

Chapter 3

Key issues:

Attendance at Australia Post nominated doctors

3.1 The evidence presented to the committee during this inquiry raised a number of interrelated and complex issues regarding Australia Post's treatment of ill and injured workers. These included matters as diverse as the relationship between sick leave versus workers compensation leave, the contractual arrangements between Australia Post and InjuryNET, and appropriate treatment methods for injured workers.

3.2 The committee has distilled this evidence into three key issues which it considers to be the central concerns regarding Australia Post's injury management system:

- the confusion regarding when employees may and when they must attend a facility nominated doctor;
- the appropriate and legal use of facility nominated doctors' assessments; and
- the question of whether Australia Post employees are routinely being returned to work too early or on inappropriate duties.

3.3 These three issues are discussed in this, and the following two chapters respectively.

Voluntary and mandatory attendance at Australia Post nominated doctors

3.4 The committee received evidence from numerous Australia Post employees and the unions representing them¹, that Australia Post routinely compels employees to attend facility nominated doctors (FNDs) rather than their own doctors or specialists. The unions contended that this frequently occurs in circumstances where Australia Post does not have the legal authority to compel employees to attend FNDs.

3.5 The Communications, Electrical and Plumbing Union's (CEPU) submission summarised the practical implications of the practice. The CEPU first outlined the 'usual' process when a worker is injured:

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.

[Following an assessment by their treating doctor]...where practicable, an employee must submit a claim for workers' compensation, and a decision

1 The committee received evidence from the Communications, Electrical and Plumbing Union (CEPU) and the Communication Workers Union (CWU), which will be referred to as 'the unions' throughout this report when referring to both organisations.

will be made by the [Australia] 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.²

3.6 However, the CEPU submitted that this 'usual course' is not the way the injury management process works at 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.³

3.7 Australia Post submitted that there are two situations in which it is empowered to direct an employee to attend a medical assessment by an FND. According to Australia Post, the circumstances in which an Australia Post employee may be required to attend an FND are:

- (a) When directed under the SRC Act in relation to a compensation claim; or
- (b) When directed by an Australia Post manager for a fitness for duty assessment under the Australia Post Principal Determination (*Determination No. 6 of 2006*).⁴

3.8 Additionally, employees may voluntarily attend an FND under Australia Post's Injury Management (Early Intervention) Policy.

Voluntary attendance at an FND

3.9 The Injury Management (Early Intervention) Policy (EIP) was introduced by Australia Post in 1999 'as a mechanism to enable management to assist employees suffering from suspected work-related injury or illness'.⁵

3.10 The EIP program is intended to assist employees suffering from suspected work-related injury or illness to receive medical treatment as early as possible so as to maintain them at work within appropriate medical restrictions or facilitate their earliest return to work.⁶ Australia Post submitted that the following principles underpin the EIP:

2 Communications, Electrical and Plumbing Union (Communications Division), *Submission 10*, p. 9.

3 CEPU (Communications Division), *Submission 10*, p. 9.

4 Australia Post, *Submission 6*, p. 35.

5 Australia Post, *Submission 6*, p. 13.

6 Australia Post, *Submission 6*, p. 13 and Appendix 2 – Injury Prevention (Early Intervention) Program, p. 4.

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- An employee has responsibility to report as soon as possible any injury or illness which may affect work performance or safety of the employee or co-workers, and to actively seek appropriate treatment.
 - All Australia Post employees who report illness or injury, where the illness or injury may have been work-related, may participate in the EIP.
 - Participation in the program does not affect an employee's rights and entitlements to workers' compensation. All employees reporting an illness or injury will be advised of their rights and entitlements under the SRC Act.
 - Employees requiring treatment have the right to attend an Australia Post FND or a doctor of their choice. An employee can choose to accept or reject a recommended course of treatment by any treatment provider.
 - Where an employee chooses to attend an FND for treatment, limited medical treatment will be provided at Australia Post's expense.⁷
 - If an employee attends their own doctor, the cost of treatment is borne fully by the employee, unless liability under the SRC Act for the injury has been accepted by Australia Post.
 - Information on an employee's medical condition must be kept separate from other employee information and maintained confidentially. Access to this information is limited to those with a legitimate reason to know.
 - An Australia Post supervisor may accompany an employee to a doctor's surgery or hospital to support the employee and ensure that the doctor/hospital is aware of Australia Post's 'commitment to assisting employees to remain at work or return to work quickly and, to provide information on the range of tasks available to the employee'.
 - A supervisor accompanying an employee is not entitled to request or receive information of a medical or personal nature from the doctor, nor is the doctor empowered to provide such information unless authorised by the employee.
 - Any discussions regarding work restrictions which occur between the supervisor and the doctor—whether treating or assessing the employee—should where possible be carried out in the employee's presence.
 - A supervisor may contact an employee's treating doctor to explore the availability of alternative duties or to clarify any recommended, work-related medical restrictions.⁸

7 Australia Post's submission (Appendix 2, p. 8) indicates that 'the early intervention program provides for a reasonable number of treatments at Australia Post's expense, for injuries or illness where a work relationship may be indicated, provided such treatments are undertaken or are recommended by an Australia Post nominated doctor'.

8 Australia Post, *Submission 6*, Appendix 2 – Injury Management (Early Intervention) Program, pp 4–6.

3.11 Australia Post advised the committee that the substantial majority (approximately 90 per cent) of referrals to FNDs occur under the EIP. In 2008–09 for example, 4124 appointments were made with FNDs under the EIP compared with 410 appointments made following a direction by Australia Post to attend an FND for a fitness for duty assessment. These figures are consistent with the figures for the previous two financial years.⁹

Situations where Australia Post may direct attendance at an FND

Direction under the SRC Act

3.12 As a 'rehabilitation authority' under the SRC Act, Australia Post may assess an injured or ill employee's 'capability of undertaking a rehabilitation program'.¹⁰ In so determining, Australia Post can require an employee to undergo an examination 'by a legally qualified medical practitioner'; 'a suitably qualified person (other than a medical practitioner)', or 'a panel comprising such legally qualified medical practitioners or suitably qualified persons (or both)' as nominated by Australia Post.¹¹

3.13 Under the SRC Act, Australia Post has the power to direct an employee to be medically assessed for the purposes of a claim for compensation by 'one legally qualified medical practitioner nominated by the relevant authority'.¹² If an employee refuses or fails, without reasonable excuse, to undergo such an examination or in any way obstructs the examination, the employee's right to compensation under the SRC Act is suspended until the examination occurs.¹³

3.14 In figures provided to this committee for the purposes of Senate Estimates by Australia Post, it is evident that Australia Post directs only a very small number of employees to attend an FND under the SRC Act each year. In 2006–07 of the total 4295 Australia Post FND appointments that occurred nationally, only 10 arose from directions under the relevant provisions of the SRC Act. In 2007–08 (to 31 May 2008) only 5 such appointments were made out of a national total of 4206 FND appointments.¹⁴

Fitness for duty assessments

3.15 The second instance in which Australia Post claims it may direct employees to attend an FND is under clause 10 of its *Principal Determination*.

9 Australia Post, *Submission 6*, p. 37.

10 *Safety, Rehabilitation and Compensation Act 1998*, ss. 36(1).

11 *Safety, Rehabilitation and Compensation Act 1998*, ss. 36(2).

12 *Safety, Rehabilitation and Compensation Act 1998*, s. 57.

13 *Safety, Rehabilitation and Compensation Act 1998*, ss. 57(2).

14 Environment, Communications and the Arts Committee, Senate Estimates, May 2008, answers to questions on notice, Australia Post, question 44, available: www.aph.gov.au/Senate/committee/eca_ctte/estimates/bud_0809/bcde/index.htm.

3.16 Section 89 of the *Australian Postal Corporation Act 1989* relates to the staff of Australia Post and provides that:

- (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.

