CONFIDENTIAL

WorkCoverSA

Review of regulations in the WorkCover Scheme

October 2008

WorkCoverSA
Better together

Supported by
Government
of South Australia

Disclaimer

The information produced by WorkCover Corporation of South Australia in this publication is correct at the time of printing and is provided as general information only. In utilising general information about workplace health and safety and injury management, the specific issues relevant to your workplace should always be considered. This publication is not intended as a substitute for the requirements of the *Workers Rehabilitation and Compensation Act 1986* or the *Occupational Health Safety and Welfare Act 1986*.

© WorkCoverSA 2008

Contents

Disclaimer 2

Part one – About the Regulations Review 4

Introduction 4

Existing regulations in the WorkCover Scheme 4

Relationship between the Regulations Review and recent legislative reforms 5

How are the regulations being reviewed? 7

What are the Government's and WorkCover's objectives in the review of these regulations? 8

Who is being consulted? 8

Responding to the Regulations Review consultation 9

What effect will your feedback have? 9

Who should I talk to? 9

Making a submission 9

Part two – WorkCover's analysis of the existing regulations 11

Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999 11

Workers Rehabilitation and Compensation (Disclosure of Information) Regulations 1999 21

Workers Rehabilitation and Compensation (Dispute Resolution) Regulations 1996 23

Workers Rehabilitation and Compensation (General) Regulations 1999 23

Workers Rehabilitation and Compensation (Rehabilitation Standards and Requirements) Regulations 1996 28

Workers Rehabilitation and Compensation (Reviews and Appeals) Regulations 1999 30

© WorkCoverSA 2008

Part one – About the Regulations Review

Introduction

All South Australian regulations are subject to the provisions of the *Subordinate Legislation Act 1978.* This legislation states that a regulation made on or after 1 January 1987, and all subsequent regulations amending that regulation, will expire on 1 September of the year following the year in which the tenth anniversary of the day on which the regulation was made. The expiry of a set of regulations may be postponed by up to two years at a time and up to four years overall. A postponement itself must be regulated.

The pending expiry dates of existing regulations (identified in Table 1), coupled with the development of new regulations associated with the Government's legislative reform agenda, have led to the requirement to review most of the regulations that are administered by WorkCover.

This review of regulatory content (referred to in this document as 'the Regulations Review') will occur over the forthcoming year and in response to the consequential amendments associated with the *Workers Rehabilitation and Compensation (Scheme Review) Amendment Act 2008* (Scheme Review Amendment Act). WorkCover anticipates that new regulations to replace all existing regulations will take effect in January 2010.

Part Two of this discussion paper seeks feedback on the content of existing regulations, however stakeholders are welcome to comment on other issues that might benefit from inclusion in the regulations.

Existing regulations in the WorkCover Scheme

As of 1 October 2008, it is expected that there will be seven separate regulations effective under the *Workers Rehabilitation and Compensation Act 1986* (the Act). The expiry date for each regulation varies according to the year individual regulations were made. Each regulation and their corresponding expiry dates are identified in Table 1. As can be seen from Table 1, six of the existing regulations under the Act are scheduled to expire in the next one to two years.

Regulations under the *Workers Rehabilitation and Compensation Act 1986*

Table 1 summarises all regulations that fall under the Act and identifies their associated expiry dates.

Table 1: Regulations under the Act		
Name of regulation	**Expiry date**	**Additional expiry program information**
Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999	1 September 2010	n/a

© WorkCoverSA 2008

Table 1: Regulations under the Act

Name of regulation	Expiry date	Additional expiry program information
Workers Rehabilitation and Compensation (Dispute Resolution) Regulations 1996	1 September 2009	Original date of expiry 1 September 2007, postponed twice, to 1 September 2008 and again to 1 September 2009 under the *Subordinate Legislation Act 1978.* Will require one further postponement during Review.
Workers Rehabilitation and Compensation (General) Regulations 1999	1 September 2010	n/a
Workers Rehabilitation and Compensation (Rehabilitation Standards and Requirements) Regulations 1996	1 September 2009	Original date of expiry 1 September 2007, postponed twice, to 1 September 2008 and again to 1 September 2009 under the *Subordinate Legislation Act 1978.* Will require one further postponement during Review.
Workers Rehabilitation and Compensation (Reviews and Appeals) Regulations 1999	1 September 2010	n/a
Workers Rehabilitation and Compensation (Territorial Application of Act) Regulations 2007	1 September 2018	n/a

Relationship between the Regulation Review and recent legislative reforms

In November 2006 the WorkCoverSA Board proposed to the South Australian Government a range of changes to the workers rehabilitation and compensation legislation that it believed was essential in ensuring the Scheme's sustainability into the future. A copy of WorkCoverSA's *Proposed legislative change to the South Australian Workers Rehabilitation and Compensation Scheme* is available on the WorkCoverSA website, www.workcover.com.

On 29 March 2007, along with the Honourable Deputy Premier and the Chair of the WorkCoverSA Board, the then Minister for Industrial Relations, the Hon Michael Wright, announced that an independent review would be held into the WorkCover Scheme.

© WorkCoverSA 2008

Commonly referred to as the Clayton-Walsh report, two leading experts in workers compensation schemes, Alan Clayton and John Walsh were commissioned to consider the fundamental structure of the legislation that establishes the WorkCover Scheme to ensure that the social and economic objectives of the Scheme can be met. The independent review considered proposals by the WorkCoverSA Board together with alternatives to reform the Scheme to make it fully-funded, fair to workers and affordable to business. The *Review of the South Australian workers compensation system report*, completed in December 2007, is available via the Department of Premier and Cabinet's website.

Prior to this review, the fundamental structure of the WorkCover Scheme had not been reassessed since its inception 20 years ago. This review had regard to the following objectives:

1) Injured workers receive fair and equitable financial and other support that is delivered efficiently and equitably and enables the earliest possible return to work.
2) The average employer levy rate be reduced and contained within the range of 2.25% to 2.75% by 1 July 2009.
3) The Scheme be fully funded as soon as practicable having regard to the above objectives.

Stakeholder submissions were sought in May and closed on 30 June 2007. The report was written following extensive consultation with the Scheme's stakeholders.

The Government introduced the *Workers Rehabilitation and Compensation (Scheme Review) Amendment Bill 2008* and the *WorkCover Corporation (Governance Review) Amendment Bill 2008* into Parliament on 28 February 2008. These Bills passed the House of Assembly on 9 and 10 April respectively and the Legislative Council on 5 June 2008. Both Bills were endorsed by the House of Assembly on 17 June 2008 following minor amendment before they were assented by the Governor on 19 June 2008.

Development of regulations to support the July 2008 legislative amendments

Two variation regulations were published in the *South Australian Government Gazette* on 26 June 2008 and took effect from 1 July 2008. These regulations modified two existing regulations, the Workers Rehabilitation and Compensation (General) Regulations 1999 and the Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999 in light of changes introduced by the Scheme Review Amendment Act. Both variation regulations are available on the Department of Premier and Cabinet's SA Legislation website and are titled:

- Workers Rehabilitation and Compensation (General) Variation Regulations 2008
- Workers Rehabilitation and Compensation (Claims and Registration) Variation Regulations 2008 (188 of 2008)

A further variation to the Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999 was published in the *South Australian Government Gazette* on 31 July 2008 and took effect from 1 August 2008 in response to recommendation 32 contained in the Clayton-Walsh report. This recommendation resulted in an amendment to Regulation 8 of the above-mentioned regulations and was made to exempt employers from having to register under section 59 of the Act, if they pay or expect to pay less than $10,200 per annum (indexed) in total remuneration, unless a claim is lodged and accepted in respect of one of their workers during a financial year.

