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**The New South Wales Workers'  
Compensation System:  
problems and proposed reforms**

by

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**Briefing Paper No 24/99**

## **RELATED PUBLICATIONS**

- Workers Compensation and Motor Accidents Compensation in NSW,  
Marie Swain: Briefing Paper No 039/95

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## EXECUTIVE SUMMARY

The NSW workers' compensation scheme has a current deficit of \$1.64 billion. The scheme has undergone substantial legislative changes since its inception due to cyclical deficit problems experienced. Recent reforms took place in 1998 and prior to that in 1995, 1996 and 1997. Further changes to the scheme were anticipated in 1999 but these have now been deferred to 2000. In particular, private underwriting has been deferred to October 2000 and other legislation for other cost cutting changes is due to be introduced into Parliament in 2000.

This paper is an update to an earlier *Briefing Paper* on workers' compensation in NSW. It briefly sets out the legal position of workers' compensation in NSW up until 1998 ( pages 2 - 11). In particular it looks at the common law position and the statutory position of workers' compensation in NSW and how the statutory scheme limits common law remedies available. It also looks at the changes made to the scheme in 1995 and 1996.

The paper then outlines and summarises the *Grellman Report* which was handed down in September 1997 (pages 12 - 16) and the legislative response to the *Grellman Report* in 1998 (pages 19 - 23). Finally the paper looks at the stakeholder views and proposals about the future sustainability of the scheme, in particular the move to establish breakaway funds in certain industries (pages 24 - 27), and further changes made to the scheme in 1999 and proposed changes in 2000 (pages 28 - 31).

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## 1. BACKGROUND

Workers' compensation in NSW is regulated by statute: the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*. The WorkCover Authority in NSW is a statutory body which is responsible for administering the workers' compensation legislation.<sup>1</sup>

This paper is intended as an update to an earlier *Briefing Paper*<sup>2</sup> on Workers Compensation in NSW. The earlier publication gives an account of workers' compensation up until November 1995<sup>3</sup>. This paper will look at changes to the scheme since that time, particularly in response to the *Grellman Report* in 1997<sup>4</sup>.

On 7 September 1999, at the official opening of Parliament<sup>5</sup>, the Governor's speech signalled proposed changes "...to ensure the sustainability of the WorkCover scheme".<sup>6</sup> This comes after substantial changes to the WorkCover scheme in 1998 (and prior to that in 1995, 1996 and 1997). The scheme has experienced financial difficulty at various points in time since its inception and has consequently seen widespread reform attempts by successive governments.<sup>7</sup> The substantial reforms in 1998 were an attempt to rid the scheme of financial difficulty. Recent reports have indicated that the deficit has been reduced from \$1.67 billion to \$1.64 billion in the 1998/99 financial year. The Attorney General and Minister for Industrial Relations, the Hon. J. Shaw QC MLC, has attributed this stabilisation of the deficit to the positive impact of the 1998 reform package.<sup>8</sup>

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<sup>1</sup> This statutory body was originally established under the *WorkCover Administration Act 1989* (NSW) (now repealed). It is now (as from 1 August 1998) constituted under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

<sup>2</sup> NSW Parliamentary Library Research Service, *Briefing Paper* No. 039/95, 'Workers Compensation and Motor Accidents Compensation in NSW' by Marie Swain, November 1995

<sup>3</sup> See the above *Briefing Paper* for a brief history of personal injury compensation and the development of workers' compensation statutory schemes in NSW (pp 3 - 18).

<sup>4</sup> *Inquiry into Workers' Compensation System in NSW, Final Report*, September 1997. Commonly referred to as the *Grellman Report*.

<sup>5</sup> Second session of the 52nd Parliament

<sup>6</sup> *NSWPD*, 7/9/99, p 3

<sup>7</sup> 'Injury fund in \$886m blowout', *The Daily Telegraph*, 25/12/98, p, 'This is no way to do business', *The Australian Financial Review*, weekend ed., 8-9/5/99, p 28; '\$1.7b deficit will rise' *Workers Compensation Report*, Issue No. 341, 19/1/99, p 1; 'Costa juggles his punches', *The Australian Financial Review*, 17/8/99, p 55

<sup>8</sup> WorkCover Authority of New South Wales, *Annual Report 1998/99*, p 68; 'Reforms slash WorkCover bill', *Sydney Morning Herald*, 1/12/99,

Further changes to the workers' compensation scheme, in particular private underwriting of the scheme, were due to take place in October 1999 but this has been delayed until October 2000.

This paper will briefly explain the legal position of workers' compensation in NSW, and address legislative changes (in particular since 1995). It will explore the reasons for further reform of the system in 1996 and 1997, and the establishment of the Grellman Inquiry in 1997. Also, it will set out the recommendations made by the *Grellman Report* and look at the legislative response to those recommendations in 1998. Finally, it will set out how the current WorkCover scheme works and industry/stakeholder views about the viability of the current scheme and favoured alternatives.

## 2. WORKERS' COMPENSATION UNTIL 1998

### 2.1 Legal Position (in particular statutory legal position) prior to 1995<sup>9</sup>

#### Common Law position - negligence actions

In general, a person's physical as well as mental interest will be protected under the common law of negligence where an injury results from a breach of duty of care by an employer<sup>10</sup>. The standard of care placed on the employer is quite high in that an employer has a duty to ensure that reasonable care is taken<sup>11</sup> to avoid exposing employees to unnecessary risks of injury. This includes an obligation to establish, maintain and enforce a safe system of work. The duty of the employer is also non delegable: as per *Kondis v State Transport Authority*<sup>12</sup>.

The potential scope for compensation payable under the common law, with respect to injury in the workplace, is wide. In order to obtain relief under the common law, a plaintiff must establish that there has been a *breach* of a legal *duty of care* by an *act or omission* which injures the plaintiff, and that there is sufficient *proximity* to establish the *foreseeability* of

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<sup>9</sup> The earlier *Briefing Paper* explained the background to workers' compensation in NSW both under common law and statute. Some of the following will recap certain information contained in the briefing paper.

<sup>10</sup> *Wilson & Clyde Coal Co v English* [1938] AIR CONDITIONER 57

<sup>11</sup> as opposed to the less onerous duty to take reasonable care: as per *Kondis v State Transport Authority* (1984) 154 CLR 672

<sup>12</sup> (1984) 154 CLR 672 at 534-537: that is, it cannot be delegated to independent contractors for example. As per Mason J who stated that "In the case of the employer there is no unfairness in imposing on him a non-delegable duty; it is reasonable that he should bear liability for the negligence of his independent contractors in devising a safe system of work"

the act.<sup>13</sup> Even though actions for negligence must pass a 'reasonably foreseeable' test which will rule out damage that is too remote, in past cases it is evident that the test can be applied narrowly or widely. In an action for negligence the *kind* of damage suffered by the plaintiff must be foreseeable, not the actual damage (or its extent).<sup>14</sup>

Under the common law, the scope is *potentially* limitless with regard to the permutations of a *kind* of damage. For example, in the case of *Mt Isa Mines v Pusey*<sup>15</sup> the plaintiff developed acute schizophrenia as a result of witnessing co-workers in a grisly condition as a result of an industrial accident. The Court held that it was foreseeable that an injury could result and that a person in the plaintiff's situation could suffer some kind of mental disturbance. As schizophrenia is a kind of mental disturbance it was held to be reasonably foreseeable. It was not seen as too remote.

Further, when the so-called 'egg-shell skull'<sup>16</sup> rule is applied, the potential scope is even wider, for example, where preexisting conditions/ sensitivities make the extent of the damage greater than usual.<sup>17</sup> In the case of *Robinson v Post Office*<sup>18</sup> a severe allergic reaction to a tetanus injection, which was administered as a result of a workplace accident, was foreseeable according to the 'egg shell skull' principle.

Compensation obtained under the common law is generally much higher than that obtained under statutory schemes, particularly in cases relating to non-economic loss such as pain and suffering.

