NEOLIBERALISM, WORKERS' COMPENSATION AND THE PRODUCTIVITY COMMISSION

Kevin Purse, Frances Meredith

and Robert Guthrie

Responsibility for workers' compensation policy in Australia rests primarily with state and territory governments. This is a reflection of the federalist nature of the Australian Constitution. Over the course of the 20th-century this gave rise to numerous inconsistencies in relation to the design of the various schemes. Differences in the range and amount of compensation payments available to workers are the most obvious illustrations of this haphazard policy and legislative development. More recently, since the mid-1990s, there have been attempts to reduce the level of inconsistency between the jurisdictions albeit with limited success.

The latest foray on this issue has come from the federal government's Productivity Commission. During 2003 it conducted a major review into the regulatory arrangements governing both workplace health and safety and workers' compensation arrangements in Australia. The Commission's final report was completed in March 2004 and publicly released in June 2004.

Like other attempts aimed at promoting national consistency in workers' compensation arrangements during the 1990s (Heads of Workers' Compensation Authorities 1997), this latest initiative took place within the broader context of a neoliberal agenda. This agenda has dominated workers' compensation discourse in Australia for over 15 years and has

resulted in a winding back of workers' entitlements, a development that was particularly pronounced during the 1990s.

The Commission's views and recommendations concerning national consistency in workers' compensation have been dealt with elsewhere (Purse, Guthrie and Meredith 2004). Its major recommendation was a three-stage proposal to provide a national workers' compensation scheme for corporate employers. This agenda for the big end of town would have had serious adverse implications for both workers and small business. Due to its concerns over the impact of the Commission's recommendation on its small-business constituency, the Howard government in the lead up to the 2004 federal election rejected, reluctantly we suspect, this recommendation.

In this article the Commission's treatment of key entitlement issues will be addressed. More specifically, it's analysis of coverage and eligibility for compensation, injury management, weekly payments of income maintenance and dispute resolution mechanisms will be critically reviewed. In the process, particular attention will be given to the Commission's preoccupation with the discourse of 'incentives' since it provides much of the rationale for its proposals to reduce workers' compensation entitlements.

Coverage and Eligibility

Fundamental to the issue of eligibility for workers' compensation entitlements is the definition of 'worker'. Historically, the legal concept of who is, or is not, a worker has been encapsulated in the notion of a contract *of* service. By contrast, the legal relationship between a contractor and an employer has been couched in terms of a contract *for* service. In practice, of course, the distinction between workers and contractors is often blurred - many contractors are contractors in name only. In a labour market of rapidly changing work organisation and employment arrangements the contract *of* service concept has been found to be increasingly inadequate. In the workers' compensation arena, this has frequently resulted in measures to 'rope in' nominal contractors working under contract *for* service arrangements through deeming

provisions. Although completely justified in public and social policy terms, deeming provisions have proved to be cumbersome, costly to administer and relatively ineffective in providing the requisite level of workers' compensation coverage.

A related difficulty identified by the Commission, and others previously, is the unreliability of data that might clarify the present extent of coverage of the Australian schemes. Estimates vary but the Commission concluded that around three-quarters of 'employed persons' are covered by workers' compensation schemes (Productivity Commission 2004: 159). This is considerably more than the 60 per cent estimate of the federal Department of Employment and Workplace Relations (Federal Department of Employment and Workplace Relations 2002: 11). Nevertheless, the Commission's estimate seems realistic in the context of the evidence cited, and other analysis of Australian and some Canadian schemes (Clayton 2002: 19-21).

Irrespective of the exact number of workers within coverage, however, it is clear that many workers who are in the 'atypical' forms of employment (for example casual, contract, outworkers) formally covered by the statutory schemes are far from clear about their entitlement. Additionally, where true employment arrangements are disguised with devices such as independent contractor and corporate entities, and those workers are not insured, they inevitably rely on federal schemes of medical and income support, and so the costs are shifted to the Commonwealth. The Commission also highlighted the problem that besets schemes in relation to a comprehensive and contemporary definition of 'worker', that is, one who is to have access to the benefits of workers' compensation.

In response to these complex difficulties, the Commission went no further than to recommend the adoption of five principles to govern the definition of worker: the employer control test consistent with the concept of 'contract of service', certainty and clarity to establish coverage at the commencement of a contract, administrative simplicity, consistency with other employment law, and durability and flexibility (Productivity Commission 2004: 171). While the Commission did mention (*ibid*: 163) a South Australian initiative to address this definitional difficulty, by reworking the traditional definition of 'contract

of service' to give it contemporary relevance (Stanley, Meredith and Bishop 2002: 13-14), the recommendations did not reflect any serious attempt to consider the possibilities of this approach, and merely referred back to the industrial courts' approaches to distinguishing between employee and independent contractor (Productivity Commission 2004 154-156). Ironically, the Commission suggested that deeming provisions might add certainty and clarity.

