



Mr Peter Rozen QC
Reviewer
Independent Agent Review
Service Delivery Reform, Co-ordination and Workplace Safety
Level 30. 121 Exhibition Street Melbourne Victoria 3000

24 September 2020

By email: agentreview@justice.vic.gov.au

Dear Mr Rozen,

RE: VICTORIAN WORKERS' COMPENSATION SYSTEM – INDEPENDENT REVIEW

The Australasian Meat Industry Employees' Union, Victorian Branch (AMIEU) welcomes the opportunity to make a submission to the independent review of the Victorian workers' compensation system.

Workers' health and safety and adequate and just compensation is a fundamental and longstanding pursuit of the AMIEU on behalf of its members. For example:

- The Victorian Branch of the AMIEU has employed full time compensation officers for more than 60 years.
- The Victorian Branch of the AMIEU established a medical centre in 1964 because of the need for medical practitioners who were capable of recognising and providing proper treatment for zoonotic infections and other work related conditions suffered by workers in the meat industry.
- The AMIEU was actively involved in developing/drafting the Accident Compensation Act in 1984/5.
- The then AMIEU Assistant Secretary, Graham Bird, was a member of the Accident Compensation Commission from its inception until it was abolished by the Kennett Government.
- A representative of the AMIEU is regular a participant in tripartite and government bodies associated with workers' compensation and occupational health and safety.

Occupational health and safety is core work to unions. No worker should be injured at work. The AMIEU is committed to ensuring employers provide and maintain work that is safe and without risk to health. Where a worker is injured at work, the main priority must be providing them with support and appropriate treatment and rehabilitation. A compensation scheme for workers injured in the course of their employment must reflect this.

In the meat industry far too many workers suffer from injuries that are extremely traumatic, and even more are traumatised by the workers' compensation system.

The AMIEU agrees with the Victorian Trades' Hall Council's statement that 'the system needs wholesale, structural change. The objectives of the scheme make no mention of providing adequate care for injured workers, or ensuring their medical needs are met. Instead, there is emphasis on containing the costs of the scheme. The current scheme is set up to enable profiteering off the back of injured workers, leading to disreputable behaviour by private insurance agents acting on behalf of WorkCover.'

AMIEU members, their families and their communities are extremely interested in the outcomes of the independent Review. We, therefore, value the opportunity to make a written submission.

The AMIEU's submission addresses most of the questions posed in the Review's Discussion Paper, sometimes by endorsing VTHC's response without specific comment.

Background

1. For individuals, please explain your experience of the workers' compensation scheme if any.

N/A.

2. For organisations, please describe your organisation.

The AMIEU Victorian Branch represents workers in the Meat Industry. The AMIEU represents a broad range of occupations including Butchers, Labourers, Drovers (at abattoirs), Slaughterers, Boners, Slicers, Knife Hands, Packers, Meat Lumpers, Casings Workers, Smallgoods Workers, Rendering Workers, Meat Wrappers, and Meat Cabinet Attendants.

Slaughtering and processing beef, lamb, pork, goat and poultry for our food supply are inherently dangerous jobs. Turning a 500 kilogram bull or a 2-3 kilogram chicken into cuts sold in the marketplace is physically demanding work undertaken in a difficult and hazardous work environment. Workers use sharp hooks and knives while standing on floors made slippery from blood, fat, faecal matter, and other bodily fluids. Unpredictable and violent reactions from animals before slaughter pose constant physical threats to workers. Heavy suspended carcasses travelling along a fast moving automated line can slam a worker to the floor. The use of machinery that is designed to kill; or cut through hides, muscle, tendon and bone can result in complex claims. Down the line, processing workers stand for long periods of time working closely together while making thousands of repetitive cuts each shift. The noise is deafening and temperatures in the plants range from hot and humid on the kill floors to near freezing in the processing rooms. Pathogens can infect workers, and chemicals from decomposing animal waste, disinfectants, or gases such as ammonia used for refrigeration can prove deadly. Emerging zoonotic diseases have potentially serious human health impacts and their current upwards trends are likely to continue.

The nature of the industry has resulted in the commitment of the AMIEU to preventing injuries and illnesses as well as supporting the workers who are injured or made ill.

Identifying and assessing complex claims

3. What are the features of a claim for worker's compensation that make it complex, or at risk of being complex?

The Ombudsman's report defined complex claims as those claims that require compensation past the 130 week cap.

It is our view that this definition is too narrow to truly capture complex claims and must be defined more broadly.

AMIEU believe that there are other factors which should form part of any definition which seeks to delineate complexity. These may include:

An injured worker's claim for compensation and treatment may be complex for a number of reasons, regardless of the length of time they are away from work, including:

1. The severity of the injury, or the circumstances in which it occurs, may cause psychiatric trauma or damage to the injured worker;
2. The injury may lead to a secondary claim (sequelae injury);
3. The impact of the injury may be severe, for example an injury to the spine, shoulders or arms on a physical worker;
4. The adversarial behaviour of the employer or agent may render managing the claim complex;
5. The vulnerability of the injured worker, such as age, cultural and linguistic diversity, employment status.

It is the experience of the AMIEU that the complexity of a claim can be established from day one.

Case Study One

Worker's injury: serious laceration to left thigh.

Site: Abattoir Kill Floor

Assessment of the incident:

Early in the morning the worker approached the supervisor and reported missing glove (PPE).

