

Standing Committee on Law and Justice

Review of the exercise of the functions of the WorkCover Authority

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Terms of reference

1. That, in accordance with section 11 of the Safety, Return to Work and Support Board Act 2012, the Standing Committee on Law and Justice be designated as the Legislative Council committee to supervise the exercise of the functions of the following authorities:
 - (a) Lifetime Care and Support Authority under the *Motor Accidents (Lifetime Care and Support) Act 2006*,
 - (b) Motor Accidents Authority under the *Motor Accidents Compensation Act 1999* and the *Motor Accidents Act 1988*,
 - (c) WorkCover Authority under the *Workplace Injury Management and Workers Compensation Act 1998*, and
 - (d) Workers' Compensation (Dust Diseases) Board under the *Workers Compensation (Dust Diseases) Act 1942*.
2. That the terms of reference of the committee in relation to these functions be:
 - (a) to monitor and review the exercise by the authorities of their functions,
 - (b) to monitor and review the exercise by any advisory committees, established under section 10 of the *Safety, Return to Work and Support Board Act 2012*, of their functions,
 - (c) to report to the House, with such comments as it thinks fit, on any matter appertaining to the authorities, and the advisory committees, or connected with the exercise of their functions to which, in the opinion of the committee, the attention of the House should be directed,
 - (d) to examine each annual or other report of the authorities and report to the House on any matter appearing in, or arising out of, any such report, and
 - (e) to examine trends and changes in compensation governed by the authorities, and report to the House any changes that the committee thinks desirable to the functions and procedures of the authorities, or advisory committees.
3. That the committee report to the House in relation to the exercise of its functions under this resolution at least once every two years in relation to each authority.
4. That nothing in this resolution authorises the committee to investigate a particular compensation claim under the legislation referred to in paragraph 1.¹

¹ *Minutes*, Legislative Council, 14 November 2012, pp 1368-1369.

Committee membership

| | | |
|--|------------------------|---------------------|
| The Hon David Clarke MLC | Liberal Party | <i>Chair</i> |
| The Hon Peter Primrose MLC | Australian Labor Party | <i>Deputy Chair</i> |
| Mr Scot MacDonald MLC | Liberal Party | |
| The Hon Sarah Mitchell MLC | The Nationals | |
| The Hon Shaoquett Moselmane MLC | Australian Labor Party | |
| Mr David Shoebridge MLC | The Greens | |

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Chair's foreword

This is the first review of the WorkCover Authority of NSW, beginning a new chapter in the Standing Committee on Law and Justice's long and productive history of scrutinising the performance of government agencies. The review has been undertaken as part of the committee's oversight role under the *Safety, Return to Work and Support Board Act 2012*.

This review has been undertaken two years after significant reforms were made to the workers compensation scheme. These reforms not only changed the governance structure of WorkCover but greatly altered the eligibility requirements and entitlements of the workers compensation scheme in New South Wales.

Everyone has the right to go to work safe in the knowledge that if they are injured in the course of their employment they will be provided with the necessary support and protection to re-enter the workforce and participate in the community. Providing such support is a key goal of any workers compensation scheme, together with ensuring the long term financial sustainability of the scheme.

There has been ongoing debate in the community about the effectiveness and fairness of the reforms since they were implemented in 2012. While the reforms have enhanced the financial sustainability of the scheme, review stakeholders identified a number of areas where the reforms have limited the assistance available to injured workers. Review stakeholders also identified a number of concerns regarding WorkCover's ability to undertake its multiple roles in the regulation, implementation and enforcement of the scheme and work health and safety legislation.

We note that changes to the workers compensation landscape have continued over the course of this review. Most notably, the NSW Government recently announced a further five per cent reduction in premiums and foreshadowed further scheme reforms pertaining to broader access to medical and related treatment for scheme participants. These changes are welcomed by the committee.

This report has made a number of recommendations for further change. We consider that these recommendations will improve the performance of WorkCover, provide enhanced support to injured workers and preserve the ongoing financial sustainability of the scheme.

The committee has benefited from the valuable contributions of stakeholders who have participated in this first review. Their involvement has allowed us to explore the issues at hand and identify appropriate recommendations for improvements. On behalf of the committee I thank all of our review participants. We look forward to their continued contributions as we fulfil our reviewing role.

I also thank my colleagues for their thoughtful contributions to this first review of WorkCover. Our monitoring role has benefited greatly from both our individual perspectives and our cooperative approach. Finally, I thank the staff of the committee secretariat for their continued professional support, in particular Teresa McMichael, Director, Cathryn Cummins, Principal Council Officer, Kate Mihajek, Senior Council Officer, Chris Angus, Assistant Council Officer and Lynn Race, Assistant Council Officer.



Hon David Clarke MLC
Committee Chair

Summary of key issues

A committee of the Legislative Council is required by the *Safety, Return to Work and Support Board Act 2012* to supervise the exercise of the functions of the WorkCover Authority of NSW (hereafter referred to as WorkCover). Since November 2012, the Standing Committee on Law and Justice has been designated by the Legislative Council to undertake this role. This report is the culmination of the committee's first review of WorkCover, during which we received 43 submissions and held three public hearings.

A key factor underpinning the review was the ongoing repercussions of the 2012 reforms to the workers compensation scheme, which were enacted in response to the scheme operating with an estimated deficit of \$4 billion. The deficit however remains contested, as it included long term projections that made multiple assumptions during the Global Financial Crisis regarding likely future investment returns and the discount rate.

The reforms included the consolidation of the governance structures of the Safety Return to Work and Support agencies, including WorkCover, and the establishment of the Safety Return to Work and Support Board. Amendments were also made to the eligibility requirements and entitlements provided to injured workers under the workers compensation scheme.

Since the implementation of the reforms, there has been a significant improvement to the scheme's financial sustainability. As of May 2014, the scheme's surplus has grown to approximately \$1.3 billion.

During the review, the Minister for Finance and Services, the Hon Dominic Perrottet MP, announced that as a consequence of the improved financial position some of the 2012 reforms would be rolled back. This includes ensuring access for injured workers to hearing aids, prostheses and home and vehicle modifications and related treatment until retirement age, and extending medical benefits for workers with whole person impairment of between 21 per cent to 30 per cent until retirement age. These changes are limited to those workers who received an injury and made a formal claim on or before 1 October 2012.

In July 2014, the Centre for International Economics released a report entitled *Statutory review of the Workers Compensation Legislation Amendment Act 2012*. The report was prepared in response to a requirement in the *Workers Compensation Act 1987* that a review of the 2012 amendments be conducted to determine if the amendments were achieving their stated policy objectives. Much of the evidence presented by the statutory review reflects the evidence received during our own review. We consider that there are benefits to reading both reports in conjunction.

We believe that the findings and recommendations contained in both reports will assist the NSW Government to further refine the workers compensation system to provide better support to injured workers, lower premiums for businesses and protect the scheme's long-term financial sustainability.

This summary outlines the key issues raised during the review and discussed in this report.

Conflicts of interest

One of the central issues explored during the review was the conflicts of interest that arise from the multiple roles carried out by WorkCover in the regulation, implementation and enforcement of the workers compensation scheme and work health and safety legislation.

Concerns were raised regarding the potential conflict between WorkCover's roles as both the nominal insurer through its management of the Workers Compensation Insurance Fund, and as the regulator of the workers compensation scheme. As the regulator WorkCover is responsible for ensuring compliance with the relevant workers compensation legislation through education, engagement and enforcement, while as the nominal insurer it is responsible for the commercial roles of managing funds and appointing and overseeing the scheme agents that issue insurance policies and manage claims.

In order to address this issue, the committee has recommended that the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office (WIRO) and other relevant stakeholders, consider the establishment of a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.

The second area of concern regarding potential conflicts of interest relates to WorkCover's role in reviewing work capacity assessments. It was argued that WorkCover's role as both the nominal insurer and the decision maker for merit reviews of work capacity decisions raises questions over the independence and impartiality of the merit review process. WorkCover has indicated that it is reviewing the segregation of functions and delegations around its role in work capacity decisions. The committee considers that WorkCover should complete this review in consultation with relevant stakeholders, including worker and employer representatives, and publish the findings as soon as practicable.

The third area of concern involves WorkCover's multiple roles in the work health and safety sphere, with WorkCover acting as both the work health and safety regulator and as an advisor to workplaces. While synergies can be achieved in having a single organisation perform both regulatory and advisory roles in the work health and safety sphere, clear protocols must exist to minimise the possibility of conflicts of interest occurring. The committee therefore recommends that WorkCover, in consultation with key stakeholders, review the procedures currently utilised to distinguish between the two functions and implement protocols to minimise conflicts occurring.

WorkCover Independent Review Office

The WIRO was created during the 2012 reforms to the workers compensation scheme as an independent body to deal with individual complaints and provide greater accountability to the workers compensation system. The WIRO is also responsible for the management of the Independent Legal Assistance and Review Service, which provides free independent legal advice to injured workers in circumstances where there is a disagreement with insurers regarding entitlements.

Despite being established as an independent body, the WIRO does not have budgetary independence from WorkCover. Instead, the WIRO must seek approval from WorkCover for all of its expenditure.

The committee believes that the WIRO performs a vital function in the workers compensation scheme, and should be able to undertake its role with complete independence from WorkCover. As such, we have recommended that the *Government Sector Employment Act 2013* be amended to designate WIRO as a separate agency, and that it receive funding for its operations accordingly.

Further, we believe that the NSW Government should consider expanding the operational parameters of the WIRO to include work health and safety, and review the resources of the Office to ensure it has the extra capacity to undertake this additional responsibility.

Medical treatment

The 2012 reforms to the scheme significantly altered access to medical treatment for injured workers by restricting the timeframe in which assistance is available. Further, workers suffering industrial hearing loss had their entitlements to lifetime assistance for hearing aids, batteries and repairs reduced to an entitlement to one set of hearing aids and 12 months of batteries and repairs.

The Minister for Finance and Services has announced that medical benefits for workers with whole person impairment assessments of between 21 and 30 per cent will be extended until retirement age, and that access to hearing aids, prosthesis, home and vehicle modifications and related treatment will be reinstated for scheme participants until retirement age. These changes are limited to those workers who received an injury and made a formal claim on or before 1 October 2012.

We consider that this decision goes some way towards restoring the balance between the financial sustainability of the scheme and providing enhanced support for injured workers. However, noting the actuarial evidence as to the relatively minimal cost to the scheme, the committee believes that medical benefits for hearing aids, prostheses, home and vehicle modifications should be restored for all injured workers for life. Once these benefits have been restored, the NSW Government should review the viability of restoring all lost medical benefits for injured workers.

Considerable concern was also expressed about the requirement to have pre-approval from an insurer before medical treatment can be received, particularly as the pre-approval requirement may result in costly delays to an injured worker receiving the appropriate treatment.

Requiring insurer approval before the costs of a medical treatment are incurred is not an unreasonable expectation. However, insurers must provide a decision regarding treatment as soon as practicable to ensure that injured workers are able to promptly access necessary treatment. We further note that there are clearly cases where seeking pre-approval is not practical or reasonable and there should be some flexibility built into the system to accommodate this. We have recommended that the NSW Government consider amendments to the scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not reasonable or practical for the worker to obtain pre-approval before undertaking necessary treatment.

We also believe that WorkCover should provide statistical details in its annual report on the frequency that insurers exceed the legislated timeframe for making decisions regarding treatment and the penalties applied. The committee encourages WorkCover to be more vigilant in enforcing this aspect of the workers compensation scheme, and intend to keep a watching brief on this issue.

Work capacity decisions and access to paid legal representation

Work capacity decisions are the result of work capacity assessments, which are conducted by insurers. A work capacity assessment is a review of an injured worker's functional, vocational and medical status that helps inform decisions by the insurer about the worker's ability to return to work.

There are three stages of review that an injured worker may pursue if they are dissatisfied with the outcome of a work capacity decision: firstly, an internal review by the insurer, followed by a merit review by WorkCover, and lastly, a procedural review by WIRO.

Significant delays are currently being experienced in the merit reviews undertaken by the WorkCover Merit Review Service. These delays are particularly troubling given that the two other levels of review for work capacity decisions are being finalised well within the required timeframes. The committee is hopeful that the employment of additional resources to clear the backlog of reviews awaiting determination, together with an operational review of the Merit Review Service, will result in improvements to this area. We intend to keep a watching brief on this matter.

In regard to paid legal representation, following the 2012 reform process a legal practitioner acting for a worker is no longer entitled to be paid or recover any amount for costs incurred in connection with a review of a work capacity decision of an insurer.

As a consequence, there has been a decline in the number of lawyers practicing in the field of workers compensation law, leaving injured workers vulnerable and without adequate representation in what is a highly complex area of law. The committee believes that the NSW Government should consider amending the *Workers Compensation Act 1987* to allow legal practitioners acting for an injured worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact.

Return to work provisions

The *Workplace Injury Management and Workers Compensation Act 1998* states that an employer must provide suitable work if a worker who has been incapacitated as a result of an injury is able to return to suitable work and requests to return to work. This can either be on a full-time or part-time basis.

Concerns were raised that some employers may fail to understand or adhere to their obligations to provide suitable employment, and that there is a lack of enforcement in instances where employers fail to meet these obligations.

Facilitating a smooth return to suitable employment for injured workers is a crucial aspect of successful rehabilitation following an injury. The committee believes that WorkCover should review the mechanisms contained in the *Workplace Injury Management and Workers Compensation Act 1998* to ensure compliance with the return to work provisions, including the use of incentives to encourage compliance and deterrents for non-compliance. Further, WorkCover should undertake an education campaign to inform employees and employers of their rights and obligations in regard to returning to work following an injury.

Stakeholder engagement, access to information and guidelines

The committee received evidence that many stakeholders were frustrated with WorkCover's consultation processes, arguing that there was a lack of genuine consultation between WorkCover and stakeholders, with the exception of scheme agents. This frustration was exacerbated during the 2012 reform period. A need to improve WorkCover's public information sources was identified, with enhancements suggested to the level, quality and access to information provided by WorkCover in its annual reports, statistical bulletins, website and customer service hub.

The committee has made a number of recommendations to address these concerns, including the establishment of a WorkCover advisory committee in line with the *Safety, Return to Work and Support Board Act 2012* and the *Work Health and Safety Act 2011*. Such a committee will provide an important forum for informed debate about workplace health and safety and workers compensation issues, and should be comprised of representatives of workers and employers together with any other relevant stakeholders.

We have also made recommendations to reconvene industry reference groups, such as a legal reference group and a disability industry reference group, as these groups offer important expertise in their fields and can be of great assistance to WorkCover in developing practices and procedures.

Another key issue is the development, accuracy and applicability of the guidelines that facilitate the operation of the workers compensation scheme. We have recommended a comprehensive review of all guidelines that apply to the scheme, in consultation with relevant stakeholders, with the intent of simplifying and consolidating these guidelines.

Other issues raised during the review include WorkCover's role in implementing work health and safety legislation, the current auditing requirements faced by self insurers, and the potential for an expanded Comcare scheme to change the makeup of the New South Wales workers compensation scheme. All of these issues are explored in more detail throughout this report.

Summary of recommendations

- Recommendation 1** **26**
That the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office and other stakeholders, consider establishing a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.
- Recommendation 2** **29**
That the WorkCover Authority of NSW consult with stakeholders, including worker and employer representatives, during its review of the segregation of functions and delegations around its role in work capacity decisions, and that it publish the review's findings.
- Recommendation 3** **32**
That the WorkCover Authority of NSW, in consultation with stakeholders, review the procedures currently utilised to distinguish between the work health and safety regulatory and advisory roles of WorkCover, and implement protocols to minimise potential conflicts of interest.
- Recommendation 4** **38**
That the NSW Government amend Part 3 of Schedule 1 of the *Government Sector Employment Act 2013* to designate the WorkCover Independent Review Office as a separate public sector agency.
- Recommendation 5** **38**
That the NSW Government expand the operational parameters of the WorkCover Independent Review Office to include work health and safety, and review the resources of the Office to ensure it has the extra capacity to undertake this additional responsibility.
- Recommendation 6** **51**
That the NSW Government restore lifetime medical benefits for hearing aids, prostheses, home and vehicle modifications for all injured workers, noting the actuarial evidence as to the relatively minimal cost of restoring such benefits to the workers' compensation scheme, and that it promptly review the viability of restoring all lost medical benefits for injured workers under the scheme.
- Recommendation 7** **54**
That the NSW Government consider amendments to the WorkCover scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not reasonable or practical for the worker to obtain pre-approval of medical expenses before undertaking the treatment.
- Recommendation 8** **57**
That the WorkCover Authority of NSW and WorkCover Independent Review Office collaborate to develop a process whereby disagreements over assessments of permanent impairment can be resolved through negotiation between an insurer and injured worker.

- Recommendation 9** 59
That the WorkCover Authority of NSW develop, through consultation with all stakeholders and their representatives, binding operational directives for the workers compensation nominal insurers' scheme agents or licenced insurers that ensure all parties are aware of their rights and responsibilities.
- Recommendation 10** 70
That the NSW Government consider amending section 44(6) of the *Workers Compensation Act 1987* to allow legal practitioners acting for a worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact.
- Recommendation 11** 76
That the WorkCover Authority of NSW review the mechanisms used to ensure compliance with the return to work provisions contained in the *Workplace Injury Management and Workers Compensation Act 1998*, and consider introducing incentives to encourage compliance and penalties for non-compliance.
- Recommendation 12** 76
That the WorkCover Authority of NSW undertake an education campaign to inform employees and employers of their rights and obligations in regard to returning to work following an injury.
- Recommendation 13** 84
That the WorkCover Authority of NSW develop an engagement plan in consultation with all stakeholders and their representatives, and publish it as soon as practicable.
- Recommendation 14** 87
That the Minister for Finance and Services establish a WorkCover Authority of NSW Advisory Committee under section 10 of the *Safety, Return to Work and Support Board Act 2012* and Schedule 2 of the *Work Health and Safety Act 2011*. The advisory committee should be comprised of representatives of workers and employers, together with other relevant stakeholders.
- Recommendation 15** 91
That the WorkCover Authority of NSW establish a disability industry reference group as soon as practicable.
- Recommendation 16** 95
That the WorkCover Authority of NSW include more detailed information in its annual reports, including information on claims processes, injury management, fraud, premium auditing and return to work rates.
- Recommendation 17** 95
That the WorkCover Authority of NSW recommence publishing its statistical bulletins, and publish bulletins containing information from 2010 to September 2014, as a matter of urgency.

- Recommendation 18** 98
That the WorkCover Authority of NSW update its website as soon as possible following the conclusion of its current review of publically available information.
- Recommendation 19** 98
That the WorkCover Authority of NSW immediately update its 'Contact us' webpage, as well as any automated phone messages used by the customer service centre, to include information about the WorkCover Independent Review Office.
- Recommendation 20** 108
That the WorkCover Authority of NSW undertake a review of all guidelines that apply to the workers compensation scheme, in consultation with stakeholders, to simplify and consolidate the guidelines.
- Recommendation 21** 113
That the WorkCover Authority of NSW publish the external auditor's final report on the decision making process for prosecutions, and invite feedback on the report's recommendations from stakeholders.
- Recommendation 22** 120
That the NSW Government require that insurers offering workers compensation cover have applicants declare whether any proprietor, director, senior executive or public officer associated with the applying entity has:
- any outstanding workers compensation premiums, and/or
 - been associated with a registered corporation, sole trader or partnership that either has outstanding premiums as a going concern, or been placed in administration or receivership in the past five years.
- Recommendation 23** 121
That the WorkCover Authority of NSW convene a roundtable of insurers, relevant employer organisations and unions to address phoenix companies and their impact on the economy. The roundtable should:
- outline the extent of the problem, the impact on work health and safety and the impact on the efficiency and cost of workers compensation
 - outline the means of addressing phoenix operators including identifying offenders, reporting to the ACCC and ASIC, insurer vigilance, industry responsibility and regulatory responses, and
 - report the outcomes of the roundtable to the Standing Committee on Law and Justice and the Minister for Finance and Services.
- Recommendation 24** 132
That the NSW Government review the regulatory requirements that apply to self insurers in New South Wales to ensure they do not require unnecessary documentation or expense.

Recommendation 25

135

That the NSW Government develop an actuarial and legal impact statement of an expanded Comcare scheme.

Recommendation 26

139

That the WorkCover Authority of NSW, in consultation with stakeholders, develop risk assessment practice guidelines for the disability sector, guidance material on workplace health and safety for disability service providers, and disability sector-specific training material for WorkCover inspectors.

Chapter 1 Introduction

This chapter provides an overview of the establishment of the review and its terms of reference. It also describes the way in which the review was conducted and provides an outline of the structure of the report.

The committee's role

- 1.1 A committee of the Legislative Council is required under s 11 of the *Safety, Return to Work and Support Board Act 2012* to supervise the exercise of the functions of the WorkCover Authority of NSW (hereafter referred to as WorkCover).
- 1.2 Since 14 November 2012, a resolution of the Legislative Council has designated the Standing Committee on Law and Justice to undertake this role, and has set out the terms of reference for the committee's review.²
- 1.3 The terms of reference are reproduced in full on page iv.
- 1.4 The current resolution designates the committee to supervise the exercise of the functions of:
 - WorkCover
 - Workers' Compensation (Dust Diseases) Board
 - Motor Accidents Authority
 - Lifetime Care and Support Authority.
- 1.5 The committee has undertaken the first reviews of WorkCover and the Workers' Compensation (Dust Diseases) Board concurrently. This report solely addresses issues pertaining to the committee's first review of WorkCover. The report for the first review of the Workers' Compensation (Dust Diseases) Board was published in August 2014.
- 1.6 Information on the committee's previous reviews, including reports, can be found on the committee's website at www.parliament.nsw.gov.au/lawandjustice.

Conduct of the review

- 1.7 The committee resolved to commence this review on 22 October 2013.
- 1.8 The committee would like to thank all participants to this review. The considered contributions of stakeholders have greatly assisted the committee to successfully undertake its reviewing role.

² *Minutes*, Legislative Council, 14 November 2012, pp 1368-69.

Submissions

- 1.9** The committee invited submissions through advertisements in the *Sydney Morning Herald* and *The Daily Telegraph*, and through a press release distributed via Media Monitors.
- 1.10** The committee received 43 submissions to the review. The full list of submissions can be found in Appendix 2.

Hearings

- 1.11** The committee held three public hearings on 21 March, 28 March and 12 May 2014. Witnesses at these hearings included representatives from WorkCover, the WorkCover Independent Review Office (WIRO), unions and legal associations.
- 1.12** A full list of witnesses who appeared at the hearings can be found in Appendix 3. A list of documents tabled at these hearings can be found in Appendix 4.
- 1.13** Transcripts of the hearings are available on the committee's website.

Report structure

- 1.14** This report is comprised of nine chapters. **Chapter 2** provides background information on WorkCover and the workers compensation scheme.
- 1.15** **Chapter 3** considers the conflicts of interest that can arise from the multiple roles carried out by WorkCover. The chapter also explores the role of WIRO and the suggestion to create an Inspector General of WorkCover.
- 1.16** **Chapter 4** discusses the scheme's financial performance and issues pertaining to access to medical treatment. This includes the timeframe for access to benefits and the requirement for pre-approval from insurers before medical treatment can be received.
- 1.17** **Chapter 5** examines issues relating to work capacity, including the three tiered review process for work capacity decisions and the role of insurers in such decisions. The chapter also examines the limitations placed on access to paid legal representation for injured workers and compliance with return to work provisions.
- 1.18** The stakeholder engagement undertaken by WorkCover is discussed in **chapter 6**, including tripartite consultation, industry reference groups and issues with accessibility of information on WorkCover's website, annual reports and statistical bulletins.
- 1.19** **Chapter 7** explores the development and implementation of guidelines that facilitate the operation of the workers compensation scheme.
- 1.20** **Chapter 8** examines the implementation of work health and safety legislation in New South Wales, including the WorkCover inspectorate division and trends in prosecutions.

- 1.21** The final chapter, **chapter 9**, considers three issues raised by review participants: the regulatory requirements imposed on self insurers, the potential impact of an expansion of the Commonwealth workers compensation scheme, and the disability sector.

Chapter 2 WorkCover Authority of NSW

This chapter sets out the functions and organisational structure of WorkCover and details the 2012 reforms to the workers compensation scheme. The chapter also outlines the current workers compensation scheme including its eligibility requirements and entitlements, claims process and financial performance.

Overview

- 2.1** WorkCover was established in 1989 as the first public agency to centralise the policy areas surrounding workplace safety, including occupational health and safety, rehabilitation, injury management and workers compensation.
- 2.2** The authority governs one of the most comprehensive workers compensation and injury assessment frameworks in Australia, with nearly 250,000 workplace health and safety interactions with New South Wales workplaces in 2012-13.³
- 2.3** Section 22 of the *Workplace Injury Management Act and Workers Compensation Act 1998* sets out WorkCover's general functions, including its responsibility for workplace injury prevention and rehabilitation, as well as the management of the workers compensation scheme:

Section 22

(1) The general functions of the Authority are:

(a) to be responsible for ensuring compliance with the workers compensation legislation and the work health and safety legislation,

(b) to be responsible for the day to day operational matters relating to the schemes to which any such legislation relates,

(c) to monitor and report to the Minister on the operation and effectiveness of the workers compensation legislation and the work health and safety legislation, and on the performance of the schemes to which that legislation relates,

(d) to undertake such consultation as it thinks fit in connection with current or proposed legislation relating to any such scheme as it thinks fit,

(d1) to monitor and review key indicators of financial viability and other aspects of any such schemes,

(e) to report and make recommendations to the Minister on such matters as the Minister requests or the Authority considers appropriate.

- 2.4** WorkCover also has a range of specific functions. These are listed in Appendix 1.

³ Evidence, Mr John Watkins, General Manager, Work Health and Safety, WorkCover Authority of NSW, 21 March 2014, p 3.

2.5 Mr John Watkins, General Manager of Work Health and Safety, WorkCover, advised that the authority's operational focus reflects its legislative responsibilities:

... our operational focus is, firstly, to prevent work-related injuries and illness and to reduce the severity of those injuries and illnesses when they do occur. Secondly, we focus on ensuring that treatment, rehabilitation, care and support is in place in accordance with the law for those workers who are injured at work; and, indeed, ensuring that they can return to work and to their lives as best as possible and as quickly as possible.⁴

2.6 WorkCover also acts as the nominal insurer for the New South Wales workers compensation scheme (the scheme) through the Workers Compensation Insurance Fund and performs the insurer's operational functions.⁵ The scheme is discussed later in this chapter.

2.7 Further, since 2012, WorkCover administers the new nationally harmonised work health and safety laws following the commencement of the *Occupational Health and Safety Act 2011* (Cth).

2.8 To fulfill its functions WorkCover ensures compliance with a number of acts and regulations including the *Workers Compensation Act 1987*, the *Workplace Injury Management Act and Workers Compensation Act* and the *Occupational Health and Safety Act 2000*.

2.9 There was debate during the review that the multiple functions of WorkCover can cause conflicts of interest.⁶ This argument is examined in chapter 3.

2.10 WorkCover derives its funding from various sources including the Workers Compensation Insurance Fund, contributions from self-insurers, licensing fees, investment income and other miscellaneous sources of income.⁷

Organisational structure

2.11 The 2012 reforms to workers compensation changed WorkCover's governance structure. Following the enactment of the *Safety, Return to Work and Support Board Act 2012*, the Safety, Return to Work and Support Board was established to oversee the functions of WorkCover, the Workers' Compensation (Dust Diseases) Board, the Motor Accidents Authority and the Lifetime Care and Support Authority.⁸

2.12 The Safety, Return to Work and Support Board determines the general policies and strategic direction for the four Safety, Return to Work and Support agencies, as well as the investment policies of these schemes' funds. The board also has investment and staffing responsibilities for the Workers' Compensation (Dust Diseases) Board.⁹

⁴ Evidence, Mr Watkins, 21 March 2014, p 2.

⁵ *Workplace Injury Management Act and Workers Compensation Act 1998*, s 23A.

⁶ See for example Submission 36, WorkCover Independent Review Office, p 5.

⁷ WorkCover Authority of NSW, *NSW WorkCover Scheme Report, 2012-13*, p 4.

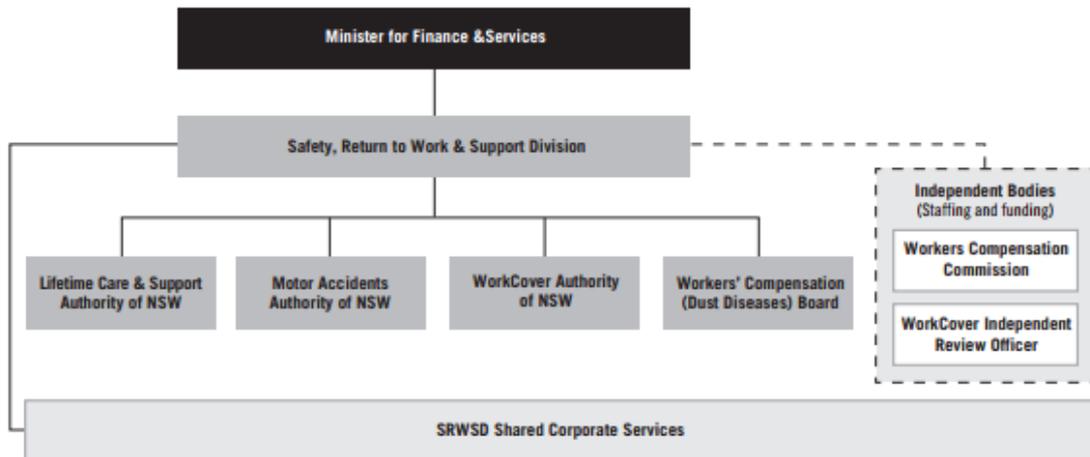
⁸ *Safety, Return to Work and Support Board Act 2012*, sch 2.

⁹ WorkCover, *Safety, Return to Work and Support Board*, (16 April 2013), <<http://www.workcover.nsw.gov.au/aboutus/Pages/safety-return-to-work-and-support-board.aspx>>.

2.13 The board has seven members, including the chief executive officer and six members appointed on the recommendation of the Minister for Finance and Services.¹⁰

2.14 All Safety, Return to Work and Support agencies report to the Minister for Finance and Services (see organisational chart at Figure 1).

Figure 1 Safety, Return to Work and Support organisational chart¹¹



2.15 WorkCover's staff are employed by Safety, Return to Work and Support and allocated to WorkCover as the authority itself cannot employ any staff.¹²

2.16 As set out in Figure 2 on the next page, WorkCover has four divisions and shares corporate services with the other Safety, Return to Work and Support agencies.

2012 workers compensation scheme reforms

2.17 This section outlines the government's rationale for reforming the workers compensation scheme in 2012 and provides a summary of these changes.

2.18 In April 2012 the then Minister for Finance and Services, the Hon Greg Pearce MLC, released the *NSW Workers Compensation Scheme Issues Paper* canvassing options to change the scheme which was seen to be in urgent need of reform:

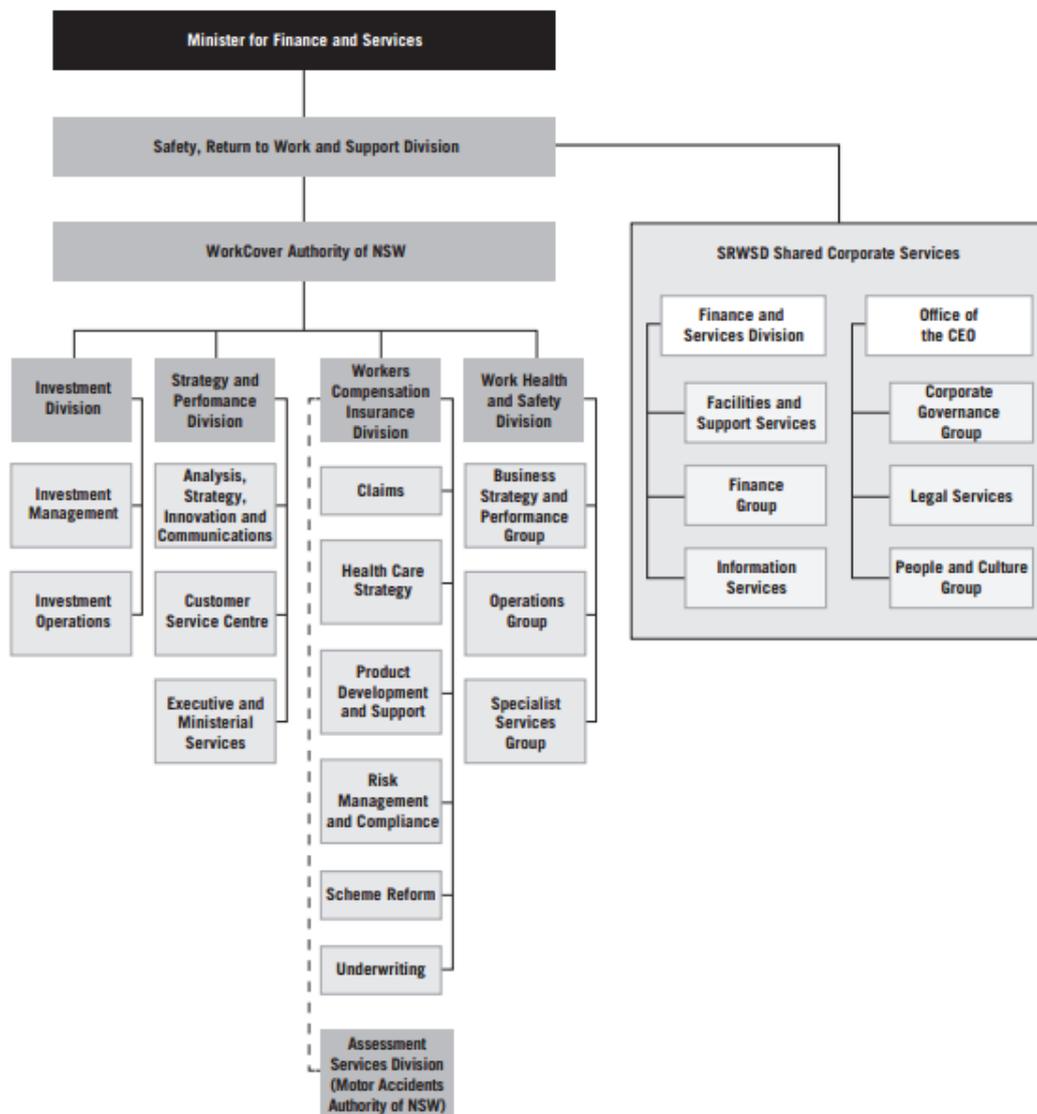
The NSW Government is responding to the deteriorating performance of the Workers Compensation Scheme and is acting urgently to ensure its long term sustainability to provide injured workers with the support they deserve while remaining affordable, fair and competitive for NSW.¹³

¹⁰ *Safety, Return to Work and Support Board Act 2012*, s 4(2).

¹¹ WorkCover Authority of NSW, *WorkCover Authority of NSW Annual Report 2012-13*, p 5.

¹² *Workplace Injury Management and Workers Compensation Act 1998*, s 22(4).

¹³ Hon Greg Pearce MLC, Minister for Finance and Services, *NSW Workers Compensation Scheme Issues Paper*, released on 23 April 2012, p 2.

Figure 2 WorkCover Authority of NSW organisational chart as at 30 June 2013¹⁴

2.19 The issues paper noted that as at 31 December 2011 the scheme was operating at a deficit of over \$4 billion, a deterioration of \$1,720 million in six months.¹⁵ The claimed deficit for outstanding claims liability however remains contested. It included long term projections that made multiple assumptions regarding likely future investment returns and the discount rate.

2.20 The government canvassed sixteen ‘options for change’ but ruled out increasing workers compensation premiums because New South Wales employers already paid higher premiums than employers in other states and would possibly face an additional 28 per cent increase in premiums if reforms were not made to the scheme.¹⁶

¹⁴ WorkCover Authority of NSW, WorkCover Authority of NSW Annual Report 2012-13, p 6.

¹⁵ *NSW Workers Compensation Scheme Issues Paper*, released on 23 April 2012, p 7.

¹⁶ *NSW Workers Compensation Scheme Issues Paper*, released on 23 April 2012, p 2.

- 2.21** As part of the reform process the Joint Select Committee on the NSW Workers Compensation Scheme was established to inquire into and report on the scheme, the authority, and specific actuarial reviews of the nominal insurer scheme as at 31 December 2011.¹⁷ The joint select committee delivered a majority report and made 28 recommendations.
- 2.22** In June 2012 the then Treasurer, the Hon Mike Baird MP, introduced the Workers Compensation Legislation Amendment Bill 2012 and its cognate bill, the Safety, Return to Work and Support Board Bill 2012. Mr Baird said that the bills responded to the joint select committee's recommendations and represented a fundamental shift towards meeting the needs of the most seriously injured workers while strongly incentivising return to work for those who have the capacity to do so.¹⁸
- 2.23** The reforms were met with significant criticism in some quarters as a result of benefit cuts they delivered to some injured workers.
- 2.24** The government implemented its workers compensation reforms in stages from June 2012. WorkCover summarised the reforms as follows:
- removal of journey claims where there is no real or substantial connection to work
 - limited lump sum payments for permanent impairment
 - removal of nervous shock claims
 - change of weekly benefits for seriously injured workers (those with an assessed whole person impairment of more than 30 per cent)
 - capped weekly benefit entitlements to 260 weeks (five years)
 - capped medical and related payments at 12 months for most workers after a claim is made or, where weekly payments of compensation are made, for 12 months after the worker ceases to be entitled to those weekly payments
 - introduction of work capacity assessments (see paragraphs 2.55 – 2.59 for more detail)
 - establishment of a new three-tiered review process for work capacity assessment decisions.¹⁹
- 2.25** The reforms also established the WorkCover Independent Review Office (WIRO) as a new statutory office charged with reviewing insurers' work capacity decisions.²⁰ The office includes the Independent Legal Assistance and Review Service which provides free, independent legal advice to injured workers where there is a disagreement with insurers regarding entitlements.²¹

¹⁷ Joint Select Committee on the NSW Workers Compensation Scheme, Terms of reference for the Joint Select Committee on the NSW Workers Compensation Scheme.

¹⁸ *Hansard*, Legislative Assembly, 19 June 2012, p 13,014.

¹⁹ Answers to questions on notice, Ms Carmel Donnelly, General Manager, Strategy and Performance Safety, Return to Work and Support, 28 April 2014, pp 1-2.

²⁰ *Workplace Injury Management and Workers Compensation Act 1998*, pt 3.

²¹ WorkCover Independent Review Officer, Frequently Asked Questions, <<http://wiro.nsw.gov.au/about/faqs/>>.

2.26 The impact of the reforms has provoked significant debate since their implementation, including during this review. For example, WorkCover supported the reforms on the basis that there have been higher weekly benefit payments for seriously injured workers in some circumstances, a more financially sustainable nominal insurer scheme and a ten per cent reduction in active claims (i.e. the number of individuals receiving weekly benefits).²²

2.27 Mr Luke Aitken, Senior Manager of Policy, NSW Business Chamber also supported the 2012 reforms, stating that they have led to ongoing improvements in workplace safety and the workers compensation system:

We believe that the changes to the legislation in 2012 and ongoing improvements to WorkCover's regulatory functions have, in the main, got the balance right and are helping to improve workplace safety and the New South Wales workers compensation system.²³

2.28 However, other stakeholders, such as the Australian Lawyers Alliance, argued that the reforms unfairly impinge on workers' rights:

... the changes made in 2012 to the NSW workers' compensation scheme have had a deleterious effect on workers' rights.

The axing of the benefits provided to workers for economic loss over the medium to long term means that a large number of injured workers can be expected to only find access to economic support under the welfare system...²⁴

2.29 Similarly, the Public Service Association of NSW stated that the changes have been detrimental to the health and economic status of injured workers.²⁵

2.30 Analysis of stakeholder concerns about the scheme following the 2012 reforms is provided throughout this report.

2.31 In June 2014, the Minister for Finance and Services, the Hon Dominic Perrottet MP, advised that there had been a significant improvement in the scheme's financial position (discussed in more detail at 2.60-2.71). In light of this development, the Minister announced several enhancements to the 2012 workers compensation reforms to better support injured workers returning to work. These changes, which do not apply to all injured workers, and are limited to those workers who received an injury and made a formal claim on or before 1 October 2012, include:

- ensuring continued access to hearing aids, prostheses and home and vehicle modifications and related treatment until retirement age
- extending medical benefits for workers with 'whole person impairment' assessed between 21 per cent to 30 per cent, until retirement age

²² Answers to questions on notice, Ms Donnelly, 28 April 2014, p 2.

²³ Evidence, Mr Luke Aitken, Senior Manager, Policy, NSW Business Chamber, 28 March 2014, p 2.

²⁴ Submission 35, Australian Lawyers Alliance, p 2.

²⁵ Answers to questions on notice, Mr Steve Turner, Public Service Association of NSW, 19 May 2014, p 8.

- providing workers injured in the 12 months before retirement age with the same entitlements as those who were injured at or after retirement age
- ensuring workers continue to be eligible for weekly benefits until a disputed work capacity assessment has been resolved
- clarifying the entitlement to a ‘second surgery’ period for workers where the initial surgery requires a second surgery falling outside 12 month medical cap.²⁶

2.32 The changes are expected to increase the scheme’s liability by approximately \$280 million.²⁷ Discussion about the scheme’s financial position is provided later in this chapter, and in chapter 4.

Statutory review of the *Workers Compensation Legislation Amendment Act 2012*

2.33 In July 2014, the Centre for International Economics released a report entitled ‘*Statutory review of the Workers Compensation Legislation Amendment Act 2012*’.²⁸ The report was prepared on behalf of the Office of Finance and Services in response to a requirement in the *Workers Compensation Act 1987* that a review of the 2012 amendments be conducted to ‘determine whether the policy objectives of those amendments remain valid and whether the terms of the workers compensation Acts remain appropriate for securing those objectives’.²⁹

2.34 The report found that it was ‘too early’³⁰ to determine the impact of the amendments on the long-term financial sustainability of the workers compensation scheme or on claim behaviours. These findings were attributed to the large scale of the reforms, and the need to embed new processes and system infrastructure to support the reforms.³¹

2.35 Notwithstanding that further time was needed to fully assess the impact of the reforms, the report highlighted a number of areas where the reforms appear to have achieved their purpose, including:

- addressing the scheme’s deficit
- putting downward pressure on premiums
- promoting return to work
- increasing some measures of financial support to the most seriously injured workers

²⁶ Media Release, Hon Dominic Perrottet MP, Minister for Finance and Services, *Workers Benefit From NSW Government’s Sound Financial Management*, 26 June 2014, p 1.

²⁷ Media Release, *Workers Benefit From NSW Government’s Sound Financial Management*, 26 June 2014, p 1.

²⁸ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014.

²⁹ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 20.

³⁰ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 1.

³¹ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 1.

- discouraging payments that do not achieve recovery and return to work.³²

2.36 However, the report identified a number of areas that warrant further consideration, including:

- **addressing barriers to return to work**, including reviewing return to work criteria to ensure that they do not impose unreasonable requirements on injured workers, ensuring that reasonable retraining and relocation costs are recognised, and providing better support for small businesses
- **minimising the regulatory burden of implementing reform**, including developing clear guidelines on return to work and other aspects of the reforms, improving communications material and support available to all stakeholder groups, and reviewing the role of the WIRO, and the fairness of dispute resolution procedures including access to legal representation
- **improving fairness and equity whilst maintaining financial sustainability**, including reviewing and where appropriate removing restrictions on weekly and medical benefits, engaging with stakeholders to develop workable alternatives to medical expense pre-approvals to avoid treatment delays, and addressing unintended anomalies in legislative drafting.³³

2.37 A number of these issues are explored in this report, including medical expenses (chapter 4), return to work provisions (chapter 5), and access to legal representation (chapter 5).

2.38 The threshold for defining a seriously injured worker, being a worker assessed as having a greater than 30 per cent whole person impairment, was described in the statutory review as ‘somewhat arbitrary’.³⁴ The review noted that a number of substantial injuries fall below this threshold, including substantial loss of use of a leg, loss of sight in one eye, and substantial loss of use of one hand, or total loss of movement in wrist.³⁵

2.39 The statutory review also observed that for injured workers with a whole person impairment assessment of between 21 and 30 per cent, ‘workers compensation benefits now available in New South Wales are generally less generous than in other jurisdictions’.³⁶

Committee comment

2.40 The committee notes that the report of the statutory review was released in the final stages of our own drafting process. Much of the evidence presented in the statutory review reflects the

³² Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 39.

³³ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 19.

³⁴ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 57.

³⁵ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 57.

³⁶ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 17.

evidence received during our review, and we consider that there are benefits to reading both reports in conjunction.

- 2.41 We believe that the findings and recommendations contained in both reports will assist the NSW Government to further refine the workers compensation system to provide enhanced support to injured workers and protect the scheme's long-term financial sustainability.

Workers compensation scheme and system

- 2.42 The workers compensation scheme is principally governed by the *Workers Compensation Act* and the *Workplace Injury Management and Workers Compensation Act*.³⁷ The compensation system has four elements (as set out in Figure 3):

- the WorkCover scheme which provides workers compensation insurance to employers through contracted scheme agents
- SICorp which manages workers compensation, administration and financial liability for most public sector employers except those who are self insurers
- self insurers which are organisations with enough capital to underwrite, pay and manage their own claims
- specialised insurers which hold restricted licences to underwrite workers compensation insurance risk for a specific industry or class of business or employers.³⁸

- 2.43 As noted in Figure 3 on the next page, the WorkCover scheme provided workers compensation protection to approximately 270,000 employers as at 30 June 2012.³⁹

- 2.44 As previously mentioned, WorkCover has multiple roles within the workers compensation system. The authority regulates and manages the system, including the licensing of self and specialised insurers and oversight of service providers, and also acts as the nominal insurer.⁴⁰ WorkCover explained the role of the nominal insurer as follows:

The NSW WorkCover Scheme is a managed fund scheme with the workers compensation Nominal Insurer underwriting the risk and providing the capital. The Nominal Insurer is a not-for-profit, legal entity established in 2005 to issue policies of insurance and manage workers compensation claims for NSW employers. All premiums received are paid into the Workers Compensation Insurance Fund to meet the cost of claims and administration costs of the scheme.⁴¹

³⁷ WorkCover, *Workers compensation legislation*, (21 February 2014) <<http://www.workcover.nsw.gov.au/lawpolicy/acts-andregulations/Pages/Workerscompensationacts.aspx>>.

³⁸ WorkCover, *Workers Compensation*, (3 October 2013), <<http://www.workcover.nsw.gov.au/aboutus/workerscompensation/Pages/default.aspx>>.

³⁹ WorkCover Authority of NSW, *WorkCover Authority of NSW Annual Report 2012-13*, p 116; and Safety, Return to Work and Support, *Background briefing for Legislative Council Standing Committee on Law and Justice*, 2013, p 33.

⁴⁰ WorkCover Authority of NSW, *Workers Compensation*, (3 October 2013); and WorkCover Authority of NSW, *NSW WorkCover Scheme Report 2012-13*, p 4.

⁴¹ WorkCover Authority of NSW, *Annual Report 2012-13*, p 14.

Figure 3 The New South Wales compensation system⁴²

- 2.45** As the nominal insurer, WorkCover manages the Workers Compensation Insurance Fund which had approximately \$12.6 billion in funds under management as at 30 June 2012.⁴³
- 2.46** The Workers Compensation Insurance Fund is funded by premiums collected from employers and investment returns. Under this system, New South Wales industry bears the direct costs of occupational health and safety.⁴⁴ WorkCover collected \$2.7 billion worth of premiums in the Policy Renewal Year 2011.⁴⁵
- 2.47** Premium rates vary depending on a number of factors including the industry in which an employer operates, the amount of wages an employer pays to its workers and the costs of any claims made by an employer's injured workers.⁴⁶ Mr Watson advised that as the scheme had accumulated a surplus of \$309 million, the improved financial position had led to premium rates being reduced for a large number of employers:

As at 30 June 2013 a surplus of \$309 million has been accumulated. As a result, 200,000 employers across 376 industries that have demonstrated an improved safety and return to work performance received an average premium reduction of 5 per cent on 31 December 2013. This reduction is in addition to the 7.5 per cent reduction that they received on 30 June 2013. There were 167 employers who received that reduction on 30 June 2013.⁴⁷

⁴² Safety, Return to Work and Support, Background briefing for Legislative Council Standing Committee on Law and Justice, p 27.

⁴³ *Background briefing for Legislative Council Standing Committee on Law and Justice*, 2013, p 33.

⁴⁴ WorkCover Authority of NSW, *NSW WorkCover Scheme Report, 2012-13*, p 4.

⁴⁵ WorkCover Authority of NSW, *WorkCover Authority of NSW Annual Report 2012-13*, p 116.

⁴⁶ WorkCover Authority of NSW, *Insurance and premiums*, (22 February 2012), <<http://www.workcover.nsw.gov.au/insurancepremiums/Pages/default.aspx>>.

⁴⁷ Evidence, Mr Watson, 21 March 2014, pp 1-2.

2.48 WorkCover has a premium target collection rate of 1.55 per cent⁴⁸ and the scheme has a funding ratio of 102 per cent as at 30 June 2014.⁴⁹ See paragraph 4.7 for further comments on fund ratios.

Eligibility and entitlements

2.49 Under the *Workers Compensation Act* and the *Workplace Injury Management and Workers Compensation Act*, injured workers are entitled to a range of benefits depending on the type, nature and severity of their injury, including:

- weekly payments
- reasonably necessary medical, hospital and rehabilitation expenses, most of which need prior approval
- death benefits and funeral expenses
- compensation for property damage to artificial aids and clothing
- work injury damages (injured workers can sue for modified common law damages in certain circumstances)
- commutation (an agreement between the injured worker, employer and scheme agent or insurer to pay all of the injured worker's entitlements to weekly benefits, medical, hospital and rehabilitation expenses as a lump sum).⁵⁰

2.50 Workers are entitled to different amounts of benefits depending on the period they have received entitlements, their pre-injury average weekly earnings, the date of their injury and the date their claim was lodged.⁵¹

2.51 Stakeholder concerns about entitlements such as weekly payments and medical, hospital and rehabilitation expenses are discussed in chapter 4.

