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WORKERS COMPENSATION - THE THIRD WAY

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ABSTRACT

Workers' compensation represents around eleven decades of experimentation with the structures and processes surrounding injury and illness in the workplace. The pioneer system was the German Berufsgenossenschaften, the autonomous industry insurance funds, which have provided the basis for occupational disability arrangements in Germany since 1885 and which have long had a focus on rehabilitation and accident prevention. In much of the Anglophonic world, and particularly in the United States and Australia, a different approach was taken and schemes based upon private insurance underwriting and individual employer liability have long been predominant. Among the shortcomings of this latter approach has been an inability to deal in any systematic and effective way with injury prevention. It is suggested that an approach to workers' compensation system design which adopts the structural characteristics of the Berufsgenossenschaften, together with the insights of the Factory Mutual approach of 'highly protected risk', provides a visionary pragmatic strategy for dealing with the challenges of occupational disability for the twenty first century.

INTRODUCTION

Language can evoke differential responses according to the particular setting in which it is employed. A term such as 'the third way' presently has something of a 'New Age' ring to it. However, there is very little of the 'New Age' in workers' compensation unless one has reference to the workers' compensation statutes in some southern American states which encompass faith healing among the areas of para-medical interventions which are compensable by the workers' compensation system. However, there is indeed a particular resonance of this term for a United States audience given the propensity there to utilise a form of short-hand designation of the financing structures of various jurisdictions in terms of whether they are a one-way, two-way or three-way system. A three-way system is one in which there is private insurance, self-insurance and a State-owned insurer which operates in the market along with private insurers.

In Scandinavia, the 'third way' has well-understood connotations in terms of cooperative arrangements which are distinct from purely state endeavours and those which are the product of the private market. In a colour-coded sense, it stands between the red and the blue. This Nordic sense of the 'third way' is primarily the manner in which the title of this paper is to be understood. However, by way of sub-text, there is a secondary rendering to the term. It is one which is of greater salience to the Anglo-Celtic history of workers' compensation development which, as briefly described below, initially understood the role of workers' compensation as being the provision of limited monetary recompense for the wage loss sustained as the result of occupational injury. Only in the 1970s did a second element, that of a more than tokenistic regard of rehabilitation, achieve any real prominence in workers' compensation system design. The final - third -

element, that of injury prevention, is the subject of much rhetoric but still remains largely undeveloped in terms of effective, coordinated and applied interventions which are seriously directed at the source of occupational injury and illness. The third way, or perhaps more correctly the 'third stage', means a visionary pragmatic strategy of coherent and applied injury prevention initiatives. The link is that one of the most hopeful environments for achieving this goal is within the framework of cooperative arrangements which involve the full participation of employers and employees.

The following section briefly sketches some of the historical development of workers' compensation and, in particular, the influence of the two major developmental models, namely the German and English approaches, fashioned at the end of last century. Apart from the Canadian developments, stemming from the investigations of Sir William Meredith, there has largely been a hermetic divide between these developments. In fashioning effective, problem-solving, approaches to the difficulties associated with occupational disability, the policy maker in the Anglo-Celtic systems may find much of value in the approaches fashioned by the German Berufsgenossenschaften. The fact that there has been so little consideration of this model may be partly accounted for by a separation of language and by cultural stereotypes borne of events earlier in this century. While it is unlikely that many schemes in Australia or North America would contemplate so radical a transformative step as moving completely to a system of industry-based insurance funds, nevertheless, in principle and in practice, such a structure is not so radically different than that of the group self-insurance mechanism which exists in many of these schemes.

WORKERS' COMPENSATION BACKGROUND

Workers' compensation systems do not simply represent a set of legal structures and arrangements governing access to and the distribution of benefits for occupational injury and illness; they are also, in the words of the 1984 Cooney Report in Victoria (Australia), "the product, over time, of economic and social values and forces in society".[1] Historically they represent a differential response within particular jurisdictions to the carnage of the late Industrial Revolution and the inability of then current legal system to deal with the phenomenon of mass injury. More strategically, and in terms of timing, they emerged as part of the chess moves of political life. In the case of the first modern workers' compensation initiative, that enacted by Bismarck in 1884, it was a pre-emptive strike by the Iron Chancellor to undercut the appeal of the emerging Social Democrats and an attempt to garner working class support for the Emperor and the German imperial system. In England, the legislation of 1897 represented a slightly maverick Tory response, imbued with noblesse oblige, to once again 'dish the Whigs' and their attempts at reform through successive amendment of the Employers' Liability legislation.

Indeed these two examples - Bismarck's Imperial German Accident Law which was promulgated on 6 July 1884 and came into force on 1 October 1885 and the English Workmen's Compensation Acts of 1897 and 1906 - represent two polar models of workers' compensation design which have profoundly influenced the arrangements adopted in most other countries.

