1. **What is your response to the material under the heading "Causation" on pages 4-5 of the submission by the Australian Medical Association (#40)?**

Causation
The other significant problem is the issue of "Causation". As things stand at the moment, if an Arbitrator refers a matter to an AMS for assessment of WPI, say for example of the cervical spine, and gives a date of injury, the AMS is legally obliged to accept that an injury to the cervical spine occurred on that date, or arose out of an injury to another body part on that date. In deciding on the particular circumstances, the Arbitrator is guided by all the medical evidence at his/her disposal, and makes a decision on the basis of this information. In our opinion the Arbitrator is not qualified to make this decision, as it is a medical decision alone, and the reports that the Arbitrator has considered are not always disinterested opinions.

An example occurred recently where a worker had injured an ankle and some years later developed discomfort in the neck with restricted range of movement. The Arbitrator had a number of medical reports available, one of which suggested that the neck symptoms had arisen as a result of the worker having to limp because of the ankle injury. One hundred percent of disinterested doctors would indicate that there was no relationship between the ankle and the neck, but the Arbitrator chose the single medical report suggesting that there was a relationship, and accordingly asked the AMS to assess lower extremity impairment and impairment of the cervical spine, as a result of the injury to the ankle. Strictly speaking then, the AMS is obliged to assess impairment of the cervical spine and relate it to the injury to the ankle.

There are no doubt injuries being accepted within the system that should not be, as they are not properly classified as being caused by a workplace incident. For example, medical practitioners are informing us that degenerative diseases that are often the result of the normal ageing process are being accepted as being caused by the workplace or the result of a workplace injury. The result of this is that the system is being costs for injuries that are not caused by or the result of workplace injury. If there was tighter control of what was assessed as being caused by the workplace, costs would be reduced as less injuries would be accepted in the system.

AMA (NSW) submits that the way to achieve this is to haven the injury assessed, and a decision on causation made by an Approved Medical Specialist or a Panel of medical assessors. This is the case in other jurisdictions (including the Motor Accident Authority Scheme, we understand). A comparison of costs with systems where causation is assessed by an AMS with the system in New South Wales would be useful[1]*.*

Response:
The NSW Workers' Compensation System is a no-fault scheme however for a claim to be accepted work must be a 'substantial contributing factor' to the injury.

[1] AMA (NSW) Submission (#40), Causation), Page 4-5 of 13

ARPA considers that for the purposes of determining whole person impairment and resolving general medical disputes, which include the determination of causation, binding decisions should be made by an independent, medical expert. Currently an Approved Medical Specialist (AMS), appointed by the Workers' Compensation Commission, conducts these assessments. Decisions in relation to general medical disputes (including causation) are not binding, but are considered by the Arbitrator in resolving the dispute. ARPA agrees that with the addition of appropriate Guidelines surrounding what constitutes a work related injury; and with legislative reform that will ensure that this determination is binding; these issues will be effectively resolved.

ARPA therefore supports the AMA in the assertion that certain illnesses and injuries which are not work related should not be covered under the workers' compensation legislation. Circumstances where claims for compensation are accepted however the relationship between work and injury is not sufficiently established erode public confidence in the scheme while at the same time draining financial resources for genuine work related injury. Other submissions to the Inquiry have raised the possibility of a tighter definition in relation to what constitutes work related injury and what is a 'substantial contributing factor'. ARPA offers in principle support to these suggested improvements including the development of Guidelines to support these determinations.

2. **What is your response to the material under heading "Other Uses of Medical Assessment?**

Other Uses of Medical Assessment Panels
A medical review panel, through the Workers Compensation Commission, should be employed to stop unnecessary treatments and over-servicing. A medical peer group should be able to suggest treatment to treating practitioners where deficient treatment is perceived. These comments are made in relation to such observations as the frequent experience of physiotherapy continuing for six or twelve months, where only a few weeks of physiotherapy would seem to be beneficial, or the use of alternative treatments with little clinical indication.

Any restriction in relation to treatment recommended by doctors, which Work Cover wishes to restrict in the system, should be subject to Guidelines prescribing the use of certain treatments or procedures, which should be developed following consultation with AMA (NSW) and the appropriate Colleges and medical societies[2].

