Submission to the

PRODUCTIVITY COMMISSION INQUIRY into NATIONAL WORKERS' COMPENSATION and OCCUPATIONAL HEALTH & SAFETY FRAMEWORKS

[JUNE 2003]

[Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union]

'...it is the duty of all union officials, delegates, health and safety representatives and members to challenge unsafe work practices and work environments ...'

Jock Ferguson, WA Branch State Secretary, AMWU (page 104, volume 6, Royal Commission into Building and Construction Industry, Feb 2003)

BACKGROUND

The Australian Manufacturing Workers' Union (AMWU) makes this submission in response to the call for public submissions on the National Workers' Compensation and Occupational Health & Safety Frameworks: Issues Paper April 2003 (Issues Paper) issued by the Productivity Commission.

The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU represents workers in an extremely broad range of sectors and occupations within Australia's manufacturing industry.

The AMWU is one of Australia's largest unions, representing over 150,000 workers from the full range of ethnic and cultural backgrounds. The union has branches or offices in each of the States and Territories.
Occupational health and safety (OH&S), workers' compensation and rehabilitation are fundamental and longstanding pursuits of the AMWU on behalf of its members. Since 1978, the predecessor union, the Amalgamated Metal and Shipwrights Union has employed full time OH&S officers. Today the AMWU is committed to this important and crucial area of its work which is demonstrated through our dedication of substantial resources to it. There is a national OH&S officer and an organiser/officer responsible for health and safety in each State. The union journal, AMWU News, contains articles and news on OH&S issues and is published quarterly and mailed to all members . A

separate OH&S newsletter is published quarterly and distributed to all AMWU health and safety representatives. Representatives of the AMWU are regular participants in tripartite and government bodies associated with workers' compensation and health and safety at both state and national levels. The union represents members who are covered by 8 of the 9 workers compensation and health and safety schemes in the country.

This submission was developed through discussion with the AMWU's OH&S officers around Australia who are knowledgeable about the operations of their respective State systems and their impact on our members. All have expressed deep concern and reservations about the framing of the terms of reference, the timetabling for written and oral submissions and the likely outcomes of this Inquiry.

AMWU members, their families and their communities stand to be both directly and indirectly affected by the outcomes of this Inquiry. The AMWU therefore values the opportunity to make written submissions to the Inquiry on these issues and will make further submissions in response to the foreshadowed Interim Report.

NATIONAL FRAMEWORKS

The Issues Paper asks if there are problems in having multiple jurisdiction-based regimes and sets out a range of possible models for establishing more coherent national frameworks:

A cooperative model for workers compensation along the lines of the current national approach to OHS;
A mutual recognition model;
An expanded Comcare model;
A uniform legislation template model;
An extended financial sector regulation model; and
A new national regime.

The Commonwealth's sources of legislative power to implement these different models has not been elaborated in the Issues Paper and therefore the AMWU reserves its comments on these respective models at this stage of the Inquiry. Section 51 (35) of the Constitution places significant limitations on the power of the Commonwealth to legislate, particularly in relation to certain groups of workers (e.g. outworkers, self-employed, etc.). Similarly, other constitutional powers affect the scope of legislation that may be made at the national level and therefore the comprehensiveness of any workers compensation scheme that can be achieved at the national level.

In any case, the choice of framework is a secondary issue to the social and economic objectives that form the basis of any regulatory system. The stated objectives of the existing systems are:

- ✓ To prevent the occurrence of work-related injury and death;
- ✓ To rehabilitate the victim of any work-related injury that occurs;
- ✓ To compensate the victim.

These objectives provide the core rationale of any system of regulation of OH&S and workers' compensation. The ongoing occurrence and impact of work-related injury and death are the key issues in this area that need to be addressed in any review of existing arrangements. The statistics speak for themselves:

Each day 82 manufacturing workers incur an injury that leads to more than 5 days off work;
Each week at least four families have loved ones who do not return at the end of the working shift; and
There is an unknown number of people who suffer from work related ill health e.g. it is estimated that one in three of adult onset asthma is work related.