The 'German model', in the form of the statutes of 1884 and 1900, was able to draw upon the traditions and institutions of the guild structure which, due largely to the late flowering of large-scale industrial activity in Germany, had managed to survive from the Middle Ages into the nineteenth century. This was particularly the case in the mining industry where mutual associations of miners (Knappschaften) provided extensive care and support in cases of disability from injury or illness. Similarly, in particular areas of manufacturing, guilds and journeymen's fraternities provided a range of benefits for their members and some journeymen's fraternities even had their own hospitals and employed their own doctors. Following this tradition, the German arrangements, in the form of the statutes of 1884 and 1900 and institutionally through the autonomous industry insurance institutes (Berufsgenossenschaften) went beyond a simple concern with compensation to encompass accident prevention (particularly through the inspectorial role vested with the insurance institutes and their ability to levy a 'danger tariff' upon firms with particularly bad accident records) and rehabilitation (an area not narrowly confined to industrial rehabilitation but extending to social rehabilitation of injured workers to a state of 'social health' (soziale Gesundung)). These German arrangements provided the model for workers' compensation developments in a number of other European states, beginning with Austria-Hungary in 1887 and Norway in 1894.

By contrast, the schema of English workers' compensation arrangements embodied in the 1897 legislation was the product of a political environment heavily imbued with the spirit of Manchester liberalism, the dominant economic and social force in late nineteenth century Britain. It was an environment in which a driving tenet was that social relations, as well as those in the economic sphere, should be the subject of minimal state intrusion. However, the effect of a triad of judicially created defences, which have become known as the 'unholy trinity', was to essentially preclude an injured worker receiving compensation payments as the result of occupational injury. After the relative ineffectiveness of successive amendments to Employers' Liability legislation to change this situation, Joseph Chamberlain, the somewhat unorthodox Tory, changed the perspective from further salami slicing the impediments to tort recovery in favour of a limited no-fault alternative.

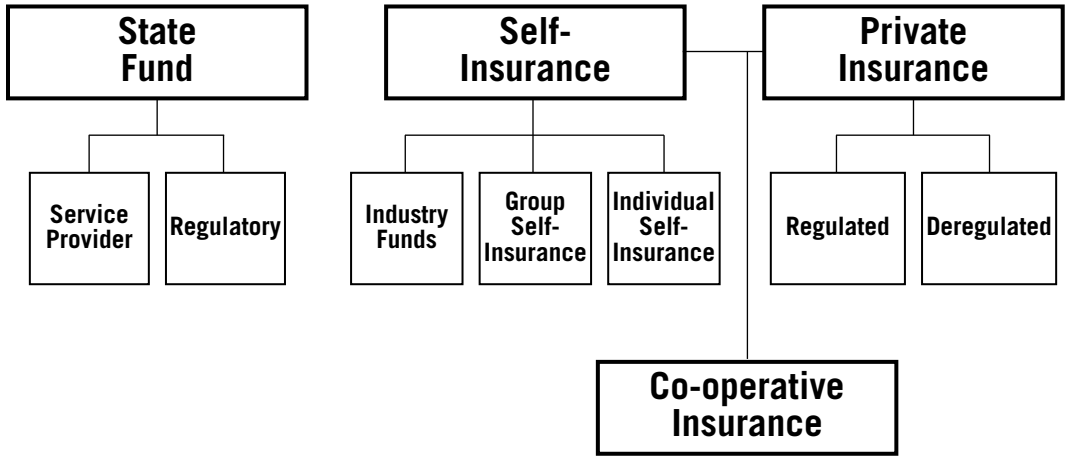
The original legislation was restricted to a number of enumerated areas of employment, such as mining, quarrying, and railway work, in which there were assumed to be special risks associated with such employment. A later extension to employment generally was subject to an income test, except for manual employment. Many classes of employment, including that of outworkers, were also explicitly excluded from coverage. As well as these limitations, the English legislation was purely an amelioratory measure concerned with the provision of limited income support to compensate for wage loss as a result of industrial injury. There was never any consideration of accident prevention or rehabilitation. To the extent that there was any State involvement in industrial safety, this was the province of the inspectorates established to enforce the provisions of the Factories and Shops legislation while rehabilitation, outside the area of wounded war veterans, was unknown outside of the very limited efforts of private charitable organisations.

This was the model of workers' compensation which was adopted in Australasia by the various Australian jurisdictions and in New Zealand. It was also the dominant model in the United States and was the basis for Canadian arrangements prior to 1914. As well as, initially, only being concerned with limited income support, this model was underwritten by private insurance except for those employers granted self insurance status. The integration of occupational rehabilitation into system operations is a development which largely stems from the late 1970s while, in most schemes, the issue of aligning scheme operations to have anything more than a token effect upon injury and illness prevention is still at a very embryonic stage.

WORKERS' COMPENSATION STRUCTURES

Contemporary workers' compensation arrangements represent the product of more than eleven decades of experimentation with the organisation, structure and process of occupational injury and illness compensation. Notwithstanding the strong influence of the two polar models referred to above, the practical articulation of these arrangements among the 145 or so nations with recognisable occupational disability systems exhibit a smorgasbord of orderings and approaches. This is particularly the situation with respect to the financial structures underpinning these schemes. A typology of such structures is given in Figure 1. The variation within regions can be considerable; for instance, in Scandinavia, Denmark and Finland have much greater level of private insurance involvement within their occupational disability systems than is the case in either Sweden or Norway.