Response:
There are current processes in place within the NSW Workers' Compensation Scheme to provide independent, expert assessment of a range of general medical issues including treatment. The Act refers to 'reasonably necessary' treatment. The development of Guidelines as suggested by the Australian Medical Association may support the assessment of what is 'reasonably necessary'.

[2] AMA (NSW) Submission (#40), Other Uses of Medical Assessment Panels, Page 5 of 13

Currently Independent Medical Examiners (IMEs) can be utilised by scheme agents (and a worker's solicitor) to provide independent specialist advice in relation to a range of issues including causation and accepting a claim, the scheme agent's ongoing liability, the worker's level of fitness for work and the type and need for ongoing treatment.

Approved Medical Specialists (AMS) manage dispute resolution of general medical issues and whole person impairment assessments. General medical issues can include causation, 'reasonably necessary treatment' the worker's fitness to undertake duties offered by an employer, their fitness for particular types of duties or their incapacity to work. These decisions are not binding however are considered by the Arbitrator in resolving the dispute. The AMS's decisions in relation to disputes involving permanent impairment are binding. ARPA considers that all decisions made by an AMS should be binding.

ARPA however does not support that all decisions surrounding 'reasonably necessary treatment' or intervention should be made by an AMS or a medical practitioner. ARPA would support more appropriately aligned independent Peer Review where an expert panel of qualified, experienced professionals that have workers' compensation expertise, be engaged to offer a determination on discipline specific intervention. This practice occurs in the Victorian workers' compensation scheme. Discipline specific peer review is likely to offer more constructive advice and determinations that will lead to better scheme outcomes and contribute to a culture of continuous improvement in intervention for the treatment and management of injuries that involve a workers' compensation claim.

3. **Looking at the material in section 5 on pages 12-13 of the submission by the Civil Contractors Federation (#70). What is your response to the material?**

   In order to achieve better health outcomes and return to work outcomes and to improve the financial sustainability of the Scheme there must be more focus on early intervention and getting people back to work safely and quickly – at the moment there is not enough support of injured workers in the early period of a claim.
   We are aware that International and Australian research results overwhelmingly support the view that early intervention in an injury improves return to work rates and that a safe, early return to work is holistically the best solution from both a physical and psycho-social perspective for the employee. CCF NSW is in no position to comment technically on this research however our experience over many years working with our Members on claim issues supports this argument wholeheartedly.

   The Workplace Injury Management & Workers Compensation Act 1998 (hereafter termed WIM & WC Act) Chapter 3 "Workplace Injury Management", s45 provides for the development of an Injury Management Plan when a worker has a significant injury. The Work Cover Guidelines determine that this must be completed within 20 days of the injury. Most workers with a significant injury return to work on a graduated plan and thus, under the Guidelines, a Return to Work (RTW) Plan must be written. The RTW Plan can be written by a RTW Coordinator within the employer but in the vast majority of

claims responsibility for this activity rests with a Work Cover approved Workplace Rehabilitation Provider. This framework is supported fully by CCF NSW.

It is with this framework in mind that our Members ask us, but to which we are unable to respond, why does it take so long for Agents to engage a Rehabilitation Provider to undertake an assessment and write a RTW Plan? Our Members routinely report periods of months after injury before a Rehabilitation Provider is engaged by the Agent and becomes involved.

In the Casey Report entitled "Australian Rehabilitation Providers Association Research Project – Effectiveness of Rehabilitation Services" dated 7 April 2011, we note that the average time for a Rehabilitation Provider to be engaged is 31 months. We note that engagement to write a RTW Plan where the employee is still with the Same Employer is 9 months, and where they are with a New Employer it is 35 months. CCF NSW cannot know if this data is accurate, however, anecdotally it reflects what our Members are saying. We have sought and obtained from Work Cover data about RTW outcomes and their results are manifestly similar (Average delay to referral: Same Employer = 6.5 months; New Employer 36 months).

The Scheme is deteriorating on the basis of poor RTW outcomes and greater duration claims. These numbers are thus of serious concern when compared to what WIM & WC Act, Chapter 3, s45 and the Guidelines requires the timing of a Return to Work Plan development to be. Under Chapter 3, s55A "A scheme agent must comply with the requirements of this Chapter". Why has Work Cover allowed these apparent breaches to occur?[3]

Response:
ARPA's submission and additional information submitted to the Parliamentary Inquiry details our concerns and evidence in relation to the lack of early intervention in the NSW workers' compensation scheme as well as the recommendation that early screening to identify 'at risk' workers be consistently applied.

