LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY

REPORT OF

THE SELECT COMMITTEE ON THE WORKERS' COMPENSATION SYSTEM IN THE ACT

May 2000

Resolution of appointment and terms of reference

The Assembly established the committee on 1 July 1999 to inquire into and report on the operation of the workers' compensation system in the ACT with particular reference to:

(a) the impact on the premium pool of employers' conduct, particularly in relation to:

(i) reporting wages;

(ii) classifying workers; and

(iii) misrepresenting claims;

(b) the role and resources of ACT Workcover in enforcing the relevant provisions of the *Workers' Compensation Act 1951*, particularly in relation to employers;

(i) reporting wages;

(ii) classifying workers; and

(iii) misrepresenting claims;

(c) the role of independent contractors and labour hire companies, particularly in relation to the premiums collected and claims; and

(d) any related matter.

Amended reference

On 10 December 1999, the Assembly resolved to amend the terms of reference by inserting the following new paragraph:

(1A) The Workers Compensation Amendment Bill 1999 be referred to the Committee and on the Committee presenting its report to the Bill to the Assembly, resumption of debate on the question "That this Bill be agreed to in principle" be set down as an order of the day for the next sitting.

Committee Membership

Mr Wayne Berry, MLA (Chair)

Mr Paul Osborne, MLA (Deputy Chair)

Mr Greg Cornwell, MLA

Secretary of the committee: Mr David Skinner

Administrative Officers: Mrs Kim Blackburn

Mrs Judy Moutia

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Summary of recommendations

Recommendation 1

The committee recommends that, if the development of the database project is not concluded by the end of the calender year 2000, the Assembly consider a course of action requiring the Government to act.

Recommendation 2

The committee recommends that, in consultation with stakeholders, the Government examine a means of improving the definition of wages in the Act to provide clarity and certainty for all parties to the scheme.

Recommendation 3

The committee recommends that:
a) the *Workers' Compensation Act 1951* be amended so that any costs expended by a business on the provision of workers by labour hire companies be considered as wage and salary costs and used in the calculation of insurance premiums;
b) the *Workers' Compensation Act 1951* be amended so that workers employed through labour hire companies be deemed employees of the host employer.

Recommendation 4

The committee recommends that the legislation be amended to require employers to provide quarterly declarations of their wage and salary bills to insurers.

Recommendation 5

The committee recommends that the Government support the *Workers' Compensation Amendment Bill 1999* in its entirety.

Recommendation 6

The committee recommends that the Government consult with the insurance industry about including an information brochure with premium renewal notices setting out employers' obligations in relation to workers' compensation.

Recommendation 7

The committee recommends that the Government investigate, drawing on the research undertaken by Queensland and New South Wales, the feasibility of legislating for workers' compensation premiums in the building and construction industry to be based on a percentage of the total cost of a particular project rather than on wage and salary bills.

Recommendation 8

The committee recommends that an 80:20 rule be adopted for incorporation into the *Workers Compensation Act 1951* as the test for determining the employment status of employees/workers versus contractors.

Recommendation 9

The committee recommends that the Government increase the number of WorkCover inspectors available to conduct workplace inspections to provide better coverage for the 13,500 private businesses operating in the ACT.

Recommendation 10

The committee recommends that the ACT WorkCover undertake random audits of employers' wage and salary records.

Recommendation 11

The committee recommends that the Government amend the *Workers' Compensation Act 1951* to allow employee organisations to conduct inspections of employers' wage and salary records for the purposes of confirming adequate workers' compensation insurance cover.

Recommendation 12

The committee recommends that the Government investigate the allegation that the accounting methods of some insurers have led to inaccurate records about the costs of claims.

Recommendation 13

The committee recommends that the Government put in place a workers' compensation subsidisation scheme for group training organisations and employers that take on apprentices or trainees.

Recommendation 14

The committee recommends that there be no reduction in the rights and benefits of employees through the reformation of the private sector workers' compensation system, including access to common law and travelling to work provisions.

CHAPTER 1. BACKGROUND

1.1. On 1 July 1999, the ACT Legislative Assembly established a select committee to inquire into and report on the operation of the workers' compensation system in the ACT.

1.2. The committee placed advertisements in local newspapers calling for written submissions and subsequently received 11 submissions, which are listed in Appendix A. The committee conducted a public hearing on 8 February 2000 and took evidence from representatives of 8 organisations which are listed in Appendix B. The committee was also briefed by ACT WorkCover on 12 November 1999.

1.3. The major impetus of the inquiry came from the concerns expressed by some MLAs and employee organisations about the potential for employer misconduct to negatively impact on the viability of the private sector workers' compensation scheme. In particular, the committee was concerned that attempts by some employers to illegally reduce their workers' compensation insurance costs would likely increase the number of claims dealt with by the nominal insurer and could well place upward pressure on premium rates across the entire scheme as insurance companies recoup lost premiums.

1.4. The terms of reference focused on the reported practices of some employers that attempt to reduce their outlay for workers' compensation insurance by classifying workers into lower risk occupational categories, under-reporting their wages bill or failing to have a workers' compensation policy in place at all. Other areas of interest to the committee were the role that labour hire companies play in the scheme and the practice of using contractors to avoid insurance premiums. One area of specific concern for the committee was premium avoidance practices in the building and construction industry.

1.5. In the course of the inquiry, the committee did receive anecdotal evidence that these practices are not likely to be uncommon in the scheme. However, the committee was not able to empirically quantify the level of premium avoidance due to the paucity of ACT WorkCover data.

1.6. This raised another issue that the committee was concerned with and that was whether ACT WorkCover is sufficiently resourced to effectively monitor and police the operation of the scheme. This, too, is examined in the course of the report.

1.7. The committee was also tasked with examining the *Workers' Compensation Bill 1999*, which aims to increase the penalties for employers that have repeatedly failed to: take out a workers' compensation policy; failed to provide information to an insurer; or provided false information to an insurer. The Act also establishes offences and penalties for a person or body corporate that has knowingly participated in providing false information in a statutory declaration and increases the amount that

the Nominal Insurer can recover from defaulting employers to three times the debt payable for lost premiums and any liabilities incurred.

1.8. The inquiry was undertaken against the background of a Government project to reform private sector workers' compensation arrangements in the ACT. Some stakeholders argue that the *Workers' Compensation Act 1951* is in need of major reformation and improvement to bring it up to date with modern employment practices. However, the committee is of the view that much of this is driven by the disparate views and agendas regarding the level of benefits which are available to workers and how the reduction of benefits might reduce costs to industry, notwithstanding the adequacy of the legislative provisions to provide a fair and reasonable outcome for injured workers. The committee notes that it requested a copy of the Workers' Compensation Monitoring Committee's report on reform of the system from ACT WorkCover but was advised that it was not available.

1.9. The committee did not concern itself with the larger task of macro-level reform of the system but offers this report to aid debate on the specific issues outlined above.

CHAPTER 2. OPERATION OF THE SCHEME

2.1. The ACT Government submission to the inquiry provided the committee with a clear examination of the operation of private sector workers' compensation arrangements in the ACT. The committee considers that it is worthwhile including a brief summary of this evidence as a basic introduction to the system in its current form.

The Act

2.2. The ultimate goal of the scheme is to provide financial assistance for workers that have been injured in the course of their employment. The origin of the ACT private sector workers' compensation scheme can be found in the *Workers' Compensation Act 1951* (the Act). Parties to the scheme, under the Act, include employers, employees, insurers, the Nominal Insurer and ACT WorkCover. The committee has included an overview of the rights and responsibilities of these various parties below.

Breadth of the Scheme

2.3. The committee was advised that there are in the order of 13,500 private sector employers in the ACT[1] and that approximately 80,000 employees are covered by the ACT's private sector workers' compensation arrangements[2]. In the 1997/1998 financial year approximately 4,200 claims were reported and the average premium rate was 2.1 per cent of the wage and salary dollar[3].

Employers

2.4. Under the Act, it is compulsory for employers in the ACT to hold a valid workers' compensation policy - currently a $25,000 fine can be imposed on employers failing to comply. However, the *Workers' Compensation Bill 1999* proposes changes in this and other areas, which are discussed in the following chapter.