The actual extent of work related ill health is not known in Australia. The Australian Bureau of Statistics Injury Survey and the BEACH project data give quite different results (in one survey it was estimated that there are 477,800 new persons injured per year and in the other, up to 1.1 million new problems annually). In both surveys, workers' compensation payments were not paid in at least half of the reported work related problems. The lack of useful comparative data across the States was also recently noted in the House of Representatives' Standing Committee on Employment and Workplace Relations report 'Back on the Job'. (The AMWU refers the Inquiry to the more comprehensive description of the shortcomings of the data relating to work related ill health in Australia that is outlined in the Australian Council of Trade Unions submission)

It is recognized at government level that there are serious problems in the current systems for regulating workers health and safety. The CEO of the National Occupational Health and Safety Commission, Jerry Ellis said on the International Day of Mourning April 28th:

'Australia has a long way to go to match world best practice. For example, according to the ILO, the best performing country, Norway, has a record of work related fatalities more than twice as good as Australia'

However, the terms of reference of the Inquiry do not embrace the prevention of work-related injury or death as the primary focus and consequently the strategies which might better suit a prevention-

based framework for regulating OH&S and workers compensation. This is a serious omission from the terms of reference of the Inquiry.

The legal regulatory framework is one of a range of techniques and disciplines that can be used to prevent the occurrence of work-related injury and can respond to the consequences of injury. As Creighton and Stewart have argued, it is necessary to take account of the roles of medicine, epidemiology, work psychology, ergonomics, engineering, occupational hygiene, sociology, economics, human resource management and industrial relations in the prevention of work-related injury and the response to the consequences of work-related injury. National consistency of standards under workers' compensation schemes is a secondary level objective to the prevention of work-related injury, illness and death and loses sight of the ways that the current interaction of medicine, epidemiology, work psychology, ergonomics, engineering, occupational hygiene, sociology, economics, human resource management and industrial relations have on the effectiveness of any regulatory system. Neither the terms of reference nor the Issues Paper mention these other areas.

Our preliminary response to the Issues Paper is to set out the essential features of a national workers' compensation system that is comprehensive and provides decent benefit and rehabilitation structures for workers. The AMWU proposes the formation of national body that includes all stakeholders similar in composition to the National Occupational Health and Safety Commission. Such a body would allow a discussion at a national level between the key stakeholders who would be able to work towards:

Greater cooperation between the state schemes; and
The development of core standards that compensation schemes need to adopt.

A nationally consistent workers' compensation system might be a desirable goal in the longer term but this would need to occur in the context of a restructuring of accident insurances systems. This would involve a major rethink of workers compensation insurance systems. There are many political, constitutional, access and equity issues that need to be resolved before such whole-scale change can be realistically considered. It is worth noting in this context that the Canadian system is fully publicly funded and underwritten.

REDUCING THE REGULATORY BURDEN AND COMPLIANCE COSTS

The Issues Paper presents OH&S and workers' compensation as a regulatory burden that imposes compliance-related costs on

employers and corporations which may be further compounded by the multiplicity of jurisdictions.

The AMWU rejects this approach to OH&S and workers' compensation which trivialises the social responsibilities of employers and corporations to provide safe systems of work for their employees. It also fails to recognise that there are regulatory burdens and compliance costs placed on others under these systems.

First and foremost, the burden placed on injured workers under these systems can be enormous. The 1995 Industry Commission report Work, Health and Safety estimated that the costs of a workplace injury were not borne predominately by employers, rather 30 % worker, 40% employer and 30 % by the community. The costs to the individual worker were clearly expressed by an AMWU H&S Rep when she was explaining why she became a H&S Representative

> " when you sustain an injury at work, your partner suffers, your kids suffer, your income suffers and your physical, emotional and mental health suffer. But the business or company is resilient, it bounces back and can replace you in a day".

