THE OPERATION OF THE QUEENSLAND WORKERS' COMPENSATION SCHEME

PROFESSOR DAVID PEETZ

REPORT OF THE SECOND FIVE-YEARLY REVIEW OF THE SCHEME

27 MAY 2018

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Hon Grace Grace MP
Minister for Education and Minister for Industrial Relations
1 William Street
Brisbane QLD 4000

Dear Minister,

I have pleasure in providing you with my report on the five-yearly review of the operation of the workers compensation scheme in Queensland, undertaken as per section 584A of the *Workers' Compensation and Rehabilitation Act 2003*.

Yours sincerely

Professor David Peetz
27 May 2018

TERMS OF REFERENCE

Section 584A of the *Workers' Compensation and Rehabilitation Act 2003* requires the responsible Minister to ensure a review is completed at least once every five years on the operation of the scheme.

The next review is required to be completed and a report tabled in Parliament by 30 June 2018.

The objective of this five yearly review is to report to Parliament on:

1. the performance of the scheme in meeting the objectives under section 5 of the Act, including:
   (a) maintaining a balance between providing fair and appropriate benefits for injured workers or dependants and persons other than workers, and ensuring reasonable cost levels for employers;
   (b) ensuring that injured workers or dependants are treated fairly by insurers;
   (c) providing for the protection of employers' interests in relation to claims for damages for workers' injuries; and
   (d) providing for employers and injured workers to participate in effective return to work programs.

2. emerging issues facing the Queensland workers' compensation scheme; and

3. the effectiveness of current rehabilitation and return to work programs and policy settings, including ways to increase Queensland's current return to work rate.

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Chapter 1: Introduction

1. The key characteristics of the workers compensation scheme in Queensland are that it is a centrally funded, 'short-tailed', no-fault scheme, with access to common law damages. The principal administrative parties in the scheme are the Office of Industrial Relations (OIR), which devises policy and acts as Regulator, and the insurers, WorkCover Queensland and 28 self-insurers. The system has undergone frequent review and reform since the early 1990s, including major rewrites of the legislation in 1996 and 2003, and changes introduced by the Newman Government in 2013, which were partially reversed two years later.

2. Consultations with stakeholders showed that, overall, they were happy with the broad operation of the scheme. They thought that it was financially sound, involved low costs for employers, provided fair treatment for both employers and injured workers, and was not facing any crises. This was also consistent with my own assessment of the scheme. Most stakeholders had some improvements that they wanted to make to the system. None, however, wanted to fundamentally overturn the operation of the system.

> *Recommendation 1.1: The core architecture of the system should be retained, and any further changes beyond those envisaged by this report should continue to involve stakeholder consultation.*

3. Some stakeholders were concerned about transparency, for example about how insurer's payments to Government were being spent, because of the aggregation of expenditure information by the Office of Industrial Relations.

> *Recommendation 1.2: The Minister should ensure that OIR publishes information on the disaggregated expenditures by the Regulator and other parts of the Office of Industrial Relations dealing with workers' compensation and safety, separate from the Parliamentary Estimates process, in a format that is friendly to users.*

4. Some matters, due in part to time constraints, were outside the scope of this report. One stakeholder raised an issue regarding the interaction of workers' compensation legislation with the *Civil Liability Act 2003*. This matter warrants further investigation but, as it relates to legislation that affects liability in a range of areas, not just workers compensation law, I cannot form a final view on it.

> *Recommendation 1.3: The Minister for Industrial Relations and the Attorney-General should consider the interaction between workers' compensation legislation and the* Civil Liability Act 2003*, in consultation with stakeholders, and put forward any legislative changes that are consequently necessary.*

Chapter 2: The financial performance of the scheme

5. Centrally funded schemes have economies of scale. This contributes to Queensland's efficiency. Amongst the central and managed schemes, the Queensland scheme has the highest proportion of total expenditure directed to claimants and the lowest proportion expended on insurance operations.

6. Due to the financial strength of self-insurers, reinsurance provisions and regularly reassessed bank guarantees, the solvency risk to the scheme posed by self-insured employers in this scheme is very low. WorkCover continues to be fully funded and maintains a strong financial position.

7. The premium paid by an employer varies according to the size, claims experience and industry of the employer, and is calculated using the Experience Based Rating (EBR) system that is designed to reward employers with good injury prevention and management. In 2017-18, its average premium rate was $1.20 per $100 of wages which, with discounts, averages around $1.17. I anticipate that it would continue to remain either the lowest or second lowest amongst the State schemes.

8. The Workers' Compensation Regulator is funded entirely from insurer contributions.

Chapter 3: Who is a worker? Access to benefits under the scheme

9. The definition of 'worker' in each jurisdiction, including Queensland, is generally intended to capture the majority of employees in traditional employment relationships, with some specific deemed additions. The deemed lists in each jurisdiction are all different. The desirability of drawing extra groups of people into the protection of workers' compensation legislation is long standing, and reflects the fact that it is not just employees who warrant the protection of beneficial legislation. However, the labour market has changed more rapidly than the definitions of worker.

10. Two related factors help explain the extent to which 'independent contractors' feature in employment: the growth of the employer drive for flexibility, and the emergence of new forms of corporate organisation of work (referred to most conveniently as 'not there' employment) to minimise costs and avoid responsibility for some of the labour costs they would otherwise incur. 'Independent contractors' typically are subject to Workplace Health and Safety legislation but are not entitled to workers' compensation or other employee benefits. They have inferior occupational health and safety (OHS) outcomes to ordinary, direct employees. There are potentially adverse effects not only for contractors but also, in cases of deaths, for their families, who find it hard to comprehend how that person's employment status could have such significant implications.

11. In many cases, controversy arises as to whether particular people should be classed as employees rather than independent contractors under employment law or for workers' compensation purposes. Often the indicia used by courts and tribunals lead to ambiguous outcomes, so cases contesting whether particular people are employees or independent contractors still end up before the tribunals or courts. The California Supreme Court recently broadened the meaning of 'employee' by replacing an assessment against various indicia with an 'ABC test'. A shorter test was, in effect, used in an Australian Federal Court decision in 2011 (by Justice Bromberg), and applied again in some cases between 2012 and 2015. While the law on this issue has evolved over the past decade, it is still not settled.

12. OHS outcomes for labour hire employees are also generally inferior to those direct employees. At present, the premiums for coverage of labour hire workers are paid by their direct employers, the labour hire companies. The host organisation is responsible under OHS law for their

safety, but there is no financial incentive directly making them address it. Jurisdictions overseas have tried different approaches to dealing with this issue. For instance, one option might be to have the premiums still paid under current arrangements but the experience rating of the host employer to also partially include the effects of injuries incurred by labour hire workers while on the premises of or working for such a firm.

> *Recommendation 3.1: The Government should consider the appropriate handling of experience rating and premiums for workers in labour hire agencies, including the role of injuries in shaping the experience rating for premium purposes of host employers. To do this a committee involving the Office of Industrial Relations (including WHSQ) and WorkCover should be established, and it should consult with relevant stakeholders and seek external input from academic researchers before making a recommendation to the Minister.*

13. A major gap in coverage of the workers' compensation system is that regarding unpaid commercial interns. This is a relatively recent phenomenon, and reflects changes in labour markets, with commercial internships seen in some industries as a way by which individuals can gain a competitive edge in the labour market. It appears some businesses engage unpaid interns to perform work that might otherwise be done by paid employees.

14. While the legality of unpaid commercial internships is controversial, many interns would not complain or take such matters to the Fair Work Ombudsman (FWO). Their replacement wages under a workers compensation system would be low (usually zero unless the intern has a casual job somewhere else), so the main expenses would be medical expenses and rehabilitation, and premiums would be low. Providing coverage would not subvert attempts to have interns classified as employees where appropriate, but equally it would enable action to be taken regardless of progress or otherwise on that front. It would be cost-neutral, as premiums would be designed to cover outlays.

> *Recommendation 3.2: The Act should be amended to enable coverage of unpaid commercial interns, with exemptions for interns already covered by injury insurance arrangements (including student internships undertaken as part of a course). For the purposes of calculating premiums, employers would be asked to report to WorkCover the number of hours worked by interns who were not covered by other injury compensation insurance. Volunteers for non-profit organisations would not be covered.*

15. In recent times, harmonisation of national OHS laws has been achieved, but huge differences in system designs, in particular the complexity of the different compensation and funding models, make it unlikely workers' compensation laws would ever fully be nationally harmonised. However, this does not preclude harmonisation as to who is covered.

16. There is benefit in seeking action on national consistency in coverage, but it is not a process without risks: there is a danger of levelling down rather than levelling up, and if consistency leads to a reduction in the beneficial nature of the legislation, it should not be pursued. Seeking national harmonisation on the definition of a worker would not prevent the Queensland government from taking action in a specific, innovative area, such as the gig economy. Regardless of which approach is

best, the debate over this is a matter the government of Queensland should be involved in and can advance.

> *Recommendation 3.3: The Government should work with other governments towards achieving a common definition across jurisdictions of 'worker' for workers' compensation purposes, that would take account of the potential for some workers, presently treated as independent contractors, to be subject to exploitation by more powerful organisations.*

17. Further ahead, the Government should engage in discussions about achieving a common definition of 'worker' for employment law purposes that would take account of similar factors.

Chapter 4: Claims and benefits under the scheme

18. A schematic outline of the claims process is on page xxxiv. It seems that statutory claim lodgements and statutory payments are relatively stable. While some factors have led to higher costs, these appear to have been offset by a reduction in serious injury claims.

19. A worker is eligible for a journey claim when the injury has resulted while travelling to and from work or while on a break from work. In the context of the financial health of the scheme, the nature of available evidence, the role of journey claims and the large, decentralised nature of Queensland in which a lot of work-related travel occurs, there is little to persuade me that the current arrangements should not be retained.

20. The National Injury Insurance Scheme (NIIS) for workplace accidents was introduced into Queensland workers' compensation legislation in 2016. It provides eligible, very seriously injured workers with a lifetime statutory entitlement to treatment, care and support payments. Most areas of ambiguity in relation to work-related injuries have now been resolved.

21. That said, it appears that NIIS still has some way to go. At the moment it is unclear how much momentum there is for extending the NIIS in Queensland (or any other state) beyond workplace and motor vehicle accidents into medical and general accidents, as was the intent, and this is not an issue that this review has had the time or opportunity to adequately pursue. However, it is important that the government efforts support people who have suffered catastrophic injuries in any form and continue cooperatively developing NIIS with a view to eventually extending its operation, as originally envisaged.

22. A recent court decision affected when a doctor is considered to have assessed somebody for workers compensation purposes. This appears to have adversely affected some workers with chronic, insidious or psychiatric injuries who did do not claim workers' compensation upon diagnosis (because they were not incapacitated). By the time the worker experiences an incapacity to work because of this injury, the resultant claim for workers' compensation can be rejected as being out of time. An insurer can waive the time limit in certain circumstances, but there needs to be more clarity in this area.

Recommendation 4.1: The Parliament should amend the Act to give insurers the discretion to accept a claim lodged more than 6 months after being assessed by a doctor, if the worker lodges their claim within 20 business days of certification of an incapacity. The Regulator should develop a practice note specifying that it will allow such claims where the medical practitioner uses the Work Capacity Certificate or where the worker can provide other evidence that they did not know before that date that the injury was covered by workers' compensation.

23. There are anomalies in the calculation of 'normal weekly earnings' (NWE) for the purpose of assessing benefits. There are also issues in the treatment of award entitlements to time-related benefits such as penalty rates and overtime pay, as well as hours worked above the standard specified in the award or agreement. Addressing this might require legislative amendment; it certainly requires further consultation.

Recommendation 4.2: The calculation of normal weekly earnings should be changed, by removing references to modes and medians, and instead avoiding the influence of outliers on the statistics by averaging the middle half of pay periods for calculation purposes.

Recommendation 4.3: The government should hold consultations with stakeholders regarding the appropriate treatment, in the calculation of benefits over the first 26 weeks, of award entitlements for payments for additional or unsocial hours, with a view to choosing one of three options: abolishing the distinction between award rates and NWE, with a new, intermediate replacement rate; creating a new distinction between overaward and award entitlements and establishing new replacement rates in such circumstances; or maintaining the status quo.

24. Great caution should be exercised in any analysis in linking the number of claims to the number of injuries. The system generates good statistics on workers compensation claims, but it is not designed to collect statistics on workplace health and safety or injuries. Accordingly, anyone planning on using system-generated claims statistics needs to be conscious of the virtues and limitations of those data.

Chapter 5: Psychological and psychiatric injuries

25. Psychological or psychiatric injuries include a range of cognitive, emotional and behavioural symptoms that have an impact on a worker's life and can significantly affect how they feel within themselves and interact with others. These claims are a small proportion of the number of claims but they are quite different to physical injury claims: they take much longer to decide; a much higher proportion are rejected; they involve a much greater amount of time off work; they have a much

lower return to work rate; and they have a higher rate of disputation over decisions. The incidence of such claims increased several years ago but has declined slightly over the past four years.

26. As with other Australian jurisdictions, where a psychiatric or psychological injury is said to arise from 'reasonable management action', it is excluded. There is some uncertainty as to what that means. In all jurisdictions the workplace must be a 'substantial' or 'significant' (as was previously the case in Queensland) contributing factor. In 2013, the Newman Government required the workplace be 'the major significant factor' in relation to psychiatric and psychological injuries. The label 'the major' probably has more symbolic value for the parties than its practical impact, which appears small though probably real. On the other hand, there seems no good reason for Queensland to be out of step with the other jurisdictions in Australia, none of which appear to require work to be 'the major' contributory factor.

> *Recommendation 5.1: The current definition of injury for psychiatric or psychological disorders in the Act should be revised to remove 'the major' as a qualifier for work's 'significant contribution' to the injury, to bring Queensland into line with other jurisdictions.*

> *Recommendation 5.2: OIR, in consultation with stakeholders, develop an information booklet for participants that clearly sets out examples of 'reasonable' and 'unreasonable' action for the acceptance of psychological and psychiatric injury claims.*

27. Psychological/psychiatric injuries have a profound effect on a worker's life both at home and work and are one of the most complex claim types to be managed in the workers' compensation scheme. The current system appears to be inadequate in terms of providing the tools to support employers to facilitate early intervention and in enabling support services to workers who may be suffering from a psychiatric or psychological disorder during the claims determination period.

> *Recommendation 5.3: The Office of Industrial Relations work with insurers to implement best practice claims management for psychological claims by adopting the principles of the Best Practice Framework for the Management of Psychological Claims in the Australian Workers' Compensation Sector.*

28. The best approach in relation to claims management itself would be for insurers to meet the cost of a prescribed number of psychological treatment services up until the time the claim is decided. This would ensure workers receive timely support and necessary treatment and provide appropriate incentive for reasonable claims decision time frames. If it was subsequently determined that the injury did satisfy the requirements to be work-related and compensable, the cost would ultimately be borne by the employer through the experience rating system (at least, for larger employers). If it was instead determined that the injury did *not* satisfy the relevant requirements, the cost would be borne by the insurer and have no bearing on the experience rating of the employer concerned.

29. Provision of these services is not intended to have any bearing on liability or acceptance of the claim. However, it is often through action in these early stages that the cost and damage caused by a psychological or psychiatric injury claim can best be reduced. The cost of mental illness is high, and it is not always easy to sort out the different contributing factors (which is one reason why it takes so long to determine a claim in this area), but early action at the workplace will possibly reduce that costs for employers, and especially do so for workers and society as a whole.

> *Recommendation 5.4: Early intervention in cases of potential psychological or psychiatric injury should be promoted by requiring insurers (on a 'no prejudice' basis) to cover the costs of treatment for such injuries before liability has been assessed, up to a limit (defined by reference to a time period). These costs would not form part of the experience rating of the relevant employer, if the claim is subsequently rejected.*

> *Follow-up recommendation 5.5: The requirement for 'no prejudice' early intervention on psychological and psychiatric injuries should be evaluated after two years, with a review including consultation with stakeholders, including mental health experts and action groups. That evaluation should also be considered by the next five-yearly review.*

30. One other matter that became apparent from the material submitted to this Review was that frequent exposure to multiple examiners and providers of psychological or psychiatric services did not assist injured workers achieve recovery and rehabilitation, and in fact it probably harms them.

> *Recommendation 5.6: The Regulator and insurers should do everything they reasonably can to minimise the number of examiners and providers of psychiatric or psychological services that workers with psychiatric or psychological injuries are required to see.*

Chapter 6: Rehabilitation and return to work

31. The performance of the Queensland system on return to work is not as strong as other aspects of the system. While financially the system appears very strong compared to other jurisdictions, its performance on return to work (RTW) is less outstanding, and relative to other states depends on what reference year is used (due in turn to data difficulties). While many aspects of the system promote RTW in the period where the greatest opportunities to do so occur, and where the efficacy of such efforts are the greatest, there is less emphasis on sustained or 'durable' return to work, especially amongst workers who have proved difficult to place back in work in the early months after injury.

32. While return to work is a valuable and appropriate objective, it may be that it is being measured too early and this may be having counterproductive impacts on incentives and behaviour

in the system. At a minimum, there should be some systematic follow-up of previously injured workers, on at least one, probably more occasions, after the time at which the claim is currently closed. This would enable understanding of their current employment status and their functioning post-injury, and identify whether any further action is required.

33. The introduction of new measures and concepts would not imply that the 'short term' nature of the Queensland scheme is being abandoned and the scheme moving to a 'long tail' scheme. The purpose is to ensure that what insurers see as 'successful' outcomes (injured workers returning to work) are genuine 'successes'.

Recommendation 6.1: To enable a focus on more durable return to work, insurers should follow-up workers some time after benefits have ceased, to ascertain their current employment status and their functioning post injury, and identify whether any further action (such as referral to a specific program) is required.

Recommendation 6.2: Insurers should collect and publish administrative data on durable return-to-work rates as key performance indicators.

Follow-up recommendation 6.3: The efficacy of new durable return-to-work measures in use should be reviewed after several years usage, or at least in the next five-yearly review.

34. With the demise of the Return to Work Assist (RTWA) program, there seems to be a gap in the provision of RTW services, arguably to the group that needs them the most (but for whom the provision of services is most difficult). A particular gap in relation to insurer responsibilities is after a worker's entitlement to compensation ceases (for example, an injured worker receives their notice of assessment, accepts a lump sum payment and is no longer entitled to compensation but may still not be able to return to work).

35. Insurers already have in place programs of some type to provide support for those who have not returned to work at the end of their statutory claim, and for those who are not working when they lodge a common law claim. However, there is no support at all for those who lose their jobs sometime after insurers administratively closed their claim because they had returned to work.

36. Unfortunately, we know very little about workers who lose their jobs sometime after their claim is administratively closed because they had previously returned to work. This is important to understand because of the high costs to society and governments when people are not working or not working to their capacity.

37. All insurers currently have an accredited return to work program, access to which could be extended by requiring the insurer to assess the rehabilitation and return to work needs of all who meet a set criteria and referring them, if necessary, to the accredited program. It is clearly better if

potential problems are identified early, when there is a good window of opportunity to influence a worker's return to work outcome.

38. Data analytics provides an increased opportunity to do this but, if human decision-making is not pivotal, there are dangers with potential biases and an individualised approach to rehabilitation tends to produce better outcomes. If data analytics is used to identify injured workers whose circumstances *increase the probability* of them having difficulty in returning to work, and target additional assistance to those workers, then it has the potential to do more good than harm.

39. Separately, it is important to ensure that no injured worker slips between the cracks and all injured workers are provided with support to return to work.

Recommendation 6.4: The Act should be amended to specify that an insurer retains responsibility for rehabilitation and return to work even after the entitlement to compensation ceases for a defined period, to ensure as much as possible that the worker either achieves or has had every reasonable opportunity to achieve a durable return to work.

Recommendation 6.5: Insurers should be required to assess the rehabilitation and return to work needs of all workers during the management of a claim and refer them to the accredited program if the assessment identifies a significant risk to the worker's return to work. However, decisions such as these (or any other by the insurer) should be made on the basis of human judgement by staff of the insurer, and not purely on the basis of algorithmic outcomes. An insurer should also be required to refer an injured worker to an accredited RTW program if, at the end of entitlement to compensation, the worker has not achieved a return to work. The entitlement to participate in the program should continue until the worker achieves a durable return to work or the insurer decides that either: the worker is not reasonably participating in the accredited program; or further participation will not reasonably contribute to achieving a durable return to work.

Recommendation 6.6: Workers should have a right to request a referral to an accredited return-to-work program.

Follow-up recommendation 6.7: An assessment should be undertaken within two years (and no later than the next five-yearly review) of the demographic and job history characteristics of workers who lose their jobs sometime after their claim is administratively closed because they had previously returned to work, and an assessment made as to whether any further legislative amendments are required, such as whether it is necessary to expand their entitlement to support beyond what is currently permitted under the Act.

40. Because the Regulator no longer accredits rehabilitation and return to work coordinators (RRTWCs), it has also lost the ability to educate and share industry best practice across the network of coordinators. There is also resultant uncertainty about the quality of some RRTWCs. That said, training should recognise industry-specific circumstances and take account of situations where RRTWCs have already achieved adequate training or qualifications.

Recommendation 6.8: The requirement that rehabilitation and return to work coordinators in larger organisations be appropriately qualified should be reintroduced, but with a transition period, partial or full credit for prior relevant training, and consideration given to the inclusion of industry-specific modules in the accredited training.

Recommendation 6.9: The Office of Industrial Relations should work in collaboration with insurers to develop a comprehensive plan to support that rehabilitation and return to work coordinators, and encourage uptake in industry, particularly within industry sectors that have a durable return-to-work rate less than scheme average.

Recommendation 6.10: The Act should be amended to oblige employers that are required to engage a rehabilitation and return to work coordinators (RRTWC) to provide a list of all RRTWCs engaged by the employer, and include in this list the RRTWC contact details and the workplace/s they have responsibility for. This information should be available to the Workers' Compensation Regulator and insurers for the purposes of educating and supporting these officers, and validating requirements.

41. Comments were made by several stakeholders that there needed to be an improvement in the regional presence of the administrators of workers' compensation in Queensland. With developments in digital technology, the need for administration through WorkCover to be centralised in Brisbane is not as strong as it was a decade or two ago. As well as making use of such

technologies, WorkCover's regional presence might also be improved through collaborative work with other agencies.

> *Recommendation 6.11: WorkCover should hold detailed consultations with the Office of Industrial Relations and stakeholders, as well as with its own employees, on ways in which its regional presence can be improved, with the objective of having a discernible proportion of its staff based outside Brisbane by the time of the next review.*

> *Follow-up recommendation 6.12: At the time of the next five-yearly Review (as well as in its annual reports before then), WorkCover should specifically report on actions it has taken to regionalise its operations, the effects and its future plans.*

42. Small businesses require additional assistance to ensure their workers are not disadvantaged, due to their low resources and infrequency of claims and rehabilitation experience. Consideration should be given to WorkCover funding a select number of allied health professionals from WorkCover's Return to Work panel to undertake appropriate activities. These professionals would also liaise with the injured workers' treating health practitioner to ensure sustainable return to work outcomes.

> *Recommendation 6.13: To assist small business to provide sustainable return to work options for injured workers, WorkCover should fund allied health professionals to undertake job task assessments at small businesses.*

Chapter 7: Prevention, education and compliance

43. Most prevention activities in workers' compensation relate to improving heath and safety at the workplace. These are the core responsibility of Workplace Health and Safety Queensland (WHSQ). There are, however, some joint activities. Effective WHS prevention initiatives need a systematic approach involving a wide range of intelligence and data. It would appear that this is more appropriately managed by WHSQ, which has the legislative responsibility for ensuring work health and safety. WorkCover's priorities should continue to be focused on premium collection, claims management and in particular rehabilitation and return to work, though its ability to fund prevention initiatives should be made clearer. A joint agency steering committee is also needed.

Recommendation 7.1: WorkCover and Workplace Health and Safety Queensland (WHSQ) should work together more closely, in particular by WorkCover using timely access of micro-level claims data to inform WHSQ of potential areas for intervention. A joint agency steering committee should also be established administratively to ensure WorkCover has input into prevention initiatives and provide for the report back on prevention initiatives and performance. Where WorkCover detects a pattern or trend that warrants intervention, it should immediately notify and meet with WHSQ, so that a cooperative strategy for intervention can be developed.

Recommendation 7.2: The Act should be amended to make clear WorkCover's ability to fund prevention initiatives.

44. During stakeholder consultations, several stakeholders commented on the combined one-stop shop website of the organisations operating in this space, in terms of the accessibility and usefulness of the information. While this is an area that is constantly evolving, it appears that many people would benefit from an improvement in the navigability of the combined website.

Recommendation 7.3: Following consultation with stakeholders, the Office of Industrial Relations (including WHSQ) and WorkCover should revise and improve their web presence to make it more accessible and useful to users.

45. The Injury Prevention and Management (IPaM) program, a joint funded initiative between WHSQ (within OIR) and WorkCover, and led by WHSQ, works closely with Queensland businesses to ensure systems are in place to prevent workplace injury and, if people are injured, return them to meaningful and appropriate work, as soon as practical. It has three components. IPaM Advance appears to be very well received by many stakeholders and is clearly effective in improving WHS outcomes and reducing injuries and claim costs. IPaM Advance would seem to be an obvious candidate for expansion. However, it is not clear that the strong evaluation performance of IPaM Advance can be extended to the other two, more recent, IPaM programs: IPaM Evolve and IPaM for Small Business.

Recommendation 7.4: Support for the IPaM Advance program should be maintained and expended across those parts of the large business sector with relatively poor performance.

Follow-up recommendation 7.5: WorkCover, in close consultation with OIR (including WHSQ), should undertake experimental research within sub-samples of its small business clientele to rigorously compare the effectiveness of various policy potential approaches for improving WHS outcomes and claims experience amongst small business. The outcomes of evaluations through that research should inform further policy development within WorkCover in relation to small business. They should also be considered by the next five-yearly review.

Follow-up recommendation 7.6: If IPaM Advance cannot be extended across the medium business sector, then WorkCover should test policy approaches for medium sized businesses using a methodology similar to that described above (regarding follow-up recommendation 7.5) for small business. If that is done, the outcomes of evaluations through that research should inform further policy development within WorkCover in relation to medium-sized businesses. They should also be considered by the next five-yearly review.

46. The problem of non-awareness by workers is most likely to occur amongst vulnerable workers, and in particular amongst vulnerable workers employed in firms that themselves do not comply with the legislation. A common way in which governments promote education of workers, including in relation to their rights, is to transmit information through the employer, sometimes compulsorily. However, this does not provide much of a model for workers' compensation education. If an employer is not themselves complying with the legislation, they are hardly going to pass on to workers a statement of their rights under that law. It seems necessary, therefore, for a state agency to engage in a direct official campaign to educate workers of their rights in workers' compensation. That campaign would best be run by WorkCover. An educational campaign would need to be available in multiple languages.

47. Other campaigns promoting awareness of worker rights are or will be run by other government agencies, including Workplace Health and Safety Queensland (WHSQ) and the federal Fair Work Ombudsman (FWO). WorkCover should work with these agencies to produce a jointly run and jointly funded educational campaign (or campaigns) that increase awareness amongst vulnerable workers of their rights under workers' compensation law (and other laws regarding employee entitlements and protections).

Recommendation 7.7: WorkCover should jointly fund and run an educational campaign aimed at promoting awareness amongst disadvantaged groups of their rights under workers' compensation legislation.
A major part of this should be done in co-operation with Workplace Health and Safety Queensland and/or the Fair Work Ombudsman, making maximum use of joint resources and overlapping interests.

48. Some groups of workers who need education would not necessarily be reached through the above approach. WorkCover should take steps to ensure that all workers of non-compliant firms are

informed of their rights under workers' compensation legislation. WorkCover also needs to consider what specific activities need to be done to increase awareness among those at risk of disadvantage.

> *Recommendation 7.8: WorkCover should also take steps to ensure that workers in identifiably non-compliant businesses are made aware of their rights, and should consider what steps should be taken to increase awareness among those not covered by any joint program with the FWO who would be at risk of disadvantage as a result.*

49. The broader question of encouraging worker activities that promote safety and good health at work, and facilitate prevention of occupational injury and illness would be a separate educational activity, but nonetheless one that should be explored. There would also be benefit, in more unionised sectors, of developing educational programs jointly with relevant trade unions, targeted to the particular circumstances in those industries. The Regulator should monitor and evaluate the efficacy of these educational programs and consider which, if any, have application in self-insured organisations as well.

> *Recommendation 7.9: WorkCover should explore educational programs, including jointly with WHSQ and with relevant trade unions, promoting good practice by employers and workers to minimise the risk of occupational illness and injury, including psychological or psychiatric injury and alerting workers to their rights under safety and compensation legislation.*

> *Follow-up recommendation 7.10: The Regulator should monitor and evaluate the effects of any new educational programs and consider which, if any, have application in self-insured organisations as well. If it concludes that one or more of them is warranted, it should advise the Minister and hold consultations with the stakeholders to determine the best way of financing and administering it or them.*

50. In order to maintain the currency of their registration, medical practitioners are required to regularly participate in continuing education. This continuing education is mostly provided by or through the professional bodies, and typically involves a series of optional modules of varying length, difficulty and hence accredited value.

51. A new module should be developed that covers the issues involved in workers' compensation, occupational therapy and return to work from the perspective of a medical practitioner. Stakeholder consultations revealed that something like this has been done once before, but it was under-utilised because it was only a small course—2 continuing professional development (CPD) points in the GPs program—and hence few medical practitioners saw it as help in gaining the 50 CPD points necessary for continuing registration. Amongst the issues covered in such a module, some non-medical matters would also likely need to be dealt with (such as eligibility criteria and benefits).

Recommendation 7.11: The Regulator, the Australian Medical Association (AMA) and the Royal Australian College of General Practitioners (RACGP) should jointly develop a course on workers' compensation, occupational therapy and return to work for general practitioners, of approximately 25-30 CPD points, for inclusion in the continuing education registration requirements for general practitioners. The AMA and the Regulator should also explore with professional colleges representing other medical specialist groups the feasibility and desirability of developing related modules for their own continuing education requirements.

52. Consultations revealed some matters where stakeholders considered that awareness amongst employers could be improved. The first was awareness of mental health issues. Some considered that there was a stigma attached to psychological injuries that was unwarranted, and that the negative attitudes employers felt for this translated into negative attitudes amongst other workers.

53. Another concern was that top level managers, a very time-poor group and hence difficult to access, may lack appropriate knowledge but make the key strategic decisions that shape the workplace environment and their subordinates' behaviour. There also appeared to be significant evidence presented that employer responses to injuries could be very influential in determining whether a common law action was pursued against the employer, because of their impact on workers' sense of injustice. This has some legal implications for liability that need to be addressed.

Recommendation 7.12: The Act should be amended to exempt apologies provided by employer representatives following a workplace injury from being considered in any assessment of liability.

Recommendation 7.13: Education of employers should give special attention to the benefits for workers and employers of: offering effective support, including but not restricted to apologies, after a workplace injury; the gains for workplace health from good management practice; and the question of how to gain the attention of CEOs and influence strategic decisions affecting the workplace environment.

54. While safety bonuses are conceptually related to experience rating, and may be a way firms attempt to align individual incentives to firm incentives, they were raised by several stakeholders as generating perverse incentives. There is substantial evidence of the difficulty of designing appropriate financial incentive systems for employees to match the objectives of the organisation. Organisations can respond to a financial incentive (experience rating) by changing the systems operating in the workplace, but individual supervisors and employees cannot. Short-term benefits for individuals able to claim their bonuses might be at the expense of long-term costs arising from systemic failures disguised by individual behaviours.

55. This is a matter on which, for better or worse, the review has not had enough time or resources to come to a definitive conclusion. It is a matter that requires good research.

> *Follow-up recommendation 7.14: The Minister should commission research investigating the relationship between safety bonuses and safety performance, using linked employee survey data. The results of that research should be taken into account in the next five-yearly review of the scheme.*

56. An issue for WorkCover is non-compliance of employers in payment of premiums, due either to employers understating their wages payments to particular workers, or not declaring the existence of particular workers. Compliance could be improved by some coordination between and joint investigations by WorkCover and the FWO.

> *Recommendation 7.15: WorkCover should improve the compliance of employers with their obligation to pay premiums by improving coordination with the Fair Work Ombudsman. The agencies should discuss whether this is best achieved through better information sharing between FWO and WorkCover or by the secondment of one or more officers from WorkCover to FWO (or vice versa).*

Chapter 8: Common law claims

57. Queensland's unlimited access to common law offsets the 'short tail' nature of the scheme, that is, workers can access common law to receive damages to meet their future needs arising from disability. The finalisation of a common law claim enables injured workers to exit the workers' compensation system years earlier than in other jurisdictions. This enables WorkCover and self-insurers to reduce their tail of claims, providing significant cost savings. The lump sum payment allows workers to move on with their lives rather than remaining on benefits for many years as is the case in some jurisdictions.

58. Common law claim frequency has dropped to 0.12 per cent of the Queensland workforce. The rate of statutory claims that convert to common law claims is steady at 3.5 per cent. While common law claims make up only a small percentage of claim numbers, they represent a large proportion of scheme costs.

59. Legislative amendments in 2013 introduced a threshold to restrict access to common law damages. In 2015, the threshold was removed for injuries on or after 31 January 2015. Although some stakeholders argued for its reinstatement, a threshold would be a very blunt and inequitable instrument that ends up placing pressure on other parts of the system.

60. While the New Zealand system shows that abolishing common law can be consistent with a low-cost scheme with a low injury rate, the merits or otherwise of that scheme need to be addressed in totality, and it is not necessarily a good idea to cherry-pick aspects of that scheme. If consideration is to be given in future to the restriction or abolition of common law access, it should be part of a broad ranging review that considers the entirety of a model such as that of New Zealand. This review has not been able to do that and has not been asked to do that.

61. There are aspects of common law that are worth understanding more about. Further research may provide additional clues on useful measures that can be undertaken to reduce common law costs without changing the fundamental design of the system. The use of research coming from, for example, Monash University to inform decision-making indicates the growing, useful role that research can play in improving the operation of workers' compensation systems.

> *Follow-up recommendation 8.1: Further research should be commissioned by WorkCover and OIR to investigate aspects of improving the operation of the workers' compensation system. Current and future research should be published so informed discussion can follow; where it contains commercially sensitive information, a version that has had the commercially sensitive information removed should instead be published. Likewise, research commissioned by other stakeholders should be published once commercially sensitive information is removed. It should also be considered by the next five-yearly review.*

62. Recently legislation was introduced to nullify 'hold harmless' clauses, which had been interpreted as enabling a host employer to transfer the liability for compensation to an insured labour hire company (that is, to WorkCover). They can also be viewed as an instrument designed to defeat legislative intent. One stakeholder raised concerns as to whether the intention has been achieved in the legislation. We will not really know whether these concerns turn out to be correct until they are tested in the courts.

> *Follow-up recommendation 8.2: OIR should closely monitor application of section 236B and, if its implementation does not adequately reflect the government's intention in overturning the Byrne decision and preventing the transfer of liability of head contractors onto WorkCover, the government should be in a position to quickly introduce legislative amendments to implement the intent.*

63. It was suggested that plaintiff solicitor fees should be monitored and controlled by the Workers' Compensation Regulator. It is a matter for a worker as to whether he or she wishes to enter into a private contract with a solicitor to be legally represented and regulation and protections are in place to govern that relationship. However, there is a public interest in knowing how much the costs in the compensation system are driven by legal expenses, while protecting the confidentiality of private contracts between plaintiffs and lawyers.

> *Follow-up recommendation 8.3: Data on the distribution of common law payouts, between plaintiffs and legal expenses at the time of settlement, should be collected on a confidential basis by an agency independent of the parties. That agency (or an approved organisation contracted for that purpose) should publish annual summaries of the data including breakdowns by size of settlement, type and size of employer and core demographics of plaintiffs.*

Chapter 9: Self-insurance

64. There are both advantages and disadvantages to the system from having self-insurance available. On the positive side, direct involvement by the employer in rehabilitation is one of the better ways to promote rehabilitation. On the negative side, the same cost incentives that promote active involvement in rehabilitation also encourage self-insurers to disguise or dismiss workplace injuries. This is mostly the case for less serious injuries or injuries that take some time to manifest themselves fully.

65. However, problematic behaviour is not restricted to self-insurers. Self-insurers can sometimes also be very innovative. The availability of common law damages acts as a constraint on the behaviour of all organisations, including self-insurers. Overall, self-insurers face incentives that can make them simultaneously better-behaved and worse-behaved than non self-insured employers of comparable size.

66. The principal methods of monitoring and auditing self-insurers used by the Regulator to assess their suitability for a license renewal—analysis of quantitative data of various forms and the undertaking of claims audits—will not necessarily detect problems that some workers have with 'high risk' self-insurers (to use a term in the PwC report).

67. The best way to tap into the potential for self-reported data would be to encourage reports by affected individuals, their representatives or people aware of their situation. The Regulator could also anonymously survey injured workers at the time of licence renewal, to assess their experiences with the self-insurer, if the Regulator felt that its deliberations would be better informed by doing so. In assessing self-insurers and studying their workers, the Regulator should pay attention to the 'early intervention' programs of some self-insurers.

Recommendation 9.1: The Regulator should encourage stakeholder input into the process of licence renewal for individual self-insurers, including by advertising for submissions when determining whether an employer is fit and proper to be a self-insurer. It should also survey injured workers in the lead-up to licence renewal.

Follow-up recommendation 9.2: The Regulator should, jointly with other parts of OIR (including WHSQ) and WorkCover, undertake or commission survey research comparing the post-injury experience of workers under 'early intervention' programs and in more conventional employers. The outcomes of that research should inform future policy development in relation to 'early intervention' programs. It should also be considered by the next five-yearly review.

68. A matter raised by a number of stakeholders was the exemption of self-insured employers from the obligation to notify WorkCover as soon as they are aware of a worker sustaining a compensable injury. Equivalence between self-insured employers and those covered by WorkCover would therefore be provided if self-insured employers were required to report all injuries to the workers' compensation insurance arm of the organisation. To ensure that this process was followed

by self-insured employers, the breadth of auditing by the Regulator could be expanded to include all injury management activities, including functions like 'early intervention' programs.

> *Recommendation 9.3: The Act should be amended to require all injuries to be reported to the relevant Insurer, with no exemption for self-insurers. The insurer should then pass that information to the Regulator.*

69. If the requirement to report all injuries was combined with an obligation to present an injured worker with an information sheet outlining their rights, it may increase the likelihood that injured workers of self-insured employers would exercise their rights to make a workers' compensation claim. A negative side-effect and concern for self-insurers may be that workers would become more litigious and less focused on rehabilitation and return to work. It is difficult to know what to make of these competing perspectives. Such a requirement would also be very difficult to enforce.

70. This question of a compulsory information sheet could be set for reconsideration at a later date. If stakeholder input into the license process is effective and adequate, then there would be no need to require an information sheet to accompany every injury.

> *Follow-up recommendation 9.4: The question of whether any information regarding the injured workers rights must be provided to all injured persons on notification of an injury should be considered at the next five-yearly review.*

Chapter 10: The Changing nature of work and the 'gig economy'

71. There is growing concern that the legal structures underpinning some 'gig economy' arrangements provide a mechanism for platforms to shift costs and risk to workers, and for gig workers to be exploited due the way they are being engaged. Although the platform economy is presently small as a portion of the overall workforce, it has the potential to grow significantly. One factor in that is the changes over the past three decades that have underpinned its emergence. These include: the emergence of the managerial desire for greater flexibility; the growth of new models of management structure; and the development of new digital technologies. The last appears to enable algorithmic management to substitute for control via the employment relationship.

72. This pattern means that the 'control' test, applied in common law to establish whether an employment relationship exists, is problematic. This growth of digital technologies and the opportunities they provide for new forms of control in response to consumer 'demands' may facilitate the expansion of the platform economy.

73. Many full-time workers in the platform economy are vulnerable and receive low wages that would be below that normally applying to the relevant award. They are often not classed as 'employees' (though internationally there is much uncertainty about their treatment, with varying interpretations in different jurisdictions) and so they are often not covered by workers compensation systems. They have low power.

74. Decisions by courts and tribunals internationally give contradictory indications on whether 'gig economy' workers are 'employees'. The uncertainty in the law is created in part by the way in which traditional legal conceptions of control and indicia of employment have failed to match contemporary practices of corporate control and public understanding of what they mean.

75. Unlike crowdwork (the other form of 'platform economy' work), work on-demand via apps lends itself to regulation in relation to workers' compensation. Arguments in favour of legislated coverage of such platform economy workers include: their vulnerability; the low likelihood they would adopt voluntary methods of compensation coverage even if such things were made available to them; the externalisation of injury costs; the likely illegality of the pay and conditions of many 'gig workers' absent possible contrivances to avoid classing them as employees; the flow-on effects to other workers; the conceptual similarity to labour hire (but with contractors instead of employees); and the spread of on-demand work via apps to a number of industries.

76. There are several possible options for the coverage of gig economy workers in workers compensation systems. Most have a number of drawbacks, especially when applied in a state that operates in the context of a federal system of employment law dominated by the Commonwealth parliament. The preferred approach is to redefine the coverage of workers compensation laws and responsibilities to encompass those who work under agency arrangements, and require payment of premiums by the intermediaries or agencies.

Recommendation 10.1: The coverage of the Act should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and specify that it applied where at least two parties were in Queensland at the time the work was undertaken.

Recommendation 10.2: Intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income received by the intermediaries or agencies.

77. There should also be a program to facilitate the return to work of injured gig workers. It will also be necessary to make both parties aware of the new arrangements. Many gig workers are likely to be ignorant of their rights and responsibilities even after changes are made. It will also be important to make platform firms aware of their responsibility to pay premiums, and they can be used to provide some of the information for employees.

Recommendation 10.3: The Regulator should have the capacity to exempt intermediaries or agents from the obligation to rehabilitate injured workers. This would normally be done unless the Regulator considered that the agent had the capacity to perform this role. In such circumstances, injured agency workers would immediately come within the scope of WorkCover's proposed extended return to work program, referred to in recommendation 6.5.

78. While this is a matter on which the State can and should take the initiative, there would be benefits from consultation with other states and the Commonwealth, to consider the implications of the changing nature of work for the definition and regulation of work.

> *Recommendation 10.4: The Office of Industrial Relations and WorkCover should manage a two-pronged information campaign, designed to build awareness of new arrangements for 'gig economy' workers, making use of both the processes by which workers are signed up to platforms, and the online environment that they frequent.*

Chapter 11: Dispute resolution

79. One feature of recent times has been the increasing number of self-represented appellants. Due to inexperience with judicial procedures, and at times concerns and impediments due to psychological injury, self-represented appeals take longer to conclude and are less likely to be found in favour of the appellant.

80. Up until mid 2017, self-represented appellants were able to access free assistance through LawRight, funded through a Commonwealth grant that was not renewed for 2017-18. By all accounts, the service was well run and only offered to those who met the eligibility requirements. Since this service has folded, vulnerable workers without the funds for legal representation have no other option but to self-represent.

> *Recommendation 11.1: Free assistance for self-represented appellants should be supported through grant funding from the Queensland government, broadly along the lines of the previous funding of LawRight's QIRC Workers' Compensation Appeals Service. OIR, the QIRC and legal associations, should work to devise a mechanism of support for such appellants.*

81. The Act does not provide an employer with the right to appear as a party when a worker appeals a review decision to the Queensland Industrial Relations Commission (QIRC). The Regulator encourages employers to be involved in the appeal by providing information and documents and access to relevant staff. To have the employer as a separate party may over-complicate the matter and be unfairly detrimental to a worker, particularly where the worker has sustained a psychological injury. However, it would be appropriate to provide the employer with an opportunity to be heard by the Regulator before a decision is made to concede an appeal.

> *Recommendation 11.2: The Regulator should put in place procedures to require it to consult with the relevant employer before conceding an appeal in the QIRC.*

Chapter 12: Conclusions

82. The recommendations that come out of this report are broadly improvements at the margin, but will nonetheless make the system work considerably better. These include recommendations in relation to: the management of psychological injuries; rehabilitation and return to work; prevention, education and compliance; and, importantly, workers in the platform economy. It is essential that the workers' compensation system maintain pace with developments in the labour market and the economy.

83. Some other matters require further consideration or research, including the experience rating of labour hire and host employers in labour hire situations; injury prevention and management programs for small and medium employers; early intervention programs; and the effects of safety bonuses. It is also important that some of the initiatives recommended in this report be evaluated properly in time for the next review.

84. One of the recurring themes I have encountered in this review is the overlap between OHS and workers' compensation policy. This overlap of issues means that, at some stage, there should be a review that looks at *both* OHS and workers' compensation issues. It does not follow that all future reviews should encompass both OHS and workers' compensation. Most would not. But every so often, it is necessary to look in detail at how both systems operate together.

