Administering the cost of death: Organisational perspectives on workers' compensation and common law claims following traumatic death at work in Australia

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ABSTRACT
Quite apart from its devastating human and psychological effects, the death of a worker can have significant, life-changing effects on their families. For many affected families, workers' compensation entitlements represent the primary financial safeguard. Where the worker was self-employed, the family will generally be excluded from this remedy and have to take the more problematic option of claiming damages at common law. Despite the centrality of workers' compensation, little attention has been given to how effectively workers' compensation agencies address the needs of bereaved families or the views of other organisations involved, such as safety inspectors, unions, employers and victim advocates. Based on interviews with forty eight organisational representatives in five Australian states, this study examines how workers' compensation regimes deal with work-related death from the perspective of those organisations involved directly or indirectly in the process. The study highlighted a number of problems, including the exclusion of self-employed workers and dealing with ‘mixed families’.

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1. Introduction

In Australia, over 2000 people die from work-related causes each year with significant social, economic, and personal costs (Safe Work Australia, 2013). It is estimated that over five thousand family members and close friends of workers become survivors of traumatic work-related death as a consequence (Matthews, Quinlan, Rawlings-Way, & Bohle, 2012). The death of a worker commonly means loss of a source of income and significant financial loss for their spouse and children or other dependants. Indeed, the consequences can be especially dire as traumatic work-related death is most likely to occur in industries like farming, forestry, fishing, road transport and construction (Ehsani, McNeilly, Ibrahim, & Ozanne-Smith, 2013; Guthrie, Westaway, & Goldacre, 2009; Safe Work Australia, 2013) where average earnings are not especially high and family budgets are often tight at the best of times.

For the families of most of those killed at work a primary source of financial support will be the workers’ compensation scheme that operates in Australia and most other countries. While some families will also be able to claim on a life insurance policy held by the worker or superannuation entitlement (private pension schemes are compulsory for employees in Australia since the mid-1990s), the former are by no means pervasive for workers in occupations where traumatic death is most likely. Further, while superannuation covered 71% of all Australians aged fifteen years or over by 2007 the median account balances were low—A$31,252 for males and A$18,489 (Australian Bureau of Statistics, 2008).

Workers’ compensation schemes provide for medical expenses and funeral expenses in the case of death (this may extend to capped expenses for non-dependent family members attending the funeral), and a specified level of income support that is paid to dependant family members in the case of death. As well as providing a level of financial support to injured workers and their families and encouraging an early return to work, workers’ compensation policy is also aimed at providing fair compensation and reducing the social and economic costs to the community (Safe Work Australia, 2010). The scheme is no-fault, requires employers to take out insurance cover, and is generally restricted to employees that are engaged under a contract of service.

The exclusion of the vast majority of self-employed workers from workers’ compensation is important because they constitute between 15% and 17% of the active workforce in Australia and New Zealand (Driscoll et al., 2003; Lilley, Samaranayaka, & Weiss, 2013). Also important are coverage problems or a reluctance to make claims on the part of workers whose employment status is ambiguous, including some
telecommuting and home-based workers, or those who are in other forms of precarious employment. The growth of precarious employment and that of precarious groups like temporary or undocumented foreign workers often concentrated in such jobs represents a serious challenge for worker’s compensation coverage (Azaroff, Lax, Levenstein, & Wegman, 2004; Guthrie & Quinlan, 2005; Quinlan & Mayhew, 1999). More flexible work arrangements, including multiple jobholding which has been linked to a higher incidence of fatalities (Bush, McKee, & Bunn, 2013), can also complicate resolution of claims even where coverage is established. Evidence indicates that there is significant under-reporting and the failure to lodge or succeed with workers’ compensation claims even in the case of death or serious injuries at work (Sears, Bowman, Adams, & Silverstein, 2013). For example, in 2008–09 the families of 276 (or 26%) of the 400 workers fatally injured at work received workers’ compensation while the families of 124 (or 31%) did not (Safe Work Australia, 2012c).

A second option available in terms of securing monetary redress following injury or death at work in Australia and some other countries—and one especially important to those excluded from workers’ compensation such as most self-employed workers—is for the family (in the case of traumatic work-related death) to pursue a claim for damages at common law under the tort of negligence or breach of contract against the person or organisation held responsible for the worker’s death. Unlike workers’ compensation, this is a fault-based remedy where the level of entitlement is not specified but decided on a case by case basis according to general rules.

In addition to workers’ compensation or damages claims at common law, families may receive financial support through the social security system or from voluntary donations from workmates of the deceased, the employer, the union, or the community. With regard to the social security available, evidence indicates there is a significant degree of cost-shifting from workers’ compensation to the social security system in the case of those experiencing serious injuries (LaDou, 2010; Quinlan, 2004). Whether a similar pattern applies to families of fatally injured workers is unknown, although limited research on the financial impacts on families suggests it does and the burden on social security would be even heavier on those families denied workers’ compensation (Matthews, Bohle, Quinlan, & Rawlings-Way, 2012). With some notable exceptions, such as funds established following workplace disasters (see Gregson, 2012), workmate, employer, union and community-based funds—we are undoubtedly valuable—are not a significant source of financial support.

