Submission by the
Communications, Electrical and Plumbing Union
(Communications Division)

to the
Senate Standing Committee on Environment,
Communications and the Arts

Inquiry into Australia Post's treatment of Injured and Ill workers

23 November, 2009

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Introduction

This submission has been prepared by the Communications Electrical and Plumbing Union (CEPU), Communications Division.

The CEPU Communications Division represents 30,000 members. We are the major union representing employees in the postal and telecommunications sectors of the Australian communications industry. Australia Post is one of the largest employers in which we have members.

This submission is provided in answer to the Terms of Reference for the Inquiry into Australia Post's treatment of injured and ill workers, referred by the Senate on 29 October 2009 to its Standing Committee on Environment, Communications and the Arts. We welcome this initiative.

For many years we have sought an opportunity to have our members concerns given a public platform – to help end a system we believe presents a threat to their health and long-term interests.

This submission – and the evidence we will present to the committee – intends to highlight how the safety and wellbeing of average employees is being compromised by Australia Post's injury management approach. To give a quick snapshot, we are concerned about the following:

- The moment Australia Post employees advise management that they are suffering from a workplace injury or illness these employees are forced to visit a doctor paid for by Australia Post (referred to as a Facility Nominated Doctor, FND).

- The evidence shows that around 4,000 referrals are made annually to FNDs. Further, these FNDs will make a fitness for duty assessment that recommends a return to work in over 90% of cases.

- If an employee turns to their family doctor for treatment and that family doctor recommends recuperation or alternative treatment, Australia Post will decline the employee's workers' compensation claim, preferring instead the advice of the FND. This sends a signal to employees that if they visit their own doctor they may be financially disadvantaged

- The CEPU says that this is done to manipulate Australia Post's workers' compensation statistics. To provide further impetus to the drive to cut these figures, Australia Post rewards its management team for lowering Lost Time Injury rates through remuneration bonuses – indirectly funded by the reduction in workers' compensation costs.

Through the evidence to be provided, we also want to put a spotlight on some other examples of a system that is neglecting employee wellbeing, including:

- Employees being required to immediately attend an FND even though the treating doctor has prescribed rest at home;
- FNDs advice used to override medical certificates and return to work programs of family or treating doctors;
- Supervisors contacting FNDs and treating doctors to persuade the doctors to return an injured employee back to work prematurely;
- Confidential and personal information about an injured employee becoming available to people unauthorised to have this information;
- Employees being forced to attend numerous FNDs for the 'right' assessment, what we label as evidence of "doctor shopping";
- FNDs providing treatment when they are not the treating doctor and have been engaged by Australia Post to provide a report on the employee for Australia Post;
- FNDs misdiagnosing and/or more serious complaints remaining undiagnosed;
- Australia Post trying to present FNDs as GPS with "special knowledge", superior to the treating doctors;
- Claims denied when employees follow the advice of their own treating doctor not to return to work or to return to work on restricted hours;
- Supervisors telephoning and/or appearing at injured workers homes pressuring them to attend the FND;
- Work-related injuries deemed no longer compensable and employees dealt with under the Australia Post Non Work-Related Injury Policy leading to termination of employment ;
- FNDs gathering evidence through compulsory attendance to be used against the injured employees;
- FNDs not disclosing their role is to obtain evidence of fitness for use by Compensation delegate; and,
- Post breaching Comcare and own policies.

Why have this inquiry?

This is an important question.

Why do we need to have the Senate hold an inquiry into the injury management approach being utilised by a government owned corporation?

Australia Post has used FNDs for many years – but it made a dramatic shift in direction in July, 2006.

It did so because the then Australian Industrial Relations Commission in May 2006 ruled that the corporation could not operate this injury management approach – because Australia Post's was breaching its own industrial awards in doing so:

> *"Australia Post's entitlement* (under the award) *to arrange and direct an attendance at a medical examination with an FND does not extend to workers' compensation or sick leave applications" AIRC, May 2006 (see attachment 1).*

At that point, Australia Post did what few other companies in this country have the ability to do – it turned to its own legislation and activated a power that lies embedded within section 89 of the *Australian Postal Corporation Act 1989*.

It is important to bear this in mind:

- Australia Post legitimised its introduction of a network of facility nominated doctors, that would make over 90% of injured or ill employees get back to work quicker and help bring Post's workers' compensation costs down, by relying on the following clause:

AUSTRALIAN POSTAL CORPORATION ACT 1989 - SECT 89
Staff

(1) Australia Post may engage such employees as are necessary for the performance of its functions.

(2) **The terms and conditions of employment shall be determined by Australia Post** (our emphasis)

These sparse words allowed Post to unilaterally introduce an injury management approach in a way few other employers could. It is an appalling abuse of its legislative powers.

The CEPU has opposed this approach every step of the way.

After arguing for years about this with Post, senior management – during recent enterprise bargaining negotiations – asked us to re-submit our objections.

The CEPU wrote to Post on 7 October 2009 and outlined in plain terms what our objections were. We have attached a copy of our letter (see attachment 2).

If one believed that all the evidence provided to Post, all the arguments made and the pleas submitted to change this system of work were carefully considered by the corporation, one would only need to read their 15 October response to our 7 October letter to have all doubt removed.

This letter is attached, but we quote the following paragraph to help answer the question that underpins this section of our submission, "*Why have this inquiry*?":

> "While your letter does outline your workers' compensation issue, it continues to claim that the FND system is fundamentally flawed and the whole program should be shut down. In circumstances where the FND network has the support and endorsement of the independent regulator Comcare and our program of assisting people to return to work as safely and quickly as possible has been referred to as 'best practice', we do not consider CEPU's continuing claims to close down this system to have merit… In these circumstances, **we do not consider that there should be any changes to the FND process**. (our emphasis added)"
>
> *- Australia Post Group Manager Corporate Human Resources to CEPU, 15 October 2009 (see attachment 3)*

Of all the issues represented and dealt with by trade unions, none is treated with more seriousness or given such overwhelming prominence and importance as health and safety.

We have tried to do everything possible to improve the protections available to our members from this unsafe injury management approach.

We now turn to the Senate in the hope that our members can have their concerns legitimately aired and fairly considered.

