Review of the Impact of the Workers Rehabilitation and Compensation (Scheme Review) Amendment Act 2008

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1. INTRODUCTION

In November 2006, the Board for the WorkCover Corporation submitted a report to the then Minister for Industrial Relations proposing a number of legislative changes to the *Workers Rehabilitation and Compensation Act 1986 (the Act).*

These changes were proposed with one of the aims being to reduce the unfunded liability of the Workers Compensation Fund. Many of the changes proposed were also designed to encourage the earliest possible return to work of injured workers and to align more closely the South Australian Scheme with schemes interstate, notably the performance of those of Victoria and/or New South Wales, the two States assessed as having similar schemes to those of South Australia.

In response to this report, the Minister commissioned an independent review of the WorkCover proposals. Mr Alan Clayton and Mr John Walsh, with professional support from the Department of the Premier and Cabinet, were retained to conduct that review.

The Clayton/Walsh review concentrated on the more significant of the proposals submitted by the WorkCover Board, recognising that a number of the changes proposed were of a technical nature (eg. updating terminology) and not fundamentally impacting on the Scheme.

In December 2007 the then Minister received the Clayton/Walsh report which essentially confirmed the general direction proposed by the WorkCover Board but put forward some variations to the Board's proposals.

The Terms of Reference for the Clayton/Walsh review required it to submit recommendations which would, in the opinion of the reviewers:

- reduce the unfunded liability to zero as soon as practicable
- reduce average annual employer levy rates to between 2.75% and 2.25% of total wages payments by 1 July 2009 (from the 3% existing at the time)
- ensure that injured workers should receive fair and equitable financial support that should be delivered efficiently and equitably and enable their earliest possible return to work.

The main areas of departure from the WorkCover proposals in the Clayton/Walsh recommendations were as follows:

- WorkCover had proposed that in the first 13 weeks following an injury, an injured worker be entitled to 95% of average weekly earnings as income maintenance with a further reduction to 75% after 13 weeks.

  Clayton/Walsh proposed that in the first 13 weeks following an injury, an injured worker receive 100% of average weekly earnings with a reduction to 80% after 13 weeks.

- WorkCover had proposed that an injured worker's average weekly earnings be 'capped' at $1190 per week.

  Clayton/Walsh did not support a cap.

- WorkCover had proposed that medical expenses for an injured worker not be paid beyond 12 months after the cessation of income maintenance.

  Clayton/Walsh did not support this proposal.

- WorkCover had proposed a change to the provisions relating to non-economic loss of an injured worker such that the assessment would use different guidelines based on whole of body impairment. Thresholds for physical impact (10% of functionality) and psychiatric impact (30% of functionality) were proposed with injured workers assessed as experiencing impact above the thresholds qualifying for a payment, but injured workers assessed as experiencing impact below the thresholds not qualifying for a payment. This proposal also included substantial increases to the quantum of payments for people who qualified with a large increase in the maximum amount payable.

  Clayton/Walsh supported the thrust of this proposal but recommended that the qualifying thresholds be 5% for physical impairment and 10% for psychiatric impairment.

- The WorkCover Board submission made only passing reference to the 'lump sum culture' in South Australia and made no reference to the need to restrict or eliminate lump sum payments (known as redemptions) in lieu of continued weekly payments for more seriously injured workers.

  Clayton/Walsh, however, paid specific attention to this 'culture' and proposed that the South Australian scheme be focussed more strongly on return to work than on lump sum payments.

Subsequently, the South Australian Cabinet, in its consideration of the Clayton/Walsh report, authorised the Parliamentary Counsel to produce a Bill amending *the Act*. That Bill was based on the original WorkCover Board submission but modified as per the recommendations in the Clayton/Walsh report.

The amending Bill, specifically titled *Workers Rehabilitation and Compensation (Scheme Review) Amendment Act 2008 (the Amendment Act)*, was introduced to the South Australian Parliament on 28 February 2008.

During the debate on *the Amendment Act*, the then Minister introduced further amendments. The main items in these further amendments were as follows:

- to further refine the step-downs such that the first step down (after 13 weeks) would be to 90% of average weekly earnings and the second step down (after 26 weeks) would be to 80% of average weekly earnings.
- to vary the thresholds for whole of body impairment under the non-economic loss provisions such that the 5% threshold for physical impairment remained but the provision related to psychiatric impairment was removed.
- to increase the notice periods to injured workers when a decision is made to reduce or discontinue weekly payments.
- to establish the role of the WorkCover Ombudsman in respect of reviewing decisions to discontinue an injured worker's weekly payments.
- to maintain the cap on levies at 7.5% of wages (compared with the original intention of increasing this cap to 15%).
- to remove the arbitration step from the dispute resolution process.

The outcome of Parliament's consideration of *the Amendment Act* was that it was assented to with only one amendment which originated in the Legislative Council.

That amendment which became Schedule 2 of *the Amendment Act* requires that:

> *(1) The Minister must, as soon as practicable after 31 December 2010, appoint an independent person to carry out a review concerning:*
>
> *(a) the impact of this Act on workers who have suffered compensable disabilities and been affected by the operation of this Act; and*
> *(b) the impact of this Act on levies paid by employers under Part 5 of the principal Act; and*
> *(c) the impact of this Act on the sufficiency of the Compensation Fund to meet the liabilities of the WorkCover Corporation of South Australia under the principal Act; and*
> *(d) such other matters as the Minister may determine.*
>
> *(2) The person appointed by the Minister under sub clause (1) must present to the Minister a report on the outcome of the review no later than 4 months following his or her appointment.*
>
> *(3) The Minister must, within 6 sitting days after receiving the report, have copies of the report laid before both Houses of Parliament.*

On 24 January 2011, the then Minister for Industrial Relations, the Hon P Holloway MLC, appointed Mr Bill Cossey AM and Mr Chris Latham (the reviewers) to conduct the review.

In approving the amendment which required the commissioning of the review, Parliament indicated that the Minister could have the review consider "*such other matters as the Minister may determine"*. The review received no request from either the Hon P Holloway MLC or the Ministers subsequently appointed to the Industrial Relations portfolio (the Hon B Finnigan MLC or the Hon P Conlon MP) to consider other matters.

This is the report of the review. The report includes extracts from the separate report prepared by Mr Latham of pwc on the financial implications of the 2008 amendments. That report in its entirety is included as Appendix Two to this report.

2. CONDUCT OF THE REVIEW

A review of this scope and complexity inevitably involves a number of phases. This review involved six main phases, viz:

1. The familiarisation with the legislative amendments by the reviewers (this phase included informal, introductory meetings with a number of key stakeholders).
2. A call for formal submissions, via public advertisements (It should be noted that Minister Holloway had, in January 2011, previously notified many of the key stakeholders of the commencement of the review and had invited submissions). 34 submissions were received and their authors are listed in Appendix One to this report.
3. All submissions were read and considered by the reviewers. Face to face meetings were arranged with 20 of the authors for the purpose of clarifying points and seeking further data where practicable.
4. The information provided via submissions and associated data requested by the reviewers was then analysed and cross referenced. Wherever possible, data to 31 December 2010 was used in the analysis.
5. An independent actuarial assessment was performed by Mr Chris Latham of the state of the Workers Compensation Fund. This assessment was based on the report provided by Finity, the WorkCover Corporation's actuary, in respect to the state of the Fund at 31 December 2010.
6. The results of the reviewers' analysis were then summarised in this report.

The review was guided by an informal steering committee comprising:

Mr Greg Mackie OAM	Deputy Chief Executive, Department of the Premier and Cabinet (until 31 March 2011)
Ms Alex Reid	A/Deputy Chief Executive, Department of the Premier and Cabinet (from 31 March 2011)
Mr Bill Cinnamond	Director, Public Sector Performance Commission, Department of the Premier and Cabinet
Mr Shane Webster	Executive Officer, Cultural Development, Department of the Premier and Cabinet

The review was ably assisted by Ms Samantha Fletcher, Executive Officer, WorkCover Review, Department of the Premier and Cabinet, who provided invaluable support in research, data analysis, and liaison with authors of submissions and in the preparation of this report. The reviewers acknowledge with great appreciation the assistance of Ms Fletcher and the guidance of the Steering Committee.

The reviewers also express their considerable gratitude to the many people and organisations who provided information and opinions to the review. Excellent cooperation existed throughout the review and the Chair and Chief Executive of the WorkCover Corporation are especially acknowledged for their continued responsiveness to questions and requests for increasing quantities of data.

Although all submissions were accepted and analysed by the reviewers, a number of submissions dealt with matters that were beyond the scope of this review because the legislative amendments did not deal with them. Such matters included:

- the performance of WorkCover's claims agent and the change from several claims agents to a single claims agent
- the performance of the vocational rehabilitation system as a whole
- restoration of Common Law rights
- the composition of the WorkCover Board
- the WorkCover Board's decision to discontinue the bonus/penalty scheme for levy payments as from 1 July 2010 (whilst acknowledging that a replacement system is being proposed).

With the approval of authors, all submissions, other than those of a personal nature are to be published on the review website. Readers of this report are encouraged to review the submissions. A full list of submissions received is included as Appendix One to this report.

The reviewers have generally made no comment on matters raised in submissions which in the reviewers' opinion were beyond the scope of the review. In certain cases, passing reference in this report has been made where a legislative amendment (or its implementation) has some connection to the matter.

Finally, the reviewers have noted that many of the submissions contain anecdotal references. Wherever possible, the reviewers have attempted to determine if hard data exists to indicate the extent of circumstances described in the anecdotal references. That has proven to be quite difficult in many areas.

3. TIMING OF THIS REVIEW

The introduction of the amendments to the Workers Rehabilitation and Compensation Act 2008 was accompanied by much comment and concern, as reflected by the parliamentary debate at the time.

Even whilst Parliament was considering the amendments, the then Minister varied several aspects of the Bill that were the subject of considerable community concern.

Taking these subsequent amendments into account, the Bill was passed by Parliament with only one other amendment, viz the requirement that the impact of the amendments on both injured workers and the Scheme's finances be reviewed as soon as possible after 31 December 2010.

It is apparent that Parliament, in supporting this amendment for the review to occur at this time (two and half years after *the Amendment Act* was assented to) anticipated that the implementation timeframe for the changes would be such as to enable trends to be well established.

In fact, the implementation timeframe has been as follows:

1 July 2008

- Changed approach to Average Weekly Earnings Calculations
- Reduction or Discontinuance of Weekly Payments including Step-downs and Changes to Continuance of Payments during Disputes
- Appointment of WorkCover Ombudsman

1 January 2009

- Appointment of Rehabilitation and Return to Work Coordinators
- Provisional Liability (note: the guidelines were amended on 1 July 2009. Section 5.9 of this report refers)
- Incentives for Early Reporting of Claims
- New Dispute Procedures

1 April 2009

- Introduction of Medical Panels
- Work Capacity Reviews
- Changes to Non-economic Loss Provisions
- Changed Schedule for Legal Costs

1 July 2009

- Restrictions to Redemptions for New Claims

1 July 2010

- Restrictions of Redemptions for Aged Claims

This has meant that the experience to 31 December 2010 has varied from a full two and a half years for some provisions, to six months for others.

This has made the assessment of the overall impact somewhat problematic particularly in the light of the firm advice in the Clayton/Walsh report that the legislative measures needed to be seen as a total package.

Furthermore, the full implementation of some key amendments has been affected (slowed down or reduced in application) by legal challenges. Key legal challenges which are still awaiting judicial determination by the South Australian Supreme Court are mostly in relation to the authority of medical panels, including their authority vis-à-vis that of the Workers Compensation Tribunal.

This has meant that the determination of clearly established trends has, in some cases, proven to be either difficult or impossible.

In addition, some key data which is essential to determining trends (once sufficient time from implementation has elapsed) are either not being routinely collected or are available only with considerable effort.

In the event that Parliament and/or the Government determines that a subsequent review with similar Terms of Reference to this one might be appropriate in due course, this review has identified in the various points of discussion in Section 5 of this report what it believes would be relevant data whose collection should commence as soon as possible to assist any such subsequent review. The reviewers also anticipate that this data will be of considerable value to the ongoing management of the Scheme irrespective of any subsequent, formal review.

4. EXECUTIVE SUMMARY

South Australia's workers rehabilitation and compensation system is complex. That complexity is reflected in *the Act*, which now runs to 124 Sections and 112 pages. Moreover, *the Act* has been amended a number of times since its original proclamation in 1986 – with each set of amendments adding to the complexity.

And yet, the basic objectives of *the Act* and the system resulting from *the Act* remain the same, and can be paraphrased as follows:

- to ensure that injured workers are treated fairly in terms of compensation and expenses
- to assist injured workers to return to work as expeditiously as possible considering the nature of their injuries
- to provide for fair and reasonable contributions by employers to support the system of compensation and rehabilitation
- to ensure that employers and injured workers meet their respective obligations in enabling the earliest practicable return to work of injured workers.

Fortunately, more than 90% of people who are injured at work incur very little by way of medical costs or experience significant time away from the workplace. The amendments to *the Act* in 2008 were not designed to impact on these injured workers and, by and large, have had no impact.

Rather, the amendments dealt with the circumstances of those more seriously injured workers – workers incurring large medical costs and experiencing large amounts of time unable, as a result of their injuries, to work at all or in a much reduced capacity.

The 2008 amendments to *the Act* made some fundamental changes to the system; changes which were intensely debated both inside and outside Parliament.

The implementation of all of the changes did not occur immediately and has taken place progressively from 1 July 2008 through to 1 July 2010.

In addition, legal challenges to several of the key new provisions (particularly related to the authority of medical panels) and which are yet to be finalised through the courts have created considerable uncertainty.

Therefore, it would be unwise to conclude that implementation of the 2008 amendments is complete. As a result it is not possible to draw any firm conclusions on the long term impact of the 2008 amendments.

That said, the reviewers have attempted throughout this report to assess whether there are emerging trends, albeit that such trends are based on limited experience, limited data and may or may not prevail in the longer term.

The Terms of Reference for the review require an assessment of the impact of the 2008 amendments on:

1. injured workers and return to work rates
2. employer levies
3. the financial health of the Workers Compensation Fund.

In respect of (1) above it appears that:

- there is some trend towards improved return to work rates of injured workers although not necessarily in return to full time work.
- the amendments have had little or no impact on the approximately 60% of injured workers who are able to return to work reasonably quickly (eg. within 13 weeks of the date of injury).
- one exception to the above is for the injured workers whose injuries are not assessed as severe but who previously may have qualified for a lump sum payment (averaging a few thousand dollars) for non-economic loss. Under the new system such people do not qualify for a payment; the short term impact of this was diluted somewhat by an abnormally high number of claims paid in the 12 months prior to the new provision being implemented on 1 April 2009.
- approximately 40% (4 061 people out of 10 108 people who received weekly payments of income maintenance) have experienced the first step down (a reduction of 10% in their weekly payments after 13 weeks). Just over 60% of the people affected by the first step down (2 574 in total) also have experienced the second step down (a further 10% reduction after 26 weeks). The distribution by income of people (both male and female) affected by the step-downs closely aligns with the total population of claimants by income of each gender group. However, this means that low paid female workers may well be impacted more severely, largely, it seems, because of the different income distribution between men and women.
- there has been a small reduction in the percentages of injured workers continuing to receive weekly payments after 52 weeks, but it is not possible yet to assess if this trend will be sustained.
- 644 injured workers who may have had an expectation that they would receive a long term maintenance of weekly payments because of their perceived incapacity to return to work have had their payments ceased because of a work capacity review at 130 weeks; 330 (51%) of these people have either lodged an objection to the assessment and/or made application for weekly payments to continue.

Further, the uncertainty which surrounds the status of some of the key changes because of legal challenges yet to be finalised has had a reported impact on injured workers to the extent that a system which is not particularly easy for all to comprehend is, at this point, even more difficult to comprehend.

The 2008 amendments, through provisional liability and rebates for employers lodging claims more quickly, have laid the foundation for the system to operate with a sense of urgency in assisting injured workers to return to work. Those particular provisions appear to have had moderate success although it is not yet apparent that the sense of urgency has flowed beyond the initial notification stages. This is crucial given the importance of the 130 week work capacity review process now in place.

The introduction of medical panels was a key feature of the 2008 amendments but their impact has not been fully tested. Legal challenges to their authority in relation to that of the Workers Compensational Tribunal have impacted greatly as have issues of process in the referral of matters to the panels. These challenges are yet to be finalised. The uncertainty is currently being felt by the high level of cancellation of appointments by injured workers. That said, Medical Panels SA has been established and medical panels have, in the 21 months of operation to December 2010, issued 888 opinions (an average of 42 per month compared with its notional capacity of 100 per month).

South Australia has a history of high levels of disputation. The number of disputes has been gradually reducing over a ten year period and there are encouraging signs that the level of disputes is continuing to reduce although this trend is not firmly established.

In addition, the trend towards resolving more disputes at the conciliation stage is continuing which is a positive development. However, uncertainty and complexity in relation to the law and other factors seem to be impacting on the speed with which matters are able to be completed by the Workers Compensation Tribunal (the Tribunal). There is a slight trend towards faster resolution for matters resolved at conciliation but no overall trend towards earlier resolutions is yet apparent.

The WorkCover Ombudsman has been favourably reported on in submissions to the review and the review strongly endorses that support for the work of the Ombudsman. Over time, the Ombudsman's influence in identifying systemic issues may well lead to further reductions in the level of disputes.

In respect of the impact of the 2008 amendments on levies paid by employers, WorkCover's actuaries have assessed there to be no material difference yet to be seen between the hindsight levy rates before and after the implementation of the amendments. The actuaries have taken this position based on the fact that not all amendments have been fully implemented and therefore, their sustainability has not yet been clearly demonstrated.

The pwc assessment as part of the review regards this as a sensible conclusion.

Regarding the overall impacts on the Workers Compensation Fund, there has been a short term positive impact on the financial health of the Fund. That impact has been assessed by the actuarial component of this review as being $450 million, of which $70 million is attributed to the impact of the legislative change (notably work capacity reviews) and $380 million to the large number of claims finalised through lump sum payments (known as redemptions) in the two years prior to 30 June 2010.

It can also be reported that the funding level of the scheme has increased from 61% at 30 June 2008 to 66% at 31 December 2010.

The longer term impact is difficult to forecast because:

- via a WorkCover policy position in support of directions proposed by Clayton/Walsh, redemptions are no longer available.
- continuing positive impacts on the Workers Compensation Fund will largely depend on the extent to which work capacity reviews at 130 weeks continue to result in significant numbers of discontinuances of weekly payments of income maintenance. The outcome of legal challenges to the authority of medical panels will be crucial in this regard.

On the basis that no firm conclusions can be drawn at this time, Parliament or the Government may wish to consider a further review at an appropriate time in the future. The timing of any such review should, of necessity, await the full implementation of whatever changes (if any) to practice, if not legislation, are required to respond to the conclusion of those matters currently awaiting judicial determination.

5. IMPACTS OF THE AMENDMENTS

5.1 Overview

In introducing the amendments to Parliament in 2008, the then Minister for Industrial Relations emphasised several key messages that were highlighted in both the initial 2006 report by the WorkCover Board to the Government and the subsequent Clayton/Walsh report. These key messages were as follows:

1) The focus (for WorkCover and employers) needs to be on assisting injured workers to return to work (an addition to the objects of *the Act* was made in 2008 to this effect).
2) Return to work objectives are enabled by the earliest possible application of the various assistance measures available to injured workers.
3) Early return to work objectives are not encouraged by maintenance of 100% of weekly earnings throughout the first year after an injury has occurred.
4) A culture ascribed to the South Australian scheme of being more associated with lump sum payments (known as redemptions) needs to be replaced with a return to work culture so redemptions need to be available only in the most extreme cases for injured workers. (Note; this was a focus of the Clayton/Walsh report not of the 2006 WorkCover Board report)
5) As a second component to addressing the lump sum culture, lump sum payments for non-economic loss should be more favourable to the most severely injured workers but not available at all to workers whose injuries are assessed at the extreme lower end of the scale.
6) Injured workers are entitled to a greater degree of certainty as to their capacity to return to work though speedier and more objective processes of medical assessment.
7) The financial sustainability of the Workers Compensation Fund needs to be improved and in particular the level of the unfunded liability needs to be reduced.
8) South Australian employers should not be put at a competitive disadvantage relative to interstate employers by continuing levy rates which are significantly higher than those interstate.

As referred to earlier, the amendments were described as a package. That is, they were described as needing to be seen in their totality and the Clayton/Walsh report went to considerable lengths to emphasise that varying any one of the proposed amendments could substantially weaken the expected overall impact.

In the sections of this report that follow each of the main changes to the legislation affecting the operation of the scheme is referenced. For each of the changes the report covers:

- Understood intention of the amendments

- Summary of views expressed in submissions to the review (both favourable and unfavourable)
- Data available to the review
- Reviewers' conclusion

It is pointed out that along with the major amendments referenced below, *the Amendment Act* introduced a number of 'technical' changes which are not particularly relevant to the purpose of this review and are not commented on in this report. An example is the change in terminology relating to the self insured employers (previously referred to in t*he Act* as exempt employers).

The Amendment Act also introduced a number of changes, which, whilst they impacted on some aspects of the rights of injured workers, attracted no (or minimal) comment in submissions to the review or in the follow up discussions with submission authors. The main items are as follows (and are not commented upon further in this report):

• Section 7:	Rehabilitation and Return to Work Plan to be prepared after 13 weeks
• Section 30:	Employment to include attendance at a place for the purposes of a Rehabilitation and Return to Work Plan
• Section 32:	Scale of Medical and Related Costs to be published by the Minister – not prescribed by Regulation
• Sections 33 and 34	Indexing of recovery amounts of transportation costs and costs associated with property damage
• Section 37	Review of average weekly earnings if there has been a change in any component of the worker's remuneration
• Section 44 and 44	Change to compensation payable on death

5.2 Part 2 – Section 4: Average Weekly Earnings

The new provision which was implemented on 1 July 2008 changed the basis of calculation of an injured worker's average weekly earnings from:

- a prospective approach (ie what the worker could be expected to earn if the worker was able to work), to
- a retrospective approach (ie based on the worker's actual earnings for the previous 12 months). Overtime is able to be included unless there is no prospect of overtime being available.

The legislation also provided guidance as to how average weekly earnings should be assessed for workers who, in the previous 12 months had, significantly changed their pattern of working including changing from casual or seasonal employment to permanent employment.

Ultimately, the legislation indicated that if because of the shortness of the period of a worker's employment or for any other reason, it was not possible to determine a fair calculation of average weekly earnings, the calculation should be based on the average weekly earnings of other persons in the same employment doing similar work with the same employer.

Should this not be possible because there are no other workers doing similar work, the legislation provides that the amount can be based on the payments made for similar work with another employer(s).