Notwithstanding the growth of non-employee work arrangements and the concentration of self-employed workers in a number of especially dangerous industries (forestry, fishing, farming, construction and road transport), workers’ compensation remains the most substantial source of financial support for the families of workers who die in Australia. For this reason it will be the main focus of this article although the common law damages option will be examined, especially given its importance in the industries being considered here. It is worth noting that the workers’ compensation premiums paid by employers represent a fraction of the total costs of work-related death and illness. For example, in 2008–9 Australian employers paid a total of A$6.5 billion in workers’ compensation premiums which Safe Work Australia (2012c) estimated to be 16% of the total costs associated with work-related injury and disease including fatalities. The community bore 10% of total costs and workers and their families bore 74%—almost three quarters of the costs. In the case of death or full incapacity, the imbalance in the burden in terms of average costs to employers, the community and workers/families actually falls even more heavily on the latter (Safe Work Australia, 2012c).

Despite the significance of work-related death in terms of financial cost, family support and psychological trauma, little research has been undertaken into how effectively workers’ compensation schemes or common law damages claims deal with traumatic work-related death. There is an extensive body of research on workers’ compensation, part of which focuses on the positive and negative experiences of workers within the compensation system and the impacts of the compensation process on their health. Findings from these studies suggest that the compensation process is often experienced as complex and frustrating by workers and that it can have adverse health effects (Boden, 2012; Ezzy, Walter, & Welch, 2009; Lippel, 1999, 2007, 2012; Parrish & Schofield, 2005; Strunin & Boden, 2004). Stigma, power-imbalance, lack of social support, and payment delays have been cited as primary causes of distress (Lippel, 2007; Strunin & Boden, 2004). Other studies have examined the sense of injustice experienced by workers in relation to the workers’ compensation system in Australia (Kennedy & Dunstan, 2013). There is, however, a paucity of research which investigates how surviving family members of workers who die from injuries sustained from workplace incidents experience the workers’ compensation process.

Results from a pilot study conducted by the authors found that surviving families also viewed their experiences with the workers’ compensation system as predominantly negative, describing it as overly complex, stressful, difficult to negotiate, and in light of the strict criteria governing the determination of eligibility for compensation in some jurisdictions—unjust (Matthews, Quinlan, Rawlings-Way, & Bohle, 2012). These systemic issues resulted in additional burden being placed on those traumatically bereaved by workplace death.

But how do organisations involved in workers’ compensation see their role, view their own experiences, or that of other bodies? The aim of this study is to examine how various organisations that are involved to a greater or lesser degree in the compensation process, view the needs of families being met by workers’ compensation, and the particular problems or issues that arose in this regard. These organisations include not only workers’ compensation authorities, insurance companies, employers and unions but other government agencies (coronial officers and government safety inspectors) and victim advocacy groups.

The remainder of the article is divided into four sections. The first section briefly describes the structure of workers’ compensation schemes in Australia with regard to dealing with work-related death. This sets the context for examining responses, including acknowledging significant changes to entitlement made in the past decade. The second section describes the research methods used in this study. The third section presents the findings and discussion, and the fourth and final section is a conclusion.

2. Workers’ compensation schemes and work-related death in Australia

Following a workplace death, the worker’s spouse or dependants may be entitled to payments through the workers’ compensation systems. Reflecting its federal structure (like the USA and Canada), these entitlements, however, vary across the eight different state and territory jurisdictions which each have their own compensation laws. In addition to these systems, there are three other Commonwealth schemes. The first of these schemes is available to Australian Government employees, the employees of licensed self-insurers under the Safety, Rehabilitation and Compensation Act 1988 and Australian Defence Force personnel with service before 1st July 2004; the second is for seafarers under the Seafarers Rehabilitation and Compensation Act 1992; and the final system is for Australian Defence Force personnel with service on or after 1st July 2004 under the Military Rehabilitation and Compensation Act 2004 (Safe Work Australia, 2012b).

Jurisdictional and legislative differences mean that there is considerable variation with regard to workers’ compensation arrangements. The type and amount of benefits available, the kinds of workers covered by legislation, and the regulation and administration of claims all point toward important disparities in compensation policy (Purse, 2005). Significant differences can be found with regard to entitlements arising from a work-related death that is captured, in part, in Table 1 with regard to lump sum payments. Other significant differences can be
found with regard to the level and duration of periodic payments made to partner/spouses and dependent children as well as the level of funds to meet funeral expenses. The state of Victoria also provides a specific allowance for counselling, although other jurisdictions also offer counselling support.

While recognising important differences, two points should be made. First, there are important commonalities that should not be overlooked. All the schemes have a substantial lump sum component which is not means tested. This payment is made to persons who are wholly or partly dependent on the financial support of the deceased worker at the time of their death including spouse/partner (in some jurisdictions including those in a registered relationship) and children aged under 16 years or aged between 16 and 25 years in full-time education. If the deceased had more than one family through a prior marriage or relationship resulting in multiple claimants the payment will be apportioned on the basis of the degree of dependency of each (again in terms of financial support being provided by the deceased at the time of their death). If there are no dependents as in the case of a young worker, the payment is made to the estate of the deceased, though some schemes also enable ‘others’ to be determined as dependents if the young person was contributing to the maintenance of the home where family members lived. In addition to this, all Australian schemes provide a system of regular payments to support each dependent child for a period up to and including the period they remain in full-time education, including university. Most schemes also include regular payments for a shorter period (around two years in most cases) for dependent spouses/partners. Further, with the exception of Tasmania, all schemes specify an entitlement to cover funeral expenses of the deceased worker (Safe Work Australia, 2012b). While same sex relations are not explicitly referred to in all jurisdictions, all schemes, with the exception of the Northern Territory, include a broad definition of dependent which includes same sex partners (Safe Work Australia, 2012b).