Claims process

2.52 The claims process has a number of steps including:

- notifying an employer of the injury

⁴⁸ *Background briefing for Legislative Council Standing Committee on Law and Justice*, 2013, p 36.

⁴⁹ *Background briefing for Legislative Council Standing Committee on Law and Justice*, 2013, p 36.

Funding ratio refers to the value of the scheme's assets in relation to the actuarially calculated value of the scheme's liabilities. For example, a funding ratio of 100 per cent indicates that the current market value of the assets equals the value of the actuarially calculated liabilities.

⁵⁰ *Workers Compensation Act 1987*, ss 25 - 42.

⁵¹ WorkCover Authority of NSW, *Benefits and entitlements*, (17 October 2012) <<http://www.workcover.nsw.gov.au/injuriesclaims/benefitsentitlements/Pages/default.aspx>> Payments for police officers, paramedics, fire fighters, emergency services volunteers, coal miners and workers making a dust disease claims are calculated using their award rate, instead of pre-injury average weekly earnings.

- obtaining a WorkCover certificate of capacity from the injured worker's nominated treating doctor or hospital
- notifying the scheme agent or insurer of the injury
- ensuring that the certificate of capacity and any associated bills or expenses are given to the worker's employer.⁵²

2.53 Following notification of an injury the scheme agent or insurer will usually contact the worker, employer, and if necessary, the worker's nominated treating doctor, and will start provisional liability payments, unless there is a reasonable excuse not to start such payments.⁵³

2.54 Injured workers must receive prior approval for the cost of any medical or related treatment or service (excluding treatment provided within 48 hours of the injury happening).⁵⁴ Issues regarding pre-approval of medical treatment are discussed in chapter 4.

Work capacity assessments

2.55 As previously mentioned, the government introduced work capacity assessments to the workers compensation scheme as part of the 2012 reforms.⁵⁵ WorkCover described work capacity assessments as ongoing assessments of an injured worker's capacity for work that are conducted by insurers:

It is an ongoing process of information gathering, assessment and reassessment of a worker's functional, vocational and medical status to inform decisions about a worker's ability to return to work in pre-injury employment or suitable employment with their pre-injury employer, or at another place of employment.⁵⁶

2.56 Those workers assessed as having a more than 30 per cent permanent impairment, are not subject to work capacity assessments.⁵⁷

2.57 The scheme agent or insurer issues a work capacity decision after conducting a work capacity assessment. If the injured worker does not agree with the assessment there is a three-tiered review process available which consists of an internal review by the insurer, a merit review by WorkCover, and an independent procedural review by WIRO.

⁵² WorkCover Authority of NSW, *Step by step claims process*, (20 November 2012) <<http://www.workcover.nsw.gov.au/injuriesclaims/makingclaim/Pages/Stepbystepclaimsprocess.aspx>>.

⁵³ WorkCover Authority of NSW, *Step by step claims process*, (20 November 2012).

⁵⁴ *Workers Compensation Act 1987*, s 60(2A).

Other conditions require the treatment or service be provided by a person who is appropriately qualified to give or provide the treatment or service, and that the treatment be provided in accordance with any conditions imposed by the WorkCover Guidelines

⁵⁵ See *Workers Compensation Act 1987*, s 43.

⁵⁶ WorkCover Authority of NSW, *Work capacity*, (8 March 2014), <<http://www.workcover.nsw.gov.au/injuriesclaims/workcapacity/Pages/default.aspx>>.

⁵⁷ WorkCover Authority of NSW, *Work capacity*, (8 March 2014).

- 2.58** Under the scheme it is unlawful for a legal practitioner to receive remuneration for acting for an injured worker in relation to a dispute concerning a work capacity assessment.⁵⁸
- 2.59** Stakeholder concerns about work capacity assessments, including issues surrounding legal representation in the process, are discussed in chapter 5.

Financial position

- 2.60** The financial position of the scheme was of significant interest to stakeholders as the scheme's previous \$4 billion deficit was a key driving force for the government to introduce its 2012 reforms.⁵⁹
- 2.61** Evidence provided to the committee by Mr Michael Playford, Consulting Actuary and Partner at PriceWaterhouseCoopers, and Actuary for the Workers Compensation Nominal Insurance Scheme, WorkCover, included an analysis of what the scheme's financial position would have been if the 2012 reforms were not implemented.
- 2.62** The revised solvency projections indicate that, other things being equal:
- at December 2013 a deficit of perhaps \$2.0 billion to \$2.5 billion may have been reported
 - by June 2014 this deficit may have reduced to perhaps \$2.0 billion
 - between June 2014 and June 2018 the deficit may have reduced to \$0.5 billion. This assumes the mean reversion of current discount rates to longer term average historic levels over the next five years in conjunction with average longer term investment returns being achieved.
 - the solvency position may have been approaching full funding by 2021.⁶⁰
- 2.63** As previously mentioned, as at 30 June 2013 the scheme had accumulated a surplus of \$309 million. Mr Watson said that this more sustainable financial position had led to premium reductions for employers.⁶¹
- 2.64** Mr Playford provided an update on the scheme's surplus in May 2014, advising that 'the scheme is currently in a surplus position of a bit over \$1.3 billion and that is about a \$1 billion improvement over the last six months.'⁶²

⁵⁸ *Workplace Injury Management and Workers Compensation Act 1998*, s 65(6).

⁵⁹ See for example Submission 31, Unions NSW, p 23.

⁶⁰ Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment F: Impact of investment returns on WorkCover December 2013, 28 April 2014, p 5.

⁶¹ Evidence, Mr Watson, 21 March 2014, pp 1-2.

⁶² Evidence, Mr Michael Playford, Consulting Actuary and Partner, Pricewaterhouse Coopers, Actuary, Workers Compensation Nominal Insurance Scheme, WorkCover Authority of New South Wales, 12 May 2014, p 20.

2.65 Mr Playford explained that the scheme's assets had improved by about \$689 million in the previous six months:

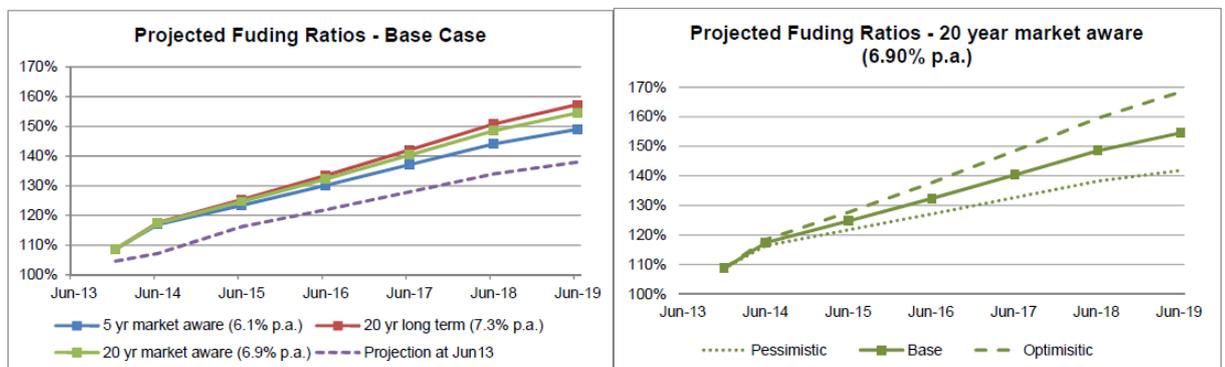
Over the last six months the assets side of the balance sheet has improved by the order of \$689 million. There are two components to that. One is that the premiums that we are currently charging are higher than what I estimate the underlying cost of the scheme is so additional premium is being collected. That automatically goes to improving the bottom line of the scheme's balance sheet. The second driver of the assets side is that investment returns continued to be very good in the last six months of 2013.⁶³

2.66 Mr Playford also estimated that there would be a \$350 million improvement in the scheme's financial performance following the decision in *ADCO Constructions Pty Ltd v Goudappel* in favour of WorkCover.⁶⁴ The Goudappel case is discussed in chapter 5.

2.67 As previously discussed, the scheme's improved financial position recently led the government to roll-back some of its 2012 reforms to the workers compensation scheme. These changes are expected to increase the scheme's liabilities by approximately \$280 million and will be absorbed by the existing surplus.⁶⁵

2.68 In regard to the future financial position of the workers compensation scheme, a Safety, Return to Work and Support Board briefing prepared by Pricewaterhouse Coopers provided the following solvency projections:

Figure 4 Solvency projections – base projections⁶⁶



2.69 These projections assume that:

- premium rates remain unchanged
- investment earnings unfold as per 'Projected Funding Ratios – Base Case' (left hand graph)

⁶³ Evidence, Mr Playford, 12 May 2014, p 20.

⁶⁴ Evidence, Mr Playford, 12 May 2014, p 8.

⁶⁵ Media Release, *Workers Benefit From NSW Government's Sound Financial Management*, 26 June 2014, p 1.

⁶⁶ Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment D: Workers Compensation Nominal Insurer Scheme – valuation results as at 31 December 2013, Safety, Return to Work and Support Board briefing presented 15 April 2014, 28 April 2014, p 11.

- future claims experiences unfold as per ‘Projected Funding Rations – 20 year market aware’ (right hand graph).⁶⁷

2.70 These projections suggest that with continued improvements in the financial returns on these scheme’s investments and the ongoing reduction in liability following the reduction in benefits due to the 2012 reforms, the scheme is moving towards an approximate \$6 billion surplus by 2019.

2.71 An analysis of the scheme’s financial position and stakeholders’ concerns about how the surplus was achieved is provided in chapter 4.

Committee comment

2.72 The committee notes that the 2012 reforms brought about a number of changes to the workers compensation system. The *Safety Return to Work and Support Act* consolidated the governance structures of the Safety Return to Work and Support agencies, including WorkCover, and established the Safety Return to Work and Support Board. Amendments to the *Workers Compensation Act* and *Workplace Injury Management and Workers Compensation Act* altered the eligibility requirements and entitlements provided to injured workers under the compensation scheme.

2.73 The most recent advice from the scheme’s actuaries is that with continued improvements in the financial returns on these scheme’s substantial investments and the ongoing reduction in liability as a result of the reduction in benefits due to the 2012 reforms, the scheme is heading towards an approximate \$6 billion surplus by 2019.

2.74 The committee notes that in June 2014 the NSW Government announced that it would roll back some of the reforms it implemented as part of the 2012 reforms to the workers compensation system as a result of the improved financial position of the scheme.

2.75 The issues raised in this chapter are examined in more detailed throughout the report.

⁶⁷ Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment D, 28 April 2014, p 11.

Chapter 3 Conflicts of interest and independent oversight

This chapter discusses one of the central issues raised throughout the review: the conflicts of interest that arise from the multiple roles carried out by WorkCover in the regulation, implementation and enforcement of the workers compensation scheme and work health and safety legislation. Review participants identified three primary areas of concern, relating to WorkCover's roles as nominal insurer and scheme regulator, as a reviewer of work capacity assessments, and as the work health and safety advisor and regulator.

The chapter also considers the role of the WorkCover Independent Review Office (WIRO), with particular regard to the independence of WIRO from WorkCover. The chapter concludes by examining the suggestion to create an Inspector General of WorkCover to provide continuous oversight and scrutiny.

Conflicts of interest

- 3.1** Throughout the course of the review many stakeholders expressed concern about the multiple functions performed by WorkCover. The numerous functions of WorkCover were outlined by the Australian Lawyers Alliance, which argued that undertaking these various functions resulted in a 'distinct' conflict of interest:

WorkCover has too many functions to operate efficiently, and is often conflicted in its functions ... WorkCover has a distinct conflict of interest in being nominal insurer and safety regulator, decision maker, overseer of the Workers Compensation Commission, overseer of WIRO, and its functions regarding the licensing of self and specialised insurers.⁶⁸

- 3.2** The Law Society of New South Wales expressed similar concerns over the multiplicity of roles, suggesting that 'WorkCover has too many functions to operate effectively, efficiently and without being conflicted'.⁶⁹ The Law Society continued:

In many cases decisions or changes adopted in one area of operation seem to have been made without due consideration of the ramifications in another area under its control ... WorkCover is constantly operating under conflicted conditions due to the multiplicity of roles and functions. In the [Injury Compensation] Committee's experience the end result is that employers, insurers and workers are all dissatisfied with the operation of the workers compensation scheme.⁷⁰

- 3.3** Ms Elizabeth Welsh, Barrister, and Member of the Common Law Committee of the New South Wales Bar Association, noted that following the 2012 reforms to the scheme additional functions were conferred on WorkCover, and suggested that as a result of this increased responsibility there had been a drop in confidence in the administration of the workers compensation system:

⁶⁸ Submission 35, Australian Lawyers Alliance, pp 1-2.

⁶⁹ Submission 22, Law Society of New South Wales, p 3.

⁷⁰ Submission 22, Law Society of New South Wales, p 3.

In drafting and implementing those [2012] amendments the authority has acquired added responsibilities. In addition to its previous functions as administrator, monitor, investigator, prosecutor and nominal insurer it has assumed the additional roles of Legal Aid provider and decision maker. The potential for serious conflicts of interest is obvious. In the present context it is impossible for an injured worker to have confidence in the system when the organisation which is vested with responsibility for reducing the scheme's liabilities is also deciding whether to fund a claim or review an insurer's decision.⁷¹

3.4 The Injured Workers Support Network questioned how an organisation with responsibility for so many functions could avoid conflicts of interest and fairly represent all parties:

WorkCover has a responsibility for overseeing the multiple functions of insurance, investment, compliance and prosecutions, whilst alleging to provide administrative services for employers, injured workers and insurers. How can one organisation possibly manage the best interests of all parties without a potential conflict of interest?⁷²

3.5 Review participants identified a number of specific areas in which they held concerns about conflicts of interest in the multiple roles undertaken by WorkCover. These related to WorkCover's roles as nominal insurer and scheme regulator, as a reviewer of work capacity assessments, and as the workplace health and safety advisor and regulator. The next sections discuss each of these concerns in turn.

Nominal insurer and scheme regulator

3.6 A number of review participants expressed concern about the potential conflict between WorkCover's roles as both the nominal insurer through its management of the Workers Compensation Insurance Fund, and as the regulator of the workers compensation scheme.

3.7 The *Workplace Injury Management and Workers Compensation Act 1998* designates WorkCover as the nominal insurer and outlines its functions in this role as follows:

- WorkCover has such additional functions as may be necessary to allow WorkCover to act for the nominal insurer and to ensure that the nominal insurer's functions are able to be exercised without restriction by any of WorkCover's other functions
- when acting for the nominal insurer, WorkCover may exercise all the functions of the nominal insurer and is not limited by any of WorkCover's other functions
- when acting for the nominal insurer, WorkCover must exercise its functions so as to ensure the efficient exercise of the functions of the nominal insurer and the proper collection of premiums for policies of insurance and the payment of claims.⁷³

3.8 WIRO explained the contrasting roles played by WorkCover, noting that as the regulator WorkCover is responsible for ensuring compliance with the relevant workers compensation

⁷¹ Evidence, Ms Elizabeth Welsh, Barrister, Member of the Common Law Committee, New South Wales Bar Association, 28 March 2014, p 38.

⁷² Submission 26, Injured Workers Support Network, p 3.

⁷³ *Workplace Injury Management and Workers Compensation Act 1998*, s 23A.

legislation through education, engagement and enforcement, while as the nominal insurer it is responsible for the commercial roles of managing funds and appointing and overseeing the scheme agents that issue insurance policies and manage claims.⁷⁴

3.9 WIRO said that '[a]t present there appears to be an inadequate separation of powers and functions between WorkCover's role as a regulator and the nominal insurer'.⁷⁵

3.10 WIRO observed that WorkCover is structured in such a way that conflict can arise when employees of WorkCover are unable to distinguish between the different functions they are required to perform:

The legislative framework and organisational structure does not assist staff to separate their tasks and manage the potential conflicts as and when they may emerge. The legislation intertwines the responsibilities in such a way as to often confuse the two roles. Decisions on issues such as premium and benefit level, medical and legal costs are controlled by WorkCover in its capacity as regulator. The regulator also issues the claims technical manual which provides detailed instruction on the management of claims and their categorisation, whereas the nominal insurer issues operational directions to scheme agents and contract management of the scheme agent deed.⁷⁶

3.11 The Law Society of New South Wales similarly considered there to be an 'inherent conflict' of interest between WorkCover acting as both the regulator and the nominal insurer.⁷⁷ The Law Society suggested that where WorkCover is the nominal insurer, there is a disincentive for employers to notify WorkCover regarding injury claims because of its concurrent role in prosecuting breaches of work, health and safety legislation:

... the availability of an injured worker's entitlement to the recovery of work injury damages from an employer is contingent on proving (among other things) negligence on the part of the employer giving rise to the injury. The extent to which workplace injury is investigated and/or prosecuted by WorkCover has the potential to have a significant impact on whether any injured worker is able to prosecute a successful claim for work injury damages. This gives rise to the possibility of a lack of objectivity affecting decisions made by the nominal insurer concerning whether workplace incidents are investigated or prosecuted.⁷⁸

3.12 The Law Society identified a further 'fundamental conflict' which arises from WorkCover having responsibility for investigating claims, while concurrently managing the fund from which work injury damages are paid:

There is an even more fundamental conflict of interest here. On the one hand WorkCover manages the fund from which all work injury damages are paid and regularly intervenes in the defences of these claims. On the other hand WorkCover is responsible for investigating and/or prosecuting the same alleged breaches of work, health and safety legislation which give rise to the damages claims.⁷⁹

⁷⁴ Submission 36, WorkCover Independent Review Office, p 4.

⁷⁵ Submission 36, WorkCover Independent Review Office, p 5.

⁷⁶ Submission 36, WorkCover Independent Review Office, p 4.

⁷⁷ Submission 22, Law Society of New South Wales, p 4.

⁷⁸ Submission 22, Law Society of New South Wales, p 4.

⁷⁹ Submission 22, Law Society of New South Wales, p 5.

3.13 Mr Tim Concannon, Partner, Carroll and O’Dea Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, highlighted similar concerns, observing that WorkCover provides advice to scheme agents on claims management whilst concurrently being responsible for funding these claims: ‘It seems to me that there is a basic conflict in that issue’.⁸⁰

3.14 A number of review participants suggested that the most appropriate course of action to address concerns regarding this conflict of interest would be to separate the two functions. For example, the NSW Business Chamber suggested separating the workers compensation function from the work health and safety function:

With respect to its position as a nominal insurer, the Chamber understands that the WorkCover Authority is the third largest insurer in the country and with an organisation of this size, it may be useful to consider the separation of its workers compensation and work health and safety functions, with people with the appropriate level of expertise providing oversight of the respective authorities.⁸¹

3.15 Mr Paul Macken, Honorary Lawyer, New South Wales Workers Compensation Self Insurers Association, similarly suggested that the functions of insurer and regulator should be separated, highlighting WorkCover’s role in the development of scheme guidelines as a clear example of the conflict that can arise:

The simple way is to separate the functions. If the WorkCover Authority is going to operate as the nominal insurer and therefore underwrite a scheme that pays out benefits, the WorkCover Authority should not be drafting the guidelines that direct how those benefits are or are not paid and how cases are managed. They are paying out the money; they should not tell themselves how to pay out the money and when to pay out the money. It is a conflicted process and quite simply they should be separated.⁸²

3.16 The Law Society of New South Wales made four suggestions to address the perceived conflicts of interest:

1. WorkCover should not continue as the nominal insurer, and consideration should be given to reintroducing private underwriting or separating the role of nominal insurer from WorkCover altogether.
2. WorkCover should be divested of many of its functions in addition to that of nominal insurer, with WorkCover only retaining responsibility as the licensing and prudential regulator, with no role in the dispute resolution process.
3. If WorkCover is to continue as the nominal insurer, it be should be divested of many or all of its other functions to avoid issues of conflict of interest.

⁸⁰ Evidence, Mr Tim Concannon, Partner, Carroll and O’Dea Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales 28 March 2014, p 30.

⁸¹ Answers to questions on notice, Mr Craig Milton, Policy Analyst, NSW Business Chamber, 28 April 2014, p 6.

⁸² Evidence, Mr Paul Macken, Honorary Lawyer, NSW Workers Compensation Self Insurers Association, 21 March 2014, p 42.

4. In any event, the investigation and enforcement of work, health and safety obligations should be removed from WorkCover and vested in a separate independent body.⁸³

3.17 WIRO also advocated for a separation of functions, recommending that the ‘... functions and responsibilities between the regulator and the nominal insurer be separated to ensure that the nominal insurer’s commercial objectives do not interfere with the administration and regulation of the scheme’.⁸⁴ Mr Kim Garling, WorkCover Independent Review Officer, WIRO, observed that such separation would allow for improved identification of responsibility for issues:

I think you would need to have separate authorities dealing with each of those functions. They are quite separate and discrete functions. If they are in separate hands, one can look for the responsibility for each of those groups when there is a failure.⁸⁵

3.18 WIRO suggested that an appropriate first step would be to establish distinct offices for the regulatory and insurance functions within WorkCover to create ‘a transparently regulated nominal insurer and a more independent, responsive regulator’.⁸⁶

A sensible first step would be to establish two separate offices with different personnel undertaking the required functions. That would enable a review of decisions made by the nominal insurer and of the claims management process and also enable oversight of the scheme valuation process.⁸⁷

3.19 WIRO advised that while it was aware of ‘... a variety of models for a separate regulator for an industry which would be suitable for the WorkCover scheme’, selecting and implementing such a model would ultimately be a policy matter for government.⁸⁸ However, WIRO stated that the office ‘... would be prepared to assist with the consideration of which model would be the most appropriate for the government to consider’.⁸⁹

3.20 WorkCover acknowledged the concerns of review participants in regard to its dual role as insurer and regulator, accepting that while the relevant legislation is clear on the different roles, greater effort could be made to distinguish between the two in practice:

Individual provisions and parts of the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* make the discrete roles of the Nominal Insurer and WorkCover Authority as regulator clear ... WorkCover agrees it could communicate more clearly with the workers compensation community about the legislation and whether it is acting in its capacity as a regulator or insurer.⁹⁰

⁸³ Submission 22, Law Society of New South Wales, p 6.

⁸⁴ Submission 36, WorkCover Independent Review Office, p 5.

⁸⁵ Evidence, Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office, 21 March 2014, p 18.

⁸⁶ Answers to questions on notice, Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office, 24 April 2014, p 2.

⁸⁷ Answers to questions on notice, Mr Garling, 24 April 2014, p 2.

⁸⁸ Answers to questions on notice, Mr Garling, 24 April 2014, p 2.

⁸⁹ Answers to questions on notice, Mr Garling, 24 April 2014, p 2.

⁹⁰ Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, pp 2-3.

- 3.21** WorkCover undertook to ‘... identify ways in which it can improve its operating model to better distinguish the regulatory and insurer functions’.⁹¹

Committee comment

- 3.22** The committee shares the concerns of review participants regarding the potential for conflicts of interest to arise in the current situation of WorkCover undertaking the role of both nominal insurer and scheme regulator. While we note the undertaking by WorkCover to more clearly distinguish between these two roles when communicating with stakeholders, we believe more needs to be done to eliminate any real or perceived conflict.
- 3.23** The committee believes that the Minister for Finance and Services, in consultation with WIRO and other relevant stakeholders, should consider the establishment of a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.

Recommendation 1

That the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office and other stakeholders, consider establishing a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.

Reviewer of work capacity assessments

- 3.24** The second area of concern identified by review participants with regard to potential conflicts of interest relates to WorkCover’s role in reviewing work capacity assessments. A work capacity assessment is a review of an injured worker’s functional, vocational and medical status that helps inform decisions by the insurer about the worker’s ability to return to work in their pre-injury employment, or suitable employment with the pre-injury employer, or at another place of employment.⁹² Work capacity decisions are further discussed in chapter 5.
- 3.25** As mentioned in chapter 2, in the event that an injured worker is dissatisfied with a work capacity decision, there are three tiers of review that can be pursued: firstly an internal review by the insurer, secondly a merit review by WorkCover, and lastly a review by WIRO.⁹³
- 3.26** The Law Society of New South Wales argued that WorkCover’s role as both the nominal insurer and the decision maker for merit reviews of work capacity decisions raises questions over the ‘independence and impartiality’ of the merit review process:

⁹¹ Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, pp 2-3.

⁹² Additional supplementary answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 1.

⁹³ WorkCover Authority of NSW, *Work capacity* (8 March 2014) <http://www.workcover.nsw.gov.au/injuriesclaims/workcapacity/Pages/default.aspx>

Pursuant to section 44 of the 1987 Act, WorkCover has the function of reviewing an insurer's decision as to an injured worker's work capacity on the merits after the insurer has reviewed its own decision. WorkCover's function as nominal insurer creates a situation of unequivocal conflict when WorkCover acts in its role as a merit reviewer. The authority that runs the scheme and is also the nominal insurer is also the merit reviewer. One can understand an injured worker feeling uncomfortable about this process and questioning the independence and impartiality of the merit reviewer.⁹⁴

- 3.27** Mr Anthony Scarcella, NSW Director, National Council of the Australian Lawyers Alliance, similarly suggested that the multiple roles of WorkCover in work capacity decisions resulted in 'distrust' in the system of work capacity reviews:

Without being overly simplistic, if you look at it this way: WorkCover is the regulator, the investigator, the police officer, the prosecutor, the judge and the jury when you look at work capacity ... And the owner, and that distrust comes from there.⁹⁵

- 3.28** Likewise, Mr Bruce McManamey, NSW Committee Member, Australian Lawyers Alliance, expressed concern with the potential conflict in WorkCover's dual roles, noting the contrasting positions of holding the financial responsibility of the nominal insurer while also determining work capacity reviews:

WorkCover is the nominal insurer, they are the person paying the money. One has a system where it is going to reduce down to the final arbiter of whether someone is entitled to ongoing compensation being determined by the person who does the paying. That seems to be the clearest form of conflict and it is certainly something that our members have seen in time, as this has come in, that injured workers have no faith in that resolution.⁹⁶

- 3.29** The Law Society of New South Wales cited the case of *Transfield Services (Aust) Pty Limited v WorkCover Authority of NSW and Mark Humphrey* (the *Transfield* case) as an example of how these dual roles conflict.⁹⁷ In July 2013, Transfield, a self-insured employer, received an application from a worker for an internal review of its work capacity decision. After Transfield issued its internal review decision, the worker applied to WorkCover for a merit review, which was completed and issued on 27 August 2013.⁹⁸
- 3.30** WorkCover's merit review decision recommended Transfield should not have made a work capacity decision about the worker's weekly payments until after the Workers Compensation Commission had determined a current dispute about liability.⁹⁹
- 3.31** In October 2013, Transfield filed a Supreme Court challenge seeking to set aside the merit review decision because of 'jurisdictional error'. Both parties agreed that WorkCover's merit

⁹⁴ Submission 22, Law Society of New South Wales, p 5.

⁹⁵ Evidence, Mr Anthony Scarcella, NSW Director, National Council of the Australian Lawyers Alliance, 28 March 2014, p 49.

⁹⁶ Evidence, Mr Bruce McManamey, NSW Committee Member, Australian Lawyers Alliance, 28 March 2014, p 49.

⁹⁷ Submission 22, Law Society of New South Wales, p 5.

⁹⁸ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 1.

⁹⁹ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 1.

review decision contained an error at law, with both WorkCover and the injured worker filing submissions that an error of law was made.¹⁰⁰

3.32 On 31 January 2014, a consent judgment was made by the Supreme Court quashing WorkCover's decision of 27 August 2013 and remitting the matter back to WorkCover to be determined according to law.¹⁰¹

3.33 The matter was concluded on 1 April 2014 when WorkCover's merit review found the worker was not entitled to ongoing weekly payments of compensation. The findings and recommendations were issued to both parties and the matter resolved by consent.¹⁰²

3.34 Ms Roshana May, Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, highlighted the conflicting roles played by WorkCover in the case:

WorkCover was acting as the merit reviewer of the decision made by its agent but was also questioning the authority and the operation of its own function, the merit review officer.¹⁰³

3.35 When asked if the conflict between WorkCover's role in undertaking merit reviews and its role as the nominal insurer ought to be removed Mr Concannon responded: 'Absolutely. That is one of the most fundamental conflicts of interest we have.'¹⁰⁴

3.36 Mr Gary Jeffrey, Acting General Manager, Workers Compensation Insurance Division, WorkCover, acknowledged the concerns raised by review participants in this regard. With specific reference to the *Transfield* case, Mr Jeffrey advised that WorkCover was currently determining how to better structure internal operations to minimise potential conflicts, including examining models used in other jurisdictions such as Victoria, Western Australia and Queensland:

I was aware of some of the concerns raised whereby WorkCover and the nominal insurer were involved in the [Transfield] case and the conflict that could arise from that – so who regulates the insurer? We are looking at that at the moment ... We are working through the division to look at the delegations and structurally look at what could be potentially changed. We are in the process of reviewing that. We are also looking at the Victorian model – some of the underwritten models – the Western Australian model, and we are also going to look at the Queensland model to see how they operate and how we can get segregation of functions and correct delegation. Where there could be conflict we are looking to resolve that.¹⁰⁵

¹⁰⁰ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 1.

¹⁰¹ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 1.

¹⁰² Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 1.

¹⁰³ Evidence, Ms Roshana May, Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, 28 March 2014, p 30.

¹⁰⁴ Evidence, Mr Concannon, 28 March 2014, p 33.

¹⁰⁵ Evidence, Mr Gary Jeffrey, A/General Manager, Workers Compensation Insurance Division, WorkCover Authority of NSW, 12 May 2014, p 2.

Committee comment

- 3.37** The committee notes that WorkCover has indicated that following the case of *Transfield Services v Humphrey* it is reviewing the segregation of functions and delegations around its role in work capacity decisions. The committee considers that WorkCover should complete this review in consultation with relevant stakeholders, including worker and employer representatives, and publish the findings as soon as practicable.

Recommendation 2

That the WorkCover Authority of NSW consult with stakeholders, including worker and employer representatives, during its review of the segregation of functions and delegations around its role in work capacity decisions, and that it publish the review's findings.

Work health and safety

- 3.38** The third area of concern identified by review participants relates to WorkCover's multiple roles in the area of work health and safety (WHS). Some review participants argued that having a single organisation act as both the WHS regulator and advisor results in conflict, while other review participants felt that there were synergies in having WorkCover undertake the two roles simultaneously.
- 3.39** Mr Mark Lennon, Secretary, Unions NSW, criticised the ability of WorkCover to carry out its dual roles of WHS advisor and regulator, suggesting that WorkCover was not satisfactorily fulfilling its role as regulator:

... it has become an issue not just in recent years but going back maybe five or six years, is this dynamic, or this tension between the role of WorkCover as an adviser and its role as a regulator. I think all parties will agree that there is scope for both; the question is degree. At the moment as far as we can see in the union movement WorkCover is falling down, particularly in regard to its role as the regulator ... the word on the street is that as a regulator and enforcer WorkCover is not what it used to be. The fact that last week we as a union movement had to go public and call for an audit of the construction industry in the Sydney region, given that we have had three major incidences on work sites across the Sydney central business district in the past 18 months, points to evidence of the problem of the role of WorkCover as a regulator and its failure to carry out that in the present time.¹⁰⁶

- 3.40** Unions NSW recommended that '... the functions of the WHS division and the workers compensation division be separated under different executive management and advisory councils to avoid conflicts of interest'.¹⁰⁷
- 3.41** RiskNet Pty Ltd, a consulting firm specialising in workers compensation management advice, WHS and industrial relations, also questioned the appropriateness of the current structure of the WHS advisor and regulator roles carried out by WorkCover, stating:

¹⁰⁶ Evidence, Mr Mark Lennon. Secretary, Unions NSW, 21 March 2014, p 28.

¹⁰⁷ Submission 31, Unions NSW, p 7.

[The current structure] combines the functions of a regulator and advisor; whether these sit comfortably together or not needs to be considered. We do not believe that they do and that there is a perceived conflict of interest in the current structure.¹⁰⁸

3.42 Mr Greg Pattison, Adviser, Workplace Health and Safety and Industrial Relations, NSW Business Chamber, highlighted that workplaces may be reluctant to seek advice from WorkCover on WHS issues for fear of regulatory action if faults are found:

I think there is some merit in the prosecution arms and the educational arms being separate. There is no doubt that there are employers who are reluctant to engage with WorkCover because they fear the consequences. It is an old story, but many years ago a member of ours was asked by an inspector to come and see him to get some advice on matters. As he left, the inspector issued him with five improvement notices. I doubt if there was a conversation between our member and that inspector ever again. It is that sort of image which WorkCover has been working to remove, I think with some success, but it is not yet complete.¹⁰⁹

3.43 Ms May indicated the Law Society's view that the investigation and enforcement of WHS responsibilities undertaken by WorkCover should be moved to an independent body to avoid conflict:

We say WorkCover can only manage one function not many. We believe the investigation and enforcement of work health and safety obligations should be removed to an independent body, probably under the board, that is specifically charged with the investigation and enforcement of the work health and safety legislation.¹¹⁰

3.44 Mr Andrew Stone, Barrister and Member of the Common Law Committee, New South Wales Bar Association, concurred with the suggestion from Ms May, saying: 'Absolutely ... Stop them being the investigator, the insurer and the regulator all rolled up in one. Break the role back down and have it in some independent arms'.¹¹¹

3.45 Likewise, the NSW Business Chamber also advocated for the separation of the advisory and enforcement functions, suggesting that the following benefits would result if such a segregation were to occur:

- greater certainty for employers regarding the functions of WorkCover officers attending workplaces
- removal of conflicts of role, and at times interest, for individual inspectors
- more efficient use of resources, with a dedicated inspectorial function possibility assisting to achieve with speedier prosecutions
- greater consistency because the number of WorkCover staff directly responsible for prosecutions would be reduced but they would be engaged in the more specialist role

¹⁰⁸ Submission 4, RiskNet Pty Ltd, p 11.

¹⁰⁹ Evidence, Mr Greg Pattison, Adviser, Workplace Health and Safety and Industrial Relations, NSW Business Chamber, 28 March 2014, p 7.

¹¹⁰ Evidence, Ms May, 28 March 2014, p 34.

¹¹¹ Evidence, Mr Andrew Stone, Barrister, Member, Common Law Committee, New South Wales Bar Association, 28 March 2014, p 45.

- increased willingness for employers to engage with WorkCover preventative and advisory services before there is an accident.¹¹²

3.46 Both the Construction Forestry Mining and Energy Union (NSW Branch) and the Australian Manufacturing Workers' Union (NSW Branch) expressed support for the separation of the investigation and enforcement of WHS obligations undertaken by WorkCover.¹¹³

3.47 However, not all review participants were supportive of WorkCover being divested of its WHS responsibilities. The Public Service Association of NSW viewed it as 'critical' for WorkCover to retain responsibility for the multiple roles within the WHS sphere:

The WorkCover Authority currently regulates workplace health and safety through the OHS division and workers compensation when health and safety fails the worker or others in the workplace through the Workers Compensation Division. These areas encompass a wide variety of activities from provision of health and safety information to compliance, through to on the spot penalties or prosecutions. Workers compensation also includes the provision of information, compliance with workers compensation legislation, managing worker's compensation insurance, the Treasury Managed Fund, insurer agents and self-insurers ... We are of the view that it is critical for WHS and workers compensation to remain under the same authority with closer and more rigorous interactions.¹¹⁴

3.48 Mr Steve Turner, Assistant General Secretary, Public Service Association of NSW, highlighted the synergies¹¹⁵ that the performance of multiple roles can create, but emphasised the need to have clear protocols to minimise the possibility of conflicts of interest occurring:

They complement each other and should remain within a single organisation to help to develop and support each of the roles of the organisation. There have been some perceived biases in WorkCover and for that reason we have put forward various proposals about how clear protocols would avoid any perceptions or interpretations of bias in conflicts within the organisation.¹¹⁶

3.49 When questioned on its ability to effectively undertake multiple roles in the WHS sphere, WorkCover argued that it was well placed to undertake the different functions.

3.50 WorkCover advised that the different functions are administered separately within the organisation, however noted that the current structure allows for collaboration in undertaking its WHS responsibilities:

WorkCover's responsibilities for work health and safety and workers compensation are administered by separate divisions of WorkCover. The current arrangement allows

¹¹² Answers to questions on notice, Mr Milton, 28 April 2014, p 6.

¹¹³ See Evidence, Ms Rita Mallia, President, Construction Forestry Mining and Energy Union (NSW Branch), 28 March 2014, p 65, and Evidence, Mr David Henry, NSW Branch Work Health and Safety Officer, Australian Manufacturing Workers' Union, 28 March 2014, p 71.

¹¹⁴ Submission 30, Public Service Association of NSW, p 2.

¹¹⁵ Evidence, Mr Steve Turner, Assistant General Secretary, Public Service Association of NSW, 21 March 2014, p 48.

¹¹⁶ Evidence, Mr Turner, 21 March 2014, p 48.

for synergies to be developed between ensuring work health and safety on the one hand and reducing work injuries and improving return to work rates on the other.¹¹⁷

- 3.51** According to Mr John Watson, General Manager, Work Health and Safety, WorkCover, having both advisory and enforcement powers embodied in one authority allows for matters to be dealt with expediently:

The role of a regulator obviously has both the enforcement and compliance functions so in that role in the work health and safety space we embody that in one person, in the inspector. That allows them to deal with matters when they see them in a workplace, either by serving notices, issuing on-the-spot fines or indeed providing advice and guidance to the PCBU [Person Conducting a Business or Undertaking] that they are visiting or indeed to the employees at that workplace.¹¹⁸

- 3.52** Mr Watson further advised that WorkCover has ‘quite a formal process of exercising our prosecutorial capacity’ using the national compliance enforcement policy and a clear separation of functions to distinguish between the different WHS functions to minimise the possibility of conflicts occurring.¹¹⁹

- 3.53** Other issues pertaining to WorkCover’s role in implementing WHS legislation are discussed in chapter 8.

Committee comment

- 3.54** The committee acknowledges the concerns of some review participants regarding a single organisation acting as both the WHS regulator and advisor. These participants advocated for the separation of the two functions into different bodies.

- 3.55** We also note that other review participants felt that there are synergies in having WorkCover undertake the two roles simultaneously.

- 3.56** The committee agrees with the Public Service Association of NSW that while synergies can be achieved in having a single organisation perform both a regulatory and advisory role in the WHS sphere, it is essential that clear protocols exist to minimise the possibility of conflicts of interest occurring. We therefore recommend that WorkCover, in consultation with key stakeholders, review the procedures currently utilised by WorkCover to distinguish between the two functions and implement protocols to minimise the possibility of conflict occurring.

Recommendation 3

That the WorkCover Authority of NSW, in consultation with stakeholders, review the procedures currently utilised to distinguish between the work health and safety regulatory and advisory roles of WorkCover, and implement protocols to minimise potential conflicts of interest.

¹¹⁷ Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, pp 2-3.

¹¹⁸ Evidence, Mr John Watson, General Manager, Work Health and Safety, WorkCover Authority of NSW, 12 May 2014, p 1.

¹¹⁹ Evidence, Mr Watson, 12 May 2014, p 1.

Independent oversight

- 3.57** There are currently two distinct mechanisms for overseeing the performance of WorkCover: this committee, and the WIRO. As noted in chapter 1, the *Safety, Return to Work and Support Board Act 2012* appoints a committee of the Legislative Council to oversight WorkCover, the Workers Compensation (Dust Diseases) Board, the Motor Accidents Authority and the Lifetime Care and Support Authority.¹²⁰
- 3.58** On 14 November 2012 this committee was designated responsibility for performing this oversight function.¹²¹ This report has been prepared as part of the committee's first review of WorkCover.
- 3.59** In addition to this committee, the WIRO provides oversight of WorkCover by dealing with complaints and inquiring into appropriate matters. A number of review participants suggested that the independence of WIRO would be significantly enhanced if it was granted complete budgetary independence from WorkCover.
- 3.60** Further, some review participants proposed a third body to oversight WorkCover: an Inspector General or Ombudsman of WorkCover, to provide continuous scrutiny of WorkCover and its performance. The following sections consider these suggestions.

WorkCover Independent Review Office

- 3.61** WIRO was created during the 2012 reforms to the workers compensation scheme as an independent body to deal with individual complaints and provide greater accountability to the workers compensation system.¹²² The functions of WIRO are outlined in the *Workplace Injury Management and Workers Compensation Act* as follows:
- to deal with complaints made to WIRO by a worker about any act or omission of an insurer that affects the entitlement rights or obligations of the worker under the workers compensation legislation
 - to review work capacity decisions of insurers
 - to inquire into and report to the Minister on such matters arising in connection with the operation of the workers compensation legislation as WIRO considers appropriate or as may be referred to WIRO for enquiry and report by the Minister
 - to encourage the establishment by insurers and employers of complaint resolution processes for complaints arising under the workers compensation legislation
 - such other functions as may be conferred on WIRO by or under the workers compensation legislation or any other legislation.¹²³
- 3.62** WIRO is also responsible for the management of the Independent Legal Assistance and Review Service which commenced operation on 1 October 2012.¹²⁴ The service facilitates

¹²⁰ *Safety, Return to Work and Support Board Act 2012*, s 11.

¹²¹ *Minutes*, Legislative Council, 14 November 2012, pp 1368-69.

¹²² Submission 36, WorkCover Independent Review Office, p 3.

¹²³ Submission 36, WorkCover Independent Review Office, p 3.

access to free independent legal advice to injured workers in circumstances where there is a disagreement with insurers regarding entitlements.¹²⁵

- 3.63** Despite being established as an independent body, WIRO does not have budgetary independence from WorkCover. Instead, WIRO must seek approval from WorkCover for all of its expenditure. WorkCover detailed the funding arrangements, with an emphasis on how WIRO's staffing costs are met:

Non-Executive staff within the WIRO are employed by the Office of Finance and Services. Senior Executive Staff within the WIRO are employed by the Department of Treasury and Finance. Wages for all staff are paid by Safety, Return to Work and Support.

Section 35 of the *Workplace Injury Management and Workers Compensation Act 1998* provides that the remuneration of the WorkCover Independent Review Officer and staff of the WIRO, as well as costs incurred in connection with the exercise of the functions of the WIRO may be paid from the WorkCover Authority Fund.

Any planned increases in resourcing form part of the annual Treasury budget and forecasting process and may require an Expenditure Review Committee Minute. Any in-year over budget expenditure would be a matter for Treasury.¹²⁶

- 3.64** Mr Garling emphasised that s 35 of the Act states that these expenses *are to be paid* from the WorkCover Authority Fund, not that they *may be paid* from the fund.¹²⁷
- 3.65** Further, Mr Garling stated that '[t]his control of the operations, staffing and general expenditure by WorkCover is not consistent with the independence of the WIRO'.¹²⁸ The budgetary reliance results in the unusual situation of WIRO having to seek the approval of WorkCover to undertake any enquiry or project, even if it were to involve investigation of WorkCover itself, as highlighted by Mr Garling:

If I consider that I should undertake an enquiry pursuant to my authority and functions I have to obtain the prior approval of WorkCover to the acquisition and allocation of resources and the funding for the project even if it happens to be an investigation of aspects of WorkCover itself. There is no review if the decision is to refuse a request by my office.¹²⁹

¹²⁴ *Workplace Injury Management and Workers Compensation Act 1998*, s 27.

¹²⁵ WorkCover Independent Review Office, *Fact Sheet: ILARS* (February 2013) http://wiro.nsw.gov.au/media/11224/2013__february__factsheetindependentlegalassistancerevi ewservice_2.0.pdf

¹²⁶ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 12.

¹²⁷ Correspondence, Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office, to the Committee Director, 11 July 2014, p 3 [Emphasis as per original].

¹²⁸ Answers to questions on notice, Mr Garling, 24 April 2014, p 7.

¹²⁹ Answers to questions on notice, Mr Garling, 24 April 2014, p 7.

3.66 Mr Garling provided an example of being thwarted in an attempt to undertake a project when he was declined permission to conduct a two day seminar for insurers and lawyers on the 2012 reforms to the scheme and the process for receiving funding grants.¹³⁰

3.67 Mr Garling further commented on the complexities of seeking approval for operations, staffing and general expenditure:

The funding may be there, but getting the resources is a different issue because everything has to be dealt with through the WorkCover Authority. Now because of the recent changes there is an extra level in that everything has to be approved through the Department of Finance and Services. Even in recruitment, that can take six months and in an office of my size where I have 34 staff members, we are a high-skilled office, we do not fall into that pattern easily. If we need to procure something, all my procurement has to be approved by the WorkCover Authority.¹³¹

3.68 In regard to budget planning, Mr Garling said that '[f]or the years ended 30 June 2013 and 30 June 2014 I was not invited to participate in setting the budget for the office'.¹³²

3.69 Mr Garling noted that this dependence on WorkCover can restrict WIRO from fulfilling its legislative obligations, yet suggested that the impetus to grant WIRO budgetary independence from WorkCover may be a low priority:

If we are funded by and subject to approval for all staff and expenditure by the very authority we are oversighting it limits the ability to undertake necessary inquiries. That [budgetary independence] is a matter which I think was on the list of things to be done at one stage and it may have lost its priority.¹³³

3.70 Mr Stone strongly agreed that WIRO should be granted complete budgetary independence from WorkCover due to the important role that WIRO plays in protecting the rights of injured workers:

... we thoroughly endorse that Mr Garling and his independent review office need independent funding. You cannot go to the person you are regulating to ask for your support. We have seen examples in the past where a Director of Public Prosecutions falls out of favour with the Attorney General and all of a sudden half his staff members disappear. That cannot be allowed to happen here. He has to be genuinely independent. If you are going to pull the lawyers out of the system and stop us representing people, he is all that is left and he must have the resources to do what he has to do.¹³⁴

3.71 When questioned on the proposal to grant WIRO full budgetary independence, WorkCover responded that 'changing the legislation would be a matter for Government and ultimately the Parliament'.¹³⁵

¹³⁰ Correspondence, Mr Garling, to the Committee Director, 11 July 2014, p 3.

¹³¹ Evidence, Mr Garling, 21 March 2014, p 23.

¹³² Correspondence, Mr Garling, to the Committee Director, 11 July 2014, p 3.

¹³³ Evidence, Mr Garling, 21 March 2014, p 26.

¹³⁴ Evidence, Mr Stone, 28 March 2014, p 39.

¹³⁵ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 12.

- 3.72** Other review participants suggested that WIRO should be completely independent from WorkCover. For example, the Law Society of New South Wales argued that it was ‘inappropriate’ for WorkCover to have any role in the administration of WIRO because of WIRO’s role as the third tier of review for work capacity decisions:

Decisions made by WIRO again have the potential to impact substantially on the nature and extent of the liabilities of the nominal insurer. The most explicit example of this conflict arises where WIRO is required to review decisions made by WorkCover’s Merit Review Service and is responsible for the final review of work capacity decisions. In these circumstances it is, in the view of the [Law Society Injury Compensation] Committee, inappropriate for WorkCover to have any role in the administration or oversight of the operations of WIRO which should be a legitimately independent organisation.¹³⁶

- 3.73** Mr Garling suggested that an appropriate solution to ensure the independence of WIRO would be to have WIRO established as a separate agency under the *Government Sector Employment Act 2013*.¹³⁷

Inspector General of WorkCover

- 3.74** Some review participants suggested that the appointment of an Inspector General, or Ombudsman, of WorkCover would provide a valuable third mechanism for continuous oversight and scrutiny, as compared to the periodic reviews undertaken by this committee. For example, the Australian Manufacturing Workers’ Union said that the appointment of such an inspector to publicly report back to this committee on the performance of WorkCover would be ‘prudent’ and provide greater transparency:

... it may be more prudent to consider mechanisms by which to better hold WorkCover to account; including benchmarking WorkCover against its functions by the Parliamentary Committee, to whom an independent ‘Inspector General of WorkCover’ would report in a similar fashion to the long standing oversight mechanism established for the ICAC. In the same way, the independent NSW Children’s Commissioner reports to the parliamentary committee overseeing the Commission of Children and Young people. Such an exercise should be public so as to provide the transparency it deserves.¹³⁸

- 3.75** Mr David Henry, NSW Branch Work Health and Safety Officer, Australian Manufacturing Workers’ Union, asserted that the appointment of an independent Inspector General of WorkCover would facilitate an ongoing review function that would allow early identification of issues within WorkCover and the scheme:

I respect that the committee under legislation has got a responsibility to review the functions, and that is done periodically. The reason that we have recommended this

¹³⁶ Submission 22, Law Society of New South Wales, p 6.

¹³⁷ Answers to questions on notice Mr Garling, 24 April 2014, p 7.

Agencies names under part 3, Schedule 1 of the *Government Sector Employment Act 2013* include the Office of the Children’s Guardian, the Office of the Director of Public Prosecutions, and the Ombudsman’s Office.