> *Follow-up recommendation 12.1: The next five-yearly review should encompass both OHS and workers' compensation in Queensland.*

GLOSSARY

Term	Definition
Accepted claim	When the first decision about the application for compensation is to accept the claim. This excludes claim decisions where the first decision is rejected, cancelled, withdrawn, report only or common law only
Accident Insurance Policy	A workers' compensation insurance policy, compulsory for employers engaging workers. The policy covers the employer's liability for workers' compensation and damages arising out of an work-related injury sustained by their worker, no matter who or what caused it
The Act	The *Workers' Compensation and Rehabilitation Act 2003* (as amended)
AiGroup	Australian Industry Group
AMWU	Australian Manufacturing Workers' Union
Appeal conceded	The regulator indicates to the parties to the appeal and the court or commission that it will not be defending the review decision
Appeal dismissed	After hearing evidence, the Commissioner or Magistrate has dismissed the appeal and confirmed the review decision
Appeal settled	The parties to the appeal have negotiated a settlement out of court
Appeal struck out	Appeals struck out by the Commissioner or Magistrate because of failure of the appellant to comply with legislative, court or Commission requirements
Appeal upheld	After hearing evidence, the Commissioner or Magistrate has upheld the appeal and set aside or varied the review decision
Appeal withdrawn	Appeal is withdrawn by the appellant prior to hearing
Average premium rate	The average premium rate is a rate per $100 of wages (that is, it is expressed as a percentage), calculated by averaging net premium assessed for the year as a proportion of total wages declared by all employers for that year
Average settlement cost	The average settlement cost, regardless of when payments were made, of finalised common law claims (excludes claims with a nil settlement)

AWU	Australian Workers' Union
CCIQ	Chamber of Commerce and Industry Queensland
Claims experience	An employer's claims experience is used when calculating premium and is comprised of the statutory claims amounts paid under an employer's Accident Insurance Policy for the preceding three years and the damages claims amounts paid under the policy for the two years preceding that
Common law claim	A common law claim is the claim made by an injured worker who commences common law action through the courts against their employer for negligence (they are 'suing' their employer). The courts award common law damages payments for economic loss, pain and suffering, legal costs, and medical and hospital costs. These damages are normally covered by the insurer.
Common law claim lodgements	All common law claims lodged with insurers, regardless of the outcome. If a common law claim is associated with more than one statutory claim, it will be counted for each statutory claim it is associated with (if one common law claim is associated with three statutory claims, the common law lodgement has been counted three times)
CPM	Comparative Performance Monitoring by SafeWork Australia
Damages	Damages are payments made under a common law claim that are classified as 'heads of damage'. These are different types of damage that may be suffered by an injured worker. Examples are general damages (compensation for pain and suffering) and economic loss (compensation for loss of past earnings or future earning capacity)
Degree of permanent impairment (DPI)	Injuries on or after 15 October 2013 are assessed under the Guidelines to the Evaluation of Permanent Impairment (GEPI) (which references AMA5). From this assessment injured workers receive a degree of permanent impairment (DPI)
DJAG	Department of Justice and Attorney-General
ESO	Electrical Safety Office
Estimated wages	When calculating premium, WorkCover requires details of the actual wages paid during the last financial year and the estimated wages you expect to pay in the next financial year
FW Act	Fair Work Act 2009 (Cth)
FWC	Fair Work Commission
FWO	Fair Work Ombudsman

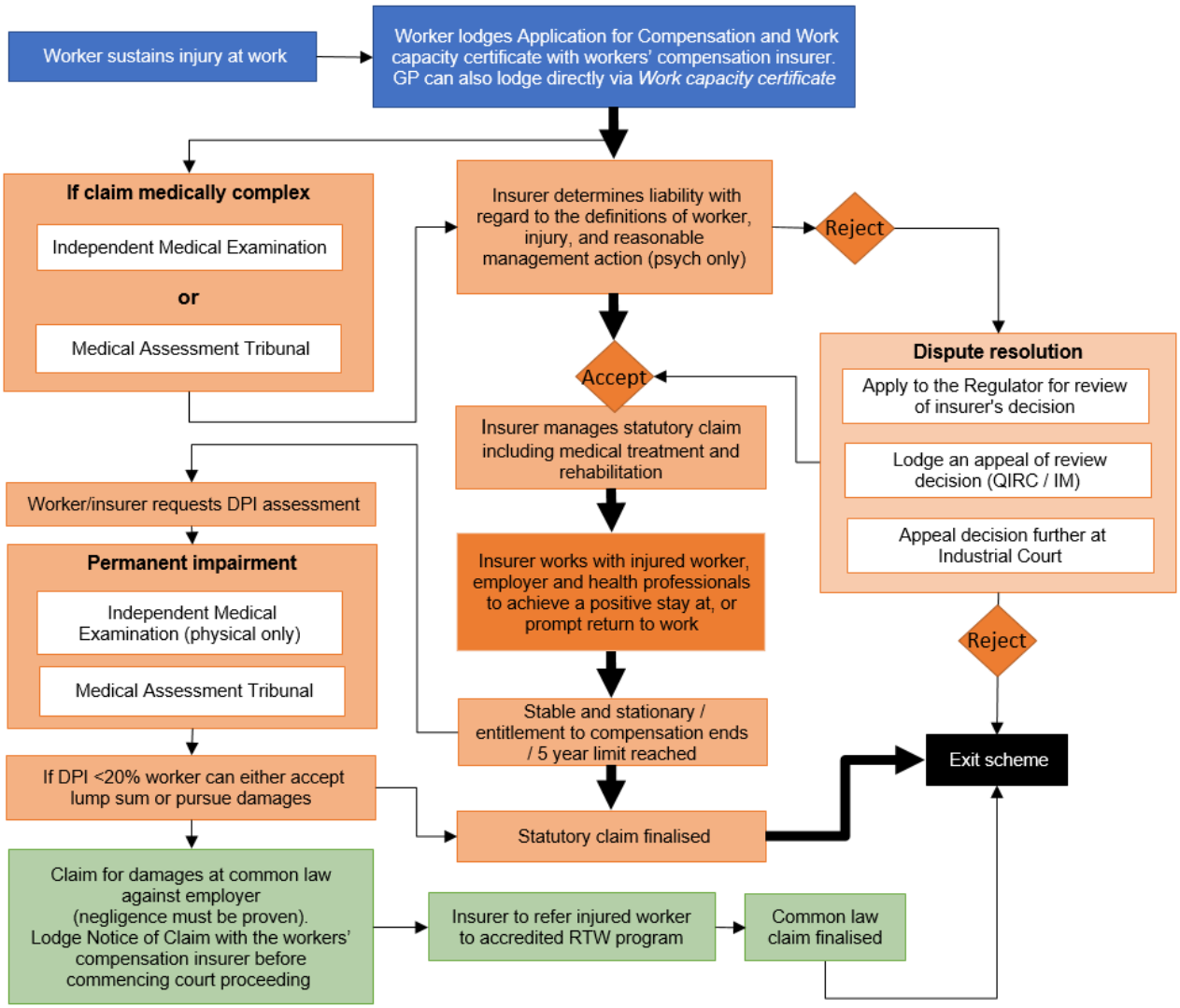
Health provider	Health provider refers to any medical or allied health provider (for example a doctor, medical specialist, physiotherapist, chiropractor or occupational therapist) who is registered with the relevant professional board (e.g. Physiotherapist Board of Queensland)
HIA	Housing Industry Association
Host employer	A host employer is an employer who agrees to host an injured worker at their workplace when the worker is unable to participate in workplace rehabilitation with their original employer. These programs normally run from three to six weeks. A host employer is not obliged to employ a person after their program has ended
HSE	Health and Safety Executive
HWCA	Heads of Workers' Compensation Authorities
Impairment	The Act describes impairment from injury as being 'a loss of, or loss of efficient use of, any part of a worker's body'. This includes psychological injuries
Industry	All industry codes are based on the insurers' coding of industry to the divisions from the 'Australian and New Zealand Standard Industry Classification' (ANZSIC), Australian Bureau of Statistics (ABS), 2006
Industry rate	The WorkCover industry rate is the amount of premium per $100 of wages for a specific WorkCover Industry Classification (WIC) code
Injury	An injury, as defined by the Workers' Compensation and Rehabilitation Act 2003 is, 'A personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury'
Injury nature	Injury nature groupings are based on the insurers' coding of primary injury nature and location. The injury nature and location coding by the insurer is determined using the Type of Occurrence Classification System as published by Safe Work Australia
IP Act	Information Privacy Act 2009
IPaM	Injury Prevention and Management Program. A partnership between WorkCover and Workplace Health and Safety Queensland which helps employers who have a high frequency of claims bring about a workplace culture change and achieve a better standard of workplace health and safety and injury management
IR Act	Industrial Relations Act 2016

ISCRR	Institute of Safety, Compensation and Recovery Research
Lodgements	All claims lodged with insurers, regardless of the outcome (i.e. excludes cancelled claims, includes withdrawn and report only claims)
MBQ	Master Builders Queensland
Medical expense only claim	All accepted claims which have had medical treatment and rehabilitation payments, excluding those that also had weekly compensation or fatality payments
MOU	Memorandum of Understanding
Nil settlement	A nil settlement is where a common law claim has finalised with no damages paid
OIR	Office of Industrial Relations
PAYG	Pay As You Go (taxation instalments)
PCBU	Person Conducting a Business or Undertaking
Permanent impairment (PI)	A permanent impairment from an injury is an impairment that is stable and stationary and not likely to improve with further medical or surgical treatment (s38)
Policyholder	Is an individual or entity that holds an insurance policy with WorkCover
Premium notice	Is a notice that is sent to WorkCover policyholders detailing an amount payable on their policy following inception, renewal or reassessment
Premium rate	The rate per $100 of wages for an individual employer
PwC	PricewaterhouseCoopers
Q-COMP	Q-COMP is now the Workers' Compensation Regulator
QCU	Queensland Council of Unions
OHS	occupational health and safety
QIRC	Queensland Industrial Relations Commission
QNMU	Queensland Nurses and Midwives Union
QOTE	The Workers' Compensation and Rehabilitation Act 2003 describes Queensland ordinary time earnings (QOTE) for a financial year as being 'the seasonally adjusted amount of Queensland full-time adult persons ordinary time earnings as declared by the Australian Statistician in the statistician's report

	about average weekly earnings published immediately before the start of the financial year'. (6302.0 - Average Weekly Earnings, Australia, Australian Bureau of Statistics)
Rehabilitation	Under workers' compensation legislation, the purpose of rehabilitation is to ensure the worker's safest and earliest possible return to work or to maximise the worker's independent functioning. Rehabilitation for return to work (sometimes called occupational, vocational or workplace rehabilitation) can include treatment from a range of health providers, assessments of work capacity and suitable duties programs. Under legislation, workers and employers must take every reasonable step to participate in rehabilitation and return to work programs
Rejected claims	The application for compensation is rejected (s134)
Results test	Is one of the tests used by WorkCover to determine if a person is considered a 'worker' under Schedule 2, Part 1 'Persons who are workers' in the Act
Return to work	The worker's timely, safe and medically structured return to preinjury duties, or other employment, following workplace injury
Review decision to confirm	Insurers' decision is confirmed by the Review Unit
Review decision to set aside	Insurers' decision is set aside by the Review Unit and a new decision substituted
Review decision to vary	Insurers' decision is varied by the Review Unit
RTO	Registered Training Organisation
RTW	Return to work
RRTWC	Rehabilitation and return to work coordinator
Self-insurer	An employer who meets certain criteria to manage their own workers' compensation issues
Statutory (no-fault) claims	A statutory or no-fault claim is when a worker is compensated for a work-related injury with payments and benefits prescribed in the Workers' Compensation and Rehabilitation Act 2003. These payments and benefits are referred to as statutory compensation and may include weekly payments as income replacement, lump sums to compensate for permanent impairment, and hospital and medical expenses. Statutory claims are administered on a 'no fault' basis. That is, it doesn't matter if it is the worker's or the employer's fault that the injury occurred compensation is still paid

Suitable duties program	A suitable duties program is designed to help workers return to work gradually through a supervised process. The program matches a worker's abilities with appropriate work tasks and hours. The goal of the program helps workers return to their normal duties
SWA	Safe Work Australia
Time lost claims	All accepted claims which have resulted in time lost from work excluding fatalities
Wages	Wages are the total amount an employer pays to a worker as defined by Schedule 6 of the Workers' Compensation and Rehabilitation Act 2003
WCR	Workers' Compensation Regulator
WCQ	WorkCover Queensland
WHS	workplace health and safety
WHS Act 2011	Work Health and Safety Act 2011
WHS Board	Work Health and Safety Board
WHSQ	Workplace Health and Safety Queensland
Work related impairment (WRI)	The degree of work related impairment is calculated after one or more permanent impairments (PI) are assessed. WRI applies to injuries before 15 October 2013
WorkCover	WorkCover Queensland
WorkCover Industry Classification (WIC)	An industry classification system based on the Australian and New Zealand Standard Industrial Classification. Businesses will be assigned an appropriate industry category on the basis of their whole-of-business activity
Worker	A 'worker' for the purposes of the Workers' Compensation and Rehabilitation Act 2003 is an individual employed under a Contract of Service (sect 11) or specifically included under Schedule 2 Part 1, unless specifically excluded under Schedule 2 Part 2
Work-related injury	An injury where employment was a significant contributing factor

THE CLAIMS PROCESS: SCHEMATIC REPRESENTATION



ACKNOWLEDGEMENTS

On 6 March 2018 I received a letter from the Minister for Education and Minister Industrial Relations, Grace Grace MP, confirming my appointment to lead the second review of the workers compensation scheme. Under section 584A of the *Workers' Compensation and Rehabilitation Act 2003*, a review of the operation of the scheme must be completed at least once every five years.

This review had to be completed in time to be considered by government and tabled in the Queensland Parliament by 30 June 2018. The focus was to be on strategic directions and consolidation, and the terms of reference are shown at the front of this report.

I would like to express my appreciation to academic and legal colleagues whom I have consulted in the preparation of this report, including Josh Bornstein, Anthony Forsythe, Ron McCallum, Michael Quinlan, Christine Randall, Andrew Stewart and Elsa Underhill. Rather than prioritising their contributions I have listed them alphabetically.

I'd also like to thank the many people who gave of their time to meet with me in the course of the stakeholder consultations, and in many cases to provide me with written submissions. The organisations they represented are listed in an appendix to this report.

My thanks for assistance in many of the activities involved in preparing this report, including dealing with the logistics of consultation, go to staff of the Office of Industrial Relations, many of whom are too modest or morally upright to be mentioned, though special thanks must go to Aleisha Dunn and Gaye Owen (whom I'm naming despite their apparently being both those things) as well as Paul Goldsbrough, who made sure I had access to the resources I needed to get it all done.

However, none of the above can take the blame for any of the content that follows. In the end, the responsibility for it, warts and all, is mine.

David Peetz

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CHAPTER 1: INTRODUCTION

The purpose of this report is to review the workers' compensation scheme in Queensland. The focus of the review is on strategic direction and consolidation. This is the second review of the scheme; under the relevant legislation these reviews must be conducted every five years, with the last one completed in 2013.

1.1 Overview of the Queensland workers' compensation scheme

SCHEME DESIGN

There are three types of workers' compensation schemes operating in Australia. Queensland, like Victoria and South Australia, has a centrally funded scheme. In centrally funded schemes, a single public insurer performs most, or all, of a workers' compensation insurer's functions. Central insurers are responsible for underwriting their scheme. This is in contrast to most other jurisdictions (Western Australia, Tasmania, Australian Capital Territory and the Northern Territory), which are privately underwritten schemes. In these schemes most, or all, insurer functions are provided by the private sector, through approved insurance companies. New South Wales by contrast, has a managed scheme. In a managed scheme, the public central insurer is responsible for underwriting, funds management and premium setting. Other functions, such as claims management, are outsourced to private sector providers. A fourth type of scheme operates in New Zealand: a centrally-funded, no-fault scheme covering injuries not just at work but also in vehicles, at home and elsewhere.

The Act establishes WorkCover Queensland ('WorkCover') as the provider of accident insurance to Queensland employers (other than self-insurers). A WorkCover insurance policy covers an employer for all compensation, medical expenses and damages claimed by injured workers for injuries that arise out of—or in the course of—employment, where employment is a significant contributing factor to the injury. Psychiatric and psychological injury that results from reasonable management action taken in a reasonable way is not covered by the scheme.

Like all Australian schemes, Queensland's statutory workers' compensation scheme is a no-fault scheme. An injured worker who meets the Act criteria is entitled to statutory compensation (as opposed to common law damages) regardless of whether it is the worker's or the employer's fault that the injury occurred. Issues of fault and negligence (including contributory negligence by a worker) may be dealt with in a common law action for damages.

Queensland has a 'short tail' workers' compensation scheme, meaning that the entitlement of a worker to weekly benefits stops when the first of the following happens:

- the incapacity because of the work related injury stops;
- when the worker's injury is considered stable and stationary and a lump sum payment has been accepted which is based on their permanent impairment;
- the worker has received weekly payments for the incapacity for five years; or
- the weekly benefits received reach the maximum amount ($320,370 as at 30 June 2017).

The short tail of the Queensland scheme is offset by the ability of injured workers to seek damages at common law. Most Australian jurisdictions operate 'long tail' schemes that pay benefits for the duration of a worker's incapacity, with heavily restricted or (in the case of South Australia and the Northern Territory) no access to common law remedies.

The only exception to the short tail nature of the Queensland scheme is for workers with serious personal injuries who are eligible to receive lifetime treatment, care and support payments under the National Injury Insurance Scheme.[1] A summary of the key features of each scheme is in Appendix 1.

ADMINISTRATION OF THE SCHEME

The *Workers' Compensation and Rehabilitation Act 2003* (the Act) and *Workers' Compensation and Rehabilitation Regulation 2003* (the Regulation) establish Queensland's system of workers' compensation. Under the Act, an employer must insure or self-insure against work related injury sustained by a worker of the employer where work is a significant contributing factor to the injury.

Queensland's workers' compensation scheme (encompassing both premium-paying employers and 28 self-insurers) covers more than 158,000 employers and an estimated 2.3 million workers (as of June 2017).

Administration of the scheme is undertaken by:

- the Office of Industrial Relations (OIR), which has responsibility for:
  - implementing the government's policy and legislative agenda, and managing the wider nexus between workers' compensation and work health and safety; and
  - regulating insurers, providing legal and medical dispute resolution, providing rehabilitation advisory services and promoting education about the scheme, through the Workers' Compensation Regulator (the Regulator); and
- the Insurers, comprising:
  - WorkCover (WorkCover), the state-owned, default insurer; and
  - 28 self-insurers (that is, organisations, including some commercial providers, that perform the function of insuring employers who opt for self-insurance) that administer 7.7 per cent of all claims lodged.

OIR also includes the main body responsible for workplace health and safety (WHS), known as Work Heath and Safety Queensland (WHSQ).

The roles and responsibilities of the Office of Industrial Relations, WorkCover and the self-insured employers are briefly described below.

Office of Industrial Relations

Policy and legislative development

The Office of Industrial Relations (OIR) ensures the legislative and policy framework for workers' compensation, including responses to emerging policy issues, are in accordance with government priorities and commitments.

[1] The background to this is discussed further in Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Act 2016.

This role involves monitoring workers' compensation trends and statistics, shifts in the labour market and economic climate, developments in common law and interpretation of legislation by the courts, and experience from other jurisdictions.

OIR advises the Minister for Industrial Relations on issues relevant to their responsibilities and powers under the Act for the monitoring and assessment of the Regulator and insurers. OIR through Workplace Health and Safety audits the health and safety performance of all self-insurers. It is also responsible for determining the work health and safety performance requirements of current and prospective self-insured employers.

Workers' Compensation Regulator

The primary function of the Workers' Compensation Regulator is to regulate the workers' compensation scheme. Most functions are delegated and undertaken by the Office of Industrial Relations**.** The Regulator is funded through a contribution from WorkCover and a proportionate levy on self-insured employers.

The Regulators' functions include:

- monitoring insurers' performance and compliance with the Act;
- deciding applications for self-insurance licences;
- undertaking reviews of insurer decisions;
- responding to appeals of its review decisions;
- supporting and overseeing the administration of medical assessment tribunals;
- undertaking workplace rehabilitation accreditation and compliance activities;
- collating and analysing scheme-wide statistics;
- promoting education about the workers' compensation scheme;
- collecting fees from insurers;
- administering grants to organisations involved in the prevention, recognition, treatment, alleviation of injury sustained by workers, including making employers and workers aware of their rights and the procedures they need to follow under the Act.

In 2013, the role and functions of the Regulator was merged into the same organisation as the Office of Industrial Relations policy and legislative area. Prior to this, the structure of the Queensland workers' compensation scheme fell between three separate agencies (WorkCover, the Workers' Compensation Regulatory Authority and the then Office of Fair and Safe Work Queensland). The latter two were merged, on the grounds that the previous structure resulted:

> in duplication and overlap which increases scheme costs. There is no one point of control for scheme costs as both the Workers' Compensation Regulatory Authority (the Authority) and WorkCover set their own budgets.[2]

WorkCover - Provision of insurance

The Act establishes WorkCover as the provider of accident insurance to Queensland employers (other than self-insurers).

[2] Explanatory Notes to the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2013

WorkCover is a government-owned statutory body that operates as a commercial enterprise. It is fully funded by the premiums paid by employers. Its charter is to maintain a balance between benefits for injured workers and affordable premiums for employers.

WorkCover insures employers against the cost of their workers' statutory and possible common law claims, ensuring a worker who is injured at work receives financial support.

Self-insurance

The Queensland scheme, like all other Australian jurisdictions, allows employers to provide their own workers' compensation insurance, through self-insurance licences, if they meet certain requirements and demonstrate the financial capacity to fully fund future liabilities. Self-insurers must have adequate arrangements for work health and safety, injury management and return to work, and the capacity to effectively manage workers' compensation. Licensing and oversight of self-insurer performance is undertaken by the Regulator.

There are currently 28 licences for self-insurance in the scheme. These licences cover 294 employers and approximately 163,580 workers. Self-insurers manage 7.7 per cent of the total number of workers in Queensland. By comparison, New South Wales has 60 licensed self-insurers and six specialised insurers for particular industries. Victoria has 37 licensed self-insurers. Fourteen of Queensland's self-insurance licence holders are also self-insured in at least one other jurisdiction, and seven of these insure in three or more jurisdictions.

Eligibility for self-insurance is discussed further in chapter 9.

1.2 Recent scheme reviews and outcomes

The Queensland workers' compensation scheme has undergone frequent review and reform since the early 1990s—see Appendix 2 for a more detailed listing of recent reviews. Major rewrites of the legislation in 1996 and 2003 resulted in significant changes, such as the establishment of WorkCover and the separation of regulatory functions from the commercial delivery of services. In 2013, the Newman government introduced limitations on common law access that were reversed two years later.

A summary of the major reviews and changes is as follows:

1996

Concern about the potential extent of the unfunded liabilities of the then Workers' Compensation Board of Queensland, together with other factors, led to the establishment of a Commission of Inquiry by the newly formed Borbidge government. The subsequent Kennedy Report referred to a 'black hole' of $320 million in unfunded liabilities and made 79 recommendations in relation to the provision of workers' compensation in Queensland. Most, including changes to the definition of 'injury' and 'worker', were incorporated in the *WorkCover Act 1996*, with the exception of recommendations to abolish journey claims and introduce thresholds for common law access, which did not proceed.

1999

The Beattie Government released the *Restoring the Balance* position paper with the aim to restore pre-1996 definitions of 'worker' and 'injury' and overhaul the review process to improve procedural fairness and transparency. Self-insurance licensing criteria were also expanded, with the employee threshold increased from 500 to 2,000 full time equivalents.

2000

A National Competition Policy (NCP) Legislation Review of the *WorkCover Act 1996* was conducted in accordance with the intergovernmental NCP agreement. The review recommended retaining WorkCover's monopoly insurer status but that its regulatory arm be separated and set up as an independent entity. Legislation established Q-COMP as a statutory body to regulate Queensland's workers' compensation scheme.

2005

Some outstanding matters from the 2000 NCP review were accepted by government and legislative amendments followed regarding the relaxation of some aspects of the self-insurance licensing criteria and workplace rehabilitation requirements to allow self-insurers and employers greater flexibility in organising their workers' compensation and rehabilitation arrangements.

2007

Another Kennedy review gauged that the new low ($1.15 per $100 wages) premium rate was sustainable for three years but that its sustainability could not be forecast beyond then. It recommended a modest package of improved worker benefits (removing one and two year step-downs of weekly benefit entitlements, and increasing the amount of and access to the maximum additional lump sum compensation payable for more seriously injured workers).

2010

Following operating deficits in WorkCover, legislative amendments, mainly focussed around the growth in common law claims, were passed in June 2010. The Government also commenced a structural review of the workers' compensation scheme in response to concerns about the quality of information on scheme performance compared with that of other workers' compensation jurisdictions, the roles of Q-COMP and WorkCover, as well as the role of lawyers and the level of legal costs in the system. Following a period of public comment, the Government approved the implementation of all 51 recommendations of the report in March 2011.

2013

The Newman government made a number of major changes to the scheme. The most important were the introduction of a threshold for accessing damages at common law of more than 5 per cent permanent impairment, and an increase in the onus of proof for compensation of psychiatric or psychological injuries. Work related impairment (WRI) was replaced by a degree of permanent impairment (DPI) as the measurement for determining statutory lump sum compensation.

2015

The Palaszczuk Government removed the requirement for a permanent impairment of greater than 5 per cent for workers seeking access to common law. It removed thresholds for injuries sustained on or after 31 January 2015, with additional compensation provided for particular workers injured between 2013 and 30 January 2015 and affected by the common law threshold previously in operation.

2016

The National Injury Insurance Scheme (NIIS) was established.

The Parliament also reversed the *Byrne v People Resourcing* judgement, preventing the transfer of liability from principal contractors or host employers to those with a workers' compensation insurance policy.

2017

Amendments were made to legislation affecting workers suffering from Coal Workers' Pneumoconiosis.

A more detailed description of the changes is in Appendix 2.

1.3 Issues arising

OVERALL OPERATION OF THE SCHEME

One thing that came out of the consultations with stakeholders was that, overall, they were happy with the broad operation of the scheme. They thought that it was financially sound, involved low costs for employers, provided fair treatment for both employers and injured workers, and was not facing any crises. This was also consistent with my own assessment of the scheme , as shall be seen later in the report, including in chapter 2.

Some (such as the Australian Lawyers Alliance) commented on the high level of stakeholder engagement that mostly characterised the operation of the scheme. Before changes were introduced, there was typically a period of public consultation, at least with the key stakeholders involved. This meant that there were fewer unintended consequences from changes, even when the philosophy behind them was not shared by the parties concerned, and so people were generally happy with the *processes* of the system, as well as the outcomes. This process of ongoing consultation is something that I welcome; I followed that logic for this review; and it should be continued into the future.

Most stakeholders had some improvements that they wanted to make to the system. Some proposed improvements that contradicted proposals from others. None, however, wanted to fundamentally overturn the operation of the system. The only thing that came close to this was the suggestion from some that the common law restrictions, imposed in 2013 and removed in 2015, be reintroduced, but even then it did not appear to be something any wished to die in a ditch over. I deal with this matter in chapter 7, but at this stage point out that I do not recommend major changes on that issue. Overall, almost all improvements suggested, and the recommendations that come out of this report, are improvements at the margin, that will nonetheless make the system work considerably better. This does not mean that they are unimportant, however. Some anticipate issues that are emerging now and will be of growing importance in the future (such as changes in the labour market); most relate to how evidence indicates the system works now and what can be done to make it work better.

> *Recommendation 1.1: The core architecture of the system should be retained, and any further changes beyond those envisaged by this report should continue to involve stakeholder consultation.*

REGULATORY STRUCTURE

Some stakeholders raised the merger of Q-COMP into OIR as a concern. For example, the Association of Self Insured Employers of Queensland (ASIEQ) stated that the amalgamation of the Regulator into the Office of Industrial Relations had led to confusion regarding the role of the Regulator and a greater separation of responsibilities was needed. In assessing this, I have to take account of the likelihood that there would have been a period of transition for this merger. More importantly, I also have to take account of the costs involved. Combining the roles of policy and regulatory functions under the one department is consistent with other jurisdictions. Synergies between the two functions, and a better working relationship between the two roles reduces the likelihood of disconnect between legislated and operational policy. It also allows for the development of more evidence-based responses to emerging issues provided there is transparency of data including research. The Queensland Legislation Handbook stresses that all endeavours should be made to avoid the creation of unnecessary statutory bodies. So the question is: would any benefits outweigh the additional costs (which would likely not be welcomed by insurers anyway, as they would have to bear the burden of such costs)? On that, I have my doubts.

At the heart of the problem seemed to be transparency. Insurers (not just the self-insurers) were unclear as to how their money was being spent, because of the aggregation of expenditure information by the Office of Industrial Relations (OIR). In some ways, some expert digging could often find the information parties wanted. The Estimates process for Parliamentary scrutiny of expenditure often provided that information. However, it is not necessarily the most user-friendly way of looking for information, and transparency would be improved by the separate publication (outside the Parliamentary Estimates process) of information on the disaggregated expenditures by the Regulator and other parts of OIR dealing with workers' compensation and safety.

> *Recommendation 1.2: The Minister should ensure that OIR publishes information on the disaggregated expenditures by the Regulator and other parts of the Office of Industrial Relations dealing with workers' compensation and safety, separate from the Parliamentary Estimates process, in a format that is friendly to users.*

There are some matters that, due in part to time constraints, are outside the scope of this report.

Some concern the fundamental design aspects of the system. One reason for that is the absence of any robust proposals from any of the stakeholders to overturn them. Nor was this a feature of the terms of reference of this review. Another reason is the time available. As discussed in chapter 7, any reconfiguration of the whole system would need to take account, for example, of comparisons with the New Zealand system, and there was neither the time available nor the impetus from any of the parties to suggest this.

Another fundamental design aspect of the system is experience rating: the provision of incentives on employers to improve safety by charging higher premiums for firms with worse claims experience. Again, none of the stakeholders suggested changing this, and it is a system widely adopted in workers' compensation schemes.

A related incentive is more controversial, however: safety bonuses (especially 'no lost injury time' bonuses) for managers (or groups of employees). These are discussed in chapter 7, but a spoiler alert is here—we need to know more about their effects.

Workplace health and safety (WHS) policy is also outside the scope of this review. This is despite the close linkages between WHS and workers' compensation, with suggestions that prevention (through better WHS interventions) is better than cure. However, the two functions are separate in Queensland and most other jurisdictions. Many aspects of the operation of WHS policy have recently been reviewed—through, for example, the Best Practice review of Work Health and Safety Queensland (WHSQ), undertaken by Tim Lyons. Neither the time available, nor the terms of reference, enable venture into this area.

Other matters are beyond the scope of this report because they concern interactions with other aspects of the law that are outside the scope of compensation law. In particular, one stakeholder noted the problem of interaction of workers' compensation legislation with the *Civil Liability Act 2003*. The Queensland Bar Association concluded that the interaction meant that any liability was greater for non-employers than employers in a manner that was unfair for non-employers and made matters more difficult to resolve because of issues in the sharing of damages. This matter needs further investigation but, as it relates to legislation that affects liability in a range of areas, not just compensation law, I cannot form a final view on it, and the Minister needs to investigate this issue in consultation with other Ministers (in particular, the Attorney-General) and external stakeholders.

Recommendation 1.3: The Minister for Industrial Relations and the Attorney-General should consider the interaction between workers' compensation legislation and the Civil Liability Act 2003*, in consultation with stakeholders, and put forward any legislative changes that are consequently necessary.*

CHAPTER 2: THE FINANCIAL PERFORMANCE OF THE SCHEME

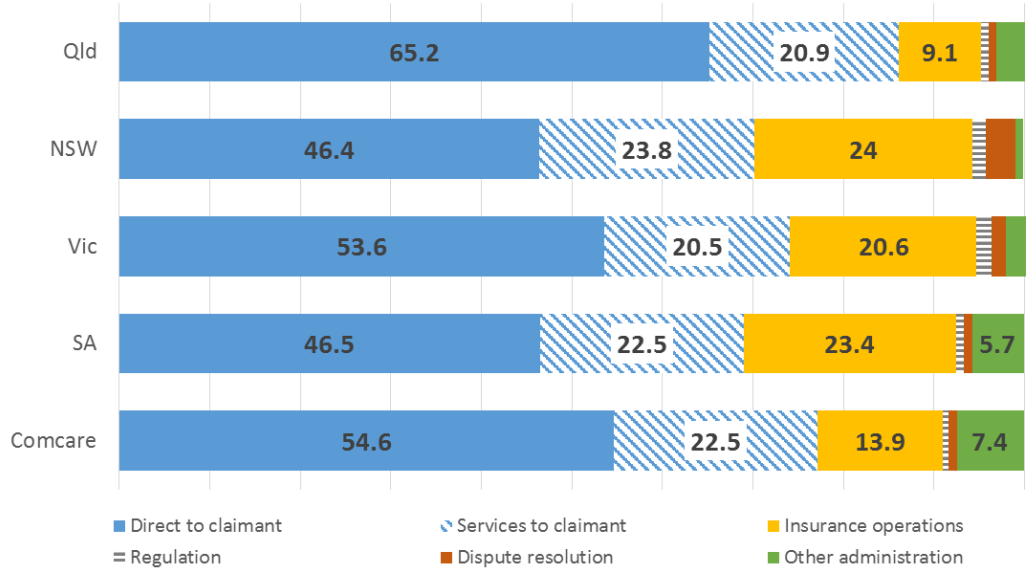
Centrally funded schemes have economies of scale. This contributes to Queensland's efficiency. Amongst the central and managed schemes, the Queensland scheme has the highest proportion of total expenditure directed to claimants and the lowest proportion expended on insurance operations.

2.1 Financial position of the scheme

The Parliament intends that the workers' compensation scheme should maintain a balance between providing fair and appropriate benefits for injured workers and ensuring reasonable cost levels for employers[3]. This section of the report is concerned with the financial performance of both WorkCover and self-insurers.

As shown in figure 2.1, over 65 per cent of all expenditure in Queensland is spent directly on the claimant, a higher figure than in the other centrally funded and managed schemes. A further 21 per cent is spent on services for the claimant. The cost of insurance operations is also the lowest of these jurisdictions, at nine per cent of total scheme expenditure —usually half or less of expenditures in the comparable jurisdictions. By these measures, the scheme is highly efficient in what it does.

Figure 2.1 – Comparisons of scheme expenditure for centrally funded and managed schemes



Source: Comparative Performance Monitoring Report 18th Edition

2.2 Financial risk of self-insured employers

The risk of self-insured employers not being able to meet their workers' compensation liabilities is managed by the Act's requirement for them to lodge bank guarantees for at least 150 per cent of their estimated claims liability (ECL), to have a specified level of reinsurance, and through regular

[3] Section 5(4)(a) of the Act

monitoring of their performance and financial results by the Regulator to ensure they are financially fit and proper to hold a licence. Table 2.1 shows the financial position of current self-insurers.

Table 2.1 – Current self-insurer prudential status

Self-insured Employer (de-identified)	Net Tangible Assets ($)	Net tangible assets as a multiple of estimated claims liability	Profit or loss over last 3 years	Bank guarantee over estimated claims liability	Reinsurance
1	117,884,000,000	3,927	PPP	1.5	1,000,000
2	67,607,947,000	2,626	---	1.5	1,000,000
3	55,952,000,000	1,393	LPP	1.8	950,000
4	52,105,000,000	69,641	PPP	6.7	850,000
5	49,690,000,000	27,793	PPP	1.5	825,000
6	20,185,229,000	3,363	---	1.5	750,000
7	19,365,000,000	593	PPP	1.5	1,000,000
8	13,254,952,000	1,487	---	1.6	900,000
9	9,983,000,000	2,293	PLP	1.5	950,000
10	6,379,000,000	518	PPP	1.5	1,000,000
11	4,226,501,000	1,332	---	1.5	500,000
12	3,020,000,000	380	PPP	1.9	1,000,000
13	2,957,093,000	2,259	PPP	3.8	850,000
14	2,803,600,000	62	PPP	1.5	1,500,000
15	2,794,522,000	163	PPP	1.5	1,000,000
16	2,505,278,000	1,794	---	3.6	500,000
17	1,866,617,900	1,244	LPP	1.5	650,000
18	1,610,100,000	189	PPP	1.5	900,000
19	1,498,924,000	184	PPP	1.5	1,000,000
20	1,423,800,000	823	PPP	2.9	500,000
21	1,062,700,000	575	PPP	1.5	750,000
22	829,961,000	223	LPP	1.6	750,000
23	808,000,000	1,079	LPL	1.5	750,000
24	657,504,000	118	PPP	1.5	750,000
25	501,721,000	277	PPP	2.8	650,000
26	421,000,000	36	LLP	2	1,000,000
27	216,500,000	31	PPP	1.5	600,000
28	87,211,000	246	PPP	1.5	1,000,000

P = Profit L = Loss --- = Not for Profit organisation

SOLVENCY

The financial position of all self-insurers, with one exception, is very sound. The Office of Industrial Relations has in place measures to closely monitor the financial arrangements of this insurer. It should also be noted that the Regulator holds a bank guarantee for one and a half times their estimated claims liability.

Due to the financial strength of self-insurers, reinsurance provisions and regularly reassessed bank guarantees, the solvency risk to the scheme posed by self-insured employers in this scheme is very low.

2.3 WorkCover's financial position

WorkCover's operating result after tax for the period ending 30 June 2017 was a surplus of $381 million. WorkCover continues to be fully funded and maintains a strong financial position. It attributes this to disciplined financial management, a prudent investment approach and a cost control focus.

SOLVENCY

WorkCover's equity position at 30 June 2017 is $2,115 million with a funding ratio (the ratio of assets to liabilities) of 171 per cent, meaning WorkCover remains fully funded in accordance with the requirements of the Act.[4]

Table 2.2 – WorkCover's financial position

Financial results ($M)	2016-17	2015-16
Statement of comprehensive income		
Net premium revenue	1,416	1,357
Net claims incurred	(1,264)	(1,479)
Underwriting expenses (net of claims handling)	(32)	(27)
Net investment and other income	413	90
Income tax equivalents	(152)	21
Operating result for the year after income tax equivalents	381	(38)
Statement of financial position		
Total assets	5,086	4,511
Total liabilities	2,971	2,785
Net assets	2,115	1,726
Statement of changes in equity		
Reserves	1,518	1,169
Contributed equity	3	0
Accumulated surplus	594	557
Total equity	2,115	1,726

Source: WorkCover annual report 2016-17

INVESTMENTS

WorkCover holds an investment portfolio of approximately $4.4 billion managed by Queensland Investment Corporation. The net return on WorkCover's investment portfolio was 2.02 per cent in 2015-16 and 9.96 per cent in 2016-17.

OUTSTANDING CLAIMS

Outstanding claims liability (not the same as total liabilities) is an actuarial measure necessary for the sound financial management of insurance schemes. WorkCover holds amounts in reserve to offset its outstanding liability for accrued, continuing and future claims for injuries sustained by workers.

[4] Section 453 of the Act

WorkCover budgeted for an increase in its outstanding claims provision of $275 million in 2016-17 as a result of legislative amendments. However, following a review by actuaries, this provision was reduced to $56 million due to:

- removal of loadings caused by uncertainty from the Byrne decision;
- lower common law claims experience for injury years to 2015-16; and
- lower than expected costs from the statutory adjustment payments and presumptive firefighters benefits.

2.4 WorkCover premiums

Under the Act, all Queensland employers who engage workers must have a workers' compensation insurance policy with WorkCover unless they are a covered by a licensed self-insurer. WorkCover insures more than 150,000 employers. An employer's insurance policy covers any costs that may be incurred from their workers' injuries, including the costs of any common law claims made against the employer.

Employers insured with WorkCover pay a premium to meet the cost of this insurance. This premium is used to administer the insurance business, make payments to injured workers for income replacement and medical treatment, rehabilitation and return to work support, injury prevention activities and scheme administration. The relative expenditure of each of these components within WorkCover is shown as a proportion of average premium rate in figure 2.2 below.

Figure 2.2 – The average premium rate broken into the costs of insurance

Source: WorkCover annual report 2016-17

PREMIUM RATES

For each of the past ten years, WorkCover has levied either the lowest or second lowest average premium rate for employers amongst the State schemes (see Table 2.3 below). WorkCover's average premium rate increased between 2009-10 and 2012-13, from $1.15 per $100 of wages to an average premium rate of $1.45. The 2013-14 average premium rate remained at $1.45, before reducing to $1.20 per $100 of wages for the last three years. In 2017-18, the average premium rate

remains at $1.20 per $100 of wages. In practice, it presently averages around $1.17, because of temporary discounts to employers. Even if it does rise slightly in the future (though an alternative would be to run down reserves), I anticipate that it would continue to remain either the lowest or second lowest amongst the State schemes.

Table 2.3 – Average Premium rates (per $100 of wages) – Australia

Jurisdiction	2016-17	2015-16	2014-15	2013-14	2012-13	2011-12	2010-11	2009-10	2008-09	2007-08
Queensland	1.20	1.20	1.20	1.45	1.45	1.42	1.30	1.15	1.15	1.15
New South Wales	1.40	1.40	1.40	1.55	1.68	1.68	1.66	1.69	1.72	1.86
Victoria	1.27	1.27	1.27	1.30	1.29	1.34	1.34	1.39	1.39	1.46
Western Australia	1.53	1.48	1.56	1.67	1.69	1.55	1.50	1.74	1.58	1.85
South Australia	1.80	1.95	2.75	2.75	2.75	2.75	2.75	3.00	3.00	3.00

* Average premium rates for Tasmania, Northern Territory and ACT are not available as premiums are set by private sector agents.

PREMIUM CALCULATION AND EXPERIENCE-BASED RATING

The actual premium paid by an employer in Queensland varies according to the size, claims experience and industry of the employer. The premium collected in a year is to pay for all injuries that occur in that year, which will be paid out in that year and over future years. Premium is calculated using the Experience Based Rating (EBR) system which multiplies an employer's *wages* by their *premium rate*. It is designed to reward employers with good injury prevention and management.

A premium rate is determined by an employer's:

- **size**: the smaller the employer, the more their premium is based on their industry rate; the larger the employer the more their premium is based on their own experience (more details on this are below);
- **industry's claims experience**: the claims costs of the industry the employer is in; and
- **claims experience**: includes the past three years of statutory claim costs, followed by the preceding one year of common law claim costs (going back four years in total, providing for the three year lag period in which a common law claim may be initiated) up to a maximum of $175,000 for each claim e.g. an employer's 2017-18 premium will be affected by statutory claims arising in 2014-15, 2015-16 and 2016-17 and common law claims arising from injuries that occurred in the 2013-14 financial year.

EBR systems are also the predominant incentive used in other jurisdictions.

In 2014-15, WorkCover introduced a simpler premium model for small business. Policyholders who paid $1.5 million or less in wages were assigned a policy rating (from 1 to 5) based on claims experience (i.e. the cost of claims) for the previous financial year, relative to the claims experience of their industry. Under this model, still in place, an employer's premium is calculated by multiplying their wages by their industry rate (as listed in the Queensland Government Gazette). An employer's policy rating determined the percentage of the industry rate they paid in this calculation. This could range from 80 per cent of their industry rate (the best policy rating) to 120 per cent of the industry rate (the worst).

To reduce the susceptibility of small businesses to large variations in premiums, if an employer's policy rating changes, it can only increase (or decrease) by one policy rating per year, which caps movement at 10 percentage points. To help prevent a minor claim from affecting an employer's policy rating, the first $500 of claim costs on a policy will not count towards their claims experience. There is also a no claims discount for employers with a policy rating of 2, 3, 4, or 5. These employers automatically move down one policy rating if they have a claim-free year, guaranteeing a 10 percentage point reduction to the amount of the industry rate they pay.

This simplified model removes the volatility of premium increases for small businesses and provides greater incentives for employers to improve their policy rating. Thresholds in EBR models are also employed within several other jurisdictions. For example, in Victoria, an employer's claims experience is only taken into consideration if their wages are over $200,000, and in New South Wales and South Australia where wages are over $300,000.

Since 1 July 2017, businesses that employ apprentices have received a discount on their WorkCover premium. The proportion of premium attributable to apprentice wages are deducted from the employer's final premium amount. Any claims made by an apprentice or trainee are still included in the employer's claims experience, to maintain an incentive to provide a safe workplace.

WorkCover also offers an early payment discount to employers who pay their annual premium before 16 September each year. This discount was increased for the 2017-2018 financial year from 3 to 5 per cent.

Although one stakeholder mentioned that employers who work across multiple industries are sometimes disadvantaged as they cannot apportion their premium accordingly, it was not a major concern. Generally, one industry rate per policy provides for simplification. After all, WorkCover may allocate more than one WorkCover Industry Classification (WIC) to an employer where WorkCover considers: the employer carries on more than one business activity; each business activity operates from a separate and distinct geographical location; and the business activities are not incidental to each other. So I have not recommended a change in this area.

2.5 Funding of the Regulator

The Workers' Compensation Regulator is funded entirely from insurer contributions. The Workers' Compensation Regulator proportions the total amount it needs to perform its functions between WorkCover and self-insured employers based on the proportion of the scheme they cover.

WorkCover pays an annual contribution based on the proportion of the scheme they cover. A self-insurer's contribution covers the rest and is made via an annual levy as prescribed by regulation.

These funds cover costs for the administration and regulation of the workers' compensation scheme, and include:

- services provided by the Regulator, including review and appeal of insurer decisions, Medical Assessment Tribunals, education, regulation of insurers, and workers' compensation policy;
- payment to the Queensland Ambulance Service for insurers' liability under the Act;
- payment for the Workplace Health and Safety grant; and
- overall scheme administration costs to which all insurers contribute.

Insurers stated that, since the merger of the Regulator into the Office of Industrial Relations, they enjoy less visibility regarding how contributions are spent or why costs are changing due to combined financial reporting arrangements. It is not unreasonable for insurers to want to be able

understand the breakdown of key expenses. An understanding of key changes and drivers to costs would also enable these groups to budget for and anticipate variance. This matter is addressed in recommendation 1.2.

CHAPTER 3: WHO IS A WORKER? ACCESS TO BENEFITS UNDER THE SCHEME

3.1 Eligibility for compensation

The workers' compensation scheme provides injured workers with statutory benefits that enable them to receive medical treatment, weekly payments of compensation (for lost wages) and rehabilitation during their recovery and return to work. Workers who are permanently impaired due to their injury may also be entitled to a lump sum payment of compensation. For more than 90 per cent of people injured in the Queensland scheme, statutory benefits and supports enable a successful recovery and return to work.

A worker can receive compensation for an injury if it meets the definition of injury as defined in the Act. Specifically, the worker is eligible for compensation for the injury or disease if it arose out of, or in the course of, the worker's employment and the employment was 'a significant contributing factor' to the injury[5]. The degree of work relatedness required for the injury to be eligible for compensation was amended in 1999 to bring it into line with other Australian jurisdictions, from requiring work to be 'the major significant contributing factor' to 'a significant contributing factor'.

Workers cannot receive compensation for certain psychological injuries that arise out of or in the course of reasonable management action, as they are excluded from the definition of 'injury'. In addition, workers cannot receive compensation for injuries that are intentionally self-inflicted or caused by the worker's misconduct.

Statutory benefits available for injured workers can include:

- weekly compensation for lost wages;
- all reasonable medical, surgical and hospital expenses, as specified in the table of costs;
- medical and other supplies;
- rehabilitation treatment and equipment or services;
- necessary and reasonable travelling expenses for the worker to obtain medical treatment or rehabilitation;
- death benefits for dependants and funeral expenses;
- lump sum compensation, based on the degree of permanent impairment or diagnosis (namely pneumoconiosis).

The level of benefits is discussed further in the next chapter. The rest of this chapter concentrates on issues associated with eligibility for coverage, that is, for the purposes of workers' compensation legislation, *who is a worker?* Appendix 3 summarises the coverage of 'worker' under each of the under the various jurisdictions.

[5] Section 32

3.2 Current definitions of worker coverage

The definition of 'worker' in each jurisdiction is generally intended to capture the majority of employees in traditional employment relationships (i.e. individuals employed under a 'contract of service'). In Queensland and the Northern Territory, a tax withholding restriction also applies. That is, if someone takes out 'pay as you go' (PAYG) tax on your behalf, you are considered a worker. Conversely, those performing work under a 'contract for services' (e.g. they supply their own tools or plant, submit invoices for payment, and carry a degree of risk over the financial viability of the undertaking), are generally excluded.

Basing the employee definition largely on the PAYG concept has the advantage of simplicity, and simplicity is something that is liked by the parties, especially by employers. But it is not as simple as all that. Not all 'workers' are employees. Deeming provisions are used in all Australian workers' compensation jurisdictions to provide coverage to some people working in precarious or non-traditional employment relationships. These are classes of persons whose status as an employee is controversial, but whom State or Territory legislatures regard as deserving the protection of the workers' compensation scheme.

As a result, the deemed lists in each jurisdiction are all different, with only a few common threads. All schemes exclude professional sportspeople but cover professional jockeys (ACT is silent). NSW, Victoria, Queensland and Tasmania deem commission-only door-to-door sellers as workers, but other jurisdictions do not.

The desirability of drawing extra groups of people into the protection of workers' compensation legislation is long standing, and reflects the fact that it is not just employees who warrant the protection of beneficial legislation. However, the labour market has changed more rapidly than the definitions of worker. Hence many of the current deemed occupations are more relevant to the industries that were prominent in the mid-20th century than the current services and information sectors employing most Australians. New South Wales for example still deems tributers, timbergetters, shearers' cooks, wrestlers and golf caddies, while Queensland deems sharefarmers to be covered—though only if they do not provide and use mechanical farm machinery—but excludes deckhands on fishing boats if they are paid a percentage of the catch.

3.3 Coverage and the meaning of work

Some stakeholders sought to extend the coverage of workers' compensation law. This arose because of changing patterns of employment, in particular the frequent use of 'independent contractors' in place of what are traditionally known as 'employees'. Two related factors help explain the extent to which 'independent contractors' feature in employment: the growth of the employer drive for flexibility, and the emergence of new forms of corporate organisation of work, referred to most conveniently as 'not there' employment.

Flexibility has been seen as important in work for over three decades. As long ago as 1987, Wolfgang Streeck emphasised how management faced the problem of finding ways of 'managing an unprecedented degree of economic uncertainty deriving from a need for continuous rapid adjustment to a market environment that appears to have become permanently more turbulent than in the past'.[6] He argued that the key concept for management became 'flexibility', which he

[6] W. Streeck, "The Uncertainties of Management and the Management of Uncertainty." *Work, Employment and Society* 1, no. 2 (1987) (pp. 281-308). 285.

defined as 'a general capacity of enterprises to reorganise in close response to fluctuations in their environment'.[7] He identified both external (numerical) and internal (functional and temporal) flexibility (discussed below) and consequently two ways firms could seek to achieve organisational flexibility – through a 'return to contract' (external flexibility) or 'extension of status' (internal flexibility). However, said Streeck, the 'management of uncertainty' remained incomplete due to the profound 'uncertainties of management' in this new regime as they faced other parties (especially trade unions) while they pushed for greater decentralisation in industrial relations. In doing this, Streeck explained the rising significance of flexibility for employers—it was a means by which management could minimise risk. Flexibility, we have since seen, has 'an array of meanings' and they may range from 'economically harmful' to 'socially beneficial'.[8]

Many corporations are seeking to make greater use of 'flexible' labour, and engage in ''not there' employment'[9] to minimise costs and avoid responsibility for some of the labour costs they would otherwise incur. They may contract to others, who in turn hire employees (or who subcontract to others, who in turn hire employees). So part of their workforce is 'flexibly' deployed. But they also retain an internal labour market for their 'core' employees. Even when firms contract out part of their operations, the people who end up doing the work are often still employees, because that is the most efficient way for a firm to run its business. In the fast food and retail industries, this phenomenon is manifested as franchising, which has emerged and expanded substantially over the past three decades. In the cleaning sector, contracting has replaced in-house cleaning over recent decades. In mining, direct employment by mines has reduced and employment by 'contracting' firms has increased substantially—the workers are typically referred to as 'contractors' but are, in fact, employees of the contracting or labour hire firms. In textiles, clothing and footwear (TCF), labour in countries such as Australia is typically provided by 'independent contractors', while in global production chains labour is hired by contracting firms who are sufficiently distant from the 'brands' (core capital in this industry) that the brands attempt to claim no responsibility for the working conditions of that labour. In construction, on-site sub-contracting has long been the standard capital/labour configuration. In road freight transport, much labour is provided by 'owner drivers' who contract to major retailers, wholesalers or logistic firms to carry goods.