Relevance to Terms of Reference

The CEPU Communications Division welcomes the opportunity to make a submission to this Inquiry. The Terms of Reference of the review invite comments and recommendations, among other things, on:

The practices and procedures of Australia Post over the past three years in relation to the treatment of injured and ill workers, including but not limited to:

1. allegations that injured staff have been forced back to work inappropriate duties before they have recovered from workplace injuries:

2. the desirability of salary bonus policies that reward managers based on lost time injury management and the extent to which this policy may impact on return to work recommendations of managers to achieve bonus targets:

3. the commercial arrangements that exist between Australia Post and InjuryNet and the quality of the service provided by the organisation:

4. allegations of Compensation Delegates using fitness for duty assessments from Facility Nominated doctors to justify refusal of compensation claims and whether the practice is in breach of the Privacy Act 1988 and Comcare policies:

5. allegations that Australia Post has no legal authority to demand medical assessments of injured workers when they are clearly workers' compensation matters:

6. the frequency of referrals to InjuryNet Doctors and the policies and circumstances behind the practices:

7. the comparison of outcomes arising from circumstances when an injured worker attends a facility nominated doctor, their own doctor and when an employee attends both, the practices in place to manage conflicting medical recommendations in the workplace; and

8. any related matters.

Key Recommendations

The CEPU would make the following key recommendations for the consideration of the Committee:

1. An end to employees being forced to attend FNDs – it should be entirely on a voluntary basis and Clause 10 of the Principal Determination should be repealed.

2. An end to the use of threats of disciplinary action to compel employees to not exercise their free choice to attend their own treating GP instead of a FND.

3. A recognition by Australia Post that employees can elect to see their own treating GP, without threat or disadvantage to their rights. We contend that treating GPs have a far better understanding of their patient's medical history and capabilities. These GPs have equal and requisite qualifications to their FND counterparts. We further contend that no reasonable person could accept that a one hour training/familiarisation course better equips FNDs to understand Post's systems and processes than compared with a "non-FND trained" GP.

4. Australia Post should comply with Comcare's jurisdictional advice and ensure that FND fitness for duty assessments are no longer used for compensation related-purposes (other than involvement specifically mandated under s.57 of the *Safety, Rehabilitation and Compensation Act 1988 (Cth)*.

5. That section 89 of the *Australia Postal Corporation Act* be amended to ensure that if Australia Post accesses this legislative power it does so in a way that is consistent with workplace law – and that its employees will be **better off overall** as a result of the corporation utilising section 89.

6. That if any injured worker voluntarily attends an FND, the FND must disclose
    - That he/she is paid by Post
    - That he/she acts for Post
    - That he/she may take down everything said and seen
    - That he/she may use that information against the injured worked in any court or tribunal
    - That he/she cannot proceed unless the injured worker signs a written authority containing this disclosure
    - That the employee may leave without being assessed and/or treated.

7. That remuneration outcomes for managers not be linked to reductions in LTIs – providing safe work places should be a fundamental priority for any manager, without the enticement or inducement of financial reward.

If it assists the Committee, we have structured our submission to align neatly with the Terms of Reference.

TERM OF REFERENCE, no. 1:

"Allegations that injured staff have been forced back to work inappropriate duties before they have recovered from workplace injuries."

As a consequence of working for a government owned corporation, our members in Australia Post are covered by the *Occupational Health and Safety Act 1991 (Cth)* (OHS Act) and the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

Australia Post is a self-insurance licensee under the provisions of the SRC Act.

The usual course for work-related injuries is for an employee to immediately see their treating doctor first and then get a medical report if necessary.

This allows the employee to be attended to and advised on what to consider in terms of necessary treatment and rehabilitation to enable a speedy return to full duties or pre-existing condition.

Following this, where practicable, an employee must submit a claim for workers' compensation, and a decision will be made by the Post delegate as to whether to support or deny the claim. In some instances, and entirely consistent with section 57 of the SRC Act, Australia Post can refer the employee to a medical practitioner (invariably a specialist) of its choice to obtain an alternative assessment and/or medical opinion.

But this is not the way things work in Australia Post.

Under Australia Post's approach, injured workers must attend the FND for assessment. Failure to attend exposes the employee to risk further injury to employment via disciplinary action.

Australia Post denies this.

We draw the Committee's attention to the following quote from a letter received by a member of ours (we seek the employee's name to be kept confidential). We quote directly from the correspondence, which is a standard letter to employees in this situation:

> *"Therefore you are directed to attend the above appointment under clause 10 (a, d and e) of the Principal Determination." (Australia Post letter, September 2008 – see attachment 4).*

The quote refers to the Principal Determination introduced by Australia Post.

Principal Determinations are instruments that can be used by Post using its powers under section 89 of the *Australian Postal Corporation Act 1989*, as earlier quoted.

The Principal Determination relevant to this Inquiry states:

Clause 10: fitness for duty

(a) Australia Post may direct an employee to:
  (i) obtain and furnish to Australia Post a report from a registered medical practitioner concerning a medical assessment of the employee's fitness to perform all or part of his or her duties; and/or
  (ii) submit to a medical examination by a registered medical practitioner determined by Australia Post, for the purpose of a medical assessment and a report to Australia Post concerning the employee's fitness to perform all or part of his or her duties.

(b) If Australia Post considers that an employee is incapable of performing duty or constitutes a danger to other employees or the public due to the employee's state of health, Australia Post may direct the employee to:

  (i) obtain and furnish to Australia Post a report from a registered medical practitioner; or
  (ii) submit to a medical examination by a registered medical practitioner determined by Australia Post.

(c) On receipt of the medical report provided in accordance with clause 10(b), the employee may be directed to take sick leave for a specified period, or, if already on sick leave, or other leave, the employee may be directed to continue on leave for a specified period, and the absence shall be regarded as sick leave.

(d) An employee to whom a direction is given under clause 10(a) or 10(b) must comply with the direction.

(e) Where an employee fails to comply with a direction under clause 10(e) or 10(b) without reasonable cause, the employee may be subject to the Employee Counselling and Discipline Process and the fees payable for the examination may be charged against the employee and deducted from salary.

Note sub-clauses (d) and (e) – which not only compel the employee to attend, but if they refuse the employee can be charged for the cost of attending the FND.

It is clear that Post directs its employees to attend the FNDs if they sustain an injury or experience illness while in the workplace.

The next matter to establish is the impact of this decision, reflecting on the outcomes flowing from such a decision.