The burdens placed on workers can be enormous and some of these we have outlined in our submission to the House of Representatives (see appendix). As explained in that submission there are many people with longer term injuries who as a consequence of their injuries are without employment, even when they are capable of performing work. (see example under Benefits Structure).

Medical Practitioners

The level of paperwork required of medical practitioners for a workers compensation claim stands in stark contrast to a Medicare claim, especially if the claim relates to only a few days off work. This may result occasionally in cost shifting to the Medicare system if it is simpler to process the cost through Medicare than through the relevant workers compensation scheme. Hendrie and Driscoll note that work-related injuries and diseases are a small but important component of medical general practice. In their analysis of the BEACH study (Bettering the Evaluation and Care of Health) in relation to work-related injuries and diseases, they highlight that the two most common reasons for not making a workers' compensation claim were that the person was self-employed or thought that he/she was not covered by his/her employer (36%) or that the condition was not considered serious enough (22%).

In the AMWU's August 2002 Submission to the House of Representatives Standing Committee on Employment and Workplace Relations, Inquiry into Aspects of Australian Workers' Compensation, a range of information and material is set out on the various ways in which employers fail to comply with the existing systems [see Appendix 1]. We refer the Inquiry to our Submission and ask: what is the case for reducing the regulatory burden and/or compliance costs placed on employers?

The National Occupational Health and Safety Commission endorsed a national strategy. Whilst there are numbers of shortcomings in the strategy, this is the first time that key players in Australia have agreed on objectives and strategy to decrease the social and economic burdens of our unacceptably high workplace toll. It is within this context that the Productivity Commission raises the issue of ''reducing the regulatory burden imposed on businesses" (*National Workers' Compensation and Occupational Health and Safety Frameworks - Issues Paper*, Productivity Commission, April 2003, p.10). Reduction of the regulatory burden is not an objective of the National Strategy because if the prevalence of ill health and injury is reduced all associated ''burdens" will be decreased.

As the National Strategy notes, these national targets are ''a step towards achieving a national vision of Australian workplaces free from death, injury and disease". (*National OHS Strategy, 2002-2012*, p.3)

The evidence is that most workplaces do not meet the minimum requirements of OH&S law. In a survey of AMWU health and safety representatives (H&SRs) in which approximately one in eight responded:

half of the employers are not doing the regular health and safety inspections that they are required by law;
one third of the respondents felt that they had been pressured by management not to raise a health and safety issue;
forty percent of H&SRs thought their employers pressured sick and injured workers back to work before the worker was ready;
nearly one quarter of the respondents said their health and safety committees did not work well;
two thirds of employers were not involving H&SRs in in accident investigations; and
one half were not regularly involving H&SRs in workplace inspections.

The AMWU contends that there is a strong case for strengthening the sanctions for failures to provide safe systems of work in accordance with OH&S laws.

When workplaces do not abide by the laws (research consistently shows that 95% of accidents are preventable) and accidents lead to death or serious injury, the number of prosecutions have not been numerous. For example

in SA in 2001 there were 118 compensable injuries (more than 5 days) per day but only one employer was prosecuted for the whole year,

in Victoria, despite 15 years of Manual Handling Regulations there have been less than 5 prosecutions for breaching of these regulations, although sprains and strains are the most prevalent category in workers compensation claims.

This has been recognized in numbers of discussion papers when jurisdictions have reviewed their legislation. For example the Queensland Department of Industrial Relations produced an issues paper for the review of the *Workplace Health and Safety Act 1995* which noted that:

the average fine imposed on a corporation for breach of the employer's OHS obligation was $10,251, (2000/1). The highest fine for breach of the employer's obligation was $40,000 in two cases where the breach caused a death. The penalty of $40,000 represents just 13% of the maximum possible penalty.