In those industries that are mentioned above as providing examples of 'not-there' employment, those which have long featured this model—apparel, road freight transport, construction—have for a long time had *independent contractors* at the bottom of the food chain, at least in Australia. In some other industries—such as manufacturing and mining—labour hire or independent contracting has been used in substitute for existing or potential employees. This has sometimes led to bitter industrial disputes, at least where unions have been involved as representatives of the previous or potential employees.[10]

The term 'independent contractors' is often used to encompass groups that may either be genuinely 'independent' or more accurately described as 'dependent'. In *dependent contractor* relationships, the worker is not technically an employee, even though they are only working for one 'employer'. In 2000, 164,300 owner-managers were dependent on their client.[11] Owner managers were defined as being dependent if: their contract prevented them subcontracting their own work or working for

[7] Ibid., 290.

[8] R. Johnstone et al., Beyond Employment: The Legal Regulation of Work Relationships (Sydney: Federation Press, 2012).

[9] So called because the distancing between the peak corporation and the workers enables the former to avoid accountability—hence 'we're not there!'. D. Peetz, "Submission to Senate Inquiry on the Future of Work and Workers." (Canberra: Australian Senate, 19 February 2018).

[10] e.g. A. O'Donnell, 'Reality Bites for Bosses of Nothing.' Age 2005

[11] Australian Bureau of Statistics, "Employment Arrangements and Superannuation." (Canberra6361.0).

multiple clients; or if a client had control over their working procedures. This group represented 29 per cent of all owner-managers working on a contract basis and was equivalent to 2.4 per cent of employees at the time.[12]

'Independent contractors', as more broadly defined, typically are subject to Workplace Health and Safety legislation but are not entitled to workers' compensation or other employee benefits. Injuries to contractors in another company's premises therefore do not affect the workers' compensation premiums paid by those companies. There is considerable international evidence that workplace health and safety outcomes are poorer for contractors than for employees.[13] There are potentially adverse effects not only for contractors but also, in extreme cases, for their families. A study of the experiences of families of workers killed on the job found:

> that families frequently found it hard to comprehend that legal employment status could have such significant implications when the worker was doing precisely the same tasks whether or not they were an employee. Adding to the sense of injustice was the fact that the worker's status as self-employed did not affect other institutional/legal and regulatory responses in the same way. Employment status did not affect the capacity of the inspectorate to investigate an incident or launch a prosecution, nor did it preclude the holding of a coronial inquest.[14]

A related effect arises with labour hire workers: even though they are covered by workers' compensation laws, if injured it is the premiums of their direct employer, the labour hire firm, that are affected, not the premiums paid by the organisation on whose premises they are injured. Moreover, workplace health and safety outcomes are poorer for labour hire workers —often referred to as 'temporary agency workers' in the literature—than for conventional employees.[15]

In many cases controversy arises as to whether particular people should be classed as employees rather than independent contractors under employment law, and therefore be treated as such not only for workers' compensation purposes but also for purposes of minimum hourly wages and other entitlements under the *Fair Work Act*. Criteria (or 'indicia') have been developed by tribunals, the courts and even the Australian Taxation Office (ATO) to determine whether persons are employees or independent contractors. When firms portray people who are clearly employees as independent contractors, and thereby withhold from them one or more of their employee entitlements (such as minimum hourly wages, leave or superannuation), they may be prosecuted for engaging in 'sham contracting'.

The common law test for employee (generally referred to as a contract of service) looks behind the contractual arrangements between all parties and attempts to consider the true nature of the engagement. An ABN is not a significant indicator that the person is an independent contractor or is self-employed, nor is any statement in a contractual arrangement. A person will not be considered a

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[12] Unfortunately, the only subsequent edition of this ABS publication I have seen does not update these data.

[13] M. Quinlan, "The Effects of Non-Standard Forms of Employment on Worker Health and Safety." Conditions of Work and Employment Series No. 67, (Geneva: International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, December 2015).

[14] M. Quinlan et al., "Administering the Cost of Death: Organisational Perspectives on Workers' Compensation and Common Law Claims Following Traumatic Death at Work in Australia." *International Journal of Law and Psychiatry* 38 (2015) (pp. 8-17).

[15] Quinlan, "The Effects of Non-Standard Forms of Employment "; A. Forsyth, "Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report." (Melbourne: Industrial Relations Victoria, Department of Economic Development, Jobs, Transport & Resources, 2016).

'worker' for compensation purposes if the person performs work under a contract of service with a corporation of which the person is a director; or a trust of which the person is a trustee; or a partnership of which the person is a member.[16] In addition a person is not a 'worker' if a personal services business determination is in effect for the person performing the work under the *Income Tax Assessment Act 1997* (Cwlth).[17] In this instance the person is considered an independent contractor._Two recent Federal Court rulings in this area have concluded a worker is not an independent contractor under 'sham contracting' provisions of the *Fair Work Act 2009* which prohibit the misrepresentation of employment relationships as independent contracting arrangements: unless there is evidence suggesting entrepreneurship like advertising of services, employment of others and repeated client engagement;[18] and where a company has 'undoubted authority to control' the relationship.[19]

Often the indicia used by courts and tribunals lead to ambiguous or debatable outcomes, at least in the eyes of lawyers, so cases contesting whether particular people are employees or independent contractors still end up before the tribunals or courts. Moreover, state governments are clearly dissatisfied with the narrowness of the definition of employee, as each mainland state government in Australia calls the object of their legislation 'workers' rather than 'employees' and each adds various categories of workers, often using deeming provisions, to their (also varying) definition of 'worker' for workers' compensation purposes (see Appendix 3). As these additions vary between states, firms that operate across interstate borders experience inconsistencies in the treatment for workers' compensation purposes of their workers. In Queensland, for example, sharefarmers are deemed to be employees, as they are in Victoria—but not in New South Wales, South Australia or Western Australia. Salespersons, covered in Queensland and New South Wales, are not covered in other states (unless, in Victoria, they are door to door canvassers). Timbergetters miss out in Queensland but are covered in Victoria and New South Wales. There are numerous other differences between the jurisdictions.

One very recent development in case law occurred in the California Supreme Court. It broadened the meaning of 'employee', redefining the test used in determining whether a worker was an employee or independent contractor by replacing an assessment against various indicia with an 'ABC test'. Under the ABC test, a worker is assumed to be an employee unless the employer can prove *all* of three criteria:

> (1) The worker is free from direction and control in the performance of the service, both under the contract of hire and in fact; and
>
> (2) The worker's services must be performed either
>
> > (i) outside the usual course of the employer's business or
> >
> > ii) outside all the employer's places of business (for example, a firm engaging seamstresses to make clothing could not call them independent contractors); and

[16] Schedule 2 Part 2.
[17] Sections 87-60 of the Income Tax Assessment Act.
[18] Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (2015) 228 FCR 346, [181]. See also Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] HCA 45 (in which the High Court imposed a broader interpretation than the Federal Court of section 157(1) of Fair Work Act 2009 (Cth), the primary sham contracting provision in the Act).
[19] Putland v Royans Wagga Pty Ltd [2017] FCA 910, [273]

(3) The worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service being provided.[20]

The ABC test brings more workers under the definition of 'employee' than do most other indicia. It has the advantage of covering most groups of workers who would be thought of as being under the 'employ' of a more powerful organisation. The ABC test now applies in several US states for aspects of workers' compensation or unemployment insurance. However, law in these states does not normally set precedent for Australian case law.

A shorter test was, in effect, used in an Australian Federal Court decision in 2011 (by Justice Bromberg), and applied again in some cases between 2012 and 2015. It essentially said that, to prove a worker was not an employee, the employer needed to demonstrate *each* of two criteria:

(1) the worker is an entrepreneur who owns and operates a business; and

(2) the worker is performing the relevant work in and for that business as a representative of that business and not of the business receiving the work.[21]

However, a number of other cases have either relied on traditional indicia or even on the parties' description of the contract themselves.[22] While the law on this issue has evolved over the past decade, it is still not settled.

The Queensland government could consider legislating the ABC test, the Bromberg test, or some combination for workers' compensation legislation purposes. (The ABC test is probably the more restrictive of the two, i.e. it is probably more likely to see people defined as employees and less likely to see them defined as independent contractors, because it requires three, not two, tests to be satisfied to achieve contractor status.) It would have the advantage of bringing within the scope of compensation law a wider group of workers who could be seen to be vulnerable to exploitation by more powerful organisations, those engaging in ''not there' employment'. Doing this might, however, have the difficulty of reducing the degree of certainty for workers and employers as to whether they are covered or are responsible for paying premiums. There would remain inconsistencies between federal employment law and workers' compensation law as to the treatment of workers.

A potential response would be to aim for a single definition of 'worker' to cover all aspects of labour law including workers' compensation law, and for that definition to be sufficiently broad to encompass all groups who warrant some protection in their work from potentially more powerful organisations, so that all parties are treated fairly. A simple but restrictive test such as the ABC test seems a good mechanism to use for this purpose, but it might be best if this could be applied in a

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[20] Dynamex Operations West, Inc. v. Superior Court, discussed in M.S. Kun and K.D. Sullivan, "California Supreme Court Adopts "Abc Test" for Independent Contractors." Wage and Hour Defense Blog, Epstein Becker Green, 2018. https://www.wagehourblog.com/; T. Lebowitz, "California's Top Court Creates New Test for Independent Contractor Vs. Employee, Re-Interprets 102-Year Old Definition." Who is my employee?, Baker Hostetler LLP, 2018. https://whoismyemployee.com/.

[21] On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3), (2011) 214 FCR 82, discussed in A. Stewart et al., Creighton & Stewart's Labour Law, 5th edition ed. (Sydney: Federation Press, 2016). Other cases cited there were FWO v Quest South Perth Holdings Pty Ltd (2015) 228 FCR 346, Fenwick v World of Maths [2012] FMCA 131; FWO v Metro Northern Enterprises Pty Ltd [2013] FCCA 216; Predl v DMC Plastering Pty Ltd [2014] FCCA 1066

[22] e.g. Tattsbet Ltd v Morrow (2015) 233 FCR 46, Young v Tasmanian Contracting Services Pty Ltd [2012] TASFC 1 cited in ibid.

nationally consistent way, given that most aspects of work are governed by federal rather than state law. Thus, the best way to advance a simple but restrictive test may be through cooperative federal-state action—or harmonisation, not so much about the totality of workers' compensation law (that is unlikely to ever happen) but about a consistent *definition* of workers. I return to this issue below.

PREMIUMS AND LABOUR HIRE

Another matter that is important, but for which I have not yet reached a solution, is the issue of the liability for premiums of labour hire employees working in host organisations. As mentioned, OHS outcomes for labour hire employees are generally inferior to those direct employees, and anecdotal evidence from industries such as mining reinforces this. At present the premiums for coverage of labour hire workers are paid by their direct employers, the labour hire companies. The host organisation is responsible under OHS law for their safety, but there is no financial incentive directly making them address it.

One alternative is to make the host organisation (in OHS terminology, the Person Conducting a Business or Undertaking, or PCBU) responsible for their premiums, as they are formally, in part, responsible for their safety. Doing so, however, would erase all liability and responsibility of the labour hire company themselves, and they are an important factor (perhaps the most important factor) in the safety of labour hire workers. In Quebec, a third approach is to make the premiums the responsibility of whichever out of the host employer or the labour hire firm is considered to have the greater control over the employee.[23] While ideal at a theoretical level, the practical impact is to lead to a substantial amount of litigation over who is responsible for premiums, and it becomes almost a case by case basis for determining who pays. It is hardly, then, a satisfactory solution. I have been advised that attempts by another jurisdiction to impose penalties on host employers, to force them to effectively share (with labour hire firms) the premium costs of labour hire workers, were followed by an increase in the injury rate to labour hire workers, because labour hire companies' diligence reduced when they were no longer bearing the full costs of workers compensation.

This is an issue that warrants further investigation. For instance, one option might be to have the premiums still paid under current arrangements but the experience rating of the host employer to also partially include the effects of injuries incurred by labour hire workers while on the premises of or working for such a firm (that is, the effects would be at least shared between the host employer and the labour hire firm). This would only work in host firms that also had employees, but this is likely to be the majority. It would also have no impact on self-insurers, or require special policy for them, as there is no financial incentive for self-insurers to include labour hire workers in their own scheme. The matter should be considered further within government, with the relevant agencies seeking input from stakeholders and academic researchers before making a recommendation to the Minister. After a policy decision had been made by government, it would be up to the board of WorkCover, on actuarial advice, to determine the actual premiums that would be payable by affected employers.

One final point should be made here. The issue of the treatment of independent contractors takes on special meaning for 'gig economy' workers. This is a group, usually (but not always) defined as 'independent contractors', who have a number of special characteristics that mean separate action is warranted for them. I explain this more, and describe the recommended approach for them, in chapter 10.

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[23] K. Lippel et al., "Legal Protections Governing the Occupational Safety and Health and Workers' Compensation of Temporary Employment Agency Workers in Canada: Reflections on Regulatory Effectiveness." *Policy and Practice in Health and Safety* 9, no. 2 (2011) (pp. 69-90).

Recommendation 3.1: The Government should consider the appropriate handling of experience rating and premiums for workers in labour hire agencies, including the role of injuries in shaping the experience rating for premium purposes of host employers. To do this a committee involving the Office of Industrial Relations (including WHSQ) and WorkCover should be established, and it should consult with relevant stakeholders and seek external input from academic researchers before making a recommendation to the Minister.

3.4 Internships

One of the major gaps in coverage of the workers' compensation system in Queensland (and elsewhere) is the coverage of the newly emerging category of interns. Interns are people—usually young—who work for an employer for a defined period of time without payment. They might be also referred to, but with slightly different meanings, as people on 'work experience' or 'volunteers'. 'Work experience' is a term that usually applies to students, while 'volunteers' usually applies to people engaged without payment by a non-for-profit organisation, such as a charity, an emergency service or even, most recently, a sporting event like the Commonwealth Games. All would be unlikely to be categorised as employees by an ABC test or anything similar because of the absence of a beneficial contract (i.e. a contract that involves payment to the volunteer or intern).

Internships and work experience have long been part of the educational experience and often formalised into the curricula of educational institutions. Volunteering has been around for as long as society. To varying degrees (not necessarily adequately), compensation arrangements have emerged, often privately, to cover those people when injured in the course of their internships or volunteer work. The group of concern here, though, is that affected by the newly emerging trend in the labour market: the growth of 'work experience' without pay in commercial organisations, as a way of gaining entry into the labour market for that particular industry. Sometimes interns are promised that there would be an educational or training component that does not eventuate, and they end up doing menial tasks; other times they end up doing work that more directly generates surplus for the organisation. I call these 'commercial internships' but the term is slightly misleading as there is often no immediate commercial benefit to the intern. Shorter term arrangements might be referred to as 'trials'.

This is a relatively recent phenomenon, and reflects changes in labour markets as underemployment has grown, especially amongst young workers, and commercial internships are seen as a way by which individuals can gain a competitive edge in the labour market. However, as corporations increasingly take advantage of the opportunity provided by free labour through such internships, and demand 'experience' in the industry as a pre-requisite for entry-level paying jobs—as already occurs in some industries (e.g. broadcast and print media)[24]—the competitive edge largely disappears. The factor that was once a 'competitive edge' becomes a new (lower) standard. There is

[24] A. Stewart and R. Owen, "Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia " Report for the Fair Work Ombudsman, (Adelaide: University of Adelaide, 2013); 245.

reason to believe that 'a growing number of businesses are choosing to engage unpaid interns to perform work that might otherwise be done by paid employees'.[25] Organisations that benefit can obtain special no-fault volunteer/intern public liability insurance from the private insurance market. However, there is no obligation to obtain insurance from WorkCover.

As mentioned, insurance arrangements of sorts exist for the more long-standing forms of internships. Many student interns who find their internship through their university or school, or are doing it as a placement for a course, already have insurance cover, albeit limited. Students are typically covered for death or serious injury, for non-Medicare costs (but not gaps on Medicare benefits), and for loss of wages (often 85 per cent of earnings up to a modest ceiling), whilst undertaking any activity that is authorised or part of their program of study. However, if they receive any remuneration (as sometimes happens, in the form of a stipend) the policy may be void.[26] School students doing work experience may be covered by WorkCover if the Department of Education or private school holds a special policy with WorkCover. Legislation in the educational sector in Queensland requires that educational institutions take out a workers' compensation insurance policy.[27] In Victoria, workers' compensation explicitly covers student interns (but no other types of interns). In the ACT, anyone engaged under an arrangement by which training or on-the-job experience is provided, regardless of whether paid, is covered.[28] It seems there are legitimate benefits from education-related internships: people who undertook unpaid work experience as part of the higher education or vocational education and training course were much more likely than other participants in unpaid work experience to say that unpaid work experience was helpful for them to find paid employment or to improve their contacts and networks.[29]

Incorporated associations such as charities may take out no-fault personal accident insurance to cover their volunteers. There is no legal requirement to do so. Such insurance covers volunteers for medical and other out of pocket expenses following injury sustained while carrying out work on behalf of the charity. Depending on the policy, it would normally cover loss of income if the person has other gainful employment. This type of insurance is generally not included in a charity's public liability insurance, and a separate policy needs to be taken out. Volunteer personal accident insurance is generally not excessively expensive or difficult to obtain. Volunteering Queensland's Code of Practice, compliance with which is voluntary, provides that organisations that manage volunteers agree to 'maintain written policies and implement procedures to ensure the safety and well-being of volunteers, including maintaining appropriate current volunteer personal accident insurance and public liability insurance which includes volunteer workers.' Appendix 5 shows that workers' compensation often covers certain forms of volunteer work in emergency services. The proposal here does not involve changes to the treatment of volunteers in non-profit organisations.

The legality of unpaid commercial internships is controversial. The FWO would argue that much of this work should be paid and non-payment is a breach of the award and potentially subject to penalties. There would seem to be a solid foundation for such a view. Several court cases have found, in effect, that internships should be paid where interns perform productive work that would

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[25] Ibid.

[26] About one fifth of people doing unpaid work experience, which includes internships, received some financial compensation for the work experience (e.g. allowance, honorarium). D. Oliver et al., "Unpaid Work Experience in Australia: Prevalence, Nature and Impact." (Canberra: Report commissioned by the Commonwealth Department of Employment, 2016).

[27] The Education (Work Experience) Act 1996 and the Vocational Education, Training and Employment Act 2000. Stewart and Owen, "Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia " 106.

[28] Ibid.

[29] Oliver et al., "Unpaid Work Experience in Australia."

otherwise be done by paid employees or do many hours of unpaid work as an intern before being given paid employment.[30] However, many interns would not complain or take such matters to the FWO: they want a good reference from the employer (that is the purpose of working for free), and to complain would ruin the chance of that happening. They often know little of their rights any way. If injured, they have no entitlement to workers' compensation (in particular, out-of-pocket medical expenses, rehabilitation costs, or wages lost from time away from the casual job(s) they hold) unless they know to complain to the FWO, the FWO succeeds in forcing the employer to treat them as a paid employee and give them backpay, and WorkCover thereby has coverage of them (and can also pursue the employer for not paying their premiums). This chain of events, which would irrevocably break the relationship with an employer from whom the intern wanted to obtain a good reference, would be much more than would be expected from an ordinary employee injured at work and entitled to a claim. Suing the organisation to exercise their rights under common law is an even less likely option. This is an emerging area, in which it could take a long time for case law to establish proper payment rights of interns. In the meantime, there is uncertainty for employers and interns. And even with certainty, it is likely than many injured interns would not exercise their rights.

So the question arises as to what should be done with regard to these people, despite the dubious legality of many unpaid commercial internships. It seems that workers' compensation arrangements should cover interns who are not covered by other insurance arrangements of the organisation or, in the case of student interns, the educational institution's insurance. Replacement wages would be low (usually zero unless the intern has a casual job some where else), so the main expenses would be medical expenses and rehabilitation, and premiums would be low. Employers would be asked to report to WorkCover the number of hours worked by interns who were not covered by injury compensation insurance (there would be no estimate available of their wages bill), and from this WorkCover would calculate a premium. It would be cost-neutral to the insurer, as premiums would be designed to cover outlays.

This approach does not accept that commercial interns are not employees—no doubt some are, they should be paid, and the employer should be made to pay them. Those interns who are already treated by their employer as employees (and paid) would be subject to the normal workers' compensation premium arrangements applicable to employees, and so would not be affected by this recommendation. So this recommendation only affects commercial interns who either are genuinely not employees, or at least are not recognised by their organisation as employees.

While it might be argued that workers' compensation coverage would discourage employers from providing internship, this is unlikely due to the benefits provided to the employer from free labour. We also need to consider whether the commercial internship really is mostly a cost to the employer (that is, the cost of supervision) and the intern gains most of the benefits? In most situations it is unlikely an internship would be solely of value to the intern if it did not also generate something of value to the employer. If, on the other hand, this internship is genuinely a traineeship or apprenticeship, it should be labelled as such and would then be subject to the apprentice discount (that is, no premiums would be payable); or if it had educational merit, it would be able to be offered to a university as a genuine part of an educational program.

This recommendation is not meant to affect volunteers for non-profit organisations, including sporting cubs, charities or community groups, as volunteering here is often done out of a sense of altruism. It is not proposed here to add to the costs of organisations such as these with limited resources but social value. The recommendation is meant to cover commercial (i.e. for-profit) organisations that use interns that are not part of an educational study program. In many such instances, the motivation for providing free labour is not altruistic but to gain a foothold in a labour

[30] A. Stewart, Stewart's Guide to Employment Law (Sydney: Federation Press, 2015). [5.15]

market, the rules of which are shaped by the organisations on the demand side, some of which potentially benefit from free labour. The implementation of these arrangements would not subvert attempts to have interns classified as employees where appropriate, and it would enable action to be undertaken regardless of progress or otherwise on that front.

> *Recommendation 3.2: The Act should be amended to enable coverage of unpaid commercial interns, with exemptions for interns already covered by injury insurance arrangements (including student internships undertaken as part of a course). For the purposes of calculating premiums, employers would be asked to report to WorkCover the number of hours worked by interns who were not covered by other injury compensation insurance. Volunteers for non-profit organisations would not be covered.*

3.5 Improving national consistency on worker definitions

In recent times harmonisation of national occupational health and safety (OHS) laws has been achieved, despite considerable differences in the previous state laws. Attempts to harmonise workers' compensation laws nationally are less advanced than is the case with occupational health and safety. In practice huge differences in system designs, in particular the complexity of the different compensation and funding models, make it unlikely workers' compensation laws would ever fully be nationally harmonised. However, harmonisation of system design (with such matters as role of common law, the value, criteria for and structure of benefits paid, etc) is not the same thing as harmonisation as to who is covered. The differing definitions of 'worker' around Australia have been the subject of a number of examinations including by the Productivity Commission (2004) and its predecessor the Industry Commission (1994). Most recently, in the context of OHS harmonisation, 2010 Safe Work Australia commenced a Definitions taskforce to look at harmonising the various Commonwealth, State and Territory workers' compensation definitions of 'worker' and 'employer' however work on this was deferred in 2012 in favour of other areas for harmonisation. For OHS purposes the core concept of the person with responsibility, that is the PCBU, has been accepted anyway. That said, in recent years not much attention has been given to achieving a harmonised national definition of 'worker' for workers' compensation purposes (including through consistency in deeming provisions).

For national organisations, consistency is a good thing, like simplicity. It may reduce what some see as the 'opportunity' or 'benefits' provided by competitive federalism, that is playing states off against each other, but then workers' compensation is meant to be beneficial legislation anyway. Reducing inconsistencies in coverage would reduce costs for employers, even where system designs are different (as they are, and likely will continue to be). So there is benefit in seeking action on national consistency in coverage. It is not a process without risks: there is a danger of levelling down rather than levelling up, but governments must remember it is intended to be beneficial legislation. National consistency is not really as important as fairness, so if consistency leads to a reduction in the beneficial nature of the legislation, it should not be pursued.

Seeking national harmonisation on the definition of a worker would not prevent the Queensland government from taking action in a specific, innovative area, such as the gig economy, where the state can see and anticipate developments that are going to take place in future (and for which agility is probably more important than consistency). The treatment of gig economy workers is discussed in chapter 10.

In looking for a nationally consistent definition for workers' compensation purposes, one question is whether a simple rule such as the ABC rule, discussed earlier as a possible way forward, would help with achieving consistency. The answer would appear to be 'yes' in relation to independent contractors. Many of the 'deemed' occupations covered in various states appear to be deemed because of the vulnerability they are perceived to have as independent contractors. However, this is not the case for all instances of deemed workers. There may be some specialist occupations covered by various jurisdictions that do not fit this model (e.g. sharefarmers in two states, including Queensland), so even the ABC decision would not be the end of the matter, and the need to consider the status of some other occupations would itself take some time.

All of this may then feed into other aspects of employment law, but that is not the key purpose of achieving consistency in the definition of a worker for workers' compensation purposes. It is beyond the scope of this report to consider what aspects of worker protections might be protected in what ways. Regardless of which approach is best, the debate over this is a matter the government of Queensland should be involved in and can advance.

Recommendation 3.3: The Government should work with other governments towards achieving a common definition across jurisdictions of 'worker' for workers' compensation purposes, that would take account of the potential for some workers, presently treated as independent contractors, to be subject to exploitation by more powerful organisations.

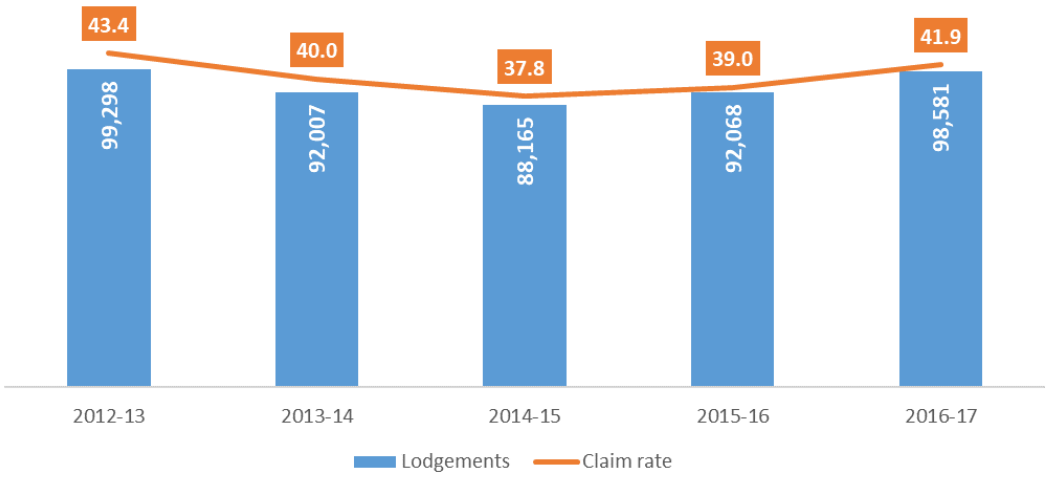
Further ahead, the Government should engage in discussions about achieving a common definition of 'worker' for employment law purposes that would take account of similar factors.

CHAPTER 4: CLAIMS AND BENEFITS UNDER THE SCHEME

4.1 Number and cost of statutory claims

In 2016-17, 98,581 injured workers lodged statutory compensation claims. This was an increase of 7.1 per cent, from 92,068 claims in 2015-16. Considered in relation to the size of the workforce, the rate of claims for 2016-17 was 41.9 per 1,000 employed people. This was an increase of 7.4 per cent from 2015-16, which had seen a rate of 39 claims per 1,000 employed people. Though this represented a slight increase in the number of claims lodged in 2016-17 compared to 2015-16, it is not outside the variability seen in recent years, and the long term trend (as shown in figure 4.1) is stable. A schematic outline of the claims process is on page xxxiv. Inter-jurisdictional comparisons of the benefits available under the different schemes are shown in Appendix 4.

Figure 4.1 – Claim rates (per 1,000 employed people) and lodgements 2012-13 to 2016-17



Statutory payments were $918.2 million for 2016-17, an increase of 7.8 per cent on the year before. This increase was in part driven by the change in the administration process of Queensland Health moving to a fee for service arrangement with WorkCover in relation to public hospital payments. As a result, the average cost of a time lost claim increased for the financial year (up 5.4 per cent to $18,744 in 2016-17), as did the average cost of a medical expenses only claim (up 3.8 per cent to $1,825).

The average finalised claim cost varies, and is influenced by such factors as:

- the duration of claims – the longer an injured worker is away from work, the more weekly compensation payments and medical expenses will be incurred by the claim, affecting the time-lost claims costs and the level of medical and other expenses required for the injury;
- changes in industry claim rates and the average wages paid in industry;
- the mix of injuries lodged scheme-wide (the severity of injury can have an impact on the average finalised time lost claim duration and cost);
- changes in practices by insurers;
- changes to legislation to provide increased or additional benefits to claimants;
- claim re-openings.

Overall, the information above suggests that statutory claim lodgements and statutory payments are relatively stable. Some factors have led to higher costs, but these appear to have been offset by a 21

per cent reduction in serious injury claims over a five year period.[31] (While there is often some legitimate questioning of the veracity of statistics on minor injuries, due to the likelihood of underreporting, discussed later in this chapter, serious injury claims are less likely to be under-reported and so it appears that this reduction in serious injury claims is probably an accurate reflection of changes in serious injury occurrences.)

JOURNEY CLAIMS

In Queensland, a worker is eligible for a journey claim when the injury has resulted while travelling to and from work or while on a break from work.[32] Workers are entitled to claim compensation for such injuries provided there has not been a substantial delay before commencing the journey or a deviation from their usual journey. A workers' journey is considered to begin and end at the boundary line of their place of residence.

Some stakeholders suggested that changes should be made to journey claims in Queensland. Arguments for removing coverage for journey claims tend to reason that the worker's actions outside of work are beyond the control of the employer, and therefore employers should not be held responsible. However, employers can influence the hours and location of the employment, which has an impact on risk. As I drove along the Peak Downs Highway, from the coast to the coal mines a few years ago, the many hand-written signs—each identifying an 'accident site'—dotted along the way, were enough to suggest employer behaviour did affect risk in journeys. Journey claims do not impact upon an individual employer's annual worker's compensation premium as they are not considered in the claims experience calculation.

In 2016-17, the net cost of journey claims was a comparatively small component of the claims costs, representing only $0.05 of the average premium rate for all employers. In the context of the financial health of the scheme, the absence of evidence that the coverage of journey claims within the scheme is problematic, the fact that journey claims are an important component of the workers' compensation scheme in Queensland, and the large, decentralised nature of Queensland in which a lot of work-related travel occurs, there is little to persuade me that the current arrangements should not be retained. All that would be achieved is the transfer of the cost from a form of payroll tax to a quasi-flat tax (via motor vehicle registration expenses), which would be more regressive.

NATIONAL INJURY INSURANCE SCHEME (NIIS)

From 8 September 2016 the Workers' Compensation and Rehabilitation Amendment Act 2016 implemented the National Injury Insurance Scheme (NIIS) for workplace accidents connected with Queensland. This provides eligible (very) seriously injured workers with a lifetime statutory entitlement to treatment, care and support payments. In addition, if an injured worker can establish that their injury was caused by negligence, they can elect to seek common law damages for the cost of treatment, care and support. This hybrid model follows the arrangement in place for motor vehicle accidents. In order to meet the eligibility requirements for NIIS, the worker will have sustained a 'serious personal injury' defined to include spinal cord injuries, brain injuries, multiple limb amputations, serious burns, or permanent traumatic blindness.

While the implementation of the scheme required a period of fine-tuning, it appears most areas of ambiguity in relation to work-related injuries have now been resolved. One concern for stakeholders was the issue of dual liability where the worker is involved in a motor vehicle accident

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[31] Safe Work Australia, "Comparative Performance Monitoring Report 18th Edition (Revised)." (Canberra: Safe Work Australia, 2017).

[32] Sections 35 and 36 of the Act contain the provisions relating to journey claims.

(that is, the potential for 'disputation over who should actually 'pay the bill'.) However, discussions appeared to be underway involving the Office of Industrial Relations, NIISQ and insurers at the time of writing, and there does not seem to be much useful that this review can add to those discussions.

That said, it appears that NIIS still has some way to go. In a sense, the easier part was dealing with it as a national policy, with a federated structure, for treatment of injuries incurred at work or in motor vehicles. However, it must be recalled that its origins lay in an August 2011 report by the Productivity Commission (PC), in which the PC recommended that the NIIS be developed for catastrophic injuries caused by four types of accidents: motor vehicle accidents, workplace accidents, *medical accidents* and *general accidents* (occurring in the home or community) (emphasis added). The PC recommended that NIIS be established separately to the National Disability Insurance Scheme for a number of reasons, one of which was to make use of existing expertise and institutions of accident compensation schemes. It is still the intention of the Australian Government to develop the NIIS as a federated model of separate, state-based no-fault schemes that provide lifetime care and support for people who have sustained a catastrophic injury. At the moment it is unclear how much momentum there is for extending the NIIS in Queensland (or any other state) beyond workplace and motor vehicle accidents into medical and general accidents, and this is not an issue that this review has had the time or opportunity to adequately pursue. However, it is important that efforts continue in this vein, to support people who have suffered catastrophic injuries in any form.

The government should continue cooperatively developing the National Injury Insurance Scheme with a view to eventually extending its operation into catastrophic injuries caused by medical and general accidents, as originally envisaged.

4.2 Determining liability

An injured worker has up to six months after the date of injury to lodge a claim. A claim form must contain relevant personal details and details of the employer as well as a medical certificate from the initial consultation for the injury. Claims can be lodged through the workers doctor or by contacting the relevant insurer directly.

Once a claim has been lodged, the insurer will apply the following criteria from the Act. That is, it can consider whether:

- the claim was made within the time limits;
- the person was considered to be a worker;
- the injury was caused by a work-related event; and
- the person was injured because of, or in the course of, employment if the employment is a significant contributing factor to the injury.

The onus is on the person who makes the claim to prove their claim. Although most decisions are made quickly (averaging 7.7 days in 2016-17), a decision on a claim can take up to 20 days depending on whether all the required information is readily available. Claims where additional detail may be required include:

- psychological and psychiatric injuries
- industrial deafness
- injuries sustained on journeys to and from work or on breaks such as morning and afternoon tea and lunch
- continuation or aggravation of an injury

- asbestos-related diseases or diseases contracted in the course of employment, for example Q-fever
- fatalities caused by a work-related event or by latent onset injuries such as mesothelioma or malignant skin cancer.

Some stakeholders (mostly but not solely employer representatives) stated that WorkCover should be more investigative in its approach to determining claims. They believed that the claims determination phase is sometimes rushed to the detriment of accurate decisions. While I appreciate that employers may sometimes feel 'out of the loop' regarding workers' compensation claims, it appears that WorkCover bases its approach to claims management on early intervention. Research has been quite clear in showing that workers who receive treatment, care and support as quickly as possible after the injury are more likely to return to meaningful work.[33] A lengthy inquisitorial claims determination period is in direct conflict with this principle, and results in additional costs to the scheme (and employers), poorer outcomes and lengthier claims.

WorkCover's claims management practices endeavours to keep the employer informed of the claims progress and provides the opportunity to offer evidence and respond as new evidence becomes available. Given the low number of claim decisions disputed across the scheme (and the high number of decisions confirmed by the Regulator), it would seem that incorrect claims decisions are made in very few cases. In 2016-17, the proportion of review applications to statutory claims was 2.9 per cent (down from 3.2 per cent for 2015-16), and over 60 per cent confirmed the decision of the insurer.

If employers are aggrieved by a decision of the insurer, they are able to lodge a review application to the Regulator to have the case assessed on its merits. This is an appropriate and cost-free mechanism to investigate the few cases in which an error may have been made, or more information has come to light post claim determination.

4.3 Time limit for lodgement of claim

The Act provides that an application for compensation 'is valid and enforceable only if the application is lodged by the claimant within 6 months after the entitlement to compensation arises'.[34] The entitlement to compensation for an injury arises on the day the worker is 'assessed' by a doctor.[35] This timeframe is consistent with that in place in other jurisdictions, including New South Wales and Victoria.

The Industrial Court of Queensland's decision in *Blackwood v Toward* [2015] ICQ 008 established a new test for determining when a doctor (or nurse practitioner or dentist) has 'assessed' a worker for the purpose of s 141(1) of the *Workers' Compensation and Rehabilitation Act 2003* (the Act). The new test requires evidence of an evaluation, conclusion or expression of an opinion by a doctor that the worker has an 'injury' within the meaning of the Act.

In a standard claim (not a 'journey', 'recess' or 'camp' claim) the test requires some evidence that a doctor has assessed the worker's injury as having arisen out of or in the course of employment if employment is a contributing factor as set out in s 32(1) of the Act. Evidence of even a minimal evaluation by a doctor of an injury as being employment-related will be sufficient because, unless a doctor is providing a report on the issue, a doctor would not have sufficient information to, or be

[33] Australasian Faculty of Occupational and Environmental Medicine, "Realising the Health Benefits of Work – an Evidence Update ", (Sydney: Royal Australian College of Physicians, November 2015).
[34] Section 131
[35] Section 141

expected to, undertake the complex analysis of questions of fact and law to determine the issue of causation.

The concern raised by stakeholders was that the effect of the decision in *Toward* has been detrimental for workers with chronic, insidious or psychiatric injuries, as many do not claim workers' compensation upon diagnosis because they are not incapacitated (either totally or partially). As a result, by the time the worker experiences an incapacity to work because of the injury, the resultant claim for workers' compensation is rejected as being out of time.

Under this test evidence of even a minimal evaluation by a doctor of an injury as being work-related will be sufficient to cause the entitlement to compensation to arise, and the six-month timeframe to commence. However, the evidence required in each case will depend upon the circumstances of the particular case.

By way of example, a recent claim for black lung was denied by the insurer due to being lodged out of time. The review decision found that although the disease had been diagnosed more than six months prior to the claim being lodged (almost ten years prior), the treating doctor had never advised the worker of any potential connection with work, and on that basis the insurer decision was overturned.

Increased doctor awareness of the ability to lodge medical expenses only, or report only claims via the Work Capacity Certificate[36] has the potential to mitigate the effect of the *Toward* decision. This resource will see workers with work injuries (but with no incapacity for work) channelled into the workers' compensation scheme much earlier than they otherwise would have been. Worker education will also increase the likelihood that conditions, no matter how minor, are reported as early as possible. Education initiatives are discussed further in chapter 6.

The Act currently allows an insurer to waive the time limit if the insurer is satisfied that a claimant's failure to lodge the application was due to: a mistake; absence from Queensland; or a reasonable cause.[37] This could be amended to provide for a further circumstance, which is if the worker is certified with a work-related incapacity and lodges their claim within 20 business days of the certification. The worker would be required to provide additional evidence that they did not know the injury was work-related if the certifying doctor, as a matter of course, did not normally use the Work Capacity certificate when certifying work-related injuries.

As part of this, the Regulator could develop a practice note for insurers and lawyers on how it would respond to the out of time issue. This would reduce the potential for injured workers, particularly those with chronic or insidious injuries, to be excluded from workers' compensation due to lodging applications out of time, though it would not eliminate the risk. This practice note would explicitly state that the Regulator would approve waivers where the worker genuinely did not know that the injury was work related.

This option would maintain the rigour of the current date that a worker's entitlement arises and provide flexibility to ensure that injured workers are not disadvantaged by attempting to remain at work while they manage their injury without the complication of a workers' compensation claim. The requirement that the claim be lodged within 20 business days of being certified with an incapacity increases the ability of the insurer to provide early medical and rehabilitation intervention.

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[36] The full title is Work Capacity Certificate – Workers' Compensation

[37] Section 131(5)

Recommendation 4.1: The Parliament should amend the Act to give insurers the discretion to accept a claim lodged more than 6 months after being assessed by a doctor, if the worker lodges their claim within 20 business days of certification of an incapacity. The Regulator should develop a practice note specifying that it will allow such claims where the medical practitioner uses the Work Capacity Certificate or where the worker can provide other evidence that they did not know before that date that the injury was covered by workers' compensation.

4.4 Calculation of weekly benefits

Injured workers who are unable to work are paid weekly compensation in lieu of lost income. The amount workers receive may depend on whether or not they are paid under an industrial instrument (i.e. an industrial award or agreement). For the first 26 weeks of their incapacity workers receive the greater amount of either:

- 85 per cent of their pre-injury normal weekly earnings (NWE); or
- 100 per cent of their award or agreement amount (if they are paid under an industrial award or agreement); or
- 80 per cent of Queensland ordinary-time earnings (QOTE)[38] (for non-award workers).

After 26 weeks, this rate steps down to 75 per cent of normal weekly earnings or 70 per cent of QOTE, whichever is the greater, for up to 2 years. QOTE is $1,482.10 for 2017–18.

After 2 years, a worker can continue to receive compensation at the same rate if they have a degree of permanent impairment of 15 per cent or more. If their impairment is less than 15 per cent, the single pension rate applies ($826.20 per fortnight as at 1 May 2018).

Normal weekly earnings (NWE) are the earnings of a worker from employment (continuous or intermittent) had by the worker in the 12 months immediately before the day the worker sustained an injury. These include amounts paid to the worker by way of overtime, higher duties, penalties and allowances that are of a regular nature, required by an employer, and other amounts that would have continued if not for the injury.

The 'step downs' in compensation are designed to encourage workers to return to work sooner, which generally results in better outcomes for the injured worker, and reduces costs for the scheme and the employer. For this reason, all jurisdictions have step downs in compensation, however, the step downs occur at different times. For example, Victoria, New South Wales and Western Australia's first step down occurs after 13 weeks, other jurisdictions typically step down at 26 weeks.

[38] Section 107 defines QOTE as the seasonally adjusted amount of Queensland full-time adult persons ordinary time earnings as declared by the Australian Statistician in the statistician's report about average weekly earnings published immediately before the start of the financial year. The entitlement described in these points is set out in section 150.

Most other jurisdictions also impose a cap on the amount of weekly compensation payments, generally ranging from $2,100 to $3,000 per week. Queensland does not impose a weekly cap.

If a worker has not had employment for the 12 months immediately before the day the worker sustained an injury, NWE are the earnings of the worker from employment (continuous or intermittent) in the period in which the worker has had the employment. If it is impracticable to calculate, then the insurer must be have regard to the remuneration that would be paid to a comparable worker. If an insurer considers that the calculation of NWE would be unfair, NWE may be calculated in a way the insurer considers to be fair. These safeguards in calculating an injured workers weekly compensation entitlement address situations where a worker has recently returned to work from a period of unpaid leave such a returning from unpaid maternity leave or from personal injury or illness. Any decision made by an insurer in relation to the calculation of NWE is a reviewable decision and the worker can apply to the Workers' Compensation Regulator for a review of the decision.

The Queensland Nurses and Midwives Union (QNMU) stated that the current total incapacity benefits provisions under the Act disadvantage those workers who receive a significant proportion of their ongoing wages from penalty rates and allowances. They argued that incapacity benefits should be 100 per cent of average earnings, which can include allowances, penalties, overtime, and bonuses, excluding any periods of unpaid leave.

There appear to be two problems that are at work here. One is the method of calculating NWE. The second is the interpretation given to 'their award or agreement amount (if they are paid under an industrial award or agreement)'. The former appears to be an administrative issue but the latter might require legislative amendment; it certainly requires further consultation.

On the first, the calculation of NWE takes account of medians, modes and means in a strange way. For example, if in the 12 months prior to a worker's injury the mode occurs at least 1/3 of the time, the mode is used as NWE. This means that if a worker is on a rotating shift in which, for half the weeks, they work 12 hours of overtime, but this alternates between all weeknights and some weekends, while for the other half of the time they work ordinary hours day shifts only, then none of their overtime work will count towards NWE. There are other anomalies. It appears that the reasoning behind the strange formula in the calculation of NWE is to remove the influence of unusual pay periods, that is, outliers. That is a commendable objective, but the best way to do that is simply to remove the outliers. A simple method for that, for example, would be to:

- rank the pay periods over the preceding year (e.g. 52 weeks, 26 fortnights or 12 months);
- take the middle half of the pay periods (e.g. the middle 26 weeks, 13 fortnights or 6 months);
- average those pay periods.

This would give a genuine measure of the worker's normal weekly earnings before they were injured.

> *Recommendation 4.2: The calculation of normal weekly earnings should be changed, by removing references to modes and medians, and instead avoiding the influence of outliers on the statistics by averaging the middle half of pay periods for calculation purposes.*

On the second matter, it appears that the legislation is being interpreted as referring not to the amount of money a worker would be entitled to under their award or agreement working the hours that they actually worked, but rather to the amount of money a worker would be entitled to under their award or agreement if they worked an ordinary 38 hour week during standard hours. This is not the interpretation that I would ordinarily have put on that form of words, and I am not sure that it was the original intent of the legislation either (I see little in the second reading speech to indicate this).

What is the policy rationale or logic for this distinction between NWE and award or agreement pay? One possibility is that workers working long or unusual shift patterns should not be entitled to as much in compensation as people receiving over-award and over-agreement payments from their employer working standard hours, at any given total pay. The second possibility is that workers receiving discretionary over-award or over-agreement pay from their employer should not be entitled to as much in compensation as people receiving only the minimum set out in the award or agreement, at any given total pay. The first does not make sense, as it penalises workers for doing night or weekend work or extra hours. The second seems to have more logic to it, as it would ensure that everyone got at least their minimum entitlement for the hours that they worked, regardless of whether the employer was making discretionary over-award payments, and would not produce a work disincentive. Regardless of what the policy intent, if knowable, was, the second appears to be a better approach. That said, if the second is the logic then there is nothing to specify the period that is relevant for consideration.

There are essentially three options for dealing with the anomaly discussed in this section. A major difficulty in assessing them is lack of data on the relative importance, in explaining the difference between award pay and NWE, of overaward payments versus award entitlements for payments for unsocial or additional hours. The options are:

(a) Abolish the distinction between award/EBA pay and normal earnings, such that all benefits for the first period are based on a (new) proportion of normal earnings.

- For those people who only receive the award rate and work ordinary hours, these two would be the same thing.
- That proportion would need to be set at a rate that was broadly cost-neutral, that is it would need to be somewhere between the current 100 per cent replacement rate for ordinary-time weekly award/EBA pay, and the current 85 per cent replacement rate for NWE.

(b) Maintain the distinction between award/EBA pay and normal earnings, but also make a distinction between where normal earnings exceed award/EBA pay due to the operation of that award/EBA (i.e. due to penalty rates and overtime pay), and where they exceed because of overaward payments.

- Workers who can demonstrate that they receive higher than the award rate for ordinary-time hours entirely because of payments specified in the award would be subject to a lower discount on their benefits than workers who receive higher than the award rate due to overaward payments.
- For example, workers who can demonstrate that their pay is entirely based on award entitlements could be entitled to a benefit of, say, 90 per cent or 92.5 per cent of NWE.
- Meal allowances, travel allowances and other notional reimbursements would be excluded from the calculation.
- If the net cost of this option is relatively low, the other replacement rates could stay at 85 per cent and 100 per cent. If the net cost is high, one or both the other replacement rates might also need to be amended.

(c) Maintain the status quo, retaining the distinction between award/EBA pay and normal earnings and current replacement rates, but making no further distinction between award entitlements (e.g. penalty rates and overtime pay), and overaward payments.

Consideration of this requires consultation with the stakeholders. Before an informed decision can be made (unless it is to stick with (c)), new data would need to be collected on the relative importance, in explaining the difference between award pay and NWE, of overaward payments versus award entitlements for payments for unsocial or additional hours.