3.17 Australia Post's *Principal Determination* covers employment matters for Australia Post employees including leave entitlements, studies assistance and allowances. Clause 10 of the Determination, which was amended by *Determination No. 6 of 2006* states that:

- (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.¹⁵

3.18 Australia Post has argued that under the Determination, it 'may require an employee to attend a medical examination to assess the employees' fitness for duty in order to safeguard the employee or co-workers' health and safety'.¹⁶ This is known as a 'fitness for duty assessment' and differs to medical assessments under the SRC Act in relation to workers' compensation.

3.19 Australia Post contends that when directed to attend an FND for a fitness for duty assessment, an employee must comply with that direction as per clause 10 of the Determination.¹⁷ Failure to comply with such a direction 'without reasonable cause' may result in the employee being 'subject to the Employee Counselling and Discipline Process'.¹⁸

3.20 According to the figures provided by Australia Post, there were 410 directions to attend FNDs made under clause 10 in 2008–09, and similar numbers made in the preceding two financial years.¹⁹

15 Australia Post, *Submission 6*, Appendix 1 – Principal Determination, p. 10.

16 Australia Post, *Submission 6*, Appendix 2, p. 7. Section 89(2) of the Australian Postal Corporation Act 1989 states that 'The terms and conditions of employment shall be determined by Australia Post' and it is this statutory power that enables Australia Post to make determinations.

17 Australia Post, *Submission 6*, Appendix 1 – Principal Determination, p. 10.

18 Australia Post, *Submission 6*, Appendix 1 – Principal Determination, p. 11.

19 Australia Post, *Submission 6*, p. 37.

Australia Post's use of the Principal Determination

3.21 The committee received evidence from over forty past and present Australia Post employees and from the unions representing them, regarding their experiences of being injured while working at Australia Post. A common story in a large proportion of those employee's accounts was that they had been verbally threatened with disciplinary action by their manager if they refused to attend an FND immediately upon being injured.²⁰

3.22 For example Mr Chlebowczyk, a mail officer at the Bendigo Mail Centre, complained to the CEPU about being threatened with being 'coded' if he refused to attend an FND following suffering a back injury at work. Upon being injured, Mr Chlebowczyk visited his family doctor. Mr Chlebowczyk's submission claims that Australia Post was not content with his treating doctor's medical opinion, and instructed him to visit a FND. When Mr Chlebowczyk refused to see an FND because '[he] was in no state to move, much less go for another doctor's consultation',²¹ he was informed that he would face disciplinary action if he refused to attend an FND.

3.23 Mr Chlebowczyk discussed the threatened disciplinary action with his union (the CEPU) who informed him that as the direction to attend an FND was not being made under the SRC Act, attendance was not compulsory. Attached to Mr Chlebowczyk's submission²² is correspondence between the CEPU and Australia Post regarding the matter. In its letter to the CEPU, Australia Post indicated that Mr Chlebowczyk's appointment with the FND was made under the EIP. However, the letter later contradicts this statement, and goes on to suggest that the direction that Mr Chlebowczyk attend the FND had been made under the *Principal Determination*, stating:

As you are aware, the Principal Determination, clause 10 enables Australia Post to refer an employee for a medical assessment concerning fitness for duty to perform all or part of the employee's duties.²³

3.24 In its reply, the CEPU questioned the lawfulness of using clause 10 to direct an employee to attend an FND in those circumstances. The CEPU stated that a senior manager at Australia Post had provided undertakings that clause 10 would:

...only be used under certain circumstances (which are quite different from those pertaining to the current case).²⁴

3.25 Furthermore, the CEPU stated that:

20 See for example: Name Withheld, *Submission 19*; Name Withheld, *Submission 30*; Name Withheld, *Submission 31*; CEPU, *Submission 10*, attachments 3, 5, 15, 20 and 24.