He started work on the line as ordered to.

Supervisor threw protective glove at/to worker.

The glove fell on the floor.

Worker asked for the chain to be stopped for 30 seconds to retrieve the glove and put it on safely.

Supervisor refused to stop the chain.

Worker bent down to retrieve the glove from the floor.

Worker was knocked on to the hide puller by the next carcass on the chain.

Worker was caught on the hide puller. The hook went into his left thigh and he was dragged under the machine, through the blood bath and hung upside down on the chain with the carcasses.

This resulted in significant infection; torn muscles and tendons requiring multiple operations skin grafts and Post Traumatic Stress Disorder.

From day one it was a complex claim.

Often the poor treatment of the injured worker by the WorkCover system increases the complexity of a claim.

The outcomes of the Ombudsman's reports are described in the Discussion Paper¹ as follows:

The Ombudsman's 2019 report followed on from her initial investigation in 2016 into WorkSafe and its agents. Both the 2016 and 2019 reports highlighted several deficiencies

¹ https://engage.vic.gov.au/download_file/32038/4492; s.2.3, p.10

that indicated a number of complex claims were being mishandled by agents including evidence of:

- *unreasonable decision-making by all five agents;*
- *agents maintaining unreasonable decisions at conciliation, forcing workers to take the matter to court;*
- *financial rewards encouraging agents to focus on rejecting or terminating entitlements; and*
- *limited accountability or oversight mechanisms of agent decisions by WorkSafe.*

Case Study Two

Worker's injury: Lower back injury

Site: Abattoir Boning Room

Circumstances: The worker is a non-English speaking background refugee who had a Bridging Visa. He obtained work in the abattoir as a labourer, worked up to being a knife hand, a slicer, then developed boning skills. He worked much overtime and developed a cumulative injury to his lower back. One day, when he was at lunch, he could not stand up. He was driven to the company doctor where he was given a Certificate of Capacity stating No Capacity. He was driven back to the workplace. The worker was not familiar with the WorkCover system and was not literate in English.

It was some time before a claim form was lodged. The Claims Agent involved a Private Investigator and several Independent Medical Examiners, the claim was rejected on the grounds that employment was not a significant contributing factor.

After more than eighteen months in which the worker had no income and no treatment the claim was accepted.

The poor treatment by the WorkCover system resulted in a severe physical injury and a secondary psychiatric injury.

The AMIEU supports the VTHC recommendation on the definition of 'complex claim'.

Recommendation 1: the Independent Review adopts a definition of a 'complex claim' that encompasses all the areas of complexity that may be associated with an injury at work, and that encourages managing the claim in a way that does not lead to further injury and therefore further complexity.

A definition of a complex claim should encompass complexity resulting from:

- The nature of the injury itself, including the measures and extent of rehabilitation;
- Whether it is a psychiatric injury, or has a psychiatric element to it;
- Whether the injury has led to a secondary injury, including injury to mental health;
- The circumstances surrounding the time the injury was sustained;
- The employment of the injured worker, such as the industry in which they are employed, their relationship with their employer, how the employer has handled the injury to date, and their type of employment (i.e. permanent - full-time, part-time, casual or labour hire);
- The personal circumstances of the injured worker, such as whether they are in secure housing, their financial circumstances, literacy and IT skills, whether they come from CALD;
- How the injured worker has been treated by the WorkCover system to date; and

- The length of time the injured worker has been unable to work.

4. How, and at what stage, should claims for worker's compensation be assessed as being complex, or at risk of becoming complex?

As we stated time frame is not the most significant factor in determining the complexity of a claim.

In terms of **at what stage** claims should be assessed as complex, this may differ depending on the type of injury.

***At initial lodgement.** The type and nature of many injuries will enable an assessment of complexity from the outset. For example, if the claim involves multiple injuries, an assumption of complexity would be justified. As mentioned above, the nature of the injury will also provide an indication, upon lodgement, of the potential for escalation of complexity if immediate action is not taken.*

Case Study Three

Mr S² was working in the in the DMM room which was where the injury took place. The boning machine, which scrapes residual meat from the bone, became blocked the worker turned it off to unblock it. As he attempted to remove the bone, the machine operation began and his left hand was trapped. As a consequence he suffered fractures, lacerations, scarring, nerve damage and loss of sensation in his left arm requiring multiple hospital admissions, skin grafts and treatment for chronic pain. As regularly occurs the worker also suffered severe psychiatric injury as he constantly relived the trauma.

His claim could be identified as complex from the beginning.

For some injuries, the failure to react or respond quickly will determine the complexity. For example, many psychological injuries will become more complex if not addressed early.

The AMIEU supports the VTHC recommendations on this matter.

Recommendation 2: an injured worker's claim is measured against criteria to be developed to determine if it is, or is at risk of becoming, complex. Once it meets this criteria, the claim must be presumed to be complex.

An injured worker and their representatives must have the right ask for an evaluation of the status of the claim against the criteria; and to challenging their claim's status if it has not been deemed to be complex.

Recommendation 3: injured workers and their representatives must have rights to challenge the status of their claims and whether it is 'complex'.