Once within coverage of a scheme, the worker is required to establish an injury is work-related to have an entitlement to compensation. The Commission adopted the position that the test for work attribution should be that work is 'a significant factor', and preferably 'the major contribution factor' (*ibid:* 187). There is no real justification by the Commission for this position apart from a claim that such tests 'would add greater clarity' (*ibid*). The effect of these more demanding tests for work-relatedness can only be to restrict the proportion of workers who can claim entitlements.

The complexities of work-relatedness have been critically assessed in some detail in a recent article, which is not cited by the Commission (Clayton, Johnstone and Sceats: 2002). Clayton and his colleagues identified seven different notions of the concept, showed that the employment contribution test is by no means easily interpreted by the courts and that 'considerable uncertainty' remains as a result of the proper meaning of the qualifying adjective (*ibid:* 125-132). Unsurprisingly, the Commission recommended that in, some circumstances where the employer has little control (the often cited situation of journeys to and from work, and recess breaks), the work-relatedness tests should operate to deny workers compensation for injury.

In summary, the Commission failed to take the opportunity to address, in any fundamental manner, the three big coverage and eligibility issues: how to ensure workers are not 'disguised' in their contractual arrangements and excluded from the schemes; how to make the schemes more inclusive in relation to work attribution; and how to achieve some definitional uniformity across the Australian jurisdictions.

Injury Management

Injury management is crucial to the successful operation of workers' compensation schemes. There are a number of reasons for this view. First, it is important in facilitating the return to work of injured workers. Second, it is critical to financial performance. In workers' compensation schemes, the average duration of claims is a key cost driver. Higher, and earlier, return to work rates reduce average claims duration and, hence, scheme costs. In practice, however, injury management remains problematic.

In its treatment of injury management arrangements, the Commission outlined various issues essential to the rehabilitation of injured workers and the return to work process. These included early intervention, workplace based rehabilitation and effective claims management (Productivity Commission 2004: 141). While there was nothing new in this, the significance of these issues as key drivers of scheme performance cannot be underestimated and, on this ground alone, were worth reiterating.

The Commission also highlighted the importance of what can be described as a 'provisional liability' approach to injury management. Although all workers' compensation schemes in Australia emphasise the importance of early intervention, vocational rehabilitation remains largely a function of the claims determination process (Purse 1998: 198). This means rehabilitation usually takes place only when the compensating authority has accepted a worker's claim for compensation. This often has an adverse effect on the worker involved as well as on scheme finances, since, as indicated above, delays in returning injured workers to suitable employment invariably result in an increase in the average claims duration.

For this reason some jurisdictions, notably New South Wales, have recently introduced a system of provisional liability, whereby weekly compensation payments may commence immediately without the compensating authority having to accept liability for a specified period. In New South Wales provisional liability applies for up to 12 weeks. Although by no means definitive, early results from New South Wales

suggest that a provisional liability model is a step in the right direction (NSW Labor Council 2003: 51-52).

The role of financial incentives was the next issue considered by the Commission. This was the most contentious, and dogmatic, aspect of its treatment of vocational rehabilitation. In the Commission's view "the incentives provided to employees through the benefits structure" can "frustrate the goal of early and durable return to work (Productivity Commission 2004: 139-140). Although it noted elsewhere that other factors impinge upon vocational rehabilitation and return to work outcomes (*ibid:* 140) much of the Commission's discussion was premised on the perceived 'incentive', or rather disincentive, effects of weekly payments on return to work rates.

This view is very popular among neoclassical economists and is widely accepted in the business community and by scheme administrators. In the neoclassical literature it is typically conceptualised in terms of 'moral hazard' - the propensity of insurance to reduce incentives to prevent, or minimise, the potential loss that is being insured against. In a workers' compensation context, moral hazard implies that workers covered by weekly payments and other entitlements may take less care of health and safety while at work, lodge fraudulent claims or extend their time off work following injury (Wooden 1989: 230, Moore and Viscusi 1990: 123, Krueger 1990: 95). A clear implication is that relatively high levels of weekly payments inhibit the return to work process (Productivity Commission 2004: 195). The associated policy prescriptions invoked to offset these supposed moral hazard effects invariably include proposals to reduce the level of weekly payments available to injured workers through step-downs and other restrictions.

In support of this policy stance, reliance is placed on econometric studies that have reported a statistically significant correlation between increased payment levels and the average duration of claims. The real meaning of this relationship, however, remains the subject of ongoing debate and is open to interpretation on at least two major counts.