> *Recommendation 4.3: The government should hold consultations with stakeholders regarding the appropriate treatment, in the calculation of benefits over the first 26 weeks, of award entitlements for payments for additional or unsocial hours, with a view to choosing one of three options: abolishing the distinction between award rates and NWE, with a new, intermediate replacement rate; creating a new distinction between overaward and award entitlements and establishing new replacement rates in such circumstances; or maintaining the status quo.*

4.5 Disclosure of prior medical records/pre-existing conditions

The *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2013* introduced provisions allowing prospective employers to obtain personal information about prospective workers, with the job applicant's permission. It required prospective workers, if requested in writing by a prospective employer, to disclose all pre-existing injuries of which they are aware that could reasonably be aggravated by performing the employment-related duties.[39] The prospective employer must advise prospective workers that if they do not comply with this request, or supply false or misleading information, they will not be entitled to compensation or damages under the Act for any event that aggravates the non-disclosed pre-existing injury.

Where a prospective worker, on request, fails to disclose relevant pre-existing injuries or provides false or misleading information, the worker's entitlement to compensation and damages for an aggravation of the non-disclosed pre-existing injury ends.[40] However, if a worker is engaged before making the disclosure (or being requested to make the disclosure), his or her rights are unaffected. Another section (now repealed) of the Act previously allowed prospective employers to request a prospective worker's claims history summary from the Regulator, for a fee (although no fee was ever charged).[41]

These provisions were modelled on similar provisions introduced by the Victorian Government in 1997 and were designed to ensure some safeguards were in place regarding disclosure. This included requiring the prospective employer's request to be in writing and to set out:

- a list of specific employment duties for the position;

[39] Section 571B
[40] Section 571C
[41] Former section 571D

- the environments in which the duties are to be performed; and

- a warning that if the prospective worker knowingly makes a false or misleading disclosure, the applicant (or other claimant) will not be entitled to compensation or damages for any event that aggravates the pre-existing condition.

As part of its inquiry into the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2015, the Finance and Administration Committee considered these provisions, but it made no recommendation on most of the above, only to repeal the ability of an employer to request a worker's claims record from the Regulator.

Stakeholder concerns regarding the remaining provisions varied greatly. Unions argued that these provisions are too harsh and may be misused. Workers may be unfairly discriminated against due to prior claims. Employer representative groups by contrast believed that the provisions are too lax. Because employers are unable to access the medical claim history of prospective and current workers, this restricts their ability to mitigate aggravating and exacerbating workers injuries.

It is in a prospective worker's interests to voluntarily disclose any pre-existing injuries to minimise the potential for an aggravation of the injury. Employers can already require prospective workers to undergo a pre-employment medical assessment to determine suitability for a role. The current provisions are designed to ensure that employers are not placing workers in jobs that will increase the risk of harm to the worker.

Prospective workers are not expected to make a medical determination, and their only requirement is to disclose pre-existing injuries or conditions that are in existence during the recruitment process that the person 'suspects or, ought reasonably to suspect, would be aggravated by performing the duties the subject of the employment'.[42] This places an evidentiary burden on insurers to show that the employer provided sufficient detail to the worker and that based on that information, the worker knowingly provided a false or misleading disclosure. In addition, if the information provided by the prospective employer is not sufficient to properly inform the worker of the in herent requirements of the job, then a worker will not be able to form a reasonable belief of the risks associated with the job. The combined effect of these factors is that, according to advice given to me, the number of claims that end up being rejected because of non-disclosure of a prior condition is very small—indeed, in single digits annually—and some of these are cases where fraud has occurred anyway. Thus non-disclosure by workers does not appear to have been a frequent or even infrequent cause of denial of benefits.

Another relevant consideration arose in considerations (though not raised in the explicit context of this proposal): if workers know that their claims or medical record will be passed on to future employers, they may be reluctant to make claims for injuries in the first place. This will lead to understatement of injury statistics, particularly for minor injuries, and potentially inadequate treatment for minor injuries, which might then be aggravated by future incidents.

The best way to resolve this conflict is not obvious. On the one hand, non-disclosure may lead to aggravation of prior injuries; on the other hand, forced disclosure may do the same thing. Employers may have a right to know whether potential workers are fit to do the job for which they are being hired, but workers also have a right to privacy. Indeed, the current trend towards improving privacy protections in the face of increased intrusions through the collection of information would also suggest the greater importance of worker privacy. In light of that, and of the

[42] Section 571A

fact that there are so few cases where benefits have been withheld due to non-disclosure, I do not propose any further tightening of provisions here beyond what already exists.

4.6 Accrual and taking of annual leave and sick leave

Prior to the referral of State industrial relations powers to the Commonwealth on 1 January 2010, Queensland private sector employees were entitled to accrue sick leave and annual leave while absent on workers' compensation due to the combined effects of industrial and compensation legislation.[43] Queensland private sector employees are now covered by the *Fair Work Act 2009* (Cwlth) in the Federal industrial relations system, under which employees who are absent from work and receiving workers' compensation are not entitled to accrue or take any leave, unless a 'compensation law' provides otherwise.[44]

Stakeholder support for the referral of Queensland's private sector industrial relations was based on a commitment from the Queensland Government that workers would not lose any entitlements derived under State law. It was not the intention of the referral to alter the benefits of private sector workers with respect to the accrual of sick, annual and long service leave entitlements while receiving workers' compensation benefits.

The *Work Health and Safety Act 2011* contained an amendment to the *Workers' Compensation and Rehabilitation Act 2003* to allow an injured worker to accrue, and require an employer to pay an entitlement to, accrued leave while an injured worker is away from work on workers' compensation benefits.

One employer group (Australian Industry Group) submitted that the entitlement to continue to accrue and take leave gives more seriously injured workers four weeks annual leave on top of weekly compensation for 52 weeks a year. Concern was also raised that accrual is not time limited, say to the first 12 months of an injury.

In 2016-17, 89.4 per cent of claims were finalised before the six month step-down in weekly compensation, and 95.6 per cent of claims were finalised within 12 months.[45] Only 4.4 per cent of claims remained open beyond 12 months, and of these, claims that remain open beyond two years are subject to a further step-down in weekly compensation if workers were unable to demonstrate a degree of permanent impairment of more than 15 per cent. For the median lost-time injury (involving about 12 days off work), the amount of annual leave accrued would be about one day.

We are therefore talking about a small benefit for most injured workers—and having a day of recreation leave some time after returning to work following a lost-time injury is not such a bad thing. Only a very small minority of cases involve seriously injured workers and therefore a significant cost to employers. Parliament's intent in 2011 was that the amendment allow the accrual and taking of annual leave, sick leave and long service leave, continuing what was the status quo in Queensland that existed prior to the passage of the *Fair Work Act 2009* (Cwlth). This entitlement is longstanding, well understood, and in keeping with the beneficial nature of the workers' compensation scheme. Further, the *Fair Work Act 2009* (Cwlth) specifically anticipates such an entitlement being bestowed by State and Territory legislatures.

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[43] To be precise, sections 10 and 11(5)(b) of the *Industrial Relations Act 1999* and section 108(3) of the *Workers' Compensation and Rehabilitation Act 2003*.

[44] Section 130 of the Fair Work Act.

[45] Queensland workers' compensation scheme statistics 2016-17, p 32

Accordingly I am not convinced that a case has been built for the removal or restriction of this entitlement at this time.

4.7 Statistics

Some stakeholders raised concern about the quality of statistics generated by the system. There are two issues here.

One is whether the information systems used by the insurers and Regulator are adequate for the task. On this, there generally appears to be a good flow of information and the data collected are generally of high quality. I do not have specific recommendations above what the participants are already doing or likely to do.

The second is the extent to which the statistics, particularly on claims, reflect the reality of what is happening with injuries. On this, some under-reporting of injuries seems inevitable, especially with minor injuries that do not require time off work or outside medical treatment that is not rebatable by Medicare. The degree of under-reporting is likely to vary structurally (for example, as discussed in chapter 9, it is more likely to occur in self-insurers, who may channel workers with minor injuries into 'early intervention' programs involving on-site care). It may also vary with other settings (for example, as discussed in chapter 7, 'no lost injury time' bonuses may increase under-reporting, perhaps not just of the most minor injuries). It is not clear that there is any single solution to this problem.

However, one implication is clear: great caution should be exercised in linking the number of claims to the number of injuries. In some instances, it is a reasonable and defensible proxy measure, particularly for more serious injuries where under-reporting is less likely. But in some other cases, it is not a good proxy, particularly if one is assessing the effect of financial incentives (which might reduce claims while having a very different impact on injuries). In short, the statistics appear to do what they are meant to do very well, but it is important not to treat them as being about something else. The system generates good statistics on workers compensation claims, but it is not designed to collect statistics on workplace health and safety or actual injuries. Accordingly, anyone planning on using system-generated claims statistics as a key variable needs to be conscious of the virtues and limitations of those data.

CHAPTER 5: PSYCHOLOGICAL AND PSYCHIATRIC INJURIES

Psychological injuries include a range of cognitive, emotional and behavioural symptoms that have an impact on a worker's life and can significantly affect how they feel within themselves and interact with others. This type of injury may include diagnoses such as depression, anxiety or post-traumatic stress disorder. Job stress is commonly used to describe physical and emotional symptoms which arise in response to work situations but it is not in itself a disorder or a psychological injury.

Workers with a psychological or psychiatric injury can claim 'no fault' statutory compensation and access common law damages under the Queensland workers' compensation scheme. In all jurisdictions an injury of any type is only compensable if it arises out of or in the course of employment. Workers' compensation laws qualify this further for psychiatric or psychological conditions by stating that the employment must have been a significant, material, substantial or the major contributing factor to the injury. Across Australian jurisdictions, claims for psychological injury are not accepted if they are related to reasonable action taken by the employer in relation to dismissal, retrenchment, transfer, performance appraisal, disciplinary action or deployment. In Queensland there is a further requirement: employment must have been *the major* contributing factor to the injury.

Each year there are approximately 4,000 psychological or psychiatric injury claims lodged in the Queensland workers' compensation scheme. The characteristics of these claims in the scheme are:

- they represent around 4.7 per cent of claims lodged in the scheme per year;
- they have a lower chance of being accepted—on average, over 63 per cent of claims lodged in relation to psychological injury are not accepted, typically because they arise out of or in the course of reasonable management action;
- the top direct causes of these injuries for accepted claims include work pressure, exposure to workplace or occupational violence, and work related harassment and/or workplace bullying. Psychological claims are most likely to occur in health care and social assistance, public administration and safety, and education and training sectors;
- claims for psychological and psychiatric injuries take longer to decide due to their nature and complexity (31 working days compared to physical injuries with 6.5 working days);
- the average duration off work is three times that of physical claims (153.3 days for time-lost injuries compared to the overall scheme average of 50.8 days) which in turn has an impact on claims cost (an average finalised time lost claim cost of $50,556 compared to $17,876 for physical injuries);
- the likelihood of a worker returning to work (i.e. to the same job and the same employer) is less than for physical injuries (56.8 per cent of those with a psychological injury compared to 89.4 per cent of workers physically injured returned to work);
- psychological claims represent a significant proportion of disputes and generally take longer to resolve. They comprise: 32 per cent of review applications; 48 per cent of appeals served; and around 50 per cent of Medical Assessment Tribunals.

After experiencing an upward trend of around 8.5 per cent per annum in lodgements for the six year period to 2012-13, psychological and psychiatric lodgements have reduced over the last four years, from 4,608 for 2012-13 to 4,273 for 2016-17. Hence, the proportion of psychological and psychiatric statutory claims as a percentage of all lodgements decreased slightly from 4.6 per cent in 2015-16 to 4.4 per cent in 2016-17.

5.1 Psychological injury definition and exclusions

In assessing a claim, an insurer applies the criteria and exclusions as outlined in the Act. The Act states that 'an injury is a personal injury arising out of, or in the course of, employment if for a psychiatric or psychological disorder—the employment is the major significant contributing factor to the injury'.

The Act also states that 'an injury does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances':

- reasonable management action taken in a reasonable way by the employer in connection with a worker's employment
- a worker's expectation or perception of reasonable management action being taken against a worker
- action by the authority or an insurer in connection with a worker's application for compensation.

Examples of actions that may be reasonable management actions taken in a reasonable way include:

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss a worker
- a decision not to award or provide promotion, reclassification (or transfer of), leave of absence or benefit in connection with the worker's employment.

The degree of work-relatedness required for an injury to be eligible for compensation has been amended a number of times over the last two decades. The definition of 'injury' until 1 December 1994 was 'personal injury arising out of or in the course of employment'. From 1 December 1994 this was amended to 'personal injury arising out of, or in the course of, employment if the employment was a significant contributing factor to the injury'. Then Minister Foley argued that the previous requirement ('a contributing factor') had led to 'a progressive extension of the liability of employers with a need to accept a growing number of claims for conditions where work is only a minor contributing factor'.[46] From 1 February 1997, this was further restricted to 'personal injury arising out of, or in the course of, employment if the employment is the major significant factor causing the injury.' From 1 July 1999, the definition reverted to 'a significant contributing factor', to bring it into line with other Australian jurisdictions.

Also consistent with other Australian jurisdictions, in the early 1990s a 'reasonable management action' exclusion for psychiatric and psychological injuries was first introduced into the definition of 'injury' under the *Workers' Compensation Act 1990* (Qld) with effect from 1 December 1994. The explanatory notes said this was to limit the grounds for compensation for a stress-related condition resulting from certain work incidents. This was in response to an apparent increase in the number and cost of stress-related claims. In the early 1990s there had been an increasing number of claims involving general workplace grievances, or where remedial action regarding a worker's poor performance was the stimulus for the claim.

In 1995, a further exclusion in relation to decisions to transfer or redeploy workers was introduced by the Goss Government. In 1996, the Borbidge Government introduced further exclusions for:

[46] Hansard, 28 October 1994, 10125

- the worker's expectation or perception of reasonable management action;
- action by the insurer in connection with the worker's application for compensation; and
- the 'ordinary susceptibility' and 'reasonable person' tests.

The 'ordinary susceptibility' and 'reasonable person' tests required insurers, and the courts, to determine whether a fictional 'reasonable person' of 'ordinary susceptibility' to psychological/psychiatric disorders, in exactly the same employment, would have sustained the same psychological injury, while disregarding any predisposition the actual worker might have had. Such assessments could only be subjective, meaning decisions were unlikely to ever be uniform.

These two tests were removed in 1999 under the Beattie Government, which also reverted the definition of 'injury' to employment being required to be 'a significant contributing factor' rather than 'the major significant factor' causing injury, as was the case from 1996. In 2013, the Newman Government reintroduced 'the major significant factor' in relation to psychiatric and psychological injuries.

DEFINITION OF 'INJURY'

A number of submissions called for a change to the definition of injury for psychological/psychiatric disorders, in particular the current threshold for employment ('the' major significant contributing factor) was said to be a substantial barrier to legitimate claims for work-related psychological/ psychiatric disorders succeeding.

One submission noted in some cases 'the injury was deemed to be non-work related due to other factors despite a clear record of witnessing traumatic events as part of the injured worker's employment which caused the decompensation or exacerbation of their psych ological injury. This is despite the other factors either exacerbating their psychological injury, being the catalyst for them seeking help (and identifying they have a compensable injury) or being a relevant contributing factor but not necessarily any more 'major' than their employment'.

In the majority of psychological/psychiatric disorders claims, there can be multiple stressors and the operation of the current criteria requires an analysis of the facts along with relevant medical evidence to determine the extent different factors have contributed to the injury. Data suggest that the change of definition had a small but probable impact on the rejection rate for psychological and psychiatric claims. Prior to the 29 October 2013 amendments the rejection rate was 61.5 per cent for the two year period November 2011 to October 2013. For the two year period after the 2013 amendments (November 2013 to October 2015) this slightly increased to 64.7 per cent—initially (in the first three months after October 2013) it increased to around 68 per cent, then gradually reduced to around 65 per cent to October 2015. Over the last twelve months the rejection rate for psychological / psychiatric claims has further reduced to 62.1 per cent, marginally above pre-October 2013 levels. This was consistent with the outcome of discussions with the QIRC, as a member there held the view that the inclusion of 'the major' had not had much of an impact on cases that got as far as reaching them.

Overall, it is very difficult to prove a psychological or psychiatric claim, but when they are accepted (which takes a long time) they are difficult to resolve and last a long time in the system. The label 'the major' probably has more symbolic value for the parties than its practical impact, which appears small though probably real. On the other hand, there seems no good reason for Queensland to be out of step with the other jurisdictions in Australia, none of which require work to be 'the major' contributory factor; instead all focus on a 'substantial' or 'significant' contribution from work and include 'reasonable management action'. Accordingly, for consistency's sake it should be removed. The real issues in the handling of psychological and psychiatric injuries lie elsewhere, in the ex tent to

which early interventions can reduce the damage and cost of such injuries. But before we get to those issues, we turn to the related issue of 'reasonable management action'.

> *Recommendation 5.1: The current definition of injury for psychiatric or psychological disorders in the Act should be revised to remove 'the major' as a qualifier for work's 'significant contribution' to the injury, to bring Queensland into line with other jurisdictions.*

REASONABLE MANAGEMENT ACTION

One submission raised concerns about subjective and varying interpretations applied to claims in relation to what is considered reasonable management action taken in a reasonable way. It argued that if 'there is any hint of disciplinary action against the injured worker their claim is settled as reasonable management action'. That submission recommended that a definition of unreasonable management action be developed with a view to providing circumstances that would assist in the assessment of claims. In addition concerns were raised about the difficulty for the injured worker in collecting evidence about events at the workplace, either because they are not currently working there or they can't access evidence held by the employer to assist in supporting their claim.

Do insurers unreasonably reject claims that should be accepted? Around 88 per cent of the disputes for 'injury - reasonable management action/reasonable way' are because the insurer rejected the claim (compared to around 72 per cent for all other disputes). Importantly, however, for two-thirds of these disputes, the reviewer agreed with the insurer's original decision and around 18 per cent vary the insurer's decision. In other disputes, the review agreed with around half of the insurer's original decision, and in almost a quarter of cases varied the insurer's decision. This suggests that the initial assessment of a claim is more often consistent with the Regulator's interpretation of the legislation.

The main issue here, then, is what the term 'reasonable management action' means to the Regulator. Reasonable management action exclusions for psychological/psychiatric injury are consistent across all Australian workers' compensation jurisdictions. In brief, the exclusion for psychological injuries where they are caused by reasonable management action taken in a reasonable way by the employer or management is an attempt to balance an employer's independence in running its business with a worker's protection from injury. In operation, this exclusion means the onus of proof rests with the worker to show evidence that, on the balance of probabilities, the injury was caused by their employment for the claim to be accepted because the management action was unreasonable.

Insurers look to relevant case law on the interpretation of the term and there is a significant body of case law to assist in interpreting the legislation. It would be possible for the Regulator to produce guidance on what constitutes 'reasonable' and 'unreasonable' management action, based on that body of case law. It seems unlikely that this could be put into legislation; defining 'reasonable' is not something the law has ever been good at, and trying to codify some other basis for exclusions could have unintended consequences. For example, if the Act sought to define 'unreasonable management action' as a justification for a psychological injury claim, anything outside that definition might be construed as constituting 'reasonable' and some factors that are neither reasonable nor unreasonable (such as 'accidental' actions) might be unintentionally excluded. Overall, it seems better to provide guidance to the parties on what constitutes 'reasonable' and 'unreasonable' than to try to codify it in legislation.

Recommendation 5.2: OIR, in consultation with stakeholders, develop an information booklet for participants that clearly sets out examples of 'reasonable' and 'unreasonable' action for the acceptance of psychological and psychiatric injury claims.

5.2 Claims management considerations

Psychological/psychiatric injuries have a profound effect on a worker's life both at home and work and are one of the most complex claims to be managed in the workers' compensation scheme. Submissions to the review referred to:

- claims for primary psychological injuries that involve workplace conflict or relationship breakdowns need rapid intervention to help resolve the underlying issues, not just time off work;
- concerns about the lack of time provided by WorkCover to give the employer the ability to respond effectively to all allegations made by the injured worker; and
- work should be undertaken to assist workers with psychological injuries to return to work in a manner which is caring and efficient; is client-focused and user-friendly; and does not re-traumatise clients.

The recently released Best Practice Framework for the Management of Psychological Claims in the Australian Workers' Compensation Sector provides advice on the entire claims management process from pre-lodgement to completion and was endorsed nationally by Safe Work Australia members at the December 2017 meeting. The framework states:

> current best practice indicates regardless of whether you are working in a scheme that offers provisional liability, access to early medical treatment and an expedited claims determination process can have positive impacts on injured workers.

Recommendation 5.3: The Office of Industrial Relations work with insurers to implement best practice claims management for psychological claims by adopting the principles of the Best Practice Framework for the Management of Psychological Claims in the Australian Workers' Compensation Sector.

Practices that provide for early detection of mental health issues and timely intervention are internationally accepted as the best way to reduce the severity, duration and recurrence of mental illness. The Queensland Mental Health Commission acknowledges that early detection improves clinical outcomes but also assists in securing employment opportunities.[47] Access to early medical treatment is therefore critical and current data supplied by the Office of Industrial Relations shows that claims for psychological injury take approximately 4.5 times longer to decide than physical injuries. In 2016-17 the average duration to decide a psychological injury claim was 31 working days.

[47] Queensland Mental Health Commission, "Early Intervention Initiatives." 2018. https://www.qmhc.qld.gov.au/awareness-promotion/early-intervention-initiatives.

The long claims determination period leaves injured workers without treatment, care or support for an average of approximately six weeks, longer for some, and this can result in a significant worsening of the condition.

Current support for workers during the claims determination process is available through public treatment options including the Medicare Better Access scheme, through their general practitioner (GP), Employee Assistance Program, or organisations such as Beyond Blue, Lifeline, Salvo Careline and Sane Australia. However these programs do not operate or connect into the workers' compensation scheme. In addition, the Medicare Better Access scheme is only available to eligible persons with a limit of up to 10 services per year across psychological and allied health specialisations. Referral to these services requires a mental health treatment plan from a GP.

Based on the information provided to date it appears the scheme is lacking in terms of providing:

(i) the tools to support employers to facilitate early intervention and
(ii) support services to workers who may be suffering from a psychiatric or psychological disorder during the claims determination period.

In addition, there is a lack of Queensland-specific guidance and materials to educate injured workers and employers on psychological injury management, especially when compared to other jurisdictions. The Office of Industrial Relations could work with insurers to implement best practice claims management for psychological claims by adopting the principles of the Best Practice Framework for the Management of Psychological Claims in the Australian Workers' Compensation Sector.

The best approach in relation to claims management itself would be for insurers to meet the cost of a prescribed number of psychological treatment services up until the time the claim is decided. (The prescribed number would depend upon the length of time being taken to assess the claim, so it could be set by reference to time, that is as a fixed number of consultations per week or month, rather than a set number of consultations per claim.) If it was subsequently determined that the injury did satisfy the requirements to be work-related and compensable, the cost would ultimately be borne by the employer through the experience rating system (at least, for larger employers). If it was instead determined that the injury did *not* satisfy the relevant requirements, the cost would be borne by the insurer and have no bearing on the experience rating of the employer concerned.

This would ensure workers receive timely support and necessary treatment and provide appropriate incentive for reasonable claims decision times. Provision of these services is not intended to have any bearing on liability or acceptance of the claim. That is, just because an insurer covered the cost of those initial treatments, it would not imply any acceptance by the insurer of liability. However, it is often through action in these early stages that the cost and damage caused by a psychological or psychiatric injury claim can best be reduced—yet nothing is done to support workers in these early stages. At present, much early action would be treated as an admission of liability, and those claims can be very expensive. Early action on a 'no prejudice' basis, in other words, while having some obvious costs attached to it, can also substantially reduce long-term costs associated with a claim—perhaps in some cases more than offsetting those costs altogether.

Importantly, this approach would also reduce the burden on workers with psychological or psychiatric injury, regardless of whether or not their injury was caused by work. The cost of mental illness is high, and it is not always easy to sort out the different contributing factors (which is one reason why it takes so long to determine a claim in this area), but early action at the workplace will very possibly reduce that cost for employers, and will especially reduce costs for workers and society as a whole.

Because the *net* cost implications are uncertain, this innovation should be evaluated after two years, and consultations held with stakeholders (which, in this case, would also include mental illness experts and action groups) to assess the costs and parameters (such as the number of treatments covered) of this obligation.

> *Recommendation 5.4: Early intervention in cases of potential psychological or psychiatric injury should be promoted by requiring insurers (on a 'no prejudice' basis) to cover the costs of treatment for such injuries before liability has been assessed, up to a limit (defined by reference to a time period). These costs would not form part of the experience rating of the relevant employer, if the claim is subsequently rejected.*

> *Follow-up recommendation 5.5: The requirement for 'no prejudice' early intervention on psychological and psychiatric injuries should be evaluated after two years, with a review including consultation with stakeholders, including mental health experts and action groups. That evaluation should also be considered by the next five-yearly review.*

One other matter is relevant to the management of psychological or psychiatric injury claims. One thing that became apparent from the material submitted to this Review was that frequent exposure to multiple examiners and providers of psychological or psychiatric services did not assist injured workers achieve recovery and rehabilitation, and in fact it probably harms them. WorkCover should do everything that it reasonably can to minimise the number of providers and examiners that injured workers are exposed to. WorkCover appears to be well aware of this consideration. This was also one of the considerations I took into account in rejecting some proposals for changes to the claims management process, if they had the likelihood of increasing the number of exposures.

> *Recommendation 5.6: The Regulator and insurers should do everything they reasonably can to minimise the number of examiners and providers of psychiatric or psychological services that workers with psychiatric or psychological injuries are required to see.*

CHAPTER 6: REHABILITATION AND RETURN TO WORK

The issue of rehabilitation and return to work is a key issue in the terms of reference. One intention embodied in the workers' compensation scheme is that it should 'provide for employers and injured workers to participate in effective return to work programs.'[48]

Return to work means assisting injured workers in staying at or getting back to meaningful work. Getting back to work is an important step in recovering from a work-related injury and means a worker can return to a normal life, often reducing the financial and emotional impact on the worker and their family. The aim of the return to work and rehabilitation provisions in the Act is to provide for the safe, timely and durable return to work of the injured worker having regard to the worker's injury.

The return-to-work plan involves the employer, the worker and the insurer and may also involve other parties such as rehabilitation coordinators, rehabilitation providers, medical and other allied health professionals. A successful return to work can be assisted by:

- ensuring that workplace psychological hazards are addressed appropriately;
- early intervention;
- an effective workplace-based rehabilitation program and return to work plan;
- effective claims management; and
- collaboration and consultation between all parties involved.

Rehabilitation and return to work for psychological injuries did not feature strongly in submissions to the review, however this is an area of concern. Data supplied by the Office of Industrial Relations shows the return to work rate for psychological injuries that had one or more days off work was 72.8 per cent for 2016-17. As a result there is a group of initiatives aimed at improving rehabilitation and return to work. The Best Practice Framework for the Management of Psychological Claims in the Australian Workers' Compensation Sector, which is recommended for implementation, provides a best practice approach for return to work for workers suffering a psychological injury (see chapter 5).

The performance of the Queensland system on return to work is not as strong as other aspects of the system. While financially the system appears very strong compared to other jurisdictions, its performance on return to work (RTW) is less outstanding, and relative to other states depends on what reference year is used (due in turn to data difficulties). While many aspects of the system promote RTW in the period where the greatest opportunities to do so occur, and where the efficacy of such efforts are the greatest, there is less emphasis on sustained or 'durable' return to work, especially amongst workers who have proved difficult to place back in work in the early months after injury. The recommendations of this chapter thus aim to promote sustainability in return to work, and deal with some other issues identified in the stakeholder consultation process.

6.1 Definition of rehabilitation in legislation

'Rehabilitation' is defined in the Act to mean 'a process designed to…ensure the worker's earliest possible return to work' or 'maximise the worker's independent functioning'.[49] Rehabilitation includes necessary and reasonable suitable duties programs, services provided by treating medical

[48] Paragraph 5(4)(d) of the Act
[49] Sub-section 40(1)

or allied health practitioners, rehabilitation services approved by an insurer, or the provision of necessary and reasonable aids or equipment to the worker.

The purpose of rehabilitation as per the Act is 'to return the worker to the worker's pre-injury duties' or, 'if it is not feasible to return the worker to the worker's pre-injury duties—to return the worker, either temporarily or permanently, to other suitable duties with the worker's pre-injury employer' or, failing that, 'to return the worker, either temporarily or permanently, to other suitable duties with another employer' or, failing that, 'to maximise the worker's independent functioning'.

The question of the definition of rehabilitation was addressed in consultations by the Australian Rehabilitation Providers Association (ARPA) Queensland Council, which argued that the definition in the Act was inadequate. It proposed, as an alternative, one described in guidelines by the Heads of Workers' Compensation Authorities (HWCA, an intergovernment agency), which depicted the generally agreed definition of workplace rehabilitation is as 'a managed process involving timely intervention with appropriate and adequate services based on assessed need, and which is aimed at maintaining injured or ill workers in, or returning them to, suitable employment.' The problem with this definition is that it does not take account of non-work rehabilitation, that is the desire to 'maximise the worker's independent functioning' if they cannot return to work. This is not surprising as it is a definition of *workplace* rehabilitation. The emphasis ARPA wishes to place, however, is probably on the adjectives surrounding the *process*, that is its being 'a managed process involving timely intervention with appropriate and adequate services'. The Act refers to rehabilitation as including necessary and reasonable suitable duties programs, services provided by a registered person and services approved by an insurer, as well as the provision of necessary and reasonable aids or equipment to the worker.[50] This appears to more than cover 'appropriate and adequate services', though the issue of 'timely intervention' is left unsaid (while 'managed process' seems redundant in light of the other terms included in the Act). The practical impact that this has is unclear to me. While the HWCA definition does not appear appropriate, as it refers only to workplace rehabilitation, there would probably be no harm (though probably also not much impact) from referring in the Act's definition to 'timely intervention'.

WORK CAPACITY CERTIFICATE

The Work Capacity Certificate is used in the determination and management of an injured workers' claim by insurers. This certificate was introduced into the Queensland workers' compensation scheme on 1 July 2016 to assist all stakeholders to work collaboratively to support injured workers back to work as early and safely as possible. It does this by prompting practitioners to focus on what the worker can do within their capacity and to consider what tasks they can perform. This is to help the worker and employer achieve a positive stay at, or prompt return to work outcome.

Several stakeholders suggested changes to the certificate to make it more useful for following up on injuries. There is already a review of the certificate underway by the Office of Industrial Relations which will involve ongoing consultation with a wide range of stakeholders. This certificate review is a more appropriate forum for advancing the technical process of any redesign of the certificate. Proposals from stakeholders for improvements to the certificate have been passed on to the OIR.

6.2 Performance measurement and claim closure

Returning an injured worker to the same job with the same employer is generally considered the best outcome that can be achieved on a claim. However, there are different ways of measuring

[50] Sub-section 40(2)

return to work, which makes jurisdictional comparison problematic. The four main ways in which return-to-work (RTW) measures are distinguished are:

a) the point in time at which they are measured (e.g. at the 'closure' of the claim or a defined amount of time after the 'closure');
b) the type of data used (administrative or survey data);
c) the denominator used (e.g. all injured workers or injured workers who had a certain amount of time off work); and
d) the 'type' of return to work (in the same or a different job, with the same or a different employer).

The standard way in which return to work is measured in the Queensland system under (a) is to measure it at the 'closure' of the claim. Closure is an administrative device used by insurers (sometimes called something else, such as 'finalised') to describe the point when it is believed that an injured worker's condition has improved to the point that it he or she is now able to return to work, or alternatively that their entitlement to compensation ends (the claim is 'closed'). It is not a term found in the legislation. If the injured worker is fully recovered, no further compensation is payable after closure. If their employer was negligent, they might be able to obtain further compensation as damages via a common law claim. Comparisons between jurisdictions, however, tend to use observations taken several months after this point (in fact, the most commonly used data source measures RTW outcomes at a point in time at least nine months after the injury). Measuring RTW this way is sometimes referred to as measuring the 'durable' RTW rate.

In relation to (b), it is naturally administrative data (that is, data generated by its own systems) that WorkCover uses to assess the RTW rate, though inter-jurisdictional comparisons normally use survey data (there being too many differences between systems to use administrative data).

On (c), Queensland data tend to focus on return to work amongst all injured workers, or all those with any lost time from work, whereas the inter-jurisdictional comparisons rely on 'serious injuries' which, for this purpose, are those involving injured workers with 10 or more days off work.

On (d), all types tend to be measured but it is noteworthy that in most cases, workers return to work not only in the same job but also with the same employer. In 2016-17, 86.9 per cent of injured Queensland workers *who had time off work* ended in this status.

In 2016-17, 92.1 per cent *of injured workers* in Queensland returned to some type of employment (91.9 per cent in 2015-16). In a small number of cases, the worker is deemed fit to return to work but there is no job for the worker to return to (2.3 per cent of time lost claims) or the worker chooses not to return (2.9 per cent of claims).

A key factor that influences the RTW outcome is the existence of a psychological injury. Table 6.1 below illustrates the impact of the injury type on RTW outcomes. As shown, workers having psychological claims are less likely to return to employment.

Table 6.1 - Return to work rate for finalised claims by injury nature

	2015-16			2016-17		
	Physical only	Psych only	Psych & Phys	Physical only	Psych only	Psych & Phys
Fit for work: same job/tasks with same employer	88.9%	55.6%	37.9%	89.4%	56.8%	37.9%
Fit for work: same job/tasks with different employer	1.1%	2.7%	1.8%	1.1%	1.9%	2.2%
Fit for work: different job/tasks with same employer	1.2%	3.8%	3.6%	1.0%	2.8%	3.7%
Fit for work: different job/tasks with different employer	2.3%	10.2%	9.6%	2.4%	11.0%	11.5%
Fit for work: no job	1.9%	5.1%	10.2%	1.9%	4.8%	10.0%
Fit for work: worker does not return	2.5%	7.5%	12.8%	2.5%	8.1%	11.2%
Not fit for work	1.8%	14.5%	22.0%	1.5%	14.2%	22.1%
Alternative outcome not claim related	0.2%	0.5%	2.0%	0.1%	0.3%	1.5%
Total	100%	100%	100%	100%	100%	100%
Finalised claims	*40,943*	*971*	*1,236*	*41,534*	*1,081*	*1,488*

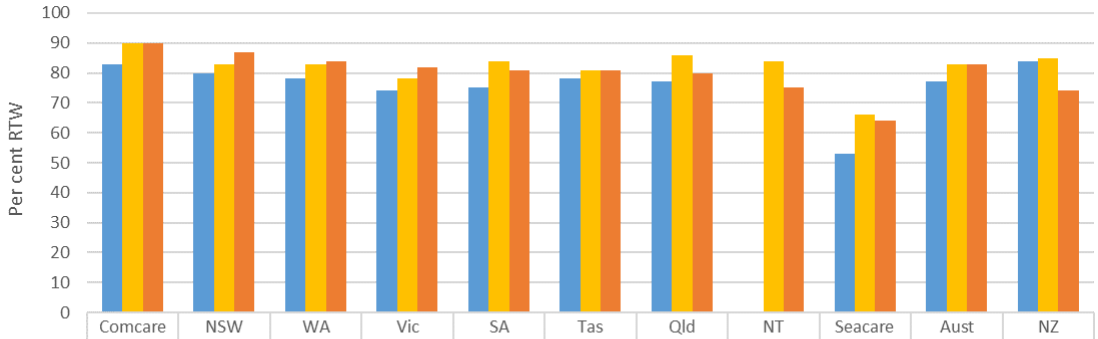
Source: OIR QSA database

Every two years the 'Return to work survey' commissioned by SafeWork Australia interviews a sample of workers from each jurisdiction. Workers are asked if they are currently working at the time of the survey, *three to six months post the finalisation of their claim*. Here, Queensland does not do as well as other jurisdictions depending on the time period used. For example, in 2016 Queensland appeared to have the lowest RTW rate of the six states, but in 2014 it was the second highest and in 2012 at the Australian average. The data from this survey are shown in Figure 6.2.

Comparisons between the jurisdictions should be interpreted with caution due to differences in benefit structures, step down provisions, and legislative differences regarding early claims reporting, employer obligations, self-insurance and common law arrangements. These mostly affect incentives to return to work (and hence differences reflect real behavioural outcomes), but some may affect reporting. For example, if self-insurers were less likely to report minor lost-time injuries (due to, say, early intervention programs), the RTW rate of self-insurers would appear lower than system-insurers even where there were no real difference. In that instance, different roles for self-insurers between jurisdictions would also affect relative reported RTW rates of jurisdictions.

But probably the biggest problem with making comparisons between jurisdictions is the characteristics of the data: a survey is subject to sampling error and it is quite plausible that the seemingly remarkable changes in Queensland's relative outcomes are more a function of sampling variability than of real changes in the relative performance of the Queensland scheme.

Figure 6.2 - Current return to work rate for 2012, 2014 and 2016 by jurisdiction



	Comcare	NSW	WA	Vic	SA	Tas	Qld	NT	Seacare	Aust	NZ
2012	83	80	78	74	75	78	77		53	77	84
2014	90	83	83	78	84	81	86	84	66	83	85
2016	90	87	84	82	81	81	80	75	64	83	74

Source: Comparative Performance Monitoring Report 18th Edition

The problem with measuring the RTW rate is not just an issue for benchmarking the efficacy of the Queensland system. It is also a problem of what incentives it might create for behaviour by participants in the system, not least administrative staff in insurers—for example, a RTW rate measured too early would lead to a focus by insurers on achieving RTW at that time which might not be durable. While there is a broad consensus that a return to work is the best outcome for workers, and there are very good reasons for agreeing with this perspective, there are two closely-related problems. As one of the stakeholders argued, not all workers may be ready to return to work, or at least not be ready to return to work in the same job with the same employer, as early as when some claims might be 'closed'. The second aspect of this is that a number of workers who return to work at the point of closure are no longer in employment several months later. For some this change might have occurred anyway, but for many it implies that they returned to work too early (despite a medical assessment that they were ready to return to work, as this is normally a requirement of return to work)[51] or (perhaps more likely) to an inappropriate position.

This suggests that, while return to work is a valuable and appropriate objective, it may be that it is being measured too early and this may be having counterproductive impacts on incentives and behaviour in the system. In this context, the concept of 'closing' the claim may be integral to the problem. Once a claim is 'closed', insurers pay no further attention to the situation of the previously injured worker unless the case is 'reopened'. The fact that a case can be reopened, if information comes to the insurer to indicate that the worker is still injured and/or out of work as a result, tells us that there are circumstances in which the insurer will take an interest in previously injured workers after closure. However, it is patchy, in that the monitoring of workers' condition after 'closure' is not at all systematic (there is no surprise there—it is not designed to be monitored after that point) and hence many problems with previously injured workers, after closure, will go unnoticed until it is too late.

At a minimum, there should be some systematic follow-up of previously injured workers, on at least one, probably more occasions, after the time at which the claim is currently closed—to understand their current employment status, their functioning-post injury, and identify whether any further action is required. But doing this after the case was 'closed' would seem odd—how can the case be

[51] It was, however, the AMA that, amongst others, referred to workers potentially returning to work too early.

'closed' if the insurer is still undertaking actions with respect to the worker, even if those actions are often only of a monitoring nature?

Administratively and conceptually, such a case would not be genuinely 'closed', and so it would make more sense to refer to 'soft' and 'hard' concepts of closure, or what would probably administratively be called 'provisional' and 'final' closure. What is presently called 'closure' would become 'provisional' closure, and insurers would follow up with previously injured workers, on preferably two occasions after their injury (say, three and nine months later) to find out their current employment status and their recovery post injury. If no further action is required, only then would 'final' closure of a claim be declared. Insurers would also be expected to collect and publish data on 'durable' RTW rates as measured in this way, and to focus on achieving high rates of durable RTW as a key performance indicator.

The key thing here, though, is not the softness, provisionality or closeness of the wording in an insurer's administrative practices. Those things are matters for insurers, and some self-insurers may have different terminology. The key thing is to get insurers to focus on *durable* return-to-work, by having them follow-up workers who appear to have returned to work, even after compensation benefits have ceased; and, if those workers' return to work now appears not to have been sustainable, to take whatever measures are appropriate to get them back to work. Some workers who leave a job may have done so for reasons unrelated to their injury, such as to pursue study or to travel overseas; but some may no longer be in work because the job they went back to was not a good 'fit' or sustainable. The latter is the group that require further action.

This is not a recommendation to change any legislated aspect of the timing or amount of the entitlement of workers to compensation or damages. It is a matter of administrative practice. This is not to say that measuring RTW at a later date would be without problems. The later RTW is measured, the more it can be influenced by factors unrelated to the worker's injury, such as movement between jobs due to age, other medical conditions, personal circumstances or moving overseas. They may be harder to track down, raising administrative costs. Such factors would need to be taken into account in assessing performance, and the efficacy of such measures would therefore need to be reviewed after several years usage, or at least in the next five-yearly review. There is also a question as to whether such measures would change behaviours, by creating expectations on injured workers that they should pursue common law litigation. The latter seems unlikely, though, as injured workers appear more likely to pursue common law action if they feel they have been badly treated, and recontacting them would be more likely to have the opposite effect. The introduction of new measures and concepts would also need to avoid the suggestion that the 'short term' nature of the Queensland scheme is being abandoned and the scheme moving to a 'long tail' scheme. The purpose is not to change the 'tail' of benefits, but to ensure that what insurers see as 'successful' outcomes (injured workers returning to work) are genuine 'successes'. Queensland's short tail scheme focuses on early resolution of claims and while this delivers a very efficient scheme it encourages stakeholders to focus on resolving claims early and ensuring workers are employed at the end of their claim rather than prioritising sustainable employment.

> *Recommendation 6.1: To enable a focus on more durable return to work, insurers should follow-up workers some time after benefits have ceased, to ascertain their current employment status and their functioning post injury, and identify whether any further action (such as referral to a specific program) is required.*

Recommendation 6.2: Insurers should collect and publish administrative data on durable return-to-work rates as key performance indicators.

Follow-up recommendation 6.3: The efficacy of new durable return-to-work measures in use should reviewed after several years usage, or at least in the next five-yearly review.

6.3 Addressing gaps in return to work

Up until a few years ago, the then Regulator (Q-COMP) administered the 'Return to Work Assist' (RTWA) program. With the folding of the Regulator functions into OIR, that program has disappeared. A number of stakeholders recommended the re-introduction of RTWA.

The RTWA program was established in 2010. Injured workers who had not returned to work were referred by their insurer to the RTWA program. The aim of the program was to enable such people to return to work. Those with an open common law claim had to satisfactorily participate in RTWA to mitigate their loss.

RTWA used two main approaches. The first was preparing injured workers for re-employment through activities such as interview training and résumé writing. The second was to focus on career development for participating workers to transition into a new career area. People on RTWA were people who were not at work, and whose compensation benefits had ceased, but many of them still had an outstanding common law claim. So, typically, they had severe conditions of a physical or psychological nature, often the latter. Some were motivated to return to work if they could, but many felt a return to work was not feasible or, in some cases, desirable. In short, it was a disadvantaged, high-need group that was difficult to assist.

An evaluation of RTWA, drawing on a number of methods, found that, despite dealing with a difficult client group, it performed well in several important respects. In particular, a majority of those who engaged with it successfully returned to work, it provided prompt initial contacts to clients, both emotional and psychological support, and clients felt that their expectations and needs were met. Advisors appeared to adopt a client-centred approach, facilitated durable RTW by following up with clients three months after they commenced work, and it appeared more cost-effective than comparators such as Job Services Australia or independent providers. That said, the evaluation was not uniformly positive, and it made a number of recommendations for improvements, including more emphasis on things like clarifying roles, rights and responsibilities, considering clients' needs on an case-by-case basis, client involvement in RTW planning, contingency planning, some specific training courses, appraising the wider contextual factors affecting RTW, employer liaison, workplace support, follow-up over longer periods, and dealing with issues in clients' understanding of and attitudes towards their situation and the changes they face.

With the demise of RTWA, there seems to be a gap in the provision of RTW services, arguably to the group that needs them the most (but for whom the provision of services is most difficult). It is also a group that, as the evaluation survey showed, has very low satisfaction with the RTW support provided by their insurer (which is hardly surprising, given that they are not at work).

That said, insurers are nonetheless bound by their legislated obligations. In particular they currently have a responsibility for rehabilitation and return to work.[52] This positive duty requires the insurer to take the steps it considers practicable to secure the rehabilitation and early return to suitable duties of workers who have an entitlement to compensation. This duty requires the insurer to consider the needs of the worker during the period that the worker is receiving compensation. In relation to common law claims, the insurer is required to refer a worker who has lodged a notice of claim for common law to an accredited return to work program of the insurer. The accredited return to work program is accredited by the Workers' Compensation Regulator and may include, but not limited to, vocational assessments, reskilling or retraining, job placement, host employment. The legislation deliberately does not preclude an insurer from engaging a third party to deliver these services on their behalf, for example, engaging a job placement agency.

A particular gap that exists in relation to insurer responsibilities is after a worker's entitlement to compensation ceases (for example, an injured worker receives their notice of assessment and accepts a lump sum payment and is no longer entitled to compensation but may still not be able to return to work). Insurers already have in place programs of some type to support those who have not returned to work at the end of their statutory claim, and those who are not working when they lodge a common law claim. However, there is no support at all for those who lose their jobs sometime after insurers administratively closed their claim because they had returned to work.

Unfortunately, we know very little about workers who lose their jobs sometime after their claim is administratively closed because they had previously returned to work. To my knowledge, no-one in the Queensland system knows where they live, their industries, occupations or age, why they are losing their jobs, whether their injury or some other factor has caused them to lose their job. This is important to understand because of the high costs to society and governments when people are not working or not working to their capacity. It is also important to understand in order to best design a solution to support them as it may require some legislative amendment to expand their entitlement to support beyond what is currently permitted under the Act.

As mentioned, all insurers currently have an accredited return to work program. Access to this program could be extended by requiring the insurer to assess the rehabilitation and return to work needs of all workers during the management of a claim which meet a set criteria (e.g. those who have had a total incapacity to work for a certain period of time) and referring them to the accredited program if the assessment identifies a risk to the workers return to work. It is clearly better if potential problems with workers at risk of not returning to work are identified early. There is a good window of opportunity to influence a worker's RTW outcome in the first one-and-a-half to three months after their injury. After that, opportunities are more limited.

WorkCover is undertaking a project, called 'Recovery Blueprint', using analysis and evidence provided by Monash University's own data analysis. It aims to identify 'at risk' workers, based on that research and using data analytic techniques, within six weeks of claim lodgement. It then plans to monitor them as their claim progresses. Data analytics is a tool with great potential, though also one where the practice may fall short of the promise. Algorithms may, for example, contain many unexpected and undetected biases that end up disadvantaging the groups it is intended to protect.[53]

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[52] Chapter 4 Part 3, in particular section 220

[53] For a discussion with examples see C. O'Neill, Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy (New York: Crown Pubishing Group, 2016). For a more recent example see C. Lecher, "What Happens When an Algorithm Cuts Your Health Care." in *The Verge* (2018), 21 March, https://www.theverge.com/2018/3/21/17144260/healthcare-medicaid-algorithm-arkansas-cerebral-palsy.

We also know that an individualised approach to rehabilitation tends to produce better outcomes.[54] One of the key considerations is to never rely on such techniques solely for decision-making purposes. However, if it is merely used to identify injured workers whose circumstances *increase the probability* of their having difficulty in returning to work, and then to target additional assistance to those workers, then it is feasible more good than harm will come from its use.

The Act could also provide workers with a right to request a referral to the accredited program. The insurer would then be required to undertake an assessment and provide a reason of decision to the injured work if the insurers decides that the referral is not supported. This decision should be a reviewable decision. Injured 'gig economy' workers would automatically fall within the scope of this program.[55]

A benefit of this approach is that it would ensure the insurer and worker are actively engaged in the return to work program before the entitlement to compensation ceases. It allows the worker to feel more supported at an early stage of their claim and provide a supported pathway for the worker to plan and prepare for their return to work, either with the same employer or another, or in the same role or another. This early intervention may assist in reducing the rate of secondary psychological injuries and contribute to reduce common law rates.

It also would set expectations with employers and workers that an insurer will maintain an active involvement even after the entitlement to compensation ceases. The costs of this additional service would be met by the employer through the experience rating calculation, thereby providing a further incentive for employers to return their injured workers to work.

In addition to the duty to refer, prior to access to compensation benefits ceases, there should be a requirement for the insurer to refer an injured worker to the accredited program if, at the end of entitlement to compensation, the worker has not achieved a return to work. This ensures that no injured worker would slip between the cracks and all injured workers would be provided with support to return to work.

The entitlement to be a participant in an insurer's accredited program will continue until the worker achieves a durable return to work or the insurer decides that either: the worker is not reasonably participating in the accredited program; or further participation will not reasonably contribute to achieve a durable return to work. The decisions made by an insurer to cease a participant's access to the insurer's accredited program should be reviewable decisions.

