

**PRELIMINARY HWCA SUBMISSION TO THE
COMMONWEALTH REFERENCE GROUP ON WELFARE REFORM**

Compensation and Social Security - a problematic interface

INTRODUCTION

The Heads of Workers Compensation Agencies (HWCA) is a group comprising the Chief Executives of Australia's ten workers' compensation authorities (6 States, 2 Territories and 2 Commonwealth^{1,2}). The Chief Executive of the New Zealand Accident Compensation Corporation is also a participant. Its vision is to reduce the social and economic cost of workplace injury and disease across Australia. It has a range of objectives, but those of most relevance to this submission are :

- To coordinate the development and implementation of initiatives of interest or relevance to multiple jurisdictions; and
- To liaise with other national bodies, including relevant Commonwealth Departments and agencies to progress issues of national significance or priority to Workers' Compensation Authorities.

Further information on the operations and interests of HWCA can be found on its website at <http://www.hwca.org.au/main2.html>.

WHY HWCA IS PUTTING IN A SUBMISSION

The interface between (mainly) State and Territory based workers compensation schemes and Commonwealth social security arrangements has always been fraught with difficulties. The problems have varied between the jurisdictions because, despite efforts over the past decade to move to a more nationally consistent set of arrangements, there are still significant differences between schemes and how they interface with the social security system.

The purpose of this submission is not to go through jurisdiction by jurisdiction to provide the Welfare Reform Reference Group with a detailed analysis of the issues for each workers' compensation scheme. We understand that that will form part of the next round of consultations during the first half of next year. Rather the submission seeks to put the overall concerns of HWCA in a brief way and to indicate to the Reference Group the range of Commonwealth reports which have already looked at this issue.

¹ Comcare, the agency responsible for administering the scheme covering Commonwealth employees, has not participated in the development of this Submission. Comcare will make its contribution to the Review through its portfolio department, the Department of Employment, Workplace Relations and Small Business, which has policy responsibility for workers' compensation matters.

² WorkCover Queensland was unable to contribute to the submission.

In overview, we do not believe that current arrangements are best for injured workers - they result in people often ending up even more disadvantaged in seeking and obtaining employment because of the “gateways” into both systems. Compensation and social security arrangements have each intended to ensure that they weren’t paying when it should be the other.

The injured person often ends up a victim of the battle between two levels of government, seeking to avoid “cost-shifting” when there has never been an overt, negotiated position between Commonwealth and the States and Territories about whose financial and moral responsibility the income maintenance and other costs of an injured worker should be. The negative impact this has on injured workers is significant. Attachment 1 attached to this submission was included in a submission by an injured worker to the HWCA Report *Promoting Excellence*³ and it graphically illustrates the difficulties for injured workers under current arrangements. If both systems are really committed to the early return to work of their clients, then development of a shared vision between the systems, through clarification of these questions of responsibility and through development of more consistent return to work assistance should be a priority.

HISTORICAL BACKGROUND

As noted in the Minister’s recently issued Discussion Paper on Welfare Reform (the Discussion Paper), the present Commonwealth social security system had its genesis at the end of the first decade of the 20th century, when aged and invalid pensions were introduced. It was not until 1945 that provisions for sickness and unemployment assistance were introduced.

Workers compensation schemes also commenced in that same period. The earliest specific workers’ compensation legislation was enacted in South Australia in 1900⁴ and by 1914, all other States and the Commonwealth had workers’ compensation legislation in place.⁵

For many years, limited statutory compensation rights co-existed in most states with the possibility of access to common law damages, where a worker could show that his or her employer had been negligent. These cases have never been very numerous, compared to the numbers of cases eligible for statutory workers’ compensation benefits. However, the existence of common law damages awards and settlements and their integration in many cases

³ The submission was from Mr W H Hillier, no 81 as listed in Heads of Workers’ Compensation Authorities (HWCA). *Promoting Excellence - National Consistency in Australian Workers’ Compensation - Final and Interim Reports to Labour Ministers’ Council* May 1997 : page 53. Similar experiences were recorded in a Department of Social Security research project, the results of which were presented to the members of HWCA on 21 October 1996 by Jenny Rush of Rush Social Research.