¹³⁸ Submission 2, Australian Manufacturing Workers’ Union (NSW Branch), p 16.

sort of Inspector General is that we think that there would be some benefit from a somewhat ongoing review so that these issues are picked up straightaway. A lot of the things that we have been talking about today stem from legislation that was implemented in 2012. We are two years down the road, and there are issues, of course, that would have predated that.¹³⁹

3.76 In addition to assisting this committee during its periodic reviews of WorkCover, Mr Henry suggested an Inspector General would provide an alternate avenue for injured workers if they were discontent with an approach pursued by WorkCover.¹⁴⁰

3.77 Unions NSW was another stakeholder that argued for greater independent oversight of WorkCover:

Unions NSW submits that the administration of WorkCover is fundamentally and perversely conflicted. There is a need for greater independent oversight of the WorkCover Authority to improve the operation of the authority including its two major functions of regulating work health and safety and workers compensation.¹⁴¹

3.78 Unions NSW recommended establishing a WorkCover Ombudsman to oversee the administrative decisions of WorkCover, including decisions related to health and safety enforcement, yet suggested ‘that this not be done to the exclusion of existing appeals processes’.¹⁴²

3.79 Mr Henry noted that there is currently an ombudsman overseeing the performance of WorkSafe Victoria: ‘... in Victoria they have the WorkSafe Ombudsman who is permanently sitting there looking over the activities of WorkSafe in Victoria. It is not a new concept but I think it is certainly one that it would be worth giving it a try’.¹⁴³

3.80 When asked if enhancing the powers of WIRO could provide an alternative solution to establishing a new office, Mr Henry replied that it may be so long as the operational parameters of WIRO were expanded to include work health and safety:

That may work as far as the workers compensation, but you are also talking about someone with oversight of the work health and safety and that is sort of part of the activity as well. So you would effectively be recreating the boundaries within which WIRO would be operating ... If WIRO was beefed up to have that role that would be fine.¹⁴⁴

Committee comment

3.81 The committee acknowledges that several review participants have advocated for WIRO to be granted either complete or budgetary independence from WorkCover to better enable the office to perform its functions. We note the suggestion from WIRO that this could be

¹³⁹ Evidence, Mr Henry, 28 March 2014, p 72.

¹⁴⁰ Evidence, Mr Henry, 28 March 2014, pp 72-73.

¹⁴¹ Submission 31, Unions NSW, p 6.

¹⁴² Submission 31, Unions NSW, p 6.

¹⁴³ Evidence, Mr Henry, 28 March 2014, p 73.

¹⁴⁴ Evidence, Mr Henry, 28 March 2014, p 73.

achieved by designating the office as a separate public sector agency under the *Government Sector Employment Act 2013*.

- 3.82** The committee believes that WIRO performs a vital function in the workers compensation scheme, and agree that it should be able to undertake its role with complete independence from WorkCover. We therefore recommend that the NSW Government amend Part 3 of Schedule 1 of the *Government Sector Employment Act 2013* to designate WIRO as a separate agency, and that it receive funding for its operations accordingly.
- 3.83** Further, we believe that the NSW Government should expand the operational parameters of the WorkCover Independent Review Office to include work health and safety, and review the resources of the Office to ensure it has the extra capacity to undertake this additional responsibility.
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Recommendation 4

That the NSW Government amend Part 3 of Schedule 1 of the *Government Sector Employment Act 2013* to designate the WorkCover Independent Review Office as a separate public sector agency.

Recommendation 5

That the NSW Government expand the operational parameters of the WorkCover Independent Review Office to include work health and safety, and review the resources of the Office to ensure it has the extra capacity to undertake this additional responsibility.

- 3.84** The committee notes the suggestion from some review participants that an Inspector General or Ombudsman of WorkCover be appointed to facilitate continuous scrutiny of the performance of WorkCover. At this point in time, the committee considers that the current legislative requirement for this committee to periodically review the functions of WorkCover, together with a more independent WIRO, provides sufficient oversight.
- 3.85** In addition, we are reluctant to instil further bureaucracy on an already highly regulated and scrutinised area. Nonetheless we will keep a watching brief on this matter.

Chapter 4 Financial performance and medical treatment

A key topic of discussion throughout this review was the repercussions of the 2012 reforms to the workers compensation scheme for the scheme's financial performance and the entitlements of injured workers under the reformed scheme. This chapter examines the sustainability of the scheme's finances, including the cost of premiums and the need to balance financial sustainability with provision of support to injured workers. The chapter also examines issues pertaining to payments for and access to medical treatment, before discussing whole person impairment dispute resolution and the treatment of injured workers by insurers.

Financial sustainability

- 4.1** As noted in chapter 2, the financial performance of the workers compensation scheme was the main impetus for the 2012 reforms. Prior to the implementation of these reforms, the scheme had an estimated deficit of \$4 billion.¹⁴⁵
- 4.2** Mr Michael Playford, Consulting Actuary and Partner, Pricewaterhouse Coopers and actuary for the Workers Compensation Nominal Insurer Scheme, advised that this deficit developed between June 2008 and December 2011, with the scheme moving from a surplus of \$625 million to the \$4 billion deficit.¹⁴⁶ Mr Playford explained that as a consequence, the scheme's assets were at that point in time considered to be insufficient to meet its liabilities, with a funding ratio¹⁴⁷ of only 78 per cent.¹⁴⁸
- 4.3** As noted in chapter 2, Mr Playford indicated that even without the 2012 reforms the scheme would have gradually returned to surplus by 2021. This return to surplus would have been driven by the recovery in returns on the scheme's multi-billion dollar investments that since the Global Financial Crisis have been returning to higher, and more normal, levels.¹⁴⁹
- 4.4** Mr Playford outlined that half of the deterioration in the schemes finances was attributable to external factors of poor investment returns as a consequence of the global financial crisis, together with changes in the risk-free discount rate.¹⁵⁰ The remaining half of the deterioration was attributable to a decline in claims management performance.¹⁵¹

¹⁴⁵ Evidence, Mr Michael Playford, Consulting Actuary and Partner, Pricewaterhouse Coopers and actuary for the Workers Compensation Nominal Insurer Scheme, 21 March 2014, p 8.

¹⁴⁶ Evidence, Mr Playford, 21 March 2014, p 8.

¹⁴⁷ As noted in chapter 2, funding ratio refers to the value of the scheme's assets in relation to the actuarially calculated value of the scheme's liabilities. A funding ratio of 100 per cent indicates that the current market value of the assets equals the value of the actuarially calculated liabilities.

¹⁴⁸ Evidence, Mr Playford, 21 March 2014, p 8.

¹⁴⁹ Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment F: Impact of investment returns on WorkCover December 2013, 28 April 2014, p 4.

¹⁵⁰ The risk-free discount rate is the return on Commonwealth Government bonds.

¹⁵¹ Evidence, Mr Playford, 21 March 2014, p 8.

- 4.5** Since the implementation of the reforms, there has been a significant improvement to the financial sustainability of the scheme. Mr John Watson, General Manager, Work Health and Safety, WorkCover, advised that as of June 2013, a surplus of \$309 million had accumulated.¹⁵²
- 4.6** By May 2014, this surplus had grown to approximately \$1.3 billion.¹⁵³ Mr Playford advised that the primary drivers for this improvement were the collection of additional premiums and better than anticipated investment returns.¹⁵⁴
- 4.7** As noted at paragraph 4.2, in December 2011 the funding ratio for the scheme was only 78 per cent. WorkCover advised that by June 2013, the funding ratio was 102 per cent.¹⁵⁵ While this was a clear improvement, Mr Playford described it as ‘quite a small buffer’:
- A \$300 million surplus that we had in June 2013 was only a funding ratio of 102 per cent, so our assets were only 2 per cent more than liabilities. It is very easy for there to be a shock in the investment market, so it would mean the assets would reduce, and that is generally a short-term shock and so forth. But in the context of a scheme of this nature, it is quite a small buffer...¹⁵⁶
- 4.8** WorkCover advised that the Safety, Return to Work and Support Board had set a funding ratio target of 110 per cent ‘to ensure the sustainability of the scheme and to maintain a solvency position’.¹⁵⁷ This target was set after consideration of the following financial factors:
- variability of the actuarially calculated value of the scheme’s liability
 - variability of the market value of the scheme’s investments
 - correlation between these two variable factors.¹⁵⁸
- 4.9** When questioned on the likely funding ratio if there were no further reforms, Mr Playford said that while a number of factors need to be taken into consideration, it was likely that by June 2015 a funding ratio of 125 per cent would be achieved.¹⁵⁹
- 4.10** As illustrated in chapter 2 (paragraphs 2.68 - 2.70 and Figure 4 - Solvency projections - base projections), with the combined impact of paying reduced claim levels and significantly improved investment returns, the scheme will likely be in a surplus of up to \$6 billion by 2019.

¹⁵² Evidence, Mr John Watson, General Manager, Work Health and Safety, WorkCover Authority of NSW, 21 March 2014, pp 2-3.

¹⁵³ Evidence, Mr Playford, 12 May 2014, p 20.

¹⁵⁴ Evidence, Mr Playford, 12 May 2014, p 20.

¹⁵⁵ Answers to questions on notice, WorkCover Authority, 28 April 2014, p 5.

¹⁵⁶ Evidence, Mr Playford, 21 March 2014, p 8.

¹⁵⁷ Answers to questions on notice, WorkCover Authority, 28 April 2014, p 5.

¹⁵⁸ Answers to questions on notice, WorkCover Authority, 28 April 2014, p 5.

¹⁵⁹ Evidence, Mr Playford, 12 May 2014, p 21.

Premiums

- 4.11** As a consequence of the improved financial position of the scheme, the cost of premiums has reduced. Mr Watson explained that the improved position has resulted in two premium reductions for employers in June and December 2013:

As a result [of the improved financial position], 200,000 employers across 376 industries that have demonstrated an improved safety and return to work performance received an average premium reduction of 5 per cent on 31 December 2013. This reduction is in addition to the 7.5 per cent reduction that they received on 30 June 2013. There were 167 employers who received that reduction on 30 June 2013.¹⁶⁰

- 4.12** In June 2014 the NSW Government announced a further 5 per cent reduction in premiums for 200,000 employers across 414 industries, stating that the reduction would save these employers more than \$113 million annually.¹⁶¹

- 4.13** The Suncorp Group observed that the reduction in premiums was an ‘excellent result’ for businesses in New South Wales:

As a result of the improved financial position, premium rates have reduced by an average of 12.5 per cent in the 2013-14 premium cycle, with an average premium rate reducing from 1.68 per cent to 1.47 per cent of wages. This is an excellent result for businesses in New South Wales. In lessening the financial burden upon them, businesses are in a better position to grow and create employment to the benefit of the State economy.¹⁶²

- 4.14** However, the Australian Federation of Employers and Industries indicated that 73 per cent of their New South Wales members reported in November 2013 that their premiums had either increased or remained the same following the 2012 reforms, with 40 per cent reporting the increase was attributable to increased claims costs.¹⁶³

- 4.15** The NSW Business Chamber also commented on the level of premiums, noting that premiums in New South Wales remain higher than other jurisdictions:

Despite these reductions, average workers compensation rates still remain significantly higher in New South Wales compared with Victoria and Queensland with average injury insurance premium rates at 1.68 per cent in New South Wales, compared to 1.298 per cent for Victoria and 1.450 per cent for Queensland. There is still a way to go in ensuring that we have a competitive WorkCover framework.¹⁶⁴

- 4.16** The Australian Federation of Employers and Industries suggested that lower premiums could be achieved by fully implementing ‘... the new work capacity reforms and effective measurement of these [reforms] to ensure that claims management is properly undertaken’,¹⁶⁵

¹⁶⁰ Evidence, Mr Watson, 21 March 2014, pp 2-3.

¹⁶¹ Media Release, NSW Government, ‘More premium cuts on the way for business’, 17 June 2014.

¹⁶² Submission 6, Suncorp Group, p 3.

¹⁶³ Submission 34, Australian Federation of Employers and Industries, pp 1-2.

¹⁶⁴ Submission 32, NSW Business Chamber, p 5.

¹⁶⁵ Submission 34, Australian Federation of Employers and Industries, p 3.

concluding that '[i]f shortcomings in these processes remain, then further change and reform will be necessary'.¹⁶⁶

Balancing financial sustainability and scheme accessibility

4.17 A number of review participants questioned if the 2012 reforms had improved the scheme's finances to the detriment of injured workers, particularly in light of the relatively short timeframe for the turnaround from deficit to surplus. For example, the Australian Lawyers Alliance said:

We wish to reiterate that the changes made in 2012 to the NSW workers' compensation scheme have had a deleterious effect on workers' rights ... The very fact that the scheme's financial position was turned around to the tune of \$4.4 billion in six months is evidence that the legislative reform, designed to reduce a substantial deficit over a five to ten year period, went far too far.¹⁶⁷

4.18 Ms Emma Maiden, Assistant Secretary, Unions NSW, argued that the reforms had a negative impact on the assistance available to injured workers, contending that the changes were skewed in favour of insurers and employers:

We have heard a number of times that the reason why the cuts need to come in was because there is a \$4.1 billion deficit. Yet the report being released today shows in June 2012, when the cut was made, the deficit was only \$2.6 billion and by the time the changes came in in October that year, it was better still and was on an improving trajectory without the changes, but a billion dollars is still being ripped out of injured workers' pockets and handed over to insurers and employers ... Of course the numbers have to add up in terms of the scope, but it should not be workers paying and employers and insurers reaping the benefits.¹⁶⁸

4.19 Mr Mark Lennon, Secretary, Unions NSW, highlighted the 'vexed question' of achieving a balance between a financially sustainable scheme and a scheme that best meets the needs of injured workers: 'Of course we want to make sure that the scheme is sustainable. We would not deny that but the question is by what means and mechanisms...'.¹⁶⁹

4.20 When questioned on the potential financial outcome if the 2012 reforms had not been enacted, Mr Playford suggested that it would have been difficult to eliminate the deficit due to its magnitude and the direction in which the fund had been trending:

In my experience with schemes of this nature around Australia over the last 20 years, it is very difficult once you get an accumulated deficit of that magnitude and those sorts of deteriorating fund trends and I term it the cultural change, the way that the different participants in the scheme interact, the propensity to claim and so forth actually shift. Then, given the magnitude of the trends without the legislative change that occurred ... in my experience those trends were likely to have continued and the funding position in all likelihood would continue to deteriorate.¹⁷⁰

¹⁶⁶ Submission 34, Australian Federation of Employers and Industries, p 3.

¹⁶⁷ Submission 35, Australian Lawyers Alliance, p 2.

¹⁶⁸ Evidence, Ms Emma Maiden, Assistant Secretary, Unions NSW, 21 March 2014, p 30.

¹⁶⁹ Evidence, Mr Mark Lennon, Secretary, Unions NSW, 21 March 2014, p 30.

¹⁷⁰ Evidence, Mr Playford, 21 March 2014, p 8.

4.21 Mr Playford stated that although investment returns had markedly improved since December 2011, it was inherently difficult to predict investment cycles and therefore improvements to the scheme's financial sustainability:

It is easy with the benefit of hindsight to see that there has been very good investment returns. But as a Government and as a Parliament back in December 2011 – I do not think anyone can always judge when good investment years will occur, so quite conceivably there could be a poor investment return next year.¹⁷¹

4.22 Mr Playford also indicated that consideration had to be given to the timeframe in which the government wanted the scheme to return to surplus: 'These schemes can operate with deficits for periods of time, but there comes a point where you have got to ask whether it should be back in a surplus position. That seems to be a laudable goal of good financial management'.¹⁷²

4.23 Given the return of the scheme to a surplus, Mr Playford outlined three potential options for the future of the scheme to ensure the most appropriate balance between financial sustainability and support for injured workers:

If you do not do anything the solvency position of the scheme is likely to continue to improve dramatically, and that is not necessarily an effective use of the capital of society having that locked away in WorkCover's balance sheets. So that is one option. The second option is you could reduce premium rates. The third option is you could improve benefits ...¹⁷³

4.24 Mr Playford concluded: 'What is the right choice? It could be a combination. That is ultimately a policy decision'.¹⁷⁴

Committee comment

4.25 It is critically important to maintain the financial sustainability of the workers compensation scheme. Without proper and rigorous financial management, the scheme will be unable to provide the best possible support to injured workers and the lowest possible premiums to New South Wales businesses. Fund shortfalls potentially expose the NSW government and therefore the public to risk and significant expense.

4.26 However, the committee considers that financial sustainability should not be achieved solely at the expense of support for injured workers. Nonetheless, the scheme must be sustainable. Financial sustainability of the fund is a function of investment returns, discount rate used, premium revenue, and current and future support for injured workers.

4.27 Given the improved financial sustainability of the scheme, we consider that there is scope for further reforms. The next section of this chapter considers the possibility of restoring less restricted access to medical expense payments to the scheme.

¹⁷¹ Evidence, Mr Playford, 12 May 2014, p 19.

¹⁷² Evidence, Mr Playford, 12 May 2014, p 20.

¹⁷³ Evidence, Mr Playford, 12 May 2014, p 21.

¹⁷⁴ Evidence, Mr Playford, 12 May 2014, p 21.

Medical treatment

4.28 The payment of medical expenses under the workers compensation scheme was debated throughout the review. Participants highlighted that the 2012 reforms to the scheme had significantly altered access to medical treatment for injured workers by restricting the timeframe that assistance is available and requiring pre-approval for medical treatments. Other matters discussed included the resolution of disputes over assessments of permanent impairment and the treatment of injured workers by insurers.

Cessation of medical payments

4.29 One of the principle areas of concern raised during the review regarding medical expenses was the cessation of coverage for medical expenses 12 months after a claim for compensation is made, or 12 months after a worker ceases to be entitled to weekly payments of compensation. Review participants argued that this provision was unfair, particularly as injuries often worsen or re-occur over time.

4.30 Under the amended *Workers Compensation Act 1987*, the following limits now apply to the payment of compensation for medical expenses:

- compensation is not payable to an injured worker for any treatment, service or assistance given or provided more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are payable to the worker
- compensation is not payable for any treatment, service or assistance given or provided more than 12 months after a worker ceases to be entitled to weekly payments of compensation
- if a worker becomes entitled to weekly payments of compensation after ceasing to be entitled to compensation, the worker is once again entitled to compensation but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable.¹⁷⁵

4.31 These limitations do not apply to what the scheme now defines as a seriously injured worker, being a worker who has a degree of permanent impairment greater than 30 per cent.¹⁷⁶

4.32 The New South Wales Bar Association described the time limits to the compensation payments as ‘harsh and unjust’,¹⁷⁷ while another review participant described them as removing the ‘safety net’ for families which ‘...forced these costs, after the 12 month period, to be borne by the injured persons and their families through no fault of their own’.¹⁷⁸

4.33 In regard to the cessation of medical payments, the *Statutory review of the Workers Compensation Legislation Amendment Act 2012* observed that ‘[w]hile 12 months may be a sufficiently long

¹⁷⁵ *Workers Compensation Act 1987*, s 59A.

¹⁷⁶ *Workers Compensation Act 1987*, Division 2 and s 59A.

¹⁷⁷ Submission 27, New South Wales Bar Association, p 2.

¹⁷⁸ Submission 41, Name suppressed, p 3.

duration to ensure the provision of appropriate care for injured workers, this is not always the case'.¹⁷⁹ The statutory review further stated that the 12 month rule:

... has the potential to disadvantage patients that may benefit from conservative treatment of certain conditions including spinal, shoulder and some other known regions, where a 'wait and see' approach is more suitable.¹⁸⁰

- 4.34** Mr Bruce McManamey, NSW Committee Member, Australian Lawyers Alliance, argued that the truncated timeframe for the payment of medical expenses does not take into account instances where treatment may be required a long time after the injury is sustained:

For many, many major surgical procedures the doctors say, 'You don't have it now. You have to wait until the appropriate time. You are too young to have a knee replacement. You are too young to have a hip replacement. You don't just launch into back surgery. We wait and see'. What this is doing is that people are now having to make decisions as to whether they now have major surgery not on the basis of their medical advice but on the basis of whether it is going to get paid.¹⁸¹

- 4.35** The Construction Forestry Mining and Energy Union (NSW Branch) argued that the 12 month limit on medical expenses was 'entirely inadequate' and contradictory to the scheme's purported aim of facilitating the return to work of injured workers:

The medical expenses limit contradicts the rhetoric, that the scheme is focused on return to work outcomes. A person unable to receive the necessary treatment will be less likely to return to fulltime work on a permanent basis. The recovery of an injury can be stifled by the arbitrary limit on medical expenses, thereby defeating the purpose of the legislative scheme.¹⁸²

- 4.36** Other review participants expressed concern about the 'artificial and arbitrary'¹⁸³ nature of the legislated timeframe for medical treatment, arguing that there was no correlation between the nature of the injuries and treatment required.¹⁸⁴

- 4.37** The United Services Union said that the cessation of benefits '... completely ignored chronic long-term conditions which might not involve any significant periods of incapacity at all but which still require careful medical management'.¹⁸⁵

- 4.38** The Construction Forestry Mining and Energy Union added that this aspect of the scheme is 'particularly harsh' on injured workers who have reached retirement age because injuries tend to deteriorate as a person ages.¹⁸⁶

¹⁷⁹ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 71.

¹⁸⁰ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, pp 59-60.

¹⁸¹ Evidence, Mr Bruce McManamey, NSW Committee Member, Australian Lawyers Alliance, 28 March 2014, p 55.

¹⁸² Submission 28, Construction Forestry Mining and Energy Union (NSW Branch), p 3.

¹⁸³ Submission 29, United Services Union, p 2.

¹⁸⁴ See Evidence, Ms Maiden, 21 March 2014, p 30, Submission 29, United Services Union, p 2, and Submission 28, Construction Forestry Mining and Energy Union (NSW Branch), p 3.

¹⁸⁵ Submission 29, United Services Union, p 2.

Proposals for change

4.39 A number of review participants, such as the Flight Attendants' Association of Australia, advocated for the removal of caps and limitations on medical and other treatment expenses beyond 12 months from the date of injury.¹⁸⁷

4.40 When questioned about the potential financial impact to the scheme if the entire medical cap was removed, Mr Playford advised that he had not done any specific costing in that regard, however based on the costings he had done he believed the cost would be 'very significant':

I have done a costing if you looked at the range just for the 20 to 30 per cent whole person impairment band where I estimated that, if you removed the medical cap just for that band – 20 to 30 per cent whole person impaired – the impact on the existing claims would be of the order of \$183 million and the per annum go forward costs would be of the order of about \$18.5 million ... I have not done a costing for less than the 20 per cent. The cost impact there would be very significant.¹⁸⁸

4.41 Following a request by the committee, Mr Playford estimated the financial impact to the scheme of the following three scenarios:

- removing the medical cap for people assessed in the range of 20-30 per cent whole person impairment
- removing the medical cap for people assessed in the range of 10-30 per cent whole person impairment
- completely removing the medical cap.

4.42 The table below outlines the estimated financial impact of each of the three scenarios.

Table 1 Estimate of financial impact of modifying the medical cap¹⁸⁹

| | Outstanding claims liability | | Future annual cost | |
|---|------------------------------|----------------------|----------------------|----------------------|
| | Lower estimate (\$m) | Upper estimate (\$m) | Lower estimate (\$m) | Upper estimate (\$m) |
| Difference to the December 2012 valuation | | | | |
| No change to current benefit structure | 0 | 0 | 0 | 0 |
| Remove cap for 21-30 per cent whole person impairment | 183 | 290 | 18 | 62 |

¹⁸⁶ Submission 28, Construction, Forestry, Mining and Energy Union (NSW Branch), p 5.

¹⁸⁷ Submission 14, Flight Attendants' Association of Australia, pp 3-6.

See also Submission 29, United Services Union, p 2 and Submission 31, Unions NSW, p 6.

¹⁸⁸ Evidence, Mr Playford, 12 May 2014, p 28.

¹⁸⁹ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, Attachment B – Potential financial impact of proposed reinstatement of medical benefits, p 4.

| | Outstanding claims liability | | Future annual cost | |
|---|------------------------------|-------|--------------------|-----|
| | | | | |
| Remove cap for 11-30 per cent whole person impairment | 490 | 770 | 38 | 127 |
| Remove cap for all claimants | 1,085 | 1,700 | 84 | 282 |

- 4.43** In providing these estimates, Mr Playford expressed the opinion it was likely that any modifications to the medical cap would likely be closer to the upper estimates provided.¹⁹⁰
- 4.44** As noted in chapter 2, on 26 June 2014 the Minister for Finance and Services, the Hon Dominic Perrottet MP, announced a number of changes to the workers compensation scheme for injured workers who made claims prior to 1 October 2012, including the extension of medical benefits for workers with whole person impairment assessments of between 21 and 30 per cent, until retirement age.¹⁹¹
- 4.45** Mr Playford advised that overall, the number of active medical claims reduced from approximately 73,000 at June 2012 to approximately 56,500 claims at the December 2013 payment quarter. This represented an approximate 22 per cent reduction in the number of active medical claims. Mr Playford observed that a key driver of this reduction was the 24 per cent reduction in the number of claims being reported since the June 2012 reforms rather than the medical cap.¹⁹²
- 4.46** Figure 5 on the next page shows that approximately 10,000 active claims (the green bars) per quarter historically received medical benefits which would now be expected to be initially eliminated by the operation of the medical cap at 31 December 2013.¹⁹³
- 4.47** In his evidence to the committee Mr Playford indicated that he had purposely referred to the 'initial' impact of the medical cap as the committee was interested in the volume of claims impacted by the commencement of the operation of the medical cap at 31 December 2013. Mr Playford noted that another tranche of claims will become subject to the medical cap from 31 December 2018. This is because a further class of injured workers will cease weekly benefits as a result of the five year weekly cap for those with a whole person impairment assessment of 20 per cent or less on and from 31 December 2017. This tranche of claims will then become subject to the medical cap 12 months later, that is, from 31 December 2018.¹⁹⁴

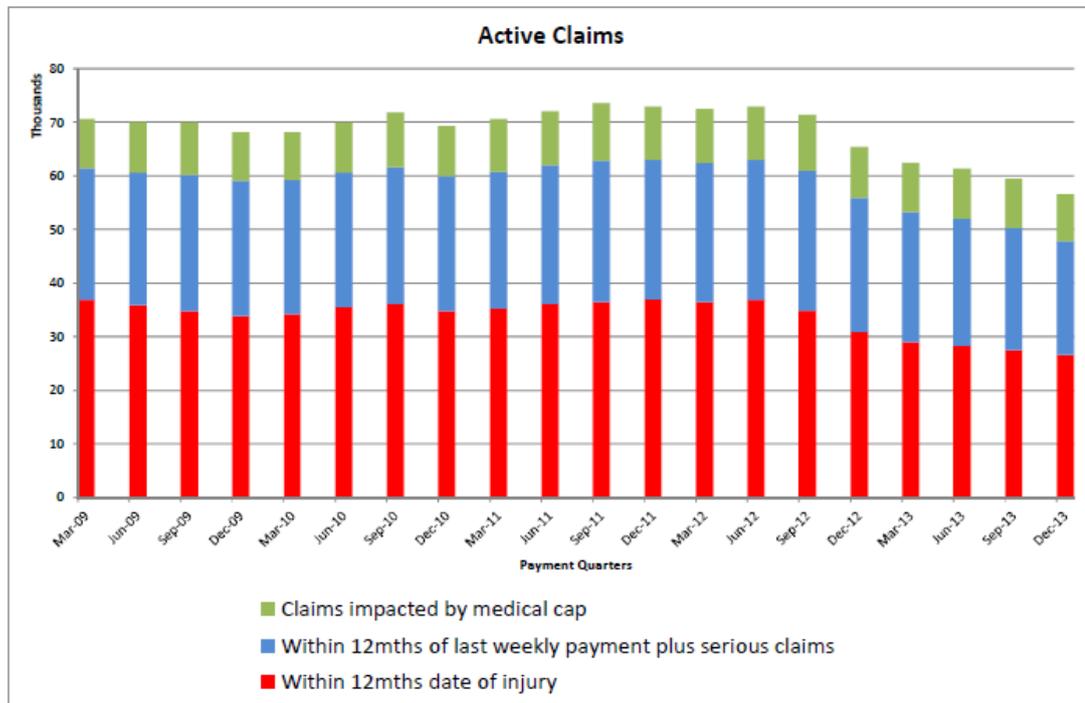
¹⁹⁰ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, Attachment B, p 4.

¹⁹¹ Media Release, Hon Dominic Perrottet MP, Minister for Finance and Services, *Workers benefit from NSW Government's sound financial management*, 26 June 2014.

¹⁹² Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B: Potential financial impact of proposed reinstatement of medical benefits, 11 June 2014, p 2.

¹⁹³ Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B, p 3.

¹⁹⁴ Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B, p 3.

Figure 5 Medical active claims by payment quarter¹⁹⁵***Committee comment***

4.48 The committee notes the significant concerns of review participants regarding the cessation of coverage for medical expenses 12 months after a claim for compensation is made, or 12 months after a worker ceases to be entitled to weekly payments of compensation. These concerns pertained to the arbitrary nature of the 12 month time frame, and the high likelihood of injured workers requiring treatment beyond 12 months. We also note that some review participants advocated for the removal of this cap.

4.49 We acknowledge that the Minister for Finance and Services has recently announced the extension of medical benefits for workers with whole person impairment assessments of between 21 and 30 per cent, until retirement age for injured workers who made claims prior to 1 October 2012. We consider that this decision goes some way towards restoring the balance between financial sustainability of the scheme and providing enhanced support for injured workers.

Hearing aids, batteries and repairs

4.50 One specific area of concern relating to the cessation of medical expenses emerged during the review pertaining to assistance for hearing aids, batteries and repairs for workers who had suffered industrial hearing loss. Review participants argued that people suffering hearing loss were particularly disadvantaged by the limitations on access to medical treatment because of the ongoing and unavoidable costs associated with hearing related injuries.

¹⁹⁵ Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B, p 2.

- 4.51** Prior to the 2012 reforms, a worker who suffered industrial deafness was compensated with the provision of hearing aids, batteries and replacement aids over the worker's lifetime.¹⁹⁶ Upon enactment of the reforms, Mr Ashley Wilson, Director, Hearing Care Industry Association, advised that the entitlements of workers suffering hearing loss was restricted to:
- \$5,000 per binaural hearing aid for one issue only
 - batteries compensated to \$110.60 per ear for the first 12 months
 - repairs compensated up to \$464.70 within the 12 months.¹⁹⁷
- 4.52** Mr Wilson criticised the limited scope of these entitlements, highlighting that without regular replacement and maintenance, a hearing device will likely become obsolete and restrict the ability of people with hearing impairment to fully participate in work, their family lives and the community.¹⁹⁸
- 4.53** The committee received a number of submissions from individuals protesting the restricted access to hearing aids, batteries and repairs. In addition, the committee received 35 letters from concerned individuals advocating for the reinstatement of access to replacement hearing aids, batteries and repairs beyond the current 12 month period.
- 4.54** One review participant noted that without the assistance of hearing aids they would be unable to operate their business or interact socially, and would likely 'become a burden on the state'.¹⁹⁹
- 4.55** Mr Graham Holdgate, private citizen, illustrated his need for ongoing assistance with hearing aids to enable his full participation in society:
- Without the hearing aids it would be just like you being muffled. I would not hear any other people talking in the room. I would have to pinpoint you and look straight at you. If I cannot see you directly I would not be able to hear you. I would be picking up any other sound around and trying to pinpoint where you are. With the hearing aid it has helped me greatly in regards to home life and going to shopping centres. The hearing aid that I have on now means I can go to a shopping centre and hear my wife when she wants to talk to me ... without these hearing aids, my life would be miserable.²⁰⁰
- 4.56** When asked if, as a retiree on a disability support pension, he could afford the cost of replacing his aids, Mr Holdgate replied '[d]efinitely not ... It would cost me far beyond what I can pay out'.²⁰¹

¹⁹⁶ Submission 13, Hearing Care Industry Association, p 2 and 3.

¹⁹⁷ Evidence, Mr Ashley Wilson, Director, Hearing Care Industry Association, 21 March 2014, p 54.

¹⁹⁸ Evidence, Mr Wilson, 21 March 2014, p 53. See also Submission 13, Hearing Care Industry Association, p 3.

¹⁹⁹ Submission 39, Name suppressed, p 4.

²⁰⁰ Evidence, Mr Graham Holdgate, private citizen, 21 March 2014, p 57.

²⁰¹ Evidence, Mr Holdgate, 21 March 2014, p 57.

4.57 As a retiree, Mr Holdgate would, even with the additional benefits recently announced by the Minister, be ineligible to receive the benefits that he would have received under the pre-2012 workers compensation scheme.

4.58 In order to address this issue, the Hearing Care Industry Association suggested that lifetime cover should be provided for hearing devices, prostheses, rehabilitation, and maintenance of any such intervention.²⁰² Mr Wilson recommended that this could be achieved by amending s 59A of the *Workers Compensation Act* to include the following statement:

This section does not apply to treatment comprising the provision, replacement, maintenance or repair of any prosthesis including crutches, artificial members, eyes or teeth and other artificial aids or spectacles.²⁰³

4.59 When questioned on the potential financial impact on the scheme if hearing aids were exempted from the medical cap, Mr Playford, the scheme actuary, advised:

I have done a calculation if hearing aids, prosthesis, home and vehicle modifications and things of that nature were exempt from the medical cap. The cost for new claims incurred would be of the order of about \$20 million per annum and there would be a once-off impact for existing claims that are currently in the scheme of the order of about \$100 million to \$140 million.²⁰⁴

4.60 Mr Playford noted that reinstating benefits for hearing aids, prosthesis, and home and vehicle modifications equated to an approximately one per cent impact on scheme finances.²⁰⁵

4.61 Mr Playford reiterated this advice in answers to questions on notice, where he estimated the impact of modifying the existing medical cap such that it would not apply with respect to either hearing aids or all aids and appliances (hearing aids, prosthesis etc). Mr Playford advised:

From an outstanding claims perspective we estimate the December 2013 liability for hearing aids to be around \$20m with the cap in place. This would likely increase by an amount in the order of \$75-100m should this exemption occur. The expected increase in the annual cost would be in order of approximately \$14-16m per annum.

Overall we estimate that the removal of the cap for all aids and appliances (hearing aids, prostheses etc) would increase the outstanding claims liability by approximately \$100-140m, and increase the annual claims cost by around \$20m per annum.²⁰⁶

4.62 Under the reformed scheme only injured workers deemed as having a ‘serious injury’ are entitled to receive medical benefits for life. The scheme defines a serious injury as one where the level of whole person impairment is greater than 30 per cent. This threshold excludes

²⁰² Submission 13, Hearing Care Industry Association, p 9.

²⁰³ Evidence, Mr Wilson, 21 March 2014, pp 54-55.

²⁰⁴ Evidence, Mr Playford, 12 May 2014, p 27.

²⁰⁵ Evidence, Mr Playford, 12 May 2014, p 27.

As at May 2014, total scheme liabilities were approximately \$11.3 billion.

²⁰⁶ Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B, p 5.

injuries such as the amputation of a person's lower limb below the knee which is assessed at 28 per cent whole person impairment.²⁰⁷

- 4.63 As noted in chapter 2 and at paragraph 4.45, the Minister for Finance and Services recently announced a number of changes to the workers compensation scheme. These changes include that access to hearing aids, prostheses and home and vehicle modifications and related treatment is to be reinstated until retirement age.²⁰⁸

Committee comment

- 4.64 The committee notes that as a consequence of the 2012 reforms to the workers compensation scheme, workers suffering industrial hearing loss had their entitlements to lifetime assistance for hearing aids, batteries and repairs cut and replaced with the entitlement to one set of hearing aids and 12 months of batteries and repairs. We acknowledge that these changes caused considerable angst for workers who have suffered industrial hearing loss due to the significant ongoing costs associated with the use of hearing aids.
- 4.65 The committee notes the recent announcement from the Minister for Finance and Services that access to hearing aids, prosthesis, home and vehicle modifications and related treatment will be reinstated for a limited class of scheme participants until retirement age. We support this amendment as it will result in a better quality of life for some scheme participants without unduly impacting on the overall financial health of the scheme.
- 4.66 The committee notes that evidence from the scheme's actuary suggests that there are sufficient financial resources in the scheme to significantly improve the level of protection injured workers receive for medical benefits under the scheme. In the first instance, the committee considers that medical benefits for hearing aids, prostheses, home and vehicle modifications should be restored for all injured workers for life. This return of benefits would have a minimal initial and recurrent impact on the overall finances of the scheme and greatly improve the lives of impacted workers.
- 4.67 Once these benefits have been restored, the committee considers that the NSW Government should undertake a review of the viability of restoring all lost medical benefits for injured workers under the scheme.

Recommendation 6

That the NSW Government restore lifetime medical benefits for hearing aids, prostheses, home and vehicle modifications for all injured workers, noting the actuarial evidence as to the relatively minimal cost of restoring such benefits to the workers' compensation scheme, and that it promptly review the viability of restoring all lost medical benefits for injured workers under the scheme.

²⁰⁷ American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition, p 545.

²⁰⁸ Media Release, *Workers benefit from NSW Government's sound financial management*, 26 June 2014.

Pre-approval of medical treatment

4.68 The *Workers Compensation Act* states that if, as a result of an injury received by a worker, it is reasonably necessary that any medical or related treatment or any workplace rehabilitation service be provided, the worker's employer is liable to pay for the cost of that treatment or service.²⁰⁹

4.69 However, the worker's employer is *not* liable to pay the cost of any treatment or service if the treatment or service is given or provided without the prior approval of the insurer.²¹⁰

4.70 Review participants expressed concern about the requirement to have a treatment pre-approved by the insurer. For example, the Public Service Association of NSW said that it can delay treatment to the detriment of the injured worker's recovery process, or result in the worker funding their own treatment:

The systematic effect of delaying treatment can result in a slower recovery (or result in more permanent damages), an extension of the rehabilitation time and a lengthening of the time off work, all adding additional stress to the injured worker. In some cases the delays to medical expense approvals are being extended until the worker is outside the time limit for the provision of medical expenses, so the worker is left to fund their own medical expenses, which can include substantial operations such as shoulder or knee reconstructions.²¹¹

4.71 According to the Construction Forestry Mining and Energy Union '[r]equiring pre-approval for medical expenses can actually hamper an injured worker's return to work options. If an injured worker does not receive medical treatment in a timely manner, the chances of returning to work are significantly reduced.'²¹²

4.72 The union also noted that in the event that an injured worker pays for their own medical treatment, they are unable to recover the cost of the treatment from the insurer:

If an injured worker chooses to rush the approval process and pay for an MRI or even physiotherapy out of his own money until liability is determined, that injured worker will not be able to recoup the cost from the insurer ... To avoid paying for costly surgery which a surgeon has deemed urgent, all the insurer needs to do is deny liability and wait for the pain to become so severe that the injured worker funds their own surgery or alternatively removes themselves from the system.²¹³

4.73 The *Statutory Review of the Workers Compensation Legislation Amendment Act 2012* highlighted concerns regarding the 'costly delays' in injured workers receiving timely treatment for both new and ongoing medical conditions resulting from the pre-approval process:

²⁰⁹ *Workers Compensation Act 1987*, s 60(1).

²¹⁰ *Workers Compensation Act 1987*, s 60(2A).

This does not include treatment provided within 48 hours of the injury happening. Other conditions require the treatment or service be provided by a person who is appropriately qualified to give or provide the treatment or service, and that the treatment be provided in accordance with any conditions imposed by the WorkCover Guidelines

²¹¹ Submission 30, Public Service Association of NSW, p 8.

²¹² Submission 28, Construction, Forestry, Mining and Energy Union (NSW Branch), p 6.

²¹³ Submission 28, Construction, Forestry, Mining and Energy Union (NSW Branch), p 7.

The current requirement for approval of each consultation (beyond 48 hours after injury) may lead to potentially costly delays in terms of treatment outcomes, and is referred to by stakeholders as overly burdensome. This is particularly for conditions requiring surgery and/or ongoing or varied management following an initial report or claim. The same issue has been observed with respect to established treatment packages, such as physiotherapy after surgery, which currently require individual approval of each treatment ...²¹⁴

- 4.74** The review further noted that the pre-approval requirement ‘is particularly detrimental where early treatment is required to maximise recovery/function and/or minimise treatment costs’.²¹⁵
- 4.75** Mr Ivan Simic, Partner, Taylor and Scott Lawyers, illustrated the difficulty with requiring pre-approval for medical treatment using the example of Mr Michael Perks, a steel fixer who suffered serious back injuries in the course of his work and whose specialist requested a discography on his back:

He [Mr Perks] has had substantial medical treatment already. The specialist surgeon says, ‘I need to do a further discography.’ The agent’s insurers replied, ‘We do not think that is reasonable treatment’ ... his doctor cannot get approval for a discography to check out a potential major problem in his spine. What was the response and the reply of the agent insurer? Tomorrow Mr Perks has to travel to Bowral to see another medico-legal specialist. It will probably cost not less than \$1,000 – probably the cost of the scan required by [the specialist surgeon]. This is the kind of absurd system we are talking about.²¹⁶

- 4.76** In regard to delays with the approval of treatments, the Australian Manufacturing Workers’ Union (NSW Branch) suggested that WorkCover should establish a system to fine and prosecute scheme agents where they are found to have, without reasonable excuse, withheld weekly benefits or authority for medical treatment from injured workers outside of legislated timeframes.²¹⁷
- 4.77** Mr David Henry, NSW Branch Work Health and Safety Officer, Australian Manufacturing Workers’ Union, said that such a system was needed because although there is a penalty for failing to provide a decision regarding treatment within the legislated timeframe of seven days, it has not been applied:

What is regularly not happening is that the weekly benefits and approval for treatment is not being done within the statutory time of seven days - the Act specifies seven days. So we have a regular, almost systematic, non-compliance with legislation. We have an Act that provides for penalty, which has never been applied ... Like anything else, a couple of good examples and maybe we will kerb that poor behaviour and get the scheme that we are supposed to have.²¹⁸

²¹⁴ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 60.

²¹⁵ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 60.

²¹⁶ Evidence, Mr Ivan Simic, Partner, Taylor and Scott Lawyers, 28 March 2014, pp 63-64.

²¹⁷ Submission 2, Australian Manufacturing Workers’ Union (NSW Branch), p 16.

²¹⁸ Evidence, Mr David Henry, NSW Branch Work Health and Safety Officer, Australian Manufacturing Workers’ Union, 28 March 2014, p 75.

Committee comment

- 4.78** The committee acknowledges the concerns of review participants regarding the pre-approval system for medical treatment, particularly the concerns that the pre-approval requirement may result in costly delays to an injured worker receiving the appropriate treatment. We also note that the *Statutory review of the Workers Compensation Legislation Amendment Act 2012* highlighted similar concerns.
- 4.79** The committee is of the view that requiring insurer approval before the costs of a medical treatment are incurred is not an unreasonable expectation. However, we firmly believe that insurers must provide a decision regarding treatment as soon as practicable to ensure that injured workers are able to promptly access the necessary treatment to assist them in their rehabilitation in most instances. However there are clearly cases where this is not practical or reasonable and there should be some flexibility built into the system to accommodate this. We note that penalties currently exist for insurers not providing a decision within the legislated timeframe, and WorkCover should provide statistical details in its annual report of the frequency that insurers exceed the legislated timeframe and penalties applied. The committee encourages WorkCover to be more vigilant in enforcing this aspect of the workers compensation scheme, and intend to keep a watching brief on this issue.
-

Recommendation 7

That the NSW Government consider amendments to the WorkCover scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not reasonable or practical for the worker to obtain pre-approval of medical expenses before undertaking the treatment.

Whole person impairment dispute resolution

- 4.80** The WorkCover Independent Review Office (WIRO) raised a concern regarding the resolution of disputes over differences in assessments of permanent impairment conducted by an injured worker's medical team and an insurer's medical team. Where differences arise, a mutual agreement is not permitted to be negotiated, with the matter forced to escalate to an approved medical specialist in the Workers Compensation Commission for resolution.²¹⁹
- 4.81** WorkCover explained that its current policy does not permit the two parties to negotiate an outcome because the negotiation could lead to 'arbitrary outcomes' that have not been reached by trained assessors:

... it is WorkCover's policy that the parties cannot negotiate and agree on a 'split difference' permanent impairment level and associated lump sum somewhere in between the assessed levels, because that notional level of assessment has not been made by a trained assessor ... To do otherwise would undermine the purpose of the Guides of ensuring an objective, fair and consistent methodology of permanent

²¹⁹ Answers to questions on notice, WorkCover Authority, 11 June 2014, p 1.

impairment assessment, and could potentially result in arbitrary outcomes for workers and insurers.²²⁰

4.82 WorkCover noted that this was particularly important given the wide ranging ramifications that an assessment of permanent impairment can have, including

- accessing any lump sum compensation
- determining the amount of lump sum compensation payable
- reaching the threshold for work injury damages and commutation
- remaining in receipt of weekly benefits post 260 weeks
- determining eligibility for seriously injured worker threshold.²²¹

4.83 However, WIRO was of the view that being unable to negotiate an outcome in such matters can often result in significant financial expenditure to achieve a resolution of what can be a relatively minor dispute:

WorkCover's position is not to allow a scheme agent to enter into a commercial compromise of the claim. This leads to the silly situation that a dispute may exist over a difference of less than a few thousand dollars but which then costs more than that to resolve which the Scheme has to fund.²²²

4.84 Mr Kim Garling, WorkCover Independent Review Officer, WIRO, discussed the low monetary value of some of the disputes in question, particularly when compared to the costs of achieving resolution:

I am presently receiving requests for funding for injured workers to proceed with an application in the Workers Compensation Commission to determine a dispute which often involves less than \$15,000 because of a disagreement between the opinions of properly qualified independent medical examiners.

Some of these disputes involve as little as \$1,650.²²³

4.85 WIRO concluded: 'It is uneconomic to have a dispute resolution mechanism which costs more than the amount in dispute.'²²⁴

4.86 Mr Paul Macken, Honorary Lawyer, New South Wales Workers Compensation Self Insurers Association, also questioned the inability to negotiate an agreed outcome, especially considering the costs associated with attempting to resolve a dispute over such matters:

... the inevitable cost is that somebody fails on application and goes to an improved medical specialist, at a price of \$1,400, for them to examine and try to find an impairment assessment that everybody likes. In the meantime, there are transactional

²²⁰ Answers to questions on notice, WorkCover Authority, 11 June 2014, p 1.

²²¹ Answers to questions on notice, WorkCover Authority, 11 June 2014, pp 1-2.

²²² Submission 36, WorkCover Independent Review Office, p 14.

²²³ Correspondence, Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office, to the Committee Director, 11 July 2014, p 4.

²²⁴ Submission 36, WorkCover Independent Review Office, p 14.

legal costs of another \$10,000 and all of the administrative costs associated with it because you cannot split the difference. It does not make any sense.²²⁵

4.87 Mr Macken described this scenario as ‘...a disconnection between the regulator and reality’.²²⁶

4.88 Mr Garling questioned the validity of WorkCover’s statement that it does not permit the two parties to negotiate an outcome because the notional level of assessment has not been made by a trained assessor, on the basis that the competing assessments have already been made by trained assessors.²²⁷

4.89 Mr Garling expressed considerable dissatisfaction with WorkCover’s approach to such matters, contending that ‘[t]he only barrier to a quick, efficient and fair resolution of the dispute is the policy of WorkCover’.²²⁸

In my view removing that barrier would enable the majority of these disputes to be resolved without the emotional distress for the injured worker; without the delays which are inherent in the present adversarial process in the Workers Compensation Commission and without the cost. In my opinion, this policy cannot be justified on any basis.²²⁹

4.90 In evidence before the committee, Mr Garling advised that his office had taken a proactive approach to the resolution of such disputes and, with the cooperation of insurers, had been able to resolve a number of matters without resorting to dispute resolution processes.²³⁰

4.91 Mr Garling advised that WIRO had also raised this matter with WorkCover.²³¹

Committee comment

4.92 The committee notes the concerns of WIRO regarding the inability of injured workers and insurers to negotiate a mutually agreed resolution in instances where disagreements over an assessment of permanent impairment arise. We also note that WIRO has raised its concerns regarding this matter with WorkCover.

4.93 While the committee acknowledges the critical importance of ensuring that an assessment of permanent impairment is accurate and conducted by a trained assessor, we are concerned that valuable financial resources are being wasted resolving such matters through the Workers Compensation Commission. We therefore recommend that WorkCover and WIRO collaborate to develop a process whereby such matters can be resolved through negotiation, prior to escalation to the Workers Compensation Commission if required.

²²⁵ Evidence, Mr Paul Macken, Honorary Lawyer, New South Wales Workers Compensation Self Insurers Association, pp 45-46.

²²⁶ Evidence, Mr Macken, 21 March 2014, p 46.

²²⁷ Correspondence, Mr Garling, to the Committee Director, 11 July 2014, p 4.

²²⁸ Correspondence, Mr Garling, to the Committee Director, 11 July 2014, p 4.

²²⁹ Correspondence, Mr Garling, to the Committee Director, 11 July 2014, pp 4-5.

²³⁰ Evidence, Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office, 21 March 2014, pp 20-21.

²³¹ Evidence, Mr Garling, 21 March 2014, pp 20-21.

Recommendation 8

That the WorkCover Authority of NSW and WorkCover Independent Review Office collaborate to develop a process whereby disagreements over assessments of permanent impairment can be resolved through negotiation between an insurer and injured worker.

Treatment by insurers

- 4.94** A number of review participants expressed dissatisfaction with the treatment they had received in dealing with claims handling by scheme agents, especially in relation to their rights to medical treatment for injuries. The Australian Lawyers Alliance claimed that many injured workers were ‘traumatised’ by their experiences within the scheme:

Many clients who experience the WorkCover scheme are traumatised by the lack of transparency they encounter; including aggressive fighting against their claims by scheme agents and insurers and an inability to receive independent advice concerning process and their rights. The scheme is being administered to the disadvantage of injured workers wherein their experience is a traumatising one.²³²

- 4.95** Mr McManamey elucidated on these concerns, noting that workers feel that they have ‘no control’ over their treatment:

What people are regularly finding is that they have no control of their own lives and their own decisions about getting back to work. In terms of getting medical treatment they are finding, for example, ‘My doctor says I should have this but a claims officer says that the WorkCover guidelines say you can only have six physiotherapy treatments per year so therefore despite the fact that you have significant problems and your doctor says you need some serious ongoing physiotherapy we are not going to approve it because it does not meet the guidelines.’ The person is left with the problem of wanting and needing treatment, they cannot afford it and WorkCover will not give it to them.²³³

- 4.96** Dr John Quinlan, a consultant in rehabilitation medicine, said that he was aware of instances of insurers delaying access to medical treatment, resulting in the worsening of injuries:

The insurer can (and does) ignore reports of the nominated treating doctor, specialists, and other treating practitioners - I have been asked to review some patients who are seriously ill, and the delays and inconsistencies of the insurer can (and has) delayed treatment resulting in further deterioration and more difficulty in expediting return to work. The injured worker may be cast aside by the insurer and left in a limbo of confusion and inaction which is distressing to those involved in treatment.²³⁴

- 4.97** Mr James Hind, a bricklayer for 48 years, was critical of the treatment he had received, describing it as a ‘nightmare’ characterised by financial difficulty, personal harassment, inappropriate interference in medical assessments by representatives of insurance companies,

²³² Submission 35, Australian Lawyers Alliance, p 2.