The benefits of this approach include that:

- insurers have the knowledge required to support the claim and return to work;
- insurers already have accredited return to work programs that can be used for early intervention to increase return to work rates;
- it removes the current gap in support for injured workers between the end to entitlement to compensation and the commencement of a common law claim;

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[54] C. Randall, N. Buys, and V. McLennan, "Responding to System Imperatives in Rehabilitation Case Management Contexts." in *Case Management: Inclusive Community Practice*, ed. E. Moore (2016) (pp. 341-63); C. Claes et al., "Person- Centered Planning: Analysis of Research and Effectiveness,." *Intellectual and Developmental Disabilities* 48, no. 6 (2010) (pp. 432-53); P. Dekkers-Sánchez et al., "What Promotes Sustained Return to Work of Employees on Long-Term Sick Leave? Perspectives of Vocational Rehabilitation Professionals." *Scandinavian Journal of Work, Environment & Health* 37, no. 6 (2011) (pp. 481-93); N. Scerra, "Strengths-Based Practices: An Overview of the Evidence." *Developing Practice* 31 (2012) (pp. 44-53).

[55] Discussed in chapter 10.

- it facilitates early engagement with the injured worker that is likely to result in a more positive experience for the worker with less secondary psychological injuries and common law claims, and
- it ensures that the injured worker maintains a relationship with a single insurer that will assist with minimising further stress or uncertainty for the injured worker during their claim.

Recommendation 6.4: The Act should be amended to specify that an insurer retains responsibility for rehabilitation and return to work even after the entitlement to compensation ceases for a defined period, to ensure as much as possible that the worker either achieves or has had every reasonable opportunity to achieve a durable return to work.

Recommendation 6.5: Insurers should be required to assess the rehabilitation and return to work needs of all workers during the management of a claim and refer them to the accredited program if the assessment identifies a significant risk to the worker's return to work. However, decisions such as these (or any other by the insurer) should be made on the basis of human judgement by staff of the insurer, and not purely on the basis of algorithmic outcomes. An insurer should also be required to refer an injured worker to an accredited RTW program if, at the end of entitlement to compensation, the worker has not achieved a return to work. The entitlement to participate in the program should continue until the worker achieves a durable return to work or the insurer decides that either: the worker is not reasonably participating in the accredited program; or further participation will not reasonably contribute to achieving a durable return to work.

Recommendation 6.6: Workers should have a right to request a referral to an accredited return to work program.

Follow-up recommendation 6.7: An assessment should be undertaken within two years (and no later than the next five-yearly review) of the demographic and job history characteristics of workers who lose their jobs sometime after their claim is administratively closed because they had previously returned to work, and an assessment made as to whether any further legislative amendments are required, such as whether it is necessary to expand their entitlement to support beyond what is currently permitted under the Act.

6.4 Rehabilitation capability of employers

The employer of a worker who has sustained an injury must take all reasonable steps to assist or provide the worker with rehabilitation for the period for which the worker is entitled to compensation. The rehabilitation must be of a suitable standard as contained in the guidelines made by the Workers' Compensation Regulator, published on the Worksafe website. This standard must be met by all employers and not just those required to have a paid rehabilitation and return to work coordinator (RRTWC).

Employers engaged in a high risk industry[56] are required to appoint a RRTWC if they have wages more than 2,600 times QOTE (approximately 50 full-time equivalent (FTE) workers), and all other employers when they have wages more than 5,200 QOTE (approximately 100 FTE workers). All self-insured employers must have a RRTWC. If an employer is required to appoint a RRTWC then they must also have workplace rehabilitation policy and procedures.

The functions of a RRTWC include to:

(a) initiate early communication with an injured worker in order to clarify the nature and severity of the worker's injury;
(b) provide overall coordination of the worker's return to work;
(c) if a rehabilitation and return to work plan is required—
    (i) consult with the worker and the worker's employer to develop the suitable duties program component of the plan; and
    (ii) ensure the program is consistent with the current medical certificate or report for the worker's injury;
(d) liaise with—
    (i) any person engaged by the employer to help in the worker's rehabilitation and return to work; and
    (ii) the insurer about the worker's progress and indicate, as early as possible, if there is a need for the insurer to assist or intervene.

The RRTWC plays an important role in facilitating actions detailed in a rehabilitation and return to work plan and establishing a suitable duties program at the workplace. The RRTWC liaises with the insurer, the injured worker's treating practitioner (where required), manager and the injured worker to assist them to identify suitable duties and strategies to successfully overcome any challenges when returning to the workplace.

The role of the employer is to take all reasonable steps to assist or provide the worker with rehabilitation and support the return to work. The employer's support for the RRTWC in coordinating the rehabilitation and return to work process in the workplace can lead to better outcomes. Ensuring the RRTWC is appropriately qualified and trained to perform the role will assist an employer to maintain a high standard of workplace assistance when suitable duties programs are required to support workers recover at work.

A RRTWC is a person who is appropriately qualified to perform the functions of a rehabilitation and return to work coordinator. Appropriately qualified is defined in the *Acts Interpretation Act 1954* as meaning 'having the qualifications, experience or standing appropriate to perform the function or

[56] These can be summarised as: agriculture, forestry and fishing; mining; manufacturing; construction; transport and storage; hospitals; residential care; medical and other health care; waste collection; and public order and safety. A full list is at https://www.worksafe.qld.gov.au/rehab-and-claims/injuries-at-work/high-risk-industries.

exercise the power'. It is the employer's duty to ensure and to demonstrate that the RRTWC is appropriately qualified. Prior to 2013, a person could only perform the role of a RRTWC if they had satisfactorily completed a workplace rehabilitation course and were registered with the Workers' Compensation Regulatory Authority (Q-COMP). Several stakeholders throughout the review felt that the skill level of RRTWCs had reduced since the 2013 changes and less emphasis was being placed on this crucial role within employers. Because the Regulator no longer accredits RRTWCs, it has also lost the ability to educate and share industry best practice across the network of coordinators. That said, requiring all RRTWCs to have completed a generic training course did not recognise that workplaces are different and RRTWCs should have training and skills that are relevant to their specific circumstances. Further, it appeared to impose an unnecessary requirement on RRTWCs that already had training or qualifications that exceeded the minimum requirement, such as occupational therapists.

It is appropriate that the employer have the obligation to assess the risks and needs of their workers and workplaces and ensure that they have engaged a RRTWC that has undertaken a suitable qualifying course. The Workers' Compensation Regulator needs to be able to undertake validation audits to ensure that employers are complying with their obligations and, most importantly, are contributing to improve durable return to work outcomes for injured workers.

There seems to be merit in reintroducing the requirement that RRTWCs hold an appropriate qualification, but with amendments to take account of the problems that the previous system had. First, there would need to be a transition period. Second, credit should be allowed for relevant courses that have already been undertaken. For some RRTWCs or occupational therapists, this would mean there was no need for them to undertake any additional courses. Third, the curriculum of the approved workplace rehabilitation courses needs to be carefully considered. Given the substantial variations in industry experiences, there is probably merit in having a common core across all industries but then specific modules that cover issues for particular sectors or groups of industries.

One way for this to occur is to require all employers that are obliged to appoint a qualified RRTWC provide to their insurer a list of all RRTWCs engaged by the employer. This list should include which workplace each RRTWC has responsibility for and a statement for each RRTWC detailing how the person is appropriately qualified for the workplace that they have responsibility for.

It makes sense that this information be provided to the insurer as there is already an existing relationship between employer and insurer and, in the case of WorkCover, every employer is required to submit information to WorkCover annually for the purposes of premium calculation. Requiring this information to be provided to the insurer will minimise the additional regulatory obligations imposed on employers required to have RRTWC. The information should only need to be updated if there is a change in it. For example, an employer with one workplace and one RRTWC that is a university qualified Allied Health Provider should not be required to re-submit the information if there have been no changes at the workplace.

The Regulator can then access this information from the insurer and use it for a number of purposes to work towards improving the scheme's durable return-to-work rate. These purposes can include providing tailored and targeted communications to RRTWC to improve their knowledge and ability to fulfil their functions, and to undertake targeted auditing to validate the appropriateness of RRTWC qualifications and the systems supporting durable return-to-work outcomes.

It will also enable the Regulator to be able to request return-to-work data for each employer that has a RRTWC and identify those employers that have a durable return-to-work rate that below their industry average. This information will allow the Regulator to undertake informed and targeted

compliance and education activities, ensuring that resources are able to be focused on the greatest areas of need and to improve return-to-work rates.

> *Recommendation 6.8: The requirement that rehabilitation and return to work coordinators in larger organisations be appropriately qualified should be reintroduced, but with a transition period, partial or full credit for prior relevant training, and consideration given to the inclusion of industry-specific modules in the accredited training.*

> *Recommendation 6.9: The Office of Industrial Relations should work in collaboration with insurers to develop a comprehensive plan to support that rehabilitation and return to work coordinators, and encourage uptake in industry, particularly within industry sectors that have a durable return-to-work rate less than scheme average.*

> *Recommendation 6.10: The Act should be amended to oblige employers that are required to engage a rehabilitation and return to work coordinator (RRTWC) to provide a list of all RRTWCs engaged by the employer, and include in this list the RRTWC contact details and the workplace/s they have responsibility for. This information should be available to the Workers' Compensation Regulator and insurers for the purposes of educating and supporting these officers, and validating requirements.*

6.5 Providers and regionalism

Submissions were also made to this review that WorkCover's panel of rehabilitation providers (particularly in relation to occupational therapists) should be revised. This was because of concerns that the panel was too restrictive, preventing some capable therapists from providing services and preventing some employers from making use of therapists who knew those employers' businesses well. Although self-insurers had no direct involvement in the panel, it appeared that some considered that the omission of some providers from the WorkCover panel meant that they were not able to gain enough work to make it worthwhile also working for self-insurers. Indeed, one suggestion was that there should be no panel at all, and that employers should be free to choose whatever provider they wished. On the other hand, there is a logic to having a panel, to make sure that each person providing therapy services has enough involvement in injury rehabilitation services to be able to deliver a good quality service. There are also managerial efficiencies and supervisory benefits for WorkCover in dealing with a limited number of providers.

Since the panel was announced, WorkCover has been in negotiation with some provider representatives, and the panel has been extended both in duration and in the number of providers included on it. Given the commercial obligations involved in the current arrangements, there is a limit to what changes can be made at present. Overall, this appeared to be largely a matter for WorkCover to resolve. There were no general feelings among representatives of WorkCover clients

that the quality of occupational therapy providers had declined. (This was in contrast to feedback about RRTWCs employed by firms themselves, about which I received quite a bit of feedback indicating their quality of services had declined in recent years, as discussed in section 6.4.)

There is, however, one dimension to this issue that has broader implications: the regional dimension. Comments were made by several stakeholders that there needed to be an improvement in the regional presence of the administrators of workers' compensation in Queensland. The main interaction people have with the workers' compensation system is through WorkCover. It is heavily centralised in Brisbane. Many services that are contracted to WorkCover are delivered regionally because that is where many of the injured workers live or work. OIR has more regionally-based staff but mainly in the form of WHS inspectors, rather than workers' compensation. That is no surprise, as most of OIR's role in workers' compensation is of a policy or regulatory nature, and it would be very inefficient for that to be decentralised outside Brisbane. Program administration is really the function of WorkCover and the self-insurers, and even enforcement of premium payments is the responsibility of WorkCover as it is the body that is financially disadvantaged when premiums are not paid.

With developments in digital technology, the need for administration through WorkCover to be centralised in Brisbane is not as strong as it was a decade or two ago. As well as making use of such technologies, WorkCover's regional presence might also be improved through collaborative work with OIR WHS staff, and even less centralised agencies from other portfolios or jurisdictions, such as the FWO. This review has not had sufficient time to consider the ways in which WorkCover's regional presence could be improved, and given the wide range of potential pathways and partners it would not be appropriate to be prescriptive on the matter. However, it is clear that WorkCover should consult with stakeholders and OIR as to the best ways in which it can improve its regional presence.

It is not as simple as saying that WorkCover should reorganise itself along regional lines and locate, say, half if its staff outside Brisbane. The history of public administration is littered with the names of organisations that lost much of their expertise through forced relocations of staff to suit the needs of others. At present claims administration in WorkCover is mainly organised along industry lines, with some adjustment for type of injury (in particular psychological or psychiatric claims), and any greater regional focus should not mean it loses industry-specific expertise. That said, many industries have a strong regional focus and vice versa, so the two are not totally mutually exclusive. It is clearly a process that requires a lot of consultation and exploration of possibilities. At the time of the next Review, WorkCover should specifically report on actions it has taken to regionalise its operations, the effects and its future plans.

Recommendation 6.11: WorkCover should hold detailed consultations with the Office of Industrial Relations and stakeholders, as well as with its own employees, on ways in which its regional presence can be improved, with the objective of having a discernible proportion of its staff based outside Brisbane by the time of the next review.

Follow-up recommendation 6.12: At the time of the next five-yearly Review, WorkCover should specifically report on actions it has taken to regionalise its operations, the effects and its future plans.

6.6 Sustainable return to work assistance for small business

In Queensland, there are approximately 120,000 premium paying small businesses employing less than 20 workers. Depending on their industry, these businesses are typically inexperienced with the workers' compensation system. Small businesses may experience a workers' compensation claim less than once in every ten years. The Worksafe website recognises this information and skills gap, and provides a lot of guidance material to assist small business navigate the system and manage their risk.

When a claim does occur, small businesses often lack the financial resources and skills to proactively manage early return to work for injured workers. These employers have no experience with job task assessment, producing a suitable duties plan, or providing alternate duties. As such, the outcomes for workers employed in small businesses are typically poorer compared to those who work within medium or large organisations.

Small businesses require additional assistance to ensure these workers are not disadvantaged. Consideration should be given to WorkCover funding a select number of allied health professionals from WorkCover's Return to Work panel to undertake job task assessments at small businesses. These professionals would also liaise with the injured workers treating health practitioner to ensure sustainable return to work outcomes.

Under this proposal, where a worker has time off work due to injury and the small business:

- is concerned that they may have difficulty in returning the injured worker to work, in the short term, or until the injured is fully recovered; or
- has returned the injured worker to work and the worker is having ongoing difficulties undertaking their duties

the small business should be able to seek the assistance with a workplace job task assessment. Further, the worker's treating health practitioner will also be able to refer the injured workplace job task assessment.

The difference with WorkCover's existing return to work arrangements is that these allied health professionals will:

- be made available at the request of the small business operator and/or after an injured worker has returned to work and continues to have difficulties; and
- have a focus on job task assessment and evaluation.

To ensure the success of this initiative, allied health professionals should be encouraged to build local relationships with treating health professionals to create awareness of this service. They should also liaise with the IPaM small business program (possibly as part of the policy experiment referred to in recommendation 7.5, discussed later) and act as a referral point for ongoing prevention support for these small business operators.

Where required these allied health professionals should be supported by OIR as well as WorkCover through access to the WHSQ regional office network for meetings, interviews and prevention advice.

> *Recommendation 6.13: To assist small business provide sustainable return to work options for injured workers, WorkCover should fund allied health professionals to undertake job task assessments at small businesses.*

CHAPTER 7: PREVENTION, EDUCATION AND COMPLIANCE

7.1 Prevention activities

Most prevention activities in this area relate to improving heath and safety at the workplace. These are the core responsibility of Workplace Health and Safety Queensland (WHSQ). There are, however, some joint activities. The CEO of WorkCover is on the board of WHSQ and once a year the boards of the two agencies hold joint meetings (though WHSQ is, in effect, part of OIR whereas WorkCover is an independent statutory agency, so there are some complexities there).

One suggestion that was made to this review was that WorkCover should be able to undertake its own preventative activities. It has access to information on claims patterns, particularly in relation to individual corporations, that could alert it to areas where quick intervention would be effective. As attractive as this proposition is, there also appear to be some problems. It is easy to envisage situations where the two agencies would be duplicating their work or, worse, acting at cross-purposes. WorkCover's definition of 'workers', and hence the focus of its data, is narrower than that used by WHSQ, and will remain different even after other recommendations of this report are implemented: the concept of a Person Conducting a Business or Undertaking (PCBU), prominent in nationally consistent health and safety laws, is not used in workers' compensation law and is not proposed to be used.[57] WorkCover's activities in prevention are understandably aimed at risk identification for premium paying employers.

That said, effective WHS prevention initiatives need a systematic approach involving a wide range of intelligence and data. It would appear that this is more appropriately managed by WHSQ, which has the legislative responsibility for ensuring work health and safety. WorkCover's priorities should continue to be focused on premium collection, claims management and in particular rehabilitation and return to work. Still, it should be made legislatively clearer that WorkCover can fund prevention initiatives. A joint agency steering committee should also be established administratively to ensure WorkCover has input into prevention initiatives and receives feedback on prevention initiatives and performance.

It would be useful for WorkCover to enhance the efficacy of WHSQ operations by providing data and support to the agency. That is, where WorkCover detects a trend that warrants intervention in relation to a particular employer, it should immediately notify and meet with WHSQ, so that a cooperative strategy for intervention can be developed.

> *Recommendation 7.1: WorkCover and Workplace Health and Safety Queensland (WHSQ) should work together more closely, in particular by WorkCover using timely access of micro-level claims data to inform WHSQ of potential areas for intervention. A joint agency steering committee should also be established administratively to ensure WorkCover has input into prevention initiatives and provide for the report back on prevention initiatives and performance. Where WorkCover detects a pattern or trend that warrants intervention, it should immediately notify and meet with WHSQ, so that a cooperative strategy for intervention can be developed.*

[57] See chapter 10.

Recommendation 7.2: The Act should be amended to make clear WorkCover's ability to fund prevention initiatives.

During stakeholder consultations, several stakeholders also commented on the combined one-stop shop website of the organisations operating in this space, in terms of the accessibility and usefulness of the information on them. While this is an area that is constantly evolving, it appears that many people would benefit from an improvement in the navigability of the combined website.

Recommendation 7.3: Following consultation with stakeholders, the Office of Industrial Relations (including WHSQ and WorkCover) should revise and improve their web presence to make it more accessible and useful to users.

INJURY PREVENTION AND MANAGEMENT (IPaM) PROGRAM

The Injury Prevention and Management (IPaM) program, a joint funded initiative between WHSQ (within OIR) and WorkCover, and led by WHSQ, works closely with Queensland businesses to ensure systems are in place to prevent workplace injury and, if people are injured, return them to meaningful and appropriate work, as soon as practical.

A team of experienced advisors, located throughout Queensland, work with employers who have comparatively high workers' compensation claims rates and costs compared to other businesses of similar size and nature. Since 2011, IPaM has assisted more than 1,025 businesses to make 'simple but effective enhancements' to their health, safety and injury management systems through the IPaM Advance program.

IPaM Advance targets larger businesses and offers a comprehensive 2 year program to assist employers review their current safety management systems, verify workplace hazards, review rehabilitation and return-to-work arrangements and evaluate workplace safety climate by seeking the views from both managers and workers on the efficacy of safety management in the workplace. Working in collaboration, the advisor and employer develop an improvement plan tailored to the individual business needs.

An evaluation by WorkCover for the 2016-17 period showed that employers who have participated in the IPaM Advance program experienced benefits in comparison to others across the scheme, that is:

- 2.6 per cent reduction in statutory claim numbers, compared to an increase of 14.7 per cent for non-IPaM employers.
- 10.1 per cent reduction in average days off work, compared to a decrease of 4.2 per cent for non-IPaM employers.
- 0.2 per cent increase in average statutory claim cost compared to an increase of 3.8 per cent for non-IPaM employers.
- 5.7 per cent reduction in claims costs per million dollars of wages, compared an increase of 8.0 per cent for non-IPaM employers.
- 1.1 per cent reduction in workers' compensation premium rate, compared to a 1.1 per cent increase for non-IPaM employers.

IPaM Advance focuses on large employers, by nature of the scheme design, so it did not address the needs of small or medium enterprises (SMEs). In response to that criticism, two new programs are currently delivered by OIR and aim to provide SMEs with a variant on IPaM-style WHS assistance. They are:

- IPaM Evolve, which offers a series of short site-based consultations across a 3 to 6 month intervention for medium-size businesses at varying stages of maturity; and
- IPaM for Small Business, which provides a 3 hour advisory service for small or micro businesses.

Whether these new activities can genuinely be called 'IPaM' is not so clear, given that their approach is quite different—though perhaps appropriate for the size and number of enterprises involved. ('IPaM Advance' appears to be a rebranding of what used to be called simply 'IPaM', perhaps in order to distinguish it from IPaM Evolve and IPaM for Small Business.)

Overall, IPaM (or at least IPaM Advance) appears to be very well received by many stakeholders and is clearly effective in improving WHS outcomes and reducing injuries and claim costs. It has been successful in reducing premiums for participating firms (a proxy measure for safety improvements) and was popular with businesses that had participated. It indicates, incidentally, that WHSQ and WorkCover can collaboratively work on joint projects leading to good outcomes, with performance reporting to both Boards.

IPaM Advance would seem to be an obvious candidate for expansion. That said, in the context of review of WHS activities, it was concluded that hard compliance activity needed to be beefed up, either by increased funding to WHSQ or some redirection of IPaM resources or a combination of the two. While there is a strong logic to beefing up hard compliance activity with WHS, it would not seem to be optimal to fund this through a reduction in IPaM resources, given the impressive performance of IPaM to date.

That said, it is not clear that the strong evaluation performance of IPaM Advance can be extended to the other two, more recent, IPaM programs. IPaM Advance relied on active interventions in workplaces. IPaM Evolve is still a form of intervention, albeit a weak one, based on site-based consultations. I am not convinced that IPaM for Small Business, which is based on providing advice without necessarily a workplace visit, fits the same mould. This does not mean that it is a non-performing program, simply that we cannot tell based simply on the performance of IPaM Advance. But I am not aware of evidence that simply providing advice outside the workplace environment is enough to improve WHS and premium outcomes in small businesses. On the other hand, stricter compliance action might not generate lasting changes in behaviour either. The intensive interventionist approach in IPaM Advance is not going to be financially viable for implementation in that sector. More information is needed, and it is not clear that there is presently the solid research evidence to support a better program.

One of the impressive things about my interactions with WorkCover and indeed with OIR has been the apparent commitment to evidence-based policy and, as part of that, to research. WorkCover, in close consultation with OIR, should devote some of its research resources to undertaking experimental research to find out what would work. That is, a sample of WorkCover small employers should be chosen for study in a controlled experiment with several different policy 'treatments'. Firms should be randomly assigned to each 'treatment' group (or a 'control' group, experiencing no change in policy), with each industry well represented in each 'treatment' group, and each 'treatment' group receiving a different policy approach. For example, one group could receive a 3 hour advisory service, another group be subject to tighter inspection regimes, other groups receive different policy approaches, and the control group would receive the same treatment

as occurs normally to that sector of the WorkCover small business clientele. Each policy approach would be rigorously evaluated in comparison with the others and the control group — not just in terms of the effects on claim costs and premiums, but also WHS outcomes as perceived by workers themselves (as actual WHS outcomes may not always be reflected in claims experience). Each policy approach being tested in this policy experiment would be designed in such a way that, if it turns out to be the most effective, it could be applied across WorkCover's small business clientele. There is no point in testing 'gold plated' policies that could not be implemented more broadly across the organization. The large number of small business clients in WorkCover's coverage would easily give a large enough sample for the experiments to be undertaken in a statistically rigorous way.

IPaM evolve sits somewhere between IPaM Advance and IPaM for Small Business. In the first instance, it should be rigorously evaluated. The question is, is it capable of being extended across the medium-sized sector at which it is presently targeted? This is something to which I do not know the answer, or at least I have not found it out in the time available. If the answer is no, then a similar approach to that described above in relation to small business should also be applied to medium business.

Recommendation 7.4: Support for the IPaM Advance program should be maintained and expended across those parts of the large business sector with relatively poor performance.

Follow-up recommendation 7.5: WorkCover, in close consultation with WHSQ and OIR, should undertake experimental research within sub-samples of its small business clientele to rigorously compare the effectiveness of various policy potential approaches for improving WHS outcomes and claims experience amongst small business. The outcomes of evaluations through that research should inform further policy development within WorkCover in relation to small business. They should also be considered by the next five-yearly review.

Follow-up recommendation 7.6: If IPaM Advance cannot be extended across the medium business sector, then WorkCover should test policy approaches for medium sized businesses using a methodology similar to that described above (regarding follow-up recommendation 7.5) for small business. If that is done, the outcomes of evaluations through that research should inform further policy development within WorkCover in relation to medium-sized businesses. They should also be considered by the next five-yearly review.

7.2 Education of workers

There are two education-related issues with non-compliance: what to do about employers who fail to understand the need to register and pay workers' compensation premiums; and what to do about workers who are unaware of their rights, including to seek compensation for work-related injury. This section deals with the latter issue; the former is considered in section 7.6.

The problem of non-awareness by workers is most likely to occur amongst vulnerable workers, and in particular amongst vulnerable workers employed in firms that themselves do not comply with the legislation. Vulnerable workers in this context refers to workers who are disadvantaged in the labour market, most obviously lower-skilled migrant workers (especially, but not exclusively, those on temporary visas), but also other disadvantaged groups which may overlap with these, including low-paid workers, non-unionised workers and workers in regional and rural areas. If injured at work, they may be unaware of their entitlement to compensation and lack the resources to seek redress. They may alternatively feel pressured not to make a claim by their employer, especially if the employer is non-compliant.

A common way in which governments promote education of workers, including in relation to their rights, is to transmit information through the employer, sometimes compulsorily. For example, under the *Fair Work Act 2009*, when an employer seeks to hold a secret ballot to obtain worker consent to a proposed enterprise agreement, the employer must provide certain information to workers, normally though an information sheet.[58] However, this does not provide much of a model for workers' compensation education. If an employer is not themselves complying with the legislation, they are hardly going to pass on to workers a statement of their rights under that law.

It seems necessary, therefore, for a state agency to engage in a direct official campaign to educate workers of their rights in workers' compensation. That campaign would best be run by WorkCover (WorkCover), as it is primarily responsible at present for monitoring and enforcing compliance and it could be assumed that self-insurers, if they want to keep their license, aim to appear to ensure that all their workers are adequately covered and informed. (The question of what happens if this is not occurring is discussed in chapter 9.)

An educational campaign would need to be in multiple languages if it is to reach the majority of the target audience. Other campaigns promoting awareness of various worker rights are or will be run by other government agencies, including Workplace Health and Safety Queensland (WHSQ) and the federal Fair Work Ombudsman (FWO). It would not make sense to cut across these campaigns; rather, WorkCover should work with these agencies to produce a jointly run and jointly funded educational campaign (or campaigns) that increase awareness amongst vulnerable workers of their rights under workers' compensation law (and other laws regarding employee entitlements and protections).

A recommendation of the Best Practice Review of WHSQ was that WHSQ and WorkCover examine the opportunity and benefits of WorkCover providing additional funding for awareness and engagement activities undertaken by WHSQ, in order to release base funding of WHSQ for more direct compliance activities. The balance of the sources of funding is a matter for the political process to determine, but it is clear that there is synergy between the activities of WorkCover and WHSQ, and that both have an interest in ensuring that workers are aware of their rights and obligations under both WHS legislation and workers' compensation legislation.

[58] Sections 173 -174 of *Fair Work Act 2009* (Cth).

FWO's resources are directed more towards educating employers than workers, but there is still some effort put into education of workers. Extending awareness of worker entitlements under awards to include awareness of their entitlements under workers' compensation legislation would not be difficult and would avoid duplication and confusion amongst workers.

Some groups of workers who need education would not necessarily be reached through this approach. First, as resources are not endless, there are workers in non-compliant firms that would not be touched by a joint campaign with FWO. WorkCover identifies non-compliant forms mostly through two mechanisms: either a claim is lodged by a worker and it turns out that their employer has not been paying premiums; or data submitted to WorkCover by an employer appears inconsistent with other data to which WorkCover has access. When this happens, WorkCover requires the employer to remedy the shortfall and may also issue a fine. In addition, WorkCover should take steps to ensure that all workers of such firms are informed of their rights under workers' compensation legislation (for example, though a multi-lingual information sheet for workers).

Second, some people eligible for coverage by workers' compensation legislation may simply not be covered by the federal system and hence not part of FWO activities, either because they are in the state jurisdiction (e.g. state public servants) or because the definition of 'worker' under workers' compensation legislation is slightly broader than the definition of 'employee' under the *Fair Work Act 2009*. In relation to these groups, WorkCover thus needs to consider what specific activities need to be done to increase awareness among those at risk of disadvantage.

Alongside this, there is the broader question of encouraging worker activities that promote safety and good health at work and facilitate prevention of occupational injury and illness. One stakeholder, for example, referred to the need to promote sleep, good diet and exercise as a way of minimizing psychological or psychiatric injury. This is an area that has little in common with the interests of the FWO but a lot in common with the interests of WHSQ and also lends itself to promotion via employers (including, in part, by educating employers). It would thus be a separate educational activity but nonetheless one that should be explored.

There would also be benefit, in more unionised sectors, of developing educational programs jointly with relevant trade unions. These would be targeted to the particular circumstances in those industries (construction might be an example) and take advantage of the access to workers and the credibility with members that would come with publications or other materials that were jointly branded by the relevant union and WorkCover.

The Regulator should monitor and evaluate the effects of these educational programs and consider which, if any, have application in self-insured organisations as well. If it concludes that one or more of them is warranted, it should advise the Minister and hold consultations with the stakeholders to determine the best way of financing and administering it or them.

There would also be a need for an education program for commercial interns (section 3.4) and gig economy workers (as per section 10.7).

Recommendation 7.7: WorkCover should jointly fund and run an educational campaign aimed at promoting awareness amongst disadvantaged groups of their rights under workers' compensation legislation.
A major part of this should be done in co-operation with Workplace Health and Safety Queensland and/or the Fair Work Ombudsman, making maximum use of joint resources and overlapping interests.

Recommendation 7.8: WorkCover should also take steps to ensure that workers in identifiably non-compliant businesses are made aware of their rights, and should consider what steps should be taken to increase awareness among those not covered by any joint program with the FWO who would be at risk of disadvantage as a result.

Recommendation 7.9: WorkCover should explore educational programs, including jointly with WHSQ and with relevant trade unions, promoting good practice by employers and workers to minimise the risk of occupational illness and injury, including psychological or psychiatric injury and alerting workers to their rights under safety and compensation legislation.

Follow-up recommendation 7.10: The Regulator should monitor and evaluate the effects of these educational programs and consider which, if any, have application in self-insured organisations as well. If it concludes that one or more of them is warranted, it should advise the Minister and hold consultations with the stakeholders to determine the best way of financing and administering it or them.

7.3 Education for medical practitioners

A second aspect of education that arose through stakeholder consultations was that of awareness amongst medical practitioners, especially general practitioners (GPs), of issues regarding workers' compensation and particularly occupational therapy in promoting return to work. In order to practice, there are a lot of issues that GPs need to be across, and many may have only occasional interface with the workers' compensation and rehabilitation system.

In order to maintain the currency of their registration, medical practitioners are required to regularly participate in continuing education. This continuing education is mostly provided by or through the professional bodies, and typically involves a series of optional modules of varying length, difficulty and hence accredited value. Practitioners have to achieve a certain number of continuing professional development (CPD) points each period (based on 50 CPD points per year), and can choose any combination of modules to make up the required CPD points.

A new module should be developed that covers the issues involved in workers' compensation, occupational therapy and return to work from the perspective of a medical practitioner. Stakeholder consultations revealed that something like this has been done once before, but it was little used because it was only a small course (2 CPD points in the GPs program) and so few medical practitioners saw it as help in gaining the 50 CPD points necessary for continuing registration. To

gain good enrolments a module needs to have a large number of CPD points attached to it, and the range of issues encompassed by workers' compensation, occupational therapy and return to work is broad enough to warrant a large number of CPD points. A module of approximately 30 CPD points for GPs was recommended in the stakeholder consultations and this seems within an appropriate range.

Amongst the issues covered in such a module, some non-medical matters would also likely need to be dealt with. This would include matters such as the fact that workers' compensation covers a broader range of expenses (in particular, medical expenses) than income protection insurance often available through superannuation, as well as the different eligibility criteria. Injured workers may often seek or obtain advice from GPs on their next steps after seeing the GP.

> *Recommendation 7.11: The Regulator, the Australian Medical Association (AMA) and the Royal Australian College of General Practitioners (RACGP) should jointly develop a course on workers' compensation, occupational therapy and return to work for general practitioners, of approximately 25-30 CPD points, for inclusion in the continuing education registration requirements for general practitioners. The AMA and the Regulator should also explore with professional colleges representing other medical specialist groups the feasibility and desirability of developing related modules for their own continuing education requirements.*

7.4 Building supportive workplaces

Consultation revealed some matters where stakeholders considered that awareness amongst employers could be improved. The first was awareness of mental health issues. Some considered that there was a stigma attached to psychological injuries that was unwarranted, and that the negative attitudes employers felt for these injuries translated into negative attitudes amongst other workers Effort should be put into the prevention, not just the treatment, of psychological problems. Related to this is the need to ensure employers are aware of the manner in which, in the absence of adequate workplace support, physical injuries can lead to subsequent complications through additional psychological problems, and the way in which good workplace health can be promoted through good management practice.

One concern was that, while middle level managers may be very aware of the issues, top level managers, including chief executive officers (CEOs), may lack appropriate knowledge but make the key strategic decisions that shape the workplace environment and their subordinates' behaviour. This is a very time-poor group and hence difficult to access, yet critical to the success of any employer education campaign.

In addition, there appeared to be significant evidence presented that employer responses to injuries could be very influential in determining whether a common law action was pursued against the employer. If a worker felt that the employer did not care about them, they were more likely to feel aggrieved and sue. This in turn tells us that worker distress is heightened if the employer appears disinterested or unhelpful after an incident. Such distress is likely to compound psychological injury, or even create a psychological complication to an initially purely physical injury. Employer disinterest may reflect genuine callousness on the part of managers, but it may alternatively reflect a lack of knowledge about appropriate ways to respond or managers' fear that admitting error may jeopardise a future common law claim or even be against company policy.

Two issues are relevant here: awareness amongst employers of appropriate handling of workers after injuries, including psychological injury; and the legal status of employer handling of workers after injuries. The first is a matter for awareness-raising amongst employers and the content of educational materials provided to employers by WorkCover or the Regulator. The second, however, is for legislative action. Under the *Civil Liability Act 2003* apologies regarding other personal injuries matters in Queensland are able to be provided without prejudice, that is they have no 'liability' consequences.[59] This protection, however, excludes workplace injuries, and there is no equivalent protection in the workers' compensation legislation. This appears to be an anomaly and should be rectified. It would reduce distress experienced by injured workers and especially by psychologically injured workers. If that is not sufficient incentive, it would also therefore likely lead to savings in employer costs.

Recommendation 7.12: The Act should be amended to exempt apologies provided by employer representatives following a workplace injury from being considered in any assessment of liability.

Recommendation 7.13: Education of employers should give special attention to the benefits for workers and employers of: offering effective support, including but not restricted to apologies, after a workplace injury; the gains for workplace health from good management practice; and the question of how to gain the attention of CEOs and influence strategic decisions affecting the workplace environment.

7.5 Bonuses

While safety bonuses are conceptually related to experience rating, and may be a way firms attempt to align individual incentives to firm incentives, they were raised by several stakeholders as generating perverse incentives—encouraging managers to suppress reporting of injuries or the lodgement of minor compensation claims. On the other hand, safety bonuses are promoted as a means of improving safety, and genuinely seen as doing that by many people. 'No lost injury time' bonuses might be particularly problematic if they are binary, i.e. if a supervisor only receives any bonus if there is no time lost at all—though this is something about which we really do not know enough.

If experience rating is a good thing, how could it be that safety bonuses are not? Does not one simply align employee incentives with the other, an incentive facing the organisation? On the surface the two seem aligned, but on deeper analysis that need not be the case. The potential divergence lies partly in the different response types of available to organisations and to individuals, and partly in the nature of motivation itself.

There is substantial evidence of the difficulty of designing appropriate financial incentive systems for employees to match the objectives of the organisation. The role of performance-related pay in the

[59] Section 72A

global financial crisis[60] is reflective of that, as is their role in current proceedings before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.[61] There is also evidence that incentive payment systems including piecework have adverse effects on workplace health and safety.[62] On workplace safety incentive pay, researchers have argued that bonuses may encourage gaming of the system. Hopkins and Maslen, for example, note that the US Occupational Safety and Health Administration (OSHA):

> is very critical of the payment of bonuses based on injury rates, because of the potential of such schemes to suppress reporting. Employees know that if they report an injury, th ey may be affecting not only their own bonus, but that of their workmates. This puts enormous pressure on people not to report.
>
> OSHA is particularly critical of incentives that are paid for achieving zero injuries, for example, 'where a team of employees is awarded a bonus if no one from the team is injured over some time period'. The pressure to not report in this situation is overwhelming.[63]

Organisations can respond to a financial incentive (experience rating) by changing the systems operating in the workplace. If the systems are poorly designed, a financial incentive will encourage them to improve those systems. Individual supervisors and employees cannot do that: all they can change is their own behaviour, and influence the staff below them. For the individual supervisor or employee, a good response to a 'no lost injury time' bonus may be to suppress reporting of minor incidents to maintain the full value of the bonus. This may not be in the interests of the organisation as a whole, as such behaviour might simply disguise system problems. Short-term benefits for individuals able to claim their bonuses might be at the expense of long-term costs arising from systemic failures that were disguised by individual behaviours. There is a long-standing debate in the literature about whether incentives are a good or a bad thing for reducing or preventing workplace injuries (as opposed to reducing premiums), including some empirical evidence suggesting that their effects may be negative, especially for discouraging infrequent, catastrophic accidents.[64]

This is a matter on which, for better or worse, the review has not had enough time or resources to come to a definitive conclusion. It is a matter that requires good research. It would need, however, to be quite specific research. It would be relatively easy to conduct research comparing claims

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[60] D. Peetz, S. Le Queux, and A. Frost, "The Global Financial Crisis and Employment Relations." in *The Future of Employment Relations: New Paradigms, New Approaches*, ed. Adrian Wilkinson and Keith Townsend (Basingstoke: Palgrave MacMillan, 2011) (pp. 193-214).

[61] Transcripts at https://financialservices.royalcommission.gov.au/public-hearings/Pages/transcripts.aspx. Some articles at J. Irvine, "Bank Boss Bonuses in the Spotlight as Royal Commission Rolls On." *Sydney Morning Herald*, 15 April 2018; C. Yeates, "Westpac Adviser's Misconduct Driven by Bonus Payments." *Sydney Morning Herald*, 20 April 2018.

[62] e.g. C. Sundstrom-Frisk, "Behavioural Control through Piece-Rate Wages." *Journal of Occupational Accidents* 6 (1984) (pp. 49-59); R. Lacey, M. Lewis, and J. Sim, "Piecework, Musculo-Skeletal Pain and the Impact of Workplace Psychosocial Factors." *Occupational Medicine* 57 (2007) (pp. 430-37); A. Williamson, "Predictors of Psychostimulant Use by Long Distance Truck Drivers." *American Journal of Epidemiology* 116, no. 11 (2007) (pp. 1320-26). all cited in M. Quinlan, P. Bohle, and F. Lamm, Managing Occupational Health and Safety: A Multidisciplinary Approach (Palgrave Macmillan,, 2010), 256.

[63] A. Hopkins and S. Maslen, Risky Rewards: How Company Bonuses Affect Safety (Ashgate, 2015), 28. The OSHA source cited is Richard E Fairfax (Deputy Assistant Secretary), "Employer Safety Incentive and Disincentive Policies and Practices." in *Occupational Safety and Health Administration, Memorandum for Regional Adminiistrators, Whistleblower Program Administrators* (Washington DC: U.S. Department of Labor, 2012), 12 March.

[64] Quinlan, Bohle, and Lamm, *Managing Occupational Health and Safety*; Hopkins and Maslen, *Risky Rewards.*

experience with safety bonuses, and this would undoubtedly show that incentives reduced claims, as both hypothesised incentive effects (to improve safety, and to reduce reporting of incidents) work in the same direction on this measure (i.e. both reduce the number of claims), even though they might have opposite effects on actual injury management. As mentioned earlier, claims records need not be a good proxy for safety outcomes.

The only way to adequately test these competing effects would be through a survey of workers' own experiences of workplace safety and culture linked to reliable measures of bonuses enjoyed by supervisors or managers—covering not just whether supervisors or managers received a bonus, but what type of bonus it was: a binary bonus, a sliding scale, how much it was worth, etc. Because only a small portion of workers experience adverse safety incidents in any year, it would need to have a large sample size (unless it were only to look at culture, not events). It would thus be expensive research, but the only way of validly testing the effects of safety bonuses. My investigations and consultations with academic colleagues have not revealed any research to date that deals with the issue in quite this way.

> *Follow-up recommendation 7.14: The Minister should commission research investigating the relationship between safety bonuses and safety performance, using linked employee survey data. The results of that research should be taken into account in the next five-yearly review of the scheme.*

7.6 Compliance

One of the issues for WorkCover, already mentioned, is non-compliance of employers in payment of premiums. This may be a result of employers understating their wages payments to particular workers, or not declaring the existence of particular workers—though the effect is the same, as the total wages bill is understated—or not appearing on business records and not paying any premiums at all. Our interest here is in the first of those two broad possibilities.

Sometimes, under-declaration of wages for workers' compensation purposes is associated with underpayment of workers generally (that is, paying them less than their award or agreement entitlement, including penalty rates and overtime premiums). Time and wages records may be inadequate and taxes underpaid.[65] There is evidence of substantial underpayment found by the FWO in the retail and hospitality industries. Some such employers may engage in 'sham contracting', pretending employees are independent contractors, and seeking to thereby also avoid workers' compensation premiums.

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[65] Fair Work Ombudsman, 'National Hospitality Campaign 2012–2015: Accommodation, pubs, taverns and bars', November 2013, http://www.fairwork.gov.au/ArticleDocuments/714/National-hospitality-campaign-report.pdf.aspx; 'National hospitality industry campaign report 2014–2015: Restaurants, Cafes and Catering (Wave 2 Report)', June 2015, http://www.fairwork.gov.au/ArticleDocuments/714/wave-2-restaurants-cafes-catering-industries-national-hospitality-industry-campaign-report.docx.aspx; 'National hospitality industry campaign report 2015–2016: Takeaway foods (Wave 3 Report)', March 2016, http://www.fairwork.gov.au/ArticleDocuments/714/hospitality-campaign-wave-3-takeaway-foods-report.docx.aspx; 'National retail industry campaign report 2010–2011', November 2011, http://www.fairwork.gov.au/ArticleDocuments/714/Retail-Industry-Campaign-Final-Report.pdf.aspx; National pharmacy campaign report 2012–2013 December 2013, http://www.fairwork.gov.au/ArticleDocuments/714/National-Pharmacy-Campaign-Report.docx.aspx; all cited in Fair Work Commission, 4 yearly review of modern awards – Penalty Rates, 23 February, [2017] FWCFB 1001, [2073-7].

Enforcement of employers' obligations here is undertaken by WorkCover. Enforcement of obligations to pay award wages and to maintain time and wages records is done by the federal agency, the FWO. WorkCover identifies recalcitrant employers either through discrepancies in data it receives from other sources, or by receiving a claim for compensation from an injured worker whose employer did not hold a policy with WorkCover, or whose wages bill was implausibly low. To the extent that WorkCover relies on the latter rather than the former, overall premiums are being underpaid by a greater amount than the under-claiming of benefits, and premiums are therefore rising for the honest employers (presumably most of them) already paying their appropriate premiums. Remember also that workers' compensation benefits may refer to what workers are entitled to under the award and this may be quite a lot more than what they have actually been paid and therefore the wages declared by the employer for workers' compensation purposes.

Compliance could be improved by some coordination between and joint investigations by WorkCover and the FWO. The FWO has a stronger regional presence than WorkCover, and while it its resources for or approaches to prosecuting delinquent employers are controversial,[66] it seems quite effective in identifying at least some of the employers who are underpaying their workers, and these are also likely to be employers who are underpaying their premiums. Whether this improved coordination is best done through better information sharing between FWO and WorkCover (which might, for example, trigger an audit by WorkCover or a non-complying employer identified by FWO), or by the actual secondment of one or more officers form WorkCover to FWO (or vice versa) is something that requires further investigation by the agencies.

> *Recommendation 7.15: WorkCover should improve the compliance of employers with their obligation to pay premiums by improving coordination with the Fair Work Ombudsman (FWO). The agencies should discuss whether this is best achieved through better information sharing between FWO and WorkCover or by the secondment of one or more officers from WorkCover to FWO (or vice versa).*

[66] R. Corr, "Criminal Bosses Belong in Criminal Courts." *Overland* (2017); D. Marin-Guzman, "Fair Work Ombudsman Accused of Overreach against Myer Cleaning Contractor." *Australian Financial Review*, 7 January 2018; M. Seccombe, "Wage against the Machine." *Saturday Paper*, 14 April 2018.

CHAPTER 8: COMMON LAW CLAIMS

The availability or otherwise of access to common law is a core design feature of a workers' compensation system. Access is generally seen as an incentive to employers to promote safe work practices because of how it penalises employers whose bad practices enable serious accidents to happen at work. The Australian workers' compensation systems stand in stark contrast to the New Zealand system, which is a 'no fault' scheme covering all accidents (not just at work or in motor vehicles, but also at home or in public places) with weekly benefits and no access to common law. It has a number of major advantages and disadvantages compared to the Australian systems. Administration costs are low and benefits to injured people are a relatively high proportion of total scheme expenses. Legal expenses are low because of the 'no fault' nature of the scheme. Premiums are collected from a number of sources, including a Medicare-style income tax levy, an experience-rated payroll tax, and levies on petrol and motor vehicle registration. The incentive structure works very differently to that in Australian schemes, for example the incentives for workers to return to work are similar to those in a 'long tail' scheme in Australia.

The absence of common law access does not appear to have prevented a relatively low incidence of serious injuries, at least when averaged over several years, in New Zealand. That said, if a review were to seriously consider abandonment of the current systems of injury compensation and their replacement of something along the lines of New Zealand's (something for which legislation was introduced nationally in Australia in 1975, but it did not pass both houses of Parliament), it would require a much more substantial review than this one. Moreover, no stakeholders suggested that Queensland abandon common law access and the 'fault' concept it embodies, or radical system change along the line adopted in New Zealand. Given the inter-related aspects of the accident compensation system in New Zealand, it is also difficult to take any lessons away from it for micro aspects of the Queensland system: for example, common law access is easier in Queensland than other Australian states, yet Queensland also has the lowest premiums, so within the confines of Australian workers' compensation systems it is not clear that tightening access to common law would reduce costs anyway. I discuss some aspects of this issue in more detail in section 8.3.

8.1 Access to common law

The Queensland scheme provides employers with insurance cover for the provision of common law damages. Access to common law is available to all workers in Queensland who can prove negligence against an employer and who have a work injury as defined by the Act.

If the worker's degree of permanent impairment (DPI) is less than 20 per cent, the worker has to choose between receiving the statutory lump sum compensation payment and seeking damages at common law. If the DPI is assessed at 20 per cent or more, the injured worker can accept both the lump sum payment and seek damages at common law.

WorkCover and self-insurers can contest both liability and the amount of damages in the pre-proceedings process and in court.

Queensland and the ACT are the jurisdictions with the greatest access to common law. NSW and Victoria have limited access to common law. In NSW an injured worker must firstly meet three criteria to access common law: the injury must be attributable to employer negligence, the worker must suffer at least 15 per cent whole person impairment, and there are compliance restrictions upon timing of claims for lump sum compensation. In Victoria, a worker must first be assessed as having a 'serious injury' (at least 30 per cent whole person impairment or satisfying an alternative narrative test linked to disability). However, only broad comparisons can be made between these

three jurisdictions because of the diversity of these statutory thresholds and compensation amounts in the various schemes.

Access to common law is also available, subject to various criteria, in Western Australia, Tasmania, the ACT and the Australian government (Comcare) system. Workers cannot access common law in the South Australian or Northern Territory systems.

Queensland's unlimited access to common law offsets the 'short tail' nature of the scheme, that is, workers can access common law to receive damages to meet their future needs arising from disability. This contrasts with Tasmania and Victoria that operate on a 'long tail' basis for seriously injured workers, which reduces reliance on common law damages. In NSW this system operated until recently. However, the Government there has moved to cease statutory benefits after 5 years unless the injured worker has a 20 per cent or more whole person impairment.