ARPA's experience is similar to that expressed by the Civil Contractors Federation, in that employers support early referral to rehabilitation where it is required. The early engagement of workplace rehabilitation will reduce the incidence of unnecessary absence from work due to work related injury. This will offer support to employers to help injured workers remain at, or return to work, rather than foster the current culture which engenders the expectation of periodic absence from work, which remains contrary to the best practice management of work related injury. Unnecessary work absence may cultivate negative psychosocial factors that erode return to work outcomes. ARPA considers that the absence of proactive early return to work management has been the greatest contributor to the emergence and growth of the 'tail'.

[3] Civil Contractors Federation Submission (#170), Section 5, Pages 12-13 of 34

4. **What can be done to reduce times within which agents engage a rehabilitation provider to undertake an assessment and to write a return to work plan?**

   Response:
   Although there is general agreement in the NSW Workers' Compensation Scheme of the benefits of early intervention (as evidenced in submissions to the Inquiry), there has been a chronic failure of the workers' compensation scheme to reliably and effectively implement early intervention. Given the significant negative impact of delayed referral to rehabilitation, mandatory screening of claims by Scheme Agents should be introduced to identify 'at risk' claimants and where appropriate, refer the injured worker to a workplace rehabilitation provider.

   In our previous submission we offered that claims should be screened using bio-psychosocial indicators early in the life of the claim to determine those most in need of intervention. Early identification of these claims, in conjunction with a work capacity assessment has been proven to result in sustainable return to work outcomes and reduced claims durations and costs. ARPA suggests that a work capacity assessment conducted by an independent workplace rehabilitation professional, is entirely appropriate where a capacity for work is identified however no return to work plan is engaged by the employer or where the nominated treating doctor continues to certify ongoing incapacity for work. ARPA would welcome the opportunity to contribute to a working party to develop a robust structure for this to consistently occur.

5. **What is your response to sections 8-11 (pages 20-23) of the submission by the Civil Contractors Federation (#170)?**

   Section 8 - In order to meet Scheme objectives by improving health outcomes and return to work outcomes, the conduct of Work Capacity Assessment should be separated from Injury Treatment.
   We recognise that the principle of timely treatment of an injury cannot be interfered with...this is where the GP forms the vital triage support under TREATMENT. However, one of the major concerns with the current system is that the assessor and the treating party are one in the same entity. This is counter to WorkCover's existing policy that 'other' service providers in the Scheme cannot also deliver treatment.

   We respectfully recommend that in claims where the immediate time provided off work is more than, three days activities of Work Capacity Assessment and Treatment be separated and that accredited health professionals appropriate to the particular injury undertake such Assessments. Nominated Treating Doctors (NTD) would continue to manage the treatment.

   The above approach is supported by Dr Doron Samuell, the Medical Practitioners' representative on the Workers Compensation and Work Health Safety Advisory Council of NSW. A model for this recommendation is presented below to illuminate how our suggestion might operate. We hope in doing so it stimulates discussion on how such a framework might be applied:

- *Injured worker notifies employer or Agent of injury ASAP. The worker can still report to a medical professional for treatment, however triage absences from work would be limited to three working days and this would occur only once and only at the commencement of an injury.*
- *Where time off work is likely to be more than the three days, the Agent would select an injury appropriate Work Capacity Assessor. Depending on the nature of the injury the WCA might be a Medical Doctor, Occupational Therapist, Psychologist, Dermatologist, Optometrist etc.*
- *The Assessor's, whilst appointed to a specific claim by the Agent, would be accredited and would be audited by Work Cover. The Assessor cannot be the NTD – thereby aligning with WorkCover's existing policy that 'other' service providers in the Scheme cannot also deliver treatment – This element of the model is a similar, but more extended, concept to that which exists in Victoria.*
- *The Assessor would then determine what capacity the worker has for work and RTW plans would be developed around this capacity.*
- *The treatment would continue to be managed and delivered by the NTD.*
- *The Assessor's ruling on Capacity would be binding on all parties.*
- *The Agent has the power to call in an IME to assess either Treatment or Assessor. The IME's ruling would be binding. Injured worker and Employer have the right to seek an IME from the Agent.*
- *Work Capacity Assessments would continue through the entire period of the Claim, with maximum periods set and Assessments undertaken at specific periods in the claim, such as benefits step downs and claim estimates[4].*