²³³ Evidence, Mr McManamey, 28 March 2014, p 51.

²³⁴ Submission 38, Dr John Quinlan, p 2.

and ignored complaints.²³⁵ Mr Hind concluded: ‘As a result of the insurers behaviour I feel helpless. I no longer feel confident in dealing with others. I have felt completely overwhelmed when dealing with the insurance company’s representatives’.²³⁶

4.98 Other review participants reported similar experiences, with one participant describing the psychological impact of dealing with the scheme and insurers:

... the new workers compensation injury laws – WorkCover – do not protect injured workers at all, they leave us exposed, pressured and manipulated. My physical and mental health has deteriorated due to my injury and workers compensation rules exposure.²³⁷

4.99 The Injured Workers Support Network suggested that the stress placed on injured workers involved in the scheme can result in psychological injury

... many workers who initially entered the workers compensation system suffering only a physical injury have since developed a secondary psychological injury due to intimidation and poor treatment by WorkCovers own scheme agents, but also due to lack of accurate information and practical assistance including enforcement of guide lines, from WorkCover Authority personnel.²³⁸

4.100 In order to address concerns relating to the treatment of injured workers by insurers, the Australian Manufacturing Workers’ Union suggested that operational directives be developed to guide insurer behaviour, and that adherence to such guidelines be included as a licencing condition:

WorkCover should develop, through negotiation with injured workers and their representatives, new operational directives for the workers compensation nominal insurers’ scheme agents or licenced insurers with respect to the management of injured workers, ensuring injured workers are treated with respect and dignity at all times. These operational directives should then be included into the conditions when contracts or licences next come up for renewal.²³⁹

Committee comment

4.101 The committee is concerned that a number of review participants have reported poor treatment from insurers under the workers compensation scheme. We are optimistic that the recommendations made in this report will improve the experiences of injured workers. We also encourage all participants in the scheme to behave respectfully and transparently towards each other.

4.102 Many injured workers are inevitably in a vulnerable position when they engage with the WorkCover scheme. This means there must be robust measures in place to ensure their rights are protected and they are treated with dignity and respect by all parties in the scheme from insurers, to WorkCover and medical and rehabilitation specialists.

²³⁵ Submission 24, Mr James Hind, p 1.

²³⁶ Submission 24, Mr James Hind, p 2.

²³⁷ Submission 37, Name suppressed, pp1-2.

²³⁸ Submission 26, Injured Workers Support Network, p 3.

²³⁹ Submission 2, Australian Manufacturing Workers’ Union (NSW Branch), p 17.

- 4.103** The committee believes that this can be achieved by WorkCover developing, through consultation with all stakeholders and their representatives, binding operational directives for the workers compensation nominal insurers' scheme agents or licenced insurers, that ensure all parties are aware of their rights and responsibilities.

Recommendation 9

That the WorkCover Authority of NSW develop, through consultation with all stakeholders and their representatives, binding operational directives for the workers compensation nominal insurers' scheme agents or licenced insurers that ensure all parties are aware of their rights and responsibilities.

Chapter 5 Work capacity

This chapter examines a central issue discussed throughout the inquiry: work capacity. It discusses the three-tiered review process for work capacity decisions, involving an internal review conducted by an insurer, a merit review conducted by WorkCover, and a procedural review by the WorkCover Independent Review Office (WIRO). The role of insurers in work capacity decisions and the administrative burden of the process are also explored, as are limitations on access to legal representation and compliance with return to work provisions under the scheme. The chapter concludes by discussing the case of *ADCO Constructions Pty Ltd v Goudappel*.

Work capacity decisions

5.1 The issue of work capacity decisions was the subject of ongoing discussions throughout the review. The *Workers Compensation Act 1987* defines the following to be a work capacity decision:

- a decision about a worker's current work capacity
- a decision about what constitutes suitable employment for a worker
- a decision about the amount an injured worker is able to earn in suitable employment
- a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings
- a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment
- any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in the above points.²⁴⁰

5.2 Work capacity decisions made by insurers are final and binding on the parties and only subject to review under s 44 of the Act (see paragraph 5.5) or judicial review by the Supreme Court.²⁴¹

5.3 Work capacity decisions are the result of work capacity assessments. A work capacity assessment is a review of an injured worker's functional, vocational and medical status that helps inform decisions by the insurer about the worker's ability to return to work in their pre-injury employment, or suitable employment with the pre-injury employer, or at another place of employment.²⁴²

²⁴⁰ *Workers Compensation Act 1987*, s 43(1). Section 43(2) of the Act states that a decision to dispute liability for weekly payments of compensation, or a decision that can be the subject of a medical dispute under the *Workplace Injury Management and Workers Compensation Act 1998* are not work capacity decisions.

²⁴¹ *Workers Compensation Act 1987*, s 43(1).

²⁴² Additional supplementary answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 1.

- 5.4 The *Workers Compensation Act* states that insurers are responsible for conducting work capacity assessments of injured workers. Further, insurers may require a worker to attend any assessment that is reasonably necessary for the purposes of the work capacity assessment, including an examination by a medical practitioner or other health care professional. If a worker refuses to attend or does not attend such an assessment, the worker's right to weekly payments is suspended until the assessment has taken place.²⁴³
- 5.5 The Act sets out three stages of review that an injured worker may pursue if they are dissatisfied with the outcome of their work capacity assessment:
1. **Review by insurer (internal review)** – a worker may request an internal review of a work capacity decision by the insurer after receiving a work capacity decision notice. A worker must specify the grounds on which the review is being sought and provide any new information.
 2. **Review by WorkCover (merit review)** – if a worker is not satisfied with the outcome of an insurer's internal review, or if the review is not completed within 30 days, the worker may lodge an application for a merit review by WorkCover within 30 days of receiving the internal review decision.
 3. **Review by WIRO** – if a worker is not satisfied with the outcome of a WorkCover merit review, the worker may lodge an application for a procedural review by the WIRO within 30 days of receiving the merit review decision.²⁴⁴
- 5.6 The subject of work capacity decisions was discussed at length by review participants, with concerns raised relating to the timeframes in which reviews are completed, the role of insurers in the assessment process, and the administrative burden of the process.

Internal reviews

- 5.7 The *Workers Compensation Act* requires an insurer to complete an internal review 30 calendar days after an application for such a review is made.²⁴⁵ WorkCover advised that the average time for insurers to complete the review process ranges from 19 to 27 days.²⁴⁶
- 5.8 The longest amount of time taken for an internal review was 40 days.²⁴⁷
- 5.9 In regard to the number of internal reviews undertaken in the period 1 July 2012 to 28 February 2014, WorkCover advised that:
- 1,779 applications for an internal review were received by scheme agents, with 1,580 applications determined

²⁴³ *Workers Compensation Act 1987*, s 44A.

²⁴⁴ *Workers Compensation Act 1987*, s 44; WorkCover Authority of NSW, *Work capacity* (8 March 2014), <http://www.workcover.nsw.gov.au/injuriesclaims/workcapacity/Pages/default.aspx>.

²⁴⁵ *Workers Compensation Act 1987*, s 44(1)(a).

²⁴⁶ Additional supplementary answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 3.

²⁴⁷ Additional supplementary answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 3.

- 887 applications for an internal review were received by self and specialised insurers, with 673 applications determined.²⁴⁸

5.10 While the committee did not receive any concerns relating to the timeframe that insurers took to complete internal reviews, some participants questioned the role that insurers play in work capacity assessments. This issue is discussed later in this chapter.

Merit reviews

5.11 The second stage of review that an injured worker can pursue if they are dissatisfied with the outcome of an internal review conducted by an insurer is a merit review, which is undertaken by the WorkCover Merit Review Service. In regard to the number of merit reviews undertaken during the period 1 July 2012 to 30 June 2014, WorkCover advised that of the 809²⁴⁹ applications for merit review, 686 applications were finalised.²⁵⁰

5.12 Decisions on merit reviews are to be ‘made and issued as soon as practicable and, preferably, within 30 days’.²⁵¹ However, it emerged during the review that the completion of merit reviews had escalated well beyond the 30 day timeframe. Mr Gary Jeffrey, Acting General Manager, Workers Compensation Insurance Division, WorkCover advised at a committee hearing in March 2014 that the delay in merit reviews had ‘... blown out to approximately four months’.²⁵²

5.13 In answers to questions on notice, WorkCover said that as at 10 April 2014, the average timeframe for the completion of merit review applications was 61.9 days.²⁵³

5.14 The longest time taken for any merit review as at 10 April 2014 was 199 days. This application was completed by June 2014.²⁵⁴ WorkCover explained that the significant delay in this matter was attributable to the ‘age of the claim, the volume of documentation to be considered during the review and the backlog caused by the high volume of matters lodged at the Merit Review Service’.²⁵⁵

5.15 Review participants were scathing of the delays experienced at the merit review level. Mr Tim Concannon, Partner, Carroll and O’Dea Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales explained that as a consequence of these delays, some injured workers are losing access to their weekly benefits: ‘The benefits are effectively

²⁴⁸ Additional supplementary answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 2.

²⁴⁹ Evidence, Mr Gary Jeffrey, A/General Manager, Workers Compensation Insurance Division, WorkCover Authority of NSW, 21 March 2014, p 5.

²⁵⁰ Additional supplementary answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 3.

²⁵¹ Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 3.

²⁵² Evidence, Mr Jeffrey, 21 March 2014, pp 5-6.

²⁵³ Additional supplementary answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 4.

²⁵⁴ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 4.

²⁵⁵ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 4.

stayed whilst the review process is underway, so the claimant is effectively out of pocket for the period of the delayed decision.²⁵⁶

- 5.16** Ms Roshana May, Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, also commented on this loss of weekly benefits, describing it as a ‘cost-shifting exercise’:

For most people who have received work-capacity decisions and seek reviews, benefits have been reduced to nil, so they receive nothing from three months after the work-capacity decision is issued until such time as an alternative decision is substituted or reviewed and changed ... Ostensibly it is six months that the worker has no benefits and is forced on to Centrelink. It is a cost-shifting exercise.²⁵⁷

- 5.17** The Construction Forestry Mining and Energy Union (NSW Branch), described the Merit Review Service as ‘deficient’, highlighting that a worker has little recourse to penalise WorkCover for these delays:

In essence there is no penalty for WorkCover failing to adhere to the legislation regarding time limits. It is essentially a right without a remedy. WorkCover is free to delay making the decision, potentially indefinitely to the detriment of these injured workers. An injured worker may have recourse to the Supreme Court to force WorkCover to make a decision, but the cost of such an application is beyond the financial means of many of these injured workers. The filing fee alone is out of reach.²⁵⁸

- 5.18** The union pointed out that ‘... an injured worker is at the mercy of WorkCover. They have no other option but to wait for WorkCover to make their decision, regardless of how long it takes’.²⁵⁹

- 5.19** In order to address the extensive delays in the merit review process, Ms Carmel Donnelly, General Manager, Strategy and Performance, Safety, Return to Work and Support said that WorkCover had employed additional resources and was undertaking an operational review of the service:

... we have recruited additional resources to remove that delay. We have very clearly instructed the scheme agents in the nominal insurers scheme not to disadvantage people in terms of their weekly benefits. We are undertaking an operational review of the merit review service in order to improve the operations and we are prioritising matters where we think a worker would be disadvantaged.²⁶⁰

- 5.20** WorkCover advised that it anticipated clearing the existing backlog by 30 June 2014.²⁶¹

²⁵⁶ Evidence, Mr Tim Concannon, Partner, Carroll and O’Dea Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, 28 March 2014, p 33.

²⁵⁷ Evidence, Ms Roshana May, Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, 28 March 2014, p 33.

²⁵⁸ Submission 28, Construction Forestry Mining and Energy Union (NSW Branch), p 21.

²⁵⁹ Submission 28, Construction Forestry Mining and Energy Union (NSW Branch), p 21.

²⁶⁰ Evidence, Ms Carmel Donnelly, General Manager, Strategy and Performance, Safety, Return to Work and Support, 12 May 2014, p 6.

²⁶¹ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 4.

Reviews by WIRO

- 5.21** In contrast to the delays experienced at the merit review level, the reviews conducted by WIRO have thus far been completed well within the 30 day timeframe. Mr Kim Garling, WorkCover Independent Review Officer, WIRO, outlined that of the 106 matters escalated to his office for review, the majority of reviews have been completed within approximately 14 days:

That was 105 requests and there was one more this morning, so that will make that 106; 88 have been completed; nine were withdrawn by either the insurer or the worker; and eight are outstanding. Those eight would be outstanding for no longer than 10 days, I believe. We have to have a time period of seven days to give the insurer an opportunity to respond, but beyond that seven days we are usually completed. We are certainly completing within seven further days, but hopefully within three business days thereafter.²⁶²

- 5.22** Mr Garling emphasised: ‘We are well within our time scale.’²⁶³

- 5.23** Questions were raised about the seemingly low number of matters being escalated to WIRO, with some review participants suggesting that injured workers may be dissuaded from pursuing a review of their work capacity assessment matters with WIRO. For example, Mr Andrew Stone, Barrister, and Member of the Common Law Committee, New South Wales Bar Association, said:

The question you always have in those circumstances is: Is this all the ones there are or is it the tip of an iceberg? Is it the ones who are resourced or can be bothered or know of their rights to pursue it? If you went and did a random audit of the ones who do not would you find that they are being done beautifully and correctly and it is only the egregious ones that get brought up for review, or is it in fact that there are vast numbers of mistakes being made but only a small number pursue that route?²⁶⁴

Committee comment

- 5.24** The committee was deeply concerned to learn of the significant delays experienced in the merit reviews undertaken by the WorkCover Merit Review Service. These delays are particularly troubling given that the two other levels of review for work capacity assessments – internal reviews by the insurers and the final review by WIRO – are being finalised well within the required timeframes.
- 5.25** We note that WorkCover has employed additional resources to assist to clear the backlog of reviews awaiting determination, and that an operational review of the Merit Review Service is underway. We are hopeful that the outcomes of this review will result in improvements to this area and will keep a watching brief on this matter.

²⁶² Evidence, Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office, 21 March 2014, p 19.

²⁶³ Evidence, Mr Garling, 21 March 2014, p 19.

²⁶⁴ Evidence, Mr Andrew Stone, Barrister, Member, Common Law Committee, New South Wales Bar Association, 28 March 2014, p 44.

Role of insurers

- 5.26** The second area of concern regarding work capacity assessments raised by review participants was the role of insurers in the process. The Construction Forestry Mining and Energy Union contended that insurers have inadequate training to perform such assessments:

The work capacity process does not function efficiently, effectively, fairly or even logically. Given the impact these decisions can have on the livelihood of injured workers and their families it is concerning that those [the insurers] responsible for making these decisions do not have adequate training.²⁶⁵

- 5.27** The union further expressed concern that an insurer can make a work capacity assessment based solely on the information contained in a workers file, without recourse to any further medical examination:

It's important to understand that while s 43 of the *Workers Compensation Act 1987* allows the insurer to send the injured worker for a work capacity assessment prior to making a work capacity decision, this is not a requirement. An insurer is permitted to make a work capacity decision based on the evidence already in an injured worker's file. This is problematic for many reasons, not least because the decision is made by a case manager who has no medical training and who has most likely never seen the injured worker.²⁶⁶

- 5.28** Ms Emma Maiden, Assistant Secretary, Unions NSW, was similarly critical of the method in which insurers undertake work capacity assessments, particularly in regard to the lack of 'check and balances':

... an admin person at the insurer looks at the file. They do not have to do extra medical tests or anything like that; they simply look at whatever paperwork is on file ... there is no requirement for any normal checks and balances that you would expect in relation to such a significant decision about someone's weekly benefit. And of course there is no ability to challenge. You can engage a lawyer, but only if you do not pay them, to act on your behalf in relation to work capacity decisions – which is one of the most appalling elements. So you are basically depriving the worker of any ability to challenge the decision.²⁶⁷

- 5.29** Access to legal representation is discussed later in this chapter.

Administrative burden

- 5.30** Other review participants raised complaints about the administrative burden of work capacity assessments. For example, Ms May described the establishment of the Merit Review Service as 'creating an unnecessarily complex level of bureaucracy':

Nothing has been done about the red tape; we have more of it. If you read the guidelines to work capacity assessments or reviews and the setup WorkCover has given to the Merit Review Service within WorkCover, it is as if they have created a

²⁶⁵ Submission 28, Construction Forestry Mining and Energy Union (NSW Branch), p 16.

²⁶⁶ Submission 28, Construction Forestry Mining and Energy Union, (NSW Branch), p 15.

²⁶⁷ Evidence, Ms Emma Maiden, Assistant Secretary, Unions NSW, 21 March 2014, pp 32-33.

mini-tribunal within the bureaucracy. No-one who is not a lawyer – and even some lawyers – can navigate that.²⁶⁸

- 5.31** Injured workers with English as a second language or with limited literacy skills were seen to be at a significant disadvantage when faced with the administrative burden of work capacity assessments, especially due to the fact that legal practitioners are not permitted to be paid for assisting workers in a work capacity decisions.²⁶⁹ For example, the United Services Union said work capacity assessments ‘have proven to be a disaster for injured workers’.²⁷⁰

Anecdotally the situation pertains where the workers are overwhelmed by the documentation and do not have the resources or skills set to comprehend the situation and respond in a meaningful way. The workers have been marginalised from seeking legal advice ... Injured workers with language barriers or limited literacy skills are particularly disadvantaged.²⁷¹

Committee comment

- 5.32** The committee acknowledges that the involvement of insurers in work capacity assessments, together with the administrative burden of the process, is of concern to a number of review participants. We also note that the restricted access to legal representation, implemented as part of the 2012 reforms to the workers compensation scheme and discussed in the next section of this chapter, has likely exacerbated both of these problems.
- 5.33** The committee believes that our recommendation in the following section relating to access to legal representation will assist to overcome some of the concerns raised in regard to these matters.

Access to legal representation

- 5.34** The amended *Workers Compensation Act* stipulates that a legal practitioner acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review of a work capacity decision of an insurer.²⁷²
- 5.35** Review participants noted that as a result of these reforms, there has been a decline in the number of lawyers practicing in the field of workers compensation law. For example, Ms Elizabeth Welsh, Barrister, and Member of the Common Law Committee, New South Wales Bar Association, explained that a recent survey of the association’s members found that only 12 per cent of participants had undertaken any work in connection with claims for weekly

²⁶⁸ Evidence, Ms May, 28 March 2014, p 33.

See also for example Submission 38, Dr John Quinlan, p 2.

²⁶⁹ *Workers Compensation Act 1987*, s 44(6).

²⁷⁰ Submission 29, United Services Union, p 3.

²⁷¹ Submission 29, United Services Union, pp 3-4.

²⁷² *Workers Compensation Act 1987*, s 44(6).

benefits under the new scheme.²⁷³ She noted: ‘Much of that will be unpaid work because it relates to work capacity assessments’.²⁷⁴

- 5.36** In addition to not being remunerated for work, Ms May suspected that many lawyers were reluctant to undertake work in this area due to the breadth and complexity of documents relating to work capacity decisions:

... a lot of lawyers are abandoning their clients’ needs because they are of the view that anything of the nature of a document which describes a reduction or increase in benefits, so the quantum of benefits, a discussion of capacity or ability to perform suitable duties falls into the nature of the work capacity assessment, which is then the subject to of a work capacity decision. A liability dispute document, such as a section 54 or 74 notice, can likewise also be a work capacity decision. It is incredibly complicated. It is incredibly complex.²⁷⁵

- 5.37** The committee heard that the prohibition on injured workers paying for legal representation is problematic because, as observed by Mr Shay Deguara, Industrial Officer, Unions NSW, although ‘[i]njured workers do not have access to lawyers under this scheme, the scheme agents do have access to lawyers and they do use them.’²⁷⁶

- 5.38** Ms Welsh was concerned that many injured workers have ‘no chance’ of interpreting the workers compensation legislation as it has become increasingly cumbersome:

... I struggle these days to find anything in it. It is almost as bad as the tax Act. That is probably a cliché because you hear people say that a lot, but it genuinely is and they [injured workers] have absolutely no chance of doing it themselves.²⁷⁷

- 5.39** This view was supported by an injured worker who commented on the unfairness of the situation: ‘It seems ridiculous that I am expected to understand and respond to this new legislation without the right of acquiring legal representation’.²⁷⁸

- 5.40** Ms Welsh illustrated the challenges faced by injured workers from different educational and cultural backgrounds when they do not have access to legal representation:

All that happens is that the insurance company makes a decision, sends a letter, ‘We’ve done work capacity assessment. You’re not entitled to anymore workers compensation.’ That injured worker, irrespective of their educational or cultural background, then has to go back to the insurer themselves to seek a review and then they can to WIRO if they have a complaint, but WIRO sends them back to the insurer. Then they can go to WorkCover. They have to do all of this themselves.²⁷⁹

²⁷³ Evidence, Ms Elizabeth Welsh, Barrister, Member of the Common Law Committee, New South Wales Bar Association, 28 March 2014, p 38.

²⁷⁴ Evidence, Ms Welsh, 28 March 2014, p 38.

²⁷⁵ Evidence, Ms May, 28 March 2014, p 32.

See also Evidence, Mr Concannon, 28 March 2014, pp 32-33.

²⁷⁶ Evidence, Mr Shay Deguara, Industrial Officer, Unions NSW, 21 March 2014, p 33.

²⁷⁷ Evidence, Ms Welsh, 28 March 2014, p 41.

²⁷⁸ Submission 18, Name suppressed, p 1.

²⁷⁹ Evidence, Ms Welsh, 28 March 2014, p 41.

5.41 The *Statutory Review of the Workers Compensation Legislation Amendment Act 2012* observed that the restrictions on access to legal representation were an area where the reforms appear to have resulted in unintended consequences that ‘are arguably counter to the spirit of the objectives of reform’.²⁸⁰ In particular, the review highlighted that ‘... the restrictions placed around legal representation in the merit review process do not exist in any other jurisdiction, where injured workers are typically afforded legal representation’.²⁸¹

5.42 Some review participants emphasised the benefits that legal representation can have on the operation of the workers compensation scheme. For example, Ms Welsh argued that workers need access to legal representation in the early stages of a dispute to ensure that the interests of the worker can be appropriately advanced:

I would say that it is most important that if you want to get a dispute resolved quickly to have that [legal representation] at the early stage otherwise that injured worker has no ability to advance their own interests. They are not going to understand the issue properly. They will be met with an insurance company that may have a medical report that, on a superficial level, is something the worker cannot argue about – but it may be a poorly reasoned report. There may be some fundamental issues with the insurer’s decision and legal representation at that stage would get straight to the heart of it.²⁸²

5.43 Mr Andrew Stone, Barrister, and Member of the Common Law Committee, New South Wales Bar Association, argued that limiting legal representation for injured workers engaged in work capacity disputes undermines the educative function that lawyers perform:

The other point to remember about legal representation is the great service it does in calming down the client. It is not just that we are there building up the client’s case; we are there explaining to the client what they cannot have, what they cannot do, the way the system works. A very large part of our role across the variety of different forums in which we appear is to educate our client about what can and cannot be achieved and to bring expectations back to a more realistic level.²⁸³

5.44 The statutory review of the 2012 reforms made a similar observation regarding the benefits of legal representation, suggesting that ‘lawyers previously played a role in filtering out which claims were nonsensical and provide advice, most of which was free, whereas now lawyers are largely removed from the system’.²⁸⁴

5.45 In the absence of legal support, the committee heard that other organisations have attempted to assist injured workers involved in work capacity decisions. For example, Mr David Henry, NSW Branch Work Health and Safety Officer, Australian Manufacturing Workers’ Union, said that the union provides limited assistance to injured workers in these situations:

²⁸⁰ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 56.

²⁸¹ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 62.

²⁸² Evidence, Ms Welsh, 28 March 2014, p 41.

²⁸³ Evidence, Mr Stone, 28 March 2014, p 41.

²⁸⁴ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 64.

We are not lawyers, we are not specifically trained in all the aspects, so what we try to do to help our members is certainly step them through any review processes that might be available to them; we will certainly help them fill in paperwork, template letters, all that sort of information. But there is really a limitation on what amount of help we can do, and it is devastating.²⁸⁵

- 5.46** In order to address this issue, several review participants proposed that injured workers be given access to legal representation throughout the work capacity assessment process. The New South Wales Bar Association was the lead proponent of this argument, stating ‘injured workers should be entitled to legal representation at all stages of a dispute with a workers compensation insurer’.²⁸⁶ Ms Welsh asserted that this was essential to ensure that the merits of all cases are fairly assessed.²⁸⁷

Committee comment

- 5.47** The committee acknowledges that the restrictions placed on the rights of injured workers to legal representation as a consequence of the 2012 reforms to the workers compensation scheme has generated significant concern amongst review participants. Further, we note that the *Statutory Review of the Workers Compensation Legislation Amendment Act 2012* stated that no other jurisdiction has such a restriction on injured workers engaging legal representation for reviews of work capacity decisions.
- 5.48** The committee shares the concerns of review participants, especially given the complexities of the workers compensation legislation and the difficulties faced by many injured workers in understanding their rights and responsibilities following a workplace injury.
- 5.49** As such, the committee believes that the NSW Government should consider amending the *Workers Compensation Act* to allow legal practitioners acting for an injured worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact.

Recommendation 10

That the NSW Government consider amending section 44(6) of the *Workers Compensation Act 1987* to allow legal practitioners acting for a worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact.

Return to work provisions

- 5.50** Some review participants raised concerns regarding the adherence of employers to the return to work provisions contained in the workers compensation legislation, suggesting that employers may not fully understand their legislative obligations.

²⁸⁵ Evidence, Mr David Henry, NSW Branch Work Health and Safety Officer, Australian Manufacturing Workers’ Union, 28 March 2014, p 72.

²⁸⁶ Submission 27, New South Wales Bar Association, p 3.

²⁸⁷ Evidence, Ms Welsh, 28 March 2014, p 41.

- 5.51** The *Workplace Injury Management and Workers Compensation Act 1998* states that an employer must provide suitable work if a worker who has been totally or partially incapacitated as a result of an injury is able to return to work and requests to return to work. This can either be on a full-time or part-time basis.²⁸⁸ The employer must provide employment that is both suitable and so far as reasonably practicable the same as, or equivalent to, the pre-injury employment of the worker.²⁸⁹
- 5.52** Failure to comply can result in a civil penalty of a maximum of 50 penalty units,²⁹⁰ and WorkCover inspectors also have the power to issue improvement notices to employers for failing to provide suitable work to injured workers.²⁹¹ The committee will keep a watching brief on the number of times these penalties are used to ensure that return to work provisions are complied with.
- 5.53** The *Workers Compensation Act* defines suitable employment as employment in work for which the worker is currently suited, having regard to:
- the nature of the worker's incapacity and the details provided in medical information including any certificate of capacity supplied by the worker
 - the worker's age, education, skills and work experience
 - any plan or document prepared as part of the return to work planning process, including an injury management plan
 - any occupational rehabilitation services that are being, or have been, provided to the worker
 - such other matters specified in the WorkCover Guidelines.²⁹²
- 5.54** Suitable employment is to be provided regardless of:
- whether the work or the employment is available
 - whether the work or the employment is of a type that is generally available in the employment market
 - the nature of the worker's pre-injury employment
 - the worker's place of residence.²⁹³

²⁸⁸ *Workplace Injury Management and Workers Compensation Act 1998*, s 49(1).

²⁸⁹ *Workplace Injury Management and Workers Compensation Act 1998*, s 49(2).

Section 49(3) of the Act states that this section does not apply if it is not reasonably practicable to provide employment; or the worker voluntarily left the employment of that employer after the injury happened; or the employer terminated the worker's employment after the injury happened, other than for the reason that the worker was not fit for employment as a result of the injury.

²⁹⁰ *Workplace Injury Management and Workers Compensation Act 1998*, s 49(1).

²⁹¹ Submission 3, NSW Nurses and Midwives' Association, p 6.

²⁹² *Workers Compensation Act 1987*, s 32A.

²⁹³ *Workers Compensation Act 1987*, s 32A.

5.55 Mr John Watson, General Manager, Work Health and Safety, WorkCover advised that Safe Work Australia found that the average return to work rate in New South Wales was 88 per cent, higher than the national average of 86 per cent.²⁹⁴

5.56 Despite this result, some review participants argued that employers were failing to provide suitable work options, to the detriment of injured workers seeking to return. For example, while supportive of the legislative provisions, Mr Brett Holmes, General Secretary, NSW Nurses and Midwives' Association, said: 'Unfortunately, however, our experience is that we have not seen any change in behaviour amongst employers. Many employers are simply continuing to attempt to shift injured workers off their books'.²⁹⁵

5.57 Mr Stephen Hurley-Smith, Industrial Officer, NSW Nurses and Midwives' Association, explained that since the enactment of the return to work provisions following the 2012 reforms, he had '...not noticed any discernible change of behaviour amongst employers'.²⁹⁶

We receive between 700 and 800 inquiries from our members each year regarding workers compensation. There has been the same level of inquiries since 1 October 2012 when those return to work changes commenced. We are still having to deal with the same volume of suitable duties disputes, day in and day out.²⁹⁷

5.58 Mr Hurley-Smith suggested that employers had 'a lot of misconceptions' about the operation of the return to work provisions. For example, he said that he frequently speaks with employers that believe their obligation to provide suitable work ceases if a doctor determines that an employee is unable to return to pre-injury duties:

A worker may be fit for 95 per cent of their pre-injury duties but as soon as a doctor says, 'You are never going to get to 100 per cent again, you are always going to have some level of medical restriction' it seems to me so often the employer will react to that by saying, 'That's the end of our obligations. We don't have to do anything more for you. We can take away your suitable duties. We can terminate you. We can force you to attempt to rely upon weekly workers compensation benefits.' That is just not the way the legislation is set up.²⁹⁸

5.59 The second misconception highlighted by Mr Hurley-Smith was that many employers believe the suitable work provisions only apply if there is a vacant position available:

Another big misconception is this idea that the obligation to provide suitable work only applies where they have got some vacant identifiable position. Particularly in the public health system I find that you have a worker who may be fit often for a very long list of duties but because they do not fit neatly within a particular vacant position

²⁹⁴ Evidence, Mr John Watson, General Manager, Work Health and Safety, WorkCover Authority of NSW, 21 March 2014, p 2.

²⁹⁵ Evidence, Mr Brett Holmes, General Secretary, NSW Nurses and Midwives' Association, 21 March 2014, p 61.

²⁹⁶ Evidence, Mr Stephen Hurley-Smith, Industrial Officer, NSW Nurses and Midwives' Association, 21 March 2014, p 61.

²⁹⁷ Evidence, Mr Hurley-Smith, 21 March 2014, pp 61-62.

²⁹⁸ Evidence, Mr Hurley-Smith, 21 March 2014, p 63.

the stance of the employer is, ‘We are not going to provide you with anything. We are going to terminate you or leave you at home languishing on workers compensation’.²⁹⁹

5.60 Mr Steve Turner, Assistant General Secretary, Public Service Association of NSW, observed that some employers can be unwilling to negotiate a return to work to alternative duties if the employee is unable to fill the same position they held pre-injury.³⁰⁰

5.61 The *Statutory Review of the Workers Compensation Legislation Amendment Act 2012* noted that the reforms have resulted in some barriers to return to work, including that consideration is not given to practical issues such as the injured workers geographic location or any retraining requirements if the worker is changing industries. The review observed that such situations are ‘likely to have a higher impost on injured workers from rural and regional locations’.³⁰¹

5.62 Ms Sherri Hayward, Industrial Officer, Construction Forestry Mining and Energy Union, likewise identified that the return to work provisions can be particularly problematic for workers in regional and rural areas, because a workers geographic location is not considered when attempting to find suitable employment:

... the fact that a person’s location is not to be taken into account when determining whether suitable employment can be found, that really affects people in regional areas. We have a gentleman in Orange who was told that he could go for a job that was 2½ to three hours drive. He cannot drive that far. But that does not matter. It is his fault that he lives in Orange, therefore, he needs to move to where the jobs are.³⁰²

5.63 Ms Maiden was also alarmed by the application of the return to work provisions, using an example of an injured construction worker with limited English-language skills to illustrate her concerns:

In terms of the way that it works, the insurer will look at a person’s file. They might say that this person who was working on a construction site and has no real command of English – and we have seen this particular example of someone who had ruined their back and could not go back to work in construction – can go and be a shop assistant ... That does not take account of the fact that the worker does not speak English or have the skills to do that job. No employer is going to offer them that job.³⁰³

5.64 Ms Maiden concluded: ‘This is really ruining people’s lives. This whole process is a fiction, as we say, because it does not result in anyone returning to meaningful work, or any paying job. All it does is cut off their weekly benefits’.³⁰⁴

²⁹⁹ Evidence, Mr Hurley-Smith, 21 March 2014, p 63.

³⁰⁰ Evidence, Mr Steve Turner, Assistant General Secretary, Public Service Association of NSW, 21 March 2014, p 51.

³⁰¹ Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, pp 50-51.

³⁰² Evidence, Ms Sherri Hayward, Industrial Officer, Construction, Forestry, Mining and Energy Union (NSW Branch), 28 March 2014, p 65.

³⁰³ Evidence, Ms Maiden, 21 March 2014, pp 32-33.

³⁰⁴ Evidence, Ms Maiden, 21 March 2014, pp 32-33.

5.65 The Construction Forestry Mining and Energy Union argued that while the current definition of suitable employment requires a range of issues to be considered, the practical application of the legislation is not carried out in a ‘logical and reasonable manner’.³⁰⁵

Often the insurer will fail to take into account the injured worker’s age and language barriers. For workers over the age of 60, age is a very significant factor in finding any form of employment, because there is an ongoing prejudice against aged workers. This factor is never taken into account by insurers. Insurers also apply the definition in a theoretical sense rather than appreciating how work is really performed. While on paper it may appear that a job requiring forklift driving does not require any manual lifting, in reality an individual does not merely sit in the forklift all day. The forklift may be the primary role, but the ancillary activities may fall outside of a person’s physical limitations.³⁰⁶

5.66 The union asserted ‘... there needs to be a greater emphasis on the actual duties required by a particular role, not just a theoretical understanding of the job’.³⁰⁷

5.67 Another issue with the return to work process, raised by the New South Wales Workers Compensation Self Insurers Association, was the requirement to prepare return to work and injury management plans. The association argued that this was a burdensome administrative requirement that had no ‘material benefit’ for injured workers:

Lengthy and detailed plans prepared ‘in consultation’ with injured workers and their treating medical practitioners are almost always entirely unread by either the injured worker or the medical practitioner and have become an object in themselves rather than a useful tool for assisting in return to work or injury management. They have become a bureaucratic nonsense and at times, impede the smooth return to work process for which they were designed.³⁰⁸

5.68 However, the committee notes that one purpose of these plans is to protect workers from being given the same work that resulted in their injury.

Proposals for change

5.69 The NSW Nurses and Midwives’ Association put forward a number of proposals to improve the existing return to work provisions, including:

- providing financial incentives for employers to provide suitable work
- increasing the civil penalties for not providing suitable work
- increasing premiums for employers who fail to provide suitable work
- implementing education programs to inform employers about their return to work obligations.³⁰⁹

³⁰⁵ Submission 28, Construction Forestry Mining and Energy Union (NSW Branch), p 12.

³⁰⁶ Submission 28, Construction Forestry Mining and Energy Union (NSW Branch), p 12.

³⁰⁷ Submission 28, Construction Forestry Mining and Energy Union (NSW Branch), pp 12-13.

³⁰⁸ Submission 12, New South Wales Workers Compensation Self Insurers Association, p 5.

³⁰⁹ Submission 3, NSW Nurses and Midwives’ Association, pp 9-10.

5.70 Mr Hurley-Smith proposed that insurers could be given responsibility to ensure the compliance of employers with the return to work provisions, in a system that he termed ‘work capacity testing for employers’:

... perhaps there needs to be a mechanism there where the insurer perhaps makes sure that in fact they are acting in good faith, that in fact there is no work for that worker ... There is work capacity testing in the legislation for workers. There could be work capacity testing for employers as well. It would not be too hard to put in place a system whereby someone has to assess whether or not there is work in a particular workplace for a worker with a particular kind of injury.³¹⁰

5.71 Mr Hurley-Smith said: ‘If it [non-compliance] could be handled much earlier in the process it is almost like the penalties may not arise because it could be dealt with so much earlier’.³¹¹

5.72 Unions NSW also made a number of proposals for change, including that:

- entry permit holders be authorised to inspect return to work programs
- inspectors actively seek out return to work programs and apply enforcement where they do not exist
- inspectors be charged with enforcing return to work outcomes
- fines for employers for non-compliance with return to work provisions be increased.³¹²

Committee comment

5.73 The committee acknowledges the concerns of review participants regarding some employers failing to understand or adhere to their obligations to provide suitable employment and the lack of enforcement in instances where employers fail to meet these obligations.

5.74 The committee considers that facilitating a smooth return to suitable employment for injured workers is a crucial aspect of successful rehabilitation following an injury. In order to encourage better compliance with the current return to work provisions, we believe that WorkCover should review the mechanisms used to ensure compliance with the return to work provisions contained in the *Workplace Injury Management and Workers Compensation Act*, including the use of incentives to encourage compliance and the deterrent effect of penalties for non-compliance.

5.75 We further believe that WorkCover should undertake an education campaign to inform employees and employers of their rights and obligations in regard to returning to work following an injury.

³¹⁰ Evidence, Mr Hurley-Smith, 21 March 2014, pp 63-64.

³¹¹ Evidence, Mr Hurley-Smith, 21 March 2014, p 64.

³¹² Submission 31, Unions NSW, p 9.

Recommendation 11

That the WorkCover Authority of NSW review the mechanisms used to ensure compliance with the return to work provisions contained in the *Workplace Injury Management and Workers Compensation Act 1998*, and consider introducing incentives to encourage compliance and penalties for non-compliance.

Recommendation 12

That the WorkCover Authority of NSW undertake an education campaign to inform employees and employers of their rights and obligations in regard to returning to work following an injury.

ADCO Constructions Pty Ltd v Goudappel

- 5.76** The 2012 reforms to the workers compensation scheme limited the entitlement to lump sum compensation to workers who had suffered injuries resulting in permanent impairment of more than ten per cent. Prior to the reforms there was no threshold level of permanent impairment for lump sum compensation payments. The relevant provisions commenced on 27 June 2012, and included savings and transitional provisions to protect the entitlements of workers who had claimed lump sum compensation before 19 June 2012.³¹³
- 5.77** During the review, the case of *ADCO Constructions Pty Ltd v Goudappel* was actively on appeal to the High Court, and had the potential to significantly impact the scheme's finances.
- 5.78** Mr Ronald Goudappel, an employee of ADCO Constructions Pty Ltd, was injured at work in April 2010. He made a claim for compensation within two days of the injury. He was later found to have a permanent impairment of six per cent and lodged a specific claim for compensation in respect of that impairment on 20 June 2012.³¹⁴
- 5.79** ADCO's workers compensation insurer declined liability for lump sum compensation. ADCO argued that the statutory protection extended to Mr Goudappel's permanent impairment entitlement by the savings and transitional provisions of the 2012 amendments was displaced by a transitional regulation issued by WorkCover, and made pursuant to those provisions. The transitional regulation extended the disentitling operation of the amendments to claims for compensation made before 19 June 2012, thus changing the intent of the legislation as created by the Parliament.³¹⁵
- 5.80** Mr Goudappel filed a dispute resolution application in the Workers Compensation Commission, with the President of the Commission finding in favour of ADCO.
- 5.81** Mr Goudappel appealed the decision to the Court of Appeal of the Supreme Court of New South Wales. The question in the appeal was whether the regulation extinguished Mr Goudappel's entitlement to lump sum compensation and, if so, whether the regulation was

³¹³ *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18.

³¹⁴ *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18.

³¹⁵ *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18.

valid. The Court of Appeal of the Supreme Court of New South Wales held that the regulation was invalid.³¹⁶

5.82 On 11 October 2013, ADCO was granted leave to appeal the Supreme Court's decision to the High Court.³¹⁷

5.83 Questions were raised during this committee's review about the appropriateness of WorkCover issuing a regulation that changed the intent of legislation. It was also highlighted that, if upheld, the decision in Goudappel could have significant ramifications for the scheme's finances.

5.84 Review participants observed that the uncertainty generated by the ongoing case created difficulties in providing advice to injured workers. For example, Mr Concannon noted that the legal community was unable to advise clients as a consequence of the unresolved legal action:

We cannot advise them, quite simply. In many cases we are saying, 'Ring me back after the Goudappel decision.' We have been doing that for quite a number of months. We have told them since April last year, 'Wait to see what the Court of Appeal says.' We are continuing to have to tell them to wait, potentially for another week, until the High Court hands down its decision. It is all very unsatisfactory.³¹⁸

5.85 Ms May also noted the difficulty of providing advice to clients pending the Goudappel decision, claiming that as a consequence, some injured workers were not receiving their rightful benefits:

... there are many, many thousands of workers who are being deprived of benefits because no-one can tell them what the state of the scheme is and how it affects them. That is what is most detrimental. This is a beneficial scheme and we are unable to say if benefits apply to a certain class of worker or to any class of worker.³¹⁹

5.86 Mr Concannon suggested that, in drafting a regulation to amend the intent of the original legislation after the legislation had been enacted, WorkCover had 'implicitly accepted' that the new legislation had been poorly drafted:

They [WorkCover] have given up on their attempt to rely on the Act so they have implicitly accepted that the legislation was wrongly drafted in the first place and did not achieve what it was intended to achieve. They are trying to fix that, not clarify it by putting the regulation in several months later.³²⁰

5.87 Mr Ivan Simic, Partner, Taylor and Scott Lawyers, was also critical of the uncertainty arising from Goudappel, describing it as 'shambolic':

I do not know what the law is. The Premier said on 20 June 2012 on ABC radio and in the papers, 'This law is not retrospective'. On Tuesday we will hear WorkCover and

³¹⁶ *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18.

³¹⁷ *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18.

³¹⁸ Evidence, Mr Concannon, 28 March 2014, p 37.

See also Evidence, Ms Welsh, 28 March 2014, p 43.

³¹⁹ Evidence, Ms May, 28 March 2014, p 37.

³²⁰ Evidence, Mr Concannon, 28 March 2014, p 37.

its insurer agent, with some of the finest legal minds, tell you it is. That is the status of the law in New South Wales. It is absolutely shambolic.³²¹

5.88 When questioned on the potential impact for the scheme if the High Court did not uphold the Court of Appeal's decision in the Goudappel matter, Mr Michael Playford, Consulting Actuary and Partner, Pricewaterhouse Coopers and actuary for the Workers Compensation Nominal Insurer Scheme, advised that the impact would be a combination of:

- future projection of s 66 of the *Workers Compensation Act* benefits in respect of claims with whole person impairment of 10 per cent or less as at 31 December 2013; plus
- payments made since 30 June 2012 in respect of claims with whole person impairment of 10 per cent or less; minus
- future projection of s 66 benefits in respect of claims with whole person impairment of 10 per cent or less as at 30 June 2012.³²²

5.89 Mr Playford provided the following table to illustrate the potential financial impact, estimating that the scheme could be required to pay out an estimated \$346 million if the High Court overturned the appeal.

Table 2 Potential impact of *Goudappel v Adco Contructions Pty Ltd* decision³²³

| Item | Number of payments | Cost (\$m) |
|---|--------------------|------------|
| Future payments after 31 December 2013 | 14,398 | 355.2 |
| Plus payments since 30 June 2012 | 3,682 | 102.5 |
| Less estimated run-off with Goudappel from June 2012 evaluation | 4,818 | 111.5 |
| Total | 13,262 | 346.3 |

5.90 On 16 May 2014 the High Court upheld the employer's appeal against the decision of the New South Wales Court of Appeal. By doing so, the High Court held that the transitional regulation was valid and extinguished Mr Goudappel's entitlement to permanent impairment compensation.³²⁴

5.91 As a consequence of the decision, the scheme will not incur any additional financial costs.

³²¹ Evidence, Mr Ivan Simic, Partner, Taylor and Scott Lawyers, 28 March 2014, p 65.

³²² Tabled document, Mr Michael Playford, Consulting Actuary and Partner, Pricewaterhouse Coopers and actuary for the Workers Compensation Nominal Insurer Scheme, *Potential Impact of Goudappel v ADCO Contructions Pty Ltd decisions*, 14 April 2014, p 1.

In each case, this is in respect of injuries prior to 30 June 2012.

³²³ Tabled document, Mr Playford, *Potential Impact of Goudappel v ADCO Contructions Pty Ltd decisions*, 14 April 2014, p 2.

³²⁴ Media Release, WorkCover Independent Review Office, *ADCO Contructions Pty Ltd v Goudappel update – High Court decision*, 16 May 2014.

Committee comment

- 5.92** The committee acknowledges that the Goudappel matter unfortunately generated considerable uncertainty over the workers compensation scheme for a significant period of time. We note that the matter has finally been resolved as a result of the High Court's decision in *ADCO Constructions Pty Ltd v Goudappel*.

Chapter 6 Communication

This chapter examines stakeholder engagement with WorkCover, setting out WorkCover's legislative obligation for consultation and detailing stakeholders' complaints about WorkCover's approach to consultation. Proposals to reinstate tripartite consultation and industry reference groups are considered, before issues with the authority's annual report, statistical bulletins, website and customer service centre are discussed.

Legislative obligation for consultation

- 6.1** Section 22 of the *Workplace Injury Management Act and Workers Compensation Act 1988* requires that WorkCover '... undertake such consultation as it thinks fit in connection with current or proposed legislation relating to any such scheme as it thinks fit.'³²⁵
- 6.2** WorkCover's *Corporate Plan 2010-2015* describes how stakeholder consultation can enhance workplace health and safety: 'Our stakeholders assist us to identify emerging issues, create new partnerships, and draw on the knowledge and expertise of individuals and groups who can assist us achieve healthy, safe and productive workplaces.'³²⁶
- 6.3** WorkCover's stakeholders include:
- workers, injured workers and their families
 - employers and persons conducting a business or undertaking
 - contracted or accredited service providers
 - unions
 - employers associations.³²⁷
- 6.4** A number of stakeholders called for WorkCover to be held to account to its legislative obligation for consultation. This argument was expressed by Ms Roshana May, Slater and Gordon Lawyers and Member of the Injury Compensation Committee, the Law Society of New South Wales, who asserted there should be 'no doubt' about WorkCover's consultation with stakeholders and the community:
- In WorkCover's general and specific functions, they are charged with ensuring efficient operation and communication and consultation with stakeholders, as they see fit. I think they have to be held to account. I think there has to be a methodology of how WorkCover operates to perform its functions... There should be no doubt about consultation. There should be stakeholder and general community consultation.³²⁸
- 6.5** WorkCover did not provide the committee with a comprehensive overview of its communication strategies or consultation methods, but instead responded to criticisms on a

³²⁵ *Workplace Injury Management Act and Workers Compensation Act 1988*, s 22(1)(d).

³²⁶ WorkCover Authority of NSW, *Corporate Plan 2010 -2015*, p 8.

³²⁷ WorkCover, *Safety, Return to Work & Support Division customer service charter*, p 2.

³²⁸ Evidence, Ms Roshana May, Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, 28 March 2014, p 35.

case-by-case basis. This chapter reflects that approach and sets out concerns raised by review participants followed by WorkCover's response.

WorkCover's approach to consultation

- 6.6** The committee received evidence that many stakeholders were frustrated with WorkCover's consultation processes. For example, the WorkCover Independent Review Office (WIRO) was highly critical of WorkCover's approach to consultation, stating that stakeholders were often denied the opportunity to contribute, receive feedback and be informed of the authority's activities.³²⁹
- 6.7** WIRO further argued that there was a lack of genuine consultation between WorkCover and all of its stakeholders with the exception of scheme agents.³³⁰ Mr Kim Garling, WorkCover Independent Review Officer, WIRO, was concerned that this situation caused the authority to overlook key issues for injured workers.³³¹
- 6.8** The Australian Manufacturing Workers' Union (NSW Branch) was similarly apprehensive about WorkCover's reliance on consultation with scheme agents, as opposed to workers and their representatives:
- Evidence suggests that WorkCover thinks it reasonable and appropriate that there is no consultation with workers or their representatives. While we understand that there is regular consultation with scheme agents, we are not aware of any recent opportunity provided for sensible discussion and consultation with workers and their representatives. While WorkCover pays the scheme agents for their services, they are very clearly not the only (or even the most important) stakeholder.³³²
- 6.9** Another concern was that WorkCover had a selective consultation process. This view was expressed by the New South Wales Workers Compensation Self Insurers Association which said that the authority '... consult[s] when they think it is something that they have got enough time to consult about and sometimes the consultation appears at least to be simply for the purpose they consulted rather than to actually listen to what has been said...'.³³³
- 6.10** The New South Wales Workers Compensation Self Insurers Association stated that it had raised the issue of 'bona fide' consultation with WorkCover several times.³³⁴
- 6.11** Certain participants argued that WorkCover employed opaque consultation methods during the 2012 workplace reform process. The primary concern was that WorkCover failed to adequately engage with stakeholders about the drafting and revision of guidelines and

³²⁹ Submission 36, WorkCover Independent Review Office, p 11.