© WorkCoverSA 2008

This variation regulation is also available on the Department of Premier and Cabinet's SA Legislation website and is titled:

- Workers Rehabilitation and Compensation (Claims and Registration) Variation Regulations 2008 (214 of 2008)

How are the regulations being reviewed?

The 2008-09 Regulation Review will consist of five distinct phases, as follows:

1) internal consultation
2) external consultation
3) development of draft regulations
4) consultation on draft regulations
5) settlement of regulations.

Part two of this discussion paper forms the basis of internal and external consultation by aiming to engage readers to provide feedback on existing regulations. It aims to identify the nature and extent of any known problems or issues associated with each regulation and poses 32 questions on various aspects of the regulations in an effort to assist consideration of the issues raised. Internal feedback from management and staff has been sought on similar questions and has been used as the predominant basis for analysis to date.

In addition to the 32 specific questions, additional high level questions that may help facilitate interested parties' feedback include:

- What is the problem ie, what's not working?
- What's the solution ie, is there more than one solution and if so what are they?
- Are there regulations that could be removed? What alternative arrangements would need to be put in place if these were removed?
- Do the regulations currently reflect best practice within the workers compensation industry?
- What implications are associated with regulatory amendments for stakeholders and/or the community in general?

The public discussion paper aims to outline a range of possible solutions that address these problems and questions are posed to assist WorkCover to assess the impact of possible changes upon stakeholders, the Scheme and the wider community.

All formal stakeholder feedback received by 13 February 2009 will be considered and incorporated into the development of proposals for change wherever relevant. Stakeholders will have further opportunity to provide feedback on draft regulations in the second consultation phase.

Consultation timeframes for the Regulation Review

Timeframes are outlined below:

Activity	Date

© WorkCoverSA 2008

Activity	Date
Commencement of first round of public consultation and call for submissions	Wednesday 1 October 2008
Closure of first round of public consultation and due date for submissions	Friday 13 February 2009
Commencement of second round of public consultation on draft regulations	July 2009
Closure of second round of public consultation on draft regulations Due date for feedback	October 2009
Planned commencement of new regulations	1 January 2010

What are the Government's and WorkCover's objectives in reviewing these regulations?

Project objectives

Objectives of the review are to:

- review the content of current regulations that are due to expire because of the passage of time, in light of industry best practice
- plan the content of future regulations to complement the Government's package of legislative reform, in consultation with the community and key stakeholders
- ensure consistency of regulation, policy and practice in the areas of rehabilitation and case management
- ensure that a new set of regulations take effect from 1 January 2010.

Who is being consulted?

The comprehensive consultation plan involves internal and external consultation which WorkCover believes will lead to better and more informed decision-making associated with the development of new regulations.

WorkCover has already consulted internally with management and staff and will continue to consult with the WorkCoverSA Board's Regulations Review Sub-Group and with WorkCover's Legislative and Regulatory Consultative Group over the duration of the review. Membership of the Legislative and Regulatory Consultative Group consists of representatives from peak employee and employer organisations and health specialists.

In addition to inviting the general public and wider community to provide feedback on the Regulations Review, WorkCover will be consulting its various external stakeholders in accordance with the Stakeholder participation guidelines available on WorkCoverSA's website.

© WorkCoverSA 2008

Stakeholder groups include:

- Aboriginal and Torres Strait Islanders
- Disability
- Employee
- Employer
- Injured worker
- Multicultural
- Women
- Self-insured employers

Membership details of the various stakeholder groups are available on WorkCoverSA's website via the following tabs Home > About us > Stakeholder groups > Our commitment.

Responding to the Regulations Review consultation

Stakeholders and interested parties will have two opportunities to provide WorkCover with feedback into the review. Two separate rounds of public consultation will occur during phases two (external consultation) and four (consultation on draft regulations) of the review:

- from 1 October to 13 February 2009 (over a period of 19 weeks) and
- from July to October 2009 (over a period of 12 weeks)

What effect will your feedback have?

An analysis of stakeholder feedback is aimed tol be completed by WorkCover by April 2009 and will contribute to the development of draft replacement regulations. Stakeholder and other interested parties' feedback will help to inform WorkCover's recommendations to Government for regulatory amendment. The second phase of external consultation is scheduled to begin in July 2009.

Who should I talk to?

For general enquiries about the Regulation Review, please telephone WorkCoverSA's Service Centre on 13 18 55.

Making a submission

If you are making a submission on behalf of yourself or an organisation, you are requested to attach a completed submission cover sheet to your submission, available on WorkCoverSA's Regulation Review webpage www.workcover.com/regulationreview.

If you wish to use a template for your actual submission, there is one available for downloading from WorkCoverSA's Regulation Review webpage. Using this template for your submission is optional. If you choose not to use it, please ensure that your submission is clearly formatted to indicate which regulation/s you are commenting on, and/or which discussion paper questions you are answering.

Submissions may be provided:

by email to: regulationreview@workcover.com

© WorkCoverSA 2008

or by post to: The WorkCoverSA Regulation Review
WorkCoverSA
GPO Box 2668
Adelaide SA 5001
(DX660)

The deadline for submissions to the first round of public consultation is Friday 13 February 2009.

© WorkCoverSA 2008

Part two – WorkCover's analysis of the existing regulations

Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999

The Workers Rehabilitation and Compensation (Claims and Registration) Variation Regulations 2008, published in the *South Australian Government Gazette* on 26 June 2008, amended various provisions within these regulations. While all provisions of the regulations are open for consultation, the following provisions have previously been identified by stakeholders as requiring amendment.

Regulation 5 – Legislative definitions

Section 3 of the Act defines a 'worker' as:

a) a person by whom work is done under a contract of service (whether or not as an employee)

b) a person who is a worker by virtue of section 103A

c) a self-employed worker

and includes a former worker and the legal personal representative of a deceased worker.

Section 3 defines 'contract of service' as the relationship between employer and employee, in other words, the common law relationship. Contract of service means:

a) a contract under which one person (the worker) is employed by another (the employer)

b) a contract, arrangement or understanding under which one person (the worker) works for another in prescribed work or work of a prescribed class

c) a contract of apprenticeship

d) a contract, arrangement or understanding under which a person (the worker) –

   i. receives on-the-job training in a trade or vocation from another (the employer) and

   ii. is during the period of that training remunerated by the employer.

Under the definition of a contract of service, the relationship between employer and employee is one which can be characterised as one that is formed under established common law criterion.

But under the definition of worker, the Act through its regulations extends contract of service with the view of ensuring the widest coverage of persons who work for others.

Within South Australia, there has been growing concern about this wide form of coverage. Many have called for a less piecemeal and more succinct definition of worker that reflects 21st-century working practices.

Across Australia, the plethora of different definitions of worker/deemed worker has led to calls for greater national consistency, and even a single national definition.

© WorkCoverSA 2008

The Heads of Workers Compensation Authorities (HWCA) have recently developed a proposal for greater national consistency in the definitions of worker. A number of states and territories have also conducted reviews and/or enacted legislation in which new definitions of worker were put forward.

The Act extends (or excludes) coverage in certain situations to specific groups of persons performing work by regulation. Regulation 5 prescribes classes of work for the purposes of the definition of contract of service in section 3(1) of the Act. Under this section, where any person who performs work for another and meets the required criteria is deemed to be working under a contract of service.