Nonetheless, although the *potential* compensation under the common law is much higher, it is not always available. Statutory schemes provide 'no fault' compensation which means that the injured employee does not need to establish negligence at common law. That is, workers no longer have to individually bring an action of negligence against employers - with the attendant uncertainty as to the ability to get relief due to factors such as proving that the employer was negligent, and the defences available which remove or diminish entitlement to compensation under the common law. As noted in the earlier *Briefing Paper*, employers' liability in negligence cases could be limited where they raised successful

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<sup>13</sup> per Deane J., *Jaensch v Coffey* (1984) 155 CLR 549

<sup>14</sup> *Hughes v Lord Advocate* (1963) AIR CONDITIONER 837

<sup>15</sup> *Mt Isa Mines v Pusey* (1970) 125 CLR 383

<sup>16</sup> This rule requires that you take the victim as you find them. This means that even if the victim has some weakness or predisposition which would make the extent of their injury greater than that suffered by someone without the predisposition, the tortfeasor (employer in this instance) would be liable for the full extent of the damage: as per *Nader v Urban Transit Authority (NSW)* (1985) 2 NSWLR 501

<sup>17</sup> *Smith v Leech Brain & Co* (1962) 2 QB 405

<sup>18</sup> (1974) 2 All ER 737

defences in 3 particular areas<sup>19</sup>: where contributory negligence was successfully proven (which meant that the claim of the employee was totally defeated); voluntary assumption of risk (ie the risk, which gave rise to the injury was inherent in the work); and where the injury was caused by the negligence of a fellow worker.

However, in New South Wales, although a worker's ability to sue under the common law is maintained, it is limited by statute in certain areas. This is discussed further below on pages 5-6.

### **Establishment of a Workers' Compensation Scheme**

A statutory Workers' Compensation scheme was first introduced in NSW in some form in 1910. The *Workers Compensation Act 1926* replaced the earlier legislative regime. The 1926 legislation "...introduced the concept of compulsory insurance, licensing and regulation of insurers and it established a Commission which was to assist in the conciliation of disputes and where this could not be achieved, to adjudicate."<sup>20</sup>

The next significant changes to the scheme up until 1995 are summarised below (for greater detail see the earlier *Briefing Paper*):

- 1972 - proposal to create a national workers' compensation scheme to cover all injuries and diseases (Justice Woodhouse's committee of inquiry<sup>21</sup>): not acted upon.
- 1984 - NSW Workers' Compensation Commission disbanded and replaced with the State Compensation Board and the Compensation Court
- 1985 - major overhaul of system due to financial difficulties (premium rise from 2.65% in 1976/77 to estimated 4.3% in 1985): key objectives of the overhaul were the introduction of strategies to create and promote safe work environments and the efficient rehabilitation of injured workers. The legislation targeted insurance premiums, court delays and legal costs. Some of the measures introduced included:
  - Commissioners of the Compensation Court being subject to the Minister for Industrial Relations instead of the court, with non-lawyers being eligible for appointment.
  - Reduction of formality and technicality of proceedings before a Commissioner.
  - Cancellation of existing insurance licenses, with a smaller pool of participating insurers and new licensing criteria.
  - Compulsory premiums as determined by the Insurance Premiums Committee.

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<sup>19</sup> As the paper noted, these 3 defences were often referred to as the 'unholy trinity'.

<sup>20</sup> *op.cit.*, n. 2, p 7

<sup>21</sup> *Compensation and rehabilitation in Australia: report of the [Woodhouse] National Committee of Inquiry*, AGPS, 1974 (Chairman Hon Mr Justice A.O Woodhouse)

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- Prohibition of broker/agent commissions.
  - Workplace safety incentives such as employers' meeting first \$500 of each claim.
- 1986 - State Compensation Board published Discussion Paper which identified continuing problems with the workers' compensation system such as the increase in compensation payments despite a reduction in the number of injuries.
  - 1987 - *Workers Compensation Act 1987* introduced, which repealed 1926 legislation. A key feature was the abolition of availability of common law damages.
  - 1989 - restoration of (limited) common law rights.

## 2.2 The NSW Workers' compensation scheme and its interaction with Common Law remedies

Statutory schemes such as workers' compensation schemes limit, or are used in place of, common law negligence actions. The NSW workers' compensation scheme is essentially a 'no fault' scheme which means that fault does not need to be demonstrated (attached to an employer) before a worker can claim compensation. Workers can obtain weekly benefits under the scheme and, in addition to receipt of those weekly benefits, employees can obtain lump sum compensation for non-economic loss<sup>22</sup> under sections 66 and 67. Section 151 of the *Workers Compensation Act 1987* ('the Act') governs the circumstances in which common law remedies are available for non-economic loss under sections 66 and 67. These are as follows<sup>23</sup>:

- Under section 66 a worker can make a claim for lump sum compensation for permanent injuries sustained
- Under section 67 of the Act a worker can make a claim for compensation for pain and suffering (up to a certain sum, and in addition to other compensation payable under the Act) with certain restrictions as set out in the section
- Under section 151 of the Act a person to whom compensation is payable under the Act is not entitled to both permanent loss compensation (under section 66 or 67), *and* damages in respect of the injury from the employer liable to pay that compensation. The person is required to elect whether to claim permanent loss compensation *or* damages. An election is made (or is taken to have been made) by

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<sup>22</sup> That is, pain and suffering.

<sup>23</sup> Note: torts are actionable per se, that is they are actionable without proof of intention on the part of the defendant. With negligence claims, negligence of the employer must be established: ie breach by the defendant of a legal duty to take care, which results in damage to the plaintiff - reasonable foreseeability test.

various means such as<sup>24</sup>:

- commencing proceedings in a court to recover damages (s151A(3)(a)); or
- accepting payment of those damages (s151A(3)(a)).
- accepting payment of permanent loss compensation (s151A(3)(b)); or
- by the Compensation Court making an award in respect of that permanent loss compensation.

Once an election is made, a person is unable to claim compensation by the other means. If a worker accepts compensation under section 66 and 67 they are taken to have made an election not to bring a common law action against the employer. In certain circumstances (as set out under s151A(5) & (6)) leave of the court can be granted to a person to revoke the election, so as to commence proceedings in a court for recovery of damages.

Once a worker elects to proceed with Common Law action and is unsuccessful, they cannot then make a claim under section 66 or 67.

Alternately, if a worker proceeds with Common Law action and damages are awarded, a worker is no longer entitled to *any* workers compensation benefits (including weekly benefits) and any benefits already paid must be paid back.

- Under Part 5, Division 3 of the Act (sections 151E), common law damages are capped for non-economic loss
- Under sections 151H - 151J, damages for economic loss (eg wages) are limited

The effect of the provisions which cap damages is to shut out smaller claims and to limit non-economic loss payable.

### **Abolition of Common Law damages in 1987**

Common law damages, however, have not always been available to workers in NSW. In 1987, the Unsworth Government introduced extensive reforms to the workers' compensation system in NSW which included the abolition of common law damages.

There was strong opposition to the legislation, particularly by the legal profession and unions<sup>25</sup>.

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<sup>24</sup> Note, factors for consideration in whether a worker will choose to make an election to commence common law damages are: order for costs in common law action can be made against the plaintiff if the action is unsuccessful and a finding of contributory negligence can reduce the damages available. Panagoda & O'Dea state that this would more than likely be the case with respect to order for costs. 'Basics - Workers Compensation' *Young Lawyers Continuing Legal Education*, June 1999, p 14

<sup>25</sup> *op. cit.*, n. 2

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## Reinstatement of Common Law damages in 1989

Common law damages were reinstated (in modified form) by the passage of the *Workers Compensation (Benefits) Amendment Act 1989*. This legislation was introduced by the Coalition government as part of its 1988 election commitment to restore common law rights to workers.