Figure 1: Typology of Workers' Compensation Financing Structures



Workers' compensation was, in Beveridge's phrase, the pioneer system of social security. It is highly likely that, if the introduction of workers' compensation had been delayed for another couple of decades, it would simply have been a component of a generalised social insurance or social security system dealing with occupational disability. Indeed, in many countries, especially those of Northern Europe, this has become the situation with the former workers' compensation schemes being integrated into the general framework of the later emerged social insurance or social security systems. This was the case with Britain itself which, with the National Insurance (Industrial Injuries) Act of 1946, moved (effective from 1948) from a workers' compensation system based on individual employer liability and private insurance to one integrated within the national social insurance system. Similarly, in France, the Employment Injuries Act of 1946 displaced the former private insurance system in favour of employer contribution to a social security fund in the form of the Caisse Nationale de l'Assurance Maladie.

The major contrast lies in North America and the Australian states, where, in large part due to the strength of the states/provinces within a federalist structure, workers' compensation remains as largely autonomous employer-financed schemes of occupational disability benefits which parallel a federally-administered, taxpayer-financed (at least in Australia), system of social security. As mentioned above, these schemes were largely the heirs to the English model of workers' compensation development in which financing was based on private insurance underwriting together with an option of self-insurance for some (usually larger) employers. However, again over time, there has been some amendatory movement from this ruling model in particular jurisdictions.

The extent to which this model has held sway, and particularly the exceptions to it, provide an interesting illustration of some elements of the prevailing Zeitgeist and also some of the dynamics, and weaknesses, of private insurance underwriting of workers' compensation. The purest operation of the English model was in Australia where, apart from the state of Queensland, it remained dominant for more than eight decades. The fact that it was supplanted, first in Victoria and then South Australia and New South Wales, in favour of public underwriting, resulted from the practices within the private insurance industry from the mid-1970s. In a period of less than a decade the private insurers veered between dramatic price discounting in a lemming-like rush to build market share and large investment reserves at a time of very high interest rates, to an even more precipitous set of shock price rises as companies realised that they were seriously under-reserved. In the wake of this series of seismic pricing changes, most areas of business lost faith with the insurance industry and manufacturing capital joined hands with labour to support Government moves to establish an exclusive state fund, although with the compromise of private sector delivery agents.

In the United States, workers' compensation was very much a social product of the Progressive era. This helps explain the initial presence of seven exclusive state fund schemes among the overall dominant private insurance model since the Progressive era probably represented (along with the New Deal) the high point of governmental intervention into economic and social relations in the United States and the creation of state enterprises and instrumentalities. It is perhaps no surprise that some of these examples emerged in areas of regional radicalism or non-conformity (the Pacific North-west examples of Washington State and Oregon), labour strongholds (Ohio and West Virginia) and areas of German influence (North Dakota). However, no new exclusive state funds have been created since the first flush of workers' compensation development in the United States in the decade after 1911. Indeed, since then one of these schemes, Oregon in the 1960s, moved to a three-way system of private insurance, a competitive state fund and self-insurance and another, Nevada, is due to take the same path in 1999. However, during the 1980s the United States experienced severe problems with insurance availability with a concomitant dramatic increase in the size of the residual market. One of the responses by Government to this crisis of availability was the establishment of a number of competitive state insurers which would compete with private insurers in the market place but would also often provide a residual market role, particularly by acting as an insurer of last resort. The seeming contradiction between no expansion (and indeed a degree of contraction) of exclusive state funds, yet, more recently, the creation of competitive state funds is in the residual market function that these latter bodies often perform, thus providing a safety valve or stabilising function to the operations of the private market.

Early Canadian development was, like that in Australia, essentially a carbon copy of the handicraft of the Imperial Parliament at Westminster. However, the detailed investigations of the Chief Justice of Ontario, Sir William Meredith, and his reports in 1912 and 1913 to the Ontario legislature, were extremely critical of this English provenance. Meredith saw the English model as primitive and barbarous, especially when compared to some European models such as those in Norway and Germany and recommended a change in that direction. Largely as a result of the Meredith reports, the Ontario legislature introduced an exclusively no-fault system of workers' compensation based on a single provincial fund. This model, over time, was adopted by all the Canadian provinces and territories.

The Zeitgeist which is currently predominant is very different from that which nourished the Progressive era and gave sustenance to the views of an enlightened jurist such as Sir William Meredith. The last two decades have seen the rise to hegemonic dominance of a new intellectual world order in the form of economic rationalism, particularly among Treasury and other economic portfolios of Government. One of the results, sometimes characterised as the Thatcherite revolution, has been a complete reappraisal of the role of Government and wholesale corporatization, out-sourcing and privatization of Government functions and instrumentalities. In country after country public utilities (such as gas, water and electricity) and public enterprises (including state banks, national airlines and telecommunication carriers) have been privatised. The out-sourcing and privatization agenda is moving on to 'social welfare' areas of Government including social security and state workers' compensation funds.

