcript of Evidence, 18 October 2002, pp. 104-105.

psychological issues are involved.<sup>237</sup> Insurance companies have a pivotal role and a positive attitude can lead to gains for all concerned.<sup>238</sup>

4.148 It was suggested that the culture of automatic assumption of guilt of the injured worker must be as costly to the community as the fraud itself.<sup>239</sup> There is a perception that some workers' compensation schemes will send injured workers to doctors who are known to give adverse medico-legal reports.<sup>240</sup>

4.149 The Workers' Medical Centre told the Committee that:

From the moment the claim is made the worker is presumed to be attempting fraud. The onus is placed on the worker to prove their injury or health condition was work related. The worker is often sent to a rude and unsympathetic doctor. They are accused of lying about their condition. They are told this is a natural aging process or it is self-inflicted.<sup>241</sup>

4.150 The RSI and Overuse Injury Association of the ACT believes that the stress of the adversarial process can exacerbate the original injury and make it more difficult to recover.<sup>242</sup> The Medical Health Centre argued that few people would be prepared to go through with the level of stress placed on the injured worker making a claim if they were not genuinely seeking fair compensation.<sup>243</sup>

Assessments required by doctors and therapists who are seemingly on the side of the employer and show no real concern for the worker who is injured can cause frustration, bitterness and anger in the belief that the employee is not being trusted by the employer.<sup>244</sup>

4.151 Injured workers may be sent for repeated examinations and the various opinions may not be particularly helpful in returning the worker to the workforce and may assist in making litigation more vigorous.<sup>245</sup> Obtaining opinions from independent specialists can be expensive, and the cost

237 Dr Peter Shannon, Submission No. 3, p. 2.

238 Dr Peter Shannon, Submission No. 3, p. 2.

239 Ms Heather McLean, Submission No. 15, p. 3.

240 Ms Ann Thomson, RSI and Overuse Injury Association of the ACT, Transcript of Evidence, 16 October 2002, p.32.

241 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14b, p. 1.

242 The RSI and Overuse Injury Association of the ACT, Submission No. 24, p. 2.

243 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14b, p. 1.

244 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14, pp. 1-2.

245 Dr Peter Shannon, Submission No. 3, p. 2.

factor may cause stress for the injured worker who has no or limited income.<sup>246</sup>

- 4.152 The RSI and Overuse Injury Association of the ACT believes that it is important to look at the previous history, and that the record of those claimants who had not previously taken time off work before the injury should be taken into account before accusing the claimant of malingering.<sup>247</sup>
- 4.153 The anger experienced by the injured worker can delay the recovery process and the change from a legitimate to an apparently fraudulent claim in the eyes of the employer can be a gradual process caused by stress.<sup>248</sup> The majority of injured workers prefer to be rehabilitated and return to work and being treated with dignity would assist this process.<sup>249</sup>
- 4.154 In situations where an injured worker is not satisfied with the service provided by an insurance company, Injuries Australia believes that the injured worker and their families do not have access to state consumer laws, as the employer has paid for the insurance and the claimant must deal with an insurance company which they believe does not represent their interests. They also believe that the appeal avenues are loaded against the non-consumer injured workers.<sup>250</sup>
- 4.155 Another key issue is the attitude of insurance agents who are paid on the basis of the number of claims finalised, and the lack of accountability in this area. A number of submissions raised the issue of the need for meaningful work and referred to the demeaning job opportunities offered to injured workers. Ms Julia Mourant stated that injured workers should be provided with retraining and should not have to take any job just to be off the insurer books.<sup>251</sup> Ms Mourant had previously held executive positions and found the attitude of the insurer was to:
- “find a job, any job” and if I can’t find what I want “then get a job in a call centre or as a receptionist”.<sup>252</sup>
- 4.156 Another issue raised in a number of submissions was the lack of accountability of insurance companies that provide in-house services or their collusion with service providers or employers. MAXNetwork

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246 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14, p. 1.

247 Ms Kate Beckett, RSI and Overuse Injury Association of the ACT, Transcript of Evidence, 16 October 2002, p. 33; See also Mr Stig Hellsing, Transcript of Evidence, 16 October 2002, p. 50.

248 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14, p. 2.

249 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14, p. 2.