Thus, while the level of support varies between states and territories (in part reflecting their average earning levels and socio-economic circumstances) they provide very similar types of support to families.

Second, while efforts to harmonise workers’ compensation schemes across the country have lagged behind the progress made in the area of preventative work and health and safety legislation, different jurisdictions have shown an increased willingness to take account of or mirror trends in other states and territories. Evidence of this is clear in the area of compensation following work-related death where there has been a substantial change to entitlements in recent years. In short, workers’ compensation entitlements, especially the lump sum component, have significantly increased over the past decade (see Table 1). In particular, the jurisdictions of Victoria, Queensland, New South Wales and South Australia have seen significant increases. In Victoria, the passing of The Accident Compensation Act Amendment 2010 saw lump sum death benefits almost double. The Act also introduced changes to improve access to pensions for dependants of deceased workers (Safe Work Australia, 2012a). In December 2008, the New South Wales WorkCover Scheme significantly increased the compensation available to families of workers who died as a result of workplace injury. Where previously only financial dependants were entitled to the lump sum payment, changes required that payment of the lump sum be made to a deceased worker’s estate where they leave no financial dependants (Safe Work Australia, 2012a).

In addition to the changes just mentioned, in recent years workers’ compensation authorities have produced specific guidance material to assist the families of deceased workers. Typically, the documents are jointly produced by several government agencies which must deal with work-related deaths, most notably workers’ compensation and the safety inspectorate, so that families can access a single source of information on the array of institutional processes involved – government safety investigation, workers’ compensation, coronial inquest – and the available support services such as counselling and voluntary groups.

For example, a guide produced by WorkCover New South Wales (2013) points to coordinator/liaison staff who can act as a reference point for queries and ongoing contact, the availability of counselling services, the role of investigation by government safety inspectors, how to lodge a compensation claim (including noting a lawyer is not required and coverage applies even when the employer is uninsured) and other sources of financial support (notably social security). The guide also includes contact details for other government agencies (such as the coroner’s court). Guidance material produced in other states like Coping with a Workplace Death (SafeWork South Australia, 2007) and When your partner or relative dies in a work-related accident (WorkSafe Western Australia, 2013) cover the same ground. Some, like the South Australian and Western Australian examples just mentioned, include information on a wider array of contact points with government agencies and other bodies, including voluntary self-help and advocacy groups, as well as describing in more detail institutional processes, addressing likely questions and potentially problematic issues. The Western Australian guide When your partner or relative dies in a work-related accident, for example, describes the institutional processes in detail, provides advice on what to do with regard to a mortgage or urgent bills, how to lodge a compensation claim, how to contact a funeral director, sources of financial and other support including unions, and rights to view the body of the deceased. The South Australian guide Coping with a Workplace Death covers similar ground, including information on coping emotionally, superannuation, insurance policies and monies owed by different parties, accessing social security and workers’ compensation, issues concerning self-employed subcontractors as well as an extensive list of government agency and support services contacts, including religiously-affiliated bodies and the mutual support advocacy group Victims of Industrial Death (VOID; www.void.org.au).

In a number of jurisdictions such as Queensland, workers’ compensation authorities have specialised liaison staff to deal with families of deceased workers and coordinate their interactions with government

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<td>Queensland</td>
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<td>South Australia</td>
<td>$178890 (lump sum only available for spouse but also available for dependent children up to a maximum of 50%)</td>
<td>$454739</td>
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<td>Tasmania</td>
<td>$117615.76 (plus lump sum payment for dependent children based on age) Maximum payment $289 192.75</td>
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<td>$120494.40 ($77.24 per week for each dependent child, maximum of 10)</td>
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<td>$97964.50 (plus $34.19 per week for each dependent child)</td>
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agencies. These activities and the production of guidance material to assist families appear to be, in part, a response to pressure from several groups established to represent families of those killed at work, including VOID in South Australia and the Workplace Tragedy Support Group in New South Wales. The latter body has produced its own detailed fifty-page information kit to assist families to deal with the death of a worker (Workplace Tragedy Support Group, 2010).

3. Aims and methods

The aims of this study were to examine how various organisations that are involved in the compensation process view the needs of families being met by workers’ compensation following a work-related death and the particular problems or issues that arose in this regard. Little is known about the nature of organisations’ responses to surviving families during the compensation process. For this reason, qualitative research methods were selected as the most suitable methods for obtaining information relating to the nature of the responses (e.g., support, information and interactions) and their implications for surviving families.