5.2.1 Intention of the Amendments

The stated intention of the amendments to the calculation method was to simplify the calculation of an injured worker's average weekly earnings and as a consequence to provide greater certainty to the injured worker and reduce the number of disputes before the Tribunal relating to this calculation.

5.2.2 Summary of Views Expressed in Submissions

The views were mixed, generally according to the variable nature of employment in the various industry sectors.

The industries for which the change has proved more problematic are those with irregular work patterns including highly variable levels of overtime and significant seasonality factors.

Ten submissions made direct comment about this set of amendments. Three of these were generally supportive and seven generally not supportive.

Those who were most supportive expressed their support with comments such as:

- injured workers have been generally accepting of the amendments, with the inclusion of overtime in the calculation being "*favourably received*".
- anecdotal evidence that disputes over the weekly earnings have decreased.
- the change being positive for both workers and employers.

Those who were least supportive expressed their dissatisfaction with comments such as:

- the amendment has not achieved its outcome of simplifying the calculation of average weekly earnings, and that some employers were finding it complex and on occasions resulting in '"*bizarre outcomes*"
- some injured workers were "*worse off*" under the new calculation and received less weekly earnings than pre-injury.

- the new calculation could "*produce a greater number of unfair outcomes*" and used a hypothetical example of a worker taking unpaid leave for six months in the year preceding the date of the injury
- the use of this method has made average weekly earnings "*generous when compared to other state jurisdictions*" and "*acts as a "brake on return to work as there is no positive incentive to return to work*".

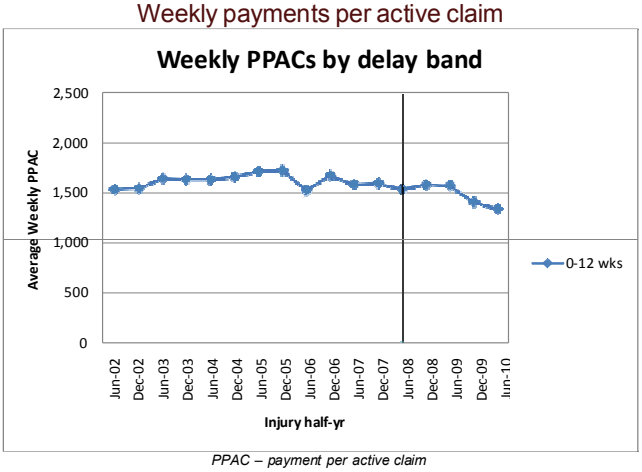
5.2.3 *Data available to the Review*

The review has analysed two sets of data associated with average weekly earnings.

The first assessment relates to whether, in overall terms, the revised method of calculation has changed (positively or negatively) the average weekly earnings quantum taking account of average wage movements over a time period.

The following chart shows the average payment per active claim (PPAC) in December 2010 values in the first 13 weeks of payments (which are 100% of earnings in each case), before and after 1 July 2008.

Weekly payments per active claim



PPAC – payment per active claim

The sequence above shows no material change immediately after the change was effected in July 2008.

However it shows a distinct reduction in the December 2009 and June 2010 half-year periods. This was not expected and may be due to data dislocation caused by delays in reimbursements to employers from the introduction of a new form.

Certainly there is no evidence that the change has caused an increase in the amounts of average weekly earnings for compensation purposes.

There will always be variations between injury periods, as the distributions of earnings of injured workers can vary.

There is no evidence of adverse cost consequences from the introduction of this change.

In respect of disputes for scheme employers before the Tribunal related to average weekly earnings, the trend information is as follows:

	Year				
	2006	**2007**	**2008**	**2009**	**2010**
Dispute Numbers	223	429	329	231	234
Disputes on Average Weekly Earnings as a % of all Disputes	10.8	15.6	10.9	11.1	11.1

These numbers show a return to 2006 levels in the past two years after increases in 2007 and 2008. Moreover, as a percentage of all disputes, the incidence of disputes relating to the calculation of average weekly earnings has been quite stable apart from a spike in 2007.

This largely correlates with the anecdotal information provided by submissions to the review.

5.2.4 Reviewers' Conclusion

The conclusion of the review is that the amendment to the basis of calculation of average weekly earnings has been moderately effective in achieving a simpler and more easily understood approach to this calculation.

The wording of the Section acknowledges that there may be numerous exceptional circumstances in employment arrangements and attempts to deal with them. Continuing attention by WorkCover to these exceptional circumstances should assist in achieving greater certainty over time. In particular, the review has noted a desire by some stakeholders that there be more clarity about the words "*or for any other reason*" in Section 4(6) of *the Act* (the Section which in part deals with exceptional circumstances)

Current management literature foreshadows significant changes in employment arrangements as both employers and workers pursue more workplace flexibility. These changes may well add further to the exceptional circumstances and should be monitored closely with the possibility of updated WorkCover guidelines from time to time in order that the intent of the legislation remains sufficiently current.

5.3 Part 2 – Section 28D: Rehabilitation and Return to Work Coordinators

The legislative provision which was implemented on 1 January 2009 requires that all employers must designate an employee as a Rehabilitation and Return to Work Coordinator.

The person so designated may undertake these duties on a part-time basis (eg. as an extension of their current role), and employers must ensure that coordinators undertake training as prescribed by WorkCover.

The legislation provides that WorkCover may exempt certain employers from the requirement to appoint a Rehabilitation and Return to Work Coordinator and accordingly WorkCover has exempted all employers employing less than 30 people. WorkCover has also prescribed that employers who are required to comply with this legislation may share a coordinator.

5.3.1 Intention of the Amendments

The intention of this requirement is to ensure a high level of engagement between the injured worker and the employer (and the workplace) in enabling the injured worker to return to the workplace as quickly and as expeditiously as possible.

A key part of this role is the expectation that the coordinator will oversee the preparation of a sound return to work plan for each injured worker and ensure that assistance to the injured worker via professional support is well coordinated.

This initiative is understood to have been modelled on reported successful practices amongst self insured employers.

5.3.2 Summary of Views Expressed in Submissions

Submissions generally supported this concept in principle, but were reserved in their conclusions about the effectiveness of the coordinators. WorkCover reported that there had been a high degree of compliance with the requirement to appoint and train coordinators.

Reservations expressed related mainly to the relatively low threshold (30 employees) and the low likelihood of small employers experiencing sufficient numbers of claims to justify the cost of a coordinator (even a part-time coordinator) and the extent of training required. This was amplified by the self insured employers who expressed some frustration that prior experience of key staff in their organisations in performing similar duties as those now prescribed for coordinators was not recognised by WorkCover in the training required of them.

Nine submissions made comment on this addition to the legislation

Two submissions were mainly positive with comments such as:

- the introduction of Return to Work Coordinators has had a positive impact and that anecdotal evidence suggests that they may also be having an effect on the lost time injury rate.

Seven submissions were mainly negative with comments such as

- impact of this amendment has been to "*increase costs for employers*" relating to the "*training and development of coordinators*" and "*loss of production*"

- whilst Return to Work Coordinators is a positive step, there is a concern they are "*replacing the role of Workplace Rehabilitation Consultants*" and "*offering much less stringent standards of professional qualifications and an absence of scrutiny of practice or quality controls*."
- employers with just over the 30 employees may not experience a claim requiring management for a number of years, therefore the "*value of the training deteriorates or is lost*"
- at the introduction of Return to Work Coordinators, the skills of current qualified in-house rehabilitation coordinators were not recognised and this has resulted in a duplication of training.
- the person appointed to the role of Return to Work Coordinator is at the discretion of the employer, which results in a perception of non-impartiality and lack of assurance that the person appointed is able to remain neutral in the role.
- current training and skills maintenance of Return to Work Coordinators is inadequate and could be improved.

5.3.3 Data available to the Review

The WorkCover submission indicated that as at 31 December 2010, 2 374 employers have met the requirement to have a Rehabilitation and Return to Work Coordinator, with approximately 2 692 coordinators being appointed and accredited (some employers have more than one coordinator to perform the role). There is a high level of compliance with this requirement.

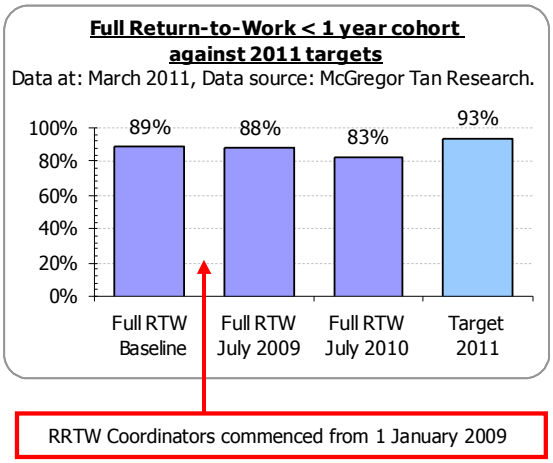
In respect of the reservation expressed above regarding the likelihood that Rehabilitation and Return to Work Coordinators may have little opportunity to use their skills because of small (or no) claim numbers, the review has been provided with data which suggests a slightly different picture shown below:

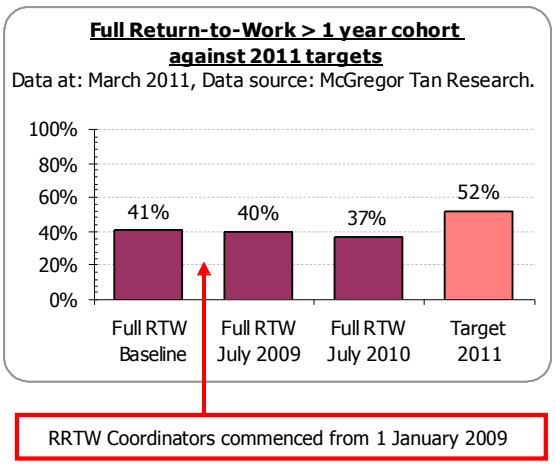
Calendar Year	Total no. of employers*	No. of employers with at least one claim	Proportion of employers with at least one claim
2007	2,401	1,656	69%
2008	2,489	1,663	67%
2009	2,509	1,631	65%
2010	2,430	1,587	65%

* Note that total number of employers differs slightly from the figure of 2 374 referred to above as for this table, employers with total wages and salaries of $1.5m per annum has been used as a reasonable proxy for an employer with 30 or more employees.

Ultimately, the effectiveness of Rehabilitation and Return to Work Coordinators, along with other provisions, will be assessed by the overall improvement in the rates of return to work of injured workers.

To 31 December 2010 the full return to work figures within and beyond one year of injury have not improved as shown in the tables below supplied by WorkCover.





A slightly more positive set of figures for South Australia taken from the Campbell Research and Consulting Australian and New Zealand Return to Work Monitor shows the following results:

	Year		
	07/08	**08/09**	**09/10**
Return to Work Rate	75%	82%	80%
Durable Return to Work Rate	64%	71%	72%

This report is based on a survey of approximately 400 injured South Australian workers who received income maintenance payments for 10 or more days.

In due course, an additional indicator of the effectiveness of the Rehabilitation and Return to Work Coordinators will be the extent of

the 'detachment' of injured workers from their pre-injury employer pursuant to Section 58B of *the Act*.

This is dealt with further in 5.10 below.

5.3.4 Reviewers' Conclusion

Only a relatively small percentage (approximately 5%) of South Australia's employers meet the threshold of 30 employees above which the requirement to appoint a Coordinator commences.

Clearly, it will take some time before the overall cohort of employers experience enough claims for an assessment of their effectiveness to be conclusive.

In other words, until a greater proportion of the trained coordinators have been able to apply their training through sufficient numbers of active claims, their overall effectiveness will not be able to be assessed fully.

That represents another challenge for the scheme in that the elapsed time between claims for many smaller employers may well exceed the average appointment period for a coordinator – leading to a continual training obligation without necessarily having much opportunity to apply the training.

That said the conclusion of the reviewers is that the concept of Rehabilitation and Return to Work Coordinators has merit and WorkCover may wish to consider modifications in due course to the training requirements for coordinators where these appointees can demonstrate relevant prior experience.

There has been speculation during the review that the threshold number of employees for this requirement might be reduced from 30 to 20. The reviewers understand that WorkCover is not currently proposing such reduction and doubt the wisdom of any such reduction given the even lower likelihood of smaller employers experiencing significant claims incidence.

In Section 5.10 of this report, reference is made to the very high number of submissions to this review referring to the ineffectiveness of the vocational rehabilitation system. No further comment is made at this point other than to suggest that much of the criticism, if substantiated, does not seem to relate to this legislative amendment.

5.4 Section 35: Section 35 – Preliminary
Section 35A – Step-downs

The amendments to the provisions relating to step-downs were implemented on 1 July 2008.

The amendment defined three periods of entitlement to payments of weekly wages for injured workers following the workplace injury, viz:

- the first entitlement period not exceeding 13 weeks (whether consecutive or not) in which a worker has an incapacity for work and is entitled to compensation
- the second entitlement period which follows the first entitlement period and which has a duration not exceeding 13 weeks (whether consecutive or not)
- the third entitlement period which follows the second entitlement period and which has a duration not exceeding 104 weeks (whether consecutive or not)

Further, these amendments prescribed the percentage of average weekly earnings to which an injured worker is entitled during each of the three periods of entitlement viz:

- in the first entitlement period (of up to 13 weeks) 100% of average weekly earnings
- in the second entitlement period (of up to a further 13 weeks) 90% of average weekly earnings
- in the third entitlement period (after 26 weeks) 80% of average weekly earnings.

This represented a significant amendment in that previously an injured worker had been entitled to 100% of average weekly earnings for the first 52 weeks and 80% thereafter.

In addition, Section 35B (4) and Section 35C prescribe that an injured worker who is assessed at the end of the third entitlement period as having a current work capacity will not be entitled to a continuation of weekly payments. The determination of an injured worker's current work capacity is prescribed in Section 35C as requiring an opinion by a medical panel including a specification of the "*further or additional employment or work the worker is capable of undertaking."* The amendments related to work capacity reviews were implemented on 1 April 2009 and are more fully discussed in Section 5.5 of this report.

5.4.1 Intention of the Amendments

Consistent with the rationale for other amendments relating to provisional liability and early lodgement of claims (to be discussed in Section 5.9 below), these amendments were proposed as encouraging injured workers to return to work as early as possible. Although most injured workers receiving weekly payments of income maintenance return to work well before the point at which there is a reduction in entitlement (13 weeks), the rationale put forward at the time of the amendments was that some injured workers needed an 'incentive' to do so. The 'incentive' was the prospect of reduced income.

Furthermore, the step-downs were proposed as being more aligned with approaches taken in Victoria and New South Wales.

The provision relating to the discontinuance of weekly payments for an injured worker after 130 weeks where a medical panel has assessed the worker as having a current work capacity extends that 'incentive'.

5.4.2 Summary of Views Expressed in Submissions

12 submissions made direct comment about this set of amendments, two of these were generally supportive and ten were generally not supportive.

Those who were most supportive expressed their support with comments such as:

- the amendment to step-downs found the balance between "*income support and return to work incentives for injured workers*".
- the amendment is an "*important part of bringing the South Australian Scheme back towards a nationally competitive position*"

Those who were least supportive expressed their dissatisfaction with comments such as:

- changes to entitlements have had a major negative impact on injured workers, including placing them under great strain and financial hardship.
- anecdotal evidence suggests that the impact of these step-downs is most keenly felt by those injured workers in the low wage bracket, and of these, predominantly female.
- the step down approach may impact "*heavily on a worker with a legitimate long term and significant disability that prevents any early return to work*"
- the notion that step-downs provide a motivation to return to work remains a "*highly contested and controversial issue*".
- what is considered as a week under the current amendment has resulted in situations where an injured worker may only be receiving payment for a few hours a week, however, this is included as a full week in the entitlement period. A fairer option would be to calculate the first two entitlement periods according to "*whether the worker has received the equivalent of 13 weeks of average weekly earnings*".

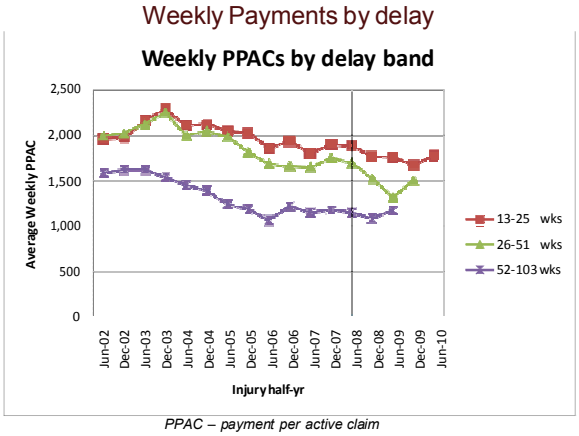
5.4.3 Data available to the Review

The step down provisions were implemented on 1 July 2008 so a reasonable time has elapsed for which an analysis has been possible.

The data supplied by WorkCover suggests that since these provisions were implemented:

- There have been 10 108 claims resulting in weekly payments to injured workers. Of these injured workers 4 061 have been affected by the first step down to 90% of average weekly earnings.
- Of the 4 061 injured workers affected by the first step down, 2 574 have been affected by the second step down to 80% of average weekly earnings.

The following chart shows the average payment per active claim (PPAC) in the periods after 13 weeks from injury.



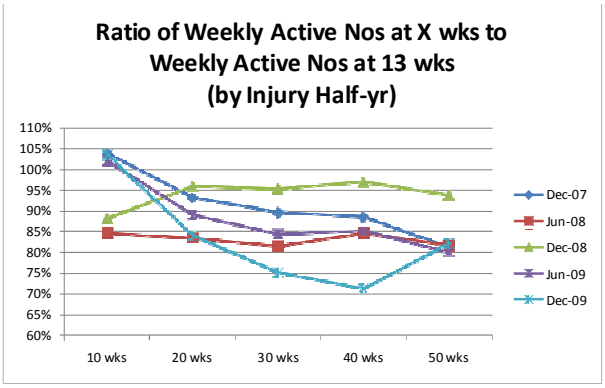
PPAC – payment per active claim

In the companion pwc report (Section 5.1) regarding date of injury relative to numbers of weeks compensation, the chart shows experience in weeks 13 to 25 after injury. This should incorporate a phased reduction of 10% relative to experience in the June 2008 injury half year and prior.

A distinct reduction is clearly observable. The reductions are smaller immediately following the change, but higher for the most recent injury periods. The average reduction post June 2008 is around 7%, noting that a proportion of claims in this period will still not have reached 13 weeks compensation after 25 weeks and will therefore still be receiving 100% of earnings.

Similarly for experience in the 26 to 51 week period since injury. The average reduction post June 2008 is 15%. For post 52 weeks there is no material difference in the amounts paid, as should be the case because 80% of average weekly earnings are paid now as was the case prior to July 2008.

The following table shows the ratios of numbers of active claims at 13 weeks to those at other durations.



It is difficult to interpret the experience. One reason for this is the effect of the introduction of incentives for early reporting and provisional liability.

This has resulted in higher numbers of active claims at early delays and consequentially higher discontinuance rates. For periods after 1 January 2009, it is difficult to identify any changes in discontinuance that might be directly attributed to the earlier step-downs.

The green line above relates to the December 2008 half-year i.e. before early reporting and provisional liability. The numbers active at 50 weeks are not very different to those active at 13 weeks. This contrasts with more favourable experience for the December 2007 and June 2008 half-years (i.e. before the *Amending Act*).

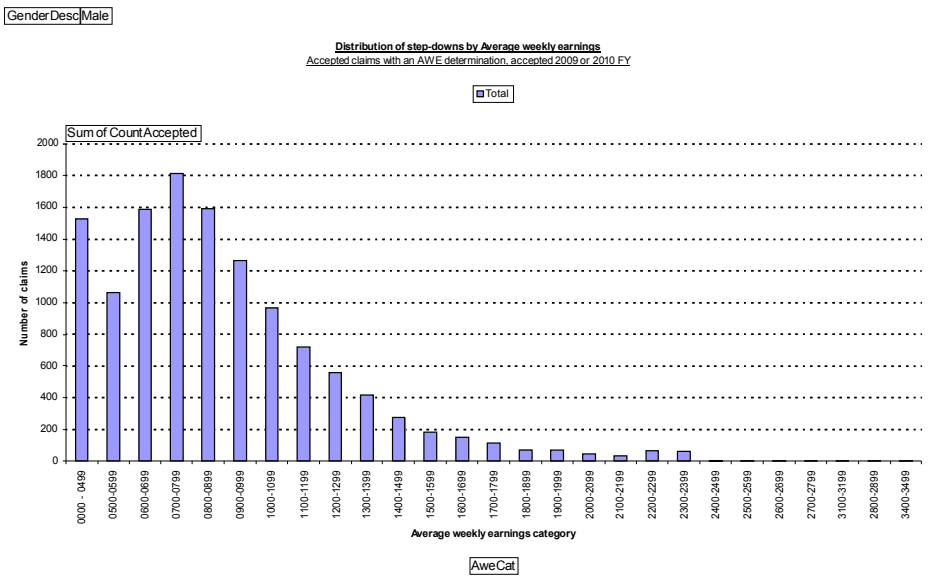
This is counter-intuitive, in that there is no apparent reason why the earlier step-downs should change behaviour such that injured workers are **more** likely to remain on benefit.

The reason may therefore rest with other factors and in particular the effect of the Global Financial Crisis, where alternative work duties may have been less readily available.

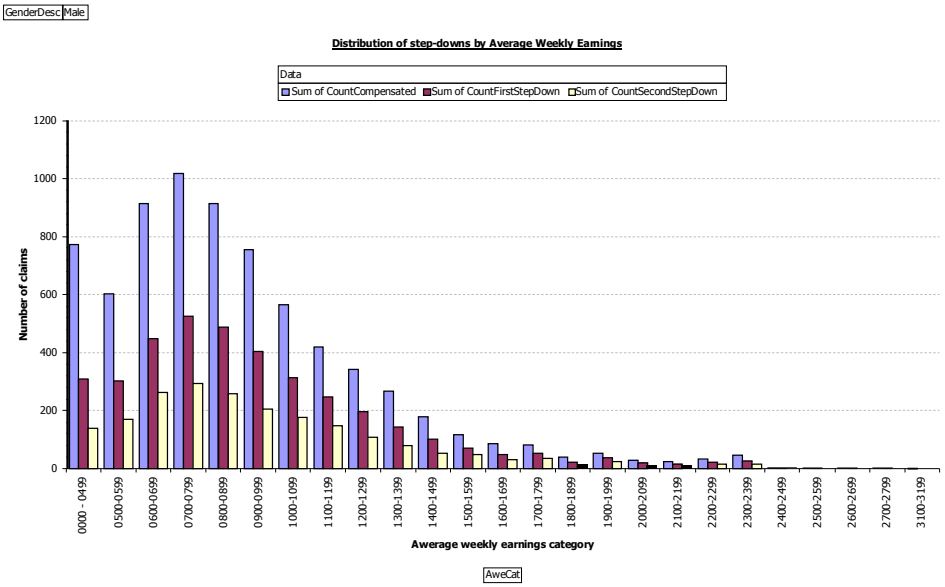
The reviewers also sought data as to whether the step-downs in the first 26 weeks had impacted differently on different categories of workers viz lower paid workers relative to higher paid workers and female workers relative to male workers.