This has already occurred in Latin America where workers' compensation arrangements have traditionally been a state responsibility either through the social security system or through a monopoly state insurer. These traditional arrangements are exemplified by the situation in countries such as Brazil where workers' compensation coverage is provided through the social security system and in Costa Rica where mandatory workers' compensation insurance can only be provided through the state-owned Instituto Nacional de Seguros. However, the pressure for market initiatives, from a variety of sources including the International Monetary Fund and the World Bank as well as the direct lobbying of the interests of domestic and international capital, has seen a number of Latin American countries open up their systems to private underwriting and/or administration. For instance, in Argentina, the new workers compensation law enacted in September 1995, and operative from April 1996, obliges employers to insure the risks of occupational injury and illness through specially created workers' compensation insurance companies (ART), although there is provision for employers with recognised solvency levels to become self-insurers. Similarly, in Colombia, Law 100 of 1993 provided for the opening up of the social security system to competition from the private sector; consequently, there is now a system of Professional Risk Administrators (ARP) which compete with the Social Security Institute (ISS) in the administration of workers' compensation benefits.

There has been a long history of debate, particularly in the United States, about the supposed merits and superiority of private insurance underwriting in workers' compensation over that of state funds and vice versa. In journals such as the ***NCCI Digest***, published by the National Council on Compensation Insurance, the argument has sometimes taken the form of polemics dressed up as scholarship. However, these efforts at structural determinism tend to miss the wood for the trees; that in terms of scheme outcomes, elements of scheme management and culture are far more important than formal aspects of underwriting structure. In particular, restoration of 'ownership' of the scheme to the primary industry parties (employers and workers) and concentration of problem solving, particularly injury prevention and return-to-work initiatives at the workplace (enterprise) level provides the soundest base for achieving optimal results and outcomes. It is no surprise that what are probably the two most highly regarded schemes in the United States in terms of effective operation, Washington State and Wisconsin, have both cemented a partnership between management and labour into the fabric of scheme operations. The salience of this fact is underscored by their different underwriting structures; Washington State is an exclusive state fund and Wisconsin is a privately underwritten jurisdiction.

What much of the debate between private insurance and state funds has also tended to overlook is the fact that the real movement in terms of workers' compensation financing has been in a continuing rise to prominence of the alternative market. That term refers to a range of arrangements within the property and

casualty insurance sector, embracing authorised self-insurance, captive insurers, risk-retention groups and group self-insurance arrangements. According to a recent study by Conning & Co, a specialist insurance research company, this market represents about a third of the total risk protection market (and as much as 37 per cent if more aggressive assumptions are used) compared to about 21 per cent of the total risk protection market in 1980. If private retentions are included, a research unit associated with the insurance brokers Sedgwick James Inc has estimated that the alternative market grew to 43 per cent of the total market in 1995, up from 35 per cent in 1990. The financing of workers' compensation risks is a sub-set, although a very significant sub-set of this overall market.

CO-OPERATIVE INSURANCE AND SELF INSURANCE

There is a long history of co-operative self-help arrangements and organisations in response to disability or the prospect of disability. Mention has already been made of the efforts of the German guild and journeymen's fraternities in providing support for injured workers which stretch back to medieval times. In England and the British colonies the operation of friendly societies and related bodies provided the major form of amelioratory relief for the consequences of injury and illness prior to the introduction of workers' compensation legislation.

Co-operative Insurance

In relation to private provision for death and disability, mutual or cooperative insurance companies providing life insurance and associated products have long had a dominant market role in most countries. Recently, this has began to change with many such companies instituting moves towards demutualisation, a development triggered by a desire to access equity markets for capital raising rather than being dependent upon the contributions of policyholders. Specifically, in respect of workers' compensation insurance, mutual insurers have played an important role from the beginning, both in the United States and in Australia. The very first workers' compensation policy issued in the United States was effected by Employers Mutual of Wassau, while Liberty Mutual Insurance is the closest approximation to a national workers' compensation insurer in that country. In Australia, a number of employers' bodies formed or were associated with mutual insurance bodies established specifically to underwrite workers' compensation business. This tradition has now become totally eclipsed and recently the most significant of such companies, Manufacturers Mutual Insurance, converted to joint stock status.

Functionally, however, the large mutual insurers have largely operated in both the life insurance and workers' compensation fields little differently from joint stock company insurers. The highly dispersed nature of policyholder ownership has meant that effective control is vested in the company management with the beneficial owners (policyholders) exercising very little influence on the strategic direction and operations of the company. There are some exceptions to this general phenomenon, particularly where a mutual insurer maintains close ties to its founding sponsors as in the case of the Swedish mutual insurance company, Folksam, which is closely aligned to the labour and co-operative movements in that country. As well as pioneering a scheme of collective house and contents insurance to union members in Sweden, as opposed to the traditional individual nature of such policies, Folksam has also provided a form of disability insurance coverage for seafarers through the major international body concerned with the advancement of the working conditions and welfare of seafarers, the International Transport Workers' Federation.