Attachment 5 contains a series of examples demonstrating how individual employees have been affected by this approach[1]. A sample – and not all – of the case studies are summarised below:

"Angela"

- Accepted directions to attend an FND for assessment and treatment.
- As a result has no independent medical evidence to support her claim.
- Was not told by the FND that he would represent Australia Post in any legal proceedings.
- Was not told by the FND that everything she said and disclosed would be taken down and used against her in any legal proceedings.
- Was not told to obtain independent legal advice.
- Faced dismissal because she was later deemed unfit to perform duties.
- Was forced to see two company doctors within seven days - with the doctors providing opposing assessments.
- Post knowingly abused the system by using one opinion to refuse Angela's compensation claim and the other contradictory opinion to direct her onto indefinite sick leave.
- Was represented by our NSW P&T Branch to help protect her employment status, with assistance from our Divisional Office.

"Rodney"

- Cut his hand at work and required stitches.
- Was harassed to attend FND but went to family doctor who recommended time off work.
- Eventually went to FND who even mentioned Post's focus on reducing LTIs while assessing Rodney.
- Was unlawfully threatened that if he did not attend an assessment from a FND it would affect his compensation claim.
- The workers' compensation delegate preferred the opinion of the FND. Rodney was forced to take sick leave to keep the manager's LTI down – but sick leave is paid at a lower rate than what would be paid if determined to be a compensable event.
- Despite an absence from work for a number of days with an obvious and admitted work related injury, Post documents indicate no LTI.
- Was represented by our Tasmanian Branch to help protect his employment status, with assistance from our Divisional Office.

[1] Real names not used in the public submission. The public submission provides details of the cases without inclusion of the actual names of affected employees, managers or medical practitioners – however detailed information has been provided in confidence to the Committee

"Len"

- Was directed (unlawfully) to attend a FND under the Principal Determination when the SRC Act clearly applied and procedures for medical appointments under that Act were not used.
- Was reminded by the manager that this was needed to avoid LTI.
- Based on the scheme at Post, Len was denied full compensation.
- Was represented by our NSW P&T Branch, with assistance from our Divisional Office.

"Graham"

- Was directed (unlawfully) to attend a FND under the Principal Determination when the SRC Act clearly applied and procedures for medical appointments under that Act were not used.
- The FND agreed with the treating doctor that he should have two days rest.
- The FND could not issue an opinion until he spoke with the Manager.
- Not surprisingly meaningful work was found for a truck driver (later found to be watching TV) and the LTI could be avoided.
- The compensation delegate preferred the opinion of the FND and refused to accept liability for the compensation claim.
- Was represented by our NSW P&T Branch, with assistance from our Divisional Office.

"Ron"

- During duties on a Friday was knocked off his motorcycle by a van - but continued his delivery run to completion.
- Was taken to a FND, diagnosed as having bruising of his leg and told he could come back to work on Monday - sidestepping the need to record an LTI.
- Was in considerable pain and took himself to hospital.
- The hospital diagnosed a fracture in his leg and was directed off work for five weeks.
- Was assisted by our South Australian Branch.

"Mike"

- Works at the Perth Mail Centre. Suffered a workplace injury affecting his left leg
- Completed his shift, returned to work the next day but after experiencing continued pain completed an incident report.
- Was told to go to FND, who took the view that it was just bruising and he should get physiotherapy.
- He was directed back to work within two days.
- Returned to the FND a week later. Mike was told the FND he was about to take leave for an overseas trip and asked if international travel would be permitted. The FND said this would be safe to do.
- Continued pain forced Mike to have an MRI scan which revealed a blood clot, prompting the treating doctor to take the view that air-flight could have contributed to a serious risk of amputation or loss of life.
- Was assisted by our Western Australia Branch.

“Wilma”

- Twisted her ankle on steps within the Underwood Mail Centre.
- In significant pain. Treated in first aid room. Taken to FND.
- Had trouble even walking into Doctor’s surgey. Doctor did not un-bandaged foot to examine affected area. Doctor prescribed two pain killers, recommended physio and return to work with no time off and on restrictions.
- Returned immediately to work but in such pain had to leave work.
- After weekend of pain, Wilma took herself to her treating doctor – who determined she had a fracture in her foot requiring plaster – and nine weeks off work.
- Was assisted by our Queensland Branch.

“John”

- Injured falling off his motorcycle - suffered concussion and serious wrist injury.
- Directed to a FND. FND not available so referred to another doctor at the same practice, who recommended two days off work to recover.
- While recovering Rick was directed back to the original FND, who asked Rick if “you could go to work and swipe on for an hour, you won't be expected to do anything?"
- After the condition worsened without further treatment by the employer's FND, Rick visited his own specialist who placed him in a cast from knuckle to shoulder and found him unfit for work for a month.
- Was assisted by our NSW P&T Branch.

“Paddy”

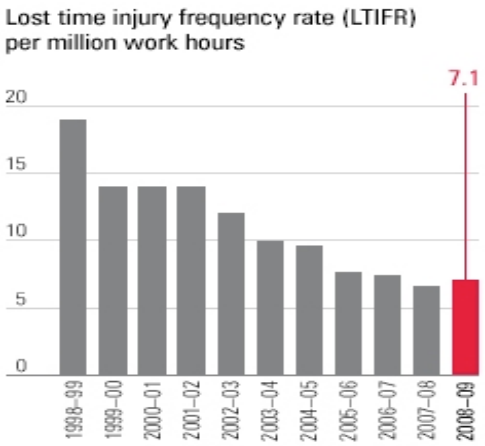
- Paddy suffered a “lumbosacral spinal strain” to the lower back. His treating doctor recommended two weeks recovery.
- Was directed to attend an FND, who agreed that he suffered the medical condition diagnosed by his treating doctor.
- The FND found him fit to attend for work with restrictions where as his treating doctor found him unfit.
- Post's workers compensation section preferred the medical opinion of the FND to his treating doctor, noting that Norm could have worked with restrictions - such as not lifting anything over 2kg.
- Was assisted by our NSW P&T Branch.

TERM OF REFERENCE, no. 2:

"The desirability of salary bonus policies that reward managers based on lost time injury management and the extent to which this policy may impact on return to work recommendations of managers to achieve bonus targets."

Because of the repetitive nature of much of the work carried out by postal employees across the world, workplace injury and safety is a matter of constant concern.

Australia Post regularly boasts that it has made tremendous inroads into reducing its Lost Time Injury (LTI) rate. The graph below is reproduced from Australia Post's Annual Report 2009.