Below, the reviewers have reproduced 4 graphs from data provided by WorkCover. They are:

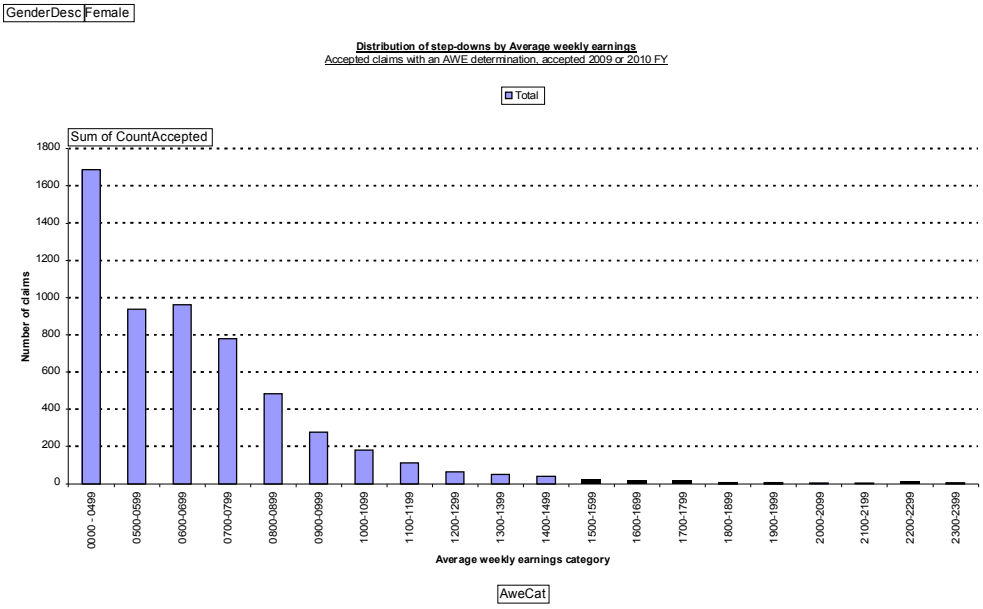
1. Distribution of all claims accepted from 1 July 2008 for weekly payments for <u>male</u> workers by average weekly earnings of the worker.



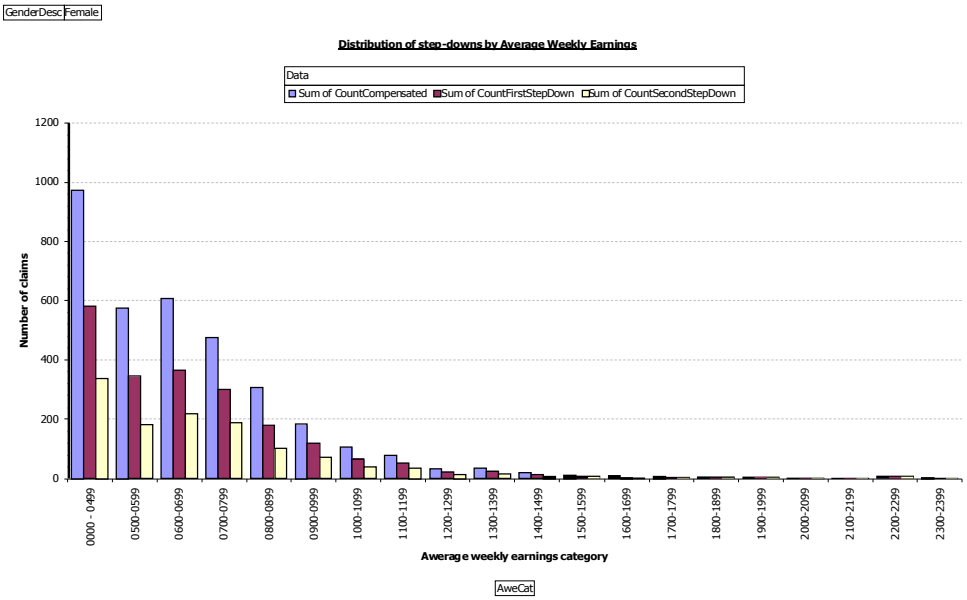
2. Distribution of all the claims affected by first and second step-downs for male workers by the average weekly earnings of the worker



3. As for 1. above but for female workers



4. As for 2. above but for <u>female</u> workers

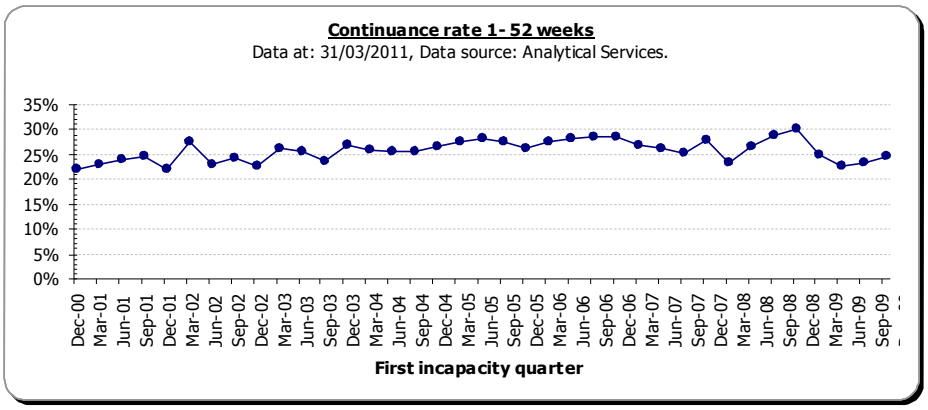


The conclusions to be drawn from these graphs are as follows:

- a much higher proportion of injured <u>female</u> workers are in the lowest average weekly earnings bands (less than $700 per week) with almost half of the people earning less than $700 per week being in the less than $500 per week band.
- approximately one third of the injured <u>female</u> workers with average weekly earnings of less than $500 have been affected by the step-downs with just over 20% of them being affected by both step-downs.
- by contrast approximately 20% of the injured <u>male</u> workers with average weekly earnings of less than $500 have been affected by the step-downs with just over 10% of them being affected by both step-downs.
- the injured <u>male</u> workers most affected by the step-downs are in the $700 to $900 bands of average weekly earnings.
- there is a similar correlation for <u>males and females</u> when comparing step-downs against all claims; the differences referred to above seemingly resulting from the overall lower rates of earning of female workers.

Finally, the review examined the proportion of injured workers continuing to receive weekly payments after 52 weeks.

The graph below provided by WorkCover shows an improvement since the December 2008 quarter but it is too early to tell if that will be sustained.



The reviewers have enquired as to whether any of the data available to WorkCover indicates either that:

- injured workers are more likely to return to work at week 12 or week 25 to avoid a step down
- injured workers are more likely as a result of the step-downs to return to work prematurely and suffer a recurrence of their injury.

No data seems to be available to verify or deny such hypotheses but there would be merit in attempting to collect this data albeit that it may require specialised survey instruments.

5.4.4 Reviewers' Conclusion

These amendments were among the most widely debated within the broader community in the lead up to (and during) the parliamentary debate.

Although 40% (approximately) of people receiving weekly payments of income maintenance reach the 13 week mark following an injury and 25% (approximately) reach the 26 week mark, it is too early to tell whether these amendments have had any long term impact on return to work rates. Therefore this needs to be monitored continually with reference to the type of data available to the review and reported above.

There is evidence that the impact of the step-downs is being most strongly experienced by the lowest paid female workers largely, it seems, as a consequence of differences in income distribution between, and presumably type of work performed by males and females.

Employee representatives have raised the question of whether any future change to this Section of *the Act* should provide that no injured worker, as a result of a step down, receives less than the minimum wage.

The reviewers consider there to be some merit in this suggestion and the monitoring referred to above should assess the number of injured workers who are being affected to that extent.

Although no detailed data is available to confirm this point, the review was informed that a number of self insured employers are not applying the step-downs to their injured workers. The reasons for this are not documented.

The most strident negative comment received in the review related to the combined impact of the step-downs, the 130 week work capacity review, the limited opportunity for redemptions, the perceived failure of many employers in conjunction with the rehabilitation system to identify suitable, alternative employment opportunities for injured workers and the uncertainties surrounding the operation of medical panels.

This is dealt with more fully in Section 5.5 and subsequent Sections below.

5.5 Part 2 – Section 35B and Section 35C: Work Capacity Assessments

These amendments provide for an assessment (generally referred to as a work capacity review) to be made at the 130 week point (ie. at the end of the third entitlement period defined earlier in Section 35) of an injured worker's capacity to undertake work.

An injured worker assessed as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to have weekly payments continued (at the level of 80% of average weekly earnings) until age 65 or the retirement age for that industry if it is lower than 65. All other injured workers (ie. those assessed as having some work capacity) have their weekly payments ceased.

5.5.1 Intention of the Amendments

This amendment was based on a belief that injured workers with a capacity to work should return to work (at least to the extent that their work capacity allows).

5.5.2 Summary of Views Expressed in Submissions

15 submissions made direct comment about this set of amendments, two of these were generally supportive and 13 were generally not supportive.

Those who supported this concept confined their comments to the principle without providing further expansion.

Those who were least supportive expressed their dissatisfaction with comments such as:

- reviews are sometimes perceived to be undertaken without "*proper paperwork, procedure and research*".
- on occasion the reviews are used as a "*threat*" towards injured workers as they are advised that upon completion of the review payments will cease.

- they cause fear amongst workers who are concerned they may be "*deemed fit to be able to work for hours that would be insufficient to meet usual living costs*".
- work capacity reviews can overlook the fact that "*the return to work process is not exclusively the responsibility of injured workers*":
- a work capacity test at 130 weeks is far too late.
- the Section of the Amending Act is vague and unnecessarily complicated and a number of submissions questioned its "*workability*".
- the removal of benefits at 130 weeks has not resulted in any "*discernable (sic) improvement in workers returning to work*".
- the amendment is being used as a threat "*by rehabilitation coordinators, claims managers and lawyers alike to encourage injured workers to either find work or resolve their claim or leave the system*".
- retraining is being delayed, or injured workers are being told it is too late, as it is nearing the 130 week mark.

5.5.3 Data available to the Review

These provisions were implemented on 1 April 2009 so 21 months of data is available.

Data supplied by WorkCover indicate that since its introduction this amendment has seen:

- 700 injured workers assessed.
- 644 of these workers have been assessed as having some work capacity; of these 416 are male and 228 are female.
- the remaining 56 injured workers have been assessed as having no work capacity and are in receipt of continuing weekly payments.
- of the 644 people assessed as having some work capacity 314 did not dispute the assessment and after being given the statutory notice period had their weekly payments ceased.
- the remaining 330 people have either lodged a dispute with the Tribunal(288 people) or have made application under Section 35C for a continuation of weekly payments (98 people). 56 people have done both.
- of the 288 assessments disputed before the Tribunal, 160 are awaiting a decision.
- of the 128 decisions made as part of the Tribunal process:
    - the injured worker conceded in 30 cases (so weekly payments ceased)
    - WorkCover reversed 9 of the original assessments

- in the remaining 89 disputes, WorkCover conceded that there were technical flaws in the wording of the determination by their claims agent and conceded all of them but with a reissue of determination in those matters where it believed the evidence supported the ceasing of weekly payments.

5.5.4 Reviewers' Conclusion

Submissions to the review generally reflected the opposition which had been voiced by advocates for, and representatives of, injured workers prior to and during the parliamentary debate on the legislative amendments.

Although this provision has been in operation for 21 months to 31 December 2010, the number of people affected is still relatively small and no data is available on the return to work 'experience' of the injured workers assessed as having some work capacity. Clearly this is an area for further study as and when the legal challenges relating to medical panels are complete, and as the number of people who have been the subject of a work capacity review increases.

Data which, with the cooperation of the injured worker, tracks their experience in returning, or attempting to return, to the workplace should be considered for collection on an ongoing basis.

Future thought may also need to be given to the definition of retirement age in light of the Federal Government's recent decisions to increase retirement age for social security purposes.

Of some concern to the reviewers was the suggestion made by a number of people with experience in supporting injured workers that, on occasions, case managers and/or rehabilitation providers are reported to have used the looming 130 week work capacity review as some sort of pressure point in their discussions with the injured workers. This, and the associated thought of the perceived undesirability of appearing before a medical panel, has been reported to the reviewers as causing severe emotional and psychological distress for some injured workers.

This is obviously undesirable and the reviewers would expect WorkCover, in association with its claims agent, to be alert to this possibility and take whatever action is appropriate to eliminate it.

The reviewers consider that the work capacity review provision places a great responsibility on WorkCover's claims agent and the professional and para-professional staff supporting injured workers (notably vocational rehabilitation advisors) to adopt a sense of urgency in assisting workers to return to work.

This sense of urgency is foreshadowed by the provisions relating to provisional liability and incentives for early lodgement of claims and it is essential that it be carried through to all subsequent involvements.

Unfortunately, the review heard too many anecdotes in which a sense of urgency was not apparent either because of continual changes of case managers or slowness in response to requests by injured workers for retraining assistance.

The extent of legal challenges in relation to work capacity reviews and the authority of medical panels has made any assessment of the overall impact of these legislative amendments extremely difficult.

This is particularly highlighted in the pwc report accompanying this report and which compares (page 16) the more favourable experience in Victoria with the experience so far in South Australia.

The ultimate effectiveness of the changes will be determined by the extent to which the intent of the legislation is sustained in the dispute process.

Coincident with this will be the success of focussed return to work initiatives. This is not yet apparent in the data to 31 December 2010

In his submission, the WorkCover Ombudsman pays particular attention to a number of technical aspects of the wording of Sections 35A, 35B and 35C. The reviewers consider his suggestions below to have merit, viz:

- there is a need to clarify what constitutes an entitlement week; as the companion pwc report summarises in Section 5.1, many workers return to work, fully or partly only to discontinue their attempts to return to work. The Ombudsman has indicated that injured workers are surprised if a week in which they received a partial payment of income maintenance is counted as a full entitlement week. The reviewers also understand that there is considerable confusion about this aspect in the minds of WorkCover's claims agent.
- a simplification should be considered to Section 35B(1) so as to make the words "*likely to continue indefinitely to have no current work capacity*" more specific with perhaps a prescribed time line to provide guidance as to what is intended by the word "*indefinitely*".
- there should be a cross reference of Sections 35 and Section 38 such that assessments under Section 35B are undertaken in the context of, and in accordance with, the provision of a Section 38 review, thereby affording injured workers a fair notice of assessment and allowing them to provide information they believe to be relevant.
- the need for Sections 35B(4), (5), (6), (7) and (8) is questioned in the light of potential confusion for injured workers who have been assessed as having total incapacity and who reach the end of the third (130 week) entitlement period.

- Section 35C could be simplified (or incorporated into a redraft of Section 35B) so that its intention in providing an exception to Section 35B (viz to provide that workers who have reached the end of the third entitlement period will continue to receive weekly payments if they are gainfully employed and working to their full capacity) is made clearer.

Should there be a reconsideration of Section 35, a suggestion by the Law Society of South Australia should also be considered. That suggestion would see an amendment to Sections 35A and 35B to enable an injured worker not currently in employment and approaching the end of the third entitlement period to have the right to make submissions for continuing weekly payments.

This would afford the injured worker an equivalent right to that of a worker in employment under Section 35C(2) to demonstrate that he or she is incapable of further or additional employment.

5.6 Part 2 – Section 36: Discontinuance of Weekly Payments

The Section 36 amendments which were implemented from 1 July 2008, prescribe the circumstances under which an injured worker's weekly payments may be reduced or discontinued completely.

The Section specifies the obligations of the injured worker in respect of cooperating with requests relating to medical examinations and treatment, rehabilitation and return to work objectives. It also specifies the notice periods that an injured worker must receive prior to action being taken to reduce or discontinue weekly payments. No comment was received during the review about these aspects of the legislative provisions.

The most debated aspect of the amendments to this Section related to Section 36(5), the effect of which was to remove the right of the injured worker to continue to receive weekly payments should he or she lodge with the Tribunal an objection to WorkCover's decision to discontinue or reduce weekly payments.

The new provisions do, however, provide that an injured worker may seek a review by the WorkCover Ombudsman of the decision to discontinue (but not reduce) weekly payments whilst a matter is in dispute before the Tribunal.

Previously, *the Act* provided that the lodgement of such an objection (ie. a dispute) with the Tribunal enabled a suspension of the action to reduce or discontinue weekly payments until the dispute was finalised.

5.6.1 Intention of the Amendments

The intention of the amendments was mainly to discourage injured workers from using the Tribunal to extend the time for decision making in relation to their right to continue to receive weekly payments of income maintenance (and therefore to stimulate the pursuit of accelerated return to work objectives).

5.6.2 Summary of Views Expressed in Submissions

Nine submissions made direct comment about this amendment, two of these were generally supportive and seven were generally not supportive.

Those who were most supportive expressed their support with comments such as:

- whilst it may be too early to tell, there is anecdotal evidence that "*disputes may be proceeding more quickly to the Workers Compensation Tribunal*"

Those who were least supportive expressed their dissatisfaction with comments such as:

- the removal of subsection 36(4), which allows for the automatic continuation of weekly payments when a dispute is lodged, has "*caused financial hardship and anguish to many injured workers*".
- the threshold where the WorkCover Ombudsman can suspend a decision by a compensating authority is quite high. Poor decisions are not within the discretion of the WorkCover Ombudsman if they are considered to be "*reasonably open*" under Section 36(15).
- the power of the WorkCover Ombudsman is limited and illogical as he is only able to review decisions to suspend payments as opposed to decisions to reduce weekly payments.

5.6.3 Data available to the Review

Since 1 July 2008, the table below indicates the level of dispute activity pursuant to Section 36 determinations:

	Year				
	2006	**2007**	**2008**	**2009**	**2010**
Number of disputes	144	151	203	198	304

Data is not readily available on the number of relevant decisions.

The recent increase in the level of these disputes together with an increase in the requests for a review by the WorkCover Ombudsman, as indicated below, has been commented on substantially in the submissions to the review.

The WorkCover Ombudsman has reported that there were, in his opinion, significant flaws in the approach taken by WorkCover's claims agent in the early stages of implementation as demonstrated by the figures below:

- In 2008/09 the WorkCover Ombudsman suspended 53 decisions out of 137 requests (almost 40%) from injured workers

- In 2009/10 the comparable figures were 28 out of 193 (14.5%), suggesting an increase in the number of injured workers requesting a review, but a considerable improvement in the claims agent's procedures and documentation.

The improvement by the claim's agent is in large part because of changes to the way in which WorkCover's claims agent has dealt with these matters in the light of the WorkCover Ombudsman's decisions.

Furthermore, the Ombudsman has reported that there is a high correlation between his decisions and the ultimate outcome of the objection before the Tribunal.

5.6.4 Reviewers' Conclusion

It is difficult to assess whether the objective of discouraging injured workers and/or their representatives from using the Tribunal as a means of extending the duration of weekly payments is being met.

This is in part because the assumption that previously an injured worker would be so inclined was not able to be fully tested.

That said the reviewers, in light of the data presented above, can see merit in the suggestion by the WorkCover Ombudsman that his powers of review be broadened, as follows:

- by extending the WorkCover Ombudsman's powers under Section 36 (15) to extend the review function to include reductions as well.
- by amendments to Section 36 (15)(6) of *the Act* and Regulation 35 that would effectively broaden the Ombudsman's powers to suspend a decision if the decision appears to the Ombudsman to be not compelling, fails to comply with *the Act* or Regulations or is otherwise unsound.

Finally, the review is aware that the Government is mindful of the hardship impacts of the Section 36 amendments. In November 2010, the then Minister for Industrial Relations sought to expedite the dispute resolution process via an Amendment Bill introduced to Parliament.

Though not within the review's Terms of Reference to consider, many submissions to the review made comment on the Amendment Bill, most of which was not favourable. Apparently, the Government has deferred further consideration of the Amendment Bill pending this review. It would seem that the above amendments to *the Act* as proposed by the WorkCover Ombudsman may go a considerable way towards dealing with a number of these underlying concerns.

5.7 Part 2 – Section 42 Redemptions of liabilities

The amendments to Section 42 prescribed the criteria under which a future liability for weekly payments could be 'redeemed' by an agreement between WorkCover and the injured worker for a lump sum payment to be made.

These criteria (which are far more limited than those which preceded them) are that:

a) an injured worker must be at least 55 years old and have no current work capacity
b) the rate of weekly payments to be redeemed does not exceed $30 per week (indexed)
c) the Workers' Compensation Tribunal is satisfied that the continuation of weekly payments is contrary to the best interests of the injured worker.

5.7.1 Intention of the Amendments

There was much comment in the Clayton/Walsh report regarding a 'lump sum culture' which existed in South Australia and which was assessed as being detrimental to the objective of enabling injured workers to return to work.

Consequently, the amendment was intended to reduce any possible compromise of the return to work objective by the perceived attractiveness in the minds of injured workers of a lump sum payment in lieu of possibly several years of average weekly earnings.

Further to the legislative amendment, the WorkCover Board has adopted a policy position that no redemptions will be negotiated for workers in the registered Scheme. The intent of this policy is to reinforce its desire to weaken the lump sum culture reported on by Clayton/Walsh. (Note: there is a minor exception to this policy viz where a worker commenced common law proceedings against a negligent third party prior to 22 October 2010 in the expectation that a redemption may be available and satisfies one or more of the criteria specified in (a), (b) and (c) above).

The key point being made in both the Clayton/Walsh report and by WorkCover in its policy position is that if an injured worker, relatively early in the period after incurring the injury, believes that a lump sum payment is possible or likely, then the worker may be disinclined to cooperate fully, or at all, with any return to work oriented assistance.

5.7.2 Summary of Views Expressed in Submissions

14 submissions made direct comment about this amendment, two of these were generally supportive and 12 were generally not supportive.

Those who were most supportive expressed their support with comments such as:

- evidence suggests "*that the use of redemptions fosters a lump sum culture which in turn discourages workers to return to work and that an excessive reliance on redemptions has also impacted negatively on scheme performance*".

Those who were least supportive expressed their dissatisfaction with comments such as:

- it is important to have a mechanism which allows workers to choose the option of removing themselves from the system.
- redemptions are very rarely used, yet unfortunately this is sometimes the best option for an injured worker when the WorkCover system is no longer "*gainfully serving*" them.
- the suspension of redemptions by WorkCover has "*affected many injured workers*".
- whilst redemptions may cause a "*lump sum culture*", it could also be said that the use of redemptions has "*provided a mechanism to reduce pressure on the Scheme's unfunded liability*".
- "*there is a wide spread view that WorkCover's current redemption policy has swung too far from what it was*".
- the removal of redemptions has resulted in the "*inability to redeem the very categories of workers who create the greatest impost on the system*".
- whilst WorkCover have removed the option to redeem injured workers for those who are covered under their system, self insurers are still able to provide redemptions which meet the criteria under *the Act*. This "*smacks of having two classes of injured workers and can hardly be regard (sic) as being the basis for a fair and equitable scheme*".