2.5. Under the Act, employers also have the following responsibilities:

- Through their insurance policies, employers are required to meet all costs associated with workers' compensation claims, including costs awarded under common law remedies…

- Employers are required to provide accurate data to insurers on all wages paid to workers [to assist with the determination of premiums].

[1] Transcript, 12 November 1999, Ms Plovits, p 7
[2] Submission 9, p 2.
[3] ibid, p 2.

- Employers are also required to provide an injured worker with a claim form, ensure that the form is completed and forward the claim form, along with all other relevant material, to the employer's insurer within seven days[4].

2.6. The committee was advised that self-insurers are permitted under the Act and there are six self-insurers in the ACT[5].

Employees

2.7. The committee heard that under the scheme, injured workers are entitled to both statutory and common law benefits. They are also able to make claims for lump-sum payments for permanent impairment[6].

2.8. The Government noted that as at January 1999, statutory benefits are paid at normal weekly earnings for the first 26 weeks of incapacity and following this they are set (as at January 1999) at $269.14 per week plus $70.83 per week for a dependent spouse and $33.05 per week for each dependent child[7]. During the recent debate on reforming the scheme, there has been some discussion about reducing the benefits and rights of employees. This is discussed in more detail in Chapter 4.

Insurers

2.9. There are currently thirteen insurers that have been approved by the Minister to operate in the ACT to provide private sector workers' compensation coverage. These insurers are responsible for calculating and collecting premiums from employers as well as managing and paying claims[8].

2.10. The committee was advised that insurers are also required to ensure that information on insurance policies and claims are made available to ACT WorkCover. Data gained from insurers is used to assist ACT WorkCover in monitoring the performance of insurers and determining how effectively employers are fulfilling their occupational health and safety responsibilities[9].

Nominal Insurer

2.11. The Nominal Insurer is the default insurer. Where an employer has failed to hold a policy or has in some other way failed to meet their responsibilities in relation to workers' compensation, it is the role of the Nominal Insurer to compensate injured workers.

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[4] ibid, p 2
[5] ibid, p 2.
[6] ibid, p 3.
[7] ibid, p 3.
[8] ibid, p 3.
[9] ibid, p 3.

2.12. The Nominal Insurer is empowered to recover the cost of claims from defaulting employers and to penalise employers through increased premiums[10].

2.13. The committee was informed that any monies unable to be recovered from defaulting employers are derived from insurers through a levy[11]. The Government noted that as at September 1999 there were forty claims against the Nominal Insurer, suggesting that there is a degree of non-compliance in the scheme[12].

ACT WorkCover

2.14. ACT WorkCover has both an enforcement role and a regulatory role in relation to private sector workers' compensation. A simple description of ACT WorkCover's responsibilities was provided in the ACT Government submission:

> A role of ACT WorkCover is to regulate the operation of the workers' compensation scheme. ACT WorkCover employs inspectors who have been appointed under the Act to ensure compliance with the legislation. They investigate employee and employer complaints and undertake prosecutions.
>
> ACT WorkCover is responsible for providing information on workers' compensation matters to the Government and to all parties involved in the delivery of the workers' compensation function. ACT WorkCover also has a responsibility to regulate the role of insurers in the scheme[13].

2.15. As noted earlier, the committee received evidence that ACT WorkCover may not have adequate resources to properly monitor and enforce compliance within the scheme. This issue is discussed throughout the following chapter.

How are premiums determined and collected?

2.16. The committee was advised that insurance companies providing workers' compensation policies determine the rate of premiums based on a range of factors.

2.17. In its submission the ACT Government noted that:

> Each insurer offering a workers' compensation underwriting function in the ACT sets premiums based on the claim's experience of the employers they cover. They will also take into account actuarial advice on the performance of the scheme as a whole. As a result the amount of premiums that need to be collected in each year by insurers is based on the previous year's claims experience, the estimated number of employees that are to be covered and on the actuarial forecasts of expected trends in claims numbers and costs. This information is translated into a

[10] ibid, p 4.
[11] ibid, p 4.
[12] ibid, p 4.
[13] ibid, p 4.

> set of premium rates (ie the amount of premium to be paid in cents per wage and salary dollar) for each employer covered by the insurer[14].

2.18. One of the main variables that insurance companies use to determine premium rates for particular employers is the annual wage and salary costs of a business. The committee heard that an employer is required to provide their insurer with an estimate of their annual wage bill at the commencement of the policy and then one year later an adjusted figure is provided showing the actual wages figures.

2.19. The Insurance Council of Australia outlined the process in the following terms:

> … the way an insurance policy works is that each year, an insured, an employer will provide an estimate of what wages they are going to pay during that period, and that will be based on historic analysis if it is a business that has been in existence for some time… On the basis of that estimate, the insurance company will use a system of looking at what premium rate should be applied for that particular type of business and apply that rate to the estimated wages. That will form what is called the deposit premium.
>
> At the end of the year, under the legislation as it currently stands, and as is reflected in all other jurisdictions, the employer is then required to provide a declaration of actual wages paid. The insurance company will then do a comparison between the premium calculated on the basis of the estimate and the premium calculated on the basis of the actual wages paid and there will either be an extra premium charged if the wages paid are more than the estimate or there will be a refund premium paid back to the employer if the actual wages are less than the estimated wages for the period[15].

2.20. The committee was advised that insurers sometimes undertake 'mid-term readjustments' of insurance policies where an employer has had an increase in wages during the life of their policy. This option, it was argued, can be useful in helping businesses manage their cash flows more efficiently[16].

2.21. Effectively, as in all insurance schemes, insurance companies 'run a book' on the extent to which it is likely that claims will be made by a particular insured/employer, the frequency of claims and the potential amount of compensation that is likely to be claimed based on a basic assessment of risk.

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[14] Submission 9, p 5.

[15] Transcript, 8 February 2000, p 38, Mr Segrott.

[16] Transcript, 8 February 2000, p 39, Mr Segrott.

CHAPTER 3. EMPLOYER CONDUCT

3.1. The committee was advised that illegal employer conduct is a significant problem in the ACT private sector workers' compensation system. Many of the issues surrounding illegal employer conduct revolve around employers that, inadvertently or consciously, understate the actual risks of their business enterprise by providing false or inaccurate information to insurers, or who fail to take out an insurance policy at all.

3.2. The issue that the committee has focused on, in particular, is premium avoidance through the under-reporting of wages to insurance companies. This can occur due to an employer's ignorance of their responsibilities, an attempt to minimise their insurance costs by using contractors or it can be a contrived and dishonest attempt by the employer to under-state their wages bill. If these practices were to become widespread, indeed some stakeholders argued that this is already the case, the viability of the scheme would be placed in jeopardy as the true liabilities of the scheme would not be reflected in the premiums collected – the premium pool would be insufficient to provide for the level of claims.

3.3. The committee received no empirical evidence to indicate the extent of these problems and the impact that they have on the viability of the scheme. However, based on the experiences relayed to the committee by ACT WorkCover, the insurance industry and employee organisations, the committee considers that these practices are unlikely to be uncommon.

3.4. The committee has examined these issues below and makes several recommendations aimed at improving compliance in the scheme. Other issues that are necessarily intertwined include: the role of ACT Workcover in enforcing the scheme, the role of labour hire companies and the potential for the *Workers' Compensation Bill 1999* to improve compliance.

3.5. The committee was advised that categorisation of employees into lower risk occupations, while a problem in previous years, has now been remedied through the adoption of ANZSIC industry ratings. A brief examination of this issue is also included below.

Reporting wages

3.6. As noted earlier, it is the usual practice that employers provide insurers with an estimate of their wages bill at the commencement of a workers' compensation policy and an adjusted figure is forwarded one year later based on actual wages paid. If there is a difference between the two amounts, the premium payable is adjusted accordingly.

3.7. Under-declaration of wages refers to a practice whereby an employer achieves a discounted premium by understating the wages bill of the business when making their end-of-year declaration. This can occur because of a lack of knowledge on the part of the employer about which workers are considered employees under the Act resulting

in under-declaration or it can be a conscious attempt by the employer to defraud the insurance company – deliberate malfeasance. There are also instances where an employer may fail to take out any workers' compensation policy at all.