While, generally, the functional difference between private insurance and mutual insurance, in terms of operating philosophies, has become increasingly blurred, one of the major impetuses for co-operative insurance initiatives has been as a response to excessive charges and cartel arrangements by mainstream insurance companies with affected groups forming their own alternative insurance arrangements. One of the most notable examples of this phenomenon was the emergence of the English hull clubs as a result of the exorbitant premiums charged by the Royal Exchange Assurance and the London Assurance through their Parliamentary-conferred monopoly on marine insurance between 1719 and 1824. These hull clubs became the precursors of the Shipowners' Protection and Indemnity Clubs (P & I Clubs) into which over ninety per cent of the world's shipping is now enrolled. Other significant examples include State Farm Mutual

Insurance Company, now the largest automobile insurer in the United States, which emerged during the 1920s as a response to overcharging of drivers in rural areas, compared to city drivers, by stock insurance companies and the Factory Mutual Insurance movement formed by dissatisfied mill owners who were unable to get their initiatives in the implementation of fire prevention devices recognised by insurers in the form of lower premiums.[2]

Self Insurance

The greatly increased prominence of alternative market approaches within the risk protection market over the last two decades has been noted above. The most significant of these alternatives in the workers' compensation market is that of self-insurance. Most workers' compensation schemes offer employers who meet designated criteria an option to 'contract out' of the statutory financing (premium) arrangements and carry their own risk. Self-insurance arrangements also tend to be a very significant aspect of public sector employment. The prescribed criteria usually relate to prudential considerations and sometimes stipulate minimum size thresholds (measured in terms of number of employees and company net assets). As well, requirements to hold catastrophe insurance, maintain bank guarantees or similar surety to the value (or multiple) of outstanding claims liabilities and to contribute to a guarantee fund (to provide for possible claims cost shortfalls in the event of self-insurer failure) may also be mandated.

In most systems self insurance is a most significant element, being the financing option which routinely covers around a third to a half of the total work-force to which the workers' compensation statute applies. In larger jurisdictions the total number of enterprises which have been granted self-insurance status can provide a significant administrative oversight task for the scheme regulator. In California, for instance, the latest figures show that some 1,546 private employers and 2,048 public agencies are approved to be self-insurers and that these employers employ approximately 4.7 million workers, or roughly one-third of the state's labour force.

The prudential and size criteria which operate with respect to self-insurance preclude this option being open, on an individual basis, for small to medium size employers. However, especially in the United States from the 1950s, this barrier has been mitigated by the development of group self-insurance, an arrangement which allows employers engaged in a similar industrial, commercial or professional area, or having a similar risk profile, to join together in a group which becomes a self-insured entity. It is thus a mechanism through which comparatively small employers may achieve self-insured status.

Some Australian states have provided for limited group self-insurance arrangements (essentially in respect to municipal bodies). New legislative changes in Queensland, which are due to take effect in mid-1997, provide for the availability of group self-insurance as one of a series of financing mechanisms and one which is not limited to the municipal sphere. However, group self-insurance is most highly developed in the United States where provision for it exists in some 33 States and where it constitutes the most common insurance mechanism for local government bodies with a population of over 100,000. It has had a particularly explosive growth in Florida where it accounts for nearly thirty per cent of the workers' compensation market with over 46,000 firms covered by such arrangements.

Group self-insurance raises a number of regulatory issues including questions in relation to what constitutes a group, matters of risk diffusion and with possible conflict of interest issues with respect to the group's third party administrator. In defining a group, while there is general agreement that the group should be based on entities which have a generally similar risk profile, there is a divergence of view as to whether this should be achieved by restricting participation to members of the same industry or whether a more general approach to risk may be taken. Thus, in the United States there is a distinction between "homogenous" groups consisting almost exclusively of firms in the same industry (as for instance in Michigan) and "heterogeneous" groups involving businesses covering a wide spectrum of manufacturing and service activity (as is the case in Illinois). Issues relating to risk diffusion concern the composition of the entities comprising the group so as to avoid, for instance, the situation of a group being dominated by one large member in conjunction with a number of small entities with the result that the viability of the group will be undermined if the large member becomes financially troubled.

The management of a group is generally in the hands of a third party administrator which provides the administrative functions in much the same way that an insurer would for its client in the underwritten market. Many third party administrators are also involved in the rehabilitation and risk management fields and questions arise as to how to avoid conflicts of interest in using management of the group to enrich these other operations. While there has grown up a group of professional third party administrators, one of the most successful group self-insurance arrangements is the Electrical Employers Self Insurance Safety Plan (EESISP) in New York which is a joint employer-union initiative with a union body providing the administration of the scheme. The scheme has a very strong safety focus and has succeeded in paying benefits to injured workers in excess of those mandated by the New York State workers' compensation statute at a cost to the employers involved in the scheme substantially below that paid by other New York employers of electrical workers.[3]

The logical extension of the group self-insurance concept is that of an industry fund which provides coverage for all employers within a designated industry. There is a distinction between an industry ***scheme*** and an industry ***fund***. An industry scheme is a specific statutory arrangement governing workers' compensation entitlement, benefits and related matters in a particular industry. The funding of these arrangements may be by private insurance (as is the situation in relation to the federal scheme for seafarers in Australia (Seacare)) as readily as by a single fund. An industry fund is represented by a single entity which provides the total administration of the system including financing and claims handling. If Seacare is an example of an industry scheme in the Australian context, the New South Wales Joint Coal Board scheme is probably the leading example of an industry fund in that country.

