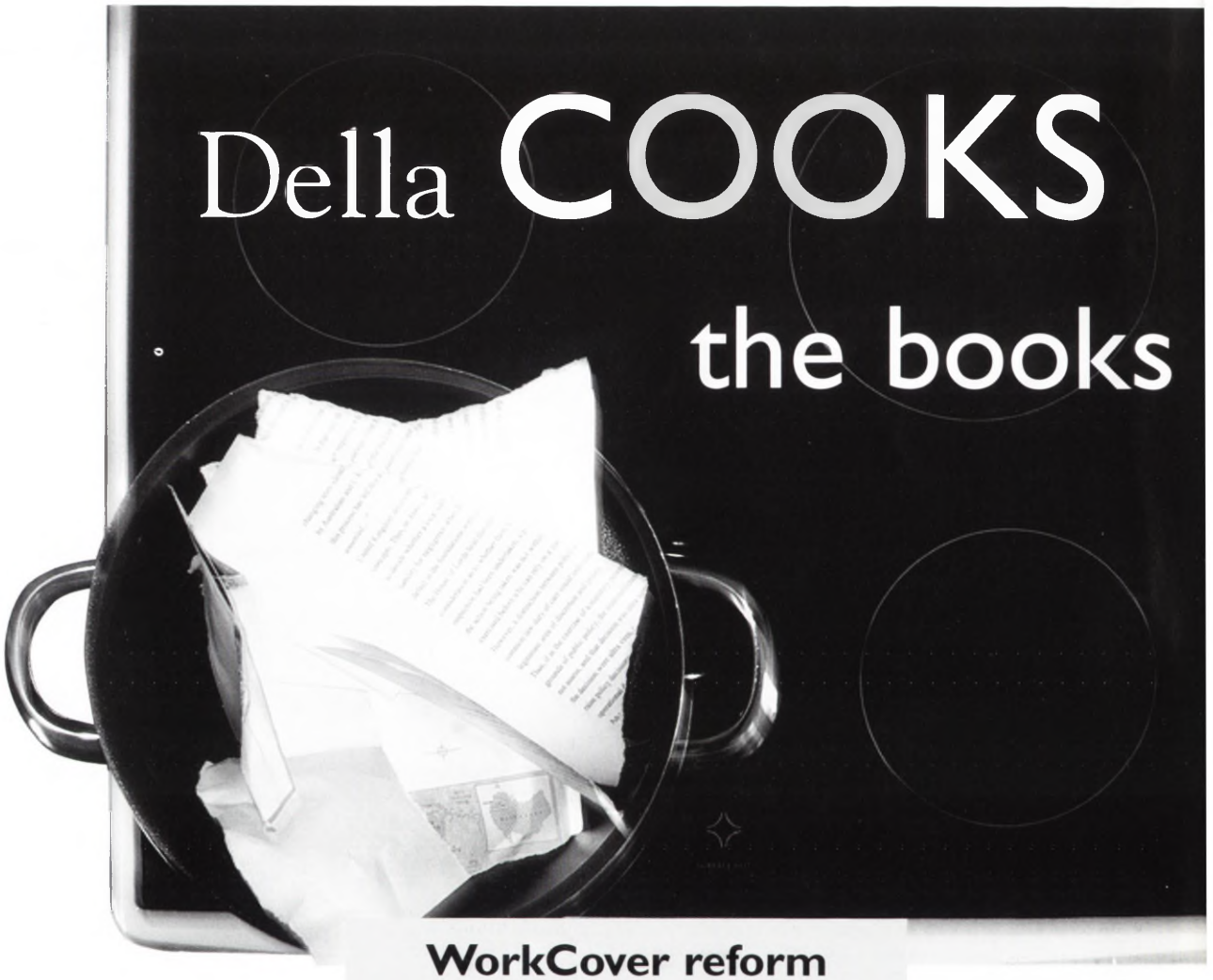
Della COOKS the books



WorkCover reform package is a recipe for injustice all round

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After nearly six years of alleged crisis, the NSW Labor Government of Bob Carr has called in "Mr Fix-it", Special Minister of State and Minister for Industrial Relations, John Della Bosca, to solve the WorkCover "disaster". The Minister's major legislative package, released to the public under the slogan of "Simpler, Fairer, Faster" on 27 March 2001, is a thinly veiled attempt to destroy the rights of injured workers to fair compensation, and an independent determination of their claims.