In various jurisdictions, the ability to seek compensation under the common law has been drastically limited or removed due to its purported financial impact (on premium costs in particular). In the previous *Briefing Paper*, the arguments for and against retaining common law negligence actions were set out. These are reproduced below.<sup>26</sup>

### Arguments for retaining common law remedies

- only individual assessment of the kind applied at common law takes into account the special needs and circumstances of the plaintiff, which enables full compensation to be awarded.

This is the most often cited reason for favouring a determination at common law. It is argued that applying a statutory defined amount can lead to inequitable results, for instance, the same fixed lump sum for the loss of a body part or function, is available whether the person is a working adult or child. While other factors may help arrive at an appropriate assessment of the particular individual's loss, critics of the statutory scheme say that there should be more of a sliding scale which takes these differences into account.

- lump sum awards promote rehabilitation and encourage independence on the part of the accident victim.
- the fault principle is in accordance with community expectations. This reflects to a certain extent the earlier sentiment of retribution in that a specific person is identified as being blameworthy of a particular incident.
- liability based on fault acts as a deterrent against conduct which is dangerous to others; and
- victims' rights are protected by the courts which are best able to determine the appropriate level of compensation, are responsive to community needs and are not vulnerable to political control.

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<sup>26</sup> *op. cit.*, n. 2, pp 6-7. The summaries were based largely on those contained in the Attorney General's Department Report on *Motor Accidents: The Act and Background Papers, 1989*, pp 6-7. The arguments apply equally to workers' compensation.

**Arguments against retaining common law remedies**

- the inability to compensate people for lifelong disability;
- the deficiencies of assessing damages on a once and for all basis;
- the difficulties and inconsistencies which arise in assessing damages for non-economic loss;
- the delays and consequent hardship experienced by many accident victims in obtaining common law damages;
- the burden on the court system and the drain on judicial resources, caused by deciding claims arising out of transport and workplace accidents;
- the substantial legal and administrative costs associated with common law negligence action;
- the adverse effects of the common law negligence action on the rehabilitation of many transport and workplace accident victims. Given that assessment of damages is made at the date of hearing, to ensure that a higher amount is obtained, workers may be inclined to prolong their injuries;
- the failure of the common law negligence action to provide compensation for a substantial proportion of accident victims. In many accidents proving fault is often artificial, time consuming and difficult and where this cannot be established no compensation will be awarded;
- the failure of the fault principle to fulfil its stated aims and the practical difficulties of its application.

**2.3 Further changes to the workers' compensation scheme in 1995, 1996 and 1997****1995 package<sup>27</sup>**

Kevin Bennett, in his paper presented at the 3rd Annual Workers' Compensation Update in August 1998, entitled 'Overview of 1998 NSW Workplace Injury Management Legislation'<sup>28</sup>, has conveniently summarised the key features of the 1995 and 1996 package of reforms to the workers' compensation system in NSW. The main changes included:

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<sup>27</sup> Passed December 1995 and commenced 1 January & 1 February 1996

<sup>28</sup> Presented at the 3rd Annual Workers' Compensation Update Seminar, *Business Law Education Centre*, September 1998. Kevin Bennett is the Manager, Legislation & Advising Branch for the NSW WorkCover Authority.

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- Restrictions on claims for stress
  - Suspension of indexation of lump sum benefits
  - Deduction of pre-existing back impairment from lump sum entitlement
  - Eligibility threshold for hearing loss claims
  - Partial abolition of interest on lump sum benefits
  - Partial abolition of interest on damages
  - 3 year limit for making claims with later claims allowed if “in the interests of justice”
  - Requirements for lodgement of claim on employer/insurer & waiting period before litigation can be commenced
  - Insurers required to give written reasons whenever claim disputed
  - Cost penalties for unreasonable refusal of settlement offer
  - Various changes to conciliation and dispute resolution
  - Provision for return-to-work plans
  - Stronger measures against failure to obtain workers' compensation insurance (and initial amnesty period)
  - Measures against prohibited conduct by hearing loss claims agents
  - Introduction of provisions allowing regulations to prescribe maximum workers' compensation legal fees (subsequent regulations reduced fees by 10%)
  - New lump sum benefits for HIV/AIDS and serious bowel injuries
  - Increased penalties for workplace safety breaches
  - Removal of existing defence of ignorance for directors of corporations prosecuted for workplace safety breaches

### **1996 package - passed Nov 1996<sup>29</sup>**

Main changes included:

- Requirement for employment to be “a substantial contributing factor” to compensable injuries
- 25% reduction in maximum lump sum benefits
- Provision for possible discontinuation of weekly compensation after 104 weeks by reference to worker's return-to-work efforts
- Extension of provision for deduction of pre-existing impairment to all lump sum disability claims (previously limited to back, neck & pelvis claims)
- New conciliation arrangements, including compulsory conciliation before commencement of litigation
- Changes concerning status of medical panel certificates
- Introduction of provisions allowing regulations to restrict workers' compensation advertising by lawyers & agents (subsequent regulations effective 6 February 1998)

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<sup>29</sup>

Many of the provisions commenced in January 1997

- Restoration of no-fault workers' compensation cover on journeys between home and work

Some of the provisions inserted as a result of the 1996 package have had difficulty being interpreted by the Courts and have therefore given rise to uncertainty. An example is section 9A which states that no compensation is payable unless employment was a substantial contributing factor to the injury. One of the key difficulties relating to the judicial interpretation of this provision is the definition of 'substantial'.<sup>30</sup> It has been argued that due to conflicting interpretations arising in the Courts and the lack of cases dealing with the section in general, it is difficult to assess when employment is or isn't a substantial contributing factor with respect to injuries obtained in the workplace.<sup>31</sup> Interestingly, section 11A, which formerly contained similar wording (ie the requirement that employment be a substantial cause of psychological injury before liability was attached) was later changed to read that no compensation is payable in respect of a psychological injury if the injury was *wholly or predominantly* caused by reasonable action taken by or on behalf of the employer.<sup>32</sup>

## 2.4 Criticisms of the scheme

In spite of these changes, the workers' compensation scheme was the subject of continuing significant criticisms, particularly with respect to its deficit. It has been reported that during 1997-98 financial year the scheme accumulated a deficit of \$886 million, which represents a \$2.5 million deficit accumulating each day for the whole year<sup>33</sup>, although as noted earlier the recent publication of the WorkCover Annual Report for 1998/99 puts the current deficit at \$1.64 billion. Media commentary around the time highlighted that the scheme was in financial crisis.<sup>34</sup>

Some commentators claimed that the dire financial position of WorkCover lent itself to a

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<sup>30</sup> Brendan Kelly, Barrister-at-Law, NSW Bar, 'Legal Developments' (presented at *What's New in Workers Compensation Law & Practice* seminar on 28 July 1999) Legal and Accounting Management Seminars, July 1999

<sup>31</sup> *Ibid.*, n. 30, p 6. See also 'Workers Compensation: Essential Update', *Young Lawyers Continuing Legal Education*, 26 May 1999, for an account of significant cases relating to the interpretation of section 9A as well as 11A.

<sup>32</sup> Section 11A was inserted by the *WorkCover Legislation Amendment Act 1995*, No. 89. It was later amended by the *WorkCover Legislation Amendment Act 1996*, No. 120.