The most comprehensive example of workers' compensation arrangements organised in the form of industry funds is, of course, the German Berufsgenossenschaften (BGs). These insurance funds or institutes fall into three main categories; industrial accident insurance institutes, agricultural accident insurance institutes and public sector accident insurance institutes. In terms of governance each of accident insurance institute has a representative assembly, which determines issues such as accident prevention regulations and the tariff of risks. This body is comprised of an equal number of elected employer and employee representatives. It also elects an executive board, also composed of equal employer and employee representation, which is responsible for administration of the scheme apart from day-to-day matters which are executed by a full-time executive director.

Accident prevention and occupational health and safety is a primary task of the BGs which maintain a large technical inspectorate of highly qualified inspectors. These inspectors are drawn from persons with an academic or trade background in the field covered by the BG and must then undergo a two year training course and pass an examination before being able to operate autonomously in the field. The technical inspectorate conducts plant inspections, investigates accidents and cases of industrial diseases and provides an advisory and training role for companies. It plays an important preventative role through defining safety requirements and testing appliances (machines, tools, equipment) and personal protective equipment before they go into production. These activities are coordinated by a Central Agency for Accident Prevention and Occupational Medicine. As well companies with more than 20 employees must appoint one or more safety officers depending on the type and size of plant and its risks of accident. The German system also has a very strong commitment to occupational medical preventative care and to rehabilitation. This is supported by a network of specialist occupational physicians which undertakes both preventative screening examinations (involving over two million preventative examinations a year) and oversight of treatment regimes and occupational rehabilitation management and retraining in the cases of injury or illness.

THE CO-OPERATIVE IMPULSE - THE THIRD WAY

The Road to Saltsjöbaden

The injury-producing effect of the Industrial Revolution was graphically illustrated by Engels' comment likening the Manchester population to an army returned from war because of the widespread incidence of amputations. It was the inability of the existing legal system to cope with this phenomenon of widespread injury which ultimately gave rise to workers' compensation systems. As well, the gathering together of workers in factories provided an impetus to a new form of industrial unionism different from preceding craft and guild arrangements. In a number of countries this new unionism took on an increasingly militant and, particularly under the influence of Marxist teachings, even revolutionary orientation. As noted above, Bismarck's initiative in instituting the first modern workers' compensation system was largely motivated by a desire to undercut the appeal of the (then Marxist) Social Democratic Party to the German working class.

In the early decades of this century, and particularly in the aftermath of the First World War, movements arose aiming at a fundamental restructuring of the existing order and the establishment of a socialist society. Apart from the overthrow of the Czarist regime in Russia in the October 1917 Revolution, there were short-lived episodes such as the Spartacist rising in Germany and the Bela Kun administration in Hungary. While, in most countries, the leadership of the mainstream labour movement was characterised more by a form of militant Fabianism, the example of the events in Russia and occasional mass mobilisation in the form of a general strike, such as the 1909 general strike in Sweden, served to concentrate the minds of the leadership of both the peak business and labour organisations and the parliamentary expression of such organisations.

The friction costs of continual confrontation and a strategy of suppression of trade unions were calculable in terms of lost production and similar measures and impelled the more enlightened and pragmatic leadership of business to seek an accommodation with labour. Similarly, prominent voices within the more radical elements of the labour movement, such as Edward Bernstein within German Social Democracy, were propounding a strategy of civilising capitalism rather than overthrowing it. Such accommodations were evidenced in a variety of forms in different countries, but perhaps the most striking concrete expression is the 1938 Saltsjöbaden agreement in Sweden which provided the foundations for the consensus model for programme development between the central labour market parties which has almost become synonymous with that country.

It is the spirit of Saltsjöbaden which informs the direction of the third way. It does not imply that capital and labour have the same interest; merely that it is wasteful for both sides to engage in internecine warfare over most workplace issues with the major beneficiaries being the legal interests employed to produce and fire the ideological bullets associated with these battles. It is a recognition of the dynamics of one of the central constructs of game theory, namely that of the Prisoner's Dilemma; that an attempt to suppress another party (particularly one with whom you will have ongoing dealings) may achieve a short-term advantage but carries with it long-term costs so that the best prospects for long-term gains lie in a strategy of cooperation.

The Case for Industry Funds

As mentioned at the beginning of this paper, there has been little consideration of the merits of industry-based funds, similar to the German Berufsgenossenschaften, in the United States and Australasia. It is suggested that this model, or variants of it, provide a fruitful area of inquiry for policy makers in these jurisdictions, both specifically in respect of issues concerning workers' compensation performance and also in relation to wider questions of the establishment and maintenance of a workers' compensation culture which is centred on cooperative problem solving.