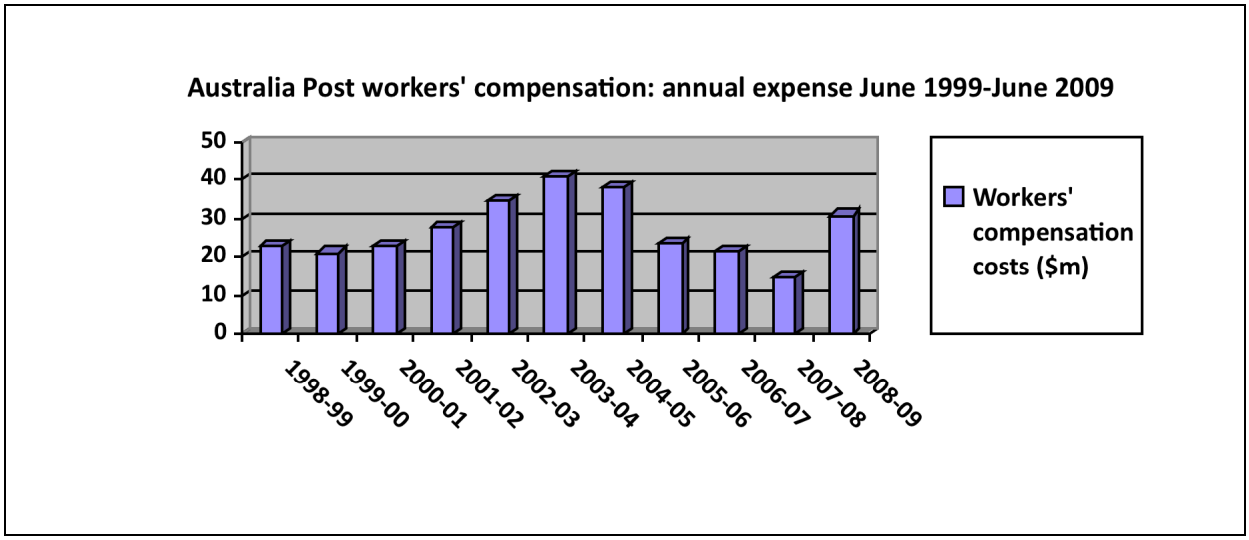


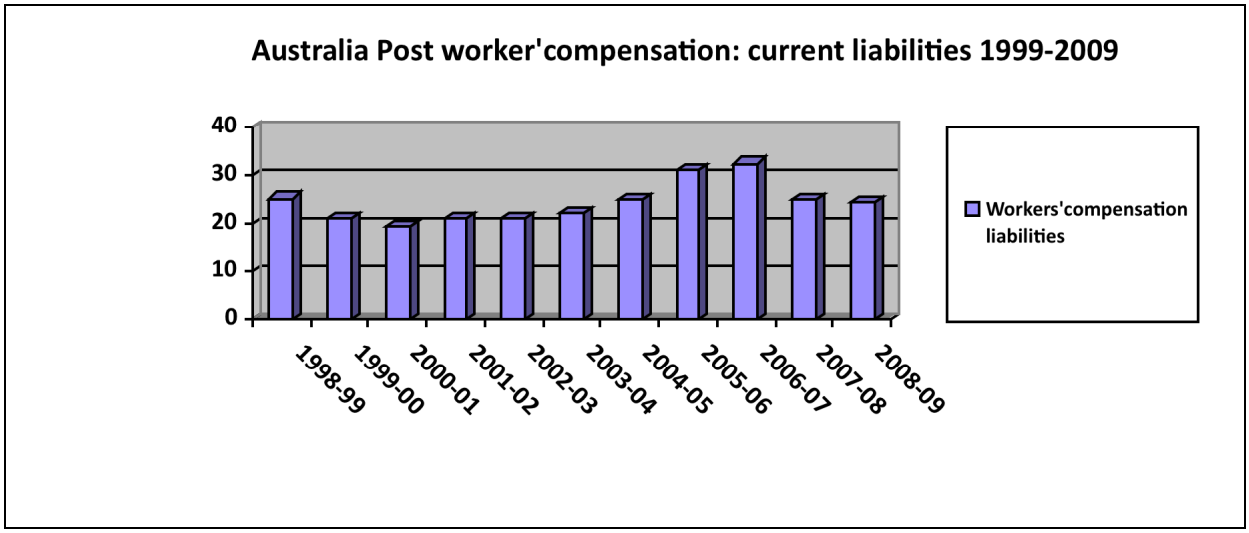
However, while the CEPU acknowledges that some of this LTI reduction is attributable to some improvements to work processes, we would also submit that the major driver for this drop is statistical manipulation.

By introducing its FND system, Post can compel employees to attend a FND and then the FND – in 9 out of every 10 cases – finds an employee is able to remain at work irrespective of restrictions preventing gainful employment in turn adversely affecting proper rehabilitation.

> Senator CONROY- … In a case currently before the AIRC, I understand that the commissioner has heard evidence that in New South Wales when an injured worker is referred to the facility nominated doctor for treatment, six per cent of patients are found to be unfit for duty. If an injured worker goes to their own GP, 95 per cent are found to be unfit. That seems an extraordinary range, wouldn't you say? It is a huge difference in outcomes.
>
> *- Senate Hansard, 13 February 2006*
> *(see attachment 6)*

What has this done to Australia Post's workers' compensation costs?





Australia Post has admitted that it's saved $64 million in workers' compensation costs over ten years[2]. The big reduction in workers' compensation annual expense and current liabilities illustrated in the above graphs coincides with the introduction of Australia Post's Fitness for Duty Determination, made pursuant to s.89 of the *Australian Postal Corporation Act 1989*.

For some time the CEPU has argued that the additional driver to the reduction in LTI rate is that managers are measured on their performance in lowering LTIs in areas they are responsible for. This was denied by Post. On 29 September, 2009, Australia Post's Manager, Employee Relations, admitted publicly:

[2] Manager Human Relations, Australia Post quoted on 7.30 Report – 29 September 2009 (see attachment 7)

CATHERINE WALSH: Certainly when we're looking at the bonuses, as I said, (inaudible) will be one component. But how safety's managed across the workplace, including prevention of injury in the first place, so making sure accidents don't happen, making sure maintenance is properly carried out - all of those things will be a factor in saying, "This manager is managing safety well."

REPORTER: So LTIs are part of the bonuses system.

CATHERINE WALSH: Sure.

7.30 Report, ABC TV
29 September, 2009

How does this translate into workplace behaviour by managers, conscious they are being measured on their performance and ability to reduce LTI's?