<sup>33</sup> 'This is no way to do business', *The Australian Financial Review*, weekend ed., 8-9/5/99, p 28

<sup>34</sup> 'WorkCover needs overhaul', commentary, Tony Selmes, *Sydney Morning Herald*, 29/11/97, p 67; 'WorkCover beyond repair: Auditor-General', *The Australian Financial Review*, 5/12/97, p 17; 'WorkCover in new blowout', *The Daily Telegraph*, 5/12/97, p 41; 'Auditor declares workers comp bankrupt', *Sydney Morning Herald*, 5/12/97

climate that would support the erosion of workers' rights, particularly with regard to the restriction of the ability to claim common law damages.<sup>35</sup>

As well as the poor financial position, the complexity and cumbersome administration of the system has been criticised.<sup>36</sup> A further criticism was the lack of stakeholder involvement in the system.<sup>37</sup>

Mary Yaager from the Labour Council of NSW<sup>38</sup> states that as well as losing money, the WorkCover scheme was experiencing many other difficulties which necessitated changes to the scheme in 1995, 1996 and further in 1998:

- The WorkCover scheme was ... [losing] ... money at an alarming rate.
- Premiums had increased from 1.8% to 2.5% to 2.8% and even at this rate did not cover the cost.
- The previous system was quite clearly failing employers and workers.
- Workers' duration on weekly benefits had significantly increased from 6% to 12%.
- Rehabilitation costs had increased dramatically - \$10 million to \$50 million and there was no impact whatsoever on return to work rates.
- The scheme was clearly out of control - a deficit of \$1.9 billion has been estimated, ie: the difference between estimated liabilities and assets.

The Hon. Jeff Shaw QC MLC, in his second reading speech on the 1998 legislation (see below for more detail), confirmed the reasons for further reform of the system:

As honourable members will recall, the Government brought forward significant legislative packages in 1995 and 1996 to deal with the WorkCover scheme cost problem ... While those earlier measures, which included reductions in benefits, have allowed considerable savings, I subsequently instigated the Grellman inquiry in April 1997 in view of the continuing deterioration in the scheme's overall financial position.<sup>39</sup>

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<sup>35</sup> Don Cameron, 'Grellman or gruel? Searching for a just and workable system of workers compensation', *Plaintiff*, February 1998, p 3

<sup>36</sup> *op. cit.*, n. 35, p 4

<sup>37</sup> *op. cit.*, n. 35, p 3

<sup>38</sup> 'The Union's View on the Barriers' *What's new in workers' compensation law and practice*, New South Wales, Legal and Accounting Management Seminars Pty Ltd. Note: Mary Yaager is a member of the NSW Workers' Compensation Interim Advisory Council

<sup>39</sup> *NSWPD*, 26/6/98, p 6707

### 3. THE GRELLMAN INQUIRY - RECOMMENDATIONS FOR CHANGE

As noted above, an inquiry into the workers' compensation scheme in NSW was instigated by the NSW Attorney General, Hon. Jeff Shaw QC MLC, and referred to Richard Grellman on 2 April 1997.<sup>40</sup> The final report was handed down on 15 September 1997. It outlined the financial progress of the WorkCover scheme (part 3), identified the weaknesses within the NSW system (part 4) and made several key recommendations to address the weaknesses (part 6 & 7). A summary and extracts from these three areas of the report will be outlined below.

#### 3.1 Financial progress of the WorkCover scheme

Grellman discussed at length the financial progress of the WorkCover scheme. As at 30 June 1996 Grellman reported that the deficit was \$454 million and worsening.<sup>41</sup>

##### Premium rates

Grellman noted that from 1985/86, the Insurance Premium Committee<sup>42</sup> (IPC) used a regulated premium formula which was characteristic of a publicly underwritten scheme even though the scheme was privately underwritten. The use of a regulated premium formula enabled the Committee to establish an average premium rate which was called the *target premium rate* which could be apportioned to employers based on their experience. The result being that even though the premium rate varied among employers (based on risk) premiums could be collected which were equivalent to the target premium rate.

The target premium rate was calculated by obtaining "...advice on an appropriate average premium rate for claims incurred on policies written during the coming financial year, termed a policy year."<sup>43</sup>

An experience-based premium rate formula was introduced by the Committee which became the maximum that insurers could charge an employer. The final premium, using the formula, was determined by blending an *industry classification premium* and an *experience premium* (with the target premium rate factored into both the industry classification and experience premium). Larger employers' premiums were weighted more heavily towards their experience than smaller employers.

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<sup>40</sup> *op.cit.*, n. 4, p 3

<sup>41</sup> *op. cit.*, n. 4, p 15

<sup>42</sup> The Committee recommended premium rates to the insurance industry.

<sup>43</sup> *op. cit.*, n. 4, p 16

The target premium rate in the 1986/87 policy year was 3.8% of wages. The Government subsequently introduced changes which included ending private underwriting and moving to public underwriting of the scheme. IPC's role continued as before even after the birth of the WorkCover system in 1987 and its associated reforms. Following changes to the scheme the target premium rate for the 1987/88 policy year was 3.2% which, Grellman noted, ultimately proved to be twice what was required.

Grellman noted that there were early signs that a surplus would emerge following the commencement of the new scheme. This became evident with the actuaries' report in 1988 that claims were extraordinarily low, coupled with the IPC's continued maintenance of the target premium rate at 3.2% of wages for the 1988/89 policy year. In subsequent years the target premium rate continued to drop which contributed to the financial success of the scheme for several years :<sup>44</sup>

- 1989/90 - **2.6%**(Note: IPC dissolved and responsibilities assumed by the Board of WorkCover<sup>45</sup>)
- 1990/91 - **2.0%**(Note: in May 1990 the Board revealed the surplus of the scheme had reached \$1.1 billion)
- 1991/92 - **1.8%** (the minimum level reached - Grellman notes that at this time the true cost of claims was estimated to be higher but the difference was being offset by investment income on the surplus). 1.8% premium rate maintained for the next 3 years.

#### *Deterioration of the scheme*

Following several successful years with low premium rates, the condition of the scheme started to deteriorate<sup>46</sup>:

- 1992 - **Scheme shows signs of deterioration** due to unfavourable trends (for example, the increase in number permanent impairment payments under section 66 of the Act, and the deterioration in the number and size of pain and suffering awards under section 67).
- 1994 - **Deterioration continues** - particularly permanent impairment lump sum payment recipients, pain and suffering and weekly payments in excess of 26 weeks, higher than expected claim numbers. Surplus continued to subsidise premiums.

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<sup>44</sup> *op. cit.*, n. 4, pp 16-20

<sup>45</sup> Following the passage of the *WorkCover Administration Act 1989*

<sup>46</sup> *op. cit.*, n. 4, pp 20-22

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- 1995/96 - **Scheme collapses.** Surplus eroded by almost \$1 billion due to adverse claims and poor investment experience. Target premium rate was set to **2.5%** - which was an increase of 39%. It was estimated that an increase of 56% was required to maintain full funding.
  - 1996 - **Various cost containment measures introduced** from 1 January 1996, including the suspension of further increases to permanent impairment and pain and suffering maximums (sections 66 and 67), reduction in certain permanent impairment awards for pre-existing conditions, 6% threshold on deafness claims and restricting stress claims.
    - Grellman noted that only moderate cost savings were achieved due to these measures.
    - The published deficit as at 30 June 1996 was \$454 million.
    - Target premium rate increased to **2.8%** even though the projected rate required was 3.11%.
  - 1997 - **Second amendment package introduced** from January 1997 which included: a further reduction (25%) in permanent impairment and pain and suffering awards; limiting claims to cases where employment is a “substantial contributing factor”; review of weekly compensation benefits after 2 years; and a new trial conciliation process.
    - Adverse trends continued to exceed expectation and Grellman notes that the package was unlikely to reduce the deficit.