First, there is the issue of the strength of the relationship between the two variables. A systematic review of US studies in the late 1980s concluded that a 10% increase in weekly payments would increase the average

duration of claims by 2%, from 11 weeks to about 11 weeks and three days. (Gardner 1989: 37). A subsequent survey of the literature in the mid 1990s concluded that a 10% increase in weekly payments would result in an elasticity duration of between 2% and 11% (Conrad, Henderlite and Loeser 1995: 34). More recently, there have been criticisms that US studies have overestimated the duration elasticities involved because of limitations in the statistical methods used (Campolieti 1999: 513).[1] Adjusting for this, a recent Canadian study reported an elasticity duration of only 0.09%, slightly more than an extra half day off work. This suggests that the duration of claims "is not as sensitive to changes in benefits as some of the previous evidence from the United States suggests (*ibid:* 517).

Certainly, on the evidence currently available, it seems clear that the linkage involved is probably quite modest. This assessment is also consistent with findings from other income transfer programs, such as unemployment benefits. In the United States, for example, average duration elasticities for unemployment benefits have been estimated at between 2.5% and 5.0% (Gardner 1989: 41). This is higher than the generally accepted range for workers' compensation, because injuries to workers reduce their ability to respond to economic changes in the labour market, both in absolute terms and compared with the unemployed (*ibid*).

---

1 Multi-variate regression studies that examine changes in the duration of workers' compensation claims associated with increases in weekly payments attempt to control for 'unobserved heterogeneity' - factors which affect the dependent variable, claims duration, but are not explicitly included as explanatory variables in the estimating equation, along with other effects which are entirely random. Traditionally this has been undertaken by parametric methods, which assume that unobserved heterogeneity conforms to a specified probability distribution. Parametric specifications, however, are often *ad hoc* and can result in biased estimates. This is a common econometric problem in labour market studies, such as those that examine the duration of unemployment. As pointed out by two leading researchers "it is unnecessary to assume a specific parametric functional form" to control for unobserved heterogeneity and "it may be empirically dangerous to do so" (Heckman and Singer 1984: 276). This has led to the development of non-parametric techniques which do not require any specific assumptions about the distribution of unobserved heterogeneity and are, therefore, capable of generating better estimates.

The second issue of concern centres around what more time off work actually means. There is an axiomatic view that an increase in claims duration associated with higher payments is evidence of worker fraud or malingering. The evidence, however, contradicts this claim. A recent Commonwealth parliamentary inquiry, for instance, reported that workers' compensation fraud, at least by workers is "estimated to be at very low levels" (House of Representatives Standing Committee on Employment and Workplace Relations 2003: 191), a finding that confirms earlier empirical work on this, often highly charged, issue (Garnett 2000: 11).

An alternative explanation is that the "the longer durations that we find after benefit increases may not indicate a loss in social welfare, as longer recovery times may improve subsequent health. *Higher benefits may enable injured workers to complete the recovery before returning to work*" (Durbin, Meyer and Viscusi 1995: 338. Emphasis added). By implication, where weekly payments are low, economic considerations may pressure injured workers into returning to work before they have recovered. This, in turn, may lead to an aggravation or recurrence of injury and hence higher social and economic costs.

In its treatment of the issue, the Commission referred to research that indicates recovery from injury is longer where workers' compensation payments are involved as evidence that weekly payments of income maintenance can "adversely influence rehabilitation outcomes" (Productivity Commission 2004: 146). This claim ignored the fact that workers' compensation schemes can be highly adversarial, and glossed over the deleterious impact that an adversarial approach to injury management can have on workers' recovery. As articulated in a recent parliamentary report, a "slower than expected recovery is associated with the stress of the workers' compensation system. This frustration, bitterness and anger is due in part to workers feeling that insurers and providers show no real concern for the injured worker, and the belief that the worker is not being trusted by the employer" (House of Representatives Standing Committee on Employment and Workplace Relations 2003: 185). It would have been preferable had the Commission sought to disentangle these institutionally generated anti-therapeutic effects from any hypothesised incentive effect.

The Commission also misleadingly claimed "Empirical evidence from Australian workers compensation schemes suggests that step-downs provide incentives for return to work" (Productivity Commission 2004: 195). The main support for this position is drawn from a policy paper commissioned by the Victorian WorkCover Authority to rationalise a range of cuts to weekly payments implemented by the Kennett Government in 1992. The authors did not present any direct evidence at all on return to work outcomes but referred to "high exit rates" from both workers' compensation and social security programs "just prior to the time at which benefits are significantly reduced" (Kennedy and Sloan 1993: 16).

Although the two are often conflated, high exit rates are not the same as high return to work rates. Workers may exit workers' compensation schemes for a number of reasons. Returning to work is one, taking redemption payments to finalise claims is another. A further, particularly important, exit mechanism involves injured workers transferring to social security programs when weekly payments have been (or are imminently expected to be) 'significantly reduced'. Far from improving return to work rates, large reductions in weekly payments, either by automatic 'step-downs', or by reviews of levels of capacity to work, do little more than externalise costs for work-related injury from employer funded workers' compensation schemes to the taxpayer funded social security system and injured workers.