Qualitative methods are valuable for conducting initial exploratory research into complex phenomena and for providing insights into the experiences and views of those with widely differing stakes and perspectives (Sofaer, 1999). Qualitative methods also play a key role in applied policy research. They allow researchers to identify, examine, and evaluate social and public policy issues by taking into consideration the viewpoints of those who are affected by a specific policy decision, or those thought to be a part of the problem (Walker cited in Ritchie & Spencer, 2002).

The research presented here reports on the first phase of a larger study that examines the consequences of traumatic work-related death for families and the adequacy of institutional responses to their needs. The larger project aims to advance knowledge of how traumatic work-related death and the institutional responses that follow affect families and provide guidance to improve policy interventions. The research protocol for the project was approved by the University of Sydney Human Research Ethics Committee prior to the commencement of the study.

3.1. Participants

The sample for this study was drawn from representatives of organisations and stakeholders involved in traumatic work-related death in Australia. In total, interviews were conducted with 48 participants from the key organisations including:

1. the government compensation authority in four jurisdictions in Australia (n = 6)
2. licensed insurers (n = 2)
3. union organisations from the high risk industries (agriculture, forestry and fishing; construction; transport and storage; and mining) (n = 5)
4. large employers from the high risk industries (n = 10)
5. an employer association (n = 1)
6. the coroner’s office in two jurisdictions (n = 4)
7. the government safety inspectorate authority from four jurisdictions in Australia (n = 11)
8. support groups/services from three jurisdictions (n = 7)
9. police (n = 1)
10. a union-affiliated lawyer (n = 1).

Managers of these organisations were contacted by phone or email and advised of the aim and purpose of the study. Agreement was sought for their participation (or that of a nominated representative) in an interview. Follow-up requests were made to managers who had not returned phone calls or responded to emails at two and four weeks after the initial contact was made. All participants were provided with a Participant Information Sheet and interview protocol prior to the interview date. Written consent was obtained prior to the interviews.

3.2. Data collection and analysis

In accordance with the exploratory nature of this study, face-to-face, semi-structured interviews were conducted with participants by the first author, an experienced researcher. Interviews took place between August 2012 and January 2013. A semi-structured interview schedule was used to elicit specific information about organisational practices and interactions between key stakeholders following traumatic work-related death and to assist in the collection of comparable data. Participants were invited to respond to a set of broad introductory questions which covered: (i) the organisation’s role in workplace death, (ii) the nature of the support offered to partners and families, (iii) the nature and timing of information provided, (iv) their interactions with families, and (v) the nature of the outcomes for spouse/partners and families. Specific probes to these responses facilitated further exploration of participants’ responses and allowed for follow-up and clarification (Marshall & Rossman, 2010). Interviews were audio-recorded, transcribed verbatim and any personally identifying information removed so as to protect participant confidentiality and anonymity. Interviews were read and analysed separately by two members of the research team to identify and develop by consensus recurring themes and concepts. This enabled any differences in interpretation or categorisation to be discussed and resolved collaboratively helping to ensure reliability and validity (DeSantis & Ugarriza, 2000).

As the specific focus of this article is on the workers’ compensation process, the results and discussion which follow draw primarily from the data obtained from interviews with government compensation authorities and insurers. Because the number of interviews undertaken with this group was relatively small and did not extend across all jurisdictions, it is unlikely to be representative. Nevertheless, those interviewed held a range of senior positions and had a sound knowledge of workers’ compensation policies and processes. This included the management of death and dependency claims, customer service, policy analysis and development, as well as senior management personnel. Interviews with union organisations, employers, and with support and advocacy groups help to broaden the discussion of this under-researched area and will form the basis of further qualitative and quantitative research on organisational responses to traumatic work-related death.

4. Results and discussion

Given the aim of this study was to identify and evaluate government mechanisms for compensating and supporting families following a traumatic workplace death, the results have been organised around the following categories: 1) timing and processes 2) entitlement, 3) common law and 4) financial consequences.

4.1. Timing and processes

Many families in the industries with higher incidences of traumatic work-related death do not have significant economic resources prior to the death and so the loss of income which results from a workplace death makes families particularly vulnerable to financial difficulties. This can have significant and long-term effects on families, particularly those with dependent children (Matthews, Bohle, Quinlan, & Rawlings-Way, 2012). Timely access to workers’ compensation or other forms of financial support are therefore critical to the families of deceased workers. There was widespread recognition of this issue amongst those we interviewed, including those directly administering workers’ compensation. While it might seem that a claim associated with a work-related fatal injury would be resolved expeditiously, and many can, this was not always the case. Amongst the questions that need to be resolved are; that the death was not the result of suicide or a pre-existing medical condition, that the worker was an employee or otherwise covered, correctly identifying the worker’s employer and identifying the worker’s family/dependants. Changes to work organisation and more elaborate corporate/
business structures together with a trend to more fluid family structures (de facto relationships and ‘mixed’ or multiple families) have complicated this process. Our interviewees made reference to all these issues.

