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A WESTERN AUSTRALIAN SURVEY ON EMPLOYER ATTITUDES AND AWARENESS OF THE INDUSTRY COMMISSION REPORT ON WORKERS COMPENSATION AND AMENDMENTS TO THE WORKERS COMPENSATION AND REHABILITATION ACT 1981(WA)

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ABSTRACT

This paper provides details of a survey of employer attitudes to a range of issues arising out of the 1994 Industry Commission report, and amendments to the Workers Compensation & Rehabilitation Act 1981 which took effect in November 1993.

The survey was conducted in August 1995. Approximately 400 respondents made up the survey. The survey was part of a study completed under the Curtin University Research Grants Scheme.

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ROBERT GUTHRIE

1. INTRODUCTION

The purpose of this study is to evaluate employer awareness and attitudes to recommendations of the Industry Commission and changes to the *Workers' Compensation and Rehabilitation Act 1981* (WA). The final report of the Industry Commission was published in February 1994[1]. Six months prior to the publication of the Industry Commission Report the Western Australian Government introduced changes to the *Workers' Compensation and Rehabilitation Act 1981* (WA), which had effects on worker rehabilitation, payments of compensation and employer liability.

When Western Australian Government significantly amended the *Workers' Compensation and Rehabilitation Act 1981* (WA) in November 1993, the changes reflected some of the matters that were subsequently raised in the Industry Commission Report. Employer Organisations were critical of some of the recommendations of the Industry Commission Report, suggesting that the changes envisaged would be too expensive[2]. The Industry Commission had noted that

> *"Currently, Australia has a multiplicity of schemes (at both Federal and State levels) for a relatively small national workforce. Existing workers' compensation arrangements do not encourage desirable behaviour on the part of the various parties, and their inconsistencies add to the problem. The result is that work related injury and illness cost the economy more than they should".*[3]

Employers were apparently not convinced that additional federal regulation through a National WorkCover authority would reduce the costs of the compensation structures.

In November 1992 the then Treasurer of the Federal Government had requested the Australian Industry Commission pursuant to Section 7 of the *Industry Commission Act* 1989 (Cth) to investigate certain matters relating to workers' compensation. The terms of reference included (but were not limited to) the following matters:

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1 Industry Commission 4 February 1994 Report No36 Workers Compensation in Australia Australian Government Printing Service pxxxi (Industry Commission Report)

2 Dodd T. (1994) Employers say workers comp plan too costly. Financial Review 26 April 1994

3 Industry Commission Report pxxxi

- The effects of workers' compensation arrangements on incentives for safety in the workplace, subsequent rehabilitation, return to work initiatives and other activities covered by the arrangements:[4] .....

The Industry Commission noted in its report (Industry Commission Report) that:

> "Employers have natural incentives to reduce employees' exposure to hazards in the workplace, so limiting the potential for work related injury or illness. Even in the absence of occupational health and safety rules and Government mandated liability to pay compensation to employees suffering work related injury or illness, employers can be expected to implement risk reducing measures in order to improve safety in the workplace because of the prospect of:
>
> - jeopardising the firm's reputation (thereby risking low worker morale, and therefore low productivity):
> - incurring additional costs which result, for example, from having to replace injured/ill workers (eg down time associated with accidents and unplanned extra recruitment and training expenses): and
> - being unable to attract sufficient workers to high risk jobs."[5]

In July 1995, Reark Research was commissioned by the author to assist in a survey to elicit employer attitudes in relation to the above matters.

2. OBJECTIVES

A questionnaire was designed by the author with assistance from Reark Research[6] and covers the key research objectives:

- to determine the attitudes of employers to some of the recommendations of the Industry Commission;
- to determine the attitudes of employers to changes to the *Workers' Compensation and Rehabilitation Act 1981* (WA) which directly affect employers;
- to determine the attitudes of business to related matters.

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4 Terms of reference 3(a) 5th November 1992 Industry Commission Report pxxvi

4 Ibid page 11.

6 The author thanks in particular David Hides formerly of Reark Research. In addition to obtaining the expert comments of David Hides, the author obtained comments from Tony Carter of the Insurance Council of Australia and John Rogers, Solicitor, Minet Insurance Brokers.

3. METHODOLOGY

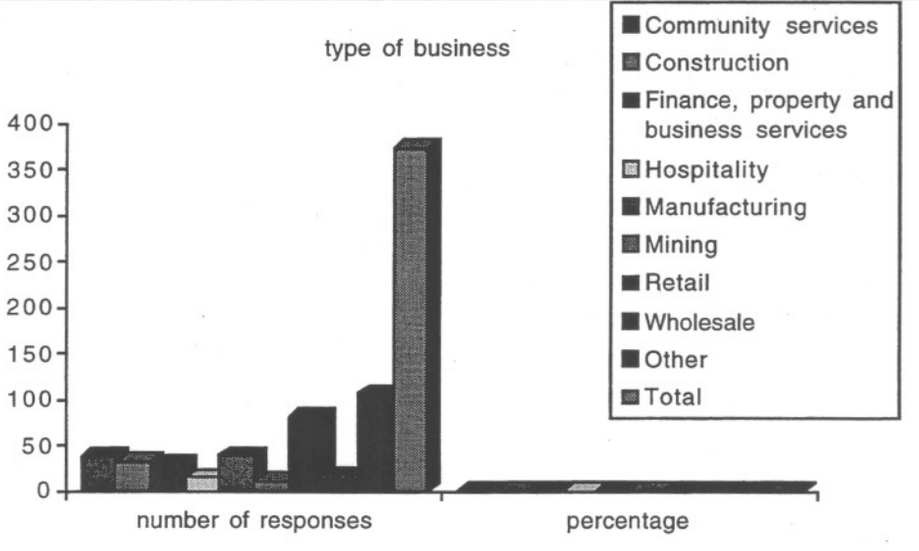
The survey was a representative sample of employers across all industry sectors using the 1994 Perth Yellow Pages, the survey was directed to 2000 employers and approximately 400 responses were received. The survey was conducted in July/August 1995. This was approximately 24 months after the changes to the *Workers' Compensation and Rehabilitation Act 1981* (WA) and some 18 months after the recommendations of the Industry Commission Report.

4 RESPONDENT PROFILE

The Industry types that responded to the survey are as follows

Table 1: Respondents by Industry Type.