21 CEPU (Communications Division), *Submission 10*, attachment 3.

22 Which is attachment 3 to CEPU (Communications Division), *Submission 10*.

23 CEPU (Communications Division), *Submission 10*, attachment 3, p. 3.

24 CEPU (Communications Division), *Submission 10*, attachment 3, p. 4.

It is quite clear that if your wish to have Mr Chelbowczyk [sic] medical condition assessed you need to provide him with a direction under section 57 of the Safety, Rehabilitation and Compensation Act [which relates to an employee's capability of undertaking a rehabilitation program].²⁵

3.26 While Australia Post was adamant in its evidence to the committee that 'employees can choose to see their own doctor' under the EIP,²⁶ the letter written by Australia Post to the CEPU in Mr Chlebowczyk's case demonstrates that if employees choose not to visit an FND, or not to participate in the EIP, then Australia Post will use clause 10 the Determination to require them to do so. Furthermore, Australia Post's own internal guidelines on the use of the Determination also indicate that it is their policy to require injured workers to take part in the 'voluntary EIP.' The internal guidelines on the use of the Determination state that:

Where an employee does not accept an offer to attend an Australia Post nominated doctor for treatment, and is provided with a certificate of incapacity from another treating doctor, this Determination would be used to direct the employee to attend a fitness for duty assessment to determine whether they are able to undertake all or part of their duties.²⁷

3.27 Mr Chlebowczyk's case study highlights one of the key issues of contention and concern with Australia Post's approach to injury management: the lack of clarity amongst both managers and employees about the use of clause 10 directions. Specifically, it highlights the lack of certainty over whether, and in what circumstances, Australia Post has the authority to use clause 10 directions to require injured workers to visit an FND immediately upon being injured.

Legal status and scope of the Principal Determination

3.28 During the inquiry, questions arose as to the legal standing of the *Principal Determination*. On the issue Mr Steve Kibble, the Deputy Chief Executive Officer of Comcare stated that while it 'is not an unusual power that employers have to direct their employees to undertake fitness for duty assessments', it is unusual for that power to be contained in, and have the force of, subordinate legislation.²⁸

3.29 While section 102 of the *Australia Postal Corporation Act 1989* provides for the power to make regulations under the Act with respect to certain matters, the list of examples of matters on which regulations may be made in paragraphs 102(c)–(h) does not include any matter resembling those covered by clause 10 of the Determination.

25 CEPU (Communications Division), *Submission 10*, attachment 3, p. 4.

26 Mr Rodney McDonald, Group Manager, Corporate Human Resources, Australia Post, *Committee Hansard*, 12 February 2010, p. 2.

27 Australia Post, *Submission 6*, Appendix 6 – Guidelines for the Use of Determination 10A – fitness for duty, pp 1–2.

28 Mr Steve Kibble, Deputy Chief Executive Officer, Comcare, *Committee Hansard*, 12 February 2010, p. 85.

3.30 In its submission, Australia Post stated:

In addition the underpinning subordinate legislation which prescribes minimum terms and conditions is the Principal Determination (terms and conditions of employment for Australia Post employees established under section 89 of the *Australian Postal Corporation Act 1989*).²⁹

3.31 However, *Determination No. 6* (which is the relevant instrument amending the *Principal Determination*) is not listed on the Federal Register of Legislative Instruments³⁰ and, given that it was made after the *Legislative Instruments Act 2003* came into effect, this means that the Determination is either not a legislative instrument (and therefore is not required to be registered) or is an unenforceable legislative instrument.³¹ If the Determination is not a legislative instrument, then its status would appear to be that of an in-house policy or procedure.

3.32 Of greater concern to the committee is the disagreement between the unions and Australia Post with respect to the scope of the Determination. As noted above, it seems that the Determination is being used to require injured employees to also attend an FND even when they choose to visit their own doctor.