5.7.3 Data available to the Review

The amendments to the legislation and the subsequent policy position adopted by the WorkCover Board were implemented progressively to enable both aged claims and more recent claims (where it was assessed that there was little likelihood of a return to work) to be redeemed in a reasonably equitable manner.

In the 12 month period from 1 July 2009 to 30 June 2010, 1 289 claims were redeemed for a total payment of $123 million, an average amount per redemption payment of $95 000.

This followed a similar level of redemption activity in the previous financial year in which 1 763 claims were redeemed for a total payment of $147 million, an average amount per redemption payment of $83 000.

Whilst the legislative amendment has, since 1 July 2010, been strongly adhered to by WorkCover for workers of registered employers, the self insured employers have continued the use of redemptions.

5.7.4 Reviewers' Conclusion

The revised redemption provisions have been in operation for a limited time (less than two years for claims after 1 October 2009). Therefore it is not possible to assess their full impact.

If this provision and the work capacity review system succeed in their combined application:

- injured workers with a capacity for work will be able to return to work (assuming suitable employment is available)
- injured workers with no capacity for work will receive weekly payments until retirement age.

The dilemmas surrounding the policy area often seem to be associated with either the availability of suitable employment (considering the nature of the injuries) or the willingness of the injured worker to undertake the type of work which might be available. In the past, a redemption has overcome both of these dilemmas which is the reason given by self-insured employers for continuing to use redemptions.

This policy needs to be given more time before its impact on injured workers can be fully assessed. The reviewers have noted, however, that there is an underlying view amongst some stakeholders in the system that the WorkCover policy will be reversed in due course (either as a result of this review or subsequently). The reviewers are concerned that this is adding to the uncertainty already facing some injured workers.

The companion pwc report to this report has particularly noted that no conclusive long term assessment of the impact of the redemption amendments (and WorkCover Board policy), either alone or in conjunction with the new system of work capacity reviews on the Workers Compensation Fund can yet be made. It has, however, noted that the short term impact on the Fund as a result of the payment of the $270 million in redemptions over the two financial years 2008/09 and 2009/10 has been positive to the extent of $380 million.

5.8 Part 2 – Section 43 – Non-Economic Loss

The amendments to Section 43 were implemented on 1 April 2009 and changed the basis of lump sum payments to injured workers for the loss of body functionality in respect of their injury or injuries (known as non-economic loss).

There were three main components to this change as follows:

- Assessments which were previously made against a Table of Maims are now made against a guide published by the American Medical Association (AMA) and Schedules 3 and 3A of *the Act*; all of which are incorporated in a comprehensive guideline document developed by WorkCover.
- *the Act* now requires an impact to be determined related to the 'whole of body' impairment with a threshold of 5% of whole of body impairment having to be met before any payment can be made.
- the maximum amount payable for injured workers with a whole person impairment rating of 70% has been increased to $400 000 (indexed) and amounts payable for the more serious injuries generally have been increased in line with the increase in the maximum payable; in 2011 the maximum has increased to $437 401.

The two Schedules (Schedule 3 and Schedule 3A) respectively:

- prescribe the minimum amounts payable depending on the percentage of whole of body impairment assessed
- provide for a 'No Disadvantage Test' where an injured worker has total loss of a sense or of a body part. This schedule again prescribes minimum amounts payable for the various loss types.

In addition, Schedule 4 of the Regulations prescribes a higher dollar figure for each percentage point of assessed whole of body impairment between 5% and 70% (at which point the maximum applies).

5.8.1 Intention of the Amendments

The intent of the amendments was three-fold viz:

- to ensure that the more seriously injured workers receive greater compensation for their injuries (in line with a similar approach in Victoria)
- to further dilute the 'lump sum culture' referred to in 5.7 above by eliminating payments to the less seriously injured workers
- to provide, through the use of the AMA guide and Schedules to *the Act* a greater degree of consistency in the quantum of payments made.

5.8.2 Summary of Views Expressed in Submissions

11 submissions made direct comment about this amendment, seven of these were generally supportive and four were generally not supportive.

Those who were most supportive expressed their support with comments such as:

- the current system is now "*weighted in favour of more significantly injured workers – workers reaching a whole person impairment rating of 70% or above receive the maximum prescribed sum*"
- whilst not receiving any negative feedback regarding lump sum payments and the 5% threshold, it would be preferred that the system is amended to "*set lump sums for a range of percentage impairments instead of for each percentage point*". This would reduce the impact that a decrease in 1% permanent impairment can have on the total figure, particularly in the higher ranges.
- whilst supportive of the threshold, an increase to 10% permanent impairment would be preferable.

Those who were least supportive expressed their dissatisfaction with comments such as:

- surprise at the "*level of variation between medical practitioners in their assessments of percentage impairment*"

- there are practical and legal difficulties with the current assessment of permanent impairment. An issue arises when an injured worker has several permanent impairments, each of which are considered under 5%, however aggregate to 5%. In this situation the claim for a non-economic loss payment would be rejected.
- certain injuries (eg. back injuries) are "*much harder to get over the 5% threshold*", than others, resulting in inequities in the system.

5.8.3 *Data available to the Review*

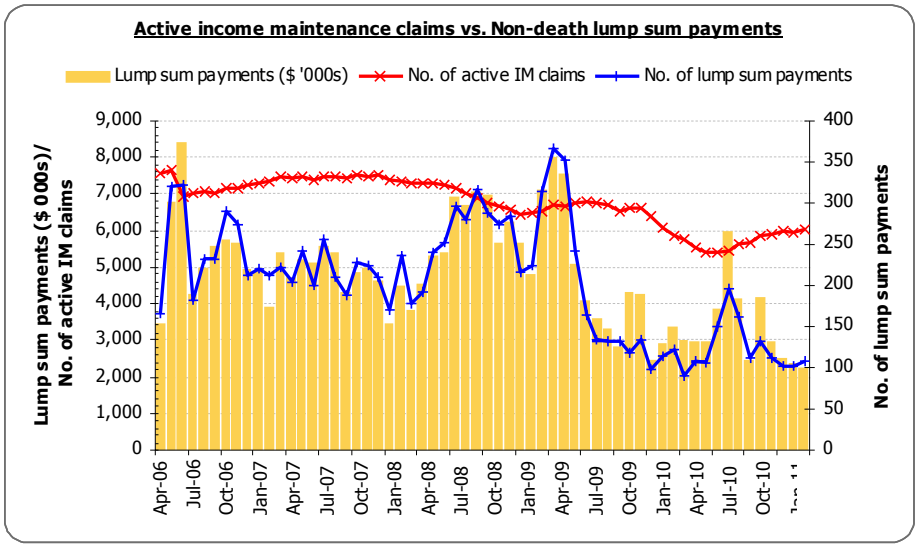
These amendments were enacted from 1 April 2009 but, as yet, significant experience has not been gained from their operation.

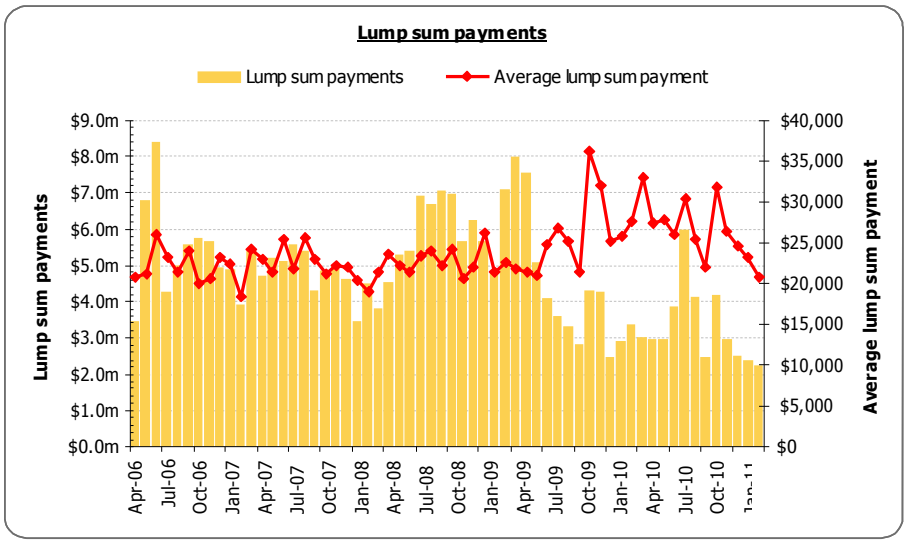
Information provided by WorkCover indicates that there was a significant increase in the number of payments finalised in the 12 months prior to the new provision being implemented. In that period, payments reached $80 million compared with an average of $60 million for each of the previous four years.

In the four years prior to the legislative amendment being implemented the average payment was $19 700 (excluding death and funeral claims). This average needs to be seen alongside the previous maximum amount payable for the most serious injuries of $230 983.

One impact of the large number of payments finalised in the 12 month period prior to the new provisions being enacted has been a reduced number of claims finalised under the new provisions. In the 21 months of operation, claims finalised have settled at between 100 and 150 per month with an average payment of $24 000. Previously (ie. before the spike in early 2009), the number of payments was in the range 200 – 250 per month.

The graphs below indicate the trend experience over the past five years:





Disputes lodged with the Tribunal in relation to non-economic loss assessments for Scheme employers have historically been high (generally more than 20% of all disputes). That percentage reduced in 2010 to just under 15% (315 out of a total of 2103 disputes lodged). However, that needs to be seen in the context of the lower number of claims finalised.

5.8.4 Reviewers' Conclusion

Approximately 18 months of data is available on which to assess the impact of the new provisions for non-economic loss. In that time it appears that the impact has been as expected viz that those injured workers assessed as having more serious injuries (above the threshold) have received an average of 20% more compensation than previously.

To offset this, approximately 30% of injured workers who would have received some compensation prior to this amendment have not received compensation.

This has meant that there has been a slightly positive impact on the Workers Compensation Fund which may be maintained or return to neutral as experience grows. This is in line with expectations.

Little comment, either in submissions, or in interview has been made about the extent to which the changes in this provision have impacted differentially on lower or higher paid workers or on males or females. This is understandable given the relatively low number of finalised claims.

This would be worth monitoring as more experience is gained with the new provisions.

Most comment during the review related to the complexity of the WorkCover guidelines and the difficulty for injured workers and their representatives in applying them with any confidence.

The assessment process in approximately 70% of cases has also involved the medical panels as distinct from individual accredited assessors. The uncertainty regarding the authority of medical panels is also adding to this situation.

The reviewers have been informed that some confusion is developing over the variations in assessments of percentage impairment by accredited assessors. This is particularly relevant in the application of Schedule 4 of the Regulations where each 1% increase in assessed impairment can mean several thousands of dollars difference in lump sum payment. An alternative approach using ranges of impairment and prescribed dollar amounts for each range may reduce the confusion but it may not be possible to eliminate it completely. No doubt, the outcome of disputes lodged with the Tribunal will be instructive in any further refinement of this aspect of the legislation.

The reviewers' conclusion is that further data, particularly once the legal questions relating to medical panels have been resolved, and the outcome of disputes before the Tribunal, is needed before the full impact of these amendments can be assessed.

5.9 Part 2, Section 50: Provisional Liability Section 46(8)(6): Incentive for Early Lodgement of Claims

The amendment to Section 50 provides that an injured worker can notify his or her employer of a workplace injury and have the employer (via WorkCover and WorkCover's claims agent) accept liability on a provisional basis in advance of the claim being lodged and formally assessed.

This enables the injured worker to receive weekly payments on a provisional basis within seven days of the notification unless a reasonable excuse exists.

This provision assures the injured worker of continuing payment of wages whilst a claim is being assessed. It also provides protections for employers in the event that there is no valid claim subsequently lodged.

In addition, a specific legislation change by the insertion of Section 46(8)(b) encouraging early lodgement of claims by employers was also implemented. This amendment provides that for all claims lodged within two days of the injury being reported, the employer is not required to meet the first two weeks of wages of the injured worker should he or she be absent from work.

5.9.1 Intention of the Amendments

The intention of the amendments regarding provisional liability along with those encouraging early lodgement of claims is to establish a greater certainty in the minds of injured workers that weekly payments will be made as well as a greater sense of urgency in supporting an injured worker's return to work.

This is based on the rationale referred to previously that return to work objectives are directly linked to the speed with which an injured worker receives appropriate professional assistance.

5.9.2 *Summary of Views Expressed in Submissions*

14 submissions made direct comment about this amendment. 13 of these were generally supportive and one was generally not supportive. Those who were most supportive expressed their support with comments such as:

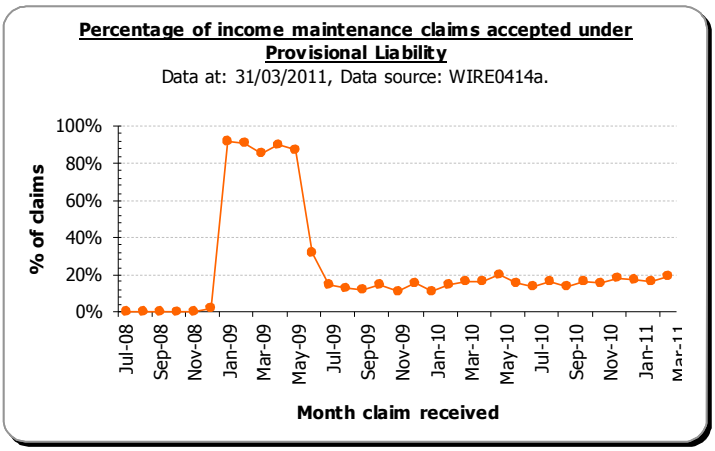
- provisional liability is supported and has *"benefitted injured workers by reducing their levels of financial hardship and anxiety while they await the determination of their claim"*. However, there does appear to be a problem with the guidelines associated with provisional liability resulting in the incorrect usage of the "*reasonable excuse criteria"*. The "*reasonable excuse criteria*" should be removed, except "*relating to whether the injured person is a worker under the Act*".
- there has been "*significant reduction in problems at the beginning of the claim process for injured workers*" since its introduction. "*The improvement in the psychological wellbeing for injured workers at the outset has been noticeable*".
- whilst the implementation and administration of the provisional liability arrangements has been not been handled correctly, this has been a beneficial change.

Those who were least supportive expressed their dissatisfaction with comments such as:

- if a claim is rejected WorkCover or registered employers absorbs the cost. It is suggested that should the claim be rejected the costs "*should be recovered from the worker.*

5.9.3 *Data available to the Review*

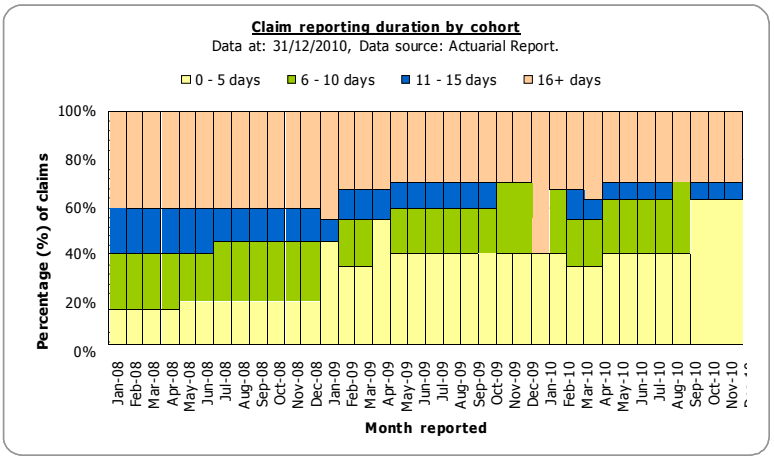
Provisional liability payments were implemented on 1 January 2009 but amendments to the guidelines were implemented on 1 July 2009. The graph below provided by WorkCover indicates that the concept of provisional liability has changed significantly since the guidelines were introduced.



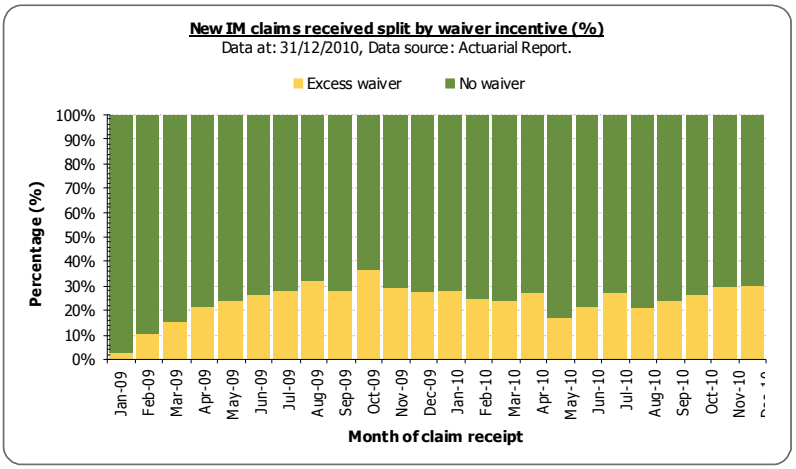
This graph shows that there was a high (between 80% and 90%) acceptance of claims under the provisional liability arrangements for a brief period from January 2009 to May 2009 but that it then reduced to around 20% where it has remained.

This contrasts with data supplied by the South Australian public sector (which is a self-insured employer). In the same period referred to above, State public sector agencies received 188 notifications and accepted 180 of them on a provisional basis (an acceptance rate of 95.66%).

In respect of the claims lodgement policy encouraging early lodgement, the data supplied by WorkCover shows a continuing reduction in claim lodgement duration as demonstrated by the graphs below.



Note: Cohort refers to month in which claim is received.

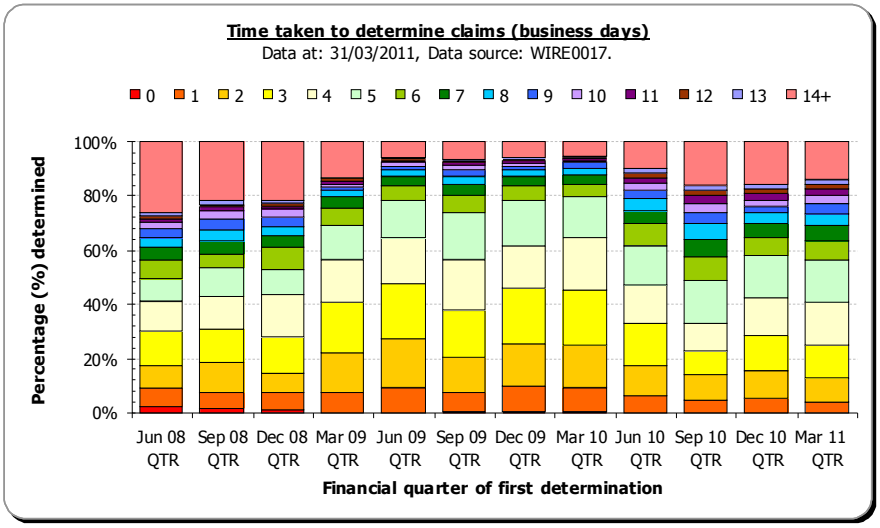


Note: Waiver incentive refers to the rebate of wages in return for claims lodgement within 48 hours

Within the data there are several points of significance, viz:

- On average, between 25% and 30% of claims are being lodged within two days; a figure that gradually improved within the first year but has largely remained unchanged since.
- There has been a slight improvement (ie. reduction) in the proportion of claims lodged after 15 days.

In addition, WorkCover has provided the following graph which indicates the time being taken to determine claims over the period June 2008 to March 2011.



This graph indicates a change in the pattern of timeliness of claim determination between the March 2009 and March 2010 quarters (faster determination in that period) but that since that time, there has been somewhat of a return to December 2008 timeliness patterns.

The reviewers have attempted, in assessing the effectiveness of these measures, to determine whether the desire to achieve a greater sense of urgency in the provision of professional support to injured workers has been achieved. Assessing this is extremely difficult as it would require data to be kept on speed of referrals. Patterns of expenditure on support could provide a crude proxy. More consideration should be given to collecting such data in due course.

Ultimately, return to work data will provide the test of the overall effectiveness of the package of legislative reforms, and the data referred to above could provide an intermediate indication of progress towards meeting improved return to work objectives through a greater sense of urgency in the system.

5.9.4 Reviewers' Conclusion

Although the concepts of provisional liability and reward for early lodgement of claims seem to have been reasonably well reported on in submissions, there have obviously been implementation difficulties.

The concept of provisional liability was based on the New South Wales system. However, the South Australian adaptation of the system seems to be quite different.

The review understands that in New South Wales, the vast majority of compensable injuries are dealt with fully under provisional liability with a relatively small percentage proceeding to a formal claim. It is further understood that, despite WorkCover's best intentions, such an approach was unable to be agreed by stakeholders in South Australia for a variety of reasons.

One legislation based reason submitted to the review is that *the Act* is based around the concept of claims by injured workers and claim determination by WorkCover via its claims agent and that in the absence of a determined claim, legislative protections are not guaranteed.

The reviewers understand that this explains the shape of the graph reproduced in Section 5.9.3 above on provisional liability.

It is not clear if a legislative amendment is required to achieve an approach similar to that of New South Wales and to have the legal protections of a claim apply equally to provisional liability. In the absence of this being achievable by WorkCover policy, future amendments to *the Act* should consider this aspect.

As indicated above, the ultimate test of these amendments is whether they lead to a greater sense of urgency in assisting an injured worker return to work.

5.10 Part 2; Section 58B – Employer's Duty to Provide Work

There were two amendments to Section 58B. This is the Section of *the Act* which places obligations on the employer of an injured worker to provide work consistent with the injured worker's capacity and to pay an appropriate wage or salary for work undertaken.

The two amendments were:

- The insertion of a maximum penalty from $25,000 for an employer found by WorkCover to be in breach of the employer's obligation to provide appropriate work for an injured worker.
- An amendment which classified that where an employer provided work outside an injured worker's normal contract of employment, the salary or wage to be paid is that which relates to the work actually undertaken.

5.10.1 Intention of the Amendments

The intent of the amendment relating to the maximum penalty for an employer found to be in breach of Section 58B(1) was to make it clear to employers that the obligation to provide appropriate duties was to be taken seriously.

The intent of the second part of the amendment was to overcome a previous situation in which employers who were paying wages in these situations may have a legal right to recover such wages from WorkCover as if they were weekly income maintenance payments.