⁴ There were earlier statutes introduced, to address some of the genuine failings apparent in common law damages, such as the Employers’ Liability Act 1894. This was replaced by a limited no-fault scheme in 1902. See CCH *Australian Workers Compensation Guide* Volume 1 ¶44-100 (South Australia); and ¶48-105 (Western Australia).

⁵ For a detailed history of the relationship between workers’ compensation and social security in Australia, see : Stewart D. *Workers’ Compensation and Social Security : An Overview*. Social Welfare Research Centre Reports and Proceedings No 63. November 1986 : Chapter 2 - especially pages 22-27.

into “all in” statutory benefit “finalisation” arrangements added further complications to the compensation/social security interaction.

Statutory workers’ compensation and social security arrangements arose and developed in quite different ways, and within different philosophical frameworks. For example:

- Social security has remained a flat-rate low level “subsistence payment”, whereas workers’ compensation has tended to move more and more towards a long term earnings related model;
- eligibility for social security required an examination of a spouse’s income, but eligibility for workers’ compensation did not;
- social security paid periodic payments only where someone could not earn, whereas compensation schemes paid for other forms of assistance, such as lump sums for certain disabilities, medical and care costs; and
- social security payments are always paid periodically, whereas many compensation schemes have some capacity to “redeem” future entitlement to compensation for lost earnings (ie have it paid as a lump sum) or pay future loss of earning capacity as a lump sum (say, for example, a table of maims payment) through common law damages.

THE NATURE OF THE RELATIONSHIP BETWEEN THE TWO SYSTEMS

At first glance, the relationship between these two systems can be thought to be deceptively straightforward. If a person’s disability is compensable and unable to work because of ill-health or disability, they will be looked after by the statutory schemes or common law. If not, they will be eligible for community assistance through social security and other Commonwealth and State payments and programs of assistance for people with disabilities or illnesses. However, this is far from the case.

As recently as the late 1980’s, in the Commonwealth’s Social Security Review’s Issues Paper 5 *Towards Enabling Policies: Income Support for People with Disabilities*,⁶ there was a recognition that this relationship was very complex and not working well. It was also believed that there was considerable slippage of people backwards and forwards between the systems⁷.

The Department of Social Security’s Disability Task Force helped oversee the implementation of the Disability Reform Package which sought to implement a more enabling set of provisions for people with disabilities. It commissioned detailed research into the relationships between the assistance available to people with compensable and non-compensable disabilities in the social security context⁸. It wanted this work to “develop policies for improving access to

⁶ Cass B. Gibson F. Tito F. *Towards Enabling Policies : Income Support for People with Disabilities*. Social Security Review Issue paper No 5. AGPS 1988 Canberra: see especially pages 88-94.

⁷ This was confirmed by the research conducted by John Ford and Associates. *Workers’ and Transport Accident Compensation and Social Security in Australia Vols 1-5*. 1 June 1992.

⁸ See eg John Ford and Associates. *Workers’ and Transport Accident Compensation and Social Security in Australia Vols 1-5*. 1 June 1992.

compensation, rehabilitation and workforce re-entry". This was occurring in a philosophical context which, in many ways, shares some of the aims set out in the Discussion Paper, ie to reduce systemic barriers to people with disabilities seeking and gaining employment. At that time, the intention was to create more empowering social security arrangements which aimed to :

- improve the participation of people with disabilities in employment, supported by rehabilitation, education and training activities;
- make it easier for people with disabilities to participate in, and contribute to, the life and work of the community; and
- ensure that people who are severely disabled and who have limited job prospects get adequate and secure income support.

The additional complexities of the compensation interrelationship in health and community services programs was the subject of separate review between 1993⁹ and 1995¹⁰.