If step-downs provided incentives needed to encourage injured workers to return to work, schemes with earlier, and or steeper, step-down provisions should have higher return to work rates than those schemes where step-downs in weekly payments are less severe. In fact, the scheme with the highest return to work rates has weekly payments that are among the highest in Australia. This is the Federal Comcare scheme which in 2002-03 had a 90% return to work rate[2] compared with the national average of 73% (Campbell Research & Consulting 2003: 2), a result that suggests that high weekly payments are by no means incompatible with high return to work rates.

---

2 As measured by surveys of workers conducted approximately six months after the lodgement of their claims (Campbell Research & Consulting 2003: ii).

A further comparison, between Victorian and South Australian return to work rates is perhaps more instructive, due to the similarity in the structure of industry in these jurisdictions. In South Australia, weekly payments are equivalent to 100% of average weekly earnings for the first 12 months of incapacity and 80% thereafter. This contrasts with Victoria where weekly payments are set at 95% of average weekly earnings for the first 13 weeks of incapacity, reducing to no more than 75% after that time (Heads of the Workers' Compensation Authorities 2002: 20).[3] In both jurisdictions injured workers may be subjected to a notional earnings, or deeming, tests at 24 months of incapacity, which can reduce weekly payments further or terminate them altogether. Despite the significantly higher level of weekly payments available in South Australia relative to Victoria, the corresponding return to work rates in 2002-03 were marginally higher in South Australia at 72%, than in Victoria at 71% (Campbell Research & Consulting 2003: 2). Although not conclusive, these findings offer little comfort to those who subscribe to the view that injured workers require substantial cuts in weekly payments to encourage their return to work.

The Commission's preoccupation with weekly payment levels also obscures substantial matters such as employment security provisions and the obligation of the pre-injury employer to provide suitable duties, and the implications for vocational rehabilitation and improved return to work rates. All Australian workers' compensation laws now contain provisions that require employers to provide suitable employment to injured workers able to return to work, wherever this is reasonably practicable. In practice, however, some employers ignore these legal obligations, and almost universally do so with impunity due to the failure of scheme administrators to enforce these obligations (Purse 2002: 65-66, Guthrie 2002: 558). The Commission, while it did note the existence of employment security provisions, neglected to provide any analysis of the routine avoidance of these provisions or to offer any

3 In both jurisdictions injured workers may be subjected to a notional earnings, or deeming, test that can reduce weekly payments further or terminate them altogether. In South Australia this may happen after two years of incapacity, while in Victoria it can occur much earlier. It should also be noted that the maximum level of weekly payments payable in South Australia is much higher than in Victoria (Heads of the Workers' Compensation Authorities 2002: 20).

recommendations to address the problems of increased claims durations and higher scheme costs associated with the failure to provide suitable employment.

It is apparent that many of the expectations raised during the 1980s and early 1990s concerning injury management and vocational rehabilitation have not been realised. This has been made abundantly clear by a range of Government sponsored inquiries that have identified numerous structural and operational barriers to improved performance (Grellman 1997: 37-39, Pearson, McCarthy and Guthrie 2000: 145-147, Stanley, Meredith and Bishop 2003: 33-43). The Commission's terms of reference provided it with the opportunity to make a contribution to overcoming these impediments. Unfortunately, it failed to meet this challenge.

Weekly Payments[4]

In the Commission's treatment of statutory workers' compensation payments much of the discourse was again couched in terms of 'incentives'.

As part of its approach, the Commission uncritically embraced the doctrine of compensating wage differentials. This theory holds that the labour market operates so that workers exposed to known workplace risks are compensated, though not necessarily fully, by higher wages (Productivity Commission 2004: 192). The Commission argued that any

4 Our analysis here is confined to weekly payments. A comprehensive assessment of weekly payments would need to take account of the availability, or otherwise, of workers' access to common law damages. The Commission opposed access to common law damages. While we concur with a number of the arguments put forward by the Commission - particularly those concerning high transaction costs, extended delays and often-inadequate awards that occur under common law regimes - we do not share its position. A more equitable and reasonable approach would provide access to common law actions for more seriously injured workers in schemes where weekly payments are significantly reduced or terminated after a specified period. Our preferred approach would entail a trade-off involving a higher level of ongoing weekly payments for more seriously injured workers in exchange for the right to pursue common law damages.

assessment of weekly payments must take this into account (*ibid:* 192). However, both the econometric studies and the theoretical assumptions that underpin this doctrine are fundamentally flawed (Purse 2004). Even within the neoclassical literature, misgivings as to the validity of the theory have been a recurrent theme (Smith 1979: 348-350, Brown 1980: 118, Viscusi 1993: 1938). The Commission, however, overlooked this evidence.

In its discussion of weekly payments, the major category of statutory payments, the Commission outlined three key criteria against which they should be assessed - the adequacy of payments compared with workers' pre-injury income, the degree to which they reinforce incentives (both with respect to employers and workers) and the extent to which they ensure that the costs for work related injury are met by employer premiums rather than through cost shifting (Productivity Commission 2004: 191).