3.8. In its submission, the Insurance Council of Australia noted that under-declaration of wages is a significant problem for insurers and the scheme itself. The Council noted that:

> The issue of under-declaration, mis-declaration or non-declaration of actual wages is of concern to insurers with wage audits tending to show a significant under declaration. Wages are one of the key components used by insurers in pricing the product [premiums]…
>
> Although there are no hard statistics available many involved in workers compensation schemes in Australia believe there is far greater financial drain on schemes due to the under declaration of wages than costs associated with fraud, malingering or malpractice by employees[17].

Level of under-reporting

3.9. As noted earlier, the committee did not receive any empirically derived statistics on the level of under-reporting in the ACT. However, a number of organisations provided various figures to the committee based on anecdotal evidence.

3.10. The CFMEU indicated in its evidence before the committee that under-reporting of wages may be as high as 75 per cent in the building and construction industry[18]. It is interesting to note evidence in the Government submission that 47.5 % of the current claims on the Nominal Insurer in the ACT come from the building and allied industries sector. The Government argued that this, 'along with the experience of other jurisdictions, …suggests that there may be particular issues with non-compliance in that industry'[19].

3.11. The committee received evidence from ACT WorkCover that one large insurer conducted an audit of 10 per cent of its policies which revealed that there was 10 per cent under reporting at the end of the year or one per cent across its entire premium load[20].

3.12. In its submission, the ACT Government suggested that under-reporting of wages and salaries might be approximately 3 per cent across the scheme. However, it acknowledged that it is, 'impossible to accurately determine the extent of the problem'[21]. The committee considers that the inability of the government body responsible for policing the scheme to accurately identify under-reporting may, in

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[17] Submission 10, p 1.
[18] Transcript, 8 February 2000, p 6, Mr Wason.
[19] Submission 9, p 7.
[20] Transcript, 12 November, p 6, Ms Plovits.
[21] Submission 9, p 7.

fact, contribute to the practice. Without effective monitoring, unscrupulous employers have very few obstacles in their path to adopting wage under-reporting or other types of premium avoidance such as failure to take out a policy.

3.13. While the committee agrees that there is a need to develop an empirical basis on which to found claims of under-reporting, it is a generally accepted, not only by employee organisations but also the insurance industry itself, that under-reporting is a substantial problem.

3.14. The committee again notes the comments made by the peak body of insurers, the Insurance Council of Australia, that under-declaration of wages by employers is viewed by many players as, '…a far greater financial drain… than costs associated with fraud, malingering or malpractice by employees'[22]. The Council also noted that, 'it appears… that on an Australia wide basis, under declaration of wages is relatively widespread'[23]. Following this, it is difficult to countenance the views of employer organisations such as Australian Business that argued that there, 'is no firm evidence of any instance were employers have undereport[ed] wages'[24] - ACT WorkCover, insurers and employee organisations all testified that there have been particular instances where this has occurred[25]. The ACT Bar Association noted in its evidence that, 'it is common knowledge that in the building industry these [under-reporting] practices are rife'[26].

3.15. The Government advised the committee that the development of a workers' compensation database will allow for improved data analysis. The committee is aware that the absence of a database has been a major gap in the policy development capabilities of the ACT Government for many years. It is unacceptable that this remains an outstanding and well understood problem after so many years of consideration.

Recommendation 1

The committee recommends that, if the development of the database project is not concluded by the end of the calender year 2000, the Assembly consider a course of action requiring the Government to act.

Impact on the scheme

3.16. The overall impact of improper wage declaration is that the level of liability across a particular industry will exceed the level of coverage that has been taken out. The flow-on effect is that premiums are increased across an industry in subsequent years as insurance companies attempt to recoup monies that were forgone. As the

[22] Submission 10, p 1.
[23] ibid, p 2.
[24] Submission 2, p 1.
[25] Transcript, 8 February 2000, p 65, Ms Plovits; p 38, Mr Segrott; p 6-7, Mr Wason.
[26] ibid, p 2, Mr Purnell.

Insurance Council noted in its submission, 'Any under or mis-declaration could lead to rating increases on an industry basis as a direct consequence[27]'.

3.17. In its submission, the Government noted how under-reporting of wages can undermine the viability of the entire scheme:

> … if in a particular year, a number of employers decide to under report wages and salaries, the premiums collected by the insurers will be less than expected. However, the *risk* covered by that insurer has not changed – the employees covered by the premiums are still being employed. At the end of the year, the insurer will note that total claims numbers and costs have not changed despite the lower amount of premiums collected. This means that as far as the insurer is concerned, claims frequency and average claims cost have risen based on premiums collected. Therefore, in setting premium rates for the next year, the insurer will increase those rates to reflect the adverse outcomes for the previous year.
>
> The more some employers under-report wages and salaries, the greater the increase in premiums that must be borne by other employers. Rising premiums can encourage more employers to under-report wages and salaries leading to further increases in premiums and further disincentives for employers to be accurate with their wage and salary estimates[28].

3.18. The committee considers that the disincentives for employers to accurately declare their wage and salary estimates are only increased when competitive advantages can be gained by failing to do so. The CFMEU advised the committee that employers in the construction and building industry can achieve a competitive advantage in securing contracts by under-declaring their wages bill. The union noted that:

> The current system is actually designed, in our view, to reward cheats… There is actually a financial incentive for people to under-declare or cheat because what is happening is that the honest employers, and there are some, are paying the full rate, but when they go to tender for contracts they are at a price disadvantage because, if an employer of contractors under-declares them by 30 or 40 per cent of the wage bill, that obviously gives him an extensive price advantage on winning the work. Hence, I would say that it does financially reward people and encourage people to be dishonest[29].

3.19. The Australian Liquor, Hospitality and Miscellaneous Workers Union (ALHMWU) echoed these comments noting that under-reporting practices in the cleaning industry put honest employers, 'at a disadvantage in competing against those

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[27] ibid, p 1.
[28] Submission 9, p 6.
[29] Transcript, 8 February 2000, p 6, Mr Wason.

less honest'[30]. The CFMEU relayed the story of one employer that had under-declared his wages bill by a massive $5 million. The union noted that:

> …[the employer] left stranded some 20 odd workers who were on workers' compensation benefits. When he wound the company up, the then insurer, FAI, assessed his wages premium and found that he was underdeclaring his wages by about $5 million and had left that debt. FAI said that, because he had put in false declarations, the policy was null and void and these 20-odd workers then became a liability of the Nominal Insurer[31].

3.20. As noted before if the nominal insurer cannot recover its claim costs from the defaulting employer, it recovers them from approved insurers via the imposition of a levy. Obviously insurers themselves then recover these additional costs through an increase in premium rates, making workers' compensation insurance more expensive for honest employers.

Wages under the Act

3.21. Under the Act, ACT WorkCover inspectors are empowered to, 'require employers to provide, within 28 days of a notice being given, a certificate from a registered auditor stating the total amount of wages paid during the specified period'[32]. WorkCover inspectors can also require employers to provide proof that they hold a valid workers' compensation insurance policy[33].

3.21. The committee was informed that, under the Act (Section 16), employers must include the following payments when calculating their wage and salary costs:

- salaries;
- overtime;
- shift and other allowances;
- over award payments;
- bonuses and commissions;
- payments to working directors;
- public and annual holiday payments (including loadings);
- sick leave payments;
- the value of board and lodgings provided to employees; and
- any other payments given to employees under a contract of service or apprenticeship[34].

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[30] ibid, p 21, Mr Anderson.
[31] Transcript, 8 February 2000, pp 6-7, Mr Wason.
[32] Submission 9, p 6.
[33] ibid, p 6.
[34] ibid, p 6.

3.22. Employers are also required to include in the declaration of wages and salaries any payments made to a person that is deemed to be a worker under Section 6 of the legislation[35]. This is discussed in more detail in the following section.

3.23. There are other types of remuneration that are not included in the Act such as director's fees, compensation payments under the Act, long service leave payments, amounts expended on behalf of an employee, special expenses outlaid due to the nature of the employment, and the reimbursement of costs that arise from obligation incurred under contract[36].