The *Melbourne Herald Sun* on 9 October 2005 reported on 'an incident of an Australia Post manager reportedly bickering with a doctor over the recovery time needed by a postie who had sustained a broken leg from a work-related a motorcycle accident. Three posties who had broken legs in accidents were made to return to office work in two days.'

'SAM': They just said that I was - I was a wuss, and that I'd be back at work the next working day. He did explain that to the manager that it was broken, and the manager still argued with the doctor. The doctor said, "Well, he's not faking it. He can't fake an X-ray. It's broken."

Australia Post employee "Sam"
7.30 Report - 29 September, 2009

"I came to work on Tuesday 19 August (2008) and was advised by (supervisor) that (employee) indicated to him that he would not be attending the appointment (with FND) based on advice by the CEPU. I rang (employee) at home later in the morning to clarify his situation … I advised (employee) that it was compulsory to attend after discussing it with (supervisor) and that he (worker) would face disciplinary action if he chose to not attend and advised that it may jeopardise the determination of his (workers' compensation) claim. I emphasised that this was not a threat…"

- *witness statement by Australia Post Manager, Launceston Delivery Centre, Carolyn Webb - 21 August 2008 (see attachment 8)*

Another incident that the CEPU was alerted to involve a postie on a motorcycle who was knocked down on the footpath by a resident reversing out of the driveway. The Postie was unconscious. The resident called the ambulance. The postie regained his faculties after a short while and soon called management. A supervisor attended the site and visited our member. The supervisor cancelled the ambulance and got the postie to finish his mail delivery. This story was told back to us by Comcare, who was also made aware of this incident.

TERM OF REFERENCE, no. 3:

"The commercial arrangements that exist between Australia Post and InjuryNet and the quality of the service provided by the organisation."

The CEPU was first advised of Australia Post's intention to introduce its Injury Management (Early Intervention) Program in October 1999. It did not take long for issues to emerge with this new system.

On 6 June, 2000, the Senate began to hear about problems with the way Australia Post was managing injured and ill workers. Hansard records:

> Senator CONROY- … Australia Post's Injury Prevention Unit (is) managed by Mr Anton Grodeck, who originally worked for Comcare.
>
> The Injury Prevention Unit has established a network of doctors identified as facility nominated doctors. It appears that the role of these facility nominated doctors has been to see employees who present at work with a medical certificate for either restricted duties or time off work from their personal doctor.
>
> …. It is worth noting that Mr Anton Grodeck has placed a close business colleague and friend in charge of maintaining the network of facility nominated doctors. Dr David Milecki is the man Anton Grodeck relied upon to handpick the doctors willing to do whatever it takes to meet Australia Post's demands to reduce workplace injury claims. He is also the man Mr Anton Grodeck calls upon to remove from the list a doctor who is unwilling to meet Australia Post's desired outcomes."

An Australia Post FND is a Doctor that is part of a private organisation that has a commercial contract with Post to "*assess and treat*" injured workers, to "*assist"* their return to work.

The organisation is called "InjuryNET" and the sole shareholder is a Dr David Milecki.

InjuryNET has a contract with Post. There was no formal tendering process for this contract.

The details of the contract and payments to InjuryNET are commercial in confidence, and not open to public scrutiny. The InjuryNET web page sets out the KPI of the company:

"How is network performance measured?

Key Performance Indicators include:

- Lost Time Injury Rates
- Lost Hours
- Duration until return to pre-injury duties or permanent alternate duties " [3]

The "effectiveness" of the FND scheme can be judged from the following statistics discussed in Senate Estimates hearings (refer page 14 of this submission):

Unfit for Work

If injured worker referred to OWN Doctor	95% deemed unfit for work
If injured worker referred to FND Doctor	6% deemed unfit for work

No one has been able to explain this massive difference in medical opinions, other than to make the obvious conclusion that one group is grossly biased.

InjuryNet is driven by a commitment to reduce LTI. It has a commercial contract with Post that is based on – as evidenced by that firm's public information – reducing LTIs at Post.

The case studies provided as part of this submission – where these is misdiagnosis or evidence of advice recommending premature return to work – does not help establish the "quality" of the service provided by InjuryNet unless, or course, the basis of measuring the "quality of service" is confined to how well InjuryNet aids Post in its ambition to reduce LTIs.

[3] http://www.injurynet.com.au/html/practitioners.cfm (see attachment 9)

TERM OF REFERENCE, no. 4:

"Allegations of Compensation Delegates using fitness for duty assessments from Facility Nominated Doctors to justify refusal of compensation claims and whether the practice is in breach of the Privacy Act 1988 and Comcare policies."

Australia Post employees have little choice – they must visit a FND if directed. The FNDs in over 90% of cases send that employee back to work – even if it is to watch TV in a work lunchroom.

But if an employee follows the advice of a family doctor to take time off from work to recover and recuperate, what happens?

When the employee submits the official paperwork indicating that they experienced an incident or injury at work – known as a P400 or workers' compensation claim – it is referred to an internal workers' compensation delegate.

The delegate considers the advice of the family doctor and the FND – then issues a determination whether to accept liability for the injury/illness and liability for treatment costs and loss of time (Normal Weekly Earnings):

> "Given (the FND's) knowledge of the availability of suitable duties at your workplace, and Australia Post's capacity to provide suitable duties, (FND's) opinion is preferred and you are therefore considered to have been fit for suitable duties… (our emphasis)"
>
> *Australia Post compensation delegate*
> *Ann Lewis, 19 August 2008 (see attachment 10)*

This is not a one off – below is Hansard from Senate Estimates (13 February 2006):

> Senator CONROY - Let me read to you from a letter from Tanya MacGregor for Australia Post compensation which says:
>
> > "Australia Post prefers the opinion of Dr Sim - Dr Sim is identified as an FND - as he is conversant with Australia Post's practices, workplace duties and reviewed on the date of incident."
>
> It is quite clearly stated here in a letter to one of your employees that you prefer the opinion of your FND (our emphasis).

> "In this case I have preferred the opinion of (FND) as he is trained in the type of duties available for injured workers within your facility (our emphasis)."
>
> *Australia Post Claims Manager*
> *G.Clark, 22 September 2008 (see attachment 11)*

FNDs were first introduced within Australia Post to undertake fitness for duty assessments.

We recognise that Fitness for Duty assessments are necessary from time to time.

The ability to undertake these assessments is established within our Award, providing the employer the right to undertake fitness for duty examinations in very limited situations. This protects employees from an invasion of their privacy and the Award provision is clearly designed to identify only a limited number of circumstances when an employer can cross that boundary.