	NUMBER OF RESPONSES	PERCENTAGE
Community services	38	10.2%
Construction	33	8.8%
Finance, property and business services	30	8%
Hospitality	15	4%
Manufacturing	40	10.7%
Mining	11	2.9%
Retail	81	21.7%
Wholesale	18	4%
Other	107	28.7%
Total	373	100%

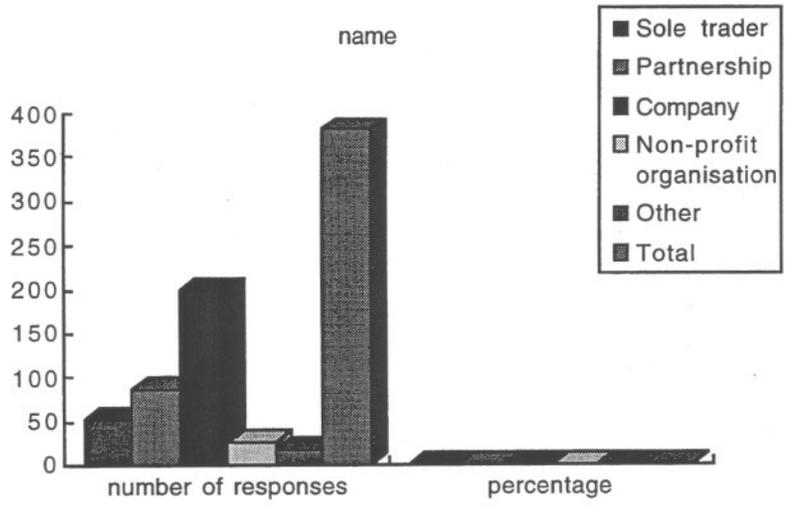


The industry type corresponds substantially with the ASIC Category Key Industry Groups selection.

The survey identified the respondents as falling into the following types of business structures.

Table 2: Respondents by Type of Business Structure.

NAME	NUMBER OF RESPONSES	PERCENTAGE
Sole trader	53	13.9%
Partnership	87	22.8%
Company	198	51.8%
Non-profit organisation	26	6.8%
Other	18	4.7%
Total	382	100%



In a comparison with the Australian Bureau of Statistics data the survey shows a higher level of responses from companies at approximately 50% as compared to the ABS statistics for Western Australia showing that 34% of business operate through companies, with sole proprietors representing 17% (the survey showing approximately 14%), and partnerships at 28% (the survey at approximately 23%).[7]

One could surmise the discrepancy reflects the greater likelihood that companies, as opposed to partnerships and sole traders are more likely to employ greater numbers of workers and are more likely to have contact and experience with workers' compensation matters. A number of responses from sole traders for example indicated that no workers' compensation policy was held by them and likewise partnerships might not need to hold a workers' compensation policy. This incidentally may indicate a level of ignorance on behalf of sole traders and partnerships (who may have employees) who in the belief that they have contracted out their liability by engaging sub-contractors have ignored the extensive reach of Occupational Health and Safety and Workers Compensation laws.[8]

Respondents were asked to advise the level of business turnover for the last financial year. The following information was provided:

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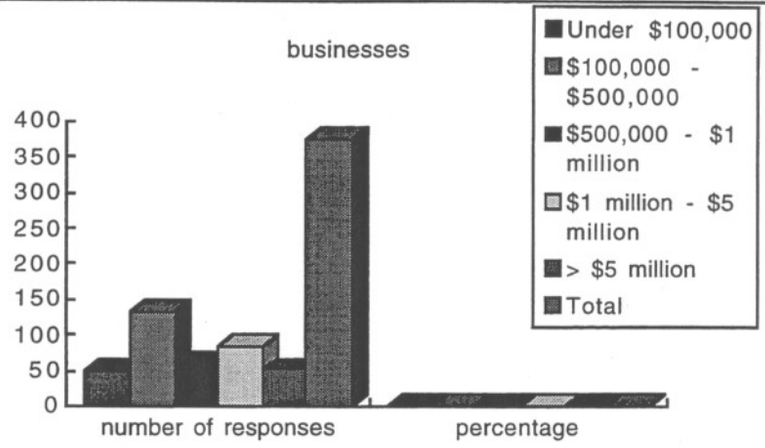
7 ABS Business Register (CAT.1322.0 Profiles of Australian Business).

8 Brown K.G. (1995)Contracting out by Western Australian Government Departments and the legal implications applicable to Occupational Safety and Health issues. The Journal of Contemporary Issues in Business and Government Volume 1 Number 1, 41-50

Table 3: Respondents by Level of Turnover.

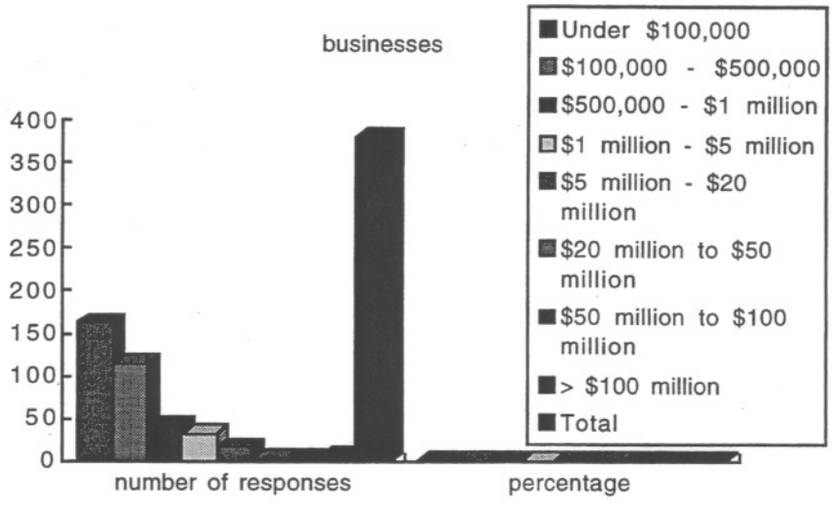
BUSINESSES	NUMBER OF RESPONSES	PERCENTAGE
Under $100,000	49	13%
$100,000 - $500,000	133	35%
$500,000 - $1 million	59	15.7%
$1 million - $5 million	84	22%
> $5 million	51	13.6%
Total	376	100%



Whilst small businesses are usually defined by reference to the number of employees, the data collected from this survey suggests that the bulk of responses came from persons operating businesses with a turnover of less than $1 million, suggesting high survey participation from smaller business. This is confirmed by reference to the information obtained on the total payroll of the business for the last accounting year. Table 4 shows the responses by reference to total payroll.

Table 4: Respondents by Total Payroll.

BUSINESSES	NUMBER OF RESPONSES	PERCENTAGE
Under $100,000	163	42.8%
$100,000 - $500,000	114	29.9%
$500,000 - $1 million	42	11%
$1 million - $5 million	33	8.7%
$5 million - $20 million	16	14.2%
$20 million to $50 million	4	1%
$50 million to $100 million	3	0.8%
> $100 million	6	1.6%
Total	381	100%



5. SURVEY RESULTS

5.1 Employer Attitudes to Insurance and Occupational Health and Safety

Employers were asked to indicate their attitude to a number of statements which were posed with the intention of ascertaining their attitude of some of the matters raised in the Industry Commission Report. On a five point scale employers were asked to indicate whether they ;

strongly disagree	1,
disagree	2,
had no opinion	3,
agreed	4,
strongly agreed	5, with following statements.

