Office of the

W O R K C O V E R   O M B U D S M A N

South Australia

ANNUAL REPORT
2008 – 2009

Government of South Australia

Letter to the Honourable Minister for Industrial Relations

The Honourable Paul Caica MP
Minister for Industrial Relations
Parliament House
Adelaide

It is my duty and privilege to submit the South Australian WorkCover Ombudsman's inaugural Annual Report for 2008/2009 to the Minister as required, pursuant to subsection (1) of section 99L of the *Worker's Rehabilitation and Compensation Act, 1986*.

Mr W I Lines
WorkCover Ombudsman
September 2009

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Introduction

The Office of the WorkCover Ombudsman is established pursuant to Part 6D of the *Workers Rehabilitation and Compensation Act 1986*. The Office commenced operation on 1 July 2008 to coincide with the commencement of the first set of amendments resulting from the *Workers Rehabilitation and Compensation (Scheme Review) Amendment Act 2008*.

The Office was created in direct response to the Clayton Walsh Report of December 2007 which recommended that *"there be established the Office of South Australia WorkCover Ombudsman as an independent office reporting to the Minister for Industrial Relations"* (Recommendation 65). The recommendation was that the Office discharge a complaints investigation role in relation to the operation of the WorkCover scheme and have the capacity to undertake wider analysis of any systemic aspects underlying complaints.

The Report also recommended that the Office have a role in monitoring the nature and quality of decision making in relation to key impact areas within the scheme such as the proposed 130 week review and termination of payments (Recommendation 26).

The Government accepted these recommendations and saw the establishment of the Office as a way of reassuring the work injured that the proposed changes to the scheme would be implemented fairly and under the scrutiny of an independent officer. Very soon after the amendments were passed in Parliament on 17 June 2008, the Minister for Industrial Relations appointed Wayne Lines as the acting WorkCover Ombudsman effective from 1 July 2008. In June 2009, he was appointed as the inaugural WorkCover Ombudsman for a period of 5 years commencing from 1 July 2009.

Mr W I Lines
WorkCover Ombudsman

What does the WorkCover Ombudsman do?
The functions and powers of the WorkCover Ombudsman are set out in sections 36(15) and 99D to 99G of the *Workers Rehabilitation and Compensation Act 1986* (the Act) and give the WorkCover Ombudsman a range of roles that are designed to support the fair and effective operation of the Act. These roles may be described as:

- Identifying and reviewing issues arising out of the operation of the Act and making recommendations for improvement.
- Receiving and investigating complaints about the administration of the Act, including complaints about the rehabilitation and return to work of injured workers, and endeavouring to resolve those complaints.
- Encouraging and assisting WorkCoverSA and employers to establish their own complaint-handling processes and procedures.
- Reviewing decisions to cease weekly payments to injured workers and suspending those decisions whenever they are not reasonably open.

The WorkCover Ombudsman has the powers necessary for the carrying out of these functions and can require a person to provide information in writing, produce documents or attend in person to answer questions.

Section 99H of the Act provides that the WorkCover Ombudsman must carry out his functions and powers independently, impartially and in the public interest.

Jurisdiction
It is clear from subsection 99D(1) of the Act that the WorkCover Ombudsman's functions and powers are confined to the operation and administration of the Act. The WorkCover Ombudsman has no power to investigate any issues related to the operation of the *WorkCover Corporation Act 1994* or the *Fair Work Act 1994,* although workers compensation issues sometimes overlap with the provisions of these Acts.

The WorkCover Ombudsman has no jurisdiction to investigate matters that are, or are capable of being, the subject of proceedings in the Workers Compensation Tribunal under Parts 6, 6A and 6B of the Act or before Medical Panels SA under Part 6C of the Act or before the Levy Review Panel under Part 5 of the Act. In addition, the WorkCover Ombudsman may not investigate a matter that has become the subject of legal proceedings.

The WorkCover Ombudsman may investigate complaints about Rehabilitation and Return to Work Plans even though disputes about Plans may be heard by the Workers Compensation Tribunal under section 28B of the Act (which comes within Part 3 of the Act). Provided no legal proceedings have actually been commenced in connection with the dispute, the WorkCover Ombudsman may still be involved in helping to resolve disagreements about Rehabilitation and Return to Work Plans.

The WorkCover Ombudsman may perform the functions under 99D(1) of the Act on his own initiative, at the request of the Minister for Industrial Relations, or on receipt of a complaint by an interested person.

However, the WorkCover Ombudsman has a wide discretion to refuse to investigate a matter if of the opinion that:

- The matter raised is trivial
- The complaint is frivolous, vexatious or not made in good faith
- The complainant has insufficient personal interest in the matter

- The complainant has failed, without good reason, to take reasonable steps to resolve the matter through another complaint-handling process
- The investigation is unnecessary or unjustifiable
- The matter of the complaint should be dealt with under another Act or by another person or body
- There is some other reasonable cause for discontinuing the investigation.

Referral and Advisory Service

Consistent with the role of supporting the fair and effective operation of the Act, the Office has provided assistance to many people who have contacted us about matters that are outside jurisdiction. It is often possible to give people some guidance about the issues they raise and refer them to another appropriate source of assistance. In addition, we are able to provide information about the scheme and the effect of legislative changes to the Act on entitlements and obligations.

The Beginning

The Office commenced operations on 1 July 2008. Wayne Lines was appointed by the Minister for Industrial Relations as the Acting WorkCover Ombudsman for up to 12 months commencing on 1 July 2008. Within a few weeks, the Office had a staff of 2 administration officers and a senior investigation officer.

At the outset, the priority was to establish modes of communication and raise public awareness of the Office. A webpage, printed letterhead, a global email address, a freecall number, facsimile, mobile phones and voice mail were all arranged by mid-August 2008.

WorkCoverSA provided invaluable assistance in the preparation of a pamphlet outlining the role of the Office and listing contact details. 2,500 copies of the pamphlet have been disseminated to date. The pamphlet has been translated into 23 languages and made available on the Office website.

The Acting WorkCover Ombudsman personally addressed a variety of forums to explain the function of the Office. These have included:

- 6 WorkCoverSA Information Sessions
- 6 SafeWork SA (Safe Work Month 2008) Regional Information Sessions
- Public Sector Workforce Division Injury Management Executive Group
- Self-Insurers of South Australia General Meeting
- SA Unions Workers Compensation Service
- SA Unions Executive Planning Meeting
- WorkCoverSA Injured Worker Stakeholder Group
- WorkCoverSA Legislative and Regulatory Consultative Group
- WorkCoverSA Leadership Forum
- Labour Lawyers "Both Sides of the Fence" Workers Compensation Seminar
- Australian Metal Workers Union Workers Compensation Seminar
- Australian Rehabilitation Providers Association SA
- Public Sector Workforce Relations Injury Management Forum
- Piper Alderman Workers Compensation Seminars

In addition, the Acting WorkCover Ombudsman met with representatives of the following organizations:

- Business SA
- SafeWork SA
- Public Service Association
- Shop Distributive and Allied Employees Association SA Branch
- Australian Metal Workers Union
- Workers Compensation Tribunal Conciliation Officers
- SA Ombudsman
- Employee Ombudsman
- Transport Workers Union
- Working Women's Centre
- Employers Mutual Limited
- Crown Solicitors Office
- Local Government Association Workers Compensation Scheme
- Textile Clothing and Footwear Union of Australia

Circulars advising of the Office have been sent to all 23 of South Australia's community legal centres, all South Australian unions (and national unions with SA branches), the Law Society of South Australia, all South Australian Members of Parliament, the Legal Services Commission and multicultural and migrant associations.