The award contemplates a number of situations that might give rise to the use of Fitness for Duty assessments:

- **Clause 26.5.10(a): may be unfit or incapable of discharging duties;**
  This provision covers the situation where a person is at work, or is returning to work, and Post believe that the person cannot carry out the particular duties .

- **Clause 26.5.10(b) may be a danger to other employees or members of the public due to state of health;**
  This provision covers the situation where a person is at work, or is returning to work, and Post believe that the person's health may be a threat to others. Examples of the situations where an employer might demand a medical certificate would be:
  - Where an employee is at work affected by alcohol or drugs and may be a danger to others
  - Where an employee is obviously ill at work and may be a danger to others
  - Where the employee has a suspected contagious illness.

- **26.5.10(c) has been absent through illness for a continuous period exceeding 13 weeks;**
  This covers a situation where a person is not at work, and is on sick leave exceeding 13 weeks.

- **26.5.10(d) has been absent through illness and the authorised employee believes that the employee is not fit to resume duty.**
  This provision covers the situation where a person is not at work, is planning to return to work, and Post believe that the person cannot carry out the particular duties. The employer might have a concern, for example, the employee is returning for economic reasons. That is, the employee has run out of sick leave and cannot afford to stay on sick leave without pay. This might be a danger to other employees.

While these are sound, common-sense reasons to undertake such assessments, the critical turning point – which we draw the Committee's attention to – is July 2006. This is when Australia Post used its powers under its governing Act – the *Australian Postal Corporation Act 1989* – to compel employees to visit FNDs for treatment.

We argue that Post did this because the AIRC took the view that the Award based Fitness for Duty provisions do not allow an employer to gather evidence for workers' compensation or simple sick leave matters.

It certainly does not allow an employer the right to demand same day fitness for duty examinations when an employee is injured.

As indicated earlier, these assessments are being used by workers' compensation delegates to make decisions on whether to accept or deny liability. Why is that a problem?

Comcare considered the inter-relationship between fitness for duty assessments and workers' compensation some time ago. It has brought down a view on how this inter-relationship should best operate. We quote directly from Comcare:

> "If information regarding an employee's medical condition is collected for an employment related purpose (for example, to record absences from work or to assess their fitness for duty) it should not, in principle, be used for a compensation-related purpose (for example, to support a decision to continue or cease liability)."
>
> *Comcare jurisdictional policy advice No. 2000/05*
> *Application for "Fitness for Duty" provisions (see attachment 12)*

Given this advice was introduced nine years ago, the CEPU believed there was reason to double check if this advice had been updated. As of November 2009, the Comcare website informs the public that this advice is current. There must be something compelling in this advice, therefore, that allows it to withstand the passage of nearly a decade without change.

Further, on Comcare's website visitors can find additional information in the section titled "The treating doctor's interactions with other stakeholders" which states among other things:

> *"An injured employee is entitled to seek treatment from the medical practitioner of their choice. The employee's choice of doctor cannot be overruled by the employer, the case manager or rehabilitation provider, Comcare or the employer's claims manager."* [4]

[4] http://www.comcare.gov.au/forms__and__publications/fact_sheets/?a=41165

At this point, therefore, it would be appropriate to inquire of the CEPU whether we raised this objection with the independent regulator.

On 18 November, 2008 the CEPU raised its objections about the FND system with Comcare.

Nine months later, on 11 August, 2009 Comcare – after reviewing our claims and Australia Post's response to our concerns (see attachment 13) – determined:

> *"In summary, without the benefit of auditing Australia Post's claim and case files, but after detailed discussions with CEPU officials and Australia Post managers, including examining IMP documentation Comcare can conclude that Australia Post's IMP has been established as a mechanism to effectively manage employees injured at work by adopting the best practice approach of making available, through an FND, early diagnosis and treatment of injures with an emphasis on matching an employee's current functioning to available duties in the workplace* (our emphasis)*."*

Why it took Comcare nine months to reach this conclusion without interviewing a single affected employee or examining – as it admits – any claim or case file is a matter that Comcare can address.

But what is noteworthy is that Comcare failed to examine how the use of FND fitness for duty assessments in workers' compensation decisions contradicts Comcare's own jurisdictional advice. Further, its 11 August response contains this admission:

> *"Australia Post acknowledges its IMP (Injury Management Policy) links to worker's compensation and it confirms that, once an employee's claim is accepted, the injury is managed under the SRC Act."*

The stark issue overlooked by Comcare is that the FND assessment – which more often than not recommends a return to work and is advice preferred by Post – is used to decline a workers' compensation claim, instantly barring any ability by an employee to have their injury managed under the SRC Act.

Australia Post has made much of Comcare's findings. They issued a Staff Information Bulletin crediting Post's systems as being "best-practice" (see attachment 14).

Remember, Australia Post used these findings to justify refusing to make any changes to this system:

> "In circumstances where the FND network has the support and endorsement of the independent regulator Comcare and our program of assisting people to return to work as safely and quickly as possible has been referred to as 'best practice', we do not consider CEPU's continuing claims to close down this system to have merit (our emphasis)."
>
> *Letter, Australia Post – 15 October, 2009*

Conveniently Australia Post misrepresents the position of Comcare which stated in its 11 August 2009 letter: "by adopting the best practice approach of making available, through an FND, early diagnosis and treatment of injuries with an emphasis on matching an employee's current functioning to available duties in the workplace." Comcare makes no clear and direct finding that the entire system is "best practice". The closest Comcare gets to this is to make the statement that the system is "designed to emulate" best practice. Hardly a conclusive position – and it's disingenuous for Post to suggest otherwise.

Also convenient is how Australia Post fails to mention in its staff bulletins these direct quotes from Comcare's response, which warrant further investigation:

> "Australia Post admits there have been instances where employees have:
>
> - unfortunately been mis-diagnosed by one of its FNDs
> - where employees have been returned too early
> - on duties which have proved too ambitious
> - had pressure exerted on them by line managers to 'voluntarily' (Comcare's emphasis) attend an FND for treatment"
>
> "Australia Post has admitted to a number of instances where there have been shortcomings."

Two critical events are worth noting here:

- Firstly, from what we've been able to gather, Comcare has so far refused to publicly defend its position when invited to by the media.

- Secondly, after media reports critical of Australia Post's FND system appeared, Comcare began its audit of Post's self insurance licence – which it previously told the media would not occur until 2010 [5].