3.33 In its submission, and in its correspondence with Australia Post, the CEPU argued that the Determination should not be used for that purpose. Specifically, the CEPU indicated that the comments of Senior Deputy President Drake, of the (then) Australian Industrial Relations Commission, in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Australian Postal Corporation* (C2005/5770), restrict the legal use by Australia Post of clause 10 of the *Principal Determination*.³² In that case, which related to a similar provision in the *Australia Post General Conditions of Employment Award 1999* (the Award), Senior Deputy President Drake stated that:

The ordinary and natural meaning of the words used in the [Award's] clauses and their context in the award make it clear that it is the purpose of those clauses to allow the employer to obtain medical evidence to ascertain the fitness of an employee who Australia Post may consider is possibly unfit or incapable of discharging their duties.³³

3.34 The practical effect of Senior Deputy President Drake's judgment was that Australia Post was no longer able to use the fitness for duty provision under the Award to require injured employees to visit an FND for the purposes of workers' compensation or sick leave applications. The CEPU contends that in response,

29 Australia Post, *Submission 6*, p. 7.

30 <http://www.comlaw.gov.au/comlaw/comlaw.nsf/frli?OpenForm&Expand=1.1>.

31 Under section 31 of the *Legislative Instruments Act 2003*.

32 CEPU (Communications Division), *Submission 10*, p. 5.

33 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Australian Postal Corporation* (C2005/5770), 8 May 2006, paragraph 10.

Australia Post amended the *Principal Determination* in an attempt to continue this practice.³⁴ The CEPU submitted that, because the *Principal Determination* is a policy document, the provisions of the Award prevail to the extent of any inconsistency. Therefore, the CEPU contends that Australia Post's use of the Determination to require attendance at an FND under the EIP is invalid.³⁵

3.35 However, Australia Post highlighted in its evidence that:

At no stage have the programs implemented at Australia Post been found to be unlawful by any court or tribunal. To the contrary, the program has been endorsed as best practice.³⁶

Committee comment

3.36 The committee notes the evidence provided by either side of this issue regarding the legal status of Australia Post's *Principal Determination*. However, the committee does not consider that it is in a position to determine this issue one way or the other. Nevertheless, it is clear to the committee that the lack of certainty about the issue, and particularly the disagreement between the unions and Australia Post, is impacting adversely on employees and reducing the effectiveness of Australia Post's injury management program.

3.37 It is evident that both managers and employees are confused as to when an employee can be directed to visit an FND. The evidence given to the committee by Mr Paul Lucignani, a member of the CEPU and an Australia Post delivery officer reflected the lack of knowledge amongst employees about their rights and obligations. Mr Lucignani told the committee that when he was injured at work:

I went to my own doctor first and then I was directed to go to an FND. I did not know I had a choice. I did not think I had a choice. I was directed to go.³⁷

3.38 Mr James Metcher, Secretary of the Postal and Telecommunications Branch, NSW Communications Division of the CEPU explained the negative effect of this lack of knowledge on an injured worker:

When [employees] do have an injury, they do not know and they are not educated about the process of what they are supposed to do when they have an injury. The first port of call is their supervisors and managers for guidance, and where the supervisors and managers are coached under this scheme on how they are expected to be dealing with these arrangements

34 CEPU (Communications Division), *Submission 10*, p. 5.

35 CEPU (Communications Division), *Submission 10*, pp 28–9.

36 Mr Rodney McDonald, Group Manager, Corporate Human Resources, Australia Post, *Committee Hansard*, 12 February 2010, p. 1.

37 Mr Paul Lucignani, Member, CEPU, *Committee Hansard*, 12 February 2010, p. 62.

under the direction of the HR departments, this is where the employee ends up caught up in the scheme.³⁸

3.39 Without clarity amongst both employees and managers as to their rights and obligations under the EIP, there is scope for the unintended misuse of injury management processes. This could lead to unnecessary tension and resentment between employees and managers. It appears to the committee that this is what has occurred at Australia Post. Injured workers are receiving conflicting advice and directions from their union and their employer, which, in some cases, has resulted in uncertainty and resentment and led to Australia Post's injury management process not being as effective as it could be for all parties concerned.

3.40 Based on the evidence presented, it is clear to the committee that there is a need for employees and management to develop well-defined principles regarding when employees *must* attend FNDs and when they *may* attend FNDs. Both parties need to cooperate in good faith to ensure that the use of facility nominated doctors in the injury management process is lawful, fair and unambiguous, and that employees and managers are adequately informed of their rights and responsibilities.