The Office webpage was redeveloped in early 2009 into an interactive website so that the public could lodge complaints and raise questions on-line. The website is now an indispensable communication tool for the Office. Each week, the website attracts over 100 visitors.

On 25 June 2009, his Excellency the Governor in Executive Council appointed Wayne Lines as the WorkCover Ombudsman for a term of 5 years commencing on 1 July 2009.

Complaints
The Office received 100 formal complaints. Notably, injured workers or their representatives lodged 87 of these. The remainder were lodged by or on behalf of employers and service providers.

17 complaints were assessed as being beyond jurisdiction and 4 were withdrawn. Another 54 were resolved by conciliation or after formal investigation. The other 25 complaints are at various stages of consideration.

A little over 50% of complaints related to various aspects of claims case management (e.g. delays with processing payments, lack of communication from case manager, refusal of provisional liability payments). Issues associated with rehabilitation and return to work made up a further 34% of the complaints lodged.

Review of Decisions to Cease Weekly Payments
A total of 137 decisions to cease weekly payments were reviewed. A further 50 applications for review were either withdrawn (usually as a result of the compensating authority setting aside their decision on reconsideration) or were beyond jurisdiction.

Of the 137 decisions reviewed, 53 (39%) were suspended on the basis that the decision was not reasonably open.

Review of Internal Complaint Handling Processes
The Office conducted a review of the internal complaint handling processes of all private and crown self-insured employers. All self-insured employers submitted their documentation when requested. A total of 81 processes were reviewed and feedback was provided in every case.

Several employers revised their processes in response to my recommendations. As at 30 June 2009, all but 4 self-insured employers had satisfactory processes in place.

Referral and Advisory Service
From the commencement of operations, the Office has had an important role in providing information and guidance to people about the operation of the workers compensation scheme or about particular issues relating to their claims. Inquiries are mainly received by telephone and email. Occasionally, inquiries are made by letter or in a personal interview with a member of the Office.

Demand for this service is growing rapidly. In the first 6 months, the Office received an average of fewer than 30 inquiries per month. Since January 2009, the Office has handled an average of almost 70 inquiries per month. The number of inquiries in June 2009 totalled 99 (see Appendix Part One).

WorkCoverSA Consultation Papers
During the year, WorkCoverSA issued several consultation papers for feedback from stakeholders. The Office provided written submissions on 5 papers:

- Advocacy Arrangements for Injured Workers
- Code of Claimants' Rights
- Stepped Increases to Weekly Payments
- Provisional Liability
- Regulation Review

Review of Decisions to Cease Payments

Introduction

One of the key changes to the workers compensation scheme introduced by the *Workers Rehabilitation and Compensation (Scheme Review) Amendment Act 2008* was the removal of the automatic continuation of weekly payments of compensation if a compensating authority's decision to cease payments was disputed in the Workers Compensation Tribunal. Section 36 of the *Workers Rehabilitation and Compensation Act 1986* was amended so that the operation of a decision to discontinue or reduce weekly payments is not affected by the injured worker lodging a notice of dispute in the Tribunal. Instead, the WorkCover Ombudsman is empowered by section 36(15) to review decisions to discontinue weekly payments and suspend the operation of those decisions where it appears to him that the decision was not reasonably open. In the event that the decision is suspended, the worker is entitled to a continuation of their weekly payments while the dispute is proceeding in the Tribunal. This change to the scheme took effect from 1 July 2008.

Shortly after commencing operations, I issued a standard notice of review rights for compensating authorities to attach to their section 36 decisions and a set of guidelines for the section 36(15) review process (see Appendix Part Two). These were disseminated through Employers Mutual Limited, the Law Society of South Australia, SA Unions, Public Sector Workforce Division of the Department of the Premier and Cabinet and Self Insurers of South Australia. A modified version of the guidelines appears on the Office website.

The table below provides the statistics for applications received by me in the 2008/2009 year.

Section 36(15) Applications: 1 July 2008 to 30 June 2009

Decisions by:	Suspended	Application Withdrawn	No Jurisdiction	Not Suspended	Total	Suspension Rate
EML (Registered Employers)	40	26	11	54	131	42%
Self-insured Employers	13	5	8	30	56	30%
Total	53	31	19	84	187	39%

Three topics for discussion arise from the above statistics.

Jurisdictional Limits

The jurisdiction to review decisions under section 36(15) has limitations. Firstly the decision must be a discontinuance of weekly payments: not a reduction in weekly payments. Secondly, a decision may only be reviewed if the applicant has also lodged a notice of dispute at the Tribunal. 18 applications were beyond jurisdiction because the decision effected a reduction of weekly payments and not a discontinuance, while one application lacked jurisdiction because the notice of dispute was never lodged at the Tribunal.

Section 36(2)(bb) of the Act allows reductions in weekly payments to reflect changes in overtime being worked in the workplace where the injured worker was employed. Reductions on this ground can be significant (reductions by hundreds of dollars per week are common).

However, as section 36(15) currently stands, there is no right to have the decision reviewed by me and a reduction will take effect even though the decision is disputed in the Tribunal. A worker may have to live on a drastically reduced income while awaiting the result of the Tribunal proceedings, even where the decision is clearly unreasonable. I believe this is a cause of some unfairness that can and should be addressed.

I recommend that consideration be given to extending the jurisdiction of section 36(15) to allow reviews of decisions to reduce weekly payments where the reduction relies upon section 36(2)(bb) of the Act.

Reconsiderations by Compensating Authorities

The statistics show that 31 (16%) of applications were withdrawn prior to me determining them. This usually occurred when the compensating authority set aside their decision on a reconsideration pursuant to section 91 of the Act. Whether an application to me to review the decision prompted the compensating authority to set aside their decision is a matter of speculation. However, if my involvement has resulted in compensating authorities scrutinising their decisions more rigorously, that is a desirable outcome.

Of course, a better outcome would be if the decision was not made in the first place. In my feedback to WorkCoverSA relating to the review of regulations, I recommended that the regulation governing the level of detail required to be given of reasons for decisions be amended to require a statement of the evidence relied upon, findings on questions of fact, a statement of the applicable law and a statement of conclusions. At present, the regulation only requires “the general basis” of the decision to be stated. I believe that a requirement for more structured and detailed reasons will force decision makers to be sure that they have the requisite evidence and factual basis before making their decisions and this will lead to fewer premature and unsustainable decisions being made. At this stage, I do not know whether my recommendation will be adopted.