Representatives of workers’ compensation agencies and insurers both indicated that they sought to resolve claims quickly, were able to do so in many instances (some could do this in a matter of weeks and one indicated it could be done even prior to the release of a death certificate) and relatively few claims were rejected (one cited 3% in this regard). In several jurisdictions the workers’ compensation authorities had dedicated liaison officers to initiate and maintain contact with families of workers killed, including updating them on the claim, providing informal emotional support and alerting them to other avenues of assistance such as Centrelink (Social Security) and child support. A number also provided counselling support services or had appointed an ombudsman to oversee the progress of claims, including appeals. On the other hand, most agencies required a medical certificate stating the causes of death, and representatives indicated that this could take up to some months if there was doubt over whether the death was work-related, suicide, or due to a pre-existing medical condition. Further, irrespective of whether the claim could be resolved fairly expeditiously, the worker’s wages/income ceased with their death and many families would find it difficult to meet immediate (i.e., funeral) and ongoing household expenses (rent/mortgage, food, utilities, healthcare, children’s education and other expenses) even if they received donations/funds from workmates, the union or employer, unless these were especially prompt and substantial.

In recognition of the immediate financial difficulties faced by families, several jurisdictions within Australia have amended their compensation legislation to allow interim payments to be made to families before the claim is decided, and these funds do not need to be repaid if the claim is ultimately rejected.

They don’t need to lodge a claim. We can assess the fatality and say that the worker was a worker, the death was compensable, and that we should be able to pay the burial and, if it’s the partner, maybe a pension. It’s limited and it’s meant to take that immediacy of finding $10,000 for a burial. Then it gives the partner a 12 week buffer before they have to have their claim in and assessed and formalised. It’s been fantastic. We’ve had between forty five and fifty deaths where that sort of payment has been made in some form in the last two years.

The principle behind interim payments is to ensure that families have access to a continuity of income while claims are being assessed, and yet it remains a discretionary decision that insurers need to make.

So where it’s clearly a work-related accident and it’s an employee, and it’s not a heart attack, stroke, or suicide, then we have the discretion to pay without a formal liability decision.

The twelve week period in which families receive the interim payment is seen, in these cases, as sufficient time for determining claims.

We could do a fatal claim within a week and have it done and finished… We have twenty days to make a decision, which is four weeks — so it’s not a long time that these claims are left. ([Government Compensation Agency #1])

There are a number of them that are straightforward. When it is a straightforward trauma; there’s no arguments about whether they’re a worker under the Act; it happened in compensable circumstances – if everything’s very, very clear [and] it’s clear that there’s no other relationships that can muddy the waters – I think the entitlements can be paid pretty quickly. ([Government Compensation Agency #2])

But delays in lodging applications undermined the efficacy of the interim payment arrangement and one participant questioned whether it was working as well as was intended.

It takes time to investigate the claim and the circumstances of the claim from the insurance point of view… [But because] they [lawyers] are putting the information together, the focus of their efforts is really on achieving the lump sum rather than the early intervention.

([Government Compensation Agency #4])

And while insurers do their best to resolve a claim as soon as possible, there are certain things that may prevent timely determinations being made.

Where we receive claims that employment has caused a heart attack that then has caused death there is a lot more investigation that would go into that and we would need medical reports and clinical notes and things like that. It can involve waiting for other providers to provide that information prior to making a determination.

([Government Compensation Agency #2])

While the idea of more ‘straightforward’ claims was often discussed, the degree to which any case could be considered straightforward was challenged on numerous occasions as was the time it took for a claim to be determined.

It can take an incredibly long time to determine a claim. It’s a matter of getting all of the relevant evidence that’s necessary to make that determination… Sometimes we don’t even have the formal cause of death for some months. I mean it can take years to determine a claim. That’s probably one of the hardest parts. It’s a matter of supporting the families through that and making sure they have what they need in that time.

([Government Compensation Agency #2])

As well as uncertainty about the cause of death, a number of additional issues may contribute to the delay in determining claims such as determining if the deceased is a worker under jurisdictional legislation.

With complex corporate structures, it may not always be easy to identify who the employer is. It’s more difficult if it’s a building site because they subcontract. So if it’s your truck driver with a logo on the side, it’s easily identifiable. But if it’s your concreter on a building site, it’s not always easy because there is a primary site manager… but underneath that there will be a subcontractor, subcontractor, subcontractor.

([Government Compensation Agency #6])

The problem of who constitutes a worker is complicated further by the lack of sufficient clarity in the primary definition of a worker and the mismatch between jurisdiction-specific workers’ compensation legislation and occupational health and safety legislation adopted by the Supreme Court in the case of appealed decisions. In addition to legislative issues surrounding the definition of worker, claims for compensation may also be delayed by the difficulty in determining the relationship and level of dependency of family members. As already noted, dependency is judged in terms of whether family members, notably a spouse/partner and children, were being financially supported in whole or part by the worker’s earnings at the time of their death. The level of dependency can affect weekly entitlements.

If you have to go down the path of appointing a forensic accountant to determine the level of dependency, then that can obviously slow the process a little bit. However, I try and identify that in those first conversations with the family and I would appoint the forensic accountant at the same time or within a very short period of
particularly those with dependent children (often called ‘mixed marriages’).

You’ve got the dependency side of things where we need to determine if the partner was wholly or mainly dependent upon the earnings or the children were partly dependent. That can be enormously complicated as well. We’ve had some that go on for years in the courts, but then others are relatively smooth.

This may be further complicated where the worker has, as has become more common, several marriages or long-term relationships, particularly those with dependent children (often called ‘mixed marriages’).