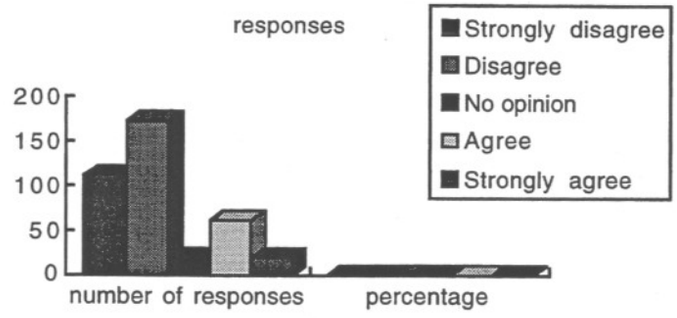
Survey Question:

"Employers should be held strictly liable (ie even if the accident was not the employer's fault) for work-related injury and illnesses (except for cases of an employee's serious and wilful misconduct".

Table 5 indicates the employer's responses to this issue:

Table 5:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	111	28.9%
Disagree	172	44.8%
No opinion	20	5.2%
Agree	62	16.1%
Strongly agree	19	4.9%



The workers' compensation schemes in Australia are based on a "no fault" principal. The employer provides payments of compensation under various statutory schemes regardless of whether the worker was injured in circumstances involving employer or employee negligence. Western Australia, following amendments made to the *Workers' Compensation and Rehabilitation Act 1981* (WA), markedly reduced the potential for common law claims against employers for injuries which were work related. In other words, the bulk of employer liability is "no fault" based. Nevertheless the response to the above question indicates, either that employers are not aware of the nature of workers' compensation liability, or more probably, that there is a general reluctance by employers to accept liability where the employer was not negligent. Over 60% of the responses disagreed that employers should be strictly liable. These responses also indicate, perhaps, that employers believe that workers should be held responsible at least in part for their own actions, particularly where work-related injury is concerned.

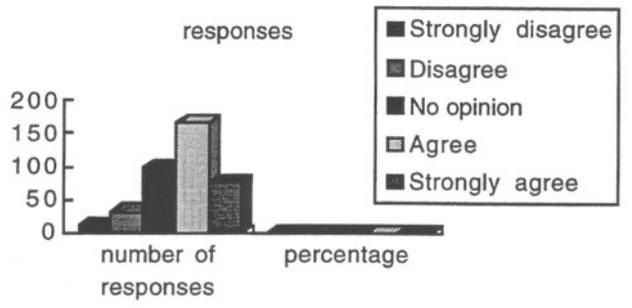
Survey Question:

"Common law claims by employees for employer's negligence are not a cost effective means of promoting prevention".

Table 6 shows employer's responses to this question:

Table 6: Employer Responses

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	11	2.9%
Disagree	31	8.2%
No opinion	97	25.5%
Agree	166	43.7%
Strongly agree	75	19.7%



The Industry Commission concluded that common law (claims for negligence against the employer) is not a cost effective means of promoting prevention.[9] The conclusion reached by the Industry Commission is not surprising given the plethora of evidence which suggests that the deterrent value of common law claims against the employer is minimal. This was first explained by Ison in the 1960s[10] and later developed by a series of workers' compensation enquiries in Australia, particularly by Woodhouse in 1975[11] and later in reports into State workers' compensation systems, particularly in South Australia.[12] The bulk of employers clearly agreed with the Industry Commission conclusions. Only a very small percentage of employers attributed any value to common law claims. Surprisingly approximately one quarter of employers responded equivocally to the statement. Taken together with the previous question, one notes the reluctance of employers to be held liable under workers' compensation schemes and common law liability.

Survey Question:

"Compensation premiums should be paid having regard to past experience of claims".

In its draft report the Industry Commission considered that:

"Premiums based on past experience constitute best practice as a means of encouraging prevention:"[13]

In its final report the Industry Commission noted that small firms may require special consideration in relation to premium calculations. The final report notes:

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9 Industry Commission Report p xii

10 Ison T.G. (1967) The Forensic Lottery - A critique on Tort Liability as a system of Personal Injury Compensation Staples Press

11 Woodhouse A.O. Justice (1974) ,Compensation and Rehabilitation in Australia Australian Government Printer

12 Byrne (1980) A Workers' Rehabilitation and Compensation Board for South Australia- The key to rapid rehabilitation and equitable compensation for the injured at work Report of the Tripartite Committee on the Rehabilitation and Compensation of Persons Injured at Work

13 Industry Commission (1993) Workers' Compensation in Australia Volume 1: Report Draft Report p48 AGPS .

"The following mechanisms as a means of achieving safety incentives for small firms, given the inappropriate experience rating in their case:

- a bonus/penalty scheme incorporating sufficient volatility in premium payments to create positive safety incentives, together with education for firms regarding what causes premiums to fluctuate;

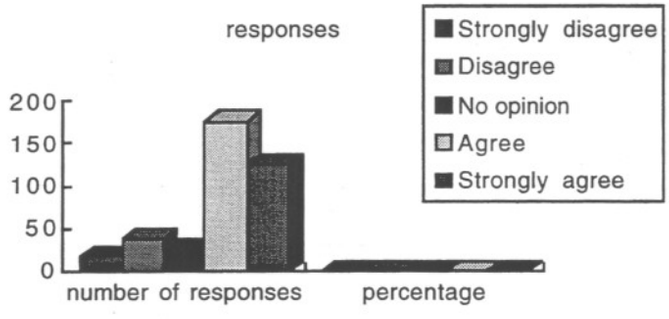
- an excess payment of small firms of, say, the first two weeks weekly compensation payments, with options for variable excess levels; and

- discounts on premiums for recognised reductions of risk".[14]

Employer responses indicate a strong level of agreement with the Industry Commission recommendation. Table 7 sets out those responses.

Table 7:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	18	4.7%
Disagree	37	9.7%
No opinion	26	6.8%
Agree	176	46.1%
Strongly agree	125	32.7%



Notwithstanding the strong level of agreement on this issue (nearly 80% approval by employers) no significant amendments to the *Workers' Compensation and Rehabilitation Act 1981* (WA) have been made so as to institute these kinds of recommendations.

Survey Question:

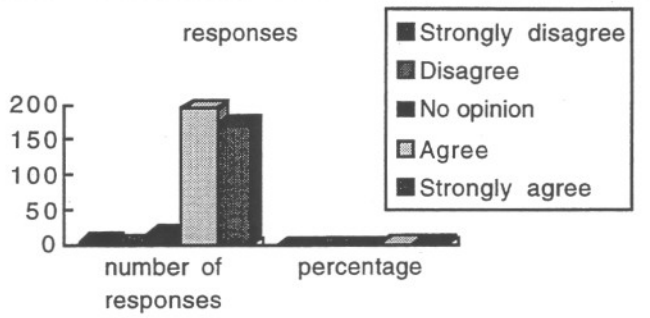
"Discounts for implementing recognised safety programs should be encouraged".

The details provided in Table 8 indicate a strong level of employer agreement with this statement.