The Commission did not specify any particular level of weekly payments, but favoured a weekly payments regime that is considerably less than pre-injury earnings. To support this view, the Commission referred to US studies which show an increase in the number of claims following an increase in weekly payments, as well as an increase in the duration of payments (*ibid*: 194). This is accompanied by references to unsourced studies cited by the Australian Institute of Actuaries and the former Industry Commission in its 1994 report (*ibid:* 194-195). Not surprisingly, the increase in claims numbers and their duration reported in these studies is taken as evidence of 'moral hazard' by workers. On the basis of this flimsy assessment, the Commission concluded that "there may be disincentives to participate in rehabilitation and return to work" at weekly payment levels that are 85% or more of pre-injury earnings (*ibid:* 195).

The nexus between increases in weekly payments and claim numbers is, of course, important. In the US studies cited by the Commission, a 10% increase in weekly payments is associated with an increase in claims lodged of between 4% and 10%. This has obvious cost implications since a given increase in weekly payments is likely to result in a more than proportionate increase in scheme costs. By way of illustration, one US commentator has suggested that a 10% increase in weekly payments

would increase total scheme costs by at least 15%, made up of a 10% direct increase and indirect increases of at least 3% as a result of increased claim numbers and 2% due to an increase in claims duration (Gardner 1989: xv). This is not an inconsiderable amount, and it is important that policymakers and scheme administrators are aware of the cost implications involved with increases in weekly payments.

There is, however, a more plausible explanation of why claim numbers rise in the wake of increases in weekly payments. At any one time, there are many workers who do not seek compensation for work related injury even though they are legally entitled to do so. This is well documented in the Australian and US literature (Australian Bureau of Statistics 2001:14, Biddle *et al* 1998: 330). The reasons workers do not claim compensation are varied but include a lack of awareness of workers' compensation entitlement, a fear of reprisals, management sponsored safety incentive schemes and concerns about what other people might think (Australian Bureau of Statistics 2001: 13, Dembe *et al* 1999: 173-177). However, an increase in weekly payments may raise the marginal propensity to claim by injured workers, particularly if the increase is widely publicised. Just as increased weekly payment levels may facilitate a more complete recovery from injury, it is apparent these increases may also encourage more workers to report injuries in order to claim compensation.

There was no analysis by the Commission of this reporting effect in its assessment of weekly payments. Instead, its position remained anchored in a faulty conception of moral hazard as applied to workers' compensation arrangements. Within this framework, the Commission enthusiastically endorsed the use of step-downs to provide the appropriate incentives to offset the supposed moral hazard effects of weekly payments that are too 'generous'. This reflects mainstream neo-liberal thinking which during the 1980s and 1990s resulted in the universal application of step-downs within Australian workers' compensation schemes (Purse 2003: 29-32). The workers most adversely affected by step-downs are the more seriously injured, who almost invariably have not only to contend with permanent disabilities but also a substantial decline in living standards. As these claimants make up the bulk of the scheme costs, it is not difficult to see that the real

function of step-downs has been to reduce the cost to employers of work related injury.

The response from the workforce to step-downs, at least in many unionised industries, has been to have 'make-up' pay provisions inserted into industrial awards and enterprise agreements. In Victoria, for instance, it is not uncommon for make-up pay to operate from between 39 and 52 weeks, or in some cases 104 weeks. (Australian Industrial Relations Commission 2001: 2). Make-up pay should be anathema to the Commission since it undermines the incentives it deems necessary to counter the supposed moral hazard effects of workers' compensation but, in a contradictory twist of logic, the Commission supported the principle of make-up pay. While reiterating that make-up pay can "reduce incentives to employees to return to work", it nevertheless concluded that as it is paid for by individual employers "there are also strong incentives on the employer to prevent illnesses or injury and facilitate return to work" (Productivity Commission 2004: 196). The problem for the Commission is that it makes no difference whether compensation is paid as weekly payments or make-up pay. The impact on an employer's total labour costs, and any incentive to improve workplace health and safety and improve return to work outcomes, is precisely the same.

The confusion evident in the Commission's assessment of weekly payments was also apparent in its treatment of cost shifting by workers' compensation schemes. As indicated earlier, cost shifting externalises costs for work related injury from employers to injured workers and the taxpayer funded social security system. This has the effect of subsidising employers for substandard workplace health and safety management practices. The 1994 report of the Industry Commission found that cost shifting was pervasive and extensive (Industry Commission 1994: xlvi). It concluded that "too many of the costs of work-related injury and illnesses are being borne by affected individuals and taxpayers" (*ibid:* xxxiv). It went on to argue that part of the solution was to "hold employers liable to pay the cost of compensating employees suffering work-related injury or illness ... for much longer periods than is typically the case at present" (*ibid:* xxxv).

The Productivity Commission was aware of the perverse effects associated with cost shifting (Productivity Commission 2004: 206).