In recent times, there is an apparent recognition that the penalties for non compliance need to be increased and the role of government authorities to behave as regulators and inspectors. (Both heads of NSW WorkCover and Victorian WorkSafe have made speeches to this effect e.g. ILO Conference on Work Health and Safety, May 2002)

However there has also been no State legislature (and the Federal Minister responsible for the NOHSC has actively opposed) any legislative provisions that would put criminal sanctions or jail terms on negligent employers. In the context of extremely low prosecution rates for breaches of occupational health and safety law, it is not consistent with the action taken for breaching laws concerned with monies. e.g. recent high profile prison sentence for insider trading or the jailing for 6 months of a man found guilty of $1000 fraud in the NSW workers compensation scheme. The latter example is a true indictment of us all.

It is very sad that in his recent review of the W.A. laws, Robert Laing said '' In recent times a fisherman was fined $90,000 for not recording his abalone catch and a medical association reportedly faced fines of $240,000 for engaging in non-competitive practices. *It is difficult to accept that the lives of employees are worth considerably less than abalone records or allegedly inappropriate fee arrangements.*" (Robert Laing, *Final Report of the* Review of the Occupational Safety and Health Act, *November 2002, p.133)*

The AMWU has been a very active participant in the community debate calling for the introduction of industrial manslaughter laws. In NSW the union displayed billboards supporting the introduction of laws during the 2003 State election campaign and in Victoria one of our members, Ms Jan Carrick, has been at the forefront of calls for legal reform. The Carrick family lost their son on his first day of work. Their tragic story can be replayed numerous times around this country every week.

In some cases this is because only the statutory authority can prosecute and they have not shown a willingness to do so. Where the employee or union can initiate an action they have been reluctant to do so either because of fear of retribution or because costs, where the standard of proof is a criminal not civil one, can be prohibitive.

Apart from the need to substantially increase the level of such fines the victims should receive part of the penalty by way of compensation and that part of the fine should go to a fund made available for rehabilitation and retraining injured workers.

There are extremely low prosecution rates for breaches of occupational health and safety law, for example:

In SA in 2001 there were 118 compensable injuries (off work for more than 5 days) per day but only one employer was prosecuted for the whole year;
In Victoria, despite 15 years of Manual Handling Regulations there have been less than 5 prosecutions for breaches of these regulations, despite sprains and strains being the most prevalent category in workers compensation claims;
The lack of prosecutions for manual handling injuries is also a feature of the NSW system, where one of the prosecutions which was initiated by the Nurses Union led to a significant improvement in behavior within the Health Care sector.

Prosecutions for breach of health and safety legislation, even where employees have been killed or seriously injured, have not been numerous. In some cases this is because only the statutory authority can prosecute and they have not shown a willingness to do so. Where the employee or union can initiate an action they have been reluctant to do so either because of fear of retribution or because costs, where the standard of proof is a criminal not civil one, can be prohibitive. There is a need to develop laws that protect co-workers as potential witnesses in cases from discrimination.

In addition to increasing prosecution activity, there is also a need to substantially increase the level of such fines. The victims of breaches of health and safety laws could receive part of the penalty by way of compensation and part of the fine could go to a fund made available for the rehabilitation and retraining of injured workers.

Such failures to prosecute breaches of health and safety laws do not do justice to the victims of such breaches. This is especially poignant for the families of those who have died as a consequence of gross negligence in the workplace. The AMWU supports the introduction of industrial manslaughter laws where death has occurred as a result of gross negligence on the part of the employer. Gross negligence may occur not only by the act of an individual but also where there is a failure to ensure appropriate supervisory, monitoring, compliance and reporting systems are installed. Given the level of workplace deaths and serious injury in Australia there is a case for making provision for criminal sanctions, including jail terms, where gross negligence is involved. Such laws could also provide for impact statements as a way of ensuring those affected by workplace death and injury are heard in the justice process. In this context, it is relevant that the Royal Commission Inquiry into the Collapse of HIH Insurance canvasses the case for providing criminal sanctions against individual directors who have engaged in financial recklessness.