Underfunding seems to be a substantial contributing factor to the cyclical deficit problems faced by the WorkCover scheme. As seen above, even when the target premium rate was quite low, it still did not reflect the true cost of the scheme and the shortfall was being met by the surplus. This set a precedent which could not be maintained when the surplus started to deplete. This was echoed by the Attorney General the Hon. Jeff Shaw QC MLC, in response to budget estimate questioning before a General Purpose Standing Committee in 1997:

It was obvious many years ago that WorkCover was being underfunded and that the premium was simply too low to meet the expenditure. This Government is attempting to stabilise those premiums.<sup>47</sup>

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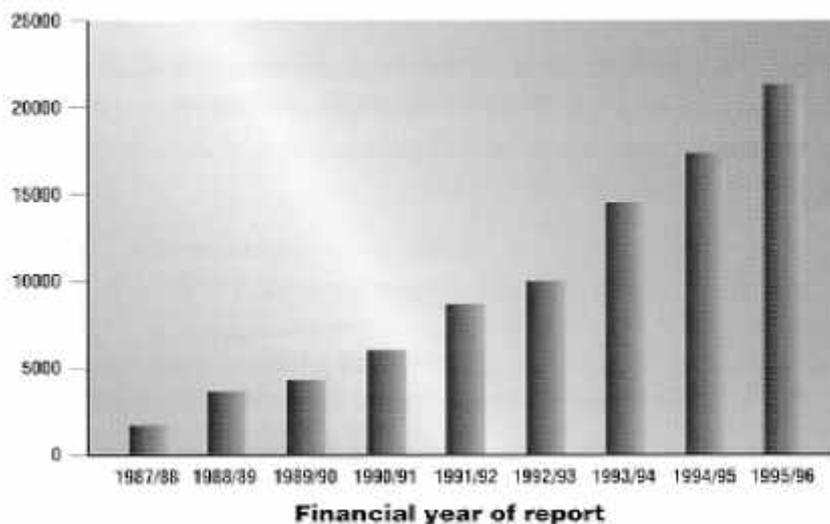
### Key financial cost drivers

Grellman found that the key financial cost drivers “...responsible for the deterioration of the Scheme’s financial position were primarily permanent impairment and pain and suffering awards, and the deterioration in the duration of weekly benefits.”<sup>48</sup> With additional key cost drivers being commutations, and disputes and litigation.

#### *Permanent impairment and associated pain and suffering*

Grellman reported that permanent impairment and the associated pain and suffering awards had deteriorated for several years. The following graph reproduced from the report displays the increase:

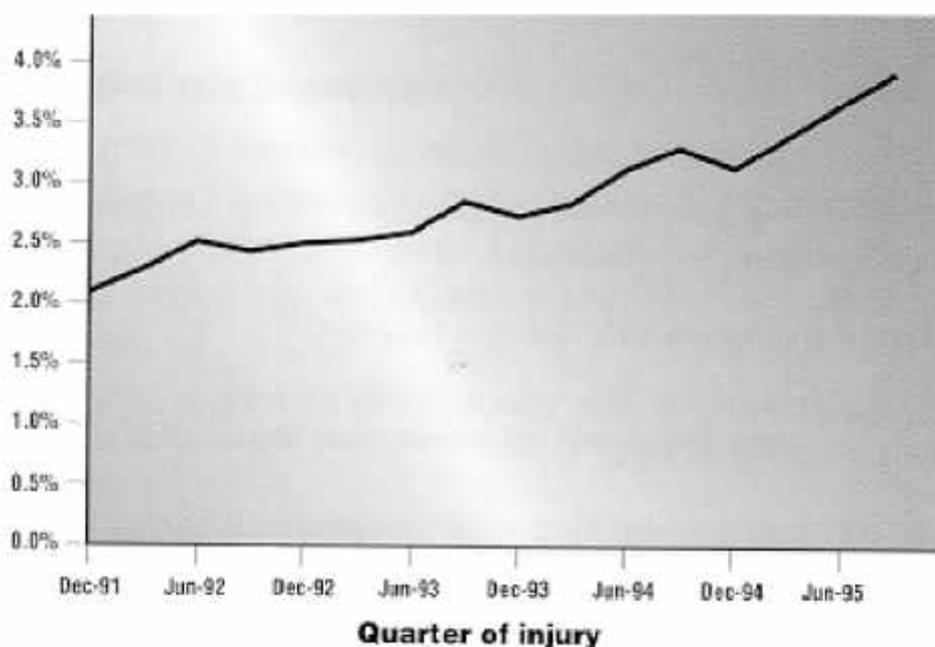
**Figure 3.1: Number of permanent impairment (section 66) claims reported by financial year.**



### *Deterioration in duration of weekly benefits*

The deterioration in duration of weekly benefits related to the increase in the length of time of weekly benefit recipients. The following graph, also from the report, displays the increase in the length of time recipients are on weekly benefits:

**Figure 3.3: Proportion of claims incurred still on weekly benefits after 26 weeks**



### **3.2 Weaknesses in the NSW system according to the Grellman Report**

The central weaknesses in the NSW system, according to the Report, were the marginalisation of the stakeholders, in particular the employers and insurers. The Report found that a common concern among stakeholders, such as workers and employers, was that fundamental changes were made to the scheme without their consultation. In addition to the marginalisation of stakeholders Grellman also found several other structural weaknesses in the system<sup>49</sup>:

- *Lack of stakeholder ownership* in most aspects of the system, including injury management processes, regulation, premium and benefit structures, and formulation of legislation.
- *Lack of legal and financial accountability* and control of statutory funds.
- *Lack of incentives for licensed insurers* to research and implement best practice

<sup>49</sup> These are reproduced below. *op. cit.*, n. 4

injury management processes.

- *Heavy regulation of licensed insurers* leading to less than optimal injury management.
- *Conflicting roles of WorkCover*, preventing it from carrying out its roles effectively.
- *Deficiencies in the premium system* which create inequities for small employers and which do not provide sufficient recognition for prevention and injury management programmes.
- *A flawed benefit structure* where a litigious lump sum approach to the delivery of benefits has developed.
- *Insufficient incentives for early resolution of disputes* subject to the performance of the...[Workers Compensation Resolution Service]... pilot programme and an expensive infrastructure for the hearing of litigated matters.
- *Complex and disjointed legislation*.

### 3.3 Recommendations

The report made several key recommendations:

#### Stakeholders

- Formation of the NSW Workers' Compensation Advisory Council whose responsibilities are to:
  - devise the new legislation and regulations, based on the proposed model;
  - implement the new system by 1 July 1998;
  - recommend ongoing changes to the system; and
  - provide advice to key participants in the system.
- Formation of Industry Reference Groups to focus on issues affecting particular industries and develop practical advice for workers and employers in areas such as prevention strategies and injury management.

#### Underwriting

- Transfer of the underwriting function to a limited number of licensed insurers who are subject to a regulated *file and write* premium system.
- Introduction of more detailed industry classifications based on the Australian and New Zealand Standard Industrial Classification system.
- Formation of the NSW Workers' Compensation Rating Bureau, which will be responsible for developing the industry classification premium rates and experience rating premium system.
- Development of a comprehensive centralised database containing unit record information, supplemented by industry standard forms for most aspects of the system.
- Alteration of self insurance licence requirements to permit outsourcing of claims management and reduce the minimum number of full time NSW workers required to 750.

**Benefit Structure**

- Implementation of a benefit structure that provides greater incentives for workers, employer and insurers to actively manage injuries with a focus on return to work.
- Statutory benefit structure to provide:
  - weekly benefits during incapacity prior to maximum medical improvement;
  - a lump sum in recognition of non-economic loss assessed as the worker's whole of body work-related permanent impairment percentage applied to a maximum amount;
  - weekly benefits for workers with a permanent impairment for a specified number of weeks, which may be commuted;
  - weekly benefits for long term incapacity, based on the reduction in earning capacity;
  - death benefits; and
  - coverage of reasonable medical expenses.
- Access to modified common law provisions for seriously injured workers, with a whole of body work-related permanent impairment in excess of 25%.

**Injury management**

- Implementation of an injury management process that focuses on early intervention through prompt reporting and the establishment of a return to work programme to effect a timely return to work at the highest possible level of earnings for the worker.

**Dispute resolution**

- Integration of the Compensation Court with the District Court.
- Implementation of a three-tiered dispute resolution process that involves :
  - screening of disputes by WorkCover with return to insurer for review if appropriate;
  - compulsory conciliation, based on the Street model<sup>50</sup>; and
  - Court proceedings, which are subject to the Final Offer Adjudication Principle.

**Legislation**

- Drafting of new, plain English, legislation and regulations to incorporate the proposed model.