14 Industry Commission Report p L.

Table 8:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	5	1.3%
Disagree	2	0.5%
No opinion	16	4.1%
Agree	194	50.1%
Strongly agree	170	43.9%



Notwithstanding the strong level of support for this statement, there may be some difficulties for small businesses in instituting safety schemes. The Industry Commission noted that up front discounts may create strong incentives for small employers to invest in safety. The Commission noted that small employers were largely unaffected by experience rating calculation of premiums. Experience rating generally applies to larger employers. Experience rating in workers compensation generally refers to an employer insurance premium pricing system that takes into account the claims cost experience of the individual employer.[15]The evidence given to the Upper House enquiry into dispute resolution by the Insurance Council of Australia (WA office) indicated that large employers are more likely to benefit from policies which fluctuate with experience rating, whereas smaller employers are likely to have premiums calculated on a basis unrelated to experience.[16]

Strong criticism of the calculation of insurance premiums by experience rating has been made by Ison.[17] Ison indicated that if premiums were calculated by claims experience there is likely to be an incentive for employers to hide claims or somehow manipulate the incidence of claims so as to reduce premiums. This could result in poor worker morale and have the unintended result of reducing safety program initiatives. Hyatt and Krajl researching experience rated employers in Canada found that there was a greater likelihood that experience rated employers would appeal decisions of the Workers Compensation tribunals as they were more claims sensitive.[18]

15 Hyatt D.E. Kralj B (1995) The Impact of Workers' Compensation Experience Rating on Employer Appeals Activity Industrial Relations Vol 34 No 1 (January 1995)p 95

16 Twenty -ninth Report of the Standing Committee on Legislation in relation to the Workers' Compensation and Rehabilitation Amendment Act 1993 (WA) 29 November 1994 p 23

17 Ison T.G.(1986) The significance of Experience Rating Osgoode Hall Law Journal 24(4) 723-42

18 Hyatt D.E. Kralj B (1995) The Impact of Workers' Compensation Experience Rating on Employer Appeals Activity Industrial Relations Vol 34 No 1 (January 1995)p 95

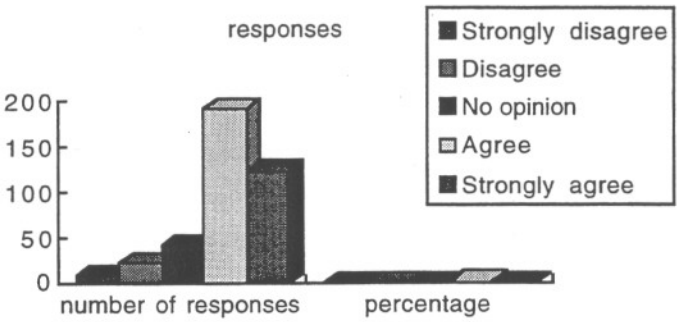
Survey Question:

"Bonus/penalty schemes designed to create incentives for accident prevention should be introduced".

Table 9 indicates employer response to this statement.

Table 9:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	7	1.8%
Disagree	21	5.5%
No opinion	41	10.6%
Agree	192	49.9%
Strongly agree	124	32.2%



The response to this question mirrors that of the previous question in relation to discounts for safety programs. The statement in relation to bonus/penalty schemes follows from the draft report of the Industry Commission and its tentative recommendations in August 1993. These recommendations were confirmed in the final report of February 1994. These results show employer support for the recommendations, again in the order of 80% in agreement with the statement. The initiatives for bonuses/penalties have been instituted in some States, in particular New South Wales but not in Western Australia. Western Australian has instituted however a partial experience rating scheme through the determinations of the Premium Rates Committee which allows for discounting, having regard to experience.

Survey Question:

"Cross subsidisation of premiums should be discouraged (cross subsidisation means an averaging of premiums over groups of employers so as to increase premiums for some and decrease premiums for others)".

The Industry Commission notes in its draft report that cross subsidy should be discouraged as they do not promote safety in the workplace and they are unfair.[19] Cross subsidisation of insurance premiums continues however. Generally in Western Australia, the effect is adverse to small employers, as it would appear that large employers obtain the benefits of discounting

19 Industry Commission (1993) Workers' Compensation in Australia Volume 1: Report Draft Report p45-6

and claims experience based ratings, whereas small employers tend to have their premium rates determined in accordance with the recommendations of the Premium Rates Committee.

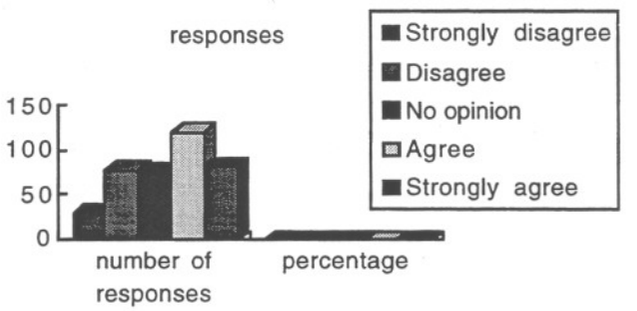
The Industry Commission noted:

"Cross subsidisation has obvious implications for prevention. This will occur between industries when class rates are artificially compressed. Then, low risk industries pay high premiums and is actuarially necessary, and high risk industries pay less. When this happens, high risk industries not bearing the full cost of their claims have lessened incentives to improve safety. Low risk industries, already paying more than their share, also face little incentive to improve".[20]

The Industry Commission also noted the "small firm problem", which was described as the situation where small firms suffer from a lack of credibility in claims experience. Small firms are expected to have a certain number of claims proportionate to large firms. Individual firms may have erratic claims experience. The setting of premiums for small firms is therefore very difficult for insurers. The employer response to this question was as follows:

Table 10:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	29	7.5%
Disagree	78	20.2%
No opinion	77	19.9%
Agree	121	31.3%
Strongly agree	82	21.2%



Survey Question:

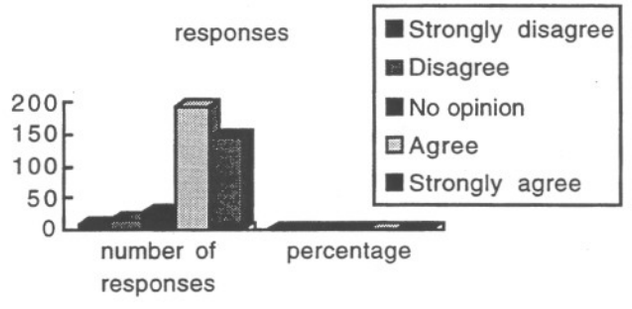
"Occupational Health Inspectors should take on more of an advisory and educative role rather than a policing role so that instead of fighting employers, they should advise them about how hazards could be contained or minimised so as to attain the lowest level of risk".

20 Industry Commission Report p63.

Again, this statement is drawn from the Industry Commission Report. Although no specific recommendations in these terms is made the Commission found that the educative and advisory role of Inspectors was important.[21] The employer response to this statement was overwhelmingly supportive with approximately 85% of employers in agreement. See Table 11:

Table 11:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	6	1.6%
Disagree	15	3.9%
No opinion	28	7.2%
Agree	192	49.6%
Strongly agree	146	37.7%



The response is clearly consistent with the statements in relation to employers bearing the cost of no fault liability and common law claims. The statement whilst presenting a pro-active role for Health Inspectors also is employer friendly in its suggestion that fining employers should be reduced.

Survey Question:

"Increasing fines and penalties for breaching occupational health and safety regulations would discourage violations".