We’ve had a lot of claims where there has been an ex-wife and a new wife and a mix of up to four or however many children... They can be very complicated circumstances.

It can be multiple partners and multiple children from different marriages. They’re probably the ones where things can get a bit tricky. So you might need to talk to Centrelink and try and gather what monies have been paid. And in those trickier situations, as a management team, we might sit down and try and... decipher what their entitlements are, because you might be dealing with two or three families.

According to one interviewee, the increase in lump sum payments had also resulted in greater legal interest, thus further impacting the timeliness of the claims process.

Because the lump sums are so high there is much more diligence put into assessing [claims]. The intention of the Hanks Review was to streamline death claims and to fast track them. That’s great with the provisional payments. And where it’s straightforward we try to make the decision as soon as possible, but if there is a bit of doubt it’s going to be a really cumbersome and drawn out process to finally get to the point where we go, ‘alright, we’ve exhausted all avenues, done our due diligence, we’re happy to pay now... It’s almost an unintended side effect that in some cases it’s actually drawing the process out.

This may be partly explained by the increase in the number of speculative claims received and the lengthy litigation process which follows the rejection of these claims, but it may also reflect the complicated nature of many claims and ongoing uncertainty about entitlements and eligibility criteria. For those families of workers without formal contracts or those employed within increasingly complex business practices, this uncertainty may be especially acute. Lawyers may also find lump sum payments attractive as they can charge a percentage of a lump sum in fees, as one insurer claimed.

I think the lawyers are a bit more interested now as well because — now I’m not sure how much they take out of the lump sum so I would hope they don’t take as much as say they might for a common law claim... I thought, couldn’t we just pay less of a lump sum and pay more pension because then the lawyers aren’t going to be as interested. But then... we kind of want to finalise the claim as well. We don’t want it going [on] indefinitely so it’s a trade-off between, I guess, efficiency and entitlement.
It seems that we’ve set up a mismatch between our Workers’ Compensation legislation and who is a worker versus our OHS [occupational health and safety] legislation and what should be provided to people in the workplace. [It can be] perplexing for families when there’s a breach of OHS legislation and prosecution is launched for all 27 people affected… but when it comes to workers’ compensation and the other side of the argument, all of a sudden thirteen of them drop out because they’re not deemed to be workers as such.

[Government Compensation Agency #3]

Given what has already been said about the prevalence of self-employment in dangerous industries, this has led to calls for reform of workers’ compensation legislation.

In Australia, there is a traditional model that most compensation schemes follow in terms of who receives benefits. In most jurisdictions this is limited to the spouse or dependents of the worker who has died. However, this traditional concept of dependency, together with measures by which it is assessed, was an issue of concern for many interviewees.

That question about degree of dependency. I think the way we look at it is too narrow. Things have changed. It was probably designed back in the days when usually the dependent female didn’t work and so there was total dependency. Now you’ve got the spouse working and contributing half the income of the family or something like that. So that benefit is diluted to a significant degree as a result of that happening.

[Government Compensation Agency #4]

This reduction in benefit may be further effected by the model employed for calculating the benefits payable which is based on a percentage of average weekly earnings for the twelve month period prior to death. For families of workers whose employment has been sporadic over this period and whose financial strain may be high, the amount of benefit payable is unlikely to be sufficient to meet ongoing living expenses. Families receiving weekly compensation payments are also subject to ongoing income maintenance where any additional income may impact the amount payable. One interviewee commented on a particular case where this occurred.

Originally [it] was determined that she was dependent... However her earnings are now at such a point... she received numerous lump sums, so she’s getting a lot of income from those lump sums. It wasn’t just the one from us, she received super and life insurance, but also the union has banded together and all the men at his place of employment all made donations, so she got a considerable amount of lump sums following his passing. The way she’s got everything all set up is that she’s gaining quite a decent amount of income off of that. So a part of when we do our reviews of ongoing income maintenance for dependents is that we look at any earnings that they might be receiving. So we did explain to her that that would need to be considered as income due to the nature of how it’s coming in and that it was putting her earnings far above needing to be dependent.

[Government Compensation Agency #2]

The concept of dependency was also shown to be insufficient in certain cases, in particular, those involving parents of young, single workers where dependency was not recognised, as was the case with one elderly non-English speaking couple who sought assistance from a support group/service.

What happened with this particular claim was that nobody offered the parents an interpreter at the very beginning. So when their son was found dead, had somebody gone in there professionally as an interpreter, they would have realised very early in the claim that they were dependent on his income. They were reliant on his income and they were reliant on him for many other things. He was their only child, so they were reliant on him for interpreting.

[Support Group/Services #2]

It also did not acknowledge dependency in later life when parents may rely more heavily upon their children for support. But more than this, compensation is understood by many to involve more than just financial loss. It is also seen as recognition of the deceased person’s value. One of the most significant improvements to compensation legislation from the perspective of unions and support groups and services, therefore, was the abolition of dependency requirements in New South Wales. As one union representative said:

Losing someone at work is not just a financial loss to the family. It’s a devastating injustice and there needed to be some recognition in the system of that human loss that was unrelated to just the impact it had on your income. So the idea of getting rid of that idea of dependency as well as allowing for the money to go into the estate meant that, for example, if a Mum and Dad lost a son who wasn’t dependent on them, they would be compensated… That money would be then paid into his estate for the family to get the benefit of in compensation for their loss of a son rather than the loss of a breadwinner or income earner, or someone who was contributing to payment of the rent.