This particularly applied where an injured worker was assigned alternative duties as part of a return to work plan.

5.10.2 Summary of Views Expressed in Submissions

Four submissions made direct comment about this amendment, and all were generally not supportive with comments such as:

- not aware of any prosecutions under Section 58B of employers failing to meet their duty, and the manner in which an alleged contravention of the Section is investigated is "*deplorable*".
- some employers "*create various types of barriers to inhibit or prohibit the return of injured workers to the workplace*".
- the application of section 58B is placed upon employers without there being "*fair and proper examination of the issues in each case*".
- there appears to be a "*failure by the Compensating Authorities to utilise Section 58B to maximise rehabilitation and meaningful return to work options*".
- "*employers are now required to pay wages for work that is not productive and of no benefit to its business operations*".

5.10.3 Data available to the Review

Data supplied by WorkCover indicates that in the period since this maximum penalty has applied, no employers have been prosecuted under this Section although one matter is before the Magistrates Court. However, 12 employers have faced additional levies since 1 July 2008 compared with 42 for the same period before 1 July 2008.

Section 58B of *the Act* also prescribes the circumstances under which an employer may declare that an injured worker, as a result of the injury, is unlikely to be able to find suitable work with that employer and should be assisted to find suitable work with another employer.

Unverified data provided in confidence to the review suggests that the level of detachment of workers since 1 July 2008 has reduced compared with previous periods.

Although the level may still be higher than desirable, this is an encouraging sign in respect of the willingness of the employer community to assist with return to work initiatives.

5.10.4 Reviewers' Conclusion

The reviewers understand that there are significant challenges for the employers of some injured workers (given the number of small employers and the nature of some injuries) to provide suitable employment.

WorkCover has implemented several approaches to address this situation notably:

- the Re-employment Incentive Scheme for Employers (RISE) which provides considerable incentives to another employer to employ an injured worker.
- awards for employers whose performance in providing employment opportunities for an injured worker from another employer is worthy of recognition.

In addition, the reviewers are aware that WorkCover is seeking to implement a new system based on 'Experience Rating' to replace the bonus/penalty system which was terminated on 30 June 2010 and which may in part provide incentives for employers based on claims experience.

More directly, WorkCover established the Return to Work Inspectorate and Support Unit in 2008 to oversee the introduction of Rehabilitation and Return to Work Coordinators as well as monitoring employers' compliance with Section 58B.

Relatively speaking this Unit is in its infancy. It is based on a similar operation in WorkSafe Victoria which, the reviewers understand has been quite successful in both assisting employers to discharge their responsibilities to provide suitable employment opportunities and in enforcing the legislation through improvement notices and prosecutions where necessary.

The reviewers accept that the Unit's initial focus has been the implementation of the provisions related to Rehabilitation and Return to Work Coordinators. As this priority reduces, the reviewers would expect to see an increasing emphasis on ensuring that there is an appropriate balance between supporting employers and enforcement of the employers' obligations under Section 58B.

WorkCover has also drawn the reviewers' attention to a recently published assessment that it commissioned into the effectiveness of the vocational rehabilitation provider system. This assessment is relevant in that one of the tasks of a rehabilitation provider is to assist in the identification of employment opportunities both with the pre-injury employer and with other employers should such opportunities not be considered to exist with the pre-injury employer.

The effectiveness of the vocational rehabilitation system drew much comment (mainly negative) from the authors of submissions to this review and there seems to be considerable alignment between this comment and the findings of the assessment commissioned by WorkCover (referred to above).

The Terms of Reference for this review require that the reviewers focus on the impact of the legislative amendments on injured workers.

Because the main amendment to Sections 26 to 28 which are the Sections of *the Act* dealing with vocational rehabilitation, related to the requirement for Rehabilitation and Return to Work Coordinators, the reviewers can only refer incidentally to those aspects of submissions which relate to vocational rehabilitation.

Anecdotal evidence suggests that much more needs to be done to ensure an effective vocational rehabilitation system.

5.11 Part 2, Section 69 – Payment of Levies

The legislative amendment provided for WorkCover to be able to require employers to pay levies in advance rather than in arrears. An associated change enabled the wages paid to apprentices and trainees to be excluded for the purpose of levy calculations.

5.11.1 Intention of the Amendments

The intention of the amendment was to bring the South Australian scheme into line with other interstate schemes. It was not anticipated that there would be any impact on injured workers or any long term impact on employers. The exclusion of wages for trainees and apprentices in levy calculations was designed to be an incentive to employers to employ more apprentices and trainees.

5.11.2 Summary of Views Expressed in Submissions

Three submissions made direct comment about this amendment, one of these was generally supportive and two were generally not supportive.

That which was supportive expressed its support with comments such as:

- the payment of levies in advance allows for businesses to "*forecast levy payments and factor in their cash flows.*

Those who were least supportive expressed their dissatisfaction with comments such as:

- the change has been a negative one as it "*is confusing, complex and in our view will take some years before employers are able to familiarise themselves with the process*".

- "*given the unique nature of the SA scheme*", this has "*uncovered a complexity that may not have been necessary*".

5.11.3 Data available to the Review

The reviewers saw no need to conduct significant data analysis on the impact on injured workers of the changed approach to levy calculations.

The companion pwc report makes considerable comment (Section 7) on the sufficiency of levies in relation to the state of the Workers Compensation Fund.

Once piece of data provided by the Traineeship and Apprenticeship Unit of the Department of Further Education, Employment, Science and Technology relating to employment of apprentices and trainees is reasonably encouraging as shown in the table below:

	Financial Year			
	2006/7	**2007/8**	**2008/9**	**2009/10**
Number of Commencements of Trainees and Apprentices	20 602	21 272	20 796	22 142

However, there is little way of relating the apparent trend increase directly to the WorkCover levy system.

5.11.4 Reviewers' Conclusion

The reviewers have concluded that with some initial and anticipated teething difficulties these amendments have been accepted by the employer community with no impact on injured workers.

In addition, the current average levy of 2.75% of wages relates closely to the improved hindsight levy rate as estimated by WorkCover's actuaries of 2.79% at December 2010.

5.12 Part 6A Division 4; Section 92 D – Reference of Dispute into Tribunal

This amendment requires that if a dispute lodged with the Tribunal is unable to be resolved at the conciliation stage (the first stage in the process of resolving a dispute) it must be referred to the Tribunal for judicial determination by a single Presidential member. Appeal rights, initially to the Full Bench of the Tribunal on a question of law and subsequently, with permission, to the Supreme Court, on a question of law exist.

5.12.1 Intention of the Amendments

Prior to this amendment there was a stage between conciliation and judicial determination by the Tribunal. This was arbitration – a stage at which an arbitrator could make a determination in respect of a dispute.

Arbitration decisions were then able to be appealed before the Tribunal.

The amendment removed the arbitration stage with the intention of putting more emphasis on the conciliation process and speeding up the process for those disputes not able to be resolved at the conciliation stage.

5.12.2 Summary of Views Expressed in Submissions

Three submissions made direct comment about this amendment, two of these were generally supportive and one was generally not supportive.

Those who were most supportive expressed their support with comments such as:

- the changes "*are consistent with a modern dispute resolution framework, and that any move to water down their impacts would pose a significant risk to the successful implementation of the 2008 legislative reforms and achievement of target financial savings*".
- it is "*an improvement on the previous process*", it is suggested however that a "*mediated outcome*" be included as an option at the first stage.

That which was least supportive expressed its dissatisfaction with comments such as:

- "*this is (sic) major source of delay and distraction to the supply of rehabilitation services"*. Lengthy delays, seemly arising from "*legal manoeuvres rather than a desire for settlemen*t", occur in the determination of disputes.

5.12.3 Data available to the Review

The review has been provided with figures related to the number of disputes lodged with the Tribunal as follows:

	Financial Year Ended 30 June				
	2006	**2007**	**2008**	**2009**	**2010**
Total Disputes (all employers)	4 106	3 728	4 413	4 746	3 496
Disputes related to Scheme Employers	2 071	2 740	3 024	2 894	2 103

The most significant factor in the reduction between 2010 and the previous two years is the reduction in disputes related to Section 43, non-economic loss payments. As discussed in 5.8 above, the change in this Section led to a change in the pattern of claims both prior to, and immediately subsequent to, the implementation date of April 2009.

In addition, there was a reduction in disputes related to redemptions given the finalisation of the large number of redemptions in 2008/09 and 2009/10.

Although there were increases in disputes lodged in 2008 and 2009 prior to the fully implementation of the legislative amendments, the 10 year trend is one of declining disputes. That trend has resumed in 2010 and, as understood by the reviewers to have continued in the first part of 2011.

In its submission the Law Society of South Australia drew attention to information it obtained from the Tribunal relating to records of the first 50% of files closed in respect to disputes, which show that there has been a gradual increase in the average elapsed resolution time from:

- 130 days in 2008 to
- 150 days in 2009; and to
- 200 days in 2010

In respect of the numbers of the files closed, the Annual Reports of the Tribunal indicate that:

- the percentage of disputes resolved at the conciliation stage has been gradually increasing from 59% in 2005/6 to 67% in 2008/9 and 69% in 2009/10.
- the percentage of disputes resolved within three months, six months and nine months has varied over the past four financial years with a slight trend towards faster resolution for those matters finalised at the conciliation stage but no obvious overall trend towards larger numbers of matters being finalised more quickly.

Informally, Tribunal staff have indicated to the reviewers that uncertainty about the current law has increased the complexity of legal argument for matters requiring judicial determination. Understandably, this would contribute to increases in resolution time.

The reviewers have also noted a significant drop (from 19% to 11%) in the past 18 months in what the Tribunal classifies as 'reconsiderations' (which are matters generally resolved quickly).

5.12.4 Reviewers' Conclusion

The reviewers have concluded that this amendment was reasonably well received as previous experience whereby arbitration decisions could be appealed to the Tribunal, suggested that most arbitration decisions were so appealed.

That said, the expected speeding up of disputes lodged with the Tribunal, has not yet been achieved unless a matter is resolved at the initial stage of conciliation.

Once clarification on outstanding questions of law is achieved, it is expected that this amendment will prove beneficial to injured workers.

Note: Associated with a desire to speed up the dispute resolution process was a strategy to reduce the perceived impact that legal fees might be having on the process.

That strategy, which was implemented pursuant to Section 95 of *the Act* (Entitled Costs), changed the scale of legal fees payable by WorkCover such that workers' representatives would be better compensated for time spent in the conciliation process than previously. The aim of this change was to address a perception that workers' representatives were inclined to fast track a matter through the conciliation process to the judicial determination stage where higher fees were payable. It is impossible to tell whether this change has contributed to the gradual increase in matters resolved at conciliation but that trend is encouraging.

Furthermore, there has been a rule introduced by the Tribunal, the aim of which is to restrict the legal fees payable by a worker to his or her legal representative. The validity of that Rule has been appealed to the Supreme Court and subsequently to the High Court.

None of these changes was incorporated in the 2008 legislative amendments but have created considerable comment from the legal profession as expressed in the various submissions.

5.13 Part 6C; Section 98 – Medical Panels

This component of the legislation provided for the establishment and operation of medical panels. The legislation prescribes the function of a medical panel as being "*to give an opinion on any medical question referred to it under this Act*". Further, *The Act* prescribes in Section 98E, 17 specific and one general medical question(s) which may be considered by a medical panel.

The legislation specifies a number of aspects of the operation of medical panels and the rights and obligations of an injured worker in relation to medical panels. Key amongst these provisions are:

- a requirement that all medical panel members not have had any prior association with the injured worker
- any matter of a medical nature in dispute before the Tribunal must be referred to a medical panel (as outlined below this provision has not yet been proclaimed)
- the attendance of an injured worker before a medical panel must be in private unless the medical panel decides that the injured worker may be accompanied
- the body referring a matter to a medical panel must specify the medical questions on which the panel's opinion is being sought and must supply all documents in its possession relating to the medical questions

- the opinion of a medical panel on a medical question referred to it is defined in *the Act* as "*final and conclusive*".

5.13.1 Intention of the Amendments

An injured worker's treating doctor is usually the worker's primary source of advice as to the injured worker's capacity to return to work. *The Act* also provides that WorkCover on behalf of the injured worker's employer can seek independent medical advice.

It has not been uncommon for the advice of an injured worker's treating doctor and that of the independent doctor to differ substantially.

The intention of the legislation establishing medical panels was to provide an impartial and conclusive medical opinion as a way of resolving these differences as well as resolving them more quickly.

5.13.2 Summary of Views Expressed in Submissions

17 submissions made direct comment about this amendment, eight of these were generally supportive and nine were generally not supportive.

Those who were most supportive expressed their support with comments such as:

- "*the system of medical panels is progressing well; however, it may require further expansion in the future, particularly with regard to the scope of medical questions*".
- the introduction of medical panels to resolve disputes about a worker's injury/illness is supported and seen as a "*valuable way of introducing informed and independent assessment in key decisions to be made along the rehabilitation pathway*".

Those who were least supportive expressed their dissatisfaction with comments such as:

- it is concerning that injured workers attending medical panels have no right of representation or appeal; and "*deliberations are held in secret"* which "*lack transparency and accountability*".
- medical panels are seen as a "*major source of injustice within the WorkCover Scheme in that they deny injured workers natural justice*".
- "*we are concerned that there have been some decisions from the panel where the opinion has strayed into questions of fact. It is not just for an opinion to be considered binding if it is an opinion based on information that has not yet been tested in court*".
- medical panels are being used as a threat to encourage injured workers to resolve their claim. There is a misconception that they are "*punitive*" in nature. This then results in injured workers becoming "*distressed and defensive*" due to living in fear of the outcomes of a medical panel.

- there is uncertainty regarding the roles/responsibilities and procedural fairness associated with medical panels. It is submitted that "*to date since the introduction of medical panels they have been exercising quasi/judicial functions*", even though panel members are not legally trained.
- consideration should be given to whether referral of injured workers to medical panels is delaying the resolution of disputes. It is also questionable whether medical panels are being properly utilised by compensating authorities.

5.13.3 Data available to the Review

Medical panels came into existence on 1 April 2009 meaning that operational experience to 31 December 2010 has been of slightly less than 21 months duration given an understandable start-up period.

The full implementation of the legislation related to medical panels has been affected by several factors:

- legal challenges to the constitutional validity and authority of medical panels including questions regarding the relationship of their powers to those of the Tribunal; at the time of the review these matters are still to be determined by the South Australian Supreme Court.
- an apparent concern by injured workers (and their legal representatives) as to the fairness of the medical panel process leading to numerous cancellations of appointments.
- the non-proclamation of Section 98F(3) at the request of the Presiding Judge of the Industrial Court pending the outcome of legal challenges referred to in (1) above; this Section refers to the requirement that the Tribunal must refer medical questions in dispute to a medical panel.

Within these limitations the review has been supplied with data by Medical Panels SA (the administrative body responsible for the establishment and operation of the medical panels) as follows:

Appendix 3 to the submission by Medical Panels SA provides a comprehensive table of the activities of medical panels in the period July 2009 to December 2010. That table is not included here but the following key points can be gleaned from the table.

- Medical Panels SA received and accepted 1 325 referrals in that 18 month period of which 894 (67%) were from WorkCover's claims agent, 391 (30%) were from self-insured employers and 40 (3%) were from the Tribunal.
- In that same period Medical Panels SA did not accept a further 197 referrals as being valid.
- To 31 December 2010, medical panels have issued 888 opinions and 341 matters have yet to reach an opinion.

- For 1 325 accepted referrals a total of 6 877 medical questions were asked (an average of more than five questions per referral).
- The most frequently asked questions (paraphrased) of medical panels are in relation to:
    1. whether a worker has a disability and, if so, the nature and extent of the disability
    2. whether a disability arose out of or in course of employment and whether the employment contributed to the disability
    3. whether a disability is permanent and, if so, the level for assessment of a non-economic loss claim
    4. whether a disability results in a capacity for work
    5. whether the worker has a capacity for work
    6. what employment would or would not constitute suitable employment for the worker
    7. when the worker ceased to be incapacitated for work by the disability.
- the average time for an opinion to be provided by a medical panel has increased from 53 days in the 2009/10 financial year to 74 days in the following six months. (Note: the legislation prescribes a response time of 60 days unless an extension of time is approved by the referring body. For reasons outlined below, requests for time extensions have become more prevalent.)

Additional information provided by Medical Panels SA in response to a request from the reviewers has indicated the extent of disruption to the activities of medical panels as a result of a range of concerns. In the five months from November 2010 to March 2011 (the period for which records have been kept), 196 (or 37%) of 526 scheduled examinations were cancelled.

Of interest also in that same period, 101 (or 31%) of the 330 examinations that proceeded involved a support person being present. In ten cases, the support person was a legal representative, in 14 cases the support person was a union representative but in the majority of cases (77 or 76%) the support person was a friend or family representative.

5.13.4 Reviewers' Conclusion

The concept of medical panels was widely opposed in the lead up to the 2008 legislative amendments and their introduction has faced considerable challenges. The full extent of their intended operation has yet to be seen and almost certainly will not be seen:

- whilst the legal challenges to their constitutional validity and authority remain unresolved (and the flow on effect of having Section 98F(3) unproclaimed)
- whilst injured workers (whether on advice from representatives or because of their innate fear of a medical panel) continue to cancel appointments at the rate that has been experienced in the recent past.

It would not be unreasonable to conclude that there is currently considerable uncertainty as to the circumstances under which a matter can be referred to a medical panel and on the obligations of WorkCover and its claims agent in referring a matter to a medical panel.

In addition, there was a brief period in which WorkCover's claims agent and some self insured employers were referring injured workers to a medical panel prior to (and as an alternative to) obtaining an independent medical report to that of the injured worker's treating doctor. Whilst it is understood that this practice has now ceased, it did create a mindset that a medical panel could be utilised to counter the assessment of a worker's treating doctor rather than as an independent 'third party'.

In the light of the limited experience to date, the reviewers can only reach tentative conclusions about their impact on injured workers as follows:

1. Given that approximately 70% of claims for non-economic loss have, since April 2009 been determined by a medical panel, some injured workers have benefited from the assessments of their injuries for the lump sum compensation for non-economic loss whilst others who are assessed as not reaching the 5% whole of body impairment are disappointed.
2. Despite the Convenor of Medical Panels SA indicating to the review that medical panels do everything possible to put an injured worker at ease, suspicion remains that this will not be the experience of injured workers.
3. Because for registered employers, the only body which may refer a matter to a medical panel is WorkCover (via its claims agent), there is a feeling that a medical panel is more likely to take a position favourable to the claims agent than to the injured worker. This particularly applies in relation to work capacity reviews. It gains some traction from the relatively small number (56 out of 644) of opinions to date that the injured worker has no work capacity.

Much of the adverse comment about medical panels received during the review related to what might be described as early 'process issues' relating to such aspects as:

- the way in which WorkCover's claims agent referred a matter to medical panels (eg. premature referrals or inadequate explanation to the injured worker about the referral, incomplete information being provided to medical panels)
- WorkCover's claims agent taking undue advantage of the provisions of Section 98F(2) in *the Act* that enable a referral to a medical panel at any time (even potentially whilst a dispute is before the Tribunal)
- irrelevant referrals because there was no difference between medical evidence obtained.

The review understands that many of these process issues have been addressed via the development by WorkCover's claims agent of referral guidelines. However, these will no doubt need continual refinement over time in the light of operational experience.

The Convenor of Medical Panels SA has highlighted a number of legal uncertainties which also relate largely to process issues. Further, the Convenor has suggested future legislative amendment which would assist in resolving those uncertainties. These suggestions appear to have merit and are included as Appendix Three to this report. Consideration of the suggestions would obviously occur in the light of the outcome of the current legal challenges to the authority of medical panels.

Comment in other submissions specifically related to the lack of opportunity for an injured worker to be represented before a medical panel. The review understands the difficulties for medical panels if representation for injured workers was introduced. Ultimately the outcome of the legal challenges to the authority of medical panels will decide key aspects of future operation.

In the meantime consideration may need to be given to enabling an injured worker who seeks legal assistance in preparing documentation for a medical panel appointment to be reimbursed the cost (within a prescribed fee) for such assistance.

In relation to 'process issues' within a medical panel, the Convenor's Directions, which are freely available, specify the modus operandi of medical panels. There is a case for these to be updated, specifically but not only in relation to the way in which medical panels respond to people of varying cultural backgrounds and limited understanding of English.

Additional non-written material (such as DVD based material) might also prove worthwhile in helping injured workers prepare better for a medical panel assessment.

An annual report to the Minister for Industrial Relations, prepared by Medical Panels SA would address some concerns about accountability of medical panels. The Convenor has proposed this in the Medical Panels SA submission to this review and the reviewers support the proposal as a future legislative amendment.

Overall, the implementation of the system of medical panels has been so impacted by legal challenges and other concerns that it is not possible to draw any lasting conclusions about their effectiveness. It is important that decisions which will affect the future role and operation of medical panels be made as quickly as possible after the legal challenges have been finalised.

In the meantime, the uncertainty is not only impacting on injured workers but on the desire of clinically active medical specialists to make themselves available for medical panel work.

5.14 Part 6D Section 99 – WorkCover Ombudsman

The legislation provides for the establishment and operation of a new Office – that of a WorkCover Ombudsman. *The Amending Act* specifies the functions of the WorkCover Ombudsman which, paraphrased, are to:

- identify and review issues arising from the administration of *the Act* and to make recommendations for improvement particularly in relation to processes affecting injured workers
- receive and resolve complaints about administrative acts and specifically to deal with complaints about an employer's failure to comply with the employer's obligation to provide suitable work for injured workers (Sections 58B and 58C)
- encourage WorkCover and employers to establish their own complaints handling processes and procedures with a view to improving the effectiveness of *the Act*.

The Amending Act also specifies that certain Parts of *the Act* are not within the charter of the WorkCover Ombudsman. These specifically are those Parts which deal with the operation of the Tribunal and medical panels.

5.14.1 Intention of the Amendments

The intent of this legislation provision was to ensure that injured workers could raise concerns about the procedural fairness of administrative actions and to have those concerns assessed independently. In addition, the Ombudsman's general power to keep the administration of *the Act* under review enables the Ombudsman to identify possible systemic issues which could impact on more than one injured worker and to have such issues addressed without waiting for the impact to be felt and complaints raised.

5.14.2 Summary of Views Expressed in Submissions

Four submissions made direct comment about this amendment. All of these were generally supportive with comments such as:

- the WorkCover Ombudsman has had a positive impact and there is "*strong support for the roles and responsibilities of the WorkCover Ombudsman being maintained in their current form*".
- whilst it is may be too early to tell, the introduction of the addressing of "*systematic issues*" by the WorkCover Ombudsman appears to have had a "*beneficial impact on injured workers generally*".
- the role of the WorkCover Ombudsman is important, however, the powers need to be strengthened to enable his recommendations to have legal force. Also, additional funding should be provided to his office to allow him to carry out public enquiries "*into systemic abuses affecting injured workers*".
- "*as far as we are aware, the Ombudsman has diligently performed this function without fear or favour to any side, delivering well reasoned and sound decisions*".