The Industry Commission found that:

- fines and penalties have an important role in deterring unsafe work practices;
- fines and penalties for OHS violations are too low in some jurisdictions to be a credible deterrent to unsafe practices;
- even where maximum fines are high, courts rarely impose large penalties, which may mean that minimum fines may be necessary in some cases;

21 Ibid p80.

- vigorous prosecution to the fullest extent of the law for OHS regulatory breaches is not a strategy being pursued in Australian jurisdictions;

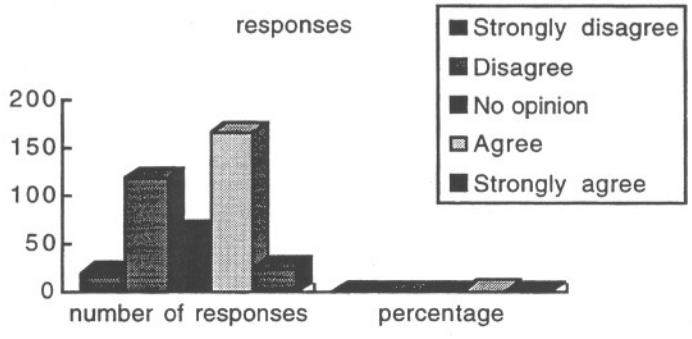
- fines and penalties are inconsistent between jurisdictions, providing scope for harmonisation; and

- in cases of gross negligence or wilful misconduct leading to serious injury or death, severe penalties, including goal sentences, are often not applied.

The employer response to this statement was equivocal. 35% of employers disagreed with the statement whereas approximately 49% of employers agreed with the statement. A further approximately 16% held no opinion. Table 12 below shows the responses.

Table 12 :

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	19	4.9%
Disagree	117	32.2%
No opinion	63	16.3%
Agree	164	42.4%
Strongly agree	24	6.2%



Interestingly one particular area of reform to the Western Australian *Occupational Safety and Health Act 1984* was the increase in fines for breaches of that Act. Read together the responses to this statement and the preceding statement tend to indicate employers are more likely to support a non-sanction approach to occupational health and safety. The responses to the following statement confirms this proposition.

Survey Question:

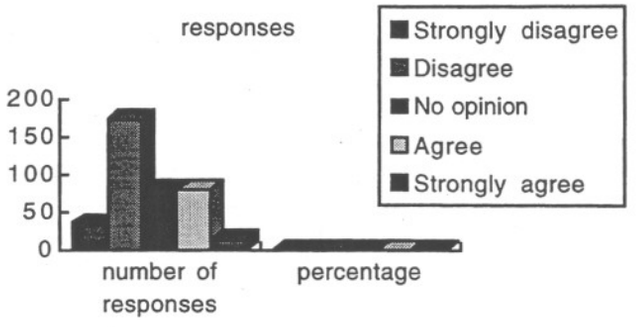
"I think that employers should be fined on the spot for minor violations".

This statement follows from the recommendation contained in the draft report of the Industry Commission, August 1993. The recommendation was not repeated in that form in Industry Commission (final) Report. Nevertheless the thrust of the final report could be said to support this statement. The employer response was substantially against such practices. This

probably explains why the recommendation in the above form was not contained explicitly in the final report of the Industry Commission.

Table 13:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	35	9.9%
Disagree	174	45.1%
No opinion	82	21.2%
Agree	81	21%
Strongly agree	14	3.6%



5.2 Employer Attitudes to Compensation and Rehabilitation

Survey Question:

"Injuries occurring during unpaid breaks (eg lunch breaks) should not be claimable as workers' compensation".

The Industry Commission surveyed employers and trade unions on their attitudes to "free time claims". Such claims included injuries sustained in accidents during lunch times and other unpaid breaks. Generally employers who made submissions to the Industry Commission were against payment of compensation for free time claims. Trade union submissions pointed out that in some circumstances the employer had some level of control over the accident and should therefore be held liable to pay compensation. The Commission concluded;

"The Commission accepts that the employer's ability to exert control over free time activities will vary depending on the circumstances. The employer is able to control the level of safety in the workplace, and is therefore responsible for all injuries occurring on site.

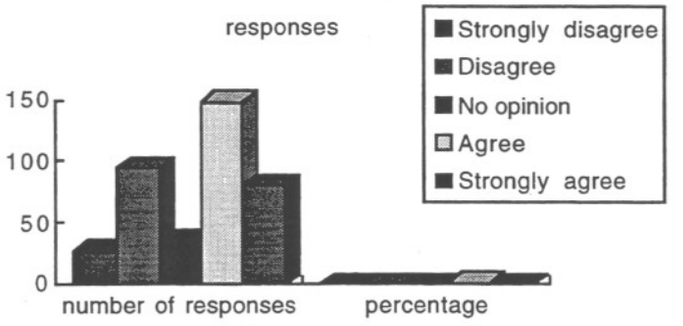
Employer responsibility therefore should extend to injuries occurring during employee's free time breaks on site. Following the principle of employer control, the Commission concurs that such accidents, for example, that cited by the AMEU, (an accident occurring in the company dining room when a chair collapses) should be covered by workers' compensation.

However, the employer has little, if any, control over accidents occurring outside the workplace. Injuries occurring during free time breaks outside the workplace should not be covered by compulsory workers' compensation".[22]

The *Workers' Compensation and Rehabilitation Act 1981* (WA) does not make any explicit distinction between free time claims and other claims. The definition of disability under section 5 of that Act includes personal injury by accident arising out of or in the course of the employment. High Court decisions have gradually extended the concept of what is in the course of the employment and many free time accident claims are compensable.[23] Employer attitudes to free time claims are as follows:

Table 14:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	27	7%
Disagree	94	24%
No opinion	36	9.4%
Agree	148	38.4%
Strongly agree	80	20.8%



The Industry Commission noted:

"That there has been a tendency for legislation to limit what qualifies as a compensable injury or illness, while judicial interpretation has intended to expand coverage".[24] Some efforts have been made to reduce employer exposure to injuries occurring to workers where it is perceived that the employer has little control. In particular stress claims and travel claims have, in Western Australia, been subject to amendments to provisions with the clear intention of reducing liability (see section 5(4) of the *Workers Compensation and Rehabilitation Act 1981*).

22 Ibid p98.

23 See for example Hatzimanolas v A.N.I. (1992) 173 C.L.R. 473.

24 Ibid p99.

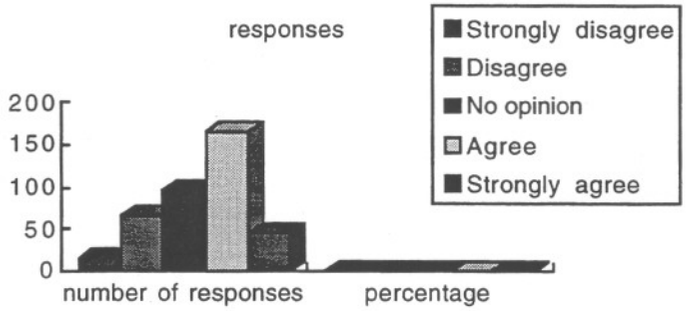
Survey Question:

"Access to common law remedies should be ceased when a claimant is able to receive workers' compensation".

