Grellman or gruel? Searching for a just and workable system of workers compensation

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On 15 September 1997 at a time when the people of Victoria were engaged in a campaign against their own government to save injured workers' rights to have access to the common law, Richard Grellman presented his Final Report following an Inquiry into Workers' Compensation in New South Wales to the Attorney General Mr Jeff Shaw.

Grellman's inquiry and report was instigated by Jeff Shaw on 2 April 1997.

Reports of a mounting deficit within the funding of the system combined with employer concern over premium rates and structures and worker resistance to further reductions in benefits were causing pressure for action. Nationally the Heads of Workers' Compensation Authorities were completing their report to the Labour Ministers Council. In Victoria moves were afoot which eventually led to the legislative removal of workers' rights to access common law damages. Some other jurisdictions had already abolished access to the common law and in almost all cases, common law access had been severely curtailed.

The poor financial outcome being experienced by the NSW system was becoming the basis for a push supported by a coalition of big business and bureaucracy for a further round of benefit reductions and restrictions of workers rights dressed up as reforms.

In such an atmosphere NSW workers and their organisations were apt to approach with extreme suspicion any new development. Few developments had been advantageous to them in recent times. They had in fact made major concessions and suffered considerable reductions in benefits. They were not in the mood for further reform.

The experience in Victoria was a further disincentive to allow any more tinkering with the current system. Additionally, the HWCA Final Report threatened reductions in benefits and restriction of the right of access to the common law that were correctly perceived as a real threat to the maintenance of a system that would provide proper benefits to the victims of industrial accidents in NSW.

In this atmosphere Grellman presented his report. There was much in the Grellman Report to dislike. Many of his suggestions were perceived as further attacks upon rights and remedies that were currently seen as barely sufficient. It is true that there were many aspects of Grellman's Report that were unacceptable and arise from faulty analysis, hasty decision-making and a misconception of the role of a system of workers compensation.

A proper analysis of these unacceptable features and the reasoning advanced for their recommendations must be the subject of more exhaustive analysis than can be attempted in this article. Each of these unpalatable recommendations are arguably untenable. None of them essential to the maintenance of the fundamental changes that are the essence of Grellman's recommendations.

In summary the recommendations that should be rejected include the adoption of the AMA Guides as the basis for assessment of permanent disability, the integration of the Compensation Court into the District Court, and the adoption of a system of limiting the discretion of judicial determination of impairment by the use of a concept called Final Offer Adjudication. In this system a judge is restrained in reaching a decision in relation to conflicting views of impairment to a range of options within 5% of the evidence of either the worker or the employer.

On the other hand there were many aspects of the report that should find favour among workers and their representatives. These include the retention of the right of access to common law, maintaining a court controlled dispute resolution system where workers can be properly represented by their lawyers and the ultimate privatisation of the insurance industry.

Rather than focus on individual aspects of his recommendations, we should look at the analysis of the core problems identified by Grellman and his solutions. I believe that if we take this approach then a new, innovative and sustainable system can be built in NSW, that will, by the force of its workability, be eventually adopted throughout Australia.

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In one respect at least, Grellman was right. The biggest single problem of the current system is the fact that the stakeholders, that is those most affected by the system, have no ownership of the system and are universally dissatisfied with the current situation.

Employers see premiums increasing, poor claims handling and lack of any real influence in outcomes as significant frustrations to their business. Workers complain of inadequate benefits, doctrinaire approaches to claims handling and ineffective rehabilitation procedures.

Insurers are constrained to operate in a system that makes a virtue out of inefficient claims handling and actively discourages incentive to reduce claims costs. All participants are frustrated by a system that ▶

is constantly changing, increasingly legalistic and complex where no one is responsible for producing satisfactory outcomes.

Astonishingly, Grellman could not find anyone who was legally and financially responsible for the statutory fund created by premium contributions. His summary of legislative amendments to the *Workers Compensation Act* since 1987 took up 44 pages of his report and contained almost 150 major amendments to the Act in 10 years of operation. He also identified other weaknesses including lack of incentives for and heavy regulation of insurers, the conflicting roles of WorkCover, deficiencies in the premium system, a flawed benefits structure and insufficient incentives for the resolution of disputes.

It is therefore not surprising that the stakeholders are unhappy with the operation of the current system. They are faced with a complex and logically flawed system regulated by a schizophrenic bureaucracy driven by political imperatives that change with the political colour of the government in power at that time.

Grellman's solution to the dilemma was to return control of the system to the stakeholders through the operation of a governing body known as the Administrative Council. This council would comprise equal numbers of employee and employer representatives, representatives from the insurance industry, an actuary and a chairman. The chairman would be the general manager of WorkCover and only that person and the employer and employee representatives would be voting members. The objectives of the Council would be the maintenance of the workers compensation system and its responsibilities would include recommending legislative changes to the system and advising the key participants in the system.

The Council would meet regularly to discuss and monitor workers compensation issues and to advise WorkCover and insurers. The Advisory Council would establish working parties and industry specific groups to advise it and hold annual public forums to comment on and suggest reforms to the system.

A compensation system moulded and administered by the stakeholders with the influence of WorkCover Authority diminished would mirror the process whereby other systems of industrial regulation are achieved in a modern society and forever remove the administration of the system from political intervention.

Such a suggestion warrants serious consideration. The outcomes are not set or even predicted by Grellman but rather in the hands of the people and organisations affected by its operation.

Do we want to consider such a change or should we rather await the inevitable outcomes suggested by HWCA Report or the Victorian experience? The Grellm[illegible] Report deserves serious consideration. This may just be the last chance. ■

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Massive changes to Victorian WorkCover

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...worker is likely to continue indefinitely to have no current work capacity.

If a worker has a current work capacity during the first entitlement period he or she is entitled to receive the difference between 95% of PIAWE and "notional earnings" or current earnings or the difference between $850 gross per week and "notional earnings" or current earnings, whichever is less. During the second entitlement period the worker is entitled to receive 60% of the difference between PIAWE and 60% of notional earnings or the difference between $510 gross per weeks and 60% of notional earnings, whichever is less.

Medical panels

The use and power of medical panels has been **extensively increased** and medical panels' opinions are binding on the Court. In non-economic loss claims, the medical panel assessment cannot be challenged by way of Court of Appeal.

Pre-employment disclosure

The Act now requires a worker to **disclose to a prospective employer all pre-existing injuries or diseases** which may be affected by the proposed employment. Failure to do so will disentitle the worker or his/her dependants to compensation in the event of any aggravation, accleration, etc, of the injury or disease.

Statutory offers and counter-statutory offers

A new procedure has been introduced in relation to existing common law claims, disability and pain and suffering claims and the new non-economic loss claims requiring insurers and workers to make statutory offers and counter statutory offers with **significant cost penalties** if the worker fails by way of a subsequent C[illegible] Order to obtain 90% of his or her counter-statutory offer.

Summary

These changes may set an ominous precedent for a further erosion of benefits to transport accident, medical negligence and occupiers liability victims and the fight will have to be maintained to prevent further abolition or restriction of the rights of injured persons in Victoria and in other states and territories. ■

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