Coverage under the South Australian workers compensation scheme is provided to most workers in a traditional employment relationship ie, under a contract of service. However, a small handful of work classes are excluded from the definition of contract of service.

These include occupations such as certain sporting professionals, ministers of specific religions, some owner drivers, some licensed gas fitters, and persons covered under the *Seafarers Rehabilitation and Compensation Act 1992.*

Regulation 5 also extends coverage to other persons who are generally engaged under a contract *for* service. Most would usually be regarded as self-employed. Those covered include persons who perform the following type of work, but only under specific circumstances. Current prescribed classes of work include:

a) building workers (other than wall or floor tilers)
b) cleaners, council drivers
c) taxi and hire car drivers
d) owner drivers (owner/operators)
e) entertainers
f) outworkers
g) jockeys
h) ministers, priests or members of other religious order (except within Anglican, Catholic, Lutheran, Uniting churches or the Salvation Army)
i) review officers appointed under the Act.

Previous feedback from employer stakeholders indicates that the deemed worker provisions may be too wide in their scope, leading to confusion when determining whether a person is a deemed worker or not. A suggestion that deeming provisions should be narrowed so that cover is only extended to those persons working in their own industry eg, builders working in the building industry, but not when working outside their own industry (such as if they were working for a butcher shop) has previously been put forward.

On the other hand, internal feedback has suggested that deeming provisions are not too broad in their scope for reasons described below.

Building work

Three major areas of concern in relation to the deeming provisions for building work have previously been raised by WorkCoverSA management, staff and stakeholders. These are summarised below.

© WorkCoverSA 2008

Firstly, the provisions are too broad and therefore lack clarity regarding who they specifically do and do not cover. Employer stakeholders within the industry have previously stated a belief that the provisions should be restricted to building work within the building industry, a view that is not supported by employee stakeholders. A common misconception is that the deeming provision for 'building work' only applies to the building industry. The definition of building work is in fact broader than this, as the definition includes any business that engages any person to undertake any work in the course of or for the purposes of a trade or business.

A differing view suggests that the Claims and Registration Regulations definition of building work is not too broad in scope on the basis that the interpretation of building work has the same meaning as in the *Building Work Contractors Act 1995* (Regulation 4). Under the *Building Work Contractors Act 1995,* building work means:

a) the whole or part of the work of constructing, erecting, underpinning, altering, repairing, improving, adding to or demolishing a building
b) the whole or part of the work of excavating or filling a site for work referred to in paragraph (a) or
c) work of a class prescribed by regulation.

The Building Work Contractors Regulations 1996 also prescribe certain classes of work as building work.

Rather than referring users of the Claims and Registration Regulations to the *Building Work Contractors Act 1995* and the Building Work Contractors Regulations 1996, the suggestion has been made that the Claims and Registration Regulations be expanded to directly include the definition from the *Building Work Contractors Act 1995* and the relevant associated regulations for ease of use. This would avoid the need for users of the Claims and Registration Regulations to source two other pieces of legislation.

Secondly, the complexity of the materials test that can be difficult to apply can lead to erroneous outcomes and be the subject of 'rorts' within the system. Some consider the test has essentially become superfluous, as its application has been more about structuring business arrangements to suit employers rather than providing certainty of coverage for workers. Both employer and employee stakeholders have previously stated that they wish to see this issue addressed.

It is understood that the current 'value of materials supplied' test as it applies to the building industry allows for much rorting of the system. With this test, if the value of any materials supplied by a builder for example exceeds 4% of the total amount payable or $50 for materials to be used for the job (whichever is the greater), then that builder is not a deemed worker. It is understood that this test has lead some employers in the building industry to ask for invoices stating the exact amount of materials used and forcing workers to purchase certain amounts of materials so as to avoid their WorkCover obligations (ie, quite often, $51 worth of materials is invoiced for). Apparently this is also the case in other industries, and determining exactly what counts as materials supplied, particularly by workers such as entertainers, can become very confusing.

One option is to remove the current materials test as it is notional, too low and not effective. If the materials test were to be excluded, the opportunity to amend the regulation to align it with section 4(7) of the Act (average weekly earnings for contractors) and ensure that the worker's rate of average weekly earnings does not include the value of materials (but includes the value of their labour) should be explored.

© WorkCoverSA 2008

Alternatively if the material test is to be retained, it is recommended that the value is increased to exclude the larger and more entrepreneurial contractors who make a profit from the provision of materials. In this event, it is proposed that the wording of the test be amended to include some examples of materials that are particular to the work of the industry.

Thirdly, industry feedback suggests there is a lack of awareness of the provisions within both the building industry and on the part of those employers outside of the industry who become deemed employers when building work is performed for them. Both employer and employee stakeholder representatives recommended that this issue may be addressed in the short term by education campaigns and compliance activities.

Finally, the exclusion of floor and wall tilers has been questioned as their work most likely fits within the definition of building work and appears to be consistent with the intent of the legislation.

Q 1: Are current deeming provisions in general, too broad or narrow in their scope? How can this be solved?

Q 2: *Should the materials test for building work be removed or altered? If so, what alternative mechanism could be created to provide a more suitable measure to be included in the deeming provisions?*

Q 3: Is it still relevant to exclude floor and wall tilers as a prescribed class of work?

Taxi drivers

Regulation 5(1)(d) relates to taxi drivers. In South Australia, taxi drivers are covered in some circumstances. Whether they are classified as workers is dependant on their contractual arrangements and their method of payment.

Providing the driver does not hold or lease a license issued to that vehicle, they are deemed workers under the Act. The relevance of this exclusion has been queried by some industry representatives.

Under current provisions there are two types of arrangements under which a driver can be employed:

(1) Share of takings – drivers employed under this arrangement do not generally supply material and would be regarded as workers.

(2) Shift leasing – also referred to as shift hire or shift rent. Under this arrangement the driver pays the licensed taxi operator a fixed fee for the use of the taxi. It is also normal for the driver to supply the fuel in these agreements. In these circumstances the driver is not considered to be a worker because over the period of the arrangement (usually one week or more) the driver would supply fuel (material) in excess of $50.

Some industry commentators have suggested that these arrangements are misleading on the basis that a taxi operator's control of the licence does not automatically mean they control the taxi driver. It has been argued that the issuing of a licence gives the licence holder the right or authority to manage that accordingly and in the case of a taxi driver, it is the taxi operator who is selling that right to use the licence so it may be used for hire and reward for a designated period.

© WorkCoverSA 2008

The materials test (supply of fuel in excess of $50) relates to taxi drivers who are working under above-mentioned shift lease arrangements. The value in the test has been eroded with recent rising fuel costs. In this light, one option is to remove the materials test for taxi drivers.

In the late 1990s, the South Australian Taxi Association submitted a proposal to the Minister for exclusion of taxi operators from coverage as workers under the Act. This proposal for exclusion never progressed to any regulatory amendments.

In 2000 WorkCover received representations from individuals within the taxi industry requesting a review of deeming provisions with the intention of removal of taxi drivers as a deemed class of work (this deeming provision includes other similar drivers). The argument for such a course of action was primarily based on the introduction at the time of the Commonwealth's A New Tax System (ANTS) legislation, which treats taxi drivers as being engaged in a trade or business. Submissions to WorkCover on the issue stated that as taxi drivers were treated as a business under the Commonwealth's ANTS legislation they should not be treated as workers under the State's workers compensation legislation.