Whilst the 130 week definition is limiting, the 52 week mark should be seen as a critical time in an injured worker's claim as, at this time, the employer's obligation to provide suitable employment ends. If the worker's employer withholds modified duties or terminates the employment at this

² NOTE: The worker's name has been suppressed

stage, the likelihood that the claim will become complex dramatically increases. If this does occur, the ability of the injury to worsen increases, as does the need for ongoing treatment.³

Case Study Four

Worker's Injury: Initial Injury was a severe burn to the right hand & wrist, secondary right hand carpal tunnel syndrome from the scar tissue, secondary epicondylitis to the left elbow, mental injury, chronic pain

Site: Meat processing

Circumstances: Mrs Y⁴ suffered severe steam burn from steriliser and was hospitalised. Her WorkCover claim was accepted. After several weeks she returned to work on full duties; but developed secondary CTS over several months. Surgery was approved and she was off work again. CTS repair was not successful. She was able to return to alternative duties, limited hours. The one handed nature of the return to work duties resulted in left elbow epicondylitis and anxiety and depression. Several requests for medical and like such as medication, psychology and electrical stimulation treatment were rejected by the claims agent. All had conciliations. The medical advice was that she would never return to pre-injury duties and she was only working in duties that were not sustainable for a maximum of 4 hours a day 3 days a week and that she had virtually no capacity to communicate in English. She requested retraining, but the agents rejected it as she had returned to work.

When the claim reached 130 weeks the employer terminated her employment. The Claims Agent terminated her weekly payments because she had a current work capacity

The AMIEU strongly supports the VTHC:

Recommendation 4: the employer's return to work obligations are present for the life of the claim, and not solely limited by the 52 or 130 week mark.

Case management of complex claims

5. Are current case management practices able to support and treat the individual needs of injured workers with complex claims?

No

6. If your answer to question 5 is yes, describe how current case management practices respond to the individual needs of injured workers with complex claims.

N/A.

7. If your answer to question 5 is no, describe what needs to change in the case management practices of complex claims so that injured workers are better supported and treated.

Complex health conditions can often result from the accepted injury, however poor management of the claim by the agent or self-insurer can lead to sub-standard medical treatment and poor outcomes for injured workers. This is particularly the case if the claim has not been managed in a timely manner.

³ Grey et al (2019) Association between workers' compensation claim processing times and work disability duration: Analysis of population level claims data" *HealthPolicy* 123, 982-991

⁴ NOTE: The worker's name has been suppressed

Case Study Five

Worker's injury: back, neck, left elbow, right arm and right shoulder were injured as the result of an incident in early 2014. . Severe depression, anxiety and suicidal thoughts and left shoulder injury developed secondary to the original physical injury.

Site: Wholesale butcher

Circumstances: A quarter of beef (approximately 85 kg) dropped from a rail, taking the butcher down with it

The worker has not worked since August 2014.

Over time there have been numerous disputes that have gone to conciliation such as:

- PIAWE which only arose after 52 weeks when the employer terminated the worker's employment and the worker was paid directly by the claims agent;
- Payment of medical and like expenses eg physiotherapy; TENS machine; travel costs for the worker who lives hundreds of kilometres remote from Melbourne; firewood etc.
- 130 week termination of weekly payments.

Recent case management by claims agent

In May 2019 the treating orthopaedic surgeon requested permission for proceeding with posterior cervical lateral mass screw rod fixation with posterolateral instrumented fusion at the C4/5, C5/6 and C6/7 levels.

In June 2019 the shoulder surgeon requested permission for shoulder surgery.

In July 2019 the claims agent notified the worker of an MD IME appointment in September 2019 with regard to the Spinal surgery request.

In July 2019 the agent wrote to the worker notifying another MD IME appointment with the same doctors in August 2019. It should also be noted that the worker had to travel approximately 500 kilometres to these appointments.

The worker questioned the agent why there were two appointments with the same doctors in within 6 weeks. The agent stated that the worker must attend in August even though the September appointment had been made.

In late July 2019 the agent communicated with the worker about the request for shoulder surgery, advising that they needed more information about pain management which the worker should raise this with the spinal surgery team because there would be a pain management doctor there.

In August 2019 the worker attended the MD IME as he had been ordered to by the claims agent. There had been no appointment made with the MD IME by the claims agent. The amount of pain and discomfort this has caused the worker was unbearable.

In September when he attended the MD IME the claims agent had provided no information, not even the surgeon's request for approval of spinal surgery. The report of the MD IME expressed extreme frustration and disappointment with the claims agent.

The appointment with an IME regarding the shoulder surgery took place, eventually, in mid-November.

The shoulder surgery took place in late January 2020 – 8 months after the request was sent to the claims agent!

In August 2019 complaint was raised with WorkSafe. In September 2019 WorkSafe Victoria responded.

This will be covered in response to question 13

The systems and processes of outsourced agents make injured people feel like a case number, rather than a person with unique needs. The Ombudsman identified that the current system lacks a personalised focus:

This is about people's lives. This is about human suffering, and what you see are references to numbers and files and claims.⁵

The AMIEU experience is that, far from allowing expert medical advice to determine outcomes, the current case management model is typified by:

- Purposefully seeking to delay decisions,
- Actively seeking to reduce payouts,
- A reliance on invasive and unnecessary surveillance to justify claim reductions,
- Ignoring the expert advice of treating health professionals
- Doctor shopping
- Inconsistency in decision making across agents
- Inconsistency in decision making within an individual case. Case managers change regularly, and there is often no consistency in the decisions of the old and new case managers.