³³⁰ Submission 36, WorkCover Independent Review Office, p 13.

³³¹ Evidence, Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office, p 25.

³³² Submission 2, Australian Manufacturing Workers' Union (NSW Branch), p 14

³³³ Evidence, Mr Paul Macken, Honorary Lawyer, New South Wales Workers Compensation Self Insurers Association, 21 March 2014, p 39.

³³⁴ Answers to questions on notice, Ms Denise Fishlock, New South Wales Workers Compensation Self Insurers Association, 23 April 2014, p 1.

regulations. For example, Mr Garling stated that his office, lawyers, medical professionals and unions were not consulted about the changes but that scheme agents were:

During the reform period there have been various amendments made to the Guidelines and Regulations, however WIRO has not been invited to discuss or participate in the revision process, despite employing 14 principal lawyers who specialise in workers compensation and informing WorkCover on a number of occasion of significant deficiencies to be addressed.

I am not aware of any consultation with lawyers, medical professionals and unions in relation to these changes. However, we are aware of consultation with scheme agents in relation to the Guidelines.³³⁵

6.12 The Law Society of New South Wales and the Australian Lawyers Alliance were similarly concerned about WorkCover's consultation process for the drafting of guidelines.³³⁶ There concerns are discussed in the next chapter at 7.17 – 7.23.

6.13 The Australian Manufacturing Workers' Union also criticised WorkCover's consultation approach during the 2012 reform process, saying that the authority failed to meet its legislative obligations:

What may be described as consultation by WorkCover would fail to meet the definition as set out in its own legislation- the NSW *Work Health and Safety Act 2011*. The 2012 legislative reforms themselves were introduced without any consultation with workers or their representatives and since then there have been significant changes to Guides and Regulations without any consultation.³³⁷

6.14 The Law Society of New South Wales stated it suspected that the breakdown in communication was caused by the authority's inherent lack of trust in certain stakeholders.³³⁸

6.15 When asked how WorkCover could 'change' its consultation methods, Mr Garling responded 'I think it's an internal management issue within the authority... And perhaps a [lack of] willingness to understand that there are people outside the authority who actually do have some understanding of the system.'³³⁹

6.16 WorkCover acknowledged that there is a perception that it does not effectively engage with stakeholders and that the authority had to find the optimal level of consultation. Ms Carmel Donnelly, General Manager, Strategy and Performance, Safety, Return to Work and Support, conceded that WorkCover needed to consult more consistently:

³³⁵ Submission 36, WorkCover Independent Review Office, p 13.

³³⁶ Submission 22, The Law Society of New South Wales, p 4, Submission 35, Australian Lawyers Alliance, p 1.

³³⁷ Submission 2, Australian Manufacturing Workers' Union (NSW Branch), p 10.

³³⁸ Evidence, Ms May, 28 March 2014, p 34 and Evidence, Mr Tim Concannon, Partner, Carroll and O'Dea Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, 28 March 2014, p 34.

³³⁹ Evidence, Mr Garling, 21 March 2014, p 19.

We do accept that there have been some peaks and troughs in that, and we probably need to have more consistency so that people within the WorkCover stakeholder group are happier with the level of engagement and that it is regular and so on.³⁴⁰

- 6.17** However, Mr John Watson, General Manager, Work Health and Safety Division, WorkCover, cautioned that there are challenges to ensuring that consultation is productive and worthwhile: ‘Consultation is one of those things that you never really finish. You never really arrive. It is important not to have consultation for the sake of consultation but to consult on issues that you need to deal with.’³⁴¹
- 6.18** WorkCover advised that the Safety, Return to Work and Support agencies had undertaken an audit of their engagement process and that WorkCover has since started developing an enhanced stakeholder engagement model.³⁴²

Committee comment

- 6.19** The committee notes that a number of WorkCover stakeholders have been disappointed by the authority’s approach to communication and consultation. This frustration was exacerbated during the 2012 reform period.
- 6.20** WorkCover has acknowledged that it needs to improve in this area and is currently drafting an enhanced stakeholder engagement plan.
- 6.21** In light of stakeholders’ criticism of WorkCover’s consultation processes, the committee recommends that the authority develop an engagement plan in consultation with all its stakeholders and their representatives, and then publish it as soon as practicable.

Recommendation 13

That the WorkCover Authority of NSW develop an engagement plan in consultation with all stakeholders and their representatives, and publish it as soon as practicable.

A tripartite model of consultation

- 6.22** As a means of overcoming the shortcomings in WorkCover’s current approach to consultation, participants proposed that the NSW government reinstate the tripartite model of consultation. Tripartite consultation refers to dialogue and cooperation between governments, employers, and workers in the formulation of standards and policies dealing with labour matters.³⁴³

³⁴⁰ Evidence, Ms Carmel Donnelly, General Manager, Strategy and Performance, Safety, Return to Work and Support, Evidence, 12 May 2014, p 16

³⁴¹ Evidence, Mr John Watson, General Manager, Work Health and Safety, WorkCover Authority of NSW, 21 March 2014, p 11.

³⁴² Evidence, Ms Donnelly, 12 May 2014, p 14.

³⁴³ International Labour Organization, International Labour Standards on Tripartite consultation, <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/tripartite-consultation/lang--en/index.htm>>.

6.23 Unions NSW argued this type of consultation model would serve a number of purposes, including:

- utilising the skills and knowledge of industry and workers
- providing WorkCover with contemporary feedback
- formulating and developing workable publications and policies
- encouraging transparency and scrutiny of WorkCover's actions and decisions.³⁴⁴

6.24 Ms Donnelly advised that Safety, Return to Work and Support was considering a tripartite model for WorkCover but noted that certain stakeholders, such as service providers, do not fit within this model and would need other types of consultation:

In the WorkCover space there are calls for a tripartite approach so we are certainly considering that... We have stakeholders who do not fit within that tripartite concept. Clearly the representatives of workers and the representatives of employers could be seen as key customers and the reason why WorkCover exists. But there are other stakeholders who are service providers.³⁴⁵

6.25 Ms Donnelly advised that WorkCover was also considering establishing regular meetings with a reference group, similar to the approach taken by the Lifetime Care and Support Authority.³⁴⁶

6.26 Two key proposals were presented to the committee in relation to reinstating tripartite consultation: firstly, reconvening an advisory council and secondly, resuming the use of industry reference groups. These proposals are examined in the following sections.

WorkCover advisory council

6.27 Several review participants supported re-establishing a WorkCover advisory council, similar to the council that existed prior to the 2012 reforms to the workers compensation scheme. While some participants wanted to reconstitute the former Workers Compensation and Workplace Occupational Health and Safety Council, others argued in favour of forming a new consultative body.

6.28 The Workers Compensation and Workplace Occupational Health and Safety Council was formed in 2001 by merging the Occupational Health and Safety Council and the Workers Compensation Advisory Council. The council's role was to '... advise the Minister on strategies for the prevention of workplace injury, injury management/return-to-work and compensation issues.'³⁴⁷ The council's members included worker and employer representatives, medical and legal practitioners, insurance, injury management and occupational health and safety experts.³⁴⁸

³⁴⁴ Submission 31, Unions NSW, p 22.

³⁴⁵ Evidence, Ms Donnelly, 12 May 2014, p 14.

³⁴⁶ Evidence, Ms Donnelly, 12 May 2014, p 14.

³⁴⁷ WorkCover Authority of NSW, *Annual Report 2001-2002*, p 17.

³⁴⁸ WorkCover, *New_WorkCover_council_appointed* (1February2010), http://www.workcover.nsw.gov.au/aboutus/newsroom/Pages/new_workcover_council_appointed.aspx.

- 6.29** Unions NSW suggested that the Workers Compensation and Workplace Occupational Health and Safety Council should be reconstituted as there are currently no formal industry mechanisms for providing feedback on workplace issues:

There has been no formal industry feedback mechanism for the development of health and safety, workers compensation, and injury management publications, legislative development, and WorkCover Authority positions on emerging issues. Unions NSW has made a recommendation to reconstitute tripartite advisory councils for workers compensation and work health and safety.³⁴⁹

- 6.30** Unions NSW suggested that the proposed advisory council could conduct open meetings to allow for greater transparency.³⁵⁰

- 6.31** The NSW Business Chamber similarly supported re-establishing an advisory body, along the lines of the original Workers Compensation Advisory Council, to provide advice to the Minister on work health and safety and workers compensation issues.³⁵¹ The Business Chamber said that while it was in favour of disbanding the original advisory council after it became too big and lost momentum, it had initially been an appropriate forum for primary stakeholders in the industry – workers and employers – to have informed debate about scheme reforms.³⁵²

- 6.32** The Australian Manufacturing Workers' Union also supported reconstituting the advisory council, adding that consideration should be given to whether '...WorkCover has a level of accountability to the Council; and any functions or powers the Council should have, including giving a directive and in providing reports to the Minister and the Parliamentary Committee.'³⁵³

- 6.33** Unions NSW further argued that WorkCover should establish a number of other tripartite forums to facilitate communication between employers, employees and the authority about work health and safety and workers compensation issues.³⁵⁴

- 6.34** In response to the proposal to reconstitute the Workers Compensation and Workplace Occupational Health and Safety Council, WorkCover advised that s 10 of the *Safety, Return to Work and Support Board Act 2012* provides for the establishment of advisory committees by the Minister, however, none have been set up to date.³⁵⁵

³⁴⁹ Submission 31, Unions NSW, p 22.

³⁵⁰ Submission 31, Unions NSW, p 23.

³⁵¹ Submission 32, NSW Business Chamber, p 4.

³⁵² Evidence, Mr Greg Pattison, Adviser, Workplace Health and Safety and Industrial Relations, NSW Business Chamber, 28 March 2014, p 8.

³⁵³ Submission 2, Australian Manufacturing Workers Union (NSW Branch), p 17.

³⁵⁴ Submission 31, Unions NSW, p 7

³⁵⁵ Answers to questions on notice, Safety, Return to Work and Support, 28 April 2014, Attachment B, p 3.

6.35 WorkCover said that it uses operational business activities and a range of targeted working groups and reference groups to consult with stakeholders in the absence of such an advisory committee.³⁵⁶

6.36 In response to the Unions NSW suggestion to establish various tripartite panels, WorkCover advised that the proposal would be considered as part of the consultation surrounding its enhanced stakeholder engagement model:

The Safety, Return to Work and Support agencies including WorkCover are developing an enhanced stakeholder engagement model, and will be consulting with stakeholders about the future approach. The suggested tri-partite panel for WorkCover will be considered in consultation with WorkCover's stakeholders.³⁵⁷

Committee comment

6.37 The committee believes that appropriately constituted advisory bodies play an important role in providing a forum for informed debate about workplace health and safety and workers compensation issues. The committee supports the establishment of a WorkCover advisory committee in line with s 10 of the *Safety, Return to Work and Support Board Act* and Schedule 2 of the *Work Health and Safety Act*. The advisory committee should be comprised of representatives of workers and employers, together with any other relevant stakeholders. We also consider that the meetings of the advisory committee should be open and transparent.

Recommendation 14

That the Minister for Finance and Services establish a WorkCover Authority of NSW Advisory Committee under section 10 of the *Safety, Return to Work and Support Board Act 2012* and Schedule 2 of the *Work Health and Safety Act 2011*. The advisory committee should be comprised of representatives of workers and employers, together with other relevant stakeholders.

6.38 Other tripartite mechanisms for consultation are considered below.

Industry reference groups

6.39 Section 33 of *Workplace Injury Management and Workers Compensation Act* previously provided for WorkCover to establish industry reference groups with tripartite membership of employer, employee and WorkCover representatives as well as expert members.³⁵⁸ Previous industry reference groups covered areas including construction, government administration and education and health and community services.³⁵⁹

³⁵⁶ Answers to questions on notice, Safety, Return to Work and Support, 28 April 2014, Attachment B, p 2.

³⁵⁷ Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, Attachment B, pp 2, 5, 8.

³⁵⁸ WorkCover Authority of NSW, *Operational Guidelines for Industry Reference Groups*, 2005, p 2.

³⁵⁹ WorkCover Authority of NSW, *Operational Guidelines for Industry Reference Groups*, 2005, p 3.

6.40 While s 33 of the Act has been repealed, a number of review participants submitted that proper consultation with industry reference groups can assist WorkCover to better develop its practices and procedures. For example, the Public Service Association of NSW stated that industry reference groups allow stakeholders to provide feedback on the work health and safety and workers compensation systems as a whole and that the disbanding of these groups has been detrimental:

... on the Industry Reference Groups on which it appeared, [the Public Service Association of NSW] was able to make comment on the system as a whole and consequently the interactions between divisions in terms of their outcomes for workers. Since the disbanding of these groups in 2012, this holistic consultation has been largely unavailable.³⁶⁰

6.41 There were calls by stakeholders to reconvene these groups, particularly the Legal Reference Group and the disability services industry reference group.

6.42 WorkCover advised that it already engages in segment-based consultation.³⁶¹ Ms Donnelly said that while WorkCover takes this approach it does not want to overburden stakeholders, particularly those that are engaged across all four Safety, Return to Work and Support agencies, with excessive meetings:

They [stakeholders] do not necessarily want to be at a lot of meetings hearing about issues that are not pertinent to them, and that is one of the considerations. Another point is that, in looking at the four agencies which are all in that space of safety, injury and insurance, there are common stakeholders... who we could, without thought, be burdening with a whole lot of consultation that maybe is not feasible. It needs to be what will meet their needs.³⁶²

Legal Reference Group

6.43 The Legal Reference Group was active from 21 June 2012 to 12 December 2013, and was formed as part of the WorkCover Regulatory Review Taskforce.³⁶³

6.44 While several stakeholders were interested in reconvening this forum, it was noted that there were a number of issues concerning WorkCover's engagement with the initial reference group. For example, the Law Society of New South Wales contended that the authority had not been transparent in its dealings with the Legal Reference Group. Ms May told the committee that despite regular meetings in 2012 the group was not consulted on the drafting of guidelines but instead found out that another group was working on the documents:

While we [the Legal Stakeholders Reference Group] were regularly sitting in meetings in 2012, guidelines were being worked on elsewhere by another committee or part of the task force. We asked whether we would get an opportunity to look at them and were not given that opportunity. When we complained about the lack of consistency between the guidelines in terms of their message, their adherence to legislation and various other issues, we were told that was being dealt with by another committee and

³⁶⁰ Answers to questions on notice, Public Service Association of NSW, 19 May 2014, p 1.

³⁶¹ Evidence, Ms Donnelly, 12 May 2014, p 14.

³⁶² Evidence Ms Donnelly, 12 May 2014, p 14.

³⁶³ Answers to questions on notice, Australian Lawyers Alliance, 2 May 2014, pp 1-2.

to hand over our issues and they would come back to us, which has never happened.³⁶⁴

- 6.45** Issues surrounding the drafting of WorkCover guidelines are discussed in more detail in chapter 7.
- 6.46** Ms May also noted that the reference group never received a resolution from WorkCover on any of the issues it raised over the course of its 20 meetings.³⁶⁵
- 6.47** The New South Wales Bar Association was similarly frustrated at the lack of outcomes from previous consultation with WorkCover. Mr Andrew Stone, Barrister and Member, Common Law Committee, New South Wales Bar Association, said ‘the problem is not going to the meeting and talking to people; it is whether anything is ever coming of it. They are good talkers; it is the listening and the actioning part that frustrates the hell out of us.’³⁶⁶
- 6.48** The Bar Association described the outcomes of the Legal Reference Group meetings as ‘minimal at best’, and attributed this failing to both WorkCover and the timing of the impact of the reforms:

This poor outcome was perhaps partly a reflection of a lack of acknowledgment from WorkCover of issues which were emerging in the implementation of the reforms, but also a reflection of the fact that the ‘bedding down’ of the legislation and a series of decisions in the Workers Compensation Commission and the Court of Appeal meant that many practical consequences of change only really began to emerge later in 2013, by which time WorkCover had wound back the meetings of the group.³⁶⁷

- 6.49** Mr Tim Concannon, Partner at Carroll and O’Dea Lawyers and Member of the Injury Compensation Committee, Law Society of New South Wales, suggested that the Legal Reference Group should be reinstated despite these failings.³⁶⁸ However, Ms May cautioned that the group should not meet unless ‘... there is proper consultation, an exchange of ideas and an answer given.’³⁶⁹
- 6.50** WorkCover acknowledged these concerns and advised that it intends for the Legal Reference Group, including Mr Garling, to reconvene and meet on a more regular basis.³⁷⁰

Disability industry reference group

- 6.51** Another specific area of concern raised during the review pertained to the disbanding of the disability reference group. National Disability Services was concerned that WorkCover’s lack of understanding of the changing nature of work in the disability industry has been

³⁶⁴ Evidence, Ms May 28 March 2014, p 35.

³⁶⁵ Evidence, Ms May, 28 March 2014, p 31.

³⁶⁶ Evidence, Mr Andrew Stone, Barrister, Member, Common Law Committee, New South Wales Bar Association, 28 March 2014, p 39.

³⁶⁷ Answers to questions on notice, New South Wales Bar Association, 1 May 2014, p 1.

³⁶⁸ Evidence, Mr Concannon, 28 March 2014, p 35.

³⁶⁹ Evidence, Ms May, 28 March 2014, p 35.

³⁷⁰ Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, Attachment A, p 3.

compounded by the abolition of the industry's reference group which has resulted in the loss of expert knowledge relating to the unique issues faced by the sector.³⁷¹

- 6.52** National Disability Services proposed that WorkCover reintroduce a sector-specific team or an industry reference group to achieve optimal outcomes for the disability services industry.³⁷²
- 6.53** When questioned by the committee about re-establishing a disability industry reference group, Ms Donnelly acknowledged that WorkCover could do more in this space and that the authority would consider the issue as part of its enhanced stakeholder strategy.³⁷³
- 6.54** Issues pertaining to the disability sector are discussed further in chapter 9.

Committee comment

- 6.55** The committee acknowledges the arguments in favour of WorkCover reinstating a tripartite model of consultation. This approach was seen as the most effective way to engage the primary stakeholders in the workers compensation sphere - workers and employers. However, as noted by WorkCover there are other significant stakeholders, such as service providers, who are not easily integrated into this model.
- 6.56** The committee understands that WorkCover is considering reinstating the tripartite model of consultation within the limits of the *Safety, Return to Work and Support Board Act* as part of broader consideration of its enhanced stakeholder engagement model (discussed earlier in this chapter. We look forward to seeing the outcomes of this model.
- 6.57** The committee also acknowledges the arguments in favour of reconvening industry reference groups. These groups offer expertise in their various fields and can be of great assistance to WorkCover in developing practices and procedures.
- 6.58** While we appreciate that WorkCover does not want to overburden stakeholders with consultation, establishing industry-specific reference groups is a means of including stakeholders, such as service providers, who would not be included in tripartite consultative bodies. We acknowledge that WorkCover is exploring the utility of such groups as part of its enhanced stakeholder communication strategy.
- 6.59** The committee notes the frustration felt by review participants regarding WorkCover's failure to adequately consult the Legal Reference Group during the 2012 reforms to the workers compensation scheme. We further note that WorkCover has given an undertaking to meet more regularly with this group and engage in more meaningful consultation, and we support this move.
- 6.60** Finally, the committee supports the re-establishment of a disability industry reference group as soon as practicable. This group will allow WorkCover to proactively respond to the needs of

³⁷¹ Evidence, Ms Susan Smith, Project Manager, National Disability Services, 21 March 2014, p 75 and Evidence, Mr Scott Holz, State Manager, National Disability Services, 21 March 2014, p 77; and Submission 8, National Disability Services, p 5.

³⁷² Submission 8, National Disability Services, p 7.

³⁷³ Evidence Ms Donnelly, 12 May 2014, pp 14-15.

the disability services industry. The group should include workers with a disability, their representatives, disability workers and employers and carers, and other stakeholders.

Recommendation 15

That the WorkCover Authority of NSW establish a disability industry reference group as soon as practicable.

Public information

- 6.61** Review participants identified a need to improve WorkCover's public information sources. Mr Garling was the lead proponent of this argument, expressing considerable concern that injured workers and employers were currently not able to easily access basic information about the workers compensation scheme.³⁷⁴
- 6.62** The following sections examine proposals to improve the level, quality and access to information provided by WorkCover in its annual reports, statistical bulletins, website and via its customer service hub.

Annual report

- 6.63** Various review participants expressed concern about the lack of detail provided in WorkCover's annual reports. For example, WIRO submitted that WorkCover's 2012-13 annual report contained minimal, and in some cases incorrect, details about the 2012 workers compensation scheme reforms:
- The Annual Report for 2012-13 contained on page 14 a reference to the 2012 reforms (which introduced very significant reforms) but the information contained on that page commented on only parts of the reforms and was incorrect in some of the information provided.³⁷⁵
- 6.64** Unions NSW suggested that WorkCover's annual reports should focus on the core functions of the authority and provide details that could inform decisions about safety or injury management, rather than the current emphasis on financial performance and governance.³⁷⁶
- 6.65** Unions NSW was also concerned that WorkCover no longer included information on agents fees, fraud and premium auditing in its annual reports.³⁷⁷
- 6.66** The Australian Federation of Employers & Industries was critical of the level of data on return to work rates in the annual report, arguing that this information was key to the functioning of the scheme and to the authority's rationale for implementing higher compensation payouts:

³⁷⁴ Evidence, Mr Garling, 21 March 2014, p 25.

³⁷⁵ Answers to questions on notice, WorkCover Independent Review Office, 24 April, p 5.

³⁷⁶ Submission 31, Unions NSW, p 43.

³⁷⁷ Submission 31, Unions NSW, p 31.

Other than a reference to improved return to work rates in the WorkCover Authority of NSW Annual Report 2012-13... WorkCover has provided no information on return to work rates or how higher weekly payments to workers influence their earlier return to work.

Given that early return to work was a justification given by WorkCover for making the change to higher compensation payments it is to be expected that WorkCover should report with detailed NSW scheme data on the scheme's return to work rates and what effect the increased payments are having.³⁷⁸

- 6.67** The Australian Federation of Employers & Industries was additionally concerned that the only publically available measure of the return to work rate was information published by Safe Work Australia's *Return to Work Survey*.³⁷⁹
- 6.68** In response to questioning from the committee about the content of its annual reports, Mr Watson advised that the Safety, Return to Work and Support agencies had changed their reporting focus and that previous annual reports were 'extremely extensive'.³⁸⁰
- 6.69** WorkCover explained that previously the WorkCover Annual Report incorporated both the annual report for WorkCover as well as the scheme's annual report. The reports were separated in 2012-13.³⁸¹
- 6.70** WorkCover also explained that scheme agents' fees are now included in the NSW WorkCover Scheme Annual Report rather than the WorkCover Annual Report, and noted that 'there is no specific requirement for the scheme agent fees to be reported in the NSW WorkCover Scheme Annual Report. However, it must be reported in the financial reports as required under the Australian Accounting Standards'.³⁸²
- 6.71** WorkCover agreed to consider re-including statistics on the number of cases of fraud it investigated during the year in its annual report.³⁸³
- 6.72** Mr Watson further noted that the public could access information that had previously been available in annual reports through the *Government Information (Public Access) Act 2009* process, or could subpoena WorkCover to provide the material.³⁸⁴

Publication of statistical bulletins

- 6.73** Section 23(m) of the *Workers' Compensation Act 1987* requires that WorkCover collect, analyse and publish statistical data. A number of review participants argued that the authority had failed to uphold this function.

³⁷⁸ Supplementary Submission 34a, Australian Federation of Employers & Industries, p 3.

³⁷⁹ Supplementary Submission 34a, Australian Federation of Employers & Industries, p 3.

³⁸⁰ Evidence, Mr Watson, 21 March 2014, p 10.

³⁸¹ Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 7.

³⁸² Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 7.

³⁸³ Evidence, Ms Donnelly, 21 March 2014, p 10.

³⁸⁴ Evidence, Mr Watson, 21 March 2014, p 10.

- 6.74** WorkCover previously released annual bulletins that covered New South Wales workers compensation claim statistics relating to the past financial year. The statistics assisted individuals and organisations to prevent workplace injury and disease, and to minimise the social and economic cost of claims through injury management practices.³⁸⁵
- 6.75** WIRO advised that the last statistical bulletin was published in 2010 for the period 2008-09 and the last scheme agent claims performance report was published in December 2012.³⁸⁶ WIRO insisted that it is important for WorkCover to publish a variety of statistical information to enable stakeholders to understand how the scheme is operating.³⁸⁷ It was suggested that this could be achieved via the annual publication of the information previously contained in statistical bulletins.³⁸⁸
- 6.76** Unions NSW also supported recommencing the publication of statistical bulletins, identifying the following information for potential inclusion:
- employment injuries
 - fatalities
 - workplace injuries
 - occupational diseases
 - other work-related injuries
 - lost time
 - payments.³⁸⁹
- 6.77** Unions NSW further submitted that more extensive information be made available in the bulletins, including details on:
- ABS Multi House Survey data comparisons with claims data
 - types of injuries and claims reported
 - return to work rates
 - emerging safety issues
 - self insurers performance and audit outcomes
 - the collated expenditure on medical expenses for liability assessment as compared to expenses for treatment
 - scheme agents including key performance indicators and fees

³⁸⁵ WorkCover, Statistical Bulletin 2008/2009, (30 September 2009), <<http://www.workcover.nsw.gov.au/formspublications/publications/pages/statisticalbulletin20082009.aspx>>.

³⁸⁶ Submission 36, WIRO, p 13.

³⁸⁷ Answers to questions on notice, WorkCover Independent Review Office, 24 April 2014, p 9

³⁸⁸ Answers to questions on notice, WorkCover Independent Review Office, 24 April 2014, p 6.

³⁸⁹ Answers to questions on notice, Australian Manufacturing Workers Union (NSW Branch), 17 April 2014, pp 1-2.

- the numbers of claimants who are terminated or returned to work
- return to work rates under the entire range of return to work statistical variables available nationally
- WorkCover's prosecutions.³⁹⁰

6.78 Unions NSW added that Safe Work Australia's *Comparative Performance Monitoring Report* included some of these statistics, but noted that the report is time delayed³⁹¹ and offers limited information as to specific indicators for the operation of WorkCover.³⁹²

6.79 Other review participants supported reinstating the monthly publication of full claims data. For example, the Australian Federation of Employers & Industries stated that a monthly publication could assist in identifying key aspects of scheme performance, including return to work rates, rather than having an annual statistical update or relying on information provided in Safe Work Australia's *Return to Work Survey*, which is the current practice.³⁹³

6.80 As a result of these concerns, WorkCover advised that it will resume publication of its Statistical Bulletin in May 2014, including a consolidated report that covers the period from 2010 to May 2014, followed by annual publication of the bulletin.³⁹⁴ Further, the new bulletins will include at least the same amount of information as previously published.³⁹⁵

6.81 WorkCover also drew the committee's attention to Safe Work Australia publications (which were also mentioned by other review participants) which include comparative performance monitoring information from all Australian jurisdictions and New Zealand:

Safe Work Australia also publishes the Comparative Performance Monitoring Report, which includes a wide range of statistical information on the New South Wales Workers Compensation Scheme. The Return to Work Survey: Headline Measures Report also published by SafeWork Australia also includes timely and relevant statistics benchmarking New South Wales workers compensation results.³⁹⁶

Committee comment

6.82 The committee notes review participants' concerns about the lack of information provided in WorkCover's annual reports, and acknowledge the requests to include more information that can better inform decisions about work health and safety. Further, we note that stakeholders expressed a reluctance to solely rely on data provided by Safe Work Australia.

³⁹⁰ Answers to questions on notice, Unions NSW, 24 April 2014, pp 19-20.

³⁹¹ In respect to the *Comparative Performance Monitoring Report* providing time delayed material, the fifteenth edition of the report, released in October 2013 stated that 'The data used in this report were most recently supplied by jurisdictions for the 2011-12 financial year plus updates back to 2007-08.' Safe Work Australia, *Comparative Performance Monitoring 2011-12*, Fifteenth Edition, October 2013, p v.

³⁹² Submission 31, Unions NSW, p 21.

³⁹³ Supplementary Submission 34a, Australian Federation of Employers & Industries, p 3.

³⁹⁴ Answers to questions on notice, Attachment B, WorkCover, p 2.

³⁹⁵ Evidence, Ms Donnelly, 21 March 2014, p 10.

³⁹⁶ Answers to questions on notice, WorkCover Authority of NSW, Attachment B, p 2; and Evidence, Mr Watson, 21 March 2014, p 11.

- 6.83** The committee acknowledges that WorkCover took a new approach to its annual report in 2012-13, separating the WorkCover Annual Report and the NSW WorkCover Scheme Annual Report, as well as changing the focus of those reports. However, we are concerned that some valuable information has been omitted under the new reporting method.
- 6.84** We therefore recommend that WorkCover include more detailed information in its annual reports, including information on the claims process, injury management, fraud, premium auditing and return to work rates.

Recommendation 16

That the WorkCover Authority of NSW include more detailed information in its annual reports, including information on claims processes, injury management, fraud, premium auditing and return to work rates.

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- 6.85** The committee acknowledges that review participants were frustrated by WorkCover's decision to stop publishing its annual statistical bulletins. We note that WorkCover advised that it planned to recommence publishing its statistical bulletins in May 2014, with the new bulletins including at least the same amount of information as previously published. However, the new statistical bulletins were not available on the authority's website as at 11 September 2014. Given that WorkCover is required to publish statistical data under s 23 of the *Workers Compensation Act*, we recommend that WorkCover publish the statistical bulletins, including bulletins containing information from 2010 to September 2014, as a matter of urgency.

Recommendation 17

That the WorkCover Authority of NSW recommence publishing its statistical bulletins, and publish bulletins containing information from 2010 to September 2014, as a matter of urgency.

Website

- 6.86** The committee received evidence that WorkCover's website does not provide accurate, up-to-date information in an accessible fashion. For example, WIRO called the website 'complex and difficult to navigate':

The WorkCover website is complex and difficult to navigate. It probably tries to do too much. The information for injured workers is often out of date and therefore no longer correct or is couched in terms and language which the injured worker could find difficult to understand.³⁹⁷

- 6.87** WIRO cited WorkCover's online factsheets as an example of these issues:

³⁹⁷ Answers to questions on notice, WorkCover Independent Review Office, 24 April 2014, p 5.

There are fact sheets which purport to be of assistance to the injured worker but are written for the benefit of insurers rather than injured workers particularly those who struggle with the complex terms used in these publications.³⁹⁸

- 6.88** Website improvements suggested by WIRO included having clear and simple information about what an injured worker should do following an injury at work, and allowing injured workers to capture the result of the workplace incident immediately and take a comment from any witness via their mobile phones.³⁹⁹
- 6.89** Another improvement, proposed by the NSW Business Chamber, was to reinstate an online service for employers to determine whether a person was an employee or a contractor. Mr Pattison advised that this service had previously been available and had greatly assisted employers.⁴⁰⁰
- 6.90** WorkCover advised that it was in the process of making improvements to its website, including reviewing publically available information:

WorkCover continues to improve the information made available to injured workers including information on its website, fact sheets, information sent in correspondence by the Customer Service Centre and about the services provided by the WIRO.⁴⁰¹

Customer service centre

- 6.91** Review participants also expressed concerns about the reliability and usefulness of the WorkCover customer service centre. WorkCover advised that the aim of the centre is to assist injured workers in their interactions with WorkCover:

Our customer service hub can be contacted on 131 050. They can talk a person through the various aspects involved in interacting with WorkCover. The customer service representative can fill out the form on their behalf and interact with them verbally.⁴⁰²

- 6.92** Mr Watson advised that the centre receives around 17,600 calls per month and helps meet the needs of workers with low literacy skills more effectively than the WorkCover website.⁴⁰³
- 6.93** However, Mr Garling was concerned that people were contacting the WorkCover customer service centre rather than WIRO, which is the statutory authority charged with dealing with complaints:

I think the major difficulty we face is the fact that the first point of contact is often given as the WorkCover complaints line rather than mine. I have the statutory authority to deal with complaints and we really should be the one contacted first.⁴⁰⁴

³⁹⁸ Answers to questions on notice, WorkCover Independent Review Office, 24 April 2014, p 5.

³⁹⁹ Answers to questions on notice, WorkCover Independent Review Office, 24 April 2014, p 5.

⁴⁰⁰ Evidence, Mr Pattison, 28 March 2014, p 3.

⁴⁰¹ Evidence, Mr Gary Jeffery, A/General Manager, WorkCover Authority of NSW, 21 March 2014, p 12.

⁴⁰² Evidence, Mr Watson, 21 March 2014, p 13.

⁴⁰³ Evidence, Mr Watson, 21 March 2014, p 13.

6.94 Mr Stone questioned the qualifications of the customer service centre's staff to give what appears to essentially be legal advice:

... [WorkCover] are very big on telephone advisory services and you can never pin them down on whether these services give legal advice and if they are giving legal advice is it lawyers doing it? They will always swear they are not giving you legal advice, but I can never quite work out how you can advise somebody about their legal rights and not call it legal advice. The qualifications, experience, competency of the people giving that advice always frightens me and, again, it is never independently audited.⁴⁰⁵

6.95 Another issue raised about the telephone advisory service concerned the new work capacity liaison officer. In its answers to questions on notice dated 28 April 2014 WorkCover advised that the customer service centre had recently employed this officer to provide high quality customer focused service, advice and support on the work capacity process to injured workers.⁴⁰⁶

6.96 WorkCover described the work capacity liaison officer as the key contact for the escalation for work capacity disputes, and said that the role contributes to '... feedback and communication between the WIRO, WorkCover Customer Service Centre, the Merit Review Service and Workers Compensation Insurance Division.'⁴⁰⁷

6.97 However, after receipt of this information from WorkCover, the committee received correspondence from Mr Garling from WIRO advising that it was the first time he had heard of such an officer.⁴⁰⁸

6.98 The committee questioned WorkCover on this lack of communication at its hearing on 12 May 2014. Ms Donnelly advised that the work capacity liaison officer had been employed since April 2014 and that the authority was evaluating the value of such a role:

We are still... evaluating whether that model will work. It is a role that exists within the customer service centre. The objective is to have as one of the team members someone who is a deeper specialist than the rest of the front-line staff who builds up their understanding of work capacity assessment and relationships with the various other bodies that have a role in work capacity assessments and reviews in order to have a faster, easier process if a matter is more complex and needs to be referred on.⁴⁰⁹

6.99 WorkCover explained that the work capacity liaison officer had not been in direct contact with WIRO because of the reporting structure within the authority:

WorkCover and the WorkCover Independent Review Office have both established a single liaison and contact person to communicate on matters related to injured

⁴⁰⁴ Evidence, Mr Garling, 21 March 2014, p 22.

⁴⁰⁵ Evidence, Mr Stone, 28 March 2014, p 45.

⁴⁰⁶ Answers to questions on notice, Safety, Return to Work and Support, 28 April 2014, p 8.

⁴⁰⁷ Answers to questions on notice, WorkCover, 28 April 2014, p 8.

⁴⁰⁸ Correspondence, Mr Kim Garling, Workplace Independent Review Officer, Workplace Independent Review Office, 12 May 2014, p 1.

⁴⁰⁹ Evidence, Ms Donnelly, 21 March 2014, p 17.

workers. The WorkCover single liaison and contact person is the Senior Manager of Customer Experience.

The Work Capacity Liaison Officer reports to the Senior Manager Customer Experience in the organisational structure.

In line with this arrangement, the Work Capacity Liaison Officer raises matters that need to be discussed with the WorkCover Independent Review Office, to the Senior Manager of Customer Experience who communicates with the single liaison and contact person at the Work Cover Independent Review Office. For this reason, the Work Capacity Liaison Officer has not had direct conversations with the WorkCover Independent Review Office.⁴¹⁰

- 6.100** On 11 July 2014, Mr Garling advised the committee that WorkCover had still not informed WIRO of the Work Capacity Liaison Officer.⁴¹¹

Committee comment

- 6.101** The committee notes the concerns of WIRO regarding the WorkCover website, including that it is difficult to navigate and provides out-of-date information. The committee is deeply concerned that the website, which is likely to be the first location that many injured workers seek assistance, does not provide authoritative and accessible information. We note that WorkCover is in the process of making improvements to its website, including reviewing publically available information. It is important that this be a thorough review. We recommend that the website be updated as soon as possible following the conclusion of the review.

Recommendation 18

That the WorkCover Authority of NSW update its website as soon as possible following the conclusion of its current review of publically available information.

- 6.102** We are concerned that the existence of WIRO does not appear to be clearly communicated to injured workers, and consider that this oversight should be rectified immediately. The committee recommends that the WorkCover 'Contact us' webpage, as well as any automated phone messages used by the customer service centre, include information about the WIRO.

Recommendation 19

That the WorkCover Authority of NSW immediately update its 'Contact us' webpage, as well as any automated phone messages used by the customer service centre, to include information about the WorkCover Independent Review Office.

⁴¹⁰ Answers to questions on notice, Safety, Return to Work and Support, 11 June 2014, p 10.

⁴¹¹ Correspondence, Mr Kim Garling, Workplace Independent Review Officer, Workplace Independent Review Office, to the Committee Director, 11 July 2014, p 1.

- 6.103** We are also concerned by the lack of communication between WorkCover and WIRO regarding the newly appointed work capacity liaison officer. Given the vital role that WIRO plays in supporting injured workers through the work capacity process, it is unsatisfactory that the liaison officer or their supervisor has not sought to establish contact with the Workplace Independent Review Officer. While the committee notes that the liaison officer has not yet been established as a permanent position, we nonetheless believe it would be prudent for communication to be established between the two offices, and encourage WorkCover to ensure this occurs.

Chapter 7 WorkCover guidelines

The role of WorkCover in developing and issuing guidelines that facilitate the operation of the workers compensation scheme was discussed throughout the review. This chapter discusses concerns expressed by review participants regarding a lack of consultation during the development process and confusion over the number and status of guidelines. The chapter also identifies a need to undertake a comprehensive review to simplify and consolidate the guidelines.

Guidelines

7.1 WorkCover is empowered by the *Workplace Injury Management and Workers Compensation Act 1998* to issue guidelines in the following areas:

- the assessment of the degree of permanent impairment of an injured worker as a result of an injury
- the professional or other requirements (including qualifications, training or membership of professional bodies) for a medical practitioner to be permitted to carry out assessments of permanent impairment
- the giving of interim payment directions by the Registrar of the Workers Compensation Commission
- such other matters as a provision of the workers compensation legislation provides may be the subject of WorkCover guidelines.⁴¹²

7.2 The Act states that:

- WorkCover may amend, revoke or replace guidelines made by WorkCover, and the Minister may amend, revoke or replace guidelines made by the Minister
- guidelines may adopt the provisions of other publications, whether with or without modification or addition and whether in force at a particular time or from time to time
- guidelines, including any amendment, revocation or replacement, must be published in the Government Gazette and take effect on the day of that publication or, if a later day is specified in the guidelines for that purpose, on the day so specified.⁴¹³

7.3 The Act further requires WorkCover to develop guidelines that relate to the assessment of the degree of permanent impairment of an injured worker in consultation with relevant medical colleges, including the Royal Australasian College of Physicians, the Royal Australasian College of Surgeons, the Australian Orthopaedic Association and other relevant colleges and associations.⁴¹⁴

⁴¹² *Workplace Injury Management and Workers Compensation Act 1998*, s 376(1). Section 376(2) empowers the Minister for Finance and Services to issue guidelines with respect to the procedure for medical assessments.

⁴¹³ *Workplace Injury Management and Workers Compensation Act 1998*, s 376(2).

⁴¹⁴ *Workplace Injury Management and Workers Compensation Act 1998*, s 377.

- 7.4 Throughout the review, concerns were raised relating to the number and method of development of WorkCover guidelines. A need to review these guidelines was identified in order to ascertain which guidelines are redundant, or incompatible with the current workers compensation legislation.

Development of guidelines

- 7.5 A central area of concern during the review was the lack of stakeholder consultation undertaken by WorkCover during the development of guidelines. It was argued that this lack of consultation has resulted in guidelines that do not accurately reflect legislative requirements and are poorly communicated to those people most affected by the guidelines.

- 7.6 Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office (WIRO), expressed concern over both the lack of consultation and notification to his office when guidelines are changed, particularly given that the WIRO staff are highly qualified staff and would be able to provide valuable input into any proposed amendments.⁴¹⁵

- 7.7 Mr Garling observed that this lack of communication can result in the provision of wrong advice to people who contact WIRO for assistance:

... with the two regulations to which I referred in my report.⁴¹⁶ They came out of the blue, no warning, no hint. My office is giving information to people who call up which is fundamentally wrong. We did not know that it was going to be changed or that there would be some alteration coming, so there is no consultation. That has got to change because there are people with the ability to make positive comment who are not being offered that opportunity.⁴¹⁷

- 7.8 The Law Society of New South Wales highlighted the lack of consultation and communication regarding the development of guidelines as a critical issue. The Law Society noted that while a Legal Reference Group exists, it meets infrequently and has not been consulted over the issuing of guidelines:

An important example of the lack of communication is WorkCover's failure to consult with this Group with respect to the issuing of guidelines introduced following commencement of the *Workers Compensation Legislation Amendment Act 2012*. Thorough and timely stakeholder consultations would have avoided the additional time and cost involved in production of the numerous amended versions of these guidelines.⁴¹⁸

- 7.9 This issue was also discussed in chapter 6.

- 7.10 Further, the Law Society submitted that the role of WorkCover in developing guidelines should be 'carefully reviewed' because of instances where the guidelines have either contradicted, or gone beyond the scope of, the relevant workers compensation legislation:

⁴¹⁵ Evidence, Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office, 21 March 2014, p 19.

⁴¹⁶ See Submission 36, WorkCover Independent Review Office.

⁴¹⁷ Evidence, Mr Garling, 21 March 2014, p 19.

⁴¹⁸ Submission 22, Law Society of New South Wales, p 3.

There have been several instances where guidelines prepared by WorkCover for the purpose of facilitating the legislation have been inconsistent with the legislation, rendering those guidelines unworkable and potentially invalid. In the [Injury Compensation] Committee's view it is also arguable that some of the guidelines go beyond WorkCover's mandate as provided in the 1987 Act and 1998 Act. WorkCover has arguably been operating even further beyond the scope of its already broad functions.⁴¹⁹

- 7.11** The New South Wales Workers Compensation Self Insurers Association also expressed concern regarding inconsistencies between the guidelines and the legislation, which it attributed to WorkCover's failure to adequately consult stakeholders:

It is the experience of the Association that such guidelines are almost inevitably developed with minimal or no consultation with those on whom they are imposed. This has often had the result that guidelines are developed in a manner which is inconsistent with the legislation pursuant to which they are made and which are unduly onerous and do very little to assist safety in the workplace or improve the smooth return to work process.⁴²⁰

- 7.12** The association further suggested that the legislation and regulations governing the workers compensation scheme are '... complex enough without being rendered more complex and difficult to follow by lengthy and often inconsistent guidelines'.⁴²¹

- 7.13** The Law Society of New South Wales made the same point, stating '... the current legislative framework is itself sufficiently complex and difficult to understand without rendering it more so by the repeated development and redevelopment of guidelines by WorkCover'.⁴²²

- 7.14** However, not all review participants were critical of the development process for the guidelines. Mr Jason Allison, Manager, Chief Workers Compensation Underwriting and Portfolio Management, Suncorp Group, stated that Suncorp was 'satisfied' with its ability to provide input to the development of guidelines:

Overall, the guidelines provide an effective additional resource to assist with the operational implementation of the legislation, and management of claims. They are a pre-requisite tool to assist in the consistent application of legislation. The guidelines are developed on an iterative basis as they are applied in practice. Suncorp is satisfied that WorkCover NSW provides appropriate opportunities for our input into the further development of guidelines.⁴²³

- 7.15** Another specific issue that came to light during the review was that WorkCover developed work capacity decision guidelines requiring employers to comply with a document called the 'Best Practice Decision-making Guide'. However, WIRO advised the committee: "That Guide

⁴¹⁹ Submission 22, Law Society of New South Wales, pp 3-4.

⁴²⁰ Submission 12, NSW Workers Compensation Self Insurers Association, p 5.

⁴²¹ Submission 12, NSW Workers Compensation Self Insurers Association, p 5.

⁴²² Submission 22, Law Society of New South Wales, pp 3-4.

⁴²³ Evidence, Mr Jason Allison, Chief Workers Compensation Underwriting & Portfolio Management, Commercial Insurance, Suncorp Group, 24 April 2014, p 2.

does not exist and has never existed. Any decision of an insurer during that period has been held to be invalid'.⁴²⁴

- 7.16** In response to this issue, Ms Carmel Donnelly, General Manager, Strategy and Performance, Safety, Return to Work and Support, acknowledged that it had been an oversight by WorkCover to not publish the 'Best Practice Decision-making Guide'.⁴²⁵ However, WorkCover advised that it had jointly obtained legal advice with WIRO which stated that not publishing the Guide 'did not invalidate the guidelines for making work capacity decisions'.⁴²⁶

Number and status of guidelines

- 7.17** A second issue of concern for review participants was the number of guidelines in existence, with some confusion about which guidelines are currently applicable. This confusion was articulated by Ms Roshana May, Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, who observed that it can be difficult to ascertain which guidelines are current:

... we have guidelines that were issued in 2006 and there is no way of finding out from the WorkCover website, we believe, whether they are still relevant but we do not know because WorkCover has not, despite our requests, provided us with a list of current operating guidelines and they are changed so often.⁴²⁷

- 7.18** Ms Denise Fishlock, Chairperson, New South Wales Workers Compensation Self Insurers Association, also expressed concern that '[t]here are a lot of guidelines that WorkCover has created over the last 10 to 20 years and I think a lot of them are outdated. They really do not help insurer managed claims ...'.⁴²⁸

- 7.19** As an example of the number of guidelines that exist, Mr Allison outlined the guidelines which Suncorp as a scheme agent utilises when managing claims, including:

- evaluation of permanent impairment
- jobcover placement program
- guidelines for claiming compensation benefits
- independent medical examinations and reports
- work capacity guidelines
- review of work capacity decisions

⁴²⁴ Submission 36, WorkCover Independent Review Office, p 10.

⁴²⁵ Evidence, Ms Carmel Donnelly, General Manager, Strategy and Performance, Safety, Return to Work and Support, 21 March 2014, p 13.

⁴²⁶ Answers to questions on notice, WorkCover Authority of NSW, Attachment A – Matters raised by the WorkCover Independent Review Officer submission to the Law and Justice Committee Review of the Exercise of the Functions of the WorkCover Authority, 28 April 2014, p 3.

⁴²⁷ Evidence, Ms Roshana May, Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, 28 March 2014, p 36.

⁴²⁸ Evidence, Ms Denise Fishlock, Chairperson, NSW Workers Compensation Self Insurers Association, 21 March 2014, p 38.

- guidelines on injury management consultants
- work trial guidelines
- domestic assistance guidelines
- return to work assist program for micro employers guidelines.⁴²⁹

7.20 Mr Allison added that there are ‘... a range of other guidelines that broadly cover work place safety, licensing requirements, insurance and premium setting’.⁴³⁰

7.21 WIRO commented that there is often confusion about the status of guidelines, particularly in regard to whether or not they are delegated legislation:

WorkCover Guidelines carry different statuses - some are delegated legislation and some are simply Guidelines for the guidance of insurers. However it is difficult to appreciate the difference and the response by WorkCover as to the status of each Guideline is not always clear or consistent.⁴³¹

7.22 Mr Paul Macken, Honorary Lawyer, New South Wales Workers Compensation Self Insurers Association, advised that WorkCover had previously attempted to rationalise the number of guidelines applying to the workers compensation scheme. This review had stalled because of the complexity of the undertaking, despite the association’s suggestion to start afresh and only draft guidelines where they were mentioned in legislation:

About two years ago WorkCover conducted their own attempt to audit and rationalise the guidelines and guideline-like publications. There turned out to be well over 700 of them, many of which WorkCover did not even know existed at all and the auditing and review process involved essentially looking at every one of them, trying to correct them, amalgamate them and abolish them where possible. The suggestion we made at the time to the WorkCover Authority is quite simple. We said, ‘All you need to do is read the legislation and where you read the word ‘guideline’ draft something that is appropriate, rational and simple and then abolish every guideline except the ones you have drafted.’ Apparently that was a little bit too simple so they did not adopt the suggestion and they went on with the review process until it eventually got disbanded, and now we are left with people not knowing what guidelines are in force.⁴³²

7.23 WorkCover advised the committee that, as at 11 September 2014, they had 105 guidelines.⁴³³

Review of the guidelines

7.24 In order to address concerns over the guidelines, a number of review participants suggested that WorkCover evaluate and consolidate the guidelines to ensure relevancy and accuracy. In

⁴²⁹ Evidence, Mr Allison, 24 April 2014, p 5.

⁴³⁰ Evidence, Mr Allison, 24 April 2014, p 5.

⁴³¹ Submission 36, WorkCover Independent Review Office, p 10.

⁴³² Evidence, Mr Paul Macken, Honorary Lawyer, NSW Workers Compensation Self Insurers Association, 21 March 2014, p 38.