Since coming to power in 1995, the Carr government has asserted that there

has been an ever-growing crisis in the WorkCover Authority's finances. The scheme that had previously operated with relatively low premiums and reasonable benefits was suddenly found to be close to $1 billion in "deficit".

It is that ever-growing "deficit" which has driven repeated legislative changes since 1995, all of which have reduced benefits to workers (such as the reduction in section 66 and 67 amounts, deduction for pre-existing impairments under s68A, and the potential two-year limit on partial incapacity benefits under s52A), made access to compensation more difficult (additional threshold tests and disqualifications such as s9A and s11A), and have made the process of obtaining compensation more cumbersome and time consuming (such as compulsory non-litigation periods and compulsory conciliation).

The WorkCover "deficit", now alleged to stand at some $2.18 billion, is something that APLA's NSW Workers Compensation Special Interest Group has been questioning for some time now, and which we believe is considerably more illusory than real. The "deficit" is the actuarially-assessed excess of future claims liabilities over current scheme assets (comprised of invested funds, property and receivables, but excluding annual premium income). The scheme currently has some $6.8 billion in assets (up from around $3.7 billion in 1995) and annual premium income of around $2 billion.

The reason for our questioning of the "crisis" is that the assessment of future claims liabilities seems to bear little relationship to the actual cost of claims in practice. The figures have also been shown to be extremely variable – in fact one actuarial review of the Scheme, carried out by David Zaman at the request of the former Workers Compensation Advisory Council in mid 2000, assessed the claims liabilities of the scheme at $6.15 billion,[1] at a time when the scheme's assets were $6.3 billion, a no-deficit position.

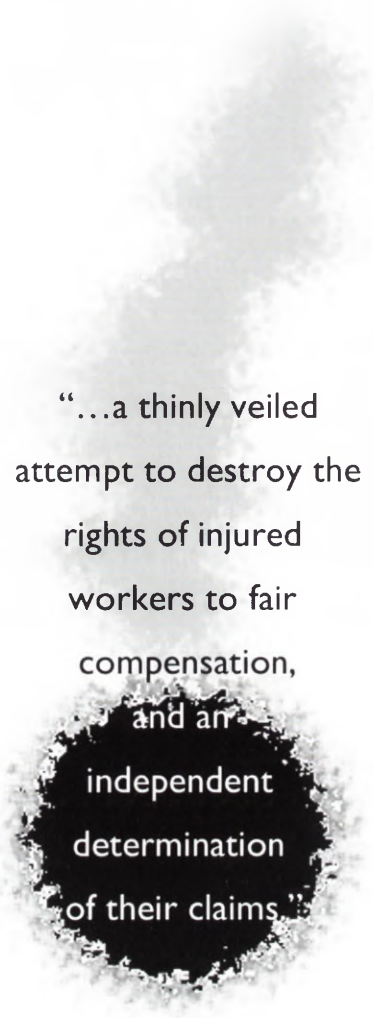
The existence of such rubbery figures is one of the major reasons that APLA has been calling for the institution of a complete, independent and public enquiry into all aspects of the NSW Workers Compensation scheme, as an essential pre-cursor to any further legislative change.

In the name of fixing this supposedly dire situation, the reform package that has now been introduced to parliament, and which is awaiting final debate on May 29, proposes:

(a) A radical overhaul benefit entitlement, both in the no-fault and common law parts of the scheme, including the introduction of impairment assessment guidelines based on the American Medical Association Guide to the Assessment of Permanent Impairment, 4th edition.
(b) "Whole Person Impairment" assessment, including a requirement to demonstrate **in excess of** 25% whole person impairment (without being able to combine physical and psychological injury) to qualify for common law damages of any kind, and a threshold of 10% WPI to obtain "pain and suffering" (s 67) compensation for no-fault injuries.
(c) The use of binding medical assessments to resolve various types of dispute, including matters that have until now been questions for determination by the Court, such disputes as to capacity for work, suitability of employment, whether employment is a substantial contributing factor to an injury, and causation.
(d) The introduction of a new claims assessment bureaucracy, staffed by public servants, to replace most of the functions of the Compensation Court, and to carry out claims assessments in common law and statutory no-fault matters. This bureaucracy will be answerable to WorkCover, its staff will not be independent, and claims determinations are likely to take place in many, if not all cases, on the basis of paperwork alone, without any hearing or proper testing of evidence, a disadvantageous situation for both workers and employers.
(e) Provisional acceptance of claims before full investigation has taken place, placing a greater burden on employers through additional excess costs and claims experience.
(f) The ability to give the legislation extensive retrospective application by way of regulation.
(g) Increased regulation of legal costs

The impact of the change in the common law threshold would be to exclude all but the most catastrophic of cases from access to damages. It must be remembered here that unlike in the *Motor Accidents Compensation Act* scheme, where failure to exceed the 10% WPI threshold only excludes the claimant from non-economic loss damages, in the Workers Compensation scheme, failure to exceed the required threshold excludes the claimant from damages of any kind.

It has been interesting to observe the Minister's reaction to the recent publicity in cases where existing injury victims have been used as examples of the kinds of claimants who would not qualify under the proposed scheme. ▶



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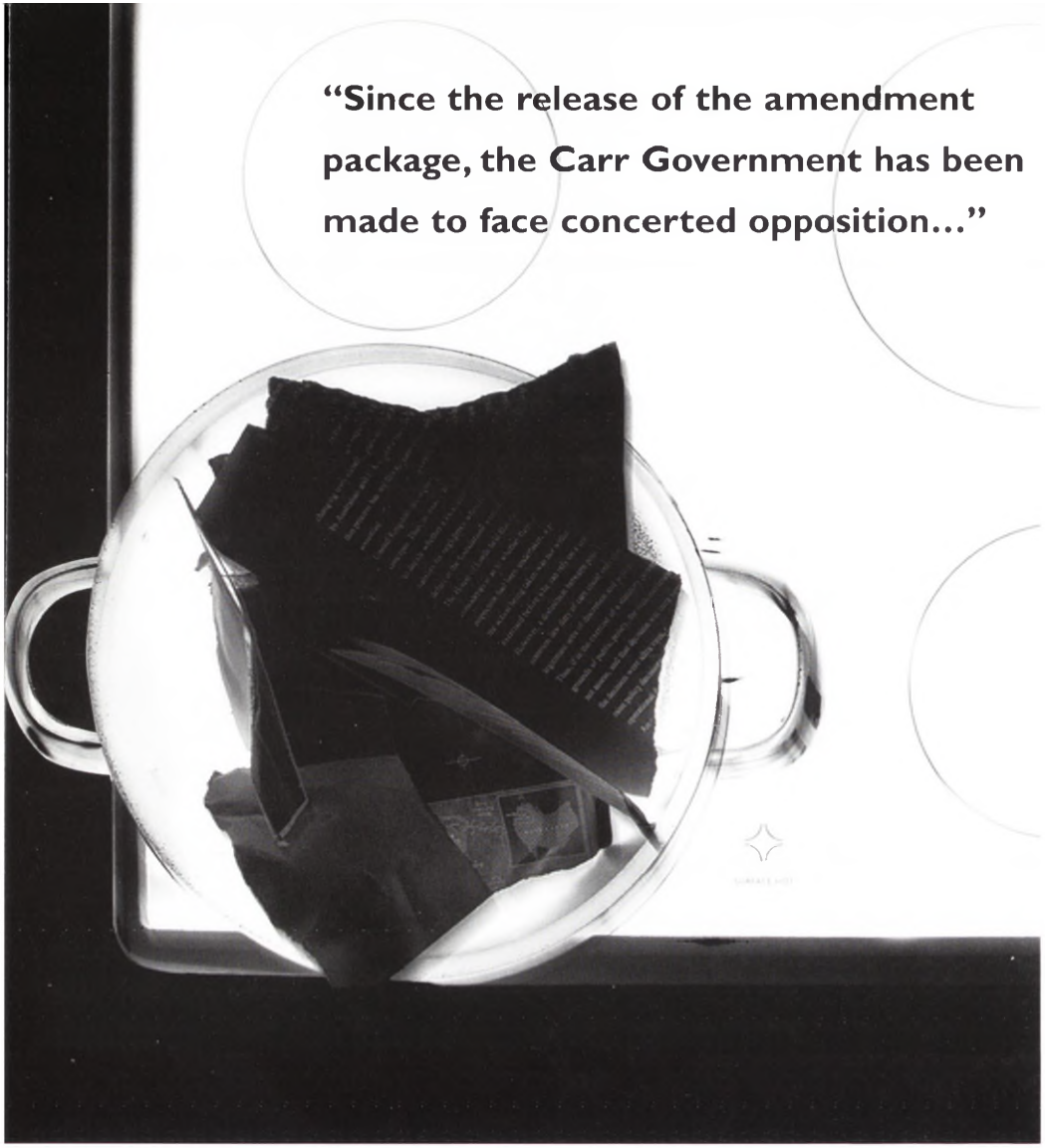