Response:
ARPA offers in principle support to the view of the Civil Contractors Submission. The nominated treating doctor holds a vital role in the management of the treatment of the injured worker however decisions surrounding work capacity, where this is outside of best practice and clinical expectations, should be determined through a work capacity assessment. Decisions regarding incapacity by the nominated treating doctor for less than five days of incapacity will generally remain appropriate. ARPA considers that claims with any period of incapacity that extend beyond five days should be screened for a work capacity assessment. The work capacity screen should be applied using structured criteria and would be reviewed/re-applied at appropriate the appropriate time for the life of the claim.

A work capacity assessment is however best completed by an independent workplace rehabilitation professional given the expertise held by this professional group with regard to functional capacity and return to work capability which does not exist in the general population of treating practitioners. A robust structure and framework could be included under the existing National Approval Framework for workplace rehabilitation providers which would involve minimal integration and avoid the creation of a new industry of work capacity assessors, which may otherwise have the unintended consequence of adding unnecessary cost to the scheme.

[4] Civil Contractors Federation Submission (#170), Section 8, Pages of 20, 21 & 22 of 34

Further the integration of what would seem to be a common sense process into an existing Framework that already demonstrates an existing synergy with the principles for 'return to work', 'staying at work' and 'work is good for you', will ultimately ensure that the best results are delivered for the scheme.

The proposal offered by the Civil Contractors Association demonstrates what could be considered the basis for an appropriate framework for the effective use of work capacity assessments and ARPA would welcome the opportunity to contribute to a working party to develop and implement a sound structure so that such an assessment could be effectively implemented within the scheme.

Please also refer to comments in relation to Section 11. Work Capacity Assessments

Section 9 - In order to meet Scheme objectives by improving health outcomes and return to work outcomes, there must be more structure in the work capacity assessment management process. Clear lines of authority are required to ensure the focus remains on a timely return to work.
In our Recommendation 8 we have outlined a very practical model for capacity assessment and treatment. The current situation where an NTD can set the capacity and treatment plan largely without dispute is a large part of the inefficiency of the Scheme.

If our recommendation 8 is not accepted we respectfully recommend that the Independent Medical Examiner should be given the power to make binding decisions over work capacity, effectively overruling the NTD's assessment[5].

Response:
ARPA supports the view of the Civil Contractors Association in this response.

A referral for an independent medical examination occurs when medical information is inadequate, unavailable, inconsistent, and where the referrer (scheme agent or worker's solicitor) has been unable to resolve these issues directly with the parties involved.

Independent medical examiners (IMEs) do not provide advice to injured workers about their condition, treatment or workers' compensation claim. An IME may provide advice to the scheme agent on accepting a claim, the scheme agent's ongoing liability and the worker's level of fitness for work and the appropriateness of ongoing treatment. If the IME considers some other type of treatment might assist the worker, they may detail this in their report and contact the worker's treating doctor to discuss treatment options.

Disputes in relation to general medical issues may be referred by the workers' compensation commission to an AMS for resolution. ARPA considers that decisions made by an AMS should be binding.

[5] Civil Contractors Federation Submission (#170), Section 9, Page 22 of 34

Section 10 - In order to meet scheme objectives by improving health outcomes and return to work outcomes, the injured worker's exclusive right to select their NTD to do assessments and treatment should be removed.
In our Recommendation 8 above we have outlined a very practical model for capacity assessment and treatment. The current situation where an NTD can set the capacity and treatment plan largely without dispute is a large part of the inefficiency of the Scheme. If the recommendation is not accepted we respectfully recommend that the Agent have the power to select an NTD, and to thus override an injured worker's selection. This trigger for such a change could, for example, be an IME having a conflicting view of the capacity assessment or treatment plan[6].

Response:
ARPA supports the principle that injured workers can select their nominated treating doctor (NTD). This is a right afforded in most medical schemes including Medicare. This practice is also sensible as workers tend to select their family doctor who is familiar with their medical and other relevant history and if an injured worker doesn't have a regular doctor they will typically choose a doctor who is convenient to them.