Rate of Suspension

I have a discretion to suspend a decision only if it appears to me that it was not reasonably open to the compensating authority to decide to discontinue the payments having regard to the circumstances of the case. For a decision to be reasonably open the decision must at least be arguable on the facts and the law. It does not have to have a better than even chance of being upheld in the Tribunal. It is very possible for a decision to be reasonably open but still be set aside by the Tribunal on a hearing of all the evidence. Therefore, the “reasonably open” threshold is not very demanding and should be relatively easy for compensating authorities to meet. It should be seen as a minimum requirement for all decisions that compensating authorities make about injured worker’s entitlements in any event.

For the 2008/2009 year the overall rate of suspension of decisions reviewed by me is 39%. This means nearly 4 out of 10 decisions reviewed by me were suspended because they failed to meet the “reasonably open” test. This failure rate is very high considering that the test is not demanding and that the requirement that a decision have an arguable basis is basic to claims management. I believe a suspension rate closer to 10% is tolerable.

The main reason for this suspension rate is that the evidential requirements for decisions to discontinue payments pursuant to section 36(1) of the Act have not been met. This is particularly a problem when the ground relied upon is that the compensating authority is satisfied on the basis of a certificate of a recognised medical expert, that the worker has ceased to be incapacitated by the compensable disability (section 36(1)(b) of the Act). In fact, 62% of all suspended decisions were based on this ground.

Having identified this as a key reason for the high rate of suspensions, I held discussions with Employers Mutual and presented a seminar to their Team Leaders in May 2009 on the requirements of decisions based on section 36(1)(b). Significantly, the suspension rate for Employers Mutual’s decisions in the last quarter fell to 15% when previously it was running at

higher than 50%. Self Insurers of South Australia has invited me to give a similar presentation at a general meeting of its members later this year.

General Comments
To state the obvious, a decision to discontinue an injured worker's weekly payments can have serious consequences for workers and their families, perhaps more than any other decision besides the initial determination of the claim. Now that the scheme has changed to remove the automatic continuation of payments when a decision is disputed, compensating authorities need to exercise additional care in their decision making. It is of concern to me that even though the majority of decisions I review are reasonably open, many of them are unlikely, in my view, to be upheld by the Tribunal.

A common example is where the injured worker has been in receipt of weekly payments for several years, but the compensating authority has now discontinued them on the basis that one or two independent specialists have recently given opinions that the compensable disability is no longer affecting the worker, but rather, the incapacity for work is due to an underlying, naturally occurring degenerative condition. These opinions give the compensating authority an arguable case so that the decision meets the "reasonably open" test for the purpose of my review. However, if the treating doctors have consistently stated that the injured worker's condition is work related it is doubtful that the Tribunal will agree with the independent specialists' opinions. I predict that many of the decisions I have found to be reasonably open will either be conceded by compensating authorities during the course of the Tribunal proceedings or the Tribunal will set them aside after a hearing of the evidence. In the meantime, the injured worker has to survive without weekly payments.

I note that one of the objects of the Act stated in section 2 is "to reduce litigation and adversarial contests to the greatest possible extent". However, my observation is that many of the decisions to discontinue weekly payments, while having a valid basis, are reliant on evidence that is weak and unconvincing. They necessarily attract litigation rather than reduce it. This is not in keeping with a key object of the Act.

The main source of the problem is the reliance by compensating authorities on the opinions of medical specialists that are in conflict with a long line of opinion from treating medical practitioners. In my view, the problem could be addressed to a large extent if compensating authorities referred questions of capacity for work to Medical Panels SA pursuant to section 98F(2) of the Act instead of seeking reports from their choice of independent specialists. A Medical Panel has the advantage of having at least 3 doctors provided with the same information considering the same question at the same time as a result of the same examination and interview of the worker. The involvement of Medical Panels SA also removes the criticism that the compensating authority has chosen the specialist whom they think will give the desired opinion. According to section 98H(4) of the Act, the opinion of a Medical Panel is final and conclusive. Therefore, if the opinion is favourable to an injured worker, a compensating authority would not proceed to make a decision to discontinue the worker's payments. If the opinion supports a discontinuance, a decision based on the opinion will be very difficult to challenge. Either way, the involvement of a Medical Panel should result in less litigation.

Currently, a question "as to the extent or permanency of a worker's incapacity for work" (section 98E(h)) may be referred to a Medical Panel. However, a question "as to when a worker ceased to be incapacitated for work by a compensable disability" (section 98E(n)) cannot yet be referred. This creates some confusion about whether a question about a worker's capacity for work can be fully considered by a Medical Panel. I believe that section 98E(n) should be brought into operation as soon as possible so as to remove this confusion and encourage compensating authorities to utilize Medical Panels SA in determining the critical question of whether a worker's ongoing incapacity for work is a result of the compensable disability.

I recommend that section 98E(n) of the Act be brought into operation as soon as possible.

Work Capacity Reviews
Sections 35B and 35C of the Act came into effect from 1 April 2009. These provisions were introduced by the *Workers Rehabilitation and Compensation (Scheme Review) Amendment Act 2008* and govern the process for determining whether a worker's weekly payments may be discontinued after 130 weeks of entitlements if the worker has a current work capacity.

The reliance of compensating authorities on section 35B to cease weekly payments after 130 weeks of entitlements appears to have been gradual. As at 30 June 2009, I had received and determined only 2 applications for review of decisions arising from work capacity reviews undertaken pursuant to section 35B. Both of these were by a crown self-insurer and I suspended both for not being reasonably open.

No doubt there will be more for me to say about section 35B work capacity reviews in next year's annual report.

Complaint Investigations

Introduction
The WorkCover Ombudsman may receive complaints from anyone who thinks they have been treated unfairly in relation to the operation of the *Workers Rehabilitation and Compensation Act 1986.* A complainant may be an injured worker, an employer, a health provider, an individual or an organization, a private business or government agency.

In accordance with Section 99D(4) of the Act, the Office established a scheme for receiving and dealing with complaints. The scheme is represented by a flow chart that has been posted on the Office website (see Appendix Part Three).

Procedure
The Office receives between 20 and 30 enquiries each week. In many cases, people are only needing some direction or guidance in relation to their workers compensation issues rather than having a complaint that requires investigation. However, some of these enquiries do result in a request for an investigation into a formal complaint. Occasionally, people lodge a formal complaint as their first contact with the Office.

When a formal complaint is received, I assess whether the subject matter of the complaint is within my jurisdiction and, if it is, whether in the exercise of my discretion I ought to investigate it. As much as possible, I encourage complainants to take up their complaint directly with the organisation against which the complaint is directed if they have not already. I usually require this to be done before I agree to undertake an investigation.