⁴³³ Correspondence from Hon Dominic Perrottet MP, Minister for Finance and Services, to Chair, 11 September 2014.

undertaking this proposed process, review participants emphasised the importance of WorkCover engaging with key stakeholders. This position was summarised by Mr Bruce McManamey, NSW Committee Member, Australian Lawyers Alliance, who said: 'I think there is a fairly strong case for a complete redrafting of the guidelines but one done with involvement of the stakeholders'.⁴³⁴

- 7.25** As with the New South Wales Self Insurers Association, Mr Tim Concannon, Partner, Carroll and O'Dea Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, also suggested that WorkCover should start afresh with the drafting of guidelines. Mr Concannon submitted that as the workers compensation legislation is so complex, guidelines should only be issued where 'absolutely necessary':

I think a good start would be to go back to stage one and get rid of all the guidelines that people do not know are not current and start afresh. If you have to issue any guidelines, only do so if they are absolutely necessary ... we have got two pieces of very complex legislation plus any number of guidelines. I think there were at least 70 at last count. Not only that, we have also got these documents called Operational Instructions sent by WorkCover to the insurers that we do not know anything about. We only hear about it inferentially.⁴³⁵

- 7.26** Ms May echoed this suggestion, stating that WorkCover should only publish guidelines that are explicitly identified in the workers compensation legislation:

... every time the word 'guidelines' appears in the Act it should be highlighted and only a guideline that is in compliance with the responsibility that is given in that part of the Act should be responded to by WorkCover.⁴³⁶

- 7.27** Ms May added that given the complexity of the legislation, stakeholder consultation was essential to ensure the accuracy of guidelines:

... there has to be consultation because we know from history that WorkCover do not get it right. They do not get it right for all sorts of reasons. They do not get the interpretation of the legislation and this piece of legislation in itself is the most complex piece of legislation we have ever had in New South Wales in workers compensation.⁴³⁷

- 7.28** Mr Anthony Scarcella, NSW Director, National Council of the Australian Lawyers Alliance, concurred that stakeholder consultation would play a critical role in rationalising and simplifying the applicable guidelines, especially as injured workers no longer have access to legal representation during the claims process:

I think the stakeholders have an excellent opportunity to provide guidance and input into the creation of those guidelines and, more importantly, to simplify them, especially in a scenario where you have got work-capacity decisions where workers are on their own so to speak in the review process. It would be good to have something

⁴³⁴ Evidence, Mr Bruce McManamey, NSW Committee Member, Australian Lawyers Alliance, 28 March 2014, p 53.

⁴³⁵ Evidence, Mr Tim Concannon, Partner, Carroll and O'Dea Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales, 28 March 2014, p 36.

⁴³⁶ Evidence, Ms May, 28 March 2014, p 36.

⁴³⁷ Evidence, Ms May, 28 March 2014, p 36.

really simple. I mean lawyers have difficulty wading their way through some of those guidelines. So if they could be trimmed and brought back down to a reasonable number then maybe it would be easier to work with.⁴³⁸

7.29 Mr Scarcella emphasised the need to consult broadly during any review of the guidelines to ensure that a range of perspectives were brought to bear on the process:

They should look at those who are at the coalface day in and day out. I am not saying just the plaintiff lawyers. The insurance lawyers and the insurers themselves have an important role to play and have the experience.⁴³⁹

7.30 When questioned by the committee on the need to undertake a review of the existing guidelines and better communicate any changes in the guidelines, WorkCover advised that it is currently ‘... developing a clear protocol for consultation, communication and publication of fact sheets for any revised guidelines and regulations’.⁴⁴⁰

7.31 WorkCover indicated that it had commenced a review of the guidelines relating to work capacity, with an anticipated implementation date for the new guidelines of July 2014:

WorkCover has commenced a review of current guidelines and instructions to ensure the authority and applicability for each instrument and whether it is for guidance only or mandatory is clarified. The WIRO has been advised of the review and is represented on the review working group ... The review of the work capacity guidelines in collaboration with the WIRO is due to be completed by 31 May for implementation in July 2014.⁴⁴¹

7.32 WorkCover further advised that it is reviewing the Guidelines for Claiming Compensation Benefits to clearly ‘outline the actions to be taken when making or determining a claim for compensation under NSW workers compensation legislation’.⁴⁴² The objectives of the review are to:

- make the guidelines simpler
- ensure that the guidelines are accessible and easily understood by all stakeholders in the claims process
- remove duplicated content
- determine content where allowed by specific legislative provision
- identify inconsistencies and provide clarification of claims processes.⁴⁴³

7.33 The review is being conducted by working groups comprised of scheme agents and self and specialised insurers.⁴⁴⁴ WorkCover advised that the draft guidelines will be distributed to a

⁴³⁸ Evidence, Mr Anthony Scarcella, NSW Director, National Council of the Australian Lawyers Alliance, 28 March 2014, p 53.

⁴³⁹ Evidence, Mr Scarcella, 28 March 2014, p 53.

⁴⁴⁰ Answers to questions on notice, WorkCover Authority of NSW, Attachment A, p 4.

⁴⁴¹ Answers to questions on notice, WorkCover Authority of NSW, Attachment A, p 2.

⁴⁴² Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, pp 10-11.

⁴⁴³ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 11.

⁴⁴⁴ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 11.

wider group of stakeholders, including WIRO, for further feedback prior to the guidelines coming into effect:

WorkCover has developed a consultation strategy to ensure the draft guidelines are appropriately released for consultation prior to gazettal. This strategy involves initial consultation with the WIRO, followed by the opportunity for further feedback via the 'Have your Say' website. Key stakeholders will be notified of this mechanism and the 21-day consultation period once the site is live.⁴⁴⁵

- 7.34** WorkCover said that following the review, the guidelines will be '... more concise, accurate and accessible to stakeholders'.⁴⁴⁶

Committee comment

- 7.35** The committee acknowledges the concerns of review participants regarding the guidelines that facilitate the implementation of the workers compensation scheme. These concerns relate to the development, accuracy and applicability of the guidelines, as well as the communication strategies used to inform key stakeholders of any amendments to the guidelines.
- 7.36** We acknowledge that WorkCover is undertaking reviews of the guidelines relating to work capacity and claiming compensation benefits, and that these reviews are being undertaken in consultation with relevant stakeholders. However, the committee considers WorkCover should undertake a full review of every guideline that applies to the workers compensation scheme in consultation with relevant stakeholders, with the intent of simplifying and consolidating all of the guidelines.

Recommendation 20

That the WorkCover Authority of NSW undertake a review of all guidelines that apply to the workers compensation scheme, in consultation with stakeholders, to simplify and consolidate the guidelines.

⁴⁴⁵ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 11.

⁴⁴⁶ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2014, p 11.

Chapter 8 Work health and safety

This chapter explores issues relating to the implementation of work health and safety legislation in New South Wales, commencing with a discussion of the WorkCover inspectorate division, including the resourcing of the division and the quality of reports prepared by inspectors. The chapter considers the declining trend in the number of prosecutions pursued by WorkCover, before examining the ability of WorkCover to prosecute ‘phoenix’ companies and labour hire companies in instances of breaches of work health and safety legislation.

WorkCover inspectorate division

- 8.1** One of the key roles undertaken by WorkCover is as the regulator of work health and safety in New South Wales. The WorkCover Annual Report 2012-13 described the role of WorkCover in this regard as being to ‘... assist businesses to improve their workplace safety, while also meeting community expectations regarding enforcement’.⁴⁴⁷ Mr John Watson, General Manager, Work Health and Safety, WorkCover, provided an overview of the authority’s interactions with workplaces in undertaking this role:

WorkCover had nearly 250,000 workplace health and safety interactions with New South Wales workplaces in 2012-13. WorkCover’s focus on regional communities and the work on the high-risk sectors has led to an approximately 55 per cent increase in proactive workplace visits by WorkCover inspectors.⁴⁴⁸

- 8.2** Review participants raised a diverse range of issues in relation to the performance of the WorkCover inspectorate. For example, one issue was the need for greater resourcing of the inspectorate to facilitate more workplace inspections. The Public Service Association of NSW argued that the inspectorate should be better resourced because of the expanded portfolio of responsibilities that inspectors have following recent changes to work health and safety legislation:

WorkCover inspectors have wide-ranging responsibilities, including provision of health and safety information, workplace inspections and compliance. With recent changes in legislation, inspectors have been allocated additional responsibilities including dealing with Return to Work plan disputes, WHS dispute resolution, oversight of Health and Safety Representatives, Provisional Improvement Notices (PINs) and Right of Entry disputes. As no additional inspectors have been appointed, the current inspectors are experiencing work overload with competing priorities and are struggling to fulfil the full range of duties assigned to them.⁴⁴⁹

- 8.3** Mr Steve Turner, Assistant General Secretary, Public Service Association of NSW, asserted that more inspectors were needed within the division to allow for a stronger focus on ‘cumulative occupational health issues’:

⁴⁴⁷ WorkCover Authority of NSW, *Annual Report 2012-13*, p 18.

⁴⁴⁸ Evidence, Mr John Watson, General Manager, Work Health and Safety, WorkCover Authority of NSW, 21 March 2014, p 3.

⁴⁴⁹ Submission 30, Public Service Association of NSW, p 4.

We believe there needs to be greater resourcing of the inspectorate division, which has been run down in recent years. There has not been a new inspector for some time and some inspectors were made redundant last year. There needs to be a better focus on cumulative occupational health issues in workplaces: workplace stress, mental disorders, contact with chemicals in the workplace. These issues need to be better resourced with the inspectorate developed to investigate.⁴⁵⁰

8.4 Ms Rita Mallia, President, Construction Forestry Mining and Energy Union (NSW Branch), expressed concern that WorkCover is not devoting sufficient resources to work health and safety issues and claimed that there are a number of issues with the inspectorate, including:

- WorkCover failing to issue improvement notices when called upon to investigate multiple contraventions
- WorkCover inspectors appearing more concerned with union right of entry rather than safety issues
- WorkCover preventing union health and safety representatives and employee representatives from being involved in investigations
- WorkCover inspectors failing to notify health and safety representatives that an investigation is underway or provide updates on current safety investigation
- the WorkCover hotline being used to triage safety incident notifications where people are advising employers that people can return to work in an unsafe situation without investigation even being undertaken.⁴⁵¹

8.5 Another issue, raised by National Disability Services, is the experience of disability service providers with the inspectorate. While the organisation provided largely positive feedback on the performance of the inspectorate, it suggested that some inspectors could benefit from having a greater awareness of the practicalities of delivering services to people with disability, rather than focusing strictly on guidelines and procedures:

The majority of members' experience with WorkCover Inspectors is positive. Despite this, some members have reported feeling 'harassed' and 'intimidated' rather than supported where issues arise ... Some members also reported feeling that some WorkCover Inspectors rely too heavily on strict guidelines. Examples given indicated such Inspectors becoming preoccupied by documentation of all risks and formalisation of consultation systems rather than considering what is reasonably practicable for small but diverse disability service providers. It was felt that in these cases there was a lack of appreciation for the range of different activities and different environments which can make up the day to day operations of a service.⁴⁵²

8.6 A third issue, raised by Mr Andrew Stone, Barrister, and Member of the Common Law Committee, New South Wales Bar Association, is the variability in quality of workplace investigations and reports undertaken by the WorkCover inspectorate. Mr Stone noted that

⁴⁵⁰ Evidence, Mr Steve Turner, Assistant General Secretary, Public Service Association of NSW, 21 March 2014, p 48.

⁴⁵¹ Evidence, Ms Rita Mallia, President, Construction Forestry Mining and Energy Union, (NSW Branch), 28 March 2014, p 57.

⁴⁵² Submission 8, National Disability Services, p 5.

since investigation reports prepared by the inspectorate can be utilised as the basis for legal action, it is critical to ensure consistency in the quality of these reports:

... in WorkCover's other role as an accident investigator we are an end consumer of those investigations. When we are looking at the rights of people to pursue common law one of the starting points is – because these are things not investigated by police – what investigations WorkCover does, and they are of an incredibly variable standard. You see some very good and very thorough WorkCover investigations and you see WorkCover investigations where, through the use of a piece of machinery, they have not properly tested the machinery. They have relied upon the employer's own mechanic to test it for them. They have left it for three weeks before they get the supplier, who is a regular supplier to the employer, out to test it. I see some shockers.⁴⁵³

8.7 Mr Stone highlighted that the rigor displayed in investigation reports can be particularly problematic in regional and rural areas, where there can be close relationships between the inspectorate, workplace and equipment supplier:

It becomes a problem – particularly in regional and rural areas – if one is trying to investigate a malfunction in a piece of equipment and the only person in town who can look at it is the supplier who regularly supplies to the employer. That is not a relationship where you are likely to see a robust criticism of either the piece of equipment, its appropriateness or anything the employer has done with it, because everybody knows where the money goes. There are some real weaknesses in the investigation that we see from time to time.⁴⁵⁴

8.8 Mr Watson acknowledged Mr Stone's concerns, stating: 'There are always ongoing concerns about variability. Unfortunately, when you have 315 inspectors you are going to have a variety of operators'.⁴⁵⁵

8.9 WorkCover identified four key ways to ensure the consistency of the reports prepared by inspectors:

- training
- policies, procedures and guidelines
- internal governance
- external review.⁴⁵⁶

8.10 Mr Watson further discussed the range of actions pursued by WorkCover to create a robust inspectorate, explaining that regular internal audits are undertaken of inspectors' work, and that concerns about an inspector can be directly reported to WorkCover:

We have a specific governance unit that conducts internal audits of operations of inspectors when they serve a notice, write a report, provide an exit report when they

⁴⁵³ Evidence, Mr Andrew Stone, Barrister, Member, Common Law Committee, New South Wales Bar Association, 28 March 2014, p 38.

⁴⁵⁴ Evidence, Mr Stone, 28 March 2014, p 46.

⁴⁵⁵ Evidence, Mr Watson, 12 May 2014, p 13.

⁴⁵⁶ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2013, p 9.

leave a workplace and so on. Those sorts of things are all subject to audit and a report is prepared for our senior management team, which discusses them at meetings to ensure that we get consistency ... we are very happy to hear from members of the public if they believe that an inspector is not fulfilling their duties appropriately; and we will deal with that.⁴⁵⁷

- 8.11** In addition, WorkCover engages an independent company to undertake customer satisfaction surveys of the workplaces that have had interactions with the inspectorate. Mr Watson explained how the surveys are conducted:

... the other thing we do is to run customer satisfaction surveys. So we actually have a company go out independently on our behalf and talk to people anonymously. We do not know who they actually talk to; we just provide that company with a list of all the businesses we have visited, including the people who we have prosecuted. We get them to ask a series of questions about the quality of the service they received. We are obviously not asking someone who has been prosecuted whether or not they were happy that they got prosecuted; we are asking them about the process when we actually did that. Was it okay and what can we do to improve that?⁴⁵⁸

- 8.12** Mr Watson further advised that an external auditor has recently been appointed to review the decision making process for prosecutions, with a view to making recommendations to improve processes:

Recently I have asked for our internal auditor, who is separate from the people who work in our division, to seek out a review of the decision-making processes ... we have for prosecutions to ensure that it is robust, that best practice is going on around the country, and that it delivers what we need to deliver in respect of transparency and accountability ... They will provide us with an overview and, I would expect, with some recommendations for improvements or areas we can adjust.⁴⁵⁹

- 8.13** It is anticipated that the external auditor's final report will be completed in July 2014.⁴⁶⁰ The committee looks forward to receiving a copy of the report.

Committee comment

- 8.14** The committee acknowledges the range of concerns raised by review participants regarding the WorkCover inspectorate division, including that it is under-resourced, lacks specialist understanding of the disability sector and that the quality of reports prepared by inspectors can vary.
- 8.15** However we also note that a number of inquiry participants indicated a high level of respect and confidence in the ability of the Inspectorate in general. The committee notes that this is a difficult area of work for a work safety regulator that will inevitably produce disparate views from stakeholders.

⁴⁵⁷ Evidence, Mr Watson, 12 May 2014, p 12.

⁴⁵⁸ Evidence, Mr Watson, 12 May 2014, p 13.

⁴⁵⁹ Evidence, Mr Watson, 12 May 2014, p 13.

⁴⁶⁰ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2013, p 9.

- 8.16** The committee believes that the establishment of a disability industry reference group, discussed in chapter 6, will provide an appropriate forum to address the lack of specialist understanding within the inspectorate of the disability sector. Other issues relating to the disability sector are explored in chapter 9.
- 8.17** We note that an external auditor has recently been appointed to review the decision making process for prosecutions, with the intent of making recommendations to improve processes. In the interests of transparency, we believe that the auditor's final report should be made public, and that feedback on the report's recommendations be invited from key stakeholders. Details of the scope of the audit and its timing should be placed on the website.

Recommendation 21

That the WorkCover Authority of NSW publish the external auditor's final report on the decision making process for prosecutions, and invite feedback on the report's recommendations from stakeholders.

Prosecutions

- 8.18** As part of its role as the workplace regulator, WorkCover undertakes prosecutions for non-compliance with work health and safety legislation. Throughout the review, participants discussed the declining trend in the number of prosecutions pursued by WorkCover, as well as issues with the authority's ability to prosecute 'phoenix' companies and labour hire companies in instances of breaches of work health and safety legislation.
- 8.19** The number of prosecutions pursued during 2012-13 were detailed in the WorkCover annual report:
- In 2012-13, WorkCover concluded 98 successful work health and safety prosecutions, involving 83 defendants in 54 matters. Total fines awarded by the courts were over \$5,259,000.
- A total of 130 defendants were charged for breaches of the legislation in 2012-13. As at 30 June 2013, 172 defendants were before the courts for breaches of work health and safety legislation, not including the two matters currently under appeal involving six defendants.⁴⁶¹
- 8.20** The annual report also highlighted the 'Close the Loop' program, which involves WorkCover meeting with recently prosecuted workplaces '... to improve their work health and safety performance, and ensure risks and hazards that gave rise to the prosecution have been eliminated or controlled'.⁴⁶² The annual report noted the success of the program:

Although the program was initially conceived as a verification program, the evaluation has shown that the program delivers added value as perceived by the workplace representatives that include; improving their working relationship with WorkCover,

⁴⁶¹ WorkCover Authority of NSW, *Annual Report 2012-13*, p 18.

⁴⁶² WorkCover Authority of NSW, *Annual Report 2012-13*, p 22.

providing an opportunity to confirm changes in systems and management practices, and to open up communication lines about safety issues.⁴⁶³

8.21 In regard to the declining trend in the number of prosecutions undertaken by WorkCover, some review participants argued that this decline was a positive outcome of WorkCover placing greater emphasis on early interactions with workplaces prior to issues developing, while others viewed the decline to be indicative of WorkCover failing to fully exercise its prosecutorial powers.

8.22 For example, Mr Luke Aitken, Senior Manager, Policy, NSW Business Chamber, cited information from the Safe Work Australia and WorkCover annual reports to demonstrate the declining trend in prosecutions and corresponding improvement in safety outcomes:

... a number of graphs we have tracked from the Comparative Performance Monitoring reports from Safe Work Australia and the WorkCover annual reports, which indicate that we are seeing improved safety outcomes in New South Wales but at the same time we are also seeing a decline in the rates of prosecutions and the imposition of fines by WorkCover ... there is clearly a long-term trend towards an increase in safety with a reduction in prosecution.⁴⁶⁴

8.23 Mr Greg Pattison, Adviser, Workplace Health and Safety and Industrial Relations, NSW Business Chamber, suggested that the decline in prosecutions was a successful outcome of WorkCover focusing on the education of, and engagement with, workplaces. Mr Pattison contended that too much of an emphasis on prosecution would deter workplaces from seeking assistance from WorkCover:

... if you have a high prosecution regime you create a situation where employers are reluctant to engage with WorkCover. As a result, you do not get the interactions you need to improve safety. The reduction in prosecutions that we have seen goes hand in hand with a whole lot of other activity that has been going on in WorkCover as well to improve its interaction with the business community. It has tried a number of strategies; over the years it has had a business assistance unit. It now has community relationship officers and a number of other things, all of which are designed, as we understand them, to get greater engagement with the business community so that WorkCover can help them meet their compliance obligations ...⁴⁶⁵

8.24 Mr Pattison said that the shift by WorkCover away from prosecutions to targeted strategies to improve work health and safety was a positive development, but emphasised that prosecutions should nonetheless remain an important component of WorkCover's responsibilities in certain circumstances:

As an organisation we are not saying that prosecutions should not occur; we are not saying that penalty notices should not be issued, but they need to be issued with consideration and, as you say, in a targeted way because if you do not, it would be our contention the credibility of the system is undermined and therefore the willingness of people to engage with it and improve their safety is weakened.⁴⁶⁶

⁴⁶³ WorkCover Authority of NSW, *Annual Report 2012-13*, p 22.

⁴⁶⁴ Evidence, Mr Luke Aitken, Senior Manager, Policy, NSW Business Chamber, 28 March 2014, p 2.

⁴⁶⁵ Evidence, Mr Greg Pattison, Adviser, Workplace Health and Safety and Industrial Relations, NSW Business Chamber, 28 March 2014, p 4.

⁴⁶⁶ Evidence, Mr Pattison, 28 March 2014, p 6.

8.25 On the other hand, Mr Mark Lennon, Secretary, Unions NSW, suggested that the decline in prosecutions was a consequence of ‘inadequate’ enforcement of work health and safety legislation:

We know that the number of prosecutions undertaken by WorkCover has declined significantly in recent years. Again, it comes back to the question of whether that then has been effective in ensuring that we have safer work places in this State. We would say the answer is no. We are still waiting, for instance, for an outcome with regard to the death of Mr Lopez, the Canadian backpacker who was killed on the old nurses’ association site in Camperdown in April last year – that is 11 months. We think that clearly is inadequate.⁴⁶⁷

8.26 The Public Service Association of NSW was similarly critical of the declining trend in prosecutions, observing: ‘The current focus appears to be less on compliance measures and more on provision of information’.⁴⁶⁸

8.27 Unions NSW emphasised that prosecutions are an invaluable tool and deterrent in WorkCover’s efforts to ensure work health and safety, yet noted that their effectiveness has been hindered by delays from WorkCover:

There can be no denying that the peak tool for work health and safety enforcement is the WHS prosecution. Prosecutions are thought to put the employer on notice and also educate the industry on ‘reasonably practicable’ means to make their workplace safe. They also have a deterrent effect.

There has also been a delay in prosecutions. This lag effect needs to be considered in light of the intended consequence of the prosecution to encourage better health and safety practice by providing examples and deterrence to the industry. How can such a goal be met when prosecutions are not timely.⁴⁶⁹

8.28 The issue of significant delays by WorkCover in the prosecution of matters was also raised by Mr Ivan Simic, Partner, Taylor and Scott Lawyers:

... in my experience as a solicitor I have often seen WorkCover wait until literally the last minute before putting on a prosecution, so the civil proceedings may be well in advance. I know one particular case where the prosecution was literally put on the last day when it involved a demolition worker who was crushed.⁴⁷⁰

8.29 Unions NSW observed that ‘WorkCover has not increased its use of other enforcement tools to compensate for the reduced emphasis on prosecutions’,⁴⁷¹ citing the following information from the WorkCover annual reports between 2006 and 2012 in support of this statement:

- prohibitions notices reported dropped from 1,212 to 601, equating to a 50 per cent drop over six years

⁴⁶⁷ Evidence, Mr Mark Lennon, Secretary, Unions NSW, 21 March 2014, p 28.

⁴⁶⁸ Submission 30, Public Service Association of NSW, p 5.

⁴⁶⁹ Submission 31, Unions NSW, p 12.

⁴⁷⁰ Evidence, Mr Ivan Simic, Partner, Taylor and Scott Lawyers, 28 March 2014, p 63.

⁴⁷¹ Submission 31, Unions NSW, p 12.

- improvement notices were reported as dropping from 14,831 to 8,858, equating to a drop of over 40 per cent in six years
- penalty notices (infringement notices) were reported as dropping from 1,195 to 357, equating to a drop of over 70 per cent.⁴⁷²

8.30 The Australian Manufacturing Workers' Union (NSW Branch) suggested that because of its focus on providing advisory services to workplaces, WorkCover was not enforcing work health and safety legislation 'to the standard of community expectation'.⁴⁷³

While the Act clearly places responsibility for provision of a safe workplace on employers; WorkCover management publicly stated their focus to be provision of advice to employers, whom they define as their 'clients'. This apparent conflict of interest suggests that both WorkCover inspectors and the prosecution branch are impossibly compromised in the conduct of their responsibility to investigate, enforce and prosecute breaches of the Act. This is a conundrum that could easily be interpreted by the public as an abdication by WorkCover management of its statutory responsibilities.⁴⁷⁴

8.31 The issue of conflicts of interest is examined in detail in chapter 3.

8.32 The Construction Forestry Mining and Energy Union was critical of the response of WorkCover to breaches of work health and safety, suggesting that in some instances inspectors have shied away from fully exerting their prosecutorial powers:

The CFMEU is often the first on the scene of any major incident on a construction site in Sydney helping to contain the area and speaking to workers to ascertain what has occurred. In performing this safety role, the CFMEU has a lot of interaction with WorkCover inspectors. In recent times the CFMEU has found that WorkCover inspectors are shying away from using their powers to their full extent. The inspectors and investigations that have taken place in relation to significant safety events have been ineffective and inadequate.⁴⁷⁵

8.33 Ms Mallia argued for 'more robust' enforcement of work health and safety legislation in place of WorkCover's current advisory approach:

We think there needs to be a much more robust enforcement of the work health and safety regime in New South Wales. What we have seen over the last few years is WorkCover vacating that role and identifying or rebadging themselves as an advisory to the employers rather than really at the end of the day enforcing what we think are very strict obligations under the *Work Health and Safety Act*.⁴⁷⁶

Committee comment

8.34 The committee notes the differing opinions of review participants regarding the declining trend in prosecutions pursued by WorkCover. While some participants believe that the decline

⁴⁷² Submission 31, Unions NSW, p 12.

⁴⁷³ Submission 2, Australian Manufacturing Workers' Union (NSW Branch), p 4.

⁴⁷⁴ Submission 2, Australian Manufacturing Workers' Union (NSW Branch), p 4.

⁴⁷⁵ Submission 28, Construction Forestry Mining and Energy Union (NSW Branch), p 24.

⁴⁷⁶ Evidence, Ms Mallia, 28 March 2014, p 57.

in prosecutions is a positive outcome of WorkCover providing enhanced advisory support to workplaces, others argued that the decline is indicative of WorkCover failing to fully exercise its prosecutorial function under work health and safety legislation.

8.35 The committee considers that both elements of WorkCover’s role – the advisory support and the prosecutorial function – are equally valuable in improving workplace safety. We encourage WorkCover to maintain its strong focus on providing advisory support to workplaces and, where necessary, promptly and robustly pursue prosecutions when work health and safety legislation has been breached.

8.36 However, there is a clear and real concern that there has been inadequate communication with the families of deceased workers regarding decisions as to whether or not to prosecute for workplace fatalities. Much of this concern is reflected in stakeholder’s submissions regarding the timing of WorkCover’s decisions on prosecutions which have been criticised as being very last minute. This is an area the committee will keep a watching brief over in the next review.

Phoenix companies and the chain of responsibility

8.37 The ability of WorkCover to prosecute ‘phoenix’ companies in instances of breaches of work health and safety legislation was raised during the review. The Australian Securities and Investment Commission describes ‘phoenix activity’ as follows:

- phoenix activity involves the intentional transfer of assets from an indebted company to a new company to avoid paying creditors, tax or employee entitlements
- the directors leave the debts with the old company, often placing that company into administration or liquidation, leaving no assets to pay creditors
- meanwhile, a new company, often operated by the same directors and in the same industry as the old company, continues the business under a new structure. By engaging in this illegal practice, the directors avoid paying debts that are owed to creditors, employees and statutory bodies
- phoenix activity is a serious crime and may result in company officers (directors and secretaries) being imprisoned.⁴⁷⁷

8.38 The issue of phoenix activity arose during discussion of the death of Mr Atilio Villegas Snr in a workplace accident (see case study below). In addition, the chain of responsibility on worksites where a principal contractor employs subcontractors was also raised.

8.39 Ms Mallia expressed support for the strengthening of legislative provisions to enhance the reachability of public officials who may be attempting to avoid prosecution by ceasing operation of one company but then starting another.⁴⁷⁸

8.40 Further, when asked if she would support a recommendation to strengthen the chain of responsibility in circumstances such as the Villegas matter, Ms Mallia replied:

⁴⁷⁷ Australian Securities and Investment Commission, *Illegal phoenix activity* <http://www.asic.gov.au/asic/asic.nsf/byheadline/Small+business+-+illegal+phoenix+activity?openDocument>

⁴⁷⁸ Evidence, Ms Mallia, 28 March 2014, p 62.

... if this case shows that there is a weakness in the legislation then we would be very supportive of a recommendation to tighten up that chain of command. We do not want to see principal contractors who control what happens on the site at the end of day to escape some liability and shift it to a subcontractor that has also breached the Act but may have mitigating circumstances because of the manner in which the whole site is managed.⁴⁷⁹

Case study – Mr Atilio Villegas Snr

Mr Atilio Villegas Snr died from a workplace accident on 27 March 2012. During the review Mr Villegas' son, Mr Atilio Villegas Jnr, shared his family's experience of dealing with WorkCover's 'painfully slow' investigation into his father's death.⁴⁸⁰

Mr Villegas Jnr explained that it was not until February 2014, almost two years after his father's death, that WorkCover advised his family that the company that had breached work health and safety legislation resulting in his father's death would not be prosecuted because it no longer existed.⁴⁸¹ Mr Villegas was extremely disappointed with this outcome.⁴⁸²

Ms Rita Mallia of the Construction Forestry Mining and Energy Union described WorkCover's decision as 'incomprehensible',⁴⁸³ and was surprised that the principal contractor for the site had also avoided prosecution.

Ms Mallia was concerned that the office holders for the company employing Mr Villegas had established a new company within the same industry and were 'doing the same sort of work'.⁴⁸⁴

When questioned on the Villegas matter, WorkCover advised that there would be no prosecution for two key reasons: firstly, a number of the entities involved in Mr Villegas Snr's employment arrangements had ceased to operate, and secondly, the principal contractor had implemented advanced safety and monitoring of work systems on site.⁴⁸⁵

WorkCover also noted that the NSW Coroner had yet to determine if it would conduct an inquest into the death of Mr Villegas.⁴⁸⁶

8.41 When questioned about its powers in relation to phoenix companies, WorkCover advised that it does not have the legislative power to prosecute phoenix companies, but that it instead refers phoenix issues to the Australian Securities and Investment Commission:

⁴⁷⁹ Evidence, Ms Mallia, 28 March 2014, p 62.

⁴⁸⁰ Evidence, Mr Atilio Villegas, 28 March 2014, p 59.

⁴⁸¹ Evidence, Mr Villegas, 28 March 2014, pp 59-60.

⁴⁸² Evidence, Mr Villegas, 28 May 2014, p 60.

⁴⁸³ Evidence, Ms Mallia, 28 March 2014, p 62.

⁴⁸⁴ Evidence, Ms Mallia, 28 March 2014, p 62.

⁴⁸⁵ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2013, p 6.

⁴⁸⁶ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2013, pp 8-9.

WorkCover has powers under the *Work Health and Safety Act 2011* to prosecute a 'person conducting a business or undertaking'. It does not have powers to conduct investigations or prosecutions relating to 'phoenix issues'.

The Australian Securities and Investment Commission has discretion under section 206F of the Commonwealth *Corporations Act 2011* to disqualify a person from managing a corporation for five years if they have been an officer of two or more corporations that have been wound up in specific circumstances. Where WorkCover becomes aware that an officer of a company which has been wound up may previously have been an officer of a company which was also wound up it will notify the Australian Securities and Investment Commission ...⁴⁸⁷

8.42 Mr Watson confirmed that WorkCover does report potential phoenix issues to the Australian Securities and Investment Commission where appropriate:

... we do report suspicious activity by entities to the Australian Competition and Consumer Commission when necessary. We report as a matter of course if someone is trying to phoenix themselves. There is no question that that goes on.⁴⁸⁸

8.43 Mr Watson observed that despite legislation being in place to prevent phoenixing occurring, some people are nevertheless adept at avoiding their legislative responsibilities:

The actual concept of phoenixing that we are talking about seems to be prevalent in some trades and it seems to occur from time to time. The legislation we have tries to get around that, but there is no doubt that it has a limited impact. People who want to get out from underneath their responsibilities and liabilities under the work health and safety legislation and the workers compensation legislation do so.⁴⁸⁹

8.44 In regard to chain of responsibility issues, WorkCover indicated that under the *Work Health and Safety Act 2011* multiple duty holders can be found responsible for a breach of work health and safety, even in circumstances where a corporate duty holder may have been wound up:

Where there are overlapping duties all the parties need to consult, cooperate and coordinate their activities to ensure work is free from risk to work health and safety ... More than one duty holder may be culpable for a breach of the *Work Health and Safety Act 2011*. This can occur particularly in industries where subcontracting is frequent, such as construction. In these circumstances, WorkCover may still proceed against one or more duty holders, even if a corporate duty holder is wound up.⁴⁹⁰

Committee comment

8.45 The committee wishes to extend its sincere condolences to the family of Mr Atilio Villegas Snr. The loss of a loved one is a terrible tragedy, particularly when the loss occurs in a workplace that is meant to have the highest possible safety standards.

⁴⁸⁷ WorkCover Authority of NSW, *Response to informal request for information from the Standing Committee on Law and Justice to WorkCover*, 3 April 2014, p 1.

⁴⁸⁸ Evidence, Mr Watson, 12 May 2014, p 11.

⁴⁸⁹ Evidence, Mr Watson, 12 May 2014, p 12.

⁴⁹⁰ WorkCover Authority of NSW, *Response to informal request for information from the Standing Committee on Law and Justice to WorkCover*, 3 April 2014, p 2.

- 8.46** The committee is concerned about the extended time taken to finalise the investigation into the death of Mr Villegas Snr and subsequent uncertainty regarding the decision to not pursue a prosecution.
- 8.47** While the committee is genuinely concerned about the lack of prosecution following the death of Mr Villegas Snr, we note that the prosecution of phoenix activities is generally a federal matter. The committee however notes that WorkCover does have the power to pursue an individual responsible for critical management decisions as opposed to a company accused of phoenixing under the *Work Health and Safety Act*.
- 8.48** The evasion of premiums and associated difficulties of prosecution of phoenix companies has a serious impact on the economics and efficacy of the NSW Workers Compensations scheme. The committee suggests that the Minister may wish to consider raising this issue at Ministerial Council level.
- 8.49** There appears to be significant scope for WorkCover to review its insurance disclosure forms to require disclosure by persons associated with the management of companies seeking insurance cover to disclose any history of involvement in companies that have previously been in administration or insolvency. This would provide some basis for reviewing applicants for insurance who have a poor risk record both in terms of past injuries at work and any default on payment of premiums or other fees associated with the scheme.
- 8.50** The committee therefore recommends that everyone applying for workers compensation cover should be required to declare whether any proprietor, director, senior executive or public officer associated with the applying entity has any outstanding workers compensation premiums; whether they have been associated with a registered corporation, sole trader or partnership that has outstanding premiums as a going concern, or been placed in administration or receivership in the past five years.

Recommendation 22

That the NSW Government require that insurers offering workers compensation cover have applicants declare whether any proprietor, director, senior executive or public officer associated with the applying entity has:

- any outstanding workers compensation premiums, and/or
- been associated with a registered corporation, sole trader or partnership that either has outstanding premiums as a going concern, or been placed in administration or receivership in the past five years.

-
- 8.51** As shown in evidence given regarding the death of Mr Atilio Villegas, phoenix company behaviour can be associated with injury and death of workers. It seems likely phoenix companies are responsible for weak health and safety practices, particularly on construction sites. WorkCover NSW has stated in the inquiry they have limited powers to investigate and prosecute these companies. The committee proposes WorkCover NSW should take a leadership role in addressing this issue by convening a roundtable of insurers, relevant employer organisations and unions to scope the nature of the problem of phoenix companies.

Recommendation 23

That the WorkCover Authority of NSW convene a roundtable of insurers, relevant employer organisations and unions to address phoenix companies and their impact on the economy. The roundtable should:

- outline the extent of the problem, the impact on work health and safety and the impact on the efficiency and cost of workers compensation
- outline the means of addressing phoenix operators including identifying offenders, reporting to the ACCC and ASIC, insurer vigilance, industry responsibility and regulatory responses, and
- report the outcomes of the roundtable to the Standing Committee on Law and Justice and the Minister for Finance and Services.

8.52 In regard to chain of responsibility issues, we note that multiple duty holders can be found responsible for breaches of work health and safety legislation under the *Work Health and Safety Act*. The next section of the chapter further discusses chain of responsibility issues as they relate to labour hire companies.

Labour hire companies

8.53 The prosecution of labour hire companies in instances where work health and safety obligations are breached was also briefly discussed during the review. Under a labour hire arrangement, the worker is not an employee of the client, they are the employee of the labour hire company.⁴⁹¹ Under these arrangements, the labour hire company:

- arranges for workers to perform work or services directly for clients
- has its services paid for by the client
- pays the worker for work performed for, or services provided to, the client.⁴⁹²

8.54 Some review participants identified that it can be problematic to ensure adherence to work health and safety practices under a labour hire arrangement. The complexity of the Barangaroo work site was cited as an example of the difficulties in having multiple labour hire companies operating on one site, with Mr Shay Deguara, Industrial Officer, Unions NSW, also noting that complex corporate structures can make it problematic to identify a responsible party if an incident occurs:

⁴⁹¹ *Workplace Injury Management and Workers Compensation Act 1998* Schedule 1; Australian Taxation Office, *Labour hire firms* (September 2010)

<https://www.ato.gov.au/Business/PAYG-withholding/In-detail/Labour-hire/PAYG-withholding-and-labour-hire-firms/>

⁴⁹² *Workplace Injury Management and Workers Compensation Act 1998* Schedule 1; Australian Taxation Office, *Labour hire firms* (September 2010)

<https://www.ato.gov.au/Business/PAYG-withholding/In-detail/Labour-hire/PAYG-withholding-and-labour-hire-firms/>

If you look at an industry such as the construction industry, down at Barangaroo there is a principal contractor who might hire a dozen staff and the rest of them are hired through labour hire contractors, so you are looking a situation where the actual person who is the principal controller may not have much influence. It has been a problem for years with labour hire. Companies do prosecute labour hire firms and they improve their act, but now everyone can hide behind the corporate veil because there are layers of corporate structure ... the levels of corporate structures and financing and stuff within the construction industry makes it very difficult for anything to be pinned on anyone, unless you say from the top to the bottom there is a corporate responsibility for the health and safety of their workers.⁴⁹³

- 8.55** Mr Deguara observed that people employed under a labour hire arrangement may be reluctant to complain about work health and safety issues, and insisted that a strong regulator was key to ensuring workplace safety:

From the labour hire perspective, these are probably people hired who have a contract for maybe a week, a month or something. If they go and complain about health and safety then they will not get another gig. The consultation process is very hard to actually enforce. You need to have a regulator standing behind them and saying that if something goes wrong here then we need to fix it.⁴⁹⁴

- 8.56** Ms Emma Maiden, Assistant Secretary, Unions NSW, emphasised the importance of ‘robust prosecutions’ in ensuring that labour hire companies meet their work health and safety obligations, and suggested that more could be done in this regard:

... part of the answer has to be having really robust prosecutions where employers are not doing the right thing. The *Work Health and Safety Act* is quite clear: all the employers operating at one site have to work together to ensure the health and safety of everyone – that is, not only their own employees but also everyone in that one place. That is just not happening.⁴⁹⁵

- 8.57** Mr Watson acknowledged the complexity of ensuring safe workplaces under labour hire arrangements, highlighting the importance of the labour hire company hiring appropriately trained employees:

The important thing for a labour hire company is to understand what sort of work workers are going to be involved in and where they are going to be working. They need to match that risk to the capabilities, training and skills the workers need to do that work. Failures have been in managing that.⁴⁹⁶

- 8.58** Mr Watson stressed the importance of cooperation between labour hire companies and their clients, stating that the recently enacted work health and safety legislation was assisting to facilitate such enhanced cooperation.⁴⁹⁷

- 8.59** WorkCover advised that under the new legislation, both the labour hire company and the client have responsibility to ensure the safety of the workforce:

⁴⁹³ Evidence, Mr Shay Deguara, Industrial Officer, Unions NSW, 21 March 2014, p 31.

⁴⁹⁴ Evidence, Mr Deguara, 21 March 2014, p 31.

⁴⁹⁵ Evidence, Ms Emma Maiden, Assistant Secretary, Unions NSW, 21 March 2014, p 31.

⁴⁹⁶ Evidence, Mr Watson, 21 March 2014, p 15.

⁴⁹⁷ Evidence, Mr Watson, 21 March 2014, p 15.

... with the change to work health and safety legislation, the scope of the primary duty of care now is now extended beyond the traditional employer and employee relationship. This means that under a labour hire arrangement, both the labour hire person conducting a business and undertaking (PCBU) and the host PCBU have duties to ensure the health and safety of labour hire workers so far as is reasonably practicable. These duties must be fulfilled to the extent to which each PCBU has the capacity to influence and control the matter.⁴⁹⁸

- 8.60** When questioned on the prevalence of prosecution of labour hire companies for breaches of work health and safety legislation, WorkCover stated that while some labour companies have been prosecuted for breaches, it does not appear to be a systemic issue:

As mentioned, WorkCover previously had a number of prosecutions against labour hire companies for instances where they had not provided a good workplace health and safety system for workers they sent to host employer sites. While all matters raised with WorkCover are investigated, current investigation activities do not indicate a general or systemic issue.⁴⁹⁹

Committee comment

- 8.61** The committee acknowledges the concerns of some review participants that it can be problematic to pursue prosecutions against labour hire companies for breaches of work health and safety legislation, especially in instances where multiple labour hire companies work on a single site or operate behind complex corporate structures.
- 8.62** We note from the previous section of this chapter that multiple duty holders can be held liable for breaches of the *Work Health and Safety Act*.
- 8.63** WorkCover has not identified any specific or systemic issues with its ability to pursue prosecutions against labour hire companies or multiple duty holders. Nonetheless we will keep a watching brief on these issues to monitor the effectiveness of the current legislation.

⁴⁹⁸ Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 10-11.

⁴⁹⁹ Answers to questions on notice, WorkCover Authority of NSW, 28 April 2014, p 10-11.

Chapter 9 Self insurers, Comcare and the disability sector

This chapter considers a range of issues, including the health and safety audits that self insurers are required to meet as part of their licensing requirements under the *Workers Compensation Act 1987*, and the potential impact on the New South Wales workers compensation scheme of proposed changes to eligibility for the Commonwealth workers compensation scheme. The chapter also examines how WorkCover can better support people with disability to participate in the workforce and community.

Self insurers

- 9.1** All employers in New South Wales, except exempt employers,⁵⁰⁰ are required to pay workers compensation premiums. The workers compensation scheme is funded by these premiums and provides medical and financial support to injured workers, while limiting the financial exposure of employers.⁵⁰¹
- 9.2** The *Workers Compensation Act* allows for employers to be licensed by WorkCover to carry their own underwriting risk, subject to meeting certain criteria. Self insurers take responsibility for the payment of their claim liabilities and the management of those claims.⁵⁰²
- 9.3** WorkCover determines applications for self insurer licences by taking into consideration matters such as:
- the protection of injured workers against insurer insolvency
 - the viability and commitment of the employer to maintain insurance in the long term
 - whether appropriate case management and work health and safety systems are implemented and maintained
 - the provision of timely and accurate data on claims to WorkCover.⁵⁰³
- 9.4** Approximately 23 per cent of the New South Wales workforce is self insured, including a number of local councils, Qantas Airways, Transfield Services (Australia) and the University of New South Wales.⁵⁰⁴

⁵⁰⁰ An exempt employer pays \$7,500 or less in annual wages, and is not required to hold an insurance policy unless they employ an apprentice or trainee, or are part of a group for premium purposes.

WorkCover Authority of NSW, *Do you need insurance?* (March 2013)

<http://www.workcover.nsw.gov.au/insurancepremiums/Policies/doyouneedinsurance/Pages/default.aspx#exemptemployers>

⁵⁰¹ WorkCover Authority of NSW, *Insurance and Premiums* (May 2013)
<http://www.workcover.nsw.gov.au/insurancepremiums/premiums/Pages/default.aspx>

⁵⁰² WorkCover Authority of NSW, *Self and specialised insurers* (August 2013)
<http://www.workcover.nsw.gov.au/insurancepremiums/selfspecialisedinsurers/Pages/default.aspx>

⁵⁰³ *Workers Compensation Act 1987* ss 178 and 211.

⁵⁰⁴ Evidence, Ms Denise Fishlock, Chairperson, New South Wales Workers Compensation Self Insurers Association, 21 March 2014, p 35; WorkCover Authority of NSW, *Self insurers* (April 2014)

9.5 Self insurers are subject to regular auditing as part of their licensing conditions. The ‘National Self-insurer Occupational Health and Safety Audit Tool – User guide and workbook’ defines the nationally agreed criteria used to assess occupational health and safety systems for self insurers. There are 108 criteria within the audit tool, divided into five overarching elements, as follows:

- **health and safety policy** including a documented policy that has measurable objectives and targets, the provision of appropriate health and safety training to all employees, and a mechanism for the periodic review of the policy to ensure it remains relevant and appropriate
- **planning** including identifying and monitoring the content of all relevant health and safety legislation, standards, codes of practice, agreements and guidelines; setting health and safety objectives and targets; and the existence of a health and safety management plan(s) that defines how the organisation will achieve its objectives and targets
- **implementation** including allocation of sufficient financial and physical resources; consultation, communication and reporting; document and data control; health and safety risk management program; hazard identification, risk assessment and control of risks; and emergency preparedness and response
- **measurement and evaluation** including incident investigation, corrective and preventive action, effective systems for the management of health and safety records, and health and safety management system audits
- **management review** whereby senior management oversee a comprehensive documented review of the health and safety management system at defined intervals to ensure its continuing suitability and effectiveness.⁵⁰⁵

9.6 Mr John Watson, General Manager, Work Health and Safety, WorkCover, explained that the audit requirements for self insurers in New South Wales are based on this national audit tool, with WorkCover using a sampling approach across the five elements to complete the audits:

We use the national audit tool for work health and safety, which is agreed to by all the workers compensation insurers across Australia. It is that audit tool that we administer in New South Wales. We use a sampling practice rather than a 100 per cent practice so out of the five elements in the audit tool we sample two of those and self insurers need to pass to a 75 per cent standard rather than a 100 per cent standard. Other self insurer arrangements around the country in at least one jurisdiction may use 100 per cent over the five standards or the five elements.⁵⁰⁶

9.7 WorkCover estimated that the audit duration lasts from four to eight days, excluding preparation time.⁵⁰⁷

<http://www.workcover.nsw.gov.au/insurancepremiums/selfspecialisedinsurers/SelfInsurers/Pages/default.aspx>

⁵⁰⁵ WorkCover Authority of NSW, *National self-insurer OHS audit tool user guide and workbook* (version 2), pp 5-17.

⁵⁰⁶ Evidence, Mr John Watson, General Manager, Work Health and Safety, WorkCover Authority of NSW, 21 March 2014, p 24.

⁵⁰⁷ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2013, p 14.

- 9.8 Mr Watson advised that self insurers are exposed to a three yearly audit cycle, with the rationale behind the audits being to ensure that self insurers are ‘exemplar performers’ in regard to workplace health and safety.⁵⁰⁸
- 9.9 Mr Watson further advised that the national audit tool is currently being reviewed.⁵⁰⁹
- 9.10 In addition, WorkCover informed the committee that it issued a discussion paper in September 2013 to measure satisfaction with the sampling approach and frequency of audits, with the feedback being mainly positive:

WorkCover issued a discussion paper in September 2013 to measure the satisfaction of this approach. The majority of feedback was positive and supported that WorkCover process and sampling methodology is fair, to the extent that a similar approach would be preferred in other states. It was also agreed that the current three-year audit frequency for those self insurers that meet the benchmark is adequate and that extending this period to more than three years would be detrimental to safety standards within the self-insurers’ workplaces.⁵¹⁰

- 9.11 However, a number of concerns were expressed by review participants about the regulatory requirements imposed on self insurers, particularly in regard to the financial cost of the health and safety audits and the capacity of self insurers to meet the prudential risk of self insurance. Some review participants proposed changes to the current regulatory framework to ease the burden on self insurers. These concerns and proposals are discussed in the following sections.

Health and safety audits

- 9.12 The main concern expressed in relation to the regulatory requirements imposed on self insurers was the financial and administrative burden of the health and safety audit that self insurers are required to complete. In addition to being costly and time consuming, review participants noted that employers covered by WorkCover approved insurers are not subject to the same auditing requirements.
- 9.13 The New South Wales Workers Compensation Self Insurers Association asserted that the auditing requirements faced by self insurers are overly arduous, particularly in regard to the financial and time costs of completing the audits. Ms Denise Fishlock, Chairperson, New South Wales Workers Compensation Self Insurers Association, summarised the association’s concerns:

Self and specialised insurers attract red tape which detracts from the primary focus. We have this extra layer of WorkCover bureaucracy which impedes our resources and finances in doing our jobs. This is a layer which is specific to only self and specialised insurers. No other New South Wales business is required to undergo these subjective and bureaucratic audits ... What has been happening over the past 10 years is that WorkCover is imposing more and more requirements, compliance audits and guidelines on self and specialised insurers, who just want to manage workers

⁵⁰⁸ Evidence, Mr Watson, 21 March 2014, p 25.

⁵⁰⁹ Evidence, Mr Watson, 21 March 2014, p 24.

⁵¹⁰ Answers to questions on notice, WorkCover Authority of NSW, 11 June 2013, p 15.

compensation claims efficiently and in accordance with legislation. We are being hindered, not helped, by WorkCover.⁵¹¹

- 9.14** The association was adamantly opposed to the imposition of health and safety audits on its members, deeming the audits to be an example of costly ‘over-regulation’:

... [auditing] adds hundreds of thousands of dollars to members costs of doing business as well as unnecessarily diverting substantial resources away from actual work health and safety initiatives in favour of compliance and auditing outcomes, for no discernible benefit to the business or its employees.⁵¹²

- 9.15** Ms Fishlock explained that the cycle of audits is costly and time consuming to prepare for, with many self insurers engaging specialists to assist in audit preparations:

Self and specialised companies preparing for these audits are so concerned that they must pass the 114 criteria in these audits they engage expensive consultants to assist them. Many of these consultants are ex-WorkCover auditors. They pay \$100,000 to \$140,000 in consultancy fees just to prepare for a WorkCover audit. They are not paying for an audit; they are paying just to prepare for an audit.⁵¹³

- 9.16** However, the committee notes Mr Watson’s comments that audits should review normal operations and documentation, and accordingly not involve extensive extra preparation time or additional costs.