The finalisation of a common law claim enables injured workers to exit the workers' compensation system years earlier than in other jurisdictions. This enables WorkCover and self-insurers to reduce their tail of claims, providing significant cost savings. The lump sum payment allows workers to move on with their lives rather than remaining on benefits for many years as is the case in some jurisdictions. Tasmania introduced a long tail to its scheme when a 15 per cent impairment threshold to access common law was introduced in 2000.

8.2 Number and cost of common law claims

During 2016-17, 2,776 injured workers lodged a common law claim to access financial support for the impact of their injury on their life and ability to work. Common law claim frequency has dropped to 0.12 per cent of the Queensland workforce. The rate of statutory claims that convert to common law claims is steady at 3.5 per cent.

In 2016-17, common law claim lodgements increased by 10.6 per cent compared to 2015-16. This was driven by the reversal of the five per cent threshold legislation, which will see common law claims increase slightly over the coming years before stabilising as fewer claims are affected by the threshold. Table 8.1 shows common law claim lodgements over the past eight years by the date of injury.

The majority of common law claims lodged in any given year are for injuries that occurred two to three financial years prior.

Table 8.1 – Common law claims, injury year by lodgement year

	Lodgement year							
Injury year	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
Pre 01/07/1999	113	54	42	28	53	24	22	17
1999-2000	6	3	1	4	3	2	1	1
2000-2001	8	7	2	2	0	1	0	0
2001-2002	8	4	7	2	1	1	1	0
2002-2003	11	9	9	3	3	2	2	0
2003-2004	17	11	9	6	5	7	2	4
2004-2005	33	32	12	8	3	2	0	4
2005-2006	67	25	24	12	6	5	2	1
2006-2007	971	65	40	19	5	4	3	0
2007-2008	1,575	1,037	64	24	16	12	6	4
2008-2009	1,839	1,371	921	43	22	13	10	3
2009-2010	340	1,672	1,348	908	53	18	12	5
2010-2011		219	1,624	1,379	948	44	21	14
2011-2012			210	1,640	1,436	867	40	14
2012-2013				223	1,526	1,235	855	27
2013-2014					148	717	850	633
2014-2015						41	575	932
2015-2016							107	1,003
2016-2017								114
Total	**4,988**	**4,509**	**4,313**	**4,301**	**4,228**	**2,995**	**2,509**	**2,776**

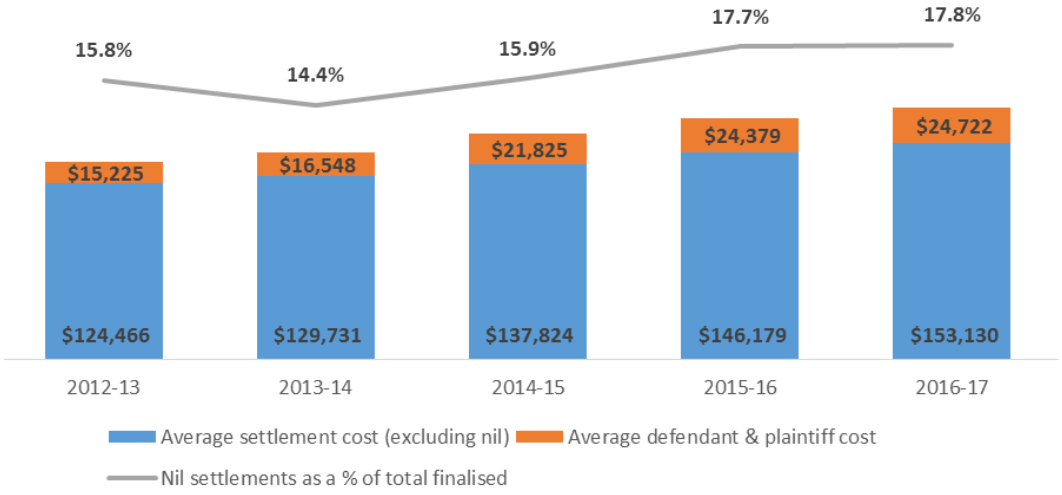
Source: OIR data.

While common law claims make up only a small percentage of claim numbers, they represent a large proportion of scheme costs. In 2016-17, common law claims made up 30.9 per cent ($411.1 million) of claim costs and the average cost of a common law damages claim settlement was $153,130.

The cost of a common law claim can include payments for loss of earnings, pain and suffering, plaintiff legal costs, and medical and hospital costs. The amount that can be awarded for loss of earnings is capped, based on the earnings of the injured worker. The maximum award a court may make is for an amount equal to the present value of three times Queensland Ordinary Time Earnings (QOTE) per week for each week of the period of loss of earning.

Common law settlement payments have increased slightly over the recent two years with average settlement costs rising from $146,179 in 2015-16 to $153,130 in 2016-17. Average defendant and plaintiff costs are stable, $24,379 in 2015-16 and $24,722 in 2016-17. Figure 8.2 shows the average costs for finalised common law claims by payment type from 2012-13 to 2016-17.

Figure 8.2 – Average costs for finalised common law claims by payment type 2012-13 to 2016-17



8.3 Issues raised by stakeholders

COMMON LAW THRESHOLD

Legislative amendments in 2013 introduced a threshold to restrict access to common law damages. This threshold required workers with injuries on or after 15 October 2013 to have a degree of permanent impairment (DPI) greater than 5 per cent to access common law.

In 2015, the threshold was removed for injuries on or after 31 January 2015. These legislative amendments established a provision for additional compensation for workers impacted by the common law threshold; specifically, workers injured between 15 October and 31 January 2015. This provision is commonly referred to as the statutory adjustment scheme. As at 31 December 2017, 675 claims have received a payment under this scheme at a total cost of $13.9M (not including legal).

Several stakeholders argued that the common law threshold should be reinstated. Their arguments appear to relate to a belief that the threshold prevented small insignificant claims from vexatious claimants, which typically result in significant administration and costly legal representation, only for the worker to return to some form of employment shortly after their settlement, much to the frustration of employers. Whilst there may be a small number of these claimants, reinstating the threshold to prevent claims of this nature is a very blunt instrument. A threshold cannot equitably distinguish those claims that may warrant the pursuit for damages. Disability and impairment are not the same thing. Furthermore, a threshold only places pressure on other parts of the system, and in particular towards dispute resolution mechanisms.

While the New Zealand system shows that abolishing common law can be consistent with a low-cost scheme with a low injury rate (though the latter comparison may be influenced by the time scale chosen), as mentioned the merits or otherwise of that scheme need to be addressed in totality, and it is not necessarily a good idea to cherry-pick aspects of that scheme. For example, while in New Zealand the almost disappearance of common law access is associated with low legal costs, it does not follow that introducing a threshold for common law would proportionately lower legal costs, at least by enough to offset increased costs elsewhere in the system. It might alternatively be that the lower system costs in New Zealand predominantly reflect the monopoly position of the insurer, or

the economies of scale from covering all forms of injury. Yet no stakeholders suggested adopting th e New Zealand scheme, or some variant of it. There is no evidence of a push for such a radical change to the compensation system, nor of a political desire to undertake one. That latter point, it should be added, also applies to partial abolition of access to common law: the presence of access to common law is a core design feature of the system, and there is no evidence of a political desire to partially or fully remove it. If consideration is to be given in future to the restriction or abolition of common law access, it should be part of a broad ranging review that considers the entirety of a model such as that of New Zealand. This review has not been able to do that and has not been asked to do that.

There are aspects of common law that are worth understanding more about. WorkCover has commissioned research to understand the drivers behind why people embark on a common law claim from the outset. For example, one of the opportunities identified by stakeholders was the significance of an apology offered by the employer to the worker. An apology may help to address workers' needs for justice and fairness and recognition of their injury, and reduce the likelihood of a worker pursuing a common law claim, even one with little prospect of success. For these reasons, it was recommend in Section 7.4 that a protection for apologies should be included in the Act, similar to that contained within the *Civil Liability Act 2003*. Further research may provide additional clues on useful measures that can be undertaken to reduce common law costs without changing the fundamental design of the system. The outcomes of this and subsequent research should be considered and their implications for improving the operation of the system should be assessed by WorkCover, the government and other stakeholders. They may also be useful to governments and stakeholders in other states. Except where it contains commercially sensitive information, it should be published so proper discussion can follow. Where it does contain commercially sensitive information, a version that has had the commercially sensitive information excised should instead be published, again to promote informed discussion. The use by parties of research coming from , for example, Monash University to inform decision-making indicates the growing, useful role that research can play in improving the operation of workers' compensation systems. Likewise, research commissioned by other stakeholders should be published once commercially sensitive information is removed.

> *Follow-up recommendation 8.1: Further research should be commissioned by WorkCover and OIR to investigate aspects of improving the operation of the workers' compensation system. Current and future research should be published so informed discussion can follow; where it contains commercially sensitive information, a version that has had the commercially sensitive information removed should instead be published. Likewise, research commissioned by other stakeholders should be published once commercially sensitive information is removed. It should also be considered by the next five-yearly review.*

BYRNE DECISION AND 'HOLD HARMLESS' CLAUSES

Under the Act an employer or insurer, can add a third party as a contributor to a damages claim - regardless of a 'hold harmless' contractual clause between the employer and a third party (e.g. a principal contractor).[67] The agreement between the insured employer and the third party is void to the extent it provides for the employer, or has the effect of requiring the employer, to indemnify

[67] Section 236B

another person for any contribution claim made by the insurer against the other party. 'Hold harmless' clauses aim to protect the host employer by requiring the agency to bear the costs of fines should the host be prosecuted for breaches of OHS legislative requirements; 'they can also be viewed as an instrument designed to defeat legislative intent'.[68]

The relevant provision was introduced in 2016 to overcome the decision in *Byrne v People Resourcing Queensland Pty Ltd & Anor* [2014] 2 QdR 397. At issue was whether WorkCover, as the insurer of the labour hire employer, was obliged to cover the purely contractual claim by the principal contractor against the labour hire company. The court held that WorkCover was liable to indemnify the labour hire company for its joint and several liability to pay damages to the worker, including any indemnity to the principal contractor.

This decision had overturned the long held view that a workers' compensation policy does not cover an employer's liability arising from an indemnity granted to a third party, in respect of that third party's liability to pay damages to the worker. That new interpretation enabled a host employer to transfer the liability for compensation to an insured labour hire company (that is, to WorkCover). Legislative amendments sought to overturn that decision and return to the *status quo ante*.

In practice, if WorkCover is aware that a third party, such as a principal contractor or host employer, contributed to a worker sustaining an injury then they will seek to join that third party as a contributor to a damages claim brought by the worker against their employer. As a consequence of WorkCover joining the third party, any 'hold harmless' contractual arrangement between the employer and the third party will become void and WorkCover will not be liable to pay damages incurred by a third party.

One stakeholder raised concerns as to whether the legislative intention has been achieved in overturning the effect of the decision in *Byrne* through the way the legislation (amending section 236B) was drafted. This is a pretty technical issue, and we will not really know whether these concerns turn out to be correct until they are tested in the courts. That said, it is important to keep a close eye on this issue and to be prepared to amend the legislation fairly rapidly if it appears that the legislative intent has not been achieved.

> *Follow-up recommendation 8.2: OIR should closely monitor application of section 236B and, if its implementation does not adequately reflect the government's intention in overturning the Byrne decision and preventing the transfer of liability of head contractors onto WorkCover, the government should be in a position to quickly introduce legislative amendments to implement the intent.*

FEES ASSOCIATED WITH LEGAL REPRESENTATION

All parties, including insurers and workers, have a right to engage legal representation at any stage of the workers' compensation process. Many workers choose to engage solicitors on a speculative or 'no-win, no-fee' basis. This means that worker's do not have to pay legal fees upfront or on an ongoing basis throughout the life of the claim, but can pay their legal fees at the successful conclusion of their matter. Lawyers that act on a speculative basis are entitled to apply an up-lift on

[68] E. Underhill and M. Quinlan, "Beyond Statutory Enforcement – Alternative Approaches to Improving Osh in the Temporary Agency Sector." *Policy and Practice in Health and Safety* 9, no. 2 (2011) (pp. 109-31).

their fees of up to 25 per cent, which is designed to mitigate the risk that the matter may not be successful, in which case the lawyer may not be paid for their services. Section 347 of the *Legal Profession Act 1997* (Qld) ensures that the legal fees payable cannot exceed 50 per cent of the settlement monies (after refunds and disbursements are paid). This is known as the '50/50 rule.' The Act does not allow for costs orders to be made, other than in particular matters that are determined by a Magistrate or Judge after a trial. This means that in the vast majority of cases, legal fees are paid directly from a workers' award of settlement monies following a common law claim for damages.

Two stakeholders submitted that plaintiff solicitor fees should be monitored and controlled by the Workers' Compensation Regulator to ensure transparency, to protect injured workers and to highlight that the amount paid in legal costs scheme-wide is disproportionately high when compared to other scheme costs, such as medical treatment or other rehabilitation costs.

When a worker engages a solicitor, they must sign a client agreement, which is a contract between solicitor and client which sets out the relationship, nature of the work to be done and the fees to be paid for that work. This contract is a confidential document, entered into by two private entities, and the content of the contract is governed by the *Legal Profession Act 1997* (Qld), which has protections built for workers, such as the '50/50 rule' detailed above. If a worker is of the view that a solicitor has charged excessively or unfairly, they may lodge a complaint with the Legal Services Commission. On the other hand, society might think it excessive of half of compensation costs in common law settlements are being used for legal expenses.

It is a matter for a worker as to whether he or she wishes to enter into a private contract with a solicitor to be legally represented and regulation and protections are in place to govern that relationship. That said, there is a public interest in knowing how much the costs in the compensation system are driven by legal expenses. It is one thing to protect the confidentiality of private contracts between plaintiffs and lawyers, it is another to have no idea as to how significant legal expenses are in the system as a whole. An earlier review recommended that relevant data be collected. One option would be to require disclosure of the distribution of expenses associated with each settlement, but this could compromise the confidentiality of the contracts. Another would be to survey successful plaintiffs, but if this is too long after the settlement, information may not be accurate. A third option would be to confidentially collect this information at the time of settlement, without allowing publication of individual data. These data would be collected by the court registrars or an independent agency such as the Australian Bureau of Statistics. Although insurers would have no role in the collection or analysis of the data, it would not preclude their having a role in the financing of this if they saw any benefit in its availability.

Follow-up recommendation 8.3: Data on the distribution of common law payouts, between plaintiffs and legal expenses at the time of settlement, should be collected on a confidential basis by an agency independent of the parties. That agency (or an approved organisation contracted for that purpose) should publish annual summaries of the data including breakdowns by size of settlement, type and size of employer and core demographics of plaintiffs.

CHAPTER 9: SELF-INSURANCE

9.1 Self-insurance in Queensland

Like other jurisdictions in Australia, the Queensland system allows for self-insurance. That is, it allows employers to arrange their own insurance, through self-insurance licences, if they meet certain requirements and demonstrate the financial capacity to fully fund future liabilities. The nature of the liabilities they face (that is, the entitlements that workers have, if injured at work) are the same as for the central fund but the associated costs are managed differently. There is no public knowledge of the administrative costs they face (if, indeed, this is a useful concept for all self-insurers) but presumably the total cost is lower than coverage by WorkCover, otherwise there would be no benefit from self-insurance.

There are currently 28 licences for self-insurance in the scheme. These licences cover 294 employers and approximately 164,000 workers. This is not all that different to the situation in Victoria (where there are 36 self-insurers in a labour force that is about 23 per cent larger), but seemingly a lower rate of self-insurance than in other jurisdictions (at least, as measured by the number of self-insurers in the state, or the number of self-insurers per million in the labour force). Jurisdictions with higher rates of self-insurance (as measured by either of those indicators) tend to have higher premiums in the central funds. It is difficult to be confident about causality in that case, as the schemes differ in so many respects and the number of self-insurers is itself driven by policy decisions, but it is plausible both that higher central premiums tend to encourage more large firms to be self-insurers, and that the departure of large firms from the risk pool raises average premiums for those who remain (a group I call 'system insurers'). Self-insurers manage 7.7 per cent of the total number of workers in Queensland.

9.2 Obligations on self-insured employers

Organisations that wish to self-insure must first satisfy a number of requirements, the first of which is size. As a result, small and medium-sized firms are typically unable to self-insure in Queensland. A Queensland employer currently seeking to self-insure must have more than 2,000 full-time workers. New South Wales requires an employer to have 500 workers (the same threshold as was required in Queensland before 1999). No other jurisdictions have a formal requirement on the number of workers, however South Australia informally requires 200 workers. Self-insurers must also have adequate arrangements for work health and safety, injury management and return to work, and the capacity to effectively manage workers' compensation. Licensing and oversight of self-insurer performance is undertaken by the Regulator.

It is not only for prudential reasons that self-insurance is a phenomenon of large firms; it is also a reflection of pressure from employers. That is, a number of large organisations that operate outside Queensland are able to self-insure there and do not wish to have separate arrangements applying here. Fourteen of Queensland's self-insurance licence holders are also self-insured in at least one other jurisdiction, and seven of these insure in three or more jurisdictions.

In theory, self-insurance could pose a risk for the scheme as a whole, if a self-insurer were unable to meet their liabilities and the firm went broke. In practice, this is extremely unlikely to pose a problem; not because large firms won't go broke (they sometimes do), but because of the stringent prudential requirements placed upon them. In particular, a self-insurer must have a bank guarantee at 150 per cent of their estimated claims liability (ECL). These prudential requirements on self-insurers leave the system with very little risk. Over 40 per cent have guarantees above 150 per cent

of ECL. They are required to have a specified level of reinsurance, and there is regular monitoring of their performance and financial results by the Regulator.

On the other hand, Queensland's financial requirements are less specific than those in other jurisdictions. When deciding an application for a self-insurance licence, the Regulator must consider whether the employer is likely to continue to be able to meet its liabilities and the long-term financial viability of the employer including its profitability and liquidity. Prospective self-insurers in most other jurisdictions must provide more specific financial information.

The Regulator may issue or renew a licence for a *single or group employer* to be a self-insurer if the employer meets the following criteria:

- the number of full-time workers employed in Queensland is at least 2,000;
- work health and safety performance is satisfactory;
- the licence will cover all workers employed in Queensland;
- the employer has given the Regulator an unconditional bank or financial guarantee for 150 per cent of the self-insurer's estimated claims liability;
- the employer has reinsurance cover, of not less than $300,000 or more than the set limit;
- all workplaces are accredited by the Regulator, or if not are adequately serviced by a rehabilitation and return to work coordinator who is in Queensland and employed under a contract (the contract can be a contract of service);
- the employer has workplace rehabilitation policies and procedures; and
- the employer is fit and proper to be a self-insurer.

In 2017, OIR commissioned a review by PwC of the self-insurer licencing, claims auditing and ongoing compliance activities of the Insurer Services Unit (ISU) of the Regulator. That unit is responsible for liaising with self-insurers, assessing licence applications and renewals, performing claims audits and ongoing compliance activities. The aim of these activities is to determine whether a self-insurer is 'fit and proper' to be licensed (or have a licence renewed).[69] PwC identified no significant issues. It referred to what were seen as a number of good practices in Queensland including the quality of the relationship between ISU and insurers, the quality and frequency of data and analytics provided by the Regulator, and the communication of best practice techniques during licence renewal audits. PwC made thirteen recommendations to improve the transparency and robustness of decision-making, modernise auditing practices, and adopt a risk based compliance approach. These recommendations will mostly be implemented over 2018.[70]

9.3 The types of self-insurance arrangements

There is actually a great diversity amongst self-insurers. Self-insuring organisations in Queensland mostly fit into three broad categories:

[69] in accordance with s75 of the Workers' Compensation and Rehabilitation Act 2003.

[70] The exception was one concerning digitising the audit process, which was supported but will require significant ICT resources and therefore will be unlikely to be implemented in 2018.

- large firms that manage their own risk internally;
- large firms that hold a single licence but outsource their claims management to another organisation;
- organisations that apply for a group licence to establish a jointly insured entity.

For example, one of the larger self-insurers manages the workers' compensation risk of a substantial number of local councils; but several other local councils manage their risk internally.

The regulation of self-insurance seems to assume that there are 'Chinese walls' between the insurer and the employer—that is, an employer that wishes to self-insure sets up a separate arm that handles the insurance licence responsibilities and is independent of the rest of the company. In reality, as explained to me by self-insurers, this does not occur. In types (b) and (c) listed above (we can call these 'external self-insurers'), the insurer is a genuinely separate entity, not part of the company, while in type (a) organisations ('internal self-insurers') the insurer *is* the company. Indeed, most of the advantages listed below from the self-insurance model would not exist if there were 'Chinese walls' (but then, neither would many of the disadvantages).

9.4 Incentives facing self-insurers and behaviour

There are both advantages and disadvantages to the system from having self-insurance available. On the positive side, direct involvement by the employer in rehabilitation is one of the better ways to promote rehabilitation.[71] This makes sense, as an employer who has the responsibility for paying the costs associated with an injured worker has a strong incentive to get that person back into full-time work at the level at which they previously operated. Moreover, they are in a good position to assess the capabilities and needs of the worker, and what the organisation can offer to facilitate rehabilitation. As large employers, self-insurers also have the resources to do this well. The above considerations apply more to internal than to external self-insurers, while the question of size is equally relevant to self-insurers and to system insurers.

On the negative side, the same cost incentives that promote active involvement in rehabilitation also encourage self-insurers to disguise or dismiss workplace injuries. This is mostly the case for less serious injuries or injuries that take some time to manifest themselves fully. Again, the above considerations are more relevant to internal self-insurers than to external self-insurers. Thus several stakeholders told of self-insurers who discouraged injured workers from recognising that their injury was work-related or from lodging a claim or obtaining expensive treatment, and provided evidence in support of this.

Self-insurers engage in some behaviours towards workers with minor injuries that are perceived very differently by different parties. When such injuries occur, a self-insurer might send them to their own in-house treatment facility, and no injury may be recorded. To the self-insurer, this 'early intervention' is a way of minimising costs and time lost and getting injured workers back to work as soon as possible, something that is good for the worker, not just the firm. To critics, this is a way of avoiding medical practitioners, preventing workers from pursuing their rights and getting workers back on the job without their genuine needs being attended to. In practice, which of these interpretations is true is probably highly dependent on the culture of the organisation and the individual managers concerned.

Self-insurers might also take a more aggressive stance than WorkCover against severely injured workers on matters of compensation (as opposed to rehabilitation), as the cost of a single expensive claim will be a higher share of their total expenses. Still, few complaints regarding this were made;

[71] Randall, Buys, and McLennan, "Responding to System Imperatives."

instead, concerns mostly focused on the behaviour of self-insurers regarding workers with less severe injuries or those that take longer to manifest. In addition, stakeholders associated with the medical assessment tribunal process observed no obvious difference between self-insurers and WorkCover in the type or severity of injuries that workers presented. This too is consistent with the view that, for workers with more serious injuries, there is on average little difference between self-insurers and WorkCover, and any difference is washed out before matters get to that point—differences in under-reporting rates, for example, would not be apparent by that stage.

That said, problematic behaviour is not restricted to self-insurers, as allegations along the lines mentioned previously were also made (less commonly) in relation to system-insured employers as well. In effect, over the long term, large employers with WorkCover face the same incentives to minimise claim costs as do self-insurers, the main difference is in the time-frame. That said, speaking from a purely economic perspective, the incentives facing self-insurers are slightly stronger because the need to discount future costs reduces the present value of costs facing system insurers.

Self-insurers can sometimes also be very innovative. One example that was presented to me involved a self-insurer outside Queensland: Alcoa at Point Henry (now closed) in Victoria. The company introduced a scheme whereby workers could access all medical and ancillary services (such as physiotherapy), including a rehabilitation provider for injuries they had received in a non-work setting (such as falling off a ladder at home)—and paid for by the company. They had previously suffered a high rate of long term workers' compensation claims and were seeking a cultural shift in workers' attitudes to being off work for injuries, by offering a high level of support for all workers with injuries, irrespective of whether those injuries were work or non-work based. The support for non-work injuries led to workers genuinely believing that Alcoa was interested in their wellbeing, and shortened the duration of time off work. Their workers compensation claims also fell (I do not have information on whether this was because workers were no longer claiming non-work injuries as work injuries, or whether the injured workers were managed much more comprehensively, e.g. by having rehabilitation providers on site). At the time, Point Henry was regarded as a 'model' self-insured employer by the state's insurer.[72]

The availability of common law damages acts as a constraint on the behaviour of all organisations, including self-insurers. If an injured worker considers themselves badly treated, they are more likely to sue and, if they actually have been badly treated, they are more likely to get a settlement in their favour. This is especially relevant for more serious injuries, as most workers with less serious injuries would not consider the cost of a common law action worthwhile.

Overall, self-insurers face incentives that can make them simultaneously better-behaved and worse-behaved than non self-insured employers of comparable size. This is most strongly the case for internal self-insurers. As mentioned, there is substantial variation between self-insurers but it appears on average that, for workers with more severe and immediate injuries, rehabilitation might be better facilitated where a worker is covered by a self-insurer. Likewise, on average for workers with less severe injuries or those that take longer to manifest, compensation might be better facilitated where a worker is covered by WorkCover. Whether injured workers are better served by being with a self-insurer or not is likely also, perhaps critically, to be influenced by the characteristics of the individuals involved.

[72] Personal communication with E. Underhill.

9.5 Assessing self-insurers

One implication is that the principal methods of monitoring and auditing self-insurers used by the Regulator to assess their suitability for a license renewal —analysis of quantitative data of various forms and the undertaking of claims audits—will not necessarily detect problems that some workers have with 'high risk' self-insurers (to use a term in the PwC report). Workers who are successfully discouraged from making a claim will not be selected in any audit of claims. There is no simple way of overcoming this. Even a sampling of staff working in self-insurers for survey purposes, unless very large and hence overly expensive, will be unlikely to turn up enough observations to discern a pattern one way or the other. We can only rely on self-reporting by affected workers, and at present most would not report to the Regulator (or even know they should make a report).

The best way to tap into the potential for self-reported data would be to encourage reports by affected individuals, their representatives or people aware of their situation. The latter could include trade unions, medical practitioners or relatives, though trade unions are the most likely and best equipped to become involved in this process. One way of doing this would be for the Regulator to publicly advertise for submissions on the performance of individual self-insurers as the period of license renewal assessment approaches. The Regulator need not accept at face value all submissions that are made, but it could use this information to decide whether to follow up on particular issues, whether by interview, documentary analysis or something else. The principle would be similar to that involved in claim auditing, but in effect the Regulator could also audit 'non-claims', that is matters that were never lodged as a workers' compensation claim. It would be an extension of the 'risk' principle expounded on in the PwC review. The Regulator would not need to follow up every complaint or submission; rather, it would simply have access to more information to enable it to make an informed decision on what investigations to pursue in deciding a licence renewal.

The Regulator could also anonymously survey injured workers at time of licence renewal, to assess their experiences with the self-insurer, in any circumstance where it feels that its deliberations would be better informed by doing so. Data from the claims experience survey run by Monash university suggested that, after controlling for other factors (including age, gender, self-related health, injury type, jurisdiction, and time from injury to claim), injured workers with self-insurers were less likely than injured workers with scheme insurers to believe that the process was open and honest, the system was working to protect the workers' best interests, or that the system helped with their recovery.[73] However, this survey covered injured workers from all jurisdictions, not just Queensland. We do not know whether the same pattern would apply in Queensland and, more importantly, we do not know which, if any, self-insurers would be problematic in this respect. Surveys of injured workers in the lead up to licence renewal would enable identification of problem self-insurers, if any, and improve confidence in self-insurers generally.

In assessing self-insurers and studying their workers, the Regulator should pay attention to the 'early intervention' programs of some self-insurers. Like much else about self-insurers, these programs are both praised and criticised. Do they enable workers to return to work earlier than they would under a conventional employer's activities, or are their injuries under-treated? The evidence and claims presented to this Review were contradictory. The research evidence in support of early intervention is strong, but it is not clear that it is supportive of the early intervention approach taken by self insurers. For example, an overview by Randall, Buys and McLennan argues that:

[73] Data provided courtesy of Monash University and refers to findings from logistic regression equations.

> early constructive intervention is important once [a referral] is received. Establishing rapport with the client and other stakeholders and proactively taking the next steps can make a significant difference in the timeliness of the ultimate outcome.[74]

Those authors also refer to some leading research by Donal Shrey, a founder of this body of literature whose work is connected with practice in a number of large US organisations. Top of a list of 'Features of successful disability management' is 'joint labour-management commitment and involvement',[75] though it is not clear from the stakeholder consultation process that such joint labour-management consultation takes place effectively within all the self-insurers.

This particular matter of researching the effect of early intervention programs is something that the Regulator would find difficult to undertake on its own, as a comparative study involving system-covered (i.e. WorkCover) workers is needed to make any informed judgements. This is potentially a longer-term study, and one that should be undertaken jointly with other parts of OIR (including WHSQ) and WorkCover; in any such study, the confidentiality of individual data from self-insurers would, of course, need to be assured.

Recommendation 9.1: The Regulator should encourage stakeholder input into the process of licence renewal for individual self-insurers, including by advertising for submissions when determining whether an employer is fit and proper to be a self-insurer. It should also survey injured workers in the lead-up to licence renewal.

Follow-up recommendation 9.2: The Regulator should, jointly with other parts of OIR (including WHSQ) and WorkCover, undertake or commission survey research comparing the post-injury experience of workers under 'early intervention' programs and in more conventional employers. The outcomes of that research should inform future policy development in relation to 'early intervention' programs. It should also be considered by the next five-yearly review.

9.6 Self-insurer exemption from the duty to report an injury

A matter raised by a number of stakeholders was the exemption of self-insured employers from s133 of the Act. This section states that employers must notify WorkCover as soon as they become aware of a worker sustaining an injury for which compensation may be payable. Stakeholders saw this as an anomaly that enabled self-insurers to avoid their obligations to injured workers. However, it would make little sense for self-insured employers to report an injury to WorkCover, as WorkCover provides no insurance services to self-insured employers. One option to rectify this would be to require all employers to report all injuries to the Regulator. A compulsory reporting requirement to the Regulator would make it easier for the Regulator to investigate allegations of poor behaviour. However, it would make little sense for the Regulator, but not insurers, to be informed

[74] Randall, Buys, and McLennan, "Responding to System Imperatives." 348.

[75] From a copy of a presentation by Randall et al, presented to the reviewer by the ASIEQ in the stakeholder consultation process.

of injuries. This would limit insurers' ability to monitor workplace injuries and respond promptly to emerging areas of risk for their business.

Equivalence between self-insured employers and those covered by WorkCover would therefore be provided if self-insured employers were required to report all injuries to the workers' compensation insurance arm of the organisation. To ensure that this process was followed by self-insured employers, the breadth of auditing by the Regulator could be expanded to include all injury management activities, including functions like that of 'early intervention' programs. To ensure that this amendment was complied with, a penalty could also be added to ensure that any employers who were found to be actively discouraging a worker from lodging a claim could be prosecuted.

If the requirement to report all injuries was combined with an obligation to present an injured worker with an information sheet outlining their rights, it may increase the likelihood that injured workers of self-insured employers would exercise their rights to make a workers' compensation claim. A negative side-effect and concern for self-insurers may be that workers would become more litigious and less focused on rehabilitation and return to work. It is difficult to know what to make of these competing perspectives. Such a requirement would also be very difficult to enforce. On balance, it appears best to put in place the mechanisms that would make stakeholder input into the license process effective (recommendation 9.1, plus an obligation to report), but leave the question of a compulsory information sheet for reconsideration at a later date. If stakeholder input into the license process is effective and adequate, then there would be no need to require an information sheet to accompany every injury. If a future review considers that a problem still exists, this further step, amongst others, could be considered.

Recommendation 9.3: The Act should be amended to require all injuries to be reported to the relevant Insurer, with no exemption for self-insurers. The insurer should then pass that information to the Regulator.

Follow-up recommendation 9.4: The question of whether any information regarding the injured workers rights must be provided to all injured persons on notification of an injury should be considered at the next five-yearly review.

CHAPTER 10: THE CHANGING NATURE OF WORK AND THE 'GIG ECONOMY'

Queensland's workers' compensation scheme, like other Australian workers' compensation schemes, was designed around traditional employment arrangements and long standing common law notions of employer and employee. Given the rapidly changing nature of work, and consistent with the terms of reference, this review considers the extent to which it adequately supports and protects all Queensland workers. The most significant change to the nature of work is currently the rise in digital platforms supporting a rapidly expanding gig economy.

Gig work is characterised by the engagement of workers in a series of predominantly short-term paid tasks as opposed to regular or long term on-going traditional work arrangements. The terms 'platform economy', the 'gig economy' or 'freelancing' are often used interchangeably, as if to indicate that the growth of the 'gig economy' is synonymous with a new way in which workers relate to employers, 'freelancing'. (The last is a very imprecise concept, the definition of which appears to vary to suit the user, and so it is not seriously discussed further here).

There are several ways in which platform activities can be classified,[76] but according to Valerio De Stefano:

> The gig-economy is usually understood to include chiefly two forms of work: 'crowdwork' and 'work on-demand via apps'… The first term is usually referred to working activities that imply completing a series of tasks through online platforms… 'Work on-demand via apps', instead, is a form of work in which the execution of traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, is channelled through apps managed by firms that also intervene in setting minimum quality standards of service and in the selection and management of the workforce.[77]

There is growing concern that the legal structures underpinning some of these arrangements provide a mechanism for gig platforms or facilitators to shift business costs and risk to workers, and for gig workers to be exploited due the way they are being engaged. There is increasing evidence that differing arrangements across different platforms and facilitators have resulted in workers performing the same work under similar conditions having different entitlements to, among other things, workers' compensation insurance.

In response to these concerns, it is necessary to assess the scheme to ensure gig workers are not being unreasonably denied access to the benefits of Queensland's workers' compensation scheme, and that a consistent approach is adopted for persons working in the gig economy.

10.1 The origins and growth of platform work

The emergence of the platform or 'gig' economy reflects changes in management strategy over the past three decades. Three trends underpin it: the emergence of the managerial desire for greater

[76] A. Stewart and J. Stanford, "Regulating Work in the Gig Economy: What Are the Options?" *Economic and Labour Relations Review* 28, no. 3 (2017) (pp. 1-18).

[77] V. De Stefano, "The Rise of the «Just-in-Time Workforce»: On-Demand Work, Crowdwork and Labour Protection in the «Gig-Economy»." Conditions of Work and Employment Series No. 71, (Geneva: International Labour Office, 2016); 1.

flexibility; the growth of new models of management structure; and development of new digital technologies.

Flexibility and the growth of new models of management structure —of ''not there' employment' — are discussed in chapter 3. I do not need to elaborate on flexibility, but a point needs to be made about the second issue. In those industries in which the move to not-there employment is a more recent phenomenon — retail and food services, mining, cleaning — we more often see *employees* at the bottom of the food chain, be they employees of franchises, mining contractors or cleaning contractors. Likewise, global supply chains in the apparel sector have employees at the bottom. So the growth of the not-here contracting model is more commonly linked to a redefining of the jobs of employees, not a redefining of workers from employees to independent contractors. This may be because no satisfactory way had been found of maintaining control while expanding the use of independent contractors.

The main exception appears to be in the online 'gig economy', where growth has been associated with workers being classified by the organisations as contractors, not employees. New digital technology appears here to serve the function of cutting out the intermediary 'peripheral' firm (the franchisee or contractor firm) that bore much of the risk, by enabling the technology (rather than a peripheral firm) to 'control' the workforce, and so even greater risk is shifted back onto employees. As pointed out by researchers from the Carnegie Mellon University Human-Computer Interaction Institute, what they call 'algorithmic management' solves the problem of 'how to instruct, track and evaluate a crowd of casual workers you do not employ, so they deliver a responsive, seamless, standardised service'.[78] This enables algorithmic management to substitute for employment in peripheral firms.

This pattern means that the 'control' test, applied in common law to establish whether an employment relationship exists, problematic. High control may still in effect be exercised by core capital even without the traditional indicators of control that form the basis used by courts to decide whether an employment relationship exists. Control is heavily there yet 'not there'. This growth of digital technologies and the opportunities they provide for new forms of control in response to consumer 'demands' may facilitate the expansion of the platform economy.

This model potentially contains many contradictions, illustrated by the way many Uber-style businesses fail.[79] This is not least because the model commonly relies on low labour costs that may not be sustainable. It may also be, though that the 'control' provided by the technology is inadequate or has adverse consequences, including producing socially undesirable rates of payment below accepted community standards.

The emergence of platform economy workers has much in common with labour hire, the biggest difference being that the affected workers in the platform economy are mostly classified as independent contractors (though this is changing in some overseas jurisdictions),[80] whereas many labour hire workers are employees of the labour hire firm. *Labour hire* (where the worker is not a direct employee of the company for whom s/he is working) is another form of casual employment, and the growth of labour hire is part of the reason for the relative growth of *full-time* casual employment. Employees paid by labour hire agencies are in uncertain 'triangular' relationships with

[78] cited in S. O'Connor, "When Your Boss Is an Algorithm." *Financial Times*, 8 September 2016.

[79] S. Hill, "Good Riddance, Gig Economy: Uber, Ayn Rand and the Awesome Collapse of Silicon Valley's Dream of Destroying Your Job." Salon, 2016. https://www.salon.com/2016/03/27/good_riddance_gig_economy_uber_ayn_rand_and_the_awesome_collapse_of_silicon_valleys_dream_of_destroying_your_job/.

[80] See footnotes 107, 113 to 126.

the labour hire firm and the firm for whom they are doing work. Labour hire workers appear to have inferior occupational health and safety outcomes[81] and lack of protection from unfair dismissal and redundancy.

WORK IN THE 'PLATFORM' OR 'GIG' ECONOMY

A number of high profile digital platforms (such as Uber, Airtasker, Deliveroo, Foodora and UberEats) appear to be the face of the gig economy, however the nature and structure of the gig system of work is not new and has existed for many years. Prior to digital platforms gig workers sought work through third party agents, by advertising in print media (e.g. yellow pages), through agencies or less formal arrangements such as word of mouth or gathering at specified locations.

Predominately gig work platforms view (or at least portray) themselves as a facilitator of tasks, or a connector between a gig worker and third parties. A third party could be conducting a business or undertaking for a peer (i.e. another person, who this time is not conducting a business or undertaking, such as a householder who for example may require house cleaning to be undertaken).

Not all gig workers are independent contractors or self-employed, with full responsibility for workers' compensation and other financial and administrative responsibilities. Gig workers may be engaged under various types of legal arrangements. It may be possible for a gig work platform to have no role other than enabling the introduction of two or more people in a 'yellow pages' advertising type arrangement, where any employment or contractual relationship will only ever exist with the person who engages the gig worker to undertake work. However, today's digital platforms and facilitators are more likely to be considered either an employer or an agent of the gig worker, depending on how they have established their business and contractual relationships with the gig worker and third party. In some instances an employment relationship may exist, not with the platform but with the third party (be it a business or a peer) who engages the gig worker. Probably more gig workers may be independent contractors. Neither the worker, the platform, or the third party receiving the benefit of the work is able to establish a gig worker's status simply by agreement alone.

THE SCOPE OF THE GIG ECONOMY

Globally, the gig economy involves many workers. Transportation provider Uber, for example, has a global workforce of around 160,000; its US competitor Lyft has 50,000. Amazon Mechanical Turk (AMT) mediates crowdwork for up to 500,000 people internationally and Crowdflower ten times that number.[82]

That said, it is still only a small (albeit growing) portion of the overall workforce. An August 2016 online survey by the Pew research Centre of 4,500 adults in the US found only 8 per cent of adults had used digital work or task platforms in the previous year.[83] An estimate, by J P Morgan based on money transfers, put the number much lower: a cumulative 0.9 per cent of US adults had ever provided labour in the gig economy according to it.[84] US economists Lawrence Katz and Alan

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[81] E. Underhill, "Changing Work and Ohs: The Challenge of Labour Hire Employment." (paper presented at the New Economies: New Industrial Relations, Noosa, February 2004) (pp. 544-51).

[82] De Stefano, "The Rise of the «Just-in-Time Workforce»: On-Demand Work, Crowdwork and Labour Protection in the «Gig-Economy»." 1.

[83] A. Smith, "Gig Work, Online Selling and Home Sharing." (Pew Research Center, 17 November 2016).

[84] D. Farrell and F. Greig, "The Online Platform Economy: Has Growth Peaked?", (New York: JPMorgan Chase Institute November 2016).

Krueger, based on 2015 data, estimated only 0.5 per cent of US workers had identified customers through an online intermediary, and noted this was close to two other, independently derived estimates.[85] The UK Chartered Institute of Personnel and Development (CIPD), drawing on its own online survey of 5,000 adults in December 2016, estimated 4 per cent of adults were 'gig workers'.[86] It is likely that online surveys will overestimate the incidence of 'gig economy' workers, but it would be surprising if that alone accounted for the discrepancy. These studies—along with another undertaken by the ILO in 2016—form the basis for much of the quantitative data discussed below.[87]

In Queensland, the Office of Industrial Relations estimated that the number workers engaged by employment agencies as well as independent contractors in 2017 was around 290,000 people—that is, 12 per cent of the workforce were engaged in these forms of employment as their primary employment.[88] The platform economy is, of course, a small share of that number. Other estimates in Australia also tend to focus on broader 'freelancing' or participation 'at some time' in the 'collaborative' economy (rather than how many participate at a point in time).[89] Whatever the true number, it is likely to increase in coming times due to the spread of platform work as a new means of exercising control without the employment relationship, and with the growth of such institutions in Australia as the National Disability Insurance Scheme, which is facilitating the emergence of numerous platforms where people who require in-home or community care can search for and connect directly with nurses, care and support workers in their area.

10.2 Conditions in the platform economy

Some people engaged in this work, particularly those in occupations that have been part of the gig economy for some time, are aware of the administrative and regulatory costs associated with their work and operate as true independent contractors. However workers new to gig work particularly in low skilled or fringe areas, are often unaware of or underestimate the true costs and the associated obligations and duties of all parties. It is these workers that are in a vulnerable position from a workers' compensation perspective, and are of concern.

The 'gig' or 'platform' economy is a major area where digital technology has allowed a new form of work organisation to develop. There are many stories, ranging from exciting to horrifying, about work in the 'gig economy'. Some of the key points about the 'gig' economy are as follows:

- *The use of digital work or task platforms is more common amongst younger workers.* In the Pew survey, 17 per cent of 18-29 year olds, compared to 10 per cent of 30-49 years olds and

[85] L.F. Katz and A.B. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015." NBER Working Paper No. 22667, (Washington DC: National Bureau of Economic Research, September 2016), http://www.nber.org/papers/w22667.

[86] Chartered Institute of Personnel and Development, "To Gig or Not to Gig? Stories from the Modern Economy." (London: CIPD, March 2017).

[87] The ILO study involved surveying 1800 workers in Crowdflower and AMT (the latter covering 1260 Americans and 230 AMT workers in India). See J. Berg, "Income Security in the on-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers." (Geneva: Inclusive Labour Markets, Labour Relations and Working Conditions Branch, International Labour Office, 2016).

[88] ABS Cat.No. 6333 Characteristics of Employment, Queensland, August 2017 customised report

[89] e.g. estimates that that 4.1 million Australians, or 32 per cent of the workforce had 'freelanced' between 2014 and 2015 (AiGroup Workforce development, The emergence of the gig economy, August 2016), or that 53 per cent of people had participated in the collaborative economy in 2014 (Deloitte. 2015. Review of the Collaborative Economy in NSW. NSW Department of Finance, Services, and Innovation).

just 4 per cent of 50-64 year olds had earned money through digital work or task platforms.[90]

- *The use of digital work or task platforms is more common amongst lower income earners.* In the Pew survey, the proportions of adults who had earned money through digital work or task platforms were 10 per cent in households with annual income less than $30,000, compared to 8 per cent with income of $30-75,000 and 4 per cent in households with incomes above $75,000. [91] The incidence was also higher amongst blacks (14 per cent) and Latinos (11 per cent) than whites (5 per cent) and lower amongst those who had college (university) qualifications (6 per cent) than those with lower qualifications (9 per cent).

- *'Gig economy' work provides essential income for a minority of participants.* In the Pew survey, 29 per cent of platform workers said that the income they earned from it was essential for meeting basic household needs, while 27 per cent said it was 'important' and 42 per cent 'nice to have, but not essential'.[92] In the CIPD survey, 25 per cent of 'gig' workers said it was their main job.[93]

- *Many 'gig economy' workers have other jobs.* In the CIPD survey, 58 per cent of 'gig economy' workers had permanent jobs (compared to 78 per cent in the population at large). Only a minority (20 per cent) were self-employed.[94] Another survey by the ILO confirmed that the self-employed were only a minority of 'gig' workers, and only a minority had been running a business before taking up 'gig' economy work.[95]

- *A majority of 'gig' workers are underemployed.* In the CIPD survey, only 26 per cent said that, overall, they got enough work on a regular basis in the gig economy.[96] In the ILO survey, the most common reason given, when respondents were asked why they were not doing more crowdwork (or non-crowdwork), was that there isn't enough work.[97]

- *Expressed as an hourly rate, pay in the 'gig economy' is low and often below minimum wages.* In the CIPD survey, median earnings for transport or delivery was £6 per hour, and for short-term jobs was £7 per hour, below the then living wage of £7.20 per hour and the minimum wage for 21-24 year olds of £6.95 per hour.[98] In the ILO survey, median pay for AMT workers was USD 4.65 per hour, well below the minimum wage.[99] In Australia, Unions NSW calculated that rates received via Airtasker for data entry, cleaning and sales were between AUD 3 and AUD 9 below the relevant minimum award rates.[100] Hence the Twitter user named 'Fair Gig for all', on a daily basis, tweets about vacancies on Airtasker for jobs paying below the minimum wage.[101]

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[90] Smith, "Gig Work."
[91] Ibid.
[92] Ibid.
[93] Chartered Institute of Personnel and Development, "To Gig or Not to Gig."
[94] Ibid.
[95] Berg, "Income Security in on-Demand Economy."
[96] Chartered Institute of Personnel and Development, "To Gig or Not to Gig."
[97] Berg, "Income Security in on-Demand Economy."
[98] Chartered Institute of Personnel and Development, "To Gig or Not to Gig."
[99] Berg, "Income Security in on-Demand Economy."
[100] Unions NSW, "Innovation or Exploitation: Busting the Airtasker Myth." (Sydney: Unions NSW, 2016).
[101] https://twitter.com/FairGigForAll

Although 'gig economy' workers are doing it tough, they also seem surprisingly optimistic, perhaps reflecting an optimism bias identified by Kahneman,[102] related to 'adaptive preferences'.[103] In the CIPD survey, 49 per cent of 'gig workers' (compared to 56 per cent of other workers) said they were 'living comfortably' or 'doing alright'. However, 46 per cent of 'gig' workers (compared to 26 per cent of other workers) expected their economic situation to improve over the coming year. And while 57 per cent of 'gig' workers (compare to 67 per cent of other workers) were saving for retirement through a pension plan, 33 per cent of 'gig' workers (compared to 21 per cent of other workers) were confident they could live comfortably when they stopped working.[104]

'Gig economy' workers did not think highly of their training opportunities. Nor did their thoughts readily turn to trade unions when asked to whom they would take complaints.[105] That said, there are many media reports of such workers taking collective action, sometimes strike action, in support of improvements in pay or conditions, and some instances where they have won treatment equivalent to that of employees.[106] The whole idea of them being independent contractors, not employees, has been challenged in several jurisdictions, sometimes successfully.[107] Uber says it is not a transport company, it is a technology company, acting as a client to drivers, but it is clearly in competition with transport companies and celebrates providing that competition.[108]

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[102] D. Kahneman, Thinking, Fast and Slow (New York: Farrar, Straus and Giroux, 2011).

[103] S. Lukes, Power: A Radical View, 2nd Edition (London: Palgrave, 2005).

[104] Chartered Institute of Personnel and Development, "To Gig or Not to Gig."

[105] Ibid.