Many of the complaints received relate to two or more issues. For example, a complainant may complain that they are having communication issues with their case manager and that there has been a delay in having costs reimbursed. In presenting statistics of complaint investigations, I have correlated the number of investigations with the number of complainants rather than the number of specific issues complained about. For each complainant, I have attempted to identify their key complaint in order to categorize the types of complaints investigated.

If I determine that I have jurisdiction to investigate and that in my discretion an investigation should be undertaken, I invariably write to the person or organization complained against (the respondent) seeking a report to explain, from their point of view, what has occurred and whether they agree with any aspect of the complaint. After receiving the report, I decide whether further investigation is required or if I require more information from the complainant. I also consider whether the matter may be resolved by a conciliation conference or by way of issuing formal recommendations. On many occasions, the complaint has been resolved on the basis of the report provided by the respondent in that it has provided an adequate explanation of the situation that has given rise to the complaint or by accepting that the complaint is substantiated and advising that appropriate action has been taken to address the problem.

Recommendations
By 30 June 2009, I had issued 52 recommendations on 18 separate complaints. These recommendations have been collated in chronological order and annexed to this report (see Appendix Part Three). The focus of all recommendations is to help improve the delivery of claims and rehabilitation services to injured workers and the delivery of services generally to all stakeholders. To this end, it is important that recommendations are realistic and achievable. It is pleasing to note that although my recommendations are not enforceable by recourse to litigation, there has been a very high compliance rate with the recommendations issued in the 2008/2009 year. As at 30 June 2009, all but 2 of the 52 recommendations have been implemented or otherwise attended to in a satisfactory manner.

The table below sets out the number of complaints received in the 2008/2009 year according to complaint subject.

Table 1: Complaints

Complaints about:	Registered Employers Scheme	WorkCoverSA	Self-Insured Scheme	Total
Provision of Suitable Duties (s58B)	8	3	9	20
Inappropriate Management of Rehabilitation	8	0	6	14
Release of Claims File (s107B)	1	2	3	6
Confidentiality (ss112/112AA)	1	1	0	2
Inadequate Investigation of Claim	2	0	0	2
Inappropriate Management of Claim	2	1	0	3
Case Manager Misconduct/ Demeanour	4	0	1	5
Case Manager Delay/Inaction	3	0	0	3
Communication	7	0	3	10
Provisional Liability	5	0	1	6
Entitlements	13	1	8	22
Levies	0	2	0	2
Other	3	1	1	5
Total	57	11	32	**100**

Commentary

Complaints relating to the provision of suitable employment and the management of rehabilitation comprised 34% of complaints received. It has been acknowledged for many years now that rehabilitation and return to work is a critical issue for the scheme. The importance of rehabilitation and the difficulties associated with it are reflected in this figure.

Several of the complaints relating to rehabilitation revolve around the process by which Employers Mutual arrives at the decision that an employer no longer has the obligation to provide employment to an injured worker and that rehabilitation will focus on seeking work with another employer. Employers Mutual is still in the process of refining their procedure, but the complaints highlight the need for specific consultation with both the injured worker and the employer, for all parties to be fully informed of their rights and for decisions to be evidence based.

Case manager conduct, demeanour, delay and communication featured significantly in the number of complaints received. In my view, many of these complaints would be avoided if more case managers adopted a customer service approach where they attempt to view things from the position of the person seeking their assistance. All case managers need to treat injured workers in the way that they would like to be treated if they were in the injured worker's position. This would mean simple things like responding to email and telephone enquiries promptly, volunteering information about the claims process, providing more than one solution to a problem or taking time to explain a key decision.

Complaints about entitlements were also prominent. However, one third of these were beyond jurisdiction as the issue of the complaint was capable of being the subject of proceedings in the Workers Compensation Tribunal. Where the issue was within jurisdiction, it usually related to a delay in processing an approved payment, such as medical costs or a settlement sum.

Table 2: Outcome of Complaints Received

Resolved by:	Notice of Recommendation	Conciliation Conference	Resolved after Response from Respondent	No Jurisdiction	Complaint Withdrawn	Notice of Resolution	Current Investigation	Total
	18	4	27	17	4	5	25	**100**

Commentary

The figures highlight the importance of obtaining the respondent's formal response to the complainant's allegations as a means of resolving the complaint. My observation is that well prepared responses, which demonstrate that the issues have been carefully looked into and objectively assessed by the respondent, are very effective in satisfying complainants' concerns. On the other hand, responses that are defensive and cursory usually increase a complainant's annoyance and prolong my involvement.

Nearly one in five complaints received are beyond jurisdiction. This is partly due to the broadness of the jurisdictional limits prescribed in section 99D(3) of the Act. My Office cannot investigate where the relevant matter is the subject of legal proceedings "or is capable of being" the subject of proceedings before the Workers Compensation Tribunal, Medical Panels or the Levy Review Panel. For example, I cannot investigate a complaint about the length of time a claims manager is taking to determine a claim because, under Part 6B of the Act, an application may be made to the Workers Compensation Tribunal for an expedited determination of the matter if there has been undue delay. It is also the case that as the Office is entirely new, advocates involved in the industry are still unfamiliar with the jurisdictional boundaries and are referring matters to me not knowing whether I have jurisdiction to investigate.

Review of Internal Complaint Handling Processes

Introduction
Under section 99D(1)(d) of the Act, the WorkCover Ombudsman has the specific function of encouraging and assisting WorkCoverSA and employers to establish their own complaint handling processes and procedures with a view to improving the effectiveness of the Act. This function is consistent with the WorkCover Ombudsman's discretion under section 99D(5) to refuse to investigate a complaint if the complainant has failed, without good reason, to take reasonable steps to resolve the matter through another established complaint-handling process. I take the view that I should only exercise the discretion on this ground if I have confidence in the internal complaint-handling processes of the organisation that is the subject of complaint. I, therefore, have an interest in ensuring that WorkCoverSA and self-insured employers have effective internal complaint handling processes.

WorkCoverSA
Pursuant to the section 99D(1)(d) function, this Office has provided feedback to WorkCoverSA in regard to:

- WorkCoverSA's procedures for receiving and investigating complaints about breaches of Section 58B of the Act
- WorkCoverSA's process for receiving complaints about provisional liability decisions and having those decisions reviewed
- The statement in the designated form pursuant to Section 50D(1)(b) of the Act, which informs workers of their rights in the event that provisional liability is refused.

In each instance, WorkCoverSA was very responsive to our feedback and implemented the changes we recommended.

Self-insured Employers
In November 2008, the Office embarked upon a review of the internal complaint handling processes of all self-insured employers. There was a very high level of co-operation by self-insured employers to my requests for copies of their documented internal complaint handling processes so that we were able to complete our review in June 2009.

The table below summarises the results of the review.