National Focus on Health and Safety

The ACTU's submission to this Inquiry clearly documents the slashing of funds from the National Occupational Health and Safety Commission. The AMWU wishes to strongly endorse the comments by the ACTU and to draw the Inquiry's attention to the par lace state of funding for health and safety research in this country. Other OECD countries can make reasonable estimates as to the prevalence of work related asthma or suggestions as to the number of workers who inhale fumes and vapours during their working day. We have no idea in Australia. We no longer have specialist tripartite structures to encourage students, academics or any institution to initiate work on the effectiveness or otherwise of health and safety interventions or regulations or education campaigns etc. In fact, despite persistent representations by trade union representatives at the NOHSC, Australia does not conduct any surveys work of the caliber of organizations such as the European Foundation for Work and Health.

The AMWU supports institutions such as the tripartite forums of NOHSC and State based bodies, however the lack of political willingness by many stakeholders for these institutions to lead the way in changing community attitudes and behavior is truly regrettable.

ACCESS AND COVERAGE

1. Coverage of types of employment

Principle: There should be common and broad definitions of ''employer" and ''employee". In particular, there is a need to ensure coverage of sub-contractors, casual workers, people on work experience and others

who may be at the fringes of a traditional employee/employer relationship. Definitions of employer should also ensure that pyramid contracting arrangements do not exclude from liability the principal contractor.

The recently released Future of Work report clearly outlines the significant changes in the labour market over the past 20 years. These changes are important as:

1. Those groups of workers who are not permanent and full-time record poorer health and safety experience i.e. more injuries;
2. Have decreased access to workers' compensation payments;

By implication, such workers are likely to use the Medicare system for treatment without any income replacement for work-related ill health. Research in Victoria clearly shows that in the same industries, injury rates for labour hire workers are higher than for permanent workers. In comparison to permanent direct hire employees, the injuries to labour hire workers:

τ occur more often,
τ occur early on in the placement with the host employer,
are more severe and
the labour hire worker is off work longer.

Evidence indicates that workers in precarious employment, an increasing section of the labour force, are uncertain of their eligibility for workers compensation and some fear the consequences if a claim is made. Elsa Underhill in a recent conference paper observed that the relatively higher levels of injuries among labour hire workers appeared to be a function of the types of work they perform and a function of the nature of their employment relationship.

Any reform of coverage of access to workers compensation cannot be conducted without reference to current inequitable employment contract arrangements. A recent New South Wales workers' compensation case has highlighted the difficulties that may be encountered in the current employment law arrangements.

A worker on an Australian Workplace Agreement (AWA) was being paid less than his normal hourly rate because the employer decided that as he was not being productive he should be significantly less whilst off on total incapacity payments. The AWA paid $22 per hour when the employee was productive (at work) but only $14 per hour when he went on a public holiday, annual leave, sick leave or on Work Cover payments. It was the State Government's workers' compensation laws that allowed the worker to appeal his low level of workers compensation payments. The Office of the Employee Advocate is charged with overseeing that no employee is disadvantaged by

conditions in the AWA. This review process failed this worker and as there is no public scrutiny of AWAs, it is unknown how many other cases of such injustices occur to injured workers on AWAs.

Changes that have been made in the NSW Workers' Compensation Act and NSW Cash In Transit Code of Practice provide for some mechanisms that could be adopted as national standards for compensation and OH&S laws to ensure that where there is a chain of supply of labour, those most disadvantaged at the bottom of the supply chain have access to legal entitlements and protection of income and health and safety. This approach has been limited to ''outworkers'' but similar arrangements in labour hire and contracting out scenarios would also benefit by such an approach.

2. Coverage of types of injury

National standards for workers' compensation must also be based on a comprehensive definition of ''injury''.