5.14.3 Data available to the Review

The WorkCover Ombudsman has, over the past two years, dealt with approximately 2000 approaches for advice, assistance, and decision. Given the number of active claims at any one time, this represents a high penetration rate.

As summarised in Section 5.6.3 of this report, the WorkCover Ombudsman has, in the past two completed financial years, reviewed more than 300 decisions to discontinue weekly payments with many more of those decisions being overturned in 2008/09 than in 2009/10.

5.14.4 Reviewers' Conclusion

The overwhelming view of submissions and subsequent interviews with authors of submissions relating to the establishment of the WorkCover Ombudsman role and to the way in which the WorkCover Ombudsman has pursued his functions under *the Act* is positive. Moreover, the WorkCover Ombudsman has earned praise for his willingness to indentify systemic issues leading to complaints and to take remedial action (including presentations to WorkCover and its claims agent) to minimise or prevent recurrence.

These actions include:

- steps to improve the decision making by WorkCover's claims agent in relation to Section 36 (discontinuance of weekly payments) matters.
- making recommendations to WorkCover and its claims agent regarding substantial improvements to the way in which decisions are made and communicated when an injured worker's employment with his or her pre-injury employer is to be terminated.
- advice on improvements to WorkCover's Injury and Case Management manual to strengthen the consultation between an injured worker and his or her vocational rehabilitation advisor in the development of the worker's rehabilitation and return to work plan.
- providing informal feedback to the Convenor of Medical Panels SA concerning 'process issues' that had been brought to his attention (whilst recognising that the Ombudsman has no legislative powers in relation to medical panels).

This review supports the positive views expressed about the work of the WorkCover Ombudsman.

The WorkCover Ombudsman has raised the question of whether his powers under Section 36 (15) could be broadened. This Section provides that an injured worker, lodging an objection against the discontinuance of weekly earnings with the Tribunal, may seek a review of the decision to discontinue weekly payments pending the outcome of the Tribunal's consideration of the matter by the WorkCover Ombudsman.

As discussed above in Section 5.6, the WorkCover Ombudsman may only overturn such actions if it appears that "*it was not reasonably open to the Compensator to discontinue the payments having regard to the circumstances of the case*". This does not enable the WorkCover Ombudsman to consider the intrinsic merit of the action.

Furthermore, the Ombudsman has no powers to suspend decisions relating to the reduction of weekly payments.

As indicated above, the reviewers support the WorkCover Ombudsman's view that a broadening of his powers under Section 36 (15) might well be considered in future amendments to *the Act*.

5.15 Part 6; Section 123 – Code of Claimants' Rights

This amendment provided for the proclamation by regulation of a code to be known as the Code of Claimants' Rights. The purpose of the Code of Claimants' Rights is specified in *the Amendment Act* and, paraphrased, is to state the expectations that injured workers should reasonably have about how WorkCover or a self insured employer should deal with them and their circumstances. Further, *the Amendment Act* specifies that the code should document the procedure for lodging and dealing with complaints about breaches of the code.

5.15.1 Intention of the Amendments

This amendment has the intention of providing another layer of assurance to injured workers that they will be dealt with reasonably by WorkCover or their self-insured employer. As in other sectors where codes apply, a code sets the expectations on both the employers and WorkCover and enables injured workers to raise objections if, in their view, expectations are not met.

5.15.2 Summary of Views Expressed in Submissions

Only two submissions (those of the WorkCover Ombudsman and SA Unions) referred to this amendment, pointing out that a Code of Claimants' Rights has yet to be promulgated. Each has an understandable interest in this matter being finalised.

5.15.3 Data available to the Review

The review understands that considerable consultation was undertaken by WorkCover in the preparation of the draft Code of Claimants Rights but that there is perceived to be a legal impediment to the proclamation of a code as a Regulation under *the Act*.

5.15.4 Reviewers' Conclusion

There has been no evidence submitted to the review that Parliament's intentions relating to the need for a code were misplaced. The review encourages an early resolution to the impediments that are delaying its finalisation.

Appendix One

Submissions

Employer Associations (10)

- SA Government
- Business SA
- Motor Traders Association
- Self Insurers Association
- Australian Industry Group
- Registered Employers Group SA
- SA Wine Industry
- Farmers Federation
- Greek Orthodox Community Services
- Aged Care Association

Employee Associations (5)

- SA Unions
- Shop, Distributive & Allied Employee's Association
- Australian Manufacturing Worker's Union in conjunction with the Transport Workers Union, the Finance Sector Union and the Communications, Electrical and Plumbing Union
- Construction Forestry Mining & Energy Union – Forestry and Furniture Division (SA)
- Work Injured Resource Connection

Providers (9)

- WorkCover Board
- Australian Medical Association
- Adelaide Psychological Services
- Law Society of South Australia
- Australian Lawyers Alliance
- GIO
- Australian Rehabilitation Providers Association
- Australian Psychological Society
- Consultant Physician

Individuals (7)

Other (3)

- WorkCover Ombudsman
- Medical Panels
- Employee Ombudsman

WorkCover Corporation of South Australia

Financial Impacts of the 2008 Scheme Review

Chris Latham

FIAA

May 2011

pwc

Contents

1 Introduction

1.1 Introduction and background

This report has been requested by Mr Greg Mackie, Deputy Chief Executive, Cultural Development, Department of the Premier and Cabinet, acting on behalf of the Minister of Industrial Relations of South Australia.

The terms of reference are described in a *Letter of engagement for Consultancy Services* dated 21 January 2011, which identifies that a report is to be prepared on:

a) The impact of the *Workers Rehabilitation and Compensation (Scheme Review) Amending Act 2008* (the Amending Act) on workers who have suffered compensable disabilities and been affected by the operation of the Amending Act; and

b) the impact of the Amending Act on levies paid by employers under Part 5 of the *Workers Rehabilitation and Compensation Act 1986 (*the Principal Act), and

c) the impact of the Amending Act on the sufficiency of the Compensation Fund to meet the liabilities of the WorkCover Corporation of South Australia under the Principal Act.

Part (a) is addressed in the main report. This appending report specifically addresses parts (b) and (c).

The Amending Act was prepared following a report submitted by WorkCover South Australia (WorkCover) to the Government in November 2006. Following this a comprehensive review of the workers compensation system was prepared by Bracton Consulting Services Pty Ltd and PricewaterhouseCoopers, and dated December 2007 (the Clayton-Walsh report).

That report considered a number the changes to the system proposed by WorkCover and made further recommendations for changes. After consultation, a suite of changes were introduced in the Amending Act.

The terms of reference for this report relate only to the scheme administered by the WorkCover Corporation of South Australia ("the Scheme"). As such it does **not** relate to self-insurers and their employees.

1.2 Summary of conclusions

The changes in the Amending Act should be considered as a "package" of changes intended to improve the benefit design in the Scheme and to create an environment which will encourage return to work.

Having said this, however, for the purposes of discussion the changes have been separated into three groups, namely

A. Those to which specific changes in direct claims costs were attributed at the outset (step-downs, Work Capacity Reviews (WCRs), lump sums for non-economic loss)

B. Those to which **no** specific change in claims costs were attributed but are important in achieving the overall effectiveness of the package (change in Average Weekly Earnings(AWE), restriction of access to redemptions, incentives for early reporting, provisional liability, dispute resolution, medical panels)

C. Changes which were expected to result in increased expenditure (incentives for early reporting, expenditure of improved injury management), operation of medical panels

A summary of the discussion appearing in Section 5 for each of these groups is as follows:

Group A

The lower weekly payments arising from *step-downs* are apparent in the data. However it is not possible to detect the expected improvement (i.e. increases) in discontinuance rates.

The numbers of exits from *WCRs* have been less than expected in the initial calculations, although this is at least partly explained by the delaying effect of a number of challenges to the legislation. The overall process is still at a relatively early stage.

Experience with respect to *lump sums for non-economic loss* is not out of line with initial expectations and there is no reason at this stage to doubt the initial calculations.

Group B

The *changes in AWE, incentives for early reporting and provisional liability* appear to have been implemented reasonably effectively and, in the case of the last two, have resulted in changes in experience that were expected. In particular their introduction does **not** appear to have led to increased claims costs. However, nor is it clear that they have led to reduced claims costs.

The *dispute resolution* process has not at this stage led to the anticipated reductions in the number of disputes (even though there is a long term trend in that direction), but rather the opposite as new legislation is tested.

The establishment of *Medical Panels* has not been legally successful, as its legitimacy is being challenged in the courts.

Group C

The increases in costs expected from incentives for *early reporting* have been less than expected.

As far as overall claims experience in the Scheme is concerned (Section 6) the most significant feature since the Amending Act has been the effect of the focus on redemptions.

It has resulted in a large reduction in the numbers of active weekly claims of more than 3 years' duration and consequential reductions in weekly payments.

The other noteworthy feature of experience was the significant increase in amounts spent on rehabilitation.

Changes in the numbers of overall claims were in accordance with the effects of the Global Financial Crisis (GFC) in other jurisdictions. Medical and hospital payments were relatively benign, as were legal costs.

With respect to levies and sufficiency of the Fund a summary of the main observations is as follows:

a) As estimated by WorkCover's actuaries, there is no material difference between the hindsight levy rates before and after the Amending Act. This compares to an expected long-term reduction of 0.8% of wages estimated at the time.

b) The calculations reflect the effect of the Amending Act only to the extent that it is apparent in the claims experience. A cautious view has been taken given that the key amendment (WCRs) is at an early stage and that there are challenges to some aspects of the legislation.

c) The level of administration costs increased significantly in the year following the Amending Act, mainly due to increased payments to the claims manager. Costs reduced slightly in 2009/10.

d) The total hindsight break-even levy for the 2010/11 year is 2.79% of wages, and compares with an actual levy to be charged of 2.75% of wages

e) There is still the potential for reductions in break-even levies in the future if the full intent of the Amending Act can be realised. However this cannot be presumed until further evidence emerges.

f) The funding level of the Scheme has increased from 61% at 30 June 2008 to 66% at 31 December 2010. This is the net effect of unfavourable economic conditions (investment returns and lower discount rates for measuring liabilities) offset by overall favourable claims experience (see (h) below).

g) Were it not for favourable claims experience the funding level at 31 December 2010 would have been 58% only.

h) The favourable claims experience derives essentially from a focus on paying lump sum redemptions to long-tail claims, a "window" existing for such redemptions until 30 June 2010.

   This has led to a reduction in liabilities of around $380m.

   The project focussing on redemptions is only indirectly related to changes in the Amending Act. Changes arising from the Amending Act might be more like $70m.

2 Information provided

I have obtained copies of the following information:

i. The Clayton-Walsh report dated November 2007
ii. The Amending Act
iii. A number of submissions made to the WorkCover Review, and in particular that made by WorkCover SA
iv. The draft actuarial report on the Scheme as at 31 December 2010 prepared by Finity Consulting
v. Abbreviated actuarial valuation reports prepared by Finity Consulting at each of 30 June and 31 December in the years 2008, 2009 and 2010
vi. The data underlying the actuarial valuation report as at 31 December 2010

This information has been supplemented by discussions with, inter alia;

- The Scheme's actuaries, Finity Consulting
- WorkCover SA
- Employers Mutual
- Public Sector Workforce Relations
- Co-reviewer Mr Bill Cossey

3 The Amending Act 2008

3.1 Summary of relevant changes

The changes introduced in the Amending Act with which I am particularly concerned are those which, either directly or indirectly, are expected to lead to changes in the aggregate claims cost in the Scheme.

The following table is a summary of such changes, and gives the effective date of the change.

Table 3.1 Summary of changes

Change	Benefits affected	Brief description	Effective date
Definition of AWE	Weekly payments	Use of actual past earnings instead of estimates of prospective earnings	1/07/2008
Step-down	Weekly payments	Move from 100% of earnings for 52 weeks to 100% for 13 weeks, then 90% to 26 weeks, then 80% thereafter	1/07/2008
Work Capacity Reviews	Weekly payments	WCRs at 130 weeks	1/04/2009
Redemptions	Weekly payments	Severely restricted -new claims -aged claims	1/07/2009 1/07/2010
Payments for permanent serious injury (non-economic loss)	NELS	Table of maims replaced by payments according to WPI with threshold of 5%. Amounts increased	1/04/2009
Provisional liability	All	Worker assumed to be entitled to benefits within 7 days	1/01/2009
Claims reporting	All	Rebate on excess payable by employer if claim reported within 48 hours	1/01/2009
Operational changes: Dispute resolution process Medical panels Rehabilitation/RTW	All	 Changed to facilitate faster resolution Establish panels Trained co-ordinators required	 1/01/2009 1/04/2009 1/01/2009

A phased implementation was adopted because of the need for consultation with stakeholders and for some significant operational changes.

A further change, that of excluding the wages of apprentices and trainees in an employer's wages bill for levy purposes, does affect the levy **rates**, but will not affect the total costs in the Scheme. The effect is noted in Section 7.2.

3.2 Expected financial effects

The Clayton-Walsh report included the estimated costs of changes recommended in that report. The final changes included in the Amending Act were essentially those recommended except for the step-down in weekly payments at 13 weeks which was altered from the 80% of earnings in the Clayton-Walsh report, to 90% of earnings:

There may also be other, definitional changes, but unlikely to materially affect claims cost.

The financial effects on the Scheme comprise potential changes in

- on-going claims cost

- the liability for past claims

With respect to the *on-going claims costs* the following table summarises the intention of each change and the estimated effect;

Table 3.2 Estimated changes in on-going costs

Change	Intention of change	Estimated effect on on-going costs (% of wages)
Definition of AWE	Removal of subjectivity, simpler	Nil
Step-down	Incentive to return to work (RTW)	-0.11%
Work Capacity Reviews	To restrict long-term benefits to those with no capacity to work	-0.69%
Redemptions	Continued access would compromise other proposals	Nil
Payments for permanent serious injury	To achieve more rigour in assessment. Threshold to cut out less severe injuries. Bring into line with other jurisdictions	-0.06%
Provisional liability	To enable earlier intervention and more effective RTW	Nil
Claims reporting	To enable earlier intervention and more effective RTW	0.02%
Operational changes : Dispute resolution process Medical panels Rehabilitation/RTW	Speedier resolution, more rigour in decisions, improved injury managment.	0.05%
Total		-0.79%

The total of the estimated effect of the changes as per the Clayton-Walsh report was therefore a **reduction** in on-going claims costs of 0.79% of wages. This should be seen in the context of an average levy rate at the time of 3.0% of wages.

However there are some important points to acknowledge, namely;

a) The reduction of 0.11% of wages due to the step-down will be less because of the increase to 90% step-down for weeks 14 to 26. This will change the estimated reduction to around 0.09% of wages.

b) While there are a number of changes against which no changes in cost are attributed, they are nevertheless important for the sustainability of other changes i.e. the changes should be considered as a "package" rather than a series of individual changes.

c) The success of the changes in achieving the reduction in costs is dependent on their effective implementation, in particular that relating to Work Capacity Reviews. As such any reductions are expected to emerge over time rather than immediately following the change.

Turning to the effect on the *liability for past claims,* Clayton-Walsh report estimated a reduction of '*perhaps $200 million, with the potential for further reductions over time".*

This reduction effectively derived from a reduction in the numbers of long-term claims returned to work, but noted that "*the actual outcome ...will depend on the success of focussed return to work initiatives and the rigor of the partial capacity assessment instrument and process"*

4 Approach adopted

The approach adopted to address the required tasks can be summarised as follows:

a) Each change identified in Section 3.1 has been considered in isolation and their effect on related claims experience in the period prior to and after their introduction identified as far as possible.
(Section 5)

b) The experience in the Scheme in a wider context has then been considered, focussing on the most significant and relevant benefit types. This enables observations on the combined effect of all factors affecting the Scheme over the period
(Section 6)

c) The questions of levies and funding, and how these have been affected by changes in the Amending Act are then discussed, in particular:

- the concept of *break-even* levies (BELs) and how they relate to *actual* levies
- the relationship between levies and *funding levels*
- changes in BELs as identified by the Scheme's actuaries, Finity Consulting, and the reasons for those changes
- levels of administration expenses
- the change in funding level over the period and the reasons for the change

(Section 7)

5 Claims experience relative to specific changes

5.1 Preliminary comments

This section considers experience in the Scheme as it relates to the changes introduced by the Amending Act, and summarised in Section 3.1

Where dollar values made at different points in time are shown they have been adjusted for inflation, so that they are in comparable dollar values.

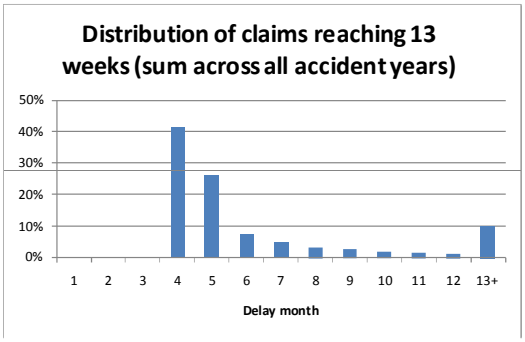
A number of the changes relate to income maintenance/weekly payments and require analyses according to *Entitlement Periods.* These are defined according to the numbers of weeks of compensation paid to the injured worker (e.g. first 13 weeks, Work Capacity Review at 130 weeks etc).

Most traditional actuarial analyses are made according to the time elapsed since the *date of injury* rather than the numbers of weeks of compensation. The two are not synonymous because there can be multiple periods of compensation, punctuated by periods back at work. Unfortunately, however, numbers of weeks' compensation is not directly captured for the Scheme, and it is not straightforward to derive reliable estimates from the data which is available.

Accordingly, to inform our analyses we have used the results of approximate work previously undertaken by Finity, together with that made available from other workers' compensation schemes.

In this regard the chart below shows a derived distribution of the period of time from injury for claims reaching 13 weeks of compensation.

Figure 5.1 Claims reaching 13 weeks compensation



This shows that some 75% of claims reach 13 weeks compensation within 5 months from the date of injury (22 weeks). However some 10% of claims take over 12 months.

The average time taken is 25 weeks i.e. 12 weeks more than the minimum time.

Similar observations can be made for other Entitlement Periods, and the 12 weeks difference with regard to the minimum period is similar.

This must be borne in mind when interpreting the analyses appearing later in this section, where the elapsed periods are relative to the date of injury rather than numbers of weeks' compensation.

5.2 Definition of AWE (effective date 1/7/2008)

Description and intent of change

This is a change with respect to the way in which an injured worker's earnings are determined for the purposes of calculating their weekly payment.

Prior to the change earnings for the forthcoming year were estimated, thereby involving assumptions about the future. It is now derived from earnings actually received in the year prior to injury.

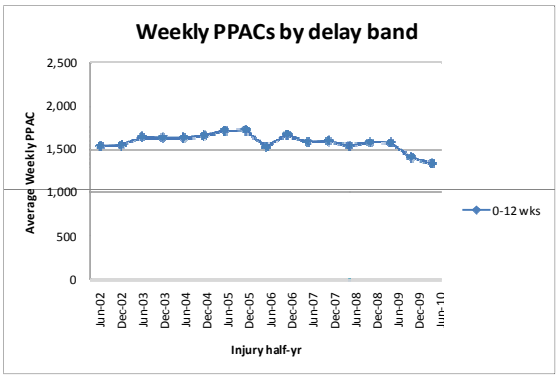
The change applies to claims reported after 1 July 2008

The change was not expected to lead to a net change in cost to the Scheme.

Experience

The following chart shows the average payment per active claim in the first 13 weeks of payments (which are 100% of earnings in each case), before and after 1 July 2008.

Figure 5.2 Weekly payments per active claim



The sequence above shows no material change immediately after the change was effected.

However it shows a distinct reduction in the December 2009 and June 2010 half-year periods. This was not expected and may be due to data dislocation caused by delays in reimbursements to employers from the introduction of a new form.

Certainly there is no evidence that the change has caused an increase in the amounts of AWE for compensation purposes.

There will always be variations between injury periods, as the distributions of earnings of injured workers can of course vary.

Conclusion

There is no evidence of adverse cost consequences from the introduction of this change.

5.3 Step-downs (effective date 1/7/2008)

Description and intent of change

Prior to these changes weekly payments were made at the level of 100% of earnings for 52 weeks, then reducing to 80% of earnings.

Following the change, payments start at 100% of earnings, then reduce to 90% after 13 weeks, and then to 80% after 26 weeks.

The change applies to claims reported after 1 July 2008.

The changes were expected to reduce on-going costs in the Scheme by around 0.09% of wages only (see discussion in Section 3.2). This would come from two sources, namely:

(i) the lower amounts of benefits themselves, and

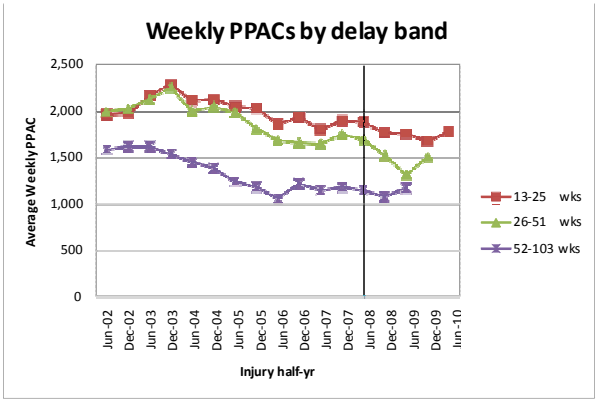
(ii) the potential effect of higher discontinuance ("drop-off") rates

Each source would represent around one-half of the total and I consider each in turn.

Experience-lower benefits

The following chart shows the average payment per active claim (PPAC) in the periods after 13 weeks from injury.

Figure 5.3 Weekly PPACs by delay



Recalling the points made in Section 5.1 regarding date of injury relative to numbers of weeks compensation the chart shows experience in weeks 13 to 25 after injury. This should incorporate a phased reduction of 10% relative to experience in the June 2008 injury half year and prior.

A distinct reduction is clearly observable. The reductions are smaller immediately following the change, but higher for the most recent injury periods. The average reduction post June 2008 is around 7%, recalling that a proportion of claims in this period will still not have reached 13

weeks compensation after 25 weeks and will therefore still be receiving 100% of earnings.

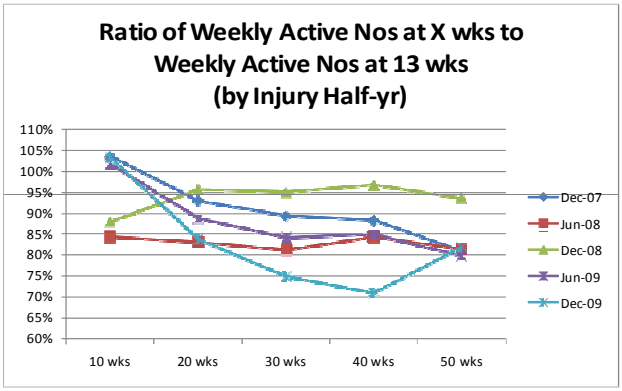
Similarly for experience in the 26 to 51 week period since injury. The average reduction post June 2008 is 15%

For post 52 weeks there is no material difference in the amounts paid, as should be the case.