However, unlike its predecessor, it offered no suggestions or recommendations on how cost shifting might be reduced. The Commission also failed to offer any explanation of how the twin objectives of curtailing cost shifting and the use of step-downs to facilitate other scheme goals might be reconciled. In effect, the Commission treated these two issues as if they were unconnected. In view of the inherent antagonism between these competing objectives this was a serious shortcoming, one that can only serve to reinforce a neoliberal workers' compensation agenda.

Dispute Resolution

Much of the basis for the discussion and recommendations concerning dispute resolution by the Commission was derived from arguments contained in the submission of Transformation Management Systems (TMS). Many of these arguments in turn relied on work done by TMS early in the 1990s for the emergent Heads of Workers' Compensation Authorities organisation which led to the articulation of a 'best practice model' for Australian workers' compensation dispute resolution (*ibid:* 366).

Before turning to the detail of that model, it is worth noting that the Commission set out a typology of dispute causes (*ibid:* 366-368) which made a simple distinction between 'artificial' and 'genuine' disputes. Artificial disputes were defined as those generated by the handling of claims. They include disputes where the parties use the dispute for other purposes, for example, delays to achieve larger settlements. The Commission also noted that the motivation of workers is often mixed and frequently includes non-monetary considerations as well - the seeking of compensation to prevent others being harmed in the same way, to be 'heard', to have the 'other side' understand their concerns – only to conclude that these motivations are artificial (*ibid:* 366). To dismiss such complex causal relationships as 'artificial' is simplistic. Such a perspective hardly assists with the analysis and ignores a large body of research on the subject (Genn: 1999, Falaris, Link and Staten: 1995).

The Commission's treatment of 'genuine disputes' included employer disputes notwithstanding the fact that in most jurisdictions the primary dispute resolution systems have been designed to deal with disputes about workers' claims.[5] What is missed entirely in the analysis is the empirical research of North American systems (different as the United States and Canadian systems are) which have identified some very clear patterns in the causes of disputes (Falaris, Link and Staten: 1995) on the one hand, and the effect on claimants of the systemic basis of many disputes on the other (Kippel 1999). One of the key 'drivers' of disputes, and a cause of poor therapeutic outcomes for injured workers, has been found to be experience rated premium setting (*ibid*).[6]

With regard to dispute prevention mechanisms, the most significant of the Commission's recommendations was for provisional acceptance of claim liability. This approach modifies the onus on the worker to 'prove' the claim by effectively allowing almost all claims on a provisional basis for a specified period of time, as is the case in New South Wales. The transaction cost savings from lower disputation rates is potentially quite high. The potential savings associated with an earlier commencement of vocational rehabilitation and the return to work process are even greater.

Much less satisfactory was the Commission's discussion about the purpose of review rights. In workers' compensation systems the purpose is to provide an appeal right in relation to legislatively prescribed entitlements. Industry complaint services for customers, which the

---

5 There are systems for employers to dispute premium rates, and frequently these are linked to the return to work and employment security provisions. For example, see ss58 and 67 of the Workers Rehabilitation and Compensation Act SA 1986. In some jurisdictions these disputes are also handled, in a separate stream by a conciliation service, for example, in Western Australia.

6 Experience rating is used by many workers' compensation schemes in an attempt to improve the workplace health and safety performance of employers. Various formulae can be used to more closely align an individual employer's premiums with their actual 'performance'. The general idea is that better performers should be rewarded with lower premiums while poorer performers should be penalised through higher premiums. In practice, workers' compensation claims costs are used as a proxy for workplace health and safety performance. Claims costs, however, can be reduced by means other than improvements in workplace health and safety performance, including increased claims disputation.

Commission compares with workers' appeal rights, have important qualitative differences that the Commission completely ignored.[7]

There was also confusion about the existing systems of dispute resolution in the various schemes. For example, in the section on medical assessments the Commission selectively quoted a paper on the judicial perspective of expert evidence and then immediately moved to a TMS report of 1995 concerning the design of medical panels. Without further discussion, the Commission recommended that independent medical panels should be used as part of a collection of screening applications. The Commission appeared to have mistaken independent medical examinations that the decision maker is entitled to require of the worker for the purpose of making a decision on a claim, with medical panels which operate primarily to resolve disputes about medical issues after the decision has been made. This is clear from the detail in Table 13.1 (Productivity Commission 2004: 372-373) that equated, under 'medical panels' operating in each system, the independent medical examination sought by the decision maker in South Australia, with the medical panel that resolves a medical issue in dispute as in Western Australia.