Review of Internal Complaint Handling Processes (ICHPs)

	ICHPs Requested	**ICHPs Reviewed**	**Satisfactory**	**Not Satisfactory**
Crown Self-Insured Employers	12	12	11	1
Private Self-insured Employers	69	69	66	3
Total	81	81	77	4

The review covered all 69 private self-insured employers and all 12 crown agencies that provide a workers compensation claims management service.

In each case, we provided written feedback including suggestions for improvement. The most common defect with the processes reviewed was that their scope was confined to disagreements about entitlements and was not sufficiently broad to address complaints about

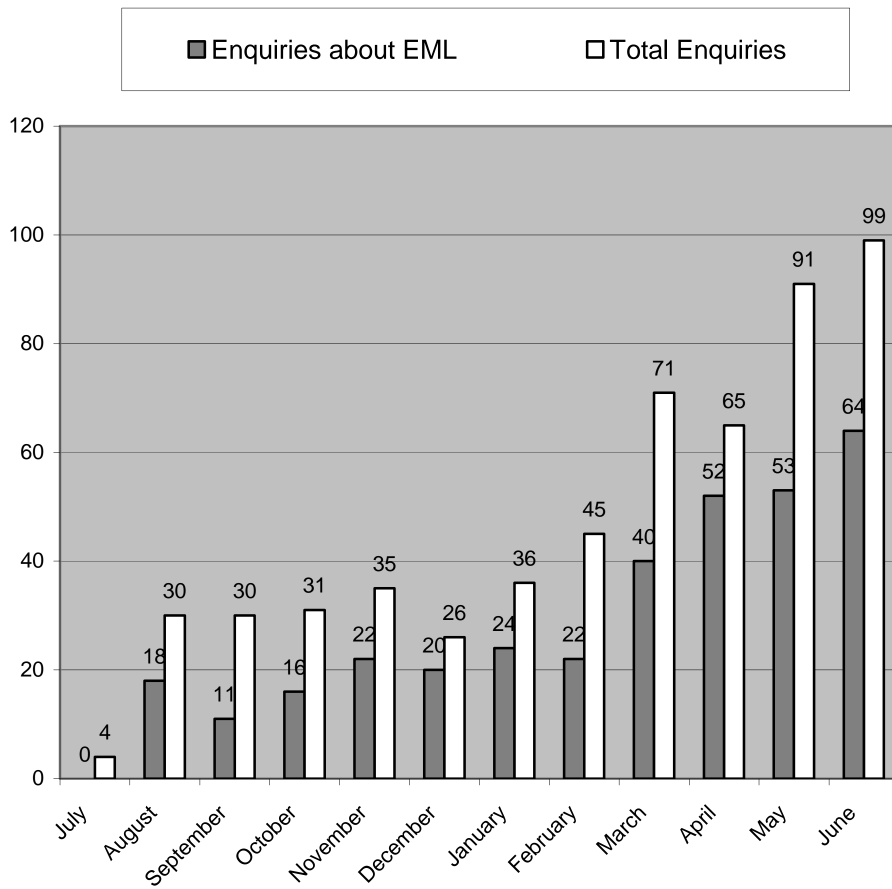
the management of an employee's claim or rehabilitation and the delivery of services. Several self-insured employers revised their existing processes or established new processes as a result of our feedback.

In the course of our review, I developed a model complaint handling process, which some self-insured employers chose to adapt to their organisation. The model complaint handling process is posted on the Self Insurers of South Australia website as well as our own (see Appendix Part Four).

I can confirm that all self-insured employers now have an internal complaint handling process in place.

As at 30 June 2009, the Office considers that there are still three private self-insured employers and one crown agency with internal complaint handling processes that are inadequate in that they would not be effective in handling complaints about the way claims management and rehabilitation services are delivered. The Office will follow up these self-insured employers later this year to check that they have improved their processes as recommended by me.

Statistics – Advisory Service



Guidelines for Section 36(15) Reviews

Introduction
From 1 July 2008, if a worker disputes a decision to discontinue their weekly payments pursuant to Section 36 of the Workers Rehabilitation and Compensation Act 1986 ("the Act"), their weekly payments are not automatically reinstated while the dispute proceeds before the Workers Compensation Tribunal ("the Tribunal").

However, under Section 36(15) of the Act, a worker may apply to the WorkCover Ombudsman for a review of the decision if he or she has received a notice of discontinuance of weekly payments under Section 36 and has lodged a notice of dispute with the Tribunal.

If it appears to the WorkCover Ombudsman that it was not reasonably open to the WorkCover Corporation or self-insured employer ("the decision maker") to decide to discontinue the weekly payments, the WorkCover Ombudsman may suspend the operation of the decision.

Effect of Suspension
The Act does not expressly state what the result of a suspension is, but I take the view that it means that weekly payments are reinstated as if the discontinuance had not taken effect. In other words, weekly payments are paid from the date they were ceased (if that has occurred). If the suspension occurs prior to the cessation of payments, they continue without interruption.

Under Section 36(16) of the Act, weekly payments that are reinstated continue until –

- (a) the notice of dispute is withdrawn;
- (b) the matter is resolved on reconsideration or at conciliation or otherwise settled between the parties;
- (c) the Tribunal orders otherwise.

Interest on Arrears
Section 47 of the Act requires interest at a prescribed rate to be paid on weekly payments that have not been paid "as and when required to be paid under the Act" unless the delay is attributable to some fault on the part of the worker.

I take the view that Section 47 applies to a reinstatement of weekly payments under Section 36(15) so that interest will be payable if there is a delay in reinstating payments after notification by me that the discontinuance is suspended. Even so, I note that interest would only have to be calculated from the date of the suspension: not the date of cessation of payments because the weekly payments were not required to be paid under the Act until the suspension of the decision.

I observe that under Subsections 36(3a) and (3b), most decisions to discontinue weekly payments will require 28 days advance notice. I expect that most workers who receive a notice will lodge their dispute and apply to me for a review well before the 28 days have expired. In many cases, I will have made a decision on the application before the discontinuance is to take effect.

Criteria for Application
A worker may only apply to the WorkCover Ombudsman for a review of a decision under Section 36 if the following preconditions are met:

1. The decision is a discontinuance of weekly payments under Subsection 36(1); not a reduction of weekly payments under Subsection 36(2);
2. The worker has received a notice of discontinuance;
3. The worker has lodged a notice of dispute with the Tribunal.

Reasons for Suspension
The only ground on which the WorkCover Ombudsman may suspend a decision to discontinue weekly payments is that it appears to not be reasonably open to the decision maker to decide to discontinue the payments having regard to the circumstances of the case.

I take the view that "reasonably open" requires that there be a proper basis for the decision or that the decision be arguable on the law and facts. It does not require that the decision be more likely than not to be upheld by the Tribunal at hearing.

Therefore, if there is cogent evidence in support of the decision, I will find that the decision is reasonably open, even if there is conflicting evidence. On the other hand, if there is no evidence to support the ground on which the discontinuance is based, the decision is not reasonably open even if there is evidence that could support another (unstated) ground for discontinuance.