There is a bias in most compensation schemes against work-related psychological injuries. There has been an increase in the numbers of employees claiming compensation for work stress related illnesses. For example, in NSW stress claims rose from 5% in 1992 of all claims to 19% in 1998. It is not uncommon when increases in injuries occur for workers compensation schemes to change the criteria for work-related illnesses and thus control the number of claims. However, this does not affect the numbers of workers being made ill as a consequence of their work. For example, the rising number of claims for stress in the Commonwealth and the limitation on the type of injuries for which compensation became payable.

Among AMWU members hearing loss claims are the classic permanent impairment type claim. There has been a reduction in access to compensation for hearing loss in a number of compensation systems but there has not been any corresponding linkage to noise legislation as a preventative measure.

The basis on which the level of compensation for permanent impairment is assessed is also questionable in terms of its fairness. Paul Mulvaney in a critique of the AMA Guides used in most jurisdictions observes that spinal injuries which are among the most common workplace injuries appear to be the subject of deliberate depression of their value (that is the assessed level of permanent impairment). Mulvaney goes on to note that there is a lack of verifiable medical research available in the public domain to substantiate the values attributed to different impairments.

3. Access

There is evidence that the unionised workforce is more knowledgeable of their rights to access workers' compensation systems than the non-unionised workforce. Workers that can rely on expertise, training, support, and representation from their union are also demonstrably safer workers.

Joint health and safety committees are an important prevention strategy in OH&S arrangements. In recognition of the importance of employee and health and safety representative/committee participation in prevention strategies at the workplace level the AMWU actively supports workplace initiatives with training, information, advice and daily support through our representative and organisational structures of the union. In considering coverage and access issues, regard must also be had to the evidence that worker involvement at the prevention level has demonstrable benefits in the reduction of injuries, etc.

BENEFIT STRUCTURES (INCLUDING ACCESS TO COMMON LAW)

National standards need to be based on the ‘‘best standards" and not achieved through the adoption of national minimums or a ‘‘levelling out" of existing provisions. This is essential given that the current systems do not provide workers' compensation coverage for a wide range of workers in so-called 'precarious' employment.

National standards also need to provide for a consistent approach to rehabilitation based on:

Early intervention;
Employee choice of approved provider;
An obligation on the employer not to sack injured workers, to provide suitable employment or pay full costs of the injury;
A focus on industry based redeployment;
Retraining directed to actual rather than theoretical employment options.

One objective of national standards should be the institution of standard costs for procedures and reports. More doctors should be encouraged to specialise in industrial medicine (through the sponsoring of this in tertiary institutions) in order to improve the quality of medical services and the choice of consumers. Such specialisation would also enable the development of preferred provider arrangements with employers and unions.

As briefly discussed above, any national cooperation must not disenfranchise the ever increasing group of workers that are not in "traditional" employment relationships.

The AMWU has a national workers' compensation policy that outlines our basic requirements for any workers' compensation system. The AMWU does not propose to list here our full list of key principles but rather uses a number of very basic standards that are currently not met by most of the workers' compensation systems.

1. Links to OHS

As the responsibility for workplace safety and for injured workers lies with the employer, health and safety and workers' compensation and rehabilitation should be integrated at the workplace level.

To enhance the workplace link between workers' compensation and OHS performance there should be a set minimum percentage of the revenue raised for workers' compensation premiums/levies which goes to the development of workplace injury prevention strategies. The revenue should not be spent on inspection services but on measures designed to assist employers and workplace representatives/committees to implement prevention strategies.

2. Benefit structures

Workers compensation insurance is a system that has its origins as social legislation to compensate workers for their loss of earning capacity as a result of injury/illness arising out of their employment. The no fault approach of eligibility for workers compensation payments arises from a recognition that:

Workers do not voluntarily accept risk;
Employers have more information and the ability to control for risk than workers;
Changes in costs of premiums have more to do with insurer's investment performance or market share ambitions than with underlying risk.

Benefit structures for workers should be such that there is no financial penalty for being injured or made ill through the course of employment. Unfortunately, as the pressures from insurers is for maintenance of profit margins, from employers for lower premiums, the level of benefits paid to workers is regularly lowered for overall scheme financial viability reasons.