As far as a national framework is concerned, the Commission focused on the interests of large multi-state employers, and their concerns over costs and compliance issues. However, it then cautioned against moving to a 'simple national system' of dispute resolution and identified the advantages of existing jurisdictional arrangements, the main one being the familiarity of participants with these arrangements. Queensland is quoted as an example of a well-designed dispute resolution scheme, which is 'understood by all' and which has a low disputation rate compared with other jurisdictions. How this analysis would treat the New South Wales dispute resolution system, for example, over the decade to 2001 is not clear. Moreover, the comparatively low disputation rate in Queensland may be explained by other factors, such as review rights that are much more limited than in other jurisdictions.

---

7 It is this confusion that appears to lead to the quotation by the Commission of United Kingdom medical negligence claimants' motivations creating artificial disputes.

Most importantly, the Commission made a strong statement about rectifying informational and power imbalances between the parties. This appears to be an endorsement of the right of workers to legal representation although it gave no indication whether this applies to conciliation and other alternative dispute resolution stages, as is the case in South Australia.

The Commission's recommendations endorsed the continuation of existing jurisdictionally based dispute resolution mechanisms designed to incorporate internal review procedures, alternative dispute resolution, appeals on points of law and independent medical panels for resolving medical issues. In this, the Commission adopted most of the 'best practice' model promoted by the Heads of Workers' Compensation Authorities and TMS throughout Australia for a decade, the features of which are summarised by the Commission as detailed information, informed initial claims decisions, internal review, advisory alternative dispute resolution and provision for final determination and legal review, as well as review panels for binding determination on medical issues (*ibid:* 377-379).

The recommendations of the Commission which did not conform to this decade old model are significant and important exceptions. Quite strikingly, the Commission supported legal representation for workers and the use of provisional acceptance of claim liability.

Not unsurprisingly, the Commission stopped short of recommending a national framework, preferring instead to promote the Heads of Workers' Compensation Authorities model, but leaving it to the states and territories to build systems upon local tradition and culture. This was consistent with its overall recommendations for diversity in the schemes themselves, contingent on providing access for multi-state employers to a national self-insurance scheme (*ibid:* 150-151).

Concluding Comments

The entitlement issues canvassed in this article were by no means the only ones considered by the Commission. They do, however, reflect the flavour of its approach to the treatment of workers' entitlements. This

approach can best be viewed as an exercise in the application of free market ideology, most conspicuously apparent in its treatment of weekly payments and injury management where its analysis was underpinned by a simplistic economism, couched in terms of 'incentives'. The result was a one-dimensional treatment of what in reality are quite complex issues. This was exacerbated by an injudicious interpretation of the available evidence that, predictably, was used to provide a rationale for reductions in compensation payments for injured workers.

On coverage and eligibility, the Commission adopted an approach designed to entrench reduced access by injured workers to compensation, while its treatment of dispute resolution - with the exception of the provisional liability issue and legal representation - amounted to little more than a restatement of the *status quo*.

The Commission's analysis of workers' entitlements to compensation for work related injury is of interest not because of the light it throws on the complexities involved, or on how a more adequate understanding of these issues might be developed. On the contrary it offers very little, if anything, which is new or constructive. The real significance of its contribution lies in the fact that it provides a veneer of legitimacy for a neoliberal political agenda designed to curtail the entitlements of those unfortunate enough to the injured as a result of the employment. As has been shown, the Commission's analysis is seriously flawed. So too are its policy prescriptions.

References

Australian Bureau of Statistics (2001), *Work-Related Injuries, Australia*, Cat. No. 6324.0, Canberra.

Australian Industrial Relations Commission (2001), *Print PR914080*, Melbourne, 5 February 2002 (Whelan C).

J. Biddle, K. Roberts, K. D. Rosenman and E. W. Welch (1998), What Percentage of Workers With Work-Related Illnesses Receive Workers Compensation Benefits?, *Journal of Occupational and Environmental Medicine*, Vol. 40, No. 4, pp. 325-331.

C. Brown (1980), Equalizing Differences in the Labor Market, *Quarterly Journal of Economics*, Vol. 94, No. 1, pp. 113-134.

Campbell Research & Consulting (2003), *2002/03 Australia & New Zealand Return to Work Monitor*, Melbourne.

M. Campolieti (1999), Workers' compensation benefits and claims duration: some Canadian evidence, *Applied Economics Letters*, No. 6, pp. 513-517.

A Clayton (2002) Current Issues in Australian Workers Compensation, in B Stanley, F Meredith and R Bishop *Review of Workers Compensation and Occupational Health, Safety and Welfare Systems in South Australia*, Vol 1, Commissioned Paper, Adelaide.

A Clayton, R. Johnstone and S. Sceats (2002), The Legal Concepts of Work-Related Injury and Disease in Australian OHS and Workers' Compensation Systems' *Australian Journal of Labour Law* Vol 15, 105.

D. A. Conrad, S. E. Henderlite and J. D. Loeser (1995), Incentive Effects of Workers' Compensation Benefits: A Literature Synthesis, *Medical Care Research and Review*, Vol. 52, No. 1, pp. 34-59.