[106] C. O'Donovan, "Uber Rallies Drivers against Teamster Unionization Efforts with Podcasts and Pizza Parties." *Buzzfeed News*, 10 March 2017; K. Minter, "Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales." *Emconomic and Labour Relations Review* 28, no. 3 (2017) (pp. 438-54); A. Sansom, "Bicycle Couriers Protest against Takeaway Food Service Deliveroo." *France24*, 12 August 2017; Z. Kilhoffer, K. Lenaerts, and M. Beblavý, "The Platform Economy and Industrial Relations: Applying the Old Framework to the New Reality." CEPS Report No 2017/12, (Brussels: Centre for European Policy Studies, 2017); R. Burns, "The Sharing Economy's 'First Strike': Uber Drivers Turn Off the App." In These Times, 2014. http://inthesetimes.com/working/entry/17279/the_sharing_economy_first_strike_uber_drivers_turn_off_the_app; A. Griswold, "Uber Just Caved on a Big Policy Change after Its Drivers Threatened to Strike." *Slate*, 12 September 2014; A. Carey, "Uber Strike: Group Calls for Drivers to 'Log Off' in One-Day Protest over Pay and Conditions." *Age*, 12 March 2017.

[107] BBC, "Bike Courier Wins 'Gig' Economy Employment Rights Case." *BBC News*, 7 January 2017; J. Grierson and R. Davies, "Pimlico Plumbers Loses Appeal against Selfemployed Status." *Guardian*, 11 February 2017; G. Gall, "Is Uber Ruling the Beginning of the End for Bogus Self-Employment?" *The Conversation*, 5 November 2016.

[108] J. Castle, "Uberx Vs Taxi—Which Is Best?" Choice, Australian Consumers Association, 2017. https://www.choice.com.au/transport/cars/general/articles/uberx-vs-taxi-which-one-is-best; S. Corby, "Uber Vs Taxi." CarsGuide, 2017. https://www.carsguide.com.au/car-news/taxi-vs-uber-30943; Caspar, "Sydneysiders Have Spoken – and They Choose Ridesharing!" Uber Newsroom, 2015. https://www.uber.com/en-AU/newsroom/sydney-has-spoken/.

10.3 Platform work and workers' compensation systems

In this section we discuss how the current Workers' Compensation Scheme applies for gig workers and whether platform economy workers warrant coverage by workers' compensation systems.

HOW THE CURRENT WORKERS' COMPENSATION SCHEME APPLIES FOR GIG WORKERS

Due to the complexity involved in contractual arrangements and multiple parties in some of the engagements in the gig economy, a gig workers coverage for workers' compensation, and a party's obligations to insure under a workers' compensation policy are not always clear.

In Queensland a person is entitled to workers' compensation benefits if the person is a worker and they have sustained a personal injury arising out of, in the course of, employment with the employer. Under the Act a worker is a person who works under a contract and, in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the *Taxation Administration Act 1953* (Cwlth), schedule 1, part 2-5. The test is not whether tax was withheld but whether it should have been withheld, and the Act also clarifies who is a worker in particular circumstances.[109] The rather unclear boundary between 'employee' and 'independent contractor' is discussed in chapter 3.

A number of gig work platforms have sought to establish, or may have established, agency arrangements to manage their relationship with gig workers and third parties. An agency arrangement exists when there is an authority or capacity in the platform (the agent) to act as an intermediary to create legal relations, either expressly or impliedly, between a person occupying the position of worker (the gig worker) and the person who requires the work to be performed (the third party). The agent is authorised by the gig worker to do, on the gig worker's behalf, certain acts which affect the gig worker's rights and duties in relation to third parties. Where an agent uses their authority to act for a gig worker, then any act done on behalf of that gig worker is an act of the gig worker.

Where the agent acts within the scope of his or her authority and brings about a contractual relationship between the gig worker and third parties, the contract is between the gig worker and the third parties: the agent is not a party to the contract but rather the intermediary or conduit to bring about the contractual relationship. Agencies decide whether and under what conditions they will represent a gig worker or end user. If the person does not comply with these conditions the agency can choose to no longer represent the person. Agents can undertake functions of the gig worker and third party such as withholding tax from remuneration paid to the worker and paying on behalf of the employer, or collecting superannuation guarantee payments from the employer and paying to the workers superannuation fund.[110]

Under genuine agency arrangements, the agent is not considered the employer of the person who uses their services. This is supported by the Australian Tax Office , which has published the *Superannuation Guarantee Ruling SGR 2005/2* to provide taxation and superannuation guidance for true agency and arrangements involving employment agencies.

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[109] Schedule 2 Part 1.

[110] Tax ruling TR 2005/16 (Income tax: Pay As You Go - withholding from payments to employees, and Superannuation Guarantee Ruling SGR 2005/2 (work arranged by intermediaries)

As a result Queensland's workers' compensation scheme currently does not apply to an agent / gig worker relationship. However in an agency arrangement a gig worker may still be a worker, if the nature of their contract with the third party meets the requirements of the definition of worker.

Under the Act the worker's employer is the person that engages the worker to perform work[111] or in particular circumstances.[112] For workers' compensation purposes it is not a relevant whether the person is conducting a business or undertaking or not, or whether the person is the holder of an ABN. The workers' compensation scheme applies equally to 'peer-to-peer' arrangements (for example to a householder that contracts with a person for domestic house cleaning, child minding, nursing or caring services were there is an expectation of on-going work). This aligns with the requirements of the Australian Tax Office in relation to persons who may need to withhold tax. WorkCover offers a separate and distinct workers' compensation policy of insurance for household employers. This 'WorkCover householder worker insurance policy' has a different premium calculation method based on a set fee and no experience based rating.

Where the digital platform, facilitator or third party directly engages a gig worker who is a worker then they are considered to be their employer under the Act with current workers' compensation scheme premium and compensation arrangements applying. Where the gig worker is found to be an independent contractor then they are not entitled to access workers' compensation benefits, and no premium requirements applies.

Claims for compensation by gig workers covered under the workers' compensation scheme are managed in the same way as other workers' compensation claims. Aside from the complexity of their employment arrangements, many gig workers undertake work from their own home, at various times of day, and if an injury is sustained a worker will need to be able to provide evidence that the injury arose out of, or in the course of employment. With more mobile workforces, insurers have experience in managing this issue across other work arrangements in a range of industries. Gig workers and employers have the same review and appeal rights as other workers and employers under the Act.

Queensland's workers' compensation scheme experience in relation to claims made in relation to a digital (rather than traditional) platform has been that the gig worker has been found either to be the worker of the platform or facilitator (11 accepted claims) or an independent contractor (4 denied claims), and a further 4 claims have been withdrawn after being made. Many would not have submitted claims because they believed they were not covered or it never occurred to them.

On the other hand, it has also been WorkCover's experience that many gig workers do not appreciate the true nature of their arrangements or have an understanding that they are not considered a worker for the purposes of receiving worker's compensation until after they have sustained an injury and a claim has been lodged. This means that these gig workers do not have the any alternative protections in place (such as income protection or a workplace personal injury insurance policy with WorkCover).

JURISDICTIONAL COMPARISONS

Like Queensland, other Australian jurisdictions apply traditional workers' compensation arrangements to these cases and are considering the issue of workers' compensation insurance for gig workers, with no clear way forward at present. For example, the NSW State Insurance Regulatory Authority (SIRA) has established a gig economy stakeholder reference group to further discuss gig

[111] Section 30
[112] Schedule 3

economy work issues and inform future advice to government. This reference group was established following a roundtable of gig economy participants, industry stakeholders and government representatives on 23 November 2017. The first reference group meeting was in March 2018 with subsequent meetings scheduled quarterly.

The Australian Senate has established the Select Committee on the Future of Work and Workers to inquire and report on the impact of technological and other change on the future of work and workers in Australia. This review is considering all aspects of work and goes beyond the limited scope of this paper regarding workers' compensation impacts.

The United Kingdom government commissioned an independent review (the Taylor review) of the UK labour market in October 2016. Its purpose was to look at how employment practices need to change in order to keep pace with modern business models, including the rise in the number of people doing gig work, and to inform the government on strategies to ensure the labour market and wider economy works for everyone. The review made 53 recommendations and addresses all aspects of work. The UK government responded to the review in February 2018, accepting all but one of the recommendations. One of the recommendations accepted is to provide agency workers with a clear breakdown of who pays them and any costs or charges deducted from their wages.

The issue of whether platform economy workers are employees or independent contractors has been tested in courts, tribunals and administrative bodies a number of jurisdictions in Australia and overseas. The end result has been far from conclusive. On the one hand, a number of cases have led to workers in platform industries being classed as employees. The London Central Employment Tribunal ruled two Uber drivers were 'workers', not self-employed.[113] Uber is appealing, with the case possibly extending to 2019.[114] The Employment Tribunal also ruled a bike courier was an employee.[115] The Central Arbitration Committee, a body that resolves worker disputes, also ruled a bike courier for a blood firm was an employee.[116] In New York City, a state administrative law judge ruled that three Uber drivers were employees.[117] An employment tribunal case in the UK found that minicab drivers for Addison Lee were employees, not contractors.[118] The UK Court of Appeal dismissed an appeal against a decision that a plumbing firm's workers were employees and not self-employed.[119] In Belgium, an administrative social security tribunal held in 2018 that Deliveroo riders were employees.[120] Spanish labour inspectorates also decided in 2018 that riders for Deliveroo and another platform, Glovo, are not self-employed.[121] Recently, the European Court of Justice ruled that Uber was a transportation company, not a technology company, raising questions about

[113] Gall, "Is Uber Ruling the Beginning of the End for Bogus Self-Employment?".
[114] R. Booth, "Uk Government Delays Possible Reforms to Gig Economy Practices." *Guardian*, 6 December 2017.
[115] BBC, "Bike Courier Wins 'Gig' Economy Employment Rights Case."
[116] B. Chapman, "Gig Economy Ruling: Couriers Carrying Blood for Nhs Win Right to Collective Bargaining." *Independent*, 1 March 2018.
[117] M. Hamilton, "Judge Finds Nyc Uber Drivers to Be Employees; Upstate Impact Debated." *Timesunion*, 12 September 2016.
[118] R. Booth, "Addison Lee Wrongly Classed Drivers as Self-Employed, Tribunal Rules." *Guardian*, 26 December 2017.
[119] Grierson and Davies, "Pimlico Plumbers Loses Appeal against Selfemployed Status."
[120] V. De Stefano, "Platform Work and Labour Protection. Flexibility Is Not Enough." in *Regulating for Globalization: Trade, Labor and EU Law Perspectives* (Wolters Kluwer, 2018), 23 May, http://regulatingforglobalization.com/2018/05/23/platform-work-labour-protection-flexibility-not-enough/.
[121] Ibid.

whether its workers would be treated as employees.[122]

On the other hand, other cases have led to their being classed as non-employees. In north London, the Central Arbitration Committee ruled Deliveroo's drivers were self-employed contractors.[123] A French appeal court held in 2017 that Deliveroo riders were not employees, an outcome repeated for Uber drivers by a lower court earlier this year.[124] A US District Court judge issued a temporary restraining order on a 2015 Seattle law that would have treated Uber drivers as employees in allowing them to join a union.[125] A 2018 Philadelphia court decision found that an Uber driver was a contractor under federal and state law, the Court commenting that Uber and Lyft 'present a novel form of business that did not exist at all ten years ago' and adding 'With time, these businesses may give rise to new conceptions of employment status'.[126] Although the California Labor Commission had earlier concluded an individual Uber driver was an employee,[127] that decision did not survive appeal.

Amongst mainstream employers, organisational control of employees' working time has become less important over recent decades than organisational control of the product employees generate for the employer,[128] yet control of working time remains one of the indicia used to determine whether someone is an employee or a contractor. The Philadelphia US District Court decision acknowledged that Uber could: terminate a driver's access to the Uber App; deactivate a driver for cancelling trips, failing its background check policy, falling short of the required 4.7-star driver rating, or soliciting payments outside of the Uber App; make deductions against a driver's earnings; and limit the number of consecutive hours that a driver may work. Yet against the more traditional indicia, Uber was not an employer and its drivers were independent contractors.[129]

The Fair Work Commission (FWC), in deciding an application for unfair dismissal, determined that a driver for Uber was not an employee.[130] The Services Agreement described the legal relationship between Drivers and Riders as follows:

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[122] Z. Aleem, "Europe's Top Court Just Said Uber Isn't a Tech Company — It's a Cab Company." *Vox*, 20 December 2017.

[123] S. Butler, "Deliveroo Wins Right Not to Give Riders Minimum Wage or Holiday Pay." *Guardian*, 15 November 2017.

[124] De Stefano, "Platform Work and Labour Protection."

[125] L.J. Hanley, "Inside Uber's Latest Move to Exploit Its Drivers and Hide Behind the Court." *Huffington Post*, 6 April 2017.

[126] Razak v. Uber Technologies Inc., U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:16-cv-00573, p25.

[127] J. Carswell-Doherty, "Are Uber Drivers Independent Contractors or Employees?" F&G Blog, Foulsham and Geddes, 2016. http://www.fglaw.com.au/are-uber-drivers-employees/.

[128] G. Kenyon, "Deviating from the Nine-to-Five Isn't Always Liberating – It Can Often Be a Constant Source of Stress." in *BBC* (2016), 9 September, http://www.bbc.com/capital/story/20160909-the-curse-of-flexible-work; J. Fear, "Polluted Time: Blurring the Boundaries between Work and Life." (Canberra: Policy Brief No. 32, The Australia Institute, 2011); D. Peetz, C. Allan, and M. O'Donnell, "Are Australians Really Unhappier with Their Bosses Because They're Working Harder? Perspiration and Persuasion in Modern Work." (paper presented at the Rethinking Institutions for Work and Employment, Selected Papers from the XXXVIIIth Annual CIRA Conference, Quebec, 26-28 May 2001); D. Peetz et al., "Race against Time: Extended Hours in Australia." *Australian Bulletin of Labour* 29, no. 2 (2003) (pp. 126-42).

[129] Razak v. Uber Technologies Inc, pp27-8.

[130] Kaseris v Rasier Pacific V.O.F [2017] FWC 6610 (21 December 2017)

> You acknowledge and agree that your provision of Transportation Services to Users creates a legal and direct business relationship between you and the User, to which Rasier Pacific [Uber, in Australia] and its Affiliates are not a party.

In addition the Services Agreement provided that Rasier Pacific was acting as the limited payment collection agent solely for the purpose of collecting payment from Users on the driver's behalf, and that the driver pays a fee for this service.

That said, in this FWC case the employee was unrepresented and some critical issues were not aired.[131] Moreover, in concluding, the Deputy President noted, in language even stronger than that used in the Philadelphia court, that it may be the case that notions about what was necessary for an employment relationship to be established:

> are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy.[132]

Another recent FWC case found again that an unrepresented Uber driver was not an employee for unfair dismissal purposes, again relying on the indicia approach.[133] An Australian legal firm, commenting on the status of taxi drivers, claimed that 'every case comes down to the individual circumstances.'[134]

Uncertainty is not satisfactory for administering a workers' compensation scheme. The uncertainty is created in part by the way in which traditional legal conceptions of control and indicia of employment have failed to match contemporary practices of corporate control and public understandings of what they mean. The law has failed to, in the words of the FWC, 'catch pace with the evolving nature of the digital economy'.[135]

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[131] D. Marin-Guzman, "Uber Wins Fair Work Commission Case over Drivers' Employment Rights." *Australian Financial Review*, 5 January 2018. 'Uber employee question not settled: Expert', Workplace Express, 9 February 2018, https://www.workplaceexpress.com.au/nl06newsselected.php?act=2&nav=10&selkey=56469, referring to [2017] FWC 6610 (21 December 2017).

[132] [2017] FWC 6610 (21 December 2017), at [66]

[133] Pallage v Rasier Pacific [2018] FWC 2579 (11 May 2018).

[134] Carswell-Doherty, "Are Uber Drivers Independent Contractors or Employees?". Carswell-Doherty had claimed (perhaps incorrectly) that 'taxi drivers may also be employees for the purposes of workers' compensation laws' and commented that 'there would be a good argument to say that Uber drivers are independent contractors, but it is by no means certain'. The oddity in this is that taxi drivers are generally considered neither employees nor independent contractors, but 'bailees in a joint venture'. See the cases in fn 11 of Creighton & Stewart ch 8. So comment in the text is not so much based on what Carswell-Doherty had to say about taxi-drivers as to the general lack of clarity in the area, as also shown in the text.

[135] [2017] FWC 6610 (21 December 2017), at [66]

10.4 Do platform economy workers warrant coverage by workers' compensation systems?

To the extent, then, that they are classed as 'contractors', platform economy workers are not covered by workers' compensation systems.

However, there appears to be a growing view that they should be covered, and there are several arguments in favour of covering them. Several stakeholders involved in the consultation process have raised this as an issue that needs addressing, and it is also alluded to in the terms of reference, reflecting its priority to the government.

First, and most importantly, many platform economy workers—particularly those most deeply involved in it—are classic 'vulnerable' workers. The data discussed above show that they have low pay and by virtue of the nature of the work, they are in insecure forms of employment. Perhaps the best indication of who holds power in the relationship between Uber and its drivers lies in the pay and conditions of the drivers.

Second, their vulnerability means that they would be unlikely to adopt voluntary methods of compensation coverage even if such things were made available to them. This might be due either to ignorance, confusion or simply lacking the resources to take up voluntary cover. Those who do take voluntary cover may find that, as it is offered at low volume and on a voluntary basis, it is more expensive than would be the case for a universal product.

Third, absent coverage and consequent premiums, the costs of injuries are externalised from the companies onto others, either the state health system or, especially if untreated, the individuals themselves.

Fourth, the rates of pay and conditions many receive would be illegal were they treated as employees, and for some at least the means by which they are classified as contractors rather than employees appears to have an element of contrivance about it. Thus, for example, Uber's declaration that it is not in the business of passenger transport, it is merely a technology company acting as a client to drivers, appears to defy common-sense understandings of what Uber does—why would it be competing with taxi companies and testing driverless cars if it was not involved in transport?—and designed to enable a particular definition of its workers.[136] It is even part of the language: people talk about 'catching an Uber' in the same way they talk about 'catching a taxi'.

Fifth, there may be flow-on effects that affect many other workers. If firms that provide sub-standard pay and conditions out-compete those providing standard pay and conditions, then the latter group will be forced to match the former or go out of business (leading to greater non-compliance with laws). If the latter go out of business, the former group would be able to raise prices as its market share increases. This appears to be the strategy of some platform firms—for example, Uber has never made a profit despite undercutting competitors,[137] but appears to anticipate profitability when it has achieved sufficient market share through growth. Increasing market shares for dominant firms appears to be an emerging trend in product markets, especially those with a heavy technology component; dominant firms now appear to have a lower labour share

[136] e.g. Caspar, "Sydneysiders Have Spoken."

[137] R. Felton, "Uber Is Doomed." in *Jalopnik* (2017), 24 February, https://jalopnik.com/uber-is-doomed-1792634203; A.J. Hawkins, "Uber Reportedly Lost $1.27 Billion in Just Six Months." in *The Verge* (2016), 25 August, https://www.theverge.com/2016/8/25/12647814/uber-loss-billion-2016-travis-kalanick-lyft.

in income than other firms; and increasing concentration in product markets within industries is associated with greater declines in the labour share in those industries.[138] So there would be nothing unexpected about a strategy of seeking to grow market share, and the implications of that for other firms' labour shares would be significant.

Sixth, platform work is, in many ways, akin to labour hire but, while labour hire is regulated in Queensland, a lacuna would be created if there were to be no regulation of platform work. Just as a labour hire firm, A, provides a conduit between a hiring entity, B, and a worker, C, so too a platform firm, A, provides a conduit between a hiring entity, B, and a worker, C. The main differences are that the worker in one case is classed as a contractor while in the other they are usually classed as an employee, and that the hiring entity in one case may be a single person while in the other case it is most commonly an organisation. However, the idea that the platform provides an intermediary to work is a major conceptual link with labour hire. The development of new apps like Squaddle, in effect providing short-term labour hire services in the Australian hospitality industry—while apps like Jobletics and Jitjato perform related functions in the US industry and facilitate 'the uber-ization of staffing'—further blurs the distinction.[139] Platform technology has provided a new solution to the supervision problem, enabling an employment model to be replaced by a contractor model, and making the analogies between labour hire and platform work strong.

Indeed, while it is easy to think of the 'gig economy' as being exemplified by Uber, this is a model that has already spread to many industries and occupations and that will find its way into almost any area of work that lends itself to casual employment or contracting, including some where those modes of employment have not been used before—because it provides for a new mechanism of control that takes the place of the employment relationship. On-demand apps have already formed the basis for business models in cleaning, food delivery, goods delivery, babysitting, education, wine, car washing, laundry, lawn services, domestic work, accounting and law, are becoming increasingly important in aged and disability support services, and as mentioned apps have recently been released in hospitality.[140] It is only a matter of time before the model spreads into most private and public sector industries. Not all such firms will be successful, as most are based on a low-cost model that often provides labour incomes below the equivalent of minimum or award wages, and this may lead to problems of both labour supply and service quality, problems which, as mentioned, have already led some such businesses to close.[141] Regardless, people working for those firms are likely to often be low paid and vulnerable, and because the model signifies a new form of control that can substitute for employment, in the absence of policy actions it might reduce the coverage and revenue base of system insurers in workers compensation.

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[138] D. Autor et al., "Concentrating on the Fall of the Labor Share." *American Economic Review* 107, no. 5 (2017) (pp. 180-85).

[139] L. Gartry, "'Uber for Hospitality' App Hopes to Shake up on-Demand Job Market." ABC News, Australian Broadcasting Corporation, 2017. http://www.abc.net.au/news/2017-04-06/uber-for-hospitality-app-connects-workers/8419530; M. Hamstra, "The Uber-Ization of Staffing." Restaurant Hospitality, 2017. http://www.restaurant-hospitality.com/technology/uber-ization-staffing.

[140] Hill, "Good Riddance, Gig Economy."; A. Fitzpatrick, "Udemy Thinks It's Cracked the Future of Online Education." *Time*, 12 February 2016; Gartry, "'Uber for Hospitality' App."; Hamstra, "The Uber-Ization of Staffing." https://www.ability8.com.au/ L. Merrillees, "Is 'Uber for Babysitters' App Gobi the Future of Childcare or a Step Too Far?" ABC News, Australian Broadcasting Corporation, 2017. http://www.abc.net.au/news/2017-11-05/uber-for-babysitters-future-of-childcare-or-step-too-far/9063068; J. Healy, A. Pekarek, and D. Nicholson, "Gig Economy Businesses Like Uber and Airtasker Need to Evolve to Survive." *The Conversation*, 4 July 2017.

[141] Hill, "Good Riddance, Gig Economy."

Against a proposal to provide workers' compensation coverage, it might be argued that voluntary insurance coverage can or should be made available to non-covered workers. However, this ignores the issues of vulnerability and low take-up discussed above. The costs of coverage may also be raised in objection, but ultimately the present system simply transfers (externalises) costs from those who should bear them to others. It may also be argued that the low-wage model is not inherent in the platform economy—for example, payments via a Danish cleaning firm organised on platform lines, Hilfr, are set at or above the Danish minimum salary (collective agreement).[142] Many platform economy workers earn good incomes either through their platform job or because their platform job is only a second job anyway. This does not, however, negate the need to provide protection for those low-income workers who are dependent on platform economy work as their main source of income.

A further concern is about horizontal equity: existing contractors or self-employed persons (e.g. some taxi drivers) are not covered, so why should their competitors be covered? This is a valid consideration, but it is not enough in itself to justify non-coverage. The exclusion of one group of vulnerable workers is not justified by the exclusion of another group of vulnerable workers. Moreover, most 'gig economy' businesses, of course, will not be in competition with taxis—it is potentially a much larger phenomenon than that. In fact, even taxi drivers are in something of an anomalous situation, in part because of the 'an ancient common law relationship' of bailment that is 'centred on rights to own and use property'.[143] The most common form of bailment in Australia is in taxi driving, in which a taxi owner (the bailor) may contract to allow another taxi driver (the bailee) to use their taxi, in order to earn income. Taxi-driving bailees are covered by workers compensation in some jurisdictions—in Victoria, for example, bailee drivers must be covered by workers compensation arrangements through the bailor—but not in Queensland. For health and safety purposes they have been considered by the Taxi Industry Advisory Committee to be 'vulnerable' workers, due to the danger of violence from passengers.[144] The Australian Taxi Federation in 2016 argued that 'if workers compensation cannot be changed to cover drivers, all owners, operators and partners must carry private insurance to cover drivers for accidents at work, and to and from work',[145] implying support for the idea that workers compensation should be changed to cover taxi drivers, as well as pointing out the absence of insurance amongst drivers for Uber and other rideshare companies. In reality, requiring private compulsory injury insurance outside the workers compensation context for 'gig economy' drivers, especially as so many do it on a part-time basis, would not adequately address the problem. It would be less efficient than applying coverage through WorkCover. That said, this issue does point to the need to attempt to design a system that neutralises as much as possible horizontal inequity.

A more important concern is about uncertainty. That is, it could be argued that changes should not be made because this would create uncertainty amongst companies as to whether certain of their workers were or were not covered, as well as uncertainty amongst workers and WorkCover itself. This would only be resolved (if at all) through seemingly endless litigation in tribunals or courts.

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[142] S.B. Haider, "The Danish Startup That Refuses to Compete on Poor Working Conditions." *Copenhagen Post*, 24 June 2017.

[143] Johnstone et al., Beyond Employment: The Legal Regulation of Work Relationships. 73.

[144] Queensland Government, "Queensland Government Response to Report on Investigation into the Taxi Industry in Queensland by the Queensland Workplace Rights Ombudsman." (Brisbane: 2011); 32. There are clearly OHS considerations for this occupation, exemplified in Worklace Health and Safety Queensland, "Work Health and Safety for Taxi Drivers and Operators." (Brisbane: Department of Justice and Attorney-General, 2012).

[145] Australian Taxi Federation Inc, "Ctp Premium System Review." (Sydney: 20 March 2016); 7, https://www.sira.nsw.gov.au/__data/assets/pdf_file/0009/102330/Australian-Taxi-Federation.pdf.

Uncertainty is a significant consideration in the design of any system. It is important that the policy outcome provides some measure of certainty to participants as to who is covered and who is meant to pay premiums. As it is, relying on the status quo is unlikely to remove uncertainty. The issue of whether platform economy workers are employees or independent contractors has been tested in courts, tribunals and administrative bodies a number of jurisdictions in Australia and overseas. The end result, as shown above, has been far from conclusive.

The FWC, for example, appears to be almost waiting for legislative action, but at present is tied to existing notions of employment. In some respects, the question of whether platform economy workers *are* technically employees is a diversion from the policy question; *should* they be given the same rights as employees, at least in relation to workers' compensation issues? While some might prefer the tribunals and courts to sort out these issues, the process may take many years and still end up inconclusive (judging by the varying decisions to date) or with an outcome counter to policy makers' preferences. The question of whether they should be afforded access to workers' compensation is a matter best determined explicitly by the legislature rather than left in the hands of courts.

10.5 Options for coverage

This paper presents a series of options for the regulation of workers' compensation in relation to platform economy work.

The distinction between workers who do 'crowdwork' and those who do 'work on-demand via apps' is important from both an analytical and policy perspective. Most of the options here focus on extending coverage to those who do 'work on-demand via apps'. This includes platforms like Deliveroo, Foodora, Uber, UberEats and Airtasker.

This is because of the greater difficulties in providing coverage for crowdwork, when much crowdwork is undertaken across borders internationally. For example, an American app may facilitate an Indian crowdworker performing work for a client organisation or individual in, say, the UK one hour and Spain the next.

By contrast, for those platform workers doing work on-demand via apps, the worker and the client are located near each other, regardless of where the app is owned, and this occurs through multiple uses of the app. For example, Uber might provide a Brisbane driver to transport someone from one part of Brisbane to another. Foodora or Deliveroo might provide a Townsville worker to deliver food from a Townsville restaurant to a Townsville location. This makes it clearer what geographic jurisdiction has responsibility for ensuring that minimum standards in employment, including in relation to workers' compensation, are set and complied with.

Several options have been considered and rejected in this review. These, and the preferred option, are discussed below.

OPTION A: ATO DEFINITION

Relying on the ATO definition of 'worker' to determine workers' compensation coverage

This possibility is rejected because it is essentially a maintenance of the status quo. It has the great advantage of simplicity, and the appearance of uncertainty avoidance, but does not address the problems identified above at length.

The other advantage it has is that it would maintain the focus on appropriately defining 'employee' and 'employer'. (Although 'worker' is a broader concept than 'employee', it is essentially 'employee

or a small number of other categories'.) It could be argued that any alternative, more activist approach would dilute the importance of finding an appropriate definition of 'employee' that could encompass labour law and taxation law. These are matters that could be handled by the courts and, with good intent, legislators.

There may be some merit to that argument, but it seems more than offset by the slow and contradictory progress in this direction. If something can be done now to deal with the 'gig economy' workers question then, as long as that does not preclude further action on the question of an appropriate definition of employee for broader purposes, it would be better to do that now than to await the uncertain outcome of future deliberations, mostly by parties outside the direct control of the Queensland Government or Parliament. (Hence 'uncertainty avoidance' is more an appearance than a reality with this option.)

A variant in this approach would be to stick with this current definition and adopt a 'strategic enforcement' approach[146] to employers who either already are, or should be, employers, with a view to achieving a demonstration effect on remaining 'gig economy' employers. However, it would be unrealistic to expect WorkCover to attempt to take the lead in enforcing a definition of 'worker' or 'employee' where others in the federal jurisdiction have failed, even if some 'gig economy' organisations (such as Deliveroo) already accept that they are employers and take on the responsibilities that come with being so.

OPTION B: NEW CLASS OF WORKER

Create a new definition of worker or a new class of employed person such as 'dependent contractor'

This is the sort of proposal arising from the Taylor review of the UK labour market, and is a serious option for policy consideration, and also has a number of practical complexities. These warrant serious discussion but in another context. It is not considered an option here because it is beyond the power of the state Parliament with respect to the general concept in labour law (even though it can do it in workers' compensation law, which is carved away from the rest of labour law by the Fair Work Act). That is, fundamentally the definition of an employee or worker for the purpose of coverage by industrial legislation is a matter for federal law. The *Independent Contractors Act (Cwlth) 2006* would override any attempt to redefine as employees what are, in federal eyes, independent contractors.

Most states, including Queensland, passed their lawmaking responsibilities for industrial relations to the Commonwealth following the Commonwealth Parliament's use of the corporations power to regulate industrial relations in the 2000s. The main exceptions are, in most states, laws relating to employment of state public servants and matters relating to workplace health and safety (WHS) and to workers' compensation. The problem of people having characteristics of employees but not having the same rights as employees is not a problem that is restricted to workers' compensation as it also encompasses minimum standards in a range of areas including wages and conditions of employment.

[146] David Weil, 'Strategic enforcement to maximise impact', US Department of Labor blog, 31 October 2014, <http://blog.dol.gov/2014/10/31/strategic-enforcement-to-maximize-impact/>.

OPTION C: WHS LEGISLATION ALIGNMENT

Redefine the coverage of workers' compensation laws and responsibilities to be similar to those under workplace health and safety (WHS) legislation, relating to persons conducting a business or undertaking (PCBU) and workers.

This is a different proposal to that in B above. The point there was that it is not possible for the state Parliament to redefine worker, or create a new class of employed person, that can only be done with the involvement of the Commonwealth Parliament. On the other hand, it is possible to consider the appropriate definition of people covered by workers' compensation law. This already happens with WHS law, and several stakeholders have proposed the same definition apply to workers' compensation law.

The definition relevant for WHS regulation is very different to that under employment law, mostly as a result of the harmonisation process, which has brought about nationally consistent WHS laws. Under WHS law, the relevant concepts are a worker and a person conducting a business or undertaking (PCBU). 'Workers' are broadly defined, and include: employees, contractors, subcontractors, outworkers, apprentices and trainees, work experience students, volunteers and PCBUs who are individuals if they perform work for the business. A PCBU can be: a sole trader (for example a self employed person), a partnership, a company, an unincorporated association, a government department, or a public authority (including a municipal council). Under this definition, a business or an undertaking can be either conducted alone or with others, whether or not for profit or gain. Everyone is either a worker or a PCBU (or a safety officer, who is usually a type of worker). So, if this approach were adopted, all workers would be covered by workers' compensation insurance, and all PCBUs who have workers would be paid premiums.

The chief advantage of this approach is that it would align workers' compensation coverage to the coverage of WHS legislation. There is a conceptual link to WHS law. It would also, on the surface, minimise uncertainty of responsibility, as WHS responsibilities would also mean workers' compensation responsibilities.

However, it would not cover all platform economy workers. This is because of the way that some platform economy firms seek to depict themselves as being technology firms rather than firms operating in the product markets they influence. If able to successfully argue this, they would avoid taking on the role of PCBU in relation to most of the platform workers whose work they shape. Firms with a more diverse industry base, such as Airtasker, would almost certainly avoid being defined as PCBUs. For others in more identifiable industries, such as transportation, food delivery or hospitality, the matters might still be argued through tribunals and courts over many years, and there would be a considerable period of uncertainty.

There is also the problem of calculating and obtaining premiums. This may not be as insuperable. For workers who are working for a PCBU but who are not employees themselves (that is, they are likely contractors or 'subbies'), the premium would be paid by the entity (usually an organisation) who pays them, and set at whatever the risk-adjusted premium is (i.e. a percentage amount) of the worker's labour income. The labour income could be the total payment to the contractor minus any allowance for capital income. That labour income share would be specified in the contract between the contractor and the PCBU. If the labour income share was not specified in the contract, it would be set by default by WorkCover, based on tables at the sub-industry level derived from the national accounts describing the capital and labour intensity of that sub-industry.

That said, the logistics of collecting such premiums would not be trivial. Administratively, it would be simpler for these premiums to be collected by the Australian Taxation Office (ATO) when it collects company tax than for such matters to become the responsibility of WorkCover or some other agency set up at the state level for that purpose. Were it to be collected by the ATO it would need to be separate and distinct from company tax, as most deductions, rebates and exemptions that apply to company tax would be irrelevant to the value of the premium liability. There is also the question of timing—premiums that should be collected in a certain year may not be collected if a company collapses. In effect, a form of 'provisional' premium may be required.

There is also the question of need. Many head contractors (and hence many PCBUs) are covered by business liability insurance, which covers much of the same terrain. Sometimes they get sued, often by workers for subcontractors who join them in a workers' compensation action, and as a result of the reversal of the Byrne decision they are partly liable for work-related injuries. At issue are the efficiency and equity considerations, that is: (a) whether a comprehensive, compulsory scheme would be more efficient; and (b) whether vulnerable workers classed as contractors are aware of, and have the resources to, sue the relevant PCBUs or would be better off in a comprehensive, compulsory scheme. Unqualified use of the WHS definition of PCBU would also potentially bring most volunteers within the scope of the scheme —something which is not, as discussed in chapter 3, the intention of this report.

In sum, the logistical issues regarding using PCBU as a basis for workers' compensation liability are complex but can probably be addressed. Whether it is worth doing depends also on the efficiency and equity considerations. The bigger and fundamental problem, though, is that many platform economy workers would still not be covered. For that reason, it does not in itself address the issues raised by the platform economy.

OPTION D: AGENCY LIABILITY

Redefine the coverage of workers' compensation laws and responsibilities to encompass those who work under agency arrangements, and require payment of premiums by the intermediaries or agencies.

This is the preferred option.

Under this option coverage would be extended to people engaged to perform work under an agency arrangement where an employment relationship is not created with another party, and responsibility for premiums would go to the intermediary organisations' or 'agencies' that hire them. An example of such a definition would be:

> A person engaged via an intermediary or agency to perform work under a contract (other than a contract of service) for another person

The meaning of 'agent'[147] here should be clarified to exclude licenced labour hire businesses[148] where the labour hire business is the employer of the gig worker. It should also be clarified to specifically exclude, from being classed as an 'agent', employees of firms that engage contractors (the mere fact that a corporation used one of its employees to source work from a contractor should not make that employee the object of this provision). It would specify that it applied where the

[147] The meaning of 'agent' has already been the subject of some court determinations, including by the High Court. See International Harvester Co of Australia Pty Ltd v Carrigan's Haselden Pastoral Co (1958) 100 CLR 644 at 652; [1958] HCA 16. This definition was re-affirmed recently in Australian Competition and Consumer Commission v Flight Centre Travel [2016] HCA 49). Whether the same applies to 'agency' is unclear.

[148] see Labour Hire Licensing Act 2017

person so engaged was in Queensland and the second person (for whom they were doing the work) was also in Queensland. Other exemptions, if need be, could be made by regulation.

Premiums would be payable by intermediary organisations with respect to the platform workers they supply. These intermediary organisations gain their income by taking a proportion of the income paid by the client to the worker (for example, in the case of Airtasker, the portion is 15 per cent). That is, they take a 'commission'. The premiums to be paid to WorkCover would be initially calculated as a proportion of the income of the worker, as that is what drives the potential liability of WorkCover. But once WorkCover knows this portion taken by the intermediary (which the intermediary would be required to disclose), the actual premium could be imposed as a proportion of the income received by the intermediary. For example, if the intermediary's portion is 15 per cent, and the premium were initially calculated as 1.2 per cent of the worker's income based on the experience rating of firms in that industry, the premium would be set at 8 per cent of the intermediary's take (as 8 per cent is 1.2 per cent divided by 15 per cent). That is, the premium could be set as a proportion of the 'commission' received by the agency. The net cost to the insurers would be zero, as premiums would cover expenses.

The development of the technologies that enable the development of platform work, and more importantly enable the platform intermediaries to command a portion of the payment to the worker, also provide an opportunity for regulatory intervention. If payment can be deducted for the intermediary, it can also be deducted for other purposes.

How would this work, if the 'agency' is located outside the jurisdiction, as it often will be in the case for platforms? On-demand work via apps will be easier to identify and locally regulate than crowdwork, and it is on-demand work via apps that is the intended focus of intervention here. In the case of on-demand work, a financial transaction occurs between an entity physically located in Queensland (a client) and another entity physically located in Queensland (a driver, rider, gutter-cleaner, disability worker, etc.) via the intermediary, for work undertaken in Queensland. The intermediary in turn must interact with both entities in Queensland. Those financial transactions can be regulated as proposed.

The recommendation here does not relate to crowdwork, which is mostly directly online and for which the client (not just the intermediary) may be in another country. Work on-demand via apps has much greater potential to intrude into traditional forms of employment in a wide range of industries and occupations than does crowdwork, which is more constrained to IT work. So work on-demand via apps is not only that part of 'gig economy' work that is more amendable to regulation, it is also the part of it that is more needing it. If other states adopt this approach, then the state-based nature of the definitions could be amended (to allow for cross-border complexities) so that the defining issue (e.g. as to what premium should be paid to which workers' compensation authority) would be in which state the work was undertaken.

An additional consideration is what happens to other (non-app based) agents who secure someone to work for a third person. Some recruitment agencies might fall into this category, but remember that this would only apply to the supply of contractors, and most labour hire workers are employees of the labour hire firm. Unless granted an exemption, such agencies would potentially be liable for premiums if they received a commission based on a proportion of the income paid by the client to the contractor. If, however, they only received a one-off fee (e.g. a 'spotter's fee'), that was independent of the contractor's income, they would not be liable. (Provisions would need to be designed in such a way as to avoid repeated engagements of the same contractor being taken to be separate, one-off events.)

There are other potential agents. The term 'gig economy' originated with the 'gigs' actors and musicians have been doing for centuries, in return for their payment, often as contractors. Most musicians have no personal injury coverage provided through their venues or festivals, they have to take it out themselves (which is expensive) or go uncovered. Many actors (particularly doing shows for larger theatre companies) are covered by the organisation's insurance, whose cost of insurance would presumably fall under this approach. (Actors working for television would also be covered, but they are employees anyway and so not affected by this recommendation.) Many musicians and actors are on low incomes and support themselves through other jobs. Some but not all of those actors and musicians have found gigs through an agent. Under this provision, those who find gigs through an agent, and from whom the agent takes a percentage commission, would be covered for workers' compensation purposes as the agent would pay the relevant premium. This would increase the complexity of being an entertainment industry agent, but it would also make it more attractive for actors and musicians to get an agent (as actors or musicians without an agent would remain without coverage), so it would probably be a net gain for most entertainment industry agents. If, however, policy-makers wanted to exempt these particular agents from coverage by the provision, it would be simple enough to draw it up so.

OPTION E: HIRER LIABILITY

Redefine the coverage of workers' compensation laws and responsibilities to encompass those who work under agency arrangements, but require payment of premiums by those who hire them.

This is similar in part to option D but instead of placing the obligation on the agency to pay premiums, the obligation is on the entity who hires them. This is less satisfactory than D because it would often place the obligation onto individuals rather than the mostly larger businesses that are the platform agencies. This might not always be the case—for example, labour hire apps in the hospitality sector may end up placing people with large hotel chains for short gigs—but there will certainly be a higher proportion of households using platform apps as clients than as deploying them for use by others.

OPTION F: RELY ON DEEMING

Give the Minister (or other regulator) power to 'deem' certain classes of people to be 'workers' for workers' compensation legislation and/or certain classes of organisation to be 'employers' for such purposes.

This would not be a good way to deal with the problem of the platform economy. In effect, it passes the buck and promotes an ad hoc approach. It raises the possibility that the people who are deemed to be 'workers' or 'employers' may vary from Minister to Minister. Moreover, if this review cannot come up with a conceptually and legally sound approach, it is unlikely that a 'deeming' power would overcome this problem. Deeming would not solve the problem as to who pays the premiums for 'gig economy' workers.

This is not to say that there is no role for a deeming capacity at the margins—quite the opposite. Along with a power by regulation to exempt certain people or businesses, it can be useful for tidying up unanticipated consequences when legislative change is too slow. But it should not be the first resort.

The *Work Health and Safety Act 2011* has a provision that provides that a worker is a specified person and '*a person of a prescribed class*'.[149] The *Acts Interpretation Act 1954* defines 'prescribed' as 'prescribed by, or by a statutory rule made or in force under, the Act in which the word is used'. If

[149] Section 7

a provision allowing the Regulator to deem by notice a class of persons to be workers, the amendment would provide that the Regulator's notice is subordinate legislation. This would ensure that the Regulator's notice will be subject to review and disallowance by the Legislative Assembly.[150] This type of provision in the Act could, however, provide the Regulator with the potential to change the scope and coverage of Queensland's workers' compensation scheme and thereby breach the *Legislative Standards Act 1992*. Thus any deeming power would need to be drafted to ensure that it only acted at the margins and was able to be used for tidying up unanticipated consequences of the main legislation.

> *Recommendation 10.1: The coverage of the Act should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and specify that it applied where at least two parties were in Queensland at the time the work was undertaken.*

> *Recommendation 10.2: Intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income reported by the intermediaries or agencies.*

10.6 Associated issues

RETURN TO WORK

An additional consideration here, assuming option D is pursued, is how to handle not only the obligation for the agency to insure for workers' compensation with WorkCover (or to self-insure), but also how to handle all other obligations and responsibilities associated with an employer (for example, managing rehabilitation and return to work). Some (most?) agencies may not be equipped to take on responsibility to promote return to work. It would be unreasonable to expect them to uniformly take on that responsibility. That said, the same might be said at present regarding many small employers who have injured workers—they often would not have a spare position for a returning injured worker. Nonetheless, the practical difficulties of agencies guaranteeing paid work for returning workers are pretty high.

In the course of this review several stakeholders have discussed the merits of reinstating the former 'Return to Work Assist' program, previously run by Q-Comp, focusing on injured workers who had not been able to return to work by the time their claim had been closed. In chapter 6 the question of reinstating such a program is discussed, and instead an extension of insurer obligations requiring return to work is proposed. In such a context, 'gig economy' workers could adequately fit into a specialised RTW program provided by WorkCover (the insurer that would almost certainly cover

[150] in accordance with the Statutory Instruments Act 1992, Part 6 (Procedures after making of subordinate legislation)

them). The cost of administering such a program would automatically be incorporated into premiums paid by intermediaries.

> *Recommendation 10.3: The Regulator should have the capacity to exempt intermediaries or agents from the obligation to rehabilitate injured workers. This would normally be done unless the Regulator considered that the agent had the capacity to perform this role. In such circumstances, injured agency workers would immediately come within the scope of WorkCover's proposed extended return to work program, referred to in recommendation 6.5.*

AWARENESS

Once rights of coverage and responsibilities for premiums and rehabilitation are established, as per Option D above, it will be necessary to make both parties aware of the new arrangements. As previously mentioned, many gig workers are confused about or unaware of the compensation issues here, and many are likely to be ignorant of their rights and responsibilities even after changes are made. It will also be important to make platform firms aware of their responsibility to pay premiums.

A two-pronged approach seems suitable here. First the platform firms need to be identified and approached, and informed of their obligations. As part of the process of signing up Queensland workers to the platform, they should be also required to provide a simple information statement about workers compensation. This would not be difficult, as all potential workers would presumably supply their postcode, and the relevant app could easily be programmed to deliver such a statement.

That said, we cannot rely on that as the only source of information. Even if the platform companies could be relied upon to fully comply, many gig workers would pay no more attention to such information than most users pay to 'terms and conditions'. So, a second approach is also required. The information campaign should also target platform workers through the online environment. This would include user forums (many platforms have led to the creation of user forums) and targeted advertising through such mechanisms as Facebook and Google.

> *Recommendation 10.4: The Office of Industrial Relations and WorkCover should manage a two-pronged information campaign, designed to build awareness of new arrangements for 'gig economy' workers, making use of both the processes by which workers are signed up to platforms, and the online environment that they frequent.*

FEDERAL-STATE RELATIONS

The preceding discussion pointed in part to the limitations on state Parliaments' capacity to act when faced with national problems such as the changing nature of work. The harmonisation of WHS laws was able to deal with this problem, through a joint federal-state collaboration process that took

many years, and which led in effect to a widening of the definition of 'worker' to one that is broader than in workers' compensation legislation.

I do not propose here that the state government should wait until such a harmonisation of workers' compensation laws at the state and national levels can occur. The differences between the various jurisdictions are quite substantial and, unlike in WHS, there is little impetus for a harmonisation of workers' compensation laws. This is instead an issue, like labour hire, where one state can take a reform initiative that might eventually be adopted by others.

The issue of the changing nature of work and what it means for legal understanding of 'employment' is, however, one that fundamentally requires national attention, as it is only through legislation in the Commonwealth parliament that reform to regulation of the broader range of employment issues can occur. Even some aspects of the handling of workers' compensation reform might benefit from federal government involvement. Thus it would be highly desirable for the State to raise with counterparts in other states and in the federal jurisdiction the need for a thorough consideration of this issue of the implications of the changing nature of work for the definition and regulation of work. Here, a common understanding of the meaning of the term 'worker', as discussed in chapter 3, would be would be important.

It may be, in this context, that a broader definition of employee could be established, and this be used as the basis for extending the coverage of employment law. As mentioned in chapter 3, one option there would be to legislatively specify a simple test such as the 'ABC' test, referred to earlier,[151] as the basis for establishing the coverage of employment law. This would probably lead to most 'gig economy' workers doing work on-demand via apps being treated as employees under federal law, and it could readily be adopted in state jurisdictions for workers' compensation law. If such occurred, some gig economy workers would no longer be subject to the policy outlined under Option D, as they would be subject to the mainstream provisions covering employees. Even then, however, not all would be covered—for example Airtasker workers would still probably not be covered. Either way, the practical implications for Queensland gig economy workers in workers' compensation terms would not be great, as their coverage and the premiums paid by the companies would be similar under Option D above and under an extension of federal coverage via the ABC test or some other expanded definition of employment.

[151] see footnote 20 in chapter 3 and text in the associated paragraphs.

CHAPTER 11: DISPUTE RESOLUTION

11.1 Reviews of insurer decisions

The review process was introduced in 1997 to provide prompt and economical resolution of disputes. Workers and employers aggrieved by insurer decisions can apply to the Regulator to review a decision. The Regulator has 25 business days to make a review de cision. The review process is an administrative process – a review on the papers – rather than an adversarial or judicial process. The review process in most instances removes the need for a longer and more expensive adversarial court process. The review process has resulted in less than 10 per cent of disputes proceeding to an appeal to the Queensland Industrial Relations Commission or Industrial Magistrate. Approximately 40 per cent of review decisions are in favour of the aggrieved party.

The dispute rate of insurer claims and premiums decisions is low compared to other jurisdictions. Review applications decreased by 3.3 per cent in 2016-17, down from 2,917 in 2015-16 to 2,820. Disputation rates in other jurisdictions (e.g. South Australia) tend to be higher because purely no fault, long tail schemes allow claimants to question more decisions in the claims process, and tend to rely on mediation to resolve disputes in the first instance. The Queensland dispute process is faster than any other jurisdiction with more than 88 per cent of disputes resolved in three months. By comparison, New South Wales and Victoria resolve 33 per cent and 67 per cent of disputes respectively within the same timeframe.