Principle: Claims should be determined within a prescribed time limit with provisions for speedy and effective dispute resolution processes. Interim payments should be available pending the determination of a claim, and ongoing weekly payments made in the case of a claim which has been accepted but subsequently challenged until the review process has been concluded.

Workers should not be disadvantaged because the employer/insurer fails to process or make timely decisions regarding acceptance of the claim.

It is not an uncommon experience that workers making claims can be left in limbo, without a decision or income because despite legal provisions indicating when a decision must be made (e.g. in SA 15 days), there can be delays up to 3 months for claims such as psychological injuries. In Victoria, employers delay their submission of the claim to the insurer, thus delaying acceptance or denial of the claims. We are unaware of prosecutions of employers for failing to meet these legal requirements.

The system recently introduced in NSW where income maintenance is automatically paid should be a feature of all systems.

Employers should be required to continue a rehabilitation program for injured workers even when the claim is disputed. It is the experience of the Victorian system that whilst the employer/insurer disputes a claim the worker is not provided with access to rehabilitation services.

Principle: Weekly compensation payments should be based on pre-injury earnings including overtime, penalty rates and other work related allowances. Payment should continue while the person is unable to return to work.

There is a large variability in the weekly payment made to workers e.g. in South Australia a worker is paid 100% of pre injury weekly earnings for 12 months & 80% thereafter, including all shift loadings and regular overtime. Whereas the Victorian system only provides 75% of pre injury average earnings (including penalties etc.) for the first 26 weeks of total incapacity. It is bizarre that such variability in income support should exist between a worker who works at Portland in Victoria and one who works at Mount Gambier in South Australia.

Principle: Where benefits are reduced they should not fall below 90 per cent of pre-injury earnings. There should be a floor for weekly payments. There should be no ‘‘cap” on total benefits payable.

The hope of any workers' compensation scheme is to return to work the worker who has been injured. The scheme needs to be designed to give adequate income protection, rehabilitation services and, if needs be, vocational services to achieve these aims. Most schemes appear to particularly fail in the latter areas. For example in South Australia after 2 years a decision is made to determine the workers residual capacity (to work) which equates to your earning ability and the insurers are allowed to take into account what the person is physically and mentally able to do. However there is no obligation on

the insurer to show that there is a job for you but only that hypothetically there could be such a job available.

For workers who are off work for a short period (i.e. one pay period) a payment of 95% of normal weekly income will not be satisfactory but it will not have the debilitating effects of poverty which is the experience of workers who are off work for longer periods of time.

This means that most schemes do not provide those with longer term injuries adequate income e.g. in Queensland after 26 weeks the worker receives 65% of normal weekly earnings which does not include overtime, or superannuation; in Victoria, workers with no work capacity will receive 75% at 13 weeks and 60% for workers with some capacity for work, even if they do not have employment. For many workers these income levels are not a viable means of support.

Principle: Where a decision is made to terminate payments, payments should continue pending the outcome of any appeal process. The onus of proof should be on the person seeking to terminate benefits. Payment should not fall below 100% of pre-injury earnings unless a review conducted 12 months after payment commenced establishes that payment should be reduced.

The review should follow an agreed process and be conducted by an agreed assessor taking into account:

Degree of incapacity;
Participation in rehabilitation;
The availability of suitable employment;
Other socio-economic factors.

Principle: There should be a legislative requirement for employers to make suitable job offers to recovered and partially recovered injured workers. The onus should be on the employer to prove that he/she has no suitable employment available. Penalties for failure to rehabilitate or to offer suitable employment should be imposed through the bonus and penalty system.

The workers' compensation system grossly under performs in regard to the provision of suitable duties for employees. Although many laws have the provision for penalties on employers for failing to provide suitable duties these have rarely been enforced.

Under the South Australian legislation, sections 58B and 58C pressure employers to provide suitable duties and provides some protection from dismissal. However the effectiveness of these sanctions is entirely dependent on the political will of the government of the day.