The current deeming provisions in relation to taxi drivers do however allow them to structure their arrangements in a way that will bring them either within or outside the scope of the deeming provisions. Where taxi drivers operate on a shift lease arrangement they are considered self-employed and not covered by the deeming provisions, however when they operate on a 'share of takings' basis the deeming provisions cover them. Such a situation allows for taxi drivers and those who employ them to negotiate and structure their arrangements either within or outside the WorkCover Scheme as agreed between them.

If coverage were to be completely removed, taxi drivers would be required to make their own arrangements for insurance coverage for injuries sustained at work. Furthermore persons who might otherwise be their employers would bear the risk of liability as third party wrongdoer under common law if their negligence contributes to the injury of a driver at work (some already do under shift lease arrangements). This would lead to a further reliance on public liability insurance.

Keeping deeming provisions for taxi drivers in place would be advantageous from the perspective that a significant number of migrant workers, who are potentially more vulnerable, are being employed within the industry.

Currently, arrangements in the taxi industry can be structured with a view to either include or exclude drivers from the deeming provisions. WorkCover has also only had limited representation from owner representatives and as such, further consultation on the impact upon industry of removing these provisions is recommended.

Education campaigns and compliance activities surrounding deeming provisions may assist those within the industry understand how the Act and its associated regulations apply to them.

Q 4: Should deeming provisions for taxi drivers be left in place?

Q 5: If so, what should be reflected in WorkCover's advice to Government about the materials test? ie, why should the material test for taxi drivers working in shift lease arrangements be removed or how should it be modified.

© WorkCoverSA 2008

Entertainers

Regulation 5(1)(f) relates to entertainers. A previous levy audit of the entertainment industry attributed a high proportion of unpaid levy to non-compliance with the regulated deeming provisions for performers.

Previous feedback suggests that some hotel industry representatives are dissatisfied with the current definition of entertainers and support its review.

In June 2001, drafting of a regulation commenced that aimed to provide a test in the deeming provisions for entertainers. This involved the use of an Australian Business Number (ABN). The draft regulation provided that when an entertainer, otherwise covered by the deeming provisions, supplied an ABN to their hirer, they were not to be covered by the deeming provisions. This change was developed as a result of representations from the Australian Hotels Association who were concerned that the current deeming provisions place too many obligations on hotel operators that were too difficult to comply with.

SA Unions (formerly the United Trades and Labor Council) and other stakeholders have strongly opposed this course of action in the past. The basis for opposition stems from the fact that such an amendment would allow hotel owners to hire only those entertainers that have an ABN, thereby effectively ensuring that no entertainers have coverage for workers compensation. This would leave entertainers with an ABN in the undesirable position of being required to make their own insurance arrangements in the case of injury whilst performing entertaining work.

It is suggested that the value of the materials test be reviewed to determine whether it is commonly used and whether it sufficiently represents today's cost. If the materials test is retained, a reasonable dollar value of supplied materials would need to be identified. Feedback suggests that the wording of the test should be amended to include some examples of materials that are particular to the work of the entertainment industry.

Q 6: Is there an alternative to the current deeming provisions for entertainers that would better satisfy all relevant parties?

Q 7: What would a reasonable dollar value be for the materials test in today's economic climate and what types of materials would be included within such a test?

Licensed gas fitters

Regulation 5(3) maintains that licensed gas fitters are not included as a prescribed class of work if they are engaged by Boral Energy to perform building work and the licensed gas fitter supplies materials for the purposes of that work. It has been suggested that this definition be reviewed to determine its continued relevance and whether there is a wider industry body that needs to be included.

Q 8: Is it still relevant to exclude Boral workers from the deeming provisions for licensed gas fitters or should this definition be amended to include licensed gas fitters engaged by Boral?

Possible solutions for deeming provisions

Previously proposed alternatives that would narrow current regulated deeming provisions relates to the revised tax system introduced on 1 July 2000 which would involve:

© WorkCoverSA 2008

- excluding from coverage, persons who have registered an ABN for their business with the Australian Taxation Office (ATO)
- excluding from coverage, persons who have registered an ABN and have also registered for the GST system with the ATO.

This possible solution was identified during a review of deeming provisions undertaken by WorkCover over the course of 2000 that found that possession of an ABN (indicating that the person was involved in a trade or business) could be used as a criterion to determine who should or should not be deemed to be a worker.

Anecdotal feedback suggests that a significant majority of persons within the deemed worker categories would have registered for an ABN and therefore a significant majority of persons would be excluded from workers compensation coverage.

However ABN's are more widely used than just by those persons who are engaged in a trade or business. There may also be significant administrative inconsistencies between the taxation and workers compensation systems.

A further suggestion to narrow the provisions involves incorporating a statement within the regulations that explicitly excludes sub-contractors from coverage.

To ensure effective deeming provisions are in place and are readily understood, it is very important that they be clearly and simply worded so they so they can be easily comprehended by everyone and easily promoted within industry.

Q 9: Deeming provisions generally utilise materials tests. Can any alternative mechanism be utilised to substitute these materials tests?

Q 10: What are some examples of materials that are particular to the work of deemed workers?

Regulation 10 – Agencies of the Crown

No amendments have been identified for Regulation 10. However Schedule 6, to which it refers, must be reviewed and updated to reflect agencies or instrumentalities of the Crown referred to under section 61 of the Act. Section 61 of the Act refers to this regulation which lists agencies or instrumentalities of the Crown that are deemed to be registered as self-insured employers. Please refer to Schedule 6 – Agencies and instrumentalities of the Crown, on page 21.

Regulation 11 – Registration

The fixed fee charged by WorkCover under section 62(2) of the Act for applications for registration as a self-insured employer has not increased since the regulations were made in 1999. Regulation 11(3) stipulates the fee of $5000 plus $5 for each worker employed by the employer and Regulation 11(4)(c) stipulates the maximum fee under sub-Regulation 11(3) is $20,000. It is timely that both of these fixed fees be reviewed. The following two methods are proposed to increase the registration fee:

1. This method involves the use of an indexation measure to account for inflation since 1999, rounding to the closest $1,000. Using the current prescribed fee of $5,000 as a basis for calculation would

result in a revised registration fee of approximately $7,000 plus $7 per worker and a maximum registration fee of $28,000.

2. Another option is to review the prescribed fee every 10 years upon expiry of the regulations. Administrative benefits associated with this option include a reduction in red tape and would result in less complex application processes. In setting a revised figure, consideration will need to be given to provide WorkCover with the opportunity to fully recover its costs associated with the evaluation system so that it remains a full user-pays process.

Q 11: What method of calculating a fee increase should WorkCover use?

Q 12: Should this methodology include a future indexation component?

Q 13: What is the associated justification for any proposals to increase self-insured regulations fees?

Regulation 13 – Remission of levy

Regulation 13 prescribes the circumstances where the employer may remit a levy payable by an employer under subsection 66(12) of the Act. As the Scheme Review Amendment Act does not amend subsection 66(12) of the Act, there is no need to amend the content of this regulation on these grounds.

Section 76A of the Act concerns recovery of levy and states that any levy, penalty interest or fine imposed by WorkCover and payable by an employer is a debt due to WorkCover and may be recovered by WorkCover in a court of competent jurisdiction. The suggestion has been made that Regulation 13 be amended to include a provision for WorkCover to write-off bad debts under section 76A of the Act. Currently bad debts are written off under section 18 of the Act.

Regulation 14 – Minimum levy

Regulation 14 is made under section 66(13) of the Act concerning the imposition of levies and states, "the levy payable by the employer for that financial year is the prescribed minimum levy". The current prescribed minimum levy is $50.