A. Dembe, J. Himmelstein, G. Pransky and T. Snyder (1999), *Ergonomics*, Vol. 42, No. 1, pp. 171-182.

D. L. Durbin, B. D. Meyer and W. K. Viscusi (1995), Workers' Compensation and Injury Duration: Evidence from a Natural Experiment, *American Economic Review*, Vol. 85, No. 2 , pp. 322-340.

E.M. Falaris, C.R.Link and M. E. Staten (1995), *Causes of Litigation in Workers' Compensation*, WE Upjohn Institute for Employment Research, Kalamazoo.

Federal Department of Employment and Workplace Relations (2002), *Submission to the 'Inquiry into Aspects of Workers' Compensation'*, House of Representative Standing Committee on Employment and Workplace Relations.

J. A. Gardner (1989), *Return to Work Incentives: Lessons for policymakers from economic studies*, Workers Compensation Research Institute, Cambridge MA.

S. Garnett (2000), Workers compensation fraud: fact or fiction? *Plaintiff*, No. 39, pp. 10-16.

H. Genn (1999) *Paths to Justice: What People Do and Think About Going to Law*, Hart Publishing, Oxford.

R. J. Grellman (1997), *Inquiry into Workers compensation System in the NSW*, Final Report, Sydney.

R. Guthrie (2002), The Dismissal of Workers Covered by Return to Work Provisions under Workers Compensation Laws, *Journal of Industrial Relations*, Vol. 44, No. 4, pp. 55-61.

Heads of Workers' Compensation Authorities (2002), *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, Melbourne.

Heads of Workers' Compensation Authorities (1997), *Promoting Excellence: National Consistency in Australian Workers' Compensation*, Melbourne.

J. Heckman and B. Singer (1984), A Method for Minimizing the Impact of Distributional Assumptions in Econometric Models for Duration Data, *Econometrica*, Vol. 54, No. 2, pp. 271-320.

House of Representatives Standing Committee on Employment and Workplace Relations (2003), *Back on the Job: Report into aspects of Australian workers' compensation schemes*, Commonwealth of Australia, Canberra.

Industry Commission (1994), *Workers' Compensation in Australia*, Report No. 36, Australian Government Publishing Service, Melbourne.

S. Kennedy and J. Sloan (1993), *Weekly Benefit arrangements under the WorkCare scheme: Some options for change*, Best Practice Research Programs Policy Research Paper No. 3, Victorian WorkCover Authority, Melbourne.

K Kippel (1999), Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation, *International Journal of Law and Psychiatry*, Vol 22, No. 5-6, 521.

A B. Krueger (1990), Incentive Effects of Workers' Compensation Insurance, *Journal of Public Economics*, Vol. 41, No. 1, pp. 73-99.

J. Moore and W. K. Viscusi (1990), *Compensation Mechanisms for Job Risks*, Princeton University Press, New Jersey.

New South Wales Labor Council (2003), *Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks: Submission*, Sydney.

D. D. R. Pearson, B. McCarthy and R. Guthrie (2000), *Report of the Review of the Western Australian Workers' Compensation System*, Perth.

Productivity Commission (2004), *National Workers' Compensation and Occupational Health and Safety Frameworks*, Final Report, Commonwealth of Australia, Canberra.

K. Purse (2004), Work Related Fatality Risks and Neoclassical Compensating Wage Differentials, *Cambridge Journal of Economics*, Vol. 28, No. 2, pp. 597-617.

K. Purse (2003), Australian Workers' Compensation Policy: Conflict, Step-Downs and Weekly Payments, *International Employment Relations Review*, Vol. 9, No. 1, pp. 23-44.

K. Purse (2002), Workers compensation-based employment security for injured workers: a review of legislation and enforcement, *Journal of Occupational Health and Safety - Australia and New Zealand*, Vol. 18, No. 1, pp. 61-66.

K. Purse (1998), Workers Compensation Policy in Australia: Best Practice or Lowest Common Denominator? *Journal of Industrial Relations*, Vol. 40, No. 3, pp. 179-203.

K Purse, R Guthrie and F Meredith (2004) Faulty Frameworks: The Productivity Commission and Workers' Compensation. *Australian Journal of Labour Law*, Vol.17, No. 3, pp. . Forthcoming.

R. S. Smith (1979), Compensating Wage Differentials and Public Policy: A Review, *Industrial and Labor Relations Review*, Vol. 32, No. 3, pp. 339-352.

B Stanley, F Meredith and R Bishop (2002) *Review of Workers Compensation and Occupational Health, Safety and Welfare Systems in South Australia*, Vol 2. Adelaide.

W. K. Viscusi (1993), The Value of Risks to Life and Health, *Journal of Economic Literature*, Vol. 31, No. 4, pp. 1912-19 46.

M. Wooden (1989), Workers' Compensation, Unemployment and Industrial Accidents: An Inter-Temporal Analysis, *Australian Economic Papers*, Vol. 28, No. 3, pp. 219-235.