An injured worker's treating medical practitioner has an ongoing relationship with the injured worker and stronger ability to understand and manage the injury. However this is too often neither recognised nor appreciated by the system. There is a need for tailored treatment which involves co-operation between the worker's treating practitioners.

The importance of removing private insurance agents and returning the whole scheme to public hands is paramount. **The AMIEU endorses the VTHC recommendations 5 to 7**

Recommendation 5: a greater weight be given to the injured workers' primary medical practitioner when making decisions on treatment plans.

Recommendation 6: if the claims managers form a view that treatment is no longer needed and this opinion is disputed by the worker and their treating health practitioner, then ongoing treatment must continue as scheduled until the matter can be resolved at conciliation and beyond.

Recommendation 7: the services of IMEs, along with the entire WorkCover scheme, must be brought back into public hands.

Key to fixing issues with case management must be the removal of private insurers where a claim is deemed 'complex' (encompassing the definition contained above at Question 3). Private insurers are solely motivated by profit and for this reason, they are not equipped to handle complex claims with the care and respect injured workers deserve. Indeed they are financially incentivised to remove injured workers with complex claims from the system.

If the review does not result in the removal of the private insurers from WorkCover entirely the AMIEU would support VTHC recommendation 8.

Recommendation 8: where a claim is deemed complex, private insurers must be removed from the process of managing the claim.

Financial incentives and agent decision making

8. What role do the current financial incentives for agents have in the agent's management of complex claims?

⁵ <https://www.abc.net.au/news/2020-07-27/four-corners-workers-compensation-investigation/12477902>

The AMIEU submits that the current system enables compromised decision making by agents. One hundred per cent of their focus should be on the health and recovery of the injured workers, not on the achievement of incentives. Frequent exposure to multiple Independent Medical Examiners does not assist injured workers achieve recovery and rehabilitation, and in fact it probably harms them.

Financial incentives are one of the core inadequacies of the current WorkCover scheme, particularly when it comes to complex claims. The precise details of these financial incentives are kept confidential as commercial secrets, but this merely reinforces the opacity of the system.

The objectives of the WorkCover scheme include “to make provision for the effective occupational rehabilitation of injured workers” and “establish incentives that are conducive to efficiency and discourage abuse.”⁶ The current remuneration scheme fails to deliver the objectives.

Instead agents are offered financial incentives to push injured workers off the statutory scheme and onto publicly funded welfare such as unemployment or disability benefits. This is cost shifting resulting in profiteering off the back of injured workers.

The WorkCover system needs to be radically overhauled. Private agents must be completely removed and have no role whatsoever in Victoria’s workers’ compensation scheme. It must be rebuilt by placing best practice, care and a stronger emphasis on the injured worker returning to work on the advice of their treating practitioner, at its centre.

The AMIEU strongly supports VTHC Recommendation 9

Recommendation 9: Private agents and the associated financial incentives must be removed from the WorkCover scheme entirely.

9. Do the current financial incentives for agents support prompt, effective and proactive outcomes for injured workers with complex claims?

No.

10. If your answer to question 9 is yes, describe:

- a. **how the current financial incentives for agents maximise outcomes for injured workers with complex claims.**
- b. **any different or additional measurements which could be linked to financial incentives to promote quality decision making by agents.**

N/A.

11. If your answer to question 9 is no, describe:

- a. **The ways in which the current financial incentives for agents could be changed to maximise outcomes for injured workers with complex claims.**
- b. **Any different or additional measurements which could be linked to financial incentives to promote quality decision making by agents**

As above, the financial incentives for private insurance agents fail to deliver positive outcomes for workers and often results in harm and further injury.

⁶ WorkSafe Claims Manual, ‘1.1.1 Objectives of the Victorian WorkCover Scheme’, http://www1.worksafe.vic.gov.au/vwa/claimsmanual/Claims_Manual/1-the-scheme/1-1-overview-of-the-scheme.htm#1.1.1

Part of the issue is that employers have the choice of agent. This creates a strong financial incentive for insurance agents to meet the needs of their client, the employer, rather than looking objectively at the injured worker's required level of care. It undermines the no-fault system by placing employers at a greater advantage, which in turn implies the worker is 'at fault' if a quick return to work is not possible.

The close inter-relationship between the employer and the claims agent and the impact on the mental health of the injured workers was explored by the Creative Ministries in 2015 in a subjective research project⁷.

It is the experience of the AMIEU that it is not uncommon for a claims agent to have evidence that an entitlement to compensation exists, but do have a client (the employer) who wishes to deny liability.

If the employer objects to the advice, the claims agent is faced with a choice:

- accept the claim but risk losing the policy of the employer who has been with them for twelve months or more; or
- accept the employer's position, fight the claim in conciliation and go to court, if the worker continues to pursue the claim.

Claims agents, acting on market imperative, often reject the claim. There are then a number of possibilities:

- In a significant proportion of claims where this occurs the claim ends here;
- If these claims go on to Conciliation where they are not resolved;
- If the dispute is then lodged in the Court it is common for it to be settled on the steps of the Court.

The AMIEU assists members with conciliation. We see a number of instances that should never have needed conciliation. We see many where resolutions should have been reached at conciliation but they are not because of:

- the symbiotic relationship between the claims agent and the employer; and
- the lack of powers given to the Conciliation Officers.

The worker does not get paid, does not get essential treatment and work relationships break down.