Proposed new model for the use of facility nominated doctors

3.41 The committee is pleased to report that Australia Post and the unions representing its employees have recently demonstrated a commitment to, and taken steps towards, resolving this issue in the context of negotiating a new enterprise agreement. In a joint submission dated 31 May 2010, Australia Post and the CEPU informed the committee that 'in-principle consensus' has been reached between them regarding a proposed new model for the use of FNDs.³⁹

3.42 According to the joint submission, under the new proposed arrangements:

...when an employee reports a possible work-related injury to their manager, they will be advised that they can elect to receive treatment from an Australia Post Medical Advisor (FND) or their own doctor.⁴⁰

3.43 If an employee chooses to visit an FND, the parties have agreed that treatment will continue to be covered by Australia Post in the same manner in which it is presently—that is up to four FND appointments, up to four physiotherapy appointments, and the costs of x-rays, tetanus injections and basic medication.⁴¹

3.44 Under the in-principle agreement, if an employee chooses to be treated by their own doctor:

38 Mr James Metcher, Secretary, Postal and Telecommunications Branch, NSW, Communications Division, CEPU, *Committee Hansard*, 12 February 2010, p. 60.

39 Australia Post and the CEPU, *Submission 37*, p. 2.

40 Australia Post and the CEPU, *Submission 37*, p. 3.

41 Australia Post and the CEPU, *Submission 37*, attachment 4.

...they must take an Australia Post 'WorkReady' pack to their doctor, which contains information about their job and the duties available and a WorkReady Report to be completed by the doctor and returned to Australia Post.⁴²

3.45 The joint submission included a draft WorkReady pack which describes the various delivery and sorting tasks available to Australia Post employees, and the physical requirements of each task. Treating doctors will then be required to complete a WorkReady Report detailing the number of hours per day the injured employee is capable of working, and the physical tasks that they are capable of performing.

3.46 Under the in-principle agreement, there will be limited circumstances in which an employee who has chosen to attend their own doctor may be directed to attend an FND by their manager. These circumstances are if:

- their treating doctor does not provide a completed WorkReady Report; or
- 'there is conflicting evidence which seriously questions the employee's own doctor's advice on the WorkReady Report'.⁴³

3.47 The joint submission states that:

...an oversight mechanism will be established, where Australia Post and the unions will meet on a regular six-monthly basis to review these referrals and seek further information, as permitted and required.⁴⁴

3.48 While the details of this in-principle agreement are yet to be finalised, the committee commends the CEPU and Australia Post on their progress to date. The proposed agreement appears to resolve one of the central issues of contention with Australia Post's injury management program—the lack of clarity as to the circumstances in which managers may direct employees to attend FNDs.

3.49 In addition, the proposed model will resolve the dispute regarding Australia Post's use of the *Principal Determination* as a basis for directing employees to attend FNDs. The committee understands that the proposed model will be set out in the new enterprise agreement between Australia Post and its employees, which will become the source of Australia Post's power to direct employees to attend FNDs in the above agreed circumstances. The joint submission states that 'as a consequence, the section of the *Principal Determination* that underpins our current FND system will be removed'.⁴⁵

3.50 The committee urges both parties to continue to work in good faith to develop the details of the new scheme. In particular, the committee recommends that both parties ensure that employees and managers are well-informed of their rights and

42 Australia Post and the CEPU, *Submission 37*, p. 3.

43 Australia Post and the CEPU, *Submission 37*, p. 3.

44 Australia Post and the CEPU, *Submission 37*, p. 3.

45 Australia Post and the CEPU, *Submission 37*, p. 3.

responsibilities under the scheme, and that adequate oversight mechanisms are in place to ensure that any emerging issues with the new scheme are dealt with promptly and fairly.

Recommendation 1

3.51 Noting the in-principle agreement reached for the use of Facility Nominated Doctors, the committee recommends that Australia Post and the unions representing its employees continue to work in good faith to develop the details of the new policy within the context of the new enterprise agreement. The committee urges both parties to ensure that once a lawful and fair agreement has been reached, both sides work to ensure that employees and managers are well-informed of their rights and obligations with respect to injury management processes.