In most other states, the lack of provision of suitable duties and the loss of employment for the injured is an everyday occurrence e.g. an email from the 3rd of June 2003 from an AMWU delegate in the aerospace industry:

"One of my members injured his back in an incident at work over 12 months ago. Long story short they have given him 3 months to find another job within the company or he is out the door on the 8th July 2003. They are saying he is not fit to return to his original position in his old area where the injury occurred, this is also the opinion of his own doctor. Where he used to work is a physical environment where standing and working on curved surfaces may aggravate his back.

Currently he is gainfully employed in another area where it is mainly bench work and he is comfortable in this environment and management have admitted that he is working well and they are happy with him. However they are still insisting that he must go as they need flexibility within their workforce. Under the current climate of retrenchments it will be almost impossible for him to find another position and why should he have to as he is gainfully employed in an area which is 20% down in numbers and there is plenty of work to go around.

I am appealing for a stay of execution for another 3 months as yet unknown whether successful.

So much for the Duty of Care clause which they tend to use as a lever to enforce restrictive policies on our members but when one of my members really needs that care applied they hang him out to dry. Any advise on this issue would be greatly appreciated as he desperately wants to keep working and not pensioned of to the scrap heap. "

This particular individual would not be counted in any return to work survey e.g. the Return to Work Monitor published by the Heads of Workplace Safety and Compensation Authorities, as he has returned to work, and the date of injury is at least 12 months ago, so any obligations under workers compensation law will not apply. It is quite possible that this man will be retrenched without any prospect of getting similar work. He is a middle aged blue collar worker, and has a workers compensation history. Bearing these factors in mind, it is not rash to say that it is unlikely any employer will take him on.

All state branches of the AMWU are currently reporting an epidemic of retrenchment of workers on "light duties", despite any penalties that employers may incur because of their actions.

In NSW it is happening at the 26 week mark of benefit payments for partial or total incapacity. In Victoria, many people are being put off their employers' books at 52 weeks, the point at which the employer's legal responsibility for the provision of suitable duties has expired.

The Victorian branch of the AMWU has proposed that employers be prosecuted for the failure to provide suitable duties (inside the 12 months period) and that compensation payments should be increased to 95% of pre-injury earnings if the employer will not provide suitable

duties. This would be an incentive for employers to meet their legal obligations.

Principle: If an employer is unable to provide suitable employment, vocational retraining and redeployment must be considered as part of the injured workers' rehabilitation. In order to provide incentives for employers to take on workers with previous claims there should be fund responsibility for redeployment costs and ''second injury" schemes.

Participation in rehabilitation and redeployment should not prejudice a worker's right to workers' compensation payments should a relapse occur due to ongoing employment where rehabilitation involves ''work trials".

Principle: Employers should be required to maintain superannuation contributions for workers who are on compensation. For example, in Queensland the calculation of normal weekly earnings does not cover contributions to superannuation.

The AMWU also opposes the DSS/ Centrelink practice of treating workers compensation benefits as income, including the assessment of lump sum payments as ''income" even where they are for non-economic loss. Precluding workers from the benefits of social security has not improved the performance of workers' compensation schemes, but has simply transferred the cost of disability to the worker and his/her family.

Principle: A major issue for injured workers is the cost and time involved in contesting a decision to deny compensation. Systems for conciliation and determination of disputed claims should be accessible and understandable. The process should be speedy, cheap and as far as possible non-adversarial.

The process of disputation and appeal processes vary considerably throughout jurisdictions and are often designed is such a way as to ensure that workers are disadvantaged if liability is not accepted for the claim. As the Victorian VWA report, The Case for Change, noted there are large numbers of claims which are submitted late (12,000 in a scheme that has about 35,000 claims per year). The union has examples where employers fail to pass the claims to the insurer, fail to submit a claim at all and pay the worker from other entitlements (e.g. sick leave or income protection insurance)[1]

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