Experience - discontinuance rates

The following table shows the ratios of numbers of active claims at 13 weeks to those at other durations.

Figure 5.4 Rates on discontinuance



It is difficult to interpret the experience. One reason for this is the effect of the introduction of incentives for early reporting and provisional liability at 1/1/2009. This has resulted in higher numbers of active claims at early delays and consequentially higher discontinuance rates. For periods after 1/1/2009, therefore, it is difficult to identify any changes in discontinuance that might be directly attributed to the earlier step-downs.

The green line above relates to the December 2008 half-year i.e. before early reporting and provisional liability. Here we can see that the numbers active at 50 weeks is not very different to those active at 13 weeks. This contrasts with more favourable experience for the December 2007 and June 2008 half-years (i.e. before the Amending Act).

This is counter-intuitive, in that there is no apparent reason why the earlier step-downs should change behaviour such that injured workers are **more** likely to remain on benefit.

The reason may therefore lay in other factors, and in particular the effect of the Global Financial Crisis (GFC), where alternative work duties will have been less readily available.

Conclusion

Discussions with Scheme management suggest that difficulties have arisen in the interpretation of Entitlement Periods, and that this has made implementation of the alternative step-downs problematical from an administrative point of view.

Notwithstanding this, the data indicates that the step-downs have been made successfully from a financial view. By itself this should result in a reduction in costs of around 0.04% of wages.

However, it is not clear that the step-downs have been successful in providing disincentives for injured workers to remain off work (alternatively, incentives to return to work).

5.4 Work Capacity Reviews (effective date 1/4/2009)

Description and intent of change

This change introduces a work capacity review (WCR) for injured workers after 130 weeks of compensation payments. Benefits cease if a worker has any residual capacity to work, either at the time, or expected to have capacity at a later date.

It applies to all injured workers receiving benefits at 1 April 2009, with around 3,500 workers having already received 130 weeks' compensation and hence potentially subject to a WCR.

This change is expected to be the single most significant change in reducing claims costs in the Scheme. A reduction of 0.69% of wages was estimated at the outset, but it was emphasised that this estimate relied for its success on focussed return to work initiatives and the rigor of the partial incapacity process.

Experience

At 31 December 2010 there were 535 current *determinations to cease* (DTC) out of a total 644 original determinations following a WCR. Of the current DTCs 345 have either not disputed the determination or been unsuccessful in their challenge. A summary by accident year is as follows:

Table 5.1 WCR experience to date

	(a)	(b)	(c)	(d)	(a) / (c)	(a) / (d)
Accident Year	DTC at Dec-10	Exits to Dec-10	Weekly actives at Mar-09	Dec-10	DTC as % actives at Mar-09	DTC as % actives at Dec-10
to 2004/05	26	20	2,557	609	1%	4%
2005/06	156	123	945	312	17%	50%
2006/07	251	154	1,172	733	21%	34%
2007/08	102	48	1,364	933	7%	11%
Total	535	345	6,038	2,587	9%	21%
Post 2004/05	509	325	3,481	1,978	15%	26%

It can be seen that there have been few DTCs in accident years 2004/05 and earlier, notwithstanding that these would have been partially subject to WCRs. Rather, these claims have been offered redemptions (see Section 5.5).

The main focus of WCRs has been accident years 2005/06 and later. As WCRs were introduced as from 1 April 2009, a good measure of the "exposure" to WCR is the numbers of active claims at March 2009, as given in the above table.

For the more developed years 2005/06 and 2006/07 we have 17% and 21% of March actives with DTCs at December 2010. However, when we exclude those DTCs currently subject to appeal, the actual exits from WCRs reduce to 13% for both years.

By comparison the corresponding experience in WorkSafe Victoria (i.e. WCR exits in the first 6 months after reaching 130 weeks after injury are around 35% of active claims, ultimately reaching over 60%.

Accordingly, the early WCR experience is significantly less favourable than currently in Victoria.

Part of the difference may well be explained by the lack of familiarity with the legislation and the processes involved. In particular, around one half of the original determinations were disputed.

The robustness of the legislation surrounding WCRs is critical to the achievement of the anticipated reductions in cost. In this regard there have been a number of challenges to various aspects of the legislation, and the ultimate effectiveness of the changes is uncertain.

Conclusion

Taken together, the introduction of WCRs and the restriction of access to redemptions were in the long term estimated to result in a significant reduction in the overall cost of claims (0.69% of wages).

At this stage, however, the degree of success of the introduction of WCRs cannot be confidently assessed. The Scheme's actuaries, Finity consulting, have allowed for experience seen to date, but the financial effect is less than that assumed in the initial calculations.

In their calculations Finity have allowed for ultimate numbers of WCR exits which represent around 30% of active claims at 130 weeks. This is around one-half of that experienced in WorkSafe Victoria.

The ultimate effectiveness of the changes will be determined by the extent to which the intent of the legislation is sustained in the dispute process, and of the appetite to introduce further amendments if necessary.

Coincident with this will be the success of focussed return to work initiatives. This is not yet apparent in the data to 31 December 2010.

5.5 Redemptions (effective date 1/7/2009)

Description and intent of change

The intention of the Amending Act is to severely restrict access to redemptions of weekly payments following 1 July 2009. The revised wording in the Act appears considerably more restrictive than the previous wording but, as with a lot of legislation, alternative interpretations can be taken.

This being so, certain *policy* decisions have been taken by WorkCover so as to support the intention of the change.

No change in on-going costs was attributed to the change; rather it was intended to influence the culture in the Scheme, away from lump sums

and towards rehabilitation and return to work. Any cost benefits from this would only emerge in the longer term.

While the legislative provisions became effective at 1 April 2009 there was a “redemption window” up to 30 June 2010 which enabled WorkCover to pursue its previous redemption strategy with respect to existing longer-term claims.

There have been no redemptions for post 1 July 2009 injuries. Superficially, therefore, no further discussion is necessary.

However the use of redemptions must be seen in a wider context and the policy adopted by WorkCover leading up to 30 June 2010 has been an important part of the experience of the Scheme in the period. This is now discussed below.

Experience up to 30 June 2010

The ability to redeem future weekly and/or medical payments for a lump sum was introduced in 1995. Since then it has been used by WorkCover as a “tool” to manage long-term claims. A large proportion of claims reaching two years’ duration have ultimately received a redemption payment.

The Amending Act foreshadowing restricted use of redemptions meant that this tool would no longer be available. Essentially, it was being replaced by Work Capacity Reviews which, if effective, would serve a similar financial purpose of reducing the numbers of long-duration claims.

The redemption window up to 30 June 2010 provided a final opportunity to reduce the existing pool of long-duration claims via redemption payments. In the two years 2008/9 and 2009/10 there were over 3000 redemptions totalling $270m. A further 400 payments were settled after 30 June 2010. The focus was on pre June 2005 injuries, and the number of active claims from this group reduced by 70%, from 3517 to 1039.

This experience has had a significant (and favourable) effect on liabilities for outstanding claims (See Section 7).

The question to be addressed is the extent to which the redemption policy can be considered to be a consequence of the changes in the Amending Act. It is perhaps an **indirect** rather than direct consequence.

Conclusion

The change introduced in the Amending Act applies to injuries after 1 July 2009 only. It is too early to gauge the effectiveness of the revised wording, or WorkCover’s policy in supporting it.

The introduction of WCRs and the restriction of access to redemptions should be considered together. As for WCRs the wording with respect to restricted access has yet to be fully tested. Once again, it may become necessary to revise the wording if the existing legislation fails in its intent.

5.6 Non-economic loss payments (effective date 1/4/2009)

Description and intent of change

Prior to the Amending Act lump sums for non-economic loss (NEL) were assessed according to a "Table of Maims". There was no objective distinction according to the degree of impairment, or disability.

The changes in the Amending Act introduced the concept *Whole Person Impairment (WPI*), which determined the amount of entitlement relative to a maximum dollar amount.

A threshold of 5% WPI was introduced below which there is no entitlement to benefits.

The intention of these changes was to achieve an improved relationship between the degree of impairment and the amount of benefit, and to enable greater weight to be given to more serious injuries.

It also brought South Australia more into line with other jurisdictions.

The new benefits apply to all determinations made after 1 April 2009, irrespective of injury period.

The changes were estimated to reduce the overall costs to the Scheme by 0.06% of wages.

Experience

While the experience is still immature I make the following comments:

i. Claims are reported over a long period after injury, and hence the changes apply to a large number of claims resulting from injuries prior to 1 April 2009

ii. The 5% threshold was expected to reduce the numbers of claims from some 2,800 per annum to 2,000 per annum. Early experience is running at less than this, but is not unexpected as the new process becomes familiar. The numbers post change will also be affected by a "bringing forward" of claims immediately prior to the change.

iii. The average size of NEL claims was expected to increase slightly, with the effect of higher maximum amounts offset in part by the effect of the threshold on small, low severity claims. Experience so far appears to support this view.

Given the limited experience to date, and the fact that it does not obviously appear to be out-of-line with that expected, Finity have continued to adopt the original costing assumptions.

Conclusion

Experience to date is insufficient to reject the original assumptions of the effect of the change on the cost of claims. As such the estimated cost of lump sums for non-economic loss is still estimated to be around 0.06% of wages **less than** prior to the changes.

A key risk for this change is the extent to which the 5% threshold may be eroded over time and the degree of subjectivity that may emerge in assessment of the level of WPI.

5.7 Provisional liability (effective date 1/1/2009)

Description and intent of change

This change introduces a process whereby a worker is assumed to be entitled to income and medical costs until a determination is made to the contrary.

The intention is that the earlier payment will result in earlier return to work and rehabilitation efforts, and reduce the incidence of disputes.

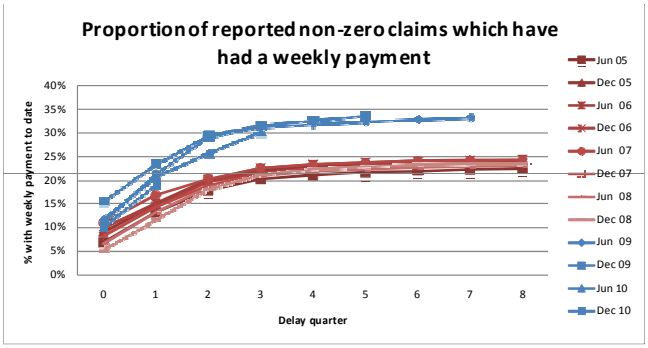
Weekly payments can be made for up to 13 weeks or until an earlier determination is made.

While this change is expected to be beneficial, it was not possible to place a reliable estimate on the effect, and none was quantified.

Experience

The following chart shows the proportion of reported non-zero claims which have received a weekly payment by a given duration.

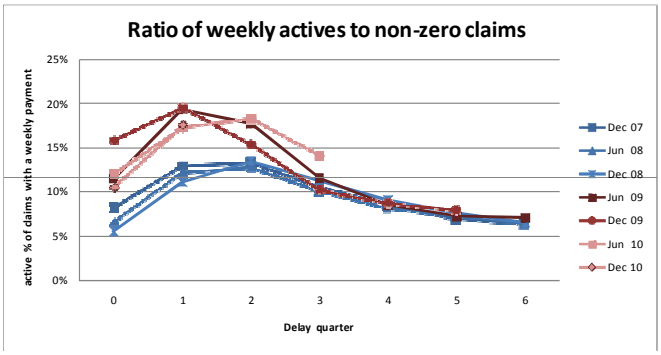
Figure 5.5 Proportions of claims receiving weekly payments



A distinct change occurred after the introduction of provisional liability and early reporting from 1 January 2009 (see Section 5.8 below). Prior to these changes the proportion of claims receiving weekly payments levelled off at around 23%. Following the changes, the proportion has increased to around 34%.

To test the effectiveness of the change we must consider the extent to which these additional claims persist into the longer term. The next figure shows the proportion of non-zero claims actively receiving weekly benefits at each duration.

Figure 5.6 Weekly actives to total claims



The higher proportions of all claims at delay quarter 1 following the introduction of provisional liability and early reporting is clear. However by delay quarters 2 and 3 the proportions for the June 2009 and December 2009 half years have reduced to prior levels.

For the June 2010 half year the proportion at delay quarter 3 has reduced, although it is still higher than prior experience.

The experience so far does not, however, provide evidence that provisional liability leads to **reduced** numbers of active claims in the longer term.

Conclusion

The introduction of provisional liability (and early reporting) may have been effective in enabling earlier intervention with respect to rehabilitation and RTW. However there is no evidence as yet to suggest longer term reductions in costs as a result, although none was incorporated into the initial calculations.

5.8 Early reporting (effective date 1/1/2009)

Description and intent of change

This change provides employers with a rebate on the 10 day excess (which they would otherwise pay) if they report claims within 48 hours.

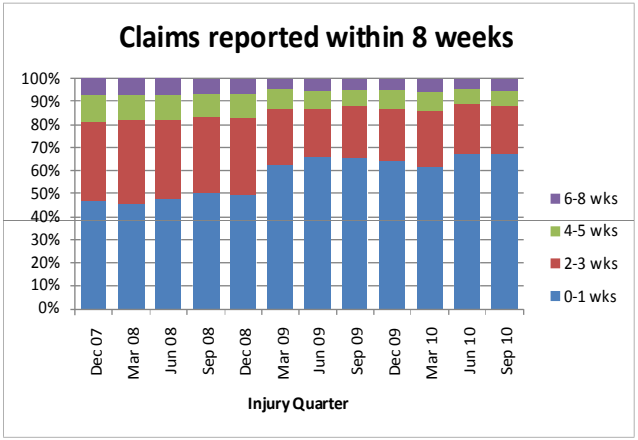
The intention is similar to that described above with regard to provisional liability i.e. earlier rehabilitation and return to work.

The additional rebates were expected to increase Scheme costs by 0.02% of wages (or $4m a year). However it was also expected to lead to reduced costs in the long-term, although these were unable to be quantified.

Experience

The following chart shows the delay distribution of claims reported within 8 weeks of injury (which is around 88% of ultimate claims).

Figure 5.7 Claims reported within 8 weeks of injury



It can be seen that the proportion reported within one week of injury increased significantly in the March 2009 quarter, and has remained at the higher level.

The average delay has reduced from 15 days to 11 days.

Conclusion

The conclusions are the same as those described above with respect to provisional liability.

The additional payments associated with the waiver of employer excess were expected to cost around $4m per annum, but have been closer to $2m.

5.9 Operational changes

In this Section I have grouped together the following:

- Dispute resolution process (effective 1 January 2009)
- Introduction of Medical Panels (effective 1 April 2009)
- Enhanced injury management and return to work co-ordinators (effective 1 January 2009)

These changes are not directed at specific benefit types in terms of changing their cost, but rather are operational changes intended to improve the functioning of the Scheme, and to improve overall outcomes for injured workers.

I discuss each in turn.

Dispute resolution process

The intention here was to streamline and simplify the dispute resolution process, and bring it more into line with other jurisdictions with more focus on conciliation.

Coincident with the changes to process were changes to the structure and scales of legal costs, which were designed to encourage early settlement.

It is difficult to assess the efficacy of the changes made in an environment where new legislative provisions have been introduced and are being tested.

Indeed the total number of disputes **increased** in 2008 following the introduction of the Amending Act, and continued at the higher level in 2009. Increases were particularly marked in relation to the assessment eligibility and quantum of lump sums for non-economic loss.

Importantly the number of disputes fell in 2010 to 2006 levels, as lump sum disputes reduced significantly.

Until the testing process has been completed, and "teething problems" resolved, we cannot assess whether changes to the dispute resolution process will be beneficial to injured workers, and the scheme overall.

No cost effect was specifically attributed to these changes.

Medical panels

The establishment of Medical Panels SA (MPSA) brought South Australia into line with other jurisdictions, in particular that of Victoria upon which it was largely based.

The intention was once again to reduce delays resulting from, in particular, "duelling doctors". Decisions made by MPSA were intended to be more evidence-based.

In the event the right to refer medical questions to MPSA has been placed in doubt in the Supreme Court matters of *Yaghoubi* and *Campbell*. Both the constitutionality of the establishment of MPSA and the binding nature of its decisions have been challenged.

The consequences should these matters be successful are significant. The role of MPSA in the dispute process is fundamental.

Once again no cost effect was specifically attributed to this change.

Enhanced injury management/RTW

The Amending Act introduced a requirement for formally-trained rehabilitation and RTW co-ordinators in workplaces with over 30 employees.

WorkCover has established a business unit (the Return to Work Inspectorate) which provides support to RTW co-ordinators. The Inspectorate conducts compliance and education visits.

I cannot comment on the effectiveness of the implementation of these parts of the Act.

The requirements, together with other operational changes were expected to lead to an increase in the expense component of the levy, of 0.05% of wages (or $12m a year). Changes in WorkCover expense levels are considered in Section 7.

5.10 Summary

It is important to consider all of the changes discussed above as a "package" of amendments intended to improve the benefit design in the Scheme and to create an environment which will encourage return to work. Having said this, however, for the purposes of discussion I have separated them into three groups, namely

A. Those to which specific changes in direct claims costs were attributed at the outset (step-downs, WCRs, lump sums for non-economic loss)

B. Those to which **no** specific change in claims costs were attributed but are important in achieving the overall effectiveness of the package (change in AWE, restriction of access to redemptions, incentives for early reporting, provisional liability, dispute resolution, medical panels)

C. Changes which were expected to result in increased expenditure (incentives for early reporting, expenditure of improved injury management)

A summary of the foregoing discussion for each of these groups is as follows:

Group A

The lower weekly payments arising from *step-downs* are apparent in the data. However it is not possible to detect the expected improvement (i.e. increases) in discontinuance rates.

The numbers of exits from *WCRs* have been less than expected in the initial calculations, although this is at least partly explained by the delaying effect of a number of challenges to the legislation. The overall process is still at a relatively early stage.

Experience with respect to *lump sums for non-economic loss* is not out of line with initial expectations and there is no reason at this stage to doubt the initial calculations.

Group B

The *changes in AWE, incentives for early reporting and provisional liability* appear to have been implemented reasonably effectively and, in the case of the last two, have resulted in changes in experience that were expected. In particular their introduction does **not** appear to have led to increased claims costs.

The *dispute resolution* process has not at this stage led to the anticipated reductions in the numbers of dispute, but rather the opposite as new legislation is tested.

The establishment of *Medical Panels* has not been legally successful, as its legitimacy is being challenged in the courts.

Group C

The increases in costs expected from incentives for *early reporting* have been less than expected.

6 Overall claims experience

In the previous section claims experience specific to the changes included in the Amending Act were considered. This section briefly considers claims experience in the period 1 July 2008 to 31 December 2010 for the Scheme in its entirety, enabling broader and more general observations to be drawn.

To enable a perspective on the significance of each benefit type the table below shows the proportion of total cost of the most recent accident years as estimated by Finity consulting

Table 6.1 Proportions of accident year costs

Benefit type	Proportion of costs
Weekly payments	57%
Medical and the like	29%
NEL	10%
Redemptions	0%
Legal payments	3%
Other	4%
Recoveries	-3%
Total	100%

Weekly payments are the cornerstone of the Scheme costs, as they are also strongly related to medical costs.

Prior to accident year 2007 redemptions represented some 15% of total costs, with lower proportions of weekly payments. Following the Amending Act redemptions are expected to be minimal.

The sections below consider the experience in the most significant benefit types.

Claim numbers

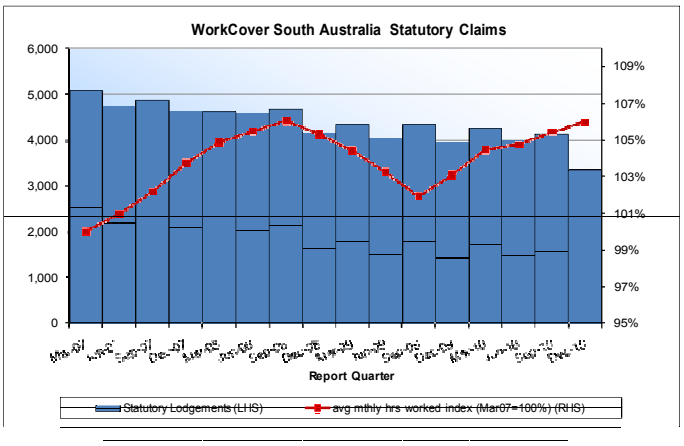
Non-zero claim numbers reduced at the start of the period, reaching a low 8970 for the December 2009 half-year (7% below the December 2008 half year).

This is similar to other jurisdictions, except that the low points were generally earlier than in South Australia, and more obviously due to the GFC.

Since December 2009 claim numbers have increased by some 4%, but are still below the level at the start of the period.

The following chart compares Scheme claim numbers to changes in hours worked.

Figure 6.1 Claim numbers vs hours worked



The chart shows a similar pattern to other jurisdictions. Reductions in hours worked following the GFC were significant, and led to some reductions in claim numbers (but less than reductions in hours). As hours worked have rebounded the numbers of claims have started to increase somewhat, more so in some jurisdictions than others.

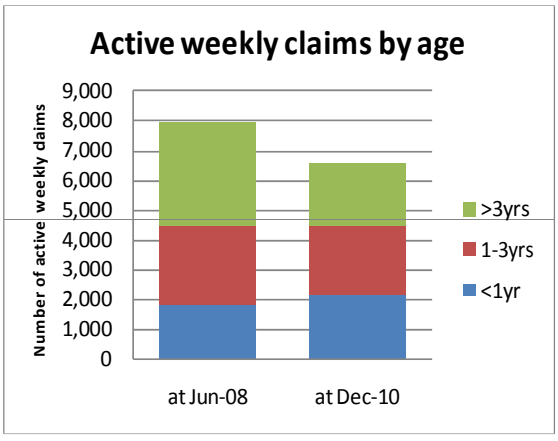
Weekly payments

As noted in Section 5.7 the proportions of non-zero claims which receive a weekly payment increased from 23% to 34% due to the introduction of provisional liability.

The numbers of active claims reduced from 7,963 at 30 June 2008 to 6,564 at 31 December 2010, due largely to the policy of encouraging redemption.