- 9.17** BlueScope Steel detailed the significant time and financial cost of its previous health and safety audit, estimating that the total cost of the audit amounted to approximately \$1 million:

It is BlueScope’s view that the imposition of audits in the area of work health and safety by WorkCover on a regular basis represents an unnecessary cost to our business. The scope and breadth of the OHS Management Systems audit is such that, through ongoing compliance activities, audit preparation, actual audit time and follow-up activities, substantial resources are diverted away from work health and safety initiatives in favour of compliance and auditing processes, for no discernible benefit to the business or its employees. BlueScope estimates direct and indirect costs of our most recent audit, in February 2013, to be in the order of \$1.0 million.⁵¹⁴

- 9.18** BlueScope Steel argued that the imposition of health and safety audits has had no demonstrable benefit of lowering the incidence of injuries or improving post-injury outcomes. In support of this claim, BlueScope Steel cited the example of Western Australia, which has comparatively low regulatory requirements to New South Wales, but achieves better safety outcomes such as:

- the incidence rate of serious injuries and disease per 1,000 employees in 2011-12 was 13.5 in New South Wales compared to 12.1 in Western Australia

⁵¹¹ Evidence, Ms Fishlock, 21 March 2014, p 35.

⁵¹² Submission 12, New South Wales Workers Compensation Self Insurers Association, p 2.

⁵¹³ Evidence, Ms Fishlock, 21 March 2014, p 35.

⁵¹⁴ Submission 20, BlueScope Steel, p 4.

- the frequency of serious injury per million man hours in New South Wales in 2011-12 was 8.1 injuries compared to 6.9 in Western Australia
- the number of compensated fatalities over the period 2007 to 2012 in New South Wales doubles that of Western Australia
- the rate of disputation in New South Wales is higher than in Western Australia
- there is no difference in frequency of long term workers compensation claims between the two jurisdictions
- there is no evidence to indicate durable return-to-work rates are better in New South Wales than other jurisdictions.⁵¹⁵

9.19 Mr Paul Macken, Honorary Lawyer, New South Wales Workers Compensation Self Insurers Association, questioned the necessity of the audits when self insurers have a vested interest in ensuring that their work places are as safe as possible, given that the self insurer is bearing the financial risk of any workplace injuries that may occur:

Why do they audit self-insurers for work health and safety when self-insurers bear the direct risk of every penny that they spend on every injured worker? They are the one part of the scheme that actually has a direct incentive to have high standards of safety and that is the part of the scheme that WorkCover audits. The parts of the scheme that actually spend no money when they injure someone do not get audited.⁵¹⁶

9.20 Mr Macken expressed the view that the resources devoted by WorkCover to undertaking the health and safety audits could be better used elsewhere, such as enforcing safety regulations in higher risk industries.⁵¹⁷

9.21 Mr Macken further questioned why only self insurers are subject to these audits, suggesting that if the health and safety audits are deemed necessary for self insurers, all large employers should be subject to the same requirements:

If auditing is something that is worthwhile for large employers, why would it only be directed at self-insured employers? If it is worthwhile, direct it at every large employer across the state and particularly at the ones that cost WorkCover money when they injure someone not the ones who do not cost WorkCover a cent.⁵¹⁸

9.22 The New South Wales Workers Compensation Self Insurers Association also questioned the process for granting licenses to new self insurers, which involves a prospective self insurer having to demonstrate both their prudential and health and safety credentials. Mr Macken informed the committee that only two new self insurers licences have been granted in the past ten years,⁵¹⁹ largely because of the onerous work health and safety audit requirements:

⁵¹⁵ Submission 20, BlueScope Steel, p 3.

⁵¹⁶ Evidence, Mr Paul Macken, Honorary Lawyer, New South Wales Workers Compensation Self Insurers Association, 21 March 2014, p 37.

⁵¹⁷ Evidence, Mr Macken, 21 March 2014, p 37.

⁵¹⁸ Evidence, Mr Macken, 21 March 2014, p 37.

⁵¹⁹ Evidence, Mr Macken, 21 March 2014, pp 40-41.

... almost inevitably new applicants cannot pass the work health and safety audit at all. They are failed on that basis and therefore there are almost no new licences granted ever.⁵²⁰

- 9.23** The Australian Manufacturing Workers' Union (NSW Branch) expressed concern over the lack of ramifications for poor audit results, pointing out that unsatisfactory results may not result in the withdrawal of a self insurers licence:

The AMWU has raised concerns for over a decade in relation to the administration of self insurance licences. Some licensees demonstrate a higher level of compliance than others. However, there is little or no attempt by WorkCover to enforce compliance or cull poor performers. The audit process for self-insurers is clearly flawed. We have frequent examples of situations where licensees have coached workers to provide a response that does not necessarily reflect the truth. Yet poor audit results do not appear to lead to withdrawal of licence.⁵²¹

- 9.24** The union was also critical of the fact that the results of self insurer audits are not publicly available.⁵²²

Prudential risk

- 9.25** It was argued by some review participants that greater weight should be given to the ability of self insurers to meet the prudential risk of self insurance rather than the health and safety requirements. For example, Mr Macken argued that the health and safety requirements were simply an 'administrative burden':

The critical considerations for licensing for self-insurance ... should be purely prudential. They should have to do with whether or not you can pay as and when required. The work health safety audits have nothing to do with prudential risk; they are just an administrative burden imposed because of some sense that somehow it needs to happen ... because other states do it. It is the lemming defence; they jump over the cliff so we want to jump over the cliff with them.⁵²³

- 9.26** Mr Macken contended that 'prudentially there is no risk at all',⁵²⁴ because self insurers are required to guarantee 150 per cent of their liabilities:

... the ability to underwrite your own risk as a self-insurer should only have regard to prudential issues, and from a prudential point of view these are organisations that have net tangible assets that mean that they are no risk; they have to take out a bank guarantee that guarantees 150 per cent of their liabilities so that even if they were at risk there would be no risk to those liabilities.⁵²⁵

⁵²⁰ Evidence, Mr Macken, 21 March 2014, p 40.

⁵²¹ Submission 2, Australian Manufacturing Workers' Union (NSW Branch), p 12.

⁵²² Submission 2, Australian Manufacturing Workers' Union (NSW Branch), p 12.

⁵²³ Evidence, Mr Macken, 21 March 2014, p 38.

⁵²⁴ Evidence, Mr Macken, 21 March 2014, pp 40-41.

⁵²⁵ Evidence, Mr Macken, 21 March 2014, pp 40-41.

9.27 BlueScope Steel raised similar concerns, expressing support for the high prudential requirements imposed on self insurers, but questioning the value of the health and safety requirements:

... BlueScope has concerns arising from the regulatory requirements imposed through self insurance licensing conditions, specifically OHS Management Systems, and Claims and Injury Management auditing, that have no connection to prudential or security requirements.⁵²⁶

9.28 Mr Macken argued that a company's ability to meet the health and safety requirements was less important than their ability to meet the prudential requirements because, as a self insurer, the company would bear the cost of any health and safety failing:

There is no reason why a company which meets the financial criteria should not be allowed to be self-insured. If they fail a work health and safety audit the only cost will be that if they become self-insured it will cost them more money because their safety standards are too low, and, frankly, their safety standards will improve when you grant them a self-insurer's licence because they are going to want to save money.⁵²⁷

Proposals for change

9.29 In order to address concerns over the audit requirements imposed on self insurers, review participants suggested that work health and safety audits should be either abolished, imposed on all employers in New South Wales, or triggered following repeated incidents within a workplace. For example, the New South Wales Workers Compensation Self Insurers Association said:

It is the strong view of the majority of members of the Association that work health and safety audits for self insurers should be removed altogether. At the very least and in the alternative, such work health and safety audits should be imposed (if they are imposed at all) on every employer in NSW.

As a further alternative the consideration of the imposition of work health and safety audits on employers (whether self insured or otherwise) should only arise in circumstances where an employer demonstrates (by incident notification or otherwise) a repeated inability to comply with its work health and safety obligations.⁵²⁸

9.30 Bluescope Steel argued that the health and safety audits imposed on self insurers should be abolished for the following reasons:

- self insurers do not contribute to the costs incurred by WorkCover as the nominal insurer, so there is no financial or economic reason for WorkCover to conduct such audits
- it is anomalous that companies that are not self insured are not subject to the same work health and safety audits as self insurers

⁵²⁶ Submission 20, BlueScope Steel, p 2.

⁵²⁷ Evidence, Mr Macken, 21 March 2014, p 40.

⁵²⁸ Submission 12, New South Wales Workers Compensation Self Insurers Association, p 3.

- as self insurers bear all of the costs any workplace injury, there is a strong financial, legal and moral incentive to ensure safe workplaces, effective safety management systems and durable return to work outcomes
- mandatory audits present an unnecessary burden that increase the cost of business and erode competitiveness
- WorkCover already has a range of low cost tools available through which to monitor a company's performance.⁵²⁹

9.31 Bluescope Steel identified a number of alternative mechanisms for collecting information that are currently used by WorkCover which they suggest negate the need for health and safety audits, including annual claims and injury management self-audit, annual reporting under s 189 of the *Workers Compensation Act*, and mandatory notification of serious incidents.⁵³⁰

9.32 Bluescope Steel contended that removing the mandatory auditing requirements would result in increased competitiveness of New South Wales business relative to other states, and improved allocation of resources and efficiencies for both self insurers and WorkCover.⁵³¹

9.33 In the event that audit requirements are not abolished, Mr Macken felt that audits should only take place when triggered by a series of incidents at a workplace within a specified timeframe: 'Just very simply, no audit without a trigger – for example, a self insurer that has three serious incidents in the space of a year, otherwise no audit, or something like that.'⁵³²

Committee comment

9.34 The committee acknowledges the concerns from the self insurance industry that the current auditing requirements are onerous and costly, and do not necessarily result in improved safety outcomes. Further, we note that only two new self insurers have been granted licenses in the past ten years due to the stringency of the audits.

9.35 We acknowledge that the current auditing regime in New South Wales is based on the nationally agreed criteria for occupational health and safety systems for self insurers, and that this tool is currently being reviewed at a national level. Nonetheless, in light of the concerns raised by participants, we consider that the NSW Government should review the regulatory requirements that apply to self insurers in New South Wales to ensure they do not require unnecessary documentation or expense.

Recommendation 24

That the NSW Government review the regulatory requirements that apply to self insurers in New South Wales to ensure they do not require unnecessary documentation or expense.

⁵²⁹ Submission 20, BlueScope Steel, p 2.

⁵³⁰ Submission 20, BlueScope Steel, pp 4-5.

⁵³¹ Submission 20, BlueScope Steel, p 5.

⁵³² Evidence, Mr Macken, 21 March 2014, p 42.

Comcare

- 9.36** Currently there is a proposal to expand eligibility to the Commonwealth workers compensation scheme, known as Comcare, to other jurisdictions. Some review participants were concerned that such an expansion could have a potential detrimental impact on the New South Wales scheme.
- 9.37** Comcare provides its scheme participants with access to an ‘integrated safety, rehabilitation and compensation system, no matter what Australian state or territory an employer operates in or where its employees are located’.⁵³³ Members of Comcare adhere to Commonwealth work health and safety legislation instead of the legislation of the relevant state or territory.⁵³⁴
- 9.38** The Comcare scheme covers employees of:
- Commonwealth Government agencies and statutory authorities, excluding members of the Australian Defence Force
 - the Australian Capital Territory Government and its agencies
 - national employers who have been granted a self-insurance licence by the Safety, Rehabilitation and Compensation Commission.⁵³⁵
- 9.39** There are currently 30 licensees in the Comcare scheme, including Australian Air Express, Commonwealth Bank of Australia, John Holland Group and Linfox Australia.⁵³⁶
- 9.40** On 19 March 2014, the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 was tabled in the Commonwealth Parliament. Amongst other changes, the bill proposes amendments to enable corporations currently required to meet workers’ compensation obligations under two or more workers’ compensation laws of a state or territory to apply to join the Comcare scheme (the ‘national employer’ test).⁵³⁷ These proposed changes broaden the range of corporations that can seek to enter the Comcare scheme.⁵³⁸
- 9.41** At the time of drafting this report, the bill had not been passed by either house of parliament.

⁵³³ Comcare, *Overview of the Comcare scheme* (April 2014) http://www.comcare.gov.au/the_scheme/overview_of_the_comcare_scheme

⁵³⁴ *Safety, Rehabilitation and Compensation Commission and Comcare Annual Reports 2012–13*, p 23. The relevant Commonwealth legislation includes the *Work Health and Safety Act 2011*, *Safety, Rehabilitation and Compensation Act 1988*, *Asbestos-related Claims (Management of Commonwealth Liabilities) Act 2005* and *Military Rehabilitation and Compensation Act 2004*.

⁵³⁵ Comcare, *Employers in the Comcare scheme* (May 2014) http://www.comcare.gov.au/the_scheme/self-insurers_licensees

⁵³⁶ Safety, Rehabilitation and Compensation Commission, *Current licensees* (June 2014) http://www.comcare.gov.au/the_scheme/self-insurers_licensees/licensees

⁵³⁷ Parliament of the Commonwealth of Australia, *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 - Explanatory Memorandum* (February 2014) http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F5200_ems_8bc20bf3-728a-46bb-a057-716680b4715a%22

⁵³⁸ Parliament of the Commonwealth of Australia, *Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 - Explanatory Memorandum* (February 2014).

9.42 Concern was expressed by some review participants that the proposed amendments could have negative ramifications for the New South Wales workers compensation scheme. For example, Mr Andrew Stone, Barrister and Member of the Common Law Committee, New South Wales Bar Association, warned that the expansion of Comcare could potentially have a negative financial impact on the New South Wales scheme as low risk, ‘white-collar’ companies transferred to Comcare while higher risk ‘blue-collar’ business remained in the New South Wales scheme:

... the opening of that [Comcare] poses a real challenge to the NSW scheme because the more you siphon low-cost white collar cases out of the NSW scheme and leave it with the blue collar cases, the more expensive the NSW scheme becomes proportionally to the income it is deriving.⁵³⁹

9.43 Mr David Henry, NSW Branch Work Health and Safety Officer, Australian Manufacturing Workers’ Union, also acknowledged the potential implications of changing the eligibility requirements for Comcare, but noted that several large manufacturing employers are already part of the Commonwealth scheme.⁵⁴⁰

9.44 Mr Michael Playford, Consulting Actuary and Partner, Pricewaterhouse Coopers and actuary for the Workers Compensation Nominal Insurer Scheme, downplayed the potential financial impact for New South Wales of an expanded Comcare. Mr Playford reasoned that because many large employers in New South Wales are already self insurers, the impact on the New South Wales scheme of those employers shifting to Comcare would likely be minimal:

If they [large, self insured employees] move across to become a Commonwealth self-insurer, that does not impact the nominal insurer scheme’s financial position because they are already out of the nominal insurer’s scheme. It would only be employers that currently are covered by the nominal insurer that made the choice to move across that would impact the financial position. They are employers that have already to date have not decided to go to self-insurance on state-based arrangements, so it is not clear to me that they would necessarily choose a Commonwealth-based self-insurance arrangement. The drivers there, or part of the drivers there, would be what is the arbitrage opportunity, which is the differential in what their costs would be if they were a Commonwealth self-insurer versus the premiums they paid in the nominal insurer’s scheme.⁵⁴¹

9.45 Mr Playford concluded:

I am not convinced that from a financial perspective it would have a major impact on the New South Wales nominal insurer. I could be wrong. These occupational health and safety rationales for why someone may want to move to be in a Commonwealth insurer may be important. I do not necessarily think they are.⁵⁴²

⁵³⁹ Evidence, Mr Andrew Stone, Barrister, Member, Common Law Committee, New South Wales Bar Association, 28 March 2014, pp 38-39.

⁵⁴⁰ Evidence, Mr David Henry, NSW Branch Work Health and Safety Officer, Australian Manufacturing Workers’ Union, 28 March 2014, p 69.

⁵⁴¹ Evidence, Mr Michael Playford, Consulting Actuary and Partner, Pricewaterhouse Coopers and actuary for the Workers Compensation Nominal Insurer Scheme, 12 May 2014, pp 22-23.

⁵⁴² Evidence, Mr Playford, 12 May 2014, pp 22-23.

- 9.46** A second issue relating to the Commonwealth sphere, raised by the Office of the NSW Small Business Commissioner, was the harmonisation of workers compensation legislation across state jurisdictions. The office advised that efforts have been made to achieve better harmonisation, but highlighted that lower premiums in other states may encourage businesses to relocate:

While recent reforms have led to substantial improvements and a reduction in premiums, businesses within NSW continue to have higher workers compensation premiums and more complex regulation imposed upon them. For small businesses located in border communities, workers compensation premiums are a significant consideration in choosing where to locate their business, with many choosing to locate their business across the border in order to enjoy the benefits of lower premiums.⁵⁴³

- 9.47** The office insisted that it was ‘imperative’ that the New South Wales workers compensation scheme be closely aligned to Queensland and Victoria to ensure that the state’s small business sector remained competitive.⁵⁴⁴

Committee comment

- 9.48** The committee notes the potential for expanded eligibility for the Comcare scheme to change the makeup of the New South Wales workers compensation scheme. If the Safety, Rehabilitation and Compensation Legislation Amendment Bill 2014 is legislated, we will closely monitor developments in this area and keep a watching brief on the issue. In the meantime, we recommend that the NSW Government develop an actuarial and legal impact statement of an expanded Comcare scheme.

Recommendation 25

That the NSW Government develop an actuarial and legal impact statement of an expanded Comcare scheme.

- 9.49** With regard to the concerns raised by the Office of the Small Business Commissioner regarding the fact that other states have lower premiums which may encourage businesses to relocate, the committee encourages the NSW Government to continue to identify ways to enhance the attractiveness of New South Wales as a business destination.

Disability sector

- 9.50** The growing participation of people with a disability in the workforce and community was raised by review participants as presenting some challenges to the workers compensation scheme. Most notably, the tension that can exist between disability legislation and work health and safety legislation was highlighted, while changing work environments within the disability sector were also identified as having potential implications for work health and safety responsibilities.

⁵⁴³ Submission 5, Office of the NSW Small Business Commissioner, p 3.

⁵⁴⁴ Submission 5, Office of the NSW Small Business Commissioner, p 3.

9.51 The implementation of the National Disability Insurance Scheme (NDIS) is likely to increase both the number of people with disability in the workforce, and the number of people employed within the disability sector. Mr Scott Holz, State Manager, National Disability Services, noted that as the NDIS is implemented, there is likely to be a doubling of the disability-related workforce in New South Wales alone:

... in New South Wales, the numbers are that we currently support about 55,000 people with a disability. With full implementation of the NDIS by 2018-19, we will see that rise to 140,000 people. This is going to be a doubling of the workforce, for example, where we need to put some supports and processes in place to ensure a safer workforce.⁵⁴⁵

9.52 Mr Jason Allison, Manager, Chief Workers Compensation Underwriting and Portfolio Management, Suncorp Group, commented on the potential impact of an increasing number of people with a disability both in the workforce and as employers, suggesting it could result in ‘superimposed inflation’ on the workers compensation scheme.⁵⁴⁶

9.53 The central area of concern identified during the review was the tension that exists between disability legislation which empowers people with disability to exercise choice, and work health and safety legislation which seeks to minimise the risk of workplace injury occurring. National Disability Services explained that while disability legislation aims to enable people with disability to choose the support they receive, implementing these choices with the assistance of a disability service provider requires the consideration of work health and safety issues:

National Disability Services supports the objects of the *Work Health and Safety Act* and associated instruments and advocates strongly within our sector for measures which provide for the health and safety of workers. A real challenge remains, however, for service providers trying to meet their obligations to eliminate, minimise and control workplace risks at the same time as upholding the ‘dignity of risk’ of the people who choose their services.⁵⁴⁷

9.54 Mr Holz commented that the shift away from centre-based activities is likely to further exacerbate the tension between disability and health and safety legislation:

Our main interest is that our members and the services for which we provide support have to deal with the dual tension of complying with work health and safety legislation – and rightly so – in an environment where people with disability are exercising increasingly greater choice and control over the types of support they receive. There has been a move from centre-based activities, where the employment environment can be controlled by an employer, often to places of the service-recipient’s choosing. That could be in the community, in their own homes or doing a variety of activities.⁵⁴⁸

9.55 National Disability Services detailed the ‘significant compliance burdens’ of undertaking risk assessments in external and home environments, noting that clients can become frustrated

⁵⁴⁵ Evidence, Mr Scott Holz, State Manager, National Disability Services, 21 March 2014, p 77.

⁵⁴⁶ Evidence, Mr Jason Allison, Manager, Chief Workers Compensation Underwriting and Portfolio Management, Suncorp Group, 28 March 2014, p 25.

⁵⁴⁷ Submission 8, National Disability Services, p 2.

⁵⁴⁸ Evidence, Mr Holz, 21 March 2014, p 75.

when money expended on undertaking such assessments is diverted from delivering actual services:

Meeting these important WHS compliance responsibilities involves hours of travel, assessment and preparation of documentation. Ultimately these are hours that are not directed toward direct service provision. Moreover, disability service providers increasingly report that service recipients are becoming frustrated with the compliance related assessments that an employer is required to undertake on 'their home'. This creates an unnecessary tension between employers' obligations and related costs of compliance and the reasonable expectations of service recipients that package value and direct support hours are maximised.⁵⁴⁹

9.56 Mr Holz noted the 'commercial tension' of such situations, contending that the portability of funding may mean that clients elect to have services delivered by organisations that are less rigorous in regard to health and safety assessments and requirements.⁵⁵⁰

9.57 National Disability Services observed that in addition to the growth in the number of options for workplaces there has been corresponding growth in the number of people with disability directly employing their own assistance. The organisation emphasised the importance of having the necessary skills, information, and work health and safety systems to support people in these circumstances:

This diversity in working environments will also occur simultaneously with the increasing prevalence of self-directed employment models. That is, where a person chooses to employ worker(s) directly, taking on an active employment role, or to share aspects of employment responsibility with a service provider. It is imperative that people with disability seeking to pursue this option are appropriately informed and skilled to do so – this is happening through a number of initiatives of the NSW government, known broadly as 'Getting Prepared'. It is also imperative, however, that the WHS system be able to respond appropriately to such cases where a person with disability is carrying all or part of the employment risk.⁵⁵¹

9.58 Ms Susan Smith, Project Manager, National Disability Services, informed the committee that under work health and safety legislation, an individual with a disability who employs someone to provide services for them at their house would be deemed to be a person conducting a business or undertaking (PCBU),⁵⁵² which then bestows a series of employer obligations on the individual with a disability:

They have obligations whether they are a PCBU because it becomes a workplace. So they have an obligation as another person in the workplace whilst the service is being provided but, especially when they are actually directly employing, they then have

⁵⁴⁹ Submission 8, National Disability Services, pp 3-4.

⁵⁵⁰ Evidence, Mr Holz, 21 March 2014, p 75.

⁵⁵¹ Submission 8, National Disability Services, p 3.

⁵⁵² Under s 19 of the *Work Health and Safety Act 2011*, a PCBU is obliged to provide a safe and healthy workplace. This includes safe systems of work and a safe work environment; facilities for the welfare of workers; notification and recording of workplace incidents; adequate information, training, instruction and supervision; compliance with the requirements under work health and safety regulation; and effective systems for monitoring the health of workers and workplace conditions.

PCBU obligations. That is something that we are trying to obtain information and provide supportive information to people with disabilities around that.⁵⁵³

- 9.59** Review participants made a number of proposals in regard to disability service providers undertaking risk assessments. For example, Ms Smith highlighted the need to train disability support workers to undertake a risk assessment when arriving at a new workplace, and negotiate with their client if they feel that the environment is not safe:

There are mechanisms that can be used, such as the risk-assessment process when they arrive at the workplace. That is the type of advice I give organisations. They have to empower workers so that when they arrive at venues the client has chosen the worker can say no if the worker feels the venue is not safe. That is difficult and in cases where they have warning, perhaps when the client has said they want to become proficient at swimming so the worker knows what to expect from the venue and can do an assessment before the day, there are associated costs. One problem organisations have is the cost of checking out workplaces, because they do not have control over the choice of workplaces.⁵⁵⁴

- 9.60** In order to achieve efficiencies in the risk assessment process, National Disability Services suggested that it would be beneficial to develop risk assessment practice guidelines specifically for the disability sector:

National Disability Service members consider the current requirements around risk assessment of the workplace to be an area where significant efficiency gains are achievable. The disability sector would benefit significantly from the development of industry specific requirements and practice guidance which better reflect the realities of practice across multiple, uncontrolled environments.⁵⁵⁵

- 9.61** Ms Smith also identified that the development of guidance material, with the assistance of WorkCover or Safe Work Australia, would assist disability service providers to have a clear understanding of their rights and responsibilities in relation to work health and safety.⁵⁵⁶

- 9.62** When discussing the role that WorkCover inspectors play in the assessment of health and safety risks, Ms Smith highlighted that the development of disability sector-specific training material would also be a beneficial tool for inspectors. Such material would allow inspectors to better understand the unique environment that disability service providers operate in, especially as a growing number of people with disability will themselves become employers.⁵⁵⁷

Committee comment

- 9.63** The committee notes the difficulties of balancing the tension that can exist between disability legislation and work health and safety legislation. While people with a disability have the right to choose the support they receive from disability service providers, employees have the right to work in a safe workplace where the risk of injury is minimised.

⁵⁵³ Evidence, Ms Susan Smith, Project Manager, National Disability Services, 21 March 2014, p 79.

⁵⁵⁴ Evidence, Ms Smith, 21 March 2014, p 75.

⁵⁵⁵ Submission 8, National Disability Services, p 4.

⁵⁵⁶ Evidence, Ms Smith, 21 March 2014, p 77.

⁵⁵⁷ Evidence, Ms Smith, 21 March 2014, p 79.

- 9.64** The committee supports the suggestions by National Disability Services to develop risk assessment practice guidelines for the disability sector, guidance material for disability service providers in relation to workplace health and safety, and sector-specific training material for WorkCover inspectors. We believe that this will assist to provide a clear understanding of work health and safety rights and responsibilities for disability service providers, as well as assist inspectors to better respond to the unique operating environments of disability service providers.
- 9.65** We therefore recommend that WorkCover develop these materials, in consultation with relevant stakeholders.

Recommendation 26

That the WorkCover Authority of NSW, in consultation with stakeholders, develop risk assessment practice guidelines for the disability sector, guidance material on workplace health and safety for disability service providers, and disability sector-specific training material for WorkCover inspectors.

Appendix 1 WorkCover's specific functions

Section 23 of the *Workplace Injury Management Act 1998* sets out WorkCover's specific functions:

(a) to initiate and encourage research to identify efficient and effective strategies for the prevention and management of work injury and for the rehabilitation of injured workers,

(b) to ensure the availability of high quality education and training in such prevention, management and rehabilitation,

(c) to develop equitable and effective programs to identify areas of unnecessarily high costs in or for schemes to which the workers compensation legislation or the work health and safety legislation relates,

(d) to foster a co-operative relationship between management and labour in relation to the health, safety and welfare of persons at work,

(f) to identify (and facilitate or promote the development of programs that minimise or remove) disincentives for injured workers to return to work or for employers to employ injured workers, or both,

(g) to assist in the provision of measures to deter and detect fraudulent workers compensation claims,

(h) to develop programs to meet the special needs of target groups...

(i) to facilitate and promote the establishment and operation of:

- work health and safety committees at places of work
- return-to-work programs,

(j) to investigate workplace accidents,

(k) to develop policies for injury management, worker rehabilitation, and assistance to injured workers,

(l) to monitor the operation of requirements and arrangements imposed or made by or under the workers compensation legislation or the work health and safety legislation, including requirements and arrangements for all or any of the following:

- injury management
- worker rehabilitation
- workers compensation insurance
- workers compensation insurer licensing,

and to commence and conduct prosecutions for offences in connection with any such requirements and arrangements,

(m) to collect, analyse and publish data and statistics, as the Authority considers appropriate,

(n) to provide advisory services to workers, employers, insurers and the general community (including information in languages other than English),

(o) to provide funds for or in relation to:

- measures for the prevention or minimisation of work injuries or diseases
- work health and safety education,

(p) to arrange, or facilitate the provision of, interpreter services to assist injured workers,

(q) to provide and administer (subject to the regulations) a legal aid service for persons who are parties to proceedings relating to workers compensation.⁵⁵⁸

⁵⁵⁸ *Workplace Injury Management Act 1998*, s 23.

Appendix 2 Submission list

| No | Author |
|----|--|
| 1 | Mr Ross Hampton |
| 2 | Australian Manufacturing Workers' Union |
| 3 | New South Wales Nurses and Midwives' Association |
| 4 | RiskNet Pty Ltd |
| 5 | Office of the NSW Small Business Commissioner |
| 6 | Suncorp Group |
| 7 | National Insurance Brokers Association of Australia |
| 8 | National Disability Services |
| 9 | Confidential |
| 10 | Confidential |
| 11 | Name suppressed |
| 12 | NSW Workers Compensation Self Insurers Association Inc |
| 13 | Hearing Care Industry Association |
| 14 | Flight Attendants' Association of Australia |
| 15 | Ms Vicki Pepyat |
| 16 | Confidential |
| 17 | Name suppressed |
| 18 | Name suppressed |
| 19 | Mr Jason Broadbent |
| 20 | BlueScope Limited |
| 21 | Name suppressed |
| 22 | The Law Society of New South Wales |
| 23 | Name suppressed |
| 24 | Mr James Hind |
| 25 | Confidential |
| 26 | Injured Workers Support Network |
| 27 | New South Wales Bar Association |
| 28 | Construction Forestry Mining and Energy Union (NSW Branch) |
| 29 | United Services Union |
| 30 | Public Service Association of NSW |
| 31 | Unions NSW |
| 32 | NSW Business Chamber |

| No | Author |
|-----------|---|
| 33 | Construction Forestry Mining and Energy Union - Northern Mining & NSW Energy District |
| 34 | Australian Federation of Employers & Industries |
| 35 | Australian Lawyers Alliance |
| 36 | WorkCover Independent Review Office |
| 37 | Name suppressed |
| 38 | Dr John Quinlan |
| 39 | Name suppressed |
| 40 | Dr Anthony Lowy |
| 41 | Name suppressed |
| 42 | Mrs Kerrie Henderson |
| 43 | Mr Ron Hammonds |

Appendix 3 Witnesses at hearings

| Date | Name | Position and Organisation |
|--|--|---|
| 21 March 2014 Hobart Room, Sofitel Sydney Wentworth, Sydney | Ms Carmel Donnelly | General Manager, Strategy and Performance, Safety, Return to Work and Support |
| | Mr John Watson | General Manager, Work Health and Safety, WorkCover Authority of NSW |
| | Mr Gary Jeffery | Acting General Manager, Workers Compensation Insurance Division, WorkCover Authority of NSW |
| | Mr Michael Playford | Consulting Actuary and Partner, PricewaterhouseCoopers |
| | Mr Kim Garling | WorkCover Independent Review Officer, WorkCover Independent Review Office |
| | Mr Mark Lennon | Secretary, UnionsNSW |
| | Ms Emma Maiden | Assistant Secretary, UnionsNSW |
| | Mr Shay Deguara | Industrial Officer, UnionsNSW |
| | Ms Denise Fishlock | Chairperson, New South Wales Workers' Compensation Self Insurers Association |
| | Mr Paul Macken | Honorary Lawyer, New South Wales Workers' Compensation Self Insurers Association |
| | Mr Steve Turner | Assistant General Secretary, Public Service Association of NSW |
| | Mr Ashley Wilson | Board Director, Hearing Care Industry Association |
| | Mr Michael Davis | WorkCover Manager, HearingLife |
| | Mr Graham Holdgate | Private citizen |
| | Mr Brett Holmes | General Secretary, NSW Nurses' and Midwives Association |
| Mr Stephen Hurley-Smith | Industrial Office, NSW Nurses' and Midwives Association | |
| Mr Adam Grumley | Coordinator, Injured Workers' Support Network | |
| Ms Janet Chan | Member, Injured Workers' Support Network | |
| Mr Scott Holz | State Manager, New South Wales, National Disability Services | |
| Ms Susan Smith | Project Manager, Disability Safe, | |

| Date | Name | Position and Organisation |
|---|---|--|
| | | National Disability Services |
| 28 March 2014 Macquarie Room, State Library of New South Wales, Sydney | Mr Luke Aitken | Senior Manager, Policy and Advocacy, NSW Business Chamber |
| | Mr Craig Milton | Policy Analyst, NSW Business Chamber |
| | Mr Greg Pattison | Advisor, WHS and Industrial Relations, NSW Business Chamber |
| | Ms Eileen Day | Secretary, Asbestos Diseases Foundation of Australia Inc |
| | Ms Maree Stokes | Vice President, Coordinator, Asbestos Diseases Foundation of Australia Inc |
| | Mr Jason Allison | Chief, Workers Compensation Underwriting & Portfolio Management, Suncorp Group |
| | Mr Timothy Concannon | Partner, Carroll and O'Dea Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales |
| | Ms Roshana May | Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales |
| | Mr Andrew Stone | Member, Common Law Committee, Bar Councillor, New South Wales Bar Association |
| | Ms Elizabeth Welsh | Member, Common Law Committee, New South Wales Bar Association |
| | Mr Bruce McManamey | NSW Committee Member, Australian Lawyers Alliance |
| | Mr Anthony Scarcella | NSW Committee Member, Australian Lawyers Alliance |
| | Ms Rita Mallia | State President, Construction, Forestry, Mining and Energy Union (NSW Branch) |
| | Ms Sherri Hayward | Industrial Officer, Construction, Forestry, Mining and Energy Union (NSW Branch) |
| Mr Ivan Simic | Partner, Taylor & Scott Lawyers, Construction, Forestry, Mining and Energy Union (NSW Branch) | |
| Mr Michael Perks | Injured worker | |

| Date | Name | Position and Organisation |
|--|---------------------|--|
| | Mr Atilio Villegas | Private citizen |
| | Mr David Henry | New South Wales Branch Work Health and Safety Officer, Australian Manufacturing Workers' Union |
| | Mr Peter Dunphy | Acting General Manager, Workers Compensation (Dust Diseases) Board and Chair of Heads of Asbestos Coordination Authorities Working Group |
| | Ms Anita Anderson | General Manager, Workers Compensation (Dust Diseases) Board |
| 12 May 2014 Macquarie Room, Parliament of New South Wales, Sydney | Ms Carmel Donnelly | General Manager, Strategy and Performance, Safety, Return to Work and Support |
| | Mr John Watson | General Manager, Work Health and Safety, WorkCover Authority of NSW |
| | Mr Gary Jeffery | Acting General Manager, Workers Compensation Insurance Division, WorkCover Authority of NSW |
| | Mr Michael Playford | Consulting Actuary and Partner, PricewaterhouseCoopers |

Appendix 4 Tabled documents

21 March 2014

Hobart Room,

Sofitel Sydney Wentworth, Sydney

1. WorkCover Authority of NSW, Opening Statement, tendered by Mr John Watson
2. WorkCover Independent Review Office, Opening Statement, tendered by Mr Kim Garling

28 March 2014

Macquarie Room,

State Library of New South Wales, Sydney

1. New South Wales Business Chamber, supplementary material, tendered by Mr Luke Aitken, Senior Manager, Policy, NSW Business Chamber
2. Southern Cross University, The Asbestos Narratives: A report into the real impact of an asbestos-related diagnosis on the lives of men and women and their carers, tendered by Ms Eileen Day, Secretary, Asbestos Diseases Foundation of Australia
3. Opening statement, Mr Atilio Villegas, Private citizen
4. Email of 7 March 2014, Mr Ivan Simic, Partner, Taylor & Scott supplementary material tendered by Ms Sherri Hayward, Industrial Officer, CFMEU
5. work capacity decision merit review response times tendered by Ms Sherri Hayward, Industrial Officer, CFMEU.
6. Construction, Forestry, Mining and Energy Union (NSW Branch), supplementary material, tendered by Ms Rita Mallia
7. Construction, Forestry, Mining and Energy Union (NSW Branch), work capacity decision merit review response times, tendered by Ms Rita Mallia

12 May 2014

Macquarie Room,

Parliament of New South Wales, Sydney

1. WorkCover Authority of NSW, Workers Compensation Valuation, tendered by Mr Michael Playford
2. WorkCover Authority of NSW, Potential impact of Goudappel v ADCO Constructions Pty Ltd decision, tendered by Mr Michael Playford

Appendix 5 Answers to questions on notice

The committee received answers to questions on notice from:

- Australian Lawyers' Alliance
- Australian Manufacturing Workers' Union (NSW Branch),
- Construction, Forestry, Mining and Energy Union (NSW Branch)
- Hearing Care Industry Association
- Injured Workers' Support Network
- Law Society of New South Wales
- New South Wales Bar Association
- NSW Business Chamber
- NSW Nurses and Midwives' Association
- New South Wales Self Insurers Association Inc
- Suncorp Group
- UnionsNSW
- WorkCover Authority of NSW
- WorkCover Independent Review Office.

Appendix 6 Minutes

Minutes No. 22

Wednesday 19 June 2013

Standing Committee on Law and Justice

Room 1136, Parliament House, at 1:16 pm

1. Members present

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mrs Mitchell: That draft Minutes No. 21 be confirmed.

3. ***

4. ***

5. ***

6. Review of the WorkCover Authority and the Workers' Compensation (Dust Diseases) Board

Resolved, on the motion of Mr Shoebridge: That the Committee commence the Review of the WorkCover Authority and the Workers' Compensation (Dust Diseases) Board, and receive a briefing from the Safety and Return to Work Support Division in November 2013.

7. Adjournment

The Committee adjourned at 1.29 pm *sine die*.

Teresa McMichael

Committee Clerk

Minutes No. 25

Tuesday 22 October 2013

Standing Committee on Law and Justice

Members' Lounge, Parliament House, Sydney, 2.20 pm

1. Members present

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

2. Previous minutes

Resolved, on the motion of Mr MacDonald: That draft Minutes No. 24 be confirmed.

3. Reviews of the WorkCover Authority and the Workers' Compensation (Dust Diseases) Board

Resolved, on the motion of Mr MacDonald that:

- The reviews and the call for submissions be advertised in the Sydney Morning Herald and Daily Telegraph on Wednesday 6 November 2013.

- The Committee hold at least one day of hearings on dates to be confirmed by the Secretariat in consultation with the Chair and subject to the availability of members and witnesses.
- Representatives of the WorkCover Authority and the Workers' Compensation (Dust Diseases) Board be invited to appear as witnesses along with any other witnesses determined by the Secretariat in consultation with the Chair and the Committee.

4. **Adjournment**

The Committee adjourned at 2.22 pm, until Friday 15 November 2013 at 10.00am (WorkCover and Dust Diseases Board briefing).

Teresa McMichael

Clerk to the Committee

Minutes No. 26

Friday 15 November 2013

Standing Committee on Law and Justice

Room 1153, Parliament House, 10.00 am

1. **Members present**

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

2. **Reviews of the WorkCover Authority and the Workers' Compensation (Dust Diseases) Board**

2.1 **Briefing**

Representatives from the WorkCover Authority and Dust Diseases Board briefed the Committee.

3. **Previous minutes**

Resolved, on the motion of Mr MacDonald: That draft Minutes No. 25 be confirmed.

4. **Correspondence**

The Committee noted the following items of correspondence:

Sent:

- 31 October 2013 - Letter to Minister Andrew Constance regarding the Committee's review of the WorkCover Authority of NSW and Workers' Compensation (Dust Diseases) Board.

5. **Reviews of the WorkCover Authority and the Workers' Compensation (Dust Diseases) Board**

5.1 **Hearings**

Resolved, on the motion of Mr Moselmane: That the Committee hold public hearings on 21 March and 28 March 2014 (reserve date).

6. ***

7. ***

8. **Adjournment**

The Committee adjourned at 2.49 pm *sine die*.

Teresa McMichael
Clerk to the Committee

Minutes No. 29

Friday 7 March 2014

Standing Committee on Law and Justice

Macquarie Room, State Library of New South Wales, 9.20 am

1. Members presentMr Clarke, *Chair*Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge (9.35 am)

2. Previous minutes

Resolved, on the motion of Mr MacDonald: That draft Minutes No. 28 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received:

- 10 January 2014 – From Mr G M Grimson, Industrial Registrar, Industrial Relations Commission of NSW, declining the invitation to make a submission to the WorkCover/Dust Diseases reviews
- 17 January 2014 – From Dr Louise Roufeil, Executive Manager Professional Practice (Policy), Australian Psychology Society to Chair, declining to make a submission to the WorkCover review but offering to appear as a witness

Sent:

- 25 February 2014 – From Chair to the Hon Andrew Constance MP, Minister for Finance and Services, inviting representatives from the WorkCover Authority and Workers' Compensation (Dust Diseases) Board to give evidence at hearings on 21 and 28 March 2014.

4. Reviews of the WorkCover Authority of NSW and Workers' Compensation (Dust Diseases) Board**4.1 Public submissions**

The Committee noted that the following submissions were published under the authorisation of an earlier resolution:

- WorkCover: Submission Nos 1-38
- Dust Diseases Board: Submission Nos 2-7.

4.2 Partially confidential submissions

Resolved, on the motion of Mr Primrose: That the Committee authorise the publication of the following submissions, with the exception of the name and other identifying details of the author which are to remain confidential.

- WorkCover: Submission Nos 11, 17, 17a, 21, 23 and 37
- Dust Diseases Board: Submission No 1.

4.3 Confidential submissions

Resolved, on the motion of Mrs Mitchell: That the following submissions to the WorkCover review remain confidential:

- Submission Nos 10 and 25, at the request of the author

- Submission Nos 9 and 16, as the authors have not been contactable to confirm their preferred publication status.

4.4 Report deliberative dates

Resolved, on the motion of Mrs Mitchell: That the Committee hold report deliberatives on the following dates:

- Friday 20 June 2014 (Review of the WorkCover Authority of NSW)
- Friday 27 June 2014 (Review of the Workers' Compensation (Dust Diseases) Board).

Mr Shoebridge joined the meeting.

5. ***

6. ***

7. ***

8. ***

9. Adjournment

The Committee adjourned at 4:45 pm until Monday 17 March 2014, at 8:45 am in the Hamilton Room, Level 47, MLC Centre, ***.

Teresa McMichael
Clerk to the Committee

Minutes No. 32

Friday 21 March 2014

Standing Committee on Law and Justice

Hobart Room, Sofitel Sydney Wentworth Hotel, Sydney, 8.50 am

1. Members present

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane from 10.55 am

Mr Shoebridge

2. Apologies

Mr Moselmane until 10.55am.

3. Previous minutes

Resolved, on the motion of Mr MacDonald: That Draft Minutes No. 30 and 31 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence:

Received:

- 18 March 2014 - From Hon Andrew Constance MP, Minister for Finance and Services to Chair, confirming witnesses appearing at the WorkCover and Dust Diseases Board review hearings on 21 and 28 March 2014.

- 20 March 2014 – From Ms Carmel Donnelly, General Manager, Strategy & Performance, Safety, Return to Work and Support, providing an update report from the independent Scheme actuary on the performance of the Workers Compensation Nominal Insurer Scheme.

Resolved, on the motion of Mrs Mitchell: That the report from the independent Scheme actuary on the performance of the Workers Compensation Nominal Insurer Scheme, provided by Ms Donnelly, be published.

5. ***

6. **Reviews of the WorkCover Authority of NSW and Workers' Compensation (Dust Diseases) Board**

6.1 Public submissions

Resolved, on the motion of Mr MacDonald: That the Committee authorise the publication of Supplementary Submission Nos 3a and 26a.

Resolved on the motion of Mr MacDonald: That the Committee authorise the publication of Submission No. 39 with the exception of the name and other identifying details of the author which are to remain confidential.

6.2 Answers to questions on notice

Resolved, on the motion of Mrs Mitchell: That witnesses be requested to return answers to questions on notice and/or supplementary questions from members within 21 days of the date on which questions are forwarded to the witnesses by the committee clerk.

6.3 Request for information

Resolved, on the motion of Mr MacDonald: That the Secretariat contact the Workers' Compensation (Dust Diseases) Board to request it provide a brief written overview to the Committee about the Board's role and functions.

6.4 Public hearing

Witnesses, the public and the media were admitted.

The following witnesses were sworn and examined:

- Mr John Watson, General Manager, Work Health and Safety, WorkCover Authority of NSW
- Ms Carmel Donnelly, General Manager, Strategy and Performance, Safety, Return to Work and Support
- Mr Gary Jeffrey, Acting General Manager, Workers Compensation Insurance Division, WorkCover Authority of NSW
- Mr Michael Playford, Consulting Actuary and Partner, Pricewaterhouse Coopers and actuary for Workers Compensation Nominal Insurer Scheme.

Mr Watson tendered the following document:

- WorkCover opening statement 21 March 2014.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined

- Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office.

Mr Garling tendered the following document:

- WorkCover Independent Review Office opening statement.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Mark Lennon, Secretary, Unions NSW

- Ms Emma Maiden, Assistant Secretary, Unions NSW
- Mr Shay Deguara, Industrial Officer, Unions NSW

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Denise Fishlock, Chairperson, NSW Workers' Compensation Self Insurers Association
- Mr Paul Macken, Honorary Lawyer, NSW Workers' Compensation Self Insurers Association.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Steve Turner, Assistant General Secretary, Public Service Association of NSW.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Ashley Wilson, Board Director, Hearing Care Industry Association.
- Mr Michael Davis, WorkCover Manager, Hearing Life.
- Mr Graham Holdgate, private citizen.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Brett Holmes, General Secretary, New South Wales Nurses' Association
- Mr Stephen Hurley-Smith, Industrial Officer, New South Wales Nurses' Association.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Adam Grumley, Coordinator, Injured Workers Support Network
- Ms Janet Chan, Member, Injured Workers Support Network.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Susan Smith, Project Manager, Disability Safe, NSW National Disability Services
- Mr Scott Holz, State Manager, NSW National Disability Services.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.00 pm.

6.5 Tendered documents

Resolved, on the motion of Mr Primrose: That the Committee accept and publish the documents tendered during the hearing held on Friday 21 March 2014:

- WorkCover opening statement tendered by Mr John Watson, General Manager, Work Health and Safety, WorkCover Authority of NSW.
- WorkCover Independent Review Office opening statement tendered by Mr Kim Garling, WorkCover Independent Review Officer, WorkCover Independent Review Office.

6.6 Supplementary questions on notice

Resolved, on the motion of Mr Shoebridge: That the Committee forward any supplementary questions on notice to the Secretariat by 5 pm on Tuesday 25 March 2014.

7. Adjournment

The Committee adjourned at 4.05 pm until Friday 28 March 2014, at 8:45 am in the Macquarie Room, State Library, for the public hearing into the WorkCover Authority and the Workers' Compensation (Dust Diseases) Board.

Teresa McMichael
Clerk to the Committee

Minutes No. 33

Friday 28 March 2014

Standing Committee on Law and Justice

Macquarie Room, State Library, Sydney, 8.47 am

1. Members present

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane (from 8.55 am)

Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mrs Mitchell: That Draft Minutes No. 32 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received:

- 25 March 2014 – From Ms Carmel Donnelly, Safety Return to Work and Support, to Director, providing information on the operation of the Workers Compensation (Dust Diseases) Board as requested by the Committee on 21 March 2014

Sent:

- 21 March 2014 – From Director to Ms Carmel Donnelly, General Manager, Strategy and Performance, Safety, Return to Work and Support Agencies, requesting a brief written overview of the Dust Diseases Board's role and function

Resolved, on the motion of Mr MacDonald: That the Committee publish the information on the operation of the Workers' Compensation (Dust Diseases) Board provided by Ms Donnelly.

4. ***

5. ***

6. Reviews of the WorkCover Authority of NSW and Workers' Compensation (Dust Diseases) Board

6.1 Recall of WorkCover witnesses

Resolved, on the motion of Mr Primrose: That the WorkCover Authority witnesses be recalled to another hearing on Monday 12 May 2014.

6.2 Declaration of interest

Mr MacDonald declared that he pays Workers' Compensation premiums for his personal business.

6.3 Public hearing

Witnesses, the public and the media were admitted.

The following witnesses were sworn and examined:

- Mr Luke Aitken, Senior Manager, Policy, NSW Business Chamber
- Mr Greg Pattison, Advisor, WHS and Industrial Relations, NSW Business Chamber

- Mr Craig Milton, Policy Analyst, NSW Business Chamber.

Mr Aitken tendered the following document:

- NSW Business Chamber, Review of the exercise of the functions of the WorkCover Authority, Second hearing: Friday 28 March 2014, Supplementary material.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Maree Stokes, Vice President, Asbestos Diseases Foundation of Australia, and Coordinator – Central Coast Support Group
- Ms Eileen Day, Secretary, Asbestos Diseases Foundation of Australia.

Ms Day tendered the following document:

- Southern Cross University, The Asbestos Narratives: A report into the real impact of an asbestos-related diagnosis on the lives of men and women and their carers.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Jason Allison, Manager, Chief Workers Compensation Underwriting & Portfolio Management, Suncorp Group.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Roshana May, Member, Injury Compensation Committee, The Law Society of NSW
- Mr Tim Concannon, Member, Injury Compensation Committee, The Law Society of NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Elizabeth Welsh, Member, Common Law Committee, NSW Bar Association
- Mr Andrew Stone, Member, Common Law Committee, NSW Bar Association.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Anthony Scarcella, NSW Director, National Council, Australian Lawyers Alliance
- Mr Bruce McManamey, NSW Committee Member, Australian Lawyers Alliance.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Rita Mallia, President, CFMEU
- Ms Sherri Hayward, Industrial Officer, CFMEU
- Mr Ivan Simic, Partner, Taylor & Scott
- Mr Michael Perks, Injured worker
- Mr Atilio Villegas, Private citizen.