3.24. However, the Insurance Council of Australia argued that there are still some problems with the interpretation of the Act in relation to wages, particularly in relation to salary packaging. In the public hearing, the Council noted that:

> …there are still difficulties associated with the interpretation of what are wages, particularly given the modern employment approaches relating to salary packaging, salary sacrifice and so on. Whether somebody is on a package of, say, $50,000 which is made up of wages plus a car allowance, superannuation and so on, determining what, in fact, is the declarable wage without a detailed definition of wages is not only difficult in many cases for the average insured, but also quite difficult in many cases for the average insured's accountant, who primarily will look at the business from the perspective of how it operates from a tax and business income point of view, not necessarily from a workers compensation wage declaration point of view[37].

3.25. It would appear to the committee that there are some areas of uncertainty in the current legislation about how various payments should be treated for premium calculation purposes. It is possible that this uncertainty has contributed to some employers inadvertently under-declaring their wages bill due to a mis-interpretation of the Act. The committee considers that the legislation should better explicate the types of payments that are to be considered in calculating remuneration costs for the purposes of workers' compensation premiums.

Recommendation 2

The committee recommends that, in consultation with stakeholders, the Government examine a means of improving the definition of wages in the Act to provide clarity and certainty for all parties to the scheme.

Who is considered a worker under the Act?

3.26. ACT WorkCover noted the importance of defining who is a worker for the purposes of the Act and how this has the capacity to improve the viability of the scheme:

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[35] ibid, p 6.
[36] ibid, p 6.
[37] Transcript, 8 February 2000, p 48, Mr Segrott.

> As a general rule, the depth and stability of the pool, along with the achievement of the scheme's objectives, is enhanced by definitions that broaden coverage. The broader the coverage, the less volatile the overall movement in premiums, and the greater the economies of scale available for the administration of the scheme[38].

3.27. The committee was advised that one issue that may contribute to under-reporting is the ambiguity about which types of worker are so considered under the Act. The committee heard that ACT WorkCover inspectors have identified instances where employers have attempted to abrogate their workers' compensation responsibilities by using contractors or subcontractors, 'in a manner which still falls within the common law definition of a[n] employer/employee relationship'[39].

3.28. Effectively, some employers are claiming that some, or all, of their workforce are contractors and that they are therefore not required to consider these workers in their wage and salary declaration. However, in many cases where this assertion has been tested in a court of law it has been found to be left wanting.

3.29. The Act as it is currently framed (section 6) sets out that workers are defined as people that:

- work under contracts of service (ie employees) and who work on a full-time, part-time or casual basis;
- are company directors and work under a contract of service with that company (e.g working directors of small private companies);
- work under a contract to perform work (contractors and subcontractors) and are paid more that $10;
- work outside any trade or business that they regularly carry on in their own name; and
- are salespersons or other individuals paid wholly or partly by commission (these individuals are regarded as workers in the employment of the person paying the commission)[40].

3.30. Subsection 14(1) of the Act outlines that where a common law contract of service appears to be operating between a person and a contractor, then that person must provide workers' compensation insurance for the contractor[41]. The Government submission noted that, 'Any attempt by an employer to artificially contract out of his/her workers' compensation responsibilities is regarded as invalid and the employer

[38] Submission 9, p 8.
[39] ibid, p 8.
[40] ibid, p 9.
[41] ibid, p 9.

retains responsibility of providing workers' compensation insurance on behalf of persons working under these arrangements'[42].

3.31. The main problem with this part of the Act is that there is no clarity about what particular situations constitute "contracts of service" – it is often left to the courts to rule on. The ACT Government noted that the ambiguity about the deeming provisions of the Act can lead to situations, 'where both the employer and the employee/contractor may take out workers' compensation policies. It can also create the situation where neither party takes out a workers' compensation policy'[43].

3.32. The committee received evidence that where there are legal disputes about the status of workers, generally the decisions of the courts find that, under the Act, they *are* deemed employees. The CFMEU noted that even when the courts have found a breach of the Act in this regard, a negative impact on the scheme will already have occurred. The union noted that:

> The advice I have received from some of the senior barristers here in Canberra who do most of the workers' compensation claims is that in more than 50 per cent of the claims that they handle in this town one of the key elements of argument is whether the person was an employee or a contractor. Their experience in the courts is that in the majority of cases the magistrate or judge rules in favour of the person being a deemed employee. But the horse has bolted by then. You put a massive strain on the Nominal Insurer because the Nominal Insurer then has to pick up the bill and then the Nominal insurer has to go and chase that employer[44].

3.33. In evidence at the public hearing, the CFMEU noted that it was aware of a practice in which some employers were retrospectively classifying their workers as contractors. The union noted that the scheme operated in the following manner:

> [employers]…have got everyone down as employees and when you inspect the wages records you see that they are being paid accordingly and the appropriate group tax is being deducted… but what happens is that they go off to see their accountant probably every two or three months and the accountant then writes to the tax office and says, "We have made a mistake. These people are not actually employees; they are contractors. Please give us a refund". They actually get a refund, but when you inspect the wage records you actually see these group remittance forms saying that it has been cancelled[45].

3.34. The committee urges the ACT Government to investigate this practice.

3.35. The committee received evidence that the 80:20 rule as identified in the Ralph Report on business taxation may be an effective test for determining the status of workers. This is discussed below under the section on improving compliance.

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[42] ibid, p 9.
[43] ibid, p 9.
[44] ibid, p 9.
[45] ibid, p 9.

Labour Hire Companies

3.36. The committee received evidence that the advent of labour hire companies has raised a number of issues about training, rehabilitation and where the responsibility for workers' compensation lies - with the labour hire company or the 'host employer'/client?

3.37. The CFMEU argued that the poor training, especially on-site orientation, provided by labour hire companies has increased the incidence of workplace accidents: The union noted:

> … our experience with labour hire companies is that they do not train people. They advertise for what we call skilled labour. They do not do any inductions or on-site training because they are not actually based on site; they just respond to an employer ringing up requiring casual or permanent part-time for whatever the contract period is. They supply little, if any, safety equipment and, in our experience, their track record on rehabilitation is virtually non-existent.
>
> … If someone gets injured at work, their attitude is, "Give us a call once you are fit and healthy again and we may be able to find you some work". That is all putting stress and pressure on the scheme, because we need to ensure that employers do act responsibly with workers if and when they get injured. Rehabilitation is a very important factor and also is induction[46].

3.38. The CFMEU noted that national studies have shown that accidents are most likely to happen in the first week of work and that because workers receive very little orientation from labour hire companies, the likelihood of accidents occurring is even greater. The union noted that:

> [the first week] is the most dangerous period and that is when most accidents actually happen. So, you have got these labour hire companies who are continually referring people to what I would describe as foreign, strange or new work environments on a regular basis and they are exposing these people to a far greater risk than people who employ them directly[47].

3.39. ACT WorkCover relayed a story about the tragic death on a NSW work site in which a person was killed when a bulldozer rolled on to him. WorkCover noted that a contributory factor in the accident was the fact that the worker (a labour hire contractor), 'did not have the faintest clue what they were doing. They were not licensed to be handling that machinery'[48].

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[46] Transcript, 8 February 2000, p 8, Mr Wason.
[47] ibid, p 8.
[48] ibid, p 60, Ms Plovits.

3.40. The CFMEU argued that a 25% premium should be applied to workers employed by labour hire companies to reflect the true level of risk that this group faces[49].

3.41. However, the Recruitment and Consultancy Services Association construed the situation differently arguing although they have little or no control over workplace safety, their workers' compensation premiums are affected by the poor performance of their clients or 'host employers'. The committee heard that, effectively, some companies are using labour hire organisations as part of their risk management policy, devolving workers compensation costs and at the same time abrogating their workplace safety responsibilities.

3.42. The Association argued that there is no incentive for a host employer to improve the safety of their operation when the increase in workers' compensation premiums falls not on them but on the labour hire company. To remedy the situation, the Association advocated the following approach:

> We would like to see their [host employers] workers' compensation policy to be affected also by accidents that happen on their work sites. We accept that they are also our workers and therefore we cannot totally absolve ourselves from responsibility. However, currently the host employers are absolving themselves from that workers' compensation responsibility and we would like to have some mechanism implemented whereby there is an incentive for that host employer also to get involved. From a compensation point of view, that has got to affect their workers' compensation premiums[50].