As a consequence of clause 44(5) of the Scheme Review Amendment Act, a new subsection 66(14) will be inserted into the Act (effective from 1 July 2009), stating that WorkCover may from time to time by notice in the *South Australian Government Gazette* fix the designated minimum levy for the purposes of subsection 66(13) of the Act. Regulation 14 will not exist in its current form from 30 June 2008.

Regulation 15 – Returns by employers

Currently there is a provision under section 69(1) of the Act which requires employers to:

a) provide prescribed information in relation to claims lodged with that employer during that month and
b) include any such other information within their monthly returns as may be prescribed or required by the Corporation.

The Scheme Review Amendment Act introduces a new Division 6 of the Act which will operate from 1 July 2009 and no later than 1 July 2010. The new section 69(1) associated with new Division 6 will require

© WorkCoverSA 2008

employers to provide a return to WorkCover by a prescribed date in each financial year. A regulation will therefore be required to support the new Division 6 provisions from 1 July 2009.

Regulation 17 – Volunteers

The Workers Rehabilitation and Compensation (Claims and Registration) Variation Regulations 2008 did not amend Regulation 17 concerning prescribed classes of volunteers.

Section 103A of the Act provides for the Crown to be the "presumptive employer of persons of a prescribed class who voluntarily perform work of a prescribed class that is of benefit to the State".

To date, the only volunteers so prescribed are volunteer fire fighters with the South Australian Country Fire Service (CFS) under Regulation 17.

Section 103A was introduced in 1988 and the regulation prescribing CFS volunteer fire fighters has been operative since September 1989 (from the date of operation of the *Country Fires Act 1989*).

In 1988, after the Act was established, a ministerial agreement/letter of understanding was issued stating that SES volunteers would be covered for workers compensation "according to, but not under" the Act.

To date, the Government has only ever prescribed volunteer fire fighters although amendments have recently been moved in Parliament unsuccessfully to extend coverage to State Emergency Service (SES) volunteers.

Since 2004, all new SES claims have been managed by SAFECOM, a division of the Justice Portfolio Services Division which is registered as a Crown self-insurer with WorkCover.

SAFECOM manages all claims for the CFS, Metropolitan Fire Service and the SES, and effectively treats the claims of SES volunteers in the same manner as the others.

As a result of the Ministerial commitments made in Parliament, and consultation with SAFECOM, WorkCover is liaising with Government to extend workers compensation coverage to SES volunteers so that they are covered, in the same manner as CFS volunteers.

Schedule 3 – Application forms

Schedule 3 was amended by the Scheme Review Amendment Act, which eradicated the need for Government to regulate the form that must be used to become a registered employer replacing this with a requirement that forms for registration will be gazetted by the Minister.

Under section 62(1)(a) of the Act, concerning application from employer for registration, "an application for registration as an employer, a self-insured employer or a group of self-insured employers must be made in the designated manner and the designated form". The three designated forms were published on 10 July 2008 and are available on pages 3307-3316 in the South Australian Government Gazette No 38. The related designated manner was published in the South Australian Government Gazette No 42 on 24 July 2008.

Additional information that must accompany an application of registration as a self-insured or group of self-insured employers is now included in the recently amended Schedule 3 and includes:

© WorkCoverSA 2008

1) financial information
2) claims administration
3) claims record
4) safety policies
5) details of registered associations.

However some commentators have questioned the need for Schedule 3 per se, as information needed to evaluate applications may already be gained by WorkCover under the *Code of conduct for self-insured employers under the WorkCover Scheme (April 2008)*. If the employer fails to provide information that is stipulated within the code, the employer would receive a negative result at their evaluation. It has been suggested that the existence of Schedule 3 requires a degree of additional formality that only serves to hamper the registration process without adding any additional value. For example, for the employer to provide WorkCover with information pertaining to their claims record, it must first arrange to get the claims record from WorkCover, only to send it back to WorkCover in order to comply with the Schedule.

Q 14: Does Schedule 3 add any value to applications for registration under section 62(b) of the Act?

Schedule 4 – Self-insured employers terms and conditions of registration

The following definitional issue has been identified within Regulation 4(11) of Schedule 4 which requires employers to ensure that a contract of insurance is in force at all times. It has been suggested that this be amended to include an additional requirement that employers are required to have an *unlimited* excess of loss insurance policy in place.

The requirement for self-insured employers to have an excess of loss insurance policy has been in place since 1987.

WorkCover's proposal for amending this Schedule involves amending Regulation 4(11) so that it includes an explicit requirement for the contract of insurance to be an unlimited policy. A policy limit of $100m is regarded as tantamount to being regarded as an unlimited excess of loss insurance policy. Most self-insured employers already provide an excess of loss insurance policy that is unlimited in nature. No adverse impact on the employers is anticipated in the event such an amendment to the regulation would be made.

Q 15: What, if any, additional burden does having to obtain an unlimited excess of loss insurance policy place upon employers?

Regulation 4(13) currently requires that employers keep all documentation relating to claims for a minimum of six years after the claim is finalised.

This differs to WorkCover's requirement to archive information relating to the management of claims under the Act (ie, incident reports, medical records, advice, appeals, litigation, payments and other information related to the case) for 75 years after the worker's date of birth or seven years after the case is closed, whichever is the later, in accordance with General Disposal Schedule No. 15 of State Records, South Australia.

© WorkCoverSA 2008

The misalignment in record-keeping requirements appears to be an aberration of history. The current requirement in Schedule 4 for employers to retain claim-related documentation for at least six years after the claim is finalised follows general tax type law for record keeping.

WorkCover has found that keeping claim files for more than seven years is necessary to enable proper handling of current claims and proper allowance for lump sums in particular.

It is suggested that the timeframe for archiving claims-related documentation be revised so that the timeframes for registered employers and WorkCover are aligned.

Q 16: What impact would such an amendment to record-keeping practices have upon registered employers?

While some feedback received has suggested that Regulation 15 of Schedule 4 be amended to explicitly include Crown self-insured employers, this is not possible as Schedule 4 is based on the power in section 60(4)(a)(ii) which creates terms or conditions of registration as self-insurers. Crown self-insurers are deemed to be self-insurers under section 61 and therefore cannot be bound by the conditions imposed under section 60.

Schedule 6 – Section 61 – Agencies and instrumentalities of the Crown

Part 1 of Schedule 6 of the regulations prescribes 'agencies and instrumentalities of the Crown' under section 61(4) of the Act. This list is outdated and will need to be reviewed in consultation with Government through the Department of the Premier and Cabinet's Public Sector Workforce Division.

For example, recent changes in the Department of Health have made the status of the country hospitals certain, so they no longer need to be on the Schedule. It is also suggested that the companies listed on Schedule 6 should be deleted as they are no longer appropriate for inclusion.

Further, it is suggested that the transitional provision within Part 2, referring to bodies temporarily prescribed as agencies or instrumentalities of the Crown, should remain in place to cover any privatisations that may occur. Its current content however is no longer relevant and should be deleted.

Q 17: What changes need to be made to Schedule 6 to ensure an accurate listing of agencies and instrumentalities of the Crown?

Workers Rehabilitation and Compensation (Disclosure of Information) Regulations 1999

Regulation 5 – Disclosure of information

This regulation concerns the maintenance of confidentiality and provides for the disclosure of specific information under section 112(2)(h) of the Act, which permits a disclosure of information to be made if it is authorised by regulation. Regulation 5 enables specific information to be disclosed to:

- the South Australian Department of Primary Industries and Resources for any employers engaged in the mining or petroleum industries
- the South Australian Department of Industry and Trade.