[Union #4]

Recognition of the personal loss and damage which results from traumatic work-related death was an issue raised by union organisations and support and advocacy groups who welcomed the increase in lump sum payments and the abolition of dependency requirements, while at the same time noting the erosion of other rights and benefits, most notably those around nervous shock which allowed individuals to claim for their own psychological distress and suffering.

4.3. The common law option

Aside from workers’ compensation, families of deceased workers in Australia, and a number of other countries, may make a claim for damages at common law under the tort of negligence. Unlike workers’ compensation, which is a no-fault system generally only requiring that the person was at work at the time of the incident and with a set of procedures specifying entitlements, a claim at common law requires the plaintiff to demonstrate fault on the part of the person who contributed by negligence to the injury (whether that be an employer, principal contractor, occupier, another worker or another party). Demonstrating negligence sets a higher bar and while there are protocols, the determination of the amount of damages is determined individually in each case. The liability of the negligent party can be offset by contributory negligence on the part of the deceased worker. Other practical considerations include whether the financial resources of the negligent party, including insurance, are sufficient to obtain a realisable damages settlement that would justify the action. Other complexities include the difficulty obtaining evidence of the incident’s precise cause where the worker was working alone or not in direct contact with other workers at the time – a not uncommon occurrence especially with regard to self-employed subcontractors – or where such information is not made freely available to families.

We get requests for accident information from a number of people through Freedom of Information, now the Right to Information. Now, whether the majority of the requests are based on legal action or looking at the possibility of starting a common law action or the like, I’m not aware. And this is maybe something we need to check.... because we don’t, as a matter of course, go and tell the families what happened.

[Government Safety Inspectorate #4]
As almost all self-employed workers are excluded from workers' compensation, a common law claim is often the only option open to their families. Self-employed workers can sometimes elect to take out workers' compensation cover, convert themselves to employee status via incorporation of the business, or they can take out personal injury/death insurance cover (Guthrie et al., 2009). However, incorporation or opting for workers' compensation cover where it is available only involves a small minority of self-employed workers. Available evidence indicates that failure to take out the alternative of private insurance or taking out policies with inadequate cover compared to workers' compensation is widespread in industries like construction and road transport (Quinlan & Mayhew, 1999).

Self-employment is widespread in the three high-risk industry sectors that were examined in this study, and it is growing in the mining sector. So it is arguably more relevant to considerations of sectors that were examined in this study, and it is growing in the compensation is widespread in industries like construction and road transport.

Self-employment is widespread in the three high-risk industry sectors that were examined in this study, and it is growing in the mining sector. So it is arguably more relevant to considerations of financial support for families in these industries than elsewhere. However, not all the families of self-employed workers will be able to use this option. The most common scenario will be where the self-employed worker is a subcontractor and the family can sue the principal contractor. However, there will be few or more difficult options where a subcontract arrangement is not present and the self-employed worker, as is the case with most farmers, is working as a sole trader in a family business/partnership or as part of a family trust (Guthrie et al., 2009). In these circumstances, unless another party can be found to be at fault such as a supplier or manufacturer of defective machinery, the family will have no one to proceed against (or only another family member).

Unlike some other countries (e.g., Canada), families of employed workers can also pursue the common law option if they believe there is clear evidence of negligence on the employer’s part. If successful, they could receive a higher settlement than would be available under workers' compensation, although to avoid ‘double dipping’ any settlement would be offset against payments already received under workers' compensation, as the following participant described:

You've got to prove negligence with a common law claim so that can be problematic. There's all sorts of things they don't get either. If they get the common law payment then whatever's been paid under statutory benefits gets taken off that... If they go through common law first then they won't have an entitlement to statutory benefits.

[Government Compensation Agency #7]

In addition to the need to demonstrate fault, the common law option is more problematic than workers' compensation in a number of respects. Problematic aspects include greater delays in resolving a claim, variability in the level of payment, and placing a greater burden on the family to make potentially critical decisions such as selecting a lawyer to represent them. Workers' compensation regimes in Australia have sought to limit the need for legal input generally to the small minority of disputed cases. Families of workers who were union members are advantaged because unions retain law firms that specialise in both workers' compensation law and work-related injury common law damages claims. These firms can assist the family and have an incentive to safeguard their interests in order to preserve their long-term relationship with the union. As one union-affiliated lawyer commented:

Common law, by definition, involves an inquiry, a very close examination of what the cause of the death was and if it could have been prevented. It's obviously a lot more stressful for the defendants involved, because there's the consideration of what could have been done to avoid the death. Often you'll find when there has been a death, it's in the family's best interests to have somebody appearing for them before the coroner, because often the findings of the coroner will determine whether there's a viable common law claim that follows or not.

[Union #6]

On the other hand, families lacking the union connection, including the vast majority of self-employed workers, commonly have limited information about which law firm they should approach and may rely on a firm that does little work in this specialised area.

We've certainly had that situation where we've been asked late in the day to take over a matter when the family realises [who] they're dealing with — without any disrespect to suburban solicitors, maybe the average suburban solicitor is dealing [in] many different legal matters, family law, whatever. We, at our firm, have a number of specialists.