3.43. The committee notes evidence provided by the Government that the Act, as it currently stands, creates uncertainty about where the responsibility for workers' compensation costs lie. The Government noted that:

> …it can be argued [under the Act] that the companies or individuals employing staff from labour hire companies are also required to provide workers' compensation cover for these individuals since under subsection 6 (3):
>
> *"where a contract to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name), or to perform any work as an outworker, is made with the contractor, who neither sublets the contract, nor employs workers, the contractor shall, for the purposes of the Act, be deemed a worker employed by the person who made such a contract.*

3.44. The committee considers that because labour hire companies have virtually no control over the safety of the workplace in which their workers are placed, it is host employers that should be required to meet the costs associated with workers' compensation insurance. The committee believes that it is appropriate for the workers'

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[49] ibid, p 8.

[50] Transcript, 8 February 2000, p 52, Mr Plummer.

compensation legislation to be amended to mandate that employers include the costs paid to labour hire companies in their wage and salary declarations to insurers. In effect, monies paid to labour hire companies should be treated as wages and salaries for the purpose of the Act.

3.45. The committee believes that workers engaged through labour hire companies should be treated under the Act as employees not of the labour hire company but of the host employer.

Recommendation 3

The committee recommends that:

a) the *Workers' Compensation Act 1951* be amended so that any costs expended by a business on the provision of workers by labour hire companies be considered as wage and salary costs and used in the calculation of insurance premiums;

b) the *Workers' Compensation Act 1951* be amended so that workers employed through labour hire companies be deemed employees of the host employer.

Classification into low-risk occupation categories

3.46. As noted earlier, one area of non-compliance that has, in the past, negatively impacted on the workers' compensation system was the misclassification of workers by employers. By classifying a worker into a lower risk occupation, usually white collar or administrative classifications, an employer was able to achieve a significant and unjustified discount on their premium rate.

3.47. This placed pressure on the entire scheme because, as noted above, when employers hold premiums that don't accurately reflect their actual liability, insurers will merely recoup the loss in subsequent years, forcing premiums up across an industry.

3.48. The CFMEU conceived the problem in the following way:

> In various industries, obviously, with a clerical person the premium is a lot lower than what it is for someone who is, say, a rigger or scaffolder. But what happens is that quite a few employers actually classify their employees as basically white-collar workers whereas, in fact, they are actually blue-collar workers. That means…, there is the money that should be going into overall ACT pool is being short-changed[51].

3.49. The CFMEU outlined the following story of one employer who was paying only a small fraction of his actual liability by misclassifying workers:

[51] ibid, p 8, Wason.

> We had one infamous situation where a steel fixing contractor was actually paying his people through one of the local restaurants. A premium for a steel fixer is about 20-odd per cent and for someone who may be is classified as a waitress in a restaurant is probably about 3 or 4 percent[52].

3.50. The committee is aware that occupational classifications no longer have a bearing on the calculation of workers' compensation premiums. The committee was advised that Australian and New Zealand Standard Industry Classification (ANZSIC) codes are now used to assist insurers in determining the appropriate premium rate according to the risk of a given industry.

3.51. The Government noted in its submission that:

> While… [occupational categorisation] was a potentially accurate method of assessing risk, it is now viewed as inferior to a premium rating method based on industry classifications. A key reason for this change was because of the difficulty in correctly determining workers' occupations (particularly with the rapidly changing nature of the workforce) and the growing evidence that some employers were avoiding paying appropriate premiums by misclassifying the occupations [of] their workers[53].

3.52. The committee supports this move as a means of better ensuring compliance in the scheme. However, the committee noted the concern of the Government that insurance companies or brokers may be tempted to apply lower-risk industry classifications to a lucrative client in an effort to keep their business and then offset the loss incurred by imposing it on other customers. The Government noted that:

> There is a need to ensure that some insurers or brokers do not apply incorrect ANZSIC codings to an organisation in order to retain that organisation's business. There can be a temptation for an insurer or a broker facing the loss of an important customer to accept an incorrect coding in order to reduce the premium payable by that organisation. In the "swings and roundabouts" of a competitive market place, the insurance broker could look to recovering the lost premium through increasing premiums for other customers[54].

3.53. The Government argued that the development of its new database will make it easier to monitor infractions in this regard.

Improving compliance

Increased reporting

3.54. The committee received evidence from several organisations that more frequent wage and salary reporting by employers may be one means of improving

[52] ibid, p 8, Mr Wason.
[53] Submission 9, p 10.
[54] ibid, p 11.

compliance[55]. Both the ALHMWU and the CFMEU argued that under the current regime, employers have little incentive to report any increases in wages over the course of the year unless they happen to have made a claim. The CFMEU noted that:

> Our experience has been that if there are no accidents over that period [the life of the policy] these employers just carry on business as usual and generally it is only when you find a few claims coming in that they decide to start putting everybody into their wages books[56].

3.55. The CFMEU argued that mandatory quarterly reporting of employee wages and salaries to insurers would help improve compliance in this regard[57]. The union noted in its submission to the Government regarding the Workers' Compensation Discussion Paper, that this measure would also solve the problem of companies that have been set up for a particular project and subsequently liquidated, leaving premiums outstanding[58].

3.56. However, the ACT and Region Chamber of Commerce and Industry noted that there is no reason that increased reporting would necessarily improve compliance, arguing that:

> If there is going to be fraud, it would appear to me that there is just as much opportunity to be fraudulent in a quarterly response as there is in an annual one if people are going to cheat the system. If they are going to be honest, which the vast majority are, then an annual declaration picks up any fluctuations during the 12-month period[59].

3.57. The Chamber also argued that the administrative costs of such an approach would place an inordinate impost on businesses, particularly small businesses. The Chamber noted that:

> The vast majority of the business community in the ACT is very small business, what we might call micro business, employing five or less. In some industries that size is very dominant. There would be added administrative costs in producing these things quarterly. In most cases they are not done by the employer. The form is sent off to the employer's accounting adviser, who completes it and sends it back to the employer for signature, so there is a direct cost of producing that documentation[60].

3.58. However, even as an employer in its own right (employing six people), the ALHMWU argued that there would be very few resources needed to more frequently report their wages. The union noted that:

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[55] ibid, p 18-19, Mr Anderson; p 11, Mr Wason.
[56] Transcript, 8 February 2000, p 12, Mr Wason.
[57] ibid, p 11, Mr Wason.
[58] CFMEU, 27 July 19999, submission in relation to ACT Government Workers' Compensation Discussion Paper.
[59] ibid, p Mr Peters,
[60] ibid, p 28. Mr Peters.

> It would not be a problem at all. I am sure that there could be a form devised which we could send in to the insurer or some mechanism like that[61].

3.59. It appears to the committee that one of the main problems of the current reporting regime is that when employers do have a higher end-of-year wages bill than expected, they are, in effect, in arrears, owing an additional premium based on the increase. If there have been no accidents in the course of that year, there is very little incentive for the employer (other than maintaining a good conscience) to declare the increase. The committee considers that by increasing reporting frequency, employers would be submitting their wages bill 'on-the-go', being able to anticipate and manage any premium increases in advance and lessening the temptation to under-report. The increased reporting regime would also prevent companies that have been set up for a particular project and then liquidated after the completion of the project from avoiding their responsibilities.

3.60. As noted earlier, sometimes mid-term adjustments are made to insurance policies so that they accurately reflect the extent of the employer's potential liability on an ongoing basis. The committee can see no reason why this should not be the norm. Despite the concerns expressed above, the committee considers that there would be very little impost on employers to provide information about their wages records on a quarterly basis if a streamlined process were adopted. The introduction of the GST has meant that electronic accounting packages are becoming pervasive in the business sector and there may be, in fact, little more effort required than using the automated capabilities of an accounting package to produce a quarterly report.

3.61. The committee considers that it is worth investigating any advantages that increased frequency of reporting may have in improving compliance with the scheme and urges the Government to investigate this proposal. The Government should also investigate how to implement such a proposal that minimises the administrative burden to business.

Recommendation 4

The committee recommends that the legislation be amended to require employers to provide quarterly declarations of their wage and salary bills to insurers.

The Workers' Compensation Amendment Bill 1999

3.62. The *Workers' Compensation Amendment Bill 1999* was introduced into the Assembly on 9 December 1999 by Independent, Paul Osborne MLA. The Bill aims to improve employer compliance with the scheme by increasing penalties and introducing new offences.