© WorkCoverSA 2008

The existing references to the South Australian Department of Primary Industries and Resources and the South Australian Department of Industry are obsolete and should be removed.

In terms of the South Australian Department of Primary Industries and Resources, the existing regulations enabled release of workers compensation data to the mining and petroleum occupational health and safety inspectorate, which at the time was located within the South Australian Department of Primary Industries and Resources.

The arrangement for the release of employer details to the South Australian Department of Industry and Trade resulted in a number of direct requests from the department to the WorkCoverSA Board. However, the release of data was never undertaken as the WorkCoverSA Board did not endorse such a request. The department has since been disbanded and its economic development activities are now undertaken by the Office of Economic Development and the Economic Development Board. Consequently, the content of the Workers Rehabilitation and Compensation (Disclosure of Information) Regulations 1999 as it currently stands is obsolete.

In September 2000, WorkCover obtained approval from the then Minister for Government Enterprises (Hon Michael Armitage MP) under section 112(2)(g) of the Act, to release specified workers compensation data (in the form of registered employer details) to RevenueSA within the Department of Treasury and Finance.

This request was made for the purpose of a data-matching exercise to identify potential non-compliance by employers with workers compensation legislation and the *Pay-roll Tax Act 1971*. Data provided to RevenueSA on registered employers is used to assist their identification of employers who are not complying with State taxation laws. Ministerial approval for the release of data to RevenueSA was given again by the then Minister for Government Enterprises (Hon Rob Lucas MLC) in February 2002, and most recently in April 2004 by the Hon Michael Wright, the then Minister for Industrial Relations.

This data-matching exercise is a critical component of WorkCover's compliance program relating to employer registration and premium collection. RevenueSA provides WorkCover with the results of the data matching that may be of interest eg, non-matches that potentially identify unregistered employers. The data exchange, done in accordance with section 112(2)(g), is a disclosure made under the authorisation of the Minister. However this has been found a slow and inefficient process at times and a call has been made for a regulation to be established that would enable WorkCover and RevenueSA to exchange information in accordance with section 112(2)(h) ie, disclosure permitted if authorised by regulation.

As a condition of the data release, RevenueSA is required to ensure that the data will only be used for the stated purpose and will not be disclosed to a third party (including another government department) and will be stored, archived and disposed of securely. At the time, WorkCover advised RevenueSA that it will initiate action for breach of any of these conditions should that occur.

While RevenueSA is the current department responsible for enforcement of the *Pay-roll Tax Act 1971*, this may change in the future to meet the needs of the government of the day. It is therefore proposed that the regulation be amended to include either RevenueSA or the department responsible for the enforcement of the *Pay-roll Tax Act 1971* and *Taxation Administration Act 1996* as an agency to which specific information may be disclosed and specifying what information is to be disclosed. RevenueSA and WorkCover would need to agree to the specific data fields. Conditions of the release would also need to mirror the conditions

© WorkCoverSA 2008

set out in the current process approved by the Minister ie, data only to be used for the stated purpose, not to be disclosed to a third party and stored, archived and disposed of securely.

Regulatory amendment to establish a referral protocol between the Department of Immigration and Citizenship and WorkCover is a further area for exploration.

Q 18: Are there any additional departments or agencies that should be included within these regulations?

Workers Rehabilitation and Compensation (Dispute Resolution) Regulations 1996

Following legislative reform in 2008, WorkCover will be changing legal costs by regulation as their structure will be amended to encourage early resolution of disputes. The following amendments will commence on 1 January 2009:

- higher fees for lawyers and advocates at conciliation (by regulation)
- the cap on amount worker can be charged (by regulation)
- costs awarded against professional representatives where unreasonable delays occur or costs incurred through their acts or omissions (by legislation)

Section 90(1) of the Act provides for 'a person with a direct interest in a reviewable decision (the applicant)' to lodge a notice of dispute with the Registrar. Schedule 1 of these regulations prescribes the notice of dispute.

One suggested change to the notice of dispute form is that parties' email addresses be included within it. This revision has already been included on the notice of dispute form available from the Tribunal.

Section 90A of the Act concerns the timeframe for lodging a notice of dispute. Currently, notices of dispute must be lodged within one month after the applicant receives notice of the reviewable decision. Section 90A(3) of the Act provides for an application to extend this timeframe by using the relevant part of the notice of dispute currently provided in Schedule 1 of the regulations.

Regulation 7 of the Workers Rehabilitation and Compensation (Dispute Resolution) Regulations 1996 concerns costs under sections 95 and 97(C) of the Act and will require amendment.

Q 19: What types of amendments, if any, need to be made to the existing notice of dispute form?

Workers Rehabilitation and Compensation (General) Regulations 1999

Regulation 5 – Transportation for initial treatment

Section 33(1) of the Act states that where a worker is injured at their workplace in the course of work, and the injury requires immediate medical treatment, the employer shall transport him/her to a hospital or medical expert for initial treatment, at their own expense.

Section 33(4) states that where transportation costs exceed a prescribed amount, the employer can apply to recover the excess from WorkCover.

© WorkCoverSA 2008

Regulation 5 of the General Regulations states that the prescribed maximum employer excess is $150. This figure was originally set under the Workers Rehabilitation and Compensation (General) Regulations 1987 (effective 1 October 1988), and was retained under the current General Regulations following recent legislative reform.

Section 13 of the Scheme Review Amendment Act added subsection (5) to section 33 of the Act. This subsection states that the prescribed excess can be indexed annually based on the consumer price index.

The WorkCoverSA Board, in its November 2006 proposal to the Minister for legislative reform, recommended that the employer excess be increased from $150 to $240, to account for inflation since 1988, and that this amount be indexed annually. The indexation mechanism was included in the recent legislative amendments passed in June 2008, but the prescribed employer excess has remained unchanged.

WorkCover has in a recent submission to Cabinet requested that Regulation 5 of the General Regulations be amended to:

- increase the maximum employer excess payable for transporting injured workers to medical treatment, from $150 to $240 based on inflation since the figure was last set in 1988 and
- introduce a mechanism to automatically index this excess each year, as provided for in the new section 33(5) of the Act.

However, the question remains whether the basis upon which the employer excess of $150, upon which the revised indexed figure of $240 is calculated (based on inflation), remains relevant in today's economic climate given that the figure was last set in 1988 and that the usual call-out fee for an emergency ambulance is now in the order of $600[1].

Q 20: Should the revised indexed figure of $240 be increased and upon what basis should a revised employer excess figure be derived?

Regulation 6 – Compensation for property damage

Section 34 states that where a worker suffers a compensable disability, and as part of that there is damage to their therapeutic appliances, clothes, personal effects or tools of trade (but not motor vehicle), the worker is, subject to the regulations, entitled to compensation for damage to those items.

Regulation 6(1) of the General Regulations sets no limit for damage to therapeutic appliances or tools of trade, but sets a maximum of $1,500 for damage to clothes and personal effects.

The prescribed maximum compensation of $1,500 for damage to clothes and personal effects, contained in Regulation 6 of the General Regulations, has not been changed since 1999 when the General Regulations were first made; however Regulation 6(2) contains an indexation mechanism that increases the cap from 1 January each year based on changes in the consumer price index.

[1] SA Ambulance Service website, www.saambulance.com.au.

© WorkCoverSA 2008

The various maxima applied under Regulation 6 since 1999 are listed in WorkCover's schedule of sums publication. The current amount, applied since 1 January 2008, is $1,970.