Making an Application
I have requested that all decision makers advise workers in the notice of discontinuance that they may apply to me for a review of the decision if they lodge a notice of dispute with the Tribunal. To apply, the worker need do no more than send to my Office a copy of the filed notice of dispute with a covering letter stating that he/she applies for a review.

Review Process
Upon receiving an application, my Office will send notification to the decision maker and request a copy of the documents relied upon for the decision. The decision maker will also be given the option to provide brief written submissions with the documents. The documents will have to be delivered to my Office within 7 days of the request.

If the discontinuance is revoked on reconsideration, the decision maker needs to advise me of that immediately and I will advise the worker that the review is no longer required.

Under Section 36(17), I have an absolute discretion as to whether or not the worker or the decision maker will be heard on the review. In most cases, I will rely on the documents obtained from the decision maker to make my decision on the application. If, on reading the documents, I require further information from either the worker or the decision maker or both, I will contact them. I will set tight deadlines for responses.

When I make a decision, I will advise both the worker and the decision maker in writing. While not obliged to, I will provide brief reasons for my decision.

Finality of WorkCover Ombudsman's Decision
Section 36(17)(c) of the Act makes it clear that a decision on a review under Section 36(15) is final: it cannot be appealed or reviewed under the Act or any other law.

Notice of Review Rights

(To be attached to notices discontinuing weekly payments)

If you file a notice of dispute against the decision to discontinue your weekly payments, you may apply to the WorkCover Ombudsman for a review of the decision. If it appears to the WorkCover Ombudsman that it was not reasonably open to decide to discontinue the payments, the WorkCover Ombudsman may suspend the operation of the decision and you will have your weekly payments reinstated until the dispute is resolved or the Tribunal orders that they cease.

Your application for review must be in writing with a copy of your filed notice of dispute and this decision attached and addressed to:

The Office of the WorkCover Ombudsman
GPO Box 2343 Adelaide SA 5001

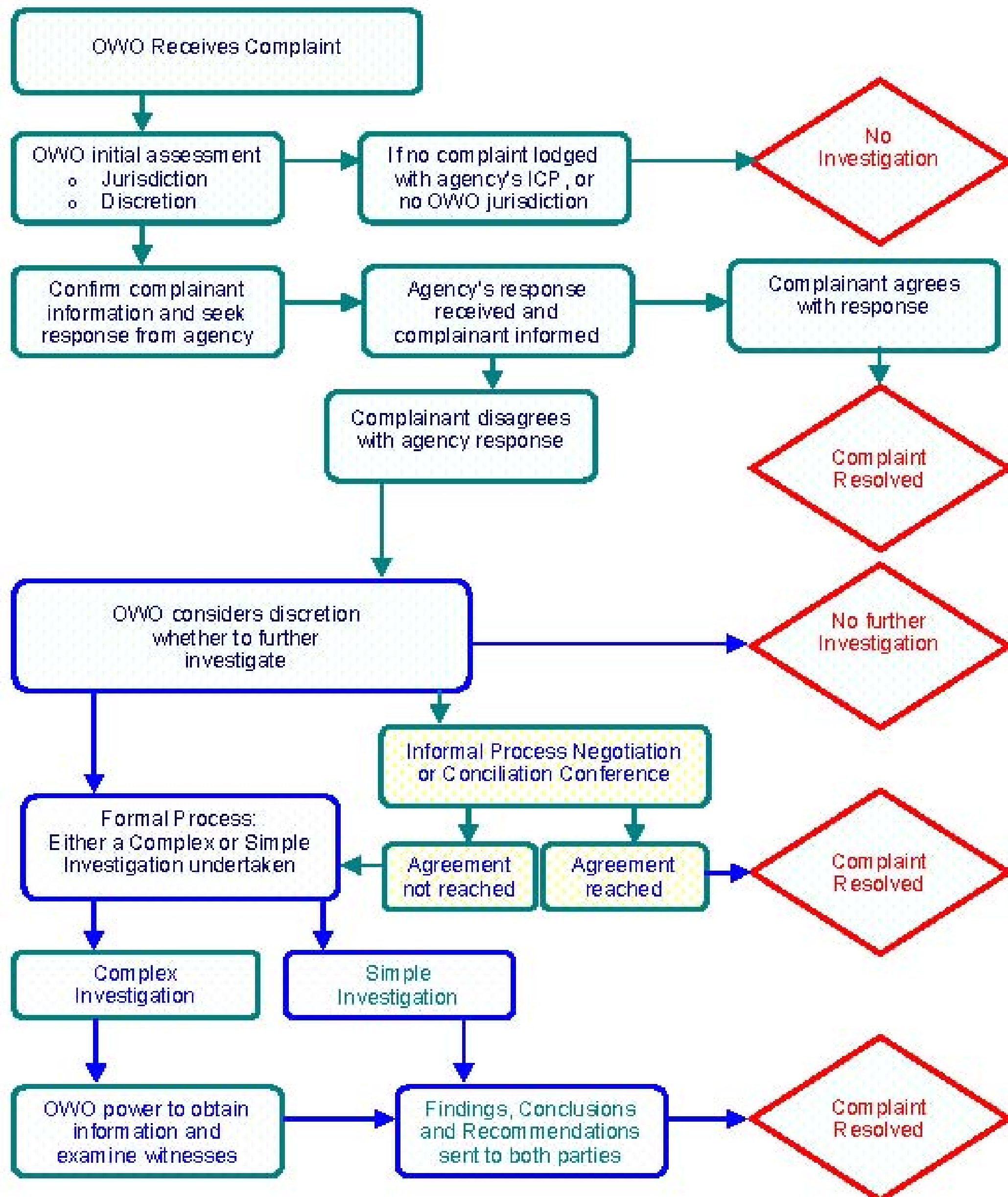
You may also contact the WorkCover Ombudsman by:
Freecall: 1800 195 202
Facsimile: (08) 8204 2169

Email: owo@sa.gov.au
Web: www.wcombudsmansa.com.au

DX: 56201 Adelaide

Office: Level 6, Chesser House
91-97 Grenfell Street, Adelaide

Complaint Resolution Process



Recommendations Issued

09/09/08 - Procedural Fairness – GM Holden Ltd

The WorkCover Ombudsman recommended that:
1. For future purposes, GM Holden Ltd reviews its practice and/or policy of not allowing legal representation during meetings involving workers compensation related matters, where the legal rights of any employee could potentially be affected.
2. If requested, legal representation should be allowed by GM Holden Ltd in such meetings, except where unreasonable, ie where the desired legal representative has failed to attend previous meetings, notwithstanding an invitation to attend, and meetings have been cancelled for that reason.
3. Within six weeks from the date of this recommendation, GM Holden Ltd provide a written report to the Office of the WorkCover Ombudsman explaining the outcome of its review and whether changes have been implemented in its policies.