250 Injuries Australia Ltd, Submission No. 27, p. 2.

251 Ms Julia Mourant, Submission No. 12, p. 2.

252 Ms Julia Mourant, Submission No. 12, p. 1.

believes that insurance companies are looking at their in-house and outsourcing services and the effectiveness and conflict of interest issues, and that:

Insurance companies are getting wiser about looking at whether they really make a difference to the bottom line and to the impact on the client.<sup>253</sup>

- 4.157 It was argued that insurers are committed to delivering the best services to injured workers in order to avoid retribution from WorkCover for inadequate performance. MAXNetwork believes that if the insurer has responsibility to WorkCover that will take precedence. One insurer that MAXNetwork has been working with is committed to providing the best service to injured workers and consequently reducing the costs.<sup>254</sup>
- 4.158 Mr Paul Stokes commented that a close relationship between all the key stakeholders needs to be developed and nurtured even if it was not an in-house relationship.<sup>255</sup>

### Relationship between employer and insurer

- 4.159 Employers in South Australia are frustrated that a lot of the focus of insurers is on compliance with WorkCover standards and believes that there is less flexibility for these employers to manage cases outside the prescribed guidelines than for self-managed and exempt companies.<sup>256</sup>
- 4.160 The Chamber of Commerce and Industry of Western Australia is also concerned at the lack of employer involvement in claims management, which results in a separation of responsibility, action and outcome. No party is fully accountable for the efficient administration of claims and most employers are unable to take their business to another insurer.<sup>257</sup>
- 4.161 The National Meat Association of Australia's members raised a number of structural factors in relation to the operations of insurers, that impact on employers and which they believe are relevant to one of more of the workers' compensation schemes. These include the following:
- employer reports and complaints are ignored; in some jurisdictions there is a perception that it is easier for agencies to pay a claim than investigate it. Insurers should be compelled to investigate possible fraudulent claims;
  - insurers fail to challenge questionable medical decisions;

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253 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 334.

254 Mrs Leonie Green, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 334.

255 Mr Paul Stokes, MAXNetwork Pty Ltd, Transcript of Evidence, 22 November 2002, p. 334.

256 Dr Christine Roberts-Yates, Transcript of Evidence, 21 November 2002, p. 256.

257 Chamber of Commerce and Industry of Western Australia, Submission No. 21, p. 4.

- insurers do not investigate suspect claims and false claims by ex-employees;
- excessive time is taken to assess claims. Claims for minor impairments may take months with little assistance from the insurer;
- there is little contact with any officer from WorkCover face to face and multiple WorkCover or insurer staff may be involved, leading to confusion and delay;
- investigating officers are ill prepared, resulting in wasting of both WorkCover and the employer's time;
- inefficiencies and inadequacies increase costs, which are borne by the employer;
- estimated costs are based on the 'worst case scenario';
- claims disallowed by WorkCover are often overruled by the WorkCover review unit;
- non-compliance by employees not cooperating with rehabilitation program should lead to cancellation of benefits in more specific terms by the insurer;
- claims are allowed in redundancy or stand-down situations;
- there is a conflict of interest in WorkCover who collect premiums and process claims;
- the premium system is wrong and rises exceed the actual cost of the claims; and
- insurers in NSW are more responsive to WorkCover as they are licensed and paid by WorkCover in NSW.<sup>258</sup>

4.162 From the employer's perspective:

Ultimately employers will react to nature and structure of the operating environment. If it is perceived to be unfair and inefficient and in particular permits fraud in certain areas without any retribution, adverse behaviour within the system will be difficult to eliminate.<sup>259</sup>

4.163 From an injured worker's perspective, in the case of self insurers, the claimant may be resentful that in providing the insurer with access to details of the medical condition, the employer also has the right to access this information.<sup>260</sup>

patients who are covered by a self-insured employer and are having a bad time with recovery have great difficulty identifying a difference between the insurer's decision making and that of the employer. Very often the person who manages the rehabilitation

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258 National Meat Association of Australia, Submission No. 41, pp. 16-39.

259 Chamber of Commerce and Industry of Western Australia Inc, Submission No. 21, p. 4.

260 Dr Sherryl Catchpole, Workers' Medical Centre, Transcript of Evidence, 22 November 2002, pp. 343-344.

program is also perceived to be a manager for the employer. The worker feels that natural justice is not being observed and becomes angry. The self-insurer's aim, by effective case management, is to return injured workers to the workplace and to close cases as soon as possible, thereby cutting costs. The worker may perceive active case management to be harassment from the employer.<sup>261</sup>