The following chart shows the distribution by duration of active weekly claims at the start and end of the period

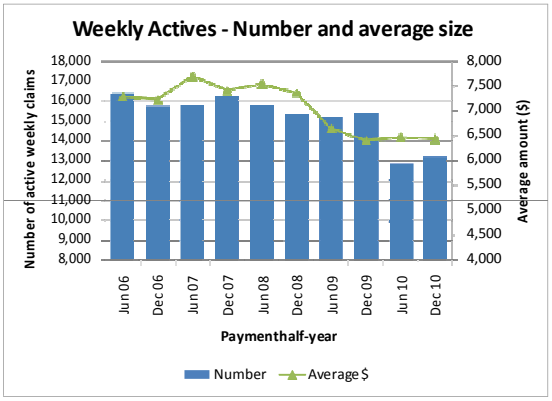
Figure 6.2 Weekly claims by duration



The effect of the active redemption policy can be seen in the reduced numbers with duration over 3 years.

The next chart shows the numbers of active claims in recent periods and the average payment per active claim in that period.

Figure 6.3 Weekly actives and sizes



Experience was reasonably stable in the period immediately up to December 2008. However the averages then reduced significantly, followed by the numbers of actives. This is most likely due to the effect of the redemption of large numbers of long term high value claims.

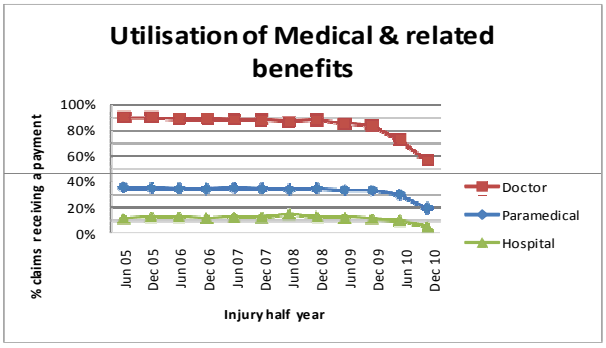
The total dollar amounts paid in the June and December 2010 half years were 15% less than in preceding periods.

Medical and like

Slightly more than one half of the Medical and like payments relate to GPs, with hospital, rehabilitation and paramedical comprising the remainder.

The proportions of total claims receiving medical and the like benefits in recent periods are as follows.

Figure 6.4 Medical proportions

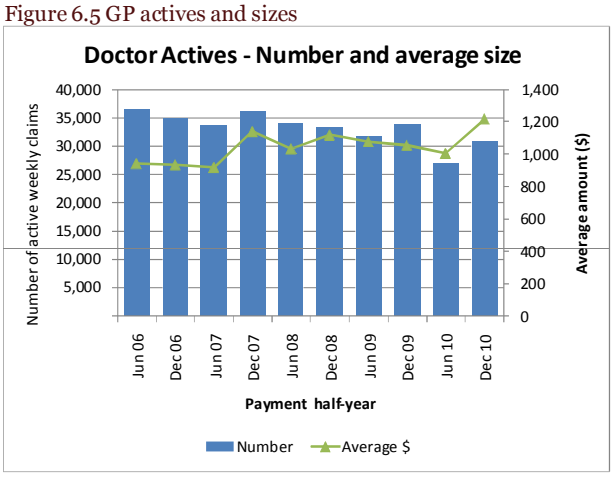


The more recent data points are likely to develop with experience, and do not represent real reductions.

With this in mind it can be seen that the proportions of claims accessing medical benefits has been quite stable over time. Some 80% of claims access GPs and 35% receive paramedical treatment.

The following chart shows the numbers of active GP claims in recent periods and the average payment per active claim in that period.

Figure 6.5 GP actives and sizes



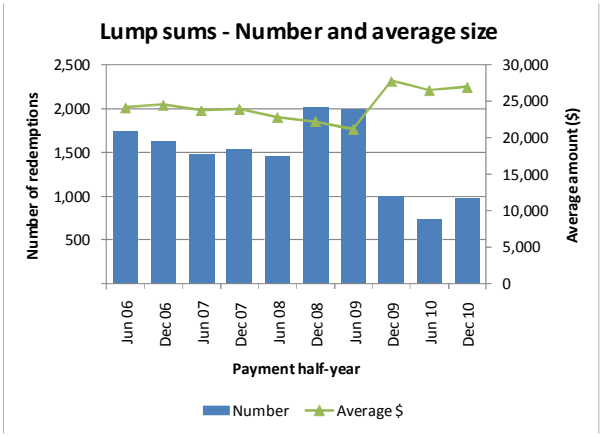
Numbers have reduced and averages have increased in the past twelve months. Immediate prior experience was reasonably stable. Overall dollar payments have been relatively stable except for a low June 2010 half year.

While hospital costs have been relatively stable in recent years the costs of rehabilitation has increased. Relative to wages they are estimated to have increased by some 27% in real terms since the 2005/06 accident year.

Non economic loss lump sums

The numbers and sizes of lump sums in recent payment periods have been as follows.

Figure 6.6 Numbers and sizes of NEL lump sums

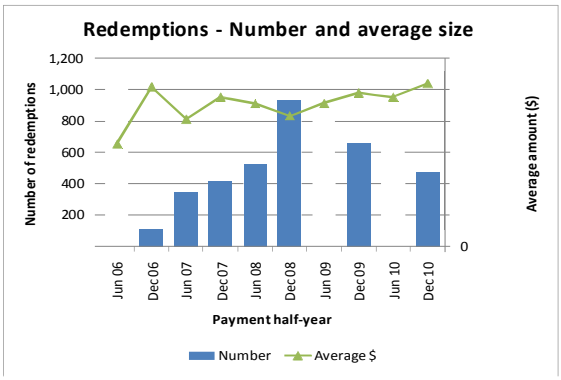


Coincident with the changes in the Amending Act numbers of payments reduced after June 2009, but at a higher average.

Redemptions

The experience in the period with respect to redemptions was discussed in Section 5.5 above. A recent history of numbers and sizes is given in the chart below.

Figure 6.7 Numbers and sizes of redemptions



Numbers have been variable in recent years, while averages have been steady in the range $80,000 to $100,000.

As noted above redemptions in future are not expected to be significant.

Legal costs

Legal costs do not represent a major proportion of total claims costs. Total dollar costs have remained quite stable in recent years, and relative to wages are estimated to have reduced from 0.079% in 2005/06 to 0.060% in 2009/10.

Summary

The most significant feature of claims experience since the Amending Act was the effect of the focus on redemptions, discussed in Section 5.5 and above.

It has resulted in a large reduction in the numbers of active weekly claims of more than 3 years' duration and consequential reductions in weekly payments.

The other noteworthy feature of experience was the significant increase in amounts spent on rehabilitation.

Changes in the numbers of overall claims were in accordance with the effects of the Global Financial Crisis (GFC) in other jurisdictions. Medical and hospital payments were relatively benign, as were legal costs.

7 Levies and Sufficiency of Fund

7.1 General background

Before discussing the specifics relating to the levies and funding of the Scheme it is useful to provide a general discussion on these aspects.

The general equation

The long term outworkings of the Scheme can be summarised by the following simple equation:

$$\textit{Net funds} = \textit{levies} + \textit{investment return} - (\textit{cost of claims} + \textit{expenses})$$

"*Net funds*" at a point in time is a measure of the extent to which the ultimate cost of all current claims is funded.

The term *funding level* is the ratio of available assets to estimates of outstanding claims. It is directly related to net funds as described above.

$$\textit{Funding level} = 1 + \frac{\textit{net funds}}{\textit{outstanding claims}}$$

Different stakeholders will tend to focus on different aspects of the above equation, rather than see it in its entirety: *Employers* tend to focus on the level of levies. *Injured workers* will be more concerned with the level of benefits. For the G*overnment* levy levels are important because of their political context. Of all the stakeholders the government is that which is most concerned with the overall management of the Scheme.

Scheme management is faced with the task of trying to manage these demands and expectations, while maintaining a reasonable balance in the Scheme equation.

Break-even levy

A break-even levy (BEL) is one which, in a realistic long-term projection of Scheme experience, generates neither profits nor losses. In the context of the above equation the net funds for a particular accident year are zero

To the extent the *actual* levies are greater/less than BEL then profits/losses will emerge, thereby affecting the funding level.

However levies are set based on *assumptions* about future experience. As such there can be considerable uncertainty in the estimate of BEL. This is particularly so when claims experience is changing.

Variability of funding levels

As noted above funding levels are affected by the relationship between actual and break-even levies.

However the single most important aspect of experience which affects funding levels of a mature scheme from year to year is the variability of investment return.

The long-term nature of the Scheme and the linkage of liabilities to inflationary increases means that investment portfolios generally have a strong bias to growth assets such as shares and property in order to achieve higher longer term returns. Investment returns on these asset classes can be volatile.

The market value approach required by AASB 1023 for both assets and liabilities reduces the overall volatility on the bottom line **only if** the assets are matched to fixed interest securities. However this is not perfectly achievable in practice.

Managing Scheme balance

Rather than focus on the Scheme's funding level at each point in time, it is in my view preferable to consider the Scheme as a whole, and in particular the relationship between levies and funding levels.

It is common for Schemes to be out of balance. It is therefore important that a plan exists for the balance to be restored in a managed and orderly manner.

It is important to have an overall framework which requires financial discipline, but there should be some flexibility within that framework to properly manage variations in levies.

Levy changes cannot of course be avoided. However, they should be managed with a view to achievement of balance, but done so in a way which minimises undesirable dislocation.

7.2 Levies in the Scheme

Actual and hindsight Break-Even Levies

Actual levies for the 2008/9 and 2009/10 years were set at an average 3.0% of wages, reducing to 2.75% for the 2010/11 year.

The Scheme's actuaries, Finity Consulting, do not estimate break-even levies for the forthcoming year i.e. prior to the setting of levies. They do, however, estimate the cost of claims and expenses at the end of each year, called *hindsight* rates. This is likened to a break-even levy estimated in arrears.

The following table summarises the hindsight rates for the accident years in question.

Table 7.1 Hindsight

Accident year ending 30 June	Hindsight rate (% wages)estimated at		
	Jun-09	Jun-10	Dec-10
2009	2.75	2.90	2.85
2010		2.90	2.85
2011			2.79

levies

The hindsight rates have varied over time. There are number of reasons why this is the case, namely:

a) The discount rate used in the calculations is based upon Government Bond rates at the date of calculation, and these have varied.

b) The effect of the removal for levy purposes of wages of apprentices and trainees was not recognised until 2010, and this caused rates to increase by 2% (or 0.06% of wages).

c) The effect of any changes in claims experience.

For the purposes of this report it is only the factor in (c) in which we are interested.

Focussing on the most recent estimates (which are not affected by factors (a) and (b)) it can be seen there is little difference between the three accident years.

More importantly is the comparison with accident years **prior to** the introduction of the Amending Act. At 30 June 2008 the estimates for years 2004/5 to 2007/8 averaged around 2.9% of wages, and around 2.8% at 31 December 2010.

As such there is no material difference between the hindsight rates before and after the changes in the Amending Act. This compares to an expectation of a reduction of around 0.8% of wages (see Section 3.2)

This should not necessarily be seen as a failure of the changes to bring about a significant reduction in levies. In their calculations of hindsight rates above Finity have adopted assumptions consistent with the valuation of balance sheet liabilities. In their valuation report as at 31 December 2010 they have acknowledged the following:

"*... we have taken the approach of not projecting the full expected impacts of some parts of the reforms [2008 changes] until they are completely implemented and their impacts can be demonstrated"*

"The current valuation should not be regarded as an assessment of the ultimate financial impact of the legislative changes on existing claims"

In this context Finity have adopted a "degree of recognition" approach to the expected impacts of the Amending Act. In my view this is a sensible approach at the time, in that:

- The key change (the introduction of Work Capacity Reviews) was only introduced at 1 April 2009
- The sustainability of the changes has not yet been clearly demonstrated.

In their valuation report Finity also provide alternative estimates of a 2011/12 levy. This is from calculations made for WorkCover of a *Benefits Realisation Project* target scenario, and estimates potential lower levy rates in the future.

Their calculation assumes fewer income maintenance claims continuing into the tail, through a combination of improvements in front-end continuance and the impact of Work Capacity Reviews.

While this can be viewed as a plausible **target**, it would be ill-advised to charge levies at this level in advance of convincing evidence of the likelihood that the underlying assumptions can be achieved and sustained.

Finally it is noted that:

i. Actual average levies in the period were around 5% above the hindsight rates until 2010/11 where they dropped to 1.4% below the hindsight rate.

ii. The hindsight rate is based on investment returns on Government Bonds. In practice the Scheme would be expected to achieve a return higher than those on Bonds, through investment in equities. As such the hindsight rates are higher than break-even and would be expected to generate profits in the long-term.

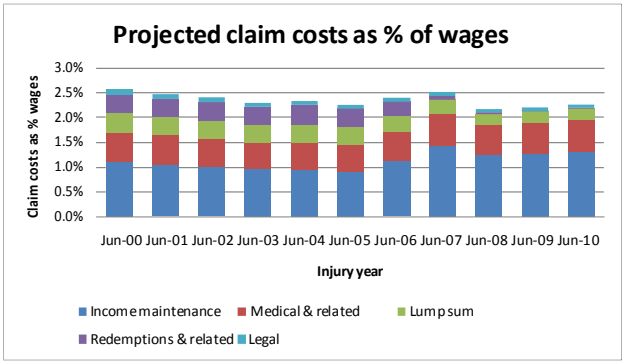
Components of hindsight break-even levies

The break-even levies comprise each of:

- claims costs, and
- expenses

The chart below shows the claims costs components as for past years as estimated by Finity Consulting

Chart 7.1 Claims costs to wages



The chart shows that;

i. For the past eleven years the cost of claims is estimated at ranging between slightly more than 2.5% and 2.2% of wages

ii. Of the more recent years the 2006/07 year stands out as a high cost year, arising from higher weekly payment costs more than offsetting lower redemptions

iii. The cost of claims reduced in the 2007/08 year and is estimated to be stable in subsequent years (the small increase being due to the removal of wages of apprentices and trainees)

iv. Accident years 2006/07 and earlier will have benefitted from the redemption program of the past two years (see below)

In their calculations Finity have reflected the effect of the changes in the Amending Act **only to the extent that it is reflected in the data**.

With respect to the second component of the break-even levy, the total expenses of administering the Scheme in recent years have been follows:

Table 7.2 Administration costs to wages

Year ending 30-Jun	Expenses ($m)	Relative to wages
2006	84.3	0.49%
2007	92.9	0.50%
2008	93.7	0.47%
2009	119.8	0.58%
2010	115.1	0.55%

As noted in Section 5.9 it was estimated at the outset that administration costs in the Scheme might increase by around $12m following the Amending Act.

Indeed there was a significant increase in costs in 2008/09, which can be split approximately as follows;

Component	Increase
	$m
Claims Management Fees	16.7
Workers Compensation Tribunal	1.0
WorkCover Ombudsman	0.8
Medical Panels SA	2.1
Operating Expenses	5.5
Total	26.1

It can be seen the majority of the increase comes from increased payments to the claims manager, EML Ltd. Smaller amounts derive from general operating expenses and from specific matters relating to the Amending Act.

Administration costs reduced slightly in 2009/10.

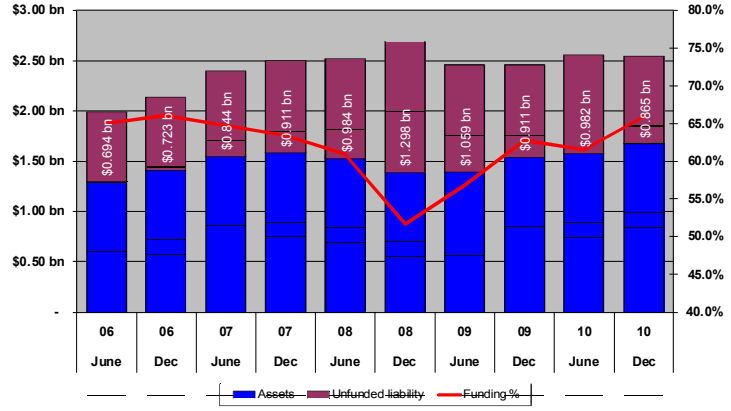
7.3 Sufficiency of the Fund

The *funding level* of the Scheme as defined in Section 7.1 above is a measure of the "sufficiency of the fund". As follows from the earlier discussion the funding level is dependent on:

- Any changes in the estimated cost of claims, and associated expenses
- The levels on investment return on existing assets
- The relationship of actual levies to break-even levies.

The following chart shows the recent history of the funding level:

Chart 7.2 Scheme funding levels



Source: Finity Consulting

At 30 June 2008 the funding level was 61%. It then reduced to 52% at 31 December 2008 and increased subsequently to 66% at 31 December 2010.

Approximate calculations have been made in order to identify the sources of change, which are broadly as follows:

i. *Estimated cost of claims:* In the context of accounting standard AASB 1023 this comprises two components:

- The effect of changes in discount rates used in the present value calculations. These rates have reduced materially between 30 June 2008 and 31 December 2010, thereby **increasing** the balance sheet liabilities, by around **$130m**.
- Changes resulting from claims experience as it has emerged and the flow-on effect to assumptions about future experience. These changes have been favourable, **reducing** the liability by around **$390m**

ii. *Investment returns*: Returns measured by changes in market values have varied significantly over the two and a half year period to 31 December 2010.

The return in 2008/9 was a negative 12.3%, being the effects of the GFC. For 2009/10 the return recovered to a positive 10%, and for the six months to 31 December 2010 is likely to have been around a positive 7%.

Overall the return over the period would equate to an average of around 1% per annum, which is less than that underlying the calculations of liabilities at 30 June 2008. The shortfall, relative to the revised discount rates, is around **$100m.**

iii. *Actual levies*: Actual levies have been slightly higher than break-even, leading to a surplus of some **$60m**

Of the above factors affecting the funding level over the period, only the changes resulting from claims experience needs further consideration in

this report. If the $390m reduction noted above had **not** occurred the funding level at 31 December 2010 would have been around **58**% only

The question to be addressed is the extent to which the $390m reduction noted above can be attributed to the changes introduced in the Amending Act.

The amount comprises a $450m reduction deriving from the changes in numbers and mix of those receiving weekly payments, offset by some increases in medical and rehabilitation payments, and some changes in actuarial methods and assumptions.

Focussing on the $450m reduction in the estimated costs of weekly payments, there are several factors which will have contributed to the reduction, namely:

- the large numbers of redemptions in the period
- the introduction of WCRs
- the introduction of step-downs
- the effect of early reporting, provisional liability and greater focus on rehabilitation and return to work

To quantify the contributions of each of these components with any degree of certainty is not really possible. However the order in which the factors above appear are in my view in descending order of significance. In particular, and noting the comments on experience in Section 5:

i. The incidence of redemptions has resulted in a substantial reduction in the liabilities

ii. Although in its early stages, the WCRs will have had some effect

iii. At this stage the effect of the other factors is likely only to have contributed a minor part of the total

Of the $450m some $300m emerged up to 31 December 2009, before the WCRs had really started to take effect. A plausible split might be;

Y $380m attributable to the redemption programme

Y $70m attributable to WCRs.

There is an important comment to make with respect to the reduction in liability arising from redemptions, which is as follows;

- The availability of redemptions in the Scheme will have led to a behavioural effect whereby injured workers were likely to remain on weekly benefits until a redemption offer was made
- In their valuations the actuaries made specific allowances for potential future redemptions at levels observed in the past. Minimal numbers of discontinuance from other causes were assumed, leading to high values to be placed on the outstanding liabilities for claims not expected to be offered redemptions.

- In recent years the numbers of redemptions have been much higher than allowed in the actuaries' valuation. This has resulted in "releases" of liabilities previously allowed for in the Scheme.

7.4 Summary

A summary of the main points from the above discussion are as follows:

a) As estimated by WorkCover's actuaries, there is no material difference between the hindsight levy rates before and after the Amending Act. This compares to an expected long-term reduction of 0.8% of wages estimated at the time.

b) The calculations reflect the effect of the Amending Act only to the extent that it is apparent in the claims experience. A cautious view has been taken given that the key Amending (WCRs) is at an early stage and that there are challenges to some aspects of the legislation.

c) The level of administration costs increased significantly in the year following the Amending Act, mainly due to increased payments to the claims manager. Costs reduced slightly in 2009/10.

d) The total hindsight break-even levy for the 2010/11 year is 2.79% of wages, and compares with an actual to be charged of 2.75% of wages

e) There is still the potential for reductions in break-even levies in the future if the full intent of the Amending Act can be realised. However this cannot be presumed until further evidence emerges.

f) The funding level of the Scheme has increased from 61% at 30 June 2008 to 66% at 31 December 2010. This is the net effect of unfavourable economic conditions (investment returns and lower discount rates for measuring liabilities) offset by overall favourable claims experience.

g) Were it not for favourable claims experience the funding level at 301 December 2010 would have been 58% only.

h) The favourable claims experience derives essentially from a focus on paying lump sum redemptions to long-tail claims, a "window" existing for such redemptions until 30 June 2010.

   This has led to a reduction in liabilities of around $380m.

   The project focussing on redemptions is only indirectly related to changes in the Amending Act. Changes arising from the Amending Act might be more like $70m.

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Appendix Three

Medical Panels SA Convenor's Suggestions for Future Legislative Amendment to Section 98

1. Introduction of a legislative requirement that Medical Panels SA provide an annual report to the Minister on the activities of Medical Panels for presentation to Parliament.
2. A requirement that the referrer provide a worker with prior notification of an intent to make a referral to a Medical Panel and allow a specified period for the worker to obtain further or updated information or prepare submissions prior to the referral being made.
3. Amendment of Section 98G(2)(b) of *The Act* to clarify its intent and effect and, if consultation is to be required, provide for the effective implementation of that process.
4. For the purposes of clarity, consideration be given to include an express power in Part 6C for the Convenor to decide upon the validity of a Certificate of Referral including, where the basic legislative requirements have been met, to decide the issue as to whether the referral of a particular medical question has been appropriately made in accordance with Act or whether a particular medical question falls outside the range of matters that should be subject to determination under Part 6C of *The Act*.
5. That the Convenor have express power to stipulate a timeframe for the making of submissions by the parties in relation to the decision as to whether a particular medical question is valid and has been properly made in accordance with *The Act*.
6. In relation to the matters in paragraphs 4 and 5 above, if considered necessary and appropriate, that the parties have a right of review of the decision of the Convenor as to whether the referral of a particular medical question has been properly made in accordance with Act, to the WorkCover Ombudsman.
7. Amendment of the medical questions defined in Sections 98E(e) and (f) to allow for future tense medical questions regarding proposed medical expenses and medical services.
8. Consideration as to the impact of past tense questions referred pursuant to Sections 98E(e) and (f) on the rights of service providers.
9. Amendment of the medical question defined in Section 98E(k) to reflect the wording of Section 35C(3)(b)(i) of *The Act*.
10. Addition of a further medical question to Section 98E of *The Act* to provide for a question in relation to whether a worker has a total loss disability pursuant to Section 43A and the No Disadvantage-Compensation Table (Schedule 3A) of *The Act*.