[5] ABC TV's 7.30 Report – 29 September 2009, p.4 (transcript)

The CEPU responded vigorously to what amounted to no more than, what we argue, was a 'desktop' investigation of the serious claims put to Australia Post (see attachment 15). We believe Comcare has seriously erred in taking such a public position on this system ahead of a thorough audit, one that has now been brought forward in response to public questions about this system.

The CEPU holds out little hope that the audit will comprehensively investigate these issues. Our pessimism is prompted by correspondence received from Comcare on 6 November 2009 (see attachment 16), which states:

> *"The audits are not able to examine the fitness for duty scheme devised by Australia Post under its 'Principal Determination' which you claim inappropriately gathers evidence, breaches privacy and encourages line managers through the payment of bonuses. However, where such a scheme operates to intersect or bring it under the OHS Act and SRC Act requirements of Australia Post as a self insurer, then it will be within the scope of the current audit program to consider those issues."*

Comcare has already contrived a means of making redundant the need to examine the impact of the Principal Determination on Post's ability to sidestep its workers' compensation responsibilities.

Comcare self-insurers, such as Australia Post, when compared to scheme contributing employers, on a percentage basis, accept less claims for compensation, have more appeals against self-insurer decisions lodged with the Administrative Appeal Tribunal (AAT), pay less compensation to injured workers and spend more money on legal, administration and regulatory matters. Reports tracing data spanning the last two years indicate that self-insurers have spent more money on administrative and regulatory costs than they have paid directly to injured workers [6].

Comcare self-insurers, such as Australia Post, do not have an independent intermediate body to review claim disputes. The dispute resolution occurs through a fully internal reconsideration process. Australia Post does its own reconsiderations or employees are forced through a litigious process at the Federal Administrative Appeals Tribunal (AAT). AAT cases are costly, lengthy and difficult to win for employees who do not have the resources that are available to big companies.

The system is coming under increasing criticism.

It has been argued that Comcare lacks the "accumulative knowledge built up in safety bureaucracies" to efficiently investigate and act on workplace incidents in, for example, the transport and construction sectors. Further Comcare rarely adopts a "collaborative approach to safety", which was in stark contrast to the "more pragmatic" approach taken in state jurisdictions where investigators traditionally liaised with workers, unions and employers - whether they were required to by law or not - immediately after an incident." [7]

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[6] Workplace Relations Ministers Council, Comparative Performance Monitoring Report, Tenth Edition, August 2008, page 24

[7] *"Comcare's non-collaborative approach puts employers and workers at risk: lawyer",* OHS Alert, Thomson Reuters - 15 September 2009

In respect of workers' compensation it is the union's view that it is critical that benefits payable under the Scheme and the processes by which claims are managed under the Scheme must be adequate and fair.

Again, the self-insurance scheme is found wanting. It's been argued that Comcare fails to provide "fair and just compensation": "If you are injured as a result of your employer's negligence and your employer is insured under Comcare, the maximum you will be entitled to is $110,000 for your pain and suffering, [compared] to $484,830 under Victorian WorkCover. While Comcare promises a reduced wage to retirement age [for workers with long-term injuries], schemes offering long-term payments are unsustainable and invariably lead to cuts to worker benefits."[8]

Under Section 104 2(c) of the SRC Act, the Safety, Rehabilitation and Compensation Commission in granting a licence must be satisfied 'the grant of the licence will not be contrary to the employees of the licensee whose affairs fall within the scope of the licence'.

Further, the union submits that self-insurance highlighted in this submission provides incentives for self-insurers to suppress claims and should be abolished.

The introduction of a network of facility nominated doctors (FNDs) by Australia Post to return injured workers to work for the purpose of avoiding lost time injuries is an example of a scheme to suppress claims. With respect, if the Government chooses it can abolish self-insurance. Current licensees hold their licence for a finite period with no guarantee of renewal.

For all the reasons mentioned above the union submits that self-insurance is undesirable, in-principle. Self-insurers generally have not demonstrated achievements of the highest levels in workplace safety, claims management and occupational rehabilitation. Indeed self-insurers like Australia Post have designed deliberate schemes to interfere with the legislative Scheme at work because they have an incentive to do so. This must be addressed.

Deliberate schemes that are designed to interfere with the legislative scheme, such as the Australia Post FND scheme, must be eliminated.

The other issue that concerns us relates to privacy and the way in which employees' medical information is obtained and shared within Australia Post.

An exchange held with Australia Post during a Senate Estimates hearing on 22 May 2006 clearly highlights the serious issues presented by Australia Post's compulsion of attendance at a FND practice:

[8] ibid.

Senator CONROY-- The point I am trying to get to, which I am sure will become obvious, is that you have directed under threat of disciplinary action employees to go to your doctors. Then, when they get there, they are told that their information can be passed on.

Mr (Rod) McDonald (Australia Post) – It is a provision we have on our form that they sign.

Senator CONROY – But you have directed, under threat of disciplinary action, that they attend. Therefore, by definition, they must sign this form. There is no genuine consent there. Would you agree?

Mr McDonald – That is because there is an award provision that we believe gives us the right to send people in those situations.

The most critical observation is dramatically made later in the hearing:

Senator CONROY – Let us just work this through. You have directed your employee under threat of disciplinary action to attend your company doctor. You have then made them sign a form giving consent – and I do not think you can actually make someone sign a form to give consent. By definition, that is not reasonable. And then the information that has been collected has not only been passed back to Australia Post for general information but has been used against the employees by management in workers' compensation claims. So illegally collected medical information is then used to undermine a workers' compensation claim by the employee. That sounds like a serious problem. Put aside the privacy law, which I dealt with a few minutes ago. Now we are moving onto the fact that you have illegally collected information and then used it against your own employees when they have made a workers comp claim.

Mr McDonald – Under the workers' compensation provisions, we are entitled to use whatever medical evidence the workers comp–

Senator CONROY – Providing it has been given with consent.

Mr McDonald – No, evidence that the workers compensation delegate believes is necessary.

But this is a convenient re-interpretation of the law because the construction of Post's injury management process – compelling employees to visit an FND ahead of submitting a formal claim – allows the corporation to gather information before the formal consideration of a compensation claim lets the workers' compensation delegate to subsequently decline the claim.

While not covered by this inquiry, the position of Comcare should be reassessed. It has conflicts of interest. It is a type of insurance company, yet it is a regulator. It regulates itself and its competing self-insurers.