Figures released by the Government with its package suggest that the target of the Government's proposed reforms is the legal profession and legal fees. Make no mistake, the target of these reforms are those most seriously injured workers, those who would under the present scheme have access to common law benefits for their employer's negligence. The virtual shut-down of common law claims, which currently cost $410 million or 17% of overall scheme costs, is the thing that will bring the government its major saving.

The Government is trying to sell the workers of NSW a con-job, just as it sold a complete con-job to the motoring public in October 1999. Motorists were promised $100.00 off their green slips insurance costs. That clearly did not occur in the majority of cases, and after one year, price restraints were lifted. As a trade-off, injured motorists cannot get compensation for their pain and suffering unless they are more than 10% impaired. Some 18 months after the start of that scheme, only a handful of injured motorists have managed to pass that threshold – only 6 cases out of 42 assessed by the Motor Accidents Authority's medical assessment service to March 2001 were found to have in excess of 10% WPI,[2] and a review of claims conducted in October 2000 suggested that as few as 4 in 10 claimants who previously received pain and suffering compensation would now qualify for the same kind of payment under the new system.[3]

The Government cannot expect the public to believe that its newly proposed system will deliver cost savings, except by cutting out a large amount of the currently available benefits for injured workers. The new Dispute Resolution Service envisages a multi-layered bureaucracy involving commissioners, a Senior Commissioner, expert medical assessors, rights of appeal to the Supreme Court, and a continued role for the Compensation Court. This can only be expensive, complicated and unwieldy.

Since the release of the amendment package, the Carr Government has been made to face concerted opposition, from trade unions and the Labor Council, from the legal and medical professions and injured persons' groups. There is an ongoing campaign of industrial action being run by the Labor Council, to support its call for major revision of the bill before its final debate. APLA's Workers Compensation SIG has been extremely active in briefing the cross-bench members of the Legislative Council, whose support will be required if additional amendments to the bill need to be moved, and we have been keeping up a steady stream of media comment, press releases and briefing papers, as well as contributing funds to a joint Law Society/Bar Association advertising campaign. This activity builds on a round of trade union briefings that APLA carried out during 2000, in anticipation of this kind of legislation, and those briefings no doubt put the unions in a good position to react quickly when the bill was released.

Our NSW Campaign Manager, Dr Hannah Middleton, has been working tirelessly since the package was made public, co-ordinating our campaign, and fellow SIG members John Wynyard and Bruce McManamey have given many hours of their time in developing proposals and submissions, talking to the media and generally trying to make sure that as many people as possible are alerted to just how dreadful the Government's proposals are.

Continuing news about the reform package and APLA's campaign is being distributed via APLA e-mail services, and we can only hope that the Carr Government is brought to its senses over the next few weeks and remembers its constituents, the ordinary working men and women of NSW whose rights must not be further eroded. PL

Footnotes:

1. Report to the Advisory Council, NSW Workers Compensation Managed Fund (David A. Zaman, 12 June 2000)
2. MAAS Bulletin no.2, p.10 (Motor Accidents Authority, April 2001)
3. Motor Accidents Compensation Act Impairment Case Studies (Motor Accidents Authority, October 2000