This, in addition to the financial rewards private insurance agents receive to keep costs down, results in perverse outcomes. These publicly funded financial rewards are eroding the purpose of a public system, established to support and rehabilitate injured workers.

Recommendation 10: remove private insurance agents entirely from the WorkCover scheme and bring the system back into public hands.

The AMIEU supports VTHC recommendation 10.

12. Describe any non-financial mechanisms by which agents could be encouraged to promote quality decision making.

⁷ Filling the dark spot: fifteen injured workers shine a light on the workers' compensation system to improve it for others Sarah Pollock, John Bottomley and Ann Taket ISBN 978-0-9872360-4-1 pp 34-35

The key issue that must be addressed is that the WorkCover system is structured so that agents can gain financially. This results in disadvantage to injured workers. In addition to removing financial incentives, non-financial mechanisms must be established for the purpose of increasing the power of injured workers within the system.

We believe that authorised agents should be removed entirely.

It should also be recognised that “Centrally funded schemes have economies of scale. This contributes to Queensland’s efficiency. Amongst the central and managed schemes, the Queensland scheme has the highest proportion of total expenditure directed to claimants and the lowest proportion expended on insurance operations”.⁸

No injured worker should miss out on care because of an accounting ledger. WorkCover must be funded to meet the medical needs of injured workers. Funding must be associated with demonstrated need rather than experimenting with how little cost can be associated with the scheme.

The AMIEU supports the VTHC proposal in Recommendations 11, 12, and 13.

Recommendation 11: case management of injured workers’ compensation claims be returned to the remit of a public body, which centres best practice and the wellbeing of injured workers.

Recommendation 12: a separate public entity be established and be responsible for financial management of the workers’ compensation scheme.

Recommendation 13: a third, related public entity, have regulatory, investigative and complaint handling powers. It should also have the power to compel the case management or financial management bodies to undertake certain actions.

Failing this, managing the claims of injured workers with complex claims must not be undertaken by private insurers. It is of utmost importance that there are no financial rewards for removing claims from the system by the 130 week mark.

The only way to achieve prompt, effective and proactive outcomes for injured workers with complex claims is to remove any processes which incentivise anything other than the needs of the injured worker.

Adding more incentives to the existing model merely exacerbates the problems identified by the Ombudsman’s investigations.

Oversight of agents by WorkSafe

13. Are WorkSafe’s processes for overseeing agents’ management of claims achieving prompt, effective and proactive outcomes for injured workers?

No.

The Ombudsman noted in her 2019 report:

⁸ The operation of the Queensland Workers’ Compensation Scheme - Professor David Peetz Report - 27 May 2018

The investigation also identified deficiencies in WorkSafe's oversight of the scheme, particularly in relation to agent decision making on complex claims.

The AMIEU's experience of the response by WorkSafe to complaints is not at all encouraging.

Further on Case Study 5

The complaint that was made about the claims agent referring issues about surgery that was not Spinal to the MD IME which is established to evaluate only Spinal was not addressed by WorkSafe in their response to the complaint lodged by AMIEU on behalf of our member.

The issue of the claims agent sending a worker to the same MD IME twice in one month was not addressed by WorkSafe in their response to the complaint.

The fact that the injured worker who needed surgery was made to drive hundreds of kilometres to attend an appointment that had not been made resulting in further damage to the worker was assessed by WorkSafe and dismissed as 'human error'.

The delay of 109 days from the request for spinal surgery to the MD IME assessment was excused as 'unfortunate'.

In evaluating the complaint no contact was made with the injured worker or their treating practitioners.

This indicates that the body that oversees the claims agents treats injured workers as numbers and costs, not people.

14. Do the new mechanisms implemented by WorkSafe in response to the Ombudsman's 2019 report address any limitations in WorkSafe's oversight of agent decision making?

Mostly no - see below.

15. If your answer to question 14 is yes, describe how.

The Workers Compensation Independent Review Service (WCIRS) is the only new mechanism that has been established. It has been introduced to provide some oversight for injured workers where they have been subjected to poor decision making by agents.

The AMIEU has not had any direct contact so we rely on the statistics that have been produced to make any assessment. It appears to have played a positive role.

16. If your answer to question 14 is no, describe why not.

Central to issues surrounding WorkSafe's oversight of agent decision making is a lack of transparency. The terms of agents' relationship with and accountability to WorkSafe are not easily accessible.

Greater trust in the agent's role may be achieved if:

- There was greater transparency in the oversight requirements of WorkSafe. (We note the list of processes for overseeing agent decision making on page 17 of the Discussion Paper, however we believe that granular detail as to how these are operationalised is lacking)
- There was greater transparency of the contractual expectations WorkSafe has of the agents
- There was greater transparency of the remuneration model that underpins the relationship

- There was greater transparency in how complaints against agents are handled
- There was greater transparency about what messages are being given to the agents by WorkSafe about their expectations

Limitations in oversight may also be a product of a disproportionate emphasis on scheme viability over benefit delivery. A system that is set up which allows substantial financial gain to private insurers cannot function to make decisions in the best interest of the injured worker, no matter the oversight mechanisms.

17. How could any limitations in WorkSafe's oversight of agent decision making be overcome?

As explained above, the profit motive driving private insurers results in harmful outcomes to injured workers. Resolving injured workers' claims in their best interest by providing the appropriate rehabilitation and treatment must be the primary purpose of the WorkCover system. However, this cannot be the case where a profit motive exists. Removing private insurers from the scheme is fundamental to ensuring better outcomes for injured workers.