3.63. In a speech before the Assembly, Mr Osborne noted that:

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[61] ibid, p 18, Mr Anderson.

> There needs to be further deterrence against employers failing to take out insurance and understating matters in order to reduce their premiums. These concerns can be met by increasing penalties for second and subsequent offences, making directors and officers liable and preventing repeat offenders from further employing workers. Abundant caution provisions have been added to catch those who assist in evasion by premium underdeclaration[62].

3.64. The legislation, if passed, will:

- establish second and subsequent offences and penalties for a person and/or body corporate who fails to maintain a workers' compensation insurance policy. The offence will be extended to a director or officer that knowingly participates in the failure to maintain a policy.

  Penalty for a person: $25,000, or 2 years imprisonment, or both
  Penalty for a body corporate: $100,000

- Increase the amount recoverable by the nominal insurer from defaulting employers (those failing to take out a policy) from two times the amount of premiums payable to three times the amount payable.

- Establish second and subsequent offences and penalties for a person and/or body corporate who fails to provide an insurer with a certificate from a registered auditor and provide a statutory declaration setting out the categories of workers and the total amount of wages paid in respect of those workers.

  Penalty for a person: $25,000, or 2 years imprisonment, or both.
  Penalty for a body corporate: $100,000.

- Establish offences and penalties for a person and/or a body corporate who knowingly participates in providing false information in a statutory declaration. These employers will also be banned from employing staff for a period of five years from the date of conviction.

  Penalty for a person: $25,000, or 2 years imprisonment for a first offence; $100,000, or 10 years imprisonment for a second and subsequent offence.
  Penalty for a body corporate: $100,000 for a first offence, $1,000,000 for second and subsequent offences.

- Increase the amount recoverable by the nominal insurer when it has incurred a liability from an employer to three times the amount of the debt payable[63].

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62 ACT Legislative Assembly Hansard, Week 13, 6 December 1999, p 4083.
63 *Workers Compensation Bill 1999* and *Workers Compensation Amendment Bill 1999* Explanatory Memorandum.

3.65. The ICA noted in its evidence before the committee that, '…[the decision to under-declare wages and salaries] has to be weighed up against the penalty and the chances of being caught'[64]. The committee considers that the current penalties in the Act may not be sufficient so as to deter dishonest employers from engaging in these practices and the committee therefore supports the Bill as means of discouraging dishonest employer conduct.

3.66. However, a Government submission on the Bill was received by the committee at the eleventh hour of its deliberations[65]. The committee notes that although the submission appears to have been prepared prior to February 2000, it was only delivered to the committee on 10 May 2000.

3.67. In the submission, the Government argued that there are several deficiencies in the Bill and in the current Act. In particular, the Government noted that under the Act, ''underinsurance' is not a reality and there are not actually any breaches of the Act for this offence'[66]. The Government argued that:

> unless there is a change to the private sector 'commercial' arrangement' (contained in Schedule 3 of the Act), where the insurer and the employer reach an agreed rate for the premium, it may be difficult to apply the penalties.

3.68. Another concern raised by the Government was that Bill in its current form, 'appear[ed] to breach International Labour Organisation conventions on employment where it is not expected that employees would loose their jobs because the employer breached the Act'.

3.69. In the absence of formal legal advice on the matter, the committee was unable to consider this issue any further.

3.70. The committee also notes that the Bill passed through the Scrutiny of Bills Committee without comment.

3.71. The committee calls on the Government to amend the Act to ensure that all the proposed penalties are indeed enforceable. Notwithstanding the claims made by the Government in its late submission regarding the Bill, the committee is of the view that the strongest possible sanctions should be included in the legislation as a disincentive against employers abrogating their workers' compensation responsibilities.

Recommendation 5

The committee recommends that the Government support the *Workers' Compensation Amendment Bill 1999* in its entirety.

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[64] ibid, p 49, Mr Segrott.
[65] Received 10 May 2000.
[66] Submission 12, p 2.

Employer information and education

3.72. The committee was advised that ACT WorkCover uses a number of communication channels to inform employers about their responsibilities in relation to workers' compensation.

3.73. The Government identified that a telephone inquiry service was an important source of information regarding the operation of the scheme for both employers and employees. The Government noted that a significant portion of calls to ACT Workcover (583) in 1998/1999 related to inquiries about the general operation of the Act[67]. This suggests that there is significant uncertainty in the community about the obligations contained within the current legislation.

3.74. The ALHMWU noted that its experience with the cleaning industry showed that many employers were not adequately informed about their obligations. In this regard, the union noted that:

> In the cleaning industry there are many what we call mum and dad operations. I really think that these people are not evil or anything in not fulfilling their obligations to society; it is simply ignorance on their part… they are usually not bad people or anything like that; they are just not very good business people[68].

3.75. ACT Workcover indicated that word of mouth following the imposition of fines on several businesses has been an effective tool in raising awareness about workers' compensation responsibilities. ACT Workcover noted that, 'The stick end of the business is about the on-the-spot fines that came in a little while ago. We have only issued 12, but there has been a ripple effect from issuing those 12. Obviously, those people are talking to either their business bodies, their business colleagues…, the insurers are reporting a big increase in the number of people contacting them about workers' compensation'[69].

3.76. The committee is also aware that ACT Workcover produces and distributes a newsletter which goes out to approximately 10,000 businesses. A recent edition of the newsletter outlining employers' obligations in relation to workers' compensation resulted in a significant increase in calls to the agency about compliance issues. The committee considers that a similar campaign undertaken by insurance agencies may also be useful in increasing awareness about employers' obligations.

3.77. One member of the committee suggested that it may be useful for similar information produced by the Government to be sent out with the premium renewal notices issued by insurers. The committee considers that this channel of information would be particularly powerful as a consciousness raising exercise in that it would be provided at a time when employers are making decisions about their policies.

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[67] Submission 9, p 16.

[68] Transcript, 8 February 2000, p 20, Mr Anderson

[69] Transcript, 12 November 1999, p 7, Ms Plovits.

Recommendation 6

The committee recommends that the Government consult with the insurance industry about including an information brochure with premium renewal notices setting out employers' obligations in relation to workers' compensation.

Project based premiums for the building and construction industry

3.78. The committee understands that other jurisdictions are currently rethinking how workers' compensation premiums should be calculated in the building and construction industry. Both NSW and Queensland have been considering a proposal in which workers' compensation premiums for the building and construction industry would be calculated on a project-specific basis, as a percentage of a particular project's cost.

3.79. Under a scheme of this type, any person undertaking work on the project site would be covered by the insurance policy. This would have the effect of increasing the coverage of the compensation scheme by eliminating the possibility of under-reporting wages through any of the aforementioned methods. The committee sees that this approach has the capacity to achieve premium rates that more accurately reflect the true level of liability. However, a concern was raised that a scheme of this type may result in some people being insured twice – both at the project specific level and at the general business level. ACT WorkCover construed the situation in the following terms:

> …you are… Joe Bloggs, glazier, and you already have a workers' compensation premium with QCover for 20 employees and you win the glazing project on the construction site, how do you adjust the levy that is charged on the project to take into account that Joe has already paid in a different circumstance, and if he has paid it in a different circumstance is it a construction industry matter or is it coming out of a glazing business which may or may not fall within the definition of construction industry[70]?

3.80. The committee agrees that there are problems to be overcome in a regime of this type. In any event, the committee considers that this proposal warrants further investigation and urges the Government to consider the research undertaken by Queensland and NSW in this area.

Recommendation 7

The committee recommends that the Government investigate, drawing on the research undertaken by Queensland and New South Wales, the feasibility of legislating for workers' compensation premiums in the building and construction industry to be based on a percentage of the total cost of a particular project rather than on wage and salary bills.

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[70] Transcript, 8 February 2000, p 66, Ms Plovits.

80:20 rule

3.81. Several submitters were supportive of implementing the 80:20 rule proposed in the Commonwealth's Ralph Report on business taxation as a means of classifying workers for the purposes of workers' compensation. The adoption of the 80:20 rule as a classification test would see any workers receiving 80 per cent or more of their income from a particular business as being deemed employees of that business – PAYE employees. Employers of workers in this situation would therefore be liable to pay workers' compensation insurance.