- 4.164 There are also cases where claimants who do not turn up for medical appointments and do not meet their rehabilitation conditions receive numerous letters about payments being stopped but nothing happens:

the first time something happens, a letter should go out, stating very clearly: 'These are your rights and responsibilities. If you do not meet your responsibilities, these will be the consequences.' Sometimes it takes three or four cancelled appointments before a letter goes out.<sup>262</sup>

### Insurance agents

- 4.165 The insurance industry performs claims management for all schemes except Queensland and Comcare, who have in-house arrangements.<sup>263</sup> The RiskNet Group believes that:

There is no expertise in fraud detection by the various insurers who act as agents for the various government schemes. That is a symptom of the schemes not being owned by the insurer. It is not their money that they are paying out, it is somebody else's money, so nobody really owns it.<sup>264</sup>

- 4.166 The Insurance Australia Group believes that insurance agents do not have the same incentive to develop best practice when they have no underwriting exposure and no direct financial interest in the scheme.<sup>265</sup>

### Independent regulatory bodies

- 4.167 There is a concern among injured workers that there is a lack of accountability for WorkCover authorities. In Queensland the concern was raised that while it is claimed that the regulatory body Q-Comp is separate from Queensland WorkCover, they answer to the same Minister, the same

261 Dr Sherryl Catchpole, Workers' Medical Centre, Transcript of Evidence, 22 November 2002, p. 343.

262 Ms Anita Grindlay, Transcript of Evidence, 26 November 2002, p. 361.

263 Department of Employment and Workplace Relations, Submission No. 48, p. 27.

264 Mr Richard Gilley, The RiskNet Group, Transcript of Evidence, 18 October 2002, p. 132.

265 Insurance Australia Group, Submission No. 47, p. 14.

Board and the same Chief Executive Officer.<sup>266</sup> Similar concerns were expressed by injured workers in other jurisdictions. For example, it was suggested that a complaints authority similar to a police complaints authority, with the power to investigate non-compliance by WorkCover authorities and to issue penalties should be established.<sup>267</sup>

### Investigation and dispute procedures

4.168 The cost of investigations is a disincentive for employers to investigate potentially fraudulent claims, because that cost will be incorporated within their premium and their yearly claims cost.<sup>268</sup> The Insurance Australia Group suggested that the relevant scheme legislation should include financial and structural incentives for pursuing fraudulent claims.<sup>269</sup>

4.169 Self-insurers may also be discouraged from disputing a claim. For example, in the Western Australian system there is a program of monitoring insurers and self-insurers, which includes the measurement of disputes that go to the Conciliation and Review Directorate:

There are other ways in which you can deal with a claim than taking it to dispute, so that in itself does not assist in the identification of fraud. It also does not assist in dealing with fraudulent behaviour, should it be discovered.<sup>270</sup>

4.170 The Victorian Automobile Chamber of Commerce suggested that the role and services of legal practitioners should be regulated with the scope of their involvement in workers' compensation claims. VACC expressed concern at the use of advertising to entice injured workers to obtain compensation lump sums, and believes that regulation of advertising by legal practitioners is required.<sup>271</sup>

4.171 It was also suggested that there needs to be a complaints authority which could take the judicial system and the conflict and the adversarial nature out of the system.<sup>272</sup> The establishment of a specialised Workers' Compensation Court in all jurisdictions could ensure that all the relevant

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266 Ms Heather McLean, Submission No. 15, p. 3.

267 Mr Markham Moore-McQuillan, Submission No. 16, p. 1.

268 Insurance Australia Group, Submission No. 47, p. 11; Ms Annette Bellamy, Chamber of Commerce and Industry of Western Australia Inc, Transcript of Evidence, 20 November 2002, p. 204.

269 Insurance Australia Group, Submission No. 47, p. 11.

270 Ms Annette Bellamy, Chamber of Commerce and Industry of Western Australia Inc, Transcript of Evidence, 20 November 2002, p. 204.

271 Victorian Automobile Chamber of Commerce, Submission No. 65, p. 8.

272 Mr Markham Moore-McQuillan, Transcript of Evidence, 21 November 2002, p. 292.

and correct facts of the case are considered.<sup>273</sup> The RiskNet Group argued, however, that there are a number of reasons why fraud flourishes:

Workers compensation courts typically have no jurisdiction over fraud; they are administrative by nature. They determine whether or not a claimant is entitled to benefits. They are not able to make a determination on whether the claimant or anybody else involved in that particular case has perjured themselves or set out to commit fraud ... The very nature of workers' compensation claims means that there is a no-fault system across all of Australia. From the outset, there does not seem to be any major attempt to bring to the attention of claimants the fact that committing a fraud or exaggerating a claim are fraudulent matters which can be dealt with under the various crimes act legislation.<sup>274</sup>