One of the recurring themes in reports of committees of inquiry and other reviews of workers' compensation systems is that while such systems have as their rationale the serving of the interest of injured and ill employees and that of employers, they have been significantly captured by, and a substantial portion of their resources give liberal sustenance to, a range of third party providers.[4] The importance of reclaiming of the workers' compensation system by the industry parties, employers and workers, can be best achieved through direct arrangements in which these parties maintain control. Self-insurance is one mechanism for achieving this end although there has been some traditional resistance from the labour movement, particularly in Australia, to self-insurance on the grounds that it may provide greater opportunity for improper employer suasion, either directly or indirectly, in such areas as the lodging of claims. While there appears to have been a lessening of such opposition in more recent years, an industry fund, whose operations are governed by a board comprising both management and labour representatives, provides a comprehensive basis of control of workers' compensation arrangements by the industry parties and reasonable safeguards against possible employer abuse.

In relation to industrial culture, it is a somewhat paradoxical fact that, while the labour movement has been at the vanguard of social reform, one of the last areas of contemporary life which has been opened up to the democratising process has been that of the workplace. Until comparatively recent times it remained very much a seigneurial domain of the employer. Now the former largely unfettered writ of the employer has become subject to a number of external constraints in such areas as unfair dismissal, equal opportunity and anti-discriminatory practices. Workers' compensation legislation has only intruded lightly into the realm of the managerial prerogative, for instance with such measures as that requiring the employer to keep open, where practicable, the job of an injured worker for a stipulated period. More intrusive has been the effect, in many jurisdictions, of health and safety legislation under which power is given to employee health and safety representatives to issue provisional improvement notices requiring modification of the work environment and even, in cases of perceived danger, to halt the production process.

An industry fund with bipartite management provides a basis both for extending the processes of industrial democracy and for effective problem solving initiatives. For instance, one area of continuing difficulty and disputation within workers' compensation systems concerns the boundary issue of who is covered by these arrangements. The classical divide is between a person working under a contract of service or employment (a worker or employee) who is covered and a person working under a contract for services (an independent contractor) who is not. With increasing specialisation and fragmentation of work functions this question has, over time, become more difficult of resolution rather than easier to decide. An industry fund provides an opportunity to cut the Gordian knot on this issue by mandating coverage for all persons engaged in the industry and determining a basis upon which contributions will be made in respect of that coverage.

It was mentioned earlier that one area where the English model of workers' compensation, based upon private underwriting of risk, has been particularly deficient is in respect of injury and illness prevention. This should perhaps come as no real surprise since there is no inherent connection between insurance and prevention. Insurance essentially involves placing a price upon risk; if there is greater risk, then the premium demanded will reflect that fact. Many insurance carriers do, of course, maintain some risk control services which clients can draw upon. However, the maintenance of such services represents an ongoing overhead and cost and there are limits to the commitment that an individual carrier can make to this area and remain price competitive with its rivals, a situation which is exacerbated, for instance, in the United States with the widespread move to open rating. Indeed the limits to the commitment of the private insurance industry to prevention can be more starkly presented when viewed through the prism of a heuristic notion that it may be possible to eliminate most or all risk; survival necessarily dictates that there must be a point where altruism and self-interest must diverge.

In insurance terms, the outstanding exception to this general situation is, of course, the Factory Mutual insurance system. However, this is precisely because the Factory Mutual model is a prevention-oriented, cooperative insurance approach in which coverage is restricted to corporate entities who meet a threshold commitment to prescribed fire safety standards with such commitment being benefited with lower premiums. While the system maintains a large and costly infrastructure of more than a thousand loss control engineers and large research facilities, this is an investment in a feedback loop whereby the adoption of better approaches to risk elimination and risk reduction by participating members can lead to a general reduction in the risk environment and hence lower premiums. However, it is as much a risk reduction as an insurance system, with the insurance premium relating to the element of residual risk.

The Factory Mutual paradigm in fire prevention has lessons for a prevention-oriented approach to occupational injury and illness. The first is the emphasis on technological innovation and risk elimination. The major contribution to safer workplaces has resulted from new technological processes and changing organisation of the workplace including automation, robotization, better ergonomic design of tools and work-stations and aids such as pneumatically powered lifting devices. Where workers' compensation systems have taken cognisance of injury prevention, the focus has been on areas such as personal protective equipment and behaviour modification campaigns. The impact upon general levels of safety has been palliative rather than transformative. Secondly, the Factory Mutual approach to 'highly protected risk' involves a requirement to achieve and adhere to stipulated minimum safety and construction conditions, for instance in respect of fire sprinkler systems. This exercise in prescription contrasts to the Robens ethos which characterises the current dominant approach to occupational health and safety in which prescriptive designation of minimum conditions has been supplanted by the judgmental criterion of 'reasonableness'.