The employer response to this statement showed approximately 50% in support. On the other hand a large number, approximately 24% had no opinion in relation to this statement.

Table 15:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	14	3.6%
Disagree	66	17.1%
No opinion	96	24.9%
Agree	165	42.9%
Strongly agree	44	11.4%



In Western Australia common law claims are still available to workers who establish $100,000 future pecuniary loss or 30% disability of the body as a whole as a consequence of a work-related injury. Amendments to the *Workers' Compensation and Rehabilitation Act 1981* (WA) which passed in November 1993 but were effective from June 1993 preclude common law claims where these threshold limits are not established. In essence for the large number of compensation claimants workers' compensation is the only remedy available. Not surprisingly, employer's support for this statement is consistent with employer attitudes in relation to strict liability and the cost effectiveness of common law claims.

Survey Question:

"Compensation claims should be terminated and employer liability ceased when employees unreasonably fail to undertake rehabilitation or fail to take reasonable steps to find work."

Provisions which already exist in the *Workers' Compensation and Rehabilitation Act 1981* (WA) provide for the cessation of compensation payments if a worker fails to attend for medical treatment or rehabilitation without reasonable excuse (see sections 64,65 and 72). The Insurance Commission recommended:

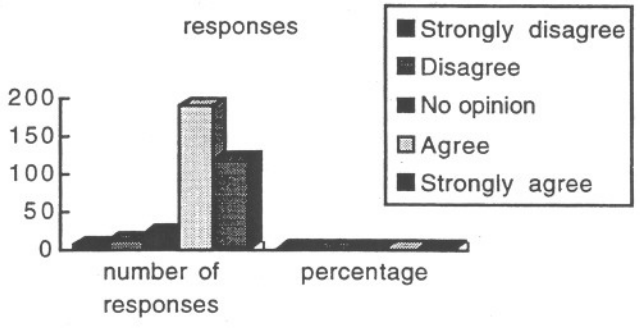
"To encourage rehabilitation and return to work, the Commission recommends, compensation payments be suspended where there is unreasonable failure on the part of an employee to undertake rehabilitation. Payments would recommence when the employee agrees to undertake a suitable program".[25]

In Western Australia currently, the worker's payments can be suspended even if there is a reasonable excuse for failing to attend rehabilitation. The provisions of the *Workers Compensation and Rehabilitation Act 1981* (section 72) are strict, so that any failure to attend rehabilitation can be the subject of suspension of payments. At the time of writing amendments are being debated so as to allow for some discretion to suspend payments if the rehabilitation program is not proceeded with.

Generally employers were supportive of this statement and the Industry Commission recommendation.

Table 16:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	6	1.7%
Disagree	12	3.5%
No opinion	20	5.8%
Agree	189	54.9%
Strongly agree	117	34%



Survey Question:

"I think that employers should keep jobs open for employees who are on benefits and/or on rehabilitation programs".

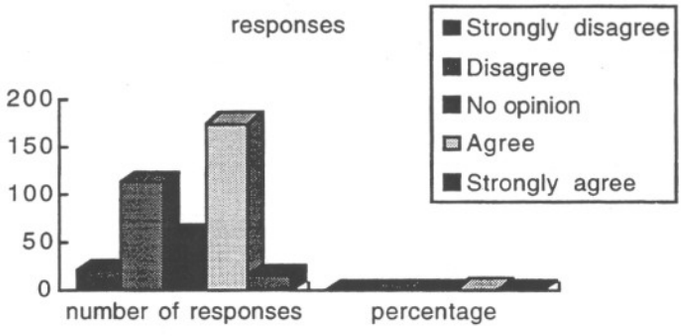
The Industry Commission recommended that all jurisdictions placed legislative obligations on employers to take responsibility for the rehabilitation of their injured/ill workers. Employers should also be required to provide a job for an injured or ill worker to return to - to be kept open for a period up to 12 months.[26]

25 Ibid p134.
26 Ibid p140.

In Western Australia since November 1993 there has been an obligation placed on employers under Section 84AA of the *Workers Compensation and Rehabilitation Act 1981* to provide work for a worker who is able to return to full or partial employment within 12 months of the date of incapacity from injury. This provision provides penal sanctions for employers who fail to comply with the provisions (a $5000 fine) but does not provide any other sanction such as that which appears in the South Australian *Workers Rehabilitation and Compensation Act 1987*. Under sections 58B and 35(2) of the South Australian Act a worker is deemed to be totally incapacitated where the employer fails to provide work within the one year period and the worker is able to show that he/she is fit to return to work. Approximately 50% of Western Australian employers were in favour of the statement, suggesting a reasonable level of support for the Western Australian provisions.

Table 17:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	20	5.3%
Disagree	113	29.8%
No opinion	57	15%
Agree	174	45.9%
Strongly agree	15	4%



Arguably the Section 84AA of the *Workers Compensation and Rehabilitation Act 1981* may lend support to the rehabilitation process, because it appears to put an onus on the employer to keep a job open, approximately half of the employers surveyed were not supportive of the proposal and/or held no opinion in relation to the proposal. This suggests that in some cases rehabilitation through return to work may not be enthusiastically approached. WorkCover South Australia has engaged an employee representative to pursue employers who failed to make employment available under their provisions[27]. If the South Australian employer was not co-operative then an extra insurance levy could be placed on the employer insurance premium. This direct premium sanction is likely to have more effect that the current Western Australian section 84AA.

27 Personal conversation with David Gray former South Australian employee representative 17 November 1995

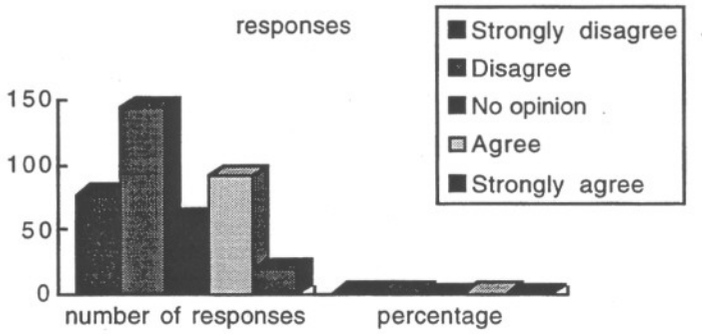
Survey Question:

"Employers must keep an injured employee's position open for one year from the day the employee is injured".

This more specific question relates directly to Section 84AA. The employer response was more clear indicating less enthusiasm for the return to work proposals.