No major concerns were raised by stakeholders in regard to the review process. ASIEQ noted that in recent times the durations for decision had increased. However, this finding appears to be a result of the proportion of complex reviews increasing (for example, reviews for psychological injuries have increased from 25 per cent of reviews in 2012-13 to 32 per cent of reviews in 2016-17) and a resourcing issue within the Regulator (which, I am advised, has since been addressed). As a result of internal changes within the review unit to respond to these issues, the average duration for finalised reviews has improved substantially. In 2016-17, the average duration to decision was 44.9 days and this dropped to 28.8 days as at 31 December 2017.

ASIEQ also requested the timeframe lodging a review be amended to 20 business days for consistency with the appeals process. However, these are very different beasts. The intention of the three-month timeframe is to provide sufficient time for the review applicant to gather evidence and provide the information required in a suitable format. Medical evidence (particularly from medical specialists) can often take considerable time to acquire. Rushing an application will no doubt lead to poorer quality applications, which may in fact have the unintended consequence of drawing out decision timeframes (which is also a concern for this stakeholder). For these reasons, no amendments are considered necessary to the review process.

11.2 Appeals of review decisions

Workers and employers who are aggrieved by the Regulator's review decision can appeal to the Queensland Industrial Relations Commission (QIRC), unless the decision relates to an employer's premium, in which case the Industrial Magistrate is the appeal body. An appeal is a hearing de novo, which means the Commissioner or Magistrate will hear both sides of the appeal and decide based on the facts and evidence presented during the hearing.

In 2016-17, 255 appeals were lodged with the QIRC. This is an increase of 9.9 per cent on 2015-16. Of these, six further appealed in the Industrial Court. In 2016-17, 78.9 per cent of appeals were

finalised before reaching the QIRC. Of these, 82.4 per cent of cases were withdrawn by the appellant and 17.6 per cent were settled or conceded.

The total number of cases determined by a court or commission decreased by 39 per cent, from 67 in 2015-16 to 41 in 2016-17. Of these, 31 cases (76 per cent) were dismissed or struck-out by the magistrate and 10 cases (24 per cent) were upheld in favour of the appellant.

SELF REPRESENTED APPELLANTS

One feature of recent times has been the increasing number of self-represented appellants. In 2014-15, self-represented appellants represented 22.6 per cent of appeals served. In 2017-18 (1 July to 31 December 2017), this proportion has more than doubled to 46.1 per cent of appeals served. Due to inexperience with judicial procedures, and at times concerns and impediments due to psychological injury, self-represented appeals take longer to conclude and are less likely to be found in favour of the appellant. In other words, the growth of self-represented appellants is against the interests of the appellants themselves as well as against the interests of the cost and efficiency of the system.

Up until 30 June 2017, self-represented appellants were able to access free assistance through LawRight (previously the Queensland Public Interest Law Clearing House: QPILCH). LawRight's QIRC Workers' Compensation Appeals Service was funded through a Commonwealth grant that was not renewed for 2017-18. Users of the service were provided assistance with preparing for court, detailing their facts and contentions in a logical and concise manner, and at times were provided legal representation at conference. By all accounts the service was well run and only offered to those who met the eligibility requirements. Since this service has folded, vulnerable workers without the funds for legal representation have no other option but to self-represent. Whilst the QIRC amends its process as much as it can to accommodate for self-represented appellants, there appears to be a gap in the accessibility to justice. Access to justice includes:

a) The ability of self-represented litigants to navigate the court process;
b) The ability of self-represented litigants to put forward the best possible case and present it in such a way that it is determined on the merits/not injured by a lack of representation;
c) The ability of self-represented parties to determine if litigation is the best way for them to resolve their dispute;
d) Achieving an outcome that resolves the dispute according to the relative rights of the parties; and
e) The perception of self-represented litigants that the legal system is fair and just.

This was not an expensive program. While it is unfortunate that the Commonwealth withdrew support, it would not be expensive for the Queensland government to reintroduce funding for this activity. I have not, in the time available, been able to identify how much money was involved, but it appears to be something equivalent to the annual cost of a salaried solicitor—that is, something between $0.1M and $0.2M. It is quite possible that some or all of this would be offset by reduced costs associated with running the appeals system. The details would need to be worked out. It is not just a matter of going back to the status quo ante; OIR, the QIRC and legal associations, would need to jointly work to devise a mechanism of support for self-represented appellants. However, the basic principle of reinstating funding for such an activity is fairly easy to accept.

Recommendation 11.1: Free assistance for self-represented appellants should be supported through grant funding from the Queensland government, broadly along the lines of the previous funding of LawRight's QIRC Workers' Compensation Appeals Service. OIR, the QIRC and legal associations, should work to devise a mechanism of support for such appellants.

EMPLOYER RIGHT TO APPEAR AT WORKER APPEAL

The Act does not provide an employer with the right to appear as a party when a worker appeals a review decision to the Queensland Industrial Relations Commission (QIRC). The Industrial Court decision of *Brisbane City Council v Gillow and Simon Blackwood (Workers' Compensation Regulator) [2016] ICQ 007* confirmed this. This means there is no avenue for an employer to become a party to a worker's appeal or appear directly before the QIRC to present evidence and submissions to support its position in relation to the claim. Instead, the Workers' Compensation Regulator is deemed by the Act to be the respondent to an appeal by a worker and is responsible for managing appeals and defending the review decision. While the effect of a decision to decline a worker's claim at review is a decision in the employer's favour, this does not mean that the Regulator represents the employer's interests in the appeal. The Regulator, as a model litigant, is responsible for upholding the objects of the Act and acting in the best interests of the scheme.

Some stakeholders (mainly those representing the interests of self-insured employers) have raised concerns about this, stating that there is an imbalance as a worker may be a party to an employer's appeal and also that if the Regulator makes the decision to concede the appeal, the employer does not have the right to pursue the appeal if it disagrees with that decision.

Despite the fact the employer does not have a right to become a party to a worker's appeal, the Regulator encourages employers to be involved in the appeal by providing information and documents, and access to relevant staff so they may provide statements and appear as witnesses. For this reason, it is unlikely to benefit proceedings to have the employer as a separate party and in fact, it may over-complicate the matter. Further, it may be unfairly detrimental to a worker, particularly where the worker has sustained a psychological injury, for the employer to become a party to the appeal. For these reasons I do not recommend any changes at this stage regarding an employer's ability to be party to an appeal. However, it would be appropriate for the Regulator to consult with the employer before any decision is made to concede an appeal, providing the employer with an opportunity to be heard by the Regulator before a decision is made. If the employer is unable to convince the Regulator, it is not likely to convince the QIRC, and particularly in cases of psychological or psychiatric injury it may compound the injury of the worker.

Recommendation 11.2: The Regulator should put in place procedures to require it to consult with the relevant employer before conceding an appeal in the QIRC.

11.3 Medical assessment tribunals

Medical assessment tribunals are independent panels of specialist doctors who, on referral from insurers, provide independent, expert medical decisions about injury and impairment sustained by workers. Decisions of tribunals are final and binding unless fresh medical evidence, not known about the worker at the time of the tribunal's decision, can be produced within 12 months of the decision.

In 2016-17, 2,803 cases were referred to a MAT. This is a 13.5 per cent decrease on the 3,242 cases referred in 2015-16. Of the cases heard in 2016-17, 59.7 per cent (1,443) were heard at a General Medical Assessment Tribunal (GMAT) – Psychiatric and a further 30.9 per cent (746) of cases were determined at an Orthopaedic Tribunal.

Referrals to the Medical Assessment Tribunals are resolved quickly. Bookings for Psychiatric, Orthopaedic, and Neurological Tribunals are held in under 30 days on average and 94 per cent of other hearings are within 50 days of a reference to tribunal.

SECOND CHANCE ASSESSMENT

The 2013 legislative amendments introduced a threshold of more than 5 per cent degree of permanent impairment (DPI) to apply to injured workers who wish to seek damages at common law, effective for injuries sustained on or after 15 October 2013. At the time it was identified that the threshold would increase pressure on Medical Assessment Tribunals (MAT) as workers close to the threshold would be incentivised to dispute their assessment.

To address this concern, an additional review mechanism was implemented to allow a worker who disagreed with the DPI assessment to have a second DPI calculated. Specifically, the worker now had the option of seeking a review by a different doctor agreed to by the worker and the insurer. Where the worker disputes this second assessment, the worker retains the ability to seek a review through the MATs. The decision of the MAT is final. Insurers are able to decline a request for a second assessment on the grounds that workers' nominated assessor is unsuitable or unqualified. However, given the legislation is intended as a beneficial provision, insurers are encouraged to make all reasonable attempts to reach an agreement with the worker.

Since the introduction of the second assessment, workers opting to undertake a second assessment has significantly reduced the number of referrals to a MAT. To date, approximately 2,200 less disputes have progressed to a MAT, a net saving to the scheme of approximately $3.3M. This is due to the cost of undertaking a second assessment with a doctor being considerably less than that at a MAT ($1,600 compared to $3,000 approximately, not considering travel or accommodation costs).

Some stakeholders have suggested that as the common law threshold has now been repealed, the second chance assessment has lost its utility and should be removed from the Act. Now, though, important considerations in the usefulness of the second assessment are the timeliness of resolving the dispute and the cost to the scheme.

At present, the average duration from the initial assessment to the second chance assessment is around 14 weeks (around three months) with a median time of around 11.7 weeks. By contrast, the average duration from the initial assessment and directly to the MAT assessment is around 16 weeks (almost four months) with a median time of around 12.5 weeks. On this aspect, the pathways are relatively similar. Those who have a second assessment still have the option to dispute the second assessment and proceed to a MAT, however few choose this path.

Given that the second assessment reduces scheme costs and results in slightly shorter dispute resolution times, I consider no changes are warranted to this provision at present.

SOLICITOR REPRESENTATION AT MAT

One stakeholder raised concerns about solicitors accompanying workers to the tribunal, stating that if workers are required to make final submissions to the Tribunal ten days prior to the hearing, then the need for the solicitor to be present is redundant. The right to legal representation is a fundamental legal right. This is reflected in the Act where, at section 511, it states that on reference to a tribunal, a worker is entitled to be heard before the tribunal in person or by the worker's representative. If a worker wishes to be represented by their legal representative at the Tribunal, or simply be accompanied by their legal representative, that is a matter for the worker. Given that a MAT is not a court, there seems to be no issue with the worker being legally represented or not. That is, the medical experts make their judgement based on medical evidence, not legal argument. The optional presence of the lawyer appears to be more for the psychological benefit of the client than to add any real element to decision-making. I recommend no changes in relation to a workers' right to legal representation at a MAT.

CHAPTER 12: CONCLUSIONS

As already stated, one thing that came out of the consultations with stakeholders was that, overall, they were happy with the broad operation of the scheme. They thought—as did I— that it was financially sound, involved low costs for employers, provided fair treatment for both employers and injured workers, and was not facing any crises. Most stakeholders had some improvements that they wanted to make to the system. Some proposed improvements that contradicted proposals from others. None, however, wanted to fundamentally overturn the operation of the system. The recommendations that come out of this report are broadly improvements at the margin, but will nonetheless make the system work considerably better. These include important recommendations in relation to: the management of psychological injuries; rehabilitation and return to work; prevention, education and compliance; and, importantly, workers in the platform economy. It is essential that the workers compensation system maintain pace with developments in the labour market and the economy. Some other matters require further consideration or research, including the experience rating of labour hire and host employers in labour hire situations; injury prevention and management programs for small and medium employers; early intervention programs; and the effects of safety bonuses. It is also important that some of the initiatives recommended in this report be evaluated properly in time for the next review.

Inevitably, given the availability of time and evidence, there are some more specialised or minor matters that may still concern some stakeholders and that I have not addressed in this report (and other matters, on which no action is recommended, might not appear in the executive summary). While this review has involved a substantial consultation process given the context, it is in the nature of policy making in this area in Queensland that consultation will continue.

One of the recurring themes I have encountered in this Review is the overlap between OHS and workers' compensation policy. In the end, a good workers' compensation scheme is one that leads to good OHS outcomes, and there are important information flows that need to happen from one system into the other. The balance in prevention, between education and enforcement, and the role of incentives in that, are key matters that intrude into both OHS and workers' compensation. People involved in workers' compensation want to do what they can to minimise injuries, to deal with the causes not just the symptoms that compensation systems handle. Yet the two are different, and it does not make sense for two or more agencies to be on the ground trying to deal, in perhaps duplicating or conflicting ways, with the same issues.

This overlap of issues means that, at some stage, there should be a review that looks at *both* OHS and workers' compensation issues. The obvious time to do that would be at the time of the next five-yearly review of the workers' compensation scheme. By then the harmonisation of OHS will be well and truly bedded down, as will the implementation of other matters such as the Lyons review of best practice in WHS administration. It will also be an opportunity to assess the implementation of the changes recommended through this review, and progress on or effects of some matters such broader coverage of the workers' compensation system and inter-jurisdictional cooperation. This would require at least two people, one to focus on the OHS side and one on the workers' compensation side, but with important opportunities for coordination in their assessment of the interrelated systems.

It does not follow that all future reviews should encompass both OHS and workers' compensation. Most would not. But every so often, it is necessary to look in detail at how both systems operate together.

Follow-up recommendation 12.1: The next five-yearly review should encompass both OHS and workers' compensation in Queensland.

APPENDIX 1 – SUMMARY OF KEY WORKERS' COMPENSATION SCHEME FEATURES

Jurisdiction[152]	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aust Gov
Fund type	**Managed fund**	**Central fund**	**Central fund**	**Private insurers**	**Central fund**	**Private insurers**	**Private insurers**	**Private insurers**	**Central fund**
Cover for journey claims	No[a]	No[b]	Yes	No	No[c]	No	Yes –limited[d]	Yes	No[e]
Common law available	Yes	Yes – limited	Yes	Yes	No	Yes	No	Yes	Yes –limited
Redemptions/settlements available	Yes	Yes – limited	Yes	Yes	Yes[f]	Yes	Yes	Yes	Yes – limited
Number of employees [g]	3 055 850	2 443 660	1 979 580	1 174 210	682 420	206 520	122 190	139 830	379 660
Number of self-insurers	58[h]	38	28	25	72 plus crown	10[i]	4	7	32[j]
Standardised average premium rate (per cent)	1.32	1.31	1.19	1.21	2.42	1.45	1.60	1.83	1.22
Funding ratio (per cent)	153	133	193	136	123	142	109	n/a	76
Disputation rate (per cent)	4.8	12.3	3.4	3.9	15.2	11.2	6.2	n/a	4.5
Current return to work rate (per cent)	87	82	80	84	81	81	75	n/a	90

a) Limited coverage continues for police officers, firefighters, paramedics, bushfire fighters, emergency services volunteers, and workers injured while working in or around coal mines. For all other workers injured on or after 19 June 2012 there must be a real and substantial connection between employments and the accident or incident out of which the personal injury arose.

b) Journey claims as a result of a transport accident are covered by the TAC in Victoria for injuries sustained to/from work. Journey injuries sustained in the course of work are compensable under the *Workplace Injury Rehabilitation and Compensation Act 2013*.

c) Journey claims are only covered in SA in limited circumstances – the journey must have been undertaken while carrying out work duties. Commutes between home and work are only compensable where there is a 'real and substantial connection' with employment.

d) Journey claims are not covered if the incident involves a motor vehicle. These are covered by the *Motor Accidents (Compensation) Amendment Act 2007*.

e) As of 13 April 2007, the SRC Act was amended to remove coverage for non-work related journeys and recess breaks; however on 7 December 2011 section 6 of the SRC Act was amended to reinstate ordinary recess claims.

f) A worker is only eligible if: (i) they have returned to work but are entitled to ≤ $30 pw, (ii) they are 55 years and have no current work capacity, or (iii) the Tribunal orders a redemption due to exceptional circumstances. Redemption can only be reached by agreement between the worker and WorkCover SA or self-insured employer.

g) Number of employees is supplied by the ABS using Labour Force Survey data as a base, with a number of adjustments applied to account for differences in coverage for some jurisdictions.

h) NSW licences 58 employers as self-insurers. NSW also licences 6 general insurers to provide insurance within specialised industries and an additional 167 government agencies deemed self-insurers covered by the Treasury Managed Fund which is centrally administered by the NSW Self-Insurance Corporation.

i) Not including the Tasmanian State Service.

j) As at 30 June 2015.

[152] Source: Comparative Performance Monitoring Report 18th edition

APPENDIX 2 – RECENT REVIEWS OF THE QUEENSLAND WORKERS' COMPENSATION SCHEME

2009 REVIEW

In 2007-08, WorkCover recorded an operating deficit of $381 million before tax, followed by an $894 million deficit before tax in 2008-09. These deficits were absorbed by investment reserves.

In 2009, the WorkCover Board commissioned a business review that identified the drivers of WorkCover's financial position as a combination of three factors:

- the increasing cost of claims, particularly a disproportionate increase in common law claims payments and the number of claims when compared to statutory claims payments and the number of claims;
- premium income not keeping pace with net claims growth; and
- two consecutive years of negative investment returns.

Following the release of a discussion paper, *Ensuring Sustainability and Fairness*, 60 submissions were received from scheme stakeholders. A series of stakeholder reference group meetings were also held. Following this process of consultation the government adopted a package of measures that resulted in:

- harmonisation with the *Civil Liability Act*
- increasing the onus of proof on workers to prove employer fault
- requiring third party contributors to participate in settlement negotiations
- clarifying that costs were potentially payable against plaintiffs whose cases were dismissed.

These amendments are outlined in more detail below.

Harmonisation with Civil Liability Act

The treatment of common law claims under the Act was brought more into line with claims under the *Civil Liability Act 2003* in terms of liability (standard of care), contributory negligence and caps on general damages (for pain and suffering) and damages for economic loss.

The adaptation of Civil Liability Act provisions on liability and contributory negligence resulted in workers suing under common law having to prove they took precautions against foreseeable and significant risks of harm, where a reasonable person in the position of the person would have taken the precautions. This did not mean the application of the doctrine of voluntary assumption of risk, because the courts have recognised that it is inappropriate in an employment context. However, obvious risks could be taken into account in determining the extent of contributory negligence on the part of an injured worker.

General damages were capped at $300,000 (indexed annually). General damages make up the smaller proportion of damages awards, and are relatively stable across different personal injury schemes. Awards of general damages of more than $300,000 are extremely unusual in workers' compensation matters. The Injury Scale Value (ISV) to determine general damages was also introduced.

Damages for economic loss were capped by limiting the basis for calculating loss of future earnings to three times the annual rate of Queensland Ordinary Time Earnings.

Increasing onus of proof on workers to prove employer fault

The 2008 judgment of the Queensland Court of Appeal in *Bourk v Power Serve Pty Ltd and Ors* [2008] QCA 225 affirmed that, if a worker is injured at work and there is a causal connection between the injury and work, the employer has breached its duty under the then *Workplace Health and Safety Act 1995*. The precedent set by this judgment led to increasing numbers of common law claims based on the argument that strict liability attached to an employer if a work injury had occurred, regardless of fault.

To reverse this interpretation, the *Workplace Health and Safety Act 1995* was amended in 2010 to provide that no provision of that Act created a civil cause of action based on a contravention of the provision. This exclusion has continued as part of the *Work Health and Safety Act 2011*.

Requiring third party contributors to participate in settlement negotiations

Contributors are parties that an employer or insurer considers may share liability for an injury, for example manufacturers, suppliers, designers and importers of plant. Previously, the obligations on contributors to participate in pre-court settlement conferences were not as strict as those imposed on the employer/insurer. A number of stakeholders reported that some contributors used this as a tactic to unnecessarily delay the settlement of claims.

Legislative amendments in 2010 aligned the obligations of contributors and employers/insurers with respect to exchanging relevant documents, providing a certificate of readiness and providing a written final offer to the party that has joined the contributor.

Costs against plaintiffs whose cases are dismissed

The Act previously allowed costs orders only where the court awarded more or less than a plaintiff's final written offer of damages. This had been interpreted by the courts to mean that if the claim was dismissed, no costs were payable by the plaintiff. A legislative amendment in 2010 allowed courts to make costs orders in these cases.

STRUCTURAL REVIEW OF INSTITUTIONAL AND WORKING ARRANGEMENTS

In submissions received following the *Ensuring sustainability and fairness* discussion paper that stakeholders expressed concerns about a lack of available information on scheme performance when compared with other workers' compensation jurisdictions. There were also concerns about clarity on the roles of Q-COMP, and WorkCover, as well as lawyers and the level of legal costs in the system.

A structural review of institutional and working arrangements in the scheme commenced in 2010. An independent reviewer, Mr Robin Stewart-Crompton, led the review. The review was supported by a stakeholder reference group comprising two employer representatives, two union representatives, two representatives of the legal profession, the chief executives of WorkCover and Q-COMP and the then Associate Director-General of the Department of Justice and Attorney-General, who chaired the group.

Mr Stewart-Crompton reported in late 2010. His review made 51 recommendations to improve these aspects of the scheme, all of which were, following a period of public comment, accepted for implementation.

Roles and functions in the workers' compensation scheme

The Review report recommended development of an overarching cross-agency strategy to enable more effective prevention of work-related injury and disease. It required WorkCover, Q-COMP and Workplace Health and Safety Queensland to work together, with each agency's strategic or business planning taking account of the overarching strategy. The strategy allowed agencies to develop, where appropriate, common or complementary goals, policies and initiatives including joint activities.

Transparency

To address stakeholder concerns on transparency, a group of recommendations proposed:

- improving the information flow about the scheme to persons affected by WorkCover's decisions;
- addressing gaps in the Regulator's (Q-COMP) powers;
- requiring all government departments and agencies to adopt best practice compliance with workplace health and safety and workers' compensation obligations; and
- requiring a review of the workers' compensation scheme every five years.

The requirement to conduct a review of the scheme every five years passed into legislation in 2011. With the exception of the remaining recommendations requiring legislative amendment (which were not implemented, as an election was called before the legislation could be enacted), other recommendations, such as regular actuarial presentations on claims trends and outstanding claims liability, were put in place.

Efficiency and effectiveness of claims managements

Another set of recommendations addressed perceptions of: WorkCover not adequately communicating with employers; insufficient investigation of claims; and unnecessary speed in settling common law claims. WorkCover published a new service charter incorporating the recommendations, and conducted regular stakeholder forums. WorkCover also established a Medical Advisory Panel. Senior specialists were appointed to this panel and became available to advise WorkCover claims staff.

Legal costs and management of the legal profession

Concerns were frequently raised that legal costs absorb too much of settlements or awards of damages. While the Review was not presented with evidence of any systematic abuses or direct evidence of inappropriate behaviour by legal practitioners, the report recommended periodic surveys by an impartial third party to determine how much of a settlement has been paid to the various parties, and that survey reports be made publicly available. Once this information was available, discussions should occur, if necessary, on options for managing legal costs. It also recommended further research to identify how the advertising of legal services affected claims for workers' compensation.

The scope of the survey recommended was subsequently determined by the then Government to involve significant cost and privacy issues and, consequently, it did not take place. While lawyer advertising went wider than workers' compensation matters, the *Legal Profession Act 2007* as well as the *Fair Trading Act 1989* and the *Competition and Consumer Act 2010* (Cwlth) imposed obligations on lawyers and prohibited advertising or activity that is false or misleading. Remaining concerns could be referred, it was believed, to the Legal Services Commission.

Rehabilitation and return to work

On the need for a greater focus on rehabilitation and return to work, the report emphasised:

- more emphasis on securing compliance with the statutory obligations of employers and workers;
- better linkages between the activities of WorkCover and the then Regulator, Q-COMP;
- better guidance material for all interested parties;
- better training and support for Rehabilitation and Return to Work Coordinators; and
- the adequacy of existing protections under the Act for injured workers who are dismissed from their employment.

With the exception of recommendations requiring legislative amendment (again, due to the election), most recommendations were implemented. These included the Q-COMP Regional Network Program, in which 10 regional representatives were appointed and 45 regional forums held in regional Queensland, with over 1,299 attendees. The program promoted better understanding of rehabilitation and return to work services. Q-COMP also appointed an experienced rehabilitation and insurance professional to review and revise best practice guidance material for any person with rehabilitation and return to work obligations or needs under the workers' compensation system.

WORKERS' COMPENSATION AND REHABILITATION AND OTHER LEGISLATION AMENDMENT ACT 2013

The *Workers' Compensation and Rehabilitation Act 2003* requires the responsible Minister to ensure a review is completed at least once every five years on the operation of the scheme.[153] On 7 June 2012, the then-Government referred the Parliament's Finance and Administration Committee to conduct the review, which they completed with a report and recommendations on 23 May 2013.

The consultation consisted of 246 written submissions, 18 public hearings, 5 briefings and 5 in-camera hearings. Among other things, the review identified the structure of Queensland's workers' compensation scheme as the most complex within Australia due to its three separate agencies.

The *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2013* passed Parliament on 17 October 2013. Included in the Act was a threshold for accessing damages at common law of more than 5 per cent permanent impairment. The onus of proof for compensation of psychiatric or psychological injuries was also increased (by inserting the words 'the major' in relation to causal factors of the injury), and work related impairment (WRI) was replaced by a degree of permanent impairment (DPI) as the measurement for determining statutory lump sum compensation.

Amendments were made to the requirements concerning rehabilitation appointments and return to work coordinators, and insurers became required to refer injured workers to a return to work program. The Amendment Act also provided access to the claim history of prospective workers for

[153] Section 584A

employers in certain circumstances, and removed a potential loophole associated with *Foster & Anor v Cameron* [2011] QCA 48.

The Act also merged the Workers' Compensation Regulatory Authority (Q-COMP) into the Office of Fair and Safe Work Queensland in the Department of Justice and Attorney General. The Workers' Compensation Regulator (in effect, OIR) replaced the Authority. WorkCover were to refer investigations and prosecutions for fraud-related offences to the Regulator, and the associated penalties increased.

WORKERS' COMPENSATION AND REHABILITATION AND OTHER LEGISLATION AMENDMENT ACT 2015

Prior to the election of the Palaszczuk Government, the Parliamentary Labor Party had established a stakeholder reference group to advise on how the Act was to be amended in reinstating common law rights for injured workers. The consultation process provided representation for employer, worker and legal representatives, WorkCover and the Association of Self-Insured Employers Queensland.

The Queensland Parliament passed the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2015* on 24 September 2015. It amended the *Workers' Compensation and Rehabilitation Act 2003* to remove the requirement for a permanent impairment of greater than 5 per cent for workers seeking access to common law. It removed thresholds for injuries sustained on or after 31 January 2015. Additional compensation in the form of lump sum benefits was provided for workers injured between 2013 and 30 January 2015 and affected by the operation of the common law threshold.

The Amendment Act also provided provisions for current and former firefighters diagnosed with one of the 12 specified cancers on or after 15 July 2015. Similar to those of other jurisdictions, the provisions deemed most injuries of full-time, part-time and active volunteer firefighters to be work related for the purposes of compensation.

The Amendment Act also removed the ability of prospective employers to obtain copies of a workers' compensation claims history from the Workers' Compensation Regulator, and streamlined regulatory processes by clarifying certain aspects of claim procedures.

WORKERS' COMPENSATION AND REHABILITATION (NATIONAL INJURY INSURANCE SCHEME) AMENDMENT ACT 2016

The National Injury Insurance Scheme (NIIS) was established to compliment the National Disability Insurance Scheme rollout by ensuring no-fault lifetime care and support arrangements for injuries relating to four streams. The streams concern injuries requiring medical treatment, those occurring in motor vehicles, in the workplace, and at home or in the community. The NIIS operates as a federation of Australia's state and territory insurance schemes. The Queensland Parliament passed the *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Act 2016* on 31 August 2016. The Amendment Act provided eligible injured workers in Queensland with statutory entitlements to lifetime treatment, care and support payments under the National Injury Insurance Scheme.

The Act also provided the opportunity for a worker to seek common law damages for the cost of treatment, care and support if their injury was caused by negligence. Workers' compensation

insurers will contract these services from the National Injury Insurance Agency for a user-pays model.

The Education, Tourism, Innovation and Small Business Parliamentary Committee conducted an inquiry to provide recommendations on how it to implement it in relation to Queensland's workers' compensation scheme.

The committee provided three recommendations, all of which were enacted. They were: that Queensland Treasury consult with stakeholders such as employers, insurers, unions, representative groups and service providers; that a parliamentary portfolio committee oversee the NIIS regarding workplace injuries and provide annual reviews and reports for its first five years of operation; and that participation in the WorkCover scheme be extended to host employers and principal contractors, and that these third parties gain the option of taking out or combining their coverage with a private insurance policy.

The Act also responded to the judgment made by the Supreme Court in *Byrne v People Resourcing (QLD) Pty Ltd & Anor* [2014] QSC 269. The judgement had encouraged principal contractors and other employers to use 'hold harmless' clauses, where they transferred any liability relating to injury costs to subcontractors. As a result, WorkCover had to indemnify a third party liability holder against an employer's policy irrespective of whether they had a contract of insurance.

In reversing the *Byrne v People Resourcing* judgement, the Act allowed WorkCover to contribute to a common law damages claim as a third party and prevent the transfer of liability from principal contractors or host employers to those with a workers' compensation insurance policy.

The Act allowed general insurers to issue financial guarantees for 150 per cent of estimated claims liability. It also clarified the period with which the Workers' Compensation Regulator must commence handling complaints relating to fraud. It changed methods of automatic indexation to prevent a reduction in the ABS estimate of average weekly earnings from leading to a reduction of weekly compensation and entitlement rates.

WORKERS' COMPENSATION AND REHABILITATION (COAL WORKERS' PNEUMOCONIOSIS) AND OTHER LEGISLATION AMENDMENT 2017

Following the re-identification of Coal Workers' Pneumoconiosis (CWP) in Queensland, Parliament established the Coal Workers' Pneumoconiosis Select Committee on 15 September 2016. CWP ('black lung') is a lung disease contracted through workplace exposure to coal dust over a period of time and is considered a latent onset injury under the workers' compensation scheme.

Evidence provided before the Select Committee raised concerns regarding how the workers' compensation scheme operated in relation to CWP. In December 2016 the Government established a CWP Stakeholder Reference Group consisting of representatives of employers, unions, the legal profession, insurers and departments relevant to coal mining to provide advice on gaps in the workers' compensation scheme.

The CWP Stakeholder Reference Group recommendations include:

- an interim medical examination for former coal workers concerned they have CWP, and who have retired or let the coal industry prior to 1 January 2017;
- ensuring workers with simple CWP who experience disease progression could apply to reopen their claim to access further benefits under the workers' compensation scheme;
- extra rehabilitation support to assist workers back into suitable alternative employment; and

- streamlining workers' compensation arrangements so they properly aligned with the Coal Mine Workers' Health Scheme.

The *Workers' Compensation and Rehabilitation (Coal Workers' Pneumoconiosis and Other Legislation Amendment 2017* (the CWP Amendment) implemented two recommendations of the CWP Stakeholder Reference Group. It amended the *Workers' Compensation and Rehabilitation Act 2003* to address concerns about former or retired coal workers not undergoing medical testing for CWP due to the high costs involved. The legislative changes also took account of how the nature of the common law system in Queensland had the potential to lead to injustice to workers with pneumoconiosis who experienced disease progression. This injustice was addressed by the provisions which allow re-opening of claims for pneumoconiosis to access further statutory compensation where a person experiences disease progression, but without permitting the re-opening of common law claims. The re-opening provisions provide a simple and expedient way for workers who suffer disease progression to re-open their workers' compensation claim and access a 'no fault' statutory lump sum top-up payment and keeps legal costs to a minimum.

The Act also introduced a lump sum compensation for workers with pneumoconiosis. This recognised the ongoing nature of pneumoconiosis injuries and ensures workers with CWP or another pneumoconiosis will have access to compensation for their injury, even in circumstances where they are not suffering any permanent impairment for work.

The amendments also addressed recent decisions of the Queensland Industrial Relations Commission to grant applications to stay a decision of the workers' compensation regulator following the review of a self-insurer's decision on a workers' compensation claim. The granting of these stays had resulted in injured workers being denied access to weekly compensation while the appeal is determined. The *Industrial Relations Act 2016* was amended to make it clear that a stay cannot be granted in an appeal against a decision to accept compensation.

APPENDIX 3 – JURISDICTIONAL COMPARISON OF COVERAGE

	Queensland	New South Wales	Victoria	Western Australia	South Australia
Definition of worker	A worker is an individual who works under a contract and, in relation to the work, is an employee for the purpose of assessment for PAYG withholding under the Taxation Administration Act 1953 (Cth), schedule 1, part 2-5. (s11, *Workers' Compensation and Rehabilitation Act 2003*).	A person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing). Certain exclusions apply — s4 and s4(1), 1998 Act. In addition, s5 of the 1998 Act provides that Schedule 1 of the 1998 Act deems outworkers, labour hire workers, some contractors and certain other classes of persons to be workers.	'worker means an individual — a) who: (i) performs work for an employer, or (ii) agrees with an employer to perform work – at the employer's direction, instruction or request, whether under a contract of employment (whether express, implied, oral or in writing) or otherwise; or who is deemed to be a worker under this Act;' — s3	Any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing. The meaning of worker also includes: a) any person to whose service any industrial award or industrial agreement applies, and b) any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services — s5(1)	A worker is: a) a person by whom work is done under a contract of service (whether or not as an employee) b) a person who is a worker by virtue of Schedule 1 c) a self-employed worker and includes a former worker and the legal personal representative of a deceased worker – s4 of the Return to Work Act 2014. Also see definition of 'contract of service' and Regulation 5 — 'Contract of service and other terms' and Regulation 69 – 'Volunteers' (prescribed under Schedule 1) For exclusions — s3(7) — regulations may exclude specified classes of workers and Regulation 6 — Exclusions.
Coverage of independent contractors	No, unless determined an employee using the ATO Decision Tool.	Not unless contractor is a deemed worker pursuant to schedule 1, Workplace Injury Management and Workers' compensation Act 1998.	Not unless the contractor is a deemed worker pursuant to clause 9 of schedule 1.	No, unless employed under contract for service and remunerated in substance for personal manual labour or service.	Yes, if covered by definitions in s4: • 'worker' which includes a person by whom work is one under a contract of service (whether or not as an employee). • 'contract of service' which includes if person undertakes prescribed work or work of a prescribed class. See also Regulation 5 and s4(7)
Coverage of labour hire workers	Yes, labour hire firm held to be employer.	Yes, labour hire firm held to be employer. Schedule 1, clause 2A, Workplace Injury Management and Workers' compensation Act 1998.	Yes, labour hire firm held to be employer (definition of 'worker' in s3.	Yes, labour hire firm held to be employer.	Yes, labour hire firm held to be employer — s4 (7)

	Queensland	New South Wales	Victoria	Western Australia	South Australia
Coverage for volunteers	Workers' compensation coverage may extend to the following volunteers if WorkCover has entered into a contract of insurance with the responsible authority/person/charitable institution/notfor-profit organisation: • particular persons under Disaster Management Act 2003 • volunteer fire fighter or volunteer fire warden • honorary ambulance officers • rural fire brigade member • person in voluntary or honorary position with religious, charitable or benevolent organisation • person in voluntary or honorary position with non-profit organisation, and • persons performing community service or unpaid duties.	• A person who voluntarily engages in any ambulance work with the consent of or under the authority and supervision of or in cooperation with the Health Administration Corporation constituted by the Health Administration Act 1982. Schedule 1, Workplace Injury Management and Workers' compensation Act 1998. • A person who voluntarily engages in fighting a bush fire in any fire district constituted under the Fire Brigades Act 1989 or is undergoing training for the purposes of fighting bush fires in those circumstances. Schedule 1, Workplace Injury Management and Workers' compensation Act 1998. • A person who meets the definition of volunteer contained under the Workers' compensation (Bush Fire, Emergency and Rescue Services) Act 1987 i.e. Rural Fire Service, State Emergency Service, Surf Life Saving, Volunteer Rescue Association and Marine Rescue Service.	Under certain Acts, volunteers assisting Government Agencies are entitled to compensation in accordance with the Workplace Injury Rehabilitation and Compensation Act 2013 if injured while carrying out specified duties. Volunteers covered include: • volunteer auxiliary workers, officers and volunteer members of the Country Fire Authority (Country Fire Authority Act 1956) • volunteers assisting police officers (Police Assistance Compensation Act 1968) • volunteer school workers or volunteer student workers (Education Training and Reform Act 2006) • jurors (Juries Act 2000) • volunteers in prisons and offenders working or participating in a program under a Correctional Order (Sentencing Act 1991 or Corrections Act 1986), and • registered and casual emergency workers (Victorian State Emergency Service Act 2005, Emergency Management Act 1986).	• No provision under the Workers' Compensation and Injury Management Act 1981. • Some volunteers are covered for personal injury under private insurance.	• Schedule 1 of the Return to Work 2014 establishes the Crown as the presumptive employer of volunteers as prescribed by the regulations. • Regulation 69 prescribes Country Fire Service volunteers and Marine Rescue and State Emergency Service volunteers

	Queensland	New South Wales	Victoria	Western Australia	South Australia
Deemed workers	Circumstances under the Act where a person may be deemed to be a worker: • sharefarmers — Schedule 2 (1.1) • salespersons — Schedule 2 (1.2) • contractors and workers of contractors — Schedule 2 (1.3). • workers lent or on hire (including labour hire firms and holding companies) — Schedule 2 (1.4 - 1.6)	Schedule 1 of the 1998 Act lists the twenty-one specific circumstances in which persons are deemed to be workers: 1. workers lent or on hire A. outworkers 2. other contractors A. contractors under labour hire services arrangements 3. rural work 4. timbergetters 5. salespersons, canvassers, collectors and others 6. tributers 7. mine employees 8. mines rescue personnel 9. jockeys and harness racing drivers 10. drivers of hire-vehicles or hire-vessels — contract of bailment 11. caddies and others employed through club 12. shearers' cooks and others 13. fire fighters in fire districts 14. workers at place of pick-up 15. boxers, wrestlers, referees and entertainers 16. voluntary ambulance workers 17. ministers of religion 18. ministers of religion covered by policies, and participants in training programs.	Circumstances under the Act where a person may be deemed to be a worker: • students under work experience and practical placement arrangements, apprentices, persons participating in declared training programs — Clauses 1 to 3 Schedule 1 • secretaries of cooperatives — Clause 4 Schedule 1 • door to door sellers — Clause 5 Schedule 1 • timber contractors — Clause 6 Schedule 1 • drivers of passenger vehicles — Clause 7 Schedule 1 • owner drivers carrying goods for reward — Clause 8 Schedule 1 • contractors — Clause 9 Schedule 1 • share farmers — Clause 12 Schedule 1 • declared workers of religious bodies and organizations — Clause 13 Schedule 1 • crown employees, Ministers, government members, judicial officers, bail justices, public corporation members, retired police reserve members — Clause 14 Schedule 1 • municipal councillors — Clause 15 Schedule 1 • persons engaged at places of pick-up for the purposes of being selected for work (e.g. fruit pickers) — Clause 16 Schedule 1 • jockeys and track riders, riders and drivers in mixed sports gatherings — Clauses 17 and 18 Schedule 1 • outworkers — Clause 19 Schedule 1	Circumstances under the Act where a person may be deemed to be a worker: • workers lent or let on hire — s5(1) • contract in substance for personal manual labour or service — s5(1) • workers under an industrial award or agreement — s5(1) • deceased worker — s5(1) • police officer — s5(1) (Who suffers an injury and dies as a result of that injury) • clergy — ss8, 9 and 10 • tributers — s7 • jockey — s11A • crown workers — s14(2) • certain persons deemed workers — s175AA, and • working directors — s10A. WorkCover WA guidance: Workers' compensation: A Guide for Employers	The definition of 'contract of service' in s4(1) of the *Return to Work Act 2014* includes: 'a contract, arrangement or understanding under which one person (the worker) works for another in prescribed work or work of a prescribed class'. Current classes of work prescribed under regulation 5 of the *Return to Work Regulations 2015*, include: • building work (other than wall or floor tilers) • cleaning work • council workers driving a motor vehicle used for the transporting goods or materials • driving a taxi cab or similar motor vehicle • driving or riding for fee or reward a vehicle, other than a commercial vehicle, for the purpose of transporting by road goods or materials (including money) where the driver or rider does not simultaneously own or operate more than 1 vehicle for work purposes • work as an entertainer • thoroughbred riding work where the work is performed by a licensed jockey • work as an outworker, and • work as a licensed jockey. Under s175(2) of the *Return to Work Act 2014*, the Corporation may also extend the application of the Act to self-employed persons.

APPENDIX 4 – JURISDICTIONAL COMPARISON OF ENTITLEMENTS

Jurisdiction	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aust Gov
Entitlements expressed as a percentage of pre-injury earnings for award wage earners									
0–13 weeks (total incapacity)	95 per cent (excl O/T)[b]	95 per cent	85 per cent of NWE[c] (or 100 per cent under industrial agreement)	100 per cent	100 per cent	100 per cent	100 per cent	100 per cent	100 per cent
14–26 weeks (total incapacity)	80 per cent (excl O/T)	80 per cent	85 per cent of NWE[c] (or 100 per cent under industrial agreement)	100 per cent (excl O/T and bonuses)	90 per cent	100 per cent	100 per cent	100 per cent	100 per cent
27–52 weeks (total incapacity)	80 per cent (excl O/T)	80 per cent	75 per cent NWE or 70 per cent QOTE[c]	100 per cent (excl O/T and bonuses)	80 per cent	90 per cent or 95 per cent[d]	75–90 per cent	65 per cent or Stat Floor	27–45 wks 100 per cent 46–52 wks 75 per cent[e]
53–104 weeks (total incapacity)	80 per cent (excl O/T)	80 per cent (excl O/T)	75 per cent NWE or 70 per cent QOTE[c]	100 per cent (excl O/T and bonuses)	80 per cent	53–78 weeks 90 per cent or 95 per cent[d], 79–104 weeks 80 per cent or 85 per cent[d]	75–90 per cent	65 per cent or Stat Floor	75 per cent[e]
104+ weeks (total incapacity)	80 per cent – (excl O/T, subject to work capacity test after 130 weeks or working 15+ hours and earning at least $173 per week and ceases at five years unless > 30 per cent WPI or 21 – 30 per cent WPI and no work capacity	80 per cent (excl O/T, subject to work capacity test after 130 weeks)	75 per cent NWE if > 15 per cent impairment, otherwise an amount equal to the single pension rate[c].	100 per cent (excl O/T and bonuses)	80 per cent (but income support only continues where the worker is assessed as being seriously injured with 30 per cent WPI or more)	80 per cent or 85 per cent[d][f]	75–90 per cent	65 per cent or Stat Floor	75 per cent[e]

a) Entitlement benefits in Victoria, WA, TAS, NT, ACT, and NZ do not include superannuation contributions. Compensation in the form of a superannuation contribution is payable in VIC after 52 weeks of weekly payments.
b) Maximum weekly payment is capped at $1974.00.
c) NWE – normal weekly earnings, QOTE – Original series amount of Queensland full-time adult persons Ordinary Time Earnings.
d) If there is medical evidence that the worker is unable to perform the worker's usual duties with the employer; and there is medical evidence that the worker is able to return to perform suitable alternative duties with the employer and the employer does not enable the worker to undertake suitable alternative duties as part of the worker's employment by the employer.
e) If the incapacitated employee is retired and receives an employer funded superannuation benefit, the SRC Scheme will pay a maximum of 70 per cent of NWE per week taking into account the weekly superannuation benefit or weekly equivalent of any lump sum amount received and the compensation amount.
f) But not exceeding: (i) 9 years from the date of the initial incapacity, if the worker's permanent impairment (if any), at a percentage of the whole person, is less than 15 per cent or is not assessed; or (ii) 12 years from the date of the initial incapacity, if the worker's permanent impairment, assessed at a percentage of the whole person, is 15 per cent or more but less than 20 per cent; or (iii) 20 years from the date of the initial incapacity, if the worker's permanent impairment, assessed at a percentage of the whole person, is between 20 per cent and 30 per cent; or (iv) the period extending from the date of the initial incapacity to the day on which the entitlement of the worker ceases in accordance with Section 87 of the *Workers Rehabilitation and Compensation Act 1988*, if the worker's permanent impairment, assessed at a percentage of the whole person, is 30 per cent or more.

Jurisdiction	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aust Gov
Lump sums– maximum	>75 per cent impairment: $220 000 (plus additional 5 per cent for back impairment [a]	$570 590	$307 385 permanent impairment + $348 210 gratuitous care	$212 980 + $159 735 in special circumstances [b]	$487 476 – lump sum for non-economic loss/$361 476 for economic loss	$336 581	$294 778 permanent impairment	$209 761 cpi indexed	$176 966.82 permanent impairment + $66 362.60 non-economic loss
Limits– medical and hospital	$50 000 or greater amount fixed by the Authority and published in the Gazette or directed by Workers' Compensation Commission [c]	52 weeks from cessation of weekly payments[d]	'Medical – reasonable expenses with regard to the injury. Hospital – 4 days (>4 days if reasonable)'	$63 894 + $50,000 in special circumstances	Up to 12 months from cessation of weekly payments for non-seriously injured workers. No limit applies to those who are seriously injured.	No limits but entitlements cease one year following the cessation of weekly benefits, or if not entitled to weekly benefits, one year following the date the claim is made	No limit	No limit	No limit
Death benefits (all jurisdictions pay funeral expenses to differing amounts)	$517 400 + $131.50pw for each dependant child	$570 590 (shared) + pre-injury earnings-related pensions to a maximum of $2130 pw for dependent partner/s and children	$575 765 + $15 390 to dep. spouse + $30 765 for each dep. family member under 16 or student + $113.80pw per child to spouse while children are under 6 yrs + $142.20pw per dep. child/family member while children/family members are under 16 yrs or a student	$291 969 + $55.80pw for each dependant child + max of $62 023 for medical expenses	$487 476 + 50 per cent of worker's NWE to totally dependent spouse + 25 per cent of worker's NWE to totally dependent orphaned child + 12.5 per cent of worker's NWE to totally dependent non-orphaned child	$336 581 +100 per cent weekly payment 0–26 weeks, 90 per cent weekly payment 27–78 weeks, 80 per cent weekly payment 79–104 weeks + $121.65pw for each dependant child	$368 472 plus $141.72 per week for each dependant child to max of 10 children	$209 761 cpi indexed + $69.92 cpi indexed per week for each dependant child	$504 449.16 lump sum + $11 267.70 funeral +$138.72pw for each dependant child

a) Workers exempt from the June 2012 legislative changes to the NSW workers' compensation system may also be entitled to pain and suffering lump sum compensation (max $50 000). Exempt workers include: police officers, paramedic and firefighters, workers injured while working in or around a coalmine, bushfire fighters and emergency service volunteers (Rural Fire Service, Surf Life Savers, SES volunteers) and people with a dust disease claim under the *Workers' Compensation (Dust Diseases) Act 1942*.

b) Lump sum shared under statutory formulae between spouse and children. Pension payable to partner for 3 years and to children until age of 16 (or 21 in full-time study).

c) Entitlements cease 52 weeks from cessation of weekly payments or claim for compensation is made if no payments for weekly compensation are payable. The 52 week limit does not apply to exempt workers or workers who meet the definition of seriously injured workers under section 32A of the 1987 Act.

d) Except for workers who receive pecuniary loss damages, receive a statutory voluntary settlement or meet statutory requirements for ongoing entitlement.

Source: Comparative Performance Monitoring Report 18th Edition

APPENDIX 5 – ORGANISATIONS INVITED TO PARTICIPATE AND/OR WHO MADE WRITTEN SUBMISSIONS

AgForce

Australian Medical Association Queensland

Association of Self-Insured Employers Queensland

Australasian Meat Industry Employees Union

Australian Industry Group (AiGroup)

Australian Lawyers Alliance

Australian Rehabilitation Providers Association

Australian Workers' Union

Bar Association of Queensland

Construction, Forestry, Maritime, Mining and Energy Union, Queensland & Northern Territory Branch

Chamber of Commerce and Industry Queensland

Department of Natural Resources, Mines and Energy

Housing Industry Association

Master Builders Queensland

Medical Assessment Tribunal (chairs)

National Retail Association

NECA

Occupational Therapy Australia

Queensland Council of Unions

Queensland Farmers Federation

Queensland Law Society

Queensland Nurses and Midwives Union

Queensland Resources Council

Royal Australian College of General Practitioners, Queensland Branch

Shop Distributive and Allied Employees Association, Queensland

Transport Workers Union

United Firefighters Union

WorkCover

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