The boundaries between compensation schemes and social security arrangements are complex for a range of reasons. For example:

- the conditions for which people claim compensation may not clearly be attributable to work - this is particularly so with conditions of gradual onset or those also commonly associated with aging;
- because higher level benefits often apply, there are incentives for people, whose cases may be marginal, at least to apply for assistance through workers' compensation arrangements;
- sometimes a worker may recover from an injury, but not be able to get back into employment, either because of employer reluctance to take on someone with a workers' compensation "history" or because there has been a downturn in that part of the labour market - in this later case, in particular, employers argue that they should not have to pay a generous *de facto* unemployment benefit;
- there are philosophical arguments about how long and how large should be the liability of an employer, when a worker's inability to gain employment is only partially related to a work injury or illness; and

⁹ Brennan T. Deeble J. *Compensation and Commonwealth Health and Community Services Programs - A Discussion paper*. Prepared for the Review of the Relationship between Compensation and Health and Community Services Programs in the Department of Health, Housing, Local Government and Community Services. June 1993

¹⁰ Review of Professional Indemnity Arrangements for Health Care Professionals (PIR). *Compensable and Non-compensable people with disabilities: equal needs - unequal assistance : a discussion paper* Commonwealth Department of Human Services and Health August 1995 Canberra. See also PIR. Compensation and Professional Indemnity in Health Care - a Final Report. AGPS November 1995 Canberra : chapter 6. As this Report is now out of print, it can be accessed most easily through the Department's website at the following address : <http://www.health.gov.au/pubs/hrom/theainsu2.htm>

- where lump sums are paid, sometimes their specific purpose has been deliberately obscure, and so what they are “compensating” is not clear to other bodies, such as the Tax Department and the agency assessing eligibility for social security payments.

All of these issues create great uncertainty at the boundaries. Where this uncertainty exists, the consequences for the injured person can be extremely unsatisfactory. As one commentator has said :

In fact, our federally based system of government means that there is no political clarity about who is responsible for looking after people with work injuries. As a result, roles are unclear, responsibilities poorly defined, who bears which costs unresolved and, most importantly, injured people can be at the mercy of bureaucracies which often seem more concerned to keep them out - “it’s someone else’s responsibility” - than to help them.¹¹

From the beginning the nexus between these two sets of arrangements has been confusing for clients, inconsistent both in outcomes for applicants and in policy terms, often discriminatory between different individuals and different schemes, and often unsuccessful in achieving an efficient and effective system for people who are long term incapacitated for work. These intrinsic difficulties have been overlaid with Commonwealth/State financial concerns about cost-shifting, when there is no agreed or consistent “sharing” of responsibility between jurisdictions. For example, schemes which rely heavily on lump sum payments have a quite different “interface” with social security arrangements from those which have only limited use of lump sums for compensation for lost earnings.

AREAS OF CONCERN WITH CURRENT SOCIAL SECURITY LEGISLATION

Some of the specific areas of concern to HWCA members include :

- the different treatment of periodic compensation income from other forms of income: for example, there is no “free area”, but rather an automatic dollar for dollar reduction in benefits where a periodic compensation payment is received (See section 1168 and section 1171) - this can lead to injured workers being more disadvantaged than any other group, if their total payments are lower (eg casual or part-time workers) and can act as a disincentive to claim compensation at all;
- the impact can be even more anomalous where it falls on the partner of the compensation recipient, for example, parenting payments;
- where a person was already receiving a social security income support payment and then became injured at work eg in a part time job, their compensation is treated under the ordinary income test and not under the direct deduction rule;

¹¹ McDowall E. “Reconciling the Boundaries” :paper delivered to AIC Workers Compensation Conference, Sydney June 1997 : page 1.