Table 18:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	76	19.7%
Disagree	143	37%
No opinion	57	14.8%
Agree	91	23.6%
Strongly agree	19	4.9%



The results from this question and the previous question suggest a lack of enthusiasm for Section 84AA of the *Workers Compensation and Rehabilitation Act 1981*. It should be noted that because Section 84AA provides for only penal sanctions there is likely to be some difficulty in its enforcement. A breach of the provision would be a matter for prosecution to be proven beyond reasonable doubt. Prosecution of an employer does not benefit the worker but merely subjects the employer to criminal sanction. Detection of breaches of Section 84AA are probably likely to be low given that, the worker is unlikely to make a complaint for the purposes of obtaining a prosecution and is more likely to seek return to work through rehabilitation and/or the dispute resolution process. Unless there is a mechanism for referral of complaints for prosecution by the dispute resolution body, there is unlikely to be any significant impact through Section 84AA. In it's review of the dispute resolution processes the Western Australian Dispute Resolution Review Committee noted that it was too early to determine whether Section 84AA had had any positive or negative affect in fostering return to work culture. One wonders how the effects of the section are to be measured. The number of prosecutions under the section is certainly no measure of its effectiveness. Only those involved in rehabilitation and the employers are in a position to tell. It was noted that WorkCover Western Australia will continue to monitor the situation, but no information was provided in relation to prosecutions under this Section.[28]

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28 1995 Review of Dispute Resolution, Dispute Resolution Review Committee, June 16, 1995, Workers' Compensation and Rehabilitation Commission, p38.

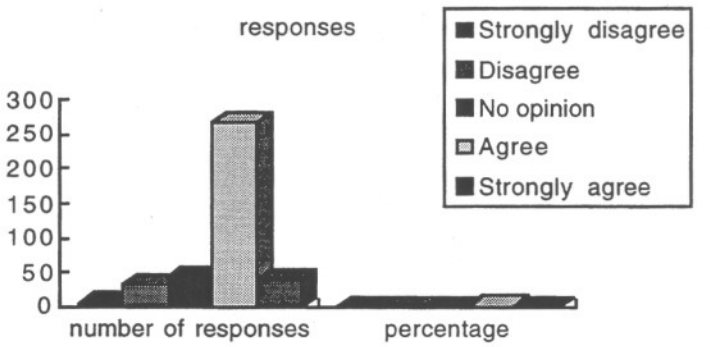
Survey Question:

"Employers and employees should reach an agreement jointly on rehabilitation, treatment, providers and programs so long as there are appropriate dispute resolution mechanisms in agreement".

The Industry Commission made a series of findings supportive of this statement.[29] Employer response to this statement indicates a high level of support for the proposition, suggesting that employers are more likely to accept a rehabilitation program where they have an input into the program, in contrast to the obligatory nature of the requirements imposed by Section 84AA.

Table 19:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	5	1.3%
Disagree	33	8.5%
No opinion	44	11.4%
Agree	266	68.7%
Strongly agree	39	10.1%



5.3 Employer's Attitude to Superannuation and Compensation

Survey Question:

"Superannuation payments on behalf of an employer should continue whilst an employee is on compensation".

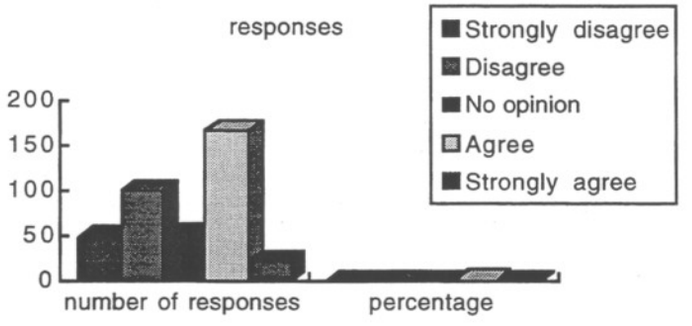
The Industry Commission was concerned that when superannuation contributions were not made while a worker was on compensation the worker would be disadvantaged on retirement and the employer had less incentive to prevent work-related injury or illness.[30]

29 Ibid p145-149.
30 Ibid p118.

The employer response to this statement was equivocal with a substantial proportion, approximately 38% not in favour of superannuation payments being made whilst the worker was on compensation, with approximately 48% in favour. A significant proportion, approximately 13% held no opinion. See table 20 below

Table 20:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	48	12.4%
Disagree	99	25.6%
No opinion	52	13.5%
Agree	166	43%
Strongly agree	21	5.4%



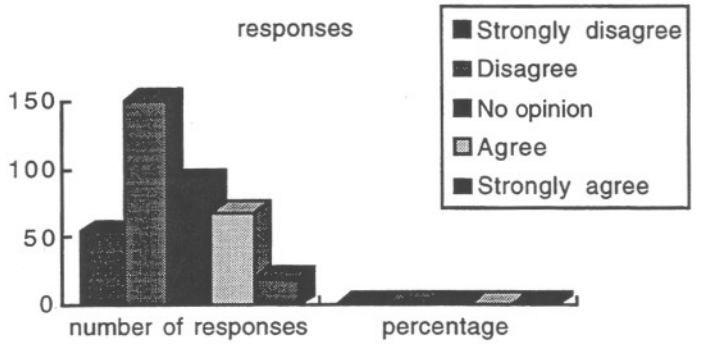
Survey Question:

"Superannuation, death and disability benefits should not be available in cases of workers' compensation".

Perhaps because of the potential for cost shifting or because more satisfactory arrangements could be made for disabled workers outside of the compensation system employer disapproval of this proposal was reasonably strong. This suggests that employers would like to keep all options open in the event that the employees contract of employment is to be terminated. With the full range of benefits available there greater potential for a package deal to be worked out on termination.

Table 21:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	54	14.1%
Disagree	150	39.3%
No opinion	91	23.8%
Agree	68	17.8%
Strongly agree	19	5%



5.5 Employer Attitudes to Recent Western Australian Amendments

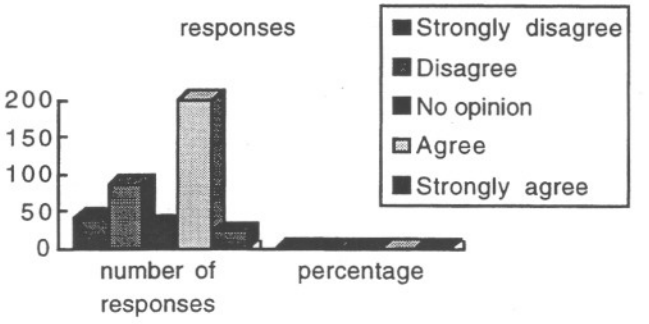
Survey Question:

"The worker should be paid his/her average weekly earnings (ie award rates, plus overtime and allowances) for the first four weeks off work".

This statement reflects the amendments to Schedule 1 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) which provides for average weekly earnings to be paid in the first four weeks of incapacity. This amendment was introduced in November 1993. Approximately 58% of employers were in support of the statement and presumably support the Western Australian amendments to that effect. See table 22 below;

Table 22:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	42	11%
Disagree	87	22.7%
No opinion	31	8.1%
Agree	200	52.2%
Strongly agree	23	6%



The luke-warm support for the increase in payments for the first four weeks reflects a number of matters;

- The calculation of average weekly payments can present some difficulties to employers where they have casual or part-time employees or worker who work shift or irregular hours.
- Over-award payments in some cases may not always be clear.
- Small employers having to pay higher rates for the first four weeks may experience cashflow problems.
- Calculation of payment in accordance with the formula is more likely to lead to incorrect payments and consequent failure of the insurer to reimburse full wages to the employer who has over paid. In the case of under paid workers this provision incites litigation.