TERM OF REFERENCE, no. 5:

"Allegations that Australia Post has no legal authority to demand medical assessments of injured workers when they are clearly workers' compensation matters."

The Principal Determination was amended following the decision of Senior Deputy President (SDP) Drake of the AIRC in 2006. Attachment 17 sets out the source material.

SDP Drake found that clause 26.5.10 of the Award could not be used to obtain fitness for duty certificates for persons who were injured. The Award was limited to four particular circumstances discussed earlier, and was clearly designed to "cover the field" by limiting the opportunities for an employer to pry into the personal health of employees.

Post then introduced a "fitness for duty" clause into the Principal Determination, which purportedly overrides the Award provisions.

First, this is clearly a breach of the enterprise agreement known as EBA6:

> *… the parties agree not to seek a variation to the Award in relation to fitness for duty examinations (Clause 26.5.10 of the General Conditions of Employment Award 1999).*

The clause in the Determination is a clear (attempted) variation to the Award provision.

There is clearly a conflict between the Award and the Principal Determination. The Award is clear where there is a conflict:

> *Where a determination is inconsistent with the provisions of this award, the latter will prevail.*

The Determination cannot operate. Thus any use of the Principal Determination is an unlawful use.

Determination void "ab initio"

The Principal Determination is an administrative decision that is subject to the *Administrative Decisions (Judicial Review) Act*. The Regulations do not exempt section 89 of the *Australian Postal Corporation Act*. The decision was issued secretly, without any person or representative having an opportunity to be heard. It was a clear breach of the rules of natural justice.

There are instances where the Principal Determination is activated in a way to balance the commercial needs of the business and the circumstances of its employees.

The new *Fair Work Act 2009* has introduced the concept the "Better Off Overall Test" in helping managing change to employee terms and conditions. It allows businesses – with legitimate commercial imperatives – to approach employees and recommend changes to terms and conditions to help better manage workplace requirements.

However, if employees agree to such changes – and these changes impact on their terms and conditions – then the employer must ensure that the employee is "better off overall".

The CEPU believes that this test should be incorporated in some shape or form within section 89 of the *Australian Postal Corporation Act 1989*. This will ensure employees are not adversely affected by Post unilaterally exercising a power that is available to it to set employee terms and conditions of employment – in a way that few other employers can.

TERM OF REFERENCE, no. 6:

"The frequency of referrals to InjuryNet Doctors and the policies and circumstances behind the practice."

The comments provided within this submission under responses to the Terms of Reference items No 3, 4 and 7 – in large part – provide information to address Terms of Reference no 6.

TERM OF REFERENCE, no. 7:

"The comparison of outcomes arising from circumstances when an injured worker attends a facility nominated doctor, their own doctor and when an employee attends both, the practices in place to manage conflicting medical recommendations in the workplace."

Over a period of 2 years between 2003 and 2005 there were 8,000 referrals to FNDs. The cost of this service during this period was estimated to be $1.42 million[9].

Hansard later reveals further figures detailing the numbers of appointments booked for employees to attend Facility Nominated Doctors for all purposes, by State and nationally, for 2006/2007 and year to date for 2007/2008, which were as follows [10]:

	2006/2007	2007/2008 (to 31 May 2008)
HEADQUARTERS	60	43
NSW/ACT	1266	1150
VIC/TAS	1558	1283
QLD	851	980
SA/NT	236	290
WA	324	460
NATIONAL TOTAL	4295	4206

The authority/program under which these appointments were made, by State and nationally, for 2006/2007 and year to date for 2007/2008 were as follows[11]:

[9] Senate Environment, Communications, Information Technology and the Arts Legislation Committee Hansard, 13 February 2006

[10] Senate Standing Committee on the Environment, Communications and the Arts, "Answers to Estimates Questions on Notce" – Budget Estimates Hearings May 2008

[11] ibid.

2006/2007				
	Injury (Early Intervention) Management Program	**Fitness for Duty Assessments under Clause 10 of Principal Determination**	**Section 57 under Safety, Rehabilitation and Compensation Act**	**YEAR TOTAL**
HEADQUARTERS	49	11	-	60
NSW/ACT	1134	129	3	1266
VIC/TAS	1275	283	-	1558
QLD	849	1	1	851
SA/NT	232	1	3	236
WA	312	9	3	324
NATIONAL TOTAL	3851	434	10	4295

2007/2008 (to 31 May 2008)				
	Injury (Early Intervention) Management Program	**Fitness for Duty Assessments under Clause 10 of Principal Determination**	**Section 57 under Safety, Rehabilitation and Compensation Act**	**YEAR TOTAL**
HEADQUARTERS	38	5	-	43
NSW/ACT	1011	138	1	1150
VIC/TAS	1071	212	-	1283
QLD	974	6	-`	980
SA/NT	287	-	3	290
WA	430	29	1	460
NATIONAL TOTAL	3811	390	5	4206

The CEPU has operated under the belief that the FNDs have another indirect benefit to Australia Post.

Because it is widely known among our members that the advice of the FNDs is preferred by Post, we are of the view that this dissuades injured employees from pursuing claims through to the AAT – simply because employees know how heavily the odds are stacked against them.

There is certainly a way to gauge this impact – by obtaining data from Australia Post on the following:

1. The number of claims Post has denied (liability, time off work and medical expenses) on the basis of an FND for the financial years 2006 through to 2009;

2. The total number of cases Post has denied (be it on the basis of a medico-legal, FND or otherwise) (liability, time off work and medical expenses) for the financial years 2006 through to 2009; and,

3. The number of applications to the AAT (liability, time off work and medical expenses) for the financial years 2006 through to 2009.

It would be worthwhile establishing whether, in fact, employees do not bother in lodging AAT claims as they consider that Post's FND will always prevail regardless. This in turn may reveal, indirectly, how valuable FNDs are to Australia Post in discouraging employees from pursuing legitimate claims for compensation.

The other benefit for Post in this system, borne out by the evidence provided in Hansard, is that the FND – a GP – is used to knock out a workers' compensation claim without the need to refer the claim for a s.57 SRC Act referral. The figures clearly show how there are a trickle of s.57 referrals, compared to the FND directions.

- The benefit here comes in the form of cost – s.57 referrals are generally made to specialists, whose advice is considerably more expensive than the cost of a GP determination.

The evidence provided in this submission so far show how Post has been able to manage the conflict between treating doctor advice and that of the FND – the FND advice is preferred in over 90 per cent of cases. There is no conflict, when the figures speak so dramatically.