- 4.172 Employers First noted that while the employer may have evidence, it is nearly always rejected by the court and that judges, with the benefit of considerable hindsight, will say that the incident was foreseeable and that the employer was guilty. Employers First added that once a claim is approved, all subsequent cases of that kind will include a similar statement of claim.<sup>275</sup>

### Appeal processes

- 4.173 Injured workers who do not receive workers' compensation and are unable to work do not have other alternatives. The Workers' Medical Centre does not advise these clients to appeal as this process is so stressful that their condition deteriorates. Many workers pursue common law claims as a result of the way they have been treated.<sup>276</sup> However, it was suggested that most injured workers do not have the right of appeal to an industrial magistrate against a workers' compensation decision, because of the economic aspects of our social structure.<sup>277</sup> In Western Australia it costs \$15 000 to appeal in the Compensation Magistrates Court and injured workers do not have the money.<sup>278</sup>

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273 Workers' Compensation Support Network, Submission No. 5, p. 5.

274 Mr Richard Gilley, The RiskNet Group, Transcript of Evidence, 18 October 2002, pp. 131-132.

275 Mr Garry Brack, Employers First, Transcript of Evidence, 18 October 2002, pp. 84-5, 88.

276 Workers' Medical Centre and Queensland Workers' Health Centre, Submission No. 14b, p. 1.

277 Ms Heather McLean, Submission No. 15, p. 2.

278 Mrs Margaret Pursey, Injured Persons Action and Support Association, Transcript of Evidence, 12 February 2003, p. 459.

## No fault systems

4.174 All Australian workers' compensation schemes are based on a 'no-fault' principle.<sup>279</sup> The Recruitment and Consulting Services Association commented that the no fault system may be open to exploitation as workers' compensation claims can be made without a review of the circumstance in which the injury occurred.<sup>280</sup> The RCSA believes that workers should have a level of accountability for their own safety.<sup>281</sup> Under the current system employees who repeatedly ignore safety procedures can still be compensated.<sup>282</sup> The Master Cleaners Guild of Western Australia stated that the onus of proof in a no fault system moves very quickly to the employer.<sup>283</sup>

4.175 Problems with the system permit illness based cases to proceed:

I think there is a lack of objectivity in the medical assessments; that is one thing. I think a lack of understanding of the problems that the employer faces contributes. I also think it goes to the judiciary; it is a common subject these days, but over the years there has been such a mutation in the tests of negligence that we have now developed a no-fault system in common law. In my view, that is the fundamental reason we have all the problems we have, because no country can afford two no-fault systems—at its origin, workers comp was to have a no-fault system. I have seen time and time again common law undermine the capacity to bring people back to work and to fire up the imposition of disability. That is really sad. I have seen people lose their cases and virtually lose their whole lives, because the system has taken them that way.<sup>284</sup>

## Settlement

4.176 Insurers see settlement as the most effective means of damage control.<sup>285</sup> The settlement process is used to eliminate fraudulent claims and behaviour:

This problem is the hard to resolve, hard to pin down condition which will not respond adequately to treatment, to rehabilitation, or to redeployment or retraining. This is usually a sign or message that

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279 Department of Employment and Workplace Relations, Submission No. 48, p. 5.

280 Recruitment and Consulting Services Association, Submission No. 20, p. 8.

281 Recruitment and Consulting Services Association, Submission No. 20, p. 8.

282 Recruitment and Consulting Services Association, Submission No. 20, p. 8.

283 Master Cleaners Guild of Western Australia Inc, Submission No. 59, p. 3.

284 Mr Kim Mettam, Charles Taylor Consulting, Transcript of Evidence, 20 November 2002, p. 247.

285 HEMSEM, Submission No. 28, p. 4.

is being given. It gives rise to a chronic condition that is fuelled by advice, by learned behaviour and by monetary gain. Thus settlement is used to overcome this behaviour. The behaviour in itself is fraudulent because it is a conscious decision to stick with the system playing the same game for monetary reward.<sup>286</sup>

- 4.177 WorkCover Queensland prefers to settle rather than go to court and therefore does not have a lot of matters at court.<sup>287</sup> When an injured worker reaches a level of stability in terms of their medical condition, their claim is escalated through their lawyer and goes through the common law arena so the person can move on with their life.<sup>288</sup>
- 4.178 People in Queensland can take an annuity by agreement. The structured settlements can be purchased for a person who receives a common law payout, which will give them some certainty of income over the longer term.<sup>289</sup>
- 4.179 The Labor Council of New South Wales commented that there are only two ways to manage the tail of a claim, and that is that you can buy out your liability through a lump sum or look at employment incentives and redeployment schemes to achieve a return to work for those claims.<sup>290</sup>

### Journey claims

- 4.180 The Council of Small Business Organisations would like to see a tightening in journey claims so that workers' compensation can revert to coverage at work, not to and from.<sup>291</sup> The Council argued that the workers' duty of care would support the view that workers are responsible for getting themselves to work safely, and that this might reduce the costs, as currently the no-fault system only leads to increased premiums for small business.<sup>292</sup> The Australian Industry Group also sees this as a potential

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286 HEMSEM, Submission No. 28, p. 4.

287 Ms Evron McMahon, WorkCover Queensland, Transcript of Evidence, 22 November 2002, p. 315.

288 Ms Evron McMahon, WorkCover Queensland, Transcript of Evidence, 22 November 2002, p. 322.

289 Mr Paul Goldsbrough, Queensland Department of Industrial Relations, Transcript of Evidence, 22 November 2002, p. 322.

290 Ms Mary-Louise Yaagar, Labor Council of New South Wales, Transcript of Evidence, 18 October 2002, p. 117.

291 Mr Michael Potter, Council of Small Business Organisations of Australia Ltd, Transcript of Evidence, 4 December 2002, p. 415.

292 Mr Michael Potter, Council of Small Business Organisations of Australia Ltd, Transcript of Evidence, 4 December 2002, p. 415.

massive weakness in most schemes but the volume of claims does not indicate that it is being exploited in a fraudulent manner.<sup>293</sup>

## The Committee's comments

- 4.181 A number of structural factors have been identified which may encourage or allow fraudulent behaviour by employees, employers, service providers, insurance companies and workers' compensation schemes. Much of the alleged fraud is due to a lack of understanding of the system and the perspectives of the other participants. A simpler approach, clarification of a number of issues and an educational approach for all participants may address many of these issues.
- 4.182 While it is generally accepted that the level of fraud by injured workers is minimal, fraudulent activity may be encouraged by various aspects of the scheme design and the manner in which the legislative imperatives are implemented in practice. While there needs to be greater consistency in legislative outcomes for the workers' compensation schemes nationally, many of the problems arise from the administration, practices and the attitudes of some employers, service providers, insurers and workers' compensation schemes.
- 4.183 The accountability of each of the sectors of the workers' compensation system needs to be enhanced to address the inefficiencies and lack of appropriateness and effectiveness of the practices. Significant improvements may be achieved by a lesser focus on potential fraud and greater attention to the consideration of best practice models.
- 4.184 There also needs to be better consideration of the overall scheme design and the goals, as there are many aspects where possible improvements are stifled by the inflexibility of the current processes. One important issue is the need to ensure that the trend to other employment arrangements does not mean that many workers are not covered by workers' compensation schemes.
- 4.185 In relation to injured workers, of particular concern are the return to meaningful employment, the support required for those who need major changes to their careers, and the need for explanation of the benefits of appropriate alternative options to a lump sum payment for those unable to return to work.

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293 Mr Mark Goodsell, Australian Industry Group, Transcript of Evidence, 18 October 2002, p. 55.

- 4.186 In many respects, the area of service provision provides opportunities for greater accountability and improved participation. The perception of fraud in relation to this sector of the industry reflects, in part, inadequacies and inefficiencies in the operation of the workers' compensation system, but this is perceived as fraud on the part of the services providers. A move to evidence based medicine and exception based reported will address many of these issues.
- 4.187 The extent to which insurance companies and workers' compensation schemes are able to simplify their procedures and provide an adequate explanation of these to the injured employees and their employers will determine the extent to which the perceptions of fraud on their part can be reduced. Inefficiencies and mismanagement not only add to their costs but also add to the perception of fraud.
- 4.188 Of concern to the Committee were the number of reports of inefficient, unethical and inappropriate actions by investigators who are engaged to monitor an injured worker's behaviour. The case was made strongly that these practices cause unnecessary stress for the injured worker and their families, this adds substantial costs to the investigation and these are often met by the employers and the resulting evidence produced by this method is often of questionable value. This is one area that should be relatively easily addressed and the Committee urges all jurisdictions to look at their activities in this area.