17/09/08 - Section 107B – Department of Education and Children's Services

The WorkCover Ombudsman recommended that:
1. If DECS has acquired any further documentary material on the complainant's file since the provision of documentation to the complainant's solicitors on 27 May 2008, this information should be provided to the complainant under her request of 11 June 2008.
2. Otherwise, the complainant should make arrangements with her solicitors to obtain copies of the documents that have previously been provided under Section 107B.

25/09/08 - Inappropriate Management of Rehabilitation – Department for Families and Communities

The WorkCover Ombudsman recommended that:
1. The Department apologise in writing to the complainant for not informing him that they would be continuing with the meeting scheduled on 28 March 2008 in his absence.
2. This apology should also apologise for communications with the complainant's treating doctor in the absence of a medical authority, even if this was inadvertent.
3. The Department convene a meeting with the complainant and his union representative as soon as possible to discuss the selection of his rehabilitation provider.
4. The parties report back to my office by Monday 13 October 2008 advising of the implementation of these recommendations.

03/10/08 - Entitlements - Department for Families and Communities

The WorkCover Ombudsman recommended that:
1. The Department for Families and Communities pay the complainant the equivalent of two weeks of income maintenance payments to compensate for the delay in payment of the redemption sum.

30/10/08 - Section 58B - WorkCoverSA

The WorkCover Ombudsman recommended that:
1. WorkCoverSA review its Section 58B procedure and develop a list of factors that it considers relevant to whether or not an employer has complied with Section 58B.
2. The list of factors include reference to competing statutory and common law duties such as those imposed by occupational health and safety legislation.
3. WorkCoverSA amend its Section 58B procedure so as to require Section 58B officers to give formal reasons (with reference to the list of factors set out in the procedure) for determining whether an employer has or has not complied with Section 58B.

07/11/08 - Inappropriate Management of Rehabilitation - Employers Mutual Limited

The WorkCover Ombudsman recommended that:
1. EML not require the worker to meet with EML's preferred rehabilitation provider for the time being.
2. EML obtain medical clarification from the worker's general practitioner and treating psychologist or psychiatrist about his psychological condition in relation to the involvement of the rehabilitation provider in his rehabilitation and that the worker do whatever is necessary to assist EML obtain that clarification.
3. EML reconsider its approach to the worker's rehabilitation in light of the further medical information obtained and, if there is no relevant medical issue, engage the worker in discussions about how to restore his confidence in EML's preferred rehabilitation provider.
4. EML report back to me by no later than 24 November 2008 to advise me of its progress with implementing my recommendations.

03/02/09 - Section 107B – Randstad Pty Ltd

The WorkCover Ombudsman recommended that:
1. Randstad Pty Ltd update its Injury Management Procedure document to include the process for managing 107B applications.
2. Within three weeks from the date of this recommendation, Randstad Pty Ltd provides a copy of its updated Injury Management Procedure document to the WorkCover Ombudsman.

12/03/09 – Communication - Department for Families and Communities

The WorkCover Ombudsman recommended that:
1. DFC confirm in writing to the Complainant that a copy of the report (email dated 5 September 2008) prepared by the claims consultant has now been placed on her file.
2. DFC provide a written explanation to the Complainant for not advising her that her Claims Manager had changed.
3. The Complainant purchase the orthopaedic footwear and submit the invoice and relevant paperwork to her Claims Manager for reimbursement of costs incurred.
4. DFC confirm in writing to the Complainant what steps are being undertaken to ensure she is being provided with the necessary hydrotherapy, physiotherapy, and nutrition and exercise support at Adelaide Obesity Services (Wakefield Hospital).
5. DFC confirm in writing to the Complainant that her application for leave dated 24 February 2009 has been received and processed by the Claims Manager.
6. DFC provide the Complainant with copies of the written Notices advising her of the proposed reviews and outcome of the reviews of weekly payments conducted in 2007 and 2008.
7. DFC advise the Complainant in writing details of the issues preventing the processing of her claims for reimbursement of travel costs and the actions required by the Complainant to comply with DFC guidelines.
8. DFC prepare a new Rehabilitation and Return to Work Plan in accordance with Section 28A of the Act.
9. Within two weeks from the date of this Notice, DFC provides a written update and copies of relevant documentation to the WorkCover Ombudsman demonstrating how the recommendations have been implemented.

07/04/09 - Provisional Liability – Employers Mutual Limited

The WorkCover Ombudsman recommended that:

1. EML amend its standard letter to employers with a view to reinforcing the provisions of Section 50B of the Act and to advise the employer of its requirements under Section 2 of the Provisional Payment Guidelines.
2. EML amend its standard letter to workers with a view to reinforcing the provisions of Section 50B of the Act, advising workers that they can expect payment at the next available pay period as required by Section 2 of the Provisional Payment Guidelines and to advise workers what to do and who to contact if payment is not made.
3. WorkCoverSA amend Chapter 3a of the WorkCoverSA Injury and Case Management Manual to provide guidance to the claims agent about what should occur if an employer fails to make payment to a worker within the designated timeframe, whether the claims agent will make payment and recover the payments from the employer, and whether the worker is entitled to any interest pursuant to Section 47 of the Act.
4. In accordance with Section 47 of the Act, EML calculate and make payment to the worker for interest accrued during the period of non-payment of his weekly payments (ie, 26 January to 9 February 2009) and EML take whatever steps are reasonably possible to recover the interest payment from the employer.
5. EML amend the 'Initial Notification of a Disability' and all other records held to reflect the worker's correct date of birth, the time of the injury was 10.00am and the date the employer was notified was 25 October 2008.

06/05/09 - Section 58B – Walker Australia Pty Ltd (3 separate complaints)

The WorkCover Ombudsman recommended that:

1. Walker Australia Pty Ltd update its standard letter for employees suffering a compensable disability to ensure an explanation is given for what level of weekly payments will continue during the period of leave.
2. Walker Australia Pty Ltd discusses its 'draft' flowchart with the Consultative Committee and if agreement is reached that the process is equitable for all employees, including those suffering from a compensable disability, ensure it is disseminated to the workforce.

07/05/09 - Entitlements – Clipsal Australia Pty Ltd

The WorkCover Ombudsman recommended that:

1. Clipsal Australia Pty Ltd ensures that it has updated its internal complaint handling procedures and incorporated the recommendations made by the WorkCover Ombudsman on 14 January 2009.
2. Clipsal Australia Pty Ltd develops an internal procedure to ensure its internal complaint handling process is published and made available to all injured workers upon lodgement of a claim for workers compensation.
3. Clipsal Australia Pty Ltd provide a copy of its updated complaints handling procedures to my office for final review by 28 May 2009.