In our experience, concerns surrounding the nominated treating doctor within the scheme mostly apply to decisions made by the nominated treating doctor regarding work capacity. Furthermore, many nominated treating doctors would prefer to be removed from decisions surrounding work capacity and instead remain focussed on treatment. We consider that with the implementation of a structured work capacity assessment, the vast majority of concerns in relation to work capacity would be eliminated and therefore do not consider that legislative reform in this area should be necessary if a work capacity assessment is successfully integrated into the framework.

Generally, if issues arise there are Work Cover NSW guidelines in place to manage a change of nominated doctor however in our experience these are not rigorously applied.

An injured worker can request a change of nominated treating doctor where the worker is not satisfied with their level of care or if the NTD has moved from the injured worker's local area. An injured worker must notify their insurer and/or employer and explain why they are requesting a change of NTD. If the issue is that the worker does not consider they are receiving appropriate care the insurer/employer is likely to engage an Injury Management Consultant (IMC) to help facilitate a safe and timely return to work.

Similarly, a scheme agent or employer can request an IMC to assist in the resolution of problems that arise in relation to a worker's return to work where there is a disagreement between the NTD, the employer and the scheme agent. An IMC aims to prevent escalation to a formal dispute in the Commission.

The purpose of referral to the IMC is to resolve difficulties with the NTD, the employer and the worker in relation to the worker's capacity to undertake suitable duties employment. If this is unsuccessful the scheme agent/employer is likely to

6 Civil Contractors Federation *Submission (#170), Section 10, Page 22 of 34*

approve/request a change in However in reality this rarely occurs and where this is proposed it is generally opposed by the injured worker. The current process is ineffective because any decision to attempt to change the NTD is largely around a dispute regarding work capacity. The introduction of a binding work capacity assessment would remove most of these issues and result in any decisions to change an NTD to be driven by concerns surrounding treatment and therefore more likely to gain injured worker support.

It is therefore the view of ARPA that with the successful introduction of Work Capacity Assessments and the introduction of Peer Review processes to determine 'reasonably necessary treatment', the existing mechanism whereby the change of an NTD can be requested will become more effective and there will not need to be any consideration for further change in this area.

Section 11 - In order to meet scheme objectives by improving health outcomes and return to work outcomes, Work Capacity Assessments must be undertaken at key benefit trigger points, and at regular periods throughout the life of a claim.
We respectfully recommend that Work Capacity Assessments continue through the entire period of the Claim, with maximum periods set, and Assessments undertaken at specific periods in the claim, such as benefits step downs and claim estimates[7].

Response:
ARPA agrees that Work Capacity Assessments can provide an independent, proactive review of progress to recovery, return to work and claim finalisation. Work Capacity Assessments may be useful if applied at particular points in the life of a claim such as just prior to 26, 52, 78 and 104 week claims review points (where structured criteria indicate the need for a review assessment) or where there is a change in the injured worker's condition (such as post surgery).

ARPA provided its' position in relation to the design of Work Capacity Assessments, who should conduct them and when they should occur, in its supplementary information to the Parliamentary Committee. That is, Work Capacity Assessments should be holistic in nature, apply a bio-psychosocial approach, be conducted by allied health professionals in conjunction with key parties, and using available information, such as medical reports.

6. **What is your response to each of the reforms proposed by Shoalhaven City Council under the heading "Additional reforms required" starting on page 5 of its submission (#148)?**
   ARPA supports the additional reforms that are offered by Shoalhaven City Council. We have offered comments relating to 'causation' previously in our response and much of this equally applies to the additional reforms proposed by Shoalhaven City Council, especially with regard to what constitutes a 'substantial contributing factor' to an illness or injury. Quite simply the Scheme should cover work related injury and be clear in what constitutes a work related injury.

[7] Civil Contractors Federation Submission (#170), Section 11, Page 23 of 34

We offer further comment in respect of the following which may be beneficial:

Injury Management and Return to Work Plans
WorkCover's requirement to develop injury management plans in addition to return to work plans for less severe injuries is both onerous and superfluous. Injury management plans should not be required unless an injured worker is totally incapacitated for more than 21 days. Treating doctors should not be required to agree to return to work plans, given that the plan will reflect medical advice already received, and the agreement requirement slows down the return to work process[8].