Evaluation measures

18. To what extent do current measurements of outcomes for injured workers, including return to work rates and worker surveys, accurately measure whether the agent model achieves prompt, effective and proactive outcomes for injured workers?

The Worksafe Annual Report lists criteria used to measure Agent Performance. Looking at them we note:

- Many seek to measure success through the lens of scheme sustainability – not whether the injured worker got the supports they needed, when they needed them.
- Purely quantitative data collection rarely provides the true picture when it comes to assessments of satisfaction.
- Quantitative data based on inputs and outputs do not assess the impacts of poor decisions or poor process on injured workers
- "Service and processing" data is collected via survey. If the vast majority of claims are simple/non-complex, then those quantitative statistics will hide the true story of the impacts of poor user experience in complex matters.
- The success of a return to work intervention is based on whether the worker is still at work after three weeks. That is a very short period of time to assess the success or otherwise of agents' actions. This focus on short-term outcomes is problematic.

While return to work is a valuable and appropriate objective, it may be that it is being measured too early and this may be having counterproductive impacts on incentives and behaviour. At a minimum, there should be some systematic follow-up of previously injured workers, on at least one, probably more occasions, after the time at which the claim is currently closed. This would enable understanding of their current employment status and their functioning post-injury, and identify whether any further action is required. The purpose is to ensure that what WorkSafe sees as 'successful' outcomes (injured workers returning to work) are genuine 'successes'.

It must also be recognised with any contact with injured workers that issues of vulnerability will arise.

The use of worker surveys in the current form is not an effective way of assessing performance. As injured workers find themselves in an adversarial system many will opt out of being surveyed. As an

injured worker who had been in the workers compensation system for some years has expressed to the union “why would I speak to anybody, anything that I say will be twisted and used against me”.

In the meat industry workers are culturally and linguistically diverse, many have limited English skills and need interpreters to communicate, they will not feel confident enough to participate in surveys.

19. Describe any additional or alternative methods of measuring outcomes for injured workers that should be considered?

As outlined earlier, the key to a WorkCover system that produces effective outcomes for injured workers is one that has no financial incentives and is run by a public agency. This would inherently increase scrutiny and accountability, resulting in outcomes that are measured against the public good and benefit injured workers.

In order to assess the quality of service provision, the quantitative data needs to be supported by long term, qualitative, attitudinal data.

To ensure the surveys genuinely reflect the handling of a complex claim, they must be amended to be more accessible to injured workers from a variety of backgrounds, and objective. They should be available in multiple languages.

The AMIEU supports VTHC recommendation:

Recommendation 15: the satisfaction surveys be re-written completely by WorkSafe, with the purpose of being accessible to a range of vulnerable workers and objective so they accurately reflect the standard of care they have received.

The current agent model and alternative models

20. Does the current agent model achieve prompt, effective and proactive management for injured workers with complex claims?

No

21. If your answer to question 20 is yes, to the extent you haven't addressed your response in answers to earlier questions, describe how the current agent model achieves prompt, effective and/or proactive management for injured workers with complex claims.

N/A

22. If your answer to question 20 is no, to the extent you haven't addressed your response in answers to earlier questions, describe:

- a. the limitations of the current agent model,
- b. how the current agent model could be improved to achieve better health and recovery outcomes for injured workers, and/or
- c. any alternative models to the current agent model that would be more effective in delivering positive health and recovery outcomes to injured workers.

As stated above, the current agent model is not working. It is failing to care for injured workers. Private insurance corporations are able to turn a substantial profit from this failure.

A 2018 study found that in Queensland 1% of injured workers continued to need support 104 weeks after their injury, whereas in Victoria, this number was 16%.⁹ This study also found that Victoria also had the second highest rate of time off work, after New South Wales, due to mental health injury claims, comprising 25.3% of cases.¹⁰

When considering the Queensland statistics on this matter it must be remembered that the Queensland scheme is centrally funded and has the highest proportion of total expenditure directed to claimants and the lowest proportion expended on insurance operations.

Any alternative scheme must have a more advanced and proactive approach to stakeholder engagement. The scheme must be open to listening to and responding to the problems stakeholders are having with the scheme.

There are models of statutory compensation schemes where in-house management of complex claims does not lead to the poor outcomes that is current.

23. Are there practices or procedures used by other compensation schemes, in Australia or overseas, that maximise outcomes for injured workers that the Review should examine?

There are models of statutory compensation schemes where in-house management of complex claims does not lead to the poor outcomes outlined above.

Transport Accident Commission (TAC)

TAC never went down the path of outsourcing claims management to agents. Having these processes in-house means there is close monitoring of decision making and case manager behaviour.

As established, the Victorian workers' compensation scheme must be brought back into public hands, with the health and well-being of injured workers as its priority.

The Transport Accident Commission model should be adopted in returning case management of WorkCover to public hands. It is a Victorian Government owned organisation that was established to pay for treatments and benefits for people injured in transport accidents, promote road safety and help Victorians get their lives back on track.¹¹

The TAC states it identifies as a social insurer, because its outcomes are about people. They aim to "help those [people] who are injured on the roads to get their lives back on track and live a life of dignity."¹² TAC states clearly in its annual report that its role is about putting the injured person first.¹³ This informs much of their case management protocols.