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- apparent inconsistencies between the treatment of “private insurance arrangements” ie income replacement insurance benefits often taken out by self-employed people, which are treated as ordinary income and periodic compensation payments for loss of earnings, which are deducted dollar for dollar (see definition of “compensation” under section 17);
- the operation of the 50% rule and subsequent preclusion period (see section 17(3), section 93V and Part 3.14), particularly where the person’s future entitlement to loss of earning capacity compensation was limited and the finalisation included their statutory disability payment;
- the effect of waiting periods on entitlement when someone is moving from compensation to social security;
- the differential access to job-seeker assistance which focuses often on duration on benefit rather than the period of time someone has not been working - it is arguable that someone who has been through the compensation system and who has not been successful in achieving employment at the end of the process should automatically be eligible for intensive assistance at the Flex 3 or 4 level;
- the added difficulties rural areas face in assisting injured workers to return to suitable work and the differences that rural and metropolitan areas encounter in trying to assist injured workers to liaise with compensation and welfare systems; and
- individuals in receipt of social security can access public housing but low income earners receiving workers’ compensation cannot.

ISSUES OF COMMON CONCERN

Social security and workers’ compensation arrangements also share areas of common concern, particularly so far as encouraging early return to work where possible. This includes the need to ensure that medical and related treatment arrangements are best practice and foster early return to work, rather than lead to longer periods off work. The key to this for both systems is the appropriateness of treatments proposed by the person’s treating medical or other practitioner.

A good example of this is the area of back injuries. Back injuries generally result in a significant proportion of workers’ compensation claims - and even greater proportion of scheme long term liabilities. They equally result in significant numbers of people going onto Disability Support Payment. At a practical level, it is notoriously difficult to determine the cause of such an injury and where the actual incapacitating event occurs may have little to do with the actions which have caused the damage. For example, the person may have gradually damaged their back through poor occupational health and safety practices at work, but actually become incapacitated when they bend over at home, or vice-versa. All of these things often result in people becoming ping pong balls between the different income and other support systems.

Equally, poor health care treatment, which is not based upon the best evidence available, and insufficient attention to early return to work, can lead to the person becoming long term dependent on either or both systems.

Ideally, both systems would work together to promote best practice treatment aimed at reducing long term disability - something which is also clearly in the client's best interest. They would also work together to promote the employment of people with disabilities and overcome the barriers they face in returning to work. The claimant survey¹² which was conducted as part of the John Ford and Associates work for the then Department of Social Security provides some very useful material on barriers where both systems could better work together for the benefit of their clients and our society. For example, there are important issues about the capacity of small employers to provide for return to work and barriers to employment arising from the perceived stigma of having "been on compo".

FURTHER QUESTIONS WHICH NEED TO BE EXAMINED

As noted this submission does not seek to catalogue all the difficulties, jurisdiction by jurisdiction. This is understood to form part of the second round of consultations. However, HWCA sees the Welfare Review as having an opportunity to ask some more fundamental research questions about the complex and unsatisfactory interface between these different systems. In particular, it may want to ask :

- What are the processes which confront an individual injured worker attempting to secure income support following injury? How might they be rationalised between systems? A diagram of the various possible paths is included in Attachment 1.
- How do workers' compensation periodic income support benefits interact with social security income support and family payments, taxation and superannuation disability benefits? What difference does it make if support is paid through lump sum benefits?
- How do workers' compensation benefits in the existing array of State/Territory schemes affect an individual's social security access from one scheme relative to the others? How might these different structures affect behaviour?
- How, if at all, do long term beneficiaries on workers' compensation vary from those on social security benefits in terms of demographic, socio-economic and injury characteristics?

HWCA believes such inquiries would be consistent with the scope of the Welfare Review. Answers to these questions could form a strong base for development of a better, cooperative framework for injured workers, the Australian community and workers' compensation and social security systems. Both of these have as a goal to better meet the needs of people who are injured or ill and facilitate their early and durable return to work - to achieve this, new ways need to be developed from our collective experiences thus far.

¹² John Ford and Associates. *Workers' and Transport Accident Compensation and Social Security in Australia. Volume 5 - Claimant Survey*. Prepared for the Disability Task Force by MSJ Keys Young, June 1992: see especially chapter 12, pages 110-113.

THE PLIGHT AND OUTCOME FOR THE DISABLED COMPENSATI