Response:
Scheme agents, self insurers and specialised insurers are required to develop an injury management plan (IMP), no more than 20 days after notification that a worker has had a significant injury. A significant injury is defined as an injury that prevents a worker from doing their usual job continuously for seven or more calendar days.

The IMP is developed in conjunction with the employer and injured worker and details all of the services required to return the injured worker to the workplace. It includes details about the worker and employer, information about the injury, the rehabilitation goal, treatment plan and the actions required by the worker, employer, nominated treating doctor, rehabilitation provider, and insurer/agent. Both the employer and injured worker have an obligation to comply with the IMP. The IMP is the source document that an agent and employer utilise to manage cooperation of all parties and where required an injured worker's compliance.

Timely commencement of treatment and arrangements to return to work and the agreement and cooperation of all parties is critical to ensure prompt, safe and durable return to work outcomes.

ARPA supports the use of IMPs to plan and support the recovery and return to work of injured workers and to manage the obligations and cooperation of all parties. We consider that IMPs should be developed for all significant injuries within 20 days of notification. This can allow for the flexibility Shoalhaven Council appears to be seeking, as it allows for an IMP not to be required if an injured worker who has suffered a significant has returned to work within 20 days.

Similarly, the return to work plan (RTW Plan) is a written, formal offer of suitable duties by the employer to an injured worker and demonstrates that an employer is meeting its legal obligations to provide suitable duties/employment. The return to work plan is developed in consultation with the employer and injured worker and is signed by both parties to confirm agreement. Similar to the IMP, the RTW Plan is utilised as the basis for managing the obligations of the employer and injured worker.

The RTW Plan is developed following an assessment of the workplace, consultation with relevant parties and in accordance with the injured worker's WorkCover medical

[8] *Shoalhaven City Council Submission (#148), Additional Reforms Required, Page 6 of 6*

certificate (WCMC). The RTW Plan outlines the suitable duties, restrictions, hours/days worked, monitoring arrangements, review points and upgrading plans.

ARPA agrees that the requirement for the nominated treating doctor to sign the RTW Plan can lead to delays. However there is flexibility in this process whereby if a RTW Plan is developed in accordance with the WCMC (which is a legal document); the RTW Plan can be commenced.

Section 38

The section 38 process (1987 act) was introduced to encourage partially fit workers to return to work. It has had the opposite effect. Compliance by workers to job seek is low and impossible to track. It is a difficult process for Insurers and self insurers to manage in terms of costs relating to functional and vocational assessments, job seeking assistance and rehabilitation options. It delivers higher benefits to workers for an additional year without the worker's sincere commitment to retraining or obtaining employment with another organisation.

Response:

ARPA considers that clear Guidelines for managing compliance with Section 38 should be developed with relevant stakeholders (including ARPA) and be applied consistently.

In 2004, Work Cover NSW developed a comprehensive and useful 'Behavioural Toolkit', however it was ineffective as it was released as part of a pilot project to manage 'tail' claims and was therefore not widely distributed or formally implemented. The 'Behavioural Toolkit' aims to ensure the engagement and compliance of injured workers in receipt of Section 38 benefits, and at the same time supports the principle of procedural fairness. The Toolkit would form a sound basis for the development of Section 38 Guidelines.

Notwithstanding this, ARPA acknowledges the difficulties with successfully achieving a Sec52A outcome - discontinuation of weekly payments for partial incapacity after 2 years[9], despite situations where an injured worker is persistently non-compliant.

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[9] **52A Discontinuation of weekly payments for partial incapacity after 2 years**

(1) Weekly payments of compensation in respect of partial incapacity for work are not payable for any period beyond the first 104 weeks of partial incapacity for work (whether or not any part of that period is compensated as if the incapacity for work was total) but only if one or more of the following paragraphs (referred to in this section as "grounds for discontinuation") applies to the worker at the "relevant time":

- (a) the worker is not suitably employed (within the meaning of section 43A) and is not seeking suitable employment (as determined in accordance with section 38A),
- (b) the worker is not suitably employed (within the meaning of section 43A) and has previously unreasonably rejected suitable employment (within the meaning of section 40 (2B)),
- (c) the worker has sought suitable employment but has failed to obtain suitable employment primarily because of the state of the labour market (rather than because of the effects of the worker's injury).