⁹ Gray, S. & Collie, A. (2018), "Comparing time off work after work-related mental health conditions across Australian workers' compensation systems: a retrospective cohort study", *Psychiatry, Psychology and Law*, VOL. 25, NO. 5, 675–692

¹⁰ Ibid, p 681

¹¹ TAC Strategy 2020, accessed:
https://www.tac.vic.gov.au/__data/assets/pdf_file/0009/192753/TAC_Strategy2020_UPDATE_WEB.pdf

¹² TAC Annual Report 2018-19, accessed:
https://www.tac.vic.gov.au/__data/assets/pdf_file/0018/402417/11129_TAC-Annual-Report_WEB-accessible.pdf

¹³ Ibid

After much research the TAC moved towards a model that centred the needs of the injured people in order to return their lives to normal as the focus. Ultimately, it was found that this approach was not only good for the injured person as it returned them to their life quickly and treated their injuries in line with best practice, but it was successful in minimising the long term liabilities as it meant early intervention meant injuries were contained and treatment costs rarely blew out.¹⁴

The TAC has what is essentially a triaging approach when an injured person first makes contact. They seek to categorise them as 'rapid recovery', 'independence' and 'supported recovery'.¹⁵ In the case of rapid recovery, injured people almost universally have their treatment approved. These injuries are relatively minor or simple to fix - it may be a case of requiring a handful of physio appointments to treat whiplash, or a simple procedure to treat an injury so that their lives can return to normal. In these cases, it is simply a matter of the injured person accessing the treatment and logging it into an app, which links to an automated approval process. This app and automated approval process again reflects an attitude of prioritising the system around the injured person's needs. Approximately 80% of TAC's clients fall into this category.

Those in the independence category makeup approximately 1% of claims. These are people who are severely injured and who are unable to recover. These require long-term treatment, provided by the TAC.

The last category is supported recovery and it includes injured people with complex needs, which is analogous to the definition of complex claims provided above in Question 3. If, when an injured person first contacts the TAC, they also meet another criteria, such as having a pre-existing mental health condition, unstable accommodation, insecure work or low income, low socio-economic, have a disability or are a migrant community member, they are automatically placed in this category. Here, injured people receive one on one, more dedicated case management, which seeks to extend any services required in addition to ensuring they get the treatment needed.

The TAC model is flexible, and in cases where an injured person is placed into the wrong category, they are often moved into the correct category quickly with little, if any, resistance. As a model, it also separates those who make the broader decisions about the scheme's management and viability, and those who manage the injured persons cases. Case managers do not report on profitability.

Disputes are handled in house, and if a poor decision has been made, it is usually picked up by a review before the injured person needs to raise a complaint. Of course, as a system it is not perfect, but its most recent iteration seems to have struck the right balance by placing the needs of the injured person as its central focus.

The AMIEU strongly encourages the Review to recommend a model for WorkCover that has a similar structure to the TAC.

Victorian Ombudsman 2016 and 2019 reports

¹⁴ Sunita Bayyavarapu, Dr Katharine Gibson, Dr Beth Costa & Dr Andrea de Silva, "Primary Care Models of Care - A scoping meta-review: Models of primary care for clients with chronic complex conditions," Evidence Review for TAC, accessed: https://www.tac.vic.gov.au/__data/assets/pdf_file/0019/270226/172_REP_ER_R02-Primary-Care_11052017_final.pdf

¹⁵ TAC Strategy 2020, accessed: https://www.tac.vic.gov.au/__data/assets/pdf_file/0009/192753/TAC_Strategy2020_UPDATE_WEB.pdf

24. Have you observed any changes to (i) agent decision making and (ii) the oversight of agents by WorkSafe since the 2016 Ombudsman report? Please describe.

No. The behaviour of agents continues to be unfair, unreasonable, illogical, uncaring and absent of best practice. Many injured workers continue to receive poor and unfair treatment.

25. What are the root causes of the problems identified by the Ombudsman in her 2016 report?

We agree with the lawyers with whom we have discussed this matter who believe that the root problems identified by the Ombudsman in 2016 were:

- A scheme culture founded on scheme sustainability, rather than decision sustainability
- A scheme culture founded on minimising benefits, rather than the genuine needs of injured workers
- Conflicted decision making by agents, who are forced to choose between company profits and the wellbeing of injured workers

which were enabled by:

- A lack of transparency in the governance and financial arrangements which apply to outsourced agents.
- An incentives process that does not promote best practice, timely, sustainable and quality decision making by agents.
- A quantitative approach to data collection.
- An inefficient complaints handling system, which was not focused on continuous improvement.
- Inappropriately experienced or qualified staff, making decisions that were not based on evidence.

26. Do you think the implementation of the recommendations 3–9 in the 2019 Ombudsman report will address those root causes? If so, how will that occur?

No.

27. If you do not think the implementation of recommendations 3–9 in the 2019 Ombudsman report will address those causes, explain why not.

With respect to the important work of the Ombudsman and their investigation into complex claims, the recommendations do not go far enough to address the problem.

The cost of the scheme increases because of the authorised agents operate on the profit principles. Many injuries could be resolved quickly and efficiently if the agent model was disbanded.

Any public scheme must be accountable, meet expectations and be sustainable. It is understood that the overall operation of the scheme must be a factor of consideration. However, the AMIEU strongly believes that injured workers and their claims must be managed by best practice with a priority of their rehabilitation and treatment, prior to reaching the 130 week mark. This will greatly impact on whether the worker needs to remain in the scheme at all. The aim of the scheme must not be to generate profit to pay annual dividends and the executive bonuses of insurance executives. A public scheme is by far the best placed to meet this criteria.