Mr Villegas tendered the following document:

- Opening statement.

Resolved, on the motion of Mr Shoebridge: That a non-publication order be issued for the individuals named in Mr Villegas' opening statement.

Mr Simic tendered the following document:

- Email, 7 March 2014.

Ms Hayward tendered the following documents:

- Supplementary material
- Work capacity decision merit review response times.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr David Henry, NSW Branch WHS Officer, Australian Manufacturing Workers' Union.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Anita Anderson, General Manager, Workers' Compensation (Dust Diseases) Board
- Mr Peter Dunphy, A/General Manager, Workers' Compensation (Dust Diseases) Board.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.10 pm.

6.4 Tendered documents

Resolved, on the motion of Mrs Mitchell: That in regard to the documents tendered during the hearing on Friday 28 March 2014, the Committee:

- accept and publish the opening statement tendered by Mr Villega, with the exception of the names of individuals which are to remain confidential
- accept and publish the email tendered by Mr Simic, with the exception of identifying information
- accept and publish the following:
 - supplementary material tendered by Mr Luke Aitken, NSW Business Chamber
 - 'The Asbestos Narratives' tendered by Ms Eileen Day, Secretary, Asbestos Diseases Foundation of Australia
 - supplementary material tendered by Ms Sherri Hayward, Industrial Officer, CFMEU
 - work capacity decision merit review response times tendered by Ms Sherri Hayward, Industrial Officer, CFMEU.

7. Adjournment

The Committee adjourned at 5.15 pm until Monday 31 March 2014, at 9.30 am in the Pioneer Community Hall, Bowraville ***

Teresa McMichael
Clerk to the Committee

Minutes No. 34

Monday 31 March 2014

Standing Committee on Law and Justice

Pioneer Community Hall, High Street, Bowraville

1. Members presentMr Clarke, *Chair*Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

2. Participating member

Ms Cusack attended the meeting as a participating member.

3. Reviews of the WorkCover Authority of NSW and Workers' Compensation (Dust Diseases) Board**3.1 Publication of transcript**

Resolved, on the motion of Mrs Mitchell: That the Committee publish the transcript of proceedings from the WorkCover hearing on Friday 28 March 2014, with the exception of the names of individuals named by Mr Villega and CFMEU witnesses, which are to remain confidential.

4. *****5. Adjournment**

The Committee adjourned at 3.15 pm until Thursday 1 May 2014, at the Nambucca Shire Council Chambers, Macksville for ***

Teresa McMichael

Clerk to the Committee**Minutes No. 35**

Thursday 1 May 2014

Standing Committee on Law and Justice

Nambucca Shire Council Chambers, Macksville, 1.50 pm.

1. Members presentMr Clarke, *Chair*Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

2. Participating members

Ms Cusack

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 4 April 2014 – From Mr Ashley Wilson, Hearing Care Industry Association, to Director, providing answers to questions on notice to the WorkCover/Dust Diseases reviews
- 16 April 2014 – From Mrs Maree Stokes, Asbestos Disease Foundation of Australia Inc., to Committee, providing answers to questions on notice to the Dust Disease review
- 17 April 2014 – From Asbestos Diseases Foundation, to Senior Council Officer, providing answers to questions on notice to the Dust Diseases review
- 17 April 2014 – From Mr Dave Henry, Australian Manufacturing Workers Union, providing answers to questions on notice to the WorkCover/Dust Diseases reviews
- 23 April 2014 – From Ms Denise Fishlock, NSW Self Insurers Association Inc., to Director, providing answers to questions on notice to the WorkCover review
- 24 April 2014 – From Mr Brett Holmes, New South Wales Nurses and Midwives' Association, to Chair, providing answers to questions on notice to the WorkCover review
- 24 April 2014 – From Mr Kim Garling, WorkCover Independent Review Office, to Director, providing answers to questions on notice to the WorkCover review
- 24 April 2014 – From Ms Sherri Hayward, CFMEU, to Director, providing answers to questions on notice to the WorkCover review
- 24 April 2014 – From Ms Eva Urban, Suncorp, to Director, providing answers to questions on notice to the WorkCover review
- 24 April 2014 – From Mr Craig Milton, NSW Business Chamber, to Director, providing answers to questions on notice to the WorkCover review
- 24 April 2014 – From Mr Shay Deguara, Unions NSW, to Director, providing answers to questions on notice to the WorkCover review.

4. **Previous minutes**

Resolved, on the motion of Mr MacDonald: That draft minutes nos. 33 and 34 be confirmed.

5. ***

6. ***

7. **Reviews of the WorkCover Authority of NSW and Workers' Compensation (Dust Diseases) Board**

7.1 Public submissions

The committee noted that the following submissions to the WorkCover Review were published by the committee clerk under the authorisation of an earlier resolution: submission nos. 40 and 40a.

7.2 Partially confidential submission

Resolved, on the Mr Moselmane: That the committee authorise the publication of submission no. 41 with the exception of the name and other identifying details of the author which are to remain confidential.

8. ***

9. **Adjournment**

The committee adjourned at 5.40pm until Friday 2 May 2014 at 9.00am ***

Teresa McMichael
Clerk to the Committee

Minutes No. 37

Monday 12 May 2014

Standing Committee on Law and Justice

Macquarie Room, Parliament House, 8.55 am

1. Members presentMr Clarke, *Chair*Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Shoebridge

2. Apologies

Mr Moselmane

3. Participating members

Ms Cusack

4. *****5. Reviews of the WorkCover Authority of NSW and Workers' Compensation (Dust Diseases) Board****5.1 Public hearing**

Witnesses, the media and the public were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses, who were sworn under a previous oath, were examined:

- Mr John Watson, General Manager, Work Health and Safety, WorkCover Authority of NSW
- Ms Carmel Donnelly, General Manager, Strategy and Performance, Safety, Return to Work and Support
- Mr Gary Jeffrey, Acting General Manager, Workers Compensation Insurance Division, WorkCover Authority of NSW
- Mr Michael Playford, Consulting Actuary and Partner, Pricewaterhouse Coopers and Scheme actuary for Workers Compensation Nominal Insurer Scheme.

Mr Playford tendered the following documents:

- correspondence from Mr Michael Playford, Partner, PricewaterhouseCoopers to Mr Chris Koutoulas, Acting Director of Claims, Safety, Return to Work and Support Division, WorkCover NSW regarding the potential impact of *Goudappel v ADCO Constructions Pty Ltd*, dated 14 April 2014
- document entitled 'Workers Compensation Nominal Insurer Scheme: Valuation results as at 31 December 2013'.

The evidence concluded and the witnesses withdrew.

6. *****7. Correspondence*****Received:***

- 24 April 2014 – From Mr Adam Grumley, Injured Workers Support Network, to Director, providing answers to questions on notice to the WorkCover review

- 28 April 2014 – From Ms Janet Chan, Injured Workers Support Network, to Director, providing answers to questions on notice to the WorkCover review
- 28 April 2014 – From Ms Sherri Hayward, CFMEU, to Director, providing answers to questions on notice to the WorkCover review
- 28 April 2014 – From Ms Carmel Donnelly, Safety, Return to Work and Support, to Director, providing answers to questions on notice to the WorkCover review
- 30 April 2014 – From the Hon Dominic Perrottet MP, Minister for Finance and Services, to Chair, confirming the appearance of WorkCover Authority representatives at the committee’s hearing on 12 May for the WorkCover review
- 1 May 2014 – From Mr Alastair McConnachie, NSW Bar Association, to Director, providing answers to questions on notice to the WorkCover review
- 2 May 2014 – From Ms Emily Mitchell, Australian Lawyers Alliance, to Committee, providing answers to questions on notice to the WorkCover review
- 5 May 2014 – From Ms Carmel Donnelly, Safety, Return to Work and Support Division, to Director, providing answers to questions on notice to the Dust Diseases review
- 5 May 2014 – From Ms Ros Everett, Law Society of New South Wales, to Committee, providing answers to questions on notice to the WorkCover review
- 7 May 2014 – From Ms Carmel Donnelly, Safety, Return to Work and Support, to Director, providing answers to additional supplementary questions to the WorkCover review
- 7 May 2014 – From *** to committee, regarding changes to the Workers Compensation Scheme.
- 12 May 2014 – From Mr Kim Garling, Workplace Independent Review Office to Director, regarding an answer to a question on notice from WorkCover.

Resolved, on the motion of Mr MacDonald: That the committee keep the correspondence from *** confidential.

8. Reviews of the WorkCover Authority of NSW and Workers’ Compensation (Dust Diseases) Board

8.1 Tended document

Resolved, on the motion of Mr Shoebridge: That the committee accept and publish the following documents tendered during the hearing on 12 May 2014:

- correspondence from Mr Michael Playford, Partner, PricewaterhouseCoopers to Mr Chris Koutoulas, Acting Director of Claims, Safety, Return to Work and Support Division, WorkCover NSW regarding the potential impact of *Goudappel v ADCO Constructions Pty Ltd*, dated 14 April 2014, tendered by Mr Michael Playford
- document entitled ‘Workers Compensation Nominal Insurer Scheme: Valuation results as at 31 December 2013’, tendered by Mr Michael Playford.

8.2 Public submission

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of supplementary submission no. 34a.

8.3 Partially confidential submissions

Resolved, on the motion of Mrs Mitchell: That the committee authorise the publication of submission nos. 42 and 43 with the exception of names and personal details of third parties which are to remain confidential.

8.4 Answers to questions on notice

Resolved, on the motion of Mr MacDonald:

- That the committee:
 - authorise the publication of the CFMEU answers to questions on notice received on 24 April 2014,

- authorise the publication of the CFMEU answers to questions on notice received on 28 April 2014, with the exception of identifying details of third parties which are to remain confidential,
 - keep the attachments to the CFMEU answers to questions on notice received on 24 and 28 April 2014 confidential as they contain identifying details of third parties.
- That the committee keep the attachments to the answers to questions on notice received from the Injured Workers Support Network confidential as they contain personal details of third parties.

9. ***

10. **Adjournment**

The committee adjourned at 2.15 pm until Monday 2 June 2014.

Teresa McMichael
Clerk to the Committee

Minutes No. 38

Monday 2 June 2014

Standing Committee on Law and Justice

Room 1254, Parliament House, 8.55 am

1. **Members present**

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell (*via teleconference*)

Mr Shoebridge

2. **Apologies**

Mr Moselmane

3. **Participating members**

Ms Cusack (*from 11.18 am, via teleconference*)

4. ***

5. **Previous minutes**

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 37 be confirmed.

6. **Correspondence**

Received:

- 8 May 2014 – From Mr Tom Fallow, private citizen, to Chair, expressing concern over WorkCover funding changes to hearing aids
- 13 May 2014 – From Mr Robert A’Court, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 13 May 2014 – From Mr Russell Fletcher, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 13 May 2014 – From Ms Jen Osborne, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 13 May 2014 – From Mr David Reid, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids

- 13 May 2014 – From Mr Geoff Trist, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 13 May 2014 – From Mr Robert Chislett, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 16 May 2014 – From Mr Frank Rice, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 19 May 2014 – From Mr Steve Turner, PSA, providing answers to questions on notice from 21 March hearing to the WorkCover/Dust Diseases Board review
- 22 May 2014 – From G Chilcott, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 22 May 2014 – From K Foster, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 22 May 2014 – From Mr Luca Bisegna, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 29 May 2014 – From Ms Jennifer Henderson, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- 29 May 2014 – From the Hon Dominic Perrottet MP, Minister for Finance and Services, to Director, confirming attendance of representatives from Safety, Return to Work and Support at 2 June 2014 meeting.

Sent:

- 20 May 2014 – From the Chair to Ms Carmel Donnelly, Safety, Return to Work and Support, to Director, providing additional supplementary questions to the WorkCover review.

7. Review of the WorkCover Authority of NSW**7.1 Correspondence regarding hearing aids**

The committee noted that it had received numerous letters from people expressing support for the Hearing Aid Industry Association's submission, and that as the closing date for submissions to the WorkCover review was 11 January, the secretariat has treated these letters as correspondence rather than processing them as submissions.

8. *****9. Adjournment**

The committee adjourned at 12.10 pm until Friday 27 June 2014.

Teresa McMichael
Clerk to the Committee

Minutes No. 39

Friday 27 June 2014

Standing Committee on Law and Justice

Room 1153, Parliament House, Sydney, 9.11 am

1. Members present

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mr Macdonald: That draft minutes no. 38 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Sent

- ***

Received

- 7 May 2014 – From Mr Raymond Hutchinson, private citizen, to Chair, supporting Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- ***
- 8 June 2014 – From Ms Kathryn Johns, private citizen, to Chair, regarding the WorkCover review
- ***
- 19 June 2014 – From Hearing Care Industry Association, to Chair, enclosing 19 letters from private citizens supporting the Hearing Care Industry Association submission regarding WorkCover funding changes to hearing aids
- ***

4. Review of the WorkCover Authority of NSW**4.1 Answers to questions on notice and supplementary questions**

Resolved, on the motion of Mr Shoebridge: That unless a compelling reason is given by WorkCover within three working days, the committee will authorise the publication of the answers to questions on notice and supplementary questions, and its attachments, from the WorkCover Review hearing on 12 May 2014 from Ms Carmel Donnelly, Safety, Return to Work and Support Division, received 11 June 2014.

5. ***

6. ***

7. ***

8. Adjournment

1.17pm until Monday 11 August 2014, 10.00 am (*report deliberative for WorkCover and Dust Diseases Board Reviews*)

Teresa McMichael
Clerk to the Committee

Minutes No. 40

Tuesday 29 July 2014

Standing Committee on Law and Justice

Room 814/815, Parliament House, Sydney, 9.55 am

1. Members present

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Ms Cusack (via teleconference)

Mr Moselmane

Mr Shoebridge

2. Apologies

Mr MacDonald
Mrs Mitchell

3. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 39 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- ***
- 10 July 2014 – From Kim Garling, WorkCover Independent Review Office, to Chair, requesting copies of the WorkCover Authority's answers to questions on notice from the 12 May 2014 public hearing
- 11 July 2014 – From Kim Garling, WorkCover Independent Review Office, to Chair, providing response to evidence from WorkCover Authority from the 12 May 2014 public hearing.

Resolved, on the motion of Mr Primrose: That the committee authorise the publication of correspondence from Mr Garling regarding evidence from the WorkCover Authority, dated 11 July 2014.

5. ***

6. ***

7. Adjournment

12.00 pm until Monday 25 August 2014, 9.30 am (*Bowraville report deliberative*).

Teresa McMichael
Clerk to the Committee

Minutes No. 41

Monday 25 August 2014
Standing Committee on Law and Justice
Room 1254, Parliament House, Sydney, 9.34 am

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Ms Cusack (participating) (from 9.35 am)
Mr MacDonald
Mrs Mitchell
Mr Moselmane
Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mr MacDonald: That draft minutes no. 40 be confirmed.

Ms Cusack joined the meeting at 9.35 am.

3. Correspondence

Received

- 19 August 2014 – Letter from Mr Kim Garling, WorkCover Independent Review Office to Director, regarding the final report by the Centre for International Economics on the Statutory Review of the *2012 Workers Compensation Legislation Amendment Act*, with two attachments raising concerns regarding errors in the report and the response received
- ***

4. ***

5. **Adjournment**

The committee adjourned at 12.00 pm until Thursday 28 August 2014, 9.30 am, Room 1254, Parliament House (WorkCover and Dust Disease report deliberatives).

Teresa McMichael
Clerk to the Committee

Minutes No. 42

Thursday 28 August 2014
 Standing Committee on Law and Justice
 Room 1254, Parliament House, Sydney, 9.40 am

1. **Members present**

Mr Clarke, *Chair*
 Mr Primrose, *Deputy Chair*
 Mr MacDonald
 Mrs Mitchell
 Mr Moselmane (until 1.11 pm)
 Mr Shoebridge

2. **Correspondence**

3. ***

4. **Review of the WorkCover Authority of NSW**4.1 **Consideration of Chair's draft report**

The Chair submitted his draft report entitled *Review of the exercise of the functions of the WorkCover Authority*, which, having been previously circulated, was taken as being read.

Chapter 2

Resolved, on the motion of Mr Primrose: That paragraph 2.19 be amended by inserting at the end: 'The claimed deficit for outstanding claims liability however remains contested. It included long term projections that made multiple assumptions regarding likely future investment returns and the discount rate.'

Mr Shoebridge moved: That paragraph 2.21 be amended by inserting at the end: 'This committee delivered a majority report five weeks after it was established.'

Question put.

The committee divided.

Ayes: Mr Moselmane, Mr Primrose, Mr Shoebridge.

Noes: Mr Clarke, Mr MacDonald, Mrs Mitchell.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.21 be amended by inserting ‘delivered a majority report and’ before ‘made 28 recommendations’.

Mr Shoebridge moved: That the following new paragraph be inserted after paragraph 2.22: ‘The reforms were met with significant criticism in some quarters as a result of benefit cuts they delivered to many injured workers.’

Mr MacDonald moved: That the motion of Mr Shoebridge be amended by omitting ‘many’ and inserting instead ‘some’.

Amendment of Mr MacDonald put and passed.

Original question of Mr Shoebridge, as amended, put and passed.

Resolved, on the motion of Mr Primrose: That paragraph 2.25 be amended by inserting ‘in some circumstances’ after ‘seriously injured workers’.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.30 be amended by inserting ‘which do not apply to all injured workers, and are limited to those workers who received an injury and made a formal claim on or before 1 October 2012’ after ‘these changes’.

Resolved, on the motion of Mr MacDonald: That paragraph 2.38 be amended by inserting ‘as at 30 June 2014. See paragraph 4.7 for further comments on fund ratios’ after ‘102 per cent’.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.46 be amended by:

- a) omitting ‘Seriously injured workers, or those assessed’ and inserting instead ‘Those workers assessed’
- b) omitting ‘not usually subject’ and inserting instead ‘not subject’.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.48 be amended by omitting ‘Legal practitioners are not entitled to recover any costs from a worker or employer in relation to most compensation claims and are not involved in work capacity assessments’ and inserting instead ‘Under the scheme it is unlawful for a legal practitioner to receive remuneration for acting for an injured worker in relation to a dispute concerning a work capacity assessment.’

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 2.50:

‘Evidence provided to the committee by Mr Michael Playford, Consulting Actuary and Partner at PriceWaterhouseCoopers, and Actuary for the Workers Compensation Nominal Insurance Scheme, WorkCover, included an analysis of what the scheme’s financial position would have been if the 2012 reforms were not implemented.

The revised solvency projections indicate that, other things being equal:

- at December 2013 a deficit of perhaps \$2.0bn to \$2.5bn may have been reported
- by June 2014 this deficit may have reduced to perhaps \$2.0bn
- between June 2014 and June 2018 the deficit may have reduced to \$0.5bn. This assumes the mean reversion of current discount rates to longer term average historic levels over the next 5 years in conjunction with average longer term investment returns being achieved.
- the solvency position may have been approaching full funding by 2021.’ [FOOTNOTE: Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment F: Impact of investment returns on WorkCover December 2013, 28 April 2014, p 5]

Resolved, on the motion of Mr Shoebridge: That paragraph 2.53 be amended by omitting 'because of higher than necessary premiums and higher investment returns'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 2.57:

'The most recent advice from the scheme's actuaries is that with continued improvements in the financial returns on these scheme's substantial investments and the ongoing reduction in liability as a result of the reduction in benefits due to the 2012 reforms, the scheme is heading towards an approximate \$6 billion surplus by 2019.'

Mr Shoebridge moved: That the following new paragraph be inserted after paragraph 2.57:

'There continues to be significant dispute as to the fairness and necessity of the government's 2012 reform agenda. The recent evidence from the scheme's actuary suggests the extent of the benefit cuts was not, in hindsight, required.'

The committee divided.

Ayes: Mr Moselmane, Mr Primrose, Mr Shoebridge.

Noes: Mr Clarke, Mr MacDonald, Mrs Mitchell.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Chapter 3

Resolved, on the motion of Mr Shoebridge: That paragraph 3.12 be amended by omitting 'claim damages' and inserting instead 'work injury damages'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.23 be amended by omitting 'determine the most appropriate model to divest WorkCover of its role as either nominal insurer or regulator of the workers compensation scheme, and implement that model as soon as practicable' and inserting instead 'consider the establishment of a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.'

Resolved, on the motion of Mr Shoebridge: That Recommendation 1 be amended by omitting 'determine the most appropriate model to divest WorkCover of its role as either nominal insurer or regulator of the workers compensation scheme, and implement that model as soon as practicable.' and inserting instead 'consider the establishment of a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.'

Resolved, on the motion of Mr Primrose: That paragraph 3.25 be amended by omitting 'work capacity assessment' and inserting instead 'work capacity decision'.

Resolved, on the motion of Mr Primrose: That paragraph 3.37 be amended by inserting 'including worker and employer representatives' after 'relevant stakeholders'.

Resolved, on the motion of Mr Primrose: That Recommendation 2 be amended by inserting 'including worker and employer representatives' after 'relevant stakeholders'.

Resolved, on the motion of Mr Primrose: That the following new recommendation be inserted after Recommendation 4:

'Recommendation X

That the NSW Government consider expanding the operational parameters of WorkCover Independent Review Office to include work health and safety, subject to the office's capacity and adequate funding subject to the office's capacity and adequate funding.'

Resolved, on the motion of Mr Shoebridge: That paragraph 3.83 be amended by inserting ‘together with a more independent WIRO’ after ‘functions of WorkCover.’

Chapter 4

Resolved, on the motion of Mr Shoebridge: That paragraph 4.2 be amended by inserting ‘at that point in time considered to be’ after ‘assets were’.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 4.2:

‘As noted in chapter 2, Mr Playford indicated that even without the 2012 reforms the scheme would have gradually returned to surplus by 2021. This return to surplus would have been driven by the recovery in returns on the scheme’s multi-billion dollar investments that since the Global Financial Crisis have been returning to higher, and more normal, levels.’

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 4.8:

‘As illustrated in chapter 2 (paragraph 2.68 and Figure 4 - Solvency projections – base projections), with the combined impact of paying reduced claim levels and significantly improved investment returns, the scheme will likely be in a surplus of up to \$6 billion by 2019.’

Resolved, on the motion of Mr MacDonald: That paragraph 4.23 be amended by inserting at the end: ‘Fund shortfalls potentially expose the NSW Government and therefore the public to risk and significant expense.’

Resolved, on the motion of Mr MacDonald: That paragraph 4.24 be amended by:

- a) inserting ‘solely’ after ‘should not be achieved’
- b) omitting ‘We are pleased to note that the current financial status of the scheme allows for injured workers and their families to be provided with better support, while simultaneously providing lower premiums for New South Wales businesses and maintaining the financial sustainability of the scheme. The changes to the scheme announced by the Minister for Finance and Services in June 2012 and outlined in chapter 2, are an example of this improved support’ and inserting instead ‘Nonetheless, the scheme must be sustainable. Financial sustainability of the fund is a function of investment returns, discount rate used, premium revenue, and current and future support for injured workers’.

Resolved, on the motion of Mr Primrose: That paragraph 4.25 be amended by omitting ‘the greatly improved’ and inserting instead ‘the improved’.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.25 be amended by omitting ‘there may be scope’ and inserting instead ‘there is scope’.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.27 be amended by omitting ‘The main area’ and inserting instead ‘One of the principle areas’.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.29 be amended by inserting ‘what the scheme now defines as’ after ‘not apply to’.

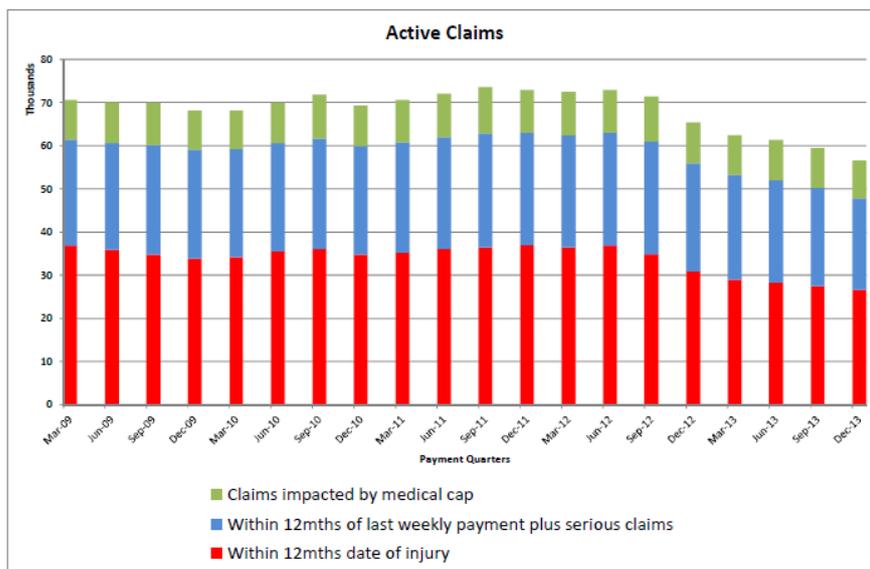
Resolved, on the motion of Mr Primrose: That paragraph 4.41 be amended by inserting ‘for injured workers who made claims prior to 1 October 2012,’ after ‘the workers compensation scheme’.

Resolved, on the motion of Mr Primrose: That paragraph 4.43 be amended by inserting ‘for injured workers who made claims prior to 1 October 2012,’ after ‘retirement age’.

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs and table be inserted after paragraph 4.41:

Mr Playford advised that overall, the number of active medical claims reduced from approximately 73,000 at June 2012 to approximately 56,500 claims at the December 2013 payment quarter. This represented an approximate 22 per cent reduction in the number of active medical claims. Mr Playford observed that a key driver of this reduction was the 24 per cent reduction in the number of claims being reported since the June 2012 reforms rather than the medical cap. [FOOTNOTE: Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B: Potential financial impact of proposed reinstatement of medical benefits, 11 June 2014, p 2.]

Figure 1 – Medical active claims by payment quarter [FOOTNOTE: Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B, p 2.]



The above figure shows that approximately 10,000 active claims (the green bars) per quarter historically received medical benefits which would now be expected to be initially eliminated by the operation of the medical cap at 31 December 2013.

In his evidence to the committee Mr Playford indicated that he had purposely referred to the ‘initial’ impact of the medical cap as the committee was interested in the volume of claims impacted by the commencement of the operation of the medical cap at 31 December 2013. Mr Playford noted that another tranche of claims will become subject to the medical cap from 31 December 2018. This is because a further class of injured workers will cease weekly benefits as a result of the five year weekly cap for those with a whole person impairment assessment of 20 per cent or less on and from 31 December 2017. This tranche of claims will then become subject to the medical cap 12 months later, that is, from 31 December 2018.’ [FOOTNOTE: Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B, p 3.]

Mr Shoebridge moved: That the following new paragraph be inserted after paragraph 4.41:

‘The committee did not receive any specific evidence as to how these costs were being met by injured workers who had lost benefits but it is undeniable that this must be causing significant distress in many cases.’

Question put.

The committee divided.

Ayes: Mr Moselmane, Mr Primrose, Mr Shoebridge.

Noes: Mr Clarke, Mr MacDonald, Mrs Mitchell.

Question resolved in the negative on the casting vote of the chair.

Resolved, on the motion of Mr MacDonald: That paragraph 4.43 be amended by:

- a) omitting 'appropriately balances the needs of ensuring the' and inserting instead 'goes some way towards restoring the balance between'
- b) omitting 'scheme whilst providing' and inserting instead 'scheme and providing'.

Resolved, on the motion of Mr Primrose: That paragraph 4.50 be amended by inserting at the end: 'As a retiree, Mr Holdgate would, even with the additional benefits recently announced by the Minister, be ineligible to receive the benefits that he would have received under the pre-2012 workers compensation scheme'.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.56 be amended by inserting 'a limited class of' after 'reinstated for'.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.56 be amended by omitting 'many scheme participants' and inserting instead 'some scheme participants'.

Mr Shoebridge moved: That paragraph 4.56 be amended by:

- a) inserting 'while' before 'The committee notes'
- b) inserting 'it does not adequately address the matter' after 'batteries and repairs'.

Question put and negatived.

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs and recommendation be inserted after paragraph 4.56:

'The committee notes that evidence from the scheme's actuary suggests that there are sufficient financial resources in the scheme to significantly improve the level of protection injured workers receive for medical benefits under the scheme. In the first instance, the committee considers that medical benefits for hearing aids, prostheses, home and vehicle modifications should be restored for all injured workers for life. This return of benefits would have a minimal initial and recurrent impact on the overall finances of the scheme and greatly improve the lives of impacted workers.

Once these benefits have been restored, the committee considers that the NSW Government should undertake a review of the viability of restoring all lost medical benefits for injured workers under the scheme.

Recommendation X

That the NSW Government restore lifetime medical benefits for hearing aids, prostheses, home and vehicle modifications for all injured workers, noting the actuarial evidence as to the relatively minimal cost of restoring such benefits to the workers' compensation scheme, and that it promptly review the viability of restoring all lost medical benefits for injured workers under the scheme.'

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 4.53:

'Under the reformed scheme only injured workers deemed as having a "serious injury" are entitled to receive medical benefits for life. The scheme defines a serious injury as one where the level of whole person impairment is greater than 30 per cent. This threshold excludes injuries such as the amputation of a person's lower limb below the knee which is assessed at 28 per cent whole person impairment.' [FOOTNOTE: American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition, p 545.]

Resolved, on the motion of Mr Shoebridge: That paragraph 4.66 be amended by inserting 'in most instances. However there are clearly cases where this is not practical or reasonable and there should be some flexibility built into the system to accommodate this' after 'in their rehabilitation'.

Resolved, on the motion of Mr Primrose: That paragraph 4.66 be amended by inserting ‘and WorkCover should provide statistical details in its annual report of the frequency that insurers exceed the legislated timeframe, and the penalties applied’ after ‘timeframe’.

Resolved, on the motion of Mr Shoebridge: That the following new recommendation be inserted after paragraph 4.66:

‘Recommendation X

That the NSW Government consider amendments to the WorkCover scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not reasonable or practical for the worker to obtain pre-approval of medical expenses before undertaking the treatment.’

Resolved, on the motion of Mr Primrose: That the following new recommendation be inserted after paragraph 4.88:

‘Recommendation X

That the WorkCover Authority of NSW develop through consultation with all stakeholders and their representatives, binding operational directives for the workers compensation nominal insurers’ scheme agents or licenced insurers, that ensure all parties are aware of their rights and responsibilities.’

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 4.88:

‘Many injured workers are inevitably in a vulnerable position when they engage with the WorkCover scheme. This means there must be robust measures in place to ensure their rights are protected and they are treated with dignity and respect by all parties in the scheme from insurers, to WorkCover and medical and rehabilitation specialists.’

Chapter 5

Resolved, on the motion of Mr MacDonald: That paragraph 5.32 be amended by inserting ‘likely’ before ‘exacerbated both of these problems’.

Mr Moselmane left the meeting at 1.11 pm.

Resolved, on the motion of Mr Shoebridge: That paragraph 5.46 be amended by omitting ‘any amount for costs incurred’ and inserting instead ‘fair and reasonable fees for the work undertaken’.

Resolved, on the motion of Mr Shoebridge: That Recommendation 6 be amended by omitting ‘any amount for costs incurred’ and inserting instead ‘fair and reasonable fees for the work undertaken’.

Resolved, on the motion of Mr Primrose: That paragraph 5.49 be amended by inserting at the end: ‘The committee will keep a watching brief on the number of times these penalties are used to ensure that return to work provisions are complied with.’

Resolved, on the motion of Mr Primrose: That the following new paragraph be inserted after paragraph 5.63: ‘However, the committee notes that one purpose of these plans is to protect workers from being given the same work that resulted in their injury.’

Resolved, on the motion of Mr Shoebridge: That paragraph 5.87 be amended by omitting ‘We are pleased that the case has finally been resolved and the rights of injured workers in this area clarified’ and inserting instead ‘We note that the matter has finally been resolved as a result of the High Court’s decision in *ADCO Constructions Pty Ltd v Goudappel*.’

Chapter 6

Resolved, on the motion of Mr MacDonald: That paragraph 6.19 be amended by inserting ‘a number of before ‘WorkCover stakeholders’.

Resolved, on the motion of Mr Primrose: That paragraph 6.21 be amended by omitting ‘publish its stakeholder engagement plan as soon as possible’ and inserting instead ‘develop an engagement plan in consultation with all its stakeholders and their representatives, and then publish it as soon as practicable.’

Resolved, on the motion of Mr Primrose: That Recommendation 9 be omitted: ‘That the WorkCover Authority of NSW publish its stakeholder engagement plan as soon as practicable.’ and the following new recommendation be inserted instead:

‘That the WorkCover Authority of NSW develop an engagement plan in consultation with all its stakeholders and their representatives, and then publish it as soon as practicable.’

Resolved, on the motion of Mr Primrose: That Recommendation 10 be amended by inserting at the end: ‘and Schedule 2 of the *Work Health and Safety Act*. The advisory committee should be comprised of representatives of workers and employers, together with other relevant stakeholders.’

Resolved, on the motion of Mr Primrose: That paragraph 6.60 be amended by inserting at the end: ‘The group should include workers with a disability, their representatives, disability workers and employers and carers, and other stakeholders.’

Chapter 8

Resolved, on the motion of Mr Primrose: That paragraph 8.13 be amended by inserting at the end: ‘The committee looks forward to receiving a copy of the report.’

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 8.14:

‘However we also note that a number of inquiry participants indicated a high level of respect and confidence in the ability of the Inspectorate in general. The committee notes that this is a difficult area of work for a work safety regulator that will inevitably produce disparate views from stakeholders.’

Resolved, on the motion of Mr Primrose: That paragraph 8.16 be amended by inserting at the end: ‘Details of the scope of the audit and its timing should be placed on the website.’

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 8.34:

‘However, there is a clear and real concern that there has been inadequate communication with the families of deceased workers regarding decisions as to whether or not to prosecute for workplace fatalities. Much of this concern is reflected in stakeholder’s submissions regarding the timing of WorkCover’s decisions on prosecutions which have been criticised as being very last minute. This is an area the committee will keep a watching brief over in the next review.’

Resolved, on the motion of Mr Primrose: That the following new paragraph be inserted after paragraph 8.44:

‘The committee however notes that WorkCover does have the power to pursue an individual responsible for critical management decisions as opposed to a company accused of phoenixing under the *Work Health and Safety Act*.’

Resolved, on the motion of Mr MacDonald: That the following new paragraph be inserted after paragraph 8.43:

‘The committee is concerned about the extended time taken to finalise the investigation into the death of Mr Villegas Snr and subsequent uncertainty regarding the decision to not pursue a prosecution.’

Resolved, on the motion of Mr Primrose: That the following new paragraph be inserted after paragraph 8.44: ‘The committee suggests that the Minister may wish to consider raising this issue at Ministerial Council level.’

Resolved, on the motion of Mr Shoebridge: That paragraph 8.44 be amended by inserting ‘generally’ before ‘a federal matter’.

Resolved, on the motion of Mr MacDonald: That paragraph 8.44 be amended by inserting at the end: ‘The evasion of premiums and associated difficulties of prosecution of phoenix companies has a serious impact on the economics and efficacy of the NSW Workers Compensations scheme.’

Resolved, on the motion of Mr MacDonald: That the following new recommendation be inserted after paragraph 8.45:

‘Recommendation X

That the NSW Government require that insurers offering workers compensation cover have applicants declare whether any proprietor, director, senior executive or public officer associated with the applying entity has:

- a) any outstanding workers compensation premiums
- b) been associated with a registered corporation, sole trader or partnership that either has outstanding premiums as a going concern or been placed in administration or receivership in the past five years.’

Chapter 9

Resolved, on the motion of Mr Primrose: That the following new paragraph be inserted after paragraph 9.15:

‘However, the committee notes Mr Watson’s comments that audits should review normal operations and documentation, and accordingly not involve extensive extra preparation time or additional costs.’

Resolved, on the motion of Mr Primrose: That paragraph 9.34 be amended by inserting at the end: ‘to ensure they do not require unnecessary documentation or expense.’

Resolved, on the motion of Mr Primrose: That Recommendation 18 be amended by inserting at the end: ‘to ensure they do not require unnecessary documentation or expense.’

Resolved, on the motion of Mr Primrose: That paragraph 9.42 be amended by omitting ‘, which may limit the impact of any changes’ after ‘Commonwealth scheme’.

Resolved, on the motion of Mr Primrose: That the following new recommendation be inserted after paragraph 9.47:

‘Recommendation X

That the NSW Government develop an actuarial and legal impact statement of an expanded Comcare scheme.’

5. Adjournment

The committee adjourned at 2.05 pm until 7.45 am, Friday 29 August 2014, Terminal 3, Sydney Airport (Inquiry into the family response to the murders in Bowraville)

Teresa McMichael

Clerk to the Committee

Minutes No. 45

Monday 11 September 2014
Standing Committee on Law and Justice
Room 1153, Parliament House, 1.05 pm

1. Members present

Mr Clarke, *Chair*
Mr Primrose, *Deputy Chair*
Mr MacDonald

Mrs Mitchell (*from 1.20 pm*)
Mr Moselmane
Mr Shoebridge

2. Apologies

3. Correspondence

The committee noted the following items of correspondence:

Sent:

- 28 August 2014 – From the Chair to the Hon Dominic Perrottet MP, Minister for Finance and Services, following up request for information on the number of WorkCover guidelines.

Received:

- 6 June 2014 – From Ms Carmel Donnelly, General Manager, Safety, Return to Work and Support Division, to Principal Council Officer, regarding publication status of documents
- 11 September 2014 – From The Hon Dominic Perrottet MP, Minister for Finance and Services, to Chair, advising committee of the number of guidelines prepared by WorkCover.

4. Review of the WorkCover Authority – consideration of Chair’s draft report

The committee continued consideration of the Chair’s draft report.

Resolved, on the motion of Mr Primrose: That the second paragraph on page xi be amended by inserting ‘The deficit however remains contested, as it included long term projections that made multiple assumptions during the Global Financial Crisis regarding likely future investment returns and the discount rate.’ after ‘estimated deficit of \$4 billion.’

Resolved, on the motion of Mr Primrose: That Recommendation 5 be omitted: ‘That the NSW Government consider expanding the operational parameters of the WorkCover Independent Review Office to include work health and safety, subject to the office’s capacity and adequate funding.’ and the following new recommendation be inserted instead:

‘That the NSW Government expand the operational parameters of the WorkCover Independent Review Office to include work health and safety, and review the resources of the Office to ensure it has the extra capacity to undertake this additional responsibility.’

Resolved, on the motion of Mr Primrose: That paragraph 8.34 be amended by omitting ‘The committee notes that there is now only one business liaison officer in WorkCover.’ after ‘function under work health and safety legislation.’

Resolved, on the motion of Mr MacDonald: That the following committee comment and recommendation be inserted after Recommendation 22:

‘Committee comment

As shown in evidence given regarding the death of Mr Atilio Villegas, phoenix company behaviour can be associated with injury and death of workers. It seems likely phoenix companies are responsible for weak health and safety practices, particularly on construction sites. WorkCover NSW has stated in the inquiry they have limited powers to investigate and prosecute these companies. The committee proposes WorkCover NSW should take a leadership role in addressing this issue by convening a roundtable of insurers, relevant employer organisations and unions to scope the nature of the problem of phoenix companies.

Recommendation X

That WorkCover NSW convene a roundtable of insurers, relevant employer organisations and unions to address phoenix companies and their impact on the economy. The roundtable should:

- outline the extent of the problem, the impact on work health and safety and the impact on the efficiency and cost of workers compensation

- outline the means of addressing phoenix operators including identifying offenders, reporting to the ACCC and ASIC, insurer vigilance, industry responsibility and regulatory responses
- report the outcomes of the roundtable to the Standing Committee on Law and Justice and the Minister for Finance and Services.’

Resolved, on the motion of Mr Shoebridge That the following new paragraphs be inserted after paragraph 2.32:

‘Statutory review of the Workers Compensation Legislation Amendment Act 2012

In July 2014, the Centre for International Economics released a report entitled ‘*Statutory review of the Workers Compensation Legislation Amendment Act 2012*’. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014.] The report was prepared on behalf of the Office of Finance and Services in response to a requirement in the *Workers Compensation Act 1987* that a review of the 2012 amendments be conducted to ‘determine whether the policy objectives of those amendments remain valid and whether the terms of the workers compensation Acts remain appropriate for securing those objectives’. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 20.]

The report found that it was ‘too early’ [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 1.] to determine the impact of the amendments on the long-term financial sustainability of the workers compensation scheme or on claim behaviours. These findings were attributed to the large scale of the reforms, and the need to embed new processes and system infrastructure to support the reforms. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 1.]

Notwithstanding that further time was needed to fully assess the impact of the reforms, the report highlighted a number of areas where the reforms appear to have achieved their purpose, including:

- addressing the scheme’s deficit
- putting downward pressure on premiums
- promoting return to work
- increasing some measures of financial support to the most seriously injured workers
- discouraging payments that do not achieve recovery and return to work. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 39.]

However, the report identified a number of areas that warrant further consideration, including:

- **addressing barriers to return to work**, including reviewing return to work criteria to ensure that they do not impose unreasonable requirements on injured workers, ensuring that reasonable retraining and relocation costs are recognised, and providing better support for small businesses
- **minimising the regulatory burden of implementing reform**, including developing clear guidelines on return to work and other aspects of the reforms, improving communications material and support available to all stakeholder groups, and reviewing the role of the WIRO, and the fairness of dispute resolution procedures including access to legal representation
- **improving fairness and equity whilst maintaining financial sustainability**, including reviewing and where appropriate removing restrictions on weekly and medical benefits, engaging with stakeholders to develop workable alternatives to medical expense pre-approvals to avoid treatment delays, and addressing unintended anomalies in legislative drafting.

[FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 19.]

A number of these issues are explored in this report, including medical expenses (chapter 4), return to work provisions (chapter 5), and access to legal representation (chapter 5).

The threshold for defining a seriously injured worker, being a worker assessed as having a greater than 30 per cent whole person impairment, was described in the statutory review as ‘somewhat arbitrary’. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 57.] The review noted that a number of substantial injuries fall below this threshold, including substantial loss of use of a leg, loss of sight in one eye, and substantial loss of use of one hand, or total loss of movement in wrist. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 57.]

The statutory review also observed that for injured workers with a whole person impairment assessment of between 21 and 30 per cent, ‘workers compensation benefits now available in New South Wales are generally less generous than in other jurisdictions’. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, p 17.]

Committee comment

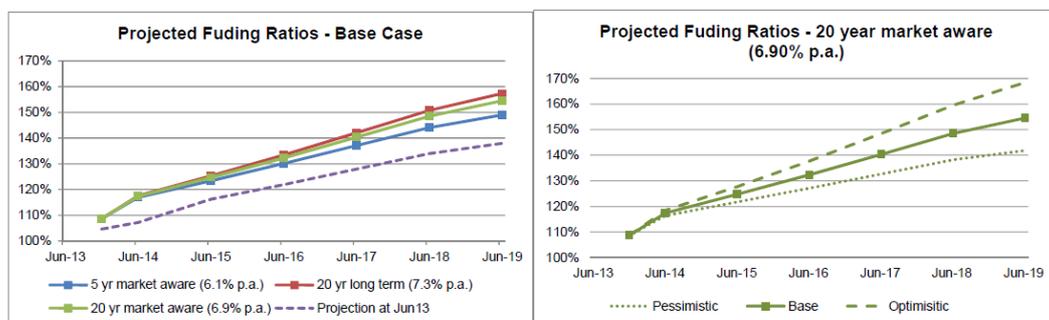
The committee notes that the report of the statutory review was released in the final stages of our own drafting process. Much of the evidence presented in the statutory review reflects the evidence received during our review, and we consider that there are benefits to reading both reports in conjunction.

We believe that the findings and recommendations contained in both reports will assist the NSW Government to further refine the workers compensation system to provide enhanced support to injured workers and protect the scheme’s long-term financial sustainability.’

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs be inserted after paragraph 2.67:

‘In regard to the future financial position of the workers compensation scheme, a Safety, Return to Work and Support Board briefing prepared by Pricewaterhouse Coopers provided the following solvency projections:

Figure 3 Solvency projections – base projections [FOOTNOTE: Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment D: Workers Compensation Nominal Insurer Scheme – valuation results as at 31 December 2013, Safety, Return to Work and Support Board briefing presented 15 April 2014, 28 April 2014, p 11.]



These projections assume that:

- premium rates remain unchanged
- investment earnings unfold as per ‘Projected Funding Ratios – Base Case’ (left hand graph)
- future claims experiences unfold as per ‘Projected Funding Ratios – 20 year market aware’ (right hand graph). [FOOTNOTE: Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment D, 28 April 2014, p 11.]

These projections suggest that with continued improvements in the financial returns on these scheme’s investments and the ongoing reduction in liability following the reduction in benefits due to the 2012 reforms, the scheme is moving towards an approximate \$6 billion surplus by 2019.’

Mrs Mitchell arrived at 1.20 pm.

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs be inserted after paragraph 4.32:

‘In regard to the cessation of medical payments, the *Statutory review of the Workers Compensation Legislation Amendment Act 2012* observed that ‘[w]hile 12 months may be a sufficiently long duration to ensure the provision of appropriate care for injured workers, this is not always the case’. [FOONOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 71.] The statutory review further stated that the 12 month rule:

... has the potential to disadvantage patients that may benefit from conservative treatment of certain conditions including spinal, shoulder and some other known regions, where a ‘wait and see’ approach is more suitable. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, pp 59-60.]

The review further noted that the pre-approval requirement ‘is particularly detrimental where early treatment is required to maximise recovery/function and/or minimise treatment costs’. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 60.]’

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs be inserted after paragraph 4.60:

‘Mr Playford reiterated this advice in answers to questions on notice, where he estimated the impact of modifying the existing medical cap such that it would not apply with respect to either hearing aids or all aids and appliances (such as hearing aids, prosthesis etc). Mr Playford advised:

From an outstanding claims perspective we estimate the December 2013 liability for hearing aids to be around \$20m with the cap in place. This would likely increase by an amount in the order of \$75-100m should this exemption occur. The expected increase in the annual cost would be in order of approximately \$14-16m per annum.

Overall we estimate that the removal of the cap for all aids and appliances (hearing aids, prostheses etc) would increase the outstanding claims liability by approximately \$100-140m, and increase the annual claims cost by around \$20m per annum. [FOOTNOTE: Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B, p 5.]’

Resolved, on the motion of Mr Shoebridge: That the following new paragraphs be inserted after paragraph 4.72:

‘The *Statutory Review of the Workers Compensation Legislation Amendment Act 2012* highlighted concerns regarding the ‘costly delays’ in injured workers receiving timely treatment for both new and ongoing medical conditions resulting from the pre-approval process:

The current requirement for approval of each consultation (beyond 48 hours after injury) may lead to potentially costly delays in terms of treatment outcomes, and is referred to by stakeholders as overly burdensome. This is particularly for conditions requiring surgery and/or

ongoing or varied management following an initial report or claim. The same issue has been observed with respect to established treatment packages, such as physiotherapy after surgery, which currently require individual approval of each treatment ... [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 60.]

The review further noted that the pre-approval requirement 'is particularly detrimental where early treatment is required to maximise recovery/function and/or minimise treatment costs'. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 60.]'

Resolved, on the motion of Mr Shoebridge: That paragraph 4.78 be amended by inserting at the end: 'We also note that the *Statutory review of the Workers Compensation Legislation Amendment Act 2012* highlighted similar concerns.'

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 5.40:

'The *Statutory Review of the Workers Compensation Legislation Amendment Act 2012* observed that the restrictions on access to legal representation were an area where the reforms appear to have resulted in unintended consequences that 'are arguably counter to the spirit of the objectives of reform'. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 56.] In particular, the review highlighted that '... the restrictions placed around legal representation in the merit review process do not exist in any other jurisdiction, where injured workers are typically afforded legal representation'. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 62.]'

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 5.43:

'The statutory review of the 2012 reforms made a similar observation regarding the benefits of legal representation, suggesting that 'lawyers previously played a role in filtering out which claims were nonsensical and provide advice, most of which was free, whereas now lawyers are largely removed from the system'. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, p 64.]'

Resolved, on the motion of Mr Shoebridge: That paragraph 5.47 be amended by inserting at the end: 'Further, we note that the *Statutory Review of the Workers Compensation Legislation Amendment Act 2012* stated that no other jurisdiction has such a restriction on injured workers engaging legal representation for reviews of work capacity decisions.'

Resolved, on the motion of Mr MacDonald: That Recommendation 10 be amended by inserting at the end: ', subject to an analysis of its financial impact'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 5.60:

'The *Statutory Review of the Workers Compensation Legislation Amendment Act 2012* noted that the reforms have resulted in some barriers to return to work, including that consideration is not given to practical issues such as the injured workers geographic location or any retraining requirements if the worker is changing industries. The review observed that such situations are 'likely to have a higher impost on injured workers from rural and regional locations'. [FOOTNOTE: Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, June 2014, pp 50-51.]'

Resolved, on the motion of Mr MacDonald: That:

- the draft report, as amended, be the report of the committee and that the committee present the report to the House;

- the transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, minutes of proceedings and correspondence relating to the review be tabled in the House with the report;
- upon tabling, all transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, minutes of proceedings and correspondence relating to the inquiry not already made public, be made public by the committee, except for those documents kept confidential by resolution of the committee;
- the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- dissenting statements be provided to the secretariat by 10am Monday 15 September 2014;
- the report be tabled on Wednesday 17 September 2014.

Resolved, on the motion of Mr Primrose: That the secretariat be thanked for their work on the report.

5. ***

6. **Adjournment**

The committee adjourned at 1.38 pm *sine die*.

Teresa McMichael
Clerk to the Committee