Section 14 of the Scheme Review Amendment Act added new subsection (3) to section 34 of the Act. This subsection confirms the kind of indexation mechanism contained in Regulation 6(2) ie, new section 34(3) provides for the current prescribed amount for property damage under section 34 to be adjusted annually according to changes in the consumer price index.

Following further analysis however, some doubt has arisen about the validity of the indexation mechanism contained in Regulation 6. As indexation was not specifically empowered by section 34 before the recent amendments, it is arguable that the regulated indexing mechanism was invalid and needs to be remade. In this light WorkCover has recommended to Government that it approve the drafting of a substituted Regulation 6(2) of the General Regulations, made under new section 34(3) of the Act, which contains a valid indexation mechanism for the maximum compensation for damage to clothes and personal effects ($1,500 in 1999, and currently $1,970).

There is no doubt that Regulation 6(2) would benefit from a quality review to increase the prescribed maximum compensation to reflect inflation since 1999. There remains scope however to revisit the basis upon which the prescribed amount of $1,500 was derived, to determine the basis upon what a revised, increased figure should be.

Q 21: Does the indexed figure of $1,950 reflect a reasonable compensation figure for damage to therapeutic appliances, clothes, personal effects or tools of trade?

Q 22: If not, upon what basis should a revised prescribed amount of compensation for property damage be based?

Regulation 7 – Notices

Regulation 7 prescribes the mandatory information that must be included under the following sections of the Act:

- Section 36(3) – Discontinuance or reduction in weekly payments
- Section 39(3) – Economic adjustments to weekly payments
- Section 45(7) – Review of weekly payments

The Scheme Review Amendment Act did not amend the regulatory requirements under section 36(3) but did change the content of the regulations relating to section 39(3) of the Act by substituting the requirement to regulate the contents of a notice for economic adjustments to weekly payments with the requirement to designate a form, as gazetted by the Minister. This form was designated by the Minister in the South Australian Government Gazette No 38, dated 10 July 2008. All forms designated at this time can be found on pages 3290-3316 of that gazette.

Current arrangements for the review of weekly payments under section 45(7) of the Act remain in place and will continue to be regulated in a similar manner unless significant and persuasive feedback suggesting requirements for amendment is received.

© WorkCoverSA 2008

Section 45 of the Act relates to the review of weekly payments and subsection 45(7) requires WorkCover to include any such information within the notice as required by the regulations. The regulations currently require notices issued under section 45(7) to include:

a) a statement of the decision that has been made to discontinue, reduce, suspend or adjust weekly payments
b) a reference to the provision of the Act and the regulations if relevant upon which WorkCover is relying to discontinue, reduce, suspend or adjust weekly payments and the text of that provision and
c) the general basis upon which WorkCover has made its decision.

Q 23: Are there any additional items of information that need to be specified for notices issued under section 45(7) relating to the review of weekly payments?

Regulation 8 – Recovery of certain amounts paid to workers

Regulation 8 was amended by the Workers Rehabilitation and Compensation (General) Variation Regulations 2008 to reflect technical regulatory amendments that were purely consequential to the enactment of the Scheme Review Amendment Act. This involved numbering changes to ensure appropriate cross-references were made to each subsection, due to amendment of section 36 (discontinuance of weekly payments) within the Scheme Review Amendment Act.

Regulation 11 – Absence from Australia

Regulation 11 details the information that a worker must give WorkCover if they are intending to be absent from Australia. The Scheme Review Amendment Act amended section 41 of the Act by removing the need for WorkCover to regulate a form under this provision and substituted it with a provision for the form to be designated by the Minister and published in the gazette. This form was designated by the Minister in the South Australian Government Gazette No 38, dated 10 July 2008.

Regulation 15 – Compensation payable on death

Regulation 15 is made under section 44(1)(a) of the Act concerning funeral benefits. Currently the prescribed amount payable as a funeral benefit for a worker who died before or on 31 December 2000 is $5,599; or, for a worker who dies in the 2001 calendar year or a subsequent calendar year, the appropriate indexed amount. These figures have not been revised since 1999.

A quality review of the prescribed figure of $5,599 is recommended to ensure that it is a reasonable quantum of insurance to reflect today's value. This could be achieved via indexation or based on average costs, whichever is more appropriate.

Q 24: Should the prescribed amount for funeral benefits be increased and if so, upon what basis should this figure be derived?

Regulation 16 – Exemption from two weeks of payments

Regulation 16 exempts employers who are participating in the Re-employment Incentive Scheme for Employers from paying compensation where the worker's period of incapacity is two weeks or less.

© WorkCoverSA 2008

There is scope under section 46(8a) to exempt other employers, subject to their fulfilment of various conditions, from paying the first two weeks of income maintenance. Such a measure would not only benefit the Scheme by reducing the cost of longer-term claims, but would also provide incentive for employers to implement return to work measures within their injury management programs.

The Scheme Review Amendment Act introduces a new section 46(8)(b) of the Act effective from 1 January 2009 that will waive the two-week employer excess if employers report an injury within two days of their receipt of notification of injury.

Q 25: What additional measures would need to be met by employers for WorkCover to extend the scope of this regulation, particularly under section 46(8a) of the Act?

Regulation 21 – Progress reports to employers

This regulation provides that employers who request a progress report under section 107(2) of the Act pay a fee of $5. The prescribed fee has not been reviewed since 1999.

Internal feedback received from WorkCover management and staff suggests that this provision is rarely utilised or claimed by employers. Employer compliance associated with the payment of this prescribed fee is not a priority for WorkCover as the provision is rarely utilised. Rather, employers generally seek copies of medical reports via section 109 of the Act which does not have a prescribed fee attached to it.

WorkCoverSA's claims agent, Employers Mutual, does not get reimbursed for its administrative time; it receives a fixed fee in its contract to undertake these types of duties.

WorkCover is of the view that this provision is not worthy of amendment. Unless significant and persuasive feedback is received in support of its retention, WorkCover is likely to recommend the revocation of this provision.

Q 26: How often do employers who request a progress report under section 107(1) pay the accompanying prescribed fee of $5?

Regulation 22 – Medical examination requested by employers

Under this provision, employers must not submit workers to medical assessments any more frequently than once every two months. Internal feedback suggests that this provision is rarely utilised by employers. Feedback also suggests that once in every two months is a reasonable frequency, as it may be quite sensible to request a review after two months eg, where a worker's condition suddenly deteriorates. The underpinning principle associated with this regulation is that any employer requests under section 108 of the Act should be reasonable and the expectation is that the claims agent would manage this with the employer.

Q 27: Is it reasonable for employers of workers who have made a claim under the Act to require that workers submit to a medical examination under section 108 of the Act no more than once every two months? If not, on what basis should the minimum frequency rate of medical examinations be reviewed?

© WorkCoverSA 2008

Workers Rehabilitation and Compensation (Rehabilitation Standards and Requirements) Regulations 1996

Under section 28C(1) of the Act, the Workers Rehabilitation and Compensation (Rehabilitation Standards and Requirements) Regulations 1996 set out the standards and requirements that rehabilitation programs and return to work plans must comply with.

Regulation 3 – Interpretation

Initial consideration has been given to the interpretation of these regulations and the following thoughts are offered to facilitate further feedback from interested parties but specifically from rehabilitation industry representatives:

- 'injured worker' is defined as 'a worker who has been incapacitated for work by a compensable disability'.