3.82. ACT WorkCover saw this approach as a sensible way forward noting that:

> …it would certainly make the deemed worker definitions more clear and take away some of the greyness, because at the moment it is by case precedent. Every time we take it to court we get a little bit more precedent, but it is different in each case so it just takes time[71].

3.83. The Insurance Council of Australia noted the benefits of the 80:20 rule not only for the efficient operation of their business but for the viability of the scheme. The Council noted that:

> This would significantly improve the insurer's chances of obtaining full declaration from an employer who regularly employs sub-contractors with a subsequent benefit to the scheme premium pool. It is not unusual for an insurer to receive a declaration showing one full-time employee however during the year four or five claims may be lodged from different workers, probably sub-contractors[72].

3.84. The CFMEU also indicated support for the 80:20 rule as a classification test.

3.85. Regardless of whether the Federal Government introduces the 80:20 rule into legislation for the purposes of taxation, it appears to be a clear and precise test for classifying workers and the committee considers that the ACT Government should incorporate this into the workers' compensation legislation.

Recommendation 8

The committee recommends that an 80:20 rule be adopted for incorporation into the *Workers Compensation Act 1951* as the test for determining the employment status of employees/workers versus contractors.

The role of ACT WorkCover

Insufficient number of inspectors

3.86. The committee was advised that ACT WorkCover has only 4 Inspectors available to carry out inspections of approximately 13,500 businesses. In 1998/99,

[71] ibid, p 67.

[72] Submission 10, p 7.

ACT WorkCover conducted 348 workplace inspections, predominantly to provide advice to employers and staff. Following the inspections, 9 on-the-spot fines were issued, 203 notices were issued and ten inspections resulted in prosecutions[73].

3.87. It is difficult to see how four inspectors can provide adequate coverage for the 13,500 private businesses in the ACT. The committee understands that inspectors will not need to inspect every one of these businesses and that usually inspections are targeted based on information provided by insurers, workers and employee organisations. However, it may well be the case that some employers have become complacent with regard to their workers' compensation responsibilities in the knowledge that they are unlikely to be inspected by ACT WorkCover.

3.88. The committee is aware that insurance companies sometimes conduct audits of their clients in relation to wage and salary declaration. The Insurance Council of Australia noted that:

> Most insurance companies will work on the basis of looking for anomalies between the figures that are submitted from year to year, either in terms of the wage values or the number of employees. Where such anomalies are discovered, we will seek an explanation from the employer. It is quite common in certain industries which rely on contracts - for example, cleaning or maintenance contracts - that they pick up a major contract which results in them putting on significantly more numbers of staff or they lose a contract, which will have the reverse effect.
>
> If there is a plausible explanation for the variation, that is either accepted as such or, from an insurance company's point of view, we will make a decision to undertake an independent audit of the company's books[74].

3.89. The committee sees that compliance could well be augmented by instituting a random auditing regime undertaken by ACT WorkCover. The Insurance Council of Australia supported such an approach in its submission[75].

Recommendation 9

The committee recommends that the Government increase the number of WorkCover inspectors available to conduct workplace inspections to provide better coverage for the 13,500 private businesses operating in the ACT.

Recommendation 10

The committee recommends that the ACT WorkCover undertake random audits of employers' wage and salary records.

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[73] Submission 9, p 16-17.
[74] Transcript, 8 February 2000, p 38, Mr Segrott.
[75] Submission 10, p 5.

Improved data

3.90. The committee understands that the development of the ACT WorkCover database should be complete around June 2000. The committee was advised that the database will assist WorkCover inspectors to focus on, 'areas that most need their involvement'[76]. In its submission the Government outlined the following areas where the database will improve its monitoring of the scheme (a full list of the reports available from the new workers' compensation database is included as Attachment A):

- Inspectors will be able to easily track the movement of employers between insurers, improving their capacity to detect employers whose policies have lapsed but have failed to take out a policy with another company;

- Data-matching will help inspectors to better target their workplace inspections;

- Employment, wage and salary figures provided to insurers in an industry can be checked against Australian Bureau of Statistics figures – with industries showing discrepancies being further scrutinised; and

- Improved monitoring of the performance of the scheme in relation to claims management and the service provided by insurers to claimants[77].

3.91.The Government noted that, 'overall, the commissioning of the database will significantly enhance the enforcement strategies available to WorkCover inspectors'[78]. The committee, too, considers that this will be a significant advancement in the monitoring of compliance with the scheme.

3.92. However, the committee again notes that the absence of a database has been a serious impediment to effective policy development in the area of workers' compensation. The committee understands that the project has been on the drawing board for many years but that no tangible results are evident to date. In its discussion paper on reform of the workers' compensation scheme, the Government noted that, 'It is expected that the database will be fully operational at the end of 1999'[79]. However, the system has still failed to materialise. As noted earlier, the committee is of the view that the Assembly should consider a course action compelling the Government to act should the system not be in place and fully operational by the end of this calender year.

[76] ibid, p 17.
[77] ibid, p 17.
[78] ibid, p 17.
[79] ACT Government, (1999) 'Reforming Private Sector Workers' Compensation in the ACT' p 15.

Inspections by employee organisations

3.93. In evidence at the public hearing, the CFMEU argued that employee organisations should be given the authority to inspect the wages records of employers. The union noted that:

> …employee organisations, along with WorkCover inspectors – and I include in that the Occupational Health and Safety inspectors, should have the power to inspect wages records to ensure that the employer has sufficient workers' compensation cover. That, in our view, would go a long way to assist in the enforcement of the Workers Compensation Act and the blocking up of quite a few of these loopholes and bad habits which have grown up through the years[80].

3.94. Given the under-resourcing of ACT WorkCover to perform inspections of wages records, the committee believes that this proposal will enhance the level of employer scrutiny and may have the effect of improving compliance with the scheme. The committee considers that the proposal warrants implementation by the Government.

Recommendation 11

The committee recommends that the Government amend the *Workers' Compensation Act 1951* to allow employee organisations to conduct inspections of employers' wage and salary records for the purposes of confirming adequate workers' compensation insurance cover.

[80] Transcript, 8 February 2000, p 8, Mr Wason.

CHAPTER 4. OTHER ISSUES

Improved accounting by insurers

4.1. The committee received evidence that the accounting practices of some insurers may have led to incorrect assessments about the efficacy of the workers' compensation scheme. The CFMEU noted in evidence that:

> At the moment, if a worker lodges a claim with an insurer, the insurer will give it to one of their assessors. Their assessor will then put a dollar amount on that claim. They may say that, on face value, they could be exposed to up to $100,000. That claim may take six months, 12 months, 18 months, maybe even two years, depending on how complex the matter is. It is not unusual for it to take 18 months to two years to resolve. Once it is resolved, it may be that on that claim the insurer actually paid out $50,000 or $60,000.
>
> We cannot see any evidence of the insurers actually reconciling that money, the excess, back into the accounts. When you go back and look at accounts for, say, 1997 and 1998 there is an imbalance. It looks like the insurers have collected $X in premiums but are exposed to a major cost. So, on paper, it looks like they are facing massive losses whereas, in effect, the study which was done [for the ACT Government] in 1989 by Coopers and Lybrand into Workers' Compensation found that for every dollar insurers were paying out they were actually making $3 profit[81], which is not a bad investment by any stretch of the imagination[82].

4.2. The committee considers that if the costs of claims are not appropriately reflected as a result of improper accounting by insurers, improper conclusions about the efficacy of the scheme may result. The Government should investigate this practice and take steps to ensure that insurers are not misrepresenting the cost of claims.

Recommendation 12

The committee recommends that the Government investigate the allegation that the accounting methods of some insurers have led to inaccurate records about the costs of claims.

Workers' compensation subsidy for training

4.3. The committee is aware that in 1987 the Workers' Compensation Rebate Scheme was introduced by the ACT Government. The scheme provided employers with a pro-rata payment for workers' compensation premiums held for trainees employed under the Australian Traineeship scheme or for first year apprentices. The scheme was later discontinued several years later for a number of reasons including its administrative complexity, duplication of existing Commonwealth programs and potential for abuse.

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[81] The study commissioned by the ACT Government and entitled 'Review of the ACT Workers Compensation Scheme' actually found that in 1988/89 insurers derived about $2.06 profit for each $1 in claims and in 1987/88 $1.92.