However on the positive side;

- Larger employers with more established pay structures may not have the same difficulties.
- Employers who are subject to make-up pay awards likewise would experience less difficulty in the calculation of payments.

Survey Question:

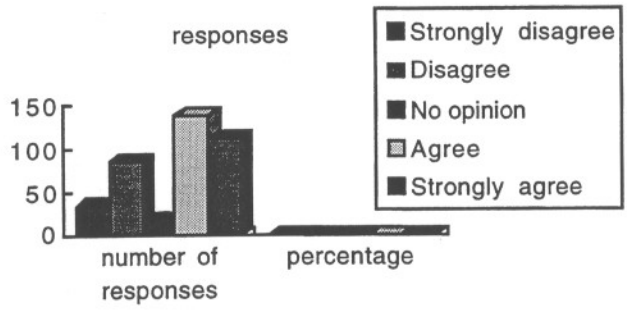
"Workers' compensation should not cover workers travelling to and from work".

Amendments to the *Workers' Compensation and Rehabilitation Act 1981* (WA), in particular section 19 effectively removes employer liability for claims by workers for accidents which occurred travelling to and from work. Such amendments were consistent with the Industry Commission approach which noted that employers should not be liable where there is a lack of control over the working environment. The Industry Commission noted however that where the community considers that compensation should be paid for such eventualities, other arrangements should be put in place - as with existing transport-accident schemes.[31] In Western Australia whilst amendments to the *Workers' Compensation and Rehabilitation Act 1981* (WA) have precluded claims for accidents occurring whilst the worker is travelling to and from work, there has not been a transference of the coverage to the transport-accident compensation scheme. Not surprisingly employer support for the statement and/or consequent amendments was strong, reflecting employer desire for reduced exposure/liability. See table 23 below;

Table 23:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	33	9.3%
Disagree	85	21.9%
No opinion	17	4.4%
Agree	139	35.7%
Strongly agree	112	28.8%

31 Ibid pxxix.



There have been some unintended consequences of the amendments to section 19 of the *Workers' Compensation and Rehabilitation Act 1981* (WA). In some cases Unions have negotiated insurance cover for their member. The Trades and Labour Council of Western Australia negotiated a package for affiliated members in 1994/95 however the scheme was abandoned when insurers increased premiums significantly for the 1995/6 policy period. Some employers have obtained policies to cover workers, with workers bearing the premium costs. Employers will have noted the extra "hidden" costs of paying sick leave to workers injured on the way to and from work who have not been able to establish a claim through the motor vehicle insurances system. Finally the cost of insurance policies taken out by workers is now the subject of some negotiations in industrial agreements so that whilst the employer may save on workers compensation premium, that saving may be lost in agreeing to pay the cost of travel cover.

Survey Question:

"Generally speaking, I think workers' compensation is confusing".

The Industry Commission noted:

"Work-related injury and illness and workplace health and safety are currently addressed with a fragmented institutional framework characterised by:

- ten sets of workers' compensation arrangements;
- ten principal Occupational Health and Safety (OHS) Acts; and
- widely varying access to remedies at common law;

as well as being influenced by:

- relevant provision of industrial awards, employment contract and enterprise agreements;

- Government programs and other arrangements (notably Medicare, Social Security and Taxation systems, transport accident schemes and superannuation arrangements); and

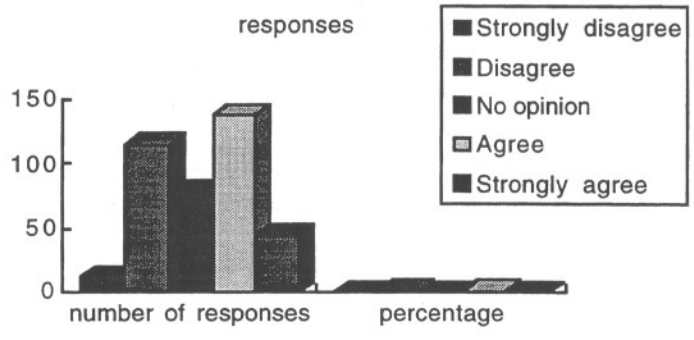
- diverse insurance arrangements (ranging from single public insurer to competitive private arrangements).

These arrangements/programs interact in complex - and often unintended and unknown - ways which are hardly conducive to effectively addressing the problems of work-related injury and illness in an efficient (or least cost) way.[32]

The following responses were obtained in response to the above statement;

Table 24:

RESPONSES	NUMBER OF RESPONSES	PERCENTAGE
Strongly disagree	12	3.1%
Disagree	115	29.9%
No opinion	77	20%
Agree	137	35%
Strongly agree	44	11.4%



The responses indicate that almost half employers agreed with the statement that workers' compensation was confusing. Given the matters referred to in the Industry Commission Report, that is, the diversity of laws and the interaction with a number of Government agencies it is not surprising that a large number of employers have difficulty grasping the number of concepts in relation to workers' compensation.

6. DISCUSSION

Generally, there is strong support for the bulk of Industry Commission recommendations. Where the recommendations are not supported this reflects the reluctance of employers to take on greater responsibilities and/or liability. The amendments to the *Workers' Compensation and Rehabilitation Act 1981* (WA) were supported insofar as they reflect a reduction in employer liability. Again, where the Western Australian amendments imposed potentially greater liability on the employer, employer responses were less enthusiastic.

32 Ibid p 15.

In relation to rehabilitation, employer responses reflected a desire for greater control by employers over the rehabilitation process, however there was employer reluctance for increased responsibility in providing return to work support.

Overall, the results reflect a reluctance by employers for interference in the control of the workplace and a desire for reduced liability and exposure to compensation claims. Employers generally support the modification of insurance premium calculation to reflect improved safety and accident records. Employers seek a supportive role from Occupational Health and Safety authorities rather than a penal/sanction approach.

The reported views of the employer organisations in relation to the costs of a National WorkCover[33] scheme probably relate to the reluctance of employers to be subject to increased regulation. What can be gleaned from the above results is that employers are not happy with a loss of autonomy in these areas. This suggests that the strategy of uniform regulation will not be welcomed unless it leads to less rather than more regulation. The uniform state workers compensation provisions approach recommended by the Industry Commission is the obvious alternative to the National scheme proposed by Woodhouse[34] in the 1970's. The Woodhouse model floundered on lack of state co-operation and doubts about its constitutional validity. As state systems continue to be revamped and apparently show no signs of controlling costs perhaps the Woodhouse model may appear more inviting.

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33 It is worth distinguishing between a National Compensation scheme which would be administered by one authority under one system. State systems would cease to exist. A National WorkCover scheme provides for the states to continue as the administrators of their own schemes, but with a uniform approach to statutory definitions and entitlements. An employer under the National WorkCover scheme that carried out business in a number of states would still be required to insure in each state of operation.

34 See footnote 7