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<sup>50</sup>

This refers to the compulsory conciliation system recommended by Sir Laurence Street who suggested that the conciliation process should be separated from the court process (ie separated from the compensation court) - as mentioned by the Attorney General, *NSWPD*, 3/6/97, p 9949; Sir Laurence Street *Report on a Model of Conciliation for the New South Wales WorkCover Scheme*, July 1996.

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### 3.4 Common law damages

Interestingly the *Grellman Report* did not recommend the abolition of availability of common law damages for workers but only recommended its restriction to seriously injured workers. This is different to other states which have abolished the ability to sue for common law damages under their respective workers' compensation legislation.<sup>51</sup>

Perhaps the reason for not adopting a similar stance in this regard is that this change had already been tried in NSW in 1987 (as referred to above) and its general unpalatability is reflected in the subsequent repeal of this enactment by the legislature (under the Greiner Government) in 1989.

### 3.5 Criticisms of the Grellman Report

One critic of the *Grellman Report* (D. Cameron) wrote that the suggestions were perceived as an attack on rights which were currently barely sufficient. As a result, he argued that several of the recommendations should be rejected including the adoption of AMA Guides<sup>52</sup> as the basis for assessment of permanent disability, and the integration of the Compensation Court into the District Court. He did, however, favour other recommendations such as the retention of access to common law damages.<sup>53</sup>

## 4. CURRENT WORKCOVER SCHEME - RESPONSE TO THE GRELLMAN REPORT

In 1998 the Workers' Compensation system was subject to further significant changes based on the Grellman Report. This section will look at these changes and the operation of the system in light of them.

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<sup>51</sup> For example, in Victoria. For details relating to the Victorian experience see: *The Law Institute Journal* November 1999 which is a special issue dealing with WorkCover in Victoria; *The Financial Review* 3/11/99; Also the Victorian scheme and the abolition of common law damages claims is discussed in 'WorkCover 1997 and the Abolition of the Common Law', *Australian Journal of Labour Law*, vol. 11, no. 3, December 1998, pp 186 onwards; and an overview of changes to the Victorian Workers' compensation legislation is also discussed by Michael Little at the Business Law Education Conference on 30 September 1998 in the *3rd Annual Workers Compensation Update*.

<sup>52</sup> American Medical Association's guidelines.

<sup>53</sup> *op. cit.*, n. 35

#### 4.1 1998 changes to workers' compensation and the WorkCover scheme<sup>54</sup>

The *Workers Compensation Legislation Amendment Bill 1998* and the *Workplace Injury Management and Workers Compensation Bill 1998* were both introduced in the Legislative Council on 26 July 1998, with their second reading on the same day. The Bills were both assented to on 8 September 1998. Both Acts made extensive changes to the WorkCover scheme.

Significant changes to the workers' compensation scheme include:

- private insurance company underwriting of the scheme (original deferred to October 1999, now deferred to October 2000 - see below)
- greater injury prevention and management
- improved rehabilitation measures
- establishment of Industry Reference Groups to advise on industry specific issues
- advisory council established (consisting of key stakeholder representatives) to advise, and recommend to, the government legislative changes<sup>55</sup>

In the Attorney General's second reading speech on the Bills he stated their object as:

...to provide a strong focus on pro-active management of injuries; to reform provisions relating to weekly benefits, review and settlement of claims, dispute resolution, insurance and premiums; and to provide fundamental reform of scheme administration by placing ownership and control of decisions in respect to legislative reform into the hands of the stakeholders. The bills are designed to implement the consensus proposals developed by the Interim Workers Compensation Advisory Council appointed by me in September 1997 following the release at that time of Richard Grellman's report entitled, "Inquiry into the Workers Compensation System in New South Wales".<sup>56</sup>

As we can see, one of the key features of the current scheme after the 1998 changes is the greater involvement of key stakeholder groups in the management of workers' compensation in NSW. The stakeholder groups have greater involvement through their representation on the Advisory Council which is a body established to consider, advise and report on any policy changes and recommendations to the Attorney General.

The opposition, whilst not opposing the legislation, indicated that the reforms did not go far enough:

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<sup>54</sup> Note: for a discussion about the changes made particularly as they relate to OH&S, and for a discussion about workplace safety in general, see the Legislative Council Standing Committee on Law & Justice *Final Report of the Inquiry into Workplace Safety*, November 1998.

<sup>55</sup> *Press Release*, NSW Attorney General and Minister for Industrial Relations, 26/6/98

<sup>56</sup> *NSWPD*, 26/6/98, p 6706

Clearly there are problems with the system, and the Government's approach has been not to pursue a dramatic change to the benefits payable. The costs of the scheme have gone through the roof. If that happened because of the amount that had to be paid out, one could logically assume that to get costs under control one would need to examine that element of the scheme. However, the working party...does not recommend dramatic change. The working party has proposed two areas of change, one of which relates to injury management. ...The opposition believes that the fund needs to be administered with real discipline. If a levy is to be imposed, it should be the subject of a specific amendment to the legislation and debated when the real costs of the scheme and the liability of the fund are known.<sup>57</sup>

## 4.2 How does the scheme operate?

The changes to the scheme made by the *Workers Compensation Legislation Amendment Bill 1998* and the *Workplace Injury Management and Workers Compensation Bill 1998* are:<sup>58</sup>

### Advisory Council

Under the scheme an Advisory Council is appointed which is made up of 10 voting members and 2 non-voting members representing key stakeholder groups, as well as a Chairman with limited voting capacity<sup>59</sup>:

- employers (5 representatives): appointed by the Minister
- employees (5 representatives): appointed by the Minister, nominated by the Labor Council
- insurers (2 non-voting representatives): appointed by the Minister, nominated by the Rating Bureau
- General Manager of WorkCover: Chairman, limited voting capacity

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<sup>57</sup> NSWPD, 26/6/98, pp 6956, 6960

<sup>58</sup> These are outlined by Charles Vandervord in a paper presented by the NSW Young Lawyers on 5th August 1998 entitled 'The New Workplace Injury Management & Workers Compensation Legislation', *Young Lawyers Continuing Legal Education*, NSW Young Lawyers, the Law Society of NSW. Some of the information from the paper will be included below.

<sup>59</sup> Ministers' second reading speech on the Bills, NSWPD, 26/6/98, p 6707

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The current members of the Advisory Council are<sup>60</sup>:

*Chairperson*

John Grayson, General Manager  
WorkCover Authority of NSW

*Employer Representatives*

Garry Brack, Employers' Federation  
Bill Healey, The Retail Traders' Association of NSW  
Ken Young, Self Insurers Association  
Mark Goodsell, Australian Industry Group  
Greg Pattison, Australian Business Limited

*Employee Representatives*

Andrew Ferguson, CFMEU  
Tony Sheldon, Transport Workers Union of Australia  
Mary Yaager, Labor Council of NSW  
Sandra Moait, NSW Nurses Association  
Ian West, Australian Liquor, Hospitality & Miscellaneous Workers Union

*Insurer Representatives*

Dallas Booth, Insurance Council of Australia  
Robert Thomson, Zurich Workers Compensation

The council has various functions, which include:

...firstly, responsibility for making recommendations to the Minister regarding the objectives and policy directions of the workers' compensation legislation; secondly, monitoring and reporting on the effectiveness of the legislation and indicators of the scheme's financial viability; and thirdly, responsibility for making recommendations to the Minister regarding amendment of the legislation.<sup>61</sup>

**Industry Reference Groups**

13 Industry Reference Groups were established by the Advisory Council in 1998, following the passage of the *Workplace Injury Management and Workers Compensation Act 1998*.