[82] Transcript, 8 February 2000, p 10, Mr Wason.

4.4. However, in evidence before the committee, the CFMEU argued that the subsidy was of considerable value to group training organisations such as its own company, CITEA. The union noted:

> It was about $1,200 per apprentice or trainee per year, which is not much at the moment but it certainly makes life a lot more comfortable. As I said, we [CITEA] had a surplus of $125,000 but that is not much. We run a very tight schedule. Our wages bill per year is just short of $2m, as you can imagine employing 130 trainees and apprentices, and then we have got our office staff, training coordinators and all the other infrastructure which go on behind it to support that[83].

4.5. In the public hearing, the Insurance Council of Australia noted that the NSW Government, unlike the ACT Government, subsidises workers' compensation for trainees.

> … New South Wales has the Australian traineeship scheme, which operates for trainees in small business enterprises. The workers compensation coverage for the trainees that participate in the Australian traineeship scheme in New South Wales is held through a policy that is paid for by the NSW Government and is part of… the social policy responsibility or community service obligation. In the ACT, people undertaking the employment of trainees take them into their books as though they are their own employees and they declare the wages that they pay through the traineeship scheme and an appropriate premium[84].

4.6. The committee also understands that under the Victorian workers' compensation system, employers do not have to declare apprentice remuneration for the purposes of premium calculation. However, last year tightened measures were introduced to preventing rorting of the system by dishonest employers.

4.7. The committee considers that it is incumbent on the Government to assist employers and training organisations in particular, in their efforts to create employment opportunities under apprenticeship and traineeship schemes. By subsidising the costs of workers' compensation for this group of workers, the committee believes that significant disincentives will be removed for providing these opportunities. The committee considers that this approach is completely congruous with the Government's rhetoric about job creation for young people in our community.

4.8. While the committee acknowledges that the previous Workers' Compensation Rebate Scheme was problematic in terms of its administrative complexity, the committee considers that it is not beyond the Government to develop a subsidisation

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[83] ibid, p 11, Mr Wason.

[84] Transcript, 8 February 2000, p 45, Mr Segrott.

scheme that effectively addresses the imperative to increase job opportunities for young people as well as issues surrounding rorting, duplication and administrative burden.

4.9. In short, the committee sees great value in providing some level of subsidisation for workers' compensation premiums to group training companies and employers that take on apprentices and trainees and urges the Government to develop and implement such a scheme.

Recommendation 13

The committee recommends that the Government put in place a workers' compensation subsidisation scheme for group training organisations and employers that take on apprentices or trainees.

Workers' rights and benefits

Access to common law

4.10. Several organisations opposed the reduction of access to common law for workers that have whole person impairment assessed as being less that 25 % as proposed in the Government's discussion paper on reform of the system. The LHMWU argued that to remove the access to common law for injured workers would be removing a significant disincentive for employers to abrogate their responsibilities for maintaining safe workplaces. The union noted that:

> We believe that common law, and the considerable money involved in that, acts as a bit of a reminder to industries such as the cleaning industry that they have a duty of care. We believe that if that was taken away it would lessen the consciousness of the employer to fulfil the duty of care[85].

4.11. The ACT Bar Association argued quite simply that, 'it is argued that this will bring ACT into line with other jurisdictions. The anticipated "cost savings" are not impressive and do not justify such a major loss of rights and benefits for injured people'[86]. The CFMEU echoed the Bar Association's view about the limited nature of the cost savings noting that:

> … it is our view from the evidence that we have been able to acquire from the insurers and others that the abolition of common law would give no net tangible benefit, up or down, in regard to the cost of premiums. That was also shown in the report Coopers [and Lybrand] conducted[87].

4.12. The CFMEU also argued that the alternative of continual benefits is unsustainable and ineffective in assisting the rehabilitation of injured workers. The union noted that:

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[85] ibid, p 19, Mr Anderson.
[86] Submission 1, p 3.
[87] ibid, p 16, Mr Wason.

> We would also argue that the mentality of putting people on a continual benefit forever does not work. In Victoria there was actual proof – it was just not a theory – when they changed their workers' compensation scheme in the mid 1980s. The commitment on the day was to the workers. By abolishing common law, we would put you on 75 per cent of your benefits for the rest of your life. What happened there was people, I would not say got lazy, just decided that you got this 75 per cent and there was no real motive or reason to get people into rehabilitation and other back-to-work programs, and it came close to sending the scheme broke.
>
> Common law, in our view, is a very reasonable, fair and equitable process to give people fair and reasonable compensation and allow them to get on with their life, readjust, set up a new business or do whatever is necessary to try to give themselves some quality of life after the serious injury[88].

4.13. The committee is of the view that access to common law should not be removed from the private sector workers' compensation system. It appears to the committee that removing the rights to common law access will likely have little bearing on the efficacy of the scheme and will further disadvantage injured workers who are often some of the most vulnerable members of our community.

4.14. In relation to the reduction of workers' benefits, the ACT Bar Association argued that:

> This is of course the route followed in Victoria. It is no secret that the Victorian system is designed to push injured worker onto the Commonwealth social security system. Apart from being a cynical and mean-spirited response to the problem, it burdens the tax payer rather than the industry that benefits from the worker's labour. The apparent policy of workers' compensation legislation is to provide a greater level of financial protection to those who by their work are exposed to workplace accidents rather than those who do not work. No valid reason is suggested to subvert or change this policy. Employment incentive, not disincentive, should remain the policy[89].

4.15. The committee can only concur with the Association's assessment.

4.16. The committee also notes that the Victorian Government has announced that it will reinstate common law rights in the Victorian scheme.

Travelling to work provisions

4.17. Another area of concern for some stakeholders was the recommendation in the Government's discussion paper on workers' compensation that the right to claim for injuries sustained whilst travelling to work be removed.

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[88] ibid, p 16, Mr Wason.

[89] Submission 1, p 2.

4.18. The Government's discussion paper cites actuarial analysis from Commonwealth and Victorian data indicating that removing travelling to work provisions would reduce the costs of a scheme by 7.5%[90]. However, the CFMEU argued that claims arising from accidents sustained on the journey to work may not impact the operation of the scheme to the extent claimed. The union noted:

> Journey claims are another area which the Government really needs to investigate, because our understanding is that most journey claims are actually recovered by the insurers through third party vehicle insurance. Most journey claims are about people driving to and from work. If people have an accident in their cars, the vast majority of claims are paid through third party insurance, so that is not a cost to this scheme, and I think it would be worth the Government's while to go off and investigate it and get the real figures. I think that they would be somewhat surprised to find out how much these insurance companies do recover from the NRMA, who is a third party insurer. There is no evidence, in our view, that journey claims have any impact on the cost of premiums[91].

4.19. It is certainly the case that workers injured in transit to work would not have sustained an injury had they not been going to work. It is the view of the committee that workers injured in the course of travelling to work should still be eligible for workers' compensation benefits.

Recommendation 14

The committee recommends that there be no reduction in the rights and benefits of employees through the reformation of the private sector workers' compensation system, including access to common law and travelling to work provisions.

Wayne Berry, MLA
Chair
18 May 2000

[90] ACT Government, (1999) 'Reforming Private Sector Workers' Compensation in the ACT' p 12.
[91] Transcript, 8 February 2000, p 16, Mr Wason.

APPENDIX A

1. The ACT Bar Association
2. Australian Business Limited
3. Recruitment and Consulting Services Association
4. Handyhelp Pty Ltd
5. Health Access Pty Ltd
6. Health Access Pty Ltd and Lisa Castles and Associates Pty Ltd
7. ACT and Region Chamber of Commerce and Industry
8. Construction Forestry Mining Energy Union
9. ACT Government
10. Insurance Council of Australia
11. HIH Insurance
12. ACT Government

APPENDIX B

1. The ACT Bar Association
2. CFMEU
3. Australian Liquor, Hospitality and
4. Miscellaneous Workers Union - ACT Branch
5. ACT Chamber of Commerce and Industry
6. Insurance Council of Australia
7. Recruiting and Consultancy Services Australia
8. ACT Government

APPENDIX C: MR CORNWELL'S DISSENTING REPORT