An industry fund offers the best prospects for a systematic and comprehensive approach to injury and illness prevention. This requires the development, maintenance and continuous improvement of a sophisticated information system based on the workers' compensation claims record. While claims data is simply a proxy for injury and illness data, it is nevertheless the best information available and can be a powerful tool for targeted accident prevention. Traditionally, workers' compensation information and data systems have been organised primarily according to the functions of collecting premiums and paying claims. Use of this data, similarly, has tended to be concentrated at the aggregate level, for instance in the calculation of an annual outstanding claims liability figure for a scheme. In terms of effectiveness for applied prevention activities, it is precisely the ability to disaggregate reliable data according to specified attributes which is an essential requirement of a scheme's information system.

Perhaps the most thoroughgoing efforts in this direction have been undertaken in Scandinavia, fertilised by the activities of the Nordic Accident Forum. In Sweden, following some five years of trialing studies, a new accident prevention system was introduced into the No-Fault Labour Market Insurance (workers' compensation) system as from 1 January 1988.[5] It is perhaps significant that the system in Australia which has an information system which can be most readily utilised for targeted injury prevention purposes is that of the Joint Coal Board of New South Wales which is the major Australian example of an industry fund.[6]

One issue which is currently at the forefront of workers' compensation discourse is the differential level of performance on various scheme outcome indicators between large and small enterprises and the difficulties associated with changing the performance of the latter group. With respect to injury and illness prevention, the major weapon of the workers' compensation system is experience rated premiums; however, apart from other problems, such an approach has little or no impact upon small to medium-sized business.[7] However, an industry fund, as the Berufsgenossenschaften model illustrates, can provide a framework in which the safety practices of all enterprises within the industry can be assessed and poor practices and procedures changed.

One of the given constants of modern industrial life is a continuing relentless process of restructuring and change. As already mentioned, the inexorable march of technological innovation has been the prime engine of substantial improvements in injury and illness prevention. However, the magnitude of this change process brings with it enormous concomitant effects, particularly in terms of labour displacement. There is a key role for the labour movement to be involved in the ongoing change process to ensure that the effects of change are dealt with in a manner which gains both maximum advantage and minimum disadvantage for its membership. An example is that of the Seamen's Union of Australia (now part of the Maritime Union of Australia) one of the more militant Australian trade unions, but one whose leadership saw the inevitability of changes in manning levels on Australian coastal vessels and actively participated in the activities of the Maritime Industry Development Committee. The union was able to gain recognition for a process of upgrading the skills of its members (multi-skilling) and a comprehensive training programme for new recruits to the industry at the national maritime college, while securing generous redundancy packages for those members who were obliged to take early retirement from the industry. On a similar basis there is a role for an industry fund, in conjunction with wider industry bodies, to be also actively involved in the change process and help ensure that the chosen path of technological change is one which best assists the role of risk elimination and reduction.

While the organisation and operation of workers' compensation arrangements constitutes a more than eleven decade experimentation process, it is one which has hitherto been largely reactive in nature. One of the great challenges for this system as it faces the twenty first century is for the industry parties, employers and workers and their respective representatives, to take firm control of the operation of the occupational disabilities compensation system and set it on a course of dealing in a comprehensive and effective manner with the major issues of injury and illness prevention and appropriate rehabilitation of those suffering occupational disability, areas which have, in most jurisdictions, not received the attention they properly deserve and the resources and managerial attention to match the official rhetoric accorded to them. Co-operative arrangements, and particularly the operation of industry schemes, deserve closer attention as a means of industry-financed and controlled approaches for effectively dealing with these issues.

1. ***Report of the Committee of Enquiry into the Victorian Workers Compensation System*** (Cooney Report). Melbourne: Government Printer (1984), para. 2.2.

2. For further discussion of these initiatives, see Alan Clayton and Torgny Wännström, 'Co-operative or mutual insurance' in Tore J Larsson and Alan Clayton (eds) ***Insurance and Prevention: some thoughts on social engineering in relation to externally caused injury and disease.*** Stockholm: IPSO (1994), pp. 132-137.

3. For an account of the operations of EESISP see James Richard Harley and S Stephen Rosenfeld, 'Negotiating Workers' Compensation: The Success of Management and Labor at Local 3' in Richard A Victor (ed) ***Workers' Compensation Success Stories.*** Cambridge, MA: Workers Compensation Research Institute (1993), chapter 3.

4. The Cooney Report, ***op. cit.*** (Table 1.16) in tracing the distribution of the premium dollar in the Victorian workers' compensation system in 1984 found that 52 cents of this dollar went to injured workers and 48 cents to various providers.

5. The requirements for an effective system have been described by the architect of the Swedish arrangements as involving:

- good quality of in-data;
- a low proportion of missing data;
- priority for the medically severe part of the injury panorama;
- good link between the injury problem and exposure; and
- planned application of results in prevention

Tore J Larsson, ***Accident Information and Priorities for Injury Prevention,*** IPSO Factum 21. Stockholm: IPSO (1990), p. 42.

6. Its claims data has been able to be effectively used for occupational health and safety priority setting for the Australian Coal Association and BHP Australia Coal.

7. See Linda Carter, Alan Clayton and John Walsh, 'Experience Rating and Occupational Health and Safety'. ***Proceedings of the Sixth Accident Compensation Seminar.*** Sydney: The Institute of Actuaries of Australia (1997).