20/05/09 - Inappropriate Management of Rehabilitation – Employers Mutual Limited

The WorkCover Ombudsman recommended that:

1. EML refer this matter to WorkCoverSA so that a determination can be made whether to impose on the employer a supplementary levy in accordance with section 67 of the Act.
2. EML ensure that Rehabilitation Consultants visit all workplaces prior to a worker returning to work to assess and review the workplace.
3. EML ensure Rehabilitation Consultants document the precise details of the duties to be performed by the worker and have the agreement signed by all relevant parties prior to the commencement of duties.
4. EML reassure the worker by letter that they will ensure that prior to any return to work by him the Rehabilitation Consultant will assess the workplace and will document the

precise details of the duties to be performed by him and have all parties sign off on these duties.

21/05/09 – Inappropriate Management of Rehabilitation - Employers Mutual Limited

The WorkCover Ombudsman recommended that:

1. EML and WorkCoverSA develop guidelines for inclusion in Chapter 7 of the Injury and Case Management Manual outlining the circumstances and factors to be taken into account when considering whether to grant approval for a worker to move interstate during participation in rehabilitation and return to work activities.

21/05/09 - Entitlements – Department of Education and Children's Services

The WorkCover Ombudsman recommended that:

1. DECS give consideration to the worker's request for interim payments in accordance with the DECS' Interim Payments Policy.
2. If DECS still refuses to grant the worker's request, it advise him in writing of its reasons by reference to the criteria of its Interim Payments Policy.
3. DECS report back to the Office of the WorkCover Ombudsman by 1 June 2009 to confirm implementation of recommendations.

27/05/09 - Communication – Employers Mutual Limited

The WorkCover Ombudsman recommended that:

1. Within four weeks from the date of this Notice EML finalise its Stakeholder Service Standards and ensure the Standards are published and available to all key stakeholders.
2. EML write to the worker and acknowledge that it should have responded to his emails within 24 hours and apologise for not advising him from the outset that a new claim form was required.
3. EML and WorkCoverSA amend Chapter 14 (Claims Administration) of the WorkCoverSA Injury and Case Management Manual to ensure all relevant information is recorded in IDEAS such as the name of the case manager, the date, and the time of making the entry.
4. EML develop and disseminate an internal instruction reminding all case managers and team leaders to record all key claims management decisions and actions into IDEAS and when doing so to include the name of the person making the entry, the time, and the date the entry was made.
5. EML develop and disseminate an internal instruction reminding all case managers and team leaders of the requirement to seek new claim forms in circumstances where a worker aggravates a pre-existing injury or develops a sequela as a consequence of a compensable disability.

30/06/09 - Provisional Liability – Employers Mutual Limited

The WorkCover Ombudsman recommended that:

1. EML write to the worker and acknowledge that it failed to apply the legislation and relevant guidelines to his case and make immediate provisional weekly payments to him for the period 19 January 2009 to 29 March 2009 plus interest pursuant to section 47 of the Act.

Model Internal Complaint Handling Process

Introduction
There are several Australian Standards that relate to Internal Complaint Handling Processes. For example:
AS ISO 10002 *Customer satisfaction – Guidelines for complaints handling organizations*
AS 4608 *Dispute management systems*
HB 229 *The why and how of complaints handling*

The following model complaint handling process is a distillation of the key features of a process as outlined in these standards and adapted to the injury management context.

1. Statement of Purpose and Principle

The purpose of this process is to provide an avenue for any concerns about the management of a workers compensation claim or rehabilitation to be addressed as quickly as possible. It is intended that this process will reduce conflict in the administration of workers compensation claims and facilitate effective rehabilitation and return to work.

The principles of procedural fairness and impartiality are to be observed throughout the process.

2. Scope

This process applies to any concern or complaint an employee of the company may have in regard to the management of their workers compensation claims or rehabilitation. Such concerns may or may not relate to decisions that can be disputed in the Workers Compensation Tribunal (known as "reviewable decisions"). Where a concern does relate to a reviewable decision, this process does not affect an employee's right to dispute the decision in the Tribunal.

3. Procedure

In the first instance (Stage 1), an employee with a concern about the management of their claim or rehabilitation may take their concern to the Manager of the Injury Management Section. The employee will complete a Complaint Report Form (see attached form) and provide it to the IM Manager.

The Manager will (a) acknowledge receipt of the complaint within 2 business days and (b) meet with the employee within 7 business days to discuss the complaint and determine how to resolve it. If the complaint raises issues that need to be investigated, a time frame for completing the investigation will be discussed with the employee and every 2 weeks, at least, the employee will be kept informed of the progress with the investigation. The Manager will endeavour to resolve the complaint or arrive at an outcome as quickly as possible.

If the employee is dissatisfied with the Manager's response or the outcome, the next stage (Stage 2) is for the complaint to be referred to the Human Resources Manager who will follow the same procedure as the IM Manager.

Records of the complaint and any investigation will be maintained. Wherever possible, sensitive information will be kept confidential.

Depending on the nature of the complaint, if the employee remains dissatisfied with the response, the employee may lodge a dispute against the decision at the Workers

Compensation Tribunal (if the complaint relates to a reviewable decision) or lodge a formal complaint with the WorkCover Ombudsman.

4. Record Keeping

Key information relating to every complaint raised with the IM Manager will be retained on a register, which will be reviewed by the HR Manager quarterly and any recurring or systemic problems identified will be discussed with the IM Manager.

5. Process Review

The company is committed to continuous improvement of its processes. Accordingly, this process will be reviewed annually and feedback from employees is welcome. Any feedback on the process should be directed to the IM Manager.

WORKERS COMPENSATION / INJURY MANAGEMENT

COMPLAINT REPORT FORM

This section to be completed by PERSON MAKING THE COMPLAINT

Title (Mr, Mrs, Miss)	Full Name:	Date: Time:
Address:		
Contact Details:	Home Phone: ( ) Work Phone: ( )	Mobile:
Worksite Name and Address:		
Claim or Injury Details (employee only)	Claim Reference No: Date of Injury: Nature of Injury:	
Nature of Complaint:	(If written complaint already made, attach letter)	

Signature (Person Making Complaint)

Stage One (IM Manager)

<table>
<tr><td colspan="3">Please indicate:
a) Action taken;
b) If matter resolved, details of the agreement;
c) If matter not resolved, details of why matter not resolved.</td></tr>
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<tr><td colspan="3">Matter referred to next stage of process (please circle) YES / NO</td></tr>
<tr><td>Name of person referred to:</td><td></td><td>Date:
Signed (IM Manager)

……………………………….</td></tr>
</table>

Stage Two (HR Manager)

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<tr><td colspan="2">Please indicate:
a) Action taken;
b) If matter resolved, details of the agreement;
c) If matter not resolved, details of why matter not resolved and options available to complainant.</td></tr>
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<tr><td>Date:</td><td>Signed (HR Manager): …………………………………..</td></tr>
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Please note:
All grievance / dispute forms are to be forwarded to Human Resources for registration whether resolved or not.
If additional space is required, please attach additional pages to the back page of this form.