There is also a greater need for research into rehabilitation and best health practice, rather than relying on the bullying and harassment of workers that is perpetuated by the WorkCover scheme. Further training for those administering the scheme is also desperately needed. Presently, a return to work officer only requires one day of training, but they can be the main reason why a worker does not make a successful return to work.

The AMIEU endorses VTHC recommendations 18 and 19

Recommendation 18: an approach that is best practice health be adopted for the WorkCover scheme, including funding established for the purposes of rehabilitation research and evaluation.

Recommendation 19: greater and more comprehensive training of agents, self-insurers and return to work staff.

28. Are there any other matters the Review should consider in meeting the Terms of Reference?

Whilst we are aware that the Ombudsman's reports 2016 and 2019, on which this review is based, did not cover self-insurers; we consider this to be a major deficiency.

Self-Insurance

Self-insurance schemes were established for large employers to be able to manage and bear costs for their own workers' compensation schemes. Self-insurance is supposed to improve OHS, increase the likelihood of workers returning to work, and ensure workers are treated fair and equitably.¹⁶

However some self-insurers are outsourcing their insurance obligations back to insurance agents, often agents who are one of the five agents acting directly on behalf of WorkSafe. For example, both Woolworths and Food Investments Pty Ltd (George Weston by another name) contract to EML. This means 'all of the joys but none of the responsibilities' see below.

Self-insurers are not subjected to the same rules and obligations as the five agents. Under self-insurance schemes, injured workers accessing compensation have fewer rights and do not have rights to review at Workers Compensation Independent Review Service.

Where injured workers are covered by the same private insurance scheme through a self-insurer as those under the public scheme, they are being subjected to the same level of poor treatment without any access to recourse.

This is a huge oversight. **The AMIEU supports the removal of self-insurance**

Recommendation 20 (i): self-insurance schemes must be phased out. All Victorian workers should be covered by the same system.

Recommendation 20 (ii): in the alternative regulation of self-insurance schemes must increase to ensure they cannot contract out their insurance obligations. Where self-insurers no longer wish to manage their own claims, they must default back to the public scheme.

Recommendation 21: appeal and complaints processes and obligations must be extended to self-insurers.

Surveillance

The Review should also consider the issue of the surveillance of injured workers undertaken by the insurance agents. The very notion of an injured worker being surveyed reinforces the idea that they are to blame for their injury and that they do not deserve care.

Its existence is the antithesis of a no-fault system which should be about care and rehabilitation. The reliance on extremely expensive surveillance, often costing between \$4,000 and \$5,000, is further called into question when considering that treatment plans are often inadequate and IMEs are not given adequate information about the worker when forming an opinion.

¹⁶ <https://www.worksafe.vic.gov.au/whats-self-insurance>

The information a private investigator needs to obtain could very well be gained by consulting with the injured worker genuinely about what they need, and then carrying out their treatment plan with the proper resources.

The so-called aim of financial consistency is disingenuous considering the willingness of agents to use expensive private investigators for surveillance, yet terminate 'complex claims' due to the so-called cost on the system.

Surveillance of injured workers must be completely removed from the system. The only exception should be where there is some demonstrated fraud occurring. Surveillance should not be relied upon on the whim of the private insurance agent to try and force injured workers out of the system and deny them the care they need.

Recommendation 23: surveillance must be removed from the WorkCover system, excepting in instances of genuine fraud.

The AMIEU endorses this VTHC recommendation

Reasonable management action in a reasonable manner

The Review should also consider the impact of section 40 of the *Workplace Injury Rehabilitation and Compensation Act (Vic) 2013*. The operation of this section has the dual effect of undermining the status of psychological injuries as compared to physical injuries, as well as undermining the no fault system. Workers who were injured through a process of undue disciplinary action or where a supervisor has bullied or harassed the worker, can have their claim nullified where managers claim they were acting in a reasonable manner. This is extremely unfair and damaging to the injured worker.

Recommendation 24: repeal s 40 of the Workplace Injury Rehabilitation and Compensation Act (Vic) 2013.

The AMIEU endorses this VTHC recommendation

Conclusion

Victoria's workers' compensation is failing injured workers. Primarily, this is due to private insurance agents making decisions that maximise their own profit rather than provide genuine care and treatment for those the system should be designed to rehabilitate.

The contracting out of claims management to insurance companies damages far too many injured workers.

The AMIEU implores the Review to recommend that private insurance agents be removed from the system entirely, and have it completely restructured so that injured workers and their needs are the central pillar. The importance of this, and its ability to enable injured workers to return to work and have their lives return to normal cannot be overstated. Private insurance agents must be removed from the system.

However, if the Review does not find this, then at the very least, the definition of a 'complex claim' must be amended to include a range of factors that make resolving the claim for the injured worker complex, and when these factors are met, the claim must be managed under the public system.

Thank you again for the opportunity to make a submission to this important review. The AMIEU hopes that this review will result in positive moves towards a fair system for injured workers access to the treatment and dignity they deserve.

If you have any questions please do not hesitate to contact me.

Sincerely

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The AMIEU acknowledges the traditional owners of the land
We pay our respects to Elders past, present and emerging