A suggestion has been made to remove the words 'been incapacitated for work by' from this definition, to enable injured workers who are neither incapacitated nor absent from work to explicitly make them eligible for a rehabilitation program. This follows several instances where workers have returned to work on a full-time (or pre-injury employment) basis but who also require a degree of rehabilitation assistance in order to maintain that return to work status. Anecdotal feedback suggests that, as these workers are not in receipt of weekly payments, they have been denied rehabilitation programs because in theory they are not specifically included under the definition of injured worker. Such an amendment would have the added advantage of legitimising the use of rehabilitation programs for injured workers who have already returned to work on a full-time or pre-injury employment basis and who are not in receipt of weekly payments. It would also explicitly extend the entitlement of rehabilitation programs to injured workers who are no longer entitled to weekly payments as a result of a new decision relating to sections 35 or a decision to discontinue entitlements under section 36 of the Act.

Further internal feedback suggests that the definition of 'pre-injury remuneration' within regulation 3 is amended to align itself more closely with the definition of 'notional weekly earnings' within the Act. This would result in a specific reference to the workers average weekly earnings or, the worker's average weekly earnings as so adjusted to take account of changes in levels of earnings, the value of money or remuneration or other relevant factors and thereby prevent users from having to reference the principal Act as well as the regulations.

Regulation 4 – Standards and requirements – Rehabilitation programs

Regulation 4 sets out standards and requirements for rehabilitation programs. Rehabilitation programs may be developed under various scenarios:

- if the worker has no reasonable prospect of returning to work within the next 12 months
- if the worker has 'no current work capacity' as defined in section 3 of the Act and as assessed by the new section 35 of the Act, concerning work capacity reviews effective from 1 April 2009
- if the claim is pending or rejected with a dispute lodged.

© WorkCoverSA 2008

To minimise any confusion that this may cause key parties, the question has been raised as to whether these scenarios should be identified, as agreed upon by consultative bodies specified under section 28C(2) of the Act, and be explicitly expressed within the regulations?

Q 28: Do you agree that the above-mentioned scenarios should be stipulated within the regulations to add clarity to this provision?

Informal feedback suggests a need to review current terminology used within Regulation 4. Specifically, sub-Regulation 4(b)(vi) currently states that rehabilitation programs must specify "the date that the disability was suffered". The suggestion has been made that the word 'suffered' be replaced with a less emotive term such as 'incurred' or 'sustained'. Further, a suggestion that the objective within sub-Regulation 4(c)(ii) be amended from "restoration, where possible, of the worker to the workforce and the community" to "restoration, where possible, of the worker to the workforce and/or the community".

Q 29: Are there any further suggestions to review terminology included within the regulations to reflect best practice within the Scheme?

Regulation 4(f) requires that rehabilitation programs specify the point of the program's commencement and completion. Internal feedback proposes that the regulations be amended to include a statement to the effect that start and end dates must be consecutive in nature and cannot overlap if they are to carry validity in the South Australian Workers Compensation Tribunal. Further internal consultation suggests that in the event of ongoing physical restrictions, the regulations be amended to include a statement that rehabilitation programs and rehabilitation and return to work plans be able to be developed for up to a maximum period of one year. While Regulations 4(f) and 5(g) provide for the commencement and completion dates of programs and plans to be included within them, they do not set out minimum or maximum amounts of time in this regard.

Q 30: What is the recommended maximum period of time that rehabilitation programs and rehabilitation and return to work plans should be 'active'?

Regulation 5 – Standards and requirements – Rehabilitation and return to work plans

Informal, internal feedback proposes that the wording of sub-Regulation 5(d) be clarified to require that, in the case of a worker returning to alternative suitable employment, the plan must specify not only the employment to which the worker should return, but also the duties associated with that role, regardless of whether that employment is permanent or temporary in nature.

Further, feedback suggests that the reference to 'pre-injury employer' within sub-Regulation 5(e) may mislead key parties in understanding their obligations since these requirements also apply to host and/or new employers. The question therefore arises whether this provision should be broadened to include a reference to employer rather than pre-injury employer.

Regulation 6 – Amendment to programs and plans

Currently the Act and regulations do not prescribe the forms to be used for rehabilitation programs or rehabilitation and return to work plans, but rather the regulations impose standards and requirements.

© WorkCoverSA 2008

Depending on industry feedback, an opportunity may exist to combine rehabilitation programs with rehabilitation and return to work plans into one document.

Q 31: Is the concept of combining rehabilitation programs and rehabilitation and return to work plans supported? If so, what types of amendments would be desirable?

Rehabilitation and return to work coordinators

By way of background, the full mandatory requirement for employers to appoint a rehabilitation and return to work coordinator (RRTWC) under section 28D(1) will not take full effect until 1 July 2009 and there will be a 'phase-in' period of five months between 1 February and 30 June 2009, during which RRTWCs could be appointed but this will not be compulsory.

At the time of preparing this paper, WorkCover was working with Government to develop a proposed transitional regulation under section 28D that would enable a smooth phase-in of RRTWCs. In this regard, WorkCover consulted with the Legislative Regulatory Consultation Group on implementation issues.

As of 1 January 2009, certain employers will be required to have a workplace-based RRTWC (new section 28D). The relevant criteria will be set by future regulation and will include employers who employ a minimum of 30 employees. While most employers will be able to build this function into the role of an existing employee, coordinators will also need to be trained. Regulations will have scope to include other functions of RRTWCs not already listed within section 9 of the Scheme Review Amendment Act 2008.

Section 9(4) of the Scheme Review Amendment Act stipulates that the coordinator has the following functions:

a) to assist workers suffering from compensable disabilities, where prudent and practicable, to remain at or return to work as soon as possible after the occurrence of the disability
b) to assist with liaising with the Corporation in the preparation and implementation of a rehabilitation and return to work plan for a disabled worker
c) to liaise with any persons involved in the rehabilitation of, or the provision of medical services to, workers
d) to monitor the progress of a disabled worker's capacity to return to work
e) to take steps to, as far as practicable, prevent the occurrence of a secondary disability when a worker returns to work
f) to perform other functions prescribed by the regulations.

Q 32: What additional functions of workplace-based rehabilitation and return to work coordinators, other than those already listed in new section 28D of the Act, should be prescribed in the regulations?

Workers Rehabilitation and Compensation (Reviews and Appeals) Regulations 1999

The Workers Rehabilitation and Compensation (Reviews and Appeals) Regulations 1999 apply to disputes lodged before the Review Panel, Appeal Tribunal or Supreme Court prior to 3 June 1996.

In 1999, when these regulations were repromulgated, there were still a number of disputes outstanding. At the time it was not possible to state with any degree of certainty when these matters would be resolved. The

© WorkCoverSA 2008

regulations were therefore allowed to operate for another 10 years on the understanding that they could be repealed when they were known to no longer be required.

Since that time WorkCover has confirmed that there are no disputes lodged prior to 3 June 1996 that remain outstanding.

It is likely that this regulation will be repealed unless differing feedback is received.

WorkCoverSA

100 Waymouth Street, Adelaide South Australia 5000

General enquiries: 13 18 55

Fax: (08) 8233 2211

Email: info@workcover.com

Website: www.workcover.com

Free information support services: TTY (deaf or have hearing/speech impairments): (08) 8233 2574. Languages other than English: call the Interpreting and Translating Centre - (08) 8226 1990 and ask for an interpreter to call WorkCover on 13 18 55. Braille, audio, or e-text: call 13 18 55 and ask for required format.

Document: External Document Template

File name: External Document Template.doc

Last updated: 26 September 2008

The information produced by WorkCover Corporation of South Australia in this publication is correct at the time of printing and is provided as general information only.

WorkCover is a statutory authority funded by employers to rehabilitate and compensate South Australians injured at work.

© WorkCoverSA 2008