The 13 groups are :

⇔ rural	⇔ construction
⇔ mining	⇔ industrial manufacturing
⇔ consumer manufacturing	⇔ wholesale
⇔ retail	⇔ transport and storage

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<sup>60</sup> Information obtained through the web site at: <http://www.workcover.nsw.gov.au>

<sup>61</sup> NSWPD, 30/6/99, p 1760



- to provide advice, statistical and actuarial information on Scheme performance and costings, and provide costing estimates in relation to any proposals for change.
- to provide advice in the development of worker's compensation insurance industry standards.<sup>65</sup>

### Strategies for prompt return to work

The issue of prompt return to work for injured workers is a critical one, as it is a primary factor for reducing costs. As noted earlier, Grellman found that one of the key cost drivers of the scheme was the increase in the number and duration of long term benefit recipients. The longer the time spent away from work, the greater the cost burden on the scheme. Early pro active workplace based intervention is a key feature to reduce financial and social burden.<sup>66</sup> To this end the 1998 reforms target several areas to maximise the numbers of (and speed with which) workers are able to return to work. For example, there are requirements for employers to report significant injuries within 48 hours, as well as the requirement that insurers implement an overall Injury Management Program to integrate aspects of injury management. Workers are required to notify injuries as soon as possible. Other reforms include increased conciliation opportunities.

#### 4.3 Have the changes met expectations?

As noted earlier, WorkCover has a reported deficit of \$1.64 billion.<sup>67</sup> It is difficult to as yet determine whether the 1998 reforms have had sufficient time to make any substantial impact on the deficit. Nonetheless, the Attorney General indicated, in response to a question, that there were some positive signs that the deficit has been stabilised because of the reforms:

There are some very positive trends in the workers compensation scheme. The deficit is being reduced, and the actuarial estimate of the premiums has been significantly reduced in recent times.<sup>68</sup>

According to WorkCover, scheme costs are generally expressed as a percentage of the total wages bill that the Scheme insures in NSW. In 1998/99 the wages bill was approximately \$71 billion dollars for all insured employers. The target income for the Scheme was \$1.99 billion, or 2.8% of the wages bill for the state. Prior to the 1998 reforms, Scheme costs were 3.27%. This is referred to as the underlying cost. The 1998 reforms have reduced the underlying cost to 2.95%, saving \$170 million dollars on an annual recurrent basis.

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<sup>65</sup> *op. cit.*, n. 58, p 7

<sup>66</sup> Pauline Dunn, 'A Case Management Perspective on the Relationship between OH&S, Workers' Compensation & Rehabilitation', *op. cit.*, n. 38, p 5

<sup>67</sup> *op. cit.*, n. 8

<sup>68</sup> NSWPD, 13/10/99, p 1361; 'Reforms slash WorkCover bill', *Sydney Morning Herald*, 1/12/99

Workers compensation insurance is known as “long tail” business. That is, claims continue to be paid out over a long period, rather than being resolved in a single settlement. At 30 June 1999, there were 107,100 open claims with outstanding liabilities of \$7.554 billion. Consequently, the Scheme has substantial assets to meet these long term liabilities. At 30 June, the Scheme statutory funds comprised assets of \$5.918 billion. Accordingly, the scheme has a net deficit of \$1.636 billion. Prior to the 1998 reforms, the deficit was expected to exceed \$2 billion by 30 June 1999.

### **Factors contributing to the deficit**

Nonetheless, there are competing views among stakeholders as to the contributing factors to the existing WorkCover deficit. For example, there is a perception that fraudulent claims on the part of employees are a major factor<sup>69</sup>, and union groups argue that employer avoidance of premium payments (through methods such as understating the number of employees for example) are a major factor. These views are outlined further below.

Whilst employer and employee fraud may be a factor, it is difficult to assess the exact extent of such fraud and its impact on the scheme. In particular whilst there is the feeling that fraud may be more prevalent amongst one group over the other, the Insurance Council of Australia have stated that anecdotal evidence suggests that employer and employee fraud was roughly equal and that “...no actual figures on the amount of ...[workers compensation]... fraud by employers or employees are available”.<sup>70</sup>

The cost contributors to the scheme would seem to be more complex (than simply fraud) and due to several factors. Some of these factors were outlined above (with regard to the *Grellman Report* findings) - in particular the consistent underfunding of the scheme:

- **Underfunding of the scheme/ Premiums not reflecting the ‘real’ cost of the scheme**

As noted earlier, the *Grellman Report* indicated that there was consistent underfunding of the scheme in the early 1990’s due to premiums being kept artificially low. This did not pose a problem while there was a surplus to meet the shortfall. However, after the surplus depleted the low premium rate could not be maintained and there was a substantial increase in the rate from 1.8% in 1994 to 2.5% in 1995 and 2.8% in 1996.

Some commentators, such as Ellis, have echoed the view that underfunding of the scheme is the central reason for the scheme’s ongoing difficulty:

Full funding is an objective of all of the Australian government-managed WorkCover schemes...In effect, full funding means that employers pay sufficient premium to meet the full ultimate cost of injuries sustained during the

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<sup>69</sup> *op. cit.*, n. 70

<sup>70</sup> ‘Employer fraud overshadows “bludger” myth’, *Workers Compensation report*, Issue No. 361, 26/10/99, p 1, 4

period of cover.<sup>71</sup>

Interestingly, the deferral of private underwriting of the scheme was due to an indication that premiums may be set to rise under a privately underwritten scheme.<sup>72</sup> This could be a possible indication that the scheme is currently being underfunded. Further:

...the Industrial Relations Minister, Mr Shaw, said yesterday that there would need to be cost-cutting changes next year because the underlying costs of the WorkCover scheme were still greater than the revenue generated from premiums.<sup>73</sup>

- **Long term injured/ long term claims** (long term payment recipients - over 26 weeks): it has been suggested that long term claims are the most expensive<sup>74</sup>
- **Permanent disability** (as per *Grellman report*)
- **Availability of common law damages**
- **fraud related cost**

#### 4.4 Future sustainability of the scheme - Stakeholder views and proposals

The WorkCover scheme has come under attack from various quarters. In particular some unions and the Labor Council have stated that they are interested in establishing separate funds.

##### Unions

###### *Greater compliance with premium payments*

The CFMEU have argued that there is a need for greater vigilance with respect to clamping down on non-payment of premiums by employers. The CFMEU believe that if there is a greater clamp down on non-payment this would assist an overall (or allow an overall) reduction in premiums. This proposal was passed on to the Advisory Council for its consideration.

The union expressed extreme dissatisfaction with delays in accepting/ or considering the above proposals and have stated that the State Government "...have been tardy and

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<sup>71</sup> 'Unfunded workers' compensation liabilities - What are the consequences for stakeholders?', *The Australian Insurance Institute Journal*, vol 21, no. 5, October/November 1998, p 5

<sup>72</sup> Hon. Jeff Shaw QC MLC, *NSWPD*, *op. cit.*, n. 61

<sup>73</sup> 'Reforms slash WorkCover bill', *Sydney Morning Herald*, 1/12/99

<sup>74</sup> 'The New Workplace Injury Management & Workers Compensation Legislation', *Young Lawyers Continuing Legal Education*, Law Society of NSW, August 1998, p (iv); *op. cit.*, n. 66, p 5

incompetent in the way they have handled this issue".<sup>75</sup>

*Proposal to disassociate from the scheme*

The CFMEU held protests in July this year due to the reported concern, as noted above, with industry non-compliance of premium payments. The Union has put forward a proposal to establish a breakaway fund to protect members.<sup>76</sup>

## **Labor Council**

*disaggregating*

The NSW Labor Council also favoured a move to disaggregate the scheme. Its secretary, Mr Michael Costa (also a WorkCover Director) stated that:

...he favoured disaggregating the scheme into dedicated industry-wide insurance schemes that offered tailored solutions to injury management - a proposal similar to the self insurance scheme being pushed for by the Construction Forestry Mining and Energy Union.<sup>77</sup>

The move to disaggregate the scheme appears to have been accepted, with recent reports stating that the Attorney General will introduce a package into Parliament in 2000 that has provision for breakaway workers' compensation schemes (where supported by unions and employers).<sup>78</sup>

## **Insurers**

*private underwriting*

Insurers do not want private underwriting to be delayed. They believe the reforms should be brought in as soon as possible, with premiums reflecting the true cost of the scheme:

The Industry believes that it would be just delaying resolution of a problem for a scheme that's clearly under funded and will continue to be so until the private underwriting aspects of the reforms are introduced. ...