[Union #6]

4.4. Financial consequences and impacts on families

There was a surprising degree of unanimity amongst those interviewed from a range of disparate organisational perspectives about the severe financial impacts on the family arising from a death at work. This point was made not just by victim support groups/services, unions and union lawyers but also by employers, insurers and workers' compensation authorities. At the same time there was also general recognition of significant improvements to lump sum benefits, both in terms of amount and in terms of who could access it. The differences with the past, where lump sum payments could be minimal or non-existent (where there were no dependents), were highlighted by one interviewee who had considerable experience administering workers' compensation. Nonetheless, the interviewee also acknowledged the widespread view about minimising payouts amongst workers' compensation authority staff. Rereading the case of a young worker’s death, an interviewee stated:

What was devastating was that at that time, because he wasn’t considered to have any dependents, there was only the cost of the funeral. The language that was used in the authority was, ‘oh that’s a good claim, it’s just a box and bury.’

[Support Group/Services #2]

What was also seen as noteworthy of this particular case was that the worker’s parents were migrants with limited English and had heavily relied on him to help translate and navigate them through their dealings with government agencies. His death, therefore, posed additional problems for his parents beyond the already considerable ones. Their agitated dealings with workers’ compensation staff was attributed to ‘ethnic emotionalism’ not their social isolation and especially vulnerable circumstances.

For those without compensation coverage or for those forced to wait long periods for their claims to be settled, the financial implications can be disastrous. In these cases, families may be left to fend for themselves or to rely on social security payments where available. But the financial implications of spouses or families receiving lump sum payments may also cause some difficulties. While in the majority of cases families might pay off their mortgage and then try to adjust to life (which may involve having to take on the role of breadwinner) others who are not used to handling such large sums of money may be vulnerable.

We have certainly had some experience with people wasting the lump sum that they got, or it being directed in ways that benefit other people [and] not the person who was meant to benefit from it. There’s always a risk with lump sums.

[(Government Compensation Agency #4)]

I did see one case... they’re going down the Wrongs Act path. It was a widow, no children, and she’s basically flattened away the whole lot. Now she had a mental illness that no one knew about, but subsequently she’s had state trustees appointed to manage her affairs.

[(Government Compensation Agency #7)
The issue of financial advice, therefore, was an issue for some interviewees.

The Tasmanian system is quite generous in terms of compensating a family for the loss of a breadwinner so there is a significant sum of money that comes to dependants. Certainly the need for them to have advice in the management of that money is an issue.

[Coroner’s Office #3]

Despite most compensation schemes not including financial planning or advice, some claims agents will recommend that people go to their banks or financial institutions. And while some debated the merits of including a provision in lump sum payments that families receive, competent and independent financial advice before settling their claim, one representative from a government compensation authority expressed concern about compensation authorities becoming too paternalistic.

5. Conclusion

While there is considerable research on workers’ compensation, relatively little attention has been given to how the system deals with families following a work-related tragedy or what other avenues of financial redress are available to them. Work-related death is not an insignificant issue in terms of its economic costs to the community. Indeed, these effects can be far-reaching given the fall-out for families and children in particular. This cost is over and above the human suffering they entail. In the past decade there have been significant changes to the level and nature of support provided to families of deceased workers by workers’ compensation schemes in Australia in an effort to rectify past deficiencies. This study examined the views of those involved in administering workers’ compensation, interacting with it or dealing with the families of fatally-injured workers more generally. While there were some differences of opinion, the overall thrust of responses was that while the changes to the schemes were positive, ongoing challenges remained in terms of the timing and expeditious processing of claims and who was entitled to benefits. Changes to work arrangements and business structures, along with changes in family arrangements, especially ‘mixed’ families, were seen to have complicated the process and excluded some families from receiving support. Most notable with regard to the latter was the exclusion of support where workers were self-employed. While families of these workers could pursue a financial remedy at common law, those interviewed saw this as a generally inferior option that was also far more problematic in terms of chances of success and not available to all families of self-employed workers in any case.

Our interviews with workers’ compensation authorities and private insurers involved in administering the compensation system, as well as other parties like unions, legal representatives and support groups and services who are also involved, indicated a widespread recognition that the exclusion of most self-employed workers from coverage imposed a significant burden on their families. It was a source of considerable frustration and anger amongst families of deceased workers and also a source of delay and complexity in determining claims given the shifting nature of employment status amongst some categories of workers. Australia is by no means alone in excluding most self-employed workers from coverage. Given changes in work arrangements over the past three decades, however, this exclusion has created a significant gap in social protection for those suffering injury or disease arising from work which particularly affects families in the case of death or full incapacity. The alternatives available of self-insurance or claiming damages at common law, while assisting to some extent, seem deficient in terms of constituting an adequate safeguard for families. The current framework therefore requires reconsideration. It should also be noted in passing that the failure to include self-employed workers has implications for the accuracy of work-related fatality data used to guide prevention and benchmark industry and national performance. Again, with notable exceptions, such as New Zealand and Sweden, this problem is to be found in many countries that rely on compensation claims to calculate work related disease and injuries (Lilley et al., 2013).

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