There is an air of unreality on behalf of advisory council members that a bit of tinkering at the edges will fix a problem of that magnitude. That's why

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<sup>75</sup> 'CFMEU ready for strike action', *The Australian Financial Review*, 7/6/99, p 7

<sup>76</sup> 'Building workers block city for a breakaway 'work cover'', *The Sydney Morning Herald*, 29/7/99, p 8

<sup>77</sup> 'Workers' compensation reforms hit another snag', *The Australian Financial Review*, 28/6/99, p 6

<sup>78</sup> 'Reforms slash WorkCover bill', *Sydney Morning Herald*, 1/12/99

they have to embrace more significant reform.<sup>79</sup>

### **Workers' compensation practitioners/ legal profession**

#### *Employee fraud*

Some Workers' Compensation practitioners have argued, that employee fraud was a 'negligible component' of workers' compensation cost and not to blame for increased premiums. To support this view, 16 official inquiries (in Australia) were cited by the practitioners as showing no evidence that there was "...widespread fraud, malingering or malpractice by employees".<sup>80</sup>

Instead, Simon Garnett (one of the practitioners), supported the union view that concern or "...accusations of fraud in ...[workers' compensation]...schemes would be more appropriately levelled at employers who avoid paying ...[workers' compensation]... insurance, thereby placing workers at risk of not being compensated for work-related injuries and illness." According to Garnett, "WorkCover authority audits have exposed tens of thousands of employers under - and over - declaring in recent years".

### **Insurance Council of Australia**

#### *Fraud*

As mentioned earlier, and unlike the view expressed by Garnett, above, the Insurance Council of Australia has stated that anecdotal evidence suggests that employer and employee fraud was roughly equal.<sup>81</sup>

### **NSW Employers' Federation**

#### *Long term workers' compensation recipients*

The President of the NSW Employers' Federation, Garry Brack, has expressed the view that the substantial reason for the increased costs of the workers' compensation scheme in NSW is the increase in the number of long term workers' compensation recipients. Long term recipients are defined as those receiving workers' compensation benefits after 26 weeks.<sup>82</sup>

## **5. FURTHER CHANGES TO THE SCHEME - 1999**

### **5.1 Private Underwriting of the Scheme - deferral of 1 October 1999 start date**

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<sup>79</sup> 'Don't delay reforms: insurers', *The Australian Financial Review*, 8/6/99, p 6

<sup>80</sup> *op. cit.*, n. 70

<sup>81</sup> *ibid.*, n. 70

<sup>82</sup> *ibid.*, n. 70

Private underwriting of the NSW workers' compensation scheme was due to commence on 1 October 1999. However, this has been delayed by the legislature through the passage of the *Workers Compensation Legislation Amendment Act 1999*, which was assented to on 8 September 1999. The Act amended the *Workplace Injury Management and Workers Compensation Act 1998* and the *Workers Compensation Act 1987* to defer the start date for private insurance from 1 October 1999 to 1 October 2000. In his second reading speech, the Attorney General outlined his reasons for the deferral of private underwriting workers' compensation insurance. In particular, he noted that the primary reason is the concern that there will be premium rate increases under the new system:

...the advisory council has recently recommended that amendments be made to defer private underwriting. That recommendation has led to the present bill. The recommendation, incidentally, has the agreement of council members representing both employers and employees. The council has advised that deferral of the privately underwritten system is appropriate, primarily because of concerns about likely premium rates under the system. In particular, there are indications that average premium rates to be charged by insurers under the new system are likely to increase.

That is based on consideration of an initial submission recently lodged on behalf of insurers that details proposed basic methods for risk premium assessment. It also takes account of premiums actually expected to be charged by insurers, which would necessarily be set at levels higher than basic risk premiums. The proposed deferral is intended to give an opportunity for additional reforms to be adopted to control premium levels, and also to address the accumulated deficit in current WorkCover scheme funds.<sup>83</sup>

The Attorney General also noted in his speech, however, that the deferred date did not prevent a possible earlier activation of private underwriting if that was appropriate.

### **Private underwriting to be abandoned?**

Questions have been raised about alleged plans to abandon private underwriting of the workers' compensation scheme altogether.<sup>84</sup> For example, an article from the *Workers Compensation Report* stated that "The office of NSW IR Minister Jeff Shaw has not ruled out speculation that the NSW ...[government]... might abort its long and twisted path towards private underwriting of the state's ...[workers' compensation]... scheme".<sup>85</sup> The Attorney General's response was that private underwriting will take place on or before 1 October 2000 as per the current legislative framework.

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<sup>83</sup> *op. cit.*, n. 61

<sup>84</sup> Question by the Hon. M.J. Gallacher, *NSWPD*, 26/10/99, p 17

<sup>85</sup> 'NSW private underwriting "uncertain"', *Workers Compensation report*, Issue No. 360, 12/10/99, p 1

## 5.2 Further legislative changes in 1999/2000

There has been speculation that further legislative changes to the workers' compensation scheme were expected in 1999, particularly the further restriction of common law rights according to one.

...sources are expecting "an enormous explosion" from within the NSW legal profession if currently circulating rumours about changes to the NSW ...[workers compensation]... scheme come to fruition. Legal sources say the purported changes would undermine workers' rights. The word going around in Sydney legal circles suggests the changes may include "a diminution of common law rights, introduction of binding medical panels, and introduction of American Medical ...[Association]... guides"... sources say the introduction of the American Medical ...[Association]... guides caused an outrage in medical and legal circles when they were recently introduced into the NSW Motor Accident Compensation Act 1999. The same reaction is "almost certain" if the guides are introduced for injury assessments in NSW ...[workers compensation]... cases.<sup>86</sup>

Interestingly, in other jurisdictions common law damages are reported as being reintroduced. In particular, the new Victorian Premier, Mr Steve Bracks, will be introducing reforms to restore access to common law remedies in Victoria.<sup>87</sup> This comes after recent reports that the Victorian scheme is in financial difficulty with a reported loss of \$176.2 million in 1998-99.<sup>88</sup> The Victorian scheme has the lowest premium rates in Australia at 1.9 percent. It will be interesting to see if the Victorian scheme will suffer greater losses as a result of the reintroduction of common law damages - particularly in light of the Premier's commitment to keeping the premium rate at 1.9%.

Mr Shaw, in his second reading speech to the 1999 legislation on 30 June 1999, to defer private underwriting, discussed future reform plans - suggesting that further reforms will be introduced as soon as possible:

The advisory council has been requested to carry out a review of the workers' compensation scheme and report back with strategies within a short time frame. Following that review, the Government plans to bring forward legislation as soon as possible to implement appropriate reform proposals. The proposed period of deferral will also allow further scope for more effective implementation of previous amendments.<sup>89</sup>

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<sup>86</sup> 'NSW w/comp changes may cause 'explosion', *Workers Compensation report*, Issue No. 358, 14/9/99, p 1

<sup>87</sup> 'Vic workers to wait for common law', *op. cit.*, n. 70

<sup>88</sup> 'WorkCover still written in red', *Australian Financial Review*, 5/11/99, p 4

<sup>89</sup> *op. cit.*, n. 61, pp 1760/61

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The Government has recently stated it will introduce a package of changes into Parliament in 2000. The reason for the delay in the changes is reportedly due to the necessity of a further consultation process because of the complexity of the changes. The changes include "...improving injury management and dispute resolution procedures and increasing the penalties for employers who fail to take out insurance". The changes are needed "...because the underlying costs of the WorkCover scheme were still greater than the revenue generated from premiums".<sup>90</sup> As noted earlier, the changes also make provision for the establishment of breakaway workers' compensation schemes.

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<sup>90</sup> 'Reforms slash WorkCover bill', *